



OPEN DIALOG

REPORT



***Ukraine: new “anti-terrorism” laws may bring about gross violations of the fundamental human rights***

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## 1. Introduction

**On August 12-14, 2014, the Parliament of Ukraine passed three acts on criminal procedure and human rights which constitute a gross and large-scale violation of generally recognised international human rights standards (in particular, the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950)) and which also contravene the Constitution of Ukraine.**

These laws are:

The Ukrainian Act “On introducing amendments to the Criminal Procedure Code of Ukraine regarding the special mode of pre-trial investigation during martial law, in a state of emergency or in the area of the anti-terrorist operation”;

The Ukrainian Act “On introducing amendments to the Ukrainian Law ‘On the Fight against Terrorism’ regarding preventive detention of persons involved in terrorist activity for a period of more than 72 hours in the area of the anti-terrorist operation”;

The Ukrainian Act “On introducing additions to the Ukrainian Law ‘On the Police’ regarding the conditions for the use of force, impact munitions and firearms in the area of the anti-terrorist operation” .

All the above-mentioned Acts have been signed into law by the President and have taken effect.

As the names of the Acts (as well as the explanations of their initiators) suggest, they are all intended for application during an anti-terrorist operation and in the area of such operation. However, under the existing laws and regulations of Ukraine, there is a wide range of cases that qualify as “anti-terrorist operations”, while the area of such operation is defined exclusively by the Ukrainian Security Service Command at their own discretion.

The regulations of the above-mentioned Acts can therefore be applied in every part of the territory of Ukraine. Moreover, the regulations of the above-mentioned Acts are of a permanent nature and not temporary.

## **2. New “anti-terrorism” laws may cause gross violations of the fundamental human rights in Ukraine**

### **2.1. Violation of the right to liberty and security of person**

Pursuant to the Act *“On introducing amendments to the Criminal Procedure Code of Ukraine regarding the special mode of pre-trial investigation during martial law, in a state of emergency or in the area of the anti-terrorist operation”*, the Criminal Procedure Code of Ukraine has been complemented with a new section stating that under martial law, or in a state of emergency, or with regard to an anti-terrorist operation, some important powers of judges related to the limitation of human rights are to be delegated to the prosecution authorities.

For instance, the Act authorises the prosecutor (during the investigation of a number of crimes in the area of the anti-terrorist operation) to handle the following issues independently, without a court decision:

1. allowing temporary access to belongings and documents;
2. conducting searches of dwellings or other property;
3. conducting covert investigative activities;
4. Detaining a suspect in custody for a period of up to 30 days as a preventive measure.

The above listed regulations of the directly contravene the Constitution of Ukraine; Article 29 of the Constitution states that no suspect can be arrested or kept in custody except upon the reasoned judgement of a court. Articles 30 and 31 of the Constitution state that conducting a search of a dwelling, violation of secrecy of correspondence and of telephone conversations are allowed solely upon the reasoned judgement of a court. Aside from that, Article 124 of the Constitution reads that delegation of the functions of a court or the appropriation of these functions by other bodies or officials is forbidden.

The impossibility of a prosecutor performing a judge’s function is clearly stated in Paragraph 17 of the Recommendation Rec (2000) 19 of the Committee of Ministers of the Council of Europe to member states on the role of public prosecution in the criminal justice system, which reads that a person cannot simultaneously perform the duties of a public prosecutor and a judge.

The above mentioned Act, as well as the Ukrainian Act *“On introducing amendments to the Ukrainian Law ‘On the Fight against Terrorism’ regarding preventive detention of persons involved in terrorist activity for a period of more than 72 hours in the area of the anti-terrorist operation”* (which provides – by way of exception – for the extension of terms of “preventive” detention of persons suspected of involvement in terrorist activity, from 72 hours to 30 days without a court ruling) grossly violates the right to liberty and security of person guaranteed by Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950).

Paragraph 3 of Article 5 of the Convention states that every person arrested or detained shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to a trial within a reasonable timeframe or be released pending trial.

According to the practice of the European Court of Human Rights, neither investigators nor prosecutors qualify as “officers authorised by law to exercise judicial power” as per Paragraph 3 of Article 5 of the Convention.

The European Court of Human Rights claimed that Paragraph 3 of Article 5 of the Convention guarantees that persons detained or taken into custody on suspicion of committing a crime be

protected from arbitrary or unjustified deprivation of liberty. This regulation of the Convention is aimed at providing immediate and automatic court control over the detention of a person by the police (paragraph 48 of the “Mironenko and Martenko versus Ukraine” case decision of December 10, 2009). The European Court also believes that there can be no exceptions to the rule about immediate delivery of the detained person to court (Paragraph 46 of the “Korniyev and Karpenko versus Ukraine” case decision of October 21, 2010)

Regulations of the two above mentioned Acts grant law enforcement officers the right to hold a person for a period of 30 days without a court order; this contravenes Article 29 of the Constitution of Ukraine which states that reasonableness of a person’s detention is to be checked by a court within 72 hours. This regulation of the Constitution of Ukraine remains in force even during martial law or in a state of emergency (Article 64 of the Constitution). The same rule is enshrined in Article 211 of the Criminal Procedure Code of Ukraine.

Aside from that, the above mentioned regulations of the Acts also contravene Paragraph 3 of Article 5 of the Convention in that every arrested or detained person shall be brought **promptly** before a judge. The precedent of the European Court of Human Rights (Paragraphs 90 and 91 of the “Zakharkin versus Ukraine” case decision of June 24, 2010) states that detaining a person without a court ruling, even for six days, is a violation of the “promptness” requirement provided for by Paragraph 3 of Article 5 of the Convention.

At the same time, pursuant to the two aforementioned Acts, law enforcement bodies are granted the right to detain a person for 30 days without good reason and at their own discretion, having sought no court ruling.

It is worth noting that upon the enactment of these Acts, Ukraine actually derogated from its obligation to adhere to the regulations of Paragraph 3 of Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950). Pursuant to Paragraphs 1 and 3 of Article 15 of the Convention, in times of war or other public emergencies which threaten the lives of citizens, any High Contracting Party may take measures derogating from its obligations under this Convention. Ukraine, however, should have kept the Secretary General of the Council of Europe fully informed as to the measures it employed, the reasons for employing the said measures and the time when it ceased taking the measures.

As far as is known, Ukraine did not provide this information to the Secretary General of the Council of Europe; moreover, the human rights limitations introduced by the above-mentioned Acts are of a permanent nature and not temporary.

## **2.2. The extension of the rights of the police may prompt an increase of violence among law enforcement officers**

The Ukrainian Act “On introducing additions to the Ukrainian Law ‘On the Police’ regarding the conditions for the use of force, impact munitions and firearms in the area of the anti-terrorist operation” provides for amendments to the Ukrainian Law “On the Police” which grants police officers the right to use weapons in the area of the anti-terrorist operation without warning and without an imminent threat to the lives and health of civilians or police officers.

This regulation contravenes Paragraphs 9 and 10 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (adopted by the Eight United Nations Congress, August 27 to September 7, 1990) which state that firearms can only be used by law enforcement officials after issuing a warning and only in self-defence or in defence of others against the imminent threat of death or serious injury. It is also important that, under Paragraph 8 of

the Basic Principles, exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles.

The present Act may therefore become grounds for unrestrained armed violence among police officers and constitute a threat of mass loss of life and damage to health of citizens of Ukraine who are within the area of the anti-terrorist operation but are not involved in terrorist activity.

Under existing Ukrainian legislation, participants of the anti-terrorist operation can take part in the detention of suspects and neutralise them should their actions cause an immediate danger to the lives and health of hostages, participants of the anti-terrorist operation or other persons. We believe that these existing regulations are sufficient and that no extension of the scope of firearms use is required.

The new Act, however, proposes the abandonment of all restrictions on the use of firearms by police officers which is totally inadmissible and violates numerous international laws related to the protection of the basic human right – the right to life.

### 3. Conclusions and recommendations

The military and terrorist threat that Ukraine is currently facing has prompted the hasty introduction of certain amendments to Ukrainian legislation which were aimed at optimising the execution of the anti-terrorist operation in Donetsk and Lugansk regions. However, human rights activists and lawyers claim that some of the recent amendments to the Ukrainian criminal procedure and human rights protection laws grossly violate the generally accepted international human rights standards, as well as the regulations of the Constitution of Ukraine.

We emphasise that the complicated internal political situation and the safety situation do not waive Ukraine's obligations to observe basic human rights.

To prevent abuse of the new 'anti-terrorist' legislation and violation of basic human rights, we consider it necessary to:

1. Adopt a law invalidating the Ukrainian Acts "On introducing amendments to the Criminal Procedure Code of Ukraine regarding the special mode of pre-trial investigation during martial law, in a state of emergency or in the area of the anti-terrorist operation", "On introducing amendments to the Ukrainian Law 'On the Fight against Terrorism' regarding preventive detention of persons involved in terrorist activity for a period of more than 72 hours in the area of the anti-terrorist operation", "On introducing additions to the Ukrainian Law 'On the Police' regarding the conditions for the use of force, impact munitions and firearms in the area of the anti-terrorist operation".
2. (If necessary.) Draft a bill which would, in accordance with the Constitution of Ukraine, the Convention for the Protection of Human Rights and Fundamental Freedoms as well as with other international enactments related to human rights, address the issue of performing certain procedural actions during criminal proceedings in the ATO area.

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