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REPORT

ON THE RESULTS OF THE PROJECT

"THE TRIAL MONITORING IN WAR CRIMES CASES"

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Contents

1. Introduction **4**

2. Conclusions and recommendations of the report **6**

3. Methodology of the monitoring and analysis of court decisions **9**

4. Monitoring of court proceedings **10**

4.1. General information on the monitoring **10**

4.2. Information on each individual monitoring region **20**

5. Analysis of court decisions **27**

Appendices **36**

1. INTRODUCTION

This report (the "Report") has been prepared by the Ukrainian Bar Association (the "UBA") within the framework of the "Monitoring of War Crimes Trials" project.

The "Monitoring of War Crimes Trials" project is being carried out by the UBA under a grant agreement with the USAID Human Rights in Action Program, implemented by the Ukrainian Helsinki Human Rights Union (UHHRU).

The relevance of the project is conditioned by the fact that with the outbreak of a full-scale war in Ukraine, the national criminal justice system faced the need to quickly and efficiently consider a large number of criminal cases concerning war crimes. As a result, judges, prosecutors and lawyers are dealing with new category of crimes, such as war crimes, collaboration, etc.

These new categories of cases overwhelmed the national justice system. According to statistics from the Prosecutor's General Office, as of December 4, 2023, law enforcement agencies have registered more than 114,000 cases of war crimes and crimes of aggression. Most of the crimes falling within this category are prosecuted under three Articles of the Criminal Code of Ukraine: violation of the laws and customs of war (Article 438), planning, preparation or initiation, and conduct of aggressive war (Article 437), propaganda of war (Article 436) and others.

In a situation where all regions of Ukraine are the target of the aggression of the Russian Federation, it is important to analyze the practice and support all participants of court proceedings throughout the country in dealing with war crimes cases.

At the same time, the right to a fair trial should also be ensured during martial law, as required by Article 10 of the Universal Declaration of Human Rights (UDHR), Article 14 of the International Covenant on Civil and Political Rights (ICCPR) and Article 6 of the European Convention on Human Rights (ECHR). The representatives of all branches of power have repeatedly confirmed their intention to demonstrate a high standard of national justice in international crime cases.

Thus, this project was aimed at piloting monitoring of court proceedings and considering court judgments in war crimes cases in order:

- To analyze the court practice in Ukraine concerning the consideration of war crimes. The monitoring also focuses on the role of the prosecution authorities and the quality of defense of the accused.
- To form an idea of the extent to which such judicial practice complies with international standards, in particular, a right to a fair trial.
- To draw the attention of the judicial community to the identified shortcomings, if any, and suggest possible ways to resolve them.

At the request of the UBA, the International Bar Association (IBA) and the International Bar's Association Human Rights Institute (IBAHRI) formed a group of international experts in international law and human rights who, together with the UBA, prepared the Methodology and the Questionnaire for the monitoring, adjusted to the case of war crimes trials in Ukraine. The Methodology was based on the IBAHRI Guidelines on Trial Observation. The project also took note of the Right to a Fair Trial Indicators prepared by the Asser Institute.

The Methodology was based on the rights and freedoms guaranteed by the UDHR, the ICCPR, the ECHR, and the case law of the European Court of Human Rights (ECtHR).

At the national level, the Supreme Court, the Prosecutor General's Office, the High Council of Justice, the National School of Judges, the State Judicial Administration, as well as courts and prosecutors' offices throughout Ukraine, were actively involved in the implementation of the monitoring.

The monitoring of court hearings took place from July to October 2023 (inclusive) in the courts of Kyiv and Kyiv Region, Kharkiv, Chernihiv, Zaporizhzhia, Kherson, Odesa, Sumy, and Dnipropetrovsk Regions.

The monitoring Methodology and the corresponding Questionnaire focused on the following elements of the right to a fair trial, in particular:

- the right to a public trial;
- the right to an impartial and independent tribunal;
- the right to participate in a court hearing;
- equality of arms;
- presumption of innocence;
- length of proceedings;
- the right to a public and reasoned court judgment.

As part of the project implementation, the verdicts delivered in war crimes cases between February 2022 and October 2023 were analyzed as well.

To conduct this monitoring, the UBA has engaged a team of national experts, including two key national experts in the field of international law and human rights, and seven monitors who are lawyers with experience in the field of criminal law. The monitors personally attended court hearings and analyzed the rendered court judgments according to the pre-approved questionnaires.

Thus, the Report, based on the results of the monitoring of court hearings and analysis of the court judgments already rendered, presents conclusions regarding the compliance of court proceedings with international standards and indicates possible challenges and potential room for improvement when considering this category of cases.

2. CONCLUSIONS AND RECOMMENDATIONS OF THE REPORT

The monitoring of court hearings took place from July to October 2023 (inclusive) in the courts of the city of Kyiv and the Kyiv region, and Kharkiv, Chernihiv, Zaporizhzhia, Kherson, Odesa, Sumy, and Dnipropetrovsk Regions. During the specified period, **the monitors attended 237 court hearings in 114 cases and for various reasons** (shelling, late receipt of information about scheduled hearings, inability to quickly get to a court etc.) **did not attend 62 court hearings. A total of 299 hearings were within the scope of the project.** Within the monitoring period, the largest number of court proceedings in war crimes cases took place in the courts of the city of Kyiv and the Kyiv Region.

Monitoring also included the analysis of 44 court decisions, mostly adopted in the period from February 24, 2022 to October 2023. For comparison, 7 court decisions delivered before the full-scale war under Article 438 of the Criminal Code of Ukraine were also taken into account.

Based on the results of the monitoring, the **following conclusions** can be drawn:

1. Ukraine does not have a *unified database of future or ongoing war crimes proceedings*. All information about court hearings was obtained by the project directly from courts, prosecutors at the local and central level, as well as from court hearing boards and websites of specific courts. Thus, the project may not have the exact number of court hearings held by the courts of Ukraine.
2. *National authorities, including courts, are open to monitoring* and generally do not object to public and media attendance at court hearings. During the entire period of project implementation, the UBA team actively cooperated with the Supreme Court, the Office of the Prosecutor General, the High Council of Justice, the National School of Judges of Ukraine, the State Judicial Administration, as well as regional courts and prosecutors. At the same time, in a small number of cases monitors had issues with accessing courts or judicial decisions.
3. Out of all 44 judgments that became the subject of analysis, only 10 were appealed to the appellate courts between 24.02.2022 and 15.10.2023. Of these 10 judgments, 7 were confirmed.
4. *Most criminal cases are considered in absentia with the involvement of defense lawyers*. Although *in absentia* trials are practically justified, trial proceedings in such cases should ensure the highest level of compliance with the defendants' right to a fair trial. In this respect, the project is alarmed by some issues with the right to defense and trial notifications identified in the process of the monitoring.
5. Based on the monitoring results, the **project recommends the following**:

5.1. Office of the Prosecutor General - to consider the possibility of creating a *single database for investigative bodies, courts and free legal aid* with information on war crimes cases. The availability of a single source of information would significantly increase the effectiveness of the judicial review of the specified cases and the constant updating of data and add a level of transparency. However, it goes without saying that such a measure should not prejudice privacy of information, protection of witnesses and victims, as well as defendants who are presumed innocent until proven guilty.

5.2. *Access to court and consideration of cases in closed court proceedings*. In general, the project did not identify systemic problems related to access to court in the category of cases in question. However, in exceptional cases monitors encountered obstacles in accessing court proceedings or negative reaction from judges or prosecutors. The Project recommends that the

judicial branch of government (Supreme Court, High Council of Justice, State Judicial Administration, appellate and local courts) unify the practice regarding the procedure for admission to court hearings of the media and the public (including documents and information that must be submitted to the court in line with the admission procedure, etc.). Experts also recommend that the Supreme Court *coordinate the development of a unified approach of courts regarding the consideration of cases in closed court proceedings*. The right to a public trial, particularly in such an important category of cases, is a key element of the rule of law and democratic governance. The mere fact of public attention to war crimes cases cannot serve as a reason for holding a closed court session. The grounds for this are clearly defined both in national legislation and in international standards.

5.3. *The right to defense* is a fundamental element of the right to a fair trial. Although defendants had court-appointed counsels in all monitored cases, the effectiveness of the defense is an "area for improvement". Given that the vast majority of cases are heard in absentia, the national justice system must do its best to demonstrate a fair trial. According to experts, it is not enough to ensure a minimally acceptable level of defense. Moreover, even the best lawyers will encounter difficulties in defending clients who are absent, since such lawyers won't be able to receive their client's account of events so that to challenge them. Attorneys must demonstrate that they defend their clients zealously, proactively, and at the highest level. Thus, they will also protect the image of the judicial system of Ukraine, including before international judicial institutions, which will undoubtedly consider relevant national proceedings in the future. The project recommends that the Coordinating Center for Free Legal Aid provide educational and training opportunities for lawyers involved in war crimes cases. We suggest that the Coordination Center also considers the possibility of introducing specialized trainings for lawyers in order to quickly build their capacity in the specified category of cases.

Finally, the project recommends that national authorities undertake a thorough and detailed analysis of the criminal procedural framework of Ukraine against the background of international standards on trials in absentia.

5.4. *Notification of the parties to the proceedings*. Given that war crimes cases involve a "foreign element", the manner in which the parties are notified is critical to ensuring a fair trial. Since notifying the accused by sending a regular letter or a phone message is not an effective way, and the effectiveness of publishing a notice of the trial in the newspaper "Government Courier" is also questionable, experts recommend that the judicial branch of power (Supreme Court, High Council of Justice, State Judicial Administration) and the Office of the Prosecutor General to consider alternative ways of communication - for example, by sending a message through social networks or messengers – that allow to unequivocable establish the receipt of a notice. Such an approach can further strengthen the fairness and impartiality of the consideration of cases by Ukrainian courts.

5.5. *Equality of arms*. Since, as noted above, most war crimes cases are heard in absentia, courts must exercise the utmost discretion in dealing with the prosecution. In the absence of the accused and in the case of an "inactive" defense position, informal communication between judges and prosecutors can create the impression of a more favorable attitude towards the prosecution and lead to a violation of the defendants' right to a fair trial. We recommend that the bodies of the judicial branch of power, in particular the Supreme Court, the High Council of Justice, and the National School of Judges additionally draw attention of judges to the importance of clearly observing impartiality when considering war crimes cases.

5.6. Given that the Rome Statute has not been ratified by Ukraine, using its provisions as an additional regulatory basis for qualification under Art. 438 of the Criminal Code currently is not advisable. This may contradict the very provision of Part 1 of Art. 438 of the Criminal Code, which provides for the violation of those laws and customs of war, which are provided

for by treaties, the consent to which was given by the Ukrainian Parliament to be binding. In view of this, we suggest that the *Supreme Court and the National School of Judges advise courts not to use the Rome Statute as a normative basis for the qualification of actions under Art. 438 of the Criminal Code*. This being said, it should be mentioned that many clauses of the Rome Statute contain customary norms of international humanitarian law which is a source of law.

5.7. In some verdicts, the courts, ascertaining the elements of the crime provided for in Art. 438 of the Criminal Code, do not specify which international law norms were violated. Experts recommend improving this approach by always referring to a source of international law. The project suggests that the *Supreme Court and the National School of Judges, when reviewing court decisions and conducting training events for judges, respectively, draw the attention of judges to the need to clearly indicate in court decisions the norm of international law that was violated*.

5.8. The project recommends that judges who consider war crimes cases prepare *clear and well-founded judgments written in simple language*. In order to ensure transparency at the international level, the project also recommends that the SJA, if possible, provide a translation of such decisions into English.

3. METHODOLOGY OF THE MONITORING AND ANALYSIS OF COURT DECISIONS

As mentioned above, the Methodology was based on the rights and freedoms guaranteed by the UDHR, the ICCPR, the ECHR, and the case-law of the ECtHR.

The monitoring of court proceedings within the framework of the project was carried out in accordance with several principles, including the principle of non-interference in the judicial process, objectivity, and consent, as advised in the Methodology.

The principle of non-interference in the judicial process. The principle of non-interference implies respect for judicial independence. Both the judiciary as an institution and individual judges administering justice in particular cases must be able to perform their professional duties without undue influence from the executive, legislative, or other authorities. The project monitors were instructed not to interfere in the proceedings and to act as an "external observer".

The principle of objectivity. The principle of objectivity requires that the trial monitoring accurately reports on court proceedings using clearly determined and accepted standards and applying them impartially. Trial monitoring is a diagnostic tool that should provide accurate and reliable information on the functioning of the justice system. Trial monitoring should be conducted free of bias, conflicts of interest, or other aspects that may affect the conclusions and analysis, and without any program or purpose other than to protect and promote the functioning of the justice system. Whenever possible, court hearings were monitored by two monitors, which facilitated the collection of the most objective information.

The principle of consent. The principle of consent means that trial monitoring should be carried out with the consent of and in cooperation with the relevant actors of the state. These actors include the judiciary, prosecution authorities, defense counsels, victims and witnesses, law enforcement agencies, and others. The UBA is grateful to the national partners who expressed their consent for and provided assistance to the monitoring.

The start of the monitoring was preceded by a training session for the monitors, which covered the monitoring Methodology, including professional ethics, and the procedure for collecting, storing, and processing information.

Before the monitoring, the UBA also held meetings and consultations with judicial governance bodies, relevant courts, and prosecution authorities, during which the project, its Methodology, and expected results were discussed.

For the purpose of monitoring court hearings, information on current war crimes trials and their territorial scope was analyzed. Monitors who have a legal education, appropriate qualifications and the necessary knowledge to participate in the monitoring of court processes were selected for monitoring.

Given the scale of the project, the monitoring was subject to several limitations, including:

- the monitoring included only criminal cases under Article 438 of the Criminal Code of Ukraine;
- the monitoring did not include cases of crimes against national security;
- the monitoring did not include cases of crimes committed before February 2022;
- the monitoring did not include analysis of case files, as the monitors did not have access to them;
- the analysis of court judgments was carried out on the basis of the judgments available in the Unified Register of Court Decisions under Article 438 of the Criminal Code of Ukraine.

4. MONITORING OF COURT PROCEEDINGS

4.1. General information on the monitoring

In total, in the period from August 1 to October 30, 2023, monitors attended 237 court hearings and for various reasons (shelling, late receipt of information about scheduled hearings, inability to quickly get to a court etc.) **did not attend 62 court hearings in 114 cases**.

The monitors also visited 6 other court hearings in criminal cases on war crimes, however, during the presentation of the cases, it was found out that they relate to events that took place before February 2022, which is not the subject of trial monitoring. After establishing this fact, the cases at issue were removed from the monitoring. In total, during the monitoring period, 15 court hearings were held in such cases.

The Questionnaire was filled out based on the results of each attended court hearing (including adjourned ones). The analysis of the received Questionnaires allows us to draw the following conclusions about the elements of the right to a fair trial.

The right to a public hearing. The right to a public hearing is guaranteed by Article 10 of the UDHR, Article 14(1) of the ICCPR and Article 6(1) of the ECHR. Exceptions to this rule are stipulated in Article 14(1) of the ICCPR and Article 6(1) of the ECHR "in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice".

During monitoring, attention was drawn to whether project monitors themselves had access to court hearings, as well as whether there were any signs of problems with access to hearings by members of the public and the media.

According to the monitoring results, it can be affirmatively stated that the vast majority of court hearings attended by monitors were open (95%). Closed court hearings (fully or partially) were held in criminal proceedings for the following reasons:

- materials related to conflict-related sexual violence;
- in one of the criminal proceedings, relatives of the victim and witnesses are in the temporarily occupied territory. In order to ensure the safety of the specified participants in the court proceedings, the court considered it necessary to conduct a closed court hearing inasmuch as they concerned the questioning of the victim, witnesses, as well as the actions provided for in Article 363 of the Criminal Procedural Code of Ukraine.

In criminal proceedings, where the case was considered in a closed hearing, public representatives were not admitted. This corresponds to the prescriptions of Part 4 of Article 27 of the Criminal Procedural Code of Ukraine, where it is determined that only the parties and other participants in the criminal proceedings may be present at the closed court hearing.

At the same time, project monitors reported isolated cases of obstacles to public access to court hearings, namely:

- the judge told the monitor that due to the internal order of the court president, persons who are not participants in the case are not allowed even to open court proceedings. When the monitor asked to familiarize himself with this order, the judge had a look at the supporting letter from the Supreme Court and the UBA and, having familiarized himself with its content, allowed the monitor to attend the meeting (case No. 754/3227/23, Desnyansky District Court of Kyiv);
- court security guards, referring to the decision of the court president and the martial law, tried to prevent the public from attending the hearings (Desnyansky District Court of the City of Kyiv, case No. 754/3227/23);
- the monitors entered the courtroom and, in the presence of the victim's representative and the prosecutor, informed the secretary of the court session of their intention to be present during the hearing of the case. The secretary informed that the court session had not yet started and that monitors should wait in the corridor. Later, the presiding judge entered the courtroom, the monitors announced their intention to be present in the courtroom, but the presiding judge asked to wait in the corridor. As it turned out later, the presiding judge opened and conducted the court session without notifying the monitors about the possibility to enter the courtroom (case 522/6292/23, Prymorsky District Court of Odesa);
- the judge asked the monitors not to take any notes at the stage of the preparatory hearing (case No. 761/9575/22, Shevchenkivskyi District Court of Kyiv);
- in one proceeding, the prosecutor stated that he did not expect the participation of observers, so he did not ask for the case to be considered in a closed court session. In view of the fact that the project monitors announced their intention to observe the proceedings, the prosecutor promised to file a corresponding motion.

Separately, it should be noted that in almost all the cases, the courtrooms were suitable for proper consideration of cases (size, etc.). Perhaps an exception to this rule is case No. 367/2115/23, which is being considered by the Irpin City Court of the Kyiv Region (0.5%), where not all media operators were able to place filming equipment in the courtroom. At the same time, it should be noted that a significant number of representatives of the public were present at all hearings in this case.

Also, objective difficulties with courtrooms arise in courts that have suffered from shelling. Thus, the previous building of the Borodyansky District Court of the Kyiv Region was destroyed by a Russian missile. Another courthouse with only one courtroom is currently in use. For these reasons, one court session on the case No. 369/6338/23 was held in the judge's office due to the fact that the courtroom was in use in another case.

The right to an impartial and independent court. This rights is also enshrined in Article 14(1) of the ICCPR and Article 6(1) of the ECHR.

The impartiality of the court, meaning the absence of bias or subjectivity, is one of the guarantees designed to ensure the general fairness of court proceedings.

Compliance with it, in accordance with the established practice of the ECtHR, is established according to two criteria: subjective and objective. Impartiality according to the subjective criterion means that the judge did not show personal bias or interest in the outcome of the case. Personal impartiality is presumed until proven otherwise by the conduct and/or personal beliefs of a judge. Objective impartiality requires the provision of sufficient guarantees by the court itself, in particular by its personnel, to exclude any doubts about its objectivity and impartiality (decision in the case of "Mykhaylova v. Ukraine" dated March 6, 2018).

In the context of the objective criterion, in addition to the judge's behavior, the presence or absence of convincing facts that may cast doubt on his impartiality must be checked. This means that when analyzing the question of the existence of reasons to doubt the judge's impartiality, the decisive factor is not the position of the interested party, but the validity of the corresponding fear. The objective criterion usually refers to hierarchical or other relationships between the judge and other participants in the proceedings (the decision in the case of "Mykhaylov v. Ukraine" dated March 6, 2018).

The ECtHR in its decision of February 09, 2021 in the case "Gorjai v. Albania" noted that judges, who by the nature of their work are considered guarantors of the rule of law, must meet particularly high standards of integrity and be "impeccable from the point of view of a reasonable observer" in order to maintain and strengthen public trust and "confirm the faith of the people in the integrity of the judiciary".

As stated in the Preamble of the Code of Judicial Ethics, approved by the XI Regular Congress of Judges of Ukraine on February 22, 2013, aware of the importance of their mission, in order to strengthen and maintain public trust in the judiciary, judges of Ukraine are obliged to demonstrate and promote high standards of behavior, in connection with which they voluntarily take on themselves more significant restrictions related to the observance of ethical norms both in behavior during the administration of justice and in extrajudicial behavior. A judge must be an example of strict compliance with the requirements of the law and the principle of the rule of law, the oath of a judge, as well as compliance with high standards of behavior in order to strengthen the trust of citizens in the honesty, independence, impartiality and justice of the court, making every effort to ensure that, in the opinion of a prudent, law-abiding and to an informed person, his behavior was impeccable (Articles 1, 3 of the Code of Judicial Ethics).

The judge, in his activities related to the administration of justice, is to be independent from any illegal influence, pressure or interference and, as stated in Art. 2, 6, 14, 17 of the Code of Judicial Ethics, must avoid any illegal influence on his activities related to the administration of justice; cannot use his official position in personal interests or in the interests of other persons and must not allow others to do so; must perform his professional duties independently, regardless of any external influences, incentives, threats, interference or public criticism and avoid extra-procedural relationships with one of the participants in the process or his representative in the case in the absence of other participants in the process, as well as relationships, which may affect his independence and impartiality.

Since 2014, judicial reform aimed at improving the legislation and institutional structure of the judiciary has been actively taking place in Ukraine. Analysis of the success of the judicial reform is not the subject of the monitoring. More detailed information on this issue can be found in numerous reports of international technical assistance projects and NGOs.

The project can state that the monitors have no reason to believe that parties to criminal proceedings, political subjects, etc., made threatening statements to the court in connection with the outcome of the proceedings, corruption or undue influence on the judges in the case.

The right to participate in court proceedings. According to Article 14(3d) of the ICCPR, everyone has the right "to be tried in his presence", and Article 6(3c) of the ECHR enshrines the right "to defend himself in person".

The ECtHR in the case "Lazarenko v. Ukraine" dated September 27, 2017, noted that the "national legislation [of Ukraine} contains special rules for ensuring that the parties to the process are informed about key procedural actions and thus complying with the principle of equality of the parties and the storage of relevant information", since the general concept of fair trial covers the fundamental principle of adversarial process (para. 37 – 38).

According to paragraph 37 of this ECtHR judgment, "Article 6 of the Convention cannot be construed as providing for a specific form of service of court mail […] Nor are the domestic authorities required to provide a perfectly functioning postal system […] However, the general concept of a fair trial, encompassing the fundamental principle that proceedings should be adversarial […], requires that the person against whom proceedings have been initiated should be informed of this fact. If court documents are not duly served on a litigant, then he or she might be prevented from defending him or herself in the proceedings".

National authorities are also not required to ensure the flawless functioning of the postal system. However, the general concept of fair trial covers the fundamental principle of adversarial proceedings, requiring that the person against whom proceedings are initiated be informed of this fact. Failure to serve a party with court documents may deprive him or her of the opportunity to defend himself or herself in the proceedings.

According to Part 5 of Art. 139 of the Criminal Procedural Code of Ukraine, evasion of appearance at the summons of an investigator, prosecutor or court summons of an investigating judge, court (failure to appear at a summons without a good reason more than two times) by a suspect, an accused who has been declared an international wanted person, and/or who has left, and/or is in the temporarily occupied territory of Ukraine, the territory of a state recognized by the Verkhovna Rada of Ukraine as an aggressor state, is the basis for conducting a special pre-trial investigation or special court proceedings.

As established by the monitoring results, in 5 court cases (2.5%) **regarding war crimes** (Case No. 367/2115/23, Irpinsky City Court of Kyiv Oblast; Case No. 939/2083/23, Borodyanskyi District Court of Kyiv Oblast; Case No. 367/6424/23, Irpin City Court of Kyiv Region; 204/8193/23, Krasnogvardiy District Court of Dnipropetrovsk City; 202/11910/23 Industrial District Court of Dnipropetrovsk City), **which are currently being considered by the courts, the accused are present**.

All other cases (97.5%) are heard within the framework of special court proceedings (in absentia). This is caused by the fact that most of the defendants are not in the territory of Ukraine and are either hiding from the law enforcement agencies of Ukraine, or don't know about the proceedings.

According to Part 2 of Article 297-1 of the Criminal Procedural Code of Ukraine, a special pre-trial investigation is carried out on the basis of a decision of an investigating judge in criminal proceedings regarding crimes provided for by the Criminal Code of Ukraine, in relation to a suspect, except a minor, who is hiding from the investigative authorities and the court in the temporarily occupied territory of Ukraine, on the territory of a state recognized by the Verkhovna Rada of Ukraine as an aggressor state, for the purpose of evading criminal responsibility and/or declared an international wanted person.

A special pre-trial investigation of other crimes is not allowed, except in cases where the crimes were committed by persons who are hiding from the investigation and court authorities in the

temporarily occupied territory of Ukraine, in the territory of a state recognized by the Verkhovna Rada of Ukraine as an aggressor state, with the aim of evading criminal responsibility and /or declared internationally wanted, and are investigated in one criminal proceeding with the crimes specified in this part, and the allocation of materials regarding them may negatively affect the completeness of the pre-trial investigation and trial.

Art. 12(3) of the Law of Ukraine "On Ensuring the Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine" establishes that the procedure for serving summons to a person for whom there are sufficient grounds to believe that such a person has left and/or is in the temporarily occupied territory of Ukraine, as well as the legal consequences of evading the summons of an investigator, prosecutor or court summons of an investigating judge, court (failure to appear at a summon without a valid reason more than two times) by a suspect, accused person who has left and/or is in the temporarily occupied territory of Ukraine, are determined by the Code of Criminal Procedure.

Also in accordance with the requirements of Art. 297 – 5 of the Criminal Procedure Code of Ukraine, subpoenas to summon a suspect in the event of a special pre-trial investigation are sent to his last known place of residence or stay and must be published in mass media of nationwide distribution and on the official website of the Office of the Prosecutor General. From the moment of publication of the subpoena 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 familiarized with its content.

The issue of proper notification of the defendants about the date and time of the court session is indeed key and problematic at the same time. All information about the hearings is available on the official website of the courts and is fully accessible. At the same time, most of the defendants are citizens of the Russian Federation, most likely are in the territory of the Russian Federation, and/or do not speak Ukrainian language, which gives grounds to believe that they might not be able to receive information about court proceedings, and therefore the effectiveness of the notification process in such cases may not be adequate.

In addition, international law in general and ECtHR case-law in particular offer extensive recommendations on trials in absentia. Although such trials are allowed under criminal procedural legislation of Ukraine, a much more thorough analysis of the legislative framework and domestic practices in the context of international standards is needed.

The schedule of court hearings in cases of war crimes is available on the official web portal "Judiciary of Ukraine" for each criminal proceeding. In addition, as it was confirmed as a result of monitoring, the schedule of court sessions is available on the notice board of courts (in 99.5% of cases).

However, some legal proceedings are exceptions to the general rule. For example, in case No. 635/2700/23, which is being considered by the Kharkiv District Court of the Kharkiv Region, there is no court schedule on the bulletin board in the court premises, however, all the information is available on the court's website.

In the Chervonozavod District Court of Kharkiv (case No. 646/3363/23), the hearing was postponed due to improper notification of the parties, and this is the only recorded case when the judge took into account the fact of improper notification of the participants in the process.

As for the interpreter's participation in the proceedings, it was carried out only in those cases that were considered with the participation of the defendant (2.5%).

Equality of arms and fairness of proceedings. Equality of parties to the proceedings is guaranteed by Article 10 of the UDHR and Article 14(1) of the ICCPR. Although the ECHR does not explicitly mention equality of arms, this notion was developed in the case-law of the ECtHR.

For example, in the case "Lazarenko and others v. Ukraine" (paragraph 36 of the said decision) the ECtHR mentioned "that the principle of equality of arms requires that each party should be afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage *vis-à-vis* his or her opponent".

Equality of the parties is one of the key principles of the right to a fair trial, especially given the realities of war crimes cases. Almost all cases are considered in absentia and all participants in criminal proceedings are undoubtedly under pressure from society, aimed at securing the conviction and receiving the most severe punishments for the defendants.

According to the results of monitoring, in more than 90% of cases, judges did not demonstrate any bias in favor of one of the parties. However, in a few cases the following issues were identified:

- Before the start of the court session in the courtroom, the court secretary invited the prosecutor to the judge's office for a conversation. In addition, the court granted the prosecution's request to re-summon witnesses who had already been fully questioned by the parties at the last court hearing. The defense party reasonably objected to the re-summoning of the prosecution's witnesses, but the court, without explaining the reasons, granted the prosecutor's request (case No. 748/855/23, Chernihiv District Court of Chernihiv Region);
- Before the start of the session, the judge held a short meeting in his private office regarding the plan and content of the upcoming session with the prosecutor without the presence of the lawyer and other participants of the session (case No. 369/6336/23, Borodyansky District Court, Kyiv Region);
- Before the start of the session, the judge held a short meeting in his personal office regarding the plan and content of the upcoming session with the prosecutor without the presence of the lawyer and other participants of the session (case No. 939/226/23, Borodyanskyi District Court, Kyiv Region).

Monitors did not report that the court did not provide the parties with sufficient time to present evidence or prepare defense, or that the judge did not provide the parties with sufficient time to process issues arising during the hearing, consultation and preparation of answers.

Right to defense is a central principle of the right to a fair trial and is guaranteed by Article 11(1) of the UDHR, 14(3b) of the ICCPR and Article 6(3b) of the ECHR.

According to paragraphs 31-32 of the decision of the ECtHR in the case "Dayanan v. Turkey", the "the fairness of criminal proceedings under Article 6 of the Convention requires that, as a rule, a suspect should be granted access to legal assistance from the moment he is taken into police custody or pre-trial detention […]. […] an accused person is entitled, as soon as he or she is taken into custody, to be assisted by a lawyer, and not only while being questioned […] Indeed, the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance. In this regard, counsel has to be able to secure without restriction the fundamental aspects of that person's defense: discussion of the case, organisation of the defense, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention".

The accused person has the right, as soon as he is taken into custody, to the assistance of a defense lawyer, and not only during interrogation. The fairness of the trial requires that the accused be able to receive the full range of services specifically related to legal aid. In this regard, the defense attorney must be able to provide without restrictions the main aspects of the defense of this person: discussion of the case, organization of defense, collection of evidence favorable to the accused, preparation for interrogation, support of the accused and checking of conditions of detention.

In the case "Zagorodny v. Ukraine", the ECtHR, relying on previous decisions, noted that "...although the right of every person accused of committing a criminal offense to effective defense by a lawyer is not absolute, it is one of the main foundations of a fair trial. A person facing criminal charges who does not wish to defend himself in person should be able to obtain legal assistance of his choice".

In cases where defendants are present during the consideration of the criminal proceedings(2.5%), monitors identified no issues with the possibility of defendants to consult with their defense counsel.

A general analysis of court hearings gives reason to highlight the following issues of involvement of the defense side in the consideration of criminal cases, in particular:

- the defense attorney was not appointed at the first court hearing and in fact the accused remained without legal aid (court case No. 766/648/23);
- most defenders show a desire to be present at court sessions in videoconference mode, however, the technical component does not always provide the opportunity to hold a court session in such a mode (Internet is absent, poor connection, use of the defendant's own technical means with poor equipment, etc.), therefore often for these reasons the meeting is postponed;
- there are cases of non-appearance of the defendant without justification (case No. 635/2700/23);
- postponement of court hearings due to the busyness of defense lawyers;
- the right to defense was explained to the defendant only once (case No. 367/2115/23, Irpinsky City Court of Kyiv Region), and subsequently all other 4 defendants did not appear at court sessions.

In many hearings where a defense attorney was present, the monitors reported that the defense attorneys professionally provided legal assistance and took an active legal position at the stage of the preparatory court hearing.

However, there are also cases of indifference or unprofessionalism of the appointed defendants. In particular:

- the defendant took a passive legal position at the court hearing and did not present any arguments in defense of the accused (No. 751/1303/23, Novozavodsky District Court, Chernihiv);
- the defense attorney did not show much initiative in responding to the arguments of the prosecutor. At the same time, the prosecutor was diligent, prepared in advance a request for a special proceeding, printed publications in the "Government Courier" and actively participated in the process (case No. 761/9575/22, Shevchenkiv District Court of Kyiv);
- the defense attorney was 30 minutes late and asked the court to remove him from the defense of the accused (case No. 367/2276/23, Irpinsky City Court);
- one of the defendants misses all sessions in the case, resulting the court secretary issuing a warning on behalf of the judge to apply to the Qualification and Disciplinary Commission of the Bar (case No. 635/2700/23, Kharkiv District Court, Kharkiv Region);
- the defense attorney constantly did not appear at court sessions, which, according to the judge, sabotages the proceedings (case No. 754/3227/23, Desnyansky District Court of Kyiv);
- the defense attorney connected to the court session via video conference from the interior of his car, which gave an impression of an irresponsible attitude to this case (case No. 361/5761/22, Brovarskiy City and District Court, Kyiv Region).

Failure to ensure effective defense raises reasonable doubts about the improper guarantee of the right to a fair trial. In addition, the non-appearance or absence of a defense attorney during the consideration of a criminal case greatly slows down the proceedings.

Presumption of innocence is enshrined in Articles 11(1) of the UDHR, Article 14(2) of the ICCPR and 6(2) of the ECHR.

According to Art. 2 of the Constitution of Ukraine, no one is obliged to prove his or her innocence of committing a crime. The accusation cannot be based on evidence obtained illegally, as well as on assumptions. All doubts regarding the guilt of a person are interpreted in his favor.

By the prescriptions of Art. 17 of the Criminal Procedural Code, a person is considered innocent of committing a criminal offense and cannot be subject to criminal punishment until his guilt is proven in accordance with the procedure provided for by this Code and is established by a court verdict that has entered into force. No one is required to prove his innocence of a criminal offense and must be acquitted unless the prosecution proves the person's guilt beyond a reasonable doubt. Indictment cannot be based on evidence obtained illegally. All doubts regarding the proven guilt of a person are interpreted in favor of such a person.

The Constitutional Court of Ukraine in its decision dated February 26, 2019 No. 1-p/2019 in the case regarding the conformity of the Constitution of Ukraine (constitutionality) of the article 368-2 of the Criminal Code of Ukraine noted that an element of the principle of presumption of innocence is the principle of "in dubio pro reo", according to which, when evaluating the evidence, all doubts about a person's guilt are interpreted in favor of his innocence. The presumption of innocence of a person assumes that the duty of proving a person's guilt rests with the state.

In the course of the Project, monitors identified no reasons to believe there was a violation of the specified principle.

Length of proceedings. The right "to be tried without delay" and the right to a "hearing within a reasonable time" are guaranteed by Article 14(3c) of the ICCPR and Article 6(1) of the ECHR respectively. Since the concept of reasonable terms is estimative, it should be considered in the context of the national legislation.

Article 28 of the Criminal Code of Ukraine stipulates that during criminal proceedings, each procedural action or procedural decision must be performed or made within a reasonable time. Terms that are objectively necessary for the execution of procedural actions and the adoption of procedural decisions are considered reasonable. Reasonable terms may not exceed the terms provided by this Code for the execution of individual procedural actions or the adoption of individual procedural decisions.

In accordance with the requirements of Part 1 of Art. 318 of the Criminal Code of Ukraine, the trial must be conducted and completed within a reasonable time.

The ECtHR has repeatedly emphasized the need to observe reasonable length of proceedings in Ukraine. The Court noted that a reasonable period of time in criminal proceedings begins from the time a person is "charged", that is, from the moment the applicant is officially notified by a competent authority that he is accused of committing a crime. The reasonableness of the duration of the proceedings must be assessed in the light of the specific circumstances of the case and taking into account such criteria as the complexity of the case, the behavior of the applicant and the relevant authorities. The requirements for speedy consideration of criminal proceedings in cases in which the defendant is kept in custody are based on increased requirements for a reasonable period of consideration (ECtHR decision in the case "Ringeisen v. Austria").

The delay in consideration of some cases that were the subject of monitoring may occur due to the non-appearance of trial participants, busyness of judges, lack of physical security, missile attacks on certain regions, and the lack of an opportunity to provide stable communication for conducting video conferences.

The information collected during the monitoring does not give grounds to claim that the duration of consideration of war crimes cases is excessive.

At the same time, some interlocutors of the project express their concern that trials in war crimes cases are very fast as compared to other categories of cases. In order for the right to a fair trial to be met, it is important to make sure that parties to the proceedings have sufficient time to argue their case, and the court – to review it.

The right to a public and reasoned court decision. Article 14(1) of the ICCPR provides that "any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children". And Article 6(1) of the ECHR establishes that "judgment shall be pronounced publicly".

Judicial verdicts in war crimes cases will be reviewed and discussed not only by parties to the case, but also by society, legal community and international partners. In view of this, there is a need for well-written and clear verdicts drafted in understandable language. For the sake of transparency at the international level, it would also be ideal if such verdicts could be translated into English.

A more detailed analysis of court decisions delivered in the period from February 24, 2022 to October 2023 is provided below in the "Analysis of court decisions" section.

Considering the fact that court sessions are held in conditions of the full-scale war, the project also paid attention to the safety of the participants in the proceedings. Since the monitoring, as well as the consideration of court proceedings, are carried out in the conditions of military operations throughout the territory of Ukraine, the safety of the participants in the court proceedings cannot be guaranteed. This particularly applies to regions that are under constant shelling (Kherson, Zaporizhzhya, Kharkiv and other regions). At the same time, even on the territory of the Kyiv Region, access to the court was repeatedly made impossible by air raids and shelling.

It is also worth noting that not all courthouses have bomb shelters, which creates additional security risks. At the same time, the project is aware that the reconstruction of the destroyed court premises and the equipment of all the courts with bomb shelters is a long-term task of post-war reconstruction and cannot be quickly and effectively solved during martial law.

4.2. Information on each individual monitoring region

Kyiv and Kyiv Region

During the monitoring period, it was established that the number of criminal cases pending in district courts was 58.

No verdicts were delivered during the monitoring period. All but 3 proceedings are held in absentia.

The monitors faced the following challenges during the monitoring:

- Periodic postponements of court hearings due to court overload, absence of defense counsels and representatives of victims, as well as judges' participation in collegial consideration of other cases.
- In rare cases, objective conditions at courts, for example, the insufficient number of employed judges to consider a case in a panel, makes it impossible to hold a court hearing.
- In some cases, representatives of the Judicial Security Service exceeded their authority by attempting to prevent monitors from entering courtrooms, citing the decision of the court president to ban the admission of citizens who are not parties in the trial. Such an order of the president of the court was reasoned by the inability to guarantee the security of citizens during the consideration of the case due to the absence of a bomb shelter. In addition, judges occasionally substantiated the non-admission of the observers by martial law.
- Effective defense. Thus, in one of the courts of the Kyiv region, during the hearing of the case, the lawyer was late for more than an hour due to attending “cosmetic procedures”, which she officially admitted. In another case, one of the defense attorneys appointed under the free legal aid program did not show up for a court hearing without proper notice. As a result, all the participants in the court session, i.e. the defendant, who was brought from the pre-trial detention center, the three-judge panel, the victims and their representatives, the prosecutor, as well as the media representatives and public present at the session, waited for about three hours for his arrival, after which the secretary reported that the hearing will not take place due to the absence of a defense attorney.
- Borodyansky District Court of the Kyiv Region was destroyed by Russian artillery strikes, the premises cannot be used for court proceedings. Currently, court hearings take place on the first floor of the Irpinsky Inter-District Unit of the Security Police Department in Kyiv Region, however, the courtrooms are completely insufficient in terms of space for hearings, which leads to the discomfort of the trial participants during the proceedings.

Among the positive aspects of court hearings monitoring is the attention of some judges and prosecutors to the project. In a number of cases, prosecutors reported that they were aware of the project, recognized its importance, and would like to continue, if needed, to help with logistical problems for the presence of monitors at the maximum number of hearings in war crimes cases.

Court	Number of pending war crimes cases	Number of court cases pending under Article 438 of the CC	Total number of hearings held to date	Total number of postponed hearings	Number of cases considered in absentia	Number of cases considered in closed session	Number of defendants present
Borodyanskyi District Court of Kyiv Region	9	8	22	4	8	0	1
Brovary City and District Court of Kyiv Region	8	8	13	4	8	1	0
Vyshgorod District Court of Kyiv Region	2	2	3	1	2	0	0
Desnianskyi District Court of Kyiv City	3	2	4	3	3	0	0
Ivankivskyi District Court of Kyiv Region	1	1	3	0	1	0	0
Irpin City Court of Kyiv Region	19	19	28	11	17	0	2
Kyiv-Svyatoshynskyi District Court of Kyiv Region	3	3	8	1	3	0	0
Makariv District Court of Kyiv Region	4	4	8	0	4	0	0
Solomianskyi District Court of Kyiv City	4	4	6	5	4	1	0
Shevchenkivskyi District Court of Kyiv City	7	6	6	5	6	0	0

Kharkiv and Kharkiv Region

During the monitoring period, there were 11 court hearings in criminal cases on war crimes pending before district courts in Kharkiv city and Kharkiv Region.

No verdicts were delivered during the monitoring period. All hearings were conducted in absentia.

The monitors faced the following challenges during the monitoring:

- A large number of court hearings were postponed due to the failure of the prosecution to place an announcement in the "Government Courier" ("*Uryadovyi Kurier"*) newspaper or because judges were involved in other proceedings.
- Almost every hearing raised the question of the presence or absence of a defense counsel. In particular, as an example, in one of the cases at the Kharkiv District Court of the Kharkiv Region, six defense attorneys were appointed by the state. The simultaneous arrival of all defenders is complicated by different work schedules and workloads.
- Monitors were often faced with the negative reaction of judges to the presence of third parties in court sessions. One of the judges noted that, despite the public hearing of the case, she has a negative attitude towards the presence of monitors and the fact that they draw up a report based on the conduct of participants of the hearings.

In addition, monitors paid attention to safety when attending court hearings. Kharkiv and the Kharkiv Region are under constant missile attacks by the Russian Federation. Despite this, after the rocket attacks, judges and parties to proceedings come back to courtrooms and hold court sessions. As a result, different practices have been formed regarding the observance of the rules for visiting courts during an air raid alert: some courts continue to hear cases, which raises concerns on the safety of those present, and some take a break to hide in a bomb shelter.

Court	Number of pending war crimes cases	Number of court cases pending under Article 438 of the Criminal Code	Total number of hearings held to date	Total number of postponed hearings	Number of cases considered in absentia	Number of cases considered in closed session	Number of defendants present
Dzerzhynskyi District Court of Kharkiv City	4	4	7	3	4	0	0
Kyiv District Court of Kharkiv City	1	1	1	3	1	0	0
Chervonozavodskyi District Court of Kharkiv City	6	5	3	4	4	0	0
Kharkiv District Court of Kharkiv Region	1	1	4	0	1	0	0
Chuhuiv City Court of Kharkiv Region	1	1	1	1	1	0	0
Balakliya District Court of Kharkiv Region	1	1	1	0	1	0	0

Dnipro and Dnipropetrovs'k Region

During the monitoring period, it was established that the number of criminal cases pending in district courts is 6.

On October 2, 2023, a verdict was delivered by the Industrial District Court of Dnipropetrovsk in case No. 202/3594/23.

All cases under Article 438 of the Criminal Code of Ukraine are considered in absentia. At the same time, the monitors observed three cases of indictment under Part 2 of Article 436-2 of the Criminal Code of Ukraine. The defendants in such cases are in the territory under the control of Ukraine and contact the court through a lawyer and personally by sending petitions and statements.

Monitors encountered the following problems during monitoring:

- A large number of postponements of court hearings due to the non-appearance of defense counsel. At almost every meeting, the question of the absence of a defendant arose.
- Absence of Internet connection in the court to hold a court session in the videoconference mode. In all cases, the Internet connection was absent for objective reasons, such as shelling of neighboring regions, due to which the light goes out in Dnipropetrovsk Region, or other factors that the court cannot influence.

Court	Number of pending war crimes cases	Number of court cases pending under Article 438 of the Criminal Code	Total number of hearings held to date	Total number of postponed hearings	Number of cases considered in absentia	Number of cases considered in closed session	Number of defendants present
Krasnohvardiyskiy District Court of Dnipropetrovs'k City	2	0	4	0	0	0	2
Pavlohrad City District Court of Dnipropetrovs'k Region	5	5	4	9	5	0	0
Industrial District Court	2	0	2	0	1	0	1
Saksahanskyi District Court of Kryvyi Rih of Dnipropetrovs'k Region	1	1	0	1	1	0	0

Odesa and Odesa Region

During the monitoring period, it was established that the number of criminal cases pending in district courts is 9.

No verdicts were delivered during. All proceedings are conducted in absentia.

Monitors encountered the following issues during monitoring:

- Court sessions are postponed in connection with the non-appearance of the parties: the prosecutor, the defendant and defense attorneys, or in connection with technical problems related to the holding of sessions via video connection. There were cases of impossibility to connect both the lawyer and the prosecutor to video conferences. Another reason for postponement of court hearings is improper notification of the accused through the “Government Courier”.
- In one of the cases, the monitors were not allowed to the court session, despite the prior agreement with the secretary, the judge's assistant and the judge himself. The judge asked the monitors to wait in the corridor, but actually entered the courtroom and conducted the hearing. Thus, the monitors were not able to observe the proceedings.

Court	Number of pending war crimes cases	Number of court cases pending under Article 438 of the Criminal Code	Total number of hearings held to date	Total number of postponed hearings	Number of cases considered in absentia	Number of cases considered in closed session	Number of defendants present
Malynovskyi District Court of Odesa City	3	3	3	4	3	0	0
Prymorskyi District Court of Odesa City	1	1	1	2	1	0	0
Suvorovskyi District Court of Odesa City	4	4	7	6	4	0	0
Bilyayivskyi District Court of Odesa Region	1	1	2	0	1	0	0

Chernihiv and Chernihiv Region

During the period of monitoring, it was established that the number of criminal cases pending in district courts is 16. 3 verdicts were delivered.

All cases are considered in absentia.

Court	Number of pending war crimes cases	Number of court cases pending under Article 438 of the Criminal Code	Total number of hearings held to date	Total number of postponed hearings	Number of cases considered in absentia	Number of cases considered in closed session	Number of defendants present
Chernihiv District Court of Chernihiv Region	6	6	15	2	6	0	0
Bakhmatskyi District Court of Chernihiv Region	1	1	0	2	1	0	0
Novozavodskyi District Court of Chernihiv City	1	1	2	0	2	0	0
Ripkinskyi District Court of Chernihiv Region	2	2	3	2	2	0	0
Bobrovytskyi District Court of Chernihiv Region	1	1	1	0	1	0	0
Desnianskyi District Court of Chernihiv City	1	1	2	0	1	0	0
Ichnianskyi District Court of Chernihiv Region	2	2	3	1	1	0	0
Kulykivskyi District Court of Chernihiv Region	1	1	1	0	1	0	0
Chernihiv Court of Appeal	1	1	1	0	1	0	0

Note: *some indictments were redirected by the courts to determine jurisdiction or due to the impossibility of consideration. The table takes into account all courts to which the indictments were sent.*

Kherson and Kherson Region

During the monitoring period, it was established that the number of criminal cases pending in district courts is 6.

No verdicts were delivered. Consideration of criminal cases was conducted in absentia.

The only problem that the monitors encountered was the issue of security during participation in court proceedings. There is constant rocket shelling in the city, in rare cases the road to the court is blocked, which prevents access to the court.

Court	Number of pending war crimes cases	Number of court cases pending under Article 438 of the Criminal Code	Total number of hearings held to date	Total number of postponed hearings	Number of cases considered in absentia	Number of cases considered in closed session	Number of defendants present
Kherson City Court of Kherson Region	5	5	8	3	5	0	0
Novorontsovskyi District Court of Kherson Region	1	1	1	0	1	0	0

Zaporizhzhia and Zaporizhzhia Region

During the monitoring period, it was established that the number of criminal cases pending in district courts is 3.

No verdicts were delivered during the monitoring period. All cases are considered in absentia.

Monitors encountered the following problems during the monitoring:

- One of the cases is being considered in a closed court session. Such a decision was taken by the court at the request of the victim in view of the presence of media representatives in the courtroom and their subsequent disclosure of sensitive information that may endanger the victims and their relatives.
- Non-appearance of attorneys at court hearings and forced postponement of court hearings due to poor communication via video conferencing.
- Court hearings are held in the immediate vicinity of the combat zone. In the Zaporizhzhia Region, 803 air alert alerts took place during July-October, the total duration of which was 880 hours. 111 media reports about explosions in the city and region were recorded. Such circumstances create an additional emotional burden for judges and trial participants.

Court	Number of pending war crimes cases	Number of court cases pending under Article 438 of the Criminal Code	Total number of hearings held to date	Total number of postponed hearings	Number of cases considered in absentia	Number of cases considered in closed session	Number of defendants present
Komunarskyi District Court of Zaporizhzhia City	1	1	7	0	1	1	0
Zavodskyi District Court of Zaporizhzhia City	1	1	4	2	1	0	0
Vilnianskyi District Court of Zaporizhzhia Region	1	1	4	0	1	0	0

Sumy and Sumy Region

During the monitoring period, it was established that the number of criminal cases pending in district courts and the Court of Appeal is 4.

During the monitoring period, 2 verdicts were delivered: on 18.10.2023 in case No. 585/2381/22 and on 30.08.2023 in case No. 588/1122/23. The Sumy Court of Appeal considered an appeal against the verdict of 01.03.2023 in case No. 588/1009/22. The sentence was left unchanged.

All cases are considered in absentia.

Court	Number of pending war crimes cases	Number of court cases pending under Article 438 of the Criminal Code	Total number of hearings held to date	Total number of postponed hearings	Number of cases considered in absentia	Number of cases considered in closed session	Number of defendants present
Romenskyi City District Court of Sumy Region	1	1	3	0	1	0	0
Trostyanetskyi District Court of Sumy Region	2	2	5	0	2	0	0
Sumy Court of Appeal	1	1	1	1	2	0	0

5. ANALYSIS OF COURT DECISIONS

For the completeness of the analysis of court decisions, the project analyzed them not only in terms of compliance with the right to a fair trial, but also in accordance with national legislation. Thus, the following provisions of the Criminal Procedural Code of Ukraine were taken into account.

Pursuant to Article 370 of the CPC of Ukraine, a court judgment must be **lawful, substantiated and reasoned**. A judgment delivered by a competent court in compliance with the substantive law and the requirements for criminal proceedings provided for by this Code shall be lawful. A judgment delivered by the court on the basis of objectively clarified circumstances, which are confirmed by evidence examined in the course of the court proceedings and evaluated by the court according to Article 94 of the CPC of Ukraine, shall be substantiated. A judgment that contains due and sufficient motives and grounds for its adoption shall be reasoned.

According to clause 1 of Part 1 of Article 91 of the CPC of Ukraine, the following elements should be proven in criminal proceedings: the event of the criminal offense (time, place, manner and other circumstances of the criminal offense); the guilt of the accused in committing the criminal offense, the form of guilt, the motive and purpose of the criminal offense; the type and amount of damage caused by the criminal offense are subject to proof, as well as the amount of procedural costs; circumstances that affect the severity of the criminal offense, characterize the personality of the accused, aggravate or mitigate the sentence, exclude criminal liability or are the basis for closing criminal proceedings; circumstances that are the basis for exemption from criminal liability or sentence; and other circumstances.

Article 94 of the CPC provides that the court, in line with its opinion based on a comprehensive, full and impartial investigation of all the circumstances of the criminal proceedings, guided by the law, shall evaluate each evidence in terms of relevance, admissibility, reliability, and the totality of the collected evidence in terms of sufficiency and interconnection for making the relevant procedural decision. No evidence has a pre-established force.

According to part 3 of Article 373 of the CPC, a guilty verdict cannot be based on assumptions and is only passed if the guilt of the person in committing a criminal offense is proven in the course of the trial. The Supreme Court, in its Resolution dated June 12, 2018, in Case No. 712/13361/15, concluded that a guilty verdict can be delivered by a court only if the guilt of the accused person is proven beyond reasonable doubt. In other words, following the principle of adversarial proceedings and fulfilling its professional duty under Article 92 of the CPC, the prosecution must prove before the court with the help of proper, admissible and reliable evidence that there is only one version by which a reasonable and impartial person can explain the facts established in court, namely, the guilt of the person in committing the criminal offense for which he or she is charged (a similar position is set out in the Resolutions of the Cassation Criminal Court of the Supreme Court of April 15, 2021 in Case No. 751/2824/20 and of February 23, 2021 in Case No. 742/642/18).

The standard of proof beyond a reasonable doubt means that the totality of circumstances established in the course of the trial excludes any other explanation of the event that is the subject of the trial, except that the charged crime was committed and the accused is guilty of committing this crime.

In order to comply with the standard of proof beyond a reasonable doubt, the law requires that any reasonable doubt about the version of the event presented by the prosecution be refuted by the facts established on the basis of admissible evidence, and the only version by which a reasonable and impartial person can explain the totality of the facts established in court is the

version of events that gives grounds for finding a person guilty as charged. At the same time, a person may be found guilty only if it is proved that he or she committed the act that contains the *corpus delicti* of a criminal offense under the Criminal Code of Ukraine.

The *corpus delicti* of a criminal offense is a set of legally significant objective and subjective features established by law which define a socially dangerous act as a criminal offense. Therefore, each of the elements of *corpus delicti* of a crime must be proven beyond reasonable doubt – both those that form the objective side (*actus reus*) of the crime and those that determine its subjective side (*mens rea*).

The ECHR emphasizes that in accordance with its case-law when assessing evidence, it is guided by the criterion of proof "beyond a reasonable doubt" (see the above judgment "*Avsar v. Turkey*"). Such proof must be based on a set of characteristics or irrefutable presumptions that are sufficiently strong, clear and consistent with each other.

The results of the analysis of court decisions are as follows.

According to the statistical data of the State Enterprise "Information Judicial Systems" ("USRCD") in Ukraine, between February 24, 2022, and October 15, 2023, **171 criminal proceedings under Article 438 of the Criminal Code were submitted to local courts, of which 46 were concluded, and 125 remained pending.**

44 verdicts delivered under Article 438 of the Criminal Code were analyzed, of which: 44 (100%) were guilty verdicts; 18 (39%) were delivered by the courts of Chernihiv Region, 16 (35%) by the courts of Kyiv and Kyiv Region, 6 (13%) by the courts of Poltava Region, 3 (7%) by the courts of Sumy Region, 2 (4%) by the courts of Donetsk Region, and 1 (2%) by the courts of Kharkiv Region. 2 court decisions are unavailable in the Unified Register.

The analyzed verdicts convicted 63 persons, including: 23 persons (36%) aged 20-29, 24 persons (38%) aged 30-39, 8 persons (13% each) aged 41-49 and 50-60; 53 persons (84%) were citizens of the Russian Federation, 10 persons (16%) were citizens of Ukraine; 62 (98%) were men, 1 (2%) was a woman; 51 persons (81%) were servicemen of the RF Armed Forces: 37 (73%) were ordinary servicemen, 26 (27%) were commanding officers of the Russian Armed Forces. 12 persons (19%) were not members of the Russian Armed Forces (8 persons were members of the DPR terrorist organization, 2 persons were employees of the Russian Federal Security Service, 1 person was a judge, and 1 person was the head of the regional headquarters of the children's and youth military movement under the auspices of the Russian Ministry of Defense).

The qualification formula includes references to the following Articles of the Special Part of the Criminal Code:

- 40 verdicts (87%) – only under Article 438 of the Criminal Code;
- 6 verdicts (13%) — both under Article 438 and: Part 1 of Article 258-3, (Verdict of the Sloviansk City District Court of Donetsk Region dated June 01, 2017 in Case No. 243/4702/17); Part 5 of Article 27 - Part 2 of Article 28 - Part 2 of Article 437 of the Criminal Code (Verdict of the Sloviansk City District Court of Donetsk Region dated December 15, 2021 in Case No. 243/6186/20); Part 1 of Article 258-3 of the Criminal Code; Part 7 of Article 111-1 of the Criminal Code (Verdict of the Industrial District Court of Dnipropetrovs'k City dated October 02, 2023 in Case No. 202/3594/23); Part 3 of Article 28 - Part 1 of Article 111-2; Part 2 of Article 111; Part 2 of Article 260 (Verdicts of the Oktyabrskyi District Court of Poltava City dated June 09, 2022 in Case No. 554/3925/22, Oktyabrskyi District Court of Poltava City dated June 13, 2022 in Case No. 554/3864/22).

Qualification of several violations of the laws and customs of war by the same convict is usually carried out once under Article 438 of the Criminal Code without taking into account the aggravating circumstance of repeated commission of the crime when imposing the sentence (clause 1 Part 1, Article 67 of the Criminal Code) (for example, the Verdicts of the Chernihiv District Court of Chernihiv Region dated August 01, 2023 in Case No. 748/1991/22 and September 14, 2023 in Case No. 748/855/23). In order to avoid such a situation, it is advisable to consider supplementing Article 438 of the Criminal Code with such a qualifying feature as a repeated violation of the laws and customs of war.

The verdicts found violations of such laws and customs of war:

1) intentional killing of a civilian, destruction of property not caused by military necessity (verdicts of the Solomianskyi District Court of Kyiv City dated May 23, 2022, and the ruling of the Kyiv Court of Appeal dated May 29, 2022, in Case No. 60/5257/22, Ichnianskyi District Court of Chernihiv Region dated April 26, 2023, in Case No. 733/923/22);
2) the theft of property belonging to civilians not caused by military necessity (e.g., verdicts of the Shevchenkivskyi District Court of Kyiv City dated August 03, 2022, in Case No. 761/14035/22, Novozavodskyi District Court of Chernihiv City dated August 31, 2022, in Case No. 751/2961/22);
3) destruction of property (civilian and/or critical infrastructure, residential buildings) not caused by military necessity (e.g., verdicts of the Kotelevskyi District Court of Poltava Region dated May 31, 2022, in Case No. 535/244/22, Desnianskyi District Court of Chernihiv dated August 08, 2022, in Case No. 750/2891/22);
4) destruction of civilian objects not justified by military necessity (verdict of the Chernihiv District Court of Chernihiv Region dated February 17, 2023 in Case No. 748/1824/22);
5) ill-treatment of prisoners of war and civilians (verdict of the Sloviansk City District Court of Donetsk Region dated December 15, 2021 and the ruling of the Dnipro Court of Appeal dated May 17, 2023 in Case No. 243/6186/20);
6) ill-treatment of civilians in the form of physical or psychological violence and torture (for example, the verdicts of the Kyiv-Sviatoshynskyi District Court of Kyiv Region dated March 27, 2023 in Case No. 369/7906/22, and the Chernihiv District Court of Chernihiv Region dated May 24, 2023 in Case No. 748/655/23);
7) ill-treatment of civilians in the form of torture and/or physical or psychological violence against civilians, as well as sexual violence against a minor/young victim (verdict of the Novozavodsk District Court of Chernihiv dated November 02, 2022, and the ruling of the Chernihiv Court of Appeal dated March 23, 2023, verdict of the Bobrovytsia District Court of Chernihiv Region dated November 25, 2022, in Case No. 729/592/22);
8) ill-treatment of civilians in the form of physical and psychological violence against victims, as well as other violation of the laws and customs of war in the form of theft of property belonging to the civilians, not justified by military necessity (for example, the verdicts of the Kyiv-Svyatoshynskyi District Court of Kyiv Region dated November 17, 2022, in Case No. 369/9950/22, the Bobrovytsia District Court of Chernihiv Region dated November 24, 2022, in Case No. 729/574/22);
9) ill-treatment of civilians in the form of torture and/or physical and psychological violence, as well as abduction/deprivation of liberty of civilians (verdicts of the

Kotelevskyi District Court of Poltava Region, dated December 23, 2022, in Case No. 535/2922/22, Irpin City Court of Kyiv Region dated May 12, 2023, in Case No. 367/3477/22);

10) attack on a civilian object, unlawful deprivation of liberty of civilians, use of physical or psychological violence against them, as well as robbery of civilians (verdict of the Makariv District Court of Kyiv Region dated April 20, 2023 in Case No. 370/179/23);

11) issuing orders to violate the laws and customs of war, as a result of which subordinate servicemen committed relevant unlawful acts in pursuance of these orders (for example, the verdict of the Solomianskyi District Court of Kyiv City dated September 26, 2022 in Case No. 760/4174/22);

12) forcing protected persons to serve in the Armed Forces of the invader state (verdicts of the Darnytsia District Court of Kyiv City dated January 30, 2023, in Case No. 753/23311/21 and April 24, 2023, in Case No. 753/14148/21);

13) illegal deportation (expulsion) of a citizen of Ukraine during the occupation of part of the territory of Ukraine (verdict of the Darnytsia District Court of Kyiv City dated March 28, 2023, in Case No. 753/2458/22);

14) propaganda of service in the army of the invader state among the civilians (by the verdict of the Podilskyi District Court of Kyiv City dated June 15, 2023 in Case No. 58/16427/21).

Taking into account the legal conclusions of the Supreme Court, provided for, in particular, in the Resolutions of the Supreme Court dated October 27, 2021 in Case No. 759/7443/17 and December 21, 2022 in Case No. 759/5737/17, the actions of former law enforcement officers of Ukraine who, before March 15, 2022 (entry into force of the Law of Ukraine dated March 03, 2022 No. 2108-IX **"**On Amendments to Certain Legislative Acts of Ukraine on Criminalization of Collaboration Activities") voluntarily joined the judicial and law enforcement agencies of the occupying state, subsequently violating the laws and customs of war, should be qualified under the totality of Article 111(1) (high treason in the form of assisting a foreign state in conducting subversive activities against Ukraine) and the relevant part of Article 438 of the Criminal Code. The commission of similar acts after March 15, 2022, in terms of voluntary occupation by a citizen of Ukraine of a position in illegal judicial or law enforcement agencies established in the temporarily occupied territory and further violation of the laws and customs of war should be qualified under the totality of Part 7 of Article 111-1 and the relevant part of Article 438 of the Criminal Code.

Based on the analysis of the sentence imposed under Article 438 of the Criminal Code, there is no unified approach of courts in determining sanctions for convicts. When choosing the sanction under Part 1 of Article 438 of the Criminal Code, courts usually select the term of the sentence of imprisonment from the upper limit of the sanction (starting from the median sentence of imprisonment of 10 years and ending with the maximum limit of this sentence of 12 years). And only in relation to eight persons convicted under Part 1 of Article 438 of the Criminal Code, the sentence was imposed at the lower limit of the sentence of imprisonment provided for in the sanction of Part 1 of Article 438 of the Criminal Code (from the lower limit of this sentence – 8 years, to its median – 10 years) (13%).

The aggravating circumstances that were taken into account by the court for the convicts under Article 438 of the Criminal Code are as follows:

— committing a criminal offense against a minor child or in the presence of a child (e.g., Verdicts of the Kyiv-Svyatoshynskyi District Court of Kyiv Region dated

November 17, 2022, in Case No. 369/9950/22, Bobrovytsia District Court of Chernihiv Region dated November 25, 2022, in Case No. 729/592/22) (4 verdicts or 16%);

— committing a criminal offense by a group of persons by prior conspiracy (e.g., verdicts of the Bobrovytsia District Court of Chernihiv Region dated November 25, 2022, in Case No. 729/592/22, Dzerzhynskyi District Court of Kharkiv dated March 02, 2023, in Case No. 638/1343/23) (12 verdicts or 48%);

— committing a criminal offense as part of an organized group (verdict of the Industrial District Court of Dnipropetrovs'k dated October 02, 2023, in Case No. 202/3594/23) (1 verdict or 4%);

— committing a crime using the conditions of martial law (e.g., verdicts of the Kotelevskyi District Court of Poltava Region dated December 23, 2022, in Case No. 535/2922/22, Chernihiv District Court of Chernihiv Region dated March 08, 2023, in Case No. 748/22/23) (6 verdicts or 24%);

— committing a crime in a generally dangerous manner (verdict of the Dzerzhynskyi District Court of Kharkiv dated March 02, 2023 in Case No. 638/1343/23) (1 verdict or 4%);

— committing a criminal offense by a person in a state of intoxication (verdict of the Kyiv-Svyatoshynskyi District Court of Kyiv Region dated March 27, 2023 in Case No. 369/7906/22) (1 verdict or 4%).

The mitigating circumstances taken into account for the convicts under Article 438 of the Criminal Code were the following:

— active assistance in solving a criminal offense (e.g., verdicts of the Shevchenkivskyi District Court of Kyiv City dated August 03, 2022, in Case No. 761/14035/22, Novozavodskyi District Court of Chernihiv dated August 31, 2022, in Case No. 751/2961/22 (6 verdicts or 43%);

— sincere repentance (e.g., verdicts of the Desnianskyi District Court of Chernihiv City dated August 08, 2022, Kotelevskyi District Court of Poltava Region dated December 23, 2022, in Case No. 535/2922/22 (7 verdicts or 50%);

— elderly age of the convict (verdict of the Sloviansk City District Court of Donetsk Region dated June 01, 2017, in Case No. 243/4702/17) (1 verdict or 7%).

The range of evidence used to confirm the guilt of a person convicted of a criminal offense under Article 438 of the Criminal Code depends on the specifics of the objective side (actus reus) of the offense, the totality of which is sufficient to establish the presence of signs of violation of the laws or customs of war in the actions of the accused person/persons.

The most common evidence in criminal proceedings under Article 438 of the Criminal Code is the testimony of the victim(s), witness(es), and the accused person(s). The use of such evidence as the testimony of the accused person(s) refers to situations where the criminal proceedings were conducted in the presence of the accused person(s), i.e., not under the in absentia procedure. Hearsay evidence may also be used in criminal proceedings under Article 438 of the Criminal Code (verdict of the Podilskyi District Court of Kyiv City dated December 19, 2022, in Case No. 758/14216/2).

The source of evidence in criminal proceedings under Article 438 of the Criminal Code is material evidence, which, according to the verdicts, was recognized as such:

— ammunition, as well as fragments thereof, belonging to the servicemen of the Russian Armed Forces and used to commit a criminal offense (for example, the verdicts of the

Ichnianskyi District Court of Chernihiv Region dated April 26, 2023, in Case No. 733/923/22, the Trostianets District Court of Sumy Region dated May 09, 2023, in Case No. 588/1072/22);

— documents belonging to servicemen of the RF Armed Forces (passport of a citizen of the Russian Federation issued in the name of the accused, insurance certificate issued in the name of the accused, military identification card of a serviceman of the RF Armed Forces, a sheet of paper entitled "Algorithm of actions of a driver's mechanic on alarm"; a driver's license of the RF Armed Forces, plastic bank cards in the name of the accused, a register with a list of RF Armed Forces servicemen, a badge with the accused's name, a diary of psychological and pedagogical observations of the RF Armed Forces serviceman, a combatant's certificate, a taxpayer's card, a passport of a DPR citizen, a driver's license, a vehicle registration certificate (e.g., the verdicts of the Trostianets District Court of Sumy Region dated May 09, 2023 in Case No. 588/1072/22, Chernihiv District Court of Chernihiv Region dated May 24, 2023 in Case No. 748/655/23);

— items belonging to the victims that were seized from them by the servicemen of the RF Armed Forces (for example, the verdicts of the Solomianskyi District Court of Kyiv City dated May 23, 2022, in Case No. 760/5257/22, the Shevchenkivskyi District Court of Kyiv City dated August 03, 2022, in Case No. 761/14035/22);

— the car in which the victims were travelling, which was shot by the servicemen of the RF Armed Forces (verdict of the Ichnianskyi District Court of Chernihiv Region dated April 26, 2023 in Case No. 733/923/22),

— the clothes worn by the victim, who was hit by a bullet during the shooting by a serviceman of the Russian Armed Forces (verdict of the Ichnianskyi District Court of Chernihiv Region dated April 26, 2023 in Case No. 733/923/22),

— clothing of servicemen of the RF Armed Forces, found during the inspection of the scene (verdict of the Dzerzhynsk District Court of Kharkiv City dated March 02, 2023, in Case No. 638/1343/23)

— military equipment of the RF Armed Forces, its wreckage (e.g. wreckage of the SU-34 aircraft) (verdict of the Dzerzhynskyi District Court of Kharkiv dated March 02, 2023 in Case No. 638/1343/23).

To confirm the guilt of committing a crime under Article 438 of the Criminal Code, the courts also examined electronic evidence, such as social media pages belonging to the accused servicemen of the RF Armed Forces and/or their close relatives, which helped to identify the accused and obtain other data about him/her (e.g., mobile phone number, location at the time of the trial), official websites of the RF Ministry of Defense, publications on Russian websites, etc. (for example, verdicts of the Solomianskyi District Court of Kyiv City dated May 23, 2022, in Case No. 760/5257/22, Chernihiv District Court of Chernihiv Region dated April 27, 2023 in Case No. 734/2129/22, Bobrovytsia District Court of Chernihiv Region dated November 25, 2022 in Case No. 729/592/22).

In the course of the trial, the courts of first instance directly examined the following reports of investigative (search) actions conducted in criminal proceedings under Article 438 of the Criminal Code:

— the report of the presentation of a person for identification from a photograph (photographs) (for example, the verdicts of the Makariv District Court of Kyiv Region as of April 20, 2023, in Case No. 370/179/23, the Chernihiv District Court of Chernihiv Region as of January 12, 2023, in Case No. 748/1773/22;

— a report of the scene inspection. The conduct of this investigative (search) action is traditionally documented in the report, which was directly examined in the majority of the verdicts reviewed (21 verdicts or 41%). Namely, in the verdicts of the Trostianets District Court of Sumy Region dated March 01, 2023 in Case No. 588/1009/22, the Desnianskyi District Court of Chernihiv dated August 08, 2022 in Case No. 750/2891/22 and others;

— protocol of the investigative experiment. An investigative experiment, as well as two other investigative (search) actions, is one of the most common investigative actions during pre-trial investigation in criminal proceedings under Article 438 of the Criminal Code. 21 verdicts (or 41%) refer to the conduct of this investigative (search) action and, accordingly, the direct examination by the court of first instance of the reports of the investigative experiment (for example, the verdicts of the Podilskyi District Court of Kyiv City dated December 19, 2022 in Case No. 758/14216/21, the Novozavodskyi District Court of Chernihiv dated August 31, 2022 in Case No. 751/2961/22).

In criminal proceedings under Article 438 of the Criminal Code, the actual factual data contained in expert opinions in the vast majority of cases are a source of evidence, and the opinions themselves are the subject of direct examination during the trial of the relevant criminal proceedings. **In total, in 19 verdicts (46%), an expert opinion was used as a source of evidence:**

— the conclusion of a forensic medical examination, according to which the severity of the victim's injuries and the mechanism of infliction of these injuries were established (for example, the verdicts of the Chernihiv District Court of Chernihiv Region dated August 28, 2023 in Case No. 748/1599/23, the Ichnianskyi District Court of Chernihiv Region dated April 26, 2023 in Case No. 733/923/22);

— the conclusion of a forensic examination of weapons, according to which objects similar to ammunition and their parts were examined (for example, the verdicts of the Chernihiv District Court of Chernihiv Region dated August 28, 2023, in Case No. 748/1599/23, the Kotelevskyi District Court of Poltava Region dated May 31, 222, in Case No. 535/244/22);

— the conclusion of the examination of explosives and explosion products (verdict of the Dzerzhynskyi District Court of Kharkiv dated March 02, 2023 in Case No. 638/1343/23);

— the conclusion of a forensic military examination, which established the radius of destruction of rocket launchers, the characteristics of the tank from which the salvos were fired, and the location of the crew in it (verdicts of the Kotelevskyi District Court of Poltava Region dated May 31, 2022, in Case No. 535/244/22, and of the Trostianets District Court of Sumy Region dated May 09, 2023 No. 588/1072/22);

— the conclusion of a forensic commodity examination, according to which the amount of material damage caused to the victim as a result of the theft of his property by the Russian Armed Forces (for example, the verdicts of the Solomianskyi District Court of Kyiv City dated September 26, 2022 in Case No. 760/4174/22, the Trostianets District Court of Sumy Region dated March 01, 2023 in Case No. 588/1009/22);

— the conclusion of a forensic automotive examination, according to which the amount of damage caused to the victim by the RF Armed Forces by the destruction of his property (vehicle, house, apartment, etc.) was determined (verdicts of the Solomianskyi District Court of Kyiv City dated September 26, 2022 in Case No. 760/4174/22, Ripkinskyi District Court of Chernihiv Region dated July 17, 2023 in Case No. 751/3261/22);

— the conclusion of a forensic psychiatric examination confirming the state of mental health of the victim (for example, the verdicts of the Ivankivskyi District Court of Kyiv Region

dated June 28, 2023, in Case No. 366/2363/22, the Solomianskyi District Court of Kyiv City dated May 23, 2022, in Case No. 760/5257/22);

— the conclusion of semantic and textual expertise (verdict of the Podilskyi District Court of Kyiv City dated June 15, 2023 in Case No. 758/16427/21);

— the conclusion of a portrait examination, which established that the documents belonged to a serviceman of the RF Armed Forces and/or identified the serviceman from photographs (verdicts of the Podilskyi District Court of Kyiv City dated June 15, 2023, in Case No. 758/16427/21, Trostianets District Court of Sumy Region dated August 30, 2023, in Case No. 588/1122/23);

— the conclusion of a forensic explosive technical examination, which established the fact of the explosion of ammunition (verdict of the Desnianskyi District Court of Chernihiv City dated August 08, 2022, in Case No. 750/2891/22, and the Desnianskyi District Court of Chernihiv City dated April 11, 2023, in Case No. 750/6470/22);

— the conclusion of a forensic construction and technical examination, which established the amount of material damage caused as a result of damage to civilian housing (verdicts of the Desnianskyi District Court of Chernihiv dated August 08, 2022, in Case No. 750/2891/22, Trostianets District Court of Sumy Region dated May 09, 2023 No. 588/1072/22, Desnianskyi District Court of Chernihiv dated April 11, 2023, in Case No. 750/6470/22).

The sources of evidence in criminal proceedings under Article 438 of the Criminal Code included such important evidence as documents containing operational information about the location of the military unit in which the serviceman was serving and which was located on the territory of a Ukrainian settlement occupied by the RF Armed Forces at the time of the violation of the laws and customs of war, etc. In some verdicts, the courts of first instance took into account the general information contained in official documents that the relevant settlement, on the territory of which the criminal offense under Article 438 of the Criminal Code was committed, was under temporary occupation by the RF Armed Forces during the relevant time period. For example, according to the Verdict of the Ivankivskyi District Court of Kyiv Region dated June 28, 2023, in Case No. 366/869/23, such evidence was the response of the Director of the Department of Civil Protection, Defense and Interaction with Law Enforcement of the Kyiv Regional Military Administration.

In 9 verdicts (43%), the courts of first instance considered criminal cases according to the rules provided for in Part 3 of Article 349 of the CPC, namely not examining the circumstances that are not being disputed by the parties, and only interrogating the accused. Such approach was motivated by the fact that the participants in the court proceedings considered it inappropriate to examine evidence regarding the circumstances of the crime which were not disputed by the parties, and the court found that the accused persons and other participants in the court proceedings correctly understood the content of these circumstances and there was no doubt about the voluntariness and trustworthiness of their position, and they were also explained that they were deprived of the right to challenge these circumstances on appeal. For example, the verdicts of the Kotelevskyi District Court of Poltava Region dated May 31, 2022, in Case No. 535/244/22, the Shevchenkivskyi District Court of Kyiv City dated August 03, 2022 in Case No. 761/14035/22, the Dzerzhynskyi District Court of Kharkiv City dated March 02, 2023 in Case No. 638/1343/23.

The special procedure of criminal proceedings (special pre-trial investigation and special trial) (in absentia) was applied in 30 criminal proceedings (73%).

For example, the verdicts of the Novozavodskyi District Court of Chernihiv dated August 31, 2022 in Case No. 751/2961/22, the Shevchenkivskyi District Court of Kyiv City dated August 03, 2022 in Case No. 761/14035/22, the Kyiv-Svyatoshynskyi District Court of Kyiv Region dated March 27, 2013 in Case No. 369/7906/22. In the remaining 11 criminal proceedings (27%), the pre-trial investigation and court proceedings were conducted in the presence of the accused.

At the same time, the special procedure of criminal proceedings (in absentia) was carried out under the rules provided for this procedure.

Verdicts passed under Article 438 of the Criminal Code were used by the courts as circumstantial evidence in other criminal proceedings under other Articles of the Special Part of the Criminal Code (in particular, under Part 3 of Article 110 "Trespass against the territorial integrity and inviolability of Ukraine" of the Criminal Code). According to certain verdicts in other criminal proceedings (in particular, under Part 7 of Article 111-1 of the Criminal Code), investigative actions on the fact of committing a criminal offense under Article 438 of the Criminal Code serve as evidence of the commission of the relevant criminal offenses.

10 verdicts of the first instance courts that were reviewed during the study were appealed to the courts of appeal. According to the information compiled on the basis of statistical data of the State Enterprise "Information Court Systems" (USRCD), in the period from February 24, 2022 to October 15, 2023, appellate courts considered 7 appeals against the verdicts of the courts of first instance whereby defendants were found guilty and sentenced under Article 438 of the Criminal Code. As a result, all 7 verdicts were confirmed.

Grounds for appealing against verdicts:

1) violation by the court of first instance of the accused's right to defense, as no interpreter was appointed and procedural documents were not translated (Rulings of the Dnipro Court of Appeal dated May 17, 2023 in Case No. 243/6186/20, Kyiv Court of Appeal dated May 02, 2023 in Case No. 753/23311/21);
2) the need to exclude from the motivational and operative parts of the verdict the aggravating circumstances that were taken into account when sentencing the convict (Ruling of the Kyiv Court of Appeal dated July 29, 2022 in Case No. 760/5257/222");
3) imposition of sentences that are too severe (Rulings of the Chernihiv Court of Appeal dated November 02, 2022, in Case No. 750/2891/225, Chernihiv Court of Appeal dated April 06, 2023, in Case No. 748/1773/22, Chernihiv Court of Appeal dated August 09, 2023, in Case No. 734/2129/22 27);
4) failure to comply with the in absentia procedure (Ruling of the Kyiv Court of Appeal dated May 02, 2023 in Case No. 753/23311/21);
5) lack of proof that it was the convict who caused the socially dangerous consequences to the victim, and not other servicemen of the RF Armed Forces (Ruling of the Chernihiv Court of Appeal dated July 26, 2023 in Case 733/923/22").

A thorough analysis of the verdicts gives grounds to conclude that most criminal cases are considered in absentia, with the involvement of defense counsels. Although *in absentia* reviews are practically justified, trial proceedings in such cases should ensure the highest level of compliance with the defendants' right to a fair trial. In this respect, the project is alarmed by some issues with the right to defense and trial notifications identified in the process of the monitoring.

Appendices:

QUESTIONNAIRE FOR MONITORING COURT PROCEEDINGS IN WAR CRIMES CASES

I. General Information:
(please provide answers to all questions)

Name of the monitors	
Name of the court	
Date and time of the court hearing	
Proceedings number	
Name of the defendant	
Name of the public prosecutor	
Name of the defense counsel	
Has the defendant's representative been appointed through FLA (Free Legal Aid)?	
Indictments	

II. Right to a public hearing
(please check "yes" or "no" and, if necessary, provide additional comments)

No.	Question	Yes	No	Additional comment
1.	Has a court hearing schedule been drawn up, and, if so, does it accurately reflect all hearings and is it posted in a public place (e.g. on an announcement board) or easily accessible to the public? Please provide details.			
2.	Is the court hearing open? If not, why? Was an appropriate explanation of the reason provided?			
3.	Were representatives of the public admitted to the court hearing? Was anyone denied entry to the trial?			
4.	Were there any restrictions on public admission to the courtroom after the start of the court hearing? If so, what are they? Are they reasonable?			
5.	Did the court demonstrate any bias in favor of either party? If so, how?			

6.	Was the courtroom too small for the expected public interest? If so, did the court have the opportunity to allocate a larger courtroom?			
7.	Does the hearing take place in the office of the judge without due reason?			
8.	Are media representatives allowed to be present in the courtroom? If so, did the judge place any restrictions on what information they were allowed to report (names, details, description of appearance, photographs or sketches)?			
9.	Were media representatives denied access to the courtroom without explanation of the reason?			
10.	In the event of a closed court hearing, did the court try to strike a case-by-case balance of interests in declaring a court hearing closed? Did the court consider less stringent measures to protect the relevant interests in declaring a court hearing closed?			

Right to a competent, independent and impartial court
(please check "yes" or "no" and, if necessary, provide additional comments)

11.	Are there objective or subjective indicators that judge(s) assigned to a case do not have the legal qualifications to try them (e.g., a minor-offense court judge being assigned to a panel on a war crimes case)?			
12.	Did the court seem objective and impartial when considering the criminal case? If not, how was it manifested?			
13.	Was the judge(s) assigned to the case on an automatic case allocation basis?			
14.	Are there indications that judges treat favorably or more cordially one party in relation to another in their communication?			
15.	Is the judge(s) considering a case continuously present during the court hearing, and is the panel of judges duly composed?			
16.	Did anyone (political parties, parties to the proceedings, etc.) threaten the court in connection with the result of the proceedings?			
17.	Did anyone make any allegations of corruption or undue influence against the judges of a case during the court hearing?			
18.	Does the court take due notice of the arguments/proposals/evidence made by the defense or prosecution? Did the court provide the parties with sufficient time to present evidence or analyze the law in support of or against their arguments? Does the judge provide the parties sufficient time to examine the issues raised during the court hearing, hold consultations and prepare a response?			

19.	Does the court reject the arguments/proposals/evidence for the defense or prosecution without due substantiation?			
20.	Does the court's judgment contain an analysis of the evidence and law that was considered in rendering the judgment?			

Right to be present at court hearing and right to defend oneself
(please check "yes" or "no" and, if necessary, provide additional comments)

21.	Is the court hearing held in absentia? If so, what were the reasons for this? Were there measures taken to ensure the presence of the accused? Did the defendant's defense counsel participate, and was he/she able to cross-examine witnesses for the prosecution or present arguments on behalf of the defendant?			
22.	In the event of in absentia proceedings, are there any signs of any obstacles to the defendants appealing against judgments rendered in their absence?			
23.	Is the prosecution present during the court hearing?			
24.	Is the defense counsel present during the court hearing?			
25.	Was the prosecution notified in advance of the time and place of the court hearing?			
26.	Was the defense counsel notified in advance of the time and place of the court hearing? Did any party request a postponement of the court hearing due to the overlay? If so, was such request approved?			
27.	Was the defendant informed of his/her right to defense?			
28.	Did the defense counsel collect and submit evidence to refute the charges? Did the defense counsel have access to witnesses and the necessary time and resources to conduct an independent investigation? If not, how much time was given to the defense counsel? What were the reasons for this?			
29.	Was the criminal case file provided to the accused? Was any information removed or amended? If so, for what reasons? If the accused was not provided with the case file, for what reasons?			
30.	Was there any pressure on the parties during the court hearing? If so, please provide details.			
31.	Were there any statements made during the proceedings (or are there any indications that the defense withheld evidence exculpating the accused)? If so, please provide details.			
32.	Did the defense counsel have the necessary time to prepare its position on the prosecution's evidence?			
33.	Are there any indications that prosecution or defense witnesses were subjected to any pressure? If so, please provide details.			
34.	Did the defendant have the opportunity to consult with his/her defense counsel in confidence and was he/she given a reasonable time to do so?			

35.	Are there any indications that there were restrictions on the defense counsel's access to the defendant in custody (e.g. in a pre-trial detention center)? Were their meetings confidential (no video or audio recording)? Was the period of time during which the defense counsel had the right to communicate with his client limited?			
36.	Are there any indications that the defense counsel is explicitly indifferent or incompetent to represent the defendant?			

V. Equality of arms

(please check "yes" or "no" and, if necessary, provide additional comments)

37.	Was motion filed by the defense counsel or the prosecution rejected without due substantiation?			
38.	Does the court give any preference to the prosecution over the defense counsel, or vice versa? If so, please provide a comment.			
39.	Does the defendant have the same opportunity as the prosecution to request an expert statement?			

VI. Presumption of innocence and burden of proof

(please check "yes" or "no" and, if necessary, provide additional comments)

40.	Does the court make statements during the court hearing that demonstrate bias against the defendant prior to judgment?			
41.	Are there any indications that judges privilege circumstantial or contradictory evidence without due substantiation?			
42.	Does the court require the defendant to prove his or her innocence?			
43.	Did the court take into account the defendant's statement as a witness without informing him of his rights as a defendant/accused/suspect?			
44.	Has the defendant reported torture or ill-treatment during the investigation without due investigation? If so, were his/her complaints considered? If so, were they taken into account by the court and the prosecution?			
45.	Is the witness statement of one of the defendants the only evidence that leads to the conviction of the defendant in the case?			
46.	Did anyone (judiciary officials, other public officials, etc.) make public statements in which they considered the defendants guilty of crimes before the court's judgment?			
47.	Did the court take into account the documents indicating unsuccessful negotiations within the plea agreement when establishing guilt?			

VII. Right not to witness against oneself and right to silence at a court hearing
(please check "yes" or "no" and, if necessary, provide additional comments)

48.	Does the court consider the silence of the accused as a sign of guilt?			
49.	Are there any indications that the defendant has been bribed, threatened or lured into a guilty plea?			
50.	Were the ethical rules of conduct followed in the case when concluding the plea agreement?			
51.	Was the defendant duly notified of his/her rights?			
52.	Does the court remind the defendant of his/her rights during the proceedings, if appropriate?			

VIII. Right to be tried without undue delay, and overall efficiency of trial proceedings
(please check "yes" or "no" and, if necessary, provide additional comments)

53.	Are there any indications of violations of the terms of the pre-trial investigation or trial of the criminal case? If so, what?			
54.	Does the court grant adjournments in the case without due reason?			
55.	Are there indications that the defense purposefully delays proceedings?			
56.	Are there indications that the presentation of expert or other evidence takes an unreasonably long time and the court does not seek to expedite this?			
57.	Are there indications that the court does not manage proceedings effectively (e.g., court staff consistently fails to send out summons and case documents within the legal deadlines, or the court repeatedly calls too many witnesses to provide statements on a given day, etc.)? Please provide details if it is so.			
58.	Does the court take due measures to ensure the presence of critical witnesses who are unwilling or unable to come to court (e.g., reviewing the service of summoning, fining and/or protecting them, etc.)?			
59.	Are there indications of the opposite in the case?			
60.	Does the court discipline parties or members of the public, etc., for contempt of court according to the law?			

IX. Right to an interpreter

(please check "yes" or "no" and, if necessary, provide additional comments)

61.	Was a professional and independent interpreter provided for the defendant if he/she does not understand the language of the proceedings?			
62.	Were the court documents translated into a language the defendant understands? Did the defense counsel speak the language the defendant understands best?			

X. Right to security and liberty

(please check "yes" or "no" and, if necessary, provide additional comments)

63.	Are there indications that the proceedings for a defendant in detention are prioritized over others? Were there opportunities for the convict to be released from custody pending a court hearing? If so, what reasons were given for the denial of release, if any?			
64.	Are the sentences imposed commensurate to the time the defendant is kept in detention? Did the defense have the required time to prepare and present mitigating evidence or evidence on the defendant's identity to request a lower sentence or sentences or alternatives to incarceration?			
65.	Does the investigating judge duly consider the issue of pre-trial detention, review the continued existence of all grounds for detention, and duly substantiate his/her decision?			
66.	Are there any indications in the case that the court repeatedly uses certain exceptional grounds to keep the defendant in custody?			

XI. Right to public and reasoned judgement

(please check "yes" or "no" and, if necessary, provide additional comments)

67.	Was the judgement pronounced publicly?			
68.	Does the judgment contain sufficient arguments to support the court's conclusions on the basis of law and presented facts, duly considering all important arguments of the parties?			
69.	In the event of a guilty plea, is the applied sentence within the range provided by law?			
70.	If the case involved mitigating or aggravating circumstances, were they duly substantiated?			

Additional comments from monitors:

QUESTIONNAIRE FOR ANALYZING COURT JUDGMENTS IN WAR CRIMES CASES

ANALYSIS CRITERIA	ANALYSIS OF A COURT JUDGEMENT
Monitors' names	
Approval date	
Region	
Case No.	
Public Prosecution Authority	
Court	
Qualifications	
Subject matter of the court hearing	
Reference to the Unified State Register of Court Judgments	
Representatives of the defendant (whether or not they are FLA (Free Legal Aid))	
Were the court hearings open to the public?	
Were members of the public admitted?	
Are media representatives allowed to be present in the courtroom?	
Were court hearings held in absentia?	
Were the parties notified of the court hearing?	
Was the defendant informed of his/her right to defense?	
Has a free legal aid attorney been appointed?	
Has the accused been provided with the criminal case file (have they been notified of the opportunity to review it)?	

Has the defendant reported torture or ill-treatment during the investigation without due investigation? If so, were they taken into account by the court?	
Are there any indications that the defendant has been bribed, threatened or lured into a guilty plea?	
Was the defendant duly notified of his/her rights?	
Was a professional and independent interpreter provided for the defendant if he/she does not understand the language of the proceedings?	
Has an interim measure been imposed on the defendant? If so, which one?	
Does the qualification of actions correspond to the circumstances of the case?	
Are there any grounds to believe that the qualification of the actions is incorrect (if so, what are they)?	
Was any evidence found to be inadmissible or undue? If so, which ones and on what basis?	
Are there any other violations of the Criminal Procedural Code of Ukraine when rendering a court judgment? If so, which ones?	