Strasbourg, 1 March 2019 **CDL(2019)013 ***

Opinion No. 939 / 2018 Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

UKRAINE

DRAFT AMICUS CURIAE BRIEF ON SEPARATE APPEALS AGAINST RULINGS ON PREVENTIVE MEASURES (DEPRIVATION OF LIBERTY) OF FIRST INSTANCE COURTS

On the basis of comments by:
Mr Alexander BARAMIDZE (Substitute Member, Georgia)
Mr Martin KUIJER (Substitute Member, the Netherlands)
Mr András Zs.VARGA (Member, Hungary)

**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

Table of Contents

I. Introduction 3
II. Request 3
III. Applicable provisions under Ukrainian Law 3
IV. Rationale of the challenged provisions: procedural efficiency 4
V. Article 5 ECHR 4
VI. Standards established by the Committee of Ministers of the Council of Europe 6
VII. National provisions in other countries 7
VIII. Analysis 11
IX. Conclusion 12

I. Introduction

1. By letter of 23 November 2018 the President of the Constitutional Court of Ukraine requested the Venice Commission to provide an *amicus curiae* brief on the following issue:

> "does the lack of legal procedure in the Ukrainian's domestic law for an individual to challenge in appeal the court ruling as concerns the selection or extension of the preventive measure, before the case is actually resolved on the merits, comply with the European standards in the field of human rights and the rule of law?"

2. The Commission invited Messrs Baramidze, Kuijer and Varga to act as rapporteurs for this opinion.

3. This opinion was adopted by the Venice Commission at its … Plenary Session (Venice, … 2019).

II. Request

4. This request has to be seen against the backdrop of two pending cases before the Constitutional Court. In both cases the applicants are defendants in criminal proceedings which are currently pending before a court of first instance. The applicants who are detained, claim that they cannot challenge interim measures such as detention separately but that they can only challenge such measures as part of an appeal against the first instance judgment on the merits. This follows from (the combined effect of) two provisions of the Code of Criminal Procedure of Ukraine. Article 392 paragraph 2 reads:

> "Rulings passed in the course of court proceedings in a court of first instance before the passing of court decisions as provided for by the first paragraph above shall not be subject to a separate challenge, except in cases specified by the present Code. Objections against such rulings may be included in an appellate complaint against a court decision as provided for by the first paragraph above."

Article 428 paragraph 2 reads:

> "Court of cassation instance shall pass a ruling to dismiss cassation proceedings if:
> 1) the cassation complaint is filed against a court decision which is not subject to challenging in cassation procedure;
> 2) it follows from the cassation complaint, attached thereto court decisions and other documents that there are no grounds for granting the complaint."

5. In the two pending cases before the Constitutional Court, the constitutionality of both provisions is challenged in light of the principle of the rule of law (Article 8 of the Constitution), the constitutional right to liberty and personal inviolability (Article 29 of the Constitution), the right to protection in court of the violated human rights, the right to challenge in court of decisions, acts or omissions of public authorities, bodies of local self-government, officials and officers (Articles 55.1, 55.2 of the Constitution); and the right to review the case in appeal (in the part of selection of a preventive measure) (clause 8 Article 129.2 of the Constitution).

6. In the light of the contact of the cases pending before the Constitutional Court of Ukraine, the scope of this opinion is limited to preventive measures relating to deprivation of liberty.

III. Applicable provisions under Ukrainian Law

7. The Ukrainian Criminal Procedural Code (CPC) provides a number of guarantees for arrested or detained persons (highlighting added):

8. Under Article 186(1) of the CPC, the investigating judge or court considers the motion to enforce or change a measure of restraint without any delay and in any case within 72 hours

after the suspect or accused has actually been apprehended; under Article 193(1), a motion to enforce a measure of restraint is considered with participation of public prosecutor, suspect, accused, his defence counsel.

9. Under Article 309(1), during pre-trial investigation, the investigating judge's rulings may be challenged in appeals procedure related to 'enforcing the measure of restraint in the form of keeping in custody' and 'extending duration of keeping in custody'.

10. Furthermore, Article 331 sets forth the procedure whereby a defendant may challenge the continued detention in the trial court. It provides for an automatic review of detention by the court: Pursuant to Article 331(1), during trial, the court, upon motion of the prosecution or defence, may change, revoke or impose a measure of restraint in respect of the accused; Article 331(2) prescribes that in doing so, the court must follow the same procedures which apply to the first application of the measure of restrained by the investigative judge.

IV. Rationale of the challenged provisions: procedural efficiency

11. The challenged provisions aim to enhance procedural efficiency. Such provisions exist also in other European legal systems (see further below).

12. The need for procedural economy is, at least to a certain extent, acknowledged in European standards. Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities recommends that

> "The authorities responsible for the organisation and functioning of the judicial system are obliged to provide judges with conditions enabling them to fulfil their mission and should achieve efficiency while protecting and respecting judges' independence and impartiality".

13. The principle of procedural economy is also acknowledged in the case-law of the European Court of Human Rights:

> "The Court finds that it is understandable that in ancillary matters, such as the determination of the cost of proceedings, the national authorities should have regard to the demands of efficiency and economy. As its case-law bears out, the Court attaches great importance to that objective, but it does not, however, justify disregarding the fundamental principle of adversarial proceedings. In fact, Article 6 § 1 is intended above all to secure the interests of the parties and those of the proper administration of justice (Acquaviva v. France judgment of 21 November 1995, Series A no. 333-A, p. 17, § 66; Nideröst-Huber v. Switzerland judgment, op. cit. p. 109, § 30). Even if, as the Government argue, in appeal proceedings on a costs order the possibility to present legal and factual arguments may be limited, it is for the parties to say whether or not a document calls for their comment. What is at stake is the litigants' confidence in the workings of justice, which is based on, inter alia, the knowledge that they have had the opportunity to express their views on every document in the file (Nideröst-Huber v. Switzerland judgment, op. cit., p. 108, § 29)." [1]

V. Article 5 ECHR

14. The European Court of Human Rights examines problems of effectiveness of the procedure of judicial review of detention orders under Article 5 of the Convention.

[1] ECtHR, *Beer v. Austria,* no. 30428/96, § 18, 6 February 2001

15. The main purpose of Article 5 of the Convention is to protect persons from arbitrary or unjustified detention.[2] Article 5 is applicable in numerous situations, for example pre-trial detention, placement in a psychiatric or social care institution, confinement in airport transit zones, questioning in a police station or stops and searches by the police, or house arrest.

16. Article 5, paragraph 3 of the Convention, contains the right for persons arrested or detained on the grounds that they are suspected of having committed a criminal offence to be brought before a judge or other officer authorised by law promptly and to have their case heard within a reasonable time or to be released pending trial. The Article does not provide for any possible exceptions to the obligation to bring a person before a judge promptly after his or her arrest or detention. Review must be automatic and cannot depend on an application being made by the detained person. If there are no reasons justifying the person's detention, the judge must be empowered to order his or her release.

17. Article 5, paragraph 4, of the Convention provides that "everyone who is deprived of his liberty […] shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful". Article 5, paragraph 4, contains special procedural safeguards that are distinct from those set out in Article 6 of the Convention. It constitutes a *lex specialis*. The proceedings referred to in Article 5, paragraph 4, must be of a judicial nature and offer certain procedural safeguards appropriate to the nature of the deprivation of liberty in question. A hearing is required in the case of a person who is held in pre-trial detention. The possibility for a detainee to be heard either in person or, where necessary, through some form of representation is a fundamental safeguard. The Convention does not require that a detained person be heard every time he or she appeals against a decision extending detention, although there is a right to be heard at reasonable intervals. The proceedings must be adversarial and must always ensure equality of arms between the parties. In the event of pre-trial detention, persons deprived of liberty must be given a genuine opportunity to challenge the elements underlying the accusations against them. This requirement implies that the court could be called to hear witnesses or to grant the defence access to documents in the investigation file. Special procedural safeguards may be necessary to protect those who, on account of their mental disorders, are not fully capable of acting for themselves. For persons who are declared deprived of their legal capacity and can therefore not oversee their detention personally, an automatic judicial review must be required. In verifying whether the requirement of a speedy judicial decision has been met, the Court may take into consideration the complexity of the proceedings, their conduct by the domestic authorities and by the applicant and what was at stake for the latter.

18. Where domestic law provides for a system of appeal, the appellate body must also comply with the requirements of Article 5 § 4, in particular, as concerns the speediness of the review by the appellate body of a detention order imposed by the lower court. At the same time, the standard of speediness is less stringent when it comes to the proceedings before the court of appeal. The Court reiterates in this connection that the right of judicial review guaranteed by Article 5 § 4 is primarily intended to avoid arbitrary deprivation of liberty. However, if the detention is confirmed by a court it must be considered to be lawful and not arbitrary, even where appeal is available. Subsequent proceedings are less concerned with arbitrariness, but provide additional guarantees aimed primarily at an evaluation of the appropriateness of continuing the detention.[3] Therefore, the Court would be less concerned with the speediness of the proceedings before the court of appeal, if the detention order under review was imposed by

[2] Guide on Article 5 of the European Convention on Human Rights, Right to liberty and security, updated on 31 December 2018.
[3] Tjin-a-Kwi and Van Den Heuvel v. the Netherlands, no. 17297/90, Commission decision of 31 March 1993.

a court and on condition that the procedure followed by that court had a judicial character and gave to the detainee the appropriate procedural guarantees.[4]

19. In case the detainee files a complaint concerning his or her detention condition, the Court has clarified that "preventive and compensatory remedies must coexist and complement each other",[5] i.e. an exclusively compensatory remedy cannot be considered sufficient. One should be mindful of the fact that the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.[6]

20. Preventive remedies must be capable of preventing the continuation of the alleged violation and of ensuring that the applicant's material conditions of detention will improve. If a person complains about lack of adequate (medical) care, the preventive remedy must ensure timely relief. The required speediness will be much more stringent where there is a risk of death or irreparable damage to health. The authority responsible need not be judicial. It should however be competent to verify the alleged violations, with the participation of the complainant, be independent, and issue binding and enforceable decisions, such as the Complaints Commission (*beklagcommissie*) in the Netherlands. The requirement of speediness is equally important with regard to complaints concerning the imposition of disciplinary measures such as placement in a disciplinary cell.

21. As for compensatory remedies, a person should be able to obtain compensation. However, mere damages do not provide an effective remedy if the appellant is still in detention. It is important that applicants must not bear an excessive burden of proof. They may be asked to produce readily accessible items of evidence, such as a detailed description of the conditions of detention, witness statements and replies from supervisory bodies. Equally important is that the cost of such proceedings must not place an excessive burden on the applicant and that an award of compensation is not made conditional on the establishment of fault on the part of the authorities. For example, by exonerating the State of all responsibility by declaring that the conditions of detention were caused not by shortcomings on the part of the authorities but rather by a structural problem, such as prison overcrowding or insufficient resources. The remedy must also provide in compensation for non-material damage; the amount of compensation must be comparable to the amounts awarded by the European Court. Redress may also be provided by a reduction of sentence as long as the domestic courts expressly recognise the violation and apply the reduction in a measurable manner.

VI. Standards established by the Committee of Ministers of the Council of Europe

22. Recommendation *Rec(2006)13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse*[7] gives detailed standards regarding right to appeal:

> '18. Any person remanded in custody, as well as anyone subjected to an extension of such remand or to alternative measures, shall have a right of appeal against such a ruling and shall be informed of this right when this ruling is made.
>
> 19. [1] A remand prisoner shall have a separate right to a speedy challenge before a court with respect to the lawfulness of his or her detention.
>
> [2] This right may be satisfied through the periodic review of remand in custody where this allows all the issues relevant to such a challenge to be raised.

[4] See, mutatis mutandis, ECtHR, Vodeničarov v. Slovakia, no. 24530/94, § 33, 21 December 2000; Lebedev v. Russia, no. 4493/04 §§ 75-97, 25 October 2007.
[5] ECtHR, *Ananyev and Others v. Russia,* nos. 42525/07 and 60800/08, § 98, 10 October 2012.
[6] ECtHR [GC], *Salman v. Turkey* (appl. no. 21986/93), § 100, 27 June 2000.
[7] Adopted by the Committee of Ministers on 27 September 2006 at the 974th meeting of the Ministers' Deputies.

20. The existence of an emergency in accordance with Article 15 of the European Convention on Human Rights shall not affect the right of a remand prisoner to challenge the lawfulness of his or her detention. '

Sections 34, 44 add to the right of appeal other remedies as compensation and complaints procedures.

23. By explicitly providing for "a right of appeal" Recommendation Rec(2006)13 goes further than Article 5§4 of the Convention, which provides that everyone arrested or detained "shall be brought promptly before a judge or other officer authorised by law to exercise judicial power".

VII. National provisions in other countries

24. Under the statutory laws and/or the constitutional court practices of many European countries a criminal defendant is entitled to file a separate appeal against the first-instance court ruling on applying preventive measures, inclusive of custodial ones.

25. In Austria, decisions ordering or continuing detention on remand shall not be effective for longer than a certain period: 14 days for the first detention, one month for the first extension of the detention and two month for each further extension.[8] The Code of Criminal Procedure (StPO) establishes a system of periodic hearings for the review of pre-trial detention, which are to be conducted *proprio motu* before the end of the detention period, if the court itself has doubts about the detention or when person detained requests his/her release and the prosecutor opposes the end of detention. The decision is taken by the court that also ordered detention.[9]

26. In Croatia, both Article 24.1 of the Constitution and Article 134 of the Criminal Procedure Code entitle a defendant and his/her counsel, as well as the prosecutor, to file an appeal against a court's ruling on ordering, prolongation or vacation of investigative detention within three days following the date of that ruling. Detention is decided upon by the investigating judge; appeals go to a panel (Article 127 of the Criminal Procedure Code). Moreover, against the second instance ruling on ordering or prolongation an investigative detention, rendered in criminal proceedings, a constitutional complaint can be lodged with the Constitutional Court under Article 62 of the Constitutional Court Act.[10]

27. In Georgia, a defendant, his counsel, or the prosecutor have a right to appeal, within 48 hours, against the judicial ruling on the imposition, prolongation, alteration or vacation of a measure of restraint, whether this ruling is made by a magistrate judge, a pre-trial judge, or a trial court.[11] The court of appeals must review the complaint within 72 hours following its receipt.[12]

28. In Germany, generally, decisions of the adjudicating courts prior to judgment are not subject to separate complaint. However, there are some exceptions which concern decisions relating to arrest, provisional placement, imposition of regulatory or coercive measures, etc.[13] The same approach applies to the higher courts. While complaints against orders and

[8] § 175 StPO.
[9] § 176 StPO; see also ECtHR, *Reinprecht v. Austria,* no. 67175/01, § 24, 15 November 2005.
[10] According to Article 62.1 of the Constitutional Court Act, everyone may lodge a constitutional complaint with the Constitutional Court if s/he deems that an individual act of a state body, a body of local and regional self-government, or a legal person with public authority, which decided about his/her rights and obligations, or about suspicion or accusation for a criminal act, has violated his/her human rights or fundamental freedoms guaranteed by the Constitution, or his/her right to local and regional self-government guaranteed by the Constitution.
[11] Criminal Procedure Code of Georgia, Articles 207(1) and 206(1).
[12] Ibid., Article 207(4).
[13] German Criminal Procedure Code, Article 305.

directions of the Higher Regional Courts are not admissible,[14] in cases where the Higher Regional Courts have jurisdiction at first instance, a complaint must, however, be admissible against orders and directions concerning arrest, provisional placement, placement for observation, etc.[15] Furthermore, when it comes, *inter alia*, to the questions of arrest or provisional placement, orders made upon by the Regional Court or by the Higher Regional Court[16] may be contested by a so-called "further complaint", which is decided by a Higher Regional Court.[17]

29. In addition, the Federal Constitutional Court of Germany which has a power to hear constitutional complaints of individuals against the relevant decisions of the courts of law has been very vigilant to ensure that the challenged decisions satisfy the constitutional standards derived most notably from the right to freedom of the person under Art. 2(2), the right to effective legal protection contained in Art. 19(4), and the principle of the rule of law under Art. 20(3) of the Basic Law. According the Constitutional Court, in view of the presumption of innocence, which derives from the principle of the rule of law under Art. 20(3) of the Basic Law and the express guarantee enshrined in Art. 6 ECHR, subjecting a person who is only suspected but not yet convicted of a crime to a deprivation of liberty is permissible only in exceptional cases. Where imposing such a deprivation of liberty as an interim measure is considered necessary and suitable based on reasons pertaining to criminal justice, it must always be measured against the right to freedom on the part of the accused who has not yet been found guilty. This balancing serves as a corrective to the serious interference, and it is imperative that the principle of proportionality be observed in this regard[18].

30. Article 67 of the Icelandic Constitution incorporates Article 5 ECHR. As an exception to the standard criteria of Art. 95 of the Law on Criminal Procedure (LCP), a person can be detained if there is strong suspicion that the person has committed a crime which is subject to 10 years imprisonment detention is required for the sake of the public interest. Following a hearing of the defendant (Art 105 LCP), a (first instance) judge has to give a reasoned decision (Art. 181 LCP) on detention with a maximum period of four weeks, (Article 97 LCP). According to Art. 67.3 of the Constitution and Art. 192.1-I LCP the detainee can appeal to the recently established Court of Appeal (*Landsréttur*), which decides within 2-3 days. This appeal is never joined to the appeal against the decision on the merits.

31. In Italy, against the decision ordering remand in custody, issued by the Judge for the Preliminary Investigations, the detained person may lodge, within ten days, a request for the review (*"riesame"*, Article 309 of the Criminal Procedure Code) of the legality and merit before the Review Court (*"Tribunale del riesame"*). The Review Court is the territorially competent court, sitting in full composition (the president and two judges). The Review Court decides within ten days; it may confirm, modify or annul the remand order, examining ex officio all legal aspects and factual circumstances, irrespectively of those invoked by the detained person. If the Review Court fails to decide within ten days, the original detention order ceases to have effect. Against the Review Court's decisions, an appeal on points of law may be filed before the Court of Cassation. The person concerned may also apply directly to the Court of Cassation against the detention measure, but in this case the appeal, which may be filed in parallel in court, becomes inadmissible

[14] Ibid., Article 304(4).
[15] Ibid., Article 304(4)(1).
[16] The Higher Regional Courts are competent in first instance in specific cases, such as high treason etc. (§120 Gerichtsverfassungsgesetz).
[17] Ibid., Article 310(1), subparagraphs (1) and (2).
[18] cf. BVerfGE 19, 342 <347>; 20, 45 <49 and 50>7; 36, 264 <270>8; 53, 152 <158 and 159>; recently, Federal Constitutional Court, Order of the First Chamber of the Second Senate of 20 December 2017 – 2 BvR 2552/17 –, para. 159; Order of the First Chamber of 11 June 2018 – 2 BvR 819/18 –, para. 2710.

32. If the conditions justifying the pre-trial detention cease to pertain, the judge must immediately order the release. The detained person may at any time request the revocation of the detention order and his or her release ("*istanza di revoca"*, Article 299 Criminal Procedure Code). This request is addressed to the Judge competent for the proceedings on the merit, who must decide within five days. If the request is refused, the person concerned may then appeal to the Review Court, which decides within twenty days ("*Appello"*, Article 310 CPP). This decision can in turn be appealed on points of law.

33. In Latvia, investigative judges take decisions on detention and other preventive measures during the pre-trial stage. Their decisions are subject to appeal. As concerns the trial stage, Article 473(7) of the Criminal Procedure Law provides that interim decisions adopted by the first instance court may be appealed against only together with an appeal against the judgment on the merits, unless the law provides otherwise. There is no appeal against a request for the assessment of the continuation of detention under Article 81(2) if the decision on pre-trial detention has been adopted prior to adjudication of the case. If the decision to detain the accused has been adopted during the adjudication of the case there is no appeal as well, unless the following hearing of the first instance court has not been scheduled within 14 days from the date of the hearing when the decision to apply detention has been adopted.

34. In the Netherlands, Section 445 of the Code of Criminal Procedure reads: *"Decisions given in chambers shall not be open to appeal or appeal in cassation and a notice of objection shall not be permitted, other than in the cases specified in this Code."*[19] However, reviews of pre-trial detention orders take place regularly. All orders for pretrial detention are subjected to a specific time limit. Once this limit is reached the District Court will review the pre-trial detention order (assuming the prosecutor wants to keep the suspect in pre-trial detention). Alternatively, a suspect or his defence lawyer can always request the District Court to review the pre-trial detention if they believe that the conditions for pre-trial detention are no longer met or when they want to request a suspension of the pre-trial detention.[20] If a case is not ready for trial, but the suspect has been in pre-trial detention for 104 days, a *pro forma* trial is held to assess the progress of the investigation and to see whether the suspect should stay in detention. These *pro forma* trials take place every three months until the substantive trial takes place or the suspect is (conditionally) released from detention.[21]

35. In North Macedonia, although there is no express procedural rule which allows appeals against court rulings on remand detention, the country's Constitutional Court has indicated that decisions on remand detention may not be implied among those court rulings which may not be separately appealed.[22]

36. In Romania, preventive arrest, as one of the preventive measures, may be ordered by a judge or a court during the criminal investigation or during trial. The preventive arrest may be ordered or extended for a maximum of 30 days, the total term for preventive arrest during the criminal investigation cannot exceed 180 days. According to Article 203.3 of the Criminal Procedure Code (CPC), the preventive measures are taken by (a) the Judge for Rights and Liberties, during the criminal investigation, (b) the Preliminary Chamber Judge, in preliminary chamber procedure, and (c) the trial court. A decision taken during the criminal investigation (a) may be challenged by the defendant with the Judge for Rights and Liberties who forwards the challenge to the hierarchically superior court within 48 hours (Article 204.1 CPC). That court rules within five days. A decision taken during the preliminary chamber procedure (b) may be

[19] https://www.legislationline.org/documents/section/criminal-codes/country/12/Netherlands/show.
[20] Dutch Code of Criminal Procedure, Article 69.
[21] J.H. Crijns, B.J.G. Leeuw & H.T. Wermink, Pre-trial detention in the Netherlands: legal principles versus practical reality, Research report, The Hague, 2016, p. 9.
[22] Decision U. no. 209/1998, dated 24.02.1999, of the Constitutional Court of Macedonia.

challenged by the defendant and the prosecutor within 48 hours. This appeal is filed with the Preliminary Chamber Judge who decided initially and who forwards the appeal to the Preliminary Chamber Judge of the hierarchically superior court. This appeal is decided within five days. A decision taken during first instance trial (c) may be challenged by the defendant and by the prosecutor is filed with the trial court which forwards it to the hierarchically superior court, which decides within five days (Article 206.5 and 6 CPC). The appeal separate from the appeal against the judgment on the merits because no preventive arrest order may exceed 30 days. In addition, the courts have the obligation to examine the preventive measures, including detention, ex officio (Articles 207.1 and 208.1 CPC).

37. According to the Criminal Procedure Code of Serbia, detention may be ordered only if the same purpose cannot be achieved by another measure. The court can order detention on a motion by the public prosecutor, and after the indictment is confirmed, also ex officio. Detention during the investigation may be ordered, extended or repealed by a ruling of the judge for preliminary proceedings or a three-judge panel. A ruling extending, or repealing detention is issued ex officio or on a motion of the parties. The parties may appeal against the ruling on detention to a three-judge panel. This appeal, delivered within 48 hours, does not stay execution. As of the filing of the indictment, detention may be ordered, extended or repealed ex officio or on a motion by the parties by a ruling of the trial panel. Even without a motion, the panel examines whether reasons for detention still exist (every 30 days until the indictment is confirmed, every 60 days after the indictment is confirmed until the first instance judgment). The parties and the defence counsel may appeal against the ruling. A detained person can also lodge an application for review of the constitutionality of his/her detention to the Constitutional Court.

38. In Slovakia, resolutions (*uznesenie)* of the first-instance courts may be appealed to a higher court.[23] In addition, warrants of arrest may be contested in the Constitutional Court.[24]

39. In the framework of Article 17 of the Spanish Constitution, the Code of Criminal Procedure provides that persons can be detained by warrant by an investigating judge or the trial court in an adversarial procedure (Article 505 LECrim). There is no *ex officio* review but the detainee can appeal to the Court of Appeal against this warrant (Article 507 LECrim). This appeal is independent from the judgment on the merits. The Court of Appeal too decides by warrant against which there is no further appeal (art. 848 LECrim).

40. In Switzerland, every person in custody can lodge an application for review of the legality of his/her custody at any time (written or orally) to the prosecutor (Art. 228 I Swiss Criminal Procedure Code). If the prosecutor does not grant the application, s/he shall pass the application within three days to the compulsory measures court accompanied by a statement of his/her opinion. The detained person can also lodge an application for review of the legality of his/her detention to a court of appeal (or a judicial authority) under Article 31 IV of the Federal Constitution, Article 233 Swiss Criminal Procedure Code and/or Article 80 V Foreign Nationals Act when applicable. A request for the review of the legality of detention can be lodged independently of an appeal against the decision on the merits. The request must be decided immediately (in general within 5 days) by a higher jurisdiction (Article 80 V Foreign Nationals Act, Article 228 V and 233 Swiss Criminal Procedure Code). With the exception of indefinite incarceration (*"Lebenslange Verwahrung"*), there is no automatic review of legality of a detention.

41. Similarly, the right to separately appeal the court's decisions on the matters of restrictive measures are expressly provided in the criminal procedure laws of France,[25] Greece,[26] Norway,[27] Poland,[28] Republic of Moldova,[29] and the Russian Federation.[30]

[23] Article 83(1) of the Slovak Criminal Procedure Code.
[24] Constitution of Slovakia, Article 127.

42. As all countries examined are bound by Article 5§4 of the Convention, they all show some system of review of detention, be it an automatic periodic review of detention or the possibility to apply for release. The reviewing decision may be taken by the same judge (pre-trial judge/court) or by another judge (different judge of same instance or different composition). In all the examined countries an appeal is possible, but in some countries (Latvia but also Ukraine) the appeal is not "separate", in that it cannot be lodged immediately but only together with the decision on the merits.

VIII. Analysis

43. Fundamental rights of suspected or accused persons in criminal procedures are guaranteed by Article 5 ECHR (right to personal liberty and security), which is the *lex specialis* in respect of detention in relation to Article 6 ECHR (right to a fair trial) and Article 13 ECHR (right to an effective remedy). These rights were evaluated and concretised by the case-law of the European Court of Human Rights and recommendations of the Committee of Minister of the Council of Europe as standards that consist of several principles: neither in the pre-trial nor the trial phase, preliminary detention may be compulsory or regular (principle of exceptionality of detention), decisions on preliminary detention may be taken only by a court (principle of *habeas corpus*), the person affected by preliminary detention should be provided with sufficient information and possibilities for defence (principle of fair trial), the right to appeal (or other remedy with the same effect) the length of preliminary detention must be supervised, not only upon request by the defendant but also *ex officio* (principle of regular review); if the preliminary detention was not followed by conviction or conviction was later changed to acquittal by a higher court, compensation should be granted to the affected person (principle of compensation).

44. The European Convention on Human Rights requires judicial review of the lawfulness of pre-trial detention. This does not *per se* mean that the periodic judicial review in respect of persons held in pre-trial detention should be conducted by a judge different from the one who ordered detention. In the *Kučera v. Slovakia* judgment the European Court of Human Rights held that:

> "Article 5 § 4 does not compel the Contracting States to set up a second level of jurisdiction for the examination of the lawfulness of detention and for hearing applications for release"[31]

45. Domestic law can also guarantee such judicial review at the first instance level, for example by obliging the first instance court to conduct an *(ex officio)* review of the lawfulness of the deprivation of liberty at reasonable intervals.

46. According to European standards it is thus imperative that national law provide for a judicial decision imposing detention under Article 5§3 and there must be the possibility to take proceedings to seek judicial review of the legality of detention (not of the first decision) under Article 5§4. The ECHR does not require an appeal against these decisions.

---

[25] French Criminal Procedure Code Article 185 ff.
[26] Greek Criminal Procedure Code, Article 285, see Georgios Pyromallis, Pre-trial detention rules in Europe, with emphasis on EAW, http://www.ecba.org/extdocserv/conferences/madrid2009/Pyromallis_pretrialdetention.pdf.
[27] Norwegian Criminal Procedure Code, Article 378(2).
[28] Polish Criminal Procedure Code, Article 252, paragraphs (1) and (3).
[29] Moldova Criminal Procedure Code, Article 196(2).
[30] Russian Criminal Procedure Code, Article 389.2.
[31] ECtHR, *Kučera v. Slovakia,* no. 48666/99, § 107, 17 July 2007.

47. Having said that, the ECHR provides minimum standards only. Obviously, a domestic (constitutional) legislator is allowed to provide for the possibility to appeal against interim measures such as a pre-trial detention ordered by a first instance court and to entrust this task to an appellate body (see examples above). The question is whether such an appeal should be decided immediately or if it can be withheld, for reasons of procedural efficiency, until the judgment on the merits is issued.

48. In the Venice Commission's opinion, a separate appeal to be decided immediately is preferable, for the following reasons:

- Unlike decisions on subsequent applications for release, an appeal - decided by a different judge who was not involved in that decision and therefore does not have bias in favour of detention - allows to correct mistakes that may have been made when the decision to detain the suspect was made or prolonged. This may avoid unlawful detentions.
- In matters as important as deprivation of liberty, an additional timely control is preferable to an *ex-post* one which could come at a time when release is no more possible and thus only result in compensation.

The prevailing practice of the European States examined supports this conclusion.

49. The argument that such appeals would lead to delays and thus to procedural inefficiency can be answered by introducing strict time-limits for such appeals.

50. Even if Article 5§4 of the Convention as such does not require that the Ukrainian law set forth procedures for a separate appeal against first-instance court's ruling on detention, the introduction of such provisions would be an important positive step to guarantee personal liberty.

IX. Conclusion

51. The President of the Constitutional Court of Ukraine requested the Venice Commission to provide an *amicus curiae* brief on whether "the lack of legal procedure in the Ukrainian's domestic law for an individual to challenge in appeal the court ruling as concerns the selection or extension of the preventive measure, before the case is actually resolved on the merits, comply with the European standards in the field of human rights and the rule of law"

52. This *amicus curiae* brief has shown that on its own Article 5§4 of the European Convention on Human Rights does not require an appeal to be established. An (automatic) review of the detention is sufficient under this provision.

53. Recommendation Rec(2006)13 of the Committee of Minister however goes further than Article 5§4 and explicitly provides for "a right of appeal" against detention.

54. In any case, the introduction of an appeal would be an important step to guarantee personal liberty. The fact that a decision on appeal is made by another judge than the one who ordered the detention – and who may be biased towards his or her first decision – allows correcting mistakes made in that decision. A separate appeal – with strict time-limits – is preferable to an *ex-post* one which could come too late for release and might result in compensation only. The practices established in a number of other European countries support this idea.

55. It remains for the Constitutional Court of Ukraine to decide whether these arguments result in a finding of unconstitutionality of the challenged provisions of the Criminal Procedure Code.

56. The Venice Commission remains at the disposal of the Constitutional Court of Ukraine for further assistance in this matter.