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## International Standards for Ensuring the Right to Liberty and Personal Security in Criminal Proceedings of Ukraine

### Міжнародні стандарти забезпечення права на свободу і особисту недоторканність в кримінальному процесі України

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#### Abstract

The purpose of this research is to analyze international legal standards that guarantee the right to liberty and personal security in criminal proceedings. The subject of the study was the requirements of international acts, the decision of the European Court of Human Rights and the provisions of the current criminal procedural legislation of Ukraine on the issues of guaranteeing and securing of that right. The authors of the article used the following methods: dialectics, comparative legal, system analysis, formal logic.

The relevance of the topic of this article depends on the fact that the current direction of the reform of the criminal procedural legislation is aimed at strengthening the legal guarantees for the protection of a person, protection of his rights, freedoms and legitimate interests in criminal proceedings. Such a fundamental right of every human being as the right to liberty and personal security is no exception to this. In this context, the legal mechanisms for the application of coercive measures need to be reviewed, re-evaluated and adjusted. This, of course, reflects the approximation of national law to

#### Анотація

Метою даної дослідницької роботи є аналіз міжнародних правових стандартів, якими гарантовано забезпечення права на свободу і особисту недоторканність в кримінальному процесі. Предметом дослідження виступили вимоги міжнародних актів, рішення Європейського суду з прав людини та положення чинного кримінального процесуального законодавства України з питань гарантування й забезпечення вказаного права. Під час написання статті авторами використано наступні методи: діалектики, порівняльно-правовий, системного аналізу, формальної логіки.

Актуальність теми статті обумовлена тим, що сучасний напрям реформа кримінального процесуального законодавства спрямований на посилення правових гарантій забезпечення захисту особи, охорони її прав, свобод та законних інтересів у кримінальному провадженні. Не виключенням із цього є й таке основоположне право кожної людини, як право на свободу та особисту недоторканність. З огляду на це, потребують свого перегляду, переосмислення та коректування усталені правові механізми застосування заходів

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international legal standards, European values, the establishment of the rule of law, and so on.

**Key words:** right to liberty and personal security, detention, arrest, custody.

## Introduction

European integration processes in Ukraine require the state to make substantial changes in all areas of law towards the strengthening guarantees of human rights and freedoms. After all, according to Article 3 of the Constitution of Ukraine (1996) (the fundamental law of the state), a person, his life and health, honor and dignity, integrity and security are recognized as the highest social value in Ukraine. Human rights, freedoms, and their guarantees determine the essence and orientation of the state. The state is responsible to the person for its activities. The promotion and protection of human rights and freedoms is the main responsibility of the state. That is why the recent reform of criminal procedural legislation should be aimed at introducing more effective protection of human rights and strengthening the entire criminal justice system.

The United Nations adopted sustainable development goals that are related to the quality of life on a global level, emphasising no poverty, no hunger, good health and well-being, quality education, gender equality, clean water and sanitation, affordable and clean energy, decent work and economic growth, industry, innovation and infrastructure, reduced inequalities, sustainable cities and communities, responsible consumption and production, climate action, life below water, life on land, peace, justice and strong institutions, and partnership for the goals (Meško et al., 2018). In this aspect, the issue of ensuring the constitutional rights and freedoms of human beings is of particular importance, among which the right to liberty and personal security plays an important role.

The relevance and at the same time the importance of the topic raised in the article is due to two interrelated and complementary factors. First, the landmark event was the consolidation in Article 9 of the Constitution of Ukraine (1996) the requirement according to which: "current international treaties, the consent for which was given by the Verkhovna Rada of Ukraine, are

процесуального примусу. Це, звісно, є свідченням наближення національного законодавства до міжнародних правових стандартів, європейських цінностей, утвердження верховенства права тощо.

**Ключові слова:** право на свободу та особисту недоторканність, затримання, арешт, тримання під вартою.

part of the national legislation of Ukraine". Secondly, according to the requirements of the Criminal Procedure Code of Ukraine in 2012 (hereinafter the CPC of Ukraine) during criminal proceedings, government officials are obliged to steadily comply with the requirements of international treaties, the consent of which is provided by the Verkhovna Rada of Ukraine. In addition, the rule of law in criminal proceedings is applied taking into account the practice of the European Court of Human Rights.

## Theoretical framework

First of all, it should be noted that among the famous scientific scholars, there are separate works in which the analysis of related problematic issues is carried out. Among the authors of such works should be noted Ablamskyi S. E. (2015), Bugaychuk K. L. (2017), Gladkova Ye. O. (2017), Macovei M. (2002), Malynovska T. M. (2017), Drozd W. G. (2015), etc. However, the scientific analysis of the outlined issues was not conducted separately. In particular, these scholars examined international standards for ensuring the right to liberty and security of person in the context of the general problems of protecting human rights and freedoms, or with regard to individual participants in the criminal process (mainly regarding the suspect or accused).

Regarding the study of various problematic aspects of the essence of a person's right to liberty and personal security, as well as ensuring it, we consider it appropriate to note Butenko V. (2019), Enonchong L. (2016), Homiyen D. (1994), Korovaiko O. I. (2017), Pastukhova L. V. (2003), Tertyshnyk V. M. (2002), Uvarov V. G. (2012) and others. However, in spite of the significant contribution of these scientists in this field, there are problematic issues that need scientific solution. First of all, this concerns the compliance of the current criminal procedural legislation of Ukraine with the requirements of international

legal acts that guarantee the protection of this right. This is explained by the fact that over the past couple of years in the CPC of Ukraine a number of changes have been introduced aimed at strengthening the protection of human rights and freedoms. Moreover, as the practice of their application testifies, in most cases legislative changes were unsystematic. In addition, in the context of national legislation reform, the priority of which is to strengthen the protection of the individual and society, the implementation of international standards is paramount. This has been repeatedly emphasized by leading European partners who are constantly providing qualified assistance regarding introduction and further practical implementation of international norms and principles in the field of human rights and freedoms.

### Methodology

Modern methods of scientific knowledge were used while writing the article. Thus, the dialectical method reveals the essence of such concepts as "international human rights standards", "human rights protection" and so on. The method of systematic analysis was used by the authors to analyze the decisions of the European Court, the benefits of international acts in terms of guaranteeing the right to liberty and personal security. The comparative legal method has helped to reveal the peculiarities of national legislation of Ukraine in comparison with international standards and norms. The method of formal logic revealed the general characteristics and distinctive features of the right to liberty and personal security. The interrelated application of the above scientific methods of research made it possible to achieve that goal and to draw relevant sound conclusions.

### Results and discussion

The right to liberty and personal security is a natural, inalienable, fundamental right of every person. So, still in the text of Grand Charter of Liberties (England, in 1215) it was said that no free person can be imprisoned or arrested except under the law of their equals and the law of the state. At the same time, they received their new round of human rights development in the twentieth century, in the post-war era (Svyda, Kovalchuk, Torbas, Melnychuk, & Kytaika, 2019, p. 857). Nowadays, relevant guarantees of human rights for freedom and personal security are also contained in fundamental international human rights instruments. In particular, it is worth noting such international documents as: the Universal Declaration of Human Rights of

1948 (hereinafter UDHR); The Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (hereinafter ECHR); The International Covenant on Civil and Political Rights of 1966 (hereinafter ICCPR); UN General Assembly Resolution 43/173 of 9 December 1988 on the Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and others. In this context, we should support S. E. Ablamskyi's position (2015, p. 130–131), who noted that a set of fundamental rights and freedoms of a person and a citizen, now known as international legal standards, was enshrined for the first time in the above-mentioned international instruments. Moreover, it should be taken into account that, in the context of democratic development, the establishment of the rule of law and legitimacy, the following international instruments contribute most to the development of the domestic legislation of European countries. In particular, this applies not only to the protection of human rights and freedoms, but also to the establishment of legal grounds for their restriction, but in this case, it must also be justified, legal and last as soon as possible.

As L. V. Pastukhova noted (2003, p. 5), a distinctive feature of international legal institutions for the protection of human and citizen's rights and freedoms is that they are established with the common efforts of states by their mutual consent and are enshrined in relevant international legal agreements and acts.

In order to create a solid legal foundation for securing and guaranteeing the rights and freedoms of the individual, a number of international instruments, which are now recognized by many countries in the world, were developed by the international community. In legal science, such normative documents are commonly called international human rights standards.

Today's lawyers have expressed different views regarding understanding of the essence of international human rights standards, but a common position has not been established yet. For example, according to V. G. Uvarov (2012, p. 226), international human rights standards are a set of basic universally recognized and generally binding norms and principles contained in international legal acts, UDHR case-law and interstate agreements that set out standardized rules of conduct for parties and others participants in the proceedings. In turn, O. I. Korovaiko (2017, p. 18-19) noted that the standard of the right to liberty and personal

security is a set of legal provisions based on the requirements of international legal acts and statutory provisions under which the unjustified and unlawful restriction of the right to liberty and security of the participants of criminal proceedings are forbidden, the possibility of protection against violation of this right is provided, and in case of limitation of the said rights the person is guaranteed the opportunity to seek their judicial protection.

It should be noted that during the development and adoption of the CPC of Ukraine, most of the international human rights standards were taken into account by the domestic legislator. However, nowadays, some of the provisions of the CPC of Ukraine regarding the right to liberty and personal security still do not fully comply with international legal standards. The evidence of that is the numerous appeals by citizens of Ukraine to the European Court of Human Rights regarding violations of the right to liberty and personal security, in particular during detention and use of preventive measure in the form of custody (Butenko, 2019). At the same time, an important means of strengthening the rule of law and legal order in criminal proceedings is compliance and ensuring regulations regarding the detention and selection of preventive measures. Preventive measures are measures of procedural coercion that restrict the personal freedom and freedom of movement of a suspect (accused) and are used to prevent the possibility to flee from investigation and trial, to prevent the establishment of objective truth and justice, and to continue criminal activity. This type of criminal prosecution, as a preventive measure, is not a punishment and an attitude of the state to the detained person as a criminal.

It should be noted that the provision of Article 29 of the Constitution of Ukraine provides: "Everyone has the right to liberty and personal security". Such a requirement is completely correlated with the norms of Article 3 of the UDHR (1948), Article 5 of the ECHR (1950), Article 9 of the ICCPR (1966) and other universally recognized international instruments. Having analyzed these international documents, it can be argued that the essence of the right to liberty and personal security may be summarized as follows: 1) man, by nature, is free; 2) the restriction of such a right is possible only as the exception, respecting guarantees that prevent the arbitrary deprivation of liberty; 3) the list of such exceptions is provided for by Article 29 of the Constitution of Ukraine and a broader list by Article 5 of the ECHR; 4) the restriction

of rights and freedoms in national legislation cannot be wider than in Article 5 of the ECHR.

Among the international instruments, guaranteeing the protection of a person's rights against unlawful arrest or detention by the authorities the ECHR plays an important role. Thus, article 5 of the European Convention embodies a key element in the protection of an individual's human rights. Personal liberty is a fundamental condition, which everyone should generally enjoy. Its deprivation is something that is also likely to have a direct and adverse effect on the enjoyment of many of the other rights. Furthermore, any deprivation of liberty will invariably put the person affected into an extremely vulnerable position, exposing him or her to the risk of being subjected to torture and inhuman and degrading treatment. Judges should constantly keep in mind that in order for the guarantee of liberty to be meaningful, any deprivation of it should always be exceptional, objectively justified and of no longer duration than absolutely necessary (Macovei, 2002).

Furthermore, paragraph 1 of Article 5 of the ECHR specifies the circumstances in which a person may be deprived of his liberty legally, and these grounds cannot be interpreted broadly, as they are the exception to the rule. In particular, a person may not be deprived of the right to liberty and security of person, except for the exhaustive cases provided for in paragraph 1 of Article 5 of the ECHR. This right is not absolute, and therefore may be restricted on the grounds and in the manner prescribed by law. Such grounds are: a) the lawful detention of a person after conviction by a competent court; b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against

whom action is being taken with a view to deportation or extradition.

As notes Laura-Stella Enonchong (2016, p. 391-392), article 9(1) of the ICCPR comprise two principal rights: the right to personal liberty and the right to security. The right to security is not discussed here because this article focuses on mandatory procedural safeguards relating to arrest and detention rather than the security of individuals deprived of their liberty. Moreover, it has been argued that the right to security is a separate and distinct right that has been accorded a broader interpretation beyond the significance of article 9(1) of the ICCPR. Deprivation of liberty has always been a legitimate means of state control and so the right to personal liberty under these instruments is not absolute. Measures restricting personal liberty are permissible under certain circumstances. Nevertheless, instruments provide normative requirements that such measures be reasonable and necessary and be carried out pursuant to the circumstances and procedures established by law.

In this respect, we can conclude that the fundamental requirements that guarantee the right to liberty and security of person are: imprisonment may take place only if there is reasonable suspicion of a criminal offense; the lawfulness of arrest and detention; the need to explain to the suspect the reasons for the arrest and the essence of the charge in a language which he understands; custody may be selected only on the basis of a court decision; the ability of an arrested person to challenge the lawfulness of his or her detention and arrest; the right to receive financial compensation in case of unlawful arrest or detention by authorized state bodies.

Legislators of the current CPC of Ukraine have made it as close as possible to its international standards for the protection of human rights and freedoms, since the shortcomings of the previous legislation led to the recognition of violation of Article 5 of the ECHR. Currently, according to Part 1 of Article 183 of the CPC (2012), custody is an exceptional preventive measure that applies only if the prosecutor fails to prove that none of the lighter preventive measures can prevent the risks provided for in Part 1 of Article 177 of the CPC. Addressing the issue which preventive measure should be taken, courts must proceed from the presumption of liberty, which means that a person must remain free until law enforcement officers prove the need for his or her detention or custody.

The right to liberty and security of person is natural but not absolute. Based on the state's duty to prosecute, officials authorized to investigate crimes may detain a person without the court's prior permission. Thus, according to the prescriptions of Part 3 of Article 29 of the Constitution of Ukraine: "In case of an urgent necessity to prevent or stop a crime, bodies authorized by law may hold a person in custody as a temporary preventive measure, the reasonable grounds for which shall be verified by a court within seventy-two hours. The detained person shall be released immediately, if he or she has not been provided, within seventy-two hours from the moment of detention, with a substantiated court decision in regard to the holding in custody". It should be emphasized that such detention can be challenged in court at any that is an important constitutional guarantee, which is provided for in Part 5 of Article 29 of the Constitution of Ukraine and reflected in paragraph 2 of Part 1 of Article 309 of the CPC of Ukraine, which meets the requirements of paragraph 3 of Article 5 of the ECHR.

Therefore, the use of preventive measure in form of holding in custody should only take place in exceptional cases established by law, since the person has not yet been convicted for a criminal offense but is in the status of a suspect or accused. The issue on holding in custody should be resolved in accordance with the principle of competitiveness and should always ensure the equality of procedural means of the parties to the case.

It should be noted that the specificity of criminal proceedings is that in the case of insufficient legal regulation, the absence of certain standards of protection of human rights and freedoms individuals may not only be subject to restrictions, but sometimes cases of their violation occur. Thus, the special attention of the state in the area of human rights protection should be focused first and foremost in criminal proceedings. This is particularly true for those participants in criminal proceedings whose rights in this area may be restricted to a greatest extent, in particular, the suspect.

V. M. Tertyshnyk (2002, p. 52) formulated a general definition of the principle (basis) of ensuring the protection of human rights and freedoms, which, in his opinion, means the exercise of procedural activity in such order, form and regime under which interference with human rights and freedoms there would not have occurred, or would happen only in the cases provided for by law, in cases of urgent necessity

when it is impossible to solve the tasks of justice by other means. Nowadays, the main function and purpose of the criminal proceedings is that they must ensure full implementation of the procedural form, the violation of which entails the inadmissibility of evidence.

It should be noted that an important guarantee of the protection of the rights and freedoms of a detained person is the duty of the competent public authorities to immediately inform every arrested person, in a language which he understands, of the reasons for his arrest and of any charge against him (paragraph 2 of Article 5 of the ECHR, Article 9.1 of the ICCPR).

Special attention of the State in the area of human rights protection should be concentrated in the exercise of judicial control, which, in accordance with the ECHR, is necessary not only to ensure the right to liberty and security of person, but also to prevent possible ill-treatment of a person when he or she is especially vulnerable. In particular, the requirements of paragraph 3 of Article 5 of the ECHR provide for mandatory and urgent judicial review of the grounds for imprisonment after the initial detention and holding in custody of a suspect. Such guarantees should minimize the risk of arbitrariness and to ensure that any deprivation of liberty on the grounds set out in the ECHR is subject to independent judicial control and is accompanied by the responsibility of the authorities for their actions (Drozd, 2015, p. 49).

The provisions of Article 29 of the Constitution of Ukraine (1996) defines detention and holding in custody as coercive measures that restrict the right to liberty and security of person and can be applied only on the grounds and in the manner prescribed by law. These grounds and procedure are provided in Chapters 1, 18 of the CPC of Ukraine. To implement the constitutional provisions the principle of securing the right to liberty and personal security (Article 12 of the CPC) is singled out in the Criminal Procedure Code of Ukraine among the principles of criminal proceedings.

One of the key principles guaranteeing the right to liberty and security of person (in the context of paragraph 5 of Article 5 of the ECHR) is the right to financial compensation for unlawful arrest and detention. The relevant requirement has been implemented in national legislation and has been set out in Article 10 of the CPC of Ukraine: "Damage caused by illegal decisions, actions or inactivity of a body carrying out an investigative activity, a pre-trial investigation, a prosecutor's

office or a court shall be compensated by the state at the expense of the State Budget of Ukraine in the cases and in the manner provided by law." The following shall be compensated: 1) earnings and other monetary incomes lost by the citizen as a result of illegal acts; 2) property (including money, cash deposits and interest on them, securities and interest on them, share in the statutory fund of a company of which the citizen was a participant, and income that he did not receive in accordance with this share, other valuables) confiscated or returned to the State by a court, seized by pre-trial investigative bodies, bodies carrying out investigative activities, and seized property; 3) fines got to enforce court sentences, court costs and other costs paid by the citizen; 4) amounts paid by a citizen to provide him legal assistance; 5) moral harm.

It should be noted that the national legislation, namely, the CPC of Ukraine provides for procedural guarantees of detained persons such as:

- a detained (arrested) person must be brought to court as soon as possible (Part 2 of Article 12 of the CPC);
- holding in custody must take place within a reasonable time (Part 1 of Article 28 of the CPC);
- a person has the right to apply for a change of preventive measure (Article 201 of the CPC);
- except in cases provided for by law, he has the right to be released on bail (Part 4 of Article 183 of the CPC);
- the general duties of the investigating judge regarding human rights protection are provided for in Article 206 of the CPC.

Other novelties of the CPC, which can be regarded as additional procedural guarantees for the right to liberty and security of person, are:

- the requirement of Part 1 of Article 196 of the CPC on the indicating in the decree on the application of preventive measures of circumstances which show the existence of the risks provided for in Article 177 of the CPC and circumstances which show that less severe measures of restraint are insufficient for preventing the risk (paragraphs 2-3 of Part 1 of Art. 196 CPC);
- the term of validity of the investigating judge's, court's ruling to commit to custody or to extend custody may not

- exceed sixty days (Part 1 of Article 197 of the CPC);
- the procedure provided for Part 5 of Article 199 of the CPC for the extension of custody period, in particular, the duty of the investigating judge to deny the extension of custody period unless public prosecutor, investigator prove that the circumstances of the case justify continued keeping under custody of the suspect, accused;
  - the establishing in articles 202, 377 of the CPC the procedure for releasing of a person from custody;
  - setting in Article 211 of the CPC terms of detention without the investigating judge's, court's ruling; the right of the court, at the preparatory hearing, at the request of the participants in the court proceedings, to change or cancel the preventive measure chosen for the accused;
  - irrespective of the presence of motions, the court shall be required to dispose the issue of expedience to extend the period of keeping the accused in custody until the expiry of the two month period after the receipt by the court of the indictment, a motion to enforce compulsory medical or educational measures, or after the day of enforcing in respect of the accused of the measure of restraint in the form of keeping in custody (Part 3 of Article 331 of the CPC).

It should be emphasized that according to parts 2, 3 of Article 206 of the CPC, if the investigating judge receives information from any sources, which gives ground for a reasonable suspicion that within the court's territorial jurisdiction, there is a person who has been deprived of his liberty without valid court's decision, or has not been released from custody after the payment of bail such judge shall have the duty to release the person deprived of liberty from custody unless the public authority or official that keeps such person in custody presents a valid court's decision, or proves the existence of any other legal grounds for deprivation of liberty.

An important international legal guarantee is the requirement of Part 3 of Article 9 of the ICCPR, which emphasizes that *"it shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement"*. This

progressive position was taken by the developers of the CPC of Ukraine in 2012, who took several steps forward in the area of securing the right of the study. For example, in the judgment in case of «Stagmuller v. Austria» (1969), the European Court emphasized that when the criterion of "reasonable suspicion" ceases to have effect, or circumstances which minimize the risk of escape (for example, the payment of bail) holding in custody becomes unjustified (Gomyen, 1994, p. 26).

### Conclusion

Based on the above, it can be argued that the standard of the right to liberty and security of person is a set of legal provisions based on the requirements of international legal acts and set by the State according to which the unjustified and unlawful restriction of the right to liberty and security (individual liberty, physical and mental security) of the participants in criminal proceedings is forbidden, the possibility of protection from violation of this right in one way or another is provided, as well as in case of restriction of the rights the opportunity to seek judicial protection (appeal to the court of actions and decisions of the relevant officials) of the said right is guaranteed.

EU integration processes, which Ukraine acceded to, affect all spheres of public life, including formation of domestic legislation. That is why the international standards of human and citizen rights and freedoms envisaged by a number of universally recognized international legal acts, ratified by Ukraine, must be strictly implemented and adhered to by the state. In addition, the level of guarantee and ensuring of the right to liberty and personal security is considered as an indicator of democratization of society and is an important component for the establishment of legal statehood.

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