"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

Estonia[1]

1. Introduction

The Republic of Estonia today has a population of about 1.3 million.[2] In 1918, it declared its independence from Russia and Germany for the first time; this was officially recognised in 1920. During World War II, Estonia was occupied and annexed first by the Soviet Union and subsequently by Germany, only to be re-occupied by the Soviet Union in 1944. Estonia regained its independence on 20 August 1991. In recent years, the country has been one of the world's fastest growing economies.[3] Major ethnic groups besides the Estonians (69%), are Russians (26%) and Ukrainians (2%).[4] The affiliation with an ethnic group has to be distinguished from citizenship. In 2006, about 84% of the population were Estonian citizens, about 7% were foreign citizens and about 9% held a special status of non-citizens. These are mainly Russians who did not (yet) apply for naturalisation or were not granted the status because of, for instance, language problems. Although in recent years progress was made in relation to the naturalisation process, still almost 120,000 (2006) persons remain non-citizens.[5]

Historically, the Estonian jurisdiction was always influenced by German law, but during Soviet times, Estonia's law was basically a copy of the Soviet legal system. The Soviet-style Code of Criminal Procedure was revised after Estonia regained its independence.[6] The Estonian legal order as a whole,[7] and the Estonian Criminal Justice System in particular,[8] have been designed, for the most part, according to the European continental models.

Estonia has been a member of the League of Nations and is a member of the United Nations since 17 September 1991. It is a member of the Council of Europe since 14 May 1993 and party to both UN International Covenants since 21 October 1991.[9] Estonia ratified the European Convention on Human Rights and Fundamental Freedoms (ECHR) on 16 April 1996 and Protocol No. 6, abolishing the death penalty, on 17 April 1998.[10] Since 1 May 2004, Estonia is a member of the European Union. It is also party to the European Convention for the Prevention of Torture (CPT) since 6 November 1996. So far, Estonia is the only Baltic Country that has ratified the Optional Protocol to the UN Convention for the Elimination of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)[11] (18 December 2006).

According to Sec. 2 of the Code of Criminal Procedure (= CCP), the criminal procedure is determined by the Constitution of the Republic of Estonia, generally recognised principles of international law, binding international agreements, the CCP itself and binding decisions of the Supreme Court. The Estonian Constitution (EC)[12] was adopted on 28 June 1992 after a

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1 The author, Christine Morgenstern, wishes to thank Prof. Jaan Ginter for commenting on and correcting earlier drafts of this report, and for taking part in the 3rd expert meeting, 30-31 January 2009 in Tilburg, the Netherlands. Jaan Ginter is a professor of criminology and assistant dean of the Faculty of Law, University of Tartu.

2 http://epp.eurostat.ec.europa.eu, last retrieved 17 January 2009.

3 See, for example, the development of the GDP according to the EUROSTAT statistics; http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&plugin=1&language=en&pcode=tec00001 (last retrieved 15 January 2009).

4 *Statistics Estonia*, http://pub.stat.ee/px-web.2001/Dialog/statfile1.asp (last retrieved 8 January 2009). The data has been taken from the 2000 census.

5 Commissioner of Human Rights 2007, p. 3.

6 An introduction into the reformed Criminal Procedure can be found in Ginter/Kunstek, 2004.

7 Narits 2002, p. 10.

8 Ginter/Kunstek 2004, p. 75.

9 http://www2.ohchr.org/english/bodies/ratification/4.htm (last retrieved 8 January 2009).

10 Estonia is party to all protocols but No. 12, to which it is a signatory. The complete status can be found at http://conventions.coe.int (last retrieved 7 January 2009).

11 http://www2.ohchr.org/english/bodies/ratification/9_b.htm (last retrieved 7 January 2009).

12 The English text can be found on the website of the President of Estonia:

referendum was held. In its second chapter, the "fundamental rights, freedoms and duties" of citizens are laid down. Judicial independence is guaranteed by §§ 146 *et passim* EC. The Supreme Court is competent to review appeals and petitions in ordinary proceedings but also to hear petitions for constitutional review (§ 149 EC).[13] The Constitution also introduces the State Audit Office (Chapter XI) as an independent state body responsible for economic control, and the Legal Chancellor ("Õiguskantsler") (Chapter XII), an equivalent to the ombudsmen in other countries, as an independent official to "exercise supervision over the constitutionality and legality of legislation passed by the legislative and executive powers and by local governments".[14] In cases of legislative conflicts with the Constitution, the Legal Chancellor is entitled to propose to the competent authority that the relevant norms must be altered. If this is not done within 20 days, he proposes[15] to the Supreme Court to declare the legislation invalid (§ 142 EC). The Legal Chancellor is also entitled to verify whether agencies and officials who perform public functions comply with the Constitution; this means, *inter alia*, that he can visit all sorts of institutions, including prisons. According to the 2007 annual report, the Legal Chancellor investigated 344 cases in the area of the Ministry of Justice, of which 257 concerned prisons.[16] Since February 2007, the Legal Chancellor also serves as the national contact point under Art. 3 of the OPCAT.

In its fundamental rights chapter, the Estonian Constitution contains basic guarantees regarding the rule of law: § 14 EC stipulates the obligation for legislative, executive and judicial powers to guarantee the rights and freedoms. § 15 EC provides the right of recourse to the courts. § 18 prohibit torture or other cruel or degrading treatment of human beings and rules out inhuman or degrading punishment. §§ 20-24 EC are norms with particular relevance to criminal proceedings: Under the conditions of § 20, a person can be deprived of his or her liberty, following a procedure provided by the law. According to § 20 (3), a person can be deprived of his or her liberty "to prevent a criminal or administrative offence, to bring a person who is reasonably suspected of such an offence before a competent state authority, or to prevent his or her escape". Therefore, the text of the Constitution generally allows arrest or pre-trial detention for all offences included in the Criminal Code of 2002 (but restrictions apply to misdemeanours, see below). The Estonian Constitution does not contain an explicit principle of proportionality, but it has been developed by the Supreme Court in its jurisdiction based on § 11 EC, which reads: "Rights and freedoms may be restricted only in accordance with the Constitution. Such restrictions must be necessary in a democratic society and shall not distort the nature of the rights and freedoms restricted."

§ 21 EC is the constitutional *habeas corpus* norm and reads: "Everyone who is deprived of his or her liberty shall be informed promptly, in a language and manner which he or she understands, of the reason for the deprivation of liberty and of his or her rights, and shall be given the opportunity to notify those closest to him or her. A person suspected of a criminal offence shall also be promptly given the opportunity to choose and confer with counsel. The right of a person suspected of a criminal offence to notify those closest to him or her of the deprivation of liberty may be restricted only in the cases and pursuant to procedure provided by law to prevent a criminal offence or in the interests of ascertaining the truth in a criminal proceeding. No one shall be held in custody for more than forty-eight hours without the specific authorisation of a court. The decision of the court shall be promptly communicated to the person in custody in a language and manner which he or she understands." § 22-24 EC contain more basic procedural rights provisions, including the presumption of innocence, the *nemo-tenetur* principle and the *ne bis in idem* principle, and generally prohibit *in absentia* proceedings.

In addition to the constitutionally guaranteed rights, international human rights treaties were incorporated into domestic Estonian law (see above). Thus, the ECHR, with regard to remand detention in particular Art. 3 (Prohibition of Torture) and Art. 5 (Right to liberty and security) as well as Article 6 (fair trial, presumption of innocence), is directly applicable in domestic law since 1997.

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http://www.president.ee/en/estonia/constitution.php (last retrieved 5 January 2009).

[13] A booklet explaining the functioning of the Estonian Supreme Court is available for download on the Internet (Eesti Vabariigi Riigikohus 2009).

[14] http://www.oiguskantsler.ee/?menuID=52, (last retrieved 15 November 2008).

[15] It is debated whether this is mandatory or, as the last Legal Chancellor argued, discretionary, even in cases where unconstitutional parts in the legislation could be found.

[16] *Office of the Chancellor of Justice*. Annual report 2007 of the Chancellor of Justice, Tallinn 2008, p. 23.

In 1992, the criminal law system was adapted by modifying the old Penal Code. In September 2002, a new Penal Code[17] came into force. All criminal offences (crimes and misdemeanours) and some administrative offences are codified in the Penal Code, but the PC still clearly distinguishes between them. The new Code also reformed the sanction system. The reform took place at a time when the crime level (according to police statistics) had reached a maximum. Before, a dramatic increase had occurred between 1986 and 1992. The numbers stabilised between 1992 and 1996, but a second "crime wave" could be seen between 1996 and 2002. Then the crime numbers stabilised again (in 2005, around 53,000 offences were recorded) and started to decrease (48,317 offences in 2006).[18] Important amendments to the Penal Code came in 2007,[19] with an Act concerning the confiscation of property as well as an Act amending defining elements of multiple criminal offences and misdemeanours. Another Act had enormous practical impact with regard to the number of prison sentences and prisoners (see below), because it decriminalised also repeated petty theft (items of small value: 1,000 Krooni/ca. 64 Euros). Over the last years, petty theft has a continued history of being criminalised and decriminalised again. Before, only first-time offenders benefited from the decriminalisation; this was changed in 2007. Since 28 July 2008, recidivism as such does not play a role, but "systematic" petty theft is a criminal offence.

The law regulating pre-trial detention mainly is the Code of Criminal Procedure (= CCP[20]/"Kriminaalmenetluse seadustik"), which originally entered into force 1 September 2004 (amended for the last time on 25 February 2007). Before the new Code came into force, the CCP of April 1961, based on Criminal Procedure Codes of the Soviet Republics and the Soviet Union, was effective in Estonia. It was amended extensively in 1994.

With the CCP of 2004, more comprehensive rules for arrest and pre-trial detention than before were formulated, but the basic amendments to the old Code of 1961 were already introduced with the 1994 amendments. The law also introduced (in 2006) the new institution of an investigating judge, with special competencies during the pre-trial phase (§§ 21, 231, 232 CCP). The investigating judges are situated at the four County Courts that serve as courts for the first instance.[21] In Chapter 8 of the CCP, the pre-trial procedure and (in Division 3) the detention of suspects for less than 48 hours is regulated, whereas the provisions for the detention itself as one of the preventive measures to secure criminal proceedings can be found in Chapter 4 (§§ 130 *et passim*). It is important to realise that, in contrast to the usual terminology, in the English translations of the Estonian Code of Criminal Procedure, the word "arrest" ("kahtlustatavana kinnipidamine") is used for the period starting with the issuing of a judicial warrant; the word "detention" ("vahistamine") is reserved for the 48-hour period during which the investigating authorities can hold a suspect in custody without such a warrant.

Other relevant law for the execution of arrest and detention are the Imprisonment Act of 2000 (with later amendments) and the Internal Rules of Detention Houses, Regulation No. 71 of the Minister of Internal Affairs of 2000 (with later amendments).[22]

2. Empirical background information

Traditionally, the prison population rate (including remand detainees) in Estonia was among the highest in Europe (for its development, see Figure 1). With 259 inmates per 100,000 inhabitants, it currently still is higher than in most other EU Member States. As this also resulted in

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[17] A translation is available at http://www.legaltext.ee/en/andmebaas/ava.asp?m=022. It is provided by the Estonian Legal Language Centre (ELLC), a State agency within the area of government of the Ministry of Justice.

[18] All data from Sootak/Markina 2009. Their data has been taken from the Police Crime Statistics (www.stat.ee). However, it has to be noted that the counting procedures and categories have changed several times, which limits data comparability. If one takes the data published by the Ministry of Justice (also published on www.stat.ee), the decrease and stabilisation can be seen as well, but the numbers are slightly higher: 55,568 in 2005, 51,834 in 2006, 50,375 in 2007 and 50,977 in 2008.

[19] *Office of the Chancellor of Justice* 2008, p. 26.

[20] A translation is available on http://www.legaltext.ee/en/andmebaas/ava.asp?m=022.

[21] Estonia has a three-level court system, consisting of 4 County Courts (or District Courts – the translations differ), 3 Circuit Courts and the Supreme Court. It is briefly explained on the website of the Supreme Court, http://www.nc.ee/?id=188.

[22] Both texts are also available in English on http://www.legaltext.ee/en/andmebaas/ava.asp?m=022.

overcrowding[23] and often poor living conditions, it constantly posed a serious problem with regard to human rights – to what extent the decreasing number of inhabitants will alleviate this problem remains to be seen. Among the prisoners, there are still many remand detainees (see Table 1), currently with a share of about 25%. However, these statistics might not represent the full picture of the detained population in Estonia, since pre-trial detainees and persons sentenced to a short term may also be detained in detention houses, under the responsibility of the Ministry of the Interior (see below). Only since 1 January 2009, short-term prison sentences can no longer be executed in detention houses (§ 3 Imprisonment Act). Whether these numbers are included in the prison statistics or not, is not entirely clear – in his 2007 Memorandum, the Council of Europe's Commissioner of Human Rights noted that they are not included;[24] in the Commentary to this Memorandum by the Estonian government,[25] it is stated (without giving an explanation for that contradiction) that they are counted as part of the prison population. According to the understanding of Estonian experts,[26] the statistics (published on www.stat.ee) include only the prison population; detainees in detention houses are not included.

Just very recently, the situation has changed – at least partly – for the better: The current situation can be seen in Table 1. This table comprises data from different sources (which nevertheless all rely on official data from national authorities).

[23] The nominal occupancy rate according to the prison statistics usually is below 100%. It has to be considered, though, that according to Estonian law the minimum space per inmate is 2.5 m^2 and not 4 m^2, which the Committee for the Prevention of Torture considers to be the European minimum standard. See e.g. Walmsley 2003, p. 271.

[24] Commissioner of Human Rights 2007, p. 6 (§24).

[25] Commissioner of Human Rights 2007, p. 22.

[26] Statement by J. Ginter (see footnote 1).

Table 1: Prison Population characteristics (latest data from different sources)

Source	Date	Total prison population	Number of remand detainees	Pre-trial detainees as a percentage of the total prison population	Total prison population rate per 100,000	Pre-trial detention rate per 100,000	Foreigners in prison (numbers and percentage)		Origin of foreigners in pre-trial detention (percentage)		Female prisoners		Prisoners under 18 (numbers and percentage)	
							All prisoners	Remand detainees	EU nationals	Third-country nationals	All prisoners	Remand detainees	All prisoners	Remand detainees
International Centre for Prison Studies[27]	1 January 2008	3,467	916	26.4%	259	*68*	6.4%	---	---	---	4.5%	---	2%	---
SPACE I (Council of Europe)[28]	31 December 2006	4,310	1,045	24.2%	322	78	1740 40.4%*	483 46.2%**	---	---	209 4.8%	---	103 2.4%	---
National Statistics[29]	1 January 2008 1 April 2008	3,467 3,517	916 891	26.4% 25.3%	259	*68*	Only sentenced prisoners: 186 7%[30]	---	---	---	Only sentenced prisoners: 103 4.1%	---	Only sentenced prisoners: 31 1.2%	---

--- No data available; *: of all prisoners; ** of all remand detainees; data in italics represents own calculations

27 International Centre for Prison Studies 2008.

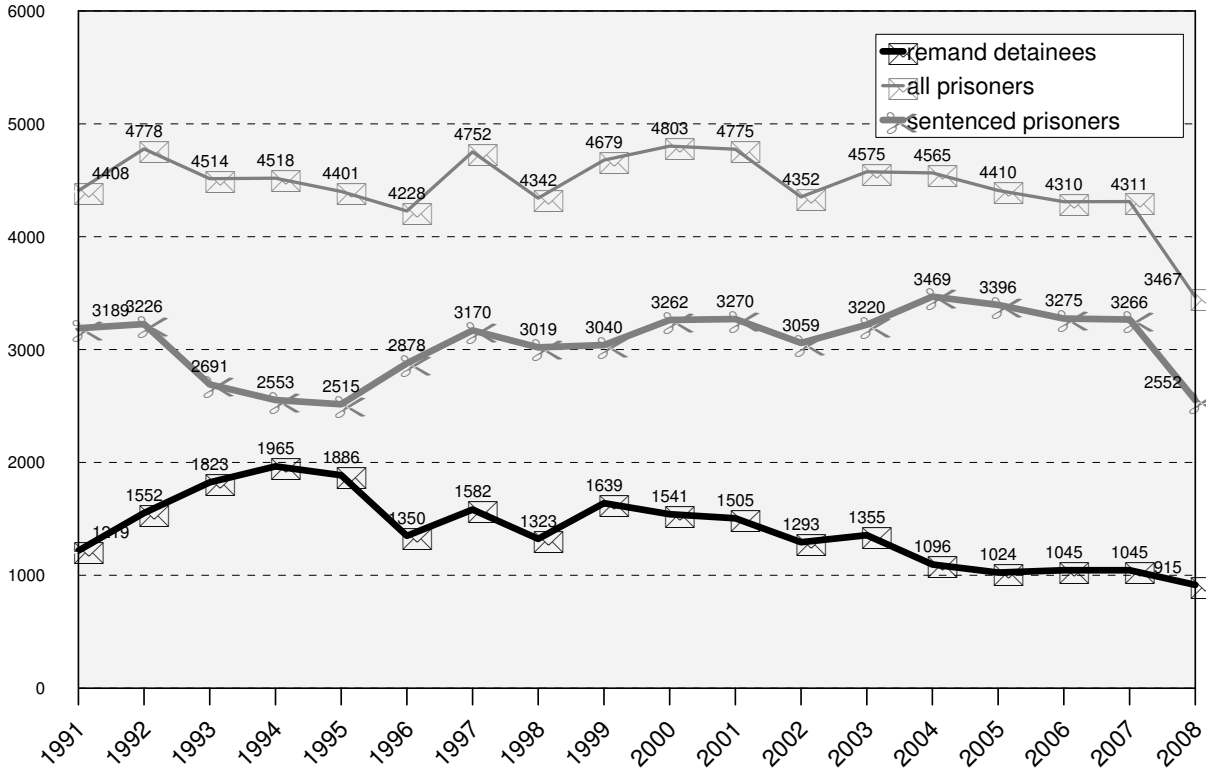
28 Aebi/Delgrande 2007. The data for 2006 is exactly the same as the data published by the National Prison Statistics.

29 National Prison Statistics, annual reports of the Prisons Department of the Ministry of Justice since 2003 at http://www.vangla.ee/36154 (last retrieved 9 January 2009). Further specifications (gender, age etc.) are only available for sentenced prisoners.

30 See paragraph 8.3 for explanations.

At the beginning of 2008, the number of prisoners decreased considerably, reaching the lowest level in the last 16 years: 3,467 (it has risen slightly in April 2008: to 3,517). The prisoner rate is now 259; it used to be well over 300, reaching 351 in 2001.[31] This reduction is the result of an increase in the number of prisoners released on parole and a decrease in the number of convicts entering the prison system (see above). This also is a consequence of an explicit change in criminal policy following the change by the Minster of Justice in 2005.[32] In recent years, the development of the number of sentenced prisoners and the development of the number of remand prisoners have been more in line. Before, both numbers developed inconsistently, with percentages of remand prisoners ranging from 23% in 2005 to as much as 43% in 1995 (see Figure 1). As can be concluded from the data provided by the SPACE statistics, the Estonian Prison Service Statistics do not sub-divide the group of remand detainees, but count all of them as "untried prisoners". As far as can be seen, this group includes all persons without a final sentence who are kept in remand prisons. According to Estonian law, it is not possible to take a prisoner who has been convicted in first instance but is in the appeals procedure (e.g. to appeal against the length of his sentence) to a regular prison to start with the enforcement of his sentence.

Figure 1: The prison population according to legal status (absolute numbers), 1991-2008



Source: National Prison Administration, http://www.vangla.ee/36154; data for the years before 2003: *Sootak/Markina* 2009.

3. Legal basis: scope and notion of pre-trial detention

3.1 Definition of pre-trial detention

According to § 130 (1) CCP, "arrest" ("kahtlustatavana kinnipidamine", for the translation problem see above)[33] is "a preventive measure which is applied with regard to a suspect, accused or convicted offender and which means deprivation of his or her liberty on the basis of a court ruling". This definition is quite broad, because it also contains "convicted" offenders (§ 35 (3) CCP)

31 International Centre for Prison Studies 2008.
32 Office of the Chancellor of Justice 2006, p. 73.
33 See above for the translation problems.

– as in most other jurisdictions, remand detention cannot only be used to secure the investigation and trial but also to secure the execution of the sentence if the convict is at large. The definition, however, makes clear that all preliminary detainees under that provision keep their status also during the appeals procedure and stay in remand prisons or the respective units. Convicted prisoners might be taken into detention in order to secure the execution of the sentence (§ 130 (4) CCP). In contrast, "detention" ("vahistamine") in the pre-trial procedure is regulated in § 217 (1) CCP, which reads: "Detention of a suspect is a procedural act whereby a person is deprived of liberty for up to 48 hours."

Several other forms of deprivation of liberty have to be distinguished: Within the CCP, detention of up to fourteen days is possible as a consequence of the failure to appear when summoned by a body that is conducting proceedings (§ 138 (1) CCP) and in case of an accused person's failure to appear before court when summoned (§ 130 (3) CCP). According to § 102 CCP, preliminary detention is also possible in the form of compulsory placement in a medical institution, if long-term expert enquiries are necessary for forensic examination based on a request of the Prosecutor's Office or on a judicial order. The duration is up to one month, but this may be extended by three months. The placement period must be included in the arrest term. Other possible grounds for placement in a police detention house include the execution of administrative detention (up to thirty days) with respect to persons found guilty of misdemeanours according to § 48 of the Penal Code. According to the Constitution (see above), pre-trial detention with regard to a misdemeanour would not be unconstitutional. Theoretically, it would also be applicable in accordance with the Code of Misdemeanour Procedure (CMP),[34] which applies instead of the CCP. § 37 CMP stipulates that "the preventive measures prescribed by criminal procedure shall not be applied in misdemeanour procedure unless otherwise provided by this Code". But there are no grounds for preliminary detention in the Code, so no remand detention can be ordered in other cases than for criminal offences. According to the system of the Penal Code,[35] criminal offences are all offences punishable with a fine or imprisonment, whereas misdemeanours are punishable with a fine or detention. For foreigners who are in Estonia illegally, the Obligation to Leave and Prohibition on Entry Act of 1998 (amended for the last time in 2007) foresees short-term detention prior to expulsion.

3.2 Primary objective and underlying principles of pre-trial detention

Several general principles laid down in the CCP are of importance for the imposition and enforcement of arrest and pre-trail detention: First of all, the criminal procedure in Estonia is of a mandatory nature (principle of legality, § 6).

§ 7 CCP repeats the presumption of innocence, laid down in the Constitution. §§ 8 and 9 CCP provide for the safeguarding of the rights of all persons involved in criminal proceedings. *Inter alia*, they refer to the transparency of the State action (by explaining the objective of the act, rights and duties to the party concerned), to the right to a proper defence, and to the provision of legal assistance. They also repeat the *habeas corpus* provisions of the EC and the need to protect the dignity of all persons involved in the proceedings as well as their privacy and family life. None of these provisions makes explicit reference to the principle of proportionality, no provision constitutes a threshold with regard to arrest or remand detention. But the principle has been developed, with regard to remand detention, out of § 127 (1) CCP,[36] which formulates the conditions under which a preventive measure shall be chosen. It refers, *inter alia*, to the "degree of punishment" that can be expected and thus constitutes an implicit reference to the concept.

Detention ("arrest" according to § 130 CCP) is one of the preventive measures. In general, the objective of all preventive measures within the CCP is "to secure the criminal proceedings" (as stated in the heading of Chapter 4 of the CCP). According to § 127 (1) CCP, a preventive measure may be chosen, taking into account several individual circumstances, one of which being the

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[34] Code of Misdemeanour Procedure, available for download in English on www.legaltext.ee (last retrieved 2 January 2009).

[35] § 3 Estonian PC: Types of offences: "(…) (2) Offences are criminal offences and misdemeanours. (3) A criminal offence is an offence which is provided for in this Code and the principal punishment prescribed for which in the case of natural persons is a pecuniary punishment or imprisonment and in the case of legal persons, a pecuniary punishment or compulsory dissolution. (4) A misdemeanour is an offence which is provided for in this Code or another Act and the principal punishment prescribed for which is a fine or detention."

[36] I thank J. Ginter (see footnote 1) for this clarification.

expected sentence (see above). Therefore, detention is always discretionary. Other preventive measures are: the prohibition to leave one's place of residence (§ 128 CCP), supervision (applicable to members of the Defence Forces; § 129 CCP) and bail (§ 135) (for details, see paragraph 8.3). Scholars do not so much criticise the legislative provisions, but their main conclusion is that, in practice, court rulings often do not offer enough information to assess whether there are substantial grounds for pre-trial detention in the respective case.[37]

3.3 Beginning, end and duration of pre-trial detention according to law

According to § 171 (2) CCP, the moment of "detention" is relevant, because from this moment on all terms are calculated. As far as can be seen, this moment is the actual apprehension meant in § 217 CCP; (for the translation problems, see above). A suspect can be detained at the police station without charge for 48 hours. These rules are much stricter than under the old CCP of 1961 (as amended up to 2003), where the 48-hours period could be extended by the order of a judge for up to ten days – in exceptional cases for up to thirty days – to prepare the charges (§ 67 CCP 1961).

Within 48 hours after this initial arrest, the person has to be brought before the preliminary investigative judge, who then has to decide whether to adjudicate the request for detention or not (§ 217 (8) CCP).

The maximum term for remand detention in the pre-trial procedure is six months (§ 130 (3) CCP). This term does not include the period of time spent under provisional arrest in a foreign country by a person whose extradition has been applied for by the Republic of Estonia. In cases of particular complexity or substance in a criminal matter, or in exceptional cases arising from international cooperation in a criminal proceeding, a preliminary investigative judge may extend the term of detention at the request of the Chief Public Prosecutor. If the case has no such complexity or extent, the term cannot be prolonged. However, it has to be noted that in cases where such preconditions are fulfilled (of course, terms like "complexity of a case" or the "extent of a case" are rather vague) no further time limits exist. (Under the old CCP of 1961, a further time limit existed; the extension was restricted to one year, § 74 CCP 1961). For the trial phase of the proceedings, no time limits exist. No research has been undertaken so far with regard to possible misuse of the extension possibilities, but cases are known where the extension was denied because the detention period during the investigation had reached the expected term of the prison sentence.[38]

[37] Suik 1997, Reinthal 2007; I thank J. Ginter (see footnote 1) for the bibliographic references and a translation of the main content.

[38] Information by J. Ginter (see footnote 1) via e-mail.

Table 2: Timeline for arrest and remand detention in Estonia

TIME Max.	PROCEDURAL ACTION OR EVENT	LEGAL BASIS	WHO? (competent authority to decide)	WHERE? (detention facility, competent authority for execution)
0.00	Actual arrest (in Estonian: "kahtlustatavana kinnipidamine") If the suspect was apprehended by a citizen he or she has to be taken to the police Immediate explanation of rights and duties to and interrogation of the suspect Opportunity to notify a close person Preparation of the application for an arrest warrant (if the detained person so wishes: notification of his counsel) Transport of the detained person to a preliminary investigation judge	§ 217 CCP § 131 CCP. § 217 (8) and (10) CCP	Anyone, if the person is caught in the act or immediately after Investigative bodies (§ 31 CCP: Police Board, Central Criminal Police, Security Police Board, Tax and Customs Board, Border Guard Administration, Competition Board and the Headquarters of the Defence Forces); in case of the need for "urgent procedural acts" (§ 31 (3) CCP), also the Environmental Inspectorate, Rescue Board, Labour Inspectorate etc.) Prosecutor's Office	Police station (Ministry of the Interior)
48.00	Decision and issuing of the decision to apply detention = Arrest warrant Immediate notification of the arrest to a close person (this can be delayed when necessary; no time limit in the law)	§ 130 CCP § 133 CCP	Request: Prosecutor's Office Decision: preliminary investigative judge or court	
6 months	Detention (in Estonian: "vahistamine") in pre-trial procedure	§ 130 (3) CCP		Remand prison/remand section of a prison (Ministry of Justice) According to § 90 (2) of the Imprisonment Act of 2000, detainees can also be placed in a detention house under the authority of the Ministry of the Interior; on the decision of the relevant police investigator, remand prisoners may also be returned to police custody from prison (and placed in a police detention house), if this is considered necessary for the preliminary investigation

More than six months (no explicit limit)	Extension of detention in pre-trial procedure in the case of particular complexity or extent, or in exceptional cases arising from international cooperation Remand detention during trial or during appeals procedure	§ 130 (4) CCP	Request: Chief Public Prosecutor Decision: pre-trial investigative judge	

3.4 Competent authorities for arrest/further detention etc.

An overview of competent authorities during the different stages of detention can be seen in Table 2. If a person is caught in the act or immediately after, while trying to escape, according to § 217 (4) anybody can take him/her to the police for detention. Therefore, Estonian law also provides for the traditional possibility of citizen's arrest. Apart from that possibility, investigative bodies are competent to arrest a suspect. These are, according to § 31 CCP, the Police Board, Central Criminal Police, Security Police Board, Tax and Customs Board, Border Guard Administration, Competition Board and the Headquarters of the Defence Forces. In case of the need for "urgent procedural acts" (§ 31 (3) CCP), the Environmental Inspectorate, Rescue Board, Labour Inspectorate etc are also competent.

The pre-trial proceedings are directed by the Prosecutor's Office. It must ensure its legality and efficiency (§ 30 CCP), and is responsible for preparing an application for an arrest warrant in cases where the prosecutor is convinced of the need for custody pending trial (§ 131 CCP and § 217 (8) CCP). If this is so, he orders that the suspect is conveyed to the preliminary investigative judge with the purpose of hearing the application. Once this has been done, the preliminary investigative judge (located at the County Court) becomes competent for the hearing and several procedural actions that will be explained below. According to § 143[1] CCP, he is also competent for ordering complete isolation from others, if deemed necessary. It is important to note, however, that isolation may also be ordered by the Prosecutor's Office. Other decisions with regard to the restriction of the rights of the detained person during custody may, in accordance with § 143[1] CCP, be made by "a body conducting the proceedings" according to § 142 CCP. Possible restrictions are, for instance, the prohibition to receive visits, to correspond etc. (for details, see paragraph 7.4). Finally, the preliminary investigative judge or a court is competent for the suspect's or accused's request to verify the reasons for his arrest (see paragraph 5).

3.5 Procedure and procedural rights of the accused at the time of arrest/during detention[39]

3.5.1 Information, notification, recording and end of the detention (initial arrest)

After apprehension, a person detained as a suspect must be informed about his or her rights and obligations (§§ 217 (6), 75 CCP). This information contains the explanation that he or she has the right to refuse to give statements (*nemo-tenetur*) but if given, those statements can be used against him or her. In its last report (of the 2003 visit), the CPT criticised that often detainees were not provided with written information they were allowed to keep.[40]

The suspect must have the opportunity to give his/her own statement with regard to the facts and the allegations. The suspect then has to be interrogated immediately. He or she must be given an opportunity to notify one close person through an official conducting the proceedings (§ 210 (10) CCP). This provision was added to the law following a recommendation by the CPT, which, in its last report, stated that the legal situation was not satisfactory and that it had found evidence (written forms on which the space to write down the notification details had been left blank) that notifications were not always made.[41] The exercise of the right to notify a close person may be refused with the permission of the prosecutor if the notification would endanger the investigation (§ 217 (10) CCP). It is doubtful whether this restriction meets with the requirements of the CPT.

The arrest and the interrogation have to be recorded. Once the prosecutor is convinced of the need to further detain a suspect, he shall prepare an application for an arrest warrant and, within 48 hours of the initial apprehension, organise the transport to a preliminary investigative judge for the adjudication of the application (§ 217 (9) CCP).

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[39] Most of the information was drawn directly from the law. However, it has been supplemented with some information taken from Tever 2007, which can be found on one of the websites of the European Criminal Bar Association: http://www.ecba-eaw.org/cms. This website aims at collecting all necessary basic information for counsels in trans-border proceedings (with a particular focus on surrender proceedings under the European Arrest Warrant).

[40] CPT 2005, § 41.

[41] CPT 2005, § 36.

3.5.2 Procedure with regard to remand detention/the arrest warrant

If the Prosecutor's Office has taken its time given in § 217 (9) CCP, the preliminary investigative judge has to hurry up: his decision must be taken within the same 48-hour period according to § 21 EC, although he has to examine the criminal file and interrogate the detained person. It is important to note that the detainee has to be heard in person. The CPT emphasises that this personal appearance before the judge after 48 hours is crucial to prevent ill-treatment in police stations, and therefore welcomes the above-mentioned regulation. Still, in its report of the 2003 visit,[42] the CPT asks for confirmation whether the possibility for detained persons to waive their right to appear in person before the judge has also been abolished (according to the new CCP and in practice). In its response,[43] the Estonian government does not explicitly answer that question. The procedure for the arrest warrant and the remand detention are laid down in §§ 131-133 CCP. The prosecutor and, at the request of the detained person, a defence counsel must be summoned to the session and be heard. For the purpose of issuing an arrest warrant against a fugitive, an interrogation prior to the issuance is not necessary. The 48-hour term becomes relevant once such a person has been apprehended, because "not later than on the second day following the date of apprehension" (§ 131 (4) CCP) the person shall be interrogated by the investigative judge. This provision has been in force since July 2004, following a complaint before the European Court of Human Rights[44] with regard to the provision in force prior to that amendment. It will be discussed in paragraph 6. Once an arrest warrant has been issued, the judge shall immediately notify a person "close to the arrested person" as well as his or her place of employment or study. § 133 (2) CCP provides that this notification may be delayed in order to prevent a crime or ascertain the truth in a criminal proceeding. It has to be noted that the offender's consent to the notification is not required. Informing the arrested person's employer or university/school seems to be problematic with regard to the right to privacy and the presumption of innocence.

3.5.3 Contact with a lawyer

As to the right to contact a defence counsel, it is important to note that no provision is contained in § 217 CCP (where one would expect it to be). § 131 (1) CCP only speaks of the duty of the Prosecutor's Office to notify the counsel of the preparation of an application for an arrest warrant if the suspect so requests. However, § 21 of the Estonian Constitution and § 45 (1) CCP make it clear that from the moment when a person acquires the status of a suspect (which is always the case if he or she has been apprehended and provisionally detained under the provisions mentioned above, § 33 CCP) a counsel may participate in the criminal proceeding. According to § 34 (1 No. 3-5) CCP, a suspect has the right to the assistance of a counsel, including the rights to confer with his counsel without the presence of others and to be interrogated in the presence of his counsel.[45] The suspect must also be informed of this right (§ 33 (2) CCP).

The participation of a counsel is mandatory in all cases where a person has been detained for six months as well as in all juvenile cases (see paragraph 8.1). According to the State Legal Aid Act, a natural person may receive state legal aid if, due to his financial situation, he is unable to pay for competent legal services. The decision to grant state legal aid in criminal proceedings is usually taken immediately, because the authorities cannot proceed with any acts involving the detained person without the presence of a lawyer. In criminal proceedings, suspects and accused persons may choose a lawyer personally or through third persons. However, indigent suspects cannot choose their own lawyer; usually, one is appointed through the Bar Association.

Confidential communication between suspect and his defence lawyer is provided for by law (§§ 42 pp. CCP). This includes telephone conversations and correspondence. A suspect has the right to meet alone (i.e. without the presence of any third persons) with his defence lawyer at all times. These meetings can be interrupted for the performance of procedural acts if the meeting has lasted for more than one hour (§ 34 CCP).

3.5.4 Access to files

During the pre-trial phase, the suspect has no access to the files. The suspect's defence lawyer can have access to the files during pre-trial detention, but only after the pre-trial investigation has

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42 CPT 2005, § 17.
43 CPT 2005a, p. 5.
44 Harkmann vs. Estonia, Application No. 2192/03, decision of 11 July 2006.
45 In practice, this is frequently done; Tever 2007.

ended. The only exception to this rule is the access to records of interviews with the suspect – the defence lawyer is entitled to examine these records during the investigation. It is unclear whether this right to inspect the files is sufficient to meet the European Court of Human Rights' jurisdiction,[46] which prescribes that, in cases where the suspect is remanded in custody, the defence counsel must have sufficient information to be able to appeal the arrest warrant or other decisions with regard to pre-trial detention. The State Prosecutor's Office has declared that the investigative authorities should provide attorneys with a copy of the interview records upon request; nevertheless, investigators sometimes only allow attorneys to examine the records (no copy is provided before closing the pre-trial investigation).[47] After the termination of the pre-trial investigation, a copy of the case file shall be given to the defence lawyer against signature. The defence lawyer is then allowed to make copies of the file and to give these to his client, co-lawyer and third parties.

4. Grounds for pre-trial detention

4.1 Grounds for arrest

The justification for an initial arrest ("detention" according to the translation of the CCP, "kahtlustatavana kinnipidamine" in Estonian) must be distinguished from the justification for remand detention. According to Sec. 217 CCP, a person shall be detained as a suspect if:

- apprehended in the act of committing a criminal offence or immediately thereafter;
- an eyewitness to a criminal offence, a victim, or evidentiary traces indicate that the person is the one who committed the criminal offence.

Apart from the reasons that allow apprehension "in flagrante delicto", a suspect may also be arrested:

- in case of attempted escape;
- prior to identification;
- if he or she may continue to commit criminal offences;
- if he or she may abscond or impede the criminal proceedings in any other manner.

Other prerequisites cannot be found directly in the law. One precondition might be deducted from the wording of § 217 (3): "(…) on the basis of other information referring to a criminal offence", meaning that every arrest has to be based on factual information. A threshold for the admissibility of arrest and detention cannot be found (see above).

4.2 Grounds for detention

The grounds for detention are described only very briefly in § 130 (2) CCP. According to this provision, remand detention ("arrest" in the English translation of the CCP, "vahistamine" in Estonian) may (only) be applied if:

- the suspect or the accused is likely to abscond from the criminal proceeding;[48]
- the suspect or the accused is likely to continue to commit criminal offences.

Other grounds, such as the severity of the crime, public disturbance etc., are not mentioned. What is most surprising is that the risk of the obscuring of evidence/collusion itself is not mentioned explicitly as ground for detention according to § 130 (2) CCP, although it is mentioned in § 217 as ground for an initial 48-hour arrest. According to the Estonian doctrine, this is not deemed necessary, because the risk of the obscuring of evidence is, at the same time, also the risk of committing a new crime according to § 130 (2) CCP. According to § 316 PC, "removal and fraudulent creation of evidence with the intention to obstruct ascertainment of the commission or absence of an act punishable as a criminal offence, or of any other facts relating to the subject of proof" is punishable by a fine or by one to five years of imprisonment. It thus constitutes a criminal offence in itself.

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46 Mooren vs. Germany, Application No. 11364/03, decision of 13 December 2007.

47 Tever 2007.

48 As to suspects or accused persons who are abroad and have absconded from court proceedings, it should be mentioned that Estonian law provides for *in absentia* proceedings (as an exception). In such cases, the summons must have reached the suspect in person, otherwise the court cannot take the position that the suspect has absconded. The trial, however, cannot be conducted in the absence of a defence lawyer (see Tever 2007).

The CCP does not explicitly mention other preconditions, such as a certain degree of suspicion, a threshold regarding the expectable punishment etc. Only § 33 (1) CCP defines a suspect as somebody who is prosecuted and/or detained "on suspicion of a criminal offence". As to the substantiation of the grounds, it can be argued that courts often do not give sufficient reasons to substantiate detention in a way that could be reproduced later on. In two cases before the European Court of Human Rights,[49] it was stated that the grounds initially given as reasons for detention were no more than brief standard formulas justifying detention on the basis of the applicants' previous convictions. However, in both cases, no violations of Art. 5 (3) were found in that respect, but only with regard to the length of detention (see paragraph 6).

5. Grounds for review of pre-trial detention

Against all activities by the investigative body or the Prosecutor's Office during the investigation part of the proceedings, appeal is possible according to § 228 CCP (to the Prosecutor's Office; further appeal to the County Court, § 230 CCP). This means that, also for complaints concerning the arrest procedure etc., this remedy can be used (in theory – in practice, judicial control is seen as more effective). The arrest by the police itself can be contested before the investigative judge at the hearing that takes place after 48 hours at the latest.

In the system of judicial control over pre-trial detention, two possibilities exist. First, the initial decision by the investigative judge or the court that issued or refused an arrest warrant can be contested by the suspect or accused as well as by the public prosecutor (§ 136 CCP). The same applies to the decision to extend (or not) the detention period. The relevant procedure can be found in chapter 15 of the CCP ("Proceedings for Adjudication of Appeals against Court Rulings"). This means that the appeal has to be lodged within ten days before a higher court (Circuit Court) according to § 387 (2) CCP. This court has to summon the counsel of the suspect or accused (or the representative of the minor) and the prosecutor to the hearing. The detained person is not heard in person. The Supreme Court shall decide upon acceptance of a further appeal against that ruling.

Second, a detained person or his lawyer may, within two months after the arrest, submit a request to the preliminary investigative judge or court to verify the reasons for the arrest (§ 137 CCP). According to § 137 (2) and (3) CCP, the preliminary investigative judge shall hear a request within five days as of the receipt of the appeal. The prosecutor, the lawyer and, if necessary, the arrested person shall be summoned before the preliminary investigative judge. In order to adjudicate a request, the preliminary investigation judge shall examine the criminal file. A request shall be adjudicated by a court ruling, which is not subject to appeal. A new request, however, may be submitted two months after the review of the previous request (§ 137 (1) CCP). After six months, a decision by the investigative judge is necessary if the Chief Public Prosecutor requests so (see above). At this point, the investigative judge has to examine whether the grounds for detention still exist and whether the case is so complex or extensive that further detention is justified. After these six months, a counsel must be appointed (if the suspect has not chosen one yet) and the investigative judge must *ex officio* verify the reasons for the arrest at least once a month.

6. Length of pre-trial detention

6.1 General

The legal provisions in the current CCP have been described above. As the length of proceedings is, like in most other European jurisdictions, a problem in Estonia, different aspects with regard to the deprivation of liberty during criminal proceedings will be examined more closely in the following section of this report. Especially the annual reports of the Legal Chancellor of Estonia, reports of the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and the Council of Europe's Commissioner of Human Rights, and decisions of the European Court of Human Rights have been taken into account. In most of the cited reports,

[49] Sulaoja vs. Estonia, Application No. 55939/00, decision of 15 February 2005; Pihlak vs. Estonia, Application No. 73270/01, decision of 21 June 2005.

the focus lies on the problem of the prolonged periods spent in houses of detention; only to a lesser degree, the lengthy periods of remand detention are considered.[50]

6.2 Length of stay in police houses of detention

With regard to the accommodation in police detention centres ("houses of detention", according to the wording of the Estonian law), as can be seen in Table 2, several possibilities exist: 1) placement in a house of detention during the initial 48 hours of arrest; 2) placement in a house of detention under § 90 (2) of the Imprisonment Act; and 3) temporary placement in a house of detention if deemed necessary during the pre-trial investigation (e.g. for interrogations, confrontations etc.).

The CCP of 2003, for the first time, sets the strict 48-hour period for detention without judicial decision for all cases – for initial apprehension by the police as well as for all cases where a person is detained following an arrest warrant issued while he was absconding from the proceedings. The latter was the problem in the case of Harkmann vs. Estonia, which was decided by the ECtHR in 2006 (but related to October 2002). Mr. Harkmann was arrested as a fugitive on the basis of an arrest warrant and brought before the judge as late as fifteen days after his apprehension. The Court ruled that this contravened Art. 5 (3) ECHR and awarded the applicant 2,000 Euros in compensation (the national legislation for compensation did not cover this case, as it happened in accordance with the CCP in force prior to 2004). Under the current CCP, a situation like the one mentioned above should be judged according to § 131 (4) CCP, although one might ask[51] whether the wording "not later than on the second day following the date of apprehension of the fugitive" really restricts the time to the 48 hours that are usually accepted as being "immediately" in the sense of Art. 5 (3) ECHR and that are explicitly mentioned in § 21 EC.

Remand detainees can stay in police detention facilities for more than 48 hours because, as mentioned above, § 90 (2) Imprisonment Act of 2000 allows for the execution of detention in so-called "houses of detention". In practice, remand detainees stay there for prolonged periods, which is particularly problematic because of the very bad conditions that generally exist in these institutions (see paragraph 7.4 for details). During its last visit, the CPT discovered that this period can reach three months, and sometimes even longer. It states: "The 2003 visit revealed that detention houses in Estonia were – to an even greater extent than in 1997 or 1999 – in effect being used as prisons."[52] These findings are supported by a more current report (and almost annually by the reports of the Legal Chancellor[53]): During his 2006 visit, the Commissioner for Human Rights was told that inmates are usually brought to a remand prison after spending 10-30 days in a house of detention. The report further states: "However, it was made clear by the Ministries of Justice and Interior that placement of a person largely depends on available space in prisons."[54]

6.3 Length of remand detention

According to a 2002 report by the Council of Europe,[55] the average period of time spent in remand custody (the period leading up to the court judgment, not the period subsequently spent in a remand prison while waiting for an appeal) was ten months. The CPT reports that, in some cases, interviewed prisoners were in remand prison much longer – at Tallinn Prison, one prisoner had already spent five years in the remand section.[56]

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50 The situation in the 1990s is reflected in the Alver case (Alver vs. Estonia, Application No. 64812/01, decision of 8 November 2005). The applicant was detained on remand for a total of about three years and seven months. For most of that period, he was held in Tallinn Central Prison (for three years and two months overall, including about ten months in the prison hospital). He also spent fourteen short periods (lasting from five to fifteen days) in detention houses, where he was taken in connection with his trial. In total, he spent 139 days in detention houses.

51 So does the Legal Chancellor 2007, p. 87. Theoretically, this period could be extended to 72 hours.

52 CPT 2004, § 24.

53 See, e. g., Legal Chancellor 2007, V, and Legal Chancellor 2006, 37.

54 Commissioner of Human Rights 2007, § 41.

55 This can be concluded from the Estonian response to question 18 of Questionnaire 1 of the Committee of Experts on remand in custody and its implications for the management of penal institutions (PC-DP) (2003). The report is cited after the CPT report of the visit in 2002 (CPT 2005, § 10), the original document of the PCDP was not accessible to the author.

56 CPT 2005, § 10.

Several decisions of the European Court of Human Rights deal with the matter of delayed procedures while the suspected or accused person is in remand detention: In the cases of Sulaoja[57] and Pihlak,[58] the Court found that, *inter alia*, the courts had not displayed special diligence in conducting the proceedings – one applicant had spent 18 months in remand detention, the other more than two years. These decisions relate to periods in 1989/1999 and 1998-2000 respectively. It has to be noted, however, that the legal provisions with regard to the time limits already existed under the old CCP, so it remains to be seen, whether the overall periods of remand detention have decreased by now and cases like these have been avoided since.

7. Other relevant aspects

7.1 Consideration of pre-trial detention in the sentencing stage

According to § 68 of the Estonian Penal Code, "provisional custody, including the time spent in provisional arrest and arrest for surrender" shall be counted as part of the sentence. One day of provisional custody corresponds to one day of imprisonment or three daily rates of a pecuniary punishment. If a person is held in custody in the course of misdemeanour proceedings, this period shall be included in the term of the punishment. 24 hours of custody correspond to one day of detention or to ten fine units. As mentioned in Sec. 171 CCP, the total term of detention shall be counted from the actual arrest onwards. Pre-trial detention spent in a foreign country must be counted in the same way, but no explicit mentioning of this point can be found in the law.

7.2 Mechanism for compensation

§ 25 EC foresees that "everyone has the right to compensation for moral and material damage caused by the unlawful action of any person", thus including unlawful actions by the State authorities.[59] In 1997, a special law with regard to the compensation of unjustified pre-trial detention was adopted: the "Compensation for Damage Caused by State to Person by Unjust Deprivation of Liberty Act".[60] The law defines the order and amount of compensation for damage caused by investigators, prosecutors or courts for, *inter alia*, persons released during the investigation because the pre-trial proceedings were terminated, persons later acquitted, and persons whose period of imprisonment exceeded the term of the punishment imposed on them. Compensation cannot be claimed if the unjust deprivation of liberty was caused by a false admission of guilt or other acts performed intentionally or due to gross negligence, or by absconding during the proceedings. According to § 5 of the Act, compensation in an amount of seven daily rates (days' wages) shall be paid to a person pursuant to the procedure provided for in § 4 of this Act for each 24-hour period during which the person was unjustly deprived of liberty. Additionally, the amount of compensation for direct proprietary damage is determined in accordance with the provisions of the State Liability Act. At the moment, the minimum monthly wage established by the Estonian government is 4,350 Krooni.[61] This means that the current compensation rate is approximately 65 Euros a day; the compensation procedure is routinely applied.[62]

7.3 Alternatives to pre-trial detention

As mentioned above, several preventive measures are foreseen to secure the criminal procedure. They are listed in §§ 127 pp. CCP and, besides "arrest" ("remand detention", for the translation see above), include:

- the prohibition to leave one's place of residence (§ 128 CCP);

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57 Sulaoja vs. Estonia, Application No. 55939/00, decision of 15 February 2005.

58 Pihlak vs. Estonia, Application No. 73270/01, decision of 21 June 2005.

59 Office of the Chancellor of Justice 2008, p. 33.

60 The English version (last retrieved 12 January 2009) is available for download at http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X80053&pg=1&tyyp=X&query=h%FCvitamise&ptyyp=RT&keel=en.

61 This can be found on the government site https://www.riigiteataja.ee/ert/act.jsp?id=12901118 (last retrieved 21 January 2009).

62 It is calculated: 7 times 4,350 /30 = 1,015 Krooni (approximately 65 Euros a day); information provided by J. Ginter via e-mail.

- supervision (applicable to members of the Defence Forces) (§ 129 CCP);
- bail (§ 135 CCP).

As described above, the law does not specify any explicit objectives of these preventive measures, but § 127 CCP gives some hints on how to choose from them. Again, the law does not mention the need to choose under consideration of the principle of proportionality; instead, individual circumstances have to be taken into account. According to § 127 (1) CCP, these circumstances are: the probability of absconding from the criminal proceeding or the execution of the sentence, recidivism, destruction, alteration or falsification of evidence, the expected degree of punishment, the suspect's personality as well as his/her health and marital status.

According to § 135 CCP, bail is a measure that substitutes detention. This means that the general preconditions of § 130 (2) CCP have to be met. At the request of a suspect or accused, the preliminary investigative judge or court may impose bail – according to the wording – "instead of arrest". Bail shall not be imposed on a suspect or an accused in the case of certain very serious crimes (e.g. crimes against humanity, war crimes, murder, extortion, terrorism, an attack against the life or health of higher State public servants, an attack against the life or health of persons enjoying international immunity, membership of a criminal organisation, formation of a criminal organisation, causing an explosion).

In at least two cases, the European Court of Human Rights criticised that the authorities did not consider any alternative means of ensuring the applicants' appearance in court and thus applied detention without the needed restraint.[63] As the number of persons in remand detention has declined, one explanation might be that courts are using more alternatives (but this suggestion cannot be validated due to the lack of data in that regard).

7.4 Execution of pre-trial detention (legal basis, practical living conditions)

7.4.1 Preliminary remarks

As can be seen in the statistics presented in this report, Estonia can be assessed as a fairly punitive country. Various reports from national[64] and international monitoring organisations also firmly criticise the living conditions in the country's old and overpopulated prisons. Since the ratification of the European Convention for the Prevention of Torture, Estonia has been visited by the CPT four times, the last time in 2007. As of 1 January 2009, three of the CPT visit reports (1997, 1999 and 2003) and the responses of the Estonian government have been made public; they are available on the CPT website.[65]

With regard to the living conditions, a decision of the European Court of Human Rights[66] has to be cited. The applicant had been in remand detention for three years and seven months in the years between 1996 and 2000. The Court concluded that the conditions of the applicant's detention, in particular the overcrowding, the inadequate lighting and ventilation, the impoverished regime, the poor hygiene conditions and the state of repair of the cell facilities, combined with the applicant's state of health and the length of the period for which he was detained in such conditions, were sufficient to cause distress and hardship of an intensity exceeding the unavoidable level of suffering inherent to detention, and amounted to inhuman treatment. Accordingly, the Court stated that there had been a violation of Article 3. This decision might reflect an extreme case and a situation that is obsolete – this argument, at least, was raised by the Estonian government in its response to the 2007 report of the Commissioner of Human Rights.[67] Two remarks must be made in that regard:

First, when Estonia regained its independence in 1991, the situation did not differ much from that in the other Baltic countries – they all inherited a prison system characterised by large-

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63 Sulaoja vs. Estonia, Application No. 55939/00, decision of 15 February 2005; Pihlak vs. Estonia, Application No. 73270/01, decision of 21 June 2005.

64 The places of detention in Estonia are supervised by various authorities. For example, there are special prison commissions under the authority of the Ministry of Justice with the powers to exercise control over the prisons. A police control department under the authority of the Ministry of the Interior exercises control over the police arrest houses. The public health board of the Ministry of Social Affairs exercises control over psychiatric hospitals, and the Ministry of Social Affairs controls the Illuka Refugee Centre. The most important and influential institution supervising the prisons is the Chancellor of Justice (see Hion 2006).

65 http://www.cpt.coe.int/en/states/lva.htm. (Last retrieved 4 November 2008).

66 Alver vs. Estonia, Application No. 64812/01, decision of 8 November 2005 (see above).

67 Commissioner of Human Rights 2007, p. 22.

capacity institutions, dilapidated prison infrastructure and severe overcrowding in pre-trial detention facilities.[68] Therefore, the Estonian government tried to react quickly and incorporated all relevant international standards very soon. It then faced enormous implementation problems relating to prison administration and the treatment of prisoners/detainees. The situation in the middle of the 1990s was described by a parliamentarian: "The prisons are in bad condition and they do not have enough places; for example, there are problems with separating persons on the basis of age, sex and the seriousness of crime. Most of the personnel was trained during the Soviet period and is often unable to ensure sufficient order. (…) Some of the guards treat prisoners brutally. As a specific refugee centre does not exist, refugees are often accommodated in prisons. Most of these problems are basically of a financial nature and it is very difficult to see, how they may be solved in the near future." The parliamentarian's evaluation of the situation led him to the conclusion that the conditions in detention places were so bad that the strict observance of Article 3 of the ECHR would be extremely difficult, if not impossible, in the near future.[69]

Secondly, at the end of 2007, five prisons and more than 40 houses of detention were in operation.[70] It has to be emphasised that Estonia is currently undergoing an important programme of prison construction with the objective of demolishing the oldest institutions that are not in accordance with current European prison standards. Tartu Prison was the first modern detention establishment to be opened in 2002 and it was positively evaluated by the CPT in its last published report. In Viru, a new prison with a capacity of 1,100 inmates was opened in 2008. The construction of a prison in Tallinn is planned for 2010.

7.4.2 Legal basis

The legal basis for the conditions under which the execution of detention takes place can be found in § 143[1] CCP (including restrictions necessary in connection with the proceedings) as well as in Chapter 5 of the Imprisonment Act of 2000 (IA), which deals with the treatment of remand prisoners. Relevant for the execution in police houses of detention are the "Internal Rules of Detention Houses", Regulation No. 71 of the Minister of Internal Affairs of 1 December 2000.

According to its heading, § 143[1] CCP contains "additional restrictions (…) to persons whose personal liberty has been restricted". The first measure mentioned is "complete isolation from other persons held in custody or prisoners or detained persons". Precondition for such a decision is the existence of grounds to believe that a detained person may "adversely affect the conduct of criminal proceedings by his or her behaviour". Competent is a court or the Prosecutor's Office. The ruling has to set the term for the restriction, but does not set an absolute limit. In that regard, it has to be emphasised that prolonged complete isolation during remand detention might be contrary to Art. 3 ECHR.[71] Other measures include restrictions or prohibitions concerning the right to receive visits, to correspond etc. No restrictions are possible for corresponding with State agencies, local governments and their officials, and with the detainee's legal defence counsel. With regard to the latter, it is problematic that the law does not mention contact with international bodies such as the European Court of Human Rights etc. These restrictions or prohibitions can be ruled by any "body conducting the proceedings" – which is problematic, because restrictions might then be used as a means of pressure by the police during the investigation. It has to be noted, however, that the most restrictive measure is available only to the Prosecutor's Office or the court: They may make a ruling on the transfer of the suspect or accused for complete isolation from other prisoners or detained persons. The Internal Rules for Detention Houses, consisting of 48 paragraphs, partly repeat the provisions of the CCP. They also regulate communication with the outside world, correspondence, disciplinary procedures, time limits for passing letters or complaints, organisational aspects (such as the organisational set-up of the staff), documentation etc. A detainee has the right to spend one hour a day in the open air and to receive one visit of up to three hours per month.

In Chapter 5 of the Imprisonment Act of 2000, the focus lies on isolating and supervising prisoners. § 90 IA reads: "A person in custody shall be lodged in a locked cell on a twenty-four-hour basis. The prison or house of detention is required to take all measures to prevent any

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68 See, e. g., the country report for Latvia in this book.

69 Cited after Hion 2006.

70 Ministry of Justice 2008.

71 See, e. g. the decision of the European Court of Human Rights in the case of Rohde vs. Denmark, Application No. 69332/01, decision of 21 July 2005.

communication between persons in custody who are lodged in different cells." The other regulations refer, e.g. to the notification of transfer to the judicial authorities (§ 92 IA) and to the living conditions in remand prisons, such as: the right to wear personal clothing, the right to open a detainee's account, the right of access to national daily newspapers as well as to books and periodicals from the prison library, the right to have a radio or television set (with the permission of the director), and the right to exercise in the open air for at least one hour daily (§ 93 IA). The implementation of the general right to receive visits depends on the house rules; visits are supervised and can be interrupted or terminated if the visit "may damage the conduct of criminal proceedings" (§ 94). It should be noted that § 102 IA, which partly repeats § 143[1] CCP, only identifies the Prosecutor's Office or court as competent to apply additional restrictions on a detained person. This contradicts the above-mentioned problematic order of competence. § 102 entered into force on 1 February 2007.

7.4.3 Conditions in detention houses

To be brief: the above-mentioned international and national bodies criticise the living conditions in detention houses unanimously and point out that these still often amount to inhuman and degrading treatment.

The third *ad hoc* visit of the CPT (in 2002) focused on reviewing the measures taken by the Estonian authorities to implement the recommendations made by the Committee after its 1999 visit. Particular attention was paid to the treatment of persons detained by the police, and to the conditions of detention in police establishments and prisons. The CPT has explicitly warned that it may initiate public statement procedures against Estonia concerning the situation in prisons.[72] While in some places of detention the situation had changed for the better, the Commissioner of Human Rights, in his report on the November 2006 visit, notes about one of the visited institutions: "The detention house has a capacity of approximately 40 inmates, but has in past years sometimes housed up to 70 detainees at any one time. Six inmates are kept in a cell of approximately 15 square meters without any daylight. The lack of ventilation creates problems of humidity and temperature regulation. As in Rakvere, detainees do not have access to any indoor or outdoor activity spaces and can only leave their cell once a week to shower. No physical or intellectual activity is offered to them. Therefore, during the whole period of their detention in Kohtla-Järve detention house, inmates do not have access to natural light, fresh air or a view other than their cell or the corridor leading to the shower. Although the majority of the inmates are only detained in detention houses for one or two weeks, the maximum sentence that could be served in a detention house is three months. According to information collected by the delegation during the follow-up visit, similar or worse living conditions could be found in other Estonian detention houses. (…) The situation was particularly tense at the moment of the follow-up visit as one prison was closed for renovation. The Commissioner recalls the imperative necessity of detaining separately untried persons, who are presumed to be innocents, and sentenced prisoners. Efforts should be made to ensure that pre-trial detainees are not accommodated with condemned inmates. In addition to the unfavorable living conditions, some problems lie with the applicable internal rules in detention houses. It is obvious that, depending on the facilities, different activities can or cannot be offered to inmates. Nevertheless, minimum standards apply to all inmates who should have the same rights to access books, newspapers, television or radio wherever they are detained. The delegation witnessed that different rules apply in different detention houses. In some detention houses, inmates were not allowed to receive newspapers or have a radio. The restrictions in this case do not appear to be proportionate."[73]

7.4.4 Conditions in remand prisons/prison units

With regard to prisons, much remains to be done too. In its report of the 2003 visit, the CPT focuses on the (lack of) activities for remand prisoners and criticises not only the actual living conditions but also the relevant legislation:[74] "A fundamental problem as regards remand prisoners in Estonia is the total lack of out-of-cell activities offered to inmates. The Imprisonment Act (2000) flatly contradicts the urgent recommendation made in paragraph 80 of the report on the 1997

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72 CPT 2005, § 7.

73 Commissioner of Human Rights 2007, §§ 36 pp.

74 CPT 2005, §§ 54 pp.

visit, aimed at radically improving regime activities for remand prisoners. Such a blatant refusal to implement a CPT recommendation is a very serious matter." It remains to be seen whether by now these observations have changed, because after the CPT visit, the Estonian authorities expressed agreement with the delegation's end-of-visit remarks concerning the above-mentioned matter.

8. Special groups

8.1 Juveniles

Estonian law does not contain any special regulations for the arrest and detention of minors (in accordance with the Penal Code, the minimum age for criminal responsibility in Estonia is 14 years).[75] According to § 45 (1) CCP, however, in cases involving juveniles, the appointment of a defence counsel is obligatory.

During the preliminary investigation, all above-mentioned preventive measures can be applied to minors. The means prescribed in the Juvenile Sanctions Act (such as § 3 (1) pp 5; 7 and 9: the obligation to live with a parent; surety; sending to a school for students with special needs) cannot be applied as preventive measures in the criminal procedure. Similarly, Chapter 5 of the Imprisonment Act, which regulates custody pending trial, does not prescribe any special conditions for arrested minors. Nevertheless, according to § 93 clause 4, a minor who has been in custody for at least one month shall be allowed to continue to acquire basic education or general secondary education. According to § 100 (2), a minor in custody can be committed to a punishment cell (as a disciplinary sanction) for no more than fifteen 24-hour periods (for adults, the maximum period is thirty days).

As to the practice: In several statements and reports, e.g. by the UN Committee on the Rights of the Child,[76] the situation of juveniles in custody in Estonia has been criticised. According to the report of the Commissioner of Human Rights, several children were in detention houses and not always separated from adults (although the authorities explained that this had been done to avoid bullying amongst the minors). They only had access to very few activities and no education was provided, although some of them had been detained for several weeks.[77]

8.2 Women

With about 4-5% (see Table 1), women comprise only a small share of the Estonian prison population. Generally, there are no legal restrictions in cases of female suspects or accused as regards the application of remand detention or its execution.

8.3 Foreigners

As explained in the introduction, non-Estonian citizens form a relatively large part of the Estonian population, in contrast to the composition of the population in other Eastern European countries. With regard to the prison population, about 40% of all prisoners are non-Estonian citizens (without being foreigners in a narrow sense). The percentage of foreigners among the remand detainees is relatively high (about 48%), whereas the share of foreigners among the sentenced prisoners is only about one third (see Table 1). One explanation for this might be the fact that, on average, foreigners commit more serious crimes, but this is probably not the only reason.[78]

According to a 2006 study,[79] most of these "foreigners" are persons with undefined citizenship, also called "non-citizens" (as mentioned in the introduction); most of them are Russian speaking. According to the above-mentioned report, about 85% (417 out of 496 on 21 February 2006) of the foreign remand prisoners were "non-citizens"; others had, for instance, Russian (57), Latvian (6), Ukrainian (3) and Israeli (2) citizenship. Only 9 out of 496 (less than 2%) came from other EU countries.

According to the CCP and the Constitution, foreigners have the right to the assistance of an interpreter during their trial, meaning that the court that hears the case will have to arrange for an

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75 A comprehensive overview of the juvenile justice system in Estonia can be found in Ginter/Sootak 2009.
76 See UN Committee on the Rights of the Child 2003, p. 14.
77 Commissioner of Human Rights 2007, §§ 43 pp.
78 Sootak/Markina 2009.
79 Liba 2007, p. 257, 266.

interpreter to be present. If the accused is not proficient in Estonian, the text of the statement of charges is translated into his native language (or into another language in which he is proficient) and communicated to him. The translation of the statement of charges shall be provided by the Prosecutor's Office. The translation of any other document that is in the file and that the suspect and/or the lawyer do not understand must be organised by the suspect and/or his lawyer. Officially, only the statement of charges will be translated. Since there is no statement of charges in the surrender proceedings, theoretically, no document in the file will be translated. However, if the requested person is not proficient in Estonian, an interpreter shall be involved in the proceedings and the documents in the file shall be orally translated to the requested person,[80] otherwise the constitutional guarantees will not be implemented fully. If a foreigner is arrested or detained, the Ministry of Foreign Affairs has to be notified (§ 133 (4) CCP). No reference is made in the CCP to the notification of an embassy or consular official by the suspect himself, but according to § 94 (2) IA, persons in custody who are citizens of foreign states have the unrestricted right to receive visits from consular officers of their countries of nationality.

As regards the apprehension of foreigners after an alleged offence, a (weak) impact of the principle of proportionality can be found in § 219 CCP. It allows the substitution of detention by a payment (to secure the costs of the proceedings and a possible fine) if a person who does not reside in Estonia is suspected of an offence in the second degree punishable by a fine.

8.4 Alleged terrorists

With regard to arrest or remand detention, no special provisions are foreseen in Estonian law for alleged terrorists.

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[80] Tever 2007.

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