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The legitimacy of restricting the right to liberty and security: Standards of the European Court of Human Rights

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■ **Abstract.** Article 5 of the European Convention on Human Rights sets out the guarantees of the right to liberty and security. During criminal proceedings, this fundamental human right may be subject to restriction. Therefore, both legislation and law enforcement practice must ensure fair procedures for such restrictions. This study aimed to provide a comprehensive analysis, systematisation, and explanation of the Convention standards that guarantee the lawfulness of restrictions on the right to liberty and security within criminal proceedings. It also aimed to identify the grounds for the application of custodial preventive measures, thereby helping to avoid errors in legal practice and contributing to the development of a uniform and consistent investigative and judicial approach, including under conditions of martial law. The principal methods of inquiry include axiological, formal-legal, logical-legal, systemic-structural, comparative-legal analysis, and generalisation. These methods have made it possible to describe the results and substantiate the conclusions reached. The study was conducted concerning the case law of the European Court of Human Rights and the national criminal procedural legislation. It has been established that, according to the standards developed in the case law of the European Court of Human Rights, the threshold for suspicion does not require the same degree of certainty as a formal charge. A reasonable suspicion implies the existence of sufficient factual information that would enable an external observer (the investigating judge) to conclude, with a high degree of probability, that the individual whose right to liberty and security is to be restricted has committed the alleged offence. It was argued that the European Court of Human Rights adheres to a substantive rather than a formal conception of a charge. Based on an analysis of the legal regulation of the grounds for applying preventive measures, it has been demonstrated that the investigating judge will, in each specific case, determine whether the factual data are sufficient to establish a reasonable suspicion and whether the associated risks are justified. The practical value of this study lies in the possibility of applying the established standards of the European Court of Human Rights when deciding on the imposition of custodial preventive measures. This would help ensure uniformity in legal practice and promote the rule of law in Ukraine

■ **Keywords:** arrest; detention; criminal proceedings; reasonable suspicion; grounds for applying preventive measures; investigator; judge

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■ Introduction

Liberty is among the most fundamental and highly valued human rights. It is safeguarded by both international legal instruments and national legislation. In particular, the right to liberty and security is enshrined in Article 9 of the International Covenant on Civil and Political Rights¹, Article 5 of the European Convention on Human Rights² (hereinafter – the Convention), Article 29 of the Constitution of Ukraine³, and Article 12 of the Criminal Procedure Code of Ukraine⁴. The question of the lawfulness of restricting the right to liberty and security (hereinafter – RLS) has gained renewed relevance in wartime conditions, as the risks of improper behaviour by suspects or accused persons have increased. In particular, individuals suspected of committing a criminal offence now have more opportunities to evade criminal liability, including by hiding in temporarily occupied territories or on the territory of the Russian Federation.

The legislation of all democratic states governed by the rule of law pays considerable attention to regulating provisions that guarantee the exercise of the right to liberty and security. At the same time, an analysis of the case law of the European Court of Human Rights (ECtHR, the Court) reveals numerous instances^{5,6} of violations of this fundamental human right through the unwarranted application of custodial preventive measures. Such enforcement practices are driven by both the lack of legal certainty in regulating certain aspects of the protection of this right and the challenge of striking a balance between the public interest in ensuring the principle of the inevitability of punishment and the suspect's or accused person's right to liberty and security.

Establishing the procedure for the application of preventive measures is a complex task that requires balancing the rights and legitimate interests of the suspect (or accused) with the needs of society and the state to protect against criminal offences. The lawfulness of restricting the RLS hinges on adhering to due procedural process and having valid grounds for applying preventive measures, as these grounds determine the appropriateness and justification of their use. The challenges related to the restriction of RLS have already been the subject of research by procedural law scholars. For instance, the legitimacy of restricting human rights during pre-trial investigations has been examined by I. Hloviuk *et*

al. (2024), I. Shapovalova & V. Rohalska (2020), and S. Prodyvus (2023). These scholars, having analysed international legal instruments and the case law of the ECtHR, justify a concept of lawful interference with human rights and freedoms based on a three-part test: legality, legitimate aim, and necessity in a democratic society. Particular attention in the studies of I. Hloviuk & V. Zavtur (2022), S. Grynenko & I. Zelenska (2022), and O. Kaplina *et al.* (2022) is devoted to the legality of restricting human rights under the legal regime of martial law. The contributions of M. Blikhar *et al.* (2020; 2021) and O. Barabash *et al.* (2022) are also noteworthy. Their studies of the ECtHR's approach to assessing the lawfulness of interference with fundamental human rights highlight the values underpinning European standards of human rights protection and their influence on the development of national law.

This study aimed to analyse, systematise, and clarify the standards established by the case law of the ECtHR that ensure the lawfulness of restrictions on the right to liberty and security during criminal proceedings.

■ Literature Review

The issue of restricting the right to liberty and security has attracted considerable academic attention in the context of balancing individual rights with state interests in criminal proceedings. O. Khablo (2023), in her research, addressed the question of proportionality and the balance between public and private interests when restricting RLS. The scholar concluded that, under the legal regime of martial law, the priority of interests should shift in favour of public interests, provided that safeguards are in place to prevent abuse of the expanded powers granted to the prosecution. T.G. Fomina *et al.* (2023) examined the issue of RLS restrictions in the context of extradition-related detention and the justification of risk as a basis for such restrictions. The researchers highlighted the primacy of international law norms when restricting the right to liberty in response to a request from a foreign state. S. Ablamskyi *et al.* (2023) explored the lawfulness of restricting human rights with a particular focus on the protection of detained suspects. The authors addressed the issue of holding prisoners of war in custody and argued that such individuals possess the procedural status of suspects. They also concluded

¹ International Covenant on Civil and Political Rights. (1966, December). Retrieved from https://treaties.un.org/doc/treaties/1976/03/19760323%2006-17%20am/ch_iv_04.pdf.

² European Convention on Human Rights. (1950, November). Retrieved from https://zakon.rada.gov.ua/laws/show/995_004.

³ Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>.

⁴ Criminal Procedure Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-1775>.

⁵ Judgment of the European Court of Human Rights in Case No. 52855/19 “Rytikov v. Ukraine”. (2024, August). Retrieved from https://zakon.rada.gov.ua/laws/show/974_k39#Text.

⁶ Judgment of the European Court of Human Rights in Case No. 10042/11 “Korniyuchuk v. Ukraine”. (2018, April). Retrieved from https://zakon.rada.gov.ua/laws/show/974_c53#Text.

ed that national legislation should be harmonised with the norms of international humanitarian law.

C. Balyan & A. Shelke (2025) explored the issue of the need to introduce an objective criterion for the imposition of custodial preventive measures. The authors point out that, although Indian legislation upholds the principle of “bail, not jail”, courts in most cases do not grant bail as a preventive measure. They stress that the judiciary must apply standards that balance the accused person’s right to liberty with the need to safeguard public security. Additionally, H. Boreiko & V. Navrotska (2023) and C. Braaten & M. Vaughn (2023) addressed the lawfulness of restricting human rights within the legal systems of foreign jurisdictions. Meanwhile, N. Nguindip & S. Ablamskyi (2020) conducted a comparative analysis of the procedural safeguards for the right to liberty and security during criminal proceedings in Ukraine and Cameroon.

These studies highlight the significance of the topic; however, they also indicate that the issue of comprehensively examining enforcement practices in ensuring the right to liberty and security in criminal proceedings – together with the identification and systematisation of the Convention standards developed in the case law of the ECtHR – has remained largely unexplored in scholarly literature preventive measures.

■ Materials and Methods

To achieve the stated aim of the study and ensure the reliability of the conclusions drawn, a range of scientific methods of inquiry was employed. The following general scientific methods were used: axiological, formal-legal, logical-legal, systemic-structural, and comparative-legal, as well as analysis and generalisation. These methods enabled the identification of the research subject, the description of findings, the comparison of national criminal procedural norms with those of international law, and the substantiation of the results obtained. The axiological method was applied in interpreting the right to liberty and security as a fundamental human value. This approach enhanced the understanding of the criteria for the lawfulness of RLS restrictions and the justification and necessity of such limitations when imposing preventive measures. The formal-legal method was used to analyse legal norms regulating RLS restrictions

in criminal proceedings. The logical-legal method helped identify the criteria for reasonable suspicion as a basis for applying preventive measures. The systemic-structural method, by examining the connections between academic approaches, the ECtHR’s case law, and domestic criminal procedural law, helped to clarify the main approaches to determining the lawfulness of restricting RLS. It also allowed for an assessment of the justification for RLS restrictions in criminal proceedings and the establishment of a logical link between the grounds for applying preventive measures and the specifics of proving them. The comparative-legal method was applied to analyse and compare international and national criminal procedural law regarding the regulation of grounds for RLS restrictions. The methods of analysis and generalisation were used to interpret the norms of criminal procedural legislation, judicial practice, and the case law of the ECtHR, including the identification of standards governing the lawfulness of RLS restrictions. The above methods were applied in an interconnected manner, enabling a comprehensive and thorough study and the substantiation of the conclusions formulated. The research followed the methodological framework outlined below: 1) an examination of national legislation and Conventionbased provisions relating to the restriction of the RLS; 2) an analysis of the grounds for restricting RLS through detention or the imposition of custodial preventive measures.

The normative basis of the study comprised international legal instruments such as the European Convention on Human Rights¹ and the International Covenant on Civil and Political Rights², both of which guarantee the suspect’s (or accused person’s) right to liberty and security. In terms of national legislation, the analysis focused on relevant provisions of the Constitution of Ukraine³, the Criminal Procedure Code (hereinafter – CPC) of Ukraine⁴, and the Criminal Code of Ukraine⁵, which regulate the procedural framework for restricting the right to liberty and security of suspects and accused persons. Particular emphasis was placed on analysing the judgments of the ECtHR, which have established Convention standards for restricting RLS in criminal proceedings. Special attention was given to the Court’s judgments in the following cases: *Fernandes Pedroso v. Portugal*⁶, *Nechiporuk and Yonkalo v. Ukraine*⁷, *Murray v. the*

¹ European Convention on Human Rights. (1950, November). Retrieved from https://zakon.rada.gov.ua/laws/show/995_004.

² International Covenant on Civil and Political Rights. (1966, December). Retrieved from https://treaties.un.org/doc/treaties/1976/03/19760323%2006-17%20am/ch_iv_04.pdf.

³ Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>.

⁴ Criminal Procedure Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-1775>.

⁵ Criminal Code of Ukraine. (2001, May). Retrieved from <https://zakon.rada.gov.ua/laws/show/2341-14#Text>.

⁶ Judgment of the European Court of Human Rights in Case No. 59133/11 “*Fernandes Pedroso v. Portugal*”. (2018, September). Retrieved from <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-183541%22%5D%7D>.

⁷ Judgment of the European Court of Human Rights in Case No. 42310/04 “*Nechiporuk and Yonkalo v. Ukraine*”. (2011, April). Retrieved from <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-104613%22%5D%7D>.

United Kingdom¹, Merabishvili v. Georgia², Deweer v. Belgium³, Shabelnik v. Ukraine⁴, Labita v. Italy⁵, Talat Tepe v. Turkey⁶, Temchenko v. Ukraine⁷, Rytikov v. Ukraine⁸, and Korniychuk v. Ukraine⁹. These judgments have created judicial precedents that define the standards for the lawful restriction of a suspect's (or accused person's) right to liberty and security.

■ Results and Discussion

The right to liberty and security is of paramount importance in a democratic state governed by the rule of law. The state's obligation to guarantee this right imposes a positive duty to protect it. Failure to do so would prevent the safeguarding of the right to liberty and security from arbitrary or baseless detention or remand, which would be unacceptable in a democratic society as it would undermine the very importance of personal freedom¹⁰. At the same time, the state is also responsible for upholding other fundamental human rights, such as the right to life, the right to dignity, and the right to a fair trial. These rights cannot be effectively protected if individuals who commit criminal offences are not brought to justice. In such circumstances, it may be necessary to impose preventive measures that restrict the right to liberty and security on those suspected of committing a criminal offence. The failure to apply custodial preventive measures (such as arrest or detention) could result in continued criminal activity or attempts to evade criminal responsibility.

In a state governed by the rule of law, restrictions on the right to liberty and security must be applied following the principles of the rule of law, proportionality, necessity, and legality. The procedural framework for restricting RLS must be clearly regulated,

including both the grounds for such restrictions and the procedure for their application – identifying the competent authorities, time limits, and guarantees for safeguarding the rights of the suspect or accused.

In the course of criminal proceedings, the restriction of the RLS arises with the application of preventive measures such as arrest and detention. The general grounds for applying such measures are set out in Part 2 of Article 177 of the CPC of Ukraine¹¹, where the legislator has established a dual basis: – the existence of a reasonable suspicion that the person has committed a criminal offence; – the presence of risks that provide sufficient grounds to believe that the suspect (or accused) may obstruct the criminal proceedings.

Reasonable suspicion of having committed a criminal offence is the primary and essential ground for restricting RLS. Detention may only be applied to individuals who are reasonably suspected of committing a crime. This principle is consistently emphasised in the case law of the ECtHR. In particular, in the 2011 judgment in Nechiporuk and Yonkalo v. Ukraine¹², the Court noted that compliance with the requirement of reasonable suspicion is essential to prevent arbitrary arrest and detention (cl 175). Similarly, in Fernandes Pedroso v. Portugal¹³, the Court underlined that the “reasonableness” of the suspicion on which the arrest is based is a crucial element in protecting the right to liberty and security (cl 87).

Recognising the existence of a “reasonable suspicion” as the primary ground for restricting the right to liberty and security is entirely logical. If there is no information indicating that a person has committed a criminal offence – no factual data supporting a “reasonable suspicion” – then no preventive measures

¹ Judgment of the European Court of Human Rights in Case No. 14310/88 “Murray v. the United Kingdom”. (1994, October). Retrieved from <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-57895%22%5D%7D>.

² Judgment of the European Court of Human Rights in Case No. 72508/13 “Merabishvili v. Georgia”. (2017, November). Retrieved from <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-178753%22%5D%7D>.

³ Judgment of the European Court of Human Rights in Case No. 6903/75 “Deweer v. Belgium”. (1980, February). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-57469>.

⁴ Judgment of the European Court of Human Rights in Case No. 16404/03 “Shabelnik v. Ukraine”. (2009, February). Retrieved from <https://surl.lu/tecisp>.

⁵ Judgment of the European Court of Human Rights in Case No. 26772/95 “Labita v. Italy”. (2000, April). Retrieved from <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-58559%22%5D%7D>.

⁶ Judgment of the European Court of Human Rights in Case No. 31247/96 “Talat Tepe v. Turkey”. (2005, March). Retrieved from <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-67765%22%5D%7D>.

⁷ Judgment of the European Court of Human Rights in Case No. 30579/10 “Temchenko v. Ukraine”. (2015, July). Retrieved from <https://surli.cc/mlfkfp>.

⁸ Judgment European Court of Human Rights in Case No. 52855/19 “Rytikov v. Ukraine”. (2024, August). Retrieved from https://zakon.rada.gov.ua/laws/show/974_k39#Text.

⁹ Judgment European Court of Human Rights in Case No. 10042/11 “Korniychuk v. Ukraine”. (2018, April). Retrieved from https://zakon.rada.gov.ua/laws/show/974_c53#Text.

¹⁰ Judgment European Court of Human Rights in Case No. 61603/00 “Storck v. Germany”. (2005, September). Retrieved from <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-69374%22%5D%7D>.

¹¹ Criminal Procedure Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-1775>.

¹² Judgment of the European Court of Human Rights in Case No. 42310/04 “Nechiporuk and Yonkalo v. Ukraine”. (2011, April). Retrieved from <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-104613%22%5D%7D>.

¹³ Judgment of the European Court of Human Rights in Case No. 59133/11 “Fernandes Pedroso v. Portugal”. (2018, September). Retrieved from <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-183541%22%5D%7D>.

can lawfully be applied to that person, particularly those that involve restrictions on the right to liberty and security. Thus, it must be emphasised that the “reasonableness” of suspicion serves as a fundamental safeguard for the right to liberty and security. In this context, a clear and consistent understanding of the term “reasonable suspicion” is crucial. This term appears in both international legal instruments and in the CPC of Ukraine. Although the CPC of Ukraine refers to “reasonable suspicion” in several provisions (e.g. Articles 177, 185, 190, 194, and 206¹), it does not provide a definition of the term. Meanwhile, “reasonable suspicion” is used in subparagraph (c), Paragraph 1 of Article 5 of the Convention², which states that a person may be arrested or detained when there is a reasonable suspicion of having committed a criminal offence. The presence of this term in the Convention has led to the development of ECtHR standards for its interpretation within the Court’s case law, as legal practice demands a substantive understanding of this concept.

First and foremost, it is important to note that the case law of the ECtHR does not distinguish between the terms “suspicion” and “charge”, unlike the provisions of the CPC of Ukraine³. In particular, in the 1980 judgment in *Deweere v. Belgium*⁴, the ECtHR stated that, for the purposes of Article 6(1) of the Convention, a “charge” should be understood as the official notification given to an individual by a competent authority that they are being accused of committing a criminal offence (cl 46). This definition is based on the approach developed in ECtHR case law, which favours a substantive (material) rather than a formal concept of a charge (cl 52 of the judgment in *Shabelnik v. Ukraine*, 2009)⁵. A similar substantive approach can be observed in the judgments of the Supreme Court of the USA, which holds that suspicion is reasonable when it is grounded in common sense, relates to the individual’s conduct, and amounts to more than a fabricated narrative or vague hunch.

With regard to the interpretation of the term “reasonable suspicion”, the leading ECtHR authority for Ukraine is the 2011 case *Nechiporuk and Yonkalo v. Ukraine*⁶. The Court stated that the term “presupposes the existence of facts or information which would

satisfy an objective observer that the person concerned may have committed the offence” (cl 175). In other words, suspicion will be considered reasonable if it is based on factual evidence that can convince an impartial party to the criminal proceedings (such as an investigating judge or court) that the person suspected of committing the criminal offence did, or may have, committed the act in question. In this context, debate arises among scholars and legal practitioners regarding the standard of proof required to establish the reasonableness of such suspicion: must it be proven beyond a reasonable doubt, or should a standard of probability apply? As N.O. Marchuk *et al.* (2015) point out, that suspicion must, on the one hand, be reasonable, but on the other, it represents a lower standard of proof than “beyond reasonable doubt”, as it requires less evidential weight than that needed to secure a conviction.

In particular, in its 1994 judgment in *Murray v. the United Kingdom*⁷, the ECtHR observed that subparagraph (c) of Paragraph 1 of Article 5 of the Convention does not require the investigative authorities to have sufficient evidence to bring formal charges at the point of arrest or detention. At the initial stage of an investigation, certain types of evidence may still be unavailable due to the nature of the alleged offence. Further investigation of the criminal proceedings is expected to either confirm or refute the specific suspicion that served as the basis for the arrest. Thus, the facts giving rise to suspicion need not reach the same level of persuasiveness as those required to justify acquittal, conviction, or even the formal bringing of charges at a later stage of the criminal proceedings (cl 55). A similar position is set out in the ECtHR judgment in *Merabishvili v. Georgia*⁸, where the Court noted that the “reasonableness” of a suspicion depends on the overall circumstances of the criminal proceedings. However, the factual grounds underlying the suspicion do not need to be of the same evidential strength as those necessary to support a conviction – or even a formal accusation (cl 184). All of the above supports the observation made by V.V. Mykhailenko (2019), who notes that the factual information forming the basis for suspicion at the initial stage of proceedings may later be refuted

¹ Criminal Procedure Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-1775>.

² European Convention on Human Rights. (1950, November). Retrieved from https://zakon.rada.gov.ua/laws/show/995_004.

³ Criminal Procedure Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-1775>.

⁴ Judgment of the European Court of Human Rights in Case No. 6903/75 “*Deweere v. Belgium*”. (1980, February). Retrieved from <http://hudoc.echr.coe.int/eng?i=001-57469>.

⁵ Judgment of the European Court of Human Rights in Case No. 16404/03 “*Shabelnik v. Ukraine*”. (2009, February). Retrieved from <https://surli.cc/cbzsyh>.

⁶ Judgment of the European Court of Human Rights in Case No. 42310/04 “*Nechiporuk and Yonkalo v. Ukraine*”. (2011, April). Retrieved from <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-104613%22%5D%7D>.

⁷ Judgment of the European Court of Human Rights in Case No. 14310/88 “*Murray v. the United Kingdom*”. (1994, October). Retrieved from <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-57895%22%5D%7D>.

⁸ Judgment of the European Court of Human Rights in Case No. 72508/13 “*Merabishvili v. Georgia*”. (2017, November). Retrieved from <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-178753%22%5D%7D>.

in the course of the pre-trial investigation, particularly with the active involvement of the suspect.

A reasonable suspicion, as a ground for arrest and detention, must be based on facts and information. However, debates continue regarding the threshold of persuasiveness, reasonableness, and the sufficiency of such factual data. In particular, in the 2020 ECtHR judgment in *Kavala v. Turkey*¹, the Court stated that the term “reasonableness” also refers to the amount (or threshold) of factual information required for a suspicion to satisfy an investigating judge or court of the likelihood of the charges. Difficulties typically arise at the factual level, centring on whether the arrest and detention of an individual were based on a sufficient amount of factual material to justify a reasonable suspicion that the alleged events did indeed occur. Furthermore, for a “reasonable suspicion” to meet the requirements of subparagraph (c), Paragraph 1 of Article 5 of the Convention, the facts cited by the pre-trial investigative authorities must fall within the scope of one of the provisions of the Criminal Code that defines criminal conduct (cl 128).

All of the above support the conclusion that a “reasonable suspicion” as the basis for imposing a custodial preventive measure should not be equated with a formal charge. According to Part 1 of Article 177 of the CPC of Ukraine², the purpose of applying a preventive measure is to prevent the suspect (or accused) from obstructing the establishment of factual circumstances that would allow for the proper legal classification of the offence and the presentation of persuasive evidence to support a formal charge. Therefore, the reasonableness of the suspicion requires the prosecution to present factual data (facts and information) that would allow an independent observer (such as an investigating judge or the court) to conclude with a high degree of probability that the individual to be arrested has committed the criminal offence imputed to them.

The sufficiency or insufficiency of such facts and information for establishing reasonable suspicion is to be assessed on a case-by-case basis by the investigating judge or court deciding on the application of pre-trial detention. The ECtHR consistently applies a contextual approach, examining all relevant circumstances of the criminal proceedings when

determining whether the suspicion is reasonable. For instance, in *Murray v. the United Kingdom*³, the Court found that the requirements of subparagraph (c) of Paragraph 1 of Article 5 of the Convention⁴ had been met even under a “lower threshold by merely requiring honest suspicion”, having regard to the “numerous victims of the terrorist campaign” and the “particular complexity of investigating terrorist offences”. Even in these challenging circumstances, the Court emphasised that pre-trial investigation authorities do not have carte blanche to arrest individuals suspected of terrorist offences (cl 51, 57-59, 63).

A similar approach is often applied in cases involving terrorism-related offences. For example, in its 2001 judgment in *O’Hara v. the United Kingdom*⁵, the ECtHR recognised that terrorist crimes present a particular challenge, as public safety may require the police to arrest a terrorism suspect based on credible information that cannot be disclosed to the defence or presented in court without endangering an informant. In this decision, the ECtHR established a standard whereby, in cases of suspected terrorist activity, the suspicion justifying arrest need not be supported by the disclosure of confidential sources. Nevertheless, the ECtHR also stressed that “exigencies of dealing with terrorist crime cannot justify stretching the notion of “reasonableness” to the point where the safeguard secured by subparagraph (c) of Paragraph 1 of Article 5 of the Convention”. Even in such cases, some factual material or information must be presented that is capable of convincing the Court of the reasonableness of the suspicion justifying the pre-trial detention (cl 35).

In particular, in its judgment in *Labita v. Italy*⁶, the ECtHR found that the testimony of an anonymous informant – based solely on hearsay and uncorroborated by other facts – was insufficient to establish a reasonable suspicion of the applicant’s involvement in mafia-related activities (cl 156). However, in a different case, *Talat Tepe v. Turkey*⁷, the Court held that the arrest was lawful and the suspicion reasonable, even though it was based on incriminating statements by other suspects who later retracted their testimony several years later (cl 61). It should also be noted that throughout the entire period during which a preventive measure is applied, the reasonableness

¹ Judgment of the European Court of Human Rights in Case No. 28749/18 “*Kavala v. Turkey*”. (2020, May). Retrieved from <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-199515%22%5D%7D>.

² Criminal Procedure Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-1775>.

³ Judgment of the European Court of Human Rights in Case No. 14310/88 “*Murray v. the United Kingdom*”. (1994, October). Retrieved from <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-57895%22%5D%7D>.

⁴ European Convention on Human Rights. (1950, November). Retrieved from https://zakon.rada.gov.ua/laws/show/995_004.

⁵ Judgment of the European Court of Human Rights in Case No. 37555/97 “*O’Hara v. the United Kingdom*”. (2002, January). Retrieved from <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-59721%22%5D%7D>.

⁶ Judgment of the European Court of Human Rights in Case No. 26772/95 “*Labita v. Italy*”. (2000, April). Retrieved from <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-58559%22%5D%7D>.

⁷ Judgment of the European Court of Human Rights in Case No. 31247/96 “*Talat Tepe v. Turkey*”. (2005, March). Retrieved from <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-67765%22%5D%7D>.

of the suspicion – initially sufficient to justify pre-trial detention – must be supported by newly gathered evidence. This requirement is emphasised both in the ECtHR’s case law and in academic scholarship. For instance, V.T. Nor & M.I. Shevchuk (2019) argue that the absence of new evidence confirming the suspicion may indicate either inaction on the part of the pretrial investigation authorities or the existence of evidence that undermines the justification for the suspicion.

The above indicates that, when deciding on the extension of a detention period, the evidentiary standards required to justify a reasonable suspicion increase compared to those sufficient for the initial decision to impose a preventive measure. In such cases, the judge must be satisfied that the suspicion remains well-founded. In its 2015 judgment in *Temchenko v. Ukraine*¹, the ECtHR noted that the applicant had initially been detained in compliance with the requirement of reasonable suspicion and with due consideration of the risks of absconding or interfering with the pre-trial investigation. However, upon examining the circumstances of the case, the Court concluded that although the original detention order had been justified, any subsequent extension required more specific factual grounds. Instead, the judges relied on the same general circumstances without providing any new or concrete details (cl 116).

The requirement to present new factual information when deciding whether to extend a period of detention is stipulated in Paragraph 1 of Part 3 of Article 199 of the CPC of Ukraine². It states that a motion to extend detention must include “circumstances indicating that the stated risk has not diminished or that new risks have emerged which justify the person’s continued detention”³. It is important to emphasise that one of the key safeguards of a fair trial is enshrined in Part 1 of Article 198 of the CPC of Ukraine. According to this provision, the conclusions set out in a court ruling on the application of a preventive measure – particularly those concerning the substance of the suspicion or accusation – do not carry prejudicial value in the court’s consideration of the case on its merits, nor do they constrain the actions of the investigator or prosecutor in the same or another criminal proceeding⁴.

Thus, in the absence of factual information sufficient to establish a reasonable suspicion, preventive measures – particularly detention – should not be

applied. However, in addition to the existence of a reasonable suspicion, the application of a preventive measure also requires the presence of risks associated with improper conduct on the part of the suspect or accused. A mandatory prerequisite is the existence of at least one risk that gives the investigating judge or court grounds to believe that the suspect or accused may engage in conduct aimed at obstructing criminal proceedings, as outlined in Part 1 of Article 177 of the CPC of Ukraine⁵. The legislature labels these methods of obstructing criminal proceedings as “risks”, and they include actions such as: absconding from pre-trial investigation authorities or the court; destroying evidence significant to the criminal proceedings; illegally influencing other participants in the same criminal proceedings; or continuing unlawful activity, among others. Therefore, the position expressed by T.G. Fomina (2018) is well founded: a “risk” should be understood as the substantiated likelihood of interference with criminal proceedings in the forms specified in Part 1 of Article 177 of the CPC of Ukraine.

Risks of interference with criminal proceedings must be substantiated by factual evidence. The failure to meet this requirement has been highlighted in several ECtHR judgments concerning Ukraine. For example, in *Temchenko v. Ukraine*⁶, the Court noted that the authorities failed to explain how the applicant might influence witnesses or obstruct the investigation (cl 116). Similarly, in *Tkachev v. Ukraine* (2007)⁷, the Court found that merely repeating formal grounds without citing specific facts or circumstances did not constitute “relevant” and “sufficient” reasons for detention (cls. 49, 52).

Thus, the use of custodial preventive measures, which restrict the right to liberty and security, is permitted in order to prevent adverse effects on the progress and outcome of pre-trial investigation or court proceedings by mitigating such risks. However, proving the existence of these risks presents a considerable challenge for the prosecution. It requires demonstrating the likelihood of a future event occurring with a high degree of probability should a custodial preventive measure not be applied. In other words, the prosecution must provide evidence of what may occur in the future if detention is not imposed.

The above demonstrates that the evidentiary assessment of risks justifying the application of a preven-

¹ Judgment of the European Court of Human Rights in Case No. 30579/10 “*Temchenko v. Ukraine*”. (2015, July). Retrieved from <https://surl.lu/kwahll>.

² Criminal Procedure Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.

³ *Ibidem*, 2012.

⁴ *Ibidem*, 2012.

⁵ *Ibidem*, 2012.

⁶ Judgment of the European Court of Human Rights in Case No. 30579/10 “*Temchenko v. Ukraine*”. (2015, July). Retrieved from <https://surl.lu/kwahll>.

⁷ Judgment of the European Court of Human Rights in Case No. 39458/02 “*Tkachev v. Ukraine*”. (2007, December). Retrieved from https://zakon.rada.gov.ua/laws/show/974_335#Text.

tive measure is inherently prognostic. In this context, V.V. Mykhailenko (2019) notes that the predictive nature of risk assessment when applying preventive measures does not exempt the prosecution from the obligation to substantiate such risks with concrete facts, rather than mere assumptions, indicating a genuine threat of the suspect or accused interfering with the course of the pre-trial investigation. It is also important to highlight the inadmissibility of justifying the existence of risks warranting pre-trial detention solely on the basis of the seriousness of the offence committed. In particular, in the ECtHR judgment in *Moskalenko v. Ukraine*¹, the ECtHR stated that the gravity of the charges may, at the initial stage, indicate a risk of absconding from the pre-trial investigation authorities. However, such grounds cannot justify extended periods of detention (cls. 34-36).

In examining the right to liberty and security, scholars have frequently highlighted the problematic nature of defining the conditions and grounds for the application of preventive measures. One point of academic debate concerns whether the provision set out in Part 3 of Article 176 of the CPC of Ukraine² should be regarded as a ground for applying such measures. This provision states that “the investigating judge or court shall refuse to apply a preventive measure if the investigator or prosecutor fails to prove that the circumstances established during the examination of the motion to apply the preventive measure are sufficient to convince the court that none of the milder preventive measures provided for in Part 1 of Article 176 of the Code would prevent the established risk or risks”³. In particular, V.T. Nor & M.I. Shevchuk (2019), as well as O.G. Shylo (2014), propose that the grounds for applying a preventive measure should also include the CPC’s stipulation that when deciding on a preventive measure, it must be proven that the objectives of the criminal proceedings cannot be achieved through the application of the preventive measure.

Nevertheless, the circumstance outlined in Paragraph 3 of Part 1 of Article 194 of the CPC of Ukraine⁴ – namely, “the insufficiency of applying milder preventive measures to prevent the risk or risks indicated in the motion” – should be regarded not as a ground but rather as a condition for restricting the RLS. This is because the provision is taken into account not when deciding on the necessity of applying a preventive measure, but when determining its specific form (Khablo, 2020). In this regard,

V.V. Rozhnova (2003) rightly notes that while a ground – the factual basis for coercive action – justifies the application of a procedural coercive measure, a condition, as a set of legal requirements, serves as a safeguard for the lawfulness of such a measure. The foregoing indicates that the right to liberty and security is a fundamental human value. Accordingly, complaints concerning violations of the rights enshrined in Article 5 of the Convention⁵ have repeatedly been the subject of consideration by the ECtHR. This has enabled the ECtHR’s case law to establish generally accepted standards for ensuring the lawfulness of restrictions on the right to liberty and security in the course of criminal proceedings.

■ Conclusions

The reasonableness of suspicion, as a ground for applying a custodial preventive measure, must be supported by a volume of factual data sufficient to allow an investigating judge to assert, with a high degree of probability, that the person concerned has committed the alleged offence. Although the suspicion must be reasonable, it should not be equated with a formal accusation, as the purpose of applying a preventive measure is to prevent the suspect from interfering with the establishment of facts and circumstances necessary to formulate the charges. It has been established that a level of suspicion considered sufficient at the time of arrest or detention must be substantiated throughout the entire period during which the preventive measure is applied. It is therefore justified to assert that, in the absence of reasonable suspicion, restrictions on the right to liberty and security are not permissible. However, in addition to the presence of reasonable suspicion, the application of a preventive measure also requires the existence of risks associated with improper conduct by the suspect or the accused.

It has been established that proving the existence of risks associated with improper conduct by a suspect (or accused person) is a complex task, as claims concerning such risks are predictive in nature. Therefore, what must be demonstrated is not a past event, but rather the likelihood of a future occurrence should a preventive measure – such as detention – not be applied. It is necessary to substantiate the risk of a negative event (e.g. absconding from pre-trial investigation authorities, tampering with evidence, etc.) occurring with a high degree of probability in the absence of a custodial preventive measure. The predictive nature of such risks must be supported by

¹ Judgment of the European Court of Human Rights in Case No. 37466/04 “*Moskalenko v. Ukraine*”. (2010, August). Retrieved from https://zakon.rada.gov.ua/laws/show/974_797#Text.

² Criminal Procedure Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.

³ *Ibidem*, 2012.

⁴ *Ibidem*, 2012.

⁵ European Convention on Human Rights. (1950, November). Retrieved from https://zakon.rada.gov.ua/laws/show/995_004.

factual data obtained by the prosecution that demonstrates the real, rather than hypothetical, possibility of the risk materialising. The seriousness of the offence committed must not serve as the sole ground for justifying the existence of such a risk as the basis for pre-trial detention.

The analysis presented above enables the identification and generalisation of internationally recognised standards regarding the lawfulness of restricting the right to liberty and security during criminal proceedings. Observance of the conventional standards established through the case law of the ECtHR in national legal practice will promote consistency and coherence in the application of the law, while also serving as a foundation for the development of high-quality amendments and improvements to

national criminal procedure legislation. Further research is required to assess and substantiate the lawfulness or unlawfulness of restricting the right to liberty and security during criminal proceedings.

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■ Conflict of Interest

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Правомірність обмеження права на свободу й особисту недоторканність: стандарти Європейського суду з прав людини

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■ **Анотація.** Положення статті 5 Європейської конвенції з прав людини визначають гарантії права на свободу й особисту недоторканність. Під час кримінального провадження це базове право людини може бути обмеженим. Тому законодавство та правозастосовна практика мають передбачити справедливі процедури такого обмеження. Метою дослідження був комплексний аналіз, систематизація та експлікація конвенційних стандартів гарантування законності обмеження права на свободу й особисту недоторканність у кримінальному провадженні, визначення підстав застосування ізоляційних запобіжних заходів, що дасть змогу уникнути правозастосовних помилок і сприятиме формуванню уніфікованої та усталеної слідчо-судової практики, зокрема і в умовах воєнного стану. Основними методами пізнання були: аксіологічний, формально-юридичний, логіко-правовий, системно-структурний, порівняльно-правовий, аналіз та узагальнення, що дало змогу описати результати й обґрунтувати отримані висновки. Дослідження здійснено з огляду на практику Європейського суду з прав людини та національне кримінальне процесуальне законодавство. Встановлено, що згідно зі стандартами, сформованими практикою Європейського суду з прав людини, підозра не потребує також рівня переконливості, як обвинувачення, а обґрунтованість підозри передбачає наявність такого обсягу фактичних даних, які дають змогу сторонньому спостерігачу (слідчому судді) з високим ступенем імовірності дійти висновку, що особа, яка буде обмежена в праві на свободу й особисту недоторканність, вчинила інкриміноване їй діяння. Аргументовано, що в практиці Європейського суду з прав людини застосовують сутнісну, а не формальну концепцію обвинувачення. На прикладі нормативного регулювання підстав застосування запобіжних заходів встановлено, що рішення про достатність чи недостатність фактичних даних для визнання підозри обґрунтованою, а також про обґрунтованість ризиків буде приймати слідчий суддя в кожному конкретному випадку. Практична цінність роботи полягає в можливості використання визначених стандартів практики Європейського суду з прав людини під час прийняття рішення про застосування ізоляційного запобіжного заходу, що забезпечить уніфіковану правозастосовну практику та сприятиме утвердженню засади верховенства права в Україні

■ **Ключові слова:** затримання; тримання під вартою; кримінальне провадження; обґрунтована підозра; підстави застосування запобіжного заходу; слідчий; суддя