Admissibility of evidence obtained with specialist participation in criminal proceedings

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The parties to criminal proceedings collect and verify evidence using, in particular, specific expertise and skills of a specialist involved in conducting relevant procedural actions. Specialist is always an individual who has rights and freedoms, which violation can result in the loss of evidence of admissibility. Competition in criminal proceedings determines focus of efforts on finding the vulnerability of the opposing party's evidence. The purpose of this article is to identify the conditions under which evidence provided by specialist can determine the issue of admissibility of their use in criminal proceedings. Achieving such a goal requires combined application of a number of scientific methods, including dogmatic, hermeneutic and comparative law one. Auxiliary role of a specialist is outlined quite clearly in the legislation: this is performance of paid work, which cannot be refused if the engagement is carried out by decision of the court, investigating judge, investigator or prosecutor. At the same time, lack

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of employment contract, social and compulsory insurance, record of work experience, etc. of such a specialist is poorly consistent with the principles of social protection in Ukraine. The paid nature creates a legal dilemma in the event of a ban on representatives of certain professions from engaging in other paid activities, in addition to their main job. Legislation does not provide equal pay for equal work of specialists. Recent efforts by the legislator to expand the range of cases of involving a specialist in criminal proceedings have led to the need to distinguish them by affiliation with a foreign state or international organization, by specialty and types of work performed. The above legal conditions relate to the sphere of human rights, and they cannot be ignored. The current state of regulation of involving a specialist in criminal proceedings increases the risk of violation of these rights by the party resorting to such involvement, primarily the prosecution. Possible situational solutions: not involving public servants or limiting the circle of involved specialists exclusively to employees of state specialized institutions, accepting the risk of recognizing evidence as inadmissible, changing the government act on the remuneration of specialists with the introduction of complexity (scientific content, safety, hygiene, etc.) of works as the main criterion (and not the level of salary at the specialist's main workplace) and/or involving exclusively persons with an equal level of remuneration, etc. are half-baked and only emphasize the expediency of a systematic review of the institution of a specialist in criminal proceedings.

Keywords: *forced labor; other paid activities; specialist involvement; evidence admissibility.*

Research Problem Formulation

Specialist is a participant in procedural criminal legal relations. Unlike the parties to criminal proceedings, such participation is not a consequence of his behavior and is not caused by a criminally unlawful infringement of his rights or interests. He is not a participant in such legal relations due to his professional duties (as opposed to investigator, judge, or court secretary). A specialist is situationally involved by an authorized person because he has special knowledge and skills. However, procedural result of such involvement is determined not only by effectiveness of the work performed by the specialist to meet the needs of the court, prosecutor, investigator, or examining magistrate. Under certain formal circumstances and in the case of involvement of certain categories of persons, specialist participation in procedural actions can become a basis for recognizing evidence as inadmissible and procedural actions as illegal. The key factors of such risk are the involuntary involvement, paid nature of the work, limited powers of the specialist and the entities that perform their procedural role with his help. The legislation that should be taken into account when involving a specialist in criminal proceedings does not contain obvious and insurmountable conflicts, but instead has a number of specifics, exceptions to the general rule, which disregard provokes the above-mentioned risk in practical activities.

Analysis of Essential Researches and Publications

Consideration of the problem of admissibility of evidence in criminal proceedings obtained through the involvement of a specialist is significantly facilitated by scientific developments on individual aspects of the issue raised. The procedural aspects of involving a specialist in criminal proceedings were investigated, in particular, by N. Rohatynska and Yu. Pidhorodetska (advantages of involving specialist) [1]; Ye. Demidova (specifics of specialist interrogation) [2]; O. Kuvshynov [3], Ye. Kompanets [4] (evidentiary properties of the specialist's conclusion).Scientific and theoretical basis of our research was formed by the way of research papers of specialists in the field of international and labor law: O. Voytenko (noted the differences between compulsory and forced labor, relying on the work of V. Zhernakov and O. Protsevskyi) [5], T. Parpan (developed the ideas of O. Stasiv, S. Plaskach, O. Starchuk, A. Orlean and outlined the international legal obligations of Ukraine to abolish forced labor) [6], L. Vakariuk (summarized the relevant practice of the European Court of Human Rights, hereinafter referred to as the ECtHR) [7]. V. Yeremenko [8], devoted scientific research to identifying elements of forced labor in legislative acts, and the categories of persons vulnerable to such coercion are discussed in the publications of N. Hladka and O. Yakovets [9], T. Lutskyi and I. Hazdai-

1 Рогатинська Н., Підгородецька Ю. Процесуальний статус спеціаліста в кримінальному провадженні. *Наукові записки. Серія: Право.* 2022. Вип. 12. С. 147—151. DOI: 10.36550/2522-9230-2022-12-147-151 (date accessed: 04.02.2025).

2 Демидова Є. Є. Тактичні прийоми допиту спеціаліста в кримінальному процесі. *Науковий вісник Херсонського державного університету. Серія: Юридичні науки.* 2016. Вип. 4. Т. 2. С. 86—89. URL: https://dspace.nlu.edu.ua/bitstream/123456789/14124/1/Demydova_86-89.pdf (date accessed: 04.02.2025).

3 Кувшинов О. Д. Отримання висновку спеціаліста як процесуальна форма використання спеціальних знань у кримінальному провадженні. *Вісник Луганського навчально-наукового інституту імені Е. О. Дідоренка.* 2024. Вип. 2 (106). Ч. 2. С. 93—106. DOI: 10.33766/2786-9156.106.2.93-106 (date accessed: 04.02.2025).

4 Компанець Є. М. Висновок спеціаліста як передумова доказування порушення прав інтелектуальної власності у кримінальному провадженні. *Часопис Київського університету права.* 2020. № 2. С. 318—323. DOI: 10.36695/2219-5521.2.2020.60 (date accessed: 04.02.2025).

5 Войтенко О. О. Заборона примусової праці в трудовому законодавстві України. *Юридичний науковий електронний журнал.* 2019. № 3. С. 114—116. URL: http://www.lsej.org.ua/3_2019/31.pdf (date accessed: 06.01.2025).

6 Парпан Т. Конституційна заборона примусової праці в Україні. *Український часопис конституційного права.* 2022. № 1. С. 55—64. DOI: 10.30970/jcl.1.2022.5 (date accessed: 06.01.2025).

7 Вакарюк Л. В. Правові позиції ЄСПЛ щодо розуміння заборони примусової праці як стандарти захисту трудових прав людини. *Юридичний науковий електронний журнал.* 2023. № 4. С. 316—320. DOI: 10.32782/2524-0374/2023-4/76 (date accessed: 06.01.2025).

8 Єрьоменко В. В. Сфера застосування поняття примусова праця. *Актуальні проблеми юридичної науки на шляху сучасної розбудови держави і суспільства* : мат-ли Міжнар. наук.-практ. конф. (Суми, 05—07.06.2014). Суми, 2014. С. 152—154. URL: https://dspace.nlu.edu.ua/bitstream/123456789/9456/1/Eremenko_152-154.pdf (date accessed: 06.01.2025).

9 Гладка Н. М., Яковець О. В. Законодавчі гарантії заборони та ризики залучення українців до примусової праці. *Аналітично-порівняльне правознавство.* 2024. № 2. С. 314—317. DOI: 10.24144/2788-6018.2024.02.54 (date accessed: 06.01.2025).

ka-Vasylyshyna [10]. The science deals with the topic of procedural coercion [11] and the legal effects of a ban on engaging in other paid activities, in addition to the main job, by certain categories of persons [12].

Article Purpose

Identify conditions under which the evidence provided by the involved specialist can raise the issue of admissibility of their use in criminal proceedings.

Research Methods

A number of scientific methods have been applied, including dogmatic, hermeneutic, comparative legal one, extrapolation and analogy.

Main Content Presentation

Involvement in criminal proceedings of a specialist, that is, a person with special knowledge and skills (paragraph 1 of Part 1 of Art. 71 of the Criminal Procedural Code of Ukraine [13]) contributes to a prompt and complete investigation and trial. The application of this knowledge is part of the collection and verification of evidence. Requirements for admissibility of evidence are strict.

Thereby the subject of quite detailed regulation was, among other things, the procedure for applying (for obtaining and verifying evidence) the above-mentioned knowledge and skills. The Criminal Procedural Code of Ukraine provides for the rights and obligations of specialists, determines the content of the work performed by them, cases in which a specialist provides evidence independently, as well as the conditions under which he is a secondary participant in the procedural action. At the same time, an analysis of the relevant norms of the Criminal Procedural Code of Ukraine and their comparison with the provisions of other laws and international treaties of Ukraine forces us, along with the advantages of involving a specialist, to take into account the legal nature of his participation in a broader sense than follows from the norms of the Criminal Procedural Code of Ukraine alone. Imperative nature of the decision to involve him does not have legal precedence over the primacy of human rights stipulated by the Constitution of Ukraine [14]. Participation in procedural

10 Луцький Т. М., Газдайка-Василишин І. Б. Протидія торгівлі людьми: історія та сучасність. *Науковий вісник Львівського державного університету внутрішніх справ. Серія юридична.* 2023. № 1. С. 42—48. DOI: 10.32782/2311-8040/2023-1-6 (date accessed: 06.01.2025).

11 Андрушко О. Примус у кримінальному процесі: питання денотації і конотації. *Підприємництво, господарство і право.* 2018. № 4. С. 215—220. URL: http://pgp-journal.kiev.ua/archive/2018/4/37.pdf (date accessed: 06.01.2025) ; Грицак Х. М. Тимчасове обмеження у користуванні спеціальним правом як захід забезпечення кримінального провадження : дис. … канд. юрид. наук. Львів, 2019. 247 с. URL: https://lpnu.ua/sites/default/files/2020/dissertation/1797/dismukanov-2.pdf (date accessed: 06.01.2025).

12 Пастух І. Д. Службове сумісництво поліцейських. *Юридичний часопис Національної академії внутрішніх справ.* 2018. № 1 (15). С. 283—295. URL: https://elar.naiau.kiev.ua/server/api/core/bitstreams/b985c366-e7fa-4f39-978b-9d82d09ec972/content (date accessed: 06.01.2025) ; Благодарний А. М. Обмеження щодо сумісництва та суміщення з іншими видами діяльності, які пов'язані із конфліктом інтересів. *Юридичний науковий електронний журнал.* 2023. № 7. С. 238—241. DOI: 10.32782/2524-0374/2023-7/54 (date accessed: 06.01.2025).

13 Кримінальний процесуальний кодекс України від 13.04.2012 р. № 4651-VI (зі змін. та допов.). URL: https://zakon.rada.gov.ua/laws/show/4651-17#Text (date accessed: 06.01.2025).

14 Конституція України : Закон України від 28.06.1996 р. № 254к/96-ВР (зі змін. та допов.). URL: https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text (date accessed: 06.01.2025).

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actions by certain categories of specialists can negatively affect admissibility of obtained evidence. Procedural risks in criminal proceedings are accompanied by inviting a specialist to take actions whose rules do not clearly stipulate this involvement.

Types of procedural actions involving a specialist are limited

One of the recent innovations in Criminal Procedural Code of Ukraine has been the expansion of the powers of specialists [15]. In the explanatory note to the relevant legislative initiative, changes are justified by the need to overcome the following problems: long terms of pre-trial investigation; slow adoption of procedural decisions; workload of forensic science institutions; lack of a sufficient number of experts conducting forensic, immunological, cytological, genetic, construction, ballistic ones and explosive examinations [16]. The proposed changes should contribute to the pre-trial investigation of criminal offenses against peace, human security, and international law [17]. In general, clarification of the norms relating to specialists in criminal proceedings directly affects the issues of collecting and verifying evidence, such as:

- documents as one of the sources of evidence in criminal proceedings (Part 2 of Article 84 of Criminal Procedural Code of Ukraine) include *"certificates, conclusions and other documents of specialists"* (Clause 5 of Part 2 of Article 99 of Criminal Procedural Code of Ukraine) [18];
- receipt of a certificate, conclusion of a specialist may occur within the inspection of the scene at the stage of pre-trial investigation in *"urgent cases"* (Part 3 of Art. 214 of Criminal Procedural Code of Ukraine) [19] before entering information into Unified Register of Pre-trial Investigations.

Unlike the expert conclusion that is an independent type of sources of evidence, the conclusion, certificates and other documents of the specialist belong to such a type of sources of evidence as the *document* [Hereinafter highlighted by us.— *Auth.*].

As noted above, given the innovations (amendments to Part 3 of Art. 214 of Criminal Procedural Code of Ukraine), such evidence can be obtained at the stage of pre-trial investigation, which is carried out before the entry of information in the Unified Register of Pre-Trial Investigations [20]. Therefore, all further evidence in criminal proceedings will most often be somehow derived from the primary evidence in the form of a protocol of inspection of the scene drawn up with the involvement of a specialist or a certificate (conclusion) provided, again by a specialist. This makes necessary to consider the issue of admissibility, legality of obtaining such evidence with all meticulousness.

Since the inspection of (terrain, premises, etc., Part 1 of Article 237 of the Crim-

15 Про внесення змін до Кодексу України про адміністративні правопорушення, Кримінального та Кримінального процесуального кодексів України щодо оптимізації діяльності спеціалістів у кримінальному провадженні : Закон України від 09.10.2024 р. № 4009-IX. URL: https://zakon.rada.gov.ua/laws/show/4009-20#n19 (date accessed: 06.01.2025).

16 Проєкт Закону про внесення змін до Кримінального процесуального кодексу України з метою оптимізації залучення спеціалістів під час досудового розслідування від 20.09.2023 р. № 10075. URL: https://itd.rada.gov.ua/billInfo/Bills/Card/42822 (date accessed: 24.01.2025).

17 Там само.

18 Кримінальний процесуальний кодекс ... . URL: https://zakon.rada.gov.ua/laws/show/4651-17#Text (date accessed: 06.01.2025).

19 Там само.

20 Там само.

inal Procedural Code of Ukraine) is an investigative (search) action, a protocol must be drawn up based on its results (in particular, if there are statements from persons in whose presence the inspection is being carried out, Part 4 of Article 237 of the Criminal Procedural Code of Ukraine) [21]. Protocols of procedural actions, annexes to them, as well as media on which procedural actions are recorded, belong to documents (Part 3 of Part 2 of Article 99 of the Criminal Procedural Code of Ukraine), as well as *"materials of photography, sound recording, video recording and other media (including computer data)"* (Part 1 of Part 2 of Article 99 of the Criminal Procedural Code of Ukraine) [22]; mentioned categories of documents are separated from the rest – the aforementioned certificates, conclusions and other documents of specialists (Part 5 of Part 2 of Article 99 of the Code of Criminal Procedure). Participation of a specialist can consist in creating documents, as well as in assisting in performance of procedural actions that ensure the receipt of evidence, primarily material and in the form of other documents, in particular, protocols in the annexes containing explanations of the specialists involved in such action (clause 2 of Part 2 of Article 105 of the Code of Criminal Procedure), specially made copies, samples of objects, things and documents, as well as photo tables, diagrams, casts, computer data carriers and other materials that explain the content of the protocol (clauses 1 and 4 of Part 2 of Article 105 of Criminal Procedural Code of Ukraine), since a specialist *"can be involved to provide direct technical assistance (taking photographs, drawing up diagrams, plans, drawings, selecting samples for examination, etc.) by the parties to criminal proceedings during pre-trial investigation and by the court during the trial"* (clause 2 of Article 71 of the Code of Criminal Procedure) [23].

Independent procedural source of evidence in criminal proceedings is the expert's conclusions. At the same time, this type of evidence can be obtained with the participation of a specialist. Thus, forensic expert has the right to file a motion to provide *additional materials and samples* (clause 2, Part 3, Article 69 of Criminal Procedural Code of Ukraine), but he does not have the right to collect materials for an examination on his own initiative (Part 4, Article 69 of the Criminal Procedural Code of Ukraine) [24]. The expert provides a description of the obtained materials in the conclusion (clause 5, Part 1, Article 102 of the Code of Criminal Procedure) [25]. Although *materials* and *samples* are not identical, forensic expert is probably prohibited from collecting samples on his own; obviously, the obtained samples should be described in the expert's conclusion. If the examination is ordered by the court, it is the court or a specialist involved on its behalf who selects samples for its conduct (Part 1, Article 245 of the Code of Criminal Procedure) [26]. The expert's conclusion cannot be based on evidence deemed inadmissible by the court (Part 5, Article 101 of Criminal Procedural Code of Ukraine) [27]. Therefore, additional samples provided in accordance with his request (in particular, those select-

21 Кримінальний процесуальний кодекс … . URL: https://zakon.rada.gov.ua/laws/show/4651-17#Text (date accessed: 06.01.2025).
22 Там само.
23 Там само.
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26 Там само.
27 Там само.

ed by the specialist) should meet admissibility criteria.

The evidence obtained with involvement of a specialist also includes duplicates of the document and copies of information made by the investigator, prosecutor, in particular computer data containing information (automated), electronic communication, information and communication and computer systems and their integral components (Part 4 of Article 99 of the Criminal Procedural Code of Ukraine) [28].

Thus, activities of a specialist in criminal proceedings ensure the receipt of material evidence and documents (drawn up both by the specialist himself and as a result of the procedural actions in which he is involved), as well as expert conclusions.

Possibility of involving (participating) a specialist is provided for by the procedures for conducting a number of procedural actions (paragraphs 4 and 5 of Part 2 of Article 168, Part 8 of Article 228, Part 1 of Article 236, Parts 3 and 7 of Article 237, Part 2 of Article 240, part 2 of Article 241, part 1 of Article 245, Parts 2 and 5 of Article 245-1 of Criminal Procedural Code of Ukraine) and his participation is acceptable during covert investigative (search) actions (Part 1 of Article 262, Parts 1 and 3 of Article 266 of the Criminal Procedural Code of Ukraine) [29], which leads us to think about a certain *restrictive effect*. Thus, in the Code of Civil Procedure, general provisions on the procedural status of a specialist (Part 2 of Article 71 of the Code of Civil Procedure) are supplemented by special provisions on the procedure for conducting specific procedural actions with his involvement (participation) [30]. These special provisions exclude the possibility of a dispute regarding the legality of the involvement or participation of a specialist in these actions. However, the remaining norms regarding procedural actions do not contain the corresponding *"guarantees"*. The rights of the prosecution (which consists exclusively of state bodies and their officials) are not subject to an expanded interpretation (Part 2 of Article 19 of the Constitution of Ukraine) [31], therefore, here one should be guided by the principle *"if something is missing in the law, it should be assumed that it is intentional"* (from the Latin. *Casus omissus pro omisso habendus est*, missed case should be considered to have been missed intentionally) [32]. That is why the involvement of a specialist in the remaining procedural actions mentioned is hardly permissible. In other words, the involvement, application, invitation, participation of a specialist can be considered carried out on the basis, within the limits of the powers and in the manner provided for by the Constitution and laws of Ukraine, only when the right to such involvement is directly stipulated by the norm on the procedure for conducting an investigative (detective), covert investigative (detective), or other procedural action. Where there is no relevant clarification, authority to involve a specialist may become the subject of dispute. Thus, a specialist participates in the study of information already obtained through

28 Кримінальний процесуальний кодекс … . URL: https://zakon.rada.gov.ua/laws/show/4651-17#Text (date accessed: 06.01.2025).

29 Там само.

30 Там само.

31 Конституція України … . URL: https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text (date accessed: 06.01.2025).

32 Кунянський С. Чому практика Верховного Суду України не є обов’язковою / Право без води і бруду : блог. 2019. URL: https://kuniansky.com.ua/all/omitted-case-canon/ (date accessed: 27.01.2025).

the use of technical means (Parts 1 and 3 of Article 266 of the Code of Criminal Procedural Code of Ukraine), but not in its covert receipt by these same means; in obtaining samples for examination (Part 1 of Article 245 of the Criminal Procedural Code of Ukraine) but not in the covert receipt of samples necessary for comparative research (Article 274 of the Code of Criminal Procedure); in a search (of a person's home or other property — Part 1 of Article 236 of the Code of Criminal Procedure) or an inspection (of premises, premises, things, etc., Part 1 of Article 237 of the Code of Criminal Procedure), but not in the examination of a corpse and its exhumation (Articles 238, 239 of the Code of Criminal Procedure) and not in the examination of publicly inaccessible places, homes or other property of a person (Part 1 of Article 267 of the Criminal Procedural Code of Ukraine); in an investigative experiment (Article 240), but not in a special investigative experiment (clause 3 of Part 1, Part 5 of Article 271 of the Code of Criminal Procedure) [33]. There is no clear basis for involving a specialist in some covert investigative and detective actions, the nature of which requires the subject of their conduct to apply both special knowledge and skills: establishing the location of radio equipment (Article 268 of the Criminal Procedure Code), monitoring bank accounts (Article 269-1 of the Criminal Procedure Code) or special production of things and documents, creation and use of specially formed enterprises, institutions, organizations (Article 273 of the Criminal Procedure Code) [34], etc.

Specialist can provide documents only on certain issues

Excessive certainty narrows not only the types of procedural actions discussed above, but also the subject of the conclusion or certificate of a specialist. Taking into account the amended Part 2 of Art. 71 of Criminal Procedural Code of Ukraine [35], such provision has clear documentary forms: *conclusions* in the pre-trial investigation of criminal offenses; *conclusions or certificates* on the identification of a person, weapons, ammunition, explosives, explosive devices, traces of an explosion or shot, narcotic drugs, psychotropic substances, their analogues and precursors, potent medicines; *certificates* on taking readings of technical devices and technical means that have the functions of photo, filming, video recording, or means of photo, filming, video recording.

In addition, a clarification (and therefore a restriction) has been applied to *foreign* specialists: *"If* ***necessary*** *and if there are* ***grounds****, a specialist in the field of chemical, biological, radiation, nuclear or other weapons can be involved from a foreign state or international organization"* (new paragraph 2, Part 1, Article 71 of Criminal Procedural Code of Ukraine) [36]. If before the amendments, specialists were not divided into foreign and national, now such a division has appeared, along with impossibility of involving foreign specialists from other than mentioned fields. In addition, the above construction links the involvement of such a specialist with the combined condition of *necessity* and *grounds*, although in the gen-

33 Кримінальний процесуальний кодекс … . URL: https://zakon.rada.gov.ua/laws/show/4651-17#Text (date accessed: 06.01.2025).

34 Там само.

35 Про внесення змін … . URL: https://zakon.rada.gov.ua/laws/show/4009-20#n19 (date accessed: 06.01.2025).

36 Кримінальний процесуальний кодекс … . URL: https://zakon.rada.gov.ua/laws/show/4651-17#Text (date accessed: 06.01.2025).

eral procedure for involving a specialist such conditions are not even mentioned, which seems to be a technical and legal drawback of the special prescription. The list of *types of weapons* seems to be imperfect in this construction. On the one hand, it is casual, on the other hand, it is open. The mentioned types of weapons nuclear, chemical one, etc. do not coincide with the provisions of the articles of the Special Part of the Criminal Code of Ukraine (hereinafter referred to as the Criminal Code): weapons of mass destruction (Articles 209-1, 439 and 440), explosives (paragraph 2 of the note to Article 260), military (note to Article 402), as well as radioactive materials (Articles 262 and 265), war materials (Article 410), radioactive, chemical, biological, etc. materials, substances, objects (Article 261) [37]. In addition to those belonging to other weapons: firearms (Article 201, note to Article 258-4, paragraph 2 of the note to Article 260, Article 262, Part 1 of Article 263, Articles 263-1 and 264 of the Criminal Code) and cold weapons (Part 2 of Article 263, Part 4 of Article 296 of the Criminal Code) [38] apparently, the *mandate* of foreign experts (from a review of Part 1 of Article 71 of the Criminal Code [39]) covers the types of weapons mentioned in the additions to Part 2 of Article 8 of the Rome Statute of the International Criminal Court and the use of which constitutes a war crime *"weapons, the main effect of which is to cause injuries with fragments that are not detected in the human body by X-rays"* and *"laser weapons"*[40]. It could be objected that the Criminal Code refers to objects and instruments of committing a criminal offense, and Article 71 of the Criminal Procedural Code of Ukraine refers to areas of specialization [41]. If the latter is available, for example, a specialist in the field of biological weapons will, of course, be useful for collecting and verifying evidence, for example, regarding violations of the rules for handling microbiological or other biological agents or toxins (Article 326 of the Criminal Code) or regarding an attack on facilities where biological materials are manufactured, stored, etc. (Article 261 of the Criminal Code) [42]. However, even with such an assumption, the involvement of a specialist (not only a foreign one) will have limited forms, because, in view of the new clause 9 of Part 4 of Art. 71 of the Code of Criminal Procedure, the subject of expert reports and conclusions is the identification, in particular, of weapons, ammunition, explosives and devices, traces of an explosion or shot, but not agents, toxins or materials [43]. Therefore, such an expert can be involved in procedural actions, but con-

37 Кримінальний кодекс України від 05.04.2001 р. № 2341-III (зі змін. та допов.). URL: https://zakon.rada.gov.ua/laws/show/2341-14#Text (date accessed: 06.01.2025).

38 Там само.

39 Кримінальний процесуальний кодекс ... . URL: https://zakon.rada.gov.ua/laws/show/4651-17#Text (date accessed: 06.01.2025).

40 Римський статут Міжнародного кримінального суду : прийнят. 17.07.1998 р. (зі змін. та допов.) ; ратифік. Законом України від 21.08.2024 р. № 3909-IX. URL: https://zakon.rada.gov.ua/laws/show/995_588#Text ; https://zakon.rada.gov.ua/laws/show/995_003-17#n2 ; https://zakon.rada.gov.ua/laws/show/995_004-17#n2 (date accessed: 24.01.2025).

41 Кримінальний кодекс ... . URL: https://zakon.rada.gov.ua/laws/show/2341-14#Text (date accessed: 06.01.2025) ; Кримінальний процесуальний кодекс ... . URL: https://zakon.rada.gov.ua/laws/show/4651-17#Text (date accessed: 06.01.2025).

42 Кримінальний кодекс ... . URL: https://zakon.rada.gov.ua/laws/show/2341-14#Text (date accessed: 06.01.2025).

43 Кримінальний процесуальний кодекс ... . URL: https://zakon.rada.gov.ua/laws/show/4651-17#Text (date accessed: 06.01.2025).

clusions and reports on relevant issues cannot be required from him.

It is necessary to distinguish *procedural actions involving* specialist (carried out by the Parties to the criminal proceedings, in particular, the prosecutor and the investigator) from involvement of a specialist to *provide* certificates and conclusions when the specialist *creates* evidence (in order to preserve information about tangible object: Part 1 of Art. 99 of the Criminal Procedural Code of Ukraine [44]), but this creation cannot be considered a procedural action, since this procedure is not regulated by the Criminal Procedural Code of Ukraine [45] and is carried out by a person who does not belong to any of the parties to the criminal proceedings or the court. In both cases, there is a place of involvement limited to foreign specialists with weapons issues.

It would seem that it is necessary to distinguish between *involvement* and participation: this would allow us to distinguish the thematically limited involvement of foreign specialists from possible other forms of their participation in criminal proceedings. Thus, it is precisely the participation of a specialist that is referred to in the norms on the procedure for a search (Part 1 of Article 236 of the Criminal Procedural Code of Ukraine), inspection of the area, premises, things, documents and computer data (Part 3 of Article 237 of the Criminal Procedural Code of Ukraine), investigative experiment (Part 2 of Article 240 of the Criminal Procedural Code of Ukraine), examination of a person (Part 3 of Article 241 of the Criminal Procedural Code of Ukraine), taking readings from technical devices and/or means (Part 2, Part 5 of Article 245-1 of the Criminal Procedural Code of Ukraine), examination of correspondence (Part 1 of Article 262 of the Criminal Procedural Code of Ukraine), investigation of information obtained in the event of the use of technical means (Part 1 of Article 266 of the Criminal Procedural Code of Ukraine, and judicial examination on the spot (Part 1 of Article 361 of the Criminal Procedural Code of Ukraine) [46]. However, comparing Part 3 of Article 237 of the Code of Criminal Procedure (invitation and participation of a specialist) with Part 7 of the same article (*rights of involved specialist*) indicates that at least in this case we are talking about the synonymy of participation and involvement [47]. Accepting the opposite and applying such a logical technique as reduction (reduction) to the absurd (from the Latin: *reductio (reductiones) ad absurdum*) [48] would give us an obviously false statement that the participation of an invited specialist does not create for him the rights that the involved specialist has. In addition, the participation of a person as a specialist in the proceedings excludes his participation in such proceedings as a judge, investigating judge, juror (Part 2 of Part 1 of Article 75 of the Code of Criminal Procedure), investigator, prosecutor, inquirer (Part 2 of Part 1 of Article 77 of the Code of Criminal Procedure), defense attorney or representative (Part 1 of Article 78 of the Code of Criminal

44 Кримінальний процесуальний кодекс … . URL: https://zakon.rada.gov.ua/laws/show/4651-17#Text (date accessed: 06.01.2025).

45 Михайлик Д. О. Поняття процесуальних дій у кримінальному провадженні України. *Право і суспільство*. 2017. № 2. С. 217–221. URL: https://elar.naiau.kiev.ua/server/api/core/bitstreams/7ac3a923-969b-450e-91a7-13e961beb84e/content (date accessed: 24.01.2025).

46 Кримінальний процесуальний кодекс … . URL: https://zakon.rada.gov.ua/laws/show/4651-17#Text (date accessed: 06.01.2025).

47 Там само.

48 Проблеми тлумачення правових норм : посібник / автор-упорядник О. М. Балинська. Львів, 2021. С. 101. URL: https://surl.li/rmuptx (date accessed: 27.01.2025).

Procedure) [49]. The approach of refusing to grant a motion for recusal, based, for example, on the fact that the person in these proceedings did not *participate*, but only provided references (conclusions) as a specialist or was *involved* in the conduct of procedural actions (and not *participated* in), is unlikely to withstand criticism. Therefore, again, by bringing to absurdity the consequences of accepting the above distinction between *participation*, *involvement* and *providing* (conclusions, references) within the limits of the institute of recusal in criminal proceedings, it is possible to determine the content of the *participation* of a specialist in it. In addition, payment of remuneration for the work performed is included in the costs associated with the involvement, in particular, of a specialist (Parts 2, 4, 5 of Article 122 of Criminal Procedural Code of Ukraine [50]), therefore, in the case of a separate interpretation, the specialist should not receive remuneration for providing references or conclusions. However, this is not the case: the aforementioned provision is also participation in criminal proceedings. Other forms of participation (and therefore paid engagement) of a specialist should be recognized as providing oral consultations, written explanations during the examination of evidence by the court (Article 360 of the Code of Criminal Procedure), clarifying information contained in audio and video recordings (Article 359 of the Code of Criminal Procedure), as well as opinions or conclusions of the person giving testimony that are useful for a clear understanding of the testimony and are based on special knowledge (Parts 6 and 7 of Article 95 of the Code of Criminal Procedure) [51].

Thus, the order to involve foreign specialists in criminal proceedings strengthened capacity of the pre-trial investigation only in a rather narrow direction. Involvement of such specialists by the prosecution outside their legally specified function may fall under one of the cases of inadmissibility of evidence, namely their receipt *"after the initiation of criminal proceedings through the exercise by the pre-trial investigation bodies or the prosecutor's office of their powers not provided for by this Code to ensure the pre-trial investigation of criminal offenses"* (paragraph 2, part 3, Article 87 of the Criminal Procedural Code of Ukraine) [52].

Anti-corruption and labor legislation define special rules for the involvement of certain categories of persons as specialists in criminal proceedings

The status of a specialist in criminal proceedings, procedure for his involvement is provided for by a number of articles of the Criminal Procedural Code of Ukraine. However, the norm of law may not only not coincide with the components of a regulatory legal act (Article, Part of an article), but is not always fully reflected in the text of one such act [53]. The above creates a basis for the statement that the provisions of Criminal Procedural Code of Ukraine do not contain an exhaustive regulation of the procedure for involving a specialist in criminal proceedings, that a holistic norm also consists of provisions from other sources of law, in particular those that are not focused on the

49 Кримінальний процесуальний кодекс … . URL: https://zakon.rada.gov.ua/laws/show/4651-17#Text (date accessed: 06.01.2025).

50 Там само.

51 Там само.

52 Там само.

53 Наливайко Л. Р. Теорія і практика правозастосування : конспект лекц. Дніпро, 2016. С. 130. URL: https://dduvs.edu.ua/wp-content/uploads/files/Structure/library/student/lectures/1114/10.1.pdf (date accessed: 06.01.2025).

procedural status of subjects of legal relations and are of a more general nature. If so, then application of only Criminal Procedural Code of Ukraine in the matter of involving a specialist may lead to a violation of the principles of criminal proceedings and other unacceptable consequences, because in this case it would be a question of applying only part of the norm, half-heartedness, selectivity. Specialist in criminal proceedings ensures the receipt and produces evidence himself by performing certain works, practical application of specific expertise and skills available to him and relevant to the subject of proof. Thereby constituent norms on his involvement can be contained in regulatory legal acts, which are usually not considered as sources of criminal procedural legislation due to belonging of the general content of such acts to other areas: constitutional, labor, military, administrative law, education legislation, etc. A broad approach, in which a norm of law can go beyond the limits of a regulatory legal act (and in the context of the rule of law be determined by other sources of law), does not simplify law enforcement, as it blurs and makes the range of sources of virtually any legal norm incomprehensibly wide. Instead, enforcement cannot consist in fulfilling "almost" all the provisions of a norm or in "mostly" fully satisfying its requirements, which necessitates the need to ensure that the addressees of the norms master the entire range of relevant sources.

In particular, the issue of a specialist's remuneration deserves separate consideration. Possibility of its payment implicitly limits the circle of specialists whose involvement is legal. Thus, a specialist has the right to *"receive remuneration for the work performed and reimbursement of expenses related to his involvement in criminal proceedings"* (clause 5, Part 4, Article 71 of the Criminal Procedural Code of Ukraine) [54]. Leaving aside the reimbursement of expenses, let us focus on the fact that such remuneration should be paid for the work performed, if it is not an official duty (Part 4, article 122 of the Criminal Procedural Code of Ukraine) [55]. Therefore, this is a paid activity. At the same time, subjects of responsibility, under the Law of Ukraine: *On Prevention of Corruption* (in particular, but not exclusively, persons authorized to perform state functions, for example, officials and service personnel of state bodies), are prohibited from *"engaging in **other paid activities** (except for teaching, scientific and creative activities, medical practice, instructor and **refereeing** practice in sports) or entrepreneurial activities"* (clause 1, Part 1, Article 25 of this Law with reference to clause 1, Part 1, Article 3 thereof) [56]. And although the above-mentioned prohibition is not absolute, as evidenced by the construction *"unless otherwise provided for by the Constitution or laws of Ukraine"* [57], and the Criminal Procedural Code of Ukraine belongs precisely to laws, this Code does not contain a special permit for the performance of paid activities. For their part, the exceptions to the ban, teaching, scientific and creative activities, medical practice, sports instructor and refereeing practices are not fully applicable to the activities of specialists, because the distinguishing feature of a specialist is the ability to operate with existing special knowledge and skills, and

54 Кримінальний процесуальний кодекс … . URL: https://zakon.rada.gov.ua/laws/show/4651-17#Text (date accessed: 06.01.2025).

55 Там само.

56 Про запобігання корупції : Закон України від 14.10.2014 р. № 1700-VII (зі змін. та допов.). URL: https://zakon.rada.gov.ua/laws/show/1700-18#n26 (date accessed: 06.01.2025).

57 Там само.

not, for example, obtaining new knowledge and/or finding ways to apply it (definition of scientific activity under Clause 12, Article 1 of the Law of Ukraine: *On Scientific and Scientific-Technical Activities* [58]) or *"activity in the creation, interpretation and performance of works"* (the definition of creative activity under Clause 21, Part 1, Article 1 of the Law of Ukraine: *On Culture* [59]).

A person who, despite the prohibition, has performed (by performing the procedural duties of a specialist) "other" paid work, cannot be considered a violator of the above anti-corruption prohibition, since the mechanism of preliminary (before the commencement of the paid activity) refusal to perform duties is exhausted by cases of disqualification of a specialist; a specialist must follow instructions and instructions. The possible refusal of the remuneration by the person himself does not eliminate the fact that payment (possibility of payment) for such activities is provided for by law. The interpretations of the Law of Ukraine: *On Prevention of Corruption* provided by the NAPC in this regard are quite clear:

"The restriction specified in paragraph 1 of Part 1 of Article 25 of the Law is not focused on remuneration based on the results of its activities other than the performance of the functions of the state or local self-government, namely, on engaging in such activities that are paid or can be paid.

Consequently, the fact that a person engages in another paid activity (the conditions for carrying out certain activities on a paid or gratuitous basis may be determined, inter alia, by law, employment or other agreement, charter and other documents of a legal entity), regardless of the financial results of such activities, will indicate a violation of these requirements of the Law" [60].

Since the person is involved as a specialist not by his own decision, the issue of bringing him to administrative responsibility under Art. 172-4: *Violation of restrictions on concurrent and concurrent with other activities* of the Code of Ukraine on Administrative Offenses (does not arise due to the absence of the offense, in particular the subjective party [61]. At the same time, impossibility of bringing to justice for the commission of a certain act is not at all equal to its legality.

According to Part 1 of Article 67 of the Law of Ukraine: *On Prevention of Corruption*, decisions taken in violation of the requirements of this Law are subject to **cancellation** by the body or official authorized to make or cancel them; such decisions may also be declared illegal in court (upon the application of an interested individual, association of citizens, legal entity, prosecutor, state authority, in particular the National Agency, local self-government body) [62]. This norm can be fully extended to decisions taken under the Code of Criminal Procedure, since *"the criminal procedural legislation of*

58 Про наукову і науково-технічну діяльність : Закон України від 26.11.2015 р. № 848-VIII (зі змін. та допов.). URL: https://zakon.rada.gov.ua/laws/show/848-19 (date accessed: 06.01.2025).

59 Про культуру : Закон України від 14.12.2010 р. № 2778-VI (зі змін. та допов.). URL: https://zakon.rada.gov.ua/laws/show/2778-17#Text (date accessed: 06.01.2025).

60 Методичні рекомендації щодо застосування окремих положень Закону України «Про запобігання корупції» стосовно запобігання та врегулювання конфлікту інтересів, дотримання обмежень щодо запобігання корупції / НАЗК : офіц. вебсайт. 2022. С. 61. URL: https://wiki.nazk.gov.ua/wp-content/uploads/2022/10/Metodychni-rekomendatsiyi-vid-21.10.2022-13.pdf (date accessed: 06.01.2025).

61 Кодекс України про адміністративні правопорушення від 07.12.1984 р. № 8073-X (зі змін. та допов.). URL: https://zakon.rada.gov.ua/laws/show/80731-10#Text (date accessed: 06.01.2025).

62 Про запобігання корупції ... . URL: https://zakon.rada.gov.ua/laws/show/1700-18#n26 (date accessed: 06.01.2025).

*Ukraine consists of <...> this Code and **other laws of Ukraine**"* [63]. Despite preponderance of the Code of Criminal Procedure over other regulatory legal acts, the provisions of which relate to criminal proceedings (Part 3 of Article 9 of Criminal Procedural Code of Ukraine), there is no conflict of procedural and anti-corruption laws as such: they complement each other [64].

Correlation between the right to work and imperative nature of the decision to involve a person as a specialist is important

According to Part 1 and 3 of Article 43 of the Constitution of Ukraine, *"everyone has the right to **work** which includes opportunity to earn a living by work that he freely **chooses or to which he freely agrees**"*, and *"the use of forced labor is prohibited. Military or alternative (non-military) service, as well as work or service performed by a person under a sentence or other court decision or in accordance with the laws on martial law and on a state of emergency, shall not be considered forced labor"* [65].

In Article 2 of the Convention on Forced or Compulsory Labor (hereinafter referred to as Convention No. 29), forced or compulsory labor is defined as *"any work or service which is exacted from any person **under menace** of any penalty and for which the said person has not offered his services voluntarily"* [66]. The Constitution of Ukraine prohibits only forced labor, while Convention No. 29 prohibits compulsory labor, and in Part 2 of Article 2 it stipulates exceptions to this definition: ordinary civic duties of citizens (b); execution of a sentence passed by a judicial body (c); small community work (e) [67]. While considering nature of the involvement of a specialist, some of the exceptions can be rejected (for example, small community work).

It is worth noting that Convention No. 29 does not so much prohibit as limit the scope of forced labor (its abolition is ensured by another Convention [68]). At the same time, another international treaty of Ukraine contains the same prohibition: according to Part 2 of Article 4 of the European Convention on Human Rights (hereinafter referred to as the ECHR), *"no one shall be required to perform forced or compulsory labor"* [69]. Like Convention No. 29, the ECHR provides for exceptions. They differ somewhat in text, as do Part 3 of Article 4 of the ECHR and Part 3 of Article 43 of the Constitution of Ukraine [70]. In particular, there is a significant difference

63 Кримінальний процесуальний кодекс ... . URL: https://zakon.rada.gov.ua/laws/show/4651-17#Text (date accessed: 06.01.2025).

64 Там само.

65 Конституція України ... . URL: https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text (date accessed: 06.01.2025).

66 Конвенція про примусову чи обов'язкову працю : підпис. Міжнар. орг. праці 28.06.1930 р. № 29 ; ратифік. УРСР 10.08.1956 р. URL: https://zakon.rada.gov.ua/laws/show/993_136#Text (date accessed: 06.01.2025).

67 Там само.

68 Конвенція про скасування примусової праці : підпис. Міжнар. орг. праці 25.06.1957 р. № 105 (зі змін. та допов.) ; ратифік. Законом України від 05.10.2000 р. № 2021-III. URL: https://zakon.rada.gov.ua/laws/show/993_013#Text (date accessed: 06.01.2025).

69 Конвенція про захист прав людини і основоположних свобод (Європейська конвенція з прав людини) : від 04.11.1950 р. ; ратифік. Законом України від 17.07.1997 р. № 475/97-ВР ; чинна для України з 11.09.1997 р. (зі змін. та допов.). URL: https://zakon.rada.gov.ua/laws/show/995_004#Text (date accessed: 06.01.2025).

70 Конвенція про захист прав людини ... . URL: https://zakon.rada.gov.ua/laws/show/995_004#Text (date accessed: 06.01.2025) ; Конституція України ... . URL: https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text (date accessed: 06.01.2025).

regarding acceptable coercion by court decision: in Article 2 of Convention No. 29 and Subparagraph "a" of Part 3 of Article 4 ECHR refers to permissible *"work which is normally required during <…> period of detention or conditional release"*, in paragraph "c" of Part 2 of Article 2 of Convention No. 29 about work or service required as a result of a sentence, while in the Constitution of Ukraine on sentence or other court decision [71]. On the other hand, the Constitution of Ukraine does not exempt *work or service "which is part of normal civic duties"* (paragraph "d" of Part 3 of Article 4 ECHR) [72]. Due to this difference, the same action can be considered a violation of the law (after all, the current international treaties of Ukraine, the consent to which was granted by the Verkhovna Rada of Ukraine are part of the national legislation, and their texts are an integral part of the laws on their ratification – Part 1 of Article 9, Part 1 of Article 19 of the Law of Ukraine: *On International Treaties of Ukraine* [73]), but not a violation of the constitutional right to work itself. It is also worth considering whether the work of a specialist is not a "normal" civic duty. Thus, the European Commission and the ECHR call "normal civic duties" works and types of service that have something in common with specialist activities: participation in a jury trial, firefighter service or payment of a monetary contribution instead, free medical consultations, emergency medical care [74], etc.

ECHR used Convention No. 29 to form its own position on the content of the prohibition specified in Part 2 of Article 4 of the ECHR [75], the key components of which: coercion can be not only physical, but also any work; coercion can take the form of a threat of any punishment; work is needed contrary to the will of the person concerned, for whom she did not offer her services [76].

Regarding the latter aspect, we note that the Criminal Procedural Code of Ukraine does not provide for the consent of a person who is involved as a specialist, even when it comes to an "invitation" to participate in a procedural action. We cannot speak of "tacit consent" (lack of objection by the specialist to his involvement), since the relevant appeal can be expressed only after the pre-trial investigation, and therefore, in a significant number of cases, after the work has been performed. The offer of his services by the person involved is not provided for in the case of a specialist. The situation with an expert is somewhat different: certified forensic experts who are not employees of state special institutions are included in the relevant Register on the basis of an application (clause 7 of

71 Конвенція про примусову … . URL: https://zakon.rada.gov.ua/laws/show/993_136#Text (date accessed: 06.01.2025) ; Конвенція про захист прав людини … . URL: https://zakon.rada.gov.ua/laws/show/995_004#Text (date accessed: 06.01.2025) ; Конституція України … . URL: https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text (date accessed: 06.01.2025).

72 Там само ; Конвенція про захист прав людини … . URL: https://zakon.rada.gov.ua/laws/show/995_004#Text (date accessed: 06.01.2025).

73 Про міжнародні договори України : Закон України від 29.06.2004 р. № 1906-IV (зі змін. та допов.). URL: https://zakon.rada.gov.ua/laws/show/1906-15#Text (date accessed: 06.01.2025).

74 Довідник із застосування статті 4 Європейської конвенції з прав людини — Заборона рабства і примусової праці. 2-ге вид. Рада Європи ; ЄСПЛ, 2014. С. 8—9, 12—13. URL: https://ks.echr.coe.int/documents/d/echr-ks/guide_art_4_ukr (date accessed: 06.01.2025).

75 Конвенція про захист прав людини … . URL: https://zakon.rada.gov.ua/laws/show/995_004#Text (date accessed: 06.01.2025).

76 Там само.

the Procedure for Maintaining the State Register of Certified Forensic Experts) [77]. Thus, the expert assumes the possibility of his involvement and the Register of Certified Forensic Experts is a means for the expert to offer his professional services to an indefinite circle of persons, an offer.

The decision to involve a specialist entails the obligation to perform certain actions. Despite the fact that some norms on the procedure for conducting investigative (search) actions refer to inviting a specialist (for example, in the case of a search: under Part 1 of Article 236 of the Criminal Procedural Code of Ukraine, *"investigator, prosecutor has the right to invite specialists to participate in the search"* [78]), the imperativeness of the investigator's (prosecutor's) decision does not disappear. Thus, the specialist is obliged to arrive upon summons to the investigator, inquiry officer, prosecutor, court and have the necessary technical equipment, devices and instruments with him; to follow the instructions of the party to the criminal proceedings that involved him, or to the court, and to provide explanations on the questions posed (Parts 1 and 2 of Part 5 of Article 71 of the Criminal Procedure Code) [79]. It is appropriate to consider the act of such involvement from the standpoint of the scientific literature on procedural coercion [80], range of objects of which is not limited to the suspect or the accused.

The degree of decision imperativeness on the involvement (participation, invitation) of a specialist confirms not only the procedure for its adoption, but also the review. An exhaustive list of decisions of the prosecutor, investigator or inquirer, complaints about which may be considered during the pre-trial investigation, is given in Part 1 of Art. 303 of Criminal Procedural Code of Ukraine; this list does not cover complaints about the involvement of a specialist: they are considered (like any other) during the preparatory court session (Part 2 of Art. 303 of Criminal Procedural Code of Ukraine) [81]. This means that the involvement of a specialist in procedural actions during the pre-trial investigation, the provision of certificates, conclusions has already taken place and such a specialist has performed paid work.

For determining the signs of imperative nature of the decision to involve a specialist, one should take into account the existence of responsibility for *"malicious evasion <...> from appearance"* in court (Part 3 of Art. 185-3 of the Code of Administrative Offenses) [82], pre-trial investigation bodies or the prosecutor (Art. 185-4 of the Code of Administrative Offenses) [83] and for refusing to perform the duties assigned to them without valid reasons, in particular, in court or during the pre-trial investigation (Part 1 of Art. 385 of the Criminal

77 Порядок ведення державного Реєстру атестованих судових експертів : затв. наказ. Мін'юсту України від 29.03.2012 р. № 492/5 (зі змін. та допов.). URL: https://zakon.rada.gov.ua/laws/show/z0484-12#Text (date accessed: 06.01.2025).

78 Кримінальний процесуальний кодекс ... . URL: https://zakon.rada.gov.ua/laws/show/4651-17#Text (date accessed: 06.01.2025).

79 Там само.

80 Грицак Х. М. Зазнач. твір. С. 47. URL: https://lpnu.ua/sites/default/files/2020/dissertation/1797/dismukanov-2.pdf (date accessed: 06.01.2025).

81 Кримінальний процесуальний кодекс ... . URL: https://zakon.rada.gov.ua/laws/show/4651-17#Text (date accessed: 06.01.2025).

82 Кодекс ... про адміністративні правопорушення ... . URL: https://zakon.rada.gov.ua/laws/show/80731-10#Text (date accessed: 06.01.2025).

83 Там само.

Code [84]). Thus, punishment is possible. Instead, there is no free offer of services by a specialist.

Therefore, if a specialist is not engaged on the basis of a court decision, his forced (even paid) labor is prohibited. The exception is the engagement of a specialist from among military staff, in case of corresponding decision by their commanders (superiors). Performance of duties or provision of services by a specialist as part of his official duties within the limits of *freely chosen work* is not forced labor, which makes acceptable to engage an employee of a state special institution as a specialist.

Evidence obtained as a result of a *significant* violation of human rights and freedoms guaranteed by the Constitution and laws of Ukraine, international treaties ratified by the Verkhovna Rada of Ukraine, as well as any other evidence obtained through information obtained as a result of such a significant violation are inadmissible (Part 1 of Art. 87 of the Criminal Procedural Code of Ukraine) [85]. The Criminal Procedural Code of Ukraine provides a list of significant violations (Part 2 of Art. 87), but inexhaustible (*"the court is obliged to recognize significant violations of human rights and fundamental freedoms, **in particular**, such acts"*) [86]. Therefore, at the same time as deciding on the existence of a human rights violation in case of forcing a specialist to perform certain work in criminal proceedings during the recognition of the admissibility of evidence, it is necessary to assess the "materiality" of such a violation.

With simultaneous involvement of several specialists, they should ensure equal pay

Remuneration of specialists is regulated by Article 122 of the Criminal Procedural Code of Ukraine, which, in particular, determines that *"the costs associated with the involvement of witnesses, specialists, translators and experts shall be borne by the party to the criminal proceedings who filed a motion to summon witnesses, involved a specialist, translator or expert, except in cases established by this Code"* (Part 1) and *"experts, specialists and translators must be paid remuneration for the work performed, unless this is their official duty"* (Part 4) [87]. The subordinate legislation corresponding to this Article [88] stipulates (Parts 1, 4 and 6) the following types of remuneration for specialists:

- preservation of average salary for all the time spent by them in connection with the *appearance and summons* to the pre-trial investigation bodies, the prosecutor's office, the court (to persons who are not employees of enterprises, institutions or organizations, pay *compensation* (reimbursement) for the break from normal classes);
- remuneration *for work performed*, if such work is not their official duty.

84 Кримінальний кодекс ... . URL: https://zakon.rada.gov.ua/laws/show/2341-14#Text (date accessed: 06.01.2025).

85 Кримінальний процесуальний кодекс ... . URL: https://zakon.rada.gov.ua/laws/show/4651-17#Text (date accessed: 06.01.2025).

86 Там само.

87 Там само.

88 Інструкція про порядок і розміри компенсації (відшкодування) витрат та виплати винагороди особам, що викликаються до органів досудового розслідування, прокуратури, суду або до органів, у провадженні яких перебувають справи про адміністративні правопорушення, та виплати державним спеціалізованим установам судової експертизи за виконання їх працівниками функцій експертів і спеціалістів : затв. постанов. КМУ від 01.07.1996 р. № 710 (зі змін. та допов.). URL: https://zakon.rada.gov.ua/laws/show/710-96-%D0%BF#Text (date accessed: 06.01.2025).

> The amount of remuneration of a specialist, if the work performed is not their official duty, is calculated for each hour in proportion to the *average salary of the person* calculated in accordance with paragraph 3 of clause 2 of the Procedure for calculating the average salary [89] (total amount of payment *cannot exceed* the amount calculated for the relevant time, taking into account the *triple amount of the subsistence minimum* for able-bodied persons).

Thus, the Procedure for Calculating Average Wage determines the amount of the average wage based on payments received by an employee, in particular, *"for the last two calendar months of work preceding the month in which the event to which the relevant payment relates occurs"* (paragraph 4, clause 2) [90]: that is, if two or more specialists whose salaries differ by their main place of work perform completely identical work in criminal proceedings, they receive different remuneration. This approach contradicts part 2 of Article 23 of the Universal Declaration of Human Rights: *"Everyone, without any discrimination, has the right to equal pay for equal work"* [91]. This problem is absent only when the amount of payment for each specialist is limited to the maximum amount three times the subsistence minimum. Therefore, it is advisable to involve specialists with the same level of salary.

Conclusions

Obtaining evidence with involvement of a specialist or directly providing them with relevant documents has a number of specifics:

- range of areas from which specialists of foreign states or international organizations can be involved in procedural actions is limited to weapons (chemical, biological, radiation, nuclear or another one). The types and content of the documents created by them are limited;
- before entering data on the committed criminal offense into the Unified Register of Pre-Trial Investigations, the specialist may, in urgent cases, provide *reference* on any issues within the scope of his/her knowledge. After such introduction, there are restrictions: it is possible to provide *conclusions* (on any issues) in the investigation of criminal misconduct, *certificates or conclusions* on the identification of a person, weapons, drugs, etc., as well as *certificates* in the case of fixing the indications of technical devices or means. The requirements for the form are conditioned only on conclusions of a specialist in the investigation of criminal offenses, such conclusions should meet requirements for forensic expert conclusion;
- product of activities of a specialist in criminal proceedings is not only evidence, but consultations, explanations and testimonies that are useful for a clear testimony understanding;
- not all norms on the procedure for carrying out procedural actions clearly mention the possibility of in-

89 Порядок обчислення середньої заробітної плати : затв. постанов. КМУ від 08.02.1995 р. № 100 (зі змін. та допов.). URL: https://zakon.rada.gov.ua/laws/show/100-95-%D0%BF#Text (date accessed: 04.02.2025).

90 Там само.

91 Загальна декларація прав людини : прийн. і проголош. резол. 217 A (III) Генасамбл. ООН від 10.12.1948 р. URL: https://zakon.rada.gov.ua/laws/show/995_015#Text (date accessed: 06.01.2025).

volving a specialist. Involving a specialist in conducting certain investigative (search) actions and covert investigative (search) actions, which rules do not provide for this, may result in the recognition of the prosecution's evidence as inadmissible. The same consequences arise from involving a specialist in matters that are outside his procedural subject matter competence, in particular, obtaining conclusions from a foreign specialist: a specialist in matters not related to weapons, as well as obtaining certificates or conclusions from a specialist, for example, regarding cultural values, special technical means of covertly obtaining information (and not weapons and ammunition, etc.), forged documents, falsified (and not potent) medicines, etc., i.e. on matters that are outside the scope defined by law;

- costs associated with the involvement of specialists are procedural. Specialists are entitled to remuneration for the work performed, which they are paid if this is not their official duty. Such work is a paid activity. The requirements of labor and anti-corruption legislation indicate the admissibility of involving as a specialist in criminal proceedings those categories of persons for whom the performance of the relevant work is due to official duties for freely chosen work (for example, in a state research institution of forensic examinations) or the duties of military service.

A rather significant number of specifics and discussion points that can restrain the parties to criminal proceedings from involving a specialist obviously require a comprehensive review of the institution of a specialist in criminal proceedings.

Допустимість у кримінальному провадженні доказів, отриманих за участі спеціаліста

Юрій Чечіль, Вікторія Біла, Станіслав Шептуховський

Сторони кримінального провадження збирають і перевіряють докази із застосуванням, зокрема, спеціальних знань та навичок спеціаліста, залученого до проведення відповідних процесуальних дій. Спеціалістом завжди є фізична особа, яка має права та свободи, наслідком порушення яких може стати втрата доказом ознаки допустимості. Змагальність у кримінальному провадженні зумовлює спрямованість зусиль на пошук вразливості доказів протилежної сторони. Мета цієї статті — виявити умови, за яких надані спеціалістом докази здатні зумовити питання про допустимість їх застосування у кримінальному провадженні. Досягнення такої мети потребує сукупного застосування низки наукових методів, включно із догматичним, герменевтичним і порівняльно-правовим. У законодавстві допоміжну роль спеціаліста окреслено доволі чітко: це виконання оплачуваних робіт, відмовитися від яких не можна, якщо залучення здійснено за рішенням суду, слідчого судді, слідчого або прокурора. Водночас відсутність трудового договору, соціального й загальнообов'язкового страхування, обліку трудового стажу тощо такого спеціаліста погано узгоджується із засадами соціального захисту в Україні. Оплатний характер утворює юридичну дилему в разі заборони представникам певних професій здійснювати, окрім основної роботи, іншу оплачувану діяльність. Законодавство не забезпечує рівної оплати за рівну працю спеціалістів. Нещодавні зусилля законодавця розширити коло випадків залучення спеціаліста до кримінального провадження призвели до необхідності розрізняти їх за належністю до іноземної держави або міжнародної *організації, за фахом і видами виконуваних робіт. Наведені правові умови стосуються сфери прав людини, і їх не можна ігнорувати. Наявний стан унормування залучення спеціаліста у кримінальному провадженні підвищує ризик порушення цих прав стороною, що вдається до такого залучення, насамперед — стороною обвинувачення. Можливі ситуативні рішення: незалучення публічних службовців або обмеження кола залучених спеціалістів виняткового працівниками державних спеціалізованих установ, прийняття ризику визнання доказів недопустимими, зміна урядового акта про оплату праці спеціалістів із запровадженням як основного критерію складності (наукомісткості, безпечності, гігієнічності тощо) робіт (а не за рівнем заробітної плати за основним місцем роботи спеціаліста) і/або залучення виняткового осіб із рівним рівнем оплати праці тощо — є половинчастими й лише підкреслюють доцільність системного перегляду інституту спеціаліста у кримінальному провадженні.*

Ключові слова: *примусова праця; інша оплачувана діяльність; залучення спеціаліста; допустимість доказу.*

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Authors declare no competing interests

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