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Right to liberty and security

Training manual on Article 5 ECHR
For Macedonian judges and prosecutors

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Introduction

How to use this Manual

This Manual has been developed within the framework of the Project "Increasing judicial capacity to safeguard human rights and combat ill-treatment and impunity "CAPI", running from December 2016 to May 2018 as part of the Horizontal Facility for the Western Balkans and Turkey. The latter is a co-operation framework of the Council of Europe and the EU aiming at supporting South East Europe and Turkey to comply with European standards. With this project the Council of Europe, as the leading European Institution in promoting and setting European human rights standards and practices, intends to contribute to the efforts of the country to strengthen the capacities of legal professionals to safeguard human rights and combat ill-treatment and impunity.

One of the objectives of the Project is to increase the knowledge and skills of the judiciary (Judges and Prosecutors) in investigating and adjudicating cases where deprivation of liberty or allegations of torture or inhuman or degrading treatment are at stake. The present work is one of the outputs produced by the Project, namely training manuals on articles 5 and 6 (both civil and criminal aspects) ECHR, reasoning of judgments, adult training methodology and techniques, as well as a moot court scenario and instructions on how to run this type of activity.

The idea was to make available to the Academy of Judges and Public Prosecutors material to be used for in-person pre and in-service training of Judges and Prosecutors to enable them to apply human rights principles and norms in the exercise of their daily professional activities. The ultimate goal of these educational resources and activities is to strengthen the protection of human rights in and through domestic legal procedures.

This guidebook aims to assist current and future trainers of the Academy of Justice in delivering pre and in-service training on article 5 ECHR. Its use requires, as a prerequisite, that trainers familiarise themselves with the principles of adult education and training methodologies and techniques illustrated in the Manual on Training Methodology developed under the same Project. The present work is in fact based on a training methodology that encourages participants to play an active role, contributing their professional expertise to the joint study of how to apply international human rights standards effectively. The idea around which it was developed is that of co-operative learning, when people learn through working together to seek outcomes that are beneficial both to themselves and to all members of the group. In addition to favouring ownership of knowledge and skills, co-operative learning promotes higher achievement and greater productivity, and greater social competence and internalization of results. The activities proposed in this manual require great participation and engagement (and often a lot of time!): resistance can only be overcome if there is a supporting environment which is perceived as not judgmental and focuses on processes rather than final solutions.

In terms of substance, use of this work requires a solid understanding of the Convention system and its principles of interpretation. This, of course, in addition to

specific knowledge of the subject matter, that cannot be confined to the information provided in this manual. The suggested readings indicated, thus, represent the essential minimum in order to run the course.

As always, it is for the facilitators to use their experience and talents to guide the audience through the course and at all times assess and reassess the needs of the participants. Accordingly, the materials proposed can and should be used with a substantial degree of flexibility: presentations, examples, case studies and role plays may need to be tailored and customized to reflect relevant legal systems and address issues of particular interest.

The present manual is composed of 2 parts. The first part comprises of 7 Sessions and offers material and guidance for running, at a minimum, a 2-day course (general module) for candidate judges and prosecutors (pre-service training). The second part comprises of 5 Sessions and offers material and guidance and a 1-day training (specific module) within the context of continuous education on article 5 ECHR. It goes without saying that the specific module requires, as a prerequisite, the knowledge of the main features of article 5 ECHR as well as the principles of interpretation of the ECHR. Each module contains guidance for the organization of the sessions, including opening and closing, as well as self-assessment exercises. Additional training aids such as questions for discussion, planning charts, exercises, case studies and role plays, are also available. These tools should in no way limit the facilitator's freedom to introduce other useful and thought-provoking questions and exercises, provided that they are aimed at meeting the learning objectives of the various sessions. The proposed questions are merely indicative of what can be asked. There may well be occasions when some facilitators will find it difficult to put too direct a question to the participants and when it might be preferable, in order to obtain the same results, to ask questions in a more indirect way.

The time allocated to each session is indicative but not final, as it might be influenced by the response or interest of the audience, also in relation to recent cases or developments. Exceptionally, the exercises presented in the manual may be too complex. In such situations, it is the task of the trainers the needs of the participants and to adjust the material provided so that it is adequate and meaningful to them at that time.

The training proposed for the pre-service training is to be complemented with the moot court that was developed under the present Project on articles 3, 5 and 6 and which is presented as a separated output, together with an accompanying guidebook on how to run this type of exercise.

We hope that this manual only represents the beginning of a fruitful training experience where your expertise, creativity and passion can make the difference!

Structure of the curriculum
The curriculum of the general module has been structured into session, each of them subdivided into steps. The table below summarized the content and duration of each stage.

Note that in addition to the sessions indicated, it would be advisable to end Day with short session during which a quickly recap the topics discussed, of the knowledge learned and the expertise gained takes place. At the beginning of day 2 participants should be asked whether they have any questions from the previous day that would need to be answered before proceeding with new topic. This introductory session should also provide a link with what has been done on day 1 and what lies ahead.

General Module

Session I - Introduction and opening of the course Duration: 45 minutes/1 hour	
Step 1 – 15/30 minutes	Introduction of participants
Step 2 – 15 minutes	Expectation and self-assessment of knowledge
Step 3 – 5 minutes	Presentation of the agenda
Step 4 – 10 minutes	Pre-course knowledge assessment

Session II - Authorized deprivation of liberty under article 5 ECHR Duration: 6 hours 30 minutes	
Step 1 – 5 minutes	What does deprivation of liberty means?
Step 2 – 2 hours	Restriction of movement vs deprivation of liberty
Step 3 – 20 minutes	The requisite of lawfulness of the detention under article 5 para. 1 ECHR – Introduction
Step 4 – 50 minutes	The notion of reasonable suspicion
Step 5 – 45 minutes	The requisites of legality and lawfulness, and protection from arbitrariness in the national context
Step 6 – 2 hours 30 minutes	Let's practice!

Session III – Rights of persons deprived of liberty Duration: 50 minutes	
Step 1 – 30 minutes	Procedural guarantees enshrined in article 5 ECHR
Step 2 – 20 minutes	Right to compensation for unlawful arrest or detention

Session IV – Protection from arbitrariness Duration: 3 hours	
Step 1 – 2 hours 30 minutes	Human rights competition
Step 2 – 30 minutes	Is national practice compliant with international standards? Share of experiences

Session V – Detention of vulnerable categories Duration: 2 hours

Step 1 –1 hour 20 minutes	Who is right?
Step 2 – 40 minutes	The treatment of person with mental health problems

Session VI – Alternative measures to detention Duration: 45 minutes	
Step 1 –10 minutes	Why alternatives to detention
Step 2 – 35 minutes	Alternatives to detention and gender perspective

Session VII – Closure Duration: 30 minutes	
Step 1 – 10 minutes	Post-course knowledge assessment
Step 2 – 20 minutes	Time to finish

Specific Module

Session I - Introduction and opening of the course Duration: 45 minutes/1 hour	
Step 1 – 15/30 minutes	Introduction of participants
Step 2 – 15 minutes	Expectation and self-assessment of knowledge
Step 3 – 5 minutes	Presentation of the agenda
Step 4 – 10 minutes	Pre-course knowledge assessment

Session II - Authorized deprivation of liberty under article 5 ECHR Duration: 2 hours	
Step 1 – 5 minutes	What does deprivation of liberty means?
Step 2 – 1 hour	Restriction of movement vs deprivation of liberty
Step 3 – 20 minutes	The requisite of lawfulness of the detention under article 5 para. 1 ECHR – Introduction
Step 4 – 50 minutes	The notion of reasonable suspicion
Step 5 – 45 minutes	The requisites of legality and lawfulness, and protection from arbitrariness in the national context

Session III – Rights of persons deprived of liberty Duration: 50 minutes	
Step 1 – 30 minutes	Procedural guarantees enshrined in article 5 ECHR
Step 2 – 20 minutes	Right to compensation for unlawful arrest or detention

Session IV – Alternative measures to detention Duration: 45 minutes	
Step 1 –10 minutes	Why alternatives to detention
Step 2 – 35 minutes	Alternatives to detention and gender perspective

Session V – Closure Duration: 30 minutes	
Step 1 – 10 minutes	Post-course knowledge assessment
Step 2 – 20 minutes	Time to finish

Keys to symbols and headings used to present activities

Time provides a general indication of the time needed to run the whole activity, including the debriefing and discussion, when applicable. You will need to make your own estimate of how much time you will need: for instance, if you are working with many small groups reporting back to plenary, then you will have to allow more time for each to feedback. If the group is large, then you will need to allow time for everyone to have an opportunity to contribute to the debriefing and evaluation.

Objectives relate to the competence-based learning objectives in terms of knowledge, skills, attitudes and values.

Key points gives an indication of the key points to be used in the course of the activity, for instance during the discussion or in the debriefing. They normally represent the knowledge-imparting component of the activity


Material indicates the tools needed to run the activity.


Resources and readings necessary to conduct the session.


Methodology and instructions for how to run the activity.


Debriefing provide help on how to conduct the debriefing of an activity.


Tips for facilitators are guidance notes and explanations about the method and content.

General module

Session I
Introduction and opening of the course
45 minutes/1 hour

Learn about other participants
State expectations
Illustrate purpose, format and methodology of training
Identify knowledge and expertise present in the group
Establish an environment that is conducive to training
Set baseline of individual knowledge

Manual on training methodology

Step 1 - Introduction of participants

15 minutes/30 minutes

The tone of the training is set from the very first moment the participants arrive at the venue. There are a number of ways to ensure that participants are introduced to one another. Even when participants already know each other it is important that they have time to 'form' as a group at the beginning of a session. This helps create an environment which is cooperative and conducive to participatory training. However, should you consider that this activity is redundant, feel free to skip it – the time left will be certainly come to use during discussions or the practical exercises!

The methodology can be chosen depending on whether most of the participants already know each other (The Little known Fact) or not (Interviews, True or False). For the first option you can consider 15 minutes in total, for the second you can consider up to 30 minutes.

The Little Known Fact: ask participants to share their name, department or role in the organisation, length of service, and one little known fact about themselves. This "little known fact" becomes a humanising element that can help break down differences such as grade/status in future interaction.

Interviews: ask participants to get into twos. Each person then interviews his or her partner for 5 minutes while paired up. The interview should touch on who, what, where, when and should also include something personal about the person (i.e. hobby, favourite movie…). When the group reconvenes, each person introduces their interviewee to the rest of the group.

True or False: ask your participants to introduce themselves and make three

or four statements about themselves, one of which is false. Now get the rest of the group to vote on which fact is false. As well as getting to know each other as individuals, this exercise helps to start interaction within the group.

 Do not worry if this activity takes less time than foreseen due to the fact that participants already know each other! The time left will certainly become an asset in the course of the training!

Step 2 – Expectations and self-assessment of knowledge

15 minutes

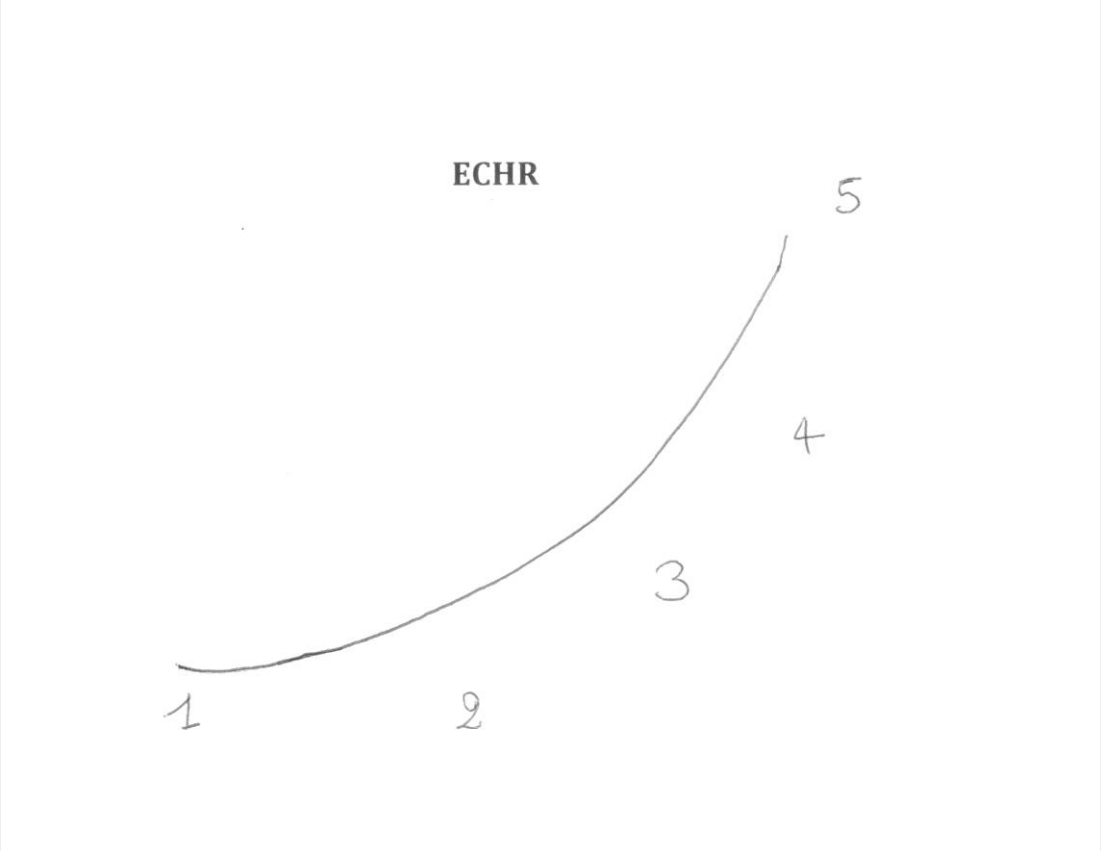
 Coloured post-its (3 colours), computer and projector, flipchart paper and markers, tape, small box

Drawing - Expectation tree
Draw structure of a tree on a flip chart paper hung to the wall.
Ask trainees to write on coloured post-its (2 colours) previously attached on their sitting desks their expectations and fears concerning the training course.
Clarify colours for expectations and fears.
Invite participants to post the slips on the flipchart, expectations to the treetop, fears to the trunk.
The trainer structures the cards so repeated expectations and fears become visible.

 *Trainer quickly reads the cards, discusses expectations (pointing out those that will not be met due to time constraints and the programme) and gives further information regarding the fears.*

 *It should be possible to revisit this expectation tree at the end of the course and discuss which expectations and fears were fulfilled or not. In this case, trainees are asked to remove post-its with expectations that were fulfilled and the cards with fears that were not significant; these cards are put in a small box below the tree.*

Self-assessment of knowledge and expertise
Draw diagram with a rising curve numbered from 1 to 5 on flipchart hung on wall, as shown below. Alternatively, use slide 1 in the Annex.



Ask trainee to write on third coloured post-it previously attached on their sitting desks their name and the numbers corresponding to highest point in knowledge of the ECHR as per the above scheme where

1 = No knowledge
2 = Basic knowledge
3 = Good knowledge
4 = Excellent knowledge
5 = Human Rights Expert

Invite participants to post the slips on the respective flipchart. Structure the cards so that the average knowledge becomes visible.

Trainer commends the wealth of knowledge or expertise already available, inviting its share within the groups, and emphasises that also those that have little to share, in fact can bring their point of view of "trainees" to the group, thus enabling it to grow. It should be possible to revisit these charts right at the end of the course, asking participants to appreciate the knowledge and expertise gained in the course by moving up the chart their post-its.

Step 3 – Presentation of the agenda

5 minutes

Navigate participants through the agenda and introduce the format of the training. Comment the agenda making reference to the expectations and fears (i.e. in relation to the self-assessment test).

Step 4 - Pre-course knowledge assessment

10 minutes

Multiple choice test annexed

Test

Distribute test. Ask participants to write their name on it. Explain to participants that this is a self-assessment tool aimed at helping identify what they know and what knowledge or understanding they need to deepen. Inform participants that results of the test will be used as baseline and that same test will be administered again at the end so as to measure progress.

Correct tests in plenary (each participant corrects own test).

Collect tests – they will be again distributed at the end of the post-training test for comparison.

Session II – Authorized deprivation of liberty under article 5 ECHR

6 hours 30 minutes

Differentiate deprivation of liberty from restriction of movement
Identify situations falling within the scope of application of article 5 ECHR
Understand what "lawfulness" mean under article 5 ECHR
Define the requisite of legality of a deprivation of liberty
Discuss the grounds justifying a deprivation of liberty
Circumscribe the notion of reasonable suspicion
Determine the length of time for validation of the arrest
Examine the effect of time on a detention
Compare national legislation to the ECHR
Sensitize participants to their particular role in protecting and promoting human rights
Apply the standards in real-life situations

The right to liberty and security of the person: A guide to the implementation of Article 5 of the ECHR https://rm.coe.int/168007ff4b (English only)
Guide on Article 5 of the Convention – Right to Liberty and Security http://www.echr.coe.int/Documents/Guide_Art_5_MKD.pdf (in Macedonian)
Selected factsheets on Detention, Criminal Field, Health http://www.echr.coe.int/Pages/home.aspx?p=press/factsheets&c= (English and other languages only)

Additional suggested reading

Copies of the ECHR for all participants, flipchart and flipchart paper, markers, tape, scenarios (handout or ppt).

Step 1 - What does deprivation of liberty means?

5 minutes

Brainstorming
Invite participants to read the text of article 5 ECHR from the Convention you distributed.
Ask participants to indicate situations or criteria to be used to assess whether a person has been deprived of its liberty. If participants are hesitant, prompt them by asking them if, for instance, if they think that a person who is obliged by the police officer to remain in the car during a routing traffic control is being deprived of its liberty or, for instance, if a witness is being held in the police station long after interrogation is subject to a restriction to liberty and security .
Note down keywords without commenting.
Keep the flipchart visible (stand-alone or wall) also in the course of the discussion of the scenarios that follow.

Main ideas will normally encompass:

detention (legal notion)
arrest (legal notion)
conviction (legal notion)
duration of the restriction (length of time)
nature of the restriction
effect of the restriction
possibility to leave
size of space available to the person
consent to confinement
degree of supervision or control

extent of isolation from the social context
availability of external contacts
use of coercion means (i.e. handcuffs)
sanctions applying if the person is leaving a certain place

 *It should be possible to revisit the result of the next activity in the light of the keywords written on the flipchart. Normally, during brainstorm, participants express an overall approach which tends to conform to the legal notion of arrest/detention/conviction which is only a minimum part of the situations covered by article 5 ECHR.*

Step 2 - Restriction of movement vs. deprivation of liberty

2 hours

 Handout or ppt, flipchart and markers, 1 stack of cards for each group, tape, markers

 ***Debate and voting***

The purpose of this exercise is to make participants understand the variety of situations that can amount to a deprivation of liberty. In order to do so distribute voting cards marked ARTICLE 5 and ARTICLE 2 P 4 to participants.

Divide participants into 6 groups of 4 people (depending on the number of participants you can have fewer groups and reduce the number of cases) and assign to each of them a case. Further subdivide each group into two and assign to one group the role of victim and to the other the role of the authorities. Instruct them they have 10 minutes to prepare for a TV debate during which each sub-group has to sustain their position as to the compatibility of the situation/incident with national and ECHR standards. Each group will have 5 minutes (to be timed strictly!) for presentation of arguments and 5 minutes for rebuttals. The rest of the audience will observe and, at the end, will be asked to vote (by holding up the relevant carton) for the party who was able to sustain better their position.

Eventually, just as in a TV debate, the trainer will act as host and invite randomly the public to express their opinion.

A short summary of the key points of the ECtHR judgment should be provided by the trainer orally.

 *If you think that the participants might resist the propose activity, as they do not feel to engage publicly to sustain their positions, also for fear of making mistakes, the same cases can be used for discussion in small groups, as illustrated below.*

Small groups

Prepare 2 flipcharts with the words DEPRIVATION OF LIBERTY and LIMITATION OF MOVEMENT and hang them to the wall. Divide participants into small groups of 3-4 persons. Distribute all the cases (or a selection of them, depending on reactivity of the group and relevance to their professional interests), together with a set of cards numbered from 1 to 8. Invite groups to choose the name of the team and the request that they put their name on each of the cards using the marker provided. Ask groups to discuss each case for around 5 minutes, focussing on the following questions:

1. Do the facts of the case disclose a deprivation of liberty under Article 5 ECHR or a restriction of movement?
2. Which arguments can you use to sustain your position?
3. In case there was a deprivation of liberty, was it lawful?

Ask participants to designate a different rapporteur for each of the cases discussed. After the internal discussion, ask all groups to glue/tape on the flipcharts each of the 8 cards with the name of their team on. Then, looking at the flipcharts (each bearing the card with the name of the team and the number of the case) ask each one group per case to explain why they considered the case to be a deprivation of liberty or a restriction of movement and debrief.

 *To ensure equal participation, make sure that each plenary discussion is lead by the presentation of findings by the rapporteur of a different group. You might want to choose the group to which to give the floor depending on whether, on a given case, the group reached conclusions which were not shared by the majority.*

 *Use the debriefing time to clarify any outstanding issues or address any misunderstanding using the solution keys provided.*

Hand-out

Case 1

The applicant was stopped at Baku International airport during border control because his name appeared under the status "to be stopped" in the database of the

State Border Service. He was taken to a separate room by the border-service officers and was ordered to wait there for further clarification of his situation. The applicant claimed that he spent some four hours in the room, whereas the Government claimed that it was only two hours. During that time the applicant was unable to leave or to contact anyone. After it turned out that his name had been flagged in the database owing to an administrative error (the failure to remove it following a presidential pardon for a criminal conviction) he was allowed to leave the airport. The cost of his missed flight ticket was reimbursed. Ultimately, the domestic courts dismissed his claims for compensation for unlawful deprivation of liberty.

Case 2

On 1 May 2001 a large demonstration against capitalism and globalisation took place in London. The organisers gave no notice to the police of their intentions and publicity material they distributed beforehand included incitement to looting, violence and multiple protests all over London. The intelligence available to the police indicated that, in addition to peaceful demonstrators, between 500 and 1,000 violent and confrontational individuals were likely to attend. In the early afternoon a large crowd made its way to Oxford Circus, so that by the time of the events in question some 3,000 people were within the Circus and several thousand more were gathered in the streets outside. In order to prevent injury to people and property, the police decided that it was necessary to contain the crowd by forming a cordon blocking all exit routes from the area. Because of violence and the risk of violence from individuals inside and outside the cordon, and because of a policy of searching and establishing the identity of those within the cordon suspected of causing trouble, many peaceful demonstrators and passers-by, including the applicants, were not released for several hours.

Case 3

The applicant had been arrested in connection with a criminal charge but the time for which he could lawfully be detained on remand had expired before the charges were ready to proceed. He was removed from the prison where he was being held and taken under court order to a small island to be kept under "special supervision". Whilst the island as a whole covered 50 sq. km., the area reserved for persons such as Mr Guzzardi in "compulsory residence" represented an area of not more than 2.5 sq. km. The applicant was able to move freely around this area during the day but unable to leave his dwelling between 22.00 and 07.00. He had to report twice daily to the authorities and could only leave the island with prior authorisation and under strict supervision. His contact with the outside world was also supervised and restricted. The applicant lived under these conditions for sixteen months.

Around the ninth-of-tenth of the island was occupied by a prison. Mr. Guzzardi was sheltered in a part of the village Cala Reale, mainly comprised by formal medical centres that were in very bad condition, almost demolished, in the region of carabineers, one school and a church. He was mainly living in society of persons who were suffering the same measure and surrounded by police.

Case 4

A group of asylum seekers from Somalia who had arrived at the Paris-Orly Airport via Syria were held for twenty days in the international transit zone and a nearby hotel specifically adapted for holding asylum seekers.

Case 5

From March 1994 to July 1997 Mark spent a relatively successful period being looked after by carers in the community. In 1995 he started attending a day-care centre on a weekly basis. On 22 July 1997, while at the day-centre, Mark became particularly agitated, hitting his head and banging it against the wall. Staff could not contact his carers, so called a local doctor, who gave him a sedative. The applicant remained agitated and, on the recommendation of his social worker, was taken to hospital. A consultant psychiatrist diagnosed Mark as requiring in-patient treatment. With the help of two nurses, he was transferred to the hospital's Intensive Behavioural Unit where he was admitted as an informal patient.

In or around September 1997 Mark sought leave to apply for judicial review of the hospital's decision to admit him. The High Court rejected his application, finding that he had not been "detained" but had been informally admitted in accordance with the principle of necessity under the common law as opposed to statute. The applicant appealed. On 29 October 1997 the Court of Appeal indicated that the appeal would be decided in his favour, whereupon the hospital admitted him on an emergency and involuntary basis under the Mental Health Act of 1983. The Court of Appeal found that the applicant had been "detained" in July 1997. A patient could be lawfully detained for treatment for mental disorder only under the provisions of the 1983 Act. Since the provisions of that Act had not been complied with, the applicant had not been lawfully detained. The relevant health-care authorities appealed. The applicant had applied, in the meantime, to the Mental Health Review Tribunal for a review of his detention. An independent psychiatric report was prepared, recommending his discharge. He was discharged to his carers on 12 December 1997. On 25 June 1998 the House of Lords allowed the appeal, finding that Mark had been lawfully admitted as an informal patient on the basis of the principle of necessity under the common law.

Case 6

Alex, Charles and Durango are members of the armed forces who have been subject to disciplinary sanctions (foreseen by applicable law on armed forces) for insubordination.
The sanctions administered were the following:
Alex: four days' light arrest for returning late from leave;
Charles: twelve days' aggravated arrest for repeatedly driving irresponsibly (reduced in appeal from the original conviction to committal to disciplinary unit for three months);
Durango: committal to a disciplinary unit for a period of three months for having taken part in the publication and distribution of a writing tending to undermine discipline.
Specifics of the penalties are as follows:

Light arrest: serviceman obliged to remain in his dwelling during off-duty hours if he lived outside the barracks; otherwise he was confined to barracks. A serviceman under light arrest at the barracks was allowed visits, correspondence and the use of the telephone; he could move freely about the barracks outside duty hours, being able for instance to visit the camp cinema, canteen and other recreation facilities.

Aggravated arrest: in off-duty hours, soldiers serve the arrest in a specially designated place which they may not leave in order to visit the canteen, cinema or recreation rooms, but they are not kept under lock and key.

Committal to disciplinary unit: offender submitted to a stricter discipline than normal by sending him to an establishment which was specially designated for that purpose. If ordered towards the end of military service, it generally delayed the individual's return to civil life. Those undergoing such punishment were removed from their own unit and placed in a special, separate group; their movements were restricted, they carried out their military service under constant supervision and emphasis was placed on their education. The units where this punishment was served were divided into three sections. Offenders as a rule passed thirty days in each of the first two, but these periods could be prolonged or shortened according to their conduct. As far as possible, they spent their nights separated from each other. In the first section, they were allowed to receive visits twice a month and to study during off-duty hours. In the second, they also enjoyed a degree of freedom of movement on Saturdays and Sundays and at least twice a week could visit the canteen and/or recreation facilities in the evening after duty. In the third, the regime was appreciably less strict. Penalty would run from 3 months to two years.

Case 7

On 20 June the homes of Maria, Luis, Angel and Irina, who were suspected of belonging to a sect, were searched as part of a criminal investigation. The applicants, who were all adults, were taken to the Court of First Instance where the judge gave a verbal order releasing them into the care of their families and suggesting that they should be admitted to a psychiatric clinic. This order was later confirmed in writing. The applicants were then taken from the court to the headquarters of the police on the orders of the Director-General of the force. On 21 June Catalan police officers transferred them to a hotel where they were handed over to their families. They were each put in a separate room with boarded-up windows. The rooms were under permanent guard and the applicants were not allowed to leave them for the first three days of their stay. They were made to undergo "deprogramming" by a psychologist and a psychiatrist. On 29 and 30 June they were cautioned and questioned by the Deputy Director-General of the police in the presence of a lawyer not chosen by them. On 30 June 1984 they were allowed to leave the hotel. They immediately filed a criminal complaint alleging various offences including unlawful detention**.** The police officers indicted were acquitted on the ground that, because their motives had been philanthropic, legitimate and well-intentioned, there had been no unlawful detention.

Case 8

Laurel is autistic, suffers from a severe learning disability and a cyclical mood disorder and is prone to severe agitation and self-harm. He has spent most of his life in psychiatric care. After 4 years being looked after in a community, Laurel started attending a day-care centre on a weekly basis. One day, it was 22 July, while at the day-centre, he became particularly agitated, hitting his head and banging it against the wall. Staff could not contact his carers, so called a local doctor, who gave him a sedative. The applicant remained agitated and, on the recommendation of his social worker, was taken to hospital. A consultant psychiatrist diagnosed him as requiring in-patient treatment. With the help of two nurses, he was transferred to the hospital's Intensive Behavioural Unit where he was admitted as an informal patient until end of October. Later he sought leave to apply for judicial review of the hospital's decision to admit him. The High Court rejected his application, finding that he had not been "detained", and that he had been lawfully admitted as an informal patient on the basis of the principle of necessity.

Solution keys
Case 1 - Gahramanov v. Azerbaijan, application 26291/06, 15/10/2013

Article 5 § 1: Given the multitude of situations in modern society where the public may be called on to endure restrictions on freedom of movement or liberty in the interests of the common good, an air traveller must be seen as consenting to a series of security checks by choosing to travel by plane. Those measures might include identity checks, baggage searches or waiting for further inquiries to be made in order to establish whether he or she represents a security risk for the flight. Accordingly, where a passenger was stopped during airport border control in order to clarify his situation for no more than the time strictly necessary to accomplish the relevant formalities, no issue arose under Article 5 of the Convention. The overall duration of the applicant's stay in the separate room could not have exceeded a few hours. When the border-service officers stopped him and asked him to wait in a separate room, they had reason to believe that further identity checks were necessary since his name was accompanied by a warning in their internal database. There was nothing to prove that the applicant's stay in the room had exceeded the time strictly necessary for searching his baggage and fulfilling the relevant administrative formalities for the clarification of his situation. Once it had been established that the warning in the database was the result of an administrative error, the applicant had been free to leave the airport immediately. His detention did therefore not amount to a deprivation of liberty within the meaning of Article 5.
Conclusion: case declared inadmissible.

Case 2 - Austin and Others v. the United Kingdom, applications 39692/09, 40713/09, and 41008/09, 15/03/2012 [GC]
This was the first time the Court was called to consider the application of the Convention in respect of the "kettling" or containment of a group of people carried out by the police on public order grounds.

In deciding whether there had been a "deprivation of liberty" within the meaning of Article 5 § 1, the Court referred to a number of general principles established in its case law. First, the Convention was a "living instrument", which had to be interpreted in the light of present day conditions. Even by 2001, advances in communications technology had made it possible to mobilise protesters rapidly and covertly on a hitherto unknown scale. Article 5 did not have to be construed in such a way as to make it impracticable for the police to fulfil their duties of maintaining order and protecting the public.
Secondly, the Convention had to be interpreted harmoniously, as a whole. It had to be taken into account that various Articles of the Convention placed a duty on the police to protect individuals from violence and physical injury. Thirdly, the context in which the measure in question had taken place was relevant. Members of the public were often required to endure temporary restrictions on freedom of movement in certain contexts, such as travel by public transport or on the motorway, or attendance at a football match. The Court did not consider that such commonly occurring restrictions could properly be described as "deprivations of liberty" within the meaning of Article 5 § 1, so long as they were rendered unavoidable as a result of circumstances beyond the control of the authorities, were necessary to avert a real risk of serious injury or damage, and were kept to the minimum required for that purpose.
The Court further emphasised that, within the Convention system, it was for the domestic courts to establish the facts and the Court would generally follow the findings of facts reached by the domestic courts. In this case, the Court based itself on the facts found by the High Court, following a three week trial and the consideration of substantial evidence. It was established that the police had expected a hard core of between 500 and 1000 violent demonstrators to gather at Oxford Circus at around 4 p.m. The police had also anticipated a real risk of serious injury, even death, and damage to property if the crowds were not effectively controlled. Given that, about two hours earlier, over 1,500 people had already gathered there, the police had decided to impose an absolute cordon as the only way to prevent violence and the risk of injured people and damaged property.
There had been space within the cordon for people to walk about and there had been no crushing. However, the conditions had been uncomfortable with no shelter, food, water or toilet facilities. Although the police had tried, continuously throughout the afternoon, to start releasing people, their attempts were repeatedly suspended because of the violent and uncooperative behaviour of a significant minority both within and outside the cordon. As a result, the police had only managed, at about 9.30 p.m., to complete the full dispersal of the people contained. Nonetheless, approximately 400 individuals who could clearly be identified as not involved in the demonstration or who had been seriously affected by being confined, had been allowed to leave before that time. The Court found that the cordon was imposed to isolate and contain a large crowd in dangerous and volatile conditions. Given the circumstances that had existed on 1 May 2011, an absolute cordon had been the least intrusive and most effective means available to the police to protect the public, both within and outside the cordon, from violence.
In this context, the Court did not consider that the putting in place of the cordon had amounted to a "deprivation of liberty". Indeed, the applicants had not contended that, when it was first imposed, those within the cordon had been immediately

deprived of their liberty. Furthermore, the Court was unable to identify a moment when the containment could be considered to have changed from what had been, at most, a restriction on freedom of movement, to a deprivation of liberty. It was striking that some five minutes after an absolute cordon had been imposed, the police had been planning to start a controlled dispersal. Shortly afterwards, and fairly frequently thereafter, the police had made further attempts to start dispersing people and had kept the situation under permanent close review. As the same dangerous conditions at the origin of the absolute cordon had continued to exist throughout the afternoon and early evening, the Court found that the people within the cordon had not been deprived of their liberty within the meaning of Article 5 § 1.
Notwithstanding the above finding, the Court emphasised the fundamental importance of freedom of expression and assembly in all democratic societies and underlined that national authorities should not use measures of crowd control to stifle or discourage protest, but rather only when necessary to prevent serious injury or damage. Since Article 5 did not apply, the Court held – by 14 votes to three - that there had been no violation of that provision.
Conclusion: no violation (14 votes to 3).

Case 3 - Guzzardi v. Italy, application 7367/76, 06/11/1980
As he was not imprisoned, the Court had to decide whether Mr Guzzardi was at all deprived of his liberty. The Court ruled that there was a difference between deprivation of and restriction of movement. The difference was one of degree and not one of nature of limitation. In this case the Court built upon the distinctions from Engel and stated that it was not possible to establish a deprivation of liberty on the strength of any one aspect of his regime taken individually, but taken cumulatively and in combination, in the light of the factors set out above, it considered that the applicant had been deprived of his liberty and his case was to be examined under Article 5 rather than Article 2 of Protocol 4, that is restriction of movement. It thus looked at the totality of the circumstances to find Mr Guzzardi's confinement to the island of Asinara was, in fact, a deprivation of his liberty. Mr Guzzardi was placed under 'special supervision' on the island after he was classified as a dangerous individual The Court noted that although the area Mr Guzzardi could move around in was much larger than a cell and not contained by a physical barrier, it was limited to a tiny fraction of an island that was difficult to access, and he could not visit the area where the island's population resided. Moreover, Mr Guzzardi was housed in a dilapidated building, lacked the opportunity for social contacts, could not leave his dwelling after ten o'clock at night. or before seven o'clock in the morning, and was required to report to the authorities twice per day. The Court, in finding a violation of Article 5, reasoned that a deprivation of liberty would not stand on one single factor; rather, it was the combination of all the factors in the case that gave rise to the violation.
Conclusion: there was in the instant case deprivation of liberty within the meaning of Article 5 ECHR (eleven votes to seven).

A contrario, in the case of ***De Tommaso v. Italy***, application 43395/09, [GC] 23/02/2017, the concluded that the measures in issue did not amount to deprivation of liberty. In this case the applicant, who had several previous convictions for

offences including drug trafficking and unlawful possession of weapons, was placed under "special police supervision" on the basis of continuing suspicions as to the its behaviour and source of income. The following set of obligations were imposed for a period of two years: to report once a week to the police authority responsible for the supervision; to look for work within a month; not to change the place of residence; to lead an honest and law-abiding life and not give cause for suspicion; not to associate with persons who had a criminal record and who were subject to preventive or security measures; not to return home later than 10 p.m. or to leave home before 6 a.m., except in case of necessity and only after giving notice to the authorities in good time; not to keep or carry weapons; not to go to bars, nightclubs, amusement arcades or brothels and not to attend public meetings; not to use mobile phones or radio communication devices; and to carry at all times the document setting out these obligations and present it to the police authority on request. The Court, deciding the admissibility of the complaint, observed that: (a) the applicant had not been forced to live within a restricted area; (b) as he remained free to leave home during the day, he had been able to have a social life and maintain relations with the outside world; (c) the prohibition on leaving home at night except in case of necessity (between 10 p.m. and 6 a.m.) could not be equated to house arrest; and (d) he had never sought permission from the authorities to travel away from his place of residence. It thus considered article 5 ECHR not applicable.

Conclusion: inadmissible (majority).

Case 4 – Amuur v. France, application 19776/92, 25/06/1996

The Court further stated that many Council of Europe member States were faced with an increasing flow of asylum seekers, and that it was aware of the difficulties involved in the reception of asylum seekers at most large European airports. States had the sovereign right to control aliens' entry into and residence in their territory, but in doing so the provisions of the Convention, including Article 5, had to be respected. As in the Guzzardi case, in deciding whether there was a deprivation of liberty or a restriction of movement the type, duration, effects and manner of the measure in question had to be examined. The Court discussed whether there had been a restriction on liberty of movement or a deprivation of liberty. It decided that this was an issue of "degree and intensity". The applicants had been held at the airport for twenty days. They were under constant police surveillance, and for most of the time not provided with any legal or social assistance. The Government had argued before the Court that the applicants could at any time have removed themselves from the sphere of application of the measure in question, arguing that the transit zone was "closed on the French side" but "open to the outside". The Court however held that the mere fact that it was possible for asylum seekers to leave the country where they wished to seek refuge did not mean that there had not been a restriction on liberty. The possibility became theoretical if no other country offered protection comparable to that which they expected to find in the country where they were seeking asylum. In addition, in the case of Amuur, sending the applicants back to Syria in fact only became possible following negotiations between the French and Syrian authorities, and they had not been free to leave whenever they wanted as was alleged by the Government.

The Court therefore concluded that the applicants' detention in the transit zone amounted to a deprivation of liberty and that Article 5 was applicable.
Conclusion: applicable (unanimously).

Case 5 - X. L. v. United Kingdom, application 45508/99, 27/05/2003
The Court considers the key factor in the present case to be that the health care professionals treating and managing the applicant exercised complete and effective control over his care and movements from 22 July 1997, when he presented acute behavioural problems, to 29 October 1997, when he was compulsorily detained.
More particularly, the applicant had been living with his carers for over three years. On 22 July 1997, following a further incident of violent behaviour and self-harm at his day-care centre, the applicant was sedated before being brought to the hospital and subsequently to the IBU, in the latter case supported by two persons. His responsible medical officer indicated clearly that, had the applicant resisted admission or subsequently tried to leave, she would have prevented him from doing so and would have considered his involuntarily committal under section 3 of the 1983 Act (see paragraphs 12, 13 and 41 above). Indeed, as soon as the Court of Appeal indicated that his appeal would be allowed, he was compulsorily detained under the 1983 Act. The correspondence between the applicant's carers and Dr M. reflects both the carers' wish to have the applicant immediately released to their care and, equally, the clear intention of Dr M. and the other relevant health care professionals to exercise strict control over his assessment, treatment, contacts and, notably, movement and residence; the applicant would only be released from the hospital to the care of Mr and Mrs E. as and when those professionals considered it appropriate. While the Government suggested that "there was some evidence" that the applicant had not been denied access to his carers, it is clear from the above-noted correspondence that the applicant's contact with his carers was directed and controlled by the hospital, his carers not visiting him after his admission until 2 November 1997
Accordingly, the concrete situation was that the applicant was under continuous supervision and control and was not free to leave. The Court would therefore agree with the applicant that it is not determinative whether the ward was "locked" or "lockable". In this regard, it notes that the applicant in Ashingdane was considered to have been "detained" for the purposes of Article 5 § 1 (e) even during a period when he was in an open ward with regular unescorted access to the unsecured hospital grounds and the possibility of unescorted leave outside the hospital.
Conclusion: violation of article 5 para. 1 ECHR as regards the lack of protection against arbitrary detention (unanimously).

Case 6 – Engels and others v. The Netherlands, applications 5100/71, 5101/71, 5102/71, 5354/72, and 5370/72, 8 June 1976
In Engel, the Court distinguished between 'light arrest' and 'aggravated arrest', which it found did not violate Article 5, and 'strict arrest', which did. The Court found there was no deprivation of liberty when light arrest or aggravated arrest was imposed. Strict arrest, however, was different because non-commissioned officers and ordinary servicemen were locked in a cell for 24 hours a day. Servicemen subjected to light arrest could still receive visitors, use the telephone and move freely about the barracks outside duty hours (though servicemen subjected to

aggravated arrest could also receive visitors but could not move freely about the barracks). However, servicemen under strict arrest were entirely excluded from the performance of their normal duties.74 Thus, the applicants who were subjected to strict arrest were deprived of their liberty under Article 5.

Case 7 – Riera Blume and others v. Spain, application 37680/97, 14 October 1999

Key points

Personal liberty is one of the key fundamental rights protected by the Convention. Every person should generally enjoy physical liberty. Any deprivation of this right has a direct and adverse effect on several other rights such as the right to family and private life, the right to freedom of assembly and association and expression or the right to freedom of movement. Article 5 protects this right to liberty against arbitrary deprivation. In every case of deprivation a judge has to decide on the lawfulness of the deprivation. ***Article 5 contains an exact, detailed and – most important – taxative enumeration of situations in which arrest and detention are permitted.*** *This ensures that any deprivation of the right to liberty is exceptional, objectively justified and of no longer duration than absolutely necessary.*

The wording of Art. 5 para. 1 protects both "liberty" and "security" of a person*. Although one might think those two freedoms were separate rights, in fact the "right to liberty and security" is* ***one unique right and the expression has to be read as a whole****. "Security of a person" must be understood in the context of physical liberty and cannot be read as to referring to different matters. Any measure depriving a person of his liberty incompatible with the purpose of Article 5 puts at stake the "right to liberty" but also the "right to security of person" (Bozano v. France, 18.12.1986)*

Article 5 contemplates the physical liberty of the person*; its aim is to ensure that no one should be deprived of that liberty in an arbitrary fashion.*

Deprivation of liberty has an autonomous meaning under the ECHR. "Arrest" and "detention" are used interchangeably and have to be seen as being concerned with any measure having the effect of depriving a person of his or her liberty. This applies to any measure, whatever designation is used by national law. That means, as soon as a deprivation of liberty happens, the guarantee start to apply.

Deprivation of liberty means any measure by state authorities holding a person on a specific place against his or her will. *Article 5 is not concerned with mere restrictions on liberty of movement - such restrictions are governed by Article 2 of Protocol No. 4, governing a person's right to liberty of movement and freedom to choose his or her residence within the territory of a State. The Court*

stated that the difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance. In order to determine whether somebody was deprived of his or her liberty, ***the individual situation of the affected person has to be taken into account*** *(Ashingdan v. the United Kingdom, 28 May 1985, para 41).*

The notion of deprivation of liberty within the meaning of Article 5 § 1 contains both an objective element of a person's confinement in a particular restricted space for a not negligible length of time, and an additional subjective element in that the person has not validly consented to the confinement in question (Storck v. Germany, § 74; Stanev v. Bulgaria [GC], § 117).

Article 5 does not cover mere restrictions on liberty of movement, which are governed by Article 2 of Protocol No. 4 . Qualification will depend on a number of factors: degree or intensity, type, duration, effects and manner of implementation of the measure in question, the possibility to leave the restricted area, the degree of supervision and control over the person's movements, the extent of isolation and the availability of social contacts (see Guzzardi v. Italy above). It also takes into account the subjective element (i.e. whether the validly consented to the restriction).

Where can deprivation of liberty take place?
Deprivation of liberty does not only occur when a person is arrested or detained*. The following situations, which are illustrated also by the case-studies proposed, can amount to deprivation of liberty:*

- *placement of individuals in psychiatric or social care institutions, whether private or public;*
- *house arrest pending trial;*
- *strict forms of curfew;*
- *confinement in airport transit zones;*
- *questioning of a person in a police station;*
- *stops and searches by the police, regardless of the place where they occur;*
- *crowd control measures.*

National legal definitions/qualifications are not conclusive. *Elements such as* ***nature of the confinement and the status of the person*** *concerned shall be taken into account.*

Nature of the confinement
For the Court the use of force or coercive measures by state officials is crucial, e.g. being stopped on the street or required to stay in a police station. ***It is of no consequence that the person may have surrendered himself or herself voluntarily*** *(see De Wilde, Ooms and Versyp v. Belgium, 18.06.1971, dealing with vagrants reporting themselves to a police station requesting to be detained in an "assistance home").*

For the Court it is also not necessary that a person affected cannot move from a certain spot (a police station, a car, a cell). ***The fact that a person has a certain degree of liberty within a particular place does not exclude the application of Article 5.*** *For example the Court found a deprivation of liberty in Guzzardi v. Italy in which the applicant was ordered by court to reside on a remote island, subject to various restrictions, prohibitions and under permanent control.*

House arrest pending trial (Giulia Manzoni v. Italy, 1 July 1997) or pursuant to a strict form of curfew (Cyprus v. Turkey, decision 26 May 1975) would also engage Article 5. According to the Court case law Article 5 also covers a psychiatric patient who, although being incapable of expressing a view on his position and already kept compulsory in a mental hospital, was placed in a ward (H.L. v. the United Kingdom, see below).

The Court also found Article 5 to be applicable in a situation where an asylum seeker was forcibly kept in the "transit zone" of an airport, although theoretically he could have left that zone to any country (Amuur v. France, 25 June 1996, see below). The Court reasoned that the option of leaving has to be realistic and not theoretical, if either no other country would admit him or not offer him protection against being returned to the country in which he feared to be persecuted.

The status of the person affected

The Court will also take in account the status of any person affected when determining whether a deprivation of liberty actually occurred. For example in the Engel v. the Netherlands above the Court found Article 5 inapplicable in the case of a soldier being under a special "arrest" confining him to one specific building where he had to carry out his normal duties. The assumption underlying this ruling was that military service inevitably leads to a lesser degree of liberty anyway, so the threshold must be higher than for civilians. Soldiers are therefore obliged to accept certain measures limiting their liberty which would already constitute a deprivation of liberty for civilians.

Inmates of prisons are already deprived of their liberty, so measures within a prison (like disciplinary confinement in a cell instead of free association with other inmates) will only be regarded as a deprivation of liberty in exceptional circumstances (see below Bollan v UK, decision of 4.05.2000).

However, ***if a prisoner is released, be it under a degree of supervision and reporting to the authorities will normally be deemed to have regained his or her liberty for the purposes of Article 5****. Therefore a recall to prison would be a depravation of liberty subject to the requirements of Article 5 (Weeks v UK, 2.03.2197, dealing with a prisoner serving a life sentence and subsequently being "released on license". A later revocation of that release has to fulfill the requirements of Article 5).*

The right to liberty is too important in a democratic society for a person to lose the benefit of Convention protection for the single reason that he may have given

himself up to be taken into detention, especially when that person is legally incapable of consenting to, or disagreeing with, the proposed action

Responsibility of the State for violation of article 5 can also occur if a private individual is directly responsible for the "detention", with the consent or knowledge of the State.

Key points

National context to be added

Depending on the time available (also in light of the discussions held), you can further elaborate on the case-law cited above or referred to in the Guide in the course of the guided discussion or use one or two of the examples by way of storytelling, pinpointing the main principles.

Step 3 - The requisite of lawfulness of the detention under article 5 para. 1 ECHR – Introduction

20 minutes

Coloured post-its (3 colours), flipchart paper, markers, tape.

Snowballing

Invite participants to read article 5 para. 1 letters a) – f) ECHR and draw their attention to the requisite of legality and lawfulness which embodied in both the first paragraph and the subsequent letters. Use the fact that participants are examining the articulated structure of the provision to remind them about the fact that article 5 ECHR is a typical example of a "limited right" (as opposed to absolute and qualified) under the ECHR, that is a right which can be limited only under the circumstances listed in the provision. Mark 2 flipchart papers with the words LEGALITY/QUALITIES OF THE LAW, LAWFULNESS and PROTECTION FROM ARBITRARINESS and hang them separately on the wall. Distribute 3 post-its per participants. Invite participants to write on each of them in a short sentence 1 (only one!) idea/notion as to what they believe each of the terms encompass (i.e. under legality/quality of the law they will have to write 1 quality that the law must have, under lawfulness the requisites for the restriction….)

Divide participants into three groups. Task each group with the review of one of the flipchart, putting aside (still visible), the discarded cards, grouped as

per the category the group believes they belong to (5 minutes maximum).

Ask groups to report in plenary about their decision (5 minutes maximum per group).

 *Be sure to maintain a strict timing: this activity works best when participants are put under pressure/do not get bored.*

 *Use the debriefing session for flipchart to illustrate the case-law of the ECtHR and to provide guidance on the definitions of terms.*

Key points

Article 5 para. 1 requires that ***any deprivation of liberty be "in accordance with a procedure prescribed by law"****. Further, each sub-paragraph providing for the cases where deprivation of liberty is permitted supposes that the measure be "lawful". The requirement of lawfulness has been interpreted as referring to both procedure and substance. Moreover, lawfulness is understood to mean that any detention must be in accordance with the national law and the European Convention and must not be arbitrary.*

Notion of law is autonomous under the ECHR *– encompasses qualities of the law such as sufficient clarity, accessibility, intelligibility, precision, enabling recipients to foresee consequences for non-compliance, consistent interpretation by authorities.*

Formal compliance with national law: *any deprivation of liberty has to be in compliance with both substantial and procedural rules of the national law. It is irrelevant that a person's confinement might on its merits be appropriate and consistent with the grounds authorised by Article 5.* ***A failure to comply with domestic (procedural or substantive) law entails a breach of the Convention****.*

Compliance with the Convention: *in addition to compliance with national law, any deprivation of liberty must be in accordance with the Convention itself to protect the individual against arbitrariness, as the Court stated in Kurt v Turkey (see below), dealing with a case of "forced disappearance".* ***The domestic law itself has to be in conformity with the Convention and especially has to be foreseeable in its application*** *(see Jėčius v. Lithuania where the rules governing the detention were considered to be too vague and unclear. The Court also found that the grounds of Article 5 para 1 (c) do not permit preventive measures to be taken against suspected criminals if prosecution is not the object of the detention. In Denizci and Others v. Cyprus, 23 May 2001, the applicants*

claimed, inter alia, that no reason was given for their arrest, and the Court found a violation of Article 5 (1), observing that the respondent government did not advance any lawful basis for the applicants' arrest and detention.

***A substantive rather than formalistic approach is to be adopted**: i.e. continued detention of a person on the basis of an order by the indictment chamber requiring further investigations, without issuing a formal detention order was not found in violation of article 5 ECHR (Laumont v. France, para 50.).*

***Legality of a detention does not mean lawfulness of the same** (Creanga v. Romania, para. 84, A. and Others v. UK [GC], para. 164).*

Lawfulness encompasses an obligation to keep detailed record of the detention (time, place, duration, details of detainee, reasons for detention, names of person effecting detention).

Arbitrariness may arise in case of bad faith or deception on the part of the authorities.

Speed of review of detention order can also disclose arbitrariness.

Absence or lack of reasoning in detention orders can determine unlawfulness of detention.

*Consideration given to **alternative, less intrusive measures are relevant in the determination of lawfulness of detention** decision.*

Certain "procedural flaws" might not trigger article 5 ECHR:
- A failure to notify the detention order officially to the accused did not amount to a "gross or obvious irregularity" in the exceptional sense indicated by the case-law given that the authorities genuinely believed that the order had been notified to the applicant (Marturana v. Italy, § 79; but see Voskuil v. the Netherlands, in which the Court found a violation where there had been a failure to notify a detention order within the time-limit prescribed by law: three days instead of twenty-four hours);
– A mere clerical error in the arrest warrant or detention order which was later cured by a judicial authority (Nikolov v. Bulgaria, § 63; Douiyeb v. the Netherlands [GC], § 52);
– The replacement of the formal ground for an applicant's detention in view of the facts mentioned by the courts in support of their conclusions (Gaidjurgis v. Lithuania (dec.)). A failure to give adequate reasons for such replacement however may lead the Court to conclude that there has been a breach of Article 5 § 1 (Calmanovici v. Romania, § 65).

Delays in executing order of release are acceptable if kept to a minimum.

*The **requirement of legality extends to the whole period** for which it lasts.*

Violations have been found because the legal basis for the deprivation of liberty had at some point ceased to exist. After a release being ordered, such an order has to be executed without undue delay. The Court found violations of Article 5 in cases of a delay in release of 11 hours (Quinn v. France, 22 March 1995), 10 hours (Labita v. Italy, 6 April 2000) and even 40 minutes after a 12-hour detention (K.-F. v. Germany, 27 November 1995).

*It should be noted that the Court has found **prolonged deprivation of liberty to be unjustified** even in murder cases (Letellier v. France, 26 June 1991). **Although one or more justified reasons may exist when the person is initially detained, they may become less pressing with the passage of time** and in such circumstances the person concerned should be released. (Tomasi v. France, 27 August 1992).*

Step 4 – The notion of reasonable suspicion

50 minutes

Hand-outs

The suspects
Divide participants into 6 groups. Distribute the background information and allow for participants to go through it for 3-5 minutes. Then distribute the second hand-out and assign 1 suspect to each group. Give the group 5 minutes to answer the question. Invite groups to present to the plenary their finding (5 minutes per group). Solicit views from the audience. Address mistakes using the solution keys.

If need be, refer to the key points used for the previous exercise to address any misunderstanding.

Hand-out 1

Background information
Operation Pegasus is the result of an 18 month investigation into the activities of the individual identified as Suspect A. Acting on information from a number of sources, the Police were authorised by a court order to begin investigations into the alleged trafficking of humans and narcotics coordinated by this individual.
The evidence against them has included:

1. Sworn statement by an informer of the activities that have taken place inside the property that was the subject of the raid.
1. Monitoring and evaluation of communications data from Subject A's telephone – including calls and conversations with the other suspects taken in the raid.
2. Undercover observation of the activities of Suspect A – and also the movements of individuals into and out of the house.
3. Shortly before the beginning of Operation Pegasus – an individual who had been seen entering the house was detained by an undercover Police officer, after attempting to sell a significant quantity of cocaine.
4. Sworn statement from an individual who was trafficked through the house that was the target of the raid. In which she described both the interior and exterior of the house- as well as the appearance of several of the suspects that were taken in the raid.

Following the investigation of this evidence, a court warrant was obtained which authorised a raid against the property.

The raid on the property uncovered in the course of Operation Pegasus was sanction at 22:34, by Judge Smith of the Central Court Division. Captain Brown, supported by a team of 20 agents and one helicopter took up position around the target property and undertook close surveillance to ensure that the target individual was inside.

At 00:38, the individual known as Suspect A was seen entering the property along with two other individuals. Close surveillance revealed that they stayed awake for an hour, drinking spirits and smoking cigarettes. Evidence recovered from the scene suggested also that a quantity of cocaine had been consumed.

Thermal signatures from within the house indicated that there were five further individuals present in the house.

When the indications suggested that they were all asleep, the team moved in. Five men moved in the front door whilst five covered the back. Support teams were stationed in the streets close by in case the suspects attempted to escape custody.

Armed units breached the front door at 0521 immediately detaining suspects C, E and B. Suspects A and D woke suddenly and made their escape close through a first floor window and onto the roof of the conservatory below. They were detained by officers. All suspects were made aware of their rights and the reasons for which they were being detained. They are all due to appear before Judge Smith at 11:00 and they are aware of this.

Hand-outs 2

Suspect A

Suspect A is the individual that has been under surveillance for 18 months. His identity has been confirmed with covert photographs and voice print analysis.

The suspect was discovered with a large quantity of narcotics stored in the house. He also had equipment that suggested his intention to mark up quantities of drugs for sale. The equipment – bags, scales, cutting and mixing equipment suggests that a larger quantity of cocaine than discovered is likely to have been involved.

Additional identification of the suspect was made by a witness who approached the Police as a victim of human trafficking.
Her testimony has been recorded.
In conclusion, there is reasonable suspicion that this individual has committed criminal acts and this assertion has been supported by the judiciary.

Consider the case against the suspect. Is his detention justified both under national law and ECHR? If so, under which section of article 5.1?

Suspect B
Suspect is a known associate of Suspect A, though in the course of Operation Pegasus he has not been found to have any proven involvement in the alleged crimes.
However, a search of his criminal record has revealed an interesting development. Suspect B has, it appears, been at large for three months, following his failure to attend court on charges of assault.
It is alleged that he violently punched and kicked his wife, rendering her unconscious- before leaving the house and not returning.
His wife has suffered from brain damage following the assault- such was the suddenness and violence of the incident.
A warrant was issued requiring him to attend court almost three months ago. He failed to answer the summons.

Consider the case against the suspect. Is his detention justified both under national law and ECHR? If so, under which section of article 5.1?

Suspect C
Suspect C is known to the court system and has previously been released on bail, pending trial.
There is no indication at present, that he has committed any act involving Suspect A, however, he had consumed a large amount of alcohol. When he was arrested by the officers, he delivered a significant level of verbal abuse and was restrained for the protection of officers.
Does his presence in the house signify a deeper level of criminality?

Consider the case against the suspect. Is his detention justified both under national law and ECHR? If so, under which section of article 5.1?

Suspect D
Suspect D is believed to be a relative if Suspect A. What appears to be likely is that he is a nephew – and a great admirer of his Uncle. Whilst this has led him to follow his Uncle around and try to spend time with him, there are no indications of criminality other than one or two minor violations and cautions.
However, the individual, whilst looking older, is actually only 14 years of age. Enquiries with the individuals school have ascertained a prolonged absence of several weeks.

Consider the case against the suspect. Is his detention justified both under national law and ECHR? If so, under which section of article 5.1?

Suspect E
Suspect E had consumed a large amount of narcotic prior to the raid, to the point that he did immediately wake when the officers entered the property. Whilst no medical examination has taken place formally, the presence of puncture marks in the arms, between the fingers and toes – in his joints and elsewhere suggest that they may be a confirmed addict.

Consider the case against the suspect. Is his detention justified both under national law and ECHR? If so, under which section of article 5.1?

Suspect F
Suspect F has no criminal record and other than being a friend of suspect B has no links with the group. During interview it was established that it has not fixed abode. Following a disagreement with his wife, he was ejected from the marital home and for several weeks he has been reliant on acquaintances for somewhere to sleep. We were able to confirm this information by contacting a list of individuals the suspect provided to us. We also spoke to the suspect's estranged wife who confirmed that she has removed him from the house. She is in the process of obtaining a restraint order in order to prevent suspect F from approaching her. As for the period before the arrest, she confirmed that he did not try to re-enter the house or speak with her.

Consider the case against the suspect. Is his detention justified both under national law and ECHR? If so, under which section of article 5.1?

Solution keys

Suspect A
Detention justified under article 5.1 c). He has been arrested and detained on reasonable suspicion of criminal acts following a prolonged investigation. He has been charged with these acts and awaits trial.

Suspect B
His detention is justified under article 5.1 b) for the purpose of bringing him before a competent court to answer for the grave crime committed against his wife.

Suspect C
A previous record is no guarantee that a person has committed a crime for which detention would be justified. However, there might be an argument under article 5.1 c) that restraining the suspect was a mean to prevent a violent outburst.

Suspect D
Detention not justified. He is a minor. Article 5.1 d), however, authorises detention on the basis of a court order or administrative order to secure a child's attendance at

an educational establishment. Therefore detention might be justified in this case – but only for that specific purpose.

Suspect E
Detention not fully justified. Whilst article 5.1 e) would be applicable, but not fully justified in the present case as the individual in question was not in an aggressive or dangerous state.

Suspect F
Detention not justified. He does not fall within any of the category foreseen by article 5.1. He is simply in the wrong place at the wrong time.

Key points (for article 5.1 letters a), b), c) and f) – letters d) and e) are covered later in the Manual, when dealing with minors and persons of unsound mind.

Detention after conviction – article 5.1 a) ECHR
Article 5 § 1 (a) applies to any "conviction" *occasioning deprivation of liberty* ***pronounced by a court*** *and makes no distinction based on the nature of the offence or whether it is classified as criminal or disciplinary by the national law (Engel and Others v. the Netherlands, § 68; Galstyan v. Armenia, § 46).*

There must be both a finding of guilt on the basis of specific facts, and the imposition of a penalty *or other measure involving the deprivation of liberty (Del Río Prada v. Spain [GC], §125; James, Wells and Lee v. the United Kingdom, § 189; M. v. Germany, § 87; Van Droogenbroeck v. Belgium, § 35; B. v. Austria, §38).*

The provision does not prevent the authorities from executing orders for detention imposed by competent courts outside their territory (X. v. Germany, Commission decision of 14 December 1963). Although Contracting States are not obliged to verify whether the proceedings resulting in the conviction were compatible with all the requirements of Article 6 (Drozd and Janousek v. France and Spain, § 110), a conviction cannot be the result of a flagrant denial of justice (Ilaşcu and Others v. Moldova and Russia [GC], § 461; Stoichkov v. Bulgaria, § 51). If a conviction is the result of proceedings which were "manifestly contrary to the provisions of Article 6 or the principles embodied therein", the resulting deprivation of liberty would not be justified under Article 5 §1 (a) (Willcoxand Hurford v. the United Kingdom (dec.), § 95)

Detention for non-compliance with lawful order – article 5.1 letter b) ECHR
The expression "non-compliance with the lawful order of a court" used in Article 5 § 1(b) of the Convention means that ***the person arrested or detained must have had an opportunity to comply with such an order and have failed to do so*** *(Beiere v. Latvia, § 49). A person cannot be held accountable for non-*

compliance with a court order if he or she has never been informed of that order (idem, § 50). A refusal of a person to undergo certain measures or to follow a certain procedure by the authorities prior to being ordered to do so by a competent court is not sufficient to justify detention unless required to do so by a court order (Petukhova v. Russia § 59).

The domestic authorities must strike a ***fair balance between the importance in a democratic society of securing compliance with a lawful order of a court, and the importance of the right to liberty.*** *In such circumstances issues such as the purpose of the order, the feasibility of compliance with the order, and the duration of the detention are matters to be taken into consideration. The issue of proportionality assumes particular significance in the overall scheme of things (Gatt v. Malta § 40).*

The Court and the Commission have applied the first part of Article 5 § 1 (b) to cases concerning, for example:

- *a failure to pay a court fine (Airey v. Ireland, Commission decision);*
- *a refusal to undergo a medical and psychiatric examination concerning mental health (X. v. Germany, Commission decision of 10 December 1975);*
- *or a blood test ordered by a court (X. v. Austria, Commission decision);*
- *a failure to observe residence restrictions (Freda v. Italy, Commission decision);*
- *a failure to comply with a decision to hand over children to another parent (Paradis v. Germany, Commission decision);*
- *a failure to observe binding-over orders (Steel and Others v. the United Kingdom);*
- *a breach of bail conditions (the above mentioned case of Gatt v. Malta) and*
- *a confinement in a psychiatric hospital (Beiere v. Latvia, where the detention decision was found not to be a "lawful order of a court").*

In all cases, the obligation must necessarily arise from a legal order of the court. In Slavomir Berlinski v. Poland, the Court found that the applicant's compulsory placement in a mental hospital was carried out in the context of criminal proceedings against him in order to secure the court order to examine his mental state for determining his criminal responsibility. Once satisfied that the detention followed a court order, the Court verified the lawfulness requirement and found that the detention had complied with a procedure prescribed by law and it was not arbitrary.

<u>Pre-trial detention - Article 5.1 c) ECHR</u>

*The notions of "****arrest" or "detention" reflect any measure relating to deprivation of liberty regardless how they are classified in domestic legislation****. In the view of the European Court, the safeguard provided by the requirement of Article 5§ 1 (c) for judicial control is crucial since it applies at the very beginning of a period of deprivation of liberty.*

The Convention case-law sets ***five distinct grounds for pre-trial detention*** *of*

persons arrested under Article 5 § 1(c) of the Convention, namely:
1) risk of absconding;
2) risk of obstructing the investigation;
3) risk of committing further offence;
4) risk of causing public disturbance if released, and
5) the need to protect the detainee (Buzadji v. Moldova, no. 23755/07, § 88).

*The requirement on the judicial officer to give **relevant and sufficient reasons for the detention** – in addition to the persistence of reasonable suspicion – applies already at the time of the first decision ordering detention on remand, that is to say "promptly" after the arrest (Buzadji, § 102).*

*Under the sub-paragraph (c) of Article 5 § 1 an **arrest must be a proportional act designed to achieve the indicated purpose** (Ladent v. Poland, §§ 55-56). Under Article 5 § 3 the term "a competent legal authority" means "a judge or any other official who, upon the law, is competent to exercise judiciary power" (Shisser v. Switzerland, § 29).*

The meaning of reasonable suspicion
*Under the sub-paragraph (c) of Article 5 § 1, the existence of **reasonable suspicion** that the offence was perpetrated **is necessary for depriving a person of his liberty,** as only then may the deprivation of liberty be sufficiently grounded and lawful. In addition, any suspicion needs to be honestly held by those involved in the arrest (Murrey v. the United Kingdom). For there to be reasonable suspicion there must be **facts or information which would satisfy an objective observer that the person concerned may have committed an offence** (Ilgar Mammadov v. Azerbaijan, § 88; Erdagöz v. Turkey, § 51; Fox, Kempbell and Hartly v. the United Kingom, § 32). Thus, the fact that the competent authorities did not investigate the key facts of the case to establish whether the complaint was grounded or not and with a good faith breaches Article 5 § 1 (c) (Stepulyak v. Moldova, § 73; Elçi and others v. Turkey, § 674).*

*It depends on the circumstances of the case as to what can be considered as "grounded" and as a basis for the suspicion (Fox, Kempbell və Hartly v. The United Kingdom, § 32). However **the suspicion will be considered "grounded" only when it is based on the facts and information objectively indicating that the suspect has been involved in the alleged offence.***

*Article 5 § 1 (c) indicates that **lawful arrest or detention** of a person on reasonable suspicion of having committed an offence **may take place before or after the commission of that offence.** However, to be lawful for the purposes of Article 5, the offence must be classified in the domestic legislation as a ground for the person's deprivation of liberty (Lukkanov v. Bulgaria). It does not mean that the commission of an offence needs to be established before the arrest; merely, there should be an assumption that the acts that have led to the arrest are classified in the legislation as a criminal offence.*

The second requirement in 5 § 1 (c) means that there should be a "reasonable suspicion" that the person perpetrated the offence in question. The provision also guarantees the maximum duration of any pre-trial detention for a relevant offence before this is authorised by an independent legal authority and the possibility of release in the pre-trial period shall be considered quickly.

The term "for ***the purpose of bringing him before the competent legal authority" relates to all three alternative grounds for arrest or detention*** *elaborated in Article 5.1 (c) (Loules v. the Ireland (No 3) §§ 13-14; Ireland v. the United Kingdom, § 196).*

A person may be arrested only for the purpose of bringing him before the competent legal authority on the suspicion of having committed an offence in the context of criminal proceedings (Ceius v. Lithuania, § 50; Shvabe and M.G. v. Germany, § 72).

Second alternative for detention under this Article *(when it is reasonably considered necessary to prevent his committing an offence) also does not mean that the person may be arrested without reasonable suspicion of being about to commit an offence and the purpose of the arrest is not for prevention purposes, but* ***is specifically designed to regulate pre-trial detention*** *(Ostendorf v. Germany, § 82).*

The existence of ***the purpose to bring the suspect before the court is required*** *regardless whether this purpose has been achieved or not. Sub-paragraph (c) of Article 5 § 1 does not require the police to have obtained sufficient evidence to bring charges (Petkov and Profirov v. Bulgaria, § 52; Erdagöz v. Turkey, § 51). Under the sub-paragraph (c) of Article 5 § 1 the purpose of questioning at the point of arrest is to assist the criminal investigation through affirming or eliminating the suspicion that constitutes the grounds for the arrest (Brogan and others v. the United Kingdom, §§ 52-54; Labita v. Italy [GC], § 155; O'Hara v. the United Kingdom, § 36).*

In the context of terrorism, though States cannot be required to establish the reasonableness of the suspicion grounding the arrest of a suspected terrorist by disclosing confidential sources of information, the Court has held that the exigencies of dealing with terrorist crime cannot justify stretching the notion of "reasonableness" to the point where the safeguard secured by Article 5 § 1 (c) is impaired (O'Hara v. the United Kingdom§ 35).

The unproven statement of an anonymous person based on rumours was not sufficient to serve as "a reasonable ground" proving that the applicant was involved in mafia-related activities (Labita v. Italy [GC], §§ 156 etc.) On the contrary, the fact that the incriminating statements dated back several years and were later withdrawn by the suspects did not necessarily remove the existence of a reasonable suspicion against the applicant and did not have an effect on the lawfulness of the arrest warrant (Talat Tepe v. Turkey, § 61).

The risk of absconding

*The **risk of absconding cannot be gauged and a decision be made solely based on the severity of the charges and the sentence faced** (Panchenko v. Russia, no. 45100/98, 08/02/2005, § 106).The risk of absconding has to be assessed in the light of the factors relating to the person's character, his morals, home, occupation, assets, family ties and all kinds of links with the country in which he is prosecuted (Neumeister v. Austria, no. 1936/63, § 10).*

Examples of situations leading to a violation

*When national courts justify the **necessity of detention solely** by:*

- *severity of charges*
- *severity of punishment prescribed for the alleged crime.*

*When **national courts do not consider other criteria** such as:*

- *personality of the accused, his/her ties with community, such as:*
- *personal,*
- *social,*
- *family,*
- *employment ties,*
- *residence status,*
- *property and assets, and other relevant factors which may either confirm the existence of the danger of absconding or make it appear so slight that it cannot justify detention pending trial;*

When first instance court and the higher courts

- *limit themselves in their decisions to **repeating the grounds brought by the investigative authority in an abstract and stereotyped way**, without indicating any reasons why they considered well founded the allegations that the applicant might abscond.*

The risk of obstructing the investigation

***The danger** of the accused hindering the proper conduct of the proceedings **cannot be relied upon in abstracto**; it has to be supported by factual evidence (Trzaska v. Poland, no. 25792/94, § 65). Grounds such as the need to carry out further investigative measures or the fact that the proceedings have not yet been completed do not correspond to any of the acceptable reasons for detaining a person pending trial under Article 5 § 3 (Piruzyan v. Armenia, no. 33376/07, § 98).*

Examples of situations leading to a violation

- ***National courts present the danger of obstructing the course of justice in an abstract form**, namely, by solely stating that if released the person would obstruct the course of justice by, for example, putting pressure on witnesses or by destroying evidence without substantiating such allegations by facts and evidence of the criminal case;*
- *Courts refer to the **necessity by the investigative authority of conducting further investigative action in abstracto**, without*

justifying the causal link between the impossibility of conducting the investigative action and the person's release;

- ***Courts keep repeating the grounds brought by the investigative authority in an abstract and stereotyped way**, without indicating any reasons why they considered well founded the allegations that the applicant might obstruct the proceedings*

Danger of committing further offences

*The danger of committing further crimes **shall also be assessed on the basis of the facts of the case,** it has to be a plausible one and the measure appropriate, in the light of the circumstances of the case and in particular the past history and the personality of the person concerned (Gal v. Hungary, no. 62631/11, § 42).*

Examples of situations leading to a violation

- *In their motions to court for pre-trial detention, **investigative bodies refer to the danger of committing further crimes in an abstract manner** – without presenting concrete facts or evidence from the criminal case to justify the allegation;*
- *In granting the motion, **the courts present their findings in abstract, by solely stating that the accused would commit further crime if released,** without justifying the decision by concrete facts or evidence, which derive from the criminal case.*

Danger of Causing Public Disorder and the need to protect detainee

Because of their particular gravity and public reaction to them, certain offences may give rise to social disturbance capable of justifying pre-trial detention, at least for a time. In exceptional circumstances, this factor may therefore be taken into account for the purposes of the Convention, as far as domestic law recognises this ground (Letellier v. France, no. 12369/86, 26/06/1991, § 51)

Examples of situations leading to a violation

- ***National law does not stipulate the danger of causing public disorder** as a distinct ground for pre-trial detention;*
- *Although the danger of causing public disorder is prescribed by law as a distinct ground for pre-trial detention, **the investigative body and the courts abstain from referring to such ground** and instead of that subsume it under the danger of commission of further crime.*
- *The **investigative body and the courts refer to the danger of causing public disorder in abstract**, without referring to facts, information or evidence of the case file to justify the findings*

Detention to prevent irregular entry or for extradition – article 5.1 f) ECHR

The detention or arrest on the basis of Article 5.1 (f) will only be lawful if it meets four criteria:

1. *the arrest takes place in good faith;*

2. *it has taken place only in order the prevent the unauthorized entry of the person into the country;*
3. *if the person left emigrated because he was concerned about threats to his life and that in deciding the place of his detention and the conditions of detention this background is taken into consideration; and*
4. *if the duration of the detention is not longer than is necessary taking into account the specific purpose of the detention (Saadi v. the UK [GC], § 74).*

Prevention of the person effecting an authorized entry into the country allows the State to control the entry of aliens into the country and the power to detain potential immigrants seeking permission to enter the country to make applications for asylum or other reasons. Until such "permission" is issued, the entry into the country is considered by the Court to be unlawful; in such a case the detention of the person who is seeking permission to enter the country, is an action carried out with a view of «preventing person's unauthorized entry into the country». Article 5.1 (f) is not limited to the arrest of the persons who try to avoid the restrictions applied on entry into the country. If the sub-paragraph only applied to such persons, that limitation would contradict the recommendations of the UN and the CoE (Saadi v. the UK [GC], §§ 64-66).

It is ***not necessary to prove that the arrest is necessary, but the principle of proportionality requires that any detention shall not last for a very long time without there being specific grounds justifying it*** *(Saadi v. the UK [GC], § 73).*

The question when the application of Article 5.1 (f) requires release as a result of the fact that permission is granted to the person to enter the country or to reside in its territory, depends significantly on the specifics of the national legislation (Suso Musa v. Malta § 97; see also: Longa Yonkeu v. Latvia § 125, 15.11. 2011).

To assess an arrest for the purpose of deportation or extradition the Court will review all the circumstances and the relevant procedures (Bozano v. France).In this context, ***it is not sufficient to only claim that the national legal norms and procedures were observed. These procedures and their application must meet the objective standards and requirements of the Convention****. The Court will examine both the outcome of the decision on the arrest and the circumstances that lead to the decision to detain.*

In the case of Bozano the French authorities declined the application to extradite and instead opted to deport. Despite one month passing since this decision was made no action was taken, as it was not clear where the applicant was supposed to be sent. One month after the decision to deport, at midnight the applicant was taken over the Swiss border and the authorities of that country extradited him to his own country - Italy. The Court came to the conclusion that in this case the deportation was a concealed form of extradition and under Article 5.1 (f) the deportation was unlawful. State authorities may not employ devious means for deporting failed asylum seekers (see: Bozano v. France, §52-56)

Article 5.1 (f) provides different level of protection than Article 5.1 (c): for the purposes of sub-paragraph (f) all that is required is that the "action is undertaken with the aim of deportation or extradition" (Chahal v. the UK, § 112; Chonka v. Belgium, § 38; Nasrullayev v. Russia, § 69; Soldatenko v. Ukraine, § 109).

Step 5 - The requisites of legality and lawfulness, and protection from arbitrariness in the national context

45 minutes

 Bowl or hat

Brainstorming and plenary discussion (lottery)
Ask participants to pair and invite them to think about practical situations, based on national legislation, in which the requisite of legality, lawfulness and protection from arbitrariness can be triggered. Ask them to write down, in a few sentences, a scenario depicting these situations and put the slips in a bowl or hat that you have placed on one of the desks/at the center of the room. Then invite one group at a time to draw from the bowl one of the scenarios, that will have to be read out to the audience. Guide the ensuing plenary discussion that will follow. Make sure to refer to the national cases indicated in the key points.

 *Make sure that the discussion keeps focussed! This exercise will give you an opportunity to go back to some of the key points discussed in the previous step.*

Key points - National context to be added about the country

Step 6 – Let's practice!

2 hours 30 minutes

 handouts

Case studies
Create a maximum of 5 groups and distribute all the case-studies. Assign 30-40 minutes for internal discussion for each case, then have groups present their findings in plenary. Use the solution keys to debrief.


To ensure equal participation of all, invite different groups to present the various cases and stimulate participation of the audience by asking guiding questions.


In the course of the debriefing prompt participants to think about how the situation would develop under national legislation.

Hand-out

Case no. 1
On 25 July 2002 the applicant was arrested on suspicion of tax evasion. A district court made an order for his detention after finding strong suspicion that he had evaded taxes on some twenty occasions over a six-year period and a risk of collusion or of his destroying evidence. The applicant subsequently obtained legal representation and on 7 August 2002 applied to the district court for a review of the detention order. A request by his lawyer for access to the case file to establish the facts and evidence on which the suspicion and order were based was turned down by the prosecution on the grounds that it would jeopardise the purpose of the investigation. The prosecution did, however, offer to inform the lawyer orally of the facts and evidence but he declined. At the review hearing, the district court upheld the detention order. The applicant's appeal to the regional court was dismissed. On 14 October 2002, following a further appeal by the applicant, a court of appeal quashed the lower courts' decisions and remitted the case to the district court after finding that the order of 25 July 2002 did not comply with statutory and constitutional requirements for a detailed description of the facts and evidence on which the defendant was suspected of the offence and of the reasons for his detention. It did not quash the order, however, as it found that while it was defective in law, it was not void. It also declined to give its own decision on the applicant's detention, preferring to remit the case to the district court, which it directed to inform the applicant of the grounds for suspicion and to hear his representations. Following the remittal of the case the prosecution provided the applicant's lawyer with a four-page overview by the tax-fraud office of the amount of the applicant's income and of the taxes he was alleged to have evaded. The district court issued a fresh detention order, but suspended it on conditions. That decision was upheld by the regional court and the applicant was released on 7 November

2002. Shortly afterwards his lawyer was authorised to consult the case file. At the trial the applicant was found guilty of tax evasion and sentenced to twenty months' imprisonment suspended on probation. Under German law detention orders that are defective in law are remediable on appeal and remain a valid basis for detention until the defect is remedied. Only in cases where the flaw is obvious and of such extent and gravity as to blatantly contradict the principles underlying the German legal system will a detention order be declared null and void. The Code of Criminal Procedure requires appeal courts to take their own decision in cases in which they find an appeal well-founded. However, the courts of appeal have developed exceptions to that rule and tend to remit the issue to a lower court where, as in the applicant's case, insufficient details have been given in the detention order and defence counsel has been refused access to the case file. The rationale for this exception is that the defective reasoning effectively amounts to a breach of the duty to hear representations from the defendant.

Questions:

Which issues arise from the above-mentioned circumstances under the angle of article 5 ECHR?

Do you think that the continued detention was in line with article 5 requirements?

Do you think that the case depicted could have happened in your country?

Case no. 2

The applicants are Mr Gutsanov, a well-known local politician, his wife and their two minor daughters. The authorities suspected Mr Gutsanov of involvement in corruption and ordered his arrest and a search of his home. On 31 March 2010 at 6.30 a.m. a special team made up of several armed and masked police officers went to the applicants' home. When Mr Gutsanov did not respond to the order to open the door, the police officers forced in the front door of the house and entered the premises. Mr Gutsanov's wife and their two young children were awoken by the arrival of the police. The first applicant was taken into a separate room. The house was searched and a number of items of evidence were taken away following the operation. When Mr Gutsanov left his home under police escort at around 1 p.m., journalists and television crews had already gathered outside. A press conference was held. The following day a regional daily newspaper published the comments made by the public prosecutor, together with extracts from an interview with the Interior Minister concerning the case. On the same day the prosecutor charged Mr Gutsanov with several criminal offences including involvement, in his capacity as a public servant, in a criminal group whose activities entailed the award of contracts potentially damaging to the municipality, and abuse of office by a public servant. The prosecutor ordered the first applicant's detention for seventy-two hours in order to ensure his attendance in court. On 3 April 2010 Mr Gutsanov appeared in court and was taken into pre-trial detention at the close of the hearing. On 25 May 2010 the court of appeal made him the subject of a compulsory residence order. On 26 July 2010 the first-instance court released him on bail.

In deciding whether the facts of the case disclose a breach of article 5 ECHR, please consider the following:
a) Mr Gutsanov had taken part in several investigative measures only in the course of the first day of detention;
b) According to the applicable legislation, the public prosecutor's office could request placement of the suspect in pre-trial detention withing 96 hours (4 days) from arrest.
c) After the arrest Mr Gutsanov had resigned from his position as chair of Municipal Council;
d) Mr Gutsanov's applications for release were rejected solely on the grounds that he might commit further offences, in particular by tampering with the evidence.

Case no. 3

The applicant, an Iraqi Kurd, fled his country of origin and arrived at London Heathrow Airport on 30 December 2000. He immediately claimed asylum and was granted "temporary admission". On reporting to the immigration authorities on 2 January 2001, he was detained and transferred to a Reception Centre, which was used for asylum seekers considered unlikely to abscond and whose applications could be dealt with by a "fast-track" procedure. When being taken into detention, the applicant was handed a standard form, "Reasons for Detention and Bail Rights", indicating that detention was used only where there was no reasonable alternative, and setting out a list of reasons, such as risk of absconding, with boxes to be ticked by the immigration officer where appropriate.

The form did not include an option indicating the possibility of detention for fast-track processing. On 5 January 2001 the applicant's representative was informed on the telephone by an immigration officer that the reason for the detention was that the applicant was an Iraqi who met the criteria for detention at the reception centre. The applicant's asylum claim was initially refused on 8 January 2001 and he was formally refused leave to enter the UK. He was released the next day and subsequently granted asylum after successfully appealing against the refusal of leave to enter. He unsuccesfully sought judicial review of the decision to detain him.

Questions

a) Do the facts of the case disclose an issue under article 5 para. 2 ECHR?
b) Can the form be regarded a fulfilling the requirements of article 5 para. 2 ECHR?

Solution keys

Case no. 1 – Mooren v. Germany, application 11364/03, [GC], 09/07/2009

In its judgment of 13 December 2007, a Chamber of the Court found no violation of Article 5 § 1 and violations of Article 5 § 4. The Grand Chamber, to which the case was referred to, decided as follows:
Article 5 § 1 – The applicant complained that the court of appeal had failed to set aside the detention order of 25 July 2002 or to order his release even though it had found the order to be illegal. The Court noted that defects in a detention order did not necessarily render the underlying detention "unlawful" for the purposes of Article 5 § 1, unless they amounted to "a gross and obvious irregularity". Although the detention order of 25 July 2002 failed to comply with the formal requirements of domestic law as it did not describe in sufficient detail the facts and evidence forming the basis for the suspicion against the applicant, it did not suffer from a gross and obvious irregularity such as to render it null and void. In particular, the district court had jurisdiction, had heard representations from the applicant at a hearing and had notified him of the order. In the review proceedings, all the domestic courts agreed that the substantive conditions for the applicant's detention – strong suspicion that he had committed an offence, coupled with the danger of collusion or of his absconding – were met. The fact that the applicant's lawyer had not been given full access to the case file did not alter the position as a violation of Article 5 § 4 on that account (see below) did not automatically entail a breach of Article 5 § 1, so that although the district court should have given more detailed information, it had nevertheless specified the charges in such a way as to make it clear that the suspicions against the applicant were based on business records seized at his home. The applicant could not therefore complain that he had been unaware of the basis for the suspicion.
Further, contrary to the applicant's submissions, the court of appeal's decision of 14 October 2002 had been sufficiently foreseeable not to violate the principle of legal certainty. The distinction between orders that were merely "defective" and those that were "void" was well-established in the domestic case-law, even if, as the applicant had alleged, there was no basis for it in the Code of Criminal Procedure. Further, even though the court of appeal's decision to remit ran counter to the wording of the Code requiring the appeal court to take the decision on the merits, it too was based on a well-established jurisprudential exception that applied in certain limited circumstances. While the Court considered that judicial exceptions to an express statutory rule should be kept to a minimum to avoid compromising legal certainty, the court of appeal had expressly cited earlier case-law in situations comparable to the applicant's, so that its decision on this point also had been sufficiently foreseeable.
Lastly, while the speed with which a defective detention order was replaced was relevant to the question whether detention was arbitrary, the district court had issued a fresh, reasoned, detention order within 15 days of the court of appeal's decision to remit. Moreover, remitting a case to a lower court was a recognised technique for establishing the facts in detail and for assessing the evidence and in cases like the applicant's, its benefits could outweigh the inconvenience caused by any delay and even serve to avoid unnecessary delays by taking advantage of the lower court's better knowledge of the suspect and the investigation. It could also serve to improve the administration of justice when, as in the applicant's case, it was accompanied with instructions to the lower court on how to avoid defective decisions in the future. Accordingly, the time that had elapsed between the court of appeal's

finding that the detention order was defective and the issuing of the fresh detention order had not rendered the detention arbitrary.
In sum, the applicant's detention had been lawful and in accordance with a procedure prescribed by law.
Conclusion: no violation (nine votes to eight).

Article 5 § 4 – (a) Speed of review: The Grand Chamber endorsed the Chamber's findings that the decision to remit the case had unjustifiably delayed the process of judicial review of the legality of the detention order. A total of two months and twenty-two days had elapsed between the date the applicant sought judicial review on 7 August 2002 and the date the district court ordered his release.
Conclusion: violation (unanimously).

Case no. 2 – Gutsanovi v. Bulgaria, application 34529/10, 15/10/2013
Article 5 § 3
(a) *Appearance before a judge* – Mr Gutsanov had been arrested on 31 March 2010 at 6.30 a.m. and had appeared before a judge three days, five hours and thirty minutes later. He had been a suspect in a case concerning misappropriation of public funds and abuse of office, but had not been suspected of involvement in violent criminal activities. He had been subjected to degrading treatment during the police operation leading to his arrest. Following those events, and notwithstanding the fact that he was an adult and had been assisted by a lawyer from the beginning of his detention, Mr Gutsanov had been psychologically vulnerable in the early days following his arrest. Furthermore, the fact that he was a well-known politician, and the media interest in his arrest, had undoubtedly added to the psychological pressure on him during the early part of his detention. During his first day in detention Mr Gutsanov had taken part in several investigative measures. However, the regional public prosecutor's office had not requested his placement in pre-trial detention until the last day of the four-day period of custody permitted under domestic law in the absence of judicial authorisation, although the applicant had not participated in any investigative measure for two days. He had been detained in the city where the court empowered to rule on his pre-trial detention was located, and no exceptional security measures had been required in his case. In sum, in view of the applicant's psychological vulnerability in the early days after his arrest, and the absence of any circumstances justifying the decision not to bring him before a judge on the second or third day of his detention, the State had failed in its obligation to bring the applicant "promptly" before a judge or other officer empowered to review the lawfulness of his detention.
Conclusion: violation (six votes to one).

(b) *Length of detention* – Mr Gutsanov had been deprived of his liberty for four months, of which two months had been spent under a compulsory residence order. Even at the time of his early applications for release the domestic courts had ruled out any risk that he might abscond. They had nevertheless ordered his continued detention on the grounds that he might commit further offences, in particular by tampering with the evidence. The court of appeal, in its ruling of 25 May 2010, had taken the view that the latter risk had also ceased to exist in view of the applicant's

resignation from his position as chair of the municipal council. A compulsory residence order had nevertheless been made in respect of Mr Gutsanov, without the court of appeal giving any specific reason justifying the measure, which had remained in place for a further two months. Accordingly, the authorities had failed in their obligation to give reasons justifying the applicant's continued detention after 25 May 2010.
Conclusion: violation (unanimously).

Case no. 3 Saadi v. the United Kingdom, application 13229/03, 11.7.2006 Article 5 § 2: The Court noted that the applicant's representative was informed of the reason for the applicant's detention by telephone on 5 January 2001. At that time, the applicant had been in detention for some 76 hours. The Court found that such a delay was not compatible with the requirement of Article 5 § 2 that such reasons be given promptly. It therefore concluded that there had been a violation of that article. The Grand Chamber agreed with the Chamber that general statements – such as parliamentary announcements – could not replace the need for the individual to be informed of the reasons for his arrest or detention.
Conclusion: violation (unanimously).

Session III – Rights of persons deprived of liberty

30 minutes

List the guarantees enjoyed by people deprived of liberty
Outline the type and quality of information on reason for arrest a person deprived of liberty is entitled to
Define the meaning of time element listed in article 5.3 and 5.4 ECHR
Understand the links between article 5 and article 6 ECHR
Define the type and quantity of compensation for unlawful detention
Sensitize participants about the duties inherent to the their roles

Step 1 – Procedural guarantees enshrined in article 5 ECHR

Part I
10 minutes

flipchart, markers

Brainstorming in small groups
Divide participants into 10 groups. Assign to each group one of the following aspects of article 5 (the same topic will be examined by 2 separate groups):

5.2 Reasons for arrest
5.3 Right to be brought promptly before a judge (2 groups for this provision, one focussing on the "time" element and the nature of the officer, the other

focussing on the powers of the officer)
5.3 Trial within reasonable time
5.4 Review of lawfulness

Ask participants to prepare bullet-points on what they think the right is about. Prompt them also to think about the domestic law and practice, providing if possible concrete examples.

Give each group 5 minutes to go through the assignment then proceed with debriefing in plenary, inviting representatives of the 2 groups dealing with the same subject to come upfront and alternating points so that both groups have the possibility to take the floor. Stimulate reactions by the audience by asking clarification question. Debrief using key points.

 *To stimulate liveliness you can hand over a flipchart paper with the assigned topic already marked on it: most people will feel "obliged" to use it!*

 *Plenary brainstorming should be limited to 5-8 minutes per topic as this is only serves as a warm-up for the next step.*

Part II

30 minutes

 PPT

Lecture and Q&A
With the help of the PPT provided, give a lecture about the topic. Include a session for Q&A at the end (10 minutes)

 *Remember to make reference to the results of the previous brainstorming session!*

Key points

<u>Information on the reason for arrest (article 5.2 ECHR)</u>

The words used in Article 5 § 2 should be ***interpreted autonomously*** *and, in particular, in accordance with the aim and purpose of Article 5 which is to protect*

everyone from arbitrary deprivations of liberty. The term "arrest" and the words "any charge" are not restricted to detention in the criminal justice system. Article 5 § 4 does not make any distinction between persons deprived of their liberty on the basis of whether they have been arrested or detained and there are no grounds for excluding the latter from the scope of Article 5 § 2 (Van der Leer v. the Netherlands, §§ 27-28) which extends to detention for the purposes of extradition (Shamayev and Others v. Georgia and Russia, §§ 414-15) and medical treatment (Van der Leer v. the Netherlands, §§ 27-28; X. v. the United Kingdom, § 66) and also applies where persons have been recalled to places of detention following a period of conditional release (the same case; X v. Belgium, Commission decision).

Article 5 § 2 contains the elementary safeguard that any person arrested should know why he is being deprived of his liberty *and is an integral part of the scheme of protection afforded by Article 5. Where a person has been informed of the reasons for his arrest or detention, he is better equipped to decide whether to apply to a court to challenge the lawfulness of his detention in accordance with Article 5 § 4 (Fox, Campbell and Hartley v. the United Kingdom, § 40; Čonka v. Belgium, § 50).*

Any person who is entitled to take proceedings to have the lawfulness of his detention decided speedily cannot make effective use of that right unless he is promptly and adequately informed of the reasons why he has been deprived of his liberty (Van der Leer v. the Netherlands, § 28; Shamayev and Others v. Georgia and Russia, § 413).

It is plain from the wording of Article 5 § 2 that ***the duty on States is to furnish specific information to the individual or his representative*** *(Saadi v. the United Kingdom, § 53, confirmed by the Grand Chamber in 2008). If the applicant is incapable of receiving the information, the relevant details must be given to those persons who represent his interests such as a lawyer or guardian (X. v. the United Kingdom, Commission Report, § 106; Z.H. v. Hungary, §§ 42-43).*

Whether the ***information conveyed is provided sufficiently promptly must be assessed in each case according to its special features****. However, the reasons need not be related in their entirety by the arresting officer at the very moment of the arrest (Fox, Campbell and Hartley v. the United Kingdom, § 40; Murray v. the United Kingdom [GC], § 72).*

The constraints of time *imposed by the notion of promptness* ***will be satisfied where the arrested person is informed of the reasons for his arrest within a few hours*** *(Kerr v. the United Kingdom (dec.); Fox, Campbell and Hartley v. the United Kingdom, § 42).*

The reasons do not have to be set out in the text *of any decision authorising detention and* ***do not have to be in writing*** *or in any special form (X. v.*

Germany, Commission decision of 13 December 1978; Kane v. Cyprus (dec.)). ***However, if a person with intellectual disability is not provided with the information in an appropriate form or via another authorized person it cannot be said that he was provided with the requisite information*** *enabling him to make effective and intelligent use of the right ensured by Article 5 § 4 to challenge the lawfulness of the detention (Z.H. v. Hungary, § 41).*

The reasons for the arrest may be provided directly or become apparent in the course of post- arrest interrogations or questioning *(Fox, Campbell and Hartley v. the United Kingdom, § 41; Murray v. the United Kingdom [GC], § 77; Kerr v. the United Kingdom (dec.)).*

Arrested persons may not claim there was a failure to understand the reasons for their arrest in circumstances where they were arrested immediately after the commission of a criminal and intentional act (Dikme v. Turkey, § 54) or where they were aware of the details of alleged offences contained within previous arrest warrants and extradition requests (Öcalan v. Turkey (dec)).

Whether the content of the information conveyed is sufficient must be assessed in each case according to its special features (Fox, Campbell and Hartley v. the United Kingdom, § 40). However, ***a bare indication of the legal basis for the arrest, taken on its own, is insufficient for the purposes of Article 5 § 2*** *(ibidem, § 41; Murray v. the United Kingdom [GC], § 76; Kortesis v. Greece, §§ 61-62).*

Arrested persons must be told, in simple, non-technical language that they can understand, the essential legal and factual grounds for the arrest, *so as to be able, if they see fit, to apply to a court to challenge its lawfulness in accordance with Article 5 § 4 (Fox, Campbell and Hartley v. the United Kingdom, § 40; Murray v. the United Kingdom [GC], § 72). However, Article 5 § 2 does not require that the information consist of a complete list of the charges against the arrested person (Bordovskiy v. Russia, § 56; Nowak v. Ukraine,*
§ 63; Gasiņš v. Latvia, § 53).

Where persons are arrested ***for the purposes of extradition, the information given may be relatively basic*** *(Suso Musa v. Malta, §§ 113 and 116; Kaboulov v. Ukraine, § 144; Bordovskiy v. Russia, § 56) as an arrest for such purposes does not require a decision to be made on the merits of any charge (Bejaoui v. Greece, Commission decision). However, such persons must nonetheless receive sufficient information so as to be able to apply to a court for the review of lawfulness provided for in Article 5 § 4 (Shamayev and Others v. Georgia and Russia, § 427).*

Where the warrant of arrest, if any, is written in a language which the arrested person does not understand, Article 5 § 2 will be complied if the applicant is subsequently interrogated, and thus made aware of the reasons for his arrest, in a language which he understands (Delcourt v. Belgium, Commission decision).

*However, **where translators are used for this purpose, it is incumbent on the authorities to ensure the translation is completed with meticulousness and precision** (Shamayev and Others v. Georgia and Russia, § 425).*

National context to be added

<u>The right to be brought promptly in front of a judge (article 5.3 ECHR)</u>

*Article 5 § 3 of the Convention provides persons arrested or detained on suspicion of having committed a criminal offence with a guarantee against any arbitrary or unjustified deprivation of liberty (the case of Aquilina v. Malta and Stephens v. Malta). **The purpose of this paragraph is to make deprivation of liberty possible only in exceptional cases and to ensure that judicial supervision over arrest and detention is in place**.*

***The reasonable suspicion, necessity to prevent a crime and the risk of absconding of the suspected person can serve as a ground to detain an individual. However, such detention will meet the requirements of Article 5 § 1 (c)** only if it is aimed to initiate criminal proceedings against the person detained. This fact demonstrates a link between Article 5 § 1 (c) and 5 § 3. The first part of the provision allows deprivation of liberty, while the second provides that everyone arrested or detained in accordance with the provision of paragraph 1 (c) "shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial."*

Judicial control as a component of the rule of law is, "one of the fundamental principles of a democratic society … which is expressly referred to in the Preamble to the Convention" and "from which the whole Convention draws its inspiration" (Brogan v. the United Kingdom).

***Judicial control serves to provide effective safeguards against the risk of ill-treatment,** which is at its greatest in this early stage of detention, and against the abuse of powers bestowed on police (or other law enforcement officers in charge of protection of public order) (Ladent v. Poland).*

*The opening part of Article 5 § 3 provides for a **prompt and automatic control of arrest or pre-trial detention** ordered in accordance with the provisions of paragraph 1 (c) (De Jong, Baljet and Van den Brink v. the Netherlands, § 51; Aquilinav. Malta).*

The time constraint imposed by this requirement leaves little flexibility in interpretation, otherwise there would be a serious weakening of a procedural guarantee to the detriment of the individual and the risk of impairing the very essence of the right protected by this provision (McKay v. the United Kingdom).

Article 5 § 3 does not provide for any possible exceptions from the requirement that a person be brought promptly before a judge *or other judicial officer after his or her arrest or detention, not even on grounds of prior judicial involvement (Bergmann v. Estonia)*

What is prompt? The time element

Let us have a look at a few examples:

- ***any period in excess of four days*** *between the arrest of an individual and his appearance before a judge* ***is prima facie too long*** *(Oral and Atabay v. Turkey; McKay v. the United Kingdom; Năstase-Silivestru v. Romania);*
- ***shorter periods can also breach the promptness*** *requirement if there are* ***no special difficulties or exceptional circumstances*** *preventing the authorised authorities from bringing the arrested person before a judge sooner (İpek and Others v. Turkey and Kandzhov v. Bulgaria).* ***The leading case*** *on the setting of a time-limit on detention prior to the judicial supervision* ***is the case of Brogan v. the United Kingdom****, which not only found* ***a period of four days and six hours to be too long****, but also shed some useful light on the very objective underlying the obligation that a person should be brought before a court following his or her initial detention. The arrest in the Brogan case concerned a suspected terrorist and the Court accepted that the specific circumstances of the fight against terrorism could have an impact on the length of detention prior to its being subjected to judicial supervision. However it stated that to attach such importance to the special features of this case as to justify so lengthy a period of detention without appearance before a judge or other judicial officer would be an unacceptably wide interpretation of the plain meaning of the word "promptly". In cases involving the detention of soldiers for military offences, although the Court has made some allowances for the exigencies of military life, it still held to the importance of the promptness requirement.*

Automatic judicial review

The fact that an arrested person had access to a judicial authority is not sufficient to constitute compliance with the opening part of Article 5 § 3 (De Jong, Baljet and Van denBrink v. the Netherlands and Pantea v. Romania). ***Judicial control of detention must be automatic and cannot be made to depend on a previous application by the detained person*** *(McKay v. the United Kingdom; Varga v. Romania, Viorel Burzo v. Romania). Such a requirement would not only change the nature of the safeguard provided for under Article 5 § 3, a safeguard distinct from that in Article 5 § 4, which guarantees the right to institute proceedings to have the lawfulness of detention reviewed by a court; it might even defeat the purpose of the safeguard under Article 5 § 3 which is to protect the individual from arbitrary detention by ensuring that the fact of deprivation of liberty is subject to independent judicial scrutiny (Aquilina v. Maltaand Niedbała v. Poland).*

Therefore, the automatic nature of the judicial review is necessary to fulfil the purpose of Article 5 § 3, as a person subjected to ill-treatment might be incapable of lodging an application asking for a judge or other officer authorised by law to exercise judicial power to review the lawfulness of their detention. The same requirement is of special importance in case of vulnerable categories of arrested persons, such as those who cannot understand the meaning of their actions or control their actions due to mental incapacity or mental illness or those ignorant of the language of the judicial review proceedings (McKay v. the United Kingdom and Ladent v. Poland).

The "officer" authorised by law

*The appropriate "officer" **has an obligation of reviewing the circumstances militating for or against detention** and of deciding, by reference to legal criteria, whether there are reasons to justify detention (Schiesser v. Switzerland; Pantea v. Romania). In other words, Article 5 § 3 requires the "officer" to consider also the merits of the detention (Aquilina v. Malta and Krejčíř v. the Czech Republic).*

*The matters which the "officer" must examine go beyond the question of lawfulness. **The review required under Article 5 § 3, needs to establish whether the deprivation of the individual's liberty is justified**, must be sufficiently wide to encompass the various circumstances militating for or against detention (Aquilina v. Malta, § 52).*

***If there are no reasons** to justify detention, the appropriate "officer" must have the power to make a binding order **for the detainee's release** (Assenov and Others v. Bulgaria; Nikolovav. Bulgaria; Niedbała v. Poland and McKay v. the United Kingdom).*

*It is essential in order to minimise delay, that **the "officer"** who conducts the first review of lawfulness and the existence of a ground for detention, **also has the competence to consider release on bail.** There is no reason in principle why the issues in a case cannot be dealt with by two judicial officers. In any event the examination of the issue of bail must take place with some speed - the Court has identified the time allowed as being a maximum four days (McKay v. the United Kingdom).*

National context to be added

Speedy review of lawfulness (article 5.4 ECHR)

According to the opinion of the European Court, the detainee shall be present in person in the proceedings related to the judiciary examination. In the countries with the two tier court systems such "presence" assumes being present both in the first instance and appellate courts (Grauslys v. Lithuania, N 36743/97, 10.10.2000, p.53). The principle of being heard was developed by the lawyers of

the ancient Rome: audi alteram partem (to hear both parties). There is another right which derives from the right to "being heard" – the right to "being heard by a court.
The European Court is of the opinion that "…it is essential that ***the person concerned should have access to a court and the opportunity to be heard****" (Megyeri v. Germany, 12.05.1992, p.22); "failing which he will not have been afforded "the fundamental guarantees of procedure applied in matters of deprivation of liberty" (Winterwerp v. the Netherlands, 24.10.1979, p. 60).*

The European Court considers that, "if the arrest of any person falls under the ambit of Article 5 §1 sub-paragraph "c", then conduct of investigation is required" (Lamy v. Belgium. 30.03.1989, p. 29). In the case of Reinprecht v. Austria (N 67175, 15.11.2005, p. 34) the Court stressed that "the requirements such as, the adversarial nature of the proceedings and the principle of equality of arms, are considered to be "fundamental guarantees of procedure" applying in matters of deprivation of liberty".[2] In the judgement of the case Nikolova v. Bulgaria it was indicated that "A court examining an appeal against detention must provide guarantees of a judicial procedure. The proceedings must be adversarial and must always ensure "equality of arms" between the parties, the prosecutor and the detained person." (Nikolova v. Bulgaria, N 31195/96, 25.03.1999, p. 58; also see: the case of Lamy v. Belgium, 30.03.1989, p. 29)

In the case of Włoch v. Poland, application no. 27785/95, 19.10.2000, the Court reiterates that "by virtue of Article 5 § 4 an arrested or detained person is entitled to bring proceedings for the review by a court of the procedural and substantive conditions which are essential for the "lawfulness".

Although it is not always necessary that the procedure under Article 5 § 4 be attended by the same guarantees as those required under Article 6 § 1 *of the Convention for criminal or civil litigation,* ***it must have judicial character and give to the individual concerned appropriate to the kind of deprivation of liberty in question.***

In case of a person whose detention falls within the ambit of Article 5 § 1 (c), a ***hearing is required****. In particular, in proceedings in which an appeal against a detention order is being examined, equality of arms between the parties, the prosecutor and the detained person must be ensured".*

What is the "equality of arms" and "adversarial" nature of the proceedings?
The European Court has concretely answered this question in relation to Article 6 and these principles apply in general to Article 5(4) proceedings: "The Court reiterates that the concept of a fair trial includes the principle of equality of arms and the fundamental right that criminal proceedings should be adversarial. This means that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence presented by the other party (Maksimov v. Azerbaijan, № 38228/05, 08/10/2009, p. 38);

"the principle of equality of arms implies that the applicant must be "afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-a-vis his opponent" (Popov, Nº 26853/04, 13/07/2006, p. 177).

***In some cases, absence of the prosecutor in the proceedings may result in lack of impartiality of the court along with not having the adversarial procedure**. For instance, in the case of Ozerov v. The Russian Federation (N 64962/01, 18/05/2010, p.54) the European Court found that by examining the case on merits and convicting the applicant without the prosecutor the District Court confused the roles of prosecutor and judge and thus, gave the grounds as to its impartiality, and this resulted in the violation of the applicant's right to "having his case heard by an impartial court" enshrined in Article 6 § 1 of the ECHR.*

*The **right of the detained or arrested person to have adequate time and facilities to prepare his defence** is closely linked to the requirements concerning the equality of arms and adversarial nature of proceedings. This requirement, in its turn, is crucial for the judicial review as an aspect of the right to fair trial.*

*"Notwithstanding the fact that domestic legislations may solve the issue of "equality of arms" in different ways, "**both the prosecution and the defence must be given the opportunity to have the knowledge of and comment on the observations filed and the evidence adduced by the other party**" regardless of the method chosen (Garcia Alva v. Germany), N 23541/94, 13.02.2001, p 39).*

Equality of arms is not ensured, for example, if:

- ***counsel is denied access to those documents** in the investigation file **which are essential** in order effectively to challenge the lawfulness of his client's detention. (Nikolova v. Bulgaria, N 31195/96, 25.03.1999, p. 58). In the paragraph 29 of the judgement of the case of Lamy v. Belgium of 30.03.1989 (n. 10444/83, p. 29), the Court further developed this opinion: "Access to these documents was essential for the applicant at this crucial stage in the proceedings, when the court had to decide whether to remand him in custody or to release him.... In the Court's view, it was therefore essential to inspect the documents in order to challange the lawfulness of the arrest warrant effectivelyr"*

***The right to legal counsel** shall be ensured in line with the Article 6 § 3 sub-paragraph "c" of the Euroepan Convention, case-law of the European Court on application of this **paragraph**, and the "standards" developed by this paragraph. Despite these standards relate to one of the aspects of another right – right to fair trial – the European Court requires that they are taken into account, with some exceptions (for instance, public hearing – opennes of the trial), also in the Article 5 cases. It is written in the judgement of the case Assenov v. Bulgaria:*

"Although it is not always necessary that the procedure under Article be attended by the same guarantees as those required under Article 6 § 1 of the Convention for criminal or civil litigation, it must have a judicial character and provide guarantees appropriate for the kind of deprivation of liberty in question." (Assenov and others v. Bulgaria, N 24760/94, 28.10.1998, p.162). One of these guarantees is the right to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require" enshrined in Article 6 § 3 c).

National context to be added

Step 2 – Right to compensation for unlawful arrest or detention

20 minutes

 flipchart, markers

Make-a-list
Prepare 3 flipcharts with the words WHEN, HOW and HOW MUCH. Divide participants into small groups. Ask each group to compile a list of situations in which, according to the national legislation, a person is entitled to compensation for unlawful arrest or detention (WHEN), listing the procedure (i.e. exhaustion of certain remedies..) (HOW) and indicating whether the amount is fixed or corresponds to certain criteria. Alternate representatives of each group in giving presentations and write the findings on the flipchart. Stimulate discussion using the key points below.

 *In order to ensure full and equal participation, ensure that each group only present 1 finding and that, in case one group is asked to make more than one presentation, the group representative is a different one. Think about inviting women participants first!*

Key points

Article 5 (5) requires that victims of arrest or detention in breach of the other provisions of this article should have an ***enforceable right to compensation.***

A remedy before a court is required*, meaning that the remedy must be awarded by a legally binding decision. A remedy by other bodies (such as an*

ombudsman) or an ex gratia payment by the government is not sufficient for the purpose of Article 5 (5). Normally, the remedy will consist of a financial compensation.

In order for the Court to find a violation of Article 5 (5), ***it must first find a violation of one or more of the rights protected by the preceding paragraphs of the article*** *(see Stoichkov v. Bulgaria below). The Court will find a violation, if the victim has no enforceable right - either before or after the findings of a violation - to compensation before national courts (see Harkmann v. Estonia and Fox, Campbell and Hartley).*

The Court accepted that States can make ***compensation dependent on the existence of damage resulting from the breach of Article 5****. If the person concerned cannot show to have suffered pecuniary or non-pecuniary damage, a state can refuse to pay compensation (see Chitayev and Chitayev v. Russia and Wassink v. the Netherlands).*

In Sakik and others v. Turkey, the Court found a violation of Article 5 (5) on the grounds that the Turkish Government could not show that anyone had ever been compensated under the domestic legal provisions the Government cited as applicable. In the case of Tsirlis and Kouloumpas the Court also found a violation of Article 5 (5) where the applicants had been detained in contravention of domestic law and thus of Article 5 (1) as well, and where the domestic courts refused to compensate them for their unlawful detention on the specious grounds that they had been detained as a result of their own gross negligence.

Even ***in the absence of a finding by a domestic authority of a breach of the other provisions of Article 5, the Court itself can consider whether such a breach of Article 5 § 5 applies*** *(Nechiporuk and Yonkalo v. Ukraine and Yankov v. Bulgaria). The applicability of Article 5 § 5 is not dependant on a domestic finding of unlawfulness or proof that, but for the breach, the person would have been released (Blackstock v. the United Kingdom and Waite v. the United Kingdom). The arrest or detention may be lawful under domestic law, but still in breach of Article 5 (Harkmann v. Estonia).*

The right to compensation relates primarily to ***financial compensation****. It* ***does not confer a right to secure the detained person's release,*** *which is covered by Article 5 § 4 of the Convention (Bozano v. France, Commission decision).*

Crediting a period of pre-trial detention towards a fine (financial) penalty does not amount to compensation *required by Article 5 § 5 (Włoch v. Poland). Article 5 § 5 does not limit the right to nationals of the states which have accepted the Convention. There can be* ***no question of "compensation" where there is no pecuniary or non-pecuniary damage to compensate (Wassink v. the Netherlands).*** *However, excessive formalism in requiring proof of non-pecuniary damage resulting from unlawful detention is not compliant with*

the right to compensation (Danev v. Bulgaria).

Article 5 § 5 of the Convention does not entitle the applicant to a particular amount of compensation (Damian-Burueana and Damian v. Romania and Şahin Çağdaş v. Turkey), however, ***compensation which is negligible or disproportionate to the seriousness of the violation would not comply with the essence of this right*** *on the account that this would render the right guaranteed by that provision purely theoretical (Cumber v. the United Kingdom, Commission decision). An award cannot be lower than that awarded by the Court in similar cases (Ganea v. Moldova and Cristina Boicenco v. Moldova).*

Session IV – Protection from arbitrariness

3 hours

Analyse complex situations
Apply principles to multifaceted scenario
Compare national and international standards
Formulate solutions to practical dilemmas

Step 1 – Human rights competition

2 hours 30 minutes

Hand-outs, flipchart papers, scissors, envelopes, bell or other instrument making noise, small price (packet of candies, calendar, stickers….)

Competition

Divide participants in groups of 3. Place them in separate parts of the room (moving tables if needed). Ask each team to select a name for their team and write it on a folded sheet of paper where they sit. Inform participants that they are going to participate in a quiz. Distribute envelopes (print out hand-out for competition, cut questions and place them into separate envelopes, as per instructions) and inform participants that they will be able to open the relevant envelope (story or question) only upon your specific indication. After inviting them to open story part 1 invite them to open question 1 only. As soon as they think they know the answer, they should run towards the bell, ring it and provide the answer. Have a scoreboard where to write points: 1 for each fully correct answer; - 1 for incorrect or partial answer. In case of partial answer you can invite another group to get their +1 point! Proceed with subsequent questions and story episodes.

With the second case, prepare 1 envelope with the story and separate

envelopes for each question only and proceed as before.

At the end, have a "ceremony" to celebrate the winner. In case of incorrect or partial answer invite other participants otherwise proceed with debriefing.

 *Depending on the time available you can run the competition with 1 or 2 cases. In any event, remember that once started, the examination of the case cannot be interrupted! Alternatively, you can use the stories for individual or small group work.*

Individual case-study
Distribute hand-out with case-study no. 3 and ask each person individually to go through all questions. Allow for some 20 minutes. Debrief in plenary and address any outstanding issues.

Hand-out for competition

CASE 1
Envelope marked STORY 1
On Friday 29 July 2001 Ludmilla, a ten-year old girl, was found in a distressed state in a city park. The police were called and she eventually explained that she had been persuaded to go into the park by a man who had her approached her on a nearby pavement where she was playing with some friends. She claimed that the man had assaulted her and, after a medical examination, it was evident that she had in fact been raped. Later the same day the Public Prosecutor started criminal proceedings in respect of the rape of a minor. During the investigation proceedings, pictures of persons already suspected of sexual assaults on children were shown to Ludmilla and her friends but, although they thought that some seemed familiar, none were sure that they were of the man in the park. However, they all said that the man had been wearing green trousers with blue stripes and a long-sleeved blue shirt.

Exactly five weeks later Ludmilla went back to school and when she saw Serhiy, the janitor, she thought that he might be the man from the park. She told her teacher who called the police but asked them to act discreetly so as not to alarm the children. Two officers went up to Serhiy and asked him to come with them as he was needed to identify someone suspected of breaking into the school during the vacation. Serhiy gladly went with them but when he reached the police station he was taken to an office and told that he could not leave until the prosecutor arrived. Some eight hours elapsed before this occurred as the prosecutor had been dealing with another investigation.

Envelope marked with QUESTION 1
At what point was Serhiy deprived of his liberty for the purpose of European Convention on Human Rights, Article 5?

Solution key to QUESTION 1
There is a need to make it clear that Article 5 applies whenever a person's liberty is lost, no matter how it might be described; the important consideration is whether or not the person is free to come and go as he or she pleases. As soon as that ceases to be possible, Article 5 becomes applicable. The establishment of the moment at which liberty is lost then becomes significant not only for determining whether it comes within one of the grounds specified in Article 5(1) but also for establishing whether he or she has been informed promptly of the reasons for this deprivation of liberty [as required by Article 5(2)] and for starting the clock running for the purposes of assessing whether the duration is compatible both with Article 5(3) and any applicable national requirements. In the present case there does not appear to be any constraint until Serhiy reaches the police station but the information as to why he was taken there would preclude compliance with Article 5(2), particularly as the circumstances are not sufficient for him to appreciate the reasons for the loss of liberty; see *Murray v United Kingdom*, 28 October 1994.

Envelop marked with QUESTION 2
Was this deprivation of liberty for a ground permitted by Article 5?

Solution key to QUESTION 2
It will be important to emphasise that the grounds listed in Article 5(1) are exhaustive unless there has been a derogation under Article 15 on account of a state of emergency. That provision cannot lightly be invoked as a number of preconditions must be satisfied but there is no suggestion that the circumstances surrounding the present case is an emergency. As a consequence the only possible ground for the deprivation of liberty is that of a suspicion of having committed an offence, ie, Article 5(1)(c). However, in order for this ground to be invoked it is essential to be able to demonstrate that the deprivation of liberty also has a legal basis in national law in this regard [as opposed to a practice which has no legal basis, see *Baranowski v Poland,* 28 March 2000] and it will be important to explore whether this exists for the confinement until the prosecutor arrives.

Envelop marked with QUESTION 3
Does it matter that the police misled Serhiy as to the reason for going to the police station?

Solution key to QUESTION 3
The fraud by the police would not have been sufficient to constitute a deprivation of liberty in itself - as no coercion was involved - but it will be part of the context in which his treatment is to be assessed and it is likely that it would be sufficient to taint the restraint imposed at the police station with arbitrariness which is in itself enough to mean that it is not lawful for the purposes of Article 5, even though the deprivation of liberty would otherwise come within one of the enumerated grounds; see *Tsirlis and Kouloumpas v Greece*, 29 May 1997

Envelope marked with STORY 2
The prosecutor told Serhiy that he was suspected of raping Ludmilla and asked him to account for his whereabouts on 29 July 2001. Serhiy said that he had spent the

day with his brother Piotr at the family dacha. The prosecutor tried to contact Piotr but, having discovered that he had just gone abroad on a business trip, told Serhiy that he would have to stay in detention until he was brought before a court the following Monday and that they might as well use the time 'to discuss the case'. Serhiy asked if he could see a lawyer but the prosecutor said this was impossible as he could not afford one and in any event no lawyer worked over the weekend.

Envelope marked with *QUESTION* 4
Did the prosecutor have a sufficient basis for keeping Serhiy in custody?

Solution key to QUESTION 4
A deprivation of liberty under Article 5(1)(c) requires that there be a 'reasonable suspicion' as to the involvement of the person affected in the commission of an offence. This entails there being some evidence that links the person with the offence must exist but this does not have to be sufficient for the purpose of obtaining a conviction; see *Fox, Campbell and Hartley v United Kingdom*, 30 August 1990 and *Erdagöz v Turkey*, 22 October 1997. The need for a reasonable suspicion is a continuing requirement throughout any deprivation of liberty and while the 'identification' of Serhiy by Ludmilla could be a sufficient basis for his initial apprehension, this has to be continually reassessed in the light of information subsequently obtained. There will, therefore, be a need to consider whether his explanation as to his whereabouts at the time of the offence is sufficient to change the position. In the present case the alibi may ultimately prove to be well-founded but it is insufficient at this stage, given the inability to obtain any confirmation of it. The fact that a reasonable suspicion eventually ceases to exist does not affect the validity of the initial deprivation of liberty.

Envelope marked with *QUESTION* 5
Was it acceptable to defer Serhiy's production in court until the Monday?

Solution key to QUESTION 5
Under Article 5(3) it is required that any person deprived of his or her liberty under Article 5(1)(c) must be brought promptly before someone authorised to exercise judicial power with the authority to determine whether the deprivation should be continued. Compliance with the promptness requirement is a matter to be determined in the circumstances of each case but it is well-established that a four-day period is unlikely to be acceptable in non-emergency situations (see Brogan v United Kingdom, 30 May 1989) and that a delay caused by a weekend will also not be accepted where this is simply a matter of organisational convenience (Koster v The Netherlands, 28 November 1991). In most cases a twenty-four hour period is likely to be the maximum accepted but any period must always be capable of being justified. There appear to be no circumstances in the present case that would justify the failure to bring Serhiy before a court during the day following his interrogation by the prosecutor.

Envelope marked with QUESTION 6

Should any steps have been taken to enable Serhiy to see a lawyer?

Solution key to QUESTION 6

Although Article 5 says nothing about access to legal advice, the failure to allow this to occur can be problematic both as regards this provision and Article 6. Thus a lawyer's assistance may be essential if a person wants to exercise the right under Article 5(4) to challenge the legality of his or her detention (*Jecius v Lithuania*, 31 July 2000) but there is no indication that Serhiy wishes to do that. However, the European Court of Human Rights has recognised that the absence of a lawyer's assistance in the early stages of an interrogation can ultimately be prejudicial to the ability of a detained person to defend him or herself and thus result in the denial of a fair hearing and a violation of Article 6(3)(c); see *John Murray v United Kingdom*, 8 February 1996 and *Averill v United Kingdom*, 6 June 2000. In the present case the continued 'discussion' without the benefit of a lawyer's advice is likely to be regarded as contrary to Article 6(3)(c) in view of the seriousness of the charge involved. A denial of access to a lawyer cannot be justified on the basis that the lawyer would tell a detained person not to answer any questions; *John Murray v United Kingdom*, 8 February 1996. A lawyer should be provided by the State if one is required and the suspect cannot afford to meet the costs involved.

Envelope marked with STORY 3

The following Monday Serhiy was brought before a court and the prosecutor submitted that it was important to keep him in custody as there were strong public feelings about the case and there was good evidence linking Serhiy to the crime. Serhiy asked to be legally represented and the judge called in a lawyer waiting outside for another case. After the lawyer told him that there was no point in expecting to be released before trial, Serhiy did not raise any further objections. The judge said the prosecutor's case for continued detention was irrefutable and he was remanded in custody for a month.

Envelope marked with QUESTION 7

Were the submissions made by the prosecutor compatible with the European Convention on Human Rights, Article 5?

Solution key to QUESTION 7

Supervision of detention by a judge under Article 5(3) is designed to determine whether there is a sufficient basis for its continuation and, in the event that there is not, to order the release of the person concerned. As has been seen, there must always be a reasonable suspicion of the involvement of that person in the commission of an offence but after the initial deprivation of liberty the European Court of Human Rights will require a person to be released if certain other considerations necessitating it are not also present. These considerations are the need to maintain public order or a risk of flight, interference with the preparation of the case or commission of further offences. The prosecutor's two grounds concern the first of these considerations and the existence of a reasonable suspicion and, if confirmed, these would be a sufficient basis for continuing Serhiy's detention at this stage.

Envelope marked with QUESTION 8
Did Serhiy receive adequate legal assistance for the purpose of these proceedings?

Solution key to QUESTION 8
The European Court of Human Right has not specifically found that legal representation is required in proceedings for the purpose of Article 5(3) but it would be essential where it is claimed that they are at the same time fulfilling the requirement under Article 5(4) that a person be able to challenge the legality of his or her detention (see above). Moreover inadequate legal assistance, where provided in a case such as this, might be seen as either inhibiting a person from putting material points before the court or demonstrating that the latter was not taking sufficiently seriously its obligation under Article 5(3) to review the justification for his or her continued detention.

Envelope marked with QUESTION 9
Did the judge discharge his responsibilities under the European Convention on Human Rights, Article 5?

Solution key to QUESTION 9
The role of the judge is to test the case for detention and to authorise it if valid and well-supported reasons are submitted. It is not enough for it to be claimed that there is a need to maintain public order (or indeed any of the other considerations that could justify continuing pre-trial detention); evidence of this possibility has to be brought forward and like all evidence its cogency must be examined. Thus interference with witnesses is a scarcely credible where sworn statements have already been taken and the risk of public disturbance following a suspect's release must be supported by instances of the threat already materialising (Letellier v France, 26 June 1991 and Labita v Italy, 6 April 2000). Moreover the reasoning given by the judge must be real and not a ritual incantation of a formula as in Mansur v Turkey, 8 June 1995 which demonstrated that no consideration was given to the merits of the application for release. Similarly any law or practice resulting in the refusal of a suspect's release would be unacceptable (Caballero v United Kingdom, 8 February 2000).

Envelope marked with STORY 4
After this ruling the prosecutor renewed questioning Serhiy who continued to plead his innocence. The prosecutor replied that this was impossible as they had found the trousers and shirt mentioned by the children at his girlfriend's apartment. The trousers were in fact green with yellow stripes and the shirt was short-sleeved. But the prosecutor had told the police not to worry as no one would expect children to have a detailed recollection of such a terrible occurrence. The clothes had been found by a police officer acting on his own initiative and without any official authorisation or permission from the girlfriend to search the apartment. Serhiy's requests for these clothes and those worn by Ludmilla to be DNA-tested were rejected as impossible in view of the limited budget for criminal investigation.

Several days after the discovery of the clothes, the prosecutor was interviewed on a television programme about the rising tide of sexual assaults on children. Responding to criticism that his department had a lamentable record in tracking down the assailants, he said that there was no need to worry about the Ludmilla case as they had conclusive evidence of Serhiy's guilt and he would be spending a very long time in prison. The next morning Serhiy was brought before the court for a decision as to whether his detention should be renewed. His face was heavily bruised and he tried to tell the judge that he had been beaten and threatened up by prison guards over a three-day period. However, the judge told him that this was not relevant to the proceedings. The prosecutor submitted that Serhiy should not be released as he might damage the investigation and the judge renewed the detention without further discussion.

Envelope marked with QUESTION 10

Was there a sufficient basis for continuing Serhiy's detention?

Solution key to QUESTION 10

As already seen, the judge's role under Article 5(3) – which applies so long as pre-trial detention lasts - is to test the case for detention and to authorise it if valid and well-supported reasons are submitted. The facts suggest that the reasoning given by the judge was no more a ritual incantation of a formula so that that no consideration had been given to the merits of the application for release and there was thus a violation of Article 5(3) (Mansur v Turkey, 8 June 1995). Consideration would in any event need to be given to whether the detention, even if justified, had continued for longer than was reasonable; particularly relevant in this will be the diligence shown by the prosecuting authorities but, although no maximum has ever been set by the European Court of Human Rights and several cases have upheld the acceptability of pre-trial detention running over several years, it is unlikely that such detention needs to be longer than a year in most cases and this is thus likely to be the yardstick used in the absence of complicating factors (such as an elaborate fraud or a multi-defendant trial).

Case 2

Envelope marked with BOMB ATTACK

On 15 June 2003, a bomb exploded in Torr central market and as a consequence 25 people died and 51 were injured. An unknown terrorist organisation "Save the World" claimed responsibility for the bomb explosion.

Shortly before the bomb attack, a police officer noticed changes in the behaviour of his neighbours Kristan and Klentiana, students of the law faculty in Kent University. In addition, he noticed that they received some visitors the night before the explosion. As a consequence, the police officer became convinced that Kristan and Klentiana were involved in the preparation of the bomb explosion at the Tirana market.

Following the police officer's report, Kristan and Klentiana were arrested on 1st August 2003 by the police on suspicion of being involved in terrorist attack at the Torr market. Kristan and Klentiana denied any involvement in the bomb attacks and sought to challenge the lawfulness of the detention. They were brought before a judge 67 hours after their arrest and the judge decided to remand them in custody for 10 months on account of the suspicions against them and also because the authorities feared that, if released, they would destroy evidence.

Kristian's family was informed about his situation on the second day following his arrest. As the authorities were not able to find Klentiana's family, they informed her friends on the third day following her arrest that she was put in the custody. It was agreed with Klentiana's friends that they will transmit this information to her family immediately after its return to the home town. However, both families were not informed about the place of the confinement due to security reasons.

On 1st October 2003, the prosecutor was provided with two signed statements Kristan and Klentiana had allegedly signed on 10th August. In that statement, Kristan confessed his involvement with the organisation "Save the World" while Klentiana denied any responsibility for the charges brought against them.

Kristan complained to the prosecutor that, immediately following his remand in custody, he was put into an overcrowded cell with unsanitary conditions. He shared one mattress with two other detainees. Despite the fact that the cell was designated for 5 inmates, the number of inmates in his cell was usually 12 persons. Kristan was allowed outdoor activity one hour per day and the rest of his time he was confined to the cell. He was obliged to use the toilets in the presence of other inmates.

Kristan complained that he had signed a document which had been put in front of him by the police in order to bring to the end the unsupportable prison conditions which caused him considerable mental suffering. Again, he denied any involvement in the bomb explosion at the Tirana market.

Klentiana also complained that she was strip-searched by a male police officer who made offensive comments of a sexual character and made an attempt to rape her. She was also submitted to the continuous and monotonous noise and was given only one slice of bread and a glass of water every 5 hours and made to stand upright for 20 hours. When eventually she was put into a cell, there was no bedding but just a mattress and the cell was cold. She had to share the mattress with two other detainees. She got ill and claimed to have kidney problems.

Klentiana submitted a request to the detention authorities indicating that she would like to see a doctor because her health situation had deteriorated. Following her request, the authorities arranged an appointment with a doctor who was working in the detention facility in question. Before appearing before the prosecutor, Klentiana was seen by a doctor who reported that she was in good health. The doctor, who had also seen Kristan, reported that Kristian suffered from depression.
Kristan and Klentiana claimed before the prosecutor that they were ill-treated in the prison and that the detention had a considerable impact on their health. In addition,

Klentiana claimed before the prosecutor that when she got ill (kidney problems) she was not seen by a doctor for five days.

Kristan requested an appointment with a lawyer to ensure his legal representation. The detention authorities proposed to Kristan a name of a lawyer who had represented many former detainees. Kristan refused the proposed lawyer and submitted a name of his friend to be contacted by the detention authorities. Following Kristan's refusal, the prison authorities denied him contact with his lawyer and as a consequence Kristan remained without legal representation.

The doctor later reported that both detainees were in good health and the present health problems were not related to the conditions in prison.

The prosecutor charged Kristan and Klentiana with terrorist offences. The prosecutor said that there was no evidence that current health problems were related to their detention.
After having been detained on remand for six months, Kristan and Klentiana were told that all the charges against them were being dropped for lack of evidence. The applicants lodged a complaint for unlawful detention before the local courts. They alleged that there were no reasonable suspicions against them and that they were not given sufficient information about the charges brought against them and claimed compensation. In addition, they claimed that they had been subject to ill-treatment while in custody.

Following a complaint to the Office of the Ombudsman, the authorities provided the applicants with compensation equal to € 500 each. Later on, the authorities claimed before the ECtHR that the applicants had already received compensation.

Envelope marked with QUESTION 1
Which issue can Kristian raise under article 5 EHCR regarding its detention?

Solution key to QUESTION 1
Klentiana:

- the delay between 1 August (date of arrest) and first appearance before a judge (67 hours later) and the long period of custody (10 months decided by the judge)
- **degrading treatment of a mental nature**: was strip-searched by a male officer, during the strip-search the police officer made offensive comments of a sexual character and made an attempt to rape her
- **ill-treatment of a physical nature**: a police officer made an attempt to rape her, she was subject to continuous and monotonous noise, she was made to stand upright for 20 hours and was given only one slide of bread and a glass of water every 5 hours
- **deprivation of sleep**: was made to stand upright for 20 hours and was subject to continuous and monotonous noise
- **bad conditions of detention**: the cell was cold (which caused Klentiana's kidney problems) and had insufficient sleeping facilities - there

was no bedding but just a mattress which she had to share with two other detainees,
- **hindered access to a doctor**: as the cell was cold she got ill but was not seen by a doctor for five days. Moreover, as she claimed to have kidney problems, she should have been examined by a specialist and not a general practitioner of the detention facility.

Kristian:
- long time between 1 August (date of arrest) and first appearance before a judge (67 hours later) and long period of custody (10 months decided by the judge)
- **bad conditions of detention**: was put into an overcrowded cell (designated for 5 inmates but usually used by 12) with unsanitary conditions and insufficient bedding facilities (Kristian was obliged to use the toilets in the presence of other inmates and had to share one mattress with two other detainees). Moreover, he was allowed outdoor activity for one hour per day and the rest of his time was confined to the cell
- **no access to lawyer**: he requested an appointment with a lawyer but was denied as he wanted to contact a lawyer of his choice and not the one proposed by the detention authorities

Envelope marked with QUESTION 2

Did the prosecutor fulfil his legal obligations when Klentiana and Kristan complained of ill-treatment? If not, what measures, if any, can the judge take to punish the prosecutor or to ensure that in future, the prosecutor carries out his duty?

Solution key to QUESTION 2

There is an overriding obligation for the judicial authorities to investigate allegations of violations of Article 3. (…) the investigations into allegations must themselves be of a high standard – they must be **thorough**, **effective** and **capable of leading to the identification of any perpetrators and their punishment**.

(emphasis added)

The reviewing investigations should ensure that (…) public prosecutors pursue investigations against perpetrators who are agents of the State, actively and vigorously (…)

Moreover, the highest standards and scrutiny should be applied where medical examinations are concerned. Inadequate forensic medical examinations of detainees, including lack of examination by appropriately qualified medical professionals can lead to misconduct in investigating of ill-treatment.

In this context the steps taken by the prosecutor should be considered insufficient:
- given the health problems:
  Klentiana was seen only by a general practitioner who was not able to estimate her kidney problems: a specialist (urologist or nephrologist) should have examined her in order to decide if the kidney problems could have been caused by the conditions of detention,

Kristian's depression caused by the conditions of detention (confirmed by a doctor who was working in the detention facility where Kristian was in custody) was ignored by the prosecutor;
- no steps were taken to investigate the other claims of Kristian and Klentiana (such as no access to lawyer, deprivation of sleep, cell conditions, degrading psychological treatment etc.).

The measures which the judge can take in order to punish the prosecutor or to ensure that in future the prosecutor carries out his duty depend on the regulations in the domestic law. Commonly, there is a possibility for the national legal structures to lodge a complaint against a prosecutor who is violating the rules.
Moreover, as far as the case of Kristian and Klentiana is concerned, the judge examining their claim for unlawful detention can order an investigation into the allegations of ill-treatment.

Envelope marked with QUESTION 3
On whom does the burden of proof lie with regard to establishing ill-treatment in detention?

Solution key to QUESTION 3
Where an individual is taken into police custody in good health but is found to be injured at the time of release the burden is on the authorities to provide a plausible explanation as to the causing of the injury or health or mental problems.
(see *Tomasi v. France* – application number 12850/87, 27/08/1992)

Envelope marked with QUESTION 4
Were the families of the applicants informed promptly about the arrest and place of confinement?

Solution key to QUESTION 4
No. Kristian's family was indeed promptly informed about his arrest and custody but this was not the case for the family of Klentiana. Neither Kristain's nor Klentiana's family was informed about the place of confinement.

Envelope marked with QUESTION 5
Was Klentiana obliged to accept the doctor proposed by the detention authorities?

Solution key to QUESTION 5
No. Although there is no obligation for the authorities to respect every wish of the prisoner, the doctor chosen by the detainee should be – if there are no contrary reasons – accepted. The court explained its view concerning this issue in the case of *Mathew v. the Netherlands*, application number *24919/03, 2*9/09/2005, paragraphs 186 – 187:
3. Alleged withholding of necessary medical assistance
186. (…), the health and well-being of a prisoner must be adequately secured. However, Article 3 cannot be interpreted as requiring the accommodation of a prisoner's every wish and preference regarding medical treatment to be

accommodated. In this as in other matters, the practical demands of legitimate detention may impose restrictions a prisoner will have to accept.
187. Examination by a medical expert who has no links to the detaining authority is an **important safeguard against the physical or mental abuse of prisoners**. The court therefore considers that **a prisoner's choice of physician should as a rule be respected**, subject if need be to the condition that responsibility for any additional expense not justified by genuine medical reasons be assumed by the prisoner. Even so, there is no objection to requiring a medical practitioner to hold a valid licence to practise issued or recognised by the competent domestic authority as a condition for being granted access to a prisoner, provided that such a requirement does not result in the withholding from the prisoner of timely and adequate medical examination, treatment and advice.

Envelope marked with QUESTION 6
Can the judge asked to decide the lawfulness of the detention, determine whether the suspicions against the applicant are reasonable?

Solution key to QUESTION 6
(based on the ECHR case of Ilijkov v. Bulgaria, application number 33977/96, 26/07/01)
Yes. The detained person must have not only the opportunity to question the lawfulness of his/her detention but should also be enabled to challenge the reason behind any suspicions about the offence with which s/he is charged.
See for example the paragraph 94 in the case of *Ilijkov v. Bulgaria*:
94. The court recalls that arrested or detained persons are entitled to a review bearing upon the procedural and substantive conditions which are essential for the "lawfulness", in the sense of the Convention, of their deprivation of liberty. This means that **the competent court has to examine** not only compliance with the procedural requirements set out in [domestic law] but **also the reasonableness of the suspicion grounding the arrest** and the legitimacy of the purpose pursued by the arrest and the ensuing detention (...).
While Article 5 § 4 of the Convention does not impose an obligation on a judge examining an appeal against detention to address every argument contained in the appellant's submissions, its guarantees would be deprived of their substance if the judge, relying on domestic law and practice, could treat as irrelevant, or disregard, concrete facts invoked by the detainee and capable of putting into doubt the existence of the conditions essential for the "lawfulness", in the sense of the Convention, of the deprivation of liberty (...).

Envelope marked with QUESTION 7
Is the police officer's testimony sufficient evidence for the detention of the applicants?

Solution key to QUESTION 7
The deprivation of liberty must be based on reasonable suspicion which is based on facts or on information which objectively link the person suspected to the supposed crime. Nobody can be deprived of liberty on the basis of feelings, instincts, mere associations or prejudice.

Thus the testimony of the police officer is not sufficient for the detention of the applicants. (*See Fox, Campbell and Hartley v UK, application n°12244/86; 12245/86; 12383/86 30 August 1990*)

Envelope marked with QUESTION 8
Were the applicants given sufficient information about the charges brought against them? Is it relevant to know why the applicants were not given more information?

Solution key to QUESTION 8
The applicants were informed by the police officers that they were suspected of being involved in a terrorist attack at the Tirana market. They were not informed that the police suspected them of being members of the "Save the World" terrorist organization. (The membership was stated and confirmed in the document Kristian signed but he claimed that this document was put in front of him and then signed without reading in order to bring to an end the unsupportable prison conditions.)
Later on, the prosecutor charged them with "terrorist offences" without giving any list of offences and without mentioning membership of "Save the World".
This information cannot be seen sufficient as the applicants were not really able to prepare a defense, nor were they able to challenge the lawfulness of their detention.

It is not relevant to know why the applicants were not given more information. Generally, there is no excuse for not giving all relevant information at the occasion of arrest. Neither the theory on human rights nor the court's case-law mention reasons for not giving information about the charges against defendant.

Envelope marked with QUESTION 9
If Kristan and Klentiana were not given sufficient information about the charges brought against them, does that make the detention unlawful?

Solution key to QUESTION 9
A failure to give an adequate explanation where one is possible might in itself be sufficient for the deprivation of liberty to be seen as arbitrary and thus unlawful for the purposes of Article 5.

Envelope marked with QUESTION 10
Could the applicant have been refused the legal representation if he had not accepted the lawyer proposed by the detention authorities?

Solution key to QUESTION 10
No. Every detainee has a right to legal advice and the lawyer can be of his/her choice. Only if the detainee cannot afford a lawyer the expense will have to be borne by the State and the lawyer will be appointed by the court.

(*See Megyeri v Germany, appl n° 13770/88 12 May 1992 and Winterwerp v the Netherlands, 24 October 1979*)

Envelope marked with QUESTION 11
Does compensation of € 500 constitute the compensation envisaged by Article 5.5 of the ECHR?

Solution key to QUESTION 11
Article 5 requires a remedy (compensation) before the court – in this case meaning the compensation must be awarded by a legally binding court decision. The compensation given to Kristian and Klentiana can be a compensation in the meaning of the Article 5.5. However, the applicants can complain that the compensation received is insufficient. In that case, the local courts should assess the damage resulting from the events and decide the amount of compensation to be paid.

Handout for Case 3
On a Saturday night, a house in the village of 'X' was burgled and the owner killed. A neighbour alerted the police who upon arrival, see 'A' running away from the house, apparently with blood stains on his clothes and carrying what looks like a small television and some silver. He is apprehended. When he protests in the car on the way to the police station, he is told by the police officers that they think he is the burglar and that is why they are arresting him.

'A' is put in a cell at the police station in the early hours of Sunday morning. On Thursday evening he is visited by his lawyer and they discuss his case in the cell, in the presence of a guard and three other detainees. On Friday morning he is brought before a judge, who confirms his continued detention, on the grounds that he is suspected of having committed a serious crime.

The judge extends 'A's detention three times in the course of the next six months. The same judge presides at the hearing, when the case comes to trial.
During his detention, 'A' twice asks for a court to review the lawfulness of his detention. The first time the request is turned down as the court "has better things to do than hold additional hearings for anyone who decides he wants one". The second time a hearing is held seven days after 'A' has submitted his request. His detention is confirmed.

What issues under Article 5 (and 6) do the situations give rise to?

1. *Could there be a criminal charge?*
2. *Do the police have reasonable grounds to detain 'A'?*
3. *Is 'A' given sufficient information by the police?*
4. *What is your opinion as to the fact that the lawyer visits 'A' on Thursday?*
5. *Do the conditions under which the meeting takes place comply with Article 5?*
6. *Is 'A 'brought "promptly" before a judge?*
7. *If it was "promptly", are there grounds for confirming the detention?*
8. *What is your opinion concerning the periodical review of the pre-trial detention?*
9. *Is there an impartiality problem?*
10. *Should 'A' be able to ask for a review of the lawfulness of his detention?*
11. *What do you think of the reasons for turning down the first request?*

12. Is it reasonable that it takes seven days before the hearing is held?

Solution keys to case no. 3

Question 1: **Could there be a criminal charge?**

The charge can be classified as criminal in the sense of Article 6 of the Convention if it meets the following criteria:

- the charge must be classified as criminal in the domestic law
- the nature of the offence (depending on the scope of the violated norm and the purpose of the penalty)
- the nature and the severity of the penalty

Thus the offence 'A' is suspected of can give a rise to a criminal charge as:

- the burglary (and possible murder of the house owner) is regarded as a criminal offence in the domestic law
- the violated norm is of general character and the penalty would have a punitive purpose
- the presumed penalty for the offence is imprisonment.

Question 2: **Do the police have reasonable grounds to detain A?**

Yes, being alerted by the neighbour and seeing 'A' "running away from the house, apparently with blood stains on his clothes and carrying what looks like a small television and some silver," the police could have a reasonable suspicion that 'A' has committed a crime.

Thus, the conditions of the Article 5 (1) (c) are met.

Question 3: **Is 'A' given sufficient information by the police?**

Assuming that the explanation given in the police car ("they think he is the burglar and this is why they are arresting him") was the only one 'A' received, it cannot be seen as sufficient. He should be informed about "the essential legal and factual grounds for his arrest." (See *Fox, Campbell and Hartley v. UK, appl n° 12244/86;12245/86;12383/86, 30 August 1990*).

Question 4: **What is your opinion as to the fact that the lawyer visits 'A' on Thursday?**

No matter if the lawyer was the one chosen by 'A' or appointed by the State, his visit on the 5th day of A's detention should be seen as too late. (See *Murray v. UK, appl n° 14310/88, 28 October 1994*).

Question 5: **Do the conditions under which the meeting takes place comply with Article 5?**

Every person suspected of committing a crime has a right to (inter alia) legal advice, either by a lawyer of his/her own choice, or a lawyer granted by the State (when the interests of justice so require). Article 5 (4) also implies the technical conditions which apply for such a meeting with a lawyer – namely out of the hearing of the detaining authorities.

Thus the conditions of the Article 5 (1) (c) are not met. (See *S v. Switzerland, 12629/87, 28 Nov 1991, Öcalan v. Turkey, appl n° 46221/99, 12 March 2003*)

Question 6: **Is 'A' brought "promptly" before a judge?**
There was a delay of 5 days between the initial detention and the Friday morning when 'A' was brought before a judge. Deprivation of liberty prior to judicial authorisation should not last any longer than needed for the purpose of 'processing' a suspect - in general about one or two days. The interval between detention and judicial supervision can be longer without breach of the international standard but the extra time taken would have to be shown to be a necessary consequence of its particular circumstances. (See *Brogan v. UK, appl n° 11209/84;11234/84;11266/84;11386/85 29 Nov, 1988*)
Thus, 'A' was not brought "promptly" before a judge.

Question 7: **If it was "prompt," are there grounds for confirming the detention?**

The prolongation of the detention can be justified only if there are relevant reasons for it (e.g. risk of flight, interference with the course of justice, re-offending).
The simple ground of being "suspected of having committed a serious crime" should not be regarded as sufficient for the prolongation, unless well-supported reasons and evidence of possibility are provided. (*Letellier v. France, appl n° 12369/86, 26 June1991*)
Given 'A' is suspected of having committed burglary and murder of the house owner and there is a strong evidence established against him in the police file, the continuation of his detention may be seen as justified.

Question 8: **What is your opinion concerning the periodical review of the pre-trial detention?**
Even if there is a justifiable reason for continuing the detention, the period of the total pre-trial detention should not be unreasonable and the case should be submitted to judicial supervision at regular intervals, which should not exceed one or two months maximum.
Thus the periodical review of 'A's detention (meaning the intervals and the total period of 6 months being kept in custody) can be seen as violating the Article 5 (3).

Question 9: **Is there an impartiality problem?**
Yes, there could be a breach of Article 6, if the presiding judge had already taken decisions on continuing the pre-trial detention stating as grounds that 'A' is "suspected of having committed a serious crime"
(See ECHR case of *Hauschildt v. Denmark, application number 10486/83, 24/05/1984*, paragraphs 43-53 where during the reviews of the pre-trail detention the judge found there was a "particularly confirmed suspicion" that the applicant has committed the crime in question and he was a presiding judge during the trial.)

Question 10: **Should 'A' be able to ask for a review of the lawfulness of his detention?**
Yes, every person kept in custody, must have the opportunity to have his/her detention reviewed, in order to question in particular, whether the detention is executed according to the national law and to the Convention and if it is not arbitrary. (See *De Jong, Baljet and Van Den Brink v. Netherlands, appl n° 8805/79;8806/79;9242/81, 22 May1984, X v. UK,appl. No 7215/75 5 Nov 1981*)

Question 11: **What do you think of the reasons for turning down the first request?**
The refusal of the request for a review of the lawfulness of the detention is to be seen as a violation of Article 5 (4). (See *Bezicheri v. Italy, appl n° 11400/85, 25 October 1989*)

Question 12: **Is it reasonable that it takes seven days before the hearing is held?**
Determining whether detention is lawful should take place "speedily" but a week or two between the application and its determination can be considered acceptable.

Step 2 – Is national practice compliant with international standards? Share of experiences

30 minutes

Sharing experiences
Everybody is asked to take some time (about 5 minutes) to think about situations where they have felt a potential violation of article 5 ECHR. It can be something they saw themselves, something they heard about, or something they were involved in.

When everybody has written down a case, collect cards and divide the class into smaller groups. Cases are then distributed evenly amongst groups. Discussion could be stimulated by writing the following questions on the board/ppt for groups to refer to:
• Which aspect of article 5 was or could have been violated?
• How would you react to such situation?
• Was there an effect of "the judicial" culture in this case?
• How common is this kind of case in your country?
• How could this case have been prevented?
• Change this case to make the situation acceptable. What has to be changed?
• How should you apply international standards in this situation?

After all the cases have been discussed, each group can briefly report back their findings in open class. Select only the most controversial/difficult/common cases for discussion.

 *This tool can be confronting and can thus create a lot of resistance. It is advisable to use it at a later stage in training. Trainer must use his/her judgement. Sometimes potential resistance can be diminished by open discussion eg., the trainer can ask participants how they feel about doing this exercise. Whatever the group's reaction, some time should be set aside for discussion about the exercise itself.*

 *This is the classical example of a buffer exercise: in case you do not have time for it, for instance because the previous exercises or discussions took more time than foreseen, you can skip it without affecting the overall training.*

Session V – Detention of vulnerable categories

 Recognize the special needs of vulnerable categories
Defend a given position
Appraise opposing arguments on a given case
Dramatise real life situations
Sensitize participants about the duties inherent to the their roles

 2 hours

Step 1 – Who is right?

 1 hour 20 minutes

 Hand-outs, 2 coloured voting cartons for each participant marked VICTIM and AUTHORITIES.

 ***Debate and voting***
Distribute voting cards marked VICTIM and AUTHORITIES to participants.

Divide participants into 4 groups and assign to each of them a case. In order to facilitate the implementation of the exercise, make sure that all participants receive all cases. Further subdivide each group into two and assign to one group the role of victim and to the other the role of the authorities. Instruct them they have 15 minutes to prepare for a TV debate during which each sub-group has to sustain their position as to the compatibility of the situation/incident with national and ECHR standards. Each group will have 5 minutes (to be timed strictly!) for presentation of arguments and 5 minutes for rebuttals. The rest of the audience will observe

and, at the end, will be asked to vote (by holding up the relevant carton) for the party who was able to sustain better their position.

Eventually, just as in a TV debate, the trainer will act as host and invite randomly the public to express their opinion.

A short summary of the key points of the ECHR standards should be provided by the trainer orally.

Hand-outs

Case 1 At the time the application was lodged, the applicant was detained in a Ukrainian penal institution, awaiting extradition to Turkmenistan. His lawyer claimed that he was stateless, whereas the Government stated that he was a Turkmen national.
In 1999 the Turkmen authorities had issued an indictment against the applicant ordering his arrest on charges of inflicting bodily injuries. The applicant left Turkmenistan, allegedly to flee persecution to which he had been subjected on ethnic grounds, and has resided ever since in Ukraine. On 4 January 2007 he was arrested by the Ukrainian police and informed that his arrest had been made in accordance with an international search warrant issued by the Turkmen authorities that same day. Six days later he was brought before a district court judge, who ordered his detention pending extradition. On 15 January 2007 the applicant requested the ECHR to issue an interim measure under Rule 39 of the Rules of Court. A day later, the President of the competent Chamber granted this request and indicated to the Ukrainian Government that the applicant should not be extradited to Turkmenistan pending the Court's examination of his case.
On 19 January 2007 the General Prosecutor's Office of Turkmenistan requested the applicant's extradition with a view to his prosecution for the offences of which he was charged. It also gave certain assurances and affirmed that he would not be discriminated against on grounds of social status, race, ethnic origin or religious beliefs. In a letter of 19 April 2007 the First Deputy Prosecutor General of Turkmenistan gave further assurances, notably that the applicant's rights under Articles 3 and 6 of the European Convention would be guaranteed.
Under the 1993 Minsk Convention regulating legal assistance in criminal matters, to which both Ukraine and Turkmenistan are parties, a person may be detained with a view to extradition on the basis of a petition on behalf of one of the Contracting States even before receipt of an official extradition request.

Solution key
Soldatenko v. Ukraine – application no. 2440/07, 23/10/2008
Article 5 §§ 1 (f) and 4 – Even though the Minsk Convention, being part of the domestic legal order, was capable of serving as a legal basis for extradition proceedings and for detention with a view to extradition, Article 5 § 1 (f) of the Convention further required that detention with a view to extradition should be

effected "in accordance with a procedure prescribed by law". In the present case, under Ukrainian law there were no specific legal provisions – whether in the Code of Criminal Procedure or in any other legislative instrument – that provided, even by reference, a procedure for detention with a view to extradition. Even though the Plenary Supreme Court by its 2004 resolution had advised the lower courts to apply certain general provisions of the Code of Criminal Procedure to extradition proceedings, its resolutions did not have the force of law and were not legally binding on the courts and the law-enforcement bodies involved in extradition proceedings. The above considerations were sufficient for the Court to establish that Ukrainian legislation did not provide for a procedure that was sufficiently accessible, precise and foreseeable in its application as to avoid the risk of arbitrary detention pending extradition.
Conclusion: violation (unanimously).

Case 2
Tabitha is from Congo. Her mother, a refugee in Canada, asks a relative to collect her daughter, who was 5, and bring her to Canada. On 18 August 2002 shortly after arriving at Brussels airport, Tabitha was detained in Transit Centre no. 127 because she did not have the necessary documents to enter Belgium. The uncle who had accompanied her to Belgium returned to the Netherlands. On the same day a lawyer was appointed by the Belgian authorities to assist Tabitha. On 27 August 2002 an application for asylum that had been lodged on behalf of Tabitha was declared inadmissible by the Belgian Aliens Office.
On 26 September 2002 Tabitha's lawyer asked the Aliens Office to place Tabitha in the care of foster parents, but did not receive a reply. On 16 October 2002 the *chambre de conseil* of the Brussels Court of First Instance held that Tabitha's detention was incompatible with the New York Convention on the Rights of the Child and ordered her immediate release. On the same day the Office of the High Commissioner for Refugees sought permission from the Aliens Office for Tabitha to remain in Belgium while her application for a Canadian visa was being processed and explained that her mother had obtained refugee status in Canada. The following day, 17 October 2002, Tabitha was removed to the Democratic Republic of Congo.

Solution key
Mubilanzila Mayeka and Kaniki Mitunga v. Belgium – application no. 13178/03, 12/10/2006
Tabitha was detained in a closed centre intended for illegal foreign aliens in the same conditions as adults. Those conditions were not adapted to the position of extreme vulnerability in which she found herself as a result of her status as an unaccompanied alien minor. In those circumstances, the Court considered that the Belgian legal system at the time and as it functioned in the case before it had not sufficiently protected her right to liberty.

Conclusion: violation (unanimously)

<u>Tabitha's deportation</u>
The Court noted that the Belgian authorities had decided on the date of Tabitha's

departure the day after she lodged her application to the *chambre de conseil* for release from detention, that is to say even before the *chambre de conseil* had ruled on it. They had not sought to reconsider the position at any stage. Moreover, the deportation had proceeded despite the fact that the 24 hour-period for an appeal by the public prosecutor had not expired and that a stay applied during that period. Tabitha's successful appeal against detention was thus rendered futile.

Conclusion: violation (unanimously).
No separate examination of the complaint under Article 13 was necessary.

Case 3
In the evening of 11 October 2001 the police received an emergency phone call from a local shop that a drunken man – the applicant – was shouting at the shop assistant and using offensive language. The police escorted the applicant from the shop, but he continued his unruly behaviour and attempted to start a fight with the police officers, waving his hands about and using offensive language. At approximately 10.30 p.m. the police took the applicant to the local sobering-up centre where a report was drawn up describing his manifestations of intoxication and violent behaviour. The applicant was released at 9.40 the following morning. He subsequently filed a complaint against the sobering-up centre claiming that his detention had been arbitrary. The district court concluded that the applicant's demeanour – unsteady gait, incoherent speech, inability to stand upright and smell of alcohol – offended human dignity and public morals so that his detention had been justified.

Solution key
Kharin v. Russia – application no. 37345/03, 03/02/2011

Article 5 § 1 (e): Regard being had to the importance of the right to liberty in a democratic society, an individual's detention could not be justified merely by an offensive physical appearance. That would be just a step away from introducing a system of compulsory confinement for any abnormal appearance which might by some be perceived as offensive or insulting. However, even though the reasoning of the domestic courts in that respect had been inexplicably inadequate, there was sufficient evidence before the Court to show that the main reason for the applicant's detention had been his aggressive and offensive behaviour, which had caused a disturbance in a public place and posed a danger to others. Both the written statement of the shop assistant and the official police records indicated that the applicant had used offensive language and threats in the shop and tried to start a fight with the police officers. In such circumstances, the police had had no alternative but to detain the applicant overnight in a sobering-up centre, which they had done in full conformity with national substantive and procedural rules. Finally, by releasing the applicant immediately after he had sobered up and gone through the administrative formalities, the authorities had struck a fair balance between, on the one hand, the need to safeguard public order and the interests of others and, on the other, the applicant's right to liberty.

Conclusion: no violation (four votes to three).

Case 4
The applicants, who were Slovakian nationals of Romany origin, said that they had fled from Slovakia where they had been subjected to racist assaults with the police refusing to intervene. In November 1998 they arrived in Belgium, where they requested political asylum. On 3 March 1999 their applications for asylum were declared inadmissible. The decisions refusing them permission to remain were accompanied by other decisions refusing them permission to enter the territory and an order to leave the territory within five days. On 5 March 1999 the applicants lodged an appeal against those decisions with the Commissioner-General for Refugees and Stateless Persons under the urgent-applications procedure. On 18 June 1999 the Commissioner-General's Office upheld the decision refusing the applicants permission to remain and stated that time had begun to run again for the purposes of the five-day time-limit. On 28 October 1999 the applicants' applications for judicial review and a stay of execution of the decision of 18 June 1999 were struck out of the *Conseil d'État*'s list. At the end of September 1999 the Ghent police sent a notice to a large number of Slovakian Roma, including the four applicants, requiring them to attend the police station on 1 October 1999. The notice stated that their attendance was required to enable the files concerning their applications for asylum to be completed. At the police station the applicants were served with a fresh order to leave the territory dated 29 September 1999, accompanied by a decision for their removal to Slovakia and for their detention for that purpose. The document, which was in identical terms for everyone concerned, informed the recipients that they could apply to the *Conseil d'État* for judicial review of the deportation order and for a stay of execution and to the indictment division of the criminal court against the order for their detention. A Slovakian-speaking interpreter was present at the police station. A few hours later the applicants and other Romany families were taken to a closed transit centre. At 10.30 a.m. on 1 October 1999 the applicants' counsel was informed that his clients were in custody. He contacted the Aliens Office, requesting that no action be taken to deport them, as they had to take care of a member of their family who was in hospital. However, he did not appeal against the deportation or detention orders made in September 1999. On 5 October 1999 the families were taken to a military airport and put on an aircraft bound for Slovakia.

Solution key
Čonka v. Belgium – application no. 51564/99, 05/02/2002
Article 5 § 1 – The applicants had been arrested so that they could be deported from Belgium. Article 5 § 1 (f) was thus applicable in the case before the Court. All that was required under that sub-paragraph was that action was being taken with a view to deportation. Where the "lawfulness" of detention was in issue, including the question whether "a procedure prescribed by law" had been followed, the Convention referred essentially to the obligation to conform to the substantive and procedural rules of national law, but it required in addition that any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness. Although the Court by no means excluded its being legitimate for the police to use stratagems in order, for instance, to counter criminal

activities more effectively, acts whereby the authorities sought to gain the trust of asylum seekers with a view to arresting and subsequently deporting them, as in the instant case, may be found to contravene the general principles stated or implicit in the Convention. While the wording of the notice was unfortunate, that had not been the result of inadvertence; on the contrary, it had been chosen deliberately in order to secure the compliance of the largest possible number of recipients. The Court reiterated that the list of exceptions to the right to liberty secured in Article 5 § 1 was an exhaustive one and only a narrow interpretation of those exceptions was consistent with the aim of that provision. That requirement had also to be reflected in the reliability of communications such as those sent to the applicants, irrespective of whether the recipients were lawfully present in the country or not. Even as regards overstayers, a conscious decision by the authorities to facilitate or improve the effectiveness of a planned operation for the expulsion of aliens by misleading them about the purpose of a notice so as to make it easier to deprive them of their liberty was not compatible with Article 5. That factor had a bearing on the Government's preliminary objection, which had been joined to the merits. The applicants' lawyer had only been informed of the events in issue and of his clients' situation at 10.30 p.m. on Friday 1 October 1999, such that any appeal to the committals division would have been pointless because, had he lodged an appeal with the division on 4 October, the case could not have been heard until 6 October, a day after the applicants' expulsion on 5 October. However, the accessibility of a remedy within the meaning of Article 35 § 1 of the Convention implied that the circumstances voluntarily created by the authorities had to be such as to afford applicants a realistic possibility of using the remedy. That had not happened in the case before the Court and the preliminary objection had therefore to be dismissed.
Conclusion: violation (unanimously).

Article 5 § 2 – on their arrival at the police station the applicants had been served with the decision ordering their arrest. The document handed to them for that purpose had stated that their arrest had been ordered pursuant to the Aliens Act to prevent them from eluding deportation. On the applicants' arrest at the police station a Slovakian-speaking interpreter had been present for the purposes of informing the aliens of the content of the verbal and written communications which they had received, in particular, the document ordering their arrest. Even though those measures by themselves had not in practice been sufficient to allow the applicants to lodge an appeal with the committals division, the information thus furnished to them nonetheless satisfied the requirements of Article 5 § 2 of the Convention.
Conclusion: no violation (unanimously).
Article 5 § 4 – The Government's submissions were the same as those on which they had relied in support of their preliminary objection to the complaints under Articles 5 § 1, § 2 and § 4 of the Convention. Accordingly, the Court referred to its conclusion that it had been impossible for the applicants to make any meaningful appeal to the committals division of the criminal court. Consequently, it was unnecessary to decide whether the scope of the jurisdiction of the committals division satisfied the requirements of Article 5 § 4.
Conclusion: violation

Step 2 – The treatment of persons with mental health problems

40 minutes

 Chairs, mobile phone

Role-play
Use the following case to run a role-play. Given the fact that the subject is mental illness, the role-play will be ideal.

Characters:
Man (victim – give him a name)
Wife (give her a name)
2 Police officers
Car and hospital bed – use chairs!
Cell phone

Fredy suffers from a mental illness that makes him confused and physically violent towards others. His wife has tried to make him see a doctor, but he has refused. The wife has therefore requested the authorities admit him to a psychiatric hospital. The police forced Fredy into a police car and took him to the hospital on the order of the Ministry of the Interior. He has been in the ward for two days but no one has given him an explanation. He calls you from the hospital and says that the hospital has no right to keep him there.

After having viewed the scene ask the audience the following questions (you can project them on the screen one at a time)

1. *When is it legitimate to deprive a person of his liberty? Is it legitimate to force Fredy to the psychiatric hospital against his will?*
2. *Did the authorities act correctly in not telling Fredy the reason why he was placed in hospital against his will?*
3. *What would have happened in your country if the situation depicted above occurred?*

 *Remember about the importance to prepare any role-play before hand! Find time to identify/solicit volunteers and brief them properly, possibly the day before the play. Do not forget to instruct adequately the audience too!*

Solution key for role-play
When is it legitimate to deprive a person of his liberty? Is it legitimate to force Fredy to the psychiatric hospital against his will?

Article 5.1. gives six situations in which the deprivation of liberty, if done in accordance with the procedure prescribed by law, is legitimate:

a. The lawful detention after conviction by a competent court
b. The lawful detention / arrest for non-compliance with the lawful order of the court or in order to secure the fulfilment of any obligation prescribed by law
c. The lawful detention / arrest for the purpose of bringing the arrested person before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so
d. The detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority
e. The lawful detention of persons for the prevention of the spread of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants
f. The lawful detention / arrest to prevent person's effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition

The court has laid down the criteria which have to be fulfilled in order to qualify the detention of a person of unsound mind as "not arbitrary" (see the ECHR case of *Winterwerp v. the Netherlands*, application number 6301/73, 24/10/1979, paragraph 39):

- the mental disorder must be established by objective medical expertise
- the nature or degree of the disorder must be sufficiently extreme to justify the detention
- detention should last only as long as the medical disorder and its required severity persist
- in case of a potentially indefinite detention, periodical reviews of the detention must be taken
- detention must take place in hospital, clinic or other appropriate institution authorised to detain such persons.

A mentally disordered person does not have to agree to the detention but the detention must be lawful, which was not the case for Fredy. There was, for example, no medical expertise confirming his mental disorder and its severity.

Question 2:
Did the authorities act correctly in not telling Fredy the reason why he was placed in hospital against his will?

No, he should have been given an explanation – see the paragraph 66 of the ECHR case of *X. v. the United Kingdom*, application number 7215/75, 05/11/1981:
66. (…) The Court would point out in the first place that the need for the applicant to be apprised of the reasons for his recall necessarily followed in any event from paragraph 4 of Article 5 (art. 5-4): **anyone entitled** - as X was (see paragraph 54 above) - **to take proceedings to have the lawfulness of his detention speedily decided cannot make effective use of that right unless he is promptly and adequately informed of the facts and legal authority relied on to deprive him of his liberty**. (…).

By not informing Fredy about the reasons of his detention in a hospital, the authorities violated Article 5.2. of the convention.

Key points

Detention of a minor – article 5.1 d)
A minor is a person under the age of 18 *(Koniarska v. the United Kingdom, [European standards and Resolution CM (72) of the Committee of Ministers of the Council of Europe] (X. v. Switzerland). However even if the school leaving age is less than 18, this provision can still be used by the state to authorize detention (DG v Ireland).*

Sub-paragraph d) gives ***specific additional reasons minors might be detained****, namely for the purpose of*
(a) their educational supervision or
(b) bringing them before the competent legal authority
Minors may also be detained on the basis of the other provisions set out in Article 5(1) (a), (b), (c), (e) or (f) (Mubilanzila Mayeka and Kaniki Mitunga v. Belgium,).

This provision allows for ***the detention of a child pending the making of an order placing him or her in care.***

The first part of Article 5 § 1 (d) authorises detention on the basis or to a court or administrative order to secure a child's attendance at an educational establishment. The words ***"educational supervision" are not to be equated rigidly with notions of classroom teaching****. Such supervision could embrace other aspects, by the authority or of parental rights for the benefit and protection of the person concerned (P. and S. v. Poland, § 147; Ichin and Others v. Ukraine, § 39; D.G.v. Ireland, §80).*

Sub-paragraph (d) does not preclude an interim custody measure being used to facilitate a regime of supervised education, without itself involving any supervised education. In such circumstances, however, ***the imprisonment must be speedily followed by transfer to a place where there is actual educational instruction*** *(whether open or closed) with sufficient resources available for that purpose (Bouamar v. Belgium, §50).*

If the State has chosen a system of educational supervision involving a deprivation of liberty, it has an ***obligation to put in place appropriate institutional facilities which meet both the security and educational demands of that system*** *(A. and Others v. Bulgaria, § 69; D.G. v. Ireland, § 79). Attempts by a state to justify the detention of minors when the detention is not lawful under other provisions of Article 5(1) (a) to (f) will be treated with some skepticism.*

Detention of special social groups – article 5.1 e) ECHR

Although this sub-paragraph justifies the deprivation of liberty from the viewpoint of public security, as well as the security of the detained persons, it nevertheless still imposes substantial safeguards against detention.

The social groups listed in Article 5 § 1 (e) may be subjected to the measure of deprivation of liberty for their medical treatment or due to the considerations dictated by the social policy, or for both, medical and social considerations (Witold Litwa v. Poland, § 60).

Prevention of diseases

Detention for the purpose of "preventing of spreading of infectious diseases" or 'Quarantine' is only lawful if it is based on the following criteria which are derived from the case of Enhorn v. Sweden (§ 44): 1) the spread of the infectious disease will constitute a threat for the health and safety of the population; and 2) the detention of the person with the infectious disease is the last resort and the only way to prevent the spread of the infectious disease and less severe measures will not be sufficient for the protection of public interest or not .

In this case the Court also stated that Article 5 § 1 (e) of the Convention refers to several categories of individuals, namely persons spreading infectious diseases, persons of unsound mind, alcoholics, drug addicts and vagrants and there is a link between all those categories in that people may be deprived of their liberty either in order to be given medical treatment or on the basis of medical and social grounds required in the public interest.

Persons of unsound mind

In the case of Wintwerp v. the Netherlands the Court came to the following conclusion, "an individual cannot be considered to be of "unsound mind" and deprived of his liberty unless the following three minimum conditions are satisfied. These are collectively known as the Wintwerp Criteria: 1. he must reliably be shown to be of unsound mind; 2) the mental disorder must be of a kind or degree warranting compulsory confinement; 3) the validity of continued confinement depends upon the persistence of such a disorder.

The Wintwerp criteria grant the person, who has been hospitalised for the examination of the psychiatric disorder, the right to be examined on the regular basis. This power to detain a person of unsound mind may not be applied to a person merely on the basis that his or her thoughts and behaviour do not comply to the general norms existing in any particular society. This power may also not be employed if the actual reason for the detention is for some other concealed purpose (Wintwerp v. the Netherlands; Varbanov v. Bulgaria, § 45).

As the Court has stated however, the term "a person of unsound mind" is a term whose meaning is continually evolving as research in psychiatry progresses, an increasing flexibility in treatment is developing and society's attitude to mental illness changes (Wintwerp v. the Netherlands, § 37).

A decision on confining a person who is considered by the authorities a patient with mental disorder but without relying upon a proper medical assessment cannot conform to Article 5 § 1 (e) (Ruiz Rivera v. Switzerland, § 59; S.R. v. the Netherlands (dec.), § 31).

As to second criterion indicated on the previous page, the confinement of a person with unsound mind may be necessary not only when it is required for his treatment with medicines or any other clinical methods for treating or improving his state, but also when it is necessary for the prevention of his causing damage to himself or to others (Hutchison Reid v. the United Kingdom, § 52).

Alcoholics, drug addicts and vagrants
For the purposes of Article 5 § 1 (e) the term "alcoholics" is not restricted to those who are in a clinical state of "alcoholism", but also those whose conduct and behaviour under the influence of alcohol poses a threat to public order or to themselves (Witold Litwa v. Poland, §§ 61-62, also see: Kharin v. Russia, § 34).

In the case of Hilda Hafsteinsdottir v. Iceland the Court made it clear that persons with this diagnosis can be taken into custody only for the protection of the public or their own interests (Hilda Hafsteinsdottir v. Iceland, § 42).

The term "vagrant" in the Convention reflects the generally understood meaning of the term and as usually set out in the national legislation. In the case of De Vilde, Ooms and Versyp v. Belgium the Court agreed that the definition of "vagrant" existing in the national legislation conformed to the notion provided for in Article 5 § 1 (e) of the Convention. This definition covers the "persons who have no fixed abode, no means of subsistence and no regular trade or profession".

The case-law concerning vagrants is not very extensive. ***The scope of application of the provision encompasses the persons who have no fixed abode, no means of subsistence and no regular trade or profession".*** *These three conditions (taken from the Criminal Code of Belgium) are cumulative and for detention to be justified they all need to be fulfilled in regard of the same person at the same time (De Vilde, Ooms and Versip v. Belgium, § 68).*

National context to be added

Session VI – Alternative measures to detention

🕘 45 minutes

🎯 List the advantages of alternatives to detention
Identify the possible alternatives to detention available in the national legal

system
Understand the importance of a gender perspective when deciding pre-trial, trial and post-sentencing measures
Sensitize participants about the importance that custodial detention is a mean of last resort

Step 1 – Why alternatives to detention?

10 minutes

Flipchart and paper, marker

Brainstorming

Ask participants to indicate the rationale behind the idea of alternatives to "coercive" detention/detention in prison, both at the level of pre-trial, sentencing and post-sentencing. Note down ideas without commenting. Keep the flipchart visible (stand-alone or wall) in the course of the session.

Main ideas will normally encompass:

reduce overcrowding
save money
earn money (if detention is converted into fine)
ensure human-rights compliant detention condition
prepare socio-economic reintegration of offenders
avoid exposure of offenders to the prison circuit
favour education
enable provision of adequate medical services
favour restorative approach of sanction

It should be possible to revisit the result of the next activity in the light of the keywords written on the flipchart. Normally, during brainstorm, participants express an overall approach which tends to conform to the legal notion of arrest/detention/conviction which is only a minimum part of the situations covered by article 5 ECHR.

Step 2 – Alternatives to detention and gender perspective

35 minutes

PPT (slide X), notepad, flipchart and paper, markers

Brainstorming and presentation (10 minutes)

Present the title of the step and explain that, in order to enable participants to perform the next exercise, there is a need that the term "gender" is

properly understood.

Start with a 1-minute brainstorming during which you ask participants to tell you what they understand the words "gender" and "gender mainstreaming" encompass. Note down the answer on your notepad so as to keep track of the ideas. Then move to a short presentation using the slide provided, focussing on the distinction between sex and gender. Explain that the exercise that you will propose will have to do with the notion of gender mainstreaming, which has been embraced internationally as a strategy towards realising gender equality. Gender mainstreaming involves the integration of a gender perspective into the preparation, design, implementation, monitoring and evaluation of policies, regulatory measures and spending programmes, with a view to promoting equality between women and men, and combating discrimination. Gender mainstreaming ensures that policy-making and legislative work is of higher quality and has a greater relevance for society, because it makes policies respond more effectively to the needs of all citizens – women and men, girls and boys. Gender mainstreaming makes public interventions more effective and ensures that inequalities are not perpetuated. Gender mainstreaming does not only aim to avoid the creation or reinforcement of inequalities, which can have adverse effects on both women and men. It also implies analyzing the existing situation, with the purpose of identifying inequalities, and developing policies which aim to redress these inequalities and undo the mechanisms that caused them. Explain that whilst gender perspective is per se a neutral term, referring to all different genders (males, females, intersexes…) the exercise they will perform will focus on a female-gender perspective.

Make-a-list (30 minutes)

Prepare 3 flipcharts with the words WHAT, WHEN and FEMALE GENDER PERSPECTIVE and hang them on the wall. Divide participants into small groups. Ask each group to compile a list of alternatives to detention at pre-trial stage, on the occasion of trial/sentencing, and during post-sentencing that are available under national legislation (WHAT). For each measure participants will have to indicate the conditions/circumstances in which the measure can be applied and weather in the granting of the measure a female gender perspective is taken into consideration (WHEN). They will also have to think about whether there is a gender dimension that should be considered in deciding for such measure (FEMALE GENDER PERSPECTIVE). Alternate representatives of each group in giving presentations and write the findings on the flipchart. Stimulate discussion using the key points below.

In order to ensure full and equal participation, ensure that each group only present 1 finding and that, in case one group is asked to make more than one presentation, the group representative is a different one. Think about inviting women participants first!

Key points

The UN Rules on the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules) recognise the ***distinct needs of women in the criminal justice system*** *and also introduce safeguards to protect women from ill-treatment.*

Considering places of detention from a gender perspective, it has been observed that ***women face heightened vulnerability and risk****, and that while the 'root causes' of both are often external to the physical environment of detention, vulnerability and risk become intensified significantly in places of deprivation of liberty.*

The root causes of women's vulnerability in detention are often to be found outside the prison walls, though such vulnerability is intensified significantly in places of deprivation of liberty.

The ***risks faced by women in prisons is often a reflection of a wider lack of understanding, prejudicial attitudes and discriminatory practices in society****: violence against women is often embedded in and supported by social values, cultural patterns and practices. The criminal justice system and legislators are not immune to such values and thus have not always regarded violence against women with the same seriousness as other types of violence.*

In addition to representing a violation of human rights per se (articles 3 and 8 ECHR), ***violence against women can also amount to discrimination based on gender.***

Non-discrimination is a founding principle of international human rights law. It is enshrined in a range of international treaties including the ECHR (article 12 and article 1 Protocol no. 14) and UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The latter states that discrimination against women is the "distinction, exclusion or restriction made on the basis of sex" that results in the curtailing of women's human rights and fundamental freedoms.

Custodial violence *against women encompasses* ***many acts, in addition to rape****. These include threats of rape, touching, insults and humiliations of a sexual nature, using mechanical restraints on women in labour and virginity testing, among others. Other practices may amount to ill-treatment depending on the manner in which they are carried out, why they are carried out and their frequency.*

In addition to the particular vulnerability of women to torture and ill-treatment, especially gender based violence, women also have

gender specific needs, which are rarely met in places of detention (e.g. special healthcare needs) or which are exacerbated dramatically by the mere fact of detention *(e.g. women may be abandoned by their families once imprisoned, due to the stigma associated with women's imprisonment).*

Women are usually discriminated against in prisons *also in many other ways, both due to their gender, as well as due to the fact that they constitute a minority in all prison systems of the world, making up between 2 and 9% of the general prison population in the large majority of countries. Thus, their distinctive needs are usually not taken into account in policy formulation and programme development and their special safety requirements are frequently ignored. While more attention may be given to their needs in prisons allocated exclusively to women, the lack of attention, at headquarters level, to strategies, policies, programmes and corresponding budgets, aiming to respond to women's gender specific needs, are still largely reflected in such prisons.*

In addition, ***prisons which hold only women are generally located far away*** *from the women's homes, due to the small number of women prisoners.* ***Therefore one of the primary needs of women – that of the maintenance of family links – is severely compromised.***

The children of women prisoners represent an additional consideration *in this context, taking into account that women are usually the primary carers of children and immense harm can be caused to dependent children, both if they are separated from their detained mothers or imprisoned with them. As such, there has been increasing recognition of the need to take into account the* ***best interests of such children and to give preference to alternatives to detention and imprisonment*** *in the case of women who are pregnant and mothers with dependent children, in line with the Bangkok Rules.*

Discrimination in accessing ***gender specific programmes and services*** *and maintaining family links does not always constitute ill-treatment, but in certain circumstances* ***such discrimination may evolve into ill-treatment.***

Session VII – Closure

🕐 30 minutes

🎯 Compare knowledge on the subject matter
Identify key learning points
Develop positive feelings about the training
Evaluate the training

Step 1 - Post-course knowledge assessment

10 minutes

 Multiple choice test annexed

Distribute pre-course tests. Ask participants to write their name on it.
Once the test is completed, proceed to correction in plenary. Then distribute the pre-training test and allow for participants to compare results. The final score should be better than the one obtained in the pre-training test, as a result of the training. Ask participants to share their impressions about the impact of the training and collect tests for recording purposes.

Step 2 – Time to finish!

20 minutes

Snowstorm
Invite trainees write down one thing they learned/liked during the training on a piece of scratch paper and wad it up. Invite participants to gather all together in the middle of the room. Ask them to throw paper snowballs and then invite them to collect one. In turn each participant reads out the feedback.

At the end, certificates (if applicable) and evaluation forms are handed out (5 minutes for completion).

Specific module

Session I
Introduction and opening of the course
45 minutes/1 hour

Learn about other participants
State expectations
Illustrate purpose, format and methodology of training
Identify knowledge and expertise present in the group
Establish an environment that is conducive to training
Set baseline of individual knowledge

Manual on training methodology

Step 1 - Introduction of participants

15 minutes/30 minutes

The tone of the training is set from the very first moment the participants arrive at the venue. There are a number of ways to ensure that participants are introduced to one another. Even when participants already know each other it is important that they have time to 'form' as a group at the beginning of a session. This helps create an environment which is cooperative and conducive to participatory training. However, should you consider that this activity is redundant, feel free to skip it – the time left will be certainly come to use during discussions or the practical exercises!

The methodology can be chosen depending on whether most of the participants already know each other (The Little known Fact) or not (Interviews, True or False). For the first option you can consider 15 minutes in total, for the second you can consider up to 30 minutes.

The Little Known Fact: ask participants to share their name, department or role in the organisation, length of service, and one little known fact about themselves. This "little known fact" becomes a humanising element that can help break down differences such as grade/status in future interaction.

Interviews: ask participants to get into twos. Each person then interviews his or her partner for 5 minutes while paired up. The interview should touch on who, what, where, when and should also include something personal about the person (i.e. hobby, favourite movie…). When the group reconvenes, each person introduces their interviewee to the rest of the group.

True or False: ask your participants to introduce themselves and make three

or four statements about themselves, one of which is false. Now get the rest of the group to vote on which fact is false. As well as getting to know each other as individuals, this exercise helps to start interaction within the group.

Do not worry if this activity takes less time than foreseen due to the fact that participants already know each other! The time left will certainly become an asset in the course of the training!

Step 2 – Expectations and self-assessment of knowledge

15 minutes

Coloured post-its (3 colours), computer and projector, flipchart paper and markers, tape, small box

Drawing - Expectation tree

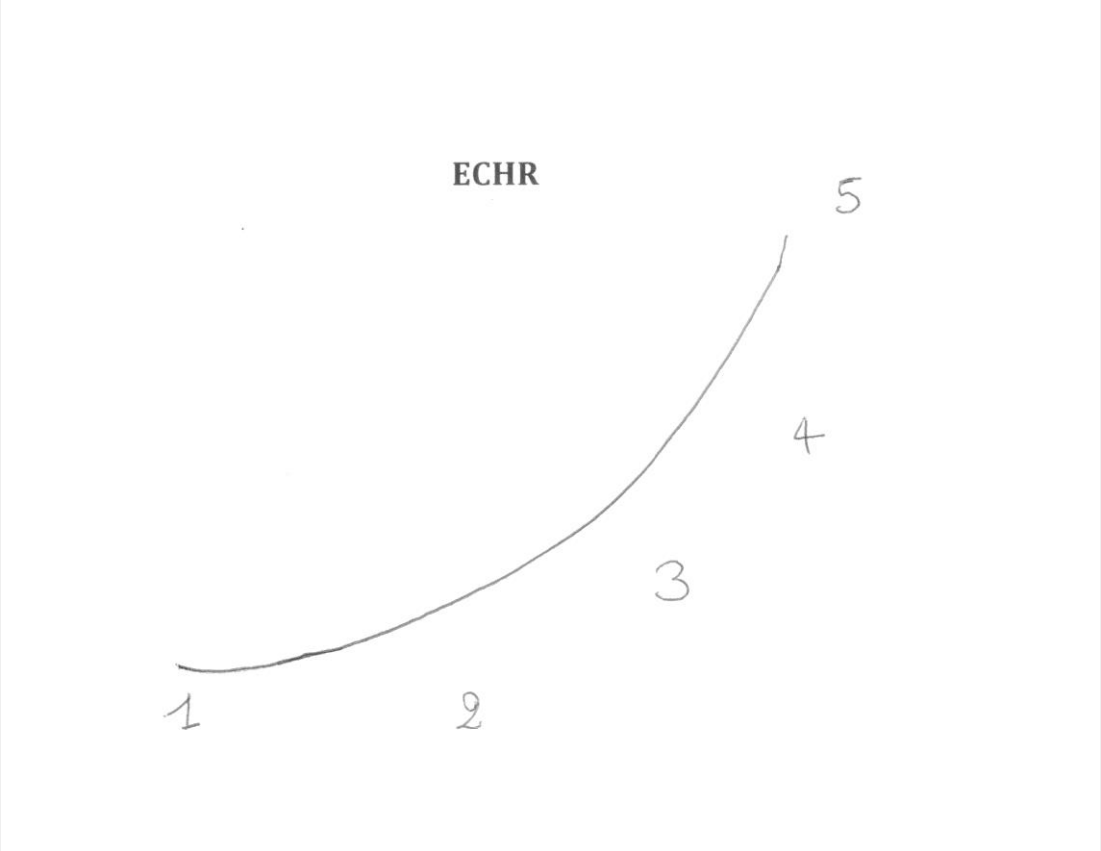
Draw structure of a tree on a flip chart paper hung to the wall.
Ask trainees to write on coloured post-its (2 colours) previously attached on their sitting desks their expectations and fears concerning the training course.
Clarify colours for expectations and fears.
Invite participants to post the slips on the flipchart, expectations to the treetop, fears to the trunk.
The trainer structures the cards so repeated expectations and fears become visible.

Trainer quickly reads the cards, discusses expectations (pointing out those that will not be met due to time constraints and the programme) and gives further information regarding the fears.

It should be possible to revisit this expectation tree at the end of the course and discuss which expectations and fears were fulfilled or not. In this case, trainees are asked to remove post-its with expectations that were fulfilled and the cards with fears that were not significant; these cards are put in a small box below the tree.

Self-assessment of knowledge and expertise

Draw diagram with a rising curve numbered from 1 to 5 on flipchart hung on wall, as shown below. Alternatively, use slide 1 in the Annex.



Ask trainee to write on third coloured post-it previously attached on their sitting desks their name and the numbers corresponding to highest point in knowledge of the ECHR as per the above scheme where

1 = No knowledge
2 = Basic knowledge
3 = Good knowledge
4 = Excellent knowledge
5 = Human Rights Expert

Invite participants to post the slips on the respective flipchart. Structure the cards so that the average knowledge becomes visible.

Trainer commends the wealth of knowledge or expertise already available, inviting its share within the groups, and emphasises that also those that have little to share, in fact can bring their point of view of "trainees" to the group, thus enabling it to grow. It should be possible to revisit these charts right at the end of the course, asking participants to appreciate the knowledge and expertise gained in the course by moving up the chart their post-its.

Step 3 – Presentation of the agenda

5 minutes

Navigate participants through the agenda and introduce the format of the training. Comment the agenda making reference to the expectations and fears (i.e. in relation to the self-assessment test).

Step 4 - Pre-course knowledge assessment

10 minutes

Multiple choice test annexed

Test

Distribute test. Ask participants to write their name on it. Explain to participants that this is a self-assessment tool aimed at helping identify what they know and what knowledge or understanding they need to deepen. Inform participants that results of the test will be used as baseline and that same test will be administered again at the end so as to measure progress.

Correct tests in plenary (each participant corrects own test).

Collect tests – they will be again distributed at the end of the post-training test for comparison.

Session II – Authorized deprivation of liberty under article 5 ECHR

6 hours 30 minutes

Differentiate deprivation of liberty from restriction of movement
Identify situations falling within the scope of application of article 5 ECHR
Understand what "lawfulness" mean under article 5 ECHR
Define the requisite of legality of a deprivation of liberty
Discuss the grounds justifying a deprivation of liberty
Circumscribe the notion of reasonable suspicion
Determine the length of time for validation of the arrest
Examine the effect of time on a detention
Compare national legislation to the ECHR
Sensitize participants to their particular role in protecting and promoting human rights
Apply the standards in real-life situations

The right to liberty and security of the person: A guide to the implementation of Article 5 of the ECHR https://rm.coe.int/168007ff4b (English only)
Guide on Article 5 of the Convention – Right to Liberty and Security http://www.echr.coe.int/Documents/Guide_Art_5_MKD.pdf (in Macedonian)
Selected factsheets on Detention, Criminal Field, Health http://www.echr.coe.int/Pages/home.aspx?p=press/factsheets&c= (English and other languages only)

Additional suggested reading

Copies of the ECHR for all participants, flipchart and flipchart paper, markers, tape, scenarios (handout or ppt).

Step 1 - What does deprivation of liberty means?

5 minutes

Brainstorming
Invite participants to read the text of article 5 ECHR from the Convention you distributed.
Ask participants to indicate situations or criteria to be used to assess whether a person has been deprived of its liberty. If participants are hesitant, prompt them by asking them if, for instance, if they think that a person who is obliged by the police officer to remain in the car during a routing traffic control is being deprived of its liberty or, for instance, if a witness is being held in the police station long after interrogation is subject to a restriction to liberty and security .
Note down keywords without commenting.
Keep the flipchart visible (stand-alone or wall) also in the course of the discussion of the scenarios that follow.

Main ideas will normally encompass:

detention (legal notion)
arrest (legal notion)
conviction (legal notion)
duration of the restriction (length of time)
nature of the restriction
effect of the restriction
possibility to leave
size of space available to the person
consent to confinement
degree of supervision or control

extent of isolation from the social context
availability of external contacts
use of coercion means (i.e. handcuffs)
sanctions applying if the person is leaving a certain place

 *It should be possible to revisit the result of the next activity in the light of the keywords written on the flipchart. Normally, during brainstorm, participants express an overall approach which tends to conform to the legal notion of arrest/detention/conviction which is only a minimum part of the situations covered by article 5 ECHR.*

Step 2 - Restriction of movement vs. deprivation of liberty

1 hour

 Handout or ppt, flipchart and markers, 1 stack of cards for each group, tape, markers

 ***Debate and voting***

The purpose of this exercise is to make participants understand the variety of situations that can amount to a deprivation of liberty. In order to do so distribute voting cards marked ARTICLE 5 and ARTICLE 2 P 4 to participants.

Divide participants into 6 groups of 4 people (depending on the number of participants you can have fewer groups and reduce the number of cases) and assign to each of them a case. Further subdivide each group into two and assign to one group the role of victim and to the other the role of the authorities. Instruct them they have 10 minutes to prepare for a TV debate during which each sub-group has to sustain their position as to the compatibility of the situation/incident with national and ECHR standards. Each group will have 5 minutes (to be timed strictly!) for presentation of arguments and 5 minutes for rebuttals. The rest of the audience will observe and, at the end, will be asked to vote (by holding up the relevant carton) for the party who was able to sustain better their position.

Eventually, just as in a TV debate, the trainer will act as host and invite randomly the public to express their opinion.

A short summary of the key points of the ECtHR judgment should be provided by the trainer orally.

 *If you think that the participants might resist the propose activity, as they do not feel to engage publicly to sustain their positions, also for fear of making mistakes, the same cases can be used for discussion in small groups, as illustrated below.*

Small groups

Prepare 2 flipcharts with the words DEPRIVATION OF LIBERTY and LIMITATION OF MOVEMENT and hang them to the wall. Divide participants into small groups of 3-4 persons. Distribute half of the cases, selected on the basis of the relevance to the group (the other cases will help you have background information for discussions), together with a set of cards numbered from 1 to 4. Invite groups to choose the name of the team and the request that they put their name on each of the cards using the marker provided. Ask groups to discuss each case for around 5 minutes, focussing on the following questions:

1. Do the facts of the case disclose a deprivation of liberty under Article 5 ECHR or a restriction of movement?
2. Which arguments can you use to sustain your position?
3. In case there was a deprivation of liberty, was it lawful?

Ask participants to designate a different rapporteur for each of the cases discussed. After the internal discussion, ask all groups to glue/tape on the flipcharts each of the 8 cards with the name of their team on. Then, looking at the flipcharts (each bearing the card with the name of the team and the number of the case) ask each one group per case to explain why they considered the case to be a deprivation of liberty or a restriction of movement and debrief.

 *To ensure equal participation, make sure that each plenary discussion is lead by the presentation of findings by the rapporteur of a different group. You might want to choose the group to which to give the floor depending on whether, on a given case, the group reached conclusions which were not shared by the majority.*

 *Use the debriefing time to clarify any outstanding issues or address any misunderstanding using the solution keys provided.*

Hand-out

Case 1

The applicant was stopped at Baku International airport during border control because his name appeared under the status "to be stopped" in the database of the State Border Service. He was taken to a separate room by the border-service officers

and was ordered to wait there for further clarification of his situation. The applicant claimed that he spent some four hours in the room, whereas the Government claimed that it was only two hours. During that time the applicant was unable to leave or to contact anyone. After it turned out that his name had been flagged in the database owing to an administrative error (the failure to remove it following a presidential pardon for a criminal conviction) he was allowed to leave the airport. The cost of his missed flight ticket was reimbursed. Ultimately, the domestic courts dismissed his claims for compensation for unlawful deprivation of liberty.

Case 2
On 1 May 2001 a large demonstration against capitalism and globalisation took place in London. The organisers gave no notice to the police of their intentions and publicity material they distributed beforehand included incitement to looting, violence and multiple protests all over London. The intelligence available to the police indicated that, in addition to peaceful demonstrators, between 500 and 1,000 violent and confrontational individuals were likely to attend. In the early afternoon a large crowd made its way to Oxford Circus, so that by the time of the events in question some 3,000 people were within the Circus and several thousand more were gathered in the streets outside. In order to prevent injury to people and property, the police decided that it was necessary to contain the crowd by forming a cordon blocking all exit routes from the area. Because of violence and the risk of violence from individuals inside and outside the cordon, and because of a policy of searching and establishing the identity of those within the cordon suspected of causing trouble, many peaceful demonstrators and passers-by, including the applicants, were not released for several hours.

Case 3
The applicant had been arrested in connection with a criminal charge but the time for which he could lawfully be detained on remand had expired before the charges were ready to proceed. He was removed from the prison where he was being held and taken under court order to a small island to be kept under "special supervision". Whilst the island as a whole covered 50 sq. km., the area reserved for persons such as Mr Guzzardi in "compulsory residence" represented an area of not more than 2.5 sq. km. The applicant was able to move freely around this area during the day but unable to leave his dwelling between 22.00 and 07.00. He had to report twice daily to the authorities and could only leave the island with prior authorisation and under strict supervision. His contact with the outside world was also supervised and restricted. The applicant lived under these conditions for sixteen months.
Around the ninth-of-tenth of the island was occupied by a prison. Mr. Guzzardi was sheltered in a part of the village Cala Reale, mainly comprised by formal medical centres that were in very bad condition, almost demolished, in the region of carabineers, one school and a church. He was mainly living in society of persons who were suffering the same measure and surrounded by police.

Case 4
A group of asylum seekers from Somalia who had arrived at the Paris-Orly Airport via Syria were held for twenty days in the international transit zone and a nearby hotel specifically adapted for holding asylum seekers.

Case 5
From March 1994 to July 1997 Mark spent a relatively successful period being looked after by carers in the community. In 1995 he started attending a day-care centre on a weekly basis. On 22 July 1997, while at the day-centre, Mark became particularly agitated, hitting his head and banging it against the wall. Staff could not contact his carers, so called a local doctor, who gave him a sedative. The applicant remained agitated and, on the recommendation of his social worker, was taken to hospital. A consultant psychiatrist diagnosed Mark as requiring in-patient treatment. With the help of two nurses, he was transferred to the hospital's Intensive Behavioural Unit where he was admitted as an informal patient.

In or around September 1997 Mark sought leave to apply for judicial review of the hospital's decision to admit him. The High Court rejected his application, finding that he had not been "detained" but had been informally admitted in accordance with the principle of necessity under the common law as opposed to statute. The applicant appealed. On 29 October 1997 the Court of Appeal indicated that the appeal would be decided in his favour, whereupon the hospital admitted him on an emergency and involuntary basis under the Mental Health Act of 1983. The Court of Appeal found that the applicant had been "detained" in July 1997. A patient could be lawfully detained for treatment for mental disorder only under the provisions of the 1983 Act. Since the provisions of that Act had not been complied with, the applicant had not been lawfully detained. The relevant health-care authorities appealed. The applicant had applied, in the meantime, to the Mental Health Review Tribunal for a review of his detention. An independent psychiatric report was prepared, recommending his discharge. He was discharged to his carers on 12 December 1997. On 25 June 1998 the House of Lords allowed the appeal, finding that Mark had been lawfully admitted as an informal patient on the basis of the principle of necessity under the common law.

Case 6
Alex, Charles and Durango are members of the armed forces who have been subject to disciplinary sanctions (foreseen by applicable law on armed forces) for insubordination.
The sanctions administered were the following:
Alex: four days' light arrest for returning late from leave;
Charles: twelve days' aggravated arrest for repeatedly driving irresponsibly (reduced in appeal from the original conviction to committal to disciplinary unit for three months);
Durango: committal to a disciplinary unit for a period of three months for having taken part in the publication and distribution of a writing tending to undermine discipline.
Specifics of the penalties are as follows:
Light arrest: serviceman obliged to remain in his dwelling during off-duty hours if he lived outside the barracks; otherwise he was confined to barracks. A serviceman under light arrest at the barracks was allowed visits, correspondence and the use of

the telephone; he could move freely about the barracks outside duty hours, being able for instance to visit the camp cinema, canteen and other recreation facilities.

Aggravated arrest: in off-duty hours, soldiers serve the arrest in a specially designated place which they may not leave in order to visit the canteen, cinema or recreation rooms, but they are not kept under lock and key.

Committal to disciplinary unit: offender submitted to a stricter discipline than normal by sending him to an establishment which was specially designated for that purpose. If ordered towards the end of military service, generally delayed the individual's return to civil life. Those undergoing such punishment were removed from their own unit and placed in a special, separate group; their movements were restricted, they carried out their military service under constant supervision and emphasis was placed on their education. The units where this punishment was served were divided into three sections. Offenders as a rule passed thirty days in each of the first two, but these periods could be prolonged or shortened according to their conduct. As far as possible, they spent their nights separated from each other. In the first section, they were allowed to receive visits twice a month and to study during off-duty hours. In the second, they also enjoyed a degree of freedom of movement on Saturdays and Sundays and at least twice a week could visit the canteen and/or recreation facilities in the evening after duty. In the third, the regime was appreciably less strict. Penalty would run from 3 months to two years.

Case 7

On 20 June the homes of Maria, Luis, Angel and Irina, who were suspected of belonging to a sect, were searched as part of a criminal investigation. The applicants, who were all adults, were taken to the Court of First Instance where the judge gave a verbal order releasing them into the care of their families and suggesting that they should be admitted to a psychiatric clinic. This order was later confirmed in writing. The applicants were then taken from the court to the headquarters of the police on the orders of the Director-General of the force. On 21 June Catalan police officers transferred them to a hotel where they were handed over to their families. They were each put in a separate room with boarded-up windows. The rooms were under permanent guard and the applicants were not allowed to leave them for the first three days of their stay. They were made to undergo "deprogramming" by a psychologist and a psychiatrist. On 29 and 30 June they were cautioned and questioned by the Deputy Director-General of the police in the presence of a lawyer not chosen by them. On 30 June 1984 they were allowed to leave the hotel. They immediately filed a criminal complaint alleging various offences including unlawful detention**.** The police officers indicted were acquitted on the ground that, because their motives had been philanthropic, legitimate and well-intentioned, there had been no unlawful detention.

Case 8

Laurel is autistic, suffers from a severe learning disability and a cyclical mood disorder and is prone to severe agitation and self-harm. He has spent most of his life in psychiatric care. After 4 years being looked after in a community, Laurel started attending a day-care centre on a weekly basis. One day, it was 22 July, while at the

day-centre, he became particularly agitated, hitting his head and banging it against the wall. Staff could not contact his carers, so called a local doctor, who gave him a sedative. The applicant remained agitated and, on the recommendation of his social worker, was taken to hospital. A consultant psychiatrist diagnosed him as requiring in-patient treatment. With the help of two nurses, he was transferred to the hospital's Intensive Behavioural Unit where he was admitted as an informal patient until end of October. Later he sought leave to apply for judicial review of the hospital's decision to admit him. The High Court rejected his application, finding that he had not been "detained", and that he had been lawfully admitted as an informal patient on the basis of the principle of necessity.

Solution keys
Case 1 - Gahramanov v. Azerbaijan, application 26291/06, 15/10/2013

Article 5 § 1: Given the multitude of situations in modern society where the public may be called on to endure restrictions on freedom of movement or liberty in the interests of the common good, an air traveller must be seen as consenting to a series of security checks by choosing to travel by plane. Those measures might include identity checks, baggage searches or waiting for further inquiries to be made in order to establish whether he or she represents a security risk for the flight. Accordingly, where a passenger was stopped during airport border control in order to clarify his situation for no more than the time strictly necessary to accomplish the relevant formalities, no issue arose under Article 5 of the Convention. The overall duration of the applicant's stay in the separate room could not have exceeded a few hours. When the border-service officers stopped him and asked him to wait in a separate room, they had reason to believe that further identity checks were necessary since his name was accompanied by a warning in their internal database. There was nothing to prove that the applicant's stay in the room had exceeded the time strictly necessary for searching his baggage and fulfilling the relevant administrative formalities for the clarification of his situation. Once it had been established that the warning in the database was the result of an administrative error, the applicant had been free to leave the airport immediately. His detention did therefore not amount to a deprivation of liberty within the meaning of Article 5.
Conclusion: case declared inadmissible.

Case 2 - Austin and Others v. the United Kingdom, applications 39692/09, 40713/09, and 41008/09, 15/03/2012 [GC]
This was the first time the Court was called to consider the application of the Convention in respect of the "kettling" or containment of a group of people carried out by the police on public order grounds.
In deciding whether there had been a "deprivation of liberty" within the meaning of Article 5 § 1, the Court referred to a number of general principles established in its caselaw. First, the Convention was a "living instrument", which had to be interpreted in the light of present day conditions. Even by 2001, advances in communications technology had made it possible to mobilise protesters rapidly and covertly on a hitherto unknown scale. Article 5 did not have to be construed in such a way as to

make it impracticable for the police to fulfil their duties of maintaining order and protecting the public.
Secondly, the Convention had to be interpreted harmoniously, as a whole. It had to be taken into account that various Articles of the Convention placed a duty on the police to protect individuals from violence and physical injury. Thirdly, the context in which the measure in question had taken place was relevant. Members of the public were often required to endure temporary restrictions on freedom of movement in certain contexts, such as travel by public transport or on the motorway, or attendance at a football match. The Court did not consider that such commonly occurring restrictions could properly be described as "deprivations of liberty" within the meaning of Article 5 § 1, so long as they were rendered unavoidable as a result of circumstances beyond the control of the authorities, were necessary to avert a real risk of serious injury or damage, and were kept to the minimum required for that purpose.
The Court further emphasised that, within the Convention system, it was for the domestic courts to establish the facts and the Court would generally follow the findings of facts reached by the domestic courts. In this case, the Court based itself on the facts found by the High Court, following a three week trial and the consideration of substantial evidence. It was established that the police had expected a hard core of between 500 and 1000 violent demonstrators to gather at Oxford Circus at around 4 p.m. The police had also anticipated a real risk of serious injury, even death, and damage to property if the crowds were not effectively controlled. Given that, about two hours earlier, over 1,500 people had already gathered there, the police had decided to impose an absolute cordon as the only way to prevent violence and the risk of injured people and damaged property.
There had been space within the cordon for people to walk about and there had been no crushing. However, the conditions had been uncomfortable with no shelter, food, water or toilet facilities. Although the police had tried, continuously throughout the afternoon, to start releasing people, their attempts were repeatedly suspended because of the violent and uncooperative behaviour of a significant minority both within and outside the cordon. As a result, the police had only managed, at about 9.30 p.m., to complete the full dispersal of the people contained. Nonetheless, approximately 400 individuals who could clearly be identified as not involved in the demonstration or who had been seriously affected by being confined, had been allowed to leave before that time. The Court found that the cordon was imposed to isolate and contain a large crowd in dangerous and volatile conditions. Given the circumstances that had existed on 1 May 2011, an absolute cordon had been the least intrusive and most effective means available to the police to protect the public, both within and outside the cordon, from violence.
In this context, the Court did not consider that the putting in place of the cordon had amounted to a "deprivation of liberty". Indeed, the applicants had not contended that, when it was first imposed, those within the cordon had been immediately deprived of their liberty. Furthermore, the Court was unable to identify a moment when the containment could be considered to have changed from what had been, at most, a restriction on freedom of movement, to a deprivation of liberty. It was striking that some five minutes after an absolute cordon had been imposed, the police had been planning to start a controlled dispersal. Shortly afterwards, and fairly frequently thereafter, the police had made further attempts to start dispersing

people and had kept the situation under permanent close review. As the same dangerous conditions at the origin of the absolute cordon had continued to exist throughout the afternoon and early evening, the Court found that the people within the cordon had not been deprived of their liberty within the meaning of Article 5 § 1. Notwithstanding the above finding, the Court emphasised the fundamental importance of freedom of expression and assembly in all democratic societies and underlined that national authorities should not use measures of crowd control to stifle or discourage protest, but rather only when necessary to prevent serious injury or damage. Since Article 5 did not apply, the Court held – by 14 votes to three - that there had been no violation of that provision.
Conclusion: no violation (14 votes to 3).

Case 3 - Guzzardi v. Italy, application 7367/76, 06/11/1980
As he was not imprisoned, the Court had to decide whether Mr Guzzardi was at all deprived of his liberty. The Court ruled that there was a difference between deprivation of and restriction of movement. The difference was one of degree and not one of nature of limitation. In this case the Court built upon the distinctions from Engel and stated that it was not possible to establish a deprivation of liberty on the strength of any one aspect of his regime taken individually, but taken cumulatively and in combination, in the light of the factors set out above, it considered that the applicant had been deprived of his liberty and his case was to be examined under Article 5 rather than Article 2 of Protocol 4, that is restriction of movement. It thus looked at the totality of the circumstances to find Mr Guzzardi's confinement to the island of Asinara was, in fact, a deprivation of his liberty. Mr Guzzardi was placed under 'special supervision' on the island after he was classified as a dangerous individual The Court noted that although the area Mr Guzzardi could move around in was much larger than a cell and not contained by a physical barrier, it was limited to a tiny fraction of an island that was difficult to access, and he could not visit the area where the island's population resided. Moreover, Mr Guzzardi was housed in a dilapidated building, lacked the opportunity for social contacts, could not leave his dwelling after ten o'clock at night. or before seven o'clock in the morning, and was required to report to the authorities twice per day. The Court, in finding a violation of Article 5, reasoned that a deprivation of liberty would not stand on one single factor; rather, it was the combination of all the factors in the case that gave rise to the violation.
Conclusion: there was in the instant case deprivation of liberty within the meaning of Article 5 ECHR (eleven votes to seven).

A contrario, in the case of **De Tommaso** v. Italy, application 43395/09, [GC] 23/02/2017,the concluded that the measures in issue did not amount to deprivation of liberty. In this case the applicant, who had several previous convictions for offences including drug trafficking and unlawful possession of weapons, was placed under "special police supervision" on the basis of continuing suspicions as to the its behaviour and source of income. The following set of obligations were imposed for a period of two years: to report once a week to the police authority responsible for the supervision; to look for work within a month; not to change the place of residence; to lead an honest and law-abiding life and not give cause for suspicion; not to associate with persons who had a criminal record and who were subject to

preventive or security measures; not to return home later than 10 p.m. or to leave home before 6 a.m., except in case of necessity and only after giving notice to the authorities in good time; not to keep or carry weapons; not to go to bars, nightclubs, amusement arcades or brothels and not to attend public meetings; not to use mobile phones or radio communication devices; and to carry at all times the document setting out these obligations and present it to the police authority on request. The Court, deciding the admissibility of the complaint, observed that: (a) the applicant had not been forced to live within a restricted area; (b) as he remained free to leave home during the day, he had been able to have a social life and maintain relations with the outside world; (c) the prohibition on leaving home at night except in case of necessity (between 10 p.m. and 6 a.m.) could not be equated to house arrest; and (d) he had never sought permission from the authorities to travel away from his place of residence. It thus considered article 5 ECHR not applicable.

Conclusion: inadmissible (majority).

Case 4 – Amuur v. France, application 19776/92, 25/06/1996

The Court further stated that many Council of Europe member States were faced with an increasing flow of asylum seekers, and that it was aware of the difficulties involved in the reception of asylum seekers at most large European airports. States had the sovereign right to control aliens' entry into and residence in their territory, but in doing so the provisions of the Convention, including Article 5, had to be respected. As in the Guzzardi case, in deciding whether there was a deprivation of liberty or a restriction of movement the type, duration, effects and manner of the measure in question had to be examined. The Court discussed whether there had been a restriction on liberty of movement or a deprivation of liberty. It decided that this was an issue of "degree and intensity". The applicants had been held at the airport for twenty days. They were under constant police surveillance, and for most of the time not provided with any legal or social assistance. The Government had argued before the Court that the applicants could at any time have removed themselves from the sphere of application of the measure in question, arguing that the transit zone was "closed on the French side" but "open to the outside". The Court however held that the mere fact that it was possible for asylum seekers to leave the country where they wished to seek refuge did not mean that there had not been a restriction on liberty. The possibility became theoretical if no other country offered protection comparable to that which they expected to find in the country where they were seeking asylum. In addition, in the case of Amuur, sending the applicants back to Syria in fact only became possible following negotiations between the French and Syrian authorities, and they had not been free to leave whenever they wanted as was alleged by the Government.

The Court therefore concluded that the applicants' detention in the transit zone amounted to a deprivation of liberty and that Article 5 was applicable.

Conclusion: applicable (unanimously).

Case 5 - X. L. v. United Kingdom, application 45508/99, 27/05/2003

The Court considers the key factor in the present case to be that the health care professionals treating and managing the applicant exercised complete and effective

control over his care and movements from 22 July 1997, when he presented acute behavioural problems, to 29 October 1997, when he was compulsorily detained.
More particularly, the applicant had been living with his carers for over three years. On 22 July 1997, following a further incident of violent behaviour and self-harm at his day-care centre, the applicant was sedated before being brought to the hospital and subsequently to the IBU, in the latter case supported by two persons. His responsible medical officer indicated clearly that, had the applicant resisted admission or subsequently tried to leave, she would have prevented him from doing so and would have considered his involuntarily committal under section 3 of the 1983 Act (see paragraphs 12, 13 and 41 above). Indeed, as soon as the Court of Appeal indicated that his appeal would be allowed, he was compulsorily detained under the 1983 Act. The correspondence between the applicant's carers and Dr M. reflects both the carers' wish to have the applicant immediately released to their care and, equally, the clear intention of Dr M. and the other relevant health care professionals to exercise strict control over his assessment, treatment, contacts and, notably, movement and residence; the applicant would only be released from the hospital to the care of Mr and Mrs E. as and when those professionals considered it appropriate. While the Government suggested that "there was some evidence" that the applicant had not been denied access to his carers, it is clear from the above-noted correspondence that the applicant's contact with his carers was directed and controlled by the hospital, his carers not visiting him after his admission until 2 November 1997
Accordingly, the concrete situation was that the applicant was under continuous supervision and control and was not free to leave. The Court would therefore agree with the applicant that it is not determinative whether the ward was "locked" or "lockable". In this regard, it notes that the applicant in Ashingdane was considered to have been "detained" for the purposes of Article 5 § 1 (e) even during a period when he was in an open ward with regular unescorted access to the unsecured hospital grounds and the possibility of unescorted leave outside the hospital.
Conclusion: violation of article 5 para. 1 ECHR as regards the lack of protection against arbitrary detention (unanimously).

Case 6 – Engels and others v. The Netherlands, applications 5100/71, 5101/71, 5102/71, 5354/72, and 5370/72, 8 June 1976

In Engel, the Court distinguished between 'light arrest' and 'aggravated arrest', which it found did not violate Article 5, and 'strict arrest', which did. The Court found there was no deprivation of liberty when light arrest or aggravated arrest was imposed. Strict arrest, however, was different because non-commissioned officers and ordinary servicemen were locked in a cell for 24 hours a day. Servicemen subjected to light arrest could still receive visitors, use the telephone and move freely about the barracks outside duty hours (though servicemen subjected to aggravated arrest could also receive visitors but could not move freely about the barracks). However, servicemen under strict arrest were entirely excluded from the performance of their normal duties.74 Thus, the applicants who were subjected to strict arrest were deprived of their liberty under Article 5.

Case 7 – Riera Blume and others v. Spain, application 37680/97, 14 October 1999

Article 5 § 1: the Court considered that the applicants' transfer to the hotel by the Catalan police and their subsequent confinement to the hotel for ten days had amounted in fact, on account of the restrictions placed on the applicants, to a deprivation of liberty. The Court found that there had been no legal basis for that deprivation of liberty. It was therefore necessary to consider the part played by the Catalan authorities and to determine its extent. It further considered that the national authorities had at all times acquiesced in the applicants' loss of liberty. While it was true that it was the applicants' families and the association that had borne the direct and immediate responsibility for the supervision of the applicants during their ten days' loss of liberty, it was equally true that without the active cooperation of the Catalan authorities the deprivation of liberty could not have taken place. As the ultimate responsibility for the matter complained of had thus lain with the authorities in question, the Court concluded that there had been a violation of Article 5 § 1 of the Convention.
Conclusion: violation of article 5 § 1 (unanimous)

Case 8
Article 5 § 1: the Court observed that, between 22 July to 29 October 1997, the applicant was under continuous supervision and control and was not free to leave. It made no difference whether the ward in which he was being treated was locked or lockable. The Court therefore concluded that the applicant was "deprived of his liberty", within the meaning of Article 5 § 1, during this period.

The Court considered there was adequate evidence justifying the initial decision to detain the applicant on 22 July 1997. The Court further found that the applicant had been reliably shown to have been suffering from a mental disorder of a kind or degree warranting compulsory confinement which persisted during his detention .

Whether or not the applicant, with appropriate advice, could reasonably have forseen his detention, the Court found that a further requirement for lawfulness under Article 5 § 1, namely that any deprivation of liberty should not be arbitrary, had not been met. In particular and most obviously, the Court noted the lack of any formalised admission procedures indicating who could propose admission, for what reasons and on the basis of what kind of medical and other assessments and conclusions. There was no requirement to fix the exact purpose of admission (for example, for assessment or for treatment) and, consistently, no limits in terms of time, treatment or care attached to that admission. Nor was there any specific provision requiring a continuing clinical assessment of the persistence of a disorder warranting detention. The nomination of a representative of a patient who could make certain objections and applications on his or her behalf was a procedural protection accorded to those committed involuntarily under the law and which would be of equal importance for legally incapacitated patients with, as in the applicant's case, extremely limited communication abilities. As a result of the lack of procedural regulation and limits, the Court observed that the hospital's health care professionals assumed full control of the liberty and treatment of a vulnerable incapacitated individual solely on the basis of their own clinical assessments completed as and when they considered fit. While the Court did not question the good faith of those professionals or that they acted in what they considered to be

the applicant's best interests, the very purpose of procedural safeguards was to protect individuals against any misjudgement or professional lapse.

Conclusion: violation of Article 5 § 1 (unanimous).

Key points

Personal liberty is one of the key fundamental rights protected by the Convention. Every person should generally enjoy physical liberty. Any deprivation of this right has a direct and adverse effect on several other rights such as the right to family and private life, the right to freedom of assembly and association and expression or the right to freedom of movement. Article 5 protects this right to liberty against arbitrary deprivation. In every case of deprivation a judge has to decide on the lawfulness of the deprivation. ***Article 5 contains an exact, detailed and – most important – taxative enumeration of situations in which arrest and detention are permitted.*** *This ensures that any deprivation of the right to liberty is exceptional, objectively justified and of no longer duration than absolutely necessary.*

The wording of Art. 5 para. 1 protects both "liberty" and "security" of a person*. Although one might think those two freedoms were separate rights, in fact the "right to liberty and security" is* ***one unique right and the expression has to be read as a whole****. "Security of a person" must be understood in the context of physical liberty and cannot be read as to referring to different matters. Any measure depriving a person of his liberty incompatible with the purpose of Article 5 puts at stake the "right to liberty" but also the "right to security of person" (Bozano v. France, 18.12.1986)*

Article 5 contemplates the physical liberty of the person*; its aim is to ensure that no one should be deprived of that liberty in an arbitrary fashion.*

Deprivation of liberty has an autonomous meaning under the ECHR.
"Arrest" and "detention" are used interchangeably and have to be seen as being concerned with any measure having the effect of depriving a person of his or her liberty. This applies to any measure, whatever designation is used by national law. That means, as soon as a deprivation of liberty happens, guarantee start to apply.

Deprivation of liberty means any measure by state authorities holding a person on a specific place against his or her will. *Article 5 is not concerned with mere restrictions on liberty of movement - such restrictions are governed by Article 2 of Protocol No. 4, governing a person's right to liberty of movement and freedom to choose his or her residence within the territory of a State. The Court stated that the difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or*

substance. In order to determine whether somebody was deprived of his or her liberty, ***the individual situation of the affected person has to be taken into account*** *(Ashingdan v. the United Kingdom, 28 May 1985, para 41).*

The notion of deprivation of liberty within the meaning of Article 5 § 1 contains both an objective element of a person's confinement in a particular restricted space for a not negligible length of time, and an additional subjective element in that the person has not validly consented to the confinement in question (Storck v. Germany, § 74; Stanev v. Bulgaria [GC], § 117).

Article 5 does not cover mere restrictions on liberty of movement, which are governed by Article 2 of Protocol No. 4 . Qualification will depend on a number of factors: degree or intensity, type, duration, effects and manner of implementation of the measure in question, the possibility to leave the restricted area, the degree of supervision and control over the person's movements, the extent of isolation and the availability of social contacts (see Guzzardi v. Italy above). It also takes into account the subjective element (i.e. whether the validly consented to the restriction).

Where can deprivation of liberty take place?
Deprivation of liberty does not only occur when a person is arrested or detained*. The following situations, which are illustrated also by the case-studies proposed, can amount to deprivation of liberty:*

- *placement of individuals in psychiatric or social care institutions, whether private or public;*
- *house arrest pending trial;*
- *strict forms of curfew;*
- *confinement in airport transit zones;*
- *questioning of a person in a police station;*
- *stops and searches by the police, regardless of the place where they occur;*
- *crowd control measures.*

National legal definitions/qualifications are not conclusive. *Elements such as* ***nature of the confinement and the status of the person*** *concerned shall be taken into account.*

Nature of the confinement
For the Court the use of force or coercive measures by state officials is crucial, e.g. being stopped on the street or required to stay in a police station. ***It is of no consequence that the person may have surrendered himself or herself voluntarily*** *(see De Wilde, Ooms and Versyp v. Belgium, 18.06.1971, dealing with vagrants reporting themselves to a police station requesting to be detained in an "assistance home").*

For the Court it is also not necessary that a person affected cannot move from a certain spot (a police station, a car, a cell). ***The fact that a person has a***

certain degree of liberty within a particular place does not exclude the application of Article 5. *For example the Court found a deprivation of liberty in Guzzardi v. Italy in which the applicant was ordered by court to reside on a remote island, subject to various restrictions, prohibitions and under permanent control.*

House arrest pending trial (Giulia Manzoni v. Italy, 1 July 1997) or pursuant to a strict form of curfew (Cyprus v. Turkey, decision 26 May 1975) would also engage Article 5. According to the Court case law Article 5 also covers a psychiatric patient who, although being incapable of expressing a view on his position and already kept compulsory in a mental hospital, was placed in a ward (H.L. v. the United Kingdom, see below).

The Court also found Article 5 to be applicable in a situation where an asylum seeker was forcibly kept in the "transit zone" of an airport, although theoretically he could have left that zone to any country (Amuur v. France, 25 June 1996, see below). The Court reasoned that the option of leaving has to be realistic and not theoretical, if either no other country would admit him or not offer him protection against being returned to the country in which he feared to be persecuted.

The status of the person affected

The Court will also take in account the status of any person affected when determining whether a deprivation of liberty actually occurred. For example in the Engel v. the Netherlands above the Court found Article 5 inapplicable in the case of a soldier being under a special "arrest" confining him to one specific building where he had to carry out his normal duties. The assumption underlying this ruling was that military service inevitably leads to a lesser degree of liberty anyway, so the threshold must be higher than for civilians. Soldiers are therefore obliged to accept certain measures limiting their liberty which would already constitute a deprivation of liberty for civilians.

Inmates of prisons are already deprived of their liberty, so measures within a prison (like disciplinary confinement in a cell instead of free association with other inmates) will only be regarded as a deprivation of liberty in exceptional circumstances (see below Bollan v UK, decision of 4.05.2000).

However, ***if a prisoner is released, be it under a degree of supervision and reporting to the authorities will normally be deemed to have regained his or her liberty for the purposes of Article 5****. Therefore a recall to prison would be a depravation of liberty subject to the requirements of Article 5 (Weeks v UK, 2.03.2197, dealing with a prisoner serving a life sentence and subsequently being "released on license". A later revocation of that release has to fulfill the requirements of Article 5).*

The right to liberty is too important in a democratic society for a person to lose the benefit of Convention protection for the single reason that he may have given himself up to be taken into detention, especially when that person is legally incapable of consenting to, or disagreeing with, the proposed action

Responsibility of the State for violation of article 5 can also occur if a private individual is directly responsible for the "detention", with the consent or knowledge of the State.

Personal liberty is one of the key fundamental rights protected by the Convention. Every person should generally enjoy physical liberty. Any deprivation of this right has a direct and adverse effect on several other rights such as the right to family and private life, the right to freedom of assembly and association and expression or the right to freedom of movement. Article 5 protects this right to liberty against arbitrary deprivation. In every case of deprivation a judge has to decide on the lawfulness of the deprivation. ***Article 5 contains an exact, detailed and – most important – taxative enumeration of situations in which arrest and detention are permitted.*** *This ensures that any deprivation of the right to liberty is exceptional, objectively justified and of no longer duration than absolutely necessary.*

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Responsibility of the State for violation of article 5 can also occur if a private individual is directly responsible for the "detention", with the consent or knowledge of the State.

Key points - *National context to be added*

Depending on the time available (also in light of the discussions held), you can further elaborate on the case-law cited above or referred to in the Guide in the course of the guided discussion or use one or two of the examples by way of storytelling, pinpointing the main principles.

Step 3 - The requisite of lawfulness of the detention under article 5 para. 1 ECHR – Introduction

20 minutes

Coloured post-its (3 colours), flipchart paper, markers, tape.

Snowballing

Invite participants to read article 5 para. 1 letters a) – f) ECHR and draw their attention to the requisite of legality and lawfulness which embodied in both the first paragraph and the subsequent letters. Use the fact that participants are examining the articulated structure of the provision to remind them about the fact that article 5 ECHR is a typical example of a "limited right" (as opposed to absolute and qualified) under the ECHR, that is a right which can be limited only under the circumstances listed in the provision. Mark 2 flipchart papers with the words LEGALITY/QUALITIES OF THE LAW, LAWFULNESS and PROTECTION FROM ARBITRARINESS and hang them separately on the wall. Distribute 3 post-its per participants. Invite participants to write on each of them in a short sentence 1 (only one!) idea/notion as to what they believe each of the terms encompass (i.e. under legality/quality of the law they will have to write 1 quality that the law must have, under lawfulness the requisites for the restriction….)

Divide participants into three groups. Task each group with the review of one of the flipchart, putting aside (still visible), the discarded cards, grouped as per the category the group believes they belong to (5 minutes maximum).

Ask groups to report in plenary about their decision (5 minutes maximum per group).

Be sure to maintain a strict timing: this activity works best when participants are put under pressure/do not get bored.

Use the debriefing session for flipchart to illustrate the case-law of the ECtHR and to provide guidance on the definitions of terms.

Key points

*Article 5 para. 1 requires that **any deprivation of liberty be "in accordance with a procedure prescribed by law"**. Further, each sub-paragraph providing for the cases where deprivation of liberty is permitted supposes that the measure be "lawful". The requirement of lawfulness has been interpreted as referring to both procedure and substance. Moreover, lawfulness is understood to mean that any detention must be in accordance with the national law and the European Convention and must not be arbitrary.*

***Notion of law is autonomous under the ECHR** – encompasses qualities of the law such as sufficient clarity, accessibility, intelligibility, precision, enabling recipients to foresee consequences for non-compliance, consistent interpretation by authorities.*

***Formal compliance with national law:** any deprivation of liberty has to be in compliance with both substantial and procedural rules of the national law. It is irrelevant that a person's confinement might on its merits be appropriate and consistent with the grounds authorised by Article 5. **A failure to comply with domestic (procedural or substantive) law entails a breach of the Convention**.*

***Compliance with the Convention:** in addition to compliance with national law, any deprivation of liberty must be in accordance with the Convention itself to protect the individual against arbitrariness, as the Court stated in Kurt v Turkey (see below), dealing with a case of "forced disappearance". **The domestic law itself has to be in conformity with the Convention and especially has to be foreseeable in its application** (see Jéčius v. Lithuania where the rules governing the detention were considered to be too vague and unclear. The Court also found that the grounds of Article 5 para 1 (c) do not permit preventive measures to be taken against suspected criminals if prosecution is not the object of the detention. In Denizci and Others v. Cyprus, 23 May 2001, the applicants claimed, inter alia, that no reason was given for their arrest, and the Court found a violation of Article 5 (1), observing that the respondent government did not advance any lawful basis for the applicants' arrest and detention.*

***A substantive rather than formalistic approach is to be adopted**: i.e. continued detention of a person on the basis of an order by the indictment chamber requiring further investigations, without issuing a formal detention order was not found in violation of article 5 ECHR (Laumont v. France, para 50.).*

***Legality of a detention does not mean lawfulness of the same** (Creanga v. Romania, para. 84, A. and Others v. UK [GC], para. 164).*

Lawfulness encompasses an obligation to keep detailed record of the detention (time, place, duration, details of detainee, reasons for detention, names of person effecting detention).

Arbitrariness may arise in case of bad faith or deception on the part of the authorities.

Speed of review of detention order can also disclose arbitrariness.

Absence or lack of reasoning in detention orders can determine unlawfulness of detention.

*Consideration given to **alternative, less intrusive measures are relevant in the determination of lawfulness of detention** decision.*

Certain "procedural flaws" might not trigger article 5 ECHR:
- A failure to notify the detention order officially to the accused did not amount to a "gross or obvious irregularity" in the exceptional sense indicated by the case-law given that the authorities genuinely believed that the order had been notified to the applicant (Marturana v. Italy, § 79; but see Voskuil v. the Netherlands, in which the Court found a violation where there had been a failure to notify a detention order within the time-limit prescribed by law: three days instead of twenty-four hours);
– A mere clerical error in the arrest warrant or detention order which was later cured by a judicial authority (Nikolov v. Bulgaria, § 63; Douiyeb v. the Netherlands [GC], § 52);
– The replacement of the formal ground for an applicant's detention in view of the facts mentioned by the courts in support of their conclusions (Gaidjurgis v. Lithuania (dec.)). A failure to give adequate reasons for such replacement however may lead the Court to conclude that there has been a breach of Article 5 § 1 (Calmanovici v. Romania, § 65).

Delays in executing order of release are acceptable if kept to a minimum.

*The **requirement of legality extends to the whole period** for which it lasts. Violations have been found because the legal basis for the deprivation of liberty had at some point ceased to exist. After a release being ordered, such an order has to be executed without undue delay. The Court found violations of Article 5 in cases of a delay in release of 11 hours (Quinn v. France, 22 March 1995), 10*

hours (Labita v. Italy, 6 April 2000) and even 40 minutes after a 12-hour detention (K.-F. v. Germany, 27 November 1995).

*It should be noted that the Court has found **prolonged deprivation of liberty to be unjustified** even in murder cases (Letellier v. France, 26 June 1991). **Although one or more justified reasons may exist when the person is initially detained, they may become less pressing with the passage of time** and in such circumstances the person concerned should be released. (Tomasi v. France, 27 August 1992).*

Step 4 – The notion of reasonable suspicion

50 minutes

Hand-outs

The suspects
Divide participants into 6 groups. Distribute the background information and allow for participants to go through it for 3-5 minutes. Then distribute the second hand-out and assign 1 suspect to each group. Give the group 5 minutes to answer the question. Invite groups to present to the plenary their finding (5 minutes per group). Solicit views from the audience. Address mistakes using the solution keys.

If need be, refer to the key points used for the previous exercise to address any misunderstanding.

Hand-out 1

Background information
Operation Pegasus is the result of an 18 month investigation into the activities of the individual identified as Suspect A. Acting on information from a number of sources, the Police were authorised by a court order to begin investigations into the alleged trafficking of humans and narcotics coordinated by this individual.
The evidence against them has included:

2. Sworn statement by an informer of the activities that have taken place inside the property that was the subject of the raid.
5. Monitoring and evaluation of communications data from Subject A's telephone – including calls and conversations with the other suspects taken in the raid.

6. Undercover observation of the activities of Suspect A – and also the movements of individuals into and out of the house.
7. Shortly before the beginning of Operation Pegasus – an individual who had been seen entering the house was detained by an undercover Police officer, after attempting to sell a significant quantity of cocaine.
8. Sworn statement from an individual who was trafficked through the house that was the target of the raid. In which she described both the interior and exterior of the house- as well as the appearance of several of the suspects that were taken in the raid.
Following the investigation of this evidence, a court warrant was obtained which authorised a raid against the property.

The raid on the property uncovered in the course of Operation Pegasus was sanction at 22:34, by Judge Smith of the Central Court Division. Captain Brown, supported by a team of 20 agents and one helicopter took up position around the target property and undertook close surveillance to ensure that the target individual was inside.

At 00:38, the individual known as Suspect A was seen entering the property along with two other individuals. Close surveillance revealed that they stayed awake for an hour, drinking spirits and smoking cigarettes. Evidence recovered from the scene suggested also that a quantity of cocaine had been consumed.
Thermal signatures from within the house indicated that there were five further individuals present in the house.
When the indications suggested that they were all asleep, the team moved in. Five men moved in the front door whilst five covered the back. Support teams were stationed in the streets close by in case the suspects attempted to escape custody.

Armed units breached the front door at 0521 immediately detaining suspects C, E and B. Suspects A and D woke suddenly and made their escape close through a first floor window and onto the roof of the conservatory below. They were detained by officers. All suspects were made aware of their rights and the reasons for which they were being detained. They are all due to appear before Judge Smith at 11:00 and they are aware of this.

Hand-outs 2

Suspect A
Suspect A is the individual that has been under surveillance for 18 months. His identity has been confirmed with covert photographs and voice print analysis.
The suspect was discovered with a large quantity of narcotics stored in the house. He also had equipment that suggested his intention to mark up quantities of drugs for sale. The equipment – bags, scales, cutting and mixing equipment suggests that a larger quantity of cocaine than discovered is likely to have been involved.
Additional identification of the suspect was made by a witness who approached the Police as a victim of human trafficking.
Her testimony has been recorded.

In conclusion, there is reasonable suspicion that this individual has committed criminal acts and this assertion has been supported by the judiciary.

Consider the case against the suspect. Is his detention justified both under national law and ECHR? If so, under which section of article 5.1?

Suspect B

Suspect is a known associate of Suspect A, though in the course of Operation Pegasus he has not been found to have any proven involvement in the alleged crimes.

However, a search of his criminal record has revealed an interesting development. Suspect B has, it appears, been at large for three months, following his failure to attend court on charges of assault.

It is alleged that he violently punched and kicked his wife, rendering her unconscious- before leaving the house and not returning.

His wife has suffered from brain damage following the assault- such was the suddenness and violence of the incident.

A warrant was issued requiring him to attend court almost three months ago. He failed to answer the summons.

Consider the case against the suspect. Is his detention justified both under national law and ECHR? If so, under which section of article 5.1?

Suspect C

Suspect C is known to the court system and has previously been released on bail, pending trial.

There is no indication at present, that he has committed any act involving Suspect A, however, he had consumed a large amount of alcohol. When he was arrested by the officers, he delivered a significant level of verbal abuse and was restrained for the protection of officers.

Does his presence in the house signify a deeper level of criminality?

Consider the case against the suspect. Is his detention justified both under national law and ECHR? If so, under which section of article 5.1?

Suspect D

Suspect D is believed to be a relative if Suspect A. What appears to be likely is that he is a nephew – and a great admirer of his Uncle. Whilst this has led him to follow his Uncle around and try to spend time with him, there are no indications of criminality other than one or two minor violations and cautions.

However, the individual, whilst looking older, is actually only 14 years of age. Enquiries with the individuals school have ascertained a prolonged absence of several weeks.

Consider the case against the suspect. Is his detention justified both under national law and ECHR? If so, under which section of article 5.1?

Suspect E
Suspect E had consumed a large amount of narcotic prior to the raid, to the point that he did immediately wake when the officers entered the property. Whilst no medical examination has taken place formally, the presence of puncture marks in the arms, between the fingers and toes – in his joints and elsewhere suggest that they may be a confirmed addict.

Consider the case against the suspect. Is his detention justified both under national law and ECHR? If so, under which section of article 5.1?

Suspect F
Suspect F has no criminal record and other than being a friend of suspect B has no links with the group. During interview it was established that it has not fixed abode. Following a disagreement with his wife, he was ejected from the marital home and for several weeks he has been reliant on acquaintances for somewhere to sleep. We were able to confirm this information by contacting a list of individuals the suspect provided to us. We also spoke to the suspect's estranged wife who confirmed that she has removed him from the house. She is in the process of obtaining a restraint order in order to prevent suspect F from approaching her. As for the period before the arrest, she confirmed that he did not try to re-enter the house or speak with her.

Consider the case against the suspect. Is his detention justified both under national law and ECHR? If so, under which section of article 5.1?

Solution keys

Suspect A
Detention justified under article 5.1 c). He has been arrested and detained on reasonable suspicion of criminal acts following a prolonged investigation. He has been charged with these acts and awaits trial.

Suspect B
His detention is justified under article 5.1 b) for the purpose of bringing him before a competent court to answer for the grave crime committed against his wife.

Suspect C
A previous record is no guarantee that a person has committed a crime for which detention would be justified. However, there might be an argument under article 5.1 c) that restraining the suspect was a mean to prevent a violent outburst.

Suspect D
Detention not justified. He is a minor. Article 5.1 d), however, authorises detention on the basis of a court order or administrative order to secure a child's attendance at an educational establishment. Therefore detention might be justified in this case – but only for that specific purpose.

Suspect E
Detention not fully justified. Whilst article 5.1 e) would be applicable, but not fully justified in the present case as the individual in question was not in an aggressive or dangerous state.

Suspect F
Detention not justified. He does not fall within any of the category foreseen by article 5.1. He is simply in the wrong place at the wrong time.

Key points (for article 5.1 letters a), b), c) and f) – letters d) and e) are covered later in the Manual, when dealing with minors and persons of unsound mind.

Detention after conviction – article 5.1 a) ECHR
***Article 5 § 1 (a) applies to any "conviction**" occasioning deprivation of liberty **pronounced by a court** and makes no distinction based on the nature of the offence or whether it is classified as criminal or disciplinary by the national law (Engel and Others v. the Netherlands, § 68; Galstyan v. Armenia, § 46).*

***There must be both a finding of guilt on the basis of specific facts, and the imposition of a penalty** or other measure involving the deprivation of liberty (Del Río Prada v. Spain [GC], §125; James, Wells and Lee v. the United Kingdom, § 189; M. v. Germany, § 87; Van Droogenbroeck v. Belgium, § 35; B. v. Austria, §38).*

The provision does not prevent the authorities from executing orders for detention imposed by competent courts outside their territory (X. v. Germany, Commission decision of 14 December 1963). Although Contracting States are not obliged to verify whether the proceedings resulting in the conviction were compatible with all the requirements of Article 6 (Drozd and Janousek v. France and Spain, § 110), a conviction cannot be the result of a flagrant denial of justice (Ilaşcu and Others v. Moldova and Russia [GC], § 461; Stoichkov v. Bulgaria, § 51). If a conviction is the result of proceedings which were "manifestly contrary to the provisions of Article 6 or the principles embodied therein", the resulting deprivation of liberty would not be justified under Article 5 §1 (a) (Willcoxand Hurford v. the United Kingdom (dec.), § 95)

Detention for non-compliance with lawful order – article 5.1 letter b) ECHR
*The expression "non-compliance with the lawful order of a court" used in Article 5 § 1(b) of the Convention means that **the person arrested or detained must have had an opportunity to comply with such an order and have failed to do so** (Beiere v. Latvia, § 49). A person cannot be held accountable for non-compliance with a court order if he or she has never been informed of that order (idem, § 50). A refusal of a person to undergo certain measures or to follow a*

certain procedure by the authorities prior to being ordered to do so by a competent court is not sufficient to justify detention unless required to do so by a court order (Petukhova v. Russia § 59).

The domestic authorities must strike a ***fair balance between the importance in a democratic society of securing compliance with a lawful order of a court, and the importance of the right to liberty.*** *In such circumstances issues such as the purpose of the order, the feasibility of compliance with the order, and the duration of the detention are matters to be taken into consideration. The issue of proportionality assumes particular significance in the overall scheme of things (Gatt v. Malta § 40).*

The Court and the Commission have applied the first part of Article 5 § 1 (b) to cases concerning, for example:

- *a failure to pay a court fine (Airey v. Ireland, Commission decision);*
- *a refusal to undergo a medical and psychiatric examination concerning mental health (X. v. Germany, Commission decision of 10 December 1975);*
- *or a blood test ordered by a court (X. v. Austria, Commission decision);*
- *a failure to observe residence restrictions (Freda v. Italy, Commission decision);*
- *a failure to comply with a decision to hand over children to another parent (Paradis v. Germany, Commission decision);*
- *a failure to observe binding-over orders (Steel and Others v. the United Kingdom);*
- *a breach of bail conditions (the above mentioned case of Gatt v. Malta) and*
- *a confinement in a psychiatric hospital (Beiere v. Latvia, where the detention decision was found not to be a "lawful order of a court").*

In all cases, the obligation must necessarily arise from a legal order of the court. In Slavomir Berlinski v. Poland, the Court found that the applicant's compulsory placement in a mental hospital was carried out in the context of criminal proceedings against him in order to secure the court order to examine his mental state for determining his criminal responsibility. Once satisfied that the detention followed a court order, the Court verified the lawfulness requirement and found that the detention had complied with a procedure prescribed by law and it was not arbitrary.

Pre-trial detention - Article 5.1 c) ECHR

The notions of ***"arrest" or "detention" reflect any measure relating to deprivation of liberty regardless how they are classified in domestic legislation****. In the view of the European Court, the safeguard provided by the requirement of Article 5§ 1 (c) for judicial control is crucial since it applies at the very beginning of a period of deprivation of liberty.*

The Convention case-law sets ***five distinct grounds for pre-trial detention*** *of persons arrested under Article 5 § 1(c) of the Convention, namely:*
1) risk of absconding;

2) risk of obstructing the investigation;
3) risk of committing further offence;
4) risk of causing public disturbance if released, and
5) the need to protect the detainee (Buzadji v. Moldova, no. 23755/07, § 88).

*The requirement on the judicial officer to give **relevant and sufficient reasons for the detention** – in addition to the persistence of reasonable suspicion – applies already at the time of the first decision ordering detention on remand, that is to say "promptly" after the arrest (Buzadji, § 102).*

*Under the sub-paragraph (c) of Article 5 § 1 an **arrest must be a proportional act designed to achieve the indicated purpose** (Ladent v. Poland, §§ 55-56). Under Article 5 § 3 the term "a competent legal authority" means "a judge or any other official who, upon the law, is competent to exercise judiciary power" (Shisser v. Switzerland, § 29).*

The meaning of reasonable suspicion
*Under the sub-paragraph (c) of Article 5 § 1, the existence of **reasonable suspicion** that the offence was perpetrated **is necessary for depriving a person of his liberty,** as only then may the deprivation of liberty be sufficiently grounded and lawful. In addition, any suspicion needs to be honestly held by those involved in the arrest (Murrey v. the United Kingdom). For there to be reasonable suspicion there must be **facts or information which would satisfy an objective observer that the person concerned may have committed an offence** (Ilgar Mammadov v. Azerbaijan, § 88; Erdagöz v. Turkey, § 51; Fox, Kempbell and Hartly v. the United Kingom, § 32). Thus, the fact that the competent authorities did not investigate the key facts of the case to establish whether the complaint was grounded or not and with a good faith breaches Article 5 § 1 (c) (Stepulyak v. Moldova, § 73; Elçi and others v. Turkey, § 674).*

*It depends on the circumstances of the case as to what can be considered as "grounded" and as a basis for the suspicion (Fox, Kempbell və Hartly v. The United Kingdom, § 32). However **the suspicion will be considered "grounded" only when it is based on the facts and information objectively indicating that the suspect has been involved in the alleged offence.***

*Article 5 § 1 (c) indicates that **lawful arrest or detention** of a person on reasonable suspicion of having committed an offence **may take place before or after the commission of that offence.** However, to be lawful for the purposes of Article 5, the offence must be classified in the domestic legislation as a ground for the person's deprivation of liberty (Lukkanov v. Bulgaria). It does not mean that the commission of an offence needs to be established before the arrest; merely, there should be an assumption that the acts that have led to the arrest are classified in the legislation as a criminal offence.*

The second requirement in 5 § 1 (c) means that there should be a "reasonable suspicion" that the person perpetrated the offence in question. The provision also

guarantees the maximum duration of any pre-trial detention for a relevant offence before this is authorised by an independent legal authority and the possibility of release in the pre-trial period shall be considered quickly.

The term "for ***the purpose of bringing him before the competent legal authority" relates to all three alternative grounds for arrest or detention*** *elaborated in Article 5.1 (c) (Loules v. the Ireland (No 3) §§ 13-14; Ireland v. the United Kingdom, § 196).*

A person may be arrested only for the purpose of bringing him before the competent legal authority on the suspicion of having committed an offence in the context of criminal proceedings (Ceius v. Lithuania, § 50; Shvabe and M.G. v. Germany, § 72).

Second alternative for detention under this Article *(when it is reasonably considered necessary to prevent his committing an offence) also does not mean that the person may be arrested without reasonable suspicion of being about to commit an offence and the purpose of the arrest is not for prevention purposes, but* ***is specifically designed to regulate pre-trial detention*** *(Ostendorf v. Germany, § 82).*

The existence of ***the purpose to bring the suspect before the court is required*** *regardless whether this purpose has been achieved or not. Sub-paragraph (c) of Article 5 § 1 does not require the police to have obtained sufficient evidence to bring charges (Petkov and Profirov v. Bulgaria, § 52; Erdagöz v. Turkey, § 51). Under the sub-paragraph (c) of Article 5 § 1 the purpose of questioning at the point of arrest is to assist the criminal investigation through affirming or eliminating the suspicion that constitutes the grounds for the arrest (Brogan and others v. the United Kingdom, §§ 52-54; Labita v. Italy [GC], § 155; O'Hara v. the United Kingdom, § 36).*

In the context of terrorism, though States cannot be required to establish the reasonableness of the suspicion grounding the arrest of a suspected terrorist by disclosing confidential sources of information, the Court has held that the exigencies of dealing with terrorist crime cannot justify stretching the notion of "reasonableness" to the point where the safeguard secured by Article 5 § 1 (c) is impaired (O'Hara v. the United Kingdom§ 35).

The unproven statement of an anonymous person based on rumours was not sufficient to serve as "a reasonable ground" proving that the applicant was involved in mafia-related activities (Labita v. Italy [GC], §§ 156 etc.) On the contrary, the fact that the incriminating statements dated back several years and were later withdrawn by the suspects did not necessarily remove the existence of a reasonable suspicion against the applicant and did not have an effect on the lawfulness of the arrest warrant (Talat Tepe v. Turkey, § 61).

The risk of absconding

*The **risk of absconding cannot be gauged and a decision be made solely based on the severity of the charges and the sentence faced** (Panchenko v. Russia, no. 45100/98, 08/02/2005, § 106).The risk of absconding has to be assessed in the light of the factors relating to the person's character, his morals, home, occupation, assets, family ties and all kinds of links with the country in which he is prosecuted (Neumeister v. Austria, no. 1936/63, § 10).*

Examples of situations leading to a violation

*When national courts justify the **necessity of detention solely** by:*

- *severity of charges*
- *severity of punishment prescribed for the alleged crime.*

*When **national courts do not consider other criteria** such as:*

- *personality of the accused, his/her ties with community, such as:*
- *personal,*
- *social,*
- *family,*
- *employment ties,*
- *residence status,*
- *property and assets, and other relevant factors which may either confirm the existence of the danger of absconding or make it appear so slight that it cannot justify detention pending trial;*

When first instance court and the higher courts

- *limit themselves in their decisions to **repeating the grounds brought by the investigative authority in an abstract and stereotyped way**, without indicating any reasons why they considered well founded the allegations that the applicant might abscond.*

The risk of obstructing the investigation

***The danger** of the accused hindering the proper conduct of the proceedings **cannot be relied upon in abstracto**; it has to be supported by factual evidence (Trzaska v. Poland, no. 25792/94, § 65). Grounds such as the need to carry out further investigative measures or the fact that the proceedings have not yet been completed do not correspond to any of the acceptable reasons for detaining a person pending trial under Article 5 § 3 (Piruzyan v. Armenia, no. 33376/07, § 98).*

Examples of situations leading to a violation

- ***National courts present the danger of obstructing the course of justice in an abstract form**, namely, by solely stating that if released the person would obstruct the course of justice by, for example, putting pressure on witnesses or by destroying evidence without substantiating such allegations by facts and evidence of the criminal case;*
- *Courts refer to the **necessity by the investigative authority of conducting further investigative action in abstracto**, without justifying the causal link between the impossibility of conducting the investigative action and the person's release;*

- ***Courts keep repeating the grounds brought by the investigative authority in an abstract and stereotyped way**, without indicating any reasons why they considered well founded the allegations that the applicant might obstruct the proceedings*

Danger of committing further offences

*The danger of committing further crimes **shall also be assessed on the basis of the facts of the case,** it has to be a plausible one and the measure appropriate, in the light of the circumstances of the case and in particular the past history and the personality of the person concerned (Gal v. Hungary, no. 62631/11, § 42).*

Examples of situations leading to a violation

- *In their motions to court for pre-trial detention, **investigative bodies refer to the danger of committing further crimes in an abstract manner** – without presenting concrete facts or evidence from the criminal case to justify the allegation;*
- *In granting the motion, **the courts present their findings in abstract, by solely stating that the accused would commit further crime if released,** without justifying the decision by concrete facts or evidence, which derive from the criminal case.*

Danger of Causing Public Disorder and the need to protect detainee

Because of their particular gravity and public reaction to them, certain offences may give rise to social disturbance capable of justifying pre-trial detention, at least for a time. In exceptional circumstances, this factor may therefore be taken into account for the purposes of the Convention, as far as domestic law recognises this ground (Letellier v. France, no. 12369/86, 26/06/1991, § 51)

Examples of situations leading to a violation

- ***National law does not stipulate the danger of causing public disorder** as a distinct ground for pre-trial detention;*
- *Although the danger of causing public disorder is prescribed by law as a distinct ground for pre-trial detention, **the investigative body and the courts abstain from referring to such ground** and instead of that subsume it under the danger of commission of further crime.*
- *The **investigative body and the courts refer to the danger of causing public disorder in abstract**, without referring to facts, information or evidence of the case file to justify the findings*

Detention to prevent irregular entry or for extradition – article 5.1 f) ECHR

The detention or arrest on the basis of Article 5.1 (f) will only be lawful if it meets four criteria:

5. *the arrest takes place in good faith;*
6. *it has taken place only in order the prevent the unauthorized entry of the person into the country;*

7. *if the person left emigrated because he was concerned about threats to his life and that in deciding the place of his detention and the conditions of detention this background is taken into consideration; and*
8. *if the duration of the detention is not longer than is necessary taking into account the specific purpose of the detention (Saadi v. the UK [GC], § 74).*

Prevention of the person effecting an authorized entry into the country allows the State to control the entry of aliens into the country and the power to detain potential immigrants seeking permission to enter the country to make applications for asylum or other reasons. Until such "permission" is issued, the entry into the country is considered by the Court to be unlawful; in such a case the detention of the person who is seeking permission to enter the country, is an action carried out with a view of «preventing person's unauthorized entry into the country». Article 5.1 (f) is not limited to the arrest of the persons who try to avoid the restrictions applied on entry into the country. If the sub-paragraph only applied to such persons, that limitation would contradict the recommendations of the UN and the CoE (Saadi v. the UK [GC], §§ 64-66).

It is ***not necessary to prove that the arrest is necessary, but the principle of proportionality requires that any detention shall not last for a very long time without there being specific grounds justifying it*** *(Saadi v. the UK [GC], § 73).*

The question when the application of Article 5.1 (f) requires release as a result of the fact that permission is granted to the person to enter the country or to reside in its territory, depends significantly on the specifics of the national legislation (Suso Musa v. Malta § 97; see also: Longa Yonkeu v. Latvia § 125, 15.11. 2011).

To assess an arrest for the purpose of deportation or extradition the Court will review all the circumstances and the relevant procedures (Bozano v. France).In this context, ***it is not sufficient to only claim that the national legal norms and procedures were observed. These procedures and their application must meet the objective standards and requirements of the Convention****. The Court will examine both the outcome of the decision on the arrest and the circumstances that lead to the decision to detain.*

In the case of Bozano the French authorities declined the application to extradite and instead opted to deport. Despite one month passing since this decision was made no action was taken, as it was not clear where the applicant was supposed to be sent. One month after the decision to deport, at midnight the applicant was taken over the Swiss border and the authorities of that country extradited him to his own country - Italy. The Court came to the conclusion that in this case the deportation was a concealed form of extradition and under Article 5.1 (f) the deportation was unlawful. State authorities may not employ devious means for deporting failed asylum seekers (see: Bozano v. France, §52-56)

Article 5.1 (f) provides different level of protection than Article 5.1 (c): for the

purposes of sub-paragraph (f) all that is required is that the "action is undertaken with the aim of deportation or extradition" (Chahal v. the UK, § 112; Chonka v. Belgium, § 38; Nasrullayev v. Russia, § 69; Soldatenko v. Ukraine, § 109).

Step 5 - The requisites of legality and lawfulness, and protection from arbitrariness in the national context

45 minutes


Bowl or hat


Brainstorming and plenary discussion (lottery)
Ask participants to pair and invite them to think about practical situations, based on national legislation, in which the requisite of legality, lawfulness and protection from arbitrariness can be triggered. Ask them to write down, in a few sentences, a scenario depicting these situations and put the slips in a bowl or hat that you have placed on one of the desks/at the center of the room. Then invite one group at a time to draw from the bowl one of the scenarios, that will have to be read out to the audience. Guide the ensuing plenary discussion that will follow. Make sure to refer to the national cases indicated in the key points.


Make sure that the discussion keeps focussed! This exercise will give you an opportunity to go back to some of the key points discussed in the previous step.

Key points - National context to be added

Session III – Rights of persons deprived of liberty

30 minutes


List the guarantees enjoyed by people deprived of liberty
Outline the type and quality of information on reason for arrest a person deprived of liberty is entitled to
Define the meaning of time element listed in article 5.3 and 5.4 ECHR
Understand the links between article 5 and article 6 ECHR

Define the type and quantity of compensation for unlawful detention
Sensitize participants about the duties inherent to the their roles

Step 1 – Procedural guarantees enshrined in article 5 ECHR

Part I

10 minutes

flipchart, markers

Brainstorming in small groups

Divide participants into 10 groups. Assign to each group one of the following aspects of article 5 (the same topic will be examined by 2 separate groups):

5.2 Reasons for arrest
5.3 Right to be brought promptly before a judge (2 groups for this provision, one focussing on the "time" element and the nature of the officer, the other focussing on the powers of the officer)
5.3 Trial within reasonable time
5.4 Review of lawfulness

Ask participants to prepare bullet-points on what they think the right is about. Prompt them also to think about the domestic law and practice, providing if possible concrete examples.

Give each group 5 minutes to go through the assignment then proceed with debriefing in plenary, inviting representatives of the 2 groups dealing with the same subject to come upfront and alternating points so that both groups have the possibility to take the floor. Stimulate reactions by the audience by asking clarification question. Debrief using key points.

To stimulate liveliness you can hand over a flipchart paper with the assigned topic already marked on it: most people will feel "obliged" to use it!

Plenary brainstorming should be limited to 5-8 minutes per topic as this is only serves as a warm-up for the next step.

Part II

30 minutes

PPT

Lecture and Q&A
With the help of the PPT provided, give a lecture about the topic. Include a session for Q&A at the end (10 minutes)

Remember to make reference to the results of the previous brainstorming session!

Key points

Information on the reason for arrest (article 5.2 ECHR)
The words used in Article 5 § 2 should be ***interpreted autonomously*** *and, in particular, in accordance with the aim and purpose of Article 5 which is to protect everyone from arbitrary deprivations of liberty. The term "arrest" and the words "any charge" are not restricted to detention in the criminal justice system. Article 5 § 4 does not make any distinction between persons deprived of their liberty on the basis of whether they have been arrested or detained and there are no grounds for excluding the latter from the scope of Article 5 § 2 (Van der Leer v. the Netherlands, §§ 27-28) which extends to detention for the purposes of extradition (Shamayev and Others v. Georgia and Russia, §§ 414-15) and medical treatment (Van der Leer v. the Netherlands, §§ 27-28; X. v. the United Kingdom, § 66) and also applies where persons have been recalled to places of detention following a period of conditional release (the same case; X v. Belgium, Commission decision).*

Article 5 § 2 contains the elementary safeguard that any person arrested should know why he is being deprived of his liberty *and is an integral part of the scheme of protection afforded by Article 5. Where a person has been informed of the reasons for his arrest or detention, he is better equipped to decide whether to apply to a court to challenge the lawfulness of his detention in accordance with Article 5 § 4 (Fox, Campbell and Hartley v. the United Kingdom, § 40; Čonka v. Belgium, § 50).*

Any person who is entitled to take proceedings to have the lawfulness of his detention decided speedily cannot make effective use of that right unless he is promptly and adequately informed of the reasons why he has been deprived of his liberty (Van der Leer v. the Netherlands, § 28; Shamayev and Others v. Georgia and Russia, § 413).

It is plain from the wording of Article 5 § 2 that ***the duty on States is to furnish specific information to the individual or his representative*** *(Saadi v. the United Kingdom, § 53, confirmed by the Grand Chamber in 2008). If the applicant is incapable of receiving the information, the relevant details must be given to those persons who represent his interests such as a lawyer or guardian (X. v. the United Kingdom, Commission Report, § 106; Z.H. v. Hungary, §§ 42-*

43).

*Whether the **information conveyed is provided sufficiently promptly must be assessed in each case according to its special features**. However, the reasons need not be related in their entirety by the arresting officer at the very moment of the arrest (Fox, Campbell and Hartley v. the United Kingdom, § 40; Murray v. the United Kingdom [GC], § 72).*

***The constraints of time** imposed by the notion of promptness **will be satisfied where the arrested person is informed of the reasons for his arrest within a few hours** (Kerr v. the United Kingdom (dec.); Fox, Campbell and Hartley v. the United Kingdom, § 42).*

***The reasons do not have to be set out in the text** of any decision authorising detention and **do not have to be in writing** or in any special form (X. v. Germany, Commission decision of 13 December 1978; Kane v. Cyprus (dec.)). **However, if a person with intellectual disability is not provided with the information in an appropriate form or via another authorized person it cannot be said that he was provided with the requisite information** enabling him to make effective and intelligent use of the right ensured by Article 5 § 4 to challenge the lawfulness of the detention (Z.H. v. Hungary, § 41).*

***The reasons for the arrest may be provided directly or become apparent in the course of post- arrest interrogations or questioning** (Fox, Campbell and Hartley v. the United Kingdom, § 41; Murray v. the United Kingdom [GC], § 77; Kerr v. the United Kingdom (dec.)).*

Arrested persons may not claim there was a failure to understand the reasons for their arrest in circumstances where they were arrested immediately after the commission of a criminal and intentional act (Dikme v. Turkey, § 54) or where they were aware of the details of alleged offences contained within previous arrest warrants and extradition requests (Öcalan v. Turkey (dec)).

*Whether the content of the information conveyed is sufficient must be assessed in each case according to its special features (Fox, Campbell and Hartley v. the United Kingdom, § 40). However, **a bare indication of the legal basis for the arrest, taken on its own, is insufficient for the purposes of Article 5 § 2** (ibidem, § 41; Murray v. the United Kingdom [GC], § 76; Kortesis v. Greece, §§ 61-62).*

***Arrested persons must be told, in simple, non-technical language that they can understand, the essential legal and factual grounds for the arrest,** so as to be able, if they see fit, to apply to a court to challenge its lawfulness in accordance with Article 5 § 4 (Fox, Campbell and Hartley v. the United Kingdom, § 40; Murray v. the United Kingdom [GC], § 72). However, Article 5 § 2 does not require that the information consist of a complete list of the charges against the arrested person (Bordovskiy v. Russia, § 56; Nowak v.*

Ukraine,
§ 63; Gasiņš v. Latvia, § 53).

Where persons are arrested ***for the purposes of extradition, the information given may be relatively basic*** *(Suso Musa v. Malta, §§ 113 and 116; Kaboulov v. Ukraine, § 144; Bordovskiy v. Russia, § 56) as an arrest for such purposes does not require a decision to be made on the merits of any charge (Bejaoui v. Greece, Commission decision). However, such persons must nonetheless receive sufficient information so as to be able to apply to a court for the review of lawfulness provided for in Article 5 § 4 (Shamayev and Others v. Georgia and Russia, § 427).*

Where the warrant of arrest, if any, is written in a language which the arrested person does not understand, Article 5 § 2 will be complied if the applicant is subsequently interrogated, and thus made aware of the reasons for his arrest, in a language which he understands (Delcourt v. Belgium, Commission decision). However, ***where translators are used for this purpose, it is incumbent on the authorities to ensure the translation is completed with meticulousness and precision*** *(Shamayev and Others v. Georgia and Russia, § 425).*

National context to be added

<u>The right to be brought promptly in front of a judge (article 5.3 ECHR)</u>
Article 5 § 3 of the Convention provides persons arrested or detained on suspicion of having committed a criminal offence with a guarantee against any arbitrary or unjustified deprivation of liberty (the case of Aquilina v. Malta and Stephens v. Malta). ***The purpose of this paragraph is to make deprivation of liberty possible only in exceptional cases and to ensure that judicial supervision over arrest and detention is in place****.*

The reasonable suspicion, necessity to prevent a crime and the risk of absconding of the suspected person can serve as a ground to detain an individual. However, such detention will meet the requirements of Article 5 § 1 (c) *only if it is aimed to initiate criminal proceedings against the person detained. This fact demonstrates a link between Article 5 § 1 (c) and 5 § 3. The first part of the provision allows deprivation of liberty, while the second provides that everyone arrested or detained in accordance with the provision of paragraph 1 (c) "shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial."*

Judicial control as a component of the rule of law is, "one of the fundamental principles of a democratic society … which is expressly referred to in the Preamble to the Convention" and "from which the whole Convention draws its inspiration" (Brogan v. the United Kingdom).

Judicial control serves to provide effective safeguards against the risk of ill-treatment, *which is at its greatest in this early stage of detention, and against the abuse of powers bestowed on police (or other law enforcement officers in charge of protection of public order) (Ladent v. Poland).*

The opening part of Article 5 § 3 provides for a ***prompt and automatic control of arrest or pre-trial detention*** *ordered in accordance with the provisions of paragraph 1 (c) (De Jong, Baljet and Van den Brink v. the Netherlands, § 51; Aquilinav. Malta).*

The time constraint imposed by this requirement leaves little flexibility in interpretation, otherwise there would be a serious weakening of a procedural guarantee to the detriment of the individual and the risk of impairing the very essence of the right protected by this provision (McKay v. the United Kingdom).

Article 5 § 3 does not provide for any possible exceptions from the requirement that a person be brought promptly before a judge *or other judicial officer after his or her arrest or detention, not even on grounds of prior judicial involvement (Bergmann v. Estonia)*

What is prompt? The time element
Let us have a look at a few examples:

- ***any period in excess of four days*** *between the arrest of an individual and his appearance before a judge* ***is prima facie too long*** *(Oral and Atabay v. Turkey; McKay v. the United Kingdom; Năstase-Silivestru v. Romania);*
- ***shorter periods can also breach the promptness*** *requirement if there are* ***no special difficulties or exceptional circumstances*** *preventing the authorised authorities from bringing the arrested person before a judge sooner (İpek and Others v. Turkey and Kandzhov v. Bulgaria).* ***The leading case*** *on the setting of a time-limit on detention prior to the judicial supervision* ***is the case of Brogan v. the United Kingdom****, which not only found* ***a period of four days and six hours to be too long****, but also shed some useful light on the very objective underlying the obligation that a person should be brought before a court following his or her initial detention. The arrest in the Brogan case concerned a suspected terrorist and the Court accepted that the specific circumstances of the fight against terrorism could have an impact on the length of detention prior to its being subjected to judicial supervision. However it stated that to attach such importance to the special features of this case as to justify so lengthy a period of detention without appearance before a judge or other judicial officer would be an unacceptably wide interpretation of the plain meaning of the word "promptly". In cases involving the detention of soldiers for military offences, although the Court has made some allowances for the exigencies of military life, it still held to the importance of the promptness requirement.*

Automatic judicial review

The fact that an arrested person had access to a judicial authority is not sufficient to constitute compliance with the opening part of Article 5 § 3 (De Jong, Baljet and Van denBrink v. the Netherlands and Pantea v. Romania). ***Judicial control of detention must be automatic and cannot be made to depend on a previous application by the detained person*** *(McKay v. the United Kingdom; Varga v. Romania, Viorel Burzo v. Romania). Such a requirement would not only change the nature of the safeguard provided for under Article 5 § 3, a safeguard distinct from that in Article 5 § 4, which guarantees the right to institute proceedings to have the lawfulness of detention reviewed by a court; it might even defeat the purpose of the safeguard under Article 5 § 3 which is to protect the individual from arbitrary detention by ensuring that the fact of deprivation of liberty is subject to independent judicial scrutiny (Aquilina v. Maltaand Niedbała v. Poland).*

Therefore, the automatic nature of the judicial review is necessary to fulfil the purpose of Article 5 § 3, as a person subjected to ill-treatment might be incapable of lodging an application asking fo ra judge or other officer authorised by law to exercise judicial power to review the lawfulness of their detention. The same requirement is of special importance in case of vulnerable categories of arrested persons, such as those who cannot understand the meaning of their actions or control their actions due to mental incapacity or mental illness or those ignorant of the language of the judicial review proceedings (McKay v. the United Kingdom and Ladent v. Poland).

The "officer" authorised by law

The appropriate "officer" ***has an obligation of reviewing the circumstances militating for or against detention*** *and of deciding, by reference to legal criteria, whether there are reasons to justify detention (Schiesser v. Switzerland; Pantea v. Romania). In other words, Article 5 § 3 requires the "officer" to consider also the merits of the detention (Aquilina v. Malta and Krejčíř v. the Czech Republic).*

The matters which the "officer" must examine go beyond the question of lawfulness. ***The review required under Article 5 § 3, needs to establish whether the deprivation of the individual's liberty is justified****, must be sufficiently wide to encompass the various circumstances militating for or against detention (Aquilina v. Malta, § 52).*

If there are no reasons *to justify detention, the appropriate "officer" must have the power to make a binding order* ***for the detainee's release*** *(Assenov and Others v. Bulgaria; Nikolovav. Bulgaria; Niedbała v. Poland and McKay v. the United Kingdom).*

It is essential in order to minimise delay, that ***the "officer"*** *who conducts the first review of lawfulness and the existence of a ground for detention,* ***also has the competence to consider release on bail.*** *There is no reason in principle why*

the issues in a case cannot be dealt with by two judicial officers. In any event the examination of the issue of bail must take place with some speed - the Court has identified the time allowed as being a maximum four days (McKay v. the United Kingdom).

National context to be added

<u>Speedy review of lawfulness (article 5.4 ECHR)</u>

According to the opinion of the European Court, the detainee shall be present in person in the proceedings related to the judiciary examination. In the countries with the two tier court systems such "presence" assumes being present both in the first instance and appellate courts (Grauslys v. Lithuania, N 36743/97, 10.10.2000, p.53). The principle of being heard was developed by the lawyers of the ancient Rome: audi alteram partem (to hear both parties). There is another right which derives from the right to "being heard" – the right to "being heard by a court.

*The European Court is of the opinion that "…it is essential that **the person concerned should have access to a court and the opportunity to be heard**" (Megyeri v. Germany, 12.05.1992, p.22); "failing which he will not have been afforded "the fundamental guarantees of procedure applied in matters of deprivation of liberty" (Winterwerp v. the Netherlands, 24.10.1979, p. 60).*

The European Court considers that, "if the arrest of any person falls under the ambit of Article 5 §1 sub-paragraph "c", then conduct of investigation is required" (Lamy v. Belgium. 30.03.1989, p. 29). In the case of Reinprecht v. Austria (N 67175, 15.11.2005, p. 34) the Court stressed that "the requirements such as, the adversarial nature of the proceedings and the principle of equality of arms, are considered to be "fundamental guarantees of procedure" applying in matters of deprivation of liberty".[2] In the judgement of the case Nikolova v. Bulgaria it was indicated that "A court examining an appeal against detention must provide guarantees of a judicial procedure. The proceedings must be adversarial and must always ensure "equality of arms" between the parties, the prosecutor and the detained person." (Nikolova v. Bulgaria, N 31195/96, 25.03.1999, p. 58; also see: the case of Lamy v. Belgium, 30.03.1989, p. 29)

In the case of Włoch v. Poland, application no. 27785/95, 19.10.2000, the Court reiterates that "by virtue of Article 5 § 4 an arrested or detained person is entitled to bring proceedings for the review by a court of the procedural and substantive conditions which are essential for the "lawfulness".

Although it is not always necessary that the procedure under Article 5 § 4 be attended by the same guarantees as those required under Article 6 § 1** of the Convention for criminal or civil litigation, **it must have judicial character and give to the individual concerned appropriate to the kind of deprivation of liberty in question.

In case of a person whose detention falls within the ambit of Article 5 § 1 (c), a ***hearing is required*** *. In particular, in proceedings in which an appeal against a detention order is being examined, equality of arms between the parties, the prosecutor and the detained person must be ensured".*

What is the "equality of arms" and "adversarial" nature of the proceedings?

The European Court has concretely answered this question in relation to Article 6 and these principles apply in general to Article 5(4) proceedings: "The Court reiterates that the concept of a fair trial includes the principle of equality of arms and the fundamental right that criminal proceedings should be adversarial. This means that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence presented by the other party (Maksimov v. Azerbaijan, № 38228/05, 08/10/2009, p. 38); "the principle of equality of arms implies that the applicant must be "afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-a-vis his opponent" (Popov, № 26853/04, 13/07/2006, p. 177).

In some cases, absence of the prosecutor in the proceedings may result in lack of impartiality of the court along with not having the adversarial procedure*. For instance, in the case of Ozerov v. The Russian Federation (N 64962/01, 18/05/2010, p.54) the European Court found that by examining the case on merits and convicting the applicant without the prosecutor the District Court confused the roles of prosecutor and judge and thus, gave the grounds as to its impartiality, and this resulted in the violation of the applicant's right to "having his case heard by an impartial court" enshrined in Article 6 § 1 of the ECHR.*

The ***right of the detained or arrested person to have adequate time and facilities to prepare his defence*** *is closely linked to the requirements concerning the equality of arms and adversarial nature of proceedings. This requirement, in its turn, is crucial for the judicial review as an aspect of the right to fair trial.*

*"Notwithstanding the fact that domestic legislations may solve the issue of "equality of arms" in different ways, "****both the prosecution and the defence must be given the opportunity to have the knowledge of and comment on the observations filed and the evidence adduced by the other party****" regardless of the method chosen (Garcia Alva v. Germany), N 23541/94, 13.02.2001, p 39).*

Equality of arms is not ensured, for example, if:

- ***counsel is denied access to those documents*** *in the investigation file* ***which are essential*** *in order effectively to challenge the lawfulness of his client's detention. (Nikolova v. Bulgaria, N 31195/96, 25.03.1999, p. 58). In*

the paragraph 29 of the judgement of the case of Lamy v. Belgium of 30.03.1989 (n. 10444/83, p. 29), the Court further developed this opinion: "Access to these documents was essential for the applicant at this crucial stage in the proceedings, when the court had to decide whether to remand him in custody or to release him.... In the Court's view, it was therefore essential to inspect the documents in order to challange the lawfulness of the arrest warrant effectivelyr"

The right to legal counsel *shall be ensured in line with the Article 6 § 3 sub-paragraph "c" of the Euroepan Convention, case-law of the European Court on application of this* ***paragraph****, and the "standards" developed by this paragraph. Despite these standards relate to one of the aspects of another right – right to fair trial – the European Court requires that they are taken into account, with some exceptions (for instance, public hearing – opennes of the trial), also in the Article 5 cases. It is written in the judgement of the case Assenov v. Bulgaria: "Although it is not always necessary that the procedure under Article be attended by the same guarantees as those required under Article 6 § 1 of the Convention for criminal or civil litigation, it must have a judicial character and provide guarantees appropriate for the kind of deprivation of liberty in question." (Assenov and others v. Bulgaria, N 24760/94, 28.10.1998, p.162). One of these guarantees is the right to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require" enshrined in Article 6 § 3 c).*

National context to be added

Step 2 – Right to compensation for unlawful arrest or detention

20 minutes

flipchart, markers

Make-a-list
Prepare 3 flipcharts with the words WHEN, HOW and HOW MUCH. Divide participants into small groups. Ask each group to compile a list of situations in which, according to the national legislation, a person is entitled to compensation for unlawful arrest or detention (WHEN), listing the procedure (i.e. exhaustion of certain remedies..) (HOW) and indicating whether the amount is fixed or corresponds to certain criteria. Alternate representatives of each group in giving presentations and write the findings on the flipchart. Stimulate discussion using the key points below.

In order to ensure full and equal participation, ensure that each group only present 1 finding and that, in case one group is asked to make more than one presentation, the group representative is a different one. Think about inviting women participants first!

Key points

Article 5 (5) requires that victims of arrest or detention in breach of the other provisions of this article should have an ***enforceable right to compensation.***

A remedy before a court is required*, meaning that the remedy must be awarded by a legally binding decision. A remedy by other bodies (such as an ombudsman) or an ex gratia payment by the government is not sufficient for the purpose of Article 5 (5). Normally, the remedy will consist of a financial compensation.*

In order for the Court to find a violation of Article 5 (5), ***it must first find a violation of one or more of the rights protected by the preceding paragraphs of the article*** *(see Stoichkov v. Bulgaria below). The Court will find a violation, if the victim has no enforceable right - either before or after the findings of a violation - to compensation before national courts (see Harkmann v. Estonia and Fox, Campbell and Hartley).*

The Court accepted that States can make ***compensation dependent on the existence of damage resulting from the breach of Article 5****. If the person concerned cannot show to have suffered pecuniary or non-pecuniary damage, a state can refuse to pay compensation (see Chitayev and Chitayev v. Russia and Wassink v. the Netherlands).*

In Sakik and others v. Turkey, the Court found a violation of Article 5 (5) on the grounds that the Turkish Government could not show that anyone had ever been compensated under the domestic legal provisions the Government cited as applicable. In the case of Tsirlis and Kouloumpas the Court also found a violation of Article 5 (5) where the applicants had been detained in contravention of domestic law and thus of Article 5 (1) as well, and where the domestic courts refused to compensate them for their unlawful detention on the specious grounds that they had been detained as a result of their own gross negligence.

Even ***in the absence of a finding by a domestic authority of a breach of the other provisions of Article 5, the Court itself can consider whether such a breach of Article 5 § 5 applies*** *(Nechiporuk and Yonkalo v. Ukraine and Yankov v. Bulgaria). The applicability of Article 5 § 5 is not dependant on a domestic finding of unlawfulness or proof that, but for the breach, the person*

would have been released (Blackstock v. the United Kingdom and Waite v. the United Kingdom). The arrest or detention may be lawful under domestic law, but still in breach of Article 5 (Harkmann v. Estonia).

*The right to compensation relates primarily to **financial compensation**. It **does not confer a right to secure the detained person's release,** which is covered by Article 5 § 4 of the Convention (Bozano v. France, Commission decision).*

***Crediting a period of pre-trial detention towards a fine (financial) penalty does not amount to compensation** required by Article 5 § 5 (Włoch v. Poland). Article 5 § 5 does not limit the right to nationals of the states which have accepted the Convention. There can be **no question of "compensation" where there is no pecuniary or non-pecuniary damage to compensate (Wassink v. the Netherlands).** However, excessive formalism in requiring proof of non-pecuniary damage resulting from unlawful detention is not compliant with the right to compensation (Danev v. Bulgaria).*

*Article 5 § 5 of the Convention does not entitle the applicant to a particular amount of compensation (Damian-Burueana and Damian v. Romania and Şahin Çağdaş v. Turkey), however, **compensation which is negligible or disproportionate to the seriousness of the violation would not comply with the essence of this right** on the account that this would render the right guaranteed by that provision purely theoretical (Cumber v. the United Kingdom, Commission decision). An award cannot be lower than that awarded by the Court in similar cases (Ganea v. Moldova and Cristina Boicenco v. Moldova).*

National context to be added

Session IV – Alternative measures to detention

🕘 45 minutes

🎯 List the advantages of alternatives to detention
Identify the possible alternatives to detention available in the national legal system
Understand the importance of a gender perspective when deciding pre-trial, trial and post-sentencing measures
Sensitize participants about the importance that custodial detention is a mean of last resort

Step 1 – Why alternatives to detention?

🕘 10 minutes

Flipchart and paper, marker

Brainstorming
Ask participants to indicate the rationale behind the idea of alternatives to "coercive" detention/detention in prison, both at the level of pre-trial, sentencing and post-sentencing. Note down ideas without commenting. Keep the flipchart visible (stand-alone or wall) in the course of the session.

Main ideas will normally encompass:

reduce overcrowding
save money
earn money (if detention is converted into fine)
ensure human-rights compliant detention condition
prepare socio-economic reintegration of offenders
avoid exposure of offenders to the prison circuit
favour education
enable provision of adequate medical services
favour restorative approach of sanction

It should be possible to revisit the result of the next activity in the light of the keywords written on the flipchart. Normally, during brainstorm, participants express an overall approach which tends to conform to the legal notion of arr

Step 2 – Alternatives to detention and gender perspective
35 minutes

PPT (slide X), notepad, flipchart and paper, markers

Brainstorming and presentation (10 minutes)
Present the title of the step and explain that, in order to enable participants to perform the next exercise, there is a need that the term "gender" is properly understood.

Start with a 1-minute brainstorming during which you ask participants to tell you what they understand the words "gender" and "gender mainstreaming" encompass. Note down the answer on your notepad so as to keep track of the ideas. Then move to a short presentation using the slide provided, focussing on the distinction between sex and gender. Explain that the exercise that you will propose will have to do with the notion of gender mainstreaming, which has been embraced internationally as a strategy towards realising gender equality. Gender mainstreaming involves the

integration of a gender perspective into the preparation, design, implementation, monitoring and evaluation of policies, regulatory measures and spending programmes, with a view to promoting equality between women and men, and combating discrimination. Gender mainstreaming ensures that policy-making and legislative work is of higher quality and has a greater relevance for society, because it makes policies respond more effectively to the needs of all citizens – women and men, girls and boys. Gender mainstreaming makes public interventions more effective and ensures that inequalities are not perpetuated. Gender mainstreaming does not only aim to avoid the creation or reinforcement of inequalities, which can have adverse effects on both women and men. It also implies analyzing the existing situation, with the purpose of identifying inequalities, and developing policies which aim to redress these inequalities and undo the mechanisms that caused them. Explain that whilst gender perspective is per se a neutral term, referring to all different genders (males, females, intersexes…) the exercise they will perform will focus on a female-gender perspective.

Make-a-list (30 minutes)
Prepare 3 flipcharts with the words WHAT, WHEN and FEMALE GENDER PERSPECTIVE and hang them on the wall. Divide participants into small groups. Ask each group to compile a list of alternatives to detention at pre-trial stage, on the occasion of trial/sentencing, and during post-sentencing that are available under national legislation (WHAT). For each measure participants will have to indicate the conditions/circumstances in which the measure can be applied and weather in the granting of the measure a female gender perspective is taken into consideration (WHEN). They will also have to think about whether there is a gender dimension that should be considered in deciding for such measure (FEMALE GENDER PERSPECTIVE). Alternate representatives of each group in giving presentations and write the findings on the flipchart. Stimulate discussion using the key points below.

 *In order to ensure full and equal participation, ensure that each group only present 1 finding and that, in case one group is asked to make more than one presentation, the group representative is a different one. Think about inviting women participants first!*

Key points

*The UN Rules on the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules) recognise the **distinct needs of women in the criminal justice system** and also introduce safeguards to protect women from ill-treatment.*

Considering places of detention from a gender perspective, it has been observed

*that **women face heightened vulnerability and risk**, and that while the 'root causes' of both are often external to the physical environment of detention, vulnerability and risk become intensified significantly in places of deprivation of liberty.*

The root causes of women's vulnerability in detention are often to be found outside the prison walls, though such vulnerability is intensified significantly in places of deprivation of liberty.

*The **risks faced by women in prisons is often a reflection of a wider lack of understanding, prejudicial attitudes and discriminatory practices in society**: violence against women is often embedded in and supported by social values, cultural patterns and practices. The criminal justice system and legislators are not immune to such values and thus have not always regarded violence against women with the same seriousness as other types of violence.*

*In addition to representing a violation of human rights per se (articles 3 and 8 ECHR), **violence against women can also amount to discrimination based on gender.***

Non-discrimination is a founding principle of international human rights law. It is enshrined in a range of international treaties including the ECHR (article 12 and article 1 Protocol no. 14) and UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The latter states that discrimination against women is the "distinction, exclusion or restriction made on the basis of sex" that results in the curtailing of women's human rights and fundamental freedoms.

***Custodial violence** against women encompasses **many acts, in addition to rape**. These include threats of rape, touching, insults and humiliations of a sexual nature, using mechanical restraints on women in labour and virginity testing, among others. Other practices may amount to ill-treatment depending on the manner in which they are carried out, why they are carried out and their frequency.*

*In addition to the particular vulnerability of women to torture and ill-treatment, especially gender based violence, women also have **gender specific needs, which are rarely met in places of detention (e.g. special healthcare needs) or which are exacerbated dramatically by the mere fact of detention** (e.g. women may be abandoned by their families once imprisoned, due to the stigma associated with women's imprisonment).*

***Women are usually discriminated against in prisons** also in many other ways, both due to their gender, as well as due to the fact that they constitute a minority in all prison systems of the world, making up between 2 and 9% of the general prison population in the large majority of countries. Thus, their distinctive needs are usually not taken into account in policy formulation and programme*

development and their special safety requirements are frequently ignored. While more attention may be given to their needs in prisons allocated exclusively to women, the lack of attention, at headquarters level, to strategies, policies, programmes and corresponding budgets, aiming to respond to women's gender specific needs, are still largely reflected in such prisons.

In addition, ***prisons which hold only women are generally located far away*** *from the women's homes, due to the small number of women prisoners.* ***Therefore one of the primary needs of women – that of the maintenance of family links – is severely compromised.***

The children of women prisoners represent an additional consideration *in this context, taking into account that women are usually the primary carers of children and immense harm can be caused to dependent children, both if they are separated from their detained mothers or imprisoned with them. As such, there has been increasing recognition of the need to take into account the* ***best interests of such children and to give preference to alternatives to detention and imprisonment*** *in the case of women who are pregnant and mothers with dependent children, in line with the Bangkok Rules.*

Discrimination in accessing ***gender specific programmes and services*** *and maintaining family links does not always constitute ill-treatment, but in certain circumstances* ***such discrimination may evolve into ill-treatment.***

Session V – Closure

30 minutes

Compare knowledge on the subject matter
Identify key learning points
Develop positive feelings about the training
Evaluate the training

Step 1 - Post-course knowledge assessment

10 minutes

Multiple choice test annexed

Distribute pre-course tests. Ask participants to write their name on it.
Once the test is completed, proceed to correction in plenary. Then distribute the pre-training test and allow for participants to compare results. The final

score should be better than the one obtained in the pre-training test, as a result of the training. Ask participants to share their impressions about the impact of the training and collect tests for recording purposes.

Step 2 – Time to finish!

20 minutes

Snowstorm
Invite trainees write down one thing they learned/liked during the training on a piece of scratch paper and wad it up. Invite participants to gather all together in the middle of the room. Ask them to throw paper snowballs and then invite them to collect one. In turn each participant reads out the feedback.

At the end, certificates (if applicable) and evaluation forms are handed out (5 minutes for completion).

Annex I - Self-assessment multiple choice test

What follows is the test to be administered both at the beginning and at the end of the training. Please note that the correct answers are underlined for the purpose of correction. **Remember to remove underlining** when you prepare the test for printing!

Test

Dear Participant,

This test is aimed to assess the knowledge of key notions pertaining to the ECHR and the prohibition of torture. The test is intended to be a self-assessment tool that can help you to identify the areas in which you can already count on substantive knowledge as well as those issues or topics that need further deepening. The test is composed of only multi-choice questions, where sometimes more than one answer is the correct one.

Please note that this is an individual test, and no consultation with other participants is allowed. Also, note that this is not an open-book quiz, thus you may not be able to refer to books or other materials during the examination time.

Should you feel the need for clarification for any of the questions, please raise your hand and wait until one of the trainers comes to you. You will have a maximum of 10 minutes to respond to all the questions.

In order to ensure privacy, please do not write your name on the test. When asked to mark it, please use the upper box on the right to indicate the number of **right answers** (for example 20/20).

1. Which of the following are likely to involve a 'deprivation of liberty', thus engaging Article 5? Please select all that apply.

a) Imprisonment in an open prison.
b) Hemming in a crowd of demonstrators in a public place in order to protect them from the violent attentions of counter-demonstrators.
c) House arrest involving only two requirements: an unsupervised requirement that the person stays in his house between 6.00 p.m. and 8.00 a.m. and a ban on the person going abroad.
d) A would-be immigrant or asylum seeker, who is denied entry into a country, chooses to 'live' in the public areas of the Airport, with the approval of the authorities, who are considering his case for exceptional entry. He is free to leave the country at any time or to enter and go to an approved detention centre.

2. Which of the following would appear to be breaches of Article 5(1)? Please select all that apply.

a) The detention of a person who is mentally ill and whose illness is untreatable. Although probably not a danger to others, he is kept in a high-security mental hospital rather than a low-security, local hospital near to his relatives.
b) The imprisonment of 'terrorist suspects' in order to prevent them committing acts of terrorism in the future.
c) A stop-and-search of a woman by the police involving a thorough search. The woman was kept in a police car for half an hour while awaiting the arrival of a female police officer to conduct the search.
d) The detention of a young teenager in a secure children's home. The teenager has not committed a crime, but is believed to have been responsible for many antisocial actions. The home provides accommodation for troubled teenagers and nothing more.

3. Article 5(1)(c) only authorises arrests when a criminal offence has been committed and the arrest is expressly for that offence.

a) True
b) False

4. Article 5(3) establishes a presumption in favour of bail, but which one of the following is a compatible reason for refusing bail?

a) Bail can be always refused in certain circumstances, such as in respect of a person accused of a serious offence of the same type for which he has been previously convicted.
b) Bail can be refused if the State produces evidence that the release of the accused person, because of his or her unpopularity, is likely to cause serious public disorder.
c) Bail can be refused if the offence is a serious offence.
d) A recidivist (a person with a considerable criminal record) can be refused bail unless he can prove that, if released, he is unlikely to commit offences while awaiting trial.

5. In article 5 ECHR the terms arrest and detention:

a) are interchangeable
b) indicate two different situations
c) reflect the meaning that such terms have under national legislation

6. Acts by private individuals:
a) are irrelevant for the purpose of article 5 ECHR
b) can trigger application of article 5 ECHR
c) are relevant insofar as the private individual is a national of a State Party to the ECHR

7. In relation to pre-trial detention, the existence of a suspicion
a) is essential
b) is essential but not sufficient
c) is sufficient for any prolongation of detention

8. The case concerns a restriction on freedom of movement rather than a 'deprivation of liberty' when the individual:
a. is not allowed to leave his/her home
b. is restricted to the transit area of an airport
c. is not allowed to leave the city of his/her residence

9. The list of grounds of detention under article 5 sub-paragraphs (a) – (f):
a. Is merely exemplary and can be further developed by the Court's jurisprudence
b. is exhaustive
c. is complemented by other provisions of the Convention providing for the limitation of basic rights and in particular limitations on freedom of movement
d. is complemented by the specific grounds for detention under domestic law

10. Under article 5 ECHR the 'competent legal authority', that can order detention of a criminal suspect, within the meaning of the Convention, is:
a. a Prosecutor
b. a Minister of Justice
c. a Judge
d. a Judge or a Prosecutor, depending on national law

11. Detention pending extradition is lawful:
a. always
b. when it aims to prevent entry into the country
c. when actions are taken with a view to extradition
d. with respect to adults only

12. When presented before a judicial officer under Article 5 (3), the criminal defendant:

a. has the right to have the hearing open to the public
b. has the right to read all the evidence in the case and be provided with the necessary time to aquaint him/herself with that evidence;
c. has an absolute right to a lawyer
d. none of the above

13. Which one of the following statements best expresses the rule in Article 5(2) requiring a person to be informed of the reason they have been deprived of their liberty?

a) Anyone arrested on reasonable suspicion of having committed a criminal offence must be told, at the time of their arrest, precisely why they have been arrested.

b) Anyone deprived of their liberty for any of the reasons listed in Article 5(1) has a right to be informed promptly of the reason for their detention, in a way they can understand and with enough precision to enable them to challenge the basis of the detention.

c) A person arrested on reasonable suspicion of having committed a criminal offence must be told, within a reasonable time, the general reasons for which they have been arrested.

d) A person arrested on reasonable suspicion of having committed a criminal offence must be told promptly (although not necessarily at the time of arrest) and with sufficient legal precision to enable them, if necessary, to challenge the legal basis of the arrest.

14. Extraterritorial application of article 5 ECHR

a) is possible
b) is never possible
c) is possible only in relation to deprivation of liberty taking place in a State which is not Party to the ECHR

15. In relation to pre-trial detention, the existence of a suspicion

a) is essential
b) is essential but not sufficient
c) is sufficient for any prolongation of detention after a certain lapse of time

16. Which of the following is not a relevant reason under article 5 ECHR for continuing pre-trial detention?

a) the risk of flight;
b) the risk of an interference with the course of justice;
c) the need to prevent the spreading of infectious diseases

17. Article 5 ECHR also applies to confinement in mental institutions:

a) yes
b) no
c) yes, but only if the mentally ill person has been convicted for a criminal offence

18. The detention of a person of unsound mind will be arbitrary if

a) the nature or degree of the disorder is sufficiently extreme to justify the detention;

b) the mental disorder has not been established by objective medical expertise;

c) the detention takes place in a location other than a mental institution

Which one of the following is correct:

- a) the term "alcoholics" refers only to the persons with a clinical diagnosis
- b) the definition of "vagrant" by the ECtHR is very different from the notion provided for in any national legislation
- c) A domestic court examining the lawfulness of the arrest under Article 5 § 1 (e) of the ECHR, needs to have the competence to order release to be competent courts for the purposes of this article and article 5(4).
-

19. **Please, choose the correct answer that complies with the notion of "arrest" under Article 5 § 1 (c) of the Convention:**

a) As it is defined by the domestic legislation

b) As it is defined by the domestic legislation, but it only applies for the purposes of Article 5 once a prosecutor has authorised the detention

c) Not necessarily the same as defined by domestic legislation, "arrest" means the first action in the detention of the person suspected in perpetration of a criminal offence.

20. **Please, choose the correct answer that complies with the notion of "reasonable suspicion" under Article 5 § 1 (c):**

a) Concerning crimes related to terrorism, it is not always possible to apply the same standards to the reasonableness of the suspicion grounding such an arrest as in a regular case

b) whenever a police officer honestly believes the person is guilty

c) any suspicion even resulting from an anonymous person's statement or based on rumours that the police officer honestly believes

Annex II – Training evaluation form

Training Evaluation Form

Please take a moment to answer the following questions. Your comments are an **important contribution** as we design learning experiences to meet your professional needs.

a) How do you rate the training overall?

Excellent	Good	Average	Poor	Very poor
❍	❍	❍	❍	❍

b) Please indicate your impressions of the items listed below.

	Strongly Agree	Agree	Neutral	Disagree	Strongly Disagree
1. The training met my expectations.	❍	❍	❍	❍	❍
2. I will be able to apply the knowledge learned.	❍	❍	❍	❍	❍
3. The training objectives for each topic were identified and followed.	❍	❍	❍	❍	❍
4. The content was organized and easy to follow.	❍	❍	❍	❍	❍
5. The materials distributed were pertinent and useful.	❍	❍	❍	❍	❍
6. The trainers were knowledgeable	❍	❍	❍	❍	❍
7. The quality of instruction was good.	❍	❍	❍	❍	❍
8. The trainers met the training objectives.	❍	❍	❍	❍	❍
9. Class participation and interaction were encouraged.	❍	❍	❍	❍	❍
10. Adequate time was provided for questions and discussion.	❍	❍	❍	❍	❍
11. The difficulty level was about right	❍	❍	❍	❍	❍
12. I can apply the information in my practice/service setting	❍	❍	❍	❍	❍
13. This training will help me perform my duties with increased	❍	❍	❍	❍	❍

professionalism

c) What will you do differently in your practice/service setting as a result of this training?

d) What do you feel were the strengths of this training?

e) What do you feel were the weaknesses of this training?

f) What aspects of the training could be improved?

g) What additional training-development education do you require?

h) Other comments?

Thank you for your cooperation!