

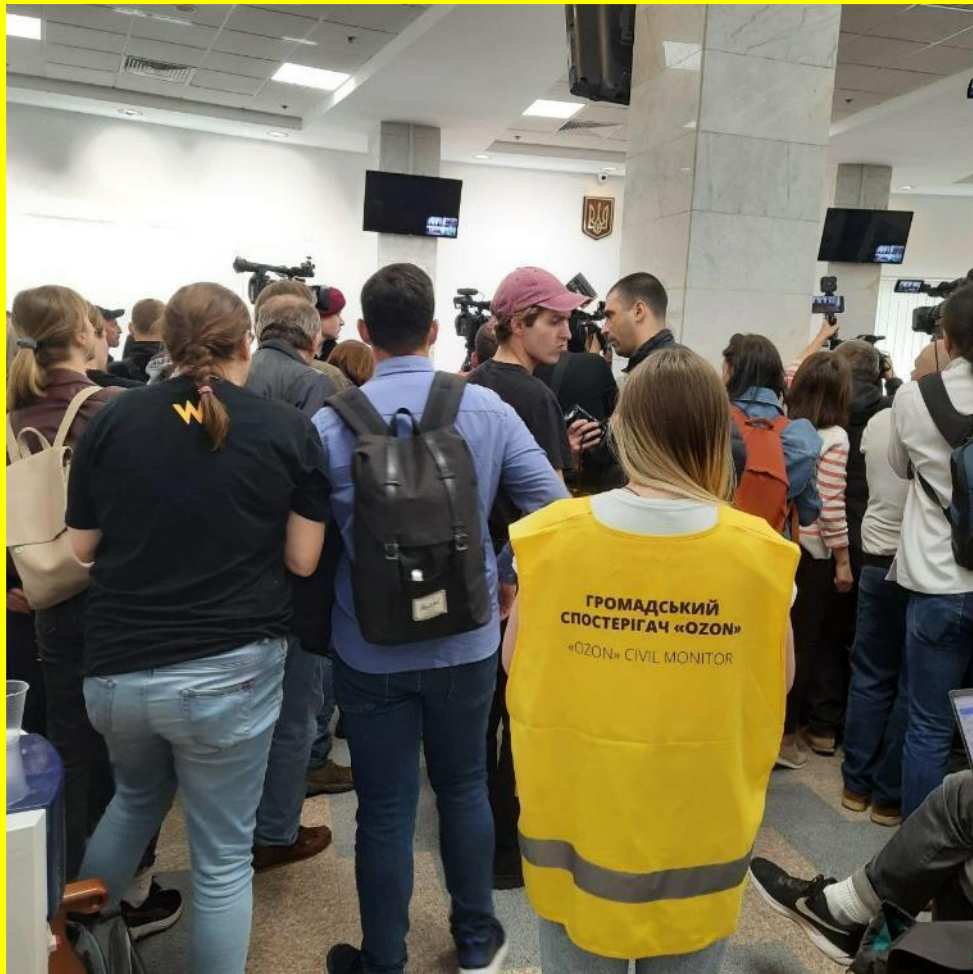


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THE TRIAL OF SHISHIMARIN: Analytical Report by OZON Civic Monitoring Group



Kyiv, 2022



INTRODUCTION.

On May 23, 2022, the Solomianskyi District Court in Kyiv delivered the first sentence to a Russian serviceman for committing a war crime in Ukraine. The panel of judges found Sergeant Vadim Shishimarin guilty of violating the laws and customs of war combined with premeditated murder (Article 438.2 of the Criminal Code of Ukraine) of Oleksandr Shelipov, a civil resident of the village of Chupakhivka, Sumy Oblast, on February 28, 2022. Russian serviceman Shishimarin was sentenced to life imprisonment for committing the crime.

OZON Civic Monitoring Group has been watching the trial and, following its outcome, publishes this Analytical Report. The Report contains brief and detailed descriptions of the events as well as an expert assessment of the trial.

Hearings were held on May 18, 19, 20, and 23, 2022.

The proceedings were carried out by a panel of judges of the Solomianskyi District Court in Kyiv: S. A. Ahafonov (President), O. O. Kryvorot, and O. V. Burlaka.

The crime was defined **under Article 438.2 “Violation of the Laws and Customs of War” of the Criminal Code of Ukraine:**

“1. Cruel treatment of prisoners of war or civilians, deportation of civilian population for forced labor, pillage of national treasures on occupied territories, use of methods of the warfare prohibited by international instruments, or any other violations of rules of the warfare recognized by international instruments to which the Verkhovna Rada of Ukraine consented to be bound by, and also giving an order to commit any such actions, shall be punished by imprisonment for a term of eight to twelve years.

2. The same actions, where accompanied with premeditated murder, shall be punishable by imprisonment for a term of ten to fifteen years, or life imprisonment.”

The May 18 hearing (preparatory court session).

Summary of the events:

At 14:31, a hearing began at the Solomianskyi District Court in Kyiv in the case of Russian serviceman Shishimarin.

Present were two prosecutors; Shelipova, the victim; interpreter; Ovsiannikov, counsel for the defense; Shishimarin, the accused.

The proceedings were carried out by a panel of three judges: S. A. Ahafonov (President), O. O. Kryvorot, and O. V. Burlaka.

Neither side filed a recusal motion.

The prosecution read out a summary of the indictment. Shishimarin has been accused under Article 438.2 of the CCU. No civil claim was filed.

Shishimarin pleaded fully guilty and did not refuse giving evidence.

At 14:58, the court adjourned for 15 minutes. It was later announced that the trial will continue on May 19 at 12 o'clock at the Kyiv Court of Appeal. The hearing ended at 15:22.

Events in detail:

On May 18, a hearing took place at the Solomianskyi District Court in Kyiv in the case of Russian serviceman Shishimarin. The hearing started at 14:31.

Present were two prosecutors; Shelipova, the victim; interpreter; Ovsiannikov, counsel for the defense; Shishimarin, the accused.

The proceedings were carried out by a panel of three judges.

Neither side filed a recusal motion.

The prosecution read out a summary of the indictment. The indictment states that, on 02/24/22, Vadim Shishimarin, being the squad commander of the 4th Kantemir Tank Division and having automatic weapons, traveled towards the Russian-Ukrainian border together with other unidentified Russian servicemen. At 9 am on 02/24/22, he crossed the Ukrainian border in the Sumy Oblast, thus having the status of combatant.

Russian servicemen repeatedly came under fire from the Armed Forces of Ukraine. In connection with these attacks, unidentified commanders of the Russian army took a decision on February 27–28 to form a convoy of five vehicles.

On February 28, the above-mentioned convoy was destroyed by fire from a place that was not identified during the pre-trial investigation, causing about 15 Russian servicemen to split into several groups, one of which included Shishimarin.

On February 28 at about 10:30 am, the Russian servicemen noticed a gray car driven by V. M. Arekhov along the road between the urban-type settlement of Chupakhivka and the village of Hrinchenkove. Later, when Arekhov's car came alongside with the servicemen, they opened fire, damaging it. The driver stopped the car, quickly moved to the right front seat, opened the right front door and, in order to save his own life and health, abandoned the car, hiding in the roadside.

After firing at the car, five armed Russian servicemen got into the car and drove in the direction of the urban-type settlement of Chupakhivka. On the sidewalk near a house, they saw Shelipov, Oleksandr Fedorovych, a civilian resident, who was unarmed, dressed in civilian clothes, and was returning home while talking on his mobile phone. The Russian servicemen decided that this citizen intended to inform the Armed Forces of Ukraine about their whereabouts. Russian serviceman Kufakov instructed Shishimarin to kill the above-mentioned civilian.

On February 28, at about 19:55, Shishimarin fired about 3–4 aimed shots from his personal automatic weapon at Shelipov out of the car window. The cause of Shelipov's death was a gunshot wound to the head. After that, the Russian servicemen continued driving.

On their way, they saw a white car driven by Kuzmenko, a citizen of Ukraine, who was moving in the opposite direction. Threatening Kuzmenko with their firearms, they took possession of the car and continued driving. While crossing the bridge, the Russian servicemen were ambushed by local residents armed with smooth-bore guns. Following the skirmish, in which Kufakov was killed, the Russian servicemen were forced to flee towards a pig farm where they hid until the morning of March 1, and then set off in the direction of the village of Komyshe where they surrendered to local residents later the same day.

Shishimarin has been accused under Article 438.2 of the CCU. No civil claim was filed.

Shishimarin pleaded fully guilty and did not refuse to give evidence. No opening speech was given by the accused.

The prosecution requested that the trial be conducted in the following order:

1. examination of the accused;
2. examination of K. S. Shelipova, the victim;

3. examination of Ihor Dekun, the witness;
4. examination of a witness, Russian serviceman Matysov, who was sitting in the car on 02/28/2022 when Shishimarin fired a shot at Citizen Shelipov;
5. examination of physical evidence (mobile phone of the killed Shelipov, five assault rifles of Russian servicemen).

The defense requested that the trial be conducted in the following order:

1. examination of Shelipova, the victim;
2. examination of the accused;
3. examination of witnesses;
4. examination of materials and physical evidence.

The court decided to:

1. examine the victim;
2. examine the accused;
3. examine the witnesses Dekun and Matysov;
4. examine written evidence from the prosecution;
5. examine physical evidence from the prosecution.

At 14:58, the court adjourned for 15 minutes. It was announced at 15:20 that the trial would continue on 05/19/2022 at 12 o'clock at the premises of the Kyiv Court of Appeal.

The May 19 hearing.

Summary of the events:

The Solomianskyi District Court continued its consideration of the case. The hearing started at 12:05 and was held in the building of the Kyiv Court of Appeal.

Present were two prosecutors; Shelipova, the victim; interpreter; Ovsiannikov, counsel for the defense; Shishimarin, the accused.

The order of consideration was as follows:

- Examination of the victim
- Examination of the accused
- Examination of Ihor Dekun, the witness
- Examination of Matysov, the witness

At 14:04 the court adjourned and, after the adjournment, a statement from Shelipova was read, announcing that she would be absent at the hearing.

At 14:50, examination of written and physical evidence began. After that, at the addendum stage, the defense requested changes to the order of consideration and that the two previously mentioned witnesses — Warrant Officer Makeyev and Senior Lieutenant Kalinin — be summoned. The prosecution informed that both the warrant officer and the senior lieutenant had been handed over to the Russian Federation on April 13, 2022. After that, the defense withdrew the motion, and the presentation of cases began, at which the prosecution spoke. The defense requested time for preparations. The court adjourned the presentation of cases until May 20. The hearing ended at 15:49.

Events in detail:

On May 19, the Solomianskyi District Court in Kyiv continued consideration of the case of Russian serviceman Vadim Shishimarin.

The hearing was held in the building of the Kyiv Court of Appeal.

The hearing started at 12:05.

Present were two prosecutors; K. S. Shelipova, the victim; V. V. Ovsiannikov, counsel for the defense; interpreter; V. E. Shishimarin, the accused.

The order of procedure at the hearing:

12:07 — examination of Shelipova, Kateryna Stepanivna, the victim.

Soon after 10 o'clock on February 28, her husband went to see the shell crater. Shelipova was "doing chores" in the backyard. She heard a gunshot while

standing close to the well. She started dialing her husband's number, opening the gate at the same time, when she saw the defendant sitting in a car behind the driver, with a muzzle of his assault rifle sticking out of the open window. She closed the gate and stood behind it for five minutes. She opened the gate then, looked out, went out on the sidewalk and saw her husband lying there, with a white car next to him. The husband was already dead from a gunshot to his head. She started shouting, neighbors gathered around, and together they decided to move and cover his body. All this happened around 11 am. The husband was unarmed, dressed in civilian clothes, and had a bicycle with him. In the victim's opinion, life imprisonment would be an adequate punitive measure. However, she wouldn't mind if he were "swapped" for the Mariupol defenders. When asked by the defense about the phone call, Shelipova said that her husband was talking to a friend. When asked by the judge about the accused, she said that he was in a military uniform and wore a red armband. The accused traveled in a gray car.

12:23 — examination of Shishimarin, Vadim Evgenevich.

On February 27, the Russian servicemen arrived at the location. During the day, engineers were setting traps, one of which was triggered in the evening. On February 28, they started their journey to Russia as part of a five-car convoy. A few hours later, the convoy was destroyed. Those who remained alive retreated a kilometer or a little more, until they saw a civilian car, Volkswagen Passat. The captain told the accused to inspect the car. Shishimarin said that he could not drive, so three people approached the car: Shishimarin, an unknown person, and Ivan Matysov. Five persons got into the car: the accused sat behind the driver, Ivan Matysov — to his right, while the unknown person sat behind the wheel. Before the convoy started moving, Warrant Officer Makeyev got behind the wheel, the unknown person sat to his right, Shishimarin — behind the driver, Matysov — to Shishimarin's right, while Senior Lieutenant Kalinin sat in the trunk. On the way, the warrant officer saw a man who was talking on the phone. The warrant officer said that the man was calling the military and told Shishimarin to shoot. Shishimarin did not fire. The unknown person then turned around to face the accused and ordered him to shoot in a threatening tone, arguing that they would not make it and that they were facing danger. The defendant did not see the man until the car approached him. Shishimarin fired a short burst. They kept on driving; a car was coming towards them. The warrant officer blocked the road and told them to get out of the car. They started driving in another car, then changed seats, with the warrant officer getting

into the trunk, and the unknown person — behind the wheel, but were ambushed soon. The hunters killed the driver, crashing the car into a ditch.

The servicemen started retreating after they had been shot at. They saw a civilian, handed over their weapons to him, and then surrendered to the Ukrainian Armed Forces without putting any resistance. When asked by the prosecution whether his commander was in the car, Shishimarin said that he was not. The warrant officer was not the immediate commander of the accused, but had a higher rank. Shishimarin had never seen the unknown person before and is unaware of his rank. He did not see the victim (Shelipova) when they approached the gate.

He surrendered because he saw no point in going back to the Russian servicemen's location and thought it necessary to surrender to stay alive. He fired from AK74M, serial number 8439778. When asked by the victim, he confessed his guilt and asked for forgiveness for what he had done.

He didn't know anything about the military operation, his mission was to ride in a convoy. When asked by the defense, he said that an order was received on February 23 to gather belongings and take three days' travel rations in order to drive in a convoy and come back. He had no intention to kill when he was shooting.

13:00 — examination of Ihor Dekun, the witness.

The witness saw the accused and is the victim's neighbor. On February 28, at about 10:30, he was standing outdoors with his father and two neighbors. They heard automatic fire. 30 minutes later they heard a growing sound, and saw a gray Volkswagen. As soon as the car appeared on the street, they heard automatic fire. The witness then saw smoke coming from an assault rifle on the car's left side. The car was driving towards the witness. He, his father and neighbors went indoors, and the witness saw that there was no glass, the trunk was opened, and the people inside were wearing Russian military uniforms. The sound came from the damaged front left tire. A few minutes later, the witness, his father and neighbors heard their neighbor, Kateryna Shelipova, crying. The witness ran up to her and saw the body of the victim's husband. He was lying on his back. His mobile phone was lying next to his left hand. Part of the skull was missing.

13:20 — examination of Matysov, Igor Valeryevich, the witness.

On February 24, we drove into Ukraine in a convoy, stopped to regroup, and left on February 25. We camped in the woods. At night, someone was posted on a lookout, and the tankmen fired several shots. Four were wounded. After that, the regiment commander ordered forming a convoy and taking the wounded to the

Russian Federation. On February 27, a column of five vehicles had left. When the car in which the witness and the accused were traveling approached the civilian, Vadim fired under pressure from an unknown serviceman. The last three digits of the witness's weapon number are 871.

At 14:04, the court adjourned for 30 minutes. After the adjournment, a statement from Shelipova was read, announcing that she would be absent at the hearing.

14:50 — examination of written and physical evidence.

Resolutions to appoint a team of prosecutors, to set up an investigative group, to sever pre-trial investigation records, to provide access to pre-trial investigation files (the suspect and the defense have read the case files), the report of photo array identification procedure (dated April 25 and evidencing identification of the suspect by the witness), the report of photo array identification procedure (dated April 25 and evidencing identification of the suspect by the victim), the report of the investigative experiment dated April 25, 2022, the report of the investigative experiment dated April 30, 2022 (involving the accused and the witness), the report of the investigative experiment dated April 22, 2022 (at the site where the unknown person was killed), the statement of weapons acceptance (3 assault rifles), the statement of weapons acceptance (2 assault rifles), the inspection report (2 assault rifles), the inspection report (3 assault rifles), the inspection report dated 04/30/22 of the "List of weapons assigned to personnel", the resolution dated 04/30/22 to recognize the documents "List of weapons assigned to personnel", the telephone inspection report, the report of determination of physical evidence (telephone), the resolution ordering outpatient comprehensive forensic psychological examination, the resolution ordering a forensic medical examination, the resolution ordering a ballistic test, two resolutions ordering the delivery of physical evidence, the resolution on admission of physical evidence.

Physical evidence includes the victim's phone and five assault rifles.

15:25 — addendum stage: The defense requested changes to the order of consideration and that the two previously mentioned witnesses — Warrant Officer Makeyev and Senior Lieutenant Kalinin — be summoned. The prosecution informed that both the warrant officer and the senior lieutenant were handed over to the Russian Federation on 04/13/2022. After that, the defense withdrew the motion.

15:30 — presentation of cases starts. The prosecution spoke, while the defense requested time for preparations.

At 15:49, the court went into recess. The next hearing is to start at 11:00 on May, 20, in the building of the Kyiv Court of Appeal.

The May 20 hearing.

Summary of the events:

The hearing started at 11:02 in the building of the Kyiv Court of Appeal. On May 20, the presentation of cases ended in the trial of Russian serviceman Vadim Shishimarin who is accused of violating the laws and customs of war.

The defense stated that the accused had not intended to commit a crime and wanted to save his life. He felt a threat to his life coming not only from the Armed Forces of Ukraine, but also from his immediate superiors, Warrant Officer Makeyev and Kufakov.

The defense declared that the suspect was innocent and asked for acquittal of its client.

In his last plea, Shishimarin said that he regretted what he had done. He said that he sincerely repented.

At 11:37, the court went into recess, scheduling the next hearing on May 23.

Events in detail:

On May 20, the presentation of cases ended in the trial of Russian serviceman Vadim Shishimarin who is accused of violating the laws and customs of war.

The defense said that the sequence in which the servicemen had taken their seats in the car in which they had been traveling was of relevance. Namely, that Kufakov sat next to the driver, as this seat offered better view of the road, monitoring of the situation and giving orders to those inside in the car. Therefore, according to the defense, Shishimarin perceived Kufakov as commander in combat conditions and had to be subordinate to a superior officer.

The defense asked the court to pay attention to the fact that the first order to fire had been given by Warrant Officer Makeyev whose rank was higher than that of Shishimarin. The suspect refused to comply with this order. The second order was issued by Kufakov; Shishimarin again refused to follow this order, and after that Kufakov started intimidating and threatening Shishimarin, saying that a civilian who was holding a mobile phone could forward their coordinates to Ukrainian servicemen.

The defense also stated that the accused had not intended to kill a civilian. The defense stated that Shishimarin had made random shots without intending to kill

the civilian and had carried out the order perfunctorily, hoping that he wouldn't hit, rather than for the purpose of killing.

The defense stated that the accused had not intended to commit a crime and wanted to save his life. He felt a threat to his life coming not only from the Armed Forces of Ukraine, but also from his immediate superiors, Warrant Officer Makeyev and Kufakov.

The defense declared that the suspect was innocent and asked for acquittal of its client.

In his last plea, Shishimarin said that he regretted what he had done. Shishimarin said that he sincerely repented.

At 11:37, the court went into recess, scheduling the announcement of the verdict on May 23.

The May 23 hearing.

Summary of the events:

The Solomianskyi District Court in Kyiv announced the verdict in the case of Russian serviceman Shishimarin, Vadim Evgenevich. The hearing started at 12:02 and was held in the building of the Kyiv Court of Appeal. The judge read out the entire text of the verdict.

The verdict notes that, despite the testimony from the accused that he had accidentally hit Shelipov, the court came to the conclusion that the murder had been committed with direct intent. The judge also added that the guilt of the accused in committing the crime had been fully corroborated during the trial. The only mitigating circumstance was that the serviceman cooperated with the investigation.

As a result, the court granted the prosecution's request and sentenced Vadim Shishimarin to life imprisonment.

Physical evidence: 5 assault rifles with magazines, empty cartridge cases, phone of the deceased. Shishimarin confirmed that he had understood all the wording.

The court announced that the verdict can be appealed within 30 days. The hearing ended at 12:55.

After the verdict was announced, Shishimarin's lawyer Viktor Ovsiannikov said that he would continue to seek the acquittal of his client and did not rule out filing an appeal.

Events in detail:

On May 23, the Solomianskyi District Court in Kyiv announced the verdict in the case of Russian serviceman Shishimarin, Vadim Evgenevich. The hearing was held in the building of the Kyiv Court of Appeal.

The hearing started at 12:02.

The judge read out the entire text of the verdict.

The court read out Shishimarin's description. After that, relevant fragments of the UN Declaration, articles of the Constitution of Ukraine, and other documents relevant to the case, i.e., the independence of Ukraine, the armed aggression, and violations of the laws and customs of war, were read out. The court described the circumstances in the case of Oleksandr Shelipov's murder. Testimonies of the victim

Shelipova, witness Dekun, and witness Matysov were read out. The court went on to describe all the written and physical evidence.

The verdict notes that, despite the testimony from the accused that he had accidentally hit Shelipov, the court came to the conclusion that the murder had been committed with direct intent. The judge also added that the guilt of the accused in committing the crime had been fully corroborated during the trial. The only mitigating circumstance was that the serviceman cooperated with the investigation.

As a result, the court granted the prosecution's request and sentenced Vadim Shishimarin to life imprisonment. Physical evidence: 5 assault rifles with magazines to be delivered to the AFU, empty cartridge cases to be destroyed, phone of the deceased to be delivered to Shelipova.

Shishimarin confirmed that he had understood all the wording.

The verdict can be appealed within 30 days.

At 12:55, the court went into recess.

After the verdict was announced, Shishimarin's lawyer Viktor Ovsiannikov said that he would continue to seek the acquittal of his client and did not rule out filing an appeal.

Later it became known that Shishimarin's lawyer Viktor Ovsiannikov had filed an appeal.

Expert Assessment of the Trial.

Volodymyr Yavorskyi, member of the Expert Panel, Center for Civil Liberties.

The case of Vadim Shishimarin, a Russian serviceman, has uncovered major problems facing the judicial system.

It is to be noted immediately that I have no doubt that he is guilty of premeditated murder.

I am surprised by the fact that the defense asked for Shishimarin's acquittal because he had followed the orders. Actually, this can never constitute grounds for full acquittal, because murder had been committed; it may only constitute grounds for reclassification of actions, thereby offering an extremely weak position for the defense.

A strange circumstance in this case is that Ukraine, as it turned out, had already exchanged in April two of the five Russian servicemen involved in this murder. Furthermore, one of them actually gave the order to kill. Who, when and on what grounds ordered the exchange remains a mystery? This once again raises the question that **this is not the first time that Ukraine swaps international criminals**. Earlier, Berkut soldiers who shot Maidan protesters, and those found guilty in the case of the downed Boeing had been swapped. The laws of Ukraine do not define exchange procedures. However, should this continue, we may forget about any international courts and justice. Besides, they were exchanged without any questioning. Their testimonies in this case are absent. The only comforting thing here is that some Ukrainians returned home thanks to the swap.

Further questions arise: Why is one serviceman in the dock, while another from their group acts as a witness only? By all indications, he is an obvious accomplice to the crime, rather than a mere witness. Who and why made this Russian serviceman a witness in this case is also a very strange and incomprehensible matter? In fact, the other serviceman may thus avoid punishment for complicity.

Shishimarin is accused of violating the laws and customs of war. In my opinion, this is an erroneous classification of his actions or at least it cannot be proven on the basis of the available evidence.

Killing a civilian is not always a violation of the laws and customs of war. In order to prove this crime, the person who had given the order must be interrogated first, so that the reason for the murder could be discovered. Especially when their doubts exist about the reason. In this case, the servicemen allege that they saw a person who started a phone conversation and could report their whereabouts. A civilian who reports the location of troops loses immunity as a civilian by participating in the destruction of manpower. The murder of such civilian is unlikely to be regarded as a murder of a civilian and, consequently, as an international crime. In other words, a serviceman is guilty when he kills a person realizing that this person is a civilian. However, interrogating those who gave the orders is impossible: one was killed, the other two were exchanged. These circumstances thus cannot be proven, and therefore must be interpreted in favor of the accused.

It is also worth noting that the servicemen did not kill all civilians indiscriminately without assessing threats first. They released the driver of the car, the security guard, and generally did not kill any other civilians. This may indicate that they had killed because they believed that this person could have cooperated with the Ukrainian military.

We know that they had been wrong in their assessment of the threat, but this does not prove their intention to violate the laws and customs of war, because direct intent is required here.

Given this, it would seem logical that Shishimarin **should not be convicted of violating the laws and customs of war**. In this case, the most likely classification could be premeditated murder committed by a group of persons and abuse of authority, resulting in the death of a person. Besides, two Russian servicemen should be prosecuted, since they had obviously made a disproportionate assessment of the threat and killed a person who in fact was not performing any military functions. The consequence of this should be a significantly milder punishment.

There are risks that this problem may be repeated in other cases of violation of the laws and customs of war, resulting in the prevalence of a completely erroneous judicial practice. For example, at the time of this trial, hearings in the cases of two Russian servicemen who had fired BM-21 launchers are nearing completion in Poltava, where both the prosecution and the court restrict themselves to proving the instances of shelling from the BM-21 launchers without establishing

whether the servicemen fired at military targets or deliberately pounded civilian facilities. Those who ordered them to do so cannot be questioned either.

The problem of vague definition of the crime under Article 438 of the Criminal Code (violation of the laws and customs of war) has already become obvious by now, making it absolutely incomprehensible which actions should be criminally punishable. Should these servicemen appeal to the European Court of Human Rights, they may well win their case. Ukraine would then find itself in a rather intricate situation.

Another problem is the waiver of civil claim by the victim's wife. She did not have a lawyer in the case. Obviously, she can later claim damages in court, but it appears to be unlikely in the absence of legal aid. It seems that this was done in order to speed up the trial by sacrificing the victim's interests. This is definitely bad practice.