AJEE
ACCESS TO JUSTICE IN EASTERN EUROPE
Peer-reviewed Journal

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print)
ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

Case Note

FEATURES OF ENSURING THE RIGHT TO LIBERTY AND PERSONAL INTEGRITY IN CRIMINAL PROCEEDINGS UNDER THE CONDITIONS OF MARTIAL LAW: PRECEDENT PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS AND UKRAINIAN REALITIES

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Submitted on 08 Aug 2022 / Revised 1st 12 Oct 2022 / Revised 2nd 21 Dec 2022 /
Approved **15 Mar 2023** / Published: **15 May 2023**

Summary: 1. Introduction. – 2. Derogation. – 3. The Non-alternative Choice of Detention in Custody. – 4. Extension of the Period of Detention in Custody. – 5. Conclusions.

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Corresponding author, responsible for writing and methodology. **Competing interests:** Any competing interests were declared by all the authors. **Disclaimer:** The authors declare that their opinion and views expressed in this manuscript are free of any impact of any organizations.
Translation: The content of this article was translated by a third party, under the authors' supervision.
Managing editor – Dr. Serhii Kravtsov. **English Editor** – Dr. Sarah White.

How to cite: A Tumanyants, H Hetman, V Babanina, R Dovbash 'Features of Ensuring the Right to Liberty and Personal Integrity In Criminal Proceedings Under the Conditions of Martial Law: Precedent Practice of the European Court of Human Rights and Ukrainian Realities' 2023 2 (19) Access to Justice in Eastern Europe 153-171. https://doi.org/10.33327/AJEE-18-6.2-n000226
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Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

Keywords: the right to freedom and personal integrity, criminal proceedings under martial law, judicial control, preventive measures, detention.

ABSTRACT

This article is devoted to the study of problems related to the peculiarities of ensuring the right to freedom and personal integrity in criminal proceedings under martial law. It is noted that one of the principles of the state policy of Ukraine in the spheres of national security and defence is the protection of people and citizens, their life and dignity, and their constitutional rights and freedoms. The article analyses the conditions of admissibility of derogation, i.e., Ukraine's right to derogate from the observance of individual rights, guaranteed, first of all, by Art. 5 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR). The authors determine the constitutionality of legislative innovations caused by unprovoked Russian aggression and, as a result, the introduction of martial law in our country. The position is argued that the limitation of the right to freedom and personal integrity provided for by the Criminal Procedure Code of Ukraine (Parts 6-7 of Art. 176) only by the use of detention pursues a legitimate goal, which is to prevent persons who are reasonably suspected of committing a number of crimes from hiding from the investigation and the court, as well as perform any actions provided for in Part 1 of Art. 177 of the CPC of Ukraine, which, taking into account the difficult situation in the country associated with military aggression, can be considered fully justified. At the same time, in the future, at the stage of extending the term of detention, the suspect or the accused is actually deprived of the right to request his release from custody and the application of an alternative preventive measure to him, which does not correlate with international standards of limiting the right to freedom and personal integrity and does not comply with the legal positions of the European Court of Human Rights. The authors emphasise that the quasi-automatic extension of the term of detention of a person in custody without appropriate requests from the prosecution, without checking the presence of new or previous risks and assessing the expediency of further deprivation of liberty, introduced into the national legislation, should be considered as a violation of the conventional norms-guarantees established by § 3 Art. 5 of the ECHR.

1 INTRODUCTION

The state's recognition of a person's life, health, honour, dignity, inviolability, and security as the highest social value (Art. 3 of the Constitution of Ukraine)[1] indicates a significant change in priorities, the democratisation of society and its desire to create a truly lawful state, one of the components of which is the principle of connection of the state with the rights and freedoms of man and citizen. The ratification on 17 July 1997 by the Verkhovna Rada of Ukraine of the European Convention for the Protection of Rights and Fundamental Freedoms[2] (hereinafter the ECHR or the Convention) has caused significant practical consequences, which lie in the opening of fundamentally new opportunities for any person whose rights, in their opinion, have been violated by state bodies, to apply for their protection directly to the European Court of Human Rights (hereinafter the ECtHR, the Court, the European Court). The realisation of the rights and freedoms proclaimed by the Convention is not only the main goal and function of the state but also a vital task of the

1 Constitution of Ukraine No 254k/96-VR of 28 June 1996 <https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text> accessed 20 December 2022.

2 The Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 <https://www.echr.coe.int/documents/convention_eng.pdf> accessed 20 December 2022.

citizens themselves. They are no less interested in the exercise of their rights and freedoms than the society and the state. Here, it is not the subordination of individual interests to the state that is obvious but their reasonable combination.

Having proclaimed at the constitutional level: 'The establishment and provision of human rights and freedoms is the main duty of the state' (Art. 3),[3] Ukraine confirmed that the provision of human rights and freedoms is the main purpose of the existence and functioning of the state in the civilised world. In addition, in accordance with Art. 3 of the Law of Ukraine 'On the National Security of Ukraine' dated 21 June 2018 No. 2469-VIII, one of the principles of state policy in the spheres of national security and defence is the protection of people and citizens, their lives and dignity, constitutional rights and freedoms, and safe living conditions.[4]

The conventional law: 'Everyone has the right to liberty and security of person. No one can be deprived of liberty, except in such cases and in accordance with the procedure established by law' (para. 1 of Art. 5)[5] became a determinant that led to the introduction and development in domestic doctrine and law enforcement practice of the theory (rule) of the existence of a presumption in favour of abandonment of a person at liberty, the essence of which is formulated in the precedent practice of the ECtHR (for example, the decisions on the cases *Witold Lithuania v. Poland*[6] and *Ambruszkiewicz v. Poland*)[7] and lies in the fact that the use of detention as the most severe preventive measure can be justified only in cases where milder preventive measures are recognised as insufficient to ensure state-protected interests (both personal and public).

In the special legal literature based on a systematic analysis of the precedent practice of the European Court, a number of rules for implementing the presumption of freedom are distinguished: 1) the need to observe the presumption of freedom is not limited to solving the issue of keeping a person in custody, but extends to all cases related to the restriction of a person's freedom; 2) deprivation of a person's liberty must satisfy the requirement of proportionality; 3) the national judicial body in each case must necessarily consider the possibility of applying measures alternative to deprivation of liberty and apply detention only in the event where the relevant measures have been considered and recognised as unable to ensure the effectiveness of criminal proceedings; 4) compliance with the procedure established in the national criminal procedural legislation for consideration and resolution of the issue of deprivation of liberty, as well as guarantees provided to a person by national law and the Convention in connection with consideration of the issue of deprivation of liberty; 5) periodic review of the court decision on the deprivation of a person's liberty, taking into account the dynamics of the actual circumstances and the person's release, as soon as the deprivation of liberty ceases to be reasonable.[8]

3 Constitution of Ukraine (n 5).

4 Law of Ukraine No 2469-VIII of 21 June 2018 'On National Security of Ukraine' <https://zakon.rada.gov.ua/laws/show/2469-19#Text> accessed 20 December 2022.

5 The Convention for the Protection of Human Rights and Fundamental Freedoms (n 6).

6 *Witold Litwa v Poland* App no 26629/95 (ECtHR, 4 April 2000) <https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-6873%22]}> accessed 20 December 2022.

7 *Ambruszkiewicz v. Poland* App no 38797/03 (ECtHR, 4 May 2006) <https://hudoc.echr.coe.int/eng#{%22appno%22:[%2238797/03%22]}> accessed 20 December 2022.

8 V A Zavtur, 'Presumption of personal freedom when applying clause 'c' of Article 5 of the Convention on the Protection of Human Rights and Fundamental Freedoms: practice of the European Court of Human Rights and the national context' in *Practice of the European Court of Human Rights in activity bodies of the prosecutor's office and the court: challenges and prospects: cont. and International science and practice conference (June 13, 2018)* (National Academy of the Prosecutor's Office of Ukraine 2018) 84-85 <http://hdl.handle.net/11300/10786> accessed 20 December 2022.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

However, the increased public danger of certain categories of crimes, in particular, against the foundations of national and public security, peace, human security, and international legal order, against the established order of military service, forces the legislator to abandon the normative requirement to substantiate the grounds for the application of a preventive measure in favour of maintaining public order and ensuring the safety of its citizens. The legitimacy of this kind of deviation from conventional obligations is the subject of this study.

2 DEROGATION

The unprovoked large-scale military aggression against Ukraine by the Russian Federation (hereinafter referred to as the RF) actualised the need for rapid and significant legislative transformation in many spheres of public life, in particular, criminal justice, which is at the forefront of the fight against crime in this most difficult time for Ukraine.

In this context, the study of William Burke-White, who drew a rather interesting conclusion (especially in the current conditions of aggression against Ukraine) about the existence of a correlation between the degree of protection of human rights and the possibility/impossibility of participating in international aggression, is of some interest. He concludes that: (1) states in which the rights and freedoms of people and citizens are systematically violated will, as a rule, take part in international aggression (the RF is a striking example); (2) states in which human and citizen rights and freedoms are protected at a relatively adequate level, most likely will not participate in international aggression; 3) states, in which the rights and freedoms of man and citizen are recognised and respected, will participate in international intervention exclusively for the purpose of protecting the rights and freedoms of citizens from violations by their own state while observing the norms of international law.[9]

In our opinion, the rights and freedoms of a person and a citizen are the main objects of the state's national security policy, and the modern paradigm of domestic criminal procedural legal relations determines the mutual correlation between the provision of national security, its protection from internal and external threats, and the observance of human rights and freedoms, guaranteed by international legal documents, including the Convention on the Rights of the Child. The need for a certain compromise between the protection of national security and, enshrined in Art. 5 of the Convention, a fundamental right – the right of a person to freedom and personal inviolability – led to the normative correction of criminal procedural legal relations, namely the introduction of extraordinary procedures when applying preventive measures in criminal proceedings under martial law.

For the first time, the Criminal Procedure Code of Ukraine[10] (hereinafter the CPC of Ukraine) was supplemented with section IX-1 'Special regime of pre-trial investigation in conditions of war, state of emergency or in the area of an anti-terrorist operation' in 2014 by the Law of Ukraine 'On Amendments to the Criminal Procedure Code of Ukraine regarding the special regime of pre-trial investigation in conditions of war, state of emergency or in the area of anti-terrorist operation' dated 12 August 2014 No. 1631-VII,[11] which briefly regulated

9 For more details, see W W Burke-White, 'Human Rights and National Security: The Strategic Correlation' (2004) 17 Harvard Human Rights Journal 254 <https://www.law.upenn.edu/cf/faculty/wburkewh/workingpapers/.pdf> accessed 20 December 2022.

10 Criminal Procedure Code of Ukraine No 4651-VI of 13 April 2012 <https://zakon.rada.gov.ua/laws/show/4651-17#Text> accessed 20 December 2022.

11 Law of Ukraine No 1631-VII of 12 August 2014 'On amendments to the Criminal Procedure Code of Ukraine regarding the special regime of pre-trial investigation in conditions of war, state of emergency or in the area of an anti-terrorist operation' <https://zakon.rada.gov.ua/laws/show/1631-18#n2> accessed 20 December 2022.

the relevant legal regimes. Taking into account the realities in the conditions of Russian aggression and the temporary occupation of the territories of our state, a number of Laws of Ukraine made changes to Section IX-1 of the CPC of Ukraine,[12] which established the features of pre-trial investigation and court proceedings under conditions of martial law, including in relation to ensuring the right to freedom and personal integrity.

A systematic analysis of legislative innovations related to the normalisation of the institution of preventive measures under martial law allows us to conclude that this is a special procedure for their application, which in some cases indicates that our state will not be able to fulfil certain obligations regarding, in particular, its compliance with international standards in the field of human rights in full due to objective reasons, the state of necessity. Such an order, most likely, can be characterised not as simplified but as compensatory, aimed at ensuring the synchronisation of criminal procedural activities with the needs of today.

Having embarked on the path of integration with the European Union, Ukraine undertook to guarantee to everyone under its jurisdiction the rights and freedoms defined in the Convention and its Protocols, which is implemented by taking into account the norms of the Convention and the practice of the European Court in national law enforcement.

The state's right to derogate from obligations during special situations (derogation procedure) is provided for in Art. 15 of the Convention, which provides that:

In time of war or other public danger threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations under this Convention, only to the extent that urgency requires position, and provided that such measures do not conflict with its other obligations under international law.[13]

Note that the state has the right to use the derogation procedure only 'to the extent that it is strictly required by the urgency of the situation' (which, of course, is the military aggression of the RF against Ukraine). National discretion regarding the possibility of derogating from convention norms is not unlimited.

The European Court, in the decision on the case *A. and others v. United Kingdom* dated 19 February 2009, emphasises, in particular, that 'even in the most difficult circumstances, such as the fight against terrorism, and regardless of the conduct of the person concerned, the European Convention absolutely prohibits torture and inhuman or degrading treatment and punishment'.[14]

12 Law of Ukraine No 2111-IX of 03 March 2022 'On Amendments to the Criminal Procedural Code of Ukraine and the Law of Ukraine "On Pre-trial Detention" regarding additional regulation of law enforcement activities under martial law' <https://zakon.rada.gov.ua/laws/show/2111-20#n5> accessed 20 December 2022; Law of Ukraine No 2125-IX of 15 March 2022 'On Amendments to the Criminal Procedural Code of Ukraine regarding the procedure for canceling a preventive measure for military service under conscription during mobilization, for a special period or its change for other reasons' <https://zakon.rada.gov.ua/laws/card/2125-20> accessed 20 December 2022; Law of Ukraine No 2137-IX of 15 March 2022 'On Amendments to the Criminal Procedural Code of Ukraine and the Law of Ukraine "On Electronic Communications" regarding increasing the effectiveness of pre-trial investigation "on hot leads" and countering cyberattacks' <https://zakon.rada.gov.ua/laws/show/2137-20#n5> accessed 20 December 2022; Law of Ukraine No 2201-IX of 14 April 2022 'On Amendments to the Criminal Procedure Code of Ukraine on Improving the Procedure for Conducting Criminal Proceedings under Martial Law' <https://zakon.rada.gov.ua/laws/show/2201-20#n2> accessed 20 December 2022; Law of Ukraine No 2462-IX of 27 July 2022 'On Amendments to the Criminal Procedure Code of Ukraine regarding the improvement of certain provisions of pre-trial investigation under martial law' <https://zakon.rada.gov.ua/laws/show/2462-20#n2> accessed 20 December 2022; Law of Ukraine No 2472-IX of 28 July 2022 'On Amendments to the Criminal and Criminal Procedural Codes of Ukraine and other legislative acts of Ukraine regarding the regulation of the procedure for the exchange of persons as prisoners of war' <https://zakon.rada.gov.ua/laws/show/2472-20#n11> accessed 20 December 2022.

13 The Convention for the Protection of Human Rights and Fundamental Freedoms (n 6).

14 *A. and Others v the United Kingdom* App no 3455/05 (ECtHR, 19 February 2009) <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22003-2638619-2883392%22%5D%7D> accessed 20 December 2022.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
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In the legal doctrine[15] and precedent practice[16] of the ECtHR, the criteria (conditions) for the legality of derogating from conventional obligations when conducting criminal proceedings in an emergency situation have been developed, namely: (1) the presence of an exceptional threat; (2) notification;[17] (3) the proportionality of the measures applied during the corresponding retreat, the severity of the emergency situation;[18] (4) inviolability of absolute rights and freedoms;[19] (5) legality.[20]

Thus, in particular, in the decision of the European Court of Justice in the case *Ireland v. United Kingdom* (Application No. 5310/71) dated 18 January 1978, it was stated:

When a state is dealing with an emergency situation that threatens the life of the nation, it would be defenseless if it were required to do everything at once to provide each of its chosen means of action with all the guarantees compatible with the primary requirements for the proper functioning of the authorities and the restoration of peace in the community from the very beginning. The interpretation of Article 15 should leave room for progressive adaptation (p. 220).[21]

In another decision in the case of *Baş v. Turkey* from 3 March 2020[22] (Application No. 66448/17), the Court emphasises:

> States do not enjoy unlimited freedom of action in this regard. It is the Court that must decide whether, in particular, states have gone beyond the "extent strictly necessary by the urgency" of the crisis. Thus, domestic discretion is accompanied by European supervision. In particular, if the derogating measure interferes with a fundamental Convention right, such as the right to liberty, the Court must ensure that it was a genuine response to an emergency, that it was fully justified by the particular circumstances of the emergency, and that adequate safeguards were provided against abuse. In exercising this supervision, the Court must give due consideration to such significant factors as the nature of the rights affected by the derogation and the circumstances giving rise to the emergency and its duration.[23]

15 For more details, see O V Lazukova, *Special regime of pre-trial investigation in conditions of war, state of emergency or in the area of an anti-terrorist operation (Pravo 2018); H Teteryatnik, Criminal proceedings in conditions of emergency legal regimes: theoretical, methodological and praxeological foundations* (Helvetica Publishing House 2021); 'Waiver of obligations during an emergency' <https://kau.in.ua/press-center/espch/vdstup_vd_zobovjazan_pd_chas_nadzvichajnoji_situacji/> accessed 20 December 2022.

16 See, for example, *Ireland v the United Kingdom* App no 5310/71 (ECtHR, 18 January 1978) <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-57506%22%5D%7D> accessed 20 December 2022; Aksoy v Turkey App no 21987/93 (ECtHR, 18 December 1996) <https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-58003%22]}> accessed 20 December 2022; *Brannigan and McBride v the United Kingdom* App no 14553/89 and 14554/89 (ECtHR, 26 May 1993) <https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-9555%22]}> accessed 20 December 2022.

17 Official notification (preliminary or post factum) of the Secretary General of the Council of Europe about the measures taken by the state and the reasons for taking them.

18 The restriction must have a legitimate aim and be proportionate between the means of restriction used and the aim to be achieved.

19 The right to life; prohibition of torture, cruel, inhuman or degrading treatment; prohibition of slavery and servitude; prohibition of punishments in the absence of law; prohibition of deprivation of liberty on the sole grounds that a person is unable to fulfil any contractual obligation; punishment solely on the basis of law; recognition of the legal personality of every person; freedom of thought, conscience and religion.

20 If one or another measure restricts human rights, these restrictions should be defined as precisely as possible, moreover, they should be necessary and correspond to the set goal.

21 *Ireland v the United Kingdom* App no 5310/71 (ECtHR, 18 January 1978) <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-57506%22%5D%7D> accessed 20 December 2022.

22 *BAŞ v. TURKEY* App no 66448/17 (ECtHR, 03 March 2020) <https://hudoc.echr.coe.int/fre?i=001-201761> accessed 20 December 2022.

23 See the decision in the case of Aksoy v Turkey App no 21987/93 (ECtHR, 18 December 1996) <https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-58003%22]}> accessed 20 December 2022; *Brannigan and McBride v the United Kingdom* App no 14553/89 and 14554/89 (ECtHR, 26 May 1993) paras 48-66 <https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-9555%22]}> accessed 20 December 2022.

While resorting to derogation from convention obligations, the legal system of specific states must provide sufficient guarantees for the protection of human rights, in particular, by applying such an institution as habeas corpus, ensuring the right to access professional legal assistance, informing close relatives or other persons about detention, and obtaining medical help.

In the context of the above, it should be noted that Ukraine was forced to resort to the right to derogate from its obligations under the Convention in 2015 as a result of the aggression of the RF, its occupation of parts of the Donetsk and Luhansk regions, as well as the annexation of the Autonomous Republic of Crimea and the city of Sevastopol, which made our state's full implementation of a number of contractual obligations in the field of human rights in these territories impossible. On 21 May 2015, the Verkhovna Rada of Ukraine adopted Resolution No. 462-VIII, which adopted the Statement of the Verkhovna Rada of Ukraine 'On the withdrawal of Ukraine from certain obligations defined by the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms'.[24] Ukraine's withdrawal from certain obligations was informed by submitting Verbal Notes with Declarations and their annexes by the Secretary General of the United Nations and the Secretary General of the Council of Europe, as well as submitting relevant information to the ECtHR.[25] In addition, a number of special laws were adopted, which regulated the possibility of limiting human rights. A systematic analysis of the cited legal acts allows us to state that Ukraine has made a departure from international obligations that guarantee the right to personal integrity (preventive detention), judicial control over the observance of the rights, freedoms, and interests of individuals (transfer of certain powers of investigative judges to prosecutors), other constitutional rights, namely restrictions on staying on the streets and other public places during a certain period of the day without specified documents, temporary restrictions or bans on the movement of vehicles and pedestrians on the streets, roads, and areas, verification of identity documents of individuals, and, if necessary, an inspection of things, vehicles, luggage and cargo, office premises and citizens' homes, except for the restrictions established by the Basic Law. At the same time, large-scale unprovoked military aggression on the part of the RF caused in 2022 the need to further adapt domestic criminal procedural legislation to today's requirements, in particular, in the sense of the realisation of certain fundamental human rights and freedoms, including the right to freedom and personal integrity.[26]

3 THE NON-ALTERNATIVE CHOICE OF DETENTION IN CUSTODY

Laws of Ukraine 'On Amendments to the Criminal Code and Criminal Procedural Code of Ukraine on Improving Responsibility for Collaborative Activities and Features of the Application of Preventive Measures for Crimes Against the Basics of National and Public

24 Resolution of the Verkhovna Rada of Ukraine dated No 462-VIII of 21 May 2015 'On the Statement of the Verkhovna Rada of Ukraine "On the withdrawal of Ukraine from certain obligations defined by the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms"' <https://zakon.rada.gov.ua/laws/show/462-19#Text> accessed 20 December 2022.

25 Concerning a given State (or the European union) <https://www.coe.int/en/web/conventions/concerning-a-given-state-or-the-european-union-?module=declarations-by-state&territoires=&codeNature=0&codePays=U&numSte=&enVigueur=true&ddateDebut=05-05-1949&ddateStatus=05-02-2022> accessed 20 December 2022.

26 For more details, see A R Tumanyants, I O Krytska, 'Exercise of Ukraine's right to derogate from Article 5 of the Convention for the Protection of Human Rights and fundamental freedoms: case law of the European Court of Human Rights in criminal proceedings and domestic realities in martial law' (2022) 5 Legal scientific electronic journal 603-607 <http://www.lsej.org.ua/5_2022/145.pdf> accessed 20 December 2022.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

Security' No. 2198-IX dated 14 April 2022[27] and 'On Amendments to the Criminal Procedural Code of Ukraine regarding the selection of preventive measures for servicemen who committed war crimes during martial law' No. 2531-IX dated 16 August 2022[28] provide a normatively established extraordinary procedure for choosing a preventive measure exclusively in the form of detention under certain conditions, namely: (a) introduction of martial law; (b) a person is suspected or accused of committing crimes provided for in Arts. 109-114[2], 258-258[5], 260, 261, and 437-442 of the Criminal Code of Ukraine[29] (hereinafter the CC of Ukraine); (c) a serviceman is suspected or accused of committing crimes provided for by Arts. 402-405, 407, 408, and 429 of the CC of Ukraine.[30]

We will immediately emphasise that according to the ordinary procedure, in accordance with Part 4 of Art. 176 of the CPC of Ukraine,[31] the application of any preventive measure, in particular, detention for any period, relates to the subject of referral to the investigating judge and the court.

Thus, with the introduced changes, in the presence of risks provided for in Art. 177 of the CPC of Ukraine[32] to persons who are suspected or accused of committing crimes against the foundations of national security, public safety, peace, human security, and international legal order, as well as to military personnel who are suspected or accused of committing crimes against the established order of military service (military criminal offences), no other preventive measure softer than detention can be applied.

The purpose of the legislative changes that took place in connection with the adoption of the above-mentioned Laws was, as follows from the explanatory notes, to prevent existing facts and risks of violations by persons suspected (accused) of committing serious and especially serious crimes against the foundations of national and public security of Ukraine, the requirements of the CPC of Ukraine, concealment from pre-trial investigation bodies and the court, resulting in non-fulfilment by the latter of the provisions of Art. 2 of the CPC of Ukraine, the tasks of criminal proceedings, under the conditions of the existing military aggression of the RF against Ukraine, during which various forms and methods of destabilisation and influence on the internal political and social processes of the state are used,[33] as well as the impossibility of applying any other preventive measures, except detention, to servicemen who committed separately defined war crimes during martial law.[34] However, in pursuing the above-described goal, the legislator did not provide a systematic approach to making corrections in the text of the criminal procedural law.

27 Law of Ukraine No 2198-IX of 14 April 2022 'On Amendments to the Criminal and Criminal Procedural Codes of Ukraine regarding the improvement of responsibility for collaborative activity and the specifics of the application of preventive measures for committing crimes against the foundations of national and public security' <https://zakon.rada.gov.ua/laws/show/2198-20#n12> accessed 20 December 2022.

28 Law of Ukraine No 2531-IX of 16 August 2022 'On Amendments to the Criminal Procedure Code of Ukraine regarding the selection of preventive measures for military personnel who committed war crimes during martial law' <https://zakon.rada.gov.ua/laws/show/2531-20#n3> accessed 20 December 2022.

29 Criminal Code of Ukraine No 2341-III of 5 April 2001 <https://zakon.rada.gov.ua/laws/show/2341-14#Text> accessed 20 December 2022.

30 Criminal Code of Ukraine (n 33).

31 Criminal Procedure Code of Ukraine (n 14).

32 Ibid.

33 Explanatory note to the Law of Ukraine project 'On Amendments to the Criminal and Criminal Procedural Codes of Ukraine regarding the improvement of responsibility for collaborative activities and the specifics of the application of preventive measures for committing crimes against the foundations of national and public security' <https://itd.rada.gov.ua/billInfo/Bills/pubFile/1247318> accessed 20 December 2022.

34 Explanatory note to the Law of Ukraine project 'On Amendments to the Criminal Procedure Code of Ukraine (regarding the selection of preventive measures for servicemen who committed war crimes during martial law)' <https://itd.rada.gov.ua/billInfo/Bills/pubFile/1339013> accessed 20 December 2022.

It must be stated that this is not the first attempt of the legislator to outline the list of criminal offences, for the commission of which the possibility of applying a preventive measure in the form of detention was imperatively established. Thus, by the Law of Ukraine 'On Amendments to the Criminal Code and Criminal Procedural Code of Ukraine regarding the inevitability of punishment for certain crimes against the foundations of national security, public security and corruption crimes' dated 7 October 2014 No. 1689-VII, Art. 176 of the CPC was supplemented by part five, according to which preventive measures in the form of personal commitment, personal guarantee, house arrest, bail cannot be applied to persons who are suspected or accused of committing crimes provided for by Arts. 109-114[1], 258-258[5], 260, and 261 of the CC of Ukraine.[35]

At the same time, the specified normative provisions of Part 5 of Art. 176 of the CPC of Ukraine by decision of the Constitutional Court of Ukraine No. 7-r/2019 dated 25 June 2019 were recognised as not in accordance with the Constitution of Ukraine (are unconstitutional). In the justification of its decision, it was indicated:

> Restrictions on the realization of constitutional rights and freedoms cannot be arbitrary and unfair, they must pursue a legitimate goal, be conditioned by the social necessity of achieving this goal, proportional and justified, in the case of limiting a constitutional right or freedom, the legislator is obliged to implement such legal regulation that will make it possible to optimally achieve a legitimate goal with minimal interference in the realization of this right or freedom (paragraph three of subsection 2.1 of paragraph 2 of the motivational part of the Decision dated June 1, 2016 No. 2-рп/2016). However, in the opinion of the Constitutional Court of Ukraine, the legislator, having established such a preventive measure as detention exclusively, for persons who are suspected or accused of committing crimes provided for in Articles 109-114[1], 258-258[5], 260, 261 of the Criminal Code of the Code of Ukraine, did not comply with the specified requirements.[36]

When expressing one's own position regarding the constitutionality of the above legislative innovations, it should be noted that, according to the practice of the European Court, certain guarantees of fundamental human rights and freedoms enshrined in the Convention can be narrowed in view of the degree of public danger of a certain category of crimes, in particular, terrorism. At the same time, it is important that the establishment of a lower threshold of these guarantees does not encroach on the very essence of human rights and freedoms, thereby depriving them of their value. Thus, in particular, in the decision in the case of *Fox, Campbell and Hartley v. United Kingdom*[37] of 30 August 1990, § 32, it is stated that in the situation of terrorism in Northern Ireland, the reasonableness of suspicion for arrest cannot always be justified on the basis of the same standards that apply to ordinary crime. Nevertheless, the Court should be able to make sure that the guarantee against arbitrary arrest and detention, provided for in paragraph 'c' of Art. 5 of the Convention, was ensured and thereby obtain at least some facts or information that could convince him that the arrested person is reasonably suspected of committing a crime.

Restriction of the right to freedom and personal integrity should be carried out only for a legitimate purpose, which is provided by law, is necessary for a democratic society, and

35 Criminal Code of Ukraine (n 33).

36 Case No 3-68/2018(3846/17, 2452/18, 3657/18, 347/19) [2019] Constitutional Court of Ukraine <https://zakon.rada.gov.ua/laws/show/v007p710-19#Text> accessed 20 December 2022.

37 *Fox, Campbell et Hartley v. RoyaumeUni* App no 12244/86; 12245/86; 12383/86 (ECtHR, 27 March 1991) <https://hudoc.echr.coe.int/app/conversion/docx/pdf?library=ECHR&id=001-62277&filename=AFFAIRE%20FOX%2C%20CAMPBELL%20ET%20HARTLEY%20c.%20ROYAUME-UNI.pdf&logEvent=False> accessed 20 December 2022.

takes into account the principle of proportionality, which is one of the components of the rule of law. As the ECtHR notes in its decisions,[38] the principle of proportionality means that when interpreting the Convention and its provisions to a specific situation, it is necessary to achieve a balance between the interests of society and human rights. That is, when analysing the articles of the Convention, in which, next to the fundamental right of an individual, it is said that the limitation of this right under certain circumstances, one should proceed from these criteria. So, for example, in Arts. 8-11 of the Convention, it is indicated that the state can limit the protected right if it is 'necessary in a democratic society'. The relevant provision means that any limitation of a protected right must be proportionate to the purpose pursued by this limitation. At the same time, however, the principle of proportionality should not change the very essence of the protected right. The principle of proportionality in the field of preventive measures requires that such restrictions are necessary under specific circumstances. In addition, investigative bodies must prove that the application of a less severe measure will not be sufficient to achieve the effectiveness of criminal proceedings. In order to implement this principle, a regulatory provision has been established that the court refuses to apply a preventive measure unless it is proven that milder measures cannot prevent the risks that the investigation will point to (Part 3 of Art. 176 of the CPC of Ukraine).[39]

The purpose of applying preventive measures in accordance with Part 1 of Art. 177 of the CPC of Ukraine[40] is to ensure that suspects and accused persons fulfil the procedural duties assigned to them, as well as to prevent attempts to hide from pre-trial investigation bodies and/or the court; destroy, hide, or distort any of the things or documents that are essential for establishing the circumstances of a criminal offence; illegally influence the victim, witness, suspect, accused, expert, specialist in the same criminal proceedings; obstruct criminal proceedings in other ways; commit another criminal offence or continue a criminal offence in which the person is suspected or accused.

The basis for the application of a preventive measure is complex and includes, first, the existence of a well-founded suspicion that a person has committed a criminal offence; secondly, the existence of a risk (risks) that give the investigating judge or the court, sufficient grounds to believe that the suspect or the accused may carry out the actions provided for in Part 1 of Art. 177 CPC of Ukraine.[41]

The general definition of the concept of 'reasonable suspicion' that a person has committed a criminal offence is formulated in the legal positions of the ECtHR. In particular, in the decision in the case *Nechiporuk and Yonkalo v. Ukraine*[42] dated 21 April 2011. The ECtHR noted that 'reasonable suspicion' presupposes the presence of circumstances or information that would convince an impartial observer that this person may have committed a certain crime. The requirement of reasonable suspicion is a significant part of the guarantee against arbitrary detention and keeping in custody. In the absence of reasonable suspicion, a person may not

38 *Soering v the United Kingdom* App no 14038/88 (ECtHR, 7 July 1989) para 89 <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57619%22]}> accessed 20 December 2022; *Matheieu-Mohin and Clerfayi v Belgium* App no 9267/81 (ECtHR, 2 March 1987) <https://hudoc.echr.coe.int/app/conversion/pdf?library=ECHR&id=001-87677&filename=CLERFAYT%20AND%20OTHERS%20v.%20BELGIUM.pdf> accessed 20 December 2022; Ashingdane v UK App no 8225/78 (ECtHR, 12 May 1983) para 57 <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-73506&filename=ASHINGDANE%20V.%20THE%20UNITED%20KINGDOM.pdf> accessed 20 December 2022.

39 Criminal Procedure Code of Ukraine (n 14).

40 Ibid.

41 Ibid.

42 Nechiporuk and Yonkalo v Ukraine App no 42310/04 (ECtHR, 21 April 2011) <https://hudoc.echr.coe.int/fre#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-104613%22]}> accessed 20 December 2022.

under any circumstances be detained or taken into custody for the purpose of forcing him to confess to a crime, to testify against other persons, or to obtain from him facts or information that may serve as a basis for reasonable suspicion. Therefore, the CPC stipulates that by the request of the investigator, the prosecutor for the application of a preventive measure, specific circumstances that give grounds to suspect a person of committing a criminal offence must be provided, as well as references to materials confirming these circumstances (clause 3, Part 1, Art. 184 of the CPC of Ukraine).[43] When considering such a request, 'the competent court must check not only compliance with the procedural requirements of national legislation, but also the validity of the suspicion on the basis of which the detention was carried out, and the legality of the purpose of this detention and further detention' (ECtHR decision in the case *Myronenko and Martenko v. Ukraine*[44] from 10 December 2009).

The second component of the basis for the application of a preventive measure is the risks specified in Part 1 of Art. 177 of the CPC of Ukraine.[45] Such risks are understood as the presence of information obtained from sources provided for by law, which testify to the possibility of the occurrence of the specified manifestations of illegal behaviour of the suspect or the accused in the future. Thus, proving the reasons for the application of preventive measures is predictive in nature; that is, it is aimed at the future, but it must be based on specific factual data that testify to the validity of the decision made. The presence of the specified risks must be confirmed by the relevant evidence, which together allows us to assert the existence of grounds for the application of a preventive measure with reasonable probability.

In addition, when deciding on the issue of choosing a preventive measure, the investigating judge or the court is obliged to assess all the circumstances in total, including those provided for in Art. 178 of the CPC of Ukraine:[46] 1) the weight of the available evidence about the commission of a criminal offence by the suspect or the accused; 2) the severity of the punishment that threatens the relevant person in case the suspect or the accused is found guilty of the criminal offence of which he is suspected or accused; 3) age and state of health of the suspect or the accused; 4) the strength of social ties of the suspect or the accused in his place of permanent residence, including the presence of his family and dependents; 5) presence of the suspect or the accused in a permanent place of work or study; 6) the reputation of the suspect or the accused; 7) property status of the suspect or the accused; 8) presence of criminal records of the suspect or the accused; 9) compliance by the suspect or the accused with the conditions of the applied preventive measures, if they were applied to him earlier; 10) presence of notification to a person of suspicion of committing another criminal offence; 11) the amount of property damage that the accused person is suspected of causing, or the amount of income that the accused person is suspected of receiving as a result of committing a criminal offence, as well as the weight of the available evidence that substantiates the relevant circumstances.

One of the precautionary measures used in criminal proceedings is detention. In accordance with Part 1 of Art. 183 of the CPC of Ukraine, detention is an exclusive preventive measure, which is applied only if the prosecutor proves that none of the milder preventive measures will be able to prevent the risks provided for in Art. 177 of the CPC of Ukraine, except for the cases provided for in Parts 6 and 7 of Art. 176 of the CPC of Ukraine.[47]

43 Criminal Procedure Code of Ukraine (n 14).

44 *Myronenko and Martenko v Ukraine* App no 4785/02 (ECtHR, 10 December 2009) <https://hudoc.echr.coe.int/fre?i=001-96195> accessed 20 December 2022.

45 Criminal Procedure Code of Ukraine (n 14).

46 Ibid.

47 Criminal Procedure Code of Ukraine (n 14).

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
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Therefore, as a general rule, the reason for choosing a preventive measure in the form of detention, in addition to the above-mentioned circumstances, also includes the fact that none of the milder preventive measures will be able to prevent the risks provided in Art. 177 of the CPC of Ukraine.[48] This approach of the legislator to the settlement of this issue is fully justified, given the fact that detention significantly limits a person's constitutional right to freedom and personal integrity, guaranteed by Art. 29 of the Constitution of Ukraine[49] and Art. 5 of the ECHR.[50] Not being absolute, this right may be subject to limitations, but when they are applied, guarantees must be observed to ensure the legality of interference with human rights.

The application of the mentioned provisions, which in general ensure the legality of the restriction of a fundamental human right, to the assessment of compliance with the content of Parts 6 and 7 of Art. 176 of the CPC of Ukraine[51] and Art. 29 of the Constitution of Ukraine[52] allows one to conclude that the limitation of the right to freedom and personal integrity provided for by the CPC of Ukraine only through the use of detention pursues a legitimate goal, which is to prevent persons who are reasonably suspected of committing crimes of the above category from hiding from investigation and court, as well as perform any actions provided for in Part 1 of Art. 177 of the CPC of Ukraine,[53] which, in our opinion, can be considered fully justified, taking into account the difficult situation in the country associated with military aggression. In this regard, the ECtHR noted that the Court's functions do not include the determination of measures that are the most appropriate from the point of view of an emergency situation since the question of the ratio of measures aimed at the effective fight against terrorism and the respect of individual rights belongs to the direct responsibility of the government. The Court reminds that each participating state is responsible for the life of [its] nation, and it is up to it to determine whether society is threatened and, if so, what measures should be taken to eliminate it. Directly and constantly facing dangerous realities, national authorities are, in principle, in a better position than an international judge to determine the presence of such a danger, the nature and possible degree of deviations from their obligations necessary to overcome it. Therefore, they should be given wide discretion in this matter (decision on the case *Ireland v. United Kingdom*[54] of 18 January 1978, Series A No. 25, paras. 78-79, para. 207).

That is, at the stage of choosing a preventive measure in criminal proceedings of the above-mentioned category of crimes, the right to freedom and personal integrity is limited by using only detention, but there are guarantees that are sufficient to establish the reasonableness of the intervention, because when choosing this preventive measure, the investigating judge ensures the implementation of the judicial control, during which he checks the validity of suspicion of a person in committing a crime, the presence of risks prescribed by law, and only on the condition that these two grounds are proven, issues a decision to keep the suspect in custody.

At the same time, it is necessary to pay attention to certain shortcomings of the considered innovations.

(A) Formulating Parts 6 and 7 of Art. 176 of the CPC of Ukraine, the legislator used approximately the same terminological construction:

48 Ibid.

49 Constitution of Ukraine (n 5).

50 The Convention for the Protection of Human Rights and Fundamental Freedoms (n 6).

51 Criminal Procedure Code of Ukraine (n 14).

52 Constitution of Ukraine (n 5).

53 Criminal Procedure Code of Ukraine (n 14).

54 *Ireland v the United Kingdom* App no 5310/71 (ECtHR, 18 January 1978) <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-57506%22%5D%7D> accessed 20 December 2022.

> During the period of martial law, to persons/military personnel who are suspected or accused of committing crimes provided for in Articles 109-114[2], 258-258[5], 260, 261, 402-405, 407, 408, 429, 437-442 of the Criminal Code of Ukraine, the preventive measure specified in clause 5 of the first part of this article is applied exclusively[55].

The use of the word 'applied' in the context of the above sentence (instead of the word 'chosen') makes it possible to state the impossibility of further changing this preventive measure to any other, which de facto turns further judicial control (which is carried out during the pre-trial investigation and proceedings in the court of first instance and exists *de jure*) into a formality.

In our opinion, there is no possibility to change this preventive measure to another one, despite the passage of time, the reduction of the risks that led to the selection of a preventive measure in the form of detention, disclosure, and investigation of the crime, the assistance of the suspect or the accused to the authorities of the pre-trial investigation in the resolution of the crime, deterioration of health of the suspect or the accused, etc., violates the substantive component of the right to freedom and personal integrity, guaranteed by Art, 29 of the Constitution of Ukraine, because such legal regulation encroaches on the essential content of this right, turning it into a declaration.

In the case *Khairedinov v. Ukraine*, dated 14 October 2010, the European Court noted the following:

> There is a presumption in favor of dismissal. The Court has consistently noted in its practice that the second aspect of paragraph 3 of Article 5 of the Convention does not give the courts a choice between bringing the accused to justice within a reasonable time and temporarily releasing him during the proceedings. Until conviction, the accused must be presumed innocent and the purpose of this provision essentially requires his temporary release from custody as soon as his further detention ceases to be justified. The Court cannot fail to note the fact that during the entire period under consideration, the national authorities never considered the possibility of securing the applicant's appearance in court by applying alternative preventive measures, such as a stay order or bail, which the applicant expressly requested.[56]

In the decision on the case *Kharchenko v. Ukraine*[57] from 10 February 2011, the ECtHR emphasised that, according to para. 3 of Art. 5, after a certain period of time, only the existence of reasonable suspicion ceases to be a reason for deprivation of liberty, and the judicial authorities are obliged to provide other reasons for continued detention. In addition, such grounds must be clearly indicated by national courts.

In terms of regulation of Parts 6 and 7 of Art. 176 of the CPC of Ukraine,[58] the suspect or the accused is effectively deprived of the right to request his release from custody and the application of an alternative preventive measure to him since, as it is enshrined in the current law, in this category of criminal proceedings, such a right, in view of the prohibition of the application of alternative preventive measures, is a legal fiction.

(B) The Criminal Procedure Law establishes a clear and comprehensive list of cases in which it is permissible to apply a preventive measure in the form of detention (Part 2 of Art. 183).[59]

55 Criminal Procedure Code of Ukraine (n 14).

56 *Hayredinov v Ukraine* App no 38717/04 (ECtHR, 14 October 2010) <https://hudoc.echr.coe.int/fre?i=001-100958> accessed 20 December 2022.

57 *Kharchenko v Ukraine* App no 37666/13 (ECtHR, 3 October 2019) <https://hudoc.echr.coe.int/app/conversion/docx/pdf?library=ECHR&id=001-196145&filename=CASE%20OF%20KHARCHENKO%20v.%20UKRAINE.pdf&logEvent=False> accessed 20 December 2022.

58 Criminal Procedure Code of Ukraine (n 14).

59 Ibid.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

In particular, the indicated preventive measure can be applied to a previously unconvicted person who is suspected or accused of committing a crime punishable by imprisonment for a term of more than five years (clause 4, Part 2, Art. 183 of the CPC of Ukraine),[60] as well as to a previously convicted person who is suspected or accused of committing a crime punishable by imprisonment for a term of more than three years (clause 4, Part 2, Art. 183 of the CPC of Ukraine).[61] That is, in a situation where taking into account the severity of the possible punishment and the presence or absence of a criminal record, a preventive measure in the form of detention cannot be chosen for a person, but at the same time, there are risks provided for in Part 1 of Art. 177 of the CPC, the investigator or the prosecutor is obliged to ask the investigating judge the question of choosing another, less strict preventive measure.

Analysis of sanctions of articles of the CC listed in Parts 6 and 7 of Art. 176 of the CPC of Ukraine[62] makes it possible to state that not every one of them provides for punishment in the form of deprivation of liberty for a term of more than five years (or at least more than three years, if we are talking about a previously convicted person), which, according to the requirements of Part 2 of Art. 183 of the CPC of Ukraine[63] is necessary for the application of a preventive measure in the form of detention. In particular, Part 2 of Art. 109 and Part 1 of Art. 258^2 of the CC of Ukraine[64] provides for punishment in the form of restriction of freedom for a term of up to three years or deprivation of liberty for the same term; Part 3 of Art. 109 of the CC of Ukraine[65] – restriction of freedom for a term of up to five years or imprisonment for the same term; Part 1 of Art. 110, Part 1 of Art. 110^2, and Part 1 of Art. 258^1 of the CC of Ukraine[66] – deprivation of liberty for a term of three to five years; Part 2 of Art. 258^2 and Part 1 of Art. 260 of the CC of Ukraine[67] – imprisonment for up to five years. Accordingly, in the case of qualification of the suspect's actions according to the above-mentioned parts of the articles of the CC of Ukraine, on the one hand, a preventive measure in the form of detention cannot be chosen due to the requirements of Part 2 of Art. 183 of the CPC of Ukraine[68] (unless the prosecutor, in addition to the grounds provided for in Art. 177 of the CPC of Ukraine, proves that, while at large, this person hid from the pre-trial investigation body or the court, obstructed criminal proceedings, or was notified of the suspicion of committing another crime (clauses 2, 3, Part 2 of Art. 183 of the CC of Ukraine), and on the other hand, Part 6 of Art. 176 of the CC of Ukraine[69] prohibits choosing any other preventive measure.

The approach outlined in Parts 6 and 7 of Art. 176 of the CPC of Ukraine[70] essentially does not take into account the idea of individualising the application of preventive measures, as it eliminates the possibility of choosing any milder preventive measure, in particular in the case when the risks (escape, obstructing the investigation, etc.) are significantly reduced, taking into account the individual characteristics of the suspect or the accused. Suspicion in itself, the accusation of committing even a serious or especially serious crime without taking into account the identity of the suspect or the accused, the way the crime was committed, the

60 Ibid.
61 Ibid.
62 Ibid.
63 Ibid.
64 Ibid.
65 Ibid.
66 Ibid.
67 Ibid.
68 Ibid.
69 Ibid.
70 Ibid.

evidence confirming his guilt, and other circumstances cannot be the basis for 'automatic' detention of the suspect or accused.

In addition, this kind of approach does not take into account the position expressed at the time by the Constitutional Court of Ukraine in the decision in the case on the constitutional submission of 50 People's Deputies of Ukraine regarding the compliance with the Constitution of Ukraine (constitutionality) of the provisions of Art. 150 of the CPC of Ukraine regarding the gravity of the crime (the case of taking into account on the gravity of the crime when a preventive measure is applied) dated 8 July 2003 No. 14-rp/2003, it was established that when deciding on the application of a preventive measure *together with other circumstances, the gravity of the crime,* of which the person is suspected or accused is taken into account.[71]

In numerous judgments of the ECtHR,[72] it was established that the gravity of the accusation could not in itself serve as a justification for a person's long pre-trial detention.

4 EXTENSION OF THE PERIOD OF DETENTION IN CUSTODY

From the point of view of a person's right to freedom and personal integrity, the issue of extending the term of detention requires an appeal to the general principles developed in the precedent practice of the ECtHR, which determine the legitimacy of further deprivation of a person's liberty, namely: (1) prolonged detention may be justified in a specific case only if there are clear signs of the existence of a public interest, which, despite the presumption of innocence, prevails over the principle of respect for personal freedom, enshrined in Art. 5 of the Convention; (2) the existence of reasonable suspicion is a condition *sine qua non* for the legality of long-term detention, but after a certain period of time, such suspicion will no longer be sufficient: therefore, the Court must establish: a) whether other grounds given by the judicial authorities continued to justify the deprivation of liberty, and b) if such grounds were 'relevant' and 'sufficient', whether the national authorities showed 'special care' during the proceedings; (3) the duty of the official who administers justice to indicate appropriate and sufficient reasons (danger of concealment from the investigation, risk of putting pressure on witnesses or falsification of evidence, risk of conspiracy, risk of re-committing a crime, risk of causing a breach of public order, as well as the need of protection of the detainee) detention, in addition to the existence of well-founded suspicion, relies on it from the moment of the first decision on the application of a preventive measure in the form of detention; (4) when deciding on the issue of release or further detention of a person in custody, state authorities are obliged to consider alternative means of ensuring his appearance in court.[73]

According to Part 2 of Art. 615 of the CPC of Ukraine,[74] the head of the relevant prosecutor's

71 Case No. 14-рп/2003 [2003] Constitutional Court of Ukraine <https://zakon.rada.gov.ua/laws/show/v014p710-03#Text> accessed 20 December 2022.

72 See, for example, *Mamedova v Russia* App no 7064/05 (ECtHR, 1 June 2006) <https://hudoc.echr.coe.int/app/conversion/docx/?library=ECHR&id=001-98574&filename=MAMEDOV%20v.%20RUSSIA.docx&logEvent=False> accessed 20 December 2022; *Hayredinov v Ukraine* App no 38717/04 (ECtHR, 14 October 2010) <https://hudoc.echr.coe.int/fre?i=001-100958> accessed 20 December 2022; *Panchenko v. Russia* App no 11496/05 (ECtHR, 11 June 2015) <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-155085&filename=001-155085.pdf&TID=ihgdqbxnfi> accessed 20 December 2022; *Kalashnikov v Russia* App no 47095/99 (ECtHR, 15 July 2002) <https://hudoc.echr.coe.int/eng?i=001-60606> accessed 20 December 2022.

73 See *Buzadji v. the Republic of Moldova* App no 23755/07 (ECtHR, 05 July 2016) <https://hudoc.echr.coe.int/eng?i=001-172357> accessed 20 December 2022; *Hrubnyk v Ukraine* App no 58444/15 (ECtHR, 17 September 2020) <https://hudoc.echr.coe.int/fre?i=001-204604> accessed 20 December 2022; *Avraimov v Ukraine* App no 71818/17 (ECtHR, 04 October 2017) <https://hudoc.echr.coe.int/fre?i=001-180440> accessed 20 December 2022.

74 Criminal Procedure Code of Ukraine (n 14).

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

office is authorised to repeatedly extend the validity period of the decision of the investigating judge or the decision of the head of the prosecutor's office on detention for up to one month. At the same time, the term of detention can be extended repeatedly within the term of the pre-trial investigation. In comparison with the general procedure provided for in Arts. 197 and 199 of the CPC of Ukraine,[75] we note that the relevant powers are vested exclusively in the investigative judge. Examining the normative construction of the extension of the term of detention in the light of international standards and precedent practice of the ECtHR, we note that the expression 'judge or other person authorized by law to exercise judicial power' is equated with the concept of 'competent judicial authority' in clause (c) Part 1 of Art. 5 of the ECHR. It is important that the 'official' provides guarantees corresponding to the 'judicial power', and for this, he must be independent of the executive power and the parties.[76] At the same time, the impartiality of such a person authorised to exercise judicial power may cause reasonable doubts if he has the right to participate in the further consideration of the case as a representative of the prosecution.[77] Thus, without a doubt, the delegation of the relevant powers from the investigating judge to the head of the prosecutor's office constitutes the deviation of Ukraine from its obligations under Art. 5 of the ECHR, about which the Secretary General of the Council of Europe was informed on 28 February 2022. However, we state that a possible alternative would be the revival of military courts in Ukraine, which are able to ensure the administration of justice and judicial control, including in wartime conditions.[78]

It is worth noting that, unlike Part 1 of Art. 615 of the PC of Ukraine,[79] delegating to the head of the relevant prosecutor's office the authority of the investigating judge to extend the term of detention, the legislator does not indicate such a caveat as the absence of an objective possibility of exercising such powers by the investigating judge. In any case, in our opinion, the real lack of an objective possibility for the investigating judge to exercise his powers must be substantiated every time in the relevant procedural decision, which, in particular, is noted in the letter of the Supreme Court 'Regarding certain issues of conducting criminal proceedings under the conditions of martial law' dated 3 March 2022 No. 1/0/2-22[80] and the recommendations of the Council of Judges of Ukraine 'Regarding taking urgent measures to ensure the stable functioning of the judiciary in Ukraine in the conditions of termination of the powers of the High Council of Justice and military actions by the Russian Federation' dated 24 February 2022 No. 9.[81]

Reflecting on the legitimacy of the above legislative innovations, we state: the European Court has repeatedly pointed out that the establishment of legislative procedures that limit the powers of national courts in relation to the protection of a person from arbitrary interference

75 Ibid.

76 *Schiesser v Switzerland* App no 7710/76 (ECtHR, 4 December 1979) <https://hudoc.echr.coe.int/eng?i=001-57573> accessed 20 December 2022.

77 *Brincat v Italy* App no 13867/88 (ECtHR, 26 11 1992) <https://hudoc.echr.coe.int/eng?i=001-57769> accessed 20 December 2022.

78 For more details, see Oksana Kaplina, Serhii Kravtsov, Olena Leyba 'Militari justice in Ukraine: renaissance during wartime' (2022) 3 (15) Access to Justice in Eastern Europe 120-136. DOI: https://doi.org/10.33327/AJEE-18-5.2-n000323.

79 Criminal Procedure Code of Ukraine (n 14).

80 Letter of the Supreme Court No. 1/0/2-22 of 03 March 2022 'Regarding certain issues of conducting criminal proceedings under martial law' <https://supreme.court.gov.ua/supreme/pres-centr/news/1261413/> accessed 20 December 2022.

81 Recommendations of the Council of Judges of Ukraine No 9 'Regarding taking urgent measures to ensure the stable functioning of the judiciary in Ukraine in the conditions of the termination of the powers of the High Council of Justice and military actions by the Russian Federation' of 24 February 2022 <https://ips.ligazakon.net/document/MUS36788> accessed 20 December 2022.

by the state in their right to freedom violates para. 3 of Art. 5 of the Convention.[82] At the same time, such a retreat in the conditions of the military conflict in Ukraine is permissible, proportional (commensurate) to the acuteness of the emergency situation, and, as noted by J. McBride, such measures should be no more than strictly necessary as guarantees against possible abuse of powers.[83]

The peculiarities of the extension of the term of detention are also established in court proceedings. Thus, in Parts 5 and 6 of Art. 615 of the CPC of Ukraine[84] provides for the possibility of automatic extension of the term of the preventive measure in the form of detention until the relevant issue is resolved in a preparatory court session or in a court trial, but not for more than two months.

In contrast to the ordinary procedure provided for in Part 3 of Art. 315 and Art. 331 of the CPC of Ukraine,[85] which regulates the prohibition of 'automatic' extension of the term of detention, an extraordinary procedure is introduced, but in the presence of certain conditions, namely: a) the impossibility of holding a preparatory court session (which must be established in each specific case); b) a preventive measure in the form of detention, which was applied at the stage of pre-trial investigation, is considered extended for no more than two months; c) the impossibility of holding a court session to resolve the issue of the feasibility of further extending the term of detention of the accused; d) the selected preventive measure in the form of detention is considered extended until the relevant issue is resolved by the court but for no more than two months.

Contextually, one should refer to the decision of the Constitutional Court of Ukraine No. 1-p/2017 dated 23 November 2017, which recognised that:

continuation by the court during the preparatory court session of the application of measures to ensure criminal proceedings regarding preventive measures in the form of house arrest and detention in the absence of petitions of the prosecutor violates the principle of equality of all participants in the judicial process, as well as the principle of independence and impartiality of the court, since the court takes the side of the prosecution in determining the presence of risks under Article 177 of the Code, which affect the necessity of continuing house arrest or detention at the stage of court proceedings in the court of first instance. When the judge, in the absence of requests from the parties (of the prosecutor), initiates the issue of continuing the detention of the accused in custody or under house arrest, he goes beyond the judicial function and actually takes the side of the prosecution, which is a violation of the principles of independence and impartiality of the judiciary.[86]

Therefore, the third sentence of Art. 315 of the CPC of Ukraine was declared unconstitutional. In this way, the court of constitutional jurisdiction implemented the observations of the European Court expressed in the decisions on the pilot cases *Chaniev v. Ukraine*,[87] para. 30 and *Kharchenko v. Ukraine*, dated 5 October 2011.[88]

82 See decision in the cases of *S.B.C. v the United Kingdom* App no 39360/98 (ECtHR, 19 June 2001) para 23 i 24 <https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-5635%22]}> accessed 20 December 2022; *Boicenco v Moldova* App no 41088/05 (ECtHR, 11 July 2006) para 134-138 <https://hudoc.echr.coe.int/fre?i=002-3201> accessed 20 December 2022; *Piruzyan v Armenia* App no 33376/07 (ECtHR, 26 June 2012) para 105 i 106 <https://hudoc.echr.coe.int/eng?i=001-111631> accessed 20 December 2022.

83 Jeremy McBride, 'To what extent does the fight against the coronavirus infection allow restrictions on human rights' (*Zakon i Biznes*, 04 April – 10 April 2020) <https://zib.com.ua/ua/142070-covid-19_i_konvenciya_u_yakiy_miri_borotba_z_koronavirusnoyu.html> accessed 20 December 2022.

84 Criminal Procedure Code of Ukraine (n 14).

85 Ibid.

86 Case No 1-p/2017 [2017] Constitutional Court of Ukraine <https://zakon.rada.gov.ua/laws/show/v001p710-17#Text> accessed 20 December 2022.

87 *Chanyev v Ukraine* App no 46193/13 (ECtHR, 9 October 2014) para 30 <https://hudoc.echr.coe.int/fre?i=001-146778> accessed 20 December 2022.

88 *Kharchenko v Ukraine* (n 61).

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

Thus, we believe that the 'automatic' extension of the term of detention of a person in custody without appropriate requests from the prosecution and without checking the presence of new or previous risks and assessing the expediency of further deprivation of liberty, introduced into national legislation, does not correlate with international standards of limiting the right to freedom and personal integrity and does not correspond to the legal positions of the ECtHR expressed, in particular, in the decision on the cases *Tejs v. Romania*[89] (§ 40), *Swepsta v. Latvia*[90] (§ 86), and others.

In our opinion, in order to ensure the implementation of conventional guarantees when solving the issue, in particular, about the continuation of detention in conditions of martial law, it is possible to involve other institutions, for example, changing the jurisdiction of the consideration of the petition, holding a court hearing in the corresponding judicial control procedure using available technical means of video communication in order to ensure the remote participation of a person, as provided for in Clause 6, Part 1 of Art. 615 of the CPC of Ukraine.[91]

In the special legal literature, attention is drawn to the applied problem, which is connected with the fact that, in accordance with Part 3 of Art. 615 of the CPC, the prosecutor, in the absence of an objective possibility of further conduct, completion of the pre-trial investigation, and an appeal to the court with an indictment, a request for the release of a person from criminal responsibility, must decide before making a decision on suspension of pre-trial investigation. However, the legislator did not pay attention to the question of a possible situation when the term of detention may exceed the term of the pre-trial investigation in those proceedings in which a decision was made to stop the pre-trial investigation because the term of the pre-trial investigation in such a case, in accordance with clause 3 Part 1 of Art. 615 of the CPC, is suspended, and the term of detention is not.[92]

5 CONCLUSIONS

The conducted research gave the authors the opportunity to draw the following conclusions. Normative regulation of ensuring a person's right to freedom and personal integrity, as well as determining the grounds for lawful restriction of a person's right to freedom and personal integrity when applying preventive measures in criminal proceedings, are not able to protect a person as a participant in criminal proceedings from possible oppression of rights by the relevant state authorities. That is why, at the regulatory level, effective guarantees of compliance with a person's right to freedom and personal integrity in criminal proceedings should be provided.

The challenges faced by Ukraine in connection with Russian aggression determined the transformation of the institution of measures to ensure criminal proceedings. Peculiarities of the regulatory regulation of pre-trial investigation and trial in martial law conditions lead to the introduction of extraordinary procedures in the application of preventive measures, the systematic analysis of which indicates that our state will not be able to fulfil certain obligations regarding, in particular, its observance of international standards in the field of rights of a person in full due to objective reasons, a state of necessity.

89 *Tase v. Romania* App no 29761/02 (ECtHR, 10 June 2008) para 40 <https://hudoc.echr.coe.int/fre?i=001-86861> accessed 20 December 2022.

90 *Svipsta v Latvia* App no 66820/01 (ECtHR, 9 March 2006) para 86 <https://hudoc.echr.coe.int/app/conversion/docx/pdf?library=ECHR&id=001-185929&filename=CASE%20OF%20SVIPSTA%20v.%20LATVIA%20%E2%80%93%20%5BRussian%20translation%5D%20summary%20by%20Development%-20of%20Legal%20Systems%20Publ.%20Co%20.pdf&logEvent=False> accessed 20 December 2022.

91 Criminal Procedure Code of Ukraine dated (n 14).

92 Tetiana Fomina, Victoriia Rogalska, 'Preventive measures under martial law: what has changed' (*Zakon i Biznes*, 19 May 2022) <https://zib.com.ua/ua/151472.html> accessed 20 December 2022.

At the stage of choosing a preventive measure in criminal proceedings, in particular, against the foundations of national and public security, peace, human security, and international legal order, against the established order of military service, the right to freedom and personal integrity is limited by applying only detention due to increased public danger of the above-mentioned crimes, but there are guarantees that are sufficient to establish the reasonableness of the intervention, because when choosing this preventive measure, the investigating judge ensures the implementation of judicial control, during which he checks the validity of the suspicion of a person in committing a crime, the presence of risks provided for by law, and only on the condition that these are proven issues a decision to detain the suspect on two grounds.

However, at the stage of the extension of the term of detention, the suspect or the accused is effectively deprived of the right to request their release from custody and the application of an alternative preventive measure to them, which contradicts the provisions of the Constitution of Ukraine and the practice of the ECHR. Quasi-automatic extension of any term of detention should be considered as a violation of the conventional norms-guarantees established by § 3 of Art. 5 of the ECHR.

The authors emphasise that the problems discussed in this publication certainly are not exhaustive and require further scientific support.

REFERENCES

1. Burke-White W W, 'Human Rights and National Security: The Strategic Correlation' (2004) 17 Harvard Human Rights Journal 254 <https://www.law.upenn.edu/cf/faculty/wburkewh/workingpapers/.pdf> accessed 20 December 2022.
2. Fomina T, Rogalska V, 'Preventive measures under martial law: what has changed' (*Zakon i Biznes,* 19 May 2022) <https://zib.com.ua/ua/151472.html> accessed 20 December 2022.
3. Kaplina O, Serhii Kravtsov, Olena Leyba 'Militari justice in Ukraine: renaissance during wartime' (2022) 3 (15) Access to Justice in Eastern Europe 120-136. DOI: https://doi.org/10.33327/AJEE-18-5.2-n000323.
4. Lazukova O V, *Special regime of pre-trial investigation in conditions of war, state of emergency or in the area of an anti-terrorist operation* (Pravo 2018).
5. McBride J, 'To what extent does the fight against the coronavirus infection allow restrictions on human rights' (*Zakon i Biznes,* 04 April – 10 April 2020) <https://zib.com.ua/ua/142070-covid-19_i_konvenciya_u_yakiy_miri_borotba_z_koronavirusnoyu.html> accessed 20 December 2022.
6. Teteryatnik H, *Criminal proceedings in conditions of emergency legal regimes: theoretical, methodological and praxeological foundations* (Helvetica Publishing House 2021).
7. Tumanyants A R, Krytska I O, 'Exercise of Ukraine's right to derogate from Article 5 of the Convention for the Protection of Human Rights and fundamental freedoms: case law of the European Court of Human Rights in criminal proceedings and domestic realities in martial law' (2022) 5 Legal scientific electronic journal 603-607 <http://www.lsej.org.ua/5_2022/145.pdf> accessed 20 December 2022.
8. Zavtur V A, 'Presumption of personal freedom when applying clause 'c' of Article 5 of the Convention on the Protection of Human Rights and Fundamental Freedoms: practice of the European Court of Human Rights and the national context' in *Practice of the European Court of Human Rights in activity bodies of the prosecutor's office and the court: challenges and prospects: cont. and International science and practice conference (June 13, 2018)* (National Academy of the Prosecutor's Office of Ukraine 2018) 81-85 <http://hdl.handle.net/11300/10786> accessed 20 December 2022.