Prison Litigation Network

ANALYSIS OF ARTICLE 5 ECHR (PRE-TRIAL DETENTION AND OVERCROWDING)

PART I – THE FRAMEWORK OF GUARANTEES GRANTED BY ARTICLE 5§1(c), 5§3 AND 5§4

Article 5 of the Convention is, together with Articles 2, 3[1] and 4, in the first rank of the fundamental rights that protect the physical security of an individual and as such its importance is paramount.[2] Its key purpose is to prevent arbitrary or unjustified deprivations of liberty[3]. It is not concerned with mere restrictions on liberty of movement, which are governed by Article 2 of Protocol No. 4[4]

A deprivation of liberty is not confined to the classic case of detention following arrest or conviction, but may take numerous other forms[5]. However, the present report will limit its scope of analysis to pre-trial detention and therefore the focus will be drawn on §§ 1(c), 3 and 4 of Article 5

Article 5§1(c)

According to Article 5§1(c) "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law...the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so"
According to the Court, the expressions "lawful" and "in accordance with a procedure prescribed by law" in Article 5§1(c) essentially refer back to national law and state the obligation to conform to the substantive and procedural rules thereof[6]. Moreover, where

[1] See, for example, its link with Articles 2 and 3 in disappearance cases such as *Kurt v. Turkey*, no. 24276/94, § 123, ECHR 1998-III
[2] *McKay v. The United Kingdom*, no.543/03, §30, ECHR 2006-X
[3] *Lukanov v. Bulgaria*,21915/93 , § 41, ECHR 1997-II; *Ilaşcu and Others v. Moldova and Russia*, no. 48787/99 48787/99, § 461, ECHR 2004-VII
[4] The difference between restrictions of movement serious enough to fall within the ambit of a deprivation of liberty under Article 5 and mere restrictions of liberty which are subject only to Article 2 of Protocol No. 4 is one of degree or intensity, and not one of nature or substance (*Creangă v. Romania*, no. 29226/03, §92, ECHR 2012)
[5] In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5, the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. (*Guzzardi v Italy*, no. 7367/76, §§92-95, ECHR 1980-A39)
[6] See *Assenov and others v. Bulgaria*, no. 24760/94, §139, ECHR 1998-VIII. Indeed, when analysing the Court's case-law, a running strand that can be clearly identified as regards Article 5§1 is the repeated emphasis on the lawfulness of the detention, procedurally and substantively, requiring scrupulous

deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention, a standard which requires that all law be sufficiently precise to allow the person –if need be, with appropriate advice- to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail[7]

In addition, any deprivation of liberty should be in keeping with the purpose of Article 5, which is to prevent persons from being deprived of their liberty in an arbitrary fashion[8]. That is, the notion of "arbitrariness" in Article 5§1 extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention[9].
While it is normally in the first place for the national authorities, notably the courts, to interpret and apply domestic law, the position is different in relation to cases where failure to comply with such law entails a breach of the Convention. In cases where Article 5§1 of the Convention is at stake, the Court must exercise a certain power to review whether national law has been observed[10]

The arrest or detention of a person must be effected for the purpose of bringing him before the competent legal authority, and this purpose qualifies all three alternative bases for arrest or detention foreseen in Article 5§1(c), that is: on reasonable suspicion of having committed an offence, when it is reasonably considered necessary to prevent the commission of an offence, or from fleeing after having done so. However, the existence of the purpose to bring a suspect before a court has to be considered independently of the achievement of that purpose. The standard impose by Article 5§1(c) does not presuppose that the police have sufficient evidence to bring charges at the time of arrest or while the applicant was in custody; precisely, the object of the questioning during detention under Article 5§1(c) is to further the criminal investigation by way of confirming or dispelling the concrete suspicion grounding the arrest[11]

A reasonable suspicion that a criminal offence has been committed presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed and offence. Therefore, a failure by the authorities to make a genuine inquiry into the basic facts of a case in order to verify whether a complaint was well-founded disclosed a violation of Article 5§1(c). However, what may be regarded as "reasonable" will depend upon all the circumstances of the

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adherence to the rule of law (i.e. detention must conform to the substantive and procedural rules of national law (*McKay v. The United Kingdom*, no.543/03, §30, ECHR 2006-X)
[7] *Creangă v. Romania*, no. 29226/03, §120, ECHR 2012
[8] *Assenov and others v. Bulgaria*, no. 24760/94, §139, ECHR 1998-VIII
[9] *Creangă v. Romania*, no. 29226/03, §84, ECHR 2012
[10] *Creangă v. Romania*, no. 29226/03, §101, ECHR 2012
[11] *Labita v. Italy*, no. 26772/95, §155, ECHR 2000-IV

cases[12]. For example, in the context of terrorism, though Contracting States cannot be required to establish the reasonableness of suspicion grounding the arrest of a suspected terrorist by disclosing confidential sources of information, the Court has held that the exigencies of dealing with terrorist crime cannot justify stretching the notion of "reasonableness" to the point where the safeguard secured by Article 5§1(c) is impaired.[13]

Article 5§3

"Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial"

Article 5 § 3 of the Convention provides persons arrested or detained on suspicion of having committed an offence with a guarantee against an arbitrary or unjustified deprivation of liberty: judicial control.

Article 5 § 3 is structurally concerned with two separate matters: the early stages following an arrest when an individual is taken into the power of the authorities, and the period pending eventual trial before a criminal court during which the suspect may be detained or released with or without conditions. These two limbs confer distinct rights and are not on their face logically or temporally linked[14]

1.) Article 5§3 first limb: The arrest period – brought promptly before a judge

The Court's case-law establishes that under the first limb of Article 5 §3 there must be protection of an individual arrested or detained on suspicion of having committed a criminal offence through judicial control. Such control serves to provide effective safeguards against the risk of ill-treatment, which is at its greatest in this early stage of detention, and against the abuse of powers bestowed on law enforcement officers or other authorities for what should be narrowly restricted purposes and exercisable strictly in accordance with prescribed procedures[15]. The judicial control must satisfy the following requirements:

Promptness: The judicial control on the first appearance of an arrested individual must above all be prompt, to allow detection of any ill-treatment and to keep to a minimum any unjustified interference with individual liberty. The strict time constraint imposed

[12] *Fox, Campbell and Hartley v. The United Kingdom*, no. 12244/86, 12245/86, 12383/86, §32, ECHR 1990-A182
[13] European Court of Human Rights, Guide on Article 5, p. 21
http://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf
See also *Fox, Campbell and Hartley v. The United Kingdom*, no. 12244/86, 12245/86, 12383/86, §32, ECHR 1990-A182
[14] *McKay v. the United Kingdom*, no. 543/03, §31, ECHR 2006-X
[15] *McKay v. the United Kingdom*, no. 543/03, §32, ECHR 2006-X

by this requirement leaves little flexibility in interpretation, otherwise there would be a serious weakening of a procedural guarantee to the detriment of the individual and the risk of impairing the very essence of the right protected by this provision[16]. Periods of more than four days in detention without appearance before a judge were held to be in violation of Article 5 § 3, even in the special context of terrorist investigations[17]. Shorter periods can also breach the promptness requirement if there are no special difficulties or exceptional circumstances preventing the authorities from bringing the arrested person before a judge sooner[18]. No possible exceptions are envisaged from the requirement that a person be brought promptly before a judge or other judicial officer after arrest or detention, not even on grounds of prior judicial involvement[19]

Automatic nature of the review: The review must be automatic and cannot depend on the application of the detained person; in this respect it must be distinguished from Article 5 § 4 which gives a detained person the right to apply for release. The automatic nature of the review is necessary to fulfil the purpose of the paragraph, as a person subjected to ill-treatment might be incapable of lodging an application asking for a judge to review their detention[20]

The characteristics and powers of the judicial officer: The judicial officer competent to decide on arrest or detention must offer the requisite guarantees of independence from the executive and the parties[21]. He/she may also carry out other duties, but there is a risk that his impartiality be questioned if he is entitled to intervene in the subsequent proceedings as a representative of the prosecuting authority[22]. According to the Court's case-law, under Article 5§3, there is both a procedural and a substantive requirement. The procedural requirement places the judicial officer under the obligation of hearing himself the individual brought before him prior to taking the appropriate decision as regards arrest or detention[23]. As for the substantive requirement, it imposes on the judicial officer the obligations of reviewing the circumstances militating for or against detention and of deciding, by reference to legal criteria, whether there are reasons to justify detention and of ordering release if there are no such reasons[24]. The initial automatic review of arrest and detention accordingly must be capable of

[16] *Vassis v. France*, no.62736/09 ,§121, ECHR 2013
[17] Indeed, in *Brogan and others v. the United Kingdom*, the Court recalled that the scope for flexibility in interpreting and applying the notion of promptness is very limited and held that a justifiable detention in police custody which had lasted four days and six hours, without judicial control, breached the requirement of promptness (See *Brogan and Others v. the United Kingdom*, no. 11209/84, § 62, ECHR 1988-A145-B)
[18] *Kandzhov v. Bulgaria*, no. 68294/01, §66, ECHR 2008
[19] *Bergmann v Estonia*, no. 38241/04, §45, ECHR 2008
[20] *Vassis v. France*, no.62736/09 ,§52, ECHR 2013
[21] *McKay v. the United Kingdom*, no. 543/03, §35, ECHR 2006-X
[22] *Huber v. Switzerland*, no.12794/87, §43, ECHR 1990-A188
[23] *Winterwerp v. The Netherlands*, no. 6301/73, § 60, ECHR 1979 A33
[24] In other words, the initial automatic review of arrest and detention must be capable of examining lawfulness issues and whether or not there is a reasonable suspicion that the arrested person has committed an offence, in other words, that detention falls within the permitted exception set out in Article 5 § 1 (c). When the detention does not, or is unlawful, the judicial officer must then have the power to release (*McKay v. the United Kingdom*, no. 543/03, §40, ECHR 2006-X)

examining lawfulness issues and whether or not there is a reasonable suspicion that the arrested person has committed an offence; in other words, whether detention falls within the permitted exceptions set out in Article 5 § 1 (c). When the detention does not, or is unlawful, the judicial officer must then have the power to release[25]

It is highly desirable in order to minimise delay, that the judicial officer who conducts the first automatic review of lawfulness and the existence of a ground for detention, also has the competence to consider release on bail. It is not however a requirement of the Convention and there is no reason in principle why the issue cannot be dealt with by two judicial officers, within the requisite time frame. In any event, as a matter of interpretation, it cannot be required that the examination of bail take place with any more speed than is demanded of the first automatic review, which the Court has identified as being a maximum of four days[26]

2.) Article 5§3 second limb: The remand period – trial within a reasonable time or release

In determining the length of detention pending trial under Article 5§3 second limb of the Convention the period to be taken into consideration, begins on the day the accused is taken into custody and ends on the day when the charge is determined, even if only by a court of first instance[27].

When part of the remand detention lies outside the Court's jurisdiction ratione temporis (for example, in those cases where the recognition by a Contracting State of the Court's jurisdiction takes place when the applicant is already in remand prison) the Court, in determining whether the applicant's continued detention is justified, still takes into account the whole period spend in detention[28]

The presumption is in favour of release. The second limb of Article 5§3 does not give the judicial authorities a choice between either bringing the accused to trial within a reasonable time or granting him provisional release – even subject to guarantees. Until conviction he must be presumed innocent and the purpose of Article 5 § 3 is essentially

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[25] *Vassis v. France*, no.62736/09 ,§52, ECHR 2013

[26] European Court of Human Rights, Guide on Article 5, p. 23
http://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf
See also *McKay v. the United Kingdom*, no. 543/03, §§ 36-40, ECHR 2006-X

[27] Issues have arisen as regards **multiple non-consecutive periods of pre-trial detention**, as well as in cases featuring a **continuing situation**. The Court has pronounced itself on these issues and how they are embroided with the six-month time limit rule for lodging applications set forth in Article 35§1. For a brief recapitulation of it see Annex 1

[28] For example, Poland's declaration recognising the right of individual petition for the purposes of former Article 25 of the Convention took effect on 1 May 1993. The period of the applicant's detention before that date lies outside the Court's jurisdiction ratione temporis. The Court consequently finds that the period to be considered under Article 5§3 was three years, nine months and twenty-seven days. Nevertheless, in determining whether the applicant's continued detention from 1 May 1993 onwards was justified, the Court will take into account the fact that by that date the applicant had already been in custody for nearly one year (*Jablonski v. Poland*, no.33492/96, §§66, ECHR 2000)

to require his provisional release once his continuing detention ceases to be reasonable[29].
Therefore, under the Court's case-law, continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty[30].

The issue of whether a period of detention is reasonable cannot be assessed in abstracto. Whether it is reasonable for an accused to remain in detention must be assessed in each case according to its special features[31]. It is for this reason, that there is no fixed time frame applicable to each case[32]. Indeed, Article 5§3 second limb cannot be seen as unconditionally authorising detention provided that it lasts no longer than a certain period. Justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities[33]

The responsibility falls in the first place to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must, paying due regard to the principle of the presumption of innocence, examine all the facts arguing for or against the existence of the public interest which justifies a departure from the rule in Article 5 and must set them out in their decisions on the applications for release. It is essentially on the basis of the reasons given in these decisions and of the established facts stated by the applicant in his appeals that the Court is called upon to decide whether or not there has been a violation of Article 5§3[34]. The arguments for and against release must not be general and abstract, but contain references to the specific facts and the applicant's personal circumstances justifying his detention. It is only by giving a reasoned decision that there can be public scrutiny of the administration of justice[35]

The existence and persistence of a reasonable suspicion that the person arrested has committed an offence is a condition sine qua non for the lawfulness of the continued

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[29] *Neumeister v. Austria*, no. 1936/63, §4, ECHR 1968 A8
[30] See among other authorities, *Kudła v. Poland*, no. 30210/96, § 110, ECHR 2000-XI; *Michta v. Poland*, no. 13425/02, §45, ECHR 2006
[31] *Idalov v. Russia*, no. 5826/03, §139, ECHR 2012
[32] The Court's case-law has not yet had occasion to consider the very early stage of pre-trial detention in this context, presumably as, in the great majority of cases, the existence of suspicion provides a sufficient ground for detention and any unavailability of bail has not been seriously challengeable. It is not in doubt, however, that there must exist the opportunity for judicial consideration of release pending trial as even at this stage there will be cases where the nature of the offence or the personal circumstances of the suspected offender are such as to render detention unreasonable, or unsupported by relevant or sufficient grounds. There is no express requirement of "promptness" as in the first sentence of paragraph 3 of Article 5. However, such consideration, whether on application by the applicant or by the judge of his or her own motion, must take place with due expedition, in order to keep any unjustified deprivation of liberty to an acceptable minimum (*McKay v. the United Kingdom*, no.543/03, §§ 45-46, ECHR 2006-X)
[33] *Ovsjannikov v. Estonia*, no. 1346/12, §43, ECHR 2014; *Idalov v. Russia*, no. 5826/03, §140, ECHR 2012
[34] *McKay v. the United Kingdom*, no.543/03, § 43, ECHR 2006-X
[35] *Tase v. Romania*, no. 29761/02, §41, ECHR 2008

detention. However, after a certain lapse of time it no longer suffices and the Court must establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds are "relevant" and "sufficient"[36], the Court must also ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings[37].

The Court's case-law has developed four basic acceptable reasons for continued detention: a) the risk that the accused will fail to appear for trial; b) the risk that the accused, if released, would take action to prejudice the administration of justice, or; c) commit further offences, or; d) cause public disorder.[38]

Danger of absconding: The danger of absconding cannot be gauged solely on the basis of the severity of the sentence risked[39]. It must be assessed with reference to a number of other relevant factors (relating to the person's character, his morals, home, occupation, assets, family ties and all kinds of links with the country in which he is being prosecuted) which may either confirm the existence of a danger of absconding or make it appear so slight that it cannot justify pre-trial detention. The danger of flight necessarily decreases with the passages of time spent in detention[40]

Obstruction of the proceedings: The danger of the accused's hindering the proper conduct of the proceedings cannot be relied upon in abstracto, it has to be supported by factual evidence. The risk of pressure being brought to bear on witnesses can be accepted at the initial stages of the proceedings. In the long term, however, the requirements of the investigation do not suffice to justify the detention of a suspect: in the normal course of events the risks alleged diminish with the passing of time as the inquiries are effected, statements taken and verifications carried out[41]

Repetition of offences: The seriousness of a charge may lead the judicial authorities to place and leave a suspect in detention on remand in order to prevent any attempts to

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[36] The use of the cumulative preposition "and" indicates that grounds have to satisfy both characteristics. For example, in the Idalov v Russia case, the Court considered that by failing to address specific facts or consider alternative "preventive measures" and by relying essentially and routinely on the gravity of the charges, the authorities extended the applicant's detention pending trial on grounds which, although "relevant", could not be regarded as "sufficient" to justify its duration *(Idalov v. Russia*, no. 5826/03, §140, ECHR 2012)

[37] The complexity and special characteristics of the investigation are factors to be considered in this respect (See *Scott v. Spain*, no.21335/93, § 74, ECHR 1996, Reports 1996-VI; *Labita v. Italy*, no.26772/95, §§ 152 and 153, ECHR 2000-IV; and *Jablonski v. Poland*, no. 33492/96, § 80, ECHR-2000)

[38] European Court of Human Rights, Guide on Article 5, p. 25
http://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf
See also *Smirnova v. Russia*, no. 46133/99 and 48183/99, §59, ECHR 2003-IX (extracts)

[39] The Court has repeatedly held that although the severity of the sentence faced is a relevant element in the assessment of the risk that an accused might abscond, the need to continue the deprivation of liberty cannot be assessed from a purely abstract point of view, taking into consideration only the gravity of the offence. Nor can continuation of the detention be used to anticipate a custodial sentence (*Idalov v. Russia*, no. 5826/03, §145, ECHR 2012)

[40] *Neumeister v. Austria*, no. 1936/63, §10, ECHR 1968-A8

[41] *Idalov v. Russia*, no. 5826/03, §144, ECHR 2012

commit further offences. It is however necessary that the danger be a plausible one and the measure appropriate, in the light of the circumstances of the case and in particular the past history and the personality of the person concerned. Previous convictions could give a ground for a reasonable fear that the accused might commit a new offence

Preservation of public order: It is accepted that, by reason of their particular gravity and public reaction to them, certain offences may give rise to a social disturbance capable of justifying pre-trial detention, at least for a time. In exceptional circumstances this factor may therefore be taken into account for the purposes of the Convention, in any event in so far as domestic law recognises the notion of disturbance to public order caused by an offence. However, this ground can be regarded as relevant and sufficient only provided that it is based on facts capable of showing that the accused's release would actually disturb public order. In addition, detention will continue to be legitimate only if public order remains actually threatened; its continuation cannot be used to anticipate a custodial sentence[42]

Under the second limb of Article 5§3 the authorities, when deciding whether a person should be released or detained, are obliged to consider alternative measures of ensuring his appearance at the trial. Indeed, that Article lays down not only the right to "trial within a reasonable time or release pending trial" but also provides that "release may be conditioned by guarantees to appear for trial"[43]. The main guarantee envisaged by the Court under this provision has been bail, designed to ensure not the reparation of loss but, in particular, the appearance of the accused at the hearing.

Bail may only be required as long as reasons justifying detention prevail. If the risk of absconding can be avoided by bail or other guarantees, the accused must be released, bearing in mind that where a lighter sentence could be anticipated, the reduced incentive for the accused to abscond should be taken into account. The authorities must take as much care in fixing appropriate bail as in deciding whether or not the accused's continued detention is indispensable. Furthermore, the amount set for bail must be duly justified in the decision fixing bail and must take into account the accused's means and his capacity to pay. In certain circumstances it may not be unreasonable to take into account also the amount of the loss imputed to him. Automatic refusal of bail by virtue of the law, devoid of any judicial control, is incompatible with the guarantees of Article 5§3[44]

Article 5§4

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[42] European Court of Human Rights, Guide on Article 5, p. 26
http://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf
See also *Letellier v. France*, no. 12369/86, §51, ECHR 1991-A207

[43] *Jablonski v. Poland*, no. 33492/96, § 83, ECHR-2000 and *Neumeister v. Austria*, no. 1936/63, §3, ECHR 1968-A8

[44] *Mangouras v. Spain*, no. 12050/04, §§ 81 and 92, ECHR 2010

"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful"

Article 5§4 is the habeas corpus provision of the Convention. It provides detained persons with the right to actively seek a judicial review of their detention[45]. The fact that the Court has found no breach of the requirements of Article 5§1 of the Convention does not mean that it is dispensed from carrying out a review of compliance with Article 5§4. The two paragraphs are separate provisions and observance of the former does not necessarily entail observance of the latter [46]

The opportunity for legal review must be provided soon after the person is taken into detention and thereafter at reasonable intervals if necessary. The Court has taken as a starting point the moment that the application for release was made/proceedings were instituted. The relevant period comes to an end with the final determination of the legality of the applicant's detention, including any appeal

The "court" to which the detained person has access for the purposes of Article 5§4 does not have to be a court of law of the classical kind integrated within the standard judicial machinery of the country. It must however be a body of judicial character offering certain procedural guarantees[47]. Thus, it must be independent both of the executive and of the parties to the case. To satisfy the requirements of the Convention the review of the national court should comply with both the substantial and procedural rules of the national legislation and be conducted in conformity with the aim of Article 5, that is with the protection of the individual against arbitrariness. The "court" must have the power to order release if it finds that the detention is unlawful; a mere power of recommendation is insufficient[48]

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[45] European Court of Human Rights, Guide on Article 5, p. 28
http://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf

[46] Although separate provisions, it must be noted that the notion of "lawfulness" under Article 5§4 has the same meaning as in §1, so that the arrested or detained person is entitled to a review of the "lawfulness" of his detention in the light not only of the requirements of domestic law but also of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5§1. Article 5§4 does not guarantee a right to judicial review of such a scope as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions which are essential for the "lawful" detention of a person according to Article 5§1 (*A. and Others v. the United Kingdom*, no. 3455/05, § 202, ECHR 2009)

[47] The proceedings must be adversarial and must always ensure "equality of arms" between the parties. In remand cases, since the persistence of a reasonable suspicion that the accused person has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, the detainee must be given an opportunity effectively to challenge the basis of the allegations against him. This may require the court to hear witnesses whose testimony appears to have a bearing on the continuing lawfulness of the detention *(See A. and Others v. the United Kingdom*, no. 3455/05, § 204, ECHR 2009)

[48] European Court of Human Rights, Guide on Article 5, p. 29
http://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf

Article 5 § 4, in guaranteeing to persons arrested or detained a right to have the lawfulness of their detention reviewed, also proclaims their right, following the institution of such proceedings, to a speedy judicial decision concerning the lawfulness of detention and to an order terminating it if proved unlawful[49]. The finding whether or not the relevant decision was taken "speedily" within the meaning of that provision depends on the particular features of each case.

The notion of "*speedily*" (*à bref délai*) indicates a lesser urgency than that of "*promptly*" (*aussitôt*) in Article 5§3[50]. In assessing the speedy character required by Article 5§4, comparable factors may be taken into consideration as those which play a role with respect to the requirement of trial within a reasonable time under Article 5§3 and Article 6§1 of the Convention such as, the diligence shown by the authorities, any delay caused by the detained person and any other factors causing delay that do not engage the state's responsibility[51]. Where an individual's personal liberty is at stake, the Court has very strict standards concerning the State's compliance with the requirement of speedy review of the lawfulness of detention[52].

PART II – When deciding on Article 5 judgments, is the Court advocating a reductionist policy?

As can be inferred from Part I of the present report, Article 5 (proclaiming the right to liberty and security) has been construed in such a manner as to keep deprivation of liberty to an acceptable minimum.

- Indeed, the correct reading of Article 5 is that the right to liberty is the rule and restrictions to it are the exception (the authorised deprivations of liberty are exhaustively listed under Article 5§1) [53]

[49] *Idalov v. Russia*, no. 5826/03, §154, ECHR 2012
[50] *Brogan and Others v. the United Kingdom*, no. 11209/84, §59, ECHR 1988-A145-B
[51] In certain instances the complexity of medical – or other – issues involved in a determination of whether a person should be detained or released can be a factor which may be taken into account when assessing compliance with the Article 5§4 requirements. That does not mean, however, that the complexity of a given dossier – even exceptional – absolves the national authorities from their essential obligation under this provision (*Jablonski v. Poland*, 33492/96, §§ 91 and 92, ECHR 2000)
[52] "In the Court's view, there is a special need for a swift decision determining the lawfulness of detention in cases where a trial is pending (see, for example, *Kadem v. Malta*, §§ 44-45, where the Court considered a time-period of seventeen days in deciding on the lawfulness of the applicant's detention to be excessive, and *Mamedova v. Russia*, § 96, where the length of appeal proceedings lasting, *inter alia*, twenty-six days, was found to be in breach of the "*speediness*" requirement)" *Jablonski v. Poland*, 33492/96, §93, ECHR 2000.
[53] As has been stated by the Court, a strand that may be identified as running through the Court's case-law is the exhaustive nature of the exceptions, which must be interpreted strictly and which do not allow for the broad range of justifications under other provisions (Articles 8-11 of the Convention in particular). See *McKay v. the United Kingdom*, no. 543/03, §30, ECHR 2006-X; See also *Ciullla v. Italy*, where the Court further stated that the exhaustive list of permissible exceptions in paragraph 1 of Article 5 (art. 5-1) of the Convention must be interpreted strictly. *Ciulla v. Italy*, no. 11152/84, §41, ECHR 1989-A148

- A deprivation of liberty must meet strict requirements. According to Article 5§1 it must be lawful, fulfil a purpose (that of bringing the arrested / detained person before the competent legal authority) and must not be arbitrary, but based on reasonable suspicions that a criminal offence has been committed

- Throughout its case-law, the Court has developed a system of guarantees, especially of a procedural nature, that narrow down the risks that arrest or detention may entail. In this sense, Article 5§3 first limb has been interpreted as laying down the right to an automatic and promptly judicial review of arrest or detention, capable of ordering release if there are no reasons justifying the detention.

- As for remand custody, according to the second limb of Article 5§3, its use is limited. Firstly because the presumption is in favour of release (thus continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest[54] which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty). Secondly, because the authorities, when deciding whether a person should be released or detained, are obliged to consider alternative non-custodial measures of ensuring his appearance at the trial

- Article 5§4 provides for the right to habeas corpus

The question is whether the Court, when applying Article 5 and all the safeguards and procedural guarantees contain therein (steeped in the principle of "imprisonment as a last resort"), is advocating in favour of a reductionist policy.

In order to answer the previous question, it is necessary to specify first what to we understand by reductionist policy[55]. According to the definition provided by SNACKEN[56], a reductionist policy is characterized by:

1. strong intolerance towards prison overcrowding
2. no expansion of prison capacity.

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[54] The Court's case-law has developed four basic acceptable reasons for continued detention: a) the risk that the accused will fail to appear for trial; b) the risk that the accused, if released, would take action to prejudice the administration of justice, or; c) commit further offences, or; d) cause public disorder. European Court of Human Rights, Guide on Article 5, p. 25
http://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf

[55] The other two types of criminal policies with regard to prison populations are: an expansionist policy, characterized by a constant increase of the prison population, a belief that "prison works", serious prison overcrowding and the expansion of prison capacity and staff; and what is known as stand still policy, characterized by a mixed bag of strategies. Sentencing judges are invited to limit the application of imprisonment by a greater use of non-custodial sanctions, new prisons are built with the intention to replace outdated capacity, there is no clear limit on the extent of the prison population, attempts are made to increase the discretionary application of early release, and the use of imprisonment is not fundamentally questioned. SNACKEN, S., A Reductionist Penal Policy and European Human Rights Standards, *European Journal on Criminal Policy and Research* (2006) 12, p. 144

[56] *Ibid*, p. 150

3. and a true scepticism towards the possible positive effects of imprisonment[57]

A reduction in prison population may be achieved through either (or preferably through a combination of both):

a. 'front door strategies' to reduce the input of prisoners into the system through decriminalisation, limitation of the use and length of remand custody and sentences of imprisonment and an effective application of non-custodial sanctions and measures. An essential element is that imprisonment is used as a last resort, in the case of offences which constitute such a threat to public security that no other reaction can suffice, such as serious violent offences
b. 'back door strategies' policies to limit the length of stay in prison, by keeping detentions as short as possible and stimulating forms of early release of prisoners, for example through as large an application as possible of parole

A true scepticism towards the possible positive effects of imprisonment:

The Court has not pronounced itself on the positive or negative effects of imprisonment. This question raises issues that seem to exceed the Court's judicial function and as it has recalled on numerous occasions, « Il n'appartient pas à la Cour d'indiquer aux États des dispositions concernant leurs politiques pénales et l'organisation de leur système pénitentiaire. Ces processus soulèvent un certain nombre de questions complexes d'ordre juridique et pratique qui, en principe, dépassent la fonction judiciaire de la Cour[58] »

Non expansion of prison capacity and a strong intolerance towards prison overcrowding

The Court has, however, considered the other two features that characterize a reductionist policy: the non expansion of prison capacity and a strong intolerance towards **prison overcrowding**. As regards the latter feature, the Court has openly and clearly expressed its intolerance towards it in numerous judgments (the milestones within the Court's case-law being: Douroz v. Greece, *Ananyev v. Russia, Kalashnikov v. Russia, Orchowski v. Poland, Sikorski v. Poland, Kudla v. Poland, Torreggiani v. Italy, Karalevičius v. Lithuania*, among others). Particularly, since the beginning of 2000 onwards it has upheld prison overcrowding as constituting a violation of Article 3[59].

[57] In this sense, imprisonment is recognized to have many detrimental psycho-social effects on prisoners and their families and is seen to hamper reparation for victims of crime and to fail to protect society in the long run by further desocialising offenders. *Ibid*, p. 145

[58] *Torreggiani et autres c. Iitalie*, no. 43517/09, §95, ECHR 2013

[59] The case of Dougoz v. Greece (1998) is generally regarded as a turning point in the Court's case law. Before it chronic forms of overcrowding had previously been described as "undesirable" but had not been considered to constitute a breach of Article 3 of the ECHR. This was linked to the fact that breaches of art. 3 were only recognised by the Court if they were deliberately imposed on the plaintiff (not if they

Indeed, the extreme lack of personal space in cells (coupled with a shortage of sleeping places, outdoor exercise, unjustified restrictions on access to natural light and air, and non-existent privacy when using the sanitary facilities) has been considered as amounting to "inhuman" and "degrading"[60].

The Court has found a close affinity between the problem of overcrowding (which falls to be considered under Article 3 of the Convention) and an excessive length of pre-trial detention (which has been found by the Court to violate another provision of the Convention, namely Article 5). The conclusion that has been reached by the Court is that the solution of the problem of overcrowding of detention facilities is indissociably linked to the solution of the problem of the excessive length of pre-trial detention[61]

As for the particular measures recommended by the Court to alleviate prison overcrowding and the problematic of the excessive length of pre-trial detention: we will distinguish between those measures suggested within the framework of a pilot or quasi-pilot judgment procedure under Article 46, and those other measures encouraged by the Court in judgments where it had to decide on a case-by-case basis whether a prisoner's particular circumstances amounted to a violation of the Convention. This differentiation is due to the fact that when applying Article 46 the Court identifies structural problems underlying the violations of the Convention and indicates measures or actions to be taken by the State to remedy them; whereas in individual cases, the Court limits itself to settle whether or not there has been a violation of the Convention, and such violation does not necessarily disclose an underlying systemic malfunctioning. Therefore, when applying Article 46 the Court's undertake is different: it addresses the underlying structural problems in greater depth, examines the source of those problems and provides further assistance to the respondent State in finding the appropriate solutions and to the Committee of Ministers in supervising the execution of the judgments[62]. Since structural problems call for structural solutions, the Court has a larger margin for advocating policies when applying the pilot or quasi-pilot procedure. In some judgments it has done so in a veiled or blurred way, in others more vehemently. Yet, either way or the other, the Court tries always not to lose sight of the fact that the premise is that the Court's aim under Article 46 is to facilitate the rapid and effective

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were the consequence of organisational circumstances or lack of means), if they reached a high threshold of severity and if they could be proven to have affected the situation or health of the individual plaintiff. SNACKEN, S., A Reductionist Penal Policy and European Human Rights Standards, *European Journal on Criminal Policy and Research* (2006) 12, p. 152

[60] Whereas the provision of four square metres remains the desirable standard of multi-occupancy cells, the Court has found that where the applicants have at their disposal less than three square metres of floor surface, the overcrowding must be considered to be so severe as to justify of itself a finding of a violation of Article 3. In cases where the inmates appeared to have at their disposal sufficient personal space, the Court noted other aspects of physical conditions of detention as being relevant for the assessment of compliance with Article 3. *Ananyev and others v. Russia*, no. 42525/07, §§145 and 149, ECHR 2012

[61] See for example: *Norbert Sikorski c. Pologne*, no. 17599/05, §159, ECHR 2009; *Orchowski v. Poland*, no. 17885/04, §150, ECHR 2009

[62] *Ananyev and others v. Russia*, no. 42525/07, §211, ECHR 2012; see also Resolution Res(2004)3 of the Committee of Ministers on judgments revealing an underlying systemic problem, and the Declarations adopted by the High Contracting Parties at the Interlaken and Izmir conferences

suppression of a shortcoming found in the national system of protection of human rights and that the respondent State remains free, subject to monitoring by the Committee of Ministers, to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment[63] Or as stated other ways It is not the Court's task to advise the respondent Government about complex reform process, let alone recommend a particular way of organising its penal and penitentiary system. While the pilot-judgment procedure has been instrumental in helping Contracting States to comply with their obligations under the Convention, the Court does not have the capacity, nor is it appropriate to its function as an international court, to involve itself in reforms of that type in parallel with the Committee of Ministers or to order a specific general measure to be adopted in that process by the respondent State. The Committee of Ministers is better placed and equipped to monitor the measures that need to be adopted by Russia to ensure adequate conditions of pre-trial detention in accordance with the Convention[64].

The following measures have been recommended under Article 46

A.) Measures requiring changes to the existing legislative framework:

1. The establishment of an adequate and efficient system of detainees' complaints to the domestic authorities, capable of, on the one hand, putting an end to the violation of the right not to be subjected to inhuman and degrading treatment and, on the other hand, guaranteeing effective redress for violations of the Convention resulting from overcrowding[65].
    a. The Court seems to be of the opinion that the system of complaints is more adequate and efficient if it addresses the authorities supervising detention facilities (in particular a penitentiary judge and the administration of these facilities[66]) since they can react more speedily than courts and therefore order, when necessary, a detainee's long-term transfer to Convention compatible conditions[67].

[63] *Mandic and Jovic v. Slovenia*, no., 5774/10, 5985/10, §125, ECHR 2011
[64] *Ananyev and others v. Russia*, no. 42525/07, §194, ECHR 2012
[65] Pour faire face au problème systémique reconnu dans la présente affaire, la Cour rappelle qu'en matière de conditions de détention, les remèdes « préventifs » et ceux de nature « compensatoire » doivent coexister de manière complémentaire. Ainsi, lorsqu'un requérant est détenu dans des conditions contraires à l'article 3 de la Convention, le meilleur redressement possible est la cessation rapide de la violation du droit à ne pas subir des traitements inhumains et dégradants. De plus, toute personne ayant subi une détention portant atteinte à sa dignité doit pouvoir obtenir une réparation pour la violation subie. *Torreggiani et autres c. Iitalie*, no. 43517/09, §96, ECHR 2013
[66] The Court has stated in various judgments that a civil claim for compensation, due to its compensatory nature, is of value only to persons who are no longer detained in overcrowded cells and cannot have any impact on general prison conditions because it cannot address the root cause of the problem. See for example, *Mandic and Jovic v. Slovenia*, no., 5774/10, 5985/10, §128, ECHR 2011
[67] *Orchowski v. Poland*, no. 17885/04, §159, ECHR 2009

b. This supervising authority should be independent[68], have the power to investigate the complaints with the participation of the detainee and the right to render binding and enforceable decisions. The Court considers that, for the procedure before the supervising prosecutor to be compliant with such requirements, the detainee must at least be provided with an opportunity to comment on factual submissions, to put questions and to make additional submissions. The treatment of the complaint does not have to be public or call for the institution of any kind of oral proceedings, but there should be a legal obligation on the prosecutor to issue a decision on the complaint within a reasonably short time-limit[69].

2. The Court has also suggested that the domestic law on compensation be amended so as to reflect the presumption that substandard conditions of detention have occasioned non-pecuniary damage to the aggrieved individual. The level of compensation awarded for non-pecuniary damage by domestic courts when finding a violation of Article 3 must not be unreasonable taking into account the awards made by the Court in similar cases. The right not to be subjected to inhuman or degrading treatment is so fundamental and central to the system of the protection of human rights that the domestic authority or court dealing with the matter will have to provide compelling and serious reasons to justify their decision to award significantly lower compensation or no compensation at all in respect of non-pecuniary damage[70]. The Court has further suggested that a mitigation of sentence may under certain conditions be a form of compensation afforded to defendants in connection with violations of the Convention that occurred in the criminal proceedings against them. In the Court's view, reducing the applicant's sentence is also capable of affording adequate redress for a violation of Article 5 § 3 in cases in which the national authorities had failed to process the case of an applicant held in pre-trial detention with special diligence[71]. However, the Court is not so persuaded that a mitigation of sentence is also capable of affording adequate redress for a violation of Article 3.[72]

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[68] The title of such authority or its place within the administrative structures is not crucial as long as it is independent from the penitentiary system's bodies. *Ananyev and others v. Russia*, no. 42525/07, §215, ECHR 2012

[69] *Ananyev and others v. Russia*, no. 42525/07, §216, ECHR 2012

[70] *Iacov Stanciu v. Romania*, no. 35972/05, §199, ECHR 2012

[71] *Ananyev and others v. Russia*, no. 42525/07, §222, ECHR 2012

[72] First, a compensatory remedy in the form of a mitigation of sentence will necessarily be of a limited remit as regards Article 3, for it will be accessible only to the persons convicted and sentenced to a period of imprisonment of a certain duration. It does nothing to accommodate the rights of persons who have been acquitted or convicted but given a sentence shorter than the time they had already spent in pre-trial detention adjusted by the applicable coefficient. Second, the courts must acknowledge the violation of Article 3 in a sufficiently clear way and afford redress by reducing the sentence in an express and measurable manner. Without a specific explanation in the domestic courts' judgments as to the extent to which the finding and acknowledgement of a violation of Article 3 entailed a reduction of the sentence, the mitigation of the sentence would not deprive, on its own, the aggrieved individual of his status as a victim of the violation. This measurability requirement presupposes the legal possibility for an individualised assessment of the impact of the violation on the Convention rights and of the specific redress that should be afforded to the aggrieved individual. An automatic mitigation operated by means of

3. The Court has also suggested amending the relevant provisions of the Code of Criminal Procedure to reflect expressly the requirements flowing from Article 5 of the Convention (in particular, that the presumption should in all cases be in favour of release and that remand in custody should be an exceptional measure rather than the norm). This measure was proposed as a means for reversing the existing trend to use deprivation of liberty as the preventive measure of predilection[73].
4. The Court has advanced further recommendations in order to avoid a violation of Article 5 § 3 of the Convention on the ground that even for lengthy periods of detention the domestic courts often refer to the same set of grounds, if any, throughout the period of the applicant's detention, even though Article 5 § 3 requires that after a certain lapse of time the persistence of a reasonable suspicion does not in itself justify deprivation of liberty and the judicial authorities should give other grounds for continued detention, which should be expressly mentioned by the domestic courts. However, the Court in this case, did not suggest the specific measures to be taken in this context, but rather left it to the Government to decide on the best strategy to bring the existing legislation and judicial practice in line with the requirements of Article 5[74]

B.) Measures to accompany amendments to the existing legislative framework and which have been figured out to implement the changes in judicial practice:

1. The redistribution of judicial duties to allow the appointment of special judges to decide on the application of preventive measures and supervise the observance of human rights in criminal proceedings[75]
2. Adequate in-service training of judges dealing with applications for detention orders[76]

C.) Introduction of national safeguards setting specific minimum requirements in respect of the accommodation provided for prisoners

1. The Court has recommended the adoption of rules on <u>maximum capacity</u> (numerus clausus for each remand prison through the definition of space per

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standard reduction coefficients is unlikely to be compatible with individualised assessment. Besides, it should be taken into account that an automatic reduction of sentence for convicted criminals on account of their previous stay in substandard detention facilities may adversely affect the public interest of criminal punishment. Finally, it is also clear that while an automatic mitigation of sentence on account of inhuman conditions of detention may be considered as a part of a wide array of general measures to be taken, it will not provide on its own a definitive solution to the existing problem of deficient remedies nor contribute, to a decisive extent, to eradication of genuine causes of overcrowding, namely the excessive use of custodial measures at the pre-trial stage and poor material conditions of detention. *Ananyev and others v. Russia*, no. 42525/07, §222, ECHR 2012
§§224-226

[73] *Ananyev and others v. Russia*, no. 42525/07, §202, ECHR 2012
[74] *Kharchenko v. Ukraine*, no. 40107/02, §§98-101, ECHR 2011
[75] *Ananyev and others v. Russia*, no. 42525/07, §203, ECHR 2012
[76] *Ananyev and others v. Russia*, no. 42525/07, §204, ECHR 2012

inmate as a minimum of square and possibly cubic metres) as well as on operational capacity (based on control, security and the proper operation of the remand prison) with a view to ensuring a smooth turnover of inmates and accommodating partial renovation work or other contingencies[77]

2. It has also suggested the review of the powers and responsibility of the governors of remand centres, so as to include the possibility for the governors not to accept detainees beyond the prison capacity[78]

D.) Special transitional arrangements which could apply pending an overall improvement of conditions of detention in the remand prison:

1. The Court believes that allowing only a short period in which to find a detention facility that meets the adequate conditions requirements should ensure that the endurance of inadequate conditions would not be long enough to entail a violation of Article 3. The duration of the transitional period in a specific case should be decided upon by a court by reference to concrete factual circumstances, but the law should set the maximum duration of such detention which should not be exceeded under any circumstances. The law should also exhaustively define the situations in which the court may order the detainee's temporary placement in an overcrowded facility. It is finally important to establish some form of compensation for such temporary placement, whether it is monetary compensation, extended hours of outdoor exercise, increased access to out-of-cell recreational activities, or a combination of these.
2. The Court further suggests that prosecutors and prison governors could use the additional time gained through transitional arrangements to examine the possibilities for freeing up places in the remand prison that offer adequate conditions of detention. Working in co-operation, they would be able to diligently identify the detainees whose authorised period of detention is about to expire or is no longer needed, and to make a proposal to the judicial or prosecutorial authorities for their immediate release. Such concerted action by the prison and prosecution authorities is an important element for easing the level of overcrowding and ensuring adequate material conditions.
3. The crucial features of this special transitional arrangements can be narrowed down to: (i) a short and defined duration; (ii) judicial supervision; and (iii) availability of compensation[79]

Yet the most recurrent recommendation suggested by the Court is the limitation of the use and length of remand custody and an effective application of non-custodial measures. Indeed, in all of its pilot or quasi-pilot judgments the Court has included a recommendation along those lines, even if the exact wording and hence the firmness of

[77] *Ananyev and others v. Russia*, no. 42525/07, §205, ECHR 2012
[78] *Ananyev and others v. Russia*, no. 42525/07, §206, ECHR 2012
[79] *Ananyev and others v. Russia*, no. 42525/07, §§207-209, ECHR 2012

the ‘recommendation’ varied broadly. This recommendation is closely related to the second characteristic of a reductionist policy: i.e. that of the **non expansion of prison capacity**.

The constant and common position of all Council of Europe bodies is that a reduction in the number of remand prisoners would be the most appropriate solution to the problem of overcrowding[80]; and the Court very much echoes such estimation[81], though it considers that the successful prevention of overcrowding of remand centres is contingent on further consistent and long-term measures (such as those afore mentioned)[82].

Throughout its case-law, the Court has reiterated that in view of both the presumption of innocence and the presumption in favour of liberty, remand in custody must be the exception rather than the norm and only a measure of last resort[83]. On these grounds, and as a measure for significantly lessening the unjustified and excessive recourse to custodial measures at the pre-trial stage of proceedings, the Court has suggested States to encourage their prosecutors and judges to use alternatives to detention as widely as possible and to redirect their criminal policy towards a reduced reliance on incarceration[84] (except in the most serious cases involving violent offences)[85].

The non expansion of prison capacity also implies rejecting the construction of new detention facilities. The Court has had occasion to pronounce on this in Ananyev v. Russia where although it welcomed the construction of more than twenty new remand centres providing remand prisoners with seven square metres of personal space, it however regretted that the other measures for improvement of the material conditions of detention that can be implemented in the short term and at little extra cost – such as for instance shielding the toilets located inside the cell with curtains or partitions, removal

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[80] *Ananyev and others v. Russia*, no. 42525/07, §197, ECHR 2012

[81] For example in *Orchowski v. Poland*, no. 17885/04, §153, ECHR 2009 the Court stated that "If the State is unable to ensure that prison conditions comply with the requirements of Article 3 of the Convention, it must abandon its strict penal policy in order to reduce the number of incarcerated persons or put in place a system of alternative means of punishment »; see also: *Norbert Sikorski c. Pologne*, no. 17599/05, §158, ECHR 2009 « En particulier, lorsque l'Etat n'est pas en mesure de garantir à chaque détenu des conditions de détention conformes à l'article 3 de la Convention, il doit agir en vue de réduire le nombre de personnes incarcérées, notamment en appliquant plus aisément des mesures punitives non privatives de liberté » ; see also *Torreggiani et autres c. Iitalie*, no. 43517/09, §96, ECHR 2013 «lorsque l’État n’est pas en mesure de garantir à chaque détenu des conditions de détention conformes à l’article 3 de la Convention, la Cour l’encourage à agir de sorte à réduire le nombre de personnes incarcérées, notamment en appliquant davantage des mesures punitives non privatives de liberté et en réduisant au minimum le recours à la détention provisoire »

[82] *Ananyev and others v. Russia*, no. 42525/07, §202, ECHR 2012

[83] *Ananyev and others v. Russia*, no. 42525/07, §197, ECHR 2012

[84] « La Cour souhaite rappeler…les recommandations du Comité des Ministres du Conseil de l’Europe invitant les États à inciter les procureurs et les juges à recourir aussi largement que possible aux mesures alternatives à la détention et à réorienter leur politique pénale vers un moindre recours à l’enfermement dans le but, entre autres, de résoudre le problème de la croissance de la population carcérale (voir, notamment, les recommandations du Comité des Ministres Rec(99)22 et Rec(2006)13) » *Norbert Sikorski c. Pologne*, no. 17599/05, §158, ECHR 2009 ; and *Torreggiani et autres c. Iitalie*, no. 43517/09, §95, ECHR 2013

[85] *Ananyev and others v. Russia*, no. 42525/07, §197, ECHR 2012

of thick netting on cell windows blocking access to natural light and a reasonable increase in the frequency of showers – had not yet been implemented.[86]

The Court has, however, been more explicitly as regards the construction of new facilities when shielding itself with the reports of the Committee for the Prevention of Torture and the Recommendations of the Committee of Ministers of the Council of Europe[87]. It has stated that "throwing increasing amounts of money at the prison estate will not offer a solution" and that "the creation of new places of detention cannot in itself provide a lasting solution to the problem of prison overcrowding and that this measure should be closely supported by others aimed at reducing the overall number of remand prisoners"[88]

Proceduralisation of substantive rights

All the measures afore mentioned, which can be clearly qualified as reductionist, have been suggested by the Court within the framework of a pilot or quasi-pilot procedure established under Article 46. Yet, when deciding on the merits of cases which do not address problems of a systemic nature, the Court traditionally has opted for a more conservative course of action and has stick to the so-called "proceduralisation of substantive rights"[89] (i.e. the Court's main commitment seems to be that of ensuring the presence of procedural guarantees, such as the right to an effective judicial remedy against the deprivation of liberty, rather than focusing on the material aspects of the detention[90]). Indeed, the Court when deciding on a case-by-case basis whether a

[86] *Ananyev and others v. Russia*, no. 42525/07, §§192-193, ECHR 2012

[87] It is important to recall that "all the elements of a reductionist policy can be found in recommendations by the Council of Europe, especially Recommendation R (99) 22 on prison overcrowding and prison population inflation" (SNACKEN, S., A Reductionist Penal Policy and European Human Rights Standards, *European Journal on Criminal Policy and Research* (2006) 12, p. 151) and that both, the recommendations of the Committee of Ministers of the Council of Europe and the reports of the Committee for the Prevention of Torture are increasingly influencing the case law of the European Court of Human Rights (the CPT reports are, mainly, used as a source of evidence and the recommendations as an authoritative basis for backing up the Court's conclusions).
Reference to other external international instruments of soft law can be found in just a few judgments (for example The Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977 are referred to under the heading "relevant international material" in *Ananyev and others v. Russia*) but the Court does not rely on them to reach its conclusions. We did not find any allusion to the Resolution of the European Union Parliament on conditions of detention and the use of alternative sanctions of 17 December 1999.
The Court has, however, sometimes taken into consideration national jurisprudence when the judgment has been discharged by the Supreme Court; see for example Orchowski v. Poland and Norbert Sikorski v. Poland. But no references to decisions of other international Tribunals have been found

[88] *Ananyev and others v. Russia*, no. 42525/07, §197, ECHR 2012

[89] SNACKEN, S., A Reductionist Penal Policy and European Human Rights Standards, *European Journal on Criminal Policy and Research* (2006) 12, p. 157

[90] The doctrine has found it perplexing that a choice between different types of punishment or measures that balances their relative severity has not been seen by the Court as necessary under Article 5. Particularly as such balancing of different possible forms of intervention is required in principle for Articles 8 to 11 of the ECHR (the rights to respect for private and family life, to freedom of conscience and religion, to freedom of expression, and to freedom of association). This is surprising, as the right to

prisoner's particular circumstances amounted to a violation of Article 5 of the Convention generally does not evaluate whether the most appropriate sanction or measure was imposed[91]. Rather, the Court leaves the choice between a custodial and a non-custodial sanction, for example, to national authorities[92] since on the basis of the principle of subsidiarity, national authorities are seen as best placed to decide which sanctions should be possible for which offences[93].

Yet this reading of the principle of subsidiarity does not preclude the Court from assessing whether national courts, when deciding whether a person should be released or detained, considered more lenient preventive measures of ensuring his appearance at trial. Such verification has always been compelling since Article 5§3 lays down not only the right to "trial within a reasonable time or release pending trial" but also provides that "release may be conditioned by guarantees to appear for trial". According to the Court's interpretation, that provision does not give the judicial authorities a choice between either bringing the accused to trial within a reasonable time or granting him provisional release – even subject to guarantees. Until conviction he must be presumed innocent and the purpose of Article 5§3 is essentially to require his provisional release once his continuing detention ceases to be reasonable[94].

Though it has always been a requirement, in recent times the jurisprudence of the Court seems to be increasingly stressing the need for careful and complete investigation by national courts of alternative measures of ensuring appearance at trial, including the need for justifying in their decisions why such alternatives were considered not suitable. For example in Khodorkovskiy v. Russia[95] the Court uses a more vigorous language for reminding national authorities of their obligation under Article 5§3 of considering alternative preventive measures:

"The Court observes that at no point during the whole period of the applicant's detention did the District Court or City Court take the trouble to explain why it was

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individual liberty enshrined in Articles 5 is an even more fundamental right than the rights guaranteed by arts. 8–11, and the national margin of appreciation is not even applicable.
If the interpretation given to Articles 8-11 in recent case-law (Hatton v. UK) was to be transferred to Article 5 this would mean that states in their legislation and judges in their sentencing should systematically "try to find alternative solutions ... to achieve their aims in the least onerous way as regards human rights", i.e. they should evaluate systematically whether shorter sentences and alternative sanctions might not attain the same aims.
SNACKEN, S., A Reductionist Penal Policy and European Human Rights Standards, *European Journal on Criminal Policy and Research* (2006) 12, p. 159-160

[91] It is not for the Court, within the context of Article 5 (art. 5), to review the appropriateness of the original sentence (*Weeks v. the United Kingdom*, no. 9787/82, § 50, ECHR 1987-A114)

[92] The length of the sentences and the possibility of early release is also a matter for national legislation. However, both issues lay outside the scope of the present report, focused on pre-trial detention.

[93] As the Court has stated it is not its task to take the place of the national authorities ruling on the applicants' detention. It falls to them to examine all the facts arguing for or against detention and set them out in their decisions. See *Nikolov v. Bulgaria*, no. 38884/97, § 74, ECHR 2003

[94] See *Neumeister v. Austria*, no. 1936/63, §3-4, ECHR 1968-A8 and *Jablonski v. Poland*, no.33492/96, §83, ECHR 2000

[95] *Khodorkovskiy v. Russia (no.1)*, no. 5829/04, §§ 194-197, ECHR 2014

impossible to apply bail or house arrest to the applicant, or to accept 'personal sureties'...There is no single standard of reasoning in those matters, and the Court is prepared to tolerate an implicit rejection of the alternative measures at the initial stages of the investigation. However, the time that had elapsed since the applicant's arrest should have given the authorities sufficient time to assess the existing options, to make practical arrangements for their implementation, if any, or to develop more detailed arguments as to why alternative measures would not work. Instead, the Russian courts simply stated that the applicant could not be released ...Further, the context of the case was not such as to make the applicant obviously "non-bailable"... The applicant was accused of a number of non-violent crimes; he did not have any criminal record and he lived permanently with his family in Moscow, where he had his main business interests...In sum, the domestic courts ought to have considered whether other, less intrusive, preventive measures could have been applied, and whether they were capable of reducing or removing completely the risks of fleeing, re-offending or obstructing justice. Their failure to do so seriously undermines the Government's contention that the applicant had to be detained throughout the whole period under consideration" [96]

However, the Court seems to view the verification of whether national authorities considered alternative non-custodial measures as if it was one more item within a check-out list for assessing the reasonableness of the detention[97] and does not further assess if those preventive measures would have suited best, that is, would have been the least onerous sanction with regard to the rights and freedoms of the offender. Some voices among the doctrine long for such an approach, one where the Court would deal with the substantive aspects, one which would be more in tune with the requirements of proportionality[98]. Not just doctrine, but even dissenting opinions within the Court's case-law endorse it too: « il convient d'examiner la légalité de détention provisoire en tenant compte de l'ensemble des options disponibles pour l'État qui doit choisir la voie

[96] See also: *Khudoyorov v. Russia*, no. 6847/02, § 184, ECHR 2005-X; *Lelievre c. Belgique*, no. 11287/03, §§10197-104, ECHR 2007; *Sulaoja v. Estonia*, no. 55939/00, §64, ECHR, 2005; *Jablonski v. Poland*, no.33492/96, §84, ECHR 2000

[97] See for example Pastukhov and Yelagin v Russia where the Court considers that "by relying essentially on the gravity of the charges, by failing to substantiate their finding by pertinent specific facts or to consider alternative preventive measures and by shifting the burden of proof to the applicants, the authorities extended their detention on grounds which, although "relevant", cannot be regarded as sufficient to justify its duration of two years and eight months and two years and eleven months respectively. In these circumstances it would not be necessary for the Court to examine whether the domestic authorities acted with special diligence". *Pastukhov and Yelagin v Russia*, no. 55299/07, §50, ECHR 2013

[98] SNACKEN defends that "throughout the process of criminalisation, prosecution, sentencing and implementation of sentences, the State must systematically balance the different rights and freedoms involved. Only the least invasive decision can be considered legitimate and proportionate. Legislators and judges should refrain from the automatic application of deprivation of liberty, and should have regard to research results concerning the effects of different sanctions on different penal aims. In every sentencing or early release case, the choice of sanction should be the object of a debate, in which it is up to the prosecutor to demonstrate that a longer prison sentence is necessary or that a fine or a community sanction is insufficient. It should no longer be up to the suspect to prove that he "deserves" a non-custodial sanction, as is usually the case now. The European Court for Human Rights could then supervise whether such a balancing exercise has taken place (procedural guarantee) and has led to the least intervening sanction or measure as regards human rights (substantive aspect)."

la moins restrictive pour les droits de l'inculpé. Le droit à la liberté et à la sûreté garanti, dans une société démocratique, par l'article 5 de la Convention revient à admettre seulement les privations de liberté strictement nécessaires »[99]. However, this dissenting opinion seems not to have been echoed in other decisions.

CONCLUSIONS:

Detention has been construed as an exceptional departure from the right to liberty and one that is only permissible in exhaustively enumerated and strictly defined cases[100]. The principle of "imprisonment as a last resort" is thus embedded within Article 5.

The Court's case-law when applying Article 5 does not advocate for each and every aspect of a reductionist policy. It has not pronounced itself on the positive or negative effects of imprisonment. This question raises issues that seem to exceed the Court's judicial function.

The Court has, however, openly and clearly expressed its intolerance towards prison overcrowding and considers it can amount to a violation of Article 3. The Court has found a close affinity between the problem of prison overcrowding and an excessive length of pre-trial detention (which has been found by the Court to violate Article 5). The Court's conclusion is that the solution of the problem of overcrowding of detention facilities is indissociably linked to the solution of the problem of the excessive length of pre-trial detention.

Prison overcrowding is closely linked as well to the third characteristic of a reductionist policy: non expansion of prison capacity. The Court has stand for the reduction of the number of incarcerated people, particularly of remand prisoners, and has suggested limiting the use and length of remand custody, as well as the effective application of non-custodial measures. The Court has also expressed its distrust towards the creation of new places of detention.

These two aspects of a reductionist policy (prison overcrowding and non expansion of prison capacity) have been advocated by the Court within the framework of a pilot or quasi-pilot procedure under Article 46. In some judgments it has done so in a veiled way, in others more vehemently. In those judgments where the Court decides on a case-by-case basis whether a prisoner's particular circumstances amounted to a violation of the Convention it has usually opted for a more conservative course of action and has stick to the so-called "proceduralisation of substantive rights".

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[99] *Bouchet c. France*, no. 33591/96, Opinion dissidente de Mme la juge Tulkens à laquelle se rallient MM. les juges Loucaides et Sir Nicolas Bratza, ECHR 2001

[100] *Ilijkov v. Bulgaria*, no. 33977/96, §§ 84-85, ECHR 2001

ANNEX I

ARTICLE 5§3 AND ARTICLE 35§1

Article 5§3 "the reasonableness of the length of detention":

Generally, the rule is that when determining whether the length of detention pending trial under Article 5 § 3 of the Convention has been "reasonable", the period to be taken into consideration begins on the day the accused is taken into custody and ends on the day when the charge is determined, even if only by a court of first instance, or, when the applicant is released from custody pending criminal proceedings against him/her[101]

Article 35§ 1 "the six-month time limit rule for lodging application":

As a rule, the six-month period runs from the date of the final decision in the process of exhaustion of domestic remedies. Where no effective remedy is available to the applicant, the period runs from the date of the acts or measures complained of, or from the date of the knowledge of that act or its effect on or prejudice to the applicant[102]

Issues have arisen as regards **multiple non-consecutive periods of pre-trial detention**, as well as in cases featuring a **"continuing situation"**. The Court has pronounced itself on these issues along the following lines:

A. Multiple non-consecutive periods of pre-trial detention:

When pre-trial detention consists of several and distinct periods, the question is whether to assess them cumulatively or not, since going for one or the other alternative will make a difference in relation to the six-month time limit.[103]

The Court's case-law[104] has developed along two lines of reasoning as regards the application of the six-month rule to multiple non-consecutive periods of pre-trial detention.

(i) The Neumeister approach

The issue first arose in the case of Neumeister, where the applicant was subjected to two periods of pre-trial detention, the first from 24 February 1961 to 12 May 1961, and the second from 12 July 1962 to 16 September 1964. The Court considered that the six-

[101] *Labita v. Italy*, no.26772/95, §§ 145 and 146, ECHR 2000-IV
[102] *Dennis and Others v. the United Kingdom* (dec.), no. 76573/01, ECHR 2002
[103] In other words, is the applicant required to lodge the complaint concerning the length of pre-trial detention within six months of being released from the first period spent in pre-trial custody, or being released for a significant period pending trial has the effect of starting the six-month period referred to in Article 35 § 1 in respect of the first part of the applicant's pre-trial detention?
[104] See *Ananyev and others v. Russia*, no. 42525/07, §§ 67-83, ECHR 2012

month time-limit precluded it from expressing any opinion on whether the length of the applicant's first period of detention was "reasonable". However, it added that the first period should nevertheless be "taken into account" when assessing the reasonableness of the second period. [105]

(ii) The global approach

In subsequent cases the Court took a different approach to the calculation of the relevant period. However, it did so without giving reasons for its departure from Neumeister. In the case of Kemmache v. France the Court simply calculated the multiple periods as a whole and did not consider the question of the application of the six-month rule as it had originally done in Neumeister.[106] However, although the Court referred to the total length of the first two periods of the applicant's pre-trial detention, it proceeded to examine separately the length of each distinct period. In cases subsequent to Kemmache, the Court proceeded with the same approach and remained silent as to the application of the six-month rule. For example, in Mitev v. Bulgaria the Court stated: "Where an accused person is detained for two or more separate periods pending trial, the reasonable time guarantee of Article 5 § 3 requires a global assessment of the cumulated period"[107]. The Court also adopted this approach in Kolev v. Bulgaria, where it assessed as a whole four separate periods of detention pending trial, notwithstanding the fact that the first period had ended more than six months before the application had been lodged with the Court[108].

(iii) Return to the Neumeister approach

More recently, however, the Court returned to the Neumeister approach and had regard to the application of the six-month rule in situations of non-consecutive periods of detention. For example, in the case of Bordikov[109], the question was examined by the Court at some length. Thereby, as in the case of Neumeister, the applicant's detention was broken up into several non-consecutive periods. He was released twice during the trial and awaited the determination of the criminal charges against him while at liberty. The Court did not add up, or consider as a whole the separate periods of the applicant's pre-trial detention for the purposes of calculating its length. Thus, in accordance with the six-month rule, only the fourth period of the applicant's pre-trial detention was examined by the Court in its assessment of his complaint under Article 5 § 3 of the

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[105] *Neumeister v. Austria*, no. 1936/63, § 6, ECHR 1968-A8

[106] The applicant underwent four periods of detention on remand: from 16 February to 29 March 1983, from 22 March 1984 to 19 December 1986, from 11 June to 10 August 1990, and from 14 March to 25 April 1991. Yet the complaints were brought on 1 August 1986 and 28 April 1989. Hence, had the six-month rule been applied, it would certainly have precluded the examination of the first pre-trial detention period (See Kemmache v. France (no. 1 and no. 2), no. 12325/86, § 44, ECHR 1991 A-218)

[107] *Mitev v. Bulgaria*, no. 40063/98, §102, ECHR 2004; See also *Mironov v. Bulgaria*, no. 30381/96, § 67, ECHR 2007; and *Vaccaro v. Italy*, no. 41852/98, §§ 31-33, ECHR 2000)

[108] *Kolev v. Bulgaria*, no. 50326/99, ECHR 2005

[109] *Bordikov v. Russia*, no. 921/03, ECHR 2009

Convention. Following Bordikov, the Court found in several cases that it could not take into consideration periods of pre-trial detention which had ended more than six months before the the application had been lodged[110]

(iv) Harmonisation of the approach to be taken

Against this background of divergences in the case-law concerning the application of the six-month rule in the context of assessing the reasonableness of the duration of pre-trial detention, the Court considered there was a need for adopting a uniform and foreseeable approach in all cases in order to better serve the requirements of justice.

It did so in the case Idalov v. Russia[111], where it stated that in circumstances where an accused person's pre-trial detention is broken into several non-consecutive periods and where applicants are free to lodge complaints about pre-trial detention while they are at liberty, those non-consecutive periods should not be assessed as a whole, as was done in Kemmache, but separately, according to the original approach adopted in Neumeister and developed subsequently in Bordikov. Therefore, and according to this approach, periods of pre-trial detention which end more than six months before an applicant lodges a complaint before the Court cannot be examined, having regard to the provisions of Article 35 § 1 of the Convention. However, where such periods form part of the same set of criminal proceedings against an applicant, the Court, when assessing the overall reasonableness of detention for the purposes of Article 5 § 3, can take into consideration the fact that an applicant has previously spent time in custody pending trial.

The reasons given by the Court for finally adopting the Neumeister approach can be listed as follows:

1. In the Court's view, on the one hand, the Neumeister approach respects more fully the purposes of the six-month rule as it marks out the temporal limits of supervision carried out by the organs of the Convention and signals to both individuals and State authorities the period beyond which such supervision is no longer possible. On the other hand, in reflecting the wish of the Contracting Parties to prevent past decisions being called into question after an indefinite lapse of time, it also serves the interests of legal certainty.
2. Moreover, the Court considers that the Neumeister approach faithfully respects the intention of the Contracting Parties vis-à-vis the six-month rule, whilst simultaneously permitting it, in the interests of justice, to have regard to prior periods of time spent in custody (in connection with the same criminal

[110] *Vladimir Krivonosov v. Russia*, no. 7772/04, § 127, ECHR 2010; *Kovaleva v. Russia*, no. 7782/04, § 71, ECHR 2010; and *Svetlana Kazmina v. Russia*, no. 8609/04, § 85, ECHR 2010
[111] *Idalov v. Russia*, no.5826/03, §§127-133, ECHR 2012

proceedings) in its assessment of the overall reasonableness of pre-trial detention.[112]

3. The Neumeister approach also provides the Court with the requisite degree of flexibility to deal with a variety of situations which might arise in the context of pre-trial detention. For instance, if an applicant is repeatedly taken into custody pending trial, albeit for relatively short periods of time, the Court will not be precluded from finding that, against the background of a number of previous periods of detention, the length of the final period – though brief in itself – may nevertheless be unreasonable.
4. Finally, the Neumeister approach may have the added benefit of promoting the more expeditious conduct of criminal trials at domestic level. If an application for pre-trial detention is made in circumstances where previous periods of such detention are the subject matter of a complaint before this Court, domestic courts may be more likely to pay particular attention to the time it is taking for the prosecuting authorities to bring an accused to trial. It is also more probable that, in such circumstances, they will ensure that detailed and careful scrutiny is carried out and that relevant and sufficient justification is advanced before granting any further orders permitting pre-trial detention.

B. "Continuing situation"

The concept of a "continuing situation" refers to a state of affairs in which there are continuous activities by or on the part of the State which render the applicant a victim.[113] In cases featuring a "continuing situation", the six-month period runs from the cessation of that situation[114]

Complaints which have as their source specific events which occurred on identifiable dates cannot be construed as referring to a continuing situation[115]. However, in the event of a repetition of the same events, such as an applicant's transport between the remand prison and the courthouse, even though the applicant was transported on specific days rather than continuously, the absence of any marked variation in the conditions of transport to which he had been routinely subjected created, in the Court's view, a "continuing situation" which brought the entire period complained of within the Court's competence[116]. Similarly, in a situation where the applicant's detention in the police ward was not continuous but occurred at regular intervals when he was brought there for

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[112]The Court adopted a similar line of reasoning in its assessment of complaints concerning the "reasonable time" requirement of Article 6. In certain cases, part of such a complaint may be inadmissible ratione temporis and the Court is precluded from examining a period which falls outside its competence. Nevertheless, when assessing a period which falls within its competence the Court may take into account the fact that proceedings had already been pending prior to ratification of the Convention by the respondent State concerned (see, among numerous authorities, *Kudła v. Poland*, no. 3021/96 § 123, ECHR 2000-XI).

[113] *Posti and Rahko v. Finland*, no. 2782/95, § 39, ECHR 2002VII

[114] *Seleznev v. Russia*, no. 15591/03, § 34, ECHR 2008

[115] *Nevmerzhitsky v. Ukraine*, no. 54825/00, ECHR 2005-II (extracts)

[116] *Vlasov v. Russia*, no. 78146/01, ECHR 2008

an interview with the investigator or other procedural acts, the Court accepted that in the absence of any material change in the conditions of his detention, the breaking-up of his detention into several periods was not justified[117] In another case, the applicant's absence from the detention facility for carrying out a certain procedural act did not prevent the Court from recognising the continuous nature of his detention in that facility[118]. Nevertheless, where an applicant was released but subsequently re-detained, the Court limited the scope of its examination to the later period[119]

An applicant's detention in the domestic system is rarely effected within the confines of the same facility: usually he or she would spend a few first days in the police custody, move later to a remand prison during the investigation and trial and, if convicted, begin to serve the sentence in a correctional colony. Different types of detention facilities have different purposes and vary accordingly in the material conditions they can offer. Thus, temporary detention wings located inside police stations are designed for short-term custody only and often lack the amenities indispensable for prolonged detention, such as a toilet, sink, or exercise yard, whereas in correctional colonies – in contrast to remand prisons – the restricted space in the dormitories is compensated for by the freedom of movement enjoyed by the detainees during the day-time. The difference in material conditions of detention creates the presumption that an applicant's transfer to a different type of facility would require the submission of a separate complaint about the conditions of detention in the previous facility within six months of such transfer[120]. Only in a few exceptional cases, having regard to the allegation of severe overcrowding as the main characteristic of the detention conditions in both facilities, has the Court recognised the existence of a "continuous situation" encompassing the applicant's stay both in police custody and in the remand prison[121]

As long as the applicant stays within the same type of detention facility, and provided the material conditions have remained substantially the same, it matters not that he or she was transferred between cells or wings within the same remand prison, from one remand prison to another within the same region or even to a remand prison in a different region. Nevertheless, a significant change in the detention regime, even where it occurs within the same facility, has been held by the Court to put an end to the "continuous situation" as described above and the six-month time-limit would thus be calculated from that moment: this would be the case for instance where the applicant

[117] *Nedayborshch v. Russia*, no. 42255/04, § 25, ECHR 2010
[118] See *Romanov v. Russia*, no. 63993/00, § 73, ECHR 2005, where the applicant spent one month out of the remand prison in a psychiatric institution
[119] See *Belashev v. Russia*, no. 28617/03, § 48, ECHR, 2008; *Grishin v. Russia*, no. 30983/02, § 83, ECHR 2007; and *Dvoynykh v. Ukraine*, no. 72277/01, § 46, ECHR 2006
[120] See *Volchkov v. Russia*, no. 45196/04, § 27, ECHR 2010; *Gultyayeva v. Russia*, no. 6741/01, § 148, ECHR 2010; *Maltabar and Maltabar v. Russia*, no. 6954/02, §§ 82-84, ECHR 2007; and *Nurmagomedov v. Russia*, no.30138/02, ECHR 2007
[121] See *Lutokhin v. Russia*, no. 12008/03, §§ 40-42, ECHR 2010; *Seleznev v. Russia*, no.15591/03, § 36, ECHR 2008; and *Guliyev v. Russia*, no.25650/02, § 33, ECHR 2008

has moved from a communal cell to solitary confinement[122] or from an ordinary cell to the hospital wing.

The Court's approach to the application of the six-month rule to complaints concerning the conditions of an applicant's detention may therefore be summarised in the following manner: a period of an applicant's detention should be regarded as a "continuing situation" as long as the detention has been effected in the same type of detention facility in substantially similar conditions. Short periods of absence during which the applicant was taken out of the facility for interviews or other procedural acts would have no incidence on the continuous nature of the detention. However, the applicant's release or transfer to a different type of detention regime, both within and outside the facility, would put an end to the "continuing situation". The complaint about the conditions of detention must be filed within six months from the end of the situation complained about or, if there was an effective domestic remedy to be exhausted, of the final decision in the process of exhaustion.

[122] *Zakharkin v. Russia*, no. 1555/04, § 115, ECHR 2010