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Circumstances subject to determination in proceedings concerning violations of the laws and customs of war

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Abstract

The research relevance is determined by the need to improve the methodology of proof in criminal proceedings on the fact of violation of the laws and customs of war. The study addressed the disposition of Article 438 of the Criminal Code of Ukraine, according to which the norms of international humanitarian and criminal law should be applied. The study aimed to determine the structure of the subject matter of proof in war crimes cases, to identify its features in view of the principle of complementarity, and to develop a forensic classification and characterisation of the relevant acts. The methodological toolkit included systemic and structural, comparative legal, and formal legal methods, content analysis of case law, and inductive analysis, which formulated theoretical generalisations based on the study of specific criminal proceedings. The practical basis of the study was determined by the analysis of decisions of national courts of first instance and appellate courts in cases involving war crimes on the territory of Ukraine. The study established that the process of proof has a dual nature. It covers, on the one hand, the circumstances stipulated by criminal procedural law, and, on the other hand, the facts that are key to qualifying acts as international crimes committed within the framework of an armed conflict and having a direct connection with it. In this context, the investigation of war crimes is characterised by an increased level of complexity, which can be conditionally differentiated into two groups. The first group includes circumstances of an objective nature that cannot be influenced by the pre-trial investigation authorities. The second group is formed by negative factors that can be influenced within criminal proceedings to minimise their consequences. In this aspect, typical elements to be established during the investigation of violations of the laws or customs of war were identified. The study substantiated the expediency of supplementing Article 438 of the Criminal Code of Ukraine with qualifying circumstances which specify its content. The scientific and practical significance of the results obtained includes the development of a unified approach to the analysis, verification and evaluation of evidence in war crimes cases, as well as to

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develop a forensic classification and forensic characteristics of such offences to form a unified methodology for investigating violations of the laws and customs of war

Keywords:

war crimes; subject matter and limits of proof; contextual circumstances; armed conflict; international humanitarian law; international criminal law; forensic characterisation; forensic classification

Introduction

The complexity of the process of proving in criminal proceedings for violations of the laws and customs of war is due to the blanket nature of the disposition of Article 438 of the CC of Ukraine¹, which requires additional specification through international legal norms and case law of international tribunals. This circumstance indicates the complementary nature of international and national law as complementary systems. Accordingly, pre-trial investigation bodies are obliged to conduct criminal proceedings in accordance with international standards for the protection of human rights and freedoms, as well as the key provisions of the Rome Statute², which is a fundamental but not the only instrument of international criminal justice.

In this context, when investigating violations of the laws and customs of war, authorised participants in criminal proceedings should be guided not only by the norms of national legislation, but also incorporate the material, procedural and penal aspects of war crimes investigation (Caianiello, 2022). This was addressed by O. Kravchuk & M. Bondarenko (2022), noting that the investigation of violations of the laws and customs of war acquires specific features due to the peculiarities of the subject of proof, its objective and subjective characteristics that determine the participants in the offence and their motives, ways of implementing criminal intentions, the nature and scale of socially dangerous consequences, as well as circumstances that may indicate the systematic or massive nature of unlawful acts and their connection with political or military plans, strategies and/or structures.

In this regard, O. Agarkova (2024) noted that during the identification and recording of violations of the laws and customs of war, law enforcement activities should focus on establishing both the general elements of proof defined by criminal procedural law³ and the individual (specific) circumstances of a particular unlawful act, which can define the features of the objective side of a war crime and conduct its criminal law qualification. In fact, this position is consistent with the

provisions of Articles 214-216 of the CPC of Ukraine⁴ and Article 19 of the Basic Law⁵.

According to S. Sichko (2019), the correct and timely determination of jurisdictional competence in criminal proceedings for violations of the laws and customs of war is a substantial prerequisite for the effective implementation of law enforcement activities and the efficient fulfilment of criminal justice tasks. That is, failure to comply with the requirements for qualification of the criminal offences under investigation and their procedural jurisdiction may cause significant complications in the process of proof and lead to the incorrect application of the methodology for collecting and analysing the evidence base, which, according to Yu. Tan & S. Yang (2023), negatively affect the quality of criminal proceedings and the legality of the results obtained.

According to the analysis of court practice, these violations impede the effective interaction of pre-trial investigation bodies with other participants in criminal proceedings, as well as lead to the loss of relevant evidence and distortion of its assessment, which complicates the administration of justice and increases the risk of erroneous decisions⁶. In this regard, in some criminal proceedings, there is an insufficient analysis of the circumstances that establish the nature of the armed conflict, which negatively affects the validity of the qualifying features of war crimes and may lead to an erroneous assessment of their composition⁷. In some cases, despite the established link between the unlawful act and the armed conflict, the key circumstances that determine the legal nature of the conflict, the status of its parties, the place and time of the crime, the nature of the accused's activities, role in the conflict, and the victims' affiliation with persons not involved in the armed conflict are not properly detailed.

In addition, the circumstances related to the period of illegal detention of victims, the fact of their forced labour, the type and nature of work performed, etc., are insufficiently investigated⁸. In several cases, the only sources of evidence establishing a link between the

¹ Criminal Code of Ukraine. (2001, May). Retrieved from <https://zakon.rada.gov.ua/laws/show/2001-05#Text>.

² Rome Statute of the International Criminal Court. (1998, July). Retrieved from https://zakon.rada.gov.ua/laws/show/995_588#Text.

³ Criminal Code of Ukraine. (2001, May). Retrieved from <https://zakon.rada.gov.ua/laws/show/2001-05#Text>.

⁴ Criminal Procedure Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.

⁵ Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>.

⁶ Verdict of the Kelmenetsky District Court of Chernivtsi Region in Court Proceedings No. 1-кп/717/1/18. (2018, October). Retrieved from <http://www.reyestr.court.gov.ua/Review/77098737>.

⁷ Ruling of the Luhansk Court of Appeal No. 415/2182/20. (2020, October). Retrieved from <https://reyestr.court.gov.ua/Review/92065176>.

⁸ Ruling of the Cassation Criminal Court of the Supreme Court No. 415/2182/20. (2022, February). Retrieved from <https://reyestr.court.gov.ua/Review/103466917>.

armed conflict and the act committed are testimonies, which are not always sufficient to fully and comprehensively establish all the circumstances of the case, as no testimony can be considered in isolation without corroboration by other relevant and admissible evidence¹.

Therefore, as noted by A. Szalai & V. Ahmeti (2025), the quality of the evidence process in criminal proceedings for violations of the laws and customs of war is affected by a wide range of negative factors. Taken together, they require comprehensive research and careful assessment. As a result, it is necessary to develop new approaches to law enforcement, improve inter-agency cooperation, enhance the education and training of relevant specialists in the investigation of international crimes, and integrate international experience to improve international law enforcement mechanisms in national legislation.

As noted by A. Shulzhenko (2022), the investigation of war crimes mostly encounters difficulties due to the complexity of establishing objective features of a particular offence, the peculiarities of its criminal law qualification, as well as the uncertainty of the subjects of the offence and the victims of its commission. There are also problems with assessing physical, moral, material and/or property damage, as well as the mechanisms for its compensation. An additional complicating factor is the lack of unified methods for investigating violations of the laws and customs of war. This necessitates a comprehensive scientific study of the material, procedural and forensic aspects of war crimes investigations. A significant condition in this process is to ensure proper coordination between national and international law enforcement and justice agencies to create a single mechanism capable of responding immediately to global challenges and needs arising in the context of international criminal justice.

In this aspect, the study aimed to determine the circumstances to be established in criminal proceedings on the fact of violation of the laws and customs of war, accounting for their significance for further development of the criminalistics classification and criminalistics characteristics of war crimes. In this regard,

the main objectives of the study are, firstly, to outline, based on a systematic analysis of scientific literature, investigative and judicial practice, the range of factual circumstances to be established in the process of proving violations of the laws and customs of war. Secondly, following the identified circumstances, to determine those which are essential for the investigation of war crimes and should be reflected in the structure of their forensic classification and characterisation.

Materials and Methods

The regulatory framework of the study is based on national and international legislation, which regulates the material and procedural aspects of war crimes investigation. These are the provisions of the criminal law of Ukraine², the criminal procedure law of Ukraine³, the Rome Statute of the International Criminal Court⁴, the Geneva Conventions of 1949⁵ and their Additional Protocols⁶, which define serious violations of international humanitarian law. In addition, the study covered the provisions of other international legal acts establishing general standards in the field of protection of human rights and freedoms, which are analysed through the prism of their legal nature and significance for the qualification and investigation of violations of the laws and customs of war.

The practical basis of the study is the analysis of court decisions of the first instance^{7,8,9} and higher courts^{10,11} in criminal proceedings on war crimes committed on the territory of Ukraine. This traced the peculiarities of the legal qualification of the acts under study, procedural approaches to recording and evaluating evidence, and identified several problems related to the interpretation of international humanitarian law within the framework of national law enforcement. The collected data provided an empirical basis for substantiating the conclusions and recommendations of the study.

Thus, the methodological basis of the study is a set of general scientific and special legal methods which ensured the comprehensiveness and scientific validity of the results obtained. In particular, the systemic-structural method was used to identify the internal

¹ Verdict of the Slavyanskyi City Court of Donetsk Region in case No. 243/6186/20. (2021, December). Retrieved from <https://reyestr.court.gov.ua/Review/99929812>.

² Criminal Code of Ukraine. (2001, May). Retrieved from <https://zakon.rada.gov.ua/laws/show/2001-05#Text>.

³ Criminal Procedure Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.

⁴ Rome Statute of the International Criminal Court. (1998, July). Retrieved from https://zakon.rada.gov.ua/laws/show/995_588#Text.

⁵ Geneva Convention relative to the Protection of Civilian Persons in Time of War. (1949, August). Retrieved from https://zakon.rada.gov.ua/laws/show/995_154.

⁶ Protocol Additional to the Geneva Conventions of August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I). (1977, October). Retrieved from https://zakon.rada.gov.ua/laws/show/995_199.

⁷ Verdict of the Kelmenetsky District Court of Chernivtsi Region in Court Proceedings No. 1-кп/717/1/18. (2018, October). Retrieved from <http://www.reyestr.court.gov.ua/Review/77098737>.

⁸ Verdict of the Slavyanskyi City Court of Donetsk Region in Case No. 243/6186/20. (2021, December). Retrieved from <https://reyestr.court.gov.ua/Review/99929812>.

⁹ Decision of the Kherson City Court No. 98716623. (2022, July). Retrieved from <https://reyestr.court.gov.ua/Review/98716623>.

¹⁰ Ruling of the Luhansk Court of Appeal No. 415/2182/20. (2020, October). Retrieved from <https://reyestr.court.gov.ua/Review/92065176>.

¹¹ Ruling of the Cassation Criminal Court of the Supreme Court No. 415/2182/20. (2022, February). Retrieved from <https://reyestr.court.gov.ua/Review/103466917>.

links between the elements of legal regulation of war crimes investigation. The comparative legal method was used to compare national and international norms governing criminal liability for violations of the laws and customs of war. Formal legal method for analysing legal acts and interpretations of legal concepts within the scope of the study. The method of contextual analysis was used to study the content of court decisions and the scientific base to identify typical approaches to the qualification and investigation of war crimes. The method of inductive analysis was used to draw general conclusions based on specific empirical data and the results of legal analysis.

Results and Discussion

Before proceeding to the identification of facts to be established in proceedings for violations of the laws and customs of war, it is first necessary to outline the negative factors that affect the process of proof in cases of this category. Such an approach is determined by several reasons and is methodologically justified in the context of the issues under study. Firstly, any process of proof in criminal proceedings is not an isolated phenomenon. It is an integral part of criminal proceedings, which functions as a complex system in which legal, social, psychological, ethical and organisational aspects interact. Evidence processing is always conducted within a specific criminal situation, characterised by a set of circumstances that can both facilitate and hinder the investigation.

Secondly, timely identification of such factors at the initial stage of the pre-trial investigation can be used for an objective assessment of the real conditions and potential possibilities of the evidence process, an outline of the range of circumstances to be established, identification of those complicated by the influence of external and/or internal factors, and timely determination of the need to apply alternative approaches to collecting evidence. This, in turn, ensures systematic and consistent forensic analysis that considers the specifics of both the commission of war crimes and their evidence.

Thus, a systematic analysis of the scientific literature, methodological recommendations and materials of investigative and judicial practice can be used to classify the negative factors affecting the process of proof

in criminal proceedings for violations of the laws and customs of war into two main groups. The first one covers conditions on which the authorised pre-trial investigation bodies have no real influence, since they exist regardless of the will or procedural activity of the participants in criminal proceedings. Under these conditions, it is only appropriate to partially adjust or adapt the tactics and methods of pre-trial investigation to the specifics of the situation within which the process of proof is carried out.

This group includes the dynamics of the development of hostilities, characterised by high variability, intensity and rapid change of the operational and tactical situation in the armed conflict zone (Shulzhenko, 2022). This significantly complicates the timely and complete implementation of procedural actions necessary for the collection, verification and legal assessment of evidence. At the same time, the systematic movement and change of deployment of military units can lead to the loss or distortion of primary information, in particular, that which records signs of a crime, and its identification and research are a prerequisite for a full and comprehensive investigation (Hryha & Burnos, 2024). It is also worth paying attention to the complete or partial destruction of the crime scene as a result of hostilities (Batiuk & Dmytriv, 2021), which significantly complicates the process of identifying, recording and investigating the circumstances of the crime at the scene.

This group also includes the death, injury, capture or repatriation of potential participants in criminal proceedings (Yankovyi, 2023), which complicates the possibility of obtaining testimony that is essential to establish the circumstances of a criminal offence and form a sufficient evidence base. The process of proof is also complicated by the excessive burden on the authorised pre-trial investigation bodies due to the large number of criminal offences committed in the combat zone. In addition, another reason that complicates the process of investigating violations of the laws and customs of war is the limited access to certain types of information, including information related to state and/or military secrets, which is necessary for the process of proof but cannot be provided within the framework of the proceedings (Fig. 1).

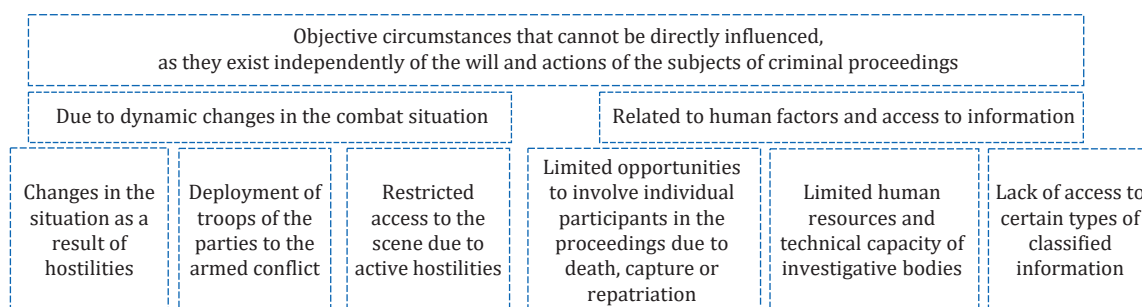


Figure 1. Objective negative factors that complicate the process of proof in the investigation of war crimes

Source: compiled by the authors

The second group consists of factors that authorised participants in criminal proceedings can influence to minimise their negative consequences. These circumstances include legal uncertainty and insufficient clarity of the regulatory provisions governing the procedural aspects of war crimes investigation (Kozmenko *et al.*, 2023). This can lead to misinterpretation of legislation, difficulties in the legal qualification of an act, as well as ambiguous application of criminal law provisions in terms of legal assessment of serious violations of international humanitarian law. This group also includes the insufficient level of legal awareness of authorised participants in criminal proceedings regarding the mechanisms of interaction with international institutions, in particular, specialised institutions of international criminal justice (Khavroniuk, 2022; Lebeniuk & Osypenko, 2024). This reduces the effectiveness of coordination of procedural actions in cases with an international context, and contributes to the emergence of legal conflicts and slows down the establishment of the contextual circumstances of war crimes in accordance with international standards of justice.

Within the above reasons, it is worth highlighting the lack of clearly formulated, scientifically based and practically oriented methodological approaches to determining the subject matter and limits of proof in war crimes cases (Kovalenko, 2022; Antoniuk, 2023). This

problem is exacerbated by the influence of contextual circumstances that cause difficulties with the legal interpretation of the relevant rules and the sequence of the evidence process. An equally significant problem is the limited staffing capacity of pre-trial investigation bodies due to the shortage of qualified professionals with the necessary theoretical knowledge and practical experience (skills) in investigating international crimes. Lack of proper professional training or retraining of employees involved in the investigation of war crimes directly affects the quality and effectiveness of the evidence process.

It is also worth noting the insufficient level of interagency cooperation between pre-trial investigation bodies, prosecutors, military formations, as well as other state institutions and local governments, including military administrations, which consequently complicates the effective cooperation of these bodies in solving the tasks of criminal proceedings (Kornev, 2022). In addition, the insufficient level of development of relevant forensic methods for investigating war crimes aimed to collect, analyse and procedurally use evidence in cases of this category (Hryha & Burnos, 2024), equally significantly reduces the effectiveness of the investigation and complicates the provision of an evidence base that would meet both national and international legal requirements (standards) (Fig. 2).

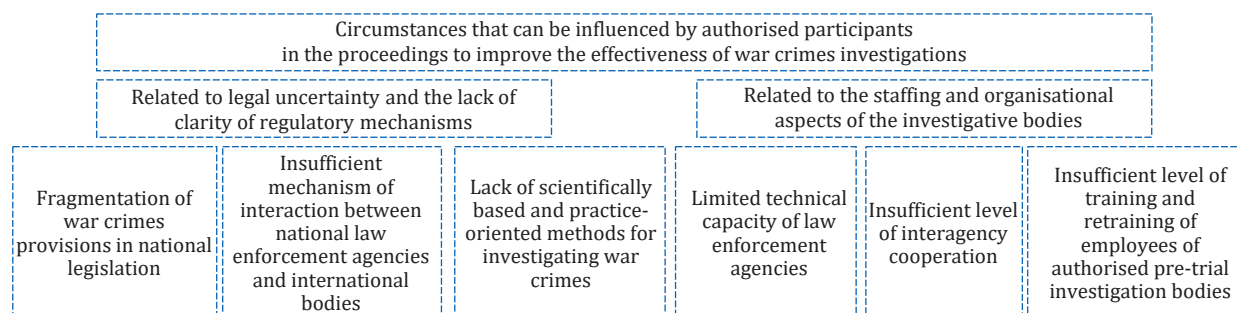


Figure 2. Controllable (subjective) factors that complicate the investigation of war crimes

Source: compiled by the authors

In view of the above, a priority area for addressing the problems referred to in the second group is a comprehensive analysis of the characteristics inherent in war crimes, with an emphasis on the methods of their commission. This approach will ensure a more accurate interpretation of the disposition of Article 438 of the Criminal Code of Ukraine¹, which currently only fragmentarily defines the objective circumstances of serious violations of international humanitarian law. Accordingly, there is a need to systematise and structure the elements of the act under investigation, which can

be utilised as a structured approach to analysis of the subject matter and limits of proof in cases involving violations of the laws and customs of war.

This thesis is confirmed by several court decisions. In their context, it is worth analysing the ruling of the Kherson City Court of 30 July 2021 in case No. 766/12962/21² on the election of a preventive measure in the form of detention for committing a crime under Part 5 of Article 27 and Part 1 of Article 438 of the Criminal Code of Ukraine³. According to this decision, security investigators served a notice of

¹ Criminal Code of Ukraine. (2001, May). Retrieved from <https://zakon.rada.gov.ua/laws/show/2001-05#Text>.

² Decision of the Kherson City Court No. 98716623. (2022, July). Retrieved from <https://reyestr.court.gov.ua/Review/98716623>.

³ Criminal Code of Ukraine. (2001, May). Retrieved from <https://zakon.rada.gov.ua/laws/show/2001-05#Text>.

suspicion of committing acts in violation of the laws and customs of war to a Ukrainian citizen for entering into a contract with a military state institution of federal significance in March 2017, while permanently residing with the family in the occupied Crimea and being a business entity, relevant business agreements on the provision of services for the transportation of persons of military age from the military commissariats of the Autonomous Republic of Crimea to the recruitment points, which, according to the investigation, violated the laws and customs of war in the form of aiding and abetting, consisting in providing means for committing war crimes by transporting persons protected by international humanitarian law.

The legal position of the prosecution in the criminal proceedings under investigation is believed to be insufficiently substantiated, as it does not fully comply with the contextual and legal features or elements that characterise the commission of war crimes. In this context, V. Repetskyi & V. Lysyk (2009) distinguished at least four general contextual features that are characteristic of all war crimes. The latter includes, firstly, actions that form the objective side of war crimes, which are committed exclusively during armed conflict or are directly related to it. In other words, war crimes can only be committed within the framework of an armed conflict or have a direct connection with it. Otherwise, as V. Novrotskyi (2022), these acts should be qualified under general, special and/or casualty grounds of criminal offences against peace, national security, life and health, human security or international law and order.

This feature is highlighted by I. Hlovyuk & H. Teteryatnyk (2022), noting that war crimes can be committed exclusively in the context of an armed conflict of an international or non-international nature, provided that the perpetrators of these offences are aware of the factual circumstances confirming the existence of such a conflict. This indicates the existence of a causal link between the act and the armed conflict.

Accordingly, not all offences committed during an armed conflict can be classified as war crimes. For example, criminal offences with material elements that are not directly related to the armed conflict occurring in any part of the territory controlled by the parties to the conflict cannot be considered war crimes. In fact, this position is supported by T. Yefimenko (2024), illustrating the opinion with the Basic Investigative Standards for International Crimes Investigation (Compliance with global rights, 2016), developed by an international non-profit human rights organisation specialising in legal protection, human rights and justice in the context of international crimes.

Secondly, acts committed by war crimes perpetrators must infringe upon the fundamental principles (foundations) of international humanitarian law, which define the limits of acceptable behaviour of participants (parties) to an armed conflict. Violation

of these fundamentals gives war crimes the status of serious violations of international humanitarian law, which fundamentally distinguishes them from other socially dangerous acts by the nature of the offence, the legal context and international legal responsibility. Some researchers include the following principles of international humanitarian law: protection of persons not directly involved in an armed conflict, which implies the obligation of the parties to the conflict to refrain from attacks on civilians and persons not involved in hostilities; distinction, which requires a clear separation of civilians and infrastructure from military objectives by the parties to the conflict; selectivity and proportionality, which relates to the reasonable choice of the object of attack; limitation of means and methods of warfare, which

Thirdly, war crimes are usually committed by combatants or other persons with the authority to give orders in an armed conflict. This means that only persons authorised by a party to the conflict to take part in hostilities, endowed with the relevant rights and obligations, and acting within the framework of an armed conflict, on behalf of a party to the conflict, a subject of international legal relations (state, union, coalition, or other recognised entity) can be the subjects of violations of the laws and customs of war. Combatants and the military and political leadership of the country have a direct obligation to comply with international humanitarian law, as they are the only ones with the relevant authority to conduct armed struggle and issue military and political orders within the framework of military resistance.

Fourthly, the object of war crimes are persons, their rights, freedoms and property protected by international humanitarian law, as well as other benefits, subjects and objects protected by its norms, including authorised representatives of international organisations whose activities are governed by relevant conventions and institutional norms of international law (authorised representatives of the Red Cross, IAEA, OSCE, etc.), cultural property and World Heritage sites, the natural environment, etc. (Rubanenko, 2024a).

A similar opinion is shared by O. Pchelina & V. Pchelina (2022), adding that the complexity and specificity of war crimes investigations are due not only to the need to amend national legislation to harmonise or unify it with international legal standards, but also to the development of scientifically sound approaches to the tactics and methods of investigating these crimes. In other words, scholars substantiate the expediency of forming a forensic methodology for investigating war crimes. In this context, based on legal regulation and case law on documenting the acts under investigation, it is proposed to develop a forensic classification of these crimes in scientific circles, with due regard for their forensic characterisation.

The relevance of developing a methodology for investigating war crimes, as well as determining the

subject matter and limits of their proof, is confirmed by court practice, which reflects the application of national legislation, considering the implementation of international criminal law in criminal proceedings. In this regard, it is worth paying attention to the verdict of the Solomianskyi District Court of Kyiv of 23 May 2022 in case No. 760/5257/22¹. According to this decision, a Russian serviceman was charged with a war crime, namely the intentional killing of a civilian in the execution of a criminal order. The criminal proceedings established that the convict, being in the combat zone, mistakenly perceived the civilian as a threat because of the telephone conversation, assuming that the civilian could pass on information about the location and number of Russian troops. Executing a criminal order from a military superior, the perpetrator used a firearm, intentionally causing the victim's death, which is a violation of the laws and customs of war under international humanitarian law.

However, the analysis of scientific discussions on the legal assessment of this situation suggests that some researchers have a well-founded position on the erroneous criminal law qualification of this act. When analysing the event under study, scholars note that not every fact of killing a civilian during an armed conflict by the relevant participants is a violation of the laws and customs of war. According to I. Hlovyuk & G. Teteryatnyk (2022), this is explained by several aspects, where one approach to assessing the situation is to analyse the legal status of a civilian in the context of possible participation in hostilities.

Firstly, if a civilian is viewed as a subject who transmits information about the location of enemy armed forces, status as a noncombatant may be lost, as such actions may be regarded as direct participation in an armed conflict. This may lead to the loss of legal immunity guaranteed to subjects of civilian legal relations under international humanitarian law.

At the same time, it is worth noting that when assessing any situation, military personnel had to be certain that there were signs that the telephone conversation did indeed concern the transmission of information of military significance. This means that the question of direct intent and full awareness of the violation of international humanitarian law requires separate proof. If the above circumstances cannot be properly proven, in accordance with the presumption of innocence, any doubts regarding the commission of a war crime should

be interpreted in favour of the accused. However, this does not eliminate legal responsibility for the act of taking a life, since even if there is suspicion of a person's possible participation in hostilities, the principles of distinction, proportionality and necessity enshrined in international humanitarian law must be observed (Rubanenko, 2024b).

This fact is confirmed by several international legal acts. According to Article 3 of the Universal Declaration of Human Rights, everyone is guaranteed the right to life, liberty and security of person². Article 6, paragraph 1, of the International Covenant on Civil and Political Rights defines life as an inalienable right of everyone protected by law and prohibits arbitrary deprivation of this right³. Article 2(1) of the European Convention on Human Rights enshrines the right to life of everyone, while providing for exceptions in cases of execution of a death sentence, protection of others, prevention of escape from custody, and the lawful use of force to suppress riots or uprisings⁴.

Similar provisions are contained in the Geneva Conventions and their Additional Protocols regulating the protection of civilians in armed conflicts. Articles 27 and 32 of the IV Convention prohibit any acts of violence against the civilian population, including those involving intentional killing⁵. Article 51(2) of Additional Protocol I prohibits attacks directed against civilians. The same applies to attacks on civilian infrastructure (Article 52)⁶. In this context, according to Article 57 of the Protocol, the parties to the conflict have an obligation to exercise due care for the protection of the civilian population, civilians and civilian objects at all times, and to take the necessary measures to distinguish between military objectives and objects of special protection to prevent their destruction. In addition, the parties to the conflict are obliged to use all possible means and methods of warfare that do not cause unnecessary civilian casualties, including incidental deaths.

Therefore, in the process of investigating war crimes, it is of particular importance to establish contextual and legal elements (circumstances) that determine the specifics of the subject matter of proof in criminal proceedings for violations of the laws and customs of war. At the same time, the circumstances are to be established in accordance with Article 91 of the CPC of Ukraine⁷ must be causally related to the contextual characteristics of the offence. That is why, as noted by I. Hlovyuk & H. Teteryatnyk (2022), the structure of the

¹ Verdict of the Solomianskyi City Court of Kyiv No. 760/5257/22. (2022, May). Retrieved from <https://reyestr.court.gov.ua/Review/104432094>.

² Universal Declaration of Human Rights. (1948, December). Retrieved from https://zakon.rada.gov.ua/laws/show/995_015#Text.

³ International Covenant on Civil and Political Rights. (1966, February). Retrieved from https://zakon.rada.gov.ua/laws/show/995_043#Text.

⁴ European Convention on Human Rights. (1950, November). Retrieved from https://zakon.rada.gov.ua/laws/show/995_004#Text.

⁵ Geneva Convention relative to the Protection of Civilian Persons in Time of War. (1949, August). Retrieved from https://zakon.rada.gov.ua/laws/show/995_154.

⁶ Protocol Additional to the Geneva Conventions of August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I). (1977, October). Retrieved from https://zakon.rada.gov.ua/laws/show/995_199.

⁷ Criminal Procedure Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.

subject matter of war crimes evidence has a two-element characteristic.

The first element is general and includes circumstances stipulated by the rules of procedural law and individual facts that depend on the specific case of a criminal offence and the specifics of its investigation. The second element, in turn, is contextual or special legal in nature, due to the specifics of objective

and subjective factors defined by international law. A substantial aspect is the assessment of the objective and subjective features of the act under investigation and their relationship to the armed conflict. In other words, when investigating war crimes, it is necessary to first establish a causal link between a particular act and the armed conflict in which it was committed (Fig. 3).

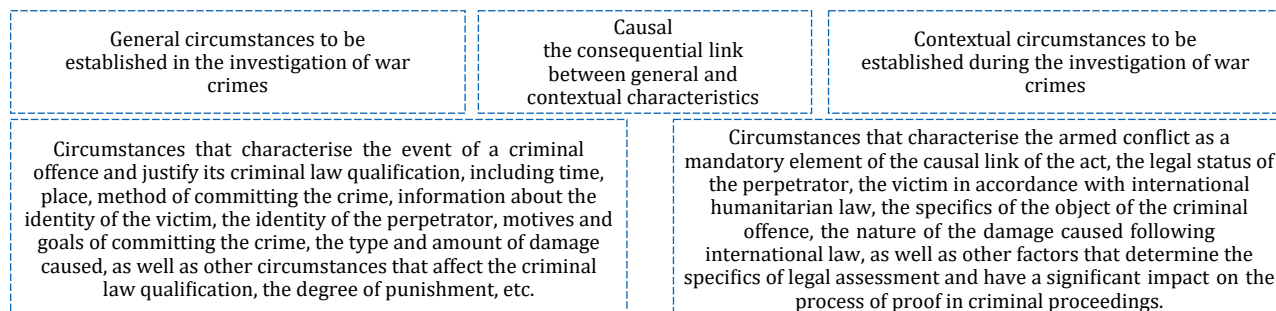


Figure 3. Two-element structure of the subject matter of proof in war crimes cases

Source: compiled by the authors

Other researchers have also drawn attention to this feature. Thus, analysing the process of proof in war crimes cases, D. Lazareva (2025) emphasises the obligation to establish contextual elements that must have a causal relationship with other circumstances to be proved in accordance with Article 91 of the CPC of Ukraine. As the author notes, this affects the specifics of criminal procedure and the peculiarities of investigative actions. According to M. Yankovyi (2023), the general characteristics of criminal offences committed by military personnel in armed conflict have a three-tiered structure, consisting of generic, group and species aspects of their commission. The study proposed to consider the differences between these groups through a set of features inherent in the respective genus, group or specific type of criminal offence. According to the author, generic features are inherent in all unlawful acts committed by military personnel in the context of armed conflict.

Group features relate to certain types of criminally similar offences determined by the circumstances of hostilities and the conditions of their commission during international or internal conflicts. Specific features, in turn, are inherent in certain types of criminal offences that are directly related to the conduct of hostilities and their course in a combat situation. From this perspective, the formation of circumstances to be established in the investigation of war crimes is determined by both the subject of proof and the criminal law and forensic assessment of a particular criminal offence. In this context, researchers rightly emphasise that the subject of proof in war crimes proceedings covers not

only the general circumstances provided for in Article 91 of the CPC of Ukraine¹, but also special or contextual elements that reflect the specifics of the category of crimes under investigation.

Developing this position, D. Lazareva (2025) addressed the close relationship between the subject matter of proof and the circumstances to be established in war crimes cases. The study noted that the determination of such circumstances directly affects the subject matter of proof, which integrates both criminal law and forensic components of a particular offence. In this context, K. Shevchyshyna (2024) identified an indicative list of circumstances to be proved in the investigation of war crimes. These include information that characterises the event of the war crime itself, the circumstances that determine its criminal law qualification, information on the time, place, manner and means of committing the unlawful acts, data on the traces of the crime, information on the victim, witnesses, eyewitnesses and complainants, characteristics of the offender, circumstances related to the intent, motives and purpose of the unlawful act, other information and/or data relating to the specific event and its consequences.

O. Taran (2022) employed a more specific approach. Analysing the issues of legal regulation and law enforcement in the process of investigating violations of the laws and customs of war, the study proposed that the circumstances to be proved in war crimes cases (the subject of proof) include the circumstances of the crime, which covers the totality of conditions under which the war crime was committed. In this regard, the author divides these circumstances by physical and legal features. The

¹ Criminal Procedure Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.

researcher refers to the physical ones as the very fact of committing a crime and its consequences, and to the legal ones as the correlation of this fact and consequences with the norms of national and international law.

In addition, the study highlighted the methods of committing a crime that result from the wording of international law, in particular those contained in the Rome Statute, the Geneva Conventions, their protocols, as well as other international instruments of treaty value, the provisions of which cover the relevant area of legal regulation. In this context, the study identified specific methods of ill-treatment of prisoners of war, expulsion of civilians for forced labour, looting of national property in the occupied territories, use of means of warfare prohibited by international treaties and other violations of the laws and customs of war, as well as ordering them to be committed.

Equally relevant is the connection of the offender's unlawful actions with the conditions of martial law. That is, the offender's awareness of the fact that unlawful acts are committed within the framework and in pursuance of the military and political plan, policy and strategy of the state, where a participant is involved in an armed confrontation of international or non-international significance, and actions are or may be part of the functions, tasks, orders or correspond to their context. It is not necessary for a person to be aware of all the details of a military-political nature. A cognitive awareness and perception of the situation as part of the military-political context is sufficient to determine the purpose, motives and circumstances of the unlawful actions.

The existence of an order, its execution, as well as the duties of military commanders and superiors who are authorised to issue orders to subordinate military personnel, deserve special attention. The issuance and execution of an order must include subjective and substantive components to prevent violations of the laws and customs of war. Any order should incorporate the requirements of international humanitarian law and not violate them, and should be aimed to ensure compliance with the rules governing the behaviour of participants in armed conflict.

This feature is also highlighted in the provisions of Article 87 of Additional Protocol I, entitled "Duties of commanders"¹. In fact, this provision emphasises the importance of the legality of orders in the context of armed conflict and establishes the responsibility of commanders for non-compliance with international humanitarian law. That is, commanders are responsible for the orders they give to their subordinates. They are obliged to take measures to ensure that their subordinates do not violate international humanitarian law and execute orders only within the limits of permitted actions. They must ensure that organisational and

preventive measures are in place to prevent their subordinates from conducting orders that are clearly criminal or from committing unlawful acts in violation of international humanitarian law.

In general, these circumstances form two main purposes of proof, which form the evidence base within the investigation. The first relates to evidence of the event of the criminal offence (time, place, manner, circumstances of commission, mechanism of development of unlawful acts, their consequences, connection between the event, circumstances and consequences, etc.) The second is evidence of involvement (who, with whom, how, in what manner, on whose orders, plan committed the crime, its purpose, motives, etc.). It is the evidence of involvement that creates the basis for proving the causal link between the act committed and the military and political structures involved in and managing the military conflict (Compliance with global rights, 2016).

As I. Hlovyuk & H. Teteryatnyk (2022) noted, without establishing the contextual elements and their causal relationship with the unlawful act, it is impossible to make a proper criminal law assessment of the act and determine the subject matter of its proof. The existence of a special subject matter in war crimes cases is due to the peculiarity of their criminal law qualification in accordance with international criminal law, as well as the need to establish a causal link between the contextual (special) and general (mandatory) elements of the subject matter of proof.

According to O. Agarkova (2024), the evidence should contain facts and circumstances that make it possible to establish individual signs of a specific event of a criminal offence and clearly outline the form of the objective side of the violation of the laws and customs of war. Therefore, when investigating war crimes, the analysis of the methods of their commission is of particular importance, which is assessed in the light of international law governing the relevant area of legal relations.

In this context, war crimes can be classified into acts that encroach on: life and health of a person, honour and dignity, inviolability and security; property rights; special international immunity of the relevant subjects of international legal relations and their activities as defined by international law; functioning of vital infrastructure to ensure the basic needs of the population and the stability of the state; established rules and methods of warfare.

This affects the choice of methods and means for collecting and analysing information about the criminal offence, the object of the offence, the victim, the place of commission, as well as the socially dangerous consequences and their causal relationship with the perpetrator's actions (Pchelina & Pchelin, 2022). These elements are substantial for establishment for relevant

¹ Protocol Additional to the Geneva Conventions of August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I). (1977, October). Retrieved from https://zakon.rada.gov.ua/laws/show/995_199.

circumstances of the act, which is necessary for its proper legal assessment, as well as for the formation and construction of the evidence base in a particular criminal proceeding.

Conclusions

The process of proving in criminal proceedings for violation of the laws and customs of war is characterised by high legal and evidentiary complexity. This is due to the blanket nature of the disposition of Article 438 of the Criminal Code of Ukraine, which provides for liability for war crimes. In this regard, pre-trial investigation bodies are obliged to implement the principle of complementarity, which requires reference not only to the provisions of national legislation, but also to the provisions of international humanitarian law and the case law of international criminal tribunals integrated into the domestic legal system. This approach ensures the unity and consistency of the evidentiary procedure in cases of this category, in conditions when international standards complement national jurisdiction.

In this regard, pre-trial investigations should be conducted with due regard to the need to achieve an appropriate balance between domestic law and the requirements of international criminal justice. The harmonisation of these two legal systems concerns both substantive and procedural aspects. Therefore, pre-trial investigation bodies should have the appropriate level of legal training to properly apply international law in the process of proving war crimes at the national level.

In this context, the subject matter of proof in criminal proceedings for violations of the laws and customs of war is of a dual nature. On the one hand, it covers the establishment of general circumstances to be proved in accordance with the provisions of the criminal procedure legislation, including the factual data that characterise the event of a criminal offence. On the other hand, it involves establishing contextual and legal features defined by international humanitarian and criminal law, as well as proving their connection to the unlawful acts, their consequences and the armed conflict itself. In this context, the key is not only to prove the existence of an armed conflict, but also to determine its legal nature, classification, and establish the fact that prohibited acts were committed by participants in the armed conflict within its borders.

Clarifying these circumstances is key to the process of proving violations of the laws and customs of war, as they form the basis for applying international legal approaches and recommendations developed in the practice of war crimes investigation. Their establishment contributes to the formation of a holistic view of unlawful

acts committed in armed conflict and ensures the analytical capacity of pre-trial investigation bodies in the complex legal and factual structure of international crimes.

The limits of the subject matter of proof in cases of violations of the laws and customs of war are closely related to the theoretical foundations of forensic classification and forensic characterisation of war crimes. This connection is due to the fact that these scientific tools make it possible to identify typical elements of a criminal event, identify its characteristic features and formulate a unified approach to the analysis of this category of offences, considering their division into relevant groups, types and subtypes. In turn, these elements are components of the subject matter of proof, as they reflect both the circumstances that characterise the methods of committing war crimes and the peculiarities of their detection, recording and investigation within a particular event.

The special qualifying circumstances of war crimes are notable. This refers to cases when authorised participants in an armed conflict who are vested with power (military and political leadership, commanders, military chiefs) give orders to their subordinates to commit acts contrary to the laws and customs of war. This is because such situations not only complicate the mechanism of qualification of an act but are also of fundamental importance for establishing individual responsibility within the collective execution of a criminal order. In this aspect, the main criterion for assessing the commission of a war crime within the process of proof is to establish the role of the relevant official in making a criminal decision that violates the laws and customs of war; the degree of participation of both this person and other participants in the armed conflict in their implementation, as well as the ability of law enforcement agencies to provide an adequate and admissible evidence base.

In further research, it is advisable to outline the forensic aspects of war crimes investigation. First, it is necessary to form a holistic forensic classification and forensic characterisation of violations of the laws and customs of war, which will ensure a unified approach to the collection, verification and evaluation of evidence during their investigation.

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Conflict of Interest

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Обставини, що підлягають встановленню в провадженнях за фактом порушення законів і звичаїв війни

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Анотація

Актуальність дослідження зумовлена необхідністю вдосконалення методології доказування в кримінальних провадженнях за фактом порушення законів і звичаїв війни. Увагу зосереджено на диспозиції ст. 438 Кримінального кодексу України, відповідно до якої слід звертатися до норм міжнародного гуманітарного і кримінального права. Метою дослідження було визначення структури предмета доказування у справах про воєнні злочини, виявлення його особливостей з огляду на принцип компліментарності, а також розроблення криміналістичної класифікації та характеристики відповідних діянь. Методологічний інструментарій охоплював системно-структурний, порівняльно-правовий, формально-юридичний методи, контент-аналіз судової практики й індуктивний аналіз, який дав змогу сформулювати теоретичні узагальнення на основі вивчення конкретних кримінальних проваджень. Практичну основу дослідження становив аналіз рішень національних судів першої та апеляційної інстанцій у справах, що стосуються вчинення воєнних злочинів на території України. Встановлено, що процес доказування має подвійну природу. Він охоплює, з одного боку, обставини, передбачені кримінальним процесуальним законодавством, а з іншого – факти, які є ключовими для кваліфікації діянь як міжнародних злочинів, учинених у межах збройного конфлікту та які мають прямий зв'язок з ним. У цьому контексті розслідування воєнних злочинів характеризується підвищеним рівнем складності, яку умовно можна диференціювати на дві групи. Першу групу становлять обставини об'єктивного характеру, що не підлягають впливу з боку органів досудового розслідування. Другу групу формують негативні чинники, на які можна вплинути в межах кримінального провадження для мінімізації їх наслідків. У цьому аспекті виявлено типові елементи, що підлягають встановленню під час розслідування порушень законів і звичаїв війни. Обґрунтовано доцільність доповнення ст. 438 Кримінального кодексу України кваліфікуючими обставинами, що конкретизують її зміст. Наукова і практична значущість одержаних результатів полягає у формуванні уніфікованого підходу до аналізу, перевірки й оцінки доказової інформації у справах про воєнні злочини, а також розробленні криміналістичної класифікації та криміналістичної характеристики таких правопорушень задля формування уніфікованої методики розслідування порушень законів і звичаїв війни.

Ключові слова:

воєнні злочини; предмет і межі доказування; контекстуальні обставини; збройний конфлікт; міжнародне гуманітарне право; міжнародне кримінальне право; криміналістична характеристика; криміналістична класифікація