HUMAN RIGHTS TRAINING BY THE PUBLIC DEFENDERS OFFICE OF GEORGIA

Prepared by Professor
Jim Murdoch

July 2016

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Human Rights Training by the Public Defenders Office of Georgia

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

The present curriculum is prepared within the framework of the Project "Improving the operational capacities of the Public Defenders' Office of Georgia" funded by the Human Rights Trust Fund (HRTF) of the Council of Europe. The views expressed herein can in no way be taken to reflect the official opinion of the Council of Europe. No part of the report may be copied or used in any way without express written permission of the Council of Europe.

English edition

Published by the Council of Europe
F-67075 Strasbourg Cedex
www.coe.int

Printed by Vesta Advertising

TABLE OF CONTENTS

1. Introduction 5
2. A strategy and methodology for human rights training: general comments 6
3. Suggested curricula 10
3.1 'Training of trainers': a course on basic training methodology for public officials with training responsibilities 10
3.2 Social rights as 'human rights': an awareness-raising course for public officials 17
3.3 An introduction to the European Convention on Human Rights: an awareness-raising course for public officials 25
3.4 Training for journalists: an introduction to freedom of expression and media....29
3.5 Combating intolerance through promoting equality: an introductory course for public sector officials 33
3.6 Addressing the risk of ill-treatment by public officials: a course for public officials involved in delivery of criminal justice 40
3.7 Combating impunity: additional / alternative material for public officials involved in the monitoring of places of detention 44
3.8 Human rights and the use of military force: training for military personnel and for public officials with responsibilities in a conflict situation 47
3.9 Women's rights in a domestic context: an introductory course for public officials involved in criminal justice system delivery 51

1. INTRODUCTION

1.1 This curricula is prepared in the score of the Project "On Improving the Operational Capacities of the Public Defender's Office in Georgia" funded by the CoE Human Rights Trust Fund. This curricula follows upon a needs assessment report of 2015.

1.2 The need to 'mainstream' human rights training is now widely recognised as a vital aspect of delivering a human rights approach to the delivery of public services. This training delivery is in line with international expectations. The establishment of national human rights institutions – whether in the form of commissions, committees, ombudsmen, institutes or the like – is supported by the United Nations as helping to ensure the effective implementation of international obligations entered into by nation states[1]. To this end, the adoption of the 'Paris Principles' by the United Nations in 1993 envisages such institutions as having a role to promote and to protect human rights.

1.3 The aim of this document is to suggest a range of basic human rights curricula on selected topics of crucial importance in human rights training for staff of a national human rights institution or similar. It is not 'advanced' training, but 'basic' insofar as it will provide a solid understanding of key issues. Other specific training in skills may also exist for such public officials (such basic training techniques; interviewing skills and monitoring the treatment of detainees in places of detention Investigating discrimination; mediation techniques; and advocacy skills in written and oral presentations, etc). This document does not, however, address these specialised forms of skills training. Rather this document focuses upon possible curricula on the fundamentals of human rights, equality and anti-discrimination.

1. 'Principles Relating to the Status of National Institutions for the Promotion and Protection of Human Rights' UN General Assembly Resolution 48/134, 20 December 1993, UN Doc A/ RES/48/134. See also Committee of Ministers Rec R (97) 14 on the establishment of independent national human rights institutions

NOTES

2. A STRATEGY AND METHODOLOGY FOR HUMAN RIGHTS TRAINING: GENERAL COMMENTS

2.1 ***Introduction***
The need for a clear methodology goes hand in hand with the benefit in having a consistent approach towards training *design*. Standardisation in course design be considered as a necessity. A common approach to planning also provides some form of quality assurance and enhancement scheme for internal monitoring of course proposals. Training should not appear *ad hoc* or inconsistent in approach. Internal consistency will help 'brand' human rights training. This is of particular importance where training is being delivered to outside organisations where it is necessary to make sure that the needs of the outside organisation are clearly understood.

2.2 ***Key action1:*** A method for internal scrutiny of proposed courses for training
Some 'internal approval process' is needed to help those planning the course clarify key questions. These questions not only concern methodology, but more broadly, the use of resources and the identification of responsibility and accountability. Training is 'costly', even if only in relation to the use of time by trainers, and the opportunity cost to an organisation while training is taking place. On the other hand, training should result in enhanced performance. To maximise the benefits, there is a need for quality assurance and pre-approval of training proposals.

2.3 There are many models of 'internal pre-approval' available. The idea is straightforward: that those entrusted with training should follow a pre-determined checklist of concerns. The University of Oxford's Centre for Continuing Education uses an approach that is not dissimilar to the following:

1. Purpose

- Why is the training thought necessary?
- How has this need been identified? And by whom?
- What is the intended audience?
- What is the aim (or aims)?

NOTES

2. Outline of the course

- How many learning hours?
  (ie, hours required to be dedicated to the course, including contact hours)
- How many contact hours (ie, actual hours spent on the training event)
- What pre-course activities are involved? (eg, preparatory reading)
- What will the actual contact hours involve?

3. Intended learning outcomes

- Is there a clear set of ILOs? (ie 'by the end of this course, each learner will be able to…')
- Have these been discussed with a representative group of targeted learners?
- Have these been discussed with the organisational leadership?

4. Course content

- What will each element of the course entail?
- Is there an attempt to ensure that the choice of methods reflect the different ILOs?

5. Assessment

- How will each ILO be assessed to ensure the learner has achieved the intended outcome?
- How will any shortcomings in performance be addressed?
  (ie, will extra time be available to try to help ensure the learner has met each ILO?

6. Management

- Who will be responsible for making sure the course is delivered?
- Will the trainers have any input into the design of the course?
- Is there a budget?

7. Administration

- What logistical tasks are necessary (room booking, catering, payment of expenses, etc)
- Who will be responsible for each of these?

8. Quality assurance and enhancement

- How will the views of the learners on the quality of the teaching be ascertained?
- How will the views of the trainers be gathered?
- How will improvements identified be implemented for future training?

A checklist approach assists clarity of thought and helps direct trainers' attention to key questions. It also allows other trainers (lecturers, small-group tutors, etc) to understand the purpose and training design (or methodology).

The suggested curricula that follow suggest aims, ILOs, course content and assessment strategies. However, these are indicative only, and should be modified in accordance with a rigorous planning process.

2.4 ***Key action 2*** : application of a methodology for planning and delivering training hand in hand with proper internal processes for scrutiny of training proposals, rigorous adherence to a standard methodology for training course design is needed. Trainers cannot simply follow a pre-determined syllabus: they must have ownership of the course, and that ownership comes from a clear understanding of training methodology and adaptation of any suggested course outline.

2.5 ***The Council of Europe's HELP programme*** The suggested methodology in the HELP handbook has five distinct stages or steps:

1. Work out what you as a trainer want to achieve and write these first as 'aims' and then as 'intended learning outcomes'
2. Communicate these aims and intended learning objectives to the rest of the trainers and to the learners
3. Design means to ensure you can measure the level of success for each of the intended learning outcomes
4. Choose the most appropriate method for delivery, ie select the training design that is most likely to achieve each intended learning outcome
5. Evaluate the extent to which each intended learning outcome has been achieved by each learner

The design of the course should follow these steps in a logical format. All of this should be reflected in the 'internal approval' planning document (discussed above). This is the approach adopted in the indicative curricula that follow.

Some further, albeit brief, discussion of this approach is needed.

2.6 ***Aims*** The establishment of general training aims or goals is a vital first step in training design. However, this first stage in design is not without difficulty. Trainers and trainees may have different wants; these wants may or may not coincide with the needs of the organisation. In the past, while increasing attention was given to attempts to establish the training needs of trainees, it was not always clear how organisations ensured their own needs were being met. As organisations started to focus on ensuring that organisational needs were more closely aligned with identified individuals' training needs, there has been greater understanding of the need to ensure that there is a 'fit' between the needs of organisations and of individual trainees. In the material surveyed for this report, trainers were assumed to be likely to have an idea of the target group or groups that are to be the beneficiaries of training. However, the fact that training may be delivered for other organisations' needs poses additional questions.

NOTES

2.7 ***Intended learning outcomes*** ILOs are likely to be expressed as involving knowledge and understanding (of basic principles in learning methodology, course design, assessment techniques, and training methods), and skills development (in terms of effective communication skills, planning, working with groups). Additionally, there may be an ILO referring to attitudinal commitment to quality delivery.

2.8 ***Assessment*** There should be some method of assisting learners measure whether they have met each ILO for the course. This is not the same as a 'test': rather, it is recognition that training design should incorporate tools that allow learners (and trainers) realise whether they are making progress, and whether sufficient progress has been made. This may take the form of, for example, group discussions on case studies.

2.9 ***Choice of training methodology*** Choice of delivery is often 'expert-led'. This may neither recognise the needs of learners, nor the resource cost in delivering sustained and repeated training. There is a need to ensure that choice of method helps learners attain each specific ILO. This requires understanding of the wide range of training 'tools' available, including on-line materials.

A move away from 'contact hours' to 'learning hours' (ie, including preparation time) will also allow trainers an awareness of how best to maximise the chance of a learner preparing in advance. It also allow the trainer to signal to the intended audience what the training is about.

2.10 ***Evaluation of the training*** The final step is evaluation of delivery. This is a common weakness in the materials considered. A training team also needs feedback. It should be invited to give their responses to issues such as:

- Learners' interest in the topics selected for consideration
- The perceived relevance of the topics for trainees' professional work
- The organisational aspects of the training (venue, timing, etc)
- The value and quality of the prepared materials circulated
- The quality of the contributions by experts or trainers (in respect of plenary sessions) and of small-group work (including the role of the tutor or facilitator)
- The range and variety and suitability of training methods adopted (including plenary presentation or debate, small-group work, moot court exercise, etc)

All of this is with a view to identifying the extent to which the *current* intended learning outcomes have been met by reviewing these briefly at the end of the training. If certain intended outcomes have not been realised, the implication is that there is already an identified *future* training need. Further, this helps to improve delivery in future by seeking to elicit ideas or suggestions for future training – in this way, trainers may gain some insight into what the audience considers may be relevant in further training (thus stressing again the importance of projecting the message that training is tailor-made for specific audiences).

2.11 ***Conclusion***
In short, a clear grasp of current thinking in adult learning and training. The HELP programme provides this. A proposed 'training the trainers' course follows in section 3. The structure follows (most of) the proposed design questions outlined above, but it is important to stress that modification will likely be necessary once the team responsible for delivery begin their planning.

3. SUGGESTED CURRICULA

This section contains a number of suggested curricula, etc for a range of human rights courses. These are in 3 categories:

a. Training methodology

b. Basic human rights awareness for public officials

c. Training for specific target audiences

a. training methodology

3.1 'TRAINING THE TRAINERS': A COURSE ON BASIC TRAINING METHODOLOGY FOR PUBLIC OFFICIALS WITH TRAINING RESPONSIBILITIES

1. Purpose

Trainers must be aware of the need to 'scan' for training needs. A national human rights institution has a number of diverse sources available to it. It is responsible for receiving complaints from citizens, it carries out visits, it has access to reports from internal and external sources (the latter including the reports of many Council of Europe institutions 'Scanning' involves a proactive attempt to identify shortcomings in existing public sector delivery, and to provide training to meet these shortcomings.

A national human rights institution has the capability of delivering training that can make a real impact. Yet this brings with it a real issue of prioritisation. Its resources are not unlimited, and it must make strategic choices as to the areas in which it wishes to operate. The choice of beneficiaries, and choice of training to be delivered, must be based upon clear principles. That training must also be based upon a clear and logical methodology, and involve careful planning.

Where training is being offered to others, there is always an inherent risk in an outside organisation providing training for another, particularly since training may have to address the values and attitudes prevalent in that organisation.

Finally, training is more than mere transmission of knowledge. Knowledge and skills are inadequate without steps to help trainees understand that they have a responsibility to uphold and to apply human rights guarantees as public officials. Attitudinal change may also need to be addressed in training.

NOTES

2. Aims, and intended learning outcomes

The aim of this course is to assist those charged with the delivery of training to plan, deliver, and evaluate training in a manner consistent with the Council of Europe's HELP Programme.

The intended learning outcomes can be stated thus:

By the end of this course, each participant will be able to:

- Understand the need for, and discuss means of, 'scanning' for training needs at organisational and individual learner levels, and prioritise such needs
- Write 'aims' and clear 'intended learning outcomes' for a variety of training needs
- Design a range of methods for measuring the level of achievement of a range of intended learning outcomes
- Choose the most appropriate method for delivery, ie select the training design that is most likely to achieve each intended learning outcome
- Evaluate methods for evaluating the success of training

3. Intended audience, and learning hours

The intended audience is staff involved in designing and delivering human rights training. It is proposed that the course extends to 2.5 days, with a further 5 hours of work by each learner and subsequent feedback.

4. Course outline

Day 1

Session 1: Rethinking training; and identifying training needs Talk (25 mins); and small-group discussion (45 mins, plus plenary feedback of 15 mins).

Session 2: Writing aims and intended learning outcomes Talk: 25 mins; and 45 mins small group work)

Session 3: Measuring attainment Talk : 25 minutes

Session 4 : Choosing training methodology (1): giving a formal presentation 2 hours, either in plenary or in

small group, depending upon size of audience

Day 2

[Session 4 – continued] Talk: say 25 minutes

Session 5 – Using audio-visual resources in formal presentations Talk with a-v examples (and with participation by the audience): say 45 minutes

Session 6 – Choosing training methodology (2): using small groups for discussion Small-group work: 75 mins; with plenary feedback of 15 mins

Session 7 – Choosing training methodology (3): case studies and moot problems Small-group work: 3 hours

Day 3

Session 8 – Aligning ILOs, assessment and choice of methodology Talk: 45 minutes

Session 9 – Evaluation of training Talk: 20 minutes; and small-group discussion for 45 mins.

Session 10 – Conclusion Talk : 20 minutes

FACILITATORS' NOTES: SESSION 1 - Rethinking training and needs assessment

Reference should be made to the relevant section in the HELP handbook.

This session introduces learners to the need to think afresh about training. It should begin with some self-evident statements: that training often is lecturing; that training should be relevant; and that training should be based upon a methodology that is logical. The key point, however, is the need to ensure that training is relevant: both on account of organisational needs, and also on account of resource costs in delivering training.

At this stage, it is also appropriate to encourage learners to think about not only *knowledge* but also *skills* and addressing or changing *attitudes and values.* Domestic protection can fall down not because of lack of awareness of, or an inability to apply, human rights standards, but because of an unwillingness to become involved as an active protector of human rights. Here, the point should be made that training needs to be reinforced by leadership from the top – ie, through clear and unambiguous messages from those charged with leadership and managerial authority of the public service in question. This will be something that learners should be aware of in respect of training provided to external organisations.

The final part of the talk concerns the 'scanning' of training needs. There are two primary means of identifying training needs: the first places the onus upon those charged with the delivery of training to identify

NOTES

the training needs of learners. The second is more challenging but potentially more valuable: it involves consideration of the training needs of *both* the intended audience and *also* of the organisation. 'Scanning' the environment in which the particular organisation finds itself will throw up a host of potential training needs. Learners' needs (or strictly, the pool of those who potentially could be learners) may be more difficult to assess in light of the fact that this cohort will likely comprise a wide range of individuals working at different levels, with varying amounts of existing skills and knowledge. However, trainers are likely to have an idea of the target group or groups that are to be the beneficiaries of training.

In small group discussion, learners can begin to explore these issues. (Learners could be asked at the outset to share their views on previous training that they have experienced, either as learners or as trainers.)

The most obvious manner in which training needs can be identified is for trainers to take the leading role in assessing organisational and (likely) trainee needs. Learners should be asked to suggest means for discharging the two means for identifying needs:

1. Identify issues that are confronting the organisation's ability to discharge its functions more effectively (in the present context, to apply human rights standards consistently)

- Have there been administrative changes necessitating training – eg a reorganisation of existing monitoring responsibilities for prisons?
- Is there a recent or pending legislative change that will require training?
- Has there been an adverse judgment from a superior domestic court or the Strasbourg Court indicating a shortfall in understanding of human rights jurisprudence?
- Does the organisation have a systemic problem in its procedures – eg, a problem in rendering judgments in a 'reasonable time'?

In this process, it is necessary to identify the key stakeholders to be consulted. Learners should be encouraged to discuss means for doing so.

2. Identify likely prospective learners and their likely profiles (and the implications for training design):

- What sort of professional or organisational backgrounds will they come from?
- What qualifications are they likely to have?
- What sort of experience or length of service will they have?
- What prior knowledge/skills would they need in order to participate in and benefit from the training?

FACILITATORS' NOTES: SESSION 2 - Aims and writing ILOs

The introductory talk should clarify the difference between aims and ILOs, and the key importance that determination of ILOs plays in subsequent course design. This aspect of course design is clearly set out in the HELP manual.

Small-group discussions should focus (a) on examples of 'good' and 'bad' ILOs (both from the perspective of clarity and attainment in the time available – ie the extent to which these are 'SMART'). Learners should discuss prepared but real examples from a range of sources.

Learners should then be asked to write their own ILOs for a (fictitious) example of a short course, and then the group should critically assess the various drafts.

FACILITATORS' NOTES: SESSION 3 - Measuring attainment

The aim here is simple: to allow learners to understand how the design of the training must allow learners and trainers to measure whether attainment has been met (for example, through small-group discussion, moot court exercises, etc). This is well-covered in the HELP manual.

FACILITATORS' NOTES: SESSION 4 - Training methodology (1): giving a formal presentation

This session can take place either in plenary or in small groups (depending upon numbers of participants). Learners should *in advance of the course* be asked to prepare a 5-6 minute talk on any issue of their choice, making use of any training aids that they would wish to use. Learners should be advised that this is not a 'test', but designed solely to give them helpful feedback on formal presentations.

Each participant should speak for no more than 6 minutes; at this point, the tutor should indicate that time is up. The audience should then be asked to give feedback: both what was good, and what could have been improved. This task has 2 purposes – to help learner confidence in giving a formal talk; and to help learners give feedback to colleagues (and to receive helpful feedback).

This session is likely to conclude at the end of day 1.

It continues as the first session on day 2, with a 25-minute talk on 'making a formal presentation'. (Again, this is well-covered in the HELP manual.) The key points to be made are:

- Audience expectations and attention-span
- Key tips in planning a presentation

NOTES

FACILITATORS' NOTES: SESSION 5 - Training methodology (2): audio visual resources

This is a talk (and open discussion) on using audio visual resources during a formal presentation. The HELP manual has significant resources on the following:

- Using 'powerpoint' (and how not to use powerpoint)
- On-line video material resources (eg Youtube)

FACILITATORS' NOTES: SESSION 6 - Using small groups for discussion

This session is designed to allow participants to discuss the challenges and advantages of small-group work. The HELP manual identifies a range of pitfalls, and learners should be encouraged to reflect on these issues by bringing in their own experiences. This should be a relatively straightforward task, but the key outcome is that learners recognise a range of strategies (as outlined in the HELP manual) to deal with these challenges.

FACILITATORS' NOTES: SESSION 7 - Writing case studies; using case studies in group discussion; and giving plenary feedback

Plenty of material available in the HELP manual on this. This session is an extended small-group session. Learners will be asked to (a) draft a case study for discussion and (b) conduct the group discussion. The facilitator will seek feedback from other participants and will also directly give feedback.

Time will not permit any extended use of 'moot court', but the facilitator should discuss with learners the specific issues that arise in drafting a 'balanced' moot problem, problems that may arise in delivery, and in giving feedback.

FACILITATORS' NOTES: SESSION 8 - Aligning ILOs, assessment and choice of method

This talk reemphasises the HELP methodology. Alignment of ILOs with design of assessment devices to measure actual learning; and choice of method to best assist the learners in achieving the ILOs. This should be illustrated with good and bad examples, and learners invited to share their own thoughts and experiences.

FACILITATORS' NOTES: SESSION 9 - Evaluation

This issue is stressed as of vital importance in the HELP manual. This contains a range of possible evaluation devices, and learners should be asked to discuss their relative merits and shortcomings. This session will also allow trainers and tutors to gain feedback from the learners as to (a) whether the training course's ILOs have been met; and (b) if not, how best to address any shortcomings.

b. basic human rights awareness for public officials

In this section, a range of human rights topics for probable inclusion in a programme of basic human rights training is presented. Each begins with a statement of possible aims/ILOs, and then is followed by suggested 'course outlines'. The assumption is that these courses are (a) courses that are likely to be of real need to officials responsible for delivery of public services with a human rights dimension; and that (b) these courses require to be offered at an *introductory* level (ie, not to an 'advanced' audience).

In each instance, 'notes for facilitators' are also included. These aim to give guidance to trainers as to the key points that should be covered in formal presentations or in group discussion. Again, however, the content should be seen as illustrative – it will be desirable to tailor content to specific domestic contexts and needs.

In the notes for facilitators, a number of key cases is presented. It is suggested that these are not simply explained, but that these can be used as the basis of group discussion. In each instance, a short synopsis of the material facts can be given (in, say, 4 paragraphs, with the possibility of adjusting the facts somewhat to the domestic situation if thought desirable). After learners have considered the factual background, they could be asked to work through a series of questions:

- *Which human right (or rights) are relevant in this case?*
- *What obligations arise in respect of public officials?*
- *Do you feel that the state response was adequate in this case?*
- *In your opinion, was there a violation of human rights?*
- *Were there alternative approaches that could have been reasonably taken in the factual situation?*

In certain circumstances, it may also be relevant to add the following questions:

- *What would you have done as a public official?*
- *Would (our) domestic law and practice have adequately addressed the issue?*

NOTES

3.2 SOCIAL RIGHTS AS 'HUMAN RIGHTS': AN AWARENESS-RAISING COURSE FOR PUBLIC OFFICIALS

1. Purpose

'Human rights' are often misunderstood. The ECHR is primarily concerned with civil and political rights, but certain 'economic, social and cultural' rights are also accommodated within the case law.

The European Social Charter is primarily concerned with rights that are less amenable to judicial intervention, but have consequences for the delivery of public services. These obligations are not always understood. This course seeks to sensitise a range of public officials to this area.

2. Aim of this course; and intended learning outcomes

To help relevant state officials understand the rationale for, and scope of, social rights.

The ILOs can be stated as follows:

By the end of this module, each learner will be able to:

- define the scope of 'social rights' within the meaning of the European Social Charter
- explain the means whereby state obligations under the European Social Charter are monitored
- explain the relationship between social rights and the ECHR

3. Suggested contact hours; and learning hours

This module aims to ensure a basic awareness of social rights, and in particular, the European Social Charter, and aspects of 'social rights' that can be of relevance under the ECHR. It is intended to be covered over a 3-hour period. It could be incorporated into a longer course (ie, as one half-day 'unit').

4. Course content

Session1: Social rights as 'human rights' talk: 30 minutes, including plenary exercise

Session 2: The European Social Charter talk: 10 minutes; and small group work for 45 minutes

Session 3: Social rights and the ECHR talk: 25 minutes

FACILITATORS' NOTES: SESSION 1 - Social rights as 'human rights'

The key point here is to get learners to understand the crucial distinction in human rights law is the distinction between *civil and political rights* and *economic, social and cultural rights*. The European Convention on Human Rights is primarily (but not exclusively) concerned with the former set of rights. Another important

distinction is between *individual* and *collective (or group) rights*. This is of some importance in devising techniques for the enforcement of human rights.

Have the participants in small groups (of 2 or 3) carry out the following exercises at the start of the session (or alternatively, issue this in advance, and ask each participant to undertake this exercise):

EXERCISE 1: Decide whether you think the following 'rights' should be labelled as 'human rights'.

'RIGHT'	YES √	POSSIBLY ?	NO X
a. to political protest			
b. to a peaceful existence free from armed conflict			
c. to adequate food			
d. not to be subjected to torture			
e. to education			
f. to free speech			
g. of a people to self-determination			
h. not to be subjected to discrimination on the grounds of race or sex or religion			
i. to housing			
j. to property			
k. to a fair hearing in the settlement of civil disputes			
l. to leisure activities			
m. to take part in religious worship			
n to marry and have children			
p not to be subject to arbitrary deprivation of liberty			
q. right to life			

This first discussion will allow the distinction to be drawn between *individual* and *collective / group /minority rights*; and between *civil and political* and *economic, social and cultural rights.*
Ask participants to reflect upon (a) how 'justiciable' (ie, enforceable by domestic courts) are 'social rights' (low; remedies may be difficult to shape; most involve allocation of spending priorities, matters outwith courts' competences); and (b) the extent to which minorities can use a system of individual complaint to raise concerns as to discriminatory practices (low opportunity in respect of eg sentencing differentials; high if discrimination can be linked directly to a specific individual right).

NOTES

The conclusion should be that social rights are of considerable importance to an individual, but that their enforceability may be less a matter for the courts as for other organs of government.

If there is time left over, or alternatively time left over in session 2 group discussion, you may want to use the following:

Ask learners to discuss the following (say, in 10 minutes)

EXERCISE 2 The Preamble to the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations in December 1948, makes several assertions, including:

A. that recognition of the dignity of each human being is the basis of freedom and justice for individuals

B. that such recognition is also the basis of friendship and world peace between nations

C. that contempt for human rights leads to massive violations of human rights

D. that human beings have the moral right to rebel against tyranny and oppression

E. that each human being enjoys equal rights and rights which cannot be taken (or given) away

F. that (in particular) men and women enjoy equal rights; and

G. that a common understanding of what is meant by 'human rights' is crucial to their promotion.

To what extent do you agree with each of these assertions?? (5- strongly agree; 1- strongly disagree)

FACILITATORS' NOTES: SESSION 2 - the European Social Charter

In the introductory talk, the importance of social rights as 'human rights' needs to be stressed. Further background is available at http://www.coe.int/socialcharter/ .The following points should be covered:

- Social rights are a vital aspect of EU law. The EU Charter of Fundamental Rights was originally proclaimed in Nice in December 2000, and sought to provide in a single text the range of rights enjoyed by EU citizens (and others resident in the EU) under six chapters: dignity; freedoms; equality; solidarity; citizens' rights; and justice. These rights are of both a civil and political as well as an economic and social nature, and are based upon sources which include the ECHR and the European Social Charter, as well as the EU Charter of Fundamental Social Rights of Workers and other international conventions ratified by the EU or member states.

- Guarantees for social and economic human rights concerning conditions of employment and social cohesion are found in the revised European Social Charter of 1996, which is gradually superseding the original 1961 Charter and its three additional Protocols. The revised Charter

contains a broad range of economic and social rights in the workplace, and more generally, in the areas of housing, health, education, and social protection. States may decide at the time of ratification which obligations they wish to undertake, although there is a 'hard core' of rights (as well as a minimum number) to which they must subscribe.

- The European Social Charter's 'hard core' of rights include the rights: to work, just conditions of work, safe and healthy working conditions, and fair remuneration (including the right of women and men to equal pay for work of equal value) (Arts 1–4); to organise and bargain collectively (ESC Arts 5–6); of children and young persons to protection and of employed women to protection of maternity (Arts 7–8); to vocational guidance and training (Arts 9–10); to protection of health (Art 11); to social security, social and medical assistance and social welfare services (Arts 12–14); of disabled persons to social integration and of the family and of children and young persons to social, legal and economic protection (Arts 16–17); to engage in gainful occupation elsewhere in Europe (Art 18); of migrant workers and their families to protection (Art 19); to equal treatment in employment without sexual discrimination (Art 20); of workers to information and consultation and to take part in determining working conditions and environment (Arts 21–22); of elderly persons to social protection (Art 23); to protection upon termination of employment, to protection of workers' claims in insolvency and to dignity at work (Arts 24–26); of workers with families to equal treatment (Art 27); of workers' representatives to protection; (to information and consultation in collective redundancies (Art 29); to protection against poverty and social exclusion (Art 30); and to housing (Art 31).
- Supervision is by means of international monitoring and scrutiny of reports submitted annually by states. These are initially considered by the European Committee of Social Rights (the ECSR) whose reports in turn provide a legal assessment of the extent of state compliance with their obligations under the Charter. This report is then transmitted to a Governmental Committee which may prepare a recommendation for the Committee of Ministers to adopt by way of recommendations to a state to amend domestic law and practice if it appears that there has been non-compliance with a conclusion.
- An additional enforcement procedure since 1998 has involved the examination of collective complaints by the European Committee of Social Rights which may in turn result in the adoption of a resolution by the Committee of Ministers. Complaints may now be lodged by recognised European management (the European Trade Union Confederation, BUSINESSEUROPE and the International Organisation of Employers), labour and non-governmental organisations (NGOs), and by employers' organisations and trade unions in the country concerned (and where a state has agreed, by national NGOs). If a complaint is declared admissible, a written procedure is instigated, and a public hearing may be held. The decision on the merits is transmitted to the Committee of Ministers which is thereafter made public. The Committee of Ministers will thereafter adopt a resolution and may recommend the state takes specific measures necessary to ensure compliance with the Charter.

NOTES

In the small group sessions, each group should be given one collective complaint (or two if the group is more than 3 participants). Each team is asked to summarise [with a view to giving a brief report-back of say 3 minutes to the rest of the group /plenary session]:

- the material facts
- nature and outcome of domestic proceedings
- key questions raised in the complaint
- the response of the State
- the outcome
- whether the team agrees with the conclusions.

The database is available on HUDOC at http://hudoc.esc.coe.int/eng# . The selection of topics should be taken in light of the particular interests of the learners (or alternatively, cases concerning countries with a similar economic, political or legal background).

FACILITATORS' NOTES: SESSION 3 - the ECHR and the European Social Charter

The aim of this talk is to help learners understand that the boundary between social rights and civil and political rights is not watertight, and that the European Court of Human Rights does give effect to 'economic, social and cultural rights' in it's case law.

The trainer will have to select the area for discussion in light of the audience. However, it may be possible to use one (or both) of the following areas for the presentation:

TRADE UNION RIGHTS

- ECHR, Article 11(1) makes specific reference to the 'right to form and to join trade unions'. A trade union must be free to determine conditions for membership, and thus to expel individuals advocating opinions incompatible with its objectives providing the trade union acts in a reasonable manner in this regard. The concluding words 'for the protection of his interests' imply that trade unions not only must be permitted but also in some manner be allowed to express the interests of their members. This may be achieved through the use of collective agreements or permitting the right to strike or to take secondary industrial action against a party not involved in a dispute (although a wide margin of appreciation is accorded national authorities in regulating whether secondary action can be limited).
- Restrictions 'that affect the essential elements of trade-union freedom, without which that freedom would become devoid of substance' are thus not acceptable. Withdrawal of legal personality of a trade union will thus constitute an interference with Article 11. The right to bargain collectively is 'one of the essential elements' of the right to form and to join a trade union. Further, there may be a positive obligation to make some special provision for trade union representatives, and to provide protection for individuals against anti-union discrimination in the workplace.

- However, the right of association may also involve recognition of a right of *non*-association which provides protection against compulsion to join any association. In *Sørensen and Rasmussen v Denmark* in 2006, the Grand Chamber considered whether an individual could be deemed to have renounced his negative right (that is, not to be forced to join a trade union) by accepting a contract of employment where membership is a precondition. The first applicant had wished to join a union other than the one stipulated, while the second applicant claimed he had only joined the specified union in order to obtain employment, even although he did not agree with the union's political stance. The Court took into account the special features of the Danish labour market in which individual and collective agreements regulated the relationships between employers and employees, but also noted that there was 'little support' now in Europe for 'closed shop agreements', and that their use was 'not an indispensable tool for the enjoyment of trade union rights.

- Article 11(2) further provides that lawful restrictions may be placed on the exercise of these rights by 'members of the armed forces, of the police or the administration of the state'. These categories must be interpreted narrowly. An absolute prohibition on the right to form and join an association seeking to protect the interests of its members is likely to be impermissible, although even major restrictions on the exercise of the right to join a union may be recognised as covered by a wide margin of appreciation, particularly if national security considerations exist or other compelling circumstances provide sufficient justification. Restrictions on the right to strike by members of such associations are also likely to be deemed justifiable.

KEY RECENT CASES:

- *The National Union of Rail, Maritime and Transport Workers v United Kingdom* 2014 (the right to secondary action falls within the scope of Art 11's freedom of association in light of the position taken by ILO and European Social Charter treaty bodies and the general consensus in European states; but no violation as a country's industrial relations policy was a part of its overall economic and social policy and legislative determinations should be respected unless they manifestly lacked reasonable foundation).

- *Matelly v France* (2 October 2014) (requirement to resign membership of association intended to serve the professional interests of the gendarmerie and thus considered to be of a trade-union nature: violation, for while lawful and even major restrictions could be imposed on the exercise of trade-union rights by members of the armed forces, police or state administrators, a blanket ban on members of these groups impaired the very essence of the right to form and join a trade union).

Junta Rectora Del Ertzainen Nazional Elkartasuna (ERNE) v Spain (21 April 2015) (statutory ban on the exercise of the right to strike by members of the state security forces: no violation, the union had been able to exercise the essential content of that right, and the responsibilities of armed security forces which extended to providing an essential and continuous service warranted a sufficiently wide margin of appreciation).

NOTES

EDUCATION

- ECHR, Article 2 of Protocol no 1 first provides that 'no person shall be denied the right to education'. This sentence dominates the article: any interpretation given to the right of parents to have philosophical convictions taken into account must not conflict with the primary right to education enjoyed by the child. This is so in light of the fundamental importance of primary and secondary education for each child's personal development and future success. In essence, the right to education involves a right of access to educational facilities existing at a given time, rather than imposing upon states positive obligations to ensure that children receive the education desired by their parents. However, this right may be made subject to restrictions, and the responsibilities of states in determining the nature of provision is respected as long as regulation does not injure the very substance of the guarantee. In other words, providing there is no 'denial of the substance of the right at issue' and that the right to access to educational facilities is a real rather than an illusory one, the provision cannot support a claim to be educated in a language that is not recognised as a national language or to be educated in a private school. Nor can it support a claim of a private school to receive state funding or to be exempted from ordinary planning controls, although the guarantee does protect the right to establish and to run private schools subject to state regulation to ensure the quality of education.

- All forms of education fall within the scope of the provision, but the margin of appreciation accorded to states 'increases with the level of education, in inverse proportion to the importance of that education for those concerned and for society at large.' Limiting entry to higher studies to those candidates who have attained a sufficient level of achievement to undertake these studies successfully does not constitute an interference. Nor is it unacceptable to limit the numbers who may enter higher education. On the other hand, assessment processes for entry must minimise the risk of arbitrariness.

- The second sentence of Article 2 of Protocol no 1 provides that 'in the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions'. The right to respect for religious and philosophical convictions belongs to the parentsof a child and not to the child itself or to any school or religious association.

- 'Education' suggests 'the whole process whereby, in any society, adults endeavour to transmit their beliefs, culture and other values to the young', while 'teaching or instruction refers in particular to the transmission of knowledge and to intellectual development'. 'Respect' suggests more than mere acknowledgment or even that a parent's views have been taken into account, but rather 'implies some positive obligation on the part of the State'. The matter may arise in regard to the content and implementation of curriculum, but will not extend to the provision of a specific form of teaching through, for example, the placement of a child in a particular school. 'Philosophical convictions' suggests views 'as are worthy of respect in a "democratic society" ... and are not incompatible with human dignity' and which also 'attain a certain level of cogency, seriousness, cohesion and importance'. These include settled beliefs which refer to 'a weighty and substantial aspect of human life and behaviour'.

- Curriculum setting and planning are matters which fall within the competence of the domestic authorities. The provision does not 'permit parents to object to the integration of such teaching or education in the school curriculum, for otherwise all institutionalised teaching would run the risk of proving impracticable' since most school subjects involved 'some philosophical complexion or implications'. However, a school has to ensure that the education provided by way of teaching or instruction conveyed information and knowledge 'in an objective, critical and pluralistic manner'. The key guarantee is against the state pursuing an 'aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions', this being 'the limit that must not be exceeded'. In short, providing indoctrination is avoided, decisions on such issues as the place accorded to religion are covered by a margin of appreciation on the part of national authorities.

- Article 14 when taken together with Article 2 of Protocol no 1 prohibits discriminatory treatment which has 'as its basis or reason a personal characteristic ('status') by which persons or groups are distinguishable from each other' falling within the scope of Article 2 of Protocol no 1, and which does not pursue a legitimate aim or is disproportionate. However, educational policy-making such as curriculum determination or delivery of education (for example, in relation to children who have specific educational needs) is covered by a wide margin of appreciation. Where arrangements involve the application of discriminatory criteria, the onus lies on the state to show that the policy or practice is objectively justified, appropriate and necessary. The state must also be able to show that safeguards are in place if a specific ethnic group requiring special protection is the subject of educational measures.

NOTES

3.3 AN INTRODUCTION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS: AN AWARENESS-RAISING COURSE FOR PUBLIC OFFICIALS

1. Purpose

It is appropriate that public officials have an essential grasp of the European Convention on Human Rights in respect of

(a) domestic obligations;
(b) fundamental concepts in jurisprudence;
(c) enforcement machinery.

This is a short and introductory training module that can be slotted into other training events. It stresses the subsidiary nature of the ECHR – ie, that the primary responsibility for delivering the guarantees lies at domestic level.

2. Aims and intended learning outcomes

The aim is to provide learners with an overview of the ECHR machinery, an introduction to its jurisprudence, and an understanding of its subsidiary nature.

The ILOs can be stated thus:

By the end of this course, each learner will be able to:

- Explain the fundamentals of the enforcement machinery under the ECHR
- Describe, with a basic understanding of, the key principles of interpretation of the ECHR used by the European Court of Human Rights
- Discuss the manner in which domestic authorities are expected to ensure the delivery of Stare obligations assumed upon ratification.

3. Suggested contact hours; and learning hours

This module aims to ensure a basic awareness of the ECHR. It can be covered in a 2-3 hour period.

4. Course content

Session 1: Why the ECHR? What does the Court do? talk: 30 minutes, including plenary exercise

Session 2: Fundamental concepts in Strasbourg jurisprudence talk: 10 minutes; and small group work for 30 minutes

Session 3: The domestic context and the ECHR talk: 20 minutes

FACILITATORS' NOTES: SESSION 1 - the ECHR

The first session seeks to ensure that learners have an understanding of the basics of the Strasbourg enforcement machinery, and the importance of *domestic* implementation of human rights. This session lends itself to a mixture of talk and video. Background information is available at http://www.echr.coe.int/ECHR/EN/Header/The+Court/Introduction/Information+documents/ ; video clips should be selected from http://www.echr.coe.int/ECHR/EN/Header/The+Court/Introduction/Video+on+the+Court/

The talk should cover the following basic points:

- The Court has jurisdiction in both inter-state cases and individual applications (that is, applications from any person, non-governmental organisation or group of individuals claiming to be a victim of a breach of the ECHR)[1] and to this end will give a decision on the admissibility of an application and a judgment on its merits. A judgment on the merits is essentially declaratory of the law, and the monitoring of action taken by the state as a consequence of a finding of a violation (including the payment of any award of 'just satisfaction') remains the responsibility of the Committee of Ministers.
- The Court consists of a number of judges equal to that of state parties to the ECHR. Judges are to be 'of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence'. States are required to nominate three candidates, one of whom is selected by the Parliamentary Assembly. Until 2010, judges were elected for renewable periods of six years, but now serve for one, non-renewable period of nine years. Judges must retire when they reach 70. [Some indication of judges appointed in respect of the domestic State may be appropriate here.]
- The procedures are largely written, and oral argument is required only in exceptional cases where the Court feels this is helpful for the proper disposal of a difficult or novel issue. Rules of Court provide that such hearings will be held in public unless the Court in exceptional circumstances decides otherwise[2]. The Court is 'master of the characterisation to be given in law to the facts of a case', and thus is not constrained by the choice of provision in the written application or in pleadings.
- The Court now sits in single-judge formation, committees (of three judges), Chambers (of seven judges, but with the proviso that the number of judges may be reduced to five), a Grand Chamber (of seventeen judges), or in plenary. Reasons for admissibility decisions and for judgments on the merits must be given; any judge who considers the judgment does not represent in whole or in part the unanimous opinion of the Court is entitled to deliver a separate opinion.
- In international law, recognition of the right of a person or body to challenge national legislation or administrative practice before an international forum was an innovation with far-reaching potential.
- Rules of Court supplemented by Practice Directions specify that an individual application must be made in writing, and prescribe the information and documents that must be supplied and the timescales that must be met. An applicant need only be legally represented once an application has been communicated to the respondent state.

NOTES

- An application will normally be considered initially by a single-judge formation, that is, by a single judge assisted by rapporteurs from the Court's Registry. A single judge may declare inadmissible or strike out of the Court's list of cases the application where such a decision can be taken without further examination[2] Such a decision is final. Substantial numbers of applications (ie, some 95%) are declared inadmissible or struck-out by single-judge formations.

- In the remainder of cases, the admissibility and merits of an application will be determined by a Chamber (unless the case is relinquished by the Chamber in favour of the Grand Chamber). Membership of the Chambers (or 'Sections') is fixed for three years and seeks to achieve gender and geographical balance and representation of the different legal traditions found across the continent. The Chamber consists of seven judges, although the Committee of Ministers may decide that the size of membership should be five judges. The judge elected in respect of a respondent state sits as an *ex officio* member of the Chamber.

- The Grand Chamber includes the President of the Court, the Vice-Presidents and Section Presidents, together with other judges chosen in accordance with Rules of Court. The judge elected in respect of the respondent state in a case sits as an *ex officio* member of the Grand Chamber. The Grand Chamber considers all inter-state cases, and individual applications where a Chamber has decided to relinquish jurisdiction. A Chamber may so decide where it feels that the case pending before it raises a serious question of interpretation or 'where the resolution of a question before it might have a result inconsistent with a judgment previously delivered by the Court', but may not do so if one of the parties to the case objects within one month. The provision is designed to help ensure consistency in jurisprudence. The Grand Chamber also acts in effect as an appellate court when a case is referred to it following a judgment of a Chamber.

- Finally, learners should know something about admissibility criteria: this is usefully highlighted at http://www.echr.coe.int/ECHR/EN/Header/Applicants/Information+for+applicants/Frequently+asked+questions/

FACILITATORS' NOTES: SESSION 2 - Fundamental concepts in Strasbourg Court jurisprudence

This session is in 2 parts: an introductory talk on basic concepts in Strasbourg case law, and discussion of key judgments in small groups. The introductory talk should introduce – briefly – the following key concepts.

- autonomous concepts
- living instrument
- legal certainty
- positive obligations
- subsidiarity
- proportionality
- 'margin of appreciation'

The small group work gives learners the opportunity to discuss these concepts, and the work of the Court.

Participants should have been asked in advance of the course to watch one actual hearing of the Court on-line. [It is assumed that participants will have access to a computer with video streaming facilities.] Hearings are available at: http://www.echr.coe.int/ECHR/EN/Header/Press/Multimedia/Webcasts+of+public+hearings/latestwebcastEN.htm

The training team needs to decide the most appropriate case for participants to watch. This is likely to be a domestic case. Learners should be asked to prepare brief notes on the following points:

- the material facts in the case
- nature and outcome of domestic proceedings
- key (legal)issue facing the Court
- any initial disposal of any admissibility issues (and in particular, exhaustion of domestic remedies)

The next task is for groups to discuss some key cases in respect of fundamental concepts in Strasbourg jurisprudence. The cases selected are (simple) examples from early case law: different 'fundamental concepts' are at stake in each. The cases are available on HUDOC (at the top corner of www.echr.coe.int). The key area is the judgment on the merits - not the admissibility decision.

- *Tyrer v United Kingdom* - living instrument
- *Handyside v United Kingdom* - margin of appreciation
- *Witold Litwa v Poland* - legal certainty
- *Osman v United Kingdom* – positive obligations

FACILITATORS' NOTES: SESSION 3 - the domestic context and the ECHR

The final session focuses upon the domestic legal system and the ECHR. This should focus upon 2 issues:

(a) the manner in which the ECHR is to be given effect to in domestic law;

(b) cases involving judgments against the home State.

This is designed to allow the trainer to illustrate (a) the impact of ECHR case law on domestic law following an adverse judgment; and (b) the types of shortcomings that have been a particular issue for the country. Again, the selection of cases should be one for the trainer, but recourse should be had to the 'country fact file', available on the Court's website (www.echr.coe.int).

At the conclusion of the training, learners should be made aware of the on-line resources available on the Court's website, including materials in the local language, the range of publications and factsheets available on the Court's site, and HUDOC. See in particular http://www.echr.coe.int/Pages/home.aspx?p=press/factsheets&c=

c. specific courses for target audiences

It is possible to identify a significant number of human rights training needs for a range of audiences, both within and outwith the public sector. Any training institution will require to determine training priorities at some stage: the curricula suggested here are indicative only, and it will always be a case of determining actual needs. The following may be of assistance in helping establish training sessions in human rights, either as 'stand-alone' training or as modules that can be integrated into other training on offer to professionals.

NOTES

3.4 TRAINING FOR JOURNALISTS: AN INTRODUCTION TO FREEDOM OF EXPRESSION AND THE MEDIA

1. Purpose

This course is likely to be of interest for journalists who seek to gain a deeper awareness of the work of the European Court of Human Rights and also of the substantive content of Article 10, ECHR case law.

journalists often do not understand the rudiments of international human rights enforcement mechanisms (such as the distinctions between different courts) nor have an adequate grasp of the fundamentals of Strasbourg Court case law.

2. Aims and intended learning outcomes

The aims of the course are to provide (a) an awareness of the organisational distinction between the Council of Europe and the EU and of their respective courts; and (b) an overview of free expression guarantees.

The suggested ILOs of the course are as follows:

By the end of this course, participants will be able to:

- Briefly describe the respective roles of the ECtHR and the CJEU.
- Restate the fundamental principles of interpretation of Art 10, ECHR in relation to the rights and responsibilities of the media in a democratic society
- Apply the case law of the Court to three case discussions based upon ECtHR key case law in relation to the responsibilities of the media in relation to (a) protection of the integrity of the judicial system; (b) protection of the private life of celebrities; and (c) protection of the reputation of individuals
- Access press releases on HUDOC

3. Length of the course

The aims are limited to a basic understanding of the relevant courts/institutions, and an outline of Article 10, ECHR and the interpretation of free expression in domestic law. This need not be a lengthy training session. On top of this, journalists are busy people. In light of this, a 4 contact hours course should be sufficient.

Session 1: The Council of Europe; and the European Union: the EuCtHR and the CJEU talk, say, 20 minutes

Session 2: Media freedom: rights and responsibilities of journalists under the ECHR 2 blocks of 90 mins each: introductory talk and small-group discussion in each block; and concluding session

FACILITATORS' NOTES : SESSION 1

'Two Europes' is not always understood. This should open with a brief presentation on the work of the Council of Europe [http://www.coe.int/en/web/about-us/videos] and thereafter the presenter should address the differences between the EU and the Council of Europe [see http://www.coe.int/en/web/about-us/do-not-get-confused] - this could be done by way of a light-hearted quiz (possibly in teams).

FACILITATORS' NOTES: SESSION 2

The first part should examine the rights of journalists and the extent of protection in European case law. The second area is somewhat more challenging to put across, both as it suggests restrictions on freedom of expression, and also on account of developments in very recent case law. The second presentation should focus upon (a) intrusions into private life by the media; and (b) protection of personal reputation of individuals.

It is suggested that these topics be presented in two blocks, each of 90 minutes. Each should start with a short overview: and then in groups journalists should be invited to discuss the material facts of particular cases (without an indication of the Court's outcomes) by discussing first the ethical dimension to each case. Here, any domestic Charter of Journalistic Ethics should be referred to. Secondly, learners should be asked what they consider should be the key human rights questions (and asked whether in their opinion the factual situation should result in a finding of a violation of Article 10).

Reporting-back to plenary session should entail identification of the relevant issues to ensure that participants understand the fundamental considerations and counterbalancing interests (protection of private life and reputation, holding institutions to account, protecting the integrity of fair hearings, etc. The approach adopted by Strasbourg could then be given (with a short explanation of any dissenting judgments). In the concluding plenary session [say 20 minutes], journalists could be introduced to HUDOC (in relation to press releases), and to other on-line materials available.

TOPIC 1

(a) Protection of the media is considered a vital feature of a democracy. The media's 'duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest, including divisive ones'· Journalists thus act as a conduit for information and thereby have a vital role in contributing to public discussion and debate and in acting in a 'watchdog' role through investigative journalism. This justifies a high level of protection for the media (and for non-governmental organisations fulfilling a similar 'watchdog' role). Thus 'the most careful of scrutiny under Article 10 is required where measures or sanctions imposed on the press are capable of discouraging the participation of the press in debates on matters of legitimate public concern', and also that 'particularly strong reasons must be provided for any measure limiting access to information which the public has the right to receive'. However, this carries with it certain responsibilities for journalists, in particular, to act in good faith and to verify in advance factual statements that are potentially defamatory where this does not involve 'an unreasonable, if not impossible task', especially when 'information imparted by the press is likely to have a serious

NOTES

impact on the reputation and rights of private individuals', although 'the press should normally be entitled, when contributing to public debate on matters of legitimate concern, to rely on the contents of official reports without having to undertake independent research'.

(b) Journalists are also expected to adhere to the law, and 'the concept of responsible journalism, as a professional activity which enjoys the protection of Article 10' also covers the lawfulness of a journalist's conduct when exercising journalistic functions. Thus the 'fact that a journalist has breached the law in that connection is a most relevant, albeit not decisive, consideration when determining whether he or she has acted responsibly.'

(c) Particular weight is accorded to media attempts to promote discussion and debate on matters of legitimate public concern. This may require allowing access to events in order to allow for the proper discharge of these functions. The potential 'chilling effect' of sanctions upon journalists' activities must be considered, and restraint is called for: 'the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media'. It is thus crucial that domestic law does not unduly deter the media from 'fulfilling their role of alerting the public to apparent or suspected misuse of public power', a risk which undoubtedly exists where investigative journalists are liable 'as one of the standard sanctions imposable for unjustified attacks on the reputation of private individuals' to be sentenced to imprisonment or being prohibited as acting as journalists. Similar concerns apply to the perceived role of the media in scrutinising the administration of justice and the policing of disorder.

(d) This underlying policy also implies recognition of the importance of protection for journalists' sources which is acknowledged as a fundamental prerequisite for a free press. However, the provision of information in itself does not render the informant a 'source' who attracts protection of Article 10: the key principle is that protection attaches only to those who provide information which the public should or are entitled to know FN0. Where source protection is engaged, the reasons for an interference must be shown to be both relevant and sufficient. However, where a criminal trial is involved and the liberty of an individual may be at stake, the pressing social need for disclosure of sources may be more readily justified.

TOPIC 2

In topic 2, the following points require to be covered:

(a) Underlying the Court's jurisprudence on respect for private life is the value of personal autonomy. The 'right to establish and develop relationships with other human beings and the outside world' free from unwanted attention in order to secure 'to the individual a sphere within which he or she can freely pursue the development and fulfilment of his or her personality' readily explains the Court's increasing emphasis upon the state's obligation to ensure appropriate regulation of the activities of private parties, particularly of the media, in respect of privacy. This extends also to public figures when the circumstances suggest there is a 'legitimate expectation' that respect for their private and family life should be protected. However, the choice of means for discharging this positive obligation falls within the state's margin of appreciation.

(b) Further, the question of privacy and press intrusion cannot be considered in isolation from the consideration of freedom of expression under Article 10 which includes the freedom 'to receive and impart information and ideas without interference by public authority' FN0. Under Article 10, there is a presumption in favour of freedom of speech as a means to the enhancement of democracy and development of the person: 'pluralism, tolerance and broadmindedness' are crucial to the maintenance of democratic society. Differing levels of protection of speech are thus justified, depending upon the issue at stake. Political expression and debate on matters of public concern call for the highest safeguards, and this may thus imply reduced protection not only for the personal privacy of those in the political arena who have voluntarily placed themselves in a public position of accountability, but also for public personalities in entertainment or otherwise well-known to the public. At the same time, the exercise of freedom carries with it responsibilities, and it is appropriate that sanctions available at domestic level adequately redress the damage suffered by the victim and thereby help deter the recurrence of such abuses in future.

(c) Protection for 'private life' seeks to protect the psychological integrity of an individual allowing for the development of personal relations, and thus intrusions of privacy by the media give rise to scrutiny of the discharge of the state's positive obligation to protect individuals from interferences by third parties. While the balancing of Article 8 and Article 10 rights of individual and publisher respectively is covered by recognition of a margin of appreciation on the part of state authorities (that is, generally the decisions arrived at by domestic courts), the Court will still nevertheless scrutinise whether the conclusions reached were appropriate. Four cases are of particular significance: Von Hannover v Germany (no 1), Von Hannover v Germany (no 2), Axel Springer v Germany, and Couderc and Hachette Filipacchi Associés v France (in 2015).

(d) A recent development has been the recognition of both reputation and honour as interests protected by Article 8, and thus as giving rise to positive obligations to guarantee effective respect for private life by legislative, executive and judicial authorities. However, 'in order for Article 8 to come into play, the attack on personal honour and reputation must attain a certain level of gravity and in a manner causing prejudice to personal enjoyment of the right to respect for private life'. An attack on an individual's reputation carries with it a moral dimension but Article 8 will not be engaged where the damage to reputation is a consequence of the individual's own actions. A positive obligation may also arise upon state authorities to protect honour and reputation from attacks by others, a matter of particular concern in respect of unwarranted media intrusion. To this end, the Court will examine the extent to which the state has put in place a legal framework protecting these interests. This assessment often calls for a careful examination of whether a proper balance has been achieved between freedom of expression and Article 8 interests, for the public interest in information may outweigh an individual's private-life interests. Certain cases are important: A v Norway, Aksu v Turkey (in respect of racial stereotyping), and Dzhugashvili v Russia (in 2014) (in respect of ancestors).

NOTES

3.5 COMBATING INTOLERANCE AND DISCRIMINATION THROUGH PROMOTING EQUALITY: AN INTRODUCTORY COURSE FOR PUBLIC SECTOR OFFICIALS

1. Purpose

The case law of the ECtHR emphasises a series of values, amongst which are pluralism, broadmindedness and non-discrimination. These values stress the inherent dignity of each human being, irrespective of personal characteristics.

That public services should be delivered in a non-discriminatory basis is self-evident. The ECHR also imposes a series of positive obligations upon state authorities to prevent intolerance and inequality imposed on others by non-State parties.

This course seeks to promote a basic awareness of the principles of equality and non-discrimination, and an acceptance of the values of tolerance and broadmindedness through discussion of relevant case law. It deliberately seeks to address attitudinal change (where necessary) on the part of learners.

Target audiences are likely to be public sector agencies (including civil servants, criminal justice services, and education managers). It must be stressed that while the course outline is of general applicability, the actual target audience must determine the trainers' actual choice of discussion topics, for training must be seen as relevant.

2. Aim of this course and intended learning outcomes

The aim is to help the relevant group of public officials to understand the scope of international equal treatment legal standards, and to help them apply this to their daily work.

By the end of this course, each learner will be able to:

- Define the basic concepts of direct discrimination, indirect discrimination, victimisation and harassment
- Restate the scope and applicability of non-discrimination guarantees found in the ECHR
- Understand the circumstances in which discriminatory treatment may be considered appropriate (or necessary)
- Accept personally and professionally the requirement to treat all individuals in terms of equal treatment

3. Suggested contact hours and learning hours

This module aims to ensure a basic awareness of equality principles and non-discrimination, in particular (but not exclusively) under the ECHR. This is a basic (ie, introductory) module designed for public sector officials.

It is intended to be covered over a 5-hour period (excluding an introductory session, and breaks). [It could thus, for instance, be presented on a one-day course specifically designed for the purpose, or be embedded into professional training courses as required].

4. Course content

A suggested course outline is as follows:

Session 1: Equality in international law talk: around 30 mins

Session 2: The sources of inequality, and current domestic issues discussion groups: around 30 minutes, plus 10 min plenary reporting back

Session 3: Discrimination and the ECHR talk, around 30 minutes

Session 4: The perspective of victims of discrimination plenary a-v presentation or speaker, around 10 minutes

Session 5: Case study discussion small groups, around 45 minutes plus plenary report-back and concluding remarks

FACILITATORS' NOTES : SESSION 1

Equality in international law: The following elements are of crucial importance, and each learner must be expected to be aware of these and be able to engage with them:

a. basic concepts in equality and non-discrimination,

b. identifying the sources of discriminatory attitudes and treatment

c. the scope of non-discrimination guarantees under the ECHR

d. identifying situations in which equality of treatment is required, and situations in which 'affirmative action' may be appropriate

The talk should cover the following points:

- The legal basis for equality and non-discrimination in international law
- Crucial definitions: direct discrimination; indirect discrimination; victimisation; harassment

The key source work for the preparation of the course should be INTERRIGHTS *Non-Discrimination in International Law*. This is available at http://www.interights.org/handbook/index.html/ . This will provide a sound basis for the content.

NOTES

FACILITATORS' NOTES: SESSION 2 - The sources of inequality; and current practice.

This is a small-group discussion work of 30 minutes; with a 10 -minute reporting-back session in plenary. This session will directly confront learners with the question as to the extent to which there is prejudice in domestic society, and the extent to which this feeds into the delivery of public services. Sensitivity is required: but it will be possible to identify external sources of references to trigger discussion. If no local sources are available (and these may well exist), then discussion based upon ECRI reports (or similar international reports) will be possible.

The aim of the discussion is to have participants consider the extent of prejudicial attitudes; whether these are widely shared (or specific to a group based on eg age); and the extent to which discriminatory treatment may exist. The introductory talk should have alerted the learners to 4 situations:

- Individuals who suffer direct discrimination;
- Policies, etc that indirectly discriminate;
- Victimisation (for having lodged a complaint); and
- Harassment.

At this stage, it may be necessary to introduce the concept of 'genuine occupational qualification' [in respect of employment – see notes 5), but this will be covered in the next talk.

The expectation is that, through open discussion, learners will begin to identify the sources and extent of prejudice against individuals on account of their personal characteristics in contemporary society. This needs careful handling: but it is imperative for the realisation of one ILO that learners engage with the issue of attitudinal change. It is certainly the case that ECRI reports will raise up issues in the reports that should trigger discussion: this will also allow the facilitator the opportunity to (a) explain the work of ECRI and other key Council of Europe initiatives such as the Framework Convention on National Minorities; and (b) discuss the limits of securing respect for human rights via individual complaint).

FACILITATORS' NOTES: SESSION 3 - Talk -Discrimination and the ECHR

Session 1 introduced learners to the 4 concepts of discrimination. This talk focuses upon direct and indirect discrimination under the ECHR (in particular, Arts 14 and Protocol no 12). The key point is that learners understand (a) identification of differential treatment may itself violate a substantive Article (eg Art 8) without recourse to Art 14, etc; (b) the idea of a comparator; (c) the concepts of legitimate aim, legal certainty and proportionality.

This is a somewhat technical talk: but learners should have a grasp of the legal test and its application in at least two areas of application. At this stage, it will also be relevant to introduce the notion of 'high risk' characteristics (sexual orientation and discrimination against Roma, most obviously).

This is a preparatory talk (of 30 mins) that will take participants into the next small-group tutorial discussion. Depending upon the particular focus of the learners, it may now be appropriate to introduce the notion of reasonable accommodation of diversity (eg, in relation to the wearing of religious symbols in the workplace; recognition of religious diversity in educational provision; 'genuine occupational qualifications' in employment practices; addressing speech that may constitute 'hate speech'; investigating crimes that are racially motivated; etc).

THE KEY POINTS TO BE MADE SHOULD INCLUDE THE FOLLOWING:

- Protection for members of minorities is inherent in the ECHR. Discrimination is regarded as particularly objectionable because it disregards fundamental notions of human dignity and equality before the law. Discrimination on the ground of sex or race demeans the victim by using a sexual or racial stereotype as a sufficient ground for unfavourable treatment, rather than treating her as an individual to be judged on her own merits.
- Explicit expression for the principle of non-discrimination is found in three provisions in the ECHR. First, Article 14 of the ECHR; secondly, Article 5 of Protocol no 7 provides that 'spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution'; and thirdly, Article 1 of Protocol no 12 which entered into force in 2005 makes provision for a general prohibition of discriminatory treatment.
- In the context of Article 14, 'discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations … [The Court] has also accepted that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group, and that discrimination potentially contrary to the Convention may result from a *de facto* situation'. Normally, the ECHR will consider it unnecessary to examine a complaint of discrimination under Article 14 when it has already established that there has been a violation of a substantive guarantee raising substantially the same point, unless 'a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case'. An individual cannot waive his right not to be subjected to discriminatory treatment.
- Article 14 can only be considered in conjunction with one or more of the substantive guarantees contained in Articles 2 to 12 of the Convention or in one of the protocols.
- The existence of a 'relevantly similar' position If the facts fall within the ambit of a Convention right, and there is established to be a difference in the treatment of two situations, the application of Article 14 may turn in the first place upon an assessment of the comparability of the situations in question. The persons in question must be in a 'relevantly similar' position. If no analogous situation arises, there can be no application of Article 14.
- *Prohibited grounds* If there is differential treatment of analogous situations, the next question is whether the basis of the differential treatment falls within the scope of Article 14. The list of prohibited grounds for discrimination is qualified by the phrase 'any ground such as', and is not exhaustive but merely illustrative· An applicant must show that a personal characteristic or status is involved in the difference of treatment. Certain prohibited grounds are straightforward: sexual orientation, marital status, and illegitimacy have readily been held to so qualify. 'Status',

NOTES

though, is not necessarily dependent upon a characteristic that is innate or inherently linked to the identity or the personality of the individual (such as sex, race or religion).

- *Justification for differences in treatment* :If there has been differential treatment of analogous situations, falling within the ambit of a Convention right, on a ground falling within the scope of Article 14, the remaining question which may arise is whether the difference in treatment has an 'objective and reasonable' justification. A difference in treatment is not necessarily discriminatory: public authorities 'are frequently confronted with situations and problems which, on account of differences inherent therein, call for different legal solutions: moreover, certain legal inequalities tend only to correct factual inequalities'. A difference in treatment will be discriminatory only if it does not pursue a legitimate aim, or if there is no 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'. Very weighty reasons' are required to justify differential treatment based on such factors as race or ethnic origin, nationality, sex, sexual orientation and illegitimacy or adopted status.
- The onus of establishing that the applicant has been treated differently from another person in an analogous position rests on the applicant. It is then for the State to establish an objective and reasonable justification for the difference in treatment.
- Article 14 is not confined to direct discrimination: it also covers indirect discrimination. Article 14 can also impose an obligation to treat differently persons whose situations are significantly different.

KEY CASES:

- *Thlimmenos v Greece*, [GC] 2000-IV, which concerned a person who had been refused admission as a chartered accountant because of a criminal conviction arising from his refusal to wear military uniform due to his religious beliefs as a Jehovah's Witness. While the State had a legitimate interest in excluding certain convicted persons from the profession of chartered accountant, 'a conviction for refusing on religious or philosophical grounds to wear the military uniform cannot imply any dishonesty or moral turpitude likely to undermine the offender's ability to exercise this profession'. Exclusion on this ground was therefore disproportionate and unjustified. In other words, 'there existed no objective and reasonable justification for not treating the applicant differently from other persons convicted of a serious crime.
- *Nachova and Others v Bulgaria* [GC] 2005-VII, the Grand Chamber held that there had been a violation of Article 14 taken together with Article 2 in respect of the failure to hold an effective investigation into allegations of racially-motivated killing. While it had not been shown that racist attitudes had played a part in the killings, the failure of the authorities to investigate allegations of racist verbal abuse with a view to uncovering any possible racist motives in the use of

force against members of an ethnic or other minority had been 'highly relevant to the question whether or not unlawful, hatred-induced violence has taken place'.

- In *DH and Others v Czech Republic,* [GC] 2007, the placement of Roma children in special schools designed to assist children with learning difficulties was found to have involved a violation of Article 14 taken in conjunction with Article 2 of Protocol no 1. Although no issue was taken with the legislation governing placements in special schools, statistical evidence demonstrated that the manner in which it was applied in practice resulted in a disproportionate number of Roma children being placed in such schools. The burden of proof therefore shifted to the State to show that the difference in the impact of the legislation was the result of objective factors unrelated to ethnic origin. The Court concluded that the tests on which the State relied could not justify the difference in treatment.
- In *Hoffman v Austria*, (1993) A 255-C, the applicant had been denied custody of her child because of her involvement with the Jehovah's Witnesses. The Court held that it was unacceptable for a domestic court to base a decision on the ground of a difference in religion. Although the point at issue was essentially one of religion, the Court considered it under Articles 8 and 14 as it concerned the determination of child custody, an aspect of family life.

FACILITATORS' NOTES: SESSION 4 - Presentation

This session helps learners appreciate the impact of discriminatory practices on members of minorities. It should last some 10 minutes (if video training material is being used; possibly 15 minutes if an invited speaker is being used). Training should make use of a wide range of materials, and in this area, hearing from a 'victim' of discriminatory treatment can be a powerful means of addressing attitudinal change. YouTube (or similar) has much material (albeit most of this may be available in the non-native language); if this is not available, then a speaker from a relevant NGO could be invited to give a short presentation. [For example, see https://www.youtube.com/watch?v=BO6PQHGXnIk]

The choice of video or of speaker should reflect the target audience. The speaker should be well-briefed in advance:

- A strict timescale that needs to be adhered to
- The purpose of the training – ie to sensitise learners to the need to tackle discrimination
- If possible, to speak about personal experience of discrimination
- If appropriate, to be polemical, but not under any circumstances to attack any organisation directly

NOTES

FACILITATORS' NOTES: SESSION 5 - Small group discussions: applying principles to scenarios

The final session involves group discussion of various scenarios. The aims are (a) to apply the principles of ECtHR case law covered in section 3; (b) to discuss possible means of preventing proactively inequality or discrimination by drawing up a list of recommendations for the learners' organisation.

These two tasks are different in nature. The first stresses application of knowledge and understanding; the second directly raises the question of attitudinal change via addressing organisational; cultural issues. (If a tutorial group is likely to find the second task too challenging, the facilitator may wish to substitute another task, eg 'implications for the training of prison staff' (in relation to prison training) or 'implications for reporting and investigating hate speech' (for prosecutors, etc.)

The first set of scenarios could focus on issues discussed directly in Strasbourg Court case-law (see key cases above) *but based upon the actual target audience.* It may also be appropriate to stress the importance of following the Strasbourg 'check list' of issues identified above.

Addressing attitudinal change – if this is thought appropriate – could use a range of scenarios based upon local situations. The following (albeit American) materials may be of assistance:

http://stepupprogram.org/topics/discrimination/

3.6 ADDRESSING THE RISK OF ILL-TREATMENT BY PUBLIC OFFICIALS: A COURSE FOR PUBLIC OFFICIALS INVOLVED IN CRIMINAL JUSTICE DELIVERY

1. Purpose

Combating the impunity of public officials such as police officers and prison staff for the infliction of ill-treatment is of fundamental importance. Article 3 of the ECHR imposes a positive obligation upon state authorities to undertake an effective investigation into allegations of, or indicators of, possible ill-treatment.

In this area, the nature and scope of legal obligations are probably understood, but officials fail to comply with them. Attitudinal change may also be an issue: the expectation is that it should be understood that a colleague who witnesses ill-treatment must report it. Organisational culture may not always encourage this.

The target audiences are likely to be police; prison staff; and children's justice services. [Note that additional material is proposed for those charged with monitoring of places of detention: see 3.6.]

2. Aim of this course; and intended learning outcomes

The aim of this training is to help relevant state officials understand the rationale for, and scope of, (a) the obligation not to inflict ill-treatment; and (b) the positive obligation to carry out an effective investigation into possible ill-treatment and their particular responsibilities for facilitating this.

It is suggested that the ILOs should read as follows:

By the end of this course, each learner will be able to:

- Define the concept of 'vulnerable individuals' in relation to the scope of positive obligations to protect their physical and psychological integrity
- Restate the scope of the obligation in relation to the specific area of public sector service in which the learner is employed
- In relation to fictitious cases, apply key Strasbourg case-law to factual situations
- Accept personally and professionally the requirement to protect vulnerable persons

NOTES

3. Suggested contact hours and learning hours

This module aims to ensure a basic awareness of legal responsibilities. It is intended to be covered over a 5-hour period (excluding an introductory session, and breaks). [It could thus, for instance, be presented on a one-day course specifically designed for the purpose, or be embedded into professional training courses as required].

There is great potential for flexible delivery of this module. Other target audiences are possible: eg, staff from forensic services; prison medical staff; bodies with responsibility for monitoring places of detention, etc.]

4. Course content and suggested course outline

The proposal is that training should go beyond the question of 'effective investigations' and focus on groups that may be particularly vulnerable to ill-treatment in session 3.

The actual content will be dependent upon the target audience. However, the following may be an appropriate course outline for staff working in prisons.

Session 1: The nature of, rationale for, and scope of the 'procedural aspect' and positive obligations under Art 3, the ECHR talk, around 30 mins

Session 2: Identifying 'vulnerable groups' small group discussion, around 60 minutes, including 15 min plenary reporting back

Session 3: Protecting vulnerable detainees in practice talk, around 40 minutes, followed by case study discussion in small groups of 45 mins, and reporting-back from case discussions; and conclusions

FACILITATORS' NOTES: SESSION 1

The key issues are a.) the nature of, and rationale for, positive obligations under the ECHR (to make rights 'practical and effective', and to address problems over evidentiary issues in establishing ill-treatment); b.) the scope of the legal obligation to carry out an effective investigation (when triggered? And what is involved?). The central issue, though, is the 'procedural aspect' of Article 3. The following points should be made:

- The 'procedural aspect' or 'procedural limb' involves a positive obligation to carry out an effective investigation into a credible claim or sufficiently strong indications that ill-treatment falling within the scope of the guarantee may have occurred. The result is that a violation of Article 3 may be established if any subsequent state investigation of a credible assertion that ill-treatment has taken place is deemed inadequate, even although it has not been possible to establish that any actual infliction of ill-treatment has occurred. The investigation must be sufficiently thorough to be capable of establishing the facts and also of leading to the identification and punishment of

those responsible. It is important to note, however, that 'an obligation to investigate "is not an obligation of result, but of means": not every investigation should necessarily be successful or come to a conclusion which coincides with the claimant's account of events; however, it should in principle be capable of leading to the establishment of the facts of the case and, if the allegations prove to be true, to the identification and punishment of those responsible'.

- The duty to initiate an investigation will arise when circumstances come to the attention of the relevant authorities suggesting that ill-treatment of sufficient severity so as to fall within the scope of Article 3 has occurred. The essence is the existence of 'sufficiently clear indications that torture or ill-treatment has been used', or of an 'arguable claim' of the infliction of ill-treatment giving rise to 'a reasonable suspicion'. The responsibility to carry out an investigation may arise even in the absence of an express complaint when other sufficiently clear indications of such ill-treatment are evident, but does not do so if the allegation or indications are inherently implausible.

- Where an individual can show that he has been the victim of ill-treatment sufficient to bring the matter within the scope of Article 3, then there is a requirement that the operation of the criminal justice system should be capable of providing appropriate redress for victims by punishing those responsible and also having a dissuasive effect capable of ensuring the effective prevention of unlawful acts.

- Where it is alleged that there has been a discriminatory element in the infliction of ill-treatment by state officials or in the discharge of their responsibilities in responding to the infliction of ill-treatment by third parties, there will also be an obligation to investigate whether such an allegation is substantiated. However, there must be some evidence to support an allegation that there has been discrimination.

- Since an investigation should in principle be capable of leading to the establishment of the facts, and to the identification and punishment of those responsible if the allegations prove to be true, 'the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions', and to this end, 'must take all reasonable steps available to them to secure the evidence concerning the incident'. The effectiveness of a domestic investigation is tested in accordance with five principles. First, the investigation must be carried out by a body independent of those alleged to have been implicated in the ill-treatment. Secondly, the investigation must be adequate (that is, capable of gathering evidence to determine whether police behaviour complained of was unlawful and if so, to identify and punish those responsible). Thirdly, the investigation must be carried out promptly and with reasonable expedition. Fourthly, there must be a sufficient element of public scrutiny of the investigation or its results, although the degree of public scrutiny required will be dependent upon the circumstances. Fifthly, the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests·

NOTES

FACILITATORS' NOTES: SESSION 2

This session seeks to sensitise identifying 'vulnerable individuals'.

This is a small-group discussion work of 45 minutes; with a 15-minute reporting-back session in plenary.

The aim of the discussion is to have participants consider the identification of 'vulnerable individuals' in detention. The introductory talk should have alerted the learners to 2 situations:

- Individuals who are at risk of psychological harm from an identifiable individual
- Individuals who may be 'vulnerable' on account of personal characteristics (or assumed characteristics)

The expectation is that, through discussion of personal experiences, learners will be able to recall and to recount specific cases (for example, in relation to police officers, victims of domestic violence or victims of human trafficking); and also begin to discuss possible organisational and institutional shortcomings in past cases. It is also expected that facilitators will assist learners (a) to discuss the concept of 'vulnerability' and identify specific risks (and that this will form the basis of report-back).

Discussion should focus on the particular group of learners: police; prison; officials dealing with complaints, etc. The sensitivity in this area may be considerable, and there may be still some difficulty when discussing factors that may encourage the use of ill-treatment by colleagues. *If* discussion flags, then learners could be asked to consider general or cultural factors that tend to facilitate (or to prevent) ill-treatment.

A final aim is to begin to help learners appreciate the importance of attitudinal change: ie, commitment to the need to address risks (group; and individual).

FACILITATORS' NOTES: Session 3 - Positive obligations in practice

This session introduces learners to the *Osman* case and related jurisprudence. This session should focus upon an introduction to application of 'positive obligations' in actual cases decided by the EuCtHR. The selection of cases may be to some extent dependent upon the target-group (as discussed above); but the wide-ranging nature of the cases should be covered, as should the particular failings (or absence of such a conclusion). Above all, learners should understand (a) the circumstances in which such obligations arise; and (b) the tests of 'identifiable risk' and of 'reasonable measures'.

This is a preparatory talk (of 30 mins) that will take participants into small-group tutorial discussion. This involves group discussion of various scenarios. These should be adopted to local circumstances (ie, written with a clear understanding of domestic law, practice and organisational responsibilities), but should feature a range of different factors in line with the case law. For a general audience, there is likely to be a range of issues (protecting prisoners in general; protecting discrete groups of prisoners; domestic violence; etc). The source of these 'scenarios' may also be based upon particular local circumstances (in particular, recent reports on ill-treatment in prisons; or Strasbourg judgments), etc.

3.7 COMBATING IMPUNITY: ADDITIONAL / ALTERNATIVE MATERIAL FOR PUBLIC OFFICIALS INVOLVED IN THE MONITORING OF PLACES OF DETENTION

1. Purpose

Systemic problems in many police and prison services are well-documented. For certain groups of public officials involved in monitoring places of detention, it will be considered desirable to have a greater awareness of the practice of other institutions (particularly the CPT). There is often an (understandable) emphasis in monitoring actual detention conditions, but this module seeks to assist the preventive and investigatory monitoring of places of detention focusing upon preventing the actual infliction of ill-treatment.

This course complements the course above [at 3.5], but is intended to be adapted for a particular audience as required. There may also be a need to ensure that visiting delegates can discharge a range of skills, eg interview techniques, assessing the quality and dimensions of living spaces, etc.

2. Aims and intended learning objectives

This course seeks (a) to ensure that learners have a significant level of understanding of CPT standards and working-methods; and (b) to discuss the implications of these standards for those charged with visits to prisons.

The intended learning outcomes can be stated thus:

By the end of this course, learners will be able to:

- Restate key CPT standards in respect of prisons (and short-term SIZOs)
- Discuss areas of concern for monitoring visitation groups (in addition to monitoring of actual conditions of detention).

3. Aims and intended learning outcomes

At this stage, and until the actual scope of the ILOs is clarified, elaboration of ILOs is not possible.. ILOs are likely to be expressed as involving knowledge and understanding but also of skills.

4. Course content

A clear statement of content may not be possible: there may indeed be a need for 'basic' and 'advanced' training (the former dealing with eg powers and responsibilities of visiting delegations, basic procedures,

NOTES

etc, and the latter for any 'team' that may require to intervene as a matter of urgency and with clear expertise).

Session 1: The scope and content of the 'procedural aspect' of Article 3 (and Article 2) talk: say 30 minutes

Session 2: Domestic issues for monitoring bodies small group discussion, say 45 mins

Session 3: Practising skills in monitoring places of detention small group work, say 2 hours with 15 mins plenary concluding session

FACILITATORS' NOTES: SESSION 1 - the procedural aspect of Articles 2 and 3

The starting-point should be an awareness across all learners of Strasbourg expectations: in particular, the domestic framework adopted must meet the key criteria of effectiveness (independence and impartiality; adequacy; promptness; sufficient victim involvement; and openness via public scrutiny); be coordinated; subject to checks (in cases of discontinuation or termination of proceedings or refusal to prosecute, the obligation extends to consideration of the judicial review of the legality of such decisions, or the possibility of triggering judicial proceedings by means of lodging a criminal complaint where this is provided for by domestic legislation); and be motivated by a determination to root out ill-treatment.

This also requires attitudinal change and a commitment to a sense of purpose. Thus 'authorities must take whatever reasonable steps they can to secure the evidence concerning the incident, including, *inter alia*, a detailed statement concerning the allegations from the alleged victim, eyewitness testimony, forensic evidence and, where appropriate, additional medical certificates apt to provide a full and accurate record of the injuries and an objective analysis of the medical findings, in particular as regards the cause of the injuries'.

FACILITATORS' NOTES: Session 2 - Current issues in monitoring places of detention

This session is designed to allow learners to discuss and to highlight (and based upon their previous experience of visits) possible areas of continuing concern. It allows groups to spot crucial areas where prison monitoring could make a real difference. Learners should each be asked to suggest 3 areas of possible attention for monitoring. Groups will be expected (in 25 minutes) to identify areas of concern. These may include the following issues (based upon a 2014 report on a specific country):

- The making of a threat or imposition of a sanction for communicating with monitoring bodies should be a specific disciplinary offence.
- Prisoners must be able to communicate concerns as to ill-treatment without fear of official reprisal; if necessary in exceptional cases, prisoners should be able to request transfer to another institution.
- Writing implements for sending written complaints should be readily available: sealed complaints envelopes should be readily available at multiple points in prisons, and not be dependent upon specific request, and access to telephone 'hotline' should be available to prisoners on the basis of confidential communication.

- A comprehensive system for the collation of data on complaints, etc of ill-treatment in prisons is necessary to give early indication of possible abuses and to monitor the subsequent investigation and outcome of complaints or reports.

- Central access to access actual real-time video of the situation in prison wings should be introduced with retention of video recordings for a sufficient period to allow the internal monitoring unit or the investigator to access relevant recordings when necessary.

- An atmosphere must be created in which the right thing to do is to report ill-treatment by prison staff; there must be a clear understanding that culpability for ill-treatment extends beyond the actual perpetrators to anyone who knows, or should know, that ill-treatment is occurring and fails to act to prevent or report it.

- Urgent attention is required in respect of the recruitment and selection, training and support of prison staff, particularly in respect of appointment and promotion criteria for prison officials. This training must also focus upon the sense of professional standards or of attitudinal change, for example by stressing the code of ethics for prison staff.

- Prisoners must be able to approach the health care service on a confidential basis without prison officers being able to screen requests for access and free from the threat of reprisal for doing so. Any attempt by prison staff to interfere with this right of access, or to seek to breach the confidentiality of the consultation, should lead to disciplinary sanctions. Transfers of prisoners for treatment to hospitals (whether within the prison system or not) should be determined by qualified medical personnel, not by bodies responsible for security or administration.

- The system for the compilation, confidentiality and long-term storage of prison medical files for each prisoner requires urgent attention. The recording of traumas must be enhanced: any signs of violence observed should be fully recorded, together with any relevant statements by the prisoner and the doctor's conclusions, and this information should be made available to the prisoner upon request. Medical secrecy should be observed in prisons in the same way as in the community, and the retention of patients' files should be the doctor's responsibility.

- Prison health care services should compile periodic statistics concerning injuries observed and forward these to the prison management, relevant Ministers, and internal and external domestic monitoring bodies (in particular, to the investigation, etc units of the MCLA and to the Ombudsman).

FACILITATORS' NOTES: Session 3 - skills

The actual training needs may include a range of skills, including (eg report-writing) and (most obviously) interview techniques. If this is thought desirable, then this should certainly make use of now –published internal CPT documents: see http://www.cpt.coe.int/en/workingdocs.htm .

This session can be complemented by a presentation (and question and answer session) by an expert who has had practical experience of monitoring. It may also be possible to invite a range of other experts (such as medical experts with a forensic background) who can help sensitise learners to issues that may arise.

NOTES

3.8 HUMAN RIGHTS AND THE USE OF MILITARY FORCE: TRAINING FOR MILITARY PERSONNEL AND FOR PUBLIC OFFICIALS WITH RESPONSIBILITIES IN A SITUATION OF CONFLICT

1. Purpose

The protection of military-personnel rights and protection of human rights of conflict-affected populations are two aspects of the topic of human rights in armed conflict. Military personnel (or armed police officers) also have the right to life. This is not an easy aspect of training. It requires a high level of awareness of Strasbourg Court case law as well as of aspects of international law (such as international humanitarian law).

Yet the importance of the topic cannot be under-estimated. Training in this area is thus likely to require a high level of contact hours for participants. However, if the training is to be provided by human rights experts for outside organisations (specifically, for the military), this will require very careful scanning of that organisation's needs to ensure there is as great a degree of alignment between what an organisation needs or wants, and what each potential trainee needs or wants, to help ensure that the training provided is going to be relevant and be seen as relevant by the trainers and learners. 'Scanning' the environment in which the particular organisation finds itself will throw up a host of potential training needs. Learners' needs (or strictly, the pool of those who potentially could be learners) may be more difficult to assess in light of the fact that this cohort will likely comprise a wide range of individuals working at different levels, with varying amounts of existing skills and knowledge.

There is an additional problem for trainers. There is a real risk that the training delivered by 'outsiders' is perceived of being delivered by an external agency that does not understand the military's needs or culture. Training that is not delivered by an organisation may readily be seen as irrelevant and an unwanted imposition. The organisation's leadership may be seen as paying lip-service to the content and its values. It can soon be discarded.

There are many topics that could readily lend themselves to training in this area. 'Protection of military rights' and 'human rights in situations of armed conflict' may well be two sides of the same coin: that is, the focus is likely to be on the use of potentially-lethal (or lethal) force, the use of force itself, detention powers, and protection of fundamental democratic freedoms. (This is to exclude consideration of human rights aspects of members of the military: ie, military justice and Article 6 guarantees; free speech and association rights, etc. It is assumed that this is training that would go well beyond the basic needs of learners.)

In addition, some awareness of jurisdictional matters (arising under Article 1 of the ECHR) may be needed where there is some issue as to *de facto* control of a territory. Again, though, this is of some complexity.

2. Aims and intended learning outcome

In light of the wide-open nature of the subject-matter, it is not possible in this area to provide clear aims or ILOs. These must be determined after careful analysis of training needs.

ILOs are likely to be expressed as involving knowledge and understanding alone. There will be a need for the development of skills (operational planning, negotiation and oral communication skills, etc) and – possibly - also attitudinal change (eg commitment to minimising the need to use force; recognition and acceptance of diversity, etc).

3. Suggested contact hours and learning hours

This requires negotiation with the external organisation. As suggested, this area of training is of considerable scope and complexity. If the assumption is that public officials should have an awareness of basic issues and leading case law in Strasbourg jurisprudence, then there still should be some discussion as to whether this is 'training' or simple knowledge-transmission, for much of the material is likely to involve the need for short lectures followed by small group discussion (based upon case discussion or scenarios). If the training is for those charged with the possible use of lethal force, more attention to other issues (such as negotiation skills, operational planning, etc) will be desirable. Attitudinal change (eg, to ensure that lethal force is only used truly as a last resort, or to ensure that detainees are treated properly) will also be necessary.

4. Course content

The course will likely focus upon an introduction to the ECHR and relevant case law. This will involve identification of key principles, including the relevant articles of the ECHR. As stressed, the range of topics is both wide and complex:

- Article 2, the right to life and the procedural aspect
- Article 3 and the fight against ill-treatment, particularly in a military setting
- Article 5, right to liberty and security
- Article 14, prohibition of discrimination and Article 1 (general prohibition of discrimination) of Protocol No. 12
- Article 1 of Protocol 1, the protection of property
- And possibly, in an international context, Article 1

In short, the problem will be in defining the scope of training. No one course is clearly able to cover all topics.

In consequence, it is not appropriate in this area to suggest a course outline, or to provide facilitators' notes. Nevertheless, it is possible to identify the areas in which case law exists. What follows is thus an attempt to highlight key cases that trainers may use:

NOTES

FACILITATORS' NOTES: The ECHR and the military, and responsibilities to the civilian population – key cases in Strasbourg jurispridence

State obligations in organising its military services:

Article 9 - Compulsory military service and conscientious objectors

- Bayatyan v. Armenia (App No. 23459/03)
- Ülke v Turkey (App No. 39437/98)
- Taştan v Turkey (App No. 6374/00)

Article 2 and 3 – Duty of care over active servicemen

- Chember v Russia (App No. 7188/03)

Article 8 – Homosexuality in the military

- Smith and Grady v United Kingdom (App Nos. 33985/96, 33986/96)

Article 14 – Gender differences in military service

- Spöttl v Austria (App No. 22956/93)
- Karlheinz Schmidt v Germany (App No. 13580/88)

Article 2 – Duty to Investigate the use of lethal force

- Al-Skeini and Others v United Kingdom (App No. 55721/07)
- Jaloud v The Netherlands (App No. 47708/08)

Article 3 – Treatment of Detainees

- El-Masri v The Former Yugoslav Republic of Macedonia (App No. 39630/09)
- Nasr and Ghali v Italy (App No. 44883/09)

Article 5 – Detention of Enemy Combatants

- A and Others v the United Kingdom (App no. 3455/05)
- Hassan v United Kingdom (App No. 29750/09)

Article 8 – Surveillance

- Roman Zakharov v Russia (App No. 47143/06)

Relationship between the ECHR and wider international humanitarian law/law of armed conflict

- Hassan v United Kingdom (App No. 29750/09)

Applicability of ECHR to conflict zones

Article 1 – Extraterritorial application

- Bankovic and Others v Belgium and Others (App No. 52207/99)
- Al-Skeini and Others v United Kingdom (App No. 55721/07)
- Hassan v United Kingdom (App No. 29750/09)
- Jaloud v The Netherlands (App No. 47708/08)
- Smith v Ministry of Defence [2014] AC 52
- Al-Saadoon & Ors v Secretary of State for Defence [2015] EWHC 715 (Admin)
- Serdar Mohammed and Others v Secretary of State for Defence [2015] EWCA Civ 843
- Hirsi Jamaa and Others v Italy (App No. 27765/09)

Article 15 – Derogation from the ECHR

- European Court of Human Rights factsheet on "Derogation in Times of Emergency".
- Lawless v Ireland (No. 3) (App No. 332/57)
- Ireland v United Kingdom (App No. 5310/71)
- A and Others v the United Kingdom (App no. 3455/05)
- Hassan v United Kingdom (App No. 29750/09)

NOTES

3.9 WOMEN'S RIGHTS IN A DOMESTIC CONTEXT: AN INTRODUCTORY COURSE FOR PUBLIC OFFICIALS INVOLVED IN CRIMINAL JUSTICE SYSTEM DELIVERY

1. Purpose

There is a particular need to consider training in sensitising public sector organisations (and in particular, individuals working in criminal justice agencies such as police, MIA, judges and prosecutors) to aspects of Strasbourg case law of relevance to the protection of women's rights. Discriminatory attitudes can affect the discharge of services to women; the particular vulnerability of women to phenomena such as domestic violence and human trafficking can continue to be effectively ignored.

The course may also be of interest to NGOs.

2. Aims and intended learning outcomes

The aim of this course seeks to raise awareness of a range of human rights concerns of particular importance in respect of women. It focuses primarily upon ECHR concerns, but also includes standard-setting under the UN Convention for the Elimination of Discrimination against Women (CEDAW).

The ILOs can be stated thus:
By the end of this course, each learner will be able to:

- explain the positive obligations placed upon state officials to take effective steps to protect women from threats of domestic and other violence
- restate the scope and content of the obligation to undertake an effective investigation into violence directed at women
- outline the content of anti-discrimination guarantees found in the ECHR.
- discuss the extent of the problems of domestic violence and human trafficking in domestic society.

3. Suggested contact hours and learning hours

It is proposed that this course extends to one day (ie, 1 session of 3 hours, and one of 2 hours). Participants will be expected to prepare for this seminar by seeking to understand the extent of violence against women in domestic society (see facilitators' notes 2).

This can be adapted in accordance with the specific background of the intended audience, but a basic suggested outline is as follows:

Session 1: International Contexts talk: 30 mins

Session 2: Domestic contexts, etc violence talk 20 mins, plus 40 minutes small-group discussion

Session 3: The ECHR and domestic violence: talk: 20 minutes, plus 60 minutes small-group discussion

Session 4: Discrimination and the ECHR

FACILITATORS' NOTES: SESSION 1 - international contexts

The purpose of this session is to sensitise the learners to the topic – the role and status of women in international law and in cultures across the globe. This talk should attempt to (a) outline the extent to which women are still being considered as second-class citizens in domestic law, culture and religion; and (b) the work of the UN's CEDAW committee.

The range of topics that could be discussed briefly is large. This talk cannot cover all of the situations, but it will be necessary to help learners be aware of the economic, cultural and social contexts of women's rights across the globe. The obvious point is that non-Europeans may find themselves in the country, and that public sector officials may be expected to be aware of the background of such individuals.

The phenomenon of human trafficking in Europe is extensive: see the website of GRETA: http://www.coe.int/t/dghl/monitoring/trafficking/default_en.asp

The final part of the talk should acquaint the learners with the UN Convention for the Elimination of Discrimination against Women (CEDAW) and the Committee: see in general https://www.un.org/womenwatch/daw/cedaw/

FACILITATORS' NOTES: SESSION 2 - domestic contexts

This session leads directly from the first session, but focuses upon the domestic situation. This could also allow a guest expert to talk about the subject in general, or another expert to address the audience on one particular aspect (such as domestic violence or human trafficking). Reports of various monitoring bodies (including Council of Europe bodies) could also provide assistance.

The first group discussion should focus upon reflection by the learners of what they have heard, and in particular, of an assessment of the extent to which their experience of the domestic situation has been reflected in official reports. Learners should thus be asked to consider (a) what experience they have in an official capacity of discrimination or inequality; and (b) of concerns relating to minorities in this field. Groups could thereafter be asked (c) to suggest strategies to address the causes and effects of discrimination. [Participants could be asked in advance to consider these questions, if this is thought appropriate.]

It goes without saying that this session is also designed to help address attitudinal change on the part of learners. The topics may require sensitive handling.

NOTES

FACILITATORS' NOTES: SESSION 3 - the ECHR and domestic violence

The first part of this presentation is a talk, outlining key case law on the subject. This leads to small-group discussion on case studies.

The following are the key points that should be made in the talk or through the group discussion; scenarios for discussion could be drafted upon the facts in the key cases listed below, but adapted to local circumstances.

DOMESTIC VIOLENCE

See in general for discussion of the notion of violence against women as a form of discrimination: http://hub.coe.int/en/web/coe-portal/event-files/our-events/25-november-domestic-violence?dynLink=true&layoutId=217&dlgroupId=10226&fromArticleId=

- There is a particular responsibility upon the authorities to address domestic violence, and the failure to protect individuals known to be at risk from a violent member of the household may in certain circumstances engage Article 2 (and similarly, in cases not involving loss of life, Articles 3 and 8). Where the violence is gender-based, Article 14 may also be of relevance. In *Opuz v Turkey* (2009), the authorities had been aware of incidents of serious violence and threats made by the applicant's husband against her and her mother, but the authorities had considered the incidents to have been a 'family matter' and only one incident had resulted in a successful criminal prosecution before the applicant's mother had been killed by her husband. Repeated requests by the women for protection had been ignored. Further requests made after the husband had been convicted but released pending appeal similarly led to no effective action until the applicant had lodged a complaint with the Strasbourg Court. The Court ruled that there had been a violation of Article 2 since a lethal attack had not only been possible but even foreseeable in light of the history of violence. The response of the authorities to protecting the applicant had been manifestly inadequate: although certain proceedings had been discontinued following the withdrawal of complaints, the Court noted that the more serious the offence or the greater the risk of further offences, the more important it was that the prosecution should continue in the public interest. Crucially, too, the circumstances disclosed a violation of Article 14 taken with Articles 2 and 3 in light of international legal standards supporting the principle that the failure (even when unintentional) to protect women against domestic violence breached the women's right to equal protection of the law. The general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence, violence that was gender-based, and that in consequence constituted a form of discrimination against women. (See also at paras 132 and 149: 'the issue of domestic violence, which can take various forms ranging from physical to psychological violence or verbal abuse … is a general problem which concerns all member states and which does not always surface since it often takes place within personal relationships or closed circuits and it is not only women who are affected; here, the conclusion was that 'the national authorities cannot be considered to have displayed due diligence' and thus had failed 'in their positive obligation to protect the right to life of the applicant's mother'.)

- The *Opuz* judgment reflects the opinion of the UN Committee on the Convention on the Elimination of All Forms of Discrimination against Women in its General Recommendation no 19 that 'gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men' and is thus prohibited under CEDAW, Art 1, and its reiteration in its combined fourth and fifth periodic report on Turkey that violence against women, including domestic violence, is a form of discrimination (CEDAW/C/TUR/4–5 and Corr.1, 15 February 2005, para 28).

- The *Opuz* judgment also reflects the CEDAW Committee's decisions in Communications 2/2003, *AT v Hungary* (decision of 26 January 2005) and 6/2005, *Fatma Yÿldÿrÿm v Austria* (decision of 1 October 2007). See also *Kontrová v Slovakia,* (31 May 2007), paras 46–55 (failure by the police to take appropriate action to protect the lives of her children in light of knowledge of the threat posed by his abusive behaviour in the home)

- Refer also to the Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS 210) (2011)) [the 'Istanbul Convention'], Art 5(2): 'Parties shall take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-State actors'. In terms of Art 3, 'violence against women' is considered 'as a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life'. 'Domestic violence' covers 'all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim'; and '"gender" shall mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men'. 'Gender-based violence against women' is defined as 'violence that is directed against a woman because she is a woman or that affects women disproportionately'; 'women' includes girls under the age of 18. For further Council of Europe standard-setting, see Committee of Ministers Rec (2002) 5 on the protection of women against violence.

- Note also the suggestion of the UN Special Rapporteur on Violence against Women to the Commission on Human Rights of the UN Economic and Social Council (E/CN.4/2006/61) that there is now a rule of customary international law requiring states 'to prevent and respond to acts of violence against women with due diligence'.

NOTES

OTHER KEY CASES:

- *MC v Bulgaria* (2003), where domestic law still proceeded upon the requirement of physical force in the definition of rape, a situation the Court considered was out of line with modem standards in comparative and international law. It is now expected that both physical and psychological violence directed against women should be subject to criminal sanction.
- *Kontrová v Slovakia* (2007) (failure to address long-standing physical and psychological abuse by father who eventually shot dead his children and himself: violation in light of failures by police to take prescribed action to prevent risk to family);
- *Branko Tomašić and Others v Croatia* (2009) (failure to take all reasonable steps to protect lives of mother and child from threat posed by the child's father who had previously been convicted of threatening to kill them: violation).

HUMAN TRAFFICKING

- Most European states are now affected by trafficking, primarily of women and minors, as countries of origin, transit or destination. At international, regional and national level, co-ordinated action is now evident. In particular, both the Council of Europe and the European Union have taken steps to tackle the issue.
- The contemporary importance of Article 4 lies in the positive obligation upon states to ensure that domestic law provides adequate protection against the exploitation of individuals through human trafficking by other private parties. Article 4 imposes both a substantive and a number of procedural obligations: to establish a legislative and administrative framework that prohibits and punishes forced or compulsory labour servitude and slavery, to make use of that framework to protect victims, and to carry out an effective investigation into 'situations of potential exploitation when the matter comes to the attention of the authorities'
- The phenomenon consists in 'the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation' Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Protocol to the 2000 UN Convention against Transnational Organised Crime) (the 'Palermo Protocol'). An identical interpretation is used in the Council of Europe Convention on Action against Trafficking in Human Beings (CETS 197 (2005)), Art 4. Art 3(a) of the Palermo Protocol adds that 'exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery

or practices similar to slavery, servitude or the removal of organs.' The consent of a victim of trafficking to the intended exploitation is irrelevant where any of the means set out in Art 3(a) have been used: Art 3(b). There are thus three elements in the definition: action, means and purpose (but note in relation to persons under 18, only action and purpose are relevant). This definition potentially encompasses a wide range of exploitation of others, including forced marriage.

- For Council of Europe standards, see Council of Europe Convention on Action against Trafficking in Human Beings (CETS 197 (2005)). See also Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (the 'Lanzarote Convention'). At EU level, the Treaty of Amsterdam, Art 29 first made specific reference to the trafficking of persons and offences against children. Further measures were contained in a Council Framework Decision in 2002, and in a Council Directive in 2004 (2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking, etc) and in Directive 2011/36/EU) on prevention and combating trafficking in human beings and protecting its victims. There is now an EU Anti-Trafficking Coordinator. See further http://ec.europa.eu/anti-trafficking.

KEY CASES

- *Siliadin v France* (2005) (the applicant was 15 when she arrived in France with a French national who had undertaken to regularise her immigration status and to arrange for her education in return for unpaid household service, but had been 'lent' to another couple who had made the applicant work 15 hours a day for some four years until criminal proceedings had been brought against the couple who had been acquitted with only an order for the payment of damages having been made against them: being held against her will, and as a minor unlawfully present in France and afraid of being arrested by the police had constituted forced labour, and while it could not be determined that the applicant had been held in slavery in the traditional sense of that concept as the couple had not exercised a genuine right of ownership over the applicant, the vulnerability and isolation in which the applicant had found herself together with the imposition of forced labour and the lack of freedom of movement supported a further determination that the applicant had also been held in servitude).
- *Rantsev v Cyprus and Russia* (2010): (death of Russian woman in unexplained circumstances after having fallen from a window of a block of flats in Cyprus where she had gone to work on an 'artiste' visa and one hour after police had asked the manager of the cabaret where she had worked before fleeing to collect her from a police station, and set against a background of reports suggesting the prevalence in Cyprus of trafficking in human beings for commercial sexual exploitation and the role of the cabaret 'industry' and 'artiste' visas in facilitating such trafficking: there had been failures on the part of both national authorities as no appropriate legal and administrative framework to combat trafficking had been put in place by the Cypriot authorities and the

NOTES

police had failed to protect the woman even although a credible suspicion that she might have been a victim of trafficking existed, while the Russian authorities had not carried out an investigation into the recruitment with a view to identifying those responsible). The Court noted:

'trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere. It implies close surveillance of the activities of victims, whose movements are often circumscribed. It involves the use of violence and threats against victims, who live and work under poor conditions. It is described … as the modern form of the old worldwide slave trade.'

EFFECTIVE INVESTIGATIONS

- The obligation to investigate possible discriminatory aspects of domestic violence or of human trafficking is an obligation not of result but of means: to carry out an effective investigation into circumstances suggesting that an individual has been subjected to behaviour falling within the scope of Articles 2, 3 or 4. The investigation must be independent from those implicated in the events and capable of leading to the identification and punishment of the individuals responsible if it is established that death, ill-treatment or forced labour or servitude has occurred. Promptness and reasonable expedition is also necessary, but action as a matter of urgency will be expected if the possibility of removing a victim from the harmful situation exists. In respect of human trafficking, this may engage the responsibilities of criminal justice agencies in two (or more) countries.

- Learners should be aware of Strasbourg Court expectations: in particular, the investigation must meet the key criteria of effectiveness (independence and impartiality; adequacy; promptness; sufficient victim involvement; and openness via public scrutiny); be coordinated; subject to checks (in cases of discontinuation or termination of proceedings or refusal to prosecute, the obligation extends to consideration of the judicial review of the legality of such decisions, or the possibility of triggering judicial proceedings by means of lodging a criminal complaint where this is provided for by domestic legislation); and be motivated by a determination to root out ill-treatment.

KEY CASES

Opuz v Turkey; and *Rantsev v Cyprus and Russia,* above.

FACILITATORS' NOTES: SESSION 4 - Discrimination

This session allows learners to gain awareness of

(a) the general approach taken to discrimination under the ECHR;
(b) specific issues affecting sex discrimination. It begins with an introductory talk, and then case dis-

cussion based upon key cases (and adapted in accordance with domestic circumstances). The session should conclude with a plenary report-back (of around 20 minutes).

Learners should be aware of crucial definitions: direct discrimination; indirect discrimination; victimisation; and harassment (see INTERRIGHTS *Non-Discrimination in International Law*. This is available at http://www.interights.org/handbook/index.html/).

- Explicit expression for the principle of non-discrimination is found in three provisions in the ECHR. First, Article 14 of the ECHR; secondly, Article 5 of Protocol no 7 provides that 'spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution'; and thirdly, Article 1 of Protocol no 12 which entered into force in 2005 makes provision for a general prohibition of discriminatory treatment.

- In the context of Article 14, 'discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations … [The Court] has also accepted that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group, and that discrimination potentially contrary to the Convention may result from a *de facto* situation'. Normally, the European Court of Human Rights will consider it unnecessary to examine a complaint of discrimination under Article 14 when it has already established that there has been a violation of a substantive guarantee raising substantially the same point, unless 'a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case'. An individual cannot waive his right not to be subjected to discriminatory treatment.

- Article 14 can only be considered in conjunction with one or more of the substantive guarantees contained in Articles 2 to 12 of the Convention or in one of the protocols.

- *The existence of a 'relevantly similar' position* If the facts fall within the ambit of a Convention right, and there is established to be a difference in the treatment of two situations, the application of Article 14 may turn in the first place upon an assessment of the comparability of the situations in question. The persons in question must be in a 'relevantly similar' position. If no analogous situation arises, there can be no application of Article 14.

- *Prohibited grounds* If there is differential treatment of analogous situations, the next question is whether the basis of the differential treatment falls within the scope of Article 14. The list of prohibited grounds for discrimination is qualified by the phrase 'any ground such as', and is not exhaustive but merely illustrative· An applicant must show that a personal characteristic or status is involved in the difference of treatment. Certain prohibited grounds are straightforward: sexual orientation, marital status, and illegitimacy have readily been held to so qualify. 'Status', though, is not necessarily dependent upon a characteristic that is innate or inherently linked to the identity or the personality of the individual (such as sex, race or religion).

NOTES

- *Justification for differences in treatment* :If there has been differential treatment of analogous situations, falling within the ambit of a Convention right, on a ground falling within the scope of Article 14, the remaining question which may arise is whether the difference in treatment has an 'objective and reasonable' justification. A difference in treatment is not necessarily discriminatory: public authorities 'are frequently confronted with situations and problems which, on account of differences inherent therein, call for different legal solutions: moreover, certain legal inequalities tend only to correct factual inequalities'. A difference in treatment will be discriminatory only if it does not pursue a legitimate aim, or if there is no 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'. Very weighty reasons' are required to justify differential treatment based on such factors as race or ethnic origin, nationality, sex, sexual orientation and illegitimacy or adopted status.
- The onus of establishing that the applicant has been treated differently from another person in an analogous position rests on the applicant. It is then for the State to establish an objective and reasonable justification for the difference in treatment.
- Article 14 is not confined to direct discrimination: it also covers indirect discrimination. Article 14 can also impose an obligation to treat differently persons whose situations are significantly different.
- The European Court of Human Rights has frequently expressed the view that the advancement of the equality of the sexes is a major goal in the member States of the Council of Europe. It has stated that very weighty reasons would have to be put forward before the Convention organs could regard as compatible with the Convention a difference in treatment based exclusively on the ground of sex. This approach underpins much of the Court's jurisprudence.

KEY CASES

- In *Burghartz v Switzerland* (1994), for example, the Court held that a Swiss law which permitted a wife to prefix her married name with her maiden name, but which prohibited her husband from using the same name, lacked an objective and reasonable basis, and therefore constituted discrimination based on sex which was incompatible with Articles 8 and 14.
- In *Karlheinz Schmidt v Germany* (1994), the Court considered a German law which obliged men, but not women, to serve in the fire brigade or to make a financial contribution. The Court noted that in view of the continuing existence of a sufficient number of volunteers, no man was obliged in practice to serve in a fire brigade: payment of the financial contribution had become the only effective duty. In the imposition of such a financial burden, a difference of treatment based on sex could not be justified. There had therefore been a violation of Article 14 taken in conjunction with Article 4, paragraph 3.

- Discrimination may also arise from a *de facto* situation as in *Zarb Adami v Malta* (2006), where the Court found a similar violation in light of the absence of a justification for the striking discrepancy between the percentage of men as opposed to women called upon to serve as jurors.
- In *Van Raalte v Netherlands* (1997), the applicant was an unmarried man with no children. He complained that a law which exempted childless women over the age of 45 from paying social security contributions towards child benefit, but which had no such provision for exempting men, was discriminatory. The European Court of Human Rights held that while States enjoyed a certain margin of appreciation as regards exemptions from such contributory obligations, Article 14 requires that such a measure 'applies even-handedly to both men and women unless compelling reasons have been adduced to justify a difference in treatment'. The Court was not persuaded that such reasons existed, and held that there had been a violation of Article 14 when taken together with Article 1 of Protocol no 1.
- In *Schuler-Zgraggen v Switzerland* (1993), which concerned the decision of the domestic court to refuse the applicant invalidity benefit, the applicant alleged that the domestic court had violated Article 14 in conjunction with Article 6 when it based its judgment on the assumption that many married women gave up their job when their first child was born. The domestic court had inferred that the applicant would similarly have given up work even if she had not had health problems. The applicant considered that if she had been a man, the court would not have made such an assumption, which was in any case contradicted by several scientific studies. The Court noted that this assumption was 'the sole basis for the reasoning', and introduced a difference in treatment based on the grounds of sex only that lacked any reasonable and objective justification.
- In *Stec and Others v United Kingdom* (2006) the Grand Chamber ruled that differences between the entitlement of men and women to work-related injury benefits pursued a legitimate aim and were reasonably and objectively justified. The differences reflected the difference in the pensionable retirement age, which was intended to correct the economic disadvantage suffered by women as a result of their traditional (and unpaid) role of family carer.
- In *Sahin v Germany* and in *Sommerfeld v Germany* (2003), the Grand Chamber held that a difference between the treatment of applications for access to children, between on the one hand fathers of children born of a relationship where the parties were living together out of wedlock, and on the other hand parents of children born in wedlock, constituted a violation of Article 14 in conjunction with Article 8. The difference in treatment was not supported by sufficiently weighty reasons to justify the assumption that access should only be permitted in the former case where it could be established that this would have beneficial effects upon the particular child's well-being.

NOTES

ENG

www.coe.int

The Council of Europe is the continent's leading human rights organisation. It comprises 47 member states, 28 of which are members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.

COUNCIL OF EUROPE

CONSEIL DE L'EUROPE