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**Taking biological samples from a person for examination in criminal proceedings:** correlation between obtaining evidence and observing human rights

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DOSSIÊ - HISTÓRIA DO DIREITO INTERNACIONAL NO BRASIL  
PARTE II



# Taking biological samples from a person for examination in criminal proceedings: correlation between obtaining evidence and observing human rights\*

## Taking biological samples from a person for examination in criminal proceedings: correlation between obtaining evidence and observing human rights

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### Abstract

This article aims to understand the shortcomings of the Criminal Procedure Code of Ukraine, in particular the current wording of article 245, with regard to the individual guarantees of the expert, making the procedure in cases of mandatory collection clearer and with greater explanation as to the rights and coercive possibilities that the expert can take. The justification and importance of the study lie in the fact that the analysis of investigative and judicial practice suggests that expert opinions play a decisive role in criminal proceedings, because they most undoubtedly indicate that the objects found at the scene belong to a particular person. According to the expert's opinion, which is a source of evidence, other circumstances relevant to criminal proceedings that cannot be proved in another way are also established.

Problematization suggests that the current criminal procedural legislation of Ukraine contains ambiguous provisions for law enforcement, which regulate the obtaining of biological samples from a person for examination.

Therefore, legislative reforms such as the one made in Italy are necessary, aiming to bring more clarity to the rights and duties of experts and experts, so that their procedural guarantees are observed in accordance with the provisions of the Ukrainian Constitution.

For that, a comparative study shown how the topic of the human rights and the collection of biological samples from known persons is regulated in Italy and which ones are the systems for protect human rights at properly during these investigations. A comparative study can be analyzed to demonstrate how the topic of human rights and the collection of biological samples from known individuals is regulated in Italy, as well as which systems are in place to protect human rights during these investigations.

**Keywords:** Criminal Proceedings; Biological Samples; Coercion; Criminal Proceedings; Selection of Samples; Human Rights and Freedoms.

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## Resumo

Este artigo visa compreender as deficiências do Código de Processo Penal da Ucrânia, em especial a atual redação do artigo 245, no que diz respeito às garantias individuais do perito, tornando o procedimento nos casos de cobrança obrigatória mais claro e com maior explicação quanto aos direitos e possibilidades coercitivas que o perito pode assumir. A justificação e a importância do estudo residem no facto de a análise da prática investigativa e judiciária sugerir que as peritagens desempenham um papel decisivo no processo penal, porque indicam, sem dúvida, que os objectos encontrados no local do crime pertencem a um pessoa específica. De acordo com o parecer do perito, que é uma fonte de prova, também são estabelecidas outras circunstâncias relevantes para o processo penal que não podem ser provadas de outra forma.

A problematização sugere que a atual legislação processual penal da Ucrânia contém disposições ambíguas para a aplicação da lei, que regulam a obtenção de amostras biológicas de uma pessoa para exame. Portanto, são necessárias reformas legislativas como a realizada na Itália, visando trazer mais clareza aos direitos e deveres dos peritos e peritos, de forma que suas garantias processuais sejam observadas de acordo com o disposto na Constituição ucraniana. Para isso, um estudo comparativo mostrou como o tema dos direitos humanos e a coleta de amostras biológicas de pessoas conhecidas é regulamentado na Itália e quais são os sistemas para proteger os direitos humanos adequadamente durante essas investigações. Um estudo comparativo pode ser analisado para demonstrar como o tema dos direitos humanos e a coleta de amostras biológicas de indivíduos conhecidos é regulamentado na Itália, bem como quais sistemas existem para proteger os direitos humanos durante essas investigações.

**Palavras-chave:** Procedimentos criminais; Amostras Biológicas; Coerção; Procedimentos criminais; Seleção de Amostras; Direitos Humanos e Liberdades.

## 1 Introduction

Evidence obtained as a result of such investigative (search) action as an examination is recognized by the court as admissible only in the absence of violations of the procedure for obtaining it. Such a procedure contains requirements not only of a procedural (legal basis, registration) and forensic (tactics) nature, but also provides for strict observance of constitutional rights and freedoms of a person, in particular the prohibition of torture, humiliation of dignity and honor, etc.

The issues of formation and development of relevant branches of criminology and forensic examination still remain without due attention, which prevents the provision of a high level of practical activity in this direction. The procedure for taking biological samples in criminal proceedings needs to be improved<sup>1</sup>. Theoretical generalization and solution of the scientific task, which is to obtain new results in the form of scientifically based conclusions related to the selection of biological samples from a person for examination, in particular their procedural and forensic aspects, has been carried out in the study. Analysis of the foreign countries legislation and a number of the European Court of Human Rights decisions on the outlined issues made it possible to clarify the legal principles of taking biological samples from individuals for examination; to investigate the definition and legal nature of taking biological samples from a person for examination; to distinguish the stages of conducting an examination related to the study of biological samples from a person; to propose the changes to the Criminal Procedure Code of Ukraine (hereinafter CPC of Ukraine) on the issue of taking biological samples from individuals for examination. Regulatory norms of taking biological samples from individuals for examination were clarified, the definition and legal nature of taking biological samples from a person for examination was investigated, the stages of conducting

<sup>1</sup> STEPANIUK, Ruslan L.; PERLIN, Stanislav I. DN Testing as a Branch of Forensic Technology: Problems of Formation and Directions of Development. *Law and Safety*, v. 77, n. 2, p. 93-99, 2020. DOI: <https://doi.org/10.32631/pb.2020.2.13>. Available at: <http://pb.univd.edu.ua/index.php/PB/article/view/362>. Access on: 18 jan. 2023. P. 93.; SAVCHUK, Tatiana I.; KOSTYUKOVA, Tatiana S.; HRETSKIY, Inna A. Problems and Perspectives of Forensic Examination of Dactyloscopic Origin's Traces. *Law and Safety*, v. 78, n. 3, p. 109-113, 2020. DOI: <https://doi.org/10.32631/pb.2020.3.14>. Available at: <http://pb.univd.edu.ua/index.php/PB/article/view/pb.2020.3.14>. Access on: 18 jan. 2023.

an examination related to the study of biological samples from a person were distinguished, and a proposal was made based on the analysis of foreign country legislation and several European Court of Human Rights decisions on the issues outlined.

The present study aims to understand the insufficiencies and opacities of the Criminal Procedure Code of Ukraine to reveal the need for legislative modification in its content in order to expose more directly what rights the expert has, especially when the expertise is coercive, as well as the permissions and limits that the expert must observe when conducting this type of evidence. As a form of analytical and theoretical support, a comparative analysis was carried out with similar legislation in Italy, seeking to demonstrate that the lack of clarity regarding the procedure violates the human rights of the expert and undermines the proper conduct of the test, culminating in the possibility of conflicting decisions within of the country and, above all, with convictions in international courts.

The methodological basis of the work is a set of general scientific and legal methods of scientific knowledge. Appeal to the *dialectical* method has ensured consideration of the selection of biological samples from a person for examination from the standpoint of the integrity of the phenomenon and the interconnection of its individual elements. The *formal and logical method* has been used to form a conceptual apparatus within the scope of the research subject. In particular, the author's definition of the concept of biological samples that can be taken from a person for examination has been provided. The *comparative method* has made it possible to compare the provisions of the criminal procedural legislation of Ukraine and foreign countries. The *bibliographic method* has been used during the study of scientific literature devoted to the problems of taking biological samples from a person for examination, as well as during the analysis of the legislation of Ukraine, which regulates the issue of taking biological samples from a person for examination. The selected methods were used in interconnection and interdependence, which ensured the comprehensiveness and objectivity of the results of the scientific research.

## 2 Expert evidence in Ukrainian law

The problem of effective provision of the protection of the aggrieved person's rights has always existed. However, as historical events testify, the Second World War radically changed views on guarantees of world peace because humanity understood the true value of human rights and freedoms, which led to a fundamental update of the legal mechanism for their protection. Starting from this time, protecting human rights is not a purely internal competence of states. It has gained international significance, embodied in the idea of creating a new international law and order, the basis of which is the respect for fundamental rights and freedoms<sup>2</sup>. Conducting any type of examination is a procedural action that requires compliance with all the rules of its conduct, since through particularly this examination the parties to the criminal proceedings have the opportunity to obtain factual data that cannot be established in any other way. At the same time, violation of the conditions of packaging, transportation or sampling for examination may lead to the impossibility of further research or recognition of the results of such research as improper evidence.

Examination is one of the forms of using special knowledge in criminal proceedings. Dudycz notes that the form of using special knowledge in criminal proceedings is a system of rules for the application of special knowledge of persons authorized by law during pre-trial investigation and trial, provided by legislation and tested by practice<sup>3</sup>.

<sup>2</sup> ABLAMSKYI, Serhii Ye.; ANSARI, Faiz A.; NOSACH, Andrii 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. 16, n. 2, 2022. p. 23–48, 2022. DOI: 10.14718/NovumJus.2022.16.2.2. Access on: 12 jan. 2023.; ABLAMSKYI, Serhii; HLOBENKO, Hennadii; CHYCHA, Ruslan; MARTOVYTSKA, Olena; BURLAKA, Iryna. 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*, Issues, 23, Special Issue, 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>. Access on: 12 jan. 2023.

<sup>3</sup> DUDYCZ, Andrii V. *An expert as a participant of the criminal proceedings: criminal proceedings and criminalistics: court expertise: operational search activity*. 2016. Dissertation (Master's degree in Law Sciences) - National University Odesa Law Academy, Odesa, 2016. 253 p. Available at: <http://dspace.onua.edu.ua/bitstream/handle/11300/7807/Дисертація%20Дудич%20А.В..pdf?sequence=2&isAllowed=y>. Access on: 10 jan. 2023.

The basic principles and procedure for conducting examinations are defined in the regulations:

1) The Constitution of Ukraine<sup>4</sup> (Articles 3, 29, 32, 62, 63);

2) The Criminal Procedural Code of Ukraine<sup>5</sup> (Articles 242, 243, 244, 245);

3) Law of Ukraine «On Judicial Examination»<sup>6</sup>, which defines the main provisions of activity, financing and organizational support of expert activity in Ukraine, as well as the legal status of an expert;

4) Order of the Ministry of Justice of Ukraine “On the approval of the Instructions on the appointment and conduct of forensic examinations and expert studies and Scientific and methodological recommendations on the preparation and appointment of forensic examinations and expert studies” dated October 8, 1998 No. 53/5, which regulates the procedure for conducting forensic examinations, their types, as well as an approximate list of questions that can be asked to the expert<sup>7</sup>.

Forensic examination is the main procedural form of using special knowledge in criminal proceedings. The examination differs from other methods of proof by the following features: 1) according to the content of the expert's actions, the examination is an independent study of objects and source data received from the party to the criminal proceedings, the investigating judge, the court, conducted in order to resolve certain issues that require the application of special knowledge; 2) the appointment and conduct of an examination is carried out at the request of a party to criminal proceedings, an investigating judge or a court; 3) the results of the study are drawn up by an expert opinion, which is drawn up in compliance with the requirements of the law; 4) the

expert's conclusions are based on personally conducted research within the special knowledge he or she possesses<sup>8</sup>.

The examination, combined with the study of biological samples of the person, takes place:

*firstly*, on the general principles of conducting examinations (in accordance with Article 242 of the CPC of Ukraine);

*secondly*, it provides that the examination is conducted by an expert (experts) or an expert institution, if special knowledge is needed to solve issues relevant to criminal proceedings.

According to the CPC of Ukraine, the defense party, as well as the prosecution party, is entitled to engage an expert. Article 243 of the CPC of Ukraine provides that the defense party has the right to independently engage an expert, experts, or an expert institution to conduct an examination. As it can be seen, the defense and the prosecution parties have equal rights in conducting the examination. However, the procedural law establishes an additional guarantee for the defense party, since the provisions of Article 244 of the CPC of Ukraine stipulate that the examination may be conducted by the decision of the investigating judge in the following cases:

- if in criminal proceedings it is necessary to conduct an expert examination to establish the circumstances of material importance, but the investigator or prosecutor did not involve him or her, or if incorrect questions were asked, or there are sufficient grounds to believe that the expert involved by the prosecution will provide or has provided an incomplete or incorrect conclusion due to lack of necessary knowledge, bias or other reasons;

- if the defense party does not have the funds to engage an expert and conduct an examination.

Part 8 of Article 244 of the Criminal Procedure Code of Ukraine stipulates that upon granting a request for the involvement of an expert, the investigating judge, if necessary, has the right, at the request of the

<sup>4</sup> UKRAINE. *The Constitution of Ukraine*. Law on June 28, 1996 No. 254к/96-BP. 1996. Available at: <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80?lang=en#Text>. Access on: 12 jan. 2023.

<sup>5</sup> UKRAINE. *The Criminal Procedural Code of Ukraine*. Law on April 13, 2012 No. 4651-VI. 2012. Available at: <https://zakon.rada.gov.ua/laws/show/4651-17?lang=en#Text>. Access on: 12 jan. 2023.

<sup>6</sup> UKRAINE. *On Judicial Examination*. Law of Ukraine on February 25, 1994, n. 4038-XII. 1994. Available at: <https://zakon.rada.gov.ua/laws/show/4038-12?lang=en#Text>. Access on: 10 jan. 2023.

<sup>7</sup> ORDER OF THE MINISTRY OF JUSTICE OF UKRAINE. *Instructions on the appointment and conduct of forensic examinations and expert studies and Scientific and methodological recommendations on the preparation and appointment of forensic examinations and expert studies*: No. 53/5. 08 oct. 1998. Available at: <https://zakon.rada.gov.ua/laws/show/z0705-98?lang=en#Text>. Access on: 10 jan. 2023.

<sup>8</sup> DUDYCZ, Andrii V. *An expert as a participant of the criminal proceedings: criminal proceedings and criminalistics: court expertise: operational search activity*. 2016. Dissertation (Master's degree in Law Sciences) - National University Odesa Law Academy, Odesa, 2016. 253 p. Available at: <http://dspace.onua.edu.ua/bitstream/handle/11300/7807/Дисертація%20Дудич%20А.В..pdf?sequence=2&isAllowed=y>. Access on: 10 jan. 2023.



person who requested the involvement of an expert, to resolve the issue of obtaining samples for examination in accordance with Article 245 of the CPC of Ukraine. Therefore, the defense party, as well as the prosecution one, has the right to involve an expert to examine samples, including biological samples of a person. However, in case of appealing to the court, it is a more protected party, since the taking of biological samples from a person in this case is carried out by the decision of the prosecutor, and in cases provided for in the CPC of Ukraine is done by the decision of the investigating judge.

## 2.1 Types of forensic examinations related to the study of biological samples of a person

In general, there are several types of forensic examinations depending on the criterion of division. In accordance with the Instruction on the appointment and conduct of forensic examinations and expert studies and Scientific and methodological recommendations on the preparation and appointment of forensic examinations and expert studies, approved by the order of the Ministry of Justice of Ukraine dated October 08, 1998 No. 53/5, the following types of examinations are established:

- primary (during such an examination, the biological object is examined for the first time);
- additional (such examinations are conducted to resolve issues regarding the object that was the subject of the initial examination, however, the party to the criminal proceedings needs to conduct additional studies or examine additional materials);
- repeated (during their conduct the same objects are examined, and the same questions are put to the expert);
- commission (such examination is carried out by several experts of the same specialization);
- comprehensive (conducted by several experts from different fields of knowledge) examinations.

Biological samples of a person are most often used when conducting comprehensive examinations (for example, trasological, automotive, forensic medical examination of the consequences of a traffic accident, etc.). However, this does not rule out the fact that a comprehensive examination can be carried out for the

first time (for example, under the conditions when the investigative team is called to the scene) or repeatedly (such examinations can be carried out in cases where the hermeticity of the packaging of samples or objects, which contain such samples, has been violated there are serious doubts about the validity and correctness of the expert opinion, or when the procedural procedure for conducting such an investigative (search) action was violated. As for additional examinations, they may take place when the court or pre-trial investigation has established additional information about the circumstances of the criminal proceedings and the same substance (for example, blood, urine, semen) may indicate the presence of such circumstances. A clear example is conducting an examination of the dead person's blood first to determine the blood group, and then this blood is used to test for the presence of toxic substances in it.

Biological samples of a person are widely used in trace examinations, in particular, examination of human handprints, human teeth marks, examination of traces of layers on objects, as well as other parts of the human body that can be trace-forming objects. It is also possible to distinguish transport and trace examination, which involves the study of traces found at the scene of the accident, damage of vehicles<sup>9</sup>. Such traces can include traces of blood, urine at the scene of the accident and other traces of biological origin. The forensic examinations should not be forgotten, where material evidence is examined, which are objects or traces that can serve to identify the circumstances of the case, establish or refute a criminal act, identify the essence of what happened. Most often, objects with traces of blood, hair, semen, saliva, colostrum, parts of bones, internal organs, that is physical evidence of biological origin, are examined in forensic medical practice<sup>10</sup>. Recently, in many European countries, including Ukraine, there has been a noticeable increase in the interest of investigative units in laboratory tests of human odor

<sup>9</sup> ORDER OF THE MINISTRY OF JUSTICE OF UKRAINE. *Scientific and methodological recommendations on the preparation of materials and appointment of forensic examinations*: No. 144/5. 30 dec. 2004. Available at: <https://zakon.rada.gov.ua/laws/show/z0061-05#o211>. Access on: 12 jan. 2023.

<sup>10</sup> ZHYTOMYR SCIENTIFIC RESEARCH FORENSIC CENTRE OF THE MINISTRY OF INTERNAL AFFAIRS OF UKRAINE. *Experts of Zhytomyr Scientific Research Forensic Centre of the Ministry of Internal Affairs of Ukraine conduct odorological examinations in criminal proceedings*. 2023. Available at: <https://www.ndekc.zhitomir.ua/odorologichna-ekpertiza>. Access on: 15 jan. 2023.



samples based on a bioanalyzer of odor - sense of smell, a specially trained detector dog.

The objects of research in the course of odorological examination are seized samples of a person's odor contained in blood, fatty traces, semen, hair or objects with which he or she has been in contact.

Within the system of the Ministry of Internal Affairs of Ukraine (hereinafter - the MIA of Ukraine) as part of the State Scientific Research Forensic Centre, experts of three laboratories identify odour traces, that are Vinnytsia, Zhytomyr and Mykolaiv regions. Such experts provide answers to the following approximate list of questions:

do the odor traces present on the provided items (fragments of one item) originate from the person being checked? - were they left by one or several persons being checked? - are there any odor traces of that person in the removed traces of blood, on the hair? - are there any odor traces of a specific suspect (accused) or victim, whose comparative samples were sent for research? - on which of the removed trace-carrying objects are there any odor traces of the persons being tested, whose comparative odor samples are submitted for research?<sup>11</sup>

Therefore, it should be noted that biological samples of a person are widely used in conducting forensic examinations. Moreover, the modern development of forensic technologies provides an opportunity to carry out expert research at a deeper level of knowledge, for example, molecular genetic research using the DNA analysis method when investigating objects of biological origin.

## 2.2 Stages of examinations related to the study of biological samples of a person

First of all, it should be noted that the conditions and procedural order for obtaining samples for examination must fully comply with the requirements for conducting investigative (search) actions (Article 223 of the CPC of Ukraine). When taking biological samples, it is important to clarify the rights and obligations of

the person who it is planned to take biological samples from.

Based on the current legislation in the field of conducting forensic examinations, it is worth highlighting the following stages of conducting an examination related to the study of biological samples of a person:

1. Availability of legal grounds for the examination. Examination is appointed if special knowledge is required to establish information relevant to criminal proceedings. Having established this, the prosecutor or investigator, the inquirer has the right to engage an expert to conduct an examination by their own decision. At the same time, the defense party has the right to either independently involve an expert on a contractual basis, or to submit a corresponding petition in the form specified in Article 244 of the CPC of Ukraine and to involve an expert thanks to the decision of the investigating judge. After the examination is appointed, the expert must be provided with the necessary material for the study.

2. Selection of biological samples for examination. Article 245 of the CPC of Ukraine defines the procedure for obtaining samples for examination. This procedure primarily depends on whether the person agrees to provide biological samples for examination. If a person voluntarily agrees to provide biological samples for examination, then in this case their selection will be carried out in accordance with the procedure specified in Article 241 of the CPC of Ukraine. So, first, the prosecutor makes a decision to take biological samples from the person. Further, this decision is provided to the person who the biological samples will be taken from.

If the person refused to take samples for examination voluntarily, then this procedural action can be carried out in a compulsory manner. To do this, it is necessary to follow the procedure specified in Articles 160-161 of the CPC of Ukraine, and therefore, it is necessary to obtain a decision of the investigating judge to conduct compulsory sampling, but before to apply to him or her with the relevant request. In this case, the investigator/ inquirer or prosecutor is entitled to compulsory sampling or is obliged by the court to perform this procedural action (if such a t was filed by the defense).

3. Taking biological samples from a person for examination. The process of taking biological samples from a person has its own peculiarities depending on the object to be sampled. For example, taking fingerprint samples from a person can take place directly in

<sup>11</sup> MOGILA, Vadim S. *Legal life of modern Ukraine: materials of the international scientific conference*. Odesa, 2020. p. 290-293. Available at: <http://dspace.onua.edu.ua/bitstream/handle/11300/13225/Могіла%20В.%20С.%20Питання%20реалізації%20повноважень%20слідчого%20та%20слідчого%20судді%20щодо%20отримання%20зразків%20для%20експертизи.pdf?sequence=1&isAllowed=y>. Access on: 12 jan. 2023.

the premises of the investigator, inquirer or prosecutor and the involvement of doctors or forensic experts is not required. In the case of taking saliva or blood samples from a person, this action must be carried out in a medical institution with the participation of doctors or forensic experts.

In any case, the Criminal Procedure Law emphasizes the need to comply with the requirements of Article 241 of the CPC of Ukraine, namely, such procedural action is carried out (if necessary) with the participation of a doctor or forensic expert. If in order to take biological samples from a person, such person must be naked, the investigator/ inquirer or prosecutor has no right to participate in such a procedural action and doctors (forensic experts) must be of the same sex. As for any procedural action, it requires either continuous video recording or the participation of at least 2 witnesses (who, in case of nudity, will be of the same sex). At the same time, both voluntary and (especially) compulsory collection of such samples must respect human rights and freedoms, since, according to Part 4 of Article 241 of the CPC of Ukraine, actions that humiliate the honor and dignity of a person or are dangerous to his or her health are unacceptable. And that is a universal imperative since “One of the important factors for establishing the theme of evidence within the scope of the concept of public order in Private International Law is its clear involvement with the grammar of human rights, considered a set of essential rights for a human life based on freedom, equality and dignity”<sup>12</sup>.

International experience on this issue should also be taken into account so that the results of such an examination are not recognized as improper evidence in the future, as they were obtained in violation of human rights.

4. Direct conduct of the examination. Forensic expert activity is carried out by state institutions, their territorial branches, expert institutions of municipal ownership, as well as forensic experts who are not employees of these institutions, and other specialists (experts) in the relevant fields of knowledge in the manner and under the conditions specified in Article 7 of the

Law of Ukraine “On Forensic Expertise”. Before the start of the examination, experts are explained the provisions of the Criminal Code of Ukraine on criminal liability for providing a deliberately false conclusion and for refusing to perform their duties without good reason, as well as on criminal liability in case of disclosure of information that became known to them during the examination.

When material evidence is received by the forensic laboratory, information about it is registered in the registration log. The expert pays attention to the packaging, checks its value and imprint. Then unpacking takes place, during which two workers are present. The presence of material evidence is checked according to the data contained in the resolution on the appointment of an expert examination. In the absence of certain items, as well as when items not mentioned in the documents are found, an act is drawn up and signed by three laboratory employees. One copy is immediately sent to the institution, which is the sender of physical evidence, the second one remains in the laboratory<sup>13</sup>.

5. Obtaining an expert’s opinion. According to Part 1 of Article 101 of the CPC of Ukraine, “the expert’s conclusion is a detailed description of the research conducted by the expert and the conclusions drawn on their results, reasonable answers to the questions posed by the person who engaged the expert, or the investigating judge or court that commissioned the examination”. In contrast to civil, economic or administrative proceedings, where there is such a procedural participant as an expert on legal issues, an expert in criminal proceedings does not have the right to resolve legal issues (Part 6 of Article 101 of the Criminal Procedure Code of Ukraine). The expert or the group of experts who conducted the research bear personal responsibility for the provided conclusion and the information provided in it. At the same time, such information cannot go beyond their special knowledge.

6. Carrying out additional, repeated examination, if necessary. An additional expert examination is appointed if the court considers the expert’s conclusions to be unclear and incomplete, or the circumstances have

<sup>12</sup> RAMOS, André de Carvalho. The taking of evidence abroad in private international law: beyond *lex fori* and *lex diligentiae*. *Brazilian Journal of International Law*, v. 12, n. 2, p. 685-704, 2015. Available at: <https://www.publicacoesacademicas.uniceub.br/rdi/article/view/3742/pdf>. Access on: 04 jan. 2023.

<sup>13</sup> KUSHPII, Volodymyr P., PALIUKH, Andriy I., SMUK, Marta I. The procedure for obtaining samples for examination as part of criminal proceedings. *Scientific notes of Lviv University of Business and Law*, n. 26, p. 141-146, 2020. Available at: <http://dx.doi.org/10.5281/zenodo.4433061>. Access on: 15 jan. 2023.

become known, according to which it is necessary to expand the expert study in the form of an additional examination. Conducting such an examination may be transferred to the competence of another or the same expert. Repeated examination is appointed in cases of receiving new information regarding the factual data that were at the expert examination or in the event that the already conducted examination does not fully reveal the essence of the received factual data as evidence. The above-mentioned procedural stages provide an opportunity to investigate the procedural order for carrying out an examination during criminal proceedings comprehensively.

### 3 International experience in taking biological samples from individuals for examination

One of the most urgent problems that needs to be solved and studied is the admissibility of coercion and its limits when obtaining samples for a comparative study, and it is not settled who exactly should take such samples: the investigator directly or a qualified medical worker<sup>14</sup>. These problems should be solved in such a way as, on the one hand, to ensure the receipt of samples necessary for conducting expert research, and on the other hand, to prevent excessive violation of the constitutional rights of citizens when obtaining samples for comparative research.

In order to understand and outline accurately the importance of the issue raised in the scientific research, an anonymous questionnaire was conducted among the following categories: prosecutor's office workers, pre-trial investigation agency workers, and judges. According to the results of the survey, 91% of the prosecutor's office workers, 78% of investigators and 92% of judges who took part in the survey answered "Yes" to the question "Do you think that the problems that exist around the collection of biological samples from a person during criminal proceedings interfere conducting a full and objective investigation of criminal offenses that require the collection of biological

samples from a person for investigation?" which fully demonstrates the importance of regulating the relevant issues at the national level, taking into account international practice in the field of collection of biological samples from a person.

Considering this issue, it is necessary to analyze the practice of the ECHR. So, the first case to be considered is *Jalloh v. Germany* (2006). In the circumstances of the case, the applicant was engaged in illegal drug trafficking and kept bags of drugs in his mouth. This was noticed by German police officers, and due to the fact that the applicant swallowed a bag containing a narcotic substance when he was detained, a decision was made to take him to a doctor. The doctor forcibly injected the applicant with medicines, and law enforcement officers at that moment were holding his arms and legs so that he could not interfere. As a result of these actions, a vomiting reflex was induced and a bag with narcotic substances was obtained. However, this issue concerns the forced sampling in the aspect that was later expressed by the court. The Court found a violation of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, emphasizing that the Convention, in principle, does not prohibit compulsory medical interventions that facilitate the investigation of offenses<sup>15</sup>. Nevertheless, any interference with the physical integrity of a person for the purpose of obtaining evidence must be subjected to careful scrutiny. Indeed, the problems that states face when trying to overcome the harm caused to society by drug trafficking should be taken into account.<sup>16</sup> From this we can conclude that the use of certain chemical or other substances in order to take biological samples from a person must be done with caution, observing the principle of proportionality of the rights violated by such a way of conducting a procedural action with the social relations that were harmed. In addition, according to the main provisions of the practice of the European Court of Human Rights, the physical integrity of a person is absorbed by the concept of "private life", which is protected by the provisions set forth in Article 8 of the Convention

<sup>14</sup> LAW ASSOCIATION "VYSHNEVY AND PARTNERS". *Compulsory collection of biological samples*: ECHR practice. 22 oct. 2021. Available at: [https://protocol.ua/ua/primusove\\_vidibrannya\\_biologichnih\\_zrazkiv\\_praktika\\_espl/](https://protocol.ua/ua/primusove_vidibrannya_biologichnih_zrazkiv_praktika_espl/). Access on: 18 jan. 2023.

<sup>15</sup> CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS. *No. 995\_004*. 04 nov. 1950. Available at: [https://zakon.rada.gov.ua/laws/show/995\\_004#Text](https://zakon.rada.gov.ua/laws/show/995_004#Text). Access on: 08 jan. 2023.

<sup>16</sup> EUROPEAN COURT OF HUMAN RIGHTS. Case "*Jalloch v. Germany*". *Bulletin of the European Court of Human Rights*, n. 88, jul./aug. 2006. Available at: <http://rudocs.exdat.com/docs/index-386794.html>. Access on: 12 jan. 2023.



for the Protection of Human Rights and Fundamental Freedoms (decision dated March 26, 1985 in the case “X and Y v. the Netherlands”<sup>17</sup>) and concerns the most intimate aspects of private life, and mandatory medical intervention, even minor, is an interference with this right.

Despite this, the ECHR still allows the possibility of forced collection of biological samples from a person for research, but places states within the framework of compliance with the conditions and procedure for such interference with the right of a person, emphasizing that the collection of biological samples from a person can only be carried out by the decision of an official authorized to do so person, it can be performed exclusively by a medical professional, such as a doctor (since such actions, in particular, taking human blood samples, require special knowledge), who has the right to refuse to participate in such an action exclusively due to the presence of medical reasons<sup>18</sup>.

A rather interesting thesis can be traced in the case law of national courts. Thus, the investigative judge of the Bogunsky District Court of Zhytomyr in case No. 295/1559/20 dated 06.02.2020 draws the attention of the trial participants to the following: in the legal conclusions of the ECHR in the cases “Yalloch v. Germany” (decision dated 11.07.2006), “Funke v. France” (decision dated February 25, 1993), “J.B. v. Switzerland” (decision dated 05.03.2001) stated that coercive measures should not be applied to a person in order to obtain data from him or her that can be used as a basis for bringing charges against such a person. The conclusions of the ECHR set out in these cases do not mean that the compulsory collection of biological samples in any case contradicts the Convention for the Protection of Human Rights and Fundamental Freedoms. Instead, when biological samples are taken from a person in order to establish his or her involvement in a criminal offense, and due to the lack of other evidence to substantiate the suspicion, their compulsory removal will contradict the provisions of Article 6 of the Convention and, in this case, violate the principles enshrined in Article 63

of the Constitution of Ukraine and Article 18 of the CPC of Ukraine<sup>19</sup>. However, the above seems rather doubtful given that it is actually impossible to take samples from the suspect or accused, since in this case, in any case, the involvement of the person in the criminal offense will be established, and therefore the evidence will be incriminating. This approach simply leads to a reduction in the ways of obtaining reliable information about the circumstances of a criminal offense for the prosecution.

Summarizing all of the above, it is necessary to emphasize that the international experience of sample collection and mistakes made by law enforcement agencies in the process of such activity indicates the need to adopt a specialized legal act in Ukraine, which would determine the procedure, grounds and methods of collecting biological samples from individuals for examination. Since significant human rights violations during such proceedings are very frequent and Ukraine should take into account the failures and problems highlighted in the case law of the ECHR in relation to other states in order to avoid similar problems.

### 3.1 Taking biological samples for forensic reasons: the Italian regulation

It is interesting to compare how different European countries have different laws on taking biological material from citizens and the related human rights guarantees.

In Italy, for example, the legislator recently introduced Article 224bis of the Code of Criminal Procedure, which precisely regulates ‘the judge’s orders for expert opinions that require the performance of acts likely to affect personal freedom’<sup>20</sup>.

The law first of all sets out the fields of application: these are serious offences against the person punishable by a minimum sentence of three years’ imprisonment up to life imprisonment, including road’s homicide<sup>21</sup>.

<sup>17</sup> EUROPEAN COURT OF HUMAN RIGHTS. *Case Hasselbaink v. the Netherlands*: No. 73329/16. Strasbourg: Council of Europe, 2021. Available at: [https://hudoc.echr.coe.int/eng-press#%7B%22site\\_mid%22:%5B%22003-6931170-9316839%22%5D%7D](https://hudoc.echr.coe.int/eng-press#%7B%22site_mid%22:%5B%22003-6931170-9316839%22%5D%7D). Access on: 12 jan. 2023.

<sup>18</sup> TATAROV, Oleg. Forcible taking of biological samples is violation of citizens’ rights. *Liga.net*, 27 jul. 2016. Available at: <https://blog.liga.net/user/otatarov/article/23187>. Access on: 15 jan. 2023.

<sup>19</sup> BOGUNSKY DISTRICT COURT OF ZHYTOMYR. *The Decision of Bogunsky District Court of Zhytomyr*: case No. 295/1559/20. 06 feb. 2020. Available at: <https://reestr.court.gov.ua/Review/87489691>. Access on: 05 jan. 2023.

<sup>20</sup> ITALIAN CRIMINAL PROCEDURE CODE. Title II - Criminal Procedure Code: Means of proof: Chapter VI – Expertise. *Brocardi.it*, 2023. Available at: <https://www.brocardi.it/codice-di-procedura-penale/libro-terzo/titolo-ii/>. Access on: 09 jan. 2023.

<sup>21</sup> ITALIAN CRIMINAL PROCEDURE CODE. Title II - Crimi-

Outside these offences, the law does not provide for the application of coercive DNA sampling to citizens. In these cases, it is possible to directly take the biological sample from the citizen even if the citizen does not give consent, if there is a warrant from the competent judge. The taking, in these cases, is carried out by the person with the appropriate power of attorney from the judiciary, i.e., the police or specialized private professionals.

The same law also specifies the modalities and types of biological samples that can be taken by the judge's delegate (police or private professionals appointed by the judiciary): specifically, the taking of hair, hair and/or cells of the mucous membrane of the oral cavity is possible.

The law also lays down minimum requirements that the judge's order for coercive collection of biological material must necessarily contain:

- Generalities of the person to be subjected to the taking of biological material;
- Indication of the offence for which it is necessary to carry out this type of investigative activity;
- Indication of the reasons that determine that this investigation is indispensable for the purposes of Justice;
- Notice that the citizen who is to undergo the taking of the biological material may be assisted by a lawyer or a technical adviser at the time of biological sampling;
- The indication of the place, day and time fixed for the performance of the biological sampling on the citizen;
- A warning that, in the event of the citizen's failure to appear at the place and on the day set for the biological sampling, he may be joined by the police and compulsorily accompanied to the performance of the biological sampling.

The rule states that, for the execution of the biological sampling, all medical or technical practices that may cause serious suffering to the citizen are prohibited. Acts that cause only slight - if any - suffering are permitted.

Furthermore, the taking of a sample is to be considered legally invalid if, at the time of the taking of the sample, the citizen is not assisted by a lawyer or a trusted technical advisor<sup>22</sup>.

This article of the Code of Criminal Procedure was inserted by virtue of Law No. 85 of 2009, which also regulated the establishment of the DNA database to combat organized crime and all cross-border crimes.

Few years before of the above-mentioned law which established the DNA database in Italy, the GDPR (Data Protection Authority) shared a document with the Italian Parliament about the necessity of the DNA database for a better international crime-fighting. Furthermore, in this document the GDPR highlighted that the sense of the DNA database is only identification. For this reason, the database would not be allowed to contain itself any biological samples. The database have to be only a recipient of a alphanumeric genetics profiles useful for comparison and person identification. These data are high sensible; this is the reason why only authorized operators have the access to the file codes of the database. Furthermore, GDPR specify that it must to avoid any ab-use of the biological samples collection from persons, also if these ones committed some crimes. In fact, the GDPR's suggestion is to regulate at properly the cluster of the person from whose the biological samples can be taken and added to the DNA database<sup>23</sup>.

The law also stipulates that, if the person who is to undergo biological sampling is under the age of 18, or is incapacitated, consent may be given by the parent or legal guardian.

Finally, it is interesting to note that Italian law lays down very strictly all the procedures for taking biological samples from citizens in a direct form, i.e., with invasive acts. It should be noted, however, that the law in force does not lay down precise rules for taking biological material from a given citizen 'outside his or her body', i.e., without the performance of a direct invasive act<sup>24</sup>. Such are the cases of the taking of genetic mate-

nal Procedure Code: Means of proof: Chapter VI – Expertise. *Brocardi.it*, 2023. Available at: <https://www.brocardi.it/codice-di-procedura-penale/libro-terzo/titolo-ii/>. Access on: 09 jan. 2023.

<sup>22</sup> FRANCIONE, Gennaro. *La Tavola delle prove legali*. Roma: Nuova Editrice Universitaria, 2021.

<sup>23</sup> GARANTE PER LA PROTEZIONE DEI DATI PERSONALI. DNA database: the Privacy Guarantor sends a report to the Government and Parliament. *GPDP*, 21 sep. 2007. Available at: <https://www.garanteprivacy.it/home/docweb/-/docweb-display/docweb/1441899>. Access on: 08 jan. 2023.

<sup>24</sup> FELICIONI, Paola. L'acquisizione di materiale biologico final-

rial from objects that have been in the possession of specific persons on which there are probably biological traces of them.

New research on the topic of the legal issue on the DNA database, biobank health-related more in the details – suggest that the approach for the biological samples collection is regulated in a very different way according to the context. In fact, in the healthcare system, the biobank is a powerful tool for the health system. The collection and the processing of these biological samples occurs with very different procedures. Data collected are – anyway – subjects to the same guaranties of privacy<sup>25</sup>.

At the end, in accordance with the current law, persons that have to be subject to the biological collection for investigative/forensic purposes have the possibility to have the assistance and presence of their lawyer/forensic science expert during the biological sample collection. Through this possibility, the legislator would like to permit a full defense right. A similar approach/system of guaranties doesn't apply for the collection of biological samples from findings in which DNA of a given person is present. On this topic, the Italian Supreme Court, with the Judgement No. 49610/2016, specify that biological samples collected from findings are subjects to different guaranties for the criminal investigation/forensic case if compared with the biological samples taken directly from a given person (in this case, the collection is supposed to be an “invasive act” which is subject of specific procedures/guaranties).

#### 4 Procedural procedure for obtaining biological samples from a person during the examination

Taking biological samples from a person for examination is a rather complicated procedural stage of

collecting materials of biological origin of a person for further examination. The ECHR case law even defines it as interference with a person's private life<sup>26</sup>.

It should be noted that there is no “legal” definition of “biological samples” in the legislation. It seems that in the context of sampling under Article 245 of the CPC of Ukraine, biological samples should be considered as originating from the human body and representing biological material, such as tissues, cells, biological fluids, secrets and products of vital activity, physiological secretions, swabs, scrapings, flushes, biopsy material obtained from a person, as well as material of embryofetal origin; any material containing genetic information that can be reproduced or be reproduced in the human biological system<sup>27</sup>. Accordingly, samples of voice, handwriting, signature, speech, etc. are not biological samples. However, it is worth noting that the national judicial practice is known for decisions that do not support this assertion. Thus, in the decision of the High Anti-Corruption Court dated 08.07.2021 No. 991/4406/21 it is determined that fingerprints are biological samples of a person. The above-mentioned decision granted the request for the selection of experimental (comparative) samples of finger nail phalanx prints and palm prints, because they are of essential importance for criminal proceedings<sup>28</sup>.

Taking this into account, the question arises as how expedient it is to use Article 160-161 and Article 241 of the CPC of Ukraine, which establish the regime of temporary access to things and documents and identification of a person. Temporary access by its legal nature is a measure to ensure criminal proceedings, which consists in providing the party to the criminal proceedings with the person in possession of such things and documents, the opportunity to get acquainted with them, make copies and seize them. Taking into

izzata alla prova del DNA tra regola ed eccezione. *Journal Processo Penale e Giustizia*, v. 3, 2018. Available at: <http://www.processopenaleggiustizia.it/acquisizione-materiale-biologico-prova-DNA>. Access on: 12 jan. 2023.

<sup>25</sup> PICIOCCHI, Cinzia ; DUCATO, Rossana ; MARTINELLI, Lucia *et al.* Legal issues in governing genetic biobanks: the Italian framework as a case study for the implications for citizen's health through public-private initiatives. *Journal of Community Genetics*, n. 9, p. 177–190, 2018. DOI: <https://doi.org/10.1007/s12687-017-0328-2>. Available at: <https://link.springer.com/article/10.1007/s12687-017-0328-2>. Access on: 18 jan. 2023.

<sup>26</sup> EUROPEAN COURT OF HUMAN RIGHTS. *Case “X v. the Netherlands”* (press release). 7 aug. 2018. Available at: <https://www.echr.com.ua/translation/sprava-h-proty-niderlandiv/>. Access on: 12 jan. 2023.

<sup>27</sup> ANTONIUK, Polina E. Organizational and tactical aspects of compulsory taking of biological samples from a person in criminal proceedings. *Criminal Bulletin*, v. 1, n. 27, p. 34-39, 2017. Available at: [http://clar.naiu.kiev.ua/bitstream/123456789/16430/1/Visnik\\_1-27-2017-34-39.pdf](http://clar.naiu.kiev.ua/bitstream/123456789/16430/1/Visnik_1-27-2017-34-39.pdf). Access on: 10 jan. 2023.

<sup>28</sup> DECISION OF THE HIGH ANTI-CORRUPTION COURT. *The Unified State Register of Court Decisions*: case No. 991/4406/21, proceeding No. 1-кв/991/4469/21. 08 jul. 2021. Available at: <https://reyestr.court.gov.ua/Review/98248612>. Access on: 12 jan. 2023.



account the mentioned wording, “are found” and not “will be found” or something else, it should be noted the correctness of the opinion that biological samples that can be taken from individuals do not exist at the time of consideration of the appeal of the parties to the investigating judge, moreover, it is possible to provide temporary access to those objects that do not exist in nature yet<sup>29</sup>; an application to the investigating judge for permission to obtain samples may take place when such samples (things and documents) already actually exist and are held in the possession of a certain person, who may be limited in his right only on the basis of a relevant court decision. That is, it could only be talked about free, and not experimental samples<sup>30</sup>. However, we can somewhat disagree with the fact that scientists actually criticize the application of the procedure defined in Articles 160-161 of the CPC of Ukraine for obtaining biological samples, since these articles actually only determine the need to obtain a decision of the investigating judge and the content of the request to obtain such a decision. As for Article 161 of the Criminal Procedure Code of Ukraine, it is really not necessary for taking biological samples, as it only sets restrictions on access to a person’s personal correspondence.

Based on the above, through the prism of criminal procedural science, we offer definitions of the following concepts, such as “collection of biological samples from a person” and “biological samples”, namely:

- taking (selection) of biological samples from a person is the process of extracting from a person samples of biological origin that contain genetic information and can be reproduced in the human biological system for the purpose of further use during the examination;

- biological samples are biological materials that contain genetic information and can be reproduced in the human biological system.

In terms of examination as a way to obtain biological samples from a person, it should be noted the following. The purpose of the examination is to detect traces of a criminal offense or special signs on the body of a person, unless it is necessary to conduct a forensic examination (Part 1 of Article 241 of the CPC of Ukraine). The CPC of Ukraine recognizes that examination is an investigative (search) action, which consists in examining a suspect, witness or victim to detect traces of a criminal offense or special signs on their body, if it does not require a forensic examination. However, even in this case, one cannot completely agree with the opinion of the scientists. Because it is necessary to take into account such biological samples as semen, saliva, smears, scrapings, and others. The mechanisms of their taking can be quite different and involve interference or even violation of the human mucous or skin. In this case, the taking of biological samples from a person becomes somewhat similar to the examination of a person. Greater attention should be paid to ensuring the observance of human rights, in particular human honor and dignity.

In the case when it comes to obtaining biological samples from a person, in the meaning stated above, their obtaining must take place within the limits of a separate procedural action of an intrusive nature, which must be carried out only by the decision of the investigating judge and carried out in a manner that will be proportional (commensurate) with respect for the individual’s right to personal integrity, will not violate the guarantees specified in Article 3 of the Convention on the Protection of Human Rights and Fundamental Freedoms<sup>31</sup>, and the limits of the permissible use of coercion will take into account the practice of the ECHR in the cases “Salikhov v. Russia”, “P.G. and J.H. v. the United Kingdom”, “S. and Marper v. The United Kingdom”, “Saunders v. the United Kingdom”, “O’Halloran and Francis v. the United Kingdom”, “Jalloh v. Germany”<sup>32</sup>.

<sup>29</sup> LAW ASSOCIATION “VYSHNEVY AND PARTNERS”. *Compulsory collection of biological samples*: ECHR practice. 22 oct. 2021. Available at: [https://protocol.ua/ua/primusove\\_vidibrannya\\_biologichnih\\_zrazkiv\\_praktika\\_espl/](https://protocol.ua/ua/primusove_vidibrannya_biologichnih_zrazkiv_praktika_espl/). Access on: 18 jan. 2023.

<sup>30</sup> MOGILA, Vadim S. *Legal life of modern Ukraine*: materials of the international scientific conference. Odesa, 2020. p. 290-293. Available at: <http://dspace.onua.edu.ua/bitstream/handle/11300/13225/Могіла%20В.%20С.%20Питання%20реалізації%20повноважень%20слідчого%20та%20слідчого%20судді%20щодо%20отримання%20зразків%20для%20експертизи.pdf?sequence=1&isAllowed=y>. Access on: 12 jan. 2023.

<sup>31</sup> CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS. *No. 995\_004*. 04 nov. 1950. Available at: [https://zakon.rada.gov.ua/laws/show/995\\_004#Text](https://zakon.rada.gov.ua/laws/show/995_004#Text). Access on: 08 jan. 2023.

<sup>32</sup> MOGILA, Vadim S. *Legal life of modern Ukraine*: materials of the international scientific conference. Odesa, 2020. p. 290-293. Available at: <http://dspace.onua.edu.ua/bitstream/handle/11300/13225/Могіла%20В.%20С.%20Питання%20реалізації%20повноважень%20слідчого%20та%20слідчого%20судді%20щодо%20отримання%20зразків%20для%20експертизи.pdf?sequence=1&isAllowed=y>. Access on: 12 jan. 2023.

Process scientist V. Rogalska sees the following problems in obtaining (taking) biological samples from a person for examination: «1) the ambiguity of the practice of attributing the refusal to provide biological samples voluntarily for examination to the exercise of the right not to testify against oneself; 2) the uncertainty in current legal acts, which samples should be classified as biological; 3) the lack of clear regulations in the legislation regarding the possibility of taking samples for examination before entering information into the Unified Register of Pre-trial Investigations; 4) the ambiguity of the practice of taking biological samples from a person for examination from a person who is not a party to criminal proceedings or has not acquired a procedural status; 5) the lack of a clearly regulated procedural order for the selection of biological samples for examination in the CPC of Ukraine<sup>33</sup>.

Thus, taking into account the criticism of scientists, it should be noted that the issue of making amendments to Article 245 of the CPC of Ukraine, indicating the conditions and other procedural aspects of taking biological samples from a person, is urgent. This would eliminate the need to apply the analogy of the law, as well as legally enshrine the limits of application of physical and moral coercion.

#### **4.1 The use of tactical techniques in the collection of biological samples from a person during an examination**

The provisions of the current criminal procedural legislation determine that the parties have the opportunity to take biological samples from a person for examination. Moreover, it is possible to forcefully take such samples in the order determined for the examination of a person. At the same time, a request for forced collection of samples must be submitted in the manner provided for a request for temporary access to things and documents. Therefore, due to so many formalities at the legislative level and bearing in mind the need to comply with international standards of human rights,

criminalists have developed certain technical and forensic techniques for conducting such a procedural action.

First of all, it should be noted that the legislator defines the procedure for taking biological samples from a person with reference to Article 241 of the CPC of Ukraine. Therefore, first of all, the investigator must obtain a decision of the prosecutor to conduct this procedural action. And in case of forced sampling of a person, it is necessary to obtain a decision of the investigating judge.

If there is a procedural basis for conducting such an investigative (search) action, the party has the right to proceed to other stages of its conduct. As a general rule, biological samples are taken in medical institutions. Such samples include all types of human secretions (blood, saliva, semen, etc.). However, before taking samples from a person, it is necessary to consult with an expert on which samples will be most appropriate to take. For example, for molecular genetic examination, it would be more appropriate to take blood samples from a person. Despite this, criminologists point out the need to comply with the following investigative techniques:

1) to ensure the delivery of all participants in the collection of biological samples to the premises in which it will be carried out (since not all biological samples must be collected in the conditions of a medical institution). For example, fingerprints can be taken in the investigator's or prosecutor's office;

2) to take biological samples from a person is recommended by a specialist (doctor, forensic scientist) of the same gender as the person whose samples will be taken;

3) before conducting a procedural action, determine the participants of such a procedural action: which units will assist in the compulsory collection of biological samples from a person, explain their rights and obligations, if necessary, warn (or involve for the procedural action) the defender of the person from whom biological samples will be taken, determine the witnesses and involve them in conducting such a procedural action (or involve a specialist for continuous video recording).

The tactical aspects of the compulsory collection of biological samples from a person include the direct influence of the investigator (inquirer, prosecutor) as subjects of the prosecution party on the person who has to be taken biological samples for examination from, or through his or her defender (representative) in or-

<sup>33</sup> LUSKATOV, Oleksandr V. *et al. Forced sampling of a person for examination. methodological recommendations for practical units.* Dnipro: Dnipro State University of Internal Affairs, 2017. 36 p. Available at: <http://er.dduvs.in.ua/bitstream/123456789/555/1/МЕТОД%20РЕК%20ПРИМУС%20ПРИ%20ВИЛУЧ%20БІОЛОГ%20ПРАКТИК%202017.pdf>. Access on: 21 jan. 2023.

der to induce the person to voluntarily provide the necessary biological samples. In this case, the investigator (inquirer, prosecutor) must clearly explain to the person or his/her defense counsel (representative) the mechanism of coercion and the way of its implementation in case of refusal of the latter to voluntarily provide the necessary samples. National law and international conventions on the subject must be observed, as the Convention is considered indispensable for the promotion of human dignity:

Among the Conventions, the preamble of the 1969 American Convention on Human Rights, also known as the Pact of San José of the Costa Rica, deserves to be highlighted for its clarity. It is in it that the intrinsic value of the human person is best expressed, because it displays a declaration that the requirement of protection of human rights derives not from being a national of a certain State, but rather from “the fact that it is based on the attributes of the human person”. It follows from this imperative that the protection is conventional, adjunctive, or complementary to domestic law for the sole reason that it exists, and not because the person has a special talent or is a member of a caste, ethnic group, or group. In other words, dignity is not constructed, but is inherent in the human person<sup>34</sup>.

In the literature, there are proposals for detailing the implementation of this action, indicating the number of participants involved in its implementation, their powers to limit the actions of a person, etc. Such detailing is informative for the person from whom it is planned to take biological samples. After such information and demonstration of decisive actions and readiness of the investigator (prosecutor) to compulsory sampling, most people agree to provide them voluntarily.<sup>35</sup> Tactics and methods of taking biological samples from a human corpse also remain an understudied issue. This issue is especially acute today, as law enforcement officers find mass graves of civilians on the territories liberated from Russian occupants. Criminologists provide

the following recommendations in this regard: “the forensic expert during the autopsy of the corpse takes a blood sample from the heart cavity or large vessels. To avoid decay, such samples should be stored in a refrigerator and delivered to the laboratory for examination as soon as possible.” Regarding the recommendations for taking saliva samples from a person: “such actions must be carried out directly in the laboratory (forensic medicine, forensic biology or in the conditions of the procedure room of a medical institution), since it is not possible to store saliva even in a refrigerator, due to the possible destruction of group antigens”<sup>36</sup>. However, there are many other modern tactics invented by criminologists in order to fill numerous gaps and conflicts in the current legislation regarding the collection of biological samples from a person.

## 5 Conclusions

Theoretical generalization and solution of the scientific task, which consists in obtaining new results in the form of scientifically based conclusions related to the collection of biological samples from a person during an examination have been carried out in the research. This has provided an opportunity to identify problematic issues and formulate proposals for improving the provisions of the Criminal Procedure Code of Ukraine and the practice of its application. The main results of the work include the following:

The legal principles of taking biological samples from a person for examination are based on the provisions of the Constitution of Ukraine, the laws of Ukraine and subordinate legal acts, the principles of ensuring human rights and freedoms, respect for human honor and dignity, freedom and personal integrity, the practice of the European Court of Human Rights and recommendations of international expert institutions.

Taking biological samples from a person is an interference with his/her private life, the right to which is guaranteed by the Constitution of Ukraine and interna-

<sup>34</sup> LEGALE, Siddharta; VAL, Eduardo Manuel. The dignity of the human person and the jurisprudence of the Inter-American Court of Human Rights. *Direitos Fundamentais e Justiça*, Belo Horizonte, year 11, n. 36, p. 175-202, jan./jun. 2017. Available at: <https://nidh.com.br/wp-content/uploads/2018/06/8.-Siddharta-e-Eduardo-Val-A-Dignidade-e-a-jurisprud%C3%Aancia-da-Corte-IDH-VF-Revista-direitos-Humanos-e-justi%C3%A7a-2017.pdf>. Access on: 9 apr. 2023.

<sup>35</sup> ANTONIUK, Polina E. Organizational and tactical aspects of compulsory taking of biological samples from a person in criminal proceedings. *Criminal Bulletin*, v. 1, n. 27, p. 34-39, 2017. Available at: [http://elar.naiu.kiev.ua/bitstream/123456789/16430/1/Visnik\\_1-27-2017-34-39.pdf](http://elar.naiu.kiev.ua/bitstream/123456789/16430/1/Visnik_1-27-2017-34-39.pdf). Access on: 10 jan. 2023.

<sup>36</sup> FURMAN, Yaroslav V.; YUSUPOV, Volodymyr V.; KOTLIARENKO, Lydia T.; DMYTRUK, Ruslana S. *Features of human biological traces collection in pre-trial proceedings*: methodical recommendations. Kyiv: Ministry Of Internal Rights Of Ukraine: National Academy of Internal Affairs, 2016. 44 p. Available at: <http://elar.naiu.kiev.ua/bitstream/123456789/1605/1/Методичка%20біологія%20арк%20фінал.pdf>. Access on: 10 jan. 2023.



tional treaties. Accordingly, this right should be ensured by the provisions of criminal procedure and correlated with the objectives of criminal proceedings.

1. The issue of the concept and legal nature of taking biological samples from a person for examination remains controversial. Some scholars regard them as physical evidence, others as secondary physical evidence or documents. The authors support the position according to which biological samples for examination are an independent category of objects that have their own procedural nature and purpose. Biological samples that can be taken from a person for examination should be understood as samples of biological materials that contain genetic information and can be reproduced in the human biological system as a biological entity. The activity related to the collection of biological samples from a person is the process of extracting from a person samples of biological origin that contain genetic information and can be reproduced in the human biological system for the purpose of further use in conducting an examination.
2. Based on the current legislation in the field of conducting forensic examinations, it is possible to distinguish the stages of conducting an examination related to the study of biological samples from a person, namely:

- 1) availability of legal grounds for the examination;
- 2) taking biological samples for examination;
- 3) taking biological samples from a person for examination;
- 4) direct conduct of the examination;
- 5) obtaining an expert conclusion;
- 6) conducting additional, repeated examination, if necessary. These stages are procedurally coordinated and legally regulated.

The CPC of Ukraine should be amended in the issue of taking biological samples from a person for examination, in particular, it is advisable to improve the

content of the provisions of Article 245 of the CPC of Ukraine, setting it out in the following wording:

4. Compulsory taking of biological samples from a person is carried out by an authorized specialist exclusively with the participation of an investigator, inquirer or prosecutor and a defender, with the least harm to the person who the biological samples are taken from.

5. During the compulsory collection of biological samples from a person, it is allowed to use physical and psychological coercion to the extent necessary to comply with the court decision on the compulsory collection of biological samples of a person.

There is a need to further introduction of modern technical means in the field of forensic science and forensic medicine in investigative practice when taking biological samples from a person for examination. Therefore, law enforcement agencies must strictly adhere to the recommendations and rules developed by the Ministry of Health of Ukraine when taking biological samples from a person for examination. Taking into account the identified criminal procedural and forensic problematic aspects related to the taking of biological samples from a person for examination, as well as the lack of a proper regulatory mechanism for its implementation and certain restrictions on human rights, the legality and effectiveness of such a procedural action depends on the competence of the investigator, inquirer and prosecutor as participants in criminal proceedings on the part of the prosecution. The specified participants in criminal proceedings need to understand the legal nature of biological samples of a person and the choice of behavioural tactics to influence a person at the appropriate level. Adherence to these aspects will avoid humiliation of honor and dignity during the collection of biological samples from a person for examination.

A similar situation happens in Italy; according to Italian's laws, biological samples from a person is considered to be an interference with his/her private life as well. The legislator – in the past decade – made specified modification of the criminal procedure's code in order to guarantee the act of taking biological sample from a person stringently regulated by the law and in accordance with the EU standards and procedures. This is the reason of the law Nr 85/2009 and the following application norms.

Right now, in Italy it's still needed a better regulation of the "indirect acts" for taking biological samples from a given person and the acts of "differently use" of the samples taken by a given person for investigative reasons.

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