

## SECTION 4. LAW AND INTERNATIONAL LAW

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### **ENSURING FAIR TRIALS: PRESERVING INDEPENDENCE AND IMPARTIALITY IN CRIMINAL PRE-TRIAL INVESTIGATIONS DURING WAR IN UKRAINE**

***Abstract.** The right to an effective investigation of the circumstances of a criminal offence must be ensured during martial law to guarantee a fair trial. The article explores the regulatory framework for effective pre-trial investigation standards under martial law. The article notes that the provisions of the current criminal procedural law are imperfect in terms of legal regulation of effective pre-trial investigation standards, which negatively affects the effectiveness of criminal proceedings during martial law. The article emphasizes that the requirement for an effective investigation must be followed during martial law, which means implementing the relevant standards for conducting effective investigations in criminal proceedings. The article underscores that the provisions of the criminal procedural law do not always contribute to the implementation of effective investigation standards. The article emphasizes that legislative provisions regarding the regulation of the identification and replacement of an investigator during the pre-trial investigation during martial law do not contribute to compliance with the "independence and impartiality" standard of effective investigation. The article determines that procedural norms regarding the legal regulation of pre-trial investigation deadlines before the notification of suspicion during martial law do not contribute to the implementation of the "exemplary conscientiousness" standard of effective investigation. The article asserts that the provisions of the criminal procedural law regarding the legal regulation of the commencement of pre-trial investigation during martial law are not aligned with the "efficiency" standard. The author concludes that changes need to be made to the provisions of the Criminal Procedural Code of Ukraine to address the problems of the regulatory framework for effective pre-trial investigation standards under martial law.*

International human rights standards in criminal proceedings require compliance with standards for effective pre-trial investigation. Moreover, the execution of such investigation standards cannot be reduced or terminated during martial law. The right to an effective investigation of criminal offences must be ensured during martial law to guarantee a fair trial. At the same time, the provisions of the current criminal procedural law are imperfect in terms of legal regulation of standards for effective pre-trial investigation, which negatively affects the effectiveness of criminal proceedings in the context of martial law. The purpose of this article is to investigate the provision of standards for effective pre-trial investigation in the conditions of martial law. The achievement of the stated purpose is conditioned by the formulation and execution of the following tasks: analysis of criminal procedural norms and theoretical concepts regarding standards for effective pre-trial investigation during martial law; identification of problems in ensuring standards for effective pre-trial investigation during martial law and proposing ways to solve them.

Martial law complicates the implementation of criminal procedural activities and the prosecution of a guilty person for committing a criminal offence. Military actions create a danger

to the life and health of participants in criminal proceedings, making it impossible to carry out procedural actions in the "normal," ordinary way of criminal proceedings. In this regard, the legislator in Section IX-1 of the Criminal Procedure Code of Ukraine (CPC) has regulated an extraordinary, special procedure for criminal proceedings, conditioned by martial law. At the same time, the legal regulation of the special procedure for criminal proceedings in conditions of martial law does not exclude the requirement to conduct an effective investigation of the circumstances of the committed criminal offence. The analysis of universal and regional international legal acts notes that the requirement to conduct an effective investigation is a norm of *jus cogens* and is immutable even in conditions of war or other emergencies. Thus, the requirement for an effective investigation must be observed in the situation of martial law, which means compliance with the corresponding standards for conducting an effective investigation in criminal proceedings.

The standards of effective investigation are established in the practice of the European Court of Human Rights (ECtHR). In paragraph 55 of the case «Aleksakhin v. Ukraine» (2012), the ECtHR noted that the minimum standards of effectiveness established by its case law include requirements that investigations should be independent, impartial, subject to public scrutiny, and conducted with promptness and diligence by competent authorities [1]. These standards of effective investigation must be observed by the criminal justice actors even during martial law in Ukraine. The norms of the CPC should ensure the realization of the standards of effective investigation during the course of criminal proceedings.

However, the CPC provisions do not always contribute to the realization of effective investigation standards. I propose to focus on three problems of legal regulation of criminal procedural law regarding the provision of effective investigation standards, namely "independence and impartiality", "exemplary conscientiousness", and "efficiency".

Firstly, the CPC provisions regarding the normalization of the determination and replacement of the investigator during the pre-trial investigation during the martial law period do not contribute to compliance with the standard of effective investigation "independence and impartiality". This standard requires that the investigation be independent and impartial. The legislative provisions of Articles 39(2) of the CPC and 39-1(2) of the CPC may prevent the implementation of the "independence and impartiality" standard. Since the specified procedural norms provide an opportunity for the head of the pre-trial investigation body to arbitrarily influence the course and results of the investigation by identifying and replacing the subject of the proceedings, which can significantly worsen or completely nullify the effectiveness of the investigation. The specified articles of the CPC enshrine the authority of the head of the pre-trial investigation body to independently identify and remove an investigator on their initiative, with the subsequent appointment of another investigator in case of an ineffective pre-trial investigation, an ineffective investigation [2]. The procedural possibility of the head of the pre-trial investigation body to independently influence the subject of the pre-trial investigation creates a risk of violation of the independence and impartiality of the investigation. Because the head of the relevant body at his discretion, without taking into account the position of the procedural supervisor (prosecutor), is authorized to appoint and change the subject of pre-trial proceedings in case of ineffective investigation. In addition, the determination and replacement of the subject of the investigation always take place either within the same body or within the same department, which is subject to the investigation of a certain composition of the criminal offence. This determines the probability that the materials of the criminal proceedings are received by an investigator who is familiar (or maybe in friendly relations) with the investigator who previously investigated the circumstances of the criminal offence. In such a case, it is difficult to count on the effectiveness of the pre-trial investigation. Given the professional relationships within the same body, the replacement of the subject of the investigation may not increase the effectiveness of pre-trial criminal proceedings, but, on the contrary, may reduce it.

The ECtHR in the decisions "Shevchenko v. Ukraine" and "Kats and others v. Ukraine" among the signs of independence of the investigator defines such as the presence of "hierarchical independence of the investigator"; "the presence of the investigator's institutional independence"; "the presence of practical independence of the investigator" [3, 4]. Therefore, Articles 39(2) and 39-

1(2) of the CPC do not contribute to the independence of the investigator in terms of the hierarchical, institutional and practical components. Using a hierarchical system of subordination in the pre-trial investigation body and the inquiry body, the head of the pre-trial investigation body can negatively affect the practical independence of the investigator by identifying and replacing him in a specific criminal proceeding. Under such legal regulation, it is difficult to recognize high-quality regulatory support of the standard of effective investigation "independence and impartiality", which can negatively affect the effectiveness of pre-trial criminal proceedings under martial law.

Secondly, the CPC provisions regarding the legal regulation of pre-trial investigation periods before notification of suspicion during martial law do not contribute to the implementation of the "exemplary conscientiousness" standard of effective investigation. The stated standard is for investigative bodies to exercise "thoroughness" and "diligence" during pre-trial criminal proceedings. Article 615(8) of the CPC does not ensure that pre-trial investigation bodies fulfil the requirement of "exemplary conscientiousness" during pre-trial criminal proceedings under martial law. Because the specified legislative norms are not aimed at ensuring efficiency in terms of "thoroughness" and "diligence" of investigative bodies in collecting and verifying evidentiary information about the circumstances of the committed criminal offence. Article 615(8) of the CPC allows the subjects of investigation in criminal proceedings in which no person was notified of the suspicion on the date of the introduction of martial law, to carry out procedural activities for the time being indefinite, since the period from the date of introduction of martial law to the date of termination or cancellation of martial law state is not included in the general terms provided for in Art. 219 of the CPC [2]. An unconditional and non-alternative procedural norm regarding the non-crediting of pre-trial investigation periods to the notification of suspicion during martial law in the general period of investigation can slow down the investigation. With such legal regulation, the subjects of the criminal process at the pre-trial stage may not show the necessary "thoroughness" and "diligence" when establishing the circumstances of the committed criminal offence.

In that case, I propose to exclude from the content of the CPC the norm enshrined in Article 615(8) to ensure "exemplary conscientiousness" of pre-trial investigation bodies before reporting suspicions during martial law. Or the content of the article should be changed in such a way as to standardize the condition "absence of an objective possibility of conducting an investigation", in which case the relevant period (start date and end date of the absence of an objective possibility of conducting an investigation) is not included in the general period of pre-trial investigation, which is regulated by the content Art. 219 of the CPC. It seems that such a legal regulation of the period of investigation before the notification of suspicion in the conditions of martial law is more reasonable, compared to the current legal regulation of the specified period. Because it makes it possible to separate the period during which there was no objective opportunity to investigate the procedural term within which the relevant opportunity existed to conduct the investigation. It is during the period when there is an objective possibility of investigating martial law that the subjects of criminal proceedings must act carefully and diligently, that is, with exemplary conscientiousness.

Finally, the CPC provisions regarding the legal regulation of the initiation of pre-trial investigation during martial law are not consistent with the standard of "efficiency". This standard of effective investigation provides that the initial examination of the circumstances of the committed criminal offence should be as quick as possible, without undue delay. Article 615(1) of CPC does not contribute to the efficiency of the pre-trial investigation at the initial stage, because in the situation of martial law, the investigator is obliged to make a corresponding paper decision in the absence of technical access to the Unified Register of Pre-Trial Investigations. Moreover, such a decision on the initiation of a pre-trial investigation should in any case be drawn up as soon as possible immediately after the inspection of the scene of the incident [2]. The given regulation of the initiation of pre-trial investigation during martial law is better than the normative regulation of the initiation of investigation in peacetime, because in exceptional cases, in the absence of the technical possibility of access to the Unified Register of pre-trial investigations, it is possible to later adopt a resolution on the initiation of a pre-trial investigation. At the same time, the categorical indication in the CPC that such a decision must be issued immediately after the review is completed does not contribute to the speed of the pre-trial investigation. Because instead of

taking other urgent procedural actions to quickly establish the event and the composition of the criminal offence under martial law, the subjects of the prosecution are forced to spend time drafting a procedural decision - a paper resolution on the initiation of a pre-trial investigation.

In my opinion, to timely start the investigation of the offence circumstances, about which the competent authority received initial information, there should be no obstacles in the procedural law in the form of a ban on the implementation of procedural actions before the completion of some formal procedures. Such as entering into registers, drawing up resolutions, etc. The specified procedures create obstacles, sometimes insurmountable, on the way to a quick, effective start of criminal procedural activity if competent subjects receive information about the commission of a criminal offence. This is extremely relevant in the period of martial law because during hostilities it is necessary to quickly and fully record the circumstances of the committed criminal offence at the first safe opportunity. In a "wartime" situation, the quick start of a pre-trial investigation and the implementation of urgent procedural actions cannot be hindered by formal procedures, both in the form of drawing up paper, structurally complex resolutions, and entering information into information databases. These or other formal mandatory mechanisms for fixing the initiation of an investigation under martial law hurt the effectiveness of the initial criminal procedural activity. As a result, they significantly reduce the effectiveness of criminal proceedings as a whole. Taking into account the above, I consider it appropriate to formulate Art. 615(1) of the CPC in the part of issuing a resolution on the initiation of a pre-trial investigation, adding the phrase "at the earliest opportunity." Or to exclude from the CPC content the provisions regarding any formal admission to start a pre-trial investigation during martial law. The given version of the legal regulation of the beginning of a pre-trial investigation in the conditions of martial law will contribute to the implementation of such a standard of effective investigation as "efficiency".

**Conclusion.** The analysis of criminal procedural legislation provisions on the legal regulation of standards for effective pre-trial investigation in conditions of martial law indicates problems with providing such standards. The issue regarding ensuring the standard of effective investigation "independence and impartiality" is the content of the procedural norms that regulate the ability of the head of the pre-trial investigation body to determine and replace the subject of the investigation. The shortcoming of the legislative provision of the standard of effective investigation "exemplary conscientiousness" is the defective regulation of the terms of the pre-trial investigation during martial law. The issue of ensuring the standard of effective pre-trial investigation "efficiency" is the imperfect legal regulation of the initiation of pre-trial investigation during martial law. In order to solve the issues of ensuring effective pre-trial investigation standards during martial law, it is necessary to make changes to the provisions of the criminal procedural legislation.

#### References:

1. European Court of Human Rights (2012). *Judgment (Merits and Just Satisfaction) Case "Aleksakhin v. Ukraine"*. No 31939/06. 19.10.2012. URL: [https://www.stradalex.eu/en/se\\_src\\_publ\\_jur\\_eur\\_cedh/document/echr\\_31939-06](https://www.stradalex.eu/en/se_src_publ_jur_eur_cedh/document/echr_31939-06).
2. Verkhovna Rada of Ukraine (2012). *Criminal Procedure Code of Ukraine*. No 4651-VI. 13.04.2012. URL: <https://zakon.rada.gov.ua/laws/show/4651-17?lang=en>.
3. European Court of Human Rights (2006). *Judgment (Merits and Just Satisfaction) Case "Sergey Shevchenko v. Ukraine"*. No 32478/02. 04.04.2006. URL: [https://www.stradalex.eu/en/se\\_src\\_publ\\_jur\\_eur\\_cedh/document/echr\\_32478-02](https://www.stradalex.eu/en/se_src_publ_jur_eur_cedh/document/echr_32478-02).
4. European Court of Human Rights (2009). *Judgment (Merits and Just Satisfaction) Case "Kats and others V. Ukraine"*. No 29971/04. 18.03.2009. URL: [https://www.stradalex.eu/en/se\\_src\\_publ\\_jur\\_eur\\_cedh/document/echr\\_29971-04](https://www.stradalex.eu/en/se_src_publ_jur_eur_cedh/document/echr_29971-04).

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