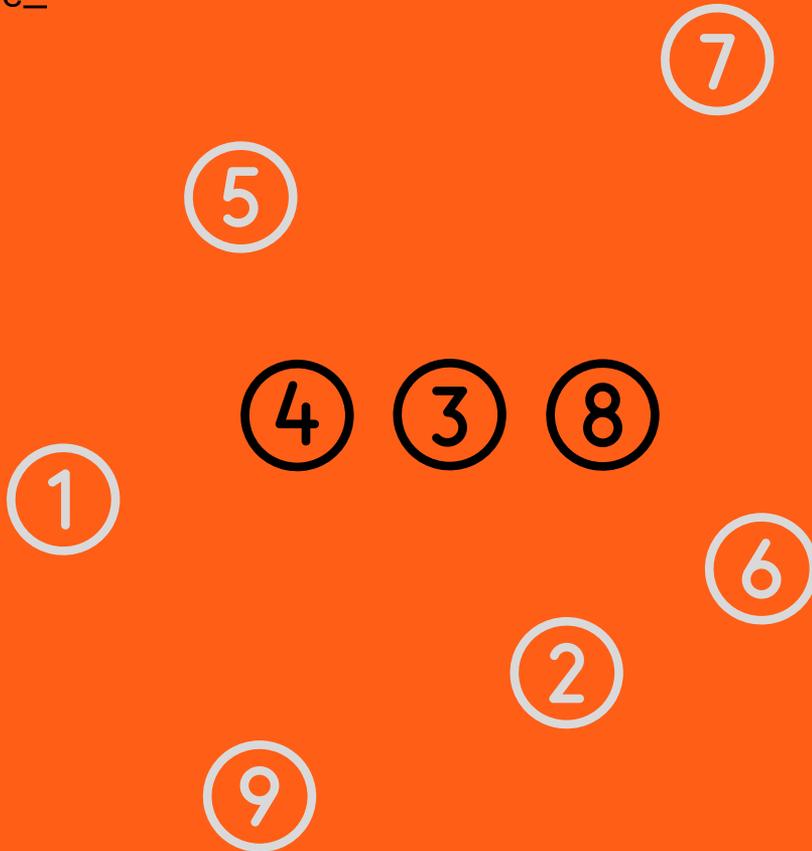


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## LEGAL ANALYTICS

The role of the court in clarifying the form of the objective element (actus reus) under Article 438 of the Criminal Code of Ukraine

**Cite as:** Hloviuk I. (2024). The role of the court in clarifying the form of the objective element (actus reus) under Article 438 of the Criminal Code of Ukraine. Truth Hounds, [URL](#)

# The role of the court in clarifying the form of the objective element (actus reus) under Article 438 of the Criminal Code of Ukraine

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## LEGAL ANALYTICS

Small research publications by Truth Hounds that provide a brief overview of a selected issue and present the main findings, suggestions or recommendations.

## **TRUTH HOUNDS**

Ukrainian civil society organization specializing in documenting and investigating international crimes and serious human rights violations in Ukraine and other conflict-affected regions of Eastern Europe, the Caucasus, and Central Asia.

[Note: the term 'objective element' used in the text corresponds to the Ukrainian term 'об'єктивна сторона (objective side)', potentially similar terms are 'actus reus', 'material element' or 'objective aspect of a criminal offence'.

In Ukrainian doctrine, this term is understood as a set of features that characterise a criminal act, namely: the social danger of the act in the form of action or inaction, socially dangerous consequences, the causal link between the act and socially dangerous consequences, place, time, environment, method and means of committing the crime.]

## **Problem statement**

1. Article 438 of the Criminal Code of Ukraine (**CCU**), which qualifies war crimes, is of a blanket nature and provides a general list of crimes without specifying their elements. This may result in an act being initially classified under one form of the objective element of the crime, but later the court may decide that the act should be classified differently. In this case, however, prosecutors will not be able to amend the indictment.
2. This raises the question of whether the court can change the charges in this situation. For example, there is currently no clear understanding in court practice as to which of the manifestations of the objective element of the crime rape and other forms of sexual violence belong to, but there is a need for unified court practice regarding the final qualification of these and other acts that constitute war crimes, taking into account the accompanying circumstances.
3. The key problems include the following:
  - Changing the charge under Article 438 of the CCU in compliance with the criminal procedure legislation of Ukraine;
  - The wording of the charge in the verdict taking into account the specifics of war crimes and the wording of Art. 438 of the CCU.

## **General issues of changing the charge under the Criminal Procedure Code of Ukraine**

4. The key issue is the description of the charge in the court verdict and its correlation with the indictment. According to the Criminal Procedure Code of Ukraine (**CPC**), the procedural decisions that set out the charges are the indictment and the guilty verdict. Under Article 3(13) of the CPC of Ukraine, a charge is an allegation that a certain person has committed an act under the law of Ukraine on criminal liability, brought in accordance with the procedure established by this Code. This wording reflects the substantive and procedural meaning of the term "charge".

5. In criminal proceedings, including those under Article 438 of the CCU, the issue of changing the charge may arise. In such a case, it should be analysed in the substantive sense. Thus, according to the almost universally accepted doctrinal approach, the charge consists of a plot; legal formulation and legal qualification of the act. This approach is also recognised by law, since clause 5 of part 2 of Article 291 of the CPC of Ukraine, which regulates the content of the indictment (and the indictment, according to part 4 of Article 110 of the CPC, is a procedural decision by which the prosecutor brings charges of a criminal offence and which ends with a pre-trial investigation), provides that the indictment, in addition to other information specified in this article, must contain “a statement of the factual circumstances of the criminal offence, which the prosecutor considers to be established, the legal qualification of the criminal offence with reference to the provisions of the law and articles (parts of articles) of the law of Ukraine on criminal liability and the wording of the charge.”<sup>1</sup> That is, as it appears, this information reflects the content of the charge in the substantive legal sense.
6. The charge in court may be changed by the prosecutor and by the court. For the prosecutor, this power is provided for in part 2 of Article 337 and Article 338 of the CPC of Ukraine. Therefore, in order to change the legal qualification and/or scope of the charge, the prosecutor has the right to amend the charge if new factual circumstances of the criminal offence of which the person is charged are established during the trial. The CPC does not provide for any limitations on the prosecutor’s right to change the charge to a lesser or more serious one.
7. The analysis of the CPC provisions regulating the scope of the trial “makes it possible to state that the court is bound not only by the factual side of the prosecution supported by the prosecutor but also by the legal side (though partially).”<sup>2</sup> The basis for this partiality is part 3 of Art. 337 of the CPC of Ukraine, according to which “in order to make a fair court decision and protect human rights and fundamental freedoms, the court has the right to go beyond the charges specified in the indictment only in terms of changing the legal qualification of a criminal offence, if this improves the situation of the person in respect of whom the criminal proceedings are being conducted.”<sup>3</sup>

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<sup>1</sup> *The Criminal Procedure Code of Ukraine* (Article 291(2)(5)). Official web portal of the Parliament of Ukraine, [URL](#).

<sup>2</sup> Kolodchyn V., Tumanyants A. (2016). *The powers of the prosecutor in court proceedings in the first instance*. Oberih, p. 124, [URL](#).

<sup>3</sup> *Ibid.* pp. 124-125; *The Criminal Procedure Code of Ukraine* (Article 337(3)). Official web portal of the Parliament of Ukraine, [URL](#).

8. Thus, "the court is bound not only by the factual side of the prosecution proposed by the prosecutor, which is quite natural but also by the prosecutor's assessment of those facts."<sup>4</sup> The latter seems somewhat questionable, given that the judge has legal training and therefore the ability to independently provide a legal assessment of the facts.<sup>5</sup> It should be noted that the nature of this binding is partial, since the court may change the legal qualification of the act under certain conditions, which may result in a change in the wording of the charge.
9. As already mentioned, part 3 of Article 337 of the CPC allows the court to change the legal qualification of a criminal offence in order to ensure a fair court decision if it improves the position of the accused. Although the CPC does not specify what is meant by "improving the position of the person", most likely it is an act that is less serious under the CCU and provides for a less severe punishment. Also, the charges cannot differ significantly in factual circumstances, since the opposite would constitute a serious violation of the right to defence, in particular in terms of non-compliance with the right to know what criminal offence the person is accused of committing.
10. The doctrine rightly points out some problematic aspects of this formulation. Indeed, it is not very clear why part 3 of Article 337 of the CPC states that the court may go beyond the scope of the charge, even in order to protect rights and fundamental freedoms, and why the court may change only the legal qualification. It would be more correct to speak of "the right of the court to change the charge only to a less serious one (i.e. only to improve the position of the accused), and one that will not differ significantly from the previous one in factual circumstances"<sup>6</sup>. But also the fact that "the change of charges by the court may consist not only in changing the legal qualification of a criminal offence but also in reducing the scope of the charge (exclusion of certain episodes of illegal activity, exclusion of certain aggravating circumstances of the case, etc.) without changing the legal qualification."<sup>7</sup> In addition, part 1 of Article 420 of the CPC states that "the court of appeal shall overturn the verdict of the court of first instance and pass its own verdict in case of 1) the need to apply the law on a more serious criminal offence or increase the scope of the

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<sup>4</sup> Kolodchyn V., Tumanyants A. (2016). *The powers of the prosecutor in court proceedings in the first instance*. Oberih, p. 125, [URL](#).

<sup>5</sup> *Ibid.*

<sup>6</sup> Kivalov S., Mishchenko S., Zakharchenko V. (2013). *The Criminal Procedure Code of Ukraine: a scientific and practical commentary*. Odyssey, p. 638.

<sup>7</sup> Hurtieva L., (2022). *The right of the court to change the charges during the final decision of the trial: analysis of legislative regulation*. Law and Society. 2022. Vol. 4, p. 398.

charge". This means that the court of second instance may return to a more serious charge if it was replaced by the court of first instance. Thus, the court of first instance may change both the qualification of the criminal offence and reduce the scope of the charge."<sup>8</sup>

11. There is also the practice of the Criminal Court of Cassation of the Supreme Court (**CCC SC**) on this issue. In particular, important legal positions include the following:

- a) *"changing the charge is a right, not an obligation of the court";<sup>9</sup>*
- b) *"using the right granted to it, the court aims to pass a fair verdict and protect the rights and fundamental freedoms of a person and a citizen;<sup>10</sup>*
- c) *the above occurs when the act of a person, which according to the indictment is imputed to him/her, is subject to qualification for a less serious offence than that specified in the indictment";<sup>11</sup>*
- d) *"if the pre-trial investigation body did not charge the person with a specific act, the court cannot go beyond the scope of the charge and additionally establish the circumstances of the criminal proceedings that were not specified in the indictment";<sup>12</sup>*
- e) *"At the same time, these provisions do not indicate that if as a result of a trial, the court does not uphold the charges against a person, the prosecution may expect that the court will independently find at least some other crime in the actions of that person and deliver a guilty verdict, since it is the direct responsibility of the prosecution to prove the person's guilt in court";<sup>13</sup>*
- f) *"closure of criminal proceedings by the court in cases where there are grounds for reclassification by the court of the actions of the accused does not meet the legitimate expectations of the person who suffered harm and is inconsistent with the objectives of criminal proceedings. The state's refusal to prosecute a person if his or her actions*

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<sup>8</sup> *Ibid.*, p. 398

<sup>9</sup> Resolution of the Criminal Court of Cassation within the Supreme Court, No. 753/11828/13-к, 20 March 2018, [URL](#).

<sup>10</sup> Resolution of the Criminal Court of Cassation within the Supreme Court, No. 280/865/16-к, 8 May 2018, [URL](#).

<sup>11</sup> Resolution of the Criminal Court of Cassation within the Supreme Court, No. 366/3050/16-к, 02 October 2018, [URL](#).

<sup>12</sup> *Ibid.*

<sup>13</sup> Resolution of the Criminal Court of Cassation within the Supreme Court, No. 243/1573/17, 13 January 2021, [URL](#).

*have signs of another criminal offence (less serious than the one charged) will contradict such principles as the rule of law, legality and discretion, which will lead to impunity for the perpetrator, and will put the victim in a position of legal insecurity and create conditions for repeated victimisation.*"<sup>14</sup>

## **Peculiarities of presentation of the accusation in procedural decisions under Article 438 of the CCU**

12. The presentation of the charge in procedural decisions at the stage of pre-trial investigation is characterised by different approaches to the formulation of the charge, even if the factual circumstances are identical. At the same time, it is important to have a unified court practice regarding the final qualification of the relevant acts, taking into account the accompanying circumstances.
13. Article 438 of the CCU is a blanket provision since in order to establish the content of the objective element and correctly qualify the act, it is necessary to refer to several norms of international humanitarian and international criminal law. In addition, there is a problem with the fact that this article, unlike, for example, the Geneva Conventions and the Rome Statute, does not specify what violations of IHL are considered "serious violations".
14. At the same time, the doctrine has a position that states that the interpretation of the content of each of the forms of the crime provided for in part 1 of Art. 438 should be carried out in accordance with the provisions of international law, in pursuance of which the commented article was actually adopted. In general, this implies 1) limitation of the scope of application of part 1 of Art. 438 to only those violations of international humanitarian law (**IHL**) that are of a serious nature; 2) consideration of the so-called contextual element in qualifying a person's actions; 3) taking into account the provisions of IHL in determining the circle of victims; 4) consideration of the provisions of IHL in determining the circle of persons who may be subjects of the crime under part 1 of Art. 438.<sup>15</sup> This concerns the immunity of a combatant since the subject of the crime under Article 438 of the CCU is a general one.

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<sup>14</sup> Resolution of the Criminal Court of Cassation within the Supreme Court, No. 552/2540/20, 19 October 2021, [URL](#).

<sup>15</sup> Melnyk M., Khavroniuk M. (2018). *Scientific and practical commentary on the Criminal Code of Ukraine*. Dakor, p. 1335

15. This disposition of Art. 438 of the CCU gives rise to the specifics of the accusation in the notice of suspicion and indictment, as well as in court verdicts.
16. The following doctrinal considerations are important: the conclusion that the relevant act constitutes a **serious violation** of IHL should be reflected in the wording of the charges against the person;<sup>16</sup> although part 1 of Art. 438 of the CCU does not explicitly mention that criminal liability for certain acts is triggered if they are committed in the context of a particular armed conflict, this circumstance should be reflected in the wording of the charge, as it is this circumstance (the so-called **contextual element**) that is crucial for distinguishing war crimes from “ordinary” crimes.<sup>17</sup>
17. **Thus, the following elements must be reflected in the notice of suspicion, indictment, and court verdict under Article 438 of the CCU:**
- a) a statement of the actual circumstances of the criminal offence, taking into account the contextual element:
    - the act took place in the context of an international armed conflict or a non-international armed conflict and was related to it. This contextual element requires that the evidence establishes the existence of an international armed conflict or the existence of a non-international armed conflict and that the act took place in the context of and was connected with an armed conflict;<sup>18</sup>
    - the perpetrator was aware of the factual circumstances that confirmed the existence of an armed conflict.
  - b) formulation of the charge (taking into account that the relevant prohibitions are established not in the CCU, but in IHL, and taking into account the criterion of the seriousness of the violation of such norms);
  - c) legal qualification of the criminal offence with reference to Article 438 of the CCU with mandatory specification of the form of objective element, in

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<sup>16</sup> Melnyk M., Khavroniuk M. (2018). *Scientific and practical commentary on the Criminal Code of Ukraine*. Dakor, p. 1335

<sup>17</sup> Melnyk M., Khavroniuk M. (2018). *Scientific and practical commentary on the Criminal Code of Ukraine*. Dakor, p. 1336

<sup>18</sup> *Basic Investigative Standards for International Crimes*, (2019). Global Rights Compliance, p. 188, [URL](#).

particular, according to the list provided by part 1 of Article 438 of the CCU.

18. The perpetrator must be identified in accordance with the provisions of international humanitarian law, including in the aspect of combatant immunity. The subjective element should be reflected in the same contextual element. In particular, the second contextual element requires the perpetrator to be aware of the factual circumstances that establish the existence of an armed conflict and the relationship between these factual circumstances and his or her conduct.<sup>19</sup> The victim, in turn, must be identified taking into account the fact that he or she belongs to the protected categories of persons under IHL.

## **Problematic issues of presentation of the accusation in the verdicts under Article 438 of the CCU**

19. A complicated issue that may arise when applying Article 438 of the CCU is the **change of charges by the court, taking into account the restrictions established by Article 337 of the CPC**. This issue is specific in the context of Art. 438 of the CCU, since (1) the article is a blanket; (2) the acts qualified under this article are contained in numerous provisions of IHL; (3) violations of IHL criminalised in Ukrainian legislation are covered by one part of Art. 438 of the CCU (except when the acts are combined with intentional murder – in this case, they are qualified under part. 2 of Article 438 of the CCU; (4) there may be a number of violations within one form of the objective element. This is especially true for the objective element form of “other violations of the laws and customs of war provided for by international treaties ratified by the Verkhovna Rada of Ukraine”.
20. A somewhat similar problem arose in the context of changing the charge from Article 126-1 of the CPC, which was recognised as possible by the Criminal Court of Cassation. Article 126-1 of the CCU on the criminalisation of domestic violence has a specific disposition, given that (1) it refers to the sign of systematicity and to the commission of (2) physical, psychological or economic violence without specifying the methods of commission, which necessitates reference to the Law of Ukraine “On Prevention and Combating Domestic Violence”, which contains relevant definitions, (3) specifies a special victim – a spouse or former spouse or another person with whom the perpetrator is (was) in a family or close relationship, and constitutes (4) consequences – leads to

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<sup>19</sup> *Basic Investigative Standards for International Crimes*, (2019). Global Rights Compliance, p. 195, [URL](#).

physical or psychological suffering, health disorders, disability, emotional dependence or deterioration of the victim's quality of life.

21. In particular, it was said that the accused on 09 February 2020 at about 10:00 struck his wife at least 12-14 times with his right fist, in the head area, namely the chin, mammary glands and left forearm, causing her physical and psychological suffering, which was expressed in the victim's bodily injuries in the form of a bruise of the left forearm and numerous bruises of the head, torso, and extremities, which, according to the expert opinion of 17 February 2020 No. 178, are classified as light bodily injuries that caused a short-term health disorder. In addition, on 24 April 2020, two reports on administrative offences under part 1 of Article 173-2 of the Code of Administrative Offences were drawn up against the accused for committing psychological violence and inflicting bodily harm on his wife.
22. The Kyiv District Court of Poltava found the accused guilty of a criminal offence under Article 126-1 of the CCU on 11 February 2021, but the decision of the Poltava Court of Appeal of 31 May 2021 cancelled the local court's verdict and closed the criminal proceedings on the basis of Article 284(1)(2) of the CPC due to the absence of a criminal offence under Article 126-1 of the CCU. In their cassation appeals, the prosecutor and the victim argued that the appellate court had failed to consider evidence confirming that the victim had suffered light bodily harm that caused a short-term health disorder.<sup>20</sup> The Criminal Court of Cassation of the Supreme Court cancelled the decision of the court of appeal and ordered a new appeal hearing, referring to the fact that the court of appeal did not check whether the perpetrator's actions had signs of another criminal offence, in particular, part 2 of Article 125 of the CCU.<sup>21</sup> The Supreme Court stated that physical violence under Art. 126-1 of the CCU may have the form of intentional light bodily harm.
23. In this criminal proceeding, the courts established that these injuries were inflicted on the victim in the episode of 09 February 2020, which was confirmed by an expert opinion available in the case file. When closing the criminal proceedings against the perpetrator due to the absence of a criminal offence under Article 126-1 of the CCU, the appellate court did not pay attention to the fact that the victim had suffered light bodily harm, which by its nature and extent caused a short-term health disorder, confirmed by the criminal proceedings. The Supreme Court provided arguments that the *corpus delicti* of the criminal offence under part 2 of Article 125 of the CCU is less serious than that under Article 126-1 of the CCU. Thus, we see that, as noted above, the

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<sup>20</sup> Resolution of the Criminal Court of Cassation within the Supreme Court, No. 552/2540/20, 19 October 2021, [URL](#).

<sup>21</sup> *Ibid.*

Supreme Court believes that closing criminal proceedings in cases where there are grounds for reclassification of the accused's actions does not meet the expectations of the victim and the purpose of criminal justice. The refusal of the state to prosecute a person for acts that can also be qualified as another less serious offence violates the principles of the rule of law, legality and discretion, which may contribute to the impunity of the perpetrator and leave the victim without protection, creating conditions for repeated victimisation.

24. The above is in line with the legal position of the Grand Chamber of the Supreme Court expressed in the decision of 03 July 2019 (case No. 288/1158/16-к, proceedings No. 13-28кc19).<sup>22</sup> The doctrine supported this approach and stated that "part 3 of Article 337 of the CPC allows the court, to make a fair court decision and protect human rights and fundamental freedoms, to go beyond the charges specified in the indictment only in terms of changing the legal qualification of a criminal offence, if this improves the situation of the person in respect of whom the criminal proceedings are being conducted. Although the CPC does not specify what is meant by "improves the situation of the person", it refers to an act for which the CC of Ukraine provides for a less severe punishment (which is lower in gravity and the punishment provided for in the CC of Ukraine is less severe). If we compare the sanctions of Art. 126-1 of the CCU (punishable by community service for a term of one hundred fifty to two hundred and forty hours, or arrest for a term of up to six months, or restriction of liberty for a term of up to five years, or imprisonment for a term of up to two years) and Art. 125 of the Criminal Code (punishable by a fine of fifty to one hundred tax-free minimum incomes, or community service for a term of one hundred fifty to two hundred and forty hours, or correctional labour for a term of up to one year, or arrest for a term of up to six months, or restraint of liberty for a term of up to two years), it is clear that this requirement has been met."<sup>23</sup>
25. Also, the charges suitable for re-qualification do not differ significantly in factual circumstances, since the opposite would indicate a violation of the right to defence in terms of non-compliance with the right to know what criminal offence the person is accused of committing. When the charge is changed from Article 126-1 of the CCU (provided that it is physical violence) to Article 125 of the CCU, the objective element in the form of bodily harm (if it was charged under Article 126-1 of the CCU) is the same. The question may arise as to the

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<sup>22</sup> Resolution of the Grand Chamber of the Supreme Court, No. 288/1158/16-к, 03 July 2019, [URL](#).

<sup>23</sup> Hloviuk I., (2022). *Changing the charge in criminal proceedings for criminal offences related to domestic violence: problematic issues. The current state and prospects of development of the system of preventing and combating domestic violence and gender-based violence in the context of global challenges of today: materials of the International Scientific and Practical Conference*. Helvetica, pp. 79-84, [URL](#).

systematic nature of domestic violence and the existence of a domestic violence environment, including a special victim.

26. Thus, the specificity of changing the charge in criminal proceedings under Article 126-1 of the CCU to another criminal offence related to domestic violence is due to the fact that the *corpus delicti* under Article 126-1 of the CCU is in a certain sense cumulative, as it contains forms of objective element that would not be qualified under Article 126-1 of the CCU in another situation or in relation to other victims, and also has a sign of systematicity, which is associated not only with the previous criminal prosecution. Thus, when deciding on the change of charges, these aspects should be taken into account while fully respecting the limits of the court's change of charges and ensuring the right to defence.<sup>24</sup>
27. It is worth noting that **international criminal law** has an interesting provision in Article 55 of the Rules of the International Criminal Court (**ICC**), entitled "Power of the Chamber to change the legal qualification of facts."<sup>25</sup> It does not specifically refer to changing the charge, but common features can be seen in the relevant wording. In particular, the Chamber is empowered to amend the legal qualification of the facts in terms of the relevance of the crimes under Articles 6, 7 or 8, or in terms of the form of participation of the accused under Articles 25 and 28, provided that the decision shall not go beyond the facts and circumstances set out in the indictment and any addenda thereto. If, at any stage of the proceedings, the Chamber finds that the legal determination of the facts may be amended, the Chamber shall inform the parties to the proceedings of the possibility of doing so and, after examining the evidence, shall give parties an opportunity to make oral or written statements at the appropriate stage of the proceedings. The Chamber shall ensure, in particular, that the accused: (a) have adequate time and facilities for the effective preparation of his or her defence; and (b) if necessary, be given the opportunity to examine again, or have examined again, a previous witness, to call a new witness or to present other evidence admissible under the Statute<sup>26</sup>.
28. The doctrine states that it is important to remember that this provision does not oblige the Trial Chamber to make such a recharacterization of the charges. "The wording of Rule 55 states that the Trial Chamber may change the legal characterisation of the facts. Thus, it is a right, not an obligation, for judges to

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<sup>24</sup> *Ibid.*

<sup>25</sup> *Regulations of the Court*, ICC-BD/01-02-07, ICC, 18 December 2007, p. 34. [URL](#).

<sup>26</sup> *Ibid.*

change the characterisation of the facts.”<sup>27</sup> “Such a recharacterization is permitted only if it does not go beyond the facts and circumstances set out in the indictment as it was drafted at the stage of its approval. Another important condition for such a recharacterisation is to provide the parties with an opportunity to put forward their arguments and to give the defence sufficient time to raise its objections. As an example, we can refer to the Katanga and Bemba cases, in which the Trial Chamber informed the parties at a certain stage of the proceedings that it was entitled to “change the legal characterisation” of the facts against the accused by reference to Regulation 55.”<sup>28</sup> Due to the non-ratification of the Rome Statute, Ukrainian courts cannot directly refer to these provisions, but they are important for understanding the court’s ability to make a legal qualification of the situation.

29. In order to address the issue of **changing the charge in the context of Article 438 of the CCU**, it is necessary to systematically analyse Article 337 of the CPC in relation to Article 6 of the European Convention on Human Rights (**ECHR**), in particular, the aspect of the right to be informed promptly and in detail, in a language that the accused person understands, of the nature and reasons for the charges against him and the right to have the time and facilities necessary to prepare his defence.
30. Article 337 of the CPC provides for a condition for the court to change the charge: “In order to make a fair judgement and protect human rights and fundamental freedoms, the court has the right to go beyond the charges stated in the indictment only in terms of changing the legal qualification of the criminal offence, if this improves the situation of the person subject to criminal proceedings”. However, as noted above, firstly, this particular provision does not contain a clause found in another article of the CPC (Article 420) that indicates the possibility of reducing the scope of the charge. Secondly, although not explicitly stated in the text, there is a restriction not only on the deterioration of the accused’s position in terms of qualifications but also on the impossibility of changing the charge to one that differs significantly from the previous one in terms of actual circumstances. Such a change would be contrary to the principle of ensuring the right to defence and the conventional right to a fair trial, but there is a problem that the determination of such a difference has no formal criteria and is evaluative.

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<sup>27</sup> Nediilko, B. (2021). *Formation of International Criminal Procedure Law in the Practice of the International Criminal Court*. Educational and Research Institute of International Relations, p. 164, [URL](#).

<sup>28</sup> *Ibid.*, p. 168

31. In case of specification of the description of the committed action or inaction **within one of the forms of the objective element** under part 1 of Article 438 of the CCU, namely:
- a) cruel treatment of prisoners of war or civilians,
  - b) expulsion of civilians for forced labour,
  - c) looting of national property in the occupied territory,
  - d) use of means of warfare prohibited by international law,
  - e) other violations of the laws and customs of war provided for in international treaties ratified by the Verkhovna Rada of Ukraine
32. such action of the court should not be considered a change in legal qualification and is not even a change in the wording of the charge, since the form of the objective element remains the same. However, even in this case, the court's verdict cannot worsen the position of the accused if the charges do not differ significantly in factual circumstances. This may be the case, in particular, but not exclusively, for the following crimes specified in the Rome Statute: torture, inhuman treatment, biological experiments, and for the description in the sentence of the use of means of warfare prohibited by international law. In such a case, if the charge does not differ significantly in factual circumstances, the clarification of the description of the formulation of the charge will not contradict the CPC. At the same time, we believe that the change from cruel treatment of prisoners of war to cruel treatment of civilians is significantly different in factual circumstances, as it involves different protected groups and different obligations in regard to treatment.
33. In case of clarification of the description of the committed act or omission and **change of the forms of the objective element** under part 1 of Article 438 of the CCU, listed in the previous paragraph, the following should be taken into account. Since in both cases the act is qualified under part 1 of Article 438 of the CCU, there will be no change in the legal qualification. At the same time, however, the wording of the charge changes within the same qualification. Thus, given the immutability of the legal qualification, there will be no deterioration in the position of the accused, but the charge may differ significantly in factual circumstances, which will violate the right to defence. Therefore, it seems that it is not possible to change the description of the charge, for example, from cruel treatment of prisoners of war or civilians to looting of national property in the occupied territory or use of means of warfare prohibited by international law, given that the specific manifestations of the objective element differ significantly in factual circumstances.
34. However, taking into account the actual circumstances, the following clarifications are possible: from cruel treatment of prisoners of war or civilians to expulsion of civilians for forced labour; from cruel treatment of prisoners of war or civilians to other violations of the laws and customs of war provided for

in international treaties ratified by the Verkhovna Rada of Ukraine; from expulsion of civilians for forced labour to other violations of the laws and customs of war provided for in international treaties ratified by the Verkhovna Rada of Ukraine; from the use of means of warfare prohibited by international law to other violations of the laws and customs of war provided for in international treaties ratified by the Verkhovna Rada of Ukraine; from looting of national property in the occupied territory to other violations of the laws and customs of war provided for in international treaties ratified by the Verkhovna Rada of Ukraine.

35. In particular, as M. Khavroniuk states, "In terms of qualification, the 'looting of national property in the occupied territory' should be understood as a large-scale or systematic commission of acts of seizure of other people's property that constitute serious violations of IHL, as provided for by the Geneva Conventions for the Protection of War Victims of 1949, the Hague Regulations concerning the Laws and Customs of War on Land, approved by the IV Convention concerning the Laws and Customs of War on Land of 18.10.1907, or the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954. The question of the large-scale and systematic nature of acts of property seizure should be decided by the court, taking into account all the circumstances of the case: the number of acts of property seizure, their interconnectedness, the existence of a joint plan with other persons, the value of the property and its nature. Acts of seizure of another's property that do not meet the criteria of large-scale and systematic nature, but at the same time reach the level of a serious violation of IHL, may be qualified as other violations of the laws and customs of war provided for by international treaties ratified by the Verkhovna Rada of Ukraine."<sup>29</sup>
36. **Changing the charge from part 1 to part 2 of Article 438 of the CCU** would contradict Article 337 of the CCU, so such a clarification of the charge by the court is impossible, even within the same article.
37. **Changing the charge from Art. 438 of the CCU to an "ordinary" act.** In the context of distinguishing from "ordinary" offences, it is important to note that if an act is covered by Article 438 of the CCU, it should not be qualified as a "general criminal" ("ordinary") or a military crime (*i.e.* related to military service, not participation in an armed conflict). The opposite approach may create preconditions for impunity for perpetrators of serious violations of international humanitarian law: 1) due to the impossibility of exercising jurisdiction over such

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<sup>29</sup> Khavroniuk, M. (2022). *Criminal liability for violation of the laws and customs of war: twenty questions and answers*. Centre of Policy and Legal Reform, [URL](#).

acts on the basis of the universal jurisdiction principle (Article 8 of the CCU), or 2) due to the expiration of the statute of limitations (Article 49 of the CCU), or 3) due to the fact that some “general” criminal offences are punished much less severely than the corresponding war crimes or crimes against humanity, or 4) due to the possibility of amnesty, etc.<sup>30</sup> From these perspectives, a change in the charge would indicate an improvement in the person’s situation. However, there are situations where “ordinary” acts are punished more severely than war crimes under Article 438 of the CCU (sanctioned by imprisonment for a term of eight to twelve years). For example, rape that caused grave consequences is punishable by imprisonment for a term of ten to fifteen years. Accordingly, in such a situation, the court’s change of charges would worsen the situation of the accused and would contravene Article 337 of the CPC.

38. Based on the provisions of Article 124 of the Constitution of Ukraine and Articles 8, 9, 22, 30, 370, and 374 of the CPC, the court is solely responsible for the quality of the court decision, namely for the description of the charges, arguments regarding the proof or disproof of circumstances, admissibility or inadmissibility of evidence. This is fully consistent with the ECHR’s case law on the reasonableness of court decisions. In particular, in its judgement in *Seriavin v. Ukraine* (Application no. 4909/04), the ECHR reiterated that, according to its established case law, which reflects the principle of the proper administration of justice, decisions of courts and other dispute resolution bodies must duly state the grounds on which they are based. Although Article 6(1) ECHR requires courts to give reasons for their decisions, it cannot be interpreted as requiring a detailed response to each argument. The extent to which the court must fulfil the obligation to give reasons may vary depending on the nature of the judgement (see the judgement in *Ruiz Torija v. Spain*).<sup>31</sup> Although the national court has a certain margin of appreciation in choosing arguments in a particular case and accepting evidence to support the parties’ positions, the authority is obliged to justify its actions by providing reasons for its decisions (see the judgement in *Suominen v. Finland*).<sup>32</sup> Another purpose of a reasoned decision is to demonstrate to the parties that they have been heard. In addition, a reasoned decision gives a party the opportunity to appeal against it and have it reviewed by a higher court. Only if a reasoned decision is issued, public control over the administration of justice can be ensured (see the judgement in *Hirvisaari v. Finland*).<sup>33</sup>

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<sup>30</sup> *Ibid.*

<sup>31</sup> *Case of Ruiz Torija v. Spain*, No. 18390/91, ECtHR, 9 December 1994, para. 29. [URL](#).

<sup>32</sup> *Case of Suominen v. Finland*, No. 37801/971, ECtHR, July 2003, para. 36. [URL](#).

<sup>33</sup> *Case of Hirvisaari v. Finland*, No. 49684/99, ECtHR, 27 September 2001, para. 30. [URL](#).

39. Thus, it is the courts that are responsible for the proper presentation of the charges under Article 438 of the CCU, taking into account that it is a war crime and that the provisions of international humanitarian and criminal law are taken into account, regardless of the way the prosecutor chooses to structure the indictment and describe the charges.
40. Taking into account the provisions of international humanitarian and international criminal law and the practice of the ICC and international tribunals, the verdict should contain arguments (answers) to the following questions:
- What kind of crime did the person commit?
  - Why does the Ukrainian court consider this crime to be criminalised under Article 438 of the CCU?
  - Did the accused have the opportunity to foresee that his or her actions were criminal?
  - What are the elements of the offence of which the person is accused (corpus delicti)?
  - Have all elements of the objective elements been proven, and which ones?
  - How does the court define the key concepts that are important for determining the objective element?
  - Have all elements of the mens rea been proven, and which ones?
  - What form of intent is considered by the court to be sufficient for the commission of the offence?<sup>34</sup>
41. Taking into account the approaches to structuring court decisions at the level of the Supreme Court,<sup>35</sup> the structuring of the verdict may include an introduction to the court decision,<sup>36</sup> where these questions may be formulated. They are answered throughout the judgement. Brief conclusions may be formulated in such a part of the judgement as the summary.<sup>37</sup>

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<sup>34</sup> The questions were formulated by D. Koval

<sup>35</sup> *How to write a court decision: new approaches of the Supreme Court*, (2021). Supreme Court, [URL](#); Mishchenko I., (2021) *New standards of judicial decision: self-improvement of judges*. Supreme Court, [URL](#).

<sup>36</sup> Example: Resolution of the Grand Chamber of the Supreme Court, No. 822/1309/17, 10 February 2021, [URL](#).

<sup>37</sup> Example: Ruling of the Criminal Court of Cassation, No. 753/13113/18, 17 January 2023, [URL](#).