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REGARDING THE OBSERVANCE OF THE RIGHT TO LIBERTY AND SECURITY OF PERSON DURING DETENTION UNDER MARTIAL LAW[1]

ЩОДО ПИТАНЬ ДОТРИМАННЯ ПРАВА НА СВОБОДУ ТА ОСОБИСТУ НЕДОТОРКАННІСТЬ ПІД ЧАС ЗАТРИМАННЯ В УМОВАХ ВОЄННОГО СТАНУ

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The article analyzes the legal aspects of ensuring human rights during detention under martial law in Ukraine. In connection with the military aggression of the russian federation against Ukraine and the introduction of martial law, Ukrainian legislation has undergone serious changes which have affected the realization of human rights, in particular the right to liberty and security of person. The article examines both national and international legal acts that enshrine human rights, in particular, the European Convention on Human Rights (ECHR), the International Covenant on Civil and Political Rights (ICCPR), and the Charter of Fundamental Rights of the European Union (Charter).

The attention is focused on the legitimacy of Ukraine's derogation from human rights under martial law. Particular attention is focused on the possibility of derogation from Article 5 ECHR and Article 9 ICCPR in the part concerning the procedure of detention, its duration and the rights of detainees to access to justice. The article provides legal assessments of international bodies, outlines the current situation with regard to the rights of persons during detention based on reports and statements of international institutions and agencies, analyzes the provisions of the case law of national courts of Ukraine illustrating the application and interpretation of legal rules today.

The publication provides recommendations for improving the provisions of the current legislation to prevent human rights violations and minimize cases of arbitrary detention through the discretionary powers of public authorities in general. Considerable attention is paid to the problematic aspects of the terms of detention, their differentiation in accordance with: the subjects authorized to carry out detention; public danger of the act; categories of persons in respect of whom it may be carried out, and also outlines problematic issues related to the procedural registration of this temporary preventive measure, etc.

Key words: human rights, international standards, detention, martial law.

Стаття присвячена аналізу правових аспектів забезпечення прав людини під час затримання в умовах воєнного стану в Україні. У зв'язку з військовою агресією російської федерації проти України та введенням воєнного стану, українське законодавство зазнало суттєвих змін, що вплинуло на реалізацію прав людини, зокрема права на свободу та особисту недоторканність. У статті розглядаються як національні, так і міжнародно-правові акти, які закріплюють права людини, зокрема, такими актами є Європейська Конвенція з прав людини (ЄКПЛ), Міжнародний пакт про громадянські та політичні права (МПГПП), Хартія основних прав Євпропейського Союзу (Хартія).

Акцентується увага на правомірності відступу України від прав людини в умовах воєнного стану. Окрему увагу приділено питанню можливості відступу від ст. 5 ЄКПЛ та ст. 9 МПГПП в частині, що стосується порядку здійснення процедури затримання, його строків та прав затриманих осіб на доступ до правосуддя. У статті наводяться правові оцінки міжнародних органів, окреслена поточна ситуація щодо стану забезпечення прав осіб під час затримання на підставі доповідей та звітів міжнародних інститутів та агентств, а також проаналізовано положення практики національних судів України, що ілюструють застосування та інтерпретацію правових норм на сьогодні.

У роботі надаються рекомендації щодо вдосконалення норм чинного законодавства для запобігання порушенням прав людини та мінімазації випадків здійснення свавільного затримання через дискреційні повноваження органів державної влади загалом. Значну увагу приділено проблемним аспектам щодо строків затримання, їх дифференціації відповідно до: суб'єктів уповноважених на здійснення затримання; суспільної небезпечності діяння; категорій осіб щодо яких воно може здійснюється, а також окреслені проблемні питання, що стосуються процесуального оформлення цього тимчасового запобіжного заходу та ін.

Ключові слова: права людини, міжнародні стандарти, затримання, воєнний стан.

In connection with the military aggression of the russian federation against Ukraine, on the basis of the proposal of the National Security and Defense Council of Ukraine, in accordance with paragraph 20, part 1, Article 106 of the Constitution of Ukraine, the Law of Ukraine "On the Legal Regime of Martial Law", the President of Ukraine decided to introduce martial law in Ukraine for the first time [1]. Since then, the special regime has been in place for more than 2 years, which has had a negative impact on the socio-economic situation in the country, and the provisions of national legislation have changed, and these changes have not passed over human rights.

According to the Legal Analysis of the derogation made by Ukraine in accordance with Article 15 of the ECHR and Article 4 of the ICCPR of the Cooperation Programs Division of the Council of Europe of November 2022, Ukraine derogated from many human rights, as an example, the rights enshrined in Articles 5, 8, 9, 10, 11 of the ECHR, Articles 9, 12, 13, 16, 17, 19 of the Covenant throughout Ukraine from 01.03.2022 [2, pp. 20–21, 24].

As for Ukraine's derogation, the legal analysis concluded that it was declared lawfully. The questions of how and whether the derogation was applied without violation are speculative, unless related to a specific case. Such a violation may be caused by the fact that the authorities, when implementing derogatory measures, disregarded the principles of legality, necessity, proportionality, equality and fairness. A violation may be possible if the authorities did not comply with other obligations under international law when applying derogation (para. 109) [2, p. 26].

In this regard, it is necessary to consider the issue of human rights through the prism of the possibility of detention, which concerns, for example, the rights provided for in Articles 2, 3, 5 of the ECHR [3], Articles 2, 4, 6 of the Charter [4], Articles 6, 7, 9 of the ICCPR [5], etc. One of these rights, which will be emphasized, is the right to liberty and security of person, from which Ukraine derogated on March 08, 2022 for the first time during the full-scale invasion under Article 5 of the ECHR [2, p. 23].

In general, human rights is one of the most important topics in our country today, as the guarantee of rights is one of the pillars of its democracy. According to the 38th report of the Office of the United Nations High Commissioner for Human Rights (OHCHR) on the human rights situation in Ukraine, from 01.12.2023 to 29.02.2024, the Ukrainian authorities opened 767 criminal proceedings and delivered 241 verdicts (0.4% of which were acquittals) in cases related to alleged cooperation with the occupation authorities (para. 9) [6, p. 3].

On January 11, 2024, a foreign blogger detained by the Ukrainian authorities for "justifying the armed attack of the Russian Federation on Ukraine" died in custody. A week earlier, he was transferred in critical condition from the pretrial detention center to a hospital, where he died. Reportedly, the forensic medical examination found that the causes

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of death were acute pulmonary and heart failure, double pneumonia, bilateral hydrothorax and dilated cardiomyopathy (para. 92) [6, p. 23].

It should be noted that OHCHR has documented arbitrary detention, enforced disappearances and torture and ill-treatment, including sexual violence, by the Ukrainian authorities in the custody of conflict-related civilians and russian prisoners of war, as well as summary executions of at least 25 russian servicemen on the spot (all in 2022 and early 2023) (para. 103) [6, p. 26].

While the Ukrainian authorities have opened at least 5 criminal investigations into allegations of violations committed by "their own security forces" involving 22 victims, OHCHR observes a lack of progress in "investigating or prosecuting" such cases (para. 104) [6, p. 26].

In its 2023 report on human rights practices in Ukraine, the Bureau for Democracy, Human Rights and Labor notes that were reports law enforcement and military officials abused and, at times, tortured persons in custody to obtain confessions, usually related to alleged collaboration with Russia.

In August, the SBI detained two police officers in Cherkasy Oblast who illegally arrested a local resident. The police officers reportedly engaged in cruel and degrading punishment to extract a confession, including beating and firing several shots near the victim. The suspects were charged with exceeding their official authority and faced up to eight years in prison.

On July 28, a city court arrested Serhiy Lutsyuk, the chief military commissar of Rivne Oblast. Together with the head of the district military enlistment office, he allegedly beat another military officer with a bat and forced him to "beg for forgiveness" on his knees. The official was charged with exceeding authority under martial law (section 1 – C).

The HRMMU's October report, covering the period from February to July, documented that six cases of arbitrary detention were carried out by the Ukrainian armed forces and law enforcement agencies. In Government-controlled territory, OHCHR continued to receive allegations that SSU detained and ill-treated individuals in both official and unofficial places of detention in order to obtain information and pressure suspects to confess or cooperate. OHCHR reported 65 cases in which Ukrainian security forces allegedly held people incommunicado in unofficial places of detention for periods ranging from several hours to four and a half months. This practice was reportedly used to force detainees to provide incriminating evidence. 57% described being subjected to torture or ill-treatment by Ukrainian security forces, predominantly in unofficial places of detention and sometimes in pretrial detention facilities. According to the OHCHR June report, a significant number of cases of arbitrary detention amounted to enforced disappearance. In such cases, law enforcement officers, mainly from the SSU, detained civilians without court authorization, held them incommunicado for several days, denied them access to counsel, and declined to disclose information to their relatives. (section 1-D) [7].

At the same time, in order to address the topic, it is necessary to understand the legal nature of the rights that may be violated during detention, so, first of all, it is advisable to start with the international legal regulation of these rights and understanding their essence through the prism of explanations of the competent authorities.

Today, the main legal acts are the ICCPR (Articles 6, 9, 10, 12, 14) [5], the ECHR (Art. 2, 3, 5) [3], the Charter (Art. 1–4, 6) [4], the International Convention on the Elimination of All Forms of Racial Discrimination (in particular, Art. 5) [8]. The Convention on the Rights of the Child (in particular, art. 37) [9], the Convention on the Rights of Persons with Disabilities (in particular, arts. 10, 14, 15) [10], the Universal Declaration of Human Rights (arts. 3, 5, 9) [11], as well as the Geneva Conventions (in particular, 3 and 4) [12; 13], etc.

For now, it is important to make a comparative legal study of the essence of legal issues under Article 9 of the ICCPR[5] and Article 5 of the ECHR [3], since this is one of the fundamental rights that may be violated during detention.

The right to personal liberty requires that individuals shall not be subjected to arrest or detention except in accordance with the law and provided that neither arrest nor detention is arbitrary. The rights provided for in the ICCPR apply to individuals who are on the territory of a state and subject to its jurisdiction. However, in times of armed conflict, IHL, as a body of law specifically applicable to the circumstances of armed conflict, is the relevant standard against which to assess the observance of the right to security of person and freedom from arbitrary detention [14].

According to the General Comment No. 35 on Article 9 of the ICCPR of the UN Human Rights Committee of 16.12.2014, Article 9 recognizes and protects both personal freedom and personal security.

In turn, the right to personal liberty is not absolute, Article 9 recognizes that sometimes deprivation of liberty is justified, for example, in the execution of criminal laws, and requires that deprivation of liberty shall not be arbitrary and shall be carried out in accordance with the rule of law. The second and third sentences of Article 9(1) contain two overlapping prohibitions, as arrests or detentions may be in violation of applicable law but not arbitrary, or permitted by law but arbitrary, or both arbitrary and unlawful. Arrest or detention without any legal basis is also arbitrary[1].

The term "arrest" refers to any apprehension of a person that commences a deprivation of liberty, and the term "detention" refers to the deprivation of liberty that begins with the arrest and continues in time from apprehension until release.

In general, the Covenant does not list permissible reasons for depriving a person of liberty. The grounds and procedures provided for by law must not violate the right to personal liberty. This regime should not be limited to evading the limitations of the criminal justice system by providing the equivalent of criminal punishment without applicable protection.

Two requirements for persons deprived of their liberty are set forth in p. 2 of art. 9 of the Covenant, namely: 1) at the time of arrest, they must be informed of the reasons for their arrest; 2) they must be informed promptly of any charges against them.

Thus, one of the main purposes of the first requirement is to provide the arrested with the opportunity to demand release if they believe that the reasons given are invalid or unreasonable. The "reasons" refer only to the official grounds for the arrest, not to the subjective motives of the arresting officer. An oral statement of the reasons for the arrest satisfies this requirement. The reasons must be stated in a language that the arrested person understands and provided immediately after the arrest[2].

The second requirement of Art. 9(2) is that persons must be informed immediately of the crimes of which they are suspected or accused. Furthermore, Article 9(2) requires that an arrested person must be informed "immediately" of any charges, but not necessarily "at the time of arrest". If the authorities have already informed the person of the charges being investigated prior to arrest, then para. 2 does not require an immediate repetition of the formal charges, provided that they inform the person of the reasons for the arrest.

It should be noted that the first sentence of Part 3 applies to persons "arrested or detained on criminal charges", and the second sentence refers to persons "awaiting trial" on such charges. The requirement of part 3 of Article 9 of the Covenant that everyone be brought promptly before a judge or other officer authorized by law to exercise judicial power applies in all cases without exception and does not depend on the choice or ability of the detained person to assert it.

While the precise meaning of "promptly" may vary depending on the objective circumstances, delays should not exceed a few days from the time of arrest. In the Commit-

[2] The concept of "arbitrariness" should not be equated with the concept of "against the law", but should be interpreted more broadly, including the elements of inappropriateness, injustice, lack of foreseeability and due process, as well as the elements of reasonableness, necessity and proportionality [15].

[3] However, in exceptional circumstances, such immediate communication may not be possible. For example, a delay may be necessary before an interpreter is present, but any such delay should be kept to an absolutely necessary minimum [15].

tee's view, 48 hours is normally sufficient for the transportation of a person and preparation for a court hearing; any delay beyond 48 hours must be absolutely exceptional and justified in the circumstances. Longer detention in law enforcement custody without judicial review unnecessarily increases the risk of ill-treatment.

Note that laws in most States parties fix precise time limits, sometimes shorter than 48 hours, and those limits should also not be exceeded. An especially strict standard of promptness, such as 24 hours, should apply in the case of juveniles.

The next requirement, expressed in the first sentence of Article 3, is that the detained person has the right to a trial within a reasonable time or to release. Pre-trial detention of minors should be avoided, but if it occurs, they have the right to be brought before a court on a particularly expedited basis in accordance with Article 10(2)(b).

It should be noted that p. 4 of Art. 9 of the Covenant establishes the principle of habeas corpus[3]. The review of the actual grounds for detention may, in appropriate circumstances, be limited to a review of the reasonableness of the previous decision. This right applies to all cases of detention by official authorities or on the basis of official authorization, including detention in connection with criminal proceedings, etc.

With regard to art. 4 of the Covenant, the Committee notes that, like the other articles of the Covenant, art. 9 also applies in situations of armed conflict to which IHL applies. While IHL rules may be relevant for the purposes of interpreting art. 9, the two areas of law are complementary, not mutually exclusive. Detention for security reasons, authorized and regulated by IHL and consistent with it, is not arbitrary in principle.

However, Art. 9 is not included in the list of non-derogable rights in p. 2 of Art. 4 of the Covenant, but there are limitations on the powers of States parties to derogate from it. States Parties derogating from art. 9 in conditions of armed conflict or other public emergency must ensure that such derogations do not go beyond the extent strictly required by the exigencies of the situation.

Thus, the prohibitions on hostage-taking, abduction or unrecognized detention are not subject to derogation. There are other elements in art. 9 which, in the Committee's view, cannot be the subject of a legitimate derogation from art. 4. The fundamental guarantee against arbitrary detention is non-derogable, since even the situations covered by art. 4 cannot justify a deprivation of liberty that is unreasonable or unnecessary in the circumstances.

It should be emphasized that the existence and nature of a public emergency that threatens the life of the nation may, however, be relevant to determining whether a particular arrest or detention is arbitrary, but the substantive and procedural rules of IHL remain applicable and limit the possibility of derogation, thereby contributing to reducing the risk of arbitrary detention.

Procedural guarantees can never be subject to derogations that would circumvent the protection of non-derogable rights. While reservations to certain provisions of art. 9 may be acceptable, it would be incompatible with the object and purpose of the Covenant for a State party to reserve the right to arbitrarily arrest and detain persons [15].

At the same time, according to the ECHR, the fundamental rights that may be violated during detention are defined by Arts. 2, 3, 5 [3], and the Charter by Arts. 1, 3, 4, 6, 41 [4]. The rights provided for in Article 6 of the Charter are the rights guaranteed by Article 5 of the ECHR and, according to p. 3 of Art. 52 of the Charter, they have the same meaning and scope, and therefore, the restrictions that may be lawfully imposed on them may not exceed the restrictions permitted by the ECHR within the meaning of art. 5 [16].

According to Article 5(1) of the ECHR, everyone has the right to liberty and security of person. No one shall be deprived of liberty except in the following cases and in accordance with the procedure established by law [3].

In order to determine whether a person has been "deprived of his or her liberty" within the meaning of art. 5, the starting point must be his or her specific situation, and a number of criteria must be taken into account, such as the type, duration, consequences and manner of implementation of the measure in question. The notion of deprivation of liberty within the meaning of p. 1 of Art. 5 contains both an objective element of placing a person in a certain limited space for a significant period of time and an additional subjective element, which is that the person did not give legal consent to such placement. The relevant objective factors to be taken into account include: the ability to leave the restricted area, the level of supervision and control over the person's movement, the degree of isolation and the availability of social contacts (paras. 5, 10, 11) [17, c. 10].

Questions about the applicability of Art. 5 may arise in different circumstances, for example, in cases of forced entry by the police or detention and search by the police. However, the state under the Convention has positive obligations under Art. 5, it must not only refrain from actively violating these rights, but also take appropriate measures to ensure protection against unlawful interference with these rights of all persons within its jurisdiction. The grounds for state liability are its tacit consent to the deprivation of liberty by private individuals or its failure to resolve the situation (paras. 19, 20, 22).

It is important to remember that the main purpose of art. 5 is to prevent arbitrary or unjustified deprivation of liberty. The terms "arrest" and "detention" are used interchangeably in almost all of the provisions of art. 5 and should therefore be seen as essentially related to any measure – regardless of the name used in national law – that has the effect of depriving a person of his or her liberty (para. 23).

However, the absence of records of the date, time and place of detention, the name of the detainee, the reasons for detention and the name of the person who carried out the detention must be considered incompatible, in particular with the very purpose of Article 5 of the Convention. No deprivation of liberty shall be lawful unless it is based on one of the admissible grounds specified in Article 5(1)(a) – (f) (paras. 24, 25) [17, c. 12–13].

For detention to be lawful, it must be carried out "in accordance with a procedure established by law". However, the requirement of lawfulness cannot be met merely by complying with national legislation, it must itself comply with the Convention, including the general principles defined or implied therein. Such principles are: the rule of law and the related principle of legal certainty, the principle of proportionality and the principle of protection against arbitrariness, which, moreover, corresponds to the main purpose of Article 5 (paras. 29, 32).

Article 5(1) thus also refers to the "quality of the law", meaning that if deprivation of liberty is permitted on the basis of a provision of national law, such legislation must be sufficiently accessible, clear and its application must be predictable. It is worth noting that provisions interpreted by national authorities in an inconsistent and mutually exclusive manner also do not meet the standard of "quality of the law" provided for by the Convention (paras. 34, 36) [17, p. 14–16].

If considering cases under Art. 5(1)(c) of the ECHR, it should be noted that the existence of a purpose to bring the suspect to trial should be considered regardless of whether this purpose is achieved. The standard does not require that the police have sufficient evidence to bring charges at the time of arrest or during pre-trial detention (para. 81).

The requirement that the "goal" of the detention is to bring the detainee to trial should be applied with a degree of flexibility to cases of detention falling within the scope of Article 5(1)(c)(2), so as not to prolong the period of (usually short) preventive detention unnecessarily. The national authorities are obliged to demonstrate convincingly that the detention is necessary. The criterion of necessity implies that less serious measures than detention or custody have been considered and found insufficient for the purposes of protecting private interests or the interests of the public (paras. 82, 83, 84).

It should be emphasized that the concept of "reasonable suspicion" is important, which is the basis for arrest and is

[4] Habeas corpus is a legal remedy used to challenge the legality of a person's detention. If the detention cannot be justified, the court has the right to order the person's release [14].

an important component of the guarantee established by para. c of Part 1 of Art. 5, it provides for the existence of facts or information that could convince an objective observer that the person concerned may have committed a crime (paras. 86, 87) [17, c. 25–27].

One of the important issues that needs to be studied is the guarantees for persons deprived of their liberty. The first of these guarantees is information about the grounds for arrest, as provided for in p. 2 of Art. 5 ECHR.

It is important to understand that the wording used in Article 5(2) should be interpreted independently and, in particular, in accordance with the purposes of art. 5, which are to protect everyone from arbitrary deprivation of liberty. Thus, art. 5 p. 2 contains a primary guarantee that any arrested person must be informed of the reasons for the deprivation of his or her liberty, which is an integral part of the defense system. Any person who has the right to an immediate court review of the lawfulness of detention cannot effectively exercise this right unless he or she is promptly and properly informed of the reasons for his or her deprivation of liberty (paras. 149, 150, 151) [17, p. 38–39].

However, arrested persons cannot claim that they do not understand the grounds for their detention if they were arrested immediately after committing a criminal or other intentional offense or if they knew the details of the alleged offense, which were specified in previous detention orders and extradition requests (para. 157).

In turn, the sufficiency of the information provided should be assessed depending on the specific circumstances of each case. However, a mere indication of the legal grounds for arrest is not sufficient for the purposes of Article 5(2). Arrested persons must be informed in simple, accessible, layman's language of the essential legal and factual grounds for their arrest in order to enable them, if they consider it necessary, to apply to a court to challenge the lawfulness of the arrest in accordance with Article 5(4) (paras. 158, 159) [17, c. 40].

It should be noted that the next guarantee provided for in Part 3 of Article 5 of the ECHR is the right to be brought before a judge immediately. The introductory part of Article 5(3) aims to ensure immediate and automatic judicial control over detention carried out by a police or administrative authority in accordance with the provisions of Article 5(1)(c). The strict time limitations imposed by this requirement are not intended to be broadly interpreted, otherwise it would lead to a serious weakening of procedural guarantees to the detriment of the individual and to the risk of violating the very essence of the right protected by this provision (paras. 166, 167).

It is relevant to point out that any period exceeding 4 days seems to be too long. A shorter period of time may also violate the requirement of immediacy, unless there are particular difficulties or exceptional circumstances preventing the authorities from bringing the arrested person before a judge earlier (para. 169) [17, c. 41–42].

The second part of Article 5(3) does not provide the judicial authorities with a choice between ensuring that the case is heard by the court within a reasonable time or the temporary release of the accused pending the merits of the case. The question of whether the duration of pre-trial detention is reasonable cannot be assessed in the abstract, but must be assessed on the facts of each individual case and in accordance with its specific features (paras. 192, 193) [17, c. 46].

Equally important is the right to a prompt review by a court of the lawfulness of the arrest, provided for in p. 4 of Art. 5 ECHR, which provides for the detainee to be brought before a court and ensures that the detainee has the right to request a review of the lawfulness of his or her detention, p. 4 of Art. 5 also guarantees arrested or detained persons the right to have a court decide on the lawfulness of their detention without delay and to decide on their release if the detention is not lawful (para. 229). [17, c. 52].

The requirement of "promptness" guarantees detainees the right to challenge the lawfulness of their detention, as well as the right to a court decision, rendered "without delay", on the lawfulness of their detention and to immediate release if it is proved that their detention is unlawful. The concept of "without delay" (à bref délai) indicates less urgency than the concept of "immediately" used in part 3 of Article 5. However, if the decision to deprive a person of liberty was made by a non-judicial body rather than a court, the requirement of "urgency" of judicial review under Article 5(4) is closer to the requirement of "immediacy" under Article 5(3) (paras. 260, 262). [17, c. 57–58].

In addition to all of the above, it should be noted that during detention, the rights under art. 3 of the ECHR, which enshrines one of the most fundamental values of democratic societies, may be violated. The prohibition in question is absolute, and no derogations from it are allowed under p. 2 of Art. 15 – even in the event of a public emergency that threatens the life of the nation or in the most difficult circumstances (p. 2) [19, p. 5]. When a person is deprived of liberty, any use of physical force that was not strictly necessary due to the person's behavior degrades human dignity and is in principle a violation of art. 3 of the ECHR (para. 36) [19, c. 13]. For detention to fall squarely within the scope of Article 3 ECHR, the suffering and humiliation involved must go beyond the inevitable element of suffering and humiliation associated with the deprivation of liberty itself. When assessing the conditions of detention, the cumulative impact of these conditions must be taken into account, as well as the specific allegations of the applicant. The duration of the period during which a person is held in specific conditions should also be taken into account (paras. 53, 54) [19, p. 16].

Therefore, after a brief overview of international legal standards, it is extremely important to consider the current provisions of national legislation in force during martial law, paying attention to the procedural aspects of detention with an analysis of court practice and the requirements of international legal treaties.

Firstly, what should be noted is the definition of the moment of detention, as stated in part 1 of Article 209 of the Criminal Procedure Code of Ukraine (hereinafter – CPC), a person is detained from the moment when he or she is forced by force or through obedience to an order to remain near an authorized official or in a room designated by such a person, but part 2 of Article 207 of the CPC stipulates that everyone has the right to detain another person ... in cases determined by law[20], i.e., it is clear from the above provisions that the actions of private persons are not included in the construction of the article, but are effective from the moment of transfer to an authorized person, which does not meet the requirements of Art. 5 ECHR, since detention by a private person can take place for 5 and 10 hours and in fact the person subject to detention will be held by force in a certain place, which increases the risk of violation of Article 3 ECHR, and the person will not be informed of his/her procedural rights at this time and in fact there may be cases when the person does not understand why he/she is being detained. As noted above by the UN Committee, the fundamental guarantee against arbitrary detention is non-derogable, since even the situations covered by Article 4 cannot justify deprivation of liberty that is unreasonable or unnecessary in the circumstances [15], i.e. in this case it would be more appropriate to set a maximum period of detention by private individuals, define the scope of their duties and make changes regarding the moment of detention.

Similar considerations were identified as early as 2002 in the Guide to the Implementation of Art. 5 ECHR, namely that any powers granted to private persons to arrest someone must also be limited by the requirements of Art. 5. A private person must ensure that a person deprived of his or her liberty is involved in the criminal process in the same way as a law enforcement officer is obliged to do. No private action that leads to deprivation of liberty contrary to this provision should be tolerated by public authorities, and the latter should certainly never encourage the former to do what they themselves are prohibited from doing [21].

Secondly, the time limits for detention are equally important. According to the ECHR case law, detention should not exceed 4 days, and it was noted that shorter periods may

also lead to a violation of Article 5. Based on the analysis of the CPC, the following terms of detention are determined: 1.) based on the decision of the investigating judge or court – 36 hours (part 1 of Article 191 of the CPC), 2.) by private individuals – the term is not defined, but not more than 72 hours (part 1 of Article 211 of the CPC), 3.) by an authorized official – 72 hours, but within 60 hours a request for a preventive measure must be filed (parts 1, 2 of Article 211 of the CPC). 4.) when a person commits a criminal offense – the general term: 3 hours, however, the term may be extended up to 72 hours in accordance with the grounds specified by the CPC or for 24 hours if the person is in a state of alcohol or drug intoxication and may harm himself/herself or others (Article 298^{-2} of the CPC) [20].

Based on a brief analysis, we note that the legislator's position on determining the time limits for detention seems controversial, since:

1. detention of a person for 72 hours is a rather long period. The UN Committee noted that the optimal permissible period of detention is 48 hours, and other European countries follow this practice, for example, the Charter ratified by the Czech Republic stipulates that an accused or suspected person may be detained and released or brought before a court within 48 hours. A person accused of committing a criminal offense may be arrested only on the basis of a warrant and must be brought to court within 24 hours (Art. 8(3), (4)) [22], Art. 20 of the Constitution of Slovenia stipulates that from the moment of detention, but not later than 24 hours, the detained person must be handed a written permission of the court stating the reasons for detention [23], ч. 3, 4 of Article 17 of the Slovak Constitution, the detainee must be released no later than 48 hours, and in the case of terrorist crimes, no later than 96 hours, or brought before a court. The accused may be arrested only upon a reasoned written order of a judge. The arrested person must be brought before a court within 24 hours [24], Article 23(3) of the Romanian Constitution stipulates that detention may not exceed 24 hours [25], Article 41(3) of the Polish Constitution requires that a person be brought before a court within 48 hours of arrest [26], ч. 3, Art. 20 of the Constitution of Lithuania, the detained person must be brought before a court within 48 hours, where the issue of the validity of the arrest is decided in the presence of the detainee [27], Art. 13, para. 3, of the Constitution of Italy, in exceptional cases of necessity and urgency, the state security authority may take temporary measures, which must be reported to the judicial authority within 48 hours [28], Art. 104, para. 2, 3, of the Constitution of the Republic of Germany, and the of the Basic Law of Germany, the police may not, at their discretion, keep a person in custody longer than until the end of the day following the day of his or her arrest. Any person temporarily arrested on suspicion of committing a criminal offense shall be brought before a judge no later than the day following the arrest [29], p. 5, Art. 11 of the Constitution of Cyprus, a detainee shall be brought before a judge as soon as possible after his arrest, but in any case not later than 24 hours from the moment of arrest, unless he is released earlier [30].

2. there is a specific differentiation of terms according to the subject of detention: authorized and private persons, which can significantly restrict the rights of persons under Articles 5 and 3, etc.

3. it seems that the absence of clear terms of detention when differentiating an act into a crime and a misdemeanor does not meet the requirements of Article 5, since a criminal misdemeanor, although a socially dangerous act, does not provide for a sanction for its commission in the form of imprisonment and may be applied to a suspect or accused in accordance with p. 1 of Art. 299 of the CPC, preventive measures may be applied to a suspect or accused only in the form of a personal commitment and personal guarantee, i.e., it is believed that the seriousness of a criminal offense should influence the differentiation of the term of detention.

Also, in practice, the legal provision of p. 4 of Art. 298^{-2} of the CPC is ambiguous and needs to be clarified, namely regarding the maximum period of detention, since the construction "may be applied" defines only additional rights of authorized persons and may become abused by public authorities and be equated with cases of arbitrary detention [20].

In addition, based on the provisions of the Constitution of Ukraine, p. 2 of Art. 29 states that in case of urgent need to prevent or stop a crime, the authorities authorized by law may apply detention as a temporary preventive measure, the validity of which must be verified by a court within seventy-two hours [31]. It may be stated that the provisions of the Article apply to crimes that are more socially dangerous than misdemeanors and do not apply to criminal offenses at all, such inaccuracies in the legislation may lead to arbitrary application of the law, which would violate Article 5 of the ECHR.

4. there is no distinction between the period of detention of adults and minors, which also does not meet the requirements of international legal standards. As the UN Committee categorically states, a particularly strict standard of promptness, for example, 24 hours, should be applied in the case of minors, and the ECtHR has determined that pre-trial detention of minors should last as little as possible (para. 228) [15; 17, p. 51]. That is, the detention of minors in criminal proceedings for both felonies and misdemeanors is a problematic issue that may entail a violation of Articles 3 and 5 of the ECHR. In this regard, we consider it necessary to review the systematic approach to determining the terms of detention.

Thirdly, it is necessary to pay attention to the detention protocol, namely the peculiarities of its delivery, so in case of committing a crime, a copy of the protocol is immediately handed over to the detainee against signature and sent to the prosecutor, and in case of detention in connection with a misdemeanor – only sent to the prosecutor (p. 4 of Art. 298^{-2} of the CPC) [20].

Thus, in essence, the delivery of the protocol to the person establishes the existence of the fact of such an action and allows to challenge the legality of the detention and bring the relevant persons to justice on the basis of it. As emphasized in the decision of the CCS of the Supreme Court of 13.06.2023 in case No. 520/2703/17, the court stated that the detention protocol cannot be recognized as inadmissible, as this would mean that the fact of detention of a person is not confirmed by anything (paragraph 47) [32]. In this regard, we can trace the inconsistency with the requirements of Art. 5 ECHR, since regardless of the differentiation of a criminal offense, a person is subjected to the same degree and intensity of restriction of his or her freedom, so it is not appropriate to establish different guarantees for persons under the same conditions of restriction, especially since the same period of detention may be applied.

Another legislative provision that may require clarification is Part 5 of Article 208 of the CPC of Ukraine, namely the absence of a mention of the mandatory drafting of a detention report in respect of criminal offenses. Thus, part 4 of Art. 298^{-2} of the CPC indicates that a copy of the detention protocol shall be immediately sent to the prosecutor, and part 1 of Art. 104 of the CPC stipulates that the course and results of the procedural action shall be recorded in the protocol, but part 5 of Art. 208 of the CPC contains additional guarantees for the detention of persons and should be applied as a special rule, but the first sentence of part 5 of Art. 208 of the CPC specifies that "a protocol shall be drawn up on the detention of a person suspected of committing a crime", namely a crime, not a misdemeanor, which is also a gap, since according to this logic, the protocol of detention of persons in respect of criminal misdemeanors should be drawn up on general grounds, under Article 104 of the CPC, without providing for additional rights, which is incompatible with the requirements of Article 5 of the Convention [20].

It is worth paying attention to the position of the Supreme Court in the decision of 19.12.2022 in case No. 331/4277/17, namely that the CPC does not provide for the obligation of the investigator to reflect in the detention report information about the notification of the authorized body about the detention of a person, as well as to stop the detention of a person and his/her personal search until the arrival of the appointed defense counsel [33].

In fact, this is a rather interesting decision, since the investigator or prosecutor is not obliged to include in the protocol information about the notification of the authorized body of the detention of a person, and there is no obligation to notify the body (institution) authorized by law to provide free legal aid, since part. 4 of Art. 213 of the CPC imposes this on an authorized official, and according to the Supreme Court's decision of June 15, 2021 (case No. 204/6541/16-k), it is neither an investigator nor a prosecutor, which, in our opinion, may lead to a violation of the right to defense and, in general, the rights of persons in criminal proceedings [34].

However, in connection with the martial law in Ukraine, the CPC was amended to provide for the detention, namely subpara. 2, para. 1, part 1, Art. 615 of the CPC additionally stipulates that in the absence of the possibility of drawing up procedural documents on the course and results of procedural actions, the recording is carried out by available technical means with the subsequent drawing up of the relevant protocol no later than 72 hours after the completion of the relevant procedural actions [20].

Analyzing the above regulations, we note that the maximum period of detention is 72 hours and it is allowed to draw up a report within 72 hours, however, the request for a preventive measure must be sent to the court in 60 hours, and if the detention takes place on the basis of a decision, then after 36 hours, which makes it unclear whether the person's rights to be notified of the reasons for the detention were observed, whether he or she understands the essence of the suspicion, and we observe restrictions on the right to appeal the decision to detain, which in fact makes it possible to draw up a detention report later than the deadline, without specifying the time of detention and thereby detain a person for up to N number of days, which does not meet the requirements of Article 5 and creates a risk of violating Article 3 of the ECHR.

Such a period of detention may lead to the defeat of the very purpose of Article 5, not to mention the fact that the rights of other persons may be jeopardized during preventive detention. Such an example can be given in relation to part 9 of Article 191 of the CPC, namely that an authorized official who detained a person on the basis of a decision of an investigating judge or court to authorize detention is obliged to immediately inform the person of the presence of a child who remains without parental care. Information on the date and exact time (hour and minutes) of notification of the relevant authorities is indicated in the detention report [20], i.e in fact, without a detention report, it is impossible to verify the proper performance of the official's duties and the fact of notification of the relevant authorities.

A similar provision is provided for in Part 6 of Art. 213 of the CPC, but it does not specify the obligation of the official to indicate in the detention report the notification of the relevant authorities, which may also need to be clarified, since both the rights of the detained person and the rights of the child are at risk in this case [20]. In our opinion, the guarantees provided for in the legislation regarding detainees, regardless of the grounds for detention and the severity of the criminal offense, should be ensured equally for all persons subject to restrictions on their rights, i.e., the principle of equality under the law should be ensured in this case.

Analyzing all of the above, we can see that national provisions do not meet the requirements of international standards, which can lead to cases of arbitrary detention, although Article 4 of the Covenant and Article 15 of the ECHR allow for derogations from the right to liberty and security of person, guarantees must still be provided to prevent arbitrary detention.

It is necessary to emphasize that the period of 72 hours for drawing up a protocol is extremely long, although martial law is in force in the country, and the largest hostilities are currently taking place in eastern Ukraine, which may in fact be a problem for drawing up a protocol on the spot and act as a condition for drawing it up later, but not for 72 hours, such a period should be no more than 24 hours, as an example, which is sufficient time to draw up a procedural act later.

At the same time, the legislator tried to additionally provide certain guarantees for the prevention of arbitrary detention, this concerns the possibility of bringing a detained person before an investigating judge or court within the time limit provided for in Art. 211 of the CPC for consideration of a motion for a preventive measure, para. 2 of Part 1 of Art. 615 of the CPC stipulates that if "there is no objective possibility to deliver the person" the consideration is carried out using available technical means of video communication in order to ensure remote participation of the detained person, and paragraph 3 stipulates that "if the detained person cannot be delivered to the investigating judge, court or ensure his/her remote participation" during the consideration of the relevant motion, such a person is immediately released [20].

The above provisions demonstrate an ambiguous approach of the legislator, who defines alternative conditions for the release of a person – "impossible to deliver" or "to ensure remote participation", if the second condition is logically consistent with the provisions of the law, then the difference between the phrases "there is no objective possibility to deliver" and "impossible to deliver" is not clear, since according to this logic, subpara. 3 of Part 1 of Article 615 of the CPC, which significantly improves the situation of a person.

In addition, the provision of cl. 6, part 1, Art. 615 of the CPC needs to be clarified, namely, if there are cases for detention of a person without a decision of an investigating judge or court, as defined by Art. 208 of the CPC, or there are reasonable circumstances giving grounds to believe that there is a possibility of escape with the aim of evading criminal liability of a person suspected of committing a crime, an authorized official has the right to detain such a person without a decision of an investigating judge or court. However, 208 of the CPC already provides for the detention of a person without a court decision, which is not unclear in essence, and therefore this provision is duplicated, we can only assume that part 2 of cl. 6 additionally allows the detention of persons suspected of committing a crime of any gravity [20].

In general, the Supreme Court defined the conditions for the application of legislation during martial law, namely, that the constitutional right to judicial protection cannot be limited [35], established that the provisions of cl. 1–5 of p. 1 of Art. 615 of the CPC should be applied only if there are 2 mandatory conditions: 1) the introduction of martial law; 2) the absence of technical/objective possibility of performing the relevant procedural actions in the general order and noted that the provisions of clause 6 of p. 1 of Art. 615 of the CPC should be applied during martial law without regard to the ability of the authorized person to act otherwise [36, p. 7]. Such provisions only indicate the existence of discretionary powers, which may lead to possible violations of the rights of persons during detention by an authorized person.

Therefore, based on the analysis of the key provisions of international legal acts, legal assessments of international bodies, national legislation and the practice of the Supreme Court, as well as taking into account the assessment of the provisions of the legislation on ensuring human rights during detention, it is appropriate to offer the above recommendations for further improvement of national legislation in accordance with the identified problematic aspects.

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