



APPLICATION OF THE ARTICLE 5 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN TIME OF WAR

**Information Note of the Council of Europe Expert Advisory Group
to the Office of the Prosecutor General of Ukraine**

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In principle, both the exhaustive list of grounds for imposing restrictions on the right to liberty and security set out in Article 5(1) of the European Convention on Human Rights (“the European Convention”) and the safeguards or rights in Article 5(2)-(5) required where a deprivation of liberty has occurred are applicable and should be observed as much in time of war as of peace.

In particular, this means that there should not be any:

- unregistered detention;
- use of administrative arrest for the purposes of criminal investigation without safeguarding the detainee's procedural rights, in particular the right to a defence;
- arrest contrary to the requirements of national law;
- detention without judicial decision (e.g., during the period between the end of the investigation and the beginning of the trial) by the police;
- failure to state the relevant grounds when authorising detention on remand or to set a time-limit for such detention by the courts;
- pre-trial detention in excess of the maximum time-limit established by the domestic law (Article 5(1));
- failure to bring an arrested person promptly before a judge;
- failure to advance relevant and sufficient grounds for extending detention on remand or to consider any alternative preventive measure (Article 5(3));
- absence of a thorough and speedy review of the lawfulness of detention (Article 5(4).; and
- failure to provide compensation for the above breaches (Article 5(5)).

Nonetheless, it may be possible under the European Convention for the requirements in these provisions to be subject to certain restrictions during a war or other emergency situation that could not be imposed in more normal circumstances.

Such restrictions may be the result of

- (a) the interpretation of Article 5 in the light of provisions of international humanitarian law;
- (b) some limited adjustment to the way the requirements in Article 5 are normally expected to be applied; or
- (c) the effect of a derogation from those requirements submitted under Article 15 of the European Convention.

In all cases, such restrictions must have a basis in law as that concept is understood by the European Court of Human Rights (“the European Court”), i.e., provisions fulfilling the requirements of accessibility, foreseeability, precision in the scope of powers and other protections against arbitrary interferences with the rights and freedoms.

International humanitarian law

The European Court has held that, during an international armed conflict, Article 5 could be interpreted as permitting the taking of prisoners of war and the detention of civilians who pose a threat to security, notwithstanding that this is not mentioned in the grounds listed in paragraph 1.

This will only be possible where:

- (i) any such detention complies with the applicable rules of international humanitarian law (i.e., Articles 4A and 21 of the Third Geneva Convention (prisoners of war) and Articles 42 and 78 of the Fourth Geneva Convention (civilians)) and
- (ii) there is sufficient protection against arbitrariness as that is the fundamental purpose of Article 5(1); [Hassan v. United Kingdom](#) [GC], no. 29750/09, 16 September 2014.

However, the European Court would not regard as justified under Article 5 any detention of civilians for their own safety on account of potential attacks by any of those participating in the armed conflict since this is not something authorised under international humanitarian law; [Georgia v. Russia \(II\)](#) [GC], no. 38263/08, 21 January 2021.

Moreover, in relation to detention taking place during an international armed conflict, the European Court has also held that the safeguards in Article 5(2) and (4) should equally be interpreted in a manner taking into account this context and the applicable rules of international humanitarian law; [Hassan v. United Kingdom](#) [GC], no. 29750/09, 16 September 2014.

Thus, as a result, there may not have to be the same degree of promptness in informing a person of the reason for her/his apprehension that is normally required under Article 5(2).

Similarly, depending upon the practicalities at the time, the European Court considers that it may be sufficient for the legality of the detention to be decided by a body other than a court, despite this being specifically required by Article 5(4).

However, this will only be possible so long as:

- (i) this body provides sufficient guarantees of impartiality and fair procedure to protect against arbitrariness and
- (ii) the first review takes place shortly after the person is taken into detention and there are subsequent reviews at frequent intervals, thereby ensuring that any person who does not fall into one of the categories subject to internment under international humanitarian law (i.e., combatants and civilians who pose a threat to security) is released without undue delay.

This position was adopted without considering the possibility that Article 5(4) might be non-derogable (i.e., a right in respect of which a derogation may be submitted), which is discussed below.

Limited adjustments

Even where the provisions of international humanitarian law cannot be relevant, the European Court has shown a readiness to make some, very limited allowance for the difficulties faced by a State when assessing the compatibility with the provisions in Article 5 of arrangements made to address an exceptional situation.

In doing so, the European Court first determines the significance to be attached to that situation and then ascertains whether, having regard to the particular circumstances, the wording of the applicable provision and its object and purpose, an appropriate balance has been struck by the limited adjustment concerned.

Thus, as regards the obligation under Article 5(3) to bring a suspect “promptly” before a court following her/his apprehension could be slightly longer on account of the difficulties posed by terrorism; [Brogan v. United Kingdom](#) [P], no. 11209/84, 29 November 1988.

Nonetheless, the precautions that this situation necessitated could not justify dispensing altogether with prompt judicial supervision and so an interval of more than four days between apprehension and the first appearance of the suspects before a court was regarded as unacceptable.

Similarly, a limited adjustment as regards the requirement to determine “speedily” challenges to pre-trial detention can be seen in [Mehmet Hasan Altan v. Turkey](#), no. 13237/17, 20 March 2018. In that case, the European Court held that a period of just over fourteen months, although not speedy in normal circumstances, would not violate Article 5(4) on account of the new and complex issues involved and the court’s heavy caseload following an attempted military coup.

However, further, more significant adjustments affecting the provisions of Article 5 of the European Convention will need to be justified through reliance on a valid derogation under Article 15.

Derogation

A derogation will only be admissible if it complies with certain procedural and substantive requirements.

Procedural requirements

Where a war or other emergency situation is considered to require restrictions affecting the provisions that in Article 5 that are not covered by either of the preceding possibilities, the Secretary General of the Council of Europe must be notified, without unavoidable delay, of the measures concerned and the reasons for taking them

A delay of twelve days was not considered problematic in [Barseghyan v. Armenia](#), no. 17804/09, 21 September 2021 but one of three months was so regarded in [Greece v. United Kingdom](#) (Rep.), no. 176/56, 26 September 1958.

The notification should explain why the measures are considered necessary; e.g., to prevent the commission of offences against public peace ([Lawless v. Ireland \(No.3\)](#), no. 332/57, 1 July 1961) or to deal with severe dangers to public security and order ([Alparslan Altan v. Turkey](#), no. 12778/17, 16 April 2019).

In addition, the notification should be accompanied by an account of the way in which legislative provisions have been (or will be) changed, showing explicitly how they deviate from the standards normally required to be observed under Article 5; [Greece v. United Kingdom](#)

(Rep.), no. 176/56, 26 September 1958 and [Alparslan Altan v. Turkey](#), no. 12778/17, 16 April 2019).

The requirements governing notification are equally applicable to any subsequent changes affecting the measures that have already been adopted, including their termination.

Another procedural requirement for the making of a derogation which is not mentioned in Article 15 stems from the specification in paragraph 1 of that provision that it must not be "inconsistent with its other obligations under international law".

Account must, therefore, also be taken of the stipulation regarding a public emergency Article 4 of the International Covenant on Civil and Political Rights ("the International Covenant") that its existence is "officially proclaimed".

For this purpose, the European Court has considered sufficient the issuing of a statement by a minister to the legislature explaining in detail the reasons underlying the Government's decision to derogate and announcing that steps were being taken to give notice of derogation; [Brannigan and McBride v. United Kingdom](#) [P], no. 14553/89, 26 May 1993.

Substantive requirements

The substantive requirements in Article 15 are fourfold:

- (a) there must be war or other emergency threatening the life of the nation;
- (b) the measures taken must only affect derogable rights;
- (c) the measures must not be inconsistent with other obligations under international law; and
- (d) the measures taken must be no more than is strictly required by the exigencies of the situation.

In addition, the case law of the European Court has established that any measure taken pursuant to a derogation must be lawful and a derogation can only be invoked with respect to any territory to which it is explicitly named as applying.

A war or emergency

So far, the European Court has only been faced with derogations relating to emergency situations involving terrorist activity within and outside a State's territory (e.g., [A. and Others v. United Kingdom](#) [GC], no. 3455/05, 19 February 2009 and [Lawless v. Ireland \(No.3\)](#), no. 332/57, 1 July 1961) and the consequences of an attempted coup ([Mehmet Hasan Altan v. Turkey](#), no. 13237/17, 20 March 2018).

However, a war would clearly meet the requirement for invoking a derogation not only because it is specifically mentioned in Article 15(1) but also because it is clearly "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is concerned"; [Lawless v. Ireland \(No.3\)](#), no. 332/57, 1 July 1961.

While such a threat must be credible, it is sufficient that it is only imminent since a State should not be required to wait for disaster to strike or an armed attack to occur before taking measures to deal with it; [A. and Others v. United Kingdom](#) [GC], no. 3455/05, 19 February 2009. Moreover, it does not need to be so grave as to entail a threat to the institutions of government or a community's existence.

In addition, the threat may be limited to just part of the territory of a State; [Aksoy v. Turkey](#), no. 21987/93, 18 December 1996.

Although States enjoy a wide margin of appreciation under Article 15 in assessing whether the life of their nation is threatened by a war or public emergency, the submission of a derogation will not be conclusive as this is a matter that will ultimately have to be determined by the European Court.

Non-derogable rights and consistency with other obligations

Article 5 is not amongst those rights from which no derogation under Article 15 is permissible, namely, Articles 2, 3, 4(1) and 7 of the European Convention and Article 2 of Protocol No. 13 and Article 4 of Protocol No. 7.

However, it is possible that the European Court will regard a derogation affecting the right to challenge the lawfulness of detention as incompatible with Article 15 of the European Convention, despite it having previously found such a derogation admissible in [Ireland v. United Kingdom](#) [P], no. 5310/71, 18 January 1978 and [Marshall v. United Kingdom](#) (dec.), no. 41571/98, 10 July 2001.

This is because the United Nations Human Rights Committee has since considered – in [General Comment No. 29 States of Emergency \(Article 4\)](#), CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 16 - that the same right in Article 9(4) of the International Covenant was non-derogable and measures in derogation under Article 15 from rights under the European Convention must not be inconsistent with a High Contracting Party's obligations under international law.

There is no reason in principle why measures restricting provisions in Article 5 other than its fourth paragraph could not be the subject of a derogation under Article 15.

Strictly required

The existence of a war or emergency is not, however, enough to justify the taking of exceptional measures.

Restrictions on rights and freedoms pursuant to a derogation under Article 15 will only be admissible if it can also be shown that they are strictly required by the exigencies of the situation.

This means that it must be demonstrated that the particular situation cannot be effectively addressed by measures that would be considered by the European Court to be permissible restrictions on rights and freedoms in situations not amounting to an emergency.

Lawful

The case law of the European Court also requires that any measures in derogation from rights and freedoms under the European Convention must be lawful.

This not only means that there must be a legal provision authorising the particular measure adopted but also that there should not be any restriction under national law on adopting that measure (such as in the constitutional guarantee of rights and freedoms), even if that measure could otherwise be regarded as strictly required by a war or other emergency situation; [Mehmet Hasan Altan v. Turkey](#), no. 13237/17, 20 March 2018.

Territorial scope

The existence of a war may require exceptional measures to be taken throughout its territory even if the conflict is only in part of it.

However, should only a specific part of a State's territory be explicitly mentioned in the notification of derogation, then reliance cannot be placed on that derogation in other parts of its territory even if the same difficulties are being faced there; [Sakik and Others](#), no. 23878/94, 26 November 1997 and [Barseghyan v. Armenia](#), no. 17804/09, 21 September 2021.

Measures affecting Article 5

In situations where there was established to be an emergency situation, the European Court has found some, but not all, measures going beyond the restrictions on the provisions of Article 5 that would be acceptable in normal times to be strictly required by that situation. These rulings could be relevant for some measures that might be considered necessary in time of war.

Thus, the European Court can be expected to conclude that the right to liberty and security would be meaningless if someone could be placed in pre-trial detention without any strong evidence that they had committed a criminal offence and so such a measure would not be regarded as strictly required by the exigencies of a war or other emergency situation; [Mehmet Hasan Altan v. Turkey](#), no. 13237/17, 20 March 2018.

However, the European Court has considered acceptable a delay of seven days – pursuant to a derogation under Article 15 in connection with an emergency arising from terrorism – before detention could be authorised by a court whereas it did not so regard one of fourteen days; respectively [Brannigan and McBride v. United Kingdom](#) [P], no. 14553/89, 26 May 1993 and [Aksoy v. Turkey](#), no. 21987/93, 18 December 1996.

A longer delay than seven days could possibly be seen as acceptable during a war where there might be significant difficulties for the courts to function, since that would be a situation of a significantly different character to that considered in first of those two cases, namely, a small judiciary being vulnerable to terrorist attacks.

At the same time, it should be recalled that the possibility of the lawfulness of the detention being challenged before a court (as required by Article 5(4)) has - together with guaranteed

access to a lawyer and the ability to notify someone about the deprivation of liberty – been regarded by the European Court in [*Brannigan and McBride v. United Kingdom*](#) [P], no. 14553/89, 26 May 1993 as an important safeguard against the risk of abuse where the exercise of judicial control for the purpose of Article 5(3) was subject to a derogation.

Indeed, the absence of such a possibility was a factor in considering in [*Aksoy v. Turkey*](#), no. 21987/93, 18 December 1996 that a derogating measure was not strictly required by the exigencies of the situation.

The detention of persons suspected of engaging in or possessing information about terrorism where the purpose was to prevent such acts being committed rather than to prosecute them for an offence has been considered by the European Court to be strictly required by the exigencies of the situation, notwithstanding that this detention lasted for a prolonged period; [*Lawless v. Ireland \(No.3\)*](#), no. 332/57, 1 July 1961 (almost five months) and [*Ireland v. United Kingdom*](#) [P], no. 5310/71, 18 January 1978 (several years).

Detention under similar powers of civilians suspected of aiding the enemy in a war might also be seen by the European Court as justified by the exigencies of the situation resulting from a war (although reliance on international humanitarian law as discussed above might also be possible without any derogation) as it has been prepared to accept the detention of suspected terrorists under emergency powers where the aim was not to prosecute them but to address the problems posed by terrorism.

In this connection, it should be noted that, in concluding in [*Ireland v. United Kingdom*](#) [P], no. 5310/71, 18 January 1978 that detention without trial of suspected terrorists was strictly required by the exigencies of the situation, the European Court attached importance to the existence of a non-judicial procedure of review, notwithstanding that there was not available to those detained a judicial remedy meeting the requirements of Article 5(4) relating to speediness and scope of review.

However, as noted above, it is doubtful that the European Court would now consider a derogation relating to Article 5(4) as one permitted under Article 15.

Any difference in the treatment of persons by reference to the grounds specified in Article 14 of the European Convention when applying any measure affecting the right to liberty and security taken pursuant to a derogation must always have a rational and objective justification; [*Ireland v. United Kingdom*](#) [P], no. 5310/71, 18 January 1978 and [*A. and Others v. United Kingdom*](#) [GC], no. 3455/05, 19 February 2009.