

A lack of motivation of judicial decisions on pre-trial detention?

*Do the practices in the Netherlands, Germany and Latvia meet the standard set by the European Court of Human Rights?*¹

1. Introduction

The key principle of Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) is the right to liberty and security for every person. Article 5 (1) of the Convention states: ‘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 intention of this Article is ‘to ensure that no one shall be dispossessed of his liberty in an arbitrary fashion’.² Article 5 (1) (c) of the Convention must be read in conjunction with Article 5 (3) of the Convention³, which incorporates a number of essential guarantees in order to make deprivation of liberty an exception to the rule of liberty and to ensure that judicial supervision is in place.⁴ A person can, for instance, be deprived of his liberty when there is a reasonable suspicion he has committed an offence and has to be brought before the competent legal authority and/or when it is reasonably considered necessary to prevent this person from committing a new offence, and/or to prevent this person from interfering with the investigation and/or to prevent this person from fleeing after committing an offence. This is often referred to as pre-trial detention, which is the topic of this paper. Pre-trial detention should always be subject to judicial scrutiny. The competent legal authority should not only consider whether the arrest/detention was justified, but also whether the prolongation of detention is still appropriate.⁵ According to the relevant case law of the European Court of Human Rights (the Court), pre-trial detention has to be reviewed *critically* by the competent legal authority.⁶ The final decision should make clear on which grounds the deprivation of liberty is either terminated or prolonged and it should contain references to the facts and circumstances of the specific case. Continuation of detention cannot be justified when a national court repeatedly

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² ECtHR *Engel v. the Netherlands*, judgement of June 8, 1967, ECtHR *Winterwerp v. the Netherlands*, judgement of October 20, 1979 and ECtHR *Guzzardi v. Italy*, judgement of October 2, 1980.

³ ECtHR *Ciulla v. Italy*, Series A no. 148, judgement of February 22, 1989, § 38.

⁴ The right to liberty and security of the person, A guide to the implementation of Article 5 of the European Convention on Human Rights. Human Rights Handbook no. 5 by Monica Macovei, p. 50.

⁵ See note 4, p. 8.

⁶ See note 4, p. 53.

uses an identical and stereotypical form of words, without further elaboration⁷. Courts are required to give an independent critical decision and to justify this decision with a reasoning which reflects the arguments raised by the defense and the prosecution.⁸

This paper will review the motivation of judicial decisions regarding pre-trial detention in the Netherlands, Germany and Latvia. The main objective of this paper is to review the Dutch practice from an European perspective and to give some recommendations regarding the Dutch practice. The practices in other European countries (Germany and Latvia) will serve as material for comparison and we will assess whether or not the practices in (all) these countries meet the standard set by the Court. The key question of this paper therefore is:

Do the practices in the Netherlands, Germany and Latvia meet the standard set by the Court regarding the motivation of decisions on pre-trial detention?

In chapter 2, the case law of the Court concerning Article 5 of the Convention (especially with regard to paragraph 3) will be discussed. Chapter 3 focuses on how decisions on pre-trial detention are motivated in the Netherlands, Germany and Latvia. In chapter 4, a conclusion will be drawn if the practice in the Netherlands meets the standard as set forth by the Court (as discussed in chapter 2). Also recommendations for the future are made.

2. The case law of the Court

2.1. Introduction

There is an enormous amount of case law from the Court on the legitimacy of pre-trial detention. This case law falls back on the fundamental starting points of the right to liberty and the presumption of innocence. As stated in the introduction we will focus on the case law that is specific for the motivation of court decisions on pre-trial detention. The purpose of this chapter is to point out standard cases on this subject and to point out that the Court made stern demands in recent cases upon the way court decisions have to be motivated.

2.2. Basic principles

As was concluded in *Lettelier v. France*⁹, a court “must examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to

⁷ ECtHR *Mansur v. Turkey*, appl. no. 16026/90, judgement of June 8, 1995, §52 - 55.

⁸ See note 4, p. 53. Also ECtHR *Mansur v. Turkey*, appl. no. 16026/90, judgement of June 8, 1995.

the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set them out in their decisions on the applications for release”.

Article 5 (3) of the Convention requires that deprivation of liberty pending trial should never exceed a *reasonable time*. The Court held repeatedly that continued detention may be justified in a given case only if there are clear indications of a genuine public interest which, notwithstanding the presumption of innocence, outweighs the right to liberty. Moreover, the Court argued that the 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 detention, but after a certain elapse of time it is no longer sufficient.¹⁰ To continue pre-trial detention, the authorities have to give “relevant” and “sufficient” reasons and show that they had displayed “special diligence” in the conduct of the proceedings.¹¹ “It is only by giving a reasoned decision that there can be *public scrutiny of the administration of justice*”.¹²

Concerning the topic of this paper: the judges have a duty to review the continued detention of persons awaiting their trial with a view to ensure release when circumstances no longer justify continued deprivation of liberty. The question whether or not a period of detention is reasonable cannot be assessed in the abstract but must be assessed in each case according to its special features.¹³ More in paragraph 2.6.

2.3 Relevant and sufficient grounds

As mentioned above, the right to liberty can only be outweighed by a genuine public interest. The gravity of the charges alone cannot itself justify detention pending trial. The Convention case law has developed four basic acceptable reasons for continuing a person’s pre-trial detention (or according to Article 5 (3): if measures that can guarantee the accused appears for trial are absent)¹⁴:

- 1) the risk that the accused, if released, will fail to appear for trial (see *Stögmüller v. Austria*, Series A no. 9, judgment of November 10, 1969, § 15);
- 2) the risk that the accused, if released, would take action to prejudice the administration of justice (see *Wemhoff v. Germany*, cited above, § 14);

⁹ ECtHR *Lettelier v. France*, Series A no. 207, judgement of June 26, 1991, § 35.

¹⁰ The right to liberty and security of the person, A guide to the implementation of Article 5 of the European Convention on Human Rights. Human Rights Handbook no. 5 by Monica Macovei, p. 34.

¹¹ ECtHR *Clooth v. Belgium*, Series A no. 225, judgement of December 12, 1991, § 44.

¹² ECtHR *Tase v. Romania*, appl. no. 29761/02, judgement of June 10, 2008, § 40.

¹³ ECtHR *McKay v. the United Kingdom*, appl. no. 543/03, judgement of October 3, 2006 § 41-45; ECtHR *Bykov v. Russia*, appl. no. 4378/02, judgement of March 10, 2009, § 61-64.

¹⁴ ECtHR *Smirnova v. Russia*, appl. nos. 46133/99 and 48183/99, judgement of June 26, 1991.

- 3) the risk that the accused, if released, commits further offences (see *Matznetter v. Austria*, Series A no. 10, judgment of November 10, 1969, § 9);
- 4) the risk that the release of the accused will cause a disturbance to public order (see *Letellier v. France*, cited above, § 51).

Hereafter we will discuss the case law concerning the reasons to corroborate these grounds. In other words: what are the standards judges have to meet to find the reasoning for “relevant and sufficient” grounds.

2.3.1. *Danger of absconding*

The severity of the sentence faced is an important element to establish a danger of absconding. But it can not be gauged solely on this and can especially not justify long periods of pre-trial detention. It must be assessed with reference to a number of other relevant factors which may either confirm the existence of a danger of absconding or make it appear so slight that it cannot justify pre-trial detention¹⁵. In *Becciev v. Moldova* the Court says that the risk of absconding must be assessed in relevant factors. The factors which may confirm the existence of a danger of absconding can be found in: the person’s character, his morals, home, occupation, assets, family ties and all kinds of links with the country in which he is prosecuted.¹⁶ The mere absence of a fixed residence does not give rise to a danger of flight.¹⁷ It speaks for itself that to obtain public scrutiny the court must address these factors in its decisions on prolonging pre-trial detention.

2.3.2. *Danger of hindering the proper conduct of the proceedings*

In *Becciev v. Moldova*, as cited above, the Court says that the existence of the danger of the accused hindering the proper conduct of the proceedings must also be assessed with reference to relevant factors. This danger cannot be relied upon in abstracto. It has to be supported by factual evidence.¹⁸ The risk of pressure being brought to bear on witnesses can be accepted at the initial stages of the proceedings.¹⁹ 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

¹⁵ ECtHR *Panchenko v. Russia*, appl. no. 45100/98, judgement of February 8, 2005, § 106.

¹⁶ ECtHR *Becciev v. Moldova*, appl. no. 9190/03, judgement of October , 2005, § 58.

¹⁷ ECtHR *Sulaoja v. Estonia*, appl. no. 55939/00, judgement of February 15, 2005, § 64.

¹⁸ § 59.

¹⁹ ECtHR *Jarzyński v. Poland*, appl. no. 15479/02, October 4, 2005, § 43.

the alleged risks diminish with the passing of time as the inquiries are conducted, statements taken and verifications carried out. This is what the Court stated in *Clooth v. Belgium*.²⁰

2.3.3. *Danger that the accused commits further offences*

In *Clooth v. Belgium*, as cited above, the Court states that also the danger that the accused commits further offences must be a plausible one and that pre-trial detention is therefore appropriate, in the light of the circumstances of the case and in particular the past history and the personality of the person concerned.²¹ With this reason, again, you can see that the Court demands reference to relevant factors. This reference will easily meet a minimum as the Court established in *Simeonov v. Bulgaria*²². Mr Simeonov had been detained for two years and one month based on the suspicion that he had committed a criminal offence (he did not dispute the suspicion). The Bulgarian court referred in her decision to Mr Simeonov's six previous convictions for theft, the other criminal proceedings also pending against him at that time and the prison sentence imposed on him in 2004. These circumstances indicated a genuine and serious risk of Mr Simeonov committing further offences (or absconding). The grounds given for his continued detention had thus been “relevant and sufficient”, according to the Court. The Court concluded that the criminal proceedings against the applicant had been conducted with the requisite “special diligence” and that there had been no violation of Article 5 (3) of the Convention. This points out the importance that the presence of reasons is not enough to justify (long term) pre-trial detention, but that the context of the case is also relevant.

2.3.4. *Preservation of public order*

In relation to public order, the Court 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. But one cannot solely rely on the gravity of the offences allegedly committed by the accused for extensive pre-trial detention. The (judicial) authorities have to provide any evidence or indicate any instance which could show that a release could pose an *actual* danger.²³ In addition, detention will continue to be legitimate only if public order remains actually threatened; its continuation cannot be used to

²⁰ ECtHR *Clooth v. Belgium*, Series A no. 225, December 12, 1991, § 44.

²¹ § 40.

²² Appl. no. 30122/03, judgement of January 28, 2010.

²³ ECtHR *Aleksandr Makarov v. Russia*, appl. no. 15217/07, judgement of March 3, 2009.

anticipate a custodial sentence²⁴. See for example *Jiga v. Romania*²⁵. Mr Jiga was held in pre-trial detention for 11 months and three weeks. As the authorities had not given “relevant and sufficient reasons” for continuing pre-trial detention, the Court found that there had been a violation of Article 5 (3) of the Convention:

“Whilst certain offences posed a particular threat to public order, such a danger necessarily decreased as time passed, thus requiring the authorities to give concrete reasons that were even more specific and in the general interest in order to show that the custodial measure continued to be justified.”

In Mr Jiga's case, no explanation had been given to demonstrate how, with the passage of time, his release would have had a negative impact on civil society or would have impeded the investigation, especially after the examination of the witnesses. The courts' brief reference to the seriousness of the charges, the prospect of a harsh sentence or the amount of the damage at issue could not make up for the lack of reasoning in this case.

2.4. No stereotypical reasoning

All the grounds as mentioned before can be regarded as relevant and sufficient provided it is based on the facts of the criminal file and/or the personal circumstances of the accused. Arguments for and against release must not be “general and abstract”^{26 27}, but contain references to the specific facts and the personal circumstances of the accused justifying his detention²⁸. It is not enough if it is claimed that, for example, there is a fear of flight or interference with witnesses; evidence of this possibility has to be brought forward and like all evidence its cogency must be examined by the judge. Moreover, the reasoning given by the judge must be real and not a ritual incantation of a formula, demonstrating that no consideration was given whether or not pre-trial detention is justified²⁹. For example, the decisions to keep an accused in pre-trial detention can not be solely based on a stereotypical reasoning concerning the “nature of the offence”, “the state of the evidence” or the “content of the file”.³⁰ Unreasoned decisions as well as automatic prolongations of the pre-trial detention are therefore not acceptable. In several cases the Court found the reasons to be

²⁴ ECtHR *Prencipe v. Monaco*, appl. no. 43376/06, judgement of July 16, 2009, § 79; ECtHR *I.A. v. France*, appl. no. 28213/95, judgement of September 23, 1998, § 104; ECtHR *Tiron v. Romania*, cited above, § 41-42.

²⁵ ECtHR *Jiga v. Romania*, appl. no. 14352/04, judgement of March 16, 2010.

²⁶ ECtHR *Clooth v. Belgium*, Series A no. 225, judgement of December 12, 1991, § 44.

²⁷ ECtHR *Boicenco v. Moldova*, appl. no. 41 088/05, judgement of July 11, 2006, § 142; ECtHR *Khudoyorov v. Russia*, appl. no. 6847/02, judgement of November 8, 2005, § 173.

²⁸ ECtHR *Aleksanyan v. Russia*, appl. no. 46468/06, judgement of December 22, 2008, § I 79.

²⁹ ECtHR *Mansur v. Turkey*, appl. no. 16026/90, judgement of June 8, 1995.

³⁰ ECtHR *Tunçe and others v. Turkey*, appl. no. 2422/06 and 3712/08, judgements of October 13, 2009.

formalistic in nature and not sufficient to justify detaining the accused. There had therefore been a violation of Article 5 (3) of the Convention.^{31 32}

2.5. Special diligence

Ultimately, the justification for the length of the pre-trial detention of an accused, while relevant, can become insufficient in the circumstances as the initial relevance will not withstand the test of time.³³ It is up to the judge to verify whether the ground(s) remain valid during the pre-trial detention. This has already been pointed out in the quotations of *Clooth v. Belgium* in paragraph 2.3.2. and *Jiga v. Romania* in paragraph 2.3.4.³⁴

The starting point of Article 5 (3) is that period of pre-trial detention is reasonable. The judge has to verify this reasonableness to the background of the ‘special diligence’ the authorities display in the conduct of the proceedings (see paragraph 2.2.). The complexity and special characteristics of the case are factors the judge can consider. For example, the Court finds in *Shabani v. Switzerland*³⁵ a pre-trial detention of a duration of five years not too excessive. Mr Shabani's pre-trial detention had been justified by the suspicion that he had committed criminal offences. The reasons the Swiss court gave for subsequently extending his detention were relevant and sufficient, namely the strong suspicion that he had committed the crimes of which he was accused and the risk of him absconding and colluding with others during the investigation. On that account, the Swiss court had duly and thoroughly substantiated their decisions to continue his detention. They had also examined the alternative solution of depositing a guarantee³⁶. An important role in this case is played by the extremely complex nature of the case in question, which involved an international criminal organization and a trafficking operation producing considerable sums of money, which is why the investigative measures had not been disproportionate. Furthermore, the authorities could not be accused of any periods of inactivity in the proceedings. So there was no lack of ‘special diligence’ of proceeding with the case.³⁷ The judge has a duty to reason his decision regarding to (the

³¹ Among others: ECtHR *Saghinadze and others v. Georgia*, appl. no. 18768/05, judgement of May 27, 2010.

³² ECtHR *Prencipe v. Monaco*, appl. no. 43376/06, judgement of July 16, 2009.

³³ See for example ECtHR *Saghinadze and others v. Georgia*, as cited above.

³⁴ More recent: ECtHR *Dermanovic v. Serbia*, appl. No. 48497/06, judgement of February 23, 2010.

³⁵ Appl. no. 29044/06, judgment of November 5, 2009.

³⁶ And had given detailed reasons for their decision on that option, finding that it would be unable to offset the risk of the accused absconding in view of the dubious origin of the money which might have been used as a guarantee.

³⁷ An example of a cases where the Court finds proceedings excessively long, can be found in ECtHR *Naduo v. France*, appl. no. 35469/06, judgement of October 8, 2009 and ECtHR *Malcom v. France*, appl. no. 35471/06, judgement of same date.

continuation) of pre-trial detention when the defense makes some remarks on a lack of ‘special diligence’ (or when the judge finds a lack himself).

2.6. Conclusion

Article 5 (3) enshrined the right to liberty pending a criminal trial. The persistence of reasonable suspicion that the person arrested had committed an offence is a *condition sine qua non* for the validity of the continued detention but after a certain lapse of time (the initial period) this is no longer sufficient. There must be genuine public interest which outweighs the right to liberty. The Convention case law has developed four basic acceptable reasons for continuing a person’s pre-trial detention. It is up to the judicial authorities to examine if (specific no abstract) reasons corroborate these grounds. In order to extend pre-trial detention further, the detaining authorities have to give “relevant and sufficient” reasons and show that they had displayed “special diligence” in the conduct of the proceedings. As we have seen in this chapter the Court is very stern about the presence (and motivation) of the reasons (and whether or not they will withstand the test of time) and if the proceedings meet special diligence. But the Court takes the merits of each case according to its special features. One final remark has to be made: in the initial period a lack of reasoning in judicial decisions concerning pre-trial detention do not automatically lead to violations of Article 5 (3), as the cases of *Kanzi v. the Netherlands* and of *Hendriks v. the Netherlands*³⁸ point out. After all the period of pre-trial detention must be reasonable.

3. Motivation of judicial decisions: the Netherlands, Germany and Latvia

3.1 Introduction

This chapter will focus on the way decisions on pre-trial detention are motivated in three different countries: the Netherlands, Germany and Latvia. These countries have not been chosen randomly; to put the Dutch practice in the right perspective it was decided to look further into the practices of a Western-European and an Eastern-European Member State of the Council of Europe.

³⁸ ECtHR, judgement of July 5, 2007, NJ 2007/632 (*Kanzi v. the Netherlands*) and ECtRM, judgement of July 5, 2007, NJ 2007/633.

3.2 The Netherlands

3.2.1. Legal basis and pre-trial detention

In the Netherlands a person has a right to physical liberty. This is laid down in Article 15 of the Dutch Constitution. Deprivation of liberty is not possible, save in the cases provided for by law. Provisions for depriving a person of his liberty can be found in the Articles 63-93 of the Dutch Code of Criminal Procedure (Dutch CCP). Different stages are to be distinguished in the investigative and pre-trial stage: 1. police-arrest in order to be questioned, 2. police custody, 3. remand in custody, 4. remand detention and 5. detention pending trial.³⁹ During questioning by the police, the lawfulness of the arrest is established and a decision is made on whether the suspect should be detained for the purpose of the investigation.⁴⁰ Pre-trial detention starts with remand in custody. Remand in custody can only last up to fourteen days. The remand in custody order is issued by the investigating judge at the demand of the public prosecutor. The investigating judge assesses whether the required reasonable presumption of guilt is present, whether the offence is a punishable offence for which pre-trial detention can be imposed, and if the legal conditions have been met.⁴¹ The legal conditions are laid down in Articles 67 and 67a of the Dutch CCP. Pre-trial detention can be ordered if there are ‘grave presumptions’ (‘ernstige bezwaren’) that the defendant has committed an offence that carries a statutory prison sentence of four years or more and/or that is specifically designated by law and/or that carries the penalty of imprisonment while the suspect does not have a fixed domicile or residence in the Netherlands.⁴² The term ‘grave presumptions’ implies a high degree of suspicion that the suspect has in fact committed the offence of which he is suspected.⁴³ Pre-trial detention can only be applied if there is a serious risk of the suspect absconding and/or if public safety requires the immediate detention of the suspect.⁴⁴ Important reasons requiring immediate detention are considered to exist if:

- the suspicion relates to an offence carrying a maximum statutory sentence of twelve years or more, and public order has been seriously affected by the offence and/or;

³⁹ Pre-trial Detention in the European Union, An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU, chapter 20 The Netherlands, p. 701, A.M. van Kalmthout, M.M. Knapen and C. Morgenstern (eds.).

⁴⁰ See note 39.

⁴¹ See note 39, p. 704.

⁴² See note 39, p. 703.

⁴³ Criminaliteit en Rechtshandhaving in de Euregio Maas-Rijn deel 2: De inrichting van opsporing en vervolging in België, Duitsland en Nederland en de internationale politie en justitie samenwerking in de Euregio Maas-Rijn, Intersentia 2007, XI: De vrijheidsberoving.

⁴⁴ Article 67a Dutch CCP.

- if there is a serious risk that the suspect will commit a crime that carries a maximum statutory prison sentence of at least six years and/or will commit a crime that may jeopardize the safety of the state or the health or safety of persons, or that creates a general danger to property and/or
- if there is serious suspicion that the offender, suspected of having committed one of the offences designated by law, will re-offend, and less than five years have passed since he was sentenced to a penalty or measure containing a deprivation or restriction of liberty, or was sentenced to community labour and/or
- if it is considered necessary to detain the suspect, in order to establish the truth, other than by its own statements (risk of collusion).⁴⁵

Furthermore, the court has to review whether or not it is expected that the time already spent in pre-trial detention will exceed the final prison sentence / community labour. If this is the case, the court has the duty to terminate pre-trial detention.⁴⁶ A person can be held in pre-trial detention for a period of 90 days. The total period of pre-trial detention may last no longer than 104 days, until the case is brought to trial. If the case is not ready for trial or a final verdict, the court may adjourn the trial for one month, and in exceptional cases for three months. This may be repeated several times.⁴⁷ The defendant can request termination or suspension of the pre-trial detention during the trial itself. The court will take a decision right away (after deliberation in chambers) or at a later time, also in chambers, after which the parties are notified of the decision.

3.2.3. Motivation of decisions on pre-trial detention

In the Netherlands it is the duty of, first the investigative judge and in a later stage the trial judge(s), to review the pre-trial detention of a defendant and to rule on whether or not it should be prolonged. As is discussed in chapter 2, the courts should critically review pre-trial detention and should substantiate their decisions with reference to the relevant facts and circumstances of the case. It is, as mentioned before, not enough to merely state the ground(s) on which continuation of pre-trial detention is deemed admissible. In the Netherlands however, courts often do not meet this standard as set forth by the Court. Judges often suffice with the use of pre-typed forms in decisions (with regard to remand in custody) and with an abstract and general ruling (when pre-trial detention is prolonged after remand in custody).

⁴⁵ See note 39, p. 703.

⁴⁶ Article 67a sub 3 Dutch CCP.

⁴⁷ See note 39, p. 703 and Articles 281 and 282 Dutch CCP.

The abstract and general ruling contains the stereotypical phrase that ‘grave presumptions’ are present – as referred to in Article 67a Dutch CCP (mentioned in paragraph 3.2.2.) – and that public interest and the interest of an effective criminal proceeding (still) prevail over the personal interest of the defendant to await his trial in liberty.⁴⁸ In a majority of cases references to the specific facts of the case and the precise personal circumstances of the defendant are not mentioned in the decision, even when the defense and/or prosecution provide specific arguments. Even though it is common practice to discuss in chambers all arguments given by the defense and prosecution, the final decision (often only drawn in a journal of the court session) does not contain these arguments and a critical review of them. This practice leaves not only the defendant⁴⁹ and the prosecution in the dark in regard to the reasons why pre-trial detention is suspended, terminated or prolonged, but also the general public.⁵⁰ Dutch courts often fail to provide an independent critical judgment, which seems to be a direct violation of Article 5 of the Convention. At least when the decisions come after the ‘initial period’ (see chapter 2.2.). The question should be if it is absolutely necessary to deprive somebody of liberty pending trial. If so, the decision ordering the pre-trial detention should be thoroughly motivated. To date the Court has not yet found a violation against the Netherlands in which the Dutch practice, as described before is deemed to be in breach of Article 5 of the Convention. Maybe the length of the pre-trial detention does not exceed what the Court refers to as reasonable or maybe it is only a matter of time.

3.3. Germany

3.3.1. Legal basis

The relevant legislation for arrest within the criminal procedure and pre-trial detention can be found in the German Code of Criminal Procedure (Strafprozessordnung or StPO, hereafter German CCP). Since 1952 the Convention has been directly applicable in domestic law.⁵¹ According to Article 5 of the Convention and Article 2 of the German Constitution every

⁴⁸ In few cases some courts do give an extended reasoning for their decision. See ruling District Court of Haarlem, judgement of April 13, 2007, *LJN*: BA2938 in which case the court explained into detail why the prolongation of pre-trial detention on the ground of a shocked public order was denied and pre-trial detention was terminated, all in light of the case law of the European Court of Human Rights.

⁴⁹ Several lawyers have already complained about the Dutch practice of not motivating the decision regarding pre-trial detention. For instance: Article of N. van der Laan, LLM and defense attorney in Amsterdam: ‘De voorlopige hechtenis lotto; Een pleidooi voor motiveren en publiceren’.

⁵⁰ In 2010 a public discussion emerged regarding the temporary suspension of a defendant (Saban B.) from detention, after which he fled to Turkey. The general public felt the court did not explain her reasons regarding temporarily releasing the defendant.

⁵¹ See note 39, p. 389.

person has the right to personal liberty.⁵² Article 104 of the Constitution provides certain legal guarantees concerning arrest and pre-trial detention. For instance only a judge may rule upon the permissibility or continuation of any deprivation of freedom. Paragraphs 112-131 in chapter 9 of the German CCP establish the specific terms of the protections as outlined in Article 104 of the Constitution.⁵³

3.3.2. Pre-trial detention

The police can hold a suspect on their own authority or on behalf of the public prosecution until the expiry of the day following the arrest. This is called ‘Gewahrsam’. The maximum duration of this detention is 48 hours. According to paragraph 127 German CCP in some cases a suspect can be held in detention (‘vorläufige Festnahme’) without a court order. In case a suspect is caught red-handed he can be held in detention if there is a risk of flight and/or his identity has to be checked. If a suspect is not caught red-handed, the prosecution can detain a suspect provided it is utterly necessary and the conditions for granting a warrant are met.⁵⁴ When a suspect is detained and is not released after 48 hours, he has to be brought before an investigating judge at the local court (‘Amtsgericht’), who decides whether to uphold the detention or not.⁵⁵ The judge will not review whether the detention is lawful, only if it should be prolonged. In case the judge concludes further detention is necessary, he will issue a warrant (‘Haftbefehl’). If a warrant is issued the suspect will be taken into detention, called ‘Untersuchungshaft’.⁵⁶ This is only possible if the detention is crucial for the public interest and/or interest of the criminal proceedings. In case a suspect is taken into detention (‘Untersuchungshaft’) it is not only necessary there is a strong suspicion (‘dringender Tatverdacht’) the suspect committed the crime, also one of the grounds as mentioned in paragraph 112 II and 113 German CCP has to be present.⁵⁷ When there is a strong suspicion the suspect committed one of the serious crimes as mentioned in paragraph 112 III German CCP (f.e. terrorist actions, murder, manslaughter, serious assault and arson) it is not necessary that one of the aforementioned grounds is present for ordering detention.⁵⁸ The grounds (‘Haftgründe’) for pre-trial detention are to be found in paragraph 112 II, III and in paragraph 112a German CCP. Not only the strong suspicion, but every ground (‘Haftgründe’), if found

⁵² See note 43, p. 235 – 239.

⁵³ See note 39.

⁵⁴ See note 43.

⁵⁵ Article 104 II German Constitution and 128 I German CCP, see note 39, paragraph 3.3.

⁵⁶ See note 43.

⁵⁷ See note 43, p. 246.

⁵⁸ See note 43.

to be present, must be substantiated by specific facts and circumstances of the case. The grounds are 1. the risk of flight / hiding or the risk of absconding or hiding ('Fluchtgefahr'), 2. tampering with evidence by obstructing evidence or collusion ('Verdunkelungsgefahr'), 3. the gravity of the crime ('Tatschwere').⁵⁹ For each ground it is necessary to specify the circumstances and facts which have led the judge to conclude one or more risks as mentioned occur in the case before him. It is not enough to conclude there is a possibility of one of the risks being present. The judge has to give a substantiated motivation.⁶⁰ The objectives of pre-trial detention in Germany are to ensure the public right to a thorough investigation of a crime, to ensure a criminal procedure according to the rule of law and, if applicable to ensure the execution of the sentence.⁶¹ The main objective seems to be to ensure the presence of the defendant during trial, because in Germany a trial in absentia is not possible. Therefore the main ground for pre-trial detention is the risk of absconding.⁶² Detention lasts until release, when the arrest warrant is revoked or expires, or until the final conviction. A general time limit in the pre-trial phase is set to six months, the detention period can be extended under certain circumstances.⁶³ A first instance judgment must be rendered within the 6 months period. If the case is of higher complexity and will take longer than 6 months, there must be a review of the grounds for pre-trial detention every 3 months.⁶⁴ According to paragraph 112 I CCP, pre-trial detention may not be ordered if it is not in proportion with regard to the importance of the case and punishment that can be expected.⁶⁵ Save for certain crimes as mentioned in paragraph 112a German CCP⁶⁶, in Germany it is not possible to detain a person on the ground he will commit a new crime when released.⁶⁷ The crimes as mentioned in paragraph 112a German CCP entail certain sexual, violent and property offences. Several types of legal remedy in Germany can be used for judicial review of pre-trial detention.⁶⁸ The detainee can apply for judicial review of the warrant to the investigating judge (so called 'Haftbeschwerde'). If this appeal is not successful, the detainee can lodge an appeal to the district court ('Beschwerde'). If this appeal is not successful, the decision can be

⁵⁹ See note 39, paragraph 4.2.

⁶⁰ See note 43, p. 244 – 256.

⁶¹ See note 39, p. 408.

⁶² See note 39, p. 408 and 409.

⁶³ See note 39, paragraph 3.3.

⁶⁴ See note 39, paragraph 3.3. and 121 German CCP.

⁶⁵ See note 39, paragraph 4.2.

⁶⁶ "An analysis of minimum standards in pre-trial detention and the grounds for regular review in the Member States of the EU", JLS/D3/2007/01. The crimes as listed in paragraph 112a German CCP are certain sexual, violent and property offences.

⁶⁷ See note 43, p. 244 – 256.

⁶⁸ Peter Gehring, public prosecutor Germany.

appealed to the higher regional court ('weitere Beschwerde' to the Oberlandesgericht).⁶⁹ As for the request to the investigating judge ('Haftrichter') there are no restrictions, a defendant can argue his release at any given time before and during the trial. An appeal can be lodged once.⁷⁰ There is also the possibility of a constitutional complaint to the Federal Constitutional Court (FCC, 'Bundesverfassungsgericht') as an extraordinary legal remedy. This is used relatively often in detention matters, partly contesting prolonged periods of detention, partly contesting restrictions during the enforcement of detention.⁷¹

3.3.3. Motivation of decisions on pre-trial detention

In Germany there seems to be a strong practice when it comes to motivating decisions on detention on remand and pre-trial detention. First, judges are required, as mentioned in paragraph 3.3.2., to substantiate their decision whether there is either a strong suspicion and/or there are one or more of the mentioned grounds ('Haftgründe') present by assessing the relevant facts and circumstances which have led to the decision. Secondly, there is a strong judicial review of the decisions on pre-trial detention, not only by the higher courts, but also by the FCC. The FCC often rules on issues of criminal procedure and has had much influence on the development of pre-trial detention. The principles which the lower courts and the FCC abide by are the same (fair trial with the presumption of innocence, the equality of arms and speedy procedure on one hand, and an effective criminal justice system on the other), but the priorities are sometimes different.⁷² The main focus of the decisions of the FCC are the human rights as expressed in the German Constitution and as expressed in the Convention. The FCC also relies on the jurisdiction of the Court.⁷³ Judges in lower courts often react sensitively and even offended to overruling verdicts from the FCC.⁷⁴ Thus, this system has a positive effect on the motivation of decisions on pre-trial detention.

In Germany it was, until recently, commonly believed that the German Constitution comprises all human rights and guarantees given by the Court and that there are no obvious conflicts between the two laws and the two courts.⁷⁵ This view has been changed by some

⁶⁹ Paragraph 310, 1 German CCP.

⁷⁰ See note 43, p. 244 – 256 and "An analysis of minimum standards in pre-trial detention and the grounds for regular review in the Member States of the EU", JLS/D3/2007/01, p. 17.

⁷¹ "An analysis of minimum standards in pre-trial detention and the grounds for regular review in the Member States of the EU", JLS/D3/2007/01, p. 17.

⁷² See note 71, p. 2.

⁷³ See note 72.

⁷⁴ See note 72.

⁷⁵ See note 72.

cases in which the Court found Germany to be in violation of Article 5 (4) of the Convention, because the applicants failed to gain access to prosecution files that contained information and evidence relevant to court challenges to their pre-trial detention.⁷⁶ However, reviewing complaints filed against Germany with the Court shows the motivation of ordering pre-trial detention does meet the standard of the Court.

For example in *Chraidi v. Germany*⁷⁷ the German courts found three principal reasons for continuing the detention on remand and pre-trial detention, namely that the applicant remained under a strong suspicion of having committed the crimes of which he was accused, the serious nature of these offences and the fact that the applicant would be likely to abscond if released, given the sentence which he risked incurring if found guilty as charged. The Court concluded the reasonable suspicion that the applicant committed the offences with which he had been charged, being based on cogent evidence, persisted throughout the trial leading to his conviction. It also agreed that the alleged offences were of a serious nature. In regard to the danger of the applicant's absconding, the Court observed that although the possibility of a severe sentence alone is not sufficient after a certain lapse of time to justify continued detention based on the danger of flight, the national courts in the present case also relied on other relevant circumstances, including the fact that the applicant had been extradited from Lebanon to Germany for the purposes of criminal proceedings in the context of international terrorism. He had neither a fixed dwelling nor social ties in Germany which might have prevented him from absconding if released. The Court was thus satisfied there was a substantial risk of the applicant's absconding persisted throughout his detention. The Court concluded there were relevant and sufficient grounds for the applicant's continued detention.

The Court also concluded the German courts gave relevant and sufficient grounds for the applicant's continued detention in *Wemhoff v. Germany*⁷⁸ and *Dzelili v. Germany*⁷⁹. In *Wemhoff v. Germany* the Court concluded the German courts had been careful to support their affirmations that a danger of flight existed by referring at an early stage in the proceedings to certain circumstances relating to the material position and the conduct of the accused.⁸⁰

⁷⁶ ECtHR *Garcia Alva v. Germany*, appl. no. 23541/94, judgement of February 13, 2001; *Schöps v. Germany*, appl. no. 25116/94, judgement of February 13, 2001; *Lietzow v. Germany*, appl. no. 24479/94, judgement of February 13, 2001.

⁷⁷ ECtHR *Chraidi v. Germany*, appl. no. 65655/01, judgement of October 26, 2006, § 38 – 41.

⁷⁸ ECtHR *Wemhoff v. Germany*, appl. no. 2122/64, judgement of June 27, 1968, § 13 – 17.

⁷⁹ ECtHR *Dzelili v. Germany*, appl. no. 65745/01, judgement of November 10, 2005, § 71 – 74.

⁸⁰ See note 78, § 14.

3.4. Latvia

3.4.1. *Legal basis and pre-trial detention*

Provisions regarding pre-trial detention are mainly to be found in the Law of Criminal Procedure (LCP) of 28 September 2005, amended for the last time on 14 January 2010.⁸¹ Before this legislation came into force, the Code of Criminal Procedure of April 1961 (CCP), based on Criminal Procedure Codes of the Soviet Republics and the Soviet Union, was in force in the Latvian territory. With the LCP of 2005, stricter rules for imposing pre-trial detention were introduced, as well as new statutory limits for imposing pre-trial detention, depending on the gravity of the crime.

A suspect's deprivation of liberty starts - like in most other countries - with a person's arrest. The justification for the initial arrest should be distinguished from the justification for prolongation of detention. According to article 264 of the LCP there should be a ground for the allegation that the person concerned has committed a crime punishable with a custodial penalty, and in addition, the person concerned should either have been caught in the act, an eye-witness should have identified the person as the alleged offender, or clear traces should have indicated the involvement of the person in the offence.⁸² Within 48 hours after apprehension an investigating judge should decide whether or not to issue a detention order. According to article 272 (1) of the LCP, (remand) detention may be applied only if concrete information, acquired in criminal proceedings regarding facts, causes justified suspicions that a person has committed a criminal offence for which the law provides for a penalty of deprivation of liberty, and the application of another security measure may not ensure that the person will not commit another criminal offence, will not hinder or will not avoid the pre-trial criminal proceedings, court (proceedings) or the execution of a judgment.

In other words: a detention order may be issued if there is a reasonable suspicion, and in addition a justification, such as (a) the danger of absconding, (b) the risk of obstructing the proceedings, and (c) the risk that the person concerned will commit a new offence. An

⁸¹ The translation used was made by the Translation and Terminology Centre and is available on the internet (http://www.ttc.lv/export/sites/default/docs/LRTA/Likumi/Criminal_Procedure_Law.doc). The Translation and Terminology Centre is a State Agency subject to the control of the Ministry of Education and Science. It was established in order to provide governmental administrative institutions and the public with translations of legislative acts and other documents published by the State and by international organizations, as well as to issue proposals for the development and standardization of terminology.

⁸² Articles 263 and 264 of the LCP. See also pre-trial Detention in the European Union, An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU, Chapter 16 Latvia, A.M. van Kalmthout, M.M. Knapen, C. Morgenstern (eds.).

additional ground can be found in article 272 (2) of the LCP, in which it is laid down that detention may also be applied (d) in cases of especially serious crimes (carrying a prison sentence of ten years or more) if the crime was directed against a minor, a dependent person or a particularly weak person, if the person concerned is a member of an organized criminal group, if his or her identity is unknown or he or she has no fixed abode and employment, or if the person concerned does not have a permanent place of residence in Latvia. In the event of prolongation of a regular term of detention, the investigating judge is the competent authority, during trial, (higher) court judges decide whether or not to extend the period of detention for three months.⁸³

3.4.2. *Motivation of decisions on pre-trial detention*

On several occasions, applicants lodged complaints with the Court, arguing that Latvian courts' decisions authorizing and extending pre-trial detention are insufficiently motivated.⁸⁴ In those cases the Court as a rule criticized the use of pre-typed forms in decisions and held that the courts' reasoning had been too concise and abstract. The Latvian courts' decisions mainly listed the grounds of detention provided by law and had not explained how those grounds had been applicable to the applicants' situation.⁸⁵ In *Svipsta v. Latvia*, the Court observed:

“However, it is the wording of a judicial decision which most clearly reveals the precise intentions and reasoning of the court. In the instant case, not one of the six orders in question contained any indication that the judge who issued it had taken into consideration the arguments and specific facts submitted to the court.

Moreover, the Court notes the virtually identical manner in which the six orders were drafted.

(...) Accordingly, the only reasonable conclusion, in the Court's view, is that the orders extending the applicant's detention were based on a pro forma model, prepared in advance, which underwent minor alterations each time before being printed out and signed in summary fashion at the end of each hearing. The Court acknowledges the fact that Article 5 § 4 contains more flexible procedural requirements than Article 6 while being much more stringent as regards speediness (...). It therefore accepts that a procedure of this kind may not always be contrary to Article 5 § 4 of the Convention; however, it will certainly be in breach of that provision if it reflects the absence of an effective examination of the

⁸³ Pre-trial Detention in the European Union, An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU, Chapter 16 Latvia, A.M. van Kalmthout, M.M. Knapen, C. Morgenstern (eds.).

⁸⁴ Among others ECtHR *Lavents v. Latvia*, appl. no. 58442/00, judgement of November 28, 2002; ECtHR *Freimanis and Lidums v. Latvia*, appl. no. 73443/01 and 74860/01, judgements of February 9, 2006; ECtHR *Kornakovs v. Latvia*, appl. no. 61005/00, judgement of June 15, 2006; ECtHR *Svipsta v. Latvia*, appl. no. 66820/01, judgement of March 9, 2006; ECtHR *Estrikh v. Latvia*, appl. no. 73819/01, judgement of January 18, 2007 and ECtHR *Ž. v. Latvia*, appl. no. 14755/03, judgement of January 24, 2008.

⁸⁵ ECtHR *Shannon v. Latvia*, appl. no. 32214/03, judgement of November 24, 2009.

parties' observations. In the Court's view, the practice of the court of first instance amounts to a classic case of denial of the fundamental guarantees contained in Article 5 § 4.

The Court points out that all the orders extending the applicant's detention on remand were the subject of an appeal before the Riga Regional Court, which upheld them by final orders dated (...). It acknowledges the fact that these decisions were more detailed than those of the first-instance court. However, here again, the appeal court merely made vague references to the seriousness of the offence, the fact that it had been perpetrated by an organised group, the applicant's personality and the risk of collusion, without substantiating these allegations. Only the order of (...) referred to the specific acts committed by the applicant; however, this is merely one exception which is insufficient to render the proceedings as a whole compatible with Article 5 § 4 of the Convention.⁸⁶

It goes without saying that the Court in the end found a violation of Article 5 (4) of the Convention as the Latvian courts extended the applicant's detention on remand without giving sufficient reasons.

Although it is hard to assess with certainty that something changed after the violations found by the Court, it looks as if some of the Latvian practices regarding pre-trial detention changed for the better. According to Republic of Latvia 2009 Ombudsman report:

"In 2009 there have been fewer complaints concerning detention as a preventive measure. In the majority of these cases the persons themselves had not used the possibility provided by the Law of Criminal Procedure to lodge an appeal against the decision to impose detention; in these cases the Ombudsman informed the persons in question of their rights."⁸⁷

Furthermore, the number of violations of Article 5, found by the Court, decreased from 11 in 2006 to 2 in 2009.⁸⁸

4. Final Conclusion

4.1 Introduction

As mentioned before, in view of both the presumption of innocence and the right to liberty⁸⁹, pre-trial detention shall - as a rule - be the exception rather than the norm. Moreover, it shall be used only when it is strictly necessary and as a measure of last resort. Aside from this, it

⁸⁶ ECtHR *Svipsta v. Latvia*, appl. no. 66820/01, judgement of March 9 2006, § 130-133.

⁸⁷ <http://www.tiesibsargs.lv/files/downloads/Tiesibsarga%202009.gada%20zinojums.pdf>; translation by K. Tamuzs.

⁸⁸ Annual Report 2006, ECHR, Violations found by Article and by respondent State: Latvia - Right to liberty and security: 11; Report 2007, ECHR, Violations found by Article and respondent State: Latvia - Right to liberty and security: 6; Report 2008, ECHR, Violations found by Article and respondent State: Latvia - Right to liberty and security: 1; Annual Report 2009, ECHR, Violations found by Article and by respondent State: Latvia - Right to liberty and security: 2. It has to be mentioned that this does not mean that after 2006 Latvian decisions on pre-trial detention have been motivated better, as the above-mentioned violations concern all aspects of Article 5. Apart from that, the judgments in which these violations are found will concern Latvian practices in previous years.

⁸⁹ See Article 5 of the ECHR – Right to liberty and security.

shall not be used for punitive reasons.⁹⁰ Therefore decisions regarding pre-trial detention should be motivated properly, compatible with the requirements laid down in Article 5 of the Convention. As a rule, the proceedings referred to in Article 5 (4) of the Convention need not always be attended by the same guarantees as those required under Article 6 (1) of the Convention⁹¹. However, its guarantees would be deprived of their substance if a national judge could treat as irrelevant, or disregard, concrete facts relied on by the detainee and capable of putting in doubt the existence of the conditions essential for the “lawfulness” of the deprivation of liberty within the meaning of Article 5 (1) of the Convention.⁹²

4.2. Pre-trial detention in the Netherlands, Germany and Latvia

As has been described in chapter 3, decisions on custody in remand in the Netherlands are most of the time limited at listing the grounds of detention provided by law without explaining how those grounds are applicable to the detainee’s situation in an individual case. Such an abstract and concise reasoning does not fulfill the requirements of Article 5 of the Convention, as has been set out in the Court’s case law. This seems to be different in regard to Germany. As been described in chapter 3, there seems to be strong practice of motivating decisions on detention on remand and pre-trial detention by German courts. As can be concluded from different rulings of the Court, the way in which decisions on pre-trial decisions are substantiated do meet the standard of the Court. Moreover: in Germany pre-trial detention seems to be the exception rather than the norm.

It looks as if reasoned decisions on pre-trial detention in Latvia were - until recently - rather an exception than a practice. Decisions mainly listed the grounds of detention provided by law and did not explain in any way how those grounds had been applicable to the detainee’s individual situation. As the Court held, the reasoning of the national courts’ decisions on pre-trial detention was too concise and abstract. It is therefore no surprise that the Court found numerous violations of the right laid down in Article 5 (4) of the Convention.

4.3. Recommendations

It would be a bit too easy to just recommend national judges to improve the motivation / reasoning of their decisions on pre-trial detention, without asking ourselves the question why

⁹⁰ Human Rights Manual for Prosecutors, Second Edition, Egbert Myjer, Barry Hancock, Nicolas Cowdery (Eds.).

⁹¹ These provisions pursue different aims; Article 5 (4) of the ECHR is - compared to Article 6 (1) of the ECHR - much more stringent as regards speediness.

⁹² ECtHR *Svipsta v. Latvia*, appl. no. 66820/01, judgement of March 9, 2006, ECtHR *Nikolova v. Bulgaria*, appl. no. 31195/96, judgement of July 15, 1998.

this practice actually exists. Of course, the speediness of the procedure will deliver part of the explanation. But we believe there is more.

In an academic article called "Pre-trial detention and freedom depriving sentences"⁹³ some of the judges, interviewed by the author of that article, put forward that not ordering pre-trial detention could have the consequence that a suspect would not be sentenced to an unconditional prison sentence in the end. One of them, quoted by the author, apparently said: 'So you are thinking of the sentence a person will get in the end, and if you let him stay in prison now, he at least already served a part.'⁹⁴ This could imply that pre-trial detention is sometimes ordered for wrong - punitive - reasons and, as a consequence, is not motivated thoroughly as no valid motivation for such a decision exists.

Thus, not only does it look like persons are sometimes put into pre-trial detention for punitive reasons, moreover it seems that the decision on whether or not to request pre-trial detention is taken based on a wrong assumption. Now, most judges and public prosecutors first ask themselves if the conditions for ordering somebody's pre-trial detention are met. In other words, this approach is very formalistic. Nevertheless, the first question should be: 'Is it absolutely necessary to deprive somebody of his or her liberty pending trial?'. If so, the decision ordering or prolonging pre-trial detention should be thoroughly motivated, using at least one of the grounds laid down in the Court's case law.

As said before, both in view of the presumption of innocence and the presumption in favor of liberty, pre-trial detention shall - as a rule - be the exception rather than the norm. When keeping this principle in mind, we truly believe the number of persons kept in pre-trial detention not only in the Netherlands but also in other Member States could still decrease. Therefore, it is of utmost importance to change the magistrates' attitude towards pre-trial detention so that in the end the wrong assumptions which are currently the starting point for this type of decisions will cease to exist. A change of approach will be in the interest of everybody; not only of the suspect and his lawyer, it will also permit more public scrutiny on the proper administration of justice.

⁹³ 'Voorlopige hechtenis en vrijheidsstraf', mr. dr. L. Stevens, NJB 2010-24.

⁹⁴ "Dus je bent bezig met hoeveel straf iemand krijgt, en dan laat je hem nu zitten, dan heeft hij het straks allemaal gehad.", 'Voorlopige hechtenis en vrijheidsstraf', mr. dr. L. Stevens, NJB 2010-24.