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Pre-Trial Detention and its alternatives in Armenia

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List of Selected Abbreviations

ABA ROLI	American Bar Association Rule of Law Initiative
CAT	UN Convention Against Torture
CCPR	Human Rights Committee
CCP	Code of Criminal Procedures of the Republic of Armenia
CPT	European Committee for Prevention of Torture and Inhuman or Degrading Treatment or Punishment
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
GRECO	Council of Europe's Group of States against Corruption
ICCPR	International Covenant on Civil and Political Rights
ODIHR	Office for Democratic Institutions and Human Rights
OSF	Open Society Foundations
OSJI	Open Society Justice Initiative
OSCE	Organisation for Security and Co-operation in Europe
PRI	Penal Reform International

Pre-Trial Detention and its alternatives in Armenia

Introduction

Excessive use of pre-trial detention is a global problem. According to the Open Society Justice Initiative on any given day, an estimated 3 million people around the world are under pre-trial detention. In the course of a single year around 10 million will be detained awaiting trial.¹

Pre-trial detention interferes with one of the fundamental human rights, the right to liberty. Moreover, detention prior to trial may undermine the presumption of innocence.² That is why the use of pre-trial detention should be limited to exceptional cases and needs to be justified on a case-by-case basis. International human rights law prohibits arbitrary and unnecessary use of pre-trial detention. It can be justified only when it is lawful, reasonable and necessary. Article 9(3) of International Covenant on Civil and Political Rights (hereinafter ICCPR) states:³

... It shall not be a general rule that persons awaiting trial shall be detained in custody, but release may be subject of guarantees to appear for trial, at any other stage of judicial proceedings, and, should occasion arise, for execution of the judgment.

The further interpretation of the above mentioned provision by the Human Rights Committee (hereinafter CCPR) makes it clear that pre trial detention is an exceptional measure and shall be used only as a measure of last resort when risk of fleeing, committing another crime or intervening with the course of justice can not be addressed by other preventive measures.⁴

Recent research by the Open Society Initiative on pre trial detention has confirmed that the excessive and arbitrary use of pre-trial detention has devastating consequences. It affects not only detained persons, but also their

¹ Open Society Justice Initiative, 'The Socioeconomic Impact of Pretrial Detention', 2011, p. 12

² *McKay v UK*, ECtHR Application no.543/03, judgment of 3 October 2006, para.42., HUDOC; see also *Kudła v. Poland* [GC], no. 30210/96, §§ 110, ECHR 2000-XI.

³ UN General Assembly, 1966.

⁴ *Hugo van Alphen v. The Netherlands*, Communication No. 305/1988, U.N. Doc. CCPR/C/39/D/305/1988 (1990), para. 5.8.; See also *Mukong v. Cameroon*, Communication No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991, para.9.8; *Hill v Spain*, U.N. Doc. CCPR/C/59/D/526/1993, 2 April 1997, para. 12.3.

families, communities, the justice system and consumes enormous amount of public resources.⁵

The Open Society Justice Initiative has launched the global campaign for pre-trial justice with the goal to reduce the use of pre-trial detention worldwide. To achieve this goal it deploys different approaches such as promotion of alternatives to pre-trial detention, making legal aid services more accessible and developing paralegal services to intervene earlier in the criminal justice process.⁶ As a partner organisation Penal Reform International (hereinafter PRI) is committed to participate in the Global Campaign for Pre-trial Justice. PRI has got extensive experience in working for the reduction of unnecessary imprisonment, including pre-trial detention, and has been working with governments, prison administrations and civil society to this end.⁷ PRI has also engaged in the promotion of legal aid. For example, as early as in 2000 PRI supported the development of successful paralegal services in Malawi which has since been adopted by number of African countries.⁸

Armenia is a country in the region covered by one of PRI's regional offices and for which the issue of overreliance on pre-trial detention has been raised by the CCPR in 1998 while considering Armenia's initial report on implementation of ICCPR. The CCPR particularly stated:

...the Committee is concerned that very few detainees benefit from bail, and urges the State party to observe strictly the requirements of article 9, paragraph 3, of the Covenant.⁹

Furthermore, the issue of excessive use of pre-trial detention was highlighted in the final report of OSCE Office for Democratic Institutions and Human Rights (hereinafter ODIHR) trial monitoring project in Armenia and The American Bar Association Rule of Law Initiative's Detention Procedure Assessment Tool for Armenia.¹⁰

Background Information on Armenia

Armenia was a part of the Soviet Union until 1991. Following the referendum on independence held on 21 September 1991, the country declared independence

⁵Open Society Justice Initiative, *'Pretrial Detention and Health: Unintended Consequences, Deadly Results', 'The Socioeconomic Impact of Pretrial Detention', 'Pretrial Detention and Torture: Why Pretrial Detainees Face the Greatest Risk of Torture'*, (Open Society Foundations, New York 2011).

⁶Justice Fact Sheet, *'Why We Need a Global Campaign for Pre-trial Justice'*, http://www.soros.org/initiatives/justice/articles_publications/publications/pretrialjustice_20090903/pretrialjustice_20090903.pdf, accessed 12 January 2011.

⁷Penal Reform International, <http://www.penalreform.org/themes/pre-trial-detention>, accessed 20 January 2011.

⁸Penal Reform International, <http://www.penalreform.org/worldwide/central-east-and-southern-africa>, accessed 20 January 2011.

⁹Concluding Observations of the Human rights Committee, Armenia, U.N. Doc. CCPR/C/79/Add.100 (1998), para.11.

¹⁰American Bar Association, Rule of Law Initiative, *'Detention Procedure Assessment Tool for Armenia'*, 2010, http://apps.americanbar.org/rol/europe_and_eurasia/armenia.html, accessed on 20 January 2011; OSCE ODIHR, *'Final Report Trial Monitoring Project in Armenia (April 2008- July 2009)'*, available on <http://www.osce.org/odhr/81140>, accessed on 20 January 2011.

and in 1992 became a member state of the United Nations.¹¹ Even before holding the referendum, on 23 August 1990 the newly elected Armenian parliament adopted a Declaration of Independence which emphasised the country's adherence to the principles of Universal Declaration of Human Rights and generally recognised norms of International law.¹²

In 1993 Armenia ratified the ICCPR and since then has acceded to seven more international human rights treaties.¹³ In 2001 the country became a member of Council of Europe, subsequently ratifying the European Convention on Human Rights and Fundamental Freedoms (hereinafter ECHR).¹⁴

Armenia is a civil law country, with the Constitution of the Republic of Armenia (hereinafter the Constitution) as the superordinate legal source. Initially adopted in 1995, the Constitution was amended in 2005 and states that the Republic of Armenia is a sovereign, democratic, social state governed by the rule of law.¹⁵ It also recognises the human being, his/her dignity and the fundamental human rights and freedoms as supreme values.¹⁶

Article 6 of the Constitution prescribes the hierarchy of legal sources. According to this Article the Constitution is the superordinate legal source and has overriding legal status in Armenia. Ratified international treaties are part of the Armenian legal system and any domestic laws other than the Constitution, prescribe a norm contradicting an international treaty, the later should prevail. However, no international treaty can be ratified if it contradicts to the Constitution.¹⁷

Amendments to the Constitution (2005) introduced some elements of common law to Armenia's legal system. It recognised the Court of Cassation as the highest court for all, other than constitutional, purposes and the guarantor of uniform application of law in Armenia.¹⁸ More detailed provisions enforcing application of judicial precedent were also introduced to the Code of Criminal Procedure (hereinafter CCP) and the newly adopted Judicial Code. In particular, Article 8 of the CCP and Article 15 of the Judicial Code unequivocally stresses that judgments of the Court of Cassation and the European Court of Human Rights (hereinafter ECtHR) are binding for courts when deciding cases on the same matter with similar circumstances unless the court can justify non applicability of particular judgments with well reasoned legal arguments.¹⁹

¹¹UN Security Council Resolution 735(1992), <http://www.un.am/en/Resolutions>, accessed 21 January 2011.

¹²Declaration of Independence, 23 August 1990, <http://www.armenica.org/armenia/doi.html>, accessed 1 February 2011.

¹³United Nations Treaty Collection, <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>, accessed 4 February.

¹⁴Council of Europe, <http://www.coe.int/lportal/web/coe-ortal/country/armenia?dynLink=true&layoutId=131&dlgroupId=10226&fromArticleId=>, accessed 4 February.

¹⁵Constitution of the Republic of Armenia, 2005, Art.1

¹⁶Constitution of the Republic of Armenia, 2005, Art.3

¹⁷Constitution of the Republic of Armenia, 2005.

¹⁸Constitution of the Republic of Armenia, 2005, Art.92.

¹⁹Code of Criminal Procedure, 1998, Art.8 (4)28.11.07; see also Judicial Code, 2007, Art.15 (4).

Pre-trial Detention in Armenia

The domestic legal framework for pre-trial detention is shaped by Article 16 of the Constitution. This Article details the following - exhaustive - grounds for the lawful deprivation of liberty:²⁰

- (a) A person has been sentenced by a competent court for committing a criminal offence;
- (b) A person has not complied with a legally binding court order entered into force;
- (c) To ensure compliance with certain responsibilities prescribed by law;
- (d) There is a reasonable suspicion of a criminal offence, or when it is necessary to prevent a person from committing a criminal offence or from fleeing after its commission;
- (e) To place a juvenile under educational supervision or to bring him or her before another competent authority;
- (f) To prevent the spread of infectious diseases or social danger emanating from persons of unsound mind, alcohol and drug addicts, or vagrants;
- (g) To prevent unauthorized entry of a person into the Republic of Armenia, to expel or extradite him or her to another State

This wording suggests that this Article is designed to reflect Article 5(1) of the ECHR.

Chapter 18 of the CCP regulates the issue of pre-trial detention and other preventive measures in more detail. According to Article 134 of the CCP:²¹

1. Preventive measures are measures of coercion applied on suspects or defendants to prevent their inappropriate behavior during criminal proceedings and to ensure the execution of judgment.

2. The following are the types of preventive measures:

- i. Detention on remand;
- ii. Monetary Bail;
- iii. Written obligation not to leave;
- iv. Personal guarantee;
- v. Guarantee of an organization;
- vi. Ordering supervision;
- vii. Ordering supervision of commander.

3. Arrest and bail shall be executed in respect to the accused only. Supervision shall be executed in respect to an under-age person only.

²⁰ Constitution of the Republic of Armenia, 2005.

²¹ Code of Criminal Procedure, 1998. unofficial translation, legislationonline.org/documents, accessed on 13.09.2011.

Supervision of commander shall be executed in respect to military servicemen or conscripts at the time of drafting.

4. The types of preventive measures prescribed by paragraph 2 of the present Article shall not be executed in combination with each other. Bail shall be considered a measure alternative to arrest and shall be granted only upon decision of the court about the arrest of the accused.

Furthermore, Article 135 of CCP provides:²²

1. Court, prosecutor, investigator or body of inquiry can impose preventive measures only when the materials of a particular criminal case provide sufficient grounds to assume that the suspect or the accused may:

- abscond from the body in charge of the criminal proceeding;
- interfere with the course of justice;
- commit a new crime;
- avoid the criminal responsibility and the imposed punishment;
- hinder the execution of the judgment.

2. Arrest and its substitute monetary bail, can be imposed against the accused only for crimes punishable by more than one-year imprisonment or when there are sufficient grounds to assume that the accused can commit actions mentioned in the first part of the present article.

3. While considering the issue of necessity of the imposition of preventive measures and the selection of a particular measure for the imposition on a suspect or accused the following shall be taken into account:

- The nature and the degree gravity of incriminated crime;
- The personality of the suspect or the accused;
- The age and the health condition of the suspect or the accused;
- Gender of suspect or accused;
- The occupation of the suspect or the accused;
- Marital status and availability of dependents;
- Wealth of suspect or accused, their financial situation;
- Availability of a permanent residence;
- Other relevant circumstances.

Despite international obligations to use pre-trial detention as a measure of last resort and domestic legal framework providing non-custodial options for those awaiting trial, statistical data on pre-trial detention in Armenia gives no reason for optimism and proves that concerns highlighted in the Concluding Observations of the CCPR in 1998 and in more recent studies are still relevant.

As of 30 August 2011 1,174 out of 4,514 prisoners were held in pre-trial detention, representing 26% of the overall prison population.²³ These data

²² Code of Criminal Procedure of the Republic of Armenia, 1998, art. 135, unofficial translation, legislationonline.org/documents, accessed on 13.09.2011.

²³Data provided by the Group of Public Observers. The Group of Public Observers was formed in 2004 upon the order of the Minister of Justice QH-66-N and complies with the principles of "The

represented the situation right after the application of a general amnesty when 508 prisoners were released in May 2011.²⁴ At the same time, still very few detainees continue to benefit from bail: in 2007, pre-trial detention was substituted with monetary bail in only 62 cases. The numbers for 2008 and 2009 are 151 and 186 respectively.²⁵ These figures illustrate that detention of persons awaiting trial continues to be a general rule rather than a measure of last resort and the legal norms are not fully implemented and followed in Armenia.

The rare application of non-custodial preventive measures and monetary bail in Armenia also contribute to prison overcrowding. Despite the release of 508 prisoners under an amnesty in May and June 2011,²⁶ the prison population as of 30 August 2011 was 4,514 when the official capacity of the Armenian Penitentiary is 4,396.²⁷

According to Council of Europe standards the practice of pre-trial detention in Armenia can be described as "virtually systematic". This term was used by the Human Rights Commissioner of the Council of Europe in a statement released on 18 August 2011 in relation to pre-trial detention rate ranging from 11% to 41% in some Council of Europe member states.²⁸

The worrying signs of excessive and unnecessary use of pre-trial detention in Armenia have raised obvious questions as to why very few detainees benefit from bail and what factors affect the excessive use of pre-trial detention. This research therefore seeks to determine the factors resulting in Armenia's non-compliance with its international obligations under Article 9(3) of ICCPR and Article 5(3) of ECHR.

The issue of pre-trial detention in Armenia was partially addressed before by previous studies.²⁹ However, remand detention during pre-trial investigation was not the main focus of these studies. PRI's study, in contrast to others, focused on identifying the factors influencing remand detention decisions to reveal underlying causes of the overreliance on pre-trial detention. Moreover, the OSCE

Regulations of Activities of a Public Monitoring Group at the Detention Facilities of Penal Services of the Ministry of Justice, the Law of the Republic of Armenia "On the Custody of Detainees and Prisoners".

²⁴The report of the Deputy Prosecutor General Aram Tamazyan in the official meeting of Armenian Prosecutors, 19.08.11, <http://www.genproc.am/am/51/item/6791/>, accessed on 30th August 2011.

²⁵American Bar Association, Rule of Law Initiative, "Detention Procedure Assessment Tool For Armenia", April 2010, available on http://apps.americanbar.org/rol/europe_and_eurasia/armenia.html, accessed on 20 January 2011, pg.36.

²⁶The report of the Deputy Prosecutor General Aram Tamazyan in the official meeting of Armenian Prosecutors, 19.08.11, available on <http://www.genproc.am/am/51/item/6791/>, accessed on 30th August 2011.

²⁷International Centre for Prison Studies, "World Prison Brief", available on http://www.prisonstudies.org/info/worldbrief/wpb_country.php?country=120, accessed 30.08.2011.

²⁸The statement of Human Rights Commissioner of the Council of Europe, 18.08.2011, available on http://commissioner.cws.coe.int/tikiiew_blog_post.php?postId=169&utm_source=Open+Society+Institute&utm_campaign=81cc6f5f3a-justice-20110818&utm_medium=email, accessed on 30th August 2011.

²⁹OSCE ODIR, "Final Report Trial Monitoring Project in Armenia (April 2008- July 2009)", <http://www.osce.org/odhr/81140>; American Bar Association, Rule of Law Initiative, "Detention Procedure Assessment Tool For Armenia", April 2010, http://apps.americanbar.org/rol/europe_and_eurasia/armenia.html, accessed on 20 January 2011.

ODHIR Trial Monitoring Project observed the issue in relation to a narrow margin of cases on 2008 post-election violence which have been regarded as politically motivated.³⁰ Thus, apart from revealing factors affecting the overreliance on pre-trial detention, the present research provided an opportunity to verify whether the problems identified in the OSCE Trial Monitoring Final Report are to be associated with the individual cases in question only or whether they are of a systematic nature.

This research presents views of different parties who are involved in remand decision making, offers analysis of factors contributing to overuse of pre-trial detention and develops an action plan to address these factors. The Action Plan can serve as an advocacy tool to engage key stakeholders in implementing change in Armenia and as practical guide to undertake similar research in countries with a similar legal and socio-political situation.

The first chapter of this research presents the scope, methodology and sets the limitations of the research. It explains the ways data were collected and analysed.

The second chapter presents an analysis of factors revealed as contributing to excessive and unnecessary use of pre-trial detention in Armenia and attempts to explain why and how these factors affect pre-trial detention. This chapter is organised according to revealed factors which were grouped in related clusters.

Finally the study suggests an Action Plan for tackling excessive and unnecessary use of pre-trial detention in Armenia.

³⁰ Parliamentary Assembly of Council of Europe, Resolution 1609(2008), para.4.

Scope, Methodology and Limitations of the Research

It is necessary to stress that this research focused only on pre-trial detention within the criminal justice system of Armenia for a five year period from 2005 to 2010.³¹

The aim of the research was defining for the selection of the methodology of inquiry. This study is qualitative. It will explore why non-custodial preventive measures were not applied sufficiently and what were the reasons of excessive use of pre-trial detention throughout the relevant period 2005-2010. As a qualitative study it inquired into the experience of the participants, the way how they explain and interpret the situation.³²

Semi structured in-depth interviews with decision makers and participants of the process were chosen as data gathering tools. Guided conversations about the issue over which participants make decisions almost everyday rather than structured interviews or questionnaires was seen as a more suitable way to generate data for the study. For this purpose, police pre-trial investigators, prosecutors, judges, defence lawyers, civil society activists, legal scholars and Ministry of Justice officials were interviewed.

The selection of participants was undertaken using purposive and referral sampling.³³ PRI sent official letters to the Office of Prosecutor General, the Main Investigative Department of the Police and the Judicial Department asking support of the research and provision of statistics on application of non-custodial preventive measures, pre-trial detention and monetary bail. Upon receipt of relevant permissions the chairs of the courts of first instance in Yerevan and two other provinces were approached and asked to refer to judges who deal with pre-trial detention requests. The same approach was also used for other bodies. However, apart from judges all other participants were from entities based in Yerevan. The interviews were conducted with the consent of participants assuring anonymity of their quotes. In total 36 interviews were conducted 20 of which were digitally recorded.³⁴

To achieve methodological triangulation multiple sources of data were used.³⁵ The interview generated data analysis was complemented by analysis of legal documents such as domestic legislation and court judgments, international conventions ratified by Armenia, judicial decisions and quasi judicial opinions, reports of intergovernmental and non-governmental organisations. The research also comprised the analysis of 82 archived decisions on pre-trial detention, court decisions authorising pre-trial detention, decisions on monetary bail and decisions on applying other non-custodial preventive measures for the period of 2005-2010. These decisions were gathered from the archives of those investigators and lawyers bodies who participated in the research project.

³¹ This research project is funded by Open Society Foundations.

³² Atkinson, P., Coffey, A. and Delamont, S., 'A Debate about our Canon' (2001) *Qualitative Research*, 1(1) 5-21.

³³ Maxwell, J., 'Qualitative Research Design: An Interactive Approach. *Applied Social Research Methods*', (1996), Series(41), Thousands of Oak, CALSage.

³⁴ Transcriptions of the interviews have been produced and are kept at PRI's premises.

³⁵ Miles, M., Huberman, A., 'Qualitative Data Analysis', (2nd ed., Thousands of Oak, Sage1994).

As in every research, in this research it is important to consider the issues of internal and external validity (generalisation) of findings. In qualitative studies these issues are perceived differently than they are in quantitative studies. As compared to quantitative concept of validity, in qualitative research the main goal of the researcher is to establish the trustworthiness of the research.³⁶

The trustworthiness of the present research could be questioned over a few issues. The researcher's background, cross-cultural nature of the research, the bias of the participants and possibility to generalise the findings for the overall situation of pre-trial detention and use of alternatives in Armenia were identified as potential threats to trustworthiness.

The researcher, being a native Armenian understands the country's historical, cultural, socio-legal and political context. Moreover, the fact that the researcher is a former police pre-trial investigator increases the chance of asking leading questions and ignoring opinions which do not support his own perceptions and conclusions about the issue.³⁷ However, the researcher's background could also be regarded as a potential strength of the research, because it gives greater opportunity for in-depth understanding of the issue.

Interview candidates were personally involved in the decision making process over the subject of the study, so they have professional and institutional interests in the subject. Even though there is a great danger that bias of respondents can affect the objectivity of gathered data, the opportunity of gathering data from primary source outweigh this concern.³⁸ Moreover, the selection of participants was done with the goal to involve participants from bodies with opposite interests to achieve as accurate as possible understanding of the situation with pre-trial detention and alternatives.

Diverse data sources were used for balancing possible bias of the researcher and the participants and to make findings as credible as possible.

The other possible threat to the trustworthiness of the results could be the issue of translation. The interviews were conducted and transcribed in Armenian, but the findings were translated into English. The two languages were also used for the work with other data sources. The issue of language is a general problem in cross-cultural research.³⁹ The issue of language opens potential for misunderstandings during interviews, misinterpretation of data and other possible implications. The fact that the researcher is bilingual and is the only person involved in data gathering could be seen as a remedy for the mentioned threat.

The final risk for the validity of the present research is whether it is possible to claim that the factors revealed during interviews with a relatively small number of participants are also true for the rest of decision makers and typical for the overall situation. It is true that this study is not representative from the statistical point of view, because it does not include the majority of judges, investigators and other participants of the process. Moreover, the findings of this

³⁶ Lincoln, Y., Guba, E. *'Naturalistic Inquiry'*, (1985), Beverley Hills, Sage.

³⁷ Padgett, D, *Qualitative Methods in Social Science*(SAGE 1998).

³⁸ Padgett, D, *Qualitative Methods in Social Science*(SAGE 1998).

³⁹ Esposito, N., *'From meaning to meaning : The influence of translation techniques on non-English focus group research'*, 200, 11(4) 568-579.

research are only relevant to issues pertaining to pre-trial detention during criminal investigations. It did not explore any type of detention outside of the normal criminal justice process such as administrative detentions or pre-trial detentions when some of the rights related to pre-trial detention are derogated during state of emergency. The study did not explore issues related specifically to the post investigation period. While most of the factors contributing to pre-trial detention during pre-trial investigation would also be relevant to the post investigation period, there could be many other factors which are relevant only for specific stages of the criminal procedure.

In addition, despite of PRI's request of the statistical data, the authorities did not provide all requested data. Data on the number of people charged annually for criminal offences and the number of non-custodial preventive measures applied was not provided by the authorities. Data was only provided for the period 2007-2010 while data have been requested for the period 2005 to 2010. Also the data on pre-trial detention was only available on cases investigated by police pre-trial investigators and only police investigators were interviewed. Even though the majority of cases in Armenia are investigated by police pre-trial investigators, the fact that cases investigated by pre-trial investigators of such bodies as Tax Service, National Security Service, Special Investigative Service, Ministry of Defence, etc. are not included in this research, should be regarded as a limitation of this research.

However, as a qualitative study the goal was not to achieve statistical representativeness, but rather to present the whole spectre of expert views and to achieve as accurate as possible a description of the situation.⁴⁰

In order to manage interviews and other qualitative data computer based qualitative analysis software NVivo 9 was used.⁴¹ This software assists the researcher to organise and analyse the raw qualitative data.

Protection of Identity of Participants

No information concerning the identity of respondents was collected during this research. As indicated above the interviews were conducted with consent of participants assuring their anonymity. The information provided by interviewees is kept confidential and used only for research purposes. The occupation of participants such as judge, investigator, defence lawyer, etc. and not their names or other private information is used to refer to their opinions in this study. Interviews were transcribed and are confidential property.

⁴⁰ Lincoln, Y., Guba, E. '*Naturalistic Inquiry*', (Beverly Hills, Sage1985), 316.

⁴¹ QSR International, 2011, http://www.qsrinternational.com/products_nvivo.aspx

Analysis and Discussions

The participants specified different factors which, in their opinion, contribute to excessive and unnecessary use of pre-trial detention in Armenia. Despite having different views on the issue 35 out of 36 participants acknowledged that pre-trial detention is used excessively in Armenia.

Qualitative analysis of the interviews revealed the following major factors affecting the decision making over application of pre-trial detention versus non-custodial preventive measures. Those factors were grouped in the 5 major categories and labelled according to issues raised by the respondents. The identified major categories are:

1. Corruption related factors
2. Factors related to the independence of judiciary
3. Factors related to the rule of law
4. Factors related to the institutional capacity of the bodies involved
5. Factors related to legislation

Corruption Related Factors

There are three factors grouped under this major label. These three subcategories are mutual distrust and fear to be perceived corrupt, consequences of actual corruption and of the anti-corruption campaign. Mutual distrust within the justice system was cited by 20 (55.5%) out of 36 participants, eight of whom cited this factor more than once in different contexts. One of the investigators stated, "Because within the system it is accepted that pre-trial detention is a norm and alternatives are exceptions, it is implied that some kind of corrupt interest is involved if a defendant is not under pre-trial detention. Investigators who sought alternatives instead of submitting requests for pre-trial detention are required to justify their choice of alternatives at all levels up the chain of command."⁴² Five out of seven investigators involved in the research described the situation in similar terms.⁴³

The mutual distrust in the criminal justice system appears to have been aggravated by the government's anti-corruption campaign. In 2008 the newly appointed government in its strategic plan declared the fight against corruption its second major priority. In 2009 it adopted Armenia's Anti-Corruption Strategy and the Implementation Plan for 2009-2012.⁴⁴ Although the former government also had an anti-corruption strategy, according to interviewees the new government used the issue of corruption in a populist manner to receive political credentials.⁴⁵ According to the respondents of this research the anti-corruption campaign has had an adverse effect on the judiciary and on law enforcement agencies which fear being perceived as corrupt by high level officials when supporting the use of non-custodial alternatives over pre-trial detention. The

⁴² Interview with a police pre-trial investigator, 16 June 2011.

⁴³ Transcripts of interviews are confidential and kept in PRI premises.

⁴⁴ Programme of Government of the Republic of Armenia 2008-2012, N 380- U, 2008, <http://www.gov.am/files/docs/82.pdf>, accessed 10 November 2011.

⁴⁵ Interviews with civil society activists, June-July 2011.

anti-corruption campaign thus became a factor affecting decision-making on pre-trial detention.⁴⁶

This factor was cited by participants with opposite procedural interests such as investigators and defence lawyers; a fact increasing the significance of such statements. One investigator said, "Courts authorise pre-trial detention requests, without going into many details, because the opposite decision will give rise to allegations of corruption."⁴⁷ Another interviewee stated that "Because the President declared an anti-corruption campaign and in several meetings with government officials publically criticised the head of the National Security Service for not arresting any judge on bribery charges, judges try to show that they are not corrupt authorising more pre-trial detention requests and handing down more guilty verdicts with stricter punishments".⁴⁸

The next most cited phenomenon is corruption. Thirteen out of 36 participants described corruption within law enforcement and the judiciary as a factor affecting the insufficient application of alternatives to pre-trial detention. However, none of the prosecutors or judges acknowledged the existence of corruption within their own agency, but either referred to the practice of corruption in the system in general terms or pointed to other agencies. For example, a participant stated that investigators mostly applied non-custodial preventive measures when they receive bribes for that or received phone calls from influential persons. The same issue was stressed in relation to the application of monetary bail by courts. Participants stated that the threat of pre-trial detention prompts detainees to bribe officials for non-custodial preventive measures to be applied.⁴⁹

Corruption constitutes a serious problem in Armenia. According to Transparency International's Corruption Perception Index (CPI) Armenia's score remained relatively stable varying from 2.9 in 2005 and 2.6 in 2010.⁵⁰ In the period of 2005-2010 the lowest level of corruption was reported in 2007, when the index scored 3.0 being placed 99th among 178 countries, still indicating serious level of corruption according to CPI methodology.⁵¹ Other surveys conducted in Armenia supported the findings of CPI and went further to indicate that law enforcement, the judiciary and the educational system are among the most corrupt institutions in Armenia.⁵²

Inter-governmental organisations such as the Council of Europe's Group of States against Corruption (hereinafter GRECO) in its country evaluation report confirmed that corruption is a major problem in Armenia. The GRECO indicated that the judiciary and the police are among the worst affected sectors.⁵³

⁴⁶ Interviews with investigators, judges, prosecutors, defence lawyers, civil society activists, June-July 2011.

⁴⁷ Interview with an investigator, 17 June 2011.

⁴⁸ Interview with a defence lawyer, 13 June 2011.

⁴⁹ Interviews with defence lawyers and civil society activists, June-July 2011.

⁵⁰ Transparency International, '*Corruption Perception Index*', 2010, 2005, <http://www.transparency.org/publications/publications>, accessed 10 February 2011.

⁵¹ Transparency International evaluates countries on a scale ranging from 0 (highly corrupt) to 10 (very clean), http://cpi.transparency.org/cpi2011/in_detail/, accessed 10 February 2011.

⁵² Transparency International, '*Global Corruption Barometer*', 2010, http://www.transparency.org/policy_research/surveys_indices/gcb/2010/in_detail, accessed 10 February 2011.

⁵³ Council of Europe, Group of States against Corruption, Joint first and second evaluation round,

More recently, the European Committee for Prevention of Torture and Inhuman or Degrading Treatment (hereinafter CPT) reported that police officers demand money from detained persons or their relatives in exchange for release or privileges in detention.⁵⁴

It has to be acknowledged that the Armenian government makes efforts to tackle corruption. In fact, as early as in 2001 the government set up a Steering Committee to coordinate anti-corruption efforts. In 2002 the government adopted an Anti-Corruption Strategy 2003-2007.⁵⁵ Furthermore, in 2008 the newly appointed government in its strategic plan declared the fight against corruption the second major priority of the government. In 2009 it adopted Armenia's Anti-corruption Strategy and the Implementation Plan for 2009-2012.⁵⁶

However, despite these plans, various surveys and reports evaluated the government's efforts to deal with corruption and found them to be ineffective.⁵⁷

Factors Related to Independence of Judiciary

The independence of the judiciary, or more, precisely its absence is among the most cited factors to blame for the excessive and unnecessary use of pre-trial detention.

Twenty-four out of 36 participants cited this factor. Additionally, there were 61 references to this factor in the mentioned 24 interviews. It could be anticipated that defence lawyers, civil society activists and legal scholars refer to this factor, but it was unexpected that 3 judges out of 6 interviewed acknowledged that the judiciary lacks independence and that this constitutes a notable factor influencing the excessive and unnecessary use of pre-trial detention.⁵⁸

One investigator described the phenomenon of the non-independence of the judiciary in the following terms, "Every court of first instance has a supervising judge in the Court of Cassation. Judges take their case folder and run to the supervising judge to seek advice on the application of detention or use of an alternative despite insufficient evidence supporting a request for pre-trial detention".⁵⁹

evaluation report on Armenia, 2006 Strasbourg, para. 139.

⁵⁴Council of Europe Committee on Prevention of Torture, Report to Armenian Government on the Visit to Armenia, CPT/Inf(2011)24, pg.16., <http://www.cpt.coe.int/en/states/arm.htm>, accessed 1 September 2011.

⁵⁵Government of the Republic of Armenia, Anti-Corruption Strategy and Implementation Action Plan 2003-2007, <http://www.gov.am/en/anticorruption/>, accessed 10 November 2011.

⁵⁶Programme of Government of the Republic of Armenia 2008-2012, N 380- U, 2008, <http://www.gov.am/files/docs/82.pdf>, accessed 10 November 2011.

⁵⁷Council of Europe Committee on Prevention of Torture, Report to Armenian Government on the Visit to Armenia, CPT/Inf(2011)24, para.11, <http://www.cpt.coe.int/en/states/arm.htm>, accessed 1 September 2011; see also ⁵⁷ Transparency International, 'Global Corruption Barometer', 2010, http://www.transparency.org/policy_research/surveys_indices/gcb/2010/in_detail, accessed 10 February 2011.

⁵⁸ Interviews with judges, June 2011.

⁵⁹ Interview with a police pre-trial investigator, 20 June 2011.

Eight interviewees, among them 1 judge, blamed the court of cassation for threatening the independence of lower courts. The judge particularly stated, "Not all matters are reported to the Court of Cassation. However controversial issues are referred to prevent them (the Court of Cassation) blaming us for not informing them, if it later acquires high publicity".⁶⁰

All 24 respondents specified that the office of the prosecutor pressurised judges to make decisions in favour of detention. One participant asserted, "So called telephone justice is common in Armenia. Prosecutors call judges to make sure that they know what type of decisions they need to issue."⁶¹

The so-called "detering effect" of disciplinary decisions of the Judicial Council of Armenia targets mainly those judges who refuse to authorise pre-trial detention requests or substitute it with monetary bail. This practice has also been highlighted by interviewees as a technique to influence judges.⁶²

Reports by inter-governmental organisations have repeatedly and consistently documented the lack of independence of the Armenian judiciary⁶³. The practice of the Court of Cassation to delegate a "supervising judge" for courts of general jurisdiction to provide instructions on the outcome of the case and the practice of disciplining those judges who applied non-custodial alternatives has also been mirrored in media articles.⁶⁴

Rule of Law

All interviewees without a single exception described situations indicating the lack of rule of law in Armenia as factors resulting in excessive and unnecessary use of pre-trial detention. The factors most cited under this category are the following:

1. Soviet punitive legacy as informally applied policy
2. Gravity of crime and severity of expected punishment
3. Schematic imposition of pre-trial detention
4. Ignoring international binding standards

According to participants soviet punitive legacy is still a critical factor in the field of criminal justice in general and particularly with regard to pre-trial remand decision making. As in soviet times, pre-trial detention is regarded as a tool of

⁶⁰ Interview with a judge, 21 June 2011.

⁶¹ Interview with a civil society activist, 2 June 2011.

⁶² Interviews with judges, civil society activists, defence lawyers, June-July 2011.

⁶³ Resolution 1609(2008), "Functioning of *Democratic institutions in Armenia*", Parliamentary Assembly of the Council of Europe, 17 April 2008, para.6.3); see also Transparency International, 'European Neighbourhood Policy: Monitoring Armenia's Anti-Corruption Commitments', <http://transparency.am/publications.php>, accessed 10 March 2011.

⁶⁴ Interview of former judge Surik Gazaryan, available at <http://www.armtimes.com/en/node/27476>, accessed on 26.08.2011; Interview of former judge Samvel Mnatzakanyan, available at <http://www.azatutyun.am/content/article/24280696.html>, accessed on 26 August 2011.; Chamber of Advocates of Republic of Armenia, "Supervision of *Independent Judiciary*", 06 July 2011, available on http://www.advocates.am/index.php?option=com_content&view=article&id=312:2011-07-06-12-36-52&catid=40:2010-09-13-16-28-11&Itemid=67, accessed on 2 September 2011; Interview of defence lawyer Yervand Varosyan to A+1 Chanel, 22 July 2011, available on <http://www.advocates.am/>, access on 2 September 2011.

intimidation and is virtually the default option rather than used as a measure of last resort.⁶⁵ The figures for the period of 2007-2009 show that the situation is not much different in modern Armenia.⁶⁶

Pre-trial Detention and Monetary Bail in Armenia, 2007-2009

Category	2007	2008	2009
Pre-trial detention requests considered by courts ⁶⁷	2,849	2,915	3,572
Pre-trial detention requests authorised	2,780(97.6%)	2,726(93.5%)	3,362(94.1%)
Bail requests considered by court (Percentage of cases where substitution of detention with bail was requested)	81(2.9%)	443(16.2%)	484(14.4%)
Bail requests granted	62	151	186

As the table illustrates, in 2007 courts authorised 2,780 out of 2,849 pre-trial detention requests which equals 97.6% authorisation. In 2008 and 2009, the percentages of authorisation of pre-trial detention requests amounted to 93.5% and 94.1% respectively.

Participants explained that in all criminal justice bodies almost all key positions are occupied by individuals who were shaped in the soviet criminal justice system and therefore are "bearers of soviet punitive mentality".⁶⁸ Even though the soviet authoritarian rules and inquisitorial criminal justice system ceased to exist 20 years ago, key decision makers seem to not have overcome this legacy. Twenty years after the fall of the Soviet Union its authoritarian legacy is still a determining factor for remand decision making in Armenia. Moreover, in relation to "soviet legacy" respondents flagged that the soviet legacy were a dominant "institutional mentality" and as such transferred to new generations of investigators, prosecutors and judges. One respondent stressed, "New generations think the same way as their senior colleagues, because they have to adjust to the system in order to be able to work".⁶⁹

It is also likely that the so-called "soviet mentality" is influential in other determinants which indicate the lack of the rule of law in the field of remand

⁶⁵Zinatulin, 'Coercion in Criminal Procedure and its Effectiveness', Kazan 1981, p.136

⁶⁶American Bar Association, Rule of Law Initiative, 'Detention Procedure Assessment Tool For Armenia', April 2010, available on http://apps.americanbar.org/rol/europe_and_eurasia/armenia.html, accessed on 20 January 2011, pg.36.

⁶⁷ Involves only pre-trial detention requests filed by police pre-trial investigators.

⁶⁸ Interviews with a prosecutor, 23 June 2011; also interviews with investigators, civil society activists, defence lawyers, June-July 2011.

⁶⁹ Interview with a defence lawyer, 25 June 2011.

decision making. For instance, 26 participants including investigators, judges and prosecutors referred to the gravity of incriminated crime and the severity of expected punishment as major determinants in remand decision making.⁷⁰ The interviewees indicated that if the crime of which a detainee is accused is grave or extremely grave the only option is pre-trial detention regardless of what the law requires. Most of the interviewed investigators, judges and prosecutors linked pre-trial detention with punishment and argued their reluctance to impose monetary bail or other non-custodial preventive measures with the fact that incriminated offences could not result in punishment other than imprisonment. In relation to this issue one judge stated, "Whenever I receive a remand detention request, I look at the gravity of crime. If it is a grave or an extremely grave crime, I will be obliged to authorise it."⁷¹ Another judge stated, "If the crime is grave, pre-trial detention should certainly be authorised. For instance if the punishment for the crime is from 1 to 10 years of imprisonment, I think the sooner s/he starts doing the time, the sooner s/he will finish it."⁷²

In a number of archived decisions on authorisation of pre-trial detention for the period from 2005-2010, the gravity of the incriminated crime was identified as the only justification for the imposition of pre-trial detention.⁷³ Other researchers have also identified such practice.⁷⁴

This approach is certainly inconsistent with the presumption of innocence, one of the cornerstone principles of international human rights law which is also prescribed in the Constitution and the CCP.⁷⁵

Schematic imposition of pre-trial detention was referred to as a factor affecting the excessive use of pre-trial detention by 29 out of 36 participants. Participants described the schematic imposition of pre-trial detention as a situation when neither pre-trial detention request nor decisions authorising pre-trial detention are supported by facts of the individual cases, but only listing absconding, interfering with course of justice, committing new crimes and other circumstances prescribed by Article 135 of CCP as grounds generally justifying the imposition of any type of remand measure.⁷⁶

One investigator specifically stated, "The grounds for requesting pre-trial detention is a pure formality. We usually copy and paste all grounds listed in Article 135, but almost always there is no evidence in the case to support these grounds. They are mostly based on pure assumptions, because in the majority of cases it is impossible to either prove or dismiss the risks."⁷⁷

⁷⁰ Interviews with judges, investigators, prosecutors, defence lawyers, civil society activists, June-July 2011.

⁷¹ Interview with a judge, 14 June 2011.

⁷² Interview with a judge, 14 June 2011.

⁷³ Archived Decisions on authorisation of pre-trial detention for the period 2005-2010, collected by PRI.

⁷⁴ OSCE ODIR, "Final Report Trial Monitoring Project in Armenia (April 2008- July 2009)", pg. 19-20, available on <http://www.osce.org/odihr/81140>, accessed on 1 February 2011; ABA ROLI, "Detention Procedure Assessment Tool for Armenia", 2010, pg. 37; Sona Mashuryan, "Requests for Alternatives to Pre-trial Detention are Universally Rejected without Justification", *Ditord Observer*(47), #10, 2010, pg.7.

⁷⁵ Constitution of the Republic of Armenia 2005, Art.21, Code of Criminal Procedure 1998, Art.18.

⁷⁶ Interviews with judges, prosecutors, investigators, defence lawyers, civil society activists, June-July 2011.

⁷⁷ Interview with an investigator, 24 June 2011.

In another interview a judge stated, "In most cases no grounds substantiating the decision requesting authorisation of pre-trial detention are provided. Sometimes requests appear ridiculous. For instance, they may write that if not detained the person could flee, but you can see from the case materials that the person voluntarily reported to police after committing the crime."⁷⁸

The counts of schematic imposition of pre-trial detention described in the interviews have also been confirmed during the assessment of 82 archived decisions on pre-trial authorisation requests and initial authorisation of pre-trial detention for the period of 2005-2010. The assessment suggests that pre-trial detention decisions of the Armenian courts are predominantly reasoned in a schematic way, based on either of the grounds listed in the Code of Criminal Procedure and without requiring the official requesting authorisation of pre-trial detention to substantiate those grounds with specific facts of the particular case. These decisions tend to include unsubstantiated, schematic assumptions about the risk of absconding, interference with the course of justice or/ and the risk of re-offending.⁷⁹ These conclusions are confirmed by other studies as well.⁸⁰

Another factor specified by participants very much reflects the issue of schematic imposition of pre-trial detention. According to participants it is common for courts to ignore international standards, judgments of ECtHR and even the judgments of the Court of Cassation while making decisions on pre-trial detention.⁸¹

As mentioned above the Constitution is the superordinate law and has overriding legal status in Armenia. According to the Constitution international treaties ratified by Armenia are integral part of Armenian legal system and are overriding domestic laws, except for the Constitution.⁸² Moreover, the Judicial Code and the CCP went further asserting that judgments of the Court of Cassation and the ECtHR are obligatory for courts when deciding cases on the same matter with similar circumstances.⁸³

The issue of justifying pre-trial detention solely on the gravity of charges has been elaborated in the Recommendation of the Committee of Ministers of the Council of Europe.⁸⁴ The Committee of Ministers of the Council of Europe (hereinafter the Committee of Ministers), recalling the case law of the ECtHR, reiterated the conditions of permissibility of remand, and listed four conditions which have to be satisfied cumulatively. Accordingly, detention must not be imposed or continue if any of the conditions are lacking or have ceased to exist.

⁷⁸ Interview with a judge, 13 June 2011.

⁷⁹ Archived Decisions on authorisation of pre-trial detention for the period 2005-2010, collected by PRI.

⁸⁰ OSCE ODIR, "Final Report Trial Monitoring Project in Armenia (April 2008- July 2009)", pg. 19-20, available on <http://www.osce.org/odihr/81140>, accessed on 1 February 2011; ABA ROLI, "Detention Procedure Assessment Tool for Armenia", 2010, pg. 37; Sona Mashuryan, "Requests for Alternatives to Pre-trial Detention are Universally Rejected without Justification", *Ditord Observer*(47), #10, 2010, pg.7.

⁸¹ Interviews with defence lawyers, civil society activists, investigators, June-July 2011.

⁸² Constitution of the Republic of Armenia 2005, Art.6.

⁸³ Code of Criminal Procedure, 28.11.07, Art.8(4); see also Judicial Code, 2007, Art.15(4)

⁸⁴ Council of Europe, Committee of Ministers (Rec.2006)13, 27.09. 2006.

The four - cumulative - conditions identified by the Committee of Ministers are⁸⁵:

- a. There is a reasonable suspicion that he or she committed an offence;
- b. There are substantial reasons for believing that, if released, he or she would either (i) abscond, (ii) commit a serious offence, (iii) interfere with the course of justice, or (iv) pose a serious threat to public order;
- c. There is no possibility of using alternative measures to address the concerns referred to in b.;
- d. The detention is a step taken as part of the criminal justice process.

In relation to the same issue the ECtHR has stressed that Article 5(3) of ECHR relates to two distinct periods: initial arrest and the period pending trial during which a defendant may be detained or released with or without conditions.⁸⁶ For the latter period, pending trial, the presumption is in favour of release.⁸⁷ The purpose of the provision entitling an arrested person to be tried within a reasonable time or released pending trial is to require the provisional release once the continuing detention is no longer reasonable, because a suspect is presumed innocent until conviction. Detention can only be continued if it is justified by specific circumstances related to public interest which override the right to liberty, notwithstanding the presumption of innocence.⁸⁸

Moreover, the UN Human Rights Committee, elaborating on the Article 9(1) of the International Covenant on Civil and Political Rights, has emphasised that a reasonable suspicion of a person having committed an offence does not constitute a self-standing justification for the imposition of pre-trial detention. It has consistently held that remand constitutes an exceptional measure and may only be imposed if prescribed in law and necessary (sic!) in the particular circumstances, in order to prevent flight, interference with evidence or reoccurrence of crime.⁸⁹

The ECtHR also stressed that the danger of absconding cannot be judged solely on the bases of the severity of expected punishment. It should be assessed together with other relevant factors which would increase or decrease the risk, making detention unnecessary.⁹⁰

In regard to delivering schematic decisions, the following international standards have been observed. In the case of *Mansur v. Turkey* ECtHR stressed that "issuance of standard, template decisions and failure to fulfil the duty to

⁸⁵Explanatory memorandum of the Recommendation Rec. (2006)13 of the Council of Europe Committee of Ministers to member states on the use of remand in custody, CM (2006)122 Addendum, 30 August 2006, para.7.

⁸⁶ *McKay v UK*, ECtHR Application no.543/03, judgment of 3 October 2006, para.31, HUDOC.

⁸⁷ *Neumeister v. Austria*, 27 June 1968, p. 37, § 4, Series A no. 8.

⁸⁸ *McKay v UK*, ECtHR Application no.543/03, judgment of 3 October 2006, para.42, HUDOC.

⁸⁹*Hugo van Alphen v. The Netherlands*, Communication No. 305/1988, U.N. Doc.

CCPR/C/39/D/305/1988 (1990), para. 5.8.; See also *Mukong v. Cameroon*, Communication No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991, para.9.8.

⁹⁰*Letellier v France*, ECtHR, application. 12369/86, judgment 26 June 1991, para.43, HUDOC; see also *Neumeister v. Austria*, 27 June 1968, p. 39, § 10, Series A no. 8.

establish convincing grounds justifying detention constitutes a serious restriction of the right to liberty guaranteed by international human rights law."⁹¹

At the domestic level, legislation does not sanction the imposition of pre-trial detention based solely on the gravity of charges. Article 135 of CCP does not list the gravity of the alleged crime among grounds which could justify the imposition of remand measures. The gravity of the alleged crime is a factor which, together with other factors listed in the same provision is to be taken into account during remand decision making.⁹² Although contrary to international standards⁹³ the CCP restricts substitution of pre-trial detention with monetary bail only to petty crimes and crimes of considerable gravity.⁹⁴ The Court of Cassation referring to the case law of the ECtHR (*Caballero v. UK*, *SBC v the UK*),⁹⁵ held that monetary bail shall be considered regardless of the severity of the charges, because according to Article 6(4) of the Armenian Constitution, ratified international treaties supersede domestic laws and if the later contradict treaties, the treaty should be applied.⁹⁶

The Court of Cassation also held that despite being an essential factor for assessing the future conduct of the defendant, the gravity of charges should be evaluated in the complex of other factors specified in the Article 135 of CCP.⁹⁷

In relation to the issue of substantiation of judicial decisions, Article 136(1) of the CCP stresses that decisions on the application of remand measures should be reasoned, should include a description of the alleged crime and substantiation of necessity to apply the particular remand measure.⁹⁸ Furthermore, Article 358 stresses that the court's final judgments should be lawful, substantiated and reasoned. As further interpreted by the Court of Cassation, the requirements of the mentioned article are applicable not only to final judgments, but also to pre-trial detention decisions and all other decisions issued by courts while executing judicial oversight at the pre-trial stage. The court went further to detail that a judicial decision is lawful if based on current legislation, substantiated if the findings of the court are based on evidence which has been explored during court hearings, and reasoned if the court could present all argumentation which supported conclusions and made reference to laws which support final findings.⁹⁹ Moreover, the Court of Cassation expressed its position regarding the requirements of judicial decisions specifically in relation to the issue of grounds

⁹¹*Mansur v. Turkey*, ECtHR, application № 16026/90, Judgment, 8 June 1995, §55; see also, *Trzaska v Poland*, ECtHR, application no. 25792/94, judgment 11 July 2000, para.66, HUDOC; *Yagci and Sargin v. Turkey*, ECtHR application no. 16419/90, judgment 08 June 1995, para.52.

⁹²Code of Criminal Procedure 1998.

⁹³*Hugo van Alphen v. The Netherlands*, Communication No. 305/1988, U.N. Doc. CCPR/C/39/D/305/1988 (1990), para. 5.8.; See also *Mukong v. Cameroon*, Communication No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991, para.9.8; *Hill v Spain*, U.N. Doc. CCPR/C/59/D/526/1993, 2 April 1997, para. 12.3.; see also *Nikolovv Bulgaria*, , ECtHR application no. 38884/97, judgment of 30.01.2003 para.70; *Caballero v the United Kingdom*, ECtHR, application no. 32819/96, judgment of 8.02.2000, para.18-21.

⁹⁴Code of Criminal Procedure of the Republic of Armenia, 1998, art.143 (4).

⁹⁵*Cabalero v. the UK*, ECtHR, application № 32819/96, Judgment, 08.02.2000, HUDOC.

⁹⁶Case of Taron Hakobyan, Court of Cassation, no. VB-115/07, judgment of 13 July 2007, para.3.1.

⁹⁷Case of Aslan Avetisyan, Court of Cassation of the RA, AVD/0022/06/08, 2008, para.26.

⁹⁸ Code of Criminal Procedure 1998.

⁹⁹Case of Khachik Galstyan, Court of Cassation of the RA, EKD/0058/11/09, 26.03.2010, para. 17-19.

supporting authorisation of pre-trial detention. In the case of Aram Chuguryan the Court of Cassation stated:¹⁰⁰

The grounds for the authorisation of pre-trial detention, listed in the Code of Criminal Procedure, relate to something which can happen in the future. However, these assumptions should be realistic and based on materials of a particular case. This means that these decisions should be based on facts.

It is apparent that decisions on pre-trial detention based solely on the gravity of the alleged crime as well as schematic decisions meet neither the requirements of international binding standards nor the requirements of domestic law and should be regarded as unlawful. However, as interviews, decisions analysed in the framework of this research and other reports demonstrated, Armenian courts continued to authorise pre-trial detention on the basis of such decisions, even after the judgments of the Court of Cassation explaining the matter in a clear and detailed way.¹⁰¹

In relation to this matter it is interesting to analyse the position of the Court of Cassation which issued judgments in line with international standards and established very strong ground to shape the domestic practice.¹⁰² Surprisingly the Court of Cassation has not been consistent in upholding its own judgments in relation to the legality of the authorisation of pre-trial detention. To follow the position of the Court of Cassation after its above mentioned precedent judgment, a case has been selected from the sample of 84 archived decisions. The analysis of the only case in the sample of this research which went through all 3 judicial instances revealed the following. In this case (#13141410) the defendant was charged for a criminal offence prescribed by the Article 258(3.1) (aggravated hooliganism with circumstances), a grave crime according the Penal Code of Armenia. In the initial decision of authorisation of pre-trial detention the court of general jurisdiction, without mentioning specific case materials, held that case materials provide sufficient grounds to assume that if not detained the defendant will abscond or interfere with the course of justice. The court also mentioned the gravity of crime as a factor supporting the decision.¹⁰³

Appealing against the mentioned decision the defence lawyer argued that the lower court's conclusion about absconding and interfering with the course of justice is not supported by case materials and requested to overturn the decision as unlawful according to domestic law and ECHR. However, the Court of Appeal upheld the initial authorisation of pre-trial detention substantiating only the reasonable suspicion. It did not provide an argument referring to the ECtHR jurisprudence or the judgment of the Court of Cassation despite the defence lawyer's explicit reference to these verdicts. The court concluded that the

¹⁰⁰Case of Aram Chuguryan, Court of Cassation of the RA, VB-132/07, 2007, para.4.

¹⁰¹OSCE ODIR, "Final Report Trial Monitoring Project in Armenia (April 2008- July 2009)", pg. 19-20, available on <http://www.osce.org/odihr/81140>, accessed on 1February 2011; ABA ROLI, "Detention Procedure Assessment Tool for Armenia", 2010, pg. 37; Sona Mashuryan, "Requests for Alternatives to Pre-trial Detention are Universally Rejected without Justification", Ditor Observer(47),#10,2010,pg.7.

¹⁰²Case of Taron Hakobyan, Court of Cassation, no. VB-115/07, judgment of 13 July 2007, para.3.1; Case of Aslan Avetisyan, Court of Cassation of the RA, AVD/0022/06/08, 2008, para.26, ect.

¹⁰³ Court of General Jurisdiction of Kentron and Nork-Marash, ԵԿԴ/0621/06/10, 13 October 2010.

severity of the punishment to be expected justifies concern of absconding in the present case.¹⁰⁴

The complaint to the Court of Cassation also remained unsuccessful. The Court of Cassation dismissed the cassation appeal as inadmissible. It dismissed arguments of the defence lawyer that authorisation of pre-trial detention in this case contradicted the principles established in case law and that the decision of the Court of Cassation on the present case will have a significant effect on the unified application of law in Armenia. The Court of Cassation, without providing reasoning, simply stated that the case law of the Court of Cassation referred to in the application is not applicable for the circumstances of the present case.¹⁰⁵

This decision is *prima facie* a violation of Article 15(4) of the Judicial Code, Article 8(4) of the CCP because the court did not justify the non applicability of the judgments referred to by the defence lawyer with well reasoned legal arguments and it is also not in line with its own previous decision, mentioned above, which provided a detailed interpretation of the requirements of judicial decisions.¹⁰⁶

Legislative Inadequacies

Thirty out of 36 participants mentioned that inadequacies in the Armenian legislation contribute to the excessive use of pre-trial detention. The participants described those inadequacies in the following terms.

- Monetary bail should not be a substitute to pre-trial detention, but a self-standing preventive measure
- Absence of effective alternative measures
- Monetary bail is unaffordable for most defendants
- No primacy among preventive measures

Monetary Bail as a Substitute Measure for Pre-trial Detention: Asked about the application of monetary bail one of the participants particularly stated, "It is strange that monetary bail is designed as a substitute for pre-trial detention and not as a self standing preventive measure. How could a judge substitute pre-trial detention with monetary bail, having first argued that detention is the only measure capable of preventing defendant from fleeing, interfering with course of justice or committing a new crime."¹⁰⁷

The examination of domestic legislation regarding monetary bail revealed the following.

The CCP provides that monetary bail can be applied only as a substitute to pre-trial detention. As a consequence, pre-trial detention has to be approved even before a motion can be considered.¹⁰⁸

¹⁰⁴ Case of Arman Hunanyan, Criminal Court of Appeal of the RA, EKD/0621/06/10, 2010.

¹⁰⁵ Case of Aram Hunanyan, Court of Cassation of RA, inadmissibility decision, 2010.

¹⁰⁶ Case of Khachik Galstyan Court of Cassation of the RA, EKD/0058/11/09, para. 17-19, 26.03.2010.

¹⁰⁷ Interview with a defence lawyer, 22 June 2011.

¹⁰⁸ Code of Criminal Procedure of the Republic of Armenia, 1998, art.57(3), 62(1), 134(2,3,4), 136(2).

As outlined above, according to Article 137(4) CCP, in pre-trial stages, courts can consider substituting pre-trial detention with monetary bail only after (sic!) first having approved pre-trial detention.¹⁰⁹ The court's assessment, thereby having already argued that all preconditions of remand are met, logically renders any subsequent decision in favour of monetary bail impossible, were the judge not to contradict his/ her own previous reasoning. The CCP does not provide any guidance to judges on how to justify the approval of monetary bail after having first authorised pre-trial detention and thereby implicitly expressing that the risk of absconding, interfering with course of justice or committing a new crime can only be addressed by pre-trial detention.

The fact that there is no clear guidance on justifying the substitution of pre-trial detention with monetary bail puts judges who do substitute pre-trial detention with monetary bail in vulnerable position. A recent disciplinary procedure, following the application of monetary bail by Judge Samvel Mnatzakanyan, is an example illustrating above mentioned concerns.

The disciplinary proceedings in the mentioned case have been initiated upon request of the Chairman of the Court of Cassation. In its disciplinary decision dating 24 June 2011, the Judicial Council held that the judge's decision to apply monetary bail amounted to a "severe and obvious violation of procedural law", stating that in its opinion the judge did not substantiate the substitution of pre-trial detention with monetary bail. In fact, the CCPR has stressed that Article 9(3) ICCPR requires courts to substantiate detention in the first place, rather than putting the burden of reasoning on the release on bail.¹¹⁰ The Judicial Council did not refer to particular articles of the CCP or any other law.¹¹¹ As a consequence of this disciplinary decision the judge was dismissed by the President of Armenia.¹¹²

In fact this disciplinary decision sends a signal to judges that they may face disciplinary sanctions for substituting pre-trial detention with monetary bail rather than authorising pre-trial detention or requesting motions for pre-trial detention to be substantiated with specific facts of the particular case. The dismissal of the respective judge following the application of monetary bail will in all probability further discourage judges from applying this provision.

The strikingly low percentage of application of monetary bail also supports claims that monetary bail is not an effective alternative to pre-trial detention. As displayed on the table on page 19-20, in 2007, only in 81 cases requests for substitution of pre-trial detention with monetary bail were brought, and granted in only 62 cases, as compared to 2,780 cases in which pre-trial detention was authorised. The percentage of monetary bail granted based on the number of respective applications therefore is relatively high at 76.5%, but strikingly low if considering the percentage of monetary bail in the total of cases (62 out of the 2,780 cases which representing 2.23% of authorised pre-trial detentions). In

¹⁰⁹ Code of Criminal Procedure of the Republic of Armenia, 1998.

¹¹⁰ *e. g. Michael and Brain Hill v. Spain*, No. 526/1993, U.N. Doc. CCPR/C/59/D/526/1993(2 April 1997), para. 12.3.

¹¹¹ Decision of Judicial Council of the Republic of Armenia on disciplinary actions against judge of the Court of General Jurisdiction Samvel Mnatzankanyan, 24 June 2011, chapter 5.

¹¹² Decree of the President of Republic of Armenia, 11 July 2011.

2008 and 2009, the number of requests increased from 81 to 443 and 484 respectively; however, the percentage of successful motions decreased dramatically, to 34.1% for 2008 and 38.4% for 2009.¹¹³ These numbers strongly support the view that monetary bail as a non-custodial preventive measure which in pre-trial stages can be considered only after (sic!) first having approved pre-trial detention does not constitute an effective guarantee for the right to liberty of those awaiting trial.

Absence of effective alternative measures: As a legislative inadequacy affecting pre-trial detention decision making participants also mentioned the absence of effective alternative preventive measures.

Detailed assessment of the legislation and numerous judicial decisions suggest that, while monetary bail and other alternatives to pre-trial detention are enshrined in Armenian legislation, these alternatives are conceptually flawed and hardly ever applied in practice.

According to the CCP pre-trial detention and monetary bail can be applied only to defendants (not suspects, i. e. before indictment) and require a respective motion by the competent investigator. Other preventive measures during pre-trial investigation can not be ordered by a judge, but only by the competent investigator or by the head of the inquiry body. Where applicable, monetary bail requires a respective motion of the defence lawyer, the prosecutor or the investigator and hence at the pre-trial stage cannot be applied by a judge on his/ her own initiative.

These provisions show that when courts conduct a review of pre-trial detention requests they can take one of the following decisions:

- Authorise pre-trial detention;
- Reject authorisation of pre-trial detention;
- Authorise pre-trial detention and approve the motion of the defence or prosecution to substitute pre-trial detention with monetary bail.

The fact that at the pre-trial stage judges are deprived of the option to order non-custodial preventive measures of diverse nature and on their own initiative where they consider substantial risks of absconding, committing a serious offence or interference with the course of justice, is likely to jeopardize compliance with Article 9(3) ICCPR and Article 5(3) ECHR. Judges have no choice other than to authorise pre-trial detention or to reject the respective motion, without the power to address their potential assessment of a substantial risk of absconding etc. by a preventive measure other than pre-trial detention.

At the pre-trial stage, if no respective motion has been filed by the defence or the prosecution, courts do not have the power to substitute pre-trial detention with monetary bail.

¹¹³ American Bar Association, Rule of Law Initiative, "*Detention Procedure Assessment Tool For Armenia*", April 2010, available on http://apps.americanbar.org/rol/europe_and_eurasia/armenia.html, accessed on 20 January 2011, pg.36.

Monetary Bail: It is worth mentioning that Article 5(3) of ECHR, stipulating that "...[r]elease may be conditioned by guarantees to appear for trial"¹¹⁴ has been incorrectly interpreted by the Court of Cassation as a threshold solely met by the instrument of monetary bail.¹¹⁵ This interpretation equally impacts on the interpretation of the Article 9(3) of ICCPR, which prescribes that "release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment."¹¹⁶

The current interpretation of Article 5(3) of ECHR by the Court of Cassation suggests that detainees who are not able to provide monetary sureties in practice cannot benefit from any preventive measure less intrusive than pre-trial detention, consequently raising concerns of discriminatory treatment in the context of Article 2(1) of ICCPR, in particular based on property.

Furthermore, participants mentioning inadequacies of legislation as a factor influencing excessive application of pre-trial detention emphasised the defendant's lack of funds as considerable factor in the small number of motions on monetary bail. Article 143 provides that the amount of monetary sureties cannot be less than 200 times the amount of the minimum wage when the accused is charged for petty crimes and 500 times the amount of the minimum wage for crimes of considerable gravity.¹¹⁷ The low-income level of the majority of the country's population¹¹⁸ appears to render release on monetary bail illusory in the majority of cases, and as a consequence, non-effective.

Moreover, some respondents also indicated the low percentage of representation and lack of professionalism of defence lawyers in criminal cases as another reason for the low number of motions to substitute pre-trial detention with monetary bail. Statistics regarding representation of defence lawyers in criminal cases were requested by PRI, but have not been received. Due to the complexity of the legal provisions implied, defendants without legal representation are unlikely to understand that they can file for substitution of pre-trial detention with monetary bail. Even if defendants were notified of this right, they are unlikely to be able to reason a motion with good prospects. In this context, the lack of power of judges to substitute pre-trial detention with monetary bail has an even bigger impact on the efficiency of this instrument.

An analysis of legislation on monetary bail further indicates that the instrument is flawed by inconsistent, vague and unpredictable concepts. According to Article 143(2) judges have the right to reject monetary bail, "*especially* when the identity of the accused is not known, s/he does not have a permanent address or attempted to abscond."¹¹⁹ However, in a precedent case the Court of Cassation has extended these grounds to include also those in Article 135 CCP, stating that the grounds listed in Article 143(2) are not exhaustive, the word "*especially*"

¹¹⁴ Council of Europe, 1950.

¹¹⁵ Court of Cassation of the Republic of Armenia, *Case of Taron Hakobyan*, № VB-115/07, 13 July 2007, para.3.1.

¹¹⁶ UN General Assembly, 1966.

¹¹⁷ Code of Criminal Procedure of the Republic of Armenia, 1998, Art. 143(4).

¹¹⁸ Daniel Fisher, "The Worlds Worst Economies", *Forbes*, 07.05.2011, available on <http://www.forbes.com/sites/danielfisher/2011/07/05/the-worlds-worst-economies/>, accessed on 08.07.2011.

¹¹⁹ Code of Criminal Procedure of the Republic of Armenia, 1998.

indicating that the grounds listed only illustrate cases when release on monetary bail can be refused. Thus, judges may refuse monetary bail on other grounds than those listed in Article 143(2).¹²⁰

This analysis strongly suggests that this practice fails to accurately implement international law and does not meet the required threshold in terms of determination and predictability (rule of law).¹²¹

While discussing inadequacies of legislation related to pre-trial detention and other preventive measures, it is not possible to avoid mentioning that contrary to international standards¹²² the CCP restricts the substitution of pre-trial detention with monetary bail to petty crimes and crimes of considerable gravity which means that it cannot be applied at all in cases of grave or especially grave crimes.¹²³ Although the CCP does not include a specific provision prohibiting the imposition of other non-custodial preventive measures on an accused charged with grave or especially grave crimes, it must be assumed that *argumentum a maiore ad minus* other non-custodial preventive measures are inadmissible.

Despite a ruling by the Court of Cassation that monetary bail shall be considered regardless of the severity of the charges¹²⁴ and that the gravity of crime alone shall not be considered sufficient to justify pre-trial detention¹²⁵, in the practice of courts of general jurisdiction and the Court of Appeal the gravity of incriminated offences appears to be the determining if not the sole factor. Studies conducted by other institutions have also documented the imposition of pre-trial detention on the basis of schematic decisions, without substantiation of the necessity of detention in the individual case, in particular for those charged with grave or especially grave crimes.¹²⁶

¹²⁰ Court of Cassation of the Republic of Armenia, No AVD/0022/06/08, 31 October 2008, para.36, 37. In the case of Aslan Avetisyan, the defence argued that in their decisions rejecting release of the accused on monetary bail both the court of general jurisdiction as well as the Court of Appeal had not provided reasoning based on one of the grounds listed in Article 143(2) CCP. The Court of Cassation, in response to this argument, stipulated that the grounds listed in Article 143(2) are not exhaustive and that the word "especially" indicates that the listed grounds only illustrate particular cases when release on monetary bail can be refused.

¹²¹ *Hugo van Alphen v. The Netherlands*, Communication No. 305/1988, U.N. Doc. CCPR/C/39/D/305/1988 (1990), para. 5.8.; See also *Mukong v. Cameroon*, Communication No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991, para.9.8; *Hill v Spain*, U.N. Doc. CCPR/C/59/D/526/1993, 2 April 1997, para. 12.3.

¹²² *Hugo van Alphen v. The Netherlands*, Communication No. 305/1988, U.N. Doc. CCPR/C/39/D/305/1988 (1990), para. 5.8.; See also *Mukong v. Cameroon*, Communication No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991, para.9.8; *Hill v Spain*, U.N. Doc. CCPR/C/59/D/526/1993, 2 April 1997, para. 12.3.; see also *Nikolovv Bulgaria*, , ECtHR application no. 38884/97, judgment of 30.01.2003 para.70; *Caballero v the United Kingdom*, ECtHR, application no. 32819/96, judgment of 8.02.2000, para.18-21.

¹²³ Code of Criminal Procedure of the Republic of Armenia, 1998, art.143 (4).

¹²⁴ The case of Taron Hakobyan, no. VB-115/07, judgment of 13 July 2007.

¹²⁵ The case of Aslan Avetisyan, no. AVD/0022/06/08, judgment of 31 October 2008, para.26.

¹²⁶ OSCE ODIHR, " *Final Report Trial Monitoring Project in Armenia (April 2008- July 2009)*", pg.20, available on <http://www.osce.org/odihr/81140>, accessed on 1February 2011; ABA ROLI, " *Detention Procedure Assessment Tool for Armenia*", 2010, pg. 35,37; Sona Mashuryan, " *Requests for Alternatives to Pre-trial Detention are Universally Rejected without Justification*", *Ditord Observer*(47),#10,2010,pg.4.(cross reference) According to Article 19 of the Armenian Criminal Code(2003) "grave crimes" are premeditated crimes punishable by more than five but not more than 10 years of imprisonment; "especially grave crimes" are those punishable by more than ten years or life imprisonment.

Primacy among Preventive Measures: As a legislative flaw participants also mentioned the lack of any primacy among preventive measures. In fact, the Code of Criminal Procedure fails to provide for a primacy of preventive measures less intrusive than pre-trial detention, while the international standards require that pre-trial detention can be applied only if alternative measures cannot address the risk of absconding, or committing a serious offence, or interfere with the course of justice, or pose a serious threat to public order.¹²⁷

In theory, this inconsistency would be remedied by the direct applicability and supremacy of the ICCPR and ECHR, pursuant to Article 6 of the Constitution (2005)¹²⁸. The Court of Cassation stressed that pre-trial detention is the most restrictive measure and should be applied only if other preventive measures can not ensure lawful conduct of the defendant.¹²⁹

However, a review of 82 court decisions indicated that courts predominantly base their decisions on Article 134 of CCP, and hardly ever apply or even refer to Article 5 of the ECHR, Article 9 of ICCPR or the above mentioned decision of the Court of Cassation. Therefore, it is believed that the national legal framework failed to accurately implement human rights standards¹³⁰ and ensure that pre-trial detention is imposed on suspects and defendants alike only as a measure of last resort.

Participants referring to this category also identified the lack of a greater variety of alternatives, non-custodial measures, such as conditional bail and use of electronic tagging, as a cause for the disproportionate use of pre-trial detention. However, despite of the fact that 30 out of 36 interviewees referred to legislative inadequacies as factors contributing to excessive use of pre-trial detention, all 30 respondents also specified that improvement of legislation and amendments introducing new alternative preventive measures alone would not reduce the excessive use of pre-trial detention significantly, but that measures are required to bridge the gap between law and practice.

Factors Related to Institutional Capacity of Investigative Bodies

Seventy-two per cent of the research participants specified some factors affecting the excessive use of pre-trial detention linked with institutional capacity of investigative bodies. The major factors grouped under this category are:

- Confessions and self-incriminating evidence
- Detention makes investigation manageable
- Impossibility to meet standards
- Risk assessment

¹²⁷ *Hugo van Alphen v. The Netherlands*, Communication No. 305/1988, U.N. Doc. CCPR/C/39/D/305/1988 (1990), para. 5.8.; See also *Mukong v. Cameroon*, Communication No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991, para.9.8; see also Council of Europe, Committee of Ministers (Rec.2006)13, 27.09. 2006, para.6.

¹²⁸ Constitution of Republic of Armenia, 2005.

¹²⁹ Case of Agasi Hovsepyan, judgment of 26.03.2010, EKD/0633/06/09, para.10.

¹³⁰ e. g. *Michael and Brain Hill v. Spain*, No. 526/1993, U.N. Doc. CCPR/C/59/D/526/1993(2 April 1997), para. 12.3.

Sixteen participants (44%) linked the excessive use of pre-trial detention with the goal of investigative bodies to receive confessions and self-incriminating evidence. Most of respondents mentioning this factor were civil society activists, defence lawyers and legal scholars. However, some investigators and a judge also linked excessive use of pre-trial detention with confessions and self-incriminating evidence. In the words of participants most of the cases are based on confessions and self-incriminating evidence, because investigative bodies do not have enough high skilled staff and technical capacity to collect incriminating evidence for achieving convictions. Moreover, police and investigative bodies are assessed on the basis of crime clearance rates, so a low clearance rate can result in the dismissal of high ranked executives. Thus, investigative bodies use every method to achieve confessions. Pre-trial detention is quite an effective tool to put pressure on defendants due to poor conditions and the use of torture and ill-treatment in detention.¹³¹

This factor was most commonly referred to by defence lawyers, civil society activists and legal scholars. However, some investigators also acknowledged that pre-trial detention sometimes is used as a tool to get confessions. An investigator stated, "I think that pre-trial detention is often very useful to break the resistance of suspects and get confessions."¹³²

Many civil society activists and defence lawyers in their interviews described an incident when during a discussion with the Prosecutor General of the Republic of Armenia stated that suspects would not confess if not detained and referred to the case of Charentzavan police officers who confessed of beating a suspect after detention.¹³³

Even though investigators, prosecutors and judges mostly did not link excessive use of pre-trial detention with confessions, many of them (41%) stated that pre-trial detention is not an exceptional preventive measure in Armenia and it helps to keep investigation under control, to investigate thoroughly and to reduce the risks of fleeing, and/ or intervening with course of justice.¹³⁴

Moreover, a prosecutor stated that it is incontestable that pre-trial detention is in the interest of investigative bodies, because it helps to keep all new developments in a case under control, which is perceived impossible if non-custodial preventive measures were applied.¹³⁵

Investigators further argued that the threshold for standards regarding the use of pre-trial detention was set very high and as it was not possible to meet those standards, they did not follow them in practice. The common view in this group was that if the ECHR standards were implemented in practice, pre-trial detention would only be permissible for very few suspects and most of them would get away unpunished.¹³⁶

¹³¹ Interview with a judge 25 June 2011; also interviews with investigators, defence lawyers and civil society activists June-July 2011.

¹³² Interview with a police pre-trial investigator, 1 July 2011.

¹³³ Interviews with defence lawyers and civil society activists, June-July 2011, International Federation for Human Rights, '*Death of a suspect at the Charentzavan Police Department*', <http://www.fidh.org/Death-of-a-suspect-at-the>, accessed 20 June 2011.

¹³⁴ Interview with judges, prosecutors and investigators, June-July 2011.

¹³⁵ Interview with a senior prosecutor 17 July 2011.

¹³⁶ Interview with investigators, June-July 2011.

A narrow margin of participants further argued that prosecutors and investigators should assess the risk of fleeing, interfering with the course of justice and committing another crime and if this was done properly, pre-trial detention would not be excessive.¹³⁷

Other studies also reflected on the issue of institutional capacity of investigative bodies in relation to excessive use of pre-trial detention. According to an ABA ROLI report a lack of resources such as experienced investigators and technology makes the collection of evidence dependent on the use of detention as a tool to extract confessions and other self-incriminating evidence in order to secure convictions.¹³⁸

In addition to international treaties (ICCPR, CAT, ECHR) ratified by Armenia, the use of torture and other ill-treatment is explicitly prohibited by Armenian legislation.¹³⁹ However, the European Committee for the Prevention of Torture (hereinafter CPT) and other organisations have repeatedly and consistently documented the use of torture and other ill-treatment by law enforcement bodies in Armenia. For instance, the CPT has documented the use of torture and other ill-treatment in pre-trial detention in every report on visits to Armenia since the country joined the Council of Europe. The reports stated that torture and other ill-treatment in detention had been used in order to extricate confessions and self-incriminating evidence.¹⁴⁰

The claims by investigators that in the current situation it is not possible to meet standards in relation to pre-trial detention is corroborated by the accounts of other interviewees on the institutional incapacity of investigative bodies.

As to risk assessments, apart from the factors which shall be taken into account while making a decision on the necessity of imposition and the type of preventive measures¹⁴¹ it was not possible to find any regulation of risk

¹³⁷ Interview with a senior prosecutor 13 June 2011.

¹³⁸ ABA ROLI, "Detention Procedure Assessment Tool for Armenia", 2010, pg.19, http://apps.americanbar.org/rol/europe_and_eurasia/armenia.html, accessed on 20 January 2011.

¹³⁹ Police law of the RA 2001, Art.5, Penal Code of the RA 2003, Art. 119.

¹⁴⁰ Resolution 1609(2008), "Functioning of Democratic institutions in Armenia", Parliamentary Assembly of the Council of Europe, 17 April 2008, para.6.3; see also ; European Committee on Prevention of Torture and Inhuman Degrading Treatment or Punishment(hereinafter CPT), Report to the Armenian Government on the visit to Armenia on 10-21May 2010, pg.16-20, available on <http://www.cpt.coe.int/documents/arm/2011-24-inf-eng.pdf>, accessed on 2 September 2011; CPT, Report to the Armenian Government on the visit to Armenia on 15-17 March 2008, pg.12-18, available on <http://www.cpt.coe.int/documents/arm/2010-07-inf-eng.pdf>, accessed on 2 September 2011; CPT, Report to the Armenian Government on the visit to Armenia on 2-12 April 2006, pg.12-16, available on <http://www.cpt.coe.int/en/states/arm.htm>, accessed on 2 September 2011; CPT, Report to the Armenian Government on the visit to Armenia on 20-22 April 2004, pg.9-13, available on <http://www.cpt.coe.int/en/states/arm.htm>, accessed on 2 September 2011; CPT, Report to the Armenian Government on the visit to Armenia on 6-17 October 2002, pg.18-22, available on <http://www.cpt.coe.int/en/states/arm.htm>, accessed on 2 September 2011; UN Committee Against Torture, Concluding Observations of the Committee against Torture: Armenia, 17.11.2000, para. 37(c); Sona Mashuryan, "Requests for Alternatives to Pre-trial Detention are Universally Rejected without Justification", *Ditord Observer*(47),#10,2010,pg.8.; ABA ROLI, "Detention Procedure Assessment Tool for Armenia", 2010,pg.20-22; OSCE ODIR, "Final Report Trial Monitoring Project in Armenia(April 2008- July 2009)", pg. 84-87, available on <http://www.osce.org/odihr/81140>, accessed on 1February 2011.

¹⁴¹ Code of Criminal Procedure of RA 1998, Art. 35(3)

assessment in relation to application of pre-trial detention in Armenian legislation. It can be assumed in this field that risk assessment is not known as a distinct type of professional activity and is conducted in an *ad hoc*, unregulated way without using a validated risk assessment tool.

Conclusion and Recommendations

This study contributes to OSJI Global Campaign for Pre-Trial Justice by revealing, examining and incorporating expert views and perceptions on the underlying causes of the excessive use of pre-trial detention and the insufficient application of non-custodial preventive measures in Armenia.

As it was pointed out in the introduction, the issue of excessive use of pre-trial detention in Armenia has been examined also in other studies. The present research, in contrast to those studies, aims to reveal the underlying causes of the excessive use of pre-trial detention by disclosing and examining factors affecting this reality. It seeks to explain the current situation with excessive use of pre-trial detention and the insufficient application of non-custodial preventive measures and to make recommendations for parties interested in improving the current situation.

However, as this study revealed, throughout the period of 2005-2010 pre-trial detention in Armenia has been used in excessive and unnecessary ways. This research has indicated that underlying causes for this phenomenon are corruption, the absence of independent judiciary and of the rule of law, legislative shortcomings and of institutional incapacity of investigative bodies to solve criminal cases without relying on the unnecessary and excessive use of pre-trial detention.

It should be noted that practices related to the use of pre-trial detention, such as issuance of schematic, template decisions, justifying pre-trial detention by virtue of the gravity of the crime etc, which have been documented previously for cases related to post election violence,¹⁴² were also established within the current study. This strongly suggests that the mentioned factors were relevant not only for “politically sensitive” cases, but in general. This indicates that the causes identified rather are of a systematic nature.

Armenia has international obligations under ICCPR and ECHR to respect the right to liberty and to limit the use of pre-trial detention to cases where the use of less coercive preventive measures would fail to prevent absconding, interference with the course of justice or the commission of a serious crime¹⁴³. In order to meet these obligations and to overcome the current excessive use of pre-trial detention, the following measures are recommended to the Armenian government:

1. Take steps to ensure the independence of judges and to prevent unwarranted interference of any party including high courts with the judicial process.

¹⁴² OSCE ODIR, “ *Final Report Trial Monitoring Project in Armenia(April 2008- July 2009)*”, <http://www.osce.org/odihr/81140>, accessed on 1February 2011.

¹⁴³ *Michael and Brain Hill v. Spain*, No. 526/1993, U.N. Doc. CCPR/C/59/D/526/1993(2 April 1997), para. 12.3.; see also *Hugo van Alphen v. The Netherlands*, Communication No. 305/1988, U.N. Doc. CCPR/C/39/D/305/1988 (1990), para. 5.8.; See also *Mukong v. Cameroon*, Communication No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991, para.9.8; see also Council of Europe, Committee of Ministers (Rec.2006)13, 27.09. 2006, para.6.

2. Ensure that pre-trial detention is imposed only as a measure of last resort and take measures in order to prevent the automatic use of pre-trial detention during criminal investigations, decided on a case-to-case basis and reasoned based on the facts of the case.
3. Ensure application of law in line with international human rights law, including the ECHR as interpreted by the ECtHR, in particular with regard to the interpretation of Article 5(3) ECHR and to prevent any discriminatory application of the law in line with Article 2(1) of ICCPR.
4. Inquire, including through the collection of detailed statistical data, why currently very few defendants benefit both from bail (non-custodial preventive measures) and monetary bail (substitute measure for pre-trial detention).
5. Initiate the issuance of instructions or guidelines with regard to the application of monetary bail so ensure consistent application by courts.
6. Take steps to decrease the reliance on confessions and self-incrimination and increase the capacity of law enforcement bodies to collect evidence using forensic methods and permissible surveillance techniques.
7. Take measures to counter any mentality of investigators, prosecutors and judges undermining the presumption of innocence and ensuring unbiased criminal investigations.
8. Increase financial and professional capacity of investigative bodies and refrain from assessing the police on the basis of crime clearance statistics.

With regard to legislation:

1. To ensure that any new Code of Criminal Procedure complies with European and international human rights standards, in particular with regard to the requirements for the lawfulness of pre-trial detention.
2. To develop and introduce new effective non-custodial alternatives to pre-trial detention.
3. Amend legislative provisions with regard to monetary bail and ensure it can be applied as a non-custodial preventive measure without the requirement of prior approval of pre-trial detention.
4. Introduce new legislative provisions allowing judges to apply preventive measures other than pre-trial detention in order to address their potential assessment of a substantial risk of absconding etc. rather than leaving them with only choice to authorise pre-trial detention or to reject the respective motion.

End/