

# Partnership for Good Governance



## PRE-TRIAL DETENTION ASSESSMENT TOOL

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The views expressed herein can in no way be taken to reflect the official opinion of either party.**

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## ***FOREWORD***

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European concept of pre-trial detention (PTD) as a measure of restraint implies that PTD must be used only as a last resort, and it should be imposed only when non-custodial measures would not suffice. In practice, however, overreliance by authorities on detention in many states is a matter of great concern.

Despite various instruments with regard to pre-trial and remand custody prepared within the Council of Europe and, the extensive case-law of the European Court of Human Rights (ECtHR), human rights violations in this sphere persist in many Member States. The lengthy periods of remand detention, insufficient and irrelevant reasons given for extending periods of detention, and its use as a disguised form of punishment are the most pressing issues in the practice of PTDs.

Disproportional use of detention gives rise to other human rights violations such as inhuman or degrading prison conditions caused by prison overcrowding, violations of the principle of presumption of innocence and even fair trial violations with respect to the manner evidence is obtained from a person deprived of his/her liberty at the initial stages of proceedings. Overuse of PTD, instead of reducing crime, may in fact increase crime rates and enhance recidivism, thus posing serious obstacles to the social integration of detainees.

There are many reasons that cause overuse of detention such as systemic problems in laws and practice, legal traditions, culture and legal thinking, dysfunctional criminal justice systems with endemic problems such as corruption, lack of institutional capacity to impose and implement non-custodial measures and sanctions, etc. These ongoing problems must be addressed to harmonise the use of detention with the European concept of detention in the Member States. The European Court of Human Rights plays a significant role in that respect; its case-law is perhaps the most important tool for bringing the practice in different Member States in line with the European concept of detention. The case-law, and its implementation by the Committee of Ministers, contributes to disclosing the systemic problems. A number of other reporting mechanisms and initiatives by the Council of Europe, the European Union and other international organisations, some of them cited in this document, equally contributes to a better understanding of the application of remand detention within Member States.

The examination of those efforts shows that those reporting mechanisms and initiatives were based on a common approach such as conducting both statistical and thematic surveys of detention practices. It is in this context that the present assessment tool is offered as a guide on

how to assess application of remand detention at national level by domestic experts and assessors. When designing the methodology, the diversity of legal frameworks and practices within Member States was taken into account. However, the main approach is based on principles and standards that are common for all Member States such as the principles set out in Article 5 of the Convention, as interpreted by the ECtHR, as well as the patterns of violations disclosed by the European Court in its numerous judgments. In that context, this assessment tool can easily be adapted for use in different jurisdictions with different legal frameworks.

### *How to use the Assessment Tool*



This guide proposes two main methods of conducting a survey of application of pre-trial detention, namely, statistical survey and thematic survey. Chapter I, entitled Statistical Survey, suggests a methodology of collecting empirical background data involving various aspects of pre-trial detention. Gathering empirical data helps to form a general and comprehensive picture about the scope and extent of the use of detention in a particular country. It also helps to identify and understand the trends of developments of the practice. Furthermore, such data help to compare the practice in a given country with those of other Council of Europe Member States and draw inferences and conclusions. The guide suggests various international and national sources for the collection of data, including inquiries to national bodies. However, statistical data alone cannot help to identify the systemic problems giving rise to continuing violations. It is therefore suggested to carry out a thematic survey in addition to the gathering of statistical data. The methods for carrying out a thematic survey are provided in Chapter 2. This chapter is designed in accordance with the principles of Article 5 of the European Convention concerning the deprivation of liberty for subjecting a person to criminal prosecution resulting in, *inter alia*, pre-trial/remand custody. In that sense, the Chapter 2 is divided into three subsections, namely, **Criteria**; **Patterns of Violations** (POV) and **Action**. The subsection on Criteria provides an explanation or an interpretation of the respective Article 5 principle with a reference (by hyperlink) to ECtHR case-law. Thus, before going forward, the user is guided through the principle under which the assessment for that specific topic has to be carried out. The POVs provide the description of typical violations by States identified by the ECtHR in its judgments. As a rule, the POVs are systemic problems and therefore they have to be carefully scrutinised during the survey. Some POVs have hyperlink references to relevant ECtHR case-law. The list of POVs can be updated in the course of time. Thus, the POVs serve to compare the national practice with the POV in order to identify a (systemic) problem. Then follows the

Action – a description of measures or instructions to assessors on what steps have to be taken and how they have to be taken in order to tackle the systemic problem. The Action appears under each POV subsection or group of such subsections. The guide suggests various tools for implementing actions such as anonymous interviews with legal practitioners and academics, journalists, human rights defenders, etc. It is also suggested to collect information by way of distributing questionnaires and a sample of the questionnaire is provided in the attached annex. The guide suggests also sample tables, diagrams, as well as hypothetical case studies as a guidance on how to conduct the survey and how to analyse collected information under Chapter I.

## Terminology & Definitions

**Apprehension:** Initial period of taking a person to a law enforcement body before giving the formal status of arrestee or detainee.

**Arrest:** Deprivation of liberty of a person by a law enforcement body on the ground of suspicion of committing or having committed a crime. The arrest is then followed by release or a detention.

**Pre-trial detention (PTD):** A measure of restraint by which a person accused of committing a crime is kept in custody, ordered by a judicial authority at pre-trial or trial stage of proceedings to ensure his/her appearance before a court, prevent his/her further criminal activity, and/or prevent unlawful interference with the investigation of the case. Other synonyms of this term such as detention, remand custody, pre-trial custody, etc., are used in this text.

**Alternative measure:** A non-custodial measure of restraint intended to ensure that the person accused of a crime appears before the investigative body or the court for further legal proceedings.

**Prison population:** Includes prisoners in pre-trial detention and detention pending trial, as well as prisoners convicted or sentenced by a final and binding court decision.

**Remand prisoner:** A person kept in pre-trial detention the periods of which can be continuously prolonged by a judicial authority.

**Detention on remand:** Detention whose periods are continuously extended until trial or sentencing.

**Convicted prisoner:** A prisoner convicted of a criminal offence, who has not been finally sentenced due to an appeal brought against the conviction.

**Sentenced prisoner:** A prisoner convicted of a criminal offence by a final and binding judgment.

## Icons used in this guidebook



Statistics

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Rule/standard

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Pattern of Violations

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Action to be taken

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Discussion of a hypothetical situation

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# CHAPTER 1 – STATISTICAL SURVEY



## 1. Gathering empirical background data from international sources

Before going to the section on the thematic survey for identifying patterns of violations and thus disclosing systemic problems, it is recommended to collect statistical data about PTDs and alternative measures. Statistical data can be collected either by referring to data published by international sources on the Internet, or by collecting data from national sources and comparing them with international data for accuracy.

The most updated information available on the Internet on prison populations of different countries is provided by the [International Centre for Prison Studies](#) (ICPS) which regularly publishes the [World Prison Brief Online](#), containing prison statistics of 223 countries and territories. The publication also includes monthly updated statistics on pre-trial/remand prison populations of over 180 countries on its webpage.



Updated information can also be found in the [Council of Europe Annual Penal Statistics \(SPACE\)](#) which provides annual data on imprisonment and penal institutions (SPACE I), and information on non-custodial sanctions and measures (SPACE II) in the Council of Europe Member States. It is therefore recommended to refer to these sources for collecting data.

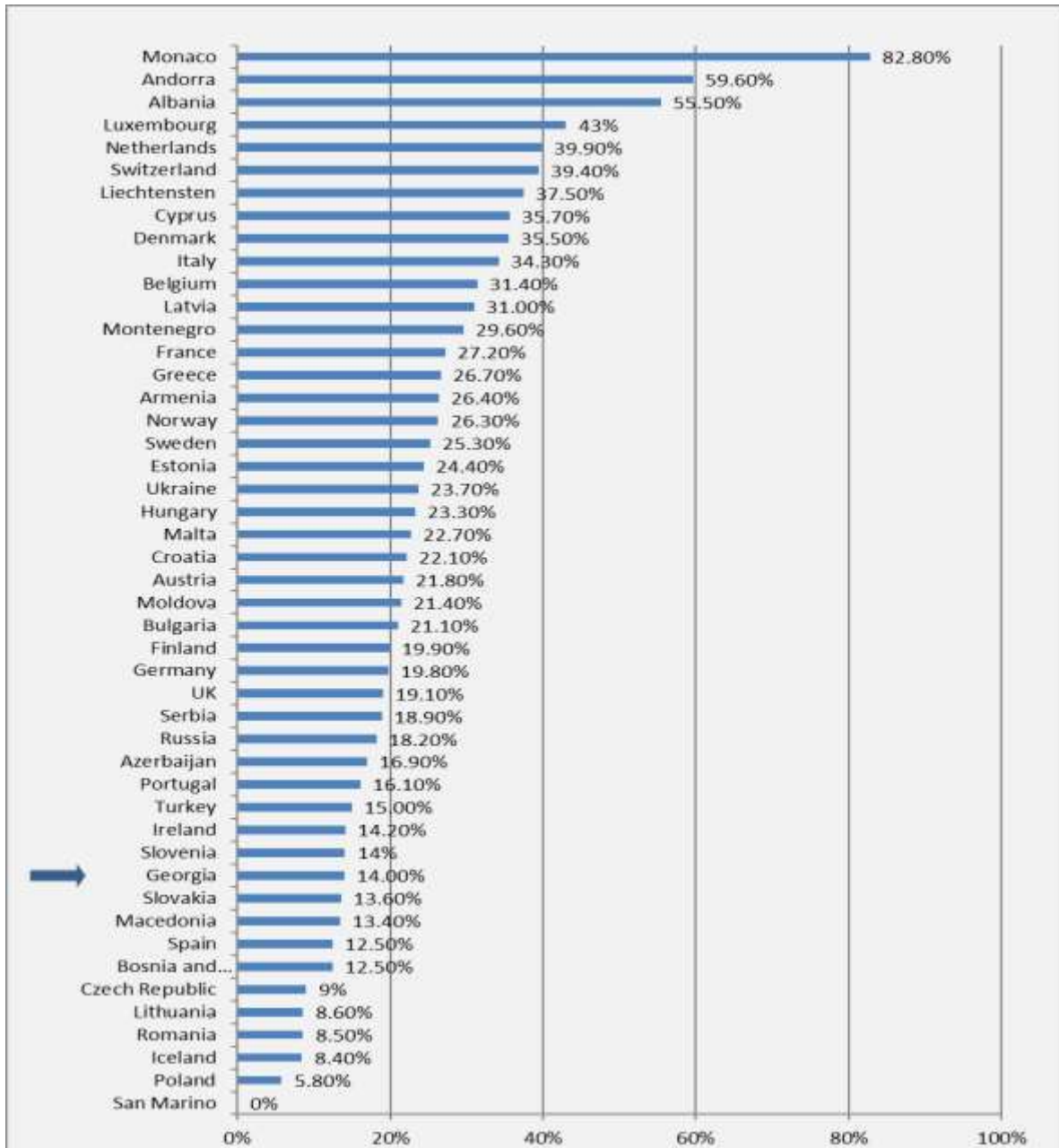


At the beginning, and to ensure consistency, it is recommended to collect data about the overall prison population in the given country, then establish the share of pre-trial detainees among the prison population, and then establish the rate of pre-trial prisoners per 100,000 inhabitants. The above collected data have to be compared with the average European (CoE) pre-trial detention (PTD) rate as a comparator. Such comparative analysis of statistical data will provide general understanding about the overall scope and extent of the use of PTD in a given country, and the position of that country among the Council of Europe Member States by rate of use of PTD. A more detailed description of the aforementioned steps is provided below.

### 1.1. The percentage of pre-trial detainees

The [ICPS data](#) comprises the number of pre-trial/remand detainees on a specific date by categorising the figures in terms of percentage of detainees **among all prisoners** of the country or per **100,000 of the national population** of the country. These two methods of calculation may provide different results. Even so, they display general trends of growth and decrease in the number of prisoners in penitentiary facilities. The Table 1 below shows the percentage of pre-trial/remand prisoners in the CoE Member States per all prisoners.

**Table 1 – Percentage of pre-trial detainees among overall prison population**



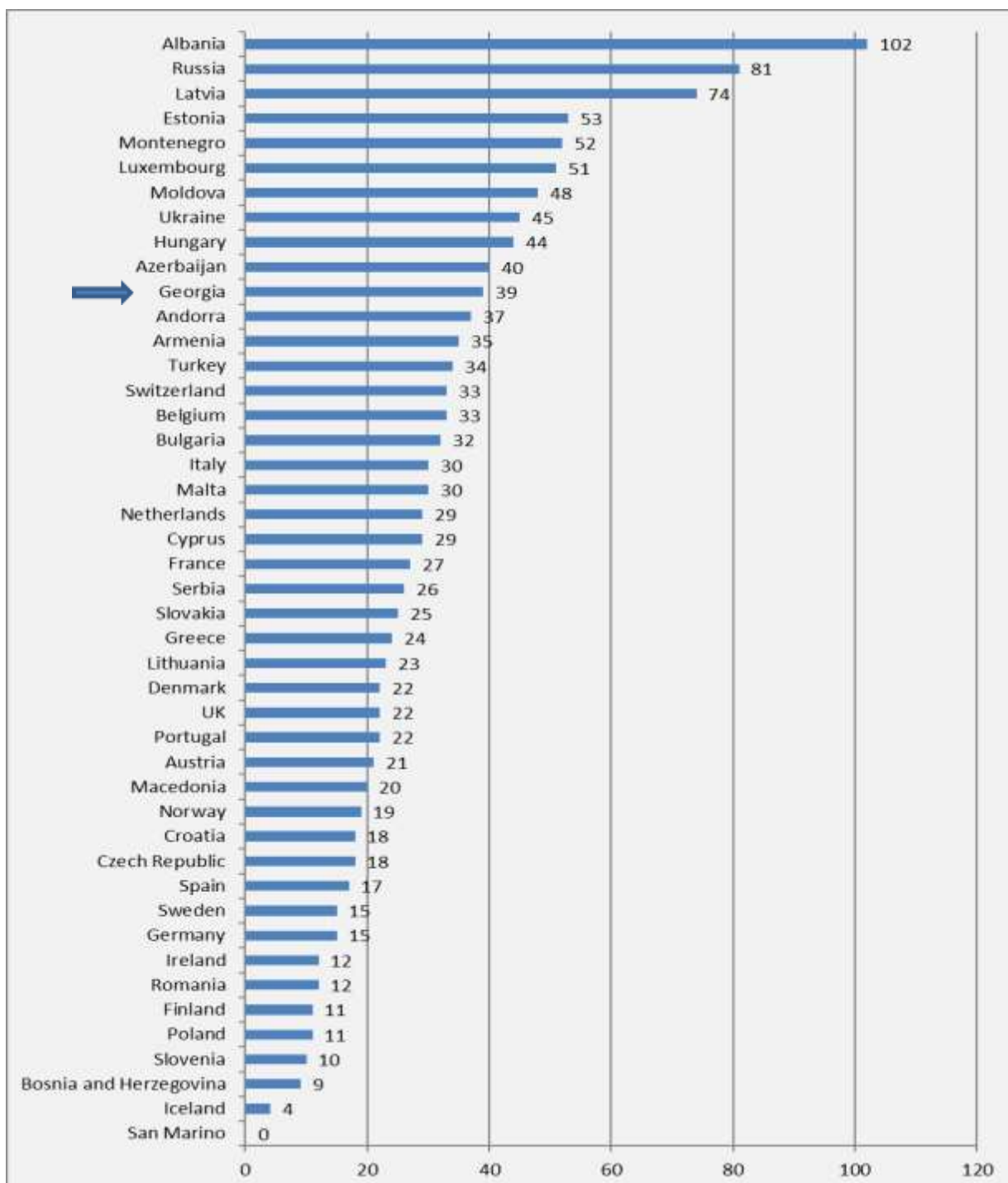
As it appears by this table, in Georgia the overall prison population as of 30 September 2015 was [10,236](#), of which pre-trial detainees constituted 14%. This is a very low pre-trial detainee rate in



comparison to other Council of Europe Member States, and consequently Georgia is positioned lower on the scale. However, the situation changes completely if the calculation is based on the number (not percentage) of pre-trial detainees per 100,000 of the overall population of the country. For Georgia (see at Table 2 below) that number is 39, which makes Georgia move up on the scale among 45 CoE countries, and, consequently, shows a very high rate of the use of detention.



**Table 2 – Number of pre-trial detainees per 100,000 of the population**



A similar result appears with respect to [Russia](#), [Estonia](#), [Lithuania](#)<sup>1</sup> and some other countries. Such an outcome demonstrates a certain trend that the method of calculation based on the number of detainees per 100,000 of the population reflects the general situation more accurately than the calculation based on the percentage of detainees among prison population. The latter method may be confusing if a country generally practices a harsh sentencing policy, causing high numbers of sentenced long-term prisoners. Thus, one effect of such policies would be that the percentage of pre-trial detainees may appear low. A good example to that respect is the United States which, according to the [EU study](#), has a comparatively low percentage of remand prisoners (around 20%) but with a sentenced prisoner rate of 756 per 100,000 inhabitants.<sup>2</sup> According to the same study, which was done based on the data from 1997 to 2008, the EU countries with lower total prison population rate show higher imprisonment rate if the calculation is based on the imprisonment rate per 100,00 inhabitants.<sup>3</sup> This trend persists with respect to CoE countries as well. Based on the [ICPS data](#), among the top 15 countries 11 are situated higher on the scale in the Table 2 which shows imprisonment rate per number of pre-trial prisoners per 100,000 of population.

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**NOTE:** Based on the above, it is possible to argue that **the two different methods are consistent and they indicate existence of a common trend**. However, the method by which the pre-trial detention rate is calculated per 100,000 of population demonstrates a more accurate view about the general practice of PTD in a given country

## 1.2. European average as a comparator

You need a comparator for comparing data under Table 1 and Table 2 in order to get a general idea about the position of the given country within CoE Member States by rate of use of PTD. It is recommended to infer a comparative index from the data of Table 1.

The calculations show that the average figure is 24.3%. This figure is very close to the average rate of the data under the above referenced [EU study](#) which is 24%.<sup>4</sup> This means that general trends of use of PTD in EU countries from 1997 to 2008 currently persist.

The above is confirmed by other calculations as well. For example, the average number of all prisoners (pre-trial detainees, convicted and sentenced prisoners) per 100,000 of population under Table 2 is 130.2, whereas by the [EU study](#) the average number as of 2007 was 131.<sup>5</sup> This comparison also shows that the EU data collected in 2007 is generally comparable with the data by the [World Prison Brief](#) collected in 2015 and 2016.

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**NOTE:** By calculating the PTD rates of CoE Member States and by comparing them with the average European rate one may draw a conclusion about the extent and scope of the use of pre-trial detention in a given country in comparison with general CoE practice.

### **1.3. Determining the average length of the PTD**

The determination of the average length of PTD may also be a factor for assessing the application of PTD in general in a given country. The [EU study](#) suggests an interesting method of calculating the average length, including the trends of PTD periods, and their comparison with similar practices among CoE States.<sup>6</sup> According to that study, it is necessary to collect two sets of data: firstly, the number of all prisoners (pre-trial detainees, convicted and sentenced prisoners) that have been present at a given period in all penitentiary facilities (for example, from 1 January 2015 to 1 January 2016); and secondly, the number of entries of the prisoners into penitentiary facilities during the same period. The first data show, as indicated in the study, the number of prisoners (stock number) while the second data show the **flow** of prisoners (flow number) in a given period. It is necessary to calculate the ratio of flow and stock numbers by dividing the flow by the list. The result will show whether the detention period of pre-trial detainees is shorter or longer compared to other (convicted and sentenced) prisoners. The higher the ratio, the larger is the flow of prisoners in a given period, which means that the period of detention is shorter. Whereas, a lower ratio is an indication that remand prisoners' "entry" and "exit" in a given period is slower and therefore the detention period is longer.

Table 8 in Chapter 1 of the [EU study](#) shows that the ratio is higher in Bulgaria, Cyprus, Ireland and UK, which means that in these countries the pre-trial detention periods are relatively shorter compared to periods of convicted and sentenced prisoners. Whereas in the Czech Republic, Latvia, Portugal, and Slovakia the ratio is low, which means that detention periods in these countries are relatively longer, to the extent that they come close to conviction or sentencing periods.

The reliability of this method of calculation can be checked if the indexes of the countries with high ratio are compared with indexes of countries with low PTD rate, and vice versa. For example, Bulgaria, Cyprus, Ireland, and UK show a high flow ratio under Table 8 of the [EU study](#), whereas the same countries show lower PTD rates under [ICPS data](#) as reflected in Table 3 of the [EU study](#) (9.3%, 15.4%, 20%, and 16.7% respectively). Similarly, Italy, Luxembourg,

Netherlands, Belgium, and Denmark show a comparatively lower ratio under Table 8, and these are the countries with higher PTD rates in Table 3 (52.1%, 42%, 34.7%, 36.1% and 34.4% respectively).

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**NOTE:** The trends resulting from the above two different methods of calculation show a match and therefore, the two methods can be considered as reliable. Hence, it is recommended to use the above two methods in carrying out the thematic survey under Chapter 2.

## 2. Gathering empirical statistical data from national sources



After establishing the percentage of pre-trial prisoners among the general prison population and a country's comparative rank within the CoE countries, it will be necessary to find out the percentage of the use of alternative measures by competent authorities. The principle that PTD should be applied as a last resort, highlighted, *inter alia*, in the [Recommendation Rec \(2006\)13 of the Council of Europe](#), depends to some extent on how widely or effectively alternative measures are used. It is therefore important to have detailed statistical data about the percentage of use of alternative measures, which can then be compared with the already established PTD rates. The rates of alternative measures in a given period is a good indicator, especially if compared with the rates of previous years, of whether such measures have been effectively used and whether they result in a reduction of PTD rates. For that purpose, either the PTD statistics already obtained by international sources, as described above, can be used or new PTD statistics can be collected along with data on alternative measures. This way, the assessors will be able to check the accuracy of data obtained from international sources. Besides, the national sources can provide more and diverse information compared to international sources such as, for example, data on PTD and alternative measures per different categories described below under Section 2.3.

### 2.1. Deciding the bulk of cases for survey

The assessors need to determine the bulk of cases to be examined. Two optional methods for determining the bulk of cases are recommended:

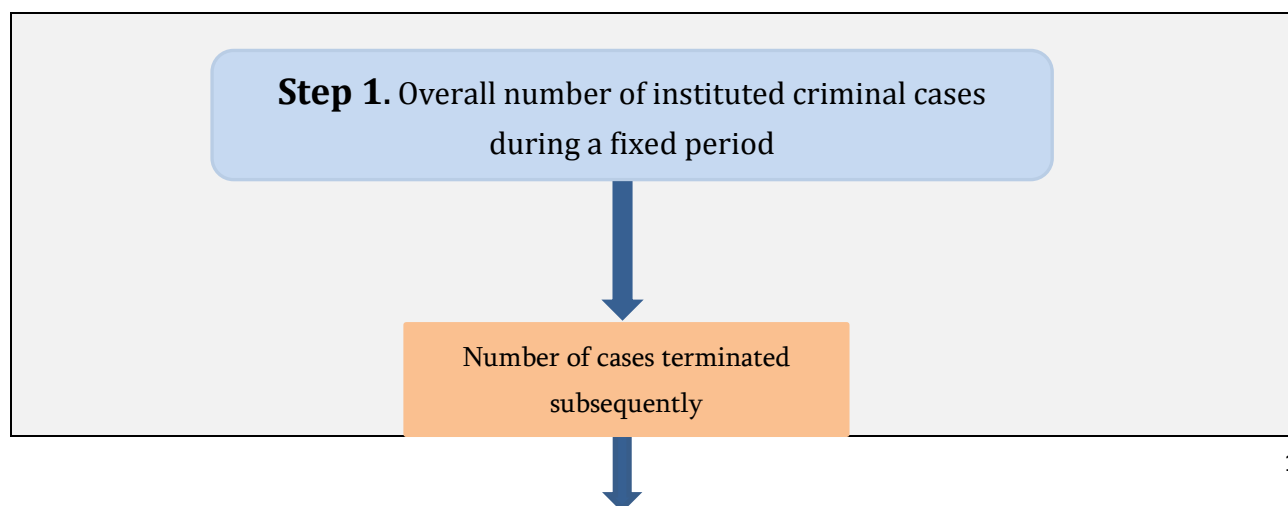
- 1) selecting all criminal cases instituted per fixed period of time; or
- 2) randomly selecting a fixed (limited) number of court cases where the courts have ordered detention or alternative measures.

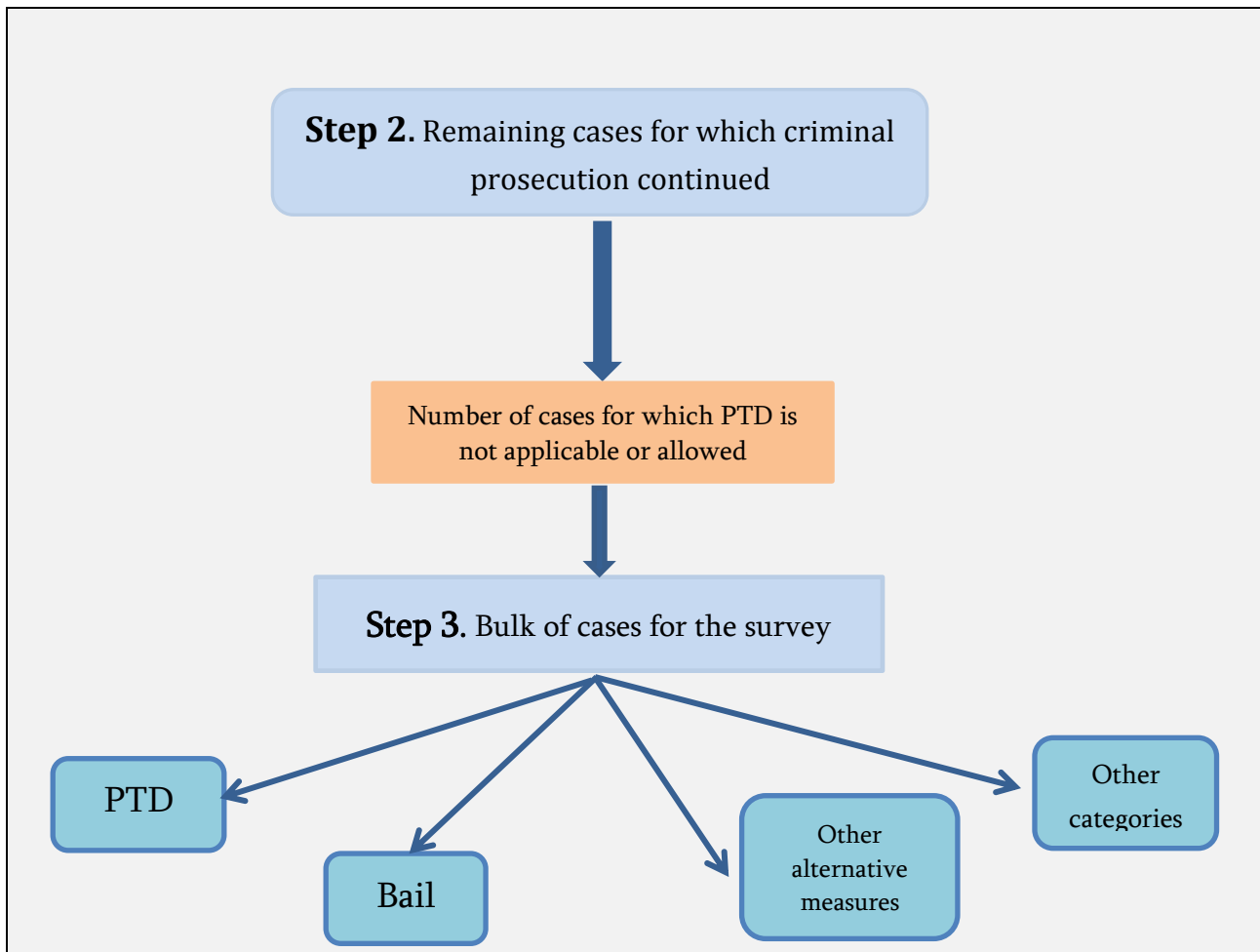
### **2.1.1. Criminal cases instituted during a fixed period of time**

With **Step 1** it is recommended to select **all criminal cases instituted during the fixed period of time** which can be assumed as the determined period of the survey. Such data can be obtained from national database systems published in annual or periodic reports of investigative, prosecutorial and/or judicial bodies, or by simply inquiring the competent bodies for such data. However, not all cases eventually result in criminal prosecution. Often criminal proceedings are terminated after initial, preliminary investigation for lack of *corpus delicti* or for other reasons (e.g. limitation period, amnesty, etc.). Therefore, with **Step 2** the number of terminated cases/proceedings should be deducted from the overall number of the instituted criminal cases. The remaining cases are those with respect to which **criminal prosecution** continued and charges against particular persons were brought. Furthermore, it would then be necessary to exclude cases for which the national law imposes certain restrictions for the use of PTD. For example, in some jurisdictions detention cannot be used in relation to crimes for which the penal code provides non-custodial punishment or the criminal procedural law expressly prohibits the use of preventive detention if the maximum length of imprisonment prescribed for the given crime exceeds certain period such as one year. Consequently, with **Step 3** such cases should be excluded or otherwise the end result will not demonstrate the true comparative picture of the use of PTD and alternative measures. After excluding those cases, the remaining cases will constitute the **bulk of cases** for the survey. Among those cases, as a **Step 4**, the number and/or percentage of alternative measures and PTDs should be examined and assessed per categories as shown in the Section 2.3. below.

The Figure 1 below provides the illustrative picture of the above steps.

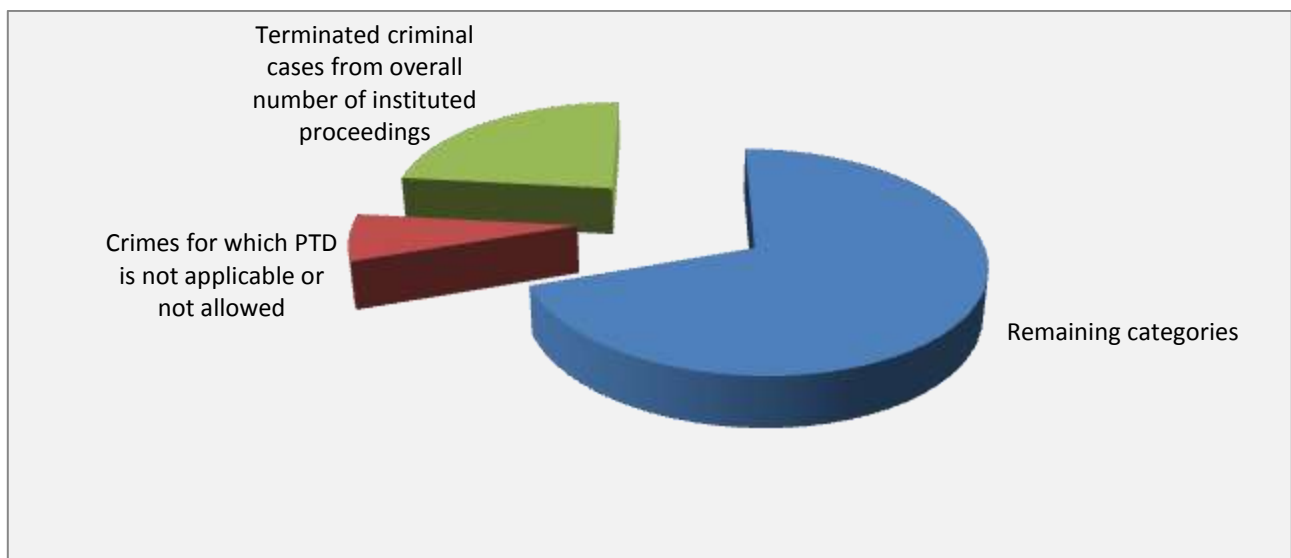
**Figure 1 – Method of excluding cases for examination**





The Figure 2 below provides a sample diagram of the above deductive method of exclusion; the basic figure is the one that shows the crimes for which custodial punishment is prescribed.

**Figure 2 - Illustrative picture of excluding bulk of cases for the survey**



### **2.1.2. Randomly selected cases decided by courts**

As an alternative to the above method under Section 2.2.1., the assessors may choose to examine a fixed number of randomly selected court decisions on PTDs decided in the same or different jurisdictions. The types of courts can be decided, for example, per principle of territoriality or functionality of operation of the courts.

After randomly selecting the bulk of cases, the assessors then need to examine the trends of use of PTD and/or alternative measures.

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**NOTE:** This method enables to establish the trends of use of PTD and alternative measures but cannot serve to establishing detailed statistics of their use.

## **2.2. Deciding the period to be covered by the survey**

Regardless of whether the survey is conducted by the method under Section 2.1.1. or 2.1.2., the length of the period of the survey must be first decided. It is recommended to choose a one-year period for the survey. However, shorter periods, like 6 months or less, can also be chosen (in general, the length of the period for calculation depends largely on availability of resources allocated for the survey).

For the comprehensiveness of the statistical data, it is recommended to take a period which is not shorter than the minimum period and not longer than the maximum period of the PTD prescribed under national law or practice in the given jurisdiction.<sup>7</sup>

## **2.3. Deciding the categories of statistical data to be collected**

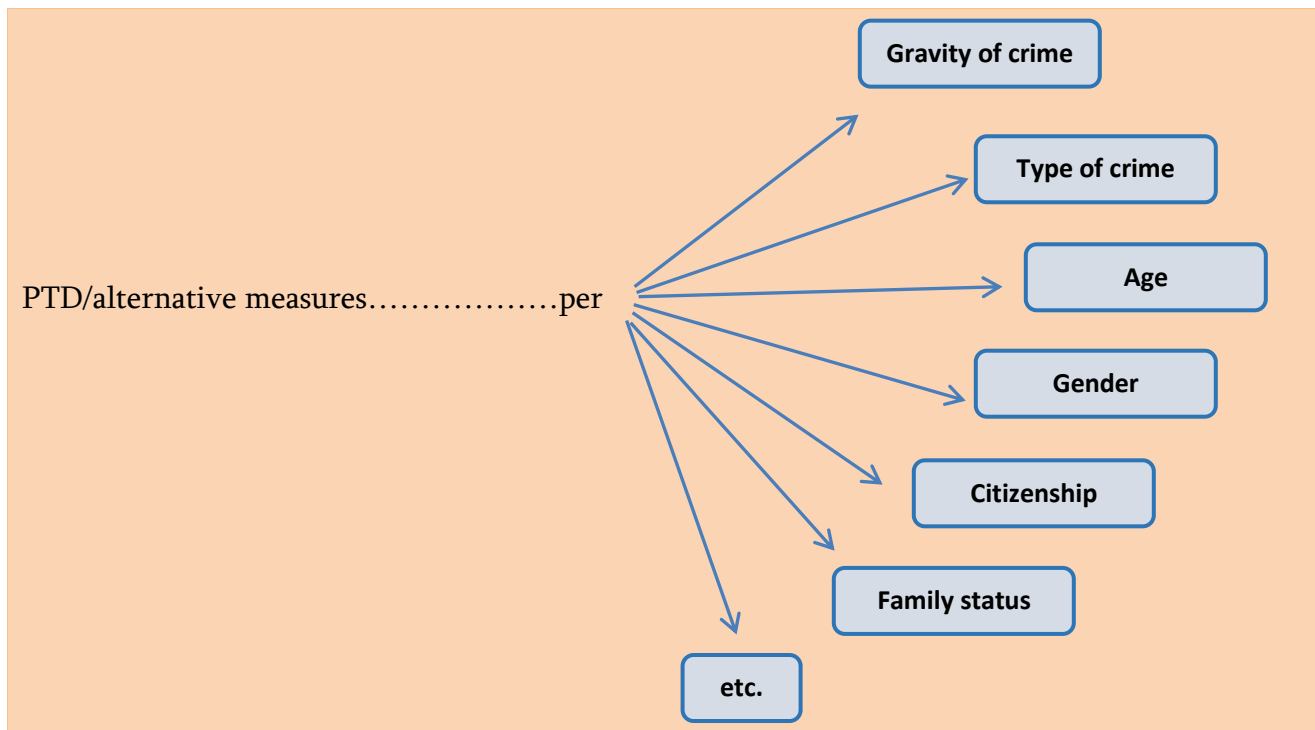
The statistical data of PTD and alternative measures is recommended to be collected and divided into the following categories:

- gravity of crime (e.g. misdemeanour, grave crime, and especially grave crime);
- type of crime (e.g. murder, physical assault, burglary, counterfeiting, bribery, etc.);
- court (per territoriality or functionality);
- prisoners' age (juvenile or adult);
- sex (male or female);

- citizenship (e.g. local or foreign citizen);
- family/marital status (married, single, availability of dependants);
- etc.

Thus, the outcome product will show the ratio of PTD and alternative measures per above categories, as shown below.

**Figure 3 – Categories of statistical data**



The aforementioned list of categories is not exhaustive and the surveyors may think of adding other categories as well such as, for example, courts (per territoriality and functionality), length of detention, amount of bail, grounds of detention such as the risks of absconding, obstructing evidence, committal of new offence, etc.

#### **Hypothetical**

Let's suppose that a group of researchers decided to conduct a survey on PTD and alternative measures in Georgia by randomly selecting 500 cases decided by six magistrate courts during a given period. Thus, the target is not the bulk of criminal cases instituted per given period as provided under Section 2.2 (in which case the researchers would have to concentrate their efforts on getting access to decisions of pre-trial, investigative bodies) but randomly selected court cases, in which case the efforts have to be



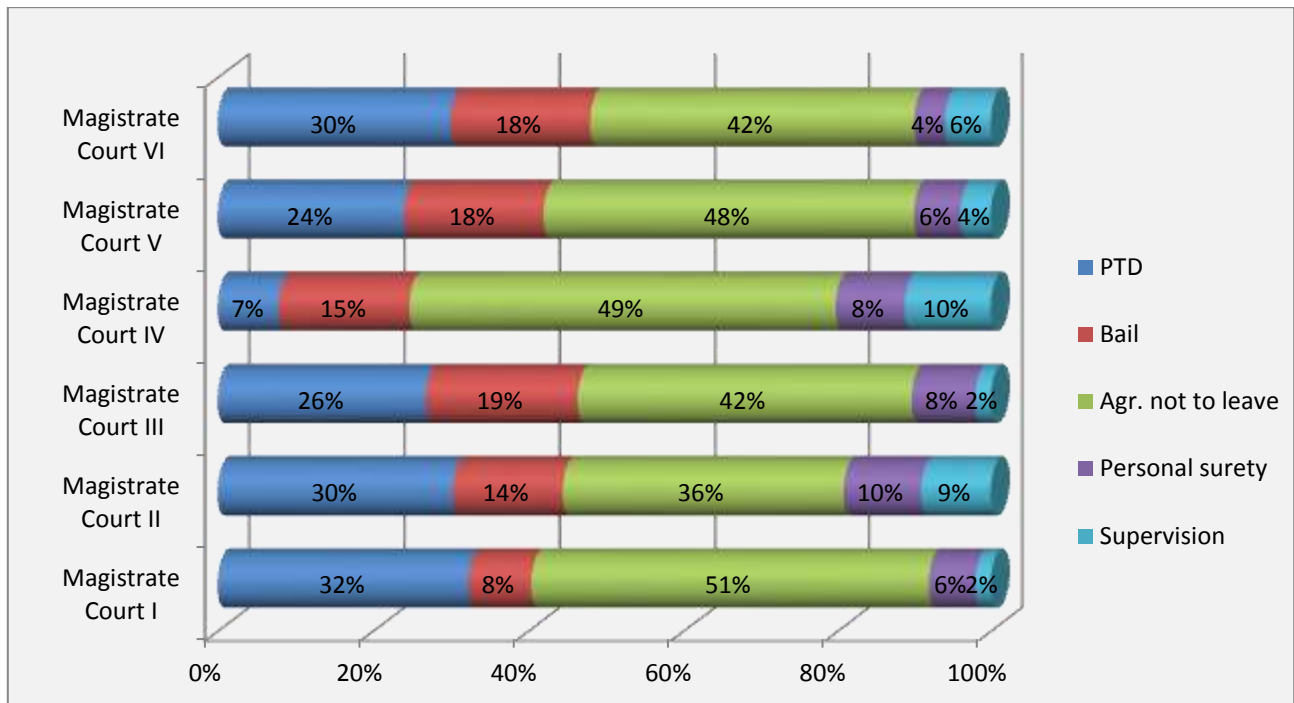
directed at getting access to decisions of judicial bodies which is relatively easier than gaining access to decisions of investigative authorities (Section 2.1.1. above).

The two hypothetical tables below show the comparative use of PTD and alternative measures by six different courts. Table 3 provides data per quantity of use of measures of restraint while Figure 4 provides the same data transformed into percentage for visual demonstration of proportion of use of PTD with alternative measures.

**Table 3 – Hypothetical data of use of PTD and alternative measures per quantity**

| Measure<br>of restraint<br>Magistrate<br>Court | Pre-trial<br>detention | Bail | Signed<br>undertaking not<br>to leave and<br>behave properly | Personal<br>surety | Military<br>supervision of<br>servicemen | PTD % |
|--|------------------------|------|--|--------------------|--|-------|
| Magistrate<br>Court I                          | 28                     | 7    | 45   | 5                  | 2  | 32%   |
| Magistrate<br>Court II                         | 25                     | 12   | 30   | 8                  | 7  | 30%   |
| Magistrate<br>Court III                        | 22                     | 16   | 35   | 8                  | 2  | 26%   |
| Magistrate<br>Court IV                         | 15                     | 12   | 40   | 7                  | 8  | 7%    |
| Magistrate<br>Court V                          | 20                     | 15   | 40   | 5                  | 3  | 24%   |
| Magistrate<br>Court VI                         | 25                     | 15   | 35   | 3                  | 5  | 30%   |
| Total:   | 135                    | 77   | 225  | 36                 | 27                                       | 27%   |
| Percentage:                                    | 27%                    | 15%  | 45%  | 7%                 | 5%                                       |       |

**Figure 4 – Hypothetical data of use of PTD and alternative measures per percentage**



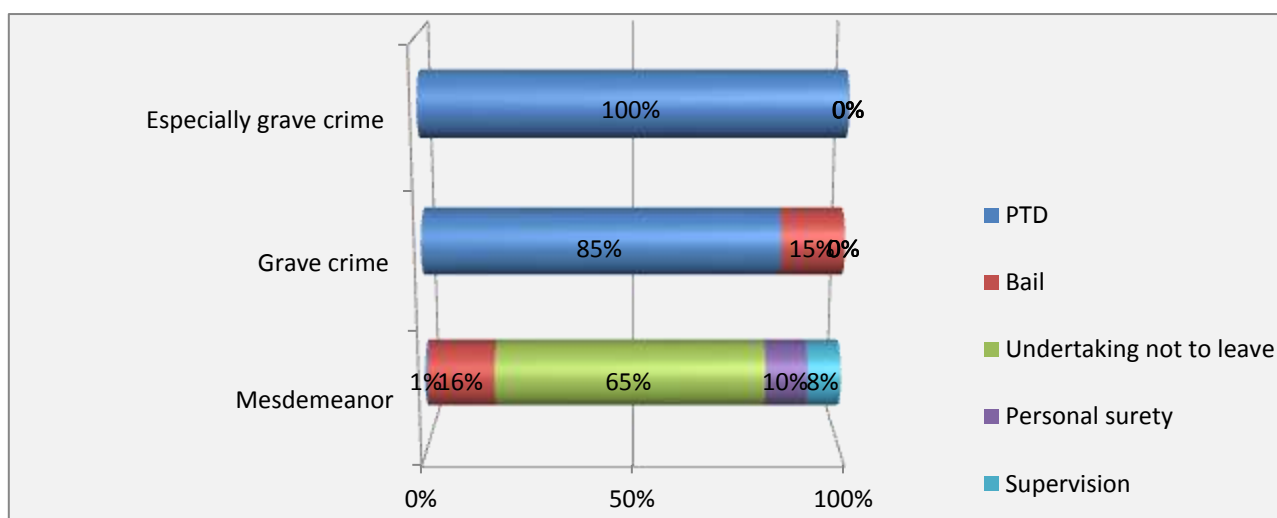
The above figures show that the formal undertaking of not leaving place of residence is the mostly used measure of restraint by the six courts which is then followed by PTD, bail, military supervision of service members and personal surety. If the authority of taking a decision over the first measure is vested with the investigative bodies rather than the courts, which is a common practice in many States, it means the investigative bodies play the main role in infiltrating cases where PTD is unwanted and as **such it is the investigative bodies that contribute mainly to the reduction of PTD rate**. This may seem to be a positive trend. However, 27% is still higher than the average European (CoE) index which is 24.3% (per Section 1.2 and Table 1 above) and therefore one can argue that the rate of PTD is still higher than the average practice in the Council of Europe Member States. Therefore the practice needs to be examined and revised. Additionally, the extremely low rate of use of PTD by the Magistrate Court IV is also a matter to be closely examined in order to reveal the reason of deviation from the mainstream practice by other courts.

Other trends can be discovered as well, for example, the practice of PTD per gravity of crimes as shown in the below tables. According to it, the PTD appears to be the measure used exclusively for especially grave crimes (100%), predominantly used for grave crimes (85%) and rarely used for misdemeanour (1%). As to the bail, it is not used often for grave crimes (15%) and misdemeanour (16%).

**Table 4 – Use of PTD and alternative measures per gravity of crime**

| Measure of restraint<br>Type of The crime | Cases heard by court |     | Pre-trial detention |      | Bail |     | Undertaking not to leave and behave properly |     | Personal surety |     | Military supervision of servicemen |    |
|---|----------------------|-----|---------------------|------|------|-----|--|-----|-----------------|-----|------------------------------------|----|
| Misdemeanour                              | 347                  | 69% | 2                   | 1%   | 57   | 16% | 225  | 65% | 36              | 10% | 27                                 | 8% |
| Grave crime                               | 133                  | 27% | 113                 | 85%  | 20   | 15% | 0  | 0   | 0               | 0   | 0                                  | 0  |
| Especially grave crime                    | 20                   | 4%  | 20                  | 100% | 0    | 0   | 0  | 0   | 0               | 0   | 0                                  | 0  |
| Total:                                    | 500                  |     | 135                 | 27%  | 77   | 16% | 225  | 45% | 36              | 7%  | 27                                 | 5% |

**Figure 5 – Use of PTD and alternative measures per type of crime**

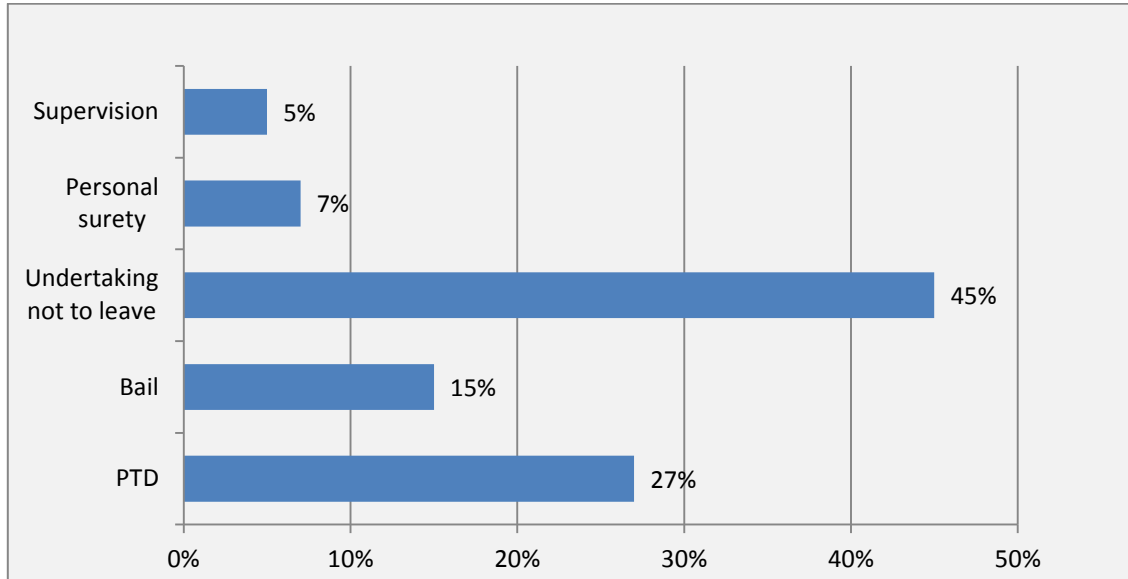


#### Hypothetical

As it appears from the above statistics, out of 153 motions by investigative authorities of keeping persons charged for commitment of grave and especially grave crimes under detention, the courts granted 133 or the 85%. In this context, the **low percentage of use of bail for grave crimes (15%)** can be worrisome as the bail, according to the ECHR caselaw, can be used where the reasons justifying detention prevail, and if the risk can be avoided by bail or other alternative measures, the accused must be released. This extremely low rate of use of bail can be an **indication of bias by judges** against use of alternative measures and it can be therefore argued that judges use detention in grave crimes as a disguised form of punishment. At the same time, the high rate of the undertaking not to leave as a measure of restraint in cases of misdemeanour (65%) is a proportional approach given the fact that the penal codes in many countries prescribe non-custodial sentences for misdemeanour and therefore the risk of absconding or interfering with justice is minimum.

If the same practice of PTD is assessed in comparison to all the remaining measures of restraint, the PTD will constitute the second mostly used measure (27%) whereas the undertaking of not leaving place of residence will constitute the mostly used measure (45%) and the bail will constitute the third mostly used measure (16%), as shown in Figure 6 below which provides the visual picture of the end result of the practice of PTD.

**Figure 6 – Use of PTD and alternative measures**



Similar statistics as described in the above hypothetical examples can be drawn per type rather than the gravity of crimes. It may reveal certain trends of how the courts use PTD where accused persons are charged, for example, for murder, physical assault, burglary, counterfeiting, fraud, thus, compiling data per separate types of crimes under the penal code. For example, statistical data may reveal that for certain types of crime the courts order solely detention. This would be an indication of existence of a trend or even an unpublished guidance issued by internal regulatory bodies of the Judiciary instructing courts how to decide on PTD or bail for certain crimes. If this is the case, it raises a serious issue of lack of internal independence of courts.

Further to the above, statistical data per crime may help to establish whether courts apply PTD and alternative measures uniformly for the similar crimes, or the practice differentiates and therefore lacks legal certainty. For example, the compiled data may reveal that one court granted the motion of detention of the accused aged 25, unmarried and charged for aggravated burglary, whereas other court turned down the motion for detention of the accused who was of the same age, unmarried and charged for the same crime. If such inconsistencies in practice

persist and the number of such inconsistencies reach certain qualitative, *prima facie* level, it may be assessed as an indication of an inconsistent practice by the Judiciary as a whole.

Similar statistical tables may be comprised and relevant inferences drawn with respect to information obtained under other categories mentioned above, such as age (by concentrating on juveniles), gender, citizenship (addressing mainly foreign prisoners), or marital status. Below is the sample table of statistics of detainees per age and marital status.

### **2.3.1. Rates of granting motions of prosecutors requesting detention**

Despite the fact that the figures in Table 4 and Figure 5 are hypothetical in nature, they reflect a common trend in many countries according to which courts are inclined to grant investigating bodies' motions requesting detention rather than alternative measures for the accused who are charged of grave crime. Thus, these trends bind the practice largely to the gravity of charges and the severity of potential sentence. The [EU study](#) also refers to similar statistics in the EU countries, showing that alternative measures to pre-trial detention have been generally unpopular and the courts have been predominantly inclined to grant the motions of investigative or prosecutorial bodies requesting PTD rather than alternative measures.<sup>8</sup> In Armenia, according to annual reports published by the judiciary, the courts in 2014 granted 96.5% of the investigative bodies' mentions requesting PTD. This is a very high rate and although Armenia shows medium PTD rate in Table 1 and Table 2, the general public perception is that detention as a measure of restraint is used widespread. Such a perception is mostly due to the practice of granting by courts of almost all the motions brought by investigators to request a court order for detention.<sup>9</sup> It is therefore very important to gather statistical data about percentage of motions by which investigators request detention and which are granted by courts. A high percentage of granting of such motions may disclose a trend of automatic, mechanistic use of PTD without due regard to substantive, legitimate grounds and conditions of detention. Moreover, such practice reveals that detention is used as a measure of punishment rather than as a measure of restraint.

### **2.3.2. Rates of detention periods coinciding with the term of sentence**

Often detainees are released from detention at the courthouse upon announcement of the verdict. If that's the case, then the period of detention matches with the period of sentence. If the period of detention matches with the term of the imprisonment announced by verdict, and

where the number of such cases reach certain qualitative, *prima facie* level and such practice shows a certain consistency, it may be an indication of a pattern that courts use preventive detention as a disguised form of punishment and sentence which is contrary to the meaning and object of Article 5 of the Convention.

## 2.4. Conclusion

As a summary, at the beginning of the survey it is recommended that surveyors refer to international sources to establish the average rate of use of PTD in a given country and compare it with the rates of the Council of Europe Member States or with the average CoE rate. This comparative survey will enable to form a general idea about the extent of use of PTD compared with other Council of Europe Member States. The surveyors then may turn to national sources to collect national data on domestic practice.

At the outset, the surveyors need to decide the bulk of cases for examination. Much will depend on the resources available for the survey. This guide suggests two avenues: selecting the bulk of cases per given *period*, or selecting a fixed number of *randomly selected* court cases (court decisions by which detention is ordered or rejected).

For the **first option**, it would be necessary to decide the period within which criminal cases were instituted. That period should not be less than the minimum period prescribed for detention under domestic law. After determining the period and establishing the number of criminal proceedings instituted during that period, it is necessary to subtract the number of cases which were terminated after institution of the proceedings, provided that no detention was ordered in the meantime. From the remaining cases, it would be necessary then to subtract the number of cases with respect to which PTD is not allowed or is not relevant under domestic law. The remaining cases is the bulk of cases for examination.

With the **second option**, it would not be necessary to go through the above steps of infiltration as the number of the randomly selected court cases form the bulk of cases for examination.

Once the bulk of cases for the survey is determined, the assessors may proceed to categorising those cases by different characteristics, as shown above, and start collecting data per those categories.

The statistical survey enables to form a clear view about the general trends of use of PTD. However, the statistical data may be of little help for identifying the systemic problems giving rise to consistent problems, resulting in local practices inconsistent with the CoE standards. It is therefore suggested that after completing the statistical part of the survey the assessors need to

continue by conducting the thematic survey and examining the substantive grounds of the use of PTD. The methods and the guidelines on how to conduct the thematic survey are provided in the following Chapter II.

## CHAPTER 2 – THEMATIC SURVEY



After having collected statistical data about the use of PTD, it is suggested to conduct a thematic survey. This chapter offers a special algorithm to be followed for conducting the thematic survey. The algorithm is based on three premises: **Rule**, **Patterns of Violations** (PoV) and **Action**, and the surveyor needs to go through all three premises one by one when conducting the survey. The *Rule* provides the specific Article 5 principle with a reference to the relevant ECtHR case-law. The *POVs* include the typical violations identified by the European Court in its case-law. The *Action* outlines the measures that the surveyors need to take for examining the given situation. Thus, the user reads the rule as a guidance, then examines the pattern of violations. Finally, he or she takes the steps under Action by identifying the similar violations in the national laws and practice while going through the bulk of cases, in order to check which pattern of violation persists in the domestic practice. With such systematic approach, the surveyors will be able to disclose problems under each relevant principle of the Article 5. The annexes attached to this chapter provide the sample forms referred to in the Chapter II.

### 3. The principle of lawfulness of detention

Article 5 § 1

“1. ...No one shall be deprived of his liberty save ...in accordance with a procedure prescribed by law: ...”

#### 3.1. The principle of legality (compliance with national law)

##### Rule

Regarding the “lawfulness” of detention, the Convention refers essentially to national law and lays down the obligation to comply to the substantive and procedural rules of national law (see [Saadi v. the United Kingdom](#) [GC], no. 13229/03, § 67). This primarily requires any arrest or detention to have a legal basis in domestic law ([Kakabadze and Others v. Georgia](#), no. 1484/07, § 62).

## PoV

Detention is considered unlawful when **apprehension and arrest** (if subsequent detention was ordered), was carried out in violation of or by lack of national procedural law grounds. This often happens when a person is taken and detained by the police for few hours or a day or more, without clear status as a witness, a suspect or an accused while being given self-incriminating questions. ([Creanga v. Romania](#), no.29226/03, § 106). For example when:

- **Detention** was ordered and carried out in violation and/or by lack of national procedural law grounds.
- Practice of keeping persons under apprehension, arrest or preventive detention is used without rules governing their periods or their situation in general such as criminal status, as mentioned in the above example.
- Authorities failed to lodge application for extension of the period of detention within the time-limits prescribed by law ([G.K. v. Poland](#), no. 38816/97, § 76).
- Apprehension, arrest and detention was ordered and carried out by lack of **substantive** law grounds.
- Formal requirements of procedural or substantive law grounds were observed but apprehension, or arrest and/or detention was carried out for other disguised purpose than formally provided in the papers. See in this regard the Section 3.2.2. below on “*The principle of prohibition of arbitrariness.*”

## 3.2. The Principle of “legal certainty”

### 3.2.1. Uncertainty in regulating the periods of PTD

## Rule

It is not sufficient that any deprivation of liberty complies with national law requirements and have a legal basis in domestic law. The law itself must meet the



requirement of the “quality of law” which implies that it must be sufficiently accessible, precise and foreseeable in its application, in order to avoid any risk of arbitrariness ([Giorgi Nikolaishvili v. Georgia](#), no. 37048/04, § 53). The practice of keeping defendants in detention without clear rules governing their situation – with the result that they may be deprived of their liberty for an unlimited period without judicial authorisation – is incompatible with the principles of legal certainty and protection from arbitrariness ([Kharchenko v. Ukraine](#), no. 40107/02, § 71).

PoV

**The periods of detention at pre-trial stage are not regulated by law.** This raises an issue of legal uncertainty and as such amounts to a systemic problem under Article 5 § 1 of the Convention. Detention is recognised as uncertain when:

- The period of detention set by a court expired with the period of pre-trial investigation, but the detention period was considered as automatically extended **by virtue of the fact that the criminal case was forwarded to a court for trial or that the bill of indictment had been lodged with the court.** As a result of such regulation, the detainee stayed under detention without court order and for an indefinite time until the trial began. The ECHR considered such practice as violating the principle of legal certainty ([Giorgi Nikolaishvili, § 65](#)). See also [Kharchenko, § 71, § 98](#), as well as [Jecius v. Lithuania](#), no. 34578/97, §§ 62-63).
- **The period of detention was not regulated at trial stage.** The ECHR has not explicitly ruled that the lack of statutory time limit over the period of detention at trial stage as such violates Article 5 of the Convention. However, it has at the same time ruled that where the court, in admitting and committing the case for trial, upholds the prior court decision on extension of period of detention without setting any time-limit for the continued detention, such practice renders the period of detention unpredictable, which, together with a lack of reasoning for prolonged detention, is contrary to the principle of legal certainty and does not afford adequate protection from arbitrariness. [Kharchenko, § 75](#)).
- **The court upheld rather than extended detention.** This is derivative to the above. The ECHR finds a violation of the principle of legal certainty where

the judge, in admitting the case from investigative bodies for trial, “**upholds**” rather than “**extends**” detention without setting a time limit, analysing the grounds for detention and existence of a reasonable suspicion, as normally required in the pre-trial stage of proceedings ([Giorgi Nikolaishvili, § 65](#)).

### 3.2.2. **The Principle of Prohibition of Arbitrariness**

#### Rule

One of the underlying principles of the Convention is the principle of prohibition of arbitrariness, which means that even if detention meets the formal requirements of national law and the principle of legal certainty, it still may be considered as contrary to the Convention and therefore unlawful if it was arbitrary ([Kakabadze and Others, § 63](#)). Detention is recognised as arbitrary when:

#### PoV

**The real reason of detention was different from what was formally presented, and these reasons are disguised behind formal procedures of deprivation of liberty;** for example, such reasons could entail persecution due to political views, or ethnicity, nationality or sexual orientation. In such cases, the reasonable suspicion of commission of a crime as required by Article 5 § 1(c) is considered to be absent (see at Section 3 below) ([Ilgar Mammadov v. Azerbaijan](#), no. 15172/13, § 101). In such cases, the Court may also find a violation of Article 18 of the Convention ([§ 144](#)):

- **The formal purpose given by authorities for depriving a person of liberty did not comply with the procedural and substantive law grounds for arrest or detention** ([James, Wells and Lee v. the United Kingdom](#), no. 25119/09, §§ 194-195). For example, it is a well-known and widespread practice in most of the former Soviet Union countries to summon a person formally as a witness to the police in accordance with Article 5 § 1(b), whereas the real reason behind it was to arrest and question the person for achieving the goal mentioned in Article 5 § 1(c), namely, criminal prosecution.
- **Detention was used as a disguised form of penalty** for the crime with which the accused was charged. Under such circumstances, quite often,

the term of detention coincides with the term of the sentence pronounced by the court, and the accused is released from the court house upon announcement of the verdict (see Section 2.3.2. above).

- **Undocumented and unrecognised arrest and detention by the authorities:** Notwithstanding the actual length of deprivation of liberty, the unrecorded detention of an individual is a complete negation of the fundamentally important guarantees contained in Article 5 of the Convention and discloses a grave violation of that provision ([Baisuev and Anzorov v. Georgia](#), no. 39804/04, § 59).
- **Where the authorities simply disregard** a decision by court or another competent authority to release a person and he/she continued to be deprived despite the existence of a court order for release ([Labita v. Italy](#), no. 26772/95, § 172, [Assanidze v. Georgia](#), no. 71503/01, § 172-173).

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**NOTE:** The European Court has not formulated a universal definition as to what types of conduct on the part of the authorities might constitute “arbitrariness” within the meaning of Article 5 § 1. The Court has confined its case-law to elaborating certain key principles, for example, the detention will be considered “arbitrary” where, despite complying with the letter of national law, there has been an element of bad faith on the part of the authorities, or where the domestic authorities have neglected to attempt applying the relevant legislation correctly.

**Action**

Decide the bulk of cases to be examined as described under Section 2.1.1. (cases instituted per given period) or Section 2.1.2. (randomly selected court cases).

- Review the relevant domestic laws governing the stages of deprivation of liberty for preventive detention in order to identify any uncertainty because of which a person may be kept in custody without clear substantive grounds or procedures governing his/her situation such the periods, regime, location of detention, etc.

- Identify and draft statistics of cases where periods of detention coincided with the periods of sentences and the prisoner was released from the court house upon announcement of the verdict (see Section 2.3.2. above). If the number of such cases indicates consistency of practice, it is an indication of a negative trend that PTD is used as a disguised form of punishment.
- Conduct anonymous interviews with one or more of the following groups:
  - investigators;
  - prosecutors;
  - lawyers;
  - judges/court clerks,
  - civil society activists,
  - human rights defenders,
  - journalists covering court practice.

The purpose of interviews is to compare the national practice and the laws with the POVs mentioned under Sections 3.1. and 3.2. above.

- As an alternative to the above, send questionnaires (sample provided in the Annex 1) to the above groups of respondents and seek answers. In order to facilitate the feedback, it is recommended to send the form electronically. The sample form has two chapters; Chapter I includes questions for checking the respondents' competency, and Chapter II includes POVs to be identified by checkmark.
- Based on the feedbacks received from interviews and/or questionnaires, including an assessment of POVs, draft a table showing whether the application of the given principle complies with CoE norms (a brief example is given in the Annex 2).
- A similar analysis can be carried out in the subsequent years in order to identify negative or positive trends throughout the years (see Annex 3 as a sample).

## 4. Arrest or detention on the basis of reasonable suspicion

(Article 5 § 1(c))

"1.... No one shall be deprived of his liberty save in the following cases...  
c. the lawful arrest or detention of a person ... on reasonable suspicion of having committed an offence ..."

#### 4.1. The meaning and scope of the concept of “reasonable suspicion”

##### Rule

The “reasonableness” of the suspicion on which an arrest must be based forms an essential part of the safeguards against arbitrary arrest. Having a “reasonable suspicion” presupposes the existence of **facts** or **information** which would satisfy an objective observer that the person concerned may have committed the offence ([Stepuleac v. Moldova](#), no. 8207/06, § 68). Even a *bona fide* or “genuine” suspicion of an investigating authority is not necessarily sufficient to satisfy an objective observer that the suspicion is reasonable ([Stepuleac](#), § 76).

##### PoV

Detention is considered unreasonable when the suspicion was based solely on the victim’s testimony where such testimony, even if it indicated the name of the arrested or the detained person’s name, was not corroborated by other facts, information or evidence. For example, when:

- **The suspicion was based solely on the victim’s testimony** by which the victim has not pointed out the arrested or the detained person’s name. Thus, the person’s link to the crime was established in an abstract manner.
- **The suspicion was based on a single fact** confirming the link between the arrested/detained person and the crime, for example, a statement by a person who claims to have witnessed the crime; the investigative body did not conduct preliminary investigation to verify that fact and the decision about arrest was taken without having conducted preliminary investigations.
- **The suspicion was based on “operative indications” of the intelligence service** without any statement, information or a concrete complaint concerning a crime ([Lazoroski v. the Former Yugoslav Republic of Macedonia](#), no. 4922/04, § 48).

- **The suspicion was based solely on the statement of a police informant** (e.g. operative information) whose identity was not disclosed. Such statements must be supported by corroborative evidence or by other facts or information ([Labita v. Italy](#), no. 26772/95, § 157).

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**NOTE:** Where the decision of arrest, detention or extension of period of detention lack factual grounds or information establishing the link between the arrested/detained person and the crime of which the person is incriminated, such situations must be assessed.

## 4.2. The reasonable suspicion in the case of acquittal

### Rule

Apart from its factual side, which is more often an issue, the existence of such a suspicion additionally requires that the facts relied on can be reasonably considered as behaviour criminalised under domestic law. Thus, there could clearly not be a “reasonable suspicion” if the acts held against a detained person did not constitute an offence at the time when they were committed ([Kandzhov v. Bulgaria](#), no. 68294/01, § 57).

### PoV

The pre-trial detention is automatically considered unlawful, when the subsequent acquittal of the person under detention and termination of the proceedings on the ground that the action, of which he/she was accused, did not constitute a crime **at the time when it was committed**.

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**NOTE:** The above shall not be understood as meaning that any subsequent acquittal automatically results in rendering the pre-trial detention as unlawful on the ground that the reasonable suspicion did not exist at the time of arrest or detention ([Erdagoz v. Turkey](#), no. 127/1996/945/746, § 51).

## 4.3. Reasonable suspicion in the case of arbitrary arrest and detention

### Rule

If the authorities have acted in bad faith, for example, where the genuine reasons for arrest and detention were different from what was formally presented by the authorities, that fact itself raises an issue about absence of a reasonable suspicion of commission of a crime (covered also under Section 3.2.2. above).

**PoV**

This principle is not respected in cases where the formal grounds of court decisions for arrest and detention are different from the real reasons of deprivation of liberty:

- political persecution to suppress political activism or civil activism of the detainee;
- victimisation of a person for whistle-blower activity; and discriminatory attitude on the account of any of the protected grounds under the general concept of non-discrimination, such as ethnic origin, etc.

#### 4.4. Reasonable suspicion as a pre-condition for detention

**Rule**

The persistence of reasonable suspicion under Article 5(1)(c) that the person arrested has committed an offence is a prerequisite for the lawfulness of the continued detention. Accordingly, while reasonable suspicion must exist at the time of the arrest and initial detention, it must also be shown, in cases of prolonged detention, that the suspicion persisted and remained “reasonable” throughout the detention ([Ilgar Mammadov v. Azerbaijan](#), no. 15172/13, § 90).

**PoV**

here is a violation of Article 5(1)(c) when the concept of "reasonable suspicion", as a **pre-condition** of detention, is not envisaged by the law or case-law for all stages of PTD (pre-trial detention and detention pending trial) until sentencing. For example, when:

- The concept of “reasonable suspicion” is foreseen in the law or in the case-law but the courts did not refer to it as a subject of judicial review at all stages of pre-trial and trial proceedings.
- The courts abstained from dealing with submissions by parties concerning reasonable suspicion by justifying that:
  - the court would otherwise violate the presumption of innocence,
  - the court would have to make a decision of guilt, and
  - the reasonable suspicion was not a relevant legal category for judicial review proceedings of PTD.

- A practice or a statutory regulation under which courts automatically refer to the existence of reasonable suspicion as the sole ground for extending detention without considering or giving priority to other grounds for detention.

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**NOTE:** The existence of reasonable suspicion in the initial period of investigation is of prior importance. However, along with progress of the investigation and lapse of time, the existence of a reasonable suspicion takes a secondary role, and the other grounds for detention acquire priority in deciding whether detention is a necessary and proportionate measure at the given stage of the proceedings ([Bykov v. Russia \[GC\], no. 4378/02, 10/03/2009, § 67](#)). ([Kharchenko v. Ukraine](#), no. 40107/02, 10/02/2011, § 99). This means that the courts cannot on a continuing basis and *a priori* justify the extension of detention solely with the existence of a reasonable suspicion.

#### Action

Examine if the national law and case-law provide the concept of “reasonable suspicion”. If yes, examine the threshold of the “suspicion” – it must provide the concept of existence of objective “fact” or “information” as a maximum threshold. “Evidence” *per se* cannot be taken as the sole ground to overcome the threshold.

- Amend the sample questionnaire under Annex 1 to include in Chapter II the above POVs under Sections 4.1. to 4.4. Distribute the questionnaires to the respondents and seek feedback.
- As an alternative, conduct anonymous interviews with respondents and for that purpose use the amended questionnaire mentioned above.
- Select court decisions per method described under Section 2.1.1. or 2.1.2. mentioned above. Draft a checklist on the basis of the POVs under Sections 4.1.-4.4 (sample given under Annex 2). Go through each court decision (or decision of investigative or other pre-trial body responsible for taking decisions on alternative measures) and checkmark with [yes] or [no] or whether the given POV persists.
- Analyse the collected statistical data above, assess the compliance of the given practice to the CoE rules given under Sections 4.1 to 4.4 above. A sample assessment paper is given under Annex 3.



- To assess and compare the progress through the longer periods (e.g. years), use the sample table under Annex 4.<sup>10</sup>

## 5. Right to trial within a reasonable time or to release pending trial

(Article 5 § 3)

"3. Everyone arrested or detained in accordance with the provisions of paragraph 1 c. of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

### 5.1. Right to be brought promptly before a judge



Any period going beyond four days is *prima facie* too long ([McKay v. the United Kingdom \[GC\]](#), no. 543/03, § 47). The interval between the initial deprivation of liberty and this appearance before a [judicial] ...authority should preferably be no more than forty-eight hours and in many cases a much shorter interval may be sufficient ([Recommendation Rec\(2006\)13 of the Council of Europe](#), par. 14(2)).



This right is violated when arrestees are brought before the judge in violation of the time limit set by the national constitutional or statutory norm (e.g. 48 or 72 hours). For example when:

- Arrestees are brought before the judge within the time limit set by national laws, but the time limit expires before the judge takes decision ordering detention and in the meantime, the arrestee is not set free at the courthouse.
- When detention of a person at large is ordered *in absentia*, upon surrendering him/herself to the authorities or when caught by the authorities, the arrestee is taken to a detention facility rather than being brought to the judge for *de novo* trial.

### 5.2. Grounds for Pre-Trial Detention

## Rule

The Convention case-law sets five distinct grounds for pre-trial detention of persons arrested under Article 5 § 1(c) of the Convention, namely, 1) risk of absconding; 2) risk of obstructing the investigation; 3) risk of committing further offence; 4) risk of causing public disturbance if released, and 5) the need to protect the detainee ([Buzadji v. Moldova](#), no. 23755/07, § 88). The requirement on the judicial officer to give relevant and sufficient reasons for the detention – in addition to the persistence of reasonable suspicion – applies already at the time of the first decision ordering detention on remand, that is to say “promptly” after the arrest ([Buzadji](#), § 102).

### 5.2.1. The risk of absconding

## Th Rule

The risk of absconding cannot be gauged and a decision be made solely based on the severity of the charges and the sentence faced ([Panchenko v. Russia](#), no. 45100/98, 08/02/2005, § 106). The risk of absconding has to be assessed in the light of the factors relating to the person’s character, his morals, home, occupation, assets, family ties and all kinds of links with the country in which he is prosecuted ([Neumeister v. Austria](#), no. 1936/63, § 10).

## PoV

This principle is not respected when the courts justified the necessity of detention solely by:

- severity of charges
  - severity of punishment prescribed for the alleged crime.
- The courts do not refer to other criteria such as:
- personality of the accused, his/her ties with community, such as
    - personal,
    - social,
    - family,
    - employment ties,
    - residence status,
    - property and assets, and other relevant factors which may either confirm the existence of the danger of absconding or make it appear so slight that it cannot justify detention pending trial.
- The first instance court and the higher courts limited themselves in their decisions to repeating the grounds brought by the investigative authority in

an abstract and stereotyped way, without indicating any reasons why they considered well founded the allegations that the applicant might abscond.

### 5.2.2. The risk of obstructing the investigation



The danger of the accused hindering the proper conduct of the proceedings cannot be relied upon *in abstracto*; it has to be supported by factual evidence ([Trzaska v. Poland](#), no. 25792/94, § 65). Grounds such as the need to carry out further investigative measures or the fact that the proceedings have not yet been completed do not correspond to any of the acceptable reasons for detaining a person pending trial under Article 5 § 3 ([Piruzyan v. Armenia](#), no. 33376/07, § 98).



Article 5 § 3 is violated when the courts present the danger of obstructing the course of justice in an abstract form, namely, by solely stating that if released, the person would obstruct the course of justice by, for example, putting pressure on witnesses or by destroying evidence without substantiating such allegations by facts and evidence of the criminal case. For example when:

- A Court referred to the necessity by the investigative authority of conducting further investigative action *in abstracto*, without justifying the causal link between the impossibility of conducting the investigative action and the person's release.
- The first instance court and the higher courts limited themselves in their decisions to repeating the grounds brought by the investigative authority in an abstract and stereotyped way, without indicating any reasons why they considered well founded the allegations that the applicant might obstruct the proceedings.

### 5.2.3. Danger of committing further offences



The danger of committing further crimes shall also be assessed on the basis of the facts of the case, it has to be a plausible one and the measure appropriate, in the

light of the circumstances of the case and in particular the past history and the personality of the person concerned ([Gal v. Hungary](#), no. 62631/11, § 42).

#### PoV

However, detention in this case can be unlawful if in their motions to court for PTD, investigative bodies refer to the danger of committing further crimes in an abstract manner – without presenting concrete facts or evidence from the criminal case to justify the allegation. For example in cases when:

- In granting the motion, the courts present their findings in abstract, by solely stating that the accused would commit further crime if released, without justifying the decision by concrete facts or evidence which derive from the criminal case.

#### 5.2.4. **Danger of Causing Public Disorder and the need to protect detainee**

#### Rule

Because of their particular gravity and public reaction to them, certain offences may give rise to social disturbance capable of justifying pre-trial detention, at least for a time. In exceptional circumstances, this factor may therefore be taken into account for the purposes of the Convention, as far as domestic law recognises this ground ([Letellier v. France](#), no. 12369/86, 26/06/1991, § 51).

#### PoV

However, detention in this case can be unlawful if the national law does not stipulate the danger of causing public disorder as a distinct ground for PTD. For example in cases when:

- Although the danger of causing public disorder is prescribed by law as a distinct ground for PTD, the investigative body and the courts abstain from referring to such ground and instead of that subsume it under the danger of commission of further crime.
- The investigative body and the courts refer to the danger of causing public disorder in abstract, without referring to facts, information or evidence of the case file to justify the findings.

### 5.3. General and abstract Findings

#### Rule

The arguments for and against release must not be “general” and “abstract”. Any system of mandatory detention on remand is *per se* incompatible with Article 5 § 3 of the Convention. Where the law provides for a presumption with respect to factors relevant to the grounds for continued detention, the existence of the concrete facts outweighing the rule of respect for individual liberty must be convincingly demonstrated ([Ilijkov v. Bulgaria](#), no. 33977/96, § 84).

#### PoV

Findings are incompatible with Article 5 § 3 ECHR, if domestic courts grant motions for PTD with the following template-like justification:

*“The court finds that the motion must be granted on the ground that the punishment prescribed for the action of which the defendant is charged exceeds one year of imprisonment. In addition, the materials acquired in the course of the investigation provide sufficient ground to presume that the defendant will abscond, obstruct the pre-trial investigation and unlawfully influence the witnesses if released”.*

- The courts refer to mandatory, presumptive grounds of detention such as, for example, that detention is mandatory where prescribed punishment exceeds one year, or that bail is non-applicable where the detainee is charged for committal of grave crime.
- The motion of the investigator for use of PTD or the court decision granting the motion refers to only a statutory provision without setting forth the underlying facts.
- The court justifies detention by a sole statement that the previously chosen preventive measure was correct and therefore the motion was to be upheld (rather than extended) ([Kharchenko](#), § 80 and § 98).

**NOTE:** It constitutes a violation of Article 5 where the laws prescribe **presumptive** grounds for choosing PTD among other forms of alternative measures, for example, the gravity of charges, which make the application of PTD mandatory. Any system of mandatory detention on remand is *per se* incompatible with Article 5 § 3 of the Convention ([Rokhlina v. Russia](#), no. 54071/00, 7/04/2005, § 67).

## 5.4. Sufficient and relevant reasons

### Rule

In addition to the unacceptability of abstract and generalised findings in PTD decisions, the reasoning must also be “sufficient” and “relevant” for the purpose and object of PTD. A person charged with an offence must always be released pending trial unless the state can show that there are “relevant and sufficient” reasons to justify the continued detention ([Khodorkovskiy v. Russia](#), no. 5829/04, 31/05/2011, § 182).

### PoV

Reasons are insufficient or irrelevant if the investigative authorities and courts justify the extension of PTD by the **need to carry out additional investigative measures by the investigative body**. The ECtHR has stated in this respect that grounds such as the need to carry out further investigative measures or the fact that the proceedings have not yet been completed do not correspond to any of the acceptable reasons for detaining a person pending trial under Article 5 § 3 ([Piruzyan v. Armenia](#), no. 33376/07, 26/06/2012, § 98). Examples of violations of Article 5 § 3 ECHR are cases where:

- The investigative authorities and courts justify the extension of PTD with the fact that the **pre-trial investigation is not over** ([ibid.](#)).
- The courts shift the burden of proof of non-existence of grounds for detention (e.g. non-absconding) to the accused ([Rokhlina v. Russia](#), no. 54071/00, 7/04/2005, § 69). This is also a violation of the presumption of innocence.
- The courts justify PTD by the fact that the accused **did not plead guilty** which raises also the issue of a violation of the presumption of innocence ([Lutsenko v. Ukraine](#), no. 6492/11, 3/7/2012, § 72).

- The investigative authority and the court justify PTD by the fact that **the accused deliberately hindered the proceedings** by, for example, delaying the period prescribed by law for examination of the case materials at the end of the pre-trial proceedings ([Lutsenko, § 68](#)).
- The investigative authority failed to perform its investigative measures and tasks in time and therefore requests additional time from the court by asking to extend the detention. In this respect, it has to be remembered that fulfilment of procedural and investigative requirements is the task of the investigative authorities and they cannot perform their duties under law at the cost of the liberty of the accused.

## 5.5. Due diligence

### Rule

At any stage of the proceedings, irrespective of its duration, the authorities bear a positive duty to display “special diligence” in the conduct of the proceedings under article 5 § 3 ([Jablonski v. Poland](#), no. 33492/96, § 80).

### PoV

Actions or decisions by the investigative authorities or courts because of which the accused remains under PTD longer **than he/she would have remained had the authorities displayed diligence** in conducting the proceedings. Due diligence is not respected in case of:

- Delays between court hearings without objective reasons.
- Delays in setting trial date by court.
- Prolonged and unjustified stays in the proceedings, etc. ([Khudoyorov, § 188](#)).

### Action

Examine the national statutory law and case law to find out how they stipulate the right to be brought before a judge and compare the conditions with the principle set forth in the case law under Section 5.1. above.

- Examine the national statutory law and case law to find out whether they provide the concepts of:
  - unacceptability of justifying detention by *abstract* and *general* findings;
  - requirement of justifying detention by *sufficient* and *relevant* facts;
  - unacceptability of any system of *mandatory* or *presumptive* basis of detention;
  - due diligence,
- Amend the sample questionnaire under Annex 1 to include in Chapter II of the questionnaire the POVs under Sections, 5.1., 5.2., 5.3., 5.4. and 5.5. above. Distribute the questionnaires to the respondents and seek their feedback. As an alternative, separate questionnaire can be developed for POVs under each section or group of POVs under two or more sections. For example, separate questionnaire can be developed for POVs under Subsections 5.2.1 to 5.2.4.
- As an alternative to the above, conduct anonymous interviews with the respondents and for that purpose use the amended questionnaire mentioned above.
- Select court decisions per method described under Section 2.1.1. or 2.1.2. mentioned above. Draft a checklist on the basis of the POVs under Sections 5.1. to 5.5. (see Annex 2 for the sample). Go through each court decision (or decision of investigative or other pre-trial body responsible for taking decision on alternative measures) and checkmark with [yes] or [no] on whether the given POV persists or no.
- Analyse the collected statistical data above, assess the compliance of the given practice to CoE rules mentioned under Sections 5.1. to 5.2. and under relevant subsections and display the results on the sample assessment paper at Annex 3.
- To assess and compare the progress through the longer periods (e.g. years), use the sample table under Annex 4.

## 5.6. Alternative measures of restraint

### 5.6.1. Bail and other alternative measures



## Rule

Bail may only be required as long as reasons justifying detention prevail. If the risk of absconding can be avoided by bail or other guarantees, the accused must be released (*Mangouras v. Spain*, no. 12050/04, 28/09/2010, § 79). The Convention case-law stipulates four acceptable grounds for refusal of bail: 1) danger of absconding; 2) danger of obstructing the investigation; 3) danger of commission of further crime; and 4) danger of causing public disorder if released (*Tamamboga and Gul v. Turkey*, no. 1636/02, § 35).

## PoV

There are practices or statutory provisions according to which the use of bail is absolutely prohibited for certain types of crimes. (Ex. grave crimes). The legislation that prohibits the use of bail depending on, for example, the severity of the crime, constitutes an automatic violation of Article 5 § 3 ECHR (*Piruzyan*, § 105). More specifically, cases that constitute a violation of Article 5 § 3 ECHR are:

- A practice or a statutory provision according to which the use of bail is prohibited by virtue of severity of the penalty prescribed for the crime of which the person is accused.
- A practice or a statutory provision according to which bail is refused based on any other presumptive ground such as the procedural grounds for choosing detention or extending the period of detention were observed by the investigative authorities.
- An arbitrary refusal, without giving reasons, by a court to examine the possibility of applying bail. According to Article 5 § 3 ECHR, the authorities bear a positive duty to examine the possibility of release by applying alternative preventive measures (*Chumakov v. Russia*, no. 41794/04, 24/04/2012, § 163).
- Disproportionate amount of bail set by law which deprives certain groups (e.g. vulnerable) of access to alternative measures.
- Unjustified amounts of bail set by courts, which deprives the accused of the opportunity to be released under bail.

- In determining the amount of bail, the national court failed to take into account the means and assets of the accused ([Mangouras v. Spain](#), no. 12050/04, 28/09/2010, § 80) to the degree of confidence that is possible so that the prospect of loss of security in the event of his non-appearance at a trial will act as a sufficient deterrent to dispel any wish on his part to abscond” ([Aleksandr Makarov v. Russia](#), no. 15217/07, 12/03/2009, § 139).
- The practice where courts set the amount of bail to ensure reparation of loss constitutes a violation of Article 5 § 3 ECHR, despite the fact that the amount of loss inputted to the accused is a factor to be considered in assessing the likelihood of absconding. ([Mangouras §§ 81, 92](#). See also [Neumeister v. Austria](#), no. 1936/63, 27/06/1968, § 14).

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**NOTE:** The Convention does not guarantee that the examination of bail takes place during the first automatic review under Article 5 § 3 which the Court has identified as a being a maximum of four days ([Magee and others v. United Kingdom](#), no. 26289/12, § 90).

#### Action

Examine the national statutory law and case-law to find out whether they stipulate an absolute ban on the use of bail for certain types of crimes or for any other grounds related to the gravity of the crime, seriousness of the punishment and personality of the accused.

- Amend the sample questionnaire under Annex 1 to include in Chapter II of the questionnaire the POVs under Section 5.6. Distribute the questionnaires to the respondents and seek their feedback.
- As an alternative, conduct anonymous interviews with the respondents and for that purpose use the amended questionnaire mentioned above.
- Select court decisions per method described under Section 2.1.1. or 2.1.2. mentioned above. Draft a checklist on the basis of the POVs under Sections 5.6.5. (see Annex 2 for the sample). Go through each court decision (or decision of investigative or other pre-trial body responsible for taking decision on alternative measures) and checkmark with [yes] or [no] on whether the given POV persists or no.

- Analyse the collected statistical data above, assess the compliance of the given practice to the CoE rule mentioned under Sections 5.6. and display the results on the sample assessment paper at Annex 3.
- In addition, compare statistics of use of bail with PTD and draft comparative tables as shown in Tables 6 to 10 under Section 2.3. above.
- To assess and compare the progress within larger periods, (e.g. years), use the sample table under Annex 4.

## 6. Right to challenge the lawfulness of detention

(Article 5 § 4)

"4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

### 6.1. The scope and nature of the judicial review

#### 6.1.1. Courts to examine arguments and facts on conditions and grounds of detention

##### Rule

The competent court has to examine not only the compliance with procedural requirements of domestic law but also the reasonableness of the suspicion underpinning the arrest, the legitimacy of the purpose pursued by the arrest, and the ensuing detention ([Svershov v. Ukraine](#), no. 35231/02, 27/11/2008, § 70). Otherwise, the scope and nature of the judicial review will not meet the requirements of Article 5 § 4 of the Convention. In this context, the requirement under this heading has a similar scope as the one under Article 5 § 3 concerning the “relevancy” and “sufficiency” of reasons.

##### PoV

The courts refuse to examine the reasonable suspicion by justifying that otherwise the court would express an opinion about the guilt, which may appear as of lack of impartiality. Here are several examples:

- The courts do not examine the merits of the detention but simply make a ruling on upholding the previous court decision than extending the detention.
- The courts limit judicial review to simply checking whether the procedural requirements have been observed ([Brogan v. the United Kingdom](#), no. 11386/85k 29/11/1988, § 65).
- The courts refuse to examine the grounds for detention by referring to certain presumptive conditions that make the application of PTD mandatory. An example of such conditions is the gravity of charges (Section 5.3. above) ([Nikolova v. Bulgaria](#), no. 31195/96, 25/03/1999, § 61), severity of the punishment, legislative ban on the application of bail for certain types of crimes, and any other grounds that make PTD mandatory regardless of the existence of grounds.

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**NOTE:** In comparison to Article 5 § 3, which also stipulates a right to judicial review, the procedure under Article 5 § 4 must be initiated by the accused whereas the initiative under Article 5 § 3 must come from the authorities (*ex officio* review).

## 6.1.2. Adversarial trial and equality of arms

### 6.1.2.1. *Disclosing case file materials to the Defence*



Equality of arms is not ensured if defence counsel is denied access to those documents in the investigation file which are **essential** to effectively challenge the lawfulness of his/her client's detention ([Mooren v. Germany \[GC\]](#), no. 11364/03, 9/7/2009, § 124). This rule does not presume that all the materials of the case file must be disclosed. The Court draws a distinction between all the materials of a criminal case, which generally should be disclosed for the proceedings under Article 6 for the determination of one's guilt and the materials which should be disclosed in connection with a foreseen procedure under Article 5 § 4 ([Sefilyan v. Armenia](#), no. 22491/p08, 2/10/2012, § 104).



The fact that the investigative authority does not disclose to the defence all the materials of the case file on which the court later relies when taking a decision about PTD, constitutes a violation of Article 5 § 4

- The national procedural laws provide the concept of “pre-trial secrecy” according to which the investigators can refuse to disclose certain case file materials to the defence by declaring them as a pre-trial secret. When such laws are interpreted and used excessively, it gives rise to a violation of the adversarial principle under Article 5 § 4 (*ibid.*). Even though such laws may pursue a legitimate aim, they must meet the proportionality test by balancing between the individual interest of the accused and the general interest of the community.

#### **6.1.2.2. Summoning a witness to a court**



In the context mentioned above, the principle of “equality of arms” requires the court also to hear witnesses whose testimony appears *prima facie* to have a material bearing on the continuing lawfulness of detention. Consequently, in cases where witness testimony may have a decisive role in challenging any of the four grounds for detention, including the existence of a reasonable suspicion, the court must ensure the presence of the witness (*A and others v. United Kingdom*, no. 3455/05, § 204).



The principle of “equality of arms” is violated if the courts systematically turn down motions for summoning witnesses by justifying with unacceptability of questioning witnesses at detention proceedings

#### **6.1.2.3. Obligation to present exculpatory evidence**



In the context of the above principle of adversarial proceedings, an obligation to disclose case file materials to the defence also includes the disclosure of exculpatory evidence (*Sefilyan, § 104*). Thus, in PTD proceedings, the investigative authority has to disclose the exculpatory evidence to the court and to the defence; otherwise the principle of adversarial hearings would be violated



A practice or a statutory ban on disclosing by investigative authority of exculpatory evidence to the parties of the proceedings would not be in compliance with this obligation.

#### **6.1.2.4. Presence of the accused or the lawyer in the trial**



The adversarial principle requires ensuring effective participation of the accused in the proceedings and an opportunity to challenge the lawfulness of PTD effectively.

This rule does not require that a detained person is heard every time he/she lodges an appeal against a decision extending his/her detention. What counts is that both parties get an equal opportunity for making their submissions regardless whether the submissions were made in writing or during oral hearings ([Catal v. Turkey](#), no. 26808/08, §§ 34-35).



The adversarial principle would not be fulfilled if the accused and his/her lawyer are not notified properly of the court hearing in due order because of which oral hearings are held *in absentia*. For example if:

- Neither the detained person nor his/her lawyer appeared on appeal but the public prosecutor was present at the hearings.
- The defence lawyer was ordered to leave the courtroom while the prosecutor remained and made further submissions in support of a detention order.
- The law does not prescribe free legal aid for PTD proceedings.

#### **6.1.2.5. Lawyer-client communication in PTD Proceedings**



The guarantees provided in Article 6 concerning access to a lawyer and effective representation by a lawyer have been found to be applicable in *habeas corpus* proceedings. Confidentiality of information exchanged between lawyer and a client must be protected. This privilege encourages open and honest communication between clients and lawyers. A genuinely held belief that their discussion was intercepted might be sufficient to limit the effectiveness of the assistance that the lawyer could provide. Such a belief would inevitably inhibit free discussion between the lawyer and client and hamper the detained person's right to challenge the lawfulness of his detention effectively ([Istratii and Others v. Moldova](#), no. 8721/05, §§ 87-91).



Constitutes a violation of Article 6, practices where the space for detainees is separated from the rest of the room by a door, partition or window in

the lawyer-client meeting room in the detention centre. For example, where:

- There is no space for passing documents between a lawyer and his/her client in the meeting room of the detention centre.
- Surveillance is carried out in the lawyer-client meeting room at the detention centre.
- The lawyer and his client are able to hear the conversations between other detainees and their lawyers in the meeting room in the detention centre.
- A glass or other partition as a general measure affects everyone indiscriminately in the remand centre, regardless of the prisoners' personal circumstances, even when a security risk exists only in case of a specific prisoner.

### **6.1.3. "Speedy" Review of the Lawfulness of Detention**

#### ***6.1.3.1. Judicial review within reasonable intervals***



Article 5 § 4, following the institution of review proceedings, guarantees to detained persons the right to a speedy judicial decision concerning the lawfulness of detention and ordering its termination if the detention is proved unlawful. The opportunity to initiate such proceedings must be provided, both in theory and in practice, soon after the person is taken into detention and, if necessary, at reasonable intervals thereafter ([\*Molotchko v. Ukraine\*](#), no. 12275/10, 26/04/2012, § 148).



Constitute a violation of Article 5 § 4 lengthy intervals between the initial deprivation of liberty and appearance before court. Under [Recommendation Rec\(2006\)13 of the Council of Europe](#),<sup>11</sup> it is recommended to have an interval of not more than 48 hours between the initial deprivation of liberty and appearance before a court. The same document recommends setting not more than 7 days for situations that

come under Article 15 of the Convention (e.g. in time of war or public emergency).

- Lengthy intervals between periods of PTD during which time the detainee may not have the lawfulness of detention reviewed but has to wait until the period expires. Under [Recommendation Rec \(2006\)13](#), the interval between reviews is recommended to last no longer than a month unless the person concerned has the right to submit and have examined, at any time, an application for release.<sup>12</sup>

#### **6.1.3.2. Unjustified delays by courts or investigative authority**



Article 5 § 4, in guaranteeing the right, to persons arrested or detained, to take proceedings to challenge the lawfulness of their detention, also proclaims their right, following the institution of such proceedings, to a speedy judicial decision concerning the lawfulness of detention ([Kadem v. Malta](#), no. 55263/00, 9/01/2003, § 43).



Constitute a violation of Article 5 § 4 unjustified and arbitrary delays in the proceedings attributed to a court or investigative authority, for example, in setting the case for trial, handling the motions, applications, and appeals.

- Unjustified delays caused by appellate courts ([Abdulkhakov v. Russia](#), no. 14743/11, 2/10/2012, § 200).
- Delays in the period between accepting the case and setting a trial date.
- Delays caused as a result of referring the case back to a lower court instead of taking its own decision on the lawfulness of detention after finding a violation by the lower court ([Mooren, § 107](#)).
- Often national laws prohibit an appeal court from releasing the prisoner despite finding violations by lower courts. Those laws require that the case is remanded to a lower court for decision.



- Refusal by the appeal court to conduct judicial review on the ground that the criminal investigation was over and the criminal case had already been transferred to a court for trial ([Poghosyan, § 80](#))

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**NOTE:** The ECtHR found a violation where the first instance court made its decision on PTD within seventeen days ([Kadem § 44](#)), and the appeal court took a decision in 26 days ([Mamedova v. Russia](#), no. 7064/05, 01/06/2006, § 96), or where the first instance court took a decision in 23 days while the higher court also took its decision in 23 days ([Rehbock v. Slovenia](#), no. 29462/95, 28/11/2000, § 85), or where the proceedings lasted 19 days by the first instance court and one year and seven months by the appeal court ([K.F. v. Cyprus](#), no. 41858/10, 21/07/2015, § 102).

### Action

Examine the national statutory law and case law to identify limitations and/or bans on the scope and nature of the detention proceedings. Draft a checklist by POVs under Sections 6.1.1., 6.1.2. and 6.1.3 and checkmark the answers. Use the sample form under Annex 3.

- Amend the sample questionnaire under Annex 1 to include in Chapter II of the questionnaire the POVs under Section 6.1.1., 6.1.2. and 6.1.3. Distribute the questionnaires to the respondents and seek their feedback.
- As an alternative, conduct anonymous interviews with the respondents and for that purpose use the amended questionnaire mentioned above.
- Select court decisions per method described under Section 2.1.1. or 2.1.2. mentioned above. Draft a checklist on the basis of the POVs under Sections 6.1.1., 6.1.2. and 6.1.3. (see Annex 2 and Annex 3 for samples). Go through each court decision (or decision of investigative or other pre-trial body responsible for taking decision on alternative measures) and checkmark with [yes] or [no] on whether the given POV persists or no.
- Analyse the collected statistical data above, assess the compliance of the given practice to the CoE rules mentioned under Sections 6.1.1., 6.1.2. and 6.1.3. and display the results on the sample assessment paper at Annex 4.

- To assess and compare the progress within larger periods, (e.g. years), use the sample table under Annex 5.

## 7. Right to compensation against unlawful detention

(Article 5 § 5)

“5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.”

### Rule

Article 5 § 5 is complied with where it is possible to apply for compensation in respect of a deprivation of liberty effected in conditions contrary to paragraphs 1, 2, 3 or 4. The right to compensation set forth in paragraph 5 therefore presupposes that a violation of one of the other paragraphs has been established, either by a domestic authority or by the Convention institutions (see, among other authorities ([N.C. v. Italy](#) [GC], no. 24952/94, § 49). Unavailability of compensation of a non-pecuniary nature for distress, anxiety and frustration which may result from violations of the guarantees of Article 5 is in violation of paragraph 5 of that Article (see [Pavletić v. Slovakia](#), no. 39359/98 § 96).

### PoV

Constitute a violation of Article 5 § 5 cases where no national law or case-law on the basis of which a monetary compensation claim as a judicial remedy can be made in a domestic court

([Michalak v. Slovakia](#), no. 30157/03, 08/02/2011, § 206). For example when:

- The national law provides substantive grounds **only** for claiming pecuniary damage, court costs, and expenses against unlawful detention whereas the national laws provide no possibility for claiming compensation against non-pecuniary (moral) damage for distress, anxiety and frustration ([Khachatryan, § 157](#)).
- An award at national level is **considerably lower** than the award by the European Court for similar violations ([Ganea v. Moldova](#), no. 2474/06, 17/05/2011, § 30). In the same context, an award considerably negligible and disproportionate to the seriousness of the violation would be in violation of Article 5 § 5.

- The award at national level is considerably lower than that awarded by the European Court in similar cases ([\*Ganea v. Moldova\*, § 30](#)), and [\*Cristina Boicenco v. Moldova\*, § 43](#)).
- The national courts overly formalise the compensation proceedings by setting a high standard of proof that detention, even if it was recognised as unlawful, caused an objectively perceptible deterioration of the physical or mental condition (*Danev v. Bulgaria*, no. 9411/05, 02/09/2010, § 34).

### Action

Examine the national statutory law and case-law in order to establish whether they provide substantive grounds for claiming by citizens of monetary compensation both for pecuniary and non-pecuniary damages for violations under all sections of the Article 5 of the Convention.

- Examine the scale of monetary compensation under domestic laws and compare them with the average amount of compensation the ECtHR grants for similar violations. There should not be **substantial** difference between amounts awarded by European Court and the national authorities.
- Amend the sample questionnaire under Annex 1 by including the POVs of Section 7, in Chapter II of the questionnaire. Distribute the amended questionnaires to the respondents and seek their feedback.
- As an alternative, conduct anonymous interviews with the respondents and for that purpose use the amended questionnaire above.
- Select court decisions concerning compensations awarded or rejected for unlawful detention. Draft a checklist on the basis of POVs under Section 7 above. (see Annex 2 and Annex 3 as samples). Go through each court decision and checkmark with [yes] or [no] answers on whether the given POV persists or no.
- Analyse the collected statistical data above, assess the compliance of the given practice to the CoE rule mentioned under Sections 7 and display the results on the sample assessment paper at Annex 4.

- To assess the progress for larger periods, (e.g. years), use the sample table under Annex 5.

## ANNEX 1 – Sample questionnaire form

### Questionnaire

(Sample form)

This questionnaire is intended for assessing the application of pre-trial detention in general in (*specify country*). The information that you give in the study will be handled confidentially. Your data will be anonymous which means that your name will not be collected or linked to the data.

Put (x) mark to answer the questions.

#### CHAPTER I

##### 1. Your speciality or occupation:

Judge/court personnel

☐

Prosecutor

☐

Lawyer

☐

Investigator

☐

Civil activist/HR defender

☐

Journalist

☐

Legal scholar/academician

☐

Other

☐

Explain

##### 2. How many years of experience do you have in your profession:

0-2 year(s)

☐

More than 5 years

☐

2-5 years

☐

More than 10 years

☐

##### 3. How often you deal with pre-trial detention cases (if applicable):

Never

☐

Rarely

☐

Often

☐

Regularly

☐

4. Please specify two spheres in the application of pre-trial detention where you see a big inconsistency between national law and practice.

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(comment)

5. How would you rate the compliance of the application of pre-trial detention with national laws in your country? (within a range from 1 (negative) to 10 (positive)).

|   |   |   |   |   |   |   |   |   |    |
|---|---|---|---|---|---|---|---|---|----|
|   |   |   |   |   |   |   |   |   |    |
| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 |

← Negative Positive →

6. At what stage of deprivation of liberty are the requirements of national law most frequently violated?

■ Apprehension

☐

■ Arrest

☐

■ Initial detention

☐

■ Extension of detention at pre-trial stage

☐

■ Extension of detention at trial stage

☐

## CHAPTER II

Mark the typical violations from the below list which in your opinion occur in the application of pre-trial detention:

7. Courts do not set periods when ordering detention.

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(comment)

8. When the period of detention expires with the period of the investigation, detention is automatically considered as extended by virtue of the fact that the case was transferred to court for trial.

☐

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(comment)

9. The person is brought before a judge in violation of the period set by law or constitution.

☐

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(comment)

10. When admitting and setting the case for trial, the judge decides on upholding rather than extending the detention without setting a time limit.

☐

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(comment)

11. The person is placed under detention for reasons different from what formally is reasoned in the decisions of apprehension, arrest or pre-trial detention.

☐

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(comment)

12. The person is apprehended and formally questioned as a witness even though he/she is suspected of commission of a crime.

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(comment)

13. The person is arrested and detained, and/or kept under prolonged detention on a discriminatory basis though formal justification such as a reasonable suspicion of committing a crime is given.

☐

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(comment)

14. The period of pre-trial detention coincides with the period of imprisonment determined by the sentencing judgment, and the detainee is released from the courthouse.

☐

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(comment)

15. Undocumented and unrecognised arrest and detention.

☐

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(comment)

16. Detainees are detained for longer period than the period prescribed by the competent court.

☐

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## ANNEX 2 – Sample checklist of POVs (I)

| <p style="text-align: center;"><b>CHECKLIST</b><br/>(per Sections 4.1.-4.4.)</p>  |   |
|---|---|
| <ul style="list-style-type: none"> <li>▪ The principle of "reasonable suspicion" as a <b>pre-condition</b> for detention is envisaged in the procedural law.</li> </ul>   | <p>Yes [ <input type="checkbox"/> ] No [ <input type="checkbox"/> ]</p> |
| <ul style="list-style-type: none"> <li>▪ The principle of “reasonable suspicion” as a pre-condition for detention is envisaged in the case-law.</li> </ul>  | <p>Yes [ <input type="checkbox"/> ] No [ <input type="checkbox"/> ]</p> |
| <ul style="list-style-type: none"> <li>▪ The concept of “reasonable suspicion” in the law or in the case law is comprised of information, fact or evidence.</li> </ul>  | <p>Yes [ <input type="checkbox"/> ] No [ <input type="checkbox"/> ]</p> |
| <ul style="list-style-type: none"> <li>▪ The court justified detention by referring to reasonable suspicion as a pre-condition, as well as by referring to other grounds of detention.</li> </ul>                     | <p>Yes [ <input type="checkbox"/> ] No [ <input type="checkbox"/> ]</p> |
| <ul style="list-style-type: none"> <li>▪ The court justified detention solely by existence of reasonable suspicion, without considering other grounds of detention.</li> </ul>  | <p>Yes [ <input type="checkbox"/> ] No [ <input type="checkbox"/> ]</p> |
| <ul style="list-style-type: none"> <li>▪ The court justified detention solely by grounds of detention, without referring to reasonable suspicion.</li> </ul>  | <p>Yes [ <input type="checkbox"/> ] No [ <input type="checkbox"/> ]</p> |
| <ul style="list-style-type: none"> <li>▪ The suspicion is based <b>solely on the victim’s testimony</b>, without corroborating it by other facts, information or evidence.</li> </ul>                                 | <p>Yes [ <input type="checkbox"/> ] No [ <input type="checkbox"/> ]</p> |
| <ul style="list-style-type: none"> <li>▪ The suspicion is based solely on the victim’s testimony, in which arrested or detained person’s name was not pointed.</li> </ul>   | <p>Yes [ <input type="checkbox"/> ] No [ <input type="checkbox"/> ]</p> |
| <ul style="list-style-type: none"> <li>▪ The suspicion is based on a single fact, and the investigative authority did not conduct preliminary investigation to verify that fact.</li> </ul>                           | <p>Yes [ <input type="checkbox"/> ] No [ <input type="checkbox"/> ]</p> |
| <ul style="list-style-type: none"> <li>▪ The suspicion is based solely on operative information of the intelligence service without any statement, information or a concrete complaint concerning a crime.</li> </ul> | <p>Yes [ <input type="checkbox"/> ] No [ <input type="checkbox"/> ]</p> |
| <ul style="list-style-type: none"> <li>▪ The suspicion is based solely on the unidentified police informant whose statement was not corroborated by evidence or other fact or information.</li> </ul>                 | <p>Yes [ <input type="checkbox"/> ] No [ <input type="checkbox"/> ]</p> |



|  |   |
|--|---|
| <ul style="list-style-type: none"> <li>▪ The court abstained from dealing with submission of a party concerning reasonable suspicion by justifying that: <ul style="list-style-type: none"> <li>➤ the court would otherwise violate the presumption of innocence,</li> <li>➤ the court would have to make a decision of guilt,</li> <li>➤ the reasonable suspicion was not a relevant legal category for judicial review proceedings of detention.</li> </ul> </li> <li>▪ Detainee was acquitted and proceedings were terminated on the basis of lack of crime at the time when it was committed and the detention was automatically considered as unlawful for lack of reasonable suspicion.</li> </ul> | <p>Yes [ ] No [ ]</p> <p>Yes [ ] No [ ]</p> <p>Yes [ ] No [ ]</p> <p>Yes [ ] No [ ]</p> |
|--|---|

## ANNEX 3 – Sample checklist of POVs (II)

| <p style="text-align: center;"><b>CHECKLIST</b></p> <p style="text-align: center;">(per Sections 6.1. – Scope and nature of judicial review)</p>  |                |
|---|----------------|
| Examine the national statutory law and case law and check mark the below questions accordingly.   |                |
| At detention and/or detention on remand proceedings, the national statutory law or the case law ban or impose limitation on:  |                |
| ▪ examination of reasonable suspicion at the first detention hearing;   | Yes [ ] No [ ] |
| ▪ examination of reasonable suspicion at remand hearings;   | Yes [ ] No [ ] |
| ▪ examination of grounds of detention at the first detention hearing;   | Yes [ ] No [ ] |
| ▪ examination of grounds of detention at remand hearings;   | Yes [ ] No [ ] |
| ▪ examination of certain facts concerning the link of the suspect to the incriminated crime,  | Yes [ ] No [ ] |
| ▪ use of bail or other alternative measures for certain crimes which results in that courts abstain from examining facts concerning applicability of the bail and other alternative measures, | Yes [ ] No [ ] |
| ▪ provision of certain case file materials to the Defence by reference to a secrecy of investigation,   | Yes [ ] No [ ] |
| ▪ Disclosing by investigative authority of exculpatory evidence to the Defence;   | Yes [ ] No [ ] |
| ▪ on the presence of the suspect or the accused at any stage of the proceedings at the first instance court or at appellate courts;   | Yes [ ] No [ ] |
| ▪ summoning of a witness to court detention proceedings;  | Yes [ ] No [ ] |
| ▪ provision of free-legal aid in detention proceedings;   | Yes [ ] No [ ] |
| ▪ on confidentiality of communication between the lawyer and the accused;   | Yes [ ] No [ ] |

## ANNEX 4 – Hypothetical table of compliance of PTD practice with CoE standards

| Criteria   | Compliance                          | Non-Compliance                      |
|--|-------------------------------------|-------------------------------------|
| <b>I. Lawfulness of detention</b>  |                                     |                                     |
| Arrest and detention comply with substantive and procedural rules of national law          | <input checked="" type="checkbox"/> |                                     |
| The laws meet the requirement of “quality of law”  |                                     | <input checked="" type="checkbox"/> |
| PTD is not used arbitrarily  |                                     | <input checked="" type="checkbox"/> |
| Periods of PTD at pre-trial and trial levels are regulated clearly by laws and/or case-law | <input checked="" type="checkbox"/> |                                     |
| PTD is not used as a disguised form of penalty   | <input checked="" type="checkbox"/> |                                     |
| <b>II. Condition and grounds for detention</b>   |                                     |                                     |
| The concept of reasonable suspicion  |                                     | <input checked="" type="checkbox"/> |
| Reasonable suspicion is used as a pre-condition  | <input checked="" type="checkbox"/> |                                     |
| The practice of assessing the risk of absconding   |                                     | <input checked="" type="checkbox"/> |
| The practice of assessing the risk of obstruction of investigation meets ECHR requirements | <input checked="" type="checkbox"/> |                                     |
| Risk of commission of further crime  | <input checked="" type="checkbox"/> |                                     |
| The concept of danger of causing public disorder   |                                     | <input checked="" type="checkbox"/> |
| <b>III. Detention as a measure of last resort</b>  |                                     |                                     |
| “Sufficiency” and “relevancy of” reasons   |                                     | <input checked="" type="checkbox"/> |
| The scope and manner of use of alternative measures  |                                     | <input checked="" type="checkbox"/> |
| The use of bail  | <input checked="" type="checkbox"/> |                                     |
| Due diligence  |                                     | <input checked="" type="checkbox"/> |
| <b>IV. Judicial review of detention</b>  |                                     |                                     |
| Disclosing case files to the defence   | <input checked="" type="checkbox"/> |                                     |
| Presence of the accused or lawyer in the proceedings                                       | <input checked="" type="checkbox"/> |                                     |
| Adversarial trial and equality of arms   | <input checked="" type="checkbox"/> |                                     |

|   |  |   |
|---|--|---|
| Speedy review of lawfulness of detention    |  | ■ |
| Judicial review within reasonable intervals |  | ■ |

#### ANNEX 5 - Hypothetical table of progress assessment of use of PTD

| Index   | Compliance | Non-Compliance | Trend |
|---|------------|----------------|-------|
|   | 2016       | 2017           |       |
| <b>I. Lawfulness of detention</b>                     |            |                |       |
| Compliance to national law                            | Neutral    | Neutral        | ↔     |
| Certainty of detention periods                        | Positive   | Negative       | ↓     |
| Arbitrary arrests and detention                       | Negative   | Positive       | ↑     |
| <b>II. Condition and grounds for detention</b>        |            |                |       |
| Reasonable suspicion as a pre-condition for detention | Negative   | Positive       | ↑     |
| Risk of absconding                                    | Negative   | Negative       | ↔     |
| Risk of obstruction                                   | Positive   | Negative       | ↓     |
| Risk of committing new crime                          | Neutral    | Negative       | ↓     |
| Danger of causing public disorder                     | Negative   | Positive       | ↑     |
| <b>III. Right to trial within a reasonable period</b> |            |                |       |
| “Sufficiency” and “relevancy” of reasons              | Positive   | Negative       | ↓     |
| Alternative measures                                  | Neutral    | Positive       | ↑     |
| Bail  | Negative   | Negative       | ↔     |
| Due diligence   | Negative   | Positive       | ↑     |
| <b>IV. Judicial review of detention</b>               |            |                |       |
| Disclosing case files to defence                      | Positive   | Negative       | ↓     |
| Presence of the accused or lawyer in the proceedings  | Neutral    | Positive       | ↑     |
| Adversarial trial and equality of arms                | Positive   | Positive       | ↔     |
| Speedy review of lawfulness of detention              | Negative   | Negative       | ↔     |
| Judicial review within reasonable intervals           | Positive   | Negative       | ↓     |

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<sup>1</sup> The data used for Russia was received in February 2016; for Estonia – February 2016; and for Lithuania – September 2015.

<sup>2</sup> Pre-trial Detention in the European Union. An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU. A.M. van Kalmthout, M.M. Knapen, C. Morgenstern (eds.), Chapter 1, p. 11, at footnote 36. Full text of the study is available at <http://www.legalaidreform.org/pretrial-justice-resources/item/272-pre-trial-detention-in-the-european-union>.

<sup>3</sup> See Chapter 1, Section 2.2.1. of the study, at page 19. Lithuania, Latvia, and Estonia showed lower total prison population rate at column 2 from the left; however, the same countries showed high number of prisoners per 100,000 of the population at column 3 from the left. Contrary to that, Germany and France, for example, showed high total imprisonment rates (77,868 and 63,500 accordingly) but they had significantly lower number of prisoners per 100,000 of the population (95 and 100 accordingly).

<sup>4</sup> See Chapter 1, Section 2.2.2.1. of the study, at Table 2 on page 30.

<sup>5</sup> See Chapter 1, Section 2.2.1. of the study, at paragraph 2 of the page 19.

<sup>6</sup> See Chapter 1, Section 2.2.2.3. of the study, at page 43.

<sup>7</sup> For example, in Armenia the maximum period of PTD under pre-trial level of proceedings is 12 months (Article 138(3) of CPC). In Georgia, the maximum term of remand detention may not exceed 9 months (Article 205(2) of CPC).

<sup>8</sup> At Section 7.3. of the report ; under Subsection “Main Observations”.

<sup>9</sup> According to the annual report of the Judicial Department of Armenia, in 2014 the courts received 2331 motions requesting to apply PTD and the courts granted 2203 motions (94.5%), and refused 122 (5.5%) motions. The percentage of granted motions was even higher in previous years at 99.5% and 96%.

<sup>10</sup> The methodology under Annex 2 and Annex 3 was suggested by the American Bar Association Rule of Law Initiative (ABA ROLI) in its assessment of judicial reform process in Armenia ([Judicial Reform Index \(JRI\)](#) of 2012. See at page 13.

<sup>11</sup> 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. In Section 14(2).

<sup>12</sup> See Section 17(2).