

# HUMAN RIGHTS BEHIND CLOSED DOORS

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«Procedural Safeguards  
for Apprehended  
Persons»  
STUDY REPORT

Kyiv  
2015

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**The study conduct and preparation of this publication took place with the support** from the Human Rights and Justice Program Initiative



**The concept of the study and overall coordination of the international team of researchers was performed** by the Open Society Justice Initiative and the Legal Aid Reformers' Network

**The following institutions contributed to the study conduct and provided organizational support:**



Ukrainian Parliament Commissioner for Human Rights



Coordination Centre for Legal Aid Provision



The Faculty of Legal Studies and the Centre for Research on Challenges of the Rule of Law and Its Implementation in Ukraine of the National University of “Kyiv-Mohyla Academy”

**The study was made possible through the support** of the Ministry of Internal Affairs of Ukraine

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## REPORT GLOSSARY

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### Definition of terms:

<b>APPREHENDED PERSON, SUSPECTED PERSON (short – SUSPECT)</b>	any physical person who has to stay next to the competent official or in premises prescribed by the competent official due to use of force or through obedience to the order.
<b>COUNSEL (DEFENDER, ATTORNEY)</b>	a person with a right to exercise defense of an apprehended (suspected) person according to Ukrainian legislation.
<b>LAW ENFORCEMENT OFFICIAL (OFFICER)</b>	an official of a body of internal affairs vested with powers to conduct procedural actions in relation to an apprehended (suspected) person according to Ukrainian legislation.
<b>RESEARCHER</b>	a person who conducted desk and/or field research in certain stream (chapter) of this research project.
<b>RIGHTS OF AN APPREHENDED (SUSPECTED) PERSON (short – PERSON’S RIGHTS)</b>	rights of a person guaranteed by the Constitution of Ukraine, legislation of Ukraine, as well as international legal instruments ratified by Ukraine, and case law of the European Court of Human Rights.
<b>RESPONDENT</b>	an apprehended (suspected) person, an attorney, a law enforcement officer interviewed in the framework of this research project.

### List of abbreviations:

<b>Constitution</b>	Constitution of Ukraine
<b>SCU</b>	Supreme Court of Ukraine
<b>FLA</b>	Free Legal Aid
<b>WHO</b>	World Health Organization
<b>OPGU</b>	The Office of the Prosecutor General of Ukraine
<b>SMS</b>	The State Migration Service of Ukraine
<b>ECHR</b>	The European Court of Human Rights
<b>THF</b>	temporary holding facility
<b>CAP</b>	Code of Administrative Proceedings of Ukraine
<b>CC</b>	Criminal Code of Ukraine
<b>Convention</b>	Convention for the Protection of Human Rights and Fundamental Freedoms
<b>Convention against Torture</b>	UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

<b>CPC</b>	Criminal Procedure Code of Ukraine
<b>Administrative Code</b>	Code of Administrative Offences of Ukraine
<b>MIA</b>	The Ministry of Internal Affairs of Ukraine
<b>MOH</b>	The Ministry of Health of Ukraine
<b>IAB</b>	internal affairs body
<b>The Beijing Rules</b>	United Nations Standard Minimum Rules for the Administration of Juvenile Justice
<b>Plenum</b>	Plenum of the Supreme Court of Ukraine
<b>SSU</b>	The Security Service of Ukraine
<b>FLA quality standards</b>	Standards on the quality of free secondary legal aid in criminal proceedings
<b>FSLA Centre</b>	Centre for Provision of Free Secondary Legal Aid

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## Report summary: key conclusions and recommendations

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The study titled “Procedural rights of suspects (apprehended persons) in detention by law enforcement agencies of Ukraine” took place during 2014-2015.

The study was conducted by the research team of the Human Rights and Justice Program Initiative of the International Renaissance Foundation in cooperation with the Ukrainian Parliament Commissioner for Human Rights, the Coordination Centre for Legal Aid Provision, the Centre for Research on Challenges of the Rule of Law and Its Implementation in Ukraine of the National University of “Kyiv-Mohyla Academy” with the support of the Ministry of Internal Affairs.

The study concept and methodology was designed by the Open Society Justice Initiative in cooperation with the University of Maastricht and adapted by the research team.

The project goal was to analyze the actual level of observance of procedural safeguards for persons apprehended (detained) by law enforcement agencies and to see what happens to the apprehended person after the moment apprehension when the risks of violations of their rights and freedoms are highest.

The study focused on the basic guarantees provided to every apprehended person, namely:

- ▶ **Right to information**, including information on rights and guarantees, the right to obtain clarification on grounds for apprehension and further remand in custody, to obtain the notice of suspicion of committing a criminal offence, access to criminal proceedings (case) files;
- ▶ **Right to legal assistance by a defense counsel (attorney)**, including prompt exercise of this right and the adequate quality of legal aid;
- ▶ **Right not to answer questions** of the investigator and law enforcement officers;
- ▶ **Right to adequate medical assistance** in case of necessity;
- ▶ **Right to special protection of vulnerable groups of suspects** — underage persons, persons with mental disabilities, representatives of ethnic minorities, and foreigners who do not understand the state language (language of judicial procedure);
- ▶ **Right to translation (oral and written)** in case the suspect is in need of such assistance.

The study allowed for identifying best practices and challenges in routine work of law enforcement officers and attorneys, as well as factors that influence their activities related to observance of human rights, both those regulated by legal norms and depending on professional ethics of law enforcement officers and attorneys.

The study was comprised of two main stages:

- a) Desk review;
- b) Field research.

**Desk review** was conducted with the purpose of analysis of domestic legislation in the field of guarantees for procedural rights of apprehended persons in Ukraine with the view to its compliance with international standards, as well as identification of gaps and shortcomings in the legal framework. Along with the analysis of legal framework, the desk review included generalization of available empirical data on the subject of this study, including the following: results of previous empirical studies on the topic, official reports and statistical information from reports by the Ukrainian Parliament Commissioner for Human Rights, the Coordination Centre for Legal Aid Provision etc.

**Field research** was dedicated to direct multi-hour observations (at any time of the day) of the daily work of investigators, law enforcement officers and attorneys in criminal proceedings.

The field research included keeping daily records, conducting interviews with investigators, law enforcement officers, attorneys and apprehended persons, as well as filling out specifically designed forms for observations of their activities.

Field research took place in five regions of Ukraine (Zakarpattia, Dnipropetrovsk, Odesa, Khmelnytsky regions, and city of Kyiv) with one local (district) unit of the bodies of internal affairs selected per each region. As an exception, in Odesa region observation took place in two districts. Therefore, observations were conducted almost simultaneously in 6 district departments/directorates, namely:

- ▶ *Berehovo district department of the Directorate of Internal Affairs in Zakarpattia region.* The researcher spent 28 days at the department during August 7 — September 3 and September 3-16, 2014 with a total of 154 hours of observation.
- ▶ *Darnytsya district department of the Main Directorate of Internal Affairs in Kyiv.* The researcher spent 29 days (without days off) at the department during July 24 — August 21, 2014 with a total of 140 working hours of observation.
- ▶ *Kyiv district department of the Odesa City Directorate of the Main Directorate of Internal Affairs in Odesa region.* The researcher spent 28 days at Kyiv district department (excluding August 20) from August 6 — September 3, 2014. She dedicated 138 hours to observation.
- ▶ *Komintern district department of the Main Directorate of Internal Affairs in Odesa region.* Field research took place during August 7 — September 3, 2014. The researcher spent 28 days at Komintern department (without days off) with a total of 153 hours of observation.
- ▶ *Novomoskovsk city department of the Main Directorate of Internal Affairs in Dnipropetrovsk region.* The researcher spent 28 days at Novomoskovsk city department during August 1-28, 2014 with 112 hours dedicated to direct monitoring.
- ▶ *Khmelnytsky city department of the Directorate of Internal Affairs in Khmelnytsky region.* The research took place from July 30 — August 26, 2014 and additionally on September 14, 2014 with a total of 130 working hours.

There were 34 formalized questionnaires on attorneys' work, 71 formalized questionnaires on the work of investigators and law enforcement completed during field research stage. In addition, notes have been prepared based on results of daily observations during their stay at the bodies of internal affairs.

Researchers conducted interviews with law enforcement officials, attorneys and apprehended persons. Interviews took place after all or most observations were completed, and were aimed at clarifying and receiving detail in relation to observations. Therefore, interviews were less formal than observations. Most interviews took place in the form of a personal conversation with the interviewee, while a small number of interviews (mostly with attorneys) were held over the phone. The research included 31 interviews with law enforcement officers, 32 interviews with attorneys, and 32 interviews with apprehended persons.

**The study provided for the following key findings:**

- ▶ There is no practice of proper recording of the actual moment of apprehension in the law enforcement activities;
- ▶ A significant number of apprehensions takes places without a court order and proper grounds.

In particular, the study identified a number of cases when law enforcement officials apprehended a person on suspicion of crime referring to Article 208 of the CPC that provides for apprehension of a person at the time of commission or immediately after the offence. However, the apprehension took place after a long period (several days or even months);

- ▶ There is no proper information (clarification) on the rights of the apprehended person at the moment of apprehension.

For instance, only in 1% of observed cases information was provided directly at the place of apprehension, in 8% of cases — shortly after apprehension. In almost one third of cases (27%) this information was provided to the apprehended person already during the process of drawing up the report on apprehension or during interrogation (15%), or during notification of suspicion (6%), i.e. long after the physical apprehension. However, even when a person was informed on his/her rights. However, even when the apprehended person was informed about his/her rights, only in 35% of monitored cases the information was proper. In most cases, the process of informing was very formal, and the person did not receive information about the complete list of rights prescribed by law, or there was not adequate clarification;

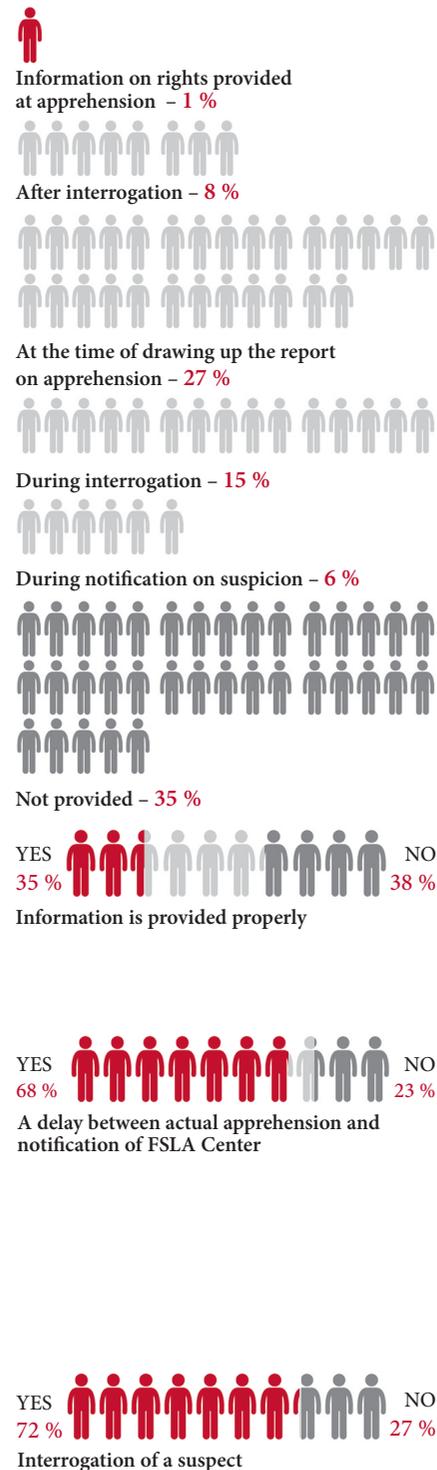
- ▶ There are widespread instances of untimely informing of the centers for free secondary legal aid on apprehension.

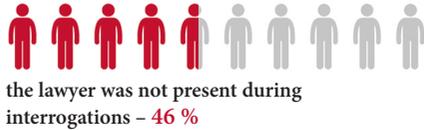
For instance, in 68% of examined cases there was a significant (several hours) delay between the actual apprehension and notification of FSLA; Center;

- ▶ Temporal limitations related to length of investigative actions are often violated;

- ▶ There is a widespread practice of “communicating” with the apprehended person without formalization of such communication as an interrogation.

The study showed that in 27% of cases the apprehended person was not interrogated officially immediately upon apprehension, which constitutes a violation of current legislation. At the same time, law enforcement officials often use “operational questioning” of the apprehended person without any documentation (reporting) of such action and, accordingly, without explanation of the procedural status and relevant rights;





- ▶ There is a widespread practice of first interrogation without prior meeting with an attorney.

The monitoring of the work of law enforcement officers shows that attorneys were present at the first interrogation of the apprehended person in 30% of cases, whereas interrogation in attorneys' absence took place in 46% of cases;

- ▶ In practice, clarification of the right to silence is purely formal and often law enforcement officers encourage the apprehended person to waive the right.

Typical cases recorded during research included situations when the rights is explained in a way that increases chances of the suspect neglecting it. For instance, the suspect may not “notice this right (formal signature in the report), or the suspect may think that this right applies only to certain stages of proceedings (only applicable in court), or the suspect may consider exercising this right “unbeneficial” (exaggeration of the impact of cooperation with authorities, threats of negative attitude from an investigator);

- ▶ It is worth to note a virtual lack of understanding of the right to silence and respect thereof by law enforcement officers;
- ▶ There is failure to ensure proper conditions for confidential meeting of an attorney with the apprehended person; often such meetings take place in a hallways or investigator's office;
- ▶ There are no specially equipped premises for interrogation; interrogations are often held in investigators' offices;
- ▶ During interrogation, third persons are often present, as a rule, to influence the apprehended person without indicating such presence in the interrogation protocol;
- ▶ There is a widespread practice of interrogation of an actual suspect as a witness;
- ▶ There are no specific mechanisms for ensuring additional guarantees for apprehended persons from vulnerable groups;
- ▶ There is no mechanism for involving an interpreter for an apprehended person who does not speak the state language. Provision of translation is organized at the discretion and expense of police officials;
- ▶ There were recorded instances of the attorneys' negligence: failure to arrive upon a call, failure to conduct/conducting a very short confidential meeting with the client, formal participation of an attorney during interrogation.

**Main conclusions of the study are the following:**

- ▶ Reform of the criminal justice legislation had positive consequences, including increased role of the court in assessment of evidence leading to increased objectivity of the criminal process, introduction of the institute of early access to an attorney from the moment of actual apprehension contributing to observance of the right to defense;

increased judiciary oversight through investigating judges during pre-trial investigation that often prevents grave violations of rights and freedoms by police;

- ▶ Notwithstanding significant positive changes in legislation, they did not/not always lead to changes in practice of law enforcement bodies. Often, their activities at the apprehension stage are based on traditions of the past;
- ▶ All procedural safeguards examined during this research are enshrined in the legislation; however, the only comprehensive implementation mechanism exists only in relation to legal aid during apprehension. There is a need for development and adoption of implementation mechanisms for the rights to translation, medical assistance, and specific guarantees for vulnerable groups;
- ▶ There is no unified mechanism and procedure for official recording of all events following the person's apprehension and detention of a suspect;
- ▶ There is a lack of unified practice of law enforcement in different regions of Ukraine stemming from low institutional capacity of criminal justice authorities for developing and implementing new approaches. There is a need for directing and harmonizing practices of these institutions;
- ▶ There is no practice of holding law enforcement officials responsible for violating the rights of apprehended persons. Impunity of law enforcement officials leads to further violations of rights during apprehension;
- ▶ Low level of public awareness on the rights during apprehension by law enforcement officials;
- ▶ There are no effective mechanisms or procedures for professional responsibility of investigators, attorneys, and prosecutors for professional negligence.
- ▶ Judiciary is not always active in exercising judicial oversight of procedural safeguards from the moment of apprehension.

#### **Key recommendations of the study:**

##### **To Verkhovna Rada (Parliament) of Ukraine:**

- ▶ Amend Article 87§2 of the Criminal Procedure Code of Ukraine by including failure to provide adequate information on the rights of apprehended persons at the moment of apprehension into the list of significant violations of human rights and fundamental freedoms;
- ▶ Develop an exhaustive list of information classified as investigatory privilege, as well as grounds on which an investigator or prosecutor can deny an attorney access to certain case files;
- ▶ Introduce amendments to Article 52§2 of the CPC to provide for mandatory presence of a defense counsel and a drug addiction specialist in criminal proceedings in relation to persons with a drug addiction;
- ▶ Amend Article 67§1 of the Criminal Code whereby a physiological condition of a person with drug abuse problems cannot be an aggravating circumstance in determination of punishments.

##### **To the Cabinet of Ministers of Ukraine:**

- ▶ Develop and adopt for all pre-trial investigation agencies a single Procedure for recording all actions involving apprehended persons. Ensure that a single competent official responsible for persons in custody conducts the recording;
- ▶ Develop a mechanism for involvement of translators and compensation of their services;
- ▶ Establish an Integrated regional registry of certified translators with mechanisms for effective access for judges, prosecutors, law enforcement officers, attorneys, and citizens;
- ▶ Introduce responsibility for translators for disclosure of the contents of confidential client-attorney communication facilitated by translators.

**To the Ministry of Internal Affairs of Ukraine:**

- ▶ Design uniform electronic registry system for recording all actions involving apprehended persons and develop uniform approach to collecting data on apprehended persons between the Ministry of Internal Affairs and the system of free legal aid (the Coordination Centre for Legal Aid Provision) and ensure systematic regular checks in accordance with this approach;
- ▶ Develop forms for oral and written notification of apprehended persons on their rights, including specialized forms for vulnerable categories with the view of their particular needs (for instance, juveniles);
- ▶ Introduce the practice of video recording of all actions involving the apprehended person, including the process of informing on their rights.
- ▶ Introduce provisions for obligatory participation of a psychologist and drug-addiction specialist during criminal proceedings against person with drug addictions;
- ▶ Ensure that information on all persons present during interrogation is included into the report on interrogation;
- ▶ Ensure compliance with Article 210 of the CPC in relation to notification on apprehensions;
- ▶ Equip premises for interrogation of apprehended persons;
- ▶ Provide conditions for confidential meeting of attorneys with apprehended persons.

**To the Ministry of Justice of Ukraine:**

- ▶ Develop a single approach to recording data on apprehended persons between the Ministry of Internal Affairs and the system of free secondary legal aid (the Coordination Centre for Legal Aid Provision) and ensure systematic regular checks in accordance with this approach;
- ▶ Ensure cooperation with the Ministry of Internal Affairs of Ukraine on creating conditions for confidential meetings of attorneys with apprehended persons.

**To the National Bar Association of Ukraine:**

- ▶ Extend the standards for legal aid in criminal proceedings to all attorneys on the Unified registry of attorneys.

**To the Council of Judges of Ukraine, the Supreme Court of Ukraine, the High Specialized Court of Ukraine on Civil and Criminal Cases:**

- ▶ Increase judiciary oversight of procedural safeguards for apprehended persons (including through generalization of case law and specialized training of judges).

**Nongovernmental organizations:**

- ▶ Conduct active information campaigns on the rights and guarantees during apprehension.

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## INTRODUCTION

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Criminal justice in Ukraine and its core component, the system of administration of criminal justice, are in the process of fundamental reform.

During two decades of statehood (1991-2011), criminal justice in Ukraine has been functioning based on concepts of the legal system of the USSR, a totalitarian state with dominating accusatorial tendencies. During these years, periodic and sporadic legal changes in regulation of pre-trial investigation of criminal offences, functioning of investigation and law enforcement bodies, and the judiciary, failed to achieve desired outcomes as the entire system remained soviet.

In 2012, the Parliament of Ukraine adopted the new Criminal Procedure Code that marked the establishment of a new European approach to reform and development of criminal justice in our country.

Contemporary fundamental principles of criminal justice in Ukraine provide for abandonment of accusatorial incline in criminal process by state authorities and its development based on the rule of law, the adversarial principle, and primacy of human rights and fundamental freedoms of individuals and citizens.

The underlying principles of the Criminal Procedure Code are those enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms. The Code requires that participants of criminal proceedings and court trials strictly comply not only with the Constitutional principles, namely the rule of law, presumption of innocence, and the protection of honor and dignity, rights and freedoms of individuals, but also take into consideration case law of the European Court of Human Rights.

The new characteristic features of contemporary criminal proceedings at pre-trial investigation stage include: abolition of compulsory procedural decision on “initiating a criminal case (launch of pre-trial investigation)”, improvement in relation to types, forms and grounds for apprehension and arrest of a person suspected of committing a crime; unconditional guarantee for the right not to incriminate oneself (“right to silence”); evaluation of information obtained during pre-trial investigation as evidence only during trial; oversight and procedural guidance by a prosecutor in pre-trial investigation; adversarial procedure for prosecution and defense; and judicial control over observance of human rights and freedoms at the stage of pre-trial criminal proceedings.

Yet, current practice of pre-trial investigation of criminal offences in Ukraine and judgements of the European Court of Human Rights in cases against Ukraine irrefutably prove that outdated approaches and gross violations of constitutional and procedural rights, as well as human rights and freedoms, continue to exist in the national system of criminal justice.

These approaches and violations include the following: refusal of the prosecution authorities, the MIA, the SSU and other law enforcement agencies to register applications and reports on criminal offences; inadequate registration of apprehension and remand in custody at detention facilities; failure to ensure timely involvement of defense counsels (attorneys) in criminal proceedings; delayed and inadequate advice and observance of procedural rights to apprehended persons; failure to provide prompt and adequate medical assistance to detainees from vulnerable groups; and insufficient qualifications (professional ethics and responsibility) of many investigators, law enforcement officials, attorneys, and judges in the context of new criminal proceedings.

The research presented in this Report focused on the first two hours following apprehension, i.e. the period when the risk of violation of rights and freedoms is the highest. As a rule, this period determines the course of entire criminal prosecution process. There is no consistent practice of observance of the rights of suspects in Ukraine. Therefore, initiators of the study deemed it crucial to understand the actual state of observance of the rights of persons apprehended by law enforcement agencies on suspicion of committing a criminal offence.

The **research purpose** was to monitor, analyze and generalize the practice of ensuring procedural safeguards for apprehended persons, to compare the actual level of observance of their rights with the relevant national legislation and international standards, and develop concrete recommendations.

The research allowed identifying best practices and challenges in routine work of law enforcement officials and attorneys, as well as factors that have impact on their actions in relation to observance of human rights, including both the legal framework and professional ethics.

The study allowed for identifying best practices and challenges in routine work of law enforcement officers and attorneys, as well as factors that influence their activities related to observance of human rights, both those regulated by legal norms and depending on professional ethics of law enforcement officers and attorneys.

The study explored compliance with the following **rights**:

- i) Right to information: right to information on procedural rights, right to be informed about the grounds for apprehension and detention, right to information about charges, and right to access to case files;
- ii) Right an attorney (including prompt exercise of this right, quality of legal aid, role of the attorney, provision of legal assistance);
- iii) Right to silence;
- iv) Right to medical assistance;
- v) Special protection for vulnerable groups of suspects - juveniles, persons with mental disabilities, representatives of ethnic minorities, and foreigners who do not speak the state language;
- vi) Right to oral and written translation.

Study results provided basis for key conclusions on compliance with the procedural safeguards for the apprehended persons examined during research. It also led to development of recommendations for solving issues in the practice of the participants of criminal proceedings with the aim of compliance with rights and freedoms of the prosecuted person, shaping of new approaches in education and professional development of investigators, law enforcement officers, and attorneys.

Methodology of this study was developed based on the experience of the two-year project titled “Inside Police Custody: An Empirical Account of Suspects’ Rights in Four Jurisdictions” carried out by the University of Maastricht. The study was conducted in England and Wales, France, Scotland and the Netherlands. It provided significant empirical data about work of lawyers and police officers during initial periods of police custody. Results of the project were published by Intersentia in 2013<sup>1</sup>.

Administration and participants of this project express their gratitude for support and organizational assistance to the Ministry of Internal Affairs of Ukraine, the Coordination Centre for Legal Aid Provision, the Ukrainian Parliament Commissioner for Human Rights, and the Centre for Research on Challenges of the Rule of Law and Its Implementation in Ukraine of the National University of “Kyiv-Mohyla Academy”.

Project participants express particular gratitude to the regional centers for free secondary legal aid in Dnipropetrovsk, Zakarpattya, Odesa and Khmelnytsky regions, and the city of Kyiv.

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<sup>1</sup> <http://www.intersentia.com/SearchDetail.aspx?bookId=102589&title=Inside%20Police%20Custody:%20An%20Empirical%20Account%20of%20Suspects>.

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Analysis of data collected through field research was conducted with the support of **Kyiv International Institute of Sociology**.

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It is necessary to acknowledge methodological support of the international team of the **Open Society Justice Initiative and the Legal Aid Reformers’ Network** for implementation of the study in Georgia, Moldova and Ukraine

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## 1. Research methodology

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*Goals and objectives of the study, its organization and conduct (including the list of study sites and its duration), data sources, research methods, sample size etc.*

The main research goal was evaluation of the real level of observance of the suspects' procedural rights by law enforcement officials during initial hours after actual apprehension. Research findings led to identification of best practices and challenges in routine work of law enforcement officials and attorneys, as well as factors that have impact on their actions in relation to observance of human rights, including both the legal framework and professional ethics.

The study covered issues of observance of the following rights of the apprehended person:

- ▶ *Right to information*, namely the right of the person to know his/her procedural competencies (rights and duties), obtain clarification on grounds for apprehension and further remand in custody, obtain the notice of suspicion of committing a criminal offence, access to case files;
- ▶ *Right to legal assistance by a defense counsel (attorney)*, including prompt exercise of this right and the adequate quality of legal aid in accordance with the attorney's role in criminal process;
- ▶ *Right not to answer questions* of the investigator and law enforcement officers;
- ▶ *Right to adequate medical assistance* where such care is necessary;
- ▶ *Right to special protection of vulnerable groups of suspects* – underage persons, persons with mental disabilities, representatives of minorities, and foreigners who do not speak the state language

The study comprised of two core stages: *a) desk review and b) field research.*

### Desk review

Desk review was conducted with the purpose of analysis of domestic legislation on procedural rights of apprehended persons in Ukraine with the view to its compliance with the international standards, as well as identification of gaps and shortcomings in legal framework for these rights.

The structure of desk review corresponds to the structure of the *Report on the results of the study*. The research design is based on forms developed within the framework of the *EU Project for research on rights of suspects in custody*<sup>2</sup> modified by Ukrainian experts to account for specifics of the national system of criminal justice.

In addition to *analysis of the legal and regulatory framework*, the desk review included generalization of available *empirical data* on the subject of this study, including the following: results of previous empirical studies on the topic, official reports and statistical information from report by the Ukrainian Parliament Commissioner for Human Rights, media publications etc.

Findings of the *desk review* provided researchers with insights legislative framework for procedural rights of apprehended persons and allowed to prepare for the *field stage* with the aim of evaluation of the situation in the practice of law enforcement agencies.

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<sup>2</sup> "Inside Police Custody: An empirical account of suspects' rights in four jurisdictions" Project referred to in the Introduction.

## Field research

### Observation objects

The research focused on direct multi-hour daily observations at any time of the day of the work of investigators, law enforcement officers and attorneys in criminal proceedings. Observations took place in local (departments and directorates) of the bodies of internal affairs.

Field research was conducted in five regions of Ukraine (*Zakarpattya, Dnipropetrovsk, Odesa, Khmelnytsky regions, and city of Kyiv*) with one local (district) unit of the bodies of internal affairs selected per each region. As an exception, in Odesa region observation took place in two districts (urban and rural). Therefore, observations were conducted almost simultaneously in six district departments/directorates of the bodies of internal affairs, namely:

- ▶ *Berehovo district department of the MIA Directorate in Zakarpattya region.* The researcher spent 28 days at the department during August 7 – September 3 and September 3-16, 2014 with a total of 154 hours of observation.
- ▶ *Darnytsya district department of the Main Directorate of Internal Affairs in Kyiv.* The researcher spent 29 days (without days off) at the department during July 24 – August 21, 2014 with a total of 140 working hours of observation.
- ▶ *Kyiv district department of the Odesa City Directorate of the Main Directorate of Internal Affairs in Odesa region.* The researcher spent 28 days at Kyiv district department (excluding August 20) from August 6 – September 3, 2014. She dedicated 138 hours to observation.
- ▶ *Komintern district department of the Main Directorate of Internal Affairs in Odesa region.* Field research took place during August 7 – September 3, 2014. The researcher spent 28 days at Komintern department (without days off) with a total of 153 hours of observation.
- ▶ *Novomoskovsk city department of the Main Directorate of Internal Affairs in Dnipropetrovsk region.* The researcher spent 28 days at Novomoskovsk city department during August 1-28, 2014 with 112 hours dedicated to direct monitoring.
- ▶ *Khmelnytsky city department of the Directorate of Internal Affairs in Khmelnytsky region.* The research took place from July 30 – August 26, 2014 and additionally on September 14, 2014 with a total of 130 working hours.

### Organization of field research

The field research was organized in the following stages:

- ▶ *first* – selection of researchers-observers and a 3-day training where all methods and instruments of the field research were practiced in accordance with specially designed program;
- ▶ *second* – five research groups were created with two members in each one: coordinator and researcher-observer. Coordinators were selected among experts who conducted desk review in this project;
- ▶ *third* – project management held preliminary meetings with the leadership of the MIA of Ukraine, the Coordination Centre for Legal Aid Provision, Office of the Prosecutor General of Ukraine, and the Ukrainian Parliament Commissioner for Human Rights. Participants of these meetings agreed upon details of the field stage of research and received written confirmation of support for the study;
- ▶ *fourth* – research coordinators held meetings with the chiefs of local bodies of internal affairs and FSLA Centers responsible for the territory where field research would take place. During these meetings, they introduced researchers-observers to the leadership and staff of stations, investigators, and operational units, as well as explained research goals and objectives in general;
- ▶ *fifth* – operational stage of field research where researcher conducted constant daily monitoring (minimum 4 hours) of the work of investigators, law enforcement officials, attorneys related to apprehension of a person suspected of committing a criminal offence. Researcher and coordinator were in constant communication



(phone or internet) for consultations, advice or solving any potential conflict situations arising during research. The coordinator also had direct constant contact with the leadership of local bodies of internal affairs and FLA Centers, which allowed avoiding serious misunderstandings or conflict during research.

## **Methods of field research**

Two key methods of data collection were used during field research: direct observation during which researcher kept hourly records and conducted interviews with apprehended persons, attorneys, investigators, and law enforcement officials.

### *Observation*

Observation forms (questionnaires) were based on materials developed by international research experts of the aforementioned EU project. There were two observation forms (observation of the work of attorneys, and investigators and law enforcement officials). These forms include data of the suspect (age, gender, vulnerability) and other information about events taking place while the person is at a local department/directorate of internal affairs.

In addition to filling out questionnaires, observers also made notes on their observations. For instance, the included a narrative on events with certain persons and circumstances of apprehension, as well as any informal communication of the researcher with investigators, law enforcement officials, attorneys and apprehended persons on the research subject.

There were 34 completed questionnaires on attorneys' work, 71 completed questionnaires on the work of investigators and law enforcement filled out during field research stage. In addition, notes have been prepared based on results of daily observations during their stay at the bodies of internal affairs.

### *Interviews*

Researchers conducted interviews with law enforcement officials, attorneys and apprehended persons. Interviews took place after all or most observations were completed, and were aimed at clarifying and receiving detail in relation to observations. Therefore, interviews were less formal than observations. This allowed modifying their content for an individual interviewee, asking additional or clarifying questions. Most interviews took place in the form of a personal conversation with the interviewee, while a small number of interviews (mostly with attorneys) were held over the phone.

During research, there were 31 interviews with law enforcement officers, 32 interviews with attorneys, and 32 interviews with apprehended persons.

## **1.1. Data analysis**

Research methodology allowed for obtaining qualitative and quantitative data.

### *Quantitative data*

Quantitative indicators collected and analyzed in the framework of this study are reflected in formalized questionnaires on observations – 34 forms for observations of attorneys' work and 71 form of observations of law enforcement officers.

Formalized questionnaires were developed with a specialized program SPSS (Statistical Package for the Social Sciences) by experts from Kyiv International Institute of Sociology.

Given the small number of observations, there was no correlation analysis conducted. The findings were not extrapolated onto the general aggregate. For further analysis, researchers chose only information of single-value breakdown represented in text via graphics.

*Qualitative data:*

Qualitative data in the framework of this study includes information recorded in notes on observations and interview records that provide an insight on the real atmosphere of observed events, give an opportunity to hear the expert opinion, as well as understand motives for actions in certain situations.

Information underwent preliminary analysis and classification with the use of form developed by researchers.

On the basis for further analysis of responses or data collected during daily observations, generalizations were made on typical violations of the right of apprehended person at different stages of pre-trial investigation.

The report features most relevant qualitative data in the form of direct quotes<sup>3</sup> that illustrate results of quantitative analysis in detail.

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<sup>3</sup> Quotes herein accurately reflect authors' statements.

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## 2. Detention by law enforcement authorities

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### 2.1. The normative regulation, objectives and scale

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#### International standards on the rights of detained persons

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Article 5 of the Convention guarantees everyone's right to liberty and security of person. No one shall be deprived of his liberty save in identified cases and in accordance with a procedure prescribed by law. A lawful arrest or detention of a person is an apprehension effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.

The view of the European Court of Human Rights on implementation of Article 5 provisions is stated in the Court's case law emphasizing that the purpose of these safeguards is to protect the individual from arbitrary detention. In addition, a lawful deprivation of liberty should meet the following criteria identified by ECHR case law, in particular:

*«The Court emphasizes that Article 5 of the Convention guarantees the fundamental right to liberty and security, which is of primary importance in a “democratic society” within the meaning of the Convention.*

*All persons are entitled to the protection of that right, that is to say, not to be deprived, or to continue to be deprived, of their liberty, save in accordance with the conditions specified in Article 5 § 1. The list of exceptions set out in the aforementioned provision is an exhaustive one and only a narrow interpretation of those exceptions is consistent with the aim of that provision, namely, to ensure that no one is arbitrarily deprived of his or her liberty [...].*

*No detention which is arbitrary can be compatible with Article 5 § 1, the notion of “arbitrariness” in this context extending beyond a lack of conformity with national law. As a consequence, a deprivation of liberty which is lawful under domestic law can still be arbitrary and thus contrary to the Convention, in particular where there has been an element of bad faith or deception on the part of the authorities [...] or where such deprivation of liberty was not necessary in the circumstances [...]”<sup>4</sup>.*

Provisions of Article 5 § 1 of the Convention require in the first place that the detention be “lawful”, which includes the condition of compliance with “a procedure prescribed by law”. In this context, the Convention essentially refers back to national law and establishes the state's obligation to conform to the substantive and procedural rules thereof, but it requires in addition that any deprivation of liberty “should be consistent with the purpose of Article 5, namely to protect individuals from arbitrariness [...]”<sup>5</sup>.

The right to liberty and security is guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>6</sup>. According to Article 5 of the Convention, No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- ▶ the lawful detention of a person after conviction by a competent court;

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<sup>4</sup> Lutsenko v. Ukraine, Application no. 6492/11, ECHR judgment, 03 July 2012, §62.

<sup>5</sup> Osypenko v. Ukraine, Application no. 4634/04, ECHR judgment, 09 November 2010, §50.

<sup>6</sup> [https://www.google.com.ua/url?sa=t&rct=j&q=&esrc=s&source=web&cad=1&cad=rja&uact=8&ved=0CBwQFjAA&url=http%3A%2F%2Fzakon.rada.gov.ua%2Fgo%2F995\\_004&ei=HF0AVevnEaGWygOquIGABA&usg=AFQjCNGJHd0THu1dyu\\_3CGZiwTxGKu3kYg&sig2=C2Vg0ZjecVz\\_6Ep4er17vw](https://www.google.com.ua/url?sa=t&rct=j&q=&esrc=s&source=web&cad=1&cad=rja&uact=8&ved=0CBwQFjAA&url=http%3A%2F%2Fzakon.rada.gov.ua%2Fgo%2F995_004&ei=HF0AVevnEaGWygOquIGABA&usg=AFQjCNGJHd0THu1dyu_3CGZiwTxGKu3kYg&sig2=C2Vg0ZjecVz_6Ep4er17vw)

- ▶ the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- ▶ the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- ▶ the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- ▶ the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- ▶ the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Everyone arrested in accordance with the law or detained for bringing him before the competent legal authority shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial.

### **Domestic legal framework on the rights of an apprehended person**

Article 29 of the Constitution of Ukraine contains similar guarantees of the rights to freedom and personal inviolability<sup>7</sup>. According to Article 29, no one shall be arrested or held in custody except under a substantiated court decision and on the grounds and in accordance with the procedure established by law. The same article provides that in exceptional circumstances in the event of an urgent necessity to prevent or stop a crime, bodies authorized by law may hold a person in custody as a temporary preventive measure, the reasonable grounds for which shall be verified by court within seventy-two hours.

Ukrainian legislation provides for the following lawful forms of deprivation (limitation) of liberty:

- ▶ apprehension under the Criminal Procedure Code (“criminal procedural apprehension”);
- ▶ apprehension under the Code of Ukraine on Administrative Offences (administrative procedural apprehension);
- ▶ apprehension under the Law of Ukraine “On Militsiya (Police)” (general or preventative apprehension);
- ▶ arrest;
- ▶ administrative arrest.

According to the Law of Ukraine “On Militsiya”, *general (preventative) apprehension* of a person by law enforcement officials can be used towards:

- 1) Underage persons who committed socially dangerous acts and have not attained the age of criminal responsibility, - until their transfer to legal guardians or reception centers for children. This apprehension can last up to 8 hours;
- 2) Underage persons who have not attained the age of 16 without guardianship. This apprehension take place until the transfer of the apprehended person to legal representatives or placement with the relevant institution according to established procedures;
- 3) Persons avoiding execution of a court decision on compulsory treatment for chronic alcohol or drug addiction. Such apprehension can last up to 3 days;
- 4) Persons with manifested symptoms of a mental disorder that pose a real threat for themselves or surrounding people. This apprehension can last until their placement in a medical institution but no longer than 24 hours.

<sup>7</sup> [https://www.google.com.ua/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CBwQFjAA&url=http%3A%2F%2Fzakon.rada.gov.ua%2Fgo%2F254%25D0%25BA%2F96-%25D0%25B2%25D1%2580&ei=4FgAVYShIqPMYAO20oGoBg&usq=AFQjCNF71SCTfKhsExwxrX9GTTgn\\_zHZgA&sig2=evKkPeHrsulxrYhWvkY4hw](https://www.google.com.ua/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CBwQFjAA&url=http%3A%2F%2Fzakon.rada.gov.ua%2Fgo%2F254%25D0%25BA%2F96-%25D0%25B2%25D1%2580&ei=4FgAVYShIqPMYAO20oGoBg&usq=AFQjCNF71SCTfKhsExwxrX9GTTgn_zHZgA&sig2=evKkPeHrsulxrYhWvkY4hw).

- 5) Persons who are intoxicated in public places if their appearance is insulting to human dignity and public morals or if they are unable to move independently or can endanger surrounding people or themselves, - until transfer to specialized medical institutions or a place of residence, or, if the above are unavailable, until sobriety.

A person can be subjected to a temporary arrest (detention) also on the grounds of a court decision for the purposes of:

- ▶ apprehension and arrest with the view to extradition;
- ▶ apprehension and expulsion of a foreigner or a stateless person from the territory of Ukraine.

Criminal procedural apprehension of a person in accordance with Article 176§2 of the Criminal Code of Ukraine is a provisional measure of restraint enforced towards a person suspected of having committed a criminal offence. As a rule, criminal apprehension can be enforced only based on a decision by an investigating judge or a court on apprehension for determination of choosing arrest as a restraint measure. At the same time, procedural regulations provide for instances where such apprehension can be used without a decision by an investigating judge or a court. Such apprehension can be done by:

1) *Representative of state authorities:*

- ▶ officials of the bodies of internal affairs, the State Security Service of Ukraine, penitentiary service, forest guard, fisheries guard, and public order service of the Armed Forces of Ukraine;
- ▶ prosecutors and investigators of pre-trial investigation agencies authorized to conduct a search or apprehend a person by an investigating judge or a court;

2) *Any physical persons* who became direct witnesses (participants) of an incident that had characteristics of a crime by the apprehended person.

There is no list of purposes of apprehension in the Criminal Procedure Code; however, analysis of Articles 177 and 183 of Chapter 18 “Measures of Restraint, Apprehension of a Person” suggests that apprehension of a person is aimed at ensuring the fulfilment of objectives of criminal proceedings, namely:

- ▶ bringing before a court (investigating judge);
- ▶ verifying of suspicion on commission of a criminal offence, as well as obtaining information about crimes that are underway or being planned;
- ▶ stopping a crime in progress;
- ▶ fulfilment of procedural obligations by the suspect (accused)
- ▶ prevention of absconding from pre-trial investigation authorities or court.

*Length of criminal procedural apprehension* of a person vary in accordance with types and grounds for such apprehension. In accordance with the Constitution and the Criminal Procedure Code, this form of apprehension is a temporary restraint measure and cannot exceed 72 hours. This period is non-renewable.

*Completion (termination)* of a criminal procedural apprehension can take place in the following circumstances:

- ▶ release of the apprehended person if s/he had not received the notice on suspicion within 24 hours from the moment of apprehension;
- ▶ release of the apprehended person if s/he had not been brought before a court for review of an application for assigning a restraint measure (this release can be applied by the prosecutor, investigator, investigating judge);
- ▶ release of the apprehended person in case of the court’s failure to review the application for assigning a restraint measure within 72 hours;
- ▶ release of the apprehended person by an investigating judge, a court in case of absence of legal grounds for apprehension without a decision of an investigating judge, a court;
- ▶ release in case of a change of replacement of arrest by a less strict restraint measure by the investigating judge;
- ▶ release of a person in case of a closure of criminal proceedings;

- ▶ court decision on release from criminal liability;
- ▶ conviction pursuant to a court judgement.

*We should emphasize that criminal apprehension in Ukraine of certain categories of persons has a number of specific features described in Chapter 7 hereinafter.*

## Legal guarantees for ensuring rights of persons during apprehension

According to general provisions of the Criminal Procedure Code, the constitutional principle of the rule of law in criminal proceedings shall be applied with due consideration of the practices of the European Court of Human Rights. The procedural law contains a number of safeguards for preventing disrespect towards people, inhuman treatment, violations of fundamental rights and freedoms by law enforcement officials in criminal proceedings, including apprehension. In accordance with Article 212 of the Criminal Procedure Code, one of these safeguards provides that one or more officials responsible for keeping those apprehended shall be designated in the pre-trial investigation agency's department. In addition, an official responsible for keeping those apprehended shall have the duty to:

- ▶ register the apprehended person immediately;
- ▶ advise the apprehended person of the grounds for apprehension, his rights and duties;
- ▶ immediately release the apprehended person after grounds for apprehension seized to exist or time limit for apprehension as established in Article 211 of this Code has expired;
- ▶ ensure appropriate treatment of the apprehended person and respect for his rights laid down in the Constitution of Ukraine, the Criminal Procedure Code, and other laws of Ukraine;
- ▶ ensure recording all actions which are conducted with the involvement of the apprehended person, including the time when such actions started and completed, as well as persons who conducted such actions or were present during the conduct of such actions;
- ▶ ensure prompt provision of adequate medical assistance and fixation of any bodily injuries or deterioration of the apprehended person's state of health by medical personnel. If the detainee so wills, a specific person of his choosing who is certified to provide medical assistance may be allowed to be amongst providers of medical assistance to the detainee.

In addition, the Criminal Procedure Code establishes a multi-level system of control over respect for human rights during pre-trial investigation, including apprehension, in particular by:

- ▶ head of the pre-trial investigation agency (Article 39 of the CPC)
- ▶ public prosecutor, including supervision of compliance with law during pre-trial investigation and through procedural guidance in a pre-trial investigation (Article 36 of the CPC)
- ▶ judicial control by investigating judges, judges in accordance with the Article 206 of the CPC under their duties regarding protection of human rights. They are required to release a person from custody unless the public authority or official in whose custody the person is kept proves:
  - 1) the existence of legal grounds for apprehension of the person concerned without investigating judge's or court's ruling;
  - 2) that maximum custody period has not been exceeded;
  - 3) that there have not been any delays in bringing the person before court.

At the same time, the research results below, as well as other sources, illustrate that safeguards against human rights violations in the actual practice of pre-trial investigating agencies in Ukraine are not always effective. This remark, first of all, relates to unlawful arrests, violations of procedural limits of detention, inhuman treatment of detainees and lack of effective mechanisms for investigation of instances of this treatment etc.

Tools of legal protection from arbitrary arrests, as well as violations of arrest procedure or deprivation of liberty for a time exceeding the period established by law are:

- ▶ possibility for indicating violations in the report on apprehension by the apprehended person or his/her legal representative;
- ▶ the right to demand verification of the grounds for apprehension (in particular, through an appeal to prosecutor supervising the compliance with law in cases where persons are in custody);
- ▶ challenging actions of officials through petitions, complaints to the court on arbitrariness of apprehension or excessive length of detention, delay in bringing a person before the court.

These legal tools also can be ineffective, as evidenced by violations identified in the process of research and presented in this Report.

## 2.2. Practice of apprehension (detention) by the bodies of internal affairs

According the Ukrainian Parliament Commission for Human Rights, during 12 months of 2014:

- ▶ In criminal proceedings by investigation units of the bodies of internal affairs of Ukraine, there were **145 580** persons notified on suspicion of committing a crime;
  - ▶ Among these, **12 371** person was detained in accordance with article 208 of the CPC (without a decision by an investigating judge, court);
- ▶ Among **12 371** persons apprehended by investigators of the bodies of internal affairs in accordance with article 208 of the CPC:
  - ▶ Released by investigators due to failure to notify on suspicion within 24 hours after apprehension – 19 persons;
  - ▶ Released due to refusal by the prosecution to support motion on detention – 191 person;
  - ▶ Released pursuant to a court order denying motion on detention – 1926 persons;
  - ▶ Assigned detention as a restraint measure – 9085 persons.

In general, the following measures of restraint were assigned in criminal proceedings of investigation units of the bodies of internal affairs of Ukraine:

- 14083 persons – keeping in custody (article 183 of the CPC);
- 24415 persons – personal commitment (article 179 of the CPC);
- 701 person – bail (article 182 of the CPC);

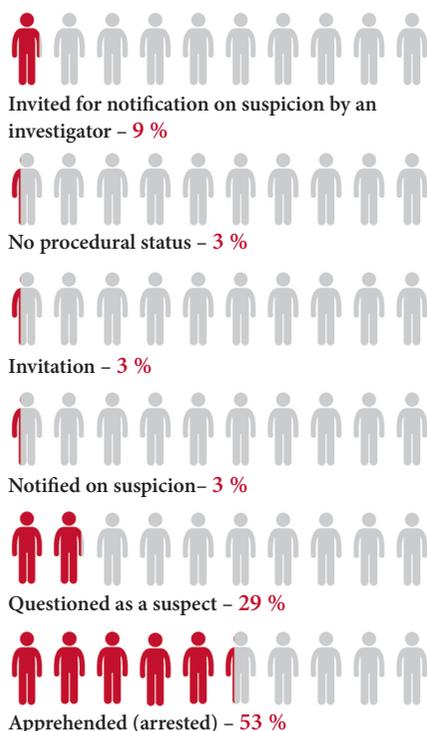


Figure 2.1. Reason for being at premises of the internal affairs bodies

8142 persons – house arrest (article 181 of the CPC);  
 489 persons – personal warranty (article 180 of the CPC).

A person can be present at the bodies of internal affairs only in the following instance:

- ▶ compulsory admission into custody in case of lawful deprivation (limitation) of liberty;
- ▶ invitation of the person for communication with an official (freedom of movement in this case is not limited and the person can leave the premises voluntarily);
- ▶ visit to premises of bodies of internal affairs on person's own initiative.

Figure 2.1 illustrates main grounds for presence of persons at premises of the internal affairs bodies that were monitored during this research.

At the same time, research results show that in 50% of monitored instances criminal cases were initiated, and apprehended persons were left in custody; in 44% of apprehensions criminal cases were initiated, and apprehended were released with a requirement to be present at the court hearing, and in 3% of apprehensions persons were left in custody (arrested) until the judgement entered into force (see Figure 2.2).

### **Violations during apprehension without a decision by an investigating judge, a court**

According to Article 208 of the Criminal Procedure Code, a competent official can apprehend a person suspected of committing a crime without a decision by an investigating judge or court if punishment for the alleged crime includes deprivation of liberty. In addition to this ground (penalty of deprivation of liberty), a person can only be apprehended if:

- ▶ the person was found committing a crime or attempting to commit it;
- ▶ immediately after the crime was committed a witness, including a victim, indicates this person, or totality of obvious signs on the body, cloth or the scene indicate that this person has committed a crime.

In any other case, detention without a decision of an investigating judge, court is unlawful and constitutes a crime under Article 371 of the Criminal Code of Ukraine (knowingly unlawful apprehension, taking into custody, arrest or detention).

At the same time, a large part of apprehensions monitored during the research and conducted without a decision by an investigating judge or a court, were conducted unlawfully, following a significant time after commitment of crimes and lack of grounds under article 208 of the CPC. Facts provided during interviews with attorneys illustrate these instances:

*«He was apprehended by field officers on 26 July at 18-00, and 18-15 he was taken to the department. ... I indicated in the protocol that apprehension took place in violation of article 208 since long time passed between commitment of the crime and apprehension, so there could be no*

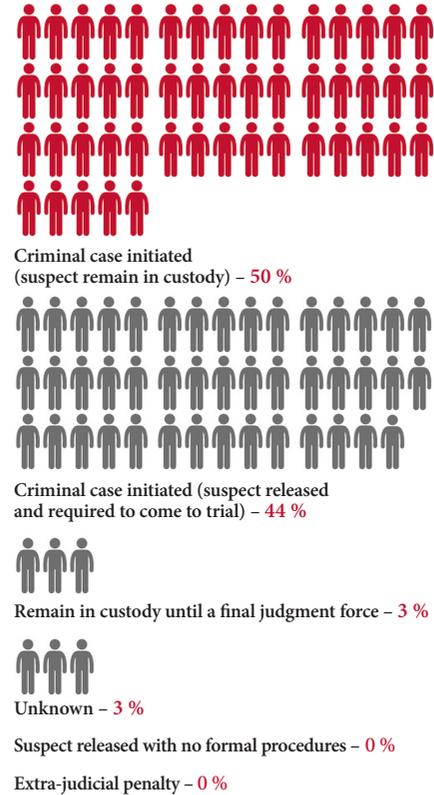


Figure 2.2. Outcomes of detention at the premises of internal affairs bodies

*immediate apprehension. The investigation authorities alleged that there is a woman who knows that my client had stolen but she did not see it thus she does not fall under the definition on an eyewitness. However, nobody reacted to this in a procedural manner...»<sup>8</sup>.*

This is an example of an apprehension not while the crime was in progress. At the same time, neither the victim nor totality of obvious signs on the body, cloth or the scene indicate that this person has committed a crime. Such apprehension without a decision by an investigating judge, a court cannot be deemed lawful.

In the example below, which was provided by an attorney in the course of an interview, the person was apprehended without a decision by an investigating judge (court) 2 days after the crime was committed, i.e. in the absence of grounds provided by article 208 of the CPC. Consequently, this apprehension should also be considered unlawful:

*«...Criminal offences (3 episodes) were committed by an apprehended person in the morning on August 4, 2014, and the actual apprehension of a suspect took place at 22-00 on August 6, 2014 without a warrant from the investigating judge – there is no decision»<sup>9</sup>.*

In this case, the person was apprehended without a decision by the court during a significant period of time after distributing drugs, which also indicated the lack of grounds for such apprehension.

The negative tendency of illegal apprehensions without a decision by an investigating judge or a court identified through during this study is also supported by other sources, including information from the official website of the Ukrainian Parliament Commissioner for Human Rights<sup>10</sup>.

*For instance, an inspection on compliance with procedural rights of apprehended persons in Sykhiv District Department of the Main Department of the MIA in Ukraine in Lviv region, which was conducted by the Special Proceedings Unit of the Secretariat of the Commissioner for Human Rights, showed that 7 out of 24 persons detained by investigators of this department from 01.03.2014 – 01.11.2014 without a decision by an investigating judge, a court, were apprehended unlawfully (with no legal grounds).*

*In the case on violation of human rights and freedoms in the activities of law enforcement bodies, prosecution and the court of the Central District of Mykolayiv materials on 20 persons were researched. These people were apprehended by investigators of law enforcement bodies in 2014 without decisions by investigating judges, courts. Out of 20 persons, 8 were apprehended without a decision by an investigating judge without grounds provided by Article 208 of the CPC.*

*In the case on violation of human rights and freedoms in the activities of law enforcement bodies, prosecution and the court of Bila Tserkva, Kyiv region, officials of the Special Proceedings Unit of the Secretariat of the Commissioner for Human Rights reviewed materials on 31 persons. They were apprehended by investigators of Bila Tserkva city police department without a decision of an investigating judge, a court. Out of 31 persons, 10 were unlawfully apprehended without a decision by an investigating judge without grounds provided by Article 208 of the CPC.*

*Multiple reports on unlawful apprehensions on suspicion of committing a crime without decisions by investigating judges, courts in 2015 were identified by the Special Proceedings Unit of the Secretariat of the Commissioner for Human Rights in the framework of an inspection on compliance with procedural rights in activities of law enforcement bodies of Industrialny and Zhovtnevy districts of Dnipropetrovsk, as well as Novomoskovsk city of Dnipropetrovsk region.*

<sup>8</sup> Interviews with attorneys.

<sup>9</sup> Interviews with attorneys.

<sup>10</sup> [https://www.google.com.ua/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CBwQFjAA&url=http%3A%2F%2Fwww.ombudsman.gov.ua%2F&ei=xv4HVebrClv9ywPotYKGAw&usq=AFQjCNGlV0iFgKpUxbSrsA069z0ZcfVebQ&sig2=ybTRPsu\\_5yoXBwxYmpqh5w&vm=bv.88198703,d.bGQ](https://www.google.com.ua/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CBwQFjAA&url=http%3A%2F%2Fwww.ombudsman.gov.ua%2F&ei=xv4HVebrClv9ywPotYKGAw&usq=AFQjCNGlV0iFgKpUxbSrsA069z0ZcfVebQ&sig2=ybTRPsu_5yoXBwxYmpqh5w&vm=bv.88198703,d.bGQ)

We should note that legal guarantees for protection of human rights were not followed in any of apprehension cases identified by representatives of the Secretariat of the Commissioner for Human Rights. Prosecutors who supervise compliance with law during pre-trial investigation did not carry out any prosecutor response prescribed by the law. Investigating judges who reviewed applications on restraint measures for apprehended persons failed to protect human rights in accordance with Article 206 of the CPC in any of these cases.

### Violations of requirements for length of apprehension

Practice of investigation and case law includes many examples of failure to comply with requirements for length of apprehension established by law. In particular, based on overview of practice of investigation and case law, the High Specialized Court of Ukraine on Civil and Criminal Cases concluded that these violations took place<sup>11</sup> mainly in the following forms:

- ▶ failure to ensure the apprehended person's right to be promptly brought before the court for decision on lawfulness of his/her apprehension;
- ▶ lack of compulsory judiciary oversight in cases of detention;
- ▶ detention of a person in the absence of a court decision in violation of the law;
- ▶ lack of material proof (report on arrest) in cases of apprehension by law enforcement during several days.

In accordance, with article 209 of the Criminal Procedure Code, an individual is considered to be apprehended if he/she, with the use of force or through obedience to the order, has to stay next to the competent official or in premises prescribed by the competent official. In particular, the High Specialized Court on Civil and Criminal Cases emphasized the need for strict compliance with this requirement in its "Overview of case law on consideration of motions on restraint measures by investigating judges from February 7, 2014"<sup>12</sup>.

According to current national legislation, period of apprehension (in the framework of securing criminal proceedings) may not exceed 72 hours from the moment of apprehension of a person, and the actual moment of apprehension constitutes the beginning of a period upon which the apprehended person shall be released immediately, in particular:

- ▶ if a person has not been served the notice of suspicion after 24 hours elapsed after the moment of his apprehension, such person is subject to immediate release (Article 278§3 of the CPC);
- ▶ an individual apprehended without investigating judge or court ruling shall be released immediately if within 60 hours from the moment of apprehension s/he has not been brought to court for consideration of a motion to impose on him a measure of restraint (Article 211§2 of the CPC);
- ▶ an individual shall be immediately released if during 72 hours from the moment of actual apprehension an investigating judge, a court has not considered a motion to impose a measure of restraint (Article 211§1 of the CPC).

It is important to note that compulsory detention of an apprehended person longer than indicated period and in case of failure to undertake these actions is unlawful and constitutes a crime under Article 371 of the CC (knowingly unlawful apprehension, taking into custody, arrest or detention).

Article 208 of the CPC contains a requirement for indication of the time, date and exact time (hour and minute) of the actual apprehension of a person in the report on apprehension.

According to the research findings, investigators have negative attitude towards these strict requirements on the onset of periods of apprehension. They consider that these terms are not sufficient for conducting necessary

<sup>11</sup> Higher Specialized Court of Ukraine on Civil and Criminal Cases. Overview of application of Articles 3, 5, 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) in criminal cases by first-instance and appeal courts of general jurisdiction (2011 – first half of 2012, dated 01.06.2013), <http://zakon2.rada.gov.ua/rada/show/n0001740-13/print>

<sup>12</sup> [https://www.google.com.ua/url?sa=t&rcct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0CCIQFjAB&url=http%3A%2F%2Fzakon.rada.gov.ua%2Fflaws%2Fshow%2Fn0001740-14&ei=HAYIVc76FsmeywOIwYcQBA&usq=AFQjCNFRnO3M2eEQNPqifo-WlaloXns5EA&sig2=qrXEktFJRlenlRcWtmAU\\_A&bvmm=bv.88198703,d.bGQ](https://www.google.com.ua/url?sa=t&rcct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0CCIQFjAB&url=http%3A%2F%2Fzakon.rada.gov.ua%2Fflaws%2Fshow%2Fn0001740-14&ei=HAYIVc76FsmeywOIwYcQBA&usq=AFQjCNFRnO3M2eEQNPqifo-WlaloXns5EA&sig2=qrXEktFJRlenlRcWtmAU_A&bvmm=bv.88198703,d.bGQ).

investigating and procedural actions, in particular, preparation of adequate notice of suspicion. The above stems from their interview responses:

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*«Researcher: how is the new CPC?*

*Investigator: well, it should be changed. You see, we apprehend him at the crime scene. And he is so smart and does not talk. And the investigator has to do everything – provide a lawyer, and explain the rights and found evidence against him. However, this is all useless since all these things cannot serve as evidence in court according to the new CPC.*

*Here is another example about the new CPC – the last case of robbery. According to the new code, a person seems to be a suspect from the moment of apprehension, or he may not be. It is unclear and vaguely written sincere there is also a separate act of notification on suspicion during 24 hours. What do you do with him before that? You cannot conduct any investigating actions. He tells you his name, and that is all. What am I going to show to the prosecutor in 24 hours? Nothing»<sup>13</sup>.*

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Violations of requirements on period of apprehension characteristic for officials of law enforcement were also identified during research. These violations include, for instance, false data on time of apprehension both in procedural documents of criminal proceedings and in official documentation for restricted use. The time indicated in reports on apprehension does not correspond to the time of actual apprehension. Thus, investigators arbitrarily increase the set timeframes for apprehension, notification on suspicion, bringing before the court for review of motion on the measure of restraint and the time for consideration of motions on the measure of restraint by an investigating judge. These examples were identified also during interviews with apprehended persons.

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*«Researcher: Did you come here voluntarily?*

*Apprehended person: No, I was brought here by militsiya officials.*

*Researcher: Did militsiya officials draw up a report on apprehension?*

*Apprehended person: Yes.*

*Researcher: Did the time of apprehension in the protocol correspond to the actual time of your apprehension?*

*Apprehended person: no, the report states I was apprehended today at 8 o'clock.*

*Researcher: What is the difference?*

*Apprehended person: I was brought here yesterday.*

*Researcher: Yesterday! What time?*

*Apprehended person: Around 17 o'clock»<sup>14</sup>.*

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Consequently, in the example above the investigator increased the procedural periods of detention by 15 hours, namely: the period of apprehension prior to notification on suspicion, the period for bringing the apprehended person before the court for consideration of a motion on the measure of restraint, the period of consideration of the motion on the measure of restraint by the investigating judge.

In the example below that was identified during an interview with the apprehended person, the investigator increased procedural time limits by 48 hours by including false information into the report on apprehension:

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*«Apprehended person: I was apprehended at home by militsiya officials and brought to the department*

*Researcher: Was there a report drawn up during apprehension?*

*Apprehended person: No, it was drawn up at the department.*

*Researcher: Therefore, the protocol included the time when it was drawn up instead of the time of actual apprehension? How much time passed from the moment you were taken from your home until the report was drawn up?*

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<sup>13</sup> Observation notes.

<sup>14</sup> Interviews with apprehended persons.

*Apprehended person: I was brought to the department, and they drew up a report couple of days later.*

*Researcher: So, over a day later?*

*Apprehended person: Not a day, but two. I remember clearly.*

*Researcher: And where were you during this time? (the apprehended person nodded towards the temporary holding facility)»<sup>15</sup>.*

Similar violations of time limits for apprehension through indication of false information in the report on apprehension were also observed directly during monitoring of activities of law enforcement officials, in particular:

*«The person was apprehended at around 21-00, a search was conducted at the same time (at 21-10). The report on apprehension includes the time 00-14, [...], but it was the time when the investigator started to draw up the report»<sup>16</sup>;*

*«16-00. The investigator is drawing up a report on apprehension. The time of drawing up the report is 16-20, which is also indicated in the report itself. [...] The time of actual apprehension indicated in the report is 16-20, August 12, 2014.*

*However, we know that the apprehended person was brought yesterday at 17-32. I saw him, and there is a record in the Journal of the Officer on Duty»<sup>17</sup>;*

*«The suspect was apprehended at 7-45 on July 25, 2014 (the time of actual apprehension)... The protocol of apprehension compiled by the investigator in presence of the legal representative at 11-40 on July 25, 2014. One of police officers of the department said that this person was apprehended at around “3-4 a.m.”, and was brought later, at 7-45. However, as we can see, the official version of the investigating authorities includes the time of apprehension at 11-40 when the report was drawn up...»<sup>18</sup>.*

In the cases above investigators indicated the time when apprehended person were at the investigator's office in the report on apprehension instead of a time when these persons were actually apprehended and brought to the law enforcement premises. Therefore, investigators and law enforcement officials created room for actual violation of procedural time limits upon expiration of which a person should be immediately released.

Research observations also showed facts of abetting by prosecutors who had a duty to undertake measures of prosecution response upon finding out instances of incompliance with procedural time limits for apprehension of persons, in particular:

*«Researcher: Does the time in the report correspond to the actual time of your apprehension?*

*Apprehended person: No, police apprehended me last night and were keeping me at the district department but they indicated in the report that they apprehended me today and brought to the prosecution where the report was drawn up.*

*Then the prosecutor asked: When were you apprehended”*

*Apprehended person: I wanted to say something but the prosecutor interrupted him and said “: When did they put handcuffs on you?”*

*Apprehended person: At the prosecutor's office.*

*Prosecutor confirmed: So when you arrived to the prosecutor's office, yes?*

*Apprehended person: Yes.*

<sup>15</sup> Interviews with apprehended persons.

<sup>16</sup> Observation notes.

<sup>17</sup> Observation notes.

<sup>18</sup> Observation notes.

*Prosecutor: Did you come to the prosecutor's office and said you had committed a crime?*

*The apprehended person was silent for a moment and said that he did not understand the question.*

*The prosecutor raised his tone and repeated in an affirmative way: Did you come to the prosecutor's office and informed that you had committed a crime?!*

*Prosecutor: The report on apprehension was drawn up at the prosecutor's office?*

*Apprehended person: Yes.*

*Prosecutor: Were there any comments or complaints?*

*Apprehended person: No.*

*Prosecutor: Were there any complaints?*

*Apprehended person: No»<sup>19</sup>.*

This example illustrates that the investigator unlawfully increased procedural time limits for apprehension by indicating false information about the time of actual apprehension into the protocol on apprehension. At the same time, the investigator committed these unlawful actions while the prosecutor was aware and supported him.

The trend of deliberate falsification of data on the time of actual apprehension, which was reported during this research, is also confirmed by results of other similar research.

For instance, from April 27 – May 7, 2013 and from September 17 – October 10, 2014 the Coordination Centre for Legal Aid Provision research problems in legal defense in the use of the new criminal procedure legislation. The research was conducted through questionnaires for attorneys providing secondary free legal aid.

*More than 545 attorneys participated in the research in 2013, and in 2014, there were 623 attorneys who filled out the questionnaires. In addition, 168 attorneys participated in surveys in 2013 and 2014. According to research results, in 2013, there were 22.57% of attorneys who responded affirmatively to the question "Were there cases in your practice where the time of apprehension did not correspond to the time indicated in the report on apprehension?" In 2014, discrepancies between the time of actual apprehension and the time indicated in reports were confirmed by 42.86% of survey participants. Therefore, there is a significant decline in compliance with procedural rights of apprehended persons.*

Information about numerous violations of the law in relation to length of apprehension is also available on the web site of the Ukrainian Parliament Commissioner for Human Rights<sup>20</sup>.

*For instance, officials of the Special Proceedings Unit of the Secretariat of the Commissioner examined 24 reports on apprehension on suspicion of committing a crime drawn up by investigators of Sykhiv District Department of police in Lviv in 2014. In violation of requirements of Article 208§5 of the CPC, investigators did not include the place or time of actual apprehension in any of these protocols.*

*In Bila Tserkva City Department of the Main Department of the MIA in Kyiv region, there were 31 reports on apprehension examined. Out of these, there was no place of apprehension indicated in 19 reports, two reports did not include the actual time of apprehension, and 5 reports did not include neither the place nor time of apprehension.*

*In the Central District Department of the MIA in Mykolayiv, there were 20 reports on apprehension on suspicion of committing a crime examined. Among these, there were 8 reports where place of apprehension was not indicated, and one protocol did not include the actual time of apprehension of a person.*

<sup>19</sup> Observation notes.

<sup>20</sup> [https://www.google.com.ua/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CBwQFjAA&url=http%3A%2F%2Fwww.ombudsman.gov.ua%2F&ei=xv4HVeVbClv9ywPotYKgAw&usg=AFQjCNGlV0iFgKpUxbSrsA069z0ZcfVebQ&sig2=ybTRPsu\\_5yoXBwxYmpqh5w&vm=bv.88198703,d.bGQ](https://www.google.com.ua/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CBwQFjAA&url=http%3A%2F%2Fwww.ombudsman.gov.ua%2F&ei=xv4HVeVbClv9ywPotYKgAw&usg=AFQjCNGlV0iFgKpUxbSrsA069z0ZcfVebQ&sig2=ybTRPsu_5yoXBwxYmpqh5w&vm=bv.88198703,d.bGQ)

## Failure to bring apprehended persons to the pre-trial investigations agency in due time

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According to Article 210 of the CPC, the competent official is required to bring the apprehended individual to the nearest department of the pre-trial investigation agency, where a record shall be promptly made of the date, exact time (hours and minutes) of the bringing of the suspect and other information provided for by the legislation. The competent official immediately informs, through technical means, appropriate officials of the pre-trial investigation agency's department on each apprehension.

Research results showed that these norms of the CPC are not complied with in practice of the bodies of internal affairs. As a rule, field officers who bring the apprehended person keep them in vehicles, offices or other locations for a long time. Instead of bringing the apprehended persons in due time to investigation departments, field officers violate requirements of Article 41 of the CPC and conduct unofficial (search) procedural actions, in particular, investigating circumstances of crimes, without authorization by an investigator. For example, an apprehended person described the following situation:

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*«Researcher: When were you apprehended exactly? How long have you been here?*

*Apprehended person: I was apprehended in the afternoon; at around 17-00, (the interview took place at 22-30).*

*Researcher: I was told that you were apprehended at 17-00. Where have you been all this time?*

*Apprehended person: An acquaintance of mine and I were brought to the department. I was taken to an office on the third floor where I have stayed the entire time. I was brought to the investigator only few minutes ago»<sup>21</sup>.*

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In this case, officials of the operational unit of bodies of internal affairs have kept an apprehended person in custody for over 5 hours in their office before bringing him to the investigator.

We should note that in accordance with Article 41 of the CPC officials of operational units of the bodies of internal affairs shall not have the right to perform procedural action in criminal proceedings on their own initiative. However, multiple instances identified during this research show that field officers take statements from apprehended persons on committed offences during significant period prior to bringing apprehended person to the investigator. Examples below confirm:

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*«Researcher: What happened after you had been brought to militsiya?*

*Apprehended person: The officer on duty wrote my data in the journal and took me to the fifth floor, to the crime detection unit. There was a field officer on duty who told me to wait. Then, I waited for about half an hour until there was a field officer who started working with me.*

*Researcher: How did he start working with you?*

*Apprehended person: He started asking me what and how often I had been stealing. He said that they will receive the security footage from the store and will find out anyway.*

*Researcher: You were at the department from 4 a.m. until 1 p.m. only to testify about the merchandise stolen from a store? Why did it take so long?*

*Apprehended person: I don't know. He questioned me and wrote things down. At the same time, he was trying to hint that there were other cases of theft and asking a lot of leading questions about what I was doing, how I was making a living, where I was getting my money from etc. Then the field officer left on call somewhere and I stayed waiting for him. This is how the time until afternoon passed»<sup>22</sup>;*

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*«At 21-15, officials of the crime detection unit brought three young men to the department. [...] They took them to the crime detection unit. According to the officials, these men were apprehended on suspicion of a robbery. First, each men was brought individually to the chief's office where their personal information was collected. Then, after the first round of communication, officers took all three apprehended persons to one room where they started taking detailed explanations about circumstances, locations and the time of attacks.*

<sup>21</sup> Interviews with apprehended persons.

<sup>22</sup> Interviews with apprehended persons.

*At approximately 11 p.m., all three apprehended persons signed frank confessions and started to write their explanations. An hour later, officials of the crime detection unit decided that apprehended persons would stay at the station until the morning when the investigator would include information into the Integrated Registry of Pre-Trial Investigations and start a pre-trial investigation»<sup>23</sup>.*

Importantly, according to Article 210 of the CPC, if there are grounds for reasonable suspicion that bringing the apprehended individual lasted longer than it was necessary, investigator shall carry out verification to decide on liability of persons guilty thereof. However, there were no cases of verification of delays in bringing apprehended individuals by investigators or prosecutors observed during the research.

### **Inadequate registration of apprehended persons**

The lack of adequate registration of persons at the bodies of internal affairs also creates room for inadequate treatment and abuse by officials of these bodies towards apprehended persons.

Position of the European Court of Human Rights on registration of apprehended persons by the IAB of Ukraine is stated in the Court's case law<sup>24</sup>:

*«The principal issue of concern is that at the time of the impugned detention there were no appropriate custody records and the applicant's status as a suspect was formalized only the next day, with a twenty-four-hour delay. There is no evidence that until the morning of 13 May 2004 any of the procedural rights he could exercise at the relevant time had been explained to him. In these circumstances, the applicant could not make effective use of a variety of procedural safeguards enshrined in the Convention and the domestic legislation. These shortcomings eventually resulted, inter alia, in the applicant being detained without a court order longer than the seventy-two-hour time limit, contrary to domestic-law requirements.*

*[...] The Court considers that the failure of the police to document the applicant's detention in the present case stems from a lack of sufficient safeguards ensuring that any involuntary retention of a person by the authorities is recorded properly and in sufficient detail, these records are publicly available, the status of the person is formalized straight after he or she has been taken in by the authorities, and all the person's rights are immediately and clearly explained to him or her»<sup>25</sup>.*

According to Article 212 of the CPC, the apprehended person must be registered immediately. In accordance with the Instruction on organization of the functioning of stations of bodies and units of internal affairs of Ukraine for the protection of public and state interests, adopted by the MIA order no.181 dated April 28, 2009<sup>26</sup>, the registration shall be included into the Registry of Persons taken into Custody, Visitors and Invitees (hereinafter – the Registry of Persons taken into Custody, Visitors and Invitees).

Research results show that officials of the bodies of internal affairs conceal instances of apprehension by putting incorrect data into the Registry and thus creating the “unacknowledged apprehension”.

In *Belousov v. Ukraine*, the Court reiterated:

*«[...] the unacknowledged detention of an individual is a complete negation of the fundamentally important guarantees contained in Article 5 of the Convention, and discloses a most grave violation of that provision. Failure to make a record of such matters as the date, time and location of detention, the name of the detainee, the reasons for the detention, and the name of the person carrying it out must be seen as incompatible with the requirement of lawfulness and with the very purpose of Article 5 of the Convention»<sup>27</sup>.*

<sup>23</sup> Observation notes.

<sup>24</sup> *Smolik v. Ukraine*, Application no. 11778/05, ECHR Judgement, 19 January 2012.

<sup>25</sup> *Ibid.*

<sup>26</sup> <http://zakon.rada.gov.ua/laws/show/z0559-05>

<sup>27</sup> *Belousov v. Ukraine*, Application no. 4494/07, ECHR Judgement, 07 November 2013.

Consequently, apprehended persons who are brought to the bodies of internal affairs are registered as invitees or visitors who come “on their own initiative”. There were multiple instances of these manipulations identified during research. Below are some examples:

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*«Two field officers in civilian clothes brought an apprehended person in handcuffs. The field officer told the officer on duty, ‘Write him down, here are his documents. What are you writing? Write in-vi-ted!’»*

*Conversation with an officer on duty:*

*Researcher: Who was taken in handcuffs?*

*Officer on duty: I don’t know. Well, he is an invitee.*

*Researcher: So he came here voluntarily?*

*Officer on duty: Of course, they only come here this way.*

*Researcher: Who invited him?*

*Officer on duty: Field officers did... It happens often»<sup>28</sup>;*

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*«22-40. Two ‘invitees’ were brought handcuffed for stealing a bicycle. They were taken for fingerprinting, I was allowed to follow and observe. After that, a field officer took one of the ‘invitees’ to take statements. I heard him say, ‘If everything is OK, and you tell me the entire truth, you will leave today against written acknowledgment, if not – you will stay at SIZO [remand prison]»<sup>29</sup>;*

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*«Patrol and inspection service and a field officer brought two people in handcuffs; [...] it was written in the Journal that the latter were ‘invitees’ from Zakarpattya. [...] Two ‘invitees’ were taken for providing testimony;*

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*«Police officers enter the hall [...] accompanied by an apprehended person...*

*Researcher: Did he ask for an attorney? Was he informed that he could call one?*

*Police officer: Well, he is not detained, he is invited!*

*Researcher: Did he come on his own?*

*Police officer: No, we brought him.*

*The apprehended person asked whether he could leave. The police officer declined. I went out to speak with the field officer.*

*20-00.*

*Chat with a field officer.*

*Researcher: When was he brought here and why was he apprehended?*

*Field officer: He was not apprehended.*

*Researcher: Did he come voluntarily?*

*Field officer: Oh, well yes, we gave him a lift of course.*

*Researcher: So what is the official reason for his presence here?*

*Field officer: There was a 102 call. An applicant called and said that a person who had stolen his money was at a certain address...»<sup>30</sup>.*

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In cases above, persons apprehended for committing crimes were forced to come to the bodies of internal affairs with the use of handcuffs. However, their apprehension was concealed by putting false information into the Registry of Persons taken into Custody, Visitors and Invitees.

The research also identified instances when investigators concealed actual apprehension of person through representing them as participation in investigatory actions. Interviewed persons also confirmed these facts:

<sup>28</sup> Observation notes.

<sup>29</sup> Observation notes.

<sup>30</sup> Observation notes.

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«August 19, 2014. I came up to the investigator's office. There are two officials of the crime detection unit, an investigator and a young man (de facto apprehended) in his office. The investigator explained that his man was not apprehended but invited. He was brought to provide a witness testimony. After the testimony was taken (12-56 – 14-35), the investigator presented a notification of suspicion at 15-30. Questioning in the status of a suspect – 15-35 – 15-40 (the same testimony was repeated).

At 18-40, the investigator received a phone call and found out that an investigating judge was already waiting. Everyone left to leave for a sanction review at the court.

I would like to note that the investigator was emphasizing that the man was not apprehended, yet there were two officials of the crime detection unit in the office during the entire time. When the man wanted to take a bathroom or smoke break he asked for their permission, and they took him out»<sup>31</sup>.

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The example illustrates how a de facto apprehended (forcefully brought) was involved into investigatory actions during a significant time, including notification of suspicion. Then the person with a status of an “invitee” was taken to the investigating judge for consideration of a motion on a measure of restraint.

Research also showed instances of failure to register apprehended persons:

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«I arrived to the department and saw several gypsies at the entrance (men and women). One gypsy was talking to the investigator. I took the journal on apprehension and registration of visitors, but there were no new records since my visit on the previous day. [...] They told me that their relative was apprehended the day before (during the night) and he was at the department. Officers on duty did not know anything and there are no records in journals. I went to the investigator immediately (she was not on duty and it was Saturday). There was a young man in front of her, approximately 20 years old (a gypsy). The apprehended told me he had been apprehended around midnight. He was kept at the department but in another office on the third floor...»<sup>32</sup>;

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«This man was apprehended by militsiya officers for hooliganism and brought to the department. The apprehension was not documented. There was no report of apprehension, and no records in any of the journals at the department about him being apprehended or brought to the department.

Researcher: When were you apprehended? At what time?

Apprehended person: I was apprehended at the territory of a city hospital before noon and then brought to the police station»<sup>33</sup>.

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There were no records about these apprehended persons in the Registry of Persons Taken into Custody and Invitees. Therefore, their apprehension was not documented properly.

### **Apprehension of a person upon invitation to provide explanations to an investigator**

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There was a serious issue related to apprehension identified during research. It is abuse of the right of officials of the bodies of internal affairs to invite (call) a person as a witness for written (oral) explanations on any events and facts.

The procedure for receiving these explanations is not regulated by any law or other legal instrument. The questionings that can last for a long time result in de facto apprehension of a person without proper documentation and respect for the rights of an apprehended person. When these questionings take place, people are actually held in offices and other premises of the bodies of internal affairs by force without registration. There were multiple instances of this kind identified during this research, in particular:

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<sup>31</sup> Observation notes.

<sup>32</sup> Observation notes.

<sup>33</sup> Observation notes.

«Apprehended person: They approached me on the street and took me to F. police station. There, a district inspector collected explanations from me. It was on August 18, 2014.

Researcher: How long have you stayed at the department for?

Apprehended person: Since 9 a.m. until 9 p.m.

Researcher: Were you invited to the department again? Did they question or interrogate you?

Apprehended person: Yes, the following day was the same – I came at 9 a.m. and was allowed to leave at 9 p.m. In addition, I was here from 10 a.m. until 9 p.m., and I have been here today since 11. The entire time, they are keeping me at the territory of the department and are not allowing going anywhere.

Researcher: Was there a report on apprehension?

Apprehended person: No»<sup>34</sup>.

In this case, the person was summoned to the bodies of the internal affairs for explanations and forced to stay at the official premises whereas this apprehension was not registered in any form.

### **Administrative detention and administrative arrest for the purposes of criminal investigation**

Article 260 of the Code on Administrative Offences provides that administrative detention is only allowed in cases explicitly provided for by laws of Ukraine in order to prevent administrative offenses when other measures of impact have been exhausted, to identify a person, to draw up an administrative offense report if it is not possible to draw it up at the offense site but drawing it up is mandatory, to ensure timely and correct case trial, and to execute administrative offense case rulings.

Administrative detention is an accessory measure for administrative termination of an offence (a measure of securing proceedings in cases on administrative offences) that constitutes a temporary limitation of the freedom of movement and residence and is used when other administrative measures are ineffective in securing adequate proceedings in cases of administrative offences, as well as for bringing the offender to responsibility. Therefore, administrative detention can be applied only towards a person suspected of committing an offence, in accordance with legislation on administrative offences, and only pursuant to aims listed in Article 260 of the Code on Administrative Offences.

Administrative arrest is a form of detention provided by the Code on Administrative Offences. Unlike other forms of limitation of liberty, it constitutes an administrative penalty imposed in exceptional cases by the district, city district, or city courts (judges) types of administrative offences punishable by the relevant penalty and not exceeding fifteen days. Administrative arrest can only be applied as an administrative penalty for an administrative offence.

In addition, the legislation provides a clear distinction between an administrative detention, administrative arrest and arrest as a temporary restraint measure in criminal proceedings.

According to ECHR case law, use of administrative detention for the purposes of criminal proceedings is unacceptable. In particular, the Court noted that:

*«the applicant's detention as a criminal suspect, which started on 17 May 2003 and ended on 24 May 2003, lasted more than six days but no judicial authorization had been obtained within seventy-two hours, which was contrary to domestic law. It further concludes that in the circumstances of this case the administrative detention turned out to be the means of extending the applicant's deprivation of liberty without judicial authorization»<sup>35</sup>.*

However, research showed that bodies of internal affairs use administrative detention and administrative arrest for objectives of criminal proceedings, in particular:

<sup>34</sup> Interviews with apprehended persons.

<sup>35</sup> Oleksiy Mykhaylovych Zakharkin v. Ukraine, Application no. 1727/04, ECHR judgment, 24 June 2010, §87.

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*«Police officers enter the hall [...] accompanied by an apprehended person...*

*Researcher: Did he ask for an attorney? Was he informed that he could call one?*

*Police officer: Well, he is not detained, he is invited!*

*Researcher: Did he come on his own?*

*Police officer: No, we brought him.*

*Researcher: (observing him fill out a card on administrative offence) – So is this an administrative case now, and then it will be a criminal one?*

*Police officer: Yes, when the applicant will write a complaint»<sup>36</sup>.*

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In this case, officials of bodies of internal affairs apprehended a person for committing a crime but documented it as administrative detention to have an opportunity to hold the person and prove his guilt. The following example confirms that investigator's stance also was aimed at using administrative detention and administrative arrest for purposes of criminal procedure:

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*«Researcher: The guys complained yesterday that you need a name to notify someone on suspicion. However, sometime it is impossible to find out the name during 3 hours, and the person is just silent. At the same time, he was caught at the crime scene with hands covered in blood, for instance. What happens then? Will they let him go?*

*Investigator: Police have their ways of finding out information.*

*Researcher: Well, what if they don't? Will you let him go?*

*Researcher: No, if it is a grave crime, we will find a reason to detain him. We will lock him up for an administrative offence for 10 days.*

*Researcher: How? Now, you can only detain for 10 days for violating the border-crossing regime, and the rest is only 3 hours.*

*Investigator: Well, this can be resolved. The prosecutor will sign. If it is a grave crime, he will sign»<sup>37</sup>.*

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Such violations by investigators and officials of the bodies of internal affairs are caused, first of all, by a broad scope of procedural safeguards for the rights of apprehended persons according to the CPC, whereas the Code on Administrative Offences does not have similar safeguards. Consequently, arbitrary detention under administrative procedure instead of a suspicion on criminal offence can be viewed as a significant limitation of procedural rights.

The use of administrative detention for securing interrogation of a person as suspect in criminal case was repeatedly considered impermissible by the ECHR in cases against Ukraine. For instance, the right to be brought promptly before a judge was violated since with consideration of the administrative arrest the applicant was deprived of liberty for a time significantly exceeding time constraints established by the law<sup>38</sup>. The ECHR also emphasized that by having formally placed the applicant in administrative detention but in fact treating him as a criminal suspect, the police deprived him of access to a lawyer, which would have been obligatory under the Ukrainian legislation<sup>39</sup>.

### **Ill-treatment of apprehended persons**

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According to ECHR statistics, 23 out of 69 cases considered by the Court against Ukraine in 2013 concerned inhuman and degrading treatment, and 3 cases were related to prohibition of torture (p. 201)<sup>40</sup>. Excessive use of force has been and remains one of the most relevant and risk-related (from the point of view of rights protection) issues in apprehension.

<sup>36</sup> Observation notes.

<sup>37</sup> Interviews with investigators.

<sup>38</sup> Kvashko v. Ukraine, ECHR, № 40939/05; Rudnichenko v. Ukraine, ECHR, № 2775/07.

<sup>39</sup> See Nechiporuk and Yonkalo v. Ukraine, ECHR, # 42310/04, 21 April 2011.

<sup>40</sup> Annual Report 2013 of the European Court of Human Rights, Council of Europe - [http://www.echr.coe.int/Documents/Annual\\_report\\_2013\\_ENG.pdf](http://www.echr.coe.int/Documents/Annual_report_2013_ENG.pdf)

Lawfulness of the use of physical force was also a subject of research during interviews and observations. Facts discovered during research confirm the use of excessive physical force directly during apprehension, immediately following the apprehension with no need for such use, as well as during transportation to IAB units. We shall provide some examples.

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*«Researcher: Did they use force towards you?»*

*Apprehended person: I already showed you. Here is a bruise, and a wound on the rib.*

*Researcher: Were you resisting?»*

*Apprehended person: No, I just told them I did not want to go anywhere.*

*Researcher: What did you feel at that moment? Did it hurt?»*

*Apprehended person: Yes, very much. I have bruises everywhere»<sup>41</sup>;*

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*«Apprehended person: They were simply humiliating me. The older officer slapped me on the back of my head and asking how I had become such a serious thief in my age. He was accusing me of spoiling air in his car etc. Only when we left the car next to the department the younger field officer kicked me when I tried to tie my shoe laces...»<sup>42</sup>;*

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*«Researcher: How did the apprehension go? Who apprehended you?»*

*Apprehended person: Field officers. They handcuffed me, beat me and took me with them. On the way, they were beating me though I showed no resistance»<sup>43</sup>.*

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There were also reports about apprehended persons being assaulted at the premises of the bodies of internal affairs. Such use of physical force was predominantly aimed at obtaining testimony on offences, in particular:

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*«Researcher: Did they use any pressure (physical or psychological)?»*

*Apprehended person: Yes, one of militsiya officials kicked my neck. It was enough. [...] I told them everything, and they were writing down my statements»<sup>44</sup>;*

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*«Researcher: How are you feeling? (there are visual signs of assault), can you talk?»*

*Apprehended person: I have a severe headache. My entire body hurts.*

*Researcher: I see bruises on your body, and you are limping. Did militsiya officials use any force (pressure), physical or psychological?»*

*Apprehended person: [...] When they brought me to this department they left me alone until the morning. In the morning, two policemen without uniforms came and took a statement from me. I told that [...] that I wanted to sleep. Then one of them started hitting me on the head with his fists. They were also hitting my back and legs with a bat, and the other one kicked me in my stomach. They did not let me smoke, and let me use the bathroom only once»<sup>45</sup>.*

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Research also identified cases of assault of apprehended persons without any requirements by the officials of the bodies of internal affairs towards the person, for instance:

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*«August 16, 2014. I went up to the investigator (she was not on duty on that day and it was Saturday). There was a young man, approximately 20 years old (a gypsy) in front of her. [...] He was wearing jeans and shoes, and had no top garments (shirt) on. There was one large red bruise and 4-5 small bruises on his back (resembling traces of sticks or bats, elongated, up to 10 cm). The apprehended person was allowed to put his shirt on; it had bloodstains and rips near the sleeve.*

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<sup>41</sup> Interviews with apprehended persons.

<sup>42</sup> Interviews with apprehended persons.

<sup>43</sup> Interviews with apprehended persons.

<sup>44</sup> Interviews with apprehended persons.

<sup>45</sup> Interviews with apprehended persons.

*The apprehended person told me, "In the morning, two policemen came and started hitting me on my head with their fists, on my back and legs with the bats. One of them kicked me in the stomach. At the same time, they were not asking or explaining anything»<sup>46</sup>.*

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In decisions on unlawful use of physical force towards detained persons, the ECHR indicated the following:

- ▶ detained persons are in a vulnerable position, and the State is under an obligation to protect their well-being<sup>47</sup>;
- ▶ in respect of a person deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention<sup>48</sup>;
- ▶ ill-treatment and torture of people deprived of liberty, as well as lack of effective investigation into allegations of such ill-treatment are systemic issues in Ukraine<sup>49</sup>.

Conditions of detention of apprehended persons, as a component of treatment, was also examined during research since inadequate conditions (lack of access to food and water for a long time, lack of possibilities to sleep) are considered ill-treatment under international legal standards.

It is symptomatic that some investigators who participated in the research openly considered that they should not bother themselves with conditions of detention of apprehended persons. For example:

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*«Researcher: By the way, in the same case the attorney complained that you were not providing the suspect with food, that it is torture etc.*

*Investigator: I don't have to feed him. Why would I? According to the rules, there is a person responsible for detainees. Do I also have to feed him? I also had no food for entire day then. So we were equals»<sup>50</sup>.*

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In addition, investigators are directly involved in keeping apprehended persons in inhuman conditions, for instance:

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*«The apprehended person was exhausted. He has not slept for over a days, has not eaten. Therefore, we refused so he could sleep.*

*14-58. The attorney came out from the apprehended person, 'He still has not been provided with food. Both the investigator and the officer on duty confirmed this. I will write a complaint to the prosecution and speak to the chief of investigation'.*

*15-10. The lawyer is writing a complaint in the hall. The investigator comes.*

*Lawyer: Why have you not given him food?*

*Investigator: I don't have to give him food.*

*Lawyer: Why did you not request food?*

*Investigator: Read the law. I don't have to do this.*

*15-24. Police escort took the apprehended person to the investigating judge 'for a sanction' (consideration of a motion for measures of restraint)*

*15-40. The lawyer comes out to the hall after speaking to the investigator's superior. 'I wrote a complaint about the failure to request food. The apprehended person has not eaten over a day and a half'»<sup>51</sup>.*

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<sup>46</sup> Observation notes.

<sup>47</sup> See Sarban v. Moldova, ECHR, № 3456/05, 4 October 2005; Mouisel v France, № 67263/01, ECHR 2002-IX.

<sup>48</sup> See Sheydayev v. Russia, ECHR, № 65859/01, 7 December 2006; Ribitsch v. Austria, ECHR, № 18896/91, 4 December 1995.

<sup>49</sup> Kaverzin v. Ukraine, ECHR, Application no. 23893/03, 15 May 2012.

<sup>50</sup> Interviews with investigators.

<sup>51</sup> Observation notes.

In the framework of this research, there were other instances where apprehended persons did not receive food and water, opportunities for sleep and other minimal conditions at the stations of the bodies of internal affairs:

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*«August 6, 2013, 22-30. Field officer of the crime detection unit brought an apprehended person to the department. The apprehended persons spent the entire night in his office until 15-25 of the next day, August 7, 2014, without food or water.*

*August 7, 2014, 17-15. The investigator, the apprehended person and two field officers leave the investigators' office and are heading towards the THF. They meet the legal representative at the door (time of arrival – 17-19).*

*The representative took the money and went to the store across the street. Five minutes later, he brought two bags with food, cigarettes, and put them on the table. The chief of the station did not allow eating food and told him to wait until placement into the cell. The apprehended person was standing the entire time. This person spent almost 19 hours without food or water»<sup>52</sup>.*

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Placement of apprehended persons into specialized facilities is important in ensuring adequate treatment of detained. According to current legislation, apprehended persons can only be held in premises “for apprehended persons and persons taken into custody at stations of the bodies of internal affairs”, or in THFs with appropriate conditions, i.e. three hot meals, possibility for sleep etc.

The legislation does not provide for any other places of detention for apprehended persons. However, research shows that officials of the bodies of internal affairs keep apprehended persons in inhuman conditions in offices and other premises for long periods (overnight and more), in particular:

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*«Researcher: When were you apprehended?*

*Apprehended person: Yesterday (August 11), at around 5-6 p.m. I was apprehended and brought to the department.*

*Researcher: Where did you spend this night?*

*Apprehended person: In the investigator's office»<sup>53</sup>;*

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*«At 21-15, officials of the crime detection unit brought three young men, [...] they decided that the latter would stay in the office of field officers until the morning»<sup>54</sup>;*

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*«[...] The apprehended person told me he had been detained at around midnight. He was kept at this department until 12 in an office on the third floor»<sup>55</sup>.*

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Consequently, it is important to emphasize that even when physical or psychological violence or pressure is not used towards the apprehended person, but the person under control of the State is subjected to conditions and procedures that result in physical and/or psychological damage, regardless of circumstances and objectives of such procedure, it constitutes a violation of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

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<sup>52</sup> Observation notes.

<sup>53</sup> Interviews with apprehended persons.

<sup>54</sup> Observation notes.

<sup>55</sup> Observation notes.

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## 3. Right to information

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### 3.1. Normative regulation of the right to information in criminal proceedings

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#### International standards

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##### *Convention for the Protection of Human Rights and Fundamental Freedoms*<sup>56</sup>:

- ▶ Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him (article 2§5);
- ▶ Everyone charged with a criminal offence has the following minimum rights: to be informed promptly, in a language, which he understands, and in detail, of the nature and cause of the accusation against him (article 3§6(a)).

##### *International Convent on Civil and Political Rights*<sup>57</sup>:

- ▶ Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him (article 2§9);
- ▶ In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: to be informed promptly and in detail in a language, which he understands of the nature and cause of the charge against him (article 14§3(a)).

##### *Standards of the European Committee for the Prevention of Torture*<sup>58</sup>:

- ▶ Persons taken into police custody should be expressly informed without delay of all their rights, including those referred to in paragraph 36 (the right of the person concerned to have the fact of his detention notified to a third party of his choice (family member, friend, consulate), the right of access to a lawyer, and the right to request a medical examination by a doctor of his choice (paragraph 37);
- ▶ Rights for persons deprived of their liberty will be of little value if the persons concerned are unaware of their existence. Consequently, it is imperative that persons taken into police custody are expressly informed of their rights without delay and in a language which they understand. In order to ensure that this is done, a form setting out those rights in a straightforward manner should be systematically given to persons detained by the police at the very outset of their custody. Further, the persons concerned should be asked to sign a statement attesting that they have been informed of their rights (paragraph 44).

##### *Case law of the European Court of Human Rights*<sup>59</sup>:

Any person arrested must receive information so as to be able to challenge lawfulness of their arrest. According to the ECHR, “anyone entitled to take proceedings to have the lawfulness of his detention speedily decided cannot make effective use of that right unless he or she is promptly and adequately informed of the reasons relied on to deprive him of his liberty”<sup>60</sup>.

<sup>56</sup> Official Journal of Ukraine, 16.04.1998 — 1998, № 13, / № 32 dd. 23.08.2006 /, p. 270.

<sup>57</sup> [http://zakon4.rada.gov.ua/laws/show/995\\_043](http://zakon4.rada.gov.ua/laws/show/995_043).

<sup>58</sup> <http://www.cpt.coe.int/lang/ukr/ukr-standards.pdf>.

<sup>59</sup> Right to Information in Criminal Proceedings. Toolkit for legal practitioners for defense guaranteed by the state/Open Society Justice Initiative [[http://ulaf.org.ua/wp-content/uploads/2013/12/BPD\\_poradnyk\\_2.pdf](http://ulaf.org.ua/wp-content/uploads/2013/12/BPD_poradnyk_2.pdf)].

<sup>60</sup> Shamayev and Others v. Georgia and Russia, ECHR, 12 April 2005, § 413.

### Simple language

Information must be conveyed in a manner that would allow a person to understand it, i.e. “in simple, non-technical language”, and include “legal and factual grounds” for arrest<sup>61</sup>. In *Fox, Campbell and Hartley v. the United Kingdom*, the Court stated that bare indication by the arresting officer of the legal basis for the arrest on suspicion of being terrorists was insufficient. Instead, it was necessary to inform them about the grounds for suspicion of their “involvement in specific criminal acts and their suspected membership of proscribed organizations”<sup>62</sup>.

### “Prompt”

ECHR requires that information shall be provided promptly, i.e. either immediately or as soon as possible following deprivation of liberty. ECHR avoided defining any maximum term. For instance, in *Kaboulov v. Ukraine*, the applicant was arrested with a view to deportation; and the Court held that a forty minutes’ delay in informing the applicant of the reasons for his arrest would not, prima facie, raise an issue under Article 5§2<sup>63</sup>. However, in *Saadi v. the United Kingdom*, the Court found a violation of Article 5§2 when an asylum-seeker was informed of reasons for his detention at the temporary detention centre only seventy-six hours after the arrest and detention<sup>64</sup>.

### Right to be informed of the nature and cause for accusation

When a person is charged with a criminal offence, state agents have an additional duty to actively provide detailed information on accusation and ensure that the accused fully understands it. According to Article 6§3a, everyone charged with a criminal offence must “be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him”. The ECHR explained the reasoning behind this provision: “the accused must at any rate be provided with sufficient information as is necessary to understand fully the extent of the charges against him with a view to preparing an adequate defense”<sup>65</sup>.

The adequacy of the information must be assessed in relation to sub-paragraph (b) of paragraph 3 of Article 6, which confers on everyone the right to have adequate time and facilities for the preparation of their defense, and in the light of the more general right to a fair hearing embodied in paragraph 1 of Article 6<sup>66</sup>.

### Positive duty

Providing information on the nature and cause of accusation is a positive duty that requires action by prosecution or police. Providing information solely upon request is insufficient: ECHR stated that the “duty rests entirely on the prosecuting authority’s shoulders and cannot be complied with passively by making information available without bringing it to the attention of the defense”<sup>67</sup>. It may require the authorities to take additional action with the purpose of directing the suspect’s attention to available information and ensuring adequate understanding of such information<sup>68</sup>. The mere access to case files or information about evidence by the accused does not release the prosecution from its obligation to inform the accused promptly and in detail of the full accusation against him<sup>69</sup>.

### Language and manner of information

Article 6§3(a) does not impose any special formal requirement as to the manner in which the accused is to be informed of the nature and cause of the accusation against him. In certain circumstances, oral notification can be sufficient<sup>70</sup>, whereas in other cases the ECHR concluded that circumstances required written notification, in

<sup>61</sup> *Fox, Campbell and Hartley v the UK*, ECHR, 30 August 1990, § 40.

<sup>62</sup> *Fox, Campbell and Hartley v the UK*, ECHR, 30 August 1990, § 40.

<sup>63</sup> *Kaboulov v. Ukraine*, ECHR, 19 November 2009, § 147.

<sup>64</sup> *Saadi v. The United Kingdom*, ECHR, 29 January 2008, § 84-85.

<sup>65</sup> *Mattoccia v Italy*, ECHR, 25 July 2000, § 60.

<sup>66</sup> *Vaudelle v France*, ECHR, 30 January 2001, § 35; *F.C.B. v Italy*, ECHR, 28 August 1991, § 29.

<sup>67</sup> *Mattoccia v Italy*, ECHR, 25 July 2000, § 65.

<sup>68</sup> *Brozicek v Italy*, ECHR, 19 December 1989, § 41; *Kamasinski v Austria*, ECHR, 19 December 1989, § 79; *Mattoccia v Italy*, ECHR, 25 July 2000, § 65.

<sup>69</sup> *Mattoccia v Italy*, ECHR, 25 July 2000, §§ 64-65.

<sup>70</sup> *Pélissier and Sassi v France*, ECHR, 26 March 1999, §53.

particular when “a defendant not conversant with the court’s language may in fact be put at a disadvantage if he is not also provided with a written translation of the indictment in a language he understands”<sup>71</sup>.

### Content

As to the information provided to the accused, s/he must be made aware at least of “the material facts alleged against him which are at the basis of the accusation, and of the nature of the accusation, namely, the legal qualification of these material facts”<sup>72</sup>. The scale, degree of detail and preciseness of information conveyed to the suspect, as well as time requirements, depend on complexity and nature of each individual case<sup>73</sup>. For instance, in *Brozicek v. Italy*, the Court held that the level of detail provided was sufficient and complied with requirements of Article 6§3(a), since “it sufficiently listed the offences of which he was accused, stated the place and the date thereof, referred to the relevant Articles of the Criminal Code and mentioned the name of the victim”<sup>74</sup>. Instead, vagueness of information on date and place of alleged offence is unacceptable. In *Matoccia v. Italy*, the Court found violations of Article 6§§3(a) and (b) in conjunction with Article 6§1 of the ECHR, emphasizing that “the provision of full, detailed information concerning the charges against a defendant is an essential prerequisite for ensuring that the proceedings are fair”<sup>75</sup>.

### Promptness

Article 6§3a requires for prompt provision of information at preliminary stages of proceedings. In *Matoccia v. Italy*, the ECHR criticized state authorities for failure to provide sufficient information prior to interrogation by police and ensure access to prosecution file before the end of preliminary investigation<sup>76</sup>.

## National legislation

According to Article 29§3 of the Constitution of Ukraine, everyone arrested or detained shall be informed without delay of the reasons for his or her arrest or detention, apprised of his or her rights, and from the moment of detention shall be given the opportunity to personally defend himself or herself, or to have the legal assistance of a defender.

According to Article 42§3(1) and (2) of the Criminal Procedure Code of Ukraine, the suspect, accused shall have the right to be informed, expressly and promptly, of his rights as laid down in this Code and have such rights explained.

Article 208§4 of the Criminal Procedure Code states that a competent official who apprehended the person, shall be required to immediately inform the apprehended person, in understandable language:

- ▶ of the grounds for the apprehension and of the commission of what crime he is suspected;
- ▶ as well as of the right to involve a defense counsel, receive medical assistance, give explanations, testimonies or keep silence regarding the ground for suspicion against him;
- ▶ inform promptly other persons of his apprehension and whereabouts in accordance with Article 213 of this Code;
- ▶ demand verification of the validity of apprehension, and of other procedural rights specified in the Criminal Procedure Code.

Importantly, since the new Criminal Procedure Code entered into force in November 2012, there has been an ongoing discussion within expert community on definition of the term “competent official” as the Code does not provide such definition. As a result, some experts consider that a “competent official” is an official vested with the right to procedural record of apprehension. Consequently, the investigating officer has an obligation to inform the apprehended person of his/her rights.

<sup>71</sup> *Kamasinski v Austria*, ECHR, 19 December 1989, §79.

<sup>72</sup> *Matoccia v Italy*, ECHR, 25 July 2000, § 59. See also *Pélessier and Sassi v France*, ECHR, 26 March 1999, §51.

<sup>73</sup> *Matoccia v Italy*, ECHR, 25 July 2000, § 60.

<sup>74</sup> *Brozicek v Italy*, ECHR, 19 December 1989, § 42.

<sup>75</sup> *Matoccia v Italy*, ECHR, 25 July 2000.

<sup>76</sup> *Matoccia v Italy*, ECHR, 25 July 2000, §§ 63-64.

In our view, this interpretation of the term “competent official” is incorrect and creates room for abuse by law enforcement. This interpretation would mean that an official of the patrol service, a precinct inspector or an officer of the operations unit does not have to comply with requirements of the Criminal Procedure Code on immediate appraisal of one’s rights while apprehending a person.

In addition, Article 276§2 actually states that the term “competent official” has a broader meaning and includes the terms “investigating officer”, “prosecutor”, and other officials vested with the right to apprehend someone. It is not just a matter of the criminal procedure law, but also other laws. For instance, Article 11 of the Law of Ukraine “On Militsiya” vests militsiya officials with the power to apprehend and detain people suspected of committing criminal offences in specialized facilities.

Accordingly, any militsiya official has the power to apprehend a person and, consequently, has an obligation to comply with the requirements of the criminal procedure legislation on informing the apprehended about their rights immediately after apprehension.

The old criminal procedure legislation distinguished physical and procedural apprehension of a person. A person was considered apprehended only following procedural documentation of the process, namely compiling a protocol. Consequently, a person acquired certain rights only upon receiving certain procedural status (suspect or accused). As a result, de facto apprehended person was deprived of any protection from the moment of physical apprehension until the protocol of apprehension was written. Surely, this created grounds for multiple abuses by law enforcement.

The new Criminal Procedure Code, giving a clear definition of the moment of apprehension, solved the problem. According to Article 209, an individual is considered to be apprehended if he/she, with the use of force or through obedience to the order, has to stay next to the competent official or in premises prescribed by the competent official. Thus, in our view, the term “promptly” in this context has to mean that a competent official authorized to conduct apprehension has a duty to explain the person’s rights immediately after the moment when the person, with the use of force or through obedience to the order, has to stay next to the competent official or in premises prescribed by the competent official.

According to Article 212§1, one or more officials responsible for keeping those apprehended shall be designated in the pre-trial investigation agency’s department. According to section 3 of this article, these persons have the duties to advise the apprehended person of the grounds for apprehension, his rights and duties.

According to Article 208§5 of the Criminal Procedure Code, on apprehension of a person suspected of the commission of crime, a report shall be drawn up in which, in addition to other information, the comprehensive list of procedural rights and duties of the apprehended person shall be indicated. The report on apprehension shall be signed by the person who draw it up, and the apprehended person. A copy of the report shall be immediately handed over to the apprehended person against signature and also sent to prosecutor.

Article 42§8 of the Criminal Procedure Code provides that the accused shall be issued a letter listing his procedural rights and duties as the same as same are brought to his notice by the notifying officer.

Requirement on the manner of providing information are contained in Article 5§8 of the Law on Ukraine “On Militsiya” whereby some rights are explained in oral manner, and some of them are provided in written form. For instance, at apprehension or arrest (detention) militsiya officials shall explain to the person the following:

*in oral form: clarification of Article 63§1 of the Constitution of Ukraine, the right to refuse testify or to provide explanations prior to arrival of the defender and simultaneously in written form: clarifications of Article 28 (Everyone shall have the right to have his dignity respected), 29 (Every person shall have the right to freedom and personal inviolability), 55 (Human and citizen rights and freedoms shall be protected by court), 56 (Everyone shall have the right to compensation, at the expense of the State authorities or local self-government bodies, for material and moral damages caused by unlawful decisions, actions, or inactivity of State power, local self-government bodies, officials, or officers while exercising their powers), 59 (Everyone shall have the right to legal assistance. Such assistance shall be rendered free of charge in cases stipulated by law. Everyone shall be free to choose the defender of his rights), 62 (A person shall be presumed innocent of committing a crime and*

shall not be subjected to criminal punishment until his guilt is proved through a legal procedure and established by a court verdict of guilty) and 63 (A person shall not bear responsibility for refusing to testify or to provide explanations about himself/herself, members of his/her family, or close relatives, the circle of whom is determined by law) of the Constitution of Ukraine and the rights of apprehended or arrested (detained) persons established by the law, including the right to defend his/her rights and interests personally or through a defendant from the moment of apprehension or arrest (detention, the right to refuse to provide any statements or testify prior to arrival of the defender.

Instruction on organization of the functioning of stations of bodies and units of interior affairs of Ukraine<sup>77</sup> also provides for a Letter for apprehended persons that contains detailed description of the rights of apprehended persons and their clarification. The Instruction provides for only one option of the letter in Ukrainian language. Current legislation does not contain obligations to verify whether the suspect/defendant understands the rights indicated in the letter.

The legislation has no provisions on the need to verify the understanding of their rights and duties by children or persons with mental disabilities.

At the same time, there are general norms regulating the obligation to explain to the apprehended person his/her rights (Article 29§3 of the Constitution of Ukraine, articles 42, 276 of the Criminal Procedure Code of Ukraine etc.)

Importantly, according to Article 10§1 of the Criminal Procedure Code, categories of people such as minors or people with mental and physical disabilities enjoy additional guarantees during criminal proceedings. According to Article 52§2 of the Criminal Procedure Code, involvement of a defender in criminal proceedings in relation to these groups is obligatory.

In addition, according to Article 213§2 of the Criminal Procedure Code, in case of apprehension of a minor a competent official who conducted the apprehension is under an obligation to inform immediately his/her parents or guardians, relevant guardianship authorities.

## 3.2. Information on rights

### 3.2.1. Process of informing suspects of their rights

In the framework of this study, we attempted to identify how the process of informing of apprehended persons takes place, what rights they are notified of, as well as the time and manner of notification.

#### *General awareness of apprehended persons about their rights*

According to law enforcement officials and attorneys, the level of awareness of an apprehended persons depends primarily on two factors: level of education and previous “criminal” experience. Educated people and those who had previously faced criminal charges are much better informed

<sup>77</sup> Adopted by the Order of the MIA of Ukraine #181 dated April 28, 2009.

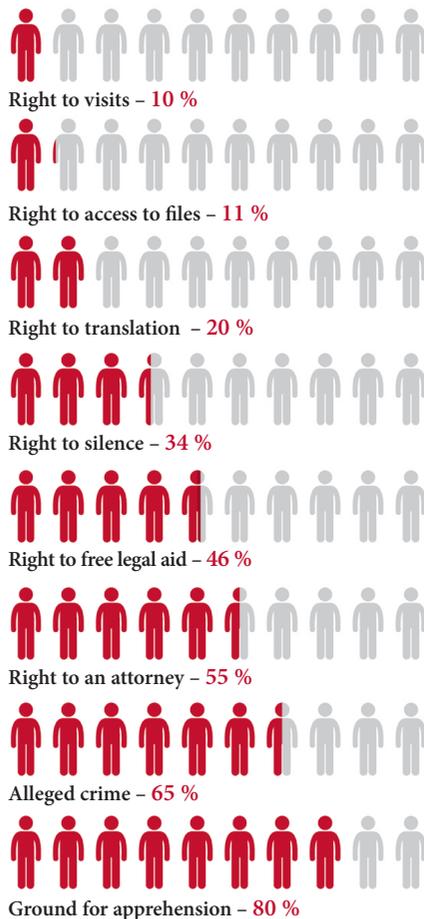


Figure 3.1. The suspect received information on

about their rights than those who are detained for the first time and do not have high-level education:

«Apprehended persons who need free legal aid usually are not aware of their rights, and if they are aware, they are not able to exercise them properly. It is a category of people who are not educated enough and can be easily influenced»<sup>78</sup>;

«No, definitely no, they don't know their rights. Perhaps, only those with specific education or engaged in entrepreneurship, or those who had dealt with attorney under certain circumstances»<sup>79</sup>;

«Only if those who had previously faced criminal charges or have other experience of dealing with the law enforcement know their rights before clarification. If it is the first time, and the person is not a lawyer, how would they know about their rights in criminal proceedings?»<sup>80</sup>;

«They do not always know. Drug addicts rarely know their rights or even if they do/did, they do not realize it; they are completely lost. It also depends on the level of education. It depends on how many time before the person was “caught” and on what charges as, for instance, fraud artists and robbers have different level of knowledge»<sup>81</sup>;

«Most committed crimes are against life and health of a person and property crimes. Many of the apprehended persons are repeat offenders. Consequently, someone who had been apprehended before definitely knows»<sup>82</sup>;

«If a person was convicted, s/he has experience and knows all the rights. If not, it depends on education and common knowledge. However, if someone had not faced charged previously, s/he usually is not aware of his/her rights. Maybe, they know the basics about the attorney and [article] 63»<sup>83</sup>.

Figure 3.1 represents responses of people who received information about their rights in relation to apprehensions on suspicion of criminal offence. As one can see, apprehended persons usually receive information about grounds of apprehension (80%) and the suspected offence (65%). Approximately half of apprehended persons (who received information about their rights) were informed about the right to have an attorney and the possibility of free legal aid (55 and 44% respectively). Only in 34% of cases, the law enforcement provided information about the right to refuse to answer questions.

Figures 3.2 and 3.3. illustrate that written notification about rights is slightly more widespread than an oral one (31% and 21% respectively).

<sup>78</sup> Interviews with attorneys.

<sup>79</sup> Interviews with attorneys.

<sup>80</sup> Interviews with attorneys.

<sup>81</sup> Interviews with law enforcement officials.

<sup>82</sup> Interviews with law enforcement officials.

<sup>83</sup> Interviews with law enforcement officials.

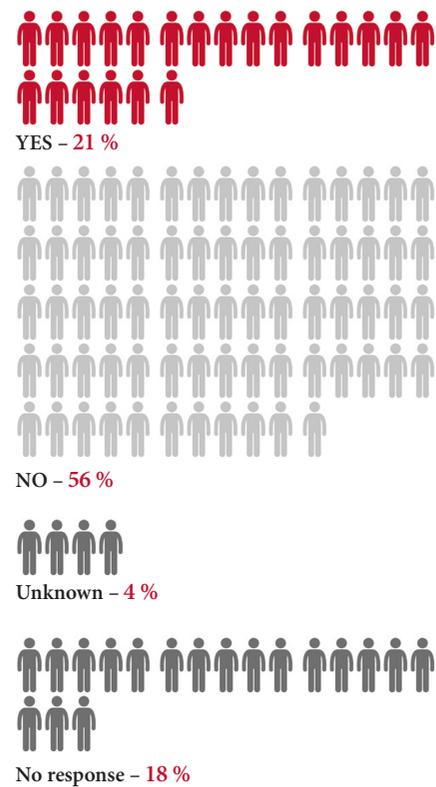


Figure 3.2. Information about procedural right is provided in oral format

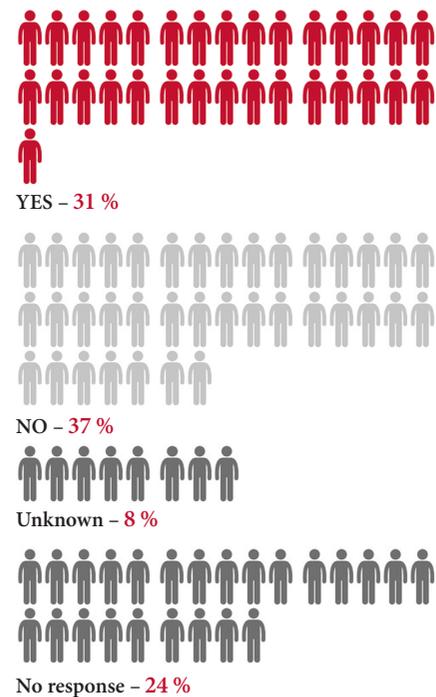


Figure 3.3. Information about procedural right is provided in written format

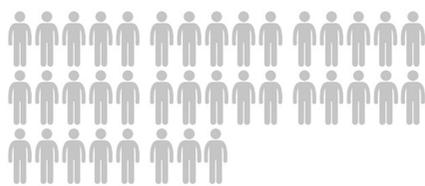
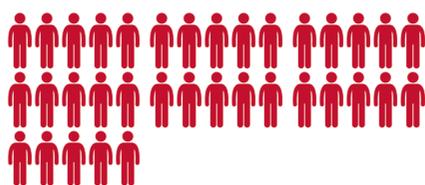


Figure 3.4. Information about procedural right is provided properly

However, even when the apprehended person was informed about his/her rights, only in 35% of monitored cases the information was proper (Figure 3.4). In most cases, the process of informing was very formal, and the person did not receive information about the complete list of rights prescribed by law, or there was not adequate clarification:

«Before interrogation, the investigating officer started to explain the defendant's right to him, but another police official entered the room and interrupted so the officer did not finish the explanation. The apprehended person did not receive a letter of rights»<sup>84</sup>;

«The investigating officer gave the apprehended person a report and told him where to put his signature. He explained that he does not know how to do it. She responded, "Just put an X", and did that. None of those present explained any rights, the report was not read out. Also, a letter of rights was given yet it was not read out»<sup>85</sup>;

«The investigating officer gave a report on apprehension and the letter of rights without providing any explanation. He showed where to sign, and the apprehended person signed»<sup>86</sup>;

«Investigating officers asked OBON officers (filed officers – ed.) whether they had the letter of rights and obligations of the apprehended person. The former said that they have no duty to be concerned about these "investigatory documentation" and rights or detainees and suspects. They decided that the letter of rights will be given to the suspect in the car during transfer to temporary holding facility»<sup>87</sup>;

«The apprehended person signed the letter of rights. The other copy was given to him by the investigating officer to look at in the THF»<sup>88</sup>;

«I was only informed about the right to a defender, but I did not know about free legal aid. I do not want to have any attorney now. I know what I violated so I do not need any defense. Nobody informed me about other rights»<sup>89</sup>.

It is important to add that survey results are supported by information received from interviews with attorneys. Most interviewed attorneys emphasized the formal character of informing the apprehended person with his/her rights by law enforcement officials:

«There were multiple instances in my practice where the investigating officer would explain the rights to the suspect in such manner that even I cannot understand anything from his words. What about a suspect who is stressed? Of course, s/he will not understand anything»<sup>90</sup>;

<sup>84</sup> Observation notes.

<sup>85</sup> Observation notes.

<sup>86</sup> Observation notes.

<sup>87</sup> Observation notes.

<sup>88</sup> Observation notes.

<sup>89</sup> Observation notes.

<sup>90</sup> Interviews with attorneys.

«In majority of cases, suspects are not aware of their rights. Clarification of rights to the suspect by law enforcement is formal and limited to the suspect signing procedural documents where certain procedural rights of the suspect are indicated»<sup>91</sup>.

During interviews with attorneys, an opinion was voiced several times that apprehended persons are “intimidated by the law enforcement officials” thus, they do not insist or ask for clarification of their rights:

«Majority of suspects are afraid to ask the law enforcement for clarification of their rights, and the law enforcement officers often treat suspects as if their guilt was proven and do not support suspects in exercise of their rights»<sup>92</sup>;

«Those (apprehended persons – ed.) who know their rights to some extent usually are afraid to exercise them in order not to infuriate investigating authorities. During actual apprehension of suspects nobody informs them about their rights either in oral form or in written»<sup>93</sup>.

In addition, some attorneys think that law enforcement officers are not interested in providing complete information about rights to the apprehended person since it might harm investigation process:

«You see, it is unbeneficial for investigating officers to inform the detainee about all his rights since they would receive no information. Accordingly, how can we talk about clarification? Recently, I had a case where a woman charged with murder was apprehended. She could not read or write. I was reading her the letter of rights, and the investigating officer asked me to abridge the contents (to save time). It was a special case, and a serious charge. In most cases they give the letter and show where to sign, and this is where clarification of rights stops»<sup>94</sup>.

When exactly does an apprehended person receive information about his/her rights? The diagram below provides an answer to this question (Figure 3.5).

Despite clear obligation of the law enforcement officials to inform apprehended persons about their rights immediately after apprehension, in practice, legal provisions are often violated. For instance, Figure 3.5 shows that only in 1% of observed cases information was provided directly at the place of apprehension, in 8% of cases – shortly after apprehension. In the meantime, no information about rights was provided to the apprehended person in 35% of cases.

The following vivid example of the lack of information about rights during apprehension comes from the monitoring notes taken during a conversation between an attorney and an apprehended person at the police department:

91 Interviews with attorneys.  
 92 Interviews with attorneys.  
 93 Interviews with attorneys.  
 94 Interviews with attorneys.

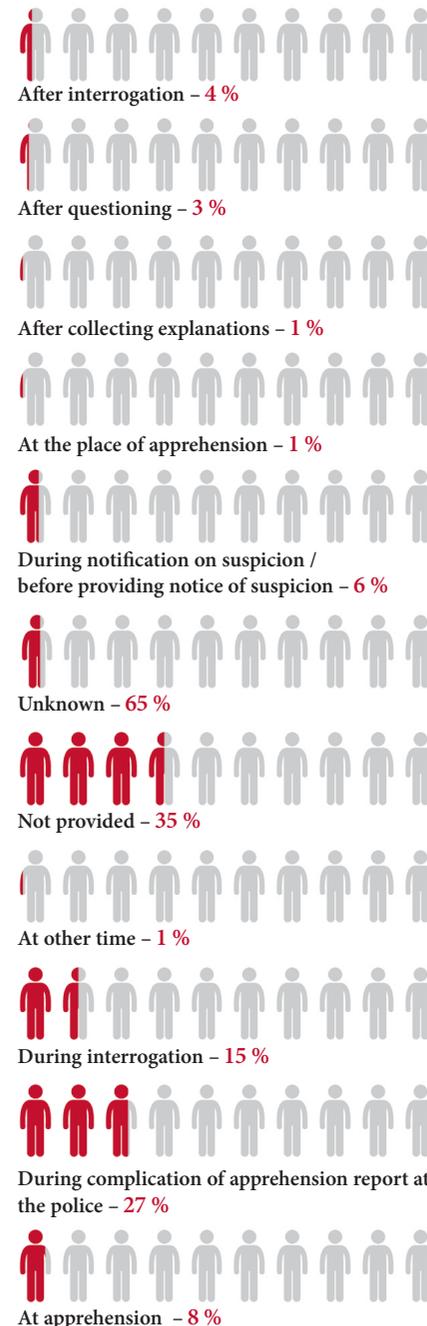


Figure 3.5. Information about procedural right provided to the apprehended person

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«Attorney. Well, did they not tell you that you had a right to a defender or any other rights? Did they just take you and bring you to police?

Apprehended person. They did not tell me anything and just took me to the station.

Attorney. Well, did you understand your right not to answer questions?

Apprehended person. I did not even know about this right and, of course, I did not understand it.

Attorney. Were you aware of your right to consult with an attorney before interrogation?

Apprehended person. I was not aware of the possibility to consult with an attorney before interrogation»<sup>95</sup>.

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We should emphasize that in one third of cases (27%) this information was provided to the apprehended person already during the process of drawing up the report on apprehension or during interrogation (15%), or during notification of suspicion (6%), i.e. long after the physical apprehension.

Consequently, investigating officers actually provide information about the rights of an apprehended person only after receiving necessary testimony. Accordingly, one can find out about having a right to refrain from answering questions or testifying against her/himself only after providing information about circumstances of the offence. The following interview with an apprehended person serves as an illustration:

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«The investigating officer finished the interrogation, printed the report and gave it for examination and signing to the suspect. At this point, the other investigating officer printed out [information about] the rights during interrogation and gave it to the suspect, asked to sign each sheet to put it into the case file»<sup>96</sup>;

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«The investigating officer told the apprehended person to write at the bottom “my words were recorded correctly, I have no complaints or comments”, as well as to put a signature on the front page. He said, “Here are your rights – take a look!»<sup>97</sup>;

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«After receiving explanation from the apprehended person, the investigating officer printed it out and gave it for examination. She put ticks where a signature was necessary and told the suspect to look at his constitutional rights»<sup>98</sup>.

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In addition, there are instances of blatant deception of the suspect with the aim of receiving testimony in the case. For instance:

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«The investigating officer explained that an apprehended person can change the testimony or “say nothing at all” according to the Criminal Procedure Code, but he has to remember that investigating officer will provide his personal characteristic in court, and unwillingness to speak will serve as an evidence of the lack of repentance of crime»<sup>99</sup>;

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«Every apprehended person is responsible for himself. I cannot force someone to read the complete apprehension report or the letter of rights of the suspect, as well as understand what is written there. I explain only things that depend on me: that your behavior affects what term of imprisonment the investigating officer and prosecution will suggest in court, that sincere confession and support to investigation are serious attenuating circumstance etc. He will then chose the course of action»<sup>100</sup>;

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«The apprehended person asked whether it was possible to call his attorney. He was told there was no need for an attorney since there would be no investigating procedures»<sup>101</sup>.

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<sup>95</sup> Observation notes.

<sup>96</sup> Observation notes.

<sup>97</sup> Observation notes.

<sup>98</sup> Observation notes.

<sup>99</sup> Observation notes.

<sup>100</sup> Interviews with law enforcement officials.

<sup>101</sup> Observation notes.

### 3.3. Information about grounds for apprehension and the nature of alleged offence

As noted above, current legislation has a number of provisions on the obligation to inform the apprehended person about the grounds for apprehension and the nature of alleged offence.

However, in practice, information is not always provided in an adequate manner. As Figure 3.6 illustrates, in 80% of monitored cases, the apprehended persons were informed about grounds for apprehension, whereas only 60% were informed about the nature of alleged offence (see Figure 3.7).

This seemingly paradox discrepancy stems from practice where by far not in all cases the apprehended persons are informed about real grounds for apprehension on the spot. For instance, during monitoring researchers observed cases when persons were called in by police officers for “conversations” or other fabricated reasons:

*«Two field officers approached him near his house and asked to come with them due to an inspection at work’. He found out about being charged with murder already in the car»<sup>102</sup>;*

*«The reason for visiting the station was indicated as ‘for a conversation’»<sup>103</sup>.*

During research, there were cases when a person was asked to come to the law enforcement authorities as a witness while the person was suspected of committing a crime, which is a gross violation of the legislation. According to Article 87§2(6) of the Criminal Procedure Code, the court shall be required to find significant violations of human rights and fundamental freedoms in case of obtaining testimonies from a witness who subsequently will be found a suspect or accused in these criminal proceedings.

It is rather difficult to check whether a person was actually notified of the real grounds for apprehension from the onset. The first official document that contains primary charges is the report on apprehension, a copy of which shall be immediately provided to the apprehended person and sent to the prosecutor (Article 208§5 of the Criminal Procedure Code).

However, the Criminal Procedure Code has no clear requirement for the time of drawing up the report on apprehension. There is also no requirement on promptness of interrogation of the apprehended person. As a result, real grounds for apprehension are revealed to the person even several hours after the actual apprehension, following various “conversations” with field officers.

#### Notice of suspicion

Notice of suspicion is the next stage in informing a person about the alleged crime. According to law, written notice of suspicion shall be served

<sup>102</sup> Observation notes.  
<sup>103</sup> Observation notes.

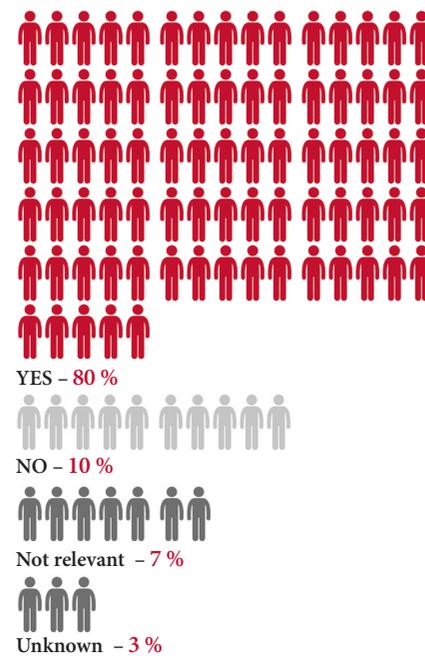


Figure 3.6. The suspect received information about grounds for apprehension

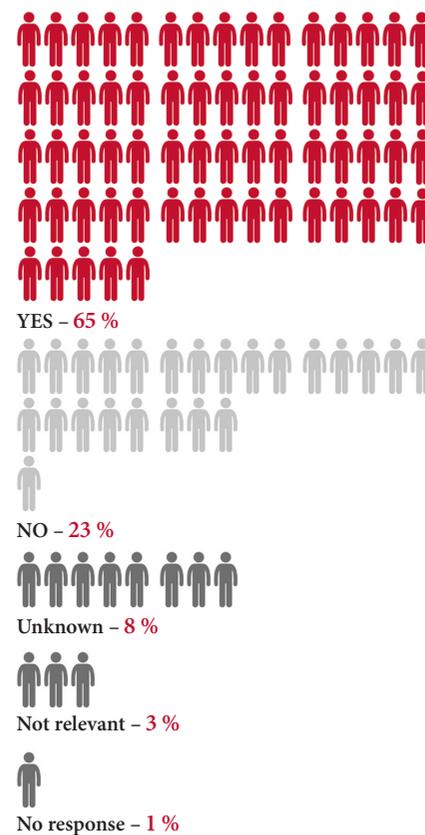


Figure 3.7. The suspect received information about the alleged crime

the day on which it has been drawn up within 24 hours after he has been apprehended by investigator or public prosecutor, and if it appears impossible to serve it, in the way prescribed by the Criminal Procedure Code for serving notifications. In case a person has not been served the notice of suspicion after 24 hours elapsed after the moment of his apprehension, such person is subject to immediate release.

According to Article 277 of the Criminal Procedure Code, notice of suspicion shall be drawn up by public prosecutor or by investigator upon approval of public prosecutor. In addition to other information, it shall contain the following:

- ▶ contents of the suspicion;
- ▶ legal qualification of criminal offense of the commission of which the person is suspected with indication of Article (Article part) of Ukraine's law on criminal liability;
- ▶ brief description of actual circumstances of criminal offence of which the person is suspected, including time, place of the commission of criminal offence, as well as other essential circumstances, which are known at the time of notifying of the suspicion.

Date and time of serving the notice of suspicion, legal qualification of criminal offense of the commission of which the person is suspected, with indication of Article (Article part) of Ukraine's law on criminal liability, shall be immediately entered by investigator, public prosecutor to the Integrated Register of Pre-Trial Investigations.

Since notification of suspicion takes place at a later stage of pre-trial investigation, it was not possible in the framework of present research to observe the process on information on the alleged crime on the stage of notifying on suspicion.

At the same time, analysis of case materials of the Ukrainian Parliament Commissioner for Human Rights points to the conclusion about widespread violations of the rights of apprehended persons at this stage. The Annual Report of the Commissioner for Human Rights<sup>104</sup>, states that

*«by violating requirements for indicating the place, date and exact time (hour and minute) of apprehension provided by Article 209 of the Criminal Procedure Code of Ukraine, investigators use the lack of prosecution oversight and conceal the time of actual apprehension; they create room for unpunished violations of procedural time limits, whereas a person shall be immediately released when these limits are exceeded.*

*With the same goal in mind, law enforcement officials undertake different manipulations in addition to violations in compilation of procedural paperwork. These manipulations include entry of false data into the official documents of the station, in particular into the Registry of Persons Taken into Custody, Visitors and Invitees, Registry of Applications and Notifications on Criminal Offences and Other Events etc. Often, persons who are brought and held at police stations by force for a long time are included into the registry as invitees or visitors. These cases constitute «unadmitted apprehensions».*

The following example comes from the Annual Report of the Commissioner for Human Rights (2014):

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*«At 5 a.m. on August 29, 2014, V. was apprehended by officials of Sykhiv district police officials of Lviv City immediately after committing a crime. From the moment of apprehension to placement into the THF of Pustomyiv District Department of the MIA Directorate in Lviv region (until 12.30 a.m. on August 30, 2014) he was under constant control of law enforcement officials. However, the Registry of persons taken into custody, visitors and invitees states that on August 29, 2014 V. allegedly was at the department as an invitee of field officers from 07.30 to 10.25 a.m., from 1.35 till 4.25 p.m. he was at the department as an invitee of the investigation, and at 7.25 p.m. he allegedly arrived to the department upon invitation of the investigator, and at 9.51 p.m. was apprehended on suspicion of a crime according to the report drawn up by the investigator. Due to these manipulations, the investigator increased the procedural terms for detention by 16 hours 51 minutes, in particular the term for notification on suspicion – from 24 hours to 40 hours 51 minutes»<sup>105</sup>.*

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<sup>104</sup> Annual report of the Ukrainian Parliament Commissioner for Human Rights, 2014.

<sup>105</sup> Annual report of the Ukrainian Parliament Commissioner for Human Rights, 2014.

During 2014, representatives of the Secretariat of the Commissioner for Human Rights recorded these manipulations with the actual time and circumstances of apprehension leading to significant exceedance of procedural terms, including timeframe for notification on suspicion, in other regions, in particular in Dnipropetrovsk, Kyiv, and Mykolaiv regions. Consequently, this is a systemic violation<sup>106</sup>.

Accordingly, it is possible to conclude that despite existence of clear legal requirements on providing the apprehended person with a copy of the notice on suspicion within 24 hours from actual apprehension, these rules are not followed in practice.

Causes include the lack of proper registration of apprehended persons and forging of the actual time of apprehension. As a result, notification on suspicion take place past the 24-hour deadline.

### 3.4. Access to case files

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#### *Procedure for accessing case records: how and when is this access provided?*

According to Article 42§3, the suspect (accused) has the right to:

- ▶ review records of pre-trial proceedings in accordance with the procedure specified in Article 221 of the Criminal Procedure Code;
- ▶ obtain copies of procedural documents and written notices;
- ▶ request disclosure of records under Article 290 of the Criminal Procedure Code.

Since disclosure of case records takes place at the final stage of pre-trial investigation, let us examine in detail the opportunity to review case records at the initial stage of apprehension.

Before completion of pre-trial investigation, on a motion by defense, victim, the investigator, public prosecutor shall be required to release the records of pre-trial investigation for review, except for the record of security measures initiated in respect of persons participating in criminal justice, as well as the records reviewing which at such stage of criminal proceedings may be to the prejudice of the pre-trial investigation. No denial shall be allowed in making a generally accessible document the original of which is contained in pre-trial investigation files available (Article 221§1 of the Criminal Procedure Code).

A person reviewing the records of pre-trial investigation may take necessary notes and copies (Article 221§2 of the Criminal Procedure Code).

In addition, as noted above, the suspect has the right to receive copies of procedural documents and written notices. It is obligatory to provide the apprehended person with copies of certain procedural documents, including:

- ▶ On apprehension of a person suspected of the commission of crime, a report shall be drawn up in which, in addition to information specified in Article 104 of this Code, the following shall be indicated: place, date and exact time (hours and minutes) of apprehension under Article 209 of this Code; grounds for apprehension; results of personal search; pleas, statements or complaints of the apprehended person, if any; comprehensive list of procedural rights and duties of the apprehended person. The report on apprehension shall be signed by the person who draw it up, and the apprehended person. A copy of the report shall be immediately handed over to the apprehended person against signature and also sent to prosecutor.
- ▶ Written notice of suspicion shall be served to apprehended person within 24 hours after he has been apprehended (Article 278§2).

<sup>106</sup> <http://www.ombudsman.gov.ua/ua/all-news/all-activity/2315-gs-v-mezhax-provazhennya-upovnovazhenogo-perevireno-diyalnist-militsiii/>,  
<http://www.ombudsman.gov.ua/ua/all-news/all-activity/151214-ir-viyavleno-nizku-porushen-dotrimannya-prav-lyudini-v-diyalnosti-pravoox/>,  
<http://www.ombudsman.gov.ua/ua/all-news/all-activity/191214-ss-viyavleno-porushennya-prav-i-svobod-lyudini-v-diyalnosti-pravooxoronn/>.



YES - 56 %



NO - 31 %



Unknown - 1 %



Not relevant - 11%

Figure 3.8. The suspect received information about the right to access relevant document

However, survey results show that in practice the apprehended person often does not have access to his/her case records. Figure 3.8 shows that only in 11% of observed cases the apprehended person was informed about the right to access relevant procedural documents.

The research showed multiple violations of this right of the apprehended person. For instance, there were cases of:

**A. Failure to provide attorneys possibility for examining case records, or impeding access:**

«The investigator has not provided me with case records. He says I should write a request and submit it through the registry, and I submitted it through the registry though according to the Criminal Procedure Code he has the right to receive this request himself»<sup>107</sup>;

«The lawyer reviewed the apprehension report, asked the investigator to provide case records, report on the incident, explanation, and the protocol of questioning of the victim. The investigator went to the neighboring room where deputy chief of investigation department sits. She is asking whether she could give these documents to the attorney. Response 'Not now. Tell them you will provide it later'»<sup>108</sup>;

«As to the evidence, one can only find out through personal contacts. Nobody wants to tell this. Case records are unavailable, they are finding excuses. To see the truth you need to see case records. If you go to this particular department often and everyone knows you there, and knows that you do decent work, they might even tell you something. The best case is when an investigator or field officer is your acquaintance»<sup>109</sup>;

«Usually, the law enforcement officers provide general information about the grounds for detention of a person and are reluctant to provide information about the evidence of prosecution. Sometimes it becomes absurd when, for instance, an investigator from the interior affairs refers to an order of the procedural supervisor, the prosecutor, and refuses to provide pre-trial case records to the attorney prior to completion of pre-trial investigation, whereas this right of the suspect and the defendant is directly provided by article 221 of the Criminal Procedure Code of Ukraine»<sup>110</sup>;

«As a rule, investigator usually provide general information about grounds for arrest of the clients and evidence they have. However, in response to requirement to provide case records for review, investigators usually try to avoid providing them, or provide incomplete records»<sup>111</sup>.

The failure to provide an opportunity for the apprehended person or his/her attorney to review case records was confirmed by law enforcement officials during interviews:

<sup>107</sup> Observation notes.

<sup>108</sup> Observation notes.

<sup>109</sup> Interviews with attorneys.

<sup>110</sup> Interviews with attorneys.

<sup>111</sup> Interviews with attorneys.

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«No, I never provide this information, only petition materials. It is an investigatory privilege. The apprehended person cannot receive case records since they contain all personal data about witnesses, their addresses, and phone numbers. If this information is provided, it poses a threat to them. That is why I don't tell. It is like war where maneuvering in the key. You cannot tell the bandits that I have something on them so they would not guess what to say»<sup>112</sup>;

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«I provide complete access to all materials upon completion of pre-trial investigation during the procedure of examining case records with an attorney. Until that moment, of course, I do not give all records, particularly to the lawyers. They start asking how and where I received it etc.»<sup>113</sup>.

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## **B. Failure to provide copies of procedural documents that are obligatory for provision to the apprehended persons:**

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«The detainee asked for a copy of the report from the investigator, and she refused saying 'you are not worth for me to make copies; I buy the paper with my own money. You have a lawyer, he will take pictures'»<sup>114</sup>;

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«Copy of the report on apprehension is not provided to the apprehended person despite a direct requirement in the Criminal Procedure Code. The apprehended person only makes an entry in the report about receiving a copy of the report on apprehension»<sup>115</sup>;

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«The lawyer asked the investigator to provide a copy of the interrogation report. The investigator said, 'You know I cannot provide it to you. You will receive it upon sanctions. You also cannot take its picture'»<sup>116</sup>.

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## **CONCLUSIONS**

The Constitution of Ukraine, the Criminal Procedure Code, the Law of Ukraine "On Militsiya" and the relevant regulatory acts of the MIA comprise a multi-level system designed to ensure adequate provision of information about rights for every apprehended person at different stages of pre-trial investigation. The legislation clearly defines the list of rights and the group of officials that have an obligation to convey these rights to the apprehended persons, as well as the manner of notification.

Research results suggest that there are significant discrepancies between legal requirements for informing persons apprehended on suspicion of committing a crime about the rights and implementation of legal norms in practice of the law enforcement.

Unfortunately, despite the relevant legislative framework, the standard of prompt informing of the apprehended person about his/her rights is not upheld in practice. The law enforcement officials not only fail to inform the apprehended person about rights at the moment of apprehension, but also in many cases do not explain from the onset of apprehension the grounds for apprehension and the alleged crime that the person is suspected of having committed.

For instance, the research shows that in one third of monitored cases (35 %), apprehended persons were not informed about their rights or notification took place long after the actual moment of apprehension, which is a gross violation of current legislation. Only in 1 % of monitored cases, such information was provided directly at the place of apprehension, and in 8 % of cases – shortly after the apprehension.

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<sup>112</sup> Interviews with law enforcement officials.

<sup>113</sup> Interviews with law enforcement officials.

<sup>114</sup> 3 нотаток за результатами спостережень.

<sup>115</sup> 3 нотаток за результатами спостережень.

<sup>116</sup> 3 нотаток за результатами спостережень.

In practice, the person learns about his/her rights at later stages, after the law enforcement officials receive initial statements whereas information about the rights must be provided prior to conducting any procedural actions.

Gaps in regulatory instruments contribute to the situation. For instance, the annex to the Instruction on organization of the functioning of stations of bodies and units of interior affairs of Ukraine (adopted by the Order of the MIA of Ukraine #181 dated April 28, 2009) contains the Letter for apprehended Persons with a detailed description and clarification of rights. It is problematic, however, that an apprehended person receives the said letter only during placement to the room for persons taken into custody or apprehended. In practice, by no means all apprehended persons get to this room, and even when they do it happens after “communication” with investigating authorities.

However, even when a person is informed about the rights on apprehension, in most cases, police officials do not provide the complete list of rights obtained immediately after apprehension, nor do they provide sufficient clarification. Moreover, there have been instances of deliberate misinformation about the actual content of rights with the purpose of obtaining testimony in the case.

There is no a clear provision establishing liability of an official for failure to inform apprehended persons of their rights. At the same time, Article 5 of the Law of Ukraine “On Militsiya”, which also contains provisions on informing apprehended persons about their rights, states that in case of militsiya officials’ failure to meet the requirements set forth by this article, the person whose rights were violated and/or his/her representatives (relatives, defender) can seek compensation for sustained damage in court in accordance with the procedure established by law.

During research period, there were reported instances of violations of legal norms on providing the apprehended person with procedural documents by militsiya officials. In some cases, even attorneys did not have an opportunity to review case records, which can constitute a crime under article 397 of the Criminal Code of Ukraine as an interference with an activity of a defender or legal agent.

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## 4. Access to an attorney and legal aid

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### 4.1. Normative regulation of the right to legal aid

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The European Convention for the Protection of Human Rights (ECHR) and the International Covenant on Civil and Political Rights are the key documents establishing guarantees for ensuring the right to legal aid.

Provision of legal assistance to individuals and citizens is envisaged by the Constitution and legislation of Ukraine. The legal aid procedure is governed by the Laws of Ukraine “On the Bar and Legal Profession”, “On Free Legal Aid”, on Preventive Detention, and the associated regulations.

#### International Standards

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##### Convention for the Protection of Human Rights and Fundamental Freedoms:

Everyone charged with a criminal offence has the following minimum rights:

(...)

*c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require (Article 6(\$3).*

##### International Covenant on Civil and Political Rights:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(...)

*d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it (§3 Article 14).*

##### Case law of the European Court of Human Rights

###### Role of Legal Aid

*«...Although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial»<sup>117</sup>.*

###### Legal Aid Efficiency

Nominal availability of a defender in criminal proceedings as such does not prove efficiency of legal aid:

*«...Article 6 par. 3 (c) (art. 6-3-c) speaks of “assistance” and not of “nomination”. ...mere nomination does not ensure effective assistance... restrictive interpretation would lead to results that are unreasonable and incompatible with both the wording of sub-paragraph (c) (art. 6-3-c) and the structure of Article 6 (art. 6) taken as a whole; in many instances free legal assistance might prove to be worthless»<sup>118</sup>.*

<sup>117</sup> Krombach v. France, Application no. 29731/96, ECHR judgment, 13 February 2001, §89.

<sup>118</sup> Artico v. Italy, Application no. 6694/74, ECHR judgment, 13 May 1980, §33.

## Time validity Article 6 §3 (c) guarantees

### *Early access to counsel*

The suspect should be represented by an attorney from the very beginning of the criminal prosecution:

*«53...Article 6 will normally require that the accused already be allowed to benefit from the assistance of a lawyer at the initial stages of police interrogation. The rights of the defense will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction (Salduz v. Turkey [GC], no. 36391/02, § 55, 27 November 2008)<sup>119</sup>.*

Guarantees of Article 6 §3 (c) extend also to the cases when the so-called unofficial “explanations” are received from the detained individuals:

*«During those interviews, which according to the police concerned different matters, the applicant allegedly confessed to the murder of the police officer, the crime for which he had been sought ... The Court considers that any conversation between a detained criminal suspect and the police must be treated as formal contact and cannot be characterized as “informal questioning” .... The Court notes that the facts of the case, as they stand, show that after being questioned by the police without legal assistance the applicant confessed to a very serious crime. The fact that he repeated his confession in the presence of the lawyer does not undermine the conclusion that the applicant’s defense rights were irretrievably prejudiced at the very outset of the proceedings...»<sup>120</sup>.*

Restriction of the right to legal assistance at the initial stage of criminal proceedings should be strongly limited:

*«The Court has consistently viewed early access to a lawyer as a procedural safeguard of the privilege against self-incrimination and a fundamental safeguard against ill-treatment, noting the particular vulnerability of an accused at the early stages of the proceedings when he is confronted with both the stress of the situation and the increasingly complex criminal legislation involved. Any exception to the enjoyment of this right should be clearly circumscribed and its application strictly limited in time. These principles are particularly called for in the case of serious charges, for it is in the face of the heaviest penalties that respect for the right to a fair trial is to be ensured to the highest possible degree by democratic societies (see Salduz, cited above, § 54)<sup>121</sup>.*

## **National Legislation**

Article 59 of the Constitution guarantees everyone the right to legal aid, including free legal aid in the cases envisaged by law.

Mechanisms for receiving legal aid at the expense of the State Budget are envisaged by the Law of Ukraine “On Free Legal Aid”. A system of legal aid sponsored by the state in criminal proceedings has been functioning in Ukraine since 2013. The Law of Ukraine “On Free Legal Aid” and the CPC establish the procedure of early access to an attorney for apprehended persons and suspects. Early access to an attorney in cases of apprehension is one of the key positive elements of the Ukrainian free legal aid system. Any apprehended person has the right to an attorney. The state guarantees provision of legal aid within 72 hours following apprehension.

Article 20 and Article 208§4 of the CPC stipulate such a right in relation to suspects (accused individuals), including a possibility to use the legal defender’s assistance. In case such an individual is detained without the ruling of an investigating judge or a court, the authorized official of the pre-trial investigation body is obliged to explain the detained individual their right to legal aid, including the right to a counsel.

Also, Article 5§8 of the Law of Ukraine “On Militiya” envisages the police officers’ obligation to inform the detained individuals of their rights, including the right to a counsel.

<sup>119</sup> Shabelnik v. Ukraine, Application no. 16404/03, ECHR judgment, 19 February 2009, §53.

<sup>118</sup> Titarenko v. Ukraine, Application no. 31720/02, ECHR judgment, 20 September 2012, §87.

<sup>121</sup> Nechiporuk and Yonkalo v. Ukraine, application no. 42310/04, ECHR judgment, 21 April 2011, §263.

Besides, Article 49§1(2) of the CPC establishes the obligation for the investigator, prosecutor, investigating judge or court to ensure participation of a counsel in criminal proceedings upon the request of the suspect/accused individual where s/he is not able to involve an attorney due to lack of funds or for other objective reasons.

Article 14§1(5) of the Law of Ukraine “On Free Legal Aid” sets that the individuals apprehended on suspicion of having committed a crime, are entitled to free legal aid. Article 213§4 of the CPC stipulates that an authorized official, that has performed the apprehension, is obliged to notify immediately thereof the relevant body (institution) authorized by the law to provide FLA. Should the lawyer fail to arrive within the period of time established by law, the same body (institution) should be similarly notified without delay.

Obligation of law enforcement officials to notify the FLA Centre on apprehensions is further defined by Article 5§5 of the Law of Ukraine “On Militsiya” and paragraph 2 of the Procedure for Notification of FSLA Centers on Apprehensions of Individuals approved by the Cabinet of Ministers of Ukraine Resolution No. 1363 of 28 December 2011.

Following notification of the regional FSLA Centre by an official, the former engages an attorney pursuant to a contract/agreement between the attorney and FSLA Centers in accordance with the duty schedule and upon assignment from the Center.

The right to use legal assistance is exercised by the suspects at their discretion. They can choose any of the following options: to defend themselves on their own, to request legal assistance from an attorney and to conclude an agreement whereby the attorney undertakes the defender’s functions, to receive consultations and explanations, and to involve an attorney into individual investigative actions. Legal aid can also be provided by the state free of charge in certain cases. Consequently, the suspect’s initiative is determinant in terms of selecting the legal assistance forms and methods. However, the legislation envisages an additional guarantee of the right to legal aid at apprehension whereby a defender can be rejected or replaced exclusively in the defender’s presence after a possibility of confidential communication between the suspect and the attorney.

The law makes the defender’s participation mandatory in criminal proceedings in the cases of:

- ▶ particularly grave crimes;
- ▶ juvenile suspects/defendants (below 18 years old);
- ▶ application of coercive educative measures;
- ▶ persons with mental or physical disabilities (mute, deaf, blind, etc.) that are not able to fully exercise their rights;
- ▶ lack of command of the language of criminal proceedings;
- ▶ coercive medical measures applied or considered to be applied;
- ▶ rehabilitation of diseased individuals.

In the numerous cases against Ukraine, the ECHR recognized violations of the Ukrainian procedural legislation as to the obligatory participation of a defender in the cases when investigation authorities artificially qualified the suspect’s actions as a less serious crime than it was obvious from the circumstances of the case:

*«The Court is struck by the fact that, as a result of the procedure adopted by the authorities, the applicant did not benefit from the requirement of obligatory representation and was placed in a situation in which, as he maintained, he was coerced into waiving his right to counsel and incriminating himself. It may be recalled that the applicant had a lawyer in the existing criminal proceedings, yet waived his right to be represented during his questioning for another offence. These circumstances give rise to strong suspicion as to the existence of an ulterior purpose in the initial classification of the offence. The fact that the applicant made confessions without a lawyer being present and retracted them immediately in the lawyer’s presence demonstrates the vulnerability of his position and the real need for appropriate legal assistance, which he was effectively denied on 1 February 2001 owing to the way in which the police investigator exercised his discretionary power concerning the classification of the investigated crime»<sup>122</sup>.*

<sup>122</sup> Yaremko v. Ukraine, Application no. 32092/02, 12 June 2008, §88.



Figure 4.1. Attorneys providing legal aid

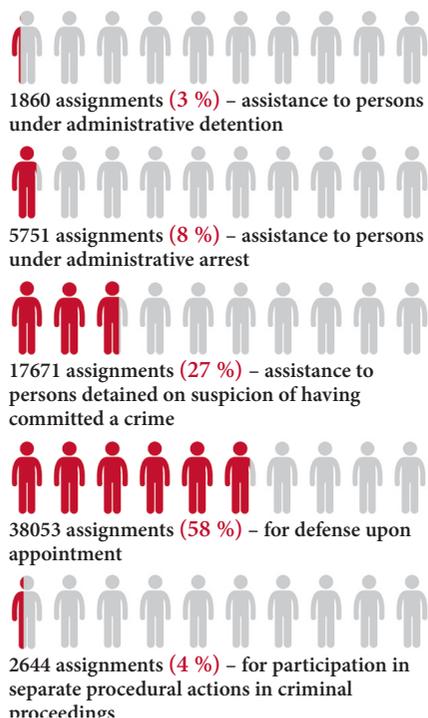


Figure 4.2. Assignments for attorneys for provision of legal aid

According to the CPC, only an attorney certified in accordance with the procedure established by law for legal practice and listed on the Unified registry of attorneys of Ukraine can act as a defender.

There is a special mechanism for open-call selection of attorneys providing legal aid sponsored by the state. In case of successful completion of the competition, the attorney is listed in the Registry of attorneys providing free secondary legal aid. Centers can enter into individual agreements/contracts with selected attorneys following the listing. Every attorney can choose whether to provide FSLA permanently or temporarily.

According to the National Bar Association of Ukraine, there are approximately 30000 attorneys in Ukraine. There are 3889 selected attorneys with the right to provide such assistance in the Registry of attorneys providing FSLA. As of September 2014, 2180 attorneys had contracts with FSLA Centers for providing legal aid in criminal cases. These attorneys are not staff of FSLA Centers but contracted individuals<sup>123</sup>.

The structure of the free legal aid system in Ukraine comprises of the Coordination Centre for Legal Aid Provision and regional (oblast) centers for free secondary legal aid. In addition, another 100 local centers will launch operations on 1 July.

The Coordination Centre was established by the Ministry of Justice of Ukraine for development and implementation of an effective system of free legal aid. It performs general coordination of the system's functioning at the national level. Regional centers are territorial units of the Coordination Centre responsible for organization of free secondary legal aid locally.

In 2014, FSLA Centers (without taking into account centers in the Autonomous Republic of Crimea and Sevastopol) issued 65979 assignments to attorneys for provision of legal assistance, including:

- ▶ 1 860 – to persons under administrative detention;
- ▶ 5751 – to persons under administrative arrest;
- ▶ 17671 – to persons detained on suspicion of having committed a crime;
- ▶ 38053 – for defense upon appointment;
- ▶ 2644 – for participation in separate procedural actions in criminal proceedings.

The ratio of refusing attorneys' services by persons entitled to free legal aid was 4 % during this period<sup>124</sup>.

At the same time, free legal aid for the client does not mean the same for the lawyer<sup>125</sup>.

<sup>123</sup> [http://legalaid.gov.ua/images/control/Legal%20Aid%20System%20in%20Ukraine%20an%20Overview\\_Ukr.pdf](http://legalaid.gov.ua/images/control/Legal%20Aid%20System%20in%20Ukraine%20an%20Overview_Ukr.pdf).

<sup>124</sup> [http://legalaid.gov.ua/images/Actual/Dov\\_BPD\\_2014.pdf](http://legalaid.gov.ua/images/Actual/Dov_BPD_2014.pdf).

<sup>125</sup> The procedure for compensation for FSLA lawyers' services is defined by the CMU Resolution No. 465 of 17 September 2014 on the Payment of the Services and Reimbursement of the FSLA Lawyers' Expenses and CMU Resolution No. 130 of 04.03.2013 approving the Procedure for the Use of Funds Envisaged in the State Budget to Pay for the Services and to Reimburse the Expenses of the FSLA Lawyers.

At the end of 2014, the reimbursement method was changed through introduction of adjusting ratios allowing for significant increase of compensation in case of positive outcomes for the client, including:

- ▶ Dismissal of a motion for detention as a measure of restraint;
- ▶ Replacement or cancellation of a restraint measure of detention;
- ▶ Acquittal;
- ▶ Dismissal of the case on exonerating grounds;
- ▶ Change of legal qualification of a crime from grave to moderate/mild offence;
- ▶ Decrease in the number of charges;
- ▶ Release on probation;
- ▶ Determination of the least/less severe punishment than those provided by the law for the relevant offense;
- ▶ Minimal punishment.

The new methodology does correct certain drawbacks. In particular, the cost of the free legal aid services, provided by the FLA lawyers at police stations during detention and paid by the government, has increased significantly.

A relatively low percentage of renunciation of free legal aid (4 %) indicates a certain level of trust to the system of free legal aid.

A comprehensive approach to the quality of legal aid has been developed within the framework of the free legal aid system.

For instance, the general standards of the lawyers' work are set by the Law of Ukraine "On the Bar and Legal Profession", and the Attorney Code of Conduct. Specialized Professional Standards on the Role of Attorneys in Criminal Proceedings during Police Custody at the legislative level are developed and established only for the FSLA attorneys<sup>126</sup>.

FSLA quality standards constitute a system of key characteristics of the model of guaranteed state defense. Adherence to these Standards is mandatory for attorneys who provide free secondary legal aid. Violation thereof leads to civil liability in accordance with the law and conditions of the contract.

Standards constitute an algorithm of the counsel's actions during defense on appointment from the moment of assignment, depending on the stage of criminal proceedings, until its completion.

The standards foresee certain mandatory action for ensuring of procedural safeguards during apprehension:

*Paragraph 1.1. Following an assignment from the center, the counsel examines criminal case files within a period identified by the law/reasonable time, conducts a confidential meeting with the client during which s/he provides explanation on the person's right along with providing a relevant letter (leaflet) from the center, clarifies circumstances of the criminal case in accordance with information from the client, receives legally significant information, agrees upon legal stance with the client, and submits necessary complaints to the proceedings supervisor or investigating judge.*

*Paragraph 1.2. In cases where it was not possible to exercise the right to confidential communication, the counsel shall make a record on this violation of the right to defense in the protocol of the procedural action and submit a complaint to the proceedings supervisor or investigating judge.*

*Paragraph 1.4. In cases where counsel's participation is mandatory, and the suspect/accused person renounces defense and does not involve another counsel, the counsel appointed by the FSLA center continues to perform professional duties.*

*Paragraph 1.7. Counsel examines facts of torture; other cruel, inhuman, or degrading treatment by officials, [...] and in case of establishing these facts compiles a report [...] and notifies the proceedings supervisor, as well as submits an application to the investigating judge in accordance with article 206 of the CPC.*

<sup>126</sup> Approved by Ministry of Justice Order No. 386/5 of 25.02.2014 on the FSLA Quality Standards in Criminal Proceedings.

The supervision powers as to the observance of the legal requirements by the defense attorneys in criminal proceedings are vested into the disciplinary chambers of the regional attestation and disciplinary bar boards and the High Attestation and Disciplinary Board. If the above quality standards are not respected, a contract with the lawyer can be terminated, while such lawyer may be excluded from the FLA register.

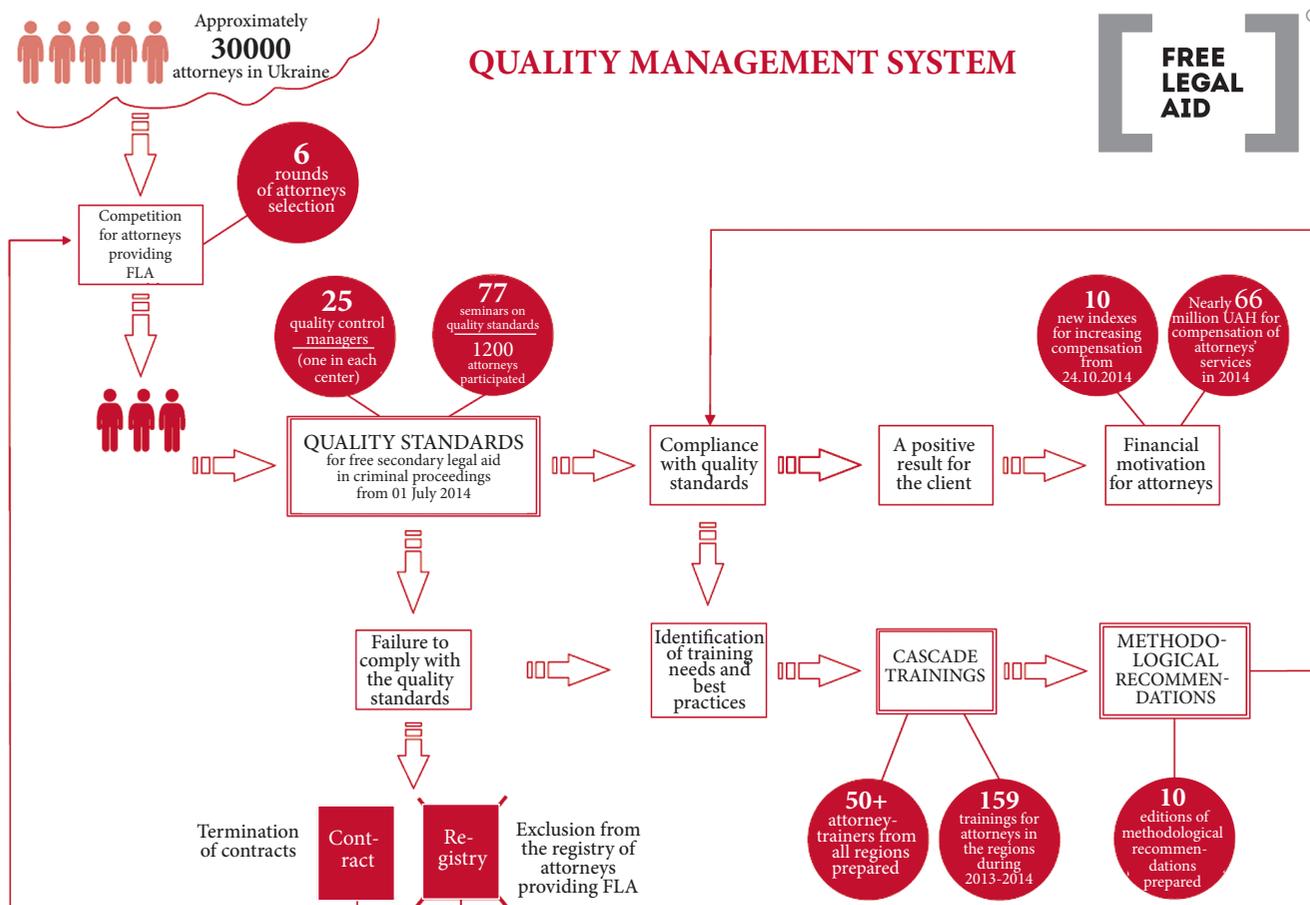


Figure 4.3. Quality control in the FLA system<sup>127</sup>

Despite the general trend of increasing trust towards the free legal aid system, there still exists the negative attitude of the law enforcement officers and the apprehended individuals to the work of attorneys provided by the state. For instance, the following opinion is rather common among police officers:

*«If a lawyer gets paid, there is a result, if not, there is absolutely no sense. I repeat once again “a state lawyer means the same as the prosecutor”»<sup>128</sup>.*

A similar conclusion is also expressed in interviews with the attorneys:

*«...I know this from my experience, and have heard it also from the clients that a FLA lawyer has a negative image. It is considered that they fulfil their obligations formally»<sup>129</sup>.*

The researchers themselves also recorded cases of negligence by attorneys:

<sup>127</sup> Infographics developed by the Coordination Centre for Legal Aid Provision.

<sup>128</sup> Interviews with investigators.

<sup>129</sup> Interviews with attorneys.

«Researcher: At what stage did you decide to replace the lawyer?

Apprehended person: I made this decision back when on the day of apprehension, when she began convincing me, even more passionately than the investigator, to plead guilty... to cooperate with the investigator, because all the evidence is there, as well as the operational deployment, so there are no chances...»<sup>130</sup>.

## 4.2. Mechanism of providing legal aid to apprehended persons

Legal aid in cases of detention is provided in accordance with a mechanism established by law. Ukrainian legislation envisions a specialized procedure of access to an attorney. Importantly, this procedure is based on a fundamental principle of effective legal aid – early access. In accordance with the procedure, an official of the body authorized to conduct apprehension shall immediately notify the relevant FSLA Center. The Center appoints an attorney, and the attorney has to meet the apprehended person within one hour (in certain cases – within 6 hours). The apprehended person has the right to waive free secondary legal aid; however, s/he can do that in the presence of an FSLA attorney during first confidential meeting. Police officials responsible for detention shall record the time of attorney’s arrival and completion of providing FSLA. If the attorney fails to arrive, the competent official has to notify the Center for appointment of a different attorney.

In 2014, a possibility of contacting the FSLA Center directly by the apprehended person, his/her family members or close relatives was included into the free legal aid mechanism. Upon receiving a notification from this person, an official on duty records all information and refers the request (by fax) to the body responsible for apprehension for confirmation/refutation. In case such information is confirmed, the FSLA Center carries on a standard procedure for appointment of attorneys.

Additional possibilities for access to free legal aid through direct application by an apprehended person, his/her family members or close relatives is an important component of ensuring early access to attorney and preventing violations of the rights of apprehended persons.

### 1. First communication: police – Center

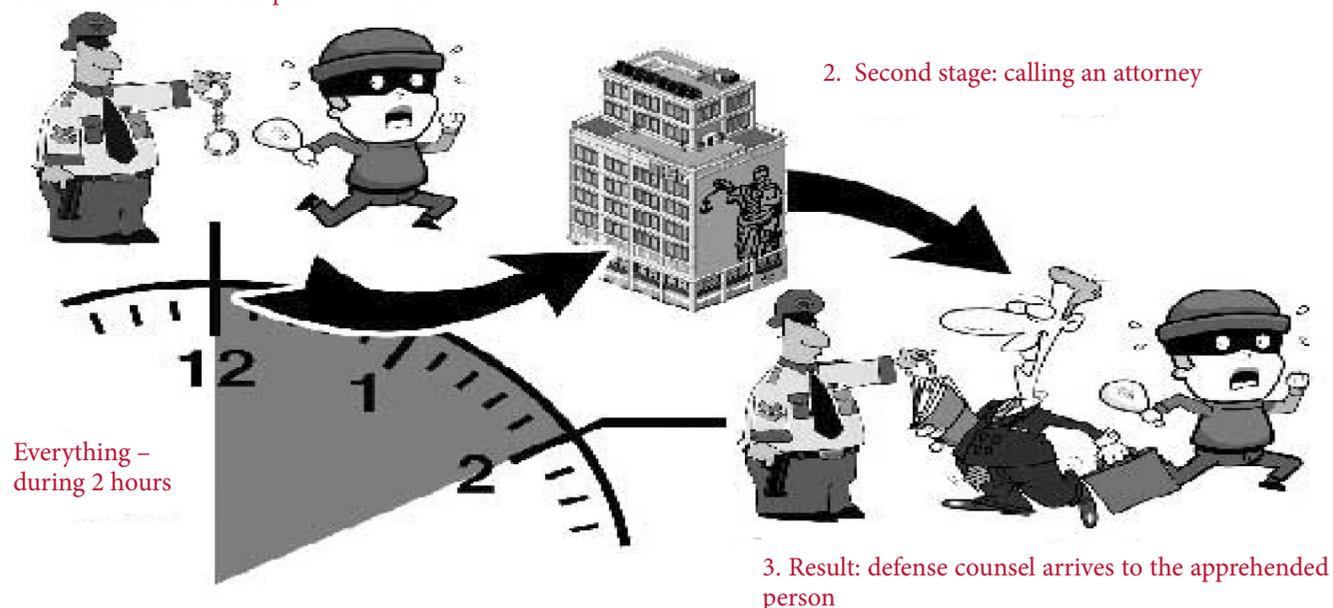


Figure 4.4. Appointment of an attorney in cases of apprehension

<sup>130</sup> Interviews with apprehended persons.

<sup>131</sup> From the presentation of a trainer-lawyer of FSLA system Tetyana Sivak.

According to the Procedure for Notification of FSLA Centers on Apprehensions of Individuals approved by the Cabinet of Ministers of Ukraine Resolution No. 1363 of 28 December 2011, immediately upon the actual detention the authorized official, who has performed apprehension, should notify accordingly the relevant FLA Centre. The Centre then informs the attorney on duty who arrives to the location of detention. The algorithm of attorney's actions upon receiving a notification on apprehension from the Centre's officer on duty is as follows:

Priority (immediate) actions	<ul style="list-style-type: none"> <li>▶ arrival to the place of apprehension or location of the apprehended person;</li> <li>▶ registration of the arrival and notification of the officer on duty;</li> <li>▶ establishment of circumstances and grounds for apprehension;</li> <li>▶ inspection of the powers of the official that has performed apprehension etc.</li> </ul>
Meeting with the client (apprehended person)	<ul style="list-style-type: none"> <li>▶ establishment of the moment and actual circumstances of apprehension;</li> <li>▶ registration of bodily injuries and illegal actions by law enforcement officials;</li> <li>▶ drafting of the client interview protocol, defense strategy development;</li> </ul>
Participation in investigative actions (incl. the urgent ones)	<ul style="list-style-type: none"> <li>▶ formalization of report on apprehension (incl. client's medical examination);</li> <li>▶ presence during notification on suspicion;</li> <li>▶ the suspect's interrogation etc.</li> </ul>
Non-investigative actions	<ul style="list-style-type: none"> <li>▶ preparation of complaints, statements, requests, comments;</li> <li>▶ preparation for consideration of the restraint measure motion.</li> </ul>

The right to confidential client-attorney communication is an important condition for effectiveness of legal aid during initial stages of apprehension. Article 46§3 of the CPC envisages the defender's right to have a confidential meeting with the suspect before the first interrogation and without the permit of the investigator, prosecutor or the court, while after the first interrogation same meetings can be held without restriction in their number and duration. Such meetings may be subject to visual supervision of an authorized officer, but under the conditions that exclude a possibility of tapping or eavesdropping.

Failure to notify or untimely notification of the FLACs by law enforcement officers used to be a serious problem in 2013. From 1 July to 31 September 2013, there were 143 information messages on websites of territorial police departments that can be qualified as failed (improper) detention notifications of the FLA Centers<sup>132</sup>.

In addition to failed/insufficient notifications on apprehension, the Coordination Centre for Legal Aid Provision for FLA defines the following problems related to the exercise of the rights of defense at the expense of the state:

- ▶ apprehended individuals are poorly advised on their right to defense guaranteed by the state;
- ▶ advise on using services of a particular attorney in violation of Article 48§1 of the CPC;
- ▶ impeding attorneys' access to apprehended persons;
- ▶ apprehended individuals are persuaded to renounce state defender<sup>133</sup>.

The study confirmed existence of all the above issues. The research also revealed instances of denying attorneys access to apprehended persons, as well as failure to arrive/untimely arrival of an attorney.

<sup>132</sup> A. Vyshnevsky. Presentation "Problems in Informing Citizens on the Right to Defense Guaranteed by the State. Suggested Solutions", 20 September 2013, p. 6-8, 13.

<sup>133</sup> Ibid, pp. 6-18.

### Failure to notify on apprehension

The observations have revealed the cases when the FLA Centers were not notified on apprehension:

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«... A man was detained on a court ruling at 19.10. The FLA Center was not informed»;

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«The FLAC was not informed on the individual's apprehension...»<sup>134</sup>.

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### Untimely notification on apprehension

The study confirmed that delay in notification of FSLA Centers is rather common. Such delays between the actual apprehension and notification of FSLA Center have been noted in 68% of the studied cases (Figure 4.5).

There were cases of delay in notification during several hours, for instance when apprehension occurred at 23:00, while notification was sent to the Centre at 8:00 next morning <sup>135</sup>.

### Denying attorneys' access to the apprehended person

Police officers often hinder the access of an attorney selected by the suspect in order to use the “police/pocket” lawyer or to buy time for “a talk” like in the following case:

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«...They were blocking my defender from me, while I thought that he simply was not coming, and even felt offended. Therefore, I agreed to the lawyer, who was called to me by the police»<sup>136</sup>.

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In *Borotyuk v. Ukraine*, the ECHR found a violation of Article 6§3(c) of the Convention where waive assistance of a counsel the lawyer was denied access to the applicant while the detained did not waive the counsel invited by his relatives:

«82. The Court notes that the applicant waived his right to legal assistance while being in a particularly vulnerable position given his medical condition (see paragraph 45 above) and without adequate understanding of the nuances of the legal classification of the incriminated crime (which changed over time from infliction of injury causing death to premeditated murder). Furthermore, the waiver in question concerned only one investigative measure, namely, the applicant's questioning by the investigator, whereas the applicant was subjected to other investigative measures thereafter, including at night, without access to counsel. The Court next observes that the lawyer hired by the applicant's parents to represent him was denied access to the applicant, not on the basis of that waiver, but under such artificial grounds as that he was a witness (while at the

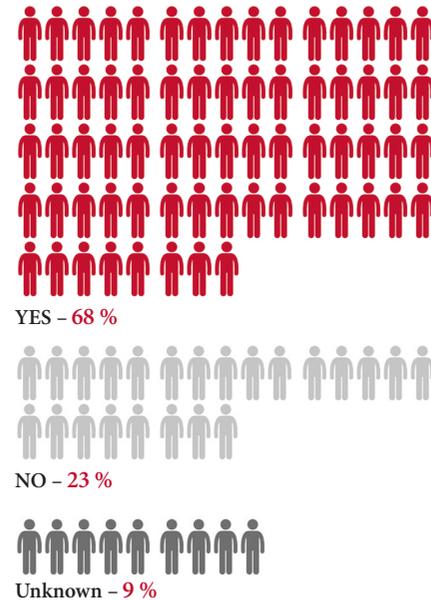


Figure 4.5. Was there a delay between actual apprehension and notification of FSLA Center

<sup>134</sup> Observation notes.

<sup>135</sup> Observation notes.

<sup>136</sup> Interviews with apprehended persons.

time he was being questioned as a suspect) and that he had not signed the authority form (which he could not possibly have done as he was in detention). Lastly, the Court does not lose sight of the fact that the applicant retracted his confessions immediately once he was in the lawyer's presence and never repeated them while legally represented (see paragraphs 28 and 31 above). In the light of all these considerations, the Court concludes that there was no unequivocal waiver by the applicant of his right to legal assistance in the circumstances of the present case. Neither were there any other compelling reasons for restricting his right to legal assistance. The authorities were thus under the obligation to provide the applicant with access to a lawyer from his first questioning by the police, which they failed to comply with»<sup>137</sup>.

#### Attorney's failure to arrive/late arrival

The observation has revealed cases when FLA Centers failed to ensure attorney's participation during apprehension due to negligence of the Center's staff, in particular:

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«The police unit officers explain that they notify the FLAC in such cases, but the center issues no assignments and the lawyers do not come»;

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«12:00. The criminal investigation officer, who performed detention, notifies the FLAC accordingly, noting that the actual detention occurred at 08.50 on 09.08.2014. The Centre officer on duty registers the notification under No. 5021 and informs that the lawyer will arrive.

13.20. The investigator calls the defender and asks why she is still not at the police station. The lawyer replies that she is not coming on this call. The investigator reports accordingly to the head of the investigation unit.

13.40. The head of the investigation unit notifies the investigator that the lawyer will come, but not from the Centre. The defender arrives at 14.20»;

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«... An individual is detained based on a court ruling... for the purpose of bringing him to the court to consider the prosecutor's request to keep the person in custody as a measure of restraint. The oblast FSLAC was informed at 12:15, but the defender did not come»;

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«... According to the FSLAC, the detention notification came on 15.08.2014 and was registered on 20:55 under No. 5282. No assignment has been issued for a defender»;

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«Before an individual is put into the THF, the investigator notifies the FLAC of the detention. However, during one hour of waiting for the attorney, the investigator received no information on the defender's name, or a FLAC assignment, or any other information from the Centre and/or the defender whether the lawyer would in the end come or not. Having called the FLAC, the investigator informed that his call was terminated, and therefore the person was put into custody at the THF»<sup>138</sup>.

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A few detained individuals also noted that the attorney sometimes does not come on the investigator's call.

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«... There were problems, as the free lawyer still did not come on the investigator's call»<sup>139</sup>.

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Such practice points to the need for additional solutions on improving the mechanism for legal aid during apprehension, particularly oversight in notification on apprehension by competent authorities and due diligence by FLA Centers in fulfilling their obligations on appointing attorneys, as well as control over time of arrival/failure to arrive by attorneys in case of appointment.

<sup>137</sup> Borotyuk v. Ukraine, Application no. 33579/04, ECHR judgement, 16 December 2010, §82.

<sup>138</sup> Observation notes.

<sup>139</sup> Interviews with apprehended persons.

### 4.3. Apprehended individual's decision to request legal aid

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The decision to request legal assistance depends, first of all, on the suspects themselves. The law establishes different ways and forms for the use of legal assistance, while the practice proves that careful attitude to one's rights mainly ensures their respect. Correctly, the right to a free choice of the lawyer correlates with the suspect's possibilities.

The suspect's financial possibilities influence the method used to exercise the right to a lawyer of their own choice. Thus, if the suspect's financial possibilities prevent them from inviting a lawyer, upon their request the relevant FLAC should ensure participation of a lawyer in the criminal proceedings<sup>140</sup>.

There are instances when an apprehended person refuses from the participation of the FLAC lawyer due to involvement of a contract counsel (according to general statistics, approximately 4% of cases). In such instances, possibility of confidential communication and waiver in attorney's presence is important. For instance:

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*«He waived me, because, as he said, he had his own lawyer. In presence, he wrote a statement that he was going to do the defense himself»;*

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*«The detained is incriminated with the CC Article 296§ 2 (hooliganism), but he waived me in my presence, because he has his own lawyer. He is a businessman, quite a prosperous one, and he has his lawyer indeed. That lawyer has arrived, I have seen him»<sup>141</sup>.*

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There were recorded cases when apprehended individuals waived not only the FLAC lawyers, but also the contracted ones:

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*«The apprehended person did demand a lawyer. He had three lawyers changed during that evening. He waived the one provided by the state, so a private counsel was invited. This one was rejected as well, so another lawyer was called in and finally accepted. The reasons of the waivers are unknown. The lawyer received the following information on the crime upon the first contact with the Centre: crime qualification (article), the names of the investigator and the apprehended person. The Centre was informed on apprehension immediately, without delay»<sup>142</sup>.*

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Attorneys still mainly hold a confidential meeting with the detained individual even if a defender is renounced:

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*«The lawyer held a confidential meeting with the detained, even though well before her arrival he had stated that he would waive the state counsel»<sup>143</sup>.*

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In practice, such approach strengthens the legal aid guarantees, as it raises the reliability of the suspect's choice and weakens the possibilities of abuse by law enforcement officials.

There have been cases when a talk with the lawyer would change the suspect's position:

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*«I arrived at around 11:30 on the same day. No sooner I came, as he told me that he needs no defender and pleads guilty. I reminded him that the lawyer may influence the qualification of the crime, and the he agreed and said that he did need a counsel»<sup>144</sup>.*

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<sup>140</sup> Article 49§1(2) of the CPC, Article 14§1(5) of the Law of Ukraine "On Free Legal Aid", the Procedure for Notification of FSLA Centers on Apprehensions of Individuals.

<sup>141</sup> Interviews with attorneys.

<sup>142</sup> Observation notes.

<sup>143</sup> Observation notes.

<sup>144</sup> Interviews with attorneys.

Free choice of courses of action and involvement of an attorney is crucial for the decision on requesting legal aid. At the same time, given serious risk of human rights violations during apprehension, it is important to ensure legal guarantees whereby an apprehended person has to meet the attorney appointed by the FLA Center and only then decide on whether to waive legal assistance or not. This guarantee calls for additional clarification both among law enforcement officers and among attorneys, as well as requires additional monitoring of its observance.

#### 4.4. Access to case files

During the pre-trial investigation, law enforcement officers are interested to keep to themselves certain information on the case in order to get operational and tactical criminalistics advantage. The legislation supports such interest having ensured the secrecy of investigation.

There are quite many legislative acts and regulations that restrict the scope of the information that can be provided to the lawyer at the apprehension stage, in particular the CPC, the Laws of Ukraine “On Combating Terrorism”, “On Militiya”, “On the Operations and Detective Activities”, “On State Secret”, “On Information”, the List of State Secret Data approved by Security Service Order No. 440 of 12.08.2005, the Model Law on Protection of Defendants, Witnesses, and Other Individuals Helping Criminal Justice adopted on 06.12.1997 by the CIS Interparliamentary Assembly etc.

Before the pre-trial investigation is completed, the prosecutor is obliged to provide the defense side, the victim, and representative of a legal entity subject to proceedings upon their request with access to case files for examination. The exception includes materials on security measures applied to the criminal proceedings parties, as well as those, the study of which at that stage of the criminal proceedings may harm the pre-trial investigation. The denial to provide a generally accessible document the original of which is kept in the materials of the pre-trial investigation, is not allowed (Article 221§1 of the CPC).

The lawyer gets full access to the file only upon the end of the pre-trial investigation when the prosecution is obliged to provide such access (Article 290§1 of the CPC).

The prosecutor or the investigator on the prosecutor’s instruction are obliged to provide access to the pre-trial investigation files available to them, including any evidence which, separately or together, can be used either to prove the defendant’s innocence or lesser guilt, or to help alleviate the punishment (Article 290§2 of the CPC).

The data not subject to disclosure during the court consideration can be withdrawn from the file. Such withdrawal should be clearly marked. On the request of a party to the criminal proceedings, the court may allow access to the withdrawn information (Article 290§5 of the CPC).

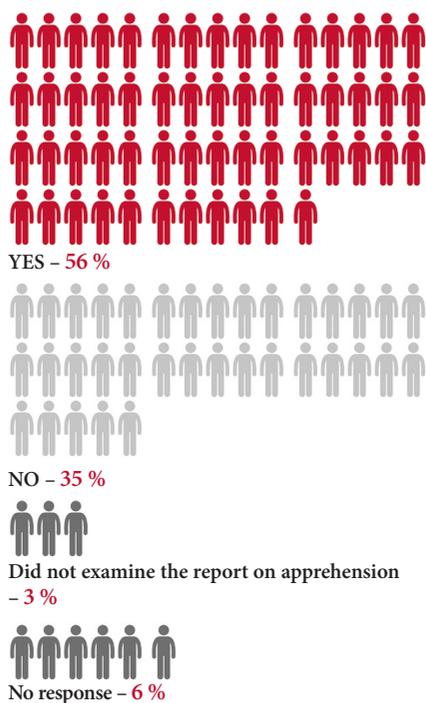


Figure 4.6. The attorney examined case files

Therefore, at the stage of apprehension, the lawyer has access only to those materials that, in the opinion of law enforcement officials, provide grounds for detention. On the one hand, such norms aims to protect the secrecy of investigation and strengthens inevitability of punishment, and on the other hand, it enables the investigators to define themselves the scope of documents provided to the attorney or, if the legality of the detention is contested, to an investigating judge. This creates a certain probability that the investigator may conceal some materials that he does not want to share with the defender, thus weakening the position of the defense.

For instance, the survey testifies that the lawyers have examined case files in 56% of observed cases (Fig. 4.6).

At the same time, the investigator’s denial to provide access to the materials of the file has been mentioned in 17% of cases, while there are many more examples when the attorney’s position led to their failure to study the file (Fig. 4.7).

Therefore, the attorneys’ right to access case files is often violated in practice. This is conditioned, on the one hand, by regulative restrictions established on the scope of the information subject to disclosure (materials that contain state secrets, the results of covert investigative measures etc.), and on the other hand, by the position of law enforcement officials attempting to conceal as much case files as possible from the attorney. Active position and persistence of the attorney is an important factor influencing access to case files.

Thus, the legislation contains general norms and does not balance the suspect’s right to information well enough against the secrecy of investigation. The relevant rights need to be specified, in particular through definition of the tentative list of materials that can or cannot be accessed. It is also important to provide reasons for concealing certain information from defense party by the prosecution. The legislation should define the notion of the “secrecy of pre-trial investigation” and specify the liability arbitrary denial of access to certain materials of the file.

#### 4.5. Conduct of confidential meetings with apprehended persons by attorneys

Article 42§3(3) of the CPC entitles the suspect to have a meeting with an attorney (counsel) before the first interrogation with observation of the conditions that ensure confidentiality of the communication, while after the first interrogation such meetings can be held without restriction as to their number and duration.

According to the FLA Quality Standards in Criminal Proceedings approved by Ministry of Justice Order No. 386/5 of 25.02.2014, upon getting an assignment from the Centre, the defender should within the terms established by law or any other reasonable term examine criminal case files and hold a confidential meeting with the client. During such a meeting, the lawyer should explain the client their rights and to give them a letter (a leaflet) provided by the Centre, as well as study the circumstances

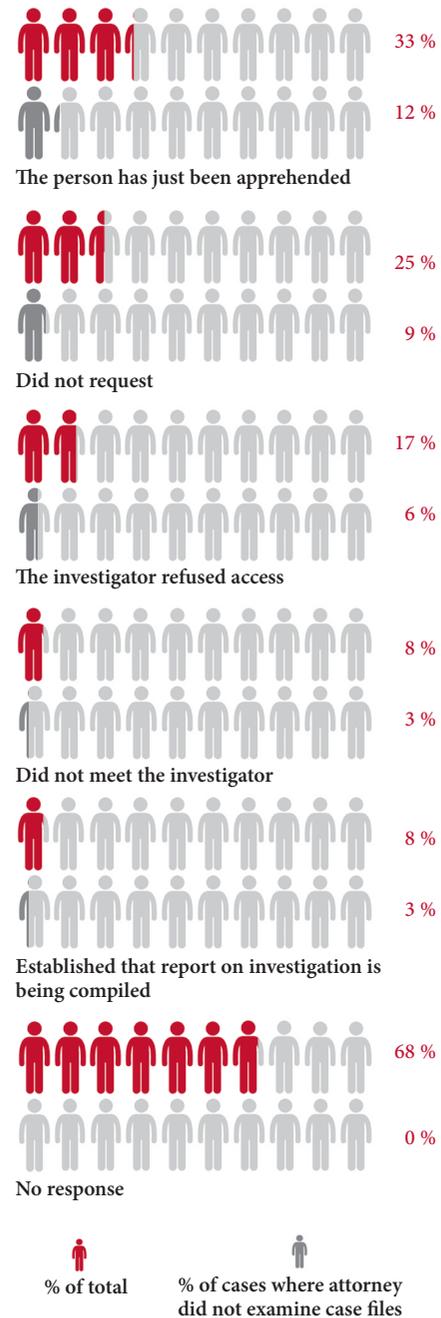


Figure 4.7. Reasons for not examining case files

of the criminal offence in the client's version, obtain information of legal significance from the client, reconcile the legal position with the client and make the relevant protocol on the results of such a meeting.

The suspect/defendant should communicate with the lawyer under the conditions of full confidentiality, otherwise the very idea of defense and provision of legal assistance is lost. The lawyers are not able to fulfil their obligation, envisaged by Articles 59, 63§2 and 129§3(6) of the Constitution of Ukraine without getting a certain scope of information directly from the client, which should be provided under the conditions of preserving such information in secret, as well as without reconciling the legal position with the client, which also constitutes client-attorney privilege. Violation of the principle of confidentiality results in the failure to fulfil the obligation to abstain from aggravating the client's status during the exercise of the attorney's powers and to the violation of the constitutional right to defense.

The legislation establishes the lawyer and the client's right to have meetings without restriction of their number and duration, including obligatory before the first interrogation. The majority of attorneys respect the principle of mandatory first confidential meeting before the first interrogation. The duration of such meetings depends on the complexity of the case, the lawyer's ability to quickly find common language with the client and to discuss all problematic issues outlined and planned by the attorney and the client for such a meeting.

Practice of FSLA Centers shows that lack of conditions, in particular premises for confidential communication of the appointed attorney with the client, and constitutes one of the problematic issues in the work of pre-trial investigation agencies<sup>145</sup>.

According to research findings, attorneys held consultations before the first interrogations in 59 % of the cases (Fig. 4.8).

Figure 4.9 contains a full breakdown of answers on the reasons for lack of consultation prior to the first interrogation.

During the survey, none of the respondent raised or mentioned the duration of the confidential meeting as a problem, while the venue of such meetings has been often pointed out as a problem by attorneys, their clients, and police officers alike. For instance, interviewed law enforcement officials mentioned:

*«The lawyers themselves express their wish to communicate with the client before the interrogation. I do not hinder this; sometimes I ask how much time they need. It is quite problematic that there is no special room for confidential meetings in our unit since I have to hang about by the doors of my own office, while there are criminal case files there, and I am responsible for preservation of the pre-trial investigation secrecy. There are also my personal belonging there, and generally it is a sort of humiliation for the investigator, when you feel yourself punished for unknown reasons and put outside»<sup>146</sup>;*

<sup>145</sup> A. Vyshnevsky. Presentation "Problems in Informing Citizens on the Right to Defense Guaranteed by the State. Suggested Solutions", 20 September 2013, p. 13.

<sup>146</sup> Interviews with law enforcement officials.

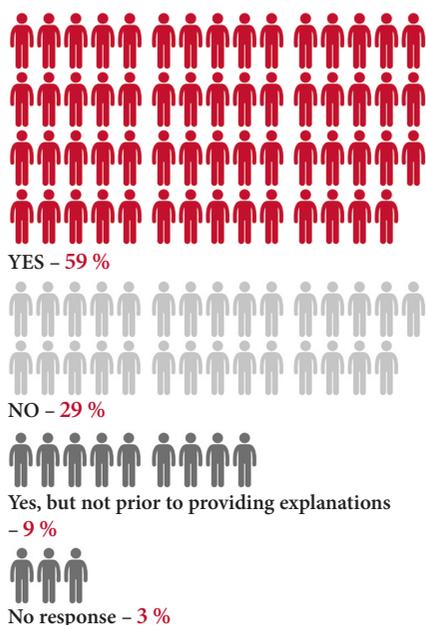


Figure 4.8. Conduct of consultation by an attorney before the first interrogation

«...They are always provided with this access. The detained and the lawyer get a separate investigation room inside the THF where they can do whatever they want. There are, however, problems with rooms for confidential meetings which sometimes results in contentious situations with the defender»<sup>147</sup>.

Despite of the seeming insignificance, such organizational component as availability of premises for confidential meetings is, as a rule, quite important. Lack of specialized premises for confidential meetings has been mentioned by practically every respondent in one form or another:

«The problem only is that the police have no special places for such conversations»<sup>148</sup>;

«...Together with the lawyer we went out into the corridor of the police station where he started asking me what happened»; «We were having a consultation at the investigator's office, there were only two of us, and we were not limited in time»<sup>149</sup>.

An interview response of an attorney:

«Such confidential meeting should always be held, whatever obstacles are set up for this. Normally it is held in the corridor of the local department. At this department (D), it is good that there is at least place to sit. Sometimes we hold confidential meetings at the investigator's office when everybody leaves, sometimes at a cell for the detained. Once, not at D but at another district department, two law enforcement officials were present, and I would not begin the meeting until they left. Here, again, it is very important not to start the conflict, but rather to avoid it»<sup>150</sup>.

Thus, availability of premises for confidential meetings is to a considerable extent important for their duration and quality. Quite frequently, it is the lack of such a place that, in our opinion, brings about situations mentioned by "the other side", i.e. a law enforcement official:

«The lawyers do not always hold confidential meetings, and if they are held, they do not happen too often and last for 10-30 min, not longer»<sup>151</sup>.

At the same time, there are cases when a meeting with the suspect cannot be described as "confidential" at all in view of the presence of other people in the premises. It should be stressed that the law does not oblige the state to equip premises for confidential meetings:

«We were talking at the investigator's office, where, in addition to him and us, there were constantly people in uniform or civilian clothes coming and going»<sup>152</sup>.

<sup>147</sup> Interviews with law enforcement officials.

<sup>148</sup> Interviews with attorneys.

<sup>149</sup> Interviews with apprehended persons.

<sup>150</sup> Interviews with attorneys.

<sup>151</sup> Interviews with investigators.

<sup>152</sup> Interviews with apprehended persons.

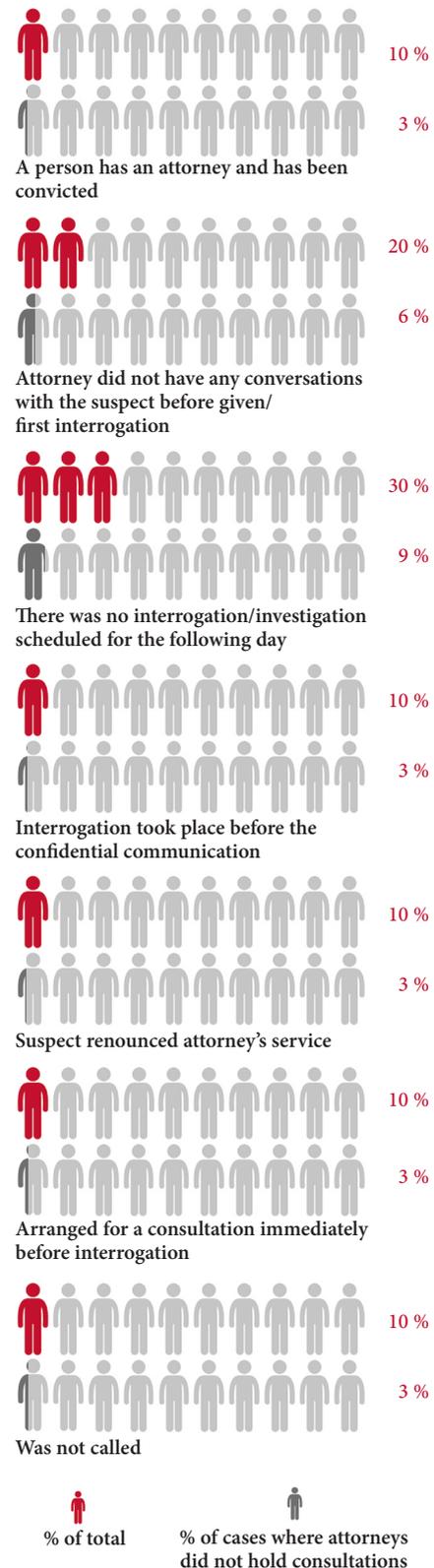


Figure 4.9. Reasons for lack of consultation prior to the first interrogation

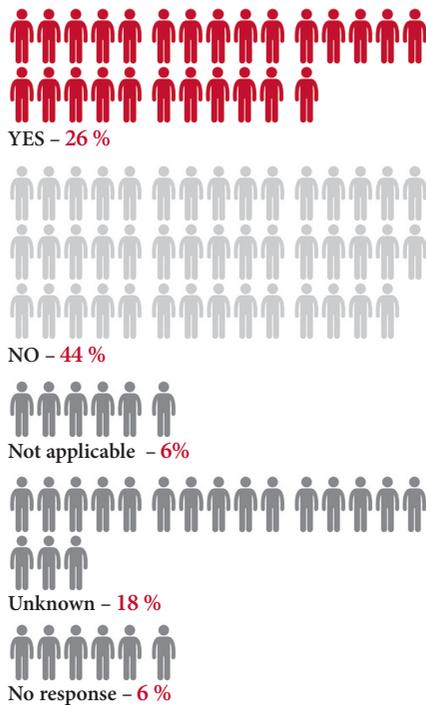


Figure 4.10. Written notes by attorneys during consultation with the apprehended person

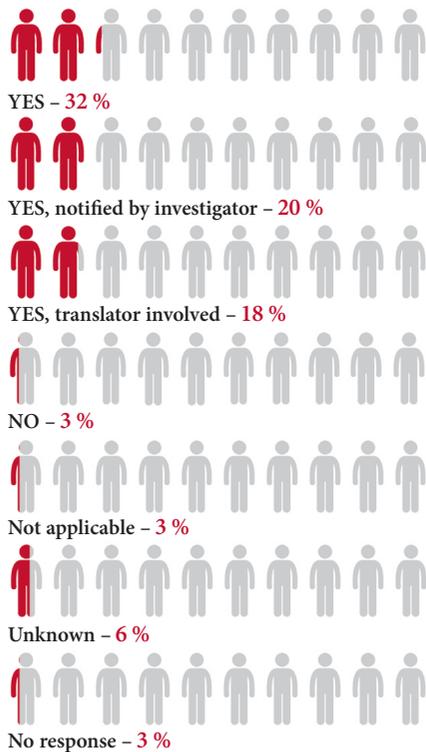


Figure 4.11. Attorneys inquiry on the apprehended person's knowledge of the criminal proceedings language

In fact, the only place equipped for confidential meetings between the lawyer and the apprehended (arrested) individual are rooms in remand prisons or temporary holding facilities. However, since the first interrogation is supposed to take place after the first confidential meeting, investigators try to ensure that it is held either at the IAB unit or in its corridors. Thereby, the investigators try to speed up such an “unnecessary” for their purpose procedure as confidential meetings of counsels with detainees/suspects. Obviously, in order to get the very possibility of such a meeting, in whatever form, attorneys and clients agree to have it under any circumstances, including either in the corridor, or at the investigator's office. There is no evidence that attorneys or suspects were demanding a confidential meeting to be held in a special room of the remand prisons or temporary holding facilities and where denied such possibility.

During the first confidential meeting, the lawyer is acquainted with the client and records in the meeting report or on any other carriers (hard copy or electronic) the client's personal and other data. In addition, information on detention and the related events is received.

The study shows, however, that in 44% of the cases, no written notes were made by the lawyers (Fig 4.10).

The fact that lawyers take no notes during their consultations should be seen negatively, rather than positively. At the same time, it is not possible to define the criteria that could be used to assert any negative impact on the quality of defense due to absence of such notes.

The lawyer inquired about the apprehended person's knowledge of the criminal proceedings language only in 33% of the cases (Fig. 4.11), while the suspects' literacy was checked in 15% of cases (Fig. 4.12).

Understanding of the attorney's role by the suspect is necessary for effective cooperation and fulfillment of his/her rights and freedoms. However, research showed that attorneys do not always clarify this issue with the client providing information in case of necessity (Fig. 4.13).

Thus, the study showed that attorney's role was explained in 59% of cases. At the same time, the share of the cases when the lawyer's role was not explained is still large and evidences superficial attitude to the communication with the client, neglect of the transparency of relations between counsel and apprehended person, insufficiently diligent fulfillment of the duties by some attorneys.

It is important that legal defense can be provided at the expense of the state funds under the conditions and in accordance with the procedure established by the Law of Ukraine “On Free Legal Aid”. Explanation of this mechanism and possibilities by the attorney is significant. The study, however, has found out that this right was explained in 62% of cases, while 12% of the clients received no explanations (Fig. 4.14).

It appears that the share of the cases where the essence of the right to free legal aid in case of apprehension was not explained is quite significant and may have considerable influence on the conclusion about informed selection of options for defending one's rights in criminal proceedings.

Article 42§3(18) of the CPC guarantees the suspect/defendant’s right to use, if needed, translation services at the expense of the state. This right should necessarily be explained to the suspect/accused by the attorney. According to the study, no such explanations were offered in 17% of cases (Fig. 4.15).

Further study results show that in 32% of cases, no interpretation was provided during client-attorney communication (Figure 4.16).

The acquired results evidence that there is a need for interpretation by a professional interpreter, however, it is actually not satisfied in the majority of cases. In practice, attorneys often agree to certain inconveniences in communication, but file no official complaints. The study has revealed no facts when attorneys would submit interpretation-related objections (Fig. 4.17).

Comparison of the results testifies that the need for interpretation exists in more cases than actually provided. However, in practice, lawyers quite often agree to certain inconveniences in communication and file no official complaints.

*Clarification of the right to silence will be examined in detail in the next chapter of this Report, as well as advice on course of action during interrogation. Therefore, we shall not focus on these crucial aspects of confidential client-attorney communication here.*

#### 4.6. Provision of support not related to legal aid by an attorney

Attorneys’ assistance is not limited to defense from prosecution, but rather lies in the complex approach to the defense of all client’s rights and legal interests. The apprehended individual is not able to exercise all his/her rights limited due to detention. Lawyers often provide assistance on restoring the clients’ lost documents, or employment. These actions do not directly related to defense but may have an impact on outcome.

Provision of medical assistance to clients requires particular attention.

*Detailed analysis of observance of the right to medical assistance is provided in Chapter 6 hereinafter thus we shall only focus on the attorney’s role in ensuring this right.*

The legislation does not establish attorneys’ direct obligation to provide an apprehended individual with other assistance but legal. In practice, the attorney is the person that has access to the suspect, can listen to his/her requests and help with urgent needs. In particular, there is an important issue of providing necessary medical assistance (chronic diseases, disability, substitution therapy in drug addiction treatment etc.). Health complaints are often related to police violence or use of the suspect’s particular condition for psychological influence or even pressure in order to obtain certain information on the committed offence and individuals involved.

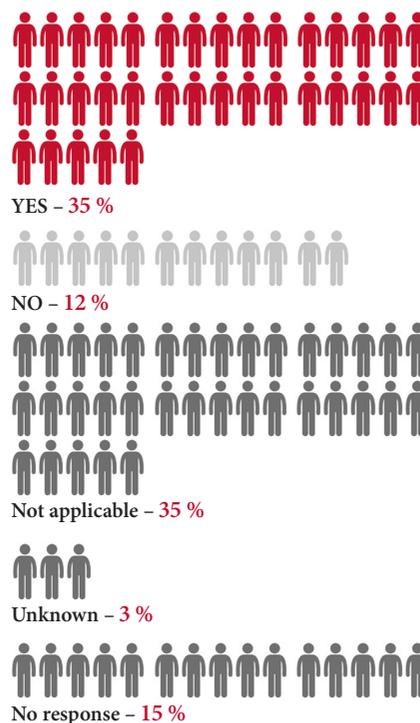


Figure 4.12. Attorneys inquiry on the apprehended persons’ literacy

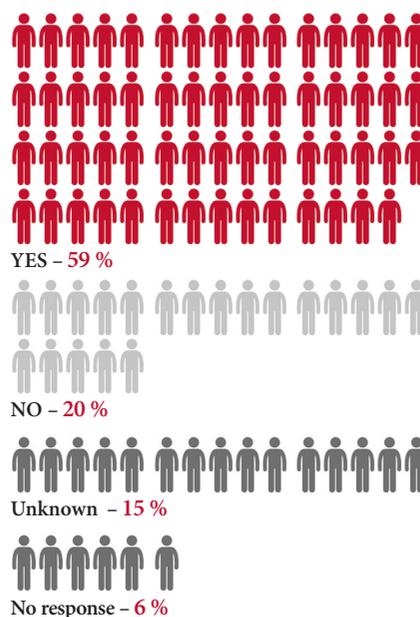


Figure 4.13. Did the attorney explain his/her role?



YES - 62 %



NO - 14 %

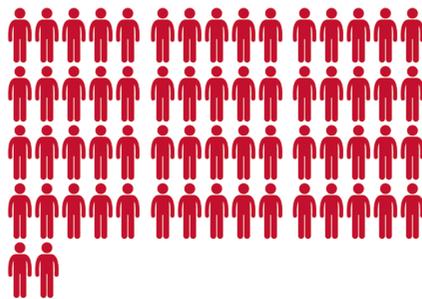


Not applicable - 12 %



No response - 12 %

Figure 4.14. Explanation by an attorney of the right to legal aid at the expense of the state



YES - 62 %



NO - 6 %



Not applicable - 15 %



No response - 17 %

No response - 17 %

Figure 4.15. Clarification of the right to translation services by an attorney

According to the FLA Quality Standards in Criminal Proceedings<sup>153</sup>

*«the counsel has to take immediate action to provide the client with medical assistance, record bodily injuries, to arrange forensic examination, if the client's appearance suggests use violence or the client complains about violence towards him/her. The lawyer should establish if there are any facts of torture or any other cruel, inhuman or degrading treatment towards the client by officers of operational units, pre-trial investigation agencies, penitentiary service, or other officials. Should such facts be revealed, the lawyer is supposed to draft the relevant standard protocol, report such facts in writing to the investigation supervisor, and file the relevant application with the investigative judge in accordance with the procedure established by Article 206 of the CPC. If the defendants held in custody are undergoing substitution therapy or have any chronic diseases that require uninterrupted treatment, the defender should immediately address administration of the facility or officials responsible for the detained individuals' stay in custody with a request to provide medical assistance, as well as file a motion for uninterrupted medical treatment...».*

Analysis of the attention paid by the lawyers to clarify the apprehended individual's health condition has shown that this question was explored in 41% of cases (Fig. 4.18).

The observation has revealed various methods used to inquire about the client's health, and specific situations of identifying the optimal methods used to provide medical assistance:

*«The lawyer asks the detained a few more questions about his health»<sup>154</sup>;*

*«The lawyer established the status of the detainee's health (through direct questions and observation), as well as absence of any particular condition (even though the client was in the state of alcohol intoxication, he was adequate and was giving consistent and smart answers to the questions)...»<sup>155</sup>;*

*«Lawyer: Let's call the emergency. They will record the blows.*

*Apprehended person: Yes, let's do that. It does hurt indeed. I do not know if it hurts to breathe.*

*Lawyer: What you have to do is to file a complaint about the investigator for using force.*

*Apprehended person: Yes, that's what I'll do. But don't call the emergency, they might beat me for it.*

*Lawyer: Should we call the emergency? Does it hurt a lot?*

*Apprehended person: No, don't call the emergency»<sup>156</sup>.*

Attorneys need to react properly to the apprehended person's health also due to improper fulfilment by the police of their obligation to provide medical assistance. The surveyed lawyers have informed the following:

<sup>153</sup> Adopted by the Ministry of Justice Order No. 386/5 of 25.02.2014.

<sup>154</sup> Observation notes.

<sup>155</sup> Observation notes.

<sup>156</sup> Observation notes.

«I myself called the emergency a number of times, but there is another problem here: just a few days ago, I was with my colleague at N police station. I saw a cuffed drug addict taken outside in a terrifying condition. I asked “Why is he cuffed, is he going to run away from you? Look at his condition.”... I called the emergency and said: “There is a man at the threshold of the police station, he is feeling bad”. They answered, “No, let the police station call”. We then forced the station staff to call, and they did of course, but we had to rage there for more than an hour. That’s all about the right to medical help: a man can die ten times before anything is done»<sup>157</sup>;

«I also had a case some time ago. I came to an apprehension and saw a drug addict practically unconscious: eyes rolling back, almost no pulse felt. I tell the investigator that a doctor should be called, and he says, “Why does he need a doctor, he is high.” I understand that quarrelling won’t help, so I start from the other end, “Ok, – I say, – now he will “kick the bucket”, and we will take him under the arms, put him on the bench next to the police station, and say that he came there himself and died.”. In the end, the emergency was finally called, though afterwards it became even worth: in 15 min the apprehended person came back to life so much that we did not know what to do with him»<sup>158</sup>;

«Drug addicts are a whole different story: there are no measures taken to mitigate their condition, as far as I know»<sup>159</sup>;

«If the client needed medical assistance, I would submit relevant statements, solicitations, and in some cases complaints»<sup>160</sup>.

We should also note that attorneys often provide apprehended individuals with other non-legal aid, for instance receiving assistance from social care services, consular support, and establishing contact with the family.

The observation recorded cases when the lawyer helped the client with getting food:

«Lawyer: Have you slept today? Did they give you food?  
Apprehended person: No, have not slept yet. They did not give any food.  
The lawyer has been indignant by such conditions that the suspect was kept in»<sup>161</sup>;

«The detained gives money and says that he wants them to be passed to his wife through the defender. The militsiya official calls the defendant standing outside. The latter comes up to the apprehended person.  
The apprehended person asked if they could allow his wife bringing him some food, because he had had nothing to eat or drink for 24 hours. He asked the defender to tell his wife to bring cigarettes.  
The defender took the money and went to the shop across the road. Five minutes later, he brought two packs of food and cigarettes, put them on the table and left the police station again»<sup>162</sup>;

<sup>157</sup> Interviews with attorneys.  
<sup>158</sup> Interviews with attorneys.  
<sup>159</sup> Interviews with attorneys.  
<sup>160</sup> Interviews with attorneys.  
<sup>161</sup> Observation notes.  
<sup>162</sup> Observation notes.

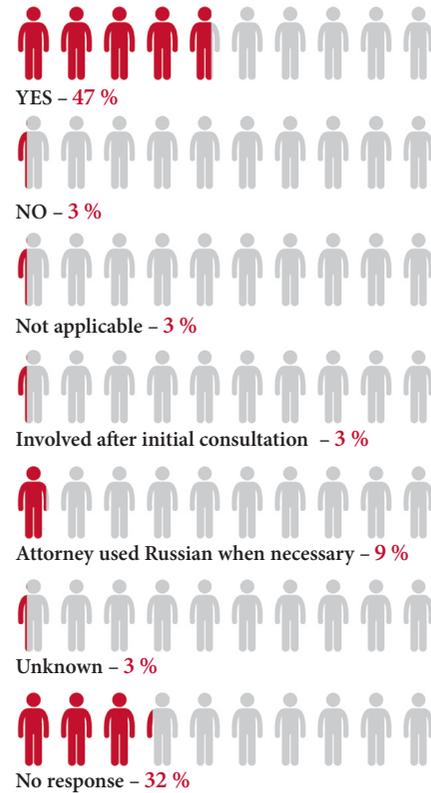


Figure 4.16. Availability of translation during attorney-client communication

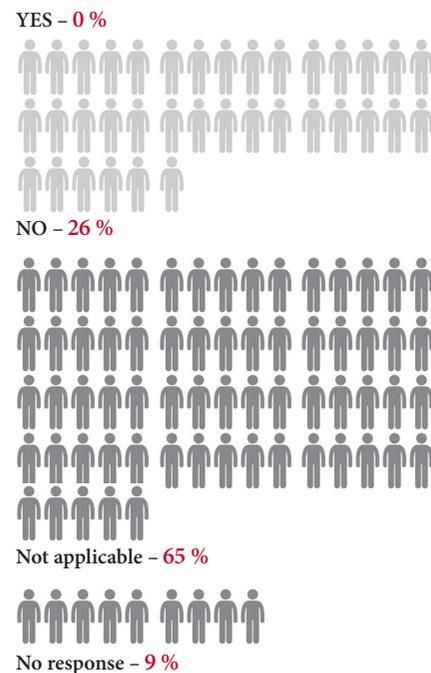


Figure 4.17. Submission of objections on translation matters by attorneys



YES - 41 %



NO - 26 %



Not applicable - 15 %



Unknown - 15 %



No response - 3 %

Figure 4.18. Clarification of the apprehended person's health condition by an attorney

«The detained gives money and says that he wants them to be passed to his wife through the defender. The militsiya official calls the defendant standing outside. The latter comes up to the apprehended person.

The apprehended person asked if they could allow his wife bringing him some food, because he had had nothing to eat or drink for 24 hours. He asked the defender to tell his wife to bring cigarettes.

The defender took the money and went to the shop across the road. Five minutes later, he brought two packs of food and cigarettes, put them on the table and left the police station again»<sup>163</sup>.

Assistance provided by attorneys is mentioned both by apprehended persons and by attorneys during interviews:

«The lawyer has also been trying to get in touch with my brother and let him know that I had been detained and held at the police station»<sup>164</sup>;

«The lawyer is also frequently the person ensuring the apprehended individual's contact with the family; therefore the defender has to pass information from family members to the individual and vice versa»<sup>165</sup>.

## CONCLUSIONS

The study has outlined a number of problems related to arranging provision of legal aid to individuals apprehended by police. One of the main problems in this context is inadequate and inconvenient conditions for attorney-client confidential meetings. Provision of properly equipped premises for confidential meetings would only improve their quality, as assured confidentiality would enable the attorney to concentrate better on explaining the client's rights and providing full-fledged legal assistance.

At the same time, the study confirmed discrepancies in understanding the time of actual apprehension by law enforcement officials and FSLA Centers and subsequent notification of FSLA Centers on apprehension, as well as the procedure of appointing an attorney based on the actual time of apprehension. Observations also revealed that attorneys are not always active in insisting on confidential meeting with a client prior to first interrogation and clarifying the rights of apprehended person, including the right to legal assistance at the state's expense.

Practice shows that in addition to legal assistance attorneys often have to pay attention to other needs of apprehended persons. Attorneys have different views on these challenges and holistic defense approach requires implementation through introduction of quality standards, development and training of attorneys.

<sup>163</sup> Observation notes.

<sup>164</sup> Interviews with apprehended persons.

<sup>165</sup> Interviews with attorneys.

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## 5. Interrogation at the bodies of internal affairs and the right to silence

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### 5.1. International standards on procedural safeguards during interrogation and domestic norms on interrogation in Ukraine

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#### International standards

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According to the general concept of the right to fair trial, the waiver of rights guaranteed by the Convention, in particular the privilege against self-incrimination must be accompanied with adherence to minimal procedural safeguards, in particular:

*«[...] the aforementioned principles of the right to defense and the privilege against self-incrimination are in line with the generally recognized international human rights standards [...] which are at the core of the concept of a fair trial and whose rationale relates in particular to the protection of the accused against abusive coercion on the part of the authorities. They also contribute to the prevention of miscarriages of justice and to the fulfilment of the aims of Article 6, in particular equality of arms between the investigating or prosecuting authorities and the accused...»<sup>166</sup>.*

In addition to the detained privilege against self-incrimination, access to a lawyer serves as an important standard for providing adequate legal aid during questioning:

*«The Court has consistently viewed early access to a lawyer as a procedural guarantee of the privilege against self-incrimination and a fundamental safeguard against ill-treatment, noting the particular vulnerability of an accused at the early stages of the proceedings, when he is confronted with both the stress of the situation and the increasingly complex criminal legislation involved. Any exception to the enjoyment of this right should be clearly circumscribed and its application strictly limited in time.*

*At the same time, the ECHR states:*

*“A waiver of a right guaranteed by the Convention – in so far as it is permissible – must not run counter to any important public interest, must be established in an unequivocal manner and must be attended by minimum safeguards commensurate to the waiver’s importance...»<sup>167</sup>.*

Consequently, according to the ECHR case law, the privilege against self-incrimination is a condition for ensuring protection of human rights in criminal justice:

*««... As regards the use of evidence obtained in breach of the right to silence and the privilege against self-incrimination, the Court recalls that these are generally recognized international standards that lie at the heart of the notion of a fair trial under Article 6. Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6. The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused...»<sup>168</sup>.*

<sup>166</sup> Ogorodnik v. Ukraine, ECHR, № 29644/10, 5 February 2015, §103.

<sup>167</sup> Leonid Lazarenko v. Ukraine, ECHR, № 22313/04, 28 October 2010, §52.

<sup>168</sup> Shabelnik v. Ukraine, ECHR, № 16404/03, 19 February 2009, §55.

ECHR has recognized that a practice of obtaining explanations from the person prior to official apprehension as a suspect very often used by Ukrainian law enforcement officials violates Article 6 of the Convention:

*«The Court considers that any conversation between a detained criminal suspect and the police must be treated as formal contact and cannot be characterized as “informal questioning”...»<sup>169</sup>.*

The Court finds that confession extracted by violence violates the right to the privilege against self-incrimination regardless of circumstances:

*« The Court has found in the present case that the applicant’s initial confession was extracted from him by ill-treatment amounting to torture within the meaning of Article 3 of the Convention [...]. It also notes that the domestic courts admitted those confessions as evidence in his trial [...]. In the light of the principles of its case law as outlined above, the Court considers that this extinguished the very essence of the applicant’s right to the privilege against self-incrimination, irrespective of the weight of the impugned confession in the evidential basis for his conviction, and regardless of the fact that he confessed several times over during the investigation»<sup>170</sup>.*

## National legal framework

Interrogation during pre-trial investigation is regulated by the following laws and legal instruments:

- ▶ Constitution of Ukraine (Articles 57—64),
- ▶ Criminal Procedure Code of Ukraine (Articles 65-71, 95-97, 104, 133, 223-226, 232, 256);
- ▶ Code on Administrative Offences of Ukraine;
- ▶ Laws of Ukraine: “On the Bar”, “On Prosecution”, “On Security Service”, “On Customs Service”, “On Operational and Detective Activities”, “On Immigration”, “On the Legal Status of Foreigners and Stateless Persons”, “On Preliminary Detention”.

Current laws and legal instruments of Ukraine<sup>171</sup> contain, as a rule, only the procedural order for interrogation foreseen by the CPC and administrative procedural norms.

We should note that in accordance with Article 103 of the CPC, interrogation of an apprehended person can be recorded: 1) in a report; 2) on a medium on which criminal proceedings are recorded with the use of technical means. Before signing the report, participants of procedural action can review the text, audio- or video record.

Comments and remarks are indicated in the report before signing. All participants of the procedural action sign the report. If a person cannot sign the report due to physical condition or for other reasons, review of the report takes place in presence of a defense counsel (legal representative) who certifies with a signature the contents of report and the impossibility to have the report signed by a questioned person.

If a participant of procedural actions refuses to sign the report, this fact is reflected in the report. This person has a right to provide written explanations of the reasons to refuse that are included into the report. The fact that a person refused to sign the report, as well as provision of written explanations on the reasons for refusal, is certified by the defense counsel (legal representative), and where such is not available, this shall be signed by attesting witnesses.

<sup>169</sup> Titarenko v. Ukraine, Application no. 31720/02, ECHR judgment, 20 September 2012, §87.

<sup>170</sup> Zhyzitskyy v. Ukraine), application no. 57980/11, ECHR judgment, 19 February 2015, §65.

<sup>171</sup> Criminal Procedure Code of Ukraine - <http://zakon.rada.gov.ua/go/4651-17>;  
Code on Administrative Offences - <http://zakon2.rada.gov.ua/laws/show/80732-10>,  
Laws of Ukraine: “On Legal Practice” - <http://zakon.rada.gov.ua/go/5076-17>,  
“On Prosecution” - <http://zakon.rada.gov.ua/go/1789-12>,  
“On Security Service” - <http://zakon.rada.gov.ua/go/2229-12>,  
“On Operational and Detective Activities” - <http://zakon.rada.gov.ua/go/2135-12>,  
“On Militsiya” - <http://zakon.rada.gov.ua/go/565-12>.

Recording of interrogation in other forms (stenography, intermediate (draft) notes, audio and video recording, as well as the rights of a person under interrogation and his/her attorney (to object and provide clarifications about content of the report, audio or video record, receiving a copy of a record/report) – is only conducted in case of a written (reporting) form of recording. All other forms of information obtained during interrogation are auxiliary (facultative) and can be corrupted.

Therefore, we can conclude that legal framework for interrogation as a procedural investigation action corresponds to international standards and ECHR case law on procedures for obtaining statements from an apprehended person.

At the same time, cases against Ukraine in ECHR on violation of human rights during interrogation, as well as breaches of the privilege against self-incrimination (*Zhukovsky v. Ukraine*, *Grinenko v. Ukraine*, *Titarenko v. Ukraine*, *Serhiy Afanas'yev v. Ukraine*, *Todorov v. Ukraine*, *Oleg Kolesnyk v. Ukraine*, *Yaremenko v. Ukraine*, *Lutsenko v. Ukraine*, *Shabelnik v. Ukraine*) suggest a number of issues that were, on one hand, removed completely by the new Criminal Procedure Code, and at the same time continue to exist in the practice of investigating authorities.

### Goal, object and objectives of interrogation

There is no clear legal or any other regulatory definition of the content and object of interrogation.

The law also does not provide a clear definition of “questioning” (i.e. receiving verbal explanations from the person) as an operational action that does not differ from interrogation in its content but has a form of an open conversation. This conversation does not bear any adequate constitutional rights of persons and is not subject to official documentation (reporting), as well as it can be done at any time of the day with no limits for its duration.

Understanding (definition) of interrogation, its aims, object and tactics and recommendations for carrying out is only available in academic works on criminal science and academic commentary to laws and legal instruments on interrogation or questioning of a person.

## **5.2. Interrogation in the practice of investigation**

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Interrogation of an apprehended person (suspect) during pre-trial criminal investigation and, partially, administrative process, is viewed in official documents and practice of relevant state authorities as a compulsory procedural action aimed at personal confirmation or refutation of one's involvement in an offence either as direct participant or direct/indirect witness. Interrogation is a compulsory procedural action only at certain stages of pre-trial proceedings, namely during apprehension and/or arrest of a suspect, personal notification on suspicion and charges, as well as in relation to all persons summoned before the court during their participation in the trial.

Analysis of investigation and court practice of law enforcement bodies, which provides basis for numerous academic research, shows that interrogation of a suspect receives significant attention, and information obtained during this action often becomes the backbone of charges or even court decisions.

Results of interviews with investigators, law enforcement officials and attorney in the framework of this research show that interrogation of a person in case of apprehension took place in 72% of observed cases (Figure 5.1).

At the same time, in 27% of cases the apprehended person was not interrogated officially immediately upon apprehension, which constitutes a violation of current legislation of Ukraine. At the same time, law enforcement officials often use “operational questioning” of the apprehended person without any documentation (reporting) of such action and, accordingly, without explanation of the procedural status and relevant rights, including the right to refuse answering questions about one's involvement in the event that has characteristics of an offence.

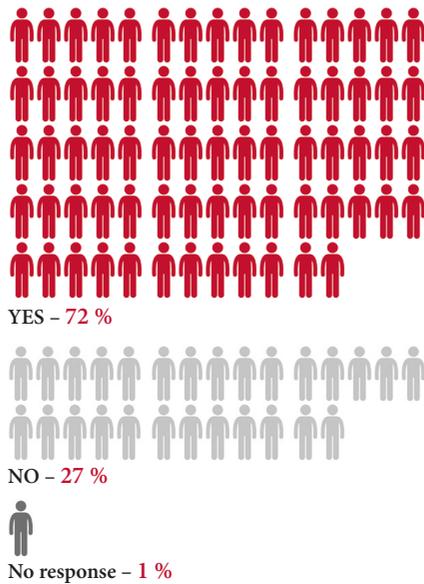


Figure 5.1. Was there an interrogation of a suspect

### Place of interrogation

According to Article 224 of the CPC, interrogation is conducted in the place of pre-trial investigation or in other place upon agreement with the individual to be interviewed.

The research shows that first interrogation of an apprehended person takes place, as a rule, in the office of an investigator or official premises of the bodies of internal affairs, including offices of field officers. In some cases, first interrogation takes place only after the person had been placed into the THF.

In general, there were no significant issues related to the choice of place for initial interrogation of an apprehended person identified during this research.

### Subjects carrying out an interrogation. Conduct of an interrogation by a person without relevant competencies

According to the CPC, the following persons are subjects of interrogation at the stage of apprehension of a suspect: prosecutor, investigator, law enforcement officials, investigating judge. In case of existence of relevant legal grounds, they can be an adequate subject carrying out an investigation.

At the same time, in accordance with Article 41 of the CPC, officials of operational units of the bodies of internal affairs, security agencies, agencies supervising compliance with the tax legislation, and those of the State Penitentiary Service of Ukraine, State Border Guard Service of Ukraine and State Customs Service of Ukraine shall conduct investigative (search) actions and covert investigative (search) actions in criminal proceedings upon written assignment of the investigator, public prosecutor. Consequently, a competent official carries out official interrogation in most cases.

Violations of regulations on the subject conducting an interrogation mostly occur during unofficial communication with the apprehended person. An interrogation by a field officer without a written assignment of the investigator or prosecutor, or conducted outside of the scope of such assignment, constitute violations of the law.

At the same time, the law does not impose an obligation on competent officials (investigator, prosecutor, field officer) to present a document confirming their powers in the individual criminal case to the apprehended person. However, the apprehended person or his/her defense counsel have the right to demand relevant information on the powers of an official and conduct of the interrogation.

The research provides a certain picture about subjects conducting interrogation. For instance, the following was recorded:

«Researcher: Were you interrogated before the first meeting with a lawyer? Who interrogated you and how many times?»

*Apprehended person: Of course, more than once. I had conversations with so many different field officials and the investigators that I don't even remember anymore »<sup>172</sup>;*

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*«Researcher: Did they tell you about any other rights, for instance the right to legal aid or to refuse answering questions etc.?*

*Apprehended person: [...] They asked us 5 times about the same facts until they found some discrepancies (there were three officials in the room, and each one of them wanted to clarify or asked again)».*

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These examples prove that unofficial interrogations, the so-called “conversations”, are carried out several times by different investigators and law enforcement officials.

Current procedural legislation does not provide for the presence of third parties during interrogation. There is only an obligation by the subject of interrogation to include all present persons into the report (Article 104 of the CPC). At the same time, in practice of investigation, law enforcement officials (in particular, convoy staff) who can be present at the interrogation are not mentioned in the report. This allows for presence of field officials at the interrogation, which creates additional psychological effect and even pressure on the apprehended person. Examples of the above were recorded during field research. For instance, there were cases when field officers who had conducted apprehension of a person and are “biased” and not impartial participants of criminal proceedings, were present in the room during interrogation, which could have a negative impact on behavior of the interrogated person.

#### *Time and length of interrogation*

Like any other investigative action, an interrogation shall take place, as a rule, during the day – from 8 a.m. until 10 p.m. In accordance with Article 224§2 of the CPC, interrogation may not last more than two hours without breaks, and in the aggregate more than eight hours per day. According to Article 226 of the CPC, interrogation of underage persons may not last more than one hour without breaks, in the whole more than two hours per day.

At the same time, since combination of official interrogations and other forms of communication between the interrogated person and law enforcement officers can also take place during “unofficial” interrogations, the overall duration of this interrogation and communication must be evaluated with consideration of the overall length of the procedure within a stage in apprehension. A dialogue between a researcher and apprehended person is a vivid example of such communication.

#### *Tactics (methods) of interrogation*

The legislation does not limit the investigator in methods (tactics) of interrogation. There is not traditional regulation that an apprehended person should receive an opportunity to an open description followed by questions. Consequently, there can be situations when an investigator only clarifies certain aspects. In these cases, the right to provide explanations and persistence in exercise of this right is particularly important.

The law does not require the investigator to clarify the apprehended person's view on the suspicion (grounds for apprehension), i.e. whether the person admits involvement in the offence and his/her guilt, and if s/he admits partially – to which part of the offence. This uncertainty creates room for manipulating received information both for the prosecution and for defense.

Only general aspects of interrogation are regulated. For instance, according to Article 224 of the CPC, before being interviewed, the person of the individual concerned is established, his/her rights and the way in which interviewing is conducted are explained. If the interviewee so desires, s/he may provide his testimony written by his own hand. Based on such written testimony, s/he may be asked additional questions.

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<sup>172</sup> Observation notes.

Tactics of interrogation is based on principles of voluntary nature and humanism in receiving the necessary information. At the same time, the legislation does not establish limits of impact (“pressure”) on the person during interrogation except for general warnings on adherence to principles of criminal or administrative process, and they are based solely on recommendations on interrogation for investigators.

Main prohibitions on psychological impact on the interviewee include:

- ▶ Direct prohibition of physical impact (coercion) through use of physical force and different technical devices for abuse and torture;
- ▶ Prohibition of psychological impact though any threats, intimidation, promises for release from punishment, substitution of a restraint measure, illegal refusal to provide legal or medical aid etc.;
- ▶ Deception on circumstances of the offence and its participants;
- ▶ Deliberate falsification of information held by pre-trial investigation agencies (statements by other persons, objects, documents, instruments of crime) on the investigated offence;
- ▶ Posing questions that suggest a desired answer or lead to such answer during direct interrogation in court (article 352§6 of the CPC).

There are additional legal guarantees for the protection of rights and interests of underage persons during their interrogation. In accordance with Article 226 of the CPC, a child or an underage person is interrogated in the presence of the legal representative, a pedagogue, or psychologist and a medical practitioner, if necessary.

In the framework of a research by the Coordination Centre for Legal Aid Provision, attorneys were asked to respond to a question “Do you know about instances of physical and/or psychological impact on the detained person?” In 2013, there were 41% of interviewed attorneys who responded affirmatively, and in 2014, there were 53% of positive responses<sup>173</sup>. Research results show that investigators often use tactics based on concealing the nature of their activities. Consequently, the aim, objectives and meaning of an investigatory (procedural) action is played down, not explained in full or partially, or explained in a formal general manner.

Often, an investigator limits the explanation to the need to sign some documents:

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*«[...] without any explanations, the investigator gave three documents to the apprehended person. He did not explain what these documents were and just told him to sign. [...] I asked [...] what was provided for signing. [...] The investigator said that these were three copies of the notice on suspicion»<sup>174</sup>;*

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*«Researcher: Have you ever exercised your right not to provide explanations or statements? If not, why? Did it take place in presence of an attorney?*

*Apprehended person: Upon apprehension, they did not ask me anything. They took me to a room and put on a chair. I was sitting, a young man was writing something. Then he pointed his finger and told me to put my signature, and gave me a pen. I signed. Then, I was taken to the cell. That is all»<sup>175</sup>.*

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According to results of the field of the field research, investigation tactics, including interrogation, can also include persuasion of the apprehended person or a suspect in the necessity of cooperation with the investigator or law enforcement officers. It also suggests that a confession may be decisive in the possible mitigation of punishment, for instance:

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*«The father asked whether he can change the testimony with the apprehended persons (meaning “explanations” taken by crime detection officials on the previous day). The investigator explained that, according to the CPC, the apprehended persons can change the statements, “say nothing at all”, but has to remember that the investigator*

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<sup>173</sup> Research on challenges for the defense in application of the new Criminal Procedure Code was conducted by the Coordination Centre for Legal Aid Provision (<http://legalaid.gov.ua/ua>).

<sup>174</sup> Interviews with attorneys.

<sup>175</sup> Observation notes.

will be providing character characteristics in court, and unwillingness to speak will serve as evidence of the lack of repentance»<sup>176</sup>.

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The following examples prove the use of this tactics of interrogation:

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«Researcher: Did you exercise your right not to provide explanations or statements? If not, why? Did it take place in the presence of an attorney?

Apprehended persons: I did not exercise it since I was confident that the 'gentlemen's agreement' between the officers and me would be kept on their part. It did not happen (they – field officers – promised to release me in exchange for telling on my friends»<sup>177</sup>.

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### Consideration for the condition of a client during interrogation

Legislation of Ukraine does not impose a direct obligation on the investigator or other official authorized to carry out an interrogation to postpone it due to relevant circumstances, including the health condition of the interviewee (apprehended persons). For instance, attorneys answered affirmatively in 21% and 29% of cases in 2013 and 2014 respectively to the question “Were there cases in your practice when procedural actions were carried out towards a person under the influence of alcohol or narcotics, or in extreme psychological condition?”<sup>178</sup>.

Law enforcement officials do not pass an opportunity to use the special condition to obtain additional information or confession of an apprehended person about involvement in the offence:

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«At 20-00, two militsiya officials brought a young man to the department. He was barely standing on his feet. His face was severely beaten; he had bruises under both eyes, blood on his lips, a scratch on the left side of his forehead, and swollen face in general. His clothes and hands were dirty from dirt and grass. When the officer on duty asked him about the name and place of residence, he could not answer clearly (only from the third attempt it was possible to guess what he was saying). During the entire time, he could not stand straight until he sat down on the floor. His gaze was dull. It seemed he was under the influence of some narcotic substances (since he did not smell of alcohol, and the militsiya officials who brought him explained that they found a syringe and four signs of injection of the left hand»<sup>179</sup>;

«Researcher: Did the lawyer advise you on your right not to testify?

Apprehended person: Yes. He said it would be better if you said nothing. He suggested after I asked for headache medication. He asked me how I was feeling. I told him I was not feeling well, and that I had been beaten. Then, he took my pictures and asked whether we should complaint about the actions of police»<sup>180</sup>.

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This example illustrates a case where the apprehended person is in unhealthy condition, and yet the right not to testify was explained by the lawyer, not law enforcement officials.

### Interrogation of an apprehended person in the status of a victim

Abuse of the law enforcement's right to invite (summon) a person as a witness for written (verbal) explanations about any events or facts, regardless of their relation to criminal investigation, poses a serious problem in relation to criminal apprehension.

<sup>176</sup> Observation notes.

<sup>177</sup> Observation notes.

<sup>178</sup> Research on challenges for the defense in application of the new Criminal Procedure Code was conducted by the Coordination Centre for Legal Aid Provision(<http://legalaid.gov.ua/ua>).

<sup>179</sup> Observation notes.

<sup>180</sup> Observation notes.

Constitutional and procedural (article 66§1(6) of the CPC) guarantees for “immunity” of the witness from self-incrimination includes the right of a witness in criminal proceedings to waive testimony about him/herself, close relatives and family members that may give rise to suspicion and accusation of committing a criminal offence by him/herself, close relatives or family members. This also includes waiving testimony in relation to information that is not subject to disclosure under article 65 of the CPC.

In accordance with Article 87§2(6) of the CPC, obtaining testimonies from a witness who subsequently will be found a suspect or accused in these criminal proceedings is a significant violation of human rights and fundamental freedoms leading to inadmissibility of such information as evidence.

The research indicated cases of interrogation of a future suspect as a witness, for instance:

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*«...He was invited as a witness. Nobody advised him on his rights. He was providing explanations and answering questions of the investigator about participation in the offence»<sup>181</sup>;*

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*«The investigator explained that this man was not apprehended, he was brought for testifying as a witness. After testimony was collected (15-56 – 14.35), the investigator notified him of suspicion at 15-30. Interrogation of a suspect is carried out»<sup>182</sup>.*

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Importantly, despite the fact that procedural value of the interrogation of a suspect as a witness is not significant, since such report on interrogation cannot be used as evidence of person’s guilt, information received in this manner is significant for pre-trial investigation and can lead to neglect of relevant provisions of the law on the right of the apprehended person by the investigator. Therefore, despite explicit prohibition on interrogation of a suspect in the status of a witness, information obtained during the interrogation has value for prosecution and can damage rights and interests of the suspect.

#### *“Unofficial interrogation (questioning) of an apprehended person”*

Unofficial interrogations in the form of “conversations” are outside of scope of criminal procedure regulations. However, they are widespread in practice. The CPC does not provide for any regular conversations for obtaining explanations. According to provisions of the Law “On Operational and Detective Activities”, operational units only have the right to “[...] 1) *question persons upon their agreement, make use of their voluntary assistance*” for the purposes of operational activities. Therefore, the Law emphasizes the voluntary nature of providing and obtaining explanations from any person.

During interviews with attorneys, the question “*Are you aware of cases of conversations, questionings, taking explanations or any other procedural actions with a person who did not have the procedural status of a suspect (apprehended person), which led to the person’s apprehension and/or notification on suspicion?*” was answered affirmatively by 48 % and 52 % of interviewed attorneys in 2013 and 2014 respectively<sup>183</sup>.

Interview answers of an attorney are illustrative in this context:

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*«[...] most of the time, we have spoken about this, the apprehended person is not brought directly before the investigator who would advise on his rights and start investigative actions; instead, he is taken to the field officers. In violation of all rights, including explanations of Article 63 of the Constitution, field officers try to use all means to get the apprehended person to talk and provide as much information as possible. They explain that these are not investigative actions (in fact, it is true) and they are not recording anything but rather just need to talk. Many people believe this and tell the officers everything. Afterwards, when the investigator calls for me and we claim that we would not answer questions with the apprehended person, it is already pointless. However, if the investigator uses*

<sup>181</sup> Observation notes.

<sup>182</sup> Observation notes.

<sup>183</sup> Research on challenges for the defense in application of the new Criminal Procedure Code was conducted by the Coordination Centre for Legal Aid Provision (<http://legalaid.gov.ua/ua>).

*information obtained in this manner from field officials, you can ask the court to declare this evidence inadmissible, but there are still difficulties. I think, in relation to exercise of the right to silence, it depends more on the apprehended persons than on law enforcement officials or lawyers. If the former understand the need to stay silent, it will be easier for the lawyer to defend them. Sometimes it takes a lot of time to convince someone that keeping silence is in his own interests»<sup>184</sup>.*

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There is also a possibility of “covert” interrogation conducted by law enforcement officials in the framework of confidential cooperation. There is no prohibition on initiating this kind of communication with the apprehended person to obtain necessary information for pre-trial investigation. They can deliberately ask questions and direct conversation towards issues of interest for the investigation when conversations are subject to audio or video surveillance.

Results of such interrogation in a report on covert investigative action with annexes (audio or video record) can be used to prove the suspect’s guilt in court. Covert investigative actions require preliminary court warrant. There can be a situation where the warrant was issued (perhaps even with proper reasoning) for recording actions related to committing a crime but its validity de facto did not expire in relation to an apprehended person. Consequently, after apprehension there is possibility for recording communication with the suspect, including deliberate communication initiated by law enforcement officials, despite significant shift in circumstances and conditions.

This method creates room for conducting an interrogation under the mask of another investigative action, namely covert investigative action such as audio or video surveillance. Importantly, not all covert investigative actions require a warrant. In addition, the warrant does not guarantee compliance with the rules on impermissibility of provocative behavior during the covert investigative action. The apprehended person is helpless against this “interrogation” since s/he is not informed about the conduct of an investigative action (which is a specific characteristic of covert investigative actions).

## **5.3. Right to silence during interrogation**

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### **5.3.1. Provision of information on the right to silence to apprehended persons**

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#### *Normative regulation*

The right to silence (right to waive answering questions) is an important procedural safeguard for the protection of rights and interests of individuals and citizens. For instance, according to Article 63 of the Constitution, A person shall not bear responsibility for refusing to testify or to explain anything about himself or herself, members of his or her family or close relatives in the degree determined by law.

According to Article 18§2 and Article 42§4 of the CPC, everyone shall have the right to keep silence about suspicion, a charge against him or waive answering questions at any time, and, also, to be promptly informed of such right. In addition, Article 18§1 of the CPC contains direct prohibition on compelling anyone to admit their guilt of a criminal offence or to give explanations, testimonies, which may serve a ground for suspecting them or charging with a commission of a criminal offence.

The right to silence is informed and explained to the suspect in the general process of informing on rights. The duty of an investigator, prosecutor, investigating judge, and court to advise the suspect, defendant on his/her rights is engraved in Article 20§2 of the Criminal Procedure Code.

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<sup>184</sup> Interviews with attorneys.

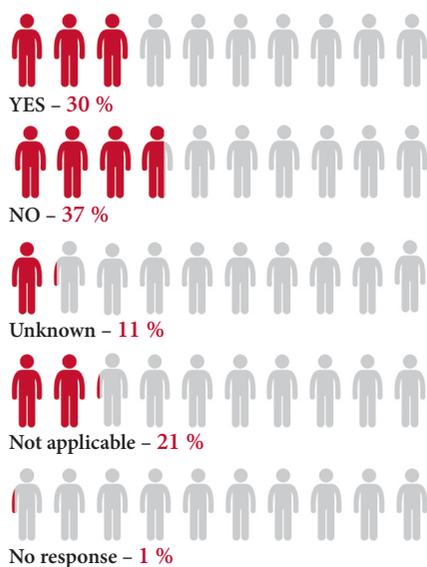


Figure 5.2. The suspect was informed about the right to silence at the onset of interrogation

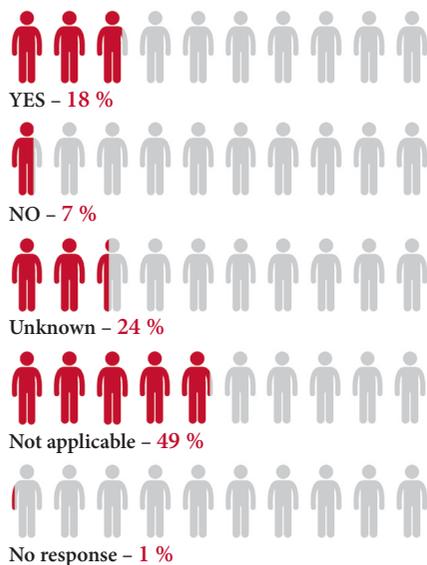


Figure 5.3. Whether the suspect seemed to understand the content of the right to silence

According to Article 208§5 of the CPC, on apprehension of a person suspected of the commission of crime, a report shall be drawn up in which, in addition to information specified in Article 104 of this Code, the following shall be indicated: place, date and exact time (hours and minutes) of apprehension under Article 209 of this Code; grounds for apprehension; results of personal search; pleas, statements or complaints of the apprehended person, if any; comprehensive list of procedural rights and duties of the apprehended person. The report on apprehension shall be signed by the person who draw it up, and the apprehended person. A copy of the report shall be immediately handed over to the apprehended person against signature and sent to prosecutor. The right to silence, among other procedural rights, is also included into the written notice of suspicion (Article 277§1(7) of the CPC).

According to Article 5§8 of the Law of Ukraine “On Militsiya”, during apprehension or arrest (detention) of a person militsiya officials shall inform her/him about grounds and motives of apprehension or arrest (detention), advise on the right to appeal such grounds and motives in court, as well as provide verbal clarification on Article 63§1 of the Constitution of Ukraine.

Research identified significant shortcomings in advising the apprehended person on the right to silence. As noted in Chapter 3, informing of the apprehended person on his/her rights has to take place during different stages starting from the moment of physical apprehension. However, even during interrogation, only one third of apprehended persons receive information on their right to silence (figure 5.2)<sup>185</sup>. At the same time, according to the researcher, only in 18% the suspect understood this right to full extent (figure 5.3)<sup>186</sup>, including only 7% of cases where the investigator provided a clarification on this right<sup>187</sup>.

The right to waive answering questions of the investigator can be explained either verbally or in written form. The law does not establish a clear template for description of this right. It is rather complicated to verify the use of a verbal form of informing about this right. As to the written form, serving a letter of rights, signature under the corresponding text in the report is often a mechanical formality. The following illustrative situation was observed during interviews with apprehended persons:

«Nobody advised him on his rights. When a statement is taken, there is a line saying that Article 63 of the Constitution was explained. And he signs below. However, nobody actually explains any of this. Formally, however, it is completely legal»<sup>188</sup>.

Law enforcement officials are not interested in the exercise of the right to silence. They confirmed it during interviews to full extent:

<sup>185</sup> Observations of the work of law enforcement officials.

<sup>186</sup> Observations of the work of law enforcement officials

<sup>187</sup> Observations of the work of law enforcement officials.

<sup>188</sup> Interviews with apprehended persons.

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«Of course, I don't like when they refuse to testify. I think that in certain cases there should be limitations on the right in article 63 of the Constitution»<sup>189</sup>;

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«I think it would be better if they removed this provision, this right. It is better if they lied instead of keeping silence. When lying, they will say something, and maybe it will be something interesting or important. When a person is open for contact, s/he answers questions, and I have an opportunity, or at least a hope, to obtain necessary information»<sup>190</sup>;

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«[...] despite everything, we need to obtain confession from the suspect, it is the most important part of the case, the base of everything»<sup>191</sup>.

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In practice, law enforcement aim at preventing the suspect from exercising his/her right to silence. It is typical to explain this right in a way that increases chances of the suspect neglecting it. For instance, the suspect may not “notice this right (formal signature in the report)”, or the suspect may think that this right applies only to certain stages of proceedings (only applicable in court), or the suspect may consider exercising this right “unbeneficial” (exaggeration of the impact of cooperation with authorities, threats of negative attitude from an investigator). For instance, the following was established during interviews with attorneys:

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«While were expecting the lawyer, I spoke to the apprehended person and found out that nobody advised him on his rights. He had been testifying and answering investigator's questions»<sup>192</sup>.

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«The right to waive answering questions, to have a defense counsel and other rights are not explained to the person [...] We decided that the letter of rights would be given in the car during transfer to the THF (the car is waiting at the department), and the investigator would pick it up from his office»<sup>193</sup>.

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At the same time, research showed widespread instances of deception of apprehended persons on their right to keep silence, in particular:

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«Researcher: Did you exercise your right not to provide explanations or statements? If not, why? Did it take place in the presence of an attorney?

Apprehended person: I did not exercise it since I was confident that the ‘gentlemen's agreement’ between the officers and me will be kept on their part. It did not happen (they – field officers – promised to release me in exchange for telling on my friends»<sup>194</sup>.

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We should note that the moment of advising on the right to silence does not differ from the moment of advising on other rights.

Study findings on these issues are presented in Chapter 3 of this report.

### 5.3.2. Practice of exercising the right to silence

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The research provides compelling evidence that the right to silence and mechanism for its exercise is an important safeguard in criminal proceedings. It is both a right and an advice to the apprehended person that is provided

<sup>189</sup> Interviews with investigators.

<sup>190</sup> Interviews with investigators.

<sup>191</sup> Interviews with law enforcement officials.

<sup>192</sup> Interviews with attorneys.

<sup>193</sup> Observation notes.

<sup>194</sup> Observation notes.

most often according to research results. There were 21 % of interviewed lawyers who reported giving this advice, which makes for 78vi% of all cases of lawyers' advice.

Interviews with attorneys showed ambiguous attitudes towards exercise of the said right in practice. Certain number of attorneys pointed out the benefits of this right and talked about its widespread use in practice. The following opinions of attorneys illustrate this fact:

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*«However, refusing to respond to the investigator's questions is not an answer since the prosecution will use this as an argument in support of client's guilt, which is often taken into consideration by courts. Therefore, it is necessary to answer questions, but it matters how and what one says. You can tell about something and leave out the important things. Everything depends on circumstances and on the alleged crime. Of course, there are cases where it is better for the client to stay silent since in approximately 50% of cases the person is found guilty when s/he confesses»<sup>195</sup>;*

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*«As a rule, suspects understand the right to waive testifying during interrogation. However, they do not realize that if there is no recording they can also refuse to answer»<sup>196</sup>.*

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Majority of interviewed attorney mentioned interference of the law enforcement with the exercise of the right to silence by the apprehended persons, for instance:

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*«Majority of clients are aware of the right not to provide answers. However, they rarely use it. Officials of the bodies of internal affairs convince the apprehended persons that the latter have to answer questions»<sup>197</sup>;*

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*«Usually, investigators necessarily advise them on this right but warn about the alleged negative consequences of the waiver (for instance, obstructing investigation). Due to these threats by law enforcement officials, the apprehended persons often provide explanations fearing negative impact for themselves»<sup>198</sup>;*

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*«Yes, they understand. Perhaps, it is the only right that everyone understands and knows about. However, it can be very difficult for the apprehended persons to voice their refusal without an attorney»<sup>199</sup>.*

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Some of the interviewed attorneys state that investigators, prosecutors and judges (legal practitioners in general) have a stereotype that an apprehended person perceives refusal to testify as a hidden evidence of his/her guilt, namely:

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*«Yes, they understand, but they also understand that neither investigators, nor prosecutors or judges approve this position of defense, and they consider it avoiding accusations»<sup>200</sup>.*

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Meanwhile, analysis of attorneys' interviews proves that the right to silence is a rather complex tool, and it is necessary to account for all circumstances of criminal proceedings in its exercise. During apprehension, exercise of this right is justified since it provides time for navigating in the situation, consulting with a lawyer, thinking about details of the position, and considering all the pros and cons:

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*«Advice on choosing such stance is given depending on different circumstances. In particular, if the attorney is confident in the weakness of prosecution's evidence. It also depends on the person. For instance, when a suspect cannot fully keep the stance chosen by defense in general, or s/he is morally unstable, and can fall for provocative questions of the investigator»<sup>201</sup>;*

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<sup>195</sup> Interviews with attorneys.

<sup>196</sup> Interviews with attorneys.

<sup>197</sup> Interviews with attorneys.

<sup>198</sup> Interviews with attorneys.

<sup>199</sup> Interviews with attorneys.

<sup>200</sup> Interviews with attorneys.

<sup>201</sup> Interviews with attorneys.

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*«I can only suggest that the client waives answering questions when I have not had enough time for communication with the client (sometimes law enforcement officials provide limited time for an attorney), or when I see that the client's story is inconsistent, illogical, confusing, and his position is unclear or s/he does not understand what had happened. I give this advice to my clients quite often»<sup>202</sup>.*

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A large number of interviewed attorneys see a link between the need to waive testifying by the suspect at initial stages of investigation (in particular, during apprehension) and lack of information about evidence collected by the investigator. The following comments prove illustrate this fact:

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*«If the situation is unclear, it is better to keep silence in the beginning»<sup>203</sup>;*

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*«[...] while there is a need to figure out what evidence the investigator has or can obtain, how the evidence was obtained, I think it is better to stay silent and make the choice»<sup>204</sup>.*

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Consequences of the decision not to testify in the practice of interrogations serve as pre-condition for such decision by a suspect. From procedural point of view, a person who refused to self-incriminate is in no way in worse position than someone who is answering questions. At the same time, judicial and investigative practice has developed a radically different position.

Investigation authorities perceive refusal to provide explanations as a method of avoiding punishment for the offence. Both attorneys and law enforcement officials mentioned this fact in their interviews. For instance, law enforcement officials tend to think the following:

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*«I think that the right to silence is a suspect's chance to avoid punishment if an investigator does not have direct proof against the suspect»<sup>205</sup>;*

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*«[...] I warn these people: they should not hope for the mildest penalty or normal treatment»<sup>206</sup>;*

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*«I write in the indictment that the person does not comprehend his/her guilt or feel repentance»;*

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*«I think that those referring to Article 63 of the Constitution are guilty and simply do not know how to lie and bailout»<sup>207</sup>.*

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Lawyers also say that courts perceive refusal to provide explanations as a negative circumstance. For instance, attorneys point out the following:

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*«[...] the court has a negative attitude towards someone who does not testify. Consequently, silence for a suspect in Ukraine comes at a price of real penalty and additional years of imprisonment as it is considered to be an aggravating circumstance»<sup>208</sup>;*

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*«[...] neither investigators, nor prosecutors or judges approve of this position of defense and consider it avoiding accusations»<sup>209</sup>;*

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<sup>202</sup> Interviews with attorneys.

<sup>203</sup> Interviews with attorneys.

<sup>204</sup> Interviews with attorneys.

<sup>205</sup> Interviews with law enforcement officers.

<sup>206</sup> Interviews with law enforcement officers.

<sup>207</sup> Interviews with law enforcement officers.

<sup>208</sup> Interviews with attorneys.

<sup>209</sup> Interviews with attorneys.

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«[...] judges have extremely negative attitude towards the right to silence since it is very good when a person confesses and shows repentance»<sup>210</sup>.

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Consequently, practice of investigation showed the following tendencies in the exercise of the apprehended persons' right to silence:

- ▶ Insufficient procedural safeguards for the exercise of this rights;
- ▶ Concealing the actual content of this rights, misrepresentation of provisions, exaggeration of negative consequences of the exercise of this right for the apprehended person;
- ▶ Illegal pressure by law enforcement officials with the purpose of obtaining testimony from the apprehended person;
- ▶ Existence of prejudice towards refusal to testify as a method to avoid responsibility by the apprehended person.

#### **5.4. Right to provide explanations during interrogation and its understanding by the suspect**

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The right to provide explanations on the content of suspicion is one of the most important and effective tools for participation of the apprehended person in pre-trial investigation. Depending on the situation, the following options can be suitable for the apprehended person: providing or not providing explanations, responding or not responding to questions etc.

It is important that the apprehended person's decision on providing or not providing explanations is conscious and weighed in the light of understanding possibility of such choice and consequences of the stance. It is impermissible to change the will of a suspect through different means of impact: violence, threats, deception, abuse of trust etc. Correct understanding of the right to provide or not provide explanations, and answer questions is crucial for ensuring lawfulness of interrogation.

In practice, given the high risk of conflict during apprehension and pre-trial investigation, law enforcement officers often use different tools and methods for obtaining information from a person despite his/her actual will. They do so by forcing the person to provide explanations in different ways, for instance by conducting "conversations" and obtaining explanations while stating that the right to waive testifying is only applicable to interrogation; convincing the apprehended person that the right to waive testifying is only applicable in court; exaggeration of possible negative consequences of refusal to testify etc.

The research identified rather contradicting opinions on the understanding of the right to "waive testifying" by an apprehended person.

According to observations of the work of law enforcement officers, one can conclude that majority of suspects decide to testify and answer investigators' questions. In 54% of observed cases, apprehended persons answered all questions, in 7% of cases, s/he provided answers to some questions, and only 11% of apprehended persons provided no answers (Figure 5.4)<sup>211</sup>.

A significant number of interviewed apprehended persons indicated that they understood the content of the right to silence, but made conscious decisions to testify. For instance:

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*« Researcher: Did you exercise your right to waive answering questions and testifying?*

*Apprehended person: No, I did not. I decided to testify.*

<sup>210</sup> Interviews with attorneys.

<sup>211</sup> Observations of the work of law enforcement officials.

Apprehended person: Were you advised on this right?

Apprehended person: No, but I am aware of it.

Researcher: Why did you not use it then?

Apprehended person: What would it change? If they wanted, they would find what they needed»<sup>212</sup>.

Attitude of attorneys towards the understanding of the right to waive providing explanations during the interrogation is illustrative. For instance, significant number of attorneys point the suspects' awareness about this right, for instance:

«Majority of suspects know that they have the right to waive testifying or providing explanations about themselves, family members or close relatives»<sup>213</sup>;

«Almost all apprehended persons/suspects know about this right»<sup>214</sup>;

«Majority of suspects understand the right not to answer questions»<sup>215</sup>.

Exercise of the right to provide or not provide explanations in the practice of investigation is rather complicated and depends on adherence to its guarantees by everyone involved in the apprehension process, including field officers, investigators, procedural prosecutors, investigating judges, lawyers, persons responsible for detainees etc. Significant number of such guarantees is related to the mechanism of their application, namely details on the moment, manner, and form of advice on the right to keep silence, as well as explanation of consequences of this right.

## 5.5. Participation and the role of an attorney during interrogation

### Presence of lawyers during interrogations by police

Interrogation is the most common investigative action in pre-trial investigation, particularly in the context of exchanging information and supporting arguments of the defense, as well as refutation of suspicion towards the apprehended person. According to research results, in most cases, lawyers view their participation in interrogations as mandatory, for instance:

«I think that participation of an attorney during interrogation is mandatory even when it is an interrogation of a witness. The person can

<sup>212</sup> Observation notes.

<sup>213</sup> Interviews with attorneys.

<sup>214</sup> Interviews with attorneys.

<sup>215</sup> Interviews with attorneys.

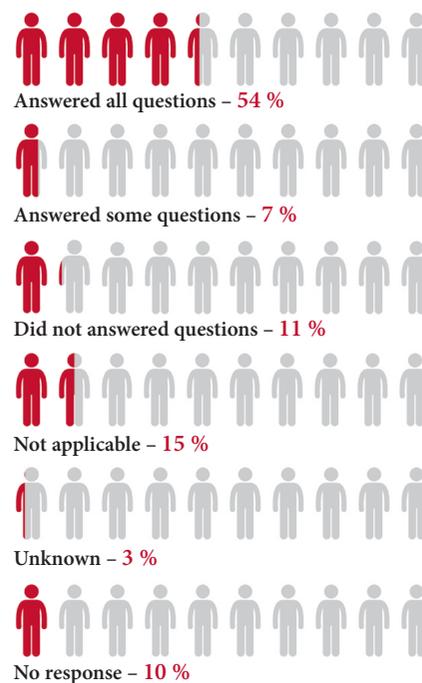


Figure 5.4. The suspect

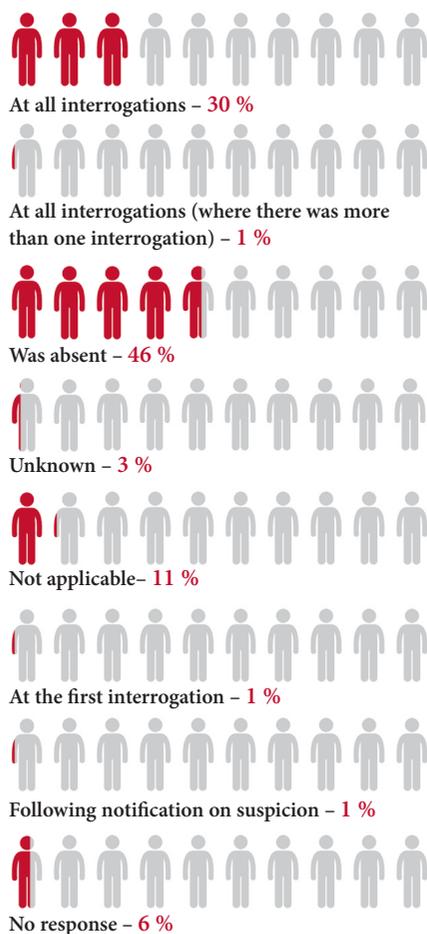


Figure 5.5. Was an attorney present during interrogation

come into the police department being a witness and leave already as a suspect, which happens in Ukraine often. During the interrogation of a witness or a suspect the lawyer has to prevent law enforcement officers from asking leading questions, convincing to “confess to everything”, impose “single true” version of events, since it will definitely be used against the apprehended person in the future»<sup>216</sup>;

«I am always present during interrogation since otherwise the investigator will impose pressure on my client and the latter can talk nonsense, which will then have a negative impact on defense»<sup>217</sup>.

Actual presence of a lawyer during interrogations is one of the key safeguards for the exercise of the right to defense. Mandatory presence of a lawyer during interrogation is defined by general rules for participation of an attorney in pre-trial investigation in accordance with the current legislation of Ukraine.

The monitoring of the work of law enforcement officers shows that attorneys were present at the first interrogation of the apprehended person in 30% of cases, whereas interrogation in attorneys’ absence took place in 46% of cases (figure 5.5)<sup>218</sup>.

Investigation practice provides evidence of abuse by law enforcement officers when they assign schedule interrogations for a time and date when an attorney cannot take actual part. For instance:

«[...] unfortunately, there are cases when the lawyer is told to arrive to the department at a certain time. For instance, they called me at 5 p.m. and told me that I had to be at the interrogation at 9 a.m. on the following day. I had a court hearing in another case scheduled for that time. I think it is wrong and inappropriate. There are also cases when militsiya officials call the board and complain that attorney do not come upon client requests. We note that there is mail with notification on delivery, e-mail, and phone for notifications on investigative actions»<sup>219</sup>.

At the same time, attorneys have an opinion that in most cases unofficial interrogations are carried out without attorneys. They stated in their interviews:

«The main conversation, undocumented interrogation, is carried out necessarily without an attorney. After the actual “work” with the apprehended person, when he is ready to say what the investigator wants, an attorney is invited»<sup>220</sup>.

At the same time, the law provides for real opportunities to postpone interrogation if the attorney is not able to come.

<sup>216</sup> Interviews with attorneys.

<sup>217</sup> Interviews with attorneys.

<sup>218</sup> Observations of the work of law enforcement officials.

<sup>219</sup> Interviews with attorneys.

<sup>220</sup> Interviews with attorneys.

### The role of attorneys in interrogation

When attorneys take part in interrogation of an apprehended person, they perform their main role, provision of legal aid, namely:

firstly, they evaluate the content of explanations given by the person during interrogation depending on the client's decision whether to admit to committing an offence and provide explanations to the investigator. The following interview responses confirm this statement:

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*«The attorney [...] advised him on his right one more time and emphasized article 63 of the Constitution on refusal to testify. The apprehended person said that he would not waive testimony and was ready to testify since he was not guilty»<sup>221</sup>;*

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*«You prepare your line of action independently and only coordinate it with me. If you agree, you sign everything. If you don't, or there is something you don't like, don't sign. Call me, and we will figure it out»<sup>222</sup>;*

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*«[...] the lawyer asked about the apprehended person's stance and whether he admitted guilt. The apprehended person said that he did not admit guilt or understand grounds for his apprehension»<sup>223</sup>;*

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secondly, an attorney provides assistance in recording complaints and statements of the suspect, and formulating and expressing his position, for instance:

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*«When the report on apprehension is signed, the attorney writes explanations on behalf of the apprehended person that apprehension was unlawful since it took place outside of the crime scene: 'My apprehension is unlawful since it was carried out without a warrant from the investigating judge, and the victim did not identify me'»<sup>224</sup>;*

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*«The protocol says, 'I refuse to testify in accordance with Article 63 of the Constitution of Ukraine since I am not feeling well. This was written by the apprehend person as directed by the attorney'»<sup>225</sup>;*

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*«[...] the attorney returned to investigator's office with the apprehended person and said that they admitted guilt and repented the crime but disagreed with the qualification (insisting on Article 124 – excess of necessary defense»<sup>226</sup>;*

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Thirdly, an attorney provides support and psychological confidence to the suspect, for instance:

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*«[...] first of all, presence of an attorney calms many people down mentally. The apprehended person feels that someone is on his/her side and behaves differently. [...] Mental state improves immediately and they understand that it is not all that horrible, the moral support itself matters a lot»<sup>227</sup>;*

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*«The apprehended person needs a lawyer, first and foremost, for psychological and moral support»<sup>228</sup>;*

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Fourthly, an attorney helps to exercise the right to silence and insist on this position, for instance:

<sup>221</sup> Interviews with attorneys.

<sup>222</sup> Interviews with attorneys.

<sup>223</sup> Observation notes.

<sup>224</sup> Observation notes.

<sup>225</sup> Observation notes.

<sup>226</sup> Observation notes.

<sup>227</sup> Observation notes.

<sup>228</sup> Observation notes.

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*«I suggested that the apprehended person refuses to testify in accordance to art. 63 of the Constitution. If you confess right away, they will add 10 additional offences. We will always have time to confess. If we refuse now, we will be able to bargain later»<sup>229</sup>;*

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*«[...] the attorney explained art.63 of the Constitution of Ukraine and recommended to refrain from testifying. The apprehended person agreed. [...] The attorney informed the investigator that they refused to testify. The investigator said that everything had been prepared and typed. However, they did not testify»<sup>230</sup>;*

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Finally, an attorney terminates law enforcement officials' efforts to use the client's special condition (illness, intoxication, confusion, depression etc.), for instance:

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*«Then, the attorney explained art. 63 of the Constitution of Ukraine and suggested to use the right due to poor physical condition. The apprehended person agreed»<sup>231</sup>;*

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*«The interrogation took place formally but we refused to testify under [article] 63 since the apprehended person was exhausted, he had not slept or eaten for over a day. Therefore, we refused so he could get some sleep.*

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Therefore, attorneys usually assist in following the client's stance and using procedural rights effectively, and formulating explanations in a more precise way. The following view of attorneys was expressed during interviews:

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*«Attorney's presence during apprehension or immediately after the apprehension is very important since s/he can prevent the person from providing information against him/herself, i.e. against self-incrimination»<sup>232</sup>;*

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*«[...] at this stage, it is crucial to talk the apprehended person through the situation, or provide correct advice to prevent him/her from self-incrimination in stressful situation. It is the attorney who has the ability and obligation to do that»<sup>233</sup>.*

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One of the factors influencing the role of an attorney during interrogation is the attitude of law enforcement officers. First of all, it stems from the attorneys' advice for clients to waive answering questions. The research identified rather negative attitude of law enforcement officers towards such advice since the latter are "interfering with their work". In particular, the following statement describes such attitude:

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*«Prosecutor: the new CPC creates many opportunities for apprehended persons and attorneys to abuse their rights and obstruct investigation. There need to be stricter measures towards attorneys who recommend to refer to Article 63 of the Constitution of Ukraine and say that law enforcement officials will not prove anything»<sup>234</sup>.*

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### Consequences of attorney's presence during interrogation

There are no provisions limiting the right of an attorney to be present during investigation. An attorney has rather broad powers during interrogations, including asking questions (Articles 46, 225 of the CPC), submit comments, objections and motions and require that they be put on the record (Articles 46, 42 KIIK) etc.

<sup>229</sup> Interviews with attorneys.

<sup>230</sup> Interviews with attorneys.

<sup>231</sup> Interviews with attorneys.

<sup>232</sup> Interviews with attorneys.

<sup>233</sup> Interviews with attorneys.

<sup>234</sup> Observation notes.

This right is violated when investigators carry out “covert interrogations”, i.e. communicate with the apprehended person without any procedural documentation and information about procedural status of such communication. These cases can be masked as alleged “cover investigative actions” whereas their results can be legalized and used as evidence in the future. These cases constitute violations of the right to defense in its entirety due to deception of the apprehended person.

In addition, there are cases when investigative actions, including interrogations, are carried out in the absence of an attorney due to lack of notification thereof in advance. In addition, law enforcement officials interpret the term “in advance” differently since there is no clear time limit for such notification, and there is ambiguous interpretation of the term “promptly” by investigators.

The research showed that consequences of attorney’s participation in interrogation play an important role. In particular, it means that an attorney will provide better advice on the suspect’s rights, mechanisms and consequences of exercising these rights, as well as will point out the aspect of the suspect’s legal status that are “unfavorable” to investigators and law enforcement officers, and the latter often fail to inform the apprehended person about them. For instance:

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*«At 00-15, the investigator completed the report on apprehension, printed out the letter of rights and duties of an apprehended person and gave them to the apprehended person and the lawyer for signature. When the apprehended person started signing, he asked what exactly he was signing. The attorney approached and showed that it was an advice on all his rights, including the right to medical assistance, legal aid, the right to refuse from testifying against oneself and family members, as well as the right to silence»<sup>235</sup>;*

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*«The attorney listened to the apprehended person during confidential communication. They agreed upon the position. The attorney advised him on his rights and emphasized provisions of art. 63 of the Constitution on the right to refuse to testify»<sup>236</sup>.*

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In addition, an attorney can explain the actual objective and meaning of investigative and procedural actions during interrogation, decrease tension and conflict, present additional possibilities to the client, and explain the right to testify at any stage of criminal proceedings. As a result, the client can make a decision on the need to testify during interrogation in much calmer and balanced manner:

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*«Very often (virtually always) I advise my clients to refrain from answering questions, particularly during apprehensions. This approach gives time for considering specifics of the legal stance»<sup>237</sup>.*

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## CONCLUSIONS

Legal framework for interrogation and the right of the suspect’s right to silence is rather consistent. The Constitution of Ukraine, Criminal Procedure Code and other legal instruments contain its key norms. There is no legal obligation of the investigator to carry out an immediate interrogation of the apprehended person or a person who had been notified of suspicion. In most cases, existing shortcomings are related to mechanisms of implementation and guarantees for ensuring rights of the suspect.

Interrogation of apprehended persons has significance in the context of the entire stage of apprehension. Therefore, it should not be evaluated as a separate event. Even if the interrogation of a suspect is short and, as a rule, does not take a long time, investigative actions taken together, including “unofficial interrogations”

<sup>235</sup> Observation notes.

<sup>236</sup> Observation notes.

<sup>237</sup> Interviews with attorneys.

(questioning) are quite lengthy and mentally exhausting. For the first time, the interrogated person is faced with, as a rule, a group of law enforcement officials.

In the context of ensuring the rights of a suspect, the biggest danger lies in the unofficial part of communication with field officers. The goal of such communication is not procedural documentation of statements as future evidence but rather obtainment of maximum information about the offence from the suspect. Communication in the form of covert investigative actions is a more sophisticated and dangerous form of unofficial interrogation. Its specifics is that the result of such communication can be used in court as evidence. Safeguards against these forms of hidden interrogation must be enshrined in the legislation.

Participation of an attorney is one of the main guarantees for ensuring the rules for interrogation and exercise of the right to silence by the suspect. Participation of an attorney allows for receiving comprehensive and objective information on rights and consequences of their exercise, counteracting law enforcement officers' attempts to influence the suspect's behavior, as well as choosing the optimal stance in the case. According to practice, there are grounds to conclude that investigators attempt to prevent the defense from exercising all of its functions (calling an attorney only to draw up the report on apprehension or for notification of suspicion).

An attorney must receive access to the apprehended persons as soon as possible. The law provides sufficient guarantees for the right to receive legal aid. During pre-trial investigation and, particularly, apprehension there are no clear and detailed regulations on notifying an attorney about investigative actions. Regulations on notification are contradictory in their content since legal regulation on referral to an attorney applies to a suspect, victims or witness and does not provide for direct application of this provision for an attorney. However, attorneys are under obligation to be present at investigative actions with their clients. It is necessary to take into account that invitation and actual arrival of an attorney takes certain time, and the apprehended person is left alone face-to-face with law enforcement officials. Regulations for notification of an attorney need to be enshrined in legislation.

The study confirmed that there is plenty of room for abuse stemming from the lack of detailed obligation on the manner, form, content and time limits for advice on rights by law enforcement officers, as well as the lack of precise template for advice on the suspect's right to remain silent. Often, advice on rights is a formality carried out through the signature of a suspect in the report. As a rule, it takes place after the completion of investigative actions and communication of law enforcement officers with the apprehended person.

The lack of clear template for advice on the right to remain silent or a requirement on the form of advice creates room for abuse by law enforcement officials in their practice. The effectiveness of advice is not confirmed by any actions of the suspect due to the lack of such requirement. A signature in the report on being informed about the right to waive answering questions or testifying does not document the fact of explaining the content of this right or its understanding by the suspect. It be reasonable to establish rules that require the suspect to personally write the full text of the right and its consequences in all procedural documents.

According to the research, there are instances of physical violence towards the apprehended persons. However, in majority of cases investigators and law enforcement officials obtain information through deception and psychological pressure on apprehended persons. These methods can usually be countered by remaining silent.

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## 6. The right to medical assistance

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### 6.1. Normative regulation of the right to medical assistance

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#### International standards

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The right of an apprehended person to medical assistance is guaranteed by the *Rules on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse*<sup>238</sup>, in particular:

- ▶ The conditions of remand in custody shall, subject to the Rules set out below, be governed by the European Prison Rules (para. 35);
- ▶ Arrangements shall be made to enable remand prisoners to continue with necessary medical or dental treatment that they were receiving before they were detained, if so decided by the remand institution's doctor or dentist where possible in consultation with the remand prisoner's doctor or dentist (para. 37.1);
- ▶ remand prisoners shall be given the opportunity to consult and be treated by their own doctor or dentist if a medical or dental necessity so requires (para. 37.2).

*European prison rules*<sup>239</sup> also have provisions on medical assistance to remand prisoners, in particular:

- ▶ Prison authorities shall safeguard the health of all prisoners in their care (para. 39);
- ▶ Prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation (para. 40.3);
- ▶ All necessary medical, surgical and psychiatric services including those available in the community shall be provided to the prisoner for that purpose (para. 40.5)
- ▶ Arrangements shall be made to ensure at all times that a qualified medical practitioner is available without delay in cases of urgency (para. 41.2);
- ▶ The medical practitioner or a qualified nurse reporting to such a medical practitioner shall see every prisoner as soon as possible after admission, and shall examine them unless this is obviously unnecessary (para. 42.1).

#### Case law of the European Court of Human Rights

Starting with *Kudła v. Poland*, the Court has repeatedly emphasized that in accordance with Article 3 of the Convention the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance<sup>240</sup>.

The ECHR has repeatedly turned to the analysis of medical assistance, including its provision for detained persons. The Court pointed out the notion of “adequacy” of medical assistance whereby the Court retains sufficient flexibility in defining the required standard of health care, deciding it on a case-by-case basis.

In the analysis of ECHR case law, it is necessary to note its conclusions. In the case of *Tymoshenko v. Ukraine*<sup>241</sup>, the Court stated:

<sup>238</sup> Adopted by the Committee of Ministers Recommendation REC (2006) 13 on 27 September 2006.

<sup>239</sup> Adopted by the Committee of Ministers Recommendation R (87) 3 on 12 February 1987.

<sup>240</sup> *Kudła v. Poland* [GC], no. 30210/96, § 94, ECHR 2000-XI.

<sup>241</sup> *Tymoshenko v. Ukraine*, Application no. 49872/11, ECHR judgment, 30 April 2013.

«The authorities must also ensure that a comprehensive record is kept concerning the detainee's state of health and his or her treatment while in detention (see, e.g., *Khudobin v. Russia*, no. 59696/00, § 83, ECHR 2006-XII (extracts)), that diagnosis and care are prompt and accurate (see *Hummatov*, cited above, § 115, and *Melnik*, cited above, §§ 104-106), and that where necessitated by the nature of a medical condition, supervision is regular and systematic and involves a comprehensive therapeutic strategy aimed at curing the detainee's diseases or preventing their aggravation, rather than addressing them on a symptomatic basis (see *Hummatov*, cited above, §§ 109 and 114; *Sarban*, cited above, § 79; and *Popov v. Russia*, no. 26853/04, § 211, 13 July 2006)».

At the same time, in many cases, the Court found insufficient regulation of medical assistance under domestic law, as well as established that the problems arising from the conditions of detention and lack of proper medical treatment are of a structural nature in Ukraine<sup>242</sup>, and there is no effective remedy in respect of these complaints<sup>243</sup>.

## Domestic legislation

Domestic legislation also guarantees the right of the apprehended person to medical assistance, for instance:

The *Constitution* states that:

- ▶ *Everyone has the right to healthcare, medical assistance and medical insurance. Healthcare is ensured through state funding of the relevant socio-economic, medical and sanitary, health improvement and prophylactic programs (Article 49).*

The *Law of Ukraine "On the Fundamental Principles of Healthcare Legislation in Ukraine"* provides the following:

- ▶ *Every citizen of Ukraine has the right to healthcare that encompasses qualified medical assistance, including free choice of a doctor, methods of treatment in accordance with recommendation and medical institution (article 6§1(d));*
- ▶ *In accordance with the Constitution of Ukraine, the state provides guarantees to all citizens for exercise of their right in the field of healthcare by ensuring guaranteed level of medical assistance on the scale identified by the Cabinet of Ministers of Ukraine (article 7§1(c)).*

Guarantees of the right to medical assistance apply to persons in custody and detention; they are specified in relevant legal instruments. Article 5 of the *Law of Ukraine "On Militiya"* establishes the general duty of law enforcement for providing urgent medical assistance to the apprehended person.

According to Article 25 of this law, there is a duty to provide urgent medical assistance to the extent possible to persons who were injured as a result of offences or accidents, or are in helpless or life-threatening condition including underage persons without guardianship, and in case of need to take measure to ensure provision of urgent medical assistance in accordance with the *Law of Ukraine "On Urgent Medical Assistance"*.

In accordance with Article 212 of the CPC, an official of pre-trial investigation agency responsible for detainees is under an obligation to ensure prompt qualified medical assistance to an apprehended person. In addition, upon detainees request a certain medical profession can be admitted for provision of medical assistance. *Instruction on organization of the functioning of stations of bodies and units of internal affairs of Ukraine*<sup>244</sup> regulates the procedure on medical assistance to persons taken into custody at the bodies of internal affairs. Provision of medical assistance is a duty of the officials of the unit. When apprehended persons are in custody at the THF, such obligation is established by *Internal regulations at the temporary holding facilities of bodies of internal affairs*<sup>245</sup> (adopted by the Order of the MIA of Ukraine #638 dated 02.12.2008). In accordance with these internal regulations within the Ministry of Internal Affairs, there shall be two universal (medical aid) kits, and at the THF – one per each cell.

<sup>242</sup> *Koval v. Ukraine*, Application no. 65550/01, ECHR judgment, 19 October 2006.

<sup>243</sup> *Melnik v. Ukraine*, Application no. 72286/01, ECHR judgment, 28 March 2006.

<sup>244</sup> Adopted by the Order of the MIA of Ukraine #181 dated April 28, 2009.

<sup>245</sup> Adopted by the Oder of the MIA of Ukraine #638 dated 02 December 2008.

Despite legal regulatory framework for medical assistance for apprehended persons, the ECHR repeatedly found violations of Article 3 of the Convention related to failure to provide adequate medical assistance to detainees. In particular, in *Salakhov and Islyamova v. Ukraine*<sup>246</sup> the ECHR found violations of Article 2 and Article 3 of the Convention in regard to the failure to provide adequate medical assistance to the person for his deteriorating health in the THF as the applicant died shortly after his release from detention.

## 6.2. Identification of suspects in need of medical assistance and funding for medical assistance

### *Identification of suspects in need of medical assistance*

Domestic legislation does not have clear regulation on identification of suspects in need of medical assistance.

At the same time, the officer on duty has to call an ambulance immediately “in case of deterioration of the condition of a person in custody”. An officer on duty has to ensure provision of medical assistance to a wider circle of people and deny taking them into custody and apprehension prior to assistance from medical professional or after treatment in healthcare institutions:

*«Persons who are unconscious, have life-threatening injuries, symptoms of acute illness of internal organs, alcohol poisoning, those who had consumed poisonous or potent substances, have infectious diseases that pose a threat to others, heavily intoxicated due to consumption of alcohol, narcotics or other intoxicating substances, have lost ability to move or can harm themselves or others, pregnant women with signs of approaching labor»<sup>247</sup>.*

The officer on duty considers the possibility of keeping these persons in custody depending on physician’s report.

In addition, the officer on duty shall call an ambulance (a doctor of the nearest healthcare institution) or provide urgent medical assistance to the detainee at the THF and ask for qualified medical assistance.

When a person in need of urgent medical assistance is brought to the station (clinical death, bleeding, frost bite, general hypothermia, burns, poisoning, bone fractures, electric or lightning shock, acute cardiovascular failure, asphyxia, heat stroke, drowning), the officer on duty has to call 103 for an ambulance along with providing urgent medical care.

A paramedic examines persons brought to the THF. Where there is no paramedic, a person responsible for custody of apprehended persons or an officer on duty interview them about health condition. In case the person complains about poor health condition or there are signs of illness, the officer on duty has to call an ambulance immediately. In case of complaints about health condition by a detainee or identified signs of illness, an officer on duty of the THF facility calls the personnel of local healthcare institutions and, in case of necessity, takes measures to escort these persons to hospitals. If there is need for emergency medical assistance, the officer shall call an ambulance. If the ambulance team concludes there is a need in hospitalization, the person shall be escorted to the relevant institution<sup>248</sup>.

### *Research data*

According to the monitoring of law enforcement activities during field research, in 54% of cases apprehended persons manifested signs of poor health condition (see Fig. 6.1).

Research results showed that in more than a quarter of these cases, health issues were related to intoxication with alcohol, and in 11% of cases – to severe injuries resulting from beatings.

<sup>246</sup> *Salakhov and Islyamova v. Ukraine*, № 28005/08, 14 March 2014, §138, 139.

<sup>247</sup> Paragraph 6.6.4 of the Instruction on organization of the functioning of stations of bodies and units of internal affairs of Ukraine.

<sup>248</sup> Paragraphs 8.7, 9.1, and 9.3 of the internal regulations at the THFs of the bodies of internal affairs.

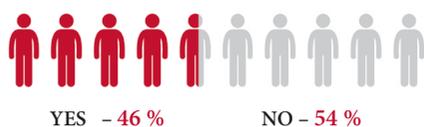


Figure 6.1. Sign of poor health condition

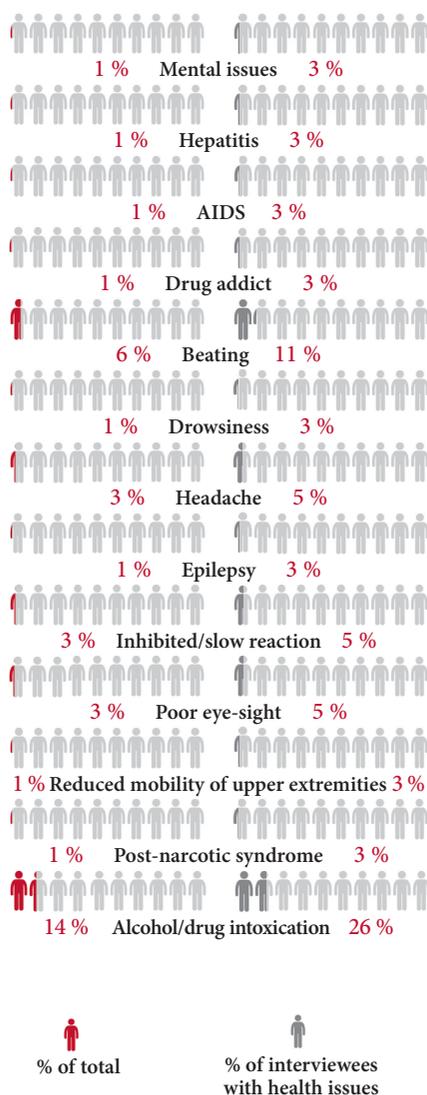


Figure 6.2. Signs of poor health condition

Results of special proceeding by the Ukrainian Parliament Commissioner for Human Rights confirm the deterioration of person's health following their contact with the law enforcement. In 2014, results showed that 1383 apprehended persons contacted healthcare institutions in relation to injuries inflicted by law enforcement officials. In addition, there were multiple reports on untimely provision of medical assistance to injured persons who are taken into custody or apprehended<sup>249</sup>.

Almost all law enforcement officers who consider themselves under an obligation to ensure medical assistance if necessary described similar approaches to verification of the need: either by external indicators (“one can see with unarmred eye” that the apprehended person is not feeling well) or pursuant to a complaint of the person.

One of the interviewed investigators described his algorithm for verification of the need to medical care:

«The suspect might need medical assistance in two situations: either he is intoxicated from alcohol or narcotics, or he is hurt during a crime. In the first case, we take him for medical examination. Medics then say whether he needs help and if we can simply wait for few hours. Possibly, he will receive the substitution therapy if he is a drug addict. When there are physical injuries or shock, heart issue due to stress etc. we act according to the situation. If the person voices the need to urgent medical assistance and we can see that, we call an ambulance. However, it is important to distinguish since these steps are designed for delay»<sup>250</sup>.

Some investigators consider that apprehended persons often simulate health problems. As a result, these investigators treat health complaints of apprehended persons with mistrust. This, in turn, interferes with objective evaluation of the need for medical assistance.

The main reasoning for providing medical assistance is the risk of responsibility in case of death upon failure to provide medical aid. The following statements of investigators provide vivid explanation:

«No adequate investigator will look for trouble»;

«If I see that the apprehended person (suspect) is a drug addict, and he is going through withdrawal, I do not do anything. It will pass in couple of days. I don't call the ambulance since it will not help»;

«If the apprehended person (suspect) tells me that, for instance, he has acute ulcer or I see other symptoms of illness, I call the ambulance right away. I don't need him to kick the bucket in my office»;

«In general, investigators make an independent decision about calling the ambulance only in extreme cases: if the apprehended person is bleeding or has heart issues, it is better to call the ambulance and avoid responsibility»;

<sup>249</sup> Report of the Ukrainian Parliament Commissioner for Human Rights, 2014.

<sup>250</sup> Interviews with investigators.

«If someone dies here, most certainly it will result in criminal responsibility. Therefore, nobody will take the risk. We call the ambulance in every case that is somehow serious»<sup>251</sup>.

### Funding of medical assistance for apprehended persons

There is no separate line in the State Budget of Ukraine for medical assistance to apprehended person, and neither there is a mention of these expenses on the official website of the Ministry of Internal Affairs of Ukraine or in annual financial reports on budget spending.

## 6.3. Provision of medical assistance

The research showed that when apprehended person had signs of poor health condition, law enforcement officers facilitated medical assistance in 2 out of 34 cases (Figure 6.3).

In addition, there were cases of delay in contact of law enforcement officers with a doctor in 9% of cases where medical assistance was provided.

*Issues related to provision of medical assistance during apprehension of person from vulnerable groups are explored in detail in Chapter 7 of this report.*

According to research results, law enforcement officers are not unanimous in their opinion on who has to ensure medical assistance for apprehended persons:

«We have a special officer on duty responsible for apprehended persons who has to monitor their health. However, I think that investigators are also responsible»;

«There is an officer responsible for apprehended persons in every district station. Ensuring medical assistance is his job»;

«It depends on the situation If the person is in my office and starts feeling bad during investigative actions, I think, of course. However, and it happens more often, when they someone beaten from the criminal detective unit or patrol service delivers someone, it is not clear why I should think what to do with him»<sup>252</sup>.

Majority of interviewed investigators consider that questions related to medical assistance for apprehended persons are outside of investigator's duties. This follows from their responses during interviews:

«I think I should not do this, but it usually works out this way»;

«It is not an investigators duty to provide medical care. I have a lot of other responsibilities already [...]»;

<sup>251</sup> Interviews with investigators.

<sup>252</sup> Interviews with investigators.

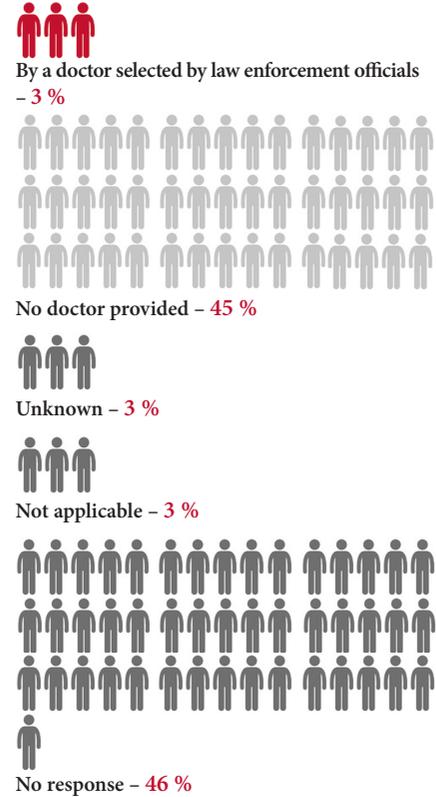


Figure 6.3. Provision of medical care

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*«I think that doctors have to ensure medical assistance for suspects. They must have medicines and relatives who would by those»<sup>253</sup>.*

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If the internal affairs unit has a THF, investigators think that there are no issues related to medical assistance since these persons undergo medical examination in the policlinics at a local hospital prior to placement into custody.

Field officers also think that organization of medical assistance for the apprehended person is not on the list of their duties:

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*«The station has to take the responsibility. They are the first ones to see when and in what condition the apprehended was taken into custody, and they should respond immediately. According to the CPC, field officers do not have to call the ambulance».*

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On the contrary, some investigators think that if a beaten apprehended person is brought to them,

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*«it is not my headache; it is the criminal investigation unit's problem»<sup>254</sup>.*

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According to investigators, referrals for in-patient treatment happen very rarely. Some of the interviewed law enforcement officers said they provided first aid themselves based on their practical skills obtained during regular classes:

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*«Sometimes we provide first aid since we can treat the wound or stop the bleeding».*

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Some investigators expressed humane attitude towards apprehended persons with health issues:

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*«Maybe I don't have to deal with that. However, I am human and cannot see another person suffering. In general, the investigator is responsible for everything that happens to the apprehended person he is "locking up". Therefore, we are fully responsible»;*

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*«Of course, as a human, I cannot ignore when someone is feeling sick. I will not stay aside. I will call the ambulance and provide any help I can»<sup>255</sup>.*

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Only one of the interviewed law enforcement officers, an official of the internal affairs unit, explained the procedure for facilitation of medical assistance to apprehended persons in detail. It includes registration of health-related complaints, calling an ambulance, examination by a medical professional, following medical recommendation, including hospitalization to a specialized ward at a hospital.

Majority of interviewed law enforcement officers think that apprehended persons are always able to receive medical care. At the same time, some of them stated that the legislation does not establish an adequate mechanism for providing medical care. In addition, there are no relevant materials and technical resources (except for special accommodation for patients with tuberculosis or mental illness). It is rather difficult to hospitalize an apprehended person with any other severe health issue. Interviewees also mentioned that the quality of medical assistance for apprehended persons is influenced by inadequacies in the public health system:

<sup>253</sup> Interviews with investigators.

<sup>254</sup> Interviews with law enforcement officials.

<sup>255</sup> Interviews with investigators.

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*«The state does not provide anything. Therefore, often it comes at one's own expense, including medicines, when family members are not helping, which also happens. Consequently, there is not just an opportunity, but a duty of the relevant person to take care of these issues»<sup>256</sup>.*

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There is a serious issue related to procurement of necessary medication to apprehended persons. According to law enforcement officers, when an apprehended person is prescribed medication, it is the relatives' task to provide it:

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*«Suspects with chronic diseases have to provide their own medication. In this case, the rescue of a drowning man is the drowning man's own job. For instance, there was an elderly man with diabetes at the THF, and his relatives provided medication. Once they were not around, and the chief of district station bought the medication. The procedure for facilitating this treatment only functions through support from the next of kin. If the latter are not able to provide it, law enforcement officers try to contact the chief medical officer and ensure constant visits to the apprehended person. We cannot call the ambulance each time, as their supply of medicines is also limited, or sometimes there is none. It's good if the agreement works. If not, we facilitate the necessary medical assistance on our own. Nobody will die here, that is for sure»<sup>257</sup>.*

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When a person is detained, there are issues in providing outpatient or inpatient care. The interviewed attorneys noted that they usually have to insist that the apprehended person is provided with medical care. Some of them spoke extremely negatively of the situation with medical assistance for apprehended persons, in particular:

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*«In general, the situation with the right of apprehended persons to medical assistance is catastrophic. Necessary medication is not available. They do not undergo sufficient inpatient treatment etc. It is hard to invite one's own doctor to the suspect»;*

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*«Medical assistance is minimal. Doctors are reluctant to hospitalize the apprehended person. Usually they say there is nothing critical, administer an injection, and that is it. If the person is hospitalized, they try to discharge him almost on the following day»;*

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*«Current system of medical assistance is on a rather low level. It is limited to calling an ambulance or consultations by general practitioners that are virtually fruitless»;*

---

*«[...] if someone has a chronic disease, unfortunately, they do not treat it with proper care. They do not indicate the need to inpatient treatment in the medical record etc. Usually, relatives and defense deal with this. If they organize everything and the investigator only needs to sign, there are no problems. Investigator will not take initiative»<sup>258</sup>.*

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Attorneys also mentioned the inadequate response of law enforcement officials to complaints by apprehended persons. In particular, interviewed attorneys stated that often they had to submit (written) statements, motions, and complaints to ensure the right to medical care, which in some cases caused open conflict:

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*«[...] Most often, law enforcement officials do not pay any attention to the condition of an apprehended person unless it is a serious case, complaints about sharp pains or very poor condition. If it is some "minor" problem in the view of law enforcement officials (toothache, sickness etc.), the right to medical assistance is not always ensured»;*

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*«Based on external signs, I conclude whether the person needs such help or not. If I see such condition, I request the investigator to call an ambulance starting a serious conflict with him by doing so»;*

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<sup>256</sup> Interviews with investigators.

<sup>257</sup> Interviews with investigators.

<sup>258</sup> Interviews with attorneys.

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*«If this does not work, I immediately notify the prosecutor over the phone and visit the head of investigations unit»<sup>259</sup>.*

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Usually, an ambulance is called when law enforcement officers are not connected to deterioration of the apprehended person's health. If abuse of physical force by law enforcement is the cause, they will only call the ambulance in case of real threat to the person's life, as suggested in the following statements:

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*«If the person is not lying on the floor, injuries are hidden and the person does not complain a lot, it is unlikely that they will ask questions about his health. Sometimes, nobody will lift a finger until the attorney starts raising alarm and threatening to complain about torture»;*

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*«This right is not ensured at all. Militsiya will only call the ambulance, roughly speaking, when the person is dying or bleeding to death. Otherwise, they never call an ambulance. Moreover, what if he tells the doctors that cops beat him?»<sup>260</sup>.*

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Apprehended persons provided examples of cases when the ambulance was not called for a severely beaten apprehended person, neither did the doctor examine him. Apprehended persons do not want to ask the law enforcement officers for an ambulance since they are afraid of repeat beating. For instance, in one of monitored cases an ambulance doctor who arrived on call to the law enforcement unit refused to hospitalize the apprehended person. He explained that it was not his area of competence, and the apprehended person should be referred to the dependency clinic:

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*«Researcher: "Did the ambulance doctor provide any medical assistance or examine you?"*

*Apprehended person: "The doctor examined me visually, wrote something down, did not give me any medication, and asked several questions".*

*Researcher: "Your face is injured; you have bruises on your body. Who inflicted these injuries?"*

*Apprehended person: "I was beaten by militsiya officers who apprehended me..."<sup>261</sup>.*

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In a case of apprehension of an underage person, the boy with signs of beating also did not receive medical assistance:

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*«Researcher: "How are you feeling? (One can see that the boy was beaten). Can you communicate?"*

*Apprehended person: "I have a severe headache and my body is hurting..."*

*Researcher: "Did they call an ambulance? Did the doctor examine you?"*

*Apprehended person: "No, nobody examined me at the station. No doctors came"»<sup>262</sup>.*

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In another case, the apprehended person did not receive any treatments for a heartache:

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*«Researcher: "How were you feeling when they brought you here? Did anything hurt? Did they ask you about your health condition?"*

*Apprehended person: "No, nobody asked me. I told them my heart was hurting"*

*Researcher: "Did they offer medical assistance?"*

*Apprehended person: "No, I asked for validol, but they did not give it to me"»<sup>263</sup>.*

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<sup>259</sup> Interviews with attorneys.

<sup>260</sup> Interviews with attorneys.

<sup>261</sup> Interviews with apprehended persons.

<sup>262</sup> Interviews with apprehended persons.

<sup>263</sup> Interviews with apprehended persons.

In some situations, the apprehended person who was not feeling well after being beaten by law enforcement officers did not ask for an ambulance out of fear of repeat illegal violence by law enforcement officials:

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*«Researcher: “How were you feeling then? Did it hurt?”*

*Apprehended person: “Yes, very much. I have bruises everywhere”.*

*Researcher: “Did you ask for an ambulance?”*

*Apprehended person: “No, I was afraid of being beaten again”»<sup>264</sup>.*

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Interviewed lawyers often expressed negative opinion about both the law enforcement officers’ treatment of detainees’ health, and the quality of examination in public health institutions prior to their admission to the THF, for instance:

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*«Militsiya officials do not care about the condition of an apprehended person, as well as any illnesses or injuries. Primarily, they care about completing all scheduled actions and transferring the person to the convoy. From then, it is not their headache. The others will take him to the doctor. The latter will be upset with the fact that they brought this ‘body’ to him and write that the apprehended person can be detained at the THF or SIZO. The doctor will not conduct a proper examination or ask the person to undress to check for injuries»<sup>265</sup>.*

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Some of the interviewed attorneys consider that the right to medical assistance is not ensured at all. Deaths in custody of internal affairs bodies prove this fact:

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*«It is a very painful issue for our system. The right is constantly violated due to the lack of funding for proper facilitation of its exercise, but even more so because the law enforcement bodies are completely indifferent about the health of suspects or accused persons»<sup>266</sup>.*

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We can state that present research identified different approaches of the law enforcement officials to the issue of the apprehended persons’ health: they vary from complete neglect to humane treatment of the person accompanied by providing urgent medical assistance and calling a doctor or an ambulance. This attitude to the health of apprehended persons creates a situation where the right to medical assistance depends on personal views of law enforcement officials. In the absence of clear legislative regulation of the procedure for verifying the need for medical care, the arbitrariness is unlimited except for life-threatening instances.

Infliction of bodily harm or other deterioration of health following illegal or excessive use of force by law enforcement officials is a separate issue. The latter are interested in hiding these facts. In addition, apprehended persons are afraid of repeat physical abuse in case they report illegal actions of law enforcement officials. In these cases, law enforcement officials facilitate medical assistance only in cases where the life of an apprehended person is at risk.

## CONCLUSIONS

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In most instances, medical assistance is provided only in cases of a threat to life or serious damage to the health of an apprehended person. An ambulance team provides the medical assistance upon a call from law enforcement officers or attorneys. There are frequent cases of diligent performance of their duties by both the ambulance team and doctors at the hospitals during examination to consider the possibility of detention.

<sup>264</sup> Interviews with apprehended persons.

<sup>265</sup> Interviews with attorneys.

<sup>266</sup> Interviews with attorneys.

The lack of medication in detention facilities is a separate issue. It results from a general lack of funding for healthcare. To some extent, it is resolved at the expense of relatives of apprehended persons.

There are also difficulties when the apprehended persons have chronic diseases and/or require regular medication in accordance with medical prescription. These difficulties relate to both receiving and storing medication, and administration in accordance with medical requirements. For instance, persons who undergo substitution therapy face these problems.

There are shortcomings in legal framework for the right of apprehended persons to receive medical care. For instance, norms on medical assistance within the Instruction on organization of the functioning of stations of bodies of internal affairs are scattered throughout the document and are general. The Internal regulations at the THF provide for a general possibility of keeping medication for the apprehended person. In the absence of a medical professional at the facility, it leads to uncertainty and consequent issues related to continuation of treatment for the persons who had been undergoing treatment at the time of apprehension.

It is suggested that a single legal instrument should regulate questions of ensuring the right of apprehended persons to medical assistance as it is done by the Police and Criminal Evidence Act in the United Kingdom<sup>267</sup>.

<sup>267</sup> <http://www.legislation.gov.uk/ukpga/1984/60/contents>.

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## 7. Specifics of ensuring procedural safeguards for vulnerable groups of apprehended persons

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### 7.1. Normative framework on vulnerability of apprehended persons

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The Constitution of Ukraine stipulates that “All people are free and equal in their dignity and rights. Human rights and freedoms are inalienable and inviolable”<sup>268</sup>. The principle of equality before the law and the court at the national level has also been reflected in Article 24 of the Constitution, whereby:

*«[...] There shall be no privileges or restrictions based on race, skin color, political, religious, and other beliefs, sex, ethnic and social origin, property status, place of residence, linguistic, or other characteristics»<sup>269</sup>.*

Provision of Article 10 of the CPC also prohibit any discrimination and exclude any privileges or restrictions in procedural rights based on any characteristics. At the same time, Part 2 of the same CPC article notes that in the cases and in accordance with the procedure established by the Code, certain categories of individuals (juveniles, foreigners, persons with mental and physical disabilities etc.) use additional guarantees for protection of their rights and interests during criminal proceedings<sup>270</sup>.

As these categories of the criminal proceedings participants have been granted additional guarantees in the cases and in accordance with the procedure envisaged by the CPC, the principle of equality before the law and the court should not be violated. One of the main additional guarantees for securing the rights of certain categories of vulnerable groups is the obligatory participation of the defender in criminal proceedings. Thus, Article 52§2(3) prescribes the mandatory participation of a defender in the criminal proceedings involving individuals who because of their mental or physical disabilities (mute, deaf, blind etc.) are not able to fully exercise their rights. At the same time, according to the ECHR case law, in such cases the state is obliged not just to ensure formally presence of a defender in criminal proceedings, but also ensure efficiency of the legal aid provided<sup>271</sup>. Representatives of certain vulnerable social groups also need special medical assistance as an additional guarantee<sup>272</sup>.

#### Definition of circumstances leading to vulnerability

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While defining certain additional guaranties for separate categories of people in need thereof for various reasons, the legislation of Ukraine does not provide either an exhaustive list of categories of such individuals, or criteria for including individuals to any vulnerability category. At the same time, however, it is obvious that the vulnerable social groups and their representatives are more likely to be affected by negative legal factors and procedural rules.

The Supreme Court Plenum decision “On Application of Legislation that Secures the Right to Defense in Criminal Justice” explains that individuals who, due to their physical or mental disabilities are not able to exercise their right to defense independently, should include, in particular, individuals with essential speech, sight, hearing impairments etc., as well as the individuals, who, even though recognized sane, have mental disabilities that

<sup>268</sup> Constitution of Ukraine, Article 21.

<sup>269</sup> Constitution of Ukraine, Article 24.

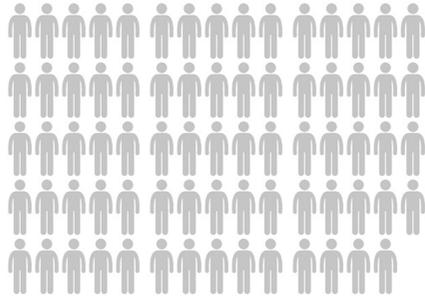
<sup>270</sup> Code of Criminal Procedure of Ukraine, Article 10.

<sup>271</sup> This principle is presented in detail in Section 4 hereof.

<sup>272</sup> Provision of such assistance is presented in detail in Section 6 hereof.



YES – 32 %



NO – 59 %



Unknown – 6 %



No response – 18 %

Figure 7.1. Vulnerability

prevent them from defending themselves from the prosecution<sup>273</sup>. Thus, in the legal sense, “vulnerable” individuals are those who are not able to defend their rights on their own for certain reasons.

The study has shown that 32% of the detained individuals subject to observation at IAB units had certain vulnerability indicators as presented on Figure 7.1.

The circumstances that cause an individual’s vulnerability during apprehension, procedural actions, and other legal relations with the internal affairs bodies depend on the features of different groups. The following categories should be singled out among these groups:

- ▶ juveniles;
- ▶ persons with alcohol and drug addictions;
- ▶ individuals with somatic (bodily) or mental illnesses, short-term mental disorder (stress condition etc.) or disability;
- ▶ individuals who cannot read or write;
- ▶ individuals who do not know the language of the criminal proceedings.

Thus, for example, age-related psychological characteristics, in particular immature thinking, lack of sufficient social experience, mental instability, increased emotionality, increased suggestibility and self-suggestibility, and inclination to fantasies etc. condition the juveniles’ vulnerability. Such characteristics prevent the juveniles from defending their rights on their own.

Vulnerability of persons with drug addiction is conditioned primarily by their sustainable psychophysiological need to take psychoactive substances. This means that due to their unhealthy condition, they, independently of the threat of influence (pressure, sanctions), will be regularly taking narcotics or psychotropic substances (at least in the minimal necessary amounts) to prevent the withdrawal syndrome that causes physical and mental suffering. In addition, the way of life of such individuals is connected closely with illegal circulation of drugs, which in itself presents criminal activity. Therefore, the police often use these vulnerability features to shape quantitative and statistical indicators of their work.

Vulnerability of the individuals in the condition of any intoxication, just like in the case of the individuals with psychiatric and mental impairments, also lies in the inadequate perception of events, which prevents them from defending their rights on their own.

Individuals with the lack of command of the criminal proceedings language and illiteracy as well are deprived of the possibility to participate in criminal and other proceedings on their own, and therefore need additional protection.

An obvious circumstance leading to vulnerability of persons with visual impairments is that they are not able to read the procedural and other documents while communicating with law-enforcement officers, and thus they need additional guarantees for defense of their rights.

<sup>273</sup> Supreme Court of Ukraine Plenum Decision No. 8 of 24.10.2003 (Para 13).

Study findings show that out of all individuals with vulnerability characteristics brought to police stations and subject to the study, 55% did not know the Ukrainian language, 36% were juveniles, 18% were not able to write and 9% could not read, while another 9% suffered from drug addictions.

## 7.2. Specifics of ensuring procedural safeguards for suspects with vulnerabilities

The procedural legislation of Ukraine entrusts pre-trial investigation agencies, the prosecution, courts, and the bar with the task to ensure procedural safeguards for apprehended individuals from vulnerable groups.

As noted above, one of the main additional legal guarantees for these categories of individuals is obligatory participation of a defender in criminal proceedings. Obviously, it is the investigator that is obliged to ensure formal participation of an attorney in criminal proceedings with due respect of the CPC requirements.

The study has found out that investigators are not unanimous on the necessity of obligatory provision of legal aid to suspects belonging to vulnerable social groups.

The dominant majority of investigators consider that “vulnerable” suspects are not able to make a conscious choice on the use of the rights to a defender or other rights and guarantees, and therefore the investigators themselves, independently of such suspect’s wish, should ensure counsel’s participation in criminal proceedings. This conclusion can be illustrated by the words of investigators who participated in the field research:

*«I consider that the “vulnerable” are not able to independently make a correct choice on the use of the right to an attorney. This is why the CPC envisages an obligatory involvement of an attorney»<sup>274</sup>;*

*«In my opinion, no. In this case, I personally make a decision. Even if the suspect rejects such a right to have a defender, I am not going to accept such rejection, because I know that for this category of individuals, involvement of a defender is obligatory, and I do not care about their unwillingness to use such an opportunity and such a right. I do not need to get the indictment returned with an indication like “the investigator is an idiot and does not know the CPC norms»<sup>275</sup>.*

At the same time, some of the investigators do not consider that the counsel’s participation in criminal proceedings should be obligatory for “vulnerable” suspects, which indicates that this part of investigators does not understand the importance of unconditional respect and observance of the “vulnerable” individuals’ right to legal assistance. Such investigators’ position is confirmed by their following answers:

<sup>274</sup> Interviews with investigators.

<sup>275</sup> Interviews with investigators.

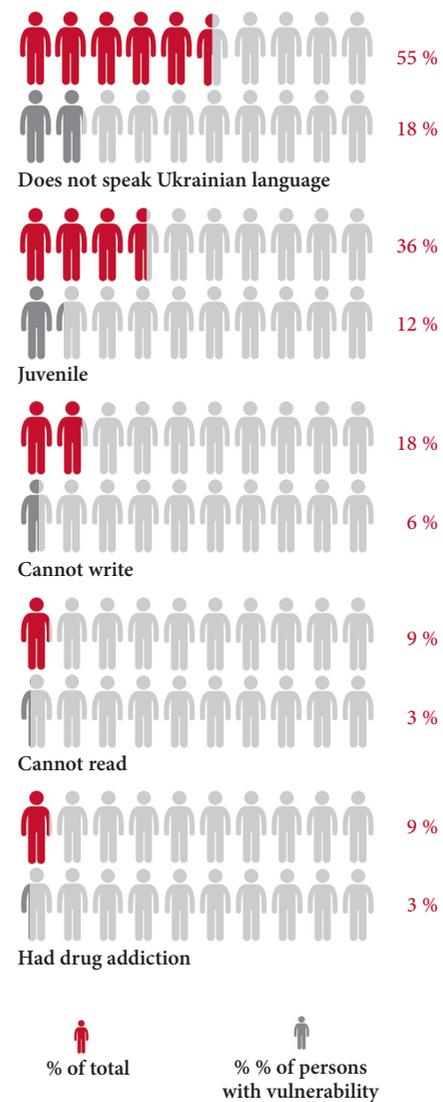


Figure 7.2. Types of vulnerability

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*«As to the so-called “vulnerable” suspects, I believe that if they can commit a crime, they can also make a weighted decision on the use of the right to the lawyer»<sup>276</sup>;*

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*«In my opinion such “vulnerable” suspects have a direct possibility to make their mind on the use of the right to defense»<sup>277</sup>.*

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In their turn, the responses by the majority of the lawyers confirm that, while formally ensuring counsel's participation in criminal proceedings for representatives of vulnerable social groups, investigators take action aiming to violate a number of other rights interrelated with the right to defense. Such actions include hindering efficiency of legal assistance, failure to explain the right to legal assistance, psychological influence (pressure) with the use of the vulnerable condition of apprehended individuals in order to get testimonies outside the boundaries established by procedural legislation. The following attorneys' statements confirm the above:

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*«The police have no special procedure for children and “vulnerable” suspects. They have one method: intimidating and then starting a friendly talk»<sup>278</sup>;*

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*«Apprehended persons (suspects) are rather rarely informed of such a right. Law enforcement bodies often even interrogate the detained individual as a witness and at the same time (the operations units in particular); they pressure and threaten the person. Special attention should be given to the interrogation of... disabled individuals (deaf-mute, individuals with mental disorders). Quite often they are interrogated without the participation of the special staff»<sup>279</sup>;*

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*«Being in the stress condition, the apprehended persons, especially the “vulnerable” suspects, are not at all able to perceive adequately any information, either on the grounds of detention, or the right to an attorney and the first meeting therewith before the first interrogation. This is, by the way, something that the investigators are making use of, thereby abusing both the detainees' condition, and their right to abstain from testifying against themselves, starting talks with them as if “not for the protocol”»<sup>280</sup>.*

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As already noted herein, according to the ECHR case law, the state is obliged to not only ensure formally the defender's obligatory participation in criminal proceedings involving vulnerable categories of individuals, but also make sure that such legal assistance is efficient. Evidently, attorneys are responsible for ensuring efficiency of legal aid, and the majority of them have pointed out the need to pay particular attention to these matters, in particular:

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*«The “vulnerable” suspects are the ones who need efficient legal assistance by a professional expert the most, and they are not able to make a conscious decision on such a necessity either due to the age, or mental restrictions»<sup>281</sup>;*

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*«In the majority of cases, vulnerable categories of suspects are informed of their right to an attorney. However, how do they understand this right? ... In 90% of cases, this category is not able to make an objective decision on involvement of a lawyer – it is the law enforcement who should do it, while the lawyer should ensure efficiency of legal aid»<sup>282</sup>.*

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<sup>276</sup> Interviews with investigators.

<sup>277</sup> Interviews with investigators.

<sup>278</sup> Interviews with attorneys.

<sup>279</sup> Interviews with attorneys.

<sup>280</sup> Interviews with attorneys.

<sup>281</sup> Interviews with attorneys.

<sup>282</sup> Interviews with attorneys.

Vulnerable categories also include individuals with physical disabilities and certain diseases that require special medical assistance. The study results, however, indicate that IAB have problems with ensuring such medical assistance to these categories of persons. In particular, the following opinion has been recorded during the observation:

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*«The law envisages no proper mechanism, there is no relevant material and technical basis (excluding tuberculosis patients held in the relevant medical institution and the mentally ill recognized non compos mentis and kept in mental clinics)»<sup>283</sup>.*

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## Ensuring procedural safeguards for persons with drug addictions

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The Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights oblige the signatory states, Ukraine among them, to ensure the rights stipulated thereby without any discrimination. Prohibition of discrimination concerns all vulnerable social groups, including persons with drug addictions.

As to the binding need to observe the rights of this category of people, the Comment<sup>284</sup> to the UN Single Convention on Narcotic Drugs of 1961<sup>285</sup> and the Resolution of the Commission on Narcotic drugs<sup>286</sup> notes that the drug control measures should be correlated and not contradict the human rights standards. The International Narcotics Control Board holds the same position<sup>287</sup>. In addition, according to the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power passed by UN General Assembly Resolution 40/34 on 29 November 1985<sup>288</sup>, drug addicts are victims of drug crimes.

However, despite of the above international standards, the national legislation envisages no additional procedural safeguards for persons suffering from drug dependence. While examining the problems of securing procedural safeguards, we should consider that, for physiological reasons, they, as a rule, find themselves either in the condition of drug intoxication, or abstinence syndrome. These conditions interchange, and in none of them, a person is able to adequately perceive events around him/her, including during apprehension, which is evidenced by examples mentioned during interviews with investigators:

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*«... The reaction is absolutely inadequate: they may laugh for no reason, or cry. And that's how you question them. Sometimes, you have to spend more time before they concentrate and answer something»<sup>289</sup>;*

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*«... When they are going through withdrawal ... they ask us to go and by them a dose, otherwise they are not going to say anything, or they may also ask for some syrups or pills»<sup>290</sup>;*

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*«... Sometimes drug addicts are brought in absolutely inadequate condition, and then nothing can be done with them, until they get back to their sense, or until an emergency is called...»<sup>291</sup>.*

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The lawyers think the same about the inadequacy of drug addicts during their apprehension:

<sup>283</sup> Interviews with investigators.

<sup>284</sup> <http://www.ecad.ru/oon/oon-kom.html>.

<sup>285</sup> [http://www.un.org/ru/ocuments/decl\\_conv/conventions/pdf/single1961pdf](http://www.un.org/ru/ocuments/decl_conv/conventions/pdf/single1961pdf).

<sup>286</sup> <https://www.unodc.org/unodc/commissions/CND/>.

<sup>287</sup> <http://www.incb.org/>.

<sup>288</sup> <http://www.un.org/documents/ga/res/40/a40r034.htm>.

<sup>289</sup> Interviews with investigators.

<sup>290</sup> Interviews with investigators.

<sup>291</sup> Interviews with investigators.

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«It is almost always a painful issue when it comes to drug addicts: awful sight in itself, I mean, when they are going through withdrawal... Drug addicts are a very difficult group: you can never develop or plan with them. When he is high, he is one person, when he has withdrawal, he will say anything only to get what will ease his condition. So, every time it's different»<sup>292</sup>.

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According to official statistics, in particular MIA<sup>293</sup> and OPGU<sup>294</sup> websites, the internal affairs bodies use these specific characteristics to shape quantitative performance indicators of their operational and detective activities. However, we should not a general downward trend for this negative phenomenon.

For instance, there were 225517 persons prosecuted in 2011 (total for all CC articles), including 36960 persons prosecuted for crimes in illegal drug trafficking, i.e. 16.4%. Therefore, one of every six people prosecuted was incriminated with drug crimes. In 2012, every eighth person prosecuted was charged with narcotics crimes.

In 2011, there were 515833 registered criminal offences; including 53539 offences related to illegal drug trafficking, constituting 10.3% of the total number. In 2012, the share of drug crimes constituted 10.5%, in 2013 – 6%, and in 2014 – only 5.7%.

However, with the general decline in the share of offences related to drug trafficking, correlation between types of drug crimes virtually has not changed over the past four years. It indicated that instead of combating drug business, law enforcement is still focused on fighting persons with drug addictions.

For instance, in 2014 there were 16803 offences recorded under article 309 of the CC, or 52.1% of all drug crimes (30494). This excludes other crimes without an intent of selling under articles 308 (stealing, appropriation of narcotics), 313 (stealing, appropriation of equipment devised for making of narcotic substances), 315 (inducement to use narcotics), 317 (organizing or running places for illegal use of narcotics) of the Criminal Code of Ukraine.

In 2013, the share of crimes related to illegal drug trafficking not for selling purposes in relation to personal use (article 309 of the CC) constituted 55% of narcotics crimes.

In 2012, this indicator was 51%, and in 2011 – 54.2 %.

Therefore, fulfilling performance indicators in operational and detective activities in the field of illegal drug trafficking takes place due to criminal prosecution of drug users instead of combating drug business and trafficking.

The main violations committed by law enforcement officials against drug addicts and the ways to counteract them are presented in detailed in the manual “*Defense Practice in Cases of Illegal Trafficking of Narcotics, Psychotropic Substances, and Their Analogues or Precursors*”<sup>295</sup>.

A number of violations of rights of this category of individuals was also revealed by the study.

Some of them are general and not group-specific; law enforcement officials commit them regardless of the person's belonging to a certain category. These include breaches of the right to information, legal assistance etc. At the same time, due to their vulnerability, persons with drug addictions suffer from such general violations more often than others do.

### Violation of the Right to Information

None of the drug addicts subject to observation were informed the grounds of apprehension, or the alleged crime, or the right to “say nothing as to the suspicion” against them, as well as the right to legal assistance, which is evidenced by their explanations:

<sup>292</sup> Interviews with attorneys.

<sup>293</sup> <https://www.google.com.ua/url?sa=t&rcrt=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CBwQFjAA&url=http%3A%2F%2Fwww.mvs.gov.ua%2F&ei=cWpYVbGAKobCywPlkj4GQBw&usg=AFQjCNGnlzXvcpEVbfKNTxpRddnS1btF9Q&bvm=bv.93564037,d.ZGU>.

<sup>294</sup> <http://www.gp.gov.ua/ua/stat.html>.

<sup>295</sup> <https://www.google.com.ua/url?sa=t&rcrt=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0CCIQFjAB&url=http%3A%2F%2Ffulaf.org.ua%2Fwp-content%2Fuploads%2F2013%2F11%2Fdrugs.pdf&ei=DvvVVIgRb9PbaLfgMAK&usg=AFQjCNHyObV4zPS7esfWuCEK3UgDp2P1cg>.

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«Researcher: Do you know why you are here? Have you been explained the reasons of your detention?

Apprehended person: No, I don't remember much, I was high. Nobody explained anything to me»<sup>296</sup>;

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«Researcher: Do you know the grounds for your apprehension? Have they been explained to you?

Apprehended person: Don't you see, I am a "systemic". Who would explain anything to me? The police has not been explaining anything to me at all...»<sup>297</sup>;

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«Researcher: Have you been informed following your apprehension in understandable language on:

- the grounds for your apprehension;
- the crime that you are suspected of;
- the rights to say nothing about the suspicion against yourself;
- the right to a defender?

Apprehended person: Don't you know the "understandable language" used by the police against drug addicts? No, I was not explained anything. If it had not been for the lawyer, the investigator would not even give a copy of the report and the letter of rights. And now I can read it in the cell, will know what it is all about»<sup>298</sup>.

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The above interview quotes demonstrate that IAB officers ignore the right to information of persons with drug addictions. In addition, it should be noted that sometimes such individuals' physiological condition prevents them from perceiving the information.

#### Violation of the Right to Legal Assistance

Despite the inability of persons with drug dependences to defend their rights on their own due to their vulnerability, the law envisages no additional guarantees or special features as concerns legal assistance for this social category. In addition, it is their vulnerability and particular crime documentation procedure in the area of illegal drug trafficking that prompt the police to violate this right of this vulnerable category probably most often.

The study results confirm that persons with drug dependence apprehended for drug crimes are first brought before the prosecutor who questions him/her for some time, checks the grounds for apprehension, and clarifies the available evidence basis, while an attorney is invited only when such individual is given the notice of suspicion. The following interrogators' opinions exemplify the above:

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«... In the crimes related to the illegal drug trafficking, in case of relevance and sufficiency of materials, the prosecutor calls the "future" suspect through the interrogator for a talk... (the prosecutor allegedly checks if the drugs were planted on the individual). The prosecutor asks clarification questions, invites to tell how everything happened, asks whether the persons pleads guilty etc., and then signs a draft resolution for notification on suspicion having satisfied himself that the case has not been forged. We bring the person to the district department, call a lawyer, and present the notice of suspicion following his arrival»<sup>299</sup>.

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Instead of notifying the FLAC immediately of the detention, which happens with the participation of the prosecutor, who, in accordance with the law should prevent violation of the law, the drug addicts are illegally subjected to investigative actions.

During observations, there were recorded instances of violations of the right to legal assistance, in particular in relation to persons with drug dependence. These include, for example, investigative and procedural actions undertaken on the scale necessary to present notice of suspicion in committing drug crimes without participation of an attorney:

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<sup>296</sup> Interviews with apprehended persons.

<sup>297</sup> Interviews with apprehended persons.

<sup>298</sup> Interviews with apprehended persons.

<sup>299</sup> Interviews with investigators.

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*«On 15.08.2014 at 17.45, an officer of the anti-drug trafficking unit delivered a drug addict upon his apprehension for selling drugs. The person was held at the duty station, while field officers were interrogating witnesses. Afterwards, they interrogated the apprehended person and presented him with the notice of suspicion. At 22.50, the officer drafted a protocol of apprehension on the suspicion of a criminal offence envisaged by CC Article 307§2. The FLAC was not notified on apprehension. Only before putting the apprehended person to the THF (around 23.40), the investigator notified the FSLA Center of apprehension of a person»<sup>300</sup>.*

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Thus, the FLA Center was notified only 5 hours 55 minutes upon the actual detention and 55 minutes after the apprehension protocol had been drafted. At the same time, before the FLAC was notified, the person had been subject to a number of investigative actions, such as scene inspection, seizure of belongings and money (the object of crime), suspect's interrogation, presentation of the notice of suspicion etc. In other words, in this case the person's right to defense, including confidential communication with an attorney, timely legal aid at the expense of the state, has been violated.

Abusing vulnerable physiological condition of persons with drug addictions, field officers and investigators conduct investigative actions prior to attorney's arrival to prove guilt through means that are not envisaged by the CPC. For the same reasons, they prevent timely access of attorneys to their clients, as well as offer no conditions for the confidential meeting before the first interrogation as confirmed by the following information:

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*«“Vulnerable” suspects are not at all able to perceive adequately any information, either on the grounds of detention, or the right to an attorney and the first meeting therewith before the first interrogation. This is, by the way, something that the investigators are making use of, thereby abusing both the detainees' condition, and their right to abstain from testifying against themselves, starting talks with them as if “not for the protocol»<sup>301</sup>.*

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### Illegal use of force against persons with drug addictions

Despite prohibition of torture and other ill-treatment in the national legislation and international legal instruments, study results and other sources of evidence show that torture and other cruel treatment of persons with drug addictions by the IAB officers in Ukraine is quite widespread.

The relevant cases are, in particular, described in such publications as “*Policemen Sentenced to Detention for Beating Apprehended Persons One of Whom Was HIV-infected*”<sup>302</sup>, “*In Chernivtsi, a 27-year Old Was Beaten to Death at the Police Station*”<sup>303</sup> and in many other sources of information. The following interview responses also point to these violations:

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*«Researcher: Your face is smashed up and there are bruises all over your body. Who has beaten you?*

*Apprehended person: The police who apprehended me beat me up. They thought they would find a syringe on me with “shirka” [drug substance], but I threw it away when fleeing. This is why they beat me up when they caught me. The cuffed me, and then one of the policemen kicked my neck, and then made a few more blows...»<sup>304</sup>.*

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In addition, the study has revealed a range of violations of procedural and other rights that are widespread in relation to persons with drug addictions.

<sup>300</sup> Observation notes.

<sup>301</sup> Interviews with attorneys.

<sup>302</sup> <http://hiv-legalaid.org/index.php?id=1402343444>

<sup>303</sup> <http://bukinfo.com.ua/show/news?>

<sup>304</sup> Interviews with apprehended persons.

### Discrimination of persons with drug addictions based on health condition

According to Ukrainian legislation and the WHO regulations, drug addiction is a disorder. Therefore, use of punishment, in particular criminal sanctions, towards persons with drug addictions for offences triggered by this disorder has all indicators of discrimination based on health condition. However, according to some provisions of the Ukrainian legislation (Article 67§1(13) of the CC) this disorder is also considered to be a circumstance that aggravates the form and scale of punishment in sentencing, which contradicts the above legal norms. Therefore, attorneys are forced to make certain agreements with the investigation to the detriment of their clients' rights and interests. For example:

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*«When the drug addict is going through withdrawal, an emergency should be called in (depending on his condition), but it is also not good for the defense to call and record drug intoxication (as this is an aggravating circumstance). In other words, one has to maneuver in every given case: make an agreement with the investigator depending on the situation, probably to admit something but ask him not to record the drug intoxication»<sup>305</sup>.*

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This example shows that for the client with drug addiction to avoid stricter punishment due to their illness (substance addiction) attorneys are forced to negotiate various concessions and preferences with the investigator (in particular, admission of guilt etc.) only to prevent the record of physiologically unhealthy condition.

### Use of Abstinence Syndrome to Force Them Testify Against Themselves

As noted above, the withdrawal syndrome causes physical and psychological suffering to the drug addicts. The research results confirm that the police use this drug addicts' condition in order to force them to testify against themselves and to confess their complicity in the crime that they might not have committed. The facts of such behavior by the investigators and the police are confirmed by the following examples:

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*«... I was at Suvorivske police station when I saw a cuffed drug addict taken out, and he was in such a condition that it was scary to look at him. I asked, "Why is he cuffed, is he going to run away from you or what? Look at his condition". I talked to him, and it turned out that this was already his fifth police station, and he had everywhere written that he was confessing his guilt. So the police were taking him from station to station to better their statistics»<sup>306</sup>;*

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*«...He was presented with the notice of suspicion, as he seemingly confessed even before my arrival that he had committed the crime (theft). Then in court he started saying that he was having a withdrawal and that the interrogator with the police promised a dose to him, therefore he wrote the confession, but as a matter of fact he did not commit anything at all...»<sup>307</sup>;*

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*«... Instead they can be easily blackmailed: promise them a dose or anything similar which can give them a relief, and they will confess anything, even Kennedy's murder, and it is this way, I know for sure, interrogators are using the drug addicts»<sup>308</sup>.*

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These examples show that law enforcement officials use the drug addiction of detained individuals as a certain "tool" of influence and coercion in order to get the "necessary" testimony from them. The prospects of withdrawal pains make these people particularly vulnerable and more inclined to subdue to the police pressure.

<sup>305</sup> Interviews with attorneys.

<sup>306</sup> Interviews with attorneys.

<sup>307</sup> Interviews with attorneys.

<sup>308</sup> Interviews with attorneys.

### Violation of the right of apprehended persons with drug addictions to medical assistance

Since the drug addicts' vulnerability is caused first of all by their physiological peculiarities that cause physical and psychological suffering in certain physiological conditions, it is obvious that the right of medical assistance should be among the priority ones for this category of individuals. The majority of law enforcement officers, however, does not think so, and their attitude to ensuring medical assistance during abstinence syndrome is illustrated by the examples below:

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*«If I see that a detained individual (suspect) is a drug addict and he is going through withdrawal, I do nothing. Two days and he will be fine, I call no emergency, it won't help him... Am I trying to get them medical assistance? - I don't get these questions at all! No, I am not»<sup>309</sup>;*

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*«... It is terrible... Sometimes we call the emergency, they come and give some injection, and it helps them. However, there is a better method. Of course, it is not spoken of openly: you can pour him 50 gr of vodka, and it helps them to relieve pain for some time. And then interrogation can continue»<sup>310</sup>.*

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This information confirms that interrogators take no measures to provide medical assistance to the drug addicts suffering from withdrawal, while health care institutions are not notified of the need of such assistance. This conclusion also finds confirmation in information received from the interviews with the lawyers:

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*«I myself called the emergency a number of times, but there is another problem here: just a few days ago, I was with my colleague at N police station. I saw a cuffed drug addict taken outside in a terrifying condition. I asked "Why is he cuffed, is he going to run away from you? Look at his condition."... I called the emergency and said: "There is a man at the threshold of the police station, he is feeling bad". They answered, "No, let the police station call". We then forced the station staff to call, and they did of course, but we had to rage there for more than an hour. That's all about the right to medical help: a man can die ten times before anything is done»<sup>311</sup>;*

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*«I also had a case some time ago. I came to an apprehension and saw a drug addict practically unconscious: eyes rolling back, almost no pulse felt. I tell the investigator that a doctor should be called, and he says, "Why does he need a doctor, he is high." I understand that quarrelling won't help, so I start from the other end, "Ok, - I say, - now he will "kick the bucket", and we will take him under the arms, put him on the bench next to the police station, and say that he came there himself and died." In the end, the emergency was finally called, though afterwards it became even worth: in 15 min the apprehended person came back to life so much that we did not know what to do with him»<sup>312</sup>;*

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*«Drug addicts are a whole different story: there are no measures taken to mitigate their condition, as far as I know...»<sup>313</sup>.*

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There were multiple recorded instances when the detained drug addicts are deprived of the right to medical aid during withdrawal:

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*«At 20.00, two policemen brought a drug addict who was hardly standing on his feet to the police station. His face was badly beaten and had bruises under both eyes, blood on his lips, a scratch on the left side of the forehead, and generally swollen look... The detained was breathing with difficulty; he was shaking and tilting into different sides, until he sat down on the floor. The officers who brought him to the police station explained that they found a syringe next to the man... At 22.00, the detained did not seem to feel better, and the police officers left him under the*

<sup>309</sup> Interviews with investigators.

<sup>310</sup> Interviews with investigators.

<sup>311</sup> Interviews with attorneys.

<sup>312</sup> Interviews with investigators.

<sup>313</sup> Interviews with investigators.

supervision of the officer on duty to wait for the morning until he comes to his sense, and went about their business. Nobody raised a question about calling a doctor»<sup>314</sup>;

«... The apprehended person was inside the office where he had been brought; the state of his health was deteriorating. He was shaking and was breathing with difficulty, his answers to all questions (who taught him to inject drugs, when he started, where he was getting drugs initially) were rather tongue-tied. The apprehended person asked the police to call a doctor or to buy some medications, because he was feeling very bad. The officers decided to buy him sleeping pills. At 21.00, the criminal detectives announced that the apprehended person was not going to be taken to the TDF, and that he would stay at the police station until morning, and then they would take him directly to the court»<sup>315</sup>.

The researchers also recorded cases when the IAB officials would request medical assistance to apprehended drug addicts from health care institutions, while doctors would refuse to provide such help:

«Visually, it was clear that the person has drug addiction and other diseases. He also had a wound on his neck closed with plaster with blood and pus coming out.

Researcher: How are you feeling? Are you registered with medical institutions, do you have grave or chronic diseases?

Apprehended person: ...My throat is aching very much. Yes, I have many diseases. I have AIDS. Hepatitis C, seborrhea, and a range of other illnesses. I am on the D register with the dependency treatment clinic and get chemotherapy once a month. As to the neck would, it is still an open sore after a surgery, which is why I am getting the chemotherapy.

Researcher: Has a doctor been called to you after detention? Has he examined you and provided any medical assistance?

Apprehended person: The doctor came when I was already in that office (shows the public reception room). She visually examined me, wrote something down, gave me no medications and provided no other assistance, only asked a few questions. I consider that in this condition she should have taken me to the hospital, but she refused to do it»<sup>316</sup>;

«Researcher: Did you need medical assistance doing detention and your stay in custody? If yes, were there any problems in receiving it? If there were problems, were they solved and how?

Apprehended person: After I was put to the THF, an emergency was called for me, as I had withdrawal pains and was feeling very bad. They did not diagnose me. The doctors wrote something down and left. They were called twice, but with the same result. I felt better only when I was already at the remand prison»<sup>317</sup>;

«There is a cuffed drug addicted young man in the room. He has a bruise under his left eye, his lips swollen and cracked (almost black). The detained was not in his right mind: he was swinging on the chair, jumping up, and his eyes were restless... A doctor (a woman) who was in this room says she was called not according to specialization, that she will not take him to the hospital, and that he has to be taken to the dependency treatment hospital. In his turn, the policemen says that when this person was apprehended, this is what they did – they took him to the specialized hospital, where the man was examined, issued an intoxication certificate, and told that he cannot be hospitalized... The doctor absolutely refuses to take him...»<sup>318</sup>.

The above examples evidence discrimination based on the unsatisfactory health condition of apprehended persons with drug addictions also by the health care staff.

While examining observance of the apprehended drug addicts' right to medical assistance, it is also necessary to pay attention to provision of uninterrupted treatment with the substitution maintenance therapy (SMT) preparations in accordance with the doctor's prescriptions.

<sup>314</sup> Observation notes.

<sup>315</sup> Observation notes.

<sup>316</sup> Interviews with apprehended persons.

<sup>317</sup> Interviews with apprehended persons.

<sup>318</sup> Observation notes.

In cases of apprehensions of persons with drug addiction who had been prescribed SMT, law enforcement officials should act in accordance with the Procedure for Cooperation of Health Care Institutions, Pre-Trial Facilities, and Correctional Centers in Provision of Uninterrupted substitution maintenance therapy<sup>319</sup>.

According to the above Procedure, law enforcement officials have to register apprehensions of SMT patients, notify the relevant health care institution, and, following doctor's prescription, ensure bringing such individual to the institution for administration of medication. The failure to fulfil the above obligations on ensuring the patient with SMT treatment should be considered as violation of the right to medical assistance amounting to torture and inhuman treatment, which clearly constitutes a violation of Article 3 of the Convention.

The study results, however, indicate that IAB officials fail to properly fulfil their obligations on ensuring an uninterrupted SMT treatment for persons with drug addictions as prescribed by doctors, which is confirmed by the following quotes from interviews with attorneys:

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*«The main problem of apprehended SMT patients is that law enforcement officials do not inform hospitals administering this medication. The law-enforcement bodies almost always neglect this duty»<sup>320</sup>;*

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*«If the detained is an SMT patient, the THF staff are trying to get an SMT waiver from him. If the client needed such medical assistance, I filed relevant statements, solicitations, and sometimes complaints»<sup>321</sup>.*

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## Ensuring procedural rights of juveniles

Article 1 of the Convention on the Rights of the Child defines a juvenile (a child) as every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier. The same definition can be found in CPC Article 3, whereby a juvenile is a minor, as well as a child between fourteen and eighteen years of age.

According to international legal norms, general features of criminal procedure concern juveniles at all its stages and envisage the following:

- ▶ promotion of the juveniles' rehabilitation and reintegration into the society<sup>322</sup>;
- ▶ representation of the child by individuals who can provide assistance in defense against prosecution and by individuals responsible for or participating in their upbringing<sup>323</sup>;
- ▶ the right to privacy in order to avoid harm being caused to her or him by undue publicity or harm to his or her reputation<sup>324</sup>;
- ▶ specifics of apprehension and detention<sup>325</sup>;
- ▶ the highest priority to the most expeditious processing by courts and investigative bodies to ensure the shortest possible duration of detention<sup>326</sup>.

These provisions are also reflected in the Ukrainian national legalization. In addition to the main procedural safeguards envisaged for all categories of individuals (presumption of innocence, the right to be notified of the

<sup>319</sup> Approved by Joint Order of the Ministry of Health Care, Ministry of Interior, Ministry of Justice, and State Drug Control Service No. 821/937/1549/5/156 of 22.10.2012.

<sup>320</sup> Interviews with attorneys.

<sup>321</sup> Interviews with attorneys.

<sup>322</sup> Article 14§4 of the International Covenant on Civil and Political Rights and Article 40§1 of the Convention on the Rights of the Child.

<sup>323</sup> Article 12 Convention on the Rights of the Child.

<sup>324</sup> Rule 8 of the Beijing Rules; Article 6§1 of the Convention on Protection of Human Rights; Article 14 of the International Covenant on Civil and Political Rights.

<sup>325</sup> Article 37 of the Convention on the Rights of the Child; Rule 11 of the UN Rules for Protection of Juveniles Deprived of Their Liberty; Rule 10 of the Beijing Rules.

<sup>326</sup> Rule 17 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty.

accusation, the right to waive testimony etc.), the CPC stipulates a range of additional (special) guarantees and features for the juveniles, part of which has also been subject of the study:

- ▶ obligatory participation of a defense counsel in criminal proceedings involving juveniles suspected or charged of the commission of a criminal offence, as well as the juveniles subject to compulsory educational measures (CPC Articles 52, 490);
- ▶ participation of a legal representative, a pedagogue, or psychologist and a medical practitioner in criminal proceedings (CPC Articles 44, 226, 227);
- ▶ the obligation to immediately inform the apprehended person's parents or adopters, custodians, caregivers, the care agency on apprehension of a juvenile (CPC Article 213);
- ▶ the obligation of the investigator, public prosecutor, investigating judge, court and all other persons participating in criminal proceedings to perform procedural actions in a manner which intrudes the least on the juvenile's usual way of life and otherwise corresponds to his age and psychological profile, and take other measures intended to prevent negative impact on the juvenile (CPC Article 484);
- ▶ possibility of apprehension and keeping in custody of a juvenile may be applied only if he is suspected or accused of committing a grave or especially grave crime, (CPC Article 492).

The Law of Ukraine "On Militsiya" defines both police obligations and rights in relation to juveniles. In particular, the police can keep the juveniles, who have committed a socially dangerous act and have not attained the criminal liability age, during eight hours before such juveniles are transferred to their legal representatives or to the children's placement facility.

For understanding of the content of the police-juvenile legal relations, it may be helpful to look at the Consolidated Report on Crime in Ukraine (January-December 2014) published on the official website of the OPGU<sup>327</sup>. According to official statistics, 179366 pre-trial investigations were completed and sent to the court. Juveniles were accused of committing a crime in 7467 cases. It is clear that such accusations were usually preceded by apprehension and other procedural actions with juveniles. One should also consider that, in addition to criminal procedures, the juveniles are also subject to administrative, preventive, and other procedures with no statistical data on their real numbers.

The study has aimed to find out how the law enforcement officers understand additional procedural safeguards for minors and their attitude to ensuring them. The majority of the interview answers can be assessed as positive, and only some replies indicate that part of investigators are not aware of legislative requirements as to procedural rights of juveniles procedural rights and, accordingly, do not fulfil them:

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*«I do not understand what special procedures are meant. If you mean toys, pencils, and child rooms, the police station is not a kindergarten, and if you mean pedagogues and psychologists, there are relevant services with such people on their staff, and if necessary they are involved by the investigator's resolution»<sup>328</sup>;*

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*«Sometimes you get such a juvenile, that he does not need those pedagogues, they know the procedure better than any investigator»<sup>329</sup>.*

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Other sources also contain information on cases of typical violations of the juveniles' procedural rights. For instance, during their monitoring visit on 12 January 2015 to the Svyatoshyn District Department of the Main MIA Directorate in Kyiv, the staff of the Secretariat of the Ukrainian Parliament Commissioner for Human Rights established a number of violations of the procedural rights in relation to juvenile Hurin Ye. apprehended on suspicion of a crime.

<sup>327</sup> Consolidated Crime Report for January-December 2014 [Electronic Resource] / General Prosecutor's Office: [http://www.gp.gov.ua/ua/stst2011.html?m=fslib&t=fsfile&c=download&file\\_id=189273](http://www.gp.gov.ua/ua/stst2011.html?m=fslib&t=fsfile&c=download&file_id=189273)

<sup>328</sup> Interviews with attorneys.

<sup>329</sup> Interviews with attorneys.

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While he was held at the offices of the district department, unknown individuals were threatening him, using physical force, and requesting that he confess having committed the crime. The apprehended juvenile sustained bodily injuries. The investigative and other actions were held not in a special investigation room equipped with video surveillance system, as required by relevant regulations, but in the department offices. The juvenile's right to defense and the right to inform the relatives on apprehension were not properly ensured. Hurin's father was informed only 8 hours 30 min after apprehension, while the FSLA Center was notified only after 9 hours 25 min. Staff of the Secretariat of the Ukrainian Parliament Commissioner for Human Rights also found facts of forged data on time and circumstances of apprehension, as well as the juvenile's stay at the district department of the MIA<sup>330</sup>.

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### Violation of the juveniles' right to information

The legislation contains no special (additional) guarantees for the juveniles' right to information, as well as no provisions on the necessity to make sure that they understand received messages and explanations of their rights and obligations. As noted above, vulnerability of this category of individuals is conditioned by their age-related psychological characteristics. Therefore, it was important to find out during research the attitude of the subjects responsible for ensuring procedural safeguards to the ability of juveniles to understand adequately certain rights and events, as well as to make correct decisions on their own. It was also crucial to find out how understandable the information was.

Some of the investigators believe that the juveniles are able to understand their rights and guarantees envisaged for them:

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*«We now have juveniles who can do more than some adults, they even know more. If juveniles tell their parents, "You have no right to beat me because this contradicts the Convention for the Protection of Children", than what balanced decision should be discussed further? I noted earlier that I have one opinion on this category of individuals – if they can commit a crime, it means they also can realize everything that concerns their rights and guarantees»<sup>331</sup>.*

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Other investigators think the opposite, i.e. that juveniles are not able to understand their rights and guarantees available to them:

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*«Children cannot, their mind is not yet mature enough to make a conscious choice as to the use of certain rights, to understand and exercise their rights in full»<sup>332</sup>.*

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Even though the national legislation contains no special (additional) guarantees of the right to information for juveniles, part of interviewed investigators consider that juveniles are able to understand their rights and guarantees envisaged for them. Others consider that immaturity of thinking and the lack of sufficient social experience cause the obligation to observe their rights in criminal process. At the same time, the study results show that in practice law enforcement bodies systemically violate the juveniles' right to information:

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*«Researcher: When was the first time that you heard explanation of your rights, the essence of the suspicion etc.?  
Apprehended person: On the following day, when the investigator called us and set an appointment at 15.00. He explained what specifically I had committed and how my actions were qualified (which part of the article is caused by what). Then, later, on the 22nd we came with my mother again to the investigator, met the defender, and the investigator presented the notice of suspicion. He gave me the letter of rights and told me to read it at home. That was the first time I saw the entire list of rights that I had in accordance with the law»<sup>333</sup>;*

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<sup>330</sup> Officials of the Svyatoshyn District MIA Department in Kyiv Violate the Juvenile's Constitutional Rights: <http://www.ombudsman.gov.ua/ua/all-news/all-activity/16115-hx-posadovi-osobi-svyatoshinskogo-ru-gumvs-ukraini-m-kiyeva-porushili-ko/>.

<sup>331</sup> Interviews with investigators.

<sup>332</sup> Interviews with investigators.

<sup>333</sup> From an interview with the detained.

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«Researcher: How did the police officers introduce themselves when they were apprehending you? Did they explain why you were being apprehended?

Apprehended person: No, they only said that they represented the criminal investigation and did not explain anything else.”

“Researcher: When you were brought to the police after all, did anybody explain anything to you – why you were apprehended, what you were suspected of? Has anybody told you the Criminal Code Article?

Apprehended person: When were only leaving the car near the district department, that police officer, the younger one... said that I got in serious trouble, and that... I had 7-8 years of prison looming before me. This, one can say, was the only explanation of what was waiting for me. Nobody ever said anything else»<sup>334</sup>;

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«Researcher: Have you been told about any other rights, like the right to legal assistance, not to answer questions or anything else?

Apprehended person: How can they say that I may not answer questions if the entire essence of our conversation came down to us telling them as much as possible? They were asking five times about the same moments until they would discover some discrepancies (there were three officers in the office, and everybody wanted to specify something or to ask once again). As to the lawyer, we were told that I would have a lawyer in any case because I am a juvenile, while my friends, with whom I was apprehended, have been told that if the investigator decides that we will go as one group, then they are lucky, and we all will be represented by one free lawyer»<sup>335</sup>.

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The examples above show that juveniles are often not informed in due time of the grounds for apprehension and the alleged crime, nor do they receive clarification on the right to be silent with regard to suspicion. The below quote from an interview with an apprehended juvenile indicates that they also do not receive clarifications on the right to have a counsel and to make use of legal assistance:

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«Researcher: When did they explain this right to “a free lawyer”?

Apprehended person: It was already sometime close to one in the morning, when we started one by one to write our confessions. The police officers started thinking which investigator would get our case and contemplating on what would happen next.

Researcher: Before taking explanations on the crime, did the police officers mention the right to an attorney, the right to abstain from answering questions or any other rights?

Apprehended person: About the lawyer they said, that he... would be called later, when the investigator would start working with me during investigative actions while at that moment they were only establishing main facts and were interested in the events in question»<sup>336</sup>.

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Research findings also contain evidence of the failure to explain the right to notify third parties to the juveniles:

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«Researcher: Did you realize that you had the right to call your parents or to ask for a lawyer? Are you theoretically aware of any rights of apprehended individuals?

Apprehended person: In general, yes, but one thing is when you watch a film, and the police say there: “You have the right to remain silent, the right to a phone call, to an attorney etc.” and another thing is when you are caught in the street, stuffed into a car and taken somewhere. What sort of rights can one think of here? I personally was very scared and thought I would go directly to prison from here»<sup>337</sup>.

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<sup>334</sup> Interviews with apprehended persons.

<sup>335</sup> Interviews with apprehended persons.

<sup>336</sup> Interviews with apprehended persons.

<sup>337</sup> Interviews with apprehended persons.

### Violation of the juveniles' right to legal assistance

In addition to main guarantees under Articles 52 and 490 of the CPC on the right to legal assistance and the procedure for securing this right to the juveniles suspected or accused of a crime, participation of a defense counsel in criminal proceeding is envisaged additionally for the juveniles subject to compulsory educational measures.

According to Article 52 of the CPC, no action in criminal proceedings with a juvenile can take place without a defense counsel. As to the interrogation of a suspected or accused juvenile, according to Article 490 of the CPC, such interrogation shall take place pursuant to general CPC rules but exclusively in the presence of a defense counsel.

At the same time, the research indicates that interrogators obtain testimony on juvenile's guilt in attorney's absence and in a manner not envisaged by the CPC. The following quote from an interview with an investigator serves as confirmation:

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*«Investigator: First of all, when we find out that someone is a juvenile, immediately their parents, ..., lawyer are invited.*

*Researcher: While the attorney, parents, or legal representative are on their way, do you try to establish any facts with the juvenile or question him somehow?*

*Investigator: Well, in very general sense, of course... with the attorney present, the juveniles most often are not so openly about telling everything, they are trying to conceal something. Therefore sometimes it is even better to ask them something without the parents and the attorney»<sup>338</sup>.*

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Same violations of the juveniles' rights to legal defense are also evidenced by information received during interviews with attorneys:

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*«The main conversation, i.e. the undocumented interrogation, always takes place without an attorney. After the actual work is done, and the apprehended person is ready to say what the interrogator needs, they invite an attorney»<sup>339</sup>.*

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During interviews, the apprehended juveniles stated that law enforcement officials conduct actions with their participation aiming to prove guilt in the lawyer's absence:

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*«Apprehended person: On that day I did not see the lawyer at all... About the lawyer they said, that he... would be called later, when the investigator would start working with me during investigative actions while at that moment they were only establishing main facts and were interested in the events in question»<sup>340</sup>.*

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Below is a typical example of how law enforcement officials violate the CPC requirements on participation of a defense counsel, legal representative, psychologist or medical professional in criminal proceedings involving juveniles suspected or accused of a crime:

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*«At 12.30, two investigation officers came in... with two persons, 17 years old, who had committed a theft... All together were taken to the investigation unit and put into one office. There the officers warned that they would call the parents and the lawyer later, while now these young people had to explain how they had stolen the money... The first detained started telling the story immediately... The juvenile was very nervous and cried from time to time, but he would answer all questions of the police and the plaintiffs clearly and quickly. The apprehended person... also fully recognized his guilt.*

<sup>338</sup> Interviews with investigators.

<sup>339</sup> Interviews with attorneys.

<sup>340</sup> Interviews with apprehended persons.

At 16.30, the official started asking detailed questions to the second apprehended juvenile (without an attorney) and writing down his explanations.

At 17.10, the official took the first juvenile to another office (there was still no attorney) and asked the apprehended person to speak in detail from the very beginning about the details... of thefts.... The officer was taking down all explanations word by word (a total of 7 pages) for them to be further read and signed by the apprehended person....

At 18.45, the first apprehended person was brought back to the previous office, where the second one was already writing an obligation to come to the district department when summoned. The first apprehended person wrote the same obligation. Afterwards, the officials asked the first person whether he would write a confession, and he wrote it personally at 19.00»<sup>341</sup>.

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### Improper treatment of apprehended juveniles

The study results also indicate that, using the juveniles' vulnerability and absence of a lawyer, legal representative, pedagogue or psychologist, law enforcement officials exert mental pressure on them, intimidating them in order to obtain testimony on committed crimes:

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«But from the very beginning, when field officers apprehend juveniles, they, in my opinion, do not really distinguish them from adults: they also try to talk with them one-on-one, intimidate them, and get information from them through any means. Moreover, this category of apprehended persons subdues to panic and intimidation much quicker than adults»<sup>342</sup>;

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«Researcher: Have the investigation officers pressured you to confess to a crime? If so, what sort of pressure and was the attorney present at that time?

Apprehended person: ... Psychologically, of course: they said that they had all evidence, that it had been a plunder by conspiracy, that it was a serious article, and we had only one way out – to confess to everything, help the investigation, and then we would have a chance to receive minimum punishment»<sup>343</sup>;

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«Researcher: How can you generally assess the investigation officers' attitude to you as an apprehended person?

Apprehended person: ... They are pressuring toughly, especially when they feel that you are not telling something. When others are around, they try to be more or less polite, but when you are alone with them they immediately start talking differently»<sup>344</sup>.

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We should also not that in practice when field officers apprehend juveniles, instead of delivering them to the pretrial investigation body in accordance with CPC Article 210 and in violation of the CPC Article 41, they “work” with them for some time on their own. Using the juveniles' psychological features, absence of a lawyer, intimidation and psychological pressure, they force the apprehended juveniles to self-incriminate through explanations and statements on their illegal activities etc.

### Failure to inform other persons on apprehension

According to CPC Article 213§2, if the apprehended person is underage, the competent official who has carried out apprehension shall be required to immediately inform of this the apprehended person's parents or adopters, custodians, care-takers, the care agency. The study results, however, evidence the facts when the parents are informed long after the actual apprehension or not informed at all:

<sup>341</sup> Observation notes.

<sup>342</sup> Interviews with attorneys.

<sup>343</sup> Interviews with apprehended persons.

<sup>344</sup> Interviews with apprehended persons.

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«Apprehended person: We were detained at about 12.00, and at 14.30 they called my dad»<sup>345</sup>;

«Apprehended person: ... Field officers did not call anybody. At the chief officer's office, when they learnt I was 17, they asked if I had any relatives in Odesa... with this the question was closed»<sup>346</sup>.

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Similar violations were revealed during direct observations of the work of law enforcement officers:

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«At 12.30, two investigation officers came in... with two persons, 17 years old, who had committed a theft (alleged by the victims). All together were taken to the investigation unit and put into one office The father of one of the apprehended persons was informed on apprehension of his juvenile son only at 14.20.

The parents of the other one were not informed by law enforcement officers at all; only at 14.30 they gave him a possibility to inform his mother»<sup>347</sup>.

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«At 21.15, detectives brought three young men to the district department. According to the officers, the former were apprehended on suspicion of a plunder. One of the apprehended persons turned out to be 17 ... At 01.45; the apprehended persons remained at the same office where the investigation officers were working with them... Neither parents, nor other representatives were called for the detained...»<sup>348</sup>.

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### Participation of a legal representative, pedagogue, psychologist, or medical doctor in criminal proceedings or individual investigative (detective) actions involving a juvenile

CPC Articles 44, 226, 227, 448, and 491 prescribe participation of a legal representative in procedural or investigative (detective) actions if a suspect/accused is a juvenile. Committed as legal representatives may be parents (adopters), and in their absence, custodians or caregivers, other adult close relatives or family members, as well as representatives of custody or trusteeship agencies, institutions and organizations under whose tutorship or custody the underage is. Article 227 also prescribes for participation of a pedagogue, or psychologist and a medical practitioner, if necessary, in investigative (detective) actions conducted with involvement of a juvenile.

Importantly, the dominant majority of investigators are aware of the legislative requirements as to the juveniles' procedural rights as evidenced by their interview responses:

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«For interrogation of children we involve their parents, pedagogues, adopters, custodians and caregivers»<sup>349</sup>;

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«... For interrogation of minors and underage persons ... it is obligatory that the parents and a pedagogue or other person defined by the CPC be present»<sup>350</sup>;

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«... yes, there is. Children are interrogated only in the presence of their legal representatives. Child psychologists or pedagogues... In addition, the rights are explained not to children personally, but to their legal representatives»<sup>351</sup>.

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At the same time, the study has revealed that certain investigators intentionally violate Article 227 of the CPC:

<sup>345</sup> Interviews with apprehended persons.

<sup>346</sup> Interviews with apprehended persons.

<sup>347</sup> Observation notes.

<sup>348</sup> Observation notes.

<sup>349</sup> Interviews with investigators.

<sup>350</sup> Interviews with investigators.

<sup>351</sup> Interviews with investigators.

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*«The CPC... envisages cases when a psychologist or a pedagogue should also be called, but where am I supposed to get them? Nobody actually ever calls them»<sup>352</sup>.*

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Articles 227§3 and 488§3 suggest that participation of a legal representative cannot be used for the juvenile's harm. However, the study results show that violations of this principle take place:

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*«The procedure exists. It lies in calling additional people to the station to accompany such apprehended person. I think it is good, because, a child might not say anything to the investigator, while it is another thing if they talk to a pedagogue or a psychologist. ... So, they make the process much easier. We always call... parents or custodians»<sup>353</sup>.*

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This quote points to the fact that pedagogues and psychologists present during interrogation often unlawfully help investigators in obtaining testimonies from apprehended juveniles on crimes committed by them. Such "participation" of the said individuals is, as a rule, used by investigators for the juveniles' harm:

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*«... In court, cases are heard in the presence of custody or trusteeship agencies. I personally have a huge question to the latter ones: whose interests are they supposed to defend? Last time I attended a case with a juvenile defendant, a representative of the custody or trusteeship agencies was supporting the prosecutor's position at every step and in every issue... The question is why she is needed at all with such an approach»<sup>354</sup>.*

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This quote from an interview with an attorney also shows that there are cases when custodians act in the interests of prosecution to the detriment of juvenile's interests. Another quote from an interview with an attorney leads to similar conclusions:

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*«I have a special question for the custody or trusteeship agencies: in this case with a juvenile I had not one prosecutor, but two, because a representative of the agencies behaved as if his guilt had already been proved at all possible levels. It seems to me that there is no use of them at all. Until I spoke openly about her during the court hearing and asked her directly whose interests she was defending, she answered on record that if the juvenile was under investigation it meant he was guilty»<sup>355</sup>.*

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The testimony below shows that pedagogues involved in criminal proceedings against juveniles also act to the detriment of their rights and interests:

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*«Sometimes, however, the invited teachers harm defense as they allow themselves to comment on their personal attitude to the crime committed by the juvenile. Therefore, they prompt the investigator, prosecutor, and, most importantly, the investigating judge to assign stricter restraint measures than personal obligation in relation to this category of suspects. In my opinion, it does not promote rehabilitation of such individuals. In addition to the investigator, such pedagogues (school/boarding-school teachers) quite often also persuade the victims to refuse a reconciliation agreement or not support defense's motion to close criminal proceedings due to reconciliation between the victims and the defendant. Unfortunately, in such cases courts listen to the opinion of victims and take their position into account, which results in finding them guilty, and thus convictions and punishment of juveniles for first-time mild or moderate offences»<sup>356</sup>.*

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Thus, the above examples illustrate multiple cases when individuals involved in criminal proceedings on the juveniles' side intentionally harm the juveniles' rights and interests.

<sup>352</sup> Interviews with investigators.

<sup>353</sup> Interviews with investigators.

<sup>354</sup> Interviews with attorneys.

<sup>355</sup> Interviews with attorneys.

<sup>356</sup> Interviews with attorneys.

## Ensuring procedural safeguards for the rights of persons with mental disabilities

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The Supreme Court Plenum<sup>357</sup> clarified that individuals who due to mental disabilities are not able to exercise their rights to defense should include, in particular, the individuals who are recognized as sane but have certain psychiatric impairments that prevent them from independently defending themselves from prosecution.

Article 10 of the CPC stipulates that during criminal proceedings these individuals enjoy additional procedural safeguards. In addition to the main guarantee of obligatory participation of a defense counsel in criminal proceedings, the CPC envisages a number of other procedural features for this category of individuals, in particular:

- ▶ an obligation of an investigator or prosecutor to address or involve an expert to conduct examination ascertaining mental state of the suspect upon availability of information which casts doubt on his sanity or limited capacity (CPC Articles 242, 509);
- ▶ suspension of the court proceedings in case where the accused has fallen ill with a mental disease that makes his participation in court proceedings impossible (CPC Article 335);
- ▶ obligatory psychiatric examination of the individual who committed crime in a state of limited criminal capacity, if application of compulsory medical measures is considered (CPC Article 368);
- ▶ circumstances to be ascertained during pre-trial investigation in criminal proceedings in respect of application of compulsory medical measures (CPC Article 505);
- ▶ the scope of rights of a person in whose respect it is provided to apply compulsory medical measures or the matter of applying is considered (CPC Article 506);
- ▶ application of measures of restraint to a person in whose respect it is provided to apply compulsory medical measures or the matter of applying was considered by commitment for care to custodians, close relatives or family members, under mandatory medical supervision, or placement in a psychiatric institution under the regime which excludes their dangerous behavior (CPC Article 505).

The ECHR position on the observation of the rights of persons with mental disabilities is reflected in a number of its judgments<sup>358</sup>. The ECHR, in particular, has noted<sup>359</sup> that sub-paragraph (e) of Article 5 para. 1 (art. 5-1-e) of the European Convention on Human Rights obviously cannot be taken as permitting the detention of a person simply because his views or behavior deviate from the norms prevailing in a particular society. The mental disorder must be of a kind or degree warranting compulsory confinement. The validity of continued confinement depends upon the persistence of such a disorder.

The Court also has stressed<sup>360</sup> that the key guarantee within Article 5§4 is the requirement for an independent legal device by which the detainee may appear before a judge who will determine the lawfulness of the continued detention. The detainee's access to the judge should not depend on the good will of the detaining authority, activated at the discretion of the medical corps or the hospital administration.

### *Violation of right to legal aid guaranteed to persons with mental disabilities*

Article 52 of the CPC requires obligatory participation of a defender in criminal proceedings of persons who because of having mental disabilities are unable to fully enjoy their rights – upon establishing the presence of such disabilities. The same article also envisages mandatory participation of a defender in criminal proceedings against the individuals be subject to compulsory medical measures or where the application of such is considered. In this case, attorney's presence is mandatory upon establishing that the person concerned is insane or other information giving ground to doubts about the person's criminal capacity.

<sup>357</sup> Resolution of the Plenum of the Supreme Court No. 8 of 24.10.2003 on Application of the Legislation that Ensures the Rights to Defense in Criminal Justice.

<sup>358</sup> See Judgements *Winterwerp v. the Netherlands*, *Gorshkov v. Ukraine*.

<sup>359</sup> See Judgement *Winterwerp v. the Netherlands*.

<sup>360</sup> See Judgement *Gorshkov v. Ukraine*.

There is information about violations of these guarantees, in particular, in case law summaries. For instance, the summary on case law on ensuring the right to defense by local courts and the court of appeal in Zaporizhzhya region in 2013<sup>361</sup> notes:

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*«On 9 January 2013, the court of appeal upheld the judgment of Orikhivsky District Court of Zaporizhzhya Region on returning for additional investigation (in accordance with the 1960 CPC) the criminal case on accusation of H. of a crime under Article 307§2 of the CC on the grounds of violation of the defendant's right to defense. The first-instance court made a grounded conclusion on obligatory participation of a defense counsel, as H. has a mental disorder, for which he is registered with a psychiatrist. The investigator, however, added no information on the disorder to case file, while the statements of H.'s relatives on the obligatory participation of a defender due to his psychiatric impairments were ignored. All investigative actions were conducted without the participation of a defender, which, unquestionably, is a violation of legal requirements of obligatory participation of a defense counsel. This provided undisputable grounds for returning the case for additional investigation».*

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The study results indicate that investigators are well aware of legal requirements on guarantees of legal protection for people with mental illness:

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*«However, if a person has mental disabilities, the investigator will insist on exercising the right to an attorney. Otherwise, the investigator may put the prosecution in court at risk, which, as a result, may have a negative impact on the investigator himself»<sup>362</sup>;*

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*«If we have the slightest doubt that a person has any deviations or possible impairments, we necessarily assign an attorney. The court is going to discover this, and say that we had conducted pretrial investigation with an individual who has not realized any of his actions, and has not been able to defend himself to full extent. Therefore, it is better for us to play safe; it is more reliable»<sup>363</sup>.*

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Despite good understanding of legal requirements on procedural safeguards for the individuals with mental disabilities, the investigators often disregard them in their work. In order to avoid the obligatory participation of an attorney in criminal proceedings, investigators try to hide the apprehended person's illness and exercise psychological pressure abusing the individual's vulnerable condition in order to get the "needed" testimonies:

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*«Even the majority of completely healthy people stop thinking and do various thoughtless things when they get into the hands of our police. Then, what can we say about people with mental and psychological impairments. Certainly, in 90% of cases this category cannot make an objective decision as to the involvement of an attorney, this should be done by the police»<sup>364</sup>;*

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*«Often even the law-enforcement bodies interrogate an apprehended individual as a witness, and at the same time (particularly field officers) exert pressure and threaten the person. Particular attention should be paid to interrogation... of individuals suffering from mental disorders. Very often they are interrogated in the absence of specialized staff»<sup>365</sup>;*

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*«... Sometimes investigators are dodging and, having learnt that a person used to be registered with a doctor and understanding that a medical examination should be ordered for the apprehended individual, they persuade the person to abstain from mentioning this fact in their biography so there would be no need for a defender. It is a problem...»<sup>366</sup>.*

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<sup>361</sup> [http://zpa.court.gov.ua/userfiles/uz\\_SH\\_.doc](http://zpa.court.gov.ua/userfiles/uz_SH_.doc).

<sup>362</sup> Interviews with investigators.

<sup>363</sup> Interviews with investigators.

<sup>364</sup> Interviews with attorneys.

<sup>365</sup> Interviews with attorneys.

<sup>366</sup> Interviews with attorneys.

The above information received through interviews with attorneys indicates that there are serious shortcomings in observance of procedural rights of individuals with mental disabilities. Disregard by the investigators of legal guarantees for such individuals, depriving them of the right to defense, including through “tacit agreements” with vulnerable individuals, constitutes a crime envisaged by Article 374 of the Criminal Code (violation of the right to defense).

## CONCLUSIONS

The study results confirm that while formally ensuring participation of a defense counsel in criminal proceedings in relation to vulnerable social groups, the investigators often take action aimed at violating a number of other rights related to the right to defense. Such actions include hindering efficiency of legal assistance, failure to explain the right to legal aid, psychological pressure and use of the detained individual’s vulnerable condition to get testimonies beyond the boundaries of procedural legislation.

Due to specific physiological characteristics, persons with drug addictions are usually in a state of intoxication or withdrawal. The key vulnerability circumstance for them is their persistent psychophysiological need to take psychotropic substances forcing them to use drugs regularly to prevent withdrawal accompanied by physiological and psychological suffering. Such circumstances deprive them of the possibility to defend themselves on their own. At the same time, despite their vulnerability, the national legislation does not provide them with any additional procedural safeguards. Moreover, the criminal legislation (Article 67§1(13) of the CPC) considers that if an individual subject to criminal prosecution has this illness, it aggravates the type and scale of punishment for criminal offence.

Research findings show numerous violations by law enforcement officials of both general procedural safeguards envisaged for all categories of individuals, and of specific guarantees for juveniles. In particular, there are systematic violations of the following rights: the right to information as concerns immediate notification on the grounds for their apprehension, clarification of the right to an attorney and legal assistance, as well as the right to abstain from testifying in relation to suspicion.

There are violations of requirements on immediate notification of parents or representatives of the juvenile on apprehension. In practice, the law enforcement deprive juveniles of participation of their legal representatives, pedagogues, psychologists, or medical practitioners in criminal proceedings and individual investigative (detective) actions with their participation.

Analysis of the study results suggests that law enforcement understand legislative requirements on ensuring procedural safeguards for persons with mental disabilities but often violate them. In particular, they attempt at concealing individual’s mental disorder to avoid obligatory participation of an attorney in criminal proceedings, exercising psychological pressure on the person abusing their vulnerability to obtain the “necessary” testimony etc.

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## 8. Right to written and oral translation

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### 8.1. Normative regulation of the right to written and oral translation

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#### International standards

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The Convention guarantees the right of everyone charged with a criminal offence to be provided with translation, which is considered an integral part of the right to defense (Article 6§3):

*«Everyone charged with a criminal offence has the following minimum rights: (...) e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court».*

Additional Protocol to the European Agreement on the Transmission of Applications for Legal Aid (ETS 179)<sup>367</sup>:

*« The requested Party shall [...] ensure that costs for translation and/or interpretation of the communications between lawyers and applicants are covered» .*

#### Case law of the European Court of Human Right

According to the ECHR, provisions of Article 6 of the Convention may be relevant for pre-trial investigation. Therefore, guarantees of Article 6§3 apply to apprehended persons in their entirety.

The ECHR has a rather extensive case law on the right to have the assistance of an interpreter as a component of the right to defense in the context of fair trial. According to several judgments of the Court<sup>368</sup>, the scope of the right to translation is not limited by any specific conditions or factors and has the following meaning:

*«[...] construed in the context of the right to a fair trial guaranteed by Article 6, paragraph 3 (e) (art. 6-3-e) signifies that an accused who cannot understand or speak the language used in court has the right to the free assistance of an interpreter for the translation or interpretation of all those documents or statements in the proceedings instituted against him which it is necessary for him to understand in order to have the benefit of a fair trial»<sup>369</sup>.*

ECHR emphasized that “the assistance of an interpreter should be provided during the investigation stage unless it can be demonstrated in the light of the particular circumstances of the case that there are compelling reasons to restrict this right”. For instance, in *Şaman v. Turkey* the ECHR concluded that there had been a violation of the right to defense under Article 6§3(c) and (e) of the Convention in conjunction with a violation of the right to fair trial under Article 6§1. In the case, the applicant did not receive assistance of an interpreter during police custody:

*«[...] even though the applicant had the assistance of a lawyer and an interpreter during her trial before the first-instance court and subsequently before the appeal court, the absence of an interpreter and a lawyer during her police custody irretrievably affected her defense rights»<sup>370</sup>.*

In addition, the Court viewed the fact that the prosecution accepted the applicant’s decision to refuse legal assistance without proper command of the language of proceedings in absence of an interpreter to be incompatible with defense rights under Article 6§3 of the Convention:

<sup>367</sup> Signed 4/10/2001, entered into force 1/09/2002, [http://zakon1.rada.gov.ua/laws/show/994\\_381](http://zakon1.rada.gov.ua/laws/show/994_381).

<sup>368</sup> *Shabelnik v. Ukraine*, ECHR, 19 February 2009, §52.

<sup>369</sup> *Luedicke, Belkacem and Koç v. Germany*, № 6210/73; 6877/75; 7132/75, 28 November 1978, § 48.

<sup>370</sup> *Şaman v. Turkey*, Application no. № 3529/05, 5 April 2011, §36).

«[...] against this background, and taking into account its above finding that the applicant had an insufficient knowledge of Turkish, the Court considers that, without the help of an interpreter, she could not reasonably have appreciated the consequences of accepting to be questioned without the assistance of a lawyer in a criminal case concerning the investigation of particularly grave criminal offences [...]. Consequently, it cannot find that the applicant waived her right to a lawyer in a knowing and intelligent way. Furthermore, the Court considers that additional protection should be provided for illiterate detainees with a view to ensuring that the voluntary nature of a waiver is reliably established and recorded. In the present case, however, no specific measures of this kind were envisaged» (ibid, §35).

In *Baytar v. Turkey*, the Court reiterated this opinion:

«[...] an individual held in police custody enjoys a certain number of rights, such as the right to remain silent or to be assisted by a lawyer. The decision to exercise or waive such rights can only be taken if the individual concerned clearly understands the charges, so that he or she can consider what is at stake in the proceedings and assess the advisability of such a waiver.

[...] The Court takes the view that, as the applicant was not able to have the questions put to her translated and was not made aware as precisely as possible of the charges against her, she was not placed in a position where she could fully assess the consequences of her alleged waiver of her right to remain silent or her right to be assisted by a lawyer and thus to benefit from the comprehensive range of services that can be performed by counsel. Accordingly, it is questionable whether the choices made by the applicant without the assistance of an interpreter were totally informed.

[...] The Court finds that this initial defect thus had repercussions for other rights which, while distinct from the right alleged to have been breached, were closely related thereto and undermined the fairness of the proceedings as a whole»<sup>371</sup>.

## Domestic legislation

The Criminal Procedure Code of Ukraine (Article 42 of the CPC) guarantees the right of a suspect, defendant to receive translation services. The official conducting proceedings in the case has an obligation to inform the suspect of his/her rights, including the right obtain copies of procedural documents in native or any other language of which he has command and, where need be, benefit from translation services at the State expense (Article 20§2, Article 42§3(2) and (18) of the CPC). Article 68§1 of the CPC provides an opportunity for parties to criminal proceedings or investigating judge, or court to involve appropriate translator (translator into sign language) when it is necessary to translate explanations, testimonies or documents in the course of criminal proceedings.

According to Article 29 §2 of the CPC, a person shall be notified of being suspected of having committed a criminal offence in state language or any other language s/he knows sufficiently to understand the substance of the suspicion of having committed a criminal offence. According to Article 29 §3 of the CPC, the official conducting proceedings has the duty to ensure participants to criminal proceedings, who do not know or do not know well enough the state language the right to provide explanations and testimony, lodge motions and file complaints, as well as to speak before court in their native language or any other language they have knowledge of and be assisted by an interpreter/translator if necessary.

The right of the suspect or defendant to use his/her native language, obtain copies of procedural documents in same language or any other language of which he has command and, where need be, benefit from services of translator is enshrined in Article 42 §3 of the CPC. In case of involvement into the criminal proceedings, an interpreter acquires a status of participant thereof.

<sup>371</sup> *Baytar v Turkey*, Application no. №45440/04, ECHR Judgment, 14 October 2014.

Therefore, a person conducting proceedings (investigating judge, court, prosecutor, investigator) have to initiate and ensure participation of an interpreter if the person does not have sufficient command of the language of criminal proceedings, is unable to cover translation costs, and, consequently, will be deprived of the ability to understand the content of actions in criminal proceedings and exercise his/her defense rights.

Article 68§4 of the CPC requires that the party, which involved the translator, or investigating judge or court shall verify the competence of the translator, and find out about his relations with the suspect, accused, victim, witness. However, there are no regulations setting the criteria for translator's competence.

The CPC, as well as other legal instruments, have no provisions that regulate criteria for identifying the apprehended person's need for translation services, as well as the procedure for involving and verifying translator's competence (qualification) etc. In Ukraine, there are no legal requirements for mandatory presence of a translator directly at the location of investigative action or participation in the action via use of communication technologies. Ukrainian legislation does not contain provisions on the procedure for waiving the suspect's right to receive translation services.

In practice, a translator can be any person who has complete command of the language of the court and language used by the relevant participant of the process, as well as a person who has skills of communication with persons with hearing or speaking impairments (sign language interpreter). Competence of an interpreter can be verified based on language certificates: education or academic degree, experience of working as an interpreter etc. At the same time, the law does not require that an interpreter have education in philology or other specialized field of science.

In addition, there are no criteria for establishing the independence of interpreters. Articles 77 and 79 of the CPC only provide grounds for challenging participation of a translator in case of his/her possible bias. There are no sanctions for incompetency of a translator. Article 384 of the Criminal Code only establishes criminal responsibility for a translator in criminal proceedings for refusal to perform the duties and knowingly false translation.

There are no regulations establishing legal safeguards in cases of violation of the right to translation, as well as separate sanctions for such violations. However, considering the right to defense under Article 20§1 of the Criminal Procedure Code, which includes exercise of rights provided by the Code, violation of the right to benefit from translation services can be considered in the light of violation of the right to defense punishable by criminal penalty for officials under Article 374 of the Criminal Code.

According to Article 118 of the CPC, expenses related to the involvement of translators constitute procedural expenses. Under the general rule, these expenses are paid by the party that filed a motion on involvement of a translator. In case of involvement and participation of translators for translation of the suspect's statements, these costs are compensated at the expense of the State Budget of Ukraine as established by the Cabinet of Ministers of Ukraine.

## **8.2. Registry of translators**

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In contrast with registries of experts or attorneys, there is no unified registry of translators in Ukraine. There is an informational registry of translators by the State Migration Service in accordance with the Procedure adopted by the order of the MIA of Ukraine #228 dated March 11, 2013. According to the Procedure, authorized users have access to the Registry of translators via login and password.

Paragraph 1.3 of the Procedure states that the registry of translators is a web page on the official website of the SMS with information about translators who can be involved by state authorities for translation services for consideration of applications and interviews with refugees and other categories of migrants during their apprehension, legal assistance, review by administrative courts of cases concerning refugees and expulsion of

foreigners and stateless persons from Ukraine, pre-trial investigation and trial of criminal proceedings and cases on administrative offences committed by refugees and other categories of migrants in Ukraine.

Therefore, this service is for translation services for special subjects, namely migrants, and only state authorities can use it. In addition, unlike with attorneys of the Centers for free secondary legal aid, there is provision for round-the-clock shifts of translators. Consequently, it is impossible to provide the apprehended person with a translator from the registry of translators within the 24-hour timeframe for notification of suspicion under Article 278§2.

The lack of such registry and criteria for verifying their competence removes limitations on invitation of translators with the relevant degree only, but it also creates practical difficulties for involvement of a translator in criminal proceedings.

During interviews, several law enforcement officers stated that current registry perform its functions:

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*«There are no databases. In theory, there is some registry but it is not functioning. We find translation agencies, call them and ask them to send someone»<sup>372</sup>;*

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*«There is access. However, what is the point if it does not work? In that registry, nobody is responsible for anything, and they do not send anyone. So we either have to ask apprehended persons or look around ourselves and pay out of our pocket if it is something serious»<sup>373</sup>;*

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*«[...] I can say that we have no procedure for providing translation services. To be more precise, there is a very unsuccessful mechanism. Though we can involve a translator from Russian to Ukrainian without any issues, for instance teachers of the neighboring school, if the suspect requires other translation, for instance Italian, Georgian, there can be difficulties and complications in ensuring participation of such specialist. Issues related to ensuring the said 'problematic' translations are responsibility of an investigator working on the criminal case. In general, if there is a need to involve a translator from Polish, the investigator contacts a translation agency in Odesa. Then, the department and the agency/translator sign a contract, the money is transferred and specialist is available. However, there are urgent cases when specialist come before conclusion of the relevant agreement and transfer of funds. Thus we are working on honest promised and under conditions of department finances»<sup>374</sup>;*

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*«The most problematic is the absence of centralized approach to ensuring these rights: investigators call some translators who they pay, qualification and objectivity of these translators is somewhere aside»<sup>375</sup>.*

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According to attorneys, there is a serious issue with involvement of professional translators in Ukraine:

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*«It is also important to mention the problem in availability and finding translators. In most cases, law enforcement officials provide translators, and we do not know where and what translators they find. We also cannot establish their independence, impartiality and objectivity. Procedure for translations is not regulated by the legislation in our country. I think it would be necessary to create self-regulatory organizations of translators similar to the Board of Attorneys»;*

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*«Law enforcement bodies have to provide a certified independent translator, which is not always possible, particularly in small towns and villages»<sup>376</sup>.*

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<sup>372</sup> Interviews with investigators.

<sup>373</sup> Interviews with investigators.

<sup>374</sup> Interviews with investigators.

<sup>375</sup> Interviews with attorneys.

<sup>376</sup> Interviews with attorneys.

### 8.3. Identification of the need for written/oral translation

As noted above, Article 42§3(18) of the CPC guarantees the right of a suspect to use his native language, obtain copies of procedural documents in same language or any other language of which he has command and, where need be, benefit from translation services at the State expense. The possibility of compensation for translation costs by the State ensures the fulfilment of other rights of the suspect during criminal proceedings.

A participant in the case evaluates own level of command of the language of proceedings (state language) and, the need for translation services. S/he can apply to involve a translator to the criminal proceedings. Command of the state language is a subjective notion. The level of command is identified by the person conducting criminal proceedings. To identify whether a participant of proceedings knows the state language, it is necessary first to find out the person's opinion. If the latter states that s/he does not understand the state language, it means that regardless of the official's opinion, the participant shall have the right to use translation services. Refusal of the suspect (accused) from translation services is not mandatory for the investigator, prosecutor, investigating judge and court.

According to observations on attorneys' work, in 18% of apprehensions the persons did not have a command of Ukrainian language. This number comprised 55% of all "particularly vulnerable" apprehended persons.

In over a tenth of all apprehension observed during the monitoring of law enforcement activities, the apprehended persons did not have any/good command of the language of criminal proceedings. Accordingly, under Article 52§2(2) of the CPC in 13% of such cases there were grounds for mandatory participation of an attorney in criminal proceedings (see Figure 8.1).

Monitoring of attorneys' work showed that almost a third of all apprehended persons do not have a command of the language of criminal proceedings or such command is insufficient.

In 38% of apprehensions, attorneys did not check the person's command of the language of criminal proceedings (see Figure 8.3).

Research findings show that the level of command of the language of proceedings is usually verified by investigators during the first meeting with an apprehended person:

*«From the first conversation with a suspect I verify the level of knowledge of the language of proceedings. For instance, if the suspect does not speak Ukrainian I cannot carry out an interrogation or other investigative actions since I don't understand Hungarian. In this case I involve a translator»;*

*«During first communication, I find out about the suspect's education and knowledge of a language of pre-trial investigation»<sup>377</sup>.*

<sup>377</sup> Interviews with investigators.

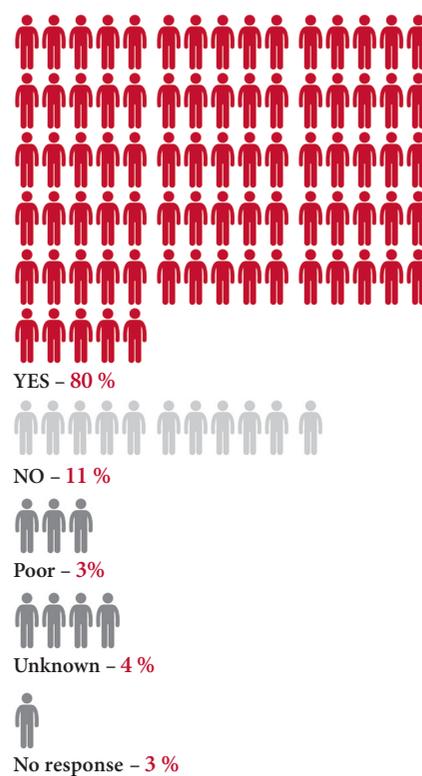


Figure 8.1. Command of the language of criminal proceedings by the suspect

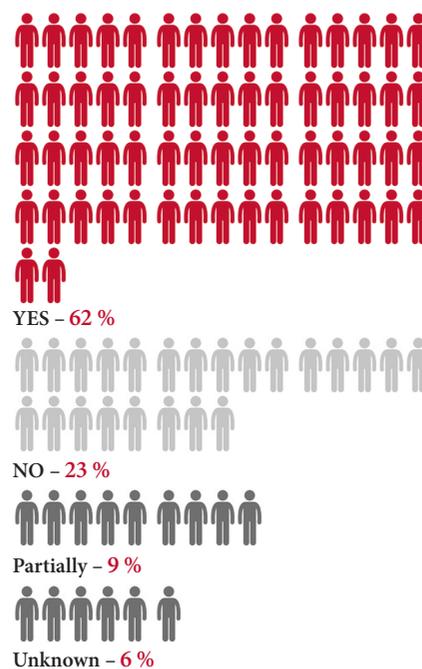


Figure 8.2. Command of the language of criminal proceedings by the suspect

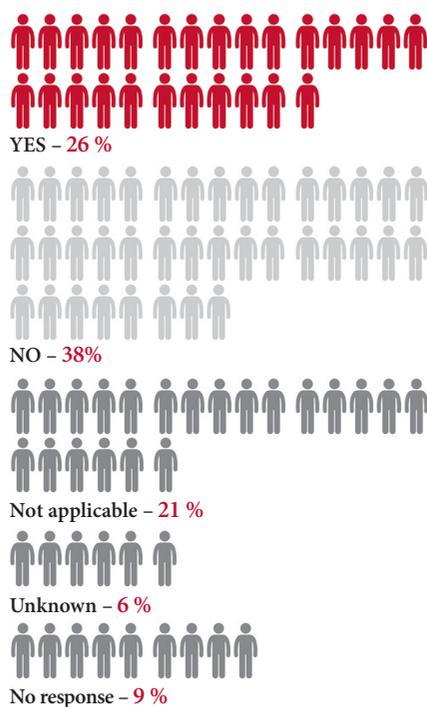


Figure 8.3. Verification of command of the language of criminal proceedings by attorneys

The level of command of the language of proceedings is usually verified by investigators during the first meeting with an apprehended person:

«From the first conversation with a suspect I verify the level of knowledge of the language of proceedings. For instance, if the suspect does not speak Ukrainian I cannot carry out an interrogation or other investigative actions since I don't understand Hungarian. In this case I involve a translator»;

«During first communication, I find out about the suspect's education and knowledge of a language of pre-trial investigation».

In general, questions on verification of the need for oral/written translation among the law enforcement officials only arise with investigators who are personally responsible for lawfulness of procedural actions, including ensuring the right to translation services for those who do not speak the language of criminal proceedings:

«Within the procedure for verification, the person conducting procedural actions learns about the person by looking at citizenship and nationality, as well as directly asking a question on the need for translator or translation in the case. Based on information from the suspect or defense counsel, this official provides a translator or translation. There were cases where translation was not provided, mostly during "initial" collection of explanations from the client. These explanations were subsequently refuted [...]».

According to their interviews, investigators identify the need for oral/written translation based on at least one of the following indicators:

1) citizenship of another country:

«If the apprehended person is a foreign citizen, it is necessary to provide an interpreter regardless of whether he understands something or not. In court, he will say he had not understood anything»;

«If the apprehended person is a foreigner, there are no questions: a translator is provided anyways since otherwise none of the investigative actions will be considered lawful»;

«A translator is always invited when the person does not speak Ukrainian. Even when someone says s/he understands, but has another country's citizenship, we play safe and invite a translator. [...] For instance, there was a Russian citizen who understood Ukrainian. However, we invited a translator so the latter would translate everything, including written procedural documents»<sup>378</sup>;

«As I can tell, there are translators in all cases involving foreigners. The investigator does not have a choice since otherwise all case files will be considered inadequate. However, not only foreigners but citizens too can have the need for translation when they do not speak Ukrainian or sometimes Russian»<sup>379</sup>;

<sup>378</sup> Interviews with investigators.

<sup>379</sup> Interviews with attorneys.

2) it is clear that the person does not understand Ukrainian:

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*«I ask suspects whether they need a translator. However, even if they refuse and I understand in conversation that the person does not completely understand, I invite a translator on my own initiative» (interviews with investigators);*

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*«I communicate with him. If he says that he does not speak well, I give him a chance to read his rights or any other documents. If he says that he needs a translator, and I invite one. If he says that he understands, I don't. However, sometimes I see that even though the suspect is not asking for an interpreter, I see that he does not understand completely or sufficiently, and then we definitely invite a translator»<sup>380</sup>;*

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*«The need for translation by the suspect is identified by law enforcement officials when it is clear that the person has very poor or no command of the state language. Then, they provide a translator. In other cases, a person can ask for that. However, there are instances where someone who does not have sufficient command of the state language is interviewed and interrogated since the person confirmed his/her command of state language, even if that is not true.*

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At the same time, the majority of investigators think that there is no need for translation for investigative actions with an apprehended person who knows Russian but not Ukrainian:

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*«If it is Russian-Ukrainian, we can allow verbal translation;*

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*«99% of staff speak Russian, so there is no need for translation in these cases»;*

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*«If its Russian-Ukrainian, the apprehended persons may start weaseling their way out and create delay by asking for an interpreter despite understanding both languages. This is all excess formality. Therefore, in such cases we just have documents and communicate in Russian. It affects the process positively. The role of a translator can even be performed by an attorney in such cases. If it is another language, it is necessary to invite a qualified specialist»<sup>381</sup>.*

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The key factor driving law enforcement officials to involve a translator in criminal proceedings is the prospect for the evidence being inadmissible in court if obtained during investigative actions without a translator:

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*«Since the prosecution intensively supervises and controls use, these issues are always acute. And, in general, why set yourself up? It is better to provide a translator»<sup>382</sup>.*

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Particularly, this matters in cases concerning foreigners:

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*«Regardless of whether he understands something or not, he will say he had not understood anything in court»<sup>383</sup>.*

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Attorneys also support this position:

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*«I came across cases where a person has different citizenship or nationality, and police officials are openly interested in involving a translator. They are concerned about the punishment for procedural violations»;*

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*«Investigators exclude such possibility since during control over compliance with criminal procedure, or during trial stage such evidence can be declared inadmissible. Participants of criminal proceedings understand that clearly»<sup>384</sup>;*

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<sup>380</sup> Interviews with investigators.

<sup>381</sup> Interviews with investigators.

<sup>382</sup> Interviews with investigators.

<sup>383</sup> Interviews with investigators.

<sup>384</sup> Interviews with attorneys.



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*«If there is smallest doubt, they call a translator. Otherwise, the absence of one will cost a lot during trial as all investigative actions will be declared invalid»<sup>385</sup>.*

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## 8.4. Forms of providing translation

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The CPC provides for two forms of ensuring the apprehended person's right to translation:

- ▶ Oral translation during procedural actions;
- ▶ Written translation of procedural documents.

### Oral translation of procedural actions

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Oral translation is provided by a translator during procedural actions. There are no procedural rules for such translation in Ukrainian legislation. In accordance with Article 68 §2 of the CPC, a translator has the following rights in relation to the quality of translation:

- ▶ ask questions with a view to provide an accurate translation;
- ▶ review records of procedural actions in which he participated and submit comments thereto.

Translation services can be performed by a relevant expert (translators, philology specialist) or other persons who has command of the language of criminal proceedings and the native language of the apprehended person, or a language that the latter has a command of. In some cases, relatives or acquaintances of the apprehended persons perform translation services. It is necessary to take into account grounds for challenging participation of a translator (Article 77 of the CPC), for instance if s/he in person, his/her close relatives or family members are interested in the results of the criminal proceedings, or if there are other circumstances casting doubts on his/her impartiality. Clearly, in cases where the apprehended person's next of kin or law enforcement officer's acquaintances are involved, there is high probability of grounds for bias of a translator and consequent challenging of his/her participation.

Field research showed that bodies of internal affairs use different methods of organizing translation. In majority of cases, officials of operational units have the first contact with the apprehended person. They think that they do not have any problems with translation since they do not write any official documents:

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*«The detective unit is easier in this regard: we can speak with them in some broken language. Worst-case scenario, we have couple of people who speak different languages, including Georgian, Polish, and Moldovan. Since we do not carry out any investigative action and do not draw official documents, it only matters that we find out some initial information. It is enough to do it verbally»<sup>386</sup>.*

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Only on investigator mentioned involvement of only qualified specialists for translation:

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*«I definitely invite a translator through Novomoskovsk State Administration and their department for education in such cases. I send a decision, and they direct a teacher of Ukrainian language (school teacher)»<sup>387</sup>.*

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At the same time, this method of inviting a translator does not solve the problem if immediate interrogation of a person is necessary, which happens in most cases of apprehensions of suspects. However, in majority of cases law enforcement officials do not involve certified translators for translation during interrogation:

<sup>385</sup> Interviews with attorneys.

<sup>386</sup> Interviews with investigators.

<sup>387</sup> Interviews with investigators.

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*«I usually try to provide translation at the expense of the apprehended person or his relatives. I explain that if they know a translator, s/he should be involved. It is in their interest since it will be faster and better quality. There are also those who say that they understand Russian well and do not need a translator, they mostly come from nearby countries. In these cases, I translate key documents into Russian, the notice of suspicion and the indictment, and give them to read and sign in Russian»;*

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*«As a rule, we involve our own acquaintances (teachers, translation agencies). We are very lucky when the apprehended person has a translator or knows whom to call. It all depends on where the foreigner comes from. For instance, Georgians and Moldovans, who comprise the majority of foreigners we see, understand Russian well so we can still communicate. What matters is to translate case files later. Secondly, we have several colleagues who speak different languages, so we can still figure something out. Then, if it makes sense, we can invite an official translator and work»;*

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*«Very often, we use information provided by apprehended persons. They give us contact information of translators whose services they use. If we need to translate files, as I know, investigators contact Lastochkino»<sup>388</sup>.*

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In certain cases, contacting the suspect's place of education in relation to the level of command of the state language serves as a solution:

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*«If a suspect wrote a statement about not having studied Ukrainian and not understanding it, I send a request to the school where he studied to verify his skills in state language. Based on received response, I make decisions about involving a translator»<sup>389</sup>.*

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Some attorneys hold the same opinion as investigators that there is no harm if an investigator informs about the rights or even performs a written translation of procedural documents:

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*«It depends on which documents are concerned. If it is an interrogation, I ask investigators to record it in Russian, if it is a notice of suspicion, I ask the client to read and ask about words that are unclear. Then I translate verbally and he signs everything on his own»<sup>390</sup>.*

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Interviewed attorneys also talked about a widespread form of organizing translations that does not follow legal requirements, namely when the person carrying out a procedural action – an investigator or field officer performs oral translation from/into Russian and written translation, if it is necessary, is performed by a translator. In addition, in some cases the investigator initiates this:

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*«Law enforcement officers provide oral translations for the client, yet again, when it is related to Russian language. From a personal point of view, it can be done when the client says that he understands this translation. However, it is still unlawful since law enforcement officers can say they will translate on their own but it is unclear what they will translate, they can insert anything. Therefore, it is possible to communicate without a translator, but when it comes to procedural documents with consequences, there is a need for professional and more independent translation. It is the best way to protect the client's rights. What if something goes wrong? Then, it will be the attorney's guilt»<sup>391</sup>;*

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*«When advising on rights the investigator can translate their content into the language understood by an apprehended person. If it is a procedural document, in my opinion, it has to be written only in the language that the apprehended person/suspect understands and speaks. In principle, investigator can translate this document or involve a translator for that»<sup>392</sup>;*

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<sup>388</sup> Interviews with investigators.

<sup>389</sup> Interviews with investigators.

<sup>390</sup> Interviews with attorneys.

<sup>391</sup> Interviews with attorneys.

<sup>392</sup> Interviews with attorneys.

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*«In my practice, there are frequent cases when a person asks to translate from Ukrainian into Russian. I translate but ask to mention at signing that this was read by the attorney and translated into Russian»<sup>393</sup>.*

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During research, interviewed attorneys mentioned cases of deliberate violations of the right to benefit from translation services:

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*«... There are also cases when they take explanations from and interrogate a person who does not have sufficient command of the state language. They interrogate if the person confirmed the command of state language despite obvious lack thereof»<sup>394</sup>;*

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*«[...] there are cases of abuse by investigators. Documents are in Ukrainian, and they take a statement from the person that he understands Ukrainian and refuses from translation services. Whereas the investigator sees that, the apprehended person is Turkish or Armenian. Though he might understand some Ukrainian, but this knowledge is not enough for reading procedural documents»<sup>395</sup>.*

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In these situations, according to attorneys, investigators sometimes asked the attorney not to insist on involvement of a translator. In their turn, they promise to qualify the offence as a less serious one. If defense agrees to participation in investigative actions without a translator, the investigator makes a verbal contract on changing the qualification of a crime.

Some attorneys indicated in their interviews that translators are involved not upon the investigator's initiative but upon attorney's request.

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*«As a rule if a person [...] states that s/he does not understand or does not have a proper command of the language of proceedings then this person is provided with translation. In practice, if a person indicates these circumstances the defense counsel submits an application for involvement of translators. I did not have cases where investigators refused to involve a translator if a client needs one»<sup>396</sup>.*

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### Written translation of procedural documents

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The CPC does not contain a direct provision requiring that only a translator do written translation. However, it follows from Article 29§4 of the CPC whereby translation of court decisions and other procedural documents of court proceedings shall be certified by the signature of the translator.

At the same time, the CPC (Article 29§4) contains an imperative requirement that court decisions by which the court completes trial of the case on its merits are provided to the parties to criminal proceedings, or to the person in whose respect the issue of imposing compulsory educational or medical measures has been decided, as translated into their native language or any other language they have command of. The said persons are also allowed to receive translation of other procedural documents of criminal proceedings. However, this right of a party to criminal proceedings applies only to documents copies of which shall be provided according to the Code, and it can only be exercised upon their request.

Field research identified that provision on mandatory translation of documents in criminal proceedings by an interpreter is not always complied with. Both investigators and attorneys, defense counsels of apprehended persons, perform translations:

<sup>393</sup> Interviews with attorneys.

<sup>394</sup> Interviews with attorneys.

<sup>395</sup> Interviews with attorneys.

<sup>396</sup> Interviews with attorneys.

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«Yes, [...] there was a case in my practice with a citizen of Russia. Investigator and I suggested to translate both written documents and have verbal communication in Russian and translate procedural documents on our own to avoid involving an interpreter. The apprehended person agreed, and there were no complaints or comments in the future»<sup>397</sup>;

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«In many cases, I translated the document and explained its contents since we use legal terms, and the apprehended persons (suspects) do not understand the vocabulary. For instance, I have recently explained the meaning of 'committed theft by means of free access [...]»<sup>398</sup>;

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«Because of this situation, in cases where the apprehended persons generally understands Russian (for instance, Georgians or Moldovans), investigators take the responsibility and translate all documents into Russian (they also print the notice of suspicion and indictment). I came across this couple times»<sup>399</sup>;

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«In general, the procedure for establishing whether the person speaks Ukrainian is strictly followed. If a person does not have a good or any knowledge of Ukrainian, but has good Russian language skills, all procedural actions are carried out in a language that the person has command of. There is a special decision about that (in relation to Russian language)»<sup>400</sup>.

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CPC is not clear on the procedure for drawing up a report on interrogation of a suspect if the latter testifies not in a language of criminal proceedings (where oral translation is provided with involvement of a translator) if the suspect would like to write down the testimony in the protocol. In that case, instead of translation of verbal testimony, there has to be translation of written statements. Therefore, instead of an oral translation there has to be written one, but there were not cases of this kind identified during research.

## 8.5. Compensation of translators' services

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In the view of many interviewed law enforcement officers, ensuring the right of apprehended persons to translation is one of the most challenging. This concerns not only invitation of a translator, but also compensation for the services:

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«... It is the most problematic right for each investigator. If a foreigner is apprehended, and regardless of whether he understands Russian or Ukrainian, he definitely needs to be provided with a translator. This (compensation for services rendered) is provided at the expense of an investigator, sometimes costs are shared with the chief investigator»;

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«Procedure for providing translation services does not function properly since the state does not allocate money for translation. They chip in to pay by the entire department»<sup>401</sup>;

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«The state does not pay for translation services in practice, or it takes a very long time. However, no translator wants to work free. In this regard, we have to give our money for involvement of a translator. Sometime, if there is time the department and translator sign a contract, money is transferred and relevant services are provided. However, there are cases when a translator is needed immediately. I mentioned time constraints, so we agree with the translator by phone, bring him here, he does the translation. Then we pay for the services from our pocket and bring him back. In addition, there are both cases when the investigator pays and when the department covers these costs. However, these payments may not be officially recorded, and the state does not compensate expenses. In general, nobody is interested how you paid for translation services as long as they were rendered»;

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<sup>397</sup> Interviews with attorneys.

<sup>398</sup> Interviews with investigators.

<sup>399</sup> Interviews with attorneys.

<sup>400</sup> Interviews with attorneys.

<sup>401</sup> Interviews with investigators.

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«We arrange translation services immediately or, the longest, on the following day. However, this procedure requires material expenses that are not compensated by the state. We provide translation at the expense of the district department. Nobody provides us with funds for translation services for apprehended persons or suspects. In case of the need for translation, we contact a translations agency in Odesa. Usually, they tell us how much an hour of translators work costs and that you need at least 6 hours for translation. We calculate the final amount and have to pay for translation services. In addition, transportation [...] is also at our expense. We do not receive any reimbursement»<sup>402</sup>;

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«Because we have to cover these expenses, and to minimize them somehow, a translator is involved at the very last stage. Imagine how many hours of work it would take if you invite a translator from the beginning of the investigation. While everything is documented and the apprehended person decides whether to speak or not, I will have to give half of my salary. Consequently, we decide depending on the situation. If it is an Arab or Chinese person who does not speak any Russian, there is no choice. However, this happens rarely. Whereas Armenians, Georgians, Moldovans understand and we can communicate with them. A translator is invited only for official documentation»<sup>403</sup>.

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Interviewed attorneys also confirmed the problem with payment for translation services:

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«However, the duty to provide translation for the suspect is often on the investigator's shoulders. Sometimes he has to do it at his own expense though investigators don't like to talk about it»;

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«I heard that there is an internal regulation on involving translators from a specialized registry. However, some investigators told me that the Ministry of Internal Affairs simply does not have the money to ensure this right. Therefore, if the apprehended person is a foreigner, the investigator is in trouble»;

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«In the last case, investigator paid for him. [...] transportation back and force was also at the investigator's expense since the state either does not compensate these costs, or takes a long time, and translators need the money on the date»<sup>404</sup>;

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«[...] the entire department of investigation gave money for the translation. Translation of the indictment and documents itself cost 5000 UAH, and the state does not reimburse these expenses. In the meantime, my client was ready to waive the right 'if it helped the case'»<sup>405</sup>.

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In the meantime, some lawyers expressed an opinion that this situation takes place partially because of inactivity of investigation authorities:

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«In fact, I think that investigators don't do the job properly in this case. The court has an opportunity, including financial resources, to involve a translator in court proceedings. Therefore, such an opportunity has to be there, it is just that nobody examined it»<sup>406</sup>.

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In certain cases, investigators even offer material services (“a reverse bribe”) to attorneys for refusing to involve an interpreter:

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«You see, the entire department has to chip in to pay an interpreter. Let's not call one. Your client can write that he trusts his defense counsel and refuses translation services. We save 1400 UAH and will provide you with new spare parts for the car, for instance»<sup>407</sup>;

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<sup>402</sup> Interviews with attorneys.

<sup>403</sup> Interviews with attorneys.

<sup>404</sup> Interviews with attorneys.

<sup>405</sup> Interviews with attorneys.

<sup>406</sup> Interviews with attorneys.

<sup>407</sup> Interviews with attorneys.

«[...] I had cases where the apprehended persons requested a translator but it was dismissed. This happened more due to abuse by an investigator (since it involves [...] additional expenses). In these situations, I always request a translator and reason that the case will not work in court without one»<sup>408</sup>.

## 8.6. Translation during consultations between attorneys and clients

The CPC does not regulate issues related to translation services during confidential communication of a suspect or accused with the defense counsel (attorney) in cases where the person does not understand the language of criminal proceedings.

There is no provision for possibility of using the information registry of translators of the State Migration Service (see Chapter 8.6 hereinafter for detail) for attorneys. In additional, confidential communication is not a part of criminal proceedings. Therefore, the legislation does not provide for translation services during confidential communication with an attorney at the State expense (see Figure 8.4).

Only in one case out of 12, the attorney and the apprehended person used translation services when it was necessary during confidential communication (see Figure 8.4).

There are no regulation for access of translators during confidential communication of the apprehended person with an attorney in detention facilities (THFs, remand prisons).

According to the law, an apprehended person is not limited in number and duration of visits by a defense counsel. However, visits to detained persons at remand prisons others can only take place pursuant to authorization by an investigator or a court, and only under supervision of the administration of detention facilities<sup>409</sup>. In a THF, authorization by an investigator, investigating judge or court is necessary, and such visits take place in presence of an appointed law enforcement official<sup>410</sup>. In these circumstances, even with an authorization for presence of a translator (“a visit” by translator) during communication with an attorney, there will be a breach of confidentiality rules.

Clearly, the translator will find out the content of confidential communication of the apprehended person with a defense counsel, including data on facts that can be used as evidence in the case, their opinion on strategies and tactics of defense etc. Therefore, if the same person is involved during confidential communication and during interrogation, there is a chance that a translator invited by the investigating authority will disclose information about the privileged client-attorney communication to the investigator or other persons.

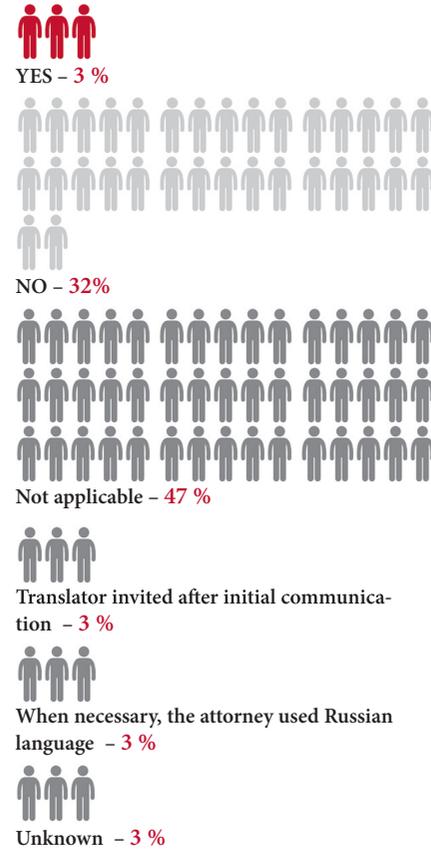


Figure 8.4. Was translation provided?

<sup>408</sup> Interviews with attorneys.

<sup>409</sup> Article 12 of the Law of Ukraine “On Preliminary Detention”.

<sup>410</sup> Paragraphs 4.3.1, 4.3.4 of internal regulations of THFs.

According to the law, there is no obligation for the interpreter not to disclose information obtained during client-attorney communication. There is only criminal responsibility for refusal to perform his duties during criminal proceedings or providing knowingly false translation. Without translator's liability for disclosure of confidential information about communication of the attorney with the apprehended person, there is a risk that translator will disclose information. Moreover, law enforcement officials often invite their acquaintances as translators, which makes the use of such services dangerous for the defense.

## 8.7. Understanding of the requirement to provide translation by attorneys and law enforcement officials

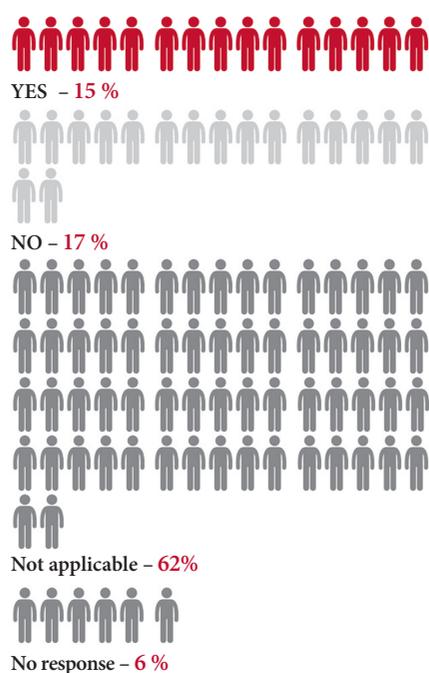


Figure 8.5. Explanation of the right to benefit from translation services by attorneys

In over a half of all cases of monitoring attorneys' work where there were grounds to consider the need for translation, attorneys did not explain the right to use these services (see Figure 8.5).

According to some interviewed attorneys, not only did they not have cases where translators were involved in procedural actions, but also they had not heard about such cases from law enforcement officials:

*«I have never heard from law enforcement officers a question about the need to invite a translator»<sup>411</sup>.*

Some interviewed attorneys consider that ensuring the right to translation does not concern them, and investigators do not bother to take care about that often:

*«Ensuring this right is investigators' headache. As an attorney, I have never thought about providing a translator»<sup>412</sup>;*

*«I think investigators do not think too much about this right. If the apprehended person is a foreigner, he is provided with a translator»<sup>413</sup>.*

Some attorneys talked about deliberate lack of objection against absence of a translator with the aim of using this violation in court:

*«You can 'play Russian', particularly with Georgians. I had such cases and they 'fell apart' in court. I did not even object to the absence of a translator at the first interrogation to 'crash' the entire case in court»<sup>414</sup>.*

Some of the interviewed attorneys take a position on taking immediate action in case of dismissal of the request for translation:

<sup>411</sup> Interviews with attorneys.

<sup>412</sup> Interviews with attorneys.

<sup>413</sup> Interviews with attorneys.

<sup>414</sup> Interviews with attorneys.

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*«If such request is dismissed, the defense refused to carry out any procedural actions and challenged inaction by the investigator with the investigating judge»;*

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*«I think that the defense counsel has to insist on involvement of a translator, and have all investigative actions conducted without a translator rendered invalid»<sup>415</sup>.*

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Some attorneys mentioned that lack of awareness about procedural rights is one of the pre-conditions for violations of the right to translation. Law enforcement officers deliberately create this lack of knowledge:

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*«Often, the problem is not that the client does not know his rights, but he does not read what he signs [...]. For someone to know about the right to choose a language and have a translator, this right has to be articulated. Then a person can decide on whether he needs a translator. Letter of rights is simply slipped among other documents, and that is all»<sup>416</sup>.*

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Some interviewed lawyers think that when the apprehended person understands the content of suspicion there is no need for translation:

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*«I think that having a translator is not necessary in cases where the person understand the content of accusation or suspicion, and the consequences of one's actions etc.»<sup>417</sup>.*

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Most attorneys think that oral translation is an imperfect form of translation and violates the rights of suspects. Therefore, all documents must be translated into the language that the suspect understands, in written form. They supported their view with the following arguments:

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*«[...] a lot of information that could support defense can be lost during oral translation»;*

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*«[...] translation can be of any quality and it is almost impossible to prove that it was wrong»;*

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*«There is no responsibility for incorrect translation for the interpreter (not in the sense of false translation but specifically incorrect). Similarly, an attorney who does not the source/target language is not able to check the quality of such translation»;*

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*«In most cases, issues related to oral translation come up during translation from Ukrainian into Russian. Oral translation is definitely legal, but my experience shows that when the apprehended person understands Ukrainian and Russian well, there are not questions about involving a translator. When the person understands both languages, calling a translator is a formality. In these instances, the apprehended person can be abusing the right by saying that s/he does not understand Ukrainian. What is the result? It is not in their interest»;*

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*«Oral translation, in my view, is not very convenient for the investigator since the investigator records everything what the suspect said from translator's words. However, during translation from one language into another there might be certain discrepancies that could affect the quality of testimony. However, it is still widely used in practice»<sup>418</sup>.*

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Investigators expressed different opinions about oral translation:

<sup>415</sup> Interviews with attorneys.

<sup>416</sup> Interviews with attorneys.

<sup>417</sup> Interviews with attorneys.

<sup>418</sup> Interviews with investigators.

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*«I think that oral translation does not violate right of suspects and is very convenient during interrogation if they don't understand Ukrainian language»;*

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*«Oral translation ensures the contact between the investigator and the suspect. It is a very convenient form of translation»;*

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*«This procedure is necessary. How can someone defend himself if he does not understand? If it is Russian, then oral translation is sufficient. If it is another language, there is a need to invite a specialist»;*

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*«The procedure is excellent since the official can explain everything if we're talking about Russian language. In these cases, calling a translator is a waste of time and money. If it involves another language, then oral translation is not enough».*

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Some of the interviewed investigators thought that oral translation is unnecessary in general:

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*«It depends on what you consider an oral translation: I don't translate the entire text, and never had the need to do that. Most often, I start writing the report in Ukrainian and when it comes to explanations by the person I ask what language is more convenient. If he says that Russian is, I switch to Russian and read the report in Russian. Of course, notice of suspicion and indictment are always given in Ukrainian. In any case, they still understand Ukrainian, so I ask to read and if some words or expressions are unclear, they ask and I translate»<sup>419</sup>.*

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Some investigators who took part in interviews considered that there is no need for translators during oral translation:

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*«I think that there is no need for involving a translator for oral translation»;*

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*«Yes, I write protocols in Ukrainian, but record explanations in the language chosen by the suspect. I personally do not know about anyone in our department providing oral translation of procedural documents to suspects»<sup>420</sup>.*

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Field officers do not have to write official documents and, therefore, do not use translators for communication with apprehended persons. Thus, they think that verification of the need for oral/written translation does not concern them:

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*«Investigators definitely use it. When it is Ukrainian to Russian language, we, investigation department officials, do not need that since we don't provide or fill out any official documents. They write explanations in whatever language they can so we are not too concerned about translation»<sup>421</sup>.*

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Almost all law enforcement officials and some attorneys mentioned in their interviews that they consider the formal violation of the right to benefit from translation services to be acceptable if the apprehended person understands the content of suspicion, questions translated by an investigator and/or a lawyer, as well as procedural documents. It mostly applies when the suspect does not speak Ukrainian but knows Russian language.

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<sup>419</sup> Interviews with investigators.

<sup>420</sup> Interviews with investigators.

<sup>421</sup> Interviews with law enforcement officials.

## 8.8. Understanding of the right to translation by suspects

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Apprehended persons were also interviewed in the framework of field research.

An underage apprehended person who did not have sufficient command of Ukrainian language but could understand Russian, in his interview stated that there was no need for translation services:

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*«[...] Why? Everyone understands what I'm saying. The attorney spoke Russian, and my mother understands Ukrainian well. She spoke to the investigator and the attorney and understood everything»<sup>422</sup>.*

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Another suspect who did not understand Ukrainian well and was offered to use translation services, refused:

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*«I understand Ukrainian a little bit but you need to speak to me slowly, as I don't understand when it is fast»<sup>423</sup>.*

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An apprehended person who had poor understanding of Ukrainian language and received documents for review in Ukrainian did not know about the possibility of having a translator since, according to him, there was no need:

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*«[...] We talked in Russian, [...] there was even no question about Ukrainian, and I did not know that was possible. I did not even think I could use translation services. Everyone talked to me in Russian so it was alright»<sup>424</sup>.*

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## CONCLUSIONS

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There is no a standard practice of ensuring the right to oral translation. There are different methods used to ensure this right even within one structural unit of the internal affairs bodies.

Apprehended persons who require translation services underestimate the importance of benefiting from translation, as well as the consequences of incomplete understanding of criminal proceedings. In particular, it concerns apprehended persons who speak Russian.

One of the main obstacles in exercising the right to translation is insufficient funding of translation services. As a result, investigators pay for translation services at their own expense. Rates for translation services at the expense of the State Budget of Ukraine are very low, which does not create an incentive for participation in criminal proceedings for translators.

The CPC does not require that prosecution provide the apprehended person with copies of documents containing reasons for apprehension or assignment of a restraint measure (these are almost the same evidence used to prove suspicion) in a language s/he understands. Therefore, an apprehended person is not able to evaluate evidence against him and, accordingly, develop the right strategy for negating or refuting charges. In particular, translators are almost never involved when there is a need for translation services during first communication (confidential visit) of the apprehended person with an attorney. Consequently, the attorney is not able to provide legal aid in accordance with defense standards in criminal proceedings. There are no legal regulations for the procedure of confidential communication of apprehended persons and attorneys with involvement of translators.

There is no unified registry of professional translators who can be invited to participate in criminal proceedings either on the regional or the state level. There is a need for relevant assessment (certification) of translators' professional qualifications.

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<sup>422</sup> Interviews with apprehended persons.

<sup>423</sup> Interviews with apprehended persons.

<sup>424</sup> Interviews with apprehended persons.

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## Recommendations

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### On apprehension of persons by law enforcement agencies

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- ▶ Increase judiciary oversight of procedural safeguards for apprehended persons (including generalization of case law and specific training of judges);
- ▶ Develop and adopt for all pre-trial investigation agencies a single Procedure for recording all actions towards persons in custody. Ensure that a single competent official responsible for persons in custody conducts the recording;
- ▶ Shape the practice of informing about actual apprehension of a person (article 210 of the CPC);
- ▶ Ensure strict compliance with Article 208§5 of the CPC on including into the protocol the place where an apprehended person with the use of force or through obedience to the order, had to stay next to the competent official or in premises prescribed by the competent official, as well as the date and exact time (hour and minute) of apprehension in accordance with article 209 of the CPC;
- ▶ Conduct active information campaigns on the rights and guarantees at apprehension;
- ▶ Design uniform electronic registry system for recording all actions involving apprehended persons and develop uniform approach to collecting data on apprehended persons between the Ministry of Internal Affairs and the system of free legal aid (the Coordination Centre for Legal Aid Provision) and ensure systematic regular checks in accordance with this approach;
- ▶ Develop and adopt for all pre-trial investigation agencies a single Procedure for recording all actions mandatory for officials responsible for persons in custody in accordance with article 212 of the Criminal Procedure Code;
- ▶ Create an effective mechanism for investigation and prosecution of all instances of torture and ill-treatment by the bodies of internal affairs.

### On the right to information

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- ▶ Develop and adopt mandatory forms for oral and written notification of apprehended persons on their rights, including specialized forms for vulnerable categories with the view of their particular needs (for instance, children);
- ▶ Introduce the practice of video recording of all actions towards the apprehended person, including the process of informing on their rights;
- ▶ To amend Article 87§2 of the Criminal Procedure Code of Ukraine by including failure to provide adequate information on the rights of apprehended persons at the moment of apprehension into the list of significant violations of human rights and fundamental freedoms;
- ▶ To indicate an exhaustive list of information classified as investigatory privilege, as well as grounds on which an investigator or prosecutor can deny an attorney access to certain case files.

### On access to an attorney and legal aid

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- ▶ Extend the standards for legal aid in criminal proceedings to all attorneys on the Registry of attorneys providing secondary legal aid, as well as introduce effective monitoring mechanisms;
- ▶ Introduce systematic training for all criminal defense attorneys on legal aid during apprehension;
- ▶ Provide conditions for confidential meeting of attorneys with apprehended persons;
- ▶ Collect and analyze information on timely arrival of an attorney upon notifying of the FSLA Center on apprehension of a person and confidential communication prior to initial interrogation;

- ▶ Collect and analyze information on refusing attorneys' assistance, reasons and stages for refusals.

### **On interrogation at the bodies of internal affairs and the right to silence**

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- ▶ Create an obligation of an investigator, prosecutor, and law enforcement officials to draw reports on advising the apprehended person on the right to waive testimony against him/herself, their family and next of kin (the right to silence) prior to the protocol on apprehension and first interrogation of a person;
- ▶ Raise awareness among law enforcement officers on the right to silence and its observance;
- ▶ Shape the practice of recording presence of all persons during interrogation in the report on interrogation;
- ▶ Equip assigned premises for interrogation of apprehended persons and conduct interrogation exclusively in these premises.

### **On the right to medical assistance**

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- ▶ Develop a mechanism for ensuring the right of apprehended persons to medical assistance and regulate it with a single document containing concrete norms on calling an ambulance, urgent care, providing medication to all apprehended persons, including those receiving medication at the moment of apprehension (in particular, ART, opioid substitution therapy, insulin, hypotonic medication or medication for heart attacks), records on provision of medical assistance etc.;
- ▶ Introduce the procedure of recording the results of a periodic medical examination of an apprehended person in a separate document;
- ▶ Identify a specific official responsible for the life and health of detainees and timely and effective medical assistance.

### **On specific procedural safeguards for vulnerable groups**

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- ▶ Introduce direct legal ban on conducting investigative actions with persons in narcotic or alcohol intoxication in accordance with the set health criteria;
- ▶ Introduce provisions for obligatory participation of a psychologist and drug specialist during criminal proceedings against person with drug addictions;
- ▶ Provide for participation of a psychologist and drug addiction specialist during interrogation of persons with drug addictions, as well as mandatory medical assessment of the possibility of conducting investigative actions with a person suffering from drug addiction;
- ▶ Develop forms for oral and written notification of apprehended persons on their rights, including specialized forms for vulnerable categories with the view of their particular needs (for instance, children);
- ▶ Amend Article 67§1 of the Criminal Code whereby a physiological condition of a person with drug abuse problems cannot be an aggravating circumstance in determination of punishment;
- ▶ Shape the practice of implementation of Article 213§2 of the CPC on unconditional immediate notification of parents or guardians, custodians, or custody and guardianship agency about apprehension of underage persons.

### **On the right to written and oral translation**

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- ▶ Develop a mechanism for involvement of translators and compensation for their services;
- ▶ Establish an Integrated regional registry of certified translators with mechanisms for effective access for judges, prosecutors, law enforcement officers, attorneys, and citizens;
- ▶ Introduce responsibility for translators for disclosure of the contents of confidential client-attorney communication facilitated by the translators;
- ▶ Harmonize CPC provisions with the ECHR position on the right to translation, namely that this right of a

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## ANNEXES

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### Annex 1. Timeline for apprehension according to Ukrainian legislation<sup>1</sup>

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	<p><b>Apprehension not by a competent official</b> – the apprehended person shall immediately be brought to a competent official, or a competent official shall be immediately notified on apprehension and whereabouts of the apprehended person.</p> <p><b>Apprehension by a competent official</b> – the apprehended person shall be promptly brought to the pre-trial investigation agency.</p>
00:00	<p><b>Apprehension by a competent official without court ruling</b> – pursuant to a report by the competent official<sup>2</sup>.</p> <p><b>Apprehension for the purpose of bringing before the court for determination of a restraint measure</b> – pursuant to a court ruling permitting apprehension for this purpose.</p>
24:00	<p><b>Serving a written notice of suspicion</b> to the person apprehended by a competent official without a court ruling shall take place within 24 hours from the moment of apprehension.</p>
36:00	<p><b>Bringing a person apprehended pursuant to a court ruling before the court</b> for determination of a restraint measure shall take place within thirty six hours from the moment of apprehension, otherwise the person shall be immediately released.</p>
60:00	<p><b>Bringing a person apprehended without a court ruling before the court</b> for determination of a restraint measure shall take place within thirty six hours from the moment of apprehension, otherwise the person shall be immediately released.</p>
72:00	<p><b>The maximum term for keeping a person in custody without a ruling by investigating judge or court</b> is seventy two hours from the moment of apprehension. The person shall be released immediately if within 72 hours the court does not assign a restraint measure of detention.</p>
60 days	<p><b>Term of validity for a ruling of an investigating judge or court on detention</b> or extension of detention cannot exceed sixty days.</p>
6 months	<p><b>Aggregate time of detention</b> of a suspect or accused during pre-trial detention in criminal proceedings in relation to minor or medium-gravity crimes shall not exceed six months.</p>
12 months	<p><b>Aggregate time of detention</b> of a suspect or accused during pre-trial detention in criminal proceedings in relation to grave or particularly grave crimes shall not exceed six months.</p>

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<sup>1</sup> The table is provided to illustrate the stages of criminal proceedings that were subject to monitoring.

<sup>2</sup> There was no monitoring during the period between actual apprehension and arrival to the unit of internal affairs body.

## Annex 2. Template of the “letter of rights” used in Ukraine

suspect (accused) is not limited by certain conditions or factors. In particular, introduce an obligation of the prosecution to provide copies of documents that serve as a basis for apprehension or restraint measure translated into the language understandable to that person.

LETTER

### of procedural rights and duties of a suspect

(suspect’s full name)

## Constitution of Ukraine

*Article 28.* Everyone has the right to respect of his or her dignity.

No one shall be subjected to torture, cruel, inhuman or degrading treatment or punishment that violates his or her dignity. No person shall be subjected to medical, scientific or other experiments without his or her free consent.

*Article 29.* Every person has the right to freedom and personal inviolability.

No one shall be arrested or held in custody other than pursuant to a substantiated court decision and only on the grounds and in accordance with the procedure established by law.

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

Everyone arrested or detained shall be informed without delay of the reasons for his or her arrest or detention, apprised of his or her rights, and from the moment of detention shall be given the opportunity to personally defend himself or herself, or to have the legal assistance of a defender.

Everyone detained has the right to challenge his or her detention in court at any time.

Relatives of an arrested or detained person shall be informed immediately of his or her arrest or detention.

*Article 55.* Human and citizens’ rights and freedoms are protected by the court.

Everyone is guaranteed the right to challenge in court the decisions, actions or omission of bodies of state power, bodies of local self-government, officials and officers.

Everyone has the right to appeal for the protection of his or her rights to the Commissioner for Human Rights of the Verkhovna Rada of Ukraine.

After exhausting all domestic legal remedies, everyone has the right to appeal for the protection of his or her rights and freedoms to the relevant international judicial institutions or to the relevant bodies of international organizations of which Ukraine is a member or participant.

Everyone has the right to protect his or her rights and freedoms from violations and illegal encroachments by any means not prohibited by law.

<sup>3</sup> There is no mandatory or recommended template of the letter of rights. The legislation only identifies the list of rights to be included into the letter.

*Article 56.* Everyone has the right to compensation, at the expense of the State or bodies of local self-government, for material and moral damages inflicted by unlawful decisions, actions or omission of bodies of state power, bodies of local self-government, their officials and officers during the exercise of their authority.

*Article 59.* Everyone has the right to legal assistance. Such assistance is provided free of charge in cases envisaged by law. Everyone is free to choose the defender of his or her rights.

In Ukraine, the advocacy acts to ensure the right to a defense against accusation and to provide legal assistance in deciding cases in courts and other state bodies.

*Article 62.* A person is presumed innocent of committing a crime and shall not be subjected to criminal punishment until his or her guilt is proved through legal procedure and established by a court verdict of guilty.

No one is obliged to prove his or her innocence of committing a crime.

An accusation shall not be based on illegally obtained evidence as well as on assumptions. All doubts in regard to the proof of guilt of a person are interpreted in his or her favor.

In the event that a court verdict is revoked as unjust, the State compensates the material and moral damages inflicted by the groundless conviction.

*Article 63.* A person shall not bear responsibility for refusing to testify or to explain anything about himself or herself, members of his or her family or close relatives in the degree determined by law.

A suspect, an accused, or a defendant has the right to a defense.

A convicted person enjoys all human and citizens' rights, with the exception of restrictions determined by law and established by a court verdict.

## **Regulations on short-term detention of persons suspected of commission of a crime**

*Article 10.* Rights and duties of apprehended persons

Persons apprehended on suspicion of a crime have the right to:

- ▶ Know the content of suspicion;
- ▶ Request a prosecutor's inspection of the lawfulness of apprehension; administration of the detention facility shall immediately inform the prosecutor about such request;
- ▶ Challenge the action of a person conducting preliminary investigation, an investigator or prosecutor, provide explanations and submit motions;
- ▶ Submit motions and petitions to state authorities, public organizations and official in accordance with the procedure established by Article 13 of this Regulation;
- ▶ Use their personal clothing and footwear, as well as other necessary objects and items defined by the internal regulations for places of custody of apprehended persons.

Persons apprehended on suspicion of commission of a crime have the duty to comply with the requirements of this Regulation and internal regulations for places of custody of apprehended persons.

## The Law of Ukraine “On Preliminary Detention”

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### *Article 9. The rights of persons in custody*

Detained persons have the right to:

- ▶ Defense in accordance with the criminal procedure legislation;
- ▶ To defend their rights and interests personally or with the assistance of an attorney from the moment of apprehension or detention, to be informed at the time of detention about the grounds for detention, the challenge the latter in courts, and to obtain in written form clarifications of Articles 28, 29, 55, 56, 59, 62, and 63 of the Constitution of Ukraine, this article and other rights of apprehended or detained persons provided by the law, including the right to defend their rights and interests personally or with the assistance of an attorney from the moment of apprehension (detention), the right to waive any explanations or testimony before the attorney’s arrival;
- ▶ To a daily walk with one-hour duration. Duration of the daily walk for pregnant women and women with children, juvenile, and persons with illnesses upon the doctor’s permission and their consent constitutes up to two hours;
- ▶ Receive twice per month packages or parcels, and money transfers and parcels;
- ▶ Purchase during the month through noncash transactions food items and essentials in the amount up to one minimum wage and unlimited amount of stationery, newspapers, and books through retail chain orders;
- ▶ Use their own clothing and footwear, have with them documents and records relating to the criminal case;
- ▶ Use TV sets received from relatives or other persons, board games, newspapers and books from the library at the preliminary detention facility and purchased through a retail chain;
- ▶ Perform individually religious rites and use the religious literature and objects specific to their religious belief produced from low-value materials provided that it does not interfere with the regulations of the preliminary detention facility, or the rights of other persons;
- ▶ To eight-hour sleep during night time with prohibition for their involvement into procedural and other actions, excluding emergencies;
- ▶ Submit complaints, petitions and letters to state authorities and officials in accordance with the procedure established by Article 13 of this Law.

Detained women can have children under the age of three stay with them.

Detained young citizens (14-28 years old) have the right to psychological and pedagogical assistance by experts of the centers for youth social services.

Persons serving their sentences in penitentiary facilities, in case a measure of restraint of detention is assigned for them in relation to other case, are held in custody in accordance with the rules established by this Law. Receipt of parcels and packages, as well as purchase of food items and necessities takes place in accordance with the procedure established by the Correctional Labor Code of Ukraine for the correctional labor facility assigned for them by the State Department for Execution of Sentences.

The list food items and necessities prohibited for transfer detained persons is defined by the State Department for Execution of Sentences, the Ministry of Defense of Ukraine in coordination with the Office of the Prosecutor General of Ukraine.

### *Article 10. Duties of detained persons.*

Detained persons have the duty to:

- ▶ Adhere to the procedure established at the preliminary detention facilities and follow lawful requirements of the administrations;

- ▶ Follow the sanitary rules, keep tidy appearance and maintain cleanness in the cell;
- ▶ Be polite to the staff of the preliminary detention facility, and to other detainees;
- ▶ Abstain from arguments with administration representatives, not to insult their dignity or obstruct performance of their duties;
- ▶ Treat appliances, equipment and other property of the preliminary detention facility with care.

## **Criminal Procedure Code of Ukraine**

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### *Article 42. The suspect*

The suspect, accused shall have the right to:

- 1) know of which criminal offence he has been suspected, accused;
- 2) be informed, expressly and promptly, of his rights as laid down in this Code and, where need be, have such rights explained;
- 3) have, on his first demand, a counsel and consultation with him prior to the first and each subsequent interview under conditions ensuring confidentiality of communication, and also upon the first interview to have such consultations with no limits as to their number or duration; the right to the presence of defense counsel during interviews and other procedural actions, refuse from services of counsel at any time in the course of criminal proceedings; have services of a counsel provided at the cost of the state in the cases stipulated for in this Code and/or the law regulating provision of legal aid at no cost, including when no resources are available to pay for such counsel;
- 4) keep silence about suspicion, a charge against him or waive answering questions at any time;
- 5) give explanations, testimony with regard to the suspicion, and a charge against him or waive giving explanations, testimony at any time;
- 6) demand that validity of the detention be verified;
- 7) when apprehended or when a preventive measure such as putting into custody has been applied, to have his family members, close relatives or other persons promptly notified of his apprehension and whereabouts, in accordance with provisions of Article 213 of this Code;
- 8) collect and produce evidence to investigator, public prosecutor, investigating judge;
- 9) participate in procedural actions;
- 10) in the course of procedural actions, ask questions, submit his comments and objections in respect of the manner in which procedural action is conducted, which should be put on the record;
- 11) in keeping with the requirements of the present Code use technical means in the course of procedural action he participates in. Investigator, public prosecutor, investigating judge, court may disallow using technical means in the course of a specific procedural action or at a specific stage of criminal proceedings in order to prevent disclosure of privileged information protected by law or related to the intimate life of the person concerned, and a reasoned decision (ruling) should be taken (adopted) thereon;
- 12) submit motions to conduct procedural actions, ensure protection for himself, family members, close relatives, property and house, etc.;
- 13) propose disqualifications;
- 14) review records of pre-trial proceedings in accordance with the procedure specified in Article 221 of this Code and request disclosure of records under Article 290 hereof;
- 15) obtain copies of procedural documents and written notices;



### **Annex 3. Template of the report on interrogation**

#### **REPORT on interrogation of a suspect**

City (village) \_\_\_\_\_ « \_\_\_\_\_ » \_\_\_\_\_ 20 \_\_\_\_ roky

Interrogation started at « \_\_\_\_\_ » hours « \_\_\_\_\_ » min

Interrogation finished at « \_\_\_\_\_ » hours « \_\_\_\_\_ » min

\_\_\_\_\_  
*(investigator, title, name of authority, initials, last name)*

Having inspected materials of pre-trial investigation entered into the Integrated Registry of Pre-Trial Investigations under # \_\_\_\_\_ dated « \_\_\_\_\_ » \_\_\_\_\_ 20 \_\_, in the premises of \_\_\_\_\_

in the presence of persons who have received explanation of requirements of the Article 66§3 of the CPC on the duty not to disclose information about the procedural action:

\_\_\_\_\_  
*(their full names, dates of birth and place residence, signature)*

who have been informed in advance about the use of technical means of recording, conditions and procedure for their use:

\_\_\_\_\_  
*(characteristics of technical means of recording and data storage devices used during this procedural action, signatures of persons)*

in accordance with articles 42, 95, 104, 106, 223, 224 of the CPC interrogated as a suspect:

1. Full name \_\_\_\_\_
2. Date and place of birth \_\_\_\_\_
3. Nationality \_\_\_\_\_
4. Citizenship \_\_\_\_\_
5. Education \_\_\_\_\_
6. Place of work (studies) \_\_\_\_\_
7. Occupation and title \_\_\_\_\_

8. Place of residence (registration) \_\_\_\_\_

9. Convictions \_\_\_\_\_

10. Is the person an elected representative (which Council) \_\_\_\_\_

11. Information about the passport or other identification document \_\_\_\_\_

The suspect was provided with a clarification that he was summoned for testimony in criminal proceedings # \_\_\_\_\_ in relation to commission of criminal offence \_\_\_\_\_

*(indicated the grounds and in relation to which proceedings the persons is interrogated, and what criminal offence he is suspected of)*

The suspect \_\_\_\_\_ was provided with clarification of Article 63 of the \_\_\_\_\_

*(full name)*

Constitution of Ukraine stating that a person shall not bear responsibility for refusing to testify or to explain anything about himself or herself, members of his or her family or close relatives in the degree determined by law

\_\_\_\_\_  
*(signature)*

The suspect \_\_\_\_\_ was provided with clarification \_\_\_\_\_

*(full name)*

of Article 18 of the CPC on freedom from self-incrimination and the right to waive testimony against close relatives or family members, as well as Article 20 of the CPC on the right to defense

\_\_\_\_\_  
*(signature)*

The suspect \_\_\_\_\_ received clarifications on interrogation \_\_\_\_\_

*(full name)*

procedure, his rights and duties in accordance with Article 42 of the CPC, and was presented with the Letter of his procedural rights and duties

\_\_\_\_\_  
*(signature)*

The rights and duties, as well as interrogation procedure, were explained to me, and I understand them.

I have received the letter of procedural rights and duties of a suspect « \_\_\_ » \_\_\_\_\_ 20 \_\_\_\_.

The suspect: \_\_\_\_\_

*(last name, initials, signature of the suspect)*

Upon examining his rights, the suspect stated that he \_\_\_\_\_ to testify and answer questions.

*(agrees, refuses)*

During interrogation \_\_\_\_\_ the will to have a defender \_\_\_\_\_ .  
(expressed/did not express) \_\_\_\_\_

\_\_\_\_\_  
*(full name)*

Wishes to testify in \_\_\_\_\_ language and provide  
testimony \_\_\_\_\_  
*(indicate the language)*  
*(to be recorded or write down by himself)*

\_\_\_\_\_ assistance of a translator.  
*(requires, does not require)*

The suspect: \_\_\_\_\_  
*(last name, initials, signature)*

In relation to questions, the suspect \_\_\_\_\_ testified the following:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
*(indicate information relevant for these criminal proceedings obtained during procedural action)*  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

The testimony is recorded on the data storage device \_\_\_\_\_  
*(indicate characteristics of data storage devices in case of use of technical means of recording)*

attached to this report.

Following the record of report with technical means there \_\_\_\_\_  
*(were, were no)*

requests including text of the testimony in the report on interrogation.

Participants of procedural action are informed on the ways of examining the report, in particular \_\_\_\_\_  
*(making the written report available, viewing or listening to information on storage devices in case of use of technical means of recording)*

Amendments, additions, or comments from participants of procedural action following examination of the text of interrogation report, \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
*(there were no amendments, additions or comments, if there were – indicate their content )*

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---

**Suspect** \_\_\_\_\_ / \_\_\_\_\_ /  
(full name) (signature)

**Defender** \_\_\_\_\_ / \_\_\_\_\_ /  
(full name) (signature)

**Participants** \_\_\_\_\_ / \_\_\_\_\_ /  
(full name) (signature)

**Conducted interrogation:** \_\_\_\_\_  
(investigator, title, name of authority, signature, last name, initials)

I hereby refuse to sign the report on interrogation in relation \_\_\_\_\_  
\_\_\_\_\_  
(indicate the grounds for refusal by the suspect or other participant of procedural action)

**Suspect** \_\_\_\_\_ / \_\_\_\_\_ /  
(full name) (signature)

**Defender** \_\_\_\_\_ / \_\_\_\_\_ /  
(full name) (signature)

**Witnesses** (in case of absence of a defender):

1. \_\_\_\_\_ / \_\_\_\_\_ /  
(full name, date of birth, place of residence) (signature)

2. \_\_\_\_\_ / \_\_\_\_\_ /  
(full name, date of birth, place of residence) (signature)

\_\_\_\_\_  
(investigator, title, name of authority, signature, last name, initials)

**Annex 4. Template of the report on apprehension of a person suspected of committing a criminal offence**

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**REPORT**  
**on apprehension of a person suspected of committing a criminal offence**

city \_\_\_\_\_ « \_\_\_\_\_ » \_\_\_\_\_ 20\_\_

Investigator (title, full name) \_\_\_\_\_

« \_\_\_\_\_ » \_\_\_\_\_ 20\_\_ at \_\_ hours\_\_ minutes (place of apprehension) \_\_\_\_\_

in the presence of:

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_ ,

who have been informed in advance about the use of technical means of recording, conditions and procedure for their use:

\_\_\_\_\_

*(characteristics of technical means of recording and data storage devices used during this procedural action, signatures of persons)*

in accordance with articles 40, 104, 131, 132, 208-211, 213 of the CPC apprehended a person suspected of committing a criminal offence – \_\_\_\_\_  
*(personal data of the apprehended person)*

Grounds for apprehension (underline):

- 1) this person was caught upon committing a criminal offence or making an attempt to commit it;
- 2) if immediately after the commission of crime, an eye-witness, including the victim, or totality of obvious signs on the body, cloth or the scene indicates that this individual has just committed the crime.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

The apprehended person (last name), in accordance with Article 208§4 of the CPC was informed in a language known to him, of the grounds for the apprehension and of the commission of what crime he is suspected, as well as of the right to involve a defense counsel, receive medical assistance, give explanations, testimonies or keep silence regarding the ground for suspicion against him, inform promptly other persons of his apprehension and whereabouts in accordance with Article 213 of this Code, demand verification of the validity of apprehension, and of other procedural rights specified in this Code.

Parents or adopters, custodians, caregivers, the care agency were informed about the apprehension of an underage person \_\_\_\_\_

---

---

(full name, date of birth)

---

(time, date and manner of notification)

Representative of an intelligence authority of Ukraine \_\_\_\_\_

---

(name of authority, full name)

was informed on apprehension of an official of an intelligence authority of Ukraine \_\_\_\_\_

---

(full name)

on duty \_\_\_\_\_

---

(time, date and manner of notification)

The body (institution) authorized by the law to provide legal aid was notified on apprehension of \_\_\_\_\_

---

(full name, date of birth of the apprehended person)

In addition, in accordance with Article 42§3 of the CPC the apprehended person \_\_\_\_\_

---

(last name)

received information on the right to:

- 1) know of which criminal offence he has been suspected, accused;
- 2) be informed, expressly and promptly, of his rights as laid down in this Code and, where need be, have such rights explained;
- 3) have, on his first demand, a counsel and consultation with him prior to the first and each subsequent interview under conditions ensuring confidentiality of communication, and also upon the first interview to have such consultations with no limits as to their number or duration; the right to the presence of defense counsel during interviews and other procedural actions, refuse from services of counsel at any time in the course of criminal proceedings; have services of a counsel provided at the cost of the state in the cases stipulated for in this Code and/or the law regulating provision of legal aid at no cost, including when no resources are available to pay for such counsel;
- 4) keep silence about suspicion, a charge against him or waive answering questions at any time;
- 5) give explanations, testimony with regard to the suspicion, and a charge against him or waive giving explanations, testimony at any time;
- 6) demand that validity of the detention be verified;
- 7) when apprehended or when a preventive measure such as putting into custody has been applied, to have his family members, close relatives or other persons promptly notified of his apprehension and whereabouts, in accordance with provisions of Article 213 of this Code;
- 8) collect and produce evidence to investigator, public prosecutor, investigating judge;
- 9) participate in procedural actions;
- 10) in the course of procedural actions, ask questions, submit his comments and objections in respect of the manner in which procedural action is conducted, which should be put on the record;

- 11) in keeping with the requirements of the present Code use technical means in the course of procedural action he participates in. Investigator, public prosecutor, investigating judge, court may disallow using technical means in the course of a specific procedural action or at a specific stage of criminal proceedings in order to prevent disclosure of privileged information protected by law or related to the intimate life of the person concerned, and a reasoned decision (ruling) should be taken (adopted) thereon;
- 12) submit motions to conduct procedural actions, ensure protection for himself, family members, close relatives, property and house, etc.;
- 13) propose disqualifications;
- 14) review records of pre-trial proceedings in accordance with the procedure specified in Article 221 of this Code and request disclosure of records under Article 290 hereof;
- 15) obtain copies of procedural documents and written notices;
- 16) challenge decisions, actions, and inactivity by investigator, public prosecutor, investigating judge in accordance with the procedure specified by the present Code;
- 17) demand that damage caused by illegal decisions, actions or inactivity of the agency conducting operative-investigative actions and pre-trial investigation, public prosecutor's office or court, be indemnified, in accordance with the procedure set forth in law, as well as have his reputation restored if the suspicion or accusations have not been confirmed;
- 18) use his native language, obtain copies of procedural documents in same language or any other language of which he has command and, where need be, benefit from translation services at the State expense.

According to Article 42§7 of the CPC, the apprehended person \_\_\_\_\_ shall have the duty to:

- 1) appear before investigator, prosecutor, investigating judge and the court upon summons and, if it is
- 2) impossible to appear upon summons at the time fixed, to inform the court thereon in advance;
- 3) perform duties imposed by the decision to take measures to make criminal proceedings possible;
- 4) obey to legal demands and orders of investigator, public prosecutor, investigating judge, and court.

Having reviewed the grounds for apprehension, and the rights and duties of an apprehended person, the suspect

\_\_\_\_\_ explained:  
*(last name)*

\_\_\_\_\_  
*(motions, statements, or complaints of the apprehended person, signature)*

Investigator \_\_\_\_\_  
*(title, full name)*

\_\_\_\_\_ ,

Pursuant to Article 208§3 of the CPC, in accordance with the rules provided by Article 223§7 and Article 236 of the CPC, in the presence of witnesses:

- 1) \_\_\_\_\_ ;
- 2) \_\_\_\_\_

conducted a search of the apprehended person \_\_\_\_\_ ,  
*(last name)*

whereby the following was found and confiscated:

\_\_\_\_\_

---

---

Comments and remarks to the report:

---

*(manner of presentation for review, comments and remarks by participants of the procedural action, last name, initials, signature)*

Witnesses have reviewed the report on apprehension and informed about the duty not to disclose information about the procedural action pursuant to Article 66 of the CPC.

- 1) \_\_\_\_\_ / \_\_\_\_\_ /  
*(full name, date of birth, place of residence) (signature)*
- 2) \_\_\_\_\_ / \_\_\_\_\_ /  
*(full name, date of birth, place of residence) (signature)*

Due to procedural action participant's refusal to sign the report, the person shall have the right to provide written explanation on the grounds for refusal. The persons explained the following:

---

---

*(explanation, signature)*

Written explanation on the grounds of refusal to sign the report is attested by the signature of the person's defender (legal representative): \_\_\_\_\_

---

#### Annexes

Witnesses (in case of absence of a defender):

1. \_\_\_\_\_
2. \_\_\_\_\_

In case the person is not able to sign the report due to physical disability or other reasons, review of the report takes place in the presence of a defender (legal representative) who attests the contest of the report and the person's inability to sign it with a signature.

\_\_\_\_\_  
*(signature)*

\_\_\_\_\_  
*(last name, initials of the apprehended person)*

The protocol was drawn up by:

Investigator \_\_\_\_\_  
*(investigator's title, last name)*

\_\_\_\_\_  
*(signature)*

I have received a copy of the report: \_\_\_\_\_  
*(apprehended person's last name)*

\_\_\_\_\_  
*(signature)*

## **Annex 5. Indicative model of the letter of rights (EU Directive on the right to information in criminal proceedings)**

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### **DIRECTIVE 2012/13/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 May 2012 on the right to information in criminal proceedings**

#### ANNEX I

#### **Indicative model Letter of Rights**

The sole purpose of this model is to assist national authorities in drawing up their Letter of Rights at national level. Member States are not bound to use this model. When preparing their Letter of Rights, Member States may amend this model in order to align it with their national rules and add further useful information. The Member State's Letter of Rights must be given upon arrest or detention. This however does not prevent Member States from providing suspects or accused persons with written information in other situations during criminal proceedings.

You have the following rights when you are arrested or detained:

#### A. ASSISTANCE OF A LAWYER/ENTITLEMENT TO LEGAL AID

You have the right to speak confidentially to a lawyer. A lawyer is independent from the police. Ask the police if you need help to get in contact with a lawyer, the police shall help you. In certain cases the assistance may be free of charge. Ask the police for more information.

#### B. INFORMATION ABOUT THE ACCUSATION

You have the right to know why you have been arrested or detained and what you are suspected or accused of having done.

#### C. INTERPRETATION AND TRANSLATION

If you do not speak or understand the language spoken by the police or other competent authorities, you have the right to be assisted by an interpreter, free of charge. The interpreter may help you to talk to your lawyer and must keep the content of that communication confidential. You have the right to translation of at least the relevant passages of essential documents, including any order by a judge allowing your arrest or keeping you in custody, any charge or indictment and any judgment. You may in some circumstances be provided with an oral translation or summary.

#### D. RIGHT TO REMAIN SILENT

While questioned by the police or other competent authorities, you do not have to answer questions about the alleged offence. Your lawyer can help you to decide on that.

#### E. ACCESS TO DOCUMENTS

When you are arrested and detained, you (or your lawyer) have the right to access essential documents you need to challenge the arrest or detention. If your case goes to court, you (or your lawyer) have the right to access the material evidence for or against you.

*F. INFORMING SOMEONE ELSE ABOUT YOUR ARREST OR DETENTION/INFORMING YOUR CONSULATE OR EMBASSY*

When you are arrested or detained, you should tell the police if you want someone to be informed of your detention, for example a family member or your employer. In certain cases the right to inform another person of your detention may be temporarily restricted. In such cases the police will inform you of this. If you are a foreigner, tell the police if you want your consular authority or embassy to be informed of your detention. Please also tell the police if you want to contact an official of your consular authority or embassy.

*G. URGENT MEDICAL ASSISTANCE*

When you are arrested or detained, you have the right to urgent medical assistance. Please let the police know if you are in need of such assistance.

*H. PERIOD OF DEPRIVATION OF LIBERTY*

After your arrest you may be deprived of liberty or detained for a maximum period of ... [fill in applicable number of hours/days]. At the end of that period you must either be released or be heard by a judge who will decide on your further detention. Ask your lawyer or the judge for information about the possibility to challenge your arrest, to review the detention or to ask for provisional release.

## **Annex 6. Research methodology**

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### **Purpose of the desk review**

The purpose of the desk review in each jurisdiction included in the research study is to provide a critical, dynamic account of the system and processes using existing sources of information in order to provide a context against which data collected during the research study may be understood.

The objectives of the desk review:

- 1) to analyze of the laws, regulations, institutions and procedures (environment) relevant to the enforcement of suspects' procedural rights in the given jurisdiction;
- 2) to equip the researchers with sufficient contextual knowledge to embark on the empirical work.

In addition to setting the normative framework in the given jurisdiction (i.e. providing information about the content of the relevant laws and other regulations), the desk review should account for the existing empirical data relevant to the subject-matter of the study. This information may come from, e.g. existing empirical research studies, official reports and statistics, media publications, etc. Where possible and appropriate, you may also refer to your personal experiences of the criminal justice system, but this should be clearly referenced as personal observations of the researcher.

### **Structure and length of the desk review**

The structure of the desk review report should follow the format as set out below.

The questions included in the extended outline for desk review report (under the sub-headings marked by letters (a), (b), etc.) and numbers (1), (2), etc.) are the research questions that should guide/facilitate your literature search and analysis. It is not expected that the desk review report be presented in a form that includes an answer to each and every question in this particular order; in the process of writing, the sub-headings can be merged, as many of them overlap. However, all of the research questions enumerated below should be answered in the desk review, unless the question is irrelevant for the given jurisdiction or no information is available to answer the question<sup>1</sup>.

### **Outline for the desk review report**

#### **1. Introduction**

#### **2. Normative regulation and practice of detention**

- 2.1. The use of apprehension: objectives and scale
- 2.2. Procedural aspects of apprehension
  - 2.2.1. The legal grounds for and procedure of arrest and taking a person into police custody
  - 2.2.2. Procedures related to apprehension
  - 2.2.3. The outcomes of apprehension
- 2.3. Police interrogation of suspects
  - 2.3.1. The role of suspect interrogations in the investigation process
  - 2.3.2. The legal regulation of police interrogations
  - 2.3.3. Interrogations of suspects in practice

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<sup>1</sup> In which case, this should be explained.

### **3. The normative regulation of suspects' rights in police detention**

- 3.1. Legal documents establishing the rights of suspects in police detention
- 3.2. Normative framework for the separate suspects' rights
  - 3.2.1. The right to translation
  - 3.2.2. The right to information
  - 3.2.3. The right to legal aid
  - 3.2.4. The right to silence

### **4. Criminal defense and legal aid**

- 4.1. The criminal defense profession
- 4.2. The normative framework of the criminal defense lawyers' role during the police detention stage
  - 4.2.1. The official regulation of the lawyers' role at police stations
  - 4.2.2. Professional regulation and culture of legal advice of suspects in police detention
- 4.3. Legal assistance at police stations
  - 4.3.1. Organization of provision of legal assistance at police stations
  - 4.3.2. Procedures related to provision of legal assistance at police stations
  - 4.3.3. Professional standards and quality of police station legal assistance
- 4.4. Criminal legal aid
  - 4.4.1. The organization of criminal legal aid
  - 4.4.2. The scale and eligibility criteria for criminal legal aid in general
  - 4.4.3. Remuneration of police station legal advice work
  - 4.4.4. Legal aid fees for work while the suspect is in police detention
  - 4.4.5. Professional attorneys and criminal legal aid

## **Extended outline for the desk review report**

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### **1. Introduction**

- (a) A short description of the criminal justice system and processes, including:
  - its typical characteristics (approaches to prosecution and defense in relation to apprehension/detention and trial etc.)
  - the significant areas of change in the past 10 years
  - the legal status and impact of the European Convention on Human Rights (ECHR).
- (b) An analysis of the relationship between the investigative and trial stages of criminal procedure, in particular:
  - What is the proportion of criminal cases in which a person is arrested and/or detained that result in a court hearing?
  - How rigorously is the evidence obtained during the investigative stage re-examined by trial judges? How often do judges (or prosecutors) decide that additional fact-finding is necessary? At which stage of pre-trial investigation or court trial (what is the proportion of cases)?

- Are statements made by a suspect to the police admissible in evidence? If not, is there evidence that these statements nonetheless play a role in the determination of guilt or innocence, or in other decisions such as pre-trial release, e.g. because they are included in the case file?
- (c) A brief account of the criminal justice policies relevant to the rights of suspects, including:
  - major recent and current issues of concern (terrorism, prison overcrowding, immigrants and crime, miscarriages of justice, etc.) and the proposed ways of dealing with these;
  - the role of procedural rights in the political discourse about criminal justice policy;
  - the influence of the European institutions and their legislation/policies on the national criminal justice policy;
  - trends in the financing of criminal justice and legal aid.
- (d) A brief account of the sources used to write the Desk Review and the methods used to collect them (in particular, jurisprudence and statistical data). If you refer to your personal experiences with the criminal justice system in the report, you should describe here the degree and nature of your familiarity with criminal justice practice.
- (e) The availability of statistics and empirical data related to the operation of the criminal justice system in the given jurisdiction.

## **2. Normative regulation and practice of detention**

### **2.1. The use of apprehension: objectives and scale**

- (a) What are the kinds of circumstances that typically trigger apprehension: e.g. suspicion that a person committed an administrative offence, breach of immigration rules, suspicion that a person committed a criminal offence etc.?
- (b) What is the relationship between “criminal” apprehension, and “administrative” and/or “preventive” apprehension and/or detention (in all other cases, e.g. breach of immigration rules, for the purpose of protection of public order), both in law and in reality?<sup>2</sup>
- (c) What are the “official” (e.g. as stated in laws, regulations, policy documents) and the “unofficial” objectives<sup>3</sup> of police arrest and/or detention (e.g. as conveyed in empirical studies or statistics)?
- (d) How may the use of police detention be described qualitatively (e.g. is it a routine practice? is it used in certain categories of offences only? are juvenile suspects dealt with in a different way than adults? etc.), and quantitatively?

*The following statistical information should be included in this Section:*

- *The overall number of persons apprehended by law enforcement bodies in respect of criminal offences (most recent available annual statistics), and how this compares to the overall number of apprehensions for any reasons (if data is available), as well as to the population of the country;*
- *The trends in the overall use of apprehension in respect of criminal offences in the five years preceding the most recent year for which relevant statistics are available (has it been growing? decreasing? relatively stable? Are there other changes?);*
- *The overall number of persons apprehended by law enforcement bodies in respect of criminal offences in comparison to: 1) the overall number of registered criminal offences; 2) the overall number of persons interrogated as suspects in relation to criminal offences (if available), 3) the overall number of cases with indictment;*

<sup>2</sup> The project focuses on the rights of criminal suspects only, and thus (in principle) police detention for other purposes than investigation of a crime falls outside of its scope. However, it is known that “administrative” or “preventive” detention may be used as a pretext to obtain information about a crime under investigation, or to avoid rights that only apply to arrest or detention for a criminal offence, etc.. If this is a concern in your jurisdiction, this should be marked as an issue subject to empirical examination.

<sup>3</sup> If different from “unofficial”.

- *The overall number apprehensions broken down by categories of suspected criminal offences (if available);*
- *The proportion of those apprehended (to the overall number of apprehensions) who are juveniles or otherwise vulnerable (e.g. persons with mental disabilities), and the categories of offences for which they are apprehended (if available).*

## **2.2. Procedural aspects of apprehension**

- (a) Is there a normative framework (laws, ministerial decrees, jurisprudence, etc.) governing procedural aspects of apprehension. In particular:
  - Is there a uniform “police detention code” similar to the Police and Criminal Evidence Act in England and Wales?
  - To what extent is police detention regulated centrally, and to what extent by regional or local police forces?
  - What are the roles of the different institutions in regulating apprehension – the Parliament, the judiciary, the Ministry of Internal Affairs, the Prosecutor General’s Office, the Ministry of Justice, the army, etc.?

### *2.2.1. The legal grounds for and procedure of arrest and taking a person into police custody*

- (a) Where are the legal grounds for arrest and for taking a person into custody set out?
- (b) What are the legal grounds for apprehension and taking a person into police custody? In particular, must there be “reasonable suspicion” that the person has committed an offence and, if so, how is it defined? Is detention in police custody permitted in respect of all offences, or only in respect of particularly grave offences?
- (c) Is there differentiation between apprehension of a suspect in the street and detention by law enforcement (taking into custody) in relation to legal grounds, length etc.?
- (d) How (in which documents and to what extent), is the procedure for apprehension and taking a person into police custody regulated? E.g. are there legal safeguards against excessive use of force during apprehension, and if yes, which ones?
- (e) Is there a legal limit on the duration of police detention and, if so, how and where is it defined? May it be prolonged, and by whom?
- (f) From which moment does police detention start according to law and/or jurisprudence?
- (g) What legal remedies are available if the legal grounds for arrest or detention were not fulfilled, the procedure for carrying out an arrest was not followed, or the suspect was kept in detention longer than allowed by law?

### *2.2.2. Procedures related to apprehension*

- (a) How (where and to what extent) is the process of apprehension regulated - from the moment the suspect arrives at the police station to the end of police detention (e.g. when a suspect is released, or placed in pre-trial detention after charge)?
- (b) In particular:
  - What actions should be carried out when a suspect arrives at the police station?
  - What records have to be made (if any) of what happens in respect of a suspect whilst s/he is in police detention? Whose responsibility is it to keep this record(s)?
  - Does this record become part of the case file, and does the suspect or his lawyer have the right of access to this record?
  - Are there separate provisions on the procedure of medical examination of a suspect? If yes, what are they?

- Are there separate provisions governing visits and communication with a lawyer? If yes, what are they?
- Are there separate regulations governing visitants and communication with relatives, social workers (for suspects with vulnerabilities) and consulate representatives?

### 2.2.3. *The outcomes of apprehension*

- (a) According to the legislation, in what ways can police apprehension come to an end, e.g. release of the suspect (with or without a without charge), resolution of a case at the police station (imposition of a fine or a warning), the suspect's transfer into custody? Who decides which would apply in any particular case?
- (b) In what circumstances, if at all, may the police drop or discontinue a case?
- (c) How often are detained suspects released and how often are they transferred to pre-trial detention facilities (see below)?

*The following statistical information should be included in this Section:*

- *The average duration of police detention (if available from empirical research), preferably broken down by categories of offences;*
- *Any available information on outcomes of apprehension, e.g. rates of release with or without charge, numbers of cases proceeded with, police detention converted into pre-trial detention, etc.*

## 2.3. **Police interrogation of suspects**

- (a) What are the official sources of regulation governing police interrogations (laws, ministerial decrees, jurisprudence, etc.)?
- (b) What existing information is available, if any, about police interrogation in practice for this jurisdiction?

### 2.3.1. *The role of suspect interrogations in the investigation process*

- (a) What are the “official” (e.g. as stated in laws, regulations, policy documents) and the “unofficial”, objectives of suspect interrogations<sup>4</sup> (e.g. as conveyed in empirical studies or statistics)?
- (b) In the official policy and/or practice, is the interrogation of a suspect seen as a necessary/indispensable procedural action, even where there is sufficient other evidence to prove that the suspect is guilty?
- (c) Is there existing evidence showing to what extent the police rely on suspect interrogations or suspect statements to “solve” a case?
- (d) Is there existing evidence showing to what extent convictions depend on confessions made by suspects to police?

*The following statistical information should be included in this Section, if available:*

- *To overall number of police interrogations and number of persons interrogated as suspects (most recent available annual statistics) in relation to: 1) overall number of persons apprehended by police in relation to criminal offences; 2) overall number of cases with indictments;*
- *The proportion of suspects who confess or otherwise make incriminating statements during interrogation, as well as the proportion of suspects who used to the full/partial extent their right to silence during interrogations (if information is available from empirical research)<sup>5</sup>;*

<sup>4</sup> If different from “unofficial”.

<sup>5</sup> There is no uniformity between different empirical studies in how “confessions” or “self-incriminating statements” are defined. Likewise, there is no uniformity between different empirical studies in how the “partial” or the “full” use of the right to silence is defined. Thus, you should explain how these terms are defined in studies which you refer to.

- *Statistics related to:*
  - 1) *the outcome of police investigation (e.g. case dropped or “solved” etc.);*
  - 2) *the outcome of the trial (i.e. conviction or acquittal) depending on whether the suspect confessed or made a self-incriminating statement to police (if such information is available).*

### 2.3.2. *The legal regulation of police interrogations*

- (a) How (in which documents) and to what extent, are police interrogations of suspects regulated?
- (b) In particular, are there specific provisions (if yes, what are they) governing:
  - the interrogation conditions, particularly the maximum duration of the interrogation, times of the day when it may be performed, breaks, etc.;
  - the point in the proceedings after which police may not interrogate a suspect anymore;
  - special safeguards for suspects who may not fully understand consequences of their responses to police questioning (underage or persons with mental disabilities);
  - the assessment of whether the suspect is fit to be interviewed (i.e. whether they can understand the questions and the consequences of responding or not responding to them);
  - the presence and respective roles of persons other than the suspect and the interrogating officer;
  - the procedure for ensuring the presence of a representative for a vulnerable suspect (for instance, underage), if the procedure is available: schedule of duty for social workers or requirements for certain professions (social workers etc.);
  - the recording of interrogations, including written records (verbatim, summary form, etc.) and audio and/or video recording, and the respective rights of the suspect and his lawyer (e.g. to make objections about the content of recording; receive the copy of the summary/record, etc.).
- (c) To what extent is the use of pressure on suspects to obtain a statement permitted by law? E.g. is there a statutory prohibition on applying improper compulsion, and how is “improper compulsion” defined? What kind of police behavior would fall under this category, and what kind of pressure is acceptable (if any)?
- (d) What are the available legal remedies for the breach of provisions related to suspect interrogations? In particular, what are the legal consequences of the finding that police used “excessive pressure” against the suspect?

### 2.3.3. *Interrogations of suspects in practice*

- (a) What training in interrogation (and different styles of interrogation) to the police receive, as evidenced e.g. by official police interrogation manuals or the content of police training courses in this jurisdiction?
- (b) Is there any existing evidence about how interrogations operate in practice? In particular:
  - How long do interrogations last on average?
  - Are suspects routinely interrogated more than once (in relation to one case)?
  - How often are interrogations attended by lawyers and other third persons (e.g. appropriate adults in the UK)?
  - If suspects confess or make self-incriminating statements, at which point during the interrogation does it happen?
  - Whether the police use interrogation tactics designed to obtain testimony (including confessions of self-incriminating statements)? If yes, what are they?

The following statistical information should be included in this Section:

- The average duration of suspect interrogations (if possible, broken down by types of offences);
- The proportion of interrogations where a lawyers, appropriate adult, and/or other third person is in attendance (in relation to overall number of interrogations where third parties could be present);
- Any statistics on the use of interrogation tactics and techniques.

### **3. The normative regulation of suspects' rights in police detention**

#### **3.1. Legal documents establishing the rights of suspects in police detention**

- (a) What official sources (the Constitution, laws, jurisprudence, ministerial decrees etc.) govern the rights of suspects during police detention and enforcement of these rights?
- (b) What is the role and status of the European Convention on Human Rights and ECHR case law in governing procedural rights of suspects in this jurisdiction?

#### **3.2. Normative framework for the separate suspects' rights**

Note: each section on particular suspect's right should have the following structure (example):

- (1) Brief overview of normative framework explaining how the right to translation should be enforced in this jurisdiction (referencing relevant legislation, jurisprudence and other sources – e.g. professional codes of conduct);
- (2) Mechanisms and structures in place for enforcement of the right to translation;
- (3) Legal remedies for violations of the right to translation used in this jurisdiction;
- (4) Exceptions on the scale and possibilities for enforcement of the right in cases where the crime is related to terrorism, organized crime or similar offences.

It is necessary to point out and explain the reasons for existence of gaps and discrepancies of the national legislation with the Roadmap on procedural rights of suspects and the draft Framework directives on procedural rights of suspects, as well as standards set by the European Convention on Human Rights and ECHR case law.

In addition, researchers have to describe any available empirical data on enforcement of these rights in these jurisdictions in practice.

##### *3.2.1. Right to translation*

- (1) Do suspects in police detention have a right to free assistance of an interpreter if they cannot understand or speak the language of their lawyer, the investigator or the court?  
If so –
  - (a) What is the source of any such right?
  - (b) How is the need for an interpreter determined?
  - (c) Who has responsibility for determining it?
  - (d) How are interpreters contacted and appointed?
  - (e) How is the provision of the service organized? E.g. is there a national registry of interpreters in place accessible by authorities engaged in criminal proceedings? Is there a 24/7 service of duty interpreters in place?
  - (f) Are there special arrangements in place for interpretation for persons with hearing and speech impediments?

- (g) Is there an official regulation as to the circumstances in which interpretation must be provided in person, and/or remotely (e.g., by telephone)?
  - (h) Who pays for interpretation services?
  - (i) What procedures are in place for notifying suspects that they are entitled to free interpretation?
  - (j) Is there any existing evidence as to how the provision of the right to interpretation works?
  - (k) Is there any remedy or sanction if the right is breached?
- (2) Does a suspect have a right to free translation of documents, evidence, etc. if s/he cannot understand the language in which they are written?
- If so –
- (a) What is the source of any such right?
  - (b) How is the need for translation determined?
  - (c) Who has responsibility for determining it?
  - (d) How does national law define the categories of documents that must be translated, if at all?
  - (e) What is the procedure for arranging the translation?
  - (f) Does the suspect's lawyer also have the right to receive the translation?
  - (g) Can a suspect waive his/her right to translation and, if yes, under what conditions?
  - (h) Is there a provision requiring that such waiver should be recorded?
  - (i) Do suspects have the right to receive a written translation of procedural documents, or is an oral summary considered sufficient in certain situations?
  - (j) Who pays for the translation?
  - (k) Is there any existing evidence as to how it works?
  - (l) Is there any remedy or sanction if the right is breached?
- (3) Is there any regulation governing the competence and/or independence of interpreters and translators?
- If so -
- (a) What is the source of any such regulation?
  - (b) Is there an accreditation/certification system for interpreters and translators?
  - (c) What does the accreditation/certification entail e.g. experience level, a standard test, a qualification?
  - (d) Which languages does it cover? Only EU languages, or other (e.g. languages spoken by ethnic minorities)?
  - (e) Is there a requirement of interpreters or translators to undergo accreditation on a regular basis?
  - (f) Is there training available for interpreters and translators? Is it required to undertake training before being accredited?
  - (g) Is there a system of continuous professional development for interpreters and translators?
  - (h) Is there a Code of Conduct and/or a disciplinary body of interpreters and translators in place to ensure quality?
  - (i) Is quality of interpretations and translations regularly monitored?
  - (j) Is there a procedure to replace an interpreter or translator who does not provide translation of adequate quality or acts unethically?
  - (l) Is there any remedy or sanction available to the suspect if an interpreter or translator is not competent or independent?

- (4) How is the provision of interpretation and translation services remunerated? Is remuneration (perceived as) adequate to enable the provision of good quality services?
- (5) Do the member-states obliged to execute the European Arrest Warrant have the duty to provide a suspect who does not understand the language of proceedings of this state with oral or written translation of the EAW and other relevant procedural documents?
  - If so -
    - (a) What is the source of any such obligation?
    - (b) What is the procedure for organizing access to interpretation in cases pursuant to the EAW? How is it different from procedure in “regular cases”?
    - (c) What is the procedure for ensuring access to translation of the EAW? Is it different from procedure in “regular cases”?
    - (d) Is there any legal remedy if access to translation is not provided to persons arrested under the EAW?

### 3.2.2. *The right to information*

- (1) Is there any obligation to inform suspects about their procedural rights?
  - If so -
    - (a) What is the source of that obligation?
    - (b) What is the procedure, if any, for informing suspects about their procedural rights? When must it happen? Who has to provide this information?
    - (c) Information about which rights must be provided? In particular, must suspects be informed about the right of access to a lawyer; the right to interpretation and translation; the right to be informed about the charge and where necessary access to case file; the right to be brought promptly before the court if a suspected person is arrested; the right to silence; the right to medical assistance?
    - (d) How is the procedure for giving suspects information about their rights regulated?
    - (e) What are the requirements as to the manner in which the information about the rights should be provided, e.g. in orally or in writing, etc.?
    - (f) Is there a requirement to provide information in the language that the suspect understands?
    - (g) Is there a requirement to record the fact that the information about the rights has been provided to the suspect?
    - (h) What provisions, if any, are in place to ensure that children or other vulnerable suspects understand their rights?
    - (i) Is there any existing evidence as to whether and how the obligation to inform suspects about their procedural rights is complied with?
    - (j) Are there any sanctions or remedies if the obligation is not complied with?
- (2) Is there an obligation to give suspects a ‘letter of rights’ (i.e., a written notice of rights) informing them of their rights?
  - If so -
    - (a) What is the source of that obligation?
    - (b) Who has to provide the ‘letter of rights’?
    - (c) At what stage does the letter of rights have to be provided?
    - (d) Is there an obligation to provide the ‘letter of rights’ in a language that the suspect/defendant understands?

- (e) Is there an obligation to verify whether the suspect/defendant understood the rights included in the 'letter of rights'?
  - (f) Are there a standard or model Letter of the Rights and what information does it contain?
  - (g) Is there an obligation to ensure that the blind, partially sighted, or illiterate suspects understand the information in the 'letter of rights'? If so, what does it entail?
  - (h) Do the suspects arrested under the EAW receive a specific Letter of rights in accordance with the Framework decision 2002/584/JHA?
  - (i) Is there any existing evidence as to whether and how the obligation to provide suspects with a Letter of Rights is complied with?
  - (j) Are there any sanctions or remedies if the obligation is not complied with?
- (3) Is there an obligation to provide a suspect with information about the charge?
- If so –
- (a) What is the source of such obligation?
  - (b) What is the procedure, if any, for informing suspects about the charges in criminal proceedings against them? When must it happen? Who must provide the information?
  - (c) What kind of information must be provided?
  - (d) Is there a requirement to provide the information in a language which the suspect understands?
  - (e) Are there special provisions regarding the provision of the information about the charge to children, suspects with mental or intellectual disabilities, or other vulnerable suspects?
  - (f) What is the procedure, if any, for verifying that suspects are given the information?
  - (g) Is there an obligation to record the fact of informing suspects about the charges?
  - (h) Is there any existing evidence as to how the provision of information about the charge work in practice?
  - (i) Is there any remedy or sanction for the breach of the right?
- (4) Is there an obligation to provide a suspect with information about the reasons for arrest?
- If so –
- (a) What is the source of such obligation?
  - (b) What is the procedure, if any, for informing arrested persons about the reasons for arrest?
  - (c) Who has the responsibility to inform the arrested persons about the reasons for their arrest?
  - (d) What kind of information must be provided?
  - (e) In which form must the information be provided, e.g. oral or written, summary of full, etc.?
  - (f) Is there a requirement to provide the information in a language which the suspect understands?
  - (g) Are there special provisions regarding the provision of the information about the reasons for arrest to children, suspects with mental or intellectual disabilities, or other vulnerable suspects?
  - (h) Is there an obligation to record the fact of giving the suspects information about the reasons for arrest?
  - (i) Is there any existing evidence as to how the provision of information about the reasons for arrest works in practice?
  - (j) Is there any remedy or sanction for the breach of the right?
- (5) Is there an obligation to provide a suspect with access to the case file?
- If so –
- (a) What is the source for such obligation?

- (b) What is the procedure for providing access to the case file? When does access have to be provided? Is it automatic, or on request from the suspect?
- (c) Does a suspect have the right to view the full contents of the case file or not? In particular, must documents which are relevant for the determination of the lawfulness of the arrest or detention be disclosed to the suspect?
- (d) Does the lawyer of the suspect have the same rights of access to the case file as the suspect?
- (e) Is there a requirement to provide copies of the documents in the case file? Is this free of charge for the suspect?
- (f) Is there a requirement to record the fact that suspect and/or his lawyer was provided with access to the case file, and the timing of such access?
- (g) Is there any evidence as to how the obligation to provide access to the case file works in practice?
- (h) Is there any remedy or sanction for the breach of the right?

### 3.2.3. *The right to legal aid*

- (1) Does a suspect have the right to legal aid/assistance?
  - If so –
  - (a) What is the source of that right?
  - (b) How does national law define the moment from which the right of access to a lawyer applies, and the situations in which it applies?
  - (c) How must the suspect be informed of the right?
  - (d) How is a request for a lawyer recorded?
  - (e) Does the right differ depending on the financial resources of the suspect and/or whether they are legally aided free of charge?
  - (f) Are there circumstances where legal assistance is mandatory for suspects detained at police stations?
  - (g) Does national law contain exceptions to the right of the suspect detained at police stations to consult a lawyer, or specify circumstances in which exercise of the right can be delayed? What are these exceptions? E.g. are there limitations on the right in terrorist and/or organized crime cases?
  - (h) Is there a provision for a right or obligation to a lawyer to be waived by the suspect?
  - (i) Is there a requirement to record the waiver and/or reasons for such waiver?
  - (j) Is there any evidence as to how the provision of information about the right to access to a lawyer and the timing of such assistance apply in practice?
- (2) Does a suspect have a right to choose his/her lawyer?
  - If so –
  - (a) What is the source of that right?
  - (b) Is the right absolute?
  - (c) Does the right differ depending on the financial resources of the suspect?
  - (d) If choice is restricted, does the suspect have a right to ask for a replacement (e.g., if they do not trust an appointed lawyer)?
  - (e) Is there any existing evidence as to the exercise of this right?
- (3) Does a suspect/defendant have a right to a confidential consultation with their lawyer?
  - (a) What is the source of such right?
  - (b) Are there any sanctions or remedies if the right is breached?

Do suspects have a right to a consultation in private?

If so, -

- (a) Are there any limitations on the right?
- (b) What is the legal source of the limitations?
- (c) Who decides whether or not a consultation is to be held in private?
- (d) Is there any existing evidence as to the extent to which the power to limit private consultations is used?
- (e) Are there any sanctions or remedies if the right is breached?

- (4) Does a lawyer acting for a suspect have a right to communicate in private with third parties (e.g., witnesses, experts, etc.)?

If so -

- (a) What is the source of any such right?
- (b) Are there any limitations on exercising the right? E.g. in terrorist or organized crime cases?
- (c) Who decides whether any such right is to be interfered with?
- (d) Is there any existing evidence as to the extent to which any such right is interfered with?
- (e) Are there any sanctions or remedies if the right is breached?

- (5) Are there any consequences, remedies or sanctions for accused or law enforcement officers/prosecutor for admissibility or use of evidence or final sentence if a suspect:

- (a) Does not have legal advice/representation during the entire period of police detention, or at certain moments during detention, particularly prior to the first interrogation by police?
- (b) Is not informed about their right to a lawyer or about their right to legal aid?
- (c) Who wants a lawyer is denied access to a lawyer, or where access to a lawyer is delayed (or where certain procedural actions (e.g. interrogation) are carried out in the absence of a lawyer)?
- (d) Is denied the right to have a lawyer of his/her own choice, or to have his/her lawyer replaced?
- (e) Is questioned in relation to his possible involvement in a criminal offence without being formally recognized as a suspect and without access to a lawyer?

- (6) Access to a lawyer in proceedings under the EAW:

- (a) How is the right to a lawyer in proceedings under the EAW enforced in the national legislation on implementation of the Framework Decision on the EAW and other relevant national regulations?
- (b) Is the procedure for access to a lawyer in proceedings under the EAW (if the jurisdiction subject to research is a party obliged to follow the EAW) similar in content to that of “regular” criminal cases, or does it have additional components?
- (c) Is there an obligation to inform the person in relation to whom proceedings are conducted pursuant to the EAW on the right to choose a lawyer from the country issuing the EAW? What information is provided to the person in relation to this matter? Who provides this information?
- (d) How is the cooperation established on appointing a lawyer from the state issuing the EAW, between the judiciary authorities of this country and the state executing the EAW?
- (e) Are there procedures aimed at promoting cooperation between lawyers from the issuing country and the executing country?
- (f) Do the lawyers accredited in a different EU member state have the right to perform activities mentioned in Article 4 (in general or for the purposes of the EAW)?

- (7) Do suspects have the right to communicate with third parties whilst in police detention?
- If so –
- (a) What is the source of that right?
  - (b) When precisely does the right arise?
  - (c) How is the suspect to be informed of the right?
  - (d) Is this right treated separately from the right to contact a lawyer?
  - (e) Are there exceptions to the right to communication (incommunicado detention)?
  - (f) What is the procedure for informing the suspects about this right and for facilitating communication?
  - (g) Are there provisions under national law regarding the notification of a third party where a child is arrested in relation to a criminal offence? Who should be informed, when and by whom?
  - (h) Until what age is a participant of criminal proceedings considered to be a child?
  - (i) Are there any other rights or obligations for third parties in relation to an apprehension of a child (e.g. visiting the child, access to case files, and presence during the child's interrogation etc.)?
  - (j) Are there separate legal provision on these rights and obligations depending on the child's age?
  - (k) Does national law provide for the right of the foreign suspects to have their consular/diplomatic authorities notified about the fact of arrest and to communicate with these authorities?
  - (l) What is the procedure for informing non-nationals about their right to communicate with the consular and diplomatic authorities?
  - (m) Is there any existing evidence about how the right to communication with third parties works in practice?
  - (n) Is there any remedy or sanction for the breach of the right to communication with third parties?

#### 3.2.4. *The right to silence*

- (1) Do suspects have the right to silence under national law?
 

If so –

  - (a) What is the source of this right?
  - (b) What categories of persons have the right to silence under national legislation? In particular, do persons other than suspects (e.g. witnesses) have the right to remain silent, and under what conditions?
- (2) Is there an obligation to inform suspects about the right to silence (give them the “caution”)?
 

If so –

  - (a) What is the source of such obligation?
  - (b) What is the procedure for informing suspects about their right to remain silent? When do they have to be informed? Who must provide the information?
  - (c) Is there a standard format or wording for the caution? If so, what is it, and does it mention the consequences of using or not using the right to silence?
  - (d) Is there any existing evidence about how the provisions on informing suspects about their right to silence operate in practice?
  - (e) What are the remedies for failure to inform the suspect about the right to silence? In particular, does the national law allow the use of statements made without a caution in criminal proceedings, or as a source for obtaining other evidence?

- (3) Are inferences of guilt from the suspect's silence during police interrogation allowed by national law?  
If so –
- (a) What are the sources regulating the use of adverse inferences?
  - (b) Under which conditions are such inferences allowed? Is this linked to the right of legal advice or disclosure of key information?
  - (c) Does national law allow for an inference be drawn from the suspect's refusal to respond to certain questions (as opposed to complete silence)?
  - (d) Is there any existing evidence as to how the provisions regarding the use of adverse inferences work in practice?
  - (e) What are the available remedies if an adverse inference was improperly drawn?

*For issues related to excess compulsion during interrogation, recording of interrogation, and interrogation of vulnerable suspects, see paragraph 2.3.2. above.*

## **4. Criminal defense and legal aid**

### **4.1. The criminal defense profession**

- (a) Is the criminal defense profession institutionalized? E.g. is there a criminal bar association or a similar institution for criminal defense lawyers? Is there a specific disciplinary body for criminal defense lawyers?
- (b) Who are the lawyers who provide criminal legal assistance? Are these young or experience lawyers? Are they (mostly) specialists, generalists, or else? Are they individual practitioners or do they mostly belong to (specialized or non-specialized) firms?
- (c) How prestigious or attractive is criminal defense work compared to other areas of legal work (e.g. civil law)? Within criminal law, which areas or kinds of cases are more or less attractive for lawyers? Is there a sharp distinction between criminal lawyers who take high-profile cases and lawyers who work on the “mainstream” criminal cases?
- (d) How specialized is criminal defense? For instance, are there specialized criminal firms and what portion of the need for criminal legal assistance do they cover? Are there any specialization requirements to undertake criminal work (or criminal legal aid work), and if yes who controls compliance with these requirements?
- (e) How are the obligations of criminal defense lawyers to their clients described and regulated? Is there a specific professional ethics code for criminal defense lawyers? Is there a complaints mechanism for clients dissatisfied with the service provided by their lawyer? Is there any existing evidence as to how the regulation and complaints mechanisms work, especially in relation to criminal defense lawyers? Are the results of complaints and/or disciplinary proceedings published?
- (f) How is quality of criminal legal assistance ensured? Are there professional standards or minimum quality of service requirements for criminal defense lawyers (or for lawyers who provide criminal legal aid), and what are they? How are they established and enforced? Is there a special body which monitors quality of criminal legal assistance? Is there any empirical evidence as to how the quality standards of criminal defense (criminal legal aid) work in practice?
- (g) Are there professional training requirements for criminal defense lawyers (or for lawyers who provide criminal legal aid) and what are they? What kind of training do lawyers who provide criminal defense services typically receive? Is training of criminal defense lawyers subsidized by the state (or are there other financial or non-financial stimuli in place to undergo training)?

*The following statistical information should be included in this Section:*

- *The number of certified lawyers and legal advisors (if entitled to provide legal services)*
- *The number of specialized criminal defense lawyers (such as e.g. number of members of specialized criminal bar; or number of lawyers possessing a respective certificate), broken down by age, number of years of experience and/or type of practice, if available*
- *The number of lawyers and legal representatives registered for the provision of criminal legal aid, broken down by age, number of years of experience and/or type of practice, if available*
- *The number of disciplinary complaints brought against criminal defense lawyers every year (most recent year available).*

#### **4.2. The normative framework of the criminal defense lawyers' role during the police detention stage**

- (a) What are the official regulations governing the role of the criminal defense lawyer during the police detention stage (laws, jurisprudence, professional regulation documents, etc.)? In particular:
- Are there provisions about the role of criminal defense lawyer during the police detention stage in the Criminal Procedure Code?
  - Are there professional regulations of the role of criminal defense lawyer during police detention, and if yes, by whom are they issued, and what are they?
  - What is the role of ECHR case law governing the role of the criminal defense lawyer during the police detention stage?

##### *4.2.1. The official regulation of the lawyers' role at police stations*

- (a) What are the rights and obligations of criminal defense lawyers during the police detention stage according to the official regulation sources (laws, jurisprudence, etc.)?
- (b) What are the functions of criminal defense lawyers during this stage, as described in the official regulation sources?
- (c) In particular:
- Do lawyers have the right to visit their client in detention, and is this right absolute or are there any limitations on the exercise of the right?
  - Do lawyers have the right of access to the case file and if yes, under which conditions: when does the right arise, are there limitations as to the scope of disclosure, etc.
  - Do lawyers have the right to be present at their client's interrogations, and under which conditions can this right to be exercised: e.g. may police deny the right of presence, is the right limited to certain categories of cases, etc.
  - If lawyers have the right to be present at their clients' interrogations, what can they do during the interrogation: e.g. pose questions to client, make remarks, ask for a time-out, check the interrogation record, etc.?
  - Does the national law allow/require the lawyer's participation in other investigative acts than suspect interrogations? Which acts, and under which conditions?
  - May limitations be imposed on the lawyer's ability to exercise their rights in certain situations (e.g. in terrorist cases, where the interests of investigation so require and so on), and if yes then what kind of limitations and by whom?
  - What are the legal avenues for lawyers or suspects to challenge the lawfulness of the arrest, if any?
- (d) What is the official position (as formulated to e.g. in policy documents issued by the Ministry of Justice, Government or Parliament) regarding the role of lawyers during the police detention stage? E.g. is it to

ensure procedural correctness, contribute to truth-finding, or else? Is the lawyer's adversarial function officially recognized?

- e) Are there gaps and discrepancies of the national legislation with the Roadmap on procedural rights of suspects and the draft Framework directives on procedural rights of suspects?

#### 4.2.2. *Professional regulation and culture of legal advice of suspects in police detention*

- (a) Are there professional rules governing the role of lawyers during the police detention stage, and if yes what do they entail? In particular:
  - Are there specific ethical norms or rules of conduct applicable at this stage, and what are these norms or rules?
  - In this jurisdiction, does the lawyer have the right to represent two suspects in one case if there is a conflict of interest (i.e. defense of one of the suspects may harm the interests of another)?
  - Are the rights, obligations and functions of criminal defense lawyers during the police detention stage explicitly specified, and if yes what are they?
  - Is the role of a lawyer during police interrogation of a suspect defined, and if yes then how?
  - How are the professional regulations of the role of lawyers during the police detention stage enforced?
- (b) Is there any empirical research regarding the culture of criminal defense lawyers in general, or of legal advice of suspects in police detention in particular? What were the findings of such research on key characteristics of such culture?

### 4.3. Legal assistance at police stations

- (a) What are the normative sources (laws, jurisprudence, professional regulation documents, protocols, ministerial decrees, etc.) that regulate the provision of police station legal assistance?

#### 4.3.1. *Organization of provision of legal assistance at police stations*

- (a) How is the provision of police station legal advice organized?
- (b) Which bodies or institutions are involved in the organization of police station legal advice? What are the functions of the various institutions?
- (c) Is service provision centralized or organized locally?
- (d) What are the modalities of the provision of the service: e.g. is there a duty lawyer scheme? Is it operational 24hr/7 days a week? Where are the lawyers based?
- (e) How is the service delivery managed? E.g. is there a contract with individual providers? Who are the providers – individual lawyers or firms, or both? Do lawyers and/or firms have to meet any requirements to be able to provide police station legal advice services, and if yes what are they?
- (f) How is the service provided on a day-to-day basis? E.g. is there a roster of on-duty lawyers, and if yes by whom and how is it drawn up? How is the referral of cases from police station to the particular lawyers managed: e.g. is there an intermediary to manage the referrals (e.g. a call center)?
- (g) Is police station legal advice free of charge for all suspects, or does this depend e.g. on the suspect's financial status or the category of the case?
- (h) What forms of legal advice are available, e.g. a personal visit, advice by phone, by videoconferencing, etc.? Who decides what form of advice will be provided in a particular case, and based on which criteria?
- (i) Is there any empirical evidence as to how the provisions related to the organization of police station legal aid work in practice?

*The following statistical information should be included in this Section, if available:*

- *The number of providers registered for the provision of police station legal advice, broken down by type and size (if law firms) of provider, if available*
- *The total number of appointments for the provision of police station legal advice compared to the total number of suspects detained at police stations during one year (most recent available)*
- *The proportion of police station legal advice provided in person as compared to the advice provided by other means, such as e.g. telephone or video-conference (most recent year available)*

#### *4.3.2. Procedures related to provision of legal assistance at police stations*

- (a) What documents regulate provision of legal aid at police stations: from the moment of notification of the suspect on the right to legal aid, appointment and involvement of a lawyer to the end of provision of such aid? Who adopts these regulations?
- (b) Who (and in what manner) informs the clients on the right to legal aid? Is such information provided in written form? Are the suspects informed on the consequences of benefiting/waiving this rights? Is there a regulation on the waiver of legal aid during apprehension, and if so, what is its content? Is the fact of waiver and reasons thereof recorded?
- (c) Is the suspect always required to request a lawyer, or are there circumstances for automatic provision of legal aid (mandatory)?
- (d) What happens following the suspect's request for legal aid? Who is responsible for finding and involving a lawyer? Do the law enforcement bodies have an obligation to ensure provision of legal assistance? How serious is the scale of these obligations?
- (e) Do all suspects have the right to a lawyer of their choice? Does it depend on whether the legal aid is provided free of charge?
- (f) Are there requirements on the time when legal assistance has to start? What happens in case of delay? E.g., can law enforcement officials conduct an interrogation of a suspect?
- (g) Are there limitations on duration of consultations with the client or number of visits?
- (h) What is the procedure for confirming and recording the fact of legal aid provision?
- (i) Is there any empirical evidence as to how the provisions related to the organization of legal aid provision at police stations work in practice?

*The following statistical information should be included in this Section:*

- *Request rates for police station legal aid*
- *Rates of provision of police station legal advice after it has been requested*
- *Average times within which legal assistance at police station is provided*
- *Average duration of the client-lawyer consultation at police station and by telephone (videoconferencing)*

#### *4.3.3. Professional standards and quality of police station legal assistance*

- (a) Do only qualified lawyers have the right to provide police station legal assistance, or can also other persons provide such assistance (e.g. apprentices, certified representatives, etc.)?
- (b) What are the minimum qualification requirements for the provision of police station legal advice, if any, how and by whom are they developed and enforced?
- (c) Are there specific quality standards or minimum quality criteria for police station legal advice, and if yes how and by whom are they developed and enforced?

- (d) What is the procedure for replacement of a legal advisor, if any (e.g. if clients asserts that the quality of assistance is unsatisfactory)?
- (e) Is there a complaints mechanisms for suspects who are dissatisfied with the quality of police station legal advice, and if yes what is it? Are the decisions of such complaints published?
- (f) Is there any empirical evidence as to how the arrangements related to the quality of police station legal advice operate in practice?

#### 4.4. Criminal legal aid

- (a) What are the normative sources (laws, jurisprudence, professional regulation documents, ministerial decrees, etc.) regulating the organization and provision of criminal legal aid?

##### 4.4.1. *The organization of criminal legal aid*

- (a) Is there an institution that has overall responsibility for (criminal) legal aid? What is its status and functions?
- (b) How is the provision of legal aid in criminal cases organized, e.g. through the private bar, through a public defender service, etc.?
- (c) If the provision of legal aid in criminal cases is organized through the private bar, what are the organizational arrangements, e.g., restrictions on which lawyers/firms can provide legal aid services?
- (d) What are the remuneration arrangements (e.g. whether lawyers are compensated in accordance with the number or cases/hours dedicated to cases)?

##### 4.4.2. *The scale and eligibility criteria for criminal legal aid in general*

- (a) Is criminal legal aid available for all categories of cases, or are certain types of cases excluded from the legal aid scheme? If there is a merits test, how does it operate? E.g. who takes a decision whether the case is worthy of funding under the legal aid scheme, and based on what criteria?
- (b) Are all suspects eligible for criminal legal aid, or are there specific conditions, e.g. financial status or special vulnerability? If there is a means test, how is it administered? E.g. who takes a decision, what evidence of financial status is required?
- (c) Are there partial and full legal aid awards depending on the financial status of the suspect, and if yes how is the contribution due from the suspect determined? May suspects be requested to subsequently repay the costs of legal aid provided, and if yes then under which conditions?
- (d) Is there any empirical evidence as to how the procedure for determining eligibility for legal aid, collecting suspects' financial contributions and/or ex post facto repayment of legal aid costs operate in practice?

*The following statistical information should be included in this Section:*

- *The total number of persons who received (or were found eligible) for criminal legal aid compared with the total number of suspects/accused during one year (most recent year available)*
- *The percentage of population eligible for criminal legal aid*
- *The financial threshold for receiving full or partial legal aid compared with the average national income and the average national minimum living cost.*

##### 4.4.3. *Remuneration of police station legal advice work*

- (a) What is the procedure of state budget allocations for legal advice at police stations? Which institutions take decisions on the scale of funding and in accordance with what criteria?

- (b) What institutions are responsible for management of funds for legal advice at police stations? Are these institutions also in charge of transferring payments for legal firms/lawyers providing legal aid?
- (c) What are the arrangements for compensations of legal aid service in police stations, i.e. whether compensation takes place in accordance with invoices provided by lawyers/firms or in another form? Are these invoices verified and, if so, in what way? Can the institution organizing payment take a decision that the compensation amount in the invoice is unjustified? Is there a procedure for challenging this decision?
- (d) Is there any existing evidence on how the system of remuneration works in practice?

*The following statistical information should be included in this Section:*

- *The overall budget expenses for legal advice at police stations (the most recent statistics available) in relation to the general expenses for legal assistance in criminal cases.*

#### *4.4.4. Legal aid fees for work while the suspect is in police detention*

- (a) What are the normative sources for regulation of remuneration of police station legal advice work?
- (b) What are the remuneration arrangements, e.g. are there fixed fees or for the time spent? Does the amount of payment differ depending upon the type of case, experience of a lawyer, etc.?
- (c) How do levels of remuneration of police station legal advice compare with remuneration for privately funded cases?
- (d) What kind of work is covered, e.g. are travel expenses, fees for translation and interpretation, etc. paid in addition to the fee for the provision of legal advice?
- (e) Is there any existing evidence on how the system of remuneration works in practice, and how the level of remuneration is perceived by lawyers (e.g. as sufficient, too low, adequate, etc.)?

*The following statistical information should be included in this Section:*

- *The average (national or regional) fee for police station legal advice (most recent year available)*
- *The average payment per hour of police station legal advice work funding by legal aid, if available/possible to calculate compared to the average fee per hour of work in private criminal practice.*

#### *4.4.5. Professional attorneys and criminal legal aid*

- (a) Is there empirical evidence showing the categories of lawyers who provide criminal legal assistance? Are these young or experience lawyers? Are individual practitioners or do they mostly belong to (specialized or non-specialized) firms?
- (b) Is there research available on how lawyers/specialized firms in criminal cases depend on the budget allocations for legal aid in criminal cases?

## POLICE STATION CASE LOG FORM

Researcher: \_\_\_\_\_ Research case ref N°: \_\_\_\_\_ Country: \_\_\_\_\_

### I. GENERAL INFORMATION

NOTE: IF ANY OF THE REQUESTED INFORMATION IS NOT AVAILABLE TO YOU, PLEASE LEAVE THE RESPECTIVE FIELD(S) BLANK

1. Town: \_\_\_\_\_ 2. Internal affairs body: \_\_\_\_\_

3. Suspect's name (code): \_\_\_\_\_

4. Nationality: \_\_\_\_\_ 5. Age: \_\_\_\_\_ 6. Gender: ♂ ♀

7. Special vulnerability<sup>1</sup>: a. YES / NO b. Which: \_\_\_\_\_

8. Medical condition: a. YES / NO b. If there are signs of poor medical conditions, which: \_\_\_\_\_

9. Suspect speaks/understands local language: YES / NO / unknown

10. Can suspect: a. Читати: YES / NO / unknown b. Write: YES / NO / unknown

11. Has the suspect been arrested before: a. Never / occasionally / often / unknown

### II. APPREHENSION

12. Apprehension<sup>2</sup>: \_\_\_\_\_ Date (actual): \_\_\_\_\_ Time (actual): \_\_\_\_\_

13. Brought to the station: \_\_\_\_\_ Date: \_\_\_\_\_ Time: \_\_\_\_\_

14. Grounds for apprehension: \_\_\_\_\_

15. Report on apprehension drawn up: Date: \_\_\_\_\_ Time: \_\_\_\_\_

17. Time indicated in the report: Date: \_\_\_\_\_ Time: \_\_\_\_\_

18. Change in suspect status<sup>3</sup>: a. YES / NO / unknown b. Which: \_\_\_\_\_

19. Place of actual apprehension: \_\_\_\_\_

20. First communication with IAB officials: Date: \_\_\_\_\_ Place: \_\_\_\_\_ Time: from \_\_\_ to \_\_\_

21. What was the service with which the first communication took place: \_\_\_\_\_

### III. PROCEDURAL SAFEGUARDS

A. Right to information

22. Information on procedural rights provided: a. Orally: YES / NO / unknown

b. In written form: YES / NO / unknown c. In the proper form YES / NO

23. Information on procedural rights provided: on apprehension / on drawing up a report on apprehension at the police station/ during interrogation / another time / not provided / unknown

24. Suspect was informed about grounds for apprehension: YES / NO / not applicable / unknown

- 
25. Suspect was informed about the suspected offence: *YES / NO / unknown*
- 
26. Suspect was informed about the right to an attorney: *YES / NO / unknown*
- 
27. Suspect was informed about the right to legal aid: *YES / NO / unknown*
- 
28. Suspect was informed about the right to translation: *YES / NO /not applicable / unknown*
- 
29. Suspect was informed about the right to silence: *YES / NO / unknown*
- 
30. Suspect was informed about the right to visitation: *YES / NO / unknown*
- 
31. Suspect was informed about the right to access to relevant documents<sup>4</sup>: *YES / NO / unknown*
- 

*B. Right of access to an attorney*

- 
32. Was legal assistance mandatory: a. *YES / NO / unknown* b. If yes, reasons:
- 
33. Did the suspect request an attorney: a. *YES / NO / unknown* b. Reasons:
- 
34. Was the decision regarding access to legal assistance recorded: *YES / NO / unknown*
- 

***If legal assistance was requested or was mandatory***

- 
35. Was attorney contacted: a. *YES / NO / unknown* b. By whom:
- 
36. Delay in contacting attorney: a. *YES / NO* b. How long: c. Reasons:
- 
37. Did the suspect consult with an attorney: *YES (in person) / YES (in person and by telephone) / NO / unknown*
- 
38. If the suspect did consult with an attorney:  
Was the attorney: a. *A contracted attorney/ Appointed by the FSLA Center/ other/ unknown*
- 
39. Did a consultation with the attorney take place before the first police interrogation at the IAB: *YES / NO / unknown / not applicable*
- 
40. Was the attorney present at interrogation: *At all interrogations / at some interrogations (where there was more than one) / was absent / unknown / not applicable*
- 
41. If the attorney was absent at interrogation, why:
- 

- 
42. Length of consultation before the first interrogation:
- 
43. Replacement of an attorney: a. *YES / NO / unknown* b. Number of times c. Reasons
- 

*C. Right to medical assistance – If the suspect had certain medical needs (see question 9)*

- 
44. Was medical assistance provided: *by a doctor chosen by the suspect / by a doctor chosen by the police / doctor was not provided / unknown*
- 
45. Delay in contacting doctor: a. *YES / NO* b. How long: c. Reasons:
- 

*D. Special protection for children and other vulnerable groups – If the suspect was a child or representative of a vulnerable group (see question 8)*

- 
46. Were there special arrangements: *an independent adult or parent invited / doctor invited / other action was taken (specify below) / no action was taken / unknown*
- 

*E. Right to benefit from interpretation and translation – If the suspect did not speak and/or understand the language of criminal proceedings, or only partially did so (see question 10)*

- 
47. Was the suspect notified of their procedural rights in an appropriate language: *YES / NO / unknown*
- 
48. Was translation provided at interrogation: *YES (in person) / YES (by telephone) / NO / not applicable / unknown*
-

---

#### IV. INTERROGATION

---

49. Was the suspect interrogated: a. YES / NO                      b. If YES, how many times:
50. The interrogation was recorded: *in writing (verbatim record) / in writing (summarized) / electronically (audio, audio and video)/the suspect wrote down the testimony/ not recorded / unknown / not applicable*
51. Suspect was informed of the right to silence at beginning of interrogation: YES / NO / unknown / not applicable
52. a. Whether the suspect appeared to understand the meaning of the right to silence: YES / NO / unknown / not applicable  
b. If NO, did the investigator explain its meaning to the suspect: YES / NO
53. Did the suspect: *answer all questions / answer some questions / not answer questions / make an oral statement / make a statement in writing / not applicable*
54. The report: a. Was signed by the suspect YES / NO    b. Did the suspect object<sup>5</sup>: YES / NO  
c. Did the attorney object<sup>6</sup>: YES / NO / not applicable  
d. If YES in b or c, were they taken into account<sup>7</sup>: YES / NO
- 

#### V. CASE PROGRESS/OUTCOME

---

55. Whether there is information about the outcome of apprehension: *suspect released without formal action / OUT-OF-COURT sanction imposed / criminal proceedings initiated (suspect in THF) / criminal proceedings initiated (suspect released pending court appearance) / unknown*
56. Overall time in police custody before being presented with the notice of suspicion (proceedings formally commenced):
- 

*Comments and notes on the case, case files or other matters:*

---

---

<sup>1</sup> Children under 18 years of age or adult suspects with mental disabilities and/or psychiatric disorders that prevent them from understanding the meaning of their right and questions they are asked.

<sup>2</sup> That is, detained in the street or at the internal affairs unit where s/he had arrived voluntarily or as a witness.

<sup>3</sup> For example, initially questioned as a witness before being treated as a suspect, or initially arrived voluntarily and was later apprehended.

<sup>4</sup> That is, information relevant to the determination of the lawfulness of arrest or detention.

<sup>5</sup> Except for corrections and formal errors.

<sup>6</sup> Except for corrections and formal errors.

<sup>7</sup> That is, whether they were recorded in the report on interrogation, or whether the report was amended.

## POLICE INTERVIEW FORM

1. Thinking about suspects (i.e. persons arrested and apprehended persons in custody at police stations on suspicion of having committed a criminal offence), what major changes have taken place in the past year or two? What do you think about those changes?

### Right to information

2. Do you think that generally suspects know what their rights are? How do they get to know about them?
3. Have you ever provided a suspect or their lawyer with information from the case-file (evidential material obtained by the police)? How do you decide what information to give, and when to give it?

### Right to interpretation and translation

4. How do you decide whether a suspect needs interpretation or translation?
5. What do you think about the current procedure used by law enforcement for providing interpretation?

### Right to legal assistance

6. According to Article 42§ (3) (3) of the Criminal Procedure Code of Ukraine, the suspect has the right to assistance by an attorney prior to and during interrogation at the internal affairs body. In your experience, are the suspects always advised on this right? Do you think that “vulnerable” suspects (juveniles, suspects with mental disabilities etc.) make an informed decision on exercising the right to an attorney?
7. What is your opinion about the procedure for providing access to a lawyer?
8. What is your opinion about the role played by defense lawyers at the stage of apprehension?

### Right to silence

9. What is your opinion about the right to silence? How do you respond if a suspect indicates that they do not wish to answer questions at interrogation?
  - 9.1. What information do you wish and try to receive during the first interrogation of an apprehended person?
  - 9.2. Do you explain (clarify) to the interrogated person the subject-matter of interrogation (ABOUT WHAT or WHOM you wish to receive testimony)?
  - 9.3. Do you check accuracy and verity of the person’s testimony during interrogation? If so, in what ways, methods and tactics?

### Right to medical assistance

10. How can you tell whether the suspect needs medical assistance? What is your response in these cases? In your opinion, is it your duty to ensure provision of medical assistance to suspects?

### Children and “vulnerable” suspects

11. Do law enforcement agencies have specific procedures for children and “vulnerable” suspects and how do they work in practice?
12. Do you think that children, and “vulnerable” suspects, are able to make an informed choice about whether to exercise the right to a lawyer and/or other rights and guarantees?

Suspects with medical needs

13. Do you think that suspects who have medical needs whilst in police custody are able to access appropriate medical assistance?

General attitude to suspects' rights

14. Do you think that suspects should be informed of their rights? What do you think about the rights that suspects now have?

Information about interviewee

15. Describe your status and role

16. What is your work experience at the bodies of internal affairs?

Date of interview:

Interviewee reference number:

## ATTORNEY CASE LOG FORM

Researcher:

Research Case ref N°:

Country:

### I. CASE DETAILS

1. Name of attorney (possible – code):

2. Attorney acting as: a. *contracted attorney* b. *public defender (from a center for free secondary legal aid)*

3. Suspect reference N° (code):

4. Nationality:

5. Age:

6. Gender: ♂ ♀

7. Special vulnerability<sup>1</sup>: a. *YES / NO / unknown*

b. Which:

8. Medical condition<sup>2</sup>: a. *YES / NO / unknown* b. Which:

9. Suspect speaks/understands language of criminal proceedings: *YES / NO / partially / unknown*

10. Can the suspect: a. *Read: YES / NO / unknown*

b. *Write: YES / NO / unknown*

11. Has the suspect been arrested before: *NEVER / OCCASIONALLY / OFTEN / unknown*

12. Case-work is paid for: a. *by the client* b. *by the state* c. *pro bono*

13. Client is: a. *new client* b. *existing client* c. *former client*

14. Client is: a. *apprehended (detained)* b. *Voluntarily taking part in interrogation as suspect*

c. *Voluntarily taking part in interrogation as witness* d. *other (specify)*

15. Criminal or administrative offences that the client is suspected of committing:

### II. INITIAL CONTACT

16. Notification by: a. *police* b. *FSLA center* c. *client* d. *third party* e. *prior arrangement* f. *other*:

17. Attorney contacted by: a. *telephone* b. *in person* c. *other*

18. Information given about case on initial contact: a. *YES / NO* b. *If YES, specify*

19. 19. Delay between actual apprehension and notification of the center for free secondary legal aid:

a. *YES / NO / unknown*

b. *How long:*

c. *Reason:*

20. Delay between actual apprehension and notification of close relatives, family members or other persons of the client's choice on apprehension and whereabouts of the apprehended person::

a. *YES / NO / unknown*

b. *How long:*

c. *Reason:*

---

21. Who performed such notification:  
a. *apprehended person him/herself*  
b. *competent official (indicate title)*

---

22. First contact with the client by: a. *telephone* b. *in person* c. *other*

---

23. Did the attorney attend on client at police station/THF: a. *YES / NO / not applicable (NA) / unknown* b. If NO, why:

---

**Sections III to VII only apply if the lawyer did attend on the client at the police station/THF.**

---

### III. ATTENDANCE AT POLICE STATION

---

24. Delay in attending police station:  
a. *YES / NO*  
b. *How long:*  
c. *Reason:*

---

25. Attorney viewed case file: a. *YES / NO* b. If NO, reason:

---

26. Attorney checked the followin<sup>3</sup>:  
a. special vulnerability *YES / NO / not applicable<sup>4</sup> / unknown*  
b. medical condition *YES / NO / NA / unknown*  
c. Knowledge of the language of criminal proceedings *YES / NO / NA / unknown*  
d. Ability to read and write *YES / NO / NA / unknown*

---

27. Did the attorney ask about reason(s) for arrest/apprehension: *YES / NO / NA / unknown*

---

28. Did the attorney ask for information about suspected criminal /administrative offence(s):  
*YES / NO / NA / unknown*

---

29. Was the attorney given information about suspected criminal /administrative offence(s):  
*YES / NO / NA / unknown*

---

30. Did the attorney verify the time of actual apprehension: *YES / NO / unknown / NA*

---

### IV. FIRST CONSULTATION WITH CLIENT

---

31. Did the attorney consult with client before first interrogation: a. *YES / NO*  
b. If NO, reasons:

---

32. Was consultation private: *YES / NO / NA / unknown<sup>5</sup>*  
b. duration of consultation:

---

33. Did the attorney check with the client:  
a. whether they have special vulnerability or are a child<sup>6</sup>: *YES / NO / NA<sup>7</sup> / unknown*  
b. health condition: *YES / NO / NA / unknown* In what manner?  
  
c. Knowledge of the language of criminal proceedings: *YES / NO / NA / unknown* In what manner?  
  
d. Ability to read and write: *YES / NO / NA / unknown*  
e. knowledge of reasons for arrest: *YES / NO / NA / unknown*

---

- 
34. If client is vulnerable or a child or underage, did the attorney take action to ensure that appropriate action was taken by IAB: *YES / NO / Not necessary<sup>8</sup> / NA<sup>9</sup> / unknown*
- 
35. Did the attorney explain his/her role: *YES / NO / NA / unknown*
- 
36. Did the attorney take client's wishes/instructions<sup>10</sup>: *YES / NO / NA / unknown*
- 
37. Did the attorney advise on client's legal position: *YES / NO / NA / unknown*
- 
38. Did the attorney advise client on behavior during interrogation: *YES / NO / NA<sup>11</sup> / unknown*
- 
39. Did the attorney make a written record of consultation: *YES / NO / NA / unknown*
- 

#### **V. RIGHT TO AN ATTORNEY AND LEGAL AID**

- 
40. Did the attorney advise the client on right to legal aid, including at the state's expense:  
*YES / NO / NA<sup>12</sup> / unknown*
- 
41. Did the attorney advise on right to have counsel present at interrogation: *YES / NO / NA<sup>13</sup> / unknown*
- 

#### **VI. RIGHT TO SILENCE**

- 
42. Did the attorney explain implications of remaining silent: *YES / NO / NA / unknown*
- 
43. Did client choose to remain silent: *YES / NO / UNCLEAR*
- 
44. Did the attorney advise client regarding the conduct at interrogation: a. *YES / NO*  
b. If Yes, what advice was given:
- 

#### **VII. RIGHT TO INTERPRETATION / TRANSLATION**

- 
45. Did the attorney explain the right to interpretation/translation: *YES / NO / NA<sup>14</sup>*
- 
46. Was an interpreter provided: *YES / NO / NA*
- 
47. Was client/lawyer communication interpreted: *YES / NO / NA*
- 
48. Did the attorney make statements/objections on interpretation/translation: a. *YES / NO / NA*  
If YES b. specify nature of statements and outcome:
- 

#### **VIII. INTERROGATIONS**

- 
49. Was the attorney present in the first communication (any conversation about the case with a police official): *YES / NO / NA*  
if NO, why:
- 
50. If there was more than one interrogation, was the attorney present during:  
a. *ALL / SOME / NONE*  
b. If SOME or NONE, why:
- 
51. Did client answer police questions: a. *YES (some) / YES (all) / NO*
- 
52. Did the attorney take a record of interrogation: a. *YES / NO*  
b. If YES: *in WRITING / with AUDIO (other) DEVICES*
- 
53. Did the attorney take active part in interrogation<sup>15</sup>: a. *YES / NO*  
b. *It was requested/initiated by: CLIENT or ATTORNEY*
- 
54. If yes in q.53, describe how:
-

---

## IX. CASE PROGRESS/OUTCOME

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55. Outcome of police detention at the IAB:  
*SUSPECT RELEASED WITHOUT FORMAL ACTION / OUT-OF-COURT SANCTION IMPOSED / CRIMINAL PROCEEDINGS INITIATED (suspect in custody) / CRIMINAL PROCEEDINGS INITIATED (suspect released pending court appearance) / REPORT ON ADMINISTRATIVE OFFENSE / unknown*
- 
56. Did lawyer submit applications/protest motions (objections, complaints) or negotiate with the law enforcement officials about the outcome: a. YES / NO / NA<sup>16</sup>  
b. If YES, explain<sup>17</sup>:
- 

---

<sup>1</sup> A child is a suspect who is, or who appears to be, under 18 years of age. A vulnerable suspect is a suspect who has or may have the following characteristics:

- Mental illness;
- Mental disorder or learning difficulties;
- Physical or sensory disability, for example, hearing/serious visual impairments;
- Inability to read or write, or a serious speech impediment;
- Drug addiction/insulin dependence/is an SMT patient.

<sup>2</sup> That is, they have or may have a medical condition that hinders their understanding or effective participation and/or for which they need medical assistance or medication whilst they are in police detention.

<sup>3</sup> Answer YES only if lawyer does more than merely checking information on the custody record, e.g. asks questions to the law enforcement officials.

<sup>4</sup> Not applicable, only when it is clear that the client does not have a special vulnerability.

<sup>5</sup> E.g. because there was no consultation before the first police interrogation.

<sup>6</sup> A child is a suspect who is, or who appears to be, under 18 years of age. A vulnerable suspect is a suspect who has or may have the following characteristics:

- Mental illness;
- Mental disorder or learning difficulties;
- Physical or sensory disability, for example, hearing/serious visual impairments;
- Inability to read or write, or a serious speech impediment;
- Drug addiction/insulin dependence/is an SMT patient

<sup>7</sup> For example, if it is clear that the client is not a child and does not have a special vulnerability.

<sup>8</sup> For example, because the police had already taken appropriate action.

<sup>9</sup> For example, because the client was not a child, and did not have special vulnerability.

<sup>10</sup> That is, the client's version of events.

<sup>11</sup> For example, if interrogation was not planned.

<sup>12</sup> E.g. if the client is clearly ineligible for legal aid.

<sup>13</sup> E.g. because the client does not have a right to have an attorney present during an interrogation.

<sup>14</sup> E.g. because it was clear that the client did not need an interpreter/translation.

<sup>15</sup> E.g. by asking questions of police, by requesting to stop the interrogation etc.

<sup>16</sup> E.g. if there was clearly no need for the lawyer to submit applications/objections, because, for example, it was a good outcome from the client's perspective, or because the outcome obviously followed from the circumstances of the case.

<sup>17</sup> For example, the lawyer tried to persuade the police that the case was suitable for a prosecution/court sanction, or the lawyer argued that their client should be released etc.

## ATTORNEY INTERVIEW FORM

1. Thinking about suspects (i.e. persons arrested or apprehended who are detained at police stations on suspicion of having committed a criminal offence), what major changes have taken place in the past year or two? What do you think about those changes?

### Right to information

2. Do you think that generally suspects know what their rights are? How do they get to know about them?
3. In your experience, do the police generally provide sufficient information to you:
  - 1) about the grounds for your client's arrest;
  - 2) about the evidential materials at their disposal? How do you obtain such information?

### Right to interpretation and translation

4. In your experience, how do the arrangements for identifying a suspect's need for interpretation or translation work in practice? Have you ever had a situation where you thought that a client at the police station needed interpretation or translation, but this was not identified by the police? If so, how did you deal with this?
5. What do you think about the current procedure for providing interpretation by the law enforcement bodies? Does interpretation ensure observance of the clients' rights to full extent?

### Right to legal assistance

6. According to Article 42§ (3) (3) of the Criminal Procedure Code of Ukraine, the suspect has the right to assistance by an attorney prior to and during interrogation at the internal affairs body. In your experience, are the suspects always advised on this right? Do you think that "vulnerable" suspects (juveniles, suspects with mental disabilities etc.) make an informed decision on exercising the right to an attorney?
7. What is your opinion about the arrangements for providing access to a lawyer to suspects in custody?
8. How do you decide whether to:
  - 1) attend on a client at the police station for individual consultation;
  - 2) whether to attend during interrogation at the IAB?
9. Can you tell what difference you think your presence makes at the place of apprehension/police station?
10. In your experience, what is opinion of law enforcement officials on the role of the defense attorney during the stage of apprehension?

### Right to silence

11. In your experience, do suspects understand what is meant by the right to silence? How do you decide whether to advise a client to remain silent during a police interrogation? How often do you give such advice?

### Right to medical assistance

12. What is your opinion about the current procedure for providing apprehended persons with medical assistance? In your experience, how often does such need arise? How do police officials respond in these situations? What measures have you taken to ensure your clients' right to medical assistance? What common issues have you encountered?

Children and “vulnerable” suspects

13. Do law enforcement agencies have specific procedures for children and “vulnerable” suspects and how do they work in practice?

Information about interviewee

14. Describe your status and role.

16. How many years of experience do you have as an attorney lawyer/in the legal field/in the system of free secondary legal aid?

Date of interview:

Interviewee reference number:

**HUMAN RIGHTS  
BEHIND CLOSED DOORS**

«Procedural Safeguards  
for Apprehended Persons»  
Study Report