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**Submission to the 103rd Session of the
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This briefing outlines PRI's concerns in relation to Armenia's failure in law and practice to implement its obligations under Article 9 of the ICCPR.

The submission includes initial, yet unpublished, findings from a research project the organisation is currently conducting into alternatives to pre-trial detention in Armenia.¹ The research project aims to identify the underlying causes of excessive use of pre-trial detention and the failure to adequately apply non-custodial preventive measures. The research has been conducted using qualitative and quantitative social science methodology as well as legal analysis. During June and July 2011 PRI's researcher conducted 36 interviews with judges, prosecutors, police pre-trial investigators, civil society activists and legal scholars who were prepared to participate in this research, upon permission of the authorities and assuring anonymity of their quotes.² Research also comprised the analysis of 82 archived motions on pre-trial detention, court decisions authorising pre-trial detention, decisions on monetary bail and decisions on applying other non-custodial preventive measures for the period of 2005-2010. PRI also requested from the authorities statistics for this period; however has not received a response to date. The study "Non-Custodial Remand Measures as Alternatives to Pre-Trial Detention in Armenia" is expected to be finalised in January 2012.

Introduction

In its concluding observations considering Armenia's Initial Report under the International Covenant on Civil and Political Rights (hereinafter ICCPR) in 1998, with regard to Article 9 (3), the Human Rights Committee (hereinafter CCPR) expressed its concern that "all the grounds for pre-trial detention are not listed in the present law. While noting that the new Criminal Code provides for a maximum period of three months' detention, the Committee is concerned that very few detainees benefit from bail, and urges the State party to observe strictly the requirements of article 9, paragraph 3, of the Covenant."³

¹ This research project is funded by Open Society Foundations.

² Transcriptions of the interviews have been produced and are kept at PRI's premises.

³ CCPR/C/79/Add.100 (1998), para.11.

Responding to this concern, in its joint second and third periodic report (hereinafter the state report), the state party acknowledged that Article 18 of the 1995 Constitution failed to provide an exhaustive list of grounds for the lawful deprivation of liberty. However, the state party highlighted that Article 16 of the amended Constitution (2005) incorporated the guarantees previously only enshrined at the level of non-constitutional legislation, i. e. the Code of Criminal Procedure (hereinafter the CCP). Furthermore, the state report⁴ listed the permissible grounds of lawful deprivation of liberty prescribed by Article 16 of the amended Constitution and included extracts from the relevant articles of the CCP.⁵

The government's report did not address the concern of the CCPR on the fact that very few detainees benefit from bail.

This diagnosis is still valid for the situation in Armenia. Still very few detainees continue to benefit from bail: In 2007, pre-trial detention was substituted with monetary bail only in 62 cases. The numbers for 2008 and 2009 are 151 and 186 respectively.⁶ These figures illustrate that detention of persons awaiting trial continue to be a general rule rather than last resort. At the same time, even after the release of 508 prisoners under an amnesty in May 2011⁷, according to figures provided by the "Group of Public Observers"⁸, as of 30 August 2011 1,174 out of 4,514 prisoners were held in pre-trial detention, representing 26% of overall prison population.

The Human Rights Commissioner of the Council of Europe, in a statement released on 18 August 2011 established a rate of pre-trial detention of up to 41% in some Council of Europe member states and criticised this practice as "virtually systematic" pre-trial detention.⁹

The rare applications of non-custodial preventive measures including monetary bail in Armenia are also factors with regard to prison overcrowding. The prison population as of 30 August 2011 constituted 4,514, as compared to the official capacity of the Armenian penitentiary system of 4,396¹⁰, despite the release of 508 prisoners under amnesty between May and July 2011.¹¹

Legal framework on pre-trial detention

PRI believes that Article 16 of the Armenian Constitution (2005) (hereinafter the Constitution), despite amendments adopted in 2005, and the CCP (1998) in its current version are still inconsistent with Article 9(3) of the ICCPR.

⁴ Joint Second and Third Periodic Reports of State Parties, Armenia, CCPR/C/ARM/2-3, 28 April 2010, para. 256

⁵ Joint Second and Third Periodic Reports of State Parties, Armenia, CCPR/C/ARM/2-3, 28 April 2010, para. 276-281.

⁶ American Bar Association, Rule of Law Initiative, "Detention Procedure Assessment Tool For Armenia", April 2010, available on http://apps.americanbar.org/rol/europe_and_eurasia/armenia.html, accessed on 20 January 2011, pg.36.

⁷ The report of the Deputy Prosecutor General Aram Tamazyan in the official meeting of Armenian Prosecutors, 19.0811, available on <http://www.genproc.am/am/51/item/6791/>, accessed on 30th August 2011.

⁸ The Group was formed in 2004 upon the order of the Minister of Justice QH-66-N and complies with the principles of "The Regulations of Activities of a Public Monitoring Group at the Detention Facilities of Penal Services of the Ministry of Justice" of the Law of the Republic of Armenia "On the Custody of Detainees and Prisoners".

⁹ The statement of Human Rights Commissioner of the Council of Europe, 18.08.2011, available on http://commissioner.cws.coe.int/tikiiew_blog_post.php?postId=169&utm_source=Open+Society+Institute&utm_campaign=81cc6f5f3a-justice-20110818&utm_medium=email, accessed on 30th August 2011.

¹⁰ International Centre for Prison Studies, "World Prison Brief", available on http://www.prisonstudies.org/info/worldbrief/wpb_country.php?country=120, accessed 30.08.2011.

¹¹ The report of the Deputy Prosecutor General Aram Tamazyan in the official meeting of Armenian Prosecutors, 19.0811, available on <http://www.genproc.am/am/51/item/6791/>, accessed on 30th August 2011.

Article 16 of the amended Constitution (2005) prescribes the following - exhaustive - grounds for the lawful deprivation of liberty:

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

The wording suggests that the respective amendments were drafted to reflect Article 5(1) of the European Convention of Human Rights and Fundamental Freedoms (hereafter ECHR) to which Armenia is also a party.

However, paragraph (d) of the above mentioned provision enshrines a “reasonable suspicion of a criminal offence”, or the “necessity to prevent a person from committing a criminal offence” or the “necessity to prevent fleeing after commission of a criminal offence” as self-standing grounds for detention respectively, and fails to prescribe cumulative preconditions for the deprivation of personal liberty anchored in international and European human rights law.

The CCPR has emphasised that a reasonable suspicion of a person having committed an offense does not constitute a self-standing justification for the imposition of pre-trial detention. It has consistently held that remand constitutes an exceptional measure and may only be imposed if prescribed in law and necessary (sic!) in the particular circumstances, in order to prevent flight, interference with evidence or reoccurrence of crime, and only if these concerns cannot be addressed by less intrusive measures such as bail.¹² The same approach has been taken by the European Court for Human Rights (ECtHR).¹³

The Committee of Ministers of Council of Europe (hereinafter the Committee of Ministers), recalling the case law of the ECtHR, reiterated the conditions of permissibility of remand, and listed four conditions, which have to be satisfied cumulatively. Accordingly, detention must not be imposed or continue if any of the conditions are lacking or have ceased to exist. The four - cumulative - conditions identified by the Committee of Ministers are:¹⁴

¹² *Hugo van Alphen v. The Netherlands*, Communication No. 305/1988, U.N. Doc. CCPR/C/39/D/305/1988 (1990), para. 5.8.; See also *Mukong v. Cameroon*, Communication No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991, para.9.8; *Hill v Spain*, U.N. Doc. CCPR/C/59/D/526/1993, 2 April 1997, para. 12.3.

¹³ *Litwa v Poland*, ECtHR Application no. 26629/95, judgment of 4 April 2000, 2000-III, para.78.

¹⁴ Explanatory memorandum of the Recommendation Rec. (2006)13 of the Council of Europe Committee of Ministers to member states on the use of remand in custody, CM (2006)122 Addendum, 30 August 2006, para.7.

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

The ECtHR has unequivocally held that the four grounds listed in paragraph b. do not justify remand in the absence of a reasonable suspicion and vice versa. However, there is no requirement to satisfy grounds mentioned in paragraph b. cumulatively.¹⁵

The CCP, in distinction to Article 16 of the Constitution, does not prescribe a reasonable suspicion as a self-standing ground for the imposition of pre-trial detention, but stipulates in Article 135:¹⁶

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

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

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

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

- The nature and the degree and gravity of incriminated crime;
- The personality of the suspect or the accused;
- The age and the health condition of the suspect or the accused;
- Gender of the suspect or the accused;
- The occupation of the suspect or the accused;
- Marital status and availability of dependents;

¹⁵ Explanatory memorandum of the Recommendation Rec. (2006)13 of the Council of Europe Committee of Ministers to member states on the use of remand in custody, CM (2006)122 Addendum, 30 August 2006, para.7.

¹⁶ Code of Criminal Procedure of the Republic of Armenia, 1998, Art. 135 as amended in 25 May 2006, unofficial translation.

- Wealth and financial situation of the suspect or the accused;
- Availability of a permanent residence;
- Other relevant circumstances.”

Article 134 of the Code of Criminal Procedure (1998) prescribes an exhaustive list of preventive measures which can be imposed upon suspects or defendants in order to prevent their “unlawful” conduct during criminal procedure and to ensure the execution of a sentence:¹⁷ pre-trial detention; monetary bail; non-custodial measures (written obligation not to leave, personal guarantee, guarantee of an organisation, supervision of a juvenile, supervision of a military service person by a commander).

However, the Code of Criminal Procedure fails to provide for a primacy of preventive measures less intrusive than pre-trial detention.

In theory, this inconsistency would be remedied by the direct applicability and supremacy of the ICCPR and ECHR, pursuant to Article 6 of the Constitution (2005)¹⁸. The Court of Cassation of the Republic of Armenia (hereinafter the Court of Cassation) stressed that pre-trial detention is the most restrictive measure and should be applied only if other preventive measures can not ensure lawful conduct of the defendant.¹⁹

However, in practice PRI’s review of 82 court decisions indicates that courts predominantly base their decisions on Article 134 of CCP, and hardly ever apply or even refer to Article 5 of the ECHR, Article 9 of ICCPR or the cited decision of the Court of Cassation.

PRI therefore believes that the national legal framework fails to accurately implement human rights standards²⁰ and ensure that pre-trial detention is imposed on suspects and defendants alike only as a measure of last resort.

The organisation is all the more alerted by an interview with a member of the working group of experts, established by the President of Armenia to draft a new Code of Criminal Procedure²¹, indicating the intention to prescribe the reasonable suspicion of having committed a crime as a self-standing ground justifying the imposition of pre-trial detention.

PRI is of the opinion that new legislative provisions of this kind would further jeopardise the right to liberty and extend rather than limit the use of pre-trial detention to situations where the deprivation of liberty is necessary and proportionate.

Schematic imposition of pre-trial detention

PRI’s research indicates that pre-trial detention constitutes the rule rather than a measure of last resort. The figures for the period of 2007-2009 are the following:²²

¹⁷ Code of Criminal Procedure of the Republic of Armenia, 1998, Art. 134(1).

¹⁸ Constitution of Republic of Armenia, 2005.

¹⁹ Case of Agasi Hovsepyan, judgment of 26.03.2010, EKD/0633/06/09, para.10.

²⁰ e. g. *Michael and Brain Hill v. Spain*, No. 526/1993, U.N. Doc. CCPR/C/59/D/526/1993(2 April 1997), para. 12.3.

²¹ Order of the President of the Republic of Armenia on establishing the working group of experts, ՆԿ-235-Ս, 6 December 2006.

²² American Bar Association, Rule of Law Initiative, “*Detention Procedure Assessment Tool For Armenia*”, April 2010, available on http://apps.americanbar.org/rol/europe_and_eurasia/armenia.html, accessed on 20 January 2011, pg.36.

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

Category	2007	2008	2009
Pre-trial detention requests considered by Courts ²³	2,849	2,915	3,572
Pre-trial detention requests authorised	2,780(97.6%)	2,726(93.5%)	3,362(94.1%)
Bail Requests Considered by Court (Percentage of cases where substitution of detention with bail was requested)	81(2.9%)	443(16.2%)	484(14.4%)
Bail Requests Granted	62	151	186

As the table illustrates, in 2007 courts authorised 2,780 out of 2,849 requests for pre-trial detention, representing a percentage of authorisation of 97.6% percent. In 2008 and 2009, the percentage of authorisation of pre-trial detention requests was 93.5% and 94.1% respectively.

International standards require that prosecutors or investigators in their motion for authorisation of pre-trial detention demonstrate the reasonable suspicion and provide a statement of grounds supporting that in the circumstances of this individual case, the imposition of detention constitutes the only safeguard preventing unlawful conduct of the suspect/ defendant.²⁴ Moreover, the ECtHR stressed that the "issuance of standard, template decisions and not fulfilling the duty to establish convincing grounds justifying detention constitutes a serious restriction of the right to liberty guaranteed by international human rights law."²⁵

However, PRI's assessment of 82 archived decisions on pre-trial authorisation requests and initial authorisation of pre-trial detention suggests that pre-trial detention decisions of Armenian courts are predominantly reasoned in a schematic way, based on either of the grounds listed in the Code of Criminal Procedure and without requiring the official requesting authorisation of pre-trial detention to substantiate those grounds with specific facts of the particular case. The decisions analysed by PRI tend to include unsubstantiated, schematic assumptions about the risk of absconding, interference with the course of justice or/ and the risk of re-offending. In a number of decisions, PRI identified the gravity of the incriminated crime as the sole justification for the imposition of pre-trial detention. This concern has equally been raised in other studies, for example in a survey conducted by OSCE ODIHR, "Final Report Trial Monitoring Project in Armenia (April 2008- July 2009)".²⁶

²³ Involves only pre-trial detention requests filed by police pre-trial investigators.

²⁴ *Hugo van Alphen v. The Netherlands*, Communication No. 305/1988, U.N. Doc. CCPR/C/39/D/305/1988 (1990), para.5.8.; See also *Mukong v. Cameroon*, Communication No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991, para.9.8, *Ilijkov v. Bulgaria*, ECtHR Judgment of 26 July 2001, §§81,96;; *Khudoyarov v. Russia*, No. 6874/02, 8.11.05, para. 146; *Mamedova v Russia*, ECtHR judgment, 1 June 2006, para.74, *Panchenko v Russia*, 8 February 2005, para. 102; ECHR, *Caballero v. the United Kingdom*, application no. 32819/96 (Feb. 8, 2000); *S.B.C. v. the United Kingdom*, application no. 39360/98, (Jun. 19, 2001). Code of Criminal Procedure of the Republic of Armenia, 1998, art. 285.1as amended in 25.05.06.(check); Case of Aram Chuguryan, Court of Cassation, 26.05.2010, para.4, Agasi Hovsepyan, Court of Cassation 26.03. 2010, para. 10,12; Aslan Avetisyan, Court of Cassation 31.10.2008, para.22.

²⁵ *Mansur v. Turkey*, ECtHR, application N° 16026/90, Judgment, 8 June 1995, §55.

²⁶ OSCE ODIR, "Final Report Trial Monitoring Project in Armenia (April 2008- July 2009)", pg. 19-20, available on <http://www.osce.org/odihr/81140>, accessed on 1February 2011; ABA ROLI, "Detention Procedure Assessment Tool for Armenia", 2010, pg. 37; Sona Mashuryan, "Requests for Alternatives to Pre-trial Detention are Universally Rejected without Justification", Ditor Observer(47),#10,2010,pg.7.

Absence of effective alternative measures

PRI's detailed assessment of numerous decisions suggests that, while monetary bail and other alternatives to pre-trial detention are enshrined in Armenian legislation, these alternatives are conceptually flawed and hardly ever applied in practice.

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

Even more significantly, the CCP provides that monetary bail can be applied only as a substitute to pre-trial detention. As a consequence, pre-trial detention has to be approved even before a motion can be considered.²⁷

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

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

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

Monetary Bail

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

It is worth mentioning that Article 5(3) of ECHR, stipulating that "...[r]elease may be conditioned by guarantees to appear for trial"²⁸ has been incorrectly interpreted by the Court of Cassation as a threshold solely met by the instrument of monetary bail.²⁹ This interpretation equally impacts on the interpretation of the Article 9(3) of ICCPR, which prescribes that "release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment."³⁰

²⁷ Code of Criminal Procedure of the Republic of Armenia, 1998, art.57(3), 62(1), 134(2,3,4), 136(2).

²⁸ Council of Europe, 1950.

²⁹ Court of Cassation of the Republic of Armenia, *Case of Taron Hakobyan*, N^o VB-115/07, 13 July 2007, para.3.1.

³⁰ UN General Assembly, 1966.

The current interpretation of Article 5(3) of ECHR and consequently Article 9(3) of ICCPR by the Court of Cassation suggests that those detainees who are not able to provide monetary sureties in practice cannot benefit from any preventive measure less intrusive than pre-trial detention, consequently raising concerns of discriminatory treatment in the context of Article 2(1) of ICCPR, in particular based on property.

PRI would like to bring to the attention of the CCPR statistics representing the application of monetary bail in Armenia for the period of 2007 to 2009. According to the table presented in the previous chapter, in 2007, 2,780 motions for pre-trial detention were authorised, but only in 81 cases out of 2,780 courts received motions to consider monetary bail, resulting in the strikingly low rate of 2.9% of motions on monetary bail. Only 443 requests out of 2,726 cases (16.2%) were filed in 2008, and only 484 requests out of 3,362 cases in 2009 (14.4%).

These figures illustrate a very low percentage of requests to substitute pre-trial detention with monetary bail, which in fact supports PRI's concern about the inefficiency of non-custodial preventive measures. In fact most of the judges, prosecutors and investigators interviewed by PRI confirmed that the defendant's lack of funds constitutes a considerable factor in the small number of motions on monetary bail. Article 143 provides that the amount of monetary sureties cannot be less than 200 times the amount of the minimum wage when the accused is charged for petty crimes and 500 times the amount of the minimum wage for crimes of considerable gravity.³¹ The low-income level of the majority of the country's population³² appears to render release on monetary bail illusory in the majority of cases, and as a consequence non-effective.

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

An analysis of legislation on monetary bail further indicates that the instrument is flawed by inconsistent, vague and unpredictable concepts.

According to Article 143(2) judges have the right to reject monetary bail, "*especially* when the identity of the accused is not known, s/he does not have a permanent address or attempted to abscond."³³ Moreover, in a precedent case the Court of Cassation has extended these grounds to include also those in Article 135 CCP, stating that the grounds listed in Article 143(2) are not exhaustive, the word "*especially*" indicating that the grounds listed only illustrate cases when release on monetary bail can be refused. Thus, judges may refuse monetary bail on other grounds than those listed in Article 143(2).³⁴

³¹ Code of Criminal Procedure of the Republic of Armenia, 1998, Art. 143(4).

³² Daniel Fisher, "*The Worlds Worst Economies*", Forbes, 07.05.2011, available on <http://www.forbes.com/sites/danielfisher/2011/07/05/the-worlds-worst-economies/>, accessed on 08.07.20011.

³³ Code of Criminal Procedure of the Republic of Armenia, 1998.

³⁴ Court of Cassation of the Republic of Armenia, No AVD/0022/06/08, 31 October 2008, para.36, 37. In the case of Aslan Avetisyan, the defence argued that in their decisions rejecting release of the accused on monetary bail both the court of general jurisdiction as well as the Court of Appeal had not provided reasoning based on one of the grounds listed in Article 143(2) CCP. The Court of Cassation, in response to

PRI is of the opinion that this practice fails to accurately implement international law and does not meet the required threshold in terms of determination and predictability (rule of law).³⁵

Furthermore PRI considers that the concept of monetary bail as a substitute to pre-trial detention constitutes a conceptual flaw of even more significance. As outlined above, according to Article 137(4) CCP, in pre-trial stages, courts can consider substituting pre-trial detention with monetary bail only after (sic!) first having approved pre-trial detention.³⁶ The court's assessment, thereby having already argued that all preconditions of remand are met, logically renders any subsequent decision in favour of monetary bail impossible, were the judge not to contradict his/her own previous reasoning. Moreover, the CCP does not provide any guidance for judges on what grounds justify the approval of monetary bail after having approved pre-trial detention and thereby implicitly having expressed that the risk of absconding etc can only be addressed by pre-trial detention.

In fact, statistical data presented in this submission illustrates the strikingly low percentage of application. As displayed in the table on page 5, in 2007, only in 81 cases requests for substitution of pre-trial detention with monetary bail were brought, and granted in only 62 cases, as compared to 2,780 cases in which pre-trial detention was authorised. The percentage of monetary bail granted based on the number of respective applications therefore is relatively high with 76.5%, but strikingly low if considering the percentage of monetary bail in the total of cases (62 out of the 2,780 cases which representing 2.23% of authorised pre-trial detentions). In 2008 and 2009, the number of requests increased from 81 to 443 and 484 respectively; however, the percentage of successful motions decreased dramatically, to 34.1% for 2008 and 38.4% for 2009.³⁷ These numbers strongly support PRI's conclusion that monetary bail as a non-custodial preventive measure which in pre-trial stages can be considered only after (sic!) first having approved pre-trial detention does not constitute an effective guarantee for the right to liberty of those awaiting trial.

A recent disciplinary procedure, following the application of monetary bail by judge Samvel Mnatzakanyan, underlines the impracticable regulation of monetary bail as a substitute of pre-trial detention.

In its disciplinary decision dating 24 June 2011, the Judicial Council of the Republic of Armenia (hereinafter the Judicial Council) held that the judge's decision to apply monetary bail amounted to a "severe and obvious violation of procedural law", stating that in its opinion the judge did not substantiate the substitution of pre-trial detention with monetary bail. In fact the CCPR has stressed that Article 9(3) ICCPR requires courts to substantiate detention in the first place, rather than putting the burden of reasoning on the release on bail.³⁸ As a consequence of this disciplinary decision the judge was dismissed by the President of Armenia.³⁹

this argument, stipulated that the grounds listed in Article 143(2) are not exhaustive and that the word "especially" indicates that the listed grounds only illustrate particular cases when release on monetary bail can be refused.

³⁵ *Hugo van Alphen v. The Netherlands*, Communication No. 305/1988, U.N. Doc. CCPR/C/39/D/305/1988 (1990), para. 5.8.; See also *Mukong v. Cameroon*, Communication No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991, para.9.8; *Hill v Spain*, U.N. Doc. CCPR/C/59/D/526/1993, 2 April 1997, para. 12.3.

³⁶ Code of Criminal Procedure of the Republic of Armenia, 1998.

³⁷ American Bar Association, Rule of Law Initiative, "Detention Procedure Assessment Tool For Armenia", April 2010, available on http://apps.americanbar.org/rol/europe_and_eurasia/armenia.html, accessed on 20 January 2011, pg.36.

³⁸ e. g. *Michael and Brain Hill v. Spain*, No. 526/1993, U.N. Doc. CCPR/C/59/D/526/1993(2 April 1997), para. 12.3.

³⁹ Decree of the President of Republic of Armenia, 11 July 2011.

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

The case subject to the above mentioned disciplinary decision at the same time demonstrates the schematic reasoning of pre-trial decisions. The initial decision authorising pre-trial detention merely stated that:⁴⁰

“(...) facts provided [by the investigator] are enough to assume that the accused A.KH., who is charged with aggravated robbery, can abscond from the body in charge of the criminal proceedings, interfere with the course of justice by hiding or forging facts and evidence which is important for the pre-trial investigation and trial, avoid the criminal responsibility and the imposed punishment. (...) Based on the above mentioned arguments the court comes to the conclusion that the request of the investigator is substantiated and shall be allowed.”

PRI also would like to emphasise that contrary to international standards⁴¹ the CCP restricts the substitution of pre-trial detention with monetary bail to petty crimes and crimes of considerable gravity which means that it cannot be applied at all in cases of grave or especially grave crimes.⁴² Although the CCP does not include a specific provision prohibiting the imposition of other non-custodial preventive measures on an accused charged with grave or especially grave crimes, it must be assumed that *argumentum a majore ad minus* other non-custodial preventive measures are inadmissible.

Despite a ruling by the Court of Cassation that monetary bail shall be considered regardless of the severity of the charges⁴³ and that the gravity of crime alone shall not be considered sufficient to justify pre-trial detention⁴⁴, in the practice of courts of general jurisdiction and the Court of Appeal the gravity of incriminated offences appears to be the determining if not sole factor. This assessment, based on an analysis of decisions, has been confirmed in interviews conducted by PRI. According to interviewees, investigators do not even consider the application of any form of non-custodial measure for a person charged with a crime considered grave or extremely grave. Interviews with prosecutors and investigators pointed to the existence of internal instructions issued by the Prosecutor General imposing a ban on the application of non-custodial preventive measures and requiring investigators to file for authorisation of pre-trial detention in all cases of grave and especially grave crimes such as robbery, premeditated grave bodily injury, murders and others.

Studies conducted by other institutions have also documented the imposition of pre-trial detention on the basis of schematic decisions, without substantiation of the necessity of detention in the individual case, in particular for those charged with grave or especially grave crimes.⁴⁵

⁴⁰ Decision of Judicial Council of the Republic of Armenia on disciplinary actions against judge of the Court of General Jurisdiction Samvel Mnatzankanyan, 24 June 2011, chapter 2.

⁴¹ *Hugo van Alphen v. The Netherlands*, Communication No. 305/1988, U.N. Doc. CCPR/C/39/D/305/1988 (1990), para. 5.8.; See also *Mukong v. Cameroon*, Communication No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991, para.9.8; *Hill v Spain*, U.N. Doc. CCPR/C/59/D/526/1993, 2 April 1997, para. 12.3.; see also *Nikolovv Bulgaria*, , ECtHR application no. 38884/97, judgment of 30.01.2003 para.70; *Caballero v the United Kingdom*, ECtHR, application no. 32819/96, judgment of 8.02.2000, para.18-21.

⁴² Code of Criminal Procedure of the Republic of Armenia, 1998, art.143 (4).

⁴³ The case of Taron Hakobyan, no. VB-115/07, judgment of 13 July 2007.

⁴⁴ The case of Aslan Avetisyan, no. AVD/0022/06/08, judgment of 31 October 2008, para.26.

⁴⁵ SCE ODIHR, “ *Final Report Trial Monitoring Project in Armenia (April 2008- July 2009)*”, pg.20, available on <http://www.osce.org/odihr/81140>, accessed on 1February 2011; ABA ROLI, “ *Detention Procedure Assessment Tool for Armenia*”, 2010, pg. 35,37; Sona Mashuryan, “ *Requests for Alternatives to Pre-trial*

In order to allow for further analysis PRI has requested the following detailed statistics from government bodies for the period 2005 to 2010, but has not been yet received a response:

- Number of persons charged with a criminal offence, including the incriminated offence (article of the Criminal Code) and the number of preventive measures applied (pre-trial detention and non-custodial).
- Number of motions for pre-trial detention rejected by courts; if available disaggregated by the offence defendants were charged with in these cases; number of appeals against the authorisation of pre-trial detention and their outcome.
- Number of cases in which pre-trial detention was substituted with monetary bail; if available disaggregated by the charges incriminated in those cases. Number of cases in which request to substitute pre-trial detention with monetary bail was rejected.
- Number of cases in which the initial application of non-custodial measures were later replaced by pre-trial detention and vice versa, including if available its reasoning.
- Number of defendants for who the initial period of pre-trial detention was extended and period of this extension.

Other Non-custodial Preventive Measures

As outlined above, non-custodial preventive measures other than monetary bail are prescribed in an exhaustive list in Article 134 of the CCP (1998) and can be imposed upon suspects or defendants in order to prevent their "unlawful" conduct during criminal procedure and to ensure the execution of sentence. Those preventive measures are: written obligation not to leave, personal guarantee, guarantee of an organisation, supervision of a juvenile, supervision of a military service person by a commander.⁴⁶ As Article 135 CCP stipulates preventive measures (custodial or non-custodial) can be applied only if there is a risk that the suspect or defendant would abscond, interfere with the course of justice, commit a new crime, avoid criminal responsibility and punishment or hinder the execution of the judgment.⁴⁷

However, contrary to this provision, all decisions reviewed by PRI on the application of non-custodial preventive measures - without exception - explicitly reasoned that the suspect/ accused will not abscond, interfere with course of justice, commit a new crime, and argued that the incriminated crime was a petty crime. Interviews conducted by PRI confirmed that the CCP does not require imposition of preventive measures in all cases, but that as a practice preventive measures are imposed automatically, including the seizure of travelling documents.

PRI is therefore concerned that preventive measures are applied even where the preconditions for its imposition are not met.

Detention are Universally Rejected without Justification", Ditor Observer(47),#10,2010,pg.4.(cross reference) According to Article 19 of the Armenian Criminal Code(2003) "grave crimes" are premeditated crimes punishable by more than five but not more than 10 years of imprisonment; "especially grave crimes" are those punishable by more than ten years or life imprisonment.

⁴⁶ Code of Criminal Procedure of the Republic of Armenia, 1998, Art. 134(1).

⁴⁷ Code of Criminal Procedure of the Republic of Armenia, 1998.

Independence of Judges/ Judicial Code

PRI believes that the lack of a robust and independent judiciary constitutes a main factor in Armenia's failure to implement Article 9(3) ICCPR. Furthermore, the lack of modern forensic equipment and methodology as well as the approach to pre-trial detention as a (preliminary) punishment and the lack of well-established alternatives to pre-trial detention further contribute to the schematic imposition of pre-trial detention orders.

Reports by Inter-Governmental Organisations have repeatedly and consistently documented the lack of independence of the Armenian judiciary. It has also been documented consistently that torture and ill-treatment are used during pre-trial detention in order to extract confessions and other self-incriminating evidence.⁴⁸

In this context, PRI would like to stress its concerns with regard to the reported informal system of so-called "supervising judges" which it considers inconsistent with the independence of the judiciary. PRI's interviews pointed to the practice of the Court of Cassation to delegate a "supervising judge" to each court of general jurisdiction to provide instructions on the outcome of a case. This practice has also been mirrored in media articles.⁴⁹

PRI believes that the Judicial Code of the Republic of Armenia (hereinafter the Judicial Code), empowering the Judicial Council to review judicial decisions and to penalise judges for "obvious and severe violation of substantive or procedural law"⁵⁰, would also require more in-depth screening with regard to potential inconsistencies with international standards safeguarding the independence of judges, including the Basic Principles on the Independence of the Judiciary.⁵¹

Interviews of PRI with investigators, prosecutors and judges have also indicated a considerable amount of bias, inconsistent with the presumption of innocence. Most interviewees linked pre-trial detention with punishment and argued their reluctance to impose monetary bail or other non-custodial preventive measures with the fact that incriminated offences could not result in punishment other than imprisonment.

⁴⁸ Resolution 1609(2008), "Functioning of *Democratic institutions in Armenia*", Parliamentary Assembly of the Council of Europe, 17 April 2008, para.6.3; see also ; European Committee on Prevention of Torture and Inhuman Degrading Treatment or Punishment(hereinafter CPT), Report to the Armenian Government on the visit to Armenia on 10-21May 2010, pg.16-20, available on <http://www.cpt.coe.int/documents/arm/2011-24-inf-eng.pdf>, accessed on 2 September 2011; CPT, Report to the Armenian Government on the visit to Armenia on 15-17 March 2008, pg.12-18, available on <http://www.cpt.coe.int/documents/arm/2010-07-inf-eng.pdf>, accessed on 2 September 2011; CPT, Report to the Armenian Government on the visit to Armenia on 2-12 April 2006, pg.12-16, available on <http://www.cpt.coe.int/en/states/arm.htm>, accessed on 2 September 2011; CPT, Report to the Armenian Government on the visit to Armenia on 20-22 April 2004, pg.9-13, available on <http://www.cpt.coe.int/en/states/arm.htm>, accessed on 2 September 2011; CPT, Report to the Armenian Government on the visit to Armenia on 6-17 October 2002, pg.18-22, available on <http://www.cpt.coe.int/en/states/arm.htm>, accessed on 2 September 2011; UN Committee Against Torture, Concluding Observations of the Committee against Torture: Armenia, 17.11.2000, para. 37(c); Sona Mashuryan, "Requests for Alternatives to Pre-trial Detention are Universally Rejected without Justification", Ditorid Observer(47),#10,2010,pg.8.; ABA ROLI, " Detention Procedure Assessment Tool for Armenia", 2010,pg.20-22; OSCE ODIR, " Final Report Trial Monitoring Project in Armenia(April 2008- July 2009)", pg. 84-87, available on <http://www.osce.org/odihhr/81140>, accessed on 1February 2011

⁴⁹ Interview of former judge Surik Gazaryan, available at <http://www.armtimes.com/en/node/27476>, accessed on 26.08.2011; Interview of former judge Samvel Mnatzakanyan, available at <http://www.azatutyun.am/content/article/24280696.html>, accessed on 26 August 2011.; Chamber of Advocates of Republic of Armenia, "Supervision of Independent Judiciary", 06 July 2011, available on http://www.advocates.am/index.php?option=com_content&view=article&id=312:2011-07-06-12-36-52&catid=40:2010-09-13-16-28-11&Itemid=67, accessed on 2 September 2011; Interview of defence lawyer Yervand Varosyan to A+1 Chanel, 22 July 2011, available on <http://www.advocates.am/>, access on 2 September 2011

⁵⁰ The Judicial Code of the Republic of Armenia, 21 February 2007, Art.153.

⁵¹ Basic Principles on the Independence of the Judiciary, UN General Assembly resolution 40/32 of 29 November 1985 and 40/146 of 13 December 1985, para.4.

Interviewees described this approach as “soviet legacy” and highlighted that an excessive use of pre-trial detention has been inherited from the Soviet era, which Armenia has not managed to overcome since its independence.⁵²

PRI is concerned that an approach antedating the conviction of suspects undermines the presumption of innocence.

Most of PRI’s interviewees specified that the legislative framework does not constitute the major cause of violations of Article 9(3), but that measures are required in order to bridge the gap between law and practice. However, practitioners also identified the lack of a greater variety of alternative, non-custodial measures as a cause for the disproportionate use of pre-trial detention.

Recommendations for the List of Issues

PRI suggests that Armenia be asked:

With regard to pre-trial detention:

1. What measures are in place in order to prevent excessive pre-trial detention; in particular to ensure pre-trial detention is imposed only as a measure of last resort and reasoned based on the circumstances of the individual case?

With regard to non-custodial preventive measures:

2. Why does the Armenian government consider do very few defendants continue to benefit both from bail (non-custodial preventive measures) and monetary bail (substitute measure for pre-trial detention)?
3. How can monetary bail be accurately applied by judges, given the requirement of approving pre-trial detention prior to the consideration of a respective motion?
4. Which instructions or guidelines are in effect, by either the Prosecutor General or other judicial or non-judicial bodies with regard to the application of monetary bail?
5. Did the Prosecutor General issue any internal instructions imposing a ban or recommending not to apply non-custodial preventive measures in cases of some grave or especially grave crimes?
6. Is there a requirement in Armenian law to apply a preventive measure on every suspect or defendant even where no risk of unlawful behaviour is implied? Are there provisions in Armenian legislation permitting the seizure of travel documents from defendants in criminal cases? Are travel documents of defendants under non-custodial preventive measures seized by investigators in practice?

With regard to statistical information:

7. Can the government provide the CCPR with the following statistics for the period since its last concluding observations (1998-2010):
 - Number of persons charged with a criminal offence, including the incriminated offence (article of the Criminal Code) and the number of preventive measures applied (pre-trial detention and non-custodial).
 - Number of motions for pre-trial detention approved and rejected by courts; if available disaggregated by the offence defendants were

⁵²ABA ROLI, “*Detention Procedure Assessment Tool for Armenia*”, 2010,pg. 37; As for the approach towards suspects in the Soviet Union see: Zinatulin, *Coercion in Criminal Procedure and its Effectiveness*, Kazan 1981, p.136.

charged with in these cases; number of appeals against approved and rejected pre-trial detention requests and their outcome.

- Number of cases in which pre-trial detention was substituted with monetary bail; if available disaggregated by the charges incriminated in those cases.
- Number of cases where motions to substitute pre-trial detention with monetary bail were rejected.
- Number of cases in which the initial application of non-custodial measures were later replaced by pre-trial detention and vice versa, including if available its reasoning.
- Number of defendants for who the initial period of pre-trial detention was extended and the period of this extension.

With regard to the reform of the Code of Criminal Procedure:

8. Which provisions are envisaged in the new Code of Criminal Procedure, currently considered by a group of experts, with regard to the admissibility of pre-trial detention and how will their consistency with international and European human rights standards be ensured? In particular, does the government intend to introduce the reasonable suspicion of the commission of a crime as a self-standing ground justifying pre-trial detention?
9. Does the Armenian government consider developing non-custodial alternatives to pre-trial detention additional to the instruments currently enshrined in the Code of Criminal Procedure? Which are those alternatives under consideration?
10. Does the government consider, in the process of redrafting the Code of Criminal Procedure, to extend the power of judges with regard to the application of non-custodial preventive measures during pre-trial stages?

With regard to the independence of the judiciary:

11. Can the Armenian government describe in detail the provisions of the Judicial Code with regard to disciplinary procedures against judges, as well as possible outcomes, consequences and remedies linked thereto?
12. Does the government consider the Judicial Code to be in line with the independence of judges in the light of the power of the Judicial Council (a non-judicial body) to conduct a review of judicial decisions and to impose disciplinary sanctions on judges, even where the underlying decision has become final?
13. Do judges of first instance courts consult or receive instructions or any kind of guidance from the Court of Cassation regarding decisions in cases assigned to them?
14. What steps have been taken and will be taken to ensure the independence of judges and to prevent unwarranted interference with the judicial process?

With regard to criminal investigations:

15. What steps have been taken to decrease reliance on confessions and self-incrimination and to increase the capacity of law enforcement bodies to collect evidence using forensic methods and permissible surveillance techniques?
16. What steps have been taken to counter the mentality of investigators, prosecutors and judges undermining the presumption of innocence and ensuring unbiased criminal investigations?

End/