1. Introduction
These days the use of pre-trial detention in Europe seems to be ever increasing. This is in spite of the fact that the presumption of innocence tells authorities to be restrictive in pre-detaining suspects. It also seems contrary to the starting point of the European Court of Human Rights. Basing itself on the presumption of innocence, the Court holds that a suspect should await his trial in freedom. For obvious reasons, the presumption of innocence and the European case-law are often invoked to either state that today’s pre-trial detention practices are in violation of both presumption and case-law or to say that pre-trial detention practice should take them more into account. In this article I am concerned with the question whether the presumption of innocence and the case-law of the European Court really make an argument against all too enthusiastic use of pre-trial detention. I will answer that question in the negative. For that I will firstly discuss the claimed pre-trial detention increase in paragraph 2. Secondly, in the third paragraph, I will elaborate on the meaning of the presumption of innocence and I will argue that the presumption cannot be invoked to effectively curtail the use of pre-trial detention. Paragraph 4 then discusses the case-law of article 5 of the European Convention.
on Human Rights. I will stipulate that the European Court in the elaboration of its afore mentioned basic assumption is not able or willing to restrict the general tendency of increasing pre-trial detention. In the fifth paragraph I will conclude my argument and I will pose some questions for the future as well.

2. Pre-Trial Detention Practice in Today’s Risk Society

The most striking examples of pre-trial detention being used in a rather unrestricted way may be found in recent measures regarding the detention of suspected terrorists: Guantanamo Bay being the ultimate example. However, many European countries, to a certain extent have also relaxed the rules on pre-trial detention for reasons of preventing further terrorist harm.¹ But even leaving terrorism aside, research shows that existing requirements on the use of pre-trial detention are easily met. Dutch judges indicate that it is relatively easy to meet the grounds on which pre-trial detention can be based. “If you are skilful, you can virtually detain anyone”, one interviewed judge pointed out.² Similarly, extensive interpretation of grounds for pre-trial detention seems to be present in German pre-trial detention decisions.³ Also, English research on bail practice has shown that magistrates are generally happy to follow the Crown Prosecution Service’s view.⁴

This apparent lenient interpretation of the rules that govern pre-trial detention should be expected to show in the figures. Indeed, English figures indicate that in England the number of defendants remanded in custody is rising.⁵ With regard to the Netherlands increase in the use of pre-trial detention has been subjectively experienced by legal practitioners for many years and can be seen objectively in the figures as well. For example, recent Dutch research has established that since 1995 the use of pre-trial detention in the Netherlands has doubled in terms of

¹) See, amongst others, Article 67 paragraph 4 of The Dutch Code of Criminal Procedure that loosens the degree of suspicion necessary for the first period of pre-trial detention for terrorist crimes. See for example also the Press release of 25 July 2008 by the United Nations Human Rights Committee regarding Final Conclusions and Recommendations on Reports of the United Kingdom, France, San Marino and Ireland: <www.unhchr.ch/huricane/huricane.nsf/NewsRoom?OpenFrameSet>.


