SUPPORT TO CRIMINAL JUSTICE REFORM IN UKRAINE

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COMMENTS ON THE LAW OF UKRAINE ON AMENDMENT OF THE LAW OF UKRAINE ON COMBATING TERRORISM AND THE LAW OF UKRAINE ON AMENDMENT OF THE CRIMINAL PROCEDURE CODE WITH REGARD TO SPECIAL REGIME OF PRE-TRIAL INVESTIGATIONS UNDER MARTIAL LAW, STATE OF EMERGENCY AND IN THE REGION OF ANTI-TERRORIST OPERATION

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A. Introduction

1. These comments are concerned with two laws, namely, the Law of Ukraine "On amendment of the "Law of Ukraine on Combating Terrorism"" ('the preventive detention law')[1] and the "Law of Ukraine On amendment of the Criminal Procedure Code with regard to special regime relating to pre-trial investigation under martial law, state of emergency and in the region of anti-terrorist operation" ('the Criminal Procedure Code amendment')[2], as well as the Regulation on preventive detention in the area of anti-terrorist activities, and special regime of pre-trial investigation in a state of war, state of emergency or in the area of anti-terrorism operations ('the Regulation')[3]. They consider the compliance of the two laws with European standards, in particular those established by the European Convention on Human Rights ("the Convention') and the case law of the European Court of Human Rights ('the Court').

2. These two laws were adopted on 12 August 2014 notwithstanding negative expert opinions on them prepared by the Main Research and Expert Department of the Verkhovna Rada[4] and the Regulation was adopted on 27 August 2014..

3. The comments first establish the scope of the preventive detention law and the Criminal Procedure Code amendment and provisions in the Regulation relating to them. They then review European standards relevant to the provisions introduced by the two laws and the Regulation before examining their compliance with those standards, concluding with consideration of the steps that might be required to secure such compliance.

4. These comments have been prepared on the basis of English translations of the preventive detention law, the Criminal Procedure Code amendment and the Regulation. They have been prepared under the auspices of the Council of Europe's Project "Support to criminal justice reform in Ukraine", financed by the Danish Government.

B. The scope of the two laws and the Regulation

5. The two laws amend existing legislation, namely, the Law of Ukraine "On Combating Terrorism" and the Criminal Procedure Code through the addition of one new paragraph and one entirely new article to the former and another entirely new article to the latter. These provide respectively for the possibility, in certain conditions, of the use of preventive detention and the exercise of certain powers, including custodial measures of restraint, being exercised by a public prosecutor rather than by an

[1] Law No. 1630-VII of 12.08.2014.
[2] Law No. 1631-VII of 12.08.2014.
[3] N 1038/25815, approved by Order N 872/88/537 of 26 August 2014.
[4] *Expert opinion of the draft Law On Amending the Law of Ukraine On combating Terrorism in terms of introducing preventive detention of persons involved in terrorist activities in the counterterrorist operation area for the period over 72 hours* and *Expert opinion of the draft Law On Amendments to the Code of Criminal Procedure of Ukraine regarding the special regime of holding pre-trial investigation during the state of war, the state of emergency and in the area of counter-terrorism operation.*

investigating judge. The Regulation deals primarily with matters relating to the implementation of the two laws and the relevant aspects of it are considered in the examination of each of the two laws.

The preventive detention law

6. The first amendment to this law entails the insertion of a paragraph into Article 14 - which is concerned with the special order that can be established in a region of anti-terrorist operations - and the introduction of an entirely new provision - Article 15-1 - providing for preventive detention of persons implicated in terrorism in such a region.

7. Anti-terrorism operations are, according to Article 10 of the Law of Ukraine "On Combating Terrorism" to be conducted

> only in case there is a real threat to the life and safety of citizens, interests of the society or the state provided it is not possible to eliminate a threat in any other way

and a region of counter-terrorism operations is defined in Article 1 as comprising:

> localities or water areas, transport vehicles, buildings, structures, premises, adjacent localities or water areas designated by the leadership of counter-terrorism operations where the operations are conducted.

8. Both the paragraph inserted into Article 14 and the new Article 15-1 authorise the use of preventive detention, with the former giving a fuller - and perhaps slightly different - rationale for this than the latter, which in turn sets out more fully the requirements governing such use.

9. Thus, the rationale for the use of preventive detention in Article 15-1 is 'to prevent terrorist threats in a region of anti-terrorist operations' whereas the one given in the paragraph added to Article 14 is 'to protect citizens, the State and society from terrorist threats in a region of a long-lasting anti-terrorist operations', reflecting more the language of Article 10.

10. Undoubtedly the prevention of the 'threats' could have the function of affording protection but there is certainly a difference, at least in nuance, between these two provisions since preventing threats - particularly without the adjective 'real' used in Article 10 - does not necessarily connote the same sense of imminence of a threat being executed that might be required by a measure that is supposedly being taken to protect citizens. Indeed, prevention of threats might just mean either preventing someone from making them without the capacity to execute them or preventing someone from acquiring the capacity to undertake terrorist activity without necessarily planning to do so in the immediate future.

11. Moreover, while Article 15-1 is concerned only with threats in 'a region of anti-terrorist operations', those operations must 'long-lasting' under the paragraph added to Article 14. Thus, the former would allow preventive detention whenever anti-terrorist operations are undertaken whereas the latter requires that such operations must have already been undertaken for a period of time, albeit one that is not specified in any exact way.

12. However, the two provisions are undoubtedly intended to be taken together and also read with Article 10, not least because the paragraph added to Article 14 states that the use of preventive detention is 'subject to the provisions of this Law'. Nonetheless, the difference in the formulation of the two provisions - and especially the requirement only in the paragraph added to Article 14 that the operations be 'long-lasting', a term not otherwise used in the Law of Ukraine "On Combating Terrorism" - does affect the clarity of the circumstances in which resort to the use of preventive detention is authorised. Furthermore, given that the formulation in Article 14's additional paragraph is more restrictive than that found in Article 15-1, it might have been expected that the latter would have been made subject to the former.

13. The term 'preventive detention' is not specifically defined in either of the provisions but it clearly connotes a loss of liberty and is not something undertaken for any purpose other than stopping the person affected from making terrorist threats, acquiring the capacity to undertake terrorist acts or carrying out such acts, depending upon how the rationales in Articles 14 and 15-1 are to be construed. However, it is evident from these provisions that the power conferred is not designed, in itself, to pursue any purpose connected to the criminal process, whether in Ukraine or elsewhere. As such, it differs from the imposition - pursuant to the Criminal Procedure Code - of a measure of restraint involving custody, which was referred to as a 'preventive measure' in translations of the 1960 Code[5]

14. In order for someone to be subjected to preventive detention, for the purposes of the preventive detention law, it is required that (a) the person concerned is someone 'implicated in terrorism', (b) there is a reasonable suspicion that he or she carried out 'terrorist activity' and (c) there has been a substantiated decision to impose it by one of several specified persons. However, the grounds for preventive detention in the Regulation are stated solely to be

> the existence of reasonable suspicion of having committed by the person of terrorist activities, including the criminal offences established in Articles 109-114-1, 258-258-5, 260-263-1, 294, 348, 349, 377-379 and 437-444 of the Criminal Code of Ukraine[6].

[5] See, e.g. Articles 16.3(3), 148 and 165.2.
[6] Article 2.1.

15. The first of the conditions in the preventive detention law is undoubtedly vague when taken by itself since it could cover not only carrying out or facilitating the carrying out of acts of terrorism but also being aware of those involved in such activities and not bringing this to the attention of the relevant authorities. However, this vagueness could well be cured by the second condition which requires that there must be 'reasonable suspicion' that the person concerned must have actually carried out 'terrorist activity', at least if the latter term is understood to be referring to the definition of act of terrorism in the Law of Ukraine "On Combating Terrorism" [7]. Furthermore, the stipulation in the preamble to the Law of Ukraine "On Combating Terrorism"

> Provisions of the Law may not apply as a ground to prosecute people who defend their constitutional rights and freedoms, acting in compliance with laws

ought to be a constraint on the way in which a particular activity can be construed as one of terrorism.

16. As terrorist activity necessarily entails the commission of one or more criminal offences[8], the existence of reasonable suspicion in this regard would clearly provide a sufficient basis for apprehending the person concerned pursuant to Articles 207 and 208 of the Criminal Procedure Code. However, apart from the possible inapplicability of the exceptions permitting apprehension without an investigating judge's warrant[9], obtaining such a warrant may be impractical[10] and so the option of instituting the criminal process may not be available. Nonetheless, the reasonable suspicion condition underlines the fact that resort to the regular criminal process is at least a theoretical alternative to preventive detention, whether at the outset or at a later stage of its use.

17. It should be noted, however, that the Regulation defines terrorism and 'terrorist activities' in a manner rather more loosely constructed than the offences established

[7] Article 1 defines 'an act of terrorism' as 'a criminal act involving the use of firearms, explosion, arson or other acts penalized under Article 258 of the Criminal Code of Ukraine, which in turn provides that 'An act of terrorism, that is the use of weapons, explosions, fire or any other actions that exposed human life or health to danger or caused significant pecuniary damage or any other grave consequences, where such actions sought to violate public security, intimidate population, provoke an armed conflict, or international tension, or to exert influence on decisions made or actions taken or not taken by government agencies or local government authorities, officials and officers of such bodies, associations of citizens, legal entities, or to attract attention of the public to certain political, religious or any other convictions of the culprit (terrorist), and also a threat to commit any such acts for the same purposes ...

[8] As has been seen of the Law of Ukraine "On Combating Terrorism" refers to Article 258 of the Criminal Code but also states that 'If terrorist acts also involve crimes specified in Articles 112, 147, 258-260, 443, 444 and other articles of the Criminal Code of Ukraine (2341-14), they shall be penalized according to the Criminal Code'. However, presumably those offences under Articles 258-1, 258-2, 258-2, 258-3, 258-4 and 258-5 of the Criminal Code are also covered by the term 'act of terrorism'.

[9] Namely, where the person was caught committing or attempting to commit an offence, immediately afterwards or during hot pursuit.

[10] As to which, see further paras. 45 and 46.

by the Criminal Code[11] - which could both cause confusion in decision-making (notwithstanding the stipulation in Article 1.3 that the actions are qualified under offences found in the Criminal Code) and have adverse implications for the exercise of the right to freedom of expression[12]. Furthermore, the offences that would justify the use of preventive detention are not just those specifically concerned with terrorism under the Criminal Code as those listed in both Articles 1.3 and 2.1 cover all those to which the special arrangements for pre-trial investigation established by the Criminal Procedure Code amendment[13].

18. It does not appear from the preventive detention law that a person detained must him or herself be in the region of ant-terrorist operations at the time the measure is imposed but this would clearly be a necessary consequence of the specification in the Regulation that the initial apprehension of such a person is by 'employees of agencies involved in conducting anti-terrorist operations'[14] and that preventive detention can be executed by a public prosecutor 'only in the area (administrative region), where the anti-terrorist operation is taking place'[15].

19. The requirement for preventive detention to be carried out on the basis of a substantiated decision would clearly entail a need for the taking this measure to be capable of being justified by reference to (a) the terrorist threats that are supposed to be being prevented, (b) the existence of the relevant anti-terrorist operations that would permit the use of this measure and (c) the existence of a reasonable suspicion that the person concerned has carried out 'terrorist activity'.

20. Although there is a requirement in the preventive detention law that the decision be substantiated, there is no explicit reference to it being reduced to writing.

[11] I.e., those referred to in n. 8. Thus Article 1.2 of the Regulation provides that: 'terrorism - socially dangerous activity that is intentional, deliberate use of violence by hostage-taking, arson, murder, torture, intimidation of citizens and public authorities or any other dangers on the life or health of innocent people or a threat to commit criminal acts for criminal purposes; terrorist activities - which includes: planning, organization, preparation and implementation of terrorist acts; incitement to commit terrorist acts of violence against individuals or organizations, the destruction of material objects for terrorist purposes; organization of illegal armed groups, criminal gangs (criminal organizations) organized crime groups to commit terrorist acts, as well as participation in such acts; recruiting, arming, training and use of terrorists; promotion and dissemination of the ideology of terrorism and propaganda; funding and other assistance to terrorism; terrorist financing - providing or collecting assets of any kind of knowledge that will be used wholly or partly for the organization, preparation and execution of certain terrorist or terrorist organization determined by the Criminal Code of Ukraine assassination, involvement in the commission of a terrorist act, public incitement to commit assassination, the creation of a terrorist group or terrorist organization, facilitate the commission of a terrorist act, any other terrorist activity, and the attempt to commit such acts; international terrorism - carried out socially dangerous acts of violence associated with theft, seizure, or murder of innocent people or threat to life and health, the destruction or threat of destruction of important economic facilities, life support systems, communications, use or threat of use of nuclear, chemical, biological and other weapons of mass destruction on a global or regional scale by terrorist organizations, groups, including through the support of public authorities of individual states in order to achieve certain goals'.

[12] Especially the reference to 'the ideology of terrorism and propaganda'.

[13] See paras. 14, 39 and 42.

[14] Article 2.3.

[15] Article 2.5.

Nonetheless, it is very doubtful if a decision could really be shown to have been substantiated without some form of documentary record of the reasoning process, albeit that this might be in an abbreviated form. Indeed, in the absence of such a record, it would be possible for an arbitrary decision to be subject to rationalisation after the event. However, the need for at least a written decision would seem to be a necessary consequence of the requirement that copies of it be handed over to the person concerned and be sent to an investigating judge or court. Furthermore, the requirement that the writing be contemporaneous with the taking of the decision undoubtedly flows from the obligation that the latter be 'immediately handed over' to the person concerned. The Regulation sets out the same requirements regarding the provision of a copy of the decision on preventive detention to the detained person and an investigating judge. However, it should be noted that the only explicit requirement concerning substantiation is in the Regulation, namely, that there be a *reasoned* decision as regards 'the lack of grounds for authorisation of preventive detention'[16], i.e., not where its imposition is actually authorised.

21. Those who are specified in the preventive detention law as competent to decide that someone should be subjected to preventive detention are the heads of the Chief Directorate (Department) of the Security Service of Ukraine and Chief Directorate (Department) of the Ministry of Internal Affairs of Ukraine in the Autonomous Republic of Crimea, respective oblasts, Kyiv City or Sevastopol City. It is expressly provided that no decision of an investigating judge or court is required but any decision by the specified persons is, however, made 'subject to consent of a public prosecutor'. However, although this list is echoed in the Regulation, the latter also qualifies which public prosecutors can provide the necessary consent by providing that the powers to authorise preventive detention must be 'executed by prosecutors of regional level, and their deputies'[17].

22. The Regulation makes it clearer than the preventive detention law that a person who is subjected to preventive detention will first have been apprehended and certain processes must be followed before the relevant decision may be taken.

23. Thus, as regards an initial apprehension, there is provision for following the procedure in Article 208 of the Criminal Procedure Code[18], the taking of steps to bring the person for whom this measure is being considered before the public prosecutor[19] and a requirement that no more than 72 hours must elapse between 'the factual moment of detention' and the taking of the decision on preventive detention[20], as well as persons

[16] Article 2.14; emphasis added.
[17] Article 2.4.
[18] Article 2.2. This also makes applicable the requirements relating to witnesses to be involved in personal searches and makes provision for identifying the person detained.
[19] Article 2.3.
[20] Article 2.9.

involved in terrorist activity being 'apprehended' by 'employees of agencies and units involved in conducting anti-terrorist operations'[21].

24. However, there is no explicit power in either the preventive detention law or the Regulation to detain someone for the purpose of considering whether to subject him or her to preventive detention. Moreover, it is questionable whether the regular powers under the Criminal Procedure Code could be used since, although there are supposed to be grounds to believe that grave offences have been committed, the object of the exercise is to consider whether someone should be subject to preventive detention rather than whether or not he or she should be prosecuted. The structure of the Regulation certainly seems to be organised on the assumption that there is a discrete power and it is thus surprising that none is included in it.

25. Before taking any decision to authorise the use of preventive detention, the public prosecutor concerned must consider the issue of its use with the 'participation of the person in regard to whom the application' for such a measure has been sought[22]. This is ostensibly some form of hearing but there are no requirements as to the disclosure of information or of any allegations regarding the person concerned. There is, however, an obligation for the public prosecutor to verify compliance with the law on communicating to the detainee 'the grounds of detention and clarification of his rights under the criminal procedural legislation of Ukraine'[23]. This would seem to relate to the initial apprehension of the person concerned rather than the imposition of preventive detention. However, the requirement is confusing since, as has already been seen, there is some uncertainty as to whether this detention could be under criminal procedural law[24].

26. There is no explicit provision in Article 15-1 or in the Regulation for a person subject to preventive detention being entitled to have access to a lawyer - whether before such detention has been authorised or while it is in effect - but this might be implied by the duty to check on compliance with rights under criminal procedure legislation, even though preventive detention does not form part of the criminal process.

27. Moreover, in the event of access to a lawyer being possible, there is no clear stipulation that the expenses involved in obtaining legal assistance will be met by the state. Certainly, as the use of preventive detention is outside the scope of the Criminal Procedure Code, the provisions in it concerning this[25] could hardly be relied upon without express provision in that regard.

[21] Article 2.3.
[22] Article 2.6.
[23] Article 2.7.
[24] See para. 24.
[25] Notably, Articles 20, 22 and 193.2(1).

28. There is also a requirement for the Ministry of Foreign Affairs to be notified where a detainee's documents 'show that he has citizenship of a foreign state'[26], which could facilitate - although does not guarantee - access to consular assistance.

29. The specification in the provisions of the preventive detention law and the Regulation that the preventive detention is to be for more than 72 hours but not more than 30 days would imply that the former is the minimum period for which such a measure can be imposed, while presumably permitting the imposition of a period longer than that but shorter than the upper limit specified. There is no provision for a decision to be renewed should a period shorter than 30 days be imposed and so it seems improbable than the period specified in a decision would ever be less than the maximum.

30. There is no provision - such as is found in Article 185.1 of the Criminal Procedure Code[27] - imposing an obligation on the specified persons to review any decision taken to subject someone to preventive detention and, in particular, to bring it to an end by the person's release before the 30 days' maximum, which might be appropriate should it be established that the conditions justifying its use no longer exist.

31. The final two paragraphs of Article 15-1 seem to link the duration of preventive detention to a decision to use the regular criminal process in respect of the person concerned in that it is provided that the decision on its use is to be sent 'immediately' to an investigating judge or court 'with the respective jurisdiction together with a request to impose a measure of restraint on the person' and that the preventive detention cannot last after that request is considered[28]. However, it is not clear how practicable it would be for an investigating judge or court to consider the request to impose a measure of restraint before the 30 days' maximum for preventive detention has been reached and indeed whether either of them would be entitled to start considering the request once it was received. Nonetheless, the expectation does seem to be that preventive detention will be followed by criminal proceedings.

32. The latter expectation would seem to be reinforced by the requirement that, before taking any decision to authorise preventive detention, the public prosecutor is required to include 'appropriate information to the Unified Register of Pre-trial Investigation'[29].

33. There is no reference in the preventive detention law to the ability of a person subject to a preventive detention decision being entitled to challenge it in a court. However, although there is a stipulation in the Regulation that a 'detained person shall have the

[26] Article 2.8.
[27] 'If, after filing the motion to enforce a measure of restraint, public prosecutor learns about circumstances which exclude the reasonable suspicion that a person has committed criminal offence, he/ she is required to withdraw the motion to enforce a measure of restraint and recall the permission for apprehension if such permission has been granted'.
[28] This is reiterated in Articles 2.12 and 13 of the Regulation.
[29] Article 2.10

right at any time to challenge his detention'[30], it is not clear what procedure could be used for this purpose. Certainly, no such procedure for challenging detention outside the criminal process invoked by the Ukrainian authorities has ever been accepted by the Court as providing effective judicial control[31]. In some instances this has been because the provisions relied upon were those in the Criminal Procedure Code and thus inapplicable to the proceedings concerned but reliance upon Article 24 of the Code of Administrative Justice[32] has also not been considered to meet the requirements of the Convention[33]. Admittedly this has always been in the context of deportation and extradition cases but there does not seem to be any basis for believing that the lacuna established in them is not equally applicable to the use of preventive detention.

34. A copy of the decision must, as has been noted, be handed over to the person concerned. This would enable him or her, at least in principle, to consider whether he or she wishes to bring proceedings to challenge the decision.

35. Public prosecutors are also required by the Regulation to keep records on any authorisation of preventive detention 'in the relevant journals'[34].

36. There is no indication in the preventive detention law as to where a person subject to preventive detention is to be held and as to any specific requirements governing the conditions in which such a person can be held. However, the Regulation provides that the 'holding of detainees is carried out in accordance with the Law of Ukraine "On

[30] Article 2.16

[31] See, e.g., *Soldatenko v. Ukraine*, no. 2440/07, 23 October 2008, *Dubovik v. Ukraine*, no. 33210/07, 15 October 2009, *Puzan v. Ukraine*, no. 51243/08, 18 February 2010 and *Nowak v. Ukraine*, no. 60846/10, 31 March 2011.

[32] 'Article 2 of the Code provides that the task of the administrative judiciary is the protection of the rights, freedoms and interests of individuals and the rights and interests of legal entities in the sphere of public-law relations from violations by State bodies, bodies of local self-government, their officials and other persons in the exercise of their powers. Under the second paragraph of this Article, any decisions, actions or omissions of the authorities may be challenged before the administrative courts'.

[33] Thus, in *Dubovik v. Ukraine*, no. 33210/07, 15 October 2009, the Court stated: 'The Court further observes that the Government also referred to Article 2 of the Code of Administrative Justice, which in their opinion provided the applicant with an effective remedy to challenge the decision on extradition and any action taken during the extradition proceedings. This provision guarantees to everyone the right to challenge any decisions, actions and omissions of the State authorities in the administrative courts. However, the Government do not give any indication of the powers of the courts in such a review, and do not submit any decisions in which such actions have been used, while the Court has previously been furnished with cases in which the domestic courts found that the Code of Administrative Justice did not provide for an appropriate procedure for challenging extradition decisions and did not give the courts competence to decide on the lawfulness of the extradition (Soldatenko, cited above, §§ 46 and 49). The Court also notes that the applicant made a complaint under the Code of Administrative Justice on 26 June 2008, but that by her release in March 2009 the complaint had not been dealt with', at para. 66.

[34] Article 2.11

pre-trial detention (custody)' and there is no attempt in either measure to exclude generally applicable provisions prohibiting ill-treatment[35].

The Criminal Procedure Code amendment

37. The effect of the new Article 615 is to authorise in certain circumstances the use by a public prosecutor of a number of powers connected with pre-trial investigation that are normally only exercisable by an investigating judge.

38. The powers concerned relate to the determination of motions or requests made by investigators or public prosecutors for:
    - provisional access to objects and documents[36];
    - a search of home or any other possession of a person[37];
    - the conduct of covert investigative (detective) actions[38]; and
    - the imposition of a custodial measure of restraint for up to 30 days.

39. The exercise of these powers by a public prosecutor is authorised only where three conditions are satisfied, namely, (a) this is to occur in 'a locality (administrative area) under the martial law, in the state of emergency or of an anti-terrorist operation', (b) certain specified offences are involved and (c) an investigating judge is not able to exercise them within the timelines established by the Code.

40. Whether somewhere can be regarded as 'a locality (administrative area) under the martial law, in the state of emergency or of an anti-terrorist operation' will presumably be determined by whether its designation as such is in conformity with the relevant legislation and the Constitution[39].

41. The required locality is certainly one where the enumerated offences might well occur but it is not an essential element of them.

42. The offences are all grave ones under the Criminal Code and comprise:
    - actions aimed at forceful change or overthrow of the constitutional order or take-over of government[40];
    - trespass against territorial integrity and inviolability of Ukraine[41];
    - high treason[42];

[35] In particular, Article 28 of the Constitution: 'Everyone has the right to respect for his or her dignity. No one shall be subjected to torture, cruel, inhuman or degrading treatment or punishment that violates his or her dignity. ...'.
[36] Articles 163 and 164.
[37] Articles 234 and 235.
[38] Articles 247 and 248.
[39] Articles 85(31) and 107(20) & (21).
[40] Article 109.
[41] Article 110.
[42] Article 111.

- trespass against life of a statesman or a public figure[43];
- sabotage[44];
- providing information on state secrets or collecting such information in order to provide to a foreign state, a foreign organization or their representatives, where these actions are committed by a foreign national or stateless person[45];
- act of terrorism[46];
- involvement in a terrorist act[47];
- public incitement to commit a terrorist act[48];
- creation of a terrorist group or terrorist organization[49];
- facilitating the commission of a terrorist act[50];
- financing of terrorism[51];
- creation of unlawful paramilitary or armed formations[52];
- attacks on objects which contain any items of increased danger to the environment[53];
- stealing, appropriation or extortion of firearms, ammunition, explosives or radioactive material, or obtaining them by fraud of abuse of office[54];
- carrying, storing, purchasing, producing, repairing, transferring or selling firearms (other than smoothbore hunting guns), ammunition, explosive substances or explosive devices without a permit required by law[55];
- riots[56];
- trespass against life of a law enforcement officer, a member of a community formation for the protection of public order, or a military servant[57];
- hostage taking of a representative of public authorities or a law enforcement officer[58];
- threats or violence against a judge, assessor or juror[59];
- wilful destruction or impairment of property owned by a judge, assessor or juror[60];
- trespass against life of a judge, assessor or juror in connection with their activity related to the administration of justice[61];

[43] Article 112.
[44] Article 113.
[45] Article 114.1.
[46] Article 258.
[47] Article 258-1.
[48] Article 258-2.
[49] Article 258-3.
[50] Article 258-4.
[51] Article 258-5
[52] Article 260.
[53] Article 261.
[54] Article 262.
[55] Article 263.1
[56] Article 294.
[57] Article 348.
[58] Article 349.
[59] Article 377.
[60] Article 378.

- planning, preparation and waging of an aggressive war[62];
- violation of rules of the warfare[63];
- use of weapons of mass destruction[64];
- development, production, purchasing, storage, distribution or transportation of weapons of mass destruction[65];
- ecocide[66];
- genocide[67];
- trespass against life of a foreign state representative[68]; and
- criminal offenses against internationally protected persons and institutions[69].

43. Turning to the third condition, there does not actually appear to be any specific timeline governing the making of rulings on requests for provisional access to objects and documents.

44. On the other hand, there are clear timelines applicable to the exercise of the other three sets of powers to which the new Article 615 applies.

45. Thus, requests to conduct searches must be considered on the day that they are made[70], while those to conduct covert investigative (detective) action must be considered within 6 hours of them being received[71]. Furthermore, motions to enforce or change a measure of restraint must be considered

> without any delay and in any case within 72 hours after the suspect, accused has actually been apprehended, or after the filing of the motion if the suspect, accused is at large, or after the suspect, accused, his defense counsel has filed an appropriate plea with the court[72]

46. In these cases, therefore, there is clearly an obligation in normal circumstances for the relevant determination to be made within a relatively short period of time. The assumption underlying the adoption of the Criminal Procedure Code amendment must be that the circumstances in the locality concerned must be such that there will be occasions when it is not practical to fulfil that obligation but there is nonetheless a wish or need to have resort to certain aspects of the criminal process.

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[61] Article 379.
[62] Article 437.
[63] Article 438.
[64] Article 439.
[65] Article 440.
[66] Article 441.
[67] Article 442.
[68] Article 443.
[69] Article 444.
[70] Article 234.4.
[71] Article 248.1.
[72] Articles 186 and 206.4.

47. Although there is no similar short timeline applicable to requests for access to objects and documents and although normally the obligation first to summon the person who possesses them can be dispensed with if the party to criminal proceedings that filed the motion proves 'the presence of sufficient grounds to believe that a real threat exists of them being altered or destroyed'[73], it is certainly conceivable that it will not be practicable, in the circumstances to which the new Article 615 applies, for an investigating judge to be available in the relevant locality determine a request for access to objects and documents in a sufficiently timely manner to avoid possible prejudice to criminal proceedings.

48. However, it is not clear from the new Article 615 whether or not the determination of the request or motion concerned can be by the same public prosecutor as the one who makes it. There is certainly no express prohibition on this but, as it would be inconsistent with the principle of adversariality of parties that is supposed to govern the conduct of criminal proceedings[74]. As the Regulation specifies that the powers are to be performed by a public prosecutor 'who is performing procedural supervision in the relevant criminal proceedings'[75], this would seem to point to there being no appropriate separation of roles. This is because such a public prosecutor will be the one who either issues a motion on imposing a measure of restraint, search or seizure of documents and objects, etc. him or herself or will approve the investigator's motion for such actions, i.e., the steps for which and so, when taking on the investigating judge's role, this public prosecutor will be authorising what he or she has already done.

49. If a public prosecutor imposes a custodial measure of restraint before the person concerned has actually been apprehended, there would then be a need to comply with the requirement in Article 186 that a motion to enforce the measure be considered 'without any delay and in any case within 72 hours after the suspect, accused has actually been apprehended' but presumably this would still be a matter for the public prosecutor rather than the investigating judge.

50. It is assumed that the public prosecutor who exercises the powers of an investigating judge with respect to the imposition of custodial measures of restraint is also subject to the general duties of such a judge under Article 206 regarding the protection of the human rights of persons deprived of liberty. This would be particularly important as concerns the duties to ensure that allegations of ill-treatment are duly investigated and that the person concerned has a defence counsel[76].

51. Although the new Article 615 gives a public prosecutor the power to impose a custodial measure of restraint for up to 30 days, there is no amendment made to the

[73] Article 163.2.
[74] Article 22 of the Criminal Procedure Code.
[75] Article 3.1.
[76] In paragraphs 6,7 and 9.

other provisions in the Criminal Procedure Code governing the imposition of measures of restraint. As a result, it is assumed that the public prosecutor concerned must also comply with the stipulation in Article 183.1, namely, that

> Keeping in custody is an exceptional measure of restraint enforced exclusively if public prosecutor proves that none of the less strict measures of restraint can prevent risks specified in Article 177 of the present Code[77].

52. Similarly, the ability of a detained person under Article 201 to seek the cancellation or change in a custodial measure of restraint does not seem to have been affected by the new Article 615 and could, therefore, remain available. However, under paragraph 3 of this provision an investigating judge, court is required to consider a motion for this purpose 'within three days after receiving the same'. The practicality of giving effect to this requirement must be questionable if the assumptions justifying the adoption of the new Article 615 are correct. In these circumstances, it could be the availability of this Article 201 has been implicitly curtailed by the new Article 615.

53. Furthermore, as there is no exclusion in the new Article 615 of the provisions in the Criminal Procedure regarding defence at the pre-trial investigation stage, notably in Articles 42 and 44-54, it must be assumed that these also remain applicable. There is, however, no information as to how it is expected this will be organised, which is undoubtedly of some significance given that the circumstances envisaged for the use of the present powers by a public prosecutor are ones in which the normal functioning of an investigating judge is assumed not to be possible

54. Apart from the clarification as to the public prosecutor who will exercise the relevant powers[78], all that the Regulation adds to the provisions in the Criminal Procedure Code amendment is to stipulate that the consideration of the matters concerned is to be by the public prosecutor deciding personally in accordance with Article 110 of the Code[79], which governs procedural decisions and to specify the procedure for certification of a ruling by a public prosecutor[80].

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[77] Article 177 provides that: 1. The purpose of a measure of restraint is to ensure the compliance of the suspect or accused, with procedural obligations imposed on him, as well as to prevent attempts to: 1) hide from pre-trial investigation agency and/or the court; 2) destroy, conceal or spoil any of objects or documents that have essential importance for establishing circumstances of criminal offence; 3) exert unlawful influence on the victim, witness, another suspect, accused, expert or specialist in the same proceedings; 4) obstruct criminal proceedings in other way; 5) commit similar or the same criminal offence, or continue the criminal offence of which he is suspected, charged. 2. Grounds for enforcement of a measure of restraint shall be the existence of reasonable suspicion of having committed a criminal offence, as well as the existence of risks that provide sufficient grounds to investigating judge, court to believe that the suspect, the accused or the convicted person can commit actions specified in part one of this Article. The investigator, public prosecutor may not initiate application of a measure of restraint without grounds provided hereunder'.

[78] See para. 48.

[79] Articles 3.2.2, 3.3.2, 3.4.2 and 3.5.2,

[80] Article 3.6.

C. European standards

55. It needs to be borne in mind that no specific treaty standards have been adopted at the European (or indeed the international) level governing the circumstances in which persons may be deprived of their liberty under martial law, in a state of emergency or in a region of anti-terrorist operations, as opposed to their treatment once this occurs[81]. Moreover, the Committee of Minister's *Guidelines on Human Rights and the Fight against Terrorism*[82], while addressing the issue of the arrest of terrorists, only do so on the basis of restating the requirements applicable for the arrest of any suspected offender[83].

56. Any deprivation of liberty under martial law, in a state of emergency or in a region of anti-terrorist operations must, therefore, be in conformity with the generally applicable guarantees of the right to liberty and security of the person in Article 5 of the Convention.

57. Referring to the fundamental importance of these guarantees for securing the right of individuals in a democracy to be free from arbitrary detention at the hands of the authorities, the Court has recently stated that

> it has repeatedly stressed in its case-law that any deprivation of liberty must not only have been effected in conformity with the substantive and procedural rules of national law but must equally be in keeping with the very purpose of Article 5, namely to protect the individual from arbitrariness (see Chahal, cited above, § 118). This insistence on the protection of the individual against any abuse of power is illustrated by the fact that Article 5 § 1 circumscribes the circumstances in which individuals may be lawfully deprived of their liberty, it being stressed that these circumstances must be given a narrow interpretation having regard to the fact that they constitute exceptions to a most basic guarantee of individual freedom (see Quinn v. France, 22 March 1995, § 42, Series A no. 311).
> 231. It must also be stressed that the authors of the Convention reinforced the individual's protection against arbitrary deprivation of his or her liberty by guaranteeing a corpus of substantive rights which are intended to minimise the

[81] Thus the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) is concerned only with the minimum standards of treatment for persons deprived of their liberty for reasons related to the armed conflict - Articles 4 and 5 - but does not indicate when such a deprivation is justified.

[82] Adopted at its 804th meeting (11 July 2002), (H(2002) 4).

[83] 'VII. Arrest and police custody 1. A person suspected of terrorist activities may only be arrested if there are reasonable suspicions. He/she must be informed of the reasons for the arrest. 2. A person arrested or detained for terrorist activities shall be brought promptly before a judge. Police custody shall be of a reasonable period of time, the length of which must be provided for by law. 3. A person arrested or detained for terrorist activities must be able to challenge the lawfulness of his/her arrest and of his/her police custody before a court. VIII. Regular supervision of pre-trial detention A person suspected of terrorist activities and detained pending trial is entitled to regular supervision of the lawfulness of his or her detention by a court'. As well as regulating the treatment of persons deprived of their liberty for terrorist activities (Article XI), the Guidelines do envisage derogating from certain obligations during a situation of war or public emergency but do not specify the particular standards to be observed (Article XV).

risks of arbitrariness, by allowing the act of deprivation of liberty to be amenable to independent judicial scrutiny and by securing the accountability of the authorities for that act. The requirements of Article 5 §§ 3 and 4 with their emphasis on promptness and judicial supervision assume particular importance in this context. Prompt judicial intervention may lead to the detection and prevention of life-threatening measures or serious ill-treatment which violate the fundamental guarantees contained in Articles 2 and 3 of the Convention (see Aksoy, cited above, § 76). What is at stake is both the protection of the physical liberty of individuals as well as their personal security in a context which, in the absence of safeguards, could result in a subversion of the rule of law and place detainees beyond the reach of the most rudimentary forms of legal protection.

232. Although the investigation of terrorist offences undoubtedly presents the authorities with special problems, that does not mean that the authorities have carte blanche under Article 5 to arrest suspects and detain them in police custody, free from effective control by the domestic courts and, in the final instance, by the Convention's supervisory institutions, whenever they consider that there has been a terrorist offence (see Dikme, cited above, § 64)[84].

58. Thus, the particular problems which the need to resort to martial law, a state of emergency or anti-terrorist operations terrorism may pose are not thereby capable of justifying any lowering of the generally applicable requirements unless those problems are sufficient to justify a derogation from them because the extent of the situation concerned is sufficient to characterise it as 'a war or other public emergency threatening the life of the nation' under Article 15. Furthermore any derogation from the generally applicable requirements must be strictly required by the exigencies of the situation and will only be admissible if certain procedural requirements are fully met.

59. Consideration is given first to the need for any deprivation of liberty to have a legal basis, the extent to which its use is permissible where the object is not a possible prosecution, its use in the criminal process, the requirement to give reasons, the need for access to a lawyer and to consular officials and the requirement of judicial control. Finally, the requirements given access to objects and documents, searches and covert investigative (detective) actions are reviewed.

Legal basis

60. As has been noted already, Article 5 of the Convention prohibits any detention that does not occur on grounds and in accordance with a procedure established by law. This requirement is concerned with both the existence of a legal basis for the detention and the use of the power concerned in the specific case.

[84] *El-Masri v. "the former Yugoslav Republic of Macedonia"* [GC], no. 39630/09, 13 December 2012 and echoed more recently in *Al-Nashiri v. Poland* [GC], no. 28761/11, 24 July 2014, at paras. 527-529 *Husayn (Abu Zubaydah) v. Poland* [GC], no. 7511/13, 24 July 2014, at paras. 521-523.

61. The legal basis will normally come from a provision of national law, although there is some support for international law as a discrete source of authority where this is part of the practice of the states concerned or it applies pursuant to a constitutional provision[85].

62. However, it is well-established in the case law of the Court that the requirement of a legal basis for detention does not simply mean the existence of formal provisions in the law. The provisions concerned must also be accessible and foreseeable, that is, they must be public and sufficiently precise to allow someone to foresee the consequences which a given action may entail and thereby avoid all risk of arbitrariness[86].

63. However, even where there is a legal basis for detention, this will be regarded as arbitrary should there be any element of bad faith or deception or should the order to detain and its execution fail to conform with the purpose of the restrictions being imposed[87]. The latter will have particular relevance to it being possible to establish that there is a real need for the detention either at all (are there suitable alternatives?) or for its length[88].

64. Furthermore detention will be regarded as arbitrary where it is imposed for a purpose that is inconsistent with the rights under the Convention[89]. This could, for example, be of particular significance for the definition of 'terrorism' and the way in which it is applied in a particular case. Thus, while efforts to change the constitutional order would be inadmissible where violence is being used or an anti-democratic goal was being pursued[90], depriving of liberty those proponents of change acting in legitimate exercise of the rights to freedom of association and of expression and their detention would not be warranted.

Preventive detention

65. Article 5(1) of the Convention specifies - with a view to limiting - the actual grounds that can be used for detention and this is particularly material for present purposes as those grounds do not include the use of preventive detention, i.e., detention for the

[85] See, e.g., *Drozd and Janousek v. France and Spain*, no. 12747/87, 26 June 1992.
[86] See, e.g., *Steel v. United Kingdom*, no. 24838/94, 23 September 1998.
[87] See *Saadi v. United Kingdom* [GC], no. 13229/03, 29 January 2008. The *Saadi* ruling also emphasised that there must be a relationship of proportionality between the basis for the deprivation of liberty and the place and conditions of detention.
[88] As the Court stated in *Witold Litwa v. Poland*, no. 26629/95, 4 April 2000, 'a necessary element of the "lawfulness" of the detention within the meaning of Article 5 § 1 (e) is the absence of arbitrariness. The detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained. That means that it does not suffice that the deprivation of liberty is executed in conformity with national law but it must also be necessary in the circumstances' (para. 78).
[89] See, e.g., *Gusinskiy v. Russia*, no. 70276/01, 19 May 2004
[90] See, e.g., *Refah Partisi (The Welfare Party) v. Turkey* [GC], no. 41340/98, 13 February 2003.

purpose of preventing crime other than where the intention is to prevent a specific crime and then bring a prosecution against the person concerned. Furthermore, the vagueness of the suspicion that the person being detained 'may' commit a crime rendered that detention arbitrary The Court has thus concluded that the detention without trial of suspected terrorists would be a violation of Article 5(1) where there has been no admissible derogation under Article 15[91]

66. The Court has, however, found both the existence of a terrorist threat to be capable of justifying a derogation and the use of detention without trial in response to it to be a legitimate and proportionate response to that threat in the particular circumstances of two cases that have come before it[92].

67. In both cases this was because there were no other means of responding effectively to the threat which was posed by the terrorists concerned at a given point in time[93].

68. However, if a derogation is only made with respect to a part or parts of the state making it then it cannot be invoked with respect to acts or omissions elsewhere[94].

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[91] See *Lawless v. Ireland (No.3)*, no. 332/57, 1 July 1961 and *Guzzardi v. Italy*, no. 7367/76, Judgment of 6 November 1980. See also *Schwabe and M G v. Germany*, no. 8080/08, 1 December 2011, at paras. 69-73.

[92] *Lawless v. Ireland (No. 3)*, no. 332/57, 1 July 1961 and *Ireland v. United Kingdom*, no. 5310/71, 18 January 1978.

[93] Thus, in the *Lawless* case the Court stated 'the application of the ordinary law had proved unable to check the growing danger which threatened the Republic of Ireland; whereas the ordinary criminal courts, or even the special criminal courts or military courts, could not suffice to restore peace and order; whereas, in particular, the amassing of the necessary evidence to convict persons involved in activities of the IRA and its splinter groups was meeting with great difficulties caused by the military, secret and terrorist character of those groups and the fear they created among the population; whereas the fact that these groups operated mainly in Northern Ireland, their activities in the Republic of Ireland being virtually limited to the preparation of armed raids across the border was an additional impediment to the gathering of sufficient evidence; whereas the sealing of the border would have had extremely serious repercussions on the population as a whole, beyond the extent required by the exigencies of the emergency' (para. 36). Similarly, in *Ireland v. United Kingdom* it found that 'Unquestionably, the exercise of the special powers was mainly, and before 5 February 1973 even exclusively, directed against the IRA as an underground military force. The intention was to combat an organisation which had played a considerable subversive role throughout the recent history of Ireland and which was creating, in August 1971 and thereafter, a particularly far-reaching and acute danger for the territorial integrity of the United Kingdom, the institutions of the six counties and the lives of the province's inhabitants (see paragraphs 16, 17, 20, 28-32, 35-42, 44, 47-48, 54-55, 58, 61, 63 and 67 above). Being confronted with a massive wave of violence and intimidation, the Northern Ireland Government and then, after the introduction of direct rule (30 March 1972), the British Government were reasonably entitled to consider that normal legislation offered insufficient resources for the campaign against terrorism and that recourse to measures outside the scope of the ordinary law, in the shape of extrajudicial deprivation of liberty, was called for. When the Irish Republic was faced with a serious crisis in 1957, it adopted the same approach and the Court did not conclude that the "extent strictly required" had been exceeded (Lawless judgment of 1 July 1961, Series A no. 3, pp. 35-36, para. 14, and pp. 57-58, para. 36). However, under one of the provisions complained of, namely Regulation 10, a person who was in no way suspected of a crime or offence or of activities prejudicial to peace and order could be arrested for the sole purpose of obtaining from him information about others - and this sometimes occurred (see paragraphs 38 and 81 above). This sort of arrest can be justifiable only in a very exceptional situation, but the circumstances prevailing in Northern Ireland did fall into such a category. Many witnesses could not give evidence freely without running the greatest risks (see paragraphs 36, 53, 58-59 and 74 above); the competent authorities were entitled to take the view, without exceeding their margin of appreciation, that it was indispensable to arrest such witnesses so that they could be questioned in conditions of relative security and not be exposed to reprisals. Moreover and above all, Regulation 10 authorised deprivation of liberty only for a maximum of forty-eight hours.(para. 212).

69. Nonetheless, a derogation will only be effective if the procedural requirements - namely, notification of the Secretary General of the Council of Europe of the measures taken and of the reasons for them, as well as the state of emergency being officially proclaimed pursuant to Article 4 of the International Covenant on Civil and Political Rights ('the Covenant')[95] - are actually fulfilled; action taken in response to a terrorist problem for which a derogation might justifiably have been made cannot excuse what would otherwise be a violation of Article 5 if there has been no such notification[96].

70. A derogation by one state pursuant to the threat posed by international terrorism has been found justified notwithstanding that other, similarly affected, states had not responded to it in this way. However, it was also found that the actual derogating measures - which provided for the indefinite detention of persons suspected of terrorism who could not be deported to their home country - had been disproportionate in that they had discriminated unjustifiably between nationals and non-nationals[97].

71. It should also be noted that the existence of safeguards against abuses in addition to judicial control have been regarded as important where detention without trial is used. These safeguards are generally review mechanisms whereby the justification for a person's detention is periodically examined - albeit without the ability on the part of the detainee to test the evidence - and inspection of places of detention to check for ill-treatment[98].

72. Furthermore, it should be noted that the Court has emphasised that

> the unacknowledged detention of an individual is a complete negation of these guarantees and a most grave violation of Article 5. Having assumed control over an individual, the authorities have a duty to account for his or her whereabouts[99].

73. Although this statement was not made in the context of preventive detention, it would be equally applicable to its use. Indeed, any detention without trial that is secret would necessarily negate the requirement for effective access to judicial control discussed

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[94] As was found to be the situation in *Sakik v. Turkey*, no. 23878/94, 26 November 1997, *Sadak v. Turkey*, no. 25142/94, 8 April 2004, *Yurttas v. Turkey*, no. 25143/94, 27 May 2004, *Abdulsamet v. Turkey*, no. 32446/96, 2 November 2004 and *Bilen v. Turkey*, no. 34482/97, 21 February 2006.
[95] See *Brannigan and McBride v. United Kingdom*, no. 14553/89, 26 May 1993.
[96] *Cf. Brogan v. United Kingdom*, no. 11209/84, 29 November 1988 and *Brannigan and McBride v. United Kingdom*, no. 14553/89, 26 May 1993.
[97] *A and Others v. United Kingdom* [GC], no. 3455/05, 19 February 2009.
[98] See, e.g., *Ireland v. United Kingdom*, no. 5310/71, 18 January 1978.
[99] *El-Masri v. "the former Yugoslav Republic of Macedonia"* [GC], no. 39630/09, 13 December 2012, at para. 233 and re-affirmed in *Al-Nashiri v. Poland* [GC], no. 28761/11, 24 July 2014, at para. 529 and *Husayn (Abu Zubaydah) v. Poland* [GC], no. 7511/13, 24 July 2014, at para. 523.

further below[100] and thus is not something that could be justified by a derogation in a state of emergency as it would impede the protection required for non-derogable rights.

Detention within the criminal process

74. As has already been seen, involvement in terrorism will invariably constitute one or more criminal offences[101] and the apprehension and detention of those concerned with a view to their being charged and prosecuted is explicitly recognised as an admissible limitation on the right to liberty and security under Article 5(1)(c) of the Convention.

75. Both the initial apprehension or arrest and the subsequent detention must be founded upon reasonable suspicion relating to the person concerned having committed a specific offence.

76. The requirement of reasonable suspicion necessitates the

> existence of facts or information which would satisfy an objective observer that the person concerned may have committed an offence[102]

but they need not be sufficient to justify a conviction or even the bringing of a charge[103].

77. This necessitates the authorities being actually able to demonstrate the basis for such a suspicion before a court, notwithstanding that the nature of counter-terrorist operations may require some details to be held back. This will not be achieved by referring only to a person's past convictions[104] but the furnish of some facts linking the person to the offence is needed even if confidential sources of supporting information is not disclosed[105]. Information from reliable informers could be sufficient[106].

78. The need for reasonable suspicion continues so long as a person is detained with a view to his or her being charged and prosecuted. While this requirement is generally easy to satisfy at the outset of detention, it inevitably becomes more exacting as the detention continues since the ability to undertake further investigations may make the initial impressions of the detaining authority less and less compelling[107].

[100] See *Lazoroski v. "the former Yugoslav Republic of Macedonia"*, no. 4922/04, 8 October 2009, para. 46.
[101] See *Murray v. United Kingdom*, no. 14310/88, 28 October 1994, para. 55.
[102] *Fox, Campbell and Hartley v. United Kingdom*, no. 12244/86, 30 August 1990.
[103] *O'Hara v. United Kingdom*, no. 37555/97, 16 October 2001.
[104] As in the *Fox, Campbell and Hartley* case.
[105] *Murray v. United Kingdom*, no. 14310/88, 28 October 1994).
[106] *O'Hara v. United Kingdom*, no. 37555/97, 16 October 2001.
[107] See, e.g., *Labita v. Italy* [GC], no. 26772/95, 6 April 2000.

79. In the event of a person not being released after his or her initial apprehension, there must then be compliance with the specific obligation in international guarantees that he or she be brought promptly before a judge or judicial officer with the power either to continue the detention or to release him or her[108].

80. The supervision must be performed by a judge rather than a prosecutor despite the wording of the relevant provisions as a prosecutor is unlikely to be able to comply with the impartiality requirement in the fair trial guarantees[109].

81. The time constraint of promptly will make allowances for the practical impossibility of a detained person being brought before a court[110] but otherwise there is not much flexibility.

82. Thus it will generally be expected that the judicial supervision will first take place within a day or two of the initial apprehension and in case of terrorism a delay of between four days and six hours and six days has been held to be unjustified in the absence of a derogation[111].

83. Longer periods have, however, been found acceptable in cases involving terrorism where a derogation had been made pursuant to a state of emergency. Thus no objection was taken to a delay of seven days where this was designed to ensure that the independence of the judiciary in a small jurisdiction was not compromised by being required to decide on the continuation of detention on the basis of incomplete information when important evidence could be expected to be obtained in the extended period[112].

84. However, a longer period involving another jurisdiction - 15 days - was not only considered excessive, notwithstanding the existence of a state of emergency and derogation, but was also considered not to be supported by any evidence that the fight against terrorism in that instance actually rendered judicial intervention impracticable[113].

85. Moreover, it should be noted that it was also significant for the extended period found acceptable in *Brannigan and McBride v. United Kingdom* that the alternative remedy of habeas corpus remained available. In addition in the situation addressed by that

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[108] Article 5(3) of the Convention.
[109] See *Nikolova v. Bulgaria* [GC], no. 31195/95, 25 March 1999.
[110] See, e.g., *Medvedyev and Others v. France* [GC], no. 3394/03, 29 March 2010.
[111] See *Brogan and Others v. United Kingdom*, no. 11209/84, 29 November 1988.
[112] *Brannigan and McBride v. United Kingdom*, no. 14553/89, 26 May 1993. A similar conclusion was reached in *Marshall v. United Kingdom* (dec.), no. 41571/98, 10 July 2001.
[113] *Aksoy v. Turkey*, no. 21987/93, 18 December 1996. Subsequently detention before being brought for a judge that lasted 16-23, 11 and 18 days was respectively found unjustified in *Demir v. Turkey*, no. 21380/93, 23 September 1998, *Nuray Sen v. Turkey*, no. 41478/98, 17 June 2003 and *Bilen v. Turkey*, no. 34482/97, 21 February 2006.

case there were also other guarantees against possible abuse to which importance was attached by the court, namely, the right to inform a relative or friend about one's detention and to have access to a doctor. Furthermore access to a lawyer was only delayed for a maximum period of forty-eight hours. The absence of all such guarantees was an important consideration for finding other periods unacceptable[114].

86. It may be that there is a possibility of a suspected terrorist, after his or her apprehension, being processed for the purpose of detention without trial rather than charged and prosecuted. In such cases there would be a need to make this choice by the time of the initial judicial supervision - possibly as a result of its outcome - as otherwise there would be a risk of the requirement that detention be linked to the criminal process being subverted by intelligence-gathering objectives and thus rendered unlawful.

87. The person exercising judicial supervision may only continue a person's detention where there is not only reasonable suspicion of his or her involvement in the commission of an offence but there are also certain substantiated risks - flight, commission of further offences, interference with the course of justice (such a collusion, intimidation of witnesses or suppression of evidence) and public disorder - that cannot be allayed by the use of less restrictive measures than detention (such as financial guarantees or the surrender of a passport).

88. Although persons involved in terrorism might be expected to flee, to continue their activities and to seek to interfere with the course of justice, this cannot be assumed and it will need to be sufficiently demonstrated for the detention of the person concerned to be continued.

89. In the event of the detention being continued at the initial judicial supervision, there will then arise an obligation for such supervision to be repeated on a periodic basis so long as the person is detained. The object of such supervision remains the same, namely, to determine whether there is a justifiable basis for the detention for the reasons outlined above.

90. Not only will the passage of time, as has been seen, make the requirement of reasonable suspicion potentially harder to demonstrate but it will also mean that at least of the risks are also less compelling. Thus the risk of tampering with evidence will be limited, if non-existent, where the investigation is complete.

91. However, where the grounds are substantiated, the detention can be continued until the completion of the trial subject only to the requirement that the trial be held within a reasonable time.

[114] *Aksoy v. Turkey*, no. 21987/93, 18 December 1996, *Demir v. Turkey*, no. 21380/93, 23 September 1998, *Nuray Sen v. Turkey*, no. 41478/98, 17 June 2003 and *Bilen v. Turkey*, no. 34482/97, 21 February 2006.

92. The determination of what is reasonable depends on the circumstances of each case but, while it will be hard to justify any period where there is a lack of diligence in pursuing a case, quite substantial periods have been upheld where the case is particularly complex and so much time is required to collect and process the necessary information. Thus, having regard to the particular circumstances of a case of international terrorism, a period of five years and nearly six months was considered reasonable[115] but such a period should, of course, not be applied automatically.

93. It may not be inconsistent with the above requirements for judicial authorisation of detention of suspected terrorists where this can be renewed for periods of seven days up to a maximum of twenty-eight days - as under the United Kingdom's Criminal Justice Act 2003 - since the aim remains to charge the persons concerned and there is ostensibly appropriate judicial control. However, this matter has not so far been addressed by the Court and the nature of the control in practice would probably be of particular significance in determining how admissible this approach is.

94. It should be noted that the existence of an emergency will not be capable of legitimising any failure to comply with requirements in the law governing a deprivation of liberty which might otherwise be capable of being justified under Article 5(1)(c)[116].

Access to a lawyer

[115] *Chraidi v. Germany*, no. 65655/01, 26 October 2006.

[116] '681. What is especially striking is the complete absence of any documentation recording either the request for authorisation of the applicants' detention or the authority or instructions given by Mr. Selçuk to detain the applicants. Despite the evidence of Mr. Gül that such a record would have been kept (paragraph 323 above), no document was produced indicating the name of the person who had informed the Prosecutor and sought his authority to detain. No written records were produced of any communications between the Prosecutor's Office and the gendarmerie relating to the decision to detain, whether in the form of requests or instructions or otherwise; the only written authorities to detain which were referred to in evidence were those of the gendarmerie itself, contained in the two warrants sent by fax to the police in Cizre and Istanbul (paragraphs 386 and 418 above). Nor were any documents produced recording the reasons for the detention of the applicants, the apprehension reports being silent on the point, despite the evidence of Mr. Yedekçi that the reasons should be stated in such reports (paragraph 349 above). 682. In the absence of any such material, the Court finds that it has not been sufficiently shown that the applicants' apprehension and their detention by the gendarmerie for periods of 7 to 25 days in November and December 1993 was duly authorised by a Prosecutor in accordance with the requirements of domestic law or "in accordance with a procedure prescribed by law" within the meaning of Article 5 § 1 of the Convention. 683. The Court refers to the Government's reliance on its derogation under Article 15 of the Convention to the rights guaranteed by Article 5 (paragraph 589 above). Article 15 § 1 of the Convention provides as follows: "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under [the] Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law." 684. However, even if the derogation and the resultant legislative Decrees could be considered relevant to the facts of the present case, the Court is not persuaded that the applicants' unlawful detention could thereby be legitimised. The Government have not shown how the applicants' detention without adequate authorisation could have been strictly required by the exigencies of the situation envisaged by Article 15 § 1 of the Convention (cf. mutatis mutandis Şen v. Turkey, no. 41478/98, §§ 22-29, judgment of 17 June 2003)'; *Elçi and Others v. Turkey*, no. 23145/93, 13 November 2003.

95. The right of access for detained persons to a lawyer is not an explicit requirement of the right to liberty and security but it is now well-established in both the case law of the Court.

96. Thus, in the context of persons being held as part of the criminal process, the basis for the right comes from the right to a fair trial under Article 6(1) of the Convention rather than the right to liberty and security of the person. It is considered that, without access to a lawyer at an early stage - namely, at the first interrogation - the right to a fair trial would be prejudiced[117]. As a consequence convictions based on evidence obtained where such access has been denied will be considered unfair but, where that evidence is not used, there could be no objection to the denial of access to a lawyer[118]. Such a denial will thus not necessarily affect the lawfulness of a person's detention, although in a particular case it could lead to this detention being regarded as arbitrary.

97. On the other hand, the right of access to a lawyer for the purpose of challenging the legality of one's detention - whether as part of the criminal process or pursuant to preventive detention or for any other reason - is based on the right to make such a challenge under Article 5(4) of the Convention. Interference with access to a lawyer in such cases would render that right ineffective. As a result any restrictions on access should not only be less than the delay allowed before such a challenge can be made but they need to take account of the practicalities of actually being able to instruct the lawyer for the purpose of the challenge[119].

Access to consular officials

98. The ability of a detained person to contact consular officials, although not part of the Convention guarantee, is something required of states that are parties to the Vienna Convention on Consular Relations[120]. Thus Article 36(1)(b) provides that if a detained person requests:

> the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph.

99. Furthermore, under sub-paragraph (1)(c), it is provided that

[117] See, e.g., *Salduz v. Turkey* [GC], no. 36391/02, 27 November 2008.
[118] See *Brennan v. United Kingdom*, no. 39846/98, 16 October 2001.
[119] See *Öcalan v. Turkey* [GC], no. 46221/99, 12 May 2005, where the isolation of the applicant on an island made this impossible.
[120] Ukraine ratified it on 27 April 198.

consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

100. Ensuring that these requirements are respected will be essential where a person detained in connection with terrorism is a foreign national. This duty arises once it is realised that the person is such a national or once there are grounds to think that he or she is probably one[121].

101. Indeed, a failure to fulfil these requirements could support the conclusion that the detention in a particular case is arbitrary and thus contrary to the Convention.

Judicial control

102. The Convention envisage two forms of judicial control where there has been a deprivation of liberty. One is applicable only to persons detained as part of the criminal process and has been already considered. The other applies to all forms of detention and thus would be applicable to those suspected of involvement in terrorism whether detained as part of the criminal process or detained on a preventive basis.

103. The first is concerned with the justification for the detention and addresses only a limited range of issues[122] whereas the second is meant to enable the legality of a person's detention[123] and can embrace a wide range of matters affecting that. The responsibility for instituting the first rests with the detaining authority but the second is a right vested in the detained person.

104. The specific requirements as to forum and delay in respect of the first form of judicial control have been outlined above[124].

105. However, although the process is clearly a judicial one, there is no requirement that the detained person be legally represented in these proceedings but it would be irrational and unjustified to exclude a person's legal representatives from them if or she has appointed them and they are able to be present[125].

106. The ability to challenge the legality of one's detention must be exercisable 'without delay', which is recognised as allowing for a somewhat longer interval than

[121] *Case concerning Avena and other Mexican nationals (Mexico v. United States of America)*, 31 March 2004 (ICJ).
[122] Pursuant to Article 5(3) of the Convention.
[123] Pursuant to Article 5(4) of the Convention.
[124] See paras. 79-94.
[125] See *Lebedev v. Russia*, no. 4493/04, 25 October 2007.

the promptness requirement for judicial supervision for those detained on suspicion of having committed an offence. Nonetheless at the outset of a person's detention a challenge must be possible at an early stage and delays of six or seven days do not seem to meet that requirement[126].

107. Furthermore the determination of a challenge should not take an unduly long period and certainly periods of more than a month have been found excessive[127].

108. A challenge to the legality of detention must be by a court or tribunal that can make a decision that is binding on the executive so that an advisory panel would not be acceptable for this purpose[128].

109. Furthermore the procedure must be one that can be successfully used and not theoretical[129] and so particular attention might be needed to ensure the effectiveness of any special procedure established in place of more regular remedies such as habeas corpus.

110. The evaluation of the legality of a person's detention will require consideration not only compliance with formal provisions but also with constitutional guarantees and international human rights guarantees that are applicable, including the requirement that detention must not be arbitrary[130].

111. In order to ensure the lawfulness of detention the court is not supposed to substitute its own discretion for that of the decision-making authority but the review must be wide enough to bear on all the conditions which are essential for the detention to be lawful.

112. Unlike the specific judicial supervision required in respect of the detention of persons in the course of the criminal process, the persons concerned must have effective access to a lawyer for the purpose of preparing and arguing a challenge to the legality of their detention[131].

113. Moreover the evaluation of the legality of detention must not be handicapped by non-disclosure to the court of the material on which the decision to detain the person concerned was taken; the court must have access to all of this material[132].

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[126] See *De Jong, Baljet and Van den Brink v. Netherlands*, no. 8805/79, 22 May 1984.
[127] See *Sanchez-Reisse v. Switzerland*, no. 9862/82, 21 October 1986 (31 days) and *Khudyakova v. Russia*, no. 13476/04, 8 January 2009 (54 days).
[128] See *Chahal v. United Kingdom* [GC], no. 22414/93, 15 November 1996.
[129] See *Sakik and Others v. Turkey*, no. 23878/94, 26 November 1997.
[130] See *Chahal v. United Kingdom* [GC], no. 22414/93, 15 November 1996 and *A and Others v. United Kingdom* [GC], no 3455/05, 19 February 2009.
[131] See *Istratii and others v. Moldova*, no. 8721/05, 27 March 2007.
[132] See *Chahal v. United Kingdom* [GC], no. 22414/93, 15 November 1996.

114. However, it is accepted that, with respect to the detainee, techniques accommodating security concerns about the nature and sources of intelligence information and the need for a substantial measure of procedural justice can be employed.

115. This means that the use of a procedure whereby the detainee is represented by a security-cleared lawyer for parts of a challenge may to some extent be a legitimate means of allowing evidence to be tested before the court - including the cross-examination of witnesses - without disclosing it to the detainee. Nonetheless this is only likely to be acceptable if the material that is actually disclosed to the detainee is still the predominant basis for the determination. Where, however, the disclosed material is no more than general in character and the determination of the challenge to the detention has to be based on non-disclosed material, the detainee will not be regarded as having had an adequate opportunity to challenge the allegations against him or her and international standards will thus be breached[133].

116. The right to challenge the legality of detention is undoubtedly to be regarded as non-derogable, notwithstanding the absence of a specific provision in international guarantees to this effect, because it protects rights expressed to be non-derogable, such as the right to life and the prohibition on torture and inhuman and degrading treatment. Although there is no ruling by the Court to this effect, it is implicit in the importance that it has attached to the availability of judicial control over deprivation of liberty pursuant to powers that derogate from Article 5(1) of the Convention. Furthermore, such a view has been taken of the essentially similar provisions in the Covenant and the American Convention on Human Rights[134].

117. The availability of a judicial procedure to challenge the legality of the use of preventive detention in individual cases was an important consideration for the Court to conclude that certain derogations were not more than was strictly required by the exigencies of the situation[135].

Access to documents, etc.

118. The enforced access to objects and documents, the conducting of the search of a home or any other possession of a person and the conducting of covert investigative (detective) actions as part of the criminal process are all measures which necessarily encroach upon the right to respect for private life, home and correspondence under Article 8 of the Convention. Furthermore, in the case of the compulsion to provide

[133] See *A and Others v. United Kingdom* [GC], no. 3455/05, 19 February 2009.
[134] See the United Nations Human Rights Committee's General Comment No. 05: Derogation of rights (Art. 4), 31 July 1981 and the Inter-American Court of Hyman Rights' Advisory Opinion, *Habeas Corpus in Emergency Situations*, OC-8/87, 30 January 1987.
[135] *Ireland v. United Kingdom*, no. 5310/71, 18 January 1978, *Brannigan and McBride v. United Kingdom*, no. 14553/89, 26 May 1993 and *Marshall v. United Kingdom* (dec.), no. 41571/98, 10 July 2001.

documents there is also a risk that the right under Article 6(1) not to incriminate oneself will be infringed.

119. Nonetheless, such measures, where sufficiently prescribed by law and attended by appropriate safeguards against abuse, will - depending upon the particular circumstances - be regarded as necessary in a democratic society in the interests of national security and for the purpose of preventing crime and protecting the rights of others, and thus justified.

120. The legal basis for such measures will be sufficiently prescribed where the scope for arbitrary decision-making is precluded by precise criteria setting out the circumstances in which they can be employed[136].

121. In addition, the safeguard required to ensure observance of those criteria will generally be a requirement that there be prior judicial authorisation before having resort to any of those measures, although subsequent judicial control may also be acceptable[137].

122. Some lessening of these requirements can be seen in case law concerning surveillance but only where alternative structural and supervisory safeguards are in place to control the use of the relevant powers[138].

123. There has been no instance of a derogation being issued pursuant to Article 15 in respect of the requirements governing these measures.

D. Issues of compliance

124. In the light of the preceding discussion, it is clear that both laws and the Regulation give rise to some potential problems of compliance with the Convention and they will thus be considered in turn.

The preventive detention law

[136] See, e.g., *Kruslin v. France*, no. 11801/85, 24 April 1990 and *Bykov v. Russia* [GC], no. 4378/02, 10 March 2009.
[137] See *Bykov v. Russia* [GC], no. 4378/02, 10 March 2009, at para. 80.
[138] See, e.g., *Klass and Others v. Germany*, no. 5029/71, 6 September 1978: 'Surveillance may be ordered only on written application giving reasons, and such an application may be made only by the head, or his substitute, of certain services; the decision thereon must be taken by a Federal Minister empowered for the purpose by the Chancellor or, where appropriate, by the supreme Land authority (see paragraph 18 above). Accordingly, under the law there exists an administrative procedure designed to ensure that measures are not ordered haphazardly, irregularly or without due and proper consideration. In addition, although not required by the Act, the competent Minister in practice and except in urgent cases seeks the prior consent of the G 10 Commission' (para. 51).

125. As is clear from the terms of Article 5(1) of the Convention and the related case law of the Court, there is certainly no admissible basis for using preventive detention pursuant to the power introduced into the Law of Ukraine "On Combating Terrorism" in the absence of a derogation[139]. It is understood that no such derogation has so far been communicated to the Secretary General of the Council of Europe, as required by Article 15, and no state of emergency has been proclaimed. However, insofar as the power remains unused, there is at present no actual violation of the Convention.

126. There can, however, be little doubt that the situation currently obtaining in parts of Ukraine would not be such as to lead the Court to conclude that there was not a state of emergency threatening the life of the nation. The armed conflict involved would seem to pose a much more extensive threat than the terrorism found by the Court to constitute genuine states of emergency in the cases involving Ireland and the United Kingdom, if not necessarily that in Turkey[140].

127. Nonetheless, even if there were to be a derogation communicated to the Secretary General (and a state of emergency proclaimed), this does not necessarily mean that the use of preventive detention power would not entail problems of compliance with the Convention. Such problems may arise from the particular of the derogation submitted but can also be expected to stem from the arrangements made, or rather not made, in the preventive detention law, as well as the actual use made of the power.

128. The derogation need not be communicated before the use of preventive detention occurs but it should not be delayed for more than a matter of days and then only to ensure that its implementation is not frustrated by advance notice[141].

129. The derogation must detail the measures taken, attaching the legislation and any administrative ones taken pursuant to them. Although there is no specific requirement to identify where the measures are to apply, this might be regarded as a necessary element of providing reasons for taking them. However, where particular areas are specified, it should be recalled that then the derogation is only effective with respect to those areas[142].

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[139] Article 15 could not, e.g., be relied upon on this account in *Cyprus v. Turkey* (dec.), no. 6780/74, 10 July 1976 and *Brogan v. United Kingdom*, no. 11209/84, 29 November 1988

[140] I.e., *Lawless v. Ireland (No. 3)*, no. 332/57, 1 July 1961, *Ireland v. United Kingdom*, no. 5310/71, 18 January 1978, *Brannigan and McBride v. United Kingdom*, no. 14553/89, 26 May 1993, *Aksoy v. Turkey*, no. 21987/93, 18 December 1996, *Demir v. Turkey*, no. 21380/93, 23 September 1998, *Nuray Sen v. Turkey*, no. 41478/98, 17 June 2003, *Elçi and Others v. Turkey*, no. 23145/93, 13 November 2003, *Bilen v. Turkey*, no. 34482/97, 21 February 2006 and *A and Others v. United Kingdom* [GC], no. 3455/05, 19 February 2009.

[141] Delays of 12 and 11 days for internment measures were not considered problematic in, respectively, *Lawless v. Ireland (No. 3)*, no. 332/57, 1 July 1961, *Ireland v. United Kingdom*, no. 5310/71, 18 January 1978. *Cf.* the four month delay considered inadequate for the purpose of Article 15 in the *Greek* case, 12 *Yb* 1, 41-2.

[142] See para. 68.

130. A satisfactory derogation is, however, only the first step to demonstrating that the use of preventive detention would be compatible with the Convention.

131. Thus, it must have a proper legal basis both generally and in the particular cases in which it is applied.

132. The latter requires full compliance with all the requirements authorising it, as discussed above but is only an issue that arises once preventive detention begins to be used.

133. However, although the provisions added to the Law of Ukraine "On Combating Terrorism" undoubtedly provide a formal basis for the use of preventive detention, this may not be sufficient for the purpose of the Convention for two possible reasons.

134. Firstly, there appears to be a possible incompatibility between the preventive detention law and the Constitution. Thus Article 29 provides that

> In the event of an urgent necessity to prevent or stop a crime, bodies authorised by law may hold a person in custody as a temporary preventive measure, the reasonable grounds for which shall be verified by a court within seventy-two hours. The detained person shall be released immediately, if he or she has not been provided, within seventy-two hours from the moment of detention, with a substantiated court decision in regard to the holding in custody.

and Article 64 stipulates that:

> Under conditions of martial law or a state of emergency, specific restrictions on rights and freedoms may be established with the indication of the period of effectiveness of these restrictions. *The rights and freedoms envisaged in Articles 24, 25, 2 7, 28, 29, 40, 47, 51, 52, 55, 56, 57, 58, 59, 60, 61, 62 and 63 of this Constitution shall not be restricted*[143].

135. As such the Constitution does not seem to permit a deprivation of liberty taking the form of preventive detention and, if this is the case, the preventive detention law would have no legal validity and thus could not provide the legal basis required for a measure derogating from the right to liberty and security under Article 5 of the Convention. The correctness of the view that the preventive detention law is contrary to the Constitution of Ukraine is, of course, a matter for the Constitutional Court to determine but it is noted that such an assessment of the preventive law was

[143] Emphasis added.

part of the reason for the negative expert opinion on it prepared by the Main Research and Expert Department of the Verkhovna Rada[144].

136. Secondly, it has been noted that there is some uncertainty as to the specific rationale for using preventive detention, some vagueness as to when resort to this measure is possible given the difference between Article 15-1 and the paragraph added to Article 14 as to whether or not this must when the anti-terrorist operations are 'long-lasting' and significant differences in the definitions relating to 'terrorism' and 'terrorist activities' following the adoption of the Regulation. In addition, there is some uncertainty as to how the preventive detention interacts with the use of the regular criminal process[145].

137. However, leaving aside the Regulation and taking into account the relative precision regarding who can be subjected to preventive detention - particularly as regards the definition of act of terrorism and a region of counter-terrorism operations - and the requirement of reasonable suspicion that he or she has actually been involved in terrorist activity, it is doubtful whether the Court would regard the scope of the power in the preventive detention law as too imprecise to satisfy the requirements of the Convention. Nonetheless, it would be preferable for there to be more consistency between the provisions introduced by the preventive detention law and it would be appropriate for the Regulation not to introduce different formulations from those found in the Criminal Code.

138. Thus, of the issues relating to the legal basis for preventive measure, the one concerning constitutionality is the one of potentially greater significance for compatibility with the Convention.

139. However, even if the measure has an adequate legal basis, it must also be shown to be strictly required by the exigencies of the situation.

140. It does not seem material that there is no restriction in the preventive detention law on the use of preventive detention with respect only to persons who are actually in a region of counter-terrorism operations. This is partly because the requirement that the person subjected to this measure is 'implicated in terrorism' and that reasonable suspicion exists about him or her having carried out terrorist activity is likely to be regarded as providing a sufficient justification for taking preventive action but mainly because the Regulation seems to be more restrictive in this aspect of its scope. Nonetheless, if the power were not subject to such an area restriction relating to the use of preventive detention, it would be essential that there was a definite link

[144] *Expert opinion of the draft Law On Amending the Law of Ukraine On combating Terrorism in terms of introducing preventive detention of persons involved in terrorist activities in the counterterrorist operation area for the period over 72 hours.*
[145] See paras. 31 and 32.

between the terrorism in which the person detained is involved and that which is occurring in the particular region of counter-terrorism operations concerned[146].

141. Furthermore, a factor in favour of the measure is undoubtedly the shortness of the period of detention authorised when compared to the months or years involved in the two cases in which the Court has previously upheld the use of preventive detention[147].

142. At the same time, given the apparent absence of any judicial control over the use of preventive detention despite the assertion to the contrary in the Regulation[148], a contrary consideration could be seen to be the failure to provide any safeguards against possible abuse in terms of internal review of the continued necessity for the detention, some external oversight and power release in the event of it proving unjustified or unnecessary.

143. Nonetheless, a possible argument against the need for such safeguards could well be that they are less essential where the preventive detention is as short as the 30 days envisaged in the new Article 15-1. Certainly it should be noted that the importance attached by the Court to their provision where there had been resort to preventive detention was in cases where this was longer lasting than the period envisaged under the preventive detention law. Moreover, it has appeared to be somewhat more understanding of shortcomings in the provision of safeguards at the outset of such detention[149].

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[146] This would meet the concern in the *Expert opinion of the draft Law On Amending the Law of Ukraine On combating Terrorism in terms of introducing preventive detention of persons involved in terrorist activities in the counterterrorist operation area for the period over 72 hours* that areas outside the operations did not feature any circumstances referred to as the reason for the use of this measure.

[147] Just over 5 months in *Lawless v. Ireland (No. 3)*, no. 332/57, 1 July 1961 and several years in *Ireland v. United Kingdom*, no. 5310/71, 18 January 1978.

[148] See para. 33.

[149] Thus, in *Ireland v. United Kingdom*, no. 5310/71, 18 January 1978, the Court stated 'The incorporation right from the start of more satisfactory judicial, or at least administrative, guarantees would certainly have been desirable, especially as Regulations 10 to 12 (1) dated back to 1956-1957 and were made under an Act of 1922, but it would be unrealistic to isolate the first from the later phases. When a State is struggling against a public emergency threatening the life of the nation, it would be rendered defenceless if it were required to accomplish everything at once, to furnish from the outset each of its chosen means of action with each of the safeguards reconcilable with the priority requirements for the proper functioning of the authorities and for restoring peace within the community. The interpretation of Article 15 (art. 15) must leave a place for progressive adaptations. The Northern Ireland Government sought in the first place - unsuccessfully - to meet the most pressing problem, to stem the wave of violence that was sweeping the region. After assuming direct responsibility for the future of the province, the British Government and Parliament lost little time in moderating in certain respects the severity of the laws applied in the early days. The Court asked itself whether those laws should not have been attenuated even more, especially as regards interim custody (see paragraph 217 above), but does not consider that it can give an affirmative answer. It must not be forgotten that the crisis experienced at the time by the six counties was serious and, hence, of a kind that justified far-reaching derogations from paragraphs 2 to 4 of Article 5 (art. 5-2, art. 5-3, art. 5-4). In view of the Contracting States' margin of appreciation, the Court does not find it established that the United Kingdom exceeded in this respect the "extent strictly required" referred to in Article 15 para. 1 (art. 15-1)' (para. 220).

144. On the other hand, although there is undoubtedly a significant margin of appreciation for measures taken in emergency situations, the last time that preventive detention was upheld by the Court was more than 36 years ago. Since then it has not been prepared to accept as justified in emergency situations any absence of automatic judicial supervision over the need for a deprivation of liberty for periods as short as 11 days[150] and has only raised no objection to a period of 7 days where the independent right to challenge the legality of the detention existed[151]. These were not, of course, cases of preventive detention but ones within the regular criminal process. Nonetheless, the circumstances were not so fundamentally different from that currently obtaining in Ukraine. Thus, the Court thus referred to the government's description of the situation it faced as one in which

> A great deal of time and effort was required to secure and verify evidence in a large region confronted with a terrorist organisation that had strategic and technical support from neighbouring countries. These difficulties meant that it was impossible to provide judicial supervision during a suspect's detention in police custody[152].

Nevertheless, the Court, after taking account of the 'unquestionably serious problem of terrorism in South-East Turkey' and the difficulties faced in taking effective measures against it, concluded that it was

> not persuaded that the exigencies of the situation necessitated the holding of the applicant on suspicion of involvement in terrorist offences for fourteen days or more in incommunicado detention without access to a judge or other judicial officer[153].

145. Furthermore, as has been seen, judicial control is a means of ensuring that a person's detention is not unacknowledged - something that the Court regards as a grave violation of Article 5 and this may make it all the more concerned that such control exists even in an emergency situation.

146. Thus, whether or not the 30 day delay in access to judicial oversight that the preventive detention law would seem to envisage is capable of being treated as compatible with the Convention in the event of there being a derogation will depend on the assessment of the situation at the time preventive detention is actually used. In particular, the Court will be concerned about the practicalities of ensuring access to judicial control at that time and it is important to keep in mind that it was not persuade it that this was impossible in a situation of serious disturbances that had raged for some 10 years in South-East of Turkey between the security forces and the members

[150] See n. 113.
[151] See paras. 83 and 85.
[152] *Aksoy v. Turkey*, no. 21987/93, 18 December 1996, at para. 72.
[153] *Ibid.*, at para. 84. The same conclusion was also reached in *Demir v. Turkey*, no. 21380/93, 23 September 1998, *Nuray Sen v. Turkey*, no. 41478/98, 17 June 2003 and *Bilen v. Turkey*, no. 34482/97, 21 February 2006

of the PKK (Workers' Party of Kurdistan), claiming the lives of 4,036 civilians and 3,884 members of the security forces.

147. However, given the increasing importance seen to be attached to judicial control in cases of detention, it can be expected that this assessment will be more exacting than it was in respect of the preventive detention employed by Ireland and the United Kingdom several decades ago.

148. In any event, the consideration by the public prosecutor with the participation of the person who may be subjected to preventive detention, as envisaged under the Regulation[154], would never be seen as an adequate substitute for judicial control.

149. A further consideration might be that the measure envisaged by the preventive detention law is not really much different in substance from the deferred access to judicial supervision effected by the Criminal Procedure Code amendment since, once the 30 day maximum is reached, there seems to be an expectation that the ordinary criminal process will then be pursued against the persons who have been preventively detained. It is true that the deferral is effected by senior officials in the Security Service and the Ministry of the Interior rather than by a public prosecutor and there is no actual indication that a pre-trial investigation will be undertaken but the ultimate objective looks more like the institution of criminal proceedings than the keeping of terrorists out of circulation until a particular situation can be contained. Such a view of the preventive detention law would make it much more likely than the Court's approach in the Turkish cases will be followed than that seen in those involving Ireland and the United Kingdom.

150. Other potential weaknesses in the regime that is supposed to govern the use of preventive detention are the lack of any certain arrangements for access to a lawyer and to consular assistance, notwithstanding potential efforts in this regard in the Regulation[155]. Moreover, there must be uncertainty as to the conditions in which persons subject to this measure will actually be kept despite the stipulation in the Regulation that the pre-trial detention regime is applicable[156] since the circumstances in which preventive detention is likely to be used are not ones of 'normality'.

151. As has been seen[157], access to a lawyer is facilitates the exercise of judicial control but it can also operate as a safeguard against possible ill-treatment. Furthermore, denial of access to consular assistance - which might well be sought by foreign nationals engaged in acts of terrorism - could render detention arbitrary[158]. Both, therefore, are likely to have a bearing on whether the Court will view preventive

[154] See para. 25.
[155] See paras. 26 and 28.
[156] See para. 36.
[157] See paras. 94-97.
[158] See paras. 98-101.

detention in particular instances as strictly required by the exigencies of the situation, with significant limitations on such access undoubtedly leading to a negative assessment.

152. It is well-established that problems in place of detention with respect to hygiene, medical treatment, overcrowding, provision of food and sleeping arrangements and facilities, as well as the nature of the disciplinary regime, can lead to violations of Article 3 of the Convention[159]. This will not necessarily affect the validity of the use of preventive detention but is nonetheless inadmissible.

153. However, none of these potential weaknesses need to be addressed by changes to the preventive detention law. It will be sufficient if the practical arrangements for access to lawyers and consular assistance and for housing those subject to preventive detention are actually adequate to ensure that there is no breach of the standards which have been elaborated by the Court.

154. Thus, both the uncertain constitutional status of the preventive detention law and the inadequacy of arrangements for judicial control and other safeguards regarding its use give serious grounds for doubting that the latter could occur compatibly with the Convention.

The Criminal Procedure Code amendment

155. The standards governing the powers affected by this amendment are, in their unamended form, compliant with the requirements of the Convention both as regards the conditions governing their use and the existence of a requirement of prior judicial authorisation.

156. The amendment has not affected the criteria in the relevant provisions of the Criminal Procedure Code but has replaced the requirement of prior judicial authorisation by one of authorisation by a public prosecutor in certain circumstances, namely, in localities under martial law, in a state of emergency or where anti-terrorist operations are being conducted and where an investigating judge is not able to provide the authorisation within the timelines applicable.

157. Although the Criminal Procedure Code amendment does not affect other guarantees of the right to liberty that the Court regards as important, such as notification of the person's family and access to a lawyer, the practicalities of these being enforced in the circumstances where a public prosecutor replaces a judge are, as has also been noted[160], uncertain.

[159] See, e.g., *Cyprus v. Turkey* (dec.), no. 6780/74, 10 July 1976, *Kalashnikov v. Russia*, 47095/99, 15 July 2002, *Khudoyorov v. Russia* 6847/02, 8 November 2005 and *Van der Ven v. Netherlands*, no. 50901/99, 4 February 2003.
[160] See para. 53.

158. It also seems unlikely that, even if the ability to seek cancellation or change in a custodial measure of restraint from a judge under Article 201 of the Criminal Procedure Code has not been implicitly amended, that it would be possible in practice to rely on this provision to ensure the judicial oversight that Article 5(3) of the Convention requires[161].

159. In any event, as has already been noted[162], it seems highly improbable that the Court would regard the deferral of judicial oversight of detention within the criminal process for a period of more than 7 days as acceptable even where there was a valid derogation under Article 15 of the Convention. None has, however, so far been communicated to the Secretary General of the Council of Europe and so a public prosecutor could not, compatibly with the Convention, authorise the imposition of custodial measures of restraint for even that period, on the questionable assumption that the guarantees regarded by the Court as essential could be relied upon.

160. In the absence of any derogation, it should, therefore, be borne in mind that the Court has not accepted a delay in the exercise of the judicial role prescribed by Article 5(3) of the Convention that exceeds 4 days in the absence of a derogation[163].

161. It is thus doubtful that the scheme envisaged by the Criminal Procedure Code amendment could not be implemented consistent with the requirements of the Convention, with or without a derogation, at least for the period which the former prescribes.

162. As regards the powers that are to be exercisable by a public prosecutor rather than an investigating judge, it might well be that the Court would accept this as compatible with Article 8 of the Convention, even without a derogation. It would probably regard this as not inappropriate in view of the serious nature of the offences involved and the restricted circumstances envisaged by the Criminal Procedure Code amendment[164]. However, this would probably only be so if there was a possibility of subsequently challenging the validity of the authorisation and the admissibility of the evidence obtained as a result, to safeguard the rights under both Articles 6 and 8 of the Convention[165].

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[161] See para. 52.
[162] See paras. 144-149.
[163] See *Brogan v. United Kingdom*, no. 11209/84, 29 November 1988.
[164] This conclusion should not be taken as questioning the merits of the view in the *Expert opinion of the draft Law On Amendments to the Code of Criminal Procedure of Ukraine regarding the special regime of holding pre-trial investigation during the state of war, the state of emergency and in the area of counter-terrorism operation* that a more comprehensive approach to conducting investigations in war, states of emergency and anti-terrorist operations would be a better solution.
[165] See *Bykov v. Russia* [GC], no. 4378/02, 10 March 2009, at para. 80 and *Khan v. United Kingdom*, no. 35394/97, 12 May 2000.

163. Furthermore, there would be a need to amend the arrangement made in the Regulation as regards the particular public prosecutor giving the authorisation[166] so as to require that this be someone other than the one seeking it as otherwise there would be no real guarantee against arbitrary decision-making[167], notwithstanding the criteria set out in the relevant provisions of the Criminal Procedure Code.

164. Thus, it is very unlikely that the power to impose custodial measures of restraint could be exercised by a public prosecutor compatibly with the requirements of the Convention but, subject to the qualifications noted in the two preceding paragraphs, there should not be such a problem with the other powers conferred on public prosecutors by the Criminal Procedure Code amendment.

E. Conclusion

165. The doubts as to the constitutional validity of the preventive detention law are significant not just for the admissibility of preventive detention under Ukrainian law but also for the purposes of Article 15 of the Convention since a derogation can only be relied upon in respect of measures that are lawful in the High Contracting Party concerned. It may be that these doubts could be resolved by a ruling of the Constitutional Court but the language of Article 64 of the Constitution makes this seem improbable. In that case, the only basis for resorting to the use of preventive detention in a manner compatible with the Convention would be through the adoption first of an appropriate amendment to the Constitution

166. Furthermore, while the envisaged period of preventive detention is not as long as periods upheld in the past by the Court, the absence of judicial control and other safeguards against possible abuse is likely to make it difficult to justify its use as consistent with the requirements of the Convention. It would, therefore, be appropriate to establish such safeguards in an explicit and unambiguous way, as well as to ensure that proper consideration is given to the practical arrangements required when persons are subjected to preventive detention.

167. It is very unlikely that, even with a derogation, a public prosecutor could be authorised to impose custodial measures of restraint for the period provided for in the Criminal Procedure Code amendment. It might, therefore, be more appropriate to make arrangements for this to be done by investigating judges outside the areas in which such measures are sought - possibly using video-conferencing arrangements - so that they have appropriate security to perform their important role.

[166] See para. 48.
[167] See para. 50.

168. On the other hand, the substitution of the public prosecutor for the investigating judge in respect of the other pre-trial investigation powers that has been effected by the Criminal Procedure Code amendment is not likely to prove problematic so long as it is clear that a public prosecutor cannot provide authorisation for him or her to use those powers and the exercise of them can be subjected to subsequent and effective judicial challenge.