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Use and Abuse of Pre-Trial Detention in Council of Europe States: A Path to Reform

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USE AND ABUSE OF PRE-TRIAL DETENTION IN COUNCIL OF EUROPE STATES: A PATH TO REFORM

Sarah Nagy

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I. Introduction

Of all incarcerated persons in the world, as many as one out of three has not been convicted of a crime.¹ Some of these detainees, held during criminal investigations for reasons of personal safety or a risk of flight, will be given a just and timely trial; but many others will remain in custody for weeks or months, separated from their families, their livelihoods, and any form of legal help, despite the fact that they are legally still presumed innocent.² While prisoners' rights have become a matter of close international attention, the problem of pre-trial detention is often overlooked, even where international standards exist to govern the use of pre-trial detention by domestic criminal courts.³ Numerous international organizations agree that pre-trial detention should be a measure of last resort in criminal proceedings, but abuse is still widespread: In some jurisdictions, whether as a result of judicial inefficiency, corruption, or lack of oversight, "pre-trial detainees outnumber convicted prisoners."⁴

¹ Michael Schönteich, PRESUMPTION OF GUILT: THE GLOBAL OVERUSE OF PRETRIAL DETENTION I (2014), <https://www.opensocietyfoundations.org/sites/default/files/presumption-guilt-09032014.pdf>.

² *Id.*

³ See AM. BAR ASS'N RULE OF LAW INITIATIVE, HANDBOOK OF INTERNATIONAL STANDARDS ON PRETRIAL DETENTION PROCEDURE 4 (2010), https://www.ilsa.org/jessup/jessup16/Batch%201/handbook_of_international_standards_on_pretrial_detention_procedure_2010_eng.authcheckdam.pdf [hereinafter ABA] (compiling language from relevant instruments of international human rights law to illustrate standard practice across jurisdictions).

⁴ Schönteich, *supra* note 1, at 1.

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Even in jurisdictions with well-developed and well-regulated criminal justice systems, pre-trial detention overwhelmingly affects the poor, non-nationals, ethnic and racial minorities, and other vulnerable populations.⁵ In some individual Council of Europe member states, a third or more of pre-trial detainees are foreign-born, detained under the belief that they pose an inherent risk of flight – in some cases even when the crime with which they are charged yields a non-custodial sentence.⁶ In Europe, the average length of detention before trial is close to five months, and national criminal codes sometimes permit maximum detention periods of multiple years.⁷ Though numerous alternatives to the custodial detention of accused persons exist and are even encoded in much domestic criminal law, many states have been slow to adopt widespread use of these alternatives, as evidenced by high (and in some cases increasing) rates of pre-trial detention.

This paper will address the use and abuse of pre-trial detention in Council of Europe states, focusing on member states' compliance with the legal standards outlined in the European Convention on Human Rights and since given shape by the European Court of Human Rights. I will provide background on the problems most commonly associated with the use of pre-trial detention in European states, as well as the Council of Europe's approach to ensuring that members comply with international standards governing the use of pre-trial detention. I will also briefly examine the relevant case law within the European Court of Human Rights, especially as it pertains to recent or ongoing criminal justice reform within member states. I will analyze a selected group of data about pre-trial detention in four Council of Europe member states and discuss recent reform efforts within those states. Finally, I will discuss alternatives to pre-trial detention successfully in use in Council of Europe member states, as well as the possibility of their implementation in other jurisdictions.

II. Background

A. International legal framework for use of pre-trial detention in Council of Europe member states

Pre-trial detention (called detention or custody on remand in some jurisdictions) is “any period of detention of a suspected offender ordered by a judicial authority and prior to conviction.”⁸ Officially, pre-trial detention is a measure of

⁵ Schönteich, *supra* note 1, at 7.

⁶ Voislav Stojanovski, *Pre-Trial Detention of Foreigners in the European Union*, 2 ANNALS CONSTANTIN BRĂNCUȘU U. TÂRGU JIU JURID. SCI. SERIES 85, 89 (2009); *World Prison Brief: Europe*, INT'L CTR. PRISON STUDIES, <http://prisonstudies.org/map/europe> (reporting, for example, rates of foreign-born pre-trial detainees at 73% of the total pre-trial population in Switzerland, 42.9% in Belgium, and 33% in Italy) (last visited Mar. 2, 2016).

⁷ Schönteich, *supra* note 1, at 25 (citing Rick Sarre, Sue King & David Bamford, *Remand in Custody: Critical Factors and Key Issues*, 310 TRENDS & ISSUES IN CRIM. JUST. 2-3 (2006)).

⁸ Eur. Consult. Ass., *Recommendation of the Committee of Ministers to member states on the use of remand in custody*, 947th sess., Rec(2006)13 (2006), available at <https://wcd.coe.int/ViewDoc.jsp?id=1041281>. [hereinafter Eur. Cons. Ass.] This definition includes any period of detention relating to international judicial cooperation and extradition, which encompasses the large population of foreign nationals held in pre-trial detention in European countries.

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last resort, to be used in circumstances involving crimes punishable by incarceration where the accused poses a risk of flight or of committing a serious offense upon release, and where no alternative measures would properly address that risk.⁹ Alternative, non-custodial measures to prevent flight or further offense might include requiring the accused to appear periodically before a judicial authority during the criminal investigation process; placing limits on engagement in particular activities or restricting the accused's movement to certain areas before trial; requiring supervision by an agency appointed by a judicial authority; or requiring the surrender of some form of identification or a financial guarantee of conduct prior to trial.¹⁰ The international approach to pre-trial detention may be summarized by the principle that "[c]ourts should only detain an individual during the adjudication process if, having considered the widest possible range of alternatives, they conclude that detention remains necessary to address the risk identified."¹¹

Among the 47 member states of the Council of Europe, the rights of prisoners and detainees are enumerated in the European Convention on Human Rights of 1953 (hereafter "the Convention"). Article 5 of the Convention establishes the fundamental right of the individual to liberty, with the corresponding right not to be subject to any arbitrary deprivation of that liberty.¹² It states in full that "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in [certain cases] and in accordance with a procedure prescribed by law."¹³ Article 5(1) lists six categories enumerating the circumstances under which public authorities may lawfully deprive an individual of his or her liberty (of which pre-trial detention is the third); it is an exhaustive list, containing the *only* permissible circumstances under which a contracting state may allow such a deprivation.¹⁴ Articles 5(2)-(5) enumerate the accused person's affirmative right to prompt notification of arrest; to stand trial within a reasonable period of time; to have the lawfulness of any pre-trial detention measure speedily examined and decided; and to have an enforceable right to compensation should the accused be the victim of detention in contravention of the terms of the Article.¹⁵

The Convention, unlike other instruments of international law of its time, contains the "institutional machinery for supervision and enforcement" of its terms in the form of the European Court of Human Rights (hereafter "the Court").¹⁶

⁹ *Id.*

¹⁰ *Id.*

¹¹ See ABA, *supra* note 3, at 5 (quoting substantively similar provisions in documents by the United Nations Human Rights Committee, the European Convention on Human Rights, the African Commission on Human and People's Rights, and the Inter-American Commission on Human Rights).

¹² European Convention for the Protection of Human Rights and Fundamental Freedoms art. 5, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 222 [hereinafter European Human Rights Convention].

¹³ *Id.*

¹⁴ Yue Ma, *The European Court of Human Rights and the Protection of the Rights of Prisoners and Criminal Defendants Under the European Convention on Human Rights*, 10 INT'L CRIM. JUST. REV. 54, 62-63 (2000).

¹⁵ European Human Rights Convention, *supra* note 13.

¹⁶ *Id.* at 54-55.

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The Court possesses the authority to investigate and adjudicate violations of the Convention in contracting states, and while it has no authority to strike down national laws, it may issue binding decisions ordering corrective action by states found to be in violation.¹⁷ Such corrective action might include the release of a detained person, or a change in the conditions of their detention.¹⁸ Under Article 5(1)(c) of the Convention, pre-trial detention is a permissible form of deprivation of liberty, provided that it constitutes “the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence of fleeing after having done so.”¹⁹ Lawful pre-trial detention, therefore, must be ordered by a judge or other judicial officer²⁰ and must involve a “genuine inquiry into the basic facts of a case in order to verify whether a complaint was well-founded.”²¹ The detainee must be charged with a specific and concrete criminal offense – a person may not be held on account of a perceived propensity to commit a crime.²²

In determining whether specific cases constitute unlawful deprivations of liberty, “the Court does not consider itself bound by the legal conclusions of domestic authorities,” but undertakes an autonomous assessment with emphasis on the context in which detention has been imposed by a domestic judicial authority.²³ The Court considers a series of objective and subjective factors to determine whether detention violates the individual’s right to liberty, including (but not limited to) the length of detention; the purpose of detention; the effect of detention on the detainee; and the manner in which the measure in question is implemented.²⁴ Importantly, the Court has chosen not to establish a minimum length of detention required to constitute a deprivation of liberty under Article 5, holding for example in *Iskandarov v. Russia* that where involuntary detention is imposed by state agents, shortness of duration is not decisive in determining whether a detainee’s rights have been violated.²⁵ Periods as short as four days have been found to violate the provisions of Article 5, while periods of three years have also been found lawful based on the surrounding circumstances.²⁶ Likewise, no other single factor is determinative in finding an Article 5 violation; every case is de-

¹⁷ *Id.* at 62.

¹⁸ *Id.*

¹⁹ European Human Rights Convention, *supra* note 13, at art. 5 § 1(c).

²⁰ *Schiesser v. Switzerland*, App. No. 7710/76, 1979 Eur. Ct. H.R. 9.

²¹ *See Stepuleac v. Moldova*, App. No. 8207/06, 2008 Eur. Ct. H.R. 18 (holding that where prosecutors included applicant’s name in a list of suspects absent any evidence of applicant’s involvement, there existed no reasonable suspicion that applicant had committed an offence, and therefore arrest was in violation of Article 5(1)).

²² *Shimovolos v. Russia*, App. No. 30194/09, 2011 Eur. Ct. H.R. 12.

²³ EUR. COURT OF HUMAN RIGHTS, GUIDE ON ARTICLE 5 OF THE CONVENTION: RIGHT TO LIBERTY AND SECURITY 5 (2012), http://www.echr.coe.int/Documents/COUREDH-2012-Guide_on_article_5_ENG.pdf [hereinafter Article 5 Guide].

²⁴ *Id.* at 6.

²⁵ *Iskandarov v. Russia*, App. No. 17185/05, 2010 Eur. Ct. H.R. 23.

²⁶ *Ma*, *supra* note 15, at 63-64.

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cided within its own context, based on the totality of the circumstances.²⁷ With this approach, the Court seeks to balance the freedom of individual states to form their own penal codes (for declaring a strict maximum period of legal detention might invalidate national legislation, which is beyond the power of the Court to do) with the right of individuals not to be detained in a manner that violates their fundamental rights.

In practice, the heavily contextual nature of the Court's analysis of pre-trial detention cases allows for a wide variety of circumstances in which detention might be found permissible. So long as it does not deem an order of detention "arbitrary," the Court may find detention lawful when permitting release would present some danger to the accused, to a potential witness in the future trial, or to society generally (especially where the investigated offense is of particular severity); when allowing the accused total freedom might lead to a breach of confidentiality; or when the accused might pose a risk of flight out of the jurisdiction in which trial is pending.²⁸ Council of Europe member states are free to set their own limits on permissible length of pre-trial detention, and may permit maximum limits of just a few weeks or of several years.²⁹ Detention periods as short as five days have been found unlawful, while periods as long as two years have been found to be appropriate to the circumstances. Overall, however, some variation in terms between domestic legal systems notwithstanding, the European legal framework for pre-trial detention established in the Convention is in keeping with the standards espoused by most of the international community, which hold that "pretrial detention can only be justified when used to prevent the accused from absconding, committing a serious offense, or interfering with the administration of justice."³⁰ Consistent enforcement within national jurisdictions presents the greater difficulty.

B. Problems presented by overuse of pre-trial detention

Because modern judicial thought is founded on a universal presumption of innocence, custodial detention before trial poses an inherent problem: Detainees held in custody under suspicion of having committed a crime must still be presumed innocent, despite the fact that custodial detention is a penalty otherwise levied only against convicted criminals. Because of this strong association between custodial detention and proven guilt, the overuse of pre-trial detention can prejudice judicial authorities against detainees held for purposes of an investigation, leading to the use of detention as a punitive or preventive measure rather than a regulatory one.³¹ And while international law calls for strict regulation of

²⁷ Article 5 Guide, *supra* note 17, at 25.

²⁸ *Commission Green Paper on the Application of EU Criminal Justice Legislation in the Field of Detention*, at 8-9, COM (2011) 327 final (June 14, 2011), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0327:FIN:en:PDF> [hereinafter *Commission Green Paper*].

²⁹ *Id.*

³⁰ American Bar Association, *supra* note 3, at 4.

³¹ Stephen Jones, *Guilty Until Proven Innocent? The Diminished Status of Suspects at the Point of Remand and as Unconvicted Prisoners*, 32 COMM. L. WORLD REV. 405 (2003); *See also* Sue King et al.,

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the use of pre-trial detention in criminal proceedings, in many jurisdictions detention remains the default solution rather than the exception.³² Judges seeking to adhere to the international standards discussed above must take a wide variety of factors into account in every individual case, which may lead to arbitrary imposition of pre-trial detention and runs the risk of decisions influenced by unconscious prejudice or the pressure of accustomed practice.³³

Domestic criminal justice systems must therefore draw a balance between the needs of criminal investigations and the right of individuals not to be detained for crimes of which they have not been found guilty. Mindful of this balance, international law-making bodies seek to define carefully the circumstances under which pre-trial detention may be used to ensure a fair and just trial.³⁴ International standards are difficult to enforce, however, even where courts have some power to intervene; the European Court of Human Rights might be able to issue binding decisions in limited individual cases, but most instruments of international law, including the Convention, lack the binding legal power to change individual states' behavior.

III. Discussion

A. Current problems in Council of Europe member states

The Council of Europe has set clear standards for the use of pre-trial detention in member states, but states have put these standards into practice inconsistently. International prisoners' rights groups support the universal adoption of the standards set down in the Council of Europe's Recommendation Rec(2006)13, a guidance document which calls for pre-trial detention to be used "only when strictly necessary and as a measure of last resort."³⁵ However, due to the long list of factors judges are expected to consider in determining whether an alternative measure would suffice, judges can sometimes order pre-trial detention without strong justification – so long as there exists a "reasonable suspicion" that the accused committed the crime with which they are charged, there are no objective standards to determine how viable an alternative measure would be.³⁶ Judges seeking to adhere to international standards are expected to take into considera-

The Remand Strategy: Assessing Outcomes, 19 CURRENT ISSUES CRIM. JUST. 328 (2008) (arguing that "without greater clarity of focus on the purposes for which the remand strategy should be deployed, custodial remand is in danger of being utilised for policy purposes other than those initially sought and pursued by legislators,"); see also Marian R. Williams, *The Effect of Pretrial Detention on Imprisonment Decisions*, 28 CRIM. JUST. REV. 299 (2003) (showing that "defendants who had been subject to pretrial detention were more likely to be incarcerated, and to receive longer sentences if they were incarcerated, than defendants who had been released pending case disposition" in a study of detention decisions in a Florida county).

³² Schönteich, *supra* note 1, at 97.

³³ Schönteich, *supra* note 1, at 98 (noting that "even well intentioned decision makers are subject to "random fluctuations in attention, perception, mood, and so on"").

³⁴ See American Bar Association, *supra* note 3, at 5.

³⁵ Matt Loffman & Faye Morton, *Investigating Alternatives to Imprisonment within Council of Europe Member States*, QUAKER COUNCIL FOR EUR. AFFAIRS 6 (Feb. 24, 2010), available at <http://www.qcea.org/wp-content/uploads/2011/06/rprt-alternatives-en-jan-2010.pdf>.

³⁶ Schönteich, *supra* note 1, at 166.

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tion not only the severity and potential penalty for the crime of which the potential detainee has been accused, but “the age, health, character, antecedents and personal and social circumstances of the person concerned,” though what weight to give individual circumstances is still left up to the individual judge.³⁷ Where judges have wide discretion to declare individuals sufficiently dangerous to justify pre-trial detention, there is greater danger that detention will be used for preventive, rather than regulatory, reasons.³⁸ And in jurisdictions where prosecutors and police have significant power to affect the outcome of detention decisions, criminal proceedings can be unfairly influenced in their early stages by the arresting authorities, leading to too many “rubber-stamped” detention orders.³⁹ As admitted by a Dutch judge, prior to the publication of Recommendation Rec(2006)13: “If you are skillful, you can virtually detain anybody.”⁴⁰

International law-making bodies regularly emphasize the ways in which the overuse of pre-trial detention undermines the universal presumption of innocence. But looking beyond the discussion of abstract rights, prison reform advocates point out that pre-trial detention also has serious negative effects on the well-being of detainees.⁴¹ Prisoners’ rights and detainees’ rights are closely connected; detainees are often kept in the same facilities as (and sometimes with no separation from) convicted prisoners, and may be subject to the same human rights abuses to which prisoners are particularly vulnerable.⁴² In jurisdictions already burdened with overcrowding in prisons, pre-trial detainees face an “increase in noise and tension, along with [a] decrease in prison visits, food, and personal space.”⁴³ According to a report published by the Quaker Council for European Affairs, in 2010 twenty-five Council of Europe member states had more prisoners than penitentiary facilities were able to accommodate, leading to problems of overcrowding and lack of resources for prisoners and detainees alike.⁴⁴ Even where conditions in detention centers and penitentiaries are adequate and overcrowding is not a problem, pre-trial detention can break down

³⁷ Eur. Consult. Ass., *supra* note 8.

³⁸ Schönteich, *supra* note 1, at 165.

³⁹ Schönteich, *supra* note 1, at 165; *See also* Jones, *supra* note 29, at 404 (discussing the tendency of England’s Crown Prosecution Service to defer to the judgment of police in a majority of bail decisions, even following highly successful penal reform).

⁴⁰ Lonke Stevens, *Pre-Trial Detention: The Presumption of Innocence and Article 5 of the European Convention on Human Rights Cannot and Does Not Limit its Increasing Use*, 17 EUR. J. CRIME CRIM. L. & CRIM. JUST. 165, 166 (2009) (pointing out areas of wide judicial discretion in implementing pre-trial detention in Dutch, German, and English courts, though Stevens ultimately argues that the negative effects of judicial leniency are less severe than commonly reported).

⁴¹ *See* Schönteich, *supra* note 1, at 2; *See also* Samuel Deltenre & Eric Maes, *Pre-trial detention and the overcrowding of prisons in Belgium*, 12 EUR. J. CRIME CRIM. L. & CRIM. JUST. 4, 348-70 (2004).

⁴² *See* José Luis Díez-Ripollés & Cristina Guerra-Pérez, *Pre-trial Detention in Spain*, 18 EUR. J. CRIME CRIM. L. & CRIM. JUST. 381-83 (2010) (discussing the rights of remand prisoners in Spain, points out that “there are no differences between them and convicted prisoners” with regard to visitation and other social rights. The authors also express concern with the fact that pre-trial detainees are not permitted certain forms of external interaction and penitentiary benefits, as these are considered part of the correctional process and available only to convicted prisoners).

⁴³ Loffman, *supra* note 33, at 26.

⁴⁴ *Id.*

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social relationships much like a prison sentence.⁴⁵ Persons held in pre-trial detention cannot work, attend social functions, or be with their families, all forms of punishment it would be unjust to levy against innocent persons – which pre-trial detainees must be assumed to be until proven otherwise.

Even in resource-rich jurisdictions with fairly low rates of pre-trial detention, the poor are particularly vulnerable to abuse by the system. Most states have bail systems, wherein an individual may pay a financial penalty to guarantee his or her appearance in court. Those who are unable to pay bail set by the court are sometimes required to serve detention because the inability to pay translates legally to a flight risk.⁴⁶ Relatedly, factors that correlate highly with poverty – lack of employment, problems with mental or physical health, lack of education, and so on – are also associated with high rates of pre-trial detention.⁴⁷ The United Nations Working Group on Arbitrary Detention reported in 2006:

People having stable residence, stable employment and financial situation, or being able to make a cash deposit or post a bond as guarantee for appearance at trial are considered as well-rooted. These criteria of course are often difficult to meet for the homeless, drug users, substance abusers, alcoholics, the chronically unemployed and persons suffering from mental disability, who thus find themselves in detention before and pending trial when less socially disadvantaged persons can prepare their defense at liberty.⁴⁸

As discussed above, in many jurisdictions judges have broad discretion to order pre-trial detention based on an individual's personal circumstances and perceived likelihood of cooperating with the court's demands.⁴⁹ As evidence has shown in other jurisdictions, being placed in pre-trial detention increases an individual's risk of being given a custodial sentence. A greater burden on the poor in pre-trial detention can lead to a greater burden on the poor in the justice system as a whole.

Finally, many member states within the Council of Europe struggle with a high incidence of pre-trial detention for non-nationals. In fact, pre-trial detention of non-nationals is substantially higher than conviction of non-nationals in some states, because even in jurisdictions where alternative measures are regularly put into practice for resident citizens, non-nationals are considered an automatic flight risk.⁵⁰ The Council of Europe has recommended that member states adopt

⁴⁵ Eur. Consult. Ass., *supra* note 8 (referring to “the irreversible damage that remand in custody may cause to persons ultimately found to be innocent or discharged” and the “detrimental impact that remand in custody may have on the maintenance of family relationships”).

⁴⁶ Jones, *supra* note 29.

⁴⁷ Schönteich, *supra* note 1, at 33.

⁴⁸ Working Group on Arbitrary Detention, Civil and Political Rights, Including the Question of Torture and Detention, 20, U.N. Doc. E/CN.4/2006/7 (Dec.12, 2005) (by Leila Zerrougui).

⁴⁹ Eur. Consult. Ass., *supra* note 8.

⁵⁰ FAIR TRIALS INT’L., DETAINED WITHOUT TRIAL: FAIR TRIALS INTERNATIONAL’S RESPONSE TO THE EUROPEAN COMMISSION’S GREEN PAPER ON DETENTION 9 (2011), available at <https://www.fairtrials.org/documents/DetentionWithoutTrialFullReport.pdf>.

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legislation ensuring that “the fact that the person concerned is not a national of . . . the state where the offence is supposed to have been committed shall not in itself be sufficient to conclude that there is a risk of flight.”⁵¹ However, such recommendations have not found their way into most domestic criminal codes, as evidenced by the fact that a 2009 Council of Europe study found that over a quarter of pre-trial detainees were non-nationals.⁵² In some member states, more than half of pre-trial detainees are non-nationals at any given time.⁵³ Non-nationals face linguistic barriers that can impede their ability to communicate with counsel and slow proceedings, and due to the perceived risk of flight, they can in some circumstances be held even when charged with crimes not punishable by a custodial sentence.⁵⁴ Because the European Union has continued to open its borders to free travel between member states, it has proven difficult for European countries to balance the need to prevent non-nationals avoiding trial by leaving the jurisdiction with the desire to promote easy movement between states by all citizens.⁵⁵

IV. Analysis

On average between 20 and 30 percent of total European state prison populations consist of pre-trial detainees.⁵⁶ The average is lower (around 12 percent) in Central Europe, slightly higher among Eastern European countries (around 17 percent), and highest in Western and Northern Europe (between 20 and 25 percent).⁵⁷ The table below illustrates pre-trial detention statistics from 2010 to 2015 in four selected Council of Europe member states, all of which are parties to the European Convention on Human Rights.⁵⁸ Statistics are collected annually by the International Centre for Prison Studies, currently the only body that compiles state-by-state statistics about the makeup of prison populations as reported by national agencies on a worldwide scale.⁵⁹

⁵¹ Eur. Consult. Ass., *supra* note 8.

⁵² FAIR TRIALS INT’L, *supra* note 48, at 6; Stojanovski, *supra* note 7, at 89 (reporting a rate of 21% in 2006, indicating an increase in the following decade).

⁵³ PRE-TRIAL DETENTION COMPARATIVE RESEARCH: APPENDIX 2, FAIR TRIALS INT’L. (2011), available at http://ec.europa.eu/justice/newsroom/criminal/opinion/files/110510/appendix_2_-_comparative_research_en.pdf.

⁵⁴ Loffman, *supra* note 33.

⁵⁵ Tapio Lappi-Seppälä, *Imprisonment and Penal Policy in Finland*, 54 SCANDINAVIAN STUDIES L. 348, 368 (2009).

⁵⁶ See *Highest To Lowest-Pre-Trial Detainees/Remand Prisoners*, WORLD PRISON BRIEF INST. CRIM. POL’Y RESEARCH, http://prisonstudies.org/highest-to-lowest/pre-trial-detainees?field_region_taxonomy_tid=14 (last visited Mar. 7, 2016).

⁵⁷ Schönteich, *supra* note 1, at 18.

⁵⁸ *Europe*, WORLD PRISON BRIEF INST. CRIM. POL’Y RESEARCH, <http://www.prisonstudies.org/map/europe> (last visited Mar. 7, 2016). Statistics last updated January of 2015. Where possible, the Brief indicates whether pre-trial detainees are included in counts of national prison populations. Most statistics in use by intergovernmental organizations such as the European Union are derived from this database.

⁵⁹ *Id.*

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State	Number of prisoners (total)	Pre-trial detainees as percentage of prison population
Austria	8,188	21.8%
Russian Federation	644,237	18.1%
Poland	71,806	6.0%
Finland	3,105	19.9%

These states are chosen for illustrative purposes: both to examine the different challenges faced by states with differing criminal justice systems and policy goals, and to show the complexities in data relating to pre-trial detention. Statistics relating to pre-trial detention may be misleading. As the Open Society Foundations point out in their 2012 report on issues in pre-trial detention worldwide, not all national reporting agencies count pre-trial detainees among their total prison populations.⁶⁰ Even those that do may define pre-trial detention differently, for example by choosing to count not only detainees who have not been convicted, but those who are in custody while appealing a conviction or sentence.⁶¹

Statistics that only show rates of pre-trial detention as a function of total prisoner population can mask huge differences in the actual number of people affected across different penal systems. Showing the absolute number of total detainees and prisoners makes clear the difference in impact of different pre-trial detention rates on different populations.⁶² For example, Finland's total detainee population, based on the rate of pre-trial detention among the entire prison population as illustrated in the above table, would be about 620 persons.⁶³ However, Poland's pre-trial detention rate, which is less than a third of Finland's and the lowest of all Council of Europe states, would represent some 4,300 persons because of the relative size of Poland's population.⁶⁴ Meanwhile Russia, which has a rate of pre-trial detention close to the European average but also one of the largest prison populations in the world, would have more than 115,000 pre-trial

⁶⁰ Schönteich, *supra* note 1, at 13-14. Open Society Foundations maintains that, due to differing definitions of "pre-trial detention" in use in different jurisdictions, possible underreporting by prison authorities, and failure to count individuals detained in police lockups rather than detention centers, ICPS's database must be viewed as providing thorough but conservative estimates of total detainee populations. *Id.*

⁶¹ *Id.*

⁶² These estimates are used only for general illustrative purposes and represent a very rough approximation of actual prison populations, based on the numbers used in the above table. Constant fluctuations in numbers of prisoners make current data difficult to utilize accurately. However, such approximation can be used to show that even a low percentage of pre-trial detainees among a prison population may represent a large absolute number of human beings.

⁶³ See generally, *World Prison Brief: Europe*, *supra* note 58.

⁶⁴ *Id.* Microstates such as Monaco and San Marino, which may have fewer than ten total prisoners at a given time, are not counted here, as issues with pre-trial detention are statistically significant only in states with sufficiently large prison populations. *Id.*

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detainees according to the above data.⁶⁵ For this reason, simple percentages must be examined more closely to draw accurate conclusions about problems in individual states. Factors such as the average length of detention and the demographic breakdown of detainee populations must be taken into account (though unfortunately this information is not always readily available). As shown by comparing the hypothetical examples of Finland and Poland, efficient and resource-rich legal systems might have high rates of pre-trial detention compared to those in more resource-poor states; but this may indicate that they simply have smaller prison populations overall, or the ability to process detainees more quickly.⁶⁶ Finland, for example, requires by law that detention orders be administered no later than four days after arrest, and permits detainees to request new detention hearings every two weeks, meaning that while its total population of detainees might seem high, the vast majority of detainees are not held for very long – a indicator of judicial efficiency that makes unjust detention less prevalent.⁶⁷ Average rates of detention might also disguise problems that affect some states more than others. In Austria, for example, pre-trial detainees make up approximately one-fifth of the total prison population, which is close to the average for the Council of Europe. However, as of 2015, over half of the prisoners in Austria were non-nationals, and in recent years that rate has been even higher for pre-trial detainees.⁶⁸ An investigation of pre-trial detention in Austria might therefore require greater attention to the issue of detention of non-nationals than it would in other jurisdictions where that population is represented at a more normal rate.

V. Proposal

A. Improving data collection and expanding research

As discussed above, statistics relating to pre-trial detention are not always widely available, and can be misleading when they fail to take into account states' differences in standard length of detention and their approaches to custodial detention in general. Therefore, the first step in implementing reforms to prevent the abuse of pre-trial detention must be an increased emphasis on data collection that assesses individual states' use of pre-trial detention, including the frequency with which it is implemented regardless of any available alternatives, and the people against whom it is most likely to be implemented (with emphasis on its effect on marginalized or economically vulnerable groups). The Council of Europe publishes yearly reports on member states' penal statistics, collected through the administration of questionnaires to national probation and peniten-

⁶⁵ *Russian Federation*, WORLD PRISON BRIEF INST. CRIM. POL.'Y RESEARCH, <http://prisonstudies.org/country/russian-federation> (last visited Mar. 7, 2016).

⁶⁶ See Schönreich, *supra* note 1, at 13.

⁶⁷ *Factsheet: Pretrial Detention and Remand to Custody*, JUSTICE POL.'Y INST. 1, 1 (2011), http://www.justicepolicy.org/uploads/justicepolicy/documents/pretrial_detention_and_remand_to_custody.pdf.

⁶⁸ See *Austria*, WORLD PRISON BRIEF INST. CRIM. POL.'Y RESEARCH, <http://prisonstudies.org/country/austria> (last visited Mar. 7, 2016).

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tiary authorities.⁶⁹ Prisoners' rights advocacy organizations, academic institutions, and nonprofits such as the International Centre on Prison Studies, the United Nations Office of Drugs and Crime, and Open Society Foundations also collaborate to compile international prison statistics. However, due to differences in definitions between legal jurisdictions, the non-participation of some states in some aspects of reporting, and a lack of emphasis on the unique circumstances of remand prisoners in prisoner advocacy, available data remains difficult to analyze. Clearer standards for data collection and analysis would aid in gaining a more realistic picture of the changes in detainee populations in Council of Europe member states, granting a clearer understanding of how penal reform can decrease the use of pre-trial detention and improve the situation of pre-trial detainees.

B. Encoding non-custodial measures in domestic law

In order to achieve less arbitrary and more just implementation of pre-trial detention measures, European countries that have not yet done so should begin by encoding a preference for non-custodial alternatives in their national criminal codes, leaving fewer subjective factors to the discretion of individual judicial authorities. While the European Court of Human Rights is unusually powerful among international judicial bodies in that it may issue binding decisions on member states in specific cases where pre-trial detention is unjustly imposed, it does not have the power to change domestic law.⁷⁰ This enables the continued overuse of pre-trial detention in numerous cases not deemed exceptional enough to come before the Court. The Council of Europe has taken a strong first step by recommending a series of strict and specific circumstances under which domestic courts *should* be permitted to impose pre-trial detention, but implementation has been slow in member states.⁷¹

Finland provides a strong example of a country that has codified strict limits on pre-trial detention and removed much of judges' discretionary power to impose custodial sentences. Since the 1970s, Finland has been reforming its penal code to de-emphasize custodial sentences, choosing to replace sentencing for almost all non-violent crimes with alternative sentences such as income-based day fines, community service, mandatory mediation, and community service.⁷² Furthermore, following the Council of Europe's 2006 publication of recommendations for detention reform, Finland chose to change its criminal code to closely match those recommendations, helping to ensure that alternatives to pre-trial detention find wider usage.⁷³

Finland, with its small and relatively homogeneous population, well-funded judicial system, very low poverty rate, and low rates of violent crime, is an out-

⁶⁹ See generally COUNCIL OF EUROPE ANNUAL PENAL STATISTICS, <http://wp.unil.ch/space> (last visited Mar.8, 2016).

⁷⁰ Ma, *supra* note 14, at 56.

⁷¹ Eur. Consult. Ass., *supra* note 8.

⁷² Lappi-Seppälä, *supra* note 53, at 336.

⁷³ *Id.* at 342.

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lier even in the Council of Europe – Russia, for example, in addition to having a population many times larger than Finland’s, has more than twice its poverty rate.⁷⁴ In proposing that other Council of Europe member states follow Finland’s example, it is important to emphasize the nature of its penal reform, which aims to change not only the criminal code but the “custodial culture” that makes detention and incarceration the default method for dealing with any criminal behavior.⁷⁵ One researcher notes that in Finland, “the role of punishment came to be seen as relative. Once regarded as the primary means of criminal policy, it came to be regarded as only one option among many.”⁷⁶ Reform in other Council of Europe member states might take a similar form in the long term – where emphasis in criminal justice falls away from custody-as-punishment and becomes more open to alternative forms of sentencing, emphasis on pre-trial detention as the primary form of guaranteeing the accused’s presence at trial could also become more open to alternatives.

C. Current problems in Council of Europe member states

As discussed in Part II, numerous international organizations and lawmaking bodies have set standards for the treatment of pre-trial detainees, but are unable to change individual states’ national legal systems even where those states are party to treaties such as the European Convention on Human Rights. Therefore, it must be the responsibility of individual states either to agree to accept decisions by bodies like the European Court of Human Rights as binding, or to introduce legislation that causes criminal codes to adhere more closely to international standards. It must also be the responsibility of states to create mechanisms to enforce adherence by domestic courts.

Poland, which has seen a decrease in its pre-trial detention rate from 30 percent to 6 percent since 2000, has written the Article 5 standards for just pre-trial detention espoused by the European Convention on Human Rights into its criminal code.⁷⁷ However, some penal reform advocates find that despite this necessary change, alternative measures are still not administered uniformly – where prosecutorial proceedings move for detention, judges still order detention in an overwhelming majority of cases.⁷⁸ However, discussion continues about the potential for Poland to incorporate decisions by the European Court of Human Rights into binding law.⁷⁹ Responses by legal professionals suggest that some courts view such decisions as binding precedent and some do not, and that estab-

⁷⁴ *World Development Indicators*, THE WORLD BANK, <http://data.worldbank.org/country/russian-federation> (last visited Mar. 8, 2016).

⁷⁵ Lappi-Seppälä, *supra* note 55, at 362 (emphasizing the “political will as consensus” as a driving factor in national penal reform).

⁷⁶ *Id.* at 350.

⁷⁷ FAIR TRIALS INT’L, COMMUNIQUÉ ISSUED AFTER THE MEETING OF THE FAIR TRIALS INTERNATIONAL LOCAL EXPERTS GROUP (POLAND) 4 (2012), available at <https://www.fairtrials.org/wp-content/uploads/Poland-PTD-communique.pdf>.

⁷⁸ *Id.* at 1.

⁷⁹ *Id.* at 4.

lishing a rule that enforces the binding nature of Court decisions with regard to Poland would be useful in continuing to reduce Poland's rate of pre-trial detention.⁸⁰

The European Union acknowledges the problem of pre-trial detention of foreign-born persons who are seen as an inherent flight risk, pointing out in its 2011 Green Paper on criminal justice in the field of detention that such detainees "are regularly denied release, and consequently their right to liberty, simply because they have fewer ties with the jurisdiction."⁸¹ It has been suggested that the continued increase in the detention of foreign-born persons, particularly in northern and western Europe, is a result of the EU's ongoing efforts to open its borders to free travel, increasing the risk that a non-national charged with a crime will return to his or her own home following pretrial release in an attempt to leave the jurisdiction.⁸² One proposed alternative to detaining foreign-born persons automatically is to permit non-nationals to return to their own states of residence during criminal proceedings (provided doing so does not pose a risk to the success of the investigation or the safety of any involved persons).⁸³ There, they may be subject to court supervision to ensure their cooperation, or be required periodically to return to the jurisdiction in which they are charged with a crime.⁸⁴ While no international framework to ensure such cooperation between member states yet exists, the idea is one espoused by the Council of Europe, which recommends that "[w]herever practicable, alternative measures shall be applied in the state where a suspected offender is normally resident if this is not the state in which the offence was allegedly committed."⁸⁵ Such a measure would require extensive international cooperation, but would prevent non-nationals charged with crimes from becoming isolated in foreign territory with little recourse to local legal aid.

VI. Conclusion

Ideally, continued progress in the arena of criminal justice will lead to a widespread cultural shift across all European states that emphasizes restorative justice, strong human rights protections, and a move away from punitive and custody-centered criminal codes. Over decades, states can continue to reduce the size of their prison populations and commit greater resources to ensuring that judicial authorities adhere to international standards in administering pre-trial detention and are not unduly influenced by prosecutorial power or personal prejudice. However, such a shift is years away, and justice for pre-trial detainees in Europe will require more immediate changes on a state-by-state level. Reform will re-

⁸⁰ *Id.*

⁸¹ *Commission Green Paper*, *supra* note 28, at 9.

⁸² *See* Lappi-Seppälä, *supra* note 55, at 368 (discussing the effects of open borders on increasing crime in Finland); Stojanovski, *supra* note 6, at 86 (discussing the use of pre-trial detention to preemptively prevent flight of non-nationals even in cases involving crimes with non-custodial penalties).

⁸³ Stojanovski, *supra* note 6.

⁸⁴ Stojanovski, *supra* note 6.

⁸⁵ Eur. Consult. Ass., *supra* note 8.

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quire a more widespread use of alternatives to remand in custody, with strong national commitments to ensuring that custodial detention measures are carried out efficiently, justly, and only under necessary circumstances.

While no single solution will have equal effectiveness across all member states, due to differences in their legal systems, their populations, and their political and economic circumstances, reform must begin with better and more detailed collection of data, which could be used to draw more useful comparisons between states and to pinpoint more exactly where problems persist. Further study would also help to determine problems' sources, whether they stem from a lack of resources for proper oversight of criminal proceedings, from some weakness in the criminal code that facilitates abuse of pre-trial detention, or from corruption within the legal system. Some states require attention to issues of basic human rights, such as adequate conditions in detention centers, separation of prisoners and detainees, and statutory maximums on length of pre-trial detention. Other states, having taken the vital step of adding protections for detainees into their criminal codes, require further oversight to ensure that judges do not abuse their discretion in choosing to order pre-trial detention over possible alternatives. In all states, greater care must be taken to ensure that pre-trial detention is a measure used to improve judicial efficiency and to protect both the accused and other involved persons during a criminal investigation, not a measure used to punish the poor, the marginalized, and non-nationals.