

LIDIIA PALIUKH, OKSANA KALUZHNA

# Cooperation Between Law Enforcement Agencies of Ukraine and The Republic of Poland in Countering Criminal Election Offenses During Ukrainian External Voting, Committed Outside the Diplomatic Institutions of Ukraine in Post-War Conditions

## Abstract

The paper deals with the current legal issues of law enforcement agencies' cooperation during the criminal proceedings on election offences committed during the Ukrainian elections on the territory of the Republic of Poland. The article focuses on the most problematic situations when an election criminal offence is committed outside the territory of a diplomatic institution of Ukraine. Gaps in the legal regulation are identified, as well as issues that need to be additionally regulated in the agreement between Ukraine and the Republic of Poland on cooperation in the organization and conduct of Ukrainian elections in order to prevent election offences.

**KEYWORDS:** elections to state authorities of Ukraine; foreign election precinct; criminal election offense; criminal proceedings; legal assistance in criminal cases.

**LIDIIA PALIUKH**, Dr.Sc. in law, Ivan Franko National University of Lviv, ORCID – 0000-0001-7073-5457, e-mail: lidiya.palyukh@lnu.edu.ua

**OKSANA KALUZHNA**, associate professor, Ivan Franko National University of Lviv, ORCID – 0000-0002-5995-1383, e-mail: oksana.kaluzhna@lnu.edu.ua

# 1 | Introduction

Due to the full-scale aggression of the Russian Federation against Ukraine, the world is faced with many challenges. One of them is how to organize the future post-war parliamentary and presidential elections in Ukraine in such a way as to ensure active voting rights of Ukrainian citizens living abroad. Most of the countries of the world, including Ukraine, Poland, allow their citizens to vote outside the borders of the state (so-called „external voting”), the number of such countries has greatly increased in recent decades. If Ukrainian elections abroad are held, as usual, in the premises of diplomatic missions and consular institutions of Ukraine, less than 1% of Ukrainians will be able to vote.

Therefore, today Ukraine needs to work out the mechanisms of the best possible organization of elections in the foreign constituency, taking into account that about 20% of Ukrainian citizens are abroad (including refugees and those who lived abroad until February 24, 2023).

There are different estimates of the scale of migration caused by the Russian aggression against Ukraine. We will use data from the Office of the United Nations High Commissioner for Refugees (UNHCR), with the caveat that the actual numbers may be higher, since not all migrants from Ukraine were able to register as refugees. Thus, as of October 29, 2023, more than 6.2 million Ukrainians have gone abroad since the beginning of the war. About 5.8 million are in Europe<sup>[1]</sup>.

The most significant number of Ukrainian refugees with the status of temporary protection (as of January-February 2023) are in Poland – 1 million 563.39 thousand, in Germany – up to 881.4 thousand, in the Czech Republic – 485.1 thousand, in Italy – 169.31 thousand, Spain – 161.01 thousand, Great Britain – 158.8 thousand, Bulgaria – 151.71 thousand<sup>[2]</sup>.

Even if the next regular elections will be held after the end of the war, the calculation of Ukrainian voters abroad should be based on at least 60-70%

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<sup>1</sup> *Ukraine Refugee Situation*. Operational Data Portal, September 26, 2023. <https://data.unhcr.org/en/situations/ukraine/> [accessed: 27.09.2023].

<sup>2</sup> “У Європі зареєстрували вже майже п’ять мільйонів біженців з України”, 4 лютого, 2023. <https://www.ukrinform.ua/rubric-society/3665195-u-evropi-zareestruvali-vze-majze-pat-miljoniv-bizenciv-z-ukraini-oon.html> [accessed: 27.09.2023] („Almost five million refugees from Ukraine have already been registered in Europe”, February 4, 2023. <https://www.ukrinform.ua/rubric-society/3665195-u-evropi-zareestruvali-vze-majze-pat-miljoniv-bizenciv-z-ukraini-oon.html> [accessed: 27.09.2023]).

of those who are currently abroad. At the same time, Ukraine has now permanently established 102 polling stations abroad (100 – in Ukrainian diplomatic institutions, 2 – in military units (formations) deployed outside Ukraine)<sup>[3]</sup>.

For comparison, on the day of the election (presidential in 2019, in the first round – clarification by our – L.P., O.K.), 101 polling stations were in operation: 47 large (more than 1,500 voters), 15 medium (500-1,500 voters) and 39 small (up to 500 voters)<sup>[4]</sup>. Arithmetic calculations show that the maximum number of voters was about 250,000.

The problem of the „capacity” of foreign precinct election commissions within diplomatic institutions was very urgent even during the previous elections of 2019: huge queues, the impossibility of voting were noted by voters, journalists, international observers, as well as public organizations. Immediately after the 2019 elections, the need to significantly increase the number of election precincts by amending the relevant provisions of Ukrainian legislation was widely discussed.

The situation is predicted to worsen at the next Ukrainian elections in the foreign constituency. Therefore, the Central Election Commission of Ukraine, in Resolution № 102 of September 27, 2022 „On proposals for improving the legislation of Ukraine, aimed at ensuring the preparation and holding of elections after the termination or cancellation of martial law in Ukraine”, proposes to introduce the possibility of voting abroad outside the diplomatic institutions in future elections.

The creation of additional premises or places for voting outside the diplomatic institutions of Ukraine is one of the obvious ways to ensure the realization of the will of a significantly larger (compared to previous elections) number of voters abroad.

In the case of real implementation of such a possibility, it would be a significant innovation and laborious achievement of Ukraine’s bilateral

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<sup>3</sup> *About the Establishing of Foreign Election Precincts on a Permanent Basis*: Resolution of the Central Election Commission of Ukraine, June 25, 2020, № 118. <https://zakon.rada.gov.ua/laws/show/v0118359-20#Text/> [accessed: 27.09.2023].

<sup>4</sup> Ігор Решетняк, „Непотрібні голоси: чому не голосували 99% виборців закордонного округу” *Європейська правда*, 3 квітня 2019. <https://www.eurointegration.com.ua/experts/2019/04/3/7094702/> [accessed: 23.09.2023] (Ihor Reshetnyak, “Unnecessary votes: why 99% of the voters of the overseas district did not vote”, *Yevropeiska pravda*, April 4, 2019. <https://www.eurointegration.com.ua/experts/2019/04/3/7094702/> [accessed: 23.09.2023]).

agreements with almost all European states where there is a large number of Ukrainian citizens.

In the case of holding elections to the state authorities of Ukraine, it is predicted that some problems will arise in the foreign constituency in the event of election criminal offenses<sup>[5]</sup> and prosecution of guilty persons. These problems will be caused by gaps in legal regulation in national legislation as well as international legal acts.

Firstly, it should be noted that the procedure for criminal proceedings regarding election offenses will differ significantly depending on the place of their committing: 1) on the territory of diplomatic institutions of Ukraine abroad, 2) outside the diplomatic institutions of Ukraine abroad.

In the first case, diplomatic missions and consular posts are subject to the criminal jurisdiction of Ukraine (the application of criminal and criminal procedural legislation). The procedure for carrying out criminal proceedings on the territory of diplomatic institutions of Ukraine abroad is defined in Chapter 41 of the Criminal Procedure Code of Ukraine (hereinafter – CPC of Ukraine)<sup>[6]</sup>. In accordance with Part 1 of Art. 520 of the CPC of Ukraine, the head of a diplomatic mission or consular institution of Ukraine or an official designated by him is obliged to immediately carry out the necessary procedural actions after they become aware of circumstances that may indicate the commission of a criminal offense from a statement, notification, self-discovery or from another source offenses on the territory of a diplomatic mission, consular institution of Ukraine. Further, the collected materials are transferred through the Ministry of Foreign Affairs of Ukraine to the National Police of Ukraine (hereinafter – the NP of Ukraine). The investigator of the NP of Ukraine enters information about an electoral criminal offense into the Unified register of pre-trial investigations and starts a pre-trial investigation. If it is necessary to perform any procedural actions provided for by the CPC of Ukraine and the Code of Criminal Procedure of Poland, on the territory of Poland, the investigator, in agreement with the prosecutor, prepares a request, the form and

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<sup>5</sup> Regarding the meaning of the notion „election offenses”, we join the position of understanding it as a separate group of criminal offenses defined in the Chapter V of the Criminal Code of Ukraine (Tetiana P. Matiushkova, „Crimes against the electoral rights of citizens in Ukraine: the peculiarities of their committing and investigation” *Law and Safety*, No.1 (2019): 14. doi: 10.32631/ pb.2019.1.01. of crimes defined by chapter V of the Special Part of the Criminal Code of Ukraine.

<sup>6</sup> *Criminal Procedural Code of Ukraine*. The Official Bulletin of the Verkhovna Rada of Ukraine, 2013, No 9-10, 11-12, 13, art. 88.

content of which are determined by Art. 552 of the CPC of Ukraine. The request is submitted to the Polish police through the regional prosecutor's offices of Ukraine and the Voivodeship Prosecutor's Offices of the Republic of Poland<sup>[7]</sup>. The police of Poland fulfills the request of the Prosecutor's Office of Ukraine within the limits of the requirements for procedural actions formulated therein and does not have the authority to carry out any procedural actions on its own initiative. Since during the Ukrainian elections of 2019 there were no criminal proceedings regarding criminal election offenses committed in Poland, there are grounds to assert that the joint activity of the Ukrainian and Polish police in this area has not been tested or practiced.

This procedure is clear and relatively simple (as simple as procedures in the form of international legal assistance can be called), so we will leave it aside from the focus of attention of this research.

On the other hand, the second order of proceedings regarding criminal election offenses committed outside the diplomatic institutions of Ukraine has a red degree of difficulty. The territorial principle of validity of the criminal law of Ukraine does not apply to these offenses, nor can the national legislation of the Republic of Poland be applied. Hypothetically, in some cases, the Criminal Code of Ukraine may be applicable to these offenses based on the principle of citizenship or the real principle of criminal law in space, but it is impossible to extradite to Ukraine persons who have committed such offenses.

Thus, the immediate goal of the article is to analyze the state of legal regulation of cooperation between law enforcement agencies of Ukraine and the Republic of Poland in the investigation of criminal election offenses committed outside the diplomatic institutions of Ukraine on the territory of the Republic of Poland, to identify problems, gaps in legal regulation and propose their possible solution.

The research methodology includes logical, comparative-legal, dogmatic, systemic-structural and modeling methods.

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<sup>7</sup> Agreement between the General Prosecutor's Office of Ukraine and the Ministry of Justice of the Republic of Poland on the Implementation of Article 3 of the Agreement between the Republic of Poland and Ukraine on Legal assistance and legal relations in civil and criminal matters, dated May 24, 1993, signed on November 10, 1998. [https://zakon.rada.gov.ua/laws/show/616\\_013#Text](https://zakon.rada.gov.ua/laws/show/616_013#Text) / [accessed: 11.07.2023].

## 2 | Legal regulation of cooperation between law enforcement agencies of Ukraine and the Republic of Poland in the investigation of criminal offenses committed during elections on the territory of the Republic of Poland outside the territory of diplomatic institutions of Ukraine

### 2.1. Legal grounds for the cooperation between law enforcement agencies of Ukraine and Poland regarding countering criminal election offenses, maintaining public order during elections

In the case of committing a criminal election offense during Ukrainian external voting on the territory of the Republic of Poland outside the premises of diplomatic missions, consular institutions (that is, outside the premises of election precincts of a foreign constituency) of Ukraine, criminal liability is possible based on the principle of citizenship, in some cases – real principles of criminal law in space and will be carried out under Chapter IX of the CPC of Ukraine „International Co-operation in Criminal Proceedings”, as well as based on international agreements.

According to Art. 54 of the Agreement between the Republic of Poland and Ukraine on legal assistance and legal relations in civil and criminal matters of May 24, 1993 (hereinafter – the Agreement) each of the Contracting Parties shall undertake, at the request of the other Party, to prosecute its citizens, as well as foreigners who have their permanent residence in its territory, suspected of committing a crime in the territory of the requesting Contracting Party. The Contracting Parties may also apply for the adoption of criminal proceedings in respect of such infringements of law as, under the law of the requesting Contracting Party, constitute a crime and, under the law of the requested Contracting Party, a mere misdemeanor. In such cases (p. 1, 2 of Art. 54 of this Convention), the competent judicial authorities of the requested Party shall apply the law of their state.

## **2.2. Is the penal code of the republic of Poland applicable to election offenses in the Ukrainian elections?**

In the current Penal Code of the Republic of Poland of 1997, in the special part, there is a separate chapter XXXI entitled „Offenses against elections and referenda”.

At the same time, „the Penal Code of the Republic of Poland cannot be applied to criminal offenses against the electoral rights of citizens of Ukraine, since the criminal offenses provided for in Chapter XXXI of the Polish Penal Code have a different object under the legislation of the Republic of Poland – the public relations regarding the holding of elections to state bodies and local self-government bodies of the Republic of Poland, referenda in this state”. Hence, there is a problematic question about the validity of the legislation of Ukraine to the accountability for violations of electoral rights of citizens of Ukraine in Poland. It was noted above that in some cases the Criminal Code of Ukraine does not apply to criminal offenses against the electoral rights of citizens of Ukraine.

In some cases, the Criminal Code of Ukraine extends its application to criminal offenses against the electoral rights of Ukrainian citizens committed abroad outside the territory of the diplomatic institutions of Ukraine. This follows from the principles of the operation of the criminal law in the space – citizenship, real – provided in the Criminal Code of Ukraine. However, it does not cover all possible cases of committing criminal election offenses outside the diplomatic institutions of Ukraine abroad. Therefore, in this regard, there is a gap. At the same time, in those cases when the Criminal Code of Ukraine extends its action to these offenses committed outside the diplomatic institutions of Ukraine abroad (in the case under consideration – in the Republic of Poland), another question arises:

## **2.3. Is it possible to take over the criminal prosecution of criminal election offenses committed on the territory of the Republic of Poland**

The answer to this question can be given unequivocally on the basis of the current legal regulation: today it is impossible.

Article 54 of the Agreement between the Republic of Poland and Ukraine on legal assistance and legal relations in civil and criminal matters refers only to the obligation to take over the criminal prosecution of criminal offenses committed on the territory of the requesting party (Ukraine). Therefore, this article does not apply to criminal offenses against the election rights of citizens of Ukraine in the territory of the Republic of Poland. This article applies to cases when a citizen of the Republic of Poland or a foreigner permanently residing in the territory of the Republic of Poland has committed a criminal offense on the territory of Ukraine. The exception to this rule applies only to war crimes and crimes against humanity — in cases of these crimes, the acceptance of criminal prosecution applies even if they were committed outside the requesting Contracting Party.

#### **2.4. Are the pre-trial investigation bodies of the republic of Poland authorized to initiate criminal prosecution of persons who committed criminal election offenses during the Ukrainian elections in Poland outside the diplomatic institutions of Ukraine (including cases if additional premises or places for voting will be created outside the diplomatic institutions)?**

On the basis of the current legal regulation, the pre-trial investigation bodies of the Republic of Poland are not authorized to initiate criminal proceedings against persons who committed criminal electoral offenses during the elections to the state authorities of Ukraine on the territory of Poland outside the diplomatic institutions of Ukraine (including the polling stations outside the diplomatic institutions, if they are established and do not have the status of the premises of the diplomatic institutions of Ukraine). The criminal legislation of the Republic of Poland does not provide for liability for criminal offenses against the electoral rights of citizens of Ukraine. That is why in case of holding elections to state authorities outside the territory of diplomatic institutions of Ukraine in the Republic of Poland, there will be a noticeable gap in legal regulation. Then there will be a need to conclude an additional agreement between Ukraine and the Republic of Poland to resolve these issues. Also, a possible future agreement between Ukraine and the Republic of Poland, should take into account that the vast majority of Ukrainian citizens currently staying in Poland, in accordance with the Law „On Assistance to Citizens of Ukraine



in connection with the Armed Conflict in the Territory of this State”, fall under the status of foreigners who do not permanently reside in Poland. In particular, all citizens of Ukraine who arrived in Poland after February 24, 2022, are entitled to temporary protection, which gives them the right to reside in the country for a period of up to 18 months (from February 24, 2022, not from the date of entry).

According to Art. 19 of the Agreement between the Republic of Poland and Ukraine on legal assistance and legal relations in civil and criminal matters of 24 May 1993, legal assistance shall not be granted if its granting may cause damage to sovereignty or security or is contrary to the basic principles of the legislation of the requested Contracting Party. Due to the above problems with the application and extension of the criminal law of Ukraine, the question arises whether the application of the Ukrainian criminal law in Poland and the prosecution of persons for the offenses provided for by it, which are not recognized as such under the criminal law of the Republic of Poland, will not be considered as a violation of the sovereignty? In our opinion, this issue could be resolved only under the condition of the sovereign consent of the Republic of Poland, and in the case of such consent – noted in a possible additional agreement.

## **2.5. Are there other international legal acts based on which it is possible to provide international legal assistance in the prosecution of criminal offenses that fall under the jurisdiction of the authorities of Ukraine?**

The provision of international legal assistance in the prosecution of criminal offenses falling within the jurisdiction of the authorities of Ukraine is also possible on the basis of the European Convention on Mutual Assistance in Criminal Matters of April 20, 1959 (hereinafter referred to as the Convention)<sup>[8]</sup>, which Ukraine ratified by Law № 44/98-BP of January 16, 1998.

According to Part 1 of Art. 1 of the Convention, the Contracting Parties undertake to afford each other the widest measure of mutual assistance in proceedings in respect of offenses the punishment of which, at the time

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<sup>8</sup> *European Convention on Mutual Assistance in Criminal Matters*, April 20, 1959. <https://rm.coe.int/16800656ce/> [accessed: 11.09.2023].

of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party.

However, in accordance with paragraph a) of Art. 2 of the Convention, assistance may be refused if the request concerns an offense which the requested Party considers a political offense, an offense connected with a political offense, or a fiscal offense. At the same time, the question of the precise definition of a „political offense” or „an offence connected with a political offence” is referred to the requested party. Similarly, according to paragraph 6, Part 1, Art. 61 of the Agreement between the Republic of Poland and Ukraine on legal assistance and legal relations in civil and criminal matters extradition does not take place if the crime is political. Besides, there is no definition of terms in this Agreement, unlike, for example, in Art. 5 of the Agreement between Ukraine and the Republic of Panama on the extradition of offenders (ratified by Law No. 1716-IV of May 12, 2004), which clearly defines which crimes for this Agreement will not be considered political crimes related to a political crime or crimes for political reasons.

## 2.6. Is the concept of „criminal election offense” covered by the concept of „political offense” or „offence connected with a political offence”?

Since criminal election offenses belong to the sphere of formation of state authorities, it should be understood to what extent they fall under the signs of political offenses. In general, the concept of a political criminal offense and an offense connected with a political offense is not established either in the academic literature<sup>[9]</sup> or in the international practice of applying the Convention and treaties on legal assistance in criminal matters.

Since most extradition agreements do not define a „political crime” („political offence”), in the law enforcement practice of foreign this task is entrusted primarily to the courts. The courts have developed two categories: „pure political offences” and „relative political offences” (or purely and relatively political crimes). Pure political offenses are generally directed against a state’s political organization or government, containing no element of

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<sup>9</sup> Jeffrey I. Ross, *The Dynamics of Political Crime* (London-New Delhi: Sage Publications, 2003), 2

a common crime<sup>[10]</sup>. They are also defined as offenses in which the conduct of the subject demonstrates the exercise of freedom of thought, expression of opinions and beliefs (in words, symbolic actions, or writings that do not incite violence), freedom of association, and religious practice in violation of a law designed to prohibit such conduct<sup>[11]</sup>. Purely political crimes include, but are not limited to, treason, espionage, and sedition.

The definition of „relative political criminal offenses” is more problematic, since it covers both political and criminal elements, when the offender commits an ordinary criminal offense for ideological reasons. The parameters of this offense are difficult to formulate because the classification mixes political and criminal elements<sup>[12]</sup>.

The following criteria (tests) are used in the judicial practice of different states:

- the so-called „objective criterion”, according to which the political motives behind the offense do not make it a political crime<sup>[13]</sup>; this test considers as relatively political only an offense that is directly related to the rights of the State and the motives of the accused had been considered irrelevant<sup>[14]</sup>;
- the „incidence” test (used in the Anglo-American system), which requires the act to be incidental and form a part of political disturbances. There must be preliminary evidence that there had been political disturbances in the requesting State. Depending on the

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<sup>10</sup> Vincent. DeFabo, „Terrorist or Revolutionary: The Development of the Political Offender Exception and Its Effects on Defining Terrorism in International Law” *American University National Security Law Brief*, No. 2 (2012): 75. <https://digital-commons.wcl.american.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1037&context=nsfb>.

<sup>11</sup> Ana Muniesa, *The Political Offense Exception to Extradition*, 31 March 2018. <https://www.linkedin.com/pulse/political-offense-exception-extradition-ana-muniesa/> [accessed: 11.06.2023]

<sup>12</sup> Ibidem.

<sup>13</sup> DeFabo, „Terrorist or Revolutionary”, 79; Mark D. Kielsingard, *The Political Offense Exception: Punishing Whistleblowers Abroad*, 14 November 2013. <https://www.ejiltalk.org/the-political-offense-exception-punishing-whistleblowers-abroad/> [accessed: 11.07.2023].

<sup>14</sup> Kielsingard, *The Political Offense Exception: Punishing Whistleblowers Abroad*.

jurisdiction, the latter can range from mere fractious dissent to shooting wars<sup>[15]</sup>;

- a „proportionality” test that weighs „elements of a general criminal offense” against „the political motives or purpose of the offender”, allowing exceptions for a political criminal offense only in cases where the latter prevails over the former. This test examines the political motivation of the person who committed the offense and the circumstances of the offense, and applies one of two standards: proportionality between means and political ends, or the superiority of the political elements over the general elements of the offense<sup>[16]</sup>.

J.I. Ross divides political crimes into two types according to their targets: oppositional (or anti-systemic) and state (or pro-systemic)<sup>[17]</sup>. Similarly, K.D. Tunnell defines political crime as an illegal offense against the state with the intention of affecting its political or economic policies, or an illegal domestic or international offense by the state and its agents<sup>[18]</sup>.

In order to avoid possible misunderstandings with the reference by the courts of the Republic of Poland of criminal election offenses to political criminal offenses (criminal offenses of a political nature), criminal offenses connected with a political offense, or criminal offenses for political reasons, the remark that criminal election offenses are not regarded by the Contracting States as political, in our opinion, needs to be clearly defined in a possible future agreement between Ukraine and the Republic of Poland.

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<sup>15</sup> Ibidem; DeFabo, „Terrorist or Revolutionary: The Development of the Political Offender Exception and Its Effects on Defining Terrorism in International Law”, 80-82.

<sup>16</sup> Kielsingard, *The Political Offense Exception: Punishing Whistleblowers Abroad*.

<sup>17</sup> Jeffrey I. Ross, *An Introduction to Political Crime* (Bristol: Policy Press, 2012), 9.

<sup>18</sup> Kenneth D. Tunnell, *Crime, Political*. <https://doi.org/10.1002/9781405165518.wbeosc152>. <https://onlinelibrary.wiley.com/doi/epdf/10.1002/9781405165518.wbeosc152>.

## **2.7. What actions can the Polish police take on their own initiative to secure order and prevent offenses during elections for public authorities of Ukraine on the territory of the Republic of Poland?**

The Polish police maintains law and order on the territory of the country. However, the immunity of the diplomatic institutions of Ukraine in the Republic of Poland does not allow them to perform actions within their boundaries at their own discretion. At the same time, the Polish police can respond to offenses related to elections to the state authorities of Ukraine on the territory of Poland and committed outside the diplomatic institutions of Ukraine in Poland. First of all, it goes about the “obvious” general (not election) offenses (against life and health, against public order such as inflicting bodily harm on election participants, organizing fights, encroachment on the life of an observer, terrorism, arson, theft of documents, etc.). Such actions will be the subject of the response of the Polish police, both on its own initiative and at the request of persons (including citizens of Ukraine, or official observers).

## **3 | Possibilities of improvement of cooperation between law enforcement agencies of Ukraine and Poland in countering electoral criminal offenses during Ukrainian external voting committed outside the diplomatic institutions of Ukraine**

The organization of additional election precincts (places) for voting in the Foreign Constituency outside the diplomatic institutions of Ukraine is more than just a managerial (technical) issue. This is primarily the issue of determining their temporary (during the voting) public legal status, because the operation of criminal and criminal procedural legislation of Ukraine with all the resulting jurisdictional problems depends on it. This issue should be resolved taking into account the principles of state sovereignty and non-interference in the internal affairs of the state (Article 7, Paragraph 2

of the UN Charter), because Ukraine organizes elections abroad in the person of authorized authorities (precinct election commissions), ensures their honesty and objective result. That is, the state that conducts external voting needs to ensure the jurisdiction of its legislation's jurisdiction and authority over the voting places. Otherwise, it will be impossible to bring violators of the election process to criminal responsibility either under the law of Ukraine or the law of the Republic of Poland. It would be rational to equate additional voting places for the period of voting, preparation for it and counting of votes by status to the territories of diplomatic institutions of Ukraine. The resolution of this issue is possible only through the agreement between the Republic of Poland and Ukraine. Such an additional agreement may also regulate the procedure of renting additional precincts, cooperation of Polish state authorities and local authorities with diplomatic missions and consulates of Ukraine, etc.

Is it possible to conclude such an agreement, taking into account the fact that it is important for the EU member states to distinguish between national sovereignty and the law of the EU, since the member states have transferred some of their sovereign powers to the EU institutions?

The basic principles of this distribution are laid down by the Treaty on European Union (Maastricht Treaty)<sup>[19]</sup>. This led to a certain legal conflict during its ratification by certain states and resistance of national constitutional courts (of France, Germany, and Spain) to the primacy of European law.

The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (2007) delimited competencies between the EU and its member states<sup>[20]</sup>. Accordingly, three types of competences of the reformed European Union appeared: exclusive competences of the European Union, shared competences and supporting competences.

Based on the analysis of part 1 of Art. 2a, Part 2 of Art. 2a, part 2 of Art. 2b, Chapter 1 of the Treaty of Lisbon, the following conclusions can be drawn:

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<sup>19</sup> *Treaty on European Union (Maastricht Treaty)*, 7 February 1992. <https://www.europarl.europa.eu/about-parliament/en/in-the-past/the-parliament-and-the-treaties/maastricht-treaty/> [accessed: 27.09.2023].

<sup>20</sup> *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*, 13 December 2007. <https://eur-lex.europa.eu/eli/treaty/lis/sign#d1e3924-1-1> / [accessed: 27.09.2023].

- a. the conclusion of international treaties is the exclusive competence of the EU under certain conditions: when they are concluded on behalf of the entire EU, when they affect the general rules of the EU or change them (the agreement on cooperation between Ukraine and the Republic of Poland in the conduct of elections to the authorities of Ukraine does not fall under this criterion);
- b. the agreement on cooperation between Ukraine and the Republic of Poland on the conduct of elections to the authorities of Ukraine does not fall under the general rules for the conclusion of mixed agreements (in EU law, agreements are called mixed when the object of the international agreement falls not only under the competence of the EU, but also of its member states, such an international agreement (with a third country) is signed by the EU together with the member states. Mixed agreements may also be necessary when the financial obligations under this agreement are their important element, and the financial responsibility rests on the States Parties. Such agreements help to prevent possible problems related to different interpretations by the EU and the Member States concerning the distribution of competence in relations with third countries since the competence of the EU has a steady tendency to expand; third countries often struggle to determine who specifically — the EU or the Member States — has powers on a particular issue);
- c. the area of „freedom, security and justice” belongs to the joint competence of the EU and Poland, therefore, under certain conditions, this area belongs to the sovereignty of the Republic of Poland as a member state of the EU.

These conditions will be outlined below.

In the scope of „police cooperation” Art. 69F of the Chapter 5 of the Title II „General Provisions” of the Treaty of Lisbon states: „The European Parliament and the Council, acting under the ordinary legislative procedure, may establish measures concerning:

- a. the collection, storage, processing, analysis and exchange of relevant information;
- b. support for the training of staff, and cooperation on the exchange of staff, on equipment and on research into crime-detection;

- c. common investigative techniques in relation to the detection of serious forms of organised crime”<sup>[21]</sup>.

In the area of „judicial cooperation in criminal matters”, the provisions of Art. 69a of Chapter 4 of Title 2 „General Provisions”<sup>[22]</sup>.

To the extent necessary to facilitate mutual recognition of judgments and sentences and police and judicial cooperation in criminal matters with a cross-border dimension, the European Parliament and the Council, acting by means of directives in accordance with the ordinary legislative procedure, may lay down minimum rules. Such rules should take account of the differences between the traditions and legal systems of the Member States.

They relate to:

- a. the mutual admissibility of evidence between Member States;
- b. the rights of a person in criminal proceedings;
- c. the rights of victims of crimes;
- d. other features of criminal proceedings determined in advance by a decision of the Council; in taking such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.

Adopting the minimum standards referred to in this paragraph shall allow Member States to maintain or introduce a higher level of protection for persons.

This leads to the conclusion: if Poland, by concluding an agreement with Ukraine on providing assistance in holding elections to the state authorities of Ukraine on the territory of the Republic of Poland, does not introduce new standards in a certain range of issues that will worsen the situation of persons, but proceeds (will proceed) on the basis of already established rules in EU law and Polish national law, such a bilateral agreement does not require the maintenance, approval or consent of the EU institutions.

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<sup>21</sup> e.g. *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*, *supra* note, 31.

<sup>22</sup> e.g. *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*, *supra* note, 31.



## 4 | Conclusion

In conditions when, as a result of Russian aggression against Ukraine, about 20% of Ukrainian citizens are abroad, it will be impossible to organize future post-war elections to Ukrainian state authorities abroad under the existing system of election precincts in the foreign constituency on the territory of Ukrainian diplomatic missions and consulates. In such conditions less than 1% of Ukrainian citizens will be able to vote. In such a situation Ukraine is forced to create additional election precincts, however, it cannot do this unilaterally and should start the negotiation process and conclude bilateral agreements at the level of an interstate agreement with states where a significant number of Ukrainians reside.

In such bilateral agreements on assistance to the Ukrainian authorities in the conduct of elections, it is possible to provide for the procedure of providing additional voting premises for rent; interaction of state authorities and local self-government of a European state (the Republic of Poland) with diplomatic missions and consulates of Ukraine; maintaining order at election precincts; equalize the public legal status of the premises for voting at the period of voting to the premises of diplomatic institutions of Ukraine; clarify that criminal election offenses are not considered by the Contracting States to be political or connected with political. The conclusion of such bilateral agreements between Ukraine and the EU member states is possible. It would not require the approval of the EU institutions under the conditions that the EU state in the agreement would proceed from already established standards in EU law and in its national law. The agreement would not introduce new standards that worsen the situation of people.

Potentially, the greatest problems would arise in criminal election offenses committed outside the territory of a diplomatic institution of Ukraine. The bodies of the pre-trial investigation of Poland (or any other European state) are not authorized to start (initiate) criminal prosecution of the persons who committed them. Therefore, in the case of creating additional election precincts outside the territory of diplomatic institutions of Ukraine in the Republic of Poland and not equating them in terms of status to the territory of diplomatic institutions of Ukraine, it will not be possible to bring offenders to justice either under the Criminal code of Ukraine, or under the Penal Code of the Republic of Poland.

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