

# COUNCIL OF EUROPE

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## EUROPEAN COMMISSION OF HUMAN RIGHTS

### PREPARATORY WORK ON ARTICLE 5 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Information Document  
prepared by the Secretariat of the Commission

1. Article 5 of the European Convention on Human Rights is worded as follows:

#### Article 5

"1. Everyone has the right to liberty and security of person.

No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

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2. The Universal Declaration of Human Rights, adopted on 10th December, 1948, by the General Assembly of the United Nations, includes an Article 3 and an Article 9 worded as follows:

Article 3

"Everyone has the right to life, liberty and security of person."

Article 9

"No one shall be subjected to arbitrary arrest, detention or exile."

3. In August, 1949, when the Consultative Assembly of the Council of Europe had obtained the inclusion in the Agenda of "measures for the fulfilment of the declared aim of the Council of Europe, in accordance with Article 1 of the Statute, in regard to the safeguarding and further realisation of Human Rights and fundamental Freedoms", M. Teitgen, the Rapporteur, laid before the Committee on Legal and Administrative Questions certain proposals including, in particular, this passage<sup>(1)</sup>:

"The Convention and the procedure to be determined later by the Committee will guarantee the fundamental rights and freedoms listed below to every person residing within the metropolitan territory of a Member State:

.....

Security of person, in accordance with Articles 3, 5. and 8 of the Universal Declaration of Human Rights approved by the General Assembly of the United Nations;<sup>(2)</sup>

Immunity from all arrest, detention or arbitrary exile, in accordance with Articles 9, 10 and 11 of the

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(1) Translation; original English text unavailable.

(2) Articles 5 and 8 of the Declaration correspond respectively to Articles 3 and 13 of the Convention.

Declaration of the United Nations."(1)  
(Doc. A 116)(2).

At its meeting of 29th August, 1949, the Committee adopted the above-mentioned paragraph relating to security of person.

On the other hand, M. Wolter (Luxembourg) suggested substituting the words "arbitrary arrest, sentence, detention or exile" for the words "arrest, detention or arbitrary exile" in the following paragraph. This amendment was negatived by 12 votes to 3 with 2 abstentions. Another amendment, moved by M. Persico (Italy), to insert after "arbitrary exile" the words "or other measures or sentences" met with the same fate. Finally the Committee agreed, by 13 votes to 3 with 1 abstention, to an amendment by M. Rolin (Belgium) and M. Teitgen (France) to replace "or arbitrary exile" by "exile or other arbitrary measures" (Doc. A 142).

4. Article 2, paras. 1 and 3, of the draft submitted to the Consultative Assembly by the Committee on 5th September, 1949, was worded as follows:

"In this Convention, the Member States shall undertake to ensure to all persons residing within their territories:

(1) Security of person, in accordance with Articles 3, 5 and 8 of the United Nations Declaration;(3)

.....

(3) Freedom from arbitrary arrest, detention, exile, and other measures,<sup>(4)</sup> in accordance with Articles 9, 10 and 11 of the United Nations Declaration."<sup>(5)</sup>

(Doc. AS (1) 77, page 204. Cf. also Doc. A 290, page 10, and Doc. B 22, page 10).

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- (1) Articles 10 and 11 of the Declaration correspond respectively to Articles 6 (para. 1) and to Articles 6 (paras. 2 and 3) and 7 of the Convention.
- (2) The drafts of the European Movement, by which the Consultative Assembly was considerably influenced (cf. Official Report of the Consultative Assembly, 1949, II, p. 410), provided for the guarantee of "freedom from arbitrary arrest, detention and exile" (Doc. INF/2/E, February, 1949, and Doc. INF/5/E/R, Article 1 (b), p. 6, June, 1949).
- (3) and (5) Doc. A.290, page 10: "... of the Declaration of the United Nations".
- (4) Doc. A.290, page 10: "Immunity from all arrest, detention, exile and other arbitrary measures".

This text did not give rise to any discussion in the Assembly and was reproduced without alteration in the Assembly's Recommendation of 8th September, 1949 (Doc. AS (1) 108, Article 2, paras. 1 and 3, page 261).

5. The Committee of Ministers of the Council of Europe then submitted the Assembly's Recommendation to a Committee of Experts on Human Rights which it had decided to convene (November, 1949).

The Committee's terms of reference stated that: "due attention should be paid to the progress which has been achieved in this matter by the competent organs of the United Nations". (Doc. AS (1) 116, para. 6, pp. 288-289).

6. The "draft International Covenant on Human Rights" prepared by the United Nations Commission on Human Rights at its fifth session at Lake Success on 9th May to 20th June, 1949, included an Article 9 worded as follows:

"1. No one shall be subjected to arbitrary arrest or detention.

2. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as established by law.

3. Any one who is arrested shall be informed promptly of the reasons for his arrest and of any charges against him.

4. Any one arrested or detained on the charge of having committed a crime or of preparing to commit a crime shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. Pending trial, release may be conditioned by guarantees to appear for trial.

5. Every one who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

6. Every person who has been the victim of unlawful arrest or deprivation of liberty shall have an enforceable right to compensation."

The Commission decided, however, not to put this text to the vote as a whole until Article 4 had been voted on<sup>(1)</sup>. (Doc. E/1371, page 19).

The same draft also contained an Article 10 in the following terms:

"No one shall be imprisoned merely on the grounds of inability to fulfil a contractual obligation". (Doc. E/1371, page 19).

The representatives of Australia, Denmark, France, Lebanon and the United Kingdom had submitted the following observations on Article 9:<sup>(2)</sup>

"The Covenant is intended to be an international agreement imposing legal obligations and conferring legal rights, and the first requisite of a legal instrument is that it should state precisely the rights which it confers and the limitations on those rights which it permits. Whereas the Covenant in general, in the form in which it is now accepted by the majority of the members of the Commission, satisfies this requirement, two important Articles, 5 (3) and 9, appear not to do so.

Thus, to take the case of Article 9:

(i) It is doubtful what value, if any, can be placed on the first paragraph in view of the precise meaning to be attached to the word 'arbitrary' and to the variety of different meanings which it can bear.

(ii) The relation between paragraph 1 and paragraph 2 is obscure. Does paragraph 2 repeat, expand or limit paragraph 1?

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- (1) On this Article, which corresponded to Article 15 of the European Convention, cf. Doc. DH (56) 4, page 3.
- (2) No comments were made on Article 10 (imprisonment for non-fulfilment of contractual obligations).
- (3) This Article corresponded to Article 2 of the European Convention (right to life).

(iii) The words 'as established by law' in paragraph 2, although intended as a safeguard against abuse, do not appear to be effective for that purpose. As was pointed out in the course of debate, any dictator would be prepared to accept such an Article.

The representatives of Australia, Denmark, France, Lebanon and the United Kingdom therefore feel obliged to place on record their doubt whether their respective Governments will feel able to accede to a Covenant imposing such imprecise obligations and to restate their view that these two Articles should be drafted on more precise lines before the Covenant is submitted to the General Assembly for approval.

For this purpose the following texts appear to offer a more satisfactory basis for further consideration.

Article 5: .....

Article 9:

1. No person shall be deprived of his liberty save by legal procedure in the case of:

(a) the lawful detention of a person after a conviction or as a security measure involving deprivation of liberty;

(b) the lawful arrest and detention of a person for non-compliance with the lawful order or injunction of a court;

(c) the arrest of a person effected for the purpose of bringing him before the competent legal authority on a reasonable suspicion of having committed an offence or which is reasonably considered to be necessary to prevent his committing a crime or fleeing after having done so;

(d) the lawful detention of persons of unsound mind or of minors, by lawful order, for the purpose of educational surveillance;

(e) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom deportation or extradition proceedings are pending.

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Paragraphs 2-5 follow paragraphs 3-6 of the text adopted by the Commission.

The representatives of Australia, Denmark, France, Lebanon and the United Kingdom believe that it is possible thus to define all the limitations of these rights which contracting States can reasonably require, in a form that is both brief and comprehensive, and they further believe that a Covenant drafted on such lines will be a much more effective instrument for the purpose for which it is intended, namely, the guarantee of human rights." (Doc. E/1371, pp. 31 to 33).

7. The Secretariat-General of the Council of Europe had prepared for the Committee of Experts on Human Rights a "Preparatory Report on the draft Convention of Collective Guarantee of Human Rights". In Part II of the Report, devoted to a "comparison between the draft International Covenant of Human Rights and the draft of the Consultative Assembly", there were the following comments on Articles 9 and 10 of the draft Covenant of 1949:

#### Article 9

"This Article contains details, regulations and limitations concerning the right of the State to encroach on individual freedom which are not to be found in Articles 9, 10 and 11 of the Universal Declaration to which paragraph 3 of Article 2 of the European Resolution refers. In any case, the Assembly had not taken into consideration the case of so-called administrative internment.

It should be pointed out that at Lake Success:

(a) the American system guaranteeing 'the due process of law' for the taking of life and liberty was rejected owing to its non-existence in other States;

(b) enumeration of exceptions was rejected;

(c) an American amendment adding the word 'arbitrarily' was rejected pending a further study by the Commission.

#### Article 10

"To the knowledge of the Secretary-General, and subject to correction, imprisonment for the non-payment of debts between individuals does not exist in any European country." (Doc. B 22, pp. 18-19).

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8. The Committee of Experts on Human Rights was also called upon to consider the "comments of the Government of the United Kingdom received by the Secretary-General" (of the United Nations) "on 4th January 1950".

In this document there were the following remarks on Article 9 of the draft Covenant:(1)

"His Majesty's Government have nothing to add to the comments on this Article submitted in common with the representatives of Australia, Denmark, France and Lebanon by their representative on the Commission and contained in Annex II to the Report of the Commission (E/1371).(2)

.....

His Majesty's Government believe that the enforceable right to compensation for the illegal detention of a person against his will is a fundamental human right. They therefore approve of the inclusion in the Covenant of a provision such as paragraph 6 of Article 9 of the present draft".(3) (Council of Europe ref. doc. A.770, pp. 3 and 4, and UN ref. doc. E/CN 4/353/Add.2).

9. At its first meeting (Strasbourg, 2nd-8th February, 1950), the Committee of Experts on Human Rights also considered proposals initiated by several of its members.

M. Salen (Sweden) suggested adding the following paragraph at the end of Article 2, para. 3, of the Consultative Assembly's draft:

"This provision should not exclude the right to take necessary measures to fight vagrancy and alcoholism or to ensure respect of obligations to pay a family upkeep allowance" (Doc. A.777).

Sir Oscar Dowson (United Kingdom) proposed an amendment in the following terms:

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- (1) The British Government did not make any comment on Article 10 (imprisonment for non-fulfilment of contractual obligations)
  - (2) Cf. supra, pp.6 to 8.
  - (3) The United States representative had requested that this paragraph be deleted (Doc. E/1371, p. 35).

"Article 9 of the latest draft of the United Nations Covenant (E/1371) refers to 'arbitrary arrest', as does paragraph 3 of Article 2 of the Consultative Assembly's draft Convention.

The United Kingdom Government considers that the text of paragraph 3 is not satisfactory. The word 'arbitrary' is vague and its force undefined, and the relations between paragraphs 1 and 2 obscure.

The United Kingdom Government accordingly proposes the following amended Article for insertion in the Convention now proposed:

'No-one shall be deprived of his liberty save by legal procedure in the case of:

1. (a) the lawful detention of a person after conviction by a competent court or as a security measure;

(b) the lawful arrest and detention of a person for non-compliance with the lawful order of a court;

(c) the arrest of a person effected for the purpose of bringing him before the competent legal authority on suspicion of having committed an offence or which is reasonably considered to be necessary to prevent his committing a crime or fleeing after having done so;

(d) the lawful detention of persons of unsound mind or of minors by lawful order for the purpose of educational surveillance;

(e) the lawful arrest and detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom deportation or extradition proceedings are pending'.

The texts of paragraphs 3 - 6 of the Article in the draft U.N. Covenant should be added as paragraphs 2 - 5 of this Article." (Doc. A.780).

It is clear that this amendment was largely inspired by the one, already quoted, which had been submitted by the representatives of Australia, Denmark, France, Lebanon and the United Kingdom to the United Nations Commission on Human

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Rights in connection with Article 9 of the draft Covenant of 1949<sup>(1)</sup>.

Sir Oscar Dowson proposed, moreover, the insertion of a new Article reproducing verbatim the terms of Article 10 of the draft Covenant of 1949:

"No one shall be imprisoned merely on the grounds of inability to fulfil a contractual obligation" (Doc. A.798).

Finally, M. Félix Welter (Luxembourg), pointing out that Article 2, para. 3, of the Consultative Assembly's draft proclaimed "freedom from arbitrary arrest, detention, exile and other measures", expressed the following opinion:

"No doubt the reference to Articles 10 and 11 of the United Nations Declaration gives an idea of the meaning of the expression 'and other measures'. However, the text might give rise to uncertainties. In using the expression 'and other measures' after the word 'exile', it is possible to take into consideration the expulsion measures which certain States take by administrative action against undesirable aliens. Since these measures are taken by administrative and not legal action, they might be interpreted as meaning that they are arbitrary<sup>(2)</sup> measures (cf. Articles 8 and 10 of the United Nations Declaration).

It is therefore suggested that it should be indicated that the word 'exile' refers only to the victims of an expulsion measure taken by the State of which they are nationals." (Doc. A.784)

10. In its report to the Committee of Experts on 6th February, 1950, the Sub-Committee for the preliminary examination of amendments relating to Section 1 of the Consultative Assembly's draft announced that M. Salen had withdrawn his amendment (Doc. A.777),

"provided that the statement of reasons, incorporated

(1) Cf. supra, pag. 7. But note the following differences: "no one" (instead of "no person").  
Sub-para. (a): "... after conviction by a competent court or as a security measure" instead of "after a conviction or as a security measure involving deprivation of liberty."  
Sub-para. (b): Deletion of "or injunction".  
Sub-para. (c): Deletion of "reasonable" between "on" and "suspicion".  
Sub-para. (e): "The lawful arrest and detention" instead of "the lawful arrest or detention."

(2) This was wrongly translated in original text as "not arbitrary".

in the report of the Committee of Experts, stated clearly:

(a) that the text of Article 6(1) covers also the right of Member States to take the necessary measures to fight vagrancy and alcoholism and to ensure respect for the obligations to pay family upkeep allowances.

(b) .....

With regard to M. Welter's amendment (Doc. A.784), the Sub-Committee considered

"that it was not desirable to amend the text of paragraph 3 of Article 2, since this was contrary to the procedure which had been adopted by the Assembly. Mention should, however, be made in the statement of reasons of the difficulty indicated by M. Welter in part (a) of his amendment" (Doc. A.802).

11. The preliminary draft Convention ultimately agreed upon by the Committee of Experts at the end of its first meeting provided, in Article 2, paras. 1(a) and 3(a), that:

"Everyone has the right to life, liberty and security of person".

and

"No one shall be subjected to arbitrary arrest, detention or exile".

This text thus repeated word for word the terms of Articles 3 and 9 of the Universal Declaration, from which the Consultative Assembly had to some extent departed. (Doc. A.833, p. 2. - Cf. also Doc. A.809, Article 3, paras. 1(a) and 3(a) pp. 2-3).

In its preliminary draft report to the Committee of Ministers, the Committee of Experts made the following comment on Article 6 of the draft Convention:<sup>(2)</sup>

"The Swedish representative further requested that it be put on record that the text of Article 6 covered, in particular, the right of signatory States to take the

(1) and (2) General saving clause (Recognition and respect for the rights and freedoms of others; just requirements of public morality, order and security in a democratic society).

necessary measures for combating vagrancy and drunkenness or to ensure respect of obligations to pay alimony costs; the Committee had no doubt that this could be agreed to since such restrictions were justified by the requirements of public morality and order" (Doc. CM/WP I (50) 1, p. 13 - Cf. also Doc. CM/WP I (50) 15, p. 17).

12. At its second meeting, held at Strasbourg from 6th to 10th March, 1950, the Committee of Experts had before it a new British amendment worded as follows:

"1. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:(1)

(a) the lawful detention of a person after conviction by a competent court(2);

(b) the lawful arrest and detention of a person for non-compliance with the lawful order of a court;

(c) the lawful arrest and detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or which is reasonably considered to be necessary to prevent his committing a crime, or fleeing after having done so;

(d) the lawful detention of a person of unsound mind or of a minor by lawful order for the purpose of educational supervision;

(e) the lawful arrest and detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom deportation or extradition proceedings are pending.

2. Anyone who is arrested shall be informed promptly of the reasons for his arrest and of any charges against him.(3)

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- (1) The changes in this paragraph compared with the first British amendment quoted above (p. 10) are underlined.
- (2) The words "or as a security measure" are omitted.
- (3) The changes in paras. 2 to 5 of the second British amendment, as compared with paras. 3 to 6 of Article 9 of the draft Covenant of 1949 (Supra, pp. 5 and 6), to which the first British amendment (Supra, p. 10) merely referred, are underlined.

3. Anyone arrested or detained on the charge of having committed a crime or to prevent his committing a crime shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of unlawful arrest or deprivation of liberty shall have an enforceable right to compensation" (Doc. CM/WP I (50) 2, p. 3).

This document contained no text corresponding to Article 10 of the draft Covenant of 1949(1).

13. The British amendment was submitted to a Drafting Committee consisting of Sir Oscar Dowson and Mr. Le Quesne (United Kingdom), M. Dons Moeller (Denmark) and M. Salen (Sweden).

This Committee modified it as follows(2):

"1. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest and detention of a person for non-compliance with the lawful order of a court, or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest and detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or which is reasonably considered to be necessary to prevent his committing a crime, or

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- (1) Imprisonment for non-fulfilment of contractual obligations (Cf. Doc. A.798, quoted above, p. 11).
- (2) The modifications made to the second British amendment, quoted above (pp. 13 and 14), are underlined.

fleeing after having done so;

(d) the lawful detention of minors by lawful order for the purpose of educational supervision;<sup>(1)</sup>

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholic or drug addicts or vagrants;

(f) the lawful arrest and detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom deportation or extradition proceedings are pending.

2. Anyone who is arrested shall be informed promptly, in a language he understands, of the reasons for his arrest and of any charges<sup>(2)</sup> against him.

3. Anyone arrested or detained on the charge of having committed a crime or to prevent his committing a crime shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

Paragraph 5 (right to compensation in the event of unlawful arrest or deprivation of liberty) no longer appears in this text (Doc. CM/WP I (50) 10, pp. 1 and 2. Cf. also Doc. CM/WP I (50) 14, Alternative A, Article 6, pp. 3 and 4).

14. The draft Convention finally submitted to the Committee of Ministers by the Committee of Experts contained two Articles corresponding to the present Article 5.

Article 2, paras. 1(a) and 3(a), in Alternatives A and A/2 (method of enumeration of rights and freedoms to be safeguarded) was merely a repetition of Articles 3 and 9,

<sup>(1)</sup> The words "of a person of unsound mind, or" were deleted  
<sup>(2)</sup> Doc. CM/WP I (50) 14: "any charge".

quoted above, of the Universal Declaration (Doc. CM/WP I (50) 15, Appendix, p. 1. Cf. also Doc. CM/WP I (50) 14, Alternative B, p. 8).

Article 6 in Alternatives B and B/2 (method of precise definition of rights and freedoms to be safeguarded) provided that<sup>(1)</sup>:

"1. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest and detention of a person for non-compliance with the lawful order of a court, or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or which is reasonably considered to be necessary to prevent his committing a crime, or fleeing after having done so;

(d) the lawful detention of minors by lawful order for the purpose of educational supervision;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholic or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom deportation or extradition proceedings are pending.

2. Anyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

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(1) The changes made in the text of the Drafting Committee, quoted above (pp. 14 and 15), are underlined.



3. Anyone arrested or detained on the charge of having committed a crime or to prevent his committing a crime shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful." (Doc. CM/WP I (50) 15, Appendix, pp. 6 and 7. Cf. also Doc. CM/WP IV (50) 9, Article 7, p. 3).

The report of the Committee of Experts made the following comments on this last Article:

"The text originally proposed by the representative of the United Kingdom contained an additional paragraph which read:

'Everyone who has been the victim of unlawful arrest or deprivation of liberty shall have an enforceable right to compensation.'

A majority of the members of the Committee considered that this phrase might be held to impose on States Parties to the Convention an obligation to ensure the payment of damages, for example, by persons ordered to pay them as a result of a civil action. This appeared to be an undesirable requirement and the paragraph was therefore omitted.

In the opinion of the United Kingdom representative, the paragraph did not bear this meaning, and he considered that the inclusion of such a provision in the Convention was desirable." (Doc. CM/WP I (50) 15, p. 21).

15. The Conference of Senior Officials (Strasbourg, 8th to 17th June, 1950) agreed on the following text:

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Article 5(1)

"1. Everyone has the right to liberty and security of person.<sup>(2)</sup> No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest and detention of a person for non-compliance with the lawful order of a court, or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or which is reasonably considered to be necessary to prevent his committing a crime or fleeing after having done so;

(d) the lawful detention of minors by lawful order for the purpose of educational supervision;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholic or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom deportation or extradition proceedings are pending.

2. Anyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

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- (1) The alterations made to the text of the Committee of Experts (supra, pp. 15 - 17) are underlined.
- (2) This phrase is clearly based on Article 3 of the Universal Declaration and Article 2, para. 1(a) of Alternatives A and A/2 of the draft of the Committee of Experts. In Doc. CM/WP IV (50) 9 (new draft of Alternatives B and B/2), it was the subject of a special Article (Article 5, p. 2). In Doc. CM/WP IV (50) 16 Appendix (first draft prepared by the Senior Officials), a separate paragraph had been devoted to it, the following sentence coming into paragraph 2. Consequently paras. 2 to 5 had been numbered 3 to 6.

3. Anyone arrested or detained on the charge of having committed a crime in accordance with the provisions of para. 1(c)(1) shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Anyone who has been victim of unlawful arrest or deprivation of liberty shall have an enforceable right to compensation."(2) (Doc. CM/WP IV (50) 19, Appendix, pp. 3 and 4. Cf. also Doc. CM/WP IV (50) 16, Appendix, pp. 3 and 4).

The report of the Conference of Senior Officials to the Committee of Ministers contained the following comments on this text:

"Article 5, para. 1(c) and 3.

The Conference considered it useful to point out that where authorised arrest or detention is effected on reasonable suspicion of preventing the commission of a crime, it should not lead to the introduction of a régime of a Police State. It may, however, be necessary in certain circumstances to arrest an individual in order to prevent his committing a crime, even if the facts which show his intention to commit the crime do not of themselves constitute a penal offence. In order to avoid any possible abuses of the right thus conferred on public authorities, Article 13, para. 2, will have to be applied strictly.(3)

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- (1) Doc. CM/WP IV (50) 16 Appendix: "or to prevent his committing a crime".
- (2) This paragraph is entirely new and is reminiscent of para. 5 of the British amendment quoted above (pp. 14 and 15) which the Committee of Experts did not adopt.
- (3) This provision corresponded to present Article 18 of the Convention.

"Article 5, para. 5

This paragraph gives anyone who has been a victim of unlawful arrest or illegal detention, that is to say, in violation of the relevant legal provisions, the right to compensation to repair the harm which he has suffered as a result of arrest and illegal detention. The action should be taken against the person or persons responsible.

The United Kingdom delegate especially insisted on the need to retain this provision, which he regarded as constituting a necessary guarantee of the protection of the right to freedom.

The Italian delegate made reservations and was doubtful as to the desirability of this paragraph.

The Danish delegate expressly reserved the position of his Government on this matter." (Doc. CM/WP IV (50) 19, pp. 14 and 15).

16. After the work of the Conference of Senior Officials had been concluded, the United Kingdom delegation suggested certain alterations to the wording of the English text of the Report as regards para. 1(c) of Article 5 of the draft Convention. (Doc. A.1690).(1)

17. The Report and the draft Convention adopted by the Conference of Senior Officials were laid before the Committee of Ministers of the Council of Europe, which agreed on 3rd August, 1950, that a Committee of Governmental Experts would meet next day to revise the text of the draft having regard to proposals received and the documentation already available (Documents of the Committee of Ministers 5th session, p. 26).

18. The United Kingdom delegation made the following observations with regard to paragraph 1(d) of Article 5 of the draft Convention:

"Article 5 (1) (d), as at present drafted, does not provide for the possibility of detaining minors for the purpose of bringing them before the court for the making of a 'lawful order'. Many children brought before the

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(1) "The phrase 'reasonable suspicion of preventing the commission of a crime' is meaningless. The wording of Article 5 (1) (c) of the Convention should be followed, i.e. 'on grounds which are reasonably considered to be necessary to prevent'".

courts have committed no offence at all and the purpose of their detention is to secure their removal from harmful surroundings, so that they are not covered by Article 5 (1) (c). At the same time, the circumstances of the case usually demand that the child should be removed from harmful surroundings before he can be brought before the court. H.M. Government therefore wish Article 5 (1) (d) to be expanded to read:

'The lawful detention of minors by lawful order for the purpose of educational supervision, or their lawful detention for the purpose of bringing them before the competent legal authority'".  
(Doc. CM I (50) 6, p. 1).

The Sub-Committee on Human Rights accordingly amended paragraph 1(d) as proposed by the United Kingdom delegation. (Doc. CM I (50) 9, p. 2).

19. On 7th August, 1950, the Committee of Ministers agreed upon the text of a "draft Convention of Protection of Human Rights and Fundamental Freedoms", which it decided to send to the Consultative Assembly for opinion. Article 5 of the draft read as follows:

"Article 5(1)

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court, or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or which is reasonably considered to be necessary to prevent his committing an offence or fleeing after having done so;

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(1) The alterations made in the text prepared by the Conference of Senior Officials (supra, 18 and 19) are underlined.

(d) the<sup>(1)</sup> detention of minors by lawful order for the purpose of educational supervision or their lawful detention for the purpose of bringing them before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholic or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom deportation or extradition proceedings are pending.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained<sup>(2)</sup> in accordance with the provisions of para. 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been victim of<sup>(3)</sup> arrest or deprivation of liberty in contravention of the preceding provisions shall have an enforceable right to compensation." (Doc. CM (50) 52, pp. 3 and 4. Cf. also Doc AS (2) 11, Appendix A, Article 5, pp. 603-604).

20. In its Recommendation of 25th August, 1950, regarding the draft Convention for the Protection of Human Rights and Fundamental Freedoms, the Consultative Assembly proposed no alteration in Article 5, which received no particular mention during the debate. (Doc. AS (2) 104, Article 5, pp. 1030-1031).

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(1) The word "lawful" was deleted.

(2) "on the charge of having committed a crime" deleted.

(3) "unlawful" deleted.

21. On 3rd November, 1950, a Committee of Legal Experts examined the text of the Convention for the last time and introduced a number of corrections of form and translation. (Doc. CM/Adj. (50) 3 Rev. para. 6).

On that occasion, Article 5 was subjected to a few slight amendments(1) and thus received its final form, confirmed next day by the signature of the Convention.

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A study of the preparatory work on the Convention reveals certain affinities between Article 5 of this Convention and Articles 9 and 11 of the draft International Covenant on civil and political rights(2).

The Secretariat of the Commission has accordingly deemed it useful to attach to this document the corresponding extract from the commentary on draft Covenants prepared by the Secretary-General of the United Nations in 1955 at the request of the United Nations General Assembly. (A/2929, pp. 98 - 103 and 106 - 107, Appendix)(3).

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- (1) Para. 1(c): "when it is reasonably considered" (instead of "which is reasonably considered").  
Words "to be" omitted.  
Para. 1(d): "a minor" (instead of "minors").  
"his" (instead of "their").  
"him" (instead of "them").  
Para. 1(e): "alcoholics or drug addicts" (instead of "alcoholic or drug addicts").  
Para. 1(f): "action is being taken with a view to deportation or extradition" (instead of "deportation or extradition proceedings are pending").  
Para. 5: "the victim" (instead of "victim").  
"or detention" (instead of "deprivation of liberty").  
"provisions of this Article" (instead of "preceding provisions").
- (2) Article 9 until 1949: Article 6 in 1950 and 1951; Article 8 in 1952; Article 9 since 1953.
- (3) On this subject cf. Doc. DH/ (56) 4, pp. 10 and 11.

A P P E N D I X

ARTICLE 9

Liberty and security of person

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that such court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or deprivation of liberty shall have an enforceable right to compensation.
26. This article begins by setting forth in positive terms, borrowed from article 3 of the Universal Declaration of Human Rights, the right of everyone to liberty and security of person (8). There was some objection that the declaratory character of this clause made it inappropriate for inclusion in a legal instrument. /.

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(8) ESC (XIII), suppl.9, annex III, art. 6; E/CN.4/SR.314.



Limitations clause (9)

27. It was generally admitted that the right to liberty and security of person might be subject to restrictions, but the terms in which such restrictions should be drafted gave rise to discussion.

28. Proposals were made listing the possible grounds on which deprivation of liberty might be justified. However, it seemed unlikely that any list proposed, whether restricted to some twelve grounds as in certain proposals or expanded to include about forty grounds suggested could cover all possible cases of legitimate arrest or detention. On the other hand, it was said that even if such a list could be made complete, its adoption might not be considered desirable: the covenant should not give the impression of being a catalogue of restrictions to the rights which it set forth.

29. The meaning of the general restrictive clause, incorporated in the last two sentences of paragraph 1, would seem to depend largely on the interpretation to be given to the word "arbitrary". It was understood, according to different schools of thought, to mean either "illegal", or "unjust", or "both illegal and unjust".

30. One opinion was that "arbitrary" was synonymous with "contrary to the national legislation"; if such were the case, it was emphasised, the third sentence in paragraph 1, "no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law", would seem to be a repetition of the second sentence.

31. On the other hand, it was argued that by using the word "arbitrary" all legislation would have to conform to the principle of justice. On the basis of such an interpretation, the third sentence of the first paragraph would qualify the fundamental idea set forth in the second sentence: the deprivation of liberty should not only conform to the principle of justice, it should also be on such grounds and in accordance with such procedure as are established by law. ./.

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(9) E/CN.4/AC.1/SR.23, 32; E/CN.4/AC.3/SR.3; E/CN.4/SR.95, 96, 144, 146, 147, 314; E/CN.4/95, annex B, art. 9, E/CN.4/170/Add.1, E/CN.4/188, 231, 235, 401, 402, 405/Rev.1, E/CN.4/523; E/CN.4/L.137, 183; ESC (IX), suppl.10, annex II, art. 9; ESC (XI), suppl.5, annex II, art.6; E/AC.7/SR.148; GA, 3rd Com., 288th, 289th, 290th, 291st and 562nd mtgs.

32. In the course of the debate it was said that national legislation might at times be arbitrary; it was said therefore that the third sentence in paragraph 1 should be read and understood in the light of the second sentence.

Guarantee of personal liberty in connexion with any arrest or detention

33. The purpose of paragraphs 2, 4 and 5 of this article is to define certain guarantees which must apply in case of any arrest or detention.

34. With regard to paragraph 2,<sup>(10)</sup> it was admitted on the one hand, that, in the interest of the arrested person, competent authorities should have sufficient time to prepare a detailed brief of the charges against him; this period of time, however, should be as short as possible. On the other hand, the person concerned should be informed of the reasons for his arrest at the time he was arrested.

35. The principle enunciated in paragraph 4,<sup>(11)</sup> according to which anyone who is deprived of his liberty shall be entitled to take proceedings before a court in order that such court may decide on the lawfulness of his detention, did not give rise to much discussion. The words "in the nature of habeas corpus" which appeared in earlier drafts were deleted in order to specify that States must be free to allow for such a right of appeal within the framework of their own legal systems.

36. The discussion on paragraph 5<sup>(12)</sup> revealed a desire to establish an effective right to compensation for illegal arrest or deprivation of liberty. The right to compensation, set forth in general terms, would seem likely to be invoked against individuals as well as against the State as a legal person. It was noted that in certain countries the civil responsibility of individuals alone for malicious or grossly negligent conduct was legally recognised. However, the words proposed in order to adapt paragraph 5 to such legal systems "... a right of action for compensation against any individual who by his malicious or grossly negligent conduct directly caused the unlawful arrest or detention", were not accepted.

(10) E/CN.4/AC.3/SR.3; E/CN.4/SR.98, 99, 145, 314; E/CN.4/399, 406; ESC (XIII) suppl.9, annex III, art.6.

(11) E/CN.4/AC.1/SR.23; E/CN.4/AC.3/SR.6; E/CN.4/SR.100, 147, 314; E/CN.4/170, 188, 353/Add.1, 515/Add.2; E/CN.4/L.151; GA, 3rd Com., 289th mtg.

(12) E/CN.4/AC.1/SR.2; E/CN.4/AC.3/SR.4; E/CN.4/SR.102, 147, 148, 314; E/CN.4/353/Add.1; E/CN.4/394; E/CN.4/L.131; E/AC.7/SR.149.

Guarantees in favour of persons arrested or detained on a criminal charge(13)

37. Paragraph 3 of this article establishes special guarantees in favour of persons arrested or detained on a criminal charge. The accused shall be brought to trial "within a reasonable time"; it was considered necessary to adopt this wording in order to allow the competent authorities to examine the charge seriously, without, however, any unjustified delay.

38. The last sentence of paragraph 3 states that "it shall not be the general rule that persons awaiting trial shall be detained in custody". It was admitted that release might be subject to certain guarantees. The objection was raised that in certain serious cases, release even under guarantees, should not be allowed; a proposal to insert such an exception in paragraph 3 was, however, rejected. It was made clear that the article allows States parties to provide for guarantees other than those of a purely financial character. It was stipulated that release subject to guarantees might apply at any stage of the judicial proceedings.

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(13) E/CN.4/AC.3/SR.3; E/CN.4/SR.99, 100, 101, 147, 154, 314;  
E/CN.4/170, 188, 250, 260, 353/Add.8, 515/Add.4; E/CN.4/L.  
137, L.151; ESC (XIII), suppl.9, annex III, art.6.

## DOCUMENTATION

<u>Organs and sessions</u>	<u>Records of discussions</u>	<u>Other documents</u>	<u>Article number</u>
DC (I)	E/CN.4/AC.1/SR.2	E/CN.4/21 annex A, art.7, annex B, art 10, annex G, art.4	
CHR (II)	E/CN.4/AC.3/SR.3,4,6,9; E/CN.4/SR.36	E/CN.4/37, 39; E/CN.4/56, art.8; ESC (VI) suppl.1, annex BII, art.9	4
DC (II)	E/CN.4/AC.1/SR.23, 32	E/CN.4/AC.1/19, 23 and Add.1 and 2; E/CN.4/AC.1/31; E/CN.4/82 and Add.2, 3, 4, 5, 7, 8, 11, 12; E/CN.4/95, annex B, art.9	9
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CHR (VI)	E/CN.4/SR.144, 145, 146, 147, 148, 154, 199	E/CN.4/353/Add.1, 2, 3, 6, 7, 8, 9, 10, 11; E/CN.4/394, 397, 399, 400, 401, 402, 405 and Rev.1, 406, 409, 410, 411, 421; ESC (XI) suppl.5, annex I, art.6, annex II, art.6	9
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CHR (VII)		E/CN.4/515/Add.2,4,13; E/CN.4/523,528,paras.109-124, E/CN.4/563 and Rev.1; E/CN.4/NGO/21;ESC (XIII), suppl.9, annex I, art. 6, annex III, art.6	6

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<u>Organs and sessions</u>	<u>Records of discussions</u>	<u>Other documents</u>	<u>Article number</u>
ESC (XIII)		E/2059/Add.8	6
CHR (VIII)	E/CN.4/SR.313, 314	E/CN.4/528/Add.1, paras. 71- 78; E/CN.4/L.131, 137, 151, 183; E/CN.4/NGO/39; ESC (XIV) suppl.4, paras. 180-188, annex IB, art.8	6
CHR (IX)		E/CN.4/674, paras. 34-37; ESC (XVI), suppl.8, annex IB, art.9	6
CHR (X)		E/CN.4/694/Add.2, 5, 6; E/CN.4/702, sections IX, XV	9
GA (IX)	3rd Com., 562nd, 565th, 568th, 569th mtgs.		9