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ANALYTICAL PAPER

Human rights impact of the provisions of article 176.5 of the Criminal Procedure Code of Ukraine

The United Nations Human Rights Monitoring Mission in Ukraine (HRMMU) has been deployed in March 2014 upon the invitation of the Government of Ukraine. It is mandated to, *inter alia*:

a) monitor the human rights situation in the country, with particular attention to the Autonomous Republic of Crimea, Eastern and Southern regions of Ukraine, and provide regular, accurate and public reports by the High Commissioner (OHCHR) on the human rights situation and emerging concerns and risks;

b) recommend concrete follow-up actions to relevant authorities of Ukraine, the UN and the international community on action to address the human rights concerns, prevent human rights violations and mitigate emerging risks.

As part of its mandate HRMMU is monitoring and reporting on the human rights impact of the armed conflict in eastern Ukraine. Particular attention is paid to criminal proceedings against individuals charged with affiliation or links with the armed groups of the self-proclaimed 'Donetsk people's republic' or the self-proclaimed 'Luhansk people's republic' or crimes against national security of Ukraine[1]. Over four years of monitoring such trials HRMMU has been observing the systematic violation of the right to liberty, mostly due to misinterpretation of the provision of article 176.5 of the Criminal Procedure Code by the judges which results in automatic remanding in custody and extension of pre-trial detention of all defendants.

SUMMARY

On 7 October 2014, the Parliament of Ukraine adopted a law[2] amending, *inter alia*, article 176 "General provisions on measures of restraint" of the Criminal Procedure Code. Despite availability of a variety of other measures of restraint (*i.e.* personal recognizance, personal guarantee, bail and house arrest), the amendment prescribed that no other measure of restraint but pre-trial detention can be applied to individuals charged with crimes against national security and a number of crimes against public security[3].

The way Ukrainian courts apply this provision contradicts the international human rights standards related to liberty of person and prohibition of arbitrary detention. In particular, judges dealing with conflict-related criminal cases do not duly assess the elements required to be met for application of a measure of restraint but instead apply pre-trial detention as the only available measure of restraint without giving due consideration to less intrusive alternatives that would effectively mitigate the risks of flight, interference with evidence or recurrence of the crime.

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[1] Hereinafter "conflict-related crimes".

[2] The Law of Ukraine "On introducing amendments to the Criminal and Criminal Procedure codes regarding inevitability of punishment for certain crimes against national security, public security and corruption crimes", no. 1689-VII, available at: http://zakon.rada.gov.ua/laws/show/1689-18#n39.

[3] Criminal Code of Ukraine, articles 109-114^1, 258-258^5, 260, 261. These crimes constitute "conflict-related crimes".

LEGAL FRAMEWORK

International Human Rights Standards

International Covenant on Civil and Political Rights

The right to liberty is prescribed in article 9 of the International Covenant on Civil and Political Rights (ICCPR), which Ukraine ratified on 19 October 1973. The ICCPR leaves it to the state parties to determine the grounds and procedure for deprivation of liberty, however, sets a number of important standards to which domestic legislation shall correspond, *e.g.*, that:

- pre-trial detention **shall not be a general rule**, however, release pending trial may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

General Comment no. 35 (Liberty and security of person)

UN Human Rights Committee in its General Comment No. 35 on article 9 gives more detailed authoritative interpretation of the content of the article. In particular it states that:

- Detention pending trial must be **based on an individualized determination** that it is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime;
- Courts must examine whether alternatives to pre-trial detention, such as bail, electronic bracelets or other conditions, would render detention unnecessary in the particular case;
- After an initial determination has been made that pre-trial detention is necessary there should be periodic re-examination of whether it continues to be reasonable and necessary in the light of alternatives;
- Pre-trial detention shall not be extremely prolonged, since this may jeopardize the presumption of innocence. When delays become necessary, the judge must reconsider alternatives to pre-trial detention;
- Pre-trial detention shall **not be mandatory for all defendants charged with a particular crime**, without regard to **individual circumstances**.

National Legislation

Article 177.2 of the Criminal Procedure Code states that the court applies measures of restraint on the basis of **reasonable suspicion that a person committed a crime**, as well **reasonable grounds** to believe that the suspect / accused / convict would:

1) flee from justice;
2) destroy, hide or corrupt evidence;
3) interfere with the victim, witness, another suspect, accused, expert, specialist within the same criminal proceeding;
4) otherwise interfere with the criminal proceeding;
5) commit another crime or continue the crime (s)he is suspected / accused of.

Article 176 of the Criminal Procedure Code provides for a variety of measures of restraints to mitigate these risks. These include: personal undertaking, personal guarantee, bail, house arrest and pre-trial detention.

In 2014 the Parliament of Ukraine adopted a law on amendments to the Criminal and Criminal Procedure Codes regarding inevitability of punishment for certain crimes against national security, public security and corruption crimes. The Law introduced a number of novelties to the Criminal Procedure Code, in particular, *in absentia* procedure, and also added

para 5 to article 176, according to which pre-trial detention is the only measure of restraint applicable for individuals charged with crimes against national security of Ukraine as well as a number of crimes against public order.[4]

ANALYSIS OF FINDINGS

Article 176.5 of the Criminal Procedure Code of Ukraine states that no other measure of restraint can be applied to individuals charged with crimes against national security of Ukraine and certain crimes against public order. Article 176.5 violates international human rights standards related to the right to liberty of person, because the interpretation of its wording and related application in practice lead to automatic rejection of release of defendants in conflict-related criminal cases under other measures of restraint. The existence of this norm and its misinterpretation by the prosecution and courts resulted in the development of a practice of remanding of nearly all defendants in conflict-related crimes in custody in violation of the key international human rights standards pertaining to the right to liberty of person as articulated above.

1. Detention pending trial must be based on an individualized determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime.

Article 177 "Purpose and grounds for applying measures of restraint" of the Criminal Procedure Code of Ukraine requires two cumulative elements to be met in order to apply a measure of restraint. These are:

(i) a **well-substantiated suspicion** that a person has committed a crime; and

(ii) the **risks** that give the court reasonable grounds to believe that the person would not fulfil procedural obligations imposed on him or would attempt to:

1) flee from pre-trial investigation and/or trial;

2) destroy, hide or corrupt any of the things or documents, which have essential significance for establishing the circumstances of the crime;

3) unlawfully influence the victim, witness, another suspect, accused, expert, specialist in this criminal case;

4) otherwise interfere with the criminal case;

5) commit other crime or continue the crime he is suspected/accused with.

Based on the above prior to applying article 176.5 the courts must assess whether both elements are met, cumulatively. Yet through trial monitoring and analysis of court rulings on application of measures of restraint in conflict-related criminal cases, HRMMU noted that in the majority of instances courts do not assess either of them:

(i) The obligation to prove that the notice of suspicion is well-substantiated rests with the prosecution. When assessing this matter the judges are authorized to hear witnesses or examine materials relevant for establishing whether the suspicion that a person committed an imputed crime is well-substantiated or not.[5] At the same time according to article 303 of the Criminal Procedure Code the notice of suspicion (as a procedural document) cannot be challenged earlier than two months after it has been presented to the defendant.[6] By virtue of

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[4] OHCHR refers to Articles 109-114[1] and 258-258[5], 260 and 261 of the Criminal Code, respectively, as 'conflict-related crimes' when these charges are pressed against individuals believed to have links with the Russian Federation as "aggressor state" or be affiliated or linked with the armed groups of the self-proclaimed 'Donetsk people's republic' or the self-proclaimed 'Luhansk people's republic'.

[5] Article 193 of the Criminal Procedure Code.

[6] *See* the Law of Ukraine On introducing amendments to the Commercial Procedure Code of Ukraine, Civil Procedure Code of Ukraine, Code of Administrative Procedure and other legislation, no. 2147-VIII, adopted on 3 October 2017.

this rule two months are reserved for the prosecution to conduct the investigation. During this time, courts apply lower standards of proof for the prosecution in substantiating the suspicion. HRMMU consistently observed that whenever defendants or their lawyers attempted to challenge the prosecution's position the investigative judges would simply ignore their arguments.

As a result, in majority of cases observed by HRMMU the courts almost automatically establish the first element. The defence can effectively challenge the notice of suspicion only after two months since the person has been formally charged with a crime.

(ii) Similarly the judges often fail to duly examine the aforementioned risks. In the majority of cases observed and followed by HRMMU, courts have been simply upholding the prosecution motions to remand defendants in custody or extend their pre-trial detention. Concerning in this regard is the fact that often in their motions prosecutors do not go beyond merely listing the above risks, without providing facts and circumstances suggesting that release of the defendant may have a negative impact on the course of investigation or appearance of the latter for trial.

Therefore the courts take decisions on the necessity to apply a measure of restraint in conflict-related criminal cases (i) without duly assessing whether the suspicion is well-substantiated at the pre-trial stage and (ii) without assessing the risks that would necessitate a measure of restraint. Such conclusion is arbitrary since it is not based on individualized determination on the reasonableness and necessity thereof taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime.

2. Courts must examine whether alternatives to pre-trial detention, such as bail, electronic bracelets or other conditions, would render detention unnecessary in the particular case.

In addition to proving the suspicion that a defendant committed a crime is well-substantiated and existence of the above risks, article 194 of the Criminal Procedure Code of Ukraine requires the prosecution to also prove that less restrictive measures of restraint cannot mitigate the said risks. It says, however, that when the first two elements have been proved to exist, the court can on its own initiative apply less restrictive alternatives to a measure of restraint requested by the prosecutor (the personal commitment is the lightest and pre-trial detention is the strictest measure of restraint).

Being bound by the provisions of article 176.5 of the Criminal Procedure Code, after reaching conclusion that the first two elements are met the courts dealing with conflict-related criminal cases disregard the third element.

Article 176.5 of the Criminal Procedure Code violates the above international human rights standard *per se* since it limits the authority of the courts dealing with conflict-related criminal cases to consider alternatives to pre-trial detention.

This conclusion is based on the analysis of the European Court of Human Rights case law which, according to the Law on Execution of judgments and application of practice of the European Court of Human Rights (ECtHR), is a source of law for Ukrainian courts. The ECtHR has previously found violation of Article 5 § 3 of the Convention in a number of cases in which an application for measures of restraint other than pre-trial detention was refused automatically by virtue of the law.[7] In the case of Piruzyan v. Armenia[8] the ECtHR found that

[7] *See* Caballero v. the United Kingdom [GC], no. 32819/96, § 21, ECHR 2000-II, S.B.C. v. the United Kingdom, no. 39360/98, §§ 23-24, 19 June 2001, Case of Boicenko v. Moldova, no. 41088/05, 11 October 2006, and Piruzyan v. Armenia, no. 33376/07, 26 June 2012.

"*the applicant's requests to be released on bail were similarly dismissed, on the grounds that he was accused of an offence which, under article 19 of the CC, qualified as a serious offence and that Article 143 § 1 of the CCP precluded release on bail in such cases. The Court considers that such automatic rejection of the applicant's applications for bail devoid of any judicial control of the particular circumstances of his detention, was incompatible with the guarantees of Article 5 § 3.*"

According to the said ECtHR judgment domestic courts dealing with conflict-related criminal cases shall consider alternatives to pre-trial detention, despite the limitations enshrined in article 176.5 of the Criminal Procedure Code of Ukraine.

Through monitoring trials and analysis of publicly available court decisions HRMMU notes that the defence counsel are discouraged by the wording of article 176.5 of the Criminal Procedure Code as well as court practice in such cases, and often do not request the court to apply less intrusive alternatives to pre-trial detention. In the rare cases where they do, the courts dismiss motions of the defence to replace pre-trial detention with alternative measures of restraint, referring to article 176.5 and arguing that in the absence of other options the defendant should be remanded in custody.

In very rare cases, however, courts referred to the provisions of the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, Convention for the Protection of Human Rights and Fundamental Freedoms and/or the ECtHR case law and applied alternative measures of restraint (*e.g.* release on bail or house arrest)[9] or unconditionally released defendants from custody due to failure of the prosecution to prove existence of the risks.[10] In some of these cases the prosecutors opened criminal investigations against the judges on charges of delivery of deliberately unjust decision under article 375 of the Criminal Code of Ukraine. These investigations are pending for a long time without any progress: neither judges are formally charged, nor the cases are being closed. This exerts pressure on the judges who ruled to release defendants from custody and also has a chilling effect on other judges who are dealing with conflict-related criminal cases.

3. After an initial determination has been made that pre-trial detention is necessary there should be periodic re-examination of whether it continues to be reasonable and necessary in the light of alternatives.

At later stages of criminal proceedings after the initial decision to place a defendant in custody the courts shall only examine existence of the risks under article 177.1 of the Criminal Procedure Code. In most of the cases monitored by HRMMU courts, however, take a formal approach to examination of the continued existence of the risks. The courts simply accept the prosecutors' motions that merely list the risks quoting respective provisions of article 177.1 of the Criminal Procedure Code of Ukraine without giving a justification with reference to specific circumstances suggesting that the risks exist.

Just like during the initial determination of the application of a measure of restraint the courts are limited by the provision of article 176.5 of the Criminal Procedure Code in applying only custodial measure of restraint.

[8] *See* § 105. Full text of the judgment is available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-111631%22]}.

[9] Ruling of Leninskyi district court of Kharkiv, 20 September 2017, available from: http://reyestr.court.gov.ua/Review/69076525.

[10] Ruling of Kyivskyi district court of Kharkiv, 1 March 2018, available from: http://reyestr.court.gov.ua/Review/72555739.

4. Pre-trial detention shall not be extremely prolonged, since this may jeopardize the presumption of innocence. When delays become necessary, the judge must reconsider alternatives to pre-trial detention.

Failure of the courts to comply with the above standards is especially concerning given that trials in conflict-related criminal cases are often protracted. In its General Comment no. 35 Human Rights Committee stated that persons who are not released pending trial must be tried as expeditiously as possible (to the extent consistent with their rights of defence). When delays become necessary, the judge must reconsider alternatives to pre-trial detention. Extremely prolonged pre-trial detention may jeopardize the presumption of innocence.

HRMMU notes that in some cases court hearings are scheduled once every two months. At these hearings the courts only examine extension of the application of the measure of restraint. Apart from having negative impact on the presumption of innocence, extremely prolonged pre-trial detention can be used to exert pressure on the defendants.

5. Pre-trial detention shall not be mandatory for all defendants charged with a particular crime, without regard to individual circumstances.

Ukrainian legislation does not require mandatory detention for all defendants charged with a particular crime. Nor does it for the individuals charged with conflict-related crimes, however, based on the above analysis HRMMU notes that in practice pre-trial detention is regarded as mandatory for all defendants charged with conflict-related crimes.[11]

HRMMU notes that in very rare cases judges have released defendants in conflict-related criminal cases from custody. In those cases, the judges have often been subjected to heavy public criticism, and sometimes are even under investigation on charges of delivering a deliberately unjust decision. This in turn violates another human rights standard related to independence of the judiciary.

[11] "All" in this case encompasses defendants whose pre-trial detention was requested by the prosecution.