

Separate Aspects of Evidentiary Basis Formation during the Investigation of Facts Related to Collaborationism

Serghii Perepelytsia *

* PhD in Law, Docent, doctoral student at NSC «Hon. Prof. M. S. Bokarius FSI», Kharkiv, Ukraine, ORCID: <https://orcid.org/0000-0002-0721-9609>, e-mail: 180.vk.2012@gmail.com

DOI: [10.32353/khrife.1.2024.05](https://doi.org/10.32353/khrife.1.2024.05) UDC [343.32:343.9](477)

Received: 18.03.2024 / Reviewed: 18.03.2024 / Accepted for print: 27.03.2024 / Available online: 29.03.2024



The Article Purpose is to outline separate aspects of forming the evidentiary basis during the investigation of facts related to collaborationism, identify challenges, and determine ways to address them. To fulfil this goal, general scientific and special scientific methods have been applied. It is emphasized that the formation of the evidentiary basis during pre-trial investigation of collaboration crimes depends on the availability of witness and eyewitness testimony, the identification of which is a leading task of the investigation involving the use of various measures (i.e., government and local self-government bodies obtain information about these people and suspects or temporarily access property and documents as envisaged by law). The paper stresses that the task of investigators in investigating this type of crime is to identify private individuals, representatives of volunteer movements, or community organizations who have documented crimes associated with collaborationist activities, and to acquire information they have documented. Answers to questions arising during pre-trial investigation are contained in the expert conclusion (as a significant component of the evidentiary basis) because it is within the expert conclusion that a forensic expert provides information that he/she identified during the investigation and utilizes specific expertise that the investigator may not have possessed.

This article is translation of the original Ukrainian content, which source is available at the link: <https://khrife-journal.org/index.php/journal> (translated by Daryna Dukhnenko). The authors acknowledge translation as corresponding to the original.

© 2024 The Author(s). Published by National Scientific Center «Hon. Prof. M. S. Bokarius Forensic Science Institute» & Yaroslav Mudryi National Law University.

This is an open access article distributed under Creative Commons Attribution License (CC_BY_4.0.0) allowing unlimited use, distribution and reproduction on any medium, subject to reference to the Author and original sources.

Keywords: open sources; expert conclusion; evidence and proof; evidentiary basis; documents; pre-trial investigation; collaborationist activity; collaboration crime; mass media; evidence gathering; criminal proceeding; witness testimony; digital evidence.

Research Problem Formulation

In the modern world, collaborationism is studied not only by historians but also by legal scholars. This is due to the fact that collaborationism is recognized as a crime against the security and well-being of humanity and against peace overall. This crime falls under the jurisdiction of international law and the legislation of those countries where the principles of democracy and human rights are paramount. Studying collaborationism as a distinct phenomenon enables in-depth understanding of the nature of treasonous behavior and the consciousness of collaborators, as well as its consequences not only within the boundaries of a particular country but also for society as a whole. Researchers emphasize that *“understanding collaborationism in a broad context and its impact on international politics is an essential task of modern criminology and criminal law”*¹. We note that this task has not been overlooked by such branches of legal science as criminal procedure, criminalistics, forensic science, etc., as they face new complex challenges in investigating facts of collaborationist activity in the process of forming the evidentiary basis. In addition, a significant set of investigative (search) actions as well as procedural actions is required

to verify information regarding the commission of collaborationist activities. On the one hand, this is necessary to confirm or refute information about a person's involvement in this activity. On the other hand, if such confirmation is obtained, it is vital for forming a complete evidentiary basis by acquiring evidence of the committed crime. Introduction of a sufficient evidentiary basis during investigation of collaborationist activity largely depends on the timely conduct and proper documentation of certain investigative (search) actions, including: examination of documents and the scene; interrogation of suspects and witnesses; search; examination of computer data; and appointment of forensic examinations.

Analysis of Essential Researches and Publications

Issues of evidence collection at the pretrial stage of a criminal proceeding have been studied at various times by proceduralists, criminalists, forensic experts, and others. Their research findings are reflected in dissertations, monographs, research papers, manuals, and textbooks. Let's focus on those that have been published recently.

O. Kovalova's dissertation outlines a comprehensive study of theoretical and legal principles of informational support

1 Кішчак Б. І. Особливості доказування злочинів, пов'язаних з колабораційною діяльністю. Наукові записки Львівського університету бізнесу та права. Серія економічна. Серія юридична. 2023. Вип. 37. С. 58. DOI: 10.5281/zenodo.7934032 (date accessed: 16.01.2024).

for pre-trial investigation of criminal offenses in Ukraine. The dissertation *“specifies peculiarities of information usage in pre-trial investigation, including: 1) urgency: means of information support must be readily available to subjects of criminal proceedings for making urgent procedural decisions; 2) limitation data contained in information support tools must be accessible only to individuals whose procedural status presupposes it; 3) authenticity: data available in information support tools are personalized and relate to a specific event (or group of events or person/persons)”*².

V. Vapniarchuk proposes an improved classification of *“evidence gathering methods (forming evidentiary basis for the legal standpoint taken by a specific subject involved in proving a case) <...>: (1) methods used by subjects conducting a criminal proceeding and (2) methods used by subjects defending their own or interests that they represent on behalf of others in a criminal proceeding”*, such as examining *“the essence of individual evidence-gathering methods <...>, including obtaining and receiving, initiating investigative (search) actions, as well as conducting other actions by the defense party, victims <...>. These actions are capable of providing the court with proper and admissible evidence”*. What is more, V. Vapniarchuk considers the specifics of *“documenting the procedure for using all the studied evidence-gathering methods”*³.

S. Dankova, analyzing the structure of criminal procedural proof in a court proceeding at the first instance, notes that *“to ensure proving during pre-trial investigation stage, it is characteristic to engage in practical activities aimed at actively searching for factual data”*, and proposes to distinguish *“four elements in this structure: 1) formation of evidence; 2) examination of evidence; 3) evaluation of evidence; 4) use of evidence”*, and emphasizes that *“it is advisable to compile materials of a criminal proceeding (evidentiary basis) during a preliminary proceeding”*⁴.

A. Kovalenko identifies obtaining initial information about signs of criminal offenses from messages or publications in the media as the primary directions of interaction between pre-trial investigation bodies and mass media during the collection, examination, and utilization of evidence in a criminal proceeding⁵. The researcher notes that publications and reports in the media *“can be proper sources of initial information about signs of criminal offenses and grounds for initiating a pre-trial investigation”* and that *“evidentiary value can be attributed to information published by the media as a result of journalistic investigation of criminal offenses. In order to use such data, it is necessary to establish contact with authors of the content, editorial staff, participants and persons involved in the investigation*

- 2 Ковальова О. В. Теоретико-правові засади інформаційного забезпечення досудового розслідування кримінальних правопорушень : автореф. дис. ... д-ра юрид. наук. Кропивницький, 2023. С. 13—14. URL: https://dnuvs.ukr.education/wp-content/uploads/2023/05/referat_dyseratacyi_kovalovoyi_o_v_.pdf (date accessed: 16.01.2024).
- 3 Вапнярчук В. В. Щодо особливостей окремих способів збирання доказів у кримінальному провадженні. Науковий вісник Ужгородського національного університету. Серія право. 2022. Вип. 70. С. 405. DOI: [10.24144/2307-3322.2022.70.65](https://doi.org/10.24144/2307-3322.2022.70.65) (date accessed: 16.01.2024).
- 4 Данькова С. О. Структура кримінального процесуального доказування в судовому провадженні у першій інстанції. Електронне наукове видання «Аналітично-порівняльне правознавство». 2023. № 6. С. 628. DOI: [10.24144/2788-6018.2023.06.111](https://doi.org/10.24144/2788-6018.2023.06.111) (date accessed: 16.01.2024).
- 5 Коваленко А. В. Взаємодія органів досудового розслідування із засобами масової інформації під час збирання, дослідження та використання доказів у кримінальному провадженні. Криміналістичний вісник. 2022. Т. 38. № 2. С. 48, 50 і 54. DOI: [10.37025/1992-4437/2022-38-2-48](https://doi.org/10.37025/1992-4437/2022-38-2-48) (date accessed: 16.01.2024).

(organizational component of its use) and to obtain, verify and legitimize the information collected by journalists (procedural-tactical component)”⁶.

An in-depth analysis of the mentioned papers by researchers shows that they have overlooked a wide range of issues related to the evidentiary basis formation during pre-trial investigation of crimes associated with collaborationist activities.

Article Purpose

To outline separate aspects of developing evidentiary basis during collaborationist activities investigation, identify challenges, and determine ways to address them.

Research Methods

To fulfil the set goal, general scientific methods (dialectical, comparative, analysis, synthesis, induction, deduction) and special scientific methods (formal-logical, logical-legal, systemic-structural) have been applied, which contributed to a logical and consistent presentation of content, meaningful and reasoned scientific conclusions, and proposals.

Main Content Presentation

One of the main features of crimes involving collaborationist activities is that they are predominantly committed in the temporarily occupied territories of Ukraine, where law enforcement agencies lack

access. This situation renders it impossible to conduct all necessary investigative (search) actions, as well as procedural actions to establish the circumstances requiring proof in a criminal proceeding. At the same time, the prosecution must identify and implement the maximum possible measures to verify information regarding collaborationist activities. If these facts are confirmed, sufficient evidence must be provided regarding the commission of these crimes⁷.

Researchers claim that during the investigation of collaborationist activities (voluntary participation of our citizens in illegal armed or paramilitary units created in temporarily occupied territories, or in units of an aggressor country) or involvement of persons in terrorist groups or organizations, it is essential to conduct a series of "investigative (search) actions and operational measures: 1) scheduling and conducting interrogations of witnesses who may be aware of circumstances regarding the involvement of individuals in respective criminal associations; 2) reviewing information available on the Internet, including social media platforms accounts of individuals involved in illegal criminal associations [para. 2, Part 2, Article 237 of the Criminal Procedure Code of Ukraine⁸: hereinafter notes in square brackets are mine: S. Perepelytsia.]; 3) conducting covert investigative (search) actions, including collecting information from telecommunications [Article 263 of the Criminal Procedure Code of Ukraine⁹],

6 Коваленко А. В. Опр. cit. С. 48. DOI: 10.37025/1992-4437/2022-38-2-48 (date accessed: 16.01.2024).

7 Жидков В. Проблеми доказування злочинів про колабораційну діяльність: аналіз прокурора Офісу Генерального прокурора / Українська Гельсінська спілка з прав людини : офіц. сайт. 01.02.2023. URL: <https://www.helsinki.org.ua/articles/problemy-dokazuvannia-zlochyniv-pro-kolaboratsiynu-diialnist-analiz-prokurora-ofisu-heneralnoho-prokurora/> (date accessed: 16.01.2024).

8 Кримінальний процесуальний кодекс України від 13.04.2012 р. № 4651-VI (зі змін. та допов.). URL: <https://zakon.rada.gov.ua/laws/show/4651-17#Text> (date accessed: 16.01.2024).— Note by S. Perepelytsia.

9 Ibid.— Note by S. Perepelytsia.

in order to establish the intent of individuals to voluntarily commit a criminal offense and to confirm other circumstances of its commission.]; 4) temporary access to items and documents containing secrets protected by law [Art. 159, 162, 165 of the Criminal Procedure Code of Ukraine¹⁰], specifically to information held by telecommunications operators and providers, regarding the communication of the guilty party for the purpose of confirming his/her location, particularly in the temporarily occupied territories of Ukraine, as well as his/her connections with representatives of illegal armed or paramilitary units and/or armed units of the aggressor state.]; 5) <...> search [Art. 234 of the Criminal Procedure Code of Ukraine¹¹] at the place of residence of the individual in order to obtain evidence regarding a person's involvement in the aforementioned units, namely: identification and seizure of weapons; computer equipment and mobile devices containing information confirming ties of these individuals with members of such units; documents issued by representatives of the aforementioned illegal units, etc. <...> It is worth noting that due to the occupation of parts of Ukraine's regions, investigative authorities may lack the physical ability to conduct searches at the residences of certain individuals"¹².

In order to collect evidence and develop evidentiary basis during the pre-

trial investigation of crimes related to collaborationist activities, investigators conduct investigative actions, employing the following methods: "1) documenting and organizing available facts (actions, activities) of suspected individuals in the media, including Internet resources, local television, etc.; 2) collecting audio, photo, and video evidence from eyewitnesses (victims) among the residents of the occupied territories; 3) analysis of the terrorist country's media covering situation in the occupied territories; 4) originals/copies of administrative documents from local heads of a settlement, written statements, payroll information, etc.»¹³.

Let's emphasize that a fair share of collaboration crimes committed in the temporarily occupied territories of Ukraine, as well as the presence of suspects, eyewitnesses, and witnesses involved in collaborationist activities in these territories, along with the location of physical evidence and documents there, enable to utilize the full range of procedural tools during pre-trial investigation of these crimes.

In criminal proceedings for collaboration crimes during the pre-trial investigation stage, the circumstances that testify, in particular, to: the commission of collaborationist activities, appointments to positions in unlawfully established

10 Кримінальний процесуальний кодекс URL: <https://zakon.rada.gov.ua/laws/show/4651-17#Text> (date accessed: 16.01.2024).— Note by S. Pereplytsia.

11 Ibid.— Note by S. Pereplytsia.

12 Мальгіна А. С. Використання методики розслідування участі у терористичній групі чи терористичній організації під час розслідування колабораційної діяльності. Актуальні питання кримінально-правової кваліфікації, документування та розслідування колабораціонізму : мат-ли Всеукр. наук.-практ. конф. (Одеса, 21.07.2022). Одеса, 2022. С. 63—64. URL: <https://dspace.oduvs.edu.ua/server/api/core/bitstreams/3ab2381e-e4e8-4932-b84f-d4e4a46cc720/content> (date accessed: 16.01.2024).

13 Вайда Т. С. Колабораційна діяльність в умовах війни: поняття, документування та кримінальна відповідальність за протиправні дії/діяльність. Актуальні питання кримінально-правової кваліфікації, документування та розслідування колабораціонізму : мат-ли Всеукр. наук.-практ. конф. (Одеса, 21.07.2022). Одеса, 2022. С. 16. URL: <https://dspace.oduvs.edu.ua/server/api/core/bitstreams/e5b44659-7bac-4fb9-87a6-0357b99358f6/content> (date accessed: 16.01.2024).

authorities in temporarily occupied territories, and denial of the facts of Russia's aggression and occupation of parts of Ukraine's territory, are subject to clarification and examination. Researchers emphasize that during the pre-trial investigation of crimes involving collaborationist activities, and considering the circumstances to be proved in criminal proceedings (Article 91 of the Criminal Procedure Code of Ukraine ¹⁴), it is important to take into account the following factors while evidentiary basis formation:

- the ability of information to change during its movement from the primary source to the public and law enforcement agencies;
- the possibility of slander from malicious individuals;
- direct physical or psychological coercion (force) that subsequently excludes criminal unlawfulness;
- the necessity to comply with a lawful order or instruction ¹⁵.

It is stressed that there are numerous when private individuals, representatives of volunteer movements, or community organizations document crimes associated with collaborationist activities, as they are able to. Investigators must identify such individuals, for example, by obtaining information

about them from government and local self-government bodies and acquiring documents confirming the facts of collaborationism. Investigators review the provided information sources and identify potential eyewitnesses and witnesses who need to be interrogated ¹⁶.

If, during a pre-trial investigation, information recorded by private individuals is not publicly available on the internet, these *“private persons should be instructed to provide relevant chronological documentation records, and they should be interrogated as witnesses regarding circumstances of discovering and preserving respective information”* ¹⁷. Such records of private individuals are documents (Article 99 of the Criminal Procedure Code of Ukraine ¹⁸) being *“relevant for assessing the admissibility and reliability of respective information stored by a volunteer from open sources as evidence”* ¹⁹. After verification by the investigator and direct review by the prosecutor, such information becomes proper and admissible evidence in court.

Note that the temporary occupation of certain Ukrainian territories has disrupted communication between close relatives who have found themselves on different sides of the contact line, thereby undermining the activities of government authorities, local self-government, law enforcement agencies, and courts. Consequently,

14 Кримінальний процесуальний кодекс URL: <https://zakon.rada.gov.ua/laws/show/4651-17#Text> (date accessed: 16.01.2024).

15 Жидков В. Л., Жила О. Б. О.р. cit. URL: <https://www.helsinki.org.ua/articles/dokazuvannia-zlochyniv-pro-kolaboratsiynu-diialnist-problemni-pytannia-zakonu/> (date accessed: 16.01.2024).

16 Жидков В. О.р. cit. URL: <https://www.helsinki.org.ua/articles/problemy-dokazuvannia-zlochyniv-pro-kolaboratsiynu-diialnist-analiz-prokurora-ofisu-heneralnoho-prokurora/> (date accessed: 16.01.2024).

17 Пашковський М. І. Особливості використання OSINT при документуванні та розслідування колабораційної діяльності. *Актуальні питання кримінально-правової кваліфікації, документування та розслідування колабораціонізму*: мат-ли Всеукр. наук.-практ. конф. (Одеса, 21.07.2022). Одеса, 2022. С. 84–85. URL: <http://surl.li/saupi> (date accessed: 16.03.2024).

18 Кримінальний процесуальний кодекс URL: <https://zakon.rada.gov.ua/laws/show/4651-17#Text> (date accessed: 16.03.2024).

19 Пашковський М. І. О.р. cit. С. 85. URL: <http://surl.li/saupi> (date accessed: 16.03.2024).

cooperation between law enforcement agencies and private individuals, volunteer movements, and community organizations has been severely affected in the pre-trial investigation process of collaboration crimes. This cooperation is crucial for obtaining and verifying information about collaborationist activities, and it takes both procedural and extra-procedural forms of interaction.

Procedural forms of interaction include:

- obtaining from the prosecution party documents and information that may serve as evidence during investigative (search) actions (requesting: Article 93 of the Criminal Procedure Code of Ukraine ²⁰; temporarily accessing items and documents: Article 159 of the Criminal Procedure Code of Ukraine ²¹);
- interrogating representatives of state authorities and local self-government, volunteer movements, public organizations, and private individuals as witnesses;
- searches or identification presentation with the participation of subjects who possess information about the suspect's collaborationist activities.

This interaction is necessary for the prosecution party for:

- obtaining one's own findings during the pre-trial investigation of collaborationist activity;
- identifying the main source of evidence regarding an individual's

collaborationist activities within a particular territory;

- procedural documentation of collaborationist activities evidence;
- identification of eyewitnesses and witnesses of such activities and their interrogation ²².

In turn, components of *extra-procedural interaction* include communication and information exchange between the prosecution and representatives of government and local self-government bodies, volunteer movements, and community organizations, as well as media and private individuals regarding known circumstances of specific individuals' collaborationist activities, evidence of such activities, and prospects for pre-trial investigation. This takes place during joint working meetings, working group meetings, or other events.

Let's emphasize that covert investigative (search) actions serve as specific evidence of collaborationist activities, which, when combined with other evidence, help either confirm or refute their occurrence. However, for various reasons, covert investigative (search) actions cannot always be carried out during the pre-trial investigation of collaboration crimes. Under such circumstances, the prosecution may use information obtained in another criminal proceeding (Article 257 of the Criminal Procedure Code of Ukraine ²³).

This rule can help identify a broad spectrum of individuals involved in collaborationist activities, whose unlawful actions have been investigated in another criminal proceeding. Such materials can

20 Кримінальний процесуальний кодекс URL: <https://zakon.rada.gov.ua/laws/show/4651-17#Text> (date accessed: 16.01.2024).

21 Ibid.

22 Жидков В. Л., Жила О. Б. Оп. cit. URL: <https://www.helsinki.org.ua/articles/dokazuvannia-zlochyniv-pro-kolaboratsiynu-diialnist-problemni-pytannia-zakonu/> (date accessed: 16.01.2024).

23 Кримінальний процесуальний кодекс URL: <https://zakon.rada.gov.ua/laws/show/4651-17#Text> (date accessed: 16.01.2024).

be acquired through request or temporary access, provided that the prosecution party has temporary access to the items and documents (from the investigator or prosecutor who initiated these actions as part of another criminal proceeding). After obtaining such materials, the prosecution must coordinate their use with the investigating judge in the specific criminal proceeding²⁴.

American researches single out the following categories of open source information: common data and information, targeted commercial data, expert assessments, and “gray” literature²⁵.

In criminal proceedings related to collaborationist activities, emphasis should be placed on electronic (digital) evidence. According to Article 99 of the Criminal Procedure Code of Ukraine²⁶, digital data are considered as evidence in accordance with Article 84 of the Criminal Procedure Code of Ukraine²⁷. Furthermore, in criminal proceedings concerning collaboration crimes, digital evidence encompasses:

- photographic materials, audio and video recordings, computer data, and other media obtained from both closed and open networks (such as the internet, media, and social networks) and supported by witnesses;

- websites and pages on social networks illegally created by authorities in temporarily occupied territories; open Telegram channels; media operating in temporarily occupied territories of Ukraine and the aggressor country, covering the creation and activities of pseudo-government bodies;
- websites and pages on social networks of Ukrainian government and local self-government bodies, public figures, journalists, and lawyers; open Telegram channels; media outlets documenting and covering war crimes and crimes against the foundations of Ukraine’s national security, committed in the temporarily occupied territories of Ukraine, as well as events in these territories;
- photo, video, and audio files; various open and private messengers of witnesses²⁸.

Digital evidence can be recorded on such carriers:

- analog device, “which properties are characterized by direct and usually relatively unaltered representation of information, such as in photo and video recordings²⁹;

24 Жидков В. Оп. cit. URL: <https://www.helsinki.org.ua/articles/problemy-dokazuvannia-zlochyniv-pro-kolaboratsiynu-diialnist-analiz-prokurora-ofisu-heneralnoho-prokurora/> (date accessed: 16.01.2024).

25 Best Jr. R. A., Cumming A. CRS Report for Congress. Open Source Intelligence (OSINT): Issues for Congress. Dec 5, 2007. 27 p. URL: <https://sgp.fas.org/crs/intel/RL34270.pdf> (date accessed: 16.01.2024) ; Виходець Ю. О., Тетерятник Г. К. Окремі питання використання OSINT при розслідуванні злочинів в умовах військової агресії рф. *Правові новели*. 2022. № 18. С. 70–76. DOI: 10.32847/ln.2022.18.10 (date accessed: 16.01.2024).

26 Кримінальний процесуальний кодекс URL: <https://zakon.rada.gov.ua/laws/show/4651-17#Text> (date accessed: 16.01.2024).

27 Ibid.

28 Жидков В. Л., Жила О. Б. Оп. cit. URL: <https://www.helsinki.org.ua/articles/dokazuvannia-zlochyniv-pro-kolaboratsiynu-diialnist-problemni-pytannia-zakonu/> (date accessed: 16.01.2024).

29 Гуцалюк М. В., Гавловський В. Д., Хахановський В. Г. та ін. Використання електронних (цифрових) доказів у кримінальних провадженнях : метод. рек. / за заг. ред. О. В. Корнейка. Вид. 2-ге, допов. Київ, 2020. С. 40. URL: <https://elar.naiu.kiev.ua/server/api/core/bitstreams/8e9e5637-7b62-475c-8c41-9850e317bfc4/content> (date accessed: 16.01.2024).

- computer, “physical properties of which are not used for the direct representation of information, but for recording-reading discrete states of the electromagnetic field indirectly through an analog-to-digital converter”³⁰.

It is worth emphasizing that identification and review of web pages and websites, groups and channels in messengers, mass media, and social networks helps the prosecution obtain photo and video evidence of collaborative actions. These materials, along with witness testimonies, form the evidentiary basis in criminal proceedings involving collaboration crimes. However, it is crucial to note that information from open sources can be deleted or destroyed over time, at the same time Part 1 of Article 23 of the Criminal Procedure Code of Ukraine contains a requirement for direct examination of evidence by the court³¹. For example, a court adhering to the principle of direct examination of evidence during a trial may raise the issue of searching for the original source of information from which a copy of the information being

examined was made, which is impossible because it has been deleted³².

During the pre-trial investigation of collaboration crimes, the use of documents enables the investigator to obtain important evidence regarding the position held by the suspect and the activities carried out by him/her, which possess subjective and objective features of a committed crime. Researchers note that “under Article 111–1 of the Criminal Code of Ukraine³³, verdicts in criminal proceedings are to be based on witness testimonies and documents. However, documents cannot constitute hearsay testimonies, as this contradicts Article 97 of the Criminal Procedure Code of Ukraine and may cast doubt on the overall fairness of the trial and affect the assessment of compliance with Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms³⁴ in the event of an appeal to the ECtHR [European Court of Human Rights: note by S. Perepelytsia]”³⁵. This indicates the need to identify the sources of evidence in criminal proceedings involving collaboration crimes.

Practitioners hold a similar opinion: they assert that verdicts should be based

30 Гуцалюк М. В., Гавловський В. Д., Хахановський В. Г. та ін. *Op. cit.* URL: <https://elar.naiu.kiev.ua/server/api/core/bitstreams/8e9e5637-7b62-475c-8c41-9850e317bfc4/content> (date accessed: 16.01.2024).

31 Кримінальний процесуальний кодекс ... URL: <https://zakon.rada.gov.ua/laws/show/4651-17#Text> (date accessed: 16.01.2024).

32 Про організацію проведення слідчих дій зі збору та збереження цифрової інформації з відкритих джерел : лист-орієнтув. Офісу Генпрокурора від 28.08.2021 р. № 18/1-386вих-515окв-21.

33 Кримінальний кодекс України від 05.04.2001 р. № 2341-III (зі змін. та допов.). URL: <https://zakon.rada.gov.ua/laws/show/2341-14#Text> (date accessed: 16.01.2024). — *Note by S. Perepelytsia.*

34 Конвенція про захист прав людини і основоположних свобод (Європейська конвенція з прав людини) : від 04.11.1950 р.; ратифік. Законом України від 17.07.1997 р. № 475/97-ВР; чинна для України з 11.09.1997 р. (зі змін. та допов.). URL: https://zakon.rada.gov.ua/laws/show/995_004#Text (date accessed: 16.01.2024). — *Note by S. Perepelytsia.*

35 Гловук І. В. Питання доказування за ст. 111-1 КК України: аналіз вироків. *Актуальні питання кримінально-правової кваліфікації, документування та розслідування колабораціонізму* : мат-ли Всеукр. наук.-практ. конф. (Одеса, 21.07.2022). Одеса, 2022. С. 32. URL: <http://surl.li/sauqh> (date accessed: 16.01.2024).

on witness testimonies and documents³⁶ in criminal proceedings under Part 1 of Article 111–1 of the Criminal Code of Ukraine³⁷.

During the pre-trial investigation of collaboration crimes, the formation of the evidentiary basis is influenced by witness and eyewitness testimonies, which play a significant role. Therefore, clarifying these testimonies is a primary task for the investigation, requiring the application of various measures. As stated above, these measures, including requesting information in the manner envisaged in Art. 93 of the Criminal Procedure Code of Ukraine³⁸ and temporarily accessing the belongings and documents of workers who have left the temporarily occupied territories of Ukraine, as well as those who have remained in these territories, by state and local authorities, are crucial. Such information is vital for investigators. It allows them to interrogate persons who have left the temporarily occupied territories, thus obtaining testimony from direct eyewitnesses to collaborationist activities.

In addition, the investigator may obtain from government and local self-government bodies, as well as from centers for the provision of administrative services, information on internally displaced persons from certain temporarily occupied territories of Ukraine, who may be both eyewitnesses of collaborationist

activities and collaborators. Requesting information from government and local self-government bodies on the operation of crossing points along the contact line and filtration points will enable the investigator to compile a list of individuals who have left the temporarily occupied territories, including eyewitnesses and witnesses of collaborationist activities. Obtaining such information will also help clarify the (im) possibility of leaving the temporarily occupied territory of Ukraine for a person suspected of collaborating³⁹.

As set out in Part 11 of Article 615 of the Criminal Procedure Code of Ukraine (although other articles of the procedural law do not contain such a requirement), witness interrogations conducted in conditions of martial law are carried out using video recording equipment⁴⁰, since only in this format will these materials be considered as evidence by the court.

Persons who have been abroad or internally displaced have repeatedly refused to testify to the investigator, while at the same time informing by phone that they possess information about a collaboration crime in a specific criminal proceeding. In such circumstances, the information provided by this person must be formalized by the prosecution as an explanation obtained by the investigator or prosecutor from the participants in a criminal proceeding, as well as from other persons with their consent (Part 8 of

36 Мальгіна А. С. *Op. cit.* С. 62. URL: <https://dspace.oduvs.edu.ua/server/api/core/bitstreams/3ab2381e-e4e8-4932-b84f-d4e4a46cc720/content> (date accessed: 16.01.2024).

37 Кримінальний кодекс України URL: <https://zakon.rada.gov.ua/laws/show/2341-14#Text> (date accessed: 16.01.2024).

38 Кримінальний процесуальний кодекс URL: <https://zakon.rada.gov.ua/laws/show/4651-17#Text> (date accessed: 16.03.2024).

39 Жидков В. *Op. cit.* URL: <https://www.helsinki.org.ua/articles/problemy-dokazuvannia-zlochyniv-pro-kolaboratsiynu-diialnist-analiz-prokurora-ofisu-heneralnoho-prokurora/> (date accessed: 16.01.2024).

40 Кримінальний процесуальний кодекс URL: <https://zakon.rada.gov.ua/laws/show/4651-17#Text> (date accessed: 16.01.2024).

Article 95 of the Criminal Procedure Code of Ukraine)⁴¹, and recorded in the format of “explanations by individuals”. The forms of recording explanations obtained by the prosecution from an individual residing abroad include:

- written explanations by the individual (similar to the written form of a witness interrogation record): should include the personal and contact details of a person; circumstances to be proved in this criminal proceeding; interrogation date, and the signature of a conducting person;
- report from the investigator to the head of the pre-trial investigation body or an official note to the head of the prosecutor’s office with a description of obtained information.

It is important to note that the information obtained by the prosecution through telephone communication cannot serve as an independent source of evidence. Furthermore, in the presence of other corroborating evidence, it can supplement the established factual circumstances of a collaboration crime. Such information should not be disregarded, as there may be opportunities in the future (for example, during the trial stage) to question those individuals who provided explanations to the prosecution over the phone. Therefore, their testimonies under such

conditions become relevant and admissible evidence⁴².

When developing the evidentiary basis during the pre-trial investigation of collaboration crimes, well-versed persons are not overlooked, which, according to the procedural law, include experts and specialists: “*Specialist in criminal proceedings shall be a person who has special knowledge and skills necessary to use technical or other devices, and who is able to consult during pre-trial investigation and judicial proceedings on issues which require special knowledge and skills*” (Part 1 of Article 71 of the Criminal Procedure Code of Ukraine)⁴³, and “*An expert in criminal proceedings shall be an individual who has scientific, technical or any other special expertise, is entitled to conduct expert examination under the Law of Ukraine “On Forensic Examination”⁴⁴ and who is assigned to examine objects, events and processes that contain information on circumstances under which a criminal offence was committed, and to provide an opinion on issues arising in the course of the criminal proceeding and relating to the scope of his/her expertise*” (Part 1 of Article 69 of the Criminal Procedure Code of Ukraine)⁴⁵.

Throughout pre-investigation of collaboration crimes, the investigator encounters questions that only a forensic expert can address after conducting a forensic examination. During pre-trial investigation of collaboration crimes, the following types of forensic examinations are most commonly appointed (in accordance

41 Ibid; Жидков В. Л., Жила О. Б. Оп. cit. URL: <https://www.helsinki.org.ua/articles/dokazuvannia-zlochyniv-pro-kolaboratsiynu-diialnist-problemni-pytannia-zakonu/> (date accessed: 16.01.2024).

42 Жидков В. Л., Жила О. Б. Оп. cit. URL: <https://www.helsinki.org.ua/articles/dokazuvannia-zlochyniv-pro-kolaboratsiynu-diialnist-problemni-pytannia-zakonu/> (date accessed: 16.01.2024).

43 Кримінальний процесуальний кодекс URL: <https://zakon.rada.gov.ua/laws/show/4651-17#Text> (date accessed: 16.01.2024).

44 Про судову експертизу : Закон України від 25.02.1994 р. № 4038-XII (зі змін. та допов.). URL: <https://zakon.rada.gov.ua/laws/show/4038-12#Text> (date accessed: 16.01.2024).— Note by S. Perepelytsia.

45 Кримінальний процесуальний кодекс URL: <https://zakon.rada.gov.ua/laws/show/4651-17#Text> (date accessed: 16.01.2024).

with the Scientific and Methodological Recommendations on the Preparation and Appointment of Forensic Examinations and Expert Studies ⁴⁶, hereinafter referred to as *the Recommendations*):

- 1) semantic-textual analysis of written and oral speech (*"semantic-textual examination addresses tasks related to determining the content of concepts, lexical meanings of words or word combinations used in the texts provided for research or oral communications [based on their textual reproductions], their stylistic coloring, semantic load, the nature of information contained herein [whether such information may be considered offensive or contain a threat to a specific person/persons], etc.) that is resolving issues of linguistic nature not related to establishing factual data about the author"*: paragraph 2 of subclause 2.1.2 of clause 2.1 of Chapter 2 of Section I of the Recommendations);
- 2) linguistic analysis of oral speech (*"during identification and diagnostic studies of a person's oral speech, questions related to:*
 - *identification of a person based on linguistic features of oral speech;*
 - *determination of speech type [spontaneous, non-spontaneous speech, reading of text, etc.];*
 - *identification of signs of mimicry in speech, native language, etc."*: paragraphs 1–4 of subclause 2.2.1 of clause 2.2 of Chapter 2 of Section I of the Recommendations);
- 3) psychological analysis (*"the main task of psychological examination is to identify in the examined person:*
 - *individual psychological features, character traits, dominant personality*

traits; motivational factors of mental life and behavior;

- *emotional reactions and states;*
- *patterns of the course of mental processes, their developmental levels, and personal qualities"*: clause 6.4 of Section VI of the Recommendations);

- 4) handwriting analysis (*"identification of the author of a handwritten text, limited to the volume of manuscript records [literary and digital] and the signature. This examination addresses certain non-identification tasks [establishing the fact of executing a handwritten text under the influence of various interfering factors: natural: illness, chronic conditions, age-related changes; temporary external: unusual pen grip, unusual posture, visual impairment, etc.; temporary internal: alcohol intoxication, pharmacological, narcotic substances, etc.; artificial: distortion of handwriting by altered movements]; determination of the author's gender, as well as affiliation to a certain age group, etc."*: clause 1.1 of Chapter 1 of Section I of the Recommendations);
- 5) video and audio recording analysis (the main tasks of this examination are: "20.1.1. To determine technical specifications and technology of video and sound recording.
20.1.2. To identify individuals by voice physical parameters.
20.1.3. To identify persons by linguistic features of speech": subclauses 20.1.1–20.1.3 of clause 20.1 of Chapter 20 of Section I of the Recommendations);
- 6) portrait analysis (*"the main task of portrait examination is identification of an individual [corpse] based on a photograph [photo card, negative], and video*

46 Науково-методичні рекомендації з питань підготовки та призначення судових експертів та експертних досліджень : затв. наказом Мініюсту України від 08.10.1998 р. № 53/5 (зі змін. та допов.). URL: <https://zakon.rada.gov.ua/laws/show/z0705-98#Text> (date accessed: 16.01.2024).

recording”: clause 18.1 of Chapter 18 of Section I of the Recommendations);

7) computer analysis (“*principal tasks of computer hardware and software expertise encompass:*

- *determining the operating status of computer-technical equipment;*
- *establishing circumstances involving the use of computer-technical means, information, and software;*
- *detecting information and software contained on computer media;*
- *determining compliance of software products with specific versions or requirements for their development”* (as specified in subclause 13.1 of Chapter 13 of Section II of the Recommendations)⁴⁷;

8) psycholinguistic multidisciplinary analysis (studies expert situations related to determining the semantic features of the text and psychological characteristics of participants’ speech behavior in communicative interaction to elucidate the specifics of the information orientation being conveyed; expert research involves using expertise from the fields of: linguistics: to analyze peculiarities of speech and semantic properties of texts; psychology: to identify peculiarities of participants’ behavior in the communicative process. This specific expertise enables in-depth examination of textual, video, and audio recordings from various aspects).

Conclusions

It has been proven that today it is not uncommon for private individuals, voluntary movements or public organizations to document crimes related to collaborationist activities. The investigators’

task is to identify private individuals, representatives of volunteer movements, or public organizations that have documented crimes associated with collaborationist activities and collect the information they have recorded. Additionally, they aim to uncover individuals suspected of collaboration, which involves obtaining information about them from government and local self-government bodies, as well as acquiring relevant documents to verify the facts of collaborationism. It should be emphasized that, for various reasons, it is not always possible to carry out covert investigative (search) actions during pre-trial investigation of collaboration crimes. Under such circumstances, the public prosecutor may utilize information obtained in another criminal proceeding (Article 257 of the Criminal Procedure Code of Ukraine).

It is pointed out that digital evidence holds a separate place in criminal proceedings involving collaboration crimes, which encompasses: photographic materials, audio and video recordings, computer data, and other media found in both closed and open networks (internet, media, social networks), as well as witness testimonies. Another component of the evidentiary basis comprises documents that enable investigators to acquire crucial evidence regarding the position held by the suspect and the activities they have undertaken, demonstrating both subjective and objective signs of the alleged crime.

When developing evidentiary basis during pre-trial investigation of collaboration crimes, witness testimonies become a pivotal component. Thus, ascertaining them is a leading task for the investigation, involving the application of various measures (such as obtaining information in the manner set out in

47 Науково-методичні рекомендації ... URL: <https://zakon.rada.gov.ua/laws/show/z0705-98#Text> (date accessed: 16.01.2024).

Article 93 of the Criminal Procedure Code of Ukraine, or temporary accessing items and documents by government and local self-government bodies). In the course of pre-trial investigation of collaboration crimes, the investigator faces questions that only a forensic expert can answer after conducting a forensic examination: namely, the expert conclusion is a key component for forming evidentiary basis. It is the expert conclusion that contains information obtained by the forensic expert during the examination using specific expertise and about which the investigator was unaware.

Due to the fact that collaboration crimes predominantly take place in temporarily occupied territories, the process of gathering evidence and developing evidentiary basis is quite complex. Such difficulties may result in the loss of part of the evidence or insufficient evidence to establish the fact of committing a collaboration crime. The investigator should also consider other nuances of evidence gathering, as collaborators use closed communication channels to conceal their actions or employ other forms of cooperation with occupiers (financial or informational support).

Окремі аспекти формування доказової бази під час розслідування фактів колабораційної діяльності

Сергій Перепелиця

Мета статті — окреслити окремі аспекти формування доказової бази під час розслідування фактів колабораційної діяльності, виокремити проблемні питання й визначити шляхи їх подолання. Для досягнення поставленої мети застосовано загальнонаукові та спеціальні наукові методи. Зауважено, що формування доказової бази під час досудового розслідування колабораційних злочинів залежить від наявності показань свідків і очевидців,

з'ясування осіб яких є провідним завданням слідства та передбачає застосування різних заходів (наприклад, витребування відомостей про цих осіб і підозрюваних або тимчасового доступу до речей і документів від органів державної влади й місцевого самоврядування в передбаченому законодавством порядку). Акцентовано, що завданням слідчих у розслідуванні цього виду злочинів є виявити приватних осіб, представників волонтерських рухів або громадських організацій, які зафіксували злочини, пов'язані з колабораційною діяльністю, та отримати зафіксовану ними інформацію. Констатовано, що законодавством України обумовлено використання інформації, отриманої за іншим кримінальним провадженням. Іншою складовою доказової бази є документи, які дають слідчому важливі докази про посаду підозрюваного та здійснювану ним колабораційну діяльність. Висновок експерта (як вагома складова доказової бази) містить відповіді на запитання, які виникають у слідчого під час досудового розслідування, оскільки саме у ньому експерт наводить відомості, які він визначив під час проведення дослідження із застосуванням спеціальних знань і про які не знав слідчий.

Ключові слова: відкриті джерела; висновок експерта; докази й доказування; доказова база; документи; досудове розслідування; колабораційна діяльність; колабораційний злочин; засоби масової інформації; збирання доказів; кримінальне провадження; показання свідків; цифрові докази.

Financing

This research did not receive any specific grant from funding institutions in the public, commercial or non-commercial sectors.

Disclaimer

Founders had no role in the study design, data collection and analysis, decision to publish, or manuscript preparation.

Participants

Author contributed solely to the intellectual discussion underlying this document, case law research, writing and editing and assumes responsibility for its content and interpretation.

Declaration of Competing Interest

Author declare no conflict of interest.

References

- Best, Jr. R. A., Cumming, A. (2007). CRS Report for Congress. Open Source Intelligence (OSINT): Issues for Congress. URL: <https://sgp.fas.org/crs/intel/RL34270.pdf>.
- Dankova, S. O. (2023). Struktura kryminalnogo protsesualnogo dokazuvannia v sudovomu provadzhenni u pershii instantsii [The structure of criminal procedural proving in court proceedings in the first instance]. *Elektronne naukovye vydannia «Analychno-porivnialne pravoznavstvo»*. № 6. DOI: 10.24144/2788-6018.2023.06.111 [in Ukrainian].
- Hloviuk, I. V. (2022). Pytannia dokazuvannia za st. 111-1 KK Ukrainy: analiz vyrokiv [Proving Issues under Article 111-1 of the Criminal Code of Ukraine: Analysis of Verdicts]. *Aktualni pytannia kryminalno-pravovoi kvalifikatsii, dokumentuvannia ta rozsliduvannia kolaboratsionizmu* : mat-ly Vseukr. nauk.-prakt. konf. (Odesa, 21.07.2022). Odesa. URL: <http://surl.li/sauqh> [in Ukrainian].
- Hutsaliuk, M. V., Havlovskiy, V. D., Khakhanovskiy, V. H. ta in. (2020). Vykorystannia elektronnykh (tsyfrovnykh) dokaziv u kryminalnykh provadzhenniakh [The use of electronic (digital) evidence in criminal proceedings] : metod. rek. / za zah. red. O. V. Korneika. Vyd. 2-he, dopov. Kyiv. URL: <https://elar.naiu.kiev.ua/server/api/core/bitstreams/8e9e5637-7b62-475c-8c41-9850e317bfc4/content> [in Ukrainian].
- Kishchak, B. I. (2023). Osoblyvosti dokazuvannia zlochyniv, poviazanykh z kolaboratsionoiu diialnistiu [Peculiarities of proving crimes related to collaboration]. *Naukovi zapysky Lvivskoho universytetu biznesu ta prava. Seriya ekonomichna. Seriya yurydychna*. 2023. Vyp. 37. DOI: 10.5281/zenodo.7934032 [in Ukrainian].
- Kovalenko, A. V. (2022). Vzaiemodiia orhaniv dosudovoho rozsliduvannia iz zasobamy masovoi informatsii pid chas zbyrannia, doslidzhennia ta vykorystannia dokaziv u kryminalnomu provadzhenni [Interaction of the pre-trial investigation bodies with the mass media during the collection, investigation and use of evidence in criminal proceedings]. *Kryminalistychnyi visnyk*. T. 38. № 2. DOI: 10.37025/1992-4437/2022-38-2-48 [in Ukrainian].
- Kovalova, O. V. (2023). *Teoretyko-pravovi zasady informatsiinoho zabezpechennia dosudovoho rozsliduvannia kryminalnykh pravoporushen* [Theoretical and legal principles of information providing pretrial investigation of criminal offenses] : avtoref. dys. ... d-ra yuryd. nauk. Kropyvnytskyi. URL: https://dnuvs.ukr.education/wp-content/uploads/2023/05/referat_dysertacziyi_kovalovoyi_o_v_.pdf [in Ukrainian].
- Malhina, A. S. (2022). Vykorystannia metodyky rozsliduvannia uchasti u terorystychnii hrupi chy terorystychnii orhanizatsii pid chas rozsliduvannia kolaboratsionoi diialnosti [The use of investigation methodologies for determining involvement in a terrorist group or terrorist organization during the investigation of collaborationist activities]. *Aktualni pytannia kryminalno-pravovoi kvalifikatsii, dokumentuvannia ta rozsliduvannia kolaboratsionizmu* : mat-ly Vseukr. nauk.-prakt. konf. (Odesa, 21.07.2022). Odesa. URL: <https://dspace.oduvs.edu.ua/server/api/core/bitstreams/3ab2381e-e4e8-4932-b84f-d4e4a46cc720/content> [in Ukrainian].
- Pashkovskiy, M. I. (2022). Osoblyvosti vykorystannia OSINT pry dokumentuvanni ta rozsliduvannia kolaboratsionoi diialnosti [Peculiarities of using OSINT in documenting and investigating collaborationist activities]. *Aktualni pytannia kryminalno-pravovoi kvalifikatsii, dokumentuvannia ta rozsliduvannia kolaboratsionizmu* : mat-ly Vseukr. nauk.-prakt. konf. (Odesa, 21.07.2022). Odesa. URL: <http://surl.li/saupi> [in Ukrainian].
- Vaida, T. S. (2022). Kolaboratsiina diialnist v umovakh viiny: poniattia, dokumentuvannia ta kryminalna

- vidpovidalnist za protypravni dii/diialnist [Collaborationism in wartime: concepts, documentation, and criminal liability for unlawful actions/activities]. *Aktualni pytannia kryminalno-pravovoi kvalifikatsii, dokumentuvannia ta rozsliduvannia kolaboratsionizmu* : mat-ly Vseukr. nauk.-prakt. konf. (Odesa, 21.07.2022). Odesa. URL: <https://dspace.oduvs.edu.ua/server/api/core/bitstreams/e5b44659-7bac-4fb9-87a6-0357b99358f6/content> [in Ukrainian].
- Vapniarchuk, V. V. (2022). Shchodo osoblyvostei okremykh sposobiv zbyrannia dokaziv u kryminalnomu provadzhenni [Regarding the peculiarities of certain methods of gathering evidence in criminal proceedings]. *Naukovyi visnyk Uzhhorodskoho natsionalnoho universytetu. Seriia pravo*. Vyp. 70. DOI: 10.24144/2307-3322.2022.70.65 [in Ukrainian].
- Vykhodets, Yu. O., Teteriatnyk, H. K. (2022). Okremi pytannia vykorystannia OSINT pry rozsliduvanni zlochyniv v umovakh viiskovoi ahresii rf. *Pravovi novely*. № 18. DOI: 10.32847/ln.2022.18.10 [in Ukrainian].
- Zhydkov, V. (2023). Problemy dokazuvannia zlochyniv pro kolaboratsiinu diialist: analiz prokurora Ofisu Heneralnoho prokurora / Ukrainiska Helsinska spilka z prav liudyny : ofits. sait. URL: <https://www.helsinki.org.ua/articles/problemy-dokazuvannia-zlochyniv-pro-kolaboratsiynu-diialnist-analiz-prokurora-ofisu-heneralnoho-prokurora/> [in Ukrainian].
- Zhydkov, V. L., Zhyla, O. B. (2023). *Dokazuvannia zlochyniv pro kolaboratsiinu diialist: problemni pytannia zakonu* [Challenges in proving crimes related to collaborationism: analysis by the Prosecutor of the Office of the Prosecutor General] / Ukrainiska Helsinska spilka z prav liudyny : ofits. sait. URL: <https://www.helsinki.org.ua/articles/dokazuvannia-zlochyniv-pro-kolaboratsiynu-diialnist-problemni-pytannia-zakonu/> [in Ukrainian].
- Perepelytsia, S. (2024). Separate Aspects of Evidentiary Basis Formation During the Investigation of Facts Related to Collaborationism. *Theory and Practice of Forensic Science and Criminalistics*. Issue 1 (34). Pp. 76—91. DOI: 10.32353/khrife.1.2024.05.