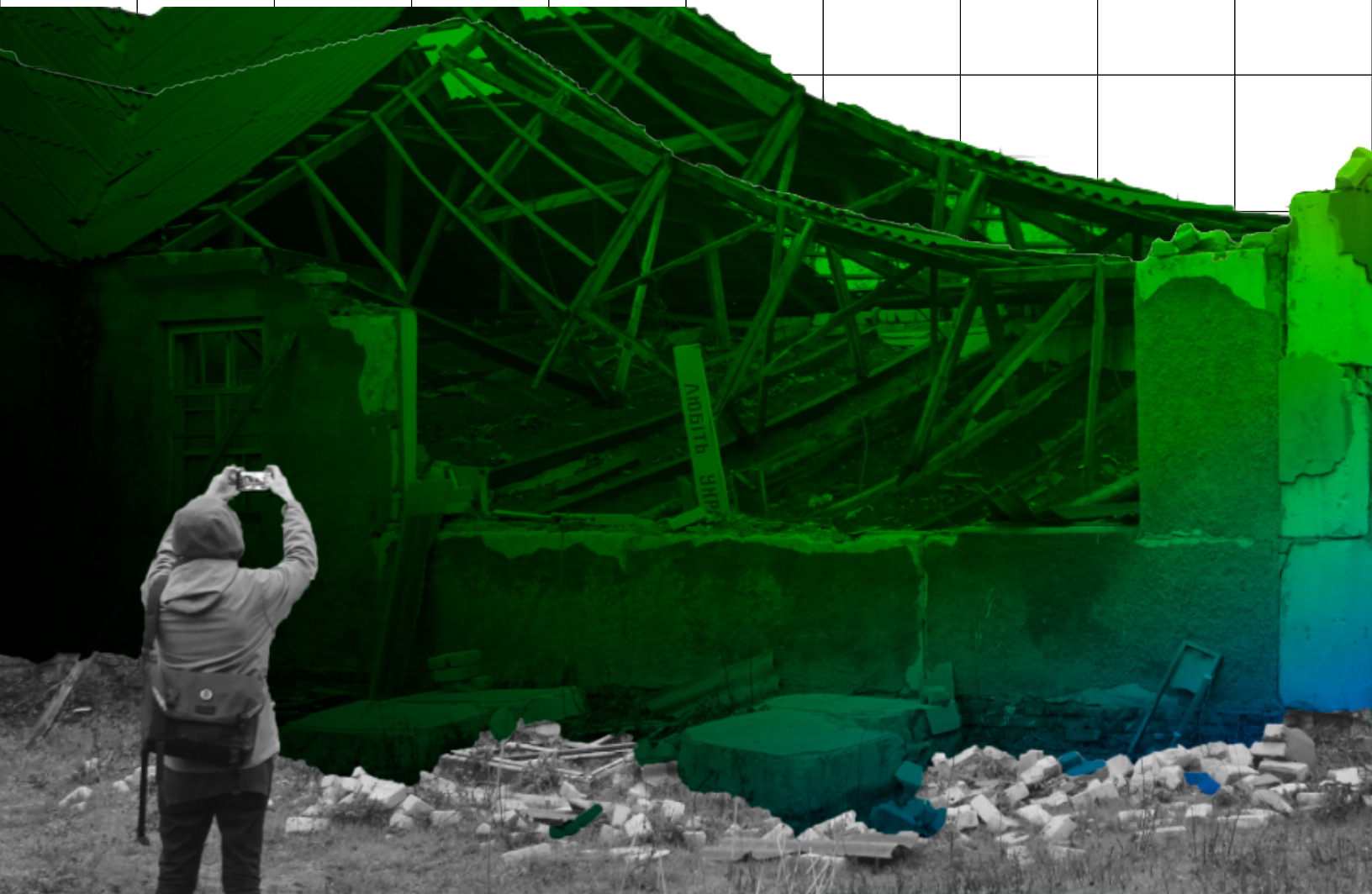




War Crimes

AN INVESTIGATIVE
METHODOLOGY FOR NGOs



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Truth Hounds – is a team of human rights professionals that has been working on documenting and investigating international crimes in the war contexts since 2014. Truth Hounds aims at establishing justice for those who suffered from international crimes, and preventing the commission of international crimes.

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Federal Foreign Office



INTRODUCTION

This reference book is intended to help representatives of NGOs documenting war crimes respond to armed conflict. In addition, it will help organisations interested in promoting the investigation of war crimes committed in Ukraine while working in foreign jurisdictions, based on the principle of universal jurisdiction. The reference book offers a brief overview of international humanitarian law and Ukrainian criminal law relating to war crimes.

In addition, the reference book offers a list of circumstances that must be ascertained during the inspection of a location where a war crime is believed to have been committed. Here you can find guidance on securing the scene and preserving data that may be important in later stages of incident investigation or recovery planning. The reference book also offers practical tips for collecting photographic and video evidence of capturing the aftermath of shelling.

The **purpose** of this reference book is to provide basic guidance on the professional documentation of war crimes cases, both for keeping track and logging these incidents and for building the capacity of specialised organizations to investigate and establish cases of violations of international humanitarian law. In addition, the reference book also aims to offer specialised organisations guidance on the principle of universal jurisdiction and the preparation of such cases for the investigation and subsequent prosecution of potential perpetrators in foreign jurisdictions.

Summary of the Primary Sources of International Humanitarian Law

International humanitarian law (IHL) is the body of wartime rules also known as the law of armed conflict or the law of war. IHL protects people who are not or are no longer participating in hostilities, while also restricting the means and methods of war. There are two branches of IHL:

the **'Law of Geneva'**, drawing its name from the city where the four Geneva conventions protecting **potential victims of armed conflicts**, such as those *hors de combat* and civilians who are not participating or are no longer directly participating in hostilities (due to being wounded, ill, having experienced shipwreck, being prisoners of war, or due to other circumstances), were adopted.

the **'Law of the Hague'**, based on the 1907 Hague Convention (IV) on the Laws and Customs of War on Land and its annex, Regulations concerning the Laws and Customs of War on Land.

The 'Law of the Hague' applies to:

- Means for armed conflict (*i.e.* weapons and other equipment allowing for offensive action)
- Methods (how those weapons are used and how overall military action is conducted)

Aside from the treaties, IHL also consists of international **customary law**. These are norms that have developed as a result of repeated identical behaviour on the part of states and the regarding of this behaviour as legally binding. Customary norms are unofficially codified by the International Committee of the Red Cross (ICRC) in the ICRC Customary International Humanitarian Law study, which is available on the ICRC website. This study covers norms that traditionally referred to both the 'Law of Geneva' and the 'Law of the Hague'. They are therefore binding on all states regardless of ratification.

The 'Law of the Hague' also refers to several conventions prohibiting or limiting the use of certain weapons, such as the 1993 Chemical Weapons Convention, the 1972 Biological Weapons Convention, the 2008 Convention on Cluster Munitions, and the 1980 Convention on Certain Conventional Weapons and its five protocols.

IHL also incorporates several other treaties, the most important of which are the 1977 Additional Protocols I and II to the Geneva Conventions, the 2005 Additional Protocol III to the Geneva Conventions, and the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

International and Non-International Armed Conflicts

Under the proper application of IHL norms, the central determinant is the conflict's qualification, *i.e.* determining whether the conflict is an international armed conflict (IAC) or a non-international armed conflict (NIAC), because the body of norms and regulations applied to these categories of conflict differs significantly. By default, the Geneva and Hague Conventions apply to IACs and, in most cases, do not apply to NIACs. Most of the customary norms of IHL apply to both types of conflicts, although even here more norms are applicable to IAC.

IAC refers to direct conflict between states, as well as situations in which a foreign power sends non-governmental troops into a territory. As such, IHL comes into force with the very first shot fired into the territory of another state or from the moment the border is crossed by a member of the armed forces of another country. Conflict is also qualified as international if a third country exercises at least general control over non-governmental troops.

International armed conflict also applies to situations of partial or total occupation of the territory of another state, even if there is no armed resistance to such an occupation (the 1949 Geneva Conventions, Article 2).

To be classified as an **NIAC** (and for respective IHL norms to be applied), the violence must reach a certain level of intensity and the parties involved must demonstrate a certain level of organisation and exercise control over some part of a country's territory. A spontaneous transition to violence by persons who are not bound by a common understanding of their actions, a common plan, and so on

cannot be considered the beginning of a non-international armed conflict. It is also important that the armed conflict should be lasting.

According to the 2018 International Criminal Court (ICC) Prosecutor's preliminary examination of the situation in Ukraine, there is both an:

- | NIAC – beginning on 30 April 2014

- | and an IAC, occurring simultaneously to the NIAC – beginning on 14 July 2014.

The Office of the ICC Prosecutor proceeded with investigating reports that the Russian Federation had been exercising overall control over armed troops in eastern Ukraine prior to 24 February 2022. The purpose of the Office's search was to determine whether the armed conflict between the Armed Forces of Ukraine and armed anti-government troops, which would otherwise be considered non-international, could be considered an international armed conflict with the use of proxy forces.

The armed conflict as it has been since 24 February 2022, due to the Russian Federation openly using their armed forces against Ukraine, as well as the complete and indisputable subordination of the proxy forces of the so-called "Donetsk and Luhansk People's Republics" ("DNR" and LNR", respectively) to the Russian Armed Forces, must be characterized as international. Accordingly, all IHL norms applicable to IAC apply here.

Article 438 of the Criminal Code of Ukraine and its Interpretation

Besides the aforementioned acts, Article 438 of the Criminal Code of Ukraine also criminalises the “use of methods of warfare prohibited by international law or any other violations of rules of warfare recognised by international law consented to by binding by the Verkhovna Rada [Parliament] of Ukraine”. While alternative views exist, references to international law should be viewed in the broadest terms possible. In other words, violation of almost any major IHL treaty (except for the Convention on Cluster Munitions and the Treaty on the Prohibition of Nuclear Weapons, to which Ukraine has not acceded) is punishable under Ukrainian criminal law.

Hence, Article 438 does not specify which violations of IHL treaties criminalises, leaving room for debate on whether national criminal law can criminalise any unspecified violation of IHL or only grave breaches of said international legislation. The answer can be derived from the rulings of the International Criminal Tribunal for the former Yugoslavia (ICTY), which in the Duško Tadić case indicated that “violations of the laws and customs of war” should be perceived as “serious violations of international humanitarian law”. The Tribunal, however, clearly and unequivocally indicated that such an interpretation was used to serve international justice.

Another source of international law that is traditionally referred to specifically by Article 438 in terms of the list of violations of the laws and customs of war is the Rome Statute of the ICC. Article 8 of said Statute offers a categorised catalogue of war crimes that are, beyond any doubt, considered to be in violation of the laws and customs of war. However, the purpose of the Statute and, therefore, of the list of war crimes therein is to create prerequisites for international prosecution of persons guilty of the gravest crimes. This, in turn, doesn't preclude different catalogues of war crimes from existing at the national level.

Another possible reading of Article 438 is its teleological consideration. This article of the Criminal Code of Ukraine was adopted to fulfil international obligations, the vast majority of which only require grave breaches of IHL to be criminalised. This could mean that Article 438 of the Criminal Code of Ukraine should only be applied to

grave breaches of IHL, not any violation of it. However, speaking of international treaties, those treaties allow (and even encourage) imposition of punishment (not necessarily criminal punishment) for violations of other IHL norms at the national level.

Thus, a reference to “violations of the laws and customs of war” in national legislation does not necessarily have to refer only to grave breaches of international humanitarian law.

There is No Crime and No Punishment Without the Respective Law.

Given the lack of a specified definition of violation of the laws and customs of war, the admissible extended interpretation of Article 438 of the Criminal Code of Ukraine must be consistent with the principle of *nullum crimen sine lege*, provided for, in particular, by Article 58 of the Constitution of Ukraine and Article 7 of the European Convention on Human Rights (ECHR).

When interpreting said principle, one has to take into consideration the practice of the Constitutional Court of Ukraine (CCU) and the European Court of Human Rights (ECtHR), as required by the “Law on the Implementation of Judgements and the Application of Practice of the European Court of Human Rights”. It is also necessary to assess the risks of potential convicts filing constitutional complaints with the CCU or a statement of human rights violations with the ECtHR should Article 438 be applied without alignment with the abovementioned principle.

To date, the ECtHR has generated considerable jurisprudence where Article 7 is interpreted. In particular, it is worth considering the *Jorgic v. Germany* and *Kononov v. Latvia* cases, with summaries of those cases being similar to possible suits against Ukraine should Article 438 of the Criminal Code of Ukraine be applied too broadly.

In those rulings, the ECtHR indicated that the rulings of national courts would not violate Article 7 of the ECHR should the defendant be aware of the possible penalty of their actions and could foresee the consequences in the form of criminal prosecution for violation of IHL. Even a simple soldier could not help but be aware of certain limitations during warfare. For instance, the execution of civilians is an obvious violation of IHL. In case of national criminal law being vague, the ECtHR in its rulings sought to determine whether the defendant could predict the potential

penalty of their specific actions. For that, the Court analysed the practice of international criminal courts, doctrine, authoritative commentary on IHL, and the provisions of international treaties.

Even in the absence of a respective law at the time the crime was committed, the deed can be criminalised if the defendant could understand the potential penalty of their deed and predict the possible repercussions in the form of criminal prosecution.

Likewise, when applying Article 438 of the Criminal Code of Ukraine, it is necessary to similarly focus on the practice of international criminal courts, doctrine, authoritative commentary on IHL, and the provisions of international treaties. At the same time, the list of actions that can be considered violations of the laws and customs of war does not necessarily have to be an exact copy of the list contained in Article 8 of the Rome Statute or the list of serious violations of IHL under the Geneva Conventions or Additional Protocol I. The list can be expanded, though not in an arbitrary fashion. In any case, the expansion of the list of the abovementioned acts should be supported by international practice. Otherwise, Ukraine will almost certainly face legal action in the ECtHR and, above all, in the Constitutional Court.

It is therefore suggested to take cues from the list of actions that can be qualified as violations of the laws and customs of war proposed by “Draft Law № 9438 on Amendments to Certain Legislative Acts of Ukraine to Provide for the Harmonisation of Criminal Legislation with International Law”. The list offered by this document complies with international standards and Ukraine’s obligations under international treaties regarding the criminalisation of violations of IHL.

Documenting War Crimes for National Courts of Law and the ICC

Documenting international crimes for national courts of law has certain specifics compared to the ICC, which is primarily attributable to the different logic of criminal provisions under each system.

Hence, for national trials, deeds that bear indicia of war crimes must generally be classified under Article 438. Other articles that are more specific, though can also be considered as types of war crimes, are Articles 432, 433, 434, and 435. As for the classification of criminal acts for the ICC, it should be based on Article 8 of the Rome Statute, which offers a catalogue of war crimes that differs to its Ukrainian counterpart.

This catalogue divides all war crimes into four groups, with two of them covering crimes that may be committed in an international armed conflict and another two covering crimes that may be committed in a non-international armed conflict. Accordingly, several groups sometimes list nearly identical charges and the choice of a specific option from those offered by the four groups of Article 8 of the Rome Statute will depend primarily on the definition of the type of armed conflict.

The very structure of war crimes in the understanding of the ICC differs from that of the respective structure as defined by Ukrainian legislation. The ICC does not deal with the concepts of subjective (subject and subjective element, *mens rea*) and objective (object and objective element, *actus reus*) features of the crime. Instead, it uses a structure that includes a material element, a mental element, and a contextual element (contextual circumstances).

In lieu of subjective and objective features of a crime, the ICC uses a structure that includes a material element, a mental element, and a contextual element (contextual circumstances).

Forms of complicity, designated as types of responsibility under international criminal law, also differ from those described by Ukrainian legislation. Thus, Article 25 of the Rome Statute defines that a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

- a) Commits a crime as an individual, jointly with another, or through another person;
- b) Orders, solicits, or induces the commission of such a crime;
- c) For the purpose of facilitating the commission of such a crime, aids, abets, or otherwise assists in its commission or its attempted commission;
- d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - d.1) Be made with the aim of furthering the criminal activity or criminal purpose of the group [...] or
 - d.2) Be made in the knowledge of the intention to commit the crime.
- e) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions.

One can visualise this classification as a pyramid, with the most difficult responsibility and liability for punishment to prove (and the closest to the base of the pyramid, as it requires as much evidence as possible) being “Commits a crime as an individual, jointly with another, or through another person”. If one can be tried and found guilty under this type of responsibility, then it makes no sense to turn to others. The higher levels of the pyramid should be perceived similarly.

Continuing the pyramid analogy, its top level will be a type of responsibility laid down in Article 28 of the Rome Statute (and totally foreign to the Ukrainian legal system), namely “the responsibility of commanders and other superiors”. This is worth proving whenever there’s no chance of prosecution for more serious levels of liability from the lower levels of the pyramid.

Unlike Ukrainian legislation, Article 28 of the Rome Statute establishes the responsibility of commanders and other superiors for committing war crimes.

The specifics of the latter is that a military commander or person effectively acting as a military commander may not participate in committing the crime or facilitating in the commission of said crime. All that is needed is that the forces that committed the crimes were under their command and control, where the military commander or person:

- a) Either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
- b) Failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Since this type of responsibility is foreign to the Ukrainian legal system, case files prepared for the ICC should be (at least in this regard) more extensive than if the case were to be prepared for a Ukrainian national court.

War crimes under the Rome Statute are listed in Article 8 of said Statute. Please scan the QR code below with your smartphone to open the document.



Elements of War Crimes According to the Rome Statute

Material Elements

The material elements of each specific body of a war crime defined in Article 8 of the Rome Statute are explained and articulated in a document entitled Elements of Crimes. This document was adopted by the member states of the Rome Statute. It is a binding source for use by the International Criminal Court, meaning that Elements of Crimes must be referred to while interpreting the material elements of war crimes.

Material elements of war crimes can be conditionally divided into two components:

- An act criminalised by the Rome Statute; and
- An object affected by such an act.

Acts are always described in the **first** paragraph of the corresponding **body of a war crime in the Elements of Crimes**. They can be, for example, attack, deportation, deprivation of liberty, capture, etc.

Objects of the infringement are described in the **second** paragraph of the corresponding **body of a war crime in the Elements of Crimes**. Among such objects are buildings and structures protected under IHL, civilians, nature, prisoners of war, combatants who laid down their arms and surrendered unconditionally, and so on.

Thus, to establish whether there are elements of a war crime present, it is necessary to establish that there is a criminal act in the deed of the defendant and that this act infringes on the objects protected by IHL.

Mental Elements

The requirements for mental elements (*mens rea*) are spelled out in Article 30 of the Rome Statute, as well as in relevant parts of the Elements of Crimes.

Article 30 of the Rome Statute indicates that a person shall be criminally responsible and liable for punishment for a crime committed with intent and knowledge. That is, the Rome Statute requires the so-called conative component and intellectual component of the mental element.

The conative component (intent) is present where:

- In relation to conduct, that person means to engage in the conduct;

- In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

The intellectual component is to be understood as though the perpetrator of the crime (in the broad sense of the word) was aware of the existence of certain circumstances (for example, the protected status under IHL of the object of attack) or that in the normal course of events, the consequences would occur.

The *mens rea* standard introduced by the Rome Statute is rather high, higher than those at the national level and in predecessor international criminal tribunals. Thus, when the mental element is defined by **negligence**, it **is not enough** for the deed to qualify as a war crime. It is necessary that the perpetrator was aware of the circumstances and the inevitability of the consequences in the normal course of events and meant to cause those consequences.

Contextual Element (Contextual Circumstances)

Contextual elements of war crimes are defined in the corresponding section of the Elements of Crimes, although the conclusion about them being a structural part of a war crime is obvious even according to a literal reading of Article 8 of the Rome Statute.

Another difference between the contextual elements of war crimes and other types of international crimes is their non-universality with regards to the composition of crimes from paragraphs (a) and (b) and (c) and (e). For the first group of components of war crimes, the contextual element is that a crime is committed in the context of an international armed conflict and in connection with it and that the defendant is aware of the fact that there is an armed conflict. For the second group, the contextual element is that a crime is committed in the context of a non-international armed conflict and in connection with it and that the defendant is aware of the fact that there is an armed conflict. At the same time, please note that the contextual elements of war crimes that are on the mental end of the spectrum (the defendant is aware of the fact that there is an armed conflict) are the same both for the compositions defined by paragraphs (a) and (b) and for the compositions from paragraphs (c) and (e). In other words, for this contextual element, it is irrelevant which type of armed conflict the defendant believes is taking place.

Therefore, for the correct interpretation of the contextual elements of war crimes, it is critical to clarify the following components:

- a) Whether there exists an international armed conflict;
 - b) Whether there exists a non-international armed conflict;
 - c) Whether the act is sufficient connected to the armed conflict (*war nexus*);
 - d) Whether the defendant is aware of the fact that there is an armed conflict (this component can be conditionally called a **mental contextual element**).
- }

**material
contextual
elements**

Sufficient Connection Between the Act and the Armed Conflict

The mere existence of an armed conflict is insufficient to indicate the requirements of the contextual element of a war crime have been fulfilled. It is also necessary to have a sufficient connection between the specific incriminating act of the defendant and said armed conflict. Proving the connection between a specific act containing elements of a crime and an armed conflict is more difficult in the case of an armed conflict of a non-international nature and is practically a non-issue in the case of an international armed conflict.

The basis for proving the connection between the conflict and a specific act consists of the following two factors:

- a) Attacks are targeted against persons not directly participating in the armed conflict; and
- b) The act must be aimed at achieving certain goals of an armed group, facilitate the achievement of those goals in some way, or at least occur simultaneously with the armed conflict (and have a certain resemblance to other operations in terms of the armed conflict).

A detailed explanation of specific components of war crimes is offered by the Elements of Crimes, an annex to the Rome Statute, and is used by the ICC as one of the main sources of law. When in doubt regarding the specific type of war crime you have encountered, it is worth looking at the elements of similar and related war crimes. This way, you will be able to establish all the necessary details of the incident, which will later be used by the competent authorities for further investigation or building a case in court.

Please acquaint yourself with the Elements of Crimes by scanning the QR code below.



Preparation of Cases for Prosecution Under the Principle of Universal Jurisdiction

General Characteristics of the Principle of Universal Jurisdiction

The principle of universal jurisdiction provides for a state's jurisdiction over specific crimes (most often international crimes, *sui generis* crimes, and universal crimes). This is the very last principle the stated will apply to establish the possibility of extending their own jurisdiction to investigate a crime. In this sense, the principle of universal jurisdiction is applied only when it is impossible to apply the territorial principle, the principles of active and passive personality, and the protective principle.

Under this principle, states may or shall prosecute criminals present on their territory, regardless of the criminal's nationality, where the crimes took place, or the victims' location and nationality.

The material basis for the application of the principle of universal jurisdiction is the national legislation of the respective country, which determines which crimes and under what conditions they may be prosecuted by the state based on this principle. However, certain obligations regarding the implementation of the principle of universal jurisdiction in national legislation are also found in international treaties (for example, in Article 5 of the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment and Punishment, Paragraph 2 of Articles 49/50/129/146 of the four Geneva Conventions of 1949, Article 85 of Additional Protocol I to the Geneva Conventions, Article 7 of the Convention on the Prevention and Punishment of Crimes Against Persons Enjoying International Protection, including Diplomatic Agents, *etc.*).

Most often, national legislation provides for the principle of universal jurisdiction in connection with four types of crimes: genocide, crimes against humanity, war crimes, and torture. As for the last type of crime, it can be both a component of crimes against humanity and war crimes and an independent body of crime (in the

latter case, its criminality does not depend on the context of whether there are large-scale or systematic attacks on the civilian population or of armed conflict as such). National legislation can offer formulas allowing for the application of this principle to other crimes as well. For instance, the Argentine Constitution refers to the possibility of prosecution for [any] crimes against international law, Norwegian criminal law allows for prosecution in cases where international treaties with other states allow or oblige Norway to do so, and the Spanish Judicative Act, in addition to the crimes listed above, also mentions piracy, terrorism, counterfeiting of foreign currency, smuggling of toxic or narcotic drugs, *etc.*

Trends in the Codification of the Principle of Universal Jurisdiction in National Legislation

According to a 2012 study by Amnesty International, 163 countries (or 84.46% of United Nations member states) have the legal capacity to prosecute those guilty of certain types of crimes under the principle of universal jurisdiction. At the same time, the national legislation of 91 of those 163 countries provides for the possibility of applying the principle of universal jurisdiction to investigate and prosecute those guilty of general criminal offences. Moreover, 16 of those 91 do not criminalise international crimes at all and, therefore, allow the use of the principle of universal jurisdiction only in relation to general criminal offences. Such seemingly positive statistics show that despite the wide codification of the principle of universal jurisdiction, in most cases it lacks deliberate efforts on the part of states to generate real negative consequences for the perpetrators of international crimes.

Thus, although, in theory, investigations based on the principle of universal jurisdiction can be initiated in most countries, only certain jurisdictions will actually deal with cases based on its application. They can be distinguished from the rest based on several key features, such as:

- The principle of universal jurisdiction is aimed at international crimes;
- Legislation on universal jurisdiction is detailed;
- They have special investigative teams tailored to investigating international crimes; and
- Settled judicial and law enforcement practices of investigating and trying universal jurisdiction cases.

An important aspect for evaluating national legislation regarding universal jurisdiction is, conditionally, the prism of “purity” of the principle of universal jurisdiction. Most modern legislative acts providing for universal jurisdiction contain certain caveat guidelines that limit the omnitude of the principle of universal jurisdiction. This statement is both static and dynamic as, since early codifications, even the countries that initially advocated a “purer” jurisdictional principle began to introduce restrictions on universal jurisdiction.

Generally speaking, national legislation can be divided into that which allows the application of the “pure” principle of universal jurisdiction and those that do not.

The “pure” principle of universal jurisdiction means that states do not require any link between the crime and the state of the jurisdiction (through perpetrators or victims) in order to be able to investigate and prosecute. For instance, this form of the principle of universal jurisdiction exists in Argentina, where broad possibilities to prosecute those guilty of committing crimes against international law outside of the country are enshrined at the constitutional level (Article 118). This broad framework is not narrowed by either secondary legislation or by law enforcement practice. The Spanish Judicative Act in its original version (subsequently amended in 2009 and 2014) recognised that Spain had the right to prosecute for crimes that could be classified under Spanish criminal law as genocide, terrorism, piracy, and a number of other crimes. Initially, there were no additional limitations to this definition of the applicability of the principle of universal jurisdiction. Article 8 of the Criminal Code of Ukraine also models the unlimited possibility of applying the principle of universal jurisdiction in cases stipulated by Ukraine’s international obligations (this may include war crimes, the crime of genocide, torture, and so on). Although, in practice, Ukraine has not declared an excessive desire to apply this principle in the form defined by the Code, the country retains the theoretical ability to do so.

Another type of codification of the principle of universal jurisdiction involves burdening it with additional requirements. Thus, the principle of universal jurisdiction either mixes with personal (active and passive) principles or closes in on them. In other words, the second type of national legislation requires some connection between the country of jurisdiction and the crime in order for state law enforcement and judicial authorities to investigate and prosecute based on the principle of universal jurisdiction.

For instance, the Spanish Judicative Act in its current form still provides for the possibility of prosecuting foreigners for committing the crime of genocide even if neither the perpetrators(s) nor the victims of this crime are Spanish citizens. However, a new addition requires that for the case to be tried in Spain the suspect of the crime needs to either reside in Spain or be staying on the territory of Spain, provided that the Spanish authorities have previously refused to extradite such a suspect to another country. Similarly conditional is the application of the principle of universal jurisdiction in relation to other crimes.

In Belgium, the situation is similar. In a country that in the early 1990s had perhaps the most progressive legislation on universal jurisdiction, criminal procedural law requires that cases under the principle of universal jurisdiction (regarding genocide, crimes against humanity, and war crimes) be initiated only with the sanction of a federal prosecutor and against persons residing in Belgium for the past three years or those who are refugees residing in Belgium.

Thus, the codification of the principle of universal jurisdiction saw it encumbered with additional conditions, which in general may be characterised as the connection of the crime with the country of jurisdiction.

Typical Requirements for the Perpetrator's Connection with the State of Application of the Principle of Universal Jurisdiction

Given current trends in the codification of the principle of universal jurisdiction, it is important to understand that most countries that may be theoretical destinations for the suspects of war crimes, crimes against humanity, or torture in connection with the conflict in Ukraine will have jurisdictional or procedural restrictions to this principle. Those restrictions will vary depending on each specific country and the type of crime. Therefore, there is no universal recipe for preparing a case for its possible investigation according to the principle of universal jurisdiction anywhere in the world.

However, it is useful to be aware of typical constraints found in the legislation of countries that are relatively active in terms of undertaking investigations based on the principle of universal jurisdiction. These constraints most often refer to:

- The accused person residing in the country;
- The accused person staying in the country;
- A tip that the country may be the possible destination of the accused person; and
- The accused person having refugee status in the country.

When the accused person has no connection to the country of potential jurisdiction, universal jurisdiction cases may still be tried in “pure” universal jurisdiction countries. However, of those countries that have a relatively extensive practice of applying the principle of universal jurisdiction, only Argentina remains on the track of the “pure” principle.

At the same time, none of the abovementioned prevents nations worldwide from investigating crimes related to the armed conflict in Ukraine when such crimes were committed by (or against) citizens or permanent residents of those states. In such cases, it comes down to the exercise of extraterritorial jurisdiction based on the principle of active or passive personality.

Extradition and “Pure” Universal Jurisdiction

One of the options for making use of the “pure” principle of universal jurisdiction is to initiate an investigation in a jurisdiction that does not require the suspect to have a connection with that state, with a subsequent extradition request from the jurisdiction to one of the states of the suspect’s stay or transit. This course of action additionally complicates the application of the principle of universal jurisdiction but is theoretically possible. To get the ball rolling, one needs to think out in advance the “route” of the case (initial jurisdiction, other jurisdictions where the suspect may show up, extradition treaties between the country of jurisdiction and the countries of the suspect’s travels, *etc.*). In addition, this algorithm should be applied to investigations of the gravest international crimes (which can be determined by the number of victims, the means of commission of the crime, negative social effects, *etc.*).

The Principle of “Complementarity” in Universal Jurisdiction

Although national legislation regarding universal jurisdiction often lacks provisions that would directly prohibit them from investigating and prosecuting persons who are under the jurisdiction of other states, the rule of complementarity is a cornerstone for most countries worldwide. This principle concerns the initiation of an investigation based on the principle of universal jurisdiction only if more closely related jurisdictions fail to pursue an appropriate investigation or prosecution. Thus, in order for cases of crimes committed in Ukraine to be prosecuted under the principle of universal jurisdiction, such cases should be chosen with consideration for the national activity of the respective Ukrainian law enforcement and judicial bodies.

Paperwork Required for the Process of Documentation and Fact-finding

Making sure that foreign law enforcement agencies and courts will be able to piece together the details of a crime, along with the process of its documentation, is an important aspect of the preparation of cases for trial under the principle of universal jurisdiction.

As for the actual crime event, the quality of its documentation is based on the amount, accuracy, and reliability of the information collected by the relevant stakeholder. As for the documentation process (or rather the paperwork on the documentation process), in order to increase the chances of success in a foreign jurisdiction, it is important that the relevant stakeholder has information on the following:

- a) The documentation action plans for the missions that obtained the respective information on the crime;
- b) What triggered the initiation of a respective mission;
- c) Persons who established the relevant facts;
- d) Steps undertaken in an open-source intelligence (OSINT) investigation;
- e) What triggered the initiation of an OSINT investigation;
- f) Persons who contacted the witness or victim, indicating the date(s) of said contact and the means of communication;
- g) Storage and record maintenance procedures for witness/victim statements; and
- h) Persons who had access to witness/victim statements.

The abovementioned information does not necessarily have to be immediately provided alongside other case materials to the respective authorities of a foreign state or partners from non-governmental organisations conducting cases under the principle of universal jurisdiction. However, it should be readily available should a foreign jurisdiction launch an investigation of the case. One option for keeping track of such information is a table recording each step taken, person, transfer of information, contact with witnesses, *etc.*

Tips on selecting Cases for further Prosecution under the Principle of Universal Jurisdiction

For ease of reference in this guide, the abovementioned information on selecting cases is presented in themed clusters. Thus, to assess the potential of a specific case in a foreign jurisdiction, one must focus on the following:

a) In terms of the perpetrator:

Citizens and permanent residents of a foreign state (naturally, except for the Russian Federation and its associate states as, in this case, the principle of active personality kicks in);

Persons who received refugee status in a foreign country;

Persons who reside (not necessarily permanently) in a foreign country;

Persons who own real estate in one of those countries; and

Persons who can travel to one of those countries.

b) In terms of the victim:

Citizens or stateless persons that are permanent residents in other countries (the principle of passive personality applies); and

Citizens of Ukraine that have cultural ties with other states that are confirmed by respective certificates, passports, cards, *etc.*

c) in terms of the type of crime:

The crime of torture as such, which generally requires at least a scant nexus with a country of potential jurisdiction; and

War crimes (primarily those not requiring complex technical assessment of proportionality, military necessity, and connection with an armed conflict, such as the killing of civilians or prisoners of war, intentional destruction of property (including cultural values) without any military justification, torture, sexual violence, military recruitment of children, *etc.*).

d) In terms of the perpetrator's level:

Middle-ranking commanders; and
Direct executors.

e) In terms of investigation in Ukraine:

Crimes that are not investigated at the national level; and
Crimes, the investigation of which is suspended or has not been initiated due to the inaccessibility of the suspect.

Question Matrix for Documenting War Crimes by Type

| Action | What to ask / What to look for |
|--|--|
| <p>Proving the connection between the incident and the armed conflict</p> | <p>First of all, you must show how the incident relates to the armed conflict. Prove in clear terms how a specific act is related to an armed conflict.</p> |
| <p>General attribution</p> | <p>The next very important task is to prove which unit involved in the conflict committed the crime(s).</p> <p>What evidence can you find that the commanders of certain military establishments organised, coordinated, or planned the military actions of a certain unit?</p> <p>To prove the involvement of the state (the Russian Federation), you will need to additionally show that these groups were financed, trained, equipped, and directed by representatives of state structures.</p> <p>Please note that war crimes can be committed by:</p> <ul style="list-style-type: none"> a) Armed personnel of the unit (regardless of the unit's subordinacy) against an enemy combatant or a civilian; or b) Civilians against either an enemy combatant or an enemy civilian. <p>We should also note that crimes committed by military personnel against their own troops/units cannot be qualified as war crimes.</p> |

Definition of the element
of “intent” about war
crimes

“Intent” refers to “criminal intent”, i.e. intent to achieve specific consequences as a result of a prohibited act.

IHL clearly requires intent, or at least **negligence** (*dolus eventualis*), which occurs every time someone, aware of the possible malicious consequences of their actions, knowingly accepts the risk of such consequences.

“Awareness”, meaning understanding the consequences of the act (what exactly will occur as a result of the act) is part of **criminal intent** (*dolus*).

For certain limited categories of war crimes, serious or **criminal negligence** (*culpa gravis*) may be sufficient, meaning the perpetrator of the crime, although aware of the degree of risk as a consequence of their actions, was nevertheless convinced that the prohibited consequences would not occur.

This modality of the mental element of the crime applies to cases of liability of commanders when the commander should have known what their subordinate was doing.

Conduct of warfare:
General principles

Under the conditions of war, the principles of **distinction and proportionality** should be observed. If a combatant intentionally or knowingly violates these principles, then their actions may constitute a war crime.

It is important to bear in mind that the presence of civilian casualties does not necessarily mean that a war crime has been committed. A certain level of collateral damage is permitted by the laws of armed

conflict if the civilian casualties are proportionate to the importance of the military object attacked.

If a combatant aims at a civilian in the full belief that he is a legitimate military target and that belief is based on valid assumptions, then such an attack is unlikely to constitute a war crime.

When conducting an investigation, it is important to gather all available information to help determine whether the combatant's attack on civilians was intentional or negligent and whether they used disproportionate military force. This determination usually derives from the circumstances of the attack.

Conduct of warfare:

Questions to ask

1. Was there any warning during the attack?
2. Were any military facilities (including personnel and equipment) located anywhere near the point of attack? This is extremely important and should be recorded in detail. It's best to simply ask the witness why they think that a particular area was attacked. Ask the witness to indicate the distance in metres as the crow flies to the nearest military object. Were there soldiers there, if so, how many? Were there military vehicles, weapons, warehouses, fortifications, or command centres? Try to depict it as accurately as possible and explain to the witness that this is necessary to obtain a complete picture of what happened. Do not tell the witness that if there were military facilities nearby the attack may not be a war crime. If the witness becomes aware of this, they may be reluctant to share such information.
3. Ask the witness if there were other eyewitnesses who could help you understand the circumstances

- of the attack.
4. Ask the witness to describe the effect of the attack. Were there any explosions or shootings? Who and what was affected?
 5. Is there any physical, photographic, or documentary evidence of the attack? Did someone take photos or record videos? Is there shrapnel or some other physical object left from the attack? Sometimes the witness themselves has such evidence or can direct you to someone who might have it.
 6. Ask the witness to describe the time of day when the attack took place and what was happening in the area when the attack took place (was there any fire from either side, was there movement of military equipment, *etc.*).
 7. Can the witness say where the attack was launched from? If so, how do they know? Sometimes the witness “knows” only because they simply believe that the attack was launched from a certain place due to the military being present there or because other attacks were launched from the same location. Sometimes a witness knows because they heard sounds or saw the attack.
 8. Ask about the place where the witness was at the time of the incident and what makes them sure of the information they provide (they were on-site and have first-hand experience, they were staying in a shelter and are making assumptions, or they weren’t personally there but heard neighbours’ recollections).

Conduct of warfare:

What to look for

Ask the witness if they know of any other attacks in the area. Under such circumstances, the crimes can often be proven by a series of deliberate attacks on civilians or the use of disproportionate force. If the incident is isolated, it will be almost impossible to determine from the circumstances that it was deliberate, as there is always room for mistake (unless, of course, there is direct evidence from someone involved in the attack or someone with knowledge that the attack was directed at the civilian population or that disproportionate force was used). Therefore, evidence of a pattern or series of events is often crucial to proving that crimes were committed.

While collecting such information, it is important to try to compile information from various witnesses and to paint a complete picture of the particular attack and any forms of attacks that may have taken place. Witnesses often mention other witnesses, sources of information, or other similar attacks.

Crimes against persons **who are not or are no longer** participating in hostilities

First of all, one must determine whether the victim belongs to any of the categories of protected persons. Protected persons are:

- a) the wounded;
- b) prisoners of war; and
- c) civilians;

Any of the following acts committed against protected persons would constitute a war crime:

- a) Wilful killing;
- b) Torture or inhuman treatment;
- c) Wilfully causing great suffering or serious injury to body or health; and

- d) Extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly.

Crimes against **enemy combatants or civilians** committed by resorting to prohibited methods of warfare

Any of the following acts is a crime:

- a) Intentionally directing attacks against the civilian population in area of hostilities;
- b) Carrying out acts or threats of violence the primary purpose of which is to spread terror among the civilian population;
- c) Intentionally launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such an attack will cause excessive loss of life, injury to civilians, or damage to civilian objects;
- d) Intentionally directing attacks at non-defended localities and demilitarised zones;
- e) Intentionally directing an attack on a person who is recognised to be hors de combat;
- f) Deliberate attacks on medical personnel, facilities, materials, and equipment;
- g) Wilful infliction of widespread, long-term, and severe damage to the natural environment;
- h) Employing weapons, projectiles, materials, and methods of warfare that are of a nature to cause superfluous injury or unnecessary suffering;
- i) Employing asphyxiating, poisonous, or other gases, as well as all analogous liquids, materials, or devices;
- j) Employing chemical or bacteriological weapons;
- k) Employing weapons that injure by fragments which, in the human body, escape detection by

| | |
|---|---|
| | <p>x-ray or blinding laser weapons; and</p> <ul style="list-style-type: none">l) Deployment of booby-traps and indiscriminate mines (affecting both combatants and civilians) in areas where civilians are likely to be found. |
| <p>Crimes against persons or objects enjoying special protection</p> | <p>Any attack committed during a military conflict against any of the following groups is a war crime:</p> <ul style="list-style-type: none">a) Medical personnel or transport;b) Personnel partaking in negotiations;c) Humanitarian organisations such as the Red Cross / Red Crescent;d) United Nations peacekeepers; ande) Any peacekeeping personnel deployed with the consent of the parties to the conflict. |

Psychological Protection of Witnesses and Victims

The professionalism of the person interviewing a witness or victim has an impact on both the quality of information obtained and the psychological health of the interviewee, who has often undergone severe stress.

If you are interviewing witnesses immediately after the incident or in the first two weeks following it, do not expect to quickly reach the relevant part of the discussion. Any life-threatening situation (even if that threat wasn't directly aimed at the witness) causes significant stress, which affects the hormonal balance and analytical functions, causing the person to act on pure instinct. Thus, such a person is unable to analyse properly and think rationally and therefore can't offer comprehensive answers to your questions. It is worthwhile to conduct an additional interview about a month after the initial one when the person's hormones have likely returned to normal levels and they have regained the capacity to think rationally and offer a consistent recollection of the events they witnessed.

While Preparing for the Interview

1) Ensure safety

Assess the situation immediately upon arrival at the scene. People should be safe. The people in question will not be able to take care of themselves in moments of stress. Is everyone okay, or does anyone have heart disease, asthma, or other health problems? Invite the person to sit down. It is advisable to offer the witness a glass of water poured in advance. Ask about the physical condition of the witness and how they are feeling.

2) Establish trust

Unfortunately, people are not always ready to trust a new acquaintance. Therefore, it is important to establish trust. This comes from respect for the witness as a person. Ask them if they are comfortable talking now. Inform them how long the

survey will take. Remember that when you start in-depth questioning on the details of the incident you are investigating, the person involuntarily immerses themselves in both memories and the feelings they experienced.

About a month after the initial post-incident interview, it is worth retaking the testimony.

The person once again relives the stress, fear, numbness, and so on that they experienced during the incident. Therefore, it's worth saying that you are sorry for having them recall the incident and reminding them of the purpose for which you are doing this, which is to punish the guilty party. Otherwise, the person may have a hard time explaining to themselves why they should relive that whole experience again.

In such situations, many people also find the sight of unconcealed weapons unnerving.

3) Protect children

It is inadmissible to take parents' testimony with any minor children present. Said children should be separated from their parents. Therefore, it is better to take interviews in teams of two, with one of the team entertaining the child(ren) while their parent(s) is/are being interviewed.

If the incident was witnessed by a minor child, you should not by any means take their testimony without a psychologist present.

Only then can you start the inquiry.

The Inquiry

1) Face-to-face meeting

Never conduct the initial interview over the phone or at least ask the person what type of communication they are most comfortable with. As for you, it is definitely better that you see the person and that said person sees you. The reinterview can

be held over the phone, but you must still have the person's agreement. It's worth revisiting the "Establish trust" paragraph. Even if you established trust in your initial interview, trust is something that should be regained every time.

2) Storytelling

Ask the person to tell you what they witnessed or experienced. If the interview is taking place during the first two weeks following the incident, do not ask closed (yes/no) questions. Do not ask for clarifications and do not offer any hints, as this is a means of implanting false memories which may stay with the person as their perceived first-hand recollection for the rest of their life.

Your questions must be open.

Please refer to the Question Matrix in this document for an approximate list of questions.

Do not offer the witness any hints, as this is a means of implanting false memories which may stay with the person as their perceived first-hand recollection for the rest of their life.

If during your conversation the person's eyes glaze over, if they start trembling, if their breathing slows, or they are gasping for air, etc. pause with the questioning and offer them some water. Ask if the person is all right and if you can proceed. If they stop breathing, they may have a panic attack. Whatever it may be, you are unable to properly cope with all those conditions of your witness on your own, so it's better that you prevent that from happening and call for medical assistance if needed.

After the Inquiry

1) Respect trauma

You need to understand that people's reactions to traumatic events will differ. Some can survive even the gravest injury relatively unscathed, while others grieve for the loss of property that (to you) has no particular value. Never compare

someone's grief with that of others. Everyone tends to take their own woes to heart more than the woes of others. We shouldn't dismiss other people's trauma. Someone who hasn't yet processed their traumatic experience can be stuck in it.

Don't compare the person's woes with those of others.
"You only have a hole in the ceiling, while your neighbour lost their leg" is a bad thing to say.

2) The here and now

You must help the interviewee return to the here and now after the inquiry is over. Never leave someone one-on-one with unpleasant memories. To do this, switch their attention to the things unrelated to the traumatic event. Try to talk about family, hobbies, praise their neat yard, or something else. Older people tend to soften when recalling the distant past when they were employed and were young and strong. It is crucial that you avoid any references to the incident that was the reason for your interview.

3) Farewells

Show some empathy and compassion for the person's misfortune. Do not say that you understand them. You should also avoid phrases like:

- "Carry on!"
- "God, why did this have to happen?"
- "That's nothing."

Show your respect and sympathy, but never pity the person. That person is not below you - they are the ones doing you a favour and helping you with the investigation.

Photographic and Video Evidence of Damage and Destruction Which may be Indicative of War Crimes

How Should One Photograph Damage that Could be Indicative of War Crimes?

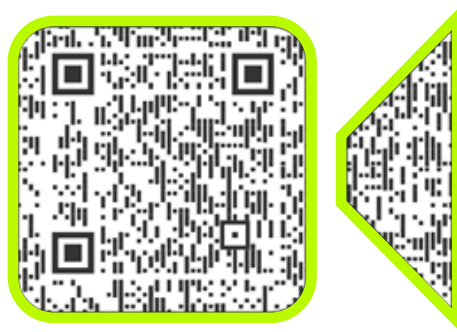
The general rule for photo fixation is to turn on the geolocation in the settings of your camera. Try not to take many photographs of the same place (from the same angle). You should rather choose only key items that would help establish the circumstances of the incident and the extent of the damage and be as informative as possible. It is important to place measuring devices (a tape measure or a ruler) in the frame while capturing close-ups to accurately demonstrate the size of the object. While taking pictures and recording videos of damage to cultural property with your phone, try using special apps (such as EyeWitness for Atrocities) allowing, firstly, to fully and accurately save all the metadata of a media file, and secondly, to save these files on the phone in restricted access mode, which increases your own security as the documenter.

How to Shoot a Video?

A video from the scene of the incident must have the following data: date and timestamp of filming, exact location, detailed description of the incident, and (optionally) the author of said video.

1. Set the video quality to 1024 HD;
2. Hold your device horizontally;
3. Determine the direction of north and start recording from this point, indicating this direction aloud in the video;
4. Then, capture a slow and smooth 360° view of the area, capturing objects in the frame that will help you easily geolocate the site of filming;

5. While capturing the 360° view, clearly state the date, time, and the site of filming, as well as what is being filmed and the name of the person recording (if safety considerations allow);
6. Afterwards, proceed to a detailed shooting of the incident site, commenting on everything you show in the frame;
7. If the object of the shooting is large or scattered over the area, you can move around the entire affected area and make a recording from different angles;
8. It is better to record at length, without cutaways or long pauses.



Securing a Shelling Site

When documenting the effects of shelling (both with the use of rocket artillery and cruise missiles and aerial bombs), the study of impact craters is an important step which allows you to determine the direction from which a shell came and what weapons were used. The shelled areas should be inspected as soon as possible. Craters are easily deformed by both the elements and human (either military or civilian) intervention, losing their value as a source of information.

Upon arrival at the site of a shelling, your primary task is to single out the craters that will offer the most detailed information on the origin of the missiles. If those craters are plenty, don't try to secure them all - one or two craters are enough.

Two criteria will help you choose the right objects:

- A crater with the most distinctive shape;

- A crater at some distance from trees and other obstacles that could alter the missile's trajectory before it exploded.

Sometimes it's worth taking photographs and videos not of the crater of the shell that damaged the property, but of another one somewhere in an open field or on the asphalt surface of a nearby road or concrete square (the latter two are the best surfaces for determining the direction of attack). The main thing is to check with the witnesses and make sure for yourself that the crater was formed during the exact shelling that you are investigating, since the shelling incidents may not be isolated.

Two more tips:

- Determine the coordinates of the site you're investigating. This will place the shelling site on the map for further investigation.

- Take photos and videos of the impact site as described in the previous section.

Who is worth taking with you when departing to the site:

Law enforcement – investigators, detective constables from the national police, and the Prosecutor’s Office; and

Explosives experts.



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