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Legal remedies for human rights violations on the Ukrainian territories outside the control of the Ukrainian authorities

Report¹

Committee on Legal Affairs and Human Rights

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Summary

The Committee on Legal Affairs and Human Rights is deeply worried about the human rights situation in Crimea and in the self-proclaimed “people’s republics” of Donetsk and Luhansk (“DPR” and “LPR”) and the lack of legal remedies for victims.

The “DPR” and “LPR”, established, supported and effectively controlled by the Russian Federation, do not enjoy any legitimacy under Ukrainian or international law. This applies to all their “institutions”, including the “courts” established by the *de facto* authorities.

Under international law, the Russian Federation, which exercises *de facto* control over these territories, is responsible for the protection of their population. Regarding Crimea, Russian military presence and effective control have been officially acknowledged by the Russian authorities. Regarding the “DPR” and the “LPR”, effective control is based on the well-documented crucial role of Russian military personnel in taking over and maintaining control of these regions, and on the complete dependence of the “DPR” and “LPR” on Russia in logistical, financial and administrative terms.

Both in Crimea and in the conflict zone in the Donbas region, serious human rights violations have occurred. The committee finds that free and fair elections are not possible in these regions as long as the climate of insecurity, intimidation and impunity and the lack of freedom of expression and information prevail.

1. Reference to committee: [Doc.13700](#), Reference 4108 of 30 January 2015 and [Doc.13728](#), Reference 4124 of 24 April 2015.



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A. Draft resolution²

1. The Parliamentary Assembly is deeply worried about the human rights situation in Crimea and in the self-proclaimed “people’s republics” of Donetsk and Luhansk (“DPR” and “LPR”).
2. It reaffirms its position that the annexation of Crimea by the Russian Federation and the military intervention by Russian forces in eastern Ukraine violate international law and the principles upheld by the Council of Europe, as stated in Assembly [Resolution 2112 \(2016\)](#), [Resolution 2063 \(2015\)](#), [Resolution 1990 \(2014\)](#) and [Resolution 1988 \(2014\)](#).
3. The “DPR” and “LPR”, established, supported and effectively controlled by the Russian Federation, do not enjoy any legitimacy under Ukrainian or international law. This applies to all their “institutions”, including the “courts” established by the *de facto* authorities.
4. Under international law, the Russian Federation, which exercises *de facto* control over these territories, is responsible for the protection of their population. Russia must therefore guarantee the human rights of all inhabitants of Crimea and of the “DPR” and “LPR”.
5. Regarding Crimea, Russian military presence and effective control have been officially acknowledged by the Russian authorities. Regarding the “DPR” and the “LPR”, effective control is based on the well-documented crucial role of Russian military personnel in taking over and maintaining control of these regions, against the determined resistance of the legitimate Ukrainian authorities and on the complete dependence of the “DPR” and “LPR” on Russia in logistical, financial and administrative terms.
6. Both in Crimea and in the conflict zone in the Donbas region, serious human rights violations have occurred, and are still occurring, as documented by numerous reports of, *inter alia*, the Council of Europe’s Commissioner for Human Rights, the United Nations Human Rights Monitoring Mission for Ukraine, the Special Monitoring Mission to Ukraine of the Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe (OSCE/ODIHR), as well as leading Ukrainian and international non-governmental human rights organisations. These violations include extrajudicial killings, enforced disappearances, torture and inhuman and degrading treatment, unlawful detentions and disproportionate restrictions of the freedom of expression and information.
7. Victims of human rights violations have no effective internal legal remedies at their disposal:
 - 7.1. as far as the residents of the “DPR” and “LPR” are concerned, local “courts” lack legitimacy, independence and professionalism; the Ukrainian courts in the neighbouring government-controlled areas to which jurisdiction for the non-controlled areas was transferred by Ukraine are difficult to reach, cannot access files left behind in the “DPR” and “LPR” and cannot ensure the execution of their judgments in these territories;
 - 7.2. as far as the residents of Crimea are concerned, the climate of intimidation also affects the independence of the courts and, in particular, the willingness of the police and the prosecution service to hold to account perpetrators of crimes against perceived or actual Ukrainian loyalists.
8. In Crimea, Ukrainians in general, and Crimean Tatars in particular, have been severely intimidated by the above-mentioned human rights violations and the fact that they remain largely unpunished. Many were forced to leave Crimea. In parallel, all inhabitants of Crimea have been placed under immense pressure to obtain Russian passports and renounce their Ukrainian nationality in order to have access to health care, housing and other essential services. The Crimean Tatars, following the dissolution of the Mejlis and its local branches, have lost their traditional democratic representation. Tatar media and the Tatar’s Muslim religious practice were also targeted. The cumulative effect of these repressive measures is a threat to the Tatar community’s very existence as a distinct ethnic, cultural and religious group.
9. In the conflict zone in the Donbas region, the civilian population as well as a large number of combatants suffered violations of their rights to life and physical integrity and to the free enjoyment of property, by war crimes and crimes against humanity including the indiscriminate or even intentional shelling of civilian areas, sometimes provoked by the stationing of weapons in close proximity.
10. Numerous inhabitants of the conflict zone in the Donbas, on both sides of the contact line, still suffer on a daily basis from numerous violations of the ceasefire agreed in Minsk. These violations are documented daily by the OSCE Special Monitoring Mission in Ukraine, despite the restrictions on access imposed mainly by the *de facto* authorities of the “DPR” and “LPR”. The inhabitants also suffer from the prevailing climate of

2. Draft resolution adopted unanimously by the committee on 6 September 2016.

impunity and general lawlessness due to the absence of legitimate, functioning State institutions, and in particular of access to justice in line with Article 6 of the European Convention on Human Rights (ETS No. 5). They also endure severe social hardship worsened by restrictive measures imposed by the Ukrainian authorities regarding pension and social assistance payments. Finally, persons displaced from the “DPR” and “LPR” face expropriation of the properties they left behind due to the unlawful re-registration requirements imposed by the *de facto* authorities.

11. The Ukrainian authorities have begun prosecuting alleged perpetrators of war crimes and other human rights violations on the side of pro-government forces. But they have not yet granted international observers access to all places of detention, in particular those run by the Security Service of Ukraine (SBU).

12. The Minsk Agreements include amnesty clauses for the participants in the armed conflict in the Donbas region. The Assembly recalls that under international law, such clauses cannot justify impunity for the perpetrators of serious human rights violations.

13. Regarding the elections foreseen in the Minsk Agreements, the Assembly considers that as long as the present situation in the “DPR” and “LPR”, characterised by a climate of insecurity, intimidation and impunity and a lack of freedom of expression and information, prevails, free and fair elections (as guaranteed by Article 3 of the Protocol to the European Convention on Human Rights (ETS No. 9)) are not possible in these regions.

14. The Assembly regrets that neither the Russian Federation nor Ukraine have ratified the Rome Statute establishing the International Criminal Court (ICC), whilst noting that Ukraine has accepted the ICC’s jurisdiction for the conflict zone in the Donbas region in its declarations of 17 April 2014 and 8 September 2015 under Article 12.3 of the Rome Statute. The Assembly welcomes the changes to the Constitution of Ukraine, finally adopted by the Ukrainian Parliament, by which the ratification of the Rome Statute will be possible. At the same time, the Assembly is concerned that these changes will come into effect only in three years’ time, and not as soon as possible, as was recommended by the Assembly.

15. The Assembly is deeply worried about the lack of progress in the international investigation into the downing of flight MH17 in Donbas.

16. The Assembly therefore urges:

16.1. the competent authorities, both in Ukraine and in the Russian Federation, to:

16.1.1. effectively investigate all cases of serious human rights violations allegedly committed in all areas under their effective control;

16.1.2. prosecute their perpetrators, thereby also discouraging any such violations in future;

16.1.3. compensate their victims to the extent possible;

16.1.4. accede to the Rome Statute of the ICC;

16.1.5. fully implement the Minsk Agreements;

16.2. the Russian authorities to:

16.2.1. end their repressive actions against people loyal to the Ukrainian authorities in all areas under their effective control, including Crimea; in particular, to restore the historical rights of the Crimean Tatar community and to enable the re-establishment of the rule of law in the whole of eastern Ukraine;

16.2.2. meanwhile, ensure the protection of the fundamental rights of all inhabitants of the “DRP” and the “LPR” and the fulfilment of their basic needs, and exercise their influence with the *de facto* authorities to this end;

16.2.3. facilitate the independent monitoring of the human rights situation in all Ukrainian territories under their effective control, including Crimea;

16.3. the Ukrainian authorities to make easier, as far as is in their power, the daily life of the inhabitants of the territories outside of their control and of the displaced persons from these areas by reducing administrative burdens in access to pensions and social allowances and by facilitating the inhabitants’ access to justice by adequately equipping and staffing the courts in government-controlled areas to which jurisdiction for the non-controlled areas has been transferred;

16.4. the international community to continue focusing on the human rights and humanitarian situation of the people living in the territories of Ukraine not under the control of the Ukrainian authorities and refrain from placing demands on Ukraine the fulfilment of which would cement the unlawful status quo;

16.5. the ICC to exercise its jurisdiction regarding the conflict zone in the Donbas region to the extent that is legally possible following the declarations filed by Ukraine.

17. The Assembly resolves to continue observing the human rights situation in the conflict zone in the Donbas region and in Crimea as a matter of priority.

B. Explanatory memorandum by Ms Marieluise Beck, rapporteur

1. Introduction

1. Due to the annexation of Crimea by the Russian Federation and the «hybrid war» in the Donbas region, which led to the proclamation of the so-called “people’s republics” of Donetsk (“DPR”) and Lugansk (“LPR”), Ukraine lost effective control over substantial parts of its territory. The Assembly has strongly condemned both the annexation of Crimea by the Russian Federation and the Russian military intervention in the Donbas region as violations of international law and of the fundamental values of the Council of Europe.³ Whilst I fully share this point of view, the focus of my mandate as rapporteur is to look into the human rights situation of the people living in these regions, with a view to identifying legal remedies for their plight. But in order to be fully objective and to avoid giving in to the temptation of simply blaming “both sides”, it is useful to recall who is the aggressor and who is the victim of the aggression. In such a situation, equidistance is in reality a form of unequal treatment. This said, Ukraine’s “victim status” does not give this country a licence to violate human rights. To the contrary, as Ms Kristýna Zelienkova and I learnt during our joint visit to the Donbas region earlier this year: the brave people still living in the conflict zone and the wonderful civil society activists devoted to helping them as well as those displaced by the conflict rightly have high expectations vis-à-vis the Ukrainian authorities – these must set the right example, to the very best of their abilities.

2. In this report, I will thus deal with the human rights situation in Crimea and the “DPR” and “LPR” and with the legal remedies available to victims of human rights violations – including measures to prevent such violations in the future. Human rights also include the right to free and fair elections protected in Article 3 of the Protocol to the European Convention on Human Rights (ETS No. 9).

3. As regards the facts, I rely in the first place on my own fact-finding activities, including the joint information visit with Ms Zelienkova as the Assembly’s rapporteur and the experience gained in dozens of visits to the conflict zone over the last years as a member of the German Bundestag and the hearings with eminent experts before our committee during the Assembly’s January, April and June 2016 part-sessions.

4. In addition, I rely on the remarkably comprehensive and coherent reports published since the beginning of the conflicts by representatives of the Council of Europe, other international bodies and numerous non-governmental organisations (NGOs), including:

- the Council of Europe Commissioner for Human Rights, and the special representative of the Secretary General, Ambassador Gérard Stoudmann;
- the Human Rights Monitoring Mission in Ukraine of the United Nations Office of the High Commissioner for Human Rights (OHCHR HRMMU);
- the Special Monitoring Mission to Ukraine of the Organisation for Security and Co-operation in Europe (OSCE SMM), as well as the OSCE’s Office for Democratic Institutions and Human Rights (OSCE/ODIHR) and High Commissioner on National Minorities (HCNM);
- numerous reports presented by international and national NGOs, including Amnesty International (AI), Human Rights Watch (HRW), International Crisis Group (ICG), Open Dialogue Foundation (ODF), the Open Russia Foundation, the Kiyv Center for Civil Liberties, the Kiyv International Partnership for Human Rights, the Crimean Human Rights Group, the Coalition “Justice for Peace in Donbas”, the Kharkiv Human Rights Group, and numerous grass-roots groups whose representatives we met in Mariupol and Dnipro.

5. As regards the legal analysis, I base myself first and foremost on the European Convention on Human Rights (ETS No. 5, “the Convention”) as interpreted by the European Court of Human Rights (“the Court”).

6. To conclude, I will make some suggestions – as summed up in the draft resolution – as to how the victims of the human rights violations in the regions covered by my mandate may obtain redress and how their situation may be improved in future.

3. [Resolution 2112 \(2016\)](#); [Resolution 2063 \(2015\)](#), [Resolution 1990 \(2014\)](#) and [Resolution 1988 \(2014\)](#). In this context, the repeated visits by Assembly members to Crimea and the “DPR” and “LPR” on the invitation of the *de facto* authorities are unacceptable (most recently by a French delegation headed by Mr Mariani, see <https://www.rt.com/news/354024-french-lawmakers-visit-crimea/> and the fully justified criticism in *Libération* (www.liberation.fr/planete/2016/07/31/le-voyage-de-parlementaires-francais-en-crimee-condamne-par-l-ukraine_1469594).

2. The human rights situation in the Ukrainian territories outside the control of the Ukrainian authorities

2.1. The human rights situation in Crimea

7. As I was not able to travel to Crimea, I am relying mostly on the reports by the Council of Europe's Commissioner for Human Rights, Mr Niels Muižnieks, and the special representative of the Secretary General, Ambassador Gérard Stoudmann,⁴ as well as reports from other international organisations (in particular, the OHCHR's HRMMU) and from NGOs. Very importantly, Mr Mustafa Dzhemilev, former chairperson of the Mejlis and currently a member of the Verkhovna Rada and of the Ukrainian delegation with the Parliamentary Assembly, gave an impressive description of the situation in his homeland at our committee meeting on 21 June 2016.

2.1.1. 1 The Council of Europe Commissioner for Human Rights

8. The Council of Europe's Commissioner for Human Rights published a report on 27 October 2014 on the human rights situation in Crimea following visits to Kyiv, Moscow and Crimea from 7 to 12 September 2014.⁵ The Commissioner insisted that all investigations should be conducted in compliance with the principles established in the case law of the European Court of Human Rights and stressed the need for accountability for serious human rights violations. He flagged a number of individual cases including:

- the disappearance and death of a protester, Mr Reshat Ametov, whose abduction on 3 March 2014 was shown on the Crimean Tatar television channel ATR;
- the suspect death of 16-year old Mark Ivanyuk on 21 April 2014;
- the cases of three local civil society activists, Leonid Korzh, Timur Shaimardanov and Seiran Zinedinov, who went missing between 22 and 30 May 2014;
- the abduction by uniformed men of MM. Islyam Dzhapparov and Dzhevdet Islyamov on 27 September 2014.

9. Mr Muižnieks also refers to the alleged implication in acts of violence of the so-called "Samo-oborona" (Self-Defence) units, whose status and functions remain unclear, and to acts of intimidation against Crimean Tatars and ethnic Ukrainians who had criticised "the recent political developments".⁶ In April 2015, the Commissioner made a public statement in defence of the Crimean Tatar ATR television channel and reiterated his point of view that minorities in Crimea should be able to freely practise their religion, receive education in their languages and manifest their views without fear.⁷

2.1.2. The Stoudmann report

10. The visit by Ambassador Stoudmann, mandated by the Secretary General of the Council of Europe, gave rise to some controversy. A number of Ukrainian, and in particular Tatar representatives found the report biased in favour of the Russian side.⁸ The report, published before the outlawing of the Mejlis as an "extremist organisation", considered that "the cases of repression, as severe as they may be, seem more targeted against individual opponents, whether they are Crimean Tatars, Ukrainians or others, rather than reflecting a collective repression policy against the Crimean Tatars as an ethnic group".⁹

11. But the report also stated that a ban on the Mejlis of the Crimean Tatar people as an "extremist organisation" (which has indeed been imposed in the meantime) would "indicate a new level of repression targeting the Crimean Tatar community as a whole".

12. Very importantly, Mr Stoudmann concluded that the situation is such that it is "neither normal, nor acceptable, that a population of 2.5 million people should be kept beyond the reach of the human rights mechanisms established to protect all Europeans". I cannot but agree with this statement.

4. SG/Inf(2016)15 rev dated 11 April 2016, Report to the Secretary General of the Council of Europe by Ambassador Gérard Stoudmann on his human rights visit to Crimea (25-31 January 2016) (hereafter: "Stoudmann report").

5. Document CommDH(2014)19 dated 27 October 2014.

6. See also statement on 12 September 2014, "[Human rights abuses in Crimea need to be addressed, mission to Kyiv, Moscow and Simferopol](#)".

7. Commissioner Muižnieks calls for unhindered broadcasting of ATR TV, statement of 2 April 2015.

8. See, for example, "[What the special mission of the Council of Europe 'didn't notice' in occupied Crimea](#)", Euromaidan Press, 30 May 2016.

9. Stoudmann report, op. cit., p. 4.

2.1.3. Reports by the Human Rights Monitoring Mission for Ukraine of the Office of the United Nations High Commissioner for Human Rights (HRMMU)

13. The HRMMU,¹⁰ which was prevented from opening an office on the territory of Crimea by the *de facto* authorities, has frequently reported on acts of intimidation against members of “pro-Ukrainian” population groups, including national and religious minorities such as the Crimean Tatars. In its June 2015 report, it stresses the tightening of the control of the media, including the denial of re-registration under Russian law and the subsequent closure of at least seven media outlets using the Crimean Tatar language. Re-registration requirements have also jeopardised freedom of religion. The HRMMU has also flagged the “dramatic” situation of vulnerable groups, such as people with a drug addiction deprived of life-saving substitution therapy.¹¹ In its December 2015 report, the HRMMU also points out the violation of the right to citizenship:

“Their right to citizenship has been violated. Although they may keep their Ukrainian passports and will not be sanctioned for not disclosing this fact, Crimean residents were granted Russian Federation citizenship by default and given no choice but to take up Russian Federation passports or lose their employment and social entitlements.”¹²

14. In its most recent (14th) report published in June 2016,¹³ the HRMMU highlights the continuing climate of intimidation fostered by the failure to investigate the killings and disappearances in 2014/15 and in particular the continuing harassment of the Tatar minority (violent searches and seizures, mass arrests, transfer of Crimean detainees to Russian prisons, opening of a new television channel (‘Millet’) broadcasting in the Tatar language with the declared aim of countering “anti-Russian propaganda”).¹⁴

2.1.4. European Union reports

15. At the request of the European Parliament’s Subcommittee on Human Rights, the European Parliament’s Directorate-General for External Policies prepared a study on “The situation of national minorities in Crimea following its annexation by Russia”,¹⁵ which concentrates on the situation of national minorities in Crimea and describes numerous human rights violations targeted specifically at minorities, including the rights to life, liberty, security and physical integrity and property, the freedom of assembly, expression, association, religion, freedom of movement, and education and cultural rights of minorities.

2.1.5. NGO reports

16. Regarding the situation in Crimea, the monthly monitoring reports by the “Crimea Field Mission on Human Rights” set up in March 2014 by a group of NGOs including the Ukrainian Helsinki Human Rights Union, the Youth Human Rights Movement and the Human Rights Centre “Almenda” (with the support of the United Nations Development Program (UNDP) and of the Ministry of Foreign Affairs of Denmark) appear to be the most serious and reliable non-governmental source of information.¹⁶ The Crimea Field Mission’s monthly reports provide useful information on the progress of individual cases and on trends developing over time. The Field Mission also provides detailed information on threats to freedom of expression in Crimea, including media freedom, freedom of assembly and freedom of religion since the annexation. As an example of the kind of cases followed up by the Field Mission, its May 2015 report¹⁷ noted that a practice has evolved in Crimea whereby pro-Ukrainian activists residing in Crimea are prosecuted for acts committed prior to the establishment of control of the Russian Federation, or for participation in events that took place outside of Crimea (for example in other Ukrainian cities), which, in the opinion of the Crimean authorities, threatened the established order of power. This also applies to the “Case of 26 February”, where criminal proceedings under Article 212 of the Criminal Code of the Russian Federation (organising and participating in “mass disorders”)

10. See paragraphs 24-34 below.

11. OHCHR, [Report on the human rights situation in Ukraine](#), 16 February-5 May 2015, p. 6, paragraph 19.

12. OHCHR, [Report on the human rights situation in Ukraine](#), 16 August-15 November 2015, p. 4, paragraph 15.

13. OHCHR, [Report on the human rights situation in Ukraine](#), 16 February-5 May 2015.

14. *Ibid.*, p. 46, paragraph 194.

15. www.europarl.europa.eu/committees/en/droi/supporting-analyses.html.

16. All reports of the Field Mission and of the Crimea Human Rights Group since April 2014 (the most recent covering June 2016) are available at: <http://crimeahr.org>; leading international human rights groups have also published in-depth reports on the human rights situation in Crimea, see Amnesty International, “Ukraine: One year on: Violations of the rights to freedom of expression, assembly and association in Crimea,” 18 March 2015, Index number: EUR 50/1129/2015; Human Rights Watch, “Rights in retreat: abuses in Crimea”, 17 November 2014; and “Russia: independent group targeted over Crimea”, 23 June 2015.

17. Dated 24 June 2015, available at: <http://crimeahr.org/en/>.

were opened against the Deputy Chairperson of the Mejlis, Mr Ahtem Chiygoz, and four other activists (MM. Ali Asanov, Eskender Nebiev, Eskender Kantemirov and Eskender Emirvaliev).¹⁸ The May 2015 report provides disturbing details about the arrest and torture of the pro-Ukrainian activist Oleksandr Kostenko, who was convicted by a court in Simferopol on the basis of confessions allegedly obtained under torture, and following a flawed trial presenting numerous characteristics pointing to its political motivation.¹⁹ The May 2016 report relates a new case of disappearance of a Tatar activist, namely the abduction, on 24 May 2016, of Erwin Ibragimov. In its latest report covering June 2016, the NGO Group cites public statements by the Crimean chief prosecutor which cast doubt on the effectiveness of the investigation into Mr Ibragimov's disappearance. In addition to the monthly reports, the Crimea Human Rights Group publishes thematic reports. One such report published in February 2016 presents numerous instances of politically motivated persecution and discrimination on the ground of pro-Ukrainian views ("Crimea: Ukrainian identity banned"). The most recent thematic report, dated June 2016, on "The victims of enforced disappearance in Crimea as a result of the illegal establishment of the Russian Federation control (2014-2016)" provides detailed descriptions of the circumstances of these disappearances and analyses the obstacles in the path of effective investigation (including at best unclear relations between the "Crimean self-defence forces" suspected of involvement in these crimes and the – de facto – Crimean law-enforcement authorities).

17. Other detailed reviews of specific human rights issues under the occupation are provided by a group of Ukrainian expert analysts (CHROT,) regarding in particular the right to liberty of movement and freedom to choose residence and the right to property, including nationalisation of property (companies, institutions and organisations State-owned and owned by trade unions, private enterprises); prevention of disposition of private property in case of non-registration of real property in accordance with the Russian procedure; demolition of constructions not authorised by the *de facto* authorities (example: demolition of a 16-storied building at Cape Crystal in Sevastopol); difficulties while removing private property from the occupied territory to mainland Ukraine and vice versa; and mandatory re-registration in accordance with Russian law of all legal entities registered on the territory of Crimea and Sevastopol with denial in some cases and nationalisation of the property.²⁰

18. Leading international human rights groups have also published in-depth reports on the human rights situation in Crimea, including Amnesty International and Human Rights Watch.²¹ The most comprehensive factual documentation of human rights violations in Crimea, covering the period between February 2014 and February 2016, can be found in the report by a coalition of Ukrainian NGOs entitled "The Peninsula of Fear: Chronicle of Occupation and Violation of Human Rights in Crimea".²² Last but not least, the "Memorial" Anti-Discrimination Centre dedicated a detailed report to the violation of the rights of lesbian, gay, bisexual and transgender (LGBT) people in Crimea (and the Donbas region).²³ Based on dozens of eyewitness reports, it describes the persecution of sexual and gender minorities and the atmosphere of fear, secrecy and insecurity created by openly homophobic armed people, decrees and regulations passed by local "authorities" under the influence of Russian laws restricting the rights of minorities and prohibiting "propaganda of non-traditional sexual orientations".

18. Human Rights Field Mission report May 2015 (note 16 above), p. 3.

19. Ibid., pp. 5-6.

20. "Crimea beyond rules. Thematic review of the human rights situation under occupation", Issue No. 2, Right to property, http://crimeahumanrights.org/wp-content/uploads/2015/11/Crimea_Beyond_Rules_EN_Issue_2.pdf.

21. Amnesty International, "Ukraine: One year on: Violations of the rights to freedom of expression, assembly and association in Crimea," op. cit.; Human Rights Watch, "Rights in retreat: abuses in Crimea", op. cit.; "Russia: independent group targeted over Crimea", op. cit.; and "Ukraine: Fear, Repression in Crimea, rapid rights deterioration in 2 years of Russian rule", 18 March 2016.

22. Sergiy Zayets (Regional Center for Human Rights), Olexandra Matviychuk (Center for Civil Liberties), Tetiana Pechonchuk (Human Rights Information Centre), Darya Svyrydova (Ukrainian Helsinki Human Rights Union) and Olga Skrypyuk (Crimean Human Rights Group): http://helsinki.org.ua/wp-content/uploads/2016/05/PeninsulaFear_Book_ENG.pdf.

23. Memorial Anti-discrimination Centre, "Violations of the rights of LGBT people in Crimea and Donbas: The problem of homophobia in territories not under Ukrainian control", June 2016: <http://hro.rightsinrussia.info/hro-org/lgbtrights-10>.

2.2. The human rights situation in the “DPR” and “LPR”

2.2.1. The Council of Europe Commissioner for Human Rights

19. From 30 November to 5 December 2014, the Commissioner visited Kyiv and the eastern regions of Ukraine, including two towns (Kurakhove and Krasnoarmiysk) situated close to the (then) frontline. The Commissioner stated that

*“[n]umerous serious human rights violations have occurred, as reported by the United Nations Office of the High Commissioner for Human Rights (OHCHR) and others, implicating primarily the rebel forces, but also governmental forces and volunteer battalions fighting alongside them”.*²⁴

20. The Commissioner referred to information on “hundreds of cases of unlawful killings, abductions and enforced disappearances, as well as torture and ill-treatment” and insisted on the need for accountability of those responsible no matter which side of the conflict they are on. He also pointed out the plight of the 500 000 internally displaced persons (IDPs) and the hardships suffered by the persons residing in the territories outside the control of the Ukrainian authorities, in particular vulnerable groups such as the elderly, persons with disabilities and persons living in penal or psychiatric institutions.²⁵

21. From 29 June to 3 July 2015, the Commissioner undertook another visit to Ukraine, including some regions in eastern Ukraine outside the control of the Ukrainian authorities (Donetsk). His statement following the visit focuses mainly on humanitarian issues, including access to humanitarian aid for residents and their freedom of movement across the dividing line and buffer zone.²⁶

22. The Commissioner’s most recent visit to the conflict region in the Donbas took place from 21 to 25 March 2016. A brief visit to Donetsk City, including a meeting with a senior staff member of the “Ombudsman” of the “DPR”, was facilitated by the United Nations HRMMU. In his report dated 11 July 2016,²⁷ the Commissioner presented *inter alia* the results of interviews with more than a dozen people who had been deprived of their liberty on both sides of the contact line. He found their detailed accounts of torture and ill-treatment particularly convincing in that they were strikingly consistent, having regard to the fact that the people were interviewed individually. Regarding unacknowledged detention, the Commissioner noted that several interviewees detained in government-controlled areas claimed that they were held incommunicado and/or in unacknowledged places of detention for at least part of the time of their detention. Those who had been deprived of their liberty in non-government controlled areas were held in basements of administrative buildings used by “various local structures performing military and security-related functions, as well as by armed groups”. The Commissioner noted that his request to visit places of detention in Donetsk was refused by the *de facto* authorities, who did not allow any such visits by international monitors as they were not foreseen by “local legislation”. He also noted that the Ukrainian authorities generally granted such access. But regarding certain alleged places of detention run by the Security Service of Ukraine (SBU), he had received information from a number of interlocutors on suspicious movements of detainees ahead of an anticipated international monitoring visit.²⁸ Commissioner Muižnieks also called the reintroduction of the death penalty in the non-government controlled areas “a regrettable step backwards, which must be reversed”.²⁹ Last but not least, the Commissioner’s report also recalls the difficult social and administrative situation of the inhabitants of the conflict zone.

23. In an interview dated 26 July 2016, Commissioner Muižnieks expressed his disappointment that during his visit to Donetsk City, he did not have the level of access that he had anticipated to representatives of the *de facto* authorities and to places of special interest from a human rights perspective.

24. Statement dated 8 December 2014, “[Conflict in eastern Ukraine has dire impact on human rights](#)”.

25. See also Nils Muižnieks, “[Eastern Ukraine: the humanity behind the headlines](#)”, in: Open Democracy, 17 December 2014.

26. Statement on “Eastern Ukraine: freedom of movement is vital to preventing isolation and favouring reintegration”, 4 July 2015.

27. [CommDH\(2016\)27](#).

28. At paragraph 25, the Commissioner’s report also refers to a statement of 25 May 2016 by the UN Subcommittee on the Prevention of Torture complaining about the denial of access to places in several parts of the country where it suspected people were detained by the SBU.

29. See Executive Summary, 2nd paragraph; and paragraphs 13 and 14.

2.2.2. The OHCHR's Human Rights Monitoring Mission in Ukraine

24. In March 2014, the OHCHR deployed a strong human rights monitoring mission in Ukraine (HRMMU) with offices in Kyiv, Lviv, Odessa, Donetsk and Kharkiv.³⁰ The mission, totalling about 35 observers initially headed by Mr Armen Harutunyan,³¹ has been tasked with reporting on the human rights situation and providing support to the Government of Ukraine in the promotion and protection of human rights.

25. The HRMMU has so far published 14 human rights monitoring reports,³² the most recent one in June 2016 covering the period between 16 February 2016 and 15 May 2016. These regular reports are valuable resources in that they provide relevant details, which may enable the identification of the victims and suspected perpetrators of serious human rights violations, including arbitrary killings (for example of captured soldiers), torture, kidnappings, and the indiscriminate shelling of civilians. The mission clearly performs its job neutrally and independently, on the basis of its international mandate. This is particularly valuable in the prevailing climate of mutual distrust between the Ukrainian authorities on the one hand and the leadership of the self-proclaimed "people's republics" of Donetsk and Luhansk and the Russian authorities on the other, which is fuelled by frequent violations of the ceasefire and an ongoing propaganda war.

26. The findings of the OHCHR mission are indeed devastating. Regarding human rights violations by the armed groups (pro-Russian separatists), the HRMMU made the following findings, *inter alia*:

*"[T]here has been deliberate targeting by the armed groups of crucial public utilities like water, electricity and sewerage plants that have shut down essential supplies to the residents. Public and private properties have been illegally seized and residences destroyed. Banks have been robbed and coal mines attacked. Railways were blown up. Hospitals and clinics were forced to shut down (...) The rule of law no longer existed and was replaced by the rule of violence."*³³

*"[A]rmed groups continue to terrorise the population in areas under their control, pursuing killings, abductions, torture, ill-treatment and other serious human rights abuses, including destruction of housing and seizure of property. They abducted people for ransom and forced labour and to use them in exchange for their fighters held by the Ukrainian authorities."*³⁴

*"[T]he collapse of law and order on the territories controlled by the self-proclaimed 'Donetsk people's republic' and the self-proclaimed 'Luhansk people's republic' continued to be aggravated by ongoing armed hostilities between the Ukrainian armed forces and armed groups. The hostilities continue to be accompanied by violations of international humanitarian law and have had a devastating impact on the overall enjoyment of human rights by an estimated five million people living in the area. In places directly affected by the fighting, such as Debaltseve, Donetsk and Horlivka, people pleaded to the HRMMU: 'we just want peace'."*³⁵

27. HRMMU reports also candidly observe how the "professionalisation" of the "armed groups" fighting in eastern Ukraine has become more and more "openly acknowledged" and "self-evident":

*"Their leadership, many of whom are nationals of the Russian Federation are trained and hardened by experience in conflicts such as Chechnya and Transnistria (...) Heavy weaponry including mortars and anti-aircraft guns, tanks and armoured vehicles, and landmines are now being used by them."*³⁶

30. See [Concept Note, UN human rights monitoring in Ukraine](#). The planned office in Simferopol, in Crimea, could not be opened because the de facto authorities would not receive the mission nor guarantee its security; see [UN-Assistant Secretary-General for Human Rights Ivan Simonovic Press Conference in Kiev, Ukraine, 14 March 2014](#).

31. On 23 June 2015, Mr Harutunyan was elected as judge of the European Court of Human Rights on behalf of Armenia.

32. www.ohchr.org/EN/Countries/ENACARRegion/Pages/UARReports.aspx.

33. OHCHR, [Report on the human rights situation in Ukraine](#), 15 July 2014, p. 3, paragraph 5.

34. Statement to the Security Council by Ivan Šimonović, Assistant Secretary-General for Human Rights, meeting on Ukraine, 24 October 2014: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15212&LangID=E.

35. OHCHR, [Report on the human rights situation in Ukraine](#), 16 February to 15 May 2015, p. 3, paragraph 4.

36. OHCHR [Report on the human rights situation in Ukraine](#), 15 July 2014, paragraph 8; [Report on the human rights situation in Ukraine](#), 17 August 2014, paragraph 2 ("Armed groups are now professionally equipped and appear to benefit from a steady supply of sophisticated weapons and ammunition, enabling them to shoot down Ukrainian military aircraft such as helicopters, fighter jets and transport planes"); OHCHR, [Report on the human rights situation](#), 16 September 2014, paragraph 3: "Armed groups of the self-proclaimed 'Donetsk people's republic' and 'Luhansk people's republic' were bolstered by an increasing number of foreign fighters, including citizens of the Russian Federation. On 27 August, the so-called 'prime minister' of the 'Donetsk people's republic', Alexander Zakharchenko, stated on Russian State television that 3 000-4 000 Russians were fighting alongside the armed groups, including former or serving Russian soldiers, on leave from their posts."; see also p. 7, paragraph 21; OHCHR, [Report on the human rights situation in Ukraine](#), 16 February to 15 May 2015, p. 4, paragraph 6.

“The absence of effective control of the Government of Ukraine over considerable parts of the border with the Russian Federation (in certain areas of Donetsk and Luhansk regions) continued to facilitate an inflow of ammunition, weaponry and fighters to the territories controlled by the armed groups. Robust military presence on both sides of the contact line carried persistent risks of resurgence of hostilities. Despite the general observance of the ceasefire, the presence of military equipment near civilian facilities continued to threaten the security of the local population.”³⁷

28. Between the beginning of hostilities in mid-April 2014 and 15 May 2016, at least 9 371 people were documented as killed and 21 532 as wounded, and hundreds of people remain missing. The HRMMU considers this as a conservative estimate. The overall trend of lower levels of civilian casualties since the September 2015 ceasefire continued. Nevertheless, the HRMMU recorded 113 new conflict-related casualties in eastern Ukraine between February and May 2016 (14 killed and 99 injured).³⁸ The HRMMU received new reports on killings, torture and ill-treatment as well as unlawful arrests, forced labour, looting, ransom demands and extortion of funds on the territories controlled by the armed groups. The persecution and intimidation of persons suspected of supporting the central authorities remained widespread. The population of the territories controlled by the armed groups is increasingly isolated from the rest of Ukraine since the Government of Ukraine decided to temporarily relocate State institutions from these territories and to stop allocations of funds and disbursements of social payments to institutions and individuals. Obviously, the most vulnerable population groups (pensioners, families with children, persons in institutional care) suffer the most. Last but not least, the inhabitants of the “people’s republics” suffer from the permit system introduced by a Temporary Order of the Security Service of Ukraine (SBU) on 21 January 2015, which limits freedom of movement across the contact line. According to the OHCHR mission, the system continues to give rise to intolerable delays and corrupt practices (though a hotline for complaints established by the Headquarters of the Anti-Terrorist Operation seems to have brought some relief³⁹). Four civilians were killed and eight others wounded on 27 April 2016 by the shelling at night of a checkpoint in the village of Olenivka (on the road between Mariupol and Donetsk City). The OSCE crater analysis indicates the responsibility of the Ukrainian armed forces.⁴⁰ For HRMMU, “[t]his is a stark illustration of the impact of the limitations on freedom of movement, which have compelled civilians to spend prolonged periods exposed to the violence and risks of ongoing hostilities near the contact line”.

29. Earlier reports by the HRMMU provide detailed accounts of other specific violations of human rights and international humanitarian law by the separatist fighters, such as:

- the rocket attacks on 24 January 2015 on the market place in the government-controlled city of Mariupol, killing at least 31 people and wounding 112, and on 13 January 2015 on a bus at a Ukrainian checkpoint near the Government controlled town of Volnovakha, killing 13 civilians and wounding 18;⁴¹
- the use of human shields, by locating military assets in, and conducting attacks from, densely populated areas, thereby putting the civilian population at risk;⁴²
- the shelling of civilians trying to leave the conflict areas (including an attack on 18 August 2014 on a column of vehicles with civilians evacuating from Luhansk, allegedly by armed groups, between the settlements of Novosvitlivka and Khryashchuvate, killing at least 17 persons).⁴³ According to the HRMMU, “[r]eports suggest that some incidents of shelling coincided with the evacuation of civilians and may have been targeted to prevent it”;⁴⁴
- the deliberate killing of soldiers who had surrendered or were trying to do so;⁴⁵ and the ill-treatment of captured servicemen;⁴⁶
- the introduction of the death penalty by the “people’s republics” of Donetsk⁴⁷ and Luhansk;⁴⁸

37. OHCHR, [Report on the human rights situation in Ukraine](#), 16 August to 15 November 2015, p. 5, paragraph 22.

38. OHCHR, [Report on the human rights situation in Ukraine](#), 16 February to 15 May 2016, paragraphs 3, 23 (and note 23), 24 and 26.

39. Ibid., paragraph 88.

40. Ibid., paragraph 20.

41. OHCHR, [Report on the human rights situation in Ukraine, 1 December 2014 to 15 February 2015](#), p. 4, paragraph 6, and p. 7, paragraphs 24 and 25.

42. OHCHR, [Report on the human rights situation in Ukraine, 17 August 2014](#), p. 3, paragraph 4; Report 16 September 2014, p. 3, paragraph 4 and p. 7, paragraph 24.

43. OHCHR, [Report on the human rights situation in Ukraine, 16 September 2014](#), p. 7, paragraph 24; see also Report 17 August 2014, p. 3, paragraph 4: “Armed groups have continued to prevent residents from leaving, including through harassment at checkpoints where residents report being robbed, and firing at vehicles conveying fleeing civilians.”

44. OHCHR, [Report on the human rights situation in Ukraine, 1 December 2014 to 15 February 2015](#), p. 8, paragraph 29.

- the violation of the election rights of the residents of the “people’s republics” of Donetsk and Luhansk, who were prevented by the armed groups from participating in the national presidential and parliamentary elections in May and October 2014⁴⁹ and subjected to the so-called “referendum on self-rule” on 11 May 2014 and the so-called “elections” on 2 November 2014 organised by the armed groups in violation of the Ukrainian Constitution and of the most basic international standards.⁵⁰

30. The HRMMU observed the further strengthening of parallel “governance structures” of the “Donetsk People’s Republic” and the “Luhansk People’s Republic”, with their own legislative frameworks, including parallel systems of law enforcement and administration of justice (“police”, “prosecutors” and “courts”), in violation of the Constitution of Ukraine and in contravention of the spirit of the Minsk Agreements. The most recent report published in June 2016 states that the “OHCHR is concerned that the development of parallel structures of ‘administration of justice’ leads to systematic abuses of the rights of persons deprived of their liberty by the armed groups and issuance of decisions which contravene human rights norms”.⁵¹

31. The HRMMU recalls that the “officials” of the “DPR” and the “LPR” are responsible and shall be held accountable for human rights abuses committed on territories under their control. This particularly applies to people bearing direct command responsibility for the actions of perpetrators.⁵²

32. The HRMMU does not fail to report also on alleged violations of international humanitarian and human rights law by Ukrainian forces, in particular the SBU and certain volunteer battalions, in the form of disproportionate or indiscriminate shelling of populated areas,⁵³ abductions of civilians for prisoner exchange purposes,⁵⁴ arbitrary arrests, secret detentions and ill-treatment of prisoners.⁵⁵ The HRMMU is right in insisting that the perpetrators of such abuses must be held to account in the same way as the separatist fighters.⁵⁶ In its most recent report, HRMMU relates allegations of over 20 cases of arbitrary and incommunicado detention as well as torture. A detention centre run by the Ukrainian Security Service (SBU) in Kharkiv is suspected of being used for such abuses.⁵⁷ The SBU has so far refused access to international monitors, as have the “de facto authorities” of the “LPR” and “DPR”.⁵⁸ The HRMMU notes that “arbitrary detention, torture and ill-treatment remain deeply entrenched practices”.⁵⁹

33. Regarding accountability, the HRMMU notes the efforts of the Ukrainian authorities to bring perpetrators from their own ranks to justice. Between March 2014 and February 2016, the Office of the Military Prosecutor reportedly investigated 726 crimes committed by members of the armed forces (including 11 killings, 12 cases of torture and 27 of arbitrary deprivation of liberty). A total of 622 persons were charged

45. Ibid., p. 9, paragraph 32 (referring to incidents at Krasnyi Partyzan on 24 January 2014, documented by video footage made by the armed groups themselves, and to the bodies of executed Ukrainian soldiers found at Donetsk airport with “their hands tied with white electrical cable”; see also OHCHR, Report on the human rights situation in Ukraine, 16 February to 15 May 2015, pp. 8-9, paragraphs 31-32, with details on the case of the summarily executed Ukrainian serviceman Ihor Branovytskyi, including specific allegations against the commander of the “Sparta battalion”).

46. OHCHR, [Report on the human rights situation in Ukraine](#), 1 December 2014 to 15 February 2015, p. 10, paragraph 33, referring to an incident on 22 January, 2015, when a dozen Ukrainian servicemen captured at Donetsk airport were forced to march through the streets of Donetsk, several of them having been assaulted by an armed group commander and by onlookers.

47. OHCHR, Report on the human rights situation in Ukraine, 16 September 2014, paragraph 9 (establishment of military tribunals to implement death sentences to be applied in cases of aggravated murder).

48. “Belarus and Ukraine rebels keep death penalty alive”, *Euractiv*, 17 April 2015.

49. OHCHR, Report on the human rights situation in Ukraine, 15 December 2014, p. 7, paragraph 25.

50. Ibid., p. 3, paragraph 3, and p. 4, paragraph 11.

51. OHCHR, [Report on the human rights situation in Ukraine](#), 16 February to 15 May 2016, paragraph 66.

52. OHCHR, Report on the human rights situation in Ukraine, 16 August to 15 November 2015, p. 3, paragraph 6.

53. OHCHR, [Report on the human rights situation in Ukraine](#), 1 December 2014 to 15 February 2015, p. 7, paragraph 25 (shelling of a trolley bus and public transport stop in Donetsk on 22 January 2015 killing 13 civilians and wounding 12; and shelling of the town of Horlivka held by the armed groups on 29 January 2015 killing eight and wounding 19 civilians).

54. For example, OHCHR, [Report on the human rights situation in Ukraine, 16 February to 15 May 2015](#), p. 13, paragraph 53 (referring to a person from the Government-controlled town of Sloviansk who was reported to have been “exchanged” three times).

55. Ibid., pp. 10-12, paragraphs 40-49.

56. For example, OHCHR, Report on the human rights situation in Ukraine, 15 June 2015, p. 3, paragraph 5, p. 5, paragraph 13; [Report on the human rights situation in Ukraine](#), 17 August 2014, p. 3 paragraph 4; Report on the human rights situation in Ukraine, 16 September 2014, p. 3, paragraph 4, p. 5, paragraph 10, p. 7, paragraph 24.

57. OHCHR, [Report on the human rights situation in Ukraine](#), 16 February to 15 May 2016, paragraphs 30-34 and 58-59.

58. At its June 2016 meeting, the committee invited its Chairperson to request information from the CPT on this issue.

59. OHCHR, [Report on the human rights situation in Ukraine](#), 16 February to 5 May, paragraph 29.

and 381 of them prosecuted. So far, 272 persons have been judged.⁶⁰ But the OHCHR remains concerned about the administration of justice by the Ukrainian authorities, in particular towards persons accused of involvement with the armed groups:

“The application of a counter-terrorism and security framework to conflict-related detention has created a permissive environment and climate of impunity.”⁶¹

34. The OHCHR also notes that the armed groups have also taken some steps to “prosecute” perpetrators from their own ranks. The “Office of the Prosecutor General” of the “LPR” reportedly stated that criminal cases against members of two armed groups headed by “Batman” and Serhii Kshorov were submitted to the “military court” of the “LPR”.

2.2.3. The OSCE observation mission

35. The OSCE’s Special Monitoring Mission to Ukraine (SMM), currently headed by Ambassador Ertuğrul Apakan (Turkey), was established on 21 March 2014 by OSCE Permanent Council Decision No. 1117. The decision tasked the SMM to, *inter alia*, “establish and report facts in response to specific incidents and reports of incidents, including those concerning alleged violations of fundamental OSCE principles and commitments” as well as to “monitor and support respect for human rights and fundamental freedoms, including the rights of persons belonging to national minorities”.⁶² The SMM is an unarmed, civilian mission, present on the ground around the clock in all regions of Ukraine, with the exception of Crimea. Its main tasks are to observe and report in an impartial and objective way on the situation in Ukraine; and to facilitate dialogue among all parties to the crisis. The mandate of the Mission covers the entire territory of Ukraine, including Crimea. The Mission’s Head Office is in Kyiv, where Ms Zelenkova and I had a very constructive meeting with Ambassador Apakan. The SMM’s monitoring teams work in 10 of the biggest cities of Ukraine: Chernivtsi, Dnepropetrovsk, Donetsk, Ivano-Frankivsk, Kharkiv, Kherson, Kyiv, Luhansk, Lviv and Odessa. About 350 monitors currently work in the Donetsk and Luhansk regions.

36. The SMM produces daily reports⁶³ summed up in weekly reports⁶⁴ providing (very) detailed information on facts observed, including ceasefire violations (with details on the number and nature of shootings, detonations, and their likely origin and responsibility), damage assessment (including assessment of the likely origin of the grenade or missile strike, through “crater analysis”), supervision of the sites to which certain weapons systems were withdrawn in line with the Minsk I and II ceasefire agreements, documentation of border crossings, etc. The SMM also reports on incidents in which the monitors were refused access to certain sites or were unable to access such sites due to unresolved security and safety issues. According to the SMM, the majority of these incidents are the responsibility of the armed groups. On 26 July 2015, an OSCE monitoring patrol came under targeted machine gun, mortar and grenade fire leading to serious injury of one of the monitors.⁶⁵

37. I have read a large number of these reports, which are impressive in terms of their objectivity, neutrality and detail. It is regrettable that they have received so little attention in the political arena in Europe. In light of these reports, it is very difficult not to despair, given that violations of the ceasefire agreements still occur on a daily basis. It is also very regrettable that due to its limited mandate, the SMM is at times even prevented from reporting facts it actually observed, such as transports over the border between Russia and Ukraine.

38. The SMM also produces thematic reports.⁶⁶ The most recent such report on “Access to Justice and the Conflict in Ukraine” (22 December 2015) studies the implications of the relocation of all judicial, prosecution and administrative services from non-government- to government-controlled areas. It describes constraints on access to effective and fair judicial services caused by a combination of actions taken by the self-proclaimed “people’s republics”, and the relocation of government services motivated by the loss of government control

60. Ibid., paragraph 55.

61. Ibid., paragraph 57.

62. OSCE Permanent Council Decision No. 1117 [Deployment of an OSCE Special Monitoring Mission to Ukraine](#), PC.DEC/1117, 21 March 2014; see in particular the “fact sheet”.

63. www.osce.org/ukraine-smm/daily-updates.

64. Not in the public domain (made available to OSCE member States’ governments).

65. [Statement by Deputy Chief Monitor Alexander Hug, “Direct violence committed against OSCE monitors, one monitor hospitalised”](#), 30 July 2015.

66. www.osce.org/ukraine-smm/156571; See for example the reports on “Gender Dimensions of SMM’s Monitoring: One Year of Progress” (22 June 2015); on “Freedom of movement across the administrative boundary line with Crimea” (19 June 2015), on “Protection of Civilians and their Freedom of Movement in the Donetsk and Luhansk Regions” (13 May 2015) and on “Findings on Formerly State-Financed Institutions in the Donetsk and Luhansk Regions” (30 March 2015).

over certain areas. The report states that access to justice remains severely limited due to the absence of legitimate justice services in non-government-controlled areas, the loss of case files, restrictions on freedom of movement and the difficulty of giving notice of proceedings in these areas. The SMM also points out that the “relocated” administration of justice faces challenges such as resource constraints, difficulties in the reconstitution of case files, and in particular the inability to enforce judgments in the areas outside of the control of the Ukrainian authorities. The report also scrutinises unlawful detentions both in government- and non-government-controlled areas. The process of court relocation and the development of parallel “justice” systems has also led to the arbitrary deprivation of liberty of persons on both sides of the contact line. In government-controlled areas, the loss of files for cases relating to the “DPR”- and “LPR”-controlled areas prevents convicted persons from lodging an appeal, and pre-trial detention periods are prolonged as prosecutors attempt to rebuild case files. In “DPR”- and “LPR”-controlled areas, people deprived of their liberty are subject to newly established parallel “courts” which are non-transparent and raise fair trial concerns; and judicial decisions by the “relocated” courts to acquit or otherwise release a person detained in the non-government-controlled areas cannot be executed. In sum, the report demonstrates the inability both of the Ukrainian authorities and of the self-proclaimed “people’s republics” of Donetsk and Luhansk to guarantee access to justice.⁶⁷

2.2.4. Reports by international and national NGOs and human rights defenders

39. Leading international human rights groups such as Amnesty International and Human Rights Watch have published several in-depth reports on human rights violations during the ongoing conflict in eastern Ukraine, which confirm and further underpin the findings of the OHCHR and OSCE observation missions. Local human rights groups also maintain a steady flow of reports, including shorter articles and statements, which contribute to keeping the victims’ plight in the public conscience.⁶⁸ Amnesty International has mostly concentrated on “core” human rights violations such as murder, enforced disappearance and torture.⁶⁹ Human Rights Watch has chosen to focus mainly on alleged violations of international humanitarian law, such as attacks with unguided rockets on populated areas⁷⁰ and the use of cluster munitions, allegedly by both sides of the conflict,⁷¹ and finally the failure to grant access to medical care to civilians.⁷² In a joint report with the Harvard Law Human Rights Program, Human Rights Watch generally questions the legality of explosive weapons in populated areas and calls for a mutual agreement to curb their use.⁷³

40. In July 2016, Amnesty International and Human Rights Watch published a joint report⁷⁴ presenting 18 cases of enforced disappearance in the conflict zone in eastern Ukraine – 9 allegedly committed by the Ukrainian authorities, in particular the SBU, and 9 by the de facto authorities of the “DPR” and “LPR”. The report, based on interviews with numerous witnesses, family members and officials, does not claim to cover all relevant cases, or that the number of such cases is the same on both sides.⁷⁵ But it documents a pattern of abuse which may well be linked indirectly to the Minsk Agreement clauses on prisoner exchange: people are apparently arrested as “currency” for exchange. This would be a highly unlawful form of “hostage taking”, which must be stamped out.

67. OSCE SMM to Ukraine report on “Access to Justice and the Conflict in Ukraine”, 22 December 2015, pp. 4-5.

68. Another report by the hitherto unknown Foundation for the Study of Democracy and the Russian Public Council for International Cooperation and Public Diplomacy on “War crimes of the armed forces and security forces of Ukraine: torture of the Donbass region residents”, published in Russian and English in November 2014, is written in such a polemic tone that it may rather fall into the category of “propaganda war”.

69. “Eastern Ukraine conflict: Summary killings, misrecorded and misreported”, 20 October 2014; “Ukraine: Breaking Bodies: Torture and Summary Killings in Eastern Ukraine”, 22 May 2015, Index number: EUR 50/1683/2015.

70. “Ukraine: Rising Civilian Death Toll, Unlawful Unguided Rocket Attacks on Populated Areas”, 3 February 2015.

71. “Ukraine: Widespread Use of Cluster Munitions, Government Responsible for Cluster Attacks on Donetsk”, 20 October 2014. “Ukraine: More Civilians Killed in Cluster Munition Attacks, Both Sides Have Used Widely Banned Weapon”, 19 March 2015.

72. “Ukraine: Civilians Struggle to Get Medical Care, All Sides Should Ensure Delivery of Aid to Civilians in Rebel-Held Areas”, 13 March 2015.

73. “Civilian Harm from Explosive Weapons: Agreement Needed to Curb Use in Towns, Cities”, 19 June 2015.

74. “You Don’t Exist” – Arbitrary Detentions, Enforced Disappearances, and Torture in Eastern Ukraine, 21 July 2016, available at: <https://www.hrw.org/report/2016/07/21/you-dont-exist/arbitrary-detentions-enforced-disappearances-and-torture-eastern>.

75. The selection by the HRW/AI of these cases was based on their ability to document them in the most reliable way.

41. A report by the International Crisis Group (“Ukraine: the Line”) dated 18 July 2016⁷⁶ describes, in particular, the dramatic situation of the still substantial civilian population living along the line of contact. They suffer frequent casualties and live in a state of permanent fear, which has serious health consequences. Civilians are still endangered by the practice, observed on both sides, of stationing heavy weaponry in densely populated areas.

42. A report by a group of Ukrainian NGO’s named “Justice in exile”⁷⁷ highlights problems concerning the administration of justice on both sides of the contact line similar to those described in the above-mentioned thematic report by the OSCE, with a special focus on the functioning of the “exiled” courts in the government-controlled parts of the Donetsk and Luhansk oblasts to which jurisdiction for cases in the non-government controlled areas has been transferred.

43. Last but not least, the “Memorial Anti-discrimination Centre”, in its June 2016 report on “Violations of the rights of LGBT people in Crimea and Donbass: The problem of homophobia in territories not under Ukrainian control” gives a dramatic account of the deteriorating situation of sexual minorities in the self-proclaimed people’s republics.⁷⁸

3. Which legal remedies for victims of human rights violations on the Ukrainian territories outside the control of the Ukrainian authorities?

44. Among the legal remedies available to the victims themselves, the possibility of an application to the European Court of Human Rights is of paramount importance, in particular in the situation where the “courts” established by the *de facto* authorities lack legitimacy and are still underdeveloped (as in the “DPR” and “LPR”) and/or unlikely to provide a fair hearing to persons alleging to be victims of human rights violations caused by the actions of the same authorities. The International Criminal Court (ICC) may also have a role to play after the two declarations by Ukraine which effectively grant the ICC jurisdiction for all international crimes committed on Ukrainian territory since 21 November 2013.

3.1. Application to the European Court of Human Rights

45. Both Ukraine and the Russian Federation are States Parties to the European Convention on Human Rights.⁷⁹ Any person who considers that his or her rights under the Convention have been violated may submit an application to the European Court of Human Rights, after the exhaustion of available domestic remedies (Article 3.1).

3.1.1. The Court’s previous practice and pending cases

46. Under the Court’s case law developed with regard to the situation in the northern part of Cyprus⁸⁰ in the Transnistria region of the Republic of Moldova,⁸¹ and, most recently, in the Nagorno-Karabakh region of Azerbaijan,⁸² residents of a region in one State Party that is *de facto* under the control of another State Party may lodge an application both against the State to whom the territory in which he or she resides belongs *de jure* and the State which exercises *de facto* control. The Court found the northern part of Cyprus to be *de facto* controlled by Turkey, Transnistria by Russia, and the Nagorno-Karabakh region by Armenia. Similar cases emanating from South Ossetia and Abkhazia, the breakaway regions of Georgia supported by Russia, have been brought before the Court, but at the end of July 2016, they had not yet been decided.

76. “Ukraine: the Line”, Paul Quinn-Judge (<https://www.crisisgroup.org/europe-central-asia/eastern-europe/ukraine/ukraine-line>).

77. “Justice in exile – Observance of the right to a fair trial in the east of Ukraine, including the territory that is temporarily not controlled by the Ukrainian government”, Center for Civil Liberties and Coalition of Public Organizations and Initiatives “Justice for Peace in Donbas”, January 2016.

78. <http://adcmemorial.org/www/publications/violation-of-lgbti-rights-in-crimea-and-donbass-the-problem-of-homophobia-in-territories-beyond-ukraine-s-control?lang=en>.

79. Both States have also ratified the International Covenant on Civil and Political Rights (ICCPR) as well as its First Optional Protocol allowing for individual communications to the Human Rights Committee. But for reasons of space and competence, I intend to focus mainly on remedies available under the European Convention on Human Rights.

80. See *Cyprus v. Turkey*, Application No. 25781/94, judgments (Grand Chamber) of 10 May 2001 (merits) and 12 May 2014 (just satisfaction).

81. See *Ilascu and others v. Moldova and Russia*, Application No. 48787/99, judgment of 8 July 2004 (Grand Chamber).

82. See *Chiragov and others v. Armenia*, Application No. 13216/05, judgment of 16 June 2015 (Grand Chamber).

47. This is true also for the numerous applications brought before the Court by inhabitants of Crimea and of the conflict zone in the Donbas.⁸³ I was informed by the Registry of the Court that by mid-June 2016, the Court had received several thousand individual applications related to the events in Crimea (prior to and after the annexation of the peninsula by Russia, including ones not directly relating to the conflict but requiring examination of the issue of jurisdiction). The applications concern a wide range of issues – right to life, prohibition of torture, right to liberty, right to fair trial, right to private life, freedom of expression, right to effective remedy, protection of property, etc.

48. More than 3 400 complaints have been introduced against Ukraine and Russia in relation to the conflict situation, some of them against only one or the other. 420 applications were introduced against Russia, Ukraine and the United Kingdom – the latter on the ground that the United Kingdom, being party to the 1994 Budapest Memorandum and a guarantor of Ukraine's security and sovereignty, failed to take necessary steps in order to provide assistance to Ukraine as a victim of aggression.

49. More than 250 applications have been lodged by soldiers and/or their relatives in connection with the abduction and subsequent captivity of servicemen/women in the course of military action. In those cases, the applicants also allege unlawful detention, ill-treatment in the course of detention, poor conditions of detention, as well as forced labour. More than 3 500 applications have been introduced by civilians who mainly complain about their property being damaged in the course of military activity in the region. The majority of applicants also complain about the lack of access to a court, violations of the right to respect for private life, freedom of expression, and about the impossibility to receive a pension. In 150 cases, the complaints lodged by victims or their relatives relate to killings, injuries, torture or enforced disappearances by separatist fighters or in the course of military activity.

50. In my view, the Court's case law developed with regard to northern Cyprus, Transnistria and Nagorno-Karabakh allowing victims of human rights violations occurring in these regions to file applications (also) against Turkey, Russia and Armenia due to the effective control they exercise over these regions could also apply to Crimea and the "DPR" and "LPR".⁸⁴

51. As summed up by Professor Luzius Wildhaber, a former President of the Court:

*"According to the Court's case law, jurisdiction is established where a State actually exercises effective control over a certain area. The control may be exercised either directly through armed forces or indirectly through a subordinate local administration. Violations of the European Convention on Human Rights are imputable to the controlling State where the local administration survives by virtue of the military, economic and political support of the State."*⁸⁵

3.1.2. "Effective control" by Russia over Crimea and the "DPR" and "LPR"?

52. In the case of Crimea, actual, effective control by the Russian Federation is not actually denied by Russia. Control is clearly exercised by Russian armed forces, even though the fact that the "little green men" without insignia who took control of strategic points during the "creeping annexation" were Russian servicemen was officially denied⁸⁶ until President Putin publicly conceded their involvement in November 2014.⁸⁷ There is also no doubt that the de facto authorities in Crimea are "subordinate" to the Russian Federation. They are in fact considered as part and parcel of the Russian State structures by the Russian authorities themselves.

83. On 28 July 2016, the Court declared an application against Ukraine and Russia by persons who claimed their houses were destroyed because of the conflict as inadmissible, for lack of evidence. The applicants had submitted only their passports and photographs of destroyed houses, but not evidence of their ownership of these houses nor any explanations why such evidence was not submitted (see the Court's press release: <http://hudoc.echr.coe.int/eng-press?i=003-5449480-6831542#itemid%3A003-5449480-6831542>).

84. See Luzius Wildhaber, former President of the European Court of Human Rights, "Crimea, Eastern Ukraine and international law", 2016 (in German).

85. Luzius Wildhaber, "Crimea, Eastern Ukraine and International Law", in *El Tribunal Europeo de Derechos Humanos. Una visión desde dentro*, p. 394 (with further references, including to the Court's judgments in *Loizidou v. Turkey*, *Issa v. Turkey*, *Ilascu v. Moldova and Russia*, *Cyprus v. Turkey*, *Al-Skeini v. United Kingdom* and *Chiragov and others v. Armenia*).

86. Initially, President Putin reportedly stated that the "men in green" were not Russian servicemen, but groups of local militia who had seized their weapons from the Ukrainian army ("Little green men" or 'Russian invaders?'), BBC News, 11 March 2014.

87. See NZZ, 18 November 2014, p. 1; in May 2015, a monument to the "polite men" who took part in the operation in Crimea was unveiled in Belogorsk, see www.rferl.org/content/russia-monument-polite-people-crimea-invasion/27000320.html.

53. In the case of the conflict zone in the Donbas, some chronological differentiation may be necessary. During the actual military conflict, effective control was – literally – fought over between the Ukrainian forces and the “pro-Russian” armed groups, and their respective zones of control shifted every day. In order to establish jurisdiction of Russia, potential applicants to the Court will need to establish not only that the “armed groups” were in fact controlled by Russia, but also that they were in control of the “locus delicti” where the alleged violation took place at the time when it took place.

54. Regarding the former issue, the parallel with the run-up to the annexation of Crimea speaks for a strong role of serving Russian military personnel in these armed groups. This form of “hybrid warfare” by unmarked soldiers was apparently used by Russia for the first time in the 1992 Transnistrian conflict.⁸⁸ An investigative report on the military involvement of Russia in the conflict in eastern Ukraine and Crimea (“Putin.The War”⁸⁹), initiated by Boris Nemtsov before his assassination and completed by Ilya Yashin and others, was presented by Mr Vladimir Kara-Murza during our committee meeting in January 2016.⁹⁰ This report and another referenced by Mr Kara-Murza (“An invasion by any other name: the Kremlin’s dirty war in Ukraine”⁹¹) provides strong elements of proof for the presence of Russian soldiers and their decisive role during the fighting in the Donbas. Their active involvement also led to numerous casualties among them, many of which have been documented by the Committee of Soldiers Mothers⁹² and other civil society activists collecting and verifying information on “cargo 200” (a codename for the transport of “body bags” with dead soldiers), in particular by the use of social media – despite aggressive attempts by the authorities to keep this information secret.⁹³ Russian soldiers were also taken prisoner by Ukrainian forces.⁹⁴ During our fact-finding visit, at the “townhall meeting” in Mariupol, we also heard the detailed testimony of a Ukrainian military pastor, a survivor of the battle of Ilovaisk, and who spoke very convincingly about the Russian prisoners his unit had taken. Their presence among the Ukrainian soldiers caught in the “green corridor” through which they were meant to withdraw did not stop the prisoners’ fellow soldiers on the other side from shelling them at close range. Senior separatist leaders boasted of the participation of numerous Russian soldiers in the conflict, though they went on to claim that these were “volunteers”, who were in fact “on holiday”.⁹⁵ Ironically, Russian army regulations cited by the Nemtsov report⁹⁶ require soldiers to obtain prior permission for any holiday abroad and expressly forbid any participation in combat during their holidays. In any case, the two reports presented by Mr Kara-Murza show that at the most critical time, entire military units were deployed to eastern Ukraine from Russia;⁹⁷ and artillery attacks against Ukrainian positions (“sector D”) were launched from Russian territory, across the border.⁹⁸ The initial “rollback” by the Ukrainian forces of the rebellion during the spring and early summer of 2014 was brought to a standstill following the “professionalisation” of the armed groups, which was also reported by the HRMMU,⁹⁹ in particularly as of August 2014. The Ukrainian forces’ situation became more and more untenable – which forced Ukraine to accept the disadvantageous terms of the two ceasefire agreements brokered in Minsk. Such decisive military power could clearly not be mustered by mere local militias who stole some weapons from Ukrainian arsenals. Ukraine simply did not have some of the modern, sophisticated weapons used by the “armed groups”, which had never been exported before – for example, a

88. Jeff Hahn, “Russia’s use of hybrid warfare as a tool of foreign policy in the near abroad”.

89. “Putin. The War – about the involvement of Russia in the Eastern Ukraine conflict and in the Crimea”, Boris Nemtsov/Ilya Yashin, 12 May 2015.

90. Full text of the statement by Vladimir V. Kara-Murza, Coordinator of Open Russia and Deputy Leader of the People’s Freedom Party (Moscow, Russia) available from the Committee secretariat.

91. “An invasion by any other name: the Kremlin’s dirty war in Ukraine”, Institute of Modern Russia/The Interpreter.

92. See “Mothers compiled a list of 400 Russian soldiers killed and wounded in Ukraine”; see also *The Guardian*, 19 January 2015, “They were never there, Russia’s silence for families of troops killed in Ukraine”.

93. See “Invasion by any other name”, op. cit., pp. 45-78, presenting numerous very specific facts and testimonies; *Newsweek*, 7 March 2016, “Over 2000 Russian fighters killed in Ukraine: President’s spokesman”; see also “Russia May Have Inadvertently Posted Its Casualties In Ukraine: 2 000 Deaths, 3 200 Disabled”, 25 August 2015 (the author bases himself on the budget made available for compensating the families of killed and disabled soldiers).

94. See, for example, “Russian servicemen captured in Ukraine convicted of terror offenses”, *The Independent*, 18 April 2016; many more examples are provided in the two reports referenced by Mr Kara-Murza.

95. Statements by Alexander Zakharchenko, “prime minister” of the “DPR” and former “DPR defence minister” Igor Girkin (aka Strelkov), quoted in “Putin. The War”, op. cit., pp. 17 and 53.

96. “Putin. The War”, op. cit., p. 18.

97. See, for example, “An invasion by any other name”, op. cit., p. 40 (with reference to the testimony of a wounded Russian tank gunner interviewed by *Novaya Gazeta*); and “Putin.The War”, op. cit., p. 18 (nine Russian soldiers detained by Ukrainian forces on 24 August 2015; the Russian Defense Ministry stated that their presence on Ukrainian territory (20 km from the border) was due to them having “lost their way” on a training exercise).

98. “An invasion by any other name”, op. cit., pp. 22-25; see also “Where did the shells come from? Investigation of cross-border attacks in eastern Ukraine”, prepared by International Partnership for Human Rights, Norwegian Helsinki Committee and Ukrainian Helsinki Human Rights Union, 2016.

99. See paragraph 27 above.

recently modernised version of the T72 main battle tank (T72 B3)¹⁰⁰ and the “Tornado” multiple rocket launcher system. As Mr Kara-Murza pointed out in January, the Russian Government itself acknowledged the presence of the “Tornado” system when its representative signed a protocol to the Minsk Agreement that referred to its withdrawal from the line of contact.

55. For the purposes of the legal analysis regarding the Court’s jurisdiction, it is irrelevant whether this military power was brought to bear by Russia through the open deployment of military forces or by “hybrid warfare” using “volunteers” or “soldiers on holiday”, equipped with modern, high-powered military hardware. A senior separatist commander admitted himself that the massive support provided by Russia was decisive, that the militia units were “subordinate” to “vacationers” and that the Russian “deliveries” were vital for them.¹⁰¹ Such (explicitly acknowledged) dependency generates effective control. I would therefore not hesitate to attribute effective control over the armed groups, and consequently over the areas controlled by these groups, to Russia.

56. This dependency continues despite the reduced intensity of the fighting following the ceasefire and the reported withdrawal of part of the Russian “soldiers on leave” from Ukrainian territory. This is true as long as a possible new “rollback” attempt by Ukrainian Government forces is effectively deterred by the threat of another intervention, which is clearly implicit in the military build-up recently observed on the Russian side of the border.¹⁰² Whilst the immediate, acute dependency of the armed groups on military support in the form of “volunteers”, weapons and ammunition is somewhat reduced, the progressive establishment of the parallel structures observed by, *inter alia*, the HRMMU,¹⁰³ fulfilled the second alternative developed by the Court’s case law for the justification of effective control, namely control through a subordinate local administration. As is the case with military presence, the existence of a subordinate local administration is a matter of fact, which must be determined by the Court in light of all available evidence. There can be no doubt that the “DPR” and “LPR” are wholly dependent on Russia. During our fact-finding visit, Ms Zelenkova and I came across so many elements in support of this dependency that we spoke of “creeping hybrid annexation” of these regions by Russia.¹⁰⁴ These elements include the economic dependence of the de facto authorities, shown for example by the delivery from Russia of basic goods (labelled “humanitarian assistance”, delivered in large convoys of trucks removed from any control by Ukraine). Alexander Khodakovsky, secretary of the “security council” of the “DPR”, announced in September 2015 that the “humanitarian convoys” represent only a tiny fraction of Russian’s financial assistance and that in fact some 70% of the “DPR”’s budget comes from Russia.¹⁰⁵ Even the power grid has reportedly been re-oriented towards provision of electricity from Russia.¹⁰⁶ The Russian rouble has become the currency most in use in the “DPR” and “LPR”, and key officials of the de facto authorities are Russian citizens.¹⁰⁷ We were told that salaries of “DPR” and “LPR” officials are paid by Russia, and even the history books used in the “people’s republic” schools are from Russia (and present history accordingly). A German media report gives details of the financial arrangements made and even identifies specific chains of command from different ministries in Moscow to their “counterparts” in the “people’s republics”, at vice-ministerial level.¹⁰⁸ The parallels to the situation of the de facto authorities in northern Cyprus, Transnistria and Nagorno-Karabakh are obvious.

3.1.3. The United Kingdom as an additional respondent State?

57. As to the applications lodged (also) against the United Kingdom as one of the guarantee powers under the 1994 Budapest Memorandum on Security Assurances,¹⁰⁹ I am rather more sceptical. I do consider the violation, by Russia as one of the guarantee powers, of Ukraine’s territorial integrity, which Russia, the United States and the United Kingdom had solemnly guaranteed in return for Ukraine giving up the nuclear arsenal

100. “An invasion by another name”, op. cit., pp. 25-26, 29 and 31; one of these tanks was even captured by Ukrainian forces, at Ilovaisk.

101. See statements referred to in note 95; see also the ICG report (“Ukraine: the Line”, note 76), which stresses the decisive role of Russia (p. 1).

102. See ICG report (note 76), p. 1.

103. See paragraph 30 above.

104. See joint statement by Ms Zelenkova and myself at the end of our fact-finding visit to Ukraine on 8 April 2016: <http://website-pace.net>.

105. Interview with A. Khodakovsky of 8 September 2015, cited by Mr Kara-Murza in his presentation before the committee in January 2016 (text available on request from the Secretariat).

106. “Russian power keeps Lugansk lights on for the holidays” (a pro-separatist website quoting local leaders).

107. See “Putin. The War”, op. cit., pp. 51-55, with numerous examples.

108. “How Russia finances the Ukrainian rebel territories”, *BILD*, 16 January 2016; the ICG report (note 76) also sees Russia as “the sole source of military, economic and other assistance to the two entities”.

109. www.cfr.org/nonproliferation-arms-control-and-disarmament/budapest-memorandums-security-assurances-1994/p32484.

“inherited” from the Soviet Union, as a sad violation of the international rule of law. The idea of somehow making the Budapest Memorandum “justiciable” is an attractive one; and in criminal law, a failure to act despite a legal duty to prevent a violation of a legally protected interest can indeed be the legal equivalent of an active violation of that interest. But the European Convention on Human Rights is not a criminal law-type instrument for “punishing” States. It is an agreement among States to protect the rights of the persons under their jurisdiction. The inhabitants of the conflict zone were only indirectly affected by the failure of the signatories of the Budapest Memorandum to stop the aggression (or to refrain from one). It will be difficult for the applicants to establish that the United Kingdom not only had a legal duty to intervene against Russia (despite the danger of a major war? *Ad impossibilia nemo tenetur?*) but also somehow exercised “effective control” over the conflict zone by merely failing to intervene in the conflict.

3.1.4. Exhaustion of internal remedies

58. In order to determine at which point in time victims of human rights violations can successfully seize the European Court of Human Rights, it will be necessary to examine the effectiveness of any legal remedies available within the States Parties concerned. According to the Court’s case law, domestic remedies need exceptionally not be exhausted if they are ineffective or if it would be too dangerous or not feasible for other reasons for victims to first apply to local courts.¹¹⁰

59. Both in Crimea and in the “DPR” and “LPR”, the de facto authorities have set up (or maintained) “courts” of their own, whilst the Ukrainian authorities have “delocalised” justice by moving entire courts out of the non-controlled areas and/or attributing jurisdiction to existing courts in neighbouring, government-controlled regions. Victims of human rights violations are in a dilemma: if they address themselves to the legitimate “delocalised” courts, they may well obtain a judgment in their favour (despite the administrative difficulties described in paragraph 38 above), but it will not be executed by the de facto authorities on their territory. If they seize the “courts” set up by the de facto authorities, they are unlikely to have the benefit of a fair hearing, especially if their complaint is related to the consequences of occupation or annexation. Similarly, Russian courts would be unlikely to accept jurisdiction over such cases, or provide relief.¹¹¹ I would therefore tend to consider that the victims of alleged human rights violations by the de facto authorities should be spared having to address themselves to the “courts” run by these authorities.

60. Such a solution would also be the most consistent with the non-recognition of the annexation of Crimea and of the unilateral secession by the “DPR” and “LPR” from Ukraine in international law. Admittedly, the International Court of Justice held in its 1971 Advisory Opinion on Namibia¹¹² that not all acts by the (South African) de facto authorities are void, in particular not those favouring the rights of the population. In the words of the ICJ,

“(…) non-recognition should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, the illegality or invalidity of acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate cannot be extended to such acts as the registration of births, deaths and marriages”.

61. The European Court of Human Rights, in its *Demopoulos v. Turkey* judgment,¹¹³ referred to the ICJ’s opinion when it recognised the “Immovable Property Commission”, established by the de facto authorities in northern Cyprus, as an effective domestic remedy which Greek-Cypriot applicants, who had been displaced by the Turkish intervention in 1974 and suffered violations of their property rights, had to exhaust before taking their case to Strasbourg. The Court, which understandably wants to avoid creating a legal vacuum and being forced to act as a court of first instance in a large number of cases, pragmatically states that “allowing the respondent State to correct wrongs imputable to it does not amount to an indirect legitimisation of a regime unlawful under international law”.¹¹⁴

110. See the summary of the Court’s case law in the *Chiragov* judgment, op. cit., paragraphs 115 and 116.

111. The Strasbourg Court came to a similar conclusion in the *Chiragov* judgment (op. cit., at paragraphs 117-120) in the case of Azerbaijani citizens displaced from the Nagorno-Karabakh region, who were not required to first bring their cases before the “courts” set up by the de facto authorities or before an Armenian court.

112. Legal consequences for States of the continued presence of south Africa in Namibia (south-west Africa) notwithstanding security council resolution 276 (1970), *Advisory Opinion of 21 June 1971*, Official summary.

113. *Demopoulos and others v. Turkey*, Applications Nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04 and 21819/04, Admissibility decision dated 1 March 2010 (Grand Chamber).

114. Ibid., paragraph 96.

62. This report is not the appropriate place to participate in the discussion whether the Court's *Demopoulos* judgment was too pragmatic at the expense of legal principle and whether decisions of the "Immovable Property Commission", empowered to substitute restitution by monetary compensation, can be compared to the registration of births or marriages.¹¹⁵ The Court relies *inter alia* on the passage of time (since 1974), whilst the annexation and occupation of Ukrainian territories go back only three years. Especially where alleged human rights violations are linked directly to the occupation and unlawful annexation, the Court would therefore be perfectly free to distinguish such cases from the *Demopoulos* precedent – as it did in its *Chiragov* judgment (see paragraph 46 above).

3.2. Reference to the International Criminal Court

63. Ukraine signed the Rome Statute of the International Criminal Court in 2000, but has not yet ratified it, following a ruling of the Constitutional Court in 2001 finding ratification to be in conflict with the Constitution. I was told during my meetings at the Verkhovna Rada in April 2016 that a modification of the Constitution to enable ratification of the Rome Statute would be part of the package of constitutional reforms under preparation, though further delays were possible. But Ukraine has made two declarations under Article 12.3 of the Rome Statute, which enables a State not Party to the Rome Statute to accept the exercise of jurisdiction by the ICC.¹¹⁶ The first declaration explicitly covers alleged crimes committed between 21 November 2013 and 22 February 2014. On 8 September 2015, Ukraine made another declaration extending the acceptance of the ICC's jurisdiction indefinitely.¹¹⁷ This means that the ICC now has jurisdiction over the period of the most violent combats between the separatist fighters and the Ukrainian forces, without limitation in time – and without being limited to the alleged perpetrators (all on the "pro-Russian" side) named in the declaration.¹¹⁸

64. On 25 April 2014, the ICC's Office of the Prosecutor launched a "preliminary examination" of the situation in Ukraine, which was initially focused on alleged crimes against humanity in the context of the "Maidan" protests, which are outside of my rapporteur mandate. Following the second declaration under Article 12.3, the Office extended the scope of the preliminary examination to include any alleged international crimes committed on the territory of Ukraine from 20 February 2014 onwards. In its most recent "Report on Preliminary Examinations Activities",¹¹⁹ the Office of the Prosecutor indicated that it had carried out three missions to Ukraine to hold meetings with the Ukrainian authorities and representatives of civil society and announced that it would "continue to gather information from reliable sources in order to conduct a thorough factual and legal analysis of alleged crimes committed across Ukraine, including in Crimea and the Donbas, to determine whether the criteria established by the Rome Statute for the opening of an investigation are met".¹²⁰

65. Among the international crimes listed in the Rome Statute, the most relevant ones would be the war crimes under Article 8. Some alleged human rights violations could also fulfil the definition of a crime against humanity under Article 7. The "Elements of Crimes" reproduced from the records of the Assembly of States Parties of the ICC list the criteria for criminal liability under these provisions in a self-explanatory way.¹²¹ Whether "hybrid warfare" of the kind described above would fulfil the elements of the newly defined crime of aggression is an issue that would warrant a separate report – in any case, neither Russia nor Ukraine are Parties to the Rome Statute, let alone the amendments adopted in Kampala in 2010.

115. Elena Katselli Proukaki, The Right of Displaced Persons to Property and to Return Home after *Demopoulos*, *Human Rights Law Review* (2014), 14(4), pp. 701-732.

116. ICC press release, 17 April 2014, Ukraine accepts ICC jurisdiction over alleged crimes committed between 21 November 2013 and 22 February 2014.

117. ICC press release, 8 September 2015, [Ukraine accepts ICC jurisdiction over alleged crimes committed since 20 February 2014](https://www.icc-cpi.int/ukraine).

118. Alexander Wills, *Old Crimes, New States and the Temporal Jurisdiction of the International Criminal Court*, *Journal of International Criminal Justice* (2014); see also Valentyna Polunina, Between Interests and Values – Ukraine's Contingent Acceptance of International Criminal Justice, International Nuremberg Principles Academy, 2016. Ms Polunina examines the political background of the two declarations, which may reflect failure to fully comprehend the complementary character of international criminal justice and respond to the deep distrust of the Ukrainian population in the country's own judicial system.

119. Dated 12 November 2015: <https://www.icc-cpi.int/ukraine>.

120. *Ibid.*, paragraph 110.

121. <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>; see also the report on "Co-operation with the International Criminal Court: towards a concrete and expanded commitment", Doc. 14136 (rapporteur: Mr Alain Destexhe, Belgium, ALDE).

66. I do not consider it as part of my mandate to subsume my factual findings under the relevant articles of the Rome Statute. This will be the task of the ICC, in due course. But it is important to stress already now that indiscriminate attacks, such as the rocket attack on the market in Mariupol on 24 January 2015¹²² can under certain circumstances give rise to prosecution as international crimes or war crimes. The same can of course be true for any indiscriminate or disproportionate attacks committed by the Ukrainian forces involved in the operations termed “anti-terrorist” by the authorities in Kyiv.

67. There can be no doubt that a situation of armed conflict existed during the period of intense fighting in eastern Ukraine until the conclusion of the Minsk II ceasefire agreement and even far beyond. Despite the ceasefire agreement, which was never really fully respected, the threat of a further military escalation is still very real. Military action by both sides will therefore have to be assessed in light of the principles of international humanitarian law, in particular the principles of distinction (between combatants and non-combatants), proportionality (between the expected military gain and the “collateral damage” to civilians) and precaution (reasonable care taken to minimise unavoidable and proportionate “collateral damage”). Military action violating any of these principles, for example indiscriminate artillery attacks against residential areas, but also the use of “human shields” by placing weapons and other likely targets in the midst of civilians, can qualify as war crimes, which give rise to the individual criminal responsibility of fighters and their commanders.

4. The amnesty clause under the Minsk II Agreement – an obstacle to accountability?

68. The Minsk II Agreement, signed on 12 February 2015 after dramatic negotiations involving the German Chancellor, the French, Russian and Ukrainian Presidents as well as representatives of the European Union, the OSCE and – indirectly – of the two self-proclaimed “people’s republics”, includes an amnesty clause to “ensure pardon and amnesty by enacting the law prohibiting the prosecution and punishment of persons in connection with the events that took place in certain areas of the Donetsk and Luhansk regions of Ukraine”.¹²³

69. Given the dramatic circumstances in which the agreement was concluded, it is obvious that some issues require clarification and interpretation.¹²⁴ This includes the amnesty clause, which gave rise to some worries soon after the agreement was published – in particular in the Netherlands, where it was feared that the perpetrators of the downing of flight MH17 could be covered by the amnesty.¹²⁵ For the interpretation of the Minsk II amnesty clause, recent developments and trends in international and international human rights law must be taken into account, which favour accountability for serious human rights violations and abhor impunity.¹²⁶ Any clause that provides an exception from the rule of accountability for perpetrators of serious human rights violations must be interpreted restrictively. This should exclude persons from the scope of the amnesty clause who committed or ordered murder, torture or war crimes, in particular those reaching the threshold of international crimes covered by the Rome Statute. The amnesty clause would still remain applicable by shielding those who instigated the armed rebellion and those who participated in the fighting in accordance with the rules of international humanitarian law (*ius in bellum*) from the criminal responsibility they would normally incur for high treason and the killings and destruction caused by taking up arms against their government. But it would not give impunity to those who committed serious crimes on the occasion of the conflict. Such impunity would constitute a serious obstacle to reconciliation and peace.

70. As regards the possible role of the ICC, similar arguments are likely to come into play. Unjustified amnesties for perpetrators of international crimes are even considered to positively underpin the ICC’s subsidiary competence in that they show that the authorities of the State concerned are either unwilling or unable to prosecute the perpetrators themselves.¹²⁷

122. See paragraph 29.

123. Full text of the Minsk Agreement available at: www.elysee.fr/declarations/article/package-of-measures-for-the-implementation-of-the-minsk-agreements/.

124. See, for example, Gustav Gressel, “The Minsk II agreement – the long game”, European Council on Foreign Relations, 13 February 2015; Neil MacFarquhar, *Ukraine’s latest peace plan inspires hope and doubt*, *New York Times*, 2 February 2015.

125. See, for example, “Hastily signed Minsk agreement forgot the perpetrators of MH17”; German Chancellor Merkel is quoted as saying that in her understanding there was “no obligation” that the amnesty include “everyone”.

126. See, for example, *Impunity and the rule of law*, OHCHR, 2011, and Mary Griffin, “Ending the impunity of perpetrators of human rights atrocities, a major challenge for international law in the 21st century”, *International Review of the Red Cross*, 30 June 2000; “Eradicating impunity for serious human rights violations, Guidelines and reference texts”, Council of Europe, Strasbourg, 2011; see also OHCHR Report on the Human Rights Situation in Ukraine, 1 December 2014 to 15 February 2015, p. 3, paragraph 4 (and p. 7, paragraph 22): “Regarding the provision on amnesty for those involved in the conflict, OHCHR reiterates the long-standing position of the United Nations that amnesty must not be granted for international crimes, including gross violations of international human rights and humanitarian law.”

71. It would appear that the Russian side also interprets the amnesty clause in the Minsk II Agreement restrictively, as shown by the prosecution of Ukrainian helicopter pilot Nadiia Savchenko for allegedly being involved in the killing, in the combat zone, of two Russian journalists. According to statements by the Russian authorities, the amnesty clause did not apply to her. One argument put forward by the prosecution is that the amnesty provision in the Minsk Agreement applied only to persons in the Donbas region, whilst Ms Savchenko was (now) in Russia.¹²⁸ This argument would condemn all fighters to stay in the conflict zone, or else they would lose the benefit of the amnesty. A statement by Russian Foreign Minister Lavrov on the Savchenko case also shows the narrow view taken by Russia regarding the amnesty clause:

“But to grant amnesty to a person, [the case] should be brought to the court and the court should take the decision. If the court decides that she is not guilty, then probably, amnesty will apply to her, if I can now interpret the Minsk Agreements in this way.”¹²⁹

72. This interpretation seems somewhat surprising to me: once a court of law finds a person not guilty, there is hardly any need for an amnesty.

5. Conclusions

5.. Regarding the human rights situation in Crimea

73. In sum, it can be safely said in light of all the reports by intergovernmental as well as non-governmental observers that the situation of Crimea is characterised by a climate of intimidation fostered by a number of high-profile killings, abductions and beatings that have remained ominously unpunished. The referendum on “reunification” with Russia was clearly affected by this climate of intimidation to the point that I would consider this vote as a violation of the right to free and fair elections.¹³⁰ Actual or presumed Ukrainian loyalists are subject to different forms of intimidation and harassment. The entire population is pressured into obtaining Russian passports in order to secure access to such basic services as health care and housing. The Crimean Tatars, in particular, have been subjected to a number of repressive measures targeting their historical self-government bodies and cultural and media institutions (dissolution of the Mejlis and its local branches; closure of the Tatar television channel ATR, prosecution of political and cultural leaders of the Tatar community on treason, espionage or “extremism” charges). Numerous Tatars have therefore felt obliged to leave their homeland, and others dare not uphold their historic traditions to such an extent that the very existence of the Crimean Tatar community as a distinct ethnic and cultural group is threatened.

5.. Regarding the human rights situation in the “LPR” and “DPR”

74. The picture of the human rights situation in the “DPR” and “LPR” painted by the reports summed up above taken together is rather depressing. This picture has been confirmed by the impressions Ms Zelenkova and I collected during our fact-finding visit to the Donbas and by the experts who testified before our committee in January, April and June 2016. I find it equally depressing that these powerful reports, based on long-term, professional monitoring by hundreds of neutral observers duly mandated by the international community have had such little impact on Western public opinion and policies. Do we not want to know what is going on so that we can continue to do nothing (or next to nothing) to stop it?

75. It is undeniable that numerous human rights violations took place during the most violent phase of the conflict, up until the Minsk II Agreement, in February 2015, and that such violations continued and are still continuing after the ceasefire agreement.

127. See, for example, The Peace and Justice Initiative, “Amnesties and the ICC”; www.jstor.org/stable/25659262?seq=1#page_scan_tab_contents.

128. Catherine Fitzpatrick, “Interpreting the Minsk Agreement Regarding Amnesty and Release of Prisoners”, “Lavrov: Savchenko may be granted amnesty after going on trial”; see also “Savchenko amnesty depends on stated article of Criminal Code in final charge – justice minister”; Ms Savchenko insists that she was captured by separatist fighters on Ukrainian territory and then abducted to Russia, whereas the Russian authorities claim that she crossed the border voluntarily.

129. Cited in <http://tass.ru/en/russia/791032>.

130. See Luzius Wildhaber (note 85), p. 386: the former President of the European Court of Human Rights points out that the official results (83% participation, 97% in favour of accession to Russia) are “quite implausible. Crimea was inhabited by some 58-59% ethnic Russians, 24-25% Ukrainians and 12-13% Crimean Tatars. The Crimean Tatars had called for a boycott of the plebiscite, and certainly not all Ukrainians had opted for an accession to Russia. Members of Putin’s Human Rights Council communicated much more credible figures, i.e. that some 30-50% had taken part in the vote, and out of these, some 50-60% had opted to accede to Russia (roughly 22% of the potential voters)”.

76. First of all, there is still heavy loss of life and property due to shelling, especially in some well-known hotspots around the line of contact.¹³¹ Despite the restrictions on their movement imposed on the OSCE observers – imposed mostly by the “armed groups” of the so-called “people’s republics” – the OSCE SMM has documented numerous ceasefire violations where the crater analysis shows that the shelling originated in rebel-controlled areas. As a result, civilians are exposed to dangers to life and limb, especially those still living near the line of contact and those who must spend many hours at the checkpoints waiting to cross into or out of the “people’s republics”.

77. Secondly, acts of repression and intimidation such as extrajudicial killings, unlawful arrests, incommunicado and/or unacknowledged detentions, torture and ill-treatment as well as the taking of hostages still occur. Whilst less numerous than during the most violent phase of the conflict, such violations are encouraged by the prevailing climate of impunity. I am dismayed by the well-documented cases presented by Amnesty International and Human Rights Watch showing that such crimes have also been committed by representatives of the Ukrainian authorities, in particular the SBU. It is paramount that Ukraine sets an example by investigating any such allegations and prosecuting the perpetrators, in line with Articles 2 and 3 of the European Convention on Human Rights as interpreted by the Court. The temporary derogation made by Ukraine under Article 15 of the Convention does not concern the rights to life and protection from torture guaranteed by Articles 2 and 3. As a first step, both sides should establish lists of all places of detention and open them up to inspection by national and international monitors. Monitors must also be given swift access to places that are merely suspected of holding, or having held detainees.

78. Thirdly, the inhabitants of the “DPR” and “LPR” have serious social and administrative problems, which must urgently be resolved in a pragmatic way. It is legitimate that the Ukrainian authorities take precautions in order to avoid fraud (including the collection of pensions and other social payments both from the *de facto* authorities and from Ukraine) and the illicit recuperation of funds transferred to the “people’s republics” by the *de facto* authorities. But the necessary checks must be carried out in such a way as to avoid blocking vital payments for extended periods of time. When we raised these issues with representatives of the Verkhovna Rada in April, we were told that the relevant laws had already been adopted and that their proper implementation by the competent ministries was under way. The most recent reports by international monitors indicate that important issues have still not been resolved. For the sake of a durable solution of the conflict, it must be ensured that the inhabitants of the non-government-controlled areas and of the “grey zone” are not made to feel abandoned by their government. We noticed during our visit in April that such feelings still prevailed. It must also be recalled that the *de facto* authorities and their Russian handlers are responsible, under international law, for the safety and welfare of the population in the territories under their *de facto* control. They are under a duty to provide basic infrastructures, commodities and services, including food, housing and health services. This also means that they must refrain from expropriating inhabitants and displaced persons by creating re-registration requirements for property which can only be fulfilled by the inhabitants subjecting themselves to unlawful rules and by displaced persons exposing themselves to the risks involved in returning to the regions under the control of the *de facto* authorities.

79. Last but not least, lack of access to justice is a serious problem for the inhabitants of the “DPR” and “LPR” as well as some persons living in the government-controlled areas. Ukraine has “delocalised” courts situated in the areas over which the government has lost control, and/or the jurisdiction for cases concerning these areas has been attributed to existing courts in neighbouring, government-controlled areas. But many case files were lost in the sometimes chaotic move, or are now inaccessible. Access to the delocalised courts is difficult for residents of the “people’s republics”, whereas the “judicial” services offered by the newly established parallel structures in the “DPR” and “LPR” are not only illegitimate, but also lacking professionalism and independence. The resulting problems are particularly difficult to resolve without a return to the rule of law upheld by the legitimate authorities. Meanwhile, the Ukrainian authorities should do what is in their power in order to enable the “delocalised” courts to function properly, by providing adequate staff and other resources.

5.. Regarding the implementation of the Minsk Agreements: link between ceasefire and elections

80. The Minsk Agreements clearly have the merit of considerably reducing the loss of life, both among combatants and civilians. But the ceasefire has never been fully implemented. The OSCE observers note numerous violations, but they are unable to do anything about them. The local population is well aware of their

131. In particular, according to the SMM’s reports, the vicinity of Avdiivka and Yasynutava, the northern outskirts of Donetsk City, Horiivka, Shyrokyne (east of Mariupol), Stanytsia Luhanska Bridge area (see, for example, the OSCE SMM Weekly Report dated 20 July 2016 and its Daily Report 181/2016 dated 1 August 2016).

inability to act. During our “townhall meeting” in Mariupol with local citizens and grass-roots activists, we heard numerous complaints about nightly artillery shelling terrorising the population, in particular in the so-called “grey zone” on both sides of the contact line. Our question regarding possible help from the OSCE observers was greeted with bitter laughter. One of the locals said: “They are not allowed to leave their accommodation at night, as the other side knows full well, and when they turn up in the morning, the damage is done and the observers can only make sure that our side does not return fire.” The Minsk Agreements, as they stand, have not resolved the conflict, at best they have frozen it. As there is nothing better in sight, their implementation by both sides is necessary. But it is not sufficient: without the restoration of the legitimate, lawful authorities there can be no rule of law, nor any effective protection of human rights in this region. This requires re-establishing the full control of Ukraine over its border with the Russian Federation and holding truly free and fair regional elections – as foreseen by the Minsk Agreement. But the conditions for such elections have yet to be created. They require proper security, during the campaign and during the election itself. This condition is far from fulfilled, as is shown, for example, by the fact that the OSCE was unable to provide security even for a short visit of our small delegation to the “people’s republics”. Free and fair elections also require freedom of speech and information, including access to the media both for the “pro-Ukrainian” and the “pro-Russian” side. It is hard to see how this can be achieved without the prior establishment of law and order by Ukraine – under strong international supervision to avoid any intimidation or retaliation “the other way round”. The very fact that such a solution can realistically only be achieved in agreement with Russia and not against Russia is, incidentally, a clear indication of who really pulls the strings in this conflict, on the “pro-Russian” side.

5.. Regarding legal remedies

81. As I see it, the best available legal remedies provided to victims of alleged human rights violations both in the territory of Ukraine outside the control of the Ukrainian authorities – e.g. in Crimea and in the so-called “people’s republics” of Donetsk and Luhansk are those provided by the European Convention on Human Rights. Given the effective control of the Russian Federation based on the numerous indications presented above (paragraphs 52-56), whether admitted by Russia (as in the case of Crimea) or not (as in the “DPR” and “LPR”), victims of alleged human rights violations should be able to make applications both against Russia – under the Court’s case law attaching jurisdiction to effective control, exercised either directly, through a military presence, or indirectly, through a dependent local administration – and against Ukraine, to whose territory these regions belong under international law.

82. I have also argued that in cases linked to the annexation of Crimea or the action of the de facto authorities of the “DPR” and “LPR”, the alleged victims should not be obliged to first exhaust such internal remedies as the “courts” run by the de facto authorities. These cannot be considered as “effective” remedies in that they lack the necessary degree of independence and/or professionalism.

83. Concerning the accountability of individual perpetrators (and their commanders), it is first and foremost up to the law-enforcement authorities both in Ukraine and in Russia to fully and swiftly investigate alleged crimes and prosecute the perpetrators robustly, without regard to their allegiance in the conflict. Whilst the Ukrainian side has made some progress, it must do more, in particular regarding unlawful detentions and torture allegedly committed by members of the SBU. All official and alleged unofficial places of detention must urgently be made accessible to national and international monitors.

84. The International Criminal Court potentially has an important role to play since Ukraine has accepted its jurisdiction for all international crimes committed on the territory of Ukraine since 21 November 2013. Whilst the progress of the “preliminary examination” launched by the ICC’s Office of the Prosecutor seems to be rather limited so far, the potential scope is considerable, in particular as regards the conflict in the Donbas.

85. Last but not least, accountability for serious human rights violations or international crimes should not be hampered by the amnesty clauses in the Minsk Agreements, which must be interpreted in such a way as to exclude perpetrators of serious crimes committed on the occasion of the conflict. Such a narrow interpretation of the amnesty clauses is also supported by statements from senior representatives of the Russian authorities. In my view, true reconciliation and lasting peace require justice for the victims of the conflict.