XLV POLISH YEARBOOK OF INTERNATIONAL LAW
2025
DOI 10.24425/PYIL.2026.3114
PL ISSN 0554-498X
e-ISSN 2957-1510

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CRITERIA FOR EFFECTIVE INVESTIGATION OF WAR CRIMES AND CRIMES AGAINST HUMANITY IN LIGHT OF MINIMUM STANDARDS FOR VICTIMS' RIGHTS, SUPPORT AND PROTECTION

Abstract: *The timeliness of the article is demonstrated by the fact that modern criminal proceedings and their associated mechanisms should serve as an effective means for protecting the rights of victims, especially when it comes to those who have suffered from crimes against humanity and war crimes. The issue is especially urgent given Ukraine's intention to join the EU, which requires that Ukrainian criminal procedural law be approximated to EU law, in in the context of minimum standards for ensuring the rights, support and protection of victims of crime. With this in mind, the research is focused on three aspects: firstly, which criteria for the effectiveness of investigations in light of the procedural obligations of the state under Arts. 2 and 3 of the European Convention on Human Rights directly affect the interests of victims and how national criminal procedural legislation should be amended to better comply with them; secondly, ways of approximating Ukrainian legislation in terms of EU law on minimum standards for the rights, support and protection of victims; and thirdly, the experience of certain European countries in improving criminal procedural law in this regard.*

Keywords: war crimes, crimes against humanity, effective investigation, minimum standards of victims' rights, procedural obligations of the state

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INTRODUCTION

Given the exceptional importance of the human rights guaranteed by Arts. 2 and 3 of the European Convention on Human Rights (ECHR),[1] it is quite clear that even in situations involving existential threats, the state must continue to duly fulfil its positive substantive and procedural obligations arising from the current interpretation of Arts. 2 and 3. This is further emphasised by Art. 15 of the Convention, which does not permit states to derogate from their obligations under Art. 2 (with certain exceptions which are not relevant to the subject of our study) and Art. 3, even during a state of emergency. This is particularly true due to the fact that, as noted in the contemporary literature, the civilian population continues to suffer the brunt of armed conflicts, often being the primary victim of violations of international humanitarian law (examples of which include deliberate attacks on the civilian population, killings, enforced disappearances, torture, cruel treatment and insults to personal dignity, rape and other forms of sexual violence, the forced displacement of civilians and the destruction of vital civilian infrastructure and property). Interpreting the relevant standards for effective investigation becomes particularly significant in the context of protecting the rights of victims of such war crimes and crimes against humanity.

The composition of this article reflects the specific nature of the implementation of certain criteria (standards) for effective investigation, particularly in the context of protecting the rights of victims of war crimes and crimes against humanity. For this reason, the focus is not on explaining the essence and characteristics of each criterion, but rather on the details of ensuring just one of them: the involvement of victims. Furthermore, to ensure a comprehensive analysis of issues relating to international armed conflict, it is appropriate to consider not only provisions arising from human rights law, but also those relating to international humanitarian law and international criminal law.

In view of this, it is appropriate to first examine the interaction between international humanitarian law and international human rights law in the context of a tate's positive procedural obligations to conduct effective investigations. Such an analysis should be based on both existing academic research and the relevant case law of the European Court of Human Rights (ECtHR), the authors' were formulated. Along with this, it is important to take into account the case law of the ECtHR in order to assess the relevance of the criteria for effective investigations an armed conflict.

The main body of the article is devoted to an analysis of two key aspects that may influence the implementation of the criterion of effectiveness regarding the

[1] Convention for the Protection of Human Rights and Fundamental Freedoms, as amended (signed 4 November 1950, entered into force 3 September 1953), 213 UNTS 221.

involvement of victims, namely the rules on jurisdiction based on the victim's whereabouts and the victim's participation in proceedings f preventing secondary victimisation. The latter aspect, in the authors' view, should be examined not only in light of the ECtHR's practice, but also taking into account international humanitarian law (with a view to future court proceedings concerning the relevant category of international crimes), as well as specific EU documents (given Ukraine's aspirations for European integration).

1. THE PROCEDURAL OBLIGATIONS REGARDING THE INVESTIGATION OF CRIMES COMMITTED IN THE CONTEXT OF AN INTERNATIONAL ARMED CONFLICT

In light of this issue, attention may be drawn to the study by H.O. Khristova, who examines two groups of positive obligations of the state arising an armed conflict: "positive obligations of the state in the event of loss of control over part of its territory" and "positive obligations in the context of conflict 'under special conditions' (conditions of armed conflict and counter-terrorism operations)." As the author herself explains, the second case concerns positive obligations arising from the state's use of lethal force during military operations, as well as positive obligations regarding the human rights of persons affected by the conflict, which are implemented within the territory under the state's full jurisdiction.[2] Meanwhile, it should be pointed out that the researcher focuses on those positive obligations that arise additionally in the context of an armed conflict. However, other obligations of the state, including positive procedural obligations under Arts. 2 and 3 ECHR, continue to exist in the same way, although they may be modified to some extent where state representatives face objective difficulties in fulfilling them as a consequence of ongoing hostilities.

1.1. Interaction between international humanitarian law and international human rights law in the context of a positive procedural obligations to conduct effective investigations

Above all, attention should be paid to the general approaches to the connection between international humanitarian law and international human rights law. In

[2] H. Khrystova, *Про позитивні зобов'язання держави стосовно прав людини в умовах збройного конфлікту та його наслідків* [On the State's positive obligations regarding human rights in the context of armed conflict and its consequences], available at: https://rm.coe.int/native/168072b3cf (accessed 31 March 2026).

light of this and based on an analysis of a number of academic studies,[3] it is possible to draw the following conclusions.

1. These two branches of international law should not be viewed as contradictory, as they complement and reinforce one another. This makes it possible both to avoid gaps in the application of the law and to strengthen the protection of fundamental human rights.
2. Although the scope of regulation in these areas of law overlaps to some extent, certain issues are governed entirely by international humanitarian law, whilst others are regulated solely by international human rights law. Their application should therefore be coordinated and comprehensive, rather than mutually exclusive.
3. In the context of an international armed conflict, international humanitarian law operates as a *lex specialis*, which primarily affects the determination of the persons to whom the relevant law applies without further exceptions or reservations, as well as the identification of the territorial scope of its application.
4. The assessment of the interaction between these fields should be individualized and flexible for each specific situation; where there is a potential conflict, priority should be given to the provisions that ensure a higher level of protection for fundamental human rights, taking into account the *lex specialis* principle and the requirements of a systematic interpretation of international treaties.
5. Given that both fields of international law are generally aimed at preventing human suffering and serious violations of fundamental rights, international human rights law may play a supplementary role where there is a need to fill gaps in cases where the rules of international humanitarian law are too general or insufficiently detailed.

A notable example of the complementary application of international humanitarian law and European human rights law is the ECHR's findings, set out in the judgment in *Ukraine v. Russia (re Crimea)* [GC]. In this case, the ECtHR demonstrated the flexibility of its analysis and the need for a case-by-case assessment. In particular, the ECtHR took into account the unjustified speed with which the Russian

[3] L. Doswald-Beck, *The right to life in armed conflict: Does international humanitarian law provide all the answers?*, 88 International Review of the Red Cross 881 (2006); ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep 2004, p. 136; N. Madzigon, *Right to Life: ECtHR Practice and IHL Rule*s, 2(3) Visegrad Journal on Human Rights 99 (2020); A. Orakhelashvili, *The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?*, 19(1) European Journal of International Law 161 (2008); G. Washefort, *The Alchemy of the Right to Life during the Conduct of Hostilities: A Normative Approach to Operationalizing the 'Supreme Right'*, 34(3) European Journal of International Law 615 (2023).

authorities and their proxies acted to replace Ukrainian legislation throughout the territory of Crimea without any justification for doing so, as well as the all-encompassing nature of such actions. In view of this, the judgment found a violation in this case specifically of the norms of international humanitarian law, which in turn led to the finding that all subsequent actions carried out in the occupied territory were "unlawful" within the meaning of the category of "legality" under human rights law.[4]

As legal scholarship rightly notes, the investigative requirements of international human rights law remain highly relevant even during armed conflict, despite international humanitarian law operating as lex specialis. This is because human rights law plays a supplementary role, establishing the criteria for an effective investigation where international humanitarian law lacks specific guidance. It is therefore valid to observe that the evolution of human rights must be taken into account in the context of investigations, even when it comes to the application of international humanitarian law as a *lex specialis* regarding the use of force in situations of armed conflict. Nevertheless, whilst the criteria for the effectiveness of an investigation (particularly independence, impartiality, reasonable speed, and thoroughness in the collection of evidence) must remain unchanged, their application to situations of armed conflict may raise complex issues and requires special consideration.[5]

In light of this, the final document following the seminar "Opening of the Judicial Year" (2016), entitled "International and national courts confronting large-scale violations of human rights – Genocide", notes that, in the ECHR's view, the obligation to investigate under Art. 2 may also be adapted to other contexts, for example, where an investigation is conducted in the context of a conflict or takes place after a conflict but concerns causing deaths during the war. For example, this interpretation of the obligation to investigate became significant when applied against Bosnia and Herzegovina in cases concerning missing persons, particularly *Palić v. Bosnia and Herzegovina*, which dealt with the investigation of a prolonged disappearance following the end of the war. In this context, the ECtHR concluded that the state had not breached its positive procedural obligations, since even after the conflict in Bosnia and Herzegovina, the national legal system was unable to consider cases of disappearance until 2005. At the same time, the Court commended the measures taken since 2005 (such as the establishment of the War Crimes Section of the Court of Bosnia and Herzegovina and the adoption of the National War Crimes Strategy),

[4] ECtHR (GC), *Ukraine v. Russia (re Crimea)* (App. Nos. 20958/14 and 38334/18), 25 June 2024, Legal summary, available at: https://hudoc.echr.coe.int/eng?i=002-14347 (accessed 31 March 2026).

[5] G. Gaggioli, *A legal approach to investigations of arbitrary deprivations of life in armed conflicts: The need for a dynamic understanding of the interplay between IHL and HRL*, 36 QIL Zoom-in 27 (2017), pp. 31-32.

as well as the specific measures taken by the state in this case – identifying Palić's remains and conducting an independent and effective criminal investigation into his disappearance/death – even in the absence of punishment for those responsible due to objectively justified reasons.[6]

Furthermore, given the somewhat technical nature of the provisions of international humanitarian law regarding investigations, their implementation can be clarified by interpreting them through procedural human rights safeguards.[7] However, it should be kept in mind that members of the armed forces will generally remain under the jurisdiction of their own state should there be a need to criminally prosecute them. Additionally, the effectiveness of an investigation is likely to be significantly reduced because the alleged offenders have either returned to their own state or due to certain jurisdictional limitations, which imposes specific requirements on the state's procedural obligation to conduct an effective investigation.[8]

1.2. Ensuring effective investigations in situations of international armed conflict

It should be recognised that the degree to which the relevant criteria for effectiveness are met may vary even in relation to cases of death, enforced disappearances or other serious violations of fundamental human rights, as provided for in Arts. 2 and 3 ECHR. This might depend on when the relevant investigation takes place – after the armed conflict or whilst it is still ongoing. This conclusion is supported by an analysis of the ECtHR's judgment in *Đaković v. Serbia*.[9]

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[6] *International and national courts confronting large-scale violations of human rights – Genocide, Crimes against Humanity and War crimes*, background paper for seminar Opening of the Judicial Year, January 2016, available at: https://www.echr.coe.int/documents/d/echr/seminar_background_paper_2016_part_1_eng (accessed 31 March 2026).

[7] D. Loizou, N. Kornioti, *Armed conflict and international humanitarian law in the jurisprudence of the European Court of Human Rights*, Strasbourg Observers, 1 August 2025, available at: https://strasbourgobservers.com/2025/08/01/armed-conflict-and-international-humanitarian-law-in-the-jurisprudence-of-the-european-court-of-human-rights/ (accessed 31 March 2026).

[8] F. Tan, M. Zwanenburg, *Case note: One Step Forward, Two Steps Back? Georgia v Russia (II), European Court of Human Rights, Appl No 38263/08*, 22(1) Melbourne Journal of International Law 136 (2021), pp. 153–154.

[9] In this case the Court rejected the Government's arguments justifying the length of the proceedings on the grounds of the complexity of war crimes cases, since the relevant delays on the part of the authorities occurred a peace had prevailed for decades the conflict. Instead, the Government failed to identify any specific security-related obstacles to substantiate its claim. As the ECtHR noted in paragraph 50 of this judgment, even though the applicant's father had died during a situation of general violence, the delays in the investigation could not be justified by complex security circumstances, since the investigation was initiated in 2007, more than 10 years after the conflict ended, in circumstances which cannot reasonably be described as having been affected by security concerns. ECtHR, *Đaković v. Serbia* (App. No. 30749/22), 17 February 2026, paras. 45 and 50.

Contrary to this, it is clear that, in the context of investigations into war crimes and crimes against humanity committed on Ukrainian territory during the international armed conflict that continues to rage, the requirements for ensuring the effectiveness of such investigations are likely to be substantially different, given the existence of objective obstacles.

Additionally, it is worth emphasising that the positive procedural obligation to conduct an effective investigation remains. Therefore, 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 or the prohibition ill-treatment. This crucial point was highlighted in *Hanan v. Germany* [GC][10] and *Georgia v. Russia (II)* [GC].[11] It is equally important to underscore the conclusion of the ECtHR in *Ukraine and the Netherlands v. Russia* [GC], where the Court pointed out that the obligation to carry out an effective investigation under Art. 2 of the Convention is broader than the corresponding obligation in international humanitarian law. However, this obligation remains just as relevant and also arose under international humanitarian law, especially if there are concerns that a serious breach of international humanitarian law might have occurred.[12]

2. IMPACT OF RULES REGARDING INVESTIGATIVE JURISDICTION ON THE INVOLVEMENT OF VICTIMS IN PROCEEDINGS AS A CRITERION FOR EFFECTIVE INVESTIGATION

To begin with, a brief overview of the national legal framework will help to illustrate the essence of the issue under consideration. Following the start of the full-scale invasion, the Ukrainian legislature was faced with the need to adapt legislation – including criminal procedural law – to the current realities. The process of amending regulatory provisions continues to this day, as evidenced by the additions in 2024 and 2025 to Part 1 of Art. 615 of the Criminal Procedure Code of Ukraine (the purpose of which is to regulate a special regime for criminal proceedings under martial law), with new paragraphs concerning the ability of prosecutors at certain levels to decide on changes to jurisdiction where there are appropriate grounds.

Specifically, the introduction of one of these amendments was clearly aimed at increasing the involvement of the victims' close relatives in the pre-trial investigation. The point is that prosecutors, as procedural supervisors, the power to change

[10] ECtHR (GC), *Hanan v. Germany* (App. No. 4871/16), 16 February 2021, para. 204.

[11] ECtHR, *Georgia v. Russia (II)* [GC] (merits) (App. No. 38263/08), 21 January 2021, para. 326.

[12] ECtHR, *Ukraine and the Netherlands v. Russia* [GC] (merits) (App. Nos. 8019/16, 43800/14, 28525/20 and 11055/22), 9 July 2025, para. 485.

the jurisdiction of certain criminal offences, including murder, enforced disappearance, violations of the laws and customs of war and crimes against humanity, but only on the condition – given the general meaning of the relevant provision that the victim has gone missing under special circumstances, and not in relation to any other manifestations of the offences provided for in Arts. 115, 438 and 442-1 of the Criminal Code of Ukraine. In light of this, it is appropriate to clarify that the definition of a person who has gone missing under special circumstances is set out in para. 12 of Part 1 of Art. 1 of the Law of Ukraine "On the Legal Status of Persons Missing under Special Circumstances", an analysis of which indicates disappearance "in connection with an armed conflict, military operations, the temporary occupation of part of the territory of Ukraine, or natural or man-made emergencies."[13]

It is appropriate to point out the prerequisite for such a change in jurisdiction, which is a motion submitted to the prosecutor by a victim who is a family member of a person who has gone missing under special circumstances. It should be clarified that, in accordance with the aforementioned law, the category of family member includes a wide range of persons:

> husband, wife, father, mother, stepfather, stepmother, son, daughter, stepson, stepdaughter, full brother, full sister, grandfather, grandmother, great-grandfather, great-grandmother, grandson, granddaughter, great-grandson, great-granddaughter, adoptive parent or adopted child, guardian or carer, a person under guardianship or care, as well as persons who live together, are bound by a common household and have mutual rights and obligations, including persons who live together but are not married.[14]

Ultimately, it should be noted that in such cases, the prosecutor's powers lie in the ability to change the territorial jurisdiction – specifically, from the place where the criminal offence was committed (i.e. the place from which the person in question was allegedly disappeared) to the place of residence of the victim who is a family member of the person missing under such circumstances.[15]

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[13] Закон України "Про правовий статус осіб, зниклих безвісти за особливих обставин" [The Law of Ukraine "On the legal status of persons missing in special circumstances"], 12 July 2018, № 2505-VIII, Bulletin of the Verkhovna Rada of Ukraine (Official Gazette) 38 (2018), p. 5, art. 280, available at: https://zakon.rada.gov.ua/laws/show/2505-19 (accessed 31 March 2026).

[14] *Ibidem*

[15] Закон України "Про внесення змін до Кримінального процесуального кодексу України щодо особливостей досудового розслідування кримінальних правопорушень, пов'язаних із зникненням осіб безвісти за особливих обставин під час дії воєнного стану" [The Law of Ukraine "On amendments to the Criminal Procedure Code of Ukraine concerning the specifics of pre-trial investigation of criminal offences related to the disappearance of persons under special circumstances during martial law"],

There is no doubt that this provision was intended to encourage greater involvement of family members of missing persons in such criminal proceedings, and to ensure that they have a better understanding of the progress and outcomes of the investigation. In particular, the drafters of this bill stated in the Explanatory Note to it the need to "establish special conditions for conducting pre-trial investigations, which allow for a prompt and effective response to reports on missing persons and to ensure access for applicants (victims) who are close relatives and family members of the missing person to legal mechanisms in wartime conditions."[16]

Nevertheless, this interpretation of victims' involvement in criminal proceedings appears rather narrow and literal, as the victims' ability to participate actively in the proceedings and their procedural rights generally do not depend on the location of the pre-trial investigation, given modern technological capabilities (for example, the possibility of participating remotely, electronic document management and thus the possibility of submitting applications, motions and complaints without being physically present).

In contrast, it is more important to adopt and implement legislation that allows victims to participate actively in criminal proceedings (including international proceedings), for example, as auxiliary or private prosecutors or co-plaintiffs, as this is an integral part of successful criminal prosecution.[17]

Having analysed the European experience of the Netherlands, Germany, Sweden and Finland, Aksamitowska highlights the following key procedural rights of victims in criminal proceedings concerning war crimes, which demonstrate due compliance with the criterion of effective investigation, i.e. the involvement of victims: presence at the trial; access to the main materials of the criminal proceedings; the right to question or participate in the questioning of witnesses and the accused; the right to file complaints, applications for recusal and other procedural documents and to submit evidence; the right to legal representation and to receive free oral and/or written translation; and certain other rights.[18]

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22 July 2025, № 4555-IX, Bulletin of the Verkhovna Rada of Ukraine (Official Gazette) 48 (2025), p. 4, art. 208, available at: https://zakon.rada.gov.ua/laws/show/4555-20#n69 (accessed 31 March 2026).

[16] Пояснювальна записка до проєкту Закону "Про внесення змін до Кримінального процесуального кодексу України щодо особливостей досудового розслідування кримінальних правопорушень, пов'язаних із зникненням осіб безвісти за особливих обставин під час дії воєнного стану" [Explanatory note to the draft law "On amendments to the Criminal Procedure Code of Ukraine concerning the specifics of pre-trial investigation of criminal offences related to the disappearance of persons under special circumstances during martial law], available at: https://itd.rada.gov.ua/086163be-7ca8-4e0d-a664-8be8542ae273 (accessed 31 March 2026).

[17] K. Aksamitowska, *War Crimes Units: Legislative, Organisational and Technical Lessons*, The Hague (September 2021), p. 4, available at: https://www.asser.nl/media/795205/karolina-aksamitowska-war-crimes-units-legislative-organisational-and-technical-lessons-eng.pdf (accessed 31 March 2026).

[18] *Ibidem*, pp. 29-31.

Consequently, the formal location of the pre-trial investigation does not directly affect the extent to which victims are involved in the process, nor does it reveal the conceptual substance of this standard or criterion of effectiveness. Particularly, this is addressed in *Al-Skeini and Others v. the United Kingdom* [GC], which emphasises the need for the victim's next of kin to be involved in the criminal proceedings to the extent necessary to protect their legitimate interests.[19]

The ECtHR also emphasised in the aforementioned *Ukraine and the Netherlands v. Russia* [GC] the significance of adhering to this criterion in order to fulfil the procedural obligation to conduct an effective investigation in the context of an armed conflict[20] Moreover, in cases involving crimes related to missing persons, it is particularly important to ensure the so-called "right to the truth" for the victims' family members and heirs regarding the circumstances of the incident, especially in the context of mass violations of such fundamental rights as the right to life.[21]

Furthermore, as can be concluded from the above-mentioned judgment in *Palić v. Bosnia and Herzegovina*, the key requirement for the state is that the authorities respond appropriately and take the situation seriously once it has been brought to their attention. In that case, where the applicant (the wife of a missing person) claimed that the authorities had for many years refused to engage with, acknowledge or assist her efforts to ascertain what had happened to her husband, the Court emphasised that the applicant had received the first official information regarding her husband's fate more than five years after his disappearance; at the same time, the applicant received compensation for non-pecuniary damages, and the remains of her husband, Mr Palich, were eventually identified. Consequently, an independent and effective criminal investigation was carried out, albeit with some delays, and the ECtHR therefore found no violation of Art. 3 of the Convention.[22]

It is also necessary to identify a number of issues that may arise from the considered amendment to Ukraine's criminal procedural legislation and, conversely, may undermine the effectiveness of pre-trial investigations for a specific range of offences in terms of their thoroughness and reasonable speed. Firstly, it is obvious that the territorial units of the pre-trial investigation authorities in areas close to the line of contact have greater professional experience in investigating crimes related to the disappearance of persons under special circumstances than units in other regions of Ukraine. Secondly, Ukrainian legislation (Art. 55 of the Criminal Procedure Code of Ukraine in particular) allows for several family members to participate as

[19] ECtHR, *Al-Skeini and Others v. the United Kingdom* (GC) (App. No. 55721/07), 7 July 2011, para. 165.

[20] ECtHR, *Ukraine and the Netherlands v. Russia* [GC], para. 489.

[21] ECtHR, *Lejla Fazlić and Others v. Bosnia and Herzegovina and 4 Others applications (dec.)* (App. Nos. 66758/09, 66762/09, 7965/10, 9149/10 and 12451/10), 3 June 2014, para. 37.

[22] ECtHR, *Palić v. Bosnia and Herzegovina* (App. No. 4704/04), 15 February 2011, para. 51.

victims simultaneously, which could potentially create a conflict when determining the issue of territorial jurisdiction if such relatives reside in different localities and simultaneously file applications to change the jurisdiction to their places of residence. Thirdly, the relevant provision of national criminal procedural law cannot be applied to family members residing outside Ukraine; consequently, their right to change the jurisdiction in such cases is overlooked by the legislature. Fourthly, the conduct of a pre-trial investigation in situations concerning missing persons is clearly not limited to questioning the victims and processing the motions they file. Instead, the majority of investigative activities must most often be carried out near the place of the victim's possible disappearance. In other words, if jurisdiction shifts from the place where the criminal offence was committed to a family member's place of residence, the pre-trial investigation is likely to become more complicated, which may ultimately negatively impact its results.

Consequently, the right of family members to be involved in and directly influence criminal proceedings is not absolute, and certainly should not be reduced to their mandatory physical" proximity to the pre-trial investigation. Instead, it is crucial to enshrine in law the rules and mechanisms for their practical implementation regarding procedural safeguards for victims' rights, which will facilitate their active participation in criminal proceedings, including remotely via special technological means.

3. PREVENTING THE SECONDARY VICTIMISATION OF VICTIMS OF WAR CRIMES AND CRIMES AGAINST HUMANITY IN LIGHT OF THE DEFENDANT'S RIGHT TO CROSS-EXAMINATION (ART. 6.3(D) ECHR)

To gain a general understanding of the issue, it is advisable to begin by referring to certain European documents aimed at protecting the rights and interests of victims in criminal proceedings. According to Art. 20(b) of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA,

> [w]ithout prejudice to the rights of the defence and to the discretion of the court, Member States shall ensure that, during criminal investigations [...] the number of interviews with victims is kept to a minimum and that interviews are conducted only where strictly necessary for the purposes of the criminal investigation.

In the case of interviews with child victims during criminal proceedings, Art. 24(1)(a) of this Directive further provides that "all interviews with a child victim may be audio-visually recorded, and such recorded interviews may be used as evidence in criminal proceedings."[23] As follows from the Preamble to this document, such approaches to taking statements from victims are intended to prevent the risks of their re-victimisation and secondary victimisation. It should be mentioned that, according to the EU Strategy on Victims' Rights 2020–2025, secondary victimisation can be regarded as the negative consequences for victims that may arise from their participation in criminal proceedings, including contact between victims and offenders, the judicial authorities and/or the general public.[24]

This aspect is also addressed in the Council of Europe's Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse specifically, its Art. 35(2) indicates the desirability of states taking the necessary legislative or other measures to ensure that the questioning of a child victim or, where appropriate, a child witness, can be recorded on video and that such video evidence will be accepted as evidence in court in accordance with the provisions of its national legislation.[25]

I n cases where victims of war crimes and crimes against humanity face potential secondary victimisation, it is undoubtedly the most rational and appropriate approach to adhere to the strategy of "seeking information from other sources", developed as an ethical imperative for criminal investigations into sexual and gender-based violence, which requires that priority be given to other evidence rather than obtaining testimony from the victims.[26]

It is equally important to mention a number of ECtHR judgments which also raise the issue of secondary victimisation of victims (particularly children) in the context of the state's compliance with its obligations under Art. 3 ECHR during the investigation of a crime. Interestingly, in such cases, the problem may arise not with the fulfilment of procedural obligations, but with the substantive obligations of the state, since, conversely, "excessive zeal" by law enforcement agencies and the prosecution could demonstrate the respondent complete disregard for the victim's suffering, having failed to protect their personal integrity during criminal

[23] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315, 14.11.2012, pp. 57–73.

[24] EU Strategy on victims' rights (2020-2025), COM(2020) 258 final.

[25] Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, adopted 25 October 2007, CETS 201.

[26] S. Barbour, *Supporting Accountability for Sexual Violence in the Syria and Iraq Conflicts Innovations, Good Practices, and Lessons Learned through Private Criminal Investigations*, 18(2) Journal of International Criminal Justice 397 (2020), p. 405.

proceedings against the alleged perpetrators of their sexual assault, thereby causing them secondary victimisation and violating Art. 3 of the Convention. This is the subject of the judgment in *B. v. Russia*, for example, where, due to the significant number of repeated interviews with the applicant (a minor victim of sexual violence) – particularly that the judge gave no reasons for his decision to question the applicant, failed to take into account her particular vulnerability as a child and disregarded expert recommendations against her participating in the court hearing, as well as the loss of the pre-trial video recording of the victim's, which could have been used in place of her court testimony – the ECtHR noted that the minimum threshold of severity had been reached, and it pointed out the lack of domestic provisions that would protect the interests of child victims in such cases (paras. 68–72).[27] The Court reached similar conclusions in another judgment, in *Y. v. Slovenia* (paras. 109–113).[28]

Thus, in accordance with European human rights standards, the use of audio and video recordings of victims' statements is generally permitted in order to prevent their secondary victimisation in cases involving specific categories of crime. However, this must not undermine the defendant's right to a defence and therefore requires compliance with certain conditions and rules. The academic literature highlights certain advantages of using video recordings during the initial questioning of a victim, not only from the perspective of the victim's personal protection, but also that of safeguarding the interests of justice. The point is that it is precisely during the initial interview that individuals are able to provide the most evidentiary information relevant to the investigation,[29] particularly when the interviewees are children, where repeating the interview may only reduce the accuracy of their testimony due to so-called "witness fatigue".[30]

Given that the authors are primarily examining this issue from the perspective of victims of war crimes and crimes against humanity, it is equally essential to consider how this matter is addressed in international criminal law – specifically, in the Rome Statute and the Rules of Procedure and Evidence of the International Criminal Court. In particular, Art. 69(2) of the Rome Statute provides for an exception to the general rule requiring a witness to give evidence personally in court – for example, by substituting audio or video recordings as evidence. It also points to the

[27] ECtHR, *B. v. Russia* (App. No. 36328/20), 7 February 2023, paras. 68–72.

[28] ECtHR, *Y. v. Slovenia* (App. No. 41107/10), 28 May 2015, paras. 109–113.

[29] R. Brink, *Secondary Victimization and Mass Atrocity Trials - Should Female SGBV Victim-Witnesses Be Summoned to Testify In-Person?*, 7(3) Journal of Psychology and Neuroscience 1 (2025), p. 4.

[30] P. Santtila, J. Korkman, N.K. Sandnabba, *Effects of Interview Phase, Repeated Interviewing, Presence of a Support Person, and Anatomically Detailed Dolls on Child Sexual Abuse Interviews*, 10(1) Psychology, Crime & Law 1 (2004), p. 32.

need to comply with two key conditions: firstly, such measures must not prejudice the rights of the accused or be incompatible with them; secondly, such exceptions must be specified in the Rules of Procedure and Evidence.[31]

Indeed, the amended version of Art. 68 of this document allows the International Criminal Court to use pre-recorded witness testimony in certain cases: (a) where the and the defence have had the opportunity to question the witness during the recording; (b) where the testimony does not relate to proving circumstances connected with the actions and conduct of the accused; (c) where the pre-recorded testimony is from a person who is no longer available due to death or a declaration of death, or due to other obstacles that cannot be overcome with due diligence; and (d) where the pre-recorded testimony is from a person who has been subjected to unlawful interference.[32]

In view of the above, the admissibility of using video recordings of victims' testimony from their initial questioning during the pre-trial investigation in lieu of direct examination in court must be based on a number of key factors.

(1) The need for such an approach must be primarily driven by the aim of protecting the rights of vulnerable categories of victims of war crimes and crimes against humanity, as well as preventing their secondary (repeated) victimisation. For Ukraine, this is critically important at present, given the corresponding priority in the activities of law enforcement and judicial bodies.[33]

(2) A mere video recording is not sufficient, as it is that the defence be able to ask their questions (at least in writing) in the course of such a preliminary interrogation.[34]

(3) The reasons why it is not possible to interrogate the victim directly in court must primarily relate to the victim's fear of contacting the accused, the victim's unavailability for objective reasons, or unlawful pressure exerted on the victim by the accused or persons acting in the accused's interests.

(4) Other alternatives capable of protecting victims from secondary victimisation without depriving the defendant of the right to cross-examine must be considered. Such alternatives could include remote questioning where the parties and the court

[31] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 UNTS 3.

[32] Assembly of States Parties to the Rome Statute of the International Criminal Court, Rules of Procedure and Evidence (1st Session, ICC-ASP/1/3 and Corr.1 3–10 September 2002), part II.A

[33] H. Spitsyna, I. Iemets, *Protecting the Rights of War Crimes Victims: Determining Ways to Prevent Their Secondary Victimization*, 9(1) Archive of Criminology and Forensic Sciences 84 (2024), p. 91.

[34] ECtHR, *D. v. Finland* (App. No. 30542/04), 7 July 2009, para. 50; *Paić v. Croatia* (App. No. 47082/12), 29 March 2016, para. 47.

are able to observe or questioning an anonymous witness (without disclosing the true identity to the defence and concealing their appearance).

CONCLUSIONS

Although the existence of an international armed conflict may indeed be regarded as an existential threat to the state and the nation, it does not relieve the state of its responsibility to fulfil its positive obligations, particularly the procedural obligation to investigate crimes that violate the human right to life and the right to not be subjected to illtreatment or prohibited conduct, which must meet standards of effectiveness.

However, whilst in the context of an international armed conflict international humanitarian law acts as a *lex specialis*, this branch of law does not itself establish specific requirements or criteria for conducting an effective investigation into war crimes and crimes against humanity. Consequently, the standards of investigation developed and interpreted in international human rights law must be applied in a complementary manner, with particular reference to the practice of the ECtHR regarding Arts. 2 and 3 ECHR. At the same time, it is important to bear in mind that, in the context of active hostilities, the threshold for the effectiveness of an investigation is likely to be lowered due to the existence of objective obstacles to ensuring the promptness of the investigation and thoroughness in the collection of evidence, for example.

The involvement of victims in criminal investigations, when assessing their effectiveness in relation to war crimes and crimes against humanity – particularly in cases involving deprivation of life and persons missing in action – may further develop into the right of close relatives "to the truth", as this often involves mass violations of one of the fundamental human rights under exceptional circumstances. Moreover, the very conceptual meaning of victims' involvement as a criterion of effectiveness should not be interpreted too narrowly or literally as the physical proximity of victims or their close relatives to the location of the pre-trial investigation. Instead, what is of decisive importance is the scope of the procedural rights granted to victims in criminal proceedings concerning war crimes and crimes against humanity, which enables them to participate actively in the process, including remotely – using modern digital technologies.

Together with this, the interests of victims of war crimes and crimes against humanity, particularly with regard to preventing secondary (or repeated) victimisation, might sometimes require exceptions to the general rule on cross-examining witnesses enshrined in Art. 6(3)(d) ECHR, which forms part of the right to a fair trial for the accused. Specifically, such an exception could be using a video recording

of the victim's testimony from their initial questioning in the pre-trial investigation. Meanwhile, to resolve the conflict of interests between the rights of participants in the criminal proceedings, it is necessary to take into account a number of key factors, such as a victim-centred approach and the prevention of secondary victimisation as the primary objective behind derogating from the general rule on obtaining direct testimony in court; the reasons preventing the victim from being present during the court proceedings; the opportunity for the defence to question the victim during the pre-trial investigation; and other alternatives that could equally prevent secondary victimisation.