
Promoting the Reform of Pre- trial Detention in CEE-FSU Countries – Introducing Good Practices

Hungarian Helsinki Committee



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1. Introductory note

1.1. About the project

This study was compiled under the auspices of the project: “Promoting the Reform of Pre-Trial Detention in CEE-FSU Countries – Introducing Good Practices”, supported by the Open Society Foundations.

The purpose of this project is to undertake a regional capacity-building and network-building initiative on pre-trial detention (PTD) to encourage advocacy efforts to challenge PTD practices in Central and Eastern Europe and the Former Soviet Union (CEE-FSU) region, to produce comparative research on PTD in these countries and to facilitate an exchange of experiences among the NGOs participating in the project.

The project is implemented by the Hungarian Helsinki Committee (HHC) with the assistance and supervision of the Steering Committee (SC). The SC is an advisory body on whose expertise the HHC drew on while implementing project activities. The SC participated in establishing the scope of the project, formulating the questionnaire and also in processing the acquired data and writing the resulting study. The SC members are: Borislav Petranov, Senior Advisor, OSF- Rights Initiative; Martin Schöenteich, Senior Legal Officer, OSF - Open Society Justice Initiative; András Kádár, Co-Chair, Hungarian Helsinki Committee; Zaza Namoradze, Director, Budapest Office OSF - Open Society Justice Initiative; Herta Tóth, Senior Program Manager, Human Rights and Governance Grants; Dávid Vig, Program Coordinator, Human Rights and Governance Grants; Zsófia Moldova, Legal Officer, Hungarian Helsinki Committee.

In the framework of this project the Hungarian Helsinki Committee, partnered with 15 NGOs and human rights defenders from the CEE-FSU region. They are: the Albanian Helsinki Committee – Ma.Av. Etilda Gjonaj (Saliu); Georgi Bankov member and coordinator - Bulgarian Helsinki Committee ; League of Human Rights (Czech Republic) – Maroš Matiaško; Georgian Young Lawyers Association – Ekaterine Popkhadze, Eka Khutsishvili, Maia Khutsishvili, Mikheil Ghoghadze, Tinatin Avaliani; Penal Reform International (Kazakhstan) – Zhanna Malayeva; The Kosova Rehabilitation Centre of Torture Victims – Alban Muriqim; Latvian Centre for Human Rights – Ilvija Pūce; Human Rights Monitoring Institute (Lithuania) – Karolis Liutkevičius; Institutul de Reforme Penale (Moldova) – Igor Dolea, Victor Zaharia; Human Rights Action (Montenegro) – Marko Ivković and Jelena Sapurić; Helsinki Foundation for Human Rights (Poland) – Maria Ejchart, Katarzyna Wiśniewska, Marcin Wolny; The Romanian Group for the Defence of Human Rights (GRADO) – Cristina Banciu; Public Verdict Foundation (Russia) – Natalia Taubina; Belgrade Centre for Human Rights – Jovana Zoric, Nevena Dicic Kostic, Nikola Kovacevic; Foundation for Society and Legal Studies (TOHAV), Turkey) – Sevgi Epeçeli Arslan; Ukrainian Legal Aid Foundation – Aigul Mukanova.

This project consists of both a research component and an advocacy one. The research component consists of a broadresearch project analyzing the legislation and practice governing pre-trial detention in the CEE-FSU region.

The preliminary research results were presented at a three-day workshop held in Budapest, between 28-30th of November 2012. This event brought together the researchers who worked on the study, HHC staff, SC members and experts in the field of criminal justice. At this event, the preliminary research results were presented and discussed. Participants and experts provided their input and shared their expertise. This event also focused on developing concrete strategies to address human rights concerns presented by pre-trial detention.

The input and comments that arose during the three-day workshop have been included in the study. Also, the comments of research participants on the draft study have been incorporated into the final study. Finally the study received input from the SC.

1.2. About the study

The research was carried out through a standardized questionnaire put together by a number of HHC experts. In developing the questionnaire, the HHC drew from previous research projects, such as “Promoting independent prison complaints mechanisms in CEE-FSU – Introducing good practices”, a study conducted by the HHC for which a questionnaire was also developed. The SC, OSF staff and a number of participating NGOs also contributed greatly to development of the questionnaire. They were consulted during the drafting process, and their input is reflected in the questionnaire.

The questionnaire takes a holistic approach to analyzing PTD and alternatives to PTD. It looks at both the legislation and practice; it looks at statistics and opinions and incorporates desk research as well as field research. The questionnaire combines quantitative and qualitative types of data and gathers both snapshot and flow statistics. This allows for the clearest possible picture of the legislation and practice concerning PTD and alternatives to PTD in the countries examined. Furthermore, it is designed to highlight good practices as well as those practices that do not live up to applicable international standards.

The questionnaire begins by presenting the scope of the research project and then defines the terminology used, in particular what is understood, for the purpose of this study, by PTD and alternatives to PTD. The principle objective of the questionnaire was to gather the following:

- General information about the country, its legal system and most importantly, the costs of implementing PTD;
- Statistical information for the years 2000, 2009, 2010 and 2011 concerning PTD and its alternatives; and
- Specific safeguards provided in each country at different stages of PTD, namely when ordering placement in PTD, when executing PTD and during the judicial review process, if any.

Furthermore, the questionnaire gives special consideration to particularly vulnerable groups. A number of other issues, such as state-funded legal aid, psychiatric detention and detention ordered for national security offences are also briefly considered.

Based on NGO responses to the questionnaires, the HHC compiled the present study, which outlines the legislation and practices of countries in the CEE-FSU region with respect to pre-trial detention and its alternatives.

This study examines the following aspects of pre-trial detention:

- Living conditions while in detention
- Rights while in PTD (access to a lawyer, translator)
- Vulnerable groups
- Procedural requirements when ordering PTD
- Duration of PTD
- Review of pre-trial detention
- Appealing PTD
- Deduction/compensation for time spent in PTD

- State-funded legal aid
- Advocacy tools that have proved efficient in working on PTD reform

For each of these aspects the study identifies the applicable international standards, as specified in both Council of Europe and United Nations body of principles, rules and jurisprudence. The study then examines the data collected in light of these international standards: first, the particular legal authorities that regulate a given issue in CEE-FSU countries and second, the way these laws play out in practice. Where appropriate, the study also highlights relevant examples of specific practices, both positive and negative, from a range of countries.

1.3. International workshop

As part of the implementation of this project, the HHC organized a three-day workshop building on the key findings of the research. The workshop took place in Budapest between 28-30 November 2012.

Forty-one experts participated in the workshop, including representatives of the NGOs that worked on country-specific research, SC members, OSF experts and staff members and HHC staff. The event also brought together a number of international experts on PTD.

The workshop focused primarily on the results of the study and the research process. It drew extensively on a comparative analysis of the countries from the CEE-FSU region and also highlighted concrete examples from particular countries. Comments and suggestions received at the workshop were incorporated into the present study.

In addition to discussing the study and its methodology, the workshop explored ongoing debates surrounding PTD practices and potential avenues of NGO participation in reform efforts. It examined how strategic litigation and detention monitoring can be applied to promote reform. The workshop also drew on examples of reform and methods of promoting reform from both the CEE-FSU region and globally— within the context of the Global Campaign on PTD.

On the final day, participants worked in three thematic groups discussing concrete ways in which to influence policy and legislative reform in relation to PTD. The main findings from these discussions were:

a) Group one: *Changing judicial attitudes and promoting the use of alternatives to PTD*

This group explored ways in which to change judicial attitudes in applying PTD and alternatives to PTD. The main ideas that came out of the discussion were:

- The necessity of familiarizing judges with detention conditions through visits to detention facilities
- The benefits of having judges with experience as lawyers, so as to expose them to the other side of the “bench”
- The need to involve more actors, such as media, civil society and the Constitutional Court, in lobbying for alternatives to PTD
- The benefits of lectures, studies, and study-visits
- The need to create institutional incentives against the use of PTD, and deterrents for the excessive use of PTD.

b) Group two: *Obtaining statistical data*

This group explored ways in which to obtain more accurate statistical information concerning the use of PTD and alternatives to PTD. The main ideas that came out of the discussion were:

- The need to identify a fixed set of data that is easily kept and comparable.
- The benefits of using online platforms to store this data
- The need to partner with external bodies in lobbying for this data to be released
- The need to make use of access to information laws to convince state officials to keep data of public interest and share it

c) Group three: *Implementing international jurisprudence*

This group explored ways in which to implement international jurisprudence into national legislation and practice. The main ideas that came out of the discussion were:

- Training to various target groups (journalists, decision-makers) can be effective in raising awareness on international standards, prison and particularly PTD conditions
- Training of judges of different levels – both judges of first and second instance – proved to be an efficient tool.
- Pre-accession countries often rely heavily on the potential critics from “Brussels”; this can be an efficient tool to implement European jurisprudence and apply European standards.
- Strategic litigation is a good and sometimes an effective tool; it can, however, be expensive and time consuming.
- NGOs might participate in the meetings of key stakeholders (i.e. ombudpersons, or parliamentary commissions responsible for human rights issues) and share international experiences, standards, and jurisprudence; different levels of cooperation might be an effective tool for promoting international standards.

1.4. Terms and definitions

The following terms and definitions were used for the purposes of this study

Total prison population – Total number of adult and juvenile prisoners (including pre-trial detainees) on 1 September (or nearest available date – if different from 1 September, please specify). Including offenders held in Prison Administration facilities, police detention facilities, other facilities and juvenile offenders' institutions. Psychiatric detention and detention relating to national security offences will not be counted in the total prison population as they will be dealt with separately.

PTD – for the purpose of this study we shall consider PTD any period in which a person is deprived of their liberty, on the basis of an order by a competent national authority, before a final and definitive judgment is passed on the given person's responsibility for violating a legal norm. This encompasses any period of detention, before, during and after trial proceedings, even after the first instance decision until the decision becomes final and definitive. It applies to any form of detention, including criminal, petty offence and administrative. Synonyms for PTD are: preventive detention and remand in custody. It does not apply to short term custody and to detention following a final and definite judgment. Psychiatric detention and detention relating to national security offences will not be counted as they will be dealt with separately

Alternatives to PTD – any non-custodial measures applied before the passing of a final and definitive judgment. It can include, but is not limited to the following:

- undertaking not to interfere with the course of justice;
- undertaking not to engage in particular conduct (such as: consuming drugs or alcohol, carry a weapon, driving vehicles, not to exercise a certain job);
- guarantees from an entity or person;
- supervision by an agency or designated individual;
- obligation to report to the police and/or judge;
- electronic monitoring;
- requirement not to reside at a specific address/not to change residence without permission;
- requirement to surrender one's passport or other identification documents;
- bail (securing financial or other forms of guarantees as to conduct pending trial);
- requirement to undergo medical or other treatment;
- house arrest;
- victim-offender mediation;
- restraining order;
- conditional suspension of PTD

Short term custody – Detention following initial police arrest for which no detention order has been issued by a competent authority.

Psychiatric detention – Detention for offenders with psychological and/or psychotic disorders who were considered as non-criminally liable by the court, held in psychiatric institutions, hospitals or special sections inside penitentiary institutions

Criminal charge – In determining whether certain charges are criminal or not please consider the following criteria: the classification in domestic law, the nature of the offence, the purpose of the penalty and the nature and the severity of the penalty. Please note that if the penalty for an offence is deprivation of liberty that offence is generally considered criminal, irrespective of how it is defined domestically. Also, when a sanction is meant to be a form of punishment then the offence is generally considered criminal and not administrative.

2. Statistical data

It should first be noted that collecting data and presenting it in a comparable manner is a very challenging task, especially when the research concerns criminal statistics. Numerous factors exist which pose significant hardships. Most importantly, countries often adopt different definitions and emphasize different indicators when collecting and publishing data. Accordingly, though national researchers were provided with the applicable definitions of the relevant terms, most importantly detention and pre-trial detention (“PTD”), it was sometimes impossible to deduce comparable data from official statistics. Secondly, countries also employ different start and end dates for data collection. The national researchers in this study were asked to report data as of 1 September of each year. However, many indicated that data was available only as of 31 December or 1 January. As a result, it proved difficult to obtain comparable data. Consequently, all statistical data should be read and interpreted with caution.

Nonetheless, it is still critical to collect and compare data on PTD. This data allows for an overview of the criminal justice system and its policies. It is also very useful in identifying problems and advocating for solutions in terms of the use of PTD. Moreover, despite all the obstacles encountered in collecting and comparing the relevant information, the resulting

statistics still have a lot to say about the basic characteristics of PTD systems and penal policies in the countries examined. It is safe to conclude the following: Pre-trial detainees still represent a significant portion of the prison population in Central and Eastern Europe and in the countries of the former-Soviet Union: the exact percentage ranged from 10 to 40 percent in 2011. Alternatives to pre-trial detention are underused in the region, despite the high costs PTD represents for national budgets. It is a deeply worrying trend – though not a new one – that courts approve the motions of police officers and prosecutors to order PTD almost automatically, without assessing the individual circumstances of the case. In every country studied the ratio of these motions approved is higher than 80 percent, in some cases even 90 percent or higher. Detailed and more inclusive data are presented in the charts below. Where data was unavailable from a particular country, it has been indicated below the respective table or figure.

Figure 1: Total population of detainees 2009-2011

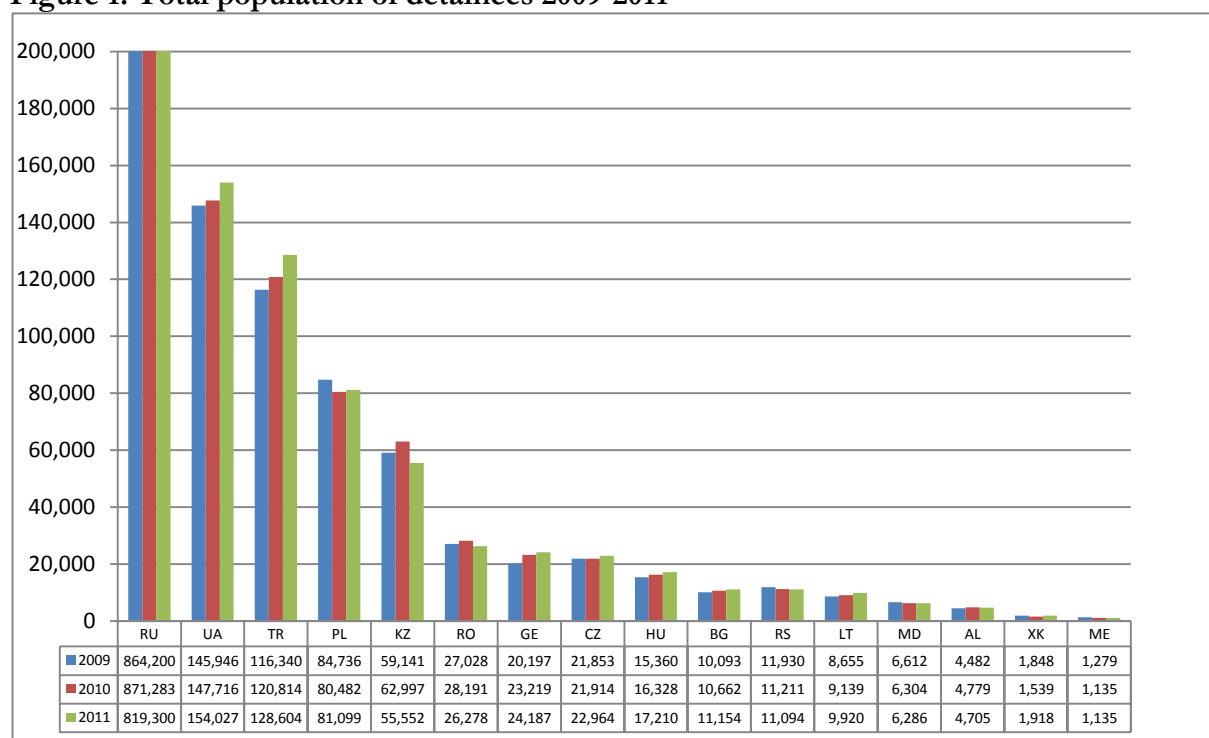


Figure 1 indicates the total number of persons detained, including both convicted and pre-trial detainees, but also individuals subjected to other types of detention. The country with the highest number of detainees is Russia by far (819,300 persons in 2011), though it should be added that their numbers seem to be decreasing. Ukraine and Turkey likewise had a detention population of over 100,000 in all three years examined, and statistics show that the number of detainees in these countries is unquestionably rising. Kosovo and Montenegro have the lowest number of detainees, both under 2,000. These statistics were weighed against the size of the population for the year 2011 in Figure 2 more indicative of relative detention rates.

Figure 2: Number of detainees per 100,000 inhabitants in 2011

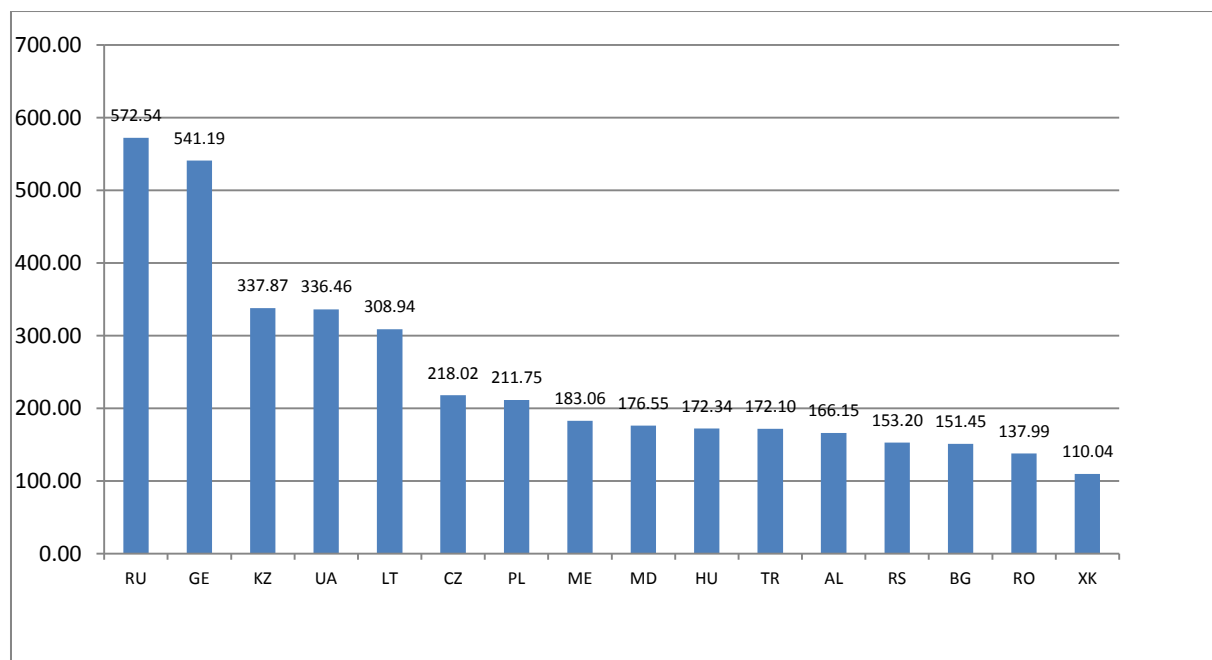
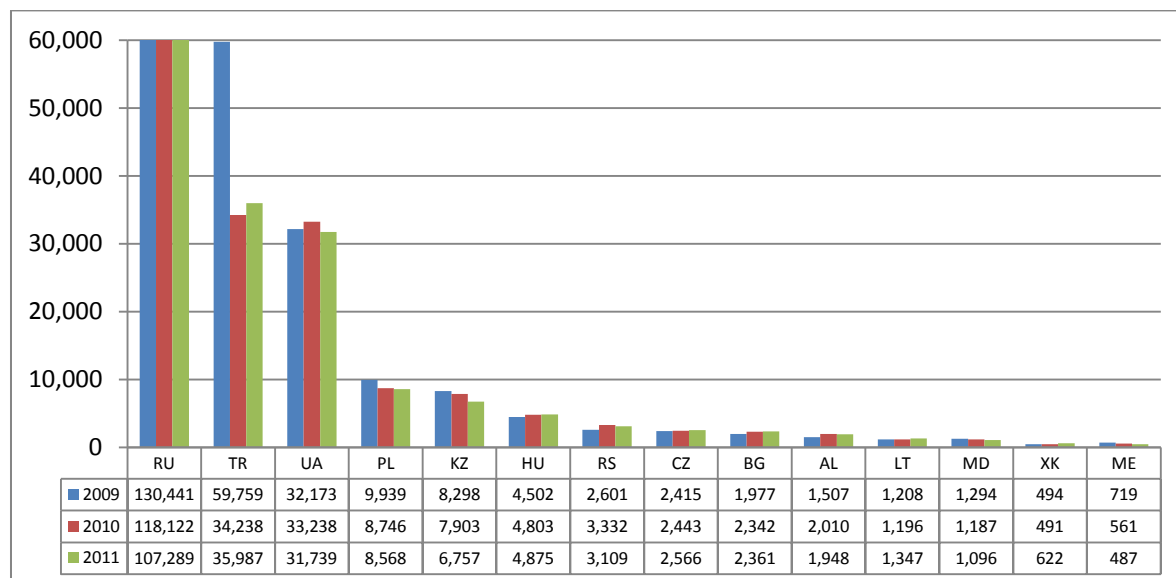


Figure 2 indicates the number of detainees per 100,000 inhabitants for year 2011. Correlating detention rates with population size reveals a markedly different picture. While Russia still leads the region with 572.5 detainees per 100,000 inhabitants, Georgia follows close behind with 541 detainees per 100,000 residents. The following three countries lock up more than 300 persons for every 100,000 inhabitants: Kazakhstan (337.9), Ukraine (336.5) and Lithuania (308.9). The countries with the lowest number of persons locked up relative to the size of the population are Serbia (153), Bulgaria (151), Romania (138) and Kosovo (110).

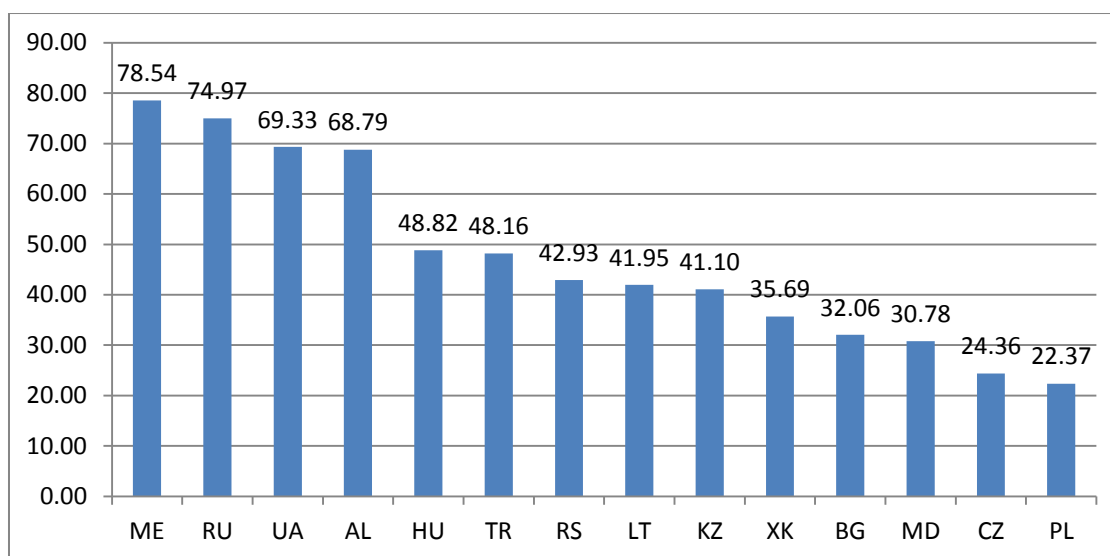
Figure 3: Total population of pre-trial detainees 2009-2011



Data not available: Georgia and Romania.

Unsurprisingly, the countries with the highest and lowest absolute numbers of pre-trial detainees overlap those with the highest and lowest total prison population with only minor changes in the order. However, looking at this data for year 2011 relative to the size of the population reveals significant differences.

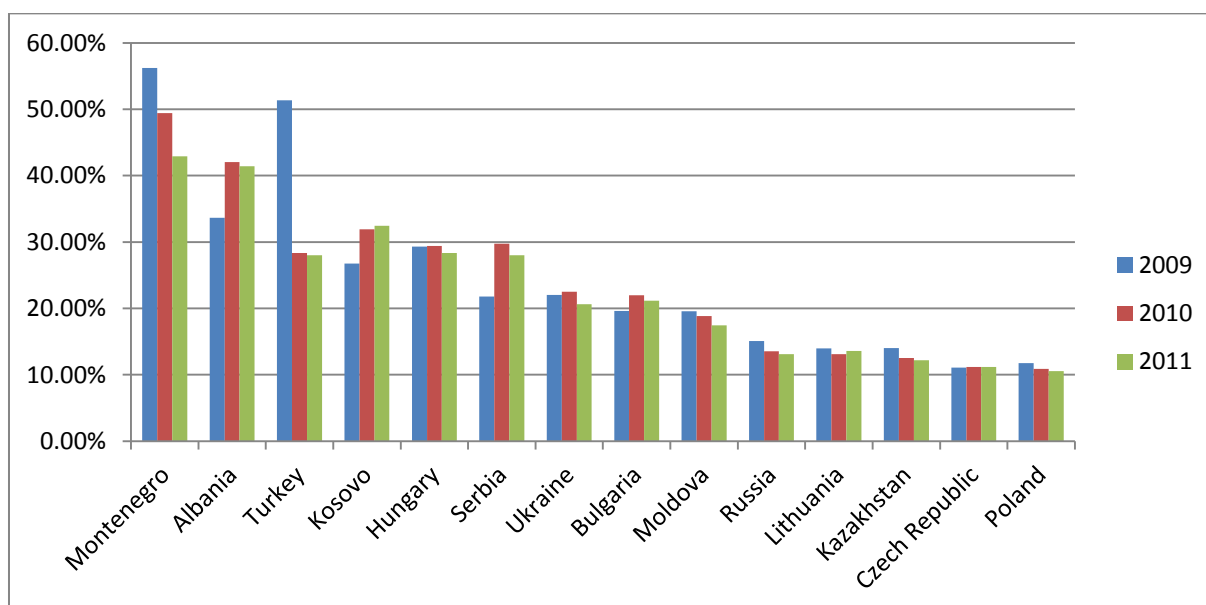
Figure 4: Number of pre-trial detainees per 100,000 inhabitants



Data not available: Georgia and Romania.

Montenegro tops the list, with 78.5 persons held in PTD for every 100 000 inhabitants; Russia, Ukraine and Albania follow closely. The relative number of those detained without a conviction is lowest in the Czech Republic and Poland. Thus, though the Czech Republic was leading the middle of the pack with regards to the relative number of total detainees, it comes second to last when examining the number of pre-trial detainees relative to the size of the population.

Figure 5: Ratio of pre-trial detainees in the total detention population



Data not available: Georgia and Romania.

Figure 5 mirrors the findings of Figure 4. The relative number of PTD prisoners is highest in Montenegro and Albania, where the number of persons detained without a final judgment by a competent court is above 40 percent. The countries with the lowest ratio are the Czech Republic and Poland, with figures just above 10 percent. In the European Union as a whole, the same figure was 21% in 2010/2011.¹

¹ Council of Europe Annual Penal Statistics (SPACE I), Percentage of pre-trial detainees in the EU prison population 2010/11 available at

Figure 6: Cost of PTD per person per day

Cost of PTD per person per day	Years				
Countries		2009	2010	2011	3 years AVG
Czech Republic		34,81 €	33,32 €	30,75 €	32,96 €
Kosovo		30,00 €	30,00 €	30,00 €	30,00 €
Hungary		28,00 €	27,00 €	26,00 €	27,00 €
Russia	N/A		21,92 €	21,92 €	21,92 €
Poland		17,72 €	18,60 €	19,14 €	18,49 €
Albania		15,60 €	17,50 €	19,80 €	17,63 €
Lithuania		16,61 €	14,24 €	13,67 €	14,84 €
Turkey		10,75 €	14,33 €	18,36 €	14,48 €
Kazakhstan		6,40 €	8,30 €	8,00 €	7,57 €
Moldova		6,31 €	6,46 €	7,25 €	6,67 €
Ukraine		1,26 €	1,63 €	1,73 €	1,54 €

Data not available: Georgia, Russia and Kosovo

Analyzing the cost of PTD is a crucial point in the debate over alternative measures to PTD. The per diem costs of PTD per person vary considerably. In the Czech Republic the money spent on pre-trial detainees is more than 30 euros per day, while in Ukraine this amount is only 1.5 euros.

Table 1: Number of motions for placement in pre-trial detention filed and approved (2011)

Country	Filed	Approved
Bulgaria	4,706	3 866
Czech Republic	4,587	N/A
Georgia	6,948	6,558
Hungary	6,245	5,712
Kazakhstan	14,246	13,404
Moldova	3,306	2,674
Poland	25,452	22,748
Romania	10,564	8,982
Russia	152,028	135,850
Ukraine	45,700	39,700

Table 2: Motion success rate

Country	2009	2010	2011
Bulgaria	83.37%	84.01%	82.15%
Czech Republic	0.00%	0.00%	0.00%
Georgia	94.10%	92.56%	94.39%
Hungary	93.81%	92.60%	91.47%
Kazakhstan	97.84%	95.00%	94.09%
Moldova	83.98%	85.61%	80.88%
Poland	89.43%	89.77%	89.38%
Romania	87.52%	86.22%	85.02%
Russia	N/A	89.94%	89.36%
Ukraine	86.70%	87.83%	86.87%

Data not available: Albania, Kosovo, Montenegro, Serbia and Turkey.

Tables 1 and 2 indicate an extremely worrying tendency. These numbers suggest that courts are likely to approve all motions for placement in PTD submitted automatically. Statistics from Hungary, Georgia and Kazakhstan are particularly shocking. In all three countries, the ratio of approved motions for placement in PTD was higher than 90 percent. Decreases in this trend can be clearly identified only in Romania.

However recent reports from Georgia suggest that this may also be the case there. The Georgian Young Lawyers' Association (GYLA), which routinely monitors court hearings noticed a change since the parliamentary elections from October 2012 in Georgia.² GYLA detected, for the first time since it began monitoring court hearings, cases when the court rejected the prosecution's motion for pre-trial detention and instead granted bail. Also, there were cases in which the court set bail at an amount less than what was requested by the prosecution, which is also very unusual.

In Lithuania the state only keeps data on the aggregate number of both motions for placement in PTD and for prolongation of PTD filed. Thus it is impossible to separate out data specifically regarding how many motions for placement in PTD were filed in a given year. Nonetheless, the success rate for both types of motions exceeded 95% in 2010 and 2011.

Table 3: Pre-trial detention lasting more than 1 year

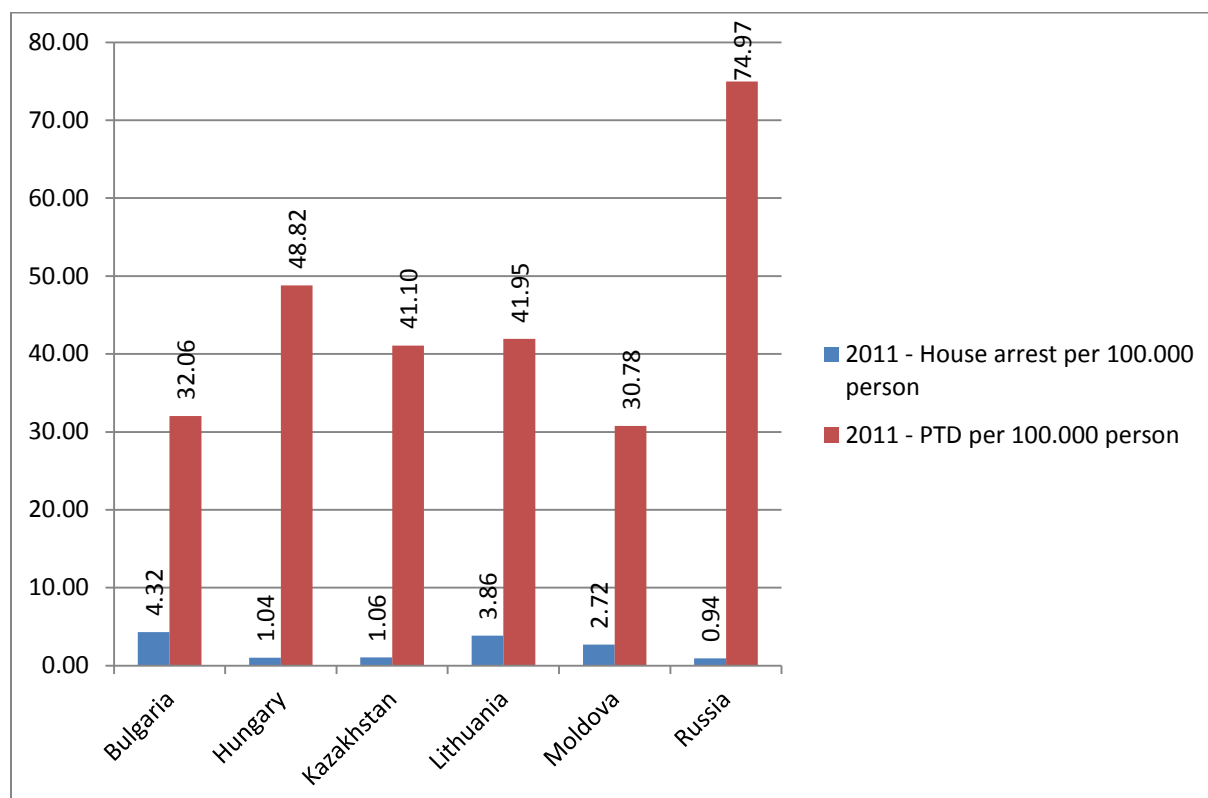
Country	2000	2009	2010	2011
Czech Republic	2	0	0	12
Hungary	128	172	243	274
Montenegro	31	46	21	10
Poland	N/A	2,344	2,149	2,088

No data available from the rest of the countries surveyed.

² "Monitoring criminal trials in Tbilisi and Kutaisi city courts" Monitoring report # 3, period covered: July-December 2012, Georgian Young Lawyers' Association

Unfortunately data was only obtainable in 4 of the countries surveyed. In the Czech Republic, in 2009 and 2010 there were no PTD detentions lasting for more than a year. However, there was an unfortunate change in this trend in 2011, when 12 such detentions occurred. The study revealed bad practices in Hungary and Poland, though the latter appears to be improving. Statistics show that in 2011, 5.62 percent of pre-trial detainees in Hungary were kept in detention for more than a year; this figure was 3.42 in Poland. Due to lack of data, it is impossible to establish any general trends regarding long-term PTD rates in Central and Eastern Europe; this would be a critical topic for further study.

Figure 7: Number of house arrests and pre-trial detainees per 100 000 inhabitants



Data are not available from the rest of the countries.

Information regarding alternatives to PTD is largely unavailable, as official data either does not exist or is hard to obtain. However, it is clear even from the data provided that alternatives to PTD are underused in the countries represented. The most frequently ordered alternative measure is house arrest – the likelihood remains much higher that an individual will be subjected to PTD than house arrest. In Russia, this outcome is 75 times more probable, and in Hungary and Kazakhstan, it is 40 times more likely.

3. Living conditions

3.1. Separating pre-trial detainees from prisoners

International standards

Both the Council of Europe³ and the United Nations⁴ have recognized the need to house pre-trial detainees separately from convicted prisoners.

This is also set out in a special provision in the International Covenant on Civil and Political Rights (“ICCPR”):

Article 10(1) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

(a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

The United Nations Human Rights Council (“HRC”) has interpreted this provision to conclude that the failure to segregate a pre-trial detainee from a convicted prisoner can lead to a violation of the ICCPR.⁵

The requirement to segregate pre-trial detainees is linked to the fact that they have not been convicted of any offence and consequently enjoy the right to a presumption of innocence.⁶

Research results

In all of the countries participating in this study, the law provides that pre-trial detainees must be held separately from the rest of the prison population. This requirement is generally observed; Georgia was the only country where researchers indicated significant failures to observe this requirement.⁷

In some countries, pre-trial detainees are kept in special sections of facilities which also hold prisoners;⁸ in other countries they are kept in completely separate buildings;⁹ while still other countries employ both separate institutions and special sections of prisons.¹⁰

3.2. Conditions of detention

International standards

According to the ECtHR, poor detention conditions may fall under the ambit of Article 3 of the Convention, provided that a “minimum level of severity is achieved”.¹¹ In that regard, well-established ECtHR case law calls on states to ensure that the individual is detained in conditions

³ Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, article 18.8 (a)

⁴ The Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, 1988, principle 8; The Standard Minimum Rules for the Treatment of Prisoners, 1955 Art. 8.(b)

⁵ *Albert Wilson v. Philippines*, Communication No. 868/1999, 30 October 2003, para. 7.3; see also: *Fongum Gorji-Dinka v. Cameroon*, Communication No. 1134/2002, 17 March 2005, para. 5.3

⁶ Human Rights Committee, General Comment No.21, Article 10, U.N. Doc. HRI/GEN/1/Rev.1 at 33 (1994), para 9.

⁷ *sagarTvelos saxalxo damcveli*, Public Defender of Georgia, special report of monitoring in penitentiary establishments and pre-trial detention isolators, 1st half of 2011, pp. 216.

⁸ Bulgaria, Hungary, Romania, Serbia

⁹ Russia, Ukraine

¹⁰ Albania, Czech Republic, Kazakhstan, Lithuania, Poland, Turkey

¹¹ *Valašinas v. Lithuania*, (Application no. 44558/98, Judgement of 24 July 2001), para 101

that correspond to a respect for human dignity and do not subject detainees to a degree of distress exceeding the “unavoidable level of suffering inherent in detention”.¹²

Therefore, detention facilities must respect a number of requirements applicable to all detainees. They should allow for natural light and fresh air in the rooms.¹³ Cells should respect the privacy needs of the detainees and “meet the requirements of health and hygiene, due regard being paid to climatic conditions and especially to floor space, cubic content of air, lighting, heating and ventilation”.¹⁴ Also, detainees should be provided with access to “sanitary facilities that are hygienic and respect privacy”.¹⁵

Detainees should be given water and “food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served”.¹⁶ There should be three meals a day and the food “shall be prepared and served hygienically”.¹⁷

Generally, people held in PTD should not be kept in worse conditions than convicted prisoners. In a case against Slovakia, the European Court of Human Rights (“ECtHR”) found a violation of Article 14 in conjunction with Article 8 as a result of the differential treatment of persons held in PTD and convicted prisoners; unlike the convicted prisoners, pre-trial detainees were allowed considerably less time for family visits and were granted no access to television, and this difference in treatment could not be objectively justified.¹⁸

As regards the practice of the HRC, complaints about detention conditions are frequently handled under Article 10 of the ICCPR.¹⁹ Nevertheless, aggravating factors may also lead to a violation of Article 7, as the HRC has found on a number of occasions concerning: deprivation of food and water for several days,²⁰ detainee locked up for 23 hours a day in a cell with no sanitation, ventilation, adequate nutrition, or medical treatment,²¹ long periods of incommunicado detention.²²

Research results

Although all of the researchers characterized detention conditions in their countries as substandard, some of them stated that conditions are equivalent for both pre-trial detainees and for convicted prisoners,²³ while others stated that detention conditions are worse for pre-trial detainees.²⁴

¹² Valašinas v. Lithuania, (Application no. 44558/98, Judgement of 24 July 2001), para 102; Kudła v. Poland, (Application no. 30210/96, Judgement of 26 October 2000), para 94

¹³ Standard Minimum Rules for the Treatment of Prisoners [New York 1984] Rule 11

¹⁴ European Prison Rules [Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules] Rule 18.1

¹⁵ European Prison Rules [Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules] Rule 19.3

¹⁶ Standard Minimum Rules for the Treatment of Prisoners [New York 1984] Rule 20.1

¹⁷ Standard Minimum Rules for the Treatment of Prisoners [New York 1984] Rule 22.1

¹⁸ Laduna v. Slovakia (Application no. 31827/02, Judgement of 13 December 2011) paras 59-73

¹⁹ HRC, *Madaffer v. Australia*, Communication No. 1011/2001, 30 July 2004, para.9.3; HRC *Kennedy v. Trinidad and Tobago*, Communication No. 845/1998, 26 March 2002, para 7.8; HRC, *Griffin v. Spain*, Communication No. 493/1992, 5 April 1995, para 9.3

²⁰ HRC, *Tshiesekedi v. Zaire*, Communications No. 241/1987 and 242/1987, 2 November 1989, para 13.b; HRC, *Miha v. Equatorial Guinea*, Communication No. 414/1990, 10 August 1994, para.6.4.

²¹ HRC, *Brown v. Jamaica*, Communication No. 775/1997, 23 March 1999, para.6.13

²² HRC, *Shaw v. Jamaica*, Communication No. 704/1996, 2 April 1998, para.7.1; HRC, *Polay Campos v. Peru*, Communication No. 577/1994, 6 November 1997, para.8.6

²³ Albania, Lithuania, Poland, Romania, Turkey

²⁴ Bulgaria, Czech Republic, Hungary, Moldova, Montenegro

Some of the reasons researchers gave for describing detention conditions as substandard relate to:

- lack of natural light²⁵
- lack of private bathroom facilities²⁶
- overcrowding²⁷
- lack of heating in the winter²⁸
- excessive heat in the summer²⁹
- restricted access to showers (once per week)³⁰

Also, many of the researchers indicated that in their countries, the right to work is not prescribed by law with regard to pre-trial detainees;³¹ in the countries where it is prescribed, it is restricted³² or is generally not observed in practice due to lack of employment opportunities.³³

In most countries surveyed, pre-trial detainees have a right to outdoor activity for one hour per day,³⁴ and in Kosovo and Serbia, pre-trial detainees are afforded 2 hours a day of outdoor exercise.

However, in practice, at times this right is not always respected. In Georgia, pre-trial detainees usually spent 40 minutes or less outside and are not allowed walks during the weekends.³⁵

3.3. Space per detainee

International standards

The ECtHR has repeatedly held that that “where the applicants had at their disposal less than three square metres of floor surface, the overcrowding was considered to have been so severe as to justify in itself a finding of a violation of Article 3”.³⁶ However, when considering a case against Romania, the ECtHR agreed with the European Committee for the Prevention of Torture (“CPT”) that the recommended living space for a detainee should be no less than 4 square meters.³⁷

Research results

In most of the countries participating in this study, there is a significant gap between the amount of space the law affords each detainee and the actual space that is generally allocated.³⁸

The legal requirements vary widely. They range from 2.5 square metres,³⁹ to 3 square metres,⁴⁰ 3.6 square metres,⁴¹ 4 square metres,⁴² and 8 square metres.⁴³

²⁵ Bulgaria, Russia, Serbia

²⁶ Bulgaria, Serbia

²⁷ Albania, Bulgaria, Kosovo, Lithuania, Serbia, Russia

²⁸ Kosovo, Serbia, Russia

²⁹ Czech republic

³⁰ Czech republic, Hungary, Lithuania, Poland

³¹ Hungary, Kazakhstan, Montenegro

³² Moldova- no more than 2 hours per day and 6 hours per week

³³ Georgia, Lithuania, Poland, Serbia

³⁴ Czech Republic, Georgia, Hungary, Lithuania, Moldova, Montenegro, Poland, Romania.

³⁵saqarTvelos saxalxo damcveli, Public Defender of Georgia, special report of monitoring in penitentiary establishments and pre-trial detention isolators, 1st half of 2011, p. 30

³⁶ *Svetlana Kazmina v. Russia*, Application no. 8609/04, 2 December 2010, para 70; *Lind v. Russia*, Application no. 25664/05, , 6 December 2007. Para 59; *Labzov v. Russia*, Application no. 62208/00, , 16 June 2005, para 44; *Mayzji v. Russia*, Application no. 63378/00, 20 January 2005, para 40

³⁷ *Jiga v. Romania* (Application no 14352/04, Judgement of 16 March 2010) para 65

³⁸ The only exception is Kazakhstan, but this country allows for a very little space per detainee., only 2.5m²

³⁹ Georgia, Kazakhstan, Ukraine (in Ukraine pregnant women and women with infants must be given at least 4m²)

Bulgaria was the only country surveyed which lacked a legal requirement as to how much space should be afforded someone held in PTD; in practice, Bulgarian detainees are generally allocated somewhere between 2 to 3 metres of space.

Montenegro is the country which grants the most space per detainee: a total of 8 square metres.⁴⁴ The 8 m² standard is generally not respected in practice, but the minimum standard of 4 m² provided for by the CPT is respected in most cells where pre-trial detainees are held.⁴⁵ Overcrowding in Montenegrin prisons was noted by the CPT in a 2008 report and prison management conceded crowded conditions were the main obstacle in executing the country's legal standards.⁴⁶ However, recent NGO reports have acknowledged that the number of detainees held in PTD in Montenegro was halved in the past four years, so that in practice the situation is much better than it used to be. Upon investigation in June 2012 of the prisons where pre-trial detainees are held, it was discovered that these facilities were not fully occupied (with a ratio of 283 detainees to 370 beds in Podgorica and 32 detainees to 50 beds in Bijelo Bolje).⁴⁷

The lack of space is partially explained by the occupancy rates. In many of the countries participating in this study, PTD facilities are overcrowded, as show by the table below:

Table 4: Occupancy rate of PTD facilities

	2000	2009	2010	2011
Albania	N/A	141%	143%	143%
Bulgaria*	90%	110%	130%	130%
Czech Republic	N/A	94.08%	98.56%	104.74%
Hungary	165%	135%	142%	145%
Kazakhstan	N/A	48%	80%	42%
Lithuania	N/A	88%	76%	86%
Montenegro	N/A	236.11%	269.44%	91.35%
Poland**	N/A	103.8%	102.2%	98.5%
Russia	102.7%	79.9%	78.6%	88.2%
Ukraine	N/A	102.8%	106.4%	99.48%

⁴⁰ Hungary (although for women and children it is 3.5 m²), Poland

⁴¹ Lithuania

⁴² Albania, Czech Republic, Kosovo, Moldova, Romania, Serbia

⁴³ Montenegro. The Kosovar researchers provided information in cubic meters and in Kosovo the law imposes a minimum of 8 cubic metres for each detainee.

⁴⁴ *Pravilnik o kućnom redu za izdržavanje pritvora, Zavod za izvršenje krivičnih sankcija Crne Gore, mart 1987, član 15* (The Rules on House Order on Execution of Imprisonment, IECF, March 1987, article 15).

⁴⁵ *Izveštaj o poštovanju ljudskih prava pritvorenih lica i lica na izdržavanju kazne zatvora u Zavodu za izvršenje krivičnih sankcija, Izveštaj monitoring tima nevladinih organizacija, Podgorica, 15 jun 2012. godine, str. 71* (The Report on Human Rights Protection of Detainees and the Persons Convicted on Imprisonment in IECF, the Report of the Monitoring Team of NGOs, Podgorica, 15 Jun 2012, p.71, available at http://www.hracion.org/wp-content/uploads/Izveštaj%20FINAL_15062012-1.pdf

⁴⁶ *Izveštaj o stanju i radu Zavoda za izvršenje krivičnih sankcija Crne Gore, strana 53* (The Report on Condition and Work of IECF, p.53., available at: [http://www.ziks.me/userfiles/Izve%20C5%A1taj%20o%20stanju%20i%20radu%20ZIKS-a%20za%202010_godinu\(1\).pdf](http://www.ziks.me/userfiles/Izve%20C5%A1taj%20o%20stanju%20i%20radu%20ZIKS-a%20za%202010_godinu(1).pdf)

⁴⁷ *Izveštaj o poštovanju ljudskih prava pritvorenih lica i lica na izdržavanju kazne zatvora u Zavodu za izvršenje krivičnih sankcija, Izveštaj monitoring tima nevladinih organizacija, Podgorica, 15 jun 2012. godine, str. 50,* (The Report on Human Rights Protection of Detainees and the Persons Convicted on Imprisonment in IECF, the Report of the Monitoring Team of NGOs, Podgorica, 15 June 2012, p.50, available at http://www.hracion.org/wp-content/uploads/Izveštaj%20FINAL_15062012-1.pdf

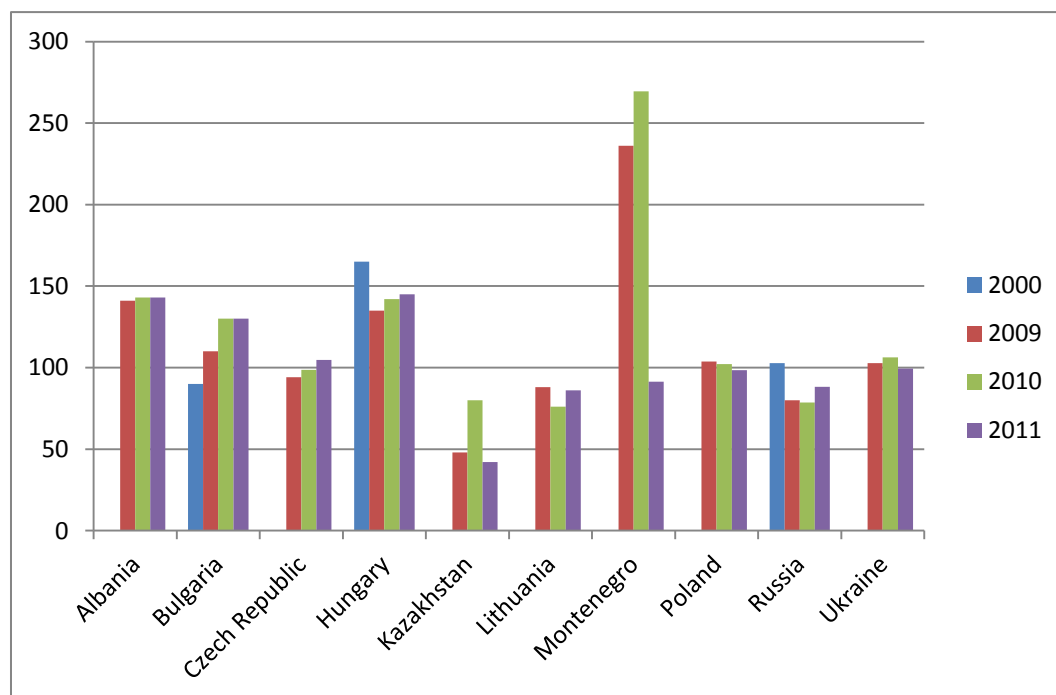
*The data from Bulgaria is an estimation made by our researchers.

**For Poland, all data is provided as of the first day of a year and concerns the population of all penitentiary units – detention centres as well as prisons.

*** The countries not included in the chart did not provide any information.

The graph below shows the same data in a comparative manner.

Figure 8



3.4. Frequency of “incidents”

In addition to substandard living conditions, detainees are also exposed to physical violence at the hands of other detainees or detention officers themselves.

Table 5

	2009		2010		2011	
Country	By guards	By other detainees	By guards	By other detainees	By guards	By other detainees
Albania	0	0	0	0	0	0
Bulgaria*	5-20	10-100	5-30	10-100	10-30	10-100
Kazakhstan	1	7	1	32	N/A	N/A
Lithuania**	N/A	N/A	<2	<2	<3	<3
Montenegro	N/A	1	3	4	N/A	4
Poland	1	63	2	47	3	N/A
Serbia***	N/A	362	N/A	387	N/A	438
Turkey	N/A	4	N/A	1	N/A	2
Total	2	437	8	473	6	447

*The data for Bulgaria is an estimation made by our researchers

**In Lithuania, the only data available was the total number of assaults; no data was available distinguishing assaults carried out by guards from those committed by other detainees. The sign “<” means “smaller than”

*** In Serbia, the following data regarding the number of assaults carried out by guards encompasses all persons deprived of liberty, not only those held in PTD:

- In 2009 – Use of means of coercion against prisoners, total incidents – 1490.
Broken down by means of coercion: Physical force- 245; Isolation and restraint – 936; Rubber truncheon – 303; Chemical means – 5; Fire arms – 1
- In 2010 – Use of means of coercion against prisoners, total incidents – 1213.
Broken down by means of coercion: Physical force – 192; Isolation and restraint – 809; Rubber truncheon – 210; Chemical means – 1 Fire arms – 1
- In 2011 – Use of means of coercion against prisoners, total incidents – 1122.
Broken down by means of coercion: Physical force – 198; Isolation and restraint – 745; Rubber truncheon – 179; Chemical means – 0; Fire arms – 0

**** No data was available from countries not included in the chart.

Another telling aspect of detention conditions may be the suicide rates of detainees. The chart below indicates the number of suicides, as well as the total number of deaths that occurred among the incarcerated in the countries participating in this study in the relevant years.

Table 6

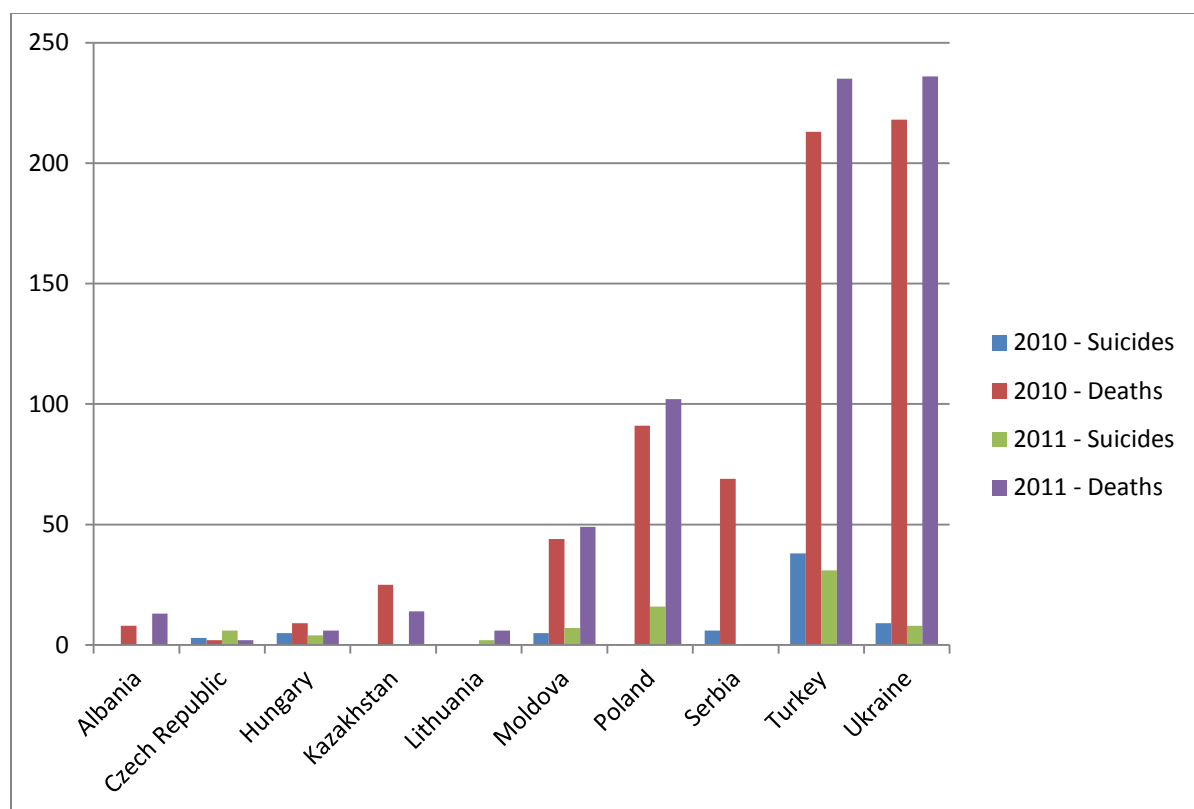
Country	2000		2009		2010		2011	
	Suicides	Deaths	Suicides	Deaths	Suicides	Deaths	Suicides	Deaths
Albania	N/A	N/A	1	10	0	8	0	13
Czech Republic	6	4	6	4	3	2	6	2
Hungary	5	6	2	14	5	9	4	6
Kazakhstan	N/A	N/A	N/A	44	N/A	25	N/A	14
Lithuania	3	N/A	4	6	0	0	2	6
Moldova	N/A	0	6	38	5	44	7	49
Poland*	46	57	41	84	N/A	91	16	102
Serbia	N/A	N/A	13	76	6	69	N/A	N/A
Turkey	23	154	37	151	38	213	31	235
Ukraine	N/A	N/A	8	180	9	218	8	236
Total	83	221	118	607	66	679	74	663

* In Poland, data was also available regarding the number of attempted suicides: In 2000: 222, in 2009: 211, in 2010: 221 and in 2011: 199.

** No data was available from countries not included in this chart.

The following diagram shows in comparative perspective how many deaths and suicides occurred in the region's prisons during the years 2010 and 2011.

Figure 9



3.5. Speedy conduct of investigation

International standards

There is a clear obligation under Article 5(3) of the European Convention on Human Rights (“ECHR”) that anyone held in PTD has the right to a trial within a reasonable time period. This right is also established in Article 9(3) of the ICCPR.

Research results

A number of countries participating in this study have a specific provision requiring that investigations concerning persons held in PTD be conducted in an expeditious manner.⁴⁸ For example, in Hungary, a fast track system is in place for persons held in PTD.⁴⁹

3.6. Complaints about physical detention conditions

International standards

According to the Minimum Rules for the Treatment of Prisoners,⁵⁰ every prisoner should have the “opportunity each week day of making requests or complaints to the director of the institution or the officer authorized to represent him” [Article 36(1)]. Such complaints must be made confidentially [Article 36(3)] through both internal and external complaints mechanisms [Article 36(2)] and they should be “dealt with and replied to without undue delay” [Article 36(4)].

⁴⁸ Czech Republic, Georgia, Hungary, Kazakhstan, Moldova, Montenegro

⁴⁹ Act XIX. of 1998 on Criminal Proceedings, Sec 136(1)

⁵⁰ Standard Minimum Rules for the Treatment of Prisoners [New York 1984] Rule 36 – As explained in art. 3 – the above provision applies *to all categories of prisoners, criminal or civil, **untried** or convicted, including prisoners subject to "security measures" or corrective measures ordered by the judge*

As explained by the CPT,⁵¹ this right is an important safeguard against ill-treatment in prisons and should be coupled with regular visits by independent actors to places of detention; these visits should offer detainees the possibility to submit complaints and have those complaints acted upon.

The ECtHR has indicated that in cases relating to allegations of inadequate conditions of detention, the burden of proof does not necessarily rest on the complainant but on the government, which must produce convincing evidence to refute the applicant's allegation; a failure to do so would benefit the applicant.⁵²

Research results

In all of the countries participating in this study, the law provides for complaints about prison conditions. Most commonly, detainees may complain about prison conditions to prison authorities,⁵³ or to prison monitoring institutions, such as the NPM. Prisoners may also complain to outside bodies, such as an ombudsperson,⁵⁴ prosecutor's office, national courts⁵⁵ and international courts like the ECtHR.

For example, in **Montenegro** a detainee may communicate with the president of the court, as well as with the investigating judge designated by the president of the court.⁵⁶ The detainee may also communicate with the ombudsperson. The ombudsperson has a right to speak with any person deprived of liberty privately, without the presence of any prison official. The detainee has the right to submit a complaint in a closed envelope, which shall be delivered directly to the ombudsperson.⁵⁷ As of 14 February 2012, detainees and convicted persons may submit complaints directly to the ombudsperson via drop boxes installed in each prison facility. Only the ombudsperson's representatives have the keys to these boxes.⁵⁸ There were six complaints in 2011, four complaints in 2010, and in 2009, there were no complaints regarding the length of the court procedure. There is no data available for 2000.⁵⁹

In **Georgia**, a pre-trial detainee may lodge a complaint with a public defender, the penitentiary department, various NGOs or a court about the conditions of detention. There are drop boxes at penitentiary departments⁶⁰ for detainees' complaints. It is the responsibility of the prison administration to forward a complaint to its addressee within 48 hours. Complaints regarding torture and inhumane and degrading treatment fall into the category of extraordinary cases and must be examined immediately. The chief of the establishment or an individual authorized by him/her and/or a special preventive group must be informed within 24 hours about a complaint regarding torture or inhumane and degrading treatment.⁶¹ However, this does not happen in practice: investigations into alleged ill-treatment are frequently not launched at all; even those that are launched are often prolonged infinitely. Thus, in practice as far as our Georgian researchers were able to ascertain, a pre-trial detainee has never received pecuniary compensation for a violation of the conditions of detention.

⁵¹ 2nd General Report of CPT [CPT/Inf (92)3] § 54

⁵² *Glotov v. Russia* (Application no. 41558/05, Judgement of 10 May 2012) para 22

⁵³ Czech Republic, Hungary, Kazakhstan, Kosovo, Montenegro, Poland, Romania, Russia, Ukraine

⁵⁴ Hungary, Lithuania, Moldova, Russia, Serbia

⁵⁵ Albania, Moldova, Montenegro, Poland, Romania, Russia, Turkey, Ukraine, Serbia

⁵⁶ *Zakonik o krivičnom postupku, Službeni list CG br. 57/09 i 49/10, član 185, paragraph 3* (The Law on Criminal Procedure, Official Gazette of Montenegro, no.57/09 i 49/10, article 185, paragraph 3).

⁵⁷ The Protector of human rights and freedoms, Competences, available at:

<http://www.ombudsman.co.me/nadleznosti.htm>.

⁵⁸ IECP of Montenegro, cover page, available at: <http://www.ziks.me/index.php>.

⁵⁹ The Protector of human rights and freedoms, Reports, p. 54,51,61, available at:

<http://www.ombudsman.co.me/izvjestaji.php>;

⁶⁰ Article 100 of the Code of Imprisonment

⁶¹ Article 105 of the Order N97, *Regulations of Detention establishment*

This seems to be the case in most of the countries surveyed, as it seems that in practice most complaint mechanisms provide little to no recourse for improving prison conditions or awarding compensation.⁶² The one mechanism which seems to allow for successful compensation claims seems to be the ECHR.⁶³

This is so even in those countries where many complaints regarding prison conditions are lodged. In **Poland** around 40% of the complaints filed with the General Prosecutor's Office related to prison conditions; overcrowding was the most common subject of these complaints; other complaints focused on access to healthcare services, restrictions on participation in cultural and educational classes, conditions preventing preservation of intimacy, as well as other living conditions. Proceedings of this type constitute the largest group of cases registered by the General Prosecutor's Office in 2011 (1.799 out of 4.478 new court actions registered in the General Prosecutor's Office). In previous years, prisoners' complaints constituted a similarly high percentage of total cases: in 2010, they constituted 1,662 of 4,715 total cases, while in 2009, they constituted 940 of 2,636 total cases.

4. Rights while in PTD

The CPT has stated that the rights afforded to detainees would be “of little value if the persons concerned are unaware of their existence”.⁶⁴ Consequently, according to UN Resolution 43/173, at the moment of arrest, or promptly thereafter, the person who is detained must be provided by the “authority responsible for his arrest, detention or imprisonment, respectively, with information on and an explanation of his rights and how to avail himself of such rights”.⁶⁵ A detainee should also be informed of the legal procedure applicable to their particular case.⁶⁶ This information should be provided both in written form and orally in a language the detainee understands.⁶⁷

The ECtHR has further specified that all information should be communicated to the detainee using “simple, non-technical language”.⁶⁸ The overriding consideration is that the person affected must understand what is happening to him or her; therefore the authorities must always take into account the specific capacities of an individual when determining the sufficiency of a given method of communication.⁶⁹

This is also the position of the European Union, which, in considering the obligation of member states to inform criminal suspects of their rights, stresses that such information must “be given orally or in writing, in simple and accessible language, taking into account any particular needs of vulnerable suspects or vulnerable accused persons”.⁷⁰

⁶² Albania, Bulgaria, Czech Republic, Kazakhstan, Kosovo, Lithuania, Moldova, Russia, Ukraine

⁶³ Bulgaria, Hungary, Moldova, Ukraine

⁶⁴ 12th General Report of CPT [CPT/Inf (2002)15], para 44

⁶⁵ United Nations General Assembly Resolution 43/173 of 9 December 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 13

⁶⁶ European Code of Police Ethics (Recommendation (2001) 10 of the Committee of Ministers to member states on the European Code of Police Ethics adopted by the Committee of Ministers on 19 September 2001 at the 765th meeting of the Ministers' Deputies), para 55

⁶⁷ European Prison Rules [Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules], rule 30.1; see also Standard Minimum Rules for the Treatment of Prisoners [New York 1984], rule 35

⁶⁸ ECtHR *Fox, Campbell and Hartley v the UK*, Judgment of 30 August 1990, para. 40.

⁶⁹ Monica Macovei, *A guide to the implementation of Article 5 of the European Convention on Human Rights* (Council of Europe, 2002), p. 47, available at <<http://echr.coe.int/NR/rdonlyres/D7297F8F-88DB-42B0-A831-FB4D1223164A/0/DG2ENHRHAND052004.pdf>> last accessed 10-04-2012.

⁷⁰ Directive 2012/13/EU of the European Parliament and of the Council, of 22 May 2012; *on the right to information in criminal proceedings*, art. 3.2

4.1. Access to counsel

International standards

The right to legal assistance is recognized by both the ECHR in Article 6(3)(c) and the ICCPR in Article 14(3).

This right has also been recognized in the jurisprudence of the HRC and the ECtHR. The HRC stated in a case against Hungary that “legal assistance should be available at all stages of criminal proceedings”, and in applying this principle, the court found a violation of Article 14(3)(d) because the detainee was not granted effective access to a lawyer during PTD.⁷¹ The HRC similarly found a violation of Article 14(3)(b) in a case where the petitioner asked to speak to his lawyer while in PTD and was denied this right.⁷²

Moreover, the HRC has previously stated that the right to a lawyer is enshrined in Article 9(3) of the ICCPR, finding a violation of this article where the petitioner was not provided with legal representation during pre-trial detention.⁷³

The ECtHR has also affirmed the right to access to legal counsel during PTD, emphasizing the right of an accused to “be able to obtain legal assistance as soon as he they are placed in custody or pre-trial detention”.⁷⁴ This has been the position of the ECtHR for many years, and since 2008, a series of decisions have further developed this requirement, holding that the right to legal assistance begins when a person is placed in custody and that no person shall be interrogated or required or invited to participate in investigative or procedural activities without the right to first access legal assistance.⁷⁵ However, in a 2012 case the ECtHR stipulated that the lack of access to counsel does not in itself lead to a violation of Article 5(1) where the detainee asserts a claim that the deprivation of liberty was illegal.⁷⁶

Research results

In all of the countries participating in this study, a detainee has the right to a lawyer. According to the national researchers, this right is generally observed in practice. Some have indicated, however, that a number of problems exist with regards to state-funded legal aid, mostly relating to the quality of legal services provided under the legal aid scheme.⁷⁷ For more information on legal aid please see the legal aid section of this study.

4.2. Access to medical services

International standards

According to a UN resolution, after admission to a place of detention, the detainee should be offered a medical examination free-of-charge and as promptly as possible.⁷⁸ Additionally, according to the CPT, all detainees have the right to access a doctor while in detention; requests for a medical examination should not be blocked by police officers, and these examinations

⁷¹ HRC, *Mr. Rostislav Borisenko v. Hungary*, Communication No. 852/1999, para 7.4 – In this case the state party assigned a lawyer to the author but the lawyer failed to appear at the interrogation or at the detention hearing

⁷² HRC, *Gridin v. Russian Federation*, CCPR/C/69/D/770/1997, para 8.5

⁷³ HRC, *Umarova v. Uzbekistan*, CCPR/C/100/D/1449/2006, para. 8.5

⁷⁴ ECtHR, *Dayanan v. Turkey*, Application no. 7377/03, 13 October 2009 para 31; see also: *Brusco v. France*, Application no 1466/07, 14 October 2010, para 45

⁷⁵ For more information on the right to a lawyer please see: Template Brief Issue #1, Early Access to Legal Assistance

Legal Brief prepared by Open Society Justice Initiative, available at: <http://www.soros.org/sites/default/files/legal-tools-early-access-20120424.pdf>

⁷⁶ *Carine Simons v Belgium* (Application number 71407/10, Decision of 28 August 2012) para. 33 – in French only

⁷⁷ Hungary, Lithuania, Kosovo, Moldova, Poland, Russia, Ukraine

⁷⁸ United Nations General Assembly Resolution 43/173 of 9 December 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. Principle 24

should be carried out outside of the observation of law enforcement officials, unless the doctor requests otherwise.⁷⁹

The medical practitioner who examines a detainee should observe the rules of confidentiality and should record and report “to the relevant authorities any sign or indication that prisoners may have been treated violently”.⁸⁰

Detainees requiring specialist treatment should be “transferred to specialized institutions or to civil hospitals”.⁸¹ Detainees also have a right to request a doctor of their own choosing.⁸²

Research results

In each of the surveyed countries, pre-trial detainees are afforded the right to medical treatment. However, in practice, a number of unresolved issues impede detainees’ access to treatment.

Many of the researchers highlighted the poor quality of the medical services generally provided to detainees.⁸³ In Poland, for example, the inadequacy of medical treatment is one of the most common subjects of inmates’ complaints.

Another recurring issue was the lack of qualified medical personnel in prisons.⁸⁴ For instance, in Bulgaria medical services are usually provided by paramedics. Also, in some countries, even though a medical doctor is available to prisoners, he/she does not work permanently as a full-time doctor in these facilities;⁸⁵ these prisons instead rely upon nurses to provide most medical services.⁸⁶

In some of the countries, medical check-ups are not carried out regularly or are carried out only by request, and the approval procedure for such requests is lengthy.⁸⁷ Additionally, in Turkey, our researchers indicated that handcuffs are not removed during medical examinations and treatment and security forces remain present in the examination room.

Conditions are even worse when a detainee must be transferred in order to access medical services, because these services are not available or are inadequate at the place where he/she is held. Lengthy approval procedures for a transfer can be a major obstacle in these situations,⁸⁸ as can lengthy wait times in police wagons during the transfer.⁸⁹

Still other problems arise regarding the way medical records are kept. Some researchers indicated that in their countries, prison medical records are frequently kept in an improper manner; they cited a lack of data in prisoner medical files,⁹⁰ or even that detainees do not have access to their own medical records, except upon a formal request submitted by a lawyer.⁹¹

⁷⁹ 12th General Report of CPT [CPT/Inf (2002)15], para 42

⁸⁰ European Prison Rules [Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules], rules 42.3 (c)

⁸¹ Standard Minimum Rules for the Treatment of Prisoners [New York 1984]
Rule 22

⁸² European Code of Police Ethics (Recommendation (2001) 10 of the Committee of Ministers to member states on the European Code of Police Ethics adopted by the Committee of Ministers on 19 September 2001 at the 765th meeting of the Ministers' Deputies), para 57

⁸³ Lithuania, Moldova, Russia, Serbia

⁸⁴ Albania, Bulgaria, Russia, Serbia.

⁸⁵ Serbia, Turkey

⁸⁶ Serbia

⁸⁷ Kosovo

⁸⁸ As is the case in Serbia, Ukraine

⁸⁹ As is the case in Turkey

⁹⁰ Albania

⁹¹ Georgia

Access to dental services can also be problematic in many countries because of the lack of qualified personnel.⁹²

4.3. Access to family members

International standards

Detainees have the right to have the fact of their detention communicated to a third party, such as a family member or friend.⁹³ This right arises “promptly after arrest and after each transfer from one place of detention or imprisonment to another”.⁹⁴

Additionally, while in detention, detainees have a right to communicate as often as possible by letter, telephone or other forms of communication with family members, though there may be some restrictions on this right “for the requirements of continuing criminal investigations, maintenance of good order, safety and security, prevention of criminal offences and protection of victims of crime”.⁹⁵

With respect to detainees whose families live far away, the CPT stresses the need for flexibility with regards to the conditions that apply to their visits, emphasizing that “such prisoners could be allowed to accumulate visiting time and/or be offered improved possibilities for telephone contacts with their families”.⁹⁶ Additionally, “if a detained or imprisoned person so requests, he shall, if possible, be kept in a place of detention or imprisonment reasonably near his usual place of residence.”⁹⁷

Research results

All of the countries participating in this study allow for family visits. In practice, the degree of observance of this right varies widely.

Some countries allow only one visit per month;⁹⁸ others allow for more frequent visits, such as two visits a month,⁹⁹ four visits per month,¹⁰⁰ or one visit per week.¹⁰¹ In some countries the head of the detention unit has discretion to allow for more visits¹⁰² or to limit these visits.¹⁰³ Additionally, some countries allow for special conditions for juveniles; in Kazakhstan, minor detainees can have three visits per month (adults are allowed only two), while in Albania they can have eight visits per month (compared to only four for adults).

The visits are supposed to take place in special meeting rooms, but at times PTD facilities lack these rooms,¹⁰⁴ or when they do have them they are inadequate as described by researchers participating in this study.¹⁰⁵

⁹² Kosovo, Serbia

⁹³ 2nd General Report of CPT [CPT/Inf (1992)3] para 36

⁹⁴ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. Adopted by General Assembly resolution 43/173 of 9 December 1988, principle 16:1

⁹⁵ European Prison Rules [Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules] Rules 24.1, 24.2; and Standard Minimum Rules for the Treatment of Prisoners [New York 1984], rule 92

⁹⁶ 2nd General Report of CPT [CPT/Inf (92)3], para 51

⁹⁷ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment Adopted by General Assembly resolution 43/173 of 9 December 1988, principle 20.

⁹⁸ Hungary, Russia

⁹⁹ Bulgaria

¹⁰⁰ Albania, Turkey

¹⁰¹ Montenegro, Serbia

¹⁰² Albania Turkey

¹⁰³ Albania, Czech Republic, Hungary

¹⁰⁴ Bulgaria

¹⁰⁵ Albania, Kazakhstan, Montenegro

In some countries visitation rights can only be exercised with a special permit from the court,¹⁰⁶ or the prosecutor in charge,¹⁰⁷ or the investigator.¹⁰⁸ This permission process is at times used as a means to put pressure on the detainee.¹⁰⁹

The duration of visits allowed vary, ranging from half an hour¹¹⁰, to one hour¹¹¹, to 90 minutes,¹¹² and in Albania visits may be extended for up to five hours in the case of pre-trial detainees who are married and/or have children. In many countries these visits are carried out under the visual supervision of prison staff.

4.4. Access to the case-file and evidence to be used against him

International standards

According to well-established ECtHR case law, the proceedings in which a decision on detention is taken “must be adversarial and must always ensure ‘equality of arms’ between the parties, the prosecutor and the detained person. [...] Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his client’s detention”.¹¹³

Research results

This right is guaranteed in the legislation of all of the participating countries, except for Kazakhstan, where suspects and accused have only the right to personally maintain copies of the documents and records related to their criminal cases

In many countries, this right may be restricted in exceptional cases;¹¹⁴ and in practice access to the case file during the pre-trial investigation is denied in most cases.¹¹⁵ Additionally, in some countries the right is limited during the investigation phase; this right is fully recognized after the investigation is complete.¹¹⁶

4.5. Access to an interpreter

International standards

The right to receive communications in a language the detainee understands is recognized by both the ECHR in Article 5(2) and the ICCPR in Article 14(3)(a).

The HRC has repeatedly found violations of the ICCPR in cases where this right is not observed.¹¹⁷ Such a right is of paramount significance for monolingual indigenous people,¹¹⁸ minors,¹¹⁹ and socially vulnerable groups.

Research results

The right to translation and interpretation is provided for in the legislation of all countries participating in this study, and it is generally respected.

¹⁰⁶ Georgia, Kosovo, Serbia, Ukraine

¹⁰⁷ Lithuania, Georgia,

¹⁰⁸ Russia, Georgia, Ukraine

¹⁰⁹ Lithuania, Russia

¹¹⁰ Montenegro

¹¹¹ Serbia, Moldova, Turkey

¹¹² Czech Republic

¹¹³ see, among other authorities, ECtHR, *Nikolova v. Bulgaria*, Application no. 31195/96, para. 58;

¹¹⁴ Bulgaria, Czech Republic, Lithuania, Turkey

¹¹⁵ Lithuania

¹¹⁶ Bulgaria, Russia,

¹¹⁷ HRC, *Sobhray v. Nepal*, CCPR/C/99/D/1870/2009 (2010),

¹¹⁸ Peru, CERD, A/54/18 (1999) 21 at para. 152; Guatemala, CERD, A/52/18 (1997) 14 at paras. 79 and 89.

¹¹⁹ Guatemala, CRC, CRC/C/108 (2001) 47 at para. 283.

Some of the researchers did point out that some issues remain regarding the implementation this right. As our Ukrainian researcher explained, one reason this right is not always respected in practice is due to lack of funding. Additionally, where this right is afforded, there are at times doubts about the quality of the translation,¹²⁰ and in some countries translation is not provided for all documents relevant to the detainee's case.¹²¹

Furthermore it seems that translation is not available for all languages, particularly those which are not very common in a given country;¹²² in Serbia it is often difficult to provide translation and interpretation even for relatively common languages like Farsi and Arabic.

4.6. Right to practice one's religion

International standards

Freedom of religion is generally recognized as a fundamental human right by both the ECHR (in Article 9) and the ICCPR (in Article 18).

In the context of detention, this right is also recognized.¹²³ Accordingly, detention facilities should allow detainees to practice their religion, and when there are sufficient detainees of the same religion, a qualified representative of that religion shall be appointed or approved and allowed to hold services and meet with detainees if the detainees so wish.¹²⁴

Research results

This right is also recognized in the legislation of all of the countries participating in this study, and many of the researchers identified no particular issues with the realisation of this right in practice.¹²⁵

However, a recurring issue in some countries is the fact that detention facilities do not have special rooms where detainees can practice their religions¹²⁶ or only provide these rooms for the dominant national religion.¹²⁷

In Turkey, our researcher indicates that only representatives of the religions which are accepted by the Turkish Government gain access to the right to practice their religion in detention facilities. As a result of this requirement, the request of Bülent Özdemir, an Alewi citizen who is a political prisoner in Kandıra F Type Prison, to see an Alewi religious leader was denied.¹²⁸

¹²⁰ Georgia

¹²¹ Georgia, Russia

¹²² Lithuania, Moldova

¹²³ European Prison Rules [Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules] Rule 29.1

¹²⁴ Standard Minimum Rules for the Treatment of Prisoners [New York 1984] Rule 41

¹²⁵ Czech Republic, Georgia, Poland, Russia

¹²⁶ Albania, Kosovo, Montenegro, Romania, Serbia, Ukraine

¹²⁷ Bulgaria, Lithuania, Moldova

¹²⁸ For the news on this subject see.

<http://www.radikal.com.tr/Radikal.aspx?aType=RadikalDetayV3&ArticleID=1074859&CategoryID=77>

5. Vulnerable Groups

5.1. LGBTQI¹²⁹

International standards

Prisoners perceived to be of a minority sexual orientation have been acknowledged by the CPT as members of a vulnerable group,¹³⁰ and accordingly, they must be granted special protection.

The ECtHR acknowledges a security issue for this group, as at times prisoners may face harassment based on sexual orientation; however the ECtHR has found that placing someone in solitary confinement in order to respond to any security threats they may face is in contradiction with the ECHR.¹³¹

Some of the special needs of homosexuals that should be addressed include: access to adequate medical care and counselling, including access to hormonal or other therapy, as well as to gender-reassignment treatments where desired.¹³²

Research results

None of the countries participating in this study have specific provisions dealing with lesbian, gay, bisexual, transgender and/or intersex (“LGBTQI”) detainees.

This is the case even though some of these countries have acknowledged that people perceived to be of a minority sexual orientation are frequently subject to harassment and mistreatment, as our researchers from Moldova¹³³ and Ukraine have indicated.

Furthermore, the question of detainee access to hormonal treatment seems to have never been raised in the practice of a number of countries participating in this study.¹³⁴

However, some countries have developed informal practices; for example in Romania, detainees of a minority sexual orientation are held in separate cells if it is necessary.

In Turkey civil society has been very active with respect to the rights of LGBTQI detainees.¹³⁵ While there is no special legislation in Turkey, there are a number of informal practices. Detainees perceived as belonging to a sexual minority are kept separately from the general prison population, at times in solitary confinement. Transwomen, however, are held in special wards;

¹²⁹ LGBTQI stands for Lesbian, Gay Bisexual, Transsexual, Queer, Questioning and Intersex

¹³⁰ Report to the Ukrainian Government on the visit to Ukraine carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 10 to 26 September 2000, para 65

¹³¹ *X v Turkey* (Application no 24626/09, Judgement of 9 October 2012) paras 63-65

¹³² Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, Principle 9,

¹³³ IRP, *Securitatea personală în mediul penitenciar* (2012), available at: http://irp.md/item.php?text_id=1196 (30.07.2012, Romanian), p. 22.

¹³⁴ Czech Republic, Lithuania, Serbia

¹³⁵ A recent study has been completed under the leadership of Civil Society in the Penal System Foundation, Kaos GL and Pembe Hayat (Pink Life) Association. These three association announced that they would develop a mutual program in order to strengthen human rights in prisons and to democratize prison management, and that they would cooperate so as to protect and strengthen the rights of lesbian, gay, bisexual, transgender and intersexual people in prisons, adding that as a first step they would document current violations, visit prisons together with voluntary institutions and individuals, determine problematic areas and carry them into the agenda of the Parliament and judicial bodies, arrange meetings with the local prison management, non-governmental organizations and media organs and demand that any violation with respect to sexual preference or gender identity be reported to these associations, either by the victim or their relatives. For calls in relation to this matter see:

<http://www.cezaevindestk.org/duyuru-4>

[ceza_infaz_sisteminde_sivil_toplum_dernegi_\(cisst\)_ile_kaos_gl_ve_pembe_hayat_dernekleri_tutuklu_hukumlu_hukum_ozlu_mahpuslar_ile_yakinlarina_cagri](http://www.cezaevindestk.org/duyuru-4)

these wards exist in 3 different prisons in Turkey. They are also at times held in a women's ward or in an otherwise empty ward. Transmen are also held in women's wards. In practice, transgender people are denied access to hormonal treatment, medical care, exercise, and vocational training; the situation of other sexual minorities is similar. These deficiencies could be explained by lack of training among prison officials and staff.

5.2. Juveniles (under 18)

International standards

Given their particular needs and in order to provide for their safety, juveniles should be held separately from adults.¹³⁶

Also, it is very important that juveniles “be provided, where possible, with opportunities to pursue work, with remuneration, and continue education or training, but should not be required to do so”.¹³⁷

Research results

In all of the countries participating in this study, juveniles are kept separately from adults. However, in some countries this is not an absolute rule, and the law allows for adults to be placed together with juveniles in exceptional cases.¹³⁸

Additionally, juveniles are provided with access to education in all countries surveyed.¹³⁹ In practice, some obstacles remain, however. For example, in Russia some regions experience difficulties with the availability of teachers, and in some regions, like Krasnoyarsk Territory, the educational process is held on an individual basis.

The situation is particularly bad in Serbia, where in almost all detention facilities minors are accommodated together with adults,¹⁴⁰ and educational programmes are not offered.¹⁴¹

5.3. People with disabilities

International standards

The ECtHR has heard a series of cases dealing with the rights of detainees that have a disability. With respect to detainees with intellectual disabilities, the ECtHR has stressed that national authorities should “take into consideration their vulnerability and their inability, in some cases, to complain coherently or at all about how they are being affected by any particular treatment”.¹⁴² Moreover, “prisoners known to be suffering from serious mental disturbance and to pose a suicide risk require special measures geared to their condition in order to ensure compatibility with the requirements of humane treatment”.¹⁴³

Some disciplinary punishments may be incompatible with the ECHR when applied to detainees with intellectual disabilities; for example, placing someone in a segregation unit for seven days.¹⁴⁴ Also such prisoners should be provided with appropriate services; in one case the ECtHR found

¹³⁶ United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”) (1985), 13.4

¹³⁷ United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990), article 18 (b)

¹³⁸ Czech Republic, Poland, Ukraine

¹³⁹ Albania, Czech Republic, Lithuania, Moldova, Montenegro, Poland, Romania, Turkey

¹⁴⁰ Human Rights Committee Valjevo, Report on Human Rights of Juvenile in the institutions of isolation, available at: <http://www.odbor.rs/images/HROMID%20engl.pdf> (20.07.2012, English)

¹⁴¹ *Ibid.*

¹⁴² Renolde v. France, Application no. 5608/05, 16 October 2008, para120

¹⁴³ Renolde v. France, Application no. 5608/05, 16 October 2008, para128

¹⁴⁴ Keenan v. the United Kingdom, Application no. 27229/95, 3 April 2001, para 116

a violation of Article 3 because the applicant was held in PTD for four days without access to the psychiatric services he urgently needed.¹⁴⁵

Detainees with physical disabilities also have special needs, and it is particularly important that the detention facilities are adapted to their disability.¹⁴⁶ The ECtHR found a violation of Article 3 in a case in which the applicant, who was wheelchair-bound, was detained in a cell where she could not reach the bed and had to sleep in her wheelchair and where she needed male guards to help her use the toilet.¹⁴⁷

Research results

Detention facilities in the countries surveyed are generally not accessible to people with disabilities.¹⁴⁸ In some countries there are no special legal provisions regulating the detention of people with disabilities.¹⁴⁹ Others have only general provisions relating to antidiscrimination and reasonable accommodation.¹⁵⁰ However, even in countries that do have specific provisions, these are not followed in practice;¹⁵¹ for example in Montenegro, the investigation prison in Podgorica has a special room intended for wheelchair users, but the toilets and bathrooms are not accessible, and the entrance door is not sufficiently wide.¹⁵²

The practice relating to staff training also varies; some countries do provide for basic training on interaction with people with intellectual disabilities,¹⁵³ while others provide no disability sensitivity training.¹⁵⁴

HIV/AIDS

Detainee access to HIV treatment is guaranteed in some of the countries participating in this study.¹⁵⁵ Regarding specific policies towards HIV-infected detainees, some countries have a very elaborate system which provides for both testing and treatment of HIV, as is the case in Georgia; while others have no specific legal provisions for HIV-infected detainees/prisoners.¹⁵⁶ In Albania, according to data provided by General Directorate of Prisons in 2011, there are no detainees infected with HIV/AIDS in the penitentiary system; this seems to also be the situation in Montenegro.¹⁵⁷

In Russia, detainees infected with HIV are generally placed in solitary confinement. This practice was criticized in an ECtHR judgment in a case in which a detainee spent almost three years in solitary confinement while in PTD because he had HIV, even though he was only charged with an economic crime and posed no threat to the security of the detention facility.¹⁵⁸

¹⁴⁵ M.S. v. the United Kingdom, Application no. 24527/08, 3 May 2012, paras 44-46

¹⁴⁶ Council of Europe, Committee of Ministers Recommendation No. R (98) 7, Concerning the Ethical and Organizational Aspects of Health Care in Prisons. C 50

¹⁴⁷ Price v. the United Kingdom, Application no. 33394/96, 10 July 2001, para 30

¹⁴⁸ Bulgaria, Czech, Georgia, Lithuania, Romania, Russia, Serbia, Turkey, Ukraine

¹⁴⁹ Kazakhstan, Moldova, Montenegro

¹⁵⁰ Albania

¹⁵¹ Georgia

¹⁵² *Izveštaj o poštovanju ljudskih prava pritvorenih lica i lica na izdržavanju kazne zatvora u Zavodu za izvršenje krivičnih sankcija, Izveštaj monitoring tima nevladinih organizacija, Podgorica, 15 jun 2012. godine, strana 53* (The Report on Human Rights Protection of Detainees and the Persons Convicted on Imprisonment in IECF, the Report of the Monitoring Team of NGOs, Podgorica, 15 Jun 2012, p.53, available at: http://www.hraction.org/wp-content/uploads/Izveštaj%20FINAL_15062012-1.pdf)

¹⁵³ Lithuania, Romania

¹⁵⁴ Czech Republic, Moldova, Russia, Serbia, Turkey, Ukraine

¹⁵⁵ Kazakhstan, Lithuania, Moldova, Montenegro, Romania, Russia

¹⁵⁶ Albania, Bulgaria, Czech

¹⁵⁷ Interview with doctor A. Marjanovic of the Health Institute, 12 July 2012.

¹⁵⁸ *A.B. v. Russia*, (Application no. 1439/06, judgment of 14 October 2010) paras 104- 107

In other countries, even if HIV-infected detainees are not separated or isolated, they are subject to harassment from other detainees/inmates; this is the case in Serbia.

5.4. People suffering from drug addictions

International standards

In a case where the applicant was experiencing heroin withdrawal while in detention, the ECtHR found a violation of Article 3, because there were deficiencies in the monitoring and treatment of the detainee.¹⁵⁹

Research results

In some of the countries surveyed, there are a significant number of people with drug dependencies held in detention, as it seems to be the case in Serbia, according to our Serbian researchers. In Albania according to the data provided by General Directorate of Prisons in 2011, 12% of detainees with health problems are addicted to drugs.

In general, staff is trained in how to handle people with drug dependencies, either through state-funded training programs,¹⁶⁰ or training is provided in an informal manner by outside actors, such as NGOs;¹⁶¹ some countries do not provide any training, however.¹⁶²

Also, generally detainees with drug addictions have access to specialised treatment.¹⁶³ This is not the case everywhere; as some countries do not provide such treatment,¹⁶⁴ while others provide such treatment only for convicted prisoners and not for pre-trial detainees.¹⁶⁵

This study turned up a number of good practices in dealing with prisoners/detainees addicted to drugs. In **Hungary**, in many institutions there are special drug prevention units where detainees currently or formerly suffering from drug dependencies may participate in group therapies and are regularly supervised by medical experts. These prevention units operate under milder security regimes, and those detainees willing to stop taking illegal substances are entitled to special benefits.

In **Georgia**, the General Directorate of Prisons has set up special medical care for drug-addicted persons in some Institutions of Execution of Criminal Decisions. Also, in October 2011 a Georgian prison received the World Health Organization's special award for implementing a methadone detoxification program successfully. According to the report, more than 500 prisoners have undergone the treatment program from the start of the program to present.¹⁶⁶

In **Montenegro**, as of February 2010, the NGO "4Life" has conducted a rehabilitation and re-socialization programme for detainees suffering from drug addictions. Group therapies are conducted twice a week, by former drug addicts, a psychologist and a social worker.

A problem that still persists in some countries is the fact that drug users are more exposed to law enforcement abuses. A recent report from **Russia** suggests a high number of incidents of

¹⁵⁹ McGlinchey and Others v. the United Kingdom, (Application no. 50390/99, Judgement of 29 April 2003), para 57

¹⁶⁰ Albania, Czech Republic, Lithuania, Moldova, Romania, Russia

¹⁶¹ Albania, Poland

¹⁶² Bulgaria, Hungary, Kazakhstan, Kosovo, Ukraine

¹⁶³ Czech Republic, Hungary, Lithuania, Moldova, Montenegro, Romania, Russia, Serbia, Turkey

¹⁶⁴ Kazakhstan, Kosovo, Poland, Ukraine

¹⁶⁵ Poland

¹⁶⁶ http://www.mcla.gov.ge/cms/site_images/pdf/prezentacia%20medical%20dept%2025%2011%2011%20final%20version.pdf (last visited 31.07.2012 English)

“forced confession”, in which drug users are subjected to torture in order to “convince” them to confess to a given crime or to act as an informant for law enforcement agents.¹⁶⁷

5.5. Women

International standards

The CPT has indicated¹⁶⁸ that a number of safeguards must be met with respect to female detainees, for example:

- detainees should only be searched by staff of the same gender, and they should not be asked to undress in front of staff of the opposite gender;¹⁶⁹
- women should be placed in separate holding cells from men; mixing may be allowed only if it is accompanied by necessary safeguards;¹⁷⁰
- in the case of pregnant women, their dietary needs must be met, and they must be allowed to give birth outside of the prison.¹⁷¹

Research results

In the countries surveyed, women are generally kept separately from men.¹⁷² Additionally, detainees may only be subjected to strip searches by staff of the same gender.¹⁷³

With the exception of Ukraine, all of the countries have special provisions for pregnant detainees.

A number of “privileges” are prescribed for pregnant detainees. These can come in the form of:

- better standards of medical care¹⁷⁴
- improved material living conditions¹⁷⁵
- more time for outside activities¹⁷⁶
- privileged visiting rights¹⁷⁷
- interdiction on placement in solitary confinement¹⁷⁸
- increased/better food portions¹⁷⁹
- special working conditions¹⁸⁰

In some countries they are allowed to give birth at home,¹⁸¹ and even take care of their infant at home until it is six months¹⁸² or one year old.¹⁸³

¹⁶⁷ Shadow Report to the UN Committee against Torture in relation to the review of the Fifth Periodic Report of the Russian Federation, 2011, para 5.3, available at:

http://www2.ohchr.org/english/bodies/cat/docs/ngos/JointPMMDPR_RussianFederation_CAT49.doc

¹⁶⁸ 10th General Report on the CPT's activities covering the period 1 January to 31 December 1999; Ref.: CPT/Inf (2000) 13 [EN] - Publication Date: 18 August 2000

¹⁶⁹ Ibid, para 23

¹⁷⁰ Ibid, para 24

¹⁷¹ Ibid, para 26, 27

¹⁷² Albania, Bulgaria, Czech Republic, Hungary, Kazakhstan, Kosovo, Lithuania, Moldova, Montenegro, Poland, Romania, Russia, Serbia, Turkey, Ukraine

¹⁷³ Albania, Bulgaria, Czech Republic, Georgia, Hungary, Kazakhstan, Lithuania, Moldova, Montenegro, Romania, Turkey, Ukraine

¹⁷⁴ Bulgaria

¹⁷⁵ Bulgaria, Georgia, Lithuania, Moldova, Serbia

¹⁷⁶ Czech Republic, Kazakhstan

¹⁷⁷ Czech Republic

¹⁷⁸ Czech Republic, Hungary

¹⁷⁹ Lithuania, Moldova, Serbia, Turkey

¹⁸⁰ Moldova

¹⁸¹ Hungary, Turkey

¹⁸² Hungary, Turkey

Also, in some countries pregnant women are held separately from other detainees.¹⁸⁴ In Poland they are moved to a hospital ward two months prior to giving birth.

5.6. Seriously ill detainees

International standards

The ECtHR has held that “the State must ensure that the health and well-being of detainees are adequately secured by, among other things, providing them with the requisite medical assistance” and if “authorities decided to place and maintain a [seriously ill] person in detention, they should demonstrate special care in guaranteeing such conditions of detention that correspond to his special needs”.¹⁸⁵

Research results

The right to health services is unanimously recognised in the countries surveyed. Generally detainees may be transferred to prison hospital centres for medical treatment,¹⁸⁶ or if they cannot be provided with adequate medical treatment in prison hospitals, they may be transferred to civil hospitals.¹⁸⁷

Serious illness is a factor in the decision of whether or not to place someone in PTD in some countries,¹⁸⁸ while others do not allow for consideration of this factor.¹⁸⁹

Also, in practice a number of problems still exist.

In Georgia detainees with an infectious disease must be accommodated according to their disease type.¹⁹⁰ However, frequently this requirement is not observed in practice, and pre-trial detainees with infectious diseases are placed together with other inmates.

In Russia, even though by law detainees must have access to medical care, in practice, seriously ill persons continually encounter difficulties in receiving adequate medical assistance. For example, in one of the cases of the Public Verdict Foundation, Taisia Osipova, who suffers from diabetes and a number of other diseases, was held in a pre-trial detention facility for a long time without receiving adequate medical care. The Russian Government maintains a list of illnesses which can serve as grounds for preventing a person from being placed into custody.¹⁹¹ The examination of Ms. Osipova, intended to determine her state of health and identify the extent to which her illnesses might qualify her for release, was carried out with a number of violations. Attempts to appeal those actions and to achieve an objective medical examination have yet to have any effect.¹⁹² In May 2012, the European Court communicated Taisia Osipova’s complaints. Another case of the Public Verdict Foundation is that of Mikhail Kosenko, who falls within the second disability group as a result of his mental health condition (received as a result of a contusion during his army service). Mikhail needs permanent medication and medical supervision once a fortnight. He has been detained since the beginning of June 2012. However, he neither received any medication, nor had any medical checkups until he and his defender filed complaints. Mikhail was finally examined by a doctor and prescribed medication two months after the filing of these

¹⁸³ Romania, Montenegro

¹⁸⁴ Georgia, Kosovo, Lithuania, Montenegro

¹⁸⁵ Khudobin v. Russia, Application no. 59696/00, 26 October 2006, para 93

¹⁸⁶ Albania, Czech Republic, Hungary, Kosovo, Lithuania, Moldova, Montenegro, Romania, Serbia

¹⁸⁷ Albania, Bulgaria, Czech Republic, Georgia, Hungary, Moldova, Montenegro, Poland, Romania

¹⁸⁸ Georgia (in practice it is not) Hungary, Kazakhstan, Kosovo, Lithuania, Moldova, Romania

¹⁸⁹ Czech Republic, Montenegro, Turkey

¹⁹⁰ Para.15, Article 19 of the Order N97, *Regulations of Detention establishment*

¹⁹¹ Decree of the Government of the Russian Federation d/d January 14, 2011 No. 3 Moscow “On Medical Examination of Persons Suspected or Accused of Committing Crimes”. <http://www.rg.ru/2011/01/21/sizo-dok.html>

¹⁹² <http://publicverdict.ru/topics/news/10037.html>

complaints. Furthermore, the pre-trial detention center administration justified their failure to render medical assistance by stating that they did not have a relevant specialist working in the facility, although the hiring of a psychiatrist is anticipated.¹⁹³

5.7. Foreigners

International standards

According to the Vienna Convention on Consular Relations of 1963, consular officials have the right to speak to their nationals detained abroad; they must be informed when any of their nationals is detained abroad and have the right to visit their nationals held in places of detention, to talk and correspond with them, and to arrange for their legal representation.¹⁹⁴

Research results

All of the countries surveyed provide for the right to access one's consular representative.¹⁹⁵

While in PTD, foreigners who do not understand the local language are generally provided with assistance from an interpreter¹⁹⁶ and with translations of their rights.¹⁹⁷ However, some countries have reported that issues remain in practice.¹⁹⁸

In Montenegro, NGO monitoring determined that prisons' House Rules have not been translated into any foreign language and that foreign prisoners and detainees are not adequately informed of their rights.¹⁹⁹

In Russia there is a problem with availability of translators. As a result, all proceedings are held in the Russian language, which often poses a problem for detainees. For example, visitors are required to speak Russian during their visits to detainees. Another problem is the requirement that detainees conduct written correspondence with relatives only in Russian, since all correspondence passes through censorship, which can only be effectively organized in Russian.

5.7. Ethnic minorities

International standards

The UN Committee on the Elimination of Racial Discrimination (CERD) has stressed the fact that ethnic minorities and foreigners are overrepresented in pre-trial detention, and it urges states to ensure "that the mere fact of belonging to a racial or ethnic group [...] is not a sufficient reason, *de jure* or *de facto*, to place a person in pre-trial detention".²⁰⁰ It also encourages states to fight discrimination, to promote greater understanding among prison staff and detainees through specialized training, to promote proper representation of ethnic minorities in the police and

¹⁹³ <http://publicverdict.ru/topics/news/10401.html> (19/07/2012, Russian)

¹⁹⁴ Vienna Convention on Consular Relations, Done at Vienna on 24 April 1963, art. 36 (1)

¹⁹⁵ Albania, Bulgaria, Czech Republic, Georgia, Hungary, Kazakhstan, Kosovo, Lithuania, Moldova, Montenegro, Poland, Romania, Serbia, Turkey, Ukraine

¹⁹⁶ Albania, Bulgaria, Czech Republic, Georgia, Hungary, Kazakhstan, Kosovo, Lithuania, Moldova, Montenegro, Romania, Turkey, Ukraine

¹⁹⁷ Bulgaria, Czech Republic, Georgia, Kazakhstan, Kosovo, Lithuania, Moldova, Montenegro, Romania

¹⁹⁸ Georgia, Kazakhstan, Montenegro, Russia, Ukraine

¹⁹⁹ *Izveštaj o poštovanju ljudskih prava pritvorenih lica i lica na izdržavanju kazne zatvora u Zavodu za izvršenje krivičnih sankcija, Izveštaj monitoring tima nevladinih organizacija, Podgorica, 15 jun 2012.godine, str. 41*, (The Report on Human Rights Protection of Detainees and the Persons Convicted on Imprisonment in IECF, the Report of the Monitoring Team of NGOs, Podgorica, 15 Jun 2012, p.41, available at http://www.hracion.org/wp-content/uploads/Izveštaj%20FINAL_15062012-1.pdf)

²⁰⁰ UN Committee on the Elimination of Racial Discrimination (CERD), *CERD General Recommendation XXXI on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System*, 2005, art. 26 (a)

justice system, and to provide accommodation for the various cultural and religious practices of detainees of minority ethnical background.²⁰¹

Research results

Many of the survey respondents claimed that racial minorities are not at any particular risk while detained in their countries,²⁰² or that they have no information that would lead them to believe that such a risk exists.²⁰³

Some do however indicate that particular minorities are overrepresented in detention centres. Such is the case with Roma in Bulgaria (where they account for 80% of the prison population according to our researcher) and in the Czech Republic.

Also, some researchers did indicate that in their countries some ethnic minorities are at higher risk in detention facilities. This is the case with Roma in Hungary and Lithuania, where they are exposed to inhumane and degrading treatment by penitentiary officers and other prisoners as well. The Kurds in Turkey also face a number of issues, primarily with regards to their right to communicate in their mother tongue, both during court proceedings and during visits/calls with friends and relatives.

6. Ordering pre-trial detention

Any deprivation of liberty must be lawful. According to the ECtHR :²⁰⁴

This requirement refers essentially to national law but also, where appropriate, to other applicable legal standards, including those which have their source in international law. In all cases, it establishes the obligation to conform to the substantive and procedural rules of the laws concerned, but it also requires that any deprivation of liberty be compatible with the purpose of Article 5, namely, to protect the individual from arbitrariness.

The ECtHR will also consider whether the law itself is in conformity with the ECHR, and in particular, whether the principle of legal certainty is respected, which requires that “the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application”.²⁰⁵

6.1. Grounds for ordering pre-trial detention

International standards

According to the ECHR, a person can be detained in order to be brought before a competent legal authority upon reasonable suspicion of having committed an offence.²⁰⁶ Once a person is brought before a competent legal authority, it is for this authority to decide whether to order release or to prolong detention.²⁰⁷

When deciding to prolong the detention, a reasonable suspicion of having committed an offence is a *sine qua non* condition for the lawfulness of such continued detention.²⁰⁸ Whether this condition is met depends on the circumstances of the case, but the general rule is that there must

²⁰¹ UN Committee on the Elimination of Racial Discrimination (CERD), *CERD General Recommendation XXXI on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System*, 2005, art. 5

²⁰² Kosovo, Moldova, Ukraine

²⁰³ Albania, Montenegro, Poland, Romania, Serbia

²⁰⁴ *Medvedyev and Others v. France* [GC], (Application no. 3394/03, Judgement of 29 March 2010), para. 79

²⁰⁵ *Chumakov v. Russia*, (, Application no. 41794/04, Judgement of 24 April 2012) para. 128

²⁰⁶ European Convention on Human Rights, as amended by Protocols Nos. 11 and 14, article 5.1 (c)

²⁰⁷ See section 6.2. of this study (Authority competent to order pre-trial detention) at page 41

²⁰⁸ *Punzelt v. the Czech Republic* (Application no. 31315/96, Judgement of 25 April 2000), para. 73

be “facts or information which would satisfy an objective observer that the person concerned may have committed the offence”.²⁰⁹

Also, after a certain lapse of time, in order to prolong the detention, the national legal authority must adduce new grounds to justify such detention.²¹⁰

Other such grounds include:

- **risk of absconding/fleeing**—The ECtHR has indicated that the fear that someone will flee cannot be based solely on the severity of the possible sentence; the national court should consider other criteria as well, such as: “the character of the person involved, his morals, his assets, his links with the State in which he is being prosecuted and his international contacts”.²¹¹
- **risk of interfering with the course of justice**—This could be based on the risk of putting pressure on the witnesses²¹² or tampering with evidence.²¹³ (However, once the evidence has been collected these grounds become irrelevant.²¹⁴)
- **risk of reoffending**—A decision based on this ground may not be based solely on a person’s antecedents.²¹⁵
- **risk to public order**—This ground can be used for offences which may give rise to social disturbances given their particular gravity of the offence and the public reaction to offences of this type.²¹⁶ The use of this ground need to be based on “facts capable of showing that the accused’s release would actually disturb public order”

The HRC in its jurisprudence²¹⁷ has suggested that PTD should be ordered only when there is a probability that the accused is likely to:

- abscond or tamper with evidence
- influence witnesses or other parties of the proceedings
- flee from the jurisdiction of the State party.

Another ground considered by the HRC is the mere fact of being a **foreigner**, which is considered to indicate a higher risk of fleeing the country. However, ordering PTD solely on this ground has been found to be in contradiction with Article 9(3) of the ICCPR.²¹⁸

The HRC also, emphasize that no one can be detained on grounds which are not clearly established in domestic legislation.²¹⁹

²⁰⁹ Fox, Campbell and Hartley v. The United Kingdom (Application no. 12244/86; 12245/86; 12383/86, Judgement of 30 August 1990), para. 32

²¹⁰ Punzelt v. the Czech Republic (Application no. 31315/96, Judgement of 25 April 2000), para. 73

²¹¹ W. v. Switzerland, (Application no. 14379/88, Judgement of 26 January 1993) para 33

²¹² Letellier v. France, (Application no.12369/86, Judgement of 26 June 1991) para 39

²¹³ W. v. Switzerland, (Application no.14379/88, Judgement of 26 January 1993) para 36

²¹⁴ Mamedova v. Russia, (Application no. 7064/05, Judgement of 1 June 2006) para 79

²¹⁵ Muller v. France, (Application no 21802/93, Judgement of 17 March 1997) para 44

²¹⁶ I.A. v. France, (Application no 28213/95, Judgement of 23 September 1998) para 104

²¹⁷ HRC, Communication No. 526/1993, *Hill v. Spain*, Views adopted on 2 April 1997, paragraph 12.3.

²¹⁸ Communication No. 526/1993, *Hill v. Spain*, Views adopted on 2 April 1997, paragraph 12.3

²¹⁹ HRC, Communication No. 702/1996, *McLawrence v. Jamaica*, Views adopted on 18 July 1997, paragraph 5.5

Research results

Table 7: Grounds for ordering pre-trial detention

	Al	Bg	Cz	Ge	Hu	Kz	Ko	Lt	Md	Mn	Pl	Ro	Rs	Sr	Tk	UKR
Reasonable suspicion	X	X			X		X	X	X	X	X	X	X	X	X	
Non-appearance	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Reoffending	X	X	X	X	X	X	X	X	X	X	X	X	X	X		X
Interfere with the course of justice	X	X	X	X	X	X	X	X	X	X	X	X	X	X		X
Public order	X	X					X			X		X		X		
Obstructing Evidence	X			X							X					
No residence						X										
No ID						X				X						
Violation of alternative measure						X						X				
Crime committed by a group of criminals						X										
Criminal record						X										X
Severity of the offence									X	X	X	X				X

A reasonable suspicion of having committed an offence is not always grounds for ordering PTD. It is sometimes just a necessary condition that must be met; PTD cannot be ordered solely on this ground. This is the case in Lithuania.

Good practice

In response to a number of ECtHR and constitutional court decisions, in 2011 the Czech Republic introduced a number of amendments to existing legislation with the aim of reducing the relatively large number of people in custody and the average length of detention.²²⁰

Under Article 67 of the Code of Criminal Procedure (“CCP”), the accused person may be taken into custody only if specific facts of the case give rise to justified concerns that: a) he or she will escape or go into hiding to avoid prosecution or punishment, particularly if his or her identity cannot be immediately determined, if he or she has no permanent residence or if he or she is liable to receive a severe sentence; b) he or she will bring pressure to bear on unquestioned witnesses or co-defendants or otherwise obstruct the clarification of facts important for

²²⁰ Z. Karabec, J. Vlach (ed): *Criminal Justice System in the Czech Republic*, Prague: IKSP, 2011, p. 39, available at: <http://www.ok.cz/iksp/docs/386.pdf>

prosecution; or c) he or she will commit again the offence for which he or she is prosecuted, or complete the attempted offence, or commit an offence which he or she has planned or threatened to commit.

The procedure is initiated by the state prosecutor, who brings the request to detain the accused person before the judge. The only authorities authorized to order detention are the judge in the pre-trial phase of the criminal proceeding or the court in the trial phase of the proceeding. The 2011 amendment introduced obligatory custodial hearings in order to comply with the criticism of the Constitutional Court of the Czech Republic (see above). These hearings are mandatory, but not public. The detained person must be afforded legal representation and translation must be available.

Also in Montenegro, in the past PTD was often ordered for young and unemployed persons, on the belief that they posed a greater risk of escape (absconding). This justification for PTD has been recently successfully challenged in appellate court, which ultimately modified the general practice. The court held that PTD should be justified with more reasons, such as evidence of a concrete threat of escape (frequent visits and contact abroad, previous escape attempts during the course of the criminal proceedings, etc.).²²¹

Bad practice

A particularly interesting situation can be found in Kazakhstan, where grounds for detention include:

- not being a permanent resident
- having a criminal record

Article 150 of the Code of Criminal Procedure of the Republic of Kazakhstan:

Arrest as a preventive measure applies only with court approval and only with respect to the accused suspected of committing a crime for which the law prescribes a penalty of imprisonment for a term of not less than five years. In exceptional cases, this preventive measure may be applied to the accused suspected of committing a crime for which the law prescribes a penalty of imprisonment for a term of less than five years, if:

- 1) **he does not have permanent residence in the territory of the Republic of Kazakhstan;**
- 2) **his identity is not established;**
- 3) he violated a previously ordered preventive measure;
- 4) he attempted escape or has escaped from the prosecuting authorities or the court;
- 5) he is accused or suspected of committing a crime in an organized group or criminal community (criminal organization);
- 6) he has a **previous conviction** for a serious or particularly serious crime.

Ordering PTD on the grounds of non-permanent residence goes against the above-mentioned HRC jurisprudence, which states that being a foreigner (arguably comparable to not having permanent residence) cannot be the sole ground on which PTD is ordered.²²²

Also, ordering PTD simply because a person has a criminal record does not take into account the fact that the person may have been rehabilitated, and is a means by which people can be sucked into a criminal cycle; it also contravenes ECtHR jurisprudence²²³

²²¹ Interview with the High Court in Podgorica judge Ana Vukovic, 30 July 2012.

²²² Communication No. 526/1993, *Hill v. Spain*, Views adopted on 2 April 1997, paragraph 12.3

6.2. Authority competent to order pre-trial detention

International standards

Both the ECHR (Article 5 (3)) and the ICCPR (Article 9(3)) require that once someone is detained he/she must be brought promptly before a judge or other officer authorised by law to exercise judicial power.

As for what an “officer authorized by law to exercise judicial power” means, the ECtHR has repeatedly explained that such an officer cannot be a prosecutor, because it fails to meet the impartiality and independence requirement.²²⁴

This is also the position adopted by the HRC. In the case of *Sultanova v. Uzbekistan*,²²⁵ the HRC explains that the decision to place someone in PTD should be brought under judicial control; the court further notes that “it is inherent to the proper exercise of judicial power, that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with”; in that case, the court found that the prosecutor did not satisfy that criteria and consequently could not be considered to be an “officer authorized to exercise judicial power”.

Research results

In all of the countries participating in this study, it is the judge who orders PTD.

Practice varies with regards to which authority may order alternatives to PTD, as per the table below:

Table 8: Authority ordering alternatives to pre-trial detention

	Al	Bg	Cz	Ge	Hu	Kz	Ko	Lt	Md	Mn	Pl	Ro	Rs	Sr	Tk	UKR
Judge	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Prosecutor						X		X	X		X	X				
Police						X		X								X
Investigator <small>226</small>													X			
Appeal to judge						X		X	X		X	X	X			X

In each of the countries where alternatives to PTD may also be ordered by authorities other than the judge, such as a prosecutor or police officer, this order may be challenged before a court.

²²³ Muller v. France, (Application no 21802/93, Judgement of 17 March 1997) para 44

²²⁴ Directorate General of Human Rights, Council of Europe, The right to liberty and security of the person *A guide to the implementation of Article 5 of the European Convention on Human Rights*, Monica Macovei, Human rights handbooks, No. 5, 2002, available at: <http://echr.coe.int/NR/rdonlyres/D7297F8F-88DB-42B0-A831-FB4D1223164A/0/DG2ENHRHAND052004.pdf> , page 50-52

²²⁵ Mrs. Darmon Sultanova v Uzbekistan, Communication No. 915/2000, 30 March 2006, para. 7.7

²²⁶ The investigator is a different authority than the police and prosecutor. There are two categories of investigators - investigative committee within Ministry of interior (which is not police but one of the body within the Ministry as well as police is one of the body within Ministry) and investigative committee of Russia (which used to be a part of prosecutor office but became independent institution since 2011). Both investigative committees investigate criminal cases, work with suspected. The difference is the categories of crimes: investigative committee within ministry of interior works on "usual" crimes, investigative committee of Russia works on most grave crimes like killing, rape, abuse of power, extremism, crimes against minors.

6.3. Reasoned and individualised decision

International standards

In the context of PTD, the ECtHR has repeatedly stated that when courts are deciding whether to order or prolong pre-trial detention they “must examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, the deprivation of liberty”, and they must **“set them out in their decisions”**.²²⁷

Consequently, there must be a reasoned decision behind any deprivation of liberty. Justifications must be provided irrespective of the length of detention.²²⁸ Such justification cannot be abstract and general.²²⁹ Moreover, according to ECtHR jurisprudence, the “legal and factual grounds” for the arrest must be given.²³⁰ In the case of several concurrent investigations, the ECtHR has held that the authorities must provide the suspect with at least minimal facts regarding each of the investigations, if the materials from those investigations may serve as a basis for his detention.²³¹

Research results

In all of the countries participating in this study, the laws on the books require a reasoned decision in order to place someone in PTD. However, this obligation is often not observed in practice. This is the case in Poland, where according to our researchers, decisions to place someone in PTD are often inadequately substantiated; there have also been instances where the decision to order PTD is taken with respect to more than one person at the same time (a “block decision”), resulting in a failure to properly individualize the grounds for ordering this preventive measure.

Good practice

Despite some problems in practice, Polish law on PTD can be seen as a positive example. In Poland, in a decision to order PTD the following should be specified: identification of the person, identification of the act of which he/she is accused, its legal qualification as well as the legal basis for ordering a preventive measure and the duration of such measure. A statement of the reasons for ordering a preventive measure should include a presentation of the evidence tending to prove that the accused committed the crime and should provide the circumstances indicating the basis and necessity for ordering the preventive measure. **Moreover it should explain why alternative preventive measures were deemed insufficient** (Criminal Procedure Code of the Republic of Poland, Article 251).

This final provision is an essential safeguard which should encourage courts to carefully consider why an alternative to PTD would not serve the same function. A similar provision also exists in other countries, such as the Czech Republic (Criminal Procedure Code of the Republic of Poland, Article 73(c))

²²⁷ ECtHR, *Labita v. Italy* [GC], 6 April 2000, Application no. 26772/95, para 152 (emphasis added)

²²⁸ ECtHR, *Belchev v. Bulgaria*, 8 April 2004, Application no. 39270/98, para 82

²²⁹ ECtHR, *Clooth v. Belgium*, 12 December 1991, Series A no 225, para 44

²³⁰ *Fox, Campbell and Hartley v the UK*, ECtHR, Judgment of 30 August 1990, para. 40.

²³¹ *Leva v. Moldova*, ECtHR, Judgment of 15 December 2009, para. 61.

7. Duration of pre-trial detention

7.1. Maximum time limit for which pre-trial detention can be ordered

International standards

There is a clear obligation under Article 5(3) of the ECHR that anyone held in PTD must be provided with a trial within a reasonable time period. This provision is also present in Article 9(3) of the ICCPR. PTD should be “as short as possible”,²³² and should last “no longer than necessary”.²³³

However, international law provides for no maximum time limits for PTD; the reasonableness of the duration is assessed on a case-by-case basis in order to evaluate if detention has been excessive. In assessing the reasonableness of the duration of PTD, the HRC may take into account “special circumstances justifying delay, such as [the fact] that there were, or had been, impediments to the investigations attributable to the accused or to his representative”.²³⁴ In the past the HRC has found a violation of Article 9(3) of the ICCPR in cases where the applicant was held in pre-trial detention for seven years and eighth months,²³⁵ nine years²³⁶ or for four years and four months.²³⁷

The ECtHR jurisprudence on the matter is more developed,²³⁸ despite not having established clear time limitations on PTD, the Court has indicated a number of factors that it will take into consideration when determining the length of PTD, such as:

- the complexity of the investigation;
- the number of co-defendants;
- whether there are international elements;
- the nature and complexity of the legal issues; and
- the conduct of the accused

In assessing the length of PTD, the ECtHR will also look at whether authorities have shown “special diligence” in dealing with cases in which someone is held in PTD.²³⁹

In applying this test, in some instances the ECtHR found periods of one year to be excessive, while in others, periods of three years were considered to be acceptable; a period of over five years, however, was generally considered unacceptable.²⁴⁰

²³² HRC Gen Comment No.8 : right to liberty and security of person (art.9) 06/301982 para.3 available: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/f4253f9572cd4700c12563ed00483bec?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/f4253f9572cd4700c12563ed00483bec?Opendocument)

²³³ United Nations Standards Minimum Rules for Non-Custodial Measures General Assembly resolution 45/110 of 14 December 1990, principle 6.2

²³⁴ HRC, *Famara Koné v. Senegal*, Communication No. 386/1989, 21 October 1994, para 8.6, 8.7

²³⁵ HRC, *Elahie v. Trinidad and Tobago*, Communication No 533/1993, 28 July 1997, para 8.2

²³⁶ HRC, *Geniuval Cagas, Wilson Butin and Julio Astillero v. Philippines*, Communication No. 788/1997, 23 October 2004, para 7.4

²³⁷ HRC, *Famara Koné v. Senegal*, Communication No. 386/1989, 21 October 1994, para 8.7

²³⁸ INTERIGHTS Manual for Lawyers – Right to Liberty and Security under the ECHR (Article 5), September 2007, page 39,40 available at: <http://www.interights.org/document/105/index.html>

²³⁹ *Assenov and others v. Bulgaria*, (Application no. 90/1997/874/1086, Judgement of 28 October 1998) para. 154; *Labita v. Italy* (Application no. 26772/95, Judgement of 6 April 2000) para 153; *Scott v. Spain*, (Applicatio no. 21335/93, Judgement of 18 December 1996), para.74

²⁴⁰ Council of Europe, Human Rights Handbook no. 5: *The right to liberty and security of the person, A guide to the implementation of Article 5 of the European Convention on Human Rights*, Monica Macovei, 2002, page 35, available at:

Research results

A number of countries participating in this study have specific provisions requiring that investigations of people held in PTD be conducted in an expeditious manner.²⁴¹ For example, in Hungary a fast track system is in place for people held in PTD.²⁴²

Also, our study found that many countries do place limits on the maximum time a person may be placed in PTD, but this practice varies widely.

Some countries set a time limit for PTD during a criminal investigation. Examples of these time limits are as follows: 180 days (Romania), six months (Serbia), 12 months (Kosovo—this limit applies only in exceptional situations²⁴³), 18 months (Lithuania—although for minors the limit is 12 months), four years (Hungary). However, some countries place no time limit on the duration of PTD during the trial phase, instead requiring only that the judge must review the continued necessity of PTD every 30 days.²⁴⁴

Others, however, do set a time limit on the entire duration of PTD; examples of these time limits are as follows: nine months (Georgia), 18 months (Ukraine, Russia), two years (Bulgaria, Moldova, Poland²⁴⁵), three years (Kazakhstan, Albania²⁴⁶), four years (the Czech Republic).

Montenegro places a fixed limit of three years on PTD, calculated from the moment charges are pressed to the moment a decision is reached by the first instance court; however, if the first-instance decision is reached within three years, a person may still be held indefinitely during appeal proceedings, a situation which has been criticised by civil society representatives.²⁴⁷

Many countries in the region impose different limits depending on the severity of the crime²⁴⁸ and whether or not the defendant is a juvenile²⁴⁹; some also take into account both the procedural stage and the severity of the offence.²⁵⁰

<http://echr.coe.int/NR/rdonlyres/D7297F8F-88DB-42B0-A831-FB4D1223164A/0/DG2ENHRHAND052004.pdf>

²⁴¹ Czech Republic, Georgia, Hungary, Kazakhstan, Moldova, Montenegro

²⁴² Act XIX. of 1998 on Criminal Proceedings, Sec 136(1)

²⁴³ The general rule is that prior to the filing of an indictment, detention on remand shall not exceed:

- Three months, if proceedings are conducted for a criminal offence punishable by imprisonment of less than five years;

- Six months, if proceedings are conducted for a criminal offence punishable by imprisonment of at least five years.

However, in **exceptional cases**, where the failure to file an indictment within the above mentioned periods is due to the complexity of the case or to other factors not attributable to the public prosecutor the time limits are:

- Nine months, if proceedings are being conducted for a criminal offence punishable by imprisonment of less than five years; or

- Twelve months, if proceedings are being conducted for a criminal offence punishable by imprisonment of at least five years

²⁴⁴ Serbia, Romania

²⁴⁵ The time limit of two years applies only until a decision is reached by the first instance court. The court of appeals may extend this period – if such need arises in connection with the suspension of criminal proceedings, actions aimed at establishment or confirmation of the identity of the accused, performance of evidence-related actions in the case of high complexity or crossborder dealings or if there is a risk of lengthening of the proceedings as a result of interventions by the accused. If there is a need to apply PTD after the decision in the first instance has been issued, each extension may not exceed a period of 6 months.

²⁴⁶ The 3 years time limit applies to cases when the accusations are for crimes that carry a sentence of 10 years to life, otherwise there is a 2 years time limit (crimes with a maximum of 10 years) or ten months (for criminal contraventions)

²⁴⁷ Human Rights Action, *Human Rights in Montenegro 2010–2011*, edited by Tea Gorjanc Prelević, Podgorica, 2011, available at: http://www.hraction.org/wp-content/uploads/Human_Rights_in_Montenegro_2010-2011.pdf

²⁴⁸ Bulgaria, Czech Republic, Moldova, Kazakhstan, Turkey

²⁴⁹ Moldova, Montenegro, Lithuania

²⁵⁰ Hungary, Kosovo, Moldova, Montenegro, Russia

Good practice

The Czech example is a particularly interesting one. Czech law sets different time limits depending on the severity of the offence, but then specifies that just one third of any given time limit should be applied to the pre-trial phase and two thirds to the trial phase. The Czech law also clearly indicates that when PTD has exceeded the time limit, the accused must be released

Bad practice

Turkey establishes different time limits in relation to different crimes and in exceptional cases the time limit can extend up to **10 years**.

Not as extreme, but still troubling, is the Hungarian example. In Hungary pre-trial detention, which may begin even before charges are pressed, may last as long as four years when a person is suspected of having committed a crime that carries a prison sentence of 15 years or more.

7.2. Time limit to bring someone before a competent legal authority

International standards

The HRC has stipulated that any delay in bringing a pre-trial detainee before a judicial authority cannot last more than a few days;²⁵¹ in the same case it found a violation of Article 9(3) because there was a 33 days delay before the detainee was brought before a judicial authority.²⁵² The HRC has reached the same conclusion for a delay of 23 days.²⁵³ In a case against Hungary, the HRC found a violation of Article 9(3) in a case where the suspect “was detained for **three days** before being brought before a judicial officer”.²⁵⁴

The ECtHR has also declined to set a clear time limit, but in *Brogdan and Others v. United Kingdom* it explained that the “scope for flexibility in interpreting and applying the notion of *promptness* is very limited”, and in that case it found that a delay of four days and six hours from the moment a person is detained to the moment when he/she was brought before a judge did not comply with the “promptness” requirement.²⁵⁵

Research results

Most of the countries surveyed had maximum time limits for when a person taken into custody must be brought before a judge; however these time limits ranged from 24 hours²⁵⁶ to 48 hours²⁵⁷ to 72 hours,²⁵⁸ while others just required that a person be brought before a judge “as soon as possible”.²⁵⁹

Good practice

In the Czech Republic, under Article 69(4) of the Code of Criminal Procedure (“CCP”), the police authority which apprehends the accused person must bring this person before the court within 24 hours. Under Article 69(5) of the CCP, the judge must hold a hearing, reach a decision on pre-trial detention and inform the accused person of this decision within 24 hours from the moment the person was brought before a judge. If the police authority fails to bring the accused

²⁵¹ HRC, *Louisa Bousroual v. Algeria*, Communication No. 992/2001, 30 March 2006, para 9.6

²⁵² Ibid.

²⁵³ HRC, *Yuri Bandajevsky v. Belarus*, Communication No. 1100/2002, 28 March 2006, para 10.3

²⁵⁴ HRC, *Mr. Rostislav Borisenko v. Hungary*, Communication No. 852/1999, 14 October 2002, para 7.4 (emphasis added)

²⁵⁵ ECtHR, *Brogan and others v. The United Kingdom*, Application no. 11209/84; 11234/84; 11266/84; 11386/85, 29 November 1988, para. 62

²⁵⁶ Bulgaria, Czech Republic, Romania

²⁵⁷ Albania, Georgia, Lithuania, Russia, Serbia

²⁵⁸ Hungary, Kazakhstan, Kosovo, Poland, Ukraine

²⁵⁹ Moldova, Kosovo, Turkey, Ukraine

person before the court within 24 hours or if the court fails to inform the accused person of its decision within 24 hours, the person concerned must be released.²⁶⁰ This final provision is not unique to the Czech Republic, in many countries there are special provisions which specify that if the defendant is not brought before a judicial authority within the set time limit he/she should be released.²⁶¹

7.3. Independence and impartiality of the judicial authority

International standards

The ECtHR explained in *Schiesser v. Switzerland*²⁶² that both a court and an officer authorised to exercise judicial power must uphold certain common criteria, one of which is the requirement to remain independent from the executive and the parties; this does not include situations in which judges are subordinated to their superiors, so long as they retain a right to independent judgment.

Applying the above-mentioned test, the ECtHR found that a body lacks independence for the purposes of Article 5(3) when the officer deciding on an order of PTD could have been replaced at any point by the executive with no guarantees against the abusive exercise of this power.²⁶³

Similarly, the HRC specifies that the authority which orders and reviews PTD must be “independent, objective and impartial in relation to the issues dealt with”.²⁶⁴

A prosecutor would normally fail the independence and impartiality test.²⁶⁵ Also, if the judicial officer who decides the question of placement in PTD has the possibility to later intervene in the proceedings “as a representative of the prosecuting authority, there is a risk that his impartiality may arouse doubts which are to be held objectively justified”.²⁶⁶

Research results

All of the countries surveyed have provisions declaring the independence and impartiality of the judiciary; however, in practice a number of issues arise which can cast doubt on judicial independence. These issues, as reported, related either to the lack of sufficient guarantees of independence in law²⁶⁷ or serious doubts as to how they are carried out in practice.²⁶⁸

Some of the issues relating to the independence of the judiciary arise from the judicial nomination process. In many countries, judges sitting on the Supreme Court and the constitutional court are chosen by the parliament.²⁶⁹

Furthermore, there are a number of issues relating to the balance of power between the prosecution and judiciary. In many countries, the researchers indicated that judges are pressured into accepting the prosecutor’s petition to place the accused in PTD. The researchers pointed to the high rate of requests for placement in PTD made by the prosecutors and accepted by judges as an indicator of the prosecutors’ influence. In Hungary, 91,5 % of motions by the prosecution resulted in an order of PTD by the courts in 2011; in Bulgaria the acceptance rate of prosecutor’s

²⁶⁰ See in more detail, P. Šámal: *Trestní řád, Commentary*, 6th edition. Prague: CH: Beck, 2008, p. 506.

²⁶¹ Kosovo, Hungary, Kazakhstan

²⁶² *Schiesser v. Switzerland*, Application no. 7710/76, 4 December 1979, para 31

²⁶³ *Mirosław Garlicki v. Poland*, Application no. 36921/07, 14 June 2011, para 113

²⁶⁴ Communication No. 521/1992, *Vladimir Kulomin v. Hungary*, 22 March 1996, para 11.3

²⁶⁵ See section 6.2. of this study (Authority competent to order pre-trial detention) at page 41

²⁶⁶ *Brincat v. Italy*, (Application no. 13867/88, Judgement of 26 November 1992), para 21

²⁶⁷ Kazakhstan

²⁶⁸ Moldova – See - Soros Foundation-Moldova, Criminal Justice Performance from a Human Rights Perspective. Assessing the transformation of the Criminal Justice System in Moldova (2009), available at: <http://soros.md/files/publications/documents/CRIMINAL%20JUSTICE%20PERFORMANCE%20FROM%20A%20HUMAN%20RIGHTS%20PERSPECTIVE.pdf> (30.07.2012, Romanian), p. 68

²⁶⁹ In Albania and Montenegro. In Montenegro there are a number of suggested amendments currently being discussed that may contribute to the independence of the judiciary.

PTD motions in 2000 was about 18%; then in 2009-2011 it jumped to more than 82%. In Ukraine, if a judge releases a detainee and orders an alternative preventive measure in spite of a prosecutor's petition to prolong the detention, he risks dismissal due to the prosecutor's complaint to the judicial disciplinary board.

Another sign of the strong influence of the prosecution could be seen in the very high conviction rates in some countries. In Georgia the conviction rates is at 98%, though the number of acquittals did increase slightly compared to 2010. The high conviction rates, coupled with severe punishments, results in the frequent use of plea bargaining: in 87.5% of cases.²⁷⁰

Problems seem to exist even with the hierarchical structures of the judiciary. In Montenegro the president of the Supreme Court and of the Judicial Council (the body which appoints judges) has great power in the process of judicial appointments, and this raises suspicions of "autocratic" management of the judiciary.²⁷¹

There are a number of factors that do contribute to the independence of the judiciary. This can be seen in Poland, which maintains a number of safeguards to this end, such as provisions on incompatibility, conflict of interest, remuneration of judges, judicial immunity, and limits on removal from office. Also, in Lithuania, the judge that issues a decision on a PTD order cannot participate in the proceedings once the case is brought to court, this being an important safeguard of the judge's impartiality.

Bad practice

In Turkey there are a number of concerns over the independence of the judiciary. First of all, serious issues exist with relation to the **appointment of court members**. According to the Turkish constitution, the President appoints the members of the Constitutional Court (Article 146), the members of the Military High Court of Appeals (Article 156/2), the members of the Military High Administrative Court (Article 157/2), and the members of the Supreme Council of Judges and Public Prosecutors (Article 159/2).²⁷²

Moreover, the head of the Supreme Council of Judges and Public Prosecutors is the Minister of Justice, the Undersecretary to the Minister of Justice is an *ex-officio* member of the Council and four regular members of the Council are appointed by the President of the Republic. The head of the Supreme Court is the one who nominates General Secretary of the said court, which raises further concerns.²⁷³

The executive is also involved in the written and oral examinations for selecting candidate judges and prosecutors, a practice which has been criticized by the EU.²⁷⁴

The influence of the executive in nominating members of said bodies is highly problematic because of the powers these bodies hold. The Supreme Council of Judges and Public Prosecutors

²⁷⁰ European Commission, Implementation of the European Neighborhood Policy in Georgia Progress in 2011 and recommendations for action, Brussels, (15.05.2012) p. 5

²⁷¹ For more details "Assessment of the reform of appointment of judges in Montenegro 2007-2008", HRA, Podgorica, 2009, p. 75 and 81 (available at: http://89.188.32.41/download/analiza_ref_izb_sudija_07-08en.pdf).

²⁷² According to Article 159/3 of the Constitution, the Supreme Council of Judges and Public Prosecutors shall deal with the admission of judges and public prosecutors of courts of justice and of administrative courts into the profession, appointments, transfers to other posts, the delegation of temporary powers, promotion, promotion to the first category and the allocation of posts.

²⁷³ Gönenç Levent, "Dünyada ve Türkiye'de Yüksek Yargı Kurulları", Anayasa Çalışma Metinleri, Tepav, Ankara-2011, p.18, Özbek Kadir/ Ertosun Ali Suat, Hâkimler ve Savcılar Yüksek Kuruluna İlişkin Anayasa Değişikliği Konusunda Analitik Bir İnceleme, Yetkin Basımevi, Ankara-2010, p.24, İnceoğlu, Sibel, "Bağımsız ve Tarafsız Bir Yargı İçin Öneriler", Çatışmacı Bir Toplumdan Uzlaşmaya: Özgürlükçü ve Eşitlikçi Anayasa Sempozyumu, p.2011, <http://www.anayasa2011.com/?p=1869>

²⁷⁴ Report of the European Union (EU) Commission, dated 11-19 July 2004, titled "Functioning of Judicial System in Republic of Turkey", Review of the European Union Center of the Ankara Bar Association, p. 21.

is a key organ in terms of the professional careers of judges. It has the power to control a judge's right to continue in the profession, including the responsibility for decisions concerning those found unsuitable to continue to serve as judges, as well as the imposition of disciplinary penalties and removal from office.²⁷⁵ Moreover, investigations regarding the conduct of judges and prosecutors shall be made by judiciary inspectors of the Council with the permission of the head of the Council.²⁷⁶ Requiring permission of the Minister of Justice, a political entity, justifies concerns that the Minister may not grant permission for investigation with regards to judges or prosecutors who are under the protection of the Minister or may request investigation to be conducted only for those judges and prosecutors determined by the Minister.²⁷⁷

This is made even more problematic by the fact that it is not possible to appeal any decision issued as a result of disciplinary proceedings against judges or prosecutors.²⁷⁸

7.4. The power to order release

International standards

The ECtHR has repeatedly stated that the judicial officer referenced in Article 5(3) “must have the power to order release, after hearing the individual and reviewing the lawfulness of, and justification for, the arrest and detention”.²⁷⁹

In this respect, there is both a procedural and a substantive requirement; “the procedural requirement places the ‘officer’ under the obligation of hearing himself the individual brought before him [...] the substantive requirement imposes on him the obligations of reviewing the circumstances militating for or against detention, of deciding, by reference to legal criteria, whether there are reasons to justify detention and of ordering release if there are no such reasons”.²⁸⁰

Additionally, Article 9(4) of the ICCPR states that:

“Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and **order his release if the detention is not lawful**”.
(emphasis added)

In applying this provision, the HRC has explained that “court review of the lawfulness of detention under Article 9 (4), which must include the possibility of ordering release, is not limited to mere compliance of the detention with domestic law”.²⁸¹ Such review must be “real and not merely formal”; accordingly “the court [must] be empowered to order release, if the detention is

²⁷⁵ Constitution of Turkey, Article 159/3

²⁷⁶ Constitution of Turkey, Article 159/9

²⁷⁷ Özen, Muharrem, “Yargı Bağımsızlığını Zedeleyen Düzenleme, Uygulamalar ve Bağımsızlığı Sağlamaya Yönelik Çözüm Önerileri”, Ankara Barosu Dergisi, S. 68/1, Y.2010, Ankara-2010, p. 53.

²⁷⁸ The European Court of Human Rights, in a case filed against Turkey (ALBAYRAK/ Turkey, Appln. No: 38406/97, 31.01.2008) held unanimously that Turkey violated Article 10 of the ECHR, stating that the judges should not have minor safeguards when compared to other public officials and safeguards that are foreseen in respect of other public officials should be available for judges as well. A similar case is KAYASU/ Turkey (13.11.2008, Application. No: 64119/00 and 76292/01). The ECHR ruled that opposition remedies envisaged against the decisions of the Supreme Council of Judges and Public Prosecutors violated Article 13 of the ECHR on effective remedy and Article 10 on freedom of expression.

Also, although Law No 6087 on the Supreme Council of Judges and Public Prosecutors includes “re-inspection” and “opposition” remedies, it is not possible to say that these are effective in terms of the ECHR. As a matter of fact, judges who issue the decision against which an opposition is filed also serve in the commissions evaluating “re-inspection” and “opposition” applications.

²⁷⁹ McKay v. the United Kingdom (Application no. 543/03, Judgement of 3 October 2006), para 35

²⁸⁰ Schiesser v. Switzerland, (Application no. 7710/76, Judgement of 4 December 1979), para 31

²⁸¹ HRC, A v. Australia Communication No. 560/1993, Views adopted on 3 April 1997, para. 9.5

incompatible with the requirements in article 9, paragraph 1, or in other provisions of the Covenant”²⁸².

Research results

In all of the countries included in the study, the officer who is competent to order placement in PTD is also competent to order release from PTD. In some of these countries, this power is also granted to the prosecutor, who is competent to order release from PTD up until the pre-trial phase.²⁸³

7.5. Limitations on the use of pre-trial detention

International standards

The general rule that PTD should be used as a means of last resort is reinforced by a number of authorities, including: the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment (Principle 36(2)), The Tokyo Rules (Rule 6(1)), and by the Council of Europe (CoE) Recommendation (2006) 13 of the Committee of Ministers on the Use of Remand in Custody. This view is also supported by both the ECtHR²⁸⁴ and the HRC²⁸⁵, which have stressed that PTD should be considered as an exceptional measure to be used only when strictly necessary.

States should generally consider alternatives to PTD. In certain cases, the ECtHR has expressly emphasized that part of the violation was the courts’ failure to look into the possibility of using alternatives to detention.²⁸⁶

As a way of guaranteeing the sparing use of this provision, the CoE has recommended that states use PTD only with respect to persons suspected of committing offences which are punishable with imprisonment.²⁸⁷

Research results

In most of the countries surveyed in this study, clear provisions have been set out that describe PTD as an extreme measure to be considered only if alternatives would not suffice to reach the same end. Only Bulgaria and Moldova are lacking such language in the relevant legal texts. In Moldova, however, in the case of minors, PTD is to be considered as a means of last resort, and there is an obligation to consider alternatives to PTD in juvenile cases.

In Albania, PTD cannot be ordered for women who are pregnant or nursing toddlers or for persons who are seriously ill, older than 70, addicted to drugs or alcohol or who are undergoing therapeutic programs in a special institution. Also, minors cannot be held in PTD when accused of an administrative offence.

As previously discussed, in many of the countries participating in this study, the seriousness of the offence correlates with the maximum time limit for which PTD can be ordered.²⁸⁸ Other countries provide for shorter time limits for PTD in the case of minors.²⁸⁹

²⁸² HRC, A v. Australia Communication No. 560/1993, Views adopted on 3 April 1997, para. 9.5

²⁸³ Czech Republic, Hungary, Kazakhstan, Poland, Ukraine

²⁸⁴ ECtHR, Lelièvre v. Belgium, Application number 11287/03, 8 November 2007, para 89

²⁸⁵ HRC Hugo van Alphen v. The Netherlands, Communication No. 305/1988, (1990) para 5.8; Mukong v. Cameroon, Communication No. 458/1991, 10 August 1994, para 9.8; Hill v Spain, Communication No. 526/1993, 2 April 1997, para 12.3

²⁸⁶ ECtHR, Darvas v. Hungary, Application no. 19547/07, Judgement of 11 January 2011, para 29; Idalov v. Russia, Application No. 5826/03, 22 May 2012, para.148; Khudoyorov v. Russia, Application No. 6847/02, Judgement of 12 April 2006, para 187.

²⁸⁷ Recommendation (2006) 13 of the Committee of Ministers to member states on the use of remand in custody, article 6

²⁸⁸ Bulgaria, Czech Republic, Hungary, Kazakhstan, Kosovo, Moldova, Montenegro, Russia, Ukraine

In some countries PTD may be ordered only for persons suspected of having committed an offence which carries a prison sentence;²⁹⁰ in some countries the prison sentence must be more than **one year,**²⁹¹ **two years,**²⁹² **four years,**²⁹³ or **five years.**²⁹⁴

In practice, it seems that allowing for PTD only when someone is suspected of having committed an offence which is punishable with a sentence of more than one year is not a very effective manner of ensuring the sparing use of PTD; this is the case in Lithuania, where the majority of crimes listed in the criminal code carry a punishment of more than one year. This would apply in Serbia as well, where PTD may be ordered for people who are accused of a crime which carries a prison sentence; as most crimes do carry a prison sentence, the safeguard against overapplication becomes less effective.

Another important safeguard can be seen in Albania, where a detainees may not be held in PTD for more than half of the maximum punishment allowable for the criminal offence of which he/she is suspected. This provision is important in order to avoid a situation in which a person ends up being held in PTD for a period that is equal to what would be the full sentence after conviction; such situations have been reported to occur by our researchers from Lithuania and Serbia.

8. Review of pre-trial detention

As previously explained, there are a number of strict conditions under which PTD can be ordered. There are limited grounds that may justify such a measure and this measure can only be imposed by a judicial authority who is under an obligation to consider the facts before him. If applied outside of the bounds of these required safeguards, PTD is illegal.

These requirements are extremely important in ensuring that PTD is not ordered in a discretionary and abusive manner. However, circumstances may change and initial reasons for ordering PTD might no longer be justifiable; this is why it is important to provide additional safeguards to ensure that a person is released when PTD is no longer justifiable.²⁹⁵

One such safeguard would be allowing for *ex officio* review of PTD. Additionally, the detainee should be provided with the possibility of initiating proceedings to trigger review of the lawfulness of his/her detention.

8.1. Ex officio review of pre-trial detention

International standards

In order for a detainee to remain in PTD, judicial authorities must establish that either the PTD or alternatives to PTD imposed on the detainee continue to be justifiable; to this end the authority has a responsibility to initiate periodic reviews of the continued necessity of these measures.²⁹⁶

²⁸⁹ Albania, Moldova, Montenegro, Lithuania

²⁹⁰ Serbia

²⁹¹ Lithuania, Poland, Turkey

²⁹² Russia

²⁹³ Romania

²⁹⁴ Kazakhstan and Moldova

²⁹⁵ Ministers' Deputies CM Documents CM(2006)122 Addendum 30 August 2006, Explanatory memorandum Rules on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse, para 17

²⁹⁶ Ministers' Deputies CM Documents CM(2006)122 Addendum 30 August 2006, Explanatory memorandum Rules on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse, para 17

The ECtHR is somewhat ambiguous on this responsibility. In a case from 2000, the ECtHR stated that Article 5(3) “does not include a right to be brought repeatedly before a judge”.²⁹⁷

However, in 2006, the Grand Chamber of the ECtHR, when considering a claim under Article 5(3) clearly stated that:

[...] domestic courts are under an obligation to review the continued detention of persons pending trial with a view to ensuring release when circumstances no longer justify continued deprivation of liberty.²⁹⁸

Research results

With regards to *ex officio* review, the practice in the CEE-FSU region varies widely. In some countries, there is no such system.²⁹⁹ The countries that do offer such a review system either impose an obligation for periodic review at set intervals or just have this as a general requirement, without specifying any time limits.

The countries that offer *ex officio* review at set intervals, have established different such intervals, including: every 30 days,³⁰⁰ 60 days,³⁰¹ or 3 months.³⁰² The intervals can vary according to the phase of the proceedings; for example, in Serbia and Montenegro, the court is obliged to review detention orders every 30 days before indictment and every two months after indictment. PTD is also generally reviewed when the court is considering whether or not to extend it.³⁰³

Other countries offer *ex officio* review of PTD, but do not lay out fixed intervals for its implementation.³⁰⁴

8.2. Review at the detainee’s request

International standards

The right to have the lawfulness of one’s detention reviewed is enshrined both in the ECHR and in the ICCPR.

ECHR Article 5(4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

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

The ECtHR has expanded upon the rights enshrined in Article 5(4) and explained that the judicial review recognized by this right is somewhat limited, in that it cannot be said to “empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority”.³⁰⁵ National courts must however examine whether there is compliance with procedural requirements set out in domestic law and also “the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention”.³⁰⁶

²⁹⁷ *Graužinis v. Lithuania* (Application no. 37975/97, Judgement of 10 October 2000) para 25

²⁹⁸ *McKay v. the United Kingdom [GC]* (Application no. 543/03, Judgement of 3 October 2006) para 45

²⁹⁹ *Albainia, Georgia, Ukraine*

³⁰⁰ *Turkey*

³⁰¹ *Romania and Serbia*

³⁰² *Lithuania and the Czech Republic*

³⁰³ *Hungary, Moldova*

³⁰⁴ *Kosovo, Kazakhstan*

³⁰⁵ *Chahal v. the United Kingdom* (Application no. 22414/93, Judgement of 15 November 1996) para. 127

³⁰⁶ *Garcia Alva v. Germany* (Application no. 23541/94, Judgement of 13 February 2001) para 39

The review prescribed in this article should be accessible, in that the detainee should have a realistic chance of making use of it; it should be speedy and capable of leading to the release of the detainee.³⁰⁷ With respect to the promptness of such review, the ECtHR has explained that “where an individual’s personal liberty is at stake, it has very strict standards concerning the State’s compliance” with this requirement.³⁰⁸ Accordingly, the ECtHR has found a violation of Article 5(4) when a court took 17 days to deliver a ruling in response to a plea of unlawful arrest.³⁰⁹

The review proceedings “must be adversarial and must always ensure *equality of arms* between the parties, the prosecutor and the detained person”.³¹⁰ One component of the equality of arms principle is the detainee’s right to be heard either in person or through legal representation.³¹¹ Also falling within the equality of arms requirement is the obligation to allow access to those “documents in the investigation file which are essential in order effectively to challenge the lawfulness” of the detention.³¹²

The ECtHR has also explained that detainees should be allowed to challenge their detention at reasonable intervals.³¹³ The ECtHR has explained that these intervals should be short and deemed an interval of one month to be reasonable.³¹⁴

Research results

Of the countries participating in this study, only three did not allow the detainee to initiate review of his/her detention; these countries are: Kazakhstan, Lithuania and Ukraine. However, in Ukraine, though the right to ask for review of a detention was not provided for by law until recently, in practice detainees did ask the court to review their detention, and sometimes they were granted this right. This right is now stipulated in the new Criminal Procedure Code which entered into force on the 19th of September 2012.

Where the possibility of review exists, a detainee may request review of his/her detention at any stage of the criminal proceedings.³¹⁵

Some countries specify that if the request for review of PTD is denied, the detainee can file another request in three months.³¹⁶

Some of the researchers stated that in practice, oftentimes the exercise of this right carries a small chance of success,³¹⁷ and these requests are often dealt with in a superficial and mostly formal manner.³¹⁸

³⁰⁷ Trifković v. Croatia (Application no. 36653/09, Judgement of 6 November 2012) paras. 136, 137

³⁰⁸ Idalov v. Russia (Application no. 5826/03, Judgement of 22 May 2012) para 157

³⁰⁹ Kadem v. Malta (Application no. 55263/00, Judgement of 9 January 2003) paras. 44,45

³¹⁰ Nikolova v. Bulgaria [GC] (Application no. 31195/96, Judgement of 25 March 1999) para 58

³¹¹ Dimitrios Dimopoulos v. Greece (Application no 49658/09, Judgement of 9 October 2012) para 47

³¹² Mooren v. Germany [GC] (Application no. 11364/03, Judgement of 9 July 2009) para 124

³¹³ Assenov and Others v. Bulgaria (90/1997/874/1086, Judgement of 28 October 1998) para 162

³¹⁴ ECtHR Bezicheri v. Italy Application No. 8/1988/152/206. Judgement of 26 September 1986, para 21

³¹⁵ Bulgaria Georgia Kosovo

³¹⁶ Czech Republic, Poland, Turkey

³¹⁷ Georgia

³¹⁸ Poland

9. Appealing PTD

9.1. The right to appeal

International standards

The right to appeal against a decision to place someone in PTD is recognised by both the Council of Europe and the United Nations.

Recommendation Rec(2006)13³¹⁹

18. Any person remanded in custody, as well as anyone subjected to an extension of such remand or to alternative measures, shall have a right of appeal against such a ruling and shall be informed of this right when this ruling is made.

UN Tokyo Rules³²⁰

6.3 The offender shall have the right to appeal to a judicial or other competent independent authority in cases where pre-trial detention is employed.

The ECtHR has explained that “Article 5 § 4 guarantees no right, as such, to appeal against decisions ordering or extending detention [...] however, where domestic law provides for a system of appeal, the appellate body must also comply with Article 5 § 4”.³²¹ Also, the appellate judge may not disregard facts raised by the application which are “capable of putting in doubt the existence of the conditions essential for the lawfulness” of the detention.³²²

Research results

In all of the countries participating in this study, a decision to place someone in PTD may be appealed.

In most cases, this appeal can be filed by the detained person himself and/or by his/her legal representative. In none of the countries could an NGO file an appeal against a PTD decision.

³¹⁹ Recommendation Rec(2006)13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse. Adopted by the Committee of Ministers on 27 September 2006 at the 974th meeting of the Ministers’ Deputies)

³²⁰ United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), G.A. res. 45/110, annex, 45 U.N. GAOR Supp. (No. 49A) at 197, U.N. Doc. A/45/49 (1990)

³²¹ Graužinis v. Lithuania (Application no. 37975/97, Judgement of 10 October 2000) para 32

³²² ECtHR, Ilijkov v. Bulgaria, (Application No. 33977/96, Judgement of 26 July 2001), para 94

This chart shows who can initiate the appeal:

Table 9: Initiation of an appeal

Country	The detainees	Family members	Legal representative	NGOs	Prosecutor
Albania	X	X	X		
Bulgaria	X		X		
Czech Republic	X	X	X		
Georgia	X		X ³²³		X
Hungary	X		X		
Kazakhstan	X		X		
Kosovo	X		X		
Lithuania	X		X		
Moldova	X		X		
Montenegro	X		X		
Poland	X		X		
Romania	X	X	X		
Russia	X		X		
Serbia	X		X		
Turkey	X	X	X		
Ukraine	X		X		

The appeals can only be made to courts, either the first instance court³²⁴ or to an appellate court.³²⁵

9.2. Success rate of appeals

The chart bellow shows how many appeals were made and the rates of success in the years 2009, 2010 and 2011.

The average success rate of appeals in the countries where this data was available was around **12-13%**

³²³ The defence counsel may file the appeal only if the defendant is a juvenile or has a physical or psychological defect which excludes the possibility to obtain his/her consent.

³²⁴ Bulgaria, Czech Republic. Kazakhstan, Kosovo, Serbia

³²⁵ Albania, Georgia, Hungary, Lithuania, Moldova, Montenegro, Poland, Romania, Russia, Turkey, Ukraine

Table 10: Success rate of appeals

	2009		2010		2011	
Country	Appeals	Successful	Appeals	Successful	Appeals	Successful
Albania	857	32%	1169	31%	1169	25%
Georgia	677	5%	524	2%	252	2%
Kazakhstan ³²⁶	-	1.8%	-	1.8%		1.8%
Moldova	1371	27.1%	1303	22.9%	1704	20.3%
Russia	20200	5.4%	47045 ³²⁷	6.8% ³²⁸	41839 ³²⁹	7% ³³⁰
Ukraine	4300	16%	4400	16%	4800	18%

*The following countries did not provide this information: Bulgaria,³³¹ Czech Republic,³³² Hungary,³³³ Kosovo,³³⁴ Latvia, Lithuania,³³⁵ Montenegro, Poland,³³⁶ Romania,³³⁷ Serbia, Turkey

Although not common, there were some reports of situations where even though an appeal challenging a PTD order was successful, the person was not released. One such situation was reported in Kazakhstan, where in 2009 a person detained in Almaty³³⁸ was not released despite a judicial decision ordering it. A similar incident was reported in Lithuania, where in 1998 a person was kept in detention for one and a half months despite there being no valid court order justifying his detention. This case later reached the European Court of Human Rights and a violation of Article 5(1) was found.³³⁹

According to the responses to this study, which reflect the professional experience of our respondents, there is no single common ground across countries on which a decision to place someone in PTD can be successfully challenged. Arguing that the threat of interference with the course of justice is no longer justified, or was never justified, especially when the testimonies have already been taken and the evidence collected, seems to work better in the Czech Republic and Hungary, while in Lithuania and Poland an argument that there were no sufficient grounds for placement in PTD in the first place has proven the most successful in an appeal against a PTD order.

³²⁶ Kazakhstan did not provide how many appeals were filed but estimated that in 2011, 10% of PTD decisions were appealed

³²⁷ 25749 of whom appealed the decision to extend their detention

³²⁸ Regarding extension: 1625 (6.3%)

³²⁹ 23982 of whom appealed the decision to extend their detention

³³⁰ Regarding extension: 1278 (5.3%)

³³¹ No official data available but most people do appeal and most often their appeals are unsuccessful

³³² No official data available but most people do appeal and most often their appeals are unsuccessful. Most people who are released from PTD are released because an *ex officio* review and not as a result of an appeal

³³⁴ This information is available just for 2012. For 2012, in the Supreme Court of Kosovo are accepted and processed 175 cases of complaints against the decisions for detention. In the first quarter period (till March) are accepted 184 cases. In the second quarter period (till June) are accepted 172 cases, in the third quarter period (till September) 192 cases, while in the last quarter period are accepted 206 cases. Experience suggest that most appeals are not successful

³³⁵ Lithuania estimated that in 2010 and 2011 38% of decisions ordering PTD were appealed, with a success rate of 6.59% in 2010 and 8.41% in 2011

³³⁶ The country experts estimate that most people file an appeal and that only about 10% of these appeals are successful

³³⁷ The country experts estimate a 30% success rate of appeals

³³⁸ The case is reported by our researchers as case number 08751703110980

³³⁹ Vaivada v. Lithuania (Application nos. 66004/01 and 36996/02, Judgement of 16 November 2006).

9.3. Deadline for an appeal

The countries participating in this study set very different deadlines within which an appeal can be made against a detention order. These were: **24 hours**,³⁴⁰ **48 hours**,³⁴¹ **three days**,³⁴² **seven days**,³⁴³ **ten days**,³⁴⁴ and **20 days**.³⁴⁵ In Hungary if the decision was delivered orally at the hearing, the appeal must be communicated **right away**. Any person who is entitled to file an appeal and was not present at the hearing has three days from the day of the hearing.

Providing only a short period of time to lodge an appeal can impede the right to effectively challenge one's detention. This can be made even more problematic when the legal representative does not have the right to file for appeal himself and must visit the detainee in PTD to get his signature. For example, in Georgia, only pre-trial detainees have the right to appeal (the defence counsel may file the appeal acting alone only if the defendant is a juvenile or has a physical or psychological impediment which excludes the possibility of obtaining his/her consent) , and the deadline for appealing is only 48 hours.³⁴⁶ Under this time constraint, it is very difficult for a lawyer to prepare an appeal, visit the pre-trial detainee and hand him/her the appeal for signing. For this reason, our Georgian researchers believe that a lawyer should have the right to appeal PTD without obtaining direct consent from the detainee. This way, in addition to the work of preparing an appeal within 48 hours, the lawyer would not have to visit the pre-trial detainee for his signature, but rather, could file the appeal himself.

10. After a final sentence is reached

10.1. Deducting pre-trial detention from a final sentence

International standards

When a final sentence is reached and the defendant is found guilty and given a prison sentence, the period of time spent in PTD should be deducted from this prison sentence.³⁴⁷

Research results

In all of the countries participating in the study, if a person is found guilty, the period spent in PTD is deducted from the final sentence. However, there are different ways of calculating this deduction. In Kazakhstan and Poland, the PTD period is deducted according to a formula which equates one day in PTD to one day of imprisonment, while in Albania for one day spent in PTD, one day and a half will be deducted from the term of imprisonment.

Also, when the final sentence is a fine, there are different systems of subtracting the time spent in PTD from the ultimate fine. In Poland, one day in PTD would be equivalent to two daily rates of the fine, while in Turkey one day in PTD is assumed to correspond to one hundred Turkish Lira.

10.2. Compensation if released without a conviction

International standards

This is a fairly straightforward right which is recognized both by the ICCPR and the ECHR.

³⁴⁰ Kosovo, Romania and Montenegro

³⁴¹ Georgia

³⁴² Czech Republic, Kazakhstan, Moldova, Russia, Serbia, Ukraine

³⁴³ Poland and Turkey

³⁴⁴ Albania

³⁴⁵ Lithuania

³⁴⁶ Article 207 of CPC

³⁴⁷ Ministers' Deputies CM Documents CM(2006)122 Addendum 30 August 2006 Explanatory memorandum Rules on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse , para 33

ECHR 5.5 Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

ICCPR 9.5 Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Research results

Most of the countries participating in this study provide for a detainee's right to request compensation if the detainee is released from PTD without a final judgment finding him/her guilty and sentencing him/her to imprisonment³⁴⁸

In some countries, there are exceptions to this right. For example, in Albania if the detainee is wholly or partially to blame for a failure of the investigators to rightfully appraise the situation or to identify some mitigating evidence, he/she is not entitled to compensation. In Hungary if a detainee has escaped or has attempted to escape from court, from the prosecutor or from the investigating authority, he/she shall not be entitled to receive any compensation.

In some countries, detainees are only entitled by law to request compensation in cases of illegal detention where a court finds that a former order for placement in PTD was illegal. However, acquittal alone does not render the placement in PTD illegal.³⁴⁹

Also, even when the right to compensation is guaranteed by law, it seems that in some countries the state is reluctant to pay such compensation. In Ukraine in order to bypass the payment of compensation for PTD the courts avoid handing down acquittals; they are more likely to sentence the detainee to the term which he has already spent in PTD. In 2011 there were only 0.2% of acquittal verdicts in national judicial practice. This number has not exceeded 1% in the previous 10 years.

This is not the case everywhere, however. In 2011, in Montenegro there were a total of 228 requests for compensation; the state recognized 70 of these requests and paid out a total of 195.120,00 EUR. Another 78 cases remain to be resolved through the ordinary civil procedure, and a further 54 cases are ongoing in the Ministry of Justice.³⁵⁰ According to the 2004 Orientation Guidelines of the High Court in Podgorica, an award of compensation for one month of unjustified detention amounts to 3.500-4.000 EUR. However, according to lawyers interviewed for this report, the amounts awarded in 2011 and 2012 were lower than those prescribed by the guidelines.³⁵¹ The amount of compensation for unlawful deprivation of liberty or sentences judged to be without legal grounds in the year 2000 was 251,176.17 DEM.³⁵²

Another interesting feature revealed by the study was that in Albania the compensation afforded for one day spent in PTD is higher than that for one day spent in prison. The compensation for one day spent in prison is 2000 lek (around 14.6 euro) and for one day in PTD, the compensation is 3000 lek (around 22 euro).

³⁴⁸ Albania, Czech Republic, Georgia Hungary Kazakhstan Kosovo Moldova, Montenegro, Russia, Serbia, Turkey

³⁴⁹ Bulgaria, Lithuania, Montenegro

³⁵⁰ *Izveštaj o radu i stanju u upravnoj oblasti Ministarstva pravde sa Izveštajem Zavoda za izvršenje krivičnih sankcija za 2011.godinu, strana 33* (The Report on work and condititon in administrative area of the Ministry of Justice with the Report of IECF for the year 2011, Podgorica, p.33).

³⁵¹ Interviews with lawyers V. Radulovic and D. Tomovic, July 2012.

³⁵² The information obtained from the Ministry of Finance of Montenegro, by HRA's researcher.

11. State funded legal aid

11.1. Brief summary of international standards

11.1.1. International Covenant on Civil and Political Rights

According to the ICCPR criminal defendants have a right to free legal aid, if the interest of justice so requires and the defendant does not have sufficient means to pay for it:

ICCPR Article 14.3 In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it

According to this provision the initial test to be used in determining whether the state is under an obligation to provide free legal aid is whether the *interests of justice* so dictate. The HRC analyzes on a case-by-case basis whether this criteria is met. For example, when a defendant requested free legal aid in order to formulate a defence against a trespassing charge which carried as a penalty a mere fine, the HRC did not find that the interest of justice criteria was met.³⁵³ However, the interest of justice will always be met when someone is accused of an offence that carries the death penalty.³⁵⁴

The right to legal aid applies to not only to the trial and relevant appeals,³⁵⁵ but also to any preliminary hearing relating to the case.³⁵⁶

When legal aid is provided, although the state is not under an obligation to allow the defendant to choose a lawyer,³⁵⁷ the state is under an obligation to ensure that once a lawyer is assigned, he/she provides effective legal representation.³⁵⁸ However, the state party cannot be held accountable for alleged errors made by a defence lawyer, unless it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice.³⁵⁹

11.1.2. European Court of Human Rights

In addition to the ICCPR, Article 6(3)(c) of the ECHR also provides that every person charged with a criminal offense has the right to “defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require”.

The ECtHR expanded this provision to include the criterion of effectiveness, when in the case of *Artico v. Italy*³⁶⁰ it ruled that the state does not fulfill its obligations under the Convention simply by providing an *ex officio* defense counsel; the defense counsel's performance must also be effective. Although in the case of *Kamasinski v. Austria*³⁶¹ the ECtHR qualified this position by stating that the state cannot be held responsible for all of the failings of the *ex officio* appointed

³⁵³ 20 October 1998, *Lindon v. Australia*, 646/1995, para. 6.5

³⁵⁴ 30 March 1989, *Robinson v. Jamaica*, 223/1987, para 10.3

³⁵⁵ 3 November 1997, *Thomas v. Jamaica*, 532/1993, para 6.4

³⁵⁶ 3 November 1997, *Thomas v. Jamaica*, 532/1993, para. 7.2; 25 November 1998, *Johnson v. Jamaica*, 592/1994, para. 10.2

³⁵⁷ *Barno Saidova v. Tajikistan*, CCPR/C/81/D/964/2001 (2004)

³⁵⁸ *Borisenco v. Hungary*, 852/1999 (1999)

³⁵⁹ *Beresford Whyte v. Jamaica*, CCPR/C/63/D/732/1997 (1998)

³⁶⁰ 6694/74, Judgment of 13/05/1980

³⁶¹ 9783/82, Judgment of 19/12/1989

defense counsel; the ECtHR also made it clear that if the *ex officio* defense counsel has obviously failed to perform his duties, or his omissions have been duly brought to the attention of the authorities, the state can be held to be in breach of the Convention. The Court's ruling in the case of *Czekalla v. Portugal*³⁶² has demonstrated the costs that the state must bear if it is found by the Court to be in violation of the above provision. In the case of Czekalla, the applicant's *ex officio* appointed defense counsel submitted an appeal in an inappropriate way against the judgment of conviction; hence the Portuguese second instance court rejected the appeal without an examination on the merits. The ECtHR found a violation of Article 6(3)(c).

11.1.3. United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems

On 20th of December 2012, the United Nations General Assembly, adopted a resolution on United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, and recommended to States to tailor their legal aid system in line with this resolution.³⁶³

This is the world's "first international instrument dedicated to the provision of legal aid", and it embodies some of the best practices from around the world, providing „some of the most progressive principles and guidelines on legal aid" in the world.³⁶⁴

This resolution emphasizes the important role legal aid plays in criminal justice systems and it highlights some of the many benefits a legal aid system may have in reducing prison populations, reoffending rates and in preventing wrongful convictions.³⁶⁵

Under this resolution states should consider legal aid as their obligation.³⁶⁶ Legal aid should be available at all stages of the criminal justice system, for "anyone who is arrested, detained, suspected of or charged with a criminal offence punishable by a term of imprisonment or the death penalty."³⁶⁷ Also, when the interest of justice so requires, legal aid should be provided irrespective of the person's means.³⁶⁸

The resolution also specifies a number of guidelines that should be followed so that detainees have access to a lawyer at this stage of the criminal proceedings.³⁶⁹

³⁶² 38830/97, Judgment of 10/10/2002

³⁶³ Please see the U.N. press release of 20th December 2012, for its Sixty-seventh General Assembly Plenary 60th Meeting (AM), available at: <http://www.un.org/News/Press/docs/2012/ga11331.doc.htm> [last accessed on 8th of February 2013]

³⁶⁴ Zaza Namoradze, *UN General Assembly Enacts Global Standards on Access to Legal Aid*, Legal Aid Reformer's Network, 21st December 2012, available at: <http://www.legalaidreform.org/news/item/484-un-general-assembly-enacts-global-standards-on-access-to-legal-aid-by-zaza-namoradze> [last accessed on 8th of February 2013]

³⁶⁵ United Nations Economic and Social Council, Commission on Crime Prevention and Criminal Justice, E/CN.15/2012/L.14/Rev.1, Annex: *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, Twenty-first session Vienna, 23-27 April 2012, article 3, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V12/528/23/PDF/V1252823.pdf?OpenElement> [last accessed on 8th of February 2013]

³⁶⁶ *Ibid*, para 14

³⁶⁷ *Ibid*, para 20

³⁶⁸ *Ibid*, para 21

³⁶⁹ *Ibid*, para 44

11.2. Research results

11.2.1. Eligibility for state-funded legal aid

Eligibility for state-funded legal aid centres around two notions: indigent defendants and cases of mandatory defence, if no defence counsel is retained by the defendant.

a) Indigent defendants

As shown by Table 11 below, in 10 of the countries covered in this research, indigent defendants are entitled to free (state-funded) legal aid. A range of different aspects are taken into account by the states when qualifying a defendant indigent, for example:

- Bulgaria: Legal aid may be provided to persons eligible for social assistance and persons living in special institutions.³⁷⁰ (If a request for legal aid is refused, the decision may be appealed before an administrative court.)
- Lithuania: Defendants may receive state-funded legal aid if their yearly income does not exceed a certain maximum level set by the Government.
- Poland: Defendants are eligible for free legal aid if they can duly prove that they are not able to cover the costs of their defense without causing detriment to the necessary maintenance of themselves and their families.

As a main rule, indigent defendants shall receive free legal aid irrespective of their other characteristics or the offence they are accused of. However, in Georgia, indigence is assessed only in cases of mandatory defence, while under the Serbian Criminal Procedure Code, a defendant who cannot afford an attorney shall have one appointed at his request if he/she is charged with a crime warranting over three years' imprisonment (or when the interests of fairness so require).³⁷¹

A special problem regarding the assessment of indigence was reported in Georgia, where as a rule, only members of families registered in the Common Database of Socially Vulnerable Families are regarded as indigent.³⁷² (The socio-economic index of these families falls below a certain limit determined by the Georgian government.) The Georgian Young Lawyers Association reported that since the process of determining insolvency and granting a family the status of "socially vulnerable" is rather problematic and flawed, there are insolvent persons who are not able to exercise their right to a free attorney because they could not be registered in the database or could not obtain sufficient scores to be entitled to the benefit (e.g. persons not having a concrete, registered address are not able to register in the database.). Although the relevant legal provisions provide for an exception³⁷³ (in extraordinary cases the director of the Legal Aid Service is entitled to grant free legal assistance for a person who is not registered in the database of socially vulnerable families), interviews conducted by the Georgian Young Lawyers Association show that the latter provision is rarely used.

b) State-funded legal aid in cases of mandatory defence

As also shown by Table 11 below, in 10 of the countries covered by the current research, state-funded legal aid is provided in cases of mandatory defence if the affected defendant fails to retain defence counsel, irrespective of the defendant's financial status. Typical instances of mandatory defence include the following:

- the defendant is currently detained (including pre-trial detention),

³⁷⁰ Article 22 of the Legal Aid Act of Bulgaria

³⁷¹ Criminal Procedure Code of Serbia, Article 77

³⁷² Law of Georgia on Legal Aid, Article 2 (g)

³⁷³ Law of Georgia on Legal Aid, Article 5

- the defendant is a juvenile,
- the defendant does not understand the language of the procedure,
- the defendant suffers from a physical or mental disability, which hinders him/her in defending himself/herself,
- the defendant is charged or accused of with a grave offence, punishable by a high sentence.

Table 11 shows whether the countries covered by the present research provide free legal aid in these typical cases of mandatory defence.

It may be interesting to have a look at how the different legislations define a “grave” offence or a “high” sentence, i.e.: with how severe a sentence must the given offence be punishable with in order to qualify the alleged perpetrator for free legal aid? Examples include the following:

- Georgia, Lithuania, Ukraine: offence punishable with life imprisonment,
- Kazakhstan: offence punishable with more than 10 years of imprisonment, life imprisonment or death penalty,
- Russia: offence punishable with 15 years of imprisonment or more,
- Hungary: offence punishable with five years of imprisonment or more.

Table 11: Defendants eligible for state funded legal aid

	Indigent defendants	Mandatory defence cases	Mandatory defence cases, namely (if detailed):				
			Defendants in PTD	Juveniles	Language barriers	Disability	Gravity of the offence/possible sentence
Albania	X						
Bulgaria	X						
Czech Republic		x	x	x			
Georgia	X	x	x	x	x	x	x
Hungary	X	x	x	x	x	x	x
Kazakhstan			x		x		x
Kosovo	N/A	N/A					
Lithuania	X	x	x	x	x	x	x
Moldova	X	x					x
Montenegro	X	x	x			x	x
Poland	X						
Romania	N/A	N/A					
Russia		x	x	x	x	x	x
Serbia	X	x				x	x
Turkey	X	x		x		x	
Ukraine		x		x	x ³⁷⁴	x ³⁷⁵	x ³⁷⁶

³⁷⁴ As soon as the defendant is detained or charges are brought against him/her.

³⁷⁵ As soon as the defendant is detained or charges are brought against him/her, or from the moment of ascertainment of his/her disabilities.

³⁷⁶ As soon as the defendant is detained or charges are brought against him/her.

It may be added that according to information provided, in Kazakhstan detainees may apply for state-funded legal aid at any stage of the criminal procedure without describing their reasons for it, and shall receive legal aid in these cases.³⁷⁷ From Romania it was reported that if criminal defendants do not retain defence counsel, they are automatically entitled to a state-paid attorney.

11.2.2. Scope of state-funded legal aid

As to the scope of the state-funded legal aid, it may be concluded that almost all countries covered by the research ensure the possibility of relying on state-funded legal assistance prior to and during the first interrogation (e.g. at the police station) and regarding court hearings related to the pre-trial detention and alternatives to the pre-trial detention, along with appeals against decisions ordering pre-trial decision.³⁷⁸

As far as legal aid for complaints and requests regarding certain further aspects of pre-trial detention are concerned, research results are more diverse, as shown by Table 12 below.

Table 12: Extent of state funded legal aid

	Complaints regarding detention conditions while in PTD	Complaints regarding length of PTD	Request for early release
Albania	-	-	-
Bulgaria	x	x	x
Czech Republic	-	-	-
Georgia	x	-	x
Hungary	x	x	x
Kazakhstan	x	x	x
Kosovo	-	-	-
Lithuania	-	-	-
Moldova	x	x	x
Montenegro	x	x	x
Poland	x	x	x
Romania	x	x	x
Russia	-	x	-
Serbia	-	-	-
Turkey	-	-	x
Ukraine	N/A	N/A	N/A

In terms of the scope of the legal assistance provided, the Albanian system is worth mentioning. According to Albanian law, there are two categories of legal assistance. “Primary” legal aid means providing information about the legal system of Albania, normative acts in force, the rights and

³⁷⁷ Criminal Code of Kazakhstan, Article 71

³⁷⁸ No data is available regarding Latvia and Ukraine. In Serbia, state funded legal aid is available only prior to and during first interrogation.

obligations of subjects of the law, the way of exercising the rights of the individual in judicial and extra-judicial processes, as well as providing assistance in compiling legal documents or other forms. “Secondary” judicial aid covers counselling, representation, or defence in penal judicial processes, civil and administrative judicial processes, as well as representation before administrative state bodies. There is a similar system in Moldova, where, since 2007, the law on legal aid distinguishes between “primary” and “qualified” legal aid.

11.2.3. System for assessing the performance of state-funded legal aid lawyers

From seven countries (Albania, Hungary, Kazakhstan, Lithuania, Moldova, Romania and Russia) it was reported that there is no system at all aimed specifically at assessing the performance of state funded legal aid attorneys.³⁷⁹ Further information shows that in some of the countries, the Bar Association and the courts have some powers in terms of sanctioning state-funded lawyers who do not carry out their tasks properly: Bar Associations may initiate disciplinary proceedings, while courts may replace defence counsels with another attorney. However, the existence and the exercise of these powers may not be considered a regular or efficient assessment or monitoring of the legal aid system.

State-funded legal aid attorneys may be subject to disciplinary proceedings by the Bar Associations in the Czech Republic, Hungary,³⁸⁰ Poland and Serbia.³⁸¹

Examples of court powers include the following:

- Czech Republic: The court may exclude the attorney from the procedure, inter alia for his/her inactivity.³⁸² It was reported that courts are sensitive to any inappropriate conduct on behalf of attorneys.
- Montenegro: The competent state prosecutor or the president of the court may dismiss the appointed defence counsel who fails to regularly perform his/her obligations. The Bar Association shall be informed about the dismissal of the defence counsel.³⁸³
- Turkey: The Criminal Procedure Code sets out the following: “In cases where the defence counsel does not appear at the main trial, or steps out of the main trial without considering the proper time or fails to fulfill his duties, then the judge or trial court shall make the necessary interactions to appoint another defense counsel immediately. In such an event, the court may interrupt or adjourn the main trial to a later date. If the new defense counsel asserts that he has not been given enough time to prepare a defense, then the main trial must be adjourned”.³⁸⁴ It was reported that in practice, the provision above is applied only with respect to defense counsels who does not appear in the court. However, no steps are taken against a defense counsel who appears in the court, but does not provide an effective defence. Furthermore, in certain cases the courts may lodge a criminal case against those defense counsels who do not appear before the court.

So far only Georgia has a separate body, vested specifically with the task of monitoring the state’s legal aid system, been established : a supervising authority, the Monitoring Council of the Legal

³⁷⁹ No exact information is available regarding Bulgaria and Kosovo.

³⁸⁰ While the Criminal Procedure Code sets out that the defence counsel should contact the defendant without delay and to use all lawful means and methods of defence at the appropriate times in the defendant’s interests, if the defence counsel fails to fulfil these obligations, he/she will commit an ethical misdemeanour at most. However, procedures on ethical misdemeanour against appointed lawyers are very rare.

³⁸¹ Defence counsels shall act in accordance with the law and ethical standards of the Bar Association, and can be sanctioned for violating these standards.

³⁸² Criminal Procedure Code no. 141/1961 Coll., Article 37a

³⁸³ The Law on Criminal Procedure, Official Gazette of Montenegro, no.57/09 i 49/10, Article 71, Paragraph 4 and 5

³⁸⁴ Criminal Procedure Code No. 5271, Article 151/3

Aid Service, has been set up to ensure the independence, transparency and effectiveness of the Legal Aid Service.³⁸⁵ However, it was reported that the Monitoring Council is ineffective: according to available data, it has never carried out actual monitoring activities and there are no practical monitoring tools envisaged by the legislation or in practice.

It was reported regarding Ukraine that as part of a pilot project, a system for monitoring the work of state-funded lawyers had been set up.

11.2.4. Practical deficiencies reported

a) Concerns related to the performance of state-funded lawyers – Ineffective defence?

Georgia: It was reported that pre-trial detainees frequently complain about lawyers appointed at the state's expense. Complaints mostly concern their attitude towards the case and their failure to allocate appropriate time for working on the case. Reasons include the massive workload of state-funded attorneys.

Hungary: Empirical studies clearly show that indigent defendants do not have access to quality legal aid in Hungarian criminal investigations: legal aid lawyers often do not contact their clients, fail to attend interrogations and remain passive even when present.

Kosovo: In certain cases, doubts were raised regarding the performance of lawyers appointed.

Lithuania: In practice, state-funded lawyers most often devote little time and effort to cases. Thus, defendants usually receive low-quality service in the framework of state-funded legal aid.

Moldova: The legal assistance provided is not in all the cases real and effective.

Montenegro: Appointed attorneys are not always specialists in criminal law, which may influence the quality of the defence. Detainees often choose the same attorneys, which may also influence the quality of work due to the workload of such "popular" attorneys.

b) Concerns related to the independence of state-funded lawyers

Georgia: State-funded lawyers' independence and objectivity have been questioned, since the Legal Aid Service falls under the Ministry of Corrections and Legal Assistance (MCLA). Furthermore, there have been cases of conflict of interests, when a lawyer of the Legal Aid Service provided defence for an individual whose rights have been violated by the authorities that the lawyer also represented, i.e. the MCLA or an agency within the MCLA (e.g. a penitentiary establishment). There have been cases when a Legal Aid Service lawyer, who was defending the interests of a detainee, requested information from a penitentiary institution, which refused to provide the information. The lawyer should have appealed the refusal in court, but he could not or chose not to do so, since by doing so he would have gone up against the Ministry. On the basis of these experiences, it was claimed by the Georgian Young Lawyers Association that subordinating the Legal Aid Service to the MCLA is problematic, and the conditions necessary for ensuring institutional independence of the Legal Aid Service must be created.

Hungary: In Hungary, the legal aid lawyer on a given case is selected by the Police during the investigation, which – by its nature – does not have an interest in efficient defense work. Under the law, the Police have total discretion in selecting lawyers from the list compiled by the Bar Associations. Data requests by the Hungarian Helsinki Committee showed, e.g., that at some Budapest police stations, one or two lawyers get approximately 90% of all appointments. Together with further empirical studies, this indicated that some attorneys base their entire practice on appointments, and hence are financially dependent on the appointing officer, who is disinterested in effective defense. This situation is prone to a form of corruption, as the lawyer's

³⁸⁵ Law of Georgia on Legal Aid, Article 10

financial interest may have a negative impact on the quality of his/her work. Since no entity monitors the appointment practice, and no data are made available on the issue, related police practices lack any transparency.

Kazakhstan: It is claimed that state-funded lawyers may be loyal to the investigators.

c) Financial matters affecting the legal aid system

Bulgaria: The fees of state-funded lawyers are not regulated. Fees usually range from 80 to 200 euros for one phase of the case (i.e. for each court appearance), but the court often lowers the lawyers' fees to 50-60 euros.

Hungary: The fees of state-funded attorneys are way below market prices, and legal provisions allow payment of fees for only certain activities. For other activities, such as the writing of petitions or appearing in a hearing during the investigating phase of the procedure, no payment is allowed. Accordingly, appointed lawyers are not motivated to participate in activities that are not funded.

Kazakhstan: Rates of state funded lawyers are extremely low.

Russia: The Ministry of Finance establishes a certain range of payment for one day for a defense counsel's participation at investigative acts. It also specifies the factors that determine the actual sum of compensation within this range (number of suspects, complexity of the case, involvement of juvenile offenders, number of counts, etc., including the breakdown of wages for weekend, weekdays, holidays, day and night working hours). Local bar associations in cooperation with the Ministry of Internal Affairs establish overall sums for transactions. Thus, in one day it is more beneficial for a lawyer to be present at 10 minimally compensated investigative acts performed by different investigators, than to be present at 3-4 investigative acts performed by the same investigator. However, the investigator might make come to terms with the lawyer by writing him/her several so-called payment obligations for an overstated rate, although the lawyer spent just one day with him/her.

Turkey: The TOHAV conducted a number of interviews with officers of the Istanbul Bar Association, Criminal Procedure Code (CMK) Service, and with practicing lawyers. Interviews showed that experienced and senior lawyers with a long professional career do not apply to participate in the defense counsel appointment system because of the low fee rates, and their inability to obtain the cost of travel expenses to appear at the hearings and prisons, as well as photocopy charges. As a result, most state-funded lawyers are younger and more inexperienced. (The CMK officers interviewed stated that lawyers participating in the CMK service have generally been working as lawyers for five years or less.³⁸⁶) Most of the lawyers interviewed stated that the allowance paid to state-funded defense lawyers is not even comparable with the work and time devoted to the cases.

Ukraine: It was reported that the payment of state-funded attorneys is low and that they are attracted to the work forcibly and as a result, typically only go through the motions of defending a case. However, the government has begun to improve its state-funded legal aid system. Facilitated by human rights organizations, three pilot, free legal aid offices were established in three Ukrainian regions. In these pilot offices, lawyers work for a more or less sufficient remuneration, and the system of payment for their services is based on time spent on the case and the difficulty of the task. On the basis of the experiences of these offices, methods of calculating attorneys' fees were established, and the system of free legal aid in criminal proceedings will be reorganized. From 1 January 2013 similar free legal aid centres will start to

³⁸⁶ Young lawyers refer to the state funded legal aid system due to economic reasons, since they have not yet attained a sufficient client portfolio. Another purpose of younger lawyers registered to the defence counsel appointment system is to gain practical experience.

operate in all other regions of the country, and it was reported that the government is committed to maintain these offices and pay for the lawyers' work a reasonable rate, according to their workload and the complexity of cases.

12. Advocacy

12.1. International jurisprudence

Many of the researchers participating in this study indicated that in their countries international jurisprudence plays an important role in their national legal systems.³⁸⁷

For example in, Montenegro the Constitutional Court in its judgment U-III No. 348 directly referred to the jurisprudence of the ECtHR when explaining that when PTD is ordered due to concerns over public order, there must be concrete evidence to justify these concerns.

Also, in Turkey, the government undertook considerable amendments to the length of PTD, as a response to ECtHR jurisprudence. In a decision on November 26, 1997 regarding Mr. Sakık and others,³⁸⁸ the ECHR ruled that extended detention of the applicants in police custody (Sakık, Türk, Alınak and Zana 12 days, Dicle and Doğan 14 days) and the failure to bring them before a judge within a reasonable time period is a breach of the 4th paragraph of Article 5 of the Convention.

International jurisprudence has even been shown to work indirectly. For example, between 2010 and 2011 the ECtHR would not allow that defendants be extradited to Kazakhstan because of concerns over torture. This fostered considerable local political will to alleviate concerns relating to the practice of torture in Kazakhshtan.

However, some researchers stated that in their countries, international jurisprudence does not have much of an impact.³⁸⁹

This is so for a number of reasons.

One cause is the fact that international jurisprudence is not directly enforceable in a particular country. In Albania there is no law regarding the execution of ECtHR decisions. The Albanian Helsinki Committee tried to push for such a law in 2011 but with no results so far. They only managed to convince the Supreme Court in 2012 to allow for a case to be reviewed when there is an ECtHR judgement, on the ground that the ECtHR judgement can be considered a new "fact" justifying review of the case.

Also, many times states would refuse to amend legislation and would simply pay compensation granted in a particular case,³⁹⁰ or if they did ammend legislation, they would not really implement the amendment it in practice.³⁹¹

12.2. National jurisprudence

Most of the countries surveyed indicated that national courts can be effective in influencing their legal system and generating change,³⁹² while others indicated that the courts fail to do so.³⁹³

In the judicial systems of the countries participating in this study the most influencial courts are usually the supreme courts³⁹⁴ and the constitutional courts.³⁹⁵ In many of these countries, the

³⁸⁷ Albania, Czech Republic, Kazakhstan, Kosovo, Moldova, Montenegro, Romania, Russia, Serbia

³⁸⁸ Sakık and Others v. Turkey (Application number : 87/1996/706/898-903, Judgement of 26 November 1997)

³⁸⁹ Bulgaria, Hungary, Lithuania, Poland

³⁹⁰ Hungary

³⁹¹ Georgia

³⁹² Albania, Czech Republic, Georgia, Kazakhstan, Kosovo, Montenegro, Poland

³⁹³ Bulgaria, Hungary, Turkey

³⁹⁴ Albania, Kazakhstan, Moldova, Poland, Romania, Russia, Ukraine

supreme courts are the only ones whose jurisprudence is generally binding for other courts.³⁹⁶ This is very important as many of our researchers pointed out that in their countries judicial practice is not uniform and varies from court to court.³⁹⁷ In Lithuania this has changed thanks to a decision of the constitutional court, which ruled that Lithuanian courts are bound by their own precedents, as well as those of higher courts.³⁹⁸

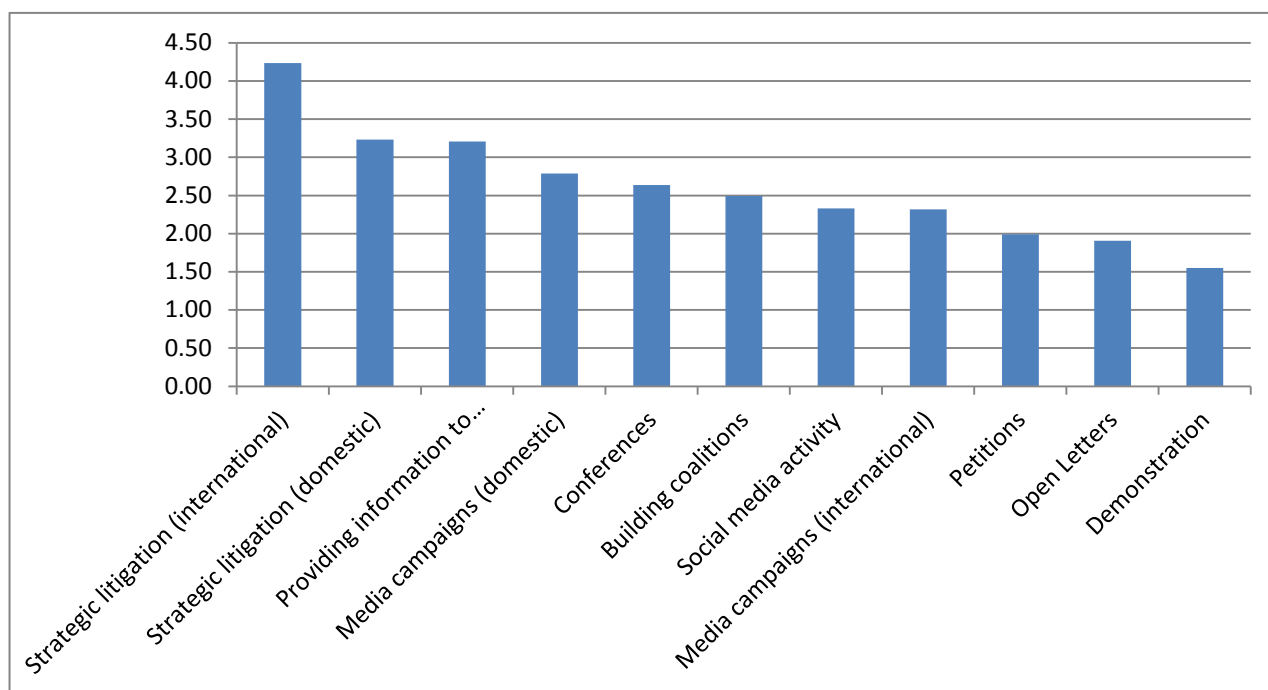
In the Czech Republic the major and recent amendment of the proceedings on pre-trial detention, Law no. 459/2011, is based largely on domestic jurisprudence, especially on decisions of the constitutional court. For example, the constitutional court ruled that the accused must be heard during the review of PTD. Also, the constitutional court in its decision no. Pl. ÚS 6/10 of **20 April 2010**, quashed article 74 (2) of the Code of Criminal Procedure, which provided that the accused person must be held in detention, even though the court found him or her not guilty but the state prosecutor appealed the court's decision.

12.3. Most effective means of promoting change

The researchers were asked to assess, according to their own experience, what advocacy tools proved to be most effective in generating practical, positive changes in their criminal justice system, especially with respect to those policies relating to PTD and alternatives to PTD. They had to rate all advocacy tools on a scale of 1 to 5; one (1) being **not very** effective and five (5) being **very** effective.

The graph below was generated from their answers. As can be seen, most indicated that international litigation would be most effective, while demonstrations and open letters were seen as the least effective.

Figure 10



³⁹⁵ Albania, Russia

³⁹⁶ Albania, Kazakhstan, Moldova, Poland, Romania

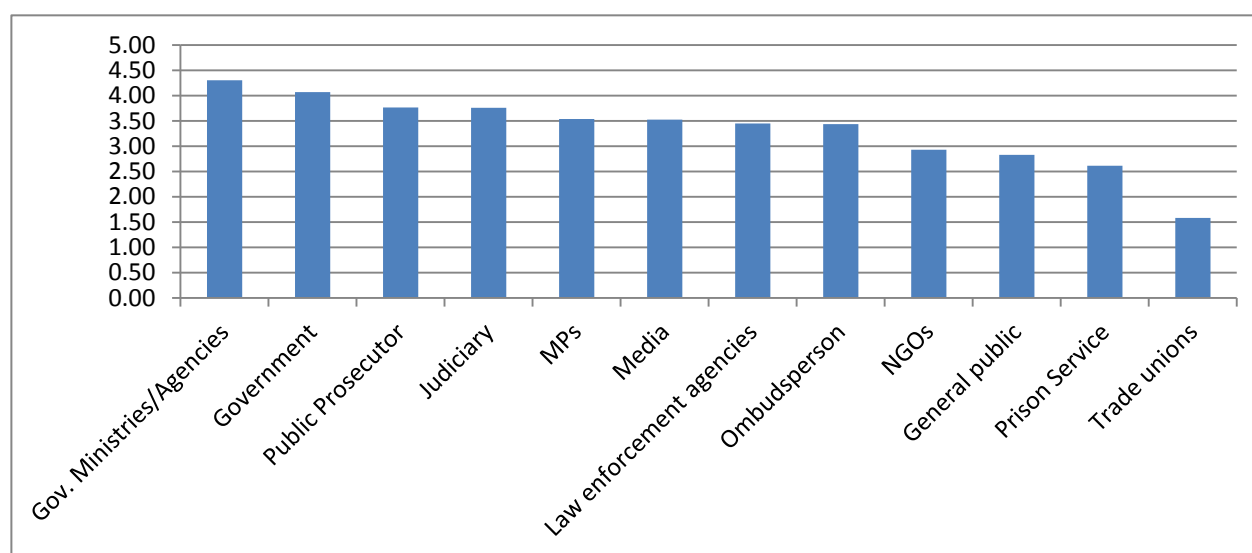
³⁹⁷ Romania, Serbia, Ukraine

³⁹⁸ Lietuvos Respublikos Konstitucinis Teismas, 33/03, 28.03.2006, available at: <http://www.lrkt.lt/dokumentai/2006/r060328.htm> (08.05.2012, English).

The researchers were also asked to assess, based on their professional experience, what would be the most relevant target audience for any advocacy effort relating to PTD and alternatives to PTD. They were asked to assess a number of targets on a scale of 1 to 5; one (1) being **not very** relevant and five (5) being **very** relevant.

The graph below was generated from their answers. As can be seen, the government, especially through its various ministries and agencies is seen to be the most relevant target of any advocacy campaign while Prison Service Officials and Trade Unions are perceived to be the least effective.

Figure 11



12.4. Ability of NGO sector to promote change

The researchers were also asked to comment on the role and power that NGOs have in their country to influence policies relating to PTD and alternatives to PTD. They were required to provide concrete examples.

Most of the respondents stated that NGOs are very active in developing new policies and legislation. In Ukraine NGOs have been very active in the development of a new Criminal Code, and in Romania NGOs have helped build the country's probation services.

However, a majority of the respondents were doubtful as to the power NGOs have in promoting reform,³⁹⁹ only some were confident in this power.⁴⁰⁰ Also, others pointed out that NGOs are most effective when their expertise is requested by state officials; in these situations the likelihood of influencing policy and legislation is the highest.⁴⁰¹

In order to optimize their power, some respondents emphasized the need to form NGO coalitions⁴⁰² or partner up with international organizations such as USAID, ODIHR⁴⁰³ or the European Union.⁴⁰⁴

³⁹⁹ Bulgaria, Georgia, Kosovo, Serbia

⁴⁰⁰ Kazakhstan, Russia

⁴⁰¹ Lithuania

⁴⁰² Georgia

⁴⁰³ Kazakhstan

⁴⁰⁴ Montenegro