



Research seminar VUB –  
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# ***Pre-trial detention in Belgium: looking for solutions to overcrowded prisons***

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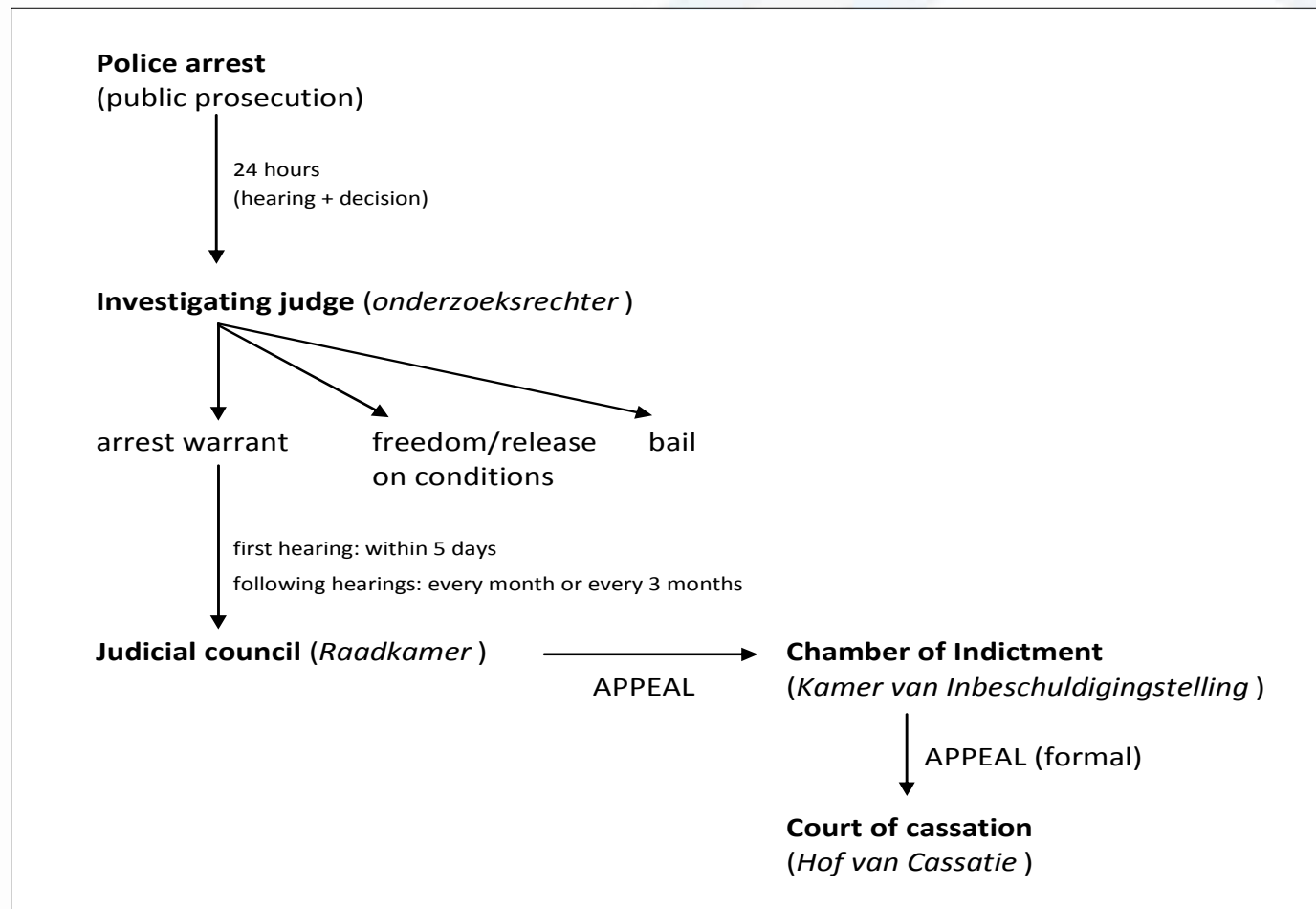
# Pre-trial detention: legal framework

- ❑ Criteria for the application of **remand custody** (art. 16 Pre-Trial Detention Act, 20<sup>st</sup> of July 1990)
  - Serious indications of guilt
  - Absolute necessity for public security
  - Criminal act punishable with prison sentence of *one year* or more
  - In case of a maximum prison sentence of 15 years or less (*additional grounds*):
    - Risk of recidivism
    - Risk of absconding
    - Risk of embezzlement of proof
    - Risk of collusion
- ❑ **Alternatives** (*cf.* freedom/release under conditions - bail): *same criteria* as for remand custody
- ❑ **Duration** of remand custody detention/alternatives
  - Arrest warrant (remand custody): valid for one month (renewable), in some cases 3 months --- no absolute maximum length of remand custody
  - Freedom/release under conditions: max. 3 months, renewable





# Pre-trial detention: procedure





# Prison population and pre-trial detention: some figures

## □ Evolution of the prison population in Belgium:

### Overall

- Between 1951 – 2010: from 4,300 in 1951 to more than 10,500 in 2010 (average daily population)
- Belgium in a European perspective: prisoner rate per 100,000 inhabitants (101.4) or 93.1 (without EM)

### Remand prisoners

- Between 1980-2009: more than doubled (but stabilisation during the last years: ± 3,500)
- Belgium in a European perspective

## □ Prison overcrowding

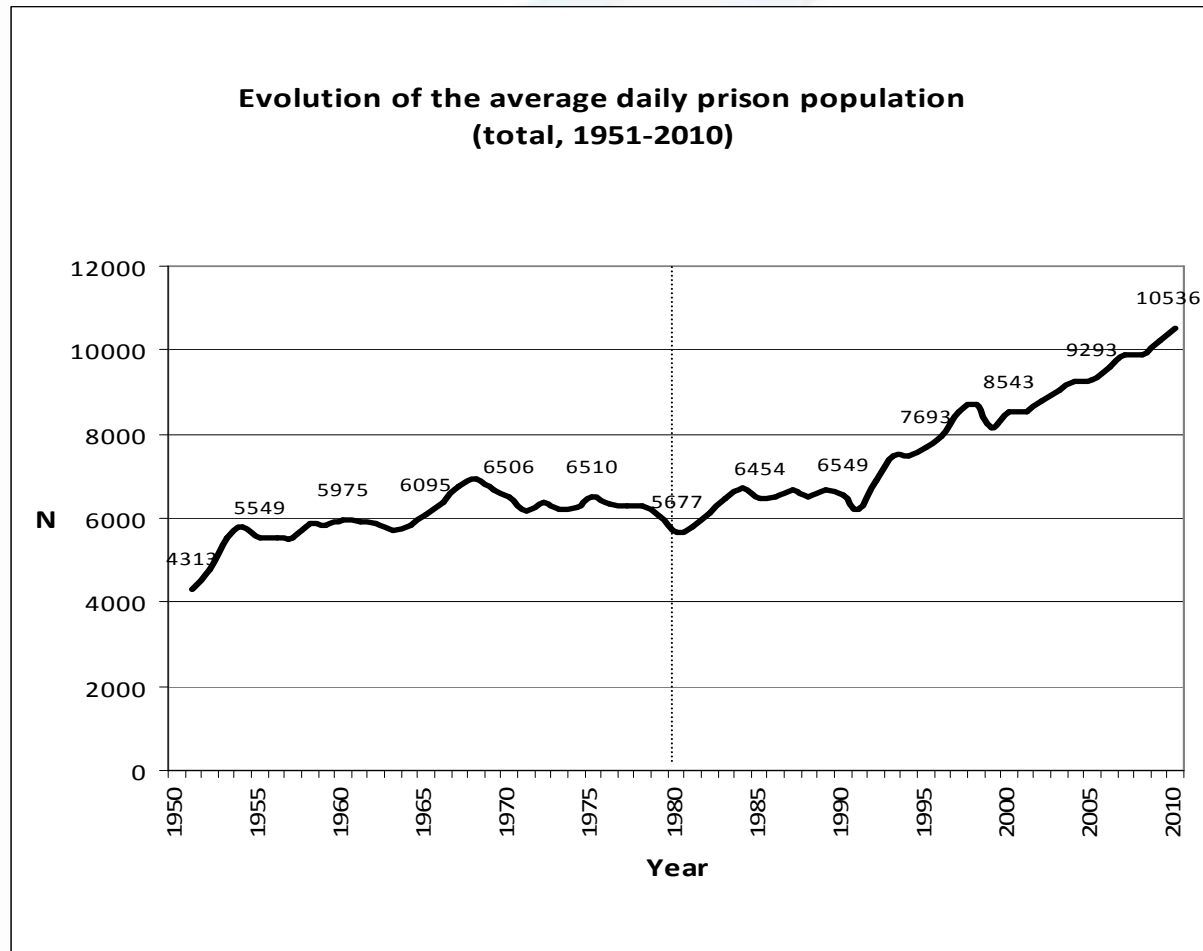
- Average daily prison population in 2010 (10,536) ↔ average prison capacity (8,950)  
⇒ over-occupancy rate 17%
- Prison density: 123.4 prisoners per 100 places (one of the highest in Europe)
- But not all prisons (mainly largest remand centres, with some of them more than 50%)

## □ Evolution of alternatives to pre-trial detention: increase of incarcerations (arrest warrant) and alternatives for pre-trial detention (freedom/release on conditions, 1995-2009)



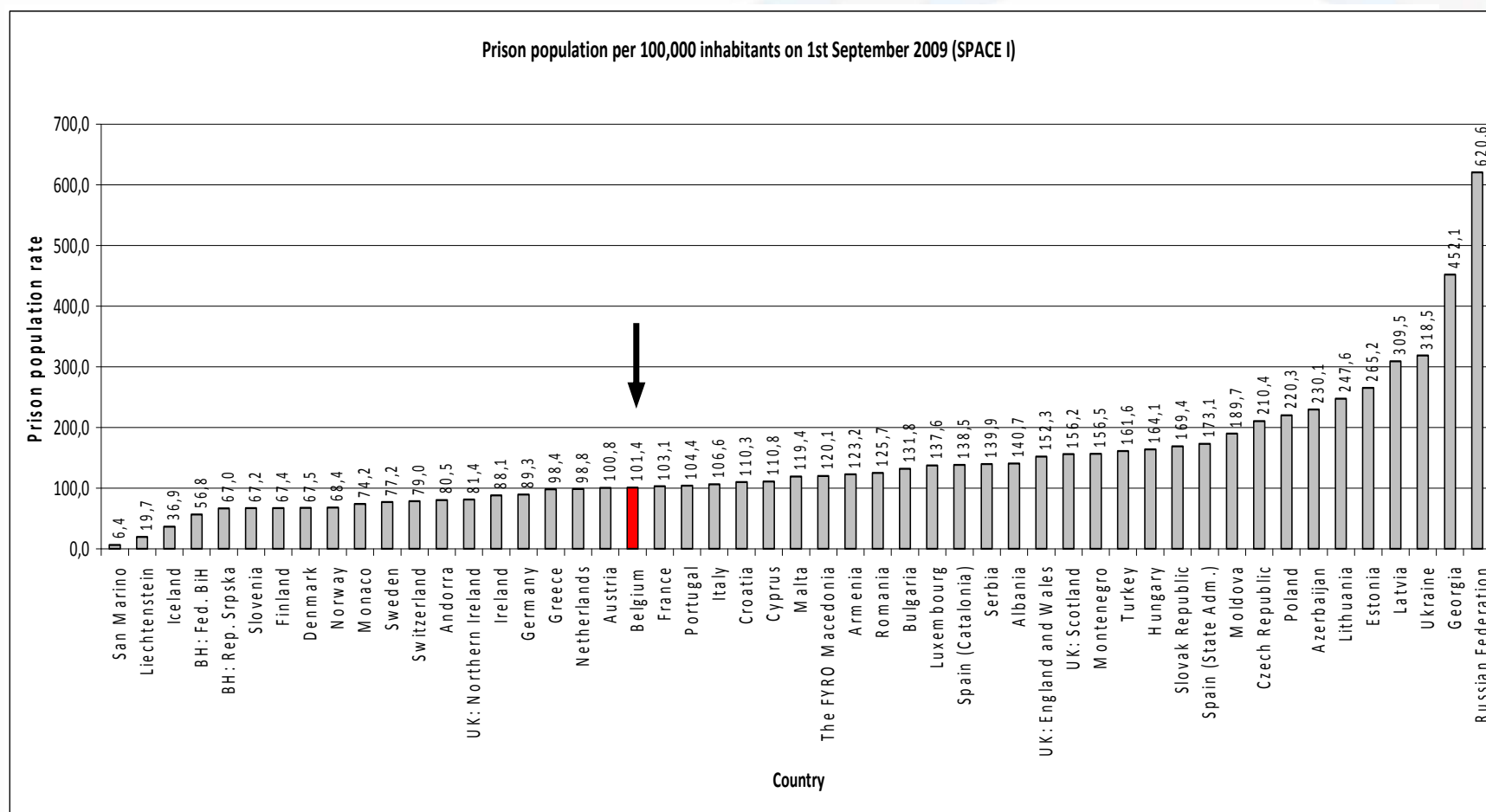


## Prison population (total): some figures (Belgium)





# Prison population (total): some figures (Europe)





# Prison population and pre-trial detention: some figures

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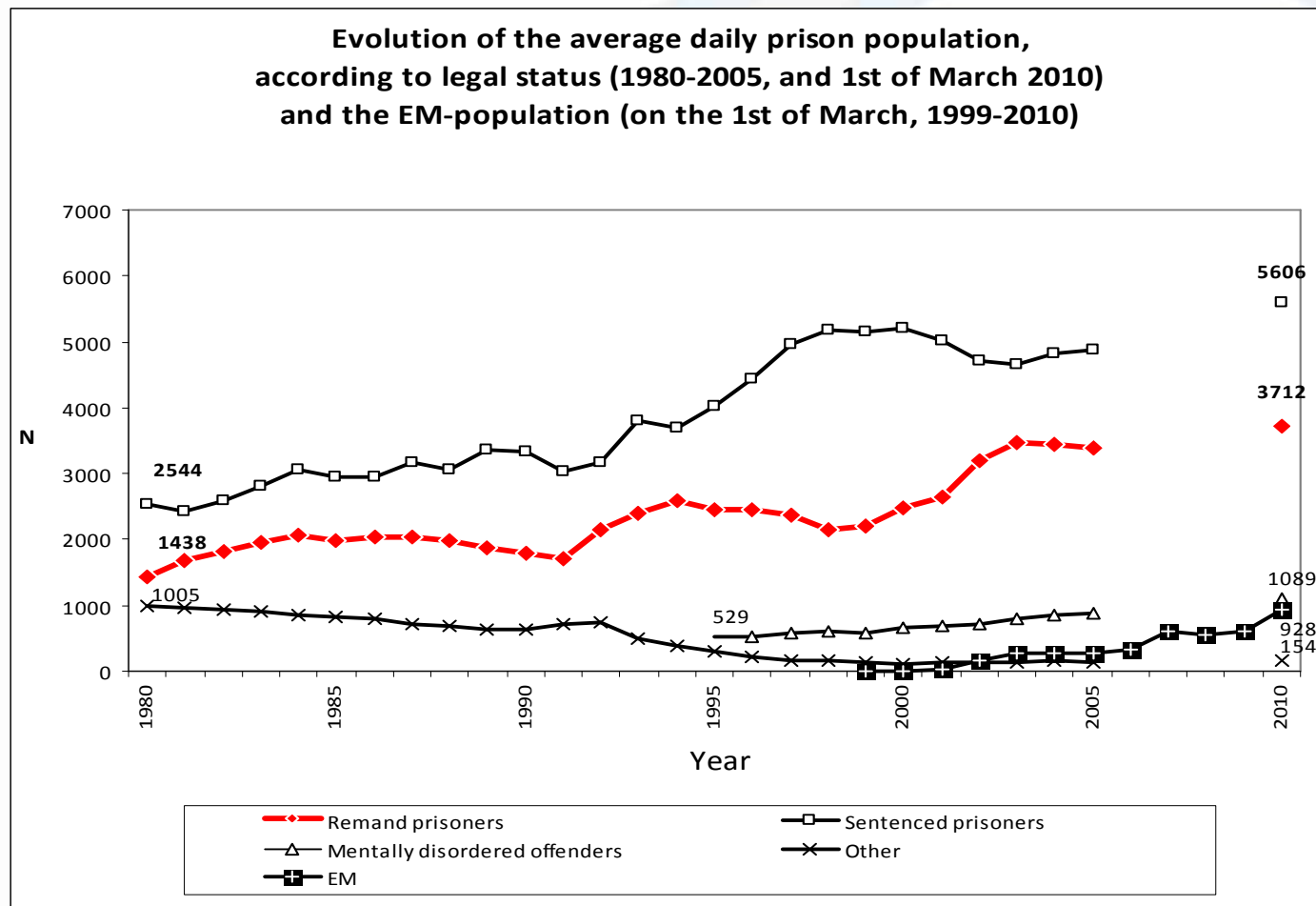
- Average prison population in 2010 (10,536)  $\leftrightarrow$  average prison capacity (8,950)  
 $\Rightarrow$  over-occupancy rate 17%
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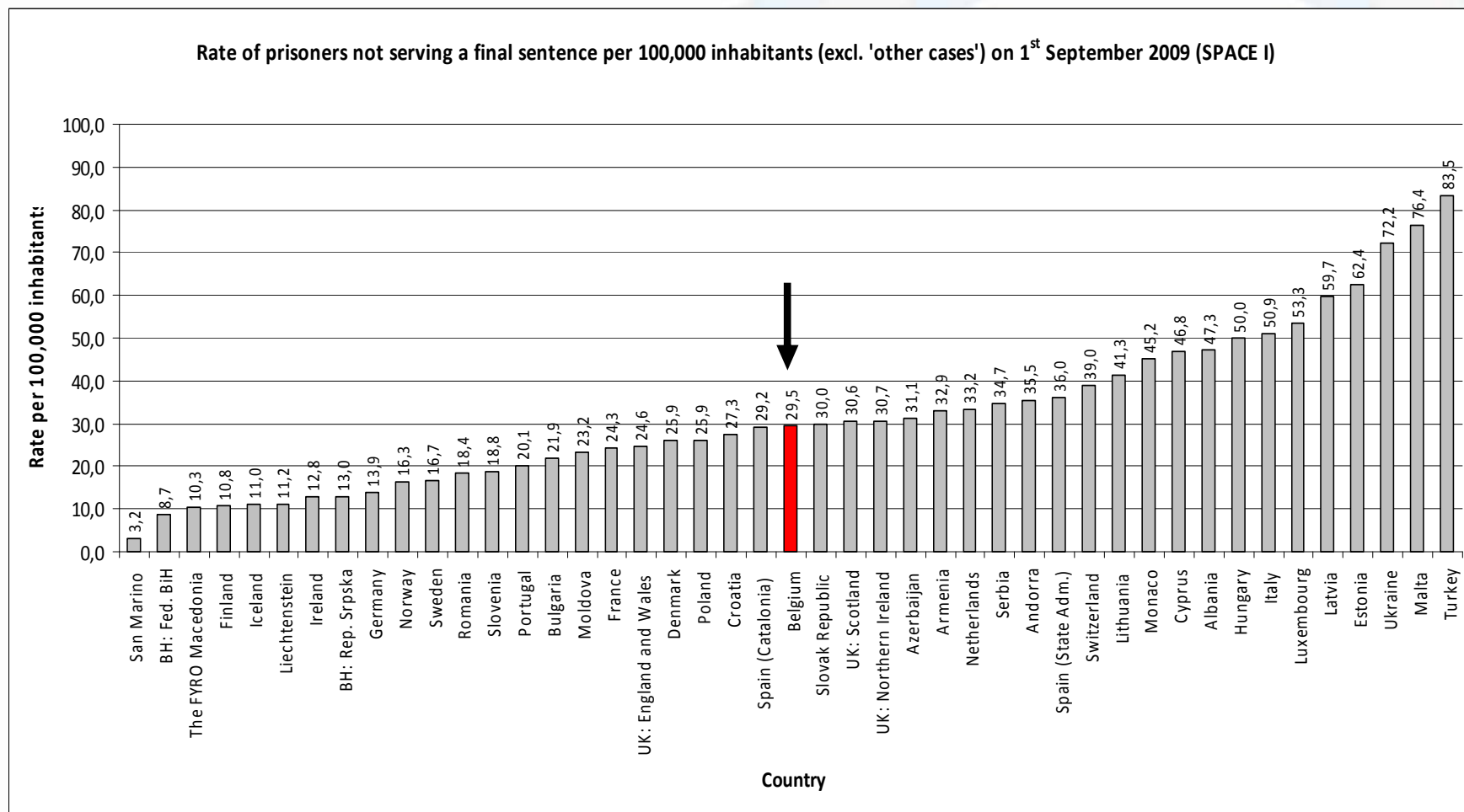
# Prison population and pre-trial detention (remand prisoners): some figures (Belgium)







# Prison population and pre-trial detention (remand prisoners): some figures (Europe)





# Prison population and prison overcrowding: some figures

## □ Evolution of the prison population in Belgium:

### Overall

- Between 1950 – 2009: from 4,300 in 1951 to more than 10,500 in 2010 (average daily population)
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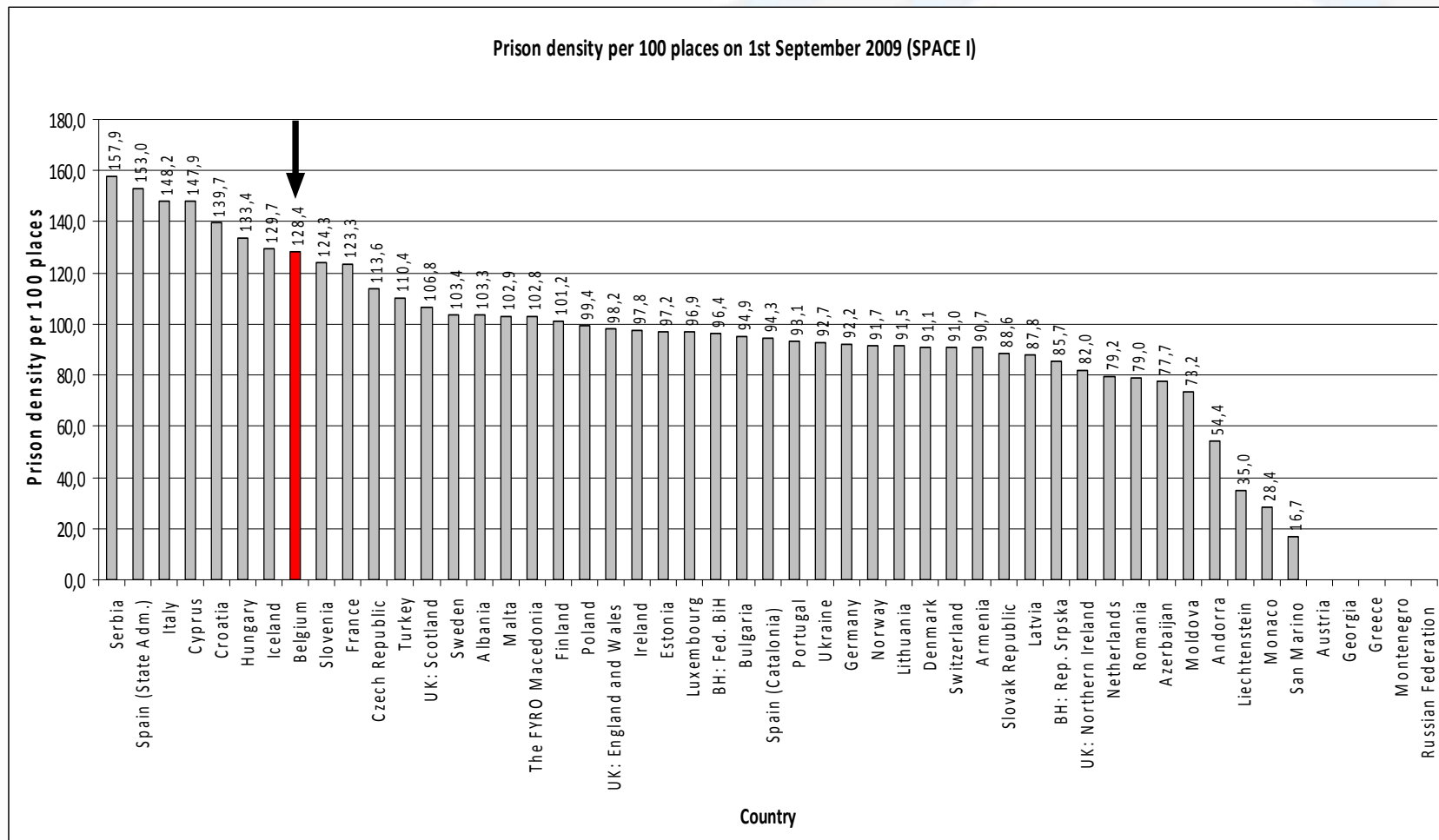
- **Average prison population in 2010 (10,536) ↔ average prison capacity (8,950):**  
⇒ **over-occupancy rate 17%**
- Prison density: 128.4 prisoners per 100 places (one of the highest in Europe)
- But not all prisons (mainly largest remand centres, with some of them more than 50% overcrowding)

## □ Evolution of alternatives to pre-trial detention: increase of incarcerations (arrest warrant) and alternatives for pre-trial detention (freedom/release on conditions, 1995-2009)



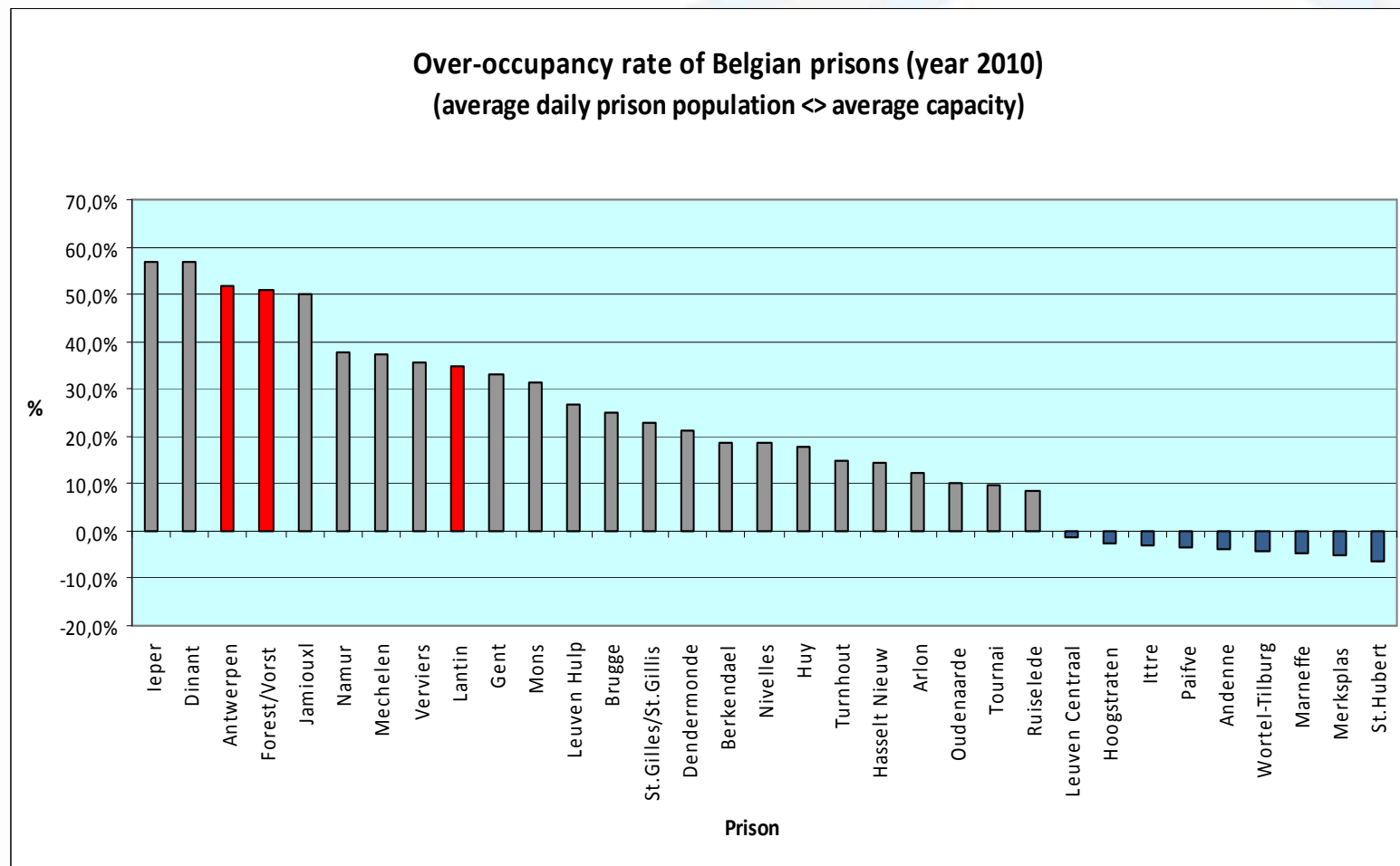


# Prison population and prison overcrowding: some figures (Europe)





# Prison population and prison overcrowding: some figures (Belgium)





# Prison population and pre-trial detention: some figures

## □ Evolution of the prison population in Belgium:

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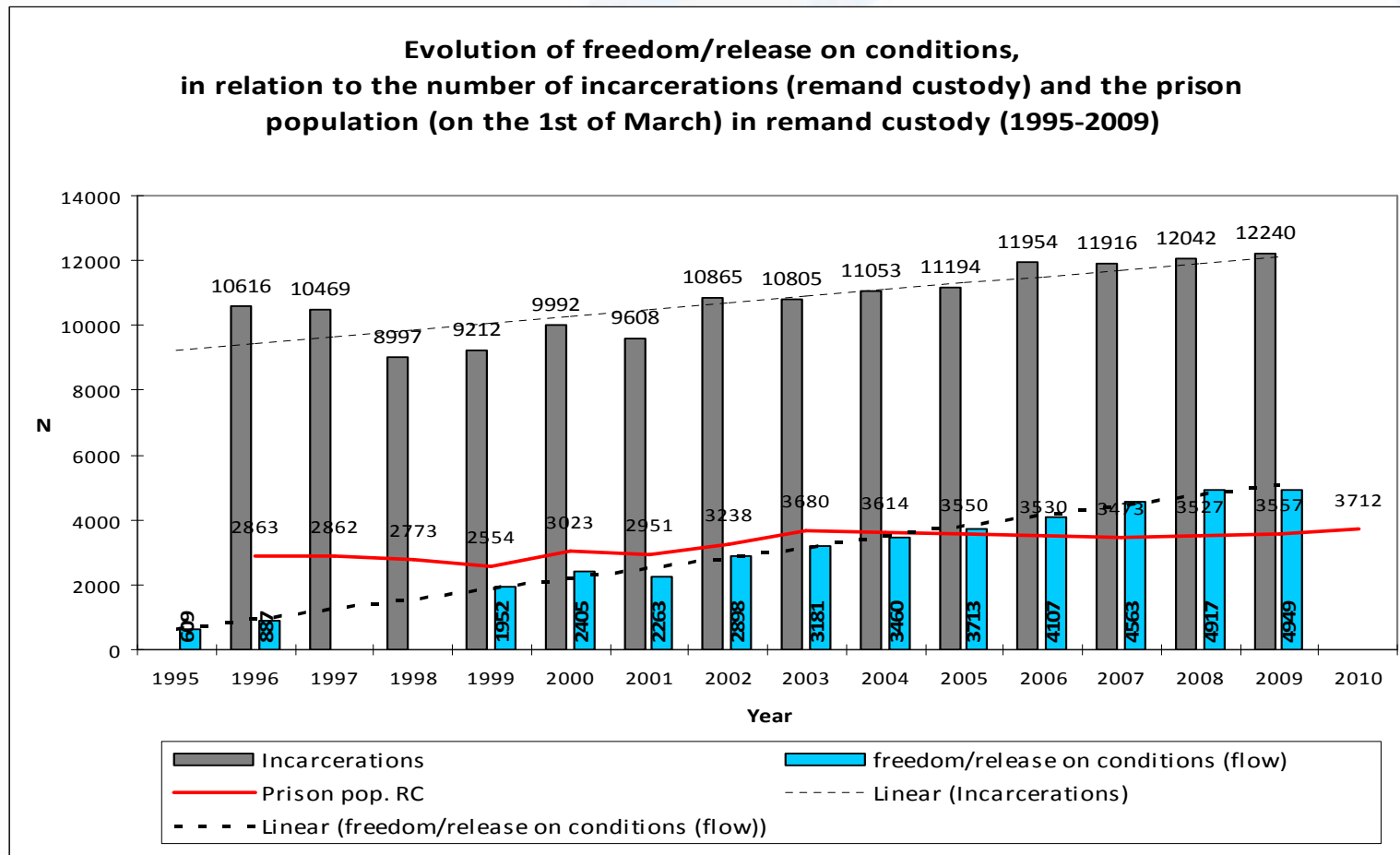
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- > But not all prisons (mainly largest remand centres, with some of them more than 50%)

## □ Evolution of alternatives to pre-trial detention: increasing numbers of incarcerations (arrest warrant) **AND** of alternatives for pre-trial detention (freedom/release on conditions, 1995-2009)





## Pre-trial detention and alternatives: some figures (Belgium)





## Pre-trial detention and alternatives: some recent research topics

1. Threshold for application of pre-trial detention (Marc Verwilghen, 2001)
2. Exhaustive lists of offences ('positive' vs. 'negative' list) (Laurette Onkelinx, 2004-2005)
3. Duration of pre-trial detention (Marc Verwilghen, 2001, Laurette Onkelinx, 2004-2005)
4. Electronic monitoring as an alternative to pre-trial detention (Jo Vandeurzen/Stefaan De Clerck, 2009)



# I. Increasing the threshold for the application of pre-trial detention





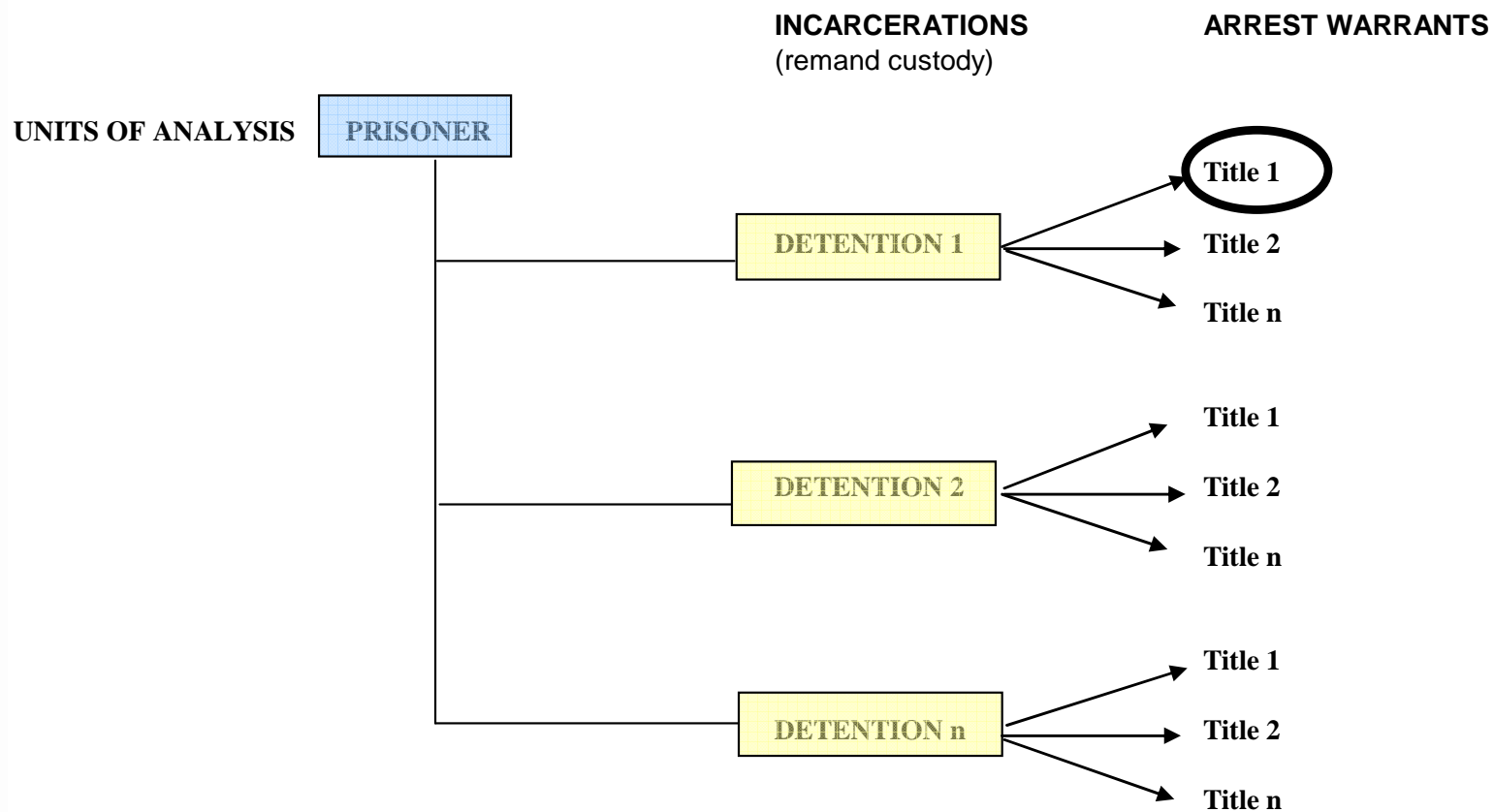


# I. Threshold: research question and methodology

- ❑ Threshold for the application of pre-trial detention (possible sentence length)
  - ❑ Actual situation:  $\geq 1$  year of imprisonment
  - ❑ Simulation research ( $\geq 3$  years)
- ❑ Data: pre-trial detention 1998 (source: database SIDIS)
- ❑ Unit of analysis: number of incarcerations (as pre-trial detainee)



# I. Threshold: methodology





## I. Threshold: evaluation

- ☐ Hypothetical reduction of the number of incarcerations with 3% (year 1998)→ thus, almost **no effect on the prison population (remand custody)**
- ☐ Automatism that risks to conflict with **other interests** protected by the legislator (cf. 'assault and battery' <> avoiding recidivism/protection of victims)
- ☐ Possible **'perverse' effect**: increasing the maximum penalty for certain offences

=> Differentiated 'thresholds'?



## 2. Construction of (positive/negative) lists of offenses





## 2. List of offences: research question and methodology

### ☐ Introduction of lists of offenses:

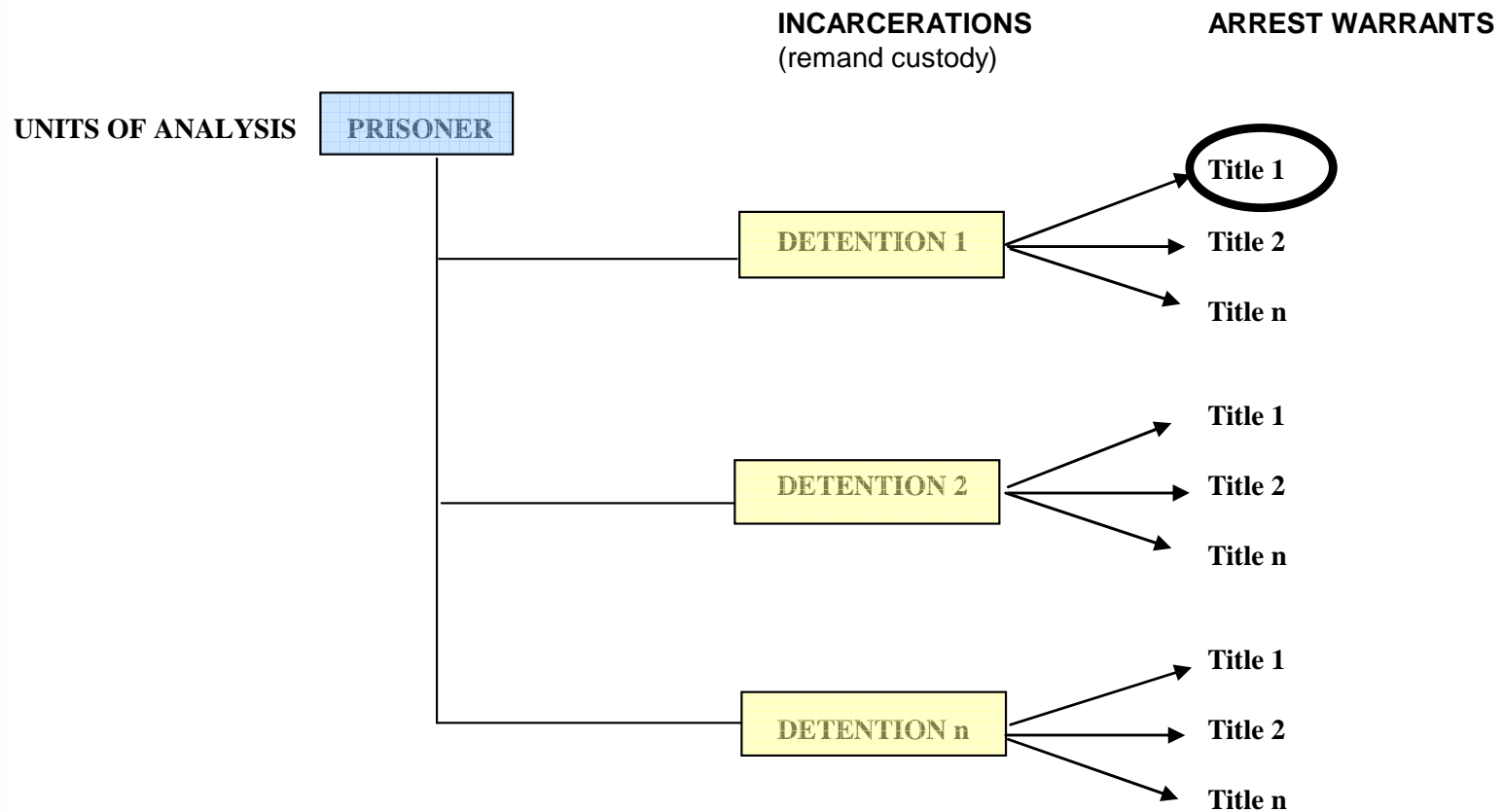
- ☐ 'Positive' list (pre-trial detention possible)
- ☐ 'Negative' list (pre-trial detention NOT possible)

### ☐ Methodology:

- ☐ Literature review + interviews
- ☐ Quantitative analysis (extraction database):
  - Data: pre-trial detention year 2003 (source: database SIDIS-GRIFFIE)
  - Unit of analysis: number of arrest warrants executed in prison during the year concerned



## 2. List of offences: methodology





## 2. List of offences: some results

Hypothetical reduction of the **number of arrest warrants with 60%**  
(if non-violent offenses excluded from the application of pre-trial detention)  
= -55% average daily population PTD (or appr. 1,000 prisoners)

<i>Judicial district</i>	<b>N arrest warrants</b>	
	% non-violent offences	% violent offences
Brussel	63,0%	37,0%
Leuven	72,8%	27,2%
Nijvel	30,8%	69,2%
Antwerpen	56,6%	43,4%
Charleroi	48,8%	51,2%
Doornik	49,0%	51,0%
Gent	64,1%	35,9%
Dendermonde	75,4%	24,6%
Brugge	72,3%	27,7%
Veurne	74,7%	25,3%
Ieper	74,5%	25,5%
Luik	53,9%	46,1%
Verviers	45,9%	54,1%
Hasselt	71,3%	28,7%
Dinant	40,7%	59,3%
<b>Total</b>	<b>59,9%</b>	<b>40,1%</b>





## 2. List of offences: evaluation

### ☐ In general:

- ☐ Possible impact on the size of the prison population  
BUT: only a real effect in case of a RADICAL selection (of offenses)  
→ **SOCIALLY DESIRABLE AND POLITICALLY ACHIEVABLE ??**

### ☐ Some observations:

- ☐ Technique already in use in other Belgian legal frameworks  
(cf. telephone tap, pro-active police investigation, DNA-database “sentenced offenders”,...)  
→ risk to adopt indiscriminately already existing lists (cf. ‘*légiférer par référence*’)
- ☐ In any case: necessary to evaluate the effect of the techniques used (lists of offences and/or threshold)
- ☐ Construction of lists requires meticulous research + continued consideration





### 3. Limiting the length of pre-trial detention





### 3a. Length PTD: methodology research I (2001)

- ❑ Data: pre-trial detention **1996-2000** (source: database SIDIS)
- ❑ Unit of analysis: number of **incarcerations** (as pre-trial detainee)
- ❑ Calculation of the length of pre-trial detention
  - Concluded vs. non-concluded (date of analysis)
  - Concluded terms: release from prison or transition to a definitive legal status
- ❑ Criminal offenses: 'violent-' vs. 'other' (non-violent) offenses
- ❑ **Simulation study:** scenarios limitation to 3, 4 or 6 months for non-violent offenses





### 3a. Length PTD: results simulation - research I (2001)

Table: Possible “saving” in detention capacity according to three scenarios of limiting the length of pre-trial detention for the category ‘other’ criminal offences

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

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



## 3b. Length PTD: methodology research II (2004-2005)

- ❑ Literature review + interviews
- ❑ Quantitative analysis data-extraction:
  - ❑ Data: pre-trial detention year **2003** (source: database SIDIS-GRIFFIE)
  - ❑ Unit of analysis: **arrest warrants** executed in the year 2003
  - ❑ Calculation length of pre-trial detention:
    - Length: date of execution arrest warrant → date of lifting arrest warrant/release or date of final judicial decision during pre-trial detention (internment, suspension)
    - Underestimation: max. till the moment of dispensation of justice ('*regeling rechtspleging*') + some periods of PTD still running at the time of data-extraction / sometimes no registration of the last decision taken
  - ❑ Criminal offenses: simulations according the different **scenarios**





## 3b. Length PTD: results simulation - research II (2004-2005)

Table: Possible 'saving' in detention capacity according to different scenarios of limiting the length of pre-trial detention (year 2003)

Limitation PTD to 67 days* (3 <sup>rd</sup> appearance before the judicial council)			
Scenarios	N arrest warrants	POP. 'saved'	% POP 'saved'**
For all offences	3,724	610.2	34.1
Only for non-violent offences	2,098	311.7	17.4
All, except 4 types of violent offences ***	7,012	345.5	19.3
Only drugs, without any other criminal offence	599	79.1	4.4
Only theft, without any other criminal offense	333	39.8	2.2

Limitation PTD to 98 days* (4 <sup>th</sup> appearance before the judicial council)			
Scenarios	N arrest warrants	POP. 'saved'	% POP 'saved'**
For all offences	2,246	354.5	19.8
Only for non-violent offences	1,212	169.3	9.5
All, except 4 types of violent offences ***	1,339	187.7	10.5
Only drugs, without any other criminal offence	326	39.4	2.2
Only theft, without any other criminal offense	140	19.4	1.1

\* Maximally till the moment of dispensation of justice (by the judicial council)

\*\* Percentages calculated on the basis of an estimated total prison population (pre-trial detention) of 1,791.1

\*\*\* Homicide, rape, violent theft and hostage





## 3a/b. Length PTD: general evaluation

### ☐ Advantages:

- ☐ Possible impact on the size of prison population  
(BUT only in case of an observable effect on the (length of the) final sentence, in case of acquittal, or if the date of parole eligibility is not exceeded)
- ☐ Stimulus for a faster conclusion of the criminal (investigation) procedure
- ☐ Protection of the suspect (avoiding unnecessary periods of PTD + more legal security)

### ☐ Some observations:

- ☐ 'Real' effect (cf. supra) OR simply a displacement ('saved' detention time to be served after the pronouncement of the final (prison) sentence)?
- ☐ Tension between abstract legal norms – concrete cases (→ introduction of 'exceptions')
- ☐ Risk of automatic release without any further judicial appreciation of the case
- ☐ Risk to fully exploit the maximum term (legitimation for a continuation of PTD)
- ☐ Situation of illegal aliens in pre-trial detention?
- ☐ Only guaranteed in case of very low maximum lengths for PTD  
(cf. average length of PTD + small % > 3 months --- cf. situation in other European countries)

### ► **Legal reform OR transforming the use of PTD/criminal investigation procedures in practice?**





## 4. Introducing electronic monitoring as an alternative to pre-trial detention





## 4. EM: object and context of the research

- ❑ Research object : Explorative study on the possibility of application of EM within the framework of remand custody (duration: March-December 2009)
- ❑ General policy note of the Minister of Justice (Parl. Doc., Chamber of Representatives, 2008-2009, n°52 1529/016, p. 71): “(...) *the use of electronic monitoring, the introduction of modern techniques like GPS-tracking, as an alternative for remand custody*”.
- ❑ Current application of EM in the Belgian penal landscape (exclusively in the domain of the execution of prison sentences)
  - (a total of) prison sentences up to 3 years: prison service (EM as ‘front door’-strategy)
  - prison sentences of more than 3 years: courts for the execution of sentences (EM as ‘back door’-strategy)→ ? EM within others stages of the penal system, *i.c.* remand custody ?





## 4. EM: research questions

### ❑ Quantitative:

→ To what **extent** EM would be applied in the context of remand custody (within a perspective, for example, of reducing the current prison population)?

### ❑ Qualitative:

→ In which **type of cases** EM would be applied?

→ Which **model** of EM would be preferred?

→ What are the kind of **contra-indications** preventing to choose EM?

→ What are the **other aspects** to be taken into account (legal framework and practical modalities)?



## 4. EM: research methodology

- ❑ International **literature review** + visits abroad
- ❑ **Round table discussions** (Dutch + French: investigating judges, judicial councils, chambers of indictment, public prosecutors, lawyers)
- ❑ **Analysis of judicial files/questionnaires**
  - Judicial districts: Antwerp (53 Dutch files), Brussels (24 Dutch files + 86 French files) and Liege (42 French files)
  - Judicial authorities: investigating judges (41 Dutch files + 57 French files), judicial councils (14 Dutch files + 22 French files), chambers of indictment (22 Dutch files + 49 French files)
  - Total: **205 files** (77 Dutch files + 128 French files)
- ❑ Analysis of the current application of remand custody (2008) according to certain characteristics, based on a **data-extraction** from the prison service's database (SIDIS/GRIFFIE)





## 4. EM: research methodology

Table: Overview of judicial files (number of cases) screened with respect to legal instance, district/jurisdiction and linguistic register

District	IJ	JC	CI	Total	French/Dutch*
Liege	19	-	23	42	128
Brussels (French)	38	22	26	86	
Brussels (Dutch)	24	-	(24)**	24	77
Antwerp	17	14	22	53	
<b>Total</b>	<b>98</b>	<b>36</b>	<b>71</b>	<b>205</b>	
	98	107			

- \* The difference in the number of Dutch and French language judicial files is explained by diverse factors such as the willingness to participate in the research, urgent deadlines in the context of the research phases, and incomplete detailed information concerning a number of cases.
- \*\* With all the participating judicial actors there was a face-to-face contact in order to fill out the registration form, except with a member of the Dutch-speaking chamber of indictment of the judicial district of Brussels who requested to fill out the registration form himself. However, due to a lack of sufficient detailed information on certain aspects we were asking for, these cases were not used in further analyses.



## 4. EM: general conclusions

A possible policy decision to introduce EM in the context of remand custody has to be defined as “a political measure requiring (without any doubt) an important **additional budgetary effort**, which:

- ) will probably have a **relatively low impact** – certainly not substantial
- **on the number of pre-trial detainees** in our prisons, and
- ) moreover raises important legal, practical and organizational questions.”

However, in certain cases EM can be considered “[...] as a potentially valuable initiative from a humane, ethical and human rights point of view, in the sense of a limitation of the harmful effects of detention and a better respect of the legal principle of the presumption of innocence.”



## 4. EM: general conclusion

Effect of EM on the size of the population on remand custody?

Relatively low impact (?), because:

Estimated **application rate** of EM within the framework of remand custody (25%, investigating judges) does not necessarily lead to an equivalent reduction of the population on remand custody (stock):

- o investigating judges participating in the reasearch may be more prepared to apply EM than others
- o possible use of EM in cases of 'freedom/release under conditions' (alternatives), or even freedom without any condition (= additional technique of control) + probably more revocations due to a more effective control
- o duration of remand custody 'saved' by EM = unclear
- o sometimes, release from remand custody is not possible because of other detention titles present (e.g. execution of former convictions to prison sentence)
- o in some cases EM will only be applied if other, specific conditions are satisfied (e.g. detention in asylum, application of GPS-technology, ...)
- o the opinion of the investigating judges might be a projection of possible future decisions to be taken (decision to release, with or without conditions)
- o If the term under EM does not have an impact on the length of the final prison sentence, EM will only have some effect on the size of the prison population **when EM is considered as 'detention time served'** (in remand custody)





## 4. EM: general conclusion

### Effect of EM on the size of the population on remand custody?

**Table:** Overview of the justifications for the warrant of detention and not making use of electronic monitoring (Dutch-speaking cases in which electronic monitoring *was not* considered)

Criteria	Justification for warrant of detention	Justification for <u>not</u> applying EM
Severity of the offence	---	33.9%
Risk of collusion	41.3%	33.9%
Risk of embezzlement	9.5%	12.9%
Risk of escaping	74.6%	75.8%
Risk of recidivism	66.7%	56.5%
<i>Illegal residency</i>	58.7%	61.3%

\* N=62 (justification for arrest warrants)

\*\* N=63 (justification for not applying electronic monitoring)

**Table:** Overview of the justifications for the warrant of detention and not making use of electronic monitoring (French-speaking cases in which electronic monitoring *was not* considered)

Criteria	Justification for warrant of detention*	Justification for <u>not</u> applying EM*
Severity of the offence	---	53.6%
Risk of collusion	41.2%	38.1%
Risk of embezzlement	21.6%	20.6%
Risk of escaping	40.2%	40.2%
Risk of recidivism	73.2%	73.2%
<i>Illegal residency</i>	24.7%	24.7%

\* Percentages calculated on 97 cases, because of the fact that in 10 cases information on the justification for the warrant of detention was not available.





## 4. EM: General conclusion

EM as an alternative to pre-trial detention would require an additional budgetary effort

Possible financial savings (in case of a reduced prison population in remand custody):

- ❑ **Variable costs:** food, clothing, wages for prison labour
- ❑ **BUT: stable costs** (prison infrastructure and personnel)
  - Cf. probably low impact on the size of the prison population
  - Cf. dispersion of prisoners in remand custody all over the country

ADDITIONAL costs (for the application of EM):

- ❑ EM-infrastructure (technology)
- ❑ Personnel (probation staff)



## 4. EM: general conclusions

A possible policy decision to introduce EM in the context of remand custody has to be defined as “a **political measure** requiring (without any doubt) an important additional budgetary effort, **which**:

- ) will probably have a relatively low impact – certainly not substantial – on the number of pre-trial detainees in our prisons, and
- ) moreover raises important **legal, practical and organizational questions.**”

However, in certain cases EM can be considered “[...] as a potentially valuable initiative from a humane, ethical and human rights point of view, in the sense of a limitation of the harmful effects of detention and a better respect of the legal principle of the presumption of innocence.”





## 4. EM: three models of EM

- 1) The "**traditional**" model  
(cf. the regime is applied in the context of the execution of prison sentences)
- 2) The "**house arrest**" model
- 3) The "**GPS**" model

→ Which model of EM would be preferred?

***Each model has the potential to be applied  
BUT the legal consequences vary according to the chosen EM  
model***





## 4. EM: legal consequences

- ❑ EM as a specific modality of the execution of remand custody

- ❑ The "house arrest" model
- ❑ The "traditional" model (?)

→ EM = deprivation of liberty (so, the legal framework is modeled upon the system of remand custody)

- ❑ EM as a particular form of freedom under conditions or release under conditions

- ❑ The « GPS » model

→ EM = restricted liberty (so, the legal framework is modeled upon the system of freedom under conditions or release under conditions)





## 4. EM: general conclusions

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