



Strengthening mutual trust in the European judicial area – A Green paper on the application of EU criminal justice legislation in the field of detention

Response by the International Commission of Jurists and JUSTICE

Introduction

The International Commission of Jurists (ICJ) and JUSTICE welcome the publication of this Green Paper, and the initiative of the European Commission to consult widely on the relationship of EU criminal justice co-operation with the protection of the human rights of detainees. This initiative has the potential to be a very positive first step in strengthening the legal and procedural protection afforded through EU law to detainees in EU Member States, and to support effective and human rights compliant criminal justice co-operation in the EU.

The International Commission of Jurists (ICJ) is a non-governmental organisation working to advance understanding and respect for Rule of Law as well as the protection of human rights throughout the world. It was set up in 1952 and has its headquarters in Geneva (Switzerland). It is made up of some 60 eminent jurists representing different justice systems throughout the world as well as national sections and affiliated justice organisations, including in the European region. The ICJ has consultative Status at the United Nations Economic and Social Council, the United Nations Organisations for Education, Science and Culture (UNESCO), the Council of Europe and the African Union. The organisation also cooperates with various bodies of the Organisation of American States and the Inter-Parliamentary Union.

JUSTICE is a British-based human rights and law reform organisation, whose mission is to advance justice, human rights and the rule of law. JUSTICE is regularly consulted upon the policy and human rights implications of, amongst other areas, policing, criminal law and criminal justice reform. It is also the British section of the International Commission of Jurists.

In this response, the ICJ and JUSTICE will not seek to respond to all of the questions raised in the Green Paper. Rather this response will address particular questions most

relevant to the organisations' work on the development and implementation of international standards on detention. Neither will this response attempt to present a comparative analysis of EU Member States' law or practice on pre-trial detention or related issues. It will focus on existing international legal frameworks, standards and mechanisms, and the potential for EU standards and the work of the EU institutions to complement and strengthen these measures of protection.

EU Criminal Justice and International Human Rights Law Standards

In the framework of the TEU and TFEU, and in particular Member States' obligations under the EU Charter of Fundamental Rights,¹ as well as their obligations under the European Convention on Human Rights (ECHR) and other international law instruments, effective criminal justice co-operation can only take place, and mutual trust can only be established, where there is reliable and consistent protection of the human rights of detainees, across the EU. Such protection, and EU-wide confidence in such protection, requires, in turn, reliable monitoring mechanisms both nationally and internationally.

Discussion within the EU of standards on detention must take place in the context of the international law obligations which already apply to EU Member States, as well as the associated jurisprudence of international courts and tribunals, and non-binding standards which have been accepted and supported by the EU and its Member States. Numerous legal instruments that specifically address the question of detention, or addressing it in relation to fair trial or torture and other ill-treatment, having been developed both at the global level, through the United Nations (UN), and at the regional level, by the Council of Europe and the European Union (EU).

It should also be underscored that the obligations of EU States to engage in cooperation and assistance, does not just encompass the area of criminal justice, but also extends to human rights. Obligations of cooperation in this regard run throughout the corpus of international human rights law, including in the express language of the UN Charter itself (articles 2(3), 55 and 56), whereby states must cooperate to achieve "universal respect for, and observance of human rights and fundamental freedoms for all without distinction...."

In terms of treaty standards pertaining to detention, the International Covenant on Civil and Political Rights (ICCPR),² the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),³ and the Convention on the Rights of the Child (CRC) each contain provisions binding upon EU member States.⁴ The conventions of the Council of Europe also contain binding provisions on detention in the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)⁵ and in the European Convention for the Prevention of Torture and

1 In relation to detention, see Articles 4 and 19 CFR in particular.

2 See Articles 9, 10, 11, 14 of ICCPR.

3 See Articles 11, 16 of CAT in particular.

4 See Articles 9 and 37 of CRC.

5 Article 3 ECHR (the ECtHR has found that unacceptable detention conditions violate Article 3, see for instance *M.S.S. v. Belgium and Greece*, Application no. 30696/09); Article 6(1) of ECHR provides for the right to an expeditious trial (excessively long pre-trial detention periods can be a ground for refusing to execute the EAW); Article 5 of ECHR on the right to liberty and security (the issuing State

Inhuman or Degrading Treatment or Punishment, which establishes the European Committee for the Prevention of Torture (CPT). Finally, besides the four mutual recognition instruments presented in the Green paper,⁶ the European Union's Lisbon Treaty granted binding legal force to the provisions of the Charter of Fundamental Rights of the European Union, including Article 4 on the prohibition of torture and inhuman or degrading treatment or punishment, Article 5 on the right to liberty and 19(2) on the principle of *non-refoulement*.⁷

The obligations under these treaties have been supplemented by a number of standards developed at the universal and regional levels. Many of these standards are either declaratory of already existing treaty or customary international law or elaborate more general obligations contained in binding instruments. At the UN level, the Universal Declaration of Human Rights (UDHR), as well as a series of specialized instruments establish rules and provide guidance for the respect of human rights of detainees. These include: the Body of principles for the protection of all persons under any form of detention or imprisonment; the UN basic principles for the treatment of prisoners; the UN Standard Minimum Rules for the Treatment of Prisoners; the UN Rules for the Protection of Juveniles Deprived of their Liberty; the UN Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"); the UN Guidelines for the prevention of juvenile delinquency; and the Principles of medical ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture and other cruel, inhuman and degrading treatment.

The Council of Europe has also developed standards on detention, with the European Prison Rules and Recommendation Rec(2006)13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse. As for the EU, relevant standards or proposed standards regarding detention are contained in Resolution on a roadmap for strengthening procedural rights of suspected persons in criminal proceedings (OJ C 295, 4.12.2010, p. 1), in the Written declaration on infringement of the fundamental rights of detainees, from MEPs – 06/2011, 14.02.2011, but also in the Commission's package of measures: the proposals will cover the right to interpretation and translation in criminal proceedings (Directive 2010/64/EU adopted in October 2010), the right to information in criminal proceedings, access to a lawyer, the right to communicate upon arrest with consular authorities and with a third person, and access to legal aid.

A further principle of international human rights law that is of crucial importance to this discussion is the principle of *non-refoulement*. This principle, established in

that transfers a prisoner into a State that is less generous in terms of early release, could be in breach of the violation if the term of imprisonment is de facto flagrantly longer.)

⁶ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States - EAW (OJL 190, 18.7.2002, p. 1); Council Framework Decision 2008/909/JHA of 27 November 2008 on the transfer of prisoners (OJL 327, 5.12.2008, p.27); Council Framework Decision 2008/947/JHA of 27 November 2008 on probation and alternative sanctions (OJ L 337, 16.12.2008, p.102); Council Framework Decision 2009/829/JHA of 23 October 2009 on European Supervision Orders - ESO (OJL 294, 11.11.2009 p.20).

⁷ See Articles 4, 5 and 19(2) of the Charter of Fundamental Rights of the European Union.

international human rights treaties expressly and through jurisprudence,⁸ requires that states desist from extraditing, returning or otherwise transferring an individual to a country where he or she faces a risk of torture, cruel inhuman or degrading treatment, or other serious violations of human rights. Effective standards of human rights protection for detainees within the EU are therefore essential if states are to be able to transfer accused persons or prisoners while respecting obligations of *non-refoulement*.

These standards and principles form the legal context for discussing the merits of any new minimum standards on detention. While if elaborated without due regard for existing provision there is a risk of creating competing provisions overlapping and inconsonant with existing instruments, in our view it is necessary to have EU action in this area in order to fill in gaps and enhance cooperation between states parties. Although Member States are already bound by the robust human rights instruments to which they are party, great disparities are sometimes found between their respective national law and practices. This directly impacts on mutual recognition and therefore the extent of criminal justice cooperation between member states. If judicial authorities in one member state cannot trust that the equivalent minimum human rights standards are observed by the authorities of other member states, then, consistent with the State's international human rights obligations, they must necessarily refuse requests to transfer accused persons, which would undermine the effective implementation of EU criminal justice legislation. Four framework decisions directly engage prison systems, as the Green Paper has identified.⁹ As such, article 82(2) enables EU action because minimum rules with respect to procedural rights are required to ensure mutual recognition of judicial decisions and judicial and police cooperation can be effectively discharged.

8 See Article 3 of CAT; Human Rights Committee, General Comment 31, the Nature of the General Legal Obligation imposed on State Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add. 13, para. 12: “[T]he article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.”; CAT, *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, CAT/C/34/D/233/2003; ECtHR, Soering v. The United Kingdom, Application No 14038/88, 7 July 1989.

9 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States - EAW (OJL 190, 18.7.2002, p. 1); Council Framework Decision 2008/909/JHA of 27 November 2008 on the transfer of prisoners (OJL 327, 5.12.2008, p.27); Council Framework Decision 2008/947/JHA of 27 November 2008 on probation and alternative sanctions (OJ L 337, 16.12.2008, p.102); Council Framework Decision 2009/829/JHA of 23 October 2009 on European Supervision Orders - ESO (OJL 294, 11.11.2009 p.20).

Question 1: Pre-Trial - What non-custodial alternatives to pre-trial detention are available? Do they work? Could alternatives to pre-trial detention be promoted at European Union level? If yes, how?

Question 2: Post trial - What are the most important alternative measures to custody (such as community service or probation) in your legal system? Do they work? Could probation and other alternative measures to detention be promoted at European Union level? If yes, how?

It is important to acknowledge the impact of detention upon the lives of those affected by it. Pre-trial detention concerns those who are innocent of the crime with which they are accused, presumed to be so unless and until such time as they are convicted.

The Justice Initiatives Journal¹⁰ published a dedicated edition to pre-trial detention in Spring 2008 and has followed this up with a series of publications on the consequences of detention.¹¹ The Journal identifies that pre-trial detention may have profound consequences upon a detainee's health,¹² including mental health, as a result of poor, overcrowded conditions. There is also a heightened risk of suicide among the recently detained due to the unfamiliar environment and removal from normal life. Pre-trial detention may also adversely affect family life, particularly of the children of detainees who may need to be taken into care, and family economy through lack of earning capacity. The article observes the acute impact of pre-trial detention upon poor communities since its members are most likely to be detained.

Any alternatives to detention must be properly funded to ensure they are supported by the necessary infrastructure and are sustained. The starting point in advocating alternatives to detention is understanding the grounds upon which detention is ordered. In many cases where the suspect is not a citizen of that Member State, the accused will be considered a flight risk irrespective of the offence with which he or she is charged, in both domestic cases and EAW requests. This risk could be alleviated, for example, by reporting requirements to police stations or the surrender of a passport. Equally the ease in obtaining an EAW now reduces the impact of such a flight risk. Other measures such as house arrest, supervision orders or bail applied proportionately may be appropriate.

Alternatives post-trial are diverse across the EU. A primary aim of any criminal justice system must be to ensure the rehabilitation of a convicted person. Prisons have regularly been shown to fail in this regard. The impact of pre-trial and post-trial detention is most acutely felt by children, and mechanisms to avoid any detention of children, in accordance with international standards (see below) should be explored.¹³

Despite the requirement under international and domestic law that pre-trial detention be a measure of last resort (see below), it is also apparent from the Commission's

10 Open Society Institute

11 Pretrial Detention and Health: Unintended Consequences, Deadly Results (OSJI: November 2011); Pretrial Detention and Torture: Why Pretrial Detainees Face the Greatest Risk (OSJI: June 2011); The Socioeconomic Impact of Pretrial Detention (OSJI: February 2001)

12 M. Schönteich, The Scale and Consequences of Pretrial Detention around the World, 'Justice Initiatives', (OSJI: Spring 2008), pp 11-44.

13 See JUSTICE, Police Foundation, Time for a New Hearing, (Independent Commission on Youth Crime and Anti Social Behaviour: 2011)

statistical data that it is widely and excessively administered. Overcrowding in prisons does not correlate with a reduction in crime. Education about the impact of detention, avoiding its routine use and alternative measures among police, prosecutors and judges is vital. Access to effective legal counsel and the role of defence lawyers are equally crucial to challenge the resort to detention and to assist the accused in demonstrating viable alternatives.

The EU is in a prime position to gather information about the best practices in alternatives to detention and convene training sessions amongst EU practitioners on how these mechanisms can be utilised throughout the EU.

Question 3: how do you think that detention conditions may have an effect on the proper operation of the EAW? And what about the operation of the Transfer of Prisoners FD?

The proper operation of the EAW, as well as that of the Transfer of Prisoners Framework Decision, greatly depend on the level of mutual recognition, which itself relies on the trust established between member states. Conditions of detention that would fall short of international standards would be a clear impediment to the effective and lawful implementation of the EAW or the Transfer of Prisoners Framework Decision. States that do not trust the conditions of detention of another member state would and should be reluctant to transfer a prisoner, and indeed would be obliged to refrain from transfer in accordance with international law obligations including those under Article 3 ECHR as well as obligations under Articles 4 and 19 of the EU Charter.

In the recent case of *MSS v Belgium and Greece*, the Grand Chamber of the European Court of Human Rights affirmed, in the context of EU co-operation in migration, that States must not transfer a person to another EU Member State, where following transfer the person would be at risk of treatment contrary to Article 3 ECHR, or to other serious violation of human rights, or would be at risk of further transfer to another state where there would be a risk of such violations. The Court stated that Belgium was or should have been aware of the risks of *refoulement* to which the asylum seeker would have been exposed if sent back to Greece, and accordingly, ought to have used the sovereignty clause contained in the Dublin II regulation (Article 3(2)) which permitted it not to return the applicant.¹⁴ Although the MSS case dealt with administrative detention of asylum seekers, the underlying legal premise would be identical in the criminal justice sphere. A similar obligation of non-refoulement to that under the ECHR is to be found under the Charter of Fundamental Rights of the European Union, which provides under Article 19(2) that “[n]o one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.”

It can be safely assumed that the finding of the ECtHR that Belgium had violated the

14 ECtHR, *M.S.S. v. Belgium and Greece*, Application no. 30696/09, 21 January 2011, para 339, 340, 342

Convention in its implementation of the Dublin II Regulation¹⁵, would be similarly applicable in respect of a transfer of a prisoner under EU legislation (the EAW) or the Transfer of Prisoners Framework Decision, to a country where the conditions of detention are in breach of Article 3 of the ECHR. Following the MSS case and based on Member States' obligation under the ECHR and the Charter of Fundamental Rights, it is now clearer than ever that in the sphere of EU criminal justice co-operation, the ECtHR and the Court of Justice of the European Union (CJEU) would find a violation of States' obligation not to transfer a suspect or convicted person to another EU Member State, if a member state were to transfer a prisoner to a country where he would be facing risks of *refoulement*. Should a Member State, including its courts, not trust the requesting country's compliance with international minimum standards regarding detention, they would be constrained not to transfer.

In our research project *Best Practice in EAW Cases*¹⁶ defence lawyers have told us of cases where prison conditions have been relied upon to persuade a prosecutor to withdraw a warrant in the Netherlands, and to persuade judges to refuse a warrant in Ireland.

In addition, poor conditions of detention may violate detainees' right to fair trial and to an effective remedy (Article 47 EU Charter, Articles 6 and 13 ECHR). Indeed, the lack of access to legal aid, to a lawyer, to interpretation or to communicate with NGOs and relatives can significantly undermine the detainee's right to fair trial as he or she might not be unable to effectively prepare his or her defence. In addition, poor conditions of detention immediately before trial may mean that an accused person is unable to participate effectively in his or her trial. These types of deficiencies in a country's legal system can affect mutual trust amongst member states and impede the proper operationalisation of the EAW and the Transfer of Prisoners framework decision.

Question 4: There is an obligation to release an accused person unless there are overriding reasons for keeping them in custody. How is this principle applied in your legal system?

At the pre-trial stage, international standards provide for the obligation to release the accused person unless there is an overriding reason requiring pre-trial detention. This obligation is articulated in several international legal instruments, and in declaratory international standards.

International Covenant on Civil and Political Rights

In terms of global treaties, the most significant provision is contained in the ICCPR. Article 9.1 ICCPR establishes the general principles of the right to liberty, and requires that all deprivations of liberty, including pre-trial detention, must not be arbitrary and must be on such grounds and in accordance with such procedures as are established by law. An assessment of whether detention is arbitrary requires

15 ECtHR, *M.S.S. v. Belgium and Greece*, Application no. 30696/09, 21 January 2011, para. 325, 358-360.

16 Jointly with the European Criminal Bar Association, funded under JPEN 2009.

consideration of the reasonableness, necessity and proportionality of the detention. An assessment of whether a deprivation of liberty is established by law requires that it be clearly and precisely provided for in national law, and that procedures for detention and review of detention be in accordance with those set out in national law. Paragraphs 3 and 4 of article 9 ICCPR are of particular relevance to pre-trial detention. These state that:

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 judgment.
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**.

The Human Rights Committee commented on these provisions in its General Comment 8 on the right to liberty and security of the person, noting that prolonged pre-trial detention could lead to violations of Article 9.3 and emphasising that “pre-trial detention should be an exception and as short as possible”.

The Human Rights Committee’s jurisprudence affirms that, under Article 9, the State must show substantial grounds for pre-trial detention. The Committee considers whether such detention is justified based on an individual assessment of the circumstances of the case.

The Committee’s jurisprudence illustrates the implementation of obligations to release accused persons in pre-trial detention contained in Article 9. The following examples demonstrate that the Human Rights Committee requires substantial grounds to establish the lawfulness of pre-trial detention, and that it carries out an individual assessment of the overriding need of detention. The Committee has consistently affirmed the exceptional nature of pre-trial detention in its case-law,¹⁷ and has rejected assumptions by the authorities of the existence of the risk “that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State party.”¹⁸ For example, in the case of *Aleksander Smantser v. Belarus*, the Committee found a violation of Article 9.3 ICCPR when the accused was held in pre-trial detention based on the “mere assumption by the State party that the author would interfere with the investigation or abscond if released on bail”, although the accused was charged with a “particularly serious crime”.¹⁹ The Committee explained that the State party did not provide sufficient reasons justifying its concern and therefore had not established the necessity to detain the person awaiting trial. Similarly, in *Michael and Brian Hill v. Spain*, the Committee found that the fact that the accused person was a foreigner did not in itself constitute a ground for pre-trial detention. The State party had to provide information supporting its concern that the person would flee should he or she be released on bail. The Committee held that the “mere conjecture of a State party that a foreigner might leave its jurisdiction if released on bail does not

¹⁷ *Juan Peirano Basso v. Uruguay*, CCPR/C/99/D/1887/2009, 29 October 2010, para.10.2; *Aleksander Smantser v. Belarus*, CCPR/C/94/D/1178/2003, 17 November 2008, para.10.3; *Michael and Brian Hill v. Spain*, CCPR/C/59/D/526/1993, 2 April 1997, para.12.3.

¹⁸ Idem.

¹⁹ *Aleksander Smantser v. Belarus*, CCPR/C/94/D/1178/2003, 17 November 2008, para.10.3

justify an exception to the rule laid out in article 9, paragraph 3, of the Covenant”,²⁰ and therefore that the State had violated the provision in issue. However, the Committee has found that the refusal to grant provisional release to the accused was justified when the person was a fugitive. Noting that the accused’s “return to the State party was not voluntary but the result of an extradition process”, it held that there were substantial grounds to detain the accused awaiting trial and that the State party had not violated article 9.3 ICCPR.²¹ The Committee is therefore very strict in terms of the elements that must be presented by the State to justify the pre-trial detention, clearly refusing to consider as substantial grounds any hypothetical risks, irrespective of the severity of the allegations.

European Convention on Human Rights

The right to liberty and security is also guaranteed at the regional level by Article 5 of the ECHR. The right to liberty under Article 5 is constructed somewhat differently than under Article 9 ICCPR, setting out a list of grounds for permissible detention, including pre-trial detention under Article 5.1.c and detention pending deportation or extradition under Article 5.1.f. Pre-trial detention on these grounds may nevertheless be found to be arbitrary and in violation of Article 5, where it is not sufficiently justified as necessary and proportionate for the permitted purposes, in the individual circumstances of the case. There is an explicit right to release pending trial in Article 5.3, obliging States to release accused persons detained unlawfully.

The jurisprudence of the European Court of Human Rights interpreting the ECHR is a valuable source of guidance for national implementation of obligations to release those held in pre-trial detention. The Court has found that the reasons for detention are only sufficient if they are determined in consideration of the particular circumstances of the person concerned and therefore applied on a case-by-case basis. Automatic pre-trial detention is therefore prohibited. Neither is automatic refusal of release or unreasoned decisions on detention acceptable.²² The seriousness of the charge cannot be the sole basis for detention: the Court has even found prolonged detention to be unjustified in murder cases.²³

The Court has found that the existence of a reasonable suspicion is necessary but not sufficient for any prolongation of detention after a certain lapse of time.²⁴ It has established the relevant reasons justifying the continuing of pre-trial detention of a person against whom there is reasonable suspicion that he or she committed an offence. These reasons are the risk of flight, the risk of an interference with the course

20 *Michael and Brian Hill v. Spain*, CCPR/C/59/D/526/1993, 2 April 1997, para.12.3.

21 *Juan Peirano Basso v. Uruguay*, CCPR/C/99/D/1887/2009, 29 October 2010, para.10.2

22 ECtHR, *Letellier v. France*, Application no. 12369/86, June 26, 1991.

23 ECtHR, *Caballero v. the United Kingdom*, Application no. 32819/96, 8 February 2000; ECtHR, *I.A. v. France*, Application no. 28213/95, 23 September 1998; ECtHR, *Letellier v. France*, Application no. 12369/86, 26 June 1991.

24 ECtHR, *Stögmüller v. Austria*, Application no. 1602/62, 10 November 1969; ECtHR, *Clooth v. Belgium*, Application no. 12718/87, 12 December 1991; ECtHR, *Contrada v. Italy*, Application no. 27143/95, 24 August 1998; ECtHR, *Jecius v. Lithuania*, Application no. 34578/97, 31 July 2000; ECtHR, *Barfuss v. the Czech Republic*, Application no. 35848/97, 31 July 2000.

of justice, the need to prevent crime, and the need to preserve public order.²⁵ Where none of the previous reasons is found applicable, the obligation to release under Article 5.3 must be discharged.²⁶ Detention can be justified only where in the circumstances of an individual case, these reasons outweigh the rule of individual liberty, with due regard for the presumption of innocence.²⁷ In addition, the Court has held that even in situations where the reasons for detention of an accused person may have at first existed, they may disappear over time and render the deprivation of liberty no longer justified, in which case, the person would have to be released pursuant to Article 5.3.²⁸

Other International Standards

Other international standards require release from pre-trial detention. In particular, the UN Body of Principles for the protection of all persons under any form of detention or imprisonment provide that “the arrest or detention … pending investigation and trial shall be carried out only for the purposes of the administration of justice”²⁹ and stipulate a standard of necessity for pre-trial detention.³⁰ They also stress the need for prompt review of detention.³¹

The Convention on the Rights of the Child, and other standards relating to juvenile justice, provide protection for detained children awaiting trial. They stress that pre-trial detention should be a measure of “last resort”,³² limited to “exceptional circumstances”³³ and provide for the necessity of pre-trial detention to be “for the shortest appropriate period of time”,³⁴ for the right to a “prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action”.³⁵ Furthermore, a number of instruments emphasise that pre-trial detention is a measure of last resort by

25 ECtHR, *Kemmache v. France*, Applications nos. 12325/86 and 14992/89, 27 November 1991; ECtHR, *Mansur v. Turkey*, Application no. 16026/90, and *Yagci and Sargin v. Turkey*, Application no. 16419/90, 8 June 1995.

26 ECtHR, *Trzaska v. Poland*, Application no. 25792/94, 11 July 2000.

27 ECtHR, *Ilijkov v. Bulgaria*, Application no. 33977/96, 26 July 2001.

28 ECtHR, *Letellier v. France*, Application no. 12369/86, 26 June 1991; ECtHR, *Tomasi v. France*, Application no. 12850/87, 27 August 1992.

29 Body of principles for the protection of all persons under any form of detention or imprisonment, Principles 36.2 and 39.

30 Body of principles for the protection of all persons under any form of detention or imprisonment, Principle 39; UNCAT, Article 6; UN Rules for the Protection of Juveniles Deprived of their Liberty, 2; EAW framework decision, Article 12.

31 Body of principles for the protection of all persons under any form of detention or imprisonment, Principles 37 and 39

32 Convention of the Rights of the Child, Article 37; UN Rules for the Protection of Juveniles Deprived of their Liberty, Rule 2; UN Standard Minimum Rules for the Administration of Juvenile Justice, Rule 13.1; UN Guidelines for the prevention of juvenile delinquency, Annex I, para.6, 46.

33 UN Rules for the Protection of Juveniles Deprived of their Liberty, Rule 17.

34 Convention of the Rights of the Child, Article 37(b); Similar provisions can be found under UN Rules for the Protection of Juveniles Deprived of their Liberty, Rule 2: “for the minimum necessary period”, and under UN Standard Minimum Rules for the Administration of Juvenile Justice, Rule 13.1: “for the shortest possible period of time”

35 Convention of the Rights of the Child, Article 37(d).

requiring states to prioritise alternatives: “all efforts shall be made to apply alternative measures.”³⁶

Question 5: Different practices between MS in relation to rules on (a) statutory maximum length of pre-trial detention and (b) regularity of pre-trial detention may constitute an obstacle to mutual confidence. What is your view? What is the best way to reduce pre-trial detention?

International Standards

International human rights law does not provide expressly for a maximum length of pre-trial detention. The standard, under both the ICCPR and the ECHR, is that deprivation of liberty should not exceed a “reasonable time”.³⁷ Although no maximum period is imposed by international law, it may support compliance with this standard to establish maximum authorized lengths for pre-trial detention at the domestic level, provided that these are accompanied by procedural safeguards to ensure that such detention is reasonable and proportionate in each case, within the permitted maximum period, and that the maximum period itself is sufficiently short that it provides real protection against excessive detention.

The requirement of detention limited to a “reasonable time” raises several questions, in particular in terms of the assessment of the reasonableness of the length of pre-trial detention, but also regarding the period that is defined as pre-trial detention. The ECtHR, in its case-law interpreting Article 5.3 and determining what is reasonable, has clearly established that reasonableness is an objective notion, but one that can only be assessed on a case-by-case basis, after examining the specific circumstances of every situation. The Court therefore does not apply a maximum length of pre-trial detention *in abstracto*.³⁸ The Court has for instance considered in some cases one year to be excessive,³⁹ while in others it found two or three years to be acceptable.⁴⁰

The Court has also stressed that, irrespective of the length of deprivation of liberty, in order to be lawful, pre-trial detention has to be justified throughout the period of the detention, especially if it is to be continued. While reasonable suspicion that the accused person has committed an offence is a prerequisite for the continued detention to be lawful, it is nonetheless not sufficient: the competent authorities must

36 UN Rules for the Protection of Juveniles Deprived of their Liberty, Rule 17; Similar provisions can be found under UN Standard Minimum Rules for the Administration of Juvenile Justice, Rule 13.2: “Whenever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home”, and under the ESO Framework Decisions, para.4 of the preamble; Examples of alternatives that should be preferred over custody are provided for under the UN Guidelines for the prevention of juvenile delinquency, Annex I, para. 6, 46

37 See Articles 9(3) of ICCPR, and 5(3) of ECHR.

38 ECtHR, *Stögmüller v. Austria*, Application no. 1602/62, 10 November 1969; ECtHR, *Wemhoff v. Germany*, Application no. 2122/64, 27 June 1968; ECtHR, *W. v. Switzerland*, Application no. 14379/88, 26 January 1993.

39 ECtHR, *Jecius v. Lithuania*, Application no. 34578/97, 31 July 2000

40 ECtHR, *Letellier v. France*, Application no. 12369/86, 26 June 1991; ECtHR, *Punzelt v. the Czech Republic*, Application no. 31315/96, 25 April 2000; ECtHR, *Stögmüller v. Austria*, Application no. 1602/62, 10 November 1969; ECtHR, *Kudla v. Poland*, Application no. 30210/96, 26 October 2000.

demonstrate that the grounds⁴¹ initially justifying the deprivation of liberty of the person awaiting trial continue to be “relevant and sufficient”, but also that the said authorities conducted the proceedings with “special diligence”.⁴²

Regarding the period taken into consideration as pre-trial detention, the ECtHR has established that the period runs from the arrest until the release, and in case the accused person is not released, until the judgment of the court of first instance.⁴³

Pre-trial detention in the EU

There are significant disparities as regards the length of pre-trial detention among various national jurisdictions, including Member States of the European Union. Further, in addition to differences in the laws, the practices vary greatly. This can have a negative impact on the mutual trust that EU Member States are seeking to establish, and that is required for the efficient implementation of the EU legislation, in particular the ESO Framework decision.

The following figures illustrate the excessive incidence of pre-trial detention in the EU. It is reported that accused persons in pre-trial detention represent almost one fourth of the total prison population. In 2006, for instance, 139,883 persons in the 27 States of the EU were in pre-trial detention, out of a total of 607,725 prisoners.⁴⁴ However, the considerable variation between countries needs to be taken into consideration, with, for example, those held in pre-trial detention representing about 11.3% of the prison population of the Czech Republic and around 10.3% of that of Poland, on the one hand, and around 43.6% of the prison population of Italy and 47.2% of that of Luxembourg on the other.⁴⁵ Another revealing example of these disparities is in the pre-trial detention prisoner rate per 100,000 people of population: it varies from 8.8 in Finland to 78 in Estonia, with 31.6 as the EU average.⁴⁶

It is also noteworthy that not all states have a legal provision for a maximum length of pre-trial detention. For instance, Sweden does not have a concrete indication in its domestic laws of a limitation on the maximum length an accused person can be held in custody.⁴⁷ Furthermore, the definition of pre-trial detention and the maximum indicated in national laws also differ from one state to another, as in some countries

41 These grounds have been identified by the ECtHR: The risk of flight, the risk of an interference with the course of justice, the need to prevent crime, or the need to preserve public order.

42 ECtHR, *W. v. Switzerland*, Application no. 14379/88, 26 January 1993; ECtHR, *Assenov and others v. Bulgaria*, Application no. 24760/94, 28 October 1998; ECtHR, *Punzelt v. the Czech Republic*, Application no. 31315/96, 25 April 2000.

43 ECtHR, *B. v. Austria*, Application no. 11968/86, 28 March 1990.

44 Meeting on minimum standards in pre-trial detention procedures, Brussels, Monday 9 February 2009, Borschette 1A, organized by the Directorate-General Justice, Freedom and Security of the European Commission.

45 “Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention”, Table 1 of the annexes, Statistics on the prison population in the European Union (International Center for Prison Studies and Eurostat data from 2009/2010.)

46 Meeting on minimum standards in pre-trial detention procedures, Brussels, Monday 9 February 2009, Borschette 1A, organized by the Directorate-General Justice, Freedom and Security of the European Commission.

47 The Swedish Code of Judicial Procedure (Section 1, Chapter 24) only requires proportionality between the length of pre-trial detention and the penalty for the alleged crime.

the definition includes all stages of the proceedings until the decision is final,⁴⁸ while in others, pre-trial detention does not for instance comprise police custody.⁴⁹ In several states priority is given to proportionality between the gravity of the alleged offence, or the length of the sentence for the offense a person is charged with, and the length of pre-trial detention. For instance, in Sweden, a person may not be detained for longer than is proportionate in relation to the individual and the suspected crime, and in no case can the pre-trial detention be longer than the sanction for the alleged crime.⁵⁰ In Denmark, pre-trial detention may not exceed two-thirds of the expected penalty.⁵¹ In other states, the maximum length of pre-trial detention varies according to the seriousness of the alleged offense, applying a proportionality rule.⁵²

Finally, in practice, figures show that the use and length of pre-trial detention varies in practice amongst EU member states. For example, in Sweden⁵³ and Germany,⁵⁴ the average length of pre-trial detention is significantly shorter than in countries such as Italy, Greece or France.⁵⁵

These examples demonstrate the great variation in definition, terminology and practice regarding pre-trial detention in the EU. This makes the collection and comparison of data and national legislation among Member States particularly difficult. The lack of clarity thereby created necessarily undermines the degree of trust member states would be willing to grant each other. Requiring all states to adopt the same definition and terminology in their national systems seems to be an unnecessary and cumbersome process. It would nonetheless be highly advantageous were a common definition of pre-trial detention to be adopted at the EU level, facilitating the exchange of information and allowing States to provide the relevant laws and comparable facts and figures.

More precise standards on minimum guarantees, such as regular and frequent judicial review of detention to establish whether grounds to detain continue to exist, would also contribute to increasing mutual trust in the different national judicial systems. Given the diversity of national systems, the most effective means of reducing excessive reliance on pre-trial detention, and of ensuring that periods of pre-trial detention are kept to the minimum necessary, may be to establish and develop EU level standards, consistent with other international human rights law and standards on

48 Italy, Article 303 of the Code of Criminal Procedure.

49 France, Articles 143-1 et suivants of the Code of Criminal Procedure do not include police custody – garde à vue.

50 See footnote 47.

51 “Pre-trial Detention in the European Union”, an analysis of minimum standards in pre-trial detention and the grounds for regular review, Universities of Tilburg, the Netherlands, and Greifswald, Germany, 2009.

52 For example: France, Article 145-2 CPP; Italy, Article 303(4) CPP; Greece, Article 6.4 of the Constitution and Article 287.2 of the CPP.

53 An average of 24 days between the apprehension and the first instance decision, while in 80% of the cases, pre-trial detention does not exceed 6 weeks.

54 For 50% of the detainees, less than 3 months (“Pre-trial Detention in the European Union”, an analysis of minimum standards in pre-trial detention and the grounds for regular review, Universities of Tilburg, the Netherlands, and Greifswald, Germany, 2009).

55 For these countries, in average pre-trial detention comes close to a year and can be much longer (“Pre-trial Detention in the European Union”, an analysis of minimum standards in pre-trial detention and the grounds for regular review, Universities of Tilburg, the Netherlands, and Greifswald, Germany, 2009).

procedural protection in pre-trial detention, including access to legal advice, provision of free legal aid, and prompt, regular access to judicial review of detention. Some of those standards, such as on access to a lawyer, are already in preparation. Strong protection in EU law for access to legal advice will represent an important safeguard against excessive use of arbitrary detention.

Question 7: Would there be merit in having European Union minimum rules for maximum pre-trial detention periods and the regular review of such detention in order to strengthen mutual trust? If so, how could this be better achieved? What other measures would reduce pre-trial detention?

European standards establishing a maximum length for pre-trial detention and the obligation of an automatic and regular review of the lawfulness of the detention do not yet exist. When representatives of the EU, the Council of Europe and of national governments have debated the necessity of such standards, it has been argued by some that the length of pre-trial detention had not yet proved to be an obstacle to mutual trust. Others, however, have stressed that disparities between member states could become an impediment to mutual trust and therefore the implementation of EU legislation.⁵⁶

The ICJ and JUSTICE believe that such minimum standards, covering both the length of pre-trial detention and the review of lawfulness of detention, would provide a useful additional protection against excessive and unreasonable periods of pre-trial detention. In doing so, they would re-enforce mutual trust and ultimately enhance mutual recognition and judicial cooperation amongst member states. In particular, providing a common EU terminology and agreeing on the definition of pre-trial detention within the meaning of EU standards would considerably help States in bringing their respective laws and practices, where necessary, in line with those minimum standards. It would facilitate communication and exchange of information between member states using commonly agreed language, and allow a better evaluation of the legislation and concrete situation in other states before carrying out transfers of prisoners or accused persons.

As explained under the previous question, full harmonization seems to be an unnecessary and difficult process that can be avoided in this manner. By having a common understanding of what period pre-trial detention covers under EU law, irrespective of the terms and definitions used domestically, states would be given the tools to understand, compare and more easily assess the severity of the detention already imposed on an individual, and whether there are sufficient grounds for continued pre-trial detention or alternatives to detention. It would thus allow for appropriate measures to be ordered in the requesting/receiving State, in light of the seriousness of the measures already taken within the jurisdiction of another member state.

Currently, as emphasized above under question 5, there are significant differences among member states, in regard to the definition of pre-trial detention, and the

56 Meeting on minimum standards in pre-trial detention procedures, Brussels, Monday 9 February 2009, Borschette 1A, organized by the Directorate-General Justice, Freedom and Security of the European Commission.

maximum period of detention permitted. In addition to those legal disparities, pre-trial detention in practice may also vary greatly. Being able to refer to comparable data is therefore key to mutual recognition.

We emphasise that establishing maximum periods of pre-trial detention would not, in itself, effectively protect against arbitrary pre-trial detention, without additional minimum standards on the promptness and regularity, as well as the quality, of judicial review of detention. This follows from the principle that the reasonableness of the length of detention must be assessed in the individual circumstances of each case. Nevertheless, although a maximum length of pre-trial detention is not itself sufficient since it cannot be applied *in abstracto*,⁵⁷ it could contribute to avoiding excessive length of criminal proceedings if the accused person must be released after a certain period of time. The reasons for lengthy pre trial detention will often be bound up in the complex administration of criminal justice systems, the investigation of sophisticated offences, and the need for more resources in over-stretched courts. Therefore, the release of an accused person because EU custody time limits have expired, in circumstances to which the member state objects, may lead to prioritisation of reforms to the system that will reduce systematically excessive pre-trial detention.

The reduction in pre-trial detention will also be achieved by an effective and regular review and proper assessment of the continuing overriding necessity of pre-trial detention. As pointed out under the previous questions, it is essential to promote minimum safeguards, by ensuring, for instance, the right of the accused person to challenge the lawfulness of the detention (*habeas corpus*) and regular automatic review of pre-trial detention. In addition, the guarantees of access to legal advice and to translation would also contribute to reducing length of pre-trial detention by ensuring fast and fair criminal proceedings. Finally, reduction of pre-trial detention can be achieved through encouraging a greater use of alternatives to detention, such as electronic monitoring, reporting mechanisms, curfews, house arrest, supervision orders or bail.

Question 8: Are there any specific alternative measures to detention that could be developed in respect of children?

International human rights law recognises that the particular needs of children require special measures, including as regards criminal proceedings and penalties, which must be adapted to meet the best interests of the child. It recognises that alternative measures to detention are important to “ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.”⁵⁸ As indicated above,⁵⁹ international legal instruments stress that pre-trial detention should occur in exceptional cases only. Treaties and standards that address juvenile justice place particular emphasis on “alternative measures” to detention.

57 See above footnote 46, ECHR case-law.

58 See Article 40(4) of CRC.

59 Question 4

The overarching principle governing the protection of the child under international human rights law, as encapsulated in article 3(1) of the Convention on the Rights of the Child, is that “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” According to the Convention on the Rights of the Child, “[n]o child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time”.⁶⁰ Under Article 40(4), the Convention further provides for examples of alternatives to institutional care, “such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes”.⁶¹

In addition, the UN Rules for the Protection of Juveniles Deprived of their Liberty state that “all efforts shall be made to apply alternative measures”⁶², while pursuant to the UN Guidelines for the Prevention of Juvenile Delinquency, “[t]he institutionalization of young persons should be a measure of last resort and for the minimum necessary period, and the best interests of the young person should be of paramount importance.”⁶³ It then lists the cases in which institutionalization would be permitted.⁶⁴ The Guidelines encourage State Parties to develop community-based services and programmes “for the prevention of juvenile delinquency, particularly where no agencies have yet been established. Formal agencies of social control should only be utilized as a means of last resort.”⁶⁵ Moreover, examples of adequate alternative measures are also provided for in the UN Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), according to which, “[w]henever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home.”⁶⁶

60 See Article 37.b of CRC.

61 See Article 40(4) of CRC.

62 UN Rules for the Protection of Juveniles Deprived of their Liberty, Rule 17.

63 UN Guidelines for the Prevention of Juvenile Delinquency, Annex I, para. 46

64 UN Guidelines for the Prevention of Juvenile Delinquency, Annex I, para. 46: “Criteria authorizing formal intervention of this type should be strictly defined and limited to the following situations: (a) where the child or young person has suffered harm that has been inflicted by the parents or guardians; (b) where the child or young person has been sexually, physically or emotionally abused by the parents or guardians; (c) where the child or young person has been neglected, abandoned or exploited by the parents or guardians; (d) where the child or young person is threatened by physical or moral danger due to the behaviour of the parents or guardians; and (e) where a serious physical or psychological danger to the child or young person has manifested itself in his or her own behaviour and neither the parents, the guardians, the juvenile himself or herself nor non-residential community services can meet the danger by means other than institutionalization.”

65 UN Guidelines for the Prevention of Juvenile Delinquency, Annex I, para.6.

66 UN Standard Minimum Rules for the Administration of Juvenile Justice, Rule 13.2.

Question 9: How could monitoring of detention conditions by the Member States be better promoted? How could the EU encourage prison administrations to network and establish best practice?

Question 10: How could the work of the Council of Europe and that of Member States be better promoted as they endeavour to put good detention standards into practice?

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or degrading Treatment or Punishment (SPT) are the monitoring bodies established by the Council of Europe convention for the prevention of torture⁶⁷ and the UN Optional Protocol to the Convention Against Torture (OPCAT)⁶⁸ respectively. They hold similar mandates allowing them to carry out onsite visits⁶⁹ and have unlimited access to all places where persons may be deprived of liberty. Following the visits, they issue recommendations to assist countries in the implementation and the respect of the rights contained in the conventions. To this end, both the CPT and the SPT are multidisciplinary bodies comprised of independent and impartial experts. Their work is guided by at least two common core principles: co-operation with the national authorities and confidentiality.⁷⁰ In addition, Parties to the OPCAT committed to set up National Preventive Mechanisms (NPMs) mandated to carry out independent preventive visits to places of detention.⁷¹ Under these circumstances, it is easy to see the risk of overlap and duplication of work that may occur in the European region.

This problem is explicitly addressed in the OPCAT, which provides not only for the co-operation between the SPT and the NPMs,⁷² but further, for that of the SPT and existing international, regional or national mechanisms involved in the prevention of torture. The SPT should “[c]ooperate, for the prevention of torture in general, with the relevant United Nations organs and mechanisms as well as with the international, regional and national institutions or organizations working towards the strengthening of the protection of all persons against torture and other cruel, inhuman or degrading treatment or punishment.”⁷³ Such bodies, which include the SPT, the CPT and the NPMs, “are encouraged to consult and cooperate with a view to avoiding duplication and promoting effectively the objectives of the present Protocol.”⁷⁴

In addition, the CPT had called for the creation of preventive mechanisms at the national level long before the OPCAT was adopted. Hence, the need for coordination

67 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, CETS No.126.

68 Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

69 The SPT conducts regular visits, while the CPT carries out periodic visits and also ad hoc ones when deemed necessary.

70 OHCHR website, OPCAT, the SPT in brief, http://www2.ohchr.org/english/bodies/cat/opcat/spt_brief.htm; The CPT, Council of Europe website, <http://www.cpt.coe.int/en/about.htm>

71 Article 3 of OPCAT: “Each State Party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment (hereinafter referred to as the national preventive mechanism).”

72 Article 11(1)(b) and Article 12(c) of OPCAT.

73 Article 11(1)(c) of OPCAT

74 Article 31 of OPCAT.

and cooperation between the Council of Europe and the UN organs was sensed and discussed soon after the establishment of the SPT, leading to the creation in 2008 of the European NPM Project, a “pilot project for tri-partite cooperation between the CPT, the SPT and the NPMs.”⁷⁵ Although it was originally established and funded by the “Peer-to-Peer II Project”, a joint project between the European Union and the Council of Europe, the SPT decided to contribute and joined the project in 2009. The project’s goals and main areas of activities have been defined as follows:

- Creating an active network of NPMs in Europe to foster peer exchange, critical reflection and creative thinking on NPM work;
- Promoting awareness of CPT and SPT standards and working methods within the European NPM network;
- Promoting the cooperation between the SPT, the CPT and the NPMs; and
- Promoting the ratification of the OPCAT and the establishment of OPCAT compliant NPMs where they do not exist.⁷⁶

Several suggestions have been debated in terms of avenues of possible co-operation. Within the framework of the European NPM project, the activities consist mostly of workshops, on-site exchanges of good practices and experiences amongst NPMs, with the participation of CPT and SPT experts.⁷⁷ Furthermore, in February 2007, the SPT met with the then President and Executive Secretary of the CPT to consider the possibility of regular exchange of information, the need for consistency between the UN and Council of Europe standards, periodic exchanges of opinions, of coordination of activities, the use of available reports of states visited by the other mechanism, systematic transmission “on a confidential basis and with the agreement of the state concerned” of visit reports and country responses, and what seems to be key to a successful co-operation in strengthening the prevention of torture: the assistance in the implementation of recommendations.⁷⁸ For that matter, in its visit report on Sweden, published at the request of the government, the SPT stated having “studied carefully the recommendations made by the Council of Europe’s Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment” and that it shared its views.⁷⁹ Aside from the benefit of mutual follow-up on recommendations, it is crucial to ensure that the CPT’s and SPT’s recommendations do not contradict each other. These questions have been recently discussed again during the Global Forum on the OPCAT in November 2011, organised by the Association for the Prevention of Torture (APT). The APT stressed that so far, “the international, regional and national monitoring bodies still lack coordination regarding their visits (especially

75 Description of the European NPM Project, a Council of Europe/European Commission Joint Programme: “Setting up an active network of national preventive mechanisms against torture, an activity of the Peer-to –Peer Network”, Association for the Prevention of Torture, co-funded by the Human Rights Trust Fund, LHRBC/NPM (2010)2, January 12, 2010.

76 The European NPM Newsletter, Issue No. 11/12, December 2010- January 2011.

77 Description of the European NPM Project, a Council of Europe/European Commission Joint Programme: “Setting up an active network of national preventive mechanisms against torture, an activity of the Peer-to –Peer Network”, Association for the Prevention of Torture, co-funded by the Human Rights Trust Fund, LHRBC/NPM (2010)2, January 12, 2010.

78 Interplay between the SPT and the CPT, Presentation by Antenor Hallo de Wolf during plenary session, Regional seminal, “OPCAT in the OSCE region: What it men as and how to make it work?”, Prague 24-26 November 2008.

79 Report on the visit of the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment to Sweden, CAT/OP/SWE/1, September 10, 2008.

follow-up visits) and they could more systematically follow-up on each other's recommendations", highlighting the still existing risk of contradicting recommendations by the CPT, SPT and the NPMs.⁸⁰

Thus, the EU has already taken part to some extent, through its financial support to the European NPM Project, in the promotion of monitoring of places of detention. The question of how the EU can further contribute to enhancing the work of the Council of Europe and that of the Member States and to implementing detention standards can be answered at different levels.

A first aspect of that contribution by the EU can be put in practice as of now, through a capacity-building effort based on existing mechanisms. A new monitoring body, this time at the EU level, would not in our view be the appropriate response, as it would only aggravate the risk of duplication of work and potential contradiction in the findings. Therefore, an immediate effort of the EU could consist of enhancing the work of the Member States and national monitoring bodies, namely the NPMs, with technical assistance. That could be achieved by setting up workshops, by ensuring a mainstreaming during discussions, but most importantly, through training of the actors involved in the process of monitoring places of detention and the personnel of such places. Indeed, it is essential that the relevant standards of the Council of Europe, the European Union and the United Nations as well as the working methods of the CPT and SPT are known and understood by the staff (police officers, prison guards, etc.) that will have to implement them and co-operate with the experts of the mechanisms, in particular during onsite visits.

A second aspect would be normative, through standard-setting at the EU level. As already argued previously in terms of length of pre-trial detention, establishing common minimum standards for EU Member States, based on existing international human rights standards as well as the EU Charter of Fundamental Rights is highly desirable. Such standards would support effective and reliable implementation of these international standards in national law and practice. The EU is in a unique position to ensure harmonization and therefore better cooperation via its role of standardization of national legislation. Establishing minimum standards regarding treatment and conditions of detention in the jurisdictions of Member States through EU law, for example through a Directive, would provide a strong legal basis for the implementation by Member States of their human rights obligations concerning detention treatment and conditions. In this regard, it would be advisable that the EU instrument be based on the relevant Council of Europe and United Nations treaties and declaratory instruments, which have long been ratified or accepted by the EU Member States, and would require Member States to implement the recommendations of the respective monitoring bodies. The existence of this EU law instrument would also give competence to EU institutions, and in particular the Commission, to monitor the implementation and the compliance of Member States with such standards, triggering, in case of lack of implementation, the possibility of infringement procedures, and recourse to the CJEU.

⁸⁰ 80 APT global forum on the implementation of the OPCAT – thematic session 5, http://www.apt.ch/doc/forum/Thematic5_En.pdf

An EU legal instrument establishing standards on conditions of detention would also grant the EU a follow-up role. In the conduct of the implementation monitoring process, it would be important that the EU institutions involved refer to the standards and observations of the CPT, the SPT and the NPMs. In that manner, the EU would re-enforce the ongoing efforts of the Council of Europe and the Member States, by strengthening the existing networks and contributing to the implementation of the recommendations of the CPT and the SPT in the jurisdictions of EU Member States. This mutual support would also reduce the risks of conflicting recommendations and duplication of work. Finally, the importance of these monitoring mechanisms should also be considered in light of the future accession of the European Union to the European Convention on Human Rights. The European Court of Human Rights, which will be empowered to assess the Convention compliance of EU criminal and judicial cooperation, often makes use of observations by these mechanisms. An EU competence to oversee the implementation of such standards in light of the CPT, SPT and NPM recommendations, would help to avoid challenges to measures of cooperation before the Strasbourg Court.

ANNEX:

International standards on torture and detention and fair trial and detention:

UN:

- International Covenant on Civil and Political Rights (ICCPR)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child (CRC)
- Universal Declaration of Human Rights (UDHR)
- Body of principles for the protection of all persons under any form of detention or imprisonment
- UN basic principles for the treatment of prisoners
- UN Standard Minimum Rules for the Treatment of Prisoners
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”)
- UN Guidelines for the prevention of juvenile delinquency
- Principles of medical ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture and other cruel, inhuman and degrading treatment

Council of Europe:

- Convention for the Protection of Human Rights and Fundamental Freedoms, ETS n. 005
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, ETS n. 126
- Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules
Recommendation Rec(2006)13 of the Committee of Ministers to Member States on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse