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Pre-trial detention and the overcrowding of prisons in Belgium[1]

Results from a simulation study into the possible effects of limiting the length of pre-trial detention

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1 SITUATING THE PROBLEM WITHIN THE INTERNATIONAL (EUROPEAN) AND NATIONAL CONTEXTS

Prison overcrowding is a problem faced by various European countries and has been receiving the attention of both politicians and academics for some time. An important cause of overcrowding in prisons is often the (increasing) use of pre-trial detention[3]. Quite recently, the Council of Europe in its Recommendation No. R (99) 22 "*Prison overcrowding and prison population inflation*" stated that *"[*T*]*he *application of pre-trial detention and its length should be reduced to the minimum compatible with the interests of justice. To this effect, member states should ensure that their law and practice are in conformity with the relevant provisions of the European Convention on Human Rights and the case-law of its control organs, and be guided by the principles set out in Recommendation No. R (80) 11 concerning custody pending trial, in particular as regards the grounds on which pre-trial detention can be ordered.*" (paragraph 11)[4]

Table 1 provides an illustration of the use of pre-trial detention in a number of European countries (number of pre-trial detainees per 100,000 inhabitants). It can be seen that especially a number of Eastern European countries, led by the Russian Federation (174 per 100,000 inhabitants in 1997), have a high number of pre-trial detainees. Macedonia, Finland, Ireland and Iceland on the other hand show a quite limited to very low level of pre-trial detention (in 1997, 10 pre-trial detainees or less per 100,000 inhabitants). In 1997, more than half of Western European countries had a level of pre-trial detention that fluctuated between 15 and 35; only five West European countries had a higher degree of pre-trial detention, notably the Netherlands (36), Italy (36), France (37), Portugal (43) and Turkey (43). With 32 pre-trial detainees per 100,000 inhabitants (in 1994 and in 1997), Belgium finds itself in the middle European bracket.

[1] This text was completed at the end of December 2003.
[2] Both authors are research assistants with the National Institute of Criminalistics and Criminology (NICC) of the Belgian Federal Service Justice.
[3] In this article, unless otherwise indicated, the term 'pre-trial detainee' is used in its broad sense, i.e. as it applies to prisoners placed in custody under an arrest warrant and awaiting trial, and prisoners convicted in first instance but who have lodged an appeal against their conviction and are awaiting a definitive judgement. Under Belgian law, custody in police cells is not considered pre-trial detention.
[4] Council of Europe, *Prison overcrowding and prison population inflation, Recommendation No. R (99) 22 adopted by the Committee of Ministers of the Council of Europe on 30 September 1999 and report* (Strasbourg, June 2000) p. 8.

Table 1: Pre-trial detention rate in penal institutions in some European countries (per 100,000 of national population, 1994 and 1997)

	1994	1997
Russian Federation	151	174
Latvia	85	130
Estonia	105	96
Romania	77	78
Lithuania	85	77
Czech Republic	76	75
Ukraine	74	74
Portugal	41	43
Turkey	41	43
Bulgaria	31	40
Hungary	35	38
France	37	37
Italy	51	36
Netherlands	19	36
Poland	36	36
Luxembourg	34	35 (1996)
Belgium	32	32
Spain	30	29
Germany	30	24
United Kingdom: Northern Ireland	31	23
Austria	27	21
Greece	21	17
United Kingdom: England and Wales	18	17
United Kingdom: Scotland	21	16
Croatia	14	16
Slovenia	12	15
Norway	15	13
Sweden	12	13
The former Yugoslav Republic of Macedonia	8	10
Finland	5	6
Ireland	4	6
Iceland	1	4

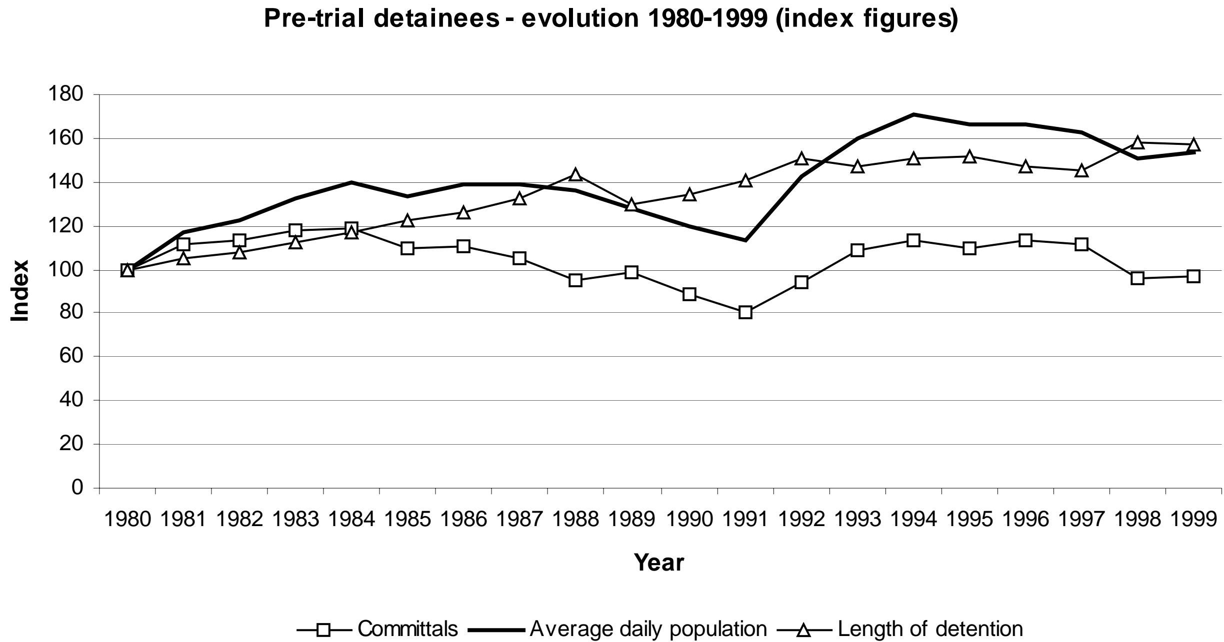
Source: Council of Europe, *Prison overcrowding and prison population inflation, Recommendation No. R (99) 22 adopted by the Committee of Ministers of the Council of Europe on 30 September 1999 and report* (Strasbourg, June 2000), Table 3 (p. 31) and Table 7 (p. 36)

To reduce the number of pre-trial detainees in the prisons, different paths are possible. On the one hand, work can be done to reduce the *number of prison committals*, on the other hand a solution can be sought in limiting the *length* of pre-trial detention, as was indicated in the recommendation of the Council of Europe cited above. For that matter, several European countries have already provided for legal limits to pre-trial detention either absolutely or subject to well-defined conditions (see for example England and Wales, Germany, France, the Netherlands, Italy, Spain)[5].

[5] Concerning this see among others the website *www.vie-publique.fr/dossier_polpublic/presomption_innoncence* and the following report: Commission de suivi de la détention provisoire [*Commission established to monitor pre-trial detention*], *Rapport au Garde des Sceaux, La détention provisoire, Edition 2002/2003* [*Report to the Minister of Justice, Pre-trial-detention, Edition 2002-2003*], Ministère de la Justice (Paris, May 2003), p. 92-121.

In Belgium, like the rest of Europe, the overcrowding of prisons is an issue that has received a central place in penal policy and academic discussions on the prison system. At the beginning of 2003, the 'historical' milestone of a total daily population of 9,000 prisoners was exceeded in Belgium.

Figure 1: Number of committals, average daily population and length of detention (pre-trial detainees, 1980-1999)



An important category considered responsible for prison overcrowding is here again the group consisting of the pre-trial detainees[6]. The evolution of this population[7] between 1980 and 1999 shows a striking increase (see figure 1). Between 1980 and 1999, the average number of pre-trial detainees included in the daily penal population increased by more than half (53%): in 1999, the average daily number of pre-trial detainees was 2,297, or 26.9% of the total daily population (n=8,548). Striking is the fact that the average daily population of pre-trial detainees during the period in question (1980-1999) never fell below the 1980 level. Despite a light decreasing trend beginning in 1994, the average daily

[6] The 'accused' pre-trial detainees are defined using the criteria then used in Belgium, namely, people confined exclusively because they are awaiting a definitive judgement. No (!) consideration was taken of those who have received final sentencing and for whom an arrest warrant is issued at the same time.

[7] The figures indicated in figure 1 were calculated based upon the data used by A. Rihoux within the framework of her research into the development of an instrument to project the evolution of the prison population, and were extracted from the SIDIS database by the Computer Operations Center of the Federal Public Service Justice. For more on this, see: A. Rihoux (under the supervision of Prof. G. Houchon and Prof. F. Brion), *Développement de modèles de projections pour la population pénitentiaire belge* [Development of models to project the Belgian prison population.] (Louvain-la-Neuve, Université Catholique de Louvain, Unité de Criminologie, September 1998), 150p. + bibl. + appendix; A. Rihoux (under the supervision of Prof. F. Brion), *Développement et valorisation des instruments d'aide en politique criminelle* [Development and validation of instruments to support criminal justice policy], (Louvain-la-Neuve, Université Catholique de Louvain, Unité de Criminologie, May 2000), 82p. + bibl. On the other hand, the data used within the framework of our cohort study (*infra*, section 2) were extracted in the middle of May 2001 by the Directorate General for the Enforcement of Sanctions and Measures and differ slightly from the figures published by Rihoux. Possible explanations for these minor differences include wrong or different search criteria used to extract the data from the database, or corrections that were made to the SIDIS data during the time between the two extractions.

population continued to fluctuate at an exceptionally high level since the strong increase at the beginning of the 1990s. Moreover, further analysis shows that especially the increase in the length of the pre-trial detention[8] is responsible for this situation. Except for a relapse at the end of the 1980s (from an index of 144 in 1988 to 130 in 1989 where index 100=1980) and a quite stable curve during the 1990s (1992-97)[9] the general trend between 1980 and 1999 was a continuously increasing one. During this period the length of detention increased by no less than 58%. In addition, the length of detention had never before been as long as it was in 1998-99.

The growth in the number of pre-trial detainees among the Belgian prison population thus shows us that especially the length of the pre-trial detention must be dealt with. Indeed, the number of detentions did not increase significantly with respect to the situation in 1980. Moreover, a simulation study that we performed concerning an increase in the pre-trial detention threshold had already indicated that an increase in this threshold from one year[10] to three years would have virtually no effect (only 3%) on the size of the average daily population of pre-trial detainees.[11] Given that it is the length of pre-trial detention that is primarily responsible for the increase in the number of pre-trial detainees, the question then arises regarding what could be expected if the length of pre-trial detention were to be limited. The idea of limiting the length of pre-trial detention is certainly not new. In fact, as was already indicated above, a number of European countries already have legal provisions limiting this term. In Belgium, on the other hand, pre-trial detention is not subject to an absolute maximum length. However, the appropriateness of maintaining an arrest warrant is assessed monthly by a judicial body.

Already for a number of years proposals for reform to the Pre-trial Detention Act (including a limitation in the length of pre-trial detention) have been under discussion within political circles in Belgium as a solution to the increase in the number of pre-trial detainees among the Belgian prison population. The "*Federal safety and detention plan*" that was approved in May 2000 by the Belgian government already stated that "[*v*]*arious possibilities to arrive at a responsible use of pre-trial detention* (…) *their feasibility* [*will*] *be examined*." (sub-project 90.1 "*De voorlopige hechtenis*"). More recently, after the

[8] The length of detention was here calculated using the formula Length=Stock/Flow*12 (the result must be divided by 12 as the length is expressed in months). The average daily population (Stock) is determined by both the input (flow, or number of committals) and the length of the stay, namely Stock=Flow*Length/12. The result obtained on the basis of the above formula is not the result of a measurement of the real length of detention (which is only possible via a cohort study), but must be considered as an indicator of the average length of detention useful in studying fluctuations over time or in performing international comparative research. For more on this, see: P. Tournier, 'Apports de la démographie à l'étude du changement dans l'univers carcéral (1978-1988-1998)' [Demographic contributions to the study of changes in the prison environment (1978-1988-1998)], in C. Veil and D. Lhuilier, ed., *La prison en changement* [The changing prison] (Ramonville Saint-Agne, Éditions Érès, 2000) pp. 103-126; P. Tournier, 'Prisons d'Europe, inflation carcérale et surpeuplement' [Prisons in Europe, prison population inflation and overcrowding], *Questions Pénales* (March 2000) XIII.2, pp. 1-4.

[9] Only beginning with 1989 is there talk of a decreasing length of detention, be it only for a short period (1989-90). In 1992 there was a sharp increase in the length of detention, +51% compared to 1980. It then continued to fluctuate around a level 40 to 50% higher than that of 1980.

[10] Pre-trial detention (or for that matter, the issuing of an arrest warrant) is only possible in Belgium if the offence one is suspected of committing is punishable with a prison sentence of 1 year or more (art. 16, § 1 Pre-trial Detention Act of 20 July 1990).

[11] S. Deltenre and E. Maes, 'Effectmeting van enkele mogelijke wetswijzigingen op het vlak van de voorlopige hechtenis' [Measuring the effects of some possible legal changes with respect to pre-trial detention], *Panopticon, Tijdschrift voor strafrecht, criminologie en forensisch welzijnswerk* (2002) pp. 196-211; S. Deltenre. and E. Maes, 'Simulation de l'impact de quelques changements législatifs en matière de détention avant jugement' [Simulation study into the effects of some legal changes with respect to custody pending trial], *Revue de Droit Pénal et de Criminologie* (2004.)

parliamentary election of May 2003 resulted in a new government, in her general policy document the current Minister of Justice Laurette Onkelinx also stated that the mechanism of pre-trial detention would again be examined "[*i*]*n order to effect a decrease in the number of people in pre-trial detention after the issuing of an arrest warrant and to address the issue of prison overcrowding*"[12]. The minister launched two more concrete proposals in this area in the press, namely the drawing up of a list of criminal offences for which pre-trial detention would no longer be possible and limiting the length of pre-trial detention[13].

In this article, we will examine what the effects of limiting the length of pre-trial detention might be on the size of the prison population. The purpose of this article, however, is not only to explore the expected effects of such a measure, but also to point out the possibilities available to exploit existing databases that were initially designed for other purposes within the framework of simulation studies designed to support policy, and to this end, to furnish an effective methodology.

2 HOW THE STUDY WAS SET UP

When a limitation in the length of pre-trial detention is contemplated, possibly by subjecting it to a legal maximum, it is essential to have in view the *number of* detentions that exceed a specific threshold (the maximum length to be introduced) as well as the average *length* of the time that this proposed maximum is currently being exceeded. Such information would allow calculating the effect on the average daily population of introducing a maximum length of pre-trial detention.[14] This requires a cohort study in which the length of the pre-trial detention is calculated for a well-defined group of pre-trial detainees for each separate case.

2.1 Data base

In realizing such a cohort study, use was made of the data stored in the database of the prison administration (SIDIS database). The Directorate General for the Enforcement of Sanctions and Measures was asked to extract specific data regarding the legal status (detention status), the crimes committed and a few time variables (to calculate the length of the pre-trial detention) for *all persons confined as pre-trial detainee during the period 1996-2000*.

[12] Algemene beleidsnota van de minister van Justitie [General policy document of the Minister of Justice], *Parl. Doc.*, Kamer, 2003-2004, no. 51 0325/16, p. 36.

[13] StS/GDC, 'Onkelinx zet mes in voorlopige hechtenis, Minister van Justitie wil met initiatief overbevolking gevangenissen aanpakken' [Onkelinx makes cuts to pre-trial detention programme, Minster of Justice intends to attack problem of prison overcrowding with this initiative] *De Tijd* (17 November 2003).

[14] The proportion of the daily population to possibly be 'saved' can be calculated using the formula Stock=Flow*Length. If we understand 'Flow' to be the annual number of detentions of long duration (greater than a stipulated length) and 'Length' as the length of time the period was exceeded (= difference between the average length of long detentions and the maximum period to be introduced), the result obtained indicates the 'Stock' that would no longer be a part of the average daily population should the maximum length be applied in the future. A concrete example will help to clarify. Suppose that the law is amended to include a maximum length of 12 months, that the average actual length of pre-trial detentions for long stays (> 12 months) is 14 months (the average amount by which the maximum is exceeded is then 2 months), and that there are 900 detentions whose term exceeds the maximum length to be legally introduced. The average daily population (Stock) "saved" in this case would be 150 units, i.e. stock=900 (flow)*2(length)/12.

2.2 Unit of measurement and description of period of detention

The unit of measurement in our study was the *number of prison committals* (thus not the number of prisoners), which means that for prisoners with multiple separate periods of detention during the period under consideration (1996-2000), each period of detention was studied individually. For that matter, most of the prisoners were confined only once within a given year; multiple detentions (≥ 3) within the same year are rather uncommon. A *period of detention* is considered to be the time between the date of imprisonment (as pre-trial detainee) and the date of release (except for cases in which the prisoner in question was still being confined on 15 May 2001, the date the analysis was begun)[15].

For the period 1996-2000, a total of 49,492 committals (as pre-trial detainee) were registered, which amounts to an annual average of 9,898 committals per year. For a number of these detentions, information was missing concerning the legal status history (consequent changes in legal status), so they were excluded from further analysis. In the end, a total 49,162 detentions with legal status history remained. In addition, we limited our analysis to those detentions that could be classified under one of the six most logical detention paths (*infra*): together, these detentions (n=46,467) represented more than 90% of the total number of registered committals for which the legal status history was recorded. A small number of analysis units (n=105) were also finally removed from consideration when these detentions were crossed with another database that contained the offence codes linked with the respective detention. Thus, in the end a total of 46,362 detentions remained for analysis.

2.3 Grouping according to detention path

As indicated, the population under study was classified into (six) different groups that correspond to the most logical (and most common) detention paths:

- Group 1: prisoners who were confined as pre-trial detainee (PTD)[16], retained this status for the duration of their detention (i.e., did not yet appear before court for trial), and were released or still in custody on 15 May 2001;
- Group 2A: prisoners that were confined as not definitively convicted (i.e., persons convicted in first instance but awaiting a judgement after appeal) (NDC)[17], underwent their detention with this status, and were released or still in custody on 15 May 2001;
- Group 2B: prisoners who were confined as pre-trial detainee (PTD), remained contiguously in detention with the status of not definitively convicted (NDC), and were again released or still in custody on 15 May 2001;
- Group 3A: prisoners who were confined as pre-trial detainee (PTD), remained contiguously in detention with the status of not definitively convicted (NDC), and ultimately underwent their detention with the status of definitively convicted (DC)[18];

[15] Pre-trial detentions that were discontinuous due to an interim release were also considered as separate periods of detention.

[16] Detention as pre-trial detainee (PTD) is understood as one of the following: detention of mentally disordered criminals with a view toward observation in a prison psychiatric unit (in application of the Social Defence Act), detention due to warrant to bring before the judge, arrest in court, arrest warrant, indictment and arrest warrant with a view toward immediate appearance before the court.

[17] By "not definitively convicted" (NDC) is understood not only the non-definitive convicts in the strict sense but also the non-definitive prisoners within the framework of the Social Defence Act.

- Group 3B: prisoners who were confined as not definitively convicted (NDC), and contiguously underwent their detention with the status of definitively convicted (DC);
- Group 3C: prisoners who were confined as pre-trial detainee (PTD), and contiguously underwent their detention with the status of definitively convicted (DC).

2.4 Further refinement according to type of criminal offence

In addition to a classification of the population under study into the six detention paths indicated above, the population under study was also categorized according to the offence for which they (as pre-trial detainee or not definitively convicted) were confined[19]. This allowed simulations on the (expected) effect of limiting the maximum length of pre-trial detention for a selection of well-defined criminal offences. Within the framework of our analysis, a *dichotomous classification* was used to group the cases according to whether the offence concerned the physical integrity of persons (violent crimes *versus* other criminal offences)[20]. The simulations made in our study, the results of which will be discussed below (*infra*), are only relevant to the introduction of a maximum length for pre-trial detention for the category 'other' criminal offences: the justification for this is to be found in the fact that it may be assumed that such a limitation for this category of criminal offences is more societally acceptable[21].

2.5 Calculating the length of pre-trial detention

When calculating the length of pre-trial detention (for groups 1, 2A and 2B) for the purposes of analysing the data, a distinction is made between the detentions for which the period of pre-trial detention was concluded at the moment of the start of our analysis (15 May 2001), and the detentions for which the prisoners in question were not yet released at that moment. However, in this article this distinction is no longer maintained when presenting the results. Nevertheless, it is important to note that for the latter category of prisoners, the period of pre-trial detention was calculated from the date of imprisonment to

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[18] Finally, the category "definitive convicts" (DC) comprises the definitive convicts that only undergo a term of imprisonment because of non-payment of fines, definitive convicts that undergo prison sentences, and mentally disordered criminals placed in detention under the provisions of the Social Defence Act.

[19] With respect to the criminal offences, it concerns only those offences relevant *at the moment of prison committal*. In other words, the offence codes are not further specified or modified on the occasion of additional or different qualifications during the course of the detention, but are only relevant to the offences for which the prisoner was taken into pre-trial detention or received a (non-definitive) sentence against which appeal was lodged.

[20] Detentions in the category "infringement of physical integrity" include detentions for which at least one of the offences committed implied such harm to physical integrity. When the offence committed *only implied* criminal offences that included *no* infringement of physical integrity, the detentions were classified in the category of 'other'. The description "harm to physical integrity" is interpreted very broadly and includes the following: (1) offences that contained no harm to physical integrity but could have had consequences at this level (e.g. abandoning a child), (2) unintentional violent offences like unintended assault and battery, (3) a number of offences characterized as "violent" by the nature and position of the victim (e.g. prostitution – recruitment of a minor), and (4) a number of offences for which there was no question of "violence" in the strict juridical sense of the word but in which harm to physical integrity must be assumed (e.g. indecent assault without violence).

[21] Thus, studies indicate, among other things, that magistrates are influenced by the presence or absence of violence when deciding on issuing an arrest warrant. See, among others: S. Snacken (supervisor), K. De Buck, K. D'Haenens, A. Raes and P. Verhaeghe, *Onderzoek naar de toepassing van de voorlopige hechtenis en de vrijheid onder voorwaarden* [Study into the application of pre-trial detention and conditional release from prison] (Brussels, VUB/NICC, 1996-97) 174p. + bibl.; S. Snacken (supervisor), S. Deltenre, C. Vanneste, A. Raes and P. Verhaeghe, *Kwalitatief onderzoek naar de toepassing van de voorlopige hechtenis en de vrijheid onder voorwaarden/Recherche qualitative sur l'application de la détention préventive et de la liberté sous conditions* [Qualitative study into the application of pre-trial detention and conditional release from prison] (Brussels, VUB/NICC, 1998-99) 244p. + appendix.

the date of 15 May 2001, despite the fact that the pre-trial detention continued beyond this date. Because of this, the length of pre-trial detention is underestimated to some degree in our study. The number of pre-trial detentions of short duration – and this of course applies to the most recent detentions i.e., those that began in 2000 - is overestimated.

Another methodological remark that needs to be made in this regard concerns the way in which the period of pre-trial detention was calculated. In principle, the global term of pre-trial detention (i.e., the total period of time before there is question of a definitive conviction, thus a judgment against which appeal is no longer possible) is calculated from the date of imprisonment until the date of release, or to the date of 15 May 2001 in the cases where the prisoner had not yet been released, i.e. groups 1, 2A and 2B. On the other hand, for other groups the period of pre-trial detention was calculated until the date of the change to a definitive status. This applies to the definitively convicted prisoners or the mentally disordered criminals (detained under the provisions of the Social Defence Act) in the last three groups (3A, 3B and 3C). This is logical because in these cases the period of pre-trial detention ceases with the attainment of a 'definitive' status[22]. However, this presents a problem insofar as some detentions were interrupted only for a short period by the enforcement of a definitive prison sentence or (social defence) measure, and afterwards pre-trial detention was resumed as the sole (primary) detention status. Our study does not take into consideration the period of pre-trial detention after interruption – this concerns in total only *2.1%* of all detentions -, which means that the length of pre-trial detention is somewhat underestimated in these cases.

The two procedures described above (concerning pre-trial detentions not yet concluded and the way in which the length of the pre-trial detention was calculated) mean that the possible detention capacity that could be gained via a limit to the maximum length of pre-trial detention is underestimated somewhat. For this reason, the "saving" indicated below in the simulations must be read as the "minimum" reduction in the average daily population.

3 A FEW SIGNIFICANT RESULTS

This section will further examine the most significant results of the cohort study and a limited supplementary study on individual prison files. An initial descriptive overview (section 3.1.) will examine the weight the various groups (types of detention path) carry among the total number of detentions, and the length of the pre-trial detention will also be described as it relates to detention path and to type of criminal offence. A second subsection (section 3.2.) will describe the most significant findings obtained from several simulations in which a number of maximum limits were introduced to the length of pre-trial detention for the category 'other' criminal offences. In addition to these 'general' simulations, the year 1999 was further analysed with respect to prison and category of offence, and the impact was examined of a possible amendment to the law that excludes the category of foreigners without right to residency.

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[22] The periods of pre-trial detention for these groups (3A, 3B and 3C) do not always indicate the real (complete) length of the pre-trial detention, but *only the term of the pre-trial detention for as long as this remains amenable to the targeted amended legislation that would introduce a maximum length to pre-trial detention* (i.e., until the moment a definitive status takes effect).

3.1 Descriptive analysis

3.1.1 Relative weight of the different groups (detention path)

When we examine the distribution of detentions according to detention path (period 1996-2000), it appears that a bit more than half of the detentions (53.8%) were limited to a (short) period of pre-trial detention with the status of pre-trial detainee (group 1). The other detentions mainly concern periods for which the pre-trial detention status changes to a definitive status: group 3A represents approximately one fifth of the total number of detentions (20.2%), groups 3B and 3C a bit more than 10% each. 'Pure' periods of pre-trial detention (i.e. without changing to a definitive status) that include a period of detention with the legal status of not definitively convicted (groups 2A and 2B), are rather uncommon.

Table 2: Distribution of the detentions as pre-trial detainee (and not definitively convicted) according to detention path (group) (1996-2000)

Groups	**N**	**%**
Group 1	24,943	53.8
Group 2A	70	0.2
Group 2B	642	1.4
Group 3A	9,378	20.2
Group 3B	5,172	11.2
Group 3C	6,157	13.3
Total	46,362	100.0

This pattern not only applies to the total number of detentions, but also to 'other' criminal offences and offences for which there is talk of harm to physical integrity of persons. However, it is so that in the case of offences against physical integrity, despite that fact that here again pure pre-trial detentions (especially group 1) constitute the vast majority, a slightly stronger tendency appears to exist than with the 'other' criminal offences to retain people in custody for the entire period of pre-trial detention and (contiguous) serving time for punishment.

3.1.2 Length of pre-trial detention

Regarding the length of pre-trial detention, it can be said that the average length of the (continuous periods of) pre-trial detention (for all groups together) fluctuates around 80 days annually, with the exception of a somewhat lower level in 1997: 79.3 days in 1996, 75.4 days in 1997, 80.1 days in 1998, and 80.6 days in 1999.[23] Most detentions have rather short periods of pre-trial detention (< 3 months). Approximately four out of ten detentions

[23] Concerning the (evolution of the) length of pre-trial detention, also see among others, the following studies: S. Snacken (supervisor), K. De Buck, K. D'Haenens, A. Raes and P. Verhaeghe, *Onderzoek naar de toepassing van de voorlopige hechtenis en de vrijheid onder voorwaarden* [Study into the application of pre-trial detention and conditional release from prison] (Brussels, VUB/NICC, 1996-97), 174p. + bibl.; C. Vanneste and P. Verhaeghe, 'Penitentiaire inflatie: kennis van het verschijnsel, de factoren die het proces beïnvloeden en mogelijke aanbevelingen' [Prison population inflation: awareness of the phenomenon, the factors that influence the process and possible recommendations], *Winket, Tijdschrift van de Federatie van Vlaamse gevangenisdirecteurs* (1998 no. 3), pp. 17-24.

(38.9%) have a length less than one month, almost two out of ten (18.8%) detentions have a length between one and two months. Globally, 70% of the detentions have a period of pre-trial detention less than three months.

There are many detentions with relatively short periods of pre-trial detention (76.1% < one month) especially in Group 3B (not definitively convicted that change to a definitive status) with groups 1 (pre-trial detainees only) and 2A (not definitively convicted only), approximately half of detentions have a period of pre-trial detention less than one month. Groups 2A (not definitively convicted only) and 2B (initial committal as pre-trial detainee, afterwards not definitively convicted), on the other hand, (also) have many detentions with a period of pre-trial detention of extremely long duration: 14.3% of detentions in Group 2A have a period of pre-trial detention greater than one year. For Group 2B, this is no less than 20.7%.

Table 3: Length of pre-trial detention according to detention path (1996-2000)

	Length						
Groups	0-1m	>1-2m	>2-3m	>3-12m	>12-24m	> 24m	Total
Group 1	47.3	26.2	11.0	14.8	0.6	0.2	100%
Group 2A	48.6	7.1	7.1	22.9	8.6	5.7	100%
Group 2B	0.9	2.0	10.0	66.3	14.8	5.9	100%
Group 3A	0.8	4.6	16.3	73.4	4.4	0.4	100%
Group 3B	76.1	14.0	4.5	5.2	0.1	0.0	100%
Group 3C	35.4	16.5	16.2	30.4	1.3	0.2	100%
Total	38.9	18.8	12.0	28.4	1.6	0.3	100%

Detentions with a short period of pre-trial detention generally have greater representation among the ‘other’ criminal offences than among criminal offences against the physical integrity of persons[24]. Longer periods of pre-trial detention are again better represented among the criminal offences against the physical integrity of persons, even though seen globally the differences between the two crime groups is not all that great[25]. Some of this can possibly be (partially) explained by the high number of cases in the category offences that ‘harm the physical integrity of persons’ that also include, for example, unintentional offences.

[24] Among the ‘other’ criminal offences, 40.5% of the detentions have a period of pre-trial detention shorter than one month (versus 36.8% of the offences against physical integrity), 19.5% have a length of one to two months (versus 17.8% of the offences against physical integrity).

[25] Regarding criminal offences against physical integrity, 33.3% of the detentions have a period of pre-trial detention greater than three months, versus 27.9% for the ‘other’ offences. With respect to criminal offences against physical integrity, extremely long periods of pre-trial detention are found especially in groups 2A and 2B. In group 2B, the length of pre-trial detention for criminal offences against physical integrity is greater than one year in no less than one out of four cases (25.8%), versus 16.3% for the ‘other’ criminal offences (which also represents a quite considerable share).

3.2 Results of the simulations

3.2.1 Simulations according to three scenarios: general

After calculating the average length of the pre-trial detention and the number of pre-trial detentions that exceed the stipulated threshold values, the cohort study allows a number of simulations to be performed that provide a better view of the possible saving in detention capacity (in terms of average daily population). As already explained above, the effect on the average daily population of introducing a maximum length of pre-trial detention can be calculated using the formula Stock=Flow*Length.

The simulations that we performed in this regard concern *three different scenarios* in which a maximum limit for the length of pre-trial detention would be introduced for the *category 'other' criminal offences.* The limits were set at three, four and six months. The results of these simulations are indicated in table 4.

Table 4: Possible "saving" in detention capacity according to three scenarios of limiting the length of pre-trial detention for the category 'other' criminal offences

Scenario	Average length of time the period was exceeded (in days)*	Number of detentions above threshold (avg./year)	Saving with respect to average daily population
> 3 months	84.4	1,452.0	340.4
> 4 months	87.5	985.4	239.5
> 6 months	104.7	433.8	126.2

* To obtain the real average length of pre-trial detention for these protracted detentions (> 3, 4 or 6 months), the average length of time the period was exceeded must be increased by the respective maximum limit, in other words, by 90 days (3 months), 120 days (4 months) or 180 days (6 months).

As appears from table 4, the average daily population of pre-trial detainees (including not definitively convicted) would be reduced by around 340 units with the introduction of a maximum length of pre-trial detention of three months for the category 'other' criminal offences. In this case, the number of pre-trial detentions with a length greater than three months is an average of 1,452 units annually; these detentions last an average of 174.4 days, which comes down to an average length of time of 84.4 days (= 174.4 days less 90 days, or three months) that the period was exceeded. According to the formula Stock=Flow*Length, this yields a saving of 340.4 places, i.e. Stock = (1452*84.4)/360 = 340.4.[26] This comes down to a 14.8% reduction in the average daily population of pre-trial detainees in 1999 (N=2,297).

Limiting the maximum length of pre-trial detention to higher thresholds logically leads to less reduction in the average daily population: approximately 240 units with the

[26] Note that the product of the flow and the length in the formula must be divided by the number of days since the average length (and the length of time the period was exceeded) was also expressed in number of days. The number of days per year was fixed at 360 since when calculating the length of pre-trial detention, one month was equal to 30 days.

introduction of a maximum of four months and a bit more than 120 units at a maximum of six months (always limited to the category ‘other’ criminal offences[27]).

3.2.2 Additional analysis of the simulation study for the year 1999

Additional analysis was done on one year from the period in question (1996-2000), namely 1999. Subject to the hypothesis of limiting the maximum length of pre-trial detention to *three months*, and exclusively for the category *'other' criminal offences*, the following was examined: (1) Which prisons (housing pre-trial detainees) would primarily ‘profit’ from such a reduction in the daily population (it concerns the penal institutions where the initial confinement took place!), (2) Which criminal offences (among the broad category of ‘other’ criminal offences) were primarily represented among the cases affected by the limitation in the maximum length, and (3) Via an additional study on individual prison files on a random sample, to what extent would the exclusion of illegal foreigners from any limitation in the length of pre-trial detention affect the “saving” obtained.

3.2.2.1 Detention capacity to be saved according to prison (that of the initial confinement)

While at first glance not very relevant to a foreign reading public, it is nevertheless interesting to briefly present the further analysis of the relevant prison. The question of course also arises concerning the extent to which a potential reduction is spread evenly across all institutions or is only focused on specific institutions. Our analysis reveals a few striking findings in this respect.

First it appears that more than half of the total number of preventative detentions (detentions for both criminal offence groups together) are ‘processed’ by only three prisons: Forest (24.8% of the total number of detentions), Antwerp (19.0%) and Lantin (10.4%).

When a calculation is made of the “saving” that can be achieved in the average daily population via the introduction of a maximum length of pre-trial detention (three months, for the category ‘other’ criminal offences), it emerges that for the year 1999, in general a total reduction of 346.2 units can be obtained (table 5), a figure comparable to that obtained for all five years (1996-2000) together (N=340.4; *supra*). However, this reduction is not evenly distributed across the various institutions. The largest reduction can be obtained at the prison in Forest (see table 5). A reduction of 156.5 prisoners can be expected for this institution[28], or no less than 45% (!) of the total expected reduction for all institutions together.

[27] For the category offences against the physical integrity of persons, the point of departure was the hypothesis that pre-trial detention for this category would not be subject to any limitation.

[28] Subject to the hypothesis that the entire duration of the pre-trial detention can be traced back to the initial prison where committal took place.

Table 5: Detention capacity "to be saved" according to prison, subject to the hypothesis of limiting the length of pre-trial detention to 3 months for 'other' criminal offences (1999)

Institution	**Average length of time the period was exceeded (in days)**	**Number of detentions above the threshold of 3 months**	**Saving with respect to average daily population**
Antwerp	65.4	149	27.1
Malines	84.1	20	4.7
Turnhout	90.5	19	4.8
Saint-Gilles (Brussels)	61.6	11	1.9
Leuven-Central	-	0	-
Forest (Brussels)	99.2	568	156.5
Leuven-Auxiliary	106.5	38	11.2
Bruges	79.1	85	18.7
Ypres	70.0	31	6.0
Ghent	72.1	50	10.0
Oudenaarde	47.6	11	1.5
Dendermonde	43.2	37	4.4
Mons	76.9	53	11.3
Tournai	73.8	32	6.6
Jamioulx (Charleroi)	88.2	93	22.8
Lantin (Liege)	75.2	172	35.9
Verviers	59.7	14	2.3
Huy	55.5	2	0.3
Hasselt	109.6	13	4.0
Tongeren	86.5	25	6.0
Arlon	59.4	5	0.8
Namur	123.7	25	8.6
Dinant	38.0	8	0.8
Total	85.3	1,461	346.2

* To obtain the real average length of pre-trial detention for these protracted detentions (> 3 months), the average length of time the period was exceeded must be increased by 90 days (3 months).

Finally it also emerges that the scope of the 'saving' can be explained by several factors. The very pronounced potential "saving" in the prison at Forest can be explained by the high average length of pre-trial detentions greater than three months for the category 'other' criminal offences (90 + 99.2 days = 189.2 days), but also especially by the very high number of detentions in the category 'other' criminal offences with a period of pre-trial detention of more than three months (N= 568) (see table 5). Other institutions have a still higher average length of pre-trial detention (greater than three months, for the category 'other' criminal offences)[29], but annually have a much smaller number of protracted pre-

[29] It must be noted that the period of pre-trial detention also includes periods of residency in psychiatric units (under observation within the framework of the Social Defence Act), which perhaps explains the quite high average length of pre-trial detention at specific institutions.

trial detentions to process (category ‘other’ criminal offences), which means that the possible saving in absolute figures also remains relatively limited [30].

3.2.2.2 Criminal offences related to the “saving”

For the year 1999, a further examination was also made regarding which infringements would be connected with the introduction of a maximum length for pre-trial detention, limited to three months and exclusively applied to the category ‘other’ criminal offences (i.e. involving no harm to the physical integrity of persons).

Table 6: Distribution of protracted pre-trial detentions (> 3 months) across the different criminal offences within the category ‘other’ (1999)

Offences	**N**	**%**
Drugs	571	39.1
Theft	481	32.9
Formation of a gang	241	16.5
Other offences	211	14.4
Falsification of documents	168	11.5
Handling of stolen goods	153	10.5
Swindle	116	7.9
Weapons	41	2.8
Foreigners	35	2.4
Threats	21	1.4
Usurpation (false impersonation)	17	1.2
Extortion	16	1.1
Abuse of confidence	16	1.1
Lewdness-prostitution	11	0.8
Damage-vandalism	7	0.5
Defamation	3	0.2
Falsification of papers of value	2	0.1
Business-related	1	0.1
Embezzlement	1	0.1
Total detentions ‘other’ > 3m	*1,461*	

As can be seen from table 6, such a measure would primarily affect the detentions for drug-related offences and theft. No less than 39.1% (or 571 detentions) of the total number of detentions with a period of pre-trial detention greater than three months (N=1,461) concerns *at least* a drug-related offence (combinations with other offences are possible, except combinations with criminal offences against physical integrity). 32.9% of these detentions concern thefts. Other offences quite strongly represented (> 10%) among detentions with a period of pre-trial detention greater than three months are formation of a gang (16.5%), other offences (14.4%), forgery (11.5%) and handling of stolen goods (10.5%)[31].

[30] This is for example the case for the institutions at Namur (average length of time the period was exceeded = 123.7 days), Hasselt (109.6 days), and Leuven-Auxiliary (106.5 days).
[31] Since combinations of offences can occur – of the total number of detentions (N=1,461), 2,112 criminal offences were registered – the percentages and absolute figures indicated in table 6 may not simply be added together.

3.2.2.3 Saving when excluding illegal foreigners (study on individual prison files)

Concerning the detentions in 1999 with a period of pre-trial detention greater than three months for the offences '*drugs' and/or 'theft'*, possibly in combination with other offences but without there being talk of harm to physical integrity, a study on individual prison files was also made – following on the analysis of the SIDIS data – to examine the extent to which they concerned prisoners of foreign nationality with no right to residency. The intent was to study the impact of limiting the length of pre-trial detention (to three months) but *excluding* this category of prisoners with foreign nationality without the right to residency. This additional constraint on the category to which a limitation in length was being considered was suggested by two issues: doubt concerning the political feasibility of the proposed reform, and by the fact that an arrest warrant can legally be issued due to the danger of fleeing justice (which can be assumed in the case of illegal residency).

The SIDIS data indicated that in 1999 there were 1,461 detentions as pre-trial detainee or not-definitively convicted for the so-called category 'other' criminal offences for which the period of pre-trial detention amounted to more than three months. A total of 1,021 of these 1,461 detentions were involved in one or more drug-related offences *and/or* one or more thefts, possibly in combination with other offences (except for criminal offences that implied harm to physical integrity). Limiting the length of pre-trial detention to three months in these cases (offences involving 'drugs' and/or 'theft' without harm to physical integrity) would result in a reduction in the average daily population of 237 units[32]. Regarding nationality, it appeared that *673* of these 1,021 detentions for 'drugs' and/or 'theft' concerned prisoners with a *foreign nationality*. To estimate the saving (from this total group of 673 relevant detentions) involving illegal foreigners, a random sample was taken of 25% of this group or *168 detentions*.[33]

The study on individual prison files indicates that of the 168 detentions, only 59 detentions (or 35.1%) concern foreigners for whom it could confidently be said that at the time of their release they had the right to residency in Belgium. In one case, no registration was present, and in 5 cases the residency status could not be ascertained based upon the file. In 103 cases (*61.3%*) the prisoner involved had *no right to residency* in Belgium. Furthermore, for detentions of prisoners with foreign nationality without right to residency (N=103) in the random sample, an average length of pre-trial detention was observed of 193.8 days. These two findings lead us to conclude that if one assumes that the values observed in the *random sample* (61.3 % illegal foreigners, average length of pre-trial detention of 193.8 days) are a good indication of these values within the total population, the total saving in the average daily population would amount to a reduction of *118.2* prisoners[34] (versus 237 if illegal foreigners were not excluded). Excluding illegal

[32] For the detentions under consideration (N=1,021, all nationalities together) an average length of pre-trial detention was observed of 173.6 days, which, with a targeted three-month ceiling, yields a length of time the period was exceeded of 83.6 days (i.e., 173.6 – 90 = 83.6). The possible saving is then *237 units*: 1,021*83.6/360.

[33] In addition to the information concerning detentions already registered as such in SIDIS or calculated based upon SIDIS data (prisoner identification number, date of committal, date of release, nationality, length of pre-trial detention, type of detention path), the individual prison files were examined in order to compile a number of additional pieces of information, in particular regarding the place of residence of the subject and residency status at the moment of release. The fact that the *status at the moment of release* was analysed does not always necessarily mean that it concerns the status at the end of the period of pre-trial detention; after all, a number of prisoners remain in prison after their pre-trial detention to serve time as punishment.

[34] This result was obtained by taking the globally expected reduction of 237 units and subtracting the number of illegal foreigners (118.8). In this hypothesis, a figure of 103 illegal foreigners in our sample comes down to 412 illegal

foreigners from the limitation to the maximum length of pre-trial detention brings about a sizeable reduction in the possible “saving” to the average daily population (at least for offences involving drugs and/or theft without harm to physical integrity).

4 BY WAY OF CONCLUSION

In the cohort study, the length of pre-trial detention was calculated for the detentions as pre-trial detainee and not-definitively convicted in the years 1996 through 2000, according to the offence for which one was imprisoned, whether or not harm to the physical integrity of persons was involved. Such a study allows, among other things, the calculation of what the effects on the average daily prison population could be of introducing a maximum length of pre-trial detention.

The cohort study resulted in a few interesting findings. First, it was found that the length of (uninterrupted periods of) pre-trial detention (as primary legal status) fluctuated around 80 days for the years in question. Approximately 70% of all detentions had a period of pre-trial detention less than three months. With respect to detention path, approximately half of the cases concerned detentions for which the entire period of detention was undergone with the status of pre-trial detainee.

Concerning the analysis according to category of offence, two important conclusions can be drawn. First, for offences against physical integrity of persons, there appears to be a somewhat stronger tendency than for the ‘other’ offences to serve a contiguous period of pre-trial detention and punishment (i.e. without interim release). Second, it was noted that detentions with a longer period of pre-trial detention (> 3 months) were represented more strongly among the offences against physical integrity of persons, even though the differences between the offence categories under consideration (criminal offences against physical integrity *vs.* other offences) were not exceptionally great.

Regarding measuring the effect of introducing a maximum length of pre-trial detention for the category ‘other’ criminal offences (for all detentions in the period 1996-2000), three scenarios were invoked: a maximum limit of three, four or six months. Of course, the greatest “saving” to the average daily population is achieved with the introduction of the ‘low’ maximum limit of three months. In this case, the estimated reduction amounts to some 340 units, which for 1999, for example, would have resulted in a total average daily population (all categories together) of approximately 8,200 prisoners (versus 8,548 prisoners without the reduction). The potential reduction must be seen as a ‘minimum’ reduction, since the way the study was set up meant that the length of pre-trial detention was somewhat underestimated.

A more in-depth analysis of 1999 (simulation based upon a hypothetical three-month limit to the length of pre-trial detention for the category ‘other’ offences) shows that a very significant part (approximately 45%) of the estimated reduction in the daily population would benefit one specific prison. The offences (in the category ‘other’ offences) affected

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foreigners in the total population (103 multiplied by 4 since it concerns a 25% random sample). An average length of 193.8 days means that the assumed maximum pre-trial detention period (three months) was exceeded by 103.8 days. The stock saved is therefore 118.8 units: 412*103.8/360.

by the limitation to the maximum length are predominantly drug-related offences (almost 40% of detentions with a pre-trial detention greater than 3 months, whether or not combined with other offences) and thefts (approximately one third of these detentions).

While the simulation showed a potential reduction in average daily population of 340 units with a limitation to the maximum length of three months for the category 'other' criminal offences, a reduction that must be seen as a minimum, the question arises whether the estimated reduction (for the population of pre-trial detainees and not definitively convicted) would really be achieved in reality. On the one hand, it is not unthinkable that in the future the detention capacity "saved" via the limitation to the length of pre-trial detention would simply be undergone instead with the legal status of definitively convicted (= displacement effect)[35]. On the other hand, one could also argue that the limitation to the maximum length of pre-trial detention would bring with it no displacement, but rather would have a moderating effect on sentencing, and in particular on the length of the prison sentences meted out[36]. Thus, since there might be a tendency for criminal judges to 'cover' the period of pre-trial detention by handing down a sufficiently long prison sentence, the limitation to the maximum length of pre-trial detention should result in shorter prison sentences: a limitation to the maximum length of pre-trial detention after all yields shorter periods of pre-trial detention that need to be 'covered' by the sentence itself. It is thus difficult to know in advance whether the "saving" calculated in this study would be confirmed in practice. That is to say, some aspects are also influenced by the effects that such a limitation would have on sentencing practice. Shorter periods of pre-trial detention could nevertheless have a favourable effect on release policy in the sense that this would avoid the eligibility date for early release being already exceeded at the end of pre-trial detention, or would go a long way toward reducing to a minimum the possibility of exceeding this eligibility date.

The issue of illegal foreigners among pre-trial detainees deserves particular attention. As appears from our study, account must be taken of a massive reduction in the saving that could possibly be realized if illegal foreigners are excluded from the measure limiting the length of pre-trial detention. Presently, political solutions to this appear to be sought chiefly in the conclusion of collaboration agreements such that foreign pre-trial detainees with no permanent ties with Belgium are transferred to the authorities of their country of origin in order to be tried there. The federal coalition agreement "*A Creative and Solidary Belgium, Oxygen for the Country*" of 10 July 2003 (p. 38) among other things stated the following: "(…) *the Government* [*will develop*] (…) *operational collaboration with countries from Central and Eastern Europe and with North Africa in order to allow*

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[35] In Belgium, at the moment the sentence imposed by the court starts to be executed, the length of the pre-trial detention is deducted in its entirety from the punishment handed down by the judge. In this regard also see the report accompanying the 1999 recommendation of the Council of Europe which also refers to the previous recommendation No. R (80) 11: "(...), *in countries where the full length of pre-trial detention periods is not deduced from sentences, the law should be amended to remedy that situation without delay and in accordance with Recommendation No. R (80) 11.*" (Council of Europe, *Prison overcrowding and prison population inflation, Recommendation No. R (99) 22 adopted by the Committee of Ministers of the Council of Europe on 30 September 1999 and report* (Strasbourg, June 2000), p. 71).

[36] Related to this, see the report accompanying the 1999 recommendation of the Council of Europe: "*It is common knowledge that pre-trial detention can have an indirect influence on the sentence handed down by the court. It can have especially unfortunate consequences in the imposition of prison sentences and can, therefore, indirectly add to the prison population. Accordingly, avoiding or shortening pre-trial detention for certain accused persons is a way of preventing certain custodial sentences from being passed.*" (Council of Europe, *Prison overcrowding and prison population inflation, Recommendation No. R (99) 22 adopted by the Committee of Ministers of the Council of Europe on 30 September 1999 and report* (Strasbourg, June 2000), p. 71).

criminals from these countries, who are picked up by us and have no permanent ties here or are not engaged in a political asylum procedure, to be tried in their own country; obviously in deciding upon such a procedure, consideration will be taken of the rights of the victims (…).”[37] Without going into more detail regarding this, and even though defensible from the point of view attempting to limit the (Belgian) prison population, these types of measures nevertheless raise a number of questions, among other things concerning the continuity of the enquiry (and the independence of the judiciary), the possibilities for the victim to enforce their rights abroad, possible additional costs for the victim and/or the countries involved (translation of case documents, etc.).

Finally, the effect of limiting the length of pre-trial detention can possibly be extended further to take into consideration a number of other policy options. Thus, a choice could be made for expanding the category of criminal offences for which savings might be made (e.g. also with respect to non-intentional offences), for a reduction to the maximum length of pre-trial detention for ‘other’ criminal offences to, for example, two months, for the introduction of a maximum limit to the length of pre-trial detention with respect to (some) criminal offences that nevertheless imply harm to physical integrity, … Within the Belgian context, any measure shortening the length of legal proceedings – in particular in those cases where a long pre-trial detention period is now imposed – could also have as practical effect a reduction in the length of pre-trial detention, and in this sense also result in limiting the number of pre-trial detainees. A recommendation of the Council of Europe from 1980 – referred to in the more recent recommendation No. R. (99) 22 – indeed already argued for effective control of the length of legal proceedings, namely “(...) *attention should* (…) *be drawn to the obligation on the authorities concerned to take “all possible measures” to carry out the investigation and bring the person concerned to trial as quickly as possible, and to give priority to “cases where the person concerned is in custody” (paragraph IV.16).”*[38] Forms of international collaboration (such as the European arrest warrant) can also put pressure on the use of pre-trial detention insofar as the mutual recognition of legal judgements reduces the risk fleeing justice: greater confidence that the punishments finally imposed will also be carried out means that it is less necessary to take foreign suspects into pre-trial detention for longer periods of time.

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[37] Prof. Brice De Ruyver (University of Ghent), also security adviser to Prime Minister Guy Verhofstadt, recently expressed the same in his monthly column ‘*Law & Order*’ in the newspaper *De Standaard*. See B. De Ruyver, ‘Voorkomen is beter dan genezen’ [Prevention is better than cure], *De Standaard* (8 December 2003).

[38] Council of Europe, *Prison overcrowding and prison population inflation, Recommendation No. R (99) 22 adopted by the Committee of Ministers of the Council of Europe on 30 September 1999 and report* (Strasbourg, June 2000), p. 70.