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Legality in Pre-trial Detention: A Legal Analysis of ECHR Case Law

Abstract

The article examines the legality of applying a preventive measure in the form of detention in Ukraine in the context of the ECHR case law. The purpose of the study is to analyze the compliance of the criminal procedure legislation of Ukraine and domestic case law with the requirements of Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms, taking into account the conditions of martial law. The methodological framework includes formal-legal, comparative-legal, doctrinal and forecasting methods. As a result, the study revealed systemic violations of the principles of proportionality, effective judicial control, and risk assessment in the selection of a preventive measure. The analysis of ECHR cases demonstrates the ineffectiveness of appellate review, the formalistic nature of judicial decisions,

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the neglect of the health of suspects, and procedural abuse. The article proposes comprehensive reforms of legislation, judicial practice, and the system of free legal aid drawing on the experience of Council of Europe member states. The research concludes that it is necessary to move from declarative to substantive control over the observance of human rights in the field of preventive detention.

KEYWORDS: preventive detention, legality requirements, detention, preventive measure, ECHR.

1 Introduction

According to the criminal procedure legislation of Ukraine, imprisonment is considered one of the most severe preventive measures. At the same time, there is substantial debate among law enforcement personnel and legal scholars regarding its regulation, judicial procedure, and adherence to international standards. However, real experience demonstrates that the deprivation of liberty is fundamentally distorted, leading to a violation of the individual's fundamental rights, even though the legislator argues that it is an extraordinary measure that should only be applied when less severe alternatives are not available.[1] This issue is particularly acute during martial law, when rights and liberties might be further curtailed, making the protection provided by the Convention for the Protection of Human Rights and Fundamental Freedoms[2] ("Convention") even more crucial. In this regard, Ukraine's obligations as a state party to the Convention are principally formed by the European Court of Human Rights ("ECHR") case law, which provides interpretations of the principles of personal liberty and the right to a fair trial.

1 Sonia Owczarek, "Report on the Ultimate View of Legal Communication in the Space Legal Sector," *Journal of International Legal Communication* 12, no. 1 (2024): 98–99. https://doi.org/10.32612/uw.27201643.2024.12.1.pp.98-99.

2 Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (1950), https://www.echr.coe.int/european-convention-on-human-rights

The issue of defending the human right to liberty and personal inviolability has been addressed by a large number of experts[3] and scholars.[4] Legal scholarship explains and acknowledges the rules on applying the ECHR case law and the Convention's standards on legality by judicial authorities in Ukraine. In addition to disclosing the ECHR's legal positions to enhance national criminal law and enforcement, Gorpyniuk[5] examined the normative provisions of the Convention and their application by the ECHR. In particular, the implementation of Article 5 of the Convention in national criminal proceedings was considered. Furthermore, Boyko[6] demonstrated that a clear trajectory toward aligning Ukraine's legislation with the Convention norms of judicial processes could be observed. In this regard, some criminal procedure principles in the Ukrainian Code of Criminal Procedure [7] ("UCCP") were amended to incorporate elements of the right to a fair trial.

Sopilko,[8] Harust et al.,[9] and Shcherbak et al.[10] examined certain facets of the ECHR's practice in applying Article 5 of the Convention. Sopilko[11] also analyzed the Convention's position within the criminal procedural

3 Oleksandr Babikov, "Additional Guarantees of Observance of the Rights and Freedoms of Specially Designated Subjects during the Conduct of Covert Investigative (Search) Actions," Legal Horizons 21, no. 2 (2024): 53–68, https://doi.org/10.54477/LH.25192353.2024.2.pp.53-68

4 Viacheslav Vapniarchuk et al., "Protection of Ownership Right in the Court: The Essence and Particularities," Asia Life Sciences, no. 2 (2019): 863–879.

5 Oksana Gorpyniuk, Application of the Standards of the Convention for the Protection of Human Rights and Fundamental Freedoms in Criminal Proceedings in Ukraine: Teaching-Methodical Manual (Lviv: Lviv State University of Internal Affairs, 2020).

6 Oleksandr Boyko, The Right to a Fair Trial in Criminal Proceedings in Ukraine (Kyiv: National Academy of Internal Affairs, 2021).

7 Verkhovna Rada of Ukraine, Law No. 4651-VI, *Criminal Procedure Code of Ukraine* (2012), https://zakon.rada.gov.ua/laws/show/4651-17

8 Iryna Sopilko, "Strengthening Cybersecurity in Ukraine: Legal Frameworks and Technical Strategies for Ensuring Cyberspace Integrity," Legal Horizons 21, no. 2 (2024): 69–80, https://doi.org/10.54477/LH.25192353.2024.2.pp.69-80

9 Yurii Harust et al., "Analysis of Official Data on the Implementation of International Technical Assistance Projects and Their Efficiency in Ukraine since 1991," Legal Horizons 25, no. 38 (2020): 121–130, http://www.doi.org/10.21272/legalhorizons.2020.i25.p121

10 Svitlana Shcherbak et al., "Recoverer-Oriented Enforcement Process: Using Technology to Its Fullest Potential," Journal of International Legal Communication 11, no. 4 (2023): 44–54, https://doi.org/10.32612/uw.27201643.2023.11.4.pp.44-54

11 Ibid 7

law of Ukraine and the challenges associated with its implementation. These academics concluded that national criminal procedure legislation was generally in line with the traditional strategy for defending individual liberties and rights. Despite the clear and intelligible wording of the UCCP, public legal awareness requires improvement since occasional errors are possible. Sopilko further noted that in Ukraine pre-trial detention practices exhibited deep-rooted systemic flaws both at the level of legislative regulation and case law, leading to regular violations of the standards of legality, proportionality, and effective judicial review.

However, the question remains whether pre-trial detention in Ukraine complies with international standards of effective judicial control and protection of individual liberty, and what systemic changes are needed to bring it into line with these standards. In this regard, the aim of the study is to analyze the compliance of the criminal procedure legislation of Ukraine and domestic case law with the requirements of Article 5 of the Convention, taking into account the conditions of martial law. To achieve this goal, the following tasks are set:

- to analyze the current legislation of Ukraine on pre-trial detention;
- to summarize typical violations identified in the case law of the ECHR and domestic courts;
- to compare the legal practice of continental European countries, including Poland, Lithuania, Germany, and Ukraine;
- to examine global international standards developed under the auspices of the United Nations;
- to propose systemic recommendations for legislative and judicial reform in Ukraine.

This article uses the concept of effective judicial control as an analytical framework, which combines the requirements of procedural fairness, proportionality, and the legality of interference with the right to liberty. This framework enables the identification of formal violations of Article 5 of the Convention and assesses systemic distortions arising from a failure to maintain a balance between the interests of the investigation and the rights of the individual. Therefore, the authors compare the continental legal systems (Germany, Poland, and Lithuania), which share common historical and legal roots with Ukraine but have achieved a higher degree of implementation of the ECHR standards.

2 Materials and Methods

A thorough examination was conducted of the problem of legal compliance while enforcing a preventative measure in the form of pre-trial detention using a comprehensive approach, which combines general scientific, specialized, and interdisciplinary methods. The methodological foundation is based on identifying patterns in law enforcement, conducting a systematic analysis of legal phenomena, and formulating findings on how to improve legislation. In this regard, Article 5 of the Convention was considered when conducting this analysis.

In order to evaluate the legal texts of domestic law, i.e., Part 1 of Article 183 and Article 177 UCCP, against the international legal standards stated in Article 5 of the Convention, a formal-legal method was employed. Special emphasis is placed on defining the requirements of necessity, legality, and proportionality of detention, as well as on the analysis of the legislative framework governing judicial oversight of such preventive measures. In order to ascertain the most efficacious models of judicial control with regard to the observance of the right to freedom and to determine the adaptability of these models to domestic realities, a comparative-legal method was employed to analyze the Ukrainian practice of ordering detention in relation to relevant approaches adopted by Council of Europe member states. The study addresses procedural and substantive remedies for upholding the principle of legality in a democracy.

The doctrinal analysis was used to examine monographs, scientific articles, and professional publications on the application of Article 5 of the Convention, the operation of judicial control mechanisms, and the role of the ECHR in the development of legal standards. This enabled the development of current scientific methods for interpreting Convention norms and their application in domestic legal practice. Using a forecasting method, an assessment was conducted of the likely consequences of amending Ukraine's criminal procedure legislation with regard to the use of pre-trial detention as a preventive measure. This was particularly evident in trial timeframes, the effectiveness of appeal, the review of decisions of courts of first instance, and adherence to the principles of adversarial proceedings and fairness. Moreover, all significant aspects of the operation of the Ukrainian detention system, including international standards, court procedure, law enforcement, regulatory control, and their interplay, were examined by means of formal-legal analysis.

This study pays special attention to the interpretation of preventive detention as an exceptional, temporary, and controlled measure. Within international legal doctrine, preventive detention is analyzed through the prism of harm minimization and the doctrine of extraordinary justification. These concepts emphasize the need to view detention not only as a procedural tool but as a risk to fundamental rights that requires strict limitations, regular review, and moral justification by the state.

3 Results

According to Part 1 of Article 183 UCC, detention is classified as an exceptional preventative measure. It is applied only when the prosecution can demonstrate that the risks specified in Article 177 UCCP cannot be prevented by less restrictive safeguards. Preventing the suspect or accused from hiding, unlawfully influencing the topics of judicial procedures, obstructing the investigation, including through the preservation of evidence or committing another crime, are the main goals of detention.

The Convention[12] and the ECHR case law ensure the human right to personal integrity. In this regard, judicial oversight is one of the instruments to uphold this right. Such control can be achieved by selecting a preventive measure in the form of detention, while considering all pertinent factors, such as adherence to domestic procedural requirements, the existence of grounds for applying a preventive measure (risks and reasonable suspicion), and the overall circumstances of the case.

Within international human rights law, the standards governing preventive detention are not limited to the Convention. They are also enshrined in a number of universal instruments, including the International Covenant on Civil and Political Rights (ICCPR), the UN Human Rights Committee's General Comment 35, and the UN Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988). Article 9 of the ICCPR guarantees that "no one shall be subjected to arbitrary arrest or detention" and that detention must be reasonable, proportionate, and necessary.

12 Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms* (1950), https://www.echr.coe.int/european-convention-on-human-rights

General Comment No. 35 emphasizes that judicial review of preventive detention should not only be accessible but also effective, including an assessment of the lawfulness, duration, and circumstances of detention. Thus, even formal judicial approval of law-enforcement decisions does not meet the standard if the court does not review the grounds for detention independently and objectively. In accordance with the UN Havana Rules and the Kigali Rules, detention should be a measure of last resort, and states should seek alternatives, in particular for vulnerable groups such as persons with disabilities, women with children, or the elderly.

Given the origins of the criminal procedural institution of detention, the use of detention as a preventative measure indicates the persistence of a historically repressive bias within Ukrainian practice. However, in order to uphold the principles of justice, proportionality, and the rule of law without restricting the rights and freedoms guaranteed by law, it is necessary to confirm the chosen path of humanizing and democratizing the institution of preventive measures.[13] Nevertheless, prevailing practice often exhibits a lack of substantive reasoning in the approval of preventive measures, with such decisions characterized by formulaic language and an absence of relevant data. This phenomenon constitutes a violation of the requirements set forth in criminal procedure law.

Hence, in order to understand the issue of detention as a preventive measure, it is necessary to study the practice of both domestic courts and the ECHR. The Supreme Court of Ukraine, in its decision dated 15 April 2021,[14] ruled that the routine practice of judicial endorsement of the investigator's arguments, accompanied by the use of formulaic reasoning, without conducting a thorough examination of the particular facts and arguments presented by the suspect and the defense, and without ascertaining the feasibility of implementing alternative preventive measures, may signify that the judge fails to satisfy the criteria outlined in Article 5 of the Convention.[15]

13 Svitlana Babiy, "Problematic Issues of Implementing the Right to Protection during the Application of a Preventive Measure in the Form of Detention," *Law and Society*, no. 5 (2023): 212–218, https://doi.org/10.32842/2078-3736/2023.5.32

14 Supreme Court of Ukraine, Ruling in Case No. 910/2116/21 (910/12050/21) (2022), https://verdictum.ligazakon.net/document/108360142

15 European Court of Human Rights, Guide on Article 5 of the Convention – Right to Liberty and Security (2014), https://www.echr.coe.int/Documents/Guide_Art_5_UKR.pdf

Therefore, the judgments of the ECHR serve as the main foundation for the development and formation of Ukrainian legislation. These judgments clarify the articles of the Convention, which are binding on state parties, including Ukraine, and establish findings of of human rights violations.[16] Moreover, the Verkhovna Rada of Ukraine adopted Article 17 of the Law of Ukraine of 23 February 2006[17] No. 3477-IV on the implementation of decisions and application of the practice of the European Court of Human Rights in order to regulate relations arising from the state's obligation to comply with the ECHR's judgments against Ukraine, eliminate the causes of violations of the Convention, introduce European human rights standards into Ukrainian judicial procedures and administrative practice, and provide conditions for minimizing the number of applications to the ECHR. Furthermore, it stipulates that general measures must be taken to eliminate established violations and prevent their recurrence, in addition to guaranteeing the payment of just satisfaction. As a result, the ECHR case law constitutes a key source of legal authority that influences how the law is applied and how the legislative process is conducted in Ukraine.

According to Article 124 of the Constitution of Ukraine, courts are the sole entities vested with the authority to administer justice in the state. They are primarily in charge of ensuring that individuals' rights and liberties are adequately protected at the national level, and their authority extends to all legal relations within the state.[18] Furthermore, in Paragraph 1 of Resolution No. 3 of 1 April 1994 on the terms of consideration by Ukrainian courts of criminal and civil cases, the Plenum of the Supreme Court of Ukraine emphasized the need to strengthen judges' personal responsibility for the timely and qualitative evaluation of cases. However, in certain circumstances, a judge's improper performance of professional duties should be regarded as deliberate unlawful execution or violation

16 Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (1950), https://www.echr.coe.int/european-convention-on-human-rights

17 Verkhovna Rada of Ukraine, Law No. 3477-IV, "On the Enforcement of Judgments and Application of the Case-Law of the European Court of Human Rights" (2006), https://zakon.rada.gov.ua/laws/show/3477-15

18 Olha Yatsun, "International Approaches to Constitutional and Legal Regulation of Human Rights Restrictions during Martial Law," Legal Horizons 23, no. 4 (2024): 21–28, https://doi.org/10.54477/LH.25192353.2024.4.pp.21-28

of procedural law, resulting in procedural delays in criminal or civil cases and significant restrictions on citizens' rights and legitimate interests.[19]

Persistent violation of reasonable term limits for the consideration of criminal proceedings indicates shortcomings in procedural management and a crisis in the functioning of the justice system. When a person waits for years for a judicial decision without a final judgement, the state creates a situation of legal uncertainty, which contradicts the European standard of legal certainty. This practice adversely affects the mental well-being of the accused, undermines the judicial system in the eyes of society, and increases the risk of political abuse of justice.

Violations of the reasonable time limit in criminal proceedings are frequent. In domestic courts, such protracted proceedings are regarded as exceptional rather than customary. In a number of cases, an individual has been under suspicion or formally charged for a period of nearly five years without any form of retribution. The repercussions of such circumstances are manifold, extending beyond the confines of the judicial sphere and permeating in personal and professional life. This phenomenon directly contravenes the standards of a fair trial, thus resulting in a state of affairs that is incompatible with the principles of justice and fairness.[20]

There are several reasons for such delays, most of which are related to structural inefficiencies within the legal system. Delays in court proceedings due to the repeated absence of participants or excessive workload of courts indicate the lack of proper procedural management and accountability. In such circumstances, a person loses a real opportunity for defense and is trapped in a procedural impasse, in which the right to hearing within a reasonable time limit exists only formally. Additional causes include the excessive burden of courts, which renders them unable to handle the volume of cases, or the judge's illness or leave. In some instances, a single adjournment may result in hearings scheduled at intervals of several months being postponed for a total period of up to six months. Such occurrences are frequent and point to deficiencies in efficient mechanisms that ensure timely and continuous review of applications.

19 Plenum of the Supreme Court of Ukraine, Resolution No. 3, "On the Time Limits for Consideration by Courts of Ukraine of Criminal and Civil Cases" (1994), https://zakon.rada.gov.ua/laws/show/v0003700-94

20 Vladyslav Zeykan, "The Role of a Defence Lawyer in Observing the Rights and Freedoms of a Person during the Application of Preventive Measures in the Form of House Arrest and Detention" (2024), https://molodyivchenyi.ua/omp/index.php/conference/catalog/download/117/1662/3459-1

In addition, there is a serious risk of formalism and dishonesty in administration of justice. Excessive attention to formal procedures along with complete disregard for the merits of the case indicates the prevalence of legal formalism over substantive justice. This practice deprives a person of an effective remedy and transforms the court into a technical instrument that serves the accusatory logic of the system. The use of formalistic justifications to adjourn proceedings occurs even when it is evident that it is contrary to the interests of justice. In other cases, the parties deliberately delay proceedings by requesting additional witnesses, filing unfounded motions, or abusing their right of access to case files. The problem is difficult since there are insufficient mechanisms within the courts and public authorities to address such conduct.[21]

It is important to address the shortcomings of judicial procedures which violate the person's right to a fair trial. The outcome of a trial frequently depends on the presiding judge rather than the merits of the case, due to legal ambiguity surrounding the admissibility and evaluation of evidence, ambiguity in rulings in factually similar cases, and a lack of consistent approaches to the interpretation of criminal procedural norms. As a result, both the public and the international community lack confidence in the judicial system and perceive selective administration of justice is a symptom of a broader issue with impunity or political interference.[22]

In this connection, the mechanical alignment of legislation with international standards will not ensure the effective protection of human rights without a corresponding change in judicial practice and law-enforcement logic. The absence of genuine risk assessment, proper justification, and institutional oversight means that even supreme legislative models may remain purely declarative in the face of the Soviet legal legacy.[23] The ECHR case law must be taken into account at every stage of criminal proceedings,

21 Tamara Kortukova et al., "Peculiarities of the Legal Regulation of Temporary Protection in the European Union in the Context of the Aggressive War of the Russian Federation against Ukraine," International Journal for the Semiotics of Law 36, no. 2 (2023): 667–678, http://www.doi.org/10.1007/s11196-022-09945-y

22 Oleksii Kalinnikov, "Some Aspects of Choosing a Preventive Measure in the Form of Detention in Relation to a Suspect Subject to a Special Pre-Trial Investigation," in The 9th International Scientific and Practical Conference "Formation of the Personality of a Specialist as a Subject of Self-Creation" (Ostrava: International Science Group, 2024), 142–143.

23 Olha Yatsun, "International Approaches to Constitutional and Legal Regulation of Human Rights Restrictions during Martial Law," *Legal Horizons* 23, no. 4 (2024): 21–28, https://doi.org/10.54477/LH.25192353.2024.4.pp.21-28

including the pre-trial investigation phase, due to deficiencies in the current domestic criminal procedure framework.

Criminal procedural law defines the criteria and procedure for selecting preventive measures imprecisely. This, in turn, makes it more difficult for the defense to support the appeal against the imposition of detention as a preventative measure. The ECHR judgements contain detailed procedural guidance and important legal findings for selecting detention as a preventative measure. When considering preventative measures, domestic courts disregard the risks listed in the UCCP and the legitimacy of suspicion. The investigating judge and the court are required to verify the prosecutor's reasons for requesting detention and assess their sufficiency before determining whether to implement a preventative measure.[24] Although Article 5 of the Convention guarantees the right to liberty, Ukrainian practice demonstrates that the mere existence of suspicion is often sufficient to restrict this right. Judges rarely require convincing evidence of relevant risks, indicating the erosion of the European standard that detention must remain exceptional. As a result, this practice leads to the institutionalization of arbitrariness.

Having ratified the Convention in 1997, Ukraine undertook to comply with its provisions and to implement the judgements of the ECHR. Article 6 of the Convention guarantees the right to a fair and public trial by an independent and impartial court within a reasonable time, which is a key element of the rule of law in a democratic society. Ukraine also assumed obligations to monitor the observance of human rights standards during judicial and investigative procedures, to incorporate them into national legislation, and to observe the rights guaranteed by international agreements. In addition, under Articles 32 and 46 of the Convention, Ukraine recognizes the authority of the ECHR to interpret the provisions thereof.

One illustration of the systemic challenges faced by suspects in Ukraine is the case of *Sotnikov and Pavelko v. Ukraine* (applications Nos. 39110/23 and 40281/23), which was decided on 12 December 2024.[25] In their application,

24 Oleksii Kalinnikov, "Some Aspects of Choosing a Preventive Measure in the Form of Detention in Relation to a Suspect Subject to a Special Pre-Trial Investigation," in The 9th International Scientific and Practical Conference "Formation of the Personality of a Specialist as a Subject of Self-Creation" (Ostrava: International Science Group, 2024), 142–143.

25 European Court of Human Rights, *Sotnikov and Pavelko v. Ukraine*, Apps. Nos. 39110/23 and 40281/23 (2024), https://www.stradalex.eu/en/se_src_publ_jur_eur_cedh/document/echr_39110-23_40281-23_001-238398

the applicants listed a number of state violations, including the use of unreliable evidence gathered during the investigation, extended detention without appropriate judicial oversight, inhuman treatment, and a lack of due regard for participants' safety. Given that the state bears a greater responsibility for law enforcement during martial law, this problem is especially relevant in Ukraine, where martial law was introduced by Presidential Decree No. 64/2022.[26]

However, in the analyzed case, the hearing regarding the selection of a preventive measure was not adjourned after the announcement of an air-raid siren, despite the fact that the court ir required to ensure the evacuation of trial participants to a shelter in the event of an air raid.[27],[28] Hence, the basic concept of prioritizing life and health under Article 2 of the Convention, which establishes the state's obligation to take preventative measures in circumstances of foreseeable risk, was violated. In addition, disregarding the air-raid siren during judicial proceedings erodes public trust in the judicial system. Despite the defense's concerns, the judges in this case failed to take basic security precautions to protect the participants, which was a clear violation of the state's duty to safeguard human life.

The second problem is that courts take an unreasonably long time to review motions to extend detention. According to Part 2 of Article 422 UCCP, the complaint must be reviewed within three days. However, in some cases, appeals were reviewed only after a delay of three months. Furthermore, during this period, courts ordered continued detention without awaiting the outcome of earlier appeals. This practice breaches the principle of legal certainty and calls into question the effectiveness of appellate review.[29] Thus, when someone is detained while awaiting the outcome of an appeal and a new detention order is issued at the same time, it creates a vicious cycle. This demonstrates systemic procedural inefficiency, as it ignores Article 5(4) of the Convention, which guarantees that anyone deprived

26 Oleksii Yuldashev et al., "Organizational and Legal Model of Competency-Based Education as a Means of the Transition to Innovative Economy," Danube 13, no. 2 (2022): 107–118, http://www.doi.org/10.2478/danb-2022-0007

27 Supreme Court of Ukraine, Ruling in Case No. 910/2116/21 (910/12050/21) (2022), https://verdictum.ligazakon.net/document/108360142

28 Council of Judges of Ukraine, Decision No. 23, "Regarding Recommendations on Organizational Issues of the Work of Judges under Martial Law" (2022), https://zakon.rada.gov.ua/rada/show/v0023414-22

29 Volodymyr Nazarov, "Problematic Issues of the Application of Preventive Measures in Criminal Proceedings" (2022), https://goal-int.org/problemni-pitannya-zastosuvannya-zapobizhnih-zahodiv-u-kriminalnomu-provadzhenni/

of liberty has the right to prompt judicial review of the lawfulness of detention. Numerous ECHR judgments, such as *Buryaga v. Ukraine*[30] and *Tretyakov v. Ukraine*,[31] affirm that the state must resolve such matters promptly and effectively to prevent detention from becoming arbitrary.

Furthermore, the ECHR case law highlights that the concept of a reasonable time encompasses both the court's procedural diligence in ensuring a fair trial and the overall duration measured in calendar days. In this regard, the state must ensure that any restriction of liberty during martial law is subject to prompt judicial review. The third problem is the neglect of the applicant's health, as he needed surgery for a serious orthopedic condition. Despite medical documentation and recommendations, the court did not take into account whether the applicant's placement in an isolated unit was compatible with his state of health. Medical data indicated that both knee joints required surgery due to *varus gonarthrosis*. Physicians recommended an ongoing specialized therapy. Inside a detention centre, such treatment could not be ensured. This negligence constitutes a violation of Article 3 of the Convention, which prohibits inhuman or degrading treatment. The ECHR has consistently found violations in cases such as *Komar and Others v. Ukraine*,[32] *Vyshnevskyy and Others v. Ukraine*,[33] and *Lunev v. Ukraine*.[34]

Another violation of the Convention is denying adequate medical care to a person in custody, particularly where this results in a deterioration of health. The courts' failure to adequately assess medical records in this case indicates a serious disregard for the concept of protection of human rights in the criminal justice system. This approach undermines the system's ability to protect prisoners' rights when they are most vulnerable.[35]

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30 European Court of Human Rights, *Buryaga v. Ukraine*, App. No. 27672/03 (2020), https://www.court.gov.ua/userfiles/file/court_gov_ua_sud5010/Konvenciya_z_prav/st_6/BURYAGA.pdf

31 European Court of Human Rights, *Tretyakov v. Ukraine,* App. No. 63126/13 (2021), https://www.laweuro.com/?p=17263

32 European Court of Human Rights, *Komar and Others v. Ukraine*, Apps. Nos. 36684/02 et al. (2006), https://www.court.gov.ua/userfiles/file/court_gov_ua_sud5010/Konvenciya_z_prav/st_6/Komar.pdf

33 European Court of Human Rights, *Vyshnevskyy and Others v. Ukraine*, App. No. 10417/14 (2020), https://www.echr.app/applications/577261

34 European Court of Human Rights, *Lunev v. Ukraine*, App. No. 4725/13 (2016), https://www.minjust.gov.ua/files/general/2023/06/01/20230601065736-73.pdf

35 Evhen Dyachenko, "Application of a Preventive Measure in the Form of Detention during the Period of Martial Law," Analytical and Comparative Law, no. 6 (2024): 810–815.

In particular, a covert investigative protocol involving audio and video surveillance was used to justify preventive measures without substantive judicial examination. The court failed to determine whether the protocol has been created by an authorized individual, whether the recordings were technically linked to the protocol, or whether the procedural requirements for obtaining such evidence had been observed. In *Nechiporuk*[36] *and Yonkalo v. Ukraine*, the ECHR ruled that reasonable suspicion constitutes a lawful prerequisite for detention and must be supported by specific evidence, rather than mere speculation. Any detention in the absence of such suspicion is arbitrary.

In addition, the rights of the accused and the validity of judicial decisions on detention based solely on covert investigation, without verifying its sources, are questioned. In its decision in *Katz and Others v. Ukraine*, the ECHR stressed that the concept of "legality" within Article 5 of the Convention covers both compliance with domestic law and the concepts of fairness and reasonableness.[37] Therefore, a formalistic approach to assessing evidence may lead to abuse of procedural powers and undermine the process of application of preventive measures.

Four major deficiencies of the Ukrainian criminal justice system are revealed in *Sotnikov and Pavelko v. Ukraine*.[38] They include careless use of evidence, failure to ensure security, disregard for medical needs, and violations of trial time limits. These interconnected shortcomings significantly impede the effective protection of human rights at the pre-trial stage. These problems indicate a broader erosion of confidence in institutions entrusted with the administration of justice and the protection of security. When the fundamental principles of the Convention are not adhered to, a thorough review of criminal legislation and procedures is required, in addition to appropriate legal remedies.

Accordingly, comprehensive judicial, legislative, executive, and penitentiary reforms are necessary to address the underlying causes of these

36 European Court of Human Rights, *Nechiporuk and Yonkalo v. Ukraine*, App. No. 42310/04 (2011), https://zakon.rada.gov.ua/laws/show/974_683

37 European Court of Human Rights, *Guide on Article 5 of the Convention – Right to Liberty and Security* (2014), https://www.echr.coe.int/Documents/Guide_Art_5_UKR.pdf

38 European Court of Human Rights, *Sotnikov and Pavelko v. Ukraine*, Apps. Nos. 39110/23 and 40281/23 (2024), https://www.stradalex.eu/en/se_src_publ_jur_eur_cedh/document/echr_39110-23_40281-23_001-238398

deficiencies and prevent their recurrence.[39] *Sotnikov and Pavelko v. Ukraine* (European Court of Human Rights, 2024) can serve as a foundation for a substantial overhaul of the framework governing the application of preventive measures in Ukraine, taking into account the requirements of the Convention. The said judgement exposes persistent problems and suggests the need for adjustments aimed at strengthening the protection of human rights, restoring public confidence in the legal system, and establishing European standards for the criminal justice system.

4 Discussion

Despite the formal harmonization of the criminal procedural legislation of Ukraine with the Convention, the practical application of the rules remains detached from the spirit and objectives of European human rights law. For example, the systematic absence of adequate reasonings in court decisions ordering detention is a violation of Article 5 of the Convention. Apart from that, this is a manifestation of the persistence of an accusatory bias historically inherent in post-Soviet models of justice. Ukraine, Poland, and Lithuania share a similar historical and legal background, grounded in the continental legal tradition shaped by the legacy of Soviet legal formalism. However, the mechanisms of judicial control over preventive measures in these countries have evolved differently.[40]

Accordingly, in Poland, each decision to detain a person requires a separate judicial assessment of actual risk, clearly linked to the evidentiary base. Polish courts are subject to quarterly review of the reasoning underlying preventive measures, and the defense has full access to the case materials. Moreover, in Lithuania, procedural law obliges courts to assess why less restrictive measures are ineffective. In the absence of such justification, the appellate court automatically recognizes the detention as unlawful.

39 Anush Tumanyants and Iryna Krytska, "Problems of Applying a Preventive Measure in the Form of Detention in Respect of Persons with Visual Impairments," *Copernicus Political and Legal Studies* 3, no. 3 (2022): 71–81.

40 Roman Tashian et al., "Scientific Doctrine as a Source of Law in International Law and Legal Systems of the World," *Revista Juridica Portucalense*, special issue (2023): 232–252.

In countries with well-developed human rights systems, such as the Netherlands or Germany, any detention without proper justification is automatically deemed unlawful, regardless of the gravity of the offense. In Germany, pre-trial detention is applied only after an exhaustive assessment of the availability of less restrictive measures. Each decision on detention or its extension must contain individualized reasoning with an analysis of risk-related evidence and must be reviewed regularly at short intervals. Failure to comply with these requirements results in the automatic release of the detainee.

In France, there is a detailed procedure governing first detention (*garde à vue*), which includes the mandatory participation of a defense counsel from the moment of actual restriction of liberty. Pre-trial detention (*détention provisoire*) is permitted exclusively in cases clearly defined by law and is subject to strict judicial control and oversight of the prosecutor's office. The judge must take into account the person's social status, family circumstances, employment, health status, and other factors that may indicate the absence of risk of absconding or interference with the investigation.

Furthermore, Sweden demonstrates an exemplary system of monitoring compliance with the terms of pre-trial detention. Under the Swedish model, a person may not be detained without charge for more than 14 days without judicial review. Any further detention requires constant updating of the grounds and their independent review, including the mandatory participation of a defense counsel. Norway has introduced a mandatory judicial review of detention circumstances every four weeks, during which the person has a full opportunity to be heard, and judges are obliged to assess whether the continued restriction of liberty remains justified. In the Netherlands, a decision to impose or extend a preventive measure cannot be made without a thorough assessment of the defendant's health, psycho-emotional state, and level of cooperation with the investigation. The court must assess the relevant risks and prove failure of alternative preventive measures. Each decision to detain a person should take the form of a structured document with a mandatory statement of reasons demonstrating its necessity and proportionality.

In contrast to these jurisdictions, where the mechanisms of preventive detention are based on the principles of pro persona, humanity, procedural equality, and effective judicial control, Ukraine continues to exhibit a high prevalence of standardized judgments, a lack of analysis of alternative measures, and a preference for formalistic reasoning over a substantive one. There is often an absence of exhaustive reasoning, no consideration of the social or medical context, and untimely judicial review of detention

decisions. In the Ukrainian context, the severity of the charges often serves as the sole and sufficient argument for restricting liberty, which contradicts both the proportionality standard and the principle of minimal interference.

Improving legislation and law enforcement practice relating to detention as a preventive measure should be pursued in a thorough manner, including reform of the regulatory framework and methods of its application in judicial proceedings. The first step is to eliminate legislative gaps in the UCCP, which permit arbitrary interpretation of its provisions and facilitate abuse. According to Article 177 UCCP, the current legislation provides an explicit definition of detention-related risks and a non-exhaustive list of factors that the court must consider when deciding on a suspect's detention. The law provides that the gravity of the charges without considering individual circumstances cannot be regarded as sufficient grounds for applying the most severe preventive measure.

Courts are often confined to the formal repetition of the investigator's or prosecutor's allegations, without considering alternative preventive measures or assessing the arguments of the defense. Such decisions often lack factual information about risks, which is a clear violation of procedural law and Ukraine's international obligations. In this context, it would be advisable to adopt legislative provisions that would require a reasoned judicial decision, containing a list of supporting data, an assessment of risks, and an examination of at least two alternative approaches, along with a justification for their inadequacy. This would improve the quality and transparency of judicial control and eliminate the practice of issuing standardized decisions.[41]

The decision to place an individual in custody should be based on an assessment of their socio-economic and medical circumstances. The legislation should require a mandatory medical examination of the suspect or accused and determine whether the person provides care to any elderly family members, individuals with disabilities, or small children. These circumstances must be taken into account when selecting an appropriate preventive measure, for example, where inappropriate, less restrictive measures, such as electronic control, house arrest, personal cognizance, or bail, should be applied.

41 Andrii Ovcharenko and Oleh Romashko, "Grounds and Procedural Procedure for Choosing a Preventive Measure in the Form of Detention," *Legal Position* 1, no. 38 (2023): 96–100.

Improving the appellate review process for detention also requires consideration. Even though complaints against detention must be examined within three days, in many instances they are ignored for weeks or even months. This practice violates the requirements of the Convention and the UCCP. Therefore, appellate procedures must be reformed, and the law must be amended to include mandatory registration of the date of filing, liability for breaches of statutory time limits, and clearly defined repercussions thereof. Such consequences should include the automatic release from custody in the event that the state fails to ensure prompt judicial review within a reasonable time. Every detention hearing should be video recorded in order to ensure transparency and safeguard adversarial guarantees. To prevent abuses by penitentiary authorities, such as non-justified absences at hearings, courts should have the technical capacity to enable detainees to participate remotely.[42]

It is also necessary to examine the practice of extending pre-trial detention. The maximum duration of detention prior to sentencing should be explicitly limited by legislation. A reasoned decision of an appellate or cessation court should be the sole justification for extending such periods in exceptional circumstances. Any exceptional procedural necessity for detaining an individual for more than a year without a final judgement must be verified by an independent and impartial authority. Moreover, to ensure the defender's involvement in the pre-trial inquiry and judicial oversight of detention, reforms should primarily focus on strengthening the operation of the free legal aid system. Attorneys should be entitled to submit alternative motions, have full access to case files, be afforded enough time to prepare for the trial, and be informed of the prosecutor's arguments. Any serious breach of these guarantees should result in the revocation of the detention order.

Implementing continuous national monitoring of detention practices is also crucial. To assess judicial practice, provide public statistics, and identify systematic breaches, the Verkhovna Rada Commissioner for Human Rights, the State Judicial Administration, and the Office of the Prosecutor General should collaborate. It is advisable to establish a digital platform for recording detention decisions in order to monitor their

42 Viktor. Zavtur, "Procedural Procedure for Consideration and Resolution by the Investigating Judge and Court of Motions for Force-Feeding a Suspect or Accused Placed under Preventive Detention," *New Ukrainian Law*, no. 1 (2023): 164–171.

duration, underlying reasoning, and the effectiveness of legal protection.[43] The reforms should also include the introduction of a distinct review procedure for detention decisions where ECHR rulings establish violations of the Convention under similar circumstances. Such rulings should produce legally binding precedents that would require domestic courts to modify their practices in accordance with accepted standards. The effective protection of human rights, the actual operation of the rule of law, and compliance with fair-trial standards can only be ensured through a comprehensive legislative and executive reform of the institution of detention. This is a prerequisite for building confidence in judiciary within a democratic state governed by the rule of law.

An analysis of the practice of preventive detention in Ukraine demonstrates a structural failure to implement the core principles of the Convention: proportionality, effective judicial review, and the state's obligation to prove the impossibility of alternative measures. When combined with the excessive workload of the courts, the weakness of legal aid institutions, and the procedural inertia of appellate review, the system effectively legitimizes arbitrary detention. These features bring the Ukrainian model closer to the authoritarian tradition than to the European legal framework, which requires a deeper conceptual reassessment rather than a purely technical legislative adjustment.

A comparison of Ukrainian practice with the experience of other Council of Europe member states permits the identification of areas where national approaches differ from established European standards. In particular, within European legal systems, preventive detention is seen as a measure of last resort, and the presumption in favor of liberty, although enshrined in law, is applied in practice rather than merely declared. Thus, strengthening Ukrainian law enforcement practice through the adoption of relevant mechanisms from Council of Europe member states would increase the effectiveness of justice, reduce the risk of human rights violations, and strengthen public trust in the judiciary. This should be a strategic direction for reforming the criminal justice system in Ukraine, especially in the context of martial law, when human rights are particularly vulnerable to abuse.[44]

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43 Anush Tumanyants and Iryna Krytska, "Problems of Applying a Preventive Measure in the Form of Detention in Respect of Persons with Visual Impairments," *Copernicus Political and Legal Studies* 3, no. 3 (2022): 71–81.

44 Verkhovna Rada of Ukraine, Law No. 389-VIII, "On the Legal Regime of Martial Law" (2015), https://zakon.rada.gov.ua/laws/show/389-19

5 Conclusions

The research demonstrates that, although the detention system in Ukraine is intended to be used as an exceptional measure, it continues to be a coercive instrument that is frequently applied without adequate justifications and in contravention of international standards. The Ukrainian judiciary reveals persistent difficulties in the protection of human rights and indicates a profound crisis of trust in judicial institutions. The widespread use of standardized detention decisions, procedural delays, and the absence of effective oversight point to the structural incapacity of the system to ensure fair-trial guarantees. This situation reduces justice to formal exercise and creates conditions for selective application of the law. The courts' lenient and inadequate response to suspects' health status, conditions of detention, appeals, and the disregard for security guarantees during martial law is particularly alarming.

Articles 5 and 6 of the Convention and the Constitution of Ukraine guarantee the right to liberty and security of the person. However, rather than being merely declaratory, these rights should be put into effect. Thus, detention as a preventive measure should be applied only after a thorough assessment of all relevant facts, under the impartial supervision of the judiciary, and with convincing evidence of risks that cannot be mitigated by alternative measures. European comparative experience and the ECHR case law should be a requirement for all levels of law enforcement. These issues can be resolved only through comprehensive institutional and legislative changes. These should include amendments to the UCCP, including with regard to the selection and extension of detention, procedural guarantees for appellate reviews, and reasoning requirements for judicial decisions.

Detention as a preventive measure should not be used as a means of exerting pressure or demonstrating the authority of the public prosecution. Its sole legitimate purpose is to ensure the proper conduct of criminal proceedings. In addition to reducing the incidence of human rights violations, compliance with these principles will increase public confidence in the legal system, foster judicial practice aligned with European legal norms, and strengthen the importance of humanistic approaches in criminal justice.

As a party to international human rights treaties, Ukraine is obliged to adapt its legislation to the ECHR case law, while taking into account broader international approaches formulated by the UN. This includes the obligation to ensure effective judicial review, introduce regular review

of detention, consider the vulnerability of suspects, and minimize the duration of restrictions on liberty. Otherwise, even well-drafted Convention standards will remain ineffective. In a broader conceptual context, judicial control, as a safeguard against arbitrary interference with the right to liberty, requires the implementation of a more robust European approach to proportionality, as observed in the practice of Germany, Poland or Lithuania. Hence, it is necessary for Ukraine to move from declarative to substantive judicial control, with an emphasis on individualization of risks, the lawfulness of each stage of detention, and effective appellate review.

Thus, reforms should be based not only on updating the wording of legal norms, but also on transforming the logic of law enforcement toward a more person-centered approach. The implementation of best practices developed by Council of Europe member states is a prerequisite for ensuring the effective implementation of Articles 5 and 6 of the Convention in Ukraine. Without a critical transformation not only of legislation, but also of legal culture, no formal implementation of the Convention will ensure effective protection of human rights in Ukrainian courts. As long as pre-trial detention is viewed not as an exceptional measure but as a routine instrument of procedural pressure, the rule of law will remain a formality. Ukraine should not only align its legal norms but also assimilate the legal philosophy underlying the ECHR judgments.

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