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PRE-TRIAL DETENTION AND ITS OVER-USE

EVIDENCE FROM TEN COUNTRIES

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NOVEMBER 2019

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Our thanks are also due to Fair Trials for contributing the section on the role of civil society in challenging misuse of pre-trial detention (at pages 10-11 of the report).

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Catherine Heard & Helen Fair

Institute for Crime & Justice Policy Research

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Foreword

Between the ages of 17 and 20 many of us will have had the opportunity to travel to new and exciting places, go on our first dates, start university, or get our first jobs. Kalief Browder didn't have the chance to do any of these things. He spent these three, formative years in Rikers Island jail in New York. He suffered mental, physical and sexual abuse – and endured two years in solitary confinement. Tragically, two years after his release, Kalief committed suicide. He was 22.

He was placed in detention and subjected to unimaginable horrors because he was too poor to pay bail and because he refused to plead guilty to something he didn't do. He spent three years in jail because the prosecution couldn't get its act together to prosecute or drop the case; and because New York's courts didn't care enough about Kalief's life and his freedom to order his release.

Of course, law and procedure play an important role in addressing the over-use of pre-trial detention but, in my view, what underlies the current pre-trial detention crisis is a fundamental disregard for the lives of some people – often the poorest, most marginalised and most vulnerable in society. As this fascinating global study demonstrates, this isn't just an American problem. This disregard for human life underlies a global crisis: around three million people are in pre-trial detention around the world.

The interviews with defence lawyers cited throughout this report allow us to look beyond the law on paper. They provide an insight into what's really driving the consignment of millions of people like Kalief Browder to days, months and years in pre-trial detention:

They probably did it anyway: The research highlights a disturbing disregard for the presumption of innocence. In the words of one Hungarian lawyer, pre-trial detention 'functions not as a preventive measure but as an advance punishment'. Indeed, if the aim of the system is simply to convict people who are presumed to be guilty, the coercive effect of detention might even seem useful:

So, if you're out on bail, you're less likely to just plead guilty to get it over with even if you're not guilty, because you're free. But if you're in and you're waiting,... that's definitely going to affect how likely you are to take a plea, how desperate you are. (New York)

I'm too scared to release them: Judges and prosecutors across the globe are described as being driven by fear in today's pervasive 'tough on crime' political and media context. '[T]hey're scared of ending up as front page news' if they release a person pre-trial who goes on and commits a further offence (Australia); and '[t]here's so much sensationalist TV coverage of stories involving blood, gangsters, arrests, chases ... it has a harmful effect on the mind-set of judges ... affecting them as much as their formal legal education.' (Brazil)

We can't take risks with people like this: When judges fail to engage with defendants as real people, they're more likely to see them as stereotypes. Presented with the scenario of a person accused of murder, lawyers in many of the countries said the social standing and race of the person would likely determine their chances of getting bail. In India, '[t]he decision would depend on the characteristics of the accused, the strata of society the accused comes from, his credentials in life...'; in South Africa, 'if he had been arrested in one part of the city it would be seen as a gangster crime and would be harder to get bail. If it was in a suburb, drunk students, remand would be less likely'.

I don't have the time to do it properly: Simply managing court 'business' seems more important than doing justice: 'Magistrates are so overwhelmed they cannot engage with the facts or the person before them, and 'barely look up to see who the accused person is' (India); and '[the court] doesn't have the time to apply the law ... they want to shuffle through cases as quickly as possible' (South Africa). Fair Trials' own research has shown that defence lawyers, too, often fail to turn up to detention hearings and that their advocacy is frequently passive or non-existent when they do.

This mechanical, impersonal handling of what are often life-changing decisions is all too clear in the court records of the repeated decisions to detain Kalief Browder. As *The New Yorker* reported in 2014:

With every trip Browder made to the courthouse, another line was added to a growing stack of index cards kept in the court file:

June 23, 2011: People not ready, request 1 week.

August 24, 2011: People not ready, request 1 day.

November 4, 2011: People not ready, prosecutor on trial, request 2 weeks.

December 2, 2011: Prosecutor on trial, request January 3rd.

June 29, 2012: People not ready, request one week.

September 28, 2012: People not ready, request two weeks.

November 2, 2012: People not ready, request one week.

December 14, 2012: People not ready, request one week.

There's no mention of the young man himself or of the devastating impact of these repeated detention orders: just an ever-present willingness to say 'yes' to the prosecutor's requests for continued pre-trial detention.

Meaningful change demands that decision-makers reckon with the human and social costs of pre-trial detention. That requires greater focus on the potentially devastating consequences of detention for the individual suspect or defendant (not just on the risk they might fail to appear or commit an offence); zealous advocacy for release by well-prepared defence lawyers; proper consideration of alternatives; and the time and resources for courts to consider carefully in every case whether pre-trial detention is necessary and, if it is, to explain why.

Jago Russell

Chief Executive, Fair Trials

Terms used in this report

Pre-trial detainee: Someone who, in connection with an alleged offence, has been deprived of their liberty following a judicial or other legal process, but not yet definitively sentenced. The person could be at any of the following stages:

- the 'pre-court' stage: the decision has been made to proceed with the case, and further investigations are in progress or a court hearing is awaited;
- the 'court' stage: the court process (involving determination of guilt and/or sentence) is ongoing;
- the 'convicted un-sentenced' stage: the person has been convicted at court but not yet sentenced;
- the 'awaiting final sentence' stage: a provisional sentence has been passed, but the definitive sentence is subject to an appeal process.

(Not all of the above stages are applicable in every case or every legal system.)

Remand prisoner: Used interchangeably with 'pre-trial detainee'

Remanded in custody: Ordered to be held in pre-trial detention or 'on remand'

Bail: Someone who is 'released on bail' before or during any of the above stages is not held in pre-trial detention pending conclusion of the case. They can either be released without conditions, or have conditions attached (by the police or the court) to their release. A common bail condition is payment of a sum of money, which is forfeited if the person then absconds. This money is itself called 'bail', as in: 'The court set bail at US\$ 500'.

Summary

This report presents our research on the use of pre-trial imprisonment in ten contrasting jurisdictions: Kenya, South Africa, Brazil, the United States of America, India, Thailand, England & Wales, Hungary, the Netherlands and Australia. A key objective of the research is to learn from disparities in the use of pre-trial imprisonment across the ten countries and to identify transferable lessons about how to prevent its misuse.

Rising pre-trial prisoner numbers; preventable injustice

At any given time, up to a third of the world's prisoners are awaiting trial or final sentence. Many of them will wait for months or years while their cases languish in congested court lists. Some may be acquitted; others may see their cases dropped before they even get to trial. Some will be convicted at trial but will not receive a custodial sentence, perhaps because the time on remand was longer than the maximum sentence for the offence; or because the sentencer does not think a prison sentence is justified in the circumstances. In all three scenarios, the time spent in pre-trial detention will usually have had major consequences for the individual: these commonly include loss of employment, accommodation, family and community ties; and deterioration in physical and/or mental health.

Pre-trial detainees represent an unacceptably large proportion of prison populations in many parts of the world. Since 2000, pre-trial prisoner populations have grown across all continents except Europe. This is despite greater availability of cheaper, less restrictive means of managing risk and ensuring attendance at trial. It is also despite clear evidence that the unnecessary use of pre-trial detention causes economic and social harm, puts pressure on prison conditions and increases the risk of crime.

The gulf between law and practice

Our research on pre-trial decision-making – both in legal theory and in practice in the ten countries – was framed around three hypothetical offending scenarios (vignettes): one refers to a burglary by a man with previous convictions for similar offences; the second, drug importation by a woman from a less developed country; and the third, an intentional homicide by a young man.

These vignettes raise distinct and important issues for consideration at the pre-trial stage. How should previous convictions be weighed in conjunction with other aspects of the defendant's circumstances? Does non-national status automatically make someone a 'flight risk' or is this an outmoded, discriminatory approach to the decision? Does a young man accused of murder stand a better chance of bail if he is from a wealthy or privileged background?

Interviews with experienced criminal defence lawyers across all ten countries provided us with a rich body of material to illustrate how, in cases like these, courts tend to approach the decision whether to remand in custody or release (with or without conditions such as money bail or electronic monitoring). The analysis of the interview material and the national and international legal frameworks produced important insights into why routine practice so frequently departs from legal theory; and into the issues to be addressed if practice is to be brought into line with the law.

Causes of pre-trial injustice

It is not principally defects in national legal provisions that cause pre-trial injustice, but wider systemic factors relating to how the law is applied (or misapplied). These wider factors are often closely intertwined. They include the socio-economic and political context in which decisions are made and policies applied in response to law-breaking. Poverty, unemployment, homelessness and substance misuse form the backdrop to a large proportion of crime. People from backgrounds of disadvantage are more likely to be arrested and more likely to be detained pre-trial; they are less likely to have the means to pay bail or comply with other conditions acceptable to the court, or to be able to afford good legal representation.

However, law matters too: just as there are practical legal provisions which can and should curb the over-use of pre-trial detention, so too there are features of criminal law and procedure that tend to raise the risk of pre-trial injustice.

Aspects of the wider criminal justice 'machinery' are an important part of the picture. The use of incentives for police, leading to more arrests than the system can handle; under-resourced prosecution services unable to investigate quickly and effectively; inadequate legal aid funding; lack of judges and other court staff; lack of adequate court buildings; unmodernised infrastructure and technology; too few alternatives to custody. All these are identified as key reasons for the unnecessary use and prolongation of pre-trial imprisonment.

Another cause of pre-trial injustice according to defence lawyers across the ten countries was the way judges apply the law in practice. Some of the points the lawyers made were closely related to the wider contextual and systemic problems outlined above. Others concerned judicial culture and practice. Judges were described as being too ready to make assumptions about risk that were not borne out by facts or supported by evidence; too quick to take the prosecutor's side; unwilling to listen to defence arguments about weak evidence or ways to mitigate risk; overly influenced by fear of media criticism, particularly in cases where the offence carries a heavy punishment; and usually disinclined to give concrete, evidence-based reasons for their decisions to remand in custody.

Addressing the problem

Our recommendations for tackling the misuse of pre-trial detention (presented on pages 33 to 36) are drawn directly from our research and are capable of being implemented in the ten countries and more widely. We give examples of legal provisions to be included – and avoided – to help reduce the risk of unnecessary pre-trial detention. Other recommendations are designed to ensure that sufficient alternatives are in place so that people are not detained merely for want of other means to manage risk; that everyone at risk of pre-trial detention receives effective legal representation; and that people are not kept in custody merely because the prosecution, the court service or some other part of the criminal justice system cannot handle the volume or complexity of cases to be tried. Several of our recommendations concern judicial standards and practices.

The report concludes with two overarching points. First, there must be greater recognition of the gulf that exists between the law – which makes pre-trial detention an exceptional measure, to be used as a last resort – and the reality, in which pre-trial detention in many countries remains the default response, certainly in cases like those depicted in the three vignettes and, often, more generally.

Secondly, governments, practitioners and civil society should see the unnecessary use of pre-trial detention as part of a wider problem of over-reliance on custody and on criminal justice interventions. Success in reducing the use of pre-trial detention can only be achieved as part of a wider strategy to limit the resort to custody as a response to criminal conduct.

1. Introduction

Prisoner numbers worldwide have seen unprecedented growth in recent decades. Failure to match these increases with the necessary extra investment in prison staff and infrastructure has, inevitably, brought about overcrowded, inhumane prison conditions. Today, two thirds of all countries worldwide have overcrowded prison systems.¹ The unnecessary use of pre-trial imprisonment is a major, but largely preventable, contributing factor to prison population growth and overcrowding.

There are now close to three million pre-trial detainees globally. In much of Africa and southern and western Asia, pre-trial detainees constitute a particularly high proportion of national prison populations. Also striking is the recent rapid growth of pre-trial detainees in the Americas, some south eastern Asian countries, Australia and New Zealand (Walmsley, 2017).

In 2015, in recognition of the harmful effects of pre-trial detention on justice, communities and economies, the governments of 193 countries committed to the United Nations' Sustainable Development Agenda for the period to 2030. For the first time, the development goals included one relating to equal access to justice and commitment to the rule of law: Goal 16 requires states to: 'Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels'. One of the indicators of states' progress towards this goal relates to the proportion of un-sentenced detainees in a country's prison population. This provides important impetus to the work of civil society and government bodies to tackle over-use of pre-trial detention.²

Pre-trial detention can occur at one of several distinct stages of the criminal justice process, as explained in the box on page v. This presents challenges in terms of data accuracy due to the significant divergence between countries in the way pre-trial detainees are classified and recorded in official prison statistics. In some countries, pre-trial detainees are held in police cells or lock-ups rather than prisons. This may mean they are not included in the country's pre-trial detention figures.³

In this report our focus is on detention ordered by courts, rather than police detention following arrest or charge but before the suspect has appeared before a court.

1.1 Background

This report describes the increase in numbers of people held in pre-trial detention in recent decades, considers causes and consequences of this growth across a range of legal systems, and sets out recommendations for reversing current trends. It is the third in a series of reports under the banner of ICPR's international, comparative project, 'Understanding and reducing the use of imprisonment in ten countries', launched in 2017.⁴ The project focuses on a diverse group of countries spanning five continents:

-
- 1 Except where stated, data used in this report are from the World Prison Brief website, hosted and published by the Institute for Crime & Justice Policy Research: www.prisonstudies.org. The data were accessed between August and September 2019. There are currently ten countries on which no pre-trial detention figures have been traced: Bhutan, China, Cuba, Equatorial Guinea, Eritrea, Guinea Bissau, Maldives, North Korea, Northern Mariana Islands, Somalia: China alone is believed to hold around 200,000 pre-trial detainees.
 - 2 There are obvious shortfalls in this being the only indicator relating to pre-trial detainees: a country's proportion of un-sentenced detainees will decrease with any increase in its sentenced population, but this would not necessarily equate to 'progress' in reducing the use of pre-trial detention. Nor does the indicator show how long on average detainees are held before sentence. The indicator could also provide a perverse incentive for fast-track justice involving greater use of plea bargaining and trial waivers at the expense of proper trials and a fair opportunity to defend charges. A more complete picture of a country's use of pre-trial imprisonment can be obtained from its *pre-trial detention rate*, ie the number of pre-trial detainees per 100,000 of population; and from the *pre-trial population trend*. This information is available for almost all countries worldwide, via the World Prison Brief database.
 - 3 This is now the case in Brazil. Until 2014, Brazil's official prison population statistics included both those held in the 'sistema penitenciário' (prison system: 579,781 people at June 2014) and those held in lock-ups run by 'polícia e segurança pública' (police and public security agencies). As at June 2014, people detained in lock-ups represented 4.6% of the country's total prisoner population: 27,950 out of total of 607,731 prisoners.
 - 4 The project's first report (Jacobson et al, 2017) presented brief accounts of the ten countries' recent patterns of imprisonment. The report showed that of the ten countries, only one – the Netherlands – has achieved a significant reverse in the upward trend, with a sustained reduction in prisoner numbers, although steady falls have also been seen in American prisoner numbers since their peak in 2008.

- Kenya and South Africa in **Africa**
- Brazil and the United States in the **Americas**
- India and Thailand in **Asia**
- England and Wales, Hungary and the Netherlands in **Europe**
- Australia in **Oceania**

The project aims to advance understanding of the factors driving high imprisonment levels and to devise strategies to curb the unnecessary resort to custody. Our research entails legal and policy reviews and empirical work, with input from a range of partners including legal and other practitioners, NGOs and in-country researchers. While the research is primarily focused on the ten countries, the issues addressed and our strategies for tackling them have broader global relevance.

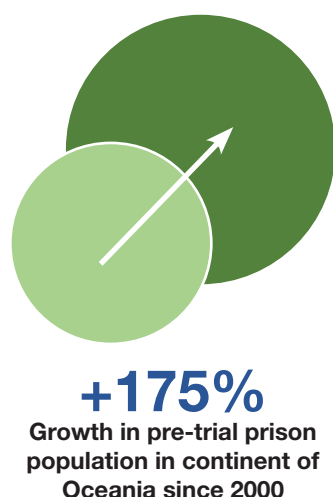
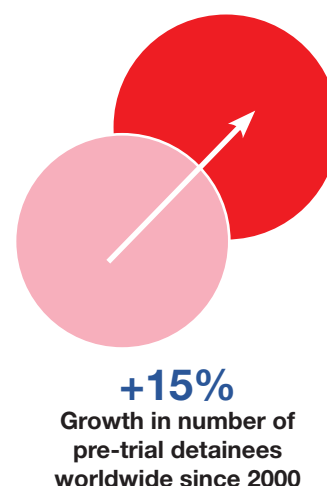
In producing this report, we have drawn on the following main sources of information:

- Pre-trial detention statistics held on ICPR’s World Prison Brief database;
- Analyses of the legal framework governing pre-trial decision-making in the ten countries;⁵
- Semi-structured interviews with sixty experienced criminal defence lawyers across the ten countries.⁶

1.2 Numbers of people in pre-trial detention

1.2.1 Global context⁷

There are around three million pre-trial detainees worldwide. Between 2000 and 2016, the total number of people in pre-trial imprisonment increased by at least 15%. Some continents and individual countries saw far larger increases than this in their pre-trial detainee populations during this period.



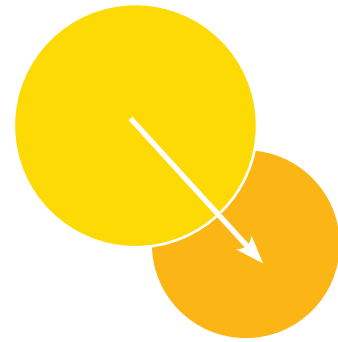
In Oceania, the total pre-trial detainee population increased by over 175%, more than trebling in both Australia and New Zealand. In the Americas, the pre-trial population grew by over 60%, with numbers more than doubling in Brazil, Peru, Venezuela and other countries. Asia’s total pre-trial population increased by over 34%: it grew six-fold in Cambodia, trebled in Indonesia and doubled in the Philippines. Data on the African pre-trial population over this period were distorted by the detention of large numbers of Rwandan genocide suspects as at 2000 and the subsequent resolution of most of these cases. If the Rwanda figures are excluded, the overall increase in Africa during this period would be around 5%.

5 The legal research was conducted by ICPR with assistance from overseas research partners drawn principally from the legal profession. In countries with federal systems where bail and sentencing laws vary between states or territories, we focused the legal research on a single state/territory in order to permit more in-depth analysis than would be feasible with a whole country approach. We selected the laws of New York State in the USA and New South Wales in Australia. Although India and Brazil also have federal systems we were advised that there were no significant differences between states in the legal provisions relating to pre-trial detention and sentencing.

6 We explain how the lawyers were recruited and interviewed at the start of Chapter 3 below.

7 Data in section 1.2.1 are from Walmsley, 2017, which was based on the latest available information on prison populations at the end of November 2016.

The only continent where the total pre-trial population decreased in size was Europe, which saw a 42% reduction, with numbers halving in Russia and falling substantially in most former Soviet republics and former socialist countries of central and eastern Europe. The totals also fell, but less sharply, in southern and western Europe.



- 42%
Decline in Europe's pre-trial prison population since 2000

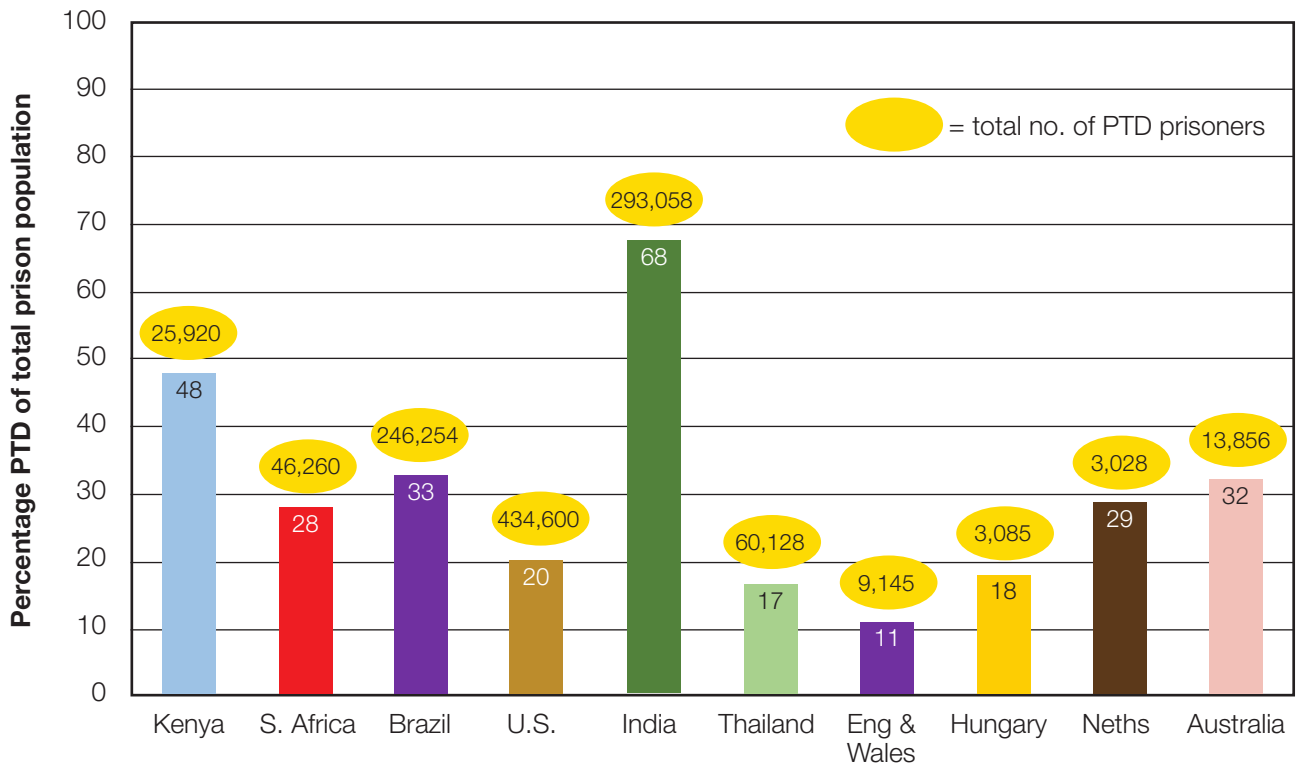
1.2.2 The ten countries

Figure 1 below shows, for each of the ten countries covered by our project, the proportion of the prison population comprising pre-trial detainees, alongside the overall numbers of people held in pre-trial detention.

India has by far the highest proportion of its prison population in pre-trial detention of all the ten countries: 68% are 'under-trials', comprising a total of 293,058 prisoners. In line with its position as the world's number one incarcerator, the USA has the greatest overall number of pre-trial detainees, 434,600, although this represents a relatively low proportion of its total prison population (20%).

In the case of India and Kenya, inefficient and under-resourced court systems are the principal reason for the high percentage of pre-trial detainees; in Brazil, this is also a problem but so, too, is the country's draconian policy of automatically remanding in custody people arrested for a range of commonly charged drugs offences.⁸ In the Netherlands the picture is more complex, reflecting both a greater judicial propensity to use (albeit usually short) periods of remand, and a far more parsimonious use of custodial sentencing than the other countries in this study.

Figure 1: The proportion of pre-trial detainees as a percentage of the total prison population*



*Most recent figures available on World Prison Brief as of September 2019. Figures vary by jurisdiction as to the specific date to which they refer.

8 This has been the effect of Brazil's Drugs Law enacted in 2006.

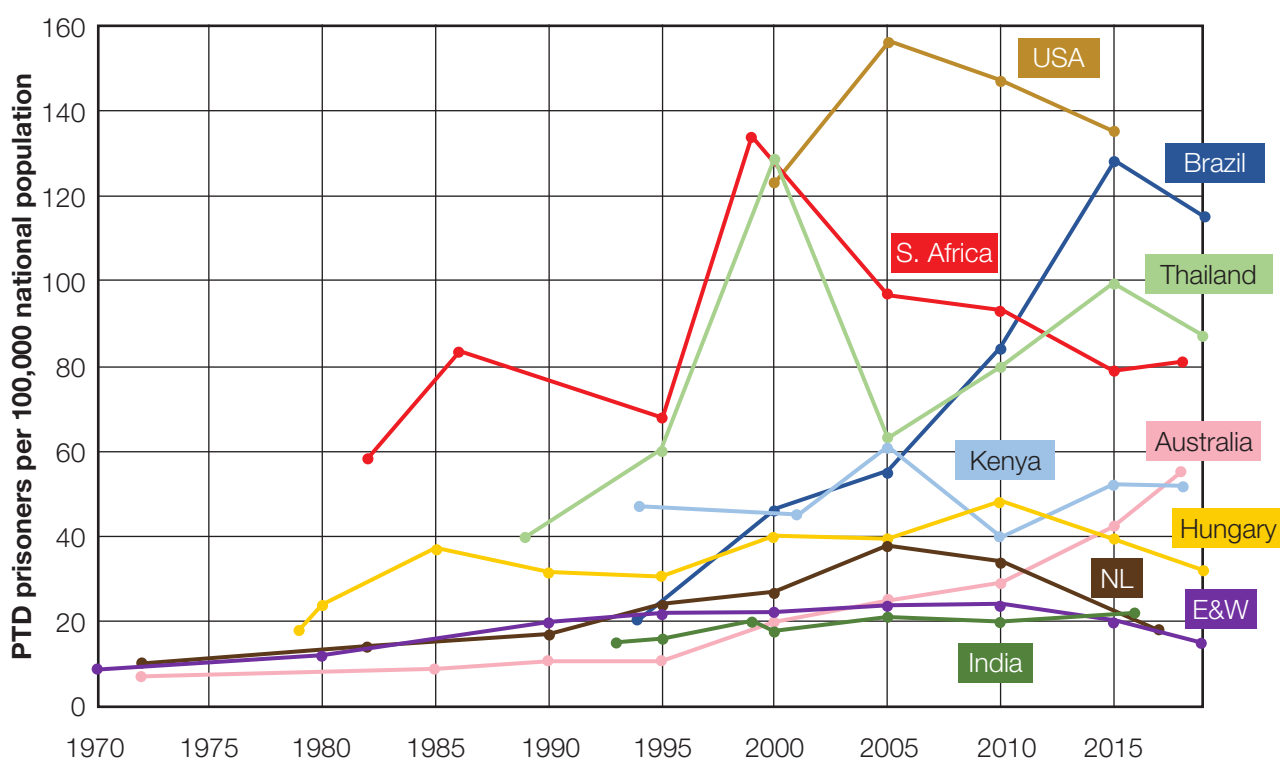
Figure 2 below charts changes in the 'pre-trial detention rate' (number of pre-trial detainees per 100,000 of the national population) since 1970 or as far back as data permit. Rates in most of the ten countries have increased significantly, most notably in Brazil and Australia.

England & Wales has the lowest pre-trial detention rate of the ten jurisdictions, at 15/100,000. Despite having Western Europe's second highest prison population rate (after Scotland), its relatively sparing use of pre-trial detention reflects a well-established presumption in favour of release on bail, bolstered by a statutory remand custody limit of six months.

Both South Africa and Thailand have seen significant reductions in their pre-trial detention populations since 2000, with this period also having seen reductions in their pre-trial detention rates (and proportions of pre-trial prisoners), though with some fluctuation. Each country has had major problems with prison overcrowding, with South Africa having been ordered by its Constitutional Court to reduce overcrowding in one of the country's principal remand detention facilities in 2016. In the absence of significant changes to law or policy, it may not be possible for South Africa to prevent numbers rising again. Thailand has for its part introduced significant reforms to pre-trial procedures and electronic monitoring has been in use for some years, although its use is not yet widespread.

Hungary has seen a modest reduction in its pre-trial detention rate since 2000, from 40 to 32 (though with some fluctuation to higher levels in the intervening years). Legislation enhancing equality of arms between defence and prosecution, including the right to see the case file at remand hearings, may have helped bring this about. Hungary was also required to reduce overcrowding following successful court challenges at the Strasbourg court.

Figure 2: Change in pre-trial detention rate (number of people held pre-trial per 100,000 of the population) since 1970*



*Figures are from earliest date for which reliable data are available to most recent data as of September 2019.

Figure 3 compares, for each of the ten countries over the past two decades, the change in size of the total prison population (both sentenced and pre-trial) with the change in size of the pre-trial detainee population. The chart shows that in five of the countries (Kenya, South Africa, Brazil, the USA and Australia), pre-trial prisoner numbers have increased at a faster rate than total prisoner numbers. India and Thailand, in contrast, saw slower growth in pre-trial detainee than in total prisoner numbers. England and Wales, the Netherlands and Hungary all saw declines in their pre-trial populations over this period, but only in the Netherlands did the overall number of prisoners also fall.

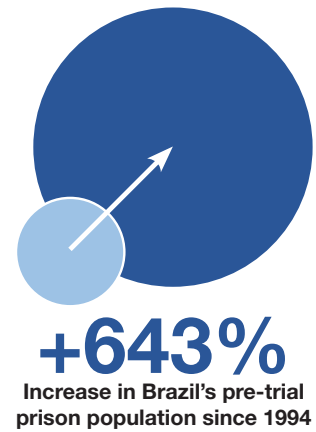
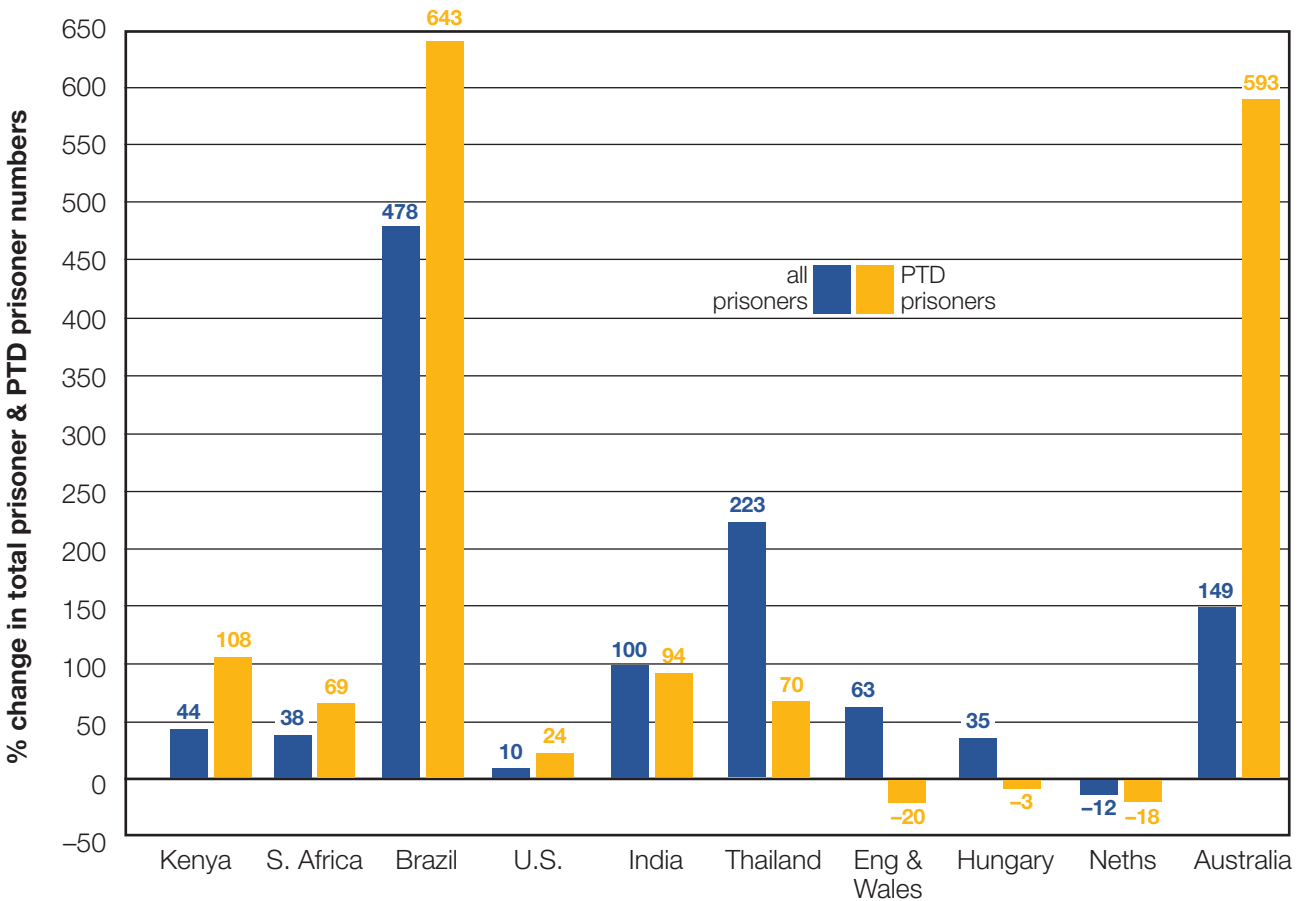


Figure 3: Percentage change in pre-trial detention total and prison population total from mid-1990s to most recent*



*Figures are from 1995 (Brazil 1994; USA 2000) to most recent.

1.3 Structure of the report

Following this introduction, in Chapter 2 we set out the main consequences of the over-use and misuse of pre-trial imprisonment and summarise international principles and laws restricting its use. (A list of relevant standards is provided in the Annex.)

Chapters 3 and 4 present a range of explanations for the misuse of pre-trial detention, as described by defence lawyers in the ten countries. Chapter 5 presents recommendations for reducing the use of pre-trial custody, drawn from our analysis of that material. Civil society organizations play a vital role in holding governments to account in this area, helping to ensure international law against the misuse of pre-trial detention is upheld and fundamental rights protected. Some of the key achievements of NGOs working in this field are featured in the pull-out section on pages 10-11. Our thanks to Fair Trials for contributing this section.

2. Pre-trial detention: why its misuse matters

‘We had two women clients who were in a cell limited to 26 people and there were 60, they were 3 or 4 to a bed, some slept on the floor, there weren’t enough toilets or showers. They had little time out of cell, were covered in bites from lice. It’s horrendous waiting for trial in prison, they can’t get medication for HIV. It’s hard to visit clients there...’

‘Appointments are always getting cancelled or they can’t find the person. This is the priority issue to sort out. Magistrates and prosecutors should have to visit prisons, there should be more awareness of the consequences of their actions... Then we’d see a shift in the mind-set about bail.’

In South Africa, to challenge remand detention defendants usually need to adduce new factual evidence, but to do this from custody is ‘almost impossible’. This is because the ‘basic rights of people in detention including right to visits are routinely trodden on’ – particularly where the accused can’t afford proper legal representation.

[Material from interviews with South African lawyers]

An English lawyer described the remand conditions endured by younger clients as ‘very scary, dangerous and damaging’. He said that one of his clients under 21 had been attacked twice while on remand in a Young Offenders Institution. The lawyer described taking instructions from him as ‘impossible’.

Depriving a person of liberty in connection with an alleged offence when the person has not been convicted and the evidence has not yet been examined or tested represents a potential infringement of several key rights. Unnecessary use of pre-trial detention also causes economic and social harm, puts pressure on prison conditions, and can give rise to greater risk of crime, as explained below.

2.1 Interference with fundamental rights

Pre-trial detention engages (and may well infringe) several distinct fundamental rights enshrined in international law. In brief terms:

Freedom from torture, mistreatment, inhumane conditions

- In many countries, people in pre-trial detention are held in overcrowded, cramped and insanitary conditions, at risk of mistreatment and violence.
- Prison conditions are often worse for those in pre-trial detention than for sentenced prisoners, despite the internationally enshrined legal principle that accused persons should be treated as innocent unless and until they are proven guilty. Remand prisoners usually have no access to work, education or rehabilitation.

Private and family life; work

- Even short periods in detention disrupt family and private life and the ability to work and earn a living, with potentially long-term consequences.

Liberty

- Pre-trial detention may contravene the right to liberty, which incorporates a right not to be detained arbitrarily.
- Time held in pre-trial detention can be needlessly long, sometimes lasting for years, because of inefficient and overloaded court systems.
- Once in detention, it becomes harder to find the evidence necessary to obtain release into less restrictive measures such as house arrest or electronic monitoring.

Fair trial and presumption of innocence

- Pre-trial detention conflicts with the right to be presumed innocent until proven guilty.
- Being in prison compromises the ability to prepare a defence, making it difficult to consult with one’s lawyer, review the prosecution case and prepare for trial. This raises the risk of miscarriage of justice.
- People in custody are at greater risk of pressure from police or prosecutors to confess or accept plea deals in exchange for release on bail or for dropping more serious charges. This in turn raises the risk of wrongful convictions.

2.2 Pressure on prison conditions

If a country's prisons are already struggling to cope with increases in prisoner numbers, the over-use of pre-trial detention puts additional pressure on staff time, space and other resources. This will serve to reduce further the resources needed for the safe and decent care of sentenced prisoners. Prison overcrowding not only harms the health and rehabilitation prospects of prisoners; it also carries grave risks for public health and safety (as described in our previous report under this project (Heard, 2019)). Overcrowding now affects the prison systems of 60% of countries worldwide – and all the countries in our study except one, the Netherlands. In 2016 the United Nations Secretary Secretary-General identified the excessive use of pre-trial detention as one of the major causes of prison overcrowding (UN Secretary-General, 2016).

2.3 Economic and social harm

Holding people in custody pre-trial carries significant additional costs compared with less restrictive measures capable of ensuring trial attendance. The costs are direct and indirect. The main direct cost is that of imprisonment itself, which is considerably higher than the alternatives, even in countries where prison systems are inadequately funded. In England and Wales, for example, a prison place costs around £90 per day; electronic monitoring costs around £13 (House of Commons Committee of Public Accounts, 2018). Money spent on incarceration could instead be channelled into public services where underfunding and cuts have been shown to lead to higher levels of disadvantage associated with rising crime rates. The unnecessary use of pre-trial imprisonment can also be seen as an opportunity cost in terms of funds that could have been spent on crime prevention.

There are also indirect costs, as someone in prison can no longer earn and provide for dependents, potentially placing a further burden on the state and a loss of productivity and income tax revenues. When prisons are located a long way from prisoners' homes, family members will also be forced to bear travel and phone costs. (See Muntingh & Redpath, 2016. For a detailed examination of the costs related to pre-trial detention, see Open Society Justice Initiative, 2014.)

Added to these are the further costs and harms resulting from potential future offending by people who are detained pre-trial. For some people who experience imprisonment, the effect will be criminogenic, for several possible reasons (which apply to pre-trial detainees in much the same way as to sentenced populations). Being on remand often means losing the benefit of protective factors known to support desistance from crime, such as family relationships, work and home (Jacobson & Fair, 2016). In prison there is also a greater likelihood of forming associations that could lead to future criminal activity. People in prison are often forced into debt due to drug use or because they need to borrow from other prisoners to pay for essentials such as phone cards, food or medicines. A period of time on remand can make it harder to gain legitimate employment after release, even if the defendant is acquitted.⁹

Without a job and perhaps also having lost their home and links with family, people who have been in prison may feel they have less to lose from engaging in crime after release and few alternatives open to them.

Remand prisoners usually have no access to work and rehabilitation programmes, education or training. Time in prison disrupts progress individuals could be making in the community to tackle the root causes of their offending, such as substance use problems or mental illness.

⁹ Very few countries provide compensation to people who are acquitted after time on remand, or whose cases are dropped before trial.

2.4 International standards

In recognition of the severe consequences of the misuse of pre-trial detention, its use is strictly limited (at least in theory) by provisions contained in international and regional standards.

The Universal Declaration of Human Rights enshrines the rights of everyone charged with a criminal offence to be presumed innocent until proven guilty according to the law (Article 11), while Article 9 of the International Covenant on Civil and Political Rights specifies that no one shall be subjected to arbitrary arrest or detention or should be deprived of their liberty except in accordance with the law. It also details the rights of those arrested or detained. These rights are echoed in the European Convention on Human Rights (Article 5), the Inter-American Convention on Human Rights (Article 7) and the African Charter on Human and Peoples' Rights (Article 6).

United Nations standards go into greater detail about other aspects of pre-trial detention, including that pre-trial detention should be considered a last resort and mandating alternatives to its use; the right of pre-trial prisoners to access legal advice and legal aid; the treatment of pre-trial prisoners in accordance with their un-convicted status, and the conditions under which pre-trial detainees should be held.

These rights are also detailed in regional human rights instruments including the European Prison Rules and the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (the Luanda Guidelines), as well as being the subject of commentary by the Inter-American Commission on Human Rights, the European Committee for the Prevention of Torture and the United Nations Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

Both the European Court of Human Rights and the Inter-American Court of Human Rights have large bodies of case-law relating to the use of pre-trial detention and the conditions under which prisoners awaiting trial are held.¹⁰ They also deal with matters not expressly covered by international law, for example, a presumption in favour of pre-trial release, the right to a regular review of detention, maximum periods for pre-trial detention, and the requirement of reasoned decisions for refusing pre-trial release or for the need for continued detention.

The United Nations has issued guidance about what states should do to ensure national systems reflect the standards. For example, in 2014 the UN Human Rights Committee adopted general comment No. 35 (2014) on liberty and security of person. This provides detail on the obligations of States in relation to the judicial control of detention, in particular, the meaning of the right to be promptly brought before a judge, the entitlement to trial within a reasonable time and limitations on the use of pre-trial detention.¹¹ The Committee also provides guidance on how to implement the right of persons deprived of their liberty to take proceedings for release from unlawful detention. This was followed in 2015 by the adoption by the Working Group on Arbitrary Detention of the final version of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court,¹² which are intended to provide states with guidance on fulfilling, in compliance with international law, their obligation to avoid the arbitrary deprivation of liberty.

Further information on the standards relating to pre-trial detention can be found in the Annex.

¹⁰ European Court of Human Rights: Guide on Article 5 of the Human Rights Convention https://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf; Inter-American Commission on Human Rights: Measures to Reduce Pre-Trial Detention <http://www.oas.org/en/iachr/reports/pdfs/PretrialDetention.pdf>

¹¹ <https://digitallibrary.un.org/record/786613>

¹² <https://www.ohchr.org/EN/Issues/Detention/Pages/DraftBasicPrinciples.aspx>

Civil society's role in reducing pre-trial detention

Bail reform: USA

The Bail Project (bailproject.org) provides free bail assistance to low-income clients to help pay bail so they can return home to their families and communities pending court dates. In some states, cash bail is being abolished altogether. See Pretrial Justice Institute (pretrial.org).

Pre-trial risk assessment: USA

Computer programmes are now used by many courts to measure the 'risk' a defendant will be re-arrested or fail to attend hearings. For a balanced look at the pros and cons, see Centre for Court Innovation, 'Beyond the Algorithm' (courtinnovation.org).

Court date notification: USA

Simple systems to notify suspects of court dates by phone or SMS have been shown to increase appearance rates, reducing justification for pre-trial detention. See National Center for State Courts (ncsc.org).

UN Standards: Global

UN advocacy has led to new rules for the treatment of prisoners (Nelson Mandela Rules) and women in the justice system (Bangkok Rules). See Penal Reform International (penalreform.org).

Torture prevention & sustainable development: Global

International advocacy has highlighted links between pre-trial detention and torture. Access to justice and respect for the rule of law are now recognised as key to development. See Open Society Justice Initiatives (justiceinitiative.org/).

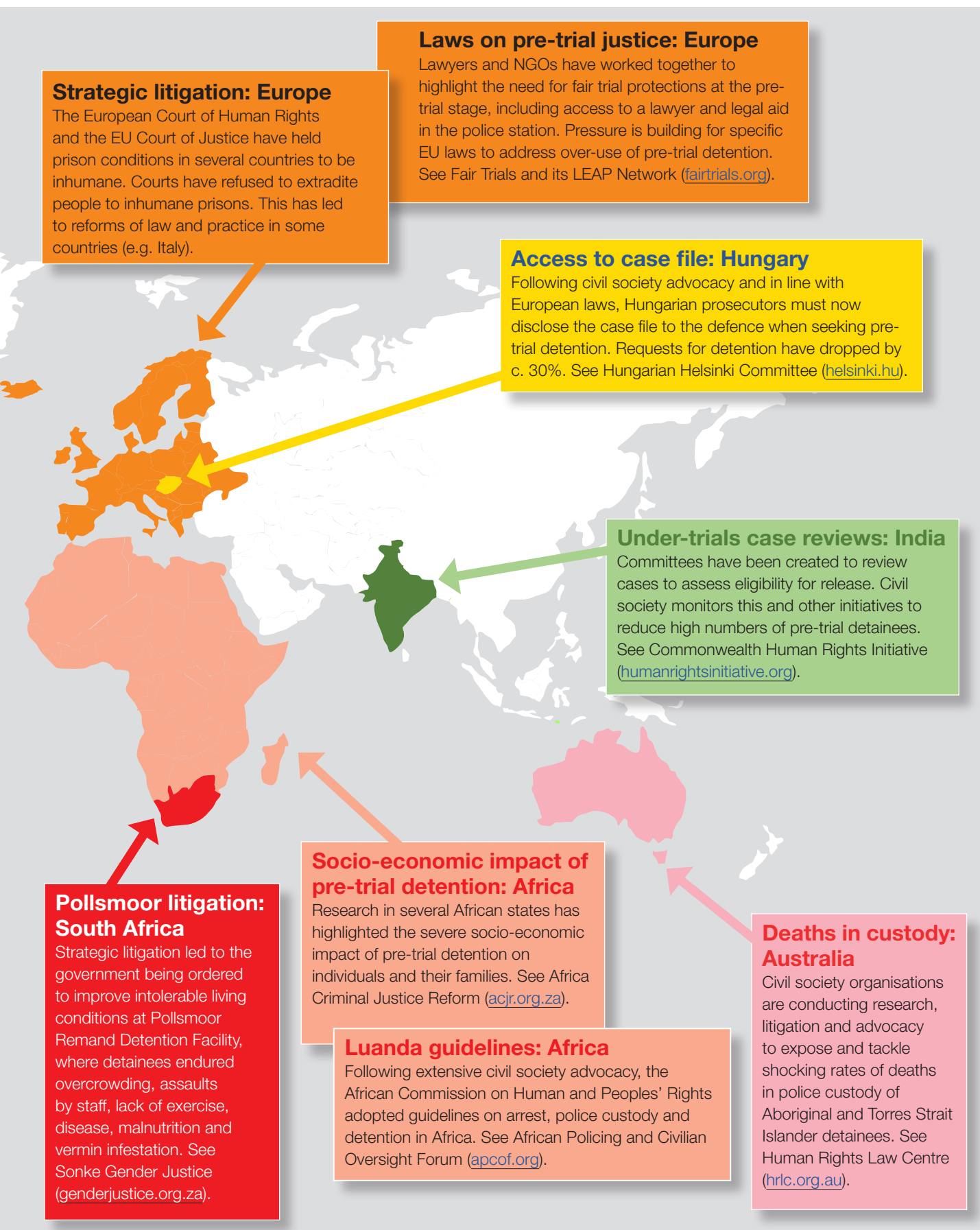
Pre-trial detention and the 'war on drugs': Latin America

Civil society groups have identified 'war on drugs' as a cause of pre-trial detainee surges in Latin America, leading to prison overcrowding, ill treatment and violence. See Advocacy for Human Rights in the Americas (WOLA) (wola.org).

Custody hearings: Brazil

Following extensive civil society advocacy, custody hearings were introduced to ensure detainees appear before a judge during first 24 hours of detention. The hearings can help reduce unjustified pre-trial detention and prevent torture. See Instituto de Defesa do Direito de Defesa (idd.org.br).

(Our thanks to Fair Trials for assistance with this section)



3. Causes of pre-trial injustice: law in context

In this and the next chapter of the report we present the factors described by experienced criminal lawyers in the ten countries as pertinent to the misuse of pre-trial detention.

3.1 Analysis of pre-trial injustice

A key objective of our legal research has been to understand why pre-trial detainee populations are still as large as they are in several of the ten countries, in some cases the highest they have ever been. Numbers have risen notwithstanding clear legal provisions that remand in custody be treated as a measure of last resort, and despite increased availability of alternatives such as electronic monitoring.

To provide a suitable framework for research and comparative analysis, we examined custodial decision-making in the ten countries by reference to three hypothetical cases. (The three vignettes are shown in Figure 4 below.) First, we analysed each country's national legal and policy frameworks and the provisions which, in theory, would govern custodial decision-making in each of the three cases (both in relation to pre-trial detention and sentencing).¹³ We then conducted semi-structured interviews with 60 criminal defence lawyers across the ten countries. Our objective in these interviews was to establish how, in practice, decisions about possible pre-trial detention would be made in the three cases, and to understand the factors – legal as well as extra-legal – that tend to influence custodial outcomes in similar cases.¹⁴

Figure 4: Three offence vignettes

Vignette	Key issues posed by vignette
<p>Burglary</p> <p>Paul, a 32-year-old man, broke into a house when the residents were at work, accessing the rear of the house via a back alley and breaking a window to gain entry. He stole jewellery and cash belonging to one of the residents, worth a total of approximately [US\$ 500]. He has several prior convictions for the same type of offence and other similar offences.</p>	<ul style="list-style-type: none"> • whether custodial or community sentence, if convicted • previous convictions • possible unmet needs underlying pattern of offending
<p>Drug importation</p> <p>Kemi, a 26-year-old woman, was recruited in her home country of [Nigeria] to transport heroin in return for a cash payment. She had flown to [England] from her home country, carrying the heroin in a hidden compartment in a money belt. The quantity of heroin was 400 grams, or a little under 1 lb.</p>	<ul style="list-style-type: none"> • foreign national status • female defendant • severity of sentence, if convicted • level of personal culpability
<p>Intentional homicide</p> <p>Two 23-year-old friends, Len and James, got into an argument while drinking together in a bar. Both left the scene, and Len texted a mutual friend to say that he was going to kill James. The next morning, on leaving his home for work, James was confronted by Len who had been waiting for him outside his property. Len was armed with a knife, which he used to stab James fatally in the chest.</p>	<ul style="list-style-type: none"> • life or other indeterminate sentence, if convicted • young defendant (maturity) • possible mental health treatment needs
<p>Note: Minor adjustments were made to suspects' names, the value of items stolen, the country the drugs were imported from, and whether cocaine or heroin was imported, to ensure appropriateness for each country.</p>	

¹³ In the case of the USA we focused on the laws of New York State and in the case of Australia, on those of New South Wales. (See footnote 5 above.)

¹⁴ Research findings relating to sentencing in the ten jurisdictions will be presented in a forthcoming report.

Our criteria when recruiting lawyers for interview were that they should have at least five years' experience as criminal defence practitioners and that this was a substantial part of their work. Volunteers were sought from law firms and barristers' chambers that undertake criminal defence work, as well as from national legal aid and public defender services. Most of the lawyers who volunteered are engaged exclusively in criminal defence work. We also interviewed one prosecutor and a small number of lawyers who work in both prosecution and defence, as well as some lawyers who sit as judges in criminal proceedings. Some of the lawyers we interviewed also work in other areas of law, including representing victims and victims' families in various capacities.

Defence lawyers routinely spend time preparing for and conducting bail applications and appearing at bail review hearings, and are often required to prepare for trial while their clients are in custody. For these reasons, we concluded that defence lawyers could offer valuable insights into the pre-trial decision-making process and shed light on the human and fair trial consequences of being detained pre-trial. However, as the views presented in this and the next chapter of the report are almost exclusively those of defence practitioners, there is a risk of bias.¹⁵

The lawyers' responses in interview indicated that, while pre-trial detention is usually stated by law to be an exceptional measure of last resort, it is in practice more frequently the default response. Our analysis of the interview material from the ten countries identified a variety of factors advanced by the lawyers to explain this. There was a striking similarity of factors advanced across this highly diverse group of legal systems. They can be grouped into three broad categories:

- (1) factors deriving from the national law and policy framework (discussed in section 3.2 below)
- (2) factors reflecting the wider political, cultural and socio-economic context (discussed in sections 3.3 and 3.4 below)
- (3) factors found in the operation of the wider criminal justice system – the 'criminal justice machinery' (discussed in Chapter 4).

3.2 National law and policy

As previous studies have demonstrated,¹⁶ laws and policies providing the framework for decisions to remand or release pre-trial vary from country to country but share broadly similar fundamental principles. These principles are usually underpinned by regional or international norms and standards (summarised in section 2.4 above).

Legal and policy frameworks have to balance competing interests and objectives. On the one hand, they must be capable of ensuring that defendants attend trial, that evidence is preserved and witnesses are protected, and that (further) offences are not committed. On the other, there must be safeguards to protect the defendant's right not to be detained arbitrarily, to be presumed innocent until convicted and to have a fair trial. Most legal systems – at least in theory – give effect to these rights by providing that defendants should not be detained pre-trial unless, and to the extent that, their detention is necessary to meet the stated objectives, and that no other means exist to do so. Some go further and state that pre-trial detention should be treated as a last resort or an exceptional measure.

In our legal analysis, we found that all ten countries' legal systems contain provisions aimed at protecting defendants' rights to liberty and the presumption of innocence, requiring the court to be satisfied on various grounds before determining that a person must be detained. Often these provisions are backed up by others enabling remand decisions to be challenged and regularly reviewed.

However, the defence lawyers we interviewed across the ten countries believed there to be a strong judicial preference for remanding defendants in custody in the kinds of cases exemplified by our vignettes, at least in the weeks and months immediately following arrest. They overwhelmingly saw pre-trial detention in such cases

¹⁵ The research and recommendations will be presented to a range of other criminal justice practitioners including judges, prosecutors, policy officials and representatives of NGOs engaged in criminal justice reform, at a series of events in the ten countries over the duration of the project.

¹⁶ Several international, regional and domestic research studies have been conducted into the causes and consequences of over-use of pre-trial imprisonment. See, for example: Heard & Mansell, 2011; McVeigh et al, 2016; OSJI, 2014; Muntingh & Redpath, 2016; Crijin et al, 2016; Boone et al, 2017; Castro, 2019; and others listed in the References.

(and often more generally) as, in effect, the norm rather than the exception, despite national or international laws aiming to limit its use and foster wider use of alternatives.

The lawyers considered that the judicial tendency to remand usually comes about because of the very broad discretion that judges have at the pre-trial stage. Less commonly, it can arise when judges do not apply laws or policies designed to limit the use of remand. Some lawyers also referred to specific legislation enacted in recent years to reduce scope for pre-trial release in some circumstances. We discuss these points further below.

3.2.1 Discretion

In several countries, lawyers emphasized that defective legal or procedural provisions are not the root cause of excessive use of pre-trial detention. As one Brazilian lawyer put it:

The problem doesn't lie with the law as such, but its interpretation. There is enough in the law in theory to protect against wrongful use of pre-trial detention, if it were being interpreted correctly and applied in a way that guarantees rights. The law demands a concrete grounding of a decision to remand within reasoning concerning the risks of release in the actual case at hand. [Brazil]

For some lawyers, a primary cause of over-use of pre-trial detention was that the law left too much to judges' discretion. A New York lawyer pointed to the 'amorphous' nature of bail laws. She pointed out that one judge could set bail at US \$250,000 and another at \$25,000 in an identical case, and both be within the law. For another New York lawyer, too much judicial discretion, and too little guidance on how to exercise it, meant that 'people often sit in jail charged with offences for which they ultimately won't serve any jail or prison time'.¹⁷

An Indian lawyer explained that the law set down broad parameters for the circumstances in which a judge could remand in custody: for example, that the defendant could influence the investigation, hamper the trial process or abscond. However, it was very common for risk-averse or unskilled judges to find that these factors existed, based solely on 'assumptions [which] may be unsound or have no basis in the facts. But the wide discretion granted to judges makes it hard to challenge decisions.'

We return to the role of judges in pre-trial decision-making in section 4.2.1 below.

3.2.2 Non-compliance with law

Lawyers from several countries told us that judges do not always comply with the law. There were several examples of this. An Indian lawyer spoke of judges' decisions straying beyond the parameters of bail laws in theft and burglary cases, where some judges are 'taking a "compensatory approach" – asking the defendant to compensate the victim first, then granting bail if they do – even though there's no legal provision for this...'

Brazilian lawyers said that judges routinely ignore a law that provides that if the offence is punishable by no more than four years' imprisonment, alternatives to remand are mandated. They said that this frequently happens in cases where a person has a prior history of minor and non-violent crimes (see section 3.4.5 below).

Thai lawyers referred to judges sometimes being reluctant to follow laws allowing for conditional release pre-trial because they fear this could conflict with provisions contained in unpublished guidelines circulated to courts.¹⁸ It was felt that some judges were afraid that, by not following this guidance, any decision they might make to release a defendant pre-trial could be investigated as potentially corrupt.

17 Many of these problems are addressed by legislation enacted by the State of New York in April 2019, after our interviews took place. The bail reforms reduce the scope of offences for which money bail can be sought, and requires judges to consider the defendant's financial resources when setting bail. (For more information see: Centre for Court Innovation briefing, at www.courtinnovation.org/sites/default/files/media/document/2019/Bail_Reform_NY_Summary.pdf)

18 These guidelines, known as 'Yee-Tok' cover sentencing for a wide range of offences, seeking to distinguish between levels of seriousness and ensure consistency. For their operation in practice see Yampracha, 2016.

3.2.3 Laws tightened to reduce chances of release

Some of the ten countries' legal systems contain provisions making it difficult or impossible for defendants to be released on bail. Lawyers provided examples of how this causes unfairness in some situations.

In several countries including South Africa, India, and Kenya there are provisions on 'habitual offenders' who have lengthy criminal records. These restrict the right to release, irrespective of whether a person has a good record of compliance with court orders, bail conditions and other requirements.

Following recent changes to the bail law in New South Wales, defendants charged with some offences, as well as defendants with qualifying previous criminal records, are now required to 'show cause' as to why they should not be detained pre-trial. This would apply to 'Len' (murder vignette) but probably not to 'Kemi', as the quantity in our example was not large enough for the offence to fall under these provisions.¹⁹ As for 'Paul', whether he had to 'show cause' for release would depend on how recent and how numerous his prior convictions were. Several lawyers felt that shifting the burden of proof onto defendants in this way can cause unfairness.

The changes to New South Wales' bail legislation had been introduced in response to the Martin Place siege and shootings in Sydney in 2014.²⁰ The attacker had been on bail at the time and the consequent public outcry led to the government ordering a review of bail legislation, resulting in these amendments. (One lawyer said the law had only recently been overhauled and, in her view, greatly improved following a Law Commission review.)

Indian lawyers said that provisions introduced in drug enforcement legislation²¹ had the effect that judges must refuse bail and remand in custody 'unless you make out a case of "not guilty" right at the beginning'. One believed no one charged with an offence under this law had ever been granted bail. Another said the law 'virtually requires the judge to give a certificate of innocence before granting bail'. The lawyer said it was not uncommon for defendants charged under this law to be detained for as long as six years before their case reached a conclusion. Several offences are classed as 'unbailable' in Indian law and there is a tendency for magistrates to remand automatically at the first appearance: a practice one lawyer described as 'routine and mechanical and inconsistent with the overriding concern for liberty contained in the law'.

In South Africa, defendants accused of some categories of offence, or defendants with prior criminal records, may be required to prove that exceptional circumstances exist such that it would be in the interests of justice to order release before trial. In practice, lawyers explained, this is almost impossible for legally aided or self-representing defendants to do. It also often means defendants have to produce evidence on the merits of the case at the bail hearing rather than simply having to show they should be released pre-trial. The prosecution can require that this evidence forms part of the case file, effectively 'locking in' the defence to the version of events it puts forward at the bail hearing, before the prosecution case has been set out in any detail. This 'bail trap', as it is known, was seen by the lawyer as contrary to the principle of equality of arms between prosecution and defence.

3.2.4 Legal constraints on pre-trial detention

By contrast, some of the ten countries' legal systems contain provisions that aim to **constrain** the use of pre-trial detention, ruling it out for some offences, limiting the length of detention, or mandating the consideration of alternatives to pre-trial custody.

In England & Wales there is a six month custody limit for pre-trial detainees, which can be extended in limited circumstances. In India, a person who has been detained for half the maximum custodial term relevant to the offence with which they have been charged has the right to be released for the rest of the pre-trial period, but courts can require them to provide a surety.

19 Australian federal law distinguishes between 'commercial' and 'marketable' quantities of illicit drugs, with the penalties being more severe for the former; New South Wales bail law specifies that the 'show cause' rule applies only to the former. See Australian Federal Prosecution Service guidance: <https://www.cdpp.gov.au/crimes-we-prosecute/serious-drugs>

20 On 15 December 2014, Man Haron Monis, a self-proclaimed Muslim cleric with a history of mental illness, took staff and customers hostage at a café in Martin Place, Sydney. The siege lasted 17 hours and resulted in the deaths of two hostages and of Monis himself. He was on conditional bail awaiting trial for several serious offences.

21 The Narcotic Drugs and Psychotropic Substances Act, 1985

In Hungary, lawyers welcomed recent amendments to the procedural code requiring prosecutors who are seeking remand to provide the defence with a copy of the case file along with the motion to detain.²² This has begun to have a noticeable effect on proceedings at pre-trial hearings, with greater equality of arms between defence and prosecution and less automatic granting of remands by courts. Improvements were said to be more noticeable in the Hungarian capital than in the regions and there may be a need for further training and monitoring. One Hungarian lawyer said: ‘Changes in the approach of the actors in the criminal justice system are much more significant for reform than changes in the law.’

3.3 Political and cultural context

While legal provisions clearly matter in that they lay down the principled framework for pre-trial decisions and for the safeguarding of fundamental rights, our research across the ten countries suggests that legal provisions are not always the primary cause of injustice in particular cases, or of the over-use of pre-trial detention more broadly. There are wider political and cultural factors at work in shaping outcomes, some unique to a jurisdiction, but most finding echoes in other legal systems.

Several lawyers saw the prevailing public discourse on crime and criminals as shaping pre-trial decision-making and the way in which judges exercise discretion. Some linked this to populist or conservative political rhetoric and many spoke of media pressure in specific cases or more broadly around specific patterns of offending. A Dutch lawyer pointed to the effects on judicial practice and culture of the current national climate and what she called a ‘punitive political culture’. Several Brazilian lawyers said the wave of political and social conservatism the country has been experiencing can be observed in judges’ decisions. One said:

Judges are under real social pressure to “curb impunity”, from people who blindly claim our laws are too lenient, when in fact they are generally severe. This has also resulted in greater propensity to remand in custody.... The judge has his Facebook, his WhatsApp groups, his Instagram, and he ends up feeling pressured to be harsher. And often this means he fails to comply with the law. [Brazil]

Another Brazilian lawyer said:

Media sensationalism, the love of blood and prison stories that you see across the board in Brazilian media – it sends a strong message about the need to punish criminality, that the only option is prison. Our judges exist in this cultural space as much as anyone else and they are professionally affected by it. The formative effect that media sensationalism has on judges, and other actors in the judicial system, is very concerning. ... There’s so much sensationalist TV coverage of stories involving blood, gangsters, arrests, chases. It’s ubiquitous, constant, it has a harmful effect on the mind-set of judges ... affecting them as much as their formal legal education. It’s insidious, it goes deeper into their consciousness than their formal training. [Brazil]

A lawyer from New South Wales also felt that excessively risk-averse decisions were partly the result of media pressure.

Judges and magistrates are only human and they make conservative decisions on bail when they’re scared of ending up as front page news. You’ve got to be expected sometimes to be pilloried by the tabloid media. So if you’re not up for that, don’t do the job. [New South Wales]

²² Lawyers at the NGO, Hungarian Helsinki Committee, advise that the provisions are part of a suite of measures aimed at ensuring necessity and proportionality in the use of pre-trial detention. They were introduced in a new Code of Criminal Procedure, which came into force in July 2019.

A South African lawyer described ‘a tendency of trial by media with more serious cases’, adding that ‘with murder and rape the presumption of innocence goes out the window’. He said that in such cases prosecutors are also ‘nervous when it comes to bail even if there are factors in favour of bail’.

A second South African lawyer said:

Sometimes in more serious cases, magistrates are reluctant to release a person on bail even where the facts are pointing to the [conclusion] that he should be released. Some are concerned what the public will say – they would rather keep a person unnecessarily in custody for three or four or five days, and then grant bail, to create a perception that the courts are doing the right thing. [S. Africa]

A similar point was made by a Brazilian lawyer who said judges are often tougher in pre-trial decisions if they believe releasing the defendant could draw media attention or public pressure. He gave the example of a judge who remanded a schoolboy charged with threatening another pupil with a knife. There had recently been a school massacre in the same area. The judge commented that he knew remand was ‘disproportionate’ in this case but added ‘I can’t let him out or it’ll be in the press, so I’ll just have him detained for a week’. The judge fixed a review hearing for seven days later.

American and Brazilian lawyers complained of a lack of understanding on the part of the general public about the purpose of pre-trial detention and bail laws. A New York lawyer said ‘There’s a general social failure to understand the purpose of bail’. A South African lawyer pointed to media reports taking a position on high profile cases, ‘effectively saying “he’s guilty, he shouldn’t get bail”, with no apparent understanding of the law’.

Lawyers in one South African city explained that in some parts of town burglaries occur so often that courts are under enormous pressure to convict, and become noticeably more reluctant to grant bail in such cases. Similar points were made regarding spates of car crime in particular localities (Netherlands, New South Wales). An Australian lawyer also said pre-trial outcomes often depend on the wish of judges to appear to be ‘dealing with’ a type of offending that has drawn public attention, where there has been a spate of such cases: ‘The judge thinks “We have to put a temporary stop to this by locking everyone up or there’s a risk we will look soft on this kind of crime.”.’

3.4 Socio-economic factors and disadvantage

It has long been recognised that socio-economic factors are important drivers of criminal justice outcomes – of levels of offending, numbers of arrests and prosecutions, reoffending rates, and of the size and make-up of prison populations. Poverty, inequality, unemployment, homelessness, substance use disorders and mental ill health lie at the root of many criminal justice interventions. Underfunded public services and economic downturns exacerbate these problems and have knock-on effects on criminal justice systems (Heard, 2019).

Most of the lawyers we interviewed made frequent reference to these points when they sought to describe the wider context in which judges make decisions about who is remanded in custody. They pointed out that defendants who are poor, of low social status, are non-nationals or members of certain racial groups (and many defendants fall into several categories at once) are more likely to be remanded in custody. When shown the burglary vignette, lawyers frequently commented that the scenario was all too familiar and that poverty, unemployment, homelessness and substance misuse were the backdrop to a large proportion of the cases they were involved in.

3.4.1 Poverty

Poverty directly affects outcomes at the pre-trial stage. This happens most commonly when suspects or defendants: (1) cannot afford to pay bail at the level set by the police or the court and there are no other alternatives to custody available; (2) cannot afford a lawyer to appear for them at the pre-trial hearing and state-

funded legal aid is not available; or (3) are unable to produce evidence of a stable home and regular employment that courts expect to see before granting conditional release. (We return to this last point in section 3.4.4 below.)

Poverty also drives patterns of offending and reoffending. Lawyers in all ten countries pointed out that people arrested for relatively low value burglary and theft offences invariably come from poor backgrounds. The same point was made about people charged with drug offences (in India, England and Thailand). Lawyers from Brazil, the Netherlands and England pointed out that women who import drugs for cash (as in the ‘Kemi’ vignette) usually do this for very small amounts of money compared to the profits made by those higher up the supply chain; and they often act out of desperation.

3.4.2 Social status and race

In several countries, lawyers described how a defendant’s class or social status as well as their race can be key determinants of pre-trial outcomes for several distinct reasons. This point was raised most frequently in connection with our third vignette. Perhaps surprisingly, in several of the ten countries lawyers saw the prospects of ‘Len’, accused of murder, being released on bail as potentially better than those of either ‘Paul’ or ‘Kemi’ – but only if he was of a certain social class or status.

In India, particularly if his case was heard in a higher court, ‘Len’ was seen as having a fair prospect of bail. ‘The decision would depend on the characteristics of the accused, the strata of society the accused comes from, his credentials in life... and the quality of legal representation he can afford.’ All the Thai lawyers we interviewed said that ‘Kemi’ would have virtually no chance of release, even if she could pay a high sum in bail. On the other hand, ‘Len’ would have some prospect of release if he could afford bail of between £7,000 and £12,000.²³

A Brazilian lawyer noted how remand decisions in drug cases depended a great deal on the defendant’s social background. He said he had had clients ‘remanded for selling one rock of crack’, whereas there had been examples of well-connected individuals being spared remand and, instead, given house arrest or sent for treatment in private clinics.²⁴ He referred to a tendency among Brazilian judges to view some defendants as likely to have gang affiliations based merely on how they look.

Another Brazilian lawyer said she found it ‘ironic’ and ‘contradictory’ that defendants in jury proceedings, reserved for trying the most serious crimes including homicide, often gain release from pre-trial detention after a few months in prison, while people charged with drug offences far more commonly spend the whole pre-trial period in custody. A third Brazilian lawyer made the same point, offering this explanation:

The Brazilian justice system is heavily focused on protection of property. Drug trafficking ends up being treated as property crime as it’s a means of gaining income that is treated as illegal. ... In effect the judiciary is less rigorous when the case isn’t about property, or the criminalisation of poverty, of the ‘dangerous classes’.... [Brazil]

A New York lawyer said ‘Len’ might get bail ‘if he’s white, the son of a rich person, lives in New York City’. In South Africa, if he had been arrested in one part of the city ‘it would be seen as a gangster crime and would be harder to get bail. If it was in a suburb, drunk students, remand would be less likely. It’s obviously unjust.’

In several of the ten countries, lawyers pointed to race as a factor capable of causing injustice at the pre-trial stage, both in relation to the ‘Kemi’ vignette and more generally. Some lawyers suggested a clear link between race and social status.

A New York lawyer said: ‘People of colour get bail set on them more than white people. ...It’s not just race, it’s socio-economic... poor people are viewed differently.’ Another said: ‘The race of the person is definitely

²³ Approximate exchange rates as at 9.5.2019

²⁴ In one such case, the son of a senior judge was transferred from custody after three days, and taken to a psychiatric clinic to await trial. The charges against him related to illegal firearms and 130 kilos of drugs. <http://g1.globo.com/jornal-nacional/noticia/2017/07/filho-de-desembargadora-presos-por-trafico-de-drogas-e-solto-no-ms.html> (‘Son of senior judge arrested for drug trafficking is released in Mato Grosso do Sul’, *Globo* national news report, 24 July 2017)

sometimes a factor. A young white woman is more likely to have a reasonable bail set than a young black guy, especially if she presents well.’

Dutch lawyers differed as to whether a defendant’s race or ethnicity is a factor in pre-trial decision-making. One lawyer pointed to research data showing Moroccans are ‘more likely than nationals to be remanded in custody and then be sentenced to prison rather than unpaid work’. She saw this as a problem of implicit bias rather than open racism, reflecting attitudes in wider society. (Implicit bias was also considered a factor by some English lawyers.)

Another Dutch lawyer said judges appeared to find ‘risk of reoffending’ more readily in the case of younger defendants from Moroccan and Algerian backgrounds. A third Dutch lawyer accepted that these communities are over-represented in detention statistics,²⁵ but saw the problem as ‘these kids have a hard time staying away from crime’ and said there was sometimes a lack of trust in police and the criminal justice system, leading to a culture of non-compliance and of resistance to authority.

3.4.3 Nationality

Several lawyers referred to nationality as a factor which, in practice, can influence pre-trial decisions. In all the ten countries the defendant’s non-national status in the ‘Kemi’ vignette was described as making it virtually impossible to avoid detention pre-trial. It would be assumed that she was a ‘flight risk’. Non-national status can also mean less focus on rehabilitation and other support at the pre-trial stage. The main focus is on detention followed by deportation; the defendant’s personal circumstances are seen as unimportant (see further discussion of this point under section 3.4.4 below). Non-nationals can experience ‘harder time’ on remand (and any later prison sentence) due to the probable lack of visits and to language and cultural differences.

An English lawyer believed that a British national with no prior record who was charged with the drug importation offence would most likely be released on bail, whereas ‘Kemi’ would almost certainly be remanded due to her non-national status. She complained of the lack of any ‘fair, objective process to assess true flight risk’. Another (also commenting on the ‘Kemi’ vignette) said that ‘non-nationals never get bail, but the flight risk is sometimes real, so it’s not necessarily always unfair.’

Non-nationals from some countries were seen as more likely to suffer discrimination and bias in bail decisions than those from others. Brazilian and Thai lawyers commented that being a foreigner could work in *favour* of someone seeking bail, even in the drugs or murder examples: it depended where the person came from and their personal status. In Thailand, lawyers said that foreigners ‘will often get bail where nationals wouldn’t, if they are businessmen or have assets here’. In Brazilian courts, an English defendant would have a better chance of getting bail than someone from Latin America.

A Hungarian lawyer said that a Dutch national charged with drug importation would have a far better chance of release after a brief period on remand than a Nigerian national. A second Hungarian lawyer said that judges’ bias against nationals from some countries was essentially racial in nature: ‘There is a racial bias in our justice system, which reflects the bias experienced in society. The judge might think: “Who invited her here? What made her come to our country and how dare she sell drugs?”’

South African lawyers did not rule out release on bail, if ‘Kemi’ had some connection with the locality, was not an illegal migrant and could post a high bail amount; but they and lawyers from other countries accepted that these conditions are often difficult to comply with. Lawyers from England, Brazil and New South Wales complained of inbuilt unfairness in a system where non-nationals have no prospect of complying with the usual pre-trial release conditions or coming up with evidence to prove that they are safe to release.

New South Wales lawyers said that people in ‘Kemi’’s situation find it almost impossible to avoid detention pre-trial and are often sent to an immigration centre to await trial if they are illegal migrants. Despite these centres

25 Dutch criminal justice statistics do not refer to the subjects’ ethnicity or race, but to their ‘migration background’, distinguishing between ‘Dutch nationals’ and people with one or both parents born outside the country (either in ‘Western’ or ‘non-Western’ countries): see Centraal Bureau voor de Statistiek at <https://opendata.cbs.nl/statline/#/CBS/nl/dataset/81947NED/table?ts=1570633480833>

being 'like prison', the time people spend in them is not deducted from their sentence. They are in a worse position than a national accused of the same offence, who would have a good chance of bail and be better able to prepare for trial. This was contrasted with a recent measure introduced to help Indigenous Australians comply with bail conditions by allowing them to provide several alternative addresses where they could be found, thereby enabling them to avoid staying at addresses where alcohol or drugs were being consumed.

Lawyers from England, the Netherlands and New South Wales made similar points to the effect that defendants of 'Kemi's' profile are not seen as worth the investment of rehabilitation, as they are not from the local community and will be deported after serving their sentence. It is assumed that they have no interest in participating in their defence and actively preparing for trial: that they 'might as well start serving their sentence now' (Netherlands). It was pointed out that these assumptions are often incorrect, and can lead to longer overall periods in custody (see section 2.1 above).

Hungarian lawyers who referred to the importance of personal circumstances in helping avoid remand detention, said that these are irrelevant for foreign defendants 'because the court is not in a position to investigate them'. Brazilian lawyers made the same point about a clean prior record: 'As she came from Venezuela, the judge would assume she had a prior record, saying "we don't get data from Venezuela"'. One added that Brazilian judges have a 'xenophobic attitude that's clearly perceptible at remand hearings' and that defendants from certain countries (he gave Paraguay, Venezuela and Bolivia as examples) were effectively assumed by judges to have prior criminal records. 'You hear judges say informally: "Ah, these foreigners who come to our country to commit crime"'. He added that they would never mention this in their decision as this would open them to a challenge of infringing the Constitution. (The same point was made by a Hungarian lawyer.)

3.4.4 Defendants' personal circumstances

Lawyers in the Netherlands and England made frequent reference to steps taken at the pre-trial stage to understand the defendant's personal circumstances. This typically involved defence lawyers, probation and other agencies working to ensure that judges have the necessary information before deciding whether to remand or release. The fact that unmet mental health needs or substance misuse problems may be driving someone's involvement with criminal justice was described as something judges are often proactive in exploring at the pre-trial stage. The lawyers observed that there is usually some scope for judges to exercise their discretion with regard to pre-trial remand or release in a way that takes into account factors like these.

In this context the English and Dutch lawyers pointed to the difference that can be made to pre-trial release prospects by a defendant's social situation: whether they have a stable home, a job, community and family ties. In the Netherlands the shorthand for this is 'the three W's' (standing for the Dutch words for 'wife', 'work' and 'home'). The chances of 'Paul', the burglary defendant with prior convictions, getting released were seen as highly dependent on these factors. Similar points were made by lawyers from New York, New South Wales and South Africa.

Several lawyers pointed to the inherent unfairness that this approach can cause. 'Someone with no family or job will have no evidence of "personal circumstances" to keep him out of pre-trial detention. So it's much harder to get him released, even though the risks could be argued to be very low' (Netherlands). In England several lawyers made the same point, saying bail was more commonly granted to defendants with a stable home, a family and a job. This struck some lawyers as unfair given the vulnerability of many suspects and defendants who have none of these and on whom time in custody may take a heavier toll.

In New York, a lawyer said: 'If he had strong community ties, owned a home, had a family (especially if at court at the arraignment hearing), I'd have more to work with. A vagrant or someone with lots of addresses [in] the last five years would find it harder.' In India, lawyers considered bail a possibility if the defendant had a family. A Hungarian lawyer pointed out that 'homeless people have almost zero chance of avoiding detention, whereas being employed can lead to less coercive restrictions.' An English lawyer made the same point. Hungarian lawyers said that defendants who are unemployed often get remanded 'automatically' on the basis that reoffending is more likely, as the court assumes that they have no other means of support.

New South Wales lawyers saw some limited scope for 'Paul' to succeed in 'showing cause' for release if he could persuade the court that he was motivated and committed to change. He could perhaps obtain release on 'very strict bail conditions' if the court was satisfied he was 'at a crossroads' in his life, but this might depend on availability of provision to support him. Unfairly, it was sometimes a 'postcode lottery', dependent on availability of places in local rehab facilities or defendants' ability to afford private treatment.

In Hungary, conditional release (probably on house arrest), at least after the initial few months on remand, was seen as a possibility even for 'Len', accused of murder, provided he had a job to go back to and stable accommodation. It would be far harder for 'Kemi' to obtain release at any stage before trial unless she had extremely poor health, or some other exceptional circumstance applied.

English lawyers said that some judges might be open to granting conditional release to 'Kemi' if satisfied on some evidence that she had some vulnerability, perhaps was pregnant or had a mental health or addiction problem. In 'Len's case, some judges might be willing to grant bail on strict conditions if there was convincing evidence that he had mental health problems requiring care or assessment.

Some lawyers noted that judges pay less attention to the personal circumstances of defendants with a previous offending history. An English lawyer said that judges can sometimes be persuaded to keep defendants out of custody where there is some evidence that support is available and there is a real prospect of resolving problems underlying the pattern of offending. However, 'magistrates in the lower courts are generally too overwhelmed with cases of a similar type and have no patience to hear arguments relating to the individual' when there is a prior record. We discuss the impact of offending history on pre-trial outcomes below.

3.4.5 Offending history

Previous convictions and poor records of compliance with bail conditions and court orders can often lead to the remand of someone who would otherwise have been released. As discussed in section 3.2, this may happen by operation of law; more commonly it happens through the exercise of judicial discretion, because 'risk of reoffending' is one of the grounds that legal systems often list for judges to remand in custody. In practice, in many countries the defendant's offending history is given far more weight than other personal circumstances.

A Kenyan lawyer said there was 'too much focus' on prior offending. In South Africa, lawyers told us prosecutors almost always seek remand when there is any offending history. For one Dutch lawyer 'the main problem is that judges start by looking for reasons to detain'. They then issue decisions that are 'technically within the law': and where there is a prior record of offending, this will be used as a ground to detain without any further reasoning. Another made a similar point: 'There's nothing wrong with Dutch law but judges often apply it wrongly, interpreting it too widely: they see previous convictions and leap to the conclusion that it's necessary to remand in custody.'

In South Africa, India, and Kenya, legal provisions (discussed in section 3.2.3 above) would make it highly unlikely that 'Paul' could be released pre-trial, irrespective of whether a person has a good record of compliance with court orders, bail conditions and other requirements. In New York and England, lawyers said that the person's record of compliance was given just as much weight, sometimes more. Defendants with a previous record of breaching bail conditions would understandably be seen as a far greater flight risk.²⁶

In Brazil, any prior offending is likely to weigh heavily towards remand, however minor the current charge. One lawyer had recently represented a client accused of stealing 'two deodorants, a shampoo and a conditioner [and had been] remanded solely based on reoffending risk'. Another lawyer explained that 'Paul' would almost certainly be remanded 'not because of this offence but because of the prior convictions [which are] the most

²⁶ This is borne out by research conducted by Thai criminal justice think-tank, the Rabi Bhadanasak Research and Development Institute, which suggests that people with previous history of jumping bail are up to 17 times more likely to jump bail than those with no such history. (Nontarat Phaicharoen, 'Thailand weighs program to ease bail process for the poor', 12.08.17, Benar News. www.benarnews.org/english/news/thai/bail-change-12082017114658.html)

determinative factor. This approach offends the right to presumption of innocence; you are imprisoning someone who could well be innocent. You are putting someone in prison for procedural rather than juridical purposes.'

In Thailand, by contrast, lawyers did not consider prior convictions as a complete bar to conditional release. If the defendant could pay bail he would have good prospects of release. In India, too, money could make a difference to the outcome. 'Paul' would find it 'very hard to get bail unless he is wealthy and well educated.'

Prior convictions can result in remands in custody even in circumstances where pre-trial detention is contrary to law. In Brazil, although the penal code has been amended to rule out remand in cases where the maximum sentence would be less than four years' imprisonment, lawyers said that judges frequently ignore this when a defendant has a prior record. In Hungary, a lawyer said 'Paul's prior record means he has zero chance of avoiding remand'. However long ago the prior convictions were, he would be treated as a repeat offender despite the law being clear that convictions fully served out at least three years ago do not count. Another Hungarian lawyer said there was a frequent practice of inferring risk of committing an offence punishable by imprisonment, merely on the strength of a prior record.

4. Causes of pre-trial injustice: the criminal justice machinery

In this chapter we discuss defence lawyers' perceptions about the workings of their national 'criminal justice machinery' at the pre-trial stage. By this we mean the processes and practices which most directly determine whether defendants are remanded in custody and, if so, for how long. We first examine lawyers' comments on weaknesses in their national criminal justice systems and how these can influence pre-trial outcomes and lead to injustice. We then present their views on the roles played by the various actors in the justice system at the pre-trial stage (beginning with judges and magistrates, the main focus of lawyers' observations).

4.1 Structural weaknesses in criminal justice systems

Lawyers we interviewed frequently described problems in the resourcing and operation of their countries' criminal justice systems as factors capable of leading to misuse of remand imprisonment and individuals spending unnecessarily long periods in pre-trial detention. The main factors discussed were slow, inefficient court processes, under-funded legal aid systems and lack of investment in alternatives to remand (and a corresponding over-reliance on money bail despite the majority of defendants being too poor to afford bail).

4.1.1 *Over-stretched, under-resourced court systems*

This problem was cited by lawyers in several of the ten countries as a direct cause of pre-trial injustice.

Lack of sufficient time to consider all the arguments in a pre-trial hearing can lead to greater bias towards remand in custody, according to Dutch lawyers. 'Because they don't give much detailed reasoning it's hard to know if the judge looked into the case carefully enough. It sometimes feels like they don't have enough time to take that care, and err on the side of detention.' Several Dutch lawyers felt the practice on specific reasoning was beginning to improve in a few courts, but there had not yet been a complete culture shift.²⁷ In both England and the Netherlands, judicial concern with personal circumstances at the pre-trial hearing was seen as less visible when courts are overwhelmed with cases of a similar type.

Indian lawyers complained of excessively slow progress of cases through the courts. One said the sheer length of proceedings, during which 'accused persons are almost always languishing in jail' creates a system 'skewed against' defendants. Lengthy delays in drugs and murder cases reaching conclusion in particular led to people being held on remand for excessive periods of time. One said: 'In theory, time on remand is limited in accordance with the sentence for the relevant offence. Any extension ... should only be granted by the trial court if satisfied on investigation that it is necessary. But in practice judges tend to extend remand without investigating the need for it, because of the volume of work before them.'

One Indian lawyer said: 'Magistrates are so overwhelmed they cannot engage with the facts or the person before them, and barely look up to see who the accused person is ... or whether the person is being falsely implicated...'. The lawyer added that the 'fate of a case can be sealed due to basic errors' at the early pre-trial stage, when a more engaged court might be alert to potential abuses including signs of violence against defendants. Another remarked: 'The lack of judges, lack of use of technology, lack of resources on the part of the State, incompetent quality of lawyers, especially legal aid lawyers, are the overreaching problems facing the system.'

Several English lawyers pointed to shortages in judicial and court staff as a major cause of delayed trials resulting in unduly lengthy stays in remand custody. One said it was common for trials to be listed 'just inside the custody limit' (six months) but then commonly postponed due to unavailability of interpreters, or delays in disclosure of evidence. These situations usually resulted from under-resourcing and led to time on remand being extended through no fault of the defendant.

²⁷ See discussion of judicial practice in section 4.2.1 below.

Murder cases in Kenya ‘take a very long time to reach conclusion’ and people often languish in prison for years awaiting trial. South African lawyers also complained of the excessive periods spent by some defendants awaiting trial.

In South Africa’s district courts (where the burglary case would be heard) the court ‘doesn’t have the time to apply the law. They want to shuffle through cases as quickly as possible’. If a defendant has a prior record the court will put ‘too much emphasis on his propensity to reoffend’ and ignore other factors, in the interests of reaching a quick decision. Another South African lawyer said: ‘[The number of] cases resulting in a guilty verdict at trial are miniscule compared to those placed on remand’. This comment ties in with several research studies in South Africa in recent years pointing to unacceptably high levels of cases not proceeding to trial, despite defendants having spent time on remand. (See de Ruiter & Hardy, 2018 and Redpath, 2019.)

4.1.2 Inadequate legal aid provision

Cuts to legal aid budgets and underfunded or patchy provision of legal aid were problems frequently raised by lawyers in interview and were linked directly to the misuse of remand detention. Lawyers in several countries said this exacerbated inequality in justice systems and contributed to the over-representation of poor and marginalised people in prisons: or, as one Brazilian lawyer called it, the ‘criminalisation of the poor’.

Several Thai lawyers complained that legal aid allowances are insufficient due to under-funding, with one seeing poor pre-trial outcomes as a direct consequence of this. One lawyer said legal aid applications take too long, often making it impossible to prevent clients being remanded in custody who might otherwise have been released.

Lawyers in England and New South Wales referred to cuts to legal aid budgets and reduced eligibility for legal aid, saying these were leading to injustice at the pre-trial stage and increasing the number of people appearing in court unrepresented at first hearings. A New South Wales lawyer said most of his firm’s clients were lower or middle class and self-funding, usually borrowing money to pay fees. Legal aid was ‘very difficult to get unless you’re on benefits and not working’ and was also not available to defend cases where there was no likelihood of a custodial sentence. This was leading to real pressures and influencing decisions about pleading guilty or defending cases. Dutch lawyers also complained of cuts to legal aid budgets in recent years.

South Africa’s legal aid lawyers handle the defence of around 85% of all criminal cases in the country, but are ‘overwhelmed’ with huge volumes of work. One lawyer estimated she handled on average six trials every day, leaving no time to prepare for bail applications.

A Brazilian lawyer said that the country’s public defender service (which provides free legal representation to those too poor to afford a private lawyer) only covers around 55% of court areas in the country, leaving poor defendants in the other areas at a disadvantage. He himself had conducted appeals in cases where miscarriages of justice had arisen when lawyers unskilled in criminal law had been privately retained by people who could ill afford their fees. He said this often happened in areas with no public defence service.

4.1.3 Lack (and under-use) of alternatives to remand

One of the key ways of limiting the use of pre-trial detention to cases where it is genuinely necessary is the provision of other measures to safeguard attendance at trial and compliance with court orders. Across the ten countries, a variety of alternatives exist including money bail, personal bonds, third party security or surety, regular reporting at police stations, surrendering of passports, house arrest, geographical bans and electronic monitoring. Lawyers in several of the ten countries said that too little use is made of alternatives, other than money bail, which in some of the countries is often the only alternative considered by courts despite many defendants being unable to afford it.

Electronic monitoring has been introduced more recently in some countries than others and, according to defence lawyers, its use has not become sufficiently established except in England and Wales, where it is used routinely.²⁸ Lawyers presented with the 'Kemi' vignette complained that non-nationals are usually unable to provide an address to which to be tagged. Several complained of the lack of sufficient bail hostels, particularly for women defendants.

In Thailand only one of the lawyers we interviewed had seen electronic monitoring used. Another Thai lawyer said that there was insufficient equipment available. In Hungary, despite availability of alternatives to custody, lawyers said these are very rarely used, at least in the initial period after arrest and remand. After some months, courts may be more amenable to ordering house arrest or a similar restriction. In South Africa, house arrest and electronic monitoring are 'available but used too rarely'. A New York lawyer explained that although the law provides state court judges with other options than cash bail or detention – including leg bracelets and personal recognisance bonds – these are rarely used.

One feature common to several of the ten countries is that payment of money bail remains the only real alternative to remand in custody commonly used by courts. In a few of the ten jurisdictions money bail has never become an established, widely used alternative (Brazil, Hungary, Netherlands). In England and Wales, the financial aspect of bail has to some extent fallen away (as the use of electronic monitoring has steadily increased), although high bail is still sometimes set for very serious offences.²⁹

Lawyers frequently complained that bail is set at unrealistically high levels. Several New York lawyers complained that unaffordably high bail is frequently used 'as a method of persuasion'. One said that clients will 'take a plea for things they sometimes don't want to take just to get out of jail.' In the burglary vignette, he said, 'Paul' would be treated as having committed a 'violent felony' even though no personal violence was used. Bail would be set at a level to reflect this, perhaps between \$10,000 and \$20,000. As a person with this history is unlikely to have any chance of paying this, he would be remanded. Lawyers and advocacy organisations have long sought to change the situation whereby – as one lawyer we interviewed put it: 'Only those who can afford to pay bail can get out of jail. It's a horrible system.'³⁰

In Thailand, a think-tank linked to the country's Court of Justice has estimated that about 66,000 people are unnecessarily incarcerated in Thailand every year because they do not have the means to post bail.³¹ Thai lawyers interviewed for our study confirmed that most defendants have great difficulty in paying bail at the levels prescribed for most offences, particularly those carrying sentences of five years or more.³²

4.2 Criminal justice system actors

The systemic weaknesses discussed in section 4.1 above can adversely affect the capacity of judges and other agencies to uphold justice at the pre-trial stage. There are also a number of factors relating to the way criminal justice system actors perform their roles, which can raise the risk of injustice.

28 In 2011-2012 it was reported that on any one day, around 25,000 people in England & Wales were subject to electronic monitoring, with around one third of these tagged as a bail condition. See: *Cutting Crime: the role of tagging in offender management*, 2016, Reform: London. https://reform.uk/sites/default/files/2018-10/Tagging%20report_AW_8.pdf

29 In England & Wales and other parts of the United Kingdom, the term 'bail' is used both to denote money bail and in the wider sense to refer to any form of conditional release, with or without financial or other security: see 'Terms used in this report', page v above.

30 See footnote 17 above regarding New York State bail law reforms enacted after our interviews took place.

31 Research conducted by the Rabi Bhadanasak Research and Development Institute: see footnote 26 above.

32 One Thai lawyer said defendants often borrow in order to post bail and there is a widespread practice of bail lending by 'professional criminal guarantors' who charge high rates of interest. In 2006 the Thai Ministry of Justice (Rights and Liberty Protection Department) established an official bail assistance fund. Up to 17,000 defendants are reported to have received bail loans through this scheme. (Source cited in footnote 26 above.)

4.2.1 Judges and magistrates

The role of judges and magistrates has emerged from our research as the key factor in pre-trial outcomes across the ten countries. While judges must comply with legal provisions, they have a significant degree of discretion. They must decide how to weigh information about the defendant's circumstances and any offending history, about the circumstances of the alleged offence and about a range of risk factors that may arise in relation to these. Inevitably this is, in part, a subjective process: the personal attitudes and views of judges will at some level affect the way they exercise discretion, as too will the prevailing political and cultural context. Below we summarise some of the main themes arising from lawyers' comments about the approach of judges and magistrates during the pre-trial process.

Experience

A New York lawyer said: 'Decisions on bail are being made by young judges without the life experience to know whether someone has a risk of reoffending or will turn up for hearings. They have their own bias and don't challenge their own assumptions. There are exceptions ... In New York State and in the Southern District, the bench has become more diverse and that maybe will bring in more diverse viewpoints and more diverse experiences and maybe that will help.' Another New York lawyer pointed out:

There's sometimes a disconnect between a judge who is presumably of a different socio-economic class than the people who they are presiding over – it shows when they set bail at a level someone could never afford. Like someone arrested for stealing Pampers from a store could never pay \$500 bail. [New York]

An Indian lawyer said: 'The training of judges and the quality of their skills are a huge component in terms of impact on outcomes at the bail stage'. Another mentioned that outcomes at the pre-trial stage depended to a large extent on the seniority of the judge hearing the case.

Ethos

For several lawyers, pre-trial outcomes often reflect the judge's personal views and values.

For example, in trying to predict the bail outcome of 'Kemi's case, a New York lawyer said some judges had strong views on drugs cases, while others 'would say, "It's people's choice to use drugs and whether it's legal or not some people will always use drugs..." They get more prickly about burglary, because burglaries affect their quality of life and that offends them more.' (An English lawyer who also sits as a judge made the same point about some judges' attitudes to burglary.)

Lawyers from both England and the Netherlands said that judicial concern with personal circumstances at the pre-trial hearing is often very limited in cases similar to the 'Kemi' vignette. They described a hardening of attitudes where judges dealt with high volumes of similar cases due to their courts being near international airports. The judges often had little time for arguments about their clients' personal situations. 'Judges already know that no one does this mule work for fun', as one Dutch lawyer put it. Lawyers in both countries acknowledged, though, that if there was evidence of human trafficking or coercion, this would be taken seriously (it might give rise to a complete defence at trial), and could be advanced as a basis to look for alternatives to remand in custody.

Indian lawyers pointed to the excessively risk-averse approach of some judges: 'Courts will remand in custody even in cases where no formal application is made for remand by the investigating agency, because they are cautious and won't want to release someone who may be guilty.' Another said:

Judges in this part of India are in practice very conservative in granting bail. Since the discretion of judges is very wide, this gives them leave to be conservative. This is more of a problem than anything in the law itself – judges being conservative in bail decisions. Another problem is the large number of cases the judge has to deal with daily – there is just no time for the judge to apply the mind. [W Bengal, India]

A Brazilian lawyer said that most judges ‘feel it’s their main duty to jail and throw away the key’. She added:

They feel they’re the last bastion, vitally important for keeping order in society, locking up gangsters and keeping them where they should be. They care nothing about the effects on the state of our prisons, on our rate of prisoners. It’s all too far away. They don’t see it as part of their job to visit prisons (although they are meant to) so they have no idea what they’re like. If they spent just a month talking to prisoners, face to face, smelling the stench inside a prison, then I think most judges would break down with the shock of it.³³ Others would remain cold, as they’re completely closed off. The distance judges maintain from the human consequences of their decisions just reinforces their conservatism. [Brazil]

Several Brazilian lawyers expressed the view that judges increasingly seem to be driven by a punitive ethos, which leads them to take decisions based on prejudicial assumptions rather than on a proper application of the law. One said:

The law is not at all bad: there’s enough in the law for someone who values liberty and fundamental rights to reach the right decision on remand or release. The real problem is the conservative attitude of judges and prosecutors – the value system they bring to their role; that’s the lens through which they read the legal provisions. The judges will ground their decision on one of the statutory justifications for remand – safeguarding public order and the proper course of justice – but they don’t properly tie this to specific factors about this defendant: like “he tried to flee before” or some similar concrete reason.

We hear these generic reasons along with moralistic comments from judges like “These people cause great anxiety to society...” far more than any concrete arguments around actual risk presented, and why the person should not be released. [Brazil]

A Dutch lawyer complained that judges often fail to understand that clients want to participate in their defence and have a strong interest in attending hearings. In cases where charges are serious and judges assume the defendant will be convicted, she said:

They’d say: “Why argue for release? He might as well start serving the time now”. I’ve tried to argue that my client needs time to prepare his defence outside of custody, but they almost never accept this. They don’t understand the argument that someone might want to participate in their defence fully, and attend their pre-trial hearings and their trial, so they are not going anywhere. These presumptions are unfair as they’re not always accurate. [Netherlands]

Practice

All the Dutch lawyers we interviewed complained of an absence of proper reasoning for decisions to remand, despite rulings requiring this by the Dutch Supreme Court and the European Court of Human Rights. They considered this was due to ‘habit’ and ‘laziness’ and was more notable when there were high volumes of cases to process. (The effects on pre-trial outcomes of over-burdened court systems are discussed further in section 4.1.1 above.) Some lawyers pointed to improvements in practice over the past decade, including better quality decisions with more individualised reasoning.

Several spoke of an enduring ‘tick box’ culture³⁴ whereby judges ‘go with their gut feeling’ whether to remand someone or not, based primarily on the likely sentence if the person is convicted.³⁵ Judges then ‘work backwards

33 A South African lawyer made the same suggestion: see quotes in box on page X [textbox in pt 2] above.

34 A *pro forma* exists for judges’ use at pre-trial hearings, which contains boxes for each prescribed ground for detention. One lawyer said this practice may have been discontinued in some court areas.

35 The ground of ‘shocked public order’ (that would result from a decision to release) is routinely relied on where the charge is one that carries a lengthy sentence.

from there', using standard prescribed grounds without taking the trouble to find actual evidence specific to this defendant or situation to support the grounds. Another Dutch lawyer pointed to a common judicial practice of, in effect, forcing defendants to prove they are safe to release pre-trial, which is often extremely difficult to do.

Some lawyers highlighted the risk that people who are held on remand will end up spending longer in custody than those who were released on bail pending trial. A Dutch lawyer said: 'Judges don't like sentencing for less than the time spent on remand and this can lead to a higher sentence than it might have done'. A Kenyan lawyer said judges do not always deduct time spent on remand from the custodial term imposed, as it is a discretionary decision whether to do so.

Several Hungarian lawyers pointed to the almost invariable tendency of judges to accept the prosecutor's motion to remand in custody. It was simply easier for judges to accept prosecutors' assertions about the need for further remands in custody, and that defendants 'play no role' in the review hearings. Although there is a legal requirement to take account of family status and personal health prior to ordering detention, judges sometimes fail to give due weight to these factors in practice. Decision-making varies greatly from judge to judge and remand outcomes can be predicted based on the location of the court, even on the judge's personality. Regional court judges are highly likely to defer to prosecution requests and order detention at least at the first hearing, whereas those in the court of the capital are less deferential. It was said to be extremely rare for judges to substitute a less restrictive measure than what the prosecutor called for. When this did happen, the decision would be overturned when the prosecutor appealed.

One Thai lawyer complained that, particularly in drug importation cases, judges choose to accept the prosecution case too readily, ordering remand in custody despite the evidence being very weak, even as to the defendant's identity.

A New York lawyer said: 'We all pay lip service to the presumption of innocence for everybody, but the reality is when a judge is looking at the charges, I don't think they're presuming the person innocent, I think they're presuming them guilty. The reality is they set bail all the time based on the seriousness of the charge.' Several New York lawyers pointed out that, while the primary intention of the legal framework on remand and setting bail is to ensure attendance at trial, in practice judges' decisions are not primarily focused on this but on the perceived seriousness of the offence and/or the severity of the sanction the offence carries. This point was echoed by lawyers in the Netherlands, England and India.

In Hungary lawyers said that remand in custody is 'almost automatic' in any case where the alleged offence involved violence, including robbery. They pointed out that basing remand decisions on seriousness of offence or severity of likely sentence breaches both domestic law and the Strasbourg jurisprudence. One lawyer had had clients facing serious drugs charges who were remanded solely on the basis of the seriousness of the charges and severity of the likely sentence and who spent over four years on remand.

Changing ingrained judicial culture was seen by several Dutch lawyers as the real challenge: 'There's a tendency to prejudge the custodial outcome and allow time on remand to serve as part of the punishment'. 'Judges tend to go for remand first and only later look at whether there might be ways to avoid it.'

In both Hungary and the Netherlands, lawyers felt that remand detention 'functions not as a preventive measure but as an advance punishment' (Hungary). A Dutch lawyer said: 'Judges over-use remand when it's clear someone will be convicted. "The sooner you go to prison the better" – by the time of the trial he'll have served all or most of the sentence passed.'

Lawyers in New South Wales, Australia also said that in situations like 'Kemi's, this attitude often prevailed:

Courts sometimes do indulge in impermissible reasoning and they just say "oh well it looks like you're going to be convicted and it looks like you're going to go to jail anyway so we'll just leave you there." I mean they don't say that, but I think that's how a lot of judicial officers think when they're making bail decisions ... if they are engaging in that sort of reasoning then they're not applying the law. It doesn't take account of fact some people facing serious charges will want to stick around and clear their name.' [New South Wales]

In India, one lawyer spoke of a climate in the last decade of judges giving ‘pre-trial punitive punishment and incarceration’. ‘They tend to ask the accused persons to first try and prove their innocence, then they will get bail. This ignores decades of previous jurisprudence.’

The strength of the evidential case against the defendant was also seen by lawyers from many countries as a factor weighing too heavily in the pre-trial decision. In essence, courts are seen as *inferring* flight risk and other grounds to detain, from the mere fact of being charged with a serious offence, not from any objective assessment of actual risk. Similar points were made by several of the Thai lawyers, who said judges usually refer simply to one or more of the statutory grounds in the procedural code for remanding in custody, such as ‘flight risk’, ‘tampering with evidence’, or ‘serious offence carrying a severe sentence’, without adding any case-specific details.

English lawyers said that, in practice, most judges faced with arguments typically raised in cases like ‘Kemi’s, for example that the woman was pregnant, had very young children, or came from a background of severe disadvantage, were ‘deaf’ to them, having ‘heard it all before’.

4.2.2 Prosecutors and police

In the exercise of their functions at the pre-trial stage, prosecutors have considerable scope to avert inappropriate use of remand in custody, but this potential is largely untapped in most of the ten countries. This is partly a cultural problem but to some extent also reflects the degree of independence prosecutors enjoy, how much discretion they have in decisions about diversion from prosecution or custody, and how prosecutors collaborate with other agencies including probation, social work and health services. In these respects, models of prosecution service vary among the ten countries.

One South African lawyer said that prosecutors ‘aren’t applying their minds’, but are ‘automatically opposing bail’. This happens especially where the defendant has previous convictions, which tends to convince prosecutors there is no need to make a proper assessment of risk aimed at keeping defendant out of custody if at all possible.

Several South African lawyers complained that the prosecutor’s right to seek a seven day extension of custody at the first bail hearing is over-used. They said that this results in many defendants being unnecessarily detained for seven days, only to reappear and the prosecution not to oppose bail. This was seen as ‘pernicious’ by one lawyer, who called it ‘an example of where our bail system is used as a punishment instead of what it is supposed to be for.’

Another South African lawyer felt this problem was linked to the fact that too many arrests take place before cases have been sufficiently investigated. Failures by the police to make proper inquiries about a person’s circumstances prior to bail hearings, or investigate the case sufficiently before the arrest and first bail hearing, cause large numbers of unnecessary remands in custody. When the necessary information has been obtained, this often leads to the person’s release on bail or to the case being dropped before trial. He said this ‘costs millions’ and exacerbates overcrowding and bad conditions in prisons.

South African and Kenyan lawyers said that prosecutors often deliberately propose bail to be set at a level that is obviously too high for defendants to have any prospect of paying it.

Lawyers from India complained of prosecutors making assertions unsupported by any evidence at pre-trial hearings. One Indian lawyer said some judges were unaware or unconcerned that this practice ‘departs from settled bail jurisprudence’. A similar point was made by an English lawyer who had seen prosecuting counsel refer to evidence of ‘wider gang activity they are monitoring’ without having to adduce anything in support of this. A court hearing such assertions by the prosecutor will often be less inclined to grant bail, but will make no express reference to this having influenced the decision to remand, effectively ruling out any challenge.

The routine American practice whereby the district attorney offers plea deals to defendants facing potentially long custodial sentences was mentioned by several New York lawyers in the context of courts’ decisions

regarding bail and custody.³⁶ Several New York lawyers said the desperation of some clients to get out of jail led to them accepting plea deals. One lawyer said: 'Someone's much more likely to plead guilty if they stay in jail'. Another said:

Whether you're remanded or out on bail colours all the decisions that you make going forward. So, if you're out on bail, you're less likely to just plead guilty to get it over with even if you're not guilty, because you're free. But if you're in and you're waiting, and I tell my clients "You could be in for a year or two ... just waiting for your trial". If you were incarcerated beforehand, you know, that's definitely going to affect how likely you are to take a plea, how desperate you are. [New York]

In the Netherlands, by contrast, there is no process of plea bargaining as such, although trial waivers can occur. There is also no formal system for giving a discount on the custodial sentence to reward a confession of guilt.³⁷ This means Dutch prosecutors have little concern as to whether someone confesses or defends a case.

Dutch lawyers pointed to the positive role prosecutors often play in ensuring defendants receive the support and advice they may need at the pre-trial stage. Indeed, two lawyers said prosecutors sometimes acted as a brake on a judicial tendency to remand saying prosecutors were an important 'filter' especially in less serious offences. Prosecutors often order reports on personal circumstances which will look at the defendant's employment status and progress with any ongoing probation or rehabilitation programmes. Prosecutors will build this information into their case planning.

Despite a sense that, in more serious cases, prosecutors apply too readily for remand at the early stage of cases, lawyers in the Netherlands pointed out that the period on remand is at least used for social inquiry and discussions with probation and other services and prosecutors are actively involved. Often information obtained in this process is relied on by the defence to obtain release from pre-trial detention after an initial period on remand, sometimes with prosecutors' endorsement.

Dutch lawyers also said that in some cases prosecutors did not disclose sufficient evidence of the defendant's involvement in the offence (this 'evidential test' is a legal requirement, separate from the need to show why remand is necessary). As lawyers must be free to challenge pre-trial detention when the prosecution evidence is extremely weak, this can cause injustice. Judges are not always alive to this as they are too deferential to the prosecutor. As one lawyer put it:

Judges do not always engage fully with defence arguments challenging whether the prosecutor has met the evidential test. When we raise this argument we are usually pushed aside. I had a client who was held for 9 months in pre-trial detention – at every review hearing we tried to argue for release due to weak evidence. Eventually he was released, due to the same evidential flaw that we had been pointing out since Day One [and had raised] at three separate review hearings. [Netherlands]

A lawyer from New South Wales complained of prosecutors failing to comply with the statutory deadline of six weeks for providing the defence with a 'brief of evidence'. In a case such as 'Len's' where the allegation is murder, the strength of the evidence would in practice be the main focus of the defence's arguments for pre-trial release. Only in a case with serious evidential weakness would release be considered. If this is delayed for several months (which the lawyer said sometimes happens) clients will spend that time on remand.

Hungarian and Dutch lawyers pointed to the practice of using the initial period of days or weeks after suspects are remanded in custody after being caught *in flagrante* to search databases and investigate possible connections with other reported crimes. The Hungarian practice is for prosecutors to seek pre-trial detention on the grounds it is necessary to 'preserve evidence or protect witnesses', without any further evidence to show

36 There has been a general increase in the number of countries worldwide where plea bargaining occurs: this has been linked to higher rates of incarceration and an erosion of fair trial rights (Fair Trials, 2017).

37 Discounts for guilty pleas are routinely given in England and Wales, several American states, and other countries and may be linked to the very high proportions of convictions that follow guilty pleas in these countries: see Fair Trials, 2017.

what the actual risk is to evidence or witnesses. One lawyer had a client who was arrested for burglary and was detained on remand. After eight months in custody he was charged with a further three burglary offences.

One Hungarian lawyer pointed to the ‘political embeddedness’ of the national Prosecutor’s Office and called for greater independence. Hungarian lawyers also pointed to the meaninglessness of review hearings (‘just a formality’) with prosecutors automatically seeking further two and three month extensions while making very little progress in the first month of remand custody. Once someone is in remand custody it is ‘extremely rare to be released before 90 days have passed’. The focus was on ‘eliminating the perpetrator’ and not on progressing the investigation.³⁸

A good relationship and constructive dialogue between lawyers and prosecutors were seen by lawyers in many jurisdictions as capable of making a difference at the bail hearing. While in some countries this would require a major cultural shift, the comments made about the Dutch prosecutor’s role would suggest it is worth considering ways of fostering more effective collaboration between prosecution and defence.

4.2.3 Defence lawyers

Effective legal representation was, unsurprisingly, seen as a vital component of fairness and justice at the pre-trial stage. Lawyers from several countries said that good legal representation often made the difference between remand and release in individual cases. Lawyers in six out of the ten countries said that inadequate funding of their national legal aid systems increased the risk of unfair outcomes pre-trial and at later stages in proceedings.

Thai lawyers referred to the important role the defence lawyer plays in challenging prosecution evidence and preparing for trial. A Kenyan lawyer pointed out that self-representing defendants unable to afford a lawyer are ‘intimidated by the way the prosecutor or state counsel ask questions. They often find themselves saying more than they should’. She explained that this in itself frequently leads to remand being ordered or extended.

Dutch lawyers saw it as a key part of their role pre-trial to assess the strength of the evidence and, in some cases, to advise the client to confess early, meanwhile working on mitigating personal circumstances and trying to avoid (further) time on remand and a prison term. While there is no plea bargain process, ‘judges appreciate confessions’ and are more inclined to use non-custodial sentences in cusp of custody cases, when someone has confessed. This means lawyers spend time at the pre-trial stage working with social workers, probation officers, perhaps psychologists, to look into personal circumstances. As one said:

*At the pre-trial stage, a lot of the work we do is ‘human work’ more than legal.
[Netherlands]*

A Brazilian lawyer said that being poor in itself represents major hurdles in mounting a defence. He said that poor defendants usually have a lower level of educational attainment and this can mean they have problems in presenting a clear account of events. Often they live in marginal, hard-to-reach communities where collecting evidence for use in the defence can be almost impossible. For such defendants, effective legal representation can make the difference between a just and an unjust outcome, both pre-trial and beyond.³⁹

In South Africa the outcome of the bail hearing in the burglary vignette was said to depend most on whether ‘Paul’ had a privately funded lawyer or not. Even in the murder vignette, the lawyer said that ‘Len’'s ability to meet the ‘interests of justice’ test was largely a matter of effective legal preparation. Several lawyers pointed out that district courts rarely adjourn cases to give time for legally aided defendants (the vast majority) to gather evidence. There is ‘a tendency to not presume innocence and to say no to bail, especially if you don’t have private representation’. A legal aid lawyer said this meant bail applications ‘don’t always get the time and attention they deserve’. A private lawyer recognised this:

³⁸ References to Hungary should be read in the context of changes to the Procedural Code, which took effect from July 2019: see footnote 22 above.

³⁹ (See section 3.4.1 above.)

Legal aid lawyers are very competent but always on the back foot. Whereas we [private lawyers] have the affidavit, the proof of address, and we can say 'we've addressed all the issues the state is raising'. Unrepresented or legally aided defendants are at a disadvantage right there at that very early stage. [South Africa]

Indian lawyers told us that a direct result of insufficient legal aid provision was that 'lawyers do not give their best'. Another went further, saying the majority of pre-trial injustice came about 'due to lack of interest on the part of the legal aid lawyer, lack of monitoring of legal aid lawyers by the legal services authorities [and] the inability of the legal aid lawyers to meet [and communicate with] their clients who are in jail.'

5. Recommendations

Our recommendations follow principally from the observations made by the lawyers we interviewed and from our research on pre-trial legal and policy frameworks in the ten countries. They are largely of a concrete and practical nature and are intended to supplement the large body of existing recommendations for avoiding unnecessary use of pre-trial detention. They do not provide a comprehensive list of matters to be addressed in order to prevent pre-trial injustice.⁴⁰

5.1 National laws and policies to prevent misuse of pre-trial imprisonment

This research has identified a number of legal provisions and policies aimed at curbing the use (and restricting the length) of pre-trial detention, which could in principle be adopted for use in any country's criminal justice system.

Recommendations on laws and policies to prevent misuse of pre-trial imprisonment

- a) Ensure that the law on pre-trial detention fully reflects international standards, is clear, and does not contain conflicting provisions.
- b) Rule out use of pre-trial detention where there is no likelihood of a custodial sentence if the defendant is convicted.
- c) Limit the overall time that a person can be detained pre-trial.
- d) Require judges, when imposing or extending pre-trial detention, to provide concrete, case-specific reasons for their decision, in writing.
- e) Mandate consideration of alternatives to pre-trial detention.
- f) If money bail is used, require that it is set with proper regard to the defendant's means.
- g) Require the prosecution to disclose to the defence the case file or the principal evidence on which the charges are based, prior to the first pre-trial detention hearing.
- h) Ensure that time spent in pre-trial detention is always deducted from any custodial sentence.
- i) Avoid introduction of laws and policies likely to increase the misuse of pre-trial imprisonment: examples of these drawn from the ten country research are in the box below.

The research also identified provisions and policies that tend to increase the risk of unnecessary use of pre-trial detention.

Laws and policies likely to increase risk of pre-trial injustice: to be avoided

- i. Blanket restrictions on the right to conditional release based solely on the offence the defendant is charged with, or on the defendant's offending history
- ii. Guidelines or policies that fix the amount of bail to be posted according to the offence
- iii. Routine use of money bail as an alternative to remand; and the setting of bail without reference to the defendant's means to pay it
- iv. Provisions shifting the burden of proof from prosecution to defence so that defendants charged with certain offences must prove that they should be released pre-trial. (It is often impossible for defendants to obtain the necessary evidence with which to prove this, especially if they have no lawyer or if they are in custody.)
- v. Provisions limiting the proper exercise of judicial discretion. (These can prevent courts from upholding the fundamental principles enshrined in international law to protect rights to liberty and fair trial. They can also hinder the evaluation of the defendant's personal circumstances and of the risks attendant on release.)

⁴⁰ For detailed recommendations on strategic and practical approaches to reducing the use of pre-trial imprisonment, see, for example: UNODC, 2007; Heard & Mansell, 2011; Inter-American Commission on Human Rights, 2013; Open Society Justice Initiative, 2014; Penal Reform International, 2016; and McVeigh et al, 2016.

5.2 Criminal justice systems

As many defence lawyers emphasised in interview, it is not principally the law on pre-trial detention that causes or contributes to pre-trial injustice, but wider systemic factors in which the law is applied (or misapplied).

Pre-trial detention can be unnecessarily used (or extended) simply as a result of outmoded, underfunded justice systems. Lack of court infrastructure, insufficient numbers of judges and other personnel, and unmodernised case management systems can all lead to long backlogs of cases. This, in turn, can result in people spending far too long in pre-trial detention. When judges are overwhelmed with cases, they are more likely to err on the side of caution and detain defendants. Prosecutors will routinely seek extensions of pre-trial detention if they do not have resources to investigate and prepare cases for trial. Poorly funded defence lawyers will struggle to give effective representation. If alternatives to custody are not sufficiently funded and supported, judges will be more likely to set bail at unaffordable levels and remand those who cannot post bail.

The solution to these problems does not lie in trial waiver systems and fast-track justice,⁴¹ but in properly resourced, modernised justice systems fit for the cases coming before courts. The most important points emerging from our research are:

Criminal justice system: recommendations

- j) **Resourcing:** All constituent parts of the criminal justice system should be sufficiently resourced and equipped to handle the case-loads coming into the system, thus reducing risk of unnecessary delays in the progress of cases. This includes: the police and forensic services; prosecutors; the judiciary and the courts; interpretation and translation; defence lawyers; and the probation service.
- k) **Alternatives to pre-trial detention:** The full range should be available, not only in law and policy, but in practice on the ground: regular reporting at police stations, surrendering of passports, house arrest, geographical bans, electronic monitoring, and bail hostels or other premises for use by defendants awaiting trial.
- l) **Data on use of alternatives:** Data should be collected on numbers of pre-trial decisions resulting in custody and in the use of alternative measures. Data should be analysed regularly, to ensure availability of alternatives matches demand.

5.3 Judges and magistrates

This report has highlighted the clear responsibility of judges and magistrates to ensure that injustice is avoided at the pre-trial stage. The qualities of independence, thoroughness, objectivity, courage and humanity are of immense importance in this regard. This is especially so in jurisdictions where judges face public, political or media pressure when making pre-trial decisions. To help foster these qualities in judges and magistrates, we propose the following:

⁴¹ For the risks inherent in using this approach to relieve over-burdened justice systems, see Fair Trials, 2017.

Judiciary: recommendations

- m) **Training:** There must be familiarity with the national and international provisions relating to pre-trial detention as a measure of last resort, as a minimum. Judges should be trained on alternatives to pre-trial custody and the measures available in the local area.
- n) **Diversity:** Judges should be drawn from all social groups, to ensure they reflect, as far as possible, the social make-up of the communities they serve. This will help limit the risk of biased, discriminatory, uninformed or disengaged decision-making.
- o) **Awareness of prison conditions:** To ensure judges are aware of the human – and public health – consequences of prison overcrowding and under-resourcing, they should be required to visit prisons in their state or region at least annually, to observe the conditions in which remand prisoners are held.
- p) **Public understanding:** Judges would benefit from better public and media awareness of the basic principles governing pre-trial decision-making, including the right to be presumed innocent and detention as a last resort. Information on government and court service websites could reduce the risk of unfair criticism of judges, including in rare cases when defendants commit offences while on bail.

5.4 Prosecutors and police

We have seen evidence of the positive ‘filtering’ role prosecutors can play at the early stages of a criminal case, when they are supported by probation, mental health, drug treatment, housing and other social services. The Dutch example is, though, far from typical: the research shows a strong tendency on the part of prosecutors to apply for remand in custody and to propose unfeasibly high bail. In some jurisdictions, notably that of New York state, the threat or use of pre-trial detention operates alongside routine use of plea bargaining, eroding the presumption of innocence and other fair trial rights.

In some jurisdictions police are incentivised to make high numbers of arrests, including for relatively minor drug and other offences, and have little or no discretion to divert less serious cases away from prosecution. This can have the effect of increasing the volume of cases passing through courts, clogging up case lists and leaving less time for proper investigation and reasoned decision-making by the courts. We therefore propose:

Prosecutors and police: recommendations

- q) **Training and support:** Prosecutors should be trained on the national and international provisions relating to pre-trial detention as a measure of last resort, and on alternatives to pre-trial custody.
- r) **Independence and resources:** Prosecution services should be independent of state control and be properly resourced. This will make it more likely that prosecutors will carry out proper, evidence-based assessments of risk, rather than automatically seeking remand in custody.
- s) **Discretion:** In some legal systems it may be possible to give prosecutors and police more discretion to divert cases away from the criminal justice system altogether at the pre-trial stage. This might be appropriate when a treatment-based intervention would be more suitable or where an administrative or civil law penalty, reprimand or warning would suffice.
- t) **Police pay:** Incentivising police with bonuses for arresting suspects is generally inadvisable. It is preferable to raise police salaries to levels at which the temptation to seek bribes will reduce, and to redouble efforts to challenge institutional impunity and eradicate corrupt practices.

5.5 Defence lawyers

A recurring theme in the evidence we have gathered is that the overwhelming majority of defendants in criminal proceedings come from backgrounds of disadvantage, often finding it impossible to afford adequate legal representation. Time and again we heard from defence lawyers that wealthier, higher status defendants had better prospects of avoiding detention pre-trial because they could afford a good lawyer. Legal aid systems are often inadequately funded and legal aid lawyers so overwhelmed with work that they cannot give sufficient attention to pre-trial hearing preparation. To address these problems, we recommend:

Defence lawyers: recommendations

- u) **Legal aid:** There must be adequate funding to ensure that people who need legal aid receive it promptly, across all geographical areas.
- v) **Training:** Lawyers who defend clients in criminal proceedings must be adequately trained not only on the law and procedure relating to pre-trial detention and fair trial rights, but also on practical ways of mitigating the need for remand in custody, for example, by liaising with social and health services to ensure that clients' health or other social needs are met.
- w) **Monitoring:** The quality of lawyers' advice and representation at pre-trial hearings should be monitored to ensure it meets acceptable national standards.

5.6 Overarching points

All the above recommendations should be viewed in the context of two overarching points.

First, it is clear from our own research and from the studies cited in this report that pre-trial detention is certainly not viewed by policy makers, judges or prosecutors as an exceptional measure, to be used as a last resort. If it were, we would see far fewer people remanded in custody and far shorter periods spent in pre-trial detention. There would instead be greater and more routine use of alternatives, including electronic monitoring, GPS tagging, regular reporting and similar measures. The past two decades have seen significant advances in the availability of such alternatives, yet their use is still extremely limited in almost all the ten countries. In view of the enormous costs of imprisonment to the public purse and the rights infringements and social harms associated with the misuse of pre-trial detention, this should be a matter of concern for governments, judges and other practitioners.

Secondly, it is important not to see the misuse of pre-trial detention as an isolated problem or one related largely to legal provisions and their application. It can only be addressed as part of wider cross-sector strategy aimed at reducing resort to custody overall. As our first report in this project demonstrated, almost all the countries in our study have seen cuts to public services and welfare provision in recent years, alongside increasingly punitive justice policies. The range of offences for which custody can be imposed has widened and there has been a steady increase in maximum statutory custodial penalties available to judges and imposed by them (Jacobson et al, 2017). Tougher punishments have had no demonstrable effect on reducing crime through deterrence or rehabilitation, but they have helped bring about a global prisons crisis.

Annex: International and regional standards on pre-trial detention

Overarching international standards

Universal Declaration of Human Rights, Adopted by UN General Assembly Resolution 217A (III) of 10 December 1948. https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf

Article 9:

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10:

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11:

Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976. <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

Article 9:

1. Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10:

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

Other international standards relating to the administration of justice

Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, Principles 8, 17, 18, 23

Adopted by General Assembly resolution 43/173 of 9 December 1988. <https://www.ohchr.org/EN/ProfessionalInterest/Pages/DetentionOrImprisonment.aspx>

Basic Principles on the Role of Lawyers, Principles 7 and 8

Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. <https://www.ohchr.org/en/professionalinterest/pages/roleoflawyers.aspx>

Guidelines on the Role of Prosecutors, number 18

Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx>

United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), Rules 61, 111 – 118, 120

General Assembly resolution 70/175, annex, adopted on 17 December 2015. <https://cdn.penalreform.org/wp-content/uploads/1957/06/ENG.pdf>

United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Rules 17 and 18

Adopted by General Assembly resolution 45/113 of 14 December 1990 <https://www.ohchr.org/EN/ProfessionalInterest/Pages/JuvenilesDeprivedOfLiberty.aspx>

United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), Rules 5 and 6

Adopted by General Assembly resolution 45/110 of 14 December 1990 <https://www.ohchr.org/Documents/ProfessionalInterest/tokyorules.pdf>

United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”), Rule 13

Adopted by General Assembly resolution 40/33 of 29 November 1985 <https://www.ohchr.org/Documents/ProfessionalInterest/beijingrules.pdf>

United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules), Rule 56

Resolution adopted by the General Assembly on 21 December 2010 https://www.unodc.org/documents/justice-and-prison-reform/Bangkok_Rules_ENG_22032015.pdf

Regional standards

African Charter on Human and People's Rights, Articles 6 and 7

Adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986 <http://www.humanrights.se/wp-content/uploads/2012/01/African-Charter-on-Human-and-Peoples-Rights.pdf>

Guidelines on the Conditions of Arrest, Police Custody and Pre-trial Detention in Africa (the Luanda Guidelines) (all)

Adopted by the African Commission on Human and Peoples' Rights (the Commission) during its 55th Ordinary Session in Luanda, Angola, from 28 April to 12 May 2014. <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=2b6f5162-c282-37e9-f6e7-61034e8bfca5&forceDialog=0>

American Declaration on the Rights and Duties of Man, Article XXV

Resolution adopted at the third plenary session, held on June 2, 1998 https://www.oas.org/dil/access_to_information_human_right_American_Declaration_of_the_Rights_and_Duties_of_Man.pdf

American Convention on Human Rights, Article 5

Signed at the Inter-American Specialized Conference on Human Rights, San Jose, Costa Rica, 22 November 1969. <https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>

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