

## PRESERVATION OF THE TERRITORIAL INTEGRITY OF UKRAINE IN ATO CONDITIONS BY CRIMINAL JUSTICE MEANS

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**Summary.** The article is devoted to the analysis of the current state of terrorism combating in Ukraine in the conditions of anti-terrorist operation. The author studies the peculiarities of criminal proceedings conducting in the area of military, emergency state, anti-terrorist operation zone, including the peculiarities investigating judge power's conduction by the prosecutor. It is concluded that the terrorism combating and ensuring the territorial integrity of Ukraine requires urgent legislative changes and enhancement of the effectiveness of pre-trial investigation in the specified territory. Combating terrorism and ensuring the territorial integrity of Ukraine require urgent legislative alterations and strengthening the effectiveness of preliminary investigation in the specified territory.

**Key words:** monitoring of bank accounts, preventive detention, the anti-terrorist operation, investigating judge, prosecutor

### INTRODUCTION

The obvious priority of protecting person's rights and interests from crime among the tasks of criminal proceedings is determined by the democratic tendency of criminal procedural policy, the strengthening of the humanistic element and the harmonization of criminal procedural legislation with European standards. However, the current situation, caused by events in the East of the country and their destructive consequences in all spheres of life, changes the proportions of values, assimilated in society in the direction of ensuring the security of the state. This is quite considerable, since performing the tasks of the criminal process is possible only if the state is properly functioned and the norms of law, envisaged by the legislator are effectively realized.

In particular, this is caused by the fact that the situation in the ATO zone has significantly complicated the activity of preliminary investigation bodies. The factors causing the dysfunctionality of the criminal procedural form of preliminary investigation in this zone (including social, political, legal, organizational, material and technical) are the following:

- a political destabilization;
- the lack of a proper normative regulation;
- the destruction of infrastructure, blockade of courts and law enforcement bodies;
- a complete cessation of the activity of preliminary investigation bodies, courts in territories, which are temporarily uncontrolled by Ukraine;
- the loss or destruction of a criminal case;
- a real threat to the life of the participants of criminal proceedings, a pressure on judges and investigators from the representatives of illegal armed groups;
- the impossibility of observing reasonable terms, conducting of urgent investigatory (search) actions or a lack of time for their conduction due to the dangerous situation;
- the impossibility of conducting certain procedural actions due to the migration of people living in these zones;
- the objective difficulties in investigating crimes in connection with the impossibility of having an access to certain territories, which are temporarily uncontrolled to Ukraine;
- a lack of experience in the activity of preliminary investigation bodies in such conditions and with such specific criminal offenses;
- a rapid increase of criminality and an increase of victim's number, including dead or missing persons respectively<sup>1</sup>.

## I

It was a first time when the law-enforcement system of Ukraine faced crimes of such a substantial scale: by intensity, a number of victims, characteristics of the performers' system, etc. There had never been mass armed conflicts in the territory of our modern state, that is why the law-enforcement

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<sup>1</sup> О.В. Лазукова, *Передумови інституалізації досудового розслідування в умовах воєнного, надзвичайного стану або у районі проведення антитерористичної операції*, "Теорія і практика правознавства" 2 (2016), pp. 6–7.

bodies have no experience of functioning in such conditions and with such specific crimes. Moreover, it is not about the linear, but about the so-called “hybrid war”, which includes many factors and tactics. Investigators have a lack of qualification, experience in using typical methods of investigating such crimes and the ability to analyze and compare diverse information. There are also no technical equipment (available IT technologies) to make these analysis simpler and more efficient. These factors considerably complicate the investigation of crimes in ATO zone. Also, one of the most important problems is to set the boundaries of the specified zone. In particular, the anti-terrorist operation zone is the territory, water area, means of transport, buildings, structures, premises and territories or water areas adjacent to them and within which the above-mentioned operation is conducted. It is clear that these boundaries determine the operation of the above-mentioned legislation in space, the territorial investigative and judicial jurisdiction, the possibility of preventive detention. The legislation does not envisages what document establishes zone of ATO conducting, the way of bringing this information to special units and the legal consequences of non-fulfilment such a regime, or vice versa, distribution it in the territory that is outside the ATO<sup>2</sup>.

The means of combating terrorism are envisaged in the Criminal Procedural Code of Ukraine and in numerous by-laws. On August 12, 2014, the Criminal Procedural Code of Ukraine was supplemented by article 615 in accordance with the Law of Ukraine “On Amendments to the Criminal Procedural Code of Ukraine regarding a special regime of preliminary investigation in conditions of military, emergency state or in zone of the anti-terrorist operation”<sup>3</sup>.

In the mentioned article, along with other provisions, it is determined that if the investigating judge can not conduct his powers in terms, envisaged by the law, these powers are exercised by the relevant prosecutor in the area (administrative territory) in which the legal regime of military, emergency state, the conduction anti-terrorist operation.

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<sup>2</sup> О.В. Капліна, *Проблеми застосування норм кримінального процесуального законодавства в умовах проведення АТО*, in: *Досудове розслідування: актуальні проблеми та шляхи їх вирішення: матеріали пост. діючого наук.-практ. семінару, 17 жовт. 2014 р.*, ed. О.В. Капліна, Право, Харків 2014, pp. 46–51.

<sup>3</sup> Закон України від 12 серпня 2014 р. Про внесення змін до Кримінального процесуального кодексу України щодо особливого режиму досудового розслідування в умовах воєнного, надзвичайного стану або у районі проведення антитерористичної операції, in: <http://zakon3.rada.gov.ua/laws/show/1631-18> [accessed: 27.11.2018].

## II

The realization of these powers by the prosecutor is envisaged in p. 3.4 of the Instruction on the procedure of a preventive detention of persons involved in terrorist activities in the anti-terrorist operation zone and a special regime of preliminary investigation in the conditions of a military, emergency state or in the anti-terrorist operation zone, approved by a joint Order of the Ministry of Internal Affairs, Prosecutor General's of Ukraine, Security Service of Ukraine from August 26, 2014<sup>4</sup>.

In this paragraph it is stated that the prosecutor, having received an investigator's request concerning the conduction of covert investigative actions or decided it personally, considers about the conduction of investigative actions in the procedure, prescribed by Article 247, 248 of the Criminal Procedural Code of Ukraine, if the investigative judge can not perform his authorities in terms, envisaged by the law. After the considering an investigator's request or in the case of deciding it personally, the prosecutor according to article 110 of this Code, issues a decree and follows the requirements provided for decrees, issued by the investigating judge.

Another mean of combating terrorism is the institution of a preventive detention. In accordance with Article 15<sup>1</sup> of the Law of Ukraine "On the combating terrorism", there can be conducted a preventive detention of persons involved in terrorist activities for a term of more than 72 hours for the prevention of terrorist threats in the anti-terrorist zone in accordance with the criminal procedural legislation of Ukraine. The maximum term of a preventive detention may not exceed 30 days. The cause for a preventive detention is the existence of a reasonable suspicion of terrorist actions committed by a person.

The above-mentioned instruction provides the detention procedure of persons suspected of terrorism. There should be issued a decree concerning person's detention by the authorized official in procedure, envisaged by article 208 of the Criminal Procedure Code of Ukraine. In order to identify a detain-

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<sup>4</sup> Інструкції про порядок превентивного затримання у районі проведення антитерористичної операції осіб, причетних до терористичної діяльності, та особливого режиму досудового розслідування в умовах воєнного, надзвичайного стану або у районі проведення антитерористичної операції, яка затверджена спільним наказом Міністерства внутрішніх справ України, Генеральної прокуратури України, Служби безпеки України від 26 серпня 2014 р., No. 872/88/537, in: <http://zakon5.rada.gov.ua/laws/show/z1038-14> [accessed: 27.11.2018].

ed person, it is compulsory to photograph a person, including using digital photo equipment, with noting detention time in any accessible way, as well as the description of individual body features and special signs in the detention decree. If there is a possibility, dactyloscopy and video recording of the detained person should be carried out.

The power to provide a consent for a preventive detention of persons involved in terrorist activities in the anti-terrorist zone for a term of more than 72 hours, but no more than 30 days, is performed by prosecutors of the regional level, their deputies.

### III

Investigative jurisdiction of criminal offenses committed in the anti-terrorist operation zone, in case of impossibility to conduct pre-trial investigation, is determined by the Prosecutor General. The pre-trial investigation materials of crimes, which are at the stage of pre-trial investigation, in case of impossibility to conduct pre-trial investigation, are transferred to the bodies of pre-trial investigation determined by the Prosecutor General within ten working days from the date of investigative jurisdiction determination.

The main negative factors that may affect the process and results of the pre-trial investigation, as well as the choice investigative (search) action tactics in the anti-terrorist operation zone by the investigator, prosecutor are the following:

- a dynamically changing operational environment;
- a permanent dislocation of military units;
- the possibility of death, injury, capture of criminal proceedings participants;
- the shortage of time, devoted to conducting investigative (search) actions;
- a reduced duration of the initial stage of pre-trial investigation;
- an opportunity to counter the course of investigation by the military authorities.

In the combating situation conditions, the preparation and conduct of separate investigative (search) actions have some peculiarities, including the review of scene investigation. At the same time, it is necessary to follow the requirements concerning the departure of the heads of the prosecutor's office to the scene of investigation on the criminal offenses against the national security, terrorist acts, banditry, disasters, accidents, explosions, fires and other events that resulted in significant material damage or deaths, intentional

murders committed under aggravating circumstances and under uncertainty, criminal offenses committed by organized groups and criminal organizations, state officials, who has responsible position, people's deputies of Ukraine, judges, heads of law-enforcement bodies and committed against them, serious criminal offenses committed by and against foreigners, as well as in relation to journalists in case of obstruction of their legal professional activities, other criminal offenses, which have negative resonance in society.

When fixing evidence, investigators and prosecutors must follow the provisions of Part 7 of Art. 223 of the CPC of Ukraine, according to which the review conduction may occurred without the participation of the concept in the case of continuous video recording of the investigative (search) action conduction. In addition, the use of video recording will greatly reduce the time spent by participants of the investigation group in a dangerous area. Certain specific features have the assigning and conducting of examinations in criminal proceedings of the specified category. The most common are the following examinations: forensic expertise of corpses and living persons with firearms, ballistic expertise, explosive devices and explosives and products of explosion (shot) expertise.

Avoiding appearance on the call of an investigator, a prosecutor or a judicial call of an investigating judge, a court (not appearance for more than two times without a valid reason) by a suspect, an accused person in the of an anti-terrorist operation zone, and his announcement in search is the basis for conduction of a special pre-trial investigation or special court proceedings. The requirement to declare an intergovernmental or international search does not apply to cases when the issue of conduction special proceeding to these people.

In the fighting actions conditions, during preparation for them or after the conduction of a military operation, the prosecutor has the duty to conduct not only certain procedural, but also organizational measures, since without them it is impossible to perform properly actions of a procedural nature. In particular, the organizational aspects of prosecutorial activity ensuring – providing premises for the allocation of the prosecutor's office (department), units of the Military Law Enforcement Service in the Armed Forces of Ukraine, other military formations that assist the prosecutor in conducting the tasks of criminal proceedings, the allocation of guarding and many other current organizational issues.

## IV

Another effective means of combating terrorism is a specific covert investigative action – the monitoring of bank accounts. This covert investigative action was introduced in a domestic legislation in order to perform Ukraine's international obligations concerning combating money laundering and terrorism financing, and to enable the National Anti-corrupt Bureau of Ukraine to combat effectively corruption crimes, committed by state officials of high rank.

The distinction should be made between the monitoring of bank accounts and financial monitoring, which is envisaged by the Law “On prevention and combating the legalization (laundering) of money, obtained from committing a crime, terrorism financing and financing the distribution of mass destruction weapon”.

Monitoring of bank accounts, according to article 269<sup>1</sup> of the Criminal Procedural Code is receiving the information by a detective of National Anti-corrupt Bureau according to investigative judge's decree in the current mode from the bank concerning transactions, carried out on one or more bank accounts in order to record a criminal action using a specific bank account in a banking institution in the territory of Ukraine or search or identification of the property, that should be confiscated or confiscated using a special procedure. In accordance with articles 246 and 269<sup>1</sup> of the Criminal Procedural Code, it may be conducted concerning grave and especially grave crimes, which are under the jurisdiction of National Anti-corrupt Bureau.

In accordance with paragraph 11 part 1 of article 1 of the Law of Ukraine „On prevention and combating the legalization (laundering) of money, obtained from committing a crime, terrorism financing and financing the distribution of mass destruction weapon”, *financial monitoring* is a complex of measures that are conducted by subjects of state financial monitoring and directed to perform the requirements of legislation in the sphere of prevention and combating the legalization (laundering) of money, obtained from committing a crime, terrorism financing and financing the distribution of mass destruction weapon<sup>5</sup>. The principles of financial monitoring system of Ukraine are fixed in article 5 of this Law. According to this article, the financial

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<sup>5</sup> Про запобігання та протидію легалізації (відмиванню) доходів, одержаних злочинним шляхом, фінансуванню тероризму та фінансуванню розповсюдження зброї масового знищення: Закон України [із змінами і доповненнями станом на 05.10.2016 року], “Офіційний вісник України” 2014, No. 90, ст. 2576.

monitoring system consists of initial financial monitoring and state financial monitoring.

While reforming of the anti-corruption legislation, it was proposed to fix the monitoring of bank accounts as a type of financial monitoring, as a separate procedural act, but later it was decided to introduce it as covert investigative action in order to increase its effectiveness.

According to article 269<sup>1</sup> of the Criminal Procedural Code of Ukraine, if there is a reasonable suspicion that a person commits a crime using a bank account, or for the purpose of searching or identifying the property, that should be confiscated or confiscated using a special procedure, in criminal proceedings that are under the jurisdiction of National Anti-Corrupt Bureau of Ukraine, the prosecutor may apply to the investigative judge for issuance a decree concerning monitoring bank accounts.

According to the decree of the investigative judge on the monitoring of bank accounts, the bank is obliged to provide information for National Anti-Corrupt Bureau of Ukraine concerning transactions carried out on one or more bank accounts in the current mode.

The investigating judge in the decree on monitoring of bank accounts informs the head of the banking institution about the obligation not to disclose information about conducting this investigative action and about the corresponding criminal liability. On the basis of the investigative judge's decree, the head of the bank institution is obligated to inform in writing all employees, involved in the monitoring of bank accounts about the obligation not to disclose information about conducting this investigative action and about the corresponding criminal liability.

## CONCLUSION

The main disadvantage of legislative regulation is that, on the one hand, this covert investigative action is an effective instrument of combating terrorism, but operational units of the State Security Service of Ukraine are not authorized to conduct it, and this fact complicates identifying methods of terrorism financing in the ATO zone and imposing an arrest on illegal assets.

Only the main legal means of combating terrorism in the ATO zone are highlighted in this study. Combating terrorism and ensuring the territorial integrity of Ukraine require urgent legislative alterations and strengthening the effectiveness of preliminary investigation in the specified territory.



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OCHRONA INTEGRALNOŚCI TERYTORIALNEJ UKRAINY  
W WARUNKACH OPERACJI ANTYTERRORYSTYCZNEJ  
ZA POMOCĄ WYMIARU SPRAWIEDLIWOŚCI W SPRAWACH KARNYCH

**Streszczenie.** Artykuł poświęcony jest analizie obecnego stanu walki z terroryzmem na Ukrainie w kontekście operacji antyterrorystycznej. Autor bada osobliwości przeprowadzania postępowania karnego w obszarze, w którym obowiązuje prawny reżim stanu wojennego, stan wyjątkowy, operacja antyterrorystyczna, w tym specyfika wykonywania uprawnień sędziego śledczego przez prokuratora. Stwierdzono, że walka z terroryzmem i zapewnienie integralności terytorialnej Ukrainy wymaga pilnych zmian legislacyjnych i zwiększenia skuteczności dochodzenia przedprocesowego na określonym terytorium.

**Słowa kluczowe:** monitorowanie rachunków bankowych, zatrzymanie zapobiegawcze, operacja antyterrorystyczna, śledczy sędzia, prokurator