(Introduction Slide) Article 5 of the ECHR – Right to Liberty and Security

- The Strasbourg case law on Art. 5 (Slide 2) underlines the paramount importance of the right to liberty in a democratic society, and the relationship that exists between this right and the principle of legal certainty and the rule of law.
- In discussing Article 5 of the Convention, it is important to keep in mind that the Court in Strasbourg – the European Court of Human Rights – is not a court of appeal in the proper sense of the word. It is a supervisory court which steps in only when it is alleged that the particular State signatory to the Convention has failed in its obligation under Article 1 of that Convention (Slide 3) – an article which is not one of the substantive articles of the Convention, but which is vital for understanding the role of the Court, its interpretation of the substantive provisions of the Convention, and the remedies ("just satisfaction") it awards when it considers that a State has violated one or more of the substantive provisions of the Convention or of one of its Protocols.
- What does Article 1 entail? Article 1 clearly places the burden of securing to everyone within their jurisdiction the rights and freedoms as defined in the convention <u>on the High Contracting Parties themselves</u>, that is on the signatories to the Convention. The ECtHR has a subsidiary role which stems from a combined reading of Article 1 together with (Slide 4) Article 19 and Article 35(1) – only after an applicant has exhausted the available domestic (i.e. internal) remedies to secure redress against a violation of the Convention, can he call

upon the ECtHR to exercise its supervisory jurisdiction. Of course, if there are no domestic/internal remedies to be pursued, then the applicant can come straight to Strasbourg; likewise, where the available domestic remedies in a particular state have already been adjudged by the ECtHR to be inadequate, an applicant can come straight to Strasbourg within six months from the act or decision complained of. In this respect the ECtHR often speaks of domestic remedies which are available only in theory, but which are not practical and effective.

- **Moreover, according to a long string of judgments, when a domestic court is applying the provisions of the Convention, it must apply them according to the same standards and logic adopted by ECtHR – as we shall see, for instance, (Slide 5) the word "lawful" in Article 5 and the expression "prescribed by law" have a special meaning for the purposes of the Convention, and domestic courts must follow and abide by that special meaning, which may be quite different from the meaning given to those words in domestic legislation.**
- **One could say in a nutshell, that the overall purpose of Article 5 is to ensure that no one should be dispossessed of his liberty in an 'arbitrary fashion'. As a natural corollary of this purpose, there is a presumption in favour of liberty, and it is up to the State in each case to prove before the Strasbourg Court – or, if the Convention is being applied internally, it is up to the authority concerned to prove before the domestic court – that the person concerned has been deprived of his liberty strictly in accordance with Article 5.**
- **Furthermore, the presumption in favour of liberty is underlined by the imperative requirement under Article 5 that liberty should be lost for**

no longer than is absolutely necessary, that that it should be capable of being readily recovered where such loss is not justified. The former requirement is evident in the stipulation that suspected offenders (Slide 6) "shall be entitled to trial within a reasonable time", while the latter requirement is found in the prescription that everyone deprived of liberty is "entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful". There is thus a clear burden of proof on those who have taken away someone's liberty to establish not only that the power under which it occurred falls within one of the grounds in Article 5, but also that its exercise was applicable to the situation in which it was used.

- **This burden necessarily requires a self-critical analysis by those who can exercise powers which may lead to a deprivation of liberty to ensure that, when they do use them, the limits imposed by Article 5 are continually observed. However, the assurance that such an analysis is both undertaken and is effective is heavily dependent upon a sceptical perspective being adopted on the part of judges – whether in Strasbourg or at domestic level – when performing the supervisory function assigned to them by paragraphs (3) and (4) of Article 5. In any case, where a deprivation of liberty is contested it is essential for a judge to start from the proposition that the person affected should be free. (Slide 7) Pursuant to such a proposition the judge should not only expect and require reasons to be advanced for this deprivation of liberty, but also subject those reasons to close scrutiny to see whether they actually support the action that has been taken. Anything less**

than that would, I submit, entail an abandonment of the rule of law, and a surrender to arbitrary treatment.

- **What I would propose to do in the limited time I have with you is to pick certain controversial, or in some cases even merely unusual aspect, of Article 5 and to discuss them with reference to specific cases which have come up before the Court in Strasbourg.**
- **The first question to be asked is – (Slide 8) when can it be said that there has been deprivation of liberty? Of course certain situations are evidently deprivations of liberty – but others may not be so. Being taken handcuffed to prison, or being kept locked up in a mental institution are clear and obvious instances of deprivation of liberty. But what about having to wait in a transit zone at an airport or sea-port, perhaps for hours, while documents, passport, visas are being checked? What about when a person is stopped at a checkpoint and asked to wait until the car is searched? Or asked to take an on-the-spot breathalyser test? Or what about, in the case of military personnel, when there is confinement to barracks for any reason whatsoever? Before one can proceed to examine whether the exceptions in paras (a) to (f) of Article 5 apply, one has to decide whether the situation amounts to a deprivation of liberty in the first place.**
- **One relatively old case illustrates this (Slide 9) problem – *Guzzardi v. Italy* – 6 November 1980. Mr Guzzardi was convicted of conspiracy and complicity in an abduction, and was sentenced to 18 years imprisonment. Prior to this, however, and during the pre-trail stage, he had to be released from pre-trail detention which at the time could not exceed two years. However as he was considered to be a dangerous person, he was the subject of a compulsory residence order under a**

regime of so called "special supervision". He was sent off with his family to an island north of Sardinia called Asinara (Slide 10). Paragraph 23 of the judgement gives a very succinct description of this island: "The island, which is long and narrow with a rugged terrain, measures about 20 km. at its greatest length. Whilst the island as a whole covers 50 sq. km., the area reserved for persons in compulsory residence represented a fraction of not more than 2.5 sq. km. This area was bordered by the sea, roads and a cemetery; there was no fence to mark out the perimeter. About nine-tenths of the island was occupied by a prison." The principal settlement on the island, Cala d'Oliva, housed nearly all of the island's permanent population - approximately two hundred people; this population comprises the prison staff and their families, schoolteachers, a priest, the post office employees and a few tradesmen.

- **The persons in compulsory residence were lodged in the hamlet of Cala Reale which consists mainly of a former medical establishment and certain other buildings including a school, a chapel and a Carabinieri station where the applicant had to report twice a day.**
- **So, was this an instance of deprivation of liberty for the purposes of Article 5, or was this merely a restriction on the freedom of movement or on the freedom to choose one's residence – something which is dealt with by an entirely different provision of the Convention (Slide 11) (Art. 2 of Protocol no. 4)? (Incidentally, in connection with the latter provision, there will be published in October a GC judgement – *Garib v. the Netherlands* – dealing precisely with this latter provision).**
- **The Government argued that Guzzardi's situation was totally different from that of a person confined to a cell in prison, and was comparable**

to that of a person on bail but who was subjected to a number of restrictions. The ECtHR was of a different view. While acknowledging the weight of the Italian Government's arguments, the court noted that deprivation of liberty can take numerous forms, their variety increasing by developments in legal standards and in attitudes; the Court also emphasised – (Slide 12) harking to the *Tyrer case* – that the Convention is a living instrument to be interpreted in the light of the notions currently prevailing in democratic States. The Court held that while the various limitations on Guzzardi, taken individually – the fact that he could not leave the island without permission, the limited area on the island itself where he could freely circulate, the limited contact that he could make with other people, the fact that he had to report twice a day to the Carabinieri station and that he was also subject to a curfew (from 10 pm to 7 am), the impossibility of finding work on the island – while these, taken individually, could not be held to amount to deprivation of liberty for the purposes of Article 5, when taken cumulatively the actual situation resembled more that of detention in an "open prison" or of committal to a disciplinary unit in the armed forces, and that therefore in Mr Guzzardi's case the situation was one which fell within the ambit of Article 5 – it was deprivation of liberty.

- **The ECtHR has often reiterated that it is not bound by the legal classification of a particular situation given in domestic law – if it were so bound it would undermine entirely its supervisory function under the Convention. Moreover the notion of deprivation of liberty for the purposes of Article 5 comprises not only an objective element of a person's confinement in a particular restricted space for a not negligible length of time, but also there must be a subjective element**

in that the person has not validly consented to the confinement in question – this issue arises not uncommonly in situations where a person is confined in a mental or health institution. The ECtHR has repeatedly held that in the light of the importance of personal liberty, it must always be ascertained whether a person confined in such institutions was in fact capable of giving his consent to the confinement in the first place. Even in situations where a person has a legal guardian, if he or she can still understand the situation, and especially if domestic law places some weight, however small, on a person's wishes to be placed in a heath institution or a care home, then the fact that a person is not in any way consulted would be held as an important circumstance for concluding that there is a deprivation of liberty for the purposes of Article 5 – a case in point is the Grand Chamber (Slide 13) judgment in *Stanev v. Bulgaria* – 17 January 2012 – the applicant, lacked, indeed, legal capacity – in fact he was represented by an officially appointed legal guardian – but the medical reality was that of a person who understood his situation and therefore could have been consulted before he was placed in a care home – the fact that he was not meant that there was deprivation of liberty for the purposes of Article 5 – in this particular case – *Stanev* – not only had the officially appointed legal guardian never met his ward before taking the decision to have him placed in a home, but the Court was also not convinced of the severity of the mental disorder warranting confinement in a home; and moreover there was a lack periodic medical assessment to determine whether confinement in the home was still necessary – in short it appeared to the Court that this was more a case of the authorities taking the easy way out in order to

avoid having to provide other forms of social assistance to the applicant.

- **What about the length or duration of the interference with liberty? Is this an important consideration for the purposes of finding a violation under Article 5? If the facts indicate that there is a deprivation of liberty within the meaning of Article 5, then the relatively short duration of that detention does not effect this conclusion. Thus, for instance, in the (Slide 14) case of *Rantsev v. Cyprus and Russia* – 7 January 2010 – a case dealing in the main with human trafficking – the ECtHR reaffirmed that in principle the short duration of the detention of the victim in this case – one hour at a police station and another hour in the pimp's apartment from where she exited, or was thrown out, from the window to her death – amounted to a deprivation of liberty within the meaning of Article 5. Likewise (Slide 15) in *Novotka v. Slovakia* – decision of 4 November 2003 -- the transportation to the police station, search and temporary confinement in a cell lasting around one hour was considered to constitute a deprivation of liberty for the purposes of Article 5. Novotka's application was declared inadmissible for reason unconnected with the issue of whether the interference in question amounted or not to a deprivation of liberty for the purposes of Article 5. On the other hand, in another (Slide 16) decision – *Gahramanov v. Azerbaijan*, 15 October 2013 – where a passenger had been stopped by border officials during border control in an airport in order to clarify his situation, with the detention not exceeding the time that was strictly necessary to comply with the relevant formalities, it was held that no issue whatsoever arises under Article 5. The facts are interesting, if anything because they are**

unusual. Following a judgment of 2001, upheld on appeal in 2002, Mr Gahramanov was convicted of several criminal offences and sentenced to ten years' imprisonment. He was later released from serving the remainder of his sentence by a presidential pardon of 2005. In July 2006, Mr Gahramanov was stopped at Baku airport following passport control as his name appeared in the Azerbaijani authorities' database with an indication "to be stopped". He was then prevented from boarding and taken to a room of the SBS (State Border Service) for further clarification of his situation. His luggage was searched and, although he was not handcuffed or confined in a special detention facility, he was not free to leave the room. After it was discovered that the aforementioned indication was the result of an administrative mistake – the Ministry of National Security had failed to delete his name from the authorities' database following his presidential pardon – Mr Gahramanov was allowed to leave the airport. He claimed his detention had lasted approximately 4 hours, while the Azerbaijani authorities maintained it had only lasted 2 hours. In order to determine whether here there was a situation of deprivation of liberty within the meaning of Article 5, the Court proceeded to take account of a whole range of factors, such as the type, duration, effects and manner of implementation of the measure – the interference with the applicant's liberty – in question. The Court, referring to a Grand Chamber judgment delivered a few months before (and to which I will refer in a moment) reiterated that the context in which the interference took place was an important factor since situations commonly occurred in modern society where the public could be called on to accept restrictions on their freedom of movement or liberty in

the interest of the common good. It considered in this respect that where a passenger was stopped during border control in an airport by officers of the border service in order to clarify his or her situation, and where this detention did not go beyond the time strictly necessary to accomplish the relevant formalities, no issues arose under Article 5. In this case, the detention had not exceeded a few hours. Indeed, even assuming that Mr Gahramanov had been detained for approximately 4 hours at the airport as he claimed, nothing proved that his stay in the SBS room had exceeded the time strictly necessary for searching his luggage and fulfilling the relevant administrative formalities for the clarification of his situation. Furthermore, the SBS officers had had reasonable grounds to believe that there had been a need to carry out further checks on Mr Gahramanov's identity. Lastly, he had been free to leave the airport immediately after the clarification of his situation. Therefore, the Court concluded that Mr Gahramanov's detention had not amounted to a deprivation of liberty within the meaning of Article 5 § 1.

- **This practical approach had, as I said, been adopted a few months before in the Grand Chamber judgment in the case *Austin and Others v. the United Kingdom*, (Slide 17) 15 March 2012. Here the interference with the liberty of the applicants was for much longer, and it involved over 150 people, even if only four persons decided, after their claims had been dismissed by the English courts, to work their way up to Strasbourg. The case involved the practice or method of crowd control called "kettling". On 1 May 2001 a number of protest marches by various groups – environmentalists, anarchists and left wing groups – were planned in London. The organisers of the protests did not make**

any contact with the police in an attempt to organise routes or to seek assistance for maintaining public order. By 2 p.m. on that day there were over 1,500 people in Oxford Circus and more were steadily joining them. The police, fearing public disorder, took the decision at approximately 2 p.m. to contain the crowd and cordon off Oxford Circus. Controlled dispersal of the crowd – that is, letting people leave the cordon in small numbers -- was attempted throughout the afternoon but had to be stopped every time as some members of the crowds both within and outside the cordon – not the applicants, by the way – were very violent, breaking up paving slabs and throwing debris at the police. The dispersal of the people within the "kettled" was only completed at around 9.30 p.m. Now whereas Ms Austin was a veteran campaigner and protester and a member of the Socialist Party, she was not behaving in any way violently, and was caught up in the Oxford Circus cordon from around 2.00 pm until about 9.00 pm. Another applicant, Mr Black, was on his way to a bookshop in Oxford Street but, diverted by a police officer on account of the approaching demonstrators, he met a wall of riot police and was forced into Oxford Circus where he remained until 9.20 pm. Likewise, the other two applicants, Ms Lowenthal and Mr O'Shea had no connection with the demonstrations whatsoever – they happened to be out on their lunch break and were held within the cordon until 9.35 pm and 8 pm – all the applicants were stuck there for between six and seven hours. Like many of the people caught up in the cordon, they had problems attending to their natural needs – one applicant also complaining that she was actually in pain.

- **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, the Court said, 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 – if the State failed in that duty there could be violations of Article 2 or even possibly Article 3 of the Convention. 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. In the instant case, 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, that is before 2.00 pm, 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, it was only at about 9.30 p.m. that the police had managed to complete the full dispersal of the people contained. The ECtHR held that given the circumstances that had existed at Oxford Circus on 1 May 2001, 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 the given circumstances, with the police acting impeccably in the course of their duty to protect life and limb, and repeatedly attempting to release the persons within the cordon, the Court held that the four applicants had not been subjected to a deprivation of liberty within the meaning of Article 5 of the Convention, and this, as already indicated, notwithstanding the length of the interference with the applicants' liberty. The Court did, however, sound two notes of caution. One was to the effect that had the containment lasted longer, it might have arrived to a different conclusion; the second cautionary note was to the effect that

notwithstanding its finding that there was no deprivation of liberty, freedom of assembly and of expression was of fundamental importance in all democratic societies, and underlined that national authorities should not use measures of crowd control to stifle or discourage protest, but only when it was necessary to prevent serious injury or damage.

- **What about stop and searches by the police? This brings me to the case (Slide 18) of *Gillan and Quinton v the United Kingdom* decided on 12 January 2010 – which will also be a convenient case to proceed to another principle underlying the interpretation and application of Article 5, namely that of lawfulness. The issue revolved around the police powers then existing in England and Wales to stop and search people even when there was no reasonable suspicion of wrongdoing. The case was actually decided by eventually finding a violation of Article 8 of the Convention – right to private life – but the reasoning is equally applicable to the complaint under Article 5, a complaint which the Court decided that it need not examined having already found a violation of another provision of the Convention on the basis of the same facts. These powers to stop and search were conceived as "anti-terrorism" powers. Under a particular provision of the relevant Act in question, a senior police office could issue an authorisation, if he or she considered it "expedient for the prevention of acts of terrorism" permitting any uniformed police officer within a defined geographical area to stop any person and search the person and anything carried by that person. This authorisation had to be confirmed within 48 hours by the Secretary of State. The search could be carried out by a constable in the authorised area whether or not he had grounds for suspicion,**

but the search could ostensibly only be "for articles of a kind which could be used in connection with terrorism". The police officer could request the individual to remove headgear or footwear, as well as outer clothing and gloves, and the officer could place his or her hand inside pockets, feel around an inside collars, socks and shoes, and search hair. All this took place entirely in public – in the street – and failure to submit to the search amounted to an offence punishable by imprisonment or fine or both.

- **The two applicants were on their way to a demonstration held close to an arms fairs held in the Docklands area of East London. Mr Gillan was riding a bicycle and carrying a rucksack; Ms Quinton, a journalist, was stopped and searched by a police officer and was asked to stop filming in spite of the fact that she showed her press cards. Both were held for about 20 minutes and later allowed to proceed. The High Court in London dismissed an application for judicial review, and both applicants obtained no redress either from the Court of Appeal or from the House of Lords. Before the Strasbourg court they complained under Articles 5, 8, 10 and 11. The first question that had to be asked was: was there an interference with a right protected by the convention – whether it was liberty or private life. The Court said yes, there was an interference. But is this not the same search that is conducted every time we board a plane? No, the court said. When we travel by air – or indeed in some cases when a national border is crossed even on foot – we know in advance that we will be searched. An air traveller may be seen as consenting to such a search by choosing to travel by air. He may opt not to travel by air. The search powers under the law in question were qualitatively different from those at**

the security-check at an airport – the individual could be stopped anywhere and at any time, without notice and without any choice as to whether or not to submit to a search.

- **The second question: was the interference in accordance with the law, or, to use the expressions used in Article 5, was (Slide 19) it "in accordance with a procedure prescribed by law" and "lawful"? This is where the British Government's case ran aground. The court held that the law in question lacked the necessary procedural safeguards so as to offer an individual adequate protection against arbitrary interference. The senior police officer could issue the requisite authorisation if it seemed to him "expedient" – there was no requirement of necessity. The constable on the ground did not even require to have a subjective, let alone any objective, reasonable suspicion that certain objects were being carried – and in any case the expression "article that could be used in connection with terrorism" could cover articles commonly carried by people in the streets – provided the person concerned is stopped for the purpose of searching for such articles, the police officer did not even have to have grounds for suspecting the presence of such articles. Everything was done in full view of other people (adding to the embarrassment to the subject – an important consideration for the purposes of Article 8). Finally – and this is, I think, crucial from the perspective of the lawfulness issue under Article 5 – although the powers exercised by the police were theoretically subject to judicial review, the breadth of the discretion involved meant that applicants faced formidable obstacles in showing that any authorisation or subsequent confirmation were *ultra vires* or an abuse of power. Likewise, as was shown in the case of the two applicants, judicial**

review or an action in damages to challenge the exercise of the stop and search powers under this particular by a constable in an individual case were unlikely ever to succeed – the absence of an obligation to show a reasonable suspicion made it almost impossible to prove that the power had been improperly exercised.

- **Therefore, this interference with the person's liberty, even if it was carried out in accordance with domestic law, could not be considered to be "lawful" for the purposes of Article 5. The ECtHR has repeatedly held that the expression "in accordance with a procedure prescribed by law" must conform to the substantive and procedural rules of national law or of international law where appropriate; but the requirement of lawfulness is not satisfied mere by compliance with domestic law: domestic law itself must be in conformity with the Convention and the general principles expressed or implied in it, namely the principle of the rule of law, the principle of legal certainty, the principle of proportionality, and the principle of protection against arbitrariness. Legal certainty requires, among other things, that the law is clearly defined and foreseeable in its application. In one case, for instance (Slide 20) – *Medvedyev and Others v. France* [GC] 29 March 2010 – a case which involved the arrest on the high seas of the crew of a merchant vessel and their detention aboard a French frigate until they were handed over to the French investigating authorities when the ship returned to Brest habour – it was held that although diplomatic notes are a source of international law, the detention of the crew on the basis of such notes was not lawful within the meaning of Article 5 in so far as they are not sufficiently precise and foreseeable. Provisions which are interpreted in an inconsistent and mutually exclusive**

manner by the domestic authorities will, too, fall short of the "quality of law" standard required under the Convention.

- **As to arbitrariness, this may be evidenced by a lack of reasoning in an order or decision purporting to be made in accordance with domestic law; or by the use of a provision of law intended for a particular purpose – for example, detaining a person for the purpose of his or her deportation – to achieve another purpose, namely to keep a person in detention for an indefinite period until negotiations are conducted with another State to hand the person over because that person was wanted in that other State in connection with alleged terrorist activities: this was one of the issues dealt with in the Grand Chamber judgment of (Slide 21) *A and Others v. the United Kingdom*, 19 February 2009.**
- **(Slide 22) Paragraph 2 of Article 5 can be said to contain the elementary safeguard that a person arrested should know why he is being deprived of his liberty. This provision has been interpreted by the ECtHR to apply also to cases where a person has been detained not with a view to his being charged but, for example, for purposes of extradition, or to have him detained for medical treatment, or when a person is recalled to a place of detention following a period of conditional release. These reasons can be provided either to the person himself or to his representative or guardian. What does "promptly" imply? Promptness applies both to the reasons for the arrest and to any eventual charges brought, but of course what charges will eventually be brought will generally become know much later after the arrest and the proper investigation. As regards the arrest, the ECtHR has held that the reasons for the arrest should be conveyed not**

later than a few hours after the arrest, unless there are exceptional circumstances such as the serious incapacity of the arrested person to comprehend the reasons that might have been given. (Slide 23) In *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990 – the background for which was terrorism in Northern Ireland, intervals of up to seven hours between the arrests and the giving of all the information required by Article 5(2) were found to meet the requirements of promptness. Later case law, however, has not been so indulgent. If the reasons can be immediately given but are withheld for improper reasons, such as to intimidate the person arrested, there will be a breach of this provision. Moreover, the Court has held that a persons may not claim a failure to be informed promptly, or a failure to be informed in a language that they understand, where they are arrested immediately after the commission of a criminal and intentional act (basically, *in flagrante*) or where they were aware of the details of alleged offences contained within previous arrest warrants and extradition requests.

- **(Slide 24) Sub-article 3, unlike sub-article 4, is inextricably linked with arrests or detentions for the purpose of criminal proceedings, since it is inextricably tied to paragraph (1)(c) of Article 5. Here again we find the word "promptly". This sub-article underlines the sanctity of the right to liberty and the need to provide accountability against the abuse of the broad power to arrest and detain that Article 5(1)(c) necessarily provides to the executive. The person arrested or detained – the word "arrest" here merely signifying a more formal kind of "detention" – must be brought automatically and promptly before a judge or other comparable officer. This judge or other comparable officer must have**

the power to release, and the initial automatic review of arrest and detention performed must be capable of examining whether the detention falls under the said Article 5(1)(c). In other words, the review carried out by this judge or other comparable officer must address the lawfulness issues and whether or not there is reasonable suspicion that the arrested person has committed the offence, whether complete, attempted or merely conspired. Beyond that, at this initial stage this provision does not require the automatic review of the additional and distinct question as to whether the subject in question should be released on bail pending trial – that stage comes later. Nevertheless, the ECtHR has emphasised that that stage must invariably follow, and has also held that it is good practice and even highly desirable, although not a strict requirement of the Convention, that the judicial officer who conducts the first initial review also has competence to consider release on bail. This was the problem in one of the few Maltese cases to make it up to the Grand Chamber (Slide 25), *Aquilina v. Malta*, decided on 29 April 1999. Up till that time the law in Malta required that a person who was arrested had to be brought before a magistrate not later the 48 hours after the initial arrest. The magistrate would simply examine whether the charges preferred against the accused where charges related to an arrestable offence or arrestable offences, but was not required to verify whether there was reasonable suspicion or not: provided the police prosecuting officer confirmed on oath the charges, that was taken as sufficient. Moreover, at that stage – and this brings me to the question of bail – the magistrate could not automatically consider a request for bail; the law as it then was required, other than for very minor offences, that bail had to be

requested by means of a written application which had to be served upon the Attorney General, who had 24 hours within which to reply. In practice this meant that if the person charged was arraigned on a Friday and the following Monday happened to be a public holiday, the AG would have up till Tuesday to file his reply and only then could the magistrate decide whether or not to grant bail. This was found to be clearly in breach of Article 5(3) – and the law in Malta was immediately changed.

- **(Slide 26) The "other officer authorised by law to exercise judicial power" need not be a judge or even a magistrate in the common law tradition – according to continental systems of law, this can also be an officer in the public prosecutor's department – on the continent, prosecutors are often members of the "judiciary" in a broad sense of the word – but the officer must offer certain guarantees befitting the judicial power conferred on him by law. He must therefore be independent of the executive and of the parties both in an objective and in a subjective way.**
- **The Convention says that the person charged (Slide 27) shall be "entitled to trial within a reasonable time or to release pending trial". The case law regarding this expression has been summed up in many important judgments of the court, and I would refer you in particular (Slide 28) to paragraphs 110 to 111 of the GC judgment in *Kudła v. Poland*, 26 October 2000. This expression does not give the judicial authorities a choice between either bringing an accused to trial within a reasonable time or granting him provisional release pending trial. Until conviction, the accused must be presumed innocent and the purpose of the provision under consideration is essentially to require**

his provisional release once his continuing detention ceases to be necessary. Put otherwise, continued detention can be justified in a given case only if there are specific or concrete indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty which underpins Article 5. The grounds of continued detention are well known (Slide 29) : they include the danger of absconding, the obstruction of, or interference with, the proceedings – in essence, interference with the proper administration of justice, the concrete possibility of a repetition of offences, and the preservation of public order. Whenever the domestic authorities refuse release pending trial, the ECtHR requires that "relevant and sufficient" reasons be given. The absence of such reasons will trigger a violation of Article 5(3).

- **A quick word on repetition of offences and preservation of public order. Regarding the first of these reasons, the ECtHR has held that the seriousness of a charge may lead the judicial authorities to place and leave a suspect in detention on remand to prevent any attempts to commit further offences. It is however necessary that the danger be a plausible one – not merely a possible or theoretical one – and must be backed up not only by the peculiar circumstances of the case but in particular by the past history and the personality of the person concerned. In invoking this ground for refusal of bail, the judicial authorities must ensure that not a word is said in the decision refusing bail which would even merely suggest that the person is guilty of the offence with which he stands charged – otherwise there would be a violation of the presumption of innocence enshrined in Article 6(2) of the Convention. As to the preservation of public order, it is accepted**

that, by reason of their particular gravity and public reaction to them, certain offences may give rise to a social disturbance capable of justifying pre-trial detention, at least for some time. In exceptional circumstances this factor may be taken into account for the purposes of the Convention, in any event in so far as domestic law recognises the notion of disturbance to public order caused by an offence. However, this ground can be regarded as relevant and sufficient only provided that it is based on facts capable of showing that the accused's release would actually disturb public order – again, a mere possibility is not sufficient since everything is possible under the sun. In addition, detention will continue to be legitimate only if public order remains actually threatened; its continuation cannot be used to anticipate a custodial sentence.

- **Once a person had been denied bail, a duty of "special diligence" is placed on the prosecuting authorities to ensure. This requirement is exemplified by the recent (Slide 30) case of *LISOVSKIJ v. LITHUANIA*, decided on 2 May 2017. The violation here found was of Article 5(3), the reason being that the trial was not conducted with the "special diligence" required when a person is detained in custody pending the trial. It was, admittedly, a complicated and complex case involving drugs, a large criminal organisation dealing with drugs and money-laundering, and it was also a high profile case. More than 50 witnesses and other suspects were examined. During a period of three years and five months while the applicant was in custody and the case was being examined on the merits by the first instance court, 57 hearing were scheduled, but almost half of them were adjourned because of the absence of witnesses or co-accused. The applicant was eventually**

sentenced to 13 years' imprisonment minus the time served in preventive custody. The ECtHR, however, was not impressed by the way the trial was conducted. It noted in particular that scheduling on average of one hearing per month did not display sufficient diligence on the part of the authorities; nor was sufficient diligence shown when the authorities did not take the necessary measures to ensure the presence of the other co-accused, with the result that 26 of those hearings had to be adjourned – as a result of the adjournments there were several long periods, each of several months, when no hearings at all were held. To be sure the Court, in this judgment, accepted the Lithuanian Government's submission that the criminal proceedings against the applicant were complex and of a large scale; however it considered that neither their complexity nor the fact that they concerned organised crime could justify detention of such length as in that case (see §68). Basically, what the court was saying was: difficult and complex cases require special structures and proceedings to enable the state to process them within a reasonable time -- these cases cannot be left to be dealt with on the same conveyor belt as ordinary cases. This point was taken up in a very short and highly focussed separate concurring opinion by the current Polish judge on the Court, Kryzsztof Wojtyczek. Allow me to quote him directly. He said (Slide 31):

> **"The essential problem in the instant case concerns the organisation of the trial. In my view States should ensure, to the extent that it is possible, that trials for serious offences follow a very tight schedule. This applies in particular to trials for offences committed by organised crime. It is true that the measure under consideration entails a complete change of paradigm for the organisation of criminal trials in**

many States. However, such a change is necessary not only in order to implement the rights of the accused but also to ensure a just and timely criminal-law response to serious crime and to protect public order as well as the rights of citizens in general. Although the Court determined the case from the viewpoint of Article 5, the instant judgment enhances the requirement to impose stricter trial schedules for serious criminal offences as one of the standards of a fair trial under Article 6 of the Convention."

- **Last point: (Slide 32) Paragraph (4) of Article 5: this is the *habeas corpus* provision of the Convention – it provides every detained person – therefore not only those detained for the purpose of the initiation of criminal proceedings – the right to actively seek judicial review of their detention. The fact that the ECtHR may have found no breach of the requirements of Article 5(1) does not mean that it is dispensed from carrying out a review of compliance with Article 5(4). The two provisions are separate and distinct, and observance of the former does not necessarily entail observance of the latter. To illustrate this point, I can again refer to a case against Malta: *Suso Musa v. Malta*, decided on 23 July 2013. Here we are dealing with detention of immigrants under paragraph (1)(f) of Article 5. Paragraph (3), therefore, is not applicable. In similar cases the Maltese Government had repeatedly argues that the remedy, for the purposes of paragraph (4), in such cases was that of a constitutional redress application before the First Hall of the Civil Court in its Constitutional Jurisdiction, with a possible appeal to the Constitutional Court. Both these courts can apply directly the substantive provisions of the ECHR by the virtue of the European Convention Act, 1987 (Cap. 319) and therefore apply the interpretation of "lawfulness" given by the ECtHR. However such**

proceedings would normally take at least two months in first instance and another three months on appeal, and therefore the requirement of "speedily" was entirely missing.