

## Circumstances to be proved in the investigation of violations of the laws or customs of war

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■ **Abstract.** Investigating violations of the laws and customs of war is a relatively new area of activity for law enforcement agencies in Ukraine. Although some experience of such investigations has existed since 2014, the international armed conflict that began on February 24, 2022, identified almost all forms (methods) of violation of the laws and customs of war, which requires a comprehensive analysis and correct understanding of the rules of international humanitarian law that define the rules for participants in armed conflict. The purpose of the research is to define some circumstances to be proved in the course of the investigation of violations of the laws and customs of war and to disclose their content with due regard for the rules of international humanitarian law which determine the specifics of the object of proof in such criminal proceedings. The research employs philosophical (dialectical and hermeneutical), general scientific (systemic, historical, functional), and special scientific (comparative jurisprudence, technical-legal, and interpretation of legal provisions) methods of cognition. The work is based on the provisions of the treaty and customary law of armed conflict, the practice of its application at the national and international level, national law providing for liability for violation of the laws and customs of war, the procedural procedure for investigating criminal offences, and forensic recommendations for investigating particular types of crimes. Based on the results of the research, the author develops several circumstances to be proved in the course of investigation of the laws and customs of war as separate but related to other elements of the object of proof, namely: lawful combatants, combatant's immunity; territorial and time limits of international humanitarian law; legitimate purpose, military necessity. Their content, evidentiary value, and relationship are covered

■ **Keywords:** pre-trial investigation, international humanitarian law; evidence; combatant; legitimate purpose; military necessity

### ■ Introduction

The specific feature of the investigation of violations of the laws and customs of war is the necessity to apply the rules of international humanitarian law (IHL), which contains several restrictions and prohibitions on the methods and means of warfare to minimise the devastating effects of armed conflict, protect civilians, infrastructure, cultural heritage, dangerous

objects, etc. Thus, the object of proof in such criminal proceedings should be determined according to the general theoretical and legal requirements for its construction, with the identification and specification of elements that cover the essence and content of acts considered by international and national law to be violations of the laws and customs of war. It will allow for avoiding mistakes in criminal legal qualification, initiation of criminal proceedings against persons who are not subject to criminal liability for participation in hostilities and other shortcomings, in particular, loss of evidentiary information or incomplete/incorrect recording, interpretation and processing.

The development of a high-quality evidence base in the investigation of violations of the laws and

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customs of war is important both for national practice and for international mechanisms for bringing perpetrators of such crimes to justice. Therefore, it is important to develop scientifically based proposals for investigating violations of the laws and customs of war, namely, to identify and specify the circumstances to be proved. The scientific originality of the work is based on the fact that this issue has not previously been the object of a separate study, and on using an integrated approach that includes consideration and combination of provisions of various branches of knowledge – international law, criminal law, criminal procedure, and forensics, which ensures the comprehensiveness and completeness of the scientific research.

Particular issues of interpretation and application of IHL have been explored by Ukrainian and foreign scholars [1-3]. Referring to some of the results allows for improving the understanding of the terminology and clarifying the specifics of IHL application to particular legal situations.

For example, research on the jurisdiction of the Nuremberg Tribunal, which paved the way for the jurisdiction of national and international courts over crimes under international law, while prompting the evolution of the relevant law on immunity from jurisdiction [1], covers the specific features of international responsibility for war crimes, including violations of the laws and customs of war. Security issues during hostilities, in particular, and the restriction of actions of participants in a military conflict using IHL [2-4] are relevant for determining the limits of application of IHL when defining the object of proof under national law. The analysis of the signs of terrorism in the context of military conflicts [5; 6] allows for distinguishing acts of terrorism from violations of the laws and customs of war and affects the determination of the legal status of participants in a military conflict. Determining the scope of human rights during a military conflict [7-9] affects the legitimacy of restrictions allowed by international and national law in such cases. The issues of harmonisation of domestic legislation and IHL [10-12] are relevant to ensure the same or close understanding of IHL as the legal basis for the regulation of armed conflicts.

Concerning the investigation of violations of the laws and customs of war in Ukraine, some issues of qualification and evidence in criminal proceedings on violations of the laws and customs of war and related issues have been explored in the works of domestic authors: A. Melnychuk and S. Melnychuk cover general approaches to the qualification and investigation of violations of the laws and customs of war [13], A. Shulzhenko emphasises the conduct of expert research in the investigation of the laws and customs of war [14], K. Savchuk explores the historiography of research in this area [15], I. Glowiyuk

and H. Teteryatnik address the issue of the contextual element in the object of proof in war crimes proceedings [16]. Other issues of liability for war crimes are explored by: O. Kaplina & O. Leyba [17] in light of the problems of legal regulation and functioning of military justice; O. Kaluzhna & K. Shunevych [18] on the mechanisms of responsibility for war crimes committed as a result of Russia's invasion of Ukraine in February 2022; O. Khotynska-Nor & N. Bakaianova [19] on the transformation of the advocacy in wartime; O. Uhrynovska & A. Vitskar [20] on the administration of justice during military aggression against Ukraine; A. Antonyuk [21] on the criminal law assessment of collaborationism.

The significant contribution of these and other scholars who have devoted their work to the interpretation, application, and enforcement of IHL, its implementation and its impact on national law, provides the foundation for new research, which is primarily motivated by the demands of law enforcement.

The purpose of the research is to define some circumstances to be proved in the course of the investigation of violations of the laws and customs of war and to disclose their content with due regard for the rules of IHL which determine the specifics of the object of proof in such criminal proceedings.

## ■ Materials and Methods

The methodological tools of the research are a combination of philosophical, general scientific and special scientific methods of cognition, which allowed obtaining new knowledge about the specifics of proof in the investigation of violations of the law and customs of war, considering the provisions of IHL.

Philosophical methods guided the research in general. The dialectical method allowed the development of a general idea of the structure, functions, connections, and development of the legal phenomena and processes under study. Thus, the author identifies the connections of national law with international law and other social, political, and economic phenomena, and the impact on the areas, forms, and results of its development. The hermeneutic method is applied to clarify the essence and interpretation of the content of IHL provisions containing vague, ambiguous wording and their interpretation, considering the legal positions of international courts and scientific research.

General scientific methods, as the foundation of any scientific knowledge, include: a systematic method used to determine the individual elements of the object of proof in its general system (internal connection), their connection with other components of this system and the tasks of criminal proceedings in general (external connection). The historical method allowed for clarifying the preconditions for the emergence, causes and areas of development of IHL. The functional method is used to develop an idea of the

relationship, interaction and development of different systems of law in the context of the subject of the research.

Specialised scientific methods are designed to understand the specifics of the phenomena and processes under study. The method of comparative jurisprudence (comparativistics) is used to explore the system and provisions of IHL to identify its general characteristics and features; the technical and legal method and the method of interpretation of legal provisions are designed to define specific concepts (combatant, legitimate aim, military necessity, etc.) and their content, and to determine the legal significance for law enforcement, including evidence.

## ■ Results and Discussion

Evidence, as the foundation of any investigation, always involves consideration of the specifics of a criminal offence, the circumstances of its commission, and, in the case of violation of the laws and customs of war, the application of IHL, which affects the development of all components of the object of proof. From this standpoint, some circumstances to be proved in criminal proceedings on violation of the laws and customs of war are defined. In addition to the above, the circumstances to be proved during the investigation of the laws and customs of war are covered in other publications of the author [22].

The proposed recommendations can be applied in the practice of investigating violations of the laws and customs of war and other criminal offences, in the investigation of which they can have evidentiary value. The list of circumstances to be proved is not exhaustive; it can be supplemented with other circumstances according to the specifics of a particular proceeding.

**Lawful combatants. Combatant immunity.** IHL defines rules and restrictions for parties to an armed conflict, including the protection of civilians (general prohibition of attack, avoidance and prevention of excessive impact of hostilities, and taking security measures, etc.), restrictions on means and methods of warfare, rules for the treatment of prisoners of war, the legal status of combatants, etc.

Establishing the status of a person is important for determining their legal position, which can affect their criminal liability, the correct qualification of their actions, and the necessity to comply with special requirements due to their status (e.g., prisoner of war). It concerns the violation of the laws and customs of war and is relevant to other crimes.

Although IHL does not define the concept of "lawful combatant", but only "combatant", this research uses it to specify the status of persons who take or have taken part in hostilities, the scope and content of their immunity, the extension of some legal provisions, guarantees, and related legal situations.

The main and defining feature of a legal combatant is their right to participate in hostilities, to perform these actions, and to support them. Accordingly, an unlawful combatant [23] is a person who does not have such a right but performs these actions despite their current status.

Thus, an unlawful combatant should be distinguished from a non-combatant, which is generally considered to be a civilian protected by IHL, and persons not participating in hostilities but belonging to the armed forces.

Thus, the immunity of civilians (from attack) and the immunity of combatants (from criminal prosecution) provided for in IHL vary substantially depending on the status of these persons.

The status of a person during a military conflict is not necessarily permanent, it can change depending on the circumstances, thus, it is important to establish the status of a person before the offence, at the time of its commission and afterwards. It is important from the standpoint of the possibility of bringing a person to criminal liability, proper qualification and proof of a criminal offence.

Notably, the loss of civilian protection as a result of incompatible actions still implies the necessity to minimise the danger during an attack. For example, if civilians physically, without using weapons, obstruct the actions of the enemy military that are essential to a military operation, such civilians can lose the protection of IHL as civilians, but the military, in overcoming the obstacles created, must take precautionary and proportionate measures to avoid excessive harm. In this situation, if the military uses lethal force or other disproportionate force and measures against unarmed civilians who have lost this status as a result of actions incompatible with their status, these actions of the military will constitute a violation of IHL, and thus a loss of the combatant's immunity from criminal prosecution for participation in hostilities.

According to the Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of June 8, 1977 (Article 43, paragraph 2) [24], and the Geneva Convention relative to the Treatment of Prisoners of War [25] (Article 4A, paragraphs 1, 2, 3, 6), lawful combatants have the right to participate in hostilities and not be prosecuted for it, if they have not committed crimes.

According to the content of these documents [24; 25], it is proposed to distinguish a system of features that should be considered in conjunction with the determination of the presence/absence of a person's status as a legal combatant. These features include:

- the presence of a military conflict;
- belonging to the armed forces, which, according to IHL, include both military personnel and other

persons, such as irregulars, who may participate in hostilities;

- the presence of a command responsible for the behaviour of its subordinates;
- compliance with the requirements for identification as a participant in hostilities;
- the obligation to comply with IHL.

Thus, a person's service in the armed forces and participation in hostilities, unless they have violated the laws and customs of war (or other crimes), is not an independent ground for prosecution.

The provisions on detention within criminal proceedings, application of preventive measures, etc. do not apply to combatants who are not held criminally liable. The apprehension and detention of prisoners of war are regulated by other legal provisions.

The capture and detention of a person in captivity (temporary restriction of liberty) are not intended to bring them to criminal liability or to ensure criminal proceedings but are implemented to prevent their further participation in hostilities. Therewith, holding a person as a prisoner of war does not mean that it is impossible to bring them to criminal liability based solely on their status as such.

**The territorial and temporal limits of IHL** as a component of the object of proof are related to others – the setting of the violation of the laws and customs of war, the connection of a person's actions with the conditions of military conflict [22]. It allows concluding that IHL applies throughout the territory of states involved in armed conflict and covers all situations related to this conflict. Thus, these are not necessarily exclusively the territories where hostilities are conducted, but all the territories of the countries at war, they can be territories where no hostilities are conducted, occupied territories. All parties to an armed conflict are obliged to comply with IHL.

It should be noted that IHL technically applies until the end of the armed conflict (except for the obligation to disseminate knowledge of IHL, which is implemented in peacetime). But this does not mean that the conclusion of peace and the end of the occupation are absolute conditions for the termination of IHL. The criterion for such termination is all the grounds on which IHL no longer applies. However, IHL does not cease to apply to the consequences resulting from a military conflict and requires the application of relevant rules, for example, about persons who remained detained in connection with a military conflict after its end, if the occupation regime remains, etc.

Thus, proof implies the necessity to determine whether a criminal offence was committed while IHL was in force on a certain territory, the status of this territory (relevant for determining the method), and if the military conflict has ceased, what consequences are governed by IHL.

Evidently, it is not always possible to accurately define when a conflict is over, particularly in cases where there is no surrender or official declaration of the end of the war. Thus, this issue should be based on the real situation and the position of the state party to the conflict and international bodies (e.g., the UN) on the situation, namely, the assessment of the state of military conflict. It can only be said unequivocally that the cessation of hostilities does not always mean the end of the conflict, thus, this circumstance should be considered only in conjunction with others.

Concerning occupation, the International Committee of the Red Cross and Red Crescent has defined the following three conditions that must be present in a situation for a regime of occupation to arise under IHL:

1. The physical presence of the armed forces of a state on a foreign territory without obtaining the consent of the local authorities in power at the time of the invasion.

2. The existing local authorities that were exercising their powers during the invasion have been or can be deprived of the opportunity to exercise their powers, to a large extent or in full, due to the presence of foreign forces that were not consented to.

3. Foreign forces can exercise authority over the relevant territory (or part thereof) instead of local authorities [26].

Taken together, these conditions constitute the so-called effective control test, which is used to determine whether a situation can qualify as an occupation for IHL [26].

These provisions can be used as a foundation for establishing the fact of occupation, with the specification of the actual circumstances in each case.

In addition, it is important to emphasise that IHL provisions are general and comprehensive, applying to all parties to an armed conflict, and require measures to ensure that the other party complies with them.

**A legitimate purpose. Military necessity.** An analysis of the provisions of IHL demonstrated that attacks on objects that are not legitimate targets are generally prohibited. The author believes that a legitimate purpose – is a category that can undergo transformations considering various factors of a particular situation, and, above all, the connection with military actions, operations, and requirements.

A correct understanding of these concepts is important for establishing the circumstances of the offence and whether it contains signs of violation of the laws and customs of war. As the author has already noted, IHL contains several prohibitions, restrictions, and obligations relating to various actions and measures related to military conflict. These include the distinction between civilians and combatants, military objectives, objects related to military operations and civilian objects as possible targets of

attack. The distinction between civilian and military objects is based on the principle that civilian objects are all objects that are not military. Doubt as to whether an object belonging to the military is interpreted in favour of that object, i.e. it is considered civilian.

Part 2 of Article 52 of Protocol I [24] states that attacks must be strictly limited to objects. Evidently, this refers to material items (objects). The characteristics of military objectives include their nature, location, purpose or use, which constitute an effective contribution to military operations. Therewith, when determining whether they are the object of attack, it matters whether there will be a clear military advantage if the attack results in partial or complete destruction, capture or neutralisation of a military objective (Article 52 of Protocol I) [24].

Thus, a military facility must comply with these criteria in aggregate and at a specific point in time. Effective contribution to military operations and military superiority should be determined specifically by the current situation. It corresponds to the regulatory statements, namely: “under the circumstances as they currently exist”, “make an effective contribution” “provide a clear military advantage”, and “object in use”, i.e., referring to the present, not to events and circumstances in the future.

A broad interpretation of these circumstances will establish artificial and unlimited grounds for determining virtually any object as a military and therefore legitimate target, which will negate the protection of IHL as such. Thus, if the ultimate purpose of armed aggression – gaining political advantage – is applied to any military action, then from this perspective, almost all such actions will be justified.

As stated by the author, the distinction between civilians and combatants is made according to the definition of these persons contained in IHL, the main criterion being participation in hostilities (use of weapons, attacks (but not self-defence), destruction of property related to hostilities), and the principle that if there is doubt as to whether a person is a civilian or a combatant, such person is considered a civilian.

The possibility of an attack on legitimate targets does not preclude the obligation to take security measures to reduce the consequences of the attack or prevent it (Article 57 of Protocol I) [24].

Thus, the necessity of gaining military advantage as the purpose of an attack does not justify unnecessary, excessive risks, losses, and destruction, especially those not related to neutralising or weakening the enemy. Military necessity cannot justify a violation of the principle of proportionality.

Proportionality is assessed on a case-by-case basis, in particular, considering the following circumstances: what measures were taken to determine whether the target was legitimate; whether there was a military necessity for the attack; the location of the

target; whether the weapons used comply with the requirements of selective action and are proportionate to the characteristics of the target; and whether sufficient measures were taken to prevent excessive impact.

Thus, destruction, extermination, killing as an end in itself, without military necessity and not for legitimate purposes, constitutes a violation of the laws and customs of war or another crime, depending on the circumstances and the connection of these actions with the military conflict.

The party under attack has the obligation to protect civilians and limit the consequences of the attack – to ensure, as far as possible, that military objectives are located away from densely populated areas, to prohibit using civilian participation in military operations and related activities, etc.

Military necessity should not be considered as a generally permissible derogation from the obligation to comply with IHL, but rather should be determined on a case-by-case basis, based on objective circumstances, and tested against the requirements and indicia established by IHL. The essence and purpose of IHL, which is to reduce the consequences of armed conflict, determine its content, which mainly consists of restrictions and prohibitions and some provisions relating to specific rights. Thus, in proving the presence/absence of military necessity, it is necessary to proceed from the general prohibition of undue influence and then determine whether particular actions comply with the signs of military necessity as defined in IHL.

The conducted research, which had the purpose of identifying some circumstances to be proved during the investigation of violations of the laws and customs of war, in addition to its main purpose for use in law enforcement practice, contributes to the expansion and deepening of scientific and practical knowledge about the content of IHL [2; 4; 10], the specific features of their interpretation, interpretation and application in modern conditions, namely, during the tasks of investigating violations of the laws and customs of war and/or other crimes connected with military conflict (if the law enforcement officer sees such a necessity).

Development of the circumstances to be proved in the course of investigation of violations of the laws and customs of war is based on the scientific works [12-14] associated with the subject of research and reflecting the current situation of military conflict, its impact on various legal relations and procedural situations in criminal proceedings which arise, develop and terminate during and in connection with military conflict. This ensures the comprehensiveness and completeness of the research and its connection with doctrine and practice at various levels.

Thus, the criminal legal qualification and concept of war crimes, in particular violations of the laws and customs of war, determine the area and applied

tasks of pre-trial investigation in relevant criminal proceedings and provide the foundation for the list of circumstances to be proved. As noted by A.I. Melnychuk & S.M. Melnychuk, war crimes are serious violations of international humanitarian law (principles, provisions, rules, laws and customs of war in force during hostilities and applicable to the parties to the conflict); violation of prohibitions contained both in the treaty and customary law, which does not assess the legitimacy of armed conflict, can be equally applied to both the aggressor and the victim. As their main vocation is to limit the warring parties to violence that exceeds the amount necessary to weaken the enemy's military power and against those who are not involved or have ceased to participate in the conflict [13, p. 72]. This definition mentions all the main elements that are relevant to evidence in criminal proceedings for violations of the laws or customs of war and to which special attention is paid, primarily the content and purpose of IHL, its impact on qualification and investigation, and the subjects to whom IHL applies. In addition, the author separately defines the temporal and territorial limits of IHL as part of the object of proof.

The forensic approach [14] provides scientific and practical recommendations for determining the elements of the forensic characterisation of violations of the laws and customs of war, the purpose of which, among other things, can be seen as detailing, and specifying the circumstances to be proved in such criminal proceedings, and the specifics of investigative (search) and other procedural actions. According to the author, determining the circumstances to be proved in the course of investigating violations of the laws and customs of war requires a combination of forensic and criminal procedure approaches, which was performed in the framework of the research.

Notably, the problems of investigating violations of the laws and customs of war that have arisen since the beginning of the armed aggression against Ukraine in February 2022 have sparked a wide discussion among scholars and practitioners on various issues [15; 16]. It appears that it was conditioned upon the lack of experience in such activities, the specifics of the situation and legal regulation during the military conflict. One such controversial issue of particular interest according to the research subject is the contextual element in the object of proof in war crimes proceedings [16]. In the author's opinion, one should agree with the position of I.V. Glowiyuk & H.K. Teteryatnik on the existence of a special object of proof in the categories of war crimes proceedings, the specificity of which is conditioned, firstly, upon the features of qualification which is non-standard, considering the construction of Article 438 of the CC of Ukraine, which refers to the provisions of international treaties and includes a wide range of acts which may be attributed to war crimes only upon proof

of contextual circumstances. Secondly, the necessity of establishing the contextual circumstances of a criminal offence, which are in a causal relationship with other elements of the object of proof, affects the specifics of the proof itself [16, p. 394]. In addition, the author identifies the connection of a criminal offence (actions of a person) with a military conflict among the circumstances to be proved and covers the content of such connection [22]. Proof of this circumstance ensures that violations of the laws and customs of war are distinguished from other crimes that can be committed in a military conflict since not every crime committed during a military conflict is a war crime, a prerequisite is the connection of a person's actions with a military conflict and the compliance of their actions with the signs of violation of the laws and customs of war. Such a connection is directly or indirectly correlated with other components of the object of proof.

It is necessary to emphasise the importance of the development of national law and international law in the establishment and application of effective mechanisms of liability for war crimes [18]. Thus, to determine the circumstances to be proved during the investigation of violations of the laws and customs of war, the author analysed in detail and considered the provisions of IHL, which will determine the legal foundation for the activities of international courts concerning crimes involving armed aggression against Ukraine. Attention is emphasised on the quality of evidence collected in criminal proceedings under national law to ensure that it can be accepted by international courts without additional verification, which will become more difficult over time. In addition, the author believes that the development and improvement of IHL in the future requires considering the circumstances and specifics of the beginning, course and consequences of the military conflict in Ukraine, which identified both violations of the laws and customs of war defined in IHL and other forms of violations not reflected/not clearly reflected in the rules of IHL, which was mainly determined by the impact of the aftermath of the Second World War, which is evidently different from the current situation. As it appears, the specific feature of the wording of most IHL provisions is their general, non-specific nature, which can be explained by the desire to introduce a universal approach that allows for the application of IHL by different countries whose national laws can vary significantly. However, Ukraine's experience in countering armed aggression, and the implementation of international accountability mechanisms should serve as a foundation for the specification and improvement of IHL in general.

The effectiveness of criminal proceedings is not possible without the proper functioning of the advocacy [19] and judicial authorities [20]. The activities

of the judiciary, the advocacy and other subjects of criminal proceedings have undergone some changes and transformations under martial law, including evidentiary activities. Therewith, it remains unchanged that the problems of proof are relevant to other subjects of criminal proceedings, and pre-trial investigation bodies investigating violations of the laws and customs of war. In addition to these, the circumstances to be proved are defined and disclosed in another work of the author [22]. The collection and evaluation of evidence, while ensuring and respecting the rights of persons held criminally liable for violations of the laws and customs of war, should be conducted in strict accordance with the requirements of the law and considering the prospect of cases being heard by international courts.

## ■ Conclusions

The development of some circumstances to be proved in the investigation of violations of the laws and customs of war, as the purpose of this research, has necessitated a systematic study of IHL, determining the limits and conditions of its application, considering the requirements of proof under national law. Based on the results of this work, the circumstances to be proved include the following: 1) whether a person belongs to the category of “lawful combatant”, determining the conditions and limits of combatant immunity; 2) territorial and temporal limits of IHL; 3) the content and relationship of the categories of “legitimate purpose” and “military necessity”.

The proposed provisions include specific circumstances that are relevant in the investigation of the laws and customs of war, and they can be supplemented and detailed in specific proceedings.

The circumstances to be proved in criminal proceedings for violations of the laws and customs

of war should not be considered in isolation, but in conjunction with and supplemented by others, which are determined by the specifics of each investigation. Thus, a model of evidence is developed that can ensure the achievement of the objectives of criminal proceedings.

Proving in compliance with the requirements of national law, considering the experience of applying IHL, its correct and systematic understanding will influence the establishment of an evidence base in international courts, and the development of interpretation and application of IHL in general, since the relevant provisions and processes are constructed and developed through and as a result of a legal and moral (from the standpoint of humanity, mercy, tolerance) assessment of the actions of participants in armed conflicts.

In addition, it should be noted that along with the importance of IHL, whose provisions have not lost their relevance for the most part, the problems that arise during the international armed conflict in Ukraine cannot always be effectively resolved by available legal means, including the practice of applying IHL, but require new approaches to understanding and interpreting some provisions of IHL. This further emphasises the importance of national law enforcement practices that respond promptly to ongoing events, with evidence collected as part of a formal investigation and in compliance with the regulatory requirements of proof.

Further research on solving the problems of investigating violations of the laws and customs of war can be devoted to improving national legislation, considering and generalising law enforcement practice (as it is developed), exploring the possibilities of using the experience of IHL application by international courts, and establishing a methodology for investigating violations of the laws and customs of war.

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## Обставини, які підлягають доказуванню під час розслідування порушення законів і звичаїв війни

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■ **Анотація.** Розслідування порушення законів і звичаїв війни – відносно новий напрям діяльності правоохоронних органів України. Попри те, що певний досвід таких розслідувань існує з 2014 року, розгортання державою-агресором повномасштабної війни, яке розпочалося 24 лютого 2022 року, виявило практично всі форми (способи) порушення законів і звичаїв війни, що потребує від правозастосовника всебічного аналізу та правильного розуміння норм міжнародного гуманітарного права, яким визначено правила для учасників збройного конфлікту. Метою статті є формулювання деяких обставин, які підлягають доказуванню під час розслідування порушення законів і звичаїв війни та розкриття їх змісту з огляду на норми міжнародного гуманітарного права, що визначає специфіку предмета доказування в таких кримінальних провадженнях. Під час дослідження застосовано філософські (діалектичний і герменевтичний), загальнонаукові (системний, історичний, функціональний), спеціально-наукові (порівняльного правознавства, техніко-юридичний, тлумачення юридичних норм) методи пізнання. Підґрунтям роботи є норми договірної та звичайної (звичаєвого) права збройних конфліктів, практика його застосування на національному та міжнародному рівні, національне право, яким передбачено відповідальність за порушення законів і звичаїв війни, процесуальний порядок розслідування кримінальних правопорушень, криміналістичні рекомендації щодо розслідування окремих видів злочинів. За результатами дослідження сформульовано низку обставин, які підлягають доказуванню під час розслідування законів і звичаїв війни як окремих, але пов'язаних з іншими елементами складових предмета доказування, а саме: законні комбатанти, імунітет комбатанта; територіальні та часові межі дії міжнародного гуманітарного права; законна ціль, військова необхідність. Розкрито їхній зміст, доказове значення та зв'язок

■ **Ключові слова:** досудове розслідування; міжнародне гуманітарне право; доказування; комбатант; законна ціль; військова необхідність