Outline of the relevant requirements under Article 5 of the European Convention on Human Rights

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Ladies and Gentlemen,

Dear colleagues and friends,

It is indeed a great honour and pleasure for me to attend this High-Level Conference. I would like to warmly thank all the organisers for kindly inviting me to this highly important event. I am grateful for the opportunity to discuss the legal safeguards under the European Convention on Human Rights surrounding the deprivation of liberty of individuals referred to in Article 5 of the Convention as "persons of unsound mind".

The European Court of Human Rights has repeatedly emphasised that the right to liberty and security is of the highest importance in a "democratic society" within the meaning of the Convention. Together with Articles 2, 3 and 4 of the Convention, Article 5 is in the first rank of the fundamental rights that protect the physical security of the individual. The key purpose of this provision is to prevent arbitrary or unjustified deprivations of liberty.

Any deprivation of liberty, irrespective of the form it may take, must be "lawful" and "in accordance with a procedure prescribed by law". Lawfulness does not only mean compliance with the relevant domestic law; domestic law must itself be in conformity with the Convention, including, in particular, the principle of the rule of law which, as the Court has repeatedly held, is, – and I quote, – "inherent in all the Articles of the Convention".

Furthermore, in order for a deprivation of liberty to be "lawful" and not arbitrary, it must be be necessary in the circumstances. According to the Court, the detention of an individual is such a serious measure that it is justified only as a last resort where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned bəe detained.

A deprivation of liberty will also be arbitrary where, despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities or where the domestic authorities neglected to apply the relevant legislation correctly.

The right to liberty and security also imposes positive obligations on the States. In particular, the State is obliged to take measures providing effective protection of vulnerable persons, including reasonable steps to prevent a deprivation of liberty of which the authorities have or ought to have knowledge.

Article 5 § 1 of the Convention contains an exhaustive list of permissible grounds for deprivation of liberty, and the lawful detention of "persons of unsound mind" is one of those six grounds. The Court explicitely stated in the Grand Chamber case of *Rooman v. Belgium* that "Article 5, as currently interpreted, does not contain a prohibition on detention on the basis of impairment, in contrast to what is proposed by the UN Committee on the Rights of Persons with Disabilities". The Court has held that a predominant reason why the Convention allows persons of unsound mind to be deprived of their liberty is not only that they may be dangerous for public safety but also that their own interests may necessitate their detention.

According to the Court, the notion of "a person of unsound mind" is difficult to define because psychiatry is an evolving field, both medically and in social attitudes. However, the scope of this notion has its limits, and it would be unacceptable to consider a person to be "of unsound mind" and detain him or her simply because his or her views or behaviour deviate from established norms. The Court has given an autonomous meaning to this term; it is not bound by the interpretation of the same or similar terms in domestic legal orders.

The Court has held that the Convention provision in question applies not only to involuntary psychiatric hospitalisation but also to the involuntary placement of persons with mental disorders in various other facilities, such as social care homes or therapeutic centres for "dangerous" offenders.

As early as in 1979, in its landmark judgment in the case of *Winterwerp v. the Netherlands*, the Court defined three minimum conditions that must be cumulatively met for an individual to be deprived of his or her liberty as being of "unsound mind":

1) the individual must be reliably shown, by objective medical expertise, to be of unsound mind;

2) the individual's mental disorder must be of a kind or degree to warrant compulsory confinement;

3) the mental disorder, verified by objective medical evidence, must persist throughout the period of detention.

It is to be noted that notwithstanding the subsequent developments in the Court's case-law, – which I will try to cover later, – the *Winterwerp* judgment remains as the most important authority regarding the matter in question.

The first *Winterwerp* condition is that unless it is an emergency situation, an objective medical expert must establish that the individual is of unsound mind. No deprivation of liberty of a person considered to be of "unsound mind" may be deemed in conformity with Article 5 § 1 (e) of the Convention if it has been ordered without seeking the opinion of a medical expert. Any other approach falls short of the required protection against arbitrariness**.**

If a medical examination of the person is not possible, the Court accepts that the expert can make a determination based on the case file. Even though the national authorities have a certain discretion, in particular on the merits of clinical diagnoses, the ground for deprivation of liberty under discussion is to be interpreted narrowly. A mental condition has to be of a certain severity

in order to be considered as a "true" mental disorder, that is, it must necessitate treatment in an institution appropriate for mental health patients. In certain specific cases, the Court has considered it necessary for the medical experts in question to have a specific qualification. For example, where the person confined had no history of mental disorder, the Court has required that the initial medical assessment prior to ordering the deprivation of liberty should be carried out by a psychiatric expert. Where there was a breakdown in the relationship of trust between the person confined and the staff of that institution, the Court has also required the medical assessment for continued deprivation of liberty to be made by an external medical expert.

The Court has emphasised that it is primarily for the domestic courts to assess the scientific quality of different psychiatric opinions, and, in that respect, they have a certain margin of appreciation. When the national courts have examined all aspects of different expert reports on the necessity of an individual's psychiatric internment, the Court will not intervene unless their findings are arbitrary or unscientific.

Furthermore, the objectivity of the medical expertise entails a requirement that it must be sufficiently recent. This requirement is determined based on the circumstances of each particular case.

The second *Winterwerp* condition is that the individual's mental disorder must justify the compulsory confinement. The mere existence of a finding of a mental illness is not enough to justify detention. There must be a rigorous assessment of the need for detention, that is, not only the need to cure or alleviate the person's condition but also the need for control and supervision to prevent the person from harming himself/herself or other persons.

According to the Court's, posing a danger to oneself may include not only direct threats, such as attempts of suicide, but also indirect ones, such as those that result from a person's inability to take care of his or her basic life needs. As regards the risk of harm to others, the Court 's requirement is that the "dangerousness" of the person concerned must be sufficiently proved.

The Court has rejected an interpretation that only such mental disorders, which deprive the person affected of his or her ability to consciously control his or her behaviour and thus to be held criminally responsible, may be considered as "unsoundness of mind". It has ruled, for example, that a convicted rapist with personality and sadistic disorders, or a convicted man diagnosed with dissocial and schizoid personality, who acted with full criminal responsibility, could have been considered "persons of unsound mind".

In the context of placement in social care homes, the Court has held that the objective need for accommodation and social assistance must not automatically lead to the imposition of deprivation of liberty. Any protective measure should reflect as far as possible the wishes of persons capable of expressing their will. A measure taken without seeking their opinion can give rise to situations of abuse and therefore, will require careful scrutiny.

The third condition is that the individual's mental condition must persist throughout the period of the deprivation of the liberty. This means that as soon as the mental disorder is no longer present, the person concerned must be released. In any event, psychiatric commitment cannot be

maintained for administrative reasons. The Court has held that a failure to monitor the person's mental condition may result in the confinement lacking justification at a later time.

Subsequent to *Winterwerp*, the Court has gradually expanded the scope of Article 5 § 1 (e). One of such developments related to the place of psychiatric commitment. The Court has held that the detention of persons of unsound mind will only be "lawful" if effected in a hospital, clinic, or other appropriate institution. This principle was particularly relevant in the context of cases concerning the post-sentence preventive detention in Germany. However, in the cases of *Bergmann v. Germany* (2016) and *Ilnseher v. Germany* (2018), the Court stated that the new detention system did not violate the Convention, as detainees were kept in conditions appropriate for "persons of unsound mind". The Court took into account that detainees were provided with personalised and varied therapy, and that the therapeutic centre employed a sufficient number of medical staff.

The notion of "appropriate institution" and accordingly, the scope of State obligations under Article 5 § 1 (e) was further clarified in the case of *Rooman v. Belgium* (2019). The Court emphasised that in addition to the *Winterwerp* criteria, subparagraph (e) requires that there be a close link between the grounds relied on for the detention and the conditions under which it takes place. The assessment of what constitutes an "appropriate institution" requires, particularly, an examination of the treatment provided to the person confined.

The Court held that deprivation of liberty under Article 5 § 1 (e) has a dual function: on the one hand, the social function of protection, and on the other, a therapeutic function that is related to the individual interest of the person of "unsound mind" in receiving an appropriate and individualised form of therapy or course of treatment. The need to ensure the first function should not, *a priori*, justify the absence of measures aimed at discharging the second, which is aimed specifically, and in so far as possible, at curing or alleviating their mental-health condition, including, where appropriate, bringing about a reduction in or control over their dangerousness. The Court stressed that, irrespective of the facility in which those persons are placed, they are entitled to be provided with a suitable medical environment accompanied by real therapeutic measures, with a view to preparing them for their eventual release.

Referring to this new clarification, the Court found a violation of Article 5 § 1 (e) of the Convention in a number of subsequent cases (for example, in *W.A. v. Switzerland*, 2021; *Sy v. Italy*, 2022), holding that considering that the applicants' detention had not been lawful as they had not been confined in an institution suitable for the detention of mental health patients.

Thus, the Court's current case-law clearly indicates that the administration of suitable therapy has become a requirement in the context of the wider concept of the "lawfulness" of the deprivation of liberty. In other words, the Court recognises, under Article 5 § 1 (e), a mental patient's right to treatment appropriate to his condition – the right which was explicitly rejected at the time in the case of *Winterwerp v. the Netherlands*. The therapeutic conditions in the place of detention should now be assessed not only from the perspective of Article 3, but also Article 5 § 1 (e) of the Convention.

Article 5 § 1 (e) of the Convention also contains procedural safeguards related to the decisions authorising a person's involuntary hospitalisation. The notion of "lawfulness" requires a fair and

proper procedure offering the person concerned sufficient protection against arbitrary deprivation of liberty. According to the Court, deprivation of liberty must be ordered by the competent authority and accompanied by sufficient reasoning. Each interned person must have access to legal assistance for any procedure relating to the deprivation of liberty. The Court has stressed that legal assistance should not only be formal, but it should be effective and controlled by competent domestic courts.

Under Article 5(4) of the Convention, the *habeas corpus* provision of the Convention, a person of unsound mind who is involuntarily confined is entitled to take proceedings to challenge the lawfulness of his or her detention at reasonable intervals, and to obtain a speedy judicial decision. The person concerned should enjoy a direct right of appeal and not have to rely on the intermediary of the detaining authority, relatives, local authorities, or a legally appointed guardian. Thus, a system of periodic review in which the initiative lies solely with the authorities is not sufficient on its own.

Since the validity of detention under the Convention provision in question depends on the persistence of the mental disorder, the review required by Article 5(4) should be made by reference to the patient's contemporaneous state of health, including his or her dangerousness, as evidenced by up-to-date medical assessments, and not by reference to past events at the origin of the initial decision to detain.

The review must provide the requisite procedural safeguards. In the context of mental illness, special safeguards may also be required to protect persons who are not fully capable of acting for themselves.

It is for the authorities to prove that he satisfies the conditions for compulsory detention, not for the applicant to prove the converse. The Court found a violation of Article 5 (4) in a case where the applicant had to show that his mental disorder was not of a nature or degree making it appropriate for him or her to receive treatment in hospital, and thus the burden of proof was on him or her to establish that his or her detention was not lawful.

The scope of review must also be adequate. For example, where an applicant is held in a psychiatric wing of a prison and seeks placement in a facility more fitting for his condition, the review body must have competence to look at this aspect of "lawfulness" of his or her detention.

I thank you for your attention.