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The Conviction-Stage Threshold in War-Crimes Adjudication: Evidentiary Adaptation and Its Limits

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The Conviction-Stage Threshold in War-Crimes Adjudication: Evidentiary Adaptation and Its Limits

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This article examines whether evidentiary hardship in war-crimes adjudication may justify adaptation in the route of proof without lowering the conviction-stage threshold. The purpose of the article is to identify the doctrinal boundary between lawful evidentiary adaptation and impermissible dilution of the conviction-stage threshold. The object of the research is the doctrinal structure of conviction-stage proof in war-crimes adjudication under conditions of evidentiary complexity. The article distinguishes the standard of proof from adjacent evidentiary categories, including admissibility, reliability, sufficiency of evidence, and burden of proof, and argues that its function is to fix the level of justification required before criminal conviction may lawfully follow. On that basis, it develops a three-part doctrinal test built around threshold stability, inferential discipline, and fair-trial control. The framework is then tested against Ukrainian war-crimes adjudication and a limited German comparator. The analysis shows that atrocity-related complexity may justify adaptation in the route of proof, including documentary, digital, contextual, testimonial, and mixed forms of proof, but cannot justify any reduction of the conviction-stage threshold. The article concludes that adaptation in route is lawful, whereas dilution in threshold is not.
Keywords: standard of proof, presumption of innocence, inferential discipline, fair-trial guarantees, international criminal law, evidentiary complexity.

Apkaltinamojo nuosprendžio slenkstis nagrinėjant karo nusikaltimus: įrodinėjimo metodo pritaikymas ir jo ribos

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Straipsnyje nagrinėjama, ar karo nusikaltimų bylose kylantys įrodinėjimo sunkumai gali pateisinti įrodinėjimo būdo pritaikymą nemažinant apkaltinamajam nuosprendžiui priimti taikomos įrodinėjimo kartelės. Straipsnio tikslas – tiksliai apibrėžti doktrininę ribą tarp teisės įrodinėjimo taikymo ir neleistino apkaltinamojo nuosprendžio slenksčio susilpninimo. Tyrimo objektas – apkaltinamojo nuosprendžio priėmimo stadijoje taikomo įrodinėjimo doktrininė struktūra. Analizė grindžiama teiginiu, kad tarptautinė baudžiamoji teisė gali prisitaikyti prie ypatingų karo nusikaltimų įrodinėjimo sąlygų keisdama įrodinėjimo būdą, tačiau negali mažinti apkaltinamajam nuosprendžiui taikomos įrodinėjimo kartelės. Straipsnyje

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įrodinėjimo standartas atskiriamas nuo giminingų įrodinėjimo kategorijų – įrodymų leistinumo, patikimumo, pakankamumo ir įrodinėjimo naštos. Teigiama, kad leistinas įrodinėjimo standarto pritaikymas galimas tik tada, kai vienu metu laikomasi trijų kumuliatyvių sąlygų: išlaikomas apkaltinamajam nuosprendžiui taikomas įrodinėjimo standartas, paisoma inferencinės disciplinos ir užtikrinamos teisės į teisingą bylos nagrinėjimą garantijos. Šios sąlygos leidžia atskirti teisėtą prisitaikymą prie įrodinėjimo sunkumų nuo atvejų, kai sudėtinga įrodinėjimo situacija faktiškai panaudojama apkaltinamojo nuosprendžio įrodinėjimo kartelei sumažinti. Straipsnyje taip pat parodoma, kad skirtingos įrodinėjimo formos – dokumentiniai, skaitmeniniai, kontekstiniai, liudytojų parodymų ir mišrūs įrodymai – gali būti naudojamos kompensuojant karo nusikaltimų byloms būdingus įrodinėjimo sunkumus, tačiau jos negali pateisinti žemesnio įrodinėjimo standarto taikymo. Siūlomas doktrininis modelis tikrinamas remiantis Ukrainos karo nusikaltimų bylų praktika ir ribota Vokietijos lyginamąja medžiaga. Daroma išvada, kad įrodinėjimo būdo pritaikymas yra teisėtas, tačiau mažinti apkaltinamajam nuosprendžiui taikomą įrodinėjimo kartelę – ne.
Pagrindiniai žodžiai: karo nusikaltimai, įrodinėjimo standartas, apkaltinamojo nuosprendžio slenkstis, išvadų darymo disciplina, teisė į teisingą bylos nagrinėjimą.

Introduction

War-crimes adjudication unfolds under conditions of acute evidentiary stress. Crime scenes may be inaccessible or altered, witnesses dispersed, documentary traces fragmentary, and proof may depend on mixed testimonial, forensic, digital, and contextual material assembled under conditions of conflict[1]. Such conditions create pressure to treat the standard of proof as responsive to evidentiary hardship. That move is doctrinally unsound within the logic of criminal proof[2]. Atrocity-related complexity may justify adaptation in the route of proof, but it cannot justify any lowering of the conviction-stage threshold consistent with the presumption of innocence and related fair-trial guarantees[3].

The central analytical problem is where the doctrinal boundary lies between lawful adaptation of the route of proof and impermissible dilution of the conviction-stage threshold. The problem has particular practical force in war-crimes proceedings because courts are often required to assess heterogeneous evidentiary records assembled under disrupted conditions, including delayed investigative access, dispersed witnesses, fragmentary documentation, and digital or open-source material of uneven quality[4].

1 FREEMAN, L., & VÁZQUEZ Llorente, R. (2021). Finding the Signal in the Noise: International Criminal Evidence and Procedure in the Digital Age. *Journal of International Criminal Justice, 19*(1), 163–188. DOI: 10.1093/jicj/mqab023; HELLWIG, K. (2022). The Potential and the Challenges of Digital Evidence in International Criminal Proceedings. *International Criminal Law Review, 22*(5–6), 965–988. DOI: 10.1163/15718123-bja10110; Office of the United Nations High Commissioner for Human Rights, & Human Rights Center, University of California, Berkeley, School of Law (2022). *Berkeley Protocol on Digital Open Source Investigations*. New York and Geneva: United Nations.

2 LAUDAN, L. (2006). *Truth, Error, and Criminal Law: An Essay in Legal Epistemology*. Cambridge: Cambridge University Press; NANCE, D. A. (2007). Allocating the Risk of Error: Its Role in the Theory of Evidence Law. *Legal Theory, 13*(2), 129–164. DOI: 10.1017/S135232520707005X; NANCE, D. A. (2016). *The Burdens of Proof: Discriminatory Power, Weight of Evidence, and Tenacity of Belief*. Cambridge: Cambridge University Press.

3 ROBERTS, P. (2021). Presumptuous or Pluralistic Presumptions of Innocence? Methodological Diagnosis towards Conceptual Reinvigoration. *Synthese, 198*(9), 8901–8932. DOI: 10.1007/s11229-020-02606-2; TADROS, V., & TIERNEY, S. (2004). The Presumption of Innocence and the Human Rights Act. *Modern Law Review, 67*(3), 402–434. DOI: 10.1111/j.1468-2230.2004.00493.x.

4 AKSAMITOWSKA, K. (2021). Digital Evidence in Domestic Core International Crimes Prosecutions: Lessons Learned from Germany, Sweden, Finland and the Netherlands. *Journal of International Criminal Justice, 19*(1), 189–211. DOI: 10.1093/jicj/mqab035; SHEPITKO, V., & SHEPITKO, M. (2023). Fixation of Evidentiary Information on the War Crimes, Committed in Ukraine. *Archives of Criminology and Forensic Sciences, 7*(1), 51–60. DOI: 10.32353/acfs.7.2023.03; SHEPITKO, V., SHEPITKO, M., & LATHYSH, K. (2024). Digital Evidence Barriers Overcoming in the Ukrainian Case: New Actors and Standards. *Revista Brasileira de Direito Processual Penal, 10*(3), e1083. DOI: 10.22197/rbdpp.v10i3.1083.

The relevant scholarship identifies the sources of evidentiary pressure but does not yet provide an integrated doctrinal account of threshold preservation under such conditions. General theories of criminal proof explain why the conviction-stage threshold matters[5], work on the presumption of innocence and fair-trial guarantees clarifies its guarantee-oriented function[6], scholarship on international criminal evidence shows why atrocity litigation requires broader evidentiary routes[7], and Ukrainian writing has begun to address wartime evidence collection and the beyond-reasonable-doubt standard[8]. What remains insufficiently theorised are the doctrinal criteria for distinguishing permissible adaptation from impermissible dilution.

Against that background, this article examines under what conditions evidentiary adaptation in war-crimes adjudication remains compatible with the presumption of innocence, the prosecution burden, and the fair-trial safeguards that structure criminal adjudication. It does so by distinguishing the standard of proof from adjacent evidentiary categories, while identifying why atrocity-related evidentiary stress encourages category confusion, reconstructing the doctrinal criteria for distinguishing lawful adaptation from impermissible dilution, and testing that framework against selected Ukrainian war-crimes decisions and a limited German comparator.

Methodologically, the article adopts a doctrinal legal approach combining conceptual analysis, case-law analysis, and systematic doctrinal synthesis. These methods are used to clarify the guarantee-oriented function of the standard of proof, reconstruct its doctrinal limits under conditions of evidentiary complexity, and test the stability of that framework across selected judicial practice. The comparative element remains limited and strictly functional: it serves only to test the stability of the framework across procedural settings, and not to propose transplantation.

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5 LAUDAN, L. (2006). *Truth, Error, and Criminal Law: An Essay in Legal Epistemology*. Cambridge: Cambridge University Press; NANCE, D. A. (2007). Allocating the Risk of Error: Its Role in the Theory of Evidence Law. *Legal Theory, 13*(2), 129–164. DOI: 10.1017/S135232520707005X; NANCE, D. A. (2016). *The Burdens of Proof: Discriminatory Power, Weight of Evidence, and Tenacity of Belief*. Cambridge: Cambridge University Press.

6 ROBERTS, P. (2021). Presumptuous or Pluralistic Presumptions of Innocence? Methodological Diagnosis towards Conceptual Reinvigoration. *Synthese, 198*(9), 8901–8932. DOI: 10.1007/s11229-020-02606-2; TADROS, V., & TIERNEY, S. (2004). The Presumption of Innocence and the Human Rights Act. *Modern Law Review, 67*(3), 402–434. DOI: 10.1111/j.1468-2230.2004.00493.x.

7 FREEMAN, L., & VÁZQUEZ Llorente, R. (2021). Finding the Signal in the Noise: International Criminal Evidence and Procedure in the Digital Age. *Journal of International Criminal Justice, 19*(1), 163–188. DOI: 10.1093/jicj/mqab023; HELLWIG, K. (2022). The Potential and the Challenges of Digital Evidence in International Criminal Proceedings. *International Criminal Law Review, 22*(5–6), 965–988. DOI: 10.1163/15718123-bja10110; GILLETT, M., & FAN, W. (2023). Expert Evidence and Digital Open Source Information: Bringing Online Evidence to the Courtroom. *Journal of International Criminal Justice, 21*(4), 661–693. DOI: 10.1093/jicj/mqad050; AKSAMITOWSKA, K. (2021). Digital Evidence in Domestic Core International Crimes Prosecutions: Lessons Learned from Germany, Sweden, Finland and the Netherlands. *Journal of International Criminal Justice, 19*(1), 189–211. DOI: 10.1093/jicj/mqab035.

8 SHEPITKO, V., & SHEPITKO, M. (2023). Fixation of Evidentiary Information on the War Crimes, Committed in Ukraine. *Archives of Criminology and Forensic Sciences, 7*(1), 51–60. DOI: 10.32353/acfs.7.2023.03; SHEPITKO, V., SHEPITKO, M., & LATHYSH, K. (2024). Digital Evidence Barriers Overcoming in the Ukrainian Case: New Actors and Standards. *Revista Brasileira de Direito Processual Penal, 10*(3), e1083. DOI: 10.22197/rbdpp.v10i3.1083; CHYZH, S. A., & BOLVINOV, S. P. (2024). Standart dokazuvannia "poza rozumnym sumnivom" u kryminalnomu provadzhenni. *Visnyk Kryminolohichnoi Asotsiatsii Ukrainy, 32*(2), 983–993. DOI: 10.32631/vca.2024.2.77; CHYZH, S. A. (2025). Do pytan otsinky dokaziv u kryminalnomu provadzhenni v umovakh voiennoho stanu. *Visnyk Kryminolohichnoi Asotsiatsii Ukrainy, 34*(1), 883–892. DOI: 10.32631/vca.2025.1.74; KRET, H. R. (2020). *Mizhnarodni standarty dokazuvannia u kryminalnomu protsesi Ukrainy: teoretyko-pravovi ta praktychni osnovy*. Doctor of Law dissertation. Odesa: National University "Odesa Law Academy"; SNIHUR, M. (2024). Standart dovedennia "poza rozumnym sumnivom" u kryminalnomu provadzhenni: analiz natsionalnoho ta mizhnarodnoho dosvidu. *Naukovyi visnyk Uzhhorodskoho natsionalnoho universytetu. Seriia: Pravo, 83*(3), 287–291. DOI: 10.24144/2307-3322.2024.83.3.44.

The article contributes to the science of law by formulating a more precise doctrinal account of threshold preservation under conditions of evidentiary stress in war-crimes adjudication. It argues that atrocity-related complexity may alter the route of proof, but not the conviction-stage threshold, and, on that basis, develops a three-part framework built around threshold stability, inferential discipline, and fair-trial control. Rather than redescribing evidentiary difficulty, the analysis clarifies the doctrinal criteria by which lawful evidentiary adaptation is distinguished from impermissible lowering of the conviction-stage threshold.

The article is structured in three parts. Section 1 distinguishes the standard of proof from adjacent evidentiary categories and explains its guarantee-oriented function within criminal adjudication. Section 2 reconstructs the doctrinal test separating lawful adaptation from impermissible dilution. Section 3 tests that framework against Ukrainian war-crimes adjudication and a limited German comparator. The analysis shows that war-crimes cases may absorb evidentiary complexity through differentiated routes of proof, but not through any doctrinal downgrade of the conviction-stage threshold.

1. The Standard of Proof as a Stable Conviction-Stage Threshold

The standard of proof must be distinguished at the outset from adjacent evidentiary categories with which it is often analytically conflated. Admissibility governs whether material may enter the evidentiary record; sufficiency asks whether the evidentiary record, taken as a whole, is capable of supporting a legal conclusion; and the burden of proof allocates responsibility for establishing disputed facts[9]. Reliability, by contrast, concerns the trustworthiness or probative force of particular items of evidence. The standard of proof performs a different function. As Laudan and Nance show in different ways, it is best understood as a device for allocating the risk of error in criminal adjudication rather than as an interchangeable evidentiary category[10]. Properly understood, it defines the level of justificatory confidence that must be reached before the state may lawfully convict. Once these categories are blurred, evidentiary weakness can be recoded as conceptual flexibility, and the conviction-stage threshold can be diluted without being openly acknowledged.

The standard of proof is therefore a guarantee-oriented doctrine. Its function is to allocate the risk of error in criminal adjudication in favour of the accused. That guarantee-oriented function explains why the presumption of innocence, burden allocation, and the standard of proof must be read together rather than in isolation. Roberts shows that the presumption of innocence cannot be reduced to a merely symbolic declaration detached from evidentiary structure, while Tadros and Tierney connect that guarantee more directly to burden allocation and the fair-trial implications of criminal proof[11]. The prosecution bears the burden of proving guilt, and unresolved doubt cannot be converted into an obligation of explanation on the part of the defence. The same logic is reflected normatively in Article

[9] NANCE, D. A. (2016). *The Burdens of Proof: Discriminatory Power, Weight of Evidence, and Tenacity of Belief*. Cambridge: Cambridge University Press, p. 3, 11.

[10] LAUDAN, L. (2006). *Truth, Error, and Criminal Law: An Essay in Legal Epistemology*. Cambridge: Cambridge University Press, pp. 20–23; NANCE, D. A. (2007). Allocating the Risk of Error: Its Role in the Theory of Evidence Law. *Legal Theory, 13*(2), 129–164. DOI: 10.1017/S135232520707005X; NANCE, D. A. (2016). *The Burdens of Proof: Discriminatory Power, Weight of Evidence, and Tenacity of Belief*. Cambridge: Cambridge University Press, pp. 181, 214–215.

[11] ROBERTS, P. (2021). Presumptuous or Pluralistic Presumptions of Innocence? Methodological Diagnosis towards Conceptual Reinvigoration. *Synthese, 198*(9), 8901–8932. DOI: 10.1007/s11229-020-02606-2; TADROS, V., & TIERNEY, S. (2004). The Presumption of Innocence and the Human Rights Act. *Modern Law Review, 67*(3), 402–434. DOI: 10.1111/j.1468-2230.2004.00493.x.

14(2) of the International Covenant on Civil and Political Rights, Article 6(1)–(2) of the European Convention on Human Rights, and Article 66(1)–(3) of the Rome Statute, which link conviction to the presumption of innocence, fair-trial guarantees, and proof beyond reasonable doubt[12].

The stability of the conviction-stage threshold follows directly from that guarantee structure. Hard cases may expose the limits of available evidence, but they do not alter the conviction-stage threshold that criminal conviction must satisfy. To allow that threshold to recede whenever proof is difficult would be to convert evidentiary hardship into a reason for redistributing the risk of error against the accused. Ukrainian doctrinal writing broadly supports the same position. Kret treats standards of proof as part of the wider functional structure of criminal proof, while Snihur and more recent Ukrainian writing connect proof beyond reasonable doubt to the presumption of innocence and to the inadmissibility of conviction based on assumptions rather than sufficiently tested proof[13]. In that respect, the Ukrainian doctrine converges with the broader European and international understanding of criminal proof: evidentiary difficulty may complicate proof, but it cannot justify a redistribution of the risk of error against the accused.

International criminal law confirms this distinction rather than displacing it. The Rome Statute does not treat atrocity-related complexity as a reason to weaken the standard required for conviction. Instead, it differentiates between procedural stages for different institutional purposes: Article 61 governs confirmation of charges and performs a filtering function, whereas Article 66 governs conviction and ties criminal responsibility to proof beyond reasonable doubt[14]. ICC confirmation-stage practice confirms that the confirmation stage operates with its own evidentiary threshold, while conviction remains governed by the beyond-reasonable-doubt standard[15]. Differentiation between the stages therefore does not authorise any complexity-based reduction of the conviction-stage threshold at the stage of guilt adjudication.

This point becomes especially important in war-crimes proceedings, where evidentiary stress creates pressure to conflate categories that must remain distinct. Destroyed or inaccessible locations, delayed investigative access, displaced victims and witnesses, fragmentary documentation, and digital or open-source material of uneven quality create a distinctive evidentiary environment for war-crimes adjudication[16]. Such conditions may require broader evidentiary collection strategies, more complex

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[12] International Covenant on Civil and Political Rights (1966). 999 UNTS 171, art. 14(2); Convention for the Protection of Human Rights and Fundamental Freedoms (1950). ETS No. 5, 213 UNTS 221, art. 6(1)–(2); Rome Statute of the International Criminal Court (1998). 2187 UNTS 90, art. 66(1)–(3).

[13] KRET, H. R. (2020). *Mizhnarodni standarty dokazuvannia u kryminalnomu protsesi Ukrainy: teoretyko-pravovi ta praktychni osnovy*. Doctor of Law dissertation. Odesa: National University "Odesa Law Academy", pp. 24–25, 148; SNIHUR, M. (2024). Standart dovedennia "poza rozumnym sumnivom" u kryminalnomu provadzhenni: analiz natsionalnoho ta mizhnarodnoho dosvidu. *Naukovyi visnyk Uzhhorodskoho natsionalnoho universytetu. Seriia: Pravo, 83*(3). DOI: 10.24144/2307-3322.2024.83.3.44, p. 288; CHYZH, S. A., & BOLVINOV, S. P. (2024). Standart dokazuvannia "poza rozumnym sumnivom" u kryminalnomu provadzhenni. *Visnyk Kryminolohichnoi Asotsiatsii Ukrainy, 32*(2). DOI: 10.32631/vca.2024.2.77, pp. 984, 993.

[14] *Rome Statute of the International Criminal Court* (1998). 2187 UNTS 90, arts 61, 66.

[15] *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges [ICC], No. ICC-01/04-01/06-803-tEN, Pre-Trial Chamber I, [29.1.2007], para. 37.

[16] FREEMAN, L., & VÁZQUEZ Llorente, R. (2021). Finding the Signal in the Noise: International Criminal Evidence and Procedure in the Digital Age. *Journal of International Criminal Justice, 19*(1), DOI: 10.1093/jicj/mqab023, pp. 163–164, 167; HELLWIG, K. (2022). The Potential and the Challenges of Digital Evidence in International Criminal Proceedings. *International Criminal Law Review*, 22(5–6), DOI: 10.1163/15718123-bja10110, pp. 966–967, 971; Office of the United Nations High Commissioner for Human Rights, & Human Rights Center, University of California, Berkeley, School of Law (2022). *Berkeley Protocol on Digital Open Source Investigations*. New York and Geneva: United Nations, pp. 5–7; SHEPITKO, V., & SHEPITKO, M. (2023). Fixation of Evidentiary Information on the War Crimes,

authentication practices, and more demanding reconstruction of chronology, linkage, and attribution[17]. What they justify, however, is adaptation in the route of proof, and not relaxation of the conviction-stage threshold. Admissibility, cumulative sufficiency, or contextual coherence cannot be permitted to operate as practical substitutes for the conviction-stage threshold. The standard of proof in war-crimes adjudication must therefore be treated as a stable conviction-stage threshold. The next doctrinal task is to identify the criteria for distinguishing lawful adaptation from impermissible dilution.

2. The Doctrinal Test: Threshold Stability, Inferential Discipline, and Fair-Trial Control

The distinction between lawful evidentiary adaptation and impermissible dilution of the standard of proof becomes operational only when the relevant doctrinal controls are identified with precision. In war-crimes adjudication, atrocity-related complexity may alter the route of proof, but it cannot alter the conviction-stage threshold[18]. The doctrinal test developed here is built around three cumulative controls: threshold stability, inferential discipline, and fair-trial control.

The first element of the test is threshold stability. More precisely, it is the prohibition of threshold migration into the adjudication of guilt. The Rome Statute preserves proof beyond reasonable doubt at the merits stage while allowing different thresholds to operate at earlier procedural stages for different institutional purposes: Article 61 governs confirmation of charges and performs a filtering function, whereas Article 66 governs conviction and ties criminal responsibility to proof beyond reasonable doubt[19]. ICC confirmation-stage practice confirms that the confirmation stage operates with its own evidentiary threshold, while conviction remains governed by the beyond-reasonable-doubt standard[20]. Procedural differentiation between stages therefore does not authorise any complexity-based reduction of the conviction-stage threshold in the adjudication of guilt. Complexity may affect the route by which facts are proved; it does not justify any relaxation of the conviction-stage threshold.

Committed in Ukraine. *Archives of Criminology and Forensic Sciences*, 7(1). DOI: 10.32353/acfs.7.2023.03, p. 51–52; SHEPITKO, V., SHEPITKO, M., & LATHYSH, K. (2024). Digital Evidence Barriers Overcoming in the Ukrainian Case: New Actors and Standards. *Revista Brasileira de Direito Processual Penal, 10*(3), e1083. DOI: 10.22197/rbdpp.v10i3.1083, p. 24–25.

[17] HELLWIG, K. (2022). The Potential and the Challenges of Digital Evidence in International Criminal Proceedings. *International Criminal Law Review*, 22(5–6), DOI: 10.1163/15718123-bja10110, p. 978, 983; AKSAMITOWSKA, K. (2021). Digital Evidence in Domestic Core International Crimes Prosecutions: Lessons Learned from Germany, Sweden, Finland and the Netherlands. *Journal of International Criminal Justice*, 19(1). DOI: 10.1093/jicj/mqab035, p. 191–192, 210; Office of the United Nations High Commissioner for Human Rights, & Human Rights Center, University of California, Berkeley, School of Law (2022). *Berkeley Protocol on Digital Open Source Investigations*. New York and Geneva: United Nations, p. 56, 58, 64; FREEMAN, L., & VÁZQUEZ Llorente, R. (2021). Finding the Signal in the Noise: International Criminal Evidence and Procedure in the Digital Age. *Journal of International Criminal Justice*, 19(1). DOI: 10.1093/jicj/mqab023, p. 167; SHEPITKO, V., SHEPITKO, M., & LATHYSH, K. (2024). Digital Evidence Barriers Overcoming in the Ukrainian Case: New Actors and Standards. *Revista Brasileira de Direito Processual Penal*, 10(3), e1083. DOI: 10.22197/rbdpp.v10i3.1083, p. 28–29.

[18] LAUDAN, L. (2006). *Truth, Error, and Criminal Law: An Essay in Legal Epistemology*. Cambridge: Cambridge University Press, pp. 68–69, 82–83; NANCE, D. A. (2007). Allocating the Risk of Error: Its Role in the Theory of Evidence Law. *Legal Theory, 13*(2), DOI: 10.1017/S135232520707005X; NANCE, D. A. (2016). *The Burdens of Proof: Discriminatory Power, Weight of Evidence, and Tenacity of Belief*. Cambridge: Cambridge University Press, pp. 17–19, 31, 178–181, 214–215.

[19] Rome Statute of the International Criminal Court (1998). 2187 UNTS 90, Articles 61, 66.

[20] *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges [ICC], No. ICC-01/04-01/06-803-tEN, Pre-Trial Chamber I, [29.1.2007], para. 37.

The second element is inferential discipline. International criminal adjudication has never required direct evidence in every case, and it has long accepted circumstantial proof in cases of mass violence and structurally complex criminality. Yet, that acceptance remains doctrinally limited. In *Vasiljević*, *Krstić*, and *Stakić*, the appellate jurisprudence made clear that guilt may be inferred from circumstantial evidence only if it remains the only reasonable inference on the evidentiary record[21]. That formula marks the point at which inferential reasoning remains compatible with conviction-stage proof. Once the standard slips from the only reasonable inference to a merely plausible, more persuasive, or contextually attractive inference, the route of proof ceases to be an adaptation in method and becomes a dilution of the conviction-stage threshold.

The same point clarifies the proper significance of recent scholarship on digital and open-source evidence. That literature shows why atrocity litigation generates pressure for broader collection practices, expert mediation, authentication work, and cumulative assessment of heterogeneous records[22]. What follows doctrinally, however, is adaptation in the route of proof, and not relaxation of the conviction-stage threshold. Digital or open-source material may widen the available route to proof, but it does not reduce the justificatory confidence required for lawful conviction[23].

The third element of the test is fair-trial control. Even where threshold stability and inferential discipline are formally preserved, evidentiary adaptation may still become unlawful if it weakens the procedural structure that protects the accused against conviction on an insufficiently supported and insufficiently tested case. At the normative level, that structure rests on Article 14 of the ICCPR and Article 6 of the ECHR[24]. The relevant case law makes the doctrinal implications clear. *Barberà, Messegué and Jabardo*, *G. v. the United Kingdom*, and *Telfner* show that the presumption of innocence and the burden of proof remain with the prosecution, and that guilt cannot be established through in-

[21] *Prosecutor v. Vasiljević*, Appeals Judgement [ICTY], No. IT-98-32-A, [25.2.2004], para. 120; *Prosecutor v. Krstić*, Appeals Judgement [ICTY], No. IT-98-33-A, [19.4.2004], para. 41; *Prosecutor v. Stakić*, Appeals Judgement [ICTY], No. IT-97-24-A, [22.3.2006], para. 420.

[22] FREEMAN, L., & VÁZQUEZ Llorente, R. (2021). Finding the Signal in the Noise: International Criminal Evidence and Procedure in the Digital Age. *Journal of International Criminal Justice, 19*(1). DOI: 10.1093/jicj/mqab023, pp. 163–167; HELLWIG, K. (2022). The Potential and the Challenges of Digital Evidence in International Criminal Proceedings. *International Criminal Law Review, 22*(5–6). DOI: 10.1163/15718123-bja10110, p. 966–972; GILLETT, M., & FAN, W. (2023). Expert Evidence and Digital Open Source Information: Bringing Online Evidence to the Courtroom. *Journal of International Criminal Justice, 21*(4). DOI: 10.1093/jicj/mqad050, pp. 661–665, 692–693; AKSAMITOWSKA, K. (2021). Digital Evidence in Domestic Core International Crimes Prosecutions: Lessons Learned from Germany, Sweden, Finland and the Netherlands. *Journal of International Criminal Justice, 19*(1). DOI: 10.1093/jicj/mqab035, pp. 191–197; Office of the United Nations High Commissioner for Human Rights, & Human Rights Center, University of California, Berkeley, School of Law (2022). *Berkeley Protocol on Digital Open Source Investigations*. New York and Geneva: United Nations, pp. 5–7, 56, 58, 64; SHEPITKO, V., & SHEPITKO, M. (2023). Fixation of Evidentiary Information on the War Crimes, Committed in Ukraine. *Archives of Criminology and Forensic Sciences, 7*(1), 51–60. DOI: 10.32353/acfs.7.2023.03, pp. 51–52; SHEPITKO, V., SHEPITKO, M., & LATHYSH, K. (2024). Digital Evidence Barriers Overcoming in the Ukrainian Case: New Actors and Standards. *Revista Brasileira de Direito Processual Penal, 10*(3), e1083. DOI: 10.22197/rbdpp.v10i3.1083, pp. 24–25.

[23] FREEMAN, L., & VÁZQUEZ Llorente, R. (2021). Finding the Signal in the Noise: International Criminal Evidence and Procedure in the Digital Age. *Journal of International Criminal Justice, 19*(1). DOI: 10.1093/jicj/mqab023, p. 167; HELLWIG, K. (2022). The Potential and the Challenges of Digital Evidence in International Criminal Proceedings. *International Criminal Law Review, 22*(5–6). DOI: 10.1163/15718123-bja10110, pp. 978, 983; AKSAMITOWSKA, K. (2021). Digital Evidence in Domestic Core International Crimes Prosecutions: Lessons Learned from Germany, Sweden, Finland and the Netherlands. *Journal of International Criminal Justice, 19*(1). DOI: 10.1093/jicj/mqab035, p. 210.

[24] International Covenant on Civil and Political Rights (1966). 999 UNTS 171, art. 14; Convention for the Protection of Human Rights and Fundamental Freedoms (1950). ETS No. 5, 213 UNTS 221, art. 6.

ferential reasoning that effectively displaces that burden[25]. *John Murray* accepts that silence may have evidentiary relevance only within strict limits and never as a substitute for a case the prosecution has failed to prove[26]. *Salabiaku* confirms that presumptions and similar inferential devices are not prohibited as such, but must remain within reasonable limits that preserve the rights of the defence[27]. *Jasper* and *Natunen* show that evidentiary fairness also depends on disclosure and on the defence's practical ability to test the material relied on by the prosecution[28]. Read together, these authorities establish three procedural imperatives: no burden-shifting, no inferential shortcut that substitutes for proof, and no conviction on material that the defence could not meaningfully challenge.

The doctrinal boundary can be stated as follows. Impermissible dilution typically appears in four forms: migration of lower procedural thresholds into the adjudication of guilt; substitution of contextual coherence for proof of guilt; inferential slippage from the only reasonable inference to a merely plausible one; and fair-trial erosion through untested material or weakened defence challenge. Lawful adaptation, by contrast, concerns the routes by which facts are collected, authenticated, linked, and assessed. It may involve contextual reconstruction, digital or open-source material, or structurally complex evidentiary chains. But it remains lawful only so long as the conviction-stage threshold itself is preserved. The admission of open-source exhibits in *Al Hassan* illustrates procedural openness to complex evidentiary material together with judicial scrutiny of objections concerning authenticity, attribution, integrity, relevance, and probative value, though not any departure from the merits-stage requirement of proof beyond reasonable doubt[29].

The doctrinal test can be stated in three cumulative conditions. Evidentiary adaptation remains lawful only if three conditions are cumulatively met. First, any lower threshold must remain strictly confined to procedural stages outside the adjudication of guilt and may not migrate into the determination of criminal responsibility. Secondly, inferential reasoning must remain constrained by the requirement that guilt be the only reasonable inference on the evidence. Thirdly, the fair-trial structure of the proceedings must continue to protect the accused against conviction on an insufficiently supported and insufficiently tested record. International criminal law may thus adapt the route of proof, but it may not dilute the standard of proof. Section 3 tests that boundary against Ukrainian war-crimes adjudication and a limited German comparator.

3. Ukrainian War-Crimes Adjudication and the Limits of Evidentiary Adaptation

If the doctrinal framework reconstructed in Sections 1 and 2 is sound, it must remain stable under the stress-test of actual war-crimes adjudication. The relevant question is whether wartime evidentiary hardship is accommodated through lawful adaptation of the route of proof or through impermissible

[25] *Barberà, Messegué and Jabardo v. Spain* [ECHR], No. 10590/83, [6.12.1988]. ECLI:CE:ECHR:1988:1206JUD001059083, paras 67–68, 77; *G. v. the United Kingdom* [ECHR], No. 37334/08, [30.8.2011]. ECLI:CE:ECHR:2011:0830JUD003733408, paras 26, 29; *Telfner v. Austria* [ECHR], No. 33501/96, [20.3.2001]. ECLI:CE:ECHR:2001:0320JUD003350196, paras 15–18.

[26] *John Murray v. the United Kingdom* [ECHR], No. 18731/91, [8.2.1996]. ECLI:CE:ECHR:1996:0208JUD001873191, para. 47.

[27] *Salabiaku v. France* [ECHR], No. 10519/83, [7.10.1988]. ECLI:CE:ECHR:1988:1007JUD001051983, para. 28.

[28] *Jasper v. the United Kingdom* [ECHR], No. 27052/95, [16.2.2000]. ECLI:CE:ECHR:2000:0216JUD002705295, paras 51–52, 55–56; *Natunen v. Finland* [ECHR], No. 21022/04, [31.3.2009]. ECLI:CE:ECHR:2009:0331JUD002102204, paras 47–49.

[29] *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on Prosecution Application Submitting 63 Open Source Exhibits into Evidence [ICC], No. ICC-01/12-01/18-1514, Trial Chamber X, [15.6.2021], paras 5–6, 8–10, 13–18.

relaxation of the conviction-stage threshold. The practical difficulty of war-crimes litigation lies in the fixation, preservation, coordination, and evaluation of heterogeneous evidentiary material rather than in any doctrinal weakening of the standard of proof[30].

Within the Ukrainian legal order, that question arises inside the ordinary architecture of criminal adjudication rather than outside it. Liability for war crimes under Article 438 of the Criminal Code of Ukraine must still be established through the procedural guarantees of criminal process[31]. This follows, in particular, from Articles 17 and 94 of the Criminal Procedure Code of Ukraine: conviction may not be based on assumptions, doubts must be resolved in favour of the accused, and the court must evaluate each item of evidence in terms of relevance, admissibility, and reliability, and the evidentiary record as a whole in terms of sufficiency and interconnection[32]. The domestic counterpart of the test developed above is therefore clear: the conflict context cannot replace proof. In that setting, case No. 415/2182/20 performs a limited but important baseline function. The Grand Chamber of the Supreme Court clarified that the applicability of Article 438 does not depend on political formalities such as a declaration of war or prior action by the United Nations Security Council. That clarification does not weaken evidentiary demands; it separates the question whether Article 438 is legally capable of applying from the distinct question whether the prosecution has proved individual liability to the criminal standard[33].

The first evidentiary configuration is comparatively direct attribution of lethal violence. Case No. 760/5257/22 remains the clearest baseline example. Its significance lies in showing that even comparatively direct proof of the act does not exhaust the prosecution case. Conviction still depends on proof of the protected status of the victim, the nexus between the conduct and the armed conflict, and the legal characterisation of the conduct as a war crime. Direct attribution of the underlying act therefore does not dispense with proof of the elements that internationalise the offence[34].

A second configuration appears in the occupation-linked conscription cases, where the prosecution case is built less around a single act of direct violence than around a documentary, administrative, and systemic record. In case No. 753/14148/21, the Criminal Cassation Court within the Supreme Court upheld a conviction under Article 438 in a record structured around documentary material, the legal framework of occupation, and official information linked to the occupation administration. The same pattern is visible in case No. 753/23311/21, where the compulsory conscription of protected persons in occupied Crimea was proved through a cumulative record extending over time rather than through one isolated act. These cases are important because they show lawful adaptation of the route of proof. Occupation-linked structures and institutional records do not prove themselves. They become evidentially relevant only through disciplined cumulative assessment that links them to the

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[30] SHEPITKO, V., & SHEPITKO, M. (2023). Fixation of Evidentiary Information on the War Crimes, Committed in Ukraine. *Archives of Criminology and Forensic Sciences, 7*(1). DOI: 10.32353/acfs.7.2023.03, p. 51–52; SHEPITKO, V., SHEPITKO, M., & LATHYSH, K. (2024). Digital Evidence Barriers Overcoming in the Ukrainian Case: New Actors and Standards. *Revista Brasileira de Direito Processual Penal, 10*(3), e1083. DOI: 10.22197/rbdpp.v10i3.1083, pp. 24–25, 28–29; CHYZH, S. A. (2025). Do pytan otsinky dokaziv u kryminalnomu provadzhenni v umovakh voiennoho stanu. *Visnyk Kryminolohichnoi Asotsiatsii Ukrainy, 34*(1). DOI: 10.32631/vca.2025.1.74, p. 883–884; AKSAMITOWSKA, K. (2021). Digital Evidence in Domestic Core International Crimes Prosecutions: Lessons Learned from Germany, Sweden, Finland and the Netherlands. *Journal of International Criminal Justice, 19*(1). DOI: 10.1093/jicj/mqab035, pp. 191–197, 210.

[31] Kryminalnyi kodeks Ukrainy (2001). No. 2341-III, art. 438.

[32] Kryminalnyi protsesualnyi kodeks Ukrainy (2012). No. 4651-VI, arts 17, 94.

[33] Velyka Palata Verkhovnoho Sudu 28 liutoho 2024 r. postanova u spravi No. 415/2182/20.

[34] Solomianskyi raionnyi sud mista Kyieva 23 travnia 2022 r. vyrok u spravi No. 760/5257/22; Kyivskyi apeliatsiinyi sud 29 lypnia 2022 r. ukhvala u spravi No. 760/5257/22.

legal elements of the offence and to the role of the accused within the prohibited conduct. The route of proof changes; the threshold does not[35].

A third configuration is visible in special proceedings, where evidentiary adaptation must remain compatible with fair-trial control under conditions of absence and digitalised proof. Case No. 127/15500/23 shows a court working with special proceedings, notification through a procedurally structured communication framework, and a record that includes digital material, including Telegram-based communications. Case No. 939/1435/22 reinforces the same point from the perspective of appellate control: what matters is not the formal isolation of one procedural act, but whether the record as a whole shows that the accused received, or should have received, information about the proceedings in a manner compatible with the fairness of conviction. Wartime disruption does not justify a thinner record or a weaker communicative framework; it requires a more carefully controlled evidentiary and procedural route to conviction[36]. Supporting authority for the broader proposition that a mixed evidentiary route may include photo identification, investigative experiment, and indirect witness material, provided that their evaluation remains disciplined and cumulative rather than substitutive, may also be found in case No. 638/1305/24[37].

The clearest domestic control point, however, is an acquittal rather than a conviction. The judgment in case No. 490/9491/23 is especially important because it makes the conviction standard explicit in terms fully consistent with the logic of this article. The trial court stated that it is insufficient for the prosecution version merely to appear more probable than the defence version and that reasonable alternative explanations must be excluded by admissible and properly evaluated evidence before conviction may follow. The significance of that judgment lies not in factual singularity, but in its doctrinal function. It shows that incriminating associations, hostile alignment, or conflict-related proximity cannot substitute for proof of the charged mode of participation where the evidentiary chain remains incomplete. In domestic war-crimes adjudication, evidentiary pressure is therefore not compensated by lowering the threshold, but by refusing conviction where the threshold has not been met[38].

A limited comparative confirmation may be drawn from the German practice. Its function is not to import a foreign model or invoke comparative prestige, but to test the portability of the same doctrinal proposition in a different procedural setting. Section 261 of the German Code of Criminal Procedure authorises judicial evaluation of the evidentiary record according to the court's conviction formed from the entire content of the hearing; properly understood, it expresses free judicial evaluation of evidence, and not a lower standard of proof[39]. In Anwar R., the Higher Regional Court in Koblenz processed an exceptionally complex atrocity case through ordinary criminal adjudication on the basis of extensive witness testimony, documentary material, expert evidence, contextual reconstruction, and an overall judicial assessment of the record. In Taha Al-J., the Federal Court of Justice likewise dealt with atrocity-scale criminality within the ordinary criminal-process framework without suggesting that evidentiary complexity alters the threshold governing conviction. The comparative value of this

[35] Kasatsiinyi kryminalnyi sud u skladi Verkhovnoho Sudu 28 liutoho 2024 r. postanova u spravi No. 753/14148/21; Darnytskyi raionnyi sud mista Kyieva 30 sichnia 2023 r. vyrok u spravi No. 753/23311/21; Kyivskyi apeliatsiinyi sud 2 travnia 2023 r. ukhvala u spravi No. 753/23311/21.

[36] Vinnytskyi miskyi sud Vinnytskoi oblasti 20 bereznia 2024 r. vyrok u spravi No. 127/15500/23; Kasatsiinyi kryminalnyi sud u skladi Verkhovnoho Sudu 4 bereznia 2026 r. postanova u spravi No. 127/15500/23; Kyivskyi apeliatsiinyi sud 8 travnia 2025 r. ukhvala u spravi No. 939/1435/22.

[37] Kharkivskyi apeliatsiinyi sud 11 bereznia 2025 r. postanova u spravi No. 638/1305/24.

[38] Tsentralnyi raionnyi sud mista Mykolaieva 2 chervnia 2025 r. vyrok u spravi No. 490/9491/23.

[39] Strafprozessordnung (StPO) (1987). BGBl. I S. 1074, 1319, p.1.

material is limited but important: it confirms, rather than reformulates, the proposition that complexity affects the evidentiary route, and not the standard required for conviction[40].

Read together, these configurations do not support the view that war-crimes adjudication requires a relaxed conviction-stage threshold. They instead confirm the stability of three cumulative constraints: threshold stability, inferential discipline, and fair-trial control. Where those constraints are maintained, evidentiary adaptation remains lawful. Where they are displaced by contextual substitution, inferential slippage, or weakened procedural testing, the line into impermissible dilution is crossed.

Ukrainian war-crimes adjudication thus confirms, rather than undermines, the broader doctrinal proposition advanced in this article: adaptation in route is lawful; dilution in threshold is not.

Conclusions

1. The analysis demonstrates that atrocity-related evidentiary complexity may justify adaptation in the route of proof, but cannot justify any lowering of the conviction-stage threshold. In war-crimes adjudication, the standard of proof therefore remains the conviction-stage threshold.
2. The decisive doctrinal distinction is not between simple and complex cases, but between lawful adaptation of the route of proof and impermissible dilution of the conviction-stage threshold. That boundary is crossed when conflict-related complexity or evidentiary hardship begins to operate as a substitute for proof rather than as part of a disciplined evidentiary record.
3. That boundary is structured by three cumulative requirements: threshold stability, inferential discipline, and fair-trial control. Evidentiary adaptation remains lawful only if lower procedural thresholds do not migrate into the adjudication of guilt, guilt remains the only reasonable inference on the evidentiary record, and conviction does not rest on an insufficiently supported or insufficiently tested record.
4. The analysed Ukrainian practice, considered alongside a limited German comparator, confirms that different evidentiary configurations may widen the route to proof without altering the conviction-stage threshold. Where the evidentiary chain remains incomplete, the legally correct response is refusal of conviction, not compensation through a weaker threshold. The preservation of the conviction-stage threshold under evidentiary stress is therefore a core requirement of the procedural legitimacy of war-crimes adjudication.

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[40] Higher Regional Court of Koblenz 13 January 2022 judgment No. 1 StE 9/19 (Anwar R.); Eurojust (2022). Unofficial Unrevised Translation of Parts of the First Instance Judgement Rendered by the Koblenz Higher Regional Court in the Case against Anwar R., dated 13 January 2022. Translation provided by the UN International, Impartial and Independent Mechanism [online]. https://www.eurojust.europa.eu/sites/default/files/assets/files/de-hrc-koblenz-1ste9-19-130122-eng.pdf; Federal Court of Justice 30 November 2022 decision No. 3 StR 230/22 (Taha Al-J.).

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