DOI https://doi.org/10.30525/978-9934-26-284-5-27

COMBATING CRIMES IN THE FIELD OF NATIONAL SECURITY: THEORETICAL IDYL AND PRACTICAL REALITY

Shestopalov R. M.

INTRODUCTION

The modern conditions of the society development and the legal democratic state development determine the need for effective protection of the rights and freedoms of citizens, creating a sense of security and safety in them, which automatically determines the need for the effective work of the state and its law enforcement agencies in combating crime in the field of national security, preventing crimes and other offenses of the specified category, proper preventive work in the specified direction.

Taking into account the above-mentioned, the aim of this article is a philosophical-legal analysis of the theoretical certainty and practical significance of combating crimes in the field of national security.

The object of the research is the set of organizational-legal foundations of the criminal and criminal procedural activities of the state represented by its law enforcement agencies regarding the detection, recording, investigation of crimes in the field of national security, as well as providing a proper assessment of the results of their work by the court.

On this basis, the aim is to develop ways to optimize the current legislation in the specified directions.

We propose to consider the issues of this scientific research subject in two aspects:

I – criminal law, which refers to the identification of gaps in substantive law and the need to improve the legislative provision of criminal responsibility for criminal offenses in the field of national security;

II – criminal-procedural, which provides for the need to optimize the very activity of law enforcement and judicial bodies in bringing to criminal responsibility people guilty of offenses, searching for options for a procedural upgrade of the very procedure of recording and collecting evidence of a person's criminal activity, checking their propriety and admissibility, and their presentation of the court.

The specified aspects are necessarily in constant and inextricable connection with each other and in close dynamic interaction and characterize the conditions and life process of the state's criminal and legal policy. Therefore, their improvement should occur simultaneously and in unison with each other. As an argument, we note that even the most progressive norm of

the law on criminal responsibility cannot be implemented without a proper legal procedure for bringing a person to the responsibility established by law.

1. Theoretical and practical understanding of crimes in the field of national security

We note that under crimes in the field of national security, we propose to consider not only those crimes against the foundations of national security, which are defined in the Chapter I of the Special Part of the Criminal Code of Ukraine, but also other criminally punishable acts that to one degree or another relate or may relate to issues protection of state sovereignty, territorial integrity and democratic constitutional system and other vital national interests from real and potential threats.

As a practical example and simplification of legal perception, we suggest that crimes in the field of national security include those crimes in which, according to Part 2 of Article 216 of the Criminal Procedure Code of Ukraine, the jurisdiction is determined by the investigators of the security agencies, which in Ukraine are the investigators of the Security Service of Ukraine.

We will try to justify our legal position by the fact that its investigative units are part of this state body of special purpose with law enforcement functions, which ensures the state security of Ukraine, enshrined in Article 2 of the Law of Ukraine "On the Security Service of Ukraine" No. 2229-XII of 25.03.1992 – protection of state sovereignty, constitutional order, territorial integrity, scientific-technical and defence potential of Ukraine, the legitimate interests of the state and the rights of citizens from the reconnaissance-subversive activities of foreign special services, encroachments by certain organizations, groups and individuals, as well as ensuring the protection of state secrets[1].

In connection with this, such crimes, in our opinion, should be considered crimes in the field of national security, which is a broader category, compared to crimes against the foundations of national security, which are defined in Section I of the Special Part of the Criminal Code of Ukraine (Articles 109-114-2), as they are determined by the subject specifics of the tasks assigned to the Security Service of Ukraine as a state body. Instead, criminal offenses provided for in Articles 109-114-2 of the Criminal Code of Ukraine (actions aimed at forceful change or overthrow of the constitutional order or take-over of government (Article 109); trespass against territorial integrity and inviolability of Ukraine (Article 110); financing of actions, committed with the aim of forceful changing or overthrowing the constitutional order or take-over of government, changing the boundaries of the territory or the state border of Ukraine

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[1] Закон України «Про Службу безпеки України» № 2229-XII від 25.03.1992. URL: https://zakon.rada.gov.ua/laws/show/2229-12#Text (дата звернення 09.12.2022).

(Article 110-2); high treason (Article 111); collaborative activity (Article 111-1); assistance to the aggressor state (Article 111-2); trespass against life of a statesman or a public figure (Article 112); sabotage (Article 113); espionage (Article 114); obstruction of the lawful activities of the Armed Forces of Ukraine and other military formations (Article 114-1); unauthorized dissemination of information on sending, moving weapons, armaments and military supplies to Ukraine, moving or deploying the Armed Forces of Ukraine or other units in accordance with the laws of Ukraine of military formations, committed in conditions of martial law or a state of emergency (Article 114-2), constitute a complex of criminally punishable acts specifically against the foundations of national security in its essential sense according to Clause 9 of Part 1 of Article 1 of the Law of Ukraine "On National security" No. 2469-VIII of 21 June 2018, according to which it represents the protection of state sovereignty, territorial integrity, democratic constitutional system and other national interests of Ukraine from real and potential threats[2].

The very tasks assigned to the Security Service of Ukraine are defined in Article 2 of the Sectoral Law, as well as the fundamental strengthening of the national security of Ukraine (protection of state sovereignty, territorial integrity, the democratic constitutional order and other national interests of Ukraine from real and potential threats) and directly the national interests of Ukraine (vital interests of an individual, society and the state, the implementation of which ensures the state sovereignty of Ukraine, its progressive democratic development, as well as safe living conditions and well-being of its citizens), defined in clauses 9, 10 of the fundamental Law of Ukraine "On the National Security of Ukraine" No. 2469-VIII of 21.06.2018, determine the content and direction of the investigation of criminal offenses, in which pre-trial investigation is carried out by investigators of security agencies – crimes provided for by specific articles of the Criminal Code of Ukraine, namely: 109 (actions aimed at forceful change or overthrow of the constitutional order or take-over of government), 110 (trespass against territorial integrity and inviolability of Ukraine), 110–2 (financing of actions, committed with the aim of forceful changing or overthrowing the constitutional order or take-over of government, changing the boundaries of the territory or the state border of Ukraine) 111 (high treason), 111-1 collaborative activity, 111–2 (assistance to the aggressor state), 112 (trespass against life of a statesman or a public figure, 113 (sabotage), 114 (espionage), 114–1 (obstruction of the lawful activities of the Armed Forces of Ukraine and other military formations), 114–2 (unauthorized dissemination

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[2] Закон України «Про національну безпеку України» № 2469-VIII від 21.06.2018. URL: https://zakon.rada.gov.ua/laws/show/2469-19#Text (дата звернення 09.12.2022).

of information on sending, moving weapons, armaments and military supplies to Ukraine, moving or deploying the Armed Forces of Ukraine or other units in accordance with the laws of Ukraine of military formations, committed in conditions of martial law or a state of emergency), 201 (smuggling), 201-1 (smuggling across the customs border of Ukraine outside customs control or with hidden exempt from customs control of lumber of valuable and rare tree species, unprocessed lumber, as well as other lumber prohibited for export outside the customs territory of Ukraine), 258 (act of terrorism), 258-1 (involvement in the commission of a terrorist act), 258-2 (public calls to commit a terrorist act), 258-3 (creation of a terrorist group or terrorist organization), 258-4 (facilitating the commission of a terrorist act), 258-5 (financing of terrorism), 265-1 (illegal manufacture of a nuclear explosive device or a device dispersing radioactive material or emitting radiation), 305 (smuggling of narcotics, psychotropic substances, their analogues or precursor), 328 (disclosure of state secrets), 329 (loss of documents containing state secrets), 330 (transfer or collection of information constituting official information collected in the process of operative-search, counter-intelligence activities, in the field of national defense), 332-1 (violation of the procedure for entering and leaving the temporarily occupied territory of Ukraine), 332-2 (illegal crossing of the state border of Ukraine), 333 (violation of the procedure for international transfers of goods subject to state export control), 333 (violation of the procedure for international transfers of goods subject to state export control), 334 (violation of international flights regulations), 359 (illegal purchase, sale or use of special technology for secret obtaining of information), 422 (disclosure of military information that constitutes state secret or loss of documents or material that contain any such information), 435-1 (insulting the honour and dignity of a serviceman, threatening a serviceman), 436 (war propaganda), 436-2 (justification, recognition as legitimate, denial of the armed aggression of the Russian Federation against Ukraine, glorification of its participants), 437 (planning, preparation, resolution and waging an aggressive war), 438 (violation of rules of the warfare), 439 (use of weapons of mass destruction), 440 (development, production, purchasing, storage, distribution or transportation of weapons of mass destruction), 441 (ecocide), 442 (genocide), 443 (trespass against life of a foreign state representative), 444 (criminal offenses against internationally protected persons and institutions), 446 (piracy), 447 (mercenaries).

Thus, we can define the concept of "crimes in the field of national security" in the sense of criminal and criminal procedural law, as well as fundamental national security principles – these are crimes and other criminal offenses, the pre-trial investigation of which is carried out by investigators of the security agencies, the prevention of which is aimed at the protection of

state sovereignty, territorial integrity, democratic constitutional order and vital interests of an individual, society and the state, its progressive democratic development, as well as safe living conditions and well-being of its citizens.

2. Issues of the investigation of crimes in the sphere of national security as a basis for combating them

2.1. "Alternative liability": cases, possibilities, conditions…

Note that in accordance with paragraph 2 of part 2 of Article 216 of the Criminal Procedure Code of Ukraine, if during the investigation of criminal offenses are established provided for by Articles 328, 329, 422 of the Criminal Code of Ukraine, criminal offenses provided for by Articles 364, 365, 366, 367, committed by a person subject to a pre-trial investigation, or by another person, if they are related to criminal offenses committed by a person subject to a pre-trial investigation, they are investigated by investigators of security agencies, except when these criminal offenses are classified in accordance with this article jurisdiction of the National Anti-Corruption Bureau of Ukraine[3].

That is, the legislator clearly limited the grounds for the pre-trial investigation of criminal offenses by the investigators of the security agencies in other crimes not subject to their investigation, namely: 1) cases – if investigation of the facts of state secrets disclosure (Article 328 of the Criminal Code), loss of documents containing state secrets (Article 329 of the Criminal Code of Ukraine) and disclosure of military information constituting a state secret, or loss of documents or materials containing such information (Article 422 of the Criminal Code of Ukraine); 2) possibilities – the specific crimes that investigators of the Security Service of Ukraine are authorized to investigate are outlined – articles of the Criminal Code of Ukraine: 364 (abuse of authority or office), 365 (excess of authority or official powers by a law enforcement officer), 366 (official forgery), 367 (neglect of official duty), 425 (neglect of duty in military service), 426 (omissions of military authorities); 3) conditions – if during the investigation of criminal offenses provided for in Articles 328, 329, 422 of the Criminal Code of Ukraine (which constitute cases of such grounds), criminal offenses provided for in Articles 364, 365, 366, 367, 425, 426 of the Criminal Code of Ukraine are established (which are opportunities for investigators of the Security Service of Ukraine to investigate other crimes), and only if they were committed by a person who is the subject of a pre-trial investigation, or by another person, if they are related to criminal offenses committed by a person who is the subject of a pre-trial investigation, they are investigated by investigators of security agencies,

[3] Кримінальний процесуальний Кодекс України від 13 квітня 2012 року № 4651-VI. URL: http://zakon0.rada.gov.ua/laws/show/4651-17 (дата звернення 14.12.2022).

except for cases when these criminal offenses are referred to the National Anti-Corruption Bureau of Ukraine in accordance with this article.

That is, the legislator limits the so-called "alternative responsibility" for security investigative bodies to cases, specifies possibilities, and, at the same time, regulates clear conditions.

From the outside, the indicated circumstances look completely regular, logical, and give the impression of a legal idyll. However, the direct implementation of the pre-trial investigation of this category crimes, the procedural management, the public prosecutor's support of the public accusation in court, as well as the trial itself make its own corrections, and once again indicate that this idyll is theoretical and has nothing to do with practical reality. That is, the legislative provision of combating crimes in the field of national security is disconnected from the needs of practice. Such a state of affairs, under the conditions of the dynamic development of de facto precedent law in Ukraine, will inevitably have a negative consequence of the state not ensuring the principle of inevitability of punishment, failure to take effective measures for the real protection of the rights and freedoms of citizens and ensuring national interests.

Let us consider specific examples. In fact, provided by the criminal procedural law, the possibility of investigators of the Security Service of Ukraine, as authorized people to whom domestic legislation gives competence for the collection and recording of evidence in the investigation of crimes in the field of national security, to carry out investigations in other crimes not under their investigation is allowed only in the case of "ideal set of crimes". In particular, if the pre-trial investigation establishes a case of state secrets disclosure (Article 328 of the Criminal Code of Ukraine) or loss of documents containing state secrets (Article 329 of the Criminal Code of Ukraine), the security investigator has the opportunity to investigate the same person in the same criminal proceedings and the fact of abuse of power or official position (Article 364 of the Criminal Code of Ukraine), abuse of power or official authority by a law enforcement officer (Article 365 of the Criminal Code of Ukraine), official negligence (Article 367 of the Criminal Code of Ukraine), etc. In particular, if an official of a state enterprise lost documents containing state secrets, these actions should be classified as a set of crimes under articles 329 of the Criminal Code of Ukraine and (depending on the subjective side of the criminal offense and the circumstances of the case) articles 364 of the Criminal Code of Ukraine (abuse of authority or office) or 367 (neglect of official duty).

The question arises: what to do, for example, with the case of an investigation of a crime under Article 305 of the Criminal Code of Ukraine (smuggling of narcotics, psychotropic substances, their analogues or precursor

or falsified medicinal products), if for the correct qualification of the actions of the suspect, his actions should be qualified according to the totality of articles 305 and 307 of the Criminal Code of Ukraine (illegal production, making, purchasing, storage, transportation, sending or sale of narcotics, psychotropic substances or their analogues), since the very smuggling of such substances prohibited in free circulation (that is, their movement across the customs border of Ukraine outside customs control or hidden from customs control) is a direct form of their sale. In this case, the authority of the investigative security body to carry out a pre-trial investigation of a criminal offense under Article 307 of the Criminal Code of Ukraine, which is not subject to it, is not determined by certain cases and possibilities specified in the list of articles fixed in paragraph 2 of part 2 of Article 216 of the Criminal Procedure Code of Ukraine.

The practice, in this case, is that the prosecutor, who supervises the observance of laws during the pre-trial investigation in the form of procedural guidance, by his decision issued in accordance with Part 1 of Article 217 of the Criminal Procedural Code of Ukraine, combines the materials of pre-trial investigations regarding several people suspected of committing one criminal offense, or in relation to one person suspected of committing several criminal offenses, as well as materials of pre-trial investigations for which no suspects have been identified, but there are sufficient grounds to believe that the criminal offenses for which these investigations are being carried out have been committed by one person (people)[4].

Such a resolution on unification must be preceded by a resolution of the prosecutor on determining the jurisdiction of the criminal offense to another body (in this case, the security investigative body), which is not responsible for it. In practice, prosecutors motivate their procedural decisions by the prescriptions of Part 10 of Article 216 of the Criminal Procedure Code of Ukraine, which provide that if during the pre-trial investigation, other criminal offenses committed by the person subject to the pre-trial investigation or by another person, if they are related, are established with criminal offenses committed by a person who is subject to a pre-trial investigation, and which are not subject to the authority that conducts a pre-trial investigation in criminal proceedings, the prosecutor supervising the pre-trial investigation, in the event of the impossibility of separating these materials into a separate proceeding, determines the subject by his resolution of all these criminal offenses[5].

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[4] Кримінальний процесуальний Кодекс України від 13 квітня 2012 року № 4651-VI. URL: http://zakon0.rada.gov.ua/laws/show/4651-17 (дата звернення 14.12.2022).

[5] Ibid.

The key in this issue is the determinant that the prosecutor can determine the responsibility of the criminal offense to another body, if it is related to a criminal offense committed by a person who is the subject of a pre-trial investigation, or by another person, if they are related to criminal offenses committed by a person in respect of whom a pre-trial investigation is being conducted.

A rhetorical question arises: what if the pre-trial investigation establishes another criminal offense that is not under investigation by the investigator of the Security Service of Ukraine, and which is not related to the criminal offense that has been committed by the person who is the subject of the pre-trial investigation?! Ideally, the prosecutor should allocate the materials of the pre-trial investigation of the non-investigative security investigative body of the criminal offense. However, in practice, it often happens that during the development of a person involved in criminal proceedings, the direct detention of a person for a crime that is not investigated by the investigators of the security authorities is a priority for his subsequent prosecution for another, relatively speaking, "main", crime, investigated by the investigators of the authority's security.

We consider it expedient to give the following example from our own practical experience. In the course of the pre-trial investigation of the criminal proceedings on the fact of treason committed by a citizen M., on the basis of the elements of the crime provided for in part 1 of Article 111 of the Criminal Code of Ukraine, the investigator of the security body conducted a search of the car of this person, as a result of which an object visually similar to a case of a hand grenade with a fuse. Also, according to the results of the search, the mobile phone and other gadgets of citizen M were seized. After this procedural action, this person was detained by the investigator for the fact of illegal handling of ammunition (under Part 1 of Article 263 of the Criminal Code of Ukraine), and the court chose a preventive measure in the form of detention. During the search of this person, in addition to items prohibited in free circulation (ammunition), a mobile phone was found and seized, and after further review of the information contained in it, the investigators found screenshots of Google maps with the coordinates of military and critical infrastructure objects, which M. with the help of one of messengers sent to a representative of a foreign state, thereby providing assistance to the latter in carrying out subversive activities against Ukraine to the detriment of its sovereignty, territorial integrity and inviolability, defence capability, state, economic and information security. In the subsequent actions of citizen M. were qualified for a combination of crimes under Part 1 of Article 263 (illegal handling of weapons, ammunition or explosives) and Part 1 of Article 111 (treason) of the Criminal Code of Ukraine.

In this specific case, it was the illegal handling of ammunition by a person (a crime not investigated by the investigators of the security agencies) that became the basis for his detention by these investigators and the seizure during a personal search of the mobile phone of citizen M. subject to investigation by the security authorities). The specified crimes are actually not related to each other, since the time parameters of the illegal acquisition and storage of military supplies by a citizen M. did not even coincide with his assistance to a representative of a foreign state in carrying out subversive activities against Ukraine. However, if the investigator of the security agency had not detained citizen M. for committing a crime, that was not his subject, the involvement of this citizen in another, more serious crime against the foundations of national security of Ukraine, would not have been established.

Under the ideal interpretation of the provisions of part 10 of Article 216 of the Criminal Procedure Code of Ukraine, the two specified crimes should not be combined in one criminal proceeding, since the crime provided for by Article 263 of the Criminal Code of Ukraine, which was not investigated by the investigators of the Security Service of Ukraine, although it was committed by a citizen M., but was not related to the crime provided for in Article 111 of the Criminal Code of Ukraine, in respect of which the security agency and pre-trial investigation was carried out in this criminal proceeding.

We predict that professional lawyers, other human rights defenders, and the majority of ordinary people who believe in the illusion of the "presumption of innocence" will argue about the lack of procedural formality and the use of improper legal procedure. However, emphasizing the priority of ensuring the protection of state sovereignty, territorial integrity, the democratic constitutional system and other national interests of Ukraine from real and potential threats, we believe that the specified circumstances prevail over the beloved principle of the presumption of innocence.

As a kind of analogy, let us turn to the Decision of the European Court of Human Rights in the case No. 980_159 of 26.06.1991 "Letellier v. France", which concerns the validity of keeping a person in custody, in accordance with paragraph 35 of which courts must take into account all the circumstances that have significance for finding out whether there is a public interest which, taking into account the principle of innocence, justifies a departure from the principle of respect for personal freedom[6]. The understanding of the public interest specified in this Decision of the convention jurisdiction body, in the context of this scientific work subject, we think it possible to consider it similar to the national interests of Ukraine, used in paragraph 10 of part 1 of

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[6] Рішення Європейського Суду з прав людини у справі № 980_159 від 26.06.1991 «Летельє проти Франції». URL: https://zakononline.com.ua/documents/show/155285___155285

article 1 of the Law of Ukraine “On the National Security of Ukraine” No. 2469-VIII of 21.06. 2018 – the vital interests of a person, society and the state, the implementation of which ensures the state sovereignty of Ukraine, its progressive democratic development, as well as safe living conditions and the well-being of its citizens[7].

In other words, in the presence of significant gaps in the criminal and criminal procedural legislation, which regulate the issue of combating crimes in the field of national security, the procedural actions of the investigative security body, under the supervision of the prosecutor and under the control of the investigating judge, are aimed at limiting the constitutional rights and freedoms of citizens in the implementation pretrial investigation in criminal proceedings about crimes that are not under their jurisdiction are justified, if such actions were taken with the aim of ensuring national security and other national interests of Ukraine from real and potential threats, on the mandatory condition, if such procedural actions succeeded in averting such threats and, subsequently, to establish the involvement of such a person in a serious or particularly serious crime in the field of national security.

As a lyrical digression, we consider it necessary to turn to the actual reasons for the detention and subsequent prosecution of one of the bloodiest criminals of the last century – the Soviet maniac Andrii Chykatylo and the American gangster of Italian origin, Al Capone. With regard to the first, the review of the sentence for the theft of linoleum and the replacement of his sentence with a real term (several months of imprisonment) gave investigators and operatives time to gather evidence of his involvement in the most serious crimes against life, health and sexual integrity of a person[8]. As for the second, in the absence of direct evidence of mafia involvement in murders and torture of people, but with the aim of protecting society from the spread of its criminal influence and the onset of negative consequences, a decision was made at the level of the President of the United States to bring him to criminal responsibility and send him to prison at any cost. In connection with this, in 1929, the new head of the Federal Bureau of Investigation, Edgar Hoover, managed to jail “Al” for 10 months for illegal carrying of weapons, and the federals continued to “dig”: thanks to Capone’s subordinate, they got hold of the “black accounting” and in 1931 incriminated the gangster tax evasion[9]. Of course, these examples do not relate to the investigation of crimes in the

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[7] Закон України «Про національну безпеку України» № 2469-VIII від 21.06.2018. URL: https://zakon.rada.gov.ua/laws/show/2469-19#Text (дата звернення 09.12.2022).

[8] Потеря И. 25 лет назад расстреляли ростовского серийного маньяка Андрея Чикатило. КП от 15 февраля 2019 года (№ 5). URL: https://www.kp.ru/daily/26194/3082162/

[9] За что сидел Аль Капоне. Аль Капоне – воплощение мафии. Обратная сторона «успеха». URL: https://podarilove.ru/za-chto-sidel-al-kapone-al-kapone-voploshchenie-mafii-obratnaya/

field of national security, but they clearly testify to the painstaking work of law enforcement officers in the interests of society and to ensure national interests.

Practical realities fill the gaps of such legislative provision as much as possible, but in order to bring the latter into the line with the needs of the former, we consider it necessary to propose legislative changes aimed at expanding the range of criminal offenses under investigation by the security authorities.

We believe that the list of articles of the Criminal Code of Ukraine defined in paragraph 2 of part 2 of Article 216 of the Criminal Procedure Code of Ukraine (328 (disclosure of state secrets), 329 (loss of documents containing state secrets, 422 (disclosure of military information that constitutes state secret or loss of documents or material that contain any such information) cannot be considered as exhaustive cases that provide the security investigative body with legal opportunities to investigate other crimes beyond its jurisdiction, provided for in Articles 364 (abuse of authority or office), 365 (excess of authority or official powers by an employee of a law enforcement agency), 366 (forgery in office), 367 (neglect of official duty), 425 (neglect of duty in military service), 426 (omissions of military authorities).

At the same time, we believe that the list of these articles of the law on criminal responsibility (Articles 364, 365, 366, 367, 425, 426) is also limited and does not meet the needs of practice.

We substantiate our opinion with several examples from personal practical experience. The pre-trial investigation in the criminal proceedings against citizen K. established his involvement in the smuggling of weapons, which citizen K. tried to smuggle into Ukraine (in the form of movement across the customs border of Ukraine and hiding from customs control) by placing several pistols under the door panel of a car that was previously purchased in the USA at one of the open internet auctions.

Under such circumstances, the actions of citizen K. are classified as a combination of crimes under Part 1 of Article 201 (arms smuggling) and Part 1 of Article 263 (illegal handling of weapons). In this case, Article 201 of the Criminal Code of Ukraine is not among the list of articles defined in the first half of paragraph 2 of part 2 of Article 216 of the Criminal Procedure Code of Ukraine (as legal cases), and Article 263 of the Criminal Code of Ukraine is not in the list of articles defined in the second half paragraph 2 of part 2 of article 216 of the Criminal Procedure Code of Ukraine (as legal opportunities to commit crimes not investigated by the investigative security body).

Let us note another example. Citizen A., acting deliberately and for selfish reasons, at the end of November 2020, illegally purchased a narcotic drug – methadone, from people not identified by the pre-trial investigation for the

purpose of sale, which, in accordance with the Resolution of the Cabinet of Ministers of Ukraine "On approval of the list of narcotic drugs, psychotropic substances and precursors" No. 770 of 06.05.2000, according to table II of list No. 1 "Narcotics, the circulation of which is restricted", is a narcotic agent, the circulation of which is restricted, weighing 34.5098 g, which is a particularly large size, and illegally kept the specified narcotic remedy until 5 p.m. 22 min. 01.12.2020 at the address of his actual residence. Subsequently, on 01.12.2020, while in the post office No. X, acting deliberately, for selfish reasons, using the services of a postal operator, citizen A. sent an international express shipment for No. X 9, namely: a music speaker of the brand "Beecaro s41b", inside of which the above-mentioned narcotic drug was contained, that is, he committed a completed attempt to smuggle a narcotic drug – methadone, in particularly large quantities, that is, he carried out its movement across the customs border of Ukraine to the Republic of Moldova, hiding it from customs control. Based on the totality of A.'s actions, he was qualified under Part 3 of Article 307 of the Criminal Code of Ukraine (illegal acquisition and storage for the purpose of selling a narcotic in particularly large quantities) and under Part 2 of Article 15, Part 3 of Article 305 of the Criminal Code of Ukraine (completed attempt to smuggle narcotics in especially large sizes, i.e., their movement across the customs border of Ukraine with concealment from customs control). This very qualification is due to the fact that citizen A.'s attempts to move the narcotic drug while hiding it from customs control were preceded by his illegal acquisition for the purpose of sale and storage for this purpose. Similarly, in this case, Article 305 of the Criminal Code of Ukraine is not among the list of articles defined in the first half of paragraph 2 of part 2 of Article 216 of the Criminal Procedure Code of Ukraine (as legal cases), and Article 307 of the Criminal Code of Ukraine is not in the list of articles defined in the second half of paragraph 2 of part 2 of Article 216 of the Criminal Procedural Code of Ukraine (as legal possibilities for the security investigative body to commit crimes beyond its jurisdiction).

So, with firm confidence and practical understanding, we can state that the list of cases and opportunities for security agency investigators to carry out pre-trial investigation of criminal offenses not subject to their investigation, defined in paragraph 2 of part 2 of Article 216 of the Criminal Procedure Code of Ukraine, is limited and does not meet the needs of modern law enforcement in the context of combating crimes in the sphere of national security.

Therefore, we believe that to foresee such specific circumstances (cases and possibilities) in the form of establishing a clearly defined list of articles does not correspond to modern practical realities, and from the point of view of constant updating of the legislation on criminal liability for crimes in the field of national security carries the risk of the need for constant updating and

the need frequent amendments to paragraph 2 of part 2 of article 216 of the Criminal Procedure Code of Ukraine.

In connection with this, we propose to exclude the specified paragraph from part 2 of Article 216 of this Code.

At the same time, we propose to improve the provisions of part 10 of this article, setting it out in the following version: "if during the pre-trial investigation, other criminal offenses committed by the person who is the subject of the pre-trial investigation or by another person, and which are not subject to investigation by the body that carries out in in criminal proceedings, a pre-trial investigation, the prosecutor supervising the pre-trial investigation, in the event of the impossibility of separating these materials into a separate proceeding, determines the jurisdiction of all these criminal offenses by his resolution".

2.2. Change of liability due to inefficiency of the investigation: myths and reality

No less important factor, which in practice contributes to the resolution of authorization issues to carry out pre-trial investigation of crimes that are not subject to investigation by security agencies, is the right, provided for in Part 5 of Article 36 of the Criminal Procedure Code of Ukraine, of the Prosecutor General (the person who performs his duties), the head of the regional prosecutor's office, their first deputies and deputies by their reasoned resolution to entrust the pre-trial investigation of any criminal offense to another pre-trial investigation body, including a higher-level investigative unit within the same body, in case of ineffective pre-trial investigation or in the presence of objective circumstances, that make it impossible for the relevant pre-trial investigation body to function or to conduct a pre-trial investigation under martial law.

Agreeing with the need for the existence of such a norm, we will analyse its individual problems, based on the results of which we will try to propose specific ways to solve them.

This provision has dual legal grounds for implementation by the Prosecutor General (a person who performs his duties), the head of the regional prosecutor's office, their first deputies and deputies, by their reasoned resolution, to entrust the implementation of a pre-trial investigation of any criminal offense to another pre-trial investigation body, including to a higher-level investigative unit within one body: 1) pre-trial investigation by an authorized investigative unit is ineffective; 2) the presence of objective circumstances that make it impossible for the relevant pre-trial investigation body to function or conduct a pre-trial investigation under martial law. The second ground is quite new, introduced in accordance with the Law of Ukraine

"On Amendments to the Criminal Procedure Code of Ukraine on Improving the Procedure for Conducting Criminal Proceedings under Martial Law" No. 2201-IX of 14 April 2022[10]. And its introduction into the current Criminal Procedural Code of Ukraine is conditioned by the needs of the introduced and continued martial law, only in the conditions of which it is acceptable for law enforcement.

In relation to the first ground, the law-enforcement judicial practice at the level of the Supreme Court has already been formed. However, with all due respect to Themis, let us find the courage to state the contradiction and inconsistency of court precedents in the indicated direction, which does not contribute to the tasks of criminal proceedings defined in Article 2 of the Criminal Procedure Code – the protection of an individual, society and the state from criminal offenses, the protection of rights, freedoms and legitimate the interests of the participants in criminal proceedings, as well as ensuring a prompt, full and impartial investigation and trial, so that everyone who committed a criminal offense was held accountable to the extent of his guilt, no innocent person was charged or convicted, no person was subjected to unjustified procedural coercion and that due legal procedure be applied to each participant in criminal proceedings[11]. More precisely, procedural formalism regarding the tasks of applying the proper legal procedure (in the presence of significant gaps in the legal provision of combating crimes in the field of national security, including regarding the investigation of criminal offenses by investigators of security agencies) under the guise of protecting the rights, freedoms and legitimate interests of participants in criminal proceedings (in this case, the defence side) in practice de facto prevails over the task of protecting an individual, society and the state from criminal offenses, and does not contribute to ensuring the principle of inevitability of punishment, but on the contrary, embodies a shameful trend regarding de jure legitimate opportunities for a person to avoid criminal charges responsibility, including due to violation of the responsibility determined by the investigators of the security agencies.

Thus, according to clauses 23–25 of the Supreme Court decision of 09.02.2021 (case No. 640/5023/19, proceedings No. 51-2917km20), the wording, in part 5 of Article 36 of the Criminal Procedure Code of Ukraine "in case of ineffective pre-trial investigation" provides the power of the relevant prosecutor to entrust the investigation to another body, cannot be

[10] Закон України «Про внесення змін до Кримінального процесуального кодексу України щодо удосконалення порядку здійснення кримінального провадження в умовах воєнного стану» від 14.04.2022 № 2201-IX. URL: https://zakon.rada.gov.ua/laws/show/2201-20#n8 (дата звернення 15.12.2022).

[11] Закон України «Про національну безпеку України» № 2469-VIII від 21.06.2018. URL: https://zakon.rada.gov.ua/laws/show/2469-19#Text (дата звернення 09.12.2022).

interpreted in such a way as to limit the power of the prosecutor to transfer the proceedings to a more effective investigative body only in the case when it has already been proven that the investigation by the body under the jurisdiction defined by law is ineffective. At the beginning of the investigation, the relevant prosecutor may have reason to believe that the investigation by the body defined by law will be ineffective. Taking into account the requirement of immediacy and effectiveness of the investigation, delaying the transfer of the case from one body to another only in order to make sure of the ineffectiveness of the investigation by the body defined by Article 216 of the Criminal Procedure Code of Ukraine can have detrimental consequences for the investigation, which in most cases cannot be compensated even with an effective but belated investigation. By itself, ensuring an effective investigation and, as a component of this activity, the determination of the investigative body is essentially a managerial activity of the prosecutor, who may have a variety of reasons for transferring the case to another body from the very beginning. This can be information about the personal interest of the officials of the "correct" investigation body in the results of the case, and their functional dependence on the parties in the case, and the lack of sufficient experience, resources and information of the body that should conduct the investigation according to the jurisdiction defined by law, etc. Taking into account the importance of quick decision-making at the initial stages of the investigation of a crime, the provisions of part 5 of article 36 of article 36 of the Criminal Procedure Code of Ukraine cannot be interpreted as requiring the prosecutor to expect the failure of the investigation in order to make sure that the investigation by the body defined by article 216 of the Criminal Procedure Code of Ukraine is ineffective, and entrust the investigation to another body[12]. In the opinion of the panel of judges, the interpretation of part 5 of Article 36 of the Criminal Procedure Code of Ukraine in such a way as to prevent the relevant prosecutors from ensuring an effective investigation, if they understand from the very beginning that the investigation under the jurisdiction defined by law will be ineffective, does not correspond to the exact meaning of this provision, taken in totality with the duty of law enforcement agencies to ensure a quick, complete and impartial investigation[13].

The specified criminal proceedings in this case based on the cassation appeals of the defenders against the judgment of the Kyiv District Court of the

[12] Ухвала Верховного Суду від 09.02.2021 (справа № 640/5023/19, провадження № 51-2917км20). URL: http://iplex.com.ua/doc.php?regnum=95111182&red=100003e7a6522fbdca9b179cb219ab573aac0f&d=5

[13] Ухвала Верховного Суду від 09.02.2021 (справа № 640/5023/19, провадження № 51-2917км20). URL: http://iplex.com.ua/doc.php?regnum=95111182&red=100003e7a6522fbdca9b179cb219ab573aac0f&d=5

city of Kharkiv of 24 January 2020 and the decision of the Kharkiv Court of Appeal of 9 April 2020 regarding PERSON_1 were referred to the combined chamber of the Cassation Criminal Court of the Supreme Court.

Justifying its position in the resolution of 9 February 2021, by which the specified criminal proceedings on the basis of parts 2 of Article 434-1 of the Criminal Procedure Code of Ukraine were referred to the joint chamber of the Criminal Court of Cassation of the Supreme Court, the panel of judges noted that the wording in part 5 of the article 36 of the Criminal Procedural Code of Ukraine "in case of an ineffective pre-trial investigation", which authorizes the relevant prosecutor to entrust the investigation to another body, cannot be interpreted in such a way as to limit the power of the prosecutor to transfer the proceedings to a more efficient investigative body only in the case when it has already been proven that the investigation by the body under by law, is ineffective. At the beginning of the investigation, the relevant prosecutor may have reason to believe that the investigation by the body defined by law will be ineffective.

The panel of judges also noted that a violation of the rules of jurisdiction, even if it occurred, should not automatically be considered a violation of the right to defence. Neither the Constitution of Ukraine, nor the provisions of national legislation, nor the provisions of any international treaties, which determine the standards of fair trial in criminal cases, provide for the right of a person to demand an investigation by a certain investigative body. The right to a defence provides that the procedural facilities necessary to defend against prosecution must be afforded by any investigative body, but however far-reaching its limits may be, it does not go so far as to enable the defence to control which the body will conduct an investigation. It is unjustified to include the right to an investigation by the body defined in Article 216 of the Criminal Procedure Code of Ukraine as part of the fundamental rights of a person. The conclusion on the inadmissibility of evidence obtained in violation of the rules of investigation (if this occurred) cannot be based on the provision provided for in clause 2 of part 3 of article 87 of the Criminal Procedure Code of Ukraine. This paragraph cannot be interpreted in such a way as to extend this rule of evidence inadmissibility to the situation when the investigation was conducted by the investigative body in violation of the investigation rules provided for in Article 216 of the Criminal Procedure Code of Ukraine[14].

Instead, the panel of judges of the Joint Chamber of the Cassation Criminal Court of the Supreme Court reached the following conclusions in its

[14] Ухвала Верховного Суду від 09.02.2021 (справа № 640/5023/19, провадження № 51-2917км20). URL: http://iplex.com.ua/doc.php?regnum=95111182&red=100003e7a6522fbdca9b179cb219ab573aac0f&d=5

Resolution of 24 May 2021 (proceedings No. 51–2917kmo20, case No. 640/5023/19).

Regarding the proper legal procedure for the implementation by the Prosecutor General, the head of the regional prosecutor's office, their first deputies and deputies of the powers provided for in part 5 of article 36 of the Criminal Procedure Code of Ukraine.

The second part of Article 19 of the Constitution of Ukraine establishes the obligation of state authorities and local self-government bodies, their officials to act only on the basis, within the limits of authority and in the manner provided for by the Constitution and laws of Ukraine.

According to Article 2 of the Criminal Procedure Code of Ukraine, the tasks of criminal proceedings are to protect an individual, society and the state from criminal offenses, to protect the rights, freedoms and legitimate interests of the participants in criminal proceedings, as well as to ensure a quick, complete and impartial investigation and trial, so that each, who committed a criminal offense was prosecuted to the extent of his guilt, no innocent person was charged or convicted, no person was subjected to unjustified procedural coercion, and that due process of law was applied to each participant in the criminal proceedings.

In the theoretical aspect, "appropriate legal procedure" is a form of administration of justice, which consists of a set of human rights guarantees of a procedural nature, aimed at achieving procedural fairness of justice. The guarantees that collectively form appropriate process include the right to legal protection, the right to an effective investigation; the right to a speedy trial; the right to a public trial; the right to an impartial trial; the right to a trial by an impartial jury; the right to an adversarial process; presumption of innocence; the right not to testify against oneself; the right to question prosecution witnesses in court; the right to the assistance of a lawyer during the trial; the right to be heard; the right not to be punished twice for the same crime; the right to a direct trial; the right to a continuous process; the right to appeal.

The application of due process is one of the constituent elements of the rule of law principle and provides, among other things, that the powers of public authorities are determined by the provisions of the law, and requires that officials have permission to commit an action, and in the future act within the limits of the powers granted to them.

The application of the proper legal procedure in criminal proceedings is the methods of implementation of criminal procedural law norms established by the criminal procedural law, which ensure the achievement of the legal regulation goals of criminal procedural relations in the field of pre-trial investigation and trial. It means not only that all actions of procedural subjects

must meet the requirements of the law, because in this case this task dissolves in the prescriptions of the legality principle. Such actions must arise from the available powers and be in an adequate relationship with a specific procedural task that arises at a certain moment of the pre-trial investigation and judicial review of criminal proceedings. Such an adequate ratio leads to the principle of proportionality.

Due process of law applies both during the trial and at the stage of the pre-trial investigation.

Failure to comply with the proper legal procedure entails a violation of the right to a fair trial guaranteed to everyone in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the Convention).

So, in Part 5 of Article 36 of the Criminal Procedure Code of Ukraine, the following system of procedural elements is written: a) the appropriate entity (the Prosecutor General, the head of the regional prosecutor's office, their first deputies and deputies); b) evaluation of the pre-trial investigation as ineffective; c) reflection of such assessment in the corresponding procedural decision – resolution; d) motivation of such resolution.

The pre-trial investigation is carried out in accordance with the rules of investigation established in Article 216 of the Criminal Procedure Code of Ukraine:

The legislator, having distributed criminal offenses within the jurisdiction of various pretrial investigation bodies, proceeded from the presumption that this particular body is capable of conducting a proper pretrial investigation of criminal proceedings regarding the specified list of criminal offenses: due to the characteristics of the criminal offense, organizational capabilities of the body, customs, needs for specialization, etc. A certain "priority" in terms of jurisdiction is given only to the National Anti-Corruption Bureau of Ukraine, since it is forbidden to entrust the implementation of a pre-trial investigation of a criminal offense under the jurisdiction of the National Anti-Corruption Bureau of Ukraine to another pre-trial investigation body – without exception, as well as to the National Anti-Corruption Bureau of Ukraine and the State Bureau of Investigation in proceedings against a people's deputy – it is forbidden to entrust the implementation of a pre-trial investigation of a criminal offense committed by a people's deputy of Ukraine to other bodies of pre-trial investigation, except for the National Anti-Corruption Bureau of Ukraine and the central apparatus of the State Bureau of Investigation in accordance with their jurisdiction. In all other cases, the law summarizes that the pre-trial investigation must be carried out in compliance with the jurisdiction rules. After all, the strategic goal of the institution of accountability is to ensure the right of a person to an objective and impartial

investigation, and as a result of the National Anti-Corruption Bureau of Ukraine, guaranteeing the right to a fair trial provided by the Convention on the Protection of Human Rights and Fundamental Freedoms.

When evaluating the effectiveness of a pre-trial investigation, it should be assumed that the effectiveness of a pre-trial investigation is a ratio of procedural actions, procedural decisions implemented by participants in criminal proceedings, as well as their results with the provisions of the Criminal Procedure Code of Ukraine, which determine the grounds, conditions and procedure for their conduct or adoption, taking into account the optimal expenditure of time and effort for this.

In its decisions, the European Court of Human Rights singled out the following system of criteria for the effectiveness of a pre-trial investigation: 1) the purpose of conducting a pre-trial investigation must always be to achieve the objectives of criminal proceedings (orientation towards achieving the objectives of criminal proceedings); 2) conducting a pre-trial investigation must comply with the principle of legality, in particular ensure the effective implementation of provisions of national legislation (legality); 3) the principle of publicity (the initiative of the pre-trial investigation body) should be inherent in the pre-trial investigation, which consists in the prompt reaction to the committed criminal offense by a competent person, which will not depend on the will of the interested parties (publicity); 4) the requirement of reasonable speed of the pre-trial investigation, which provides for the implementation of procedural actions at this stage of the proceedings without unnecessary delays, their timeliness, the absence of unjustified suspension of criminal proceedings, etc. (reasonable speed); 5) comprehensiveness and completeness of the applicating measures aimed at the disclosure of a criminal offense, which, first of all, involves the correctness, consistency and logic of obtaining and handling evidence, substantiation of procedural decisions (comprehensiveness and completeness of the investigation); 6) independence and impartiality of the person conducting pre-trial investigation of a criminal offense (independence and impartiality); 7) transparency of the pre-trial investigation, protection of the rights and interests of the victim and his relatives, which involves providing them with a timely procedural status, involvement in the conduct of procedural actions, familiarization with the materials of the proceedings (transparency); 8) consideration during the pre-trial investigation of the individual characteristics of the offender, in particular, his age, gender, nationality (individualization); 9) differentiation of forms of pre-trial investigation for the purpose of its optimization (differentiation of forms of investigation).

In order to establish the ineffectiveness of the pre-trial investigation, an assessment of the pre-trial investigation is necessary in order to make a

decision on entrusting the implementation of the pre-trial investigation of any criminal offense to another pre-trial investigation body, including a higher-level investigative unit within the same body.

The availability of relevant information related to a specific criminal proceeding, regarding its ineffectiveness, can be established by the relevant prosecutor at any stage of the pre-trial investigation, including at its beginning, and be grounds for making a decision in the order and in accordance with the requirements of Part 5 of Article 36 of the Criminal Procedure Code of Ukraine.

The granting of rights, imposition of duties and determination of the scope of responsibility by its legal nature require a written form in order to avoid subjectivism and ensure legal certainty.

In each specific case, the existence of such grounds must be substantiated in the relevant resolution of the prosecutor, because the change of jurisdiction provided by law, as it seems, must be considered as an extraordinary procedure compared to the general procedure for determining jurisdiction, according to which the resolution of this issue is a matter of legislative regulation, and not a matter of discretion.

A mandatory prerequisite for the implementation by the Prosecutor General, the head of the regional prosecutor's office, their first deputies and deputies of the powers provided for in part 5 of Article 36 of the Criminal Procedure Code of Ukraine is the assessment of the pre-trial investigation by the pre-trial investigation body established by Article 216 of the Criminal Procedure Code of Ukraine as ineffective and the reflection of such evaluations in the resolution with appropriate motivation.

In the case that the Prosecutor General, the head of the regional prosecutor's office, their first deputies and deputies entrust the pretrial investigation of a criminal offense to another pretrial investigation body without establishing the ineffectiveness of the pretrial investigation by the pretrial investigation body defined in Article 216 of the Criminal Procedure Code of Ukraine, the said authorized people will act outside the scope of their powers. In this case, there will be non-compliance with the proper legal procedure for the application of part 5 of Article 36 of the Criminal Procedure Code of Ukraine and a violation of the requirements of Articles 214, 216 of the Criminal Procedure Code of Ukraine.

The consequence of non-observance of due legal procedure as a constituent element of the principle of the rule of law is the recognition of evidence obtained during the pre-trial investigation as inadmissible on the basis of Article 86, Clause 2 of Part 3 of Article 87 of the Criminal Procedure Code of Ukraine as collected (obtained) by unauthorized persons

(authorities) in specific criminal proceedings, in violation of the procedure established by law[15].

So, in essence, this court decision "buried" the results of the work of the Security Service of Ukraine and the prosecutor's office, as well as judges of the first and appellate instances, and the legal community was given a basis for thinking about the possibility of further de facto contributing to the avoidance of criminal liability and being subject to fair punishment due to the ambiguous interpretation by Themis representatives of the provisions of part 5 of Article 36 of the Criminal Procedure Code of Ukraine regarding the grounds for exercising by the leadership of the General Prosecutor's Office and regional prosecutors' offices the right to declare a pre-trial investigation ineffective in a specific criminal proceeding, and entrust its conduct to another pre-trial investigation body.

As can be seen from the materials of the specified criminal proceedings, the investigative bodies of the Security Service of Ukraine conducted a pre-trial investigation in the criminal proceedings entered in the Unified Register of Pre-trial Investigations under No. 22018220000000193 of 9 August 2018, on the grounds of a criminal offense provided for in Part 3 of Article 332 of the Criminal Code of Ukraine. According to Article 216 of the Criminal Procedure Code of Ukraine, this criminal offense is under the jurisdiction of the investigative bodies of the National Police. During this investigation, a number of investigative (search) and covert investigative (search) actions were conducted, during which signs of other criminal offenses provided for by part 2 of article 15, part 2 of article 146, part 1 of article 14, article 189 of the Criminal Code of Ukraine were revealed. And on 13 January 2019, investigators of the Security Service of Ukraine entered relevant information into the Unified Register of Pretrial Investigations. On 13 January 2019, this investigation was entrusted to the same unit of the Security Service of Ukraine that conducted the investigation under Art. 332 of the Criminal Code of Ukraine by the prosecutor's decision who carried out procedural management in criminal proceedings. On 25 February 2019, the investigators of the Security Service of Ukraine entered information into the Unified Register of Pretrial Investigations about the commission of a criminal offense provided for in part 1 of Article 263 of the Criminal Code of Ukraine, and by the resolution of 25 February 2019, the investigation was also entrusted to the specified unit of the Security Service of Ukraine. According to Article 216 of the Criminal Procedure Code of Ukraine, criminal offenses provided for by

[15] Постанова Верховного Суду від 24.05.2021 (справа № 640/5023/19, провадження № 51-2917кмо20). URL: http://iplex.com.ua/doc.php?regnum=97286253&red=100003161acef099a0dbfc0c8b729fac56e1ee&d=5

Articles 146, 189, 263 of the Criminal Code of Ukraine are brought under the jurisdiction of investigative bodies of the National Police[16].

Taking into account the fact that, in accordance with part 6 of Article 13 of the Law of Ukraine "On the Judiciary and the Status of Judges", conclusions regarding the application of legal norms set forth in the Supreme Court's rulings are taken into account by other courts when applying such legal norms[17], the legal position in the criminal conducted are a reference point for courts of other instances during the implementation of law enforcement in such legal relations.

However, we believe that such a legal position of the Supreme Court is unlikely to be in line with national interests and society's requests for crime prevention and countermeasures.

In addition, with due respect to all members of this panel of judges, we believe that with such a decision the court took over powers that are not inherent to it, since according to part 5 of Article 218 of the Criminal Procedure Code of Ukraine it is clearly stipulated that disputes about liability are decided by the head of the higher-level prosecutor's office[18]. Therefore, the criminal procedural legislation clearly defines that the issue of the investigation of criminal offenses, including the assignment of pre-trial investigation of crimes not investigated by security agencies, is the prerogative of the prosecutor's office (in particular, the leadership of the General Prosecutor's Office and regional prosecutor's offices).

Please note that in the text of the Resolution there is a contradictory conclusion of the same board that the presence of relevant information relating to a specific criminal proceeding, regarding its ineffectiveness, can be established by the relevant prosecutor at any stage of the pre-trial investigation, including at its beginning, and be grounds for making a decision in accordance with the requirements of part 5 of Article 36 of the Criminal Procedure Code of Ukraine[19]. We believe that this is fully consistent with the decision of the panel of judges of the First Judicial Chamber of the Cassation Criminal Court of the Supreme Court of 9 February 2021 in the same case, according to which the interpretation of part 5 of Article 36 of the Criminal

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[16] Постанова Верховного Суду від 24.05.2021 (справа № 640/5023/19, провадження № 51-2917кмо20). URL: http://iplex.com.ua/doc.php?regnum=97286253&red=100003161acef099a0dbfc0c8b729fac56e1ee&d=5

[17] Закон України «Про судоустрій і статус суддів» від 02.06.2016 № 1402-VIII. URL: https://zakon.rada.gov.ua/laws/show/1402-19#Text (дата звернення 15.12.2022).

[18] Кримінальний процесуальний Кодекс України від 13 квітня 2012 року № 4651-VI. URL: http://zakon0.rada.gov.ua/laws/show/4651-17 (дата звернення 14.12.2022).

[19] Постанова Верховного Суду від 24.05.2021 (справа № 640/5023/19, провадження № 51-2917кмо20). URL: http://iplex.com.ua/doc.php?regnum=97286253&red=100003161acef099a0dbfc0c8b729fac56e1ee&d=5

Procedure Code of Ukraine in such a way as to prevent the relevant prosecutors from providing effective investigation, if they understand from the very beginning that the investigation under the jurisdiction defined by the law will be ineffective, does not correspond to the exact content of this provision, taken together with the duty of law enforcement agencies to ensure a quick, complete and impartial investigation[20].

However, in unison with the court decision of the Supreme Court of 24 May 2021, the same court issued a similar decision of 28 October 2021 (case No. 725/5014/18, proceeding No. 51–3231 km 21), which states that according to the provisions of Article 87 of the Criminal Procedural Code of Ukraine, evidence obtained as a result of a significant violation of human rights and freedoms guaranteed by the Constitution and laws of Ukraine is inadmissible, including as a result of a violation of a person's right to defence and through the exercise of powers by pre-trial investigation bodies or the prosecutor's office, not provided for by the Criminal Procedural Code of Ukraine, to ensure pretrial investigation of criminal offenses. That is, conducting a pre-trial investigation by unauthorized people (bodies) is recognized as a significant violation of human rights and fundamental freedoms and has the consequence of declaring the obtained evidence inadmissible. That the evidence should be received only by authorized people (bodies); methods and means intended for obtaining certain evidence; in the process of obtaining evidence, the requirements of the law, which determine the procedure for carrying out specific actions, their sequence, and the composition of participants, must be observed; evidence must be properly recorded[21].

The introduction of martial law in the state forced to make significant changes to Part 5 of Article 36 of the Criminal Procedure Code of Ukraine regarding other grounds that provide the Prosecutor General (the person performing his duties), the heads of the regional prosecutor's office, their first deputies and deputies to entrust the implementation of a pre-trial investigation of any criminal offense to another pre-trial investigation body, including a higher-level investigative unit within the same body: the presence of objective circumstances that make it impossible for the relevant pre-trial investigation body to function or conduct a pre-trial investigation under martial law. Expressing a personal opinion on this matter, let us assume that the prototype

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[20] Ухвала Верховного Суду від 09.02.2021 (справа № 640/5023/19, провадження № 51-2917км20). URL: http://iplex.com.ua/doc.php?regnum=95111182&red=100003e7a6522fbdca9b179cb219ab573aac0f&d=5

[21] Докази є недопустимими, якщо слідчі органи Служби безпеки України діяли за невмотивованою постановою про визначення підслідності. URL: https://lc-les.com/press-center/posts/dokazi-ye-nedopustimimi-yakshcho-slidchi-organi-sbu-diyali-za-nevmotivovanoyu-postanovoyu-pro-viznachenya-pidslidnosti

of the second basis for the possibility of instructing the leadership of the prosecutor's office to carry out a pre-trial investigation in non-investigable crimes, in addition to recognizing it as ineffective, is precisely what became a progressive (from the point of view of real crime prevention), but, unfortunately, an interim court decision of the Supreme Court of 9 February 2021, which allowed the right of the prosecutor to determine in advance the potential ability of the pretrial investigation body "to bring a specific case to court". According to the new prescriptions of Part 5 of Article 36 of the Criminal Procedure Code of Ukraine, this reason is limited by such factors as: time – martial law, which in turn determines objective circumstances that make it impossible for the relevant pre-trial investigation body to function or conduct a pre-trial investigation.

Taking into account the above-mentioned, we consider it necessary to express our point of view regarding the provision's optimization of the specified norms of the Criminal Procedure Legislation.

Firstly, the provisions of parts 6 of Article 13 of the Law of Ukraine "On the Judiciary and the Status of Judges" should be brought into line with the provisions of the Criminal Procedure Code of Ukraine, which currently does not contain a direct imperative to use legal conclusions regarding the application of legal norms set forth in the decisions of the Supreme Court. Only Part 2 of Article 1 indicates that the criminal procedural legislation of Ukraine consists of the relevant provisions of the Constitution of Ukraine, international treaties, the binding consent of which was given by the Verkhovna Rada of Ukraine, this Code and other laws of Ukraine. That is, in this case, this article is not a blanket one, but the Law of Ukraine "On the Judiciary and the Status of Judges", de jure, is equivalent in terms of law enforcement to other branch laws, like the Laws of Ukraine "On the Security Service of Ukraine", "On the Prosecutor's Office", "On the National Police", etc.

Secondly, it is necessary to optimize which conclusions of the Supreme Court should be taken into account or be mandatory in law enforcement. More precisely, the conclusions expressed in which court decisions must necessarily be taken into account in law enforcement. Modern practice has followed the path that each participant in the process, as well as the court, when justifying their statements, refer to the obligation to take into account the legal conclusions of the Supreme Court. However, if we speak literally, the Resolution of the Supreme Court is a court decision in a specific case. Ukraine is not included in the Anglo-Saxon legal family, in which judicial precedent is the source of national law, including criminal procedural law.

2.3. Case law: legal position or legal chaos…

In practice, during the trial of criminal cases, the prosecution and defence parties often substantiate their procedural positions with diametrically opposed Supreme Court Resolutions, which contradict each other even though they relate to the same issue of law enforcement. At the same time, the court itself, having considered the first and second arguments, generally makes its decision, necessarily motivating it by the third legal position of the same Supreme Court. That is, the criminal-procedural system of Ukrainian law is a precedent, and the court decision in a specific case, acting as a legal guide for the servants of Themis, is de facto a source of law.

Therefore, in order to prevent the further development of legal chaos and to optimize the uniform application of the law, the legislator should think about what exactly should be understood by the concept of "legal positions" and which legal positions of the Supreme Court should be binding for all subjects of power that apply in its activity, a normative legal act, which contains the relevant legal norm.

N. Bobechko provides a definition of the legal position as the view of the universally mandatory when solving similar cases in the interpretation of criminal law and criminal procedural norms to the established circumstances of criminal proceedings, set out in the resolution of the highest body in the judicial system of Ukraine, as a result of the review of the court decision justice, in which examples of resolving legal conflicts methods, overcoming gaps in legal regulation are theoretically substantiated, and judicial norms are created, thanks to which the unity and stability of judicial practice is achieved[22].

A. Pomazanov emphasizes that the court of cassation "forms new concepts", i.e., during the implementation of law enforcement it demonstrates (proposes) a new reading of the case norms/circumstances, their combinations, as a result of which the legal position of the cassation instance is formed, applied in the future to such legal relations[23]. Agreeing with this statement, we note that in some cases such a "new reading of the case norms/circumstances, their combinations, as a result of which the legal position of the cassation instance is formed" has created not only legal chaos in judicial practice, when the parties to the proceedings and the courts hesitate to justify their vision one or another legal situation, fearing the presence of legal positions of the Supreme Court on a similar issue that are still unknown

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[22] Бобечко Н. Р. Поняття, ознаки, значення та класифікація правових позицій Верховного Суду у кримінальному провадженні. *Порівняльно-аналітичне право*. 2017. № 2. С. 172.

[23] Помазанов А. В. Касаційний перегляд судових рішень у цивільному процесі України : дис. … докт. філософії: 081. Київ, 2019. С. 219.

to them, or, on the contrary, having convinced themselves of the presence of several such contradictory positions. They postpone making their decision, waiting for a new, relatively speaking, “third” such position, which should settle these questions. This inevitably creates investigative and judicial red tape, which, we believe, is unacceptable in the context of combating crimes in the field of national security, and also creates legal nihilism in society.

D. Skrypnyk, equating the terms “conclusion on the application of the rule of law of the Supreme Court” and “legal position of the Supreme Court”, believes that the latter represent conclusions on the application of the rules of law that are set forth in its rulings, since the legal position of the Supreme Court is a result (conclusion), made by the Supreme Court as a result of the interpretation of legal norms, elimination of gaps in legislation, etc[24].

Article 46 of the Law of Ukraine “On the Judiciary and the Status of Judges” is devoted to the Plenum of the Supreme Court, which, in addition to exercising administrative and managerial and other economic-management powers, in accordance with Clause 10–1 of Part 2 of Article 46 of the above-mentioned sectoral Law, in order to ensure the uniform application of legal norms when deciding of certain categories of cases summarizes the practice of applying material and procedural laws, systematizes and ensures the publication of the legal positions of the Supreme Court with reference to the court decisions in which they were formulated[25]. The above-mentioned norm directly provides for the generalization subject of law enforcement practice (the Plenum of the Supreme Court), its goals (equal application of legal norms when deciding certain categories of cases). A natural question arises: how many such generalizations in the form of Plenum Resolutions were made by the Supreme Court during the period of validity of the new Criminal Procedure Code of Ukraine?! Why are thousands of legal positions of the Supreme Court, set out in Resolutions not of the Plenum of the Supreme Court, but in everyday court decisions on specific cases regarding individually identified persons, directly indicated in the Unified State Register of Court Decisions as PERSON_1, PERSON_2, and so on, are mandatory for implementation in other, even similar legal relationships, in relation to other persons in general?!

Therefore, we consider it necessary to specify the list of sources of criminal procedural law, supplementing it with Resolutions of the Supreme Court’s Plenum, which should have a recommended (non-binding) nature for courts and act only as a guide in law enforcement. For this purpose, we

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[24] Скрипник Д. Поняття та особливості правових позицій Верховного Суду в кримінальному провадженні. Публічне право.2020. № 4 (40). С. 128.

[25] Закон України «Про судоустрій і статус суддів» від 02.06.2016 № 1402-VIII. URL: https://zakon.rada.gov.ua/laws/show/1402-19#Text (дата звернення 15.12.2022).

consider it necessary to amend part 2 of Article 1 of the Criminal Procedural Code of Ukraine in the following version: "Criminal procedural legislation of Ukraine consists of relevant provisions of the Constitution of Ukraine, international treaties, the binding consent of which has been given by the Verkhovna Rada of Ukraine, this Code and other laws of Ukraine, as well as Resolutions of the Plenum of the Supreme Court, which are of a recommended (non-binding) nature".

Also, for the same reasons, we propose to amend part 2 of Article 8 of this Code in the following version: "The principle of the rule of law in criminal proceedings is applied taking into account the practice of the European Court of Human Rights and the legal positions of the Supreme Court, set out in the Resolutions of its Plenum".

This corresponds to the need to amend the Law of Ukraine 'On the Judiciary and the Status of Judges", namely its Article 13, Part 6, to be set out as follows: "Conclusions regarding the application of legal norms, set out in the resolutions of the Plenum of the Supreme Court, are taken into account by other courts when applying such legal norms".

Taking into account the above-mentioned, we believe that in order to increase the effectiveness of real countermeasures against crimes in the field of national security, as well as to eliminate contradictions regarding the possibility and expediency of security agencies investigators to conduct pre-trial investigations in various categories of criminal offenses, it would be appropriate for the Plenum of the Supreme Court to summarize and systematize the established practice application of the provisions of Part 5 of Article 36 of the Criminal Procedure Code of Ukraine (in terms of recognition by the courts of the admissibility of evidence in cases of implementation by the Prosecutor General (a person performing his duties), the head of the regional prosecutor's office, their first deputies and deputies of the right to entrust the implementation of a pre-trial investigation of any of a criminal offense to another investigative unit in case of ineffective pre-trial investigation).

In unison, we suggest that part 5 of Article 36 of the Criminal Procedure Code of Ukraine be set out as follows:

"The Prosecutor General (a person performing his duties), the head of the regional prosecutor's office, their first deputies and deputies have the right to entrust the implementation of a pre-trial investigation of any criminal offense to another pre-trial investigation body, including a higher-level investigative unit in within the limits of one body, in the case of an ineffective pre-trial investigation or in the presence of objective circumstances that make it impossible for the relevant pre-trial investigation body to function or conduct a pre-trial investigation under martial law.

The ineffectiveness of the pre-trial investigation can be established by the Prosecutor General (the person performing his duties), the head of the regional prosecutor's office, their first deputies and deputies at any stage of the criminal proceedings, but no later than the disclosure of materials to the other party in accordance with Article 290 of this Code". Further according to the text.

CONCLUSIONS

Crimes in the field of national security should be considered in the sense of criminal and criminal procedural law, as well as fundamental national security principles – these are crimes and other criminal offenses, the pre-trial investigation of which is carried out by investigators of the security agencies, the prevention of which is aimed at the protection of state sovereignty, territorial integrity, democratic constitutional order and vital interests of man, society and the state, its progressive democratic development, as well as safe living conditions and well-being of its citizens.

A meticulous and detailed review of the specific provisions of the current Criminal Procedure Code of Ukraine and other branch laws, an analysis of judicial and other law enforcement practice, as well as our own practical experience made it possible to state that the legislative support for combating crimes in the field of national security is disconnected from the needs of practice.

In order to reduce the gap between the theoretical idyll and the realities of practice in the direction of combating crimes in the field of national security, we have proposed the above-mentioned changes to specific legislative acts, aimed at the real protection of state sovereignty, territorial integrity, the democratic constitutional system and other national interests of Ukraine from real and potential threats.

SUMMARY

The article is dedicated to a philosophical-legal analysis of the theoretical certainty and applied significance of combating crimes in the field of national security.

The prosecutor's own practice of supervising the laws observance by the security agencies in the form of procedural guidance of pre-trial investigation in criminal proceedings on criminal offenses in the field of national security, is presented, as well as the prosecutor's maintenance of public accusations in criminal cases of this category, a legal analysis of the relevant judicial practice has been carried out. This made it possible to compare the theoretical idyll and the practical reality of combating crime in the indicated direction.

In this scientific work, a theoretical definition of crimes in the field of national security is provided, criminal-legal and criminal-procedural identification of each such crime is carried out with reference to a specific norm of the law on criminal responsibility.

This made it possible to specify the problematic issues of the investigation of criminal offenses in which the pre-trial investigation is carried out by the investigators of the security agencies, to determine the cases, possibilities and conditions of their implementation of the pre-trial investigation in other crimes not under their jurisdiction, to argue the justification of the corresponding law enforcement practice using practical examples.

Much attention was paid to the analysis of judicial practice regarding the prosecutor's recognition of the pre-trial investigation as ineffective and his exercise in this connection of the right to entrust the investigation to the investigative units of the security body. The ambiguity and contradiction of the decisions of the cassation instance court, which has the consequence of generating legal chaos and legal nihilism, have been noted. This necessitated the introduction of legal certainty and specifics of legal conclusions of the Supreme Court into the current legislation, which should be taken into account when decisions are made by other courts in similar legal relations.

The mentioned circumstances made it possible to propose our own scientifically based and practically balanced ways to improve the legal means of combating crimes in the field of national security, namely: to make specific changes to the Criminal Procedure Code of Ukraine and the Law of Ukraine "On the Judiciary and the Status of Judges".

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Information about the author:
Shestopalov Roman Mykolaiovych,
Candidate of Juridical Sciences, Prosecutor of the Law Enforcement Supervision Department of the Regional Security Body of the Dnipropetrovsk Regional Prosecutor's Office, Senior Lecturer of the Department of Law and Methods of Teaching Jurisprudence
Sumy State Pedagogical University named after A. S. Makarenko
87, Romenska str., Sumy, 40002, Ukraine