

Interrogation in Ukrainian Criminal Procedure

Iryna Hloviuk

<https://orcid.org/0000-0002-5685-3702>

Doctor of Law, Professor at Vilnius University, Faculty of Law

306 room (Dean's Office)

Saulėtekis av. 9 – I block, LT-10222 Vilnius, Lithuania

Phone: (+370 5) 236 61 85

E-mail: tf@tf.vu.lt

Professor of the Department of Criminal Law Disciplines, Institute of Law;

chief researcher of the department of organization of scientific work

at Lviv State University of Internal Affairs

26 Horodotska str., Lviv, Ukraine

E-mail: irynavasgloviuk@gmail.com

The aim of the paper is to research the interrogation in Ukrainian criminal procedure with a particular focus on the use of pretrial testimonies in trial. The author seeks to identify the main problems of procedure of interrogation and grounds of use testimonies in trial. The draft amendments of interrogation and doctrine views are discussed. The conclusions of article are the propositions for review of the use of pretrial testimonies in trial for testimonies of children and testimonies in wartime. **Keywords:** testimonies, victim, witness, investigating judge, trial, war.

Apklausa Ukrainos baudžiamajame procese

Straipsnio tikslas yra ištirti apklausos institutą Ukrainos baudžiamajame procese, ypatingą dėmesį skiriant ikiteisminio tyrimo metu duotiems parodymams panaudoti teisme. Autorė siekia nustatyti pagrindines apklausos procedūros problemas ir parodymų panaudojimo teisme pagrindus. Aptariami apklausą reguliuojančių teisės aktų pakeitimų projektai ir doktrinos nuomonės. Straipsnio išvadose pateikiama siūlymų peržiūrėti ikiteisminio tyrimo metu duotų parodymų panaudojimą teisme dėl vaikų parodymų ir parodymų karo metu.

Pagrindiniai žodžiai: parodymai, nukentėjusysis, liudytojas, ikiteisminio tyrimo teisėjas, teismo procesas, karas.

Introduction

In 2022, the Criminal Procedure Code of Ukraine (CPC) has an anniversary of adoption and of entry into force (2012) (Criminal Procedure Code of Ukraine). This Code changed a lot of ancient procedures according to the European standards of human rights and criminal procedure. Also the procedure and the meaning of interrogation were changed. There changes were based on the situation with ill-treatment during the pretrial investigation in Ukraine, that was pointed in the ECHR jurisprudence v. Ukraine (for example, «Danilov v. Ukraine» (Application no. 2585/06) (case «Danilov v. Ukraine»), «Afanasyev v. Ukraine» (Application no. 38722/02) (case «Afanasyev v. Ukraine») etc.).

Now the CPC prescribes that the court shall examine evidence directly. The court takes testimonies of the participants in criminal proceedings orally. Except as otherwise provided in this Code, inform-

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ation contained in testimonies, objects and documents that have not been directly examined by court may not be admitted as evidence. The court may admit in evidence testimonies which are not given directly in court only when it is provided for by this Code (art. 23).

That's why it is possible to indicate two aspects: 1) the procedure of interrogation according to the European standards of human rights, and 2) the meaning of interrogation to prevent ill-treatment during the pretrial investigation (inadmissibility of evidence obtained through significant violation of human rights and fundamental freedoms).

Also the CPC adopted the procedure of interrogation of a witness, victim in the course of pretrial investigation in court session, and criminal cases demonstrate that it is effective, especially in the time of COVID-19. And art. 23 of CPC with rule that the court may admit in evidence testimonies which are not given directly in court only when it is provided for by this Code, means this procedure.

Therefore, there are new propositions for the procedure of interrogation during wartime in Ukraine and for use of testimonies in proving, especially in trial.

Consequently, it is important to discuss the general aspects of interrogation in Ukrainian criminal procedure, testimonies and evidence for pretrial investigation and for trial and interrogation during wartime.

1. General aspects of interrogation in Ukrainian criminal procedure

Interrogation in Ukrainian criminal procedure is one of the most popular investigative (detective, search) actions. As the barrister, I have never seen materials of criminal proceedings (criminal case) without interrogations. That's why the CPC has lots of rules about the interrogation.

Firstly, interrogation is the investigative (detective, search) action, the conduct of which is aimed at collecting, verifying, evaluating evidence by obtaining verbal data on circumstances relevant to criminal proceedings, and their subsequent recording in the protocol and other legally prescribed ways by appropriate subjects of criminal procedural activities (Blahuta, Hutsuliak, Dufeniuk *et al.*, 2016, p. 65). It is important to differentiate the interrogation (the result of them is testimonies as the procedural sources of evidence) and obtaining the explanations (explanations are the procedural sources of evidence only for inquiry (where criminal misdemeanors are investigated)).

In criminal procedural doctrine many types of interrogation are identified, but the most important are:

- depending on the stage of criminal procedure (pretrial, trial);
- depending on the participant of criminal procedure;
- depending on the age of the participant of criminal procedure;
- depending on the conditions of interrogation.

Depending on the participant of criminal procedure, there are the interrogation of: witness, victim, suspect, accused, expert (only in trial). The suspect, the accused and the victim have the right to give testimony during pretrial investigation and court hearing. Witness shall be required to give testimony to investigator, prosecutor, investigating judge and the court. Expert shall be required to give testimony to investigating judge and the court. Also it is possible to interrogate two or more persons, who have already been interrogated, simultaneously to clarify the reasons for discrepancies in their testimonies.

Depending on the age of the participant of criminal procedure, the CPC has different rules in pretrial investigation and trial for child and underage, and especially for accused and witness, victim. For example, in criminal proceedings involving crimes against sexual freedom and sexual inviolability of a person, as well as crimes involving violence or threat of violence, two or more persons that have already been interviewed where a minor or underage witness is involved may not be interviewed concurrently with the suspect to find out why their testimonies are divergent (art. 224).

The conditions of interrogation denote if the interrogated person takes part in the place of interrogation or in the mode of video conference or with the use of technical means from another premise, including outside court's building, or in other way making the identification of person impossible. It is possible to take part into interrogation in the mode of video conference in pretrial investigation, if: 1) persons are not able to participate directly in pretrial proceedings for health or other valid reasons; 2) it is necessary to ensure safety of persons; 3) a minor or underage witness or victim is interviewed; 4) such measures are necessary to ensure speedy pretrial investigation; 5) there are other grounds deemed sufficient by the investigator, public prosecutor, investigating judge. Also this mechanism may be used in trial, if: 1) it is impossible for a participant of criminal proceedings to participate directly in the court proceedings for reason of health or for other valid reasons; 2) it is necessary to ensure the persons' security; 3) a minor or underage person is to be interrogated as a witness or victim; 4) such measures are necessary to ensure speedy court proceedings; 5) there exist other grounds recognised sufficient by the court.

Also in trial in exceptional cases with a view to ensure security of a witness or victim to be examined, the court passes a reasoned ruling to examine the witness or victim concerned with the use of technical means from another premise, including outside court's building, or in other way making his identification impossible, and ensures parties to criminal proceedings the possibility to ask questions and hear answers thereto. If there is a danger that voice can be identified, examination may be accompanied by acoustic disturbance (art. 352).

However, these rules have the defect, because they cannot be applied if no security measures were taken to the witness or the victim within criminal proceedings under Law of Ukraine 'On ensuring the safety of persons participating in criminal proceedings'. Additionally, the procedure can be used solely for preventing witness's, victim's identification; thus, if the witness or the victim are identified the procedure cannot be used (Hloviuk, 2019, p. 65).

The interrogation must be fixed. The most popular remedy is the record. Also it is possible to use technical means. Decision to use of technical means during pretrial proceedings shall be taken by the person who conducts the procedural action concerned: prosecutor or investigator, but upon motion of the participants to procedural action, the use of technical means for recording is compulsory.

For interrogation, it is a special rule: if interrogation is recorded with technical means, the text of testimony may not be entered in the relevant record on condition that none of the participants in this procedure insists upon this. In such case, entry should be made in the record that the testimony has been recorded on a medium that is attached to the record (art. 104). This way is not popular in practice, but it is really used.

2. Testimonies and evidence for pretrial investigation and for trial

According to the CPC and doctrine, there are two types of understanding of term "evidence". First of them identify evidence only as a category of trial. The argument is that information contained in testimonies, objects and documents that have not been directly examined by court may not be admitted as evidence (art. 23) (Loboyko, Banchuk, 2014, p.184; Panova, 2017, p. 14). Therefore, another point of view is that evidence exist not only in trial, and also in pretrial investigation (Zavtur, 2018, p. 103; Shulhin, p. 53). And there are the researches, where authors divide pretrial and trial evidence (Shumylo, 2013, p. 212). The position about pretrial evidence is more motivated, and grounds on the CPC, because according to the art. 94 of CPC, not only investigating judge, court, but also investigator, public prosecutor evaluates evidence from the point of view of adequacy, admissibility, and in

respect of the aggregate of collected evidence, sufficiency and correlation, in order to take a proper procedural decision.

Therefore, for testimonies this division is more clear. The testimonies may be used in pretrial investigation for validation the procedural decisions of investigator, prosecutor, and investigating judge, if they are adequate, admissible, reliable. For admissibility, there are special rules. The court shall be required to find significant violations of human rights and fundamental freedoms (and inadmissibility of evidence), in particular the following acts (art. 87 of CPC): obtaining evidence subjecting a person to torture and inhuman or degrading treatment or threats to apply such treatment; violating the right of a person to defence; obtaining testimony or explanations from a person who has not been advised of his right to refuse to give evidence or answer questions, or where these were obtained in violation of this right; obtaining testimonies from a witness who subsequently will be found a suspect or accused in these criminal proceedings.

It is important, that now the violation “obtaining testimonies from a witness who subsequently will be found a suspect or accused in these criminal proceedings” is not obligatory for inadmissibility of testimonies, because now it is not the obligation for the court to find this act as the significant violation of human rights and fundamental freedoms. «“Moving” the text of paragraph 6 of Part 2 of Art. 87 of the CPC to Part 3 of this article, the legislator, apparently, intended to limit the rule of “poisoned fruit”, formulated in Part 1 of Art. 87 of the CPC. According to the latter, any other evidence obtained through information obtained as a result of a substantial violation of human rights and freedoms is inadmissible» (Loboyko, 2016, p. 50).

CPC prescribes strict rules for the testimonies, because the court takes testimonies of the participants in criminal proceedings orally. Except as otherwise provided in this Code, information contained in testimonies, objects and documents that have not been directly examined by court may not be admitted as evidence. The court may admit in evidence testimonies which are not given directly in court only where it is provided for by this Code (art. 23). CPC provides exceptions: for the testimonies, obtained by interrogation of a witness, victim in the course of pretrial investigation in court session, and for explanation, if the investigating judge allows it to be used for investigation (art. 298-1 of CPC). But it is important to understand, that (1) with a view to verify the veracity of testimonies of a witness, victim, and establish discrepancy with the testimonies given in the course of pretrial investigation in court session, they may be read out during his interrogation during court trial, and (2) the court may disregard the testimonies, only upon giving motives of such decision.

It means that it is impossible to use pretrial testimonies, if the interrogated person is dead or waives giving testimonies (victim, accused). This way was chosen as the reaction for abuses according to the old soviet CPC of 1960, where previous testimonies were declared in trial, and substitution mechanism now is depositing testimony (as the result of the interrogation of a witness, victim in the course of pretrial investigation in court session). But now it is a problem for practice, when even without abuses the parties cannot use the testimonies, if the previously interrogated person is dead, or waives giving testimonies (victim, accused), or it is impossible to find the person. For accused these rules are relevant, but there are questions for victims and witnesses.

The ECHR practice has less strict rules for interrogation. For example, the principles to be applied in cases where a prosecution witness did not attend the trial and statements previously made by him or her were admitted as evidence have been summarised and refined in *Al-Khawaja and Tahery v. the United Kingdom* ([GC], nos. 26766/05 and 22228/06, ECHR 2011, and confirmed in *Schatschaschwili*). According to the principles developed in that judgment, it is necessary to examine in three steps the compatibility with Article 6 §§ 1 and 3 (d) of the Convention of proceedings in which statements made

by a witness who was not present and questioned at the trial are used as evidence. The Court must examine: (i) whether there was a good reason for the nonattendance of the witness and, consequently, for the admission of the absent witness's untested statement as evidence; (ii) whether the evidence of the absent witness was the sole or decisive basis for the defendant's conviction; and (iii) whether there were sufficient counterbalancing factors, including strong procedural safeguards, to compensate for the handicaps faced by the defence as a result of the admission of the untested evidence and to ensure that the trial, judged as a whole, was fair ("Sitnevskiy and Chaykovskiy v. Ukraine" (Applications nos. 48016/06 and 7817/07) (case "Sitnevskiy and Chaykovskiy v. Ukraine"). Also in "Makeyan and Others v. Armenia" (Application no. 46435/09) (case "Makeyan and Others v. Armenia") the Court declared that the Court has previously emphasized that the notion of a fair and adversarial trial presupposes that, in principle, a tribunal should attach more weight to a witness's testimony given at the trial hearing than to a record of his or her pretrial questioning produced by the prosecution, unless there are good reasons to find otherwise. Among other reasons, this is because pretrial questioning is primarily a process by which the prosecution gather information in preparation for the trial in order to support their case in court, whereas the tribunal conducting the trial is called upon to determine a defendant's guilt following a fair assessment of all evidence actually produced at the trial, based on the direct examination of evidence in court. The Court is therefore required to review whether the domestic courts gave reasons for their decisions in respect of any objections concerning the evidence produced. The Court reiterates in this respect that the assessment of evidence is in the first place a matter for the jurisdiction of the national courts. The Court will therefore not question under Article 6 § 1 the national courts' assessment, unless their findings can be regarded as arbitrary or manifestly unreasonable. Furthermore, the Court has on previous occasions found that where the domestic judicial authorities are confronted by several conflicting versions of the truth offered by the same person, the final preference for a statement given at the pretrial stage over one given in an open court does not in itself raise an issue as regards the overall fairness of the proceedings where that preference is substantiated and the statement itself was given of the person's own volition. Having regard to the fact that none of the witnesses had complained at the domestic level about any form of pressure let alone ill-treatment by the investigative authorities and that certain witnesses had invoked the fear of pressure from the applicants' supporters as justification not to attend the trial while at least one of the witnesses had fully confirmed the version of the events submitted in his earlier statement, the Court accepts that the reasons given by the trial court for attaching more weight to the pretrial statements of the seven witnesses in question was sufficient to satisfy the relevant criteria established in the Court's case-law.

In Ukraine now the possibility to declare the testimonies of victim or witness in trial is absent (except depositing testimonies). Therefore, with depositing testimonies there are another problems. Firstly, the grounds for deposition are formulated in general, that's why there are different interpretations by different judges. Secondly, the court may disregard the evidence obtained in a procedure of deposition, only upon giving motives of such decision, but CPC does not declare which motives it may be.

That's why the court's assessment of the relevance, admissibility and reliability of the deposited testimony is based on the following parameters: 1) assessment of the existence of statutory grounds for the procedure of depositing testimony; 2) assessment of compliance with the procedure of deposition established by law under Art. 225 of the CPC of Ukraine; 3) the presence of reasonable doubts about the reliability of the deposited testimony and the possibility of their elimination (Zavtur, 2022, p. 273). In doctrine there are proposed the rules of evaluation of depositing testimony by the court: 1) assessment of depositing testimony is carried out according to three criteria (there are grounds for depositing testimony, compliance with the procedural procedure for the depositing procedure, assessment of the

reliability of depositing testimony); 2) the interrogation of a witness, victim without the participation of the defence at the time when the person has already been notified of the suspicion, always entails the inadmissibility of relevant testimony as evidence due to violation of the right to confrontation (Zavtur, 2022, p. 275) etc.

If the person is dead, it is possible to use hearsay testimonies according to rules of art. 97 of CPC. More difficult is the situation, when the victim, witness waive giving testimonies (but for witness giving the testimonies is the obligation). It may be the result of illegal pressure on the person, and it is impossible in this situation to insure of quick, comprehensive and impartial trial. The same problem exists in the situation, when it is impossible to find the person; for Ukraine, due to problems with the timing of the trial, it is not the rare situation.

Another side of this problem is the testimonies of child or an underage. The rules of use his testimonies in trial is the same. But the standards for questioning children in criminal procedure – for example, Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice (Guidelines on child-friendly justice, Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention)) – declare the need to minimize the number of interviews (interrogations). In accordance with its obligations under the Lanzarote Convention, each Party shall take the necessary legislative or other measures to ensure that the victim's interview or, where appropriate, the child's witness is videotaped and accepted as evidence in court, in accordance with the norms of its national legislation. Also there is the position that interrogation methods, such as video or audio recording or previous closed court hearings, should be used and considered as admissible evidence; taking into account the best interests and welfare of children, there should be an opportunity for the judge to allow the child not to testify; audiovisual statements by child victims or witnesses should be encouraged, while respecting the rights of other parties to challenge the content of such statements (Guidelines on child-friendly justice). Also Recommendation No. R (97) 13 of the Committee of Ministers of the Council of Europe to Member States concerning intimidation of witnesses and the rights of the defence (Recommendation No. R (97) 13) provides recording by audiovisual means statements made by witnesses during pretrial examination; using pretrial statements given before a judicial authority as evidence in court when it is not possible for witnesses to appear before the court or when appearing in court might result in great and actual danger to the life and security of witnesses, their relatives or other persons close to them.

Now in Ukraine there are different ways to insure the rights of children and underages according to the strict rules of CPC, that was indicated earlier: depositing testimonies (because psychological characteristics of the person of a minor witness or of the victim are recognized as exceptional cases that make it impossible to interrogate the witness, the victim in trial or may affect the completeness or the reliability of their testimony); hearsay; court in accordance with Art. 349 of the CPC found it inexpedient to interrogate the minor victim during the trial (Hloviuk, 2021; Hloviuk, 2022). As the reaction to this problem, there are interesting propositions for new legislation: receipt of the testimony of a minor as the new obligate ground for depositing testimony; the court reproduce the video of the interrogation of a juvenile witness or victim in trial obtained as the depositing testimonies, without summoning them and direct interrogation in court, unless it finds additional interrogation necessary or if the juvenile does not submit a statement of desire to testify personally in the court (Projekt Zakonu Ukrainy, №5618).

3. Interrogation in wartime

In wartime the problems of interrogation escalated due to war situation. And the main problem is the deposition of evidence of witness / victim, because lot of people are refugees. Also it is the problem with testimonies of prisoners of war, because they may be changed and transferred from Ukraine.

Firstly, there is the situation in places, where the courts cannot work due to military action, and it is impossible to interrogate witness / victim under Art. 225 of CPC. Secondly, the investigating judge does not have the power to interrogate the suspect. Thirdly, the article 23 of CPC does not prescribe the exceptions for wartime. That's why there are the proposition for amendments for national Ukrainian legislation due to international practice.

In doctrine there are the propositions to interrogate victim, witness and even suspect (because in martial law, the risk to life and health exists in virtually everyone, especially in areas close to the theater of operations, not only for witnesses and victims, but also for suspects), according to all procedure guaranties with video record not by investigating judge, but by the prosecutor (Krapyvin, Bielousov, Orlean).

Also there is the proposition in Draft of Law № 7183 (20/03/2022): the testimony obtained during the interrogation of the witness, the victim, including number of simultaneous interrogations of two or more interrogated persons, in criminal proceedings carried out under martial law may be used as evidence in court only if the course and results of such interrogation were recorded by available technical means of video recording. Testimony obtained during the interrogation of a suspect, including the simultaneous interrogation of two or more already interrogated persons in criminal proceedings that carried out under martial law, may be used as evidence in court only if the defence counsel participated in such interrogation, and the course and results of the interrogation were recorded using available technical means of video recording (Proiekt Zakonu Ukrainy, № 7183). The idea of video recording must be supported.

In wartime we must change the procedure for objectives of criminal procedure, especially for the protection of individuals, society and the state from criminal offence, but without the violation of fundamental procedural rights. Now for Ukraine it is possible to change the principles of use of testimonies in trial. These amendments will allow the use of testimony in court regardless of the grounds on which the witness, the victim, the accused is not questioned in court. Understanding the risks for all people in martial law, there are also risks of such wide use of testimony where the rights of the defence are not limited by appropriate procedural safeguards like that require standards of the ECHR practice. So that's for testimony of witness, the victim must be told that the objective impossibility of interrogation in court. Also only the head of the prosecutor's office may have the power to interrogate.

But for suspect, the rules must be another. The accused must take part in trial (but there is the exception: trial in absentia according to part 3 of art. 323 of CPC), and his testimonies are his means of defence. The use of testimonies without his participation cancels the rights for fair trial.

There is also the procedure of trial in absentia. It means that the trial in criminal proceedings as to the crimes specified in part 2 of art. 297-1 of CPC may be held in absentia (without the accused (except for a minor) who absconds (hides from the investigation and judicial bodies), in the temporarily occupied territory of Ukraine, in the territory of the state recognised by the Verkhovna Rada of Ukraine as the aggressor state, with the view of avoiding criminal liability (special judicial proceedings)) and / if the accused is announced in an international wanted list. That's why for the suspect these amendments may be available only if proceedings will be conducted in absentia.

Conclusions

In Ukrainian criminal procedure the interrogation is very important and popular investigative (detective, search) action. Now the general idea is the review of rules of the procedure of interrogation of a witness, victim in the course of pretrial investigation in court session and of use the testimonies in trial, because there are problems with absenteeism of victim / witness and illegal influence on victim / witness, and traumatization of children. Also it is almost impossible to use the testimonies in trial, if the victim / witness is dead. In wartime this problem acquired even greater relevance, because there are the testimonies of refugees and of prisoners of war.

That's why the model of interrogation must be changed to the interrogation of victim / witness by the head of the prosecutor's office maintaining the freedom from self-incrimination and the right to not testify against close relatives and family members, right to defence and with video record. The conditions must be: wartime, interrogation of victim / witness, objective impossibility of interrogation in court. For children, we need new general rules for questioning children in criminal procedure.

Generally, the model of interrogation and use of testimonies must be adaptable to current challenges, taking into account European standards of criminal procedure.

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Interrogation in Ukrainian Criminal Procedure

Iryna Hloviuk

(Vilnius University)

(Lviv State University of Internal Affairs)

S u m m a r y

The article is devoted to general aspects of interrogation in Ukrainian criminal procedure, testimonies and evidence for pretrial investigation and for trial, interrogation in wartime. The problems of procedure of interrogation are identified, deposition of testimonies, questions of use of pretrial testimonies in trial. The situation of testimonies of children and testimonies in wartime is discussed due to the existence of the rules that the court takes testimonies of the participants in criminal proceedings orally. Information contained in testimonies that have not been directly examined by court may not be admitted as evidence. The court may admit in evidence testimonies which are not given directly in court only where it is provided for by CPC. It means also that it is impossible to use pretrial testimonies, if victim, witness, accused waives giving testimonies or is dead.

In this paper it is proved that the model of interrogation and use of testimonies must be adaptable to current challenges, taking into account European standards of criminal procedure: for wartime the model of interrogation of victim / witness must be changed and the use of pretrial testimonies may be allowed. Also, the model of use of pretrial testimonies of children must be changed and adopted due to the European standards of questioning children.

Apklausa Ukrainos baudžiamajame procese

Iryna Hloviuk

(Vilniaus universitetas)

(Lvivo valstybinis vidaus reikalų universitetas)

S a n t r a u k a

Straipsnyje aptariami bendrieji apklausos instituto aspektai Ukrainos baudžiamajame procese, parodymai ir įrodymai ikiteisminio tyrimo ir teismo nagrinėjimo metu, apklausa karo metu. Identifikuojamos apklausos procedūros, parodymų davimo, ikiteisminio tyrimo metu duotų parodymų panaudojimo teisme problemos. Aptariama vaikų parodymų ir parodymų karo metu situacija, susidaranti dėl taisyklių, kad teismas priima baudžiamojo proceso dalyvių parodymus žodžiu. Parodymuose esanti informacija, kurios teismas tiesiogiai neištyrė, negali būti pripažinta įrodymu. Teismas gali pripažinti įrodymais parodymus, kurie nebuvo duoti tiesiogiai teisme, tik tais atvejais, kai tai numatyta Ukrainos baudžiamojo proceso kodekse. Tai taip pat reiškia, kad negalima remtis ikiteisminio tyrimo metu duotais parodymais, jeigu nukentėjusysis, liudytojas, kaltinamasis atsisako duoti parodymus arba yra miręs.

Šiame straipsnyje įrodoma, kad apklausos ir parodymų panaudojimo modelis turi būti pritaikomas prie dabartinių iššūkių, atsižvelgiant į Europos baudžiamojo proceso standartus: karo metu turi būti keičiamas nukentėjusiojo / liudytojo apklausos modelis, o ikiteisminio tyrimo metu duotus parodymus panaudoti gali būti leidžiama. Taip pat turi būti pakeistas vaikų ikiteisminio tyrimo metu duotų parodymų panaudojimo modelis, jis turi būti pritaikytas atsižvelgiant į Europos vaikų apklausos standartus.

Iryna Hloviuk is Doctor of Law, Honored Lawyer of Ukraine, Professor of the Department of Criminal Law Disciplines, Institute of Law; chief researcher of the department of organization of scientific work at Lviv State University of Internal Affairs. She has a keen interest in criminal procedure, the use of ECHR jurisprudence in criminal procedure.

Iryna Hloviuk yra teisės mokslų daktarė, Ukrainos garbės teisininkė, Teisės instituto Baudžiamosios teisės disciplinų skyriaus dėstytoja, Lvivo valstybinio vidaus reikalų universiteto Mokslinių darbų organizavimo skyriaus vyriausioji tyrėja. Ji domisi baudžiamuoju procesu, EŽTT praktikos panaudojimu baudžiamajame procese.