Application and interpretation of Article 5 of the European Convention of Human Rights

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Art. 5 of the European Convention on Human Rights

"*They who can give up essential liberty to obtain a little temporary safety, deserve neither liberty nor safety.*" Benjamin Franklin (1706-1790)

The guarantee of liberty was the biggest achievement during the last centuries. Especially after the 2nd World War Conventions of Human Rights were created[1] and regional courts[2] established to protect it. In the following as an example the interpretation and application of the Art. 5 of the European Convention on Human Rights[3], which guarantees the liberty, by the European Court of Human Rights[4] shall be (critically regarded) scrutinized. Thus, first the(re) will be a general overview of Art. 5, followed by (scrutiny of special problems) special issues of interpretation and application and at least a conclusion will finish this paper.

I. General overview of Art. 5

Art. 5 protects the right of liberty and security of a person. For this purpose it codifies grounds for a detention in Art. 5(1) and procedural safeguards in Art. 5(2) to (4). In case of arrest or detention in breach of these provisions Art. 5(5) gives everyone the right to claim compensation. In the following first the scope of protection, secondly the grounds for detention, than the procedural safeguards and at least the claim for compensation shall be described.

1. Scope of protection

First the scope of protection by Art. 5 has to be determined. The right to liberty and security are mentioned together in Art. 5(1), although the following part of the Art. just refers to the right of liberty.[5] Liberty covers the physical liberty of a person.[6] It is infringed by the loss of liberty of an individual against his will.[7] Loss of liberty itself is an extreme form of limitation upon freedom of movement, which itself is protected by the optional protocol No. 4 Art. 2 of the Convention, so that a differentiation between the two rights is mandatory.[8] The right to security itself has no meaning beyond the right to liberty, so that the court in Strasbourg treated the two rights as one.[9] Therefore

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[1] E.g. Universal Declaration of Human Rights, United Nations, 1948; American Convention on Human Rights 1969.
[2] Besides the European Court of Human Rights for example the Inter-American Court of Human Rights and African Court on Human and Peoples' Rights.
[3] In the following just the Article will be named.
[4] In the following just Court.
[5] Van Dijk, p. 252.
[6] *Engel v Netherlands* A 22 (1976); 1 EHRR 706 para 58 PC.
[7] *Storck v Germany* 2005-V.
[8] Harris, p. 123.
[9] *Adler and Bivas v. Federal Republic of Germany*, Yearbook XX (1977), p. 146; van Dijk, p. 252; Macdonald, p. 282.

this provision cannot be understood as right to social security.[10] Art. 5 requires a detention against the will so the detainee can consent in his deprivation of liberty. As minors are also protected by Art. 5, their limited decision-making capacity has to be considered in the light of the parental rights protected by Art. 8 of the Convention. The exercise of parental rights can lead to a child's detention without bringing Art. 5 into play even when the child does not agree upon the confinement.[11]
Art. 5 applies to all forms of detention and to everyone, thus also for personnel in the military service.[12] Clearly Art. 5 is applicable when the state detains an individual. But it also imposes in special circumstances the duty on the state to give protection against detention by private parties.[13]

2. Grounds of detention

For all grounds it is necessary that the deprivation of liberty is "in accordance with a procedure prescribed by law". Furthermore each ground for detention contains the word "lawful". These provisions overlap and the Court merges their consideration.[14] Nevertheless clear provisions have been established to meet the requirement of "lawfulness". First the detention has to have a basis in domestic law and be conforming to it. For the review of domestic law and the question if the detention complies with it the national authorities decide in first place.[15] Secondly the application of the domestic law has to be in conformity with the Convention that is to say for one of the grounds covered by Art. 5(1)(a)-(f).[16] Moreover a test of legal certainty and quality of law[17] has to be satisfied as well as general principles of the Convention[18]. The test of legal certainty and quality of law requires that all law, whether written or unwritten, be public and sufficiently precise to allow the citizen to foresee the consequences which a given action may entail.[19] It is enough when a domestic provision is clarified by a series of domestic rulings.[20] This all shall minimize the risk of arbitrariness.[21] The notion of arbitrariness however entails additionally provisions. So a detention will be arbitrary when there is an element of bad faith or deception on the part of the authorities.[22] The same holds if the order to detain or its execution does not genuinely conform with the purpose of the restrictions permitted by Art. 5(1)(a)-(f).[23]

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[10] *X v FRG No 5287/71*, 1 Digest 288 (1972).
[11] *Nielsen v Denmark* A 144 (1988).
[12] *Engel v Netherlands* A 22 (1976).
[13] *Storck v Germany* 2005-V; *Blume v Spain* 1999-VII; *Cyprus v Turkey* 2001-IV.
[14] Harris, p. 133.
[15] *Wintwerp v Netherland* A 33 (1979); *Bozano v France* A 111 (1986); Harris p. 133-134.
[16] *Wintwerp v Netherland* A 33 (1979); see Harris, p. 133; van Dijk, p. 255.
[17] *HL v UK* 2004-IX.
[18] *Ilascu v Moldowia* 2004-VII.
[19] *Steel v UK* 1998- VII; *HL v UK* 2004-IX; *Nasrulloyev v Russia* (2007); Harris, p. 134.
[20] *Steel v UK* 1998-VII.
[21] *Amuur v France* 1996-III.
[22] *Bozano v France* A 111 (1986).
[23] *Wintwerp v Netherlands* A 33 (1979).

Although the conditions of detention just fall under Art. 3 for the non arbitrariness of detention under Art. 5 there must be some relationship between the grounds of permitted confinement relied on and conditions of detention.[24]

These general principles stated above apply to any detention under Art. 5(1). But the non-arbitrariness-test can be higher or lower depending on the provision scrutinized.[25] The grounds listed in Art. 5 are exhaustive.[26] However, the applicability of one ground does not necessarily preclude that of another. These grounds shall now be described.

a) Detention after conviction

A detention is possible after conviction by a competent court. The detention follows in this case a sentence of imprisonment. There is no examination of the legality of a conviction[27] or the length or appropriateness of a sentence of imprisonment[28]. Just the detention has to be "lawful". The word "conviction" has an autonomous Convention meaning entailing a finding of guilt in respect of an offence.[29] Competent court means a body that is independent of the executive and the parties and that provides adequate judicial guarantees.[30] In respect of the adequate judicial guarantees there can be an overlap with Art. 6 of the Convention. Thus a breach of Art. 6 in the trial of a person can mean an infringement of Art. 5(1)(a).[31] There has to be a causal connection between the conviction and the detention as the word "after" implies.

b) Detention for non-compliance with a court order or an obligation prescribed by law

Art. 5(1)(b) allows to detain a person after a court order was already made against him and he disobeys.[32] Detention on suspicion of having committed a crime falls under Art. 5(1)(c). The second limb of Art. 5(1)(b) permits detention to enforce obligations. To limit its possible broad application the obligation has to be specific and concrete and the detention is just to secure its fulfilment and not penal.[33] Moreover the detention in this case is a last resort measure.[34] In every case the balance between the right to liberty and the fulfilment of the obligation in question has to be found.[35]

c) Detention on suspicion of having committed an offence

In Art. 5(1)(c) contains three different grounds for detention. But the most important is the imprisonment on remand. For this kind of detention a reasonable suspicion of having committed an

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[24] *Ashingdane v UK* A 93 (1985); Harris,p. 130.
[25] Harris, p. 137.
[26] *Ireland v United Kingdom* A 25 (1978).
[27] *Krzycki v FRG No 7629/76*, 13 DR 57 at 61 (1978).
[28] *Weeks v UK* A 114 (1987).
[29] *Engel v Netherlands* A 22 (1976).
[30] Harris, p. 139; *De Wilde, Ooms and Versyp v Belgium* A 12 (1971).
[31] See Harris, p. 139.
[32] Macdonbald, p. 302.
[33] *Engel v Netherlands* A 22 (1976); *Vasileva v Denmark* hudoc (2003).
[34] *Saadi v UK* hudoc (2008).
[35] *Vasileva v Denmark* hudoc (2003).

offence is needed. Offence is one under domestic law.[36] The reasonable suspicion has to be based on reasonable grounds and the Court stated that in principle a suspicion just held in good faith is insufficient.[37] Facts or information has to exist which would satisfy an objective observer that the person concerned may have committed the offence.[38] The purpose of this detention is the purpose of bringing him before the competent legal authority. Art. 5(1)(c) gives the possibility to proceed further investigation while the person is detained[39], so this provision is not infringed when eventually the detainee is not charged.[40] The third ground – a detention after fleeing after committing an offence- is superfluous, because in this case a detention is anyway possible under the first ground.[41]

The second ground does not authorize the state to justify preventive detention. Even applying this ground the state has to have the will to bring a person before the competent legal authority.[42] From this it follows that the second ground has a quite narrow area of application.[43]

d) Detention of minors

Art. 5(1)(d) establishes a specific ground to detain minors for the purpose of educational supervision or bringing them before the competent legal authority. Minor has to be interpreted autonomous according to European standards.[44]

e) Detention of persons of unsound mind, alcoholics, drug addicts and vagrants

In Art. 5(1)(e) each mentioned group has its autonomous Convention meaning. All the mentioned persons can be detained to be given medical treatment or because of social considerations, nonetheless the main reason for deprivation of liberty according to the Court is danger for public safety and the person's own interest. Moreover a detention in this case has to be the last resort.[45]

f) Detention pending deportation or extradition

Art. 5(1)(f) permits to detain individuals who enter unauthorized a country or which are subject to deportation or extradition. For the Court this subparagraph just requires that the detention is carried out in good faith[46] and the length of detention stays in a reasonable time.[47]

3. Procedural safeguards

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[36] *Ciulla v Italy* A 148 (1989).
[37] *Gusinsky v Russia* 2004-IV.
[38] *Fox, Campbell and Hartley v UK* A 182 (1990).
[39] Harris, p. 146.
[40] *Brogan v UK* A 145-B (1988).
[41] Macdonald-*Trechsel* p.304, Harris, p. 147.
[42] *Lawless v Ireland* A 3 (1961).
[43] See Harris, p. 147; *Eriksen v Norway* 1997-III, 29 EHRR 328, which involved a violent applicant kept in detention for an extra four weeks when his sentence expired by the authorities, pending a decision by a court on whether or not detention should be extended.
[44] *X v Switzerland* No 8500/79, 18 DR 238 (1979).
[45] *Enhorn v Sweden* 2005-I; *Litwa v Poland* 2000-III.
[46] *Amuur v France* 1996-III.
[47] *Saadi v UK* hudoc (2008) GC.

Reasons for arrest have to be given promptly according to Art. 5(2) in a language known by the detainee. The information has to be easily understandable to enable the detainee to challenge the lawfulness of his detention.[48] Promptly is interpreted by the Court as within a few hours after the arrest.[49]

Art. 5(3) just applies to detention based on Art. 5(1)(c). It gives three different rights to a detainee.[50] First it obliges the state to bring a person arrested because of the suspicion of having committed a crime promptly before a judge. Secondly after this period, as to say in the period of a pending trial, it gives according to the Court a qualified right to release.[51] At last a detainee has to be tried in a reasonable time. Judicial control of detention has to be carried out without any need for an application by the detainee to ensure an effective control of the executive.[52] If the timeframe of "promptly" is complied with, the Court decides case by case.[53] For a detention based on Art. 5(1)(c) a reasonable suspicion is needed, but during continued detention a higher standard applies. Further reasons in public interest have to exist to authorize a detention of a person for whom still the presumption of innocence applies.[54] Thus the Court interprets Art. 5(3) as the right to release pending trial when circumstances no longer justify continued detention.[55] Moreover a right to bail is guaranteed by Art. 5(3) and there are just five grounds upon which a national court can refuse to grant it, if imposition of bail conditions cannot stop the risk of one of the identified grounds.[56] The identified grounds are: the danger of flight, interference with the course of justice, prevention of crime, preservation of public order and the safety of the person under investigation.[57]

Art. 5(4) gives the detainee the right to seek a decision by court concerning the lawfulness of his detention and a release if the detention is unlawful. This provision logically just applies to cases of deprivation of liberty which is not based on court order. But even detention by court order has, according to this provision, to be reviewed after a certain time at reasonable intervals thereafter by a court.[58] Judicial reviews of the lawfulness of the detention and appropriate guarantees have to be given.[59] Although not all of the fair trial rights of Art. 6(1) apply for Art. 5(4).[60]

4. Right to compensation for illegal detention

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[48] *Fox, Campbell and Hartley v UK* A 182 (1990).
[49] *Kerr v UK No 40451/98* hudoc (1999) DA.
[50] See Harris, p. 168.
[51] *McKay v UK* 2006-X.
[52] *De Jong, Baljet; and Van Den Brink v Netherlands* A 77 (1984).
[53] *Ireland v UK* A 25 (1978)
[54] *Ilijkov v Bulgaria* hudoc (2001).
[55] *McKay v UK* 2006-X.
[56] *Jablonski v Poland* hudoc (2000).
[57] See Harris, p. 177-179.
[58] See Harris, p. 182-183.
[59] *Assenov v Bulgaria* 1998-VIII.
[60] *Hutchison Reid v UK* 2003 IV; *Reinprecht v Austri* 2005-XII.

Art. 5(5) entitles everybody, who has been arrested or detained in contravention of Art. 5 to a right to compensation. This is the only provision in the whole Convention that gives a right to compensation at the national level for contempt of Convention right.[61] The breach of Art. 5 can be either determined by a domestic authority or by the Court.[62] The national authorities however have a wide margin of appreciation as to the amount of compensation but it has to be proportionate to the duration of detention.[63]

II. Particular issues of the application and interpretation of Art. 5

In the following particular issues of the application and interpretation of Art. 5 should be illustrated. Due to the extent of the rights guaranteed in Art. 5 not all problematic issues can be presented. The choice in this paper is based on actuality of some topics and on fundamental importance of other issues. So first the distinction between deprivation of liberty and the restriction on freedom will be described, secondly the interpretation of absence of consent in the deprivation is presented, followed by the issue of a positive obligation of the state, than the application of Art. 5(a) is scrutinized, thereafter the specific issue of application of Art. 5 in the light of terrorism is shown, at least the interpretation of Art. 5(e) and (f) is pictured.

1. The distinction between the deprivation of liberty and the restriction on freedom of movement

Art. 5 protects every person from the loss of liberty. Because the wording is so wide, the most important question arising is how to decide whether it is a deprivation of liberty or a restriction on freedom of movement, which is not protected under Art. 5 but under the optional protocol No. 4 Art. 2, which secures the right to leave a country and move freely within one[64]. The Court states that the difference between these two Art.s is not a structural but in degree[65], meaning that the intensity of protection is higher in Art. 5. One reason is, that not all Convention States have signed the optional protocol No. 4[66].

Two elements have to be fulfilled for the deprivation of liberty in comparison to a restriction of movement[67]. The objective element requires a "confinement in a particular restricted space for a not

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[61] See Harris, p.197.
[62] *NC v Italy* 2002-X.
[63] *Attard v Malta No 46750/99* hudoc (2000) DA.
[64] Jacobs/White p. 123.
[65] Grabenwarter, p. 188; *Guzzardi v Italy* A 39 (1980); 3 EHRR 333 para 93; *Engel v Netherlands* A 22 (1976); 1 EHRR 706 para 59 PC.
[66] Twelve Member States of the European Union are parties to this Protocol. Spain and the United Kingdom have simply signed it. Greece has not signed it. Rights codified: prohibition of imprisonment for debt, freedom of movement, prohibition of expulsion of nationals, prohibition of collective expulsion of aliens. http://www.europarl.europa.eu/comparl/libe/elsj/charter/un_legislation_en.htm#a; 12.08.2010
[67] *Storck v Germany* 2005-V; 43 EHRR 96 para 74.

negligible length of time"[68] and for the subjective element it is necessary, that the detainee, who has the capacity to consent did not consent[69]. But for the distinction between the deprivation of liberty and the restriction on freedom of movement only the objective element is decisive.

In *Guzzardi v Italy* the Court stated, that the affirmation of a loss of liberty depends on the degree and intensity not on the nature and substance of the detention. The criteria for the degree and intensity are the type, the duration, the effects and the manner of implementation of the measure in question[70].

The applicant in *Guzzardi*, who was a Mafia suspect, was ordered to stay on a small Island for sixteen months. He was not allowed to leave a 2.5 qm village, had to report to police twice a day, needed permission of the police for making telephone calls or seeing visitors. Any breach of these requirements was punishable with incarceration[71]. His family was allowed to live with him but could not, because the available accommodation was cramped.

So the duration was one of the decisive reasons, why the Court affirmed deprivation of liberty. But the other elements such as the effect of his staying on this Island so, that he could not live at his home with his family, did also play a big role in the decision that this was a case of Art. 5.

In *Raimondo v Italy*[72] a Special Police suspect had house arrest from 9 pm to 7 am and was not allowed to leave his home before telling the Police. The Court ruled that these restrictions only amounted to a violation of Protocol 4, Art. 2. A similar decision was made in *Trijonis v Lithuania*[73], where the applicant was from 7 pm to 7 am weekdays and the whole time on the weekend under house arrest for a period of sixteen month, which is exact the same length of time as in *Guzzardi*. So the single look on the duration of a restriction is not sufficient for the distinction between Art. 5 and 2 of the 4th optional protocol. It seems that as long as the applicant can carry on with his daily work and home balance no deprivation of liberty is reached[74].

A similar border is drawn in the military cases until the protection of Art. 5 is reached. The Dutch armed forces disciplinary penalties consist of different grades of arrest, from the confinement to the barracks, where the soldier can still fulfil his normal duties to locked detention[75]. The Court did not see a loss of liberty in the lower grades, only in the strict arrest, where the soldiers were locked up and unable to perform there normal work[76].This ruling is comparable to the later decisions

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[68] Ibid.
[69] Harris, O'Boyle & Warbrick, p. 123.
[70] *Guzzardi v Italy* A 39 (1980); 3 EHRR 333 para 92, 95.
[71] Jacobs/White, p. 124.
[72] 18 EHRR 237 para39.
[73] No 2333/02 hudoc (2005) DA (admissibility decision).
[74] Harris, O'Boyle & Warbrick, p. 124.
[75] *Engel and others v Netherland*, 1 EHRR 706, para59 PC.
[76] Harris, O'Boyle, Warbrick, p. 126.

regarding civilians[77] and the argument that no deprivation of liberty occurs as long as the normal life and work balance is not interrupted.

On the contrary in *Ashingdane v UK*[78] the applicant was in open ward because of his mentally illness. He was free to leave the hospital on the weekend and during the week in the daytime and here the Court said it amounted to a deprivation of liberty, a lawful one but still a deprivation. In *HL v UK* the Court emphasised that there is no need of being held under locked conditions for the application of Art. 5. A complete and effective control over his care and movement is sufficient[79]. The cases cited are dealing with detention of mentally ill people but that should not lead to another distinction whether there is a deprivation or not.

"Confinement in a particular restricted space for a not negligible length of time" was the official definition from the Court in *Storck*[80]. By restricted space the Court just seems to mean an institutional one[81]. As long as the arrest takes place at your own house no deprivation of liberty occurs. An exception has been made, where the house arrest was twenty-four hours a day[82].

So in general the Court does not apply Art. 5 in a restrictive manner. In *Amuur v France* refugees from Somalia whose passports were falsified, had to be shuttled from the police between their hotel and the Paris airport for twenty days[83]. Though the authorities said they were free to go back to Syria, the last country they came from, the Court ruled it is a violation of Art. 5 because the restrictions suffered were equivalent to a deprivation of liberty[84] and as asylum seekers they were in a vulnerable position[85]. The Court doesn't require a detaining itself, an equivalent to it is sufficient but as mentioned above only in asylum seekers cases.

The highest goal of Art. 5 is to prevent arbitrariness, but the Court itself breaks this resolution by ruling that a home arrest of 12 hours a day and the whole weekend doesn't amount to a deprivation, but being in an "open ward" does. The application of Art. 5 should be comprehensible. A normal work and life balance is not kept only because one is allowed to sleep in its own home but not allowed to leave it. It's an obvious restriction of the liberty, which needs justification, but the Court doesn't require any, because it doesn't amount to a deprivation of liberty in the first place.

The Court has to change its jurisdiction towards accepting house arrest as a deprivation of liberty. Otherwise the opposite of the protection of the liberty, one of the highest goals within the Convention and arbitrariness is reached.

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[77] See p...., *Trijonis v Lithuania*
[78] 7 EHRR 528.
[79] 40 EHRR 761, para 91.
[80] Where a 17 year old girl was detained in a private psychiatric clinic.
[81] Harris, O'Boyle & Warbrick, p. 125.
[82] *NC v Italy*, 2002-X para 33; *Niklova v Bulgaria* hudoc 2004, no 2, para 60
[83] 22 EHRR 533.
[84] Id, para 49.
[85] The emphasis was put on the fact, that they were under police surveillance and had nowhere else to go. In *Mahdid and Haddar v Austria No 74762/01* hudoc (2006), where the asylum process only took three days and they were not guarded by the local authorities no loss of liberty was assumed.

2. Absence of consent in the deprivation of liberty

Art. 5 has an additional subjective element as mentioned above which implies that a person can only be considered to have been deprived of his liberty if he has not validly consented to the confinement in question[86]. Evidently a person can only properly consent if he or she has the capacity to do so.[87] If a person has such capacity it is assumed that they gave consent to the way they were treated if they did not raise objections at the time.[88] In the case *Storck v Germany* it was unclear if the applicant had consented to her stay in a psychiatric clinic. She had attained the age of maturity, had not been placed under guardianship and she came to the clinic but under the instruction of her father. Because she was already 18, she was considered to have the capacity to consent or object to her admission in the hospital. The applicant tried to escape several times and brought back to the clinic by the police, wherefore the Court was unable to affirm that the applicant agreed to her continued stay in the clinic.[89] Referring to this the Court declared that the right to liberty is too important in a democratic society for a person to lose the benefit of the Convention protection for the single reason that he may have given himself up to be taken into detention.[90] The Court concludes that the applicant was deprived of her liberty within the meaning of Art. 5 (1) of the Convention.[91]

In contrast to this the Court decided in *Nielsen v Denmark* differently. A state hospital placed a twelve-year-old boy in a closed psychiatric ward at the request of his mother, who had sole parental rights, for treatment his neurotic condition.[92] The son, acting through his father, claimed that the resulting detention was a deprivation of his liberty against his will[93]. The Court decided that it is a parental right to decide where a child must reside and also impose, or authorise others to impose, various restrictions on the child's liberty[94]. Therefore Art. 5 is not affected, because it was a responsible exercise by the mother of her custodial rights in the interest of the child.[95] The Court decided similarly in *H.M. v Switzerland.* This case concerned an old pensioner, who suffered from serious neglect, the living conditions and the standards of hygienic and medical care at the applicant's home were unsatisfactory[96]. Therefore the national authorities placed her in a nursing home. The applicant submitted that she had been detained against her will. The Court determined that the applicant's placement in the nursing home did not amount to a deprivation of liberty within

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[86] *Storck vs Germany* 2005-V EHRR 96 para 74.
[87] Harris/O´Boyle/Warbrick, p. 126.
[88] Harris/O´Boyle/Warbrick, p. 127.
[89] *Storck vs Germany* 2005-V EHRR 96 para 76.
[90] *Storck vs Germany* 2005-V EHRR 96 para 75.
[91] *Storck vs Germany* 2005-V EHRR 96 para 78
[92] Harris/O´Boyle/Warbrick, p. 127.
[93] Harris/O´Boyle/Warbrick, p. 127.
[94] *Nielsen vs Denmark* 11 EHRR 175 para 61 PC.
[95] *Nielsen vs Denmark* 11 EHRR 175 para 73 PC.
[96] *H.M. vs Switzerland* 38 EHRR 17, para 44.

the meaning of Art. 5(1), because the placement was ordered in her own interest in order to provide her with the necessary medical care and satisfactory living conditions and standards of hygiene.
It is dangerous to deny the application of Art. 5 only based on the single fact that the detention serves the interest of the person. This can easily be abused by the state or the "scheming relatives".[97] Viewed in this light Art. 5 would no longer serve as a protection of persons. The Court has to make clear that the application of Art. 5 is not depending on the fact that the treatment might be in the interest of a detainee but on the fact that this person consents.

3. Private detention – possible obligation of the States

Art. 5 is not just a passive defence protection against authorities but also includes a protection via an active action from the State when a person is detained by privates.
On the one hand the Court ruled in *Storck v Germany* that the State is obliged to take measures providing effective protection[98]. The authorities have to supervise and control private institutions to review their lawfulness, not that they become actively involved in private detention. In *Storck*, the police brought back the girl, when she tried to escape without reviewing the legality of her detention[99].
In another case[100] the police contrary to the court order brought the applicants, who were brainwashed as members of a religious sect, to a hotel where they were detained against their will and supervised by their relatives and psychologists to become normal.
The Court stated that the national authorities although they knew what happened did not do anything against it and that the detention was only possible because of their support[101], thus Art. 5 was violated.
On the other hand the Court did not apply Art. 5 in the Nielsen case[102].
This was also a case of private detention because the mother decided as a private person over her son's liberty. With the ruling that this did not even amount to a deprivation no justification under Art. 5 (1)(a)-(f) had to be made. But in 2005 the Court emphasised the importance of the liberty in a democratic society and thus the State is not just allowed to detain anybody only when it is justified, but also obliged to take positive steps to prevent a violation of Art. 5 through privates[103].
It should not matter if the detention is carried out by privates, even if parents or national authorities deciding, there is a detention, as long as the requirements of the application of Art. 5 are met[104]. The State has to check if the detention is lawful, if the person has to go to psychiatric ward due to a

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[97] Harris/O'Boyle/Warbrick, p. 128.
[98] 43 EHRR 96, para 102.
[99] Ibid, para 96, 106; Harris, O'Boyle, Warbrick, p. 129.
[100] *Riera Blume v Spain*, 30 EHRR 632.
[101] Ibid, para 35.
[102] See also page ... *Nielsen v Denmark (1988)*, 11 EHRR 175.
[103] *Nielsen v Denmark*, 11 EHRR 175, para 102.
[104] See page (Nadine)..

medical estimate and not due to the parents wish. A breach of this requirement has to be checked by the Court even though the parents decide on the behalf of their children. A professional psychiatric or psychological opinion needs to be given at all times.

4. Lawful detention of a person after conviction by a competent court

a) Convictions established by a non-Convention Country

Art. 5(1)(a) permits the lawful detention of a person after conviction by a competent court. Conditions of detention are generally irrelevant.[105] The Court considers that the words "in accordance with a procedure prescribed by law" essentially refers to domestic law.[106] Therefore the national law becomes an essential element of the Convention. However, the domestic law must itself be in conformity with the Convention, including the general principles expressed or implied therein.[107] If the national courts disregard their national guarantees, they also violate the rules of the Convention, even if the national law exceeds the guarantees of the Convention.[108]

It is in the first place for the national authorities, notably the courts, to interpret and apply the domestic law, even in those fields where the Convention "incorporates" the rules of that law.[109] Therefore the Court considers that any measure depriving a person of his liberty should issue from and be executed by an appropriate authority and should not be arbitrary.[110] So the Court only controls abuse and arbitrariness.

If the conviction is established in a third country, but the enforcement takes place in the scope of the Convention, the Court does not review the procedural law of this third country. So the Court does not review if there were any procedural irregularities. In *Drozd and Janousek v France and Spain* the applicants were imprisoned in France after being convicted in Andorra, which was not a party to the Convention at that time, following a trail which appeared contrary to Art. 6.[111] The Court determined that the detention in a French prison would be justified by Art. 5(1)(a) unless the conviction in Andorra was the result of a flagrant denial of justice.[112] The Convention does not require the contracting parties to impose its standards on third countries or territories.[113] The convention country is not obliged to verify whether the proceedings which resulted in the conviction were compatible with all the requirements of the Convention.[114] This review would thwart the current trend towards strengthening international cooperation in the administration of

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[105] Harris/ O`Boyle/Warbrick, p. 138.
[106] *Winterwerp vs. Netherlands* A 33, para 45.
[107] *Winterwerp vs. Netherlands* A 33, para 45.
[108] *K.F. vs Germany* (1997) 26 EHRR 390, para 73
[109] *Winterwerp vs. Netherlands* A 33, para 46.
[110] *Winterwerp vs. Netherlands* A 33, para 45.
[111] Harris/ O`Boyle/Warbrick, p. 139.
[112] Harris/ O`Boyle/Warbrick, p. 140.
[113] *Drozd/Janousek vs France and Spain*, Series A, no. 240, § 110.
[114] *Drozd/Janousek vs France and Spain*, Series A, no. 240, § 110.

justice, a trend which is in principle in the interests of the persons concerned.[115] Nevertheless the contracting states are obliged to refuse their co-operation if it emerges that the conviction is the result of a flagrant denial of justice.[116]

This notion is unsatisfactory. Where is the threshold between a proceeding irregularity which is marginal and has not to be reviewed by the executing state, and a procedural error which constitutes a flagrant denial of justice? It is difficult to distinguish between the various errors.

Furthermore it is not acceptable that a detained person has no right to get a proper process, solely because he was convicted by a state that is not party to the Convention, but is imprisoned in a Convention state. As the judges Mcdonald, Bernhardt, Pekkanen and Wildhaber note, there has to be some effective control to make sure that the foreign court has respected those guarantees which must be considered fundamental under the European Convention. Such a control is of special importance when prison sentences deprive a person of his freedom for very long periods.[117]

b) The causal link between the conviction and the detention

As the Court does not review as stated above the conviction itself, the most decisive provision in Art. 5 (1)(a) is the causal connection between the conviction and the detention. The detention must result from, follow and depend on the conviction.[118] In *Van Droogenbroeck v Belgium*[119] the applicant was sentenced by a criminal court to two years of imprisonment and thereafter was placed at the disposal of the Government for ten years. The Court had to review, whether there was a causal connection between this conviction and two subsequent detentions based on the decision by the Minister of Justice. The Court ruled that the causal connection was satisfied, because the sentence containing the imprisonment and the order to be placed at Government's disposal were inseparable. In particular the executive could monitor the development of the applicant more closely and had based their decision on grounds that had connection with objectives of the sentencing court.[120] The connection was also accepted in the case *Weeks v UK*[121]. Mr Weeks was sentenced to life imprisonment aged 17 after an armed robbery. Ten years later he was released on licence by the Home Secretary but this was revoked after 15 months. The causal connection between the revocation and the sentence was seen in the reasoning in the sentence. The essence of the reasoning is, that the applicant should be subject to a continuing security measure in the interest of the public safety, so that the Home Secretary acted within its discretion and the sentence.[122] This link was

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[115] *Drozd/Janousek vs France and Spain*, Series A, no. 240, § 110.
[116] *Drozd/Janousek vs France and Spain*, Series A, no. 240, § 110.
[117] *Drozd/Janousek vs France and Spain*, Series A, no. 240, Joint dissentening opinion of judges Mcdonald, Bernhardt, Pekkanen and Wildhaber.
[118] *X v United Kingdom* A 46 (1982).
[119] *Van Droogenbroeck v Belgium* A 50 (1982), see Janis, p. 622.
[120] *Van Droogenbroeck v Belgium* A 50 (1982), p. 35.
[121] A 114 (1987), see Janis, p. 624-628.
[122] *Weeks v UK* A 114 (1987) p.26.

missing in *Stafford v UK*[123]. The applicant was convicted of murder and sentenced to a life sentence. After 12 years he was released on licence. Many years later he was convicted and imprisoned for fraud. The Home Secretary relying on his life sentence rejected his release after his time in jail for fraud on basis that he could commit further non-violent offences. Here the Court stated that a link between the life sentence and the detention because of the risk of other non-violent offences did not exist.[124] The causal link was broken because the life imprisonment sentence was based on violent crimes and the later decision on the risk of non-violent crimes. In the most recent case *M. v Germany*[125] the causal link was denied. The applicant was sentenced in 1986 to 5 years of imprisonment and thereafter ordered to a continued preventive detention based on his dangerousness to the public which by law had the maximum duration of ten years. In 1998 the law for preventive detention was changed and the limit of ten years cancelled. This new provision was declared applicable to prisoners whose preventive detention had been ordered prior to the change by law. Thus in 2001 the applicant's release was rejected because of the risk of committing further offences and he remained detained beyond the ten-year period. The Court stated that detention after the ten-year period was just made possible by the changed law and not the original sentence.[126] In this case it is not quite clear why the detention over ten years lacks the causal connection. As in the sentence itself there was no time-limit to the preventive detention, the detention itself based on the dangerousness of the applicant was still consistent with the objective of the initial decision. The problem here is more one of retrospective criminal law than of a causal connection.

5. The guarantees of Art. 5 and Terrorism, especially Art. 5(1)(c)

A special problem arises where the Court has to deal with cases where suspicion of terrorist activities is involved, especially for the interpretation of "reasonable suspicion" in Art. 5 (1)(c). The Court states that Art. 5 (1)(c) "should not be applied in such a manner as to put disproportionate difficulties in the way of the police authorities of the Contracting States in taking effective measures to counter organised terrorism."[127] In *Fox, Campbell and Hartley v UK*[128] a detention on remand of suspected terrorists on the fact that there was a conviction seven years ago of the applicants because of a terrorist act was said to be inconsistent with Art. 5. The Court stressed that terrorist crime falls into a special category, because urgent action is required. Nevertheless the information relied on cannot be revealed to the suspect, without putting in jeopardy the source of the information.[129] So the States cannot be asked to disclose confidential sources of supporting information. But still the

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[123] 2002-IV.
[124] *Stafford v UK*, 2002-IV, p. 81.
[125] *No 19359/04,* Jugment of 17. Dezember 2009 hudoc (2009).
[126] *M. v. Germany No 19359/04* hudoc (2009), p.100.
[127] Murray and Others v UK (1994) GH 300-A, p. 51.
[128] A 182 (1990); see Janis, p. 658-661.
[129] *Fox, Campbell and Hartley v UK* A 182 (1990), p. 32.

executive has to "furnish at least some facts or information capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offence"[130]. For this in *Fox* a reasonable suspicion could not be based on the conviction of the applicants seven years ago. But in *Murray and Others v UK*[131], where the applicant was arrested on suspicion of collecting funds for terrorist purposes, because her brothers were convicted in the USA of offences connected with the purchase of weapons for the Provisional IRA and her own visit to the USA and contact with her brothers there, this facts were enough for a reasonable suspicion. Here the applicant had in comparison to the first case not even herself been ever convicted of terrorist crimes and nevertheless a reasonable suspicion was accepted.

As for the duration of a detention under Art. 5(c) the Court ruled although "investigation of terrorist offences undoubtedly presents the authorities with special problems"[132] in *Brogan and Others v UK*[133] that a detention over 5 days without being brought before a judge is an infringement of Art. 5. This approach was affirmed in *Öcalan v Turkey*[134] where the applicant, leader of the PKK (Workers' Party of Kurdistan), was brought before the judge after an arrest of 8 days. This was said to be not "promptly". This ruling implies that states should rather think about derogation according to Art. 15[135] of the Convention for terrorist cases than to overstretch Art. 5(3).[136] Still in *Brogan* the vague provision "acts of terrorism" was said to comply with the meaning of an offence in Art. 5(1)(c).

Especially a dilution of Art. 5(2) can be seen in terrorist cases. In *Fox, Campbell and Hartley* the mere interrogation of the suspect was said to be sufficient as to comply with the duty to give the reasons for arrest. It is clear that the Court struggles to keep a reasonable balance in the need of urgent and delicate action in terrorist cases and the guarantees in Art. 5. Here the risk of using this minimized standard also for non-terrorist cases arises. Furthermore the Court itself has not always a clear line as was seen in *Murray*. Although the facts for a detention on remand were less than in *Fox* the reasonable suspicion was affirmed. Derogation according to Art. 15 is not always a good solution especially in the light of international terrorism. This kind of terrorism is not bound to one area so that rights could be derogate for an unforeseeable time for a whole state and would so erode the guarantees of the Convention. To give at least a judicable core for terrorist cases bearing in mind that the presumption of innocence applies also here, there should be an additional provision written, which draws the balance between effective fight with terrorism and the liberty rights. This standard (even if lower) should be applied strictly to guard the concept of liberty.

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[130] *Fox, Campbell and Hartley v UK* A 182 (1990, p. 51.
[131] (1994) GH 300-A.
[132] *Brogan and Others v UK* A 145-B (1988), p.33.
[133] A 145-B (1988).
[134] *No 46221/99* hudoc (2000) DA.
[135] This Article enables the Contracting State to derogate from liberty rights in time of war and public emergency.
[136] See Klugmann, p. 121; Harris, p. 199.

6. Detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants Art. 5(1)(e)

Art. 5(1) (e) permits the enforced detention of persons because of personal attributes. The reason why the Convention allows individuals to be deprived of their liberty is not only that they have to be considered as occasionally dangerous for public safety but also that their own interests may necessitate their detention.[137]

Art. 5(1)(e) does not need an adjudication or other several procedural steps, it refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of domestic law. Therefore only the national courts are exclusively competent to review the lawfulness of the deprivation of liberty.

a) Detention of persons for the prevention of the spreading of infectious diseases

Concerning the placement of persons for the prevention of the spreading of infectious diseases, there is yet no much case law.[138] Not only sufferers from diseases can be detained, but also people who are suspected being infected, because they had contact with an infected person.[139] For reasons of proportionality, a deprivation of liberty should only be considered for dangerous and easily transmissible diseases.[140] The detention of an HIV-infected person is a violation of Art. 5(1)(e) because this is not the last option in order to prevent the person from spreading the HIV virus.[141] The Court considers that if the deprivation of liberty leads to an extension over several years, the authorities failed to strike a fair balance between the need to ensure that the HIV virus did not spread and the applicant's right to liberty.

b) Persons of unsound mind

The Convention does not state what is meant by "persons of unsound mind". This term is not one that can be given a definitive interpretation: it is a term whose meaning is continually evolving as research in psychiatry progresses and society's attitude to mental illness changes, in particular so that a greater understanding of the problems of mental patients is becoming more wide-spread.[142] The Court considers that sub-paragraph (e) of Art. 5 obviously is not permitting the detention of a person simply because his views or behaviour deviate from the norms prevailing in a particular society.[143]

c) Alcoholics or drug addicts

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[137] *Guzzardi v Italy*, 3 EHRR 333, para 98.
[138] Dörr, in: Grote/Marauhn, EMRK/GG, 2006, Kap. 13 Rn.192.
[139] Dörr, in: Grote/Marauhn, EMRK/GG, 2006, Kap. 13 Rn.192.
[140] Dörr, in: Grote/Marauhn, EMRK/GG, 2006, Kap. 13 Rn.192.
[141] *Enhorn vs Sweden*, Series A, no 201, para 55.
[142] *Winterwerp vs Netherland*, Series A no. 46, § 37.
[143] *Winterwerp vs Netherland*, Series A no. 46, § 37.

The term "alcoholics" was formerly interpreted in the limited sense of persons in a clinical state of "alcoholism". Since *Witold Litwa vs Poland* the Court considers that alcoholics are persons who are not medically diagnosed as "alcoholics", but whose conduct and behaviour under the influence of alcohol pose a threat to public order or themselves.[144] Therefore a person can be taken into custody for the protection of the public or his own interests, such as his health or personal safety, only because he drank too much of alcohol.[145] On this point, the Court observes that there can be no doubt that the harmful use of alcohol poses a danger to society and that a person who is in a state of intoxication may pose a danger to himself and others, regardless of whether or not he is addicted to alcohol.[146]

This notion is absolutely unacceptable. The classification of the persons who can be lawfully detained share one common factor: they refer to continuing or habitual states of socially dangerous conditions or attitudes.[147] For example drug addiction relates to a continuing situation, the same like being unsound of mind means a condition of extended impairment of mental processes.[148] Contrary to the ruling concerning alcoholics, now there is the danger that the Convention allows persons who are in a temporary state of intoxication to be deprived when they have not committed any criminally relevant act.[149]

7. The justification of detention under Art.. 5 f

Under Art. 5 f it is possible to arrest or detent 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.

The Court interpreted "unauthorised entry" in a very wide way. Even a person who was granted a temporary admission to enter the country would fall under the wording and thus gives the State the right to detent or arrest the person[150]. The Court developed the so called "Good faith test" to prevent arbitrariness, where four requirements have to be fulfilled. The detention has to be carried out in good faith. A close connection between the detention and the purpose is required. The place and the condition of the detention has to be appropriate. The length of the detention should not exceed what is reasonably required[151].

It has to be kept in mind that the detention is not against criminals but aliens who fled their country. So there are two interests which have to be weighed up against each other. On the one hand the

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[144] *Witold Litwa vs Poland*, 2000-III,289, § 61.
[145] *Witold Litwa vs Poland*, 2000-III,289, § 61.
[146] *Witold Litwa vs Poland*, 2000-III,289, § 62.
[147] Concurring opinion of judge Bonello in: *Witold Litwa vs Poland*, 2000-III,289.
[148] Concurring opinion of judge Bonello in: *Witold Litwa vs Poland*, 2000-III,289.
[149] Concurring opinion of judge Bonello in: *Witold Litwa vs Poland*, 2000-III,289.
[150] *Saadi v UK*, 44 EHRR 1005, where the applicant, an asylum seeker who returned three days every day to the airport and was than brought to a fast-track center for seven days. The Court hold that there was no violation of Art. 5.
[151] Ibid.

interest of the State where the asylum seekers arrive, who wants to have effective immigration control and on the other hand the vulnerable situation of the foreign people who are looking for protection[152].

The requirement of good faith is a too abstract and elastic term. It prioritizes the State's interest of effective immigration control. But as soon as you have a temporary admission a country should not have the right to detent or arrest the person. With the limited granted permission for the time of application the detainee has already shown that he does not intend to enter or move illegally in or through the country and has the right of the protection of the Convention.

The wording in Art. 5 (1)(f) is clear "unauthorised entry" and should not be interpreted as entry after being carefully and completely scrutinized by the authorities. When the asylum seeker gets a temporary permission his entry is limited but authorised. The jurisdiction has to go back to the exact wording and goal of Art. 5 to protect the most important basic need in a democratic society - the liberty of any human being and in the special situation of immigrants most certainly than, when temporary permission is already granted.

The second limb of Art. 5 (1) (f) is dealing with detention due to deportation or extradition. The Court distinguishes between an action in good faith, where the national authorities later find out, that they have acted illegally and the case, where there was evidence of abuse of power from the very beginning. In *Bozana v France*, where an Italian national convicted of murder was brought to Switzerland and than Italy by the French authorities without telling him the order or giving him the possibility to reach his lawyer or nominate a country for his deportation, the Court ruled that it was an arbitrary executive action[153], which led to an unlawful detention.

The Court demands a lawful basis for the detention[154], but no formal request or order for the extradition or deportation is needed, enquiries that have been made are sufficient[155] and no additional prerequisites have to be fulfilled such as fleeing or committing further offence[156]. The sole intention to deport or extradite is enough to satisfy the requirements of Art. 5 (1)(f)[157]. The detention is still justified under this Art. even though no actual extradition is occurring.

On the one hand the Court stated that the interpretation of the exceptions (a)–(f) of Art. 5 has to be restrictive, meaning that the national authorities are not allowed to abuse their power even if dealing with illegal immigrants[158]. So if the executive disguise the real reason (detention for deportation)

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[152] Harris, O'Boyle, Warbrick, p. 160.
[153] 9 EHRR 297; Harris, O'Boyle, Warbrick p. 161.
[154] *Chahal v UK* 23 EHRR 413, para 112; *Slivenko v Latvia* 39 EHRR 490, para 146.
[155] *X v Switzerland* No 9012/80.
[156] *Conka v Belgium* 344 EHRR 1298, para 38.
[157] *X v FRG* 5 EHRR 512.
[158] *Conka v Belgium* 344 EHRR 1298, para 41. In this case the national authority was deliberately lying to the applicants, who were illegal immigrants and trusted the police, that they had to come to the police station, where they were arrested and deported.

why the illegal immigrants have to contact the police, just to make it easier for the police to catch them, Art. 5 is violated, although the reasons for the deporting action was given.

But on the other hand the lawfulness of the deportation or extradition itself is not an issue scrutinised under Art. 5(1)(f). The lawfulness is checked under Art. 1 of the 7th optional protocol[159], which is not ratified by all Convention States[160].

Only one exception has been made so far, regarding the Russian extradition regulations, where the Court ruled that these conditions are contradictory and thus amounted to a violation of Art. 5 (1)(f), because there was no protection against the arbitrary decisions of the State, which were not predictable[161]. In *Ryabikin v Rus* the authorities were not able to set the duration for the detention, to name the competent authority and the appropriate municipal law[162].

The encroachment on liberty and the vulnerable situation of the asylum seekers is too important to be in an optional protocol which not all Convention States of the Convention have ratified.

In the future the judicial power of the Court is the only possibility to change this unsatisfying situation. Until now the Court is not allowed to check the lawfulness of the deportation or extradition, only the detention itself. But if they see that the deportation is obviously unlawful than the detention should not be justified by the Court. Critical voices could argue that in Art. 5(1)(a) the conviction itself is also not scrutinized. Eventually this is not true, as the Court checks the lawfulness of the trial leading to the conviction under Art. 6 whereas the deportation or extradition is only protected under an optional protocol but not in the Convention itself.

When the Court is applying Art. 5(1)(f) they especially scrutinize the duration of the detention, which shall not be unnecessarily prolonged. They use a due diligence test, where they look on the conduct of the applicant as well as on that of the authority and the circumstances of the case, because there exist no absolute time limit[163]. However in *Chahal v UK*[164] the applicant had been detained for over 5 years. The national authorities justified this long period with the concern that he was a threat to national security because of a link to terrorist organisation. According to the UK it was also in his interest considering that he run risk of torture and execution in India. The Court ruled that, although the domestic court had no effective control over the detainee because they did

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[159] Eight Member States of the European Union are parties to this Protocol. Germany, Spain, Ireland, the Netherlands and Portugal have simply signed it. Belgium and the United Kingdom have not signed it.
Rights codified: procedural safeguards relating to the expulsion of aliens.;
http://www.europarl.europa.eu/comparl/libe/elsj/charter/un_legislation_en.htm#a; 12.08.2010

[160] Grabenwarter, p. 176.

[161] ECHR, 11.10.2007 *Nasrulloyev v RUS*, No 656/06, para 76; ECHR, 24.04.2008, *Ismoilov v RUS*, No 2947/06, para 140; ECHR, 12.06.2008, *Shchebet v RUS*, No 16074/07, para 69.

[162] ECHR, 19.06.2008, Nr. 8320/04, para 129.

[163] *Quinn v France*, 21 EHRR 529, para 48; *Kolompar v Belgium*, 16 EHRR 197 para 36, Harris, O'Boyle, Warbrick, p. 162.

[164] 23 EHRR 413.

not get the full material from the executive, arbitrariness was avoided due to the special advisory panel consisting of experienced judicial figures[165].

It has to be kept in mind that the applicant was detained for 5 years justified on the sole reason of extradition and deportation. The presence of jurists does not give a guarantee, that the weighting of the interests had been correct. Even though there is no absolute time limit, the relative one is expired, considering the length of 5 years. However, the Court affirmed a violation of Art. 5(4), but this shows how inferior the review under Art. 5(1)(f) is[166].

The simple existence of a judicial panel, which examines the case, but does not give any official statement on how long the detention for the purpose of extradition will be, cannot satisfy the requirements of Art. 5(1)(f).

III. Conclusion

The analysis has shown, that the interpretation and application of Art. 5 by the Court are on the most decisive parts contradictory[167]. The definitions, which are meant as an orientation for the Convention States are often too wide[168]. The interpretation of the Court enables the abuse of power by relatives[169]. Only few requirements have to be fulfilled to justify detention under Art. 5 (1) f[170]. The Court is sometimes negligent using Art.5 without really scrutinizing, if the Article really applies to the situation[171].

The first idea, which could solve the shown problems, is to change the Courts partly contradictory jurisdiction. New optional protocols could bring clarity regarding the application and wording of Art. 5, but as already shown, not all Convention States will sign or ratify it.

A better idea is the establishment of an independent judicial panel, which is allowed to check randomly the Convention States if they fulfil the requirements written down in the Convention.

A High Commissioner for Human Rights within the Council of Europe[172] already exists, next to the Court, but he has no judicial knowledge to scrutinize if a breach of human rights occurred. Another proposal is to organise an Ombudsman in every Convention State, where the people have the possibility to directly refer to him.

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[165] Ibid, para 122.
[166] Harris, O'Boyle, Warbrick, p. 163.
[167] See the discussion on page 7, *Guzzardi v Italy* and *Raimondo v Italy*; p. 13-14, *Murray and Others v . UK* and *Fox, Campbell and Hartley v UK.*
[168] See page 18 good faith test in Saadi v UK; *Witold Litwa vs Poland*, 2000-III,289, § 61.
[169] See page 9,11 *Nielsen v Denmark* and *H.M. vs Switzerland* 38 EHRR 17
[170] See page 17-18.
[171] See page 13, *M. v Germany*.
[172] Mr Thomas Hammarberg was elected Commissioner for Human Rights on 5 October 2005 by the Council of Europe's Parliamentary Assembly. http://www.coe.int/t/commissioner/About/biohammarberg_en.asp, 07.09.2010

The Convention States don't have to ratify these new measures, because they already signed and ratified the Convention, which they have to follow anyway. These innovations are no additional rights or obligations, but simply a supervision of a Convention they are bound to respect.

They have to respect one of the highest and fundamental rights among the human rights: the liberty of any human being, because otherwise "something precious is threatened as our freedom becomes a prey to fears"[173].

[173] The Herald (Glasgow) Features, pg 12, 2005.

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