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Detention of a person suspected of committing a criminal offense during martial law in Ukraine

Detenção de uma pessoa suspeita de cometer um crime durante a lei marcial na Ucrânia

Serhii Ablamskyi

Volodymyr Galagan

Iryna Basysta

Zhanna Udoenko

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Detention of a person suspected of committing a criminal offense during martial law in Ukraine*

Detenção de uma pessoa suspeita de cometer um crime durante a lei marcial na Ucrânia

Serhii Ablamskyi**

Volodymyr Galagan***

Iryna Basysta****

Zhanna Udovenko*****

Abstract

This article is a detailed exploration of the detention procedures in Ukraine's criminal justice system under the Criminal Procedure Code of Ukraine, with a specific focus on the conditions of martial law. The primary objective of the study is to offer a scientific solution to both theoretical and applied issues surrounding the procedural regulation of detentions, especially in the context of suspects of criminal offenses under martial law. Employing a range of research methods, including comparative legal, systemic, structural, formal legal, and statistical analyses, the study thoroughly examines existing legislation, regulations, and practices of detention procedures in Ukraine. It relies on a strong theoretical foundation derived from scholarly works in criminal procedure and law, and is further supported by empirical data from Ukrainian legal institutions like the General Prosecutor's Office and the Supreme Court. The article presents well-reasoned conclusions and recommendations for improving detention practices, while also acknowledging the limitations of the research. These limitations encompass both theoretical perspectives and practical applications, highlighting the study's implications in the broader context of criminal law and human rights. The originality and value of this research lie in its comprehensive and nuanced analysis of the detention process within a specific and challenging legal framework, contributing significantly to the academic and practical understanding of criminal procedural law under extraordinary circumstances.

Keywords: detention of a person; detainee; criminal offense; crime; collaboration; restriction of rights and freedoms.

Resumo

Este artigo é uma exploração detalhada dos procedimentos de detenção no sistema de justiça criminal da Ucrânia ao abrigo do Código de Processo Penal da Ucrânia, com foco específico nas condições da lei marcial. O objetivo

* Artigo convidado

** PhD candidate of Law at Kharkiv National University of Internal Affairs. Associate Professor. Head of the Department of Scientific Activity Organization and Intellectual Property Protection, Ukraine, Kharkiv.
E-mail: ablamu4@gmail.com.

*** Doctor of Law at National University of Kyiv-Mohyla Academy". Professor, Head of the Department of Criminal Law and Law of Criminal Procedure, Ukraine, Kyiv.
E-mail: galaganvi@ukr.net.

**** Doctor of Law at Lviv State University of Internal Affairs. Professor at the Department of the Criminal Procedure. Member of the Academic Advisory Council under the Supreme Court. Ukraine, Lviv.
E-mail: basysta-i@ukr.net.

***** Doctor of Law at National University of "Kyiv-Mohyla Academy". Associate Professor of the Department of Criminal Law and Law of Criminal Procedure, Ukraine, Kyiv.
E-mail: udaffchik@gmail.com.

principal do estudo é oferecer uma solução científica para questões teóricas e aplicadas que envolvem a regulamentação processual das detenções, especialmente no contexto de suspeitos de crimes sob lei marcial. Empregando uma série de métodos de pesquisa, incluindo análises comparativas jurídicas, sistêmicas, estruturais, jurídicas formais e estatísticas, o estudo examina minuciosamente a legislação, regulamentos e práticas existentes de procedimentos de detenção na Ucrânia. Baseia-se numa forte base teórica derivada de trabalhos acadêmicos em processo penal e direito, e é ainda apoiada por dados empíricos de instituições jurídicas ucranianas, como a Procuradoria-Geral e o Supremo Tribunal. O artigo apresenta conclusões e recomendações bem fundamentadas para melhorar as práticas de detenção, ao mesmo tempo que reconhece as limitações da investigação. Estas limitações abrangem tanto perspectivas teóricas como aplicações práticas, destacando as implicações do estudo no contexto mais amplo do direito penal e dos direitos humanos. A originalidade e o valor desta investigação residem na sua análise abrangente e matizada do processo de detenção dentro de um quadro jurídico específico e desafiante, contribuindo significativamente para a compreensão acadêmica e prática do direito processual penal em circunstâncias extraordinárias.

Palavras chave: detenção de uma pessoa; detido; ofensa criminal; crime; colaboração; restrição de direitos e liberdades.

1 Introduction

The article delves into the critical issue of developing an effective legal mechanism to protect and defend the rights, freedoms, and legitimate interests of individuals, with a specific focus on detention as a legal procedure. This topic holds significant importance in the realms of modern legal doctrine, the theory of criminal procedure, and the practical operations of law enforcement agencies. The study scrutinizes the various contexts in which the Criminal Procedure Code of Ukraine (CPC of Ukraine) applies the term “detained person,” encompassing situations such as detention on suspicion of committing a criminal offense, detention in connection with international criminal proceedings, and scenarios under the martial law regime in Ukraine.

The issue of introducing an effective legal mechanism for the protection of the individual, the defense of their rights, freedoms and legitimate interests, including the case of detention, is one of the fundamental in modern legal doctrine, the theory of criminal procedure and the practical activities of law enforcement agencies.¹

It is not unreasonably noted in scientific publications² that the Criminal Procedure Code of Ukraine (hereinafter - the CPC of Ukraine) uses the term “detained person” in relation to various situations that may arise or continue on the grounds and in the manner prescribed by law. For example:

1) a person may also acquire the procedural status of a suspect at the time of his or her detention on suspicion of committing a criminal offense (Article 42(1) of the CPC of Ukraine);

¹ ABLAMSKYI, S. Ye. Theoretical and applied aspects of protecting the rights of a detainee suspected of committing a crime. *Lexa și viața*, v. 3/2, n. 291, p. 2-6, 2016. Available at: <https://univd.edu.ua/science-issue/issue/84>; ABLAMSKYI, S.; HLOBENKO, H.; CHYCHA, R.; MARTOVYTSKA, O.; BURLAKA, I. Ensuring Protection of the Rights of the Aggrieved Person in Criminal Proceedings through the Prism of Requirements of International Law Acts. *Journal of Legal, Ethical and Regulatory*, v. 23, n. 1, p. 1-7, 2020. Available at: <https://www.abacademies.org/articles/Ensuring-protection-of-the-rights-of-the-aggrieved-person-1544-0044-25-SI-540.pdf>; ABLAMSKYI, S. Ye.; ANSARI, F. A.; NOSACH, A. V. Evaluating the Current State of Realization of Victims' Rights in the Criminal Process: An Explanation Under Ukrainian and Indian Criminal Procedure CODES. *Novum Jus*, v. 2, n. 16, p. 23-48, 2022. Available at: <https://doi.org/10.14718/NovumJus.2022.16.2.2>.

² UDOVENKO, Zhanna. The right of the suspect to show the indication as a protective guarantee to protect its rights and legitimate interests after detention. *Juridical scientific and electronic journal*, v. 1, p. 211-214, 2018. Available at: http://lsej.org.ua/1_2018/58.pdf; BASYSTA, Iryna. On certain aspects of realization of the notion “detained person”. *Social & Legal Studies*, v. 1, n. 11, p. 12–20, 2021. DOI: 10.32518/2617-4162-2021-1-12-20.

2) a person may be detained in connection with his or her search by the competent authority of a foreign state for criminal prosecution or execution of a sentence (Article 208(4)(2) of the CPC of Ukraine);

3) a detainee is also a person who is wanted by the International Criminal Court or in respect of whom the International Criminal Court has requested temporary arrest or arrest and transfer and who has been detained by an authorized official on this basis (Article 208(4)(3) of the CPC of Ukraine);

4) a person suspected of committing a crime (for which the main penalty is a fine of more than three thousand tax-free minimum incomes) may be detained if he or she has not fulfilled the obligations imposed on him or her when choosing a preventive measure or has not complied with the requirements for depositing funds as bail and providing a document confirming this in accordance with the established procedure (Article 208(2) of the CPC of Ukraine);

5) detention of a suspect or accused person who is at large may be implemented on the basis of a ruling of an investigating judge or court as one of the measures to ensure the person's arrival for consideration of a request for a preventive measure (Article 187(2-3) of the CPC of Ukraine).

Among scholars and lawyers, the issue of bringing a person within the framework of the execution of an investigating judge's or court's decision to bring a suspect, accused, or witness to participate in certain procedural actions remains controversial (Articles 140-143 of the Criminal Procedure Code of Ukraine). It is seen that in this case the *de facto* person should also be considered detained with his or her inherent procedural rights. And this is not even to mention the cases when, due to the failure of the person subject to summons to comply with the legal requirements for the execution of the decree on the execution of summons, measures of physical influence may be applied to him or her, which allow him or her to be escorted to the place of summons (paragraph 2 of part 3 of the article 143 of the Criminal Procedure Code of Ukraine).

In the context of the legal regime of martial law in Ukraine, the issue of detention of a person suspected of committing crimes is particularly relevant.

The overarching aim of this study is to address and resolve both theoretical and practical challenges associated with the procedural regulation of detention, particularly concerning individuals suspected of criminal activities under martial law. To achieve this, the study sets forth several specific objectives: firstly, to examine the current state and evolution of legislation related to the detention of individuals in criminal proceedings; secondly, to delve into the theoretical and legal underpinnings of detention, particularly in the context of suspected criminal offenses; thirdly, to elucidate the purpose, legal grounds, and precise moments when detention becomes applicable; fourthly, to differentiate between legal detention by authorities and detention authorized under specific legal provisions; and fifthly, to identify and reinforce the guarantees in place for protecting the rights of detained individuals, including those categorized as prisoners of war.

The methodology adopted in this research is comprehensive and complex, combining general scientific approaches with specialized research techniques. All of this includes the comparative legal method, which is instrumental in examining the legislation, regulatory frameworks, and the practical application of the detention process in Ukraine. Systemic and structural methods are employed to dissect and understand the core elements and nuances of the legal categories and phenomena associated with detention. The formal legal method is utilized to formulate scientifically grounded conclusions and recommendations aimed at refining the procedural aspects of detention. Additionally, the statistical method provides a framework for analyzing state-level data and trends, particularly focusing on the investigation of war crimes in Ukraine. This diverse methodological approach ensures a thorough, balanced, and objective analysis of the detention procedures and their implications in the Ukrainian legal context.

The theoretical foundation of this study is affixed in the scientific literature on criminal procedure, criminal law, and forensic science, offering a robust academic backdrop for the research. Legally, the study is grounded in the Constitution of Ukraine, relevant international legal acts, Ukrainian legislation, and

the jurisprudence of the Supreme Court of Ukraine. Empirically, the research is supported by statistical and analytical data from the General Prosecutor's Office of Ukraine and the Supreme Court, providing a concrete, real-world basis for the study's findings and recommendations. This article aims to contribute a comprehensive, nuanced, and practical perspective to the discourse on criminal procedural law in Ukraine, particularly under the challenging conditions imposed by martial law, thereby enhancing the understanding and application of detention procedures in a manner that upholds the rule of law and human rights.

The legislative changes to the detention of persons under martial law in Ukraine, particularly following the introduction of emergency laws into the Criminal Procedure Code of Ukraine, present several challenges and debates. Key issues include the expanded scope for detention without judicial oversight, ambiguities around the definition of "authorized officials" for detention, and procedural complexities like accurately documenting detention times. Moreover, the prosecution of war crimes and the delicate balance between international humanitarian law and national security needs, especially regarding prisoners of war, add to these complexities. Additionally, the legal distinction between collaboration activities and high treason, as well as concerns over potential human rights violations, underscore the challenges in adapting criminal procedural law to the exigencies of martial law, highlighting the need for a careful and rights-respecting approach to law enforcement and judicial processes in these extraordinary circumstances.

2 Legislative changes to the detention of persons under martial law in Ukraine

It is appropriate to focus on the provisions of the criminal procedural legislation of Ukraine, which have undergone changes regarding the detention of persons and have problems in their own implementation after the introduction of martial law. The specificity of the legal regulation of criminal proceedings in such conditions is due to the fact that together with the norms characteristic of the regulation of legal relations in the conditions of ordinary life, emergency laws were included in the regulatory component of the legal regulation. They establish not only specific means and mechanisms of legal regulation, but also have their own specifics regarding action in space, time and among persons³. In particular, responding to the challenges that arose as a result of the full-scale aggressive invasion of Russia, the Law of Ukraine "On Amendments to the Criminal Procedure Code of Ukraine on Improving the Procedure for Conducting Criminal Proceedings under Martial Law"⁴ has been adopted, which changed the detention procedure and caused considerable debate in circle of proceduralists.

Considering the detention, which can be implemented without a decision of an investigating judge by any person (Article 207(2-3) of the CPC of Ukraine) regardless of citizenship, social status, official duties, etc., it should be clarified that the current Criminal Code of Ukraine allows it only in two cases, namely: 1) when committing or attempting to commit a criminal offense; 2) immediately after the commission of a criminal offense or during the continuous pursuit of a person suspected of committing it⁵. Similar, but not identical, wording is also found in Article 73 of the Criminal Procedure Code of the French Republic⁶, of

³ TETERIATNYK, Hanna. Some Issues of Legal Regulation of Criminal Proceedings in the Conditions of Emergency Legal Regimes. *Scientific Bulletin of the International Humanitarian University. Ser. Jurisprudence*, v. 48, p. 98, 2020.

⁴ UKRAINE. *Law of Ukraine (14.04.2022) No. 2201-IX*. On Amendments to the Criminal Procedure Code of Ukraine on Improving the Procedure for Conducting Criminal Proceedings under Martial Law. Available at: <https://zakon.rada.gov.ua/laws/show/2201-20#Text>.

⁵ UKRAINE. *Criminal Procedural Code of Ukraine (13 April 2012)*. Available at: <https://zakon.rada.gov.ua/laws/show/4651-17?lang=en#Text>.

⁶ FRENCH. *Criminal Procedure Code of the French Republic*. Available at: https://sherloc.unodc.org/cld/uploads/res/document/fra/2006/code_of_criminal_procedure_en_html/France_Code_of_criminal_procedure_EN.pdf.

Article 127(1) of the German Code of Criminal Procedure⁷ (it is about the right to detain a suspect by any citizen).

According to Article 208(1) of the CPC of Ukraine, an authorized official has the right to detain a person suspected of committing a crime punishable by imprisonment without a ruling of an investigating judge or court only in the following cases:

- 1) if the person was caught committing a crime or attempting to commit a crime;
- 2) if immediately after the commission of the crime, an eyewitness, including the victim, or a set of obvious signs on the body, clothing or place of the event indicate that this person has just committed the crime;
- 3) if there are reasonable grounds to believe that a person suspected of committing a grave or especially grave corruption crime under the jurisdiction of the National Anti-Corruption Bureau of Ukraine may escape with the intent to evade criminal liability;
- 4) if there are reasonable grounds to believe that a person suspected of committing a crime under Articles 255, 2551, 2552 of the Criminal Code may escape with the intent to evade criminal liability.

Also, in accordance with part 2 of Article 208 of the CPC of Ukraine, cases of detention of a person are established if the suspect has not fulfilled the duties imposed on him or her when choosing a preventive measure or has not complied with the requirements for depositing funds as bail and providing a document confirming this in the prescribed manner.

The legislator has established a new alternative ground for detention without a decision of an investigating judge or court of a person suspected of committing a crime under martial law, when there are reasonable circumstances giving rise to the belief that a person suspected of committing a crime may escape with the intent to evade criminal liability⁸. This provision of the current CPC of Ukraine correlates with paragraph 1(c) of Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms (November 4, 1950).⁹ Given this state of affairs, two questions arise, namely: 1) which law should give a person the right to such detention and 2) who should be considered an authorized official?

If to analyze various legislative acts of Ukraine, there can be answer to the question of who is authorized to detain persons, which is very relevant today. We believe that, both in the context of criminal proceedings in the normal course and in the context of a special regime, criminal proceedings under martial law should be considered to be carried out by the appropriate authorized persons, including, inter alia, detention by employees of the Ministry of Defense of Ukraine; military administration bodies, formations, military units and subdivisions of the Armed Forces of Ukraine; military personnel, as well as employees of the State Border Guard Service of Ukraine involved in operational activities; by members of the National Guard of Ukraine, etc.

This legal issue has already been the subject of the Supreme Court consideration. In particular, the definition of the concept and list of participants who are authorized officials for detention was provided by the panel of judges of the First Judicial Chamber of the Criminal Court of Cassation of the Supreme Court in its decision dated February 16, 2021 in case No.204/6541/16-к (proceeding No. 51-2172km19)¹⁰. However, even the existing commentaries and interpretations have not fully exhausted the existing debate yet. In practice, some participants still tend to believe that the official authorized to detain is only the inves-

⁷ GERMAN. Federal Ministry of Justice. *German Code of Criminal Procedure*. Available at: https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p1155.

⁸ UKRAINE. *Criminal Procedural Code of Ukraine (13 April 2012)*. Available at: <https://zakon.rada.gov.ua/laws/show/4651-17?lang=en#Text>.

⁹ EUROPEAN CONVENTION ON HUMAN RIGHTS. *Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950)*. Available at: https://www.echr.coe.int/documents/convention_eng.pdf.

¹⁰ DECISION of the Criminal Court of Cassation of the Supreme Court (16.02.2021), case No. 204/6541/16-к. Available at: <https://reyestr.court.gov.ua/Review/95533196>.

tigator, who is empowered by the CPC of Ukraine to draw up a detention report. Obviously, such a limited approach may result in further incorrect assessments of the illegality of detention on the grounds of an improper subject.

Another existing problem concerns the indication of the time of detention in the detention report. The statement of the hour and minute of detention in the detention report is important not only for calculating the duration of detention as a temporary preventive measure, but is also crucial for calculating other procedural deadlines. Some practitioners calculate the time of detention not from the moment of physical detention, i.e., when a person is forced to stay near an authorized official or in a room designated by an authorized official (Article 209 of the CPC of Ukraine), but according to their own perception, believing that this moment is the time of drawing up a protocol or bringing a person to the police station. The following example is provided. Immediately after the commission of a crime (at the scene of the crime or immediately after it has been committed), a patrol police officer makes a detention, but he or she is not considered an authorized official. At the same time, based on the analysis of the provisions of paragraph 9 of part 1 of Article 23, Article 37 of the Law of Ukraine “On the National Police”, it can be concluded that any certified police officer is authorized to detain persons who have committed criminal or administrative offenses. Thus, it can be stated that a patrol police officer is an official authorized to detain. In compliance with the requirements of the CPC of Ukraine, a patrol officer must draw up a detention report on such detention, indicating the hour and minute of detention when the person was forced to stay with them by force or by obeying an order.

Meanwhile, there is another problem, which is a legislative inaccuracy, namely, the Law of Ukraine provisions “On the National Police” do not a priori facilitate the documentation of criminal activity during the detention of a person in accordance with paragraphs 1, 2 of Part 1 of Article 208 of the CPC of Ukraine in such a way that the evidence obtained would be recognized in court in the future. It should be noted that Article 31 of the Law of Ukraine “On the National Police” provides for a superficial inspection and examination among preventive police measures. A superficial inspection as a preventive police measure is a visual inspection of a person, carrying out a visual inspection with a hand, special device or instrument over the surface of a person’s clothing, visual inspection of a thing or vehicle (Article 34(1) of the Law)¹¹. In order to carry out a superficial inspection of a person, a police officer may stop and/or inspect them if there are sufficient grounds to believe that the person is carrying an item whose circulation is prohibited or restricted or which poses a threat to the life or health of such person or other persons (Article 34(2) of the Law). It is important to understand that such a legislative “stop” must be consistent with the requirements of Article 209 of the CPC of Ukraine, which provides that a person is detained from the moment he or she is obliged by force or by obeying an order to remain near an authorized official or in a room designated by an authorized official. In other words, the term “to stop” in criminal proceedings will be regarded as the moment of detention, which should be reflected in the detention report of such a person. Otherwise, it may be talked about a violation of the constitutional right of such a person, restriction of his/her ability to move freely, and, as a result, exceeding the terms of detention. Therefore, due to the different approaches of the legislator in the Law of Ukraine “On the National Police” and the CPC of Ukraine to the understanding of the detention procedure and the concept of “detainee”, there are numerous violations of the right to defense. A person who obeys the above-mentioned lawful demand of a police officer is already a detainee, as he or she is forced to stay near him or her, not to mention the use of force against him or her¹². As a disappointing result of various unacceptable actions that the legislator actually pushed practitioners to take due to not entirely successful legislative regulation, we can cite the decision of the panel of judges

¹¹ UKRAINE. *Law of Ukraine (July 2, 2015) No. 580-VIII*. On the National Police. Available at: <https://zakon.rada.gov.ua/laws/show/580-19#Text>.

¹² BASYSTA, Iryna. Ways to improve criminal procedural legislation to level the problems that arise during the detention and search of a person. In: INTERNATIONAL SCIENTIFIC AND PRACTICAL CONFERENCE. *Theory and practice of combating crime in modern conditions: materials of the International Scientific and Practical Conference* (6 November). Lviv: LvSUIA, 2020.

of the Criminal Court of Cassation of the Supreme Court dated January 21, 2020 in case No.756/8425/17 (proceeding No. 51-859km19), which states that

... having directly examined as evidence the report of the inspection of the scene of the incident dated May 15, 2017, according to which PERSON_1 provided a psychotropic substance, the court of appeal concluded that the specified document is not a valid source of evidence, since the factual data contained therein was obtained with a significant violation of the requirements of the criminal procedural law. The circumstances of this particular case show that PERSON_1 was actually detained, but contrary to the requirements of Article 208(5) of the CPC of Ukraine, no protocol on his/her detention was drawn up and his/her procedural rights were not explained. The violation is significant and, in the absence of a search report over the detained person drawn up in accordance with Article 208(3) of the CPC, served as an indisputable basis for the appellate court to question the legality of the report of the inspection of the scene, on which the accusation of PERSON_1 is decisively based.¹³

3 Peculiarities and specific problems of detention under martial law

Since February 24, 2022, when martial law was introduced in Ukraine, the Ukrainian criminal justice system has faced new challenges, such as documenting, investigating and prosecuting Russian soldiers and officers who commit war crimes on the territory of Ukraine. Back in early October 2022, the Prosecutor General of Ukraine announced that 176 Russian army servicemen had been notified of suspicion for committing war crimes in Ukraine. The indictments have been sent to court against 44 of them, and 10 Russian servicemen have already been sentenced¹⁴. As of October 6, 2022, the police have opened more than 36,200 criminal proceedings on war crimes committed by Russian military personnel and their accomplices in Ukraine. This was stated by a spokeswoman for the National Police of Ukraine at a press conference during which the results of the study “Assessment of the damage caused by Russia’s war crimes in Ukraine” were presented, an Ukrinform correspondent reports.¹⁵

As for detention, in these realities it is important to monitor the state of coordination between a number of requirements of international documents and Ukrainian legislation. This issue is not entirely new, as its components have already been analyzed, and there have been cases of Russian prisoners of war conviction for crimes on the territory of Ukraine in national court practice (for example, the cases of Aleksandrov and Yerofeev).¹⁶

It is worth noting that under international humanitarian law, prisoners of war are protected from prosecution for participating in hostilities (combatant immunity), but this protection does not apply to cases of war crimes. Regarding the obligation to repatriate a prisoner of war, researchers quite correctly state that prisoners may be held in custody for the period of criminal proceedings and trial, and in case of conviction, until the end of their sentence (Article 119, paragraph 5 of the Geneva Convention on the Treatment of Prisoners of War).¹⁷

Thus, the following questions need to be clarified in detail: is detention of prisoners of war possible? Is it a temporary measure of restraint and how is the exchange of prisoners of war realized when it is used?

¹³ RESOLUTION of the panel of judges of the Criminal Court of Cassation of the Supreme Court (January 21, 2020), case No. 756/8425/17, proceeding № 51-859km19. Available at: <https://zakononline.com.ua/court-decisions/show/87053575>.

¹⁴ HAMALYI, Iryna. The Office of the Prosecutor General has notified 176 Russian servicemen of suspicion of committing war crimes in Ukraine. *LB.UA*, 2022. Available at: https://lb.ua/society/2022/10/05/531572_pro_pidozru_vchinenni_voiennih.html.

¹⁵ WAR crimes in Russia: Police have opened more than 36,000 criminal proceedings. *INTERNET UA*, 6.10.2022. Available at: <https://internetua.com/voyenni-zlocsini-rf-policiya-rozpocsala-ponad-36-tisyacs-kriminalnih-provadjen>.

¹⁶ LEBID, Vitaliia. What should be the special justice for crimes against the Ukrainian people? *Law and Business*, 2022. Available at: <https://zib.com.ua/ua/151148.html>.

¹⁷ LEBID, Vitaliia. What should be the special justice for crimes against the Ukrainian people? *Law and Business*, 2022. Available at: <https://zib.com.ua/ua/151148.html>.

Firstly, it will be determined under what conditions of martial law the fact of making a procedural decision to initiate a pre-trial investigation affects the detention that preceded it and the subsequent recognition of such detention as legal or illegal. If to refer to Article 615(1)(1) of the CPC of Ukraine (this article of the CPC of Ukraine provides for a special regime of criminal proceedings under martial law), detention of a person without a decision of the investigating judge or court is possible regardless of whether a pre-trial investigation has been initiated. The possibility of detention before the pre-trial investigation is indicated in the letter of the Prosecutor General's Office "On Compliance with the Convention for the Protection of Human Rights and Fundamental Freedoms and the CPC of Ukraine during the Detention of a Person" dated August 17, 2020, No. 13/4-565ВНХ-328ОКВ-20¹⁸. The Supreme Court in its ruling dated February 16, 2021 in case No. 204/6541/16-к (proceeding No. 51-2172km19) also stated that detention of a person before entering information into the USRCD is not a violation of the CPC of Ukraine¹⁹.

Secondly, it is important to understand under what conditions the detention of a prisoner of war (or capture, which in practice is not easy to distinguish in terms of time in the context of information uncertainty) who committed a war crime can be exchanged (since at the moment of procedural detention he or she acquires the procedural status of a suspect) and how to decide on the further status of the preventive measure chosen in criminal proceedings. We believe that it is necessary to refer to the provisions on the exchange of prisoners of war introduced by the Law of Ukraine "On Amendments to the Criminal Code, the Criminal Procedure Code and Other Legislative Acts of Ukraine Regarding the Regulation of the Procedure for the Exchange of Persons as Prisoners of War". In general, the legal status of a prisoner of war is defined by the Geneva Convention relative to the Treatment of Prisoners of War dated August 12, 1949 (the Convention entered into force for Ukraine on January 3, 1955). In Ukrainian legislation, the concept of prisoners of war is defined in the Instruction on the Procedure for the Implementation of International Humanitarian Law in the Armed Forces of Ukraine, which was approved by the Order of the Ministry of Defense of Ukraine on March 23, 2017, No. 164. According to paragraph 6, section 6 of the Procedure for the Detention of Prisoners of War, if a person who has been captured is not detained as a prisoner of war and is subject to trial for an offense related to hostilities, he or she has the right to the status of a prisoner of war before a judicial authority and to a decision on this issue²⁰. The problem is that the CPC of Ukraine does not currently provide for such a procedure, and this regulatory gap should be eliminated. At the same time, the national legislator in paragraph 28 of Article 3 of the CPC of Ukraine provides for a new participant, that is a person in respect of whom the authorized body has made a decision to exchange as a prisoner of war (any person who has the procedural status of a suspect, accused, convicted, i.e., those who committed acts during the armed conflict that are not covered by combatant immunity). This is absolutely logical, since the exchange of prisoners of war who do not have criminal procedural status should not be regulated by the Criminal Code of Ukraine and the Criminal Procedure Code of Ukraine. This person must be included in the list for exchange as a prisoner of war by the relevant authorized body. It should be noted that the CPC of Ukraine does not contain a list of rights and obligations of such a person, as already noted by researchers²¹, possibly because he or she is a suspect or accused.

¹⁸ LETTER of the Prosecutor General's Office (17.08.2020) No. 13/4-565ВНХ-328ОКВ-20. On compliance with the requirements on the Convention for the Protection of Human Rights and Fundamental Freedoms and the Criminal Procedure Code of Ukraine during the detention of a person.

¹⁹ RESOLUTION of the Criminal Court of Cassation of the Supreme Court (16.02.2021), case No.204/6541/16-к. Available at: <https://reyestr.court.gov.ua/Review/95533196>.

²⁰ UKRAINE. *Resolution of the Cabinet of Ministers of Ukraine (05.04.2022) No. 413*. On the procedure for the detention of prisoners of war. Available at: <https://zakon.rada.gov.ua/laws/show/413-2022-%D0%BF#n23>.

²¹ HLOVIUK, I.V.; TETERIATNYK, H.K. The issue of regulation of the due process of law of the criminal procedure for the exchange of prisoners of war. *Juridical scientific and electronic journal*, v. 8, p. 478-483, 2022. DOI: <https://doi.org/10.32782/2524-0374/2022-8/109>; FOMINA, T. H. Cancellation of a preventive measure in connection with the adoption by an authorized body of a decision on the transfer of a suspect, an accused person for exchange as a prisoner of war: procedural order and problematic issues. *Bulletin of Kharkiv National University of Internal Affairs*, v. 3, n. 98, p. 194-205, 2022. DOI: <https://doi.org/10.32631/v.2022.3.18>.

M. I. Pashkovskiy sees the following problem when, at the time of deciding on their exchange, these persons have already been sentenced to imprisonment and are serving their sentences for committing international crimes, in particular, under Articles 438 and 440 of the Criminal Code of Ukraine. Firstly, it violates the principle of the binding nature of court decisions, and secondly, it violates international legal obligations to punish such persons. In addition, this situation is inconsistent with the rule of law. The exchange of persons sentenced to punishment for international crimes should be accompanied by a solution to the issue of their transfer to the Russian Federation in accordance with the procedure provided for by the Convention on the Transfer of Sentenced Persons dated March 21, 1983 (ETS No. 112) with the receipt of appropriate guarantees from the Russian Federation on the continuation of the execution of the sentence in the territory of the Russian Federation. One of the possible ways to resolve this conflict between the institution of exchange and the obligations to prosecute international crimes, when the Russian Federation will not provide guarantees for the execution of the sentence against the persons who are accepted, may be to institutionalize and apply a deferred execution of the sentence against persons sentenced to imprisonment for committing international crimes in the event of their exchange for other persons during an armed conflict.²²

In this sense, it must be understood that merely asserting rights without pointing out the normative-procedural structure to be observed is, comparatively, in the words of Prittwitz, to act with the hypocrisy of someone who affirms something only to contradict themselves later, doing exactly the opposite of what was intended. What is being asserted is precisely the understanding of the purposes and objectives of criminal proceedings and how this can be applied to cases of prisoners of war and the subsequent fulfillment of their conviction and sentence, understanding that “On this basis, the objective of criminal proceedings is formulated as ‘(1) a materially correct decision, (2) procedurally correct, (3) and peaceful on the criminal responsibility of the defendant’”²³.

Referring back to the moment of detention (or more correctly, capture), it should be noted that anyone who has lawfully detained a person in accordance with Articles 207-208 of the CPC of Ukraine may temporarily seize his or her property, which, together with the detained person, he or she is obliged to hand over to the investigator, prosecutor, or other authorized official, and the fact of such seizure is certified by drawing up a relevant protocol (Article 168(1) of the CPC of Ukraine). It is clear that during martial law, first of all, weapons and ammunition must be seized from the detainee, and, if circumstances and time permit, documents and personal belongings. At the same time, if a detainee has any papers other than personal documents, such as maps and schemes, orders, technical documentation, letters, notebooks, journals, diaries, newspapers, magazines, etc., they are also seized. After the search, each prisoner is filled out a standardized questionnaire, DD-2745, in which they describe everything seized and mark the owner.

The detainees should be immediately transported away from the area of direct hostilities and provided with medical care. This is an important issue in view of the observance of the legal procedure of criminal proceedings²⁴. Detainees may also be provided with water and food, but later, when they are in a safe place. It is necessary to protect the prisoners from aggressive local population and repressions by local authorities. Such detainees are divided into two main groups: 1) military personnel, who are divided into a group of

²² PASHKOVSKIY, M. I. On the Collision of the Institution of Prisoners of War and Other Persons Exchange during Armed Conflict with the Obligations of Criminal Prosecution and Punishment of Persons Guilty of International Crimes. *In: INTERNATIONAL SCIENTIFIC AND PRACTICAL CONFERENCE “ACTUAL PROBLEMS OF PRIVATE AND PUBLIC LAW”*, 4. Dedicated to the 93rd anniversary of the birth of the corresponding member of the National Academy of Legal Sciences of Ukraine, Academician of the International Personnel Academy, Honored Scientist of Ukraine, Doctor of Law, Professor O. Protsevskiy. Kharkiv: [s. n.], 2022. p. 444-446.

²³ PRITTWITZ, Cornelius. Purposes and functions of criminal procedure. *Brazilian Journal of Public Policies*, v. 13, n. 1, 2023. DOI: <https://doi.org/10.5102/rbpp.v13i1.9091>. Available at: <https://www.publicacoesacademicas.uniceub.br/RBPP/article/view/9091>.

²⁴ TEREOMETSKIY, V.; CHMELYUK, V.; MATSIUK, V.; GALAGAN, V.; UDOVENKO, Zh. Problem of ensuring the right to medical care of a detainee (detained in custody) within criminal proceedings: experience of Ukraine and foreign countries. *Georgian Medical News*, v. 11, n. 296, p. 154-160, 2019. Available at: <http://ekmair.ukma.edu.ua/handle/123456789/17776>

privates and a group of sergeant officers, and 2) civilians, men and women with children. Deserters and persons who voluntarily surrendered are singled out as separate groups.

The term of detention of a person without a decision of an investigating judge or court during martial law may not exceed 72 hours from the moment of detention, which is determined in accordance with the requirements of Article 209 of the CPC of Ukraine (Article 211(1) of the CPC of Ukraine) and is considered from the moment of actual detention of the person. It should be noted that in order to ensure the safety of the participants of the investigative (“search”) action, its efficiency under martial law, the legislator in paragraph 2 of point 1 of part 1 of Article 615 of the CPC of Ukraine provides for an exception to part 1 of Article 106 of the CPC of Ukraine regarding the preparation of a protocol by the investigator or prosecutor conducting the relevant procedural action during its conduct or immediately after its completion, and the possibility of technical recording by available technical means with the subsequent preparation of a protocol of the procedural action no later than 72 hours after its completion, in cases where it is not possible to draw up procedural documents on the course and results of investigative (“search”) actions or other procedural actions (in the context of the provision - directly during or immediately after their conduct)²⁵ The Criminal Court of Cassation of the Supreme Court in case No. 127/8962/20 of February 17, 2022, also noted that it would not be a violation of the CPC of Ukraine to draw up a detention report after its completion.²⁶

At the same time, if under martial law there is no objective possibility to bring a detained person before an investigating judge or court within the time limit provided for in Article 211 of the CPC of Ukraine, consideration of the request for a preventive measure against him or her is carried out using available technical means of video communication in order to ensure the remote participation of the detained person. In our opinion, the use of the term “objective opportunity” in this provision is an evaluative category and should be determined on a case-by-case basis, in accordance with the circumstances arising in the context of war, taking into account the location of the detainee, active hostilities, problems with transportation, threats to the life, health and safety of participants in criminal proceedings, etc. The question also arises regarding the impossibility of the defense counsel’s appearance to participate in this procedural action. In accordance with Article 615(12) of the CPC of Ukraine, in cases provided for by law, the defense counsel may also participate remotely with the use of technical means. It is clear that the inquirer, investigator, or prosecutor can ensure such participation of a defense counsel, but the detainee does not have the opportunity to communicate with him or her in confidence, which violates not only the rights of the detainee, but also raises the issue of the protection of attorney-client privilege. In addition, a lawyer is deprived of the opportunity to make sure that his client has not been subjected to psychological or physical coercion. It should be also noted that in order to normalize and ensure the effectiveness of the administration of justice under martial law, the court practice has taken the path of using technical means not provided for in the criminal procedure legislation of Ukraine, such as EasyCon, ZOOM, Skype, Viber, etc. during court hearings via video conferencing.²⁷

In addition, the legislative approach should be provided: if a detained person cannot be brought before an investigating judge or court within 72 hours to consider a request for a preventive measure or to ensure his/her remote participation during the consideration of the relevant request, such a person shall be immediately released²⁸. However, as it is correctly noted by Fomina T.H. and Rohalska, V.V. (2022, p. 38), currently

²⁵ HLOVIUK, I. V.; DROZDOV, O. M.; TETERIATNYK, H. K.; FOMINA, T. H.; ROHALSKA, V. V.; ZAVTUR, V. A. *Special regime of pre-trial investigation, trial in conditions of martial law*: scientific and practical commentary on Section IX-1 of the Criminal Procedure Code of Ukraine. 3. ed. Dnipro: Lviv: Odesa: Kharkiv, 2022.

²⁶ DECISION of the Criminal Court of Cassation of the Supreme Court (17.02.2022), case No.127/8962/20. Available at: <https://reyestr.court.gov.ua/Review/103525237>.

²⁷ DECISION of the Kyiv District Court of Kharkiv (10.05.2022), case No. 953/3101/22, proceedings No. 1-кк/953/1766/22. Available at: <https://reyestr.court.gov.ua/Review/104474384>; DECISION of the Southern City Court of Odesa Region (09.06.2022), case No. 504/3733/19, proceedings No. 1-кк/519/12/22. Available at: <https://reyestr.court.gov.ua/Review/104681590>.

²⁸ UKRAINE. *Criminal Procedural Code of Ukraine (13 April 2012)*. Available at: <https://zakon.rada.gov.ua/laws/show/4651-17?lang=en#Text>.

the CPC of Ukraine does not have a procedural order for such dismissal and does not specify the list of subjects authorized to implement it²⁹. The analysis of Articles 36, 40, 212, 206 of the CPC of Ukraine, Article 20 of the Law of Ukraine “On Pre-trial Detention”³⁰, and departmental regulations allows to conclude that this can be done at their decision: Investigating judge, prosecutor, investigator, official responsible for the stay of detainees, head of a pre-trial detention facility. However, in practice, under martial law, this rule is violated.

It should be recognized that the existence and application of the articles of the current Criminal Code of Ukraine should be considered separately, since its “... current stage is associated with the armed aggression of the Russian Federation against Ukraine. Under its influence, the dynamics of domestic criminal law has undergone significant fluctuations (13 laws have been adopted), especially in terms of criminal liability for crimes against the foundations of Ukraine’s national security (the emergence of Articles 111¹ “Collaboration Activities”, 111² “Assistance to the Aggressor State”, etc.³¹. In view of the above, the problem that attracts attention is the procedure for detention of a person who has committed a criminal offense, because from the point of view of criminal law experts, this category includes certain “reformed” and constructed by the national legislator articles of the Criminal Code of Ukraine or their individual components (paragraphs, parts). According to some scholars, criminal liability for collaboration is already provided for (criminalized) as part of the crime of treason, and therefore the introduction of a new independent form of such an act, in their opinion, will lead to confusion and pose a risk of violating human rights and freedoms. It is emphasized that collaboration activities can take any of the forms of treason provided for in Article 111 of the Criminal Code of Ukraine and can be carried out in the military, administrative (managerial), economic and even domestic spheres. Nevertheless, criminal liability for the relevant activities will be imposed only for such acts that are intentional and cause significant damage to the sovereignty, territorial integrity and inviolability, defense capability, state, economic or information security of Ukraine or create a real threat of such damage.³² However, according to T. M. Lutskyi, this issue is controversial and requires some clarification. In particular, collaboration activities should be distinguished from high treason, although the wording of the objective party of high treason as a crime in the disposition of Article 111 of the CCU is quite general, so all the elements of the crime covered by Article 111¹ of the CCU committed by Ukrainian citizens may, at first glance, appear to be separate cases (sometimes as privileged elements) of high treason. The main difference is that the perpetrator commits collaborative acts already in the context of occupation or aggression. The following can be noted as signs for distinction: high treason is always committed by a citizen of Ukraine, while collaboration is not always (although the very concept of collaborationism logically applies primarily to citizens of Ukraine, however, as already noted, the corpus delicti provided for in Article 111¹ of the CCU itself are different: some of them, according to the disposition of the article, can be committed only by citizens of Ukraine, and some do not contain such an indication); high treason can be committed in favor of any state, as well as collaboration only in favor of the aggressor state³³. In our opinion, collaboration activities were conceptually correct, but not entirely successfully distinguished from high treason in criminal

²⁹ HLOVIUK, I. V.; DROZDOV, O. M.; TETTERIATNYK, H. K.; FOMINA, T. H.; ROHALSKA, V. V.; ZAVTUR, V. A. *Special regime of pre-trial investigation, trial in conditions of martial law: scientific and practical commentary on Section IX-1 of the Criminal Procedure Code of Ukraine*. 3. ed. Dnipro: Lviv: Odesa: Kharkiv, 2022.

³⁰ UKRAINE. *Law of Ukraine (30.06.1993) No. 3352-XII*. On pre-trial detention. Available at: <https://zakon.rada.gov.ua/laws/show/3352-12#Text>.

³¹ BALOBANOVA, D. O. The time component of the dynamics of criminal law of Ukraine in the conditions of armed aggression. In: INTERNATIONAL SCIENTIFIC AND PRACTICAL CONFERENCE. *Theory and practice of combating crime in modern conditions: materials of the International Scientific and Practical Conference (October 21)*. Lviv: Lviv State University of Internal Affairs, 2022. p. 28-31.

³² HOROBETS, Vitalii. Cooperation with enemy as forced behavior and strategy of survival. Military-historical meridian. *Electronic scientific professional journal*, v. 3, n. 21, p. 60, 2018.

³³ LUTSKYI, T.M. Problematic issues of qualification of collaboration activities in Ukraine. In: INTERNATIONAL SCIENTIFIC AND PRACTICAL CONFERENCE. *Theory and practice of combating crime in modern conditions: material. International scientific and practical conference (21 October)*. Lviv: Lviv State University of Internal Affairs, 2022. p. 215-219.

terms. In today's realities, it was time to construct such a separate provision, but not in the way we have it in the Criminal Code of Ukraine today. According to N. A. Orlovska, Article 111¹ of the Criminal Code of Ukraine is constructed in such a way that each of its parts sets out a separate form of realization of collaboration, i.e., it provides for 8 independent criminal offenses. The sanctions of the norms under consideration give grounds to believe that parts 1.2 of Article 111¹ of the Criminal Code of Ukraine are criminal offenses.³⁴ For example, the Unified State Register of Court Decisions currently contains 116 sentences for collaboration, of which 105 are under Article 111¹(1) of the Criminal Code of Ukraine.³⁵

The analysis of statistical data shows that during martial law, people are detained for collaboration, and it is logical that the procedural order provided for in Article 298² of the Criminal Procedure Code of Ukraine is applied as a criminal offense. We believe that in the criminal procedural framework, law enforcement agencies currently have no legal grounds to detain persons suspected of committing crimes that are not punishable by imprisonment in accordance with Article 208(1) of the CPC of Ukraine or to detain persons on the basis of a court order. The amendment of the CPC of Ukraine with Article 298² has caused a debate among scholars and practitioners, including on the issue of the legality of detaining a person for committing a criminal offense and the compliance of these regulatory provisions with Article 29 of the Constitution of Ukraine, which provides for the possibility to restrict a person's right to liberty and security of person only in case of committing a crime, but not a criminal offense. Thus, the CPC of Ukraine is improving and making progress in ensuring the proper functioning of criminal justice during martial law in the country. However, the institute of detention contains problems of law enforcement, certain legislative inconsistencies and contradictions that need to be resolved and procedurally regulated. Failure to resolve them, on the one hand, may lead to a violation of the rights and freedoms of a person, and on the other hand, is an obstacle to the full and predictable implementation of the provisions of the current CPC of Ukraine on detention of persons, including in conditions of martial law.

4 Conclusions

Thus, the legal restrictions on a person during detention arising from the detention regime are as significant as when a preventive measure in the form of detention is applied. This is an effective measure to ensure criminal proceedings, while unlawful detention inevitably encroaches on the constitutional and conventional rights of individuals, may well lead to their violation, and cause significant harm to their interests.

It has been proven that the concept of "detained person" in the current CPC of Ukraine is used not in relation to a single event, but in relation to various situations which may arise and/or continue on the grounds and in the manner prescribed by criminal procedural law. Detention of a person may be carried out both on the basis of the decision of the investigating judge and without it, if there are grounds and cases provided for by the CPC of Ukraine.

Foreign experience in regulating detention is important for Ukraine, first of all, in terms of improving the national criminal procedure legislation, as well as from the standpoint of the joint investigations that are currently being implemented (some of which are already being considered by the courts of Ukraine), as well as those that will be the subject of consideration by the International Criminal Court or other jurisdictions.

It has been stated that the Ukrainian legislator has established a new alternative ground for detention without a court order of an investigating judge or court of a person suspected of committing a crime under

³⁴ ORLOVSKA, N. A. Problems of Sanctions Formation Norms on Criminal Liability for Collaboration and Assistance to the Aggressor State. *In: CRIMINAL justice in Ukraine: realities and prospects: materials of the round table* (23 September). Lviv: Lviv State University of Internal Affairs, 2022. p. 60-65.

³⁵ THE UNIFIED State Register of Court Decisions. Available at: <https://reyestr.court.gov.ua/>.

martial law, when there are reasonable circumstances which give grounds to consider that a person suspected of committing a crime may escape with the aim of evading criminal liability. At the same time, answering the very topical question regarding the persons authorized to detain persons, we believe that, both in the context of criminal proceedings in the usual mode and in the context of the special regime of criminal proceedings under martial law, the detention of employees of the Ministry of Defense of Ukraine; military command and control bodies, formations, military units and subdivisions of the Armed Forces of Ukraine; military personnel, as well as employees of the State Border Guard Service of Ukraine should be considered as carried out by the appropriate authorized persons.

When answering the question whether detention of prisoners of war is possible, whether it is a temporary measure of restraint, and how the exchange of prisoners of war is implemented when it is used, we state that in these realities it is important to monitor the state of harmonization of a number of requirements of international documents, norms of Ukrainian legislation and international humanitarian law. In the context of the issues declared in this publication, detention situations should be viewed through the prism of the axiom that, according to international humanitarian law, prisoners of war have combatant immunity and their treatment should comply with all its components, but such protection does not apply to cases of war crimes. In these realities, they become participants in criminal proceedings with the status of a suspect and are endowed by the national CPC with all the rights and obligations of a suspect.

Considering detentions through the prism of the crucial issue of prosecution for collaboration, a number of material and procedural gaps and conflicts have been identified that can negate the titanic efforts made by practitioners to document this illegal phenomenon and, of course, prevent it. We agreed that collaboration was conceptually correct, but not entirely well distinguished from high treason in criminal terms. There is no justification for the conceptual approach of classifying certain components of collaboration (the sanctions of the provisions under consideration give grounds to believe that these are parts 1 and 2 of Article 111¹ of the Criminal Code of Ukraine) as criminal offenses. This leads to a consequent problem, that is the possibility of detaining a person for committing it and the duration of its period, which has not been resolved by either the legislator or the Supreme Court.

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