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Administrative detention

Report[1]
Committee on Legal Affairs and Human Rights
Rapporteur: Lord Richard BALFE, United Kingdom, European Conservatives Group

Summary

The Committee on Legal Affairs and Human Rights stresses the importance of the right to liberty and security guaranteed in Article 5 of the European Convention on Human Rights. It is worried that administrative detention has been abused in certain member States for purposes of punishing political opponents, obtaining confessions in the absence of a lawyer and/or under duress, or apparently for stifling peaceful protests.

Regarding administrative detention as a tool to prevent terrorism or other threats to national security, the committee recalls that purely preventive detention of persons suspected of intending to commit a criminal offence is not permissible and points out that mere restrictions (as opposed to deprivation) of liberty are permissible in the interests of national security or public safety and for the prevention of crime.

All member States concerned should refrain from using administrative detention in violation of Article 5. Instead, they should make use of available tools respecting human rights in order to protect national security or public safety. Giving examples of such tools, the committee recalls their legal requirements, including a prohibition of discrimination on the basis of nationality.

1. Reference to committee: D oc. 12998, Reference 3900 of 1 October 2012.

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A. Draft resolution[2]

1. The Parliamentary Assembly stresses the importance of the right to liberty and security guaranteed in Article 5 of the European Convention on Human Rights (ETS No. 5, "the Convention"). No one shall be deprived of his or her liberty except in the cases enumerated in the closed list of Article 5.1.

2. Recalling its Resolution 1707 (2010) on the detention of asylum seekers and irregular migrants in Europe, the Assembly stresses that under Article 5.1.*f* of the Convention administrative detention in immigration cases is only allowed if it is based on a precise, accessible legal framework ensuring that such detention has a prompt procedural purpose and respects protective standards such as certainty (including maximum duration) and necessity (being a means of last resort to carry out entry controls or to ensure expulsion effectively), all under the authority of a court of law.

3. The Assembly is concerned that administrative detention has been abused in certain member States for purposes of punishing political opponents, obtaining confessions in the absence of a lawyer and/or under duress, or apparently for stifling peaceful protests.

4. Regarding administrative detention as a tool to prevent terrorism or other threats to national security, the Assembly:

4.1. recalls that purely preventive detention of persons suspected of intending to commit a criminal offence is not permissible under Article 5 of the European Convention on Human Rights as interpreted by the European Court of Human Rights;

4.2. points out that mere restrictions (as opposed to deprivation) of liberty are permissible under Article 2 of Protocol No. 4 to the Convention (ETS No. 46), in the interests of national security or public safety and for the prevention of crime;

4.3. notes that detention of persons suspected of constituting a threat to national security can be permissible as pretrial detention when there are reasonable grounds to believe that such a person has already committed a criminal offence, including specific offences criminalising certain preparatory actions for especially serious crimes, or actions aimed at supporting terrorist activities, for example the funding of, or propaganda or recruitment for a terrorist organisation.

5. The Assembly therefore calls on all member States concerned to refrain from:

5.1. using administrative detention as a tool for the management of migration, beyond the narrow purposes permissible under Article 5 of the Convention;

5.2. placing political opponents, human rights activists or journalists in administrative detention in order to coerce or persuade them by other means into confessing a criminal offence;

5.3. placing participants of or persons intending to participate in peaceful protests in administrative detention in order to prevent them from taking part in a given protest or to deter them from participating in such protests in the future.

6. The Assembly encourages all member States to make use of available tools respecting human rights in order to protect national security or public safety, and to prevent crimes, including acts of terrorism. In particular, the Assembly recommends:

6.1. the use of restrictions of liberty falling short of detention, such as restraining persons suspected of constituting a risk for national security from visiting certain places, or even obliging them to remain within a certain area in order to disrupt potentially dangerous activities; such restrictions could be enforced if need be by electronic tagging devices;

6.2. the adoption, as needed, and the systematic enforcement of laws criminalising certain preparatory actions for especially serious crimes, or actions aimed at supporting terrorist activities, such as the funding of, or propaganda or recruitment for a terrorist organisation, as foreseen in the Council of Europe Convention for the Prevention of Terrorism and its Additional Protocol (CETS Nos. 196 and 217).

7. In applying alternative measures to administrative detention as specified in paragraph 6 above, the Assembly urges all member States to use utmost restraint.

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2. Draft resolution adopted unanimously by the committee on 17 May 2016.

8. In particular, the Assembly stresses that all restrictions to liberty must be:

8.1. based on a clear, predictable legislative authorisation ensuring that they are necessary in a democratic society for the legitimate purpose pursued;

8.2. respectful of the principle of non-discrimination, on any grounds specified in the European Convention on Human Rights and its protocols;

8.3. open to timely challenge before a court of law as specified in Article 5 of the Convention.

9. Criminal law provisions aimed at penalising preparatory and other ancillary actions in support of terrorism must fulfil the requirements of Article 7 of the Convention (no punishment without law); in particular, they must be clear and predictable. Any pretrial detention ordered in enforcing such provisions shall respect the principles laid down by the Assembly in Resolution 2077 (2015) on the abuse of pretrial detention in States Parties to the European Convention on Human Rights.

B. Explanatory memorandum by Lord Richard Balfe, rapporteur

1. Introduction

1.1. Procedure

1. The motion for a resolution on "Administrative detention" was referred to the Committee on Legal Affairs and Human Rights for report on 1 October 2012. At its meeting on 11 December 2012, the committee appointed Mr Roman Jakić (Slovenia, ALDE) rapporteur. Following Mr Jakić's departure, the committee, on 25 April 2013, appointed Mr Agustin Conde as rapporteur. At its meetings on 4 and 30 September 2013, the committee considered an introductory memorandum presented by Mr Conde. On 12 December 2013, the committee examined a revised introductory memorandum and agreed to hold, at a future meeting, a hearing with experts on general issues regarding administrative detention. On 18 March 2015, the committee took note that Mr Conde had stepped down as rapporteur owing to his increased responsibilities in the Spanish Parliament and on 20 April 2015 appointed me as new rapporteur. At its meeting on 28 September 2015, the Bureau invited the committee to take into account in the preparation of the current report the motion for a resolution by Mr Wold and others on "When human rights provide protection to individuals who represent a threat to national security",[3] as recommended by the committee at its meeting on 23 June 2015. On 28 September 2015, the committee considered another revised introductory memorandum.[4] The reference was last extended until 31 December 2016.[5] At its meeting on 7 March 2016, the committee held a hearing with the following three experts: Michael Fordham QC (barrister at Blackstone Chambers), Professor Stefan Trechsel (University of Bern, Switzerland, former President of the European Commission of Human Rights, former judge at the International Criminal Tribunal for the former Yugoslavia) and Professor Jon Petter Rui (University of Bergen, Norway).

1.2. Questions at issue

2. There is no single international definition of administrative detention. However, according to one of the generally accepted definitions, administrative detention or internment refers to deprivation of liberty which has been ordered *de facto* and/or *de jure* by the executive and comes under the sole responsibility of the administrative or ministerial authority, even if an *a posteriori* judicial review is available against such a decision. In this case, the jurisdiction of the courts is confined to examining the legality of the decision and/or the appropriateness of its implementation.[6]

3. This means that the definition of administrative detention does not cover the provisional detention of a person suspected of having committed a criminal offence (pretrial detention or detention on remand).[7] Nor does it include the internment of prisoners of war in an international armed conflict.

4. Both international and domestic law, including in the member States of the Council of Europe, use a variety of terms to describe this type of custody. Depending on the circumstances of each case and the perspective adopted by the commentator, the different terms used range from "detention without charges and without trial", "extra-judicial detention", "administrative detention", "arrest", "administrative internment", "house arrest", "ministerial detention" or "preventive detention".[8] Administrative detention is used by States for very different purposes, including custody of persons who are considered to pose a security threat, for controlling immigration and cross-border movements, and in dealing with persons suffering from mental disorders, rehabilitation of minors, protection of minors,[9] protection of public health[10] and application of disciplinary

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3. Doc. 13746.
4. AS/Jur (2015) 29 dated 25 September 2015.
5. Decision of the Bureau of 2 October 2015.
6. Louis Joinet, Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Report on the Practice of Administrative Detention, United Nations document E/CN.4/sub.2/1989/27, paragraph 17.
7. See the report on "Abuse of pre-trial detention in States Parties of the ECHR" (Rapporteur: Mr Pedro Agramunt, Spain, EPP/CD), Doc. 13863, Resolution 2077 (2015) and Recommendation 2081 (2015).
8. Administrative detention is described as "preventive detention" in most common-law countries. However, the use of this expression in this context can sometimes cause confusion because in many States "preventive detention" is synonymous with deprivation by a judicial authority of suspects' liberty prior to bringing them before a court.
9. Particularly for minors exposed to a risk of abuse or exploitation.
10. Particularly in case of risks of propagation of infectious diseases or for persons suffering from drug addiction or alcoholism.

sanctions.[11] Thus, the term administrative detention applies to a whole range of situations falling outside the normal procedure for the arrest of persons suspected of having committed a crime by the police for purposes of prosecution.

5. Despite the many possible forms of administrative detention, States' international obligations in this field remain the same: judicial proceedings must be the rule and administrative proceedings the exception – an exception which must also, eventually, give rise to judicial review. According to the European Court of Human Rights ("the Court"), the right to liberty and security is "a fundamental human right, namely the protection of the individual against arbitrary interferences by the State with his right to liberty".[12] In order to prevent administrative detention from degenerating into arbitrary detention, it will be necessary to apply relevant human rights standards and to safeguard the rule of law.

6. Recourse to administrative detention raises questions in terms of procedural guarantees and the right to a fair trial. In some cases, this practice can be abused to bypass the strict rules of evidence and the guarantees applicable in criminal matters. Persons placed in administrative detention may be deprived of the right to information on the reasons for their detention, the right of speedy access to a lawyer, the right to challenge the lawfulness of their detention and the right to periodical reconsideration of such lawfulness, the right to be brought before a judge, and lastly, the right to adversarial proceedings. This may also flout the presumption of innocence, because some individuals are placed in detention on the sole ground that they are likely to pose a threat to the security of the State, even though they have not yet committed any offence, or there is no evidence to this effect.

7. Administrative detention can also imply risks of torture or inhuman or degrading treatment. Not only have human rights bodies frequently emphasised the link between this practice and an increased risk of torture,[13] but also the conditions and duration (and the uncertainty regarding the duration) of such detention are liable per se to constitute inhuman or degrading treatment as prohibited under the applicable international standards.[14]

8. Lastly, where administrative detention is used to detain political opponents on the basis of administrative legislation, which is sufficiently vague to enable a whole range of political protest to be sanctioned, it also infringes freedom of expression, association and peaceful assembly, as well as the legality principle ("no penalty without a law"), which constitutes an essential component of the rule of law.

9. In view of the wide range of practices of administrative detention, I will not be able to cover them all in the framework of this report. I suggest focusing on three forms of administrative detention, which have spread most widely in recent years and have also prompted the most serious concerns in terms of preserving human rights standards and the rule of law. The practices in question are:

9.1. administrative detention based on the need to manage migration flows;

9.2. administrative detention as a means of punishing political opponents and quelling protests;

9.3. administrative detention for reasons of security, including national security.

10. As regards administrative detention for reasons of security, this group of cases comprises both administrative detention based on military law and the state of emergency (this would apply particularly to Israel) and administrative detention based on anti-terrorism legislation.[15] It is true that the initiators of the original motion three years ago placed considerable emphasis on the use of administrative detention by Israel,

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11. Particularly vis-à-vis disciplinary provisions applicable to military personnel or members of the police forces or other State bodies responsible for security.

12. See, among many others, *Winterwerp v. Netherlands*, Application No. 6301/73, judgment of 24 October 1979; paragraph 37; *Brogan and others v. United Kingdom*, Applications Nos. 11209/84, 11234/84, 11266/84 and 11386/85, judgment of 29 November 1988, and *Saadi v. United Kingdom*, Application No. 13229/03, judgment of 29 January 2008 [Grand Chamber], paragraph 63.

13. See Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment before the Human Rights Commission, 17 December 2002, E/CN.4/2003/68.

14. The United Nations Committee against Torture has held that some forms of administrative detention constitute ill-treatment prohibited under Article 16 of the Convention against Torture, see annual report of the UN Committee against Torture 2009-2010, document A/65/44, paragraph 60 (13), Conclusions and recommendations of the Committee against Torture: Republic of Moldova, 27 May 2003, document CAT/C/CR/30/7, paragraph 6.*d*; Examination of the reports presented by States Parties in pursuance of Article 19 of the Convention, Conclusions and recommendations of the Committee against Torture, Egypt, 23 December 2002, document CAT/C/CR/29/4, paragraph 6.*f*.

15. See the Assembly's report on "Human Rights and the fight against terrorism", Doc. 12712 (rapporteur: Lord John E. Tomlinson, United Kingdom, SOC).

which was also presented in some detail in an earlier version of the introductory memorandum prepared under the instructions of my predecessor. But in my view, it has become apparent in the meantime that there are enough challenges related to administrative detention in the Council of Europe's own member States, without entering into the detail of the situation in Israel. Furthermore, the situation in Israel is rather specific, due to the conflict situation which has evolved over a very long time. It is therefore unlikely that we could draw any lessons for the benefit of our member States from a more in-depth analysis of the situation in Israel, for which we would also have to take into account the practices and tactics used by the opposing party in this conflict, some of which have been described in the excellent information memorandum on the state of play concerning the abolition of the death penalty.[16]

11. Regarding, again, administrative detention for reasons of security, we have been asked by the Parliamentary Assembly to take into account a second motion submitted by Mr Wold and others on "When human rights provide protection to individuals who represent a threat to national security". With this in mind, I have explored not only what States cannot do without violating their human rights obligations, but also what they can do in order to ensure the safety of their citizens from new threats of terrorism. A citizen's right to protection from terrorism is also a human right.

12. By way of example, the authorities in Norway have found it difficult to deal with a fundamentalist cleric called Mullah Krekar. Since he fled to Norway in 1991, he has faced multiple criminal charges for incitement to violence and for issuing death threats against Norwegian politicians and fellow Kurds. In February 2003, a deportation order was served but attempts to deport him have been constantly frustrated by the Mullah who, whilst refusing to abide by the norms of Norwegian society, is nonetheless keen to remain in that country. The seeming impossibility to deport him and what is seen locally as a perverse interpretation of human rights is widely resented in Norway. On a recent visit to Norway talking to a wide range of citizens from across the political spectrum, your rapporteur did not find a single person ready to support the continued presence of Mullah Krekar in Norway.

13. Any country should first and foremost be able to protect its own citizens, and the European Convention on Human Rights (ETS No. 5, "the Convention) should not be interpreted in such a way as to make this impossible. With the help of the experts we heard at the committee meeting on 7 March 2016, I have therefore pointed out some measures which could take the place of administrative detention when it is not legally possible.

2. International law applicable to administrative detention in general

2.1. International human rights and humanitarian law

14. The right to liberty and security and the right to *habeas corpus* in order to challenge the lawfulness of any deprivation of liberty, of whatever kind and on whatever grounds, are enshrined in a wide variety of international human rights instruments.[17]

15. As a result, according to the case law of the United Nations treaty bodies, administrative detention is often but not always incompatible with the rule of law and with the States' obligations deriving from international human rights law, with some very limited exceptions. In particular, the United Nations Human Rights Committee considers that this practice is generally contrary to Article 9 of the International Covenant on Civil and Political Rights and that security reasons cannot justify infringing the right to liberty and security.[18]

16. See document AS/Jur (2015) 21.

17. See the Universal Declaration of Human Rights (Articles 3, 8, 9 and 10), the International Covenant on Civil and Political Rights (Articles 2, 4, 5, 9 and 10), Standard minimum rules for the treatment of prisoners (Rule 95, Parts I and II-C) and Resolution 34/178 (habeas corpus) of the United Nations General Assembly and Resolutions 1992/35 (habeas corpus) and 1993/36 (paragraph 16) of the Human Rights Commission.

18. See Human Rights Committee, *Shafique v. Australia*, Communication No. 1324/2004, 13 November 2004, UN document CCPR/C/88/D/1324/2004, paragraph 7.2. See also Report of the Human Rights Committee A/65/40 (Vol. I), 2010, p. 78, Final Observations on Jordan, UN document CCPR/C/JOR/CO/4, 2010, paragraph 11. Final Observations on Colombia, UN document CCPR/C/COL/CO/6, 2010, paragraph 20.

16. The UN Committee against Torture and the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment[19] consider that some forms of administrative detention (especially incommunicado detention and detention of indeterminate duration) constitute ill-treatment within the meaning of Article 16 of the Convention against Torture. The UN Committee against torture takes a particularly restrictive view.[20]

17. Exceptions to the principle of the general prohibition of administrative detention are generally confined to cases of duly proclaimed states of emergency and are strictly regulated by a number of principles, such as:

– the legality principle and the rule of law;

– the legitimacy principle (in particular, proportionality);

– the non-discrimination principle.

18. International humanitarian law, which is applicable to armed conflicts and other situations of violence, does not proscribe administrative detention. But its use is confined to exceptional circumstances, where the security of the power being held by the persons protected under the Geneva Convention (IV) on the Protection of Civilian Persons in Times of War makes it "absolutely necessary".[21] This also applies to cases of "imperative reasons of security".[22]

19. International humanitarian law also establishes a number of principles to the effect that administrative detention cannot take the place of criminal prosecution, can only be imposed on a case-by-case basis, individually and without discrimination, must cease as soon as the causes justifying it no longer exist, and must comply with the legality principle and be accompanied by procedural safeguards.[23]

2.2. The European Convention on Human Rights

2.2.1. Case law of the European Court of Human Rights

20. The European Court of Human Rights considers that the right to liberty and security enshrined in Article 5 of the European Convention on Human Rights constitutes "a fundamental human right"[24] and that the purpose of Article 5 is to protect the individual from the arbitrary deprivation of liberty. Three major principles emerge consistently from the Court's case-law with respect to the right to liberty enshrined in Article 5:

– exceptions to the right to liberty are listed exhaustively and must be interpreted narrowly;[25]

– for the deprivation of liberty to be "lawful", it must be effected in accordance with a procedure prescribed by law that includes procedural safeguards;[26]

– Article 5.4 of the Convention guarantees a judicial review of the lawfulness of the measure under which one is detained.[27]

21. The Court has repeatedly held that Article 5.1(*a-f*) is the exclusive and exhaustive list of exceptions under which a person may be lawfully detained, and that these exceptions should be interpreted narrowly so as to ensure that no one is arbitrarily deprived of his or her liberty.[28] In considering cases relating to detention measures taken "preventively" against individuals suspected of participating in ordinary-law offences,

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19. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 17 December 2002, UN document E/CN.4/2003/68, paragraph 26.*h*.
20. Committee against Torture, Annual Report 2009-2010, UN document A/65/44, at pp. 23, 101, 104, 106, 114, 115, 123 and 132.
21. Geneva Convention (IV) on the Protection of Civilian Persons in Times of War, 12 August 1949, Article 42: www.icrc.org/applic/ihl/ihl.nsf/TRA/380?OpenDocument&.
22. Ibid.
23. Jelena Pejic, Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence, CICR, June 2005.
24. Al-Jedda v. United Kingdom, Application No. 27021/08, judgment of 7 July 2011 [Grand Chamber], paragraph 99.
25. Doronin v. Ukraine, Application No. 16505/02, judgment of 19 February 2009, paragraph 52.
26. Akram Karimov v. Russia, Application No. 62892/12, judgment of 13 October 2014, paragraph 143.
27. Niyazov v. Russia, Application No. 27843/11, judgment of 16 January 2013, paragraph 140.
28. See Doronin v. Ukraine, Application No. 16505/02, judgment of 19 February 2009, paragraph 52; Ostendorf v. Germany, Application No. 15598/08, judgment of 7 June 2013, paragraph 65; Witold Litwa v. Poland, Application No. 26629/95, judgment of 4 April 2000, paragraph 49.

including terrorist activities, the Court affirmed that "it has long been established that the list of grounds of permissible detention in Article 5.1 does not include internment or preventive detention where there is no intention to bring criminal charges within a reasonable time".[29]

22. The Court has also repeatedly stated that for detention to be "lawful" within the exceptions listed in Article 5.1(*a-f*), it must look to the procedure and safeguards of the national system in order to determine whether the relevant authorities followed a "procedure prescribed by law", as required by Article 5.1.[30] The Court has found that national law has not met the sufficient "quality of law" standard to constitute a lawful detention in cases in which there are no applicable time limits to the detention[31] or when an applicant is held in detention "without a specific legal basis or clear rules governing his situation".[32] When a national legal system fails to protect an individual from arbitrary detention, the detention cannot be considered "lawful" under the Convention.

23. With respect to expulsion, the Court determined that "a Contracting State would be in violation of Article 5 if it removed an applicant to a State where he or she was at real risk of a flagrant breach of that Article".[33] It nevertheless set a high threshold for determining the existence of a "flagrant" breach of Article 5, noting that only extreme circumstances, such as arbitrary detention for several years or without intention of bringing an individual to trial, could constitute a flagrant breach of Article 5.[34]

24. The Court has stated that various forms of judicial review will satisfy the Article 5.4 guarantee to a review of the lawfulness of the measure under which one is detained and it is not the Court's place to determine the most appropriate system of judicial review.[35] Nevertheless, the Court has also professed that even in cases that concern matters of national security the authorities may not use this as an excuse to free themselves from effective control by domestic courts.[36]

2.2.2. Relevant work of the Parliamentary Assembly and of the Committee of Ministers

25. The Parliamentary Assembly has not yet dealt with the issue of administrative detention in general, but has consistently condemned abusive practices concerning the detention of refugees and migrants.[37] The Assembly recently reiterated its position that detention shall only be used as a last resort, in particular for asylum seekers, when it should be as short as possible, and that alternatives to detention should be used wherever possible.[38] With regard to immigration detention of children, the Assembly has taken a particularly critical stand.[39]

26. The Council of Europe's Committee of Ministers has affirmed the fundamental rights of all persons deprived of their liberty several times[40] and has developed a number of general rules in this field,[41] including the legality principle, the prohibition of arbitrariness, the right to *habeas corpus,* the proportionality requirement, the right of access to a lawyer and authorisation of contact with the outside. In view of the general nature of these principles, they also apply in the area of administrative detention.

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29. *Lawless v. Ireland*, Application No. 332/57, judgment of 14 November 1960 [Grand Chamber]; Al-Jedda v. United Kingdom, Application No. 27021/08, judgment of 7 July 2011 [Grand Chamber], paragraph100.
30. See Ostendorf v. Germany, Application No. 15598/08, judgment of 7 June 2013, paragraph 74; Akram Karimov v. Russia, Application No. 62892/12, judgment of 13 October 2014, paragraph 143; Niyazov v. Russia, Application No. 27843/11, judgment of 16 January 2013, paragraph 115.
31. Akram Karimov v. Russia, Application No. 62892/12, judgment of 13 October 2014, paragraph 148.
32. Niyazov v. Russia, Application No. 27843/11, judgment of 16 January 2013, paragraph 124.
33. Othman (Abu Qatada) v. United Kingdom, Application No. 8139/09, judgment of 9 May 2012, paragraph 233.
34. Ibid.
35. Niyazov v. Russia, Application No. 27843/11, judgment of 16 January 2013, paragraph 139.
36. Chalal v. United Kingdom, Application No. 22414/93, judgment of 15 November 1996, paragraph 131.
37. See Resolution 1707 (2010) on detention of asylum seekers and irregular migrants in Europe.
38. See Resolution 2059 (2015), paragraphs 7 and 11.7-11.9., based on the report on "Criminalisation of irregular migrants, a crime without a victim", Doc. 13788 (rapporteur: Mr Ionuț-Marian Stroe, Romania, EPP/CD).
39. See Resolution 2020 (2014) on the alternatives to immigration detention of children, paragraph 9.
40. See Committee of Ministers Recommendation Rec(2006)2 of 11 January 2006 on the European Prison Rules.
41. See Resolution (73) 5 of the Committee of Ministers of 19 January 1973 on Standard minimum rules for the treatment of prisoners, Committee of Ministers Recommendation R(2000)21 of 25 October 2000 on the freedom of exercise of the profession of lawyer, and the Guidelines on human rights and the fight against terrorism adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Ministers' Deputies.

3. Administrative detention of migrants and asylum seekers in Council of Europe member States

3.1. The legal framework

27. Administrative detention of immigrants in an irregular situation and asylum seekers is permitted in limited circumstances. Detention is possible in order to facilitate either the removal of an irregular migrant from the national territory, or the implementation of the procedure to determine whether a foreign national shall be allowed to stay. This is the "prompt procedural purpose", the need for which Michael Fordham stressed at the hearing on 7 March 2016. If removal turns out to be unfeasible within a reasonable period of time, the "prompt procedural purpose" disappears and the detention must be ended. The Council of Europe Commissioner for Human Rights also recalled that "detention is arbitrary when it is not closely connected to the grounds on which it has been ordered".[42]

28. In addition, immigration detention must fulfil legal standards of certainty, that is to say it must be in accordance with criteria and process prescribed by law,[43] including a maximum duration. The need for a prescribed maximum duration was embraced by the European Court of Human Rights in 2012 in *Mathloom v Greece.*[44] Legislation of Council of Europe member States provides for administrative detention lasting up to one or two years. The so-called "Return Directive" recommends, for European Union countries, a maximum of eighteen months' detention for the purposes of deportation.[45] The actual period in detention may be even longer, notably where judicial review is ineffective, where there are obstacles, particularly financial ones, to implementing the relevant decisions,[46] or when deportation orders are more difficult to implement for certain nationalities.[47] In the United Kingdom, a maximum duration has not yet been fixed, but this may soon change.[48]

29. Immigration detention must also fulfil a "strict necessity" standard, that is to say it must be necessary in order to carry out entry or removal controls effectively, as confirmed by the European Court of Human Rights.[49] This applies to the need for any detention at all (or whether a less intrusive alternative exists), and to the duration, which must not exceed the reasonable period required to achieve the aim pursued. Ordering detention requires addressing the specific circumstances of the individual and can therefore not be automatic.

30. Finally, every detainee must be promptly brought before a court of law. The judge must decide whether, for what purpose and for how long detention may be ordered. Mr Fordham recalled that Spain and Denmark require referral to a judge within three days, Finland and Switzerland within four and France within five days. He stressed that this is not voluntary "best practice" but an essential legal safeguard.[50]

31. In view of the above, the practice of some States to systematically detain migrants in an irregular situation on arrival in the national territory or when they are subject to a deportation order, without considering less coercive measures, and even if they belong to a vulnerable group of persons,[51] would appear to be in violation of the Convention.[52] Also, in a judgment concerning Belgium, the Court found that administrative

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42. Nils Muiznieks: Migrants' and children's rights need better protection in the Netherlands, 15 October 2014.
43. See *Garabayev v. Russia*, Application No. 38411 /02, judgment of 30 January 2008, paragraph 88, and *Amuur v. France*, Application No.19776/92, judgment of 25 June 1996, paragraph 50.
44. *Mathloom v. Greece*, Application No. 48883/07, judgment of 24 July 2012 (paragraphs 64 and 71).
45. Directive 2008/115/EC of 16 December 2008 (in force since the end of 2010) on common rules and procedures applicable in Member States to the return of nationals of third countries in illegal residence; see Steve Peers, The EU's return directive, does it improve or worsen the lives of irregular migrants, 28 March 2014; the report critically assesses the implementation of this directive so far, on the basis of a report by the European Commission dated 28 March 2014 (available at: http://europa.eu/rapid/press-release_IP-14-340_en.htm).
46. UNHCR, Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report – Universal Periodic Review: The Russian Federation, October 2012.
47. In the case of Iraqi, Syrian, Georgian and Iranian nationals expelled from Greece. UNHCR, Asylum Situation in Greece including for Dublin II Transferees, 31 January 2011.
48. On 15 March 2016, the House of Lords voted an amendment to the Immigration Bill pending before parliament under which a limit of 28 days would apply, which could be extended upon an application by the Home Office by court order if "exceptional circumstances of the case require extended detention". This amendment may have been motivated by a 2015 Cross-Party Parliamentary Report on Immigration Detention which recommended a time limit of 28 days and called the current system "expensive, inefficient and unjust." (see "The Report on the Inquiry into the Use of Immigration Detention in the United Kingdom, A joint inquiry of the All-Party-Parliamentary Group on Refugees & the All-Party Parliamentary Group on Migration").
49. *Massoud v. Malta*, Application No. 24340/08, paragraph 68; *Mwanje v. Belgium*, Application No. 10486/10, paragraphs 124-125.
50. See UNHCR's 2012 Detention Guidelines (Guideline No. 7) and Assembly Resolution 1707 (2010)

detention of infant asylum seekers together with their mother constituted a violation of Article 3 of the Convention (inhuman and degrading treatment).[53] Indefinite detention of stateless persons who have no status in the host country and cannot be deported would also appear to be inadmissible.[54]

3.2. Practice in the member States

32. The principles and minimum standards of international law in matters of detention apply to persons detained for the purposes of immigration control in the same way as to individuals held on other grounds. In practice, however, migrants held in administrative detention find themselves in a particularly difficult situation if they do not speak the language of the host country and can therefore find it difficult to challenge the lawfulness of their detention. The Committee of Ministers has therefore set out the procedural safeguards to which persons in detention are entitled, including the right to be informed as quickly as possible, in a language they understand, of the legal and factual grounds for their detention and the remedies available to them, as well as the possibility of immediately contacting a lawyer, a doctor and another person of their choice to inform them of their situation.[55]

33. In principle, migrants held in administrative detention must be placed in centres specially designed for them covering their specific needs.[56] In practice, the conditions of detention for migrants sometimes amount to inhuman or degrading treatment,[57] either because of unacceptable living conditions (overcrowding, lack of basic amenities, insufficient staffing, lack of appropriate medical, psychological, social and legal assistance)[58] or owing to general conditions likely to cause major distress to the asylum seekers.[59]

34. The Assembly deplored in 2010 that the living conditions and safeguards provided for migrants in administrative detention – who are not criminals, as must be recalled – are often worse than those provided for persons sentenced to prison (for example, dirty, unhealthy surroundings, lack of beds, clothing and food, insufficient health care); it noted that the detention system often does not allow for any normal activities (for example, education, access to the outside and open-air exercise). The Assembly also deplored persistent allegations of ill-treatment, violence and abuse by staff.[60] The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), for its part, has noted from its visits to member States that immigrants in an irregular situation are sometimes held in police stations under conditions which are barely acceptable for twenty-four hours, never mind for weeks at a time.[61] It is not likely that the situation has improved in the current conditions of mass migration to Europe.

35. In particular, establishments suitable for vulnerable persons (including families with children, pregnant women and unaccompanied minors) have limited accommodation capacities. Regarding unaccompanied minors, international organisations and non-governmental organisations (NGOs) are advocating alternatives to detention. The United Nations Working Group on arbitrary detention has said that it finds it difficult to conceive of a situation in which the detention of an unaccompanied minor would be compatible with the

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51. See Maltese legislation, which provides for systematic detention even of families with children, unaccompanied minors, pregnant women, elderly persons and persons with disabilities. Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Malta, 9 June 2011, CommDH(2011)17.
52. Amnesty International, Punishment without a Crime, Detention of migrants and asylum-seekers in Cyprus, 2012.
53. *Muskhadzhiyeva and Others v. Belgium*, Application No. 41442/07, judgment of 19 January 2010 (four children aged between 7 months and 7 years and their mother held for several months in a "closed transit centre").
54. UNHCR, Submission in the case of Lakatosh and Others v. Russia, March 2011.
55. See document CM(2005)40 final, 9 May 2005, Twenty guiding principles on forcible repatriation, Principe 6.2.
56. CPT, CPT standards, December 2011, document CPTInf/E(2002)1 – Rev. 2011, and Committee of Ministers, Guidelines on accelerated asylum procedures (Principe XI.7).
57. See the judgments handed down by the European Court of Human Rights in the cases of *S.D. v. Greece*, Application No. 53541/07, judgment of 11 June 2009, paragraphs 52-53; *Kantyrev v. Russia*, Application No. 37213/02, judgment of 21 June 2007, paragraphs 50-51; *Labzov v. Russia*, Application No. 62208/00, judgment of 16 June 2005, paragraph 44; and *M.S.S. v. Belgium and Greece*, Application No. 30696/09, judgment of 21 January 2011 [Grand Chamber].
58. See the many reports on living conditions in Greece for detained migrants, including the Report of the UN Committee against Torture, 2011-2012, A/67/44 and Report to the Government of Greece on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 17 to 29 September 2009.
59. European Court of Human Rights, *Mubilanzila Mayeka and Kaniti Mitunga v. Belgium*, Application No. 13178/03, judgment of 12 October 2006.
60. Resolution 1707 (2010) on the detention of asylum seekers and irregular migrants in Europe, paragraph 4.
61. 20 years of combating torture, 19th General Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 1 August 2008 – 31 July 2009, paragraph 77.

second sentence of Article 37.*b* of the Convention on the Rights of the Child, which provides that imprisonment of a child must only be ordered as a last resort.[62] Regarding persons with disabilities or serious chronic mental or physical problems must be given access to appropriate health care.[63]

4. Administrative detention as a means of repressing political opponents in some Council of Europe member States

4.1. The legal framework

36. Administrative detention is provided for by national law for certain administrative offences, below the threshold of criminal law. It is used by some States as a means of restricting freedom of expression and of assembly. In your rapporteur's view it is unacceptable for administrative detention to be used in this way and indeed its abuse makes it harder to justify its use in deserving cases of combating terrorist threats.

37. The various pieces of legislation providing for this type of detention are generally broad in scope. For instance, the following may fall within the ambit of an administrative offence and be subject to detention on this ground: refusal to obey a police officer, participation in riots, hooliganism and other forms of non-compliance with the regulations in matters of public assembly.[64]

38. Here again, administrative detention is broadly characterised by an erosion of the applicable procedural safeguards. Judicial procedures relating to administrative offences do not always fulfil all the requirements of a fair trial.[65] Until last year, the Georgian Code of Administrative Offences provided for detention of up to 90 days, which was reduced to 15 days in an overhaul of the Code adopted in November 2014. This reform has also strengthened the procedural rights of detainees. Previously, the police was not even required to rapidly inform defendants of their rights or to provide grounds of detention. In many cases, detainees had access neither to their families nor to a lawyer and were tried peremptorily.[66] Where detainees did have access to lawyers, the latter had only a few minutes to prepare their files, and it was unusual for the defence to be allowed to produce evidence.[67] It remains to be seen to what extent the recent reform succeeds in changing such practices.

39. States have some discretion in deciding on the length of such detention before a person is brought before a court. On 14 May 2013, for instance, Azerbaijan adopted new legislative provisions extending the maximum length of administrative detention – without any court decision – for a wide range of offences. For example, organising an unauthorised demonstration now gives rise to 60 days detention, and the refusal to obey a police officer can be punished by up to 30 days' detention (in both cases, the limit was previously 15 days).[68]

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62. Report by the Working Group on arbitrary detention, 15 January 2010, A/HRC/13/30, paragraph 60.
63. Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Malta, 9 June 2011, CommDH(2011)17.
64. Report of the UN Working Group on arbitrary detention, Addendum – Mission in Georgia, 27 January 2002, A/HRC/19/57/Add.2, paragraph 63; Human Rights Watch, Administrative Error: Georgia's Flawed System for Administrative Detention, January 2012; Article 19, Azerbaijan: New legislative amendments further erode rights to freedom of expression and peaceful assembly, 16 May 2013.
65. Report by the UN Working Group on arbitrary detention, Addendum – Mission to Georgia, 27 January 2002, A/HRC/19/57/Add.2, paragraph 63; Human Rights Watch, Administrative Error: Georgia's Flawed System for Administrative Detention, January 2012; see also Thomas Hammarberg, Georgia in transition, Report on the human rights dimension: background, steps taken, remaining challenges, September 2013 (page 11, item 1.3) who recommends that the government should consider abolishing imprisonment as a penalty for administrative offences altogether.
66. See the analysis by the Georgian Young Lawyers' Association of persons arrested after the May 2011 demonstrations, which shows that the judicial examinations sometimes took less than five minutes, or a maximum of half an hour, and the rate of findings of innocence was 0% (compared with 0,2% in criminal cases). Georgian Young Lawyers' Association, Legal Analysis of cases of criminal and administrative offences with alleged political motive, 2012; Human Rights Watch called this the "copy-and-paste" approach to processing administrative detainees; see Human Rights Watch, Georgia reforms draconian administrative detention laws, 26 November 2014.
67. Human Rights Watch, World Report 2012 – Georgia, January 2012.
68. Article 19, Azerbaijan: New legislative amendments further erode rights to freedom of expression and peaceful assembly, 16 May 2013.

4.2. Practice in the member States

40. Cases in which administrative detention is used in order to imprison political opponents, demonstrators and activists during periods of political tension, particularly in pre- or post-electoral contexts, are far from isolated. Such practices have been observed in recent years in Armenia,[69] Azerbaijan,[70] Georgia,[71] the Republic of Moldova,[72] the Russian Federation,[73] Turkey[74] and Ukraine.[75]

41. Administrative detention often follows in the wake of mass arrests carried out during political demonstrations.[76] It is sometimes even implemented preventively, before any hypothetical administrative offence could have been committed, for example when potential participants in a planned protest are arrested in their homes or on their way to the site of the public gathering.[77]

42. Administrative detention has been used to arrest any person considered to have been directly or indirectly involved in such demonstrations: not only organisers and participants[78] – even where the demonstrations were duly authorised – but also mere observers[79] of such demonstrations, including journalists covering them.[80] Recent examples include the detention, in Belarus, of 16 people participating in a protest on the occasion of the anniversary of the Chernobyl disaster.[81]

43. The aim of resorting to administrative detention in such cases is clearly political: to restrict freedom of expression and assembly by imprisoning activists and opponents while depriving them of the means of defence, which they would enjoy under regular criminal proceedings. This practice has been condemned by the European Court of Human Rights on many occasions. The Court has assessed such cases both directly as deprivation of liberty per se (violation of the right to liberty and security as guaranteed by Article 5 of the Convention), and on the grounds of its indirect effects (violation of the right to a fair trial, Article 6 ECHR, or of the principle secured under Article 7 that there can be no punishment without law, violation of the freedom of assembly and association guaranteed by Article 11).[82]

44. Another type of abuse of administrative detention under this heading was noted by the Assembly's rapporteur on the issue of political prisoners in Azerbaijan, Christoph Strässer:[83] certain political opponents were first of all placed in administrative detention,[84] where they were pressured into confessing to more

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69. Resolution 1374 (2004) on the honouring of obligations and commitments by Armenia, and Resolution 1532 (2007) noting that the constitutional reform adopted by Armenia put an end to the practice of administrative detention in 2005.
70. Resolution 1917 (2013) and Doc. 13084, "Honouring of obligations and commitments by Azerbaijan", Doc. 13079, "The follow-up to the issue of political prisoners in Azerbaijan" (rapporteur: Mr Strässer): Article 19, Azerbaijan: New legislative amendments further erode rights to freedom of expression and peaceful assembly, 16 May 2013.
71. Human Rights Watch, Administrative Error: Georgia's Flawed System for Administrative Detention, January 2012.
72. Doc. 11878, report on the functioning of democratic institutions in Moldova (co-rapporteurs: Ms Durrieu and Mr Vareikis).
73. See Doc. 13018, report on "Honouring of obligations and commitments by the Russian Federation" (co-rapporteurs: Mr Frunda and Mr Gross) and Amnesty International, Submission to the a Universal Periodic Review – Federation of Russia, February 2013.
74. See for instance Ayla Aybarak, "Turkish Police detain May day protesters in Istanbul", *Wall Street Journal*, 1 May 2015; and Amnesty International, End the Incommunicado detention of Istanbul protesters, 16 June 2013; "Turkish police launch crackdown on protesters in Istanbul", PressTV.com, 15 March 2016.
75. FIHD – Worldwide Human Rights Movement, FIDH and Viasna demand to drop charges against those convicted after Chernobyl Way March, 2 May 2013.
76. For instance, the peaceful demonstrations held in December 2011 in the Russian Federation against the running of the parliamentary elections gave rise to arrests of over 1 000 demonstrators, with more 100 sentenced to administrative detention. Russian Federation, New laws lead to increased repression of fundamental rights, Amnesty International Submission to the Universal Periodic Review, 16th Session of the UPR Working Group, April-May 2013.
77. In the context of the peaceful demonstrations held in the Russian Federation on 4 December 2011, several members of the opposition were placed under preventive arrest at their homes or on their way to the demonstrations. Amnesty International, ibid.
78. FIHD – Worldwide Human Rights Movement, Ukraine: FIDH and Viasna demand to drop charges against those convicted after Chernobyl Way March, 2 May 2013.
79. Ibid.
80. Ibid.
81. Amnesty International, Annual Report 2014/15, Belarus, Freedom of Assembly.
82. *Vyerentsov v. Ukraine*, Application No. 20372/11, judgment of 11 April 2013 (violation of Articles 6, 7 and 11 of the Convention); *Kakabadze and others v. Georgia*, Application No. 1484/07, judgment of 2 October 2012 (violation of Articles 5, 6 and 11 of the Convention); *Hakobyan and others v. Armenia*, Application No. 34320/04, judgment of 10 April 2012 (violation of Articles 5 and 6 of the Convention) and *Makhmudov v. Russia*, Application No. 35082/04, judgment of 26 July 2007 (violation of Articles 5 and 11 of the Convention); *Shvydka v. Ukraine*, Application No. 17888/12, judgment of 30 October 2014, paragraphs 42 and 55 (violation of Article 10); *Navalny and Yashin v. Russia*, Application No. 26205/11, judgment of 4 December 2014 (violation of Articles 3, 5, 6, 11 and 13); see also the cases referred under item 2.2.1 above.

serious criminal offences. At the end of the maximum period of administrative detention, they were once again detained and placed in pretrial detention pending the criminal proceedings for the offences admitted under pressure, during the period of administrative detention.:

5. Administrative detention based on reasons of security

5.1. Introduction

45. The second motion by Mr Wold and others ("When human rights provide protection to individuals who represent a threat to national security"),[85] which the committee has been invited to take into consideration in the preparation of this report clearly raises some important issues.

46. To avoid any misunderstandings, I should like to begin this chapter by endorsing the Assembly's well-settled position[86] that democratic societies must not "throw out the baby with the bathwater" by overreacting to the threat of terrorism in such a way that basic rights and freedoms are sacrificed for the sake of an (often illusory) increase of security. As our committee's former chairperson and rapporteur on several relevant issues stated at a hearing before the committee on 18 March 2015, such over-reactions play into the hands of the terrorists, whose aim it is, precisely, to destroy our free societies. Extrajudicial killings, abductions, secret detentions, torture and other human rights violations committed in the so-called war on terror are just so many recruitment arguments for terrorist groups, as can be observed most directly in the North Caucasus region of the Russian Federation.[87]

47. At the same time, democracy must be willing and able to defend itself against its enemies. In Germany, this concept (*wehrhafte Demokratie)* is a lesson learnt from the failure of the Weimar Republic espoused by the drafters of the 1949 Basic Law and consistently upheld by the Federal Constitutional Court. In my view, the defence of democracy and the rule of law against its enemies remains a necessity in the face of Al Qaida and Daesh. But this must be done without giving up democracy and the rule of law ourselves.

48. As explained before, I do not cover in this report detention – albeit also for security purposes – in an armed conflict situation, such as the conflict opposing Israel and certain Palestinian authorities. The same applies to the conflicts in Afghanistan, Iraq, Somalia, Syria and any other countries and regions outside the territorial remit of the Council of Europe. The closest we have come in Europe to armed conflict is the situation in the North Caucasus region of the Russian Federation and that in the east of Ukraine. The human rights issues pertaining to these two regions are the subject of separate pending rapporteur mandates, by Michael McNamara (North Caucasus) and Marieluise Beck (eastern Ukraine, including Crimea). I trust the two colleagues will cover all relevant human rights issues, including possible abuses of administrative detention. The North Caucasus report adopted by the committee on 18 April 2016 does indeed include numerous references to cases of arbitrary detention in the fight against terrorism.

5.2. The rule: preventive detention is unlawful under Article 5 of the Convention

49. At the committee hearing in March 2016, all experts were in agreement that the interpretation given to Article 5 of the Convention by the European Court of Human Rights would generally exclude the use of administrative detention for purposes of the prevention of terrorism. At first glance, this interpretation is a little surprising, because Article 5.1.*c* explicitly refers to the possible detention of a person "on reasonable suspicion of having committed an offence **or when it is reasonably considered necessary to prevent his committing an offence**" [emphasis added]. The Court, in several Grand Chamber judgments, has given this phrase a restrictive interpretation. Stefan Trechsel, one of the committee's experts, notes that "[t]he Court has

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83. http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=19217&lang=en.
84. For example, MM. Tural Abbasli and Movsum Samedov: http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=19217&lang=en, paragraphs 45 and 96 respectively.
85. See note 3 above.
86. See Doc. 11302, "Secret detentions and illegal transfers of detainees involving Council of Europe member States: second report" and Doc. 10957, "Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member States" (rapporteur for both: Dick Marty, Switzerland, ALDE); Doc. 12712, "Human rights and the fight against terrorism" (rapporteur: Lord John Tomlinson, United Kingdom, SOC), Doc. 13731, "Drones and targeted killings: the need to uphold human rights and international law" (rapporteur: Arcadio Diaz Tejera, Spain, SOC).
87. Doc. 12276, "Legal remedies for human rights violations in the North Caucasus region" (rapporteur: Dick Marty, Switzerland, ALDE). A follow-up report on this issue has been prepared by Michael McNamara (Ireland, SOC), "Human Rights in the North Caucasus: what follow-up to Resolution 1738 (2010)?", Doc. 14083.

held that any person detained under paragraph 5.1.*c* must eventually be brought to trial. This makes sense only if there also exists a suspicion that the person concerned has actually committed an offence. In view of the first alternative, the second one becomes thereby redundant".[88] But Mr Trechsel also explained during the hearing, convincingly in my view, why this interpretation is the correct one: starting from the consensus that the over-arching purpose of Article 5 is to prevent arbitrary detention, he noted that for all exceptions from the right to liberty in Article 5.1(*a-f*), there are:

> *"proved and tested methods for ascertaining whether the conditions justifying arrest and detention of a specific individual are given or not. … There is an exception in lit. (c), where the substantial justification involves suspicion. Suspicion is, by definition not, or not yet, proven. Still, detention on remand remains provisional and, even more important, under the control of a judicial authority. However there is, to my best knowledge, no reliable method to prove that a person is dangerous. Suspicion is retrospective and must eventually be proven to be justified. If this does not succeed, the suspect must be released. Dangerousness is, as it were, a suspicion pro futuro. The only evidence which can prove that it was justified arises when the danger materializes. This is exactly what the detention is intended to prevent.[89]"*

The slippery slope we would engage in if we were to follow the contrary interpretation would end at a "European Guantanamo", with the indefinite detention of putatively "dangerous" individuals. This would not be compatible with the right to liberty enshrined in the Convention.

5.3. Possible exception: lawful short-term preventive detention in case of imminent danger

50. Our Norwegian expert, Professor Jon Petter Rui, considers that the prohibition on preventive detention is not absolute. First, he pointed out that Article 5 can be derogated from under Article 15 of the Convention "in time of war or other public emergency threatening the life of the nation". The threshold of Article 15 is a high one, but a sustained campaign of severe terrorist attacks may indeed justify such a derogation, as was the case during the height of the IRA's bombing campaign and, more recently, in France after the attacks in Paris.

51. Mr Rui, basing himself on a Strasbourg Court Grand Chamber judgment and the separate opinions of two judges, considers that in extreme cases, short-term preventive detention is also possible in the absence of a derogation. In *Ostendorf v Germany* (note 30 above), the Court did indeed find that preventive detention without charge of a suspected football hooligan for four hours did not violate Article 5. Mr Rui also pointed out that police laws in several German *Länder* allow for detention of people for up to two weeks if there is a clear and present danger for public security.[90]

52. Personally, I do not think it wise to put into question the well-established case law of the European Court of Human Rights. Detention for a few hours, as tolerated by the Court in *Ostendorf*, or even for two weeks, as foreseen by law in some German *Länder*, do not really provide a sustainable solution to problems such as that posed by Mullah Krekar in Norway. Europe should definitely not adopt a Guantanamo-style solution.

5.4. Failure of preventive detention in the United Kingdom

53. As far as the United Kingdom is concerned, the experience with indefinitely detaining suspected terrorists without trial in Northern Ireland under the Prevention of Terrorism (Temporary Provisions) Act 1984 (PTA) was ultimately unsuccessful. Unsurprisingly, the European Court of Human Rights ruled that this practice was a breach of Article 5.3 of the Convention.[91] The government responded by derogating from Article 5.3 under Article 15 of the Convention. The subsequent internment of almost 2 000 mostly Catholic men led to greater civil disturbances and was qualified by a former IRA commander as "among the best recruiting tools the IRA ever had".[92] The PTA (and the derogation from Article 5.3) was left to expire and was replaced by the Terrorism Act 2000, which severely restricted the possibility to detain terrorism suspects without charge. The time limit for such "pre-charge detention" was subsequently extended again, from 7 to 14

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88. Stefan Trechsel, *Human Rights in Criminal Proceedings*, Oxford University Press, p. 427.
89. Statement by Stefan Trechsel at the hearing on 7 March 2016, available from the secretariat.
90. For example, *Polizeigesetz Baden-Württemberg*, paragraph 28. The detention must be confirmed before the end of the first day after the arrest by a judge, who must also indicate the maximum duration (not exceeding 14 days).
91. See *Brogan and others v. United Kingdom*, Applications Nos. 11209/84, 11234/84, 11266/84 and 11386/85, judgment of 29 November 1988.
92. Former IRA Commander Jim McVeigh, quoted in the article in the Law Library of Congress on "Pre-charge detention for Terrorist Suspects: United Kingdom", at note 8.

days by the Criminal Justice Act 2003 and from 14 to 28 days by the Terrorism Act 2006. Plans for a further extension to 42 days were scrapped after considerable doubts were voiced about its compatibility with the United Kingdom's human rights obligations, also by this committee.[93] "Pre-charge detention" for terrorism suspects is a problematic instrument, also in terms of effectiveness for purposes of detention. Even 42 days come to an end, and then charges must be brought or the person released.

5.5. Other solutions

5.5.1. Closed material procedure in the United Kingdom

54. In many cases, the underlying problem is another one, namely that evidence for a crime may well exist, but that it is of the kind that cannot be disclosed in open court without disclosing the competent authorities' working methods or its sources (in particular, the identity of informers). In order to prevent such long-term damage, the British authorities have, in a number of cases, preferred not to press charges and let suspects go free knowing they had committed serious terrorist offences.[94] A solution to this dilemma has been attempted with the introduction of the closed material procedure (CMP) by the Justice and Security Act 2013.[95] The Act foresees some safeguards to avoid descent into unacceptable "secret trials" against suspected terrorists, but it relies mostly on the long-standing, well-established culture of independence and critical distance from the executive authorities prevailing among British judges. I would not wish to speculate whether such a system could function satisfactorily in countries whose judiciary does not have such a "track record" or has different traditions. However, if this basic approach were adopted then it would go a long way, in my view, towards making this practice acceptable – as Professor Trechsel also hinted during the hearing in March.

5.5.2. Banishment: from Guzzardi to Mullah Krekar

55. The problem remains – in particular in view of the motion by Mr Wold and others of which I have been invited to take account in this context – of what to do when a person gives rise to a threat to national security without having committed a criminal offence – yet, or after having served out a prison term. Mr Wold has kindly provided me with some information on an individual case in Norway, which had triggered his initiative. As mentioned above (paragraphs 11-13), a radical Mullah from Iraq, who preaches hatred against the infidels in his mosque in Oslo and even issued a death threat against the Norwegian Prime Minister, cannot be expelled from Norway, basically because Iraq refuses to promise that he will not be subjected to the death penalty there and no other country will accept him. Such cases obviously do not only exist in Norway. The hearing in March was designed to identify possible solutions, including ones outside the scope of administrative detention. More precisely, I am looking at restrictive measures that remain below the threshold of detention, which involves the complete withdrawal of liberty of movement. An example for such measures could indeed be the Norwegian measure to ban Mullah Krekar from Oslo and re-settle him in Kyrksæterøra, a remote town in the centre of Norway, where he will presumably pose less of a threat to national security.[96]

56. An important precedent for such a measure is the European Court of Human Rights' judgment in the case of *Guzzardi v. Italy*.[97] Mr Guzzardi was a suspected mafioso, who, along with other mafia suspects, was "banished" to the small island of Asinara, off Sardinia, for more than a year, after the time limit for pretrial detention had expired and before he was finally tried and convicted for conspiracy and abduction. The Court took great care to establish the existence of a "deprivation" of liberty within the meaning of Article 5 of the Convention, to be distinguished from a mere "restriction" of liberty, which is permitted more widely under Article 2 of Protocol No. 4 to the Convention (ETS No. 46). In view of the circumstances of the individual case (namely the small size of the island, and in particular of the section accessible to the banished suspected mafiosi, under police guard; lack of access other than by a police boat, strict limits on visiting rights and communications), the Court found that this banishment amounted to "deprivation" of liberty, which was not covered by one of the exceptions listed in Article 5. Mr Guzzardi was subsequently ordered to stay in a remote

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93. See Assembly Resolution 1634 (2008) and Doc. 11725 "Proposed 42-day pre-charge detention in the United Kingdom" (rapporteur: Mr Klaas de Vries, Netherlands, SOC).
94. See Lord Wallace of Tankerness, replying to the debate on the extension of closed material procedures on behalf of the government, in "Secret courts plan in chaos: Lords reject closed hearings by crushing majority", 21 November 2012.
95. See presentation on the website of the UK Ministry of Justice, PART 82 – CLOSED MATERIAL PROCEDURE: https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part-82-closed-material-procedure; and the Government's Report on use of CMP between June 2013 and June 2014: https://www.gov.uk/government/publications/report-on-use-of-closed-material-procedure-june-2013-to-june-2014.
96. See "Krekar avoids banishment, but not confinement", NEWSinENGLISH.no, 23 March 2015, the banishment order by the Norwegian Ministry of Justice was quashed by a Norwegian court on 20 March 2015.
97. Application No. 7367/76, judgment of 6 November 1980.

town in central Italy, on the mainland. The complaint he then launched against the new measure was summarily rejected as inadmissible by the European Commission of Human Rights – which our expert, Mr Trechsel, had chaired – because the application concerned a mere restriction of Mr Guzzardi's liberty of movement.[98]

57. In light of the explanations provided by our Norwegian expert, Mr Rui, I would contend that the banishment of Mullah Krekar to Kyrksæterøra is indeed comparable with that of Mr Guzzardi – but not the one to the island of Asinara, but the second one to the remote town on the Italian mainland. I would agree with Mr Rui that such banishment would be compatible with the Convention – provided it has a proper basis in national law, which must be sufficiently precise, accessible and non-discriminatory. A law allowing for the banishment of potentially dangerous persons must not be limited to foreigners, which seems to create a problem at present in Norway.

5.5.3. Control orders, TPIMs and ASBOs

58. Similar measures were possible, in the United Kingdom, in the form of "Control Orders" based on the Prevention of Terrorism Act 2005, replaced in 2011 by "Terrorism Prevention and Investigation Measures" (TPIMs).[99] In brief, the Minister of the Interior is empowered to impose certain restrictions upon persons suspected of constituting a threat to national security, including a ban on visiting certain places, meeting with certain people, using the Internet and other measures, for up to two years. Short of completely depriving a person of liberty by placing him or her under arrest, such measures, which can also be enforced by electronic tagging, can free police resources required for placing a person under round-the-clock surveillance.

59. Whilst such measures can be imposed administratively, in a procedure under the responsibility of the Home Office, another instrument, the ASBO (anti-social behaviour order),[100] has the advantage, from a rule of law perspective, that it must be imposed by a court. It has been used for preventive purposes such as keeping a violent person away from his or her partner, or a recidivist drunk driver from his or her favourite pub. It may be worth considering whether hate propaganda of the kind described by Mr Wold could not also qualify as "anti-social behaviour". It should be noted that the violation of an ASBO qualifies as a criminal offence giving rise to criminal sanctions – including a term of imprisonment.

5.5.4. The last resort: expansion of substantive criminal law

60. Finally, as Mr Trechsel indicated at the hearing in March, the detention (on remand, and after conviction) of suspected terrorists can also be facilitated by cautiously expanding the limits of substantive criminal law. One direction to follow would be to specifically criminalise actions to prepare or otherwise facilitate terrorist acts, beyond the traditional scope of "aiding and abetting" a particular crime. Another would be to create new criminal offences that are easier to prove than participation in a particular attack, such as membership in a terrorist group. In extreme cases, hate propaganda as such can be made a criminal offence, especially if it involves incitement to violence. In my view, the Norwegian case may well fall in this category. In this context, it is worth considering the Council of Europe Convention for the Prevention of Terrorism (CETS No. 196) and its 2015 amending Protocol (CETS No. 217),[101] which calls on States Parties to criminalise a number of ancillary acts related to terrorism, such as certain preparatory acts, recruitment and propaganda.

61. In agreement with all our experts, I would recommend caution for the expansion of criminal law, whose clarity, predictability and proportionality must not be damaged by the legislature "shooting from the hip" in a quick reaction to the latest terrorist attack.

6. Conclusion

62. As we have seen, administrative detention is still a widespread practice in the Council of Europe's member States. The legality of such detention is subject to a number of safeguards, whose violation gives rise to infringements of international and European human rights law.

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98. Application No. 23046/93, unpublished.
99. See BBC, Q & A: Control Orders, 3 January 2011, and the UK Independent Reviewer of Terrorism Legislation's annual reports on TPIMs and Control Orders; for a critical assessment, see LIBERTY's article on TPIMs.
100. Introduced by the 1998 Crime and Disorder Act.
101. See Opinion on the Draft Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, Doc. 13763 (rapporteur: Lord John Tomlinson, United Kingdom, SOC).

63. We should not underestimate the challenges facing member States, particularly as regards controlling migration flows and ensuring national security in the face of the threat of terrorism. But these challenges do not justify infringing the rule of law and failing to respect human rights. These constitute the very foundations of our democratic societies. Other solutions than those undermining the protection of the right to liberty and security by resorting to preventive detention exist, as shown above. The draft resolution contained in this report sums up these findings.