


# Digital Evidence Barriers Overcoming in the Ukrainian case: New Actors and Standards

*Superando obstáculos às provas digitais no caso ucraniano: novos atores e critérios*

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**ABSTRACT:** The purpose of this article is to examine the evolving landscape of joint investigative efforts (public and private), with a particular focus on new actors, and the emerging importance of digital evidence collection in conflict zones. It addresses the role of civil society organizations (CSOs) in collecting evidence, analyzing this from historical and legal perspectives. The article discusses the integration of collected digital evidence into ongoing investigations,

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highlighting the practical obstacles encountered. It also presents case studies where CSOs have intervened when state authorities failed to effectively investigate core international crimes, showcasing how these organizations contribute to modernizing investigative mechanisms using technology. As digital technology becomes increasingly central to criminal activity law enforcement bodies are challenged to adapt their investigative techniques to this new digital landscape. This article suggests opportunities for cooperation between public organizations and law enforcement agencies and emphasizes the importance of interdisciplinary cooperation to keep pace with the evolution of the digital criminal landscape. The article uses a combination of general scientific and specialized methods. The results highlight the importance of continued innovation and interdisciplinary collaboration, and policy development for better frameworks and cooperation.

**KEYWORDS:** international cooperation; civil society organization; investigative standards; digital evidence collection.

**RESUMO:** O objetivo deste artigo é examinar o cenário em evolução dos esforços investigativos conjuntos (públicos e privados), especialmente quanto aos novos atores e na crescente importância da coleta de provas digitais em zonas de conflito. Aborda-se o papel das organizações da sociedade civil (OSCs) na coleta de provas, analisando essa questão sob uma perspectiva histórica e jurídica. O artigo discute a integração das provas digitais coletadas nas investigações em curso, destacando os obstáculos práticos encontrados. Também apresenta estudos de caso em que as OSCs intervieram quando as autoridades estatais falharam em investigar de forma eficaz crimes internacionais graves, mostrando como essas organizações contribuem para a modernização dos mecanismos investigativos por meio do uso de tecnologia. À medida que a tecnologia digital se torna cada vez mais central para a atividade criminosa, as autoridades de aplicação da lei enfrentam o desafio de adaptar suas técnicas investigativas a esse novo cenário digital. Este artigo sugere oportunidades de cooperação entre organizações públicas e órgãos de persecução penal e enfatiza a importância da cooperação interdisciplinar para acompanhar a evolução do panorama criminal digital. O artigo utiliza uma combinação de métodos científicos gerais e especializados. Os resultados destacam a importância da contínua inovação, colaboração interdisciplinar e desenvolvimento de políticas para melhores estruturas e cooperação.

**PALAVRAS-CHAVE:** cooperação internacional; organização da sociedade civil; standards investigativos; obtenção de provas digitais.

## INTRODUCTION

Despite the continuous development of digital technologies, the emergence of artificial intelligence (AI), and the increasing digitization of society, pre-trial investigators and the administrators of justice still tend to use traditional, sometimes outdated, methods and are reluctant to use newly evolving methods, such as digital evidence, open-source intelligence (OSINT), and AI. When the state fails, the civil sector comes to the rescue. The documentation of war crimes by civil society organizations (CSOs) before and during the Second World War marked an important chapter in the history of human rights and international law<sup>4</sup>. The active involvement of CSOs in the collection of evidence, particularly in the context of human rights and environmental crimes, has developed significantly since at least the Second World War and continues in a modernized form to the present day. This analysis will highlight how new actors have operated and contributed to the documentation of such crimes. A prime modern example of how digital technology is revolutionizing modern investigations is the use of satellite imagery by The New York Times Visual Investigations team in April 2022, which provided crucial evidence of civilian bodies lying in the street in Bucha, Ukraine during Russian occupation<sup>5</sup>. This demonstrates the transformative power of digital tools in modern investigations, providing critical, verifiable evidence that supports accountability in international conflicts. The New York Times' investigation showcases the evolving role of technology in enhancing transparency and documentation efforts. The number and quality of actors involved is changing, and even private companies are joining, using technological digital forensics tools, which significantly speed up and optimize the investigation process.

This article utilizes a blend of general scientific approaches and specialized methodologies. It uses a historical-legal method to examine the role of CSOs since the post-Second World War era in securing

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<sup>4</sup> See: QUAKERS AND WWI. Available at: <<https://www.quaker.org.uk/faith/our-history/ww1>> access on: July 27, 2024.; WILPF RESOLUTIONS. 1st Congress. Available at: <[https://www.wilpf.org/wp-content/uploads/2012/08/WILPF\\_triennial\\_congress\\_1915.pdf](https://www.wilpf.org/wp-content/uploads/2012/08/WILPF_triennial_congress_1915.pdf)> access on: July 27, 2024.

<sup>5</sup> NY times. Available at: <<https://www.nytimes.com/2022/04/04/world/europe/bucha-ukraine-bodies.html>> access on: July 27, 2024.

human rights and utilizing digital technologies to collect and analyze evidence, thus implementing new investigative standards. The article employs a comparative legal method to highlight the experiences of various CSOs in situations where national mechanisms have failed to effectively investigate international core crimes. These organizations, often supported by the expertise of university law schools, contribute to the development and updating of investigative mechanisms through the use of modern technology. The article further utilizes a systems analysis method, which provides a framework for evaluating the performance of CSOs, while the universalization method consolidates information on the standardization of investigations. Lastly, the forecasting method is used to identify trends and future prospects in the standardization of core criminal investigations and the application of digital forensic tools.

In the modern era of turbulence in the world order, all processes are undergoing significant changes. The current situation in Ukraine, Gaza and other places has shown the failure of the system created to prevent and end armed conflicts<sup>6</sup>. This is understandable since most of the developed mechanisms were put in place immediately after the Second World War and have not been modernized according to current trends. The established accountability mechanisms for the prosecution of core international crimes – which comprise the crime of genocide, war crimes, crimes against humanity and aggression<sup>7</sup> - and human rights violations also proved to be unprepared. This impunity has led to an increase in the number of crimes committed, especially in uncontrolled territories under the influence of authoritarian regimes<sup>8</sup>, due to the feeling that there are

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<sup>6</sup> AL JAZEERA. UN head slams Security Council for failure to end Gaza, Sudan, Ukraine wars. Available at: <<https://www.aljazeera.com/news/2024/9/13/un-head-slams-security-council-for-failure-to-end-gaza-sudan-ukraine-wars>> access on: July 27, 2024.

<sup>7</sup> SCHWOBEL-PATEL, Christine. 'The Core Crimes of International Criminal Law.' *The Oxford Handbook of International Criminal Law*. 2020. <https://doi.org/10.1093/law/9780198825203.003.0034>

<sup>8</sup> SUESSER, Julia R. 'Accountability for Human Rights Abuses in Authoritarian Regimes? The Insufficiency of International Justice Institutions: A Critical Look at Syria, China, and Russia.' *Connecticut Public Interest Law Journal*. 2022. Available at: <Vol. 22.1. [https://cpilj.law.uconn.edu/wp-content/uploads/sites/2515/2023/02/Suesser\\_Final-copy.pdf](https://cpilj.law.uconn.edu/wp-content/uploads/sites/2515/2023/02/Suesser_Final-copy.pdf)> access on: October 12, 2024.

no real mechanisms for prosecuting human rights violations. Territories of states where core international crimes and human rights violations occur are usually physically inaccessible to national and international law enforcement bodies and other agencies whose purpose is to collect evidence and maintain law and order. Therefore, two situations are possible: due to occupation and physical dangers in ongoing conflicts, national law enforcement agencies are unable or unwilling to investigate these crimes for various objective and subjective reasons, especially in authoritarian regimes. In such conditions, there is a need for the emergence of new entities capable of collecting evidence of core international crimes and human rights violations from a distance.

There are three levels of such entities, which usually emerge one after another in a chain reaction: CSOs, private companies, and other non-state actors, regardless of the country in which they are incorporated; foreign national law enforcement agencies under universal jurisdiction; joint investigative teams for special cases or purposes (e.g., the Europol OSINT task force, which united 14 countries and their police units to collect and analyze digital data from open sources regarding the core international crimes committed in Ukraine<sup>9</sup>).

## **1. THE ROLE OF CIVIL SOCIETY ORGANIZATIONS IN DOCUMENTING WAR CRIMES AND OTHER CRIMES: A HISTORICAL PERSPECTIVE**

The origins of civil society documentation of war crimes can be traced back to the humanitarian movements of the 19th century. Organizations such as the International Committee of the Red Cross (ICRC, 1863) played a crucial role in documenting atrocities and the need for humane treatment of wounded and captured soldiers in warfare. The ICRC's work often involved collecting testimony and reports from conflict zones, especially regarding the treatment of the wounded and prisoners of war<sup>10</sup>.

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<sup>9</sup> EUROPOL. Europol set up OSINT task force to support war crimes investigation in Ukraine. Available at: < <https://www.europol.europa.eu/media-press/newsroom/news/europol-sets-osint-taskforce-to-support-investigations-war-crimes-committed-in-ukraine> > access on: July 27, 2024.

<sup>10</sup> INTERNATIONAL COMMITTEE OF THE RED CROSS. Our history. Available at: <<https://www.icrc.org/en/our-history> > access on: July 27, 2024.

An important moment was the creation of organizations such as Amnesty International<sup>11</sup> (1961) and Human Rights Watch (1978)<sup>12</sup>, which focused on monitoring and documenting human rights violations. However, the beginnings of the public movement for human rights and environmental initiatives can be traced back to the pre-Second World War period<sup>13</sup>. The efforts of CSOs before the Second World War set a precedent for documenting war crimes and laid the groundwork for more systematic documentation and prosecution of such crimes in the postwar period. Their work not only contributed to humanitarian relief, but also played a crucial role in the development of international human rights law and the creation of institutions such as the United Nations.

The Women's International League for Peace and Freedom (WILPF, 1915) appealed in its Resolution for international cooperation and urged "that the organization of the Society of nations should be further developed" and that it should include a permanent International Court of Justice and a Council of Conciliation and Investigation<sup>14</sup>. Even before the League of Nations convened its first Assembly in November 1920, WILPF began corresponding with Secretary General Eric Drummond in April of that year, addressing pressing issues such as the repatriation of prisoners of war, the right of asylum, and the trafficking of women and children in Asia Minor<sup>15</sup>.

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<sup>11</sup> AMNESTY INTERNATIONAL. *Our mission and statute*. Available at: <<https://www.amnesty.org/en/what-we-do>> access on: July 27, 2024.

<sup>12</sup> HUMAN RIGHTS WATCH ARCHIVES. Center for Human Rights Documentation and Research. Available at: <[https://library.columbia.edu/libraries/chrdr/archive\\_collections/hrw.html](https://library.columbia.edu/libraries/chrdr/archive_collections/hrw.html)> access on: July 27, 2024.

<sup>13</sup> THE CONCEPT OF HUMAN RIGHTS AND THE GLOBAL HISTORY OF AN IDEA. *Mind and Rights The History, Ethics, Law and Psychology of Human Rights*. p. 41-198, 2023.

<sup>14</sup> WILPF RESOLUTIONS. 1st Congress. Available at: <[https://www.wilpf.org/wp-content/uploads/2012/08/WILPF\\_triennial\\_congress\\_1915.pdf](https://www.wilpf.org/wp-content/uploads/2012/08/WILPF_triennial_congress_1915.pdf)> access on: July 27, 2024.

<sup>15</sup> MOLLY COCHRAN, *Activism and International Thought: The Women's International League of Peace and Freedom and the Problem of Statelessness in the Interwar Period*. *Global Studies Quarterly*, v. 3, is. 1, January 2023, ksad011, p 1-12, 2023. <https://doi.org/10.1093/isagsq/ksad011>

Save the Children was founded in 1919 by Eglantyne Jebb and her sister Dorothy Buxton in response to the plight of children in war-torn Europe after the First World War. They collected and disseminated information on the effects of war, including eyewitness accounts, with a special focus on the effects on women and children. A notable example of their efforts was Eglantyne Jebb's organization of a relief mission to Russia, where millions of children were starving due to political and other turmoil. Jebb chartered the SS *Torcello*, a cargo ship carrying 600 tons of food and medical supplies, which saved thousands of lives. Jebb presented the Declaration of the Rights of the Child at the League of Nations convention in Geneva, which was adopted by the League of Nations in 1924, advocating for the recognition of children's rights as fundamental human rights<sup>16</sup>.

Quaker organizations, known for their peace activism, were active in war zones, providing humanitarian aid and documenting the impact of conflict on civilians. The American Jewish Joint Distribution Committee (JDC, 1914)<sup>17</sup> was instrumental in providing aid to Jewish communities affected by war and persecution, and documented many cases of suffering and injustice. The Society of Friends (Quakers) has a long history of supporting peace and social justice work, including efforts during and after the First World War to document the conditions of civilians and prisoners of war<sup>18</sup>. Through their efforts of gathering eyewitness testimonies and advocating for victims of conflict, these organizations laid important groundwork for modern humanitarian movements. Their work contributed to the evolving international focus on human rights and the establishment of more formal mechanisms for documenting and responding to war crimes in the post-Second World War era.

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<sup>16</sup> SAVE THE CHILDREN. *Our History*. Available at: < <https://www.savethechildren.org/us/about-us/why-save-the-children/eglantyne-jebb> > access on: July 27, 2024.

<sup>17</sup> JDC. JDC is the leading global Jewish humanitarian organization. *Our Story*. Available at: < <https://www.jdc.org/our-story/> > access on: July 27, 2024.

<sup>18</sup> QUAKERS AND WWI. Available at: < <https://www.quaker.org.uk/faith/our-history/ww1> > access on: July 27, 2024.

The Hague Conventions of 1899<sup>19</sup> and 1907<sup>20</sup>, which established the laws of war and war crimes, were a response to advocacy and pressure from various humanitarian groups. These conventions provided a legal framework to which civil society organizations could refer when documenting violations.

CSOs collected various types of evidence, including eyewitness accounts (before the Second World War, a few CSOs were involved in collecting eyewitness accounts from conflict zones; they interviewed survivors, refugees, and even soldiers to compile reports on wartime atrocities); photographs and media (the advent of photography played an important role; the media, including newspapers and magazines, were instrumental in bringing these images and stories to a wider audience); reports and publications (many organizations published detailed reports on conditions in war-torn areas, focusing on the impact on civilians; these reports were often used to lobby governments and international bodies for intervention or sanctions against perpetrators); the results of work with legal experts (some CSOs worked closely with legal experts to interpret and apply international law in the context of documented atrocities; this collaboration helped to frame the narratives of war crimes within the legal definitions available at the time); advocacy and awareness-raising (CSOs played a key role in raising public awareness about the horrors of war and the need for international rules to prevent such crimes, which was crucial in shaping public opinion and influencing political decisions).

To complete this list of types of evidence collected by civil organizations, it is necessary to mention the League of Nations, which, while not an CSO, was the precursor to the United Nations, established after the First World War<sup>21</sup>. The League had various commissions and

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<sup>19</sup> CONVENTION (II) WITH RESPECT TO THE LAWS AND CUSTOMS OF WAR ON LAND AND ITS ANNEX. Regulations concerning the Laws and Customs of War on Land, 1899. Available at: <<https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-ii-1899>> access on: July 27, 2024.

<sup>20</sup> CONVENTION RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND (HAGUE IV), 1907. Available at: <[https://avalon.law.yale.edu/20th\\_century/hague04.asp](https://avalon.law.yale.edu/20th_century/hague04.asp)> access on: July 27, 2024.

<sup>21</sup> THE LEAGUE OF NATIONS. *United Nations*. Available at: <<https://www.un-geneva.org/en/about/league-of-nations/overview>> access on: July 27, 2024.



agencies that collected reports and testimonies about conflicts and war crimes. Member countries of the League were expected to report any conflicts or potential war crime within their territories or areas of interest. These reports were usually submitted by government officials or diplomats. For more serious or controversial cases, the League could establish a commission of inquiry made up of representatives from various member states to investigate the situation on the ground. The commissions were tasked with collecting evidence, interviewing witnesses, and compiling reports based on their findings. For example, during the Greco-Turkish War (1919-1922), the League established a commission to investigate the situation and report on atrocities committed during the war. Similarly, the League was involved in investigating and reporting on the Italian invasion of Ethiopia in 1935<sup>22</sup>, using various sources of information to assess the situation. However, the political interests of member states often limited the League's work. The League also received petitions from individuals, groups, or CSOs; these included first-hand accounts, testimonies, or other forms of evidence of conflicts or abuses. The League's mandate system, which governed former colonies and territories of the defeated powers after the First World War, also served as a source of information. Mandated powers were required to submit annual reports on the administration of these territories, including any conflicts or issues related to justice and human rights. The League often cooperated with other international organizations and agencies that could provide relevant information or data, and monitored international media and publications for information on potential conflicts and war crimes.

The Nuremberg Trials, conducted after the Second World War, were groundbreaking in their use of extensive documentation to prosecute war crimes, crimes against humanity, and genocide<sup>23</sup>. With regard to the Nuremberg Tribunal's use of reports from CSOs, the following aspects should be noted: First, the main body of evidence used at the Nuremberg Trials consisted of official documents from the

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<sup>22</sup> BAER, George W. Sanctions and Security: The League of Nations and the Italian-Ethiopian War, 1935-1936. *International Organization*. v. 27, n. 2, p. 165-179, 1973.

<sup>23</sup> NUREMBERG TRIALS. United Nations. Available at: <<https://www.un Geneva.org/en/about/league-of-nations/overview>> access on: July 27, 2024.

Nazi government, military, and related organizations. These included government decrees, military orders, correspondence, and other official records that directly implicated the defendants in war crimes. The trials also relied heavily on eyewitness testimony. This testimony came not only from victims and survivors, but also from former Nazi officials and soldiers who provided first-hand accounts of the atrocities. Visual evidence, including photographs and films documenting the atrocities, was also presented<sup>24</sup>. Some of this evidence may have been collected or disseminated by CSOs, particularly those involved in humanitarian aid and documentation during the war.

In summary, the Nuremberg Trials used three main types of evidence: official documents, eyewitness testimony, and photographs and films. Nowadays, things have changed and due to the advancement of digital technologies, we have moved on to a new type of evidence - digital evidence.

## **2. CHALLENGES AND LIMITATIONS OF DIGITAL EVIDENCE COLLECTION BY NON-STATE ACTORS**

In situations where national authorities are, for various reasons, unwilling or unable to ensure accountability for serious crimes, CSOs, private companies, and other non-state actors are beginning to fill the void by gathering evidence and promoting accountability. At the same time, most of these CSOs are not based in conflict countries, but in more stable and economically developed areas (e.g., Germany, the United Kingdom, the United States, and others). These organizations have a certain specialization in investigating crimes in various countries where conflicts are taking place, enjoy trust from the impacted communities,

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<sup>24</sup> The screening of the “Nazi Concentration Camps” film at Nuremberg was the first time film was used as evidence. LAWRENCE, Douglas ‘Film as Witness: Screening Nazi Concentration Camps before the Nuremberg Tribunal’ *The Yale Law Journal*.1995. 105 (2) 449; MICHALCZYK John J. ‘Filming the End of the Holocaust – Allied Documentaries, Nuremberg and the Liberation of Concentration Camps’ (2014 Bloomsbury).

and have contextual knowledge<sup>25</sup>, which puts them in an ideal position for documenting crimes and human rights violations.

However, the procedure for the participation of such non-state actors and their role in pre-trial investigations has not yet been properly regulated, nor have the legal forms of interaction with law enforcement agencies been established. This means that the results of their research become the property of the public and the scientific community, but the impact on the law enforcement system remains insignificant, mainly due to the lack of legal regulation. The establishment of such a legal regulation is crucial because the criminal process has a strictly established procedural form and all procedural actions of the investigator, as well as the process of collecting evidence, are strictly regulated.

Judicial authorities are not legally allowed to exercise legal creativity in interactions with CSOs, but are often forced to do so because of the value of the information collected by those organizations. For example, non-state actors may collect evidence directly by going on a 'field mission' and using digital forensic tools remotely. The results of such activities are summarized in a report, which is then published and shared with potentially interested stakeholders who may conduct pre-trial investigations or public reporting.

The NGO 'Truth Hounds' documented more than 100 cases of war crimes for the period from 2014 to 2020, the results of which were submitted to the General Prosecutor's Office of Ukraine<sup>26</sup>, and five reports were submitted to the International Criminal Court (ICC) in 2015 (in which testimonies were collected on 300 incidents that occurred in eastern Ukraine and described various war crimes: shelling of the civilian

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<sup>25</sup> HURIDOCS report. Human Rights Documentation by Civil Society – Technological Needs, Challenges, and Workflows. Perspectives from Documenters, Transitional Justice Experts, and Tool Developers November 2020. Available at: <<https://static1.squarespace.com/static/5900b58e1b631bffa367167e/t/5fb58bcb67862d7d964cf27a/1605733350976/PILP-G+-+HR+Doc+Solutions+-+Assessment+Report.pdf>> access on: July 27, 2024.

<sup>26</sup> OVER 100 NEW EPISODES OF WAR CRIMES IN DONBAS TRANSFERRED TO THE OFFICE OF THE PROSECUTOR GENERAL. Interfax. 2020. Available at: <<https://www.ukrinform.ua/rubric-ato/3122024-v-ofis-genprokuro-ra-peredali-ponad-100-novih-epizodiv-voennih-zlociniv-na-donbasi.html>> access on: July 27, 2024.

population, torture, forced disappearances, murders, confiscation of property) and 2017 (on 208 cases of artillery attacks and attacks with grenade launchers or machine guns against the civilian population, as well as on Crimea and the crimes of the occupying authorities against the pro-Ukrainian population, the Crimean Tatars)<sup>27</sup>. However, Truth Hounds has been even more active in its documentation since the full-scale invasion began in 2022. In 2019 alone, the Ukrainian Helsinki Human Rights Union, together with its partners including Truth Hounds and Global Diligence LLP, filed seven submissions to the ICC - five on crimes committed by the Russian Federation on the territory of the temporarily occupied Crimea, and two in eastern Ukraine<sup>28</sup>.

The principle of universal jurisdiction has been another avenue for CSOs to become important actors in international criminal law. Universal jurisdiction requires no nexus to the crime, and allows for a pre-trial investigation into core international crimes to be conducted on the territory of any state if it has universal jurisdiction laws in place, for crimes that were neither committed in its territory, nor by its citizens, and when the victims are not citizens of that state.

The results of public investigations can also be shared with other countries in investigations and cases based on universal jurisdiction. Truth Hounds, for instance, handed over materials collected on the injury of a Swiss freelance journalist while driving a car with the inscription 'Press' and foreign license plates to the Prosecutor General of Switzerland<sup>29</sup>.

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<sup>27</sup> CHABARAI, Hanna. For The Hague. Evidence of War Crimes in Donbas. Available at: <<https://tyzhden.ua/dlia-haahy-svidchennia-pro-voienni-zlochyny-na-donbasi/>> access on: July 27, 2024.

<sup>28</sup> SEVENTH SUBMISSION TO THE INTERNATIONAL CRIMINAL COURT: UHHRU SUBMITTED ADDITIONAL EVIDENCE OF RF WAR CRIMES IN EASTERN UKRAINE. Ukrainian Helsinki Human Rights Union. Available at: <<https://www.helsinki.org.ua/articles/7-podannya-do-mizhnarodno-ho-kryminalnoho-sudu-uhspl-peredala-cherhovi-dokazy-vchynennya-rf-vo-jennyh-zlochyniv-na-shodi-ukrajiny/>> access on: July 27, 2024.

<sup>29</sup> COMPLAINT FIELD OVER ATTACK ON SWISS JOURNALIST IN UKRAINE. Swissinfo.ch. 2022. Available at: <<https://www.swissinfo.ch/rus/подана-жалоба-по-поводу-нападени-я-на-швейцарского-журналиста-в-украине/47841766>> access on: July 27, 2024.

At the same time, as mentioned above, many questions arise regarding the procedural status of such CSOs and the criminal processing of the results of their actions. If the above-mentioned CSOs collect information about the event independently, i.e. separately from the investigative team, after inspecting the scene of the event, then there are no problems, because this is their independent activity, which is not connected with the investigation process. The timing of the collection of facts is important, so that it takes place prior to the inspection of the scene by the investigative team, because the integrity of the trace of the crime must be preserved.

It is a completely different matter if members of such non-state organizations directly participate in conducting investigative actions, since such participation requires strict observance of the form of criminal proceedings. Therefore, the question of the legal status of CSOs arises, since the established form of criminal proceedings is obligatory and the procedure for conducting all investigative (search) actions is clearly regulated. For example, during the inspection of the crime scene, which in their terminology is called 'field mission', the question arises whether CSOs may participate in the inspection in the status of a specialist or other participant in the criminal proceedings.

Pashkovsky suggests to use the information received from NGOs as a factual basis for conducting appropriate investigative (search) actions, followed by proper formalization of these data, or to include the results of the documentation of NGOs by submitting a statement on the commission of a criminal offense in accordance with Art. 214 of the Criminal Procedural Code of Ukraine (hereinafter - CPC), or a request for information by the law enforcement body itself pursuant to Part 2 of Art. 93 of the CPC of Ukraine<sup>30</sup>.

The authors of this article can only partially agree with this point of view, especially with regard to the interviewing of witnesses, because

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<sup>30</sup> PASHKOVSKIY, Mykola. Documentation of International Crimes by Non-Governmental Organizations and the Use of Obtained Digital Information in Criminal Proceedings Under Article 438 of the Criminal Code of Ukraine. Almanac of Scientific Papers of Specialists of the V. V. Stashis Crime Research Institute of the National Academy of Legal Sciences of Ukraine Based on the Results of Research, v. 23, p. 70–80, 2023.

witnesses might be re-traumatized if interviewed by CSOs (NGOs) and official investigative authorities, which could lead to a decrease in the level of trust and, as a result, the decrease in the quality of the testimony given. It is therefore considered necessary to work closely with CSOs (NGOs) to develop common approaches to working with evidence in accordance with the five guiding principles developed by Eurojust, the EU Network for investigation and prosecution of genocide, crimes against humanity and war crimes ('Genocide Network'), and the Office of the Prosecutor (OTP) of the ICC<sup>31</sup>. The principles state, for instance, that when working with witnesses and possible eyewitnesses, one should not allow repeated, multiple interviews, and instead agree on common tactics for conducting interviews so as not to harm the interviewees. Considering that all collected statements of victims and witnesses should be disclosed in court proceedings, as an effective tool to avoid threepeated interrogation, which can be used during the investigation, is conducting an interrogation during a pre-trial investigation in a court session in accordance with Art. 225 of the CPC of Ukraine<sup>32</sup>. Such an interrogation will be recorded using audio and video recording equipment by the court. The official record of such a court session is solely the technical recording made by the court (art. 27 CPC of Ukraine), so it could be used further for reasoning at the court decision.

Domestic authorities and CSOs have, in the past years, increasingly relied on user-generated evidence from people who are highly motivated, but mostly have no experience working in law enforcement agencies and therefore do not know how to collect evidence in a way that meets all the norms and standards of evidence. Given the increasing prevalence of user-generated evidence, non-state actors have started to conduct training for national law enforcement agencies on how to investigate war and other crimes using digital tools. It should be noted that ICC OTP

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<sup>31</sup> DOCUMENTING INTERNATIONAL CRIMES AND HUMAN RIGHTS VIOLATIONS FOR ACCOUNTABILITY PURPOSES. Guidelines for civil society organizations. 2022. Available at: <<https://www.icc-cpi.int/news/documenting-international-crimes-and-human-rights-violations-accountability-purposes>> access on: July 27, 2024.

<sup>32</sup> THE CRIMINAL PROCEDURE CODE OF UKRAINE. Available at: <<https://zakon.rada.gov.ua/laws/show/4651-17#n2123>> access on: July 27, 2024.

has been quite active in referring to reports prepared by authoritative international CSOs. However, ICC judges have found the OTP's excessive reliance on such reports to be of insufficient probative value<sup>33</sup>. For example, in the *Bemba case*, the Chamber ruled that NGO reports were of limited evidential value, as their origin and reliability had not been fully examined or verified. Consequently, these reports were deemed to carry minimal, if any, weight as evidence<sup>34</sup>. In another case (*Prosecutor v. Gbagbo*<sup>35</sup>), there were numerous references to reports by civil society organizations, the United Nations, and news clippings from various websites, the vast majority of which were based on a significant number of anonymous hearsay statements. At the same time, no additional investigations were conducted, and no forensic examinations were ordered to confirm their authenticity or veracity. In this respect, it is important to The Court noted that while these reports and news stories help to establish context, "such evidence cannot in any way be presented as the results of a full and proper investigation"<sup>36</sup>. Thus, the problem of evaluating evidence gathered online is still in its infancy, and international practice recognizes such information as evidence only to confirm the context of war or other international crimes, and courts are still cautious in evaluating such evidence.

We now turn to international law enforcement agencies, which can conduct online investigations individually or in groups, and can also be specialized to work on a specific case or collect specific evidence. In law enforcement practice, the role of CSOs is particularly important in the investigation of core international crimes. It should be noted that CSOs

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<sup>33</sup> FREEMAN, Lindsay. Prosecuting Atrocity Crimes with Open Source Evidence: Lessons from the International Criminal Court. *Digital Witness: Using Open Source Information for Human Rights Investigation, Documentation, and Accountability*. 2020. p. 48–67, 2020.

<sup>34</sup> *Prosecutor v. Bemba*, ICC-01/05-01/08-802, Decision on the Admissibility and Abuse of Process Challenges, 24 June 2010, paras. 235, 254-255.

<sup>35</sup> GBAGBO AND BLE GOUDE CASE. *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15. Available at: <<https://www.icc-cpi.int/cdi/gbagbo-goude>> access on: July 27, 2024.

<sup>36</sup> *The Prosecutor v. Laurent Gbagbo*. ICC. Pre-Trial Chamber I. 'Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c) (i) of the Rome Statute'. ICC-02/11-01/11 (2013). 35. Available at: <[https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2013\\_04054.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2013_04054.PDF)> access on: July 27, 2024.

cannot and should not replace judicial and law enforcement authorities. They can, however, push them forward, give them the necessary impetus, direction or technical (much needed) assistance. The development of such CSOs is a sign of a democratic society that upholds high human rights standards. Therefore, the effective cooperation of developed CSOs with state institutions is a sign of a democratic society that upholds high human rights standards within it. CSOs can provide both financial support for the activities of judicial and law enforcement bodies and, in this context, the provision of the necessary tools for their activities, which can be expressed in the free transfer of appropriate technical forensic or expert forensic means for fighting crime, or, no less important, often even more important, in providing assistance in recording (documenting) war crimes.

### **3. COLLABORATIVE APPROACHES TO INVESTIGATION – TASK FORCES AND JOINT INVESTIGATION TEAMS**

The same question arises with respect to the procedural possibilities of participation of investigative and judicial experts of foreign law enforcement agencies and other authorized bodies in the conduct of investigative (search) actions on the territory of Ukraine.

One of the possible solutions to such a situation is participation in international joint investigation teams (JITs) which conduct criminal investigations for a specific purpose and a limited period<sup>37</sup>, the role of which are understudied. Notably, the recently adopted Ljubljana-The Hague Convention on cooperation includes a dedicated provision on JITs (Art. 41)<sup>38</sup> and it does not restrict participation to European Union (EU) countries alone.

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<sup>37</sup> COUNCIL ACT of 29 May 2000, establishing the Convention on Mutual Assistance in Criminal Matters, OJ C 197, 12.7.2000, p. 1–23; COUNCIL FRAMEWORK DECISION 2002/465/JHA of 13 June 2002 on joint investigation teams, OJ L 162, 20.6.2002, p. 1–3, as amended by Directive (EU) 2022/211, OJ L 42, 17.2.2022, p. 8–11.

<sup>38</sup> Ljubljana-The Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity, War Crimes and other International Crimes, adopted in May 2023, signed on 14 February 2024 (hereafter ‘Ljubljana-The Hague Convention’). Available



JITs are quite new and difficult to implement in the context of exchange of evidence between different jurisdictions, since each country participating in an international investigation team has its own requirements for collection and storage of evidence, which may differ from each other and from established international practice. However, there have been some successful practices of joint international collection and evidence sharing that has subsequently been recognized as admissible by the courts. Examples include the case of the downing of Malaysian Boeing MH-17 and the French–German joint structural investigation into a Syrian case<sup>39</sup>. In addition, there are valuable suggestions to take up ‘open-entry/closed-exit’ provisions for evidentiary material in international crimes JITs, which “enables JIT members to ‘feed in’ the *entirety* of their information into the JIT (‘open entry’) while requiring the source’s consent before any of the material is used in court proceedings abroad, thus triggering disclosure obligations and associated risks (‘closed exit’)”<sup>40</sup>.

This is especially important in the context of the increasing amount of digital information available online and actors who are collecting it. To overcome this gap, at least two JITs were set up to investigate international crimes committed during the conflict in Ukraine. The first one is an ordinary JIT with members of seven states and unprecedented joint participant from the ICC OTP on 25 March, 2022. This JIT agreement extended until 25 March 2026<sup>41</sup>. Some authors consider the OTP’s engagement in this JIT as an opportunity for “novel modality of implementing the policy of proactive complementarity through two-track

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at: <<https://www.gov.si/assets/ministrstva/MZEZ/projekti/MLA-pobuda/The-Ljubljana-The-Hague-MLA-Convention.pdf>> access on: July 27, 2024.

<sup>39</sup> LATYSH, Kateryna. Concept of digital forensics and open data source information in the investigation process. *Criminalistics and forensic expertology: science, studies, practice*, 19, 2023. 89–94.

<sup>40</sup> FURAER Andrea. Can They Deliver? The Practice of Joint Investigation Teams (JITS) in Core International Crimes Investigations. *Journal of International Criminal Justice*. v. 22, is. 1, March 2024, p. 43–58, 2024. <https://doi.org/10.1093/jicj/mqae005>

<sup>41</sup> EUROJUST. Agreement to extend the joint investigation team into alleged core international crimes in Ukraine for two years. Available at: <<https://www.eurojust.europa.eu/news/agreement-extend-joint-investigation-team-alleged-core-international-crimes-ukraine-two-years>> access on: July 27, 2024.

cooperation and assistance”<sup>42</sup>. Furthermore, the timeline of joining different actors to this JIT is also notable and shows the increasing impact of JITs. At the beginning, there were only 3 countries (Ukraine, Lithuania and Poland) who signed the JIT agreement after the first coordination meeting on judicial cooperation involving 31 countries in March, but on 25 April the ICC joined the JIT, then in a month (30 May) three more countries (Estonia, Latvia, Slovakia) became JIT members, and on 13 October Romania became the seventh JIT member. National authorities participating in the JIT signed a Memorandum of Understanding with the United States (3 March 2023) and Europol became a JIT participant (10 October 2023)<sup>43</sup>. To sum up, this timeline highlights the growing role of JITs reflected in both the number of participating countries (seven, not just two to three) and the quality of investigations, including the unprecedented collaboration with the ICC.

The second JIT, named Open Source Intelligence (OSINT) Operational Taskforce (OTF), is unique in its focus on the collection and analysis of OSINT. Led by the international crimes units of the Dutch Police (Nationale Politie) and the German Federal Criminal Police Office (Bundeskriminalamt), the OTF is supported by Europol and its Analysis Project Core International Crimes (AP CIC). So far, 14 countries<sup>44</sup> have committed dedicated OSINT resources to the taskforce, assisting with prioritized requests from Ukraine, other nations, and the ICC<sup>45</sup>. Although

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<sup>42</sup> YUDAN Tan, SUBONG Yang. The Joint Investigation Team in Ukraine: An Opportunity for the International Criminal Court?, *Chinese Journal of International Law*, v. 22, is. 1, March 2023, p. 103–119, 2023. <https://doi.org/10.1093/chinesejil/jmad005>

<sup>43</sup> EUROJUST. Timeline of Eurojust’s response to the war in Ukraine. Available at: < <https://www.eurojust.europa.eu/sites/default/files/assets/two-years-on-a-timeline-of-eurojust-s-response-to-the-war-in-ukraine-en.pdf> > access on: July 27, 2024.

<sup>44</sup> Among participating countries are Belgium, France, Germany, Ireland, Italy, Lithuania, Netherlands, Portugal, Slovak Republic, Slovenia, Spain, Norway, United Kingdom, United States of America. EUROPOL. *Europol set up OSINT task force to support war crimes investigation in Ukraine*. Available at: < <https://www.europol.europa.eu/media-press/newsroom/news/europol-sets-osint-taskforce-to-support-investigations-war-crimes-committed-in-ukraine> > access on: July 27, 2024.

<sup>45</sup> Ibid.

open-source investigations are typically part of routine law enforcement activities, the creation of this specialized JIT emphasizes the collective need to focus on this particular type of digital evidence again within the scope of a JIT (not separately).

Thus, JITs can be categorized not only by the geography of the conflict and the parties involved in the investigation, or the duration for which they are established, but also by the types of evidence they are set to collect.

There are opportunities for scientific and legal assistance to judicial and law enforcement bodies on the interpretation and possible application of legal regulations (e.g., regarding digital evidence). There are scientific advisory councils in Ukraine<sup>46</sup>, for example, at the Supreme Court, which, in accordance with Article 47 of the Law of Ukraine ‘On the Judiciary and the Status of Judges’, are formed from among highly qualified specialists in the field of law to prepare scientific conclusions on issues of the Supreme Court’s activity requiring scientific support. The powers of the Scientific Council include the following main functions (Article 3.2. Regulations on the Scientific Council of the Supreme Court of Ukraine): preparation of legal opinions on the interpretation and application of legal regulations; participation in the preparation of draft generalizations of the practice of application of substantive and procedural law by the courts in order to ensure their uniform application in the course of consideration of cases; preliminary consideration of draft resolutions of the Plenum of the Supreme Court of Ukraine on the issuance of advisory opinions on the application of Ukrainian legislation by the courts in the course of consideration of cases; participation in the coordination of scientific research in the field of law and in the formation of the state order of scientific research in the field of law; assistance in the publication of the official printed organ of the Supreme Court of Ukraine, its other publications (including electronic)<sup>47</sup>.

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<sup>46</sup> See: OFFICIAL WEBSITE OF THE SUPREME COURT. About Supreme Court. Available at: < [https://supreme.court.gov.ua/supreme/pro\\_sud/sn\\_kr/](https://supreme.court.gov.ua/supreme/pro_sud/sn_kr/) > access on: July 27, 2024.

<sup>47</sup> REGULATION ON THE SCIENTIFIC ADVISORY COUNCIL UNDER THE SUPREME COURT OF UKRAINE. Supreme Court. Available at: <[https://supreme.court.gov.ua/supreme/pro\\_sud/ppn\\_kr/](https://supreme.court.gov.ua/supreme/pro_sud/ppn_kr/)> access on: July 27, 2024.

However, the existing scientific and advisory councils in Ukraine cannot fully meet the needs of practice, which consists of resolving legal conflicts and filling the identified gaps in the legislation. This is reflected in the lack of motivation of the members of such councils. Therefore, it would be advisable to use the capabilities of CSOs, which are able not only to provide such consultations (including written replies or other issues), but also to conduct trainings and webinars, which could connect theory and practice, demonstrate trends in the application of legislation, adjust our current practice to international and foreign ones.

In order to investigate core international crimes, JITs are being created and working, which is undoubtedly a progressive step of the world community in the fight against international crime.

#### **4. FIRST STEPS TOWARDS THE DIGITALIZATION OF CRIMINAL PROCEEDINGS**

Technologies are evolving faster than the laws that govern their use, often outpacing the ability of the legal system to adapt and integrate these changes. It is becoming increasingly clear that modern society is facing several complex challenges that require urgent solutions: the need to use advanced digital and innovative technologies (such as optical visualization systems, 3D scanners, unmanned aerial vehicles - including drones, quadcopters and multicopters - and mobile DNA laboratories); ensuring access to relevant information and analytical software through the organization of automated workstations for staff in pre-trial investigation bodies and courts (e.g., workstations for investigators, prosecutors, judges and experts); the development of automated information and research systems and databases ('investigative practice', 'investigative precedent', etc.)<sup>48</sup>; and the implementation of AI<sup>49</sup> in law enforcement activities.

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<sup>48</sup> SHEPITKO, Valery; ZHURAVEL, Volodymyr; AVDEYEVA, Galyna. Innovations in Criminalistics and Their Implementation in the Activities of Pre-Trial Investigation Bodies. *Issues of Crime Control*, v. 21, p. 39-46, 2011.

<sup>49</sup> PÉREZ ESTRADA, Miren Josune. Artificial intelligence as scientific evidence in the Spanish criminal process. *Brazilian Journal of Criminal Procedure*, v. 7, n. 2, p. 1385, 2021. <https://doi.org/10.22197/rbdpp.v7i2.505>.

The informatization, algorithmization, and technologization of law enforcement agencies and courts is facilitated by the introduction of innovative digital technologies. There is even the discussion how to use artificial intelligence as scientific evidence<sup>50</sup>. These advances enable remote forms of pre-trial investigation and trial, as well as the conduct of procedural actions via videoconferencing. They also support the creation of electronic criminal proceedings<sup>51</sup> (cases) and the development and implementation of various unified registers. For example, in Ukraine there are the information and telecommunication systems of pre-trial investigation, which ensure the creation, collection, search, processing and transmission of materials and information (information) in criminal proceedings (Art. 106-1 of the CPC of Ukraine)<sup>52</sup>. One of these systems is named ‘eCase<sup>53</sup>’ (telecommunication system for pre-trial investigation), the purpose of which is automation of pre-trial investigation processes, including creation, collection, storage, search, processing and transmission of materials and information in criminal proceedings, as well as processes providing organizational, managerial, analytical, information and telecommunication and other needs of the system users<sup>54</sup>. It may indicate that the situation will soon change, and more attention will be paid to digital information not only in the investigation of core international crimes, but also in the investigation of ordinary criminal cases. Various types of individual registers may also be used during the investigation (for

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<sup>50</sup> PÉREZ ESTRADA, Miren Josune. Artificial intelligence as scientific evidence in the Spanish criminal process. *Brazilian Journal of Criminal Procedure*, 7(2), 1385. <https://doi.org/10.22197/rbdpp.v7i2.505>.

<sup>51</sup> MAZURYK, Roman. Current Issues of Implementing the Concept of Electronic Criminal Proceedings in the Activities of Prosecutor’s Offices: Administrative and Legal Aspect. *Law and Society*. v. 1, p. 156-163, 2022. doi. [org/10.32842/2078-3736/2022.1.22](https://doi.org/10.32842/2078-3736/2022.1.22)

<sup>52</sup> THE CRIMINAL PROCEDURE CODE OF UKRAINE. Available at: <<https://zakon.rada.gov.ua/laws/show/4651-17#Text>> access on: July 27, 2024.

<sup>53</sup> NATIONAL ANTICORRUPTION BUREAU. Available at: <<https://nabu.gov.ua/tags/ecase/>> access on: July 27, 2024.

<sup>54</sup> REGULATION ON THE INFORMATION AND TELECOMMUNICATION SYSTEM OF PRE-TRIAL INVESTIGATION I-CASE. Verkhovna Rada of Ukraine. Available at: <<https://zakon.rada.gov.ua/laws/show/v0390886-21#Text>> access on: July 27, 2024.

example, the Unified State Register of Court Decisions<sup>55</sup>, a single register of legal entities, individual entrepreneurs and public organizations<sup>56</sup>, certified forensic experts<sup>57</sup>, and forensic examination methodologies<sup>58</sup>, etc.). We completely agree that ‘novel ecosystem characterized by digitalization and democratization of international criminal justice efforts’<sup>59</sup>.

However, the digitization of law enforcement has been slow because these agencies tend to be more cautious about adopting new technologies than non-state actors, whose activities are not constrained by the strict framework of criminal proceedings. This continued lack of cooperation between national authorities and CSOs, coupled with the conditions of war or other conflict, has created an opportunity to foster the development of a new type of evidence that can be collected remotely - digital evidence.

## 5. ESTABLISHING STANDARDS FOR DIGITAL EVIDENCE COLLECTION IN CONFLICT ZONES

There are specific requirements and standards that must be met in digital information collection activities. Given the legislative process of legislative adoption and the immediate need for practical solutions, particularly in conflict zones, steps have been taken to develop these standards independently. Non-state actors such as Global Rights

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<sup>55</sup> UNIFIED STATE REGISTER OF COURT DECISIONS. Available at: <<https://reyestr.court.gov.ua>> access on: July 27, 2024.

<sup>56</sup> THE UNIFIED STATE REGISTER OF LEGAL ENTITIES, INDIVIDUAL ENTREPRENEURS AND PUBLIC ORGANIZATIONS. Available at: <<https://usr.minjust.gov.ua/content/free-search>> access on: July 27, 2024.

<sup>57</sup> REGISTER OF CERTIFIED FORENSIC. Minjust.gov.ua. 2024. Available at: <<https://rase.minjust.gov.ua>> access on: July 27, 2024.

<sup>58</sup> SHEPITKO, Valery. Place of Digital Evidence and Evidence Concept in the Doctrine of Criminalistics and Forensic Science. Informative Support of Crime Investigation. v. 1, p. 126-133, 2022.

<sup>59</sup> KOWALCZEWSKA, Kaja. War-Torn Justice: Empirical Analysis of the Impact of Armed Conflict on Fair Trial Guarantees in Ukraine. *Brazilian Journal of Criminal Procedure*, 9(3). p. 1062-1063. 2023 <https://doi.org/10.22197/rbdpp.v9i3.896>.

Compliance<sup>60</sup> and academic institutions (e.g., UC Berkeley<sup>61</sup>, Leiden University<sup>62</sup>, Swansea University<sup>63</sup>) have contributed to these efforts. Some standards focus exclusively on the collection of digital information, while others address broader investigative practices in conflict zones, including specific sections on the collection of digital evidence.

The development of the Guidelines for Civil Society Organisations on Documenting International Crimes and Human Rights Violations for Accountability, jointly created by Eurojust, the EU Network for the Prosecution of Genocide, Crimes against Humanity and War Crimes, and the Office of the Prosecutor of the International Criminal Court, represents an important recognition of the efforts of CSOs in evidence collection and the need to enhance standards for online investigations so that their findings can be admissible in international courts. These guidelines aim to support their efforts in preserving and gathering information on the commission of international crimes and human rights violations to ensure accountability<sup>64</sup>.

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<sup>60</sup> BASIC INVESTIGATIVE STANDARDS FOR DOCUMENTING INTERNATIONAL CRIMES IN UKRAINE. Global Rights Compliance. Available at: <<https://globalrightscompliance.com/wp-content/uploads/2023/05/КЕРІВНИЦТВО-3-БАЗОВИХ-СТАНДАРТІВ-РОЗСЛІДУВАННЯ-ДІЯ-ДОКУМЕНТУВАННЯ-МІЖНАРОДНИХ-ЗЛОЧИНІВ-В-УКРАЇНІ.pdf>> access on: July 27, 2024.

<sup>61</sup> BERKELEY PROTOCOL ON CONDUCTING INVESTIGATIONS USING OPEN DIGITAL DATA. Berkeley Law. : Available at <<https://www.law.berkeley.edu/wp-content/uploads/2022/03/Berkeley-Protocol-Ukrainian.pdf>> access on: July 27, 2024.

<sup>62</sup> Leiden Guidelines on the Use of Digitally Derived Evidence in International Criminal Courts and Tribunals. Leiden University. Available at: <<https://leiden-guidelines.com/guidelines/>> access on: July 27, 2024.

<sup>63</sup> Evaluating digital open source imagery: *A guide for judges and fact-finders* (2024), published online at [www.trueproject.co.uk/osguide](http://www.trueproject.co.uk/osguide). 2024. Available at: < <https://www.trueproject.co.uk/osguide>> access on: July 27, 2024.

<sup>64</sup> The Guidelines for Civil Society Organisations on Documenting International Crimes and Human Rights Violations for Accountability. Eurojust, the EU Network for the Prosecution of Genocide, Crimes against Humanity and War Crimes, and the Office of the Prosecutor of the International Criminal Court. 2023. Available at: <<https://www.eurojust.europa.eu/sites/default/files/assets/eurojust-icc-csos-guidelines.pdf>> access on: October 12, 2024.

The support from such key actors highlights the recognition of the crucial role of civil society in the evidence-gathering process and the elevation of their status in this context. Furthermore, specific sections of these guidelines are dedicated to collecting digital information and conducting online investigations, emphasizing the possibility of expanding the scope of traditional evidence.

On the one hand, it is important to distinguish all these standards from the requirements established by the applicable domestic rules of procedure and evidence for the collection of digital evidence. Of course, such standards may contain generalizations of legal requirements, but in general there are certain instructions, guidelines for action, intended for individuals with little or no experience in this type of activity. For example, one of these guidelines says, “[w]hen a documentation team collects video information, make sure that the person taking the footage is experienced in doing so”<sup>65</sup>. That is, the purpose of such standards is to provide certain guidelines, recommendations for collecting or creating digital information, but if they are not followed, it will not always lead to the non-recognition or exclusion of evidence .

On the other hand, criminal procedure does not provide for the participation of anyone in investigative actions, let alone their recording. A specialist may be involved in such recordings, but he or she must meet certain qualification requirements established by law. There are also specific procedural requirements that must be met in order for the digital evidence collected to be admissible in court.

Special attention should be paid to the use of digital information in criminal proceedings (information created with the help of advanced information technologies). Such information can be created, transmitted, stored, etc. not only with the help of computer equipment, but also with

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<sup>65</sup> BASIC INVESTIGATIVE STANDARDS FOR DOCUMENTING INTERNATIONAL CRIMES IN UKRAINE. Global Rights Compliance. 2023. Available at: < <https://globalrightscompliance.com/wp-content/uploads/2023/05/Basic-Investigative-Standards-for-Documenting-International-Crimes-in-Ukraine-Guides.pdf>> access on: September 27, 2024.



the help of other equipment (recorders, digital cameras, video cameras, smartphones, etc.)<sup>66</sup>.

Standards for the collection and preservation of information are critical factors that must be met to ensure that the evidence collected is admissible in court. Problems arise particularly in the investigation of core international crimes, as national standards for evidence collection may vary from country to country based on national legislation. These differences can create difficulties in international cooperation, raising the question of which standards should be followed. This issue has become even more relevant with the emergence of a new type of evidence - digital evidence - which differs in form and collection methods and requires specific equipment.

These challenges have not been fully addressed by the recently adopted Ljubljana-The Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity, War Crimes, and Other International Crimes<sup>67</sup>. However, non-governmental sectors have made efforts to develop investigative standards for documenting international crimes, with particular attention to the collection, handling, and preservation of OSINT evidence, digital or audiovisual information.

Standardization of investigation of international core crimes helps to streamline the process of training of investigators, algorithms of work at the scene of the incident, interaction between various units, expert institutions, to ensure quality documentation of facts, implementation of procedural actions<sup>68</sup>. The peculiarity of the methodology of investigation of

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<sup>66</sup> SEMKO, Mykhailo, KRAKHMALYOV, Oleksandr. Electronic Information as Evidence. Bulletin of the National Technical University "Kharkiv Polytechnic Institute". Series: Current Issues of Ukrainian Society Development. v. 1, p. 49, 2021. doi: 10.20998/2227-6890.2021.1.07

<sup>67</sup> The Ljubljana-The Hague Convention on International cooperation in the investigation and prosecution of the crime of genocide, crime against humanity, war crimes and other international crimes. Available at: <<https://www.gov.si/assets/ministrstva/MZEZ/projekti/MLA-pobuda/The-Ljubljana-The-Hague-MLA-Convention.pdf>> access on: July 27, 2024.

<sup>68</sup> DUFENIUK, Oksana. Investigation of War Crimes in Ukraine: Challenges, Standards, Innovations. Baltic Journal of Legal and Social Sciences, v. 1, p. 46-56, 2022.

war crimes committed within the framework of an armed conflict consists in the application of the collective (brigade) method of investigation, investigation on 'hot tracks' and special procedures of investigative (search) actions<sup>69</sup>.

The investigation of war crimes should be based on the Basic Standards of Investigation (BSR) for the Documentation of International Crimes in Ukraine. The BSR provide a set of basic standards to be applied to a range of documentation activities, to prevent harm when interacting with victims and witnesses, and to understand the elements of core international crimes<sup>70</sup>.

The Ukrainian Prosecutor's Office, together with leading national experts on international humanitarian law, has developed and presented the methodological recommendations 'Standards for the Investigation of War Crimes. General Part'<sup>71</sup>.

The International Protocol on Documenting and Investigating Sexual Violence in Conflict is also important for documenting these specific crimes, setting basic standards of good practice for documenting sexual violence as a crime under international law (first edition: June 2014)<sup>72</sup>.

It is also possible to talk about international standards for the use and collection of digital information in war crimes investigations. For example, the use of digital information in the investigations of war crimes

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<sup>69</sup> Ibid.

<sup>70</sup> BASIC INVESTIGATIVE STANDARDS FOR DOCUMENTING INTERNATIONAL CRIMES IN UKRAINE. Global Rights Compliance. Available at: <<https://globalrightscpliance.com/wp-content/uploads/2023/05/КЕРІВНИЦТВО-3-БАЗОВИХ-СТАНДАРТІВ-РОЗСЛІДУВАННЯ-ДЛЯ-ДОКУМЕНТУВАННЯ-МІЖНАРОДНИХ-ЗЛОЧИНІВ-В-УКРАЇНІ.pdf>> access on: July 27, 2024.

<sup>71</sup> STANDARDS FOR INVESTIGATING WAR CRIMES. General Part: Methodical Recommendations. p. 112, 2023.

<sup>72</sup> INTERNATIONAL PROTOCOL ON DOCUMENTATION AND INVESTIGATION OF SEXUAL VIOLENCE IN CONFLICT: BASIC STANDARDS OF GOOD PRACTICE FOR DOCUMENTING SEXUAL VIOLENCE AS A CRIME UNDER INTERNATIONAL LAW. United Nations. Available at: <[https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2019/06/report/international-protocol-on-the-documentation-and-investigation-of-sexual-violence-in-conflict/International\\_Protocol\\_2017\\_2nd\\_Edition.pdf](https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2019/06/report/international-protocol-on-the-documentation-and-investigation-of-sexual-violence-in-conflict/International_Protocol_2017_2nd_Edition.pdf)> access on: July 27, 2024.

should take into account the provisions of the “Berkeley Protocol”<sup>73</sup> – a practical guide on the effective use of open source digital information in the investigations of violations of international criminal law, human rights and humanitarian law<sup>74</sup>. The Berkeley Protocol is a document of recommendations issued in 2020 by the Center for Human Rights at the University of California, Berkeley, and the Office of the United Nations High Commissioner for Human Rights. It outlines minimum standards for finding, collecting, preserving, verifying, and analyzing open source<sup>75</sup>.

The Berkeley Protocol states that “an open data investigation is an investigation that relies, in whole or in part, on publicly available information to conduct formal and systematic online investigations... Publicly available information can provide leads, support intelligence, and serve as direct evidence in court”<sup>76</sup>.

The development of separate forensic methodologies for the investigation of war crimes and other crimes of an international nature requires the determination of their definition and types, as well as the consideration of standards of investigation. A separate forensic technique is certain algorithms of the investigator’s actions, a complex of standardized advice<sup>77</sup>. Investigative methodology determines the

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<sup>73</sup> BERKELEY PROTOCOL ON CONDUCTING INVESTIGATIONS USING OPEN DIGITAL DATA: PRACTICAL GUIDE TO THE EFFECTIVE USE OF OPEN DIGITAL DATA IN INVESTIGATING VIOLATIONS OF ICL, HR AND IHL. UN Human Rights Office of the High Commissioner. Available at: <<https://www.ohchr.org/ru/publications/policy-and-methodological-publications/berkeley-protocol-digital-open-source>> access on: July 27, 2024.

<sup>74</sup> GRACERS, Law Firm. Berkeley Protocol – Principle of Conducting Investigations Using Electronic Digital Data. Available at: <<https://gracers.com/pres-centr/protocol-berkli-princip-vedennya-rozsliduvannya/>> access on: July 27, 2024.

<sup>75</sup> CENTER FOR DEMOCRACY AND RULE OF LAW. Berkeley Protocol: How Open Sources Help to Hold Russia Accountable. Available at: <<https://cedem.org.ua/news/protocol-berkli>> access on: July 27, 2024.

<sup>76</sup> BERKELEY PROTOCOL ON CONDUCTING INVESTIGATIONS USING OPEN DIGITAL DATA. Berkeley Law. Available at: <<https://www.law.berkeley.edu/wp-content/uploads/2022/03/Berkeley-Protocol-Ukrainian.pdf>> access on: July 27, 2024.

<sup>77</sup> CRIMINALISTICS. Textbook: in 2 volumes. Edited by Valery Shepitko. v. 2, p. 328, 2019.

optimal course of criminal proceedings in the investigation of a criminal offense, the sequence of investigative (search) actions or organizational and technical measures, the system of used forensic means and their regime. Investigative methodology is a certain process, a sequence of investigative activities, the use of forensic means (techniques, methods, recommendations, operations) in the investigation of a certain type (subtype) of crime, aimed at obtaining the truth in the case<sup>78</sup>. The use of investigative methodology allows for the best possible conduct of war crimes investigations.

## CONCLUSION

Traditional evidence and the traditional actors who collect it are becoming less relevant in the face of modern challenges. The criminal justice system is often reluctant to embrace technological advances, particularly digital tools. This reluctance is due to a number of challenges, including limited access to conflict zones, the risks involved, and the reliability of information. CSOs and non-state actors have increasingly filled the gap left by national authorities, especially in areas affected by war and authoritarian regimes. These entities have developed a high level of professionalism and confidence in documenting crimes and human rights violations, but their legal status and the admissibility of the evidence they collect remain regulated inadequately.

Effective collaboration between CSOs, the private sector, and national and international law enforcement agencies is essential. JITs and innovative methods, such as remote digital evidence collection, are critical to addressing these challenges. The development of standards for digital evidence collection, such as the Berkeley Protocol, and the implementation of new technologies in law enforcement and judicial processes are critical steps forward. The form and character of the proposed standards are of secondary importance; the content is what truly matters. Since CSOs collect digital information that may be used in criminal proceedings, which have imperative requirements for admissibility in court, it is essential to

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<sup>78</sup> CRIMINALISTICS. Textbook: in 2 volumes. Edited by Valery Shepitko. v. 2, p. 7, 8, 2019.

provide a detailed explanation of these requirements. This should include not only the standards and requirements for digital evidence but also the format in which the collected material must be presented and the entities responsible for its submission (considering their procedural status). Additionally, drawing on existing practices where provided information has been disregarded by law enforcement or courts for formal reasons, it is important to indicate the actions that should be avoided. There is no necessity for these standards to be legally binding for CSOs; thus, the content holds greater significance than the form. This approach grants the entity collecting such information the flexibility and creative latitude often lacking in law enforcement agencies, while ensuring that they understand the consequences of non-compliance with these standards. However, it is crucial to establish, at the legislative level, the procedural possibility for obtaining information from third parties and clarifying their procedural status, as this is currently not codified in Ukrainian law.

This article has highlighted the importance of continued innovation, interdisciplinary collaboration, and the establishment of clear legal standards to improve the effectiveness of digital evidence collection and ensure accountability for core crimes and human rights violations in conflict zones. The evolving role of non-state actors, coupled with technological advancements, offers promising avenues for improving the documentation and prosecution of international crimes.

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