

Research Article

PRISONER OF WAR: SPECIAL STATUS IN THE CRIMINAL PROCEEDINGS OF UKRAINE AND THE RIGHT TO EXCHANGE

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Summary: – 1. Introduction. – 2. The System of Ukrainian Law in The Conditions of War. – 3. Factors Causing the Necessity for Special Normative Regulation During the Period of War. – 4. Procedure for Criminal Responsibility and Exchange of Prisoners of War. – 5. Conclusions.

Keywords: *armed conflict, war crimes, prisoner of war, exchange of prisoners of war, prosecution of combatants, due legal procedure, prisoner of war as a participant in criminal proceedings, criminal proceedings in absentia, release from serving a sentence.*

ABSTRACT

Background. *This article is devoted to the relevant issue of the creation of appropriate normative regulation of criminal prosecution of prisoners of war who were captured during the armed conflict in Ukraine and their exchange. Despite the positive dynamics of destabilisation processes taking place all over the world, and in some places connected with the outbreak of military*

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conflicts of an international nature, insufficient attention is paid to the issue of legitimising the process of exchange of prisoners of war in national legal systems.

Methods: *The problem is complicated by the need to coordinate national legal mechanisms with the norms of international humanitarian and human rights laws, which cannot be competitive, but instead should have an integrative effect on national legal systems. Relying on the norms of international humanitarian law, the author concludes that prisoners of war, as legal participants in an armed conflict, due to the immunity (privilege) of the combatant, do not bear individual responsibility for the initiation of an aggressive war or participation in it and must be repatriated after its end, with the exception of cases where they committed so-called 'general criminal' crimes or violated the laws and customs of war. Moreover, the author's position is illustrated by a concrete practical example of the first sentence of the Ukrainian court against a combatant.*

Given that until July 2022, the Ukrainian criminal procedural law lacked a proper mechanism aimed at the exchange of prisoners of war, it is quite logical to direct the legal policy of the state to the development of the relevant procedural legislation.

Results: *Considering the significant dangerous challenges that Ukraine has faced, and the amendment of the legislation, the author refers to the analysis of the factors that determined the special normative regulation of the procedural order of prisoners of war; analyse the criminal procedural status of the suspect-prisoner of war; and point to the differentiation of the procedural orders of such an exchange, the key criterion for the division of which is the procedural status of the person. Using the example of the first sentence in Ukraine to a Russian prisoner of war and relying on the norms of international humanitarian and national law, the author illustrates the specifics of the criminal liability of combatants. Evaluating the procedure of exchange of prisoners of war and criminal proceedings in absentia which were positively introduced in the legislation of Ukraine, it was concluded that the exchange is not an act of forgiveness, but an opportunity to return Ukrainian citizens, which is of the utmost importance in the hierarchy of values for the state.*

1 INTRODUCTION

Unfortunately, local wars have always been a tool of policy of many states and the global strategy of competing international powers. Despite the processes of globalisation – the erasure of borders, the powerful digital transformation of all spheres of social life, and the rapid development of economies – humanity has not yet learned to solve geopolitical problems in a peaceful, diplomatic way.

It is even more unfortunate that an armed conflict is ignited on the European continent, where the vast majority of the population has been brought up in the spirit of non-acceptance of any manifestation of intolerance or use of armed force. However, the realities are that on 24 February 2022, Russia launched an unprecedented armed aggression against Ukraine, which essentially became an aggravation of the armed conflict that had been simmering for eight years in the east of Ukraine. The offensive of the armed forces of the aggressor country took place along the entire line of the state border between Ukraine and Russia. The aggressor also used the temporarily occupied territories of the Luhansk and Donetsk regions and Crimea, which was annexed in 2014, as a springboard for the offensive. However, in the first days of the offensive, the enemy met with fierce resistance from the Armed Forces of Ukraine, territorial defense forces and ordinary Ukrainian citizens. Thus, an international armed conflict, unprecedented for the territory of Eastern Europe in the 21st century, began.

Armed aggression is certainly a test of the maturity of all state institutions of Ukraine, among which the defense sector plays a key role. However, in a state governed by the rule of law,

even in times of war, the well-coordinated work of the state's legal system, which is thus tested for maturity and strength, is of great importance.

2 THE SYSTEM OF UKRAINIAN LAW IN THE CONDITIONS OF WAR

After the start of armed aggression, not only state institutions and the legal system as a whole but also the system of law itself faced complex challenges. This especially applies to criminal procedural law because law enforcement agencies faced extremely difficult tasks connected to the need to both maintain constitutional law and order in the state and perform a new function that was not inherent to them – the implementation of pre-trial investigations of military and war crimes, and the prosecution of persons who have the status of combatants and have committed war crimes on the territory of Ukraine.

The Criminal Procedure Code of Ukraine, which entered into force on 20 November 2012¹, is a modern codified normative act, however, it was developed and adopted in conditions of peace and stability in the functioning of state institutions and was designed for its application in peacetime. In no way did it contain differentiated procedures for criminal proceedings, which would be aimed at normalising the implementation of criminal proceedings under martial law. It should be noted that certain corrections were made to the Criminal Procedure Code of Ukraine in 2014 after the events in Donetsk and Luhansk regions. However, the novelties introduced by the Criminal Procedure Code were almost never applied, since the anti-terrorist operation (the operation of the joint forces) covered only a small part of the state, which made it possible to carry out criminal proceedings in the ordinary regime, and the normative regulation was and still is quite fragmented and non-complex.

The criminal legislation also turned out to be unprepared because the Criminal Code of Ukraine² did not contain the appropriate normative regulation for the qualification of war crimes committed during the war. The provision of the Rome Statute of the ICC³, which enshrines the list of war crimes, and the four Geneva Conventions of 12 August 1949⁴ and its Additional Protocol of 8 June 1977⁵ were not implemented prior to the outbreak of hostilities. In Crimea, investigators, prosecutors, and judges faced the problem of the need

- 1 Criminal Procedure Code of Ukraine of 13 April 2012 No. 4651-VI (*Official website of the Verkhovna Rada of Ukraine: official web portal*) <<https://zakon.rada.gov.ua/laws/show/4651-17#Text>> accessed 21 November 2022.
- 2 Criminal Code of Ukraine of 5 April 2001 No. 2341-VIII (*Official website of the Verkhovna Rada of Ukraine: official web portal*) < <https://zakon.rada.gov.ua/laws/show/2341-14#Text>> accessed 21 November 2022.
- 3 Rome Statute of the International Criminal Court. Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 38544 <<https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>> accessed 20 November 2020.
- 4 Geneva Convention on the Amelioration of the Fate of the Wounded and Sick in Active Armies <https://zakon.rada.gov.ua/laws/show/995_151#Text> accessed 20 November 2020; Geneva Convention on the Amelioration of the Fate of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea <https://zakon.rada.gov.ua/laws/show/995_152#Text> accessed 20 November 2020; Geneva Convention on the Treatment of Prisoners of War <https://zakon.rada.gov.ua/laws/show/995_153#Text> accessed 20 November 2020; Geneva Convention on the Protection of the Civilian Population in Time of War <https://zakon.rada.gov.ua/laws/show/995_154#Text> accessed 20 November 2020; Additional Protocol to of the Geneva Conventions of 12 August 1949, relating to the protection of victims of international armed conflicts (Protocol I), of 8 June 1977 <https://zakon.rada.gov.ua/laws/show/995_199#Text> accessed 20 November 2020.
- 5 Additional Protocol to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts (Protocol I), dated 8 June 1977 <https://zakon.rada.gov.ua/laws/show/995_199#Text> accessed 20 November 2020.

for a systematic interpretation and application of the norms of current national legislation and the so-called law of war – the norms of international humanitarian law.

Several mechanisms for bringing perpetrators of war crimes to justice are recognised: national, international and mixed⁶. Without their consideration in detail (which goes far beyond the scope of our research) we note that every person who has committed a socially dangerous act, which contains the composition of a criminal offense provided for by the Criminal Code of Ukraine, must be held criminally liable.

The parties to an armed conflict are also obliged by the norms of international humanitarian law to conduct an investigation into violations of international humanitarian law⁷. That is why national legislation must necessarily contain norms on responsibility for violations of the rules of warfare provided for by international humanitarian law. In Ukraine, such a norm is, primarily, Art. 438 of the Criminal Code 'Violation of laws and customs of war'⁸.

Given the fact that military conflicts of an international and non-international nature are a frequent occurrence in the world, the European Court of Human Rights (ECtHR) has repeatedly addressed the problems of effective investigation of crimes committed during armed conflicts, emphasising the relationship between international humanitarian law and international human rights law. In particular, in the case of *Georgia v Russia* (II), the ECtHR noted that

"In general, it may be observed that the obligation to carry out an effective investigation under Article 2 of the Convention is broader than the corresponding obligation in international humanitarian law [...] Otherwise, there is no conflict between the applicable standards in this regard under Article 2 of the Convention and the relevant provisions of international humanitarian law."⁹

In *Kaya v. Turkey*, the ECtHR developed a very important legal position that all serious violations of human rights must be subject to prompt, impartial, thorough, and independent official investigation. Moreover, the ECtHR applies this provision also in the case of a pre-trial investigation in the context of an armed conflict, because 'neither the scale of violent military clashes, nor the large number of them, can cancel the obligation to ensure the effective and independent investigation of deaths related to clashes in which the security forces participated.'¹⁰

6 For more detail, see: I Marchuk, 'Green Light from the ICJ to Go Ahead with Ukraine's Dispute against the Russian Federation Involving Allegations of Racial Discrimination and Terrorism Financing' EJIL Talk, European Journal of International Law 2019. <<https://www.ejiltalk.org/green-light-from-the-icj-to-go-ahead-with-ukraines-dispute-against-the-russian-federation-involving-allegations-of-racial-discrimination-and-terrorism-financing/>> accessed 20 November 2022; I Marchuk, 'From Warfare to Lawfare: Increased Litigation and Rise of Parallel Proceedings in International Courts: A Case Study of Ukraine's and Georgia's Action Against the Russian' in *Book The Future of International Courts* (2019) 217-234; YI Usmanov, 'International mechanisms for the protection of the right to life in armed conflicts' (2018) 140 *Problems of Legality* 154-165 <<http://plaw.nlu.edu.ua/article/view/121621/121075>> accessed 20 November 2022.

7 For example, Art. 103 of the Geneva Convention on the Treatment of Prisoners of War stipulates that 'Any judicial investigation of a prisoner of war shall be conducted with such speed as the circumstances permit and in such a manner as to cause the trial to commence as soon as possible'. See also 'Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy and Good Practice', published in 2019 by the International Committee of the Red Cross and the Geneva Academy of International Humanitarian Law and Human Rights. <file:///C:/Users/asus/Downloads/guidelines_on_investigating_violations_of_ihl_final.pdf> accessed 21 November 2022.

8 Criminal Code of Ukraine of 5 April 2001 No 2341-VIII (*Official website of the Verkhovna Rada of Ukraine: official web portal*) <<https://zakon.rada.gov.ua/laws/show/2341-14#Text>> accessed 21 November 2022.

9 *Georgia v Russia* (II) App no 382663/08 (ECtHR, 21 January 2021) para 325 <https://hudoc.echr.coe.int/fre#_ftn42> accessed 21 November 2022.

10 *Kaya v Turkey*, App no 22729/93, 19 February 1998, para 91. <https://www.stradalex.com/en/sl_src_publ_jur_int/document/echr_22729-93> accessed 21 November 2022.

In the case of *Al-Skeini and others v. the United Kingdom*, the ECtHR also indicated that

“... the procedural obligation under Article 2 continues to apply in difficult security conditions, including in a context of armed conflict... It is clear that where the death to be investigated under Article 2 occurs in circumstances of generalised violence, armed conflict or insurgency, obstacles may be placed in the way of investigators [...] and concrete constraints may compel the use of less effective measures of investigation or may cause an investigation to be delayed. Nonetheless, the obligation under Article 2 to safeguard life entails that, even in difficult security conditions, all reasonable steps must be taken to ensure that an effective, independent investigation is conducted into alleged breaches of the right to life.”¹¹

Considering that international documents, legal positions of the ECtHR refer the requirement to carry out an effective investigation to *jus cogens* norms. The state is obliged to conduct such an investigation, including war crimes, despite difficult conditions, such as a state of emergency or armed conflict, which determines its obligation to provide law enforcement agencies with appropriate legal regulation.

Taking into account Ukraine’s positive obligations and the lack of normative regulation, the Parliament of Ukraine, with the beginning of a full-scale war on 24 February 2022, directed the course of legal policy to active rule-making and adopted several packages of changes and additions to the current legislation in ‘turbo mode’, including the Criminal Procedural Code and the Criminal Code of Ukraine, with the aim of creating normative regulation of the procedure for carrying out criminal proceedings in conditions of war. It can even be stated that in the first two months of the war, a differentiated form, a special order of criminal proceedings, was created, which took the form of an institution of criminal proceedings and contains a set of norms aimed at regulating the order of pre-trial investigation and trial in martial law conditions.

3 FACTORS CAUSING THE NECESSITY FOR SPECIAL NORMATIVE REGULATION DURING THE PERIOD OF WAR

The factors that determined the need to create a special regime of pre-trial investigation and trial under martial law¹² can be divided into several groups.

The first group consists of circumstances of a legal nature. These include:

- a) the lack of adequate material and procedural legislative support, the specifics of which in the conditions of war are in the systematic regulatory regulation; and the application of norms of international humanitarian law and international human rights law in addition to national legislation, as well as bringing them into compliance with the requirements of international humanitarian law of Ukrainian legislation;
- b) the fact that the pre-trial investigation, even under martial law, must be both carried out in accordance with the law and the norms of the current legislation because criminal proceedings on the territory of Ukraine are conducted on the grounds and in the manner provided by the Criminal Procedure Code, regardless of the place where the criminal offense

11 *Al-Skeini and Others v The United Kingdom*, App no 55721/07, 7 July 2011, para 164. <<https://hudoc.echr.coe.int/fre?i=001-105606>> accessed 21 November 2022.

12 Section IX-1 ‘Special Regime of Pre-Trial Investigation, Trial Under Martial Law’ of the Criminal Procedure Code of Ukraine of 13 April 2012 No 4651-VI (*Official website of the Verkhovna Rada of Ukraine: official web portal*) < <https://zakon.rada.gov.ua/laws/show/4651-17#Text>> accessed 21 November 2022.

was committed (part 1 of Art. 4 of the Criminal Procedure Code of Ukraine);

c) any restrictions on the rights of a person in criminal legislation, which are determined by martial law, must have a legitimate purpose, be proportionate, and be based on current legislation;

d) the demand for simplified procedures;

e) the impossibility of applying certain norms of current legislation or even entire legal institutions, which is explained by conditions of an objective nature.

The second group consists of determinants of an organisational nature: a) carrying out hostilities on a certain territory of the state; b) lack of access to part of the occupied territory and the impossibility of conducting a pre-trial investigation and ensuring effective control and constitutional order there; c) destruction of administrative buildings and/or criminal procedural documents, materials of pre-trial investigations and court proceedings; d) inability of investigative judges, prosecutors, investigators, detectives, inquirers and other employees of law enforcement agencies to fulfill their powers; e) complete or partial non-functioning of state authorities and local self-government; e) destruction of the established mechanism of state administration; f) a sharp increase in the number of criminal offenses caused, among other things, by committing military and war crimes; g) lack of mobile communication and Internet; and h) mass migration processes, which cause the impossibility of involving participants in criminal proceedings to participate in investigative (search) actions, other procedural actions, court proceedings, and the impossibility of bringing to criminal responsibility persons for whom preventive measures in the form of detention were not chosen and who are hiding from pre-trial investigation bodies and the court in the territory not controlled by Ukraine.

The third group consists of factors of a security nature: a) the risk of conducting individual investigative actions or a pre-trial investigation in general in areas of active hostilities, b) the impossibility of ensuring safety for the life and health of participants in a certain procedural actions or criminal proceedings in general; and c) the impossibility of attracting witnesses, specialists, jurors, appointing and conducting an examination, which would determine the receipt of admissible evidence in criminal proceedings, due to hostilities.

A number of factors of a subjective nature can be distinguished as the fourth group: a) a lack of work experience in emergency conditions; b) the suddenness of the situation, which caused in some cases the inability of managers to organise subordinates to perform tasks under martial law; and c) a lack of experienced personnel who would be able to ensure the implementation of a pre-trial investigation under martial law.

4 PROCEDURE FOR CRIMINAL RESPONSIBILITY AND EXCHANGE OF PRISONERS OF WAR

One of the issues that arose in the criminal process of Ukraine is the problem of normalising the procedural status of prisoners of war who committed crimes. As is well known, the procedural status of prisoners of war is the subject of normative regulation of 'Geneva law'¹³. Until July 2022, criminal procedural legislation did not provide for the definition of the term 'prisoner of war'. Efforts to introduce the process of bringing combatants to criminal responsibility and their exchange into the legal field have been made by Ukrainian legislators

13 Geneva Convention on the Treatment of Prisoners of War. <https://zakon.rada.gov.ua/laws/show/995_153#Text> accessed 21 November 2022.

before, in view of the anti-terrorist operation (operation of the united forces) since 2014. In particular, in 2017, the concept of a prisoner of war was introduced in para. 8 of the Instructions on the Procedure for Implementing the Norms of International Humanitarian Law in the Armed Forces of Ukraine¹⁴. The Ukrainian legislator borrowed this concept almost *verbatim* from the Geneva Convention¹⁵. However, it was rather the harmonisation of the norms of international humanitarian law with national legislation. Despite the smouldering armed conflict in the East of Ukraine since 2014, the Ukrainian legislator did not anticipate the possibility of a large-scale armed aggression by Russia. Therefore, in the criminal proceedings there was no mechanism aimed at normalising the procedural status of a combatant who is brought to criminal responsibility.

It must be said that the persons who took part in the events in the east of Ukraine in 2014-2021, despite the lack of proper regulation and Russia's denial of their participation in it, were still brought to criminal responsibility and exchanged for Ukrainian military personnel. The lack of a legal mechanism led to informal practices being used to overcome the existing gap. In particular, a suspect who was held in custody, and for whom an exchange agreement was reached, was placed in non-isolation custody, after which he or she was released from custody in the courtroom and sent for exchange. Such cases became a custom, an informal practice, since their number was insignificant.

However, on February 22, 2022, after the start of the full-scale armed aggression against Ukraine and an increase in the number of prisoners of war, there was a need to adopt new legislation that would be consistent not only with the norms of international humanitarian law but also become the legal basis for a proper criminal procedural mechanism for bringing them to criminal responsibility and exchange (subject to agreements being in place).

It should be noted that combatants, in accordance with the norms of international humanitarian law, enjoy immunity (privilege) and cannot be prosecuted for participating in an armed conflict, with the exception of cases of international crimes committed, in particular war crimes, as well as so-called general crimes, provided by the national legislation on criminal liability. In these cases, the combatant, taking into account the principle of inevitability of punishment existing in Ukrainian law, should be held criminally liable. As an example, we can cite the first sentence that was handed down in the criminal trial of Ukraine against the 21-year-old Russian Armed Forces serviceman Vadym Shishimarin¹⁶, who became the first Russian soldier to appear before a Ukrainian court for committing a war crime.

In particular, on 24 February 2022, a serviceman of the Russian Armed Forces (Person 1), being the commander of the military unit of the 4th Tank Kantemyriv Division of the Moscow Region of the Armed Forces of the Russian Federation, having a personal automatic firearm, together with other persons not identified by the pre-trial investigation, including servicemen of the 13th Guard Tank Shepetovsky

14 Instructions on the procedure for implementing the norms of international humanitarian law in the Armed Forces of Ukraine. Approved by the Order of the Ministry of Defense of Ukraine of 23 March 2017 <<https://zakon.rada.gov.ua/laws/show/z0704-17#n1359>> accessed 21 November 2022.

15 Geneva Convention on the Treatment of Prisoners of War Ratified with reservations by Decree of the Presidium of the Verkhovna Rada of the Ukrainian SSR No 114a-03 of 03 July 1954. Entered into force for Ukraine on 3 January 1955. <https://zakon.rada.gov.ua/laws/show/995_153#Text> accessed 22 November 2022.

16 We are not changing the name due to the widespread media coverage of this trial. See: 'The first trial of a war criminal, Russian military officer Vadym Shishymarin, took place in Ukraine' (*Ukrainian News Agency*) <<https://nv.ua/ukr/ukraine/events/sud-na-rosiyskim-soldatom-shishimarinim-reportazh-nv-novini-ukrajini-50244061.html>> accessed 20 November 2022; 'The first verdict under Art. 438 of the Criminal Code over the Russian murderer-military Shishimarin: regarding legal qualifications' (*Protocol*) <https://protocol.ua/ru/pershiy_sudoviy_protses_nad_rosiyskim_viyskovim_shchodo_pravovoi_kvalifikatsii/> accessed 20 November 2022.

Krasnoznamennoy, Order of Suvorov and Kutuzov Regiment of military unit Number 1 and the commanders of the Armed Forces of the Russian Federation, set out from the city of Graivoron of the Belgorod Region of the Russian Federation in the direction of the Russian-Ukrainian border and at approximately 9 o'clock in the morning of the same day crossed the state border of Ukraine in Sumy Oblast.

A military convoy with servicemen of the Russian Federation, including Person 1, in compliance with the order of unidentified commanders of the Armed Forces of the Russian Federation, crossed the state border of Ukraine on February 24-26, 2022 and continued its movement through the territory of Ukraine. While following the route, servicemen of the Armed Forces of the Russian Federation in the territory of the Sumy region repeatedly came under fire from the Armed Forces of Ukraine, who were performing their duty, provided for in Art. 65 of the Constitution of Ukraine on protection of independence and territorial integrity of Ukraine.

In connection with these shellings, on February 27-28, 2022, the unidentified commanders of the Russian Armed Forces decided to form a military convoy of the Russian Armed Forces consisting of five units of equipment, namely: IFV, KAMAZ vehicle, two gasoline trucks and another IFV with a number of servicemen of the Russian Armed Forces who went to the Russian Federation. Among others, this column included servicemen of the Russian Armed Forces, namely: Person 1 and other servicemen.

At approximately 08:00 a.m. on 28 February 2022, from a place not determined by the pre-trial investigation, near the village of Komyshi, Okhtyrsky District, Sumy Oblast, the above-mentioned column of the Armed Forces of the Russian Federation set off towards the state border of Ukraine with the Russian Federation, passing through the village of Komyshi and continuing in the direction of Chupakhivka settlement of Okhtyrskyi district of Sumy Oblast.

The specified convoy of five units of military equipment of the Armed Forces of the Russian Federation and personnel, being in the town of Chupakhivka, moved along Lenina Street, after which it crossed the bridge of the Tashan River and left on the Lebedynska street and continued towards the village of Grinchenkove, Okhtyr district, Sumy Oblast. However, in the vicinity of the village of Grinchenkove, the said convoy was destroyed by the Armed Forces of Ukraine, as a result of which the IFV and the Kamaz vehicle were destroyed.

In this regard, about 15 servicemen of the Russian Armed Forces, who were left without means of transportation, divided into several groups, one of which included 5 servicemen of the Russian Armed Forces, namely: Person 1 and other persons.

At approximately 10:30 a.m. on the highway between Chupakhivka and the village of Grinchenkove, the specified servicemen noticed a gray Volkswagen Passat car (station wagon body) moving towards them from the direction of the village of Dovzhik in the direction of the village of Grinchenkove.

When this car leveled with servicemen of the Armed Forces of the Russian Federation, the latter, acting with the aim of taking possession of this car, fired a number of shots from their automatic weapons in the direction of the specified car, as a result of which the body, windshield and front left wheel were damaged. At the same time, the driver stopped and, in order to save his own life and health, left his car, hiding on the roadside on the right side of the road.

After the shelling of the car, five servicemen of the Russian Federation: Person 1 and other persons, together with their weapons, namely Kalashnikov assault rifles, got into it and started moving in the direction of Chupakhivka settlement of Okhtyr district of Sumy Oblast.

Driving along Lebedynska Street in the town of Chupakhivka, in the direction of

the Tashan River, the said servicemen of the Russian Armed Forces near building No. 52 on the sidewalk, saw a civilian, who was a citizen of Ukraine, a local resident Person 2, born in 1959, who, without posing any danger to the servicemen of the Russian Federation, being dressed in civilian clothes, unarmed, was returning to his home with a bicycle and talked on a mobile phone.

Mistakenly believing that the citizen of Ukraine Person 2 intends to inform about their location, the serviceman of the Russian Armed Forces instructed Person 1 to kill the specified civilian Person 2.

Violating the laws and customs of war provided for by the Additional Protocol to the Geneva Convention of 12 August 1949, applicable to the protection of victims of international armed conflicts (Protocol I), of 8 June 1977, a serviceman of the Russian Federation Person 1, carrying out a criminal order, realizing that the victim is a civilian person, was not armed, did not pose a threat to him, acting deliberately, fired several (3-4) aimed shots through the open rear left window of the car from his personal automatic weapon, a 5.45 mm Kalashnikov assault rifle, into the head of the victim, as a result of which the latter received a wound of the parietal-temporal area on the left, crushing of the bones of the vault of the skull and destruction of the brain.

The accused fully admitted his guilt in committing the crime.¹⁷

Analysing the given verdict of the court, it should be noted that the accused, in accordance with Art. 43 of the Additional Protocol to the Geneva Convention of 12 August 1949, which applies to the protection of victims of international armed conflicts (Protocol I) of 8 June 1977¹⁸, had the status of a combatant, as he was a legal participant in an international armed conflict. This is confirmed by the materials of the pre-trial investigation and court evidence: 1) the accused was the commander of the branch of the military unit Number 1 '4th Tank Kantemyriv Division of the Moscow Region' of the Armed Forces of the Russian Federation; 2) had a personal automatic firearm; 3) acted together with other persons not identified in the pre-trial investigation, including servicemen of the '13th Guards Tank Shepetovskyy Krasnoznamyonny, Order of Suvorov and Kutuzov Regiment' of military unit NUMBER_1; and 4) left the city of Graivoron of the Belgorod region of the Russian Federation in the direction of the Russian-Ukrainian border and at approximately 9:00 a.m. of the same day, illegally crossed the state border of Ukraine in Sumy Oblast.

As a rule, such persons, when captured, are prisoners of war and, in accordance with the provisions of international humanitarian law, and are subject to placement in appropriate camps for prisoners of war, and due to the immunity (privilege) of a combatant, they do not bear individual responsibility for participating in an armed conflict and must be repatriated after the end of the armed conflict, only if, however, they did not violate the laws and customs of warfare. The actions of such combatants cannot be qualified as crimes (which often happened in the first months of the war) according to Art. 110 of the Criminal Code of Ukraine¹⁹ 'Encroachment on the Territorial Integrity and Inviolability of Ukraine'; Part 3 of Art. 332-2 of the Criminal Code of Ukraine 'Illegal Crossing of The State Border of

17 Verdict of 23 May 2022 in criminal proceedings No 1-kp/760/2024/22 Case No 760/5257/22 regarding Person 1, a native of Ust-Ilimsk, Russian Federation, a citizen of the Russian Federation, a soldier of the military unit NUMBER 1 of the Russian Army, accused of having committed the crime provided for in Part 2 of Art 438 of the Criminal Code of Ukraine <<https://reyestr.court.gov.ua/Review/104432094>> accessed 20 November 2022.

18 Additional Protocol to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts (Protocol I), dated 8 June 1977. <https://zakon.rada.gov.ua/laws/show/995_199#Text> accessed 20 November 2022.

19 Criminal Code of Ukraine of 5 April 2001 No 2341-VIII (*Official website of the Verkhovna Rada of Ukraine: official web portal*) <<https://zakon.rada.gov.ua/laws/show/2341-14#Text>> accessed 21 November 2022.

Ukraine'; Art. 258 – 258-5 of the Criminal Code of Ukraine (terrorism); and Art. 437 of the Criminal Code of Ukraine 'Planning, Preparing, Starting and Waging an Aggressive War', since under this article only the higher military and political leadership of the aggressor state is responsible (according to Article 8bis of the Rome Statute of the International Criminal Court²⁰: persons who are able to actually carry out controlling or directing the political or military actions of the state). In addition, they should not become participants in criminal proceedings. Their detention is carried out in accordance with the report of the authority responsible for the placement of prisoners of war, and not on the basis of the resolution on the detention of the investigator, the prosecutor and the selection of a preventive measure against them by the investigating judge in accordance with the requirements of the current criminal procedural legislation.

However, in this case, the serviceman Person 1 committed a war crime, which was the intentional killing of a civilian, therefore information about him should have been – but was not – entered into the Unified Register of Pretrial Investigations with qualification under Part 2 of Art. 438 of the Criminal Code of Ukraine 'Violation of the Laws and Customs of War', a pre-trial investigation launched, and the accused brought to criminal liability in accordance with the requirements of current Ukrainian legislation.

In general, since the beginning of the armed aggression of the Russian Federation against Ukraine, the Prosecutor General's Office has registered and initiated investigations into 49,629 crimes of aggression and war crimes, including 47,948 under Art 438 of the Criminal Code of Ukraine 'Violation of the laws and customs of war'²¹.

In connection with the need to bring national legislation to the norms of international humanitarian law in the criminal process of Ukraine, the problem arose of directing the criminal legal policy of the state to establish the proper legal procedure for the exchange of prisoners of war, including those who were brought to criminal responsibility and acquired the status of suspects, respectively to the norms of the current criminal procedural legislation. Such a procedure was not provided for in the criminal process of Ukraine at all.

In order to create such a procedure, the Ukrainian Parliament and the Cabinet of Ministers of Ukraine adopted a number of legislative acts. These are, in particular, Resolution No. 721 of 17 June 2022 'On the Procedure for the Implementation of Measures Regarding the Treatment of Prisoners of War in a Special Period'²², Resolution of the Cabinet of Ministers of Ukraine No. 413 of 04 May 2022 'The Procedure for Detaining Prisoners of War'²³, Law of Ukraine 'On the Introduction of amendments to the Criminal and Criminal Procedural Codes of Ukraine, and other legislative acts of Ukraine regarding the regulation of the procedure for the exchange of persons as prisoners of war'²⁴.

In accordance with these laws, a new subject appeared in the criminal process of Ukraine: a person in respect of whom an authorised body made a decision on exchange as a prisoner

20 Rome Statute of the International Criminal Court. Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, vol 2187, No 38544 <<https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>> accessed 20 November 2022.

21 The official website of the Office of the Prosecutor General of Ukraine <<https://www.gp.gov.ua>> accessed 20 November 2022.

22 Resolution of the Cabinet of Ministers of Ukraine No 721 of 17 June 2022 'On the Procedure for the Implementation of Measures Regarding the Treatment of Prisoners of War in a Special Period' <<https://zakon.rada.gov.ua/laws/show/721-2022-n#Text>> accessed 20 November 2022.

23 Resolution of the Cabinet of Ministers of Ukraine No 413 of 04 May 2022 'Procedure for Keeping Prisoners of War' <<https://zakon.rada.gov.ua/laws/show/413-2022-n#Text>> accessed 20 November 2022.

24 The Law of Ukraine 'On Amendments to the Criminal Code and Criminal Procedural Code of Ukraine and other legislative acts of Ukraine on regulating the procedure for the exchange of persons as prisoners of war' of 28 July 2022 No 2472-IX.

of war, which is understood as any person who has the procedural status of suspect, accused or convicted and who is included in the list for exchange as a prisoner of war by a relevant authorised body.

A sign of such a person is that they: 1) have the status of a combatant, which is defined by the Geneva Conventions; 2) committed a so-called general criminal war crime; 3) such actions were committed during an armed conflict of an international nature, in particular, between Ukraine and Russia; 4) have been notified of the suspicion of committing a war crime (or an indictment against them has been submitted to the court, or a guilty verdict has been issued); 5) have received the procedural status of a suspect (of the accused if the indictment has been submitted to the court or of the convicted if the indictment has entered into force); 6) the authorised body has made a decision to exchange him or her as a prisoner of war; and 7) who is included by the relevant authorised body in the list for exchange as a prisoner of war.

The law does not provide for a separate systemic regulation of the procedural status of a suspect (accused, convicted) prisoner of war in a separate article, most likely in connection with its exclusive regulation, so to speak, the motives of ad hoc regulation. A comparison of the procedural status of a suspect and a suspect-prisoner of war gives reason to assert that the Ukrainian criminal procedural legislation, in view of its integrability with the norms of international humanitarian law, expands the procedural status of the latter, granting them the general status of a suspect, whose rights and obligations are provided for in Art. 42 of the Criminal Code of Ukraine and further provides for a number of additional rights, guarantees and obligations.

In particular, Clause 20-1 of the Procedure for Detention of Prisoners of War²⁵, once again reminds the latter that if they are participants in criminal proceedings, they are guaranteed the opportunity to exercise the relevant rights defined by the Criminal Procedure Code of Ukraine.

At the same time, unlike Clause 4, Part 3, Art. 42 of the Criminal Code of Ukraine, according to which the suspect/accused has the right not to say anything about the suspicion against him/her, or the accusation, based on the provisions of Art. 17 of the Geneva Convention on the Treatment of Prisoners of War, which is also reflected in clauses 10-11 of the Procedure for Detention of Prisoners of War²⁶. The latter are required to state only their surname, first name, military rank, date of birth, and army, regimental, personal or serial number or, if not available, other equivalent information. At the same time, interrogation of prisoners of war should be conducted in a language they understand, without the use of torture and other coercive measures.

Also, a feature of the criminal procedural status of a prisoner of war, which is not inherent to other suspects (accused and convicted) in criminal proceedings, is their right to exchange, if a decision on exchange has been made in relation to them by an authorised body and if they are included in the list for exchange as a prisoner of war by the relevant authorised body. We believe that we should talk about the right to exchange. This is indicated by the legal requirement to obtain the written consent of the prisoner of war for the exchange²⁷. Thus, the latter has a discretionary right that cannot be enforced.

Long discussions regarding the procedure for normalising the procedural order of such an exchange, the rejection of several draft laws by the Parliament of Ukraine led to a certain

25 Resolution of the Cabinet of Ministers of Ukraine No. 413 of 04 May 2022 'Procedure For Keeping Prisoners Of War' <<https://zakon.rada.gov.ua/laws/show/413-2022-п#Text>> accessed 20 November 2022.

26 Ibid.

27 In particular, this is Part 1 of Art 84 of the Criminal Code of Ukraine and Part 5 of Art 201-1, p. 5, part 1, Art 280, Part 2 of Art 335 of the Criminal Procedure Code of Ukraine.

legislative consensus. At present, the criminal process of Ukraine provides for two orders, which differ depending on the procedural status of the prisoner of war who participates in criminal proceedings: 1) in relation to the suspect and the accused and 2) in relation to the convicted person, in respect of whom the verdict has become legally binding and who is serving a sentence.

The first procedure is related to the implementation of the exchange procedure in relation to a prisoner of war who is under pretrial investigation, has been notified of suspicion, or an indictment has been submitted to the court, and he/ she has received the status of an accused. If the authorised body has made a decision to transfer such a suspect/accused for exchange as a prisoner of war, with a petition, in the manner provided by Art. 184 'Petition of The Investigator, Prosecutor for The Application Of Preventive Measures' and 132 'General Rules for the Application of Measures to Ensure Criminal Proceedings' of the Code of Criminal Procedure of Ukraine, the prosecutor must apply to the investigating judge and the court for the cancellation of a preventive measure in connection with the adoption by the authorised body of a decision on exchange.

In view of the general requirement regarding the validity of the motion, the prosecutor must attach to the motion for the cancellation of the preventive measure materials confirming the adoption by the authorised body of the decision on the transfer of the suspect/accused for exchange as a prisoner of war and the written consent of the suspect/accused for the exchange as a prisoner of war.

A copy of the petition and the materials attached to it shall be provided to the suspect/accused no later than three hours before the beginning of consideration of the petition.

The request of the prosecutor to cancel the preventive measure is considered by the investigating judge and the court on the day of its arrival in court with the obligatory participation of the prosecutor.

The investigating judge and the court, after verifying the circumstances confirming the adoption by the authorised body of the decision to transfer the suspect/accused for exchange as a prisoner of war and the suspect/accused giving consent to such an exchange, issues a decision on the cancellation of the preventive measure and the transfer of the person (Article 201-1 of the Criminal Procedure Code of Ukraine)²⁸.

In this case, the suspected prisoner of war, the accused, is immediately released from custody and transferred to the supervision of an authorised body, if the authorised official of the place of detention in which he/she is detained does not have another court decision that has entered into legal force and directly provides for holding the suspect/accused in custody (Part 6 of Article 202 of the Criminal Procedure Code of Ukraine). The law does not provide for the possibility of appealing the decision of the investigating judge or the court on the cancellation of a preventive measure against a prisoner of war who is subject to exchange. Their further detention and measures regarding the treatment of a suspect or accused released from custody are carried out in accordance with the above-mentioned procedure established by the Cabinet of Ministers of Ukraine for prisoners of war 'Procedure for Detention of Prisoners of War'²⁹.

Parallel to this mechanism, after the authorised body has made a decision to hand over the suspect for exchange as a prisoner of war and the suspect has given written consent to such

28 Criminal Procedure Code of Ukraine of 13 April 2012 No 4651-VI (*Official website of the Verkhovna Rada of Ukraine: official web portal*) <<https://zakon.rada.gov.ua/laws/show/4651-17#Text>> accessed 21 November 2022.

29 Resolution of the Cabinet of Ministers of Ukraine No 413 of 04 May 2022 'Procedure for Keeping Prisoners of War' <<https://zakon.rada.gov.ua/laws/show/413-2022-ii#Text>> accessed 20 November 2022.

an exchange, the pre-trial investigation regarding them is stopped by a reasoned decision of the prosecutor, or the investigator in agreement with the prosecutor. A copy of the resolution is sent to the defense and the victim. Moreover, in contrast to the undifferentiated procedure, when the pre-trial investigation regarding a prisoner of war who is subject to exchange is stopped, the decision to stop it on this basis is not subject to appeal (clause 5 part 1, part 4 of article 280 of the Criminal Procedure Code of Ukraine).

Similarly, if a prisoner of war is on trial, their case is referred to the court, and at that time the authorised body has made a decision to transfer the accused for exchange as a prisoner of war and the accused has given written consent to such exchange, the court stops the court proceedings until the exchange is carried out or until receiving information from the authorised body that such an exchange did not take place. The decision to stop the court proceedings on the specified grounds is not subject to appeal.

The procedure considered by us and introduced into the criminal procedural legislation does not mean a complete refusal of the state to prosecute persons who committed war crimes on the territory of Ukraine. The state takes a complimentary step regarding the exchange not because of reluctance to conduct pre-trial investigation, economy of criminal repression, or because of forgiveness. It would be wrong from a moral point of view, especially to the memory of dead civilians, as well as military personnel of the Armed Forces of Ukraine. Rather, such actions are taken due to the fact that the exchange is not so much the transfer of a prisoner of war to an aggressor country, but an opportunity to return Ukrainian citizens to their homes, which in the hierarchy of values for the state is vastly more important than bringing to criminal responsibility a prisoner of war suspect accused, even if they committed war crimes on the territory of Ukraine.

Therefore, since Ukraine does not refuse to prosecute prisoners of war who have committed war crimes, the following mechanism has been implemented in the state. After the exchange of the suspect as a prisoner of war has been carried out or such exchange has taken place, the suspended pre-trial investigation is resumed by the resolution of the investigator or prosecutor (Part 1 of Art. 282 of the Criminal Procedure Code of Ukraine). Regarding a person in respect of whom the authorised body made a decision to exchange as a prisoner of war and such an exchange took place, a special pre-trial investigation may be initiated, i.e., in the absence of the suspect, which is carried out on the basis of the decision of the investigating judge in criminal proceedings regarding the crime committed.

If the exchange of a prisoner of war took place, the prosecutor or the investigator, in agreement with the prosecutor, must initiate the issue of conducting a special pre-trial investigation before the investigating judge. In such a petition, the agent of the state must indicate the grounds for carrying out criminal proceedings in the absence of the suspect, which include: 1) a brief summary of the circumstances of the criminal offense in connection with which the petition is submitted; 2) legal qualification of the criminal offense with an indication of the article (part of the article) of the Law of Ukraine on criminal responsibility; 3) a statement of the circumstances that give grounds to suspect a person of committing a criminal offense, and a reference to such circumstances; 4) materials confirming the adoption by the authorised body of the decision to transfer the suspect for exchange as a prisoner of war and the fact of exchange; and 5) a list of witnesses whom the investigator or prosecutor deems necessary to interrogate during the consideration of the petition.

The investigating judge considers such a petition no later than ten days from the date of its receipt in court with the participation of the investigator, the prosecutor who submitted it, and the defense counsel, who can be engaged by the suspect himself, and if he has not done so, the duty to take measures to engage one rests with investigating judge.

A copy of the decision is sent to the prosecutor, the investigator and the defense attorney. Information on suspects, in respect of whom the investigating judge has issued a decision to carry out a special pre-trial investigation, shall be entered into the Unified Register of Pre-trial Investigations immediately, but no later than 24 hours after the decision is issued, and published in mass media of nationwide distribution and on the official website of the Office of the General Prosecutor.

Notices of summons of a suspect in the event of a special pre-trial investigation in connection with a decision by an authorised body to hand over a suspect for exchange as a prisoner of war are published in mass media of nationwide distribution and on the official website of the Prosecutor General's Office.

From the moment of publication of the notice in mass media of nationwide distribution and on the official website of the Prosecutor General's Office, the suspect is deemed to have been duly familiarised with its content.

Copies of the procedural documents to be served on the suspect are sent to the defense attorney.

The specifics of pre-trial investigation in absentia and trial in the absence of the suspect or accused are provided for in Chapter 24-1 of the Criminal Procedure Code of Ukraine³⁰.

The law provides guarantees of compliance with the rights of the person in respect of whom it is carried out: 1) proceedings *in absentia* are possible only in exceptional cases; 2) the procedure for its implementation is a special (extraordinary) procedure for criminal proceedings, which is regulated by a separate chapter 24-1 of the Criminal Procedure Code of Ukraine; 3) this procedure is consistent with the norms of international humanitarian law; 4) it is carried out in relation to a prisoner of war who has committed a war crime in respect of which there is a well-founded suspicion, which has been reported to them; 5) is carried out exclusively on the basis of the decision of the investigating judge; and 6) provides for additional guarantees of compliance with the rights of such a suspect, including the mandatory participation of a defense attorney.

It should be noted that such absenteeism is often criticised by lawyers and scientists. However, a special pre-trial investigation in the absence of the suspect or accused (*in absentia*) exists in many countries of the world: Austria, Bulgaria, Denmark, Estonia, Germany, the Netherlands, France, etc. It is consistent with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the UN General Assembly in 1985, which states that victims should have the right to access justice mechanisms and to prompt reparation; at the same time, all UN member states are obliged to ensure that judicial and administrative procedures meet the needs of victims of crimes to a greater extent³¹. It also does not contradict Resolution (75) 11 of the Committee of Ministers of the Council of Europe 'On the Criteria Regulating Proceedings Conducted in The Absence of The Accused' of 19 January 1973³² and

30 Criminal Procedure Code of Ukraine of 13 April 2012 No 4651-VI (*Official website of the Verkhovna Rada of Ukraine: official web portal*) <<https://zakon.rada.gov.ua/laws/show/4651-17#Text>> accessed 21 November 2022.

31 Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power dated 29 November 1985. Legislation of Ukraine / Verkhovna Rada of Ukraine < https://zakon.rada.gov.ua/laws/show/995_114#Text> accessed 20 November 2022.

32 About the criteria regulating the hearing conducted in the absence of the accused (adopted by the Committee of Ministers on January 19, 1973 at the 217th meeting of the Representatives of Ministers): Resolution 75 (11) of the Committee of Ministers of the Council of Europe <http://echr-base.ru/res75_11.jsp> accessed 20 November 2022.

Recommendation No. 6 R (87) 18 of the Committee of Ministers of the Council of Europe to member states 'Regarding Simplification of Criminal Proceedings' of 17 September 1987³³.

We believe that 'wartime' realities require the search for new means of ensuring the inevitability of criminal liability of prisoners of war for 'general criminal' crimes committed on the territory of Ukraine. When choosing between the complete absence of criminal procedural activity aimed at holding persons criminally responsible and punishing persons who committed crimes during the armed conflict on the territory of Ukraine, and carrying out criminal proceedings in absentia, it is better to choose the second option, since this procedure will ensure not only the identification of the person who committed the crime, but also the collection and consolidation of evidence in the form of witness statements, material evidence, expert opinions, and documents that can be used later in international judicial institutions. By introducing such a specialised (non-typical) order into the field of legal regulation, the legislator has the task not of simplifying criminal proceedings but of achieving the tasks defined in Article 2 of the Criminal Procedure Code of Ukraine, with minimal deviation from the general order due to the specifics of the situation. Reputational and moral factors are important. In this way, Ukraine demonstrates that despite armed aggression and the need to repel it, to solve extremely complex social problems bordering on survival in war conditions, the state finds the strength and means for the functioning of both the legal system and branches of law, with a legitimate purpose and in the legal field, as a European country where the rule of law and legality prevail.

The first order given above and analysed in this article is related to the normalisation of the procedure aimed at introducing a proper procedure for the exchange of a prisoner of war suspect or accused (defendant) at the stage of pre-trial investigation and conducting proceedings against them in absentia. However, in the event that a court order has already been passed for such a person's verdict, such a procedure cannot be applied. Due to the fact that the sentence against such a prisoner of war has already entered into force, and the person has the status of a convicted person, this person can only be released from serving the sentence. Therefore, in connection with the adoption by an authorised body of a decision to hand over a prisoner of war who has already been convicted, the legislator provided for an independent procedure for their release from serving a sentence (84-1 of the Criminal Code of Ukraine, clause 13-4, part 1, Art. 237, Art. 537 of the Criminal Procedure Code of Ukraine).

In particular, the issue of release from serving a sentence in connection with the adoption by an authorised body of a decision to transfer a person for exchange as a prisoner of war is decided by the court at the request of the prosecutor. The law sets a fairly short period for consideration of such a petition. It is considered by the court with the participation of the prosecutor on the day of their arrival at the court by a single judge in accordance with the rules of judicial proceedings provided for in Art. 318-380 of the CPC of Ukraine. In order to be released from serving the sentence and exchanged, the convict's consent must also be obtained (Art. 539 of the Criminal Procedure Code of Ukraine).

If the exchange of such a convict did not take place, the court, at the request of the prosecutor, makes a decision on their referral to further serve the previously imposed punishment (Part 2 of Art. 84-1 of the Criminal Code of Ukraine).

In the event that a person who was released by the court from serving a sentence in connection with the adoption by an authorised body of a decision on their transfer for

³³ Recommendation No. 6 R(87)18 of the Committee of Ministers of the Council of Europe to member states 'Regarding the Simplification of Criminal Justice' (17 September 1987) <http://zakon4.rada.gov.ua/laws/show/994_339> accessed 20 November 2022.

exchange as a prisoner of war and such an exchange took place, during the unserved part of the sentence of a new criminal offense, the court shall impose a punishment on them according to the rules provided for in Arts. 71 and 72 of the Criminal Code of Ukraine, i.e., by adding punishments based on the totality of sentences.

5 CONCLUSIONS

The conducted research allowed the author to draw the following conclusions.

Russia's armed aggression against Ukraine became a test of the maturity of all state institutions of Ukraine, among which the defense sector plays a key role. However, in a state governed by the rule of law, even in times of war, the coordinated work of state institutions, the system of law as a whole, and the legal system also become important. This especially applies to such a field of Ukrainian law as Criminal Procedural law because law enforcement agencies face extremely difficult tasks, which are connected to the need to maintain constitutional law and order in the state and perform new functions that were not inherent to them – the implementation of pre-trial investigations of military and war crimes, and the prosecution of persons who have the status of combatants and have committed war crimes on the territory of Ukraine.

Taking into account that the implementation of an effective investigation of war crimes in accordance with the norms of international humanitarian and human rights laws belongs to the norms of *jus cogens*, and further taking into account the positive obligations of Ukraine and the gap in the normative regulation of certain segments of activity, the Parliament of Ukraine directed the course of legal policy towards active rule-making and adopted several packages of changes and additions to the current legislation, aimed at harmonising its norms with international humanitarian law and creating a proper procedure for carrying out criminal proceedings in conditions of war. As a result, during the first two months of the war, a differentiated form, a special procedure of criminal proceedings, was created, which was formalised into the institution of criminal proceedings and contains a set of norms aimed at regulating the procedure for conducting pre-trial investigations and conducting trials under martial law.

Factors that determined the need to create a special regime of pre-trial investigation and court proceedings under martial law, including norms regarding the exchange of prisoners of war, include a set of circumstances of a law enforcement, organisational, security and subjective nature.

The procedural order created in Ukraine, aimed at carrying out the exchange of prisoners of war, is a model of proper legal procedure, which can be borrowed in the comparative legal aspect by states with an unstable security situation as it is based on the norms of international humanitarian and human rights laws and contains a system of guarantees, observance of the rights of combatants, effective pre-trial investigation, and the possibility of conducting criminal proceedings in absentia, which in turn will ensure both the private interests of the person who committed the war crime and the interests of justice.

The possibility of exchanging prisoners of war does not mean Ukraine's complete refusal to prosecute persons who have committed war crimes on the territory of Ukraine. The state takes a complimentary step regarding the exchange not because of reluctance to conduct pre-trial investigation, economy of criminal repression, or because of forgiveness. The exchange is not so much a transfer of a prisoner of war to an aggressor country, but rather an opportunity to return Ukrainian citizens home, which in the hierarchy of values for the state is more important than bringing a prisoner of war suspect/accused to criminal responsibility,

even if they committed war crimes on the territory of Ukraine. The reputational and moral factor is also important. In this way, Ukraine demonstrates that despite the armed aggression and the need to repel it, the solution of extremely complex social problems bordering on survival in war conditions, the state finds the strength and means for the functioning of the legal system, branches of law, in the legal field, as a European country, where the rule of law and legality prevail.

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