Evaluation Report

on

Area of Intervention 9.1. Enhanced Fairness Through Development of Procedural Safeguards for Defence

Jeremy McBride
International Expert, Council of Europe Consultant
Yurii Bielousov
National Expert, Council of Europe Consultant

October 2019
Kyiv

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EXPERTISE FRANCE

PRAVO-JUSTICE

HUMAN RIGHTS COMPLIANT CRIMINAL JUSTICE SYSTEM IN UKRAINE
COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

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INTRODUCTION

The Report has been developed as a part of the overall JSRSAP evaluation exercise by the PJ and Council of Europe Project Human Rights Compliant Criminal Justice System in Ukraine experts with the support of the project teams. It concerns the results of an assessment carried out by Jeremy McBride acting as international expert, Council of Europe consultant[1], and Yuriy Belousov as national expert, Council of Europe Consultant.[2] It has been conducted with regard to JSRSAP Area of Intervention 9.1. Enhanced Fairness Through Development of Procedural Safeguards for Defence[3] in accordance with the tailored, evaluation area(s)-specific methodology.[4]

The evaluation has been conducted in accordance with the area-specific methodology (Matrix)[5] designed on the basis of the relevant template developed for the purposes of the Exercise in issue. It was carried out and benefited from support provided by the PJ team and valuable co-operation extended by the General Prosecutor's Office, other stakeholders individual experts and legal professionals met or interviewed for the purposes of evaluation concerned.

The Report has been drafted according to the uniform table of content and technical template. Its sections are internally structured according to the blocks of outcomes, as they have been grouped for the evaluation purposes in the attached methodological Matrix. Key points and important findings are highlighted (underlined) in the text. As a rule, they are followed by recommendations that are formulated in bold and recapitulated at the end of the Report accordingly.

1 Barrister, Monckton Chambers, London, Visiting Professor, Central European University and Council of Europe expert, international consultant under the Council of Europe project "Human rights compliant criminal justice system in Ukraine", implemented within the Council of Europe Action Plan for Ukraine 2019-2021.
2 PhD in sociology, lawyer, Executive Director of the Expert Center for Human Rights.
3 The part of the Action Plan under consideration are attached to this report. See Annex III.
4 See the assessment-specific activities matrix attached.
5 See the assessment-specific activities matrix attached.

ABBREVIATIONS

CC	Criminal Code
CPC	Criminal Procedure Code
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
JSRSAP	Justice Sector Reform Strategy and Action Plan of Ukraine for 2015-2020
MT	JSRSAP monitoring tool
NABU	National Anti-Corruption Bureau of Ukraine
PJ	EU funded Project Support to Justice-related Reforms in Ukraine (PRAVO-JUSTICE)
PPO	Public Prosecutor's Office
PPO Law	Law on the Public Prosecutor's Office
SBI	State Bureau of Investigation
SBU	Security Service of Ukraine

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BASELINE

Overall state of affairs

1. The adoption of the new CPC in 2012 established a framework for criminal justice that embodied an adversarial system and sought to secure rights for the defence at all stages of criminal proceedings in line with the requirements of European standards.
2. However, in the first few years following its entry into force, the expectations raised by the CPC were not entirely fulfilled, partly because of shortcomings concerning certain aspects of its provisions but primarily on account of cultural, institutional and organisational failings within the judiciary, law enforcement bodies and the prosecution which had not also been addressed in a manner that ensured that the requirements of the new criminal justice system could be properly realised.

9.1.1 Development of pre-trial procedural safeguards for defence

Role of the judge (court)

3. The position of the investigative judge and the scheme of plea bargaining were new elements introduced into the criminal justice system by the CPC. The former was intended to ensure a fairer (and more effective) pre-trial procedure and also to be the means of making great use of alternative measures to detention on remand. The latter was intended to reduce the need for cases to go to trial while ensuring that the conviction of accused persons pursuant to this scheme would still be governed by a fair procedure.
4. However, neither of these elements has at their introduction been entirely satisfactory.
5. This is attributable to there being:
   - Insufficient control exercised over compliance with the requirement to enter information in the Unified Register of Pre-trial Investigations, the conduct of investigative actions and the possible use of ill-treatment of suspects by law enforcement officials.
   - insufficient steps being taken to ensure that the procedural rights of the defence are respected, especially as regards the right to refuse to provide an explanation with regard to a suspicion and to refuse to answer questions;
   - Insufficient use being made of the scope for employing alternative measures to detention on remand;
   - Insufficient steps being taken to ensure fairness in the conduct of plea bargaining procedures; and
   - The absence of clear and precise regulation by the CPC of the detention of an accused following the completion of the investigation[6]).[7]

[6] The automatic extension of detention on remand without a court order between the end of the investigation and the beginning of the trial was found to violate Art. 5(1) of the ECHR by the ECtHR in cases such as Chanyev v. Ukraine, no. 46193/13, 9 October 2014 and Ignatov v. Ukraine, no. 40583/15, 15 December 2016, whose execution is still under consideration by the Committee of Ministers of the Council of Europe (see https://hudoc.exec.coe.int/eng#{"EXECIdentifier":["004-46503"]}) .

[7] See Report on an Evaluation of the Implementation of the Criminal Procedure Code of Ukraine, CoE Experts (2015; https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168044f56a) and Ukrainian Parliamentary Commissioner for Human Rights Special Report Concerning the Results of Pilot Monitoring of New Ukrainian Criminal Procedure Code Implementation by Kyiv Courts, Ombudsman of Ukraine (2015; https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680657b51).

Defendant's role

6. The importance of the adversarial nature of criminal proceedings in the right to a fair trial under the ECHR has made early access by a suspect to the assistance of a lawyer of critical importance in ensuring that he or she ultimately has a fair trial. This was one of the primary objects of the guarantees for suspects introduced by the CPC and the establishment of Regional Centres of Free Legal Aid.
7. However, at the outset of its implementation there were difficulties in securing such access on account of:
   - Insufficient knowledge on the part of suspects of their entitlement to it;
   - Various practices that led to it being either prevented entirely or allowed it in circumstances that was not always helpful; and
   - Inadequate practical arrangements for making legal aid lawyers available.
8. Moreover, legal aid lawyers did not always assert the right of suspects and the latter tended to lack confidence in both the competence and the independence of the former.[8]

Application of standards

9. Certainty in the way determinations are made as to whether or not particular requirements have been fulfilled is crucial for the rule of law. This is especially important where such determinations occur in the criminal justice system.
10. Nonetheless, the standard of proof can vary when considering particular requirements have been met but such a standard should be especially exacting where a conviction will follow. Appropriate guidance and effective supervision are thus both essential in order to eliminate or reduce the scope for arbitrary decision-making.
11. The CPC envisages investigators being guided by prosecutors and it elaborates various requirements that must be satisfied so that various measures can be taken in the course of the pre-trial investigation. However, the exercise of the supervisory role did not prove effective at the outset because this was undermined by uncertainty as to the precise scope of this role and the continuation of hierarchical direction over decision-making of individual prosecutors.
12. At the same time, investigators continued to use inadmissible techniques of interrogation and neither prosecutors nor investigators provided the courts with a proper basis for determining whether or not investigative actions should be taken and measures of restraint should be imposed.[9]

Notification system

13. The exercise of rights and, in particular, the taking of steps to resist measures which might be considered unwarranted is dependent upon the person concerned – or someone supposed to take action on his or he behalf - being aware that some action potentially prejudicial to his or her interests has been taken or, in some instances, not been taken. The CPC envisages that suspects be informed of various actions related to the pre-trial investigation of the offence concerned.

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8 *Ibid*.
9 *Ibid*.

14. However, it soon became apparent that the arrangements made to ensure that the relevant person was informed were not sufficient to ensure that the scheme established by the CPC would be realised.

15. In particular

- There was no coherent arrangement for ensuring how prosecutors learnt of the apprehension of a suspects;
- The issue of notices of suspicion could be delayed because it is wrongly being assimilated to the preparation of an indictment;
- There was no means of ensuring that suspects were being informed of their rights either at all or in an adequate manner;
- There were no means of ensuring that families and lawyers of apprehended persons learnt that this has occurred in a timely manner; and
- The requirements for summons to be served in the manner required by the Code were not being enforced.[10]

Plea and reconciliation agreements

16. Cases involving a reconciliation or plea agreement were made the subject of a simplified procedure in the CPC. Following its adoption, the numbers of cases involving them seemed to increase, with estimates ranging from one-sixth to just over one-third of cases in 2015.

17. There was, however, some doubt as to whether these agreements were always voluntary as a result of:

- The failure of the judge always to explain the right to a trial to the accused;
- The failure of the judge to check on the issue of voluntariness beyond asking the accused whether this was the case;
- The apparent issuing of threats in court to the accused by the prosecution regarding agreements concluded; and
- The absence of any mandatory requirement for defence lawyers to be present at the initiation of the conclusion of plea agreements.

18. The last problem was supposed to be addressed by an amendment to the CPC in 2015.[11]

9.1.2. Development of procedural safeguards for defence at trial

“Equality of arms” standard

19. Observing the equality of arms between the prosecution and the defence is a central aspect of the right to a fair trial under the ECHR.

20. Although this requirement was enshrined in the CPC, it quickly became apparent that its implementation could be undermined by:

- Accused persons not being aware or being informed of their procedural rights and obligations;

10 Ibid.
11 Ibid.

- The lack or apparent lack of impartiality on the part of judges in the conduct of proceedings;
- Accused persons being prevented from attending particular hearings;
- The inability of the defence to obtain the conducting of investigative measures that it considered relevant;
- The inability of the defence to obtain early disclosure of records of pre-trial investigation; and
- The failure of defence lawyers failing to attend particular proceedings or to advance points on behalf of their clients.[12]

Alternative trials

21. The jury is, according to the Constitution of Ukraine, a form of direct citizen's participation in administration of justice (Article 124). In 2012 the norm on jury participation in criminal proceedings was incorporated into the CPC, to be applied upon the motion of the defendant. The jury panel consists of two professional judges and three jurors (lay judges).
22. Preliminary analyses of the jury model being introduced indicated, that there were some aspects, which could negatively influence it effectiveness, such as:
    - The implemented model of mixed court significantly diminishes authority of lay judges and nullifies the purpose of jury as such. Since there are few lay judges and they do not act independently from professional judges, the influence and persistence of professionals may rather intimidate then persuade people who have minor or none experience in trial proceedings;
    - The jurisdiction of juries is limited just to life imprisonment cases;
    - The level of payment for jury work is extremely low;
    - There was no clear legislative procedure for selection of candidates for lay judges that could undermine the transparency of the selection process.[13]

E-tools and equipment

23. Observance of the publicity of the trial and its complete fixation by technical means are required by the Constitution of Ukraine (Article 129) as part of the basic principles of justice. The Law of Ukraine «On ensuring the right to a fair trial» of 12.02.2015, No. 192-VIII introduced several amendments to relevant legislation as to the recording of the trial process, including the norm giving the right to participants of the trial, other persons present in the courtroom, representatives of the mass media to hold a photo, video and audio recording in the courtroom with the use of portable video and audio equipment without a separate court authorization. Furthermore, legislation then prescribed an obligation for the court to make a full audio recording of the trial.
24. A number of measures have also been taken during this period to introduce e-tools in court activities such as introduction of the Unified State Register of Judgments; implementation of an automated system of court workflow, which also enabled the automatic

[12] Ibid.
[13] Jury in Ukraine, Voxlaw (20 July 2015), https://voxukraine.org/en/jury-in-ukraine/

division of cases between judges; Installment of the equipment for court hearings in video conference mode in all local and appellate courts of general jurisdiction in accordance with the requirements of Article 336 of the CPC. In 2012 the State Enterprise "Information Judicial Systems" developed the Concept of the Electronic Court of Ukraine and subsequently pilot projects were launched in several courts to test the "Electronic court" system.

25. In spite of all these developments, there continued to be a great need for further introduction of e-tools and informational technologies in court proceedings, including the full video recording of the trial, obligatory recording of interrogations, the spread of the "electronic court" system to courts all over the country and increasing the number of hearings with the help of video conferencing equipment.

9.1.3. Development of greater fairness and defence rights on appeal

Safeguards for defence

26. A right of appeal is required in respect of many but not all criminal proceedings by Article 2 of Protocol No. 7 to the ECHR. There are also extensive provisions dealing with appeals in the CPC which are consistent with the right in Protocol No. 7.

27. However, although there are extensive provisions in the CPC concerning appeals as regards both rulings of investigative judges and convictions, it has become apparent that the effectiveness of some of them can be affected by factors such as their scope or by practice.

28. These problems include:

- The holding of hearings in the absence of prosecutors or investigators whose decisions were the object of the appeal;
- The impossibility or failure to bring the suspect, accused to the hearing from a place of detention;
- Technical problems relating to videoconferencing facilities; and
- The passivity of defence lawyers in advancing issues relating to the appeal.[14]

Appeal powers for Prosecution

29. The CPC doesn't limit the range of court decisions that may be appealed by the prosecutor or the grounds for such appeal, except for court judgments based on agreement or conciliation

30. Moreover, prosecutors of higher level have the right to appeal irrespectively of their participation in the trial.

[14] See Report on an Evaluation of the Implementation of the Criminal Procedure Code of Ukraine, CoE Experts (2015; https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168044f56a) and Ukrainian Parliamentary Commissioner for Human Rights Special Report Concerning the Results of Pilot Monitoring of New Ukrainian Criminal Procedure Code Implementation by Kyiv Courts, Ombudsman of Ukraine (2015; https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680657b51).

Appeal powers for victims

31. The CPC also provides victims with a wide range of procedural rights at the pre-trial and trial stages, including the right to present evidence to the investigator, the prosecutor, the investigating judge, the court; to give explanations, testimony or refuse to give them; to challenge the decision, actions or omissions of the investigator, prosecutor, investigating judge, court; for compensation of damage caused by a criminal offense in the manner prescribed by law; to get acquainted with the materials directly related to the criminal offense committed against him, etc.
32. At the same time, in practice rights of victims are often violated by law-enforcement. According to the Ukrainian Parliamentary Commissioner for Human Rights, the most common violations of procedural rights of victims include denials of entering criminal information on criminal offenses in the Unified Register of Pre-trial Investigations, groundless closing of criminal proceedings and delaying the process of pre-trial investigation.[15]
33. The CPC gives a wide opportunity for victims to appeal. Thus, the victim or his/her legal representative or representative has the right to appeal the part of the verdict that relates to the interests of the victim, but within the requirements stated by them in the court of first instance.

Appeal procedures

34. According to traditional models of jury trials, there are peculiarities of the procedure for appealing its verdicts in comparison with professional courts. Generally, there is a limited basis for such an appeal, or an appeal is not possible. However, the CPC does not contain any separate provision regarding appeal against a jury's verdicts. Participants of criminal proceedings appeal a jury's verdict on the same grounds as those of professional judges.
35. The CPC narrowed significantly the grounds on which criminal proceedings could be remanded to the court of first instance by a court of appeal, defining an exhaustive list (Articles 412 and 415). Such grounds include significant violations of the criminal procedure law; cases where a judge was involved in the adjudication of the case, which was appealed on the basis of judge's impartiality; cases where the court decision was passed or signed by the judge different from the one who carried out the trial. At the same time, the practice of returning cases by appellate courts for a new trial to the courts of first instance on other unforeseen grounds is widespread, which often leads to unjustified delays in criminal proceedings.
36. The CPC also provides for clear grounds and conditions for extending the terms of appeal. However, the practice is common where courts of appeal do not renew or, on the contrary, renew the terms of an appeal without proper justification, which, on the one hand, creates a risk of infringement of the applicant's rights to a fair trial and, on the other hand, may lead to undue burden on the judges of the courts of appeal.

[15] Monitoring of custodial settings in Ukraine: status of implementation of the national preventive mechanism. Report for 2014, http://www.ombudsman.gov.ua/ua/page/secretariat/docs/presentations/&page=2.

ADEQUACY OF JSRSAP AND ITS PARAMETERS

Overall assessment

37. The interventions, structure, indicators, formulations and other parameters of this JSR-SAP segment – as well as some of those in other segments – are generally appropriate for addressing the problems seen in the Baseline.
38. However, in some instances it would have been useful more attention to have been paid in them to the factors affecting practice rather than formal requirements. In addition, some consideration should have been given to the resource requirements needed to achieve particular outcomes. Furthermore, greater use of plea bargaining and jury trials might not be the best way of securing defence rights.

9.1.1 Development of pre-trial procedural safeguards for defence

Role of the judge (court)

39. The outcomes that are envisaged would help address the problems identified above, particularly insofar as the aim is to ensure practical and effective control of legality of investigations and oversight of intrusive measures, practical and effective application of alternatives to detention on remand.
40. However, an increased role for the investigative judge in terms of formal powers is less important than the appropriate exercise of existing powers. This would require more attention to be given to the factors affecting practice, in particular the absence of a sufficient judicial culture that appreciates the importance of the adversarial system and recognises the legitimacy of the rights conferred on suspects, accused by the Criminal Procedure Code. This has implications for not only their training and the development of practice guides but also for the selection of those who act as investigative judges.
41. The foregoing would also be important for achieving as an outcome a clear and foreseeable practice of courts regarding presumption of innocence and privilege against self-incrimination. Although greater use of plea bargaining might help address the workload of the courts, more emphasis on the fairness in the use of such a procedure is required not only to prevent injustice but also to secure greater confidence of both the accused and the public as a whole in the criminal justice system.
42. The outcomes envisaged in respect of pillars relating to the independence and competence of the judiciary will undoubtedly contribute to the improvement in actual practice that is required.

Defendant's role

43. The envisaged outcome of clear and consistent defence rights and lawyers' role pre-trial, including the ability to conduct lawyer's investigation and formalize evidence, is obviously crucial for the purpose of addressing some elements of the problems that have been identified. The measures and outcomes relating to the notification system will also be helpful.
44. The strengthening of the role of the defence lawyer for this purpose will also be assisted by the outcomes for the pillar concerned with strengthening the Bar and legal aid.

45. However, it should not be overlooked that the problems identified are only partly about the functioning of defence lawyers since there are, at least formally, many rights in the CPC which should allow an effective defence to be mounted if the lawyers concerned are ready to use them.
46. The ability to provide an effective defence is undermined by the tactics and practices of investigators and it is not sufficiently clear how this is to be addressed. Some contribution in this regard may come from more effective prosecutorial supervision if the outcomes envisaged for the pillar concerned with strengthening the PPO are achieved.

Application of standards

47. Insofar as formalised standards contribute to legal certainty, the outcome envisaged is entirely appropriate.
48. However, it is questionable whether there is really a need for new standards of proof to be developed for the various measures under this heading since the problem is perhaps more an insufficient appreciation of what ought to be required to justify the measures authorised under the CPC as well as of what might be sufficient to constitute the risks that would justify the imposition of particular restrictions being imposed on suspects, accused persons.
49. In the light of this, the outcome of achieving clear and foreseeable practice in application of PPO guidelines for the use of detention on remand and other restrictive measures, together with clarification as to how the relevant risks justifying their use is to be established, is thus likely to be much more useful. The envisaged training and practical guides are thus going to be crucial.
50. In this connection, some contribution in this regard may also be expected to come from more effective prosecutorial supervision in the event of the outcomes envisaged for the pillar concerned with strengthening the PPO being achieved.
51. At the same time, reinforcement of an understanding of what approach is appropriate can be expected from strengthening the role of investigative judges as a consequence of achieving the outcomes envisaged in respect of pillars relating to the independence and competence of the judiciary.

Notification system

52. The envisaged outcome of a clear and foreseeable notification system of all measures affecting defendant in criminal process is clearly vital in addressing the problems identified.
53. At the same time, an improvement in the actual regulation of such a system will also be essential for making this work in practice.
54. The tactics and practices of investigators will thus need to be addressed and it is not sufficiently clear how this will occur. Some contribution in this regard may come from more effective prosecutorial supervision if the outcomes envisaged for the pillar concerned with strengthening the PPO are achieved.

Plea and reconciliation agreements

55. The envisaged outcome of practical limitations on use of coercive measures to force settlements is undoubtedly appropriate. If these are achieved, such limitations will address the difficulties that have been identified.

56. However, there is a lack of specificity as to the form that these limitations should take which will make it difficult to determine what exactly should be done. Nonetheless, the outcomes envisaged for the role of the judge and the defendant could support the achievement of this outcome.

9.1.2. Development of procedural safeguards for defence at trial

"Equality of Arms" standard

57. All the envisaged outcomes can be expected to contribute to ensuring that there is greater observance of the "equality of arms" standard in practice.
58. An appreciation of the legitimacy of the exercise of defence rights – as well as not acting in a manner to frustrate or interfere with their exercise - has implications for not only the culture of the judiciary but also the way in which prosecution and investigators approach the conduct of criminal proceedings.
59. The outcomes envisaged in respect of the development of pre-trial safeguards for the defence, as well as those for the pillars relating to the independence and competence of the judiciary and the pillar concerned with strengthening the PPO, will undoubtedly contribute to increasing the observance of the equality of arms standard.
60. At the same time it should not be overlooked that equality of arms will also be dependent upon the strengthening of the role of the defence lawyer. This will also be assisted by the outcomes for the pillar concerned with strengthening the Bar and legal aid.

Alternative trials

61. Analysis of the outcomes of this group indicates that the primary purpose of the envisaged measures/outputs is to expand the scope of jury trial, in particular by covering a wider range of crimes, and by increasing the regularity of jury trials. In this context, measures such as the introduction of changes to the normative regulation of the jury, the piloting of this model of justice and the distribution of training modules on these issues are relevant to the envisaged outcomes.
62. At the same time, the envisaged outcomes illustrate only the possible quantitative changes in the work of the jury, while it would be advisable to provide qualitative indicators that would indicate the efficiency of the jury. In turn, in order to achieve such outcomes, it would have been advisable to have included among the proposed measures the improvement of the legislative regulation of the jury selection procedure, as well as the strengthening of the jury court model itself, which would ensure greater independence of the lay judges from professional judges.

E-tools and equipment

63. The outcomes for this group are related to the wider use of e-tools, audio and video recording systems and videoconferencing equipment to increase efficiency and fairness of the trial, its openness for the public. The analysis of measures/outputs which should produce these outcomes shows that the focus was done on amendments of the legal acts regulating public access to court hearings and decisions, as well as the development and dissemination of appropriate training modules.

64. In spite of the importance of improving normative regulations and dissemination of the training materials, such measures itself are not fully sufficient to change existent practices. There would also be a need for measures contributing to the practical implementation of regulatory changes in this area, such as development or purchase new equipment and software, its piloting, monitoring and evaluation of this process. Certainly, effective achievement of the above-mentioned outcomes demands significant financial resources, but the scope of measures proposed does not reflect this aspect.

9.1.3. Development of greater fairness and defence rights on appeal

Safeguards for defence

65. All the envisaged outcomes can be expected to contribute to addressing the problems identified.

66. In addition, the outcomes envisaged for the pillars relating to the independence and competence of the judiciary and pillar concerned with strengthening the Bar and legal aid will undoubtedly contribute to increasing the effectiveness of appeals.

Appeal powers for prosecution

67. The outcomes relevant for this group reflect the need to limit the power of the prosecution side to appeal in contrary to the need of the extension of defense powers. Such limitations include the prohibition for the prosecutor to appeal acquittal by jury, introduction of the test of 'reasonableness' for any exercise of prosecutorial discretion on appeal, consolidation of prosecution arguments in one appeal, and not separate appeals, etc.

68. All the outcomes are formulated in a precise and specific manner that makes the future assessment process much easier. Achieving the above-mentioned scope of the outcomes is planned through the revision of the regulatory framework, developing and disseminating of the relevant practice guides and training modules that could be considered as relevant measures. At the same time, it would have been desirable for their formulation to have been more specific regarding the measure on the revision of the regulatory framework by stating the clear purpose of such revision.

Appeal powers for victims

69. There is provision for the restriction of the victim's powers, such as the reduction of victim right to appeal to exceptional cases and the need to restrict the victim's participation to stage of pre-trial and trial. This outcome is formulated in a precise manner and could be considered as the absolutely relevant.

70. At the same time, the scope of measures could have been widened with ones, aimed at increasing the protection of victims' rights at the pre-trial and trial due to the wide spread violations of victims' rights at these stages.

Appeal procedures

71. The outcomes related to appeal procedures reflect the need for both changing the acting legislative provisions (on appeal of jury's verdicts), and existing practices in courts of the general jurisdiction and appeal courts (such as unmotivated extension of time limits for appeal and unmotivated return of the case by the appeal court to the lower court).

72. It is suggested to address these challenges with the help of the regulatory framework revision and the development and dissemination of the practice guides and training modules, which could be considered as the relevant measures. At the same time, the offered set of measures/outputs does not include such an effective instrument as the generalization of the relevant court practices by appeal courts and the Supreme Court. Such a generalization could be considered as the one of the most effective ways of influencing the current negative court practices and serve as the standard for considering similar cases.
73. It should be also stressed that formulating the measures and outputs in a more specific way would enhance the likelihood of them being achieved.

ACCURACY OF MONITORING OF AND REPORTING ON JSRSAP IMPLEMENTATION

74. The reporting is focused primarily on legislative changes and undoubtedly some of these are warranted but the level of generality makes assessment not particularly practicable.

75. Nonetheless, it should be noted that – despite what the reporting suggests – it is not correct to state that there is now a clear and predictable notification system. Moreover, there have been no legislative changes with respect to the presumption of innocence and the privilege against self-incrimination or with regard to the procedure of remand in custody. Furthermore, the changes suggested with respect to negotiation between parties to proceedings and execution of an amicable agreement do not seem to be reflected in the ones actually adopted.

76. As regards jury trial, the reporting instrument contains just a reference to the decision of the Council of Judges of June 2016 to apply to the Government to review the level of jury payment. However, there is no information regarding the results of the consideration of this decision. Nor does it mention that legislative changes were made in September 2016 that significantly increased the level of jury payments.

77. The monitoring tool contains the reference to the Law “On Amendments to the Economic Procedure Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Procedure of Ukraine, and other legislative acts”, adopted in October, 2017. This reference is mentioned in the block on appeal procedures. However, the analyses of the reference allows it to be concluded that it is not relevant to the expected outcomes since the mentioned law does not in any way limit the appeal powers of the prosecutor or the victim, nor does it impose strict restrictions on the appeal of the acquittals of a jury.

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ATTAINMENT OF RELEVANT JSRSAP OUTCOMES

9.1.1 Development of pre-trial procedural safeguards for defence

Role of the judge (court)

78. There have been a number of amendments to the CPC of relevance to the attainment of the envisaged outcomes.

79. These concern, in particular:

- The adoption of a provision rendering inadmissible evidence obtained during the execution of the ruling on the permission to search the housing or other possession of a person where such a ruling was made by the investigating judge without the full technical recording of the session (Art. 87.3(4));
- The introduction of a requirement to file within 48 hours a motion for the attachment of property following its provisional seized during a search or inspection under an investigating judge's ruling (Art. 171(3)) and the making of provision of the return of property that has been seized where deficiencies in a motion for attachment are not rectified within a specified time (Art. 172.3);
- The elaboration of the basis for dismissing a motion for attachment where the motion does not specify the risks referred to in Article 170.1(2) (Art. 173.1);
- The introduction of a bar on investigators or prosecutors appealing to the investigating judge against the dismissal of a request to search a house or other property in the absence of new circumstances being indicated (Art. 234(6));
- The introduction of the possibility of challenging a prosecutor's dismissal of a complaint about the failure of an investigator to observe reasonable time limits and an investigator or prosecutor's report on suspicion by not later than the closure of the criminal proceedings by the public prosecutor or the application of the court with the indictment (Arts. 303.9[1] & 10 and 307.2(1[1]));
- The authorization of the conclusion of plea agreements in respect of especially grave crimes committed in collusion by a group of persons, an organized group, a criminal organization or a terrorist group in certain circumstances (Art. 469.4(3)); and
- The addition to the matters to be specified in a plea agreement of the conditions of provisional release of the suspect, the accused from civil liability in the form of reimbursement of costs to the state incurred due to the committing of crime by this person (Art. 472.1).

80. A further amendment to the CPC so as to preclude the possibility of applying measures of restraint other than remand in custody for certain crimes (Art. 176(5)) would have meant that the latter is not a last resort and thus have the potential to lead loss of liberty inconsistent with Article 5(3) of the European Convention. However, this consequence was averted as a result of the amendment being declared unconstitutional by the Constitutional Court on 25 June 2019 and thus ceasing to apply.

81. The other amendments cited above go some way to strengthening the role of the investigative judge and increasing the possibility of using plea agreements, two of the envisaged outcomes.

82. In addition, the Constitutional Court on 23 November 2017 also declared unconstitutional the automatic extension of detention on remand without a court order between the end of the investigation and the beginning of the trial. An amendment to the CPC to take account of this ruling is now expected to be considered by the Verkhovna Rada.

83. Notwithstanding these positive developments, reports by international monitoring and Ukrainian research bodies and information received during focus group discussions and interviews with defence lawyers, investigative judges, investigators and prosecutors, suggest that investigative judges have not always been exercising practical and effective control over the legality of investigations.

84. In particular, it would seem that at times they:

- Ignore or are not particularly sympathetic to complaints about ill-treatment by the police even when there are visible injuries to the suspects concerned and thus do not act to fulfil their duty to protect human rights;
- Do not appreciate or do not exercise their competence to deal with complaints about refusal to enter information in the Unified Register of Pre-Trial Investigations, either in a timely fashion or at all;
- Take decisions without going into the deliberation room and without announcing introductory and resolution parts of decision upon consideration of complaints;
- Proceed with the hearing regardless of the need for a suspect to be given urgent medical care;
- Are unduly sympathetic to motions of investigators or prosecutors as compared to those of the suspect;
- Do not establish that the circumstances warrant the grant of measures to secure criminal proceedings such as suspension from office; and
- Appoint lawyers for single procedural actions so that their effectiveness is diminished by a lack of familiarity with the case as a whole.

85. In addition, there are occasions when the authorization of investigative judges is not being sought in all instances where suspects are transferred from remand prisons to the detention facilities off law enforcement agencies; there are delays in the approval of investigative actions such as searches and the recovery of information concerning the use of mobile phones and appeals against their decisions are heard in the absence of the suspect.

86. Furthermore, investigative judges do not always taken sufficient account of the requirements of the presumption of innocence and the privilege against self-incrimination. In particular, they do not always ensure that suspects are sufficiently aware of their procedural rights and duties, especially as regards the right to refuse to provide an explanation with regard to a suspicion and to refuse to answer questions.

87. Moreover, resort by investigative judges to the use of alternative measures to detention on remand is not always occurring on account of factors such as:

- Reliance improperly being placed on the severity of the offence;
- Proper assessment not being made of the relevant risks;
- Undue deference being accorded to the motions and submissions of the prosecution when compared with those made by the defence;

– Motions to ensure criminal proceedings are often considered in the absence of the defence lawyer and/or the suspect; and
– Determination of the possibility of granting bail failing to take account of the particular circumstances of a suspect so that the amount required is excessive or impossible to fulfil.

88. Finally, judges are not always ensuring that the principle of fairness is being respected in the conduct of plea bargaining procedures. In particular, they:
– Do not seek to establish whether the accused understands his or her rights;
– Do not seek to establish whether the agreement of the accused to the plea bargain is voluntary and/or he or she has had a sufficient opportunity to discuss it with his or her lawyer beforehand;
– Proceed with the consideration of cases in the absence of the accused's lawyer; and
– Do not respond to threats made by the prosecution in the course of the proceedings.

89. However, some investigative judges do allow extra time for appeals against the refusal to make an entry in the Unified Register of Pre-Trial Investigations where a complaint was belatedly returned by an investigator.

90. Moreover, it should also be borne in mind that many investigative judges perform that role on a part-time basis as they are also administrative and civil judges as the original intention of establishing a specific cadre of investigative judges was not pursued on account of budgetary constraints.

91. The non-criminal background of many investigative judges can be relevant to their appreciation of the requirements of the CPC but more fundamentally is a factor leading to an excessive workload. The latter, in particular affects both the timeliness of their decision-making and makes it unusual for a single investigative judge to deal with all the motions relating to a particular case, making it unlikely that the judge has an in-depth appreciation of all the pertinent issues relevant to it. In some districts, there are no duty investigative judges which can contribute to delayed decision-making.

92. Moreover, there were doubts expressed not only by investigators and prosecutors but also defence lawyers as to whether there was a need for the authorization of investigative judges to be sought in matters such as forensic examinations, which only adds to their workload. At the same time, investigative judges were concerned about their time being unnecessarily consumed by motions from investigators that were either premature or of poor quality. In particular, it was suggested that there was an over-reliance on gathering evidence through searches when less intrusive means would be just as effective.

93. It can thus be concluded that the legislative changes have, on the whole, led to some strengthening of the role to be played by the investigative judge. However, they have not been accompanied by a significant improvement in the actual control exercised by them in protecting the rights of the defence. Moreover, there are no significant developments regarding outcomes concerning the presumption of innocence, the privilege against self-incrimination, the use of detention on remand as a last resort and fairness in concluding plea agreements. The relevant outcomes have thus only been partially attained.

94. It is recommended that there be appointed investigative judges in sufficient numbers with this function as their only responsibility and that there be a review of the investiga-

tive actions requiring their approval so that there is no need for this where the interests of the defence would not be prejudiced.

Defendant role

95. There have been a number of amendments to the CPC of relevance to the attainment of the envisaged outcomes.

96. These concern – in addition to those referred to under the previous heading - in particular:

- The establishment for the accused of the rights to receive explanations on the procedure for preparing and using a pre-trial report, refuse to participate in the preparation of a pre-trial report; participate in the preparation of a pre-trial report, provide the representative of probation body staff with the information necessary for preparing such a report, review the text of a pre-trial report, and submit his/her comments and clarifications (Art. 42.4(7) & (8));
- The extension of the right to the mandatory participation of defence counsel to cases involving special pre-trial investigation or special judicial proceedings (art. 52.2(8));
- The introduction of a provision rendering inadmissible evidence obtained during the execution of the ruling on the permission to search the housing or other possession of a person where the defence lawyer was not admitted to this investigative (searching) action (Art. 87.3(3));
- The provision that a ruling which grants permission for apprehension in view of compelled appearance becomes legally ineffective upon the voluntary appearance of the suspect to the investigating judge and the accused to the court (Art. 190.3(2[1])); and
- The introduction of requirements to hand a second copy of the search record, together with a list of seized documents, temporarily seized objects to the person who underwent the search (or an adult member of his family or his representative in case of his absence to) or to the manager's representative of the enterprise, establishment or organization where these are searched and to record by means of audio and video recording the search of housing or other property of a person based on the ruling of the investigating judge shall be mandatory recorded (Art. 236.9 and 10).

97. However, the rights of the defence could be constrained by the dispensing with the requirement to send, against acknowledgement of receipt, copies of the indictment, any motion to impose compulsory medical or educational measures and the register of pre-trial proceedings records to the suspect in cases involving special pre-trial investigation (Arts. 291.4(3) and 293.1).

98. Nonetheless, the above amendments go some way to strengthening in formal terms the rights of the defence, the envisaged outcome.

99. However, reports by international monitoring and Ukrainian research bodies and information received during focus group discussions with defence lawyers suggest that access to the assistance of a lawyer is not always enjoyed before or during interrogation by law enforcement agencies because:

- There continues to be recourse to informal questioning in the absence of a lawyer, with subsequent questioning in the presence of the latter then becoming a formality and the lawyer's role being limited to just counter-signing any statement made by a suspect;

- There is delay in contacting the lawyer of a suspect after his or her apprehension or access to the lawyer may only be allowed after he or she has been transferred to an official place of detention;
- Suspects may not be aware of and may not be informed of their right to the assistance of a lawyer or the latter is done in a very formal and non-understandable manner;
- Family members of a suspect may not have been informed that he or she has been apprehended and thus are not able to instruct a lawyer on his or her behalf;
- Suspects may be treated as having waived their right to the assistance of a lawyer after having been asked to sign a document listing their rights under the CPC either without being able to read it or being a copy which is insufficiently legible;
- Legal aid lawyers arrive after considerable delay, with a record only being made as to when they were notified and not about when they actually arrived; and
- There are insufficient legal aid lawyers available in certain areas or such lawyers do not work outside “office hours”.

100. In addition, there appear to be instances of access to the lawyer being simply prevented.

101. Moreover reports by international monitoring and Ukrainian research bodies note that suspects can have doubts about the independence of some lawyers from law enforcement agencies (especially where they seem to be pressing them to confess), as well as about them being sufficiently qualified. They can also be faced with ex officio lawyers who request “undue payments” for their services making it clear that they would not otherwise act on their behalf.

102. Furthermore, these reports indicate that, where lawyers do attend the interrogation, there is not always an opportunity for suspects to communicate with them in private, with the rooms made available for this purpose being under electronic surveillance. Communication can also be impeded by a bar on suspects being able to contact their lawyers in writing.

103. In addition, defence lawyers indicated that police stations often simply lacked any facilities in which it was possible to have a confidential discussion with their clients.

104. Although defence lawyers did not report problems in general as regards gaining access to pre-trial investigation materials, this was not always possible.

105. In addition, cost was seen as an inhibiting factor in seeking the conduct of some investigative actions, in particular, those involving forensic examinations. In such cases, the conduct of these actions were simply not being sought.

106. Finally, reports by international monitoring and Ukrainian research bodies suggest that lawyers do not always provide effective assistance to suspects at the pre-trial stage. In particular, they:

- Do not raise or raise belatedly allegations of torture and ill-treatment in the course of interrogation, preferring to focus only on issues relating to the criminal charges being faced as it is only for these that they may be paid;
- Are willing to sign police interview protocols even when they were not present;
- May accept appointment for just a single procedural action when the suspect’s lawyer is not available and are thus not familiar with all aspects of the case;
- May not be motivated on account of the low level of fees paid to those working in the legal aid scheme, particularly if called upon to act at night or during holidays.

107. Again there have been useful improvements in the legislative framework but this has yet to be accompanied by any significant improvement in practice in the position of the defence at the pre-trial stage. The relevant outcomes have thus only been partially attained.
108. It is recommended that facilities be provided in police stations for confidential meetings between defence lawyers and their clients and that an officer in each police station have specific responsibility for securing the rights of suspects and accused persons.

Application of standards

109. There have been several amendments to the CPC of relevance to the attainment of the envisaged outcomes.
110. These concern in particular:
    - The introduction of a requirement that provisionally seized property be returned to the person from whom it has been seized in cases where the arrest is cancelled (Art. 169.1(4));
    - The specification of the task of property attachment and the elaboration of certain conditions governing its use (Art 170.1 & 4-11); and
    - The provision that motion for attachment should be dismissed not only if it is proved that this is necessary but also the motion refers to the risks justifying such a measure set out recital 2 of Article 170.1).
111. These amendments can be seen as making some contribution to the attainment of the envisaged outcomes.
112. However, reports by Ukrainian research bodies and information received during focus group discussions with defence lawyers and prosecutors and interviews with investigative judges and investigators suggest that there are various problems still being encountered as regards the application of standards.
113. The problems identified include:
    - investigators not necessarily following procedural guidance that is actually given by prosecutors, in part because of directions by the head of their own units;
    - Investigators seeking approval for investigative actions from another prosecutor where one prosecutor has already refused it;
    - Prosecutors not always supervising the observance of the law by investigators in their conduct of a pre-trial investigation and not always taking any interest in their actions at this stage;
    - Prosecutors considering that they do not have any means of directing investigators as they cannot make them criminally liable and refusing to proceed with a prosecution would create difficulties within their own hierarchy;
    - Important procedural decisions (such as those concerned with apprehension of a suspect, serving a notice of suspicion, or choosing a restraint measure of detention) not always being taken by the relevant prosecutors on account of a lack of independence from their superiors or a fear of possible sanctions for taking independent action;
    - Prosecutors being focused on winning a case at any price so that they do not observe the requirement for objective circumstances establishing guilt in the presentation of cases;

- The notice of suspicion often wrongly being viewed by investigators and prosecutors as analogous to an indictment leading to both delay in recording the apprehension of a suspect so as not to breach the 24-hour limit for issuing such a notice and a bureaucratic procedure for its approval within the prosecution service;
- Investigators, in the course of the pre-trial investigations, continuing to seek to obtain confessions from suspects in circumstances where they do not have the assistance of a lawyer or where either they are subjected to torture or ill-treatment or there is a risk of this occurring, notwithstanding that such confessions should not be admissible in any trial;
- Confessions obtained in this way also being used in support of applications for the imposition of measures of restraint pending trial;
- Allegations of torture or ill-treatment which should affect the admissibility of particular evidence not always being investigated and so reliance may ultimately be placed on evidence that should be inadmissible;
- Prosecutors not always submitting proof of circumstances to the investigating judge or complying with the general rules as to the need to justify the use of measures to ensure criminal proceedings and also failing to review carefully motions prepared by investigators for the application of such measures but support them merely formally;
- Prosecutors not always reacting when investigators seek to conduct interrogations during a re-enactment so that there is then a possibility of circumventing the prohibition on using testimony provided to the investigator or prosecutor as grounds for a court decision; and
- Not all prosecutors seeming to refuse to submit to the court pieces of inadmissible evidence that have been obtained by investigators, particularly if there is a chance that the defence will not raise the issue of their admissibility and the court will not notice this.

114. In addition, the reports by Ukrainian research bodies indicate that the possibility of using alternative measures to detention on remand is not always occurring on account of factors such as:

- Reliance improperly being placed on the severity of the offence in motions prepared by investigators and prosecutors; and
- Proper assessment not being made of the relevant risks, with submissions by investigators and prosecutors being prepared according to a template without regard to the circumstances of the specific case

115. Furthermore, these reports also suggest that prosecutors do not always seek exculpatory evidence and can ignore possible human rights violations by investigators on account of the potential negative consequences for them of acquittals.

116. Moreover, the reports by Ukrainian research bodies and interviews with investigative judges indicate a tendency to submit motions for provisional access to documents and objects as a measure to secure criminal proceedings when the actual aim is the collection of evidence that could be achieved through investigative actions.

117. There also seems to be a tendency for authorities to make copies and seize objects that are not indicated in the ruling concerned and not to respect the prohibition on access to correspondence or any other information exchange between the defence counsel and client, or any person who represents the client in relation to provision

of legal aid, as well as to objects attached to this correspondence and other forms of information exchange, as well the requirements on access to objects and documents that contain secrets protected by the law.

118. Finally, the reports by Ukrainian research bodies point to prosecutors not always fulfilling their responsibility to oversee the use of measures to secure criminal proceedings so that these can be used in a manner inconsistent with the law. They also note that there is often a failure to return seized property when its retention ceases to be justified.

119. Notwithstanding the legislative changes previously referred to, there has not been a significant improvement in actual practice as regards the application of standards and so the relevant outcomes remain to be achieved.

120. It is recommended that investigators and prosecutors be given enhanced training as regards their responsibilities under the CPC.

Notification system

121. There have been several amendments to the CPC of relevance to the attainment of the envisaged outcomes.

122. In particular, these concern:

- The removal of the requirements that a person must receive the ruling on court summons or be notified of it in another way at least three days prior the day on which he or she has been summoned to appear and that such receipt or notification should leave the person concerned the necessary time to prepare and appear upon the summons where other time limits make fulfilment of the three-day requirement impossible (Art. 135.8);
- The stipulation that a failure on more than two occasions for a suspect, accused who is announced in interstate or international wanted list to appear on summons without valid reason will serve as the ground for conducting special pre-trial investigation or special judicial proceedings (Art. 139.5);
- The introduction of a requirement for an investigator, prosecutor to provide the person submitting a report, information on a criminal offence with an extract from the Integrated Register of Pre-Trial Investigations 24 hours after such information has been entered into it (Art. 214.1); and
- The dispensing with the requirement to send, against acknowledgement of receipt, copies of the indictment, any motion to impose compulsory medical or educational measures and the register of pre-trial proceedings records to the suspect in cases involving special pre-trial investigation (Arts. 291.4(3) and 293.1).

123. These amendments do not contribute to the attainment of the envisaged outcomes.

124. Moreover, reports by Ukrainian research bodies and information received in focus group discussions with defence lawyers and prosecutors suggest that there are various problems being encountered as regards the application of standards.

125. The problems identified concern:

- The practice of some investigators of continuing to undertake pre-investigation verification before making any entry in the Unified Register of Pre-Trial Investigations;
- The delayed return of complaints considered insufficient by investigators so that an appeal to an investigative judge is not always possible and the failure by some investi-

gators – even those in the State Bureau of Investigation – to take any action regarding a complaint;

- The notice of suspicion often being wrongly viewed by investigators and prosecutors as analogous to an indictment leading to both delay in recording the apprehension of a suspect so as not to breach the 24-hour limit for issuing such a notice and a bureaucratic procedure for its approval within the prosecution service;
- The continued absence of a unified procedure for informing a public prosecutor about apprehension of a person and appointing a procedural supervisor in criminal proceedings. Prosecutors learn about this from different sources either by looking at the Unified Register of Pre-Trial Investigations, receiving a notice from the investigator or the head of the prosecutor's office, or even by receiving a copy of the order;
- The notice of suspicion often being changed at the end of a pre-trial investigation on account of judges returning indictments to prosecutors because it does not match the indictment;
- Suspects not always being informed of their rights following apprehension or this being done in a manner which does not give them a genuine opportunity to understand or avail themselves of them;
- Families and lawyers of persons who have been apprehended not always being notified that this has occurred or this occurring with unjustified delay;
- Accused persons not always being informed of their procedural rights and obligations at the different stages of the proceedings against them;
- The recording of the date, time and place of a suspect's detention tending to be made only at the time of writing the protocol of detention and not when it is initiated;
- There often being a failure to prove all the necessary grounds to believe that the measure of suspension from office is relevant for the aim of its use against an individual (i.e. to stop criminal offence, stop or prevent unlawful behaviour of the suspect or the accused, who, if holding the office, may destroy or forge objects and documents of essential importance for the pre-trial investigation, or exert illegal influence on witnesses etc.); and
- The requirements for serving summons on an addressee not always being observed as they are being served on other persons and not in accordance within the applicable time limits.

126. The legislative changes have not improved the arrangements with respect to the notification system and the problems with its implementation in practice have not been adequately addressed. The relevant outcomes have thus still to be achieved.

127. It is recommended that there be introduced a unified procedure for informing a public prosecutor about apprehension of a person and appointing a procedural supervisor in criminal proceedings. In addition, it is recommended that an officer in each police station have specific responsibility for securing the rights of suspects and accused persons

Plea and reconciliation agreements

128. There have been three amendments to the CPC of relevance to the attainment of the envisaged outcomes, namely,
   – The authorization of the conclusion of plea agreements in respect of especially grave crimes committed in collusion by a group of persons, an organized group, a criminal organization or a terrorist group in certain circumstances (Art. 469.4(3));
   – The exclusion of the possibility of concluding plea agreements in criminal proceedings concerning criminal offenses that cause damage to the public or civil interest, or the rights and interests of individuals, involving the victim or victims, except in cases where all the victims have given written consent to the prosecutor to conclude an agreement (Art. 469.4(5); and
   – The addition to the matters to be specified in a plea agreement of the conditions of provisional release of the suspect, the accused from civil liability in the form of reimbursal of costs to the state incurred due to the committing of crime by this person (Art. 472.1).
129. The first and third of these amendments could contribute to the attainment of the envisaged efficiency outcome.
130. In focus group discussions with defence lawyers and prosecutors and interviews with investigative judges, the conclusion of plea and reconciliation agreements was not generally seen as problematic, with them hardly ever being challenged.
131. However, reports by Ukrainian research bodies and information received in focus group discussions with lawyers and prosecutors did suggest that judges are not always ensuring that the principle of fairness is being respected in the conduct of plea bargaining procedures.
132. In particular, they do not always:
   – Seek to establish whether the accused understands his or her rights;
   – Seek to establish whether the agreement of the accused to the plea bargain is voluntary and/or he or she has had a sufficient opportunity to discuss it with his or her lawyer beforehand; and
   – Respond to threats made by the prosecution in the course of the proceedings.
133. In addition, they sometimes proceed with the consideration of cases in the absence of the accused's lawyer.
134. At the same time, there can be delay in approving plea agreements that are voluntary on account of the non-availability of a judge for this purpose.
135. Furthermore, there was concern on the part of prosecutors that plea agreements tended to restricted in practice to the less serious offences.
136. The legislative changes are modest and do not alter the situation to any great extent. It is not steps taken evident that there have been any steps taken to preclude coercion in the conclusion of agreements. The relevant outcomes have thus only been partially attained.
137. It is recommended that judges be reminded of their responsibility to ensure plea agreements are voluntary.

9.1.2. Development of procedural safeguards for defence at trial

"Equality of arms" standard

138. There have been no amendments to the CPC of relevance to the attainment of the envisaged outcomes.

139. However, in addition to the matters noted in respect of the defendant role above, reports by Ukrainian research bodies suggest that there are various problems being encountered as regards the observance of this standard.

140. In the first place, judges do not always ensure that accused persons are aware of their procedural rights and obligations or that the rights which they have are actually respected. In particular, they:
   - Do not always explain the possible consequences and risks of representing themselves in the trial;
   - Do not always appoint an ex officio lawyer where one is requested;
   - Do not always remind the accused of the right to remain silent; and
   - Sometimes allow witnesses who have yet to be examined to be present when others are testifying.

141. Furthermore, judges sometimes act in a manner inconsistent with the duty of impartiality. In particular, they:
   - May exchange gestures with members of the public attending the hearing;
   - Leave without announcing any adjournment of the proceedings;
   - Treat some participants in an improper manner;
   - Fail to give the proceedings their full attention (e.g., by using their phones or reading newspapers);
   - Have discussions with prosecutors in their offices regarding the content of the judgment; and
   - Move the trial to their offices following the appearance of certain persons wanting to attend the hearing.

142. Moreover, accused persons can sometimes be unable to attend particular hearings because of the impossibility of bringing them to court from the detention facilities in which they are being held.

143. In addition, defence lawyers are in some instances unduly passive or not even taking part in the proceedings. In particular, they:
   - May not always be present at particular hearings, which continue in their absence;
   - May not always seek to provide evidence in support of the accused;
   - May sometimes need to be reminded by the court of the need for the prosecution to prove its points and for the defence to refute the submissions made by the prosecution; and
   - Do not always raise issues regarding the admissibility of evidence, particularly that allegedly obtained through torture or ill-treatment.

144. Finally, fast-track proceedings are being increasingly used in circumstances where they take place without the participation of a defence lawyer.

145. There does not appear to have been any significant improvement in the observance of the “equality of arms” standards and so the relevant outcomes remain to be achieved.

146. It is recommended that judges be given training on appropriate conduct in court and of the need not to give the impression of favouring one party even if this is not intentional.

Alternative trials

147. An analysis of the statistics, as well as the results of studies on the effectiveness of jury trials in Ukraine, shows that this institute of direct citizens’ participation in the administration of justice in criminal proceedings has yet to become widespread.

148. Researches show that even in such categories of cases where the law provides for the possibility of involving a jury, the trials were still conducted without one. Thus, only one in seven cases falling within these categories was considered with the participation of a jury. This also indicates that the accused persons do not exercise their right to a jury trial, since one is to be appointed at their request. At the same time, it should be noted that the share of the sentences made by the jury of the total number of sentences made under Part 2 of Art. 115 of the Criminal Code (premeditated murder) is gradually increasing - from 7.09% in 2013 to 17.23% in 2017.

149. Researches also show that there are some differences in the work of the jury and the professional court. Thus, in particular, the jury is twice as likely to admit fully acquittal verdict. In particular, in 5.4% of the cases reviewed in 2013-2017, the jury found a full acquittal, while the professional court only in 2.8% of cases. At the same time, a professional court is considering criminal cases faster than the jury. In particular, in 2013-2017, up to 100 working days, the professional court heard more than 44% of all cases (21% of which up to 50 working days), while for the jury this figure was just over 32% (12 of them) % - within 50 working days). In addition, juries are more likely to sentence life imprisonment than a professional court. 22.7% of cases analyzed in such cases were punished by a jury, while in professional courts - by 13.6%.

150. Particular attention should be paid to the appearance in Ukraine of the practice of revocation sentences by higher courts if lower courts failed to inform defendant on his/her right to a jury. Appropriate decisions were taken by both the Courts of Appeal and the Supreme Court.

151. During the meeting with judges of the Supreme Court, the latter reported that they did not see much difference in the work of the jury and the professional court. In particular, the judges noted that they had never seen the jury’s separate opinion. As a rule, the jury agrees with the opinion of the professional judges who are part of the jury. In addition, judges noted that jurors have been evaded from performing their duties, including when jurors do not appear without due cause at court hearings. The current law does not provide for any liability of the jury for such actions, except for the exclusion from the jury.

152. Among the reasons for the poor efficiency of the jury in Ukraine are gaps in its legislative framework. For the time being, the jury’s powers are limited solely to the consideration of criminal cases involving life imprisonment. There has also been no change in the legislative regulation of the selection process for jurors, which would make the process more transparent. It should be added that over the last 5 years, several draft laws have been submitted to the Verkhovna Rada improve the efficiency of the jury but none have been adopted.

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153. A positive development has been the change in the jury's payment. Thus, in 2016 due to the legislative changes the payment for the jury work was equated to that for the judge of the local court and it is calculated on an hourly basis.

154. In the light of all of the above, it could be concluded that the expected outcomes for this group have been partially achieved. On the one hand, the share of jury verdicts is gradually increasing, but on the other - within 5 years of implementation of the JSRSAP, this institute has not become widely used. In addition, until now, the scope of the jury trial has been limited to cases involving life imprisonment.

155. It is recommended to introduce amendments to the CPC regarding the extension of the scope of jury trial to offences other than those which provide for life imprisonment. In addition, it is recommended that the current jury model be changed to one that would include an increase in the number of jurors, a clear delineation of their powers and functions from professional judges. Furthermore, provision should be made to properly regulate the jury selection procedure.

E-tools and equipment

156. Substantial changes have been made in the area of e-justice in Ukraine, including as regards the criminal justice system. Thus, in particular, since January 1, 2019, all the local and appellate courts of Ukraine have started the work of the Electronic Court system, which is currently functioning in a test mode. In addition, from the same date, amendments to the CPC requiring full record of court hearings by means of sound and video recording equipment at both trial and pre-trial stages, except of hearings on covert measures in pre-trial investigation, came into force.

157. The practice of conducting videoconference hearings has also become widespread over the last 5 years. In particular, according to statistics, the number of such hearings in 2018 increased to 75,300, of which nearly 30,000 (29,900) were in criminal proceedings.

158. During focus groups and meetings with attorneys, prosecutors and judges, they reported that the implementation of the videoconference system was a clear milestone, as it significantly simplifies the interrogation of suspects being kept in custody. In addition, the use of such a system is very useful in cases of interrogation of a witness or victim who is afraid to be in one court hearing with the suspect because of the possibility of pressure and intimidation by the latter. At the same time, almost all participants pointed out that there were technical problems with the use of this system, including:

- poor video or audio quality, which often leads to postponement or delay of court hearings;
- lack of a proper number of courtrooms equipped with the appropriate equipment, which may delay the trial time.

159. There were some differences identified in opinions of focus group participants and workshops regarding the effectiveness and appropriateness of the mandatory court videotaped system. In particular, defense lawyers noted the critical importance of this system for ensuring proper control over and transparency of court hearings. However, prosecutors and judges have indicated that it is inappropriate to make mandatory videotaping of all court hearings, noting that such a fixation could be carried out at the request of the parties or in serious and particularly serious crime proceedings.

160. Investigating judges and Supreme Court judges have also focused on technical issues that impede the full implementation of video records systems, such as:

– lack of adequate equipment in all courtrooms, which leads to considerable delays in procedural time due to the need to wait for a free room;
– poor video quality, which in some cases even leads to the annulment of the relevant court decision, including verdicts.

161. According to the participants of the focus groups and workshops, the implementation of e-court is also extremely relevant and necessary. At the same time, the full launch of e-court was delayed by a decision of the Judges' Council in March 2019 due to the technical unpreparedness of the courts, including the lack of adequate equipment and infrastructure.
162. The CPC also contains provision on use of audio and video recording of interrogation (Art. 224), but this norm is not obligatory. Accordingly the investigator or prosecutor determines the necessity of making such recording at his/her own discretion.
163. During a working meeting with the leadership of the Chief Investigative Directorate of the National Police of Ukraine, it was learned that all investigative units are now properly equipped with video cameras and accessories to make a record of searches (such video recording is obligatory). The specified equipment may also be used by investigators to record interrogations if necessary. In addition, information was received on the implementation of a joint project with the EUAM which suggests to equip special police rooms in police stations for interrogation with the use of video recording systems in 9 regions of the country. These rooms will also be used for video conferencing.
164. In summary, it can be noted that the expected outcomes have not been fully achieved, and despite the unconditional progress with the introduction of electronic justice tools and video-recording systems, their full implementation requires additional measures.
165. It is recommended that the courts be provided with adequate funding in order to procure the necessary equipment for the installation of video recording and video conferencing systems in all courtrooms of the courts of first instance and appellate court, as well as in the Supreme Court. In addition, it is recommended that additional training be provided to the technical court staff on the features of the use of electronic justice systems, video recording and video conferencing and special rooms for interrogation be equipped with the possibility of video recording in all territorial departments of the National Police of Ukraine, as well as other law enforcement agencies (NABU, SBI, SBU).

9.1.3. Development of greater fairness and defence rights on appeal

Safeguards for defence

166. There have been a number of amendments to the CPC of relevance to the attainment of the envisaged outcomes.
167. These concern, in particular:
– The introduction of a provision for renewing the time limit for filing an appellate complaint in respect of the results of special judicial proceedings where the accused has proved the availability of valid reasons (Art. 400.3);
– The removal of the requirement to adjourn a hearing on appeal where the participation in the proceedings of a participant who failed to appear is deemed mandatory by the appellate court or by law (Art. 4054);

– The introduction of certain grounds of exceptional circumstances for reviewing court decisions which have taken effect, namely, (a) the unconstitutionality, constitutionality of the law, other legal act or their separate provision, applied by the court in resolving the case, as established by the Constitutional Court of Ukraine, (b) the establishment by an international judicial institution, whose jurisdiction is recognized by Ukraine, of a violation of Ukraine's international obligations in resolving this case by a court and (c) the establishment of a judge's guilt in committing an offense or abusive act by an investigator, public prosecutor, investigating judge or court during a criminal proceeding, which resulted in a court decision (Arts. 459.3 & 4 and 461.5).

168. These amendments can be seen as contributing to the attainment of the envisaged outcomes.

169. As noted in the preceding topic, there are practical problems in the operation of videoconferencing which, in particular cases, can have an adverse impact on the position of the defence.

170. No information was received in focus group discussions or interviews regarding safeguards in practice for the defence in the context of appeals.

171. The legislative changes are significant as regards the formal attainment of the relevant outcomes but it remains to be seen how these work in practice. Furthermore, there remains a need to improve videoconferencing arrangements.

172. The recommendations relating to the "Equality of arms" standard above and to appeal powers and procedures below are equally applicable to this item.

Appeal powers for prosecution

173. There have been no changes in the appeal powers of the prosecution.

174. Thus, the CPC still does not limit the range of court decisions that may be appealed by the prosecutor or the grounds for such appeal, except for court judgments based on agreement or conciliation.

175. Similarly, there have also been no changes to the wide discretion given to prosecutors of higher level to initiate appeals

176. During the focus groups with lawyers and prosecutors, information was received that in practice, prosecutors could challenge judicial decisions on formal grounds. For example, a prosecutor is compelled to challenge a court decision, which he/she fully agrees with, because the appeal was filed by a defense lawyer. Such practice is due to the fact that the prosecutor may be adversely affected by his / her management if the complaint of the defense lawyer is satisfied.

177. There are also widespread appeals by higher level prosecutors. At the same time, the prosecutors - procedural supervisors may not even be aware that the decision of the court in his case has been appealed by the higher level prosecutor's office. Moreover, they may not be involved in the court of appeals in such cases. According to local prosecutors there are cases of appeal by prosecutors of higher prosecutor's offices because of the existence of certain statistical indicators for assessing the effectiveness of their activities, when such appeals are made solely to ensure the sustainability of such indicators.

178. In view of the above, we can conclude that the expected outcomes have not been achieved in terms of limiting the prosecutor's powers of appeal, since no changes in the legislative regulation of these powers have occurred.

179. It is recommended that the CPC be amended so as establish clear restrictions on the prosecutor's appeal powers and that the PPO Law be amended to ensure proper procedural independence for the prosecutor vis-á-vis higher level prosecutors, including at the stage of deciding on the expediency of appeal against the court decision.

Appeal powers for victims

180. There have been no changes in the appeal powers for victims.
181. Thus, victims still have wide rights to appeal so that their participation in criminal proceedings is not limited to pre-trial and trial stages.
182. At the same time, there has been no strengthening of the victim's rights at the pre-trial and trial stages. As a result, denials of entering criminal information on criminal offenses in the Unified Register of Pre-Trial Investigations, groundless closing of criminal proceedings and delaying the process of pre-trial investigation continue to bel widespread violations of victim's rights in criminal proceedings.
183. During the focus group, attorneys emphasized that the victim was the least protected person in criminal proceedings. Thus, in particular, the victim is deprived of the right to initiate the conduct of any investigative actions, as well as to express an opinion when choosing a preventive measure for a suspect. There are widespread cases where the victim is not even informed about the closure of criminal proceedings upon his / her statement.
184. Summarizing, it can be noted that the expected outcomes in this area has not been achieved, since no changes in the legal regulation of the victim's powers in terms of appeal have occurred. In addition, it is important to add that taking measures to limit the victim's powers of appeal in criminal proceedings would be appropriate to combine with measures to enhance the victim's legal status at the pre-trial stage and during the trial in a court of first instance.
185. It is recommended to amend the CPC so as to strengthen the legal status of the victim at the pre-trial stage of criminal proceedings, as well as during the court proceedings. Such changes should include, inter alia, granting the victim the right to initiate investigative and procedural actions, obligatory and timely informing the victim of the date and place of court hearings on consideration of preventive measures for a suspect, etc.. At the same time, the CPC should be amended to limit the victim's powers on appeal.

Appeal procedures

186. The CPC has not been amended so as to have a separate provision regarding an appeal against a jury's verdicts. As a result, the participants of criminal proceedings can still appeal a jury's verdict on the same grounds as those of professional judges.
187. Notwithstanding express CPC provisions regarding the grounds for remand of criminal proceedings to the court of first instance by a court of appeal, the practice of returning cases by appellate courts for a new trial to the courts of first instance on other unforeseen grounds is still widespread, which often leads to unjustified delays in criminal proceedings.
188. According to focus group data, this practice is widespread in cases of first-instance court acquittal - in 70% of such cases, the court of appeal overturns the court's decision and remits the case to the first-instance court again instead of adopting its own

decision on the merits. Such data are also confirmed by other studies, according to which almost 60% of the acquittals passed by a jury were overturned by an appeal court. It should also be added that, according to Supreme Court's judges the practice of unreasonably returning appellate cases to a new trial before the courts of first instance has significantly decreased over the last two years.

189. The practice of the groundless refusal to renew or, on the contrary, to renew the terms of an appeal without proper justification, also still occurs in appeal courts.

190. During the focus group, the attorneys noted that the courts of appeals are fairly loyal to the renewal of such terms. One of the reasons for this state of affairs was the fear of the judges of the appellate courts that in the event of their refusal to renew the appeal term, such a decision would be appealed to the Supreme Court, which may overturn the decision of the Court of Appeal.

191. In the light of the foregoing, it can be argued that the expected outcomes were not reached as there were no relevant legislative changes regarding the limitation of appeal powers of prosecutors and victims, as well as the practices for cases overturn to first instances courts and renewal of appeal terms without proper justification still exist.

192. It is recommended the CPC be amended so as to narrow the prosecutor's powers on appeal, including the prohibition to appeal the acquittals of a jury and to strengthen the victim's procedural powers in criminal proceedings, and in particular at the pre-trial stage, while reducing the victim's appeal powers. In addition, it is recommended that the Supreme Court summarize the practice of the courts of appeals as regards the grounds for returning the cases for a new trial to the courts of first instance, as well as the grounds for renewal of the terms of appeal.

CONCLUSIONS

193. There has been little progress in terms of the overall attainment of the outcomes envisaged by JSRSAP for the areas tackled by the assessment, even though some individual ones have been achieved. According to the expert estimates its level amounted to median in the region of no more than 22%.[16]

194. For ensuring enhancement of the reforms and their advancement in the justice sector of Ukraine, in particular, improving relevant framework and its steering mechanisms, the assessment suggest the following:

SHORT-TERM RECOMMENDATIONS (within the period up to the end of 2020)

- Adoption of an amendment to the CPC to take account of the ruling of the Constitutional Court on 23 November 2017 that declared unconstitutional the automatic extension of detention on remand without a court order between the end of the investigation and the beginning of the trial;
- investigators and prosecutors should be given enhanced training as regards their responsibilities under the CPC;
- a unified procedure should be introduced for informing a public prosecutor about apprehension of a person and appointing a procedural supervisor in criminal proceedings;
- Judges should be reminded of their responsibility to ensure plea agreements are voluntary;
- Judges be given training on appropriate conduct in court and of the need not to give the impression of favouring one party even if this is not intentional; and
- The Supreme Court should summarize the practice of the courts of appeals as regards the grounds for returning the cases for a new trial to the courts of first instance, as well as the grounds for renewal of the terms of appeal.

LONGER-TERM RECOMMENDATIONS (within the next full-fledged policy cycle)

- Investigative judges should be appointed in sufficient numbers with this function as their only responsibility
- Investigative actions requiring the approval of investigative judges be reviewed so that there is no need for this where the interests of the defence would not be prejudiced;
- Facilities be provided in police stations for confidential meetings between defence lawyers and their clients;
- An officer in each police station should have specific responsibility for securing the rights of suspects and accused persons;
- The current jury model should be changed to one that would include an increase in the number of jurors and has a clear delineation of their powers and functions from those of professional judges

[16] Outcomes, their group-specific scoring details are suggested in the right column of the attached evaluation matrix.

- Provision should be made to properly regulate the jury selection procedure and to increase their numbers in a particular case;
- Courts should be provided with adequate funding in order to procure the necessary equipment for the installation of video recording and video conferencing systems in all courtrooms of the courts of first instance and appellate court, as well as in the Supreme Court.
- Additional training should be provided to the technical court staff on the features of the use of electronic justice systems, video recording and video conferencing and special rooms for interrogation should be equipped with the possibility of video recording in all territorial departments of the National Police of Ukraine, as well as other law enforcement agencies (NABU, SBI, SBU).
- The CPC should be amended so as to (a) establish clear restrictions on the prosecutor's appeal powers, (b) strengthen the legal status of the victim at the pre-trial stage of criminal proceedings, as well as during the court proceedings (such changes should include, inter alia, granting the victim the right to initiate investigative and procedural actions, obligatory and timely informing the victim of the date and place of court hearings on consideration of preventive measures for a suspect, etc.), (c) limit the victim's powers on appeal, (d) narrow the prosecutor's powers on appeal, including the prohibition to appeal the acquittals of a jury; and (e).extend the availability of jury trial to offences other than those for which life imprisonment can be imposed In addition; and
- The PPO Law be amended to ensure proper procedural independence for the prosecutor vis-á-vis higher level prosecutors, including at the stage of deciding on the expediency of appeal against the court decision.

ANNEX I ASSESSMENT-SPECIFIC MATRIX

Area of Intervention 9.1. **Enhanced Fairness Through Development of Procedural Safeguards for Defence**

Outcomes to be addressed[17]	Desk research[18] DR	Third-party reports TPR	Other methods[19]	Level of Implementation[20]
I. Role of the judge (court) – Increased role of investigative judge during pre-trial stage, to provide practical and effective control of legality of investigations and oversight of intrusive measures – Clear and foreseeable practice of courts regarding presumption of innocence and privilege against self-incrimination – Practical and effective application of home arrest, electronic surveillance, and other forms of alternative detention as matter of preference, with detention on remand being applied as a last resort	1	1	1&3	50%
II. Defendant role – Clear and consistent defense rights and lawyers' role pre-trial, including the ability to conduct lawyer's investigation and formalise evidence	1	1	1&3	**50%**
III. Application of standards – Formalised standards of proof in law and practice for different areas of investigation and trial. – Different standards of proof developed for questions of guilt, justification for investigation, detention on remand, use of SITs, searches and seizure of property, various types of confiscation, declarations of insanity, entrapment etc.) – Clear and foreseeable practice in application of PPO guidelines for remand, with definition of types of bail depending on risk (of flight, collusion, reoffending), and clarification of different standards of proof for justification of relevant risks	1	1	1&3	0%

17 Outcomes envisaged in the relevant box of the JSRSAP to be tackled are specified. Where necessary, basic parameters outlined. Outcomes have been grouped, taking into account actions for particular outputs envisaged in JSRSAP's and methods to be applied for evaluation of certain group of outputs.

18 For every method relevant responsible experts identified: ISTE I = 1; NSTE = 3 (see the relevant ToR). In some activities all experts have been identified as relevant to be involved.

19 Level of attainment of all listed outcomes was also analyzed in a course of focus groups (lawyers, prosecutors, investigative judges) and working meetings with the Supreme Court judges and the representatives of the National Police .

20 Experts estimate level of attainment of the outcome (based on the assessment/evaluation results) in %.

IV. Notification system – Clear and foreseeable notification system of all measures affecting defendant in criminal process – Improved regulation on handing the notification of suspicion, putting on wanted list, extradition, seizure of property and withdrawal of seizure, temporary withdrawal of property at pre-trial stage, the order of entering information to the Unified Register of Pre-trial Investigations, the grounds and procedure of appeal against actions or lack of activity, if the order of entering data to the register is violated, and in other cases).	1	1	1&3	0%
V. Plea and reconciliation agreements – Greater use of plea bargaining, taking account of principles of efficiency and fairness	1	1	1&3	25%
VI. "Equality of arms" standard – Clear, practical and effective use of notion of "public interest" with respect to rights of defence in court proceedings – Practical and effective application of advanced witness and forensic expert interviewing techniques, respecting the equality of arms – Elimination of ex parte communications by judges – Respect for timelines, so that defence has adequate opportunity to prepare its case – Full respect for right of defence to conduct investigations and have equal access to witnesses	1	1	1&3	0%
VII. Alternative trials – Extension of jury trials to cover wide range of crimes; regular use of juries in mandatory situations – Introduction of lay judges in minor criminal offences (misdemeanours)	3	3	1&3	30%
VIII. E-tools and equipment – Practical and effective application of e-justice tools to increase efficiency and fairness – Greater use of audio and video recording of interrogations and hearings, to ensure protection of rights of defence – Greater use of video conferencing	3	3	1&3	60%
IX. Safeguards for defence – Greater rights of defence (as opposed to prosecution) to appeal in criminal process; – Safeguards in place for awareness of defendant being notified of appellate hearing (but no default obligation of defendant's presence, in case his lawyer is present) – Safeguards in place for establishing defendant's waiver to be present at hearing (test of 'genuine and unequivocal' waiver) – Safeguards for effective counsel representation in case of video-conferencing	1	1	1&3	50%
X. Appeal powers for Prosecution – No right of prosecution to appeal acquittal by jury; – Required consolidation of prosecution arguments in one appeal, and not separate appeals (by case-assigned, senior prosecutor etc.) – Any exercise of prosecutorial discretion on appeal subject to test of 'reasonableness'	3	3	1&3	0%

XI. Appeal powers for victims – Wider victim participation restricted to stage of pre-trial and trial; – Victim right to appeal (as opposed to right of prosecution) reduced to exceptional cases	3	3	1&3	0%
XII. Appeal procedures – Conviction by jury susceptible to narrow review on breaches of procedure (on appeal by defence against conviction; introduction of 'safe jury conviction' criterion), or only where new, previously unknown, and compelling circumstances arise after conviction (on appeal by accusation) – No unjustified (unmotivated) extension of time-limits for appeal for any party; strict and short statutory limitations on extension of time-limits – In case of reversal of lower decision, remittal warranted only in exceptional cases that cannot be remedied on appeal, such as 'serious' procedural breaches at lower level – Reclassification on appeal to milder charge acceptable, but only where right to request adjournment is given to defence and ability of full appeal exists at appeal level – No reliance on trial transcripts on appeal for fact-finding purposes, if transcript contested by parties	3	3	1&3	0%
Total (average for the assessment)				**22%**

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ANNEX II LIST OF REPORTS, PUBLICATIONS AND OTHER DOCUMENTS REVIEWED

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3. Expert Center for Human Rights, The Role of the Prosecutor of the Specialized Anti-Corruption Prosecutor's Office at the Pre-trial Stage, https://ecpl.com.ua/en/publications/the-role-of-the-prosecutor-of-the-specialized-anti-corruption-prosecutor-s-office-at-the-pre-trial-stage-study-report/
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11. NGO All-Ukrainian European Foundation "The League of Law" et al, Rule of law in Ukraine: Human Rights in Criminal Proceedings, https://www.osce.org/odihr/346176?download=true
12. Report on an Evaluation of the Implementation of the Criminal Procedure Code of Ukraine, CoE Experts (2015; https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168044f56a
13. Report to the Ukrainian Government on the visit to Ukraine carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 21 to 30 November 2016, CPT/Inf (2017) 15, https://rm.coe.int/pdf/1680727930
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15. Response of the Ukrainian Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Ukraine, CPT/Inf (2017) 19, https://rm.coe.int/pdf/1680734be7
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17. Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its Visit to Ukraine undertaken from 19 to 25 May and from 5 to 9 September 2016: observations and recommendations addressed to the State party, CAT/OP/UKR/3, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fOP%2fUKR%2f3&Lang=en
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ANNEX III EXTRACT FROM JSRSAP

Chapter 9
Enhancing Fairness and Defence Rights in Criminal Proceedings

Action		Implementation Deadline			Performance Criteria		
		End of 2016	*End of 2018*	*End of 2020*	*Measures/Outputs*	*Responsible Body / Means*	*Outcomes*
					Area of Intervention 9.1 **Enhanced Fairness Through Development of Procedural Safeguards for Defence**		
9.1.1	Development of pre-trial procedural safeguards for defence				1. Reviewed regulatory framework on role of judges during pre-trial stage	CJ, SC, HSC (criminal), MOJ, Parliament / Decisions, statutes and rules amended	- Increased role of investigator during pre-trial stage, to provide practical and effective control of legality of investigations and oversight of intrusive measures - Clear and consistent defence rights and lawyers' role pre-trial, including the ability to conduct lawyer's investigation and formalise evidence - Clear and foreseeable notification system of all measures affecting defendant in criminal process - Clear and foreseeable practice of courts regarding presumption of innocence and privilege against self-incrimination - Formalised standards of proof in law and practice for different areas of investigation and trial. - Different standards of proof developed for questions of guilt, justification for investigation, detention on remand, use of SITs, searches and seizure of property, various types of confiscation, declarations of insanity, entrapment etc.) - Clear and foreseeable practice in application of PPO guidelines for remand, with definition of types of bail depending on risk (of flight, collusion, reoffending), and clarification of different standards of proof for justification of relevant risks - Practical and effective application of home arrest, electronic surveillance, and other forms of alternative detention as matter of preference, with detention on remand being applied as a last resort - Greater use of plea bargaining, taking account of principles of efficiency and fairness - Practical limitations on use of coercive measures to force settlements -- Improved regulation on handing the notification of suspicion, putting on wanted list, extradition, seizure of property and withdrawal of seizure, temporary withdrawal of property at pre-trial stage, the order of entering information to the Unified Register of Pre-trial Investigations, the grounds and procedure of appeal against actions or lack of activity, if the order of entering data to the register is violated, and in other cases).
					2. Reviewed regulatory framework on defence rights and role of lawyers pre-trial. Reviewed system of notification (of bringing suspicion, charges, putting on wanted list, seizure and confiscation etc.).	UNBA, MOJ, Parliament / Decisions, statutes and rules amended	
					3. Reviewed regulatory framework on obligation of courts and public bodies to respect presumption of innocence and privilege against self-incrimination	CJ, SC, HSC(criminal), MOJ, Parliament / Decisions, statutes and rules amended	
					4. Reviewed regulatory framework on detention on remand. Remand guidelines adopted and disseminated.	CJ, SC, HSC (criminal), PPO, MOJ, Parliament / Decisions, statutes and rules amended	
					5. Reviewed regulatory framework of oversight system of use of special investigative techniques (SITs) by PPO or courts, including authorisation of intelligence and undercover operations	CJ, SC, HSC (criminal), PPO, MOJ, Parliament / Decisions, statutes and rules amended	
					6. Reviewed regulatory framework on plea bargaining and conciliation agreements	CJ, PPO, MOJ, Parliament / Decisions, statutes and rules amended	
					7. Practice guides and training modules developed, disseminated, and regularly updated, covering roles of judges, prosecutors, and lawyers during pre-trial proceedings,, presumption of innocence and privilege against self-incrimination, lawfulness of detention on remand, SITs, plea bargaining, etc.	NSJ, NAPU, BTC / Decisions, trainings, publications	

9.1.2	Development of procedural safeguards for defence at trial				1. Reviewed regulatory framework on publication and public access to court hearings and decisions	CJ, SC, HSC, MOJ, Parliament / Decisions, statutes and rules introduced	- Practical and effective application of e-justice tools to increase efficiency and fairness - Greater use of audio and video recording of interrogations and hearings, to ensure protection of rights of defence - Greater use of video conferencing - Clear, practical and effective use of notion of "public interest" with respect to rights of defence in court proceedings - Practical and effective mechanism of oversight of quality of legal aid in criminal process by Bar and courts - Practical and effective application of advanced witness and forensic expert interviewing techniques, respecting the equality of arms - Extension of jury trials to cover wide range of crimes; regular use of juries in mandatory situations - Introduction of lay judges in minor criminal offences (misdemeanours) - Elimination of ex parte communications by judges - Respect for timelines, so that defence has adequate opportunity to prepare its case - Full respect for right of defence to conduct investigations and have equal access to witnesses
					2. Reviewed regulatory framework on effective legal representation at trial	UNBA, CJ, SC, HSC, MOJ, Parliament / Decisions, statutes and rules introduced	
					3. Reviewed regulatory framework on handling of witnesses and experts at trial	CJ, SC, HSC, PPO, UNBA, MOJ, Parliament / Decisions, statutes and rules amended	
					4. Reviewed regulatory framework on juries and lay judges. Statewide piloting of juries.	CJ, SC, HSC, MOJ, Parliament / Decisions, statutes and rules amended, reports, jury decisions	
					5. Practice guides and training modules developed, disseminated, and regularly updated, covering publicity of proceedings, effective legal representation, witness and expert handling, jury trials and role of lay judges	NSJ, NAPU, BTC / Decisions, trainings, publications	
9.1.3	Development of greater fairness and defence rights on appeal				1. Reviewed regulatory framework - including statutes, court rules, judicial practice and formalised prosecution policies - on scope and procedure of examination of cases at 2nd and 3rd instance	Courts, PPO, UNBA, MOJ, Parliament / Decisions, statutes and rules amended	- Greater rights of defence (as opposed to prosecution) to appeal in criminal process; no right of prosecution to appeal acquittal by jury; conviction by jury susceptible to narrow review on breaches of procedure (on appeal by defence against conviction; introduction of 'safe jury conviction' criterion), or only where new, previously unknown, and compelling circumstances arise after conviction (on appeal by accusation) - Required consolidation of prosecution arguments in one appeal, and not separate appeals (by case-assigned, senior prosecutor etc.) - No unjustified (unmotivated) extension of time-limits for appeal for any party; strict and short statutory limitations on extension of time-limits - Wider victim participation restricted to stage of pre-trial and trial; victim right to appeal (as opposed to right of prosecution) reduced to exceptional cases - Reclassification on appeal to milder charge acceptable, but only where right to request adjournment is given to defence and ability of full appeal exists at appeal level - Any exercise of prosecutorial discretion on appeal subject to test of 'reasonableness' - Safeguards in place for awareness of defendant being notified of appellate hearing (but no default obligation of defendant's presence, in case his lawyer is present) - Safeguards in place for establishing defendant's waiver to be present at hearing (test of 'genuine and unequivocal' waiver) - Safeguards for effective counsel representation in case of video-conferencing - No reliance on trial transcripts on appeal for fact-finding purposes, if transcript contested by parties - In case of reversal of lower decision, remittal warranted only in exceptional cases that cannot be remedied on appeal, such as 'serious' procedural breaches at lower level
					2. Practice guides and training modules developed, disseminated, and regularly updated, covering questions of scope and procedural rules on appeal, sentencing, grounds for appeal, exercise of judicial or prosecutorial discretion on appeal etc.	NSJ, NAPU, BTC / Decisions, trainings, publications	

HUMAN RIGHTS COMPLIANT CRIMINAL JUSTICE SYSTEM IN UKRAINE
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Evaluation Report

on

Area of Intervention 9.1. Enhanced Fairness Through Development of Procedural Safeguards for Defence

Jeremy McBride

International Expert, Council of Europe Consultant

Yurii Bielousov

National Expert, Council of Europe Consultant

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