ppi 201502ZU4645
Esta publicación científica en formato digital es continuidad de la revista impresa
ISSN-Versión Impresa 0798-1406 / ISSN-Versión on line 2542-3185Depósito legal pp
197402ZU34

CUESTIONES POLÍTICAS

Instituto de Estudios Políticos y Derecho Público "Dr. Humberto J. La Roche"
de la Facultad de Ciencias Jurídicas y Políticas de la Universidad del Zulia
Maracaibo, Venezuela

Vol.40 *Nº 72*
Enero
Junio
2022

Cuestiones Políticas Vol. 40, Nº 72 (2021), 509-530
IEPDP-Facultad de Ciencias Jurídicas y Políticas - LUZ

International standards for criminal proceedings in emergency legal regimes

DOI: https://doi.org/10.46398/cuestpol.4072.29

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Abstract

The article aims to study the theoretical and applied aspects of pre-trial research in emergency legal regimes such as: martial law, the state of emergency or the area of joint forces operation in Ukraine. International legal requirements for due process in criminal proceedings during emergency legal regimes are analyzed. It is claimed that the existing experience in Ukraine of normative regulation of criminal proceedings under the conditions of special legal regimes is inefficient, fragmentary, and therefore does not fully correspond to modern ideas about human rights and the democratic and legal state. The perspectives for the application of the jurisprudence of the European Court of Human Rights in criminal proceedings under emergency legal regimes are identified. It was concluded that the investigating authorities carry out all the means to establish the facts of the disappeared persons in the area of Operation of Joint Forces within the framework of the criminal process, which will allow to comply, in theory, with all the requirements for the effectiveness of the investigation. The basis for the formation of legislation on this subject should be the relevant law on missing persons.

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Recibido el 15/09/2021 Aceptado el 14/12/2021

Keywords: extraordinary legal regimes; criminal proceedings; international standards; legal research; special pre-trial instruction.

Estándares internacionales para procesos penales en regímenes legales de emergencia

Resumen

El artículo tiene como objetivo el estudio en profundidad de los aspectos teóricos y aplicados de la investigación previa al juicio en regímenes legales de emergencia como: la ley marcial, el estado de emergencia o el área de la Operación de Fuerzas Conjuntas en Ucrania. Se analizan los requisitos legales internacionales al debido proceso en los procesos penales durante los regímenes legales de emergencia. Se afirma que la experiencia existente en Ucrania de regulación normativa de procesos penales en las condiciones de regímenes legales especiales es ineficiente, fragmentaria, por lo que no corresponde plenamente a las ideas modernas sobre los derechos humanos y el estado democrático y legal. Se identifican las perspectivas de aplicación de la jurisprudencia del Tribunal Europeo de Derechos Humanos en procesos penales bajo regímenes legales de emergencia. Se concluyó que las autoridades de instrucción realizan todos los medios para establecer los hechos de las personas desaparecidas en el área de Operación de Fuerzas Conjuntas en el marco del proceso penal, lo que permitirá cumplir, en teoría, con todos los requisitos para la efectividad de la investigación. La base para la formación de la legislación sobre este tema debe ser la ley pertinente sobre personas desaparecidas.

Palabras clave: regímenes legales extraordinarios; proceso penal; normas internacionales; investigación jurídica; instrucción especial previa al juicio.

Introduction

According to Article 3 of the Constitution of Ukraine, a person, his life and health, honor and dignity, inviolability and security are recognized in Ukraine as the highest social value. Human rights and freedoms and their guarantees determine the content and direction of the state. The state is accountable to man for his activities. The establishment and protection of human rights and freedoms is the main duty of the state (Constitution of Ukraine, 1996).

In addition, Article 2 of the Criminal Procedure Code of Ukraine defines the tasks of criminal proceedings, which are the protection of the individual, society and the state from criminal offenses, protection of rights, freedoms and legitimate interests of participants in criminal proceedings, as well as prompt, complete and impartial investigation and trial so that anyone who commits a criminal offense is prosecuted to the extent of his guilt, no innocent person has been accused or convicted, no person has been subjected to unreasonable procedural coercion and that every participant in criminal proceedings has been subjected to due process of law and the provision of procedural guarantees. Procedural guarantee is a guarantee of justice (Mykhaylenko, 1996).

The challenges facing Ukraine against the background of negative socio-political events in 2014 have become a serious challenge for many socio-legal institutions, led to an urgent transformation of public policy in the field of improving the legal regulation of crime. Loss of control over certain territories of Ukraine, lack of legitimate law enforcement agencies, disorganization of public relations, mass abuse of the rights of suspects, accused and their deliberate hiding from the authorities in inaccessible territories, absence or ineffectiveness of agreements with some countries on mutual assistance in criminal proceedings offenders, danger to life and health of persons who carried out criminal proceedings or participated in it, a number of other negative factors created atypical conditions in which the current criminal procedural legislation, developed for peacetime, was ineffective to achieve the objectives of criminal proceedings (Kopersak, 2021).

In the conditions of permanent social and economic crisis, increase of unemployment and falling of material level of citizens, impossibility of satisfaction of the basic part of the population of the basic ways legally, continuation of the conflict in the east of Ukraine (illegal distribution of the weapon, ammunition, and explosives) armed conflict and psychological stress), loss of social control and some miscalculations that were made during the reform of the law enforcement and judicial system, led to the fact that in 2018 in Ukraine a special pre-trial investigation was conducted on 32 criminal proceedings, in 2019 only 9, in 2020 on 21 criminal proceedings, in 2021 concerning 34 criminal proceedings for this period 55 criminal proceedings were sent to court with indictments, in which a special pre-trial investigation was carried out. Thus, the above data show that the law enforcement system of Ukraine does not sufficiently use the opportunity provided by the Criminal Procedure Code of Ukraine – to conduct a special pre-trial investigation.

Such a small number of criminal proceedings indicates the presence of significant gaps in the regulation of the procedure of special pre-trial investigation and the lack of practice of its application. In view of the

above, the issues of developing a theoretical basis and improving criminal procedural legislation in terms of its adaptation to international standards of criminal proceedings in emergency legal regimes remain extremely relevant today.

1. Methodology of the study

The methodological basis of this work is is based on general and special methods of scientific knowledge, the use of which is determined by the purpose, object, and subject of research philosophical methods: dialectical (the basic principles of which are objectivity, comprehensiveness, concreteness, and completeness of knowledge's etc.), logical (the main methods of which are analysis and synthesis, induction and deduction, analogy), etc.

The dialectical method contributed studying the special regime of pre-trial investigation from the standpoint of integrity of this legal phenomenon and the interconnectedness of its individual elements. The comparative legal method is used in the analysis of national and foreign legislation on the regulation of criminal procedure legal relations during the investigation of criminal offenses in special legal regimes. By using hermeneutic method clarified the legal content of the law, identified defects of normative regulation of the special pre-trial regime investigation under martial law.

The operation of the formal method was due to the need to formulate properly conceptual and categorical apparatus of research. Method generalization made it possible to consistently reduce individual facts into one whole and formulate sound conclusions aimed at improvement normative regulation of researched questions. Methods of modeling and abstraction allowed design proposals for amendments to the legislation. These methods applied comprehensively, which allowed to ensure comprehensiveness, completeness, and the objectivity of the study, justify and agree the conclusions formulated in the scientific article, to make sure of their reliability.

2. Analysis of recent research

Various aspects of the selected issues in the criminal process science are the subject of research in the works of scientists of the modern period, among which it is appropriate to note Dei (2017), Kopersak (2021), Pilley (2015), Lazukova (2016), Malanchuk (2017), Pohoretsky (2016), Volkova (2021) and others.

However, there are some issues that need comprehensive analysis and coverage. In particular, the issues of legislative regulation of certain legal relations in the conditions of armed conflict need an additional solution. There is a scientific and applied problem, which is the urgent need for a comprehensive theoretical study of the special regime of pre-trial investigation in the Joint Forces Operation in eastern Ukraine, in developing scientifically sound approaches to its regulatory support and outlining the necessary areas for improvement.

3. Results and discussion

We consider it expedient to begin the analysis of international standards for the conduct of criminal proceedings under emergency legal regimes by clarifying the prospects for the application of the case law of the European Court of Human Rights in such criminal proceedings.

According to the analysis of the case law of the European Court of Human Rights, the positive obligation of the state to conduct an effective pre-trial investigation exists even in an emergency, including in difficult and dangerous conditions, including the conditions of military conflict (Lazukova, 2016).

The Court has repeatedly stated that the investigation of terrorist crimes, in particular, undoubtedly poses particular problems for the authorities, but this does not mean that such a situation gives the investigating authorities, so to speak, cart blanche (A. and Others v. the United Kingdom, 2009). Thus, in Halki v. Turkey, the Court did not satisfy the Government's argument that the bringing of witnesses to court could have been due to some difficulties due to the general situation in the region (Turkish part of Kurdistan). The European Court of Human Rights noted that these circumstances should not have made it impossible to interrogate individuals in court, and that transport difficulties and even general safety considerations were not taken as a serious argument to rehabilitate a witness's failure to appear in court.

In another case, Jalud v. The Netherlands, the Court found that the investigation was characterized by significant shortcomings that made it ineffective (in particular, records of key witness statements were not provided to the judiciary; where the victim was, etc.). The court found that the Dutch military and investigators, although recruited in a foreign country after the end of hostilities, nevertheless worked in difficult conditions, but did not take the latter into account and stated that these shortcomings in the investigation had seriously compromised its effectiveness.

In the judgment of the European Court of Human Rights in the cases of Haralambu and Others v. Turkey and Emin and Others v. Cyprus

(concerning the complaint concerning the lack of an effective investigation during the Turkish invasion in 1974) The court found that the Turkish and Cypriot governments under Art. 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms were obliged to investigate the bodies of missing persons who showed signs of violent death, but it was premature to find the death investigation ineffective (the bodies of the applicants' relatives were found by the United Nations Committee program). The fact that no concrete progress has been made does not in itself indicate a lack of goodwill on the part of the authorities.

At present, there are no clearly defined legal approaches to involving international organizations and individual countries to facilitate conflict resolution. At the same time, it should be noted that given the situation in eastern Ukraine and aware of the growing number of conflicts around the world, representatives of national human rights institutions of 20 countries adopted the Kyiv Declaration on October 22, 2015 «The role of national human rights institutions». This document is the first and only international human rights instrument that guides the actions of national human rights institutions in conflict and post-conflict situations (Dei, 2017).

In particular, if the national authorities are unable to restore the violated rights, the Kyiv Declaration outlines the cases in which measures can be taken in the event of impossibility to resolve disputes in court and within the framework of political agreements. An example is a situation where, at the time of the conflict, a person in custody was in a territory not controlled by the government and the criminal proceedings against that person remained in the controlled area or vice versa.

One of the main international legal requirements for a proper form of pre-trial investigation is the obligation of the state, even in an emergency, to ensure effective forms of judicial review. The right of access to court, enshrined in Part 1 of Art. 6 of the Convention, is not absolute, and in cases established by law, it may be limited (Tsesar and Others v. Ukraine, 2018). However, the European Court of Human Rights notes that the right of access to a court should not be restricted in such a way that the very essence of this right is nullified.

In Art. 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms states that no one shall be deprived of his liberty save in the cases expressly provided for in this Article and in accordance with the procedure established by law. Subparagraph «c» of paragraph 1 of this article provides for the possibility of lawful arrest or detention of a person committed to bring him to the competent judicial authority in the presence of reasonable suspicion of committing an offense or if it is reasonably necessary to prevent him from committing an offense or fleeing after it.

Everyone who is arrested or detained in accordance with the provisions of subparagraph «c» of paragraph 1 of Art. 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms, must immediately appear before a judge or other official empowered by law to exercise judicial power and be provided with a court hearing within a reasonable time or dismissal during the proceedings.

Thus, the Government of Turkey on July 23, 2016, issues a decree № 667, Art. 6 (1 (a)) on the possibility of detaining suspects for up to thirty days without trial. In Spain, special anti-terrorist measures are defined in Art. 55 (2) of the Spanish Constitution, 97 which provides for an extended period of detention for a suspect before he appears before a judge, as well as the possibility of detaining a detainee with limited communication with the outside world. In Thailand, Decree 3/2015 of the head of the National Council for Security and Peace allows arbitrary detention for up to seven days without contact with the outside world and without notification of suspicion (Human Rights Around the World, 2017).

As part of the fight against terrorism, the Malaysian parliament passed a law in April 2015 authorizing the detention of terrorism suspects without trial for up to 60 days by a decision of the Counter-Terrorism Committee and a ban on reviewing such decisions by the court. decision to extend the arrest for two years or more if necessary. The decision on dismissal is also made by this body. As for the legal position of the European Court of Human Rights on this issue, for example, in the case of Aksoy v. Turkey, it was emphasized that the difficulties of investigating terrorist acts could not justify the detention of a suspect for 14 days without judicial review.

The European Court of Human Rights has taken into account "the undoubtedly serious problem of terrorism in south-eastern Turkey and the difficulties faced by the state in taking effective measures to combat it." (Aksoy v. Turkey, 1996). At the same time, he was not persuaded that an emergency required the applicant to be detained on suspicion of involvement in terrorist offenses for 14 or more days incommunicado without being brought before a judge or other judicial official power (Aksoy v. Turkey, 1996). The court noted that the complexity of the investigation of terrorist acts could not give freedom to the actions of the pre-trial investigation body to detain suspects without any intervention of the courts, because judicial control is an important element of the guarantee designed to minimize the risk of arbitrariness and rule of law (Dikme v. Turquie, 2000).

In the case of Castillo Petruzzi and others, the detainees were taken only 36 days later, which was found by the Inter-American Court of Human Rights to be a violation of Article 5 § 1.7 of the American Convention on Human Rights (Castillo Petruzzi *et al.* v. Peru, 1999). In Browgan and Others v. The United Kingdom, the Court noted that the applicant's detention in police custody was 4 days and six hours beyond the strictly established

time limits of Art. 5§3. The question of the proportionality of the length of detention and the right to liberty and security of person guaranteed by Art. 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms, as well as the right to a fair trial, guaranteed by Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, has been the subject of proceedings by the European Court of Human Rights in several other cases.

This allows us to emphasize that the limits of flexibility in the interpretation and application of the concept of "immediacy" are limited and depend on the specifics of the particular case and the situation in which the detention took place. In particular, the United Nations Human Rights Committee stated in a general comment № 8 that "the delay should not exceed a few days"(UN COMMITTEE, 1982).

In turn, the European Court of Human Rights points out that in the case of long-term detention (in Demir and Others v. Turkey 16 days and 23 days) a general reference to the difficulties associated with terrorism is insufficient. It is necessary to indicate, for example, for what reasons and the specific circumstances of the case which gave rise to them, the judicial control over the applicants' detention was jeopardized during the investigation (Affaire Demir et gül c. Turquie, 2001).

In the context of terrorist activities in Northern Ireland, detention for up to seven days without any form of judicial control complied with the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms (provided for in Article 12 of the Prevention of Terrorism Act 1984) (Brannigan and McBride v. the United Kingdom, 1993). The European Court of Human Rights did not find a violation of the requirement of urgency, given that the detainee was given the opportunity to consult a lawyer, contact relatives and undergo a medical examination (Brannigan and McBride v. the United Kingdom, 1993). Thus, the court proceeds from the factual circumstances of the case, but at the national level special guarantees must be established that would supplement the temporary absence of judicial control and, in particular, ensure: 1) the right to defense; 2) the right to notify relatives or friends of their detention; 3) the right to access a doctor, etc.

One of the most serious threats to human rights, which is most pronounced during emergencies, is the increased risk of torture and ill-treatment. Paragraph 2 of Art. 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms stipulates that the prohibition of torture is absolute and does not allow for derogations. It is emphasized that no exceptional circumstances, whatever they may be, a state of war or a threat of war, internal political instability or any other state of emergency, can justify torture.

The European Court of Human Rights notes that the undeniable complexity of the fight against terrorism cannot lead to restrictions on guarantees of the physical integrity of the individual (Tomasi v. France, 1992). At the same time, despite the absolute nature of this right in many countries of the world, unfortunately, there are many cases of such violations: «Palestinian suspension» is used - hanging naked with hands tied behind his back (the case of «Aksoy v. Turkey»); «Intensive interrogation techniques», methods of psychological influence, coercion to stand by a wall, noise exposure, sleep deprivation, food and water are used (see, for example, Ireland v. the United Kingdom, 1978); electric shocks, prolonged hanging by the wrists and ankles, threats to detainees and their relatives, etc.

It should be noted that despite the obvious gross violation of convention rights in foreign literature, there is a position according to which the state's criminal policy to combat terrorist crimes may contain deviations from the general standards of proof (Butaev, 2015).

It is important to note that in many countries of the world there are (or have been) provisions that in some way limit both the guarantees of confidential communication with a lawyer and certain aspects of the right to defense in general. At the same time, the case law of the United Nations Human Rights Committee and the Inter-American Court of Human Rights stipulates that the suspension of habeas corpus cannot be justified under any circumstances, given the fundamental nature of this guarantee in a democratic society (Habeas Corpus In Emergency Situations, 1987).

Of interest in this context is the Advisory Opinion of the Inter-American Court of Human Rights (1987) «Habeas Corpus in Emergencies», which states that habeas corpus and amparo are among the remedies that are fundamental to the protection of various rights. , deviation from which is unacceptable (Habeas Corpus In Emergency Situations, 1987).

The obligation of states to «ensure the confidentiality of communication between a suspect or accused person and a lawyer» is also set out in Directive 2013/48 / EC of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal and European proceedings. arrest warrant, as well as the right to inform third parties about their imprisonment, to communicate with third parties and the consulate during imprisonment»(DIRECTIVE 2013/48/EU, 2013).

Despite the pressure exerted by some countries in the process of drafting this Directive in order to consolidate the possibility of a certain derogation, in particular in cases of terrorism, R. Pillay emphasizes that such a right is not subject to any restriction or derogation (Pilley, 2015); such absolute protection reflects the provisions of the United Nations Basic Principles on the Role of Lawyers (para. 8) and the standards of the Committee against Torture (European Committee For The Prevention Of Torture, 2002).

At the same time, an analysis of the provisions of the Directive shows that the latter still provides for certain exceptions in some cases. In particular, in the case of geographical distance of the suspect or accused, which makes it impossible to exercise the right of access to a lawyer immediately after imprisonment.

This circumstance allows a certain temporary deviation from the right of the suspect or accused to immediate access to a lawyer (Article 3.5). Thus, in Salduz v. Turkey, the European Court of Human Rights stated that, in order to ensure sufficient "practicality and effectiveness" of the right to a fair trial guaranteed by Article 6 § 1, access to a lawyer must be granted, interrogation of the suspect, except in cases when in the specific circumstances of the case it is demonstrated that there are good grounds for restricting such a right.

Another possibility to derogate from the immediate right to a lawyer is provided for in paragraph 3.6 of the Directive. In particular, such a derogation may be considered lawful if justified by the particular circumstances of the case for one of the following good reasons: (a) if there is an urgent need to prevent serious adverse consequences for the life, liberty or physical integrity of the person; (b) if urgent action by the investigating authorities is strictly necessary to prevent a significant danger.

An example of the application of this derogation is illustrated in the decision of the European Court of Human Rights «Ibrahim and others v. The United Kingdom» of 13.09.2016, where the so-called «Security interrogations» of persons suspected of terrorism (according to the Terrorism Act of 2000, this type of interrogation is conducted without the presence of a lawyer and before the detainee can exercise the right to legal aid). In its judgment, the Court stated that at the time of the applicants' detention and interrogation there was a serious threat to public safety, which was certainly an extraordinary circumstance allowing a waiver of the general guarantees of the Convention under Article 15 and the use in the process of written testimony taken without the presence of counsel.

Thus, the European Court of Human Rights did not find a violation of Article 6 of the Convention in the case. Further analysis of the provisions of the Directive in the light of the case law of the European Court of Human Rights suggests that the former sets higher standards than the case law of the European Court of Human Rights, which in exceptional cases, given the factual circumstances of the case, allows wider restrictions. In particular, the Code of Criminal Procedure of the Federal Republic of Germany provides for the possibility for a judge to review correspondence between a lawyer and an accused if the latter is accused of belonging to a terrorist organization (paragraph 2 (148) of the Code of Criminal Procedure of the Federal Republic of Germany).

At the same time, the law establishes certain guarantees for such interference in confidential communication. In particular, only the judge of the district where the remand center is located has the right to examine the materials submitted during the conversation between the defense counsel and his client; however, this judge has no right to disclose the details of the studied materials and correspondence, unless they contain information about serious offenses under paragraphs 1 and 2 of Art. 138 of the Criminal Code of the Federal Republic of Germany (Savchenko, 2017).

The question of the legality of monitoring the correspondence of a terrorist suspect with a lawyer in the Federal Republic of Germany was the subject of the European Court of Human Rights in 2001 in Erdem v. Germany, in which the court concluded that such interference did not violate Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, as the basis for such interference was the provisions of national law.

However, the European Court of Human Rights noted that this is a limited control, as the accused is free to communicate orally with his lawyer. The Court also noted that such measures were provided for in a very narrow area (the fight against terrorism) and were an exception to the general rule that all contacts between the applicant and his lawyer were confidential.

Moreover, the documents exchanged between the lawyer and his client were read by an independent judge, whose duty was not to disclose the information received to the investigating authorities, unless it contained signs of a new corpus delicti. At the same time, the European Court of Human Rights stressed the need to maintain confidentiality and explained that the provisions of Art. 138 should be used only in exceptional situations. Thus, in that judgment, the Court essentially gave priority in the regulation of legal secrecy to the rules of national law over international law (Pohoretsky and Pohoretsky, 2016).

At the same time, in the case of Petra v. Romania, the automatic monitoring of all prisoners' correspondence (not only with a lawyer but also with relatives) was found to be inconsistent with the Convention. Interestingly, the reasons for the domestic decisions in this case were quite convincing, and, moreover, the measure was limited in time and even the applicant was officially notified of the perlustration.

However, the Court found a violation of Art. 8 of the Convention. On the one hand, he acknowledged that the actions of the prison authorities had a legal basis, while the European Court of Human Rights focused on such an issue as the «quality of the law» applied in this case. Italian law did not specify the grounds on which a judge may allow a perlustration and for how long. Thus, the judge's discretion in these matters remained unacceptably wide, and the law was too vague.

However, the Court noted that the law could not describe in detail each case in which perlustration was allowed - such a requirement would be unfeasible, but the law should establish at least some framework that limits the discretion of internal authorities in resolving this issue. Note that at the national level, such rules are quite common. In particular, in cases concerning the confidentiality of correspondence between the accused and his lawyer, it is necessary to cite as an example the case of Calogero Diana v. Italy, which concerned a terrorist, a member of the Italian Red Brigade.

His correspondence with a lawyer was monitored by the prison administration. Italian law allowed a judge's reasoned decision on certain categories of prisoners. In view of this, we can mention the Law of the Republic of Kazakhstan of 5.12.1997 № 195 «On Advocacy», according to Part 4 of Art. 18 of which the provision of information to the authorized body for financial monitoring is not a disclosure of legal secrecy.

The possibility of short-term restriction of the detainee's communication with the defense counsel is provided for in the Code of Principles for the Protection of All Persons Subject to Detention or Arrest. Thus, Principle 16 of the Code states: «Notwithstanding the exceptions contained in paragraph 4 of principle 16 and paragraph 3 of principle 18, a detainee may be refused in connection with the outside world, and in particular his family or lawyer, during period not exceeding several days». Part 4 of Principle 16 states: «Any notification referred to in this principle (notification of detention) must be sent or addressed by the competent authority without delay. The competent authority may defer notification for a reasonable period if the exceptional circumstances of the investigation so require» (Human Rights: A Collection Of International Treaties, 1995).

In view of the above, it can be concluded that the national criminal procedure law establishes higher guarantees. Thus, the defense counsel has the right to participate in interrogation and other proceedings conducted with the participation of the suspect, accused, before the first interrogation of the suspect to have a confidential meeting with him without the permission of the investigator, prosecutor, court, and after the first interrogation - the same meetings without restriction. quantity and duration.

There is only one restriction on confidentiality during the interrogation of a suspect, accused and defense counsel: according to Part 5 of Art. 46 of the Criminal Procedure Code of Ukraine «such meetings may take place under the visual control of an authorized official, but in conditions that exclude the possibility of eavesdropping and eavesdropping».

It should be emphasized that the above list of conditional blocks of international minimum requirements for due process in an emergency is, of course, not exhaustive and may become a promising area for further research. Expansion and deepening of the latter is also possible through the emergence of clearer international «patterns».

In particular, an important step in this direction was taken by the European Commission «For Democracy through Law» at the 106th plenary session, at which a checklist of questions to states was developed and published to assess the rule of law in emergencies (Recommendations For The Unification And Harmonization Of The National Legislation Of The Cis Member States In The Field Of Combating Terrorism, 2006).

That is, we can talk about the beginning of a new stage of standardization of relations in this area. However, with the further development of international law in this context, the number and content of rights that cannot be restricted during an emergency may change. This will be affected by both the increase in the practice of international judicial and quasi-judicial human rights bodies and the change in the approaches of states themselves to regulating the possibility of restricting human rights at the national level (in particular, states may establish higher human rights guarantees).

The importance of the issue under consideration requires its further doctrinal elaboration and close attention of legal researchers. We therefore believe that a working group should be set up under the auspices of the United Nations to define the minimum requirements to ensure proper legal procedure in an emergency.

It should be noted that there is some positive experience in the world in a somewhat similar direction (in the development of standards for education in emergencies in 2003; works) (Minimum Education Standards For Emergencies, Chronic Crises And Early Recovery, 2006). The work of such a group may result in the development and adoption of a special international convention on human rights in an emergency, based on the provisions of the Declaration on Minimum Humanitarian Standards, which will set out basic general principles and maximum human rights restrictions.

In the context of criminal procedure, it is necessary to introduce such a paradigm of dealing with the negative consequences of emergencies, such universal requirements, which are based on the values of due process of peacetime and most fully ensure the rights and interests of individuals. (In the criminal justice system) (Resolution of The Verkhovna Rada Of Ukraine, 2015).

The next part of our study will be devoted to the study of the peculiarities of legal regulation and procedural order of pre-trial investigation of criminal proceedings in emergency legal regimes in modern Ukraine. After all, as practice shows, certain provisions of national law, investigative and judicial practice do not always meet the requirements of such special procedures of criminal proceedings by the international community.

Today, the pre-trial investigation of criminal offenses committed on the territory of Ukraine both in the area of the Joint Forces Operation and in the territory of the Autonomous Republic of Crimea does not always meet the criteria of effectiveness. Of course, its efficiency and quality are affected by the real extraordinary situation, which, of course, makes its adjustments in the work of pre-trial investigation bodies.

However, this fact is often manipulated, justifying inaction by the difficult situation in the region. The marker in this case is the absence of the investigation process itself, the necessary efforts of the investigator to conduct proper proceedings, etc. (as evidenced by criminal proceedings, in which the vast majority of procedural documents are purely organizational, such as to conduct investigative actions, etc.). The inability to establish the facts and the ineffectiveness of the investigative (investigative) actions are explained by the investigators of the Joint Forces Operation and the «impossibility of access to the territory».

It should be emphasized that the temporary occupation of the Autonomous Republic of Crimea and the uncontrollability of certain territories of Donetsk and Luhansk oblasts do not mean that Ukraine «automatically» bears no responsibility for human rights violations in these territories. Although the Resolution of the Verkhovna Rada of Ukraine adopted the Statement of the Verkhovna Rada of Ukraine "On Derogation from Certain Obligations Defined by the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms", it does not release the state from its responsibilities. obligations.

These territories continue to be considered as part of Ukraine and, therefore, they continue to be subject to state jurisdiction. At the same time, Ukraine cannot be held responsible for the actions of the occupying authorities of another state or separatist regimes sponsored by another state, if it is objectively impossible to restore control over the territories. The government, by applying special rules to the conflict zone, weakens the guarantees of human rights protection by deviating from certain obligations.

According to the logic of the Statement, the deviation from certain obligations under these international agreements applies to the area of the long-term Joint Forces Operation, while "full responsibility for human rights and implementation of relevant international agreements in Ukraine, which is temporarily not controlled by the Ukrainian authorities, the state exercising effective control over these territories"(see paragraphs 1, 2 of the Statement) (Resolution Of The Verkhovna Rada Of Ukraine, 2015).

In the event of a temporary loss of state control over part of its territory, positive obligations remain, which require all available diplomatic, economic, judicial / legal and other measures to restore lost control and

continue to guarantee fundamental rights and freedoms, the main The Court is not the result achieved, but the desire of the state to achieve it, which is generally inherent in positive obligations.

In criminal proceedings against persons subject to a special pre-trial investigation, one of the procedural guarantees is the participation of counsel. The right to protection of a suspect is a set of powers granted to him by law in order to refute the suspicion, mitigate punishment, as well as protect their personal interests (Malanchuk, 2017).

In case of intentional concealment of a suspect, investigators are forced to submit a request for detention by analogy with a notice of suspicion. Thus, in practice, a request for detention is sent by the last known place of residence of the suspect by registered mail, published on the official website of the designated authority and in the official publication of the designated authority. The study found that the opinions of judges who grant or deny a request for detention in such conditions were proportionally divided.

Those judges who grant a request for detention in the absence of a suspect or accused shall initiate a special pre-trial investigation procedure (in absentia). That is, the suspect has already decided to hide and is actively implementing it, his whereabouts are unknown to law enforcement agencies, and the decision to arrest the suspect has not been executed due to his absence, permission to detain the suspect does not work. But Part 1 of Art. 193 of the Criminal Procedure Code of Ukraine provides that consideration of the petition for application of a precautionary measure is carried out with participation of the prosecutor, the suspect, the accused, his defender, except for the cases provided by h. 6 Art. 193 of the Criminal Procedure Code of Ukraine, and in Part 6 of Art. 193 of the Criminal Procedure Code of Ukraine there is a requirement to declare the suspect internationally wanted.

In order to declare a suspect internationally wanted, a decision must be made to choose a measure of restraint in the form of detention of the same suspect. That is, there is a conflict between the norms of the Criminal Procedure Code of Ukraine and international acts of the Interpol institution.

The lack of a coordinated position of the courts on the criteria of sufficiency of such evidence, the relevant investigative, prosecutorial and judicial practice indicate the application by analogy of the provisions of Art. 297-5 of the Criminal Procedure Code of Ukraine on the procedure for serving procedural documents on the suspect, including summonses, notices of suspicion, when the investigator or prosecutor establishes the need for further application of the rules of the special pre-trial investigation «in absentia» before the official decision on its implementation, ie except sending at the last known place of residence or stay of the suspect by publication in the mass media of the national sphere of distribution and on

the official websites of the pre-trial investigation bodies (During Criminal Proceedings Under The Procedure «In Absentia»On One Scale - The Interests Of Ensuring The Effectiveness Of The Proceedings, And On The Other – The Right Of A Person To A Fair Trial, 2018).

There is a scientific opinion among procedural scholars that during a special pre-trial investigation the defense counsel may be questioned instead of his client, and his testimony may be used as evidence as well as the testimony of the accused (During Criminal Proceedings Under The Procedure «In Absentia»On One Scale – The Interests Of Ensuring The Effectiveness Of The Proceedings, And On The Other - The Right Of A Person To A Fair Trial, 2018).

G.P. Vlasova believes that this position is difficult to agree with, as it contradicts the role of the lawyer, the legal regulation of the lawyer and the traditions that have developed over the centuries (Vlasova, 2014). And we are ready to fully agree with the scientist. Therefore, it is impossible to interrogate the defense counsel instead of the suspect, as such evidence does not have factual data on the circumstances of the criminal offense, the defense counsel did not commit such a criminal offense and did not witness the commission of such a criminal offense or from free primary legal aid.

Thus, a special pre-trial investigation in criminal proceedings is a consequence of the suspect's choice of his line of defense in the form of hiding from law enforcement, so communication of such a suspect with his lawyer is impossible for objective reasons, and in case of change of conduct of the suspect law and order, the court, the suspect will fully use the right to defense, communication with a lawyer, the choice of a lawyer and will enjoy all the rights defined in the Criminal Procedure Code of Ukraine.

One of the urgent problems is the inadequate pre-trial investigation of missing persons. On 5 June 2015, the Parliamentary Assembly of the Council of Europe adopted Resolution 2067 (2015) "Missing persons during the conflict in Ukraine", in which it expressed serious concern about the growing number of cases of missing persons (Resolution Parliamentary Assembly, 2015). Deep concern over the fate of missing persons in Ukraine is reflected in numerous reports from international organizations (Volkova, 2016). Thus, in the 13th Report of the Office of the United Nations High Commissioner for Human Rights for the period from November 16, 2015 to February 15, 2016, a separate section is devoted to the above issue (Report Of The United Nations High Commissioner For Human Rights On The Human Rights Situation In Ukraine, 2016).

According to the Report, the search for missing persons requires close coordination between the relevant government bodies, including the Ministry of the Interior, the Security Service and the Ministry of Defense, as well as a special mechanism for obtaining applications from relatives of missing persons in the Joint Forces Operation area.

According to statistics, in the first year since the beginning of Operation Allied Forces, almost 4,000 missing people have been registered (information from the Ministry of Internal Affairs, which was released in November 2015).

At the beginning of the pre-trial investigation into the disappearance of a person, the practice is faced with the problem of uncertainty of circumstances that may indicate the commission of a criminal offense. Usually, the relevant statement or notification contains only information about the missing person, without specifying the circumstances of their disappearance.

In departmental regulations, the Ministry of Internal Affairs of Ukraine applied a special approach to the implementation of the provisions of Art. 214 of the Criminal Procedure Code of Ukraine, the duty of the investigator to enter the relevant information in the Unified Register of pre-trial investigations and to initiate an investigation.

According to paragraphs. 9.4.2 of the order of the Ministry of Internal Affairs of Ukraine dated August 14, 2012 № 700 «On the organization of interaction of pre-trial investigation bodies with other bodies and units of internal affairs in the prevention, detection and investigation of criminal offenses» the head of the investigative unit within 24 hours, as well as in case of disappearance of an adult in circumstances indicating the possibility of committing a criminal offense against him, provides mandatory entry in the Unified Register of pre-trial investigations information about the specified criminal offense and its preliminary qualification as premeditated murder (Article 115 of the Criminal Code) and takes all measures provided by the Criminal Procedure Code of Ukraine for a comprehensive, complete and impartial investigation of the circumstances of criminal proceedings.

In accordance with paragraph 6 of ch. 2 of Section II of the Regulations on the Procedure for Maintaining the Unified Register of Pre-trial Investigations, simultaneously with the determination of the preliminary legal qualification, this application shall be entered into the Unified Register of Pre-trial Investigations with an additional mark «disappearance» (Regulations On The Unified Register Of Pre-Trial Investigations, The Procedure For Its Formation And Maintenance, 2020).

However, the analysis of law enforcement practice shows that a missing person in the event of their death is considered found if the identification procedure will establish that the physical or biological characteristics of the body of the deceased correspond to the characteristics of the missing person.

In fact, it turns out that there is the body of the deceased, the expert's conclusion confirms the coincidence of DNA and life-threatening circumstances that caused the death. Investigators do not see the events of

the criminal offense in the intentional deprivation of human life and close the criminal proceedings on the death of a person in case of confirmation of the coincidence of DNA profiles under paragraph 1, part 1 of Art. 284 of the Criminal Procedure Code of Ukraine. Within the criminal proceedings, the circumstances of the person's death are not established.

The provisions of Part 1 of Art. 91 of the Criminal Procedure Code of Ukraine, which provides that in criminal proceedings the event of a criminal offense is subject to proof (time, place, manner and other circumstances of the criminal offense). The inability to establish the facts and the ineffectiveness of the investigative actions are explained by the anti-terrorist operation and the «impossibility of access to the territory».

Meanwhile, every family has the right to know the fate of their relative, and the exercise of this right is the duty of the state, in particular, in light of the recently ratified by Ukraine International Convention for the Protection of All Persons from Enforced Disappearance (June 2015) (International Convention On The Seizure Of People From Violent Events, 2006). That is why the pre-trial investigation authorities should use all means to establish the facts of missing persons in the area of the Joint Forces Operation within the framework of criminal proceedings. This is the only way to meet the requirements for the effectiveness of the investigation (Resolution Parliamentary Assembly, 2015).

We will note that in this direction certain work is conducted (Draft Law On The Legal Status Of Missing Persons, 2016). The basis for the formation of national legislation on this issue should be the Model Law on Missing Persons (Model Law On Missing Persons, 2008).

Conclusions

The study of international legal requirements for the proper legal procedure of pre-trial investigation in criminal proceedings under emergency legal regimes allows us to formulate the following conclusions.

Ensuring human rights in national criminal proceedings in a state of war, emergency or in the area of the Joint Forces Operation in eastern Ukraine is an important vector of scientific development, as it should be based on a reasonable balance of interests of society and the state. and effective human rights in the context of the demands of the world community.

Analysis of the International Covenant on Civil and Political Rights, the Convention for the Protection of Human Rights and Fundamental Freedoms and the case law of the European Court of Human Rights (Axoi v. Turkey, Cyprus v. Turkey, Erdem v. Germany, Liu and Liu v. Russia, Tomazi v. France, Ibrahim et al. v. the United Kingdom, Peter v. Romania,

etc.) suggests that the State's positive obligation to carry out an effective pre-trial investigation of each criminal offense exists even in complex and dangerous situations, including a state of emergency or military conflict.

The realization of the right of relatives of the missing is a duty of the state, in particular, in the light of the recently ratified by Ukraine International Convention for the Protection of All Persons from Enforced Disappearance. This actualizes the use of pre-trial investigation bodies of all means to establish the facts of missing persons / deaths in the area of the Joint Forces Operation within the criminal proceedings, which will allow to comply with all requirements for the effectiveness of the investigation. The basis for the formation of national legislation on this issue should be the relevant law on missing persons.

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DEL ZULIA

CUESTIONES POLÍTICAS

Vol.40 Nº 72

Esta revista fue editada en formato digital y publicada en enero de 2022, por el ***Fondo Editorial Serbiluz, Universidad del Zulia. Maracaibo-Venezuela***

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