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Office of the United Nations High Commissioner for Human Rights

Human Rights in the Administration of Justice in Conflict-Related Criminal Cases in Ukraine
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Contents

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I. Executive Summary

1. This report by the Office of the United Nations High Commissioner for Human Rights (OHCHR) examines human rights violations committed in the course of criminal proceedings and processes related to the armed conflicts in eastern Ukraine and in the Autonomous Republic of Crimea, and the city of Sevastopol, temporarily occupied by the Russian Federation[1] (hereinafter Crimea) from 14 April 2014 to 13 April 2020. It is based on the work of the Human Rights Monitoring Mission in Ukraine (HRMMU)[2], which monitored and analysed individual cases throughout Ukraine, including in Crimea and in territory controlled by the self-proclaimed 'Donetsk people's republic' and the self-proclaimed 'Luhansk people's republic'.[3]

2. OHCHR recalls that the sovereignty, unity and territorial integrity of Ukraine within its internationally recognized borders was affirmed by General Assembly resolution 68/262. This report is focused on human rights issues.[4]

3. With unimpeded access to court hearings and places of detention in Government-controlled territory, OHCHR documented 590 individual cases and monitored 1,280 hearings. By contrast, in territory controlled by the self-proclaimed 'republics', OHCHR had no access to places of detention and restricted access to 'proceedings', but nevertheless documented 305 cases and monitored 71 'hearings'. OHCHR has no access to Crimea, and thus was not able to directly monitor any court hearings that took place there. Nevertheless, OHCHR documented 106 cases in Crimea.

4. While armed groups and other non-State actors cannot become parties to international human rights instruments, where they exercise government-like functions and control over a territory, they must respect human rights standards when their conduct affects the human rights of individuals under their control. Therefore noting OHCHR's mandate to promote and protect the human rights of everyone, everywhere, this report assesses how the human rights of persons living within these territories are affected when these actors exercise government-like functions. As such, it does not legitimize the processes or the structures themselves.

5. In conflict-related cases before the Ukrainian judicial system, suspects were generally charged with crimes against the national security of Ukraine or certain crimes against public security, including membership or affiliation with armed groups.[5] In such criminal proceedings, OHCHR identified systematic violations of the rights to liberty and security, to legal counsel, to a fair hearing by a competent, independent and impartial tribunal, trial without undue delay, to be present during trial and effective remedy, as well as violations of the right not to be compelled to confess guilt.

6. In Government-controlled territory, OHCHR noted widespread violations of the right to liberty of individuals prosecuted for conflict-related crimes. Throughout the reporting period individuals were often arrested without a court warrant, in violation of national legislation. Pre-trial detention was often automatically imposed and extended, contrary to international human rights law.

7. The report raises concerns regarding the right to legal counsel. State-appointed lawyers handling the majority of conflict-related criminal cases often provided poor quality services, and did not act in the best interests of their clients. In addition, in 2017 and 2018,

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1 General Assembly resolution 73/263, *Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine*, A/RES/73/263 (22 December 2018), para. 11.

2 HRMMU was deployed in March 2014 to monitor the human rights situation in Ukraine with particular attention to its eastern and southern regions, and the temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol, Ukraine.

3 Hereinafter referred to as 'Donetsk people's republic' and 'Luhansk people's republic' or jointly referred to as self-proclaimed 'republics'.

4 Specific terms such as 'legislation', 'prosecution', 'court' etc. are used exclusively for the convenience of the reader and to provide the most precise description possible of specific decisions, documents and structures with a view to identify human rights protection needs (and remedies) for the affected population.

5 Crimes against national security (articles 109-114[1], chapter I of the Special Part of the Criminal Code) and certain crimes against public security (articles 258-258[5], chapter IX of the Special Part of the Criminal Code) were previously rarely applied. Their systematic application coincided with the beginning of the armed conflict due to the application of counter-terrorism legislation. For the purposes of this report, these crimes are jointly referred to as "conflict-related crimes".

OHCHR documented eight cases where private lawyers dealing with conflict-related cases were attacked because of their professional activity.

8. OHCHR is concerned about interference with the independence of judges dealing with conflict-related cases, which were most frequent in 2017 and 2018. In some of these cases, prosecutors pressured judges by opening criminal investigations against those who issued rulings in favour of defendants, while in others, judges were harassed by members of extreme right-wing and other groups, in an attempt to coerce them to adopt certain decisions. Police present often failed to prevent or stop these acts, or afterwards, to effectively investigate them.

9. Throughout the reporting period, access to judicial remedies for human rights violations perpetrated during the prosecution of conflict-related crimes was lacking. Courts often failed to address allegations of torture, ill-treatment and unlawful arrest raised by defendants.

10. OHCHR is concerned by credible allegations depicting the widespread use of forced confessions in conflict-related cases documented between 2014 and 2020. Based on information collected, in at least 55 cases, apprehended individuals were forced to incriminate themselves on camera. OHCHR is further concerned that convictions based on plea bargains and admissions of guilt may be the result of duress stemming from the combination of the aforementioned human rights violations, almost automatic pre-trial detention during protracted trials, poor quality of legal assistance provided by the state-appointed lawyers and the failure of the authorities to remedy these violations. As a matter of practice, judges accepted plea bargains without examining their circumstances or the merits of the case, raising the risk of misuse by the prosecution to secure convictions in the absence of sufficient evidence.

11. Contrary to international human rights standards, Ukrainian legislation governing *in absentia* proceedings does not envisage the right of a convicted person to retrial after the verdict has been delivered, thereby depriving them of the opportunity to present a defence. In addition, host States may refer to this procedural shortcoming as grounds for refusing requests for extradition of persons convicted *in absentia*, thus hampering the enforcement of such verdicts and undermining accountability efforts and the right to a remedy for victims.

12. In territory controlled by the self-proclaimed 'republics', OHCHR found that both the legal framework and practice applied did not respect the basic elements of fair trial and related human rights of individuals 'accused' of conflict-related 'crimes'.[6] Most notably, the use of *incommunicado* detention, without any independent oversight, for up to several months before an 'investigation' formally commences denies individuals of the protection they are entitled to in criminal proceedings. In tandem with the lack of access by independent human rights monitors, including OHCHR, to places of detention in this territory, this raises concerns regarding the use of torture and ill-treatment to secure confessions from detainees.

13. OHCHR further observed that 'trials' in territory controlled by the self-proclaimed 'republics' were marked by the lack of access to a lawyer of one's choice, closed 'hearings' and lack of independence and impartiality of 'judges'. OHCHR is concerned that lawyers and lawyers' associations in the territory lack independence and do not provide an effective defence to the 'accused'. Finally, OHCHR is concerned by the operation of 'military courts' because they processed cases of civilians and held closed 'hearings'. All of these violations raise concerns as to the overall fairness of these 'proceedings'.

14. Human rights violations in the context of criminal proceedings have been a concern since before the armed conflict broke out in eastern Ukraine.[7] The armed conflict in the east has exacerbated existing problems and brought up additional issues. Criminal prosecutions relating to the armed conflict therefore serve as a litmus test for the overall criminal justice system in Government-controlled territory. OHCHR notes that some human rights violations stem from the legal framework and therefore can equally affect individuals prosecuted for non-conflict-related crimes on both sides of the contact line. This report and its recommendations are

[6] For the purposes of the report's sections describing fair trial rights violations in territory controlled by the self-proclaimed 'republics', conflict-related 'crimes' mean 'prosecution' of individuals believed to be affiliated with Ukrainian government or having pro-Ukrainian views. 'Charges' against such individuals included espionage, diversion, high treason, terrorism, and illegal possession of weapons.

[7] See, e.g., *Addendum to the Report of the Working Group on Arbitrary Detention on mission to Ukraine Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development,* A/HRC/10/21/Add.4, paras. 35 and 98 (g), available at https://undocs.org/A/HRC/10/21/ADD.4.

addressed to the Government and its international partners with the objective of strengthening the independence of the judiciary, judicial safeguards and protection of human rights.

15. OHCHR is concerned that in territory controlled by the self-proclaimed 'republics' the above human rights violations may be perpetrated in non-conflict-related 'proceedings' as well. This report therefore addresses interlocutors from the self-proclaimed 'republics' with the objective of ending practices that violate human rights.

16. As the occupying Power in Crimea, the Russian Federation is bound by human rights obligations, including in the administration of justice. In conflict-related cases[8] monitored by OHCHR, the justice system applied by the Occupying Power often failed to uphold fair trial rights and due process guarantees. OHCHR is concerned about the intimidation of defence lawyers representing clients who opposed to the presence of the Russian Federation in Crimea, and improper interference in the discharge of their professional duties to their clients. OHCHR is also concerned by reports of ineffective representation provided by legal aid lawyers to their clients in such trials, and deficiencies in the equality of arms between the prosecution and defence. Furthermore, in some cases, judges applied Russian Federation criminal law provisions retroactively to events that preceded the occupation of Crimea.

II. Methodology

17. The report is based on 673 in-depth interviews with victims and witnesses of human rights violations perpetrated in the context of 517 criminal proceedings related to the armed conflict in eastern Ukraine.[9] Information was also obtained from relatives of victims and their lawyers, Government representatives, civil society and other interlocutors, trial monitoring of 1,280 court hearings, as well as more than 3,300 court documents, official records, open sources and other relevant material. Findings are based on verified information collected from primary and secondary sources assessed as credible and reliable. Findings are included in the report where the "reasonable grounds" standard of proof is met, namely where, based on a body of verified information, an ordinarily prudent observer would have reasonable grounds to believe that the facts took place as described and, where legal conclusions are drawn, that these facts meet all the elements of a violation.

18. OHCHR is committed to the protection of its sources and therefore ensures the preservation of their confidentiality. OHCHR does not disclose any information, which may lead to identification of the source, unless the source gave informed consent and OHCHR assessment concluded it would not carry potential risks of harm and retaliation.

19. In Government-controlled territory, OHCHR enjoys freedom of movement and full, unimpeded access to detainees and detention facilities. By contrast, in territory controlled by the self-proclaimed 'republics', OHCHR operations have been severely restricted since July 2018. Furthermore, OHCHR has never been granted unimpeded confidential access to places of detention, which severely limits OHCHR's ability to obtain primary source information through confidential interviews with detainees. Between April 2017 and July 2018, OHCHR had restricted access to 'hearings' in conflict-related cases, which were usually held *in camera.*[10] Despite these impediments, OHCHR monitored 71 'hearings', interviewed 453 individuals, and carried out remote monitoring and analysis of information obtained from a range of other sources including 'court verdicts', replies of the 'authorities' and open-source information to verify allegations of human rights violations perpetrated in this territory.

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[8] For the purposes of this report, "conflict-related cases" in Crimea are prosecutions of individuals believed to be affiliated with Ukrainian Government, those holding pro-Ukrainian views, critics of the Russian Federation's occupation of Crimea, and members of organizations banned in the Russian Federation but operating legally in mainland Ukraine. Charges against such individuals include, but are not limited to, espionage, sabotage, high treason, terrorism, illegal possession of weapons, extremism and membership in terrorist organizations. This report also includes prosecutions of Ukrainian citizens arrested in Crimea, but transferred to the Russian Federation for trial and/or to serve sentences.

[9] These 517 proceedings represent approximately 80 per cent of conflict-related criminal cases in which defendants have been remanded in custody pending trial, prosecuted in Dnipropetrovsk, Donetsk, Kharkiv, Kherson, Kyiv, Mykolaiv, Odesa, Poltava, Sumy, Vinnytsia, Zaporizhzhia and Zhytomyr regions.

[10] Prior to 2017, OHCHR did not seek access to 'trials' in territory controlled by the self-proclaimed 'republics'.

20. Due to lack of access, OHCHR has remotely monitored the human rights situation in Crimea on a continuous basis since March 2014. OHCHR conducted 183 direct in-depth interviews with victims and witnesses of human rights violations, as well as relatives of victims and their lawyers, Government representatives, members of civil society and other stakeholders. OHCHR collects and analyses information from court registries and documents, official Government records, open sources and other relevant material, and assesses Ukrainian and Russian Federation legislation which impact the enjoyment of human rights in Crimea. OHCHR also regularly monitors the crossing points of the Administrative Boundary Line (ABL) between mainland Ukraine and Crimea.

III. Context

21. From 21 November 2013 to 20 February 2014, large-scale protests erupted in Kyiv and other parts of Ukraine, triggered by the decision of then President Viktor Yanukovych not to sign the Association Agreement with the European Union. The protests were characterized by violence and excessive use of force by police and other law enforcement agencies. Such incidents took place particularly near Independence Square (Maidan Nezalezhnosti) in Kyiv, and resulted in the death of 98 people including 13 law enforcement officers.[11] On 21 February 2014, President Yanukovych fled Ukraine and the next day, Parliament voted to remove him from office.[12]

22. On 27 February 2014, uniformed men without insignia took over the Parliament of Crimea and dismissed the Government of Crimea. On 16 March 2014, a "referendum" on Crimea's incorporation into the Russian Federation was held.[13] Shortly thereafter, on 18 March 2014, the Russian Federation and the "Republic of Crimea" signed a "Treaty on the Accession of the Republic of Crimea to the Russian Federation" ("Treaty on Accession") effectively annexing Crimea into the Russian Federation.[14]

23. The Treaty on Accession provided for a transitional period until 1 January 2015 to fully apply the legal framework of the Russian Federation in Crimea. This led to the wholesale replacement of Ukrainian criminal law with Russian Federation criminal law, in violation of the obligation under international humanitarian law to respect the existing law of an occupied territory.[15]

24. Individuals opposed to the Russian Federation's occupation of Crimea or critical of specific Russian Federation policies applied on the peninsula, such as journalists, bloggers, supporters of the Mejlis[16], and pro-Ukrainian and Maidan activists, were targeted for prosecution under the newly applied legal system in Crimea. Persons with no declared political affiliation, but who advocated strict compliance with the tenets of Islam, were accused of

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11 See, *e.g.*, OHCHR, *Accountability for killings in Ukraine from January 2014 to May 2016*, available at https://www.ohchr.org/Documents/Countries/UA/OHCHRThematicReportUkraineJan2014-May2016_EN.pdf, and HRMMU briefing note, *Accountability for Killings and Violent Deaths during the Maidan Protests*, available at http://www.un.org.ua/images/documents/4700/Accountability%20for%20Killings%20and%20Violent%20Deaths%20During%20the%20Maidan%20Protest_2.pdf.

12 Verkhovna Rada of Ukraine (Parliament), *Self-Removal of the President of Ukraine from Performance of Constitutional Functions and Appointment of the Extraordinary Election of the President of Ukraine*, Resolution No. 757-VII, available at https://zakon.rada.gov.ua/laws/show/757-VII#Text.

13 The "referendum" was declared invalid by the Government of Ukraine, as well as by the General Assembly of the United Nations, which stated that the referendum, "having no validity, cannot form the basis for any alteration of the status of the Autonomous Republic of Crimea or of the city of Sevastopol" (General Assembly resolution 68/262, para. 5). See also OHCHR first report on Crimea, paras. 5, 24 and 28.

14 UN General Assembly resolution 71/205 condemned the temporary occupation of part of the territory of Ukraine – Crimea – by the Russian Federation and reaffirmed the non-recognition of its annexation.

15 Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, the Hague, 18 October 1907, Article 45, and IV Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, Article 64.

16 The Mejlis is a self-governing institution of the Crimean Tatar people holding executive powers which boycotted the referendum and initiated public protests in favour or Crimea remaining a part of Ukraine. It was banned in April 2016 by the Supreme Court of Crimea.

belonging to extremist groups banned in the Russian Federation and were also now prosecuted under Russian Federation criminal law applied in Crimea.

25. From early April 2014, groups of armed people began to seize the buildings of government institutions across Donetsk and Luhansk regions. After gaining control over some areas in these regions, armed groups proclaimed independence from Ukraine and the creation of the 'Donetsk people's republic' and 'Luhansk people's republic', respectively. On 11 May 2014, both self-proclaimed 'republics' held 'referendums' to validate their 'acts of independence'. The self-proclaimed 'republics' were recognized neither by the Government of Ukraine, nor the international community. Since their formation, both self-proclaimed 'republics' began processing 'criminal cases'.

26. The Government of Ukraine considers both self-proclaimed 'republics' terrorist organisations.[17] In response to the seizure of administrative facilities in Donetsk and Luhansk regions, the Government launched an "anti-terrorist operation",[18] which allowed for the application of counter-terrorism legislation to the criminal proceedings related to the armed conflict.

27. The Government's lack of access to territory controlled by the self-proclaimed 'republics' and residents there complicated investigations into human rights violations perpetrated there, and thus rarely resulted in prosecution of perpetrators. OHCHR is aware of only four convictions in conflict-related cases, on charges implying human rights violations. OHCHR findings show that the majority of individuals prosecuted for their membership or affiliation with the armed groups resided in Donetsk and Luhansk regions.[19] The majority were men: 520 defendants in 408 criminal proceedings; while 70 women were prosecuted in 61 criminal proceedings. The majority were accused of being members or supporters of the armed groups.[20] charges of the crimes of trespassing against the territorial integrity or inviolability of Ukraine and high treason (crimes against national security) were less common, they were mostly used against those who did not support Ukrainian defence policy or instead supported the self-proclaimed 'republics'.

28. In territory controlled by the self-proclaimed 'republics', most of those 'prosecuted' in relation to the armed conflict were individuals believed to be affiliated with the Ukrainian armed or security forces, who committed 'subversive acts' against these self-proclaimed 'republics'.[21] Most resided in or regularly travelled to territory controlled by the self-proclaimed 'republics'. Of the 305 individuals whose cases OHCHR followed, the majority were men – 248, 52 were women, and five were boys.

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[17] See the Declaration of the Parliament "On the rebuff to the military aggression of the Russian Federation and overcoming its consequences" adopted on 21 April 2015, available at https://zakon.rada.gov.ua/laws/show/337-19. OHCHR notes that there has been no decision by a judicial or administrative body declaring or recognising the self-proclaimed 'republics' and/or their entities as terrorist organisations.

[18] President of Ukraine, On the decision of the National Security and Defence Council of Ukraine of 13 April 2014 regarding high priority measures to address terrorist threats and securing territorial integrity of Ukraine, Decree No. 405/2014, 14 April 2014, available at http://zakon2.rada.gov.ua/laws/show/405/2014.

[19] There are a few cases where foreigners were prosecuted for membership in the armed groups, including citizens of the Russian Federation and Brazil.

[20] For instance, for collecting information on the manoeuvres of the Ukrainian military and transferring this information via phone to active members of the armed groups. In some anecdotal cases, the defendants claimed that they were speaking to their loved ones living in territory controlled by the self-proclaimed 'republics'.

[21] "Subversive acts" referred to as conflict-related crimes include terrorism, extremism, espionage, high treason, diversion, violent coup, threatening the life of a State official, armed insurrection, and illegal possession of weapons.

IV. Legal Framework

29. The right to a fair trial is a part of customary international human rights law[22] and customary international humanitarian law.[23] It has also been enshrined in a number of widely ratified international[24] and regional human rights[25] and international humanitarian law treaties.[26]

30. This right encompasses a series of procedural rights and judicial guarantees. The International Covenant on Civil and Political Rights (ICCPR)[27] prohibits arbitrary arrest and detention, guarantees judicial review of detention and entitles individuals facing criminal charges, *inter alia,* with the right to be informed at the time of arrest, of the reasons for their arrest, of any charges against them, and of their rights and how to avail themselves of such rights. It also states that hearings must be fair and public, and conducted by a competent, independent and impartial tribunal established by law. Individuals should not be compelled to testify against themselves, and have the right to be tried without undue delay, in their presence, and to defend themselves in person or through legal assistance of their own choosing whether hired or assigned if they do not have sufficient means to pay for it. In case of violations of their rights, individuals should have the right to remedy those violations.

31. While armed groups and other non-State actors cannot become parties to international human rights instruments, it is accepted that where they exercise government-like functions and control over a territory, they must respect human rights standards when their conduct affects the human rights of individuals under their control.[28]

32. In situations of armed conflict and occupation, international humanitarian law applies alongside international human rights law. International humanitarian law prohibits the passing of sentences and carrying out executions without previous judgement pronounced by a court affording all the judicial guarantees recognized as indispensable. All parties involved in an armed conflict must ensure that penal prosecutions comply with, at a minimum, the following: the right to an independent and impartial tribunal, the right to information and defence, presumption of innocence, the right of the accused to be present at their own trial, the right not to be compelled to testify against themselves or to confess guilt, right to be informed of judicial remedies and of the time limits in which they may be exercised, and the prohibition of arbitrary

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22 Universal Declaration on Human Rights, Article 10: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him".

23 International Committee of the Red Cross (ICRC) database on customary international humanitarian law, Rule 100. Fair Trial Guarantees: "No one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees".

24 International Covenant on Civil and Political Rights, Article 14; Convention of the Rights of the Child, Article 40.

25 European Convention on Human Rights, Article 6; American Convention on Human Rights, Article 8; African Charter on Human and Peoples' Rights, Article 7.

26 Article 3 common to the four Geneva Conventions of 12 August 1949, and also First Geneva Convention, Article 49; Second Geneva Convention, Article 50, Third Geneva Convention, Articles 102-108; Fourth Geneva Convention, Articles 5 and 66-75; Additional Protocol I, Article 75; Additional Protocol II, Article 6.

27 Ratified by Ukraine on 12 November 1973.

28 The Independent International Commission of Inquiry on the Syrian Arab Republic in its Report A/HRC/19/69 concluded that "at a minimum, human rights obligations constituting peremptory international law (jus cogens) bind States, individuals and non-State collective entities, including armed groups. Acts violating jus cogens – for instance, torture or enforced disappearances – can never be justified". The United Nations Committee on the Elimination of Discrimination Against Women considers that "[…] where an armed group with an identifiable political structure exercises significant control over territory and population, non-State actors are obliged to respect international human rights" (General Recommendation No 30, 2013). The United Nations Security Council strongly condemned "the continued violations of international humanitarian law and the widespread human rights violations and abuses, perpetrated by armed groups" in the Central African Republic (resolution 2127 (2013), para. 17). In relation to the situation in the Democratic Republic of the Congo, it reminded all parties "[…] that they must abide by international humanitarian standards and ensure respect for human rights in the sectors they control" (statement by the President of the Council, S/PRST/2002/27(2002)), and indicated that "the RCD-GOMA must… ensure an end to all violations of human rights and to impunity in all areas under its control" (statement by the President of the Council, S/PRST/2002/22(2002)).

deprivation of liberty.[29] In situations of occupation, under the international humanitarian law the occupying Power must respect the fair trial rights listed above.[30] The penal laws of occupied territory must remain in force, subject to some limited exceptions, and be applied by the tribunals of the occupied territory which should be allowed to continue to function.[31]

33. The Rome Statute of the International Criminal Court[32] also defines as a war crime the passing of sentences and carrying out of executions of persons taking no active part in hostilities without previous judgment pronounced by a court, affording all of the above judicial guarantees.[33]

V. Human Rights Concerns in Conflict-Related Criminal Proceedings before the Ukrainian Judiciary

34. OHCHR monitoring has shown widespread violations of defendants' rights to a fair trial, to liberty and to effective legal remedy in conflict-related criminal cases. Some violations stem from flaws in the legislation, others from the application of the legislation in practice.

A. Right to liberty (pending trial)

35. OHCHR found that the right to liberty was often violated due to arrests of suspects in conflict-related cases without a court warrant and the lack of courts' effective control over pre-trial detention, contrary to international standards and national legislation. OHCHR documented 435 cases where arrests were not ordered by a court, where courts failed to address allegations of unlawful arrest, or where courts did not consider alternatives to pre-trial detention, often resulting in defendants remaining in pre-trial custody for years.

1. Arrest

36. An arrest violates international human rights law if it is not in accordance with the national laws or is otherwise arbitrary. While States may determine the reasons and grounds for detention, they must ensure compliance with their legally prescribed procedures.[34] The Criminal Procedure Code ("CPC") permits arrest of a person with a court ruling (arrest

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[29] *See* Article 3 common to the four Geneva Conventions of 1949; First Geneva Convention, Article 49; Second Geneva Convention, Article 50, Third Geneva Convention, Articles 102-108; Additional Protocol I, Article 75; Additional Protocol II, Article 6. See also ICRC *Database on Customary International Humanitarian Law* Rules 100-102.

[30] Fourth Geneva Convention, Articles, 5, 71-76 and 126.

[31] Penal laws may only be repealed or suspended by the occupying Power if they constitute a threat to its security or an obstacle to the application of the requirements listed under the Fourth Geneva Convention. *See* Fourth Geneva Convention, Article 64.

[32] Ukraine is not a State Party to the Statute. However, pursuant to the two article 12(3) declarations lodged by the Government of Ukraine on 17 April 2014 and 8 September 2015 respectively, the Court may exercise jurisdiction over Rome Statute crimes committed on the territory of Ukraine from 21 November 2013 onwards. See para. 259 of the Office of the Prosecutor of the International Criminal Court Report on Preliminary Examination Activities 2019, 5 December 2019, available at https://www.icc-cpi.int/itemsDocuments/191205-rep-otp-PE.pdf.

[33] Rome Statute of the ICC, articles 8(2)(a)(vi) and 8(2)(c)(iv), available at https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf , and Elements of Crime, articles 8(2)(a)(iv) and 8(2)(c)(iv), available at https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf. The Office of the Prosecutor of the International Criminal Court assessed that by 30 April 2014, the intensity of hostilities between government forces and armed groups in eastern Ukraine had reached a level triggering application of the law of armed conflict, and that the armed groups were sufficiently organised to qualify as parties to a non-international armed conflict. The Office further assessed that direct military engagement between the armed forces of the Russian Federation and Ukraine "indicated the existence of an international armed conflict in eastern Ukraine from 14 July 2014 at the latest, in parallel to the non-international armed conflict". Report on Preliminary Examination Activities 2019, 5 December 2019, para. 266, available at https://www.icc-cpi.int/itemsDocuments/191205-rep-otp-PE.pdf. For the purpose of determining whether the otherwise non-international armed conflict involving Ukrainian armed forces and anti-government armed groups could be actually international in character, the Office continues to examine allegations that the Russian Federation has exercised overall control over armed groups in eastern Ukraine. Available at https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE-Ukraine_ENG.pdf

[34] Human Rights Committee (HRC), *General Comment No. 35*, para. 23.

warrant).[35] As an exception, however, a person can be arrested without a court ruling if caught while committing a crime *(in flagrante)*.[36]

37. OHCHR documented 420 cases where individuals were apprehended without a court warrant on the basis of having participated in armed groups months and sometimes years earlier.[37] This was one of the most common violations identified by OHCHR, which persisted throughout the reporting period. According to the prosecution, such membership is a continuous crime and therefore the suspects were considered to be permanently 'committing a crime'. However, OHCHR notes that such arrests without court authorisation are unlawful as they do not respond to an urgent need to prevent or stop the crime.[38]

38. OHCHR is not aware of any case where law enforcement authorities effectively investigated or prosecuted such unlawful arrests.[39] In some documented cases, investigative judges rejected on dubious grounds complaints by the suspects regarding the unlawful arrest. In rare cases where judges found the arrest unlawful, there was no effective remedy provided.[40]

39. OHCHR also documented 57 cases with credible allegations that evidence, such as hand grenades or rifle rounds, was planted in order to justify arrests. Complaints about planted evidence went unaddressed by prosecutors and judges in these cases, while other safeguards, such as the requirement of video recording searches or of the presence of attesting witnesses, ostensibly failed to prevent abuses during searches.

2. Pre-trial detention

40. Between April 2014 and April 2020, OHCHR documented a widespread practice by judges of remanding defendants in conflict-related criminal cases in custody without considering its necessity or alternatives to pre-trial detention, in violation of the defendants' right to liberty, and jeopardizing their presumption of innocence.

41. Pursuant to Article 9 of the ICCPR, pre-trial detention of individuals on criminal charges should not be a general rule. Both international human rights law and Ukrainian legislation require a court to determine the lawfulness of detention as the basis for deprivation of liberty.[41] In line with the ICCPR,[42] the CPC allows for pre-trial detention on the basis of (1) a reasonable suspicion that a person has committed a crime; (2) the determination of risks that give reasonable grounds to believe that the suspect would abscond, interfere with the investigation or continue committing crimes; and (3) the determination that less intrusive measures, such as bail, would not be enough to mitigate the risks.[43] If the prosecutor fails to prove any of the three elements, the court must deny the motion for pre-trial detention and impose a less intrusive measure or release the suspect.

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35 Article 207.

36 Article 208.

37 See, e.g., Verdict of Slovianskyi town-district court of Donetsk region, 5 May 2017 (the accused was arrested under article 208 on 18 November 2016, while the verdict states he left the armed groups on 25 August 2015), available at http://reyestr.court.gov.ua/Review/66337035; Verdict of Krasnoarmiiskyi town-district court of Donetsk region, 27 December 2017 (the accused was arrested on 1 June 2017, while the verdict states she was a member of an armed group between July 2014 and spring 2015), available at http://reyestr.court.gov.ua/Review/86672166.

38 The European Court of Human Rights (ECtHR) found the arrest without a court ruling for alleged actions more than one year before was contrary to article 5 para. 1 of the European Convention on Human Rights, as the Criminal Procedure Code allows for such practice "only as a response to an urgent need to prevent or stop a crime". See ECtHR Judgment in the case of Korban v. Ukraine, 4 July 2019, paras. 146-147, available at http://hudoc.echr.coe.int/eng?i=001-194188.

39 Criminal Code, Article 371 punishes the unlawful arrest of a person by depriving the arresting individual of the right to hold certain positions or carry out certain activities for up to five years.

40 See ruling of Shevchenkivskyi district court of Kyiv, 14 December 2017, available at http://reyestr.court.gov.ua/Review/63439265.

41 CPC, Article 177.2 requires an investigative judge or court to order detention or bail. The investigative judge is a judge of first instance, authorised to judicially control compliance with the human rights, freedoms and interests of persons in criminal proceedings.

42 The Human Rights Committee stated that pre-trial detention must be based on an individualised determination that it is reasonable and necessary, taking into account all relevant circumstances, including to mitigate the risks of flight, interference with evidence or the recurrence of crime (*General Comment No. 35*, para. 38).

43 CPC, Article 176 provides a variety of controls to mitigate these risks including a personal undertaking, personal guarantee, monetary bail, house arrest and pre-trial detention.

42. Even though the burden of proof for all three elements lies with the prosecutor, in 100 cases documented by OHCHR, prosecutors requested pre-trial detention without establishing the reasonableness and necessity of this or any other measure.[44] They often simply listed the risks as enumerated in the law, without applying the circumstances of the specific case at hand and failed to argue why only pre-trial detention could mitigate the risks. OHCHR observed that the burden of proof then shifted to the defence to prove that the defendant should be released. By granting such unfounded motions, the courts failed in their duty to exercise judicial control of detention, resulting in the automatic application and extension of pre-trial detention of individuals.

43. Such practice not only amounted to arbitrary detention, but also negatively affected the presumption of innocence, as it was assumed that the defendants will continue to commit crimes or abscond.

44. In addition, between October 2014 and June 2019, the law limited judges' powers to choose among alternatives to pre-trial detention.[45] According to article 176.5 of the CPC, in conflict-related cases, judges could only remand an individual in custody or release them unconditionally.[46] This violates the ICCPR, which prohibits imposition of mandatory pre-trial detention on individuals prosecuted for a specific crime.[47]

45. On 25 June 2019, the Constitutional Court of Ukraine found article 176.5 unconstitutional and repealed it, *inter alia* because it limited judicial control of detention and thus interfered with an individuals' right to liberty.[48] During the 4.5 years in which this article was applied, most individuals detained pursuant to it remained in custody with little chance of release pending trial. Some spent over four years in pre-trial detention, in breach of the defendant's right to be tried within a reasonable time or released.[49] OHCHR found that, during this time, the legally mandated periodic assessment of the reasonableness and necessity of pre-trial detention became a formalistic exercise.

46. OHCHR documented 16 cases where, following the court-ordered release of an individual, the prosecution pressed additional charges of conflict-related crimes in order to ensure that the defendant would be re-arrested and detained on the basis of CPC article 176.5. In one case, an investigator additionally charged a soldier prosecuted for desertion with high treason after his release was granted by the court. As a result, the defendant was re-arrested on the new charges and the court ordered his detention under article 176.5.[50]

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[44] The report focuses on OHCHR findings in conflict-related criminal proceedings, which fell under the limitations imposed by CPC, article 176.5 (see paras. 44-46 below), however OHCHR observed the same pattern in other high-profile and emblematic criminal proceedings during its five-year operation in Ukraine.

[45] Paragraph 5 of article 176 was introduced to the Criminal Procedure Code on 7 October 2014 by the law on ensuring the inevitability of punishment for certain crimes against Ukraine's national security, public security and corruption crimes no. 1689-VII, available at https://zakon.rada.gov.ua/laws/show/1689-18#n27.

[46] Article 176.5 of the Criminal Procedure Code limited the judges' powers to decide on the third element by stating that no other measures except for pre-trial detention can be applied to individuals prosecuted for conflict-related crimes. It did not affect their obligation to establish existence of (1) a reasonable suspicion that a person has committed a crime and (2) the risks of flight, interference with the investigation or recurrence of crimes.

[47] ICCPR, Article 9.2. See also HRC, *General Comment No. 35*, para. 38.

[48] The Constitutional Court noted that the wording of this article was contrary to international human rights standards by limiting the powers of the court to determine bail or conditional releases of its own choice, thus offsetting judicial control of detention. Pro-forma court decisions to remand individuals in custody did not minimise the risk of arbitrary detention. The full text of the decision is available at http://ccu.gov.ua/sites/default/files/docs/7-r_19.pdf.

[49] HRC, *General Comment No*. 35, para. 37.

[50] OHCHR interview, 2 August 2018. In this case, the SBU arrested a man on 16 June 2016 on charges of smuggling weapons. On 28 September 2016, upon his release on bail from the SIZO, an SBU investigator requested he come to the SBU office for interrogation the next day. On 29 September 2016, during the interrogation, the SBU additionally charged him with conspiring to commit a terrorist act (article 258.2 of the Criminal Code) and a court immediately remanded him in custody (ruling of Kyivskyi district court of Kharkiv, 29 September 2016, available at http://reyestr.court.gov.ua/Review/61670336), where he remained until the pronouncement of the verdict on 18 February 2019 (verdict of Kharkivskyi district court of Kharkiv region, 18 February 2019, available at http://www.reyestr.court.gov.ua/Review/79888377). In another case (OHCHR interview, 19 October 2017) the SBU arrested two men on 18 September 2017, under article 110.2 of the Criminal Code for making public calls to trespass against the territorial integrity and inviolability

47. OHCHR also documented 85 cases where individuals believed to be affiliated or linked with the armed groups were held *incommunicado* prior to official arrest, during which law enforcement and security officers attempted to extract self-incriminating testimonies. Individuals told OHCHR that the stress and fear stemming from isolation coerced them into confessing to anything.[51] OHCHR notes that *incommunicado* detention inherently violates international human rights law, and may amount to torture or inhumane treatment.[52]

48. OHCHR recalls that irrespective of the specific charges against an individual, the right to liberty should only be limited in exceptional circumstances and should always be subject to effective judicial control. This control implies a *prima facie* assessment of the case, ensuring that detention in a particular case is reasonable and necessary, and that this reasonableness and necessity is periodically re-assessed.

B. Right to trial without undue delay

49. OHCHR observed that trials in conflict-related criminal proceedings were often unnecessarily protracted, lasting in some cases more than four years, during which defendants were held in custody, in violation of their rights to liberty and a trial without undue delay.

50. The ICCPR emphasises that individuals charged with criminal offences have the right to be tried without undue delay as an important aspect of fairness.[53] In addition to preventing individuals from being kept in a state of uncertainty about their cases for too long, if the defendant is held in detention pending trial this right aims "to ensure that such deprivation of liberty does not last longer than necessary in the circumstances of the specific case, but also to serve the interests of justice".[54] The reasonableness of any delay should be assessed by considering the complexity of the case, the conduct of the accused and the manner in which the matter was dealt with by the judicial authorities.[55] In cases where the accused is held in pre-trial detention, they must be tried as expeditiously as possible.[56]

51. The CPC enshrines the right to a trial without undue delay and refers to the same criteria for assessing the reasonableness of delays as listed above.[57]

52. OHCHR observed that trials in conflict-related criminal cases were frequently delayed; 140 cases followed by OHCHR lasted more than two years, with 15 cases lasting over four years. In all of these 15 cases, the defendants were held in pre-trial detention. In many cases, the delays could not be justified by the complexity of the case or the conduct of the accused, and therefore can constitute a violation of this right.

53. Some delays were caused by the conduct of the prosecution. OHCHR observed that courts adjourned hearings for up to two months upon prosecutors' requests, referring to them being 'unprepared', not having read case files or being ready to call witnesses. For example, in one case, a woman was arrested with a bag of explosives which, according to the Security Service of Ukraine (SBU), she was planning to detonate in central Kyiv. Despite the compelling evidence against her[58], the trial lasted more than two years, as the prosecution failed to call its witnesses and otherwise present its case. During this period, the court failed to ensure the expeditiousness of the process, tolerating repeated delays caused by the prosecution and failing to hold regular hearings on the merits. For over two years, at the hearings held once every two

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of Ukraine (rulings of Kyivskyi district court of Odesa, 19 September 2017, available at http://reyestr.court.gov.ua/Review/69108139 and http://reyestr.court.gov.ua/Review/69108082) directly after the Illichivskyi district court of Odesa region acquitted them of organizing mass disturbances on 2 May 2014 in Odesa, which led to the deaths of 6 people (verdict of Illichivskyi town court of Odesa region, 18 September 2017, available at http://reyestr.court.gov.ua/Review/68926870).

51 OHCHR, *Report on the human rights situation in Ukraine 16 November 2017 – 15 February 2018*, para. 65, available at https://www.ohchr.org/Documents/Countries/UA/ReportUkraineNov2017-Feb2018_EN.pdf.

52 HRC, *General Comment No. 35*, para. 35.

53 Article 14. See also HRC, *General Comment No. 32*, paras. 27 and 35.

54 HRC, *General Comment No. 32*, para. 35.

55 Ibid.

56 Ibid.

57 Article 28.

58 The SBU had observed her for three weeks to collect evidence, before arresting her at the alleged crime scene in possession of explosives. See the comment of the SBU to the video of her confession, available at https://www.youtube.com/watch?v=2ad8r4X_2TY&feature=emb_logo.

months, the court only considered the extension of her pre-trial detention[59], until she decided to plead guilty.[60] The UN Human Rights Committee has stated that when a suspect is arrested on the day of the offence and the factual evidence is straightforward and requiring little investigation, substantial reasons must be shown to justify a delay.[61]

54. Even though courts should act as guarantors of the expeditiousness of trials,[62] they systematically failed to address unreasonable delays stemming from the conduct of the parties. In the cases where the prosecution caused such delays, it appears that it was used as a tool to pressure the detained defendants.[63]

55. Undue delays also negatively affect the victims' right to effective remedy. OHCHR followed 15 trials against members of the Ukrainian military or security forces prosecuted for human rights violations, which were characterized by undue delays. In these cases, the delays favoured the defendants, all of whom remained free pending trial. This delayed access of the victims to an effective remedy. In one example, three years after the court registered the case and had held numerous hearings on the merits, the court of appeal ruled to transfer the case of SBU officers accused of killing of Oleksandr Ahafonov on 14 November 2014 to another court, causing a retrial.[64] Despite the gravity of charges, the defendants have not been dismissed from service, while the victim's family continues to seek justice.

56. OHCHR notes that some delays are, in part, caused by severe understaffing of trial courts as a result of ongoing judicial reforms.[65] For instance, trials in terrorism-related criminal cases are to be heard by a panel of three judges, which corresponds to the total number of judges in some courts in eastern Ukraine.[66] Hearings in these cases were therefore rarely held more often than once every two months, the minimum necessary to ensure that pre-trial detention or bail is extended every 60 days as required by law.[67] While the problem of understaffing of courts remains unaddressed, the right to a trial without undue delay will remain in jeopardy. In this regard, OHCHR notes that when delays are caused by a lack of resources, additional resources should be allocated for the administration of justice to ensure protection of fair trial rights.[68]

C. Right to legal counsel

57. OHCHR is concerned that State-appointed lawyers in conflict-related criminal cases often did not act in the best interests of their clients, violating the accused's right to effective representation. Whilst free legal aid lawyers have proved effective in other criminal

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[59] The hearings took place on: 20 May 2015, 3 August 2015, 28 September 2015, 24 November 2015, 20 January 2016, 16 March 2016, 12 May 2016, 10 June 2016, 8 August 2016, 3 October 2016, 28 November 2011, 14 December 2016, 23 January 2017, 15 March 2017, 11 May 2017 and on 2 June 2017.

[60] Verdict of Pecherskyi district court of Kyiv of 2 June 2017, available at http://www.reyestr.court.gov.ua/Review/66974597. OHCHR interviews, 17 July 2015 and 26 April 2016.

[61] *Sandy Sextus v. Trinidad and Tobago*, Communication No. 818/1998, U.N. Doc. CCPR/C/72/D/818/1998 (2001), para. 7.2.

[62] CPC, Article 28.

[63] For instance, in 36 cases OHCHR observed prosecutors not appearing for hearings or requesting the court to postpone the hearings because they were not ready to present their case and needed time to familiarize with the case file or ensure presence of their witnesses.

[64] See also OHCHR, *Accountability for killings in Ukraine from January 2014 to May 2016*, Annex I, paras. 71-73, available at https://www.ohchr.org/Documents/Countries/UA/OHCHRThematicReportUkraineJan2014-May2016_EN.pdf; and OHCHR, *Report on the human rights situation in Ukraine from 16 February to 15 May 2018*, para. 57, available at https://www.ohchr.org/Documents/Countries/UA/ReportUkraineFev-May2018_EN.pdf.

[65] As of 1 January 2020, 32.6 per cent of judges' positions in local general courts were vacant. High Council of Justice, *Annual report on the ensuring of independence of judges in Ukraine for 2019*, page 36, available at: https://hcj.gov.ua/sites/default/files/field/file/shchorichna_dopovid_za_2019_rik.pdf.

[66] See OHCHR, *Report on the human rights situation in Ukraine, 16 February – 15 May 2019*, para. 61 available at https://www.ohchr.org/Documents/Countries/UA/ReportUkraine16Feb-15May2019_EN.pdf.

[67] CPC, Article 197.1.

[68] HRC, *General Comment No. 32*, para. 27.

proceedings,[69] they appeared reluctant to confront investigators and prosecution in these sensitive proceedings. OHCHR also documented eight attacks against privately-contracted lawyers dealing with conflict-related criminal proceedings.

58. The ICCPR guarantees the right to free and effective legal assistance in the interests of justice to a person who is unable to pay for it.[70] The Government must ensure prompt access of individuals to their counsel, and that lawyers are guided by "generally recognized professional ethics", free from any pressure, restrictions or undue interference.[71] The same standards are reflected in Ukrainian legislation.[72]

59. In the majority of conflict-related criminal cases monitored by OHCHR, defendants were represented by state-appointed lawyers from the free legal aid system. Individual cases documented by OHCHR throughout the reporting period illustrated a worrying continuous pattern of frequent violations of one or more of the above elements of the right to legal counsel.

60. OHCHR observed that immediate access to a lawyer was not always granted to individuals detained on conflict-related charges. In 45 monitored cases, law enforcement officials failed to immediately inform the free legal aid centres of the arrests made. As a result, the authorities interrogated detainees without a lawyer present, contrary to the law. This made it easier to exert pressure on detainees and obtain confessions or desired information.[73]

61. OHCHR also observed that some free legal aid lawyers violated their professional and legal obligations by seemingly working in the interests of the prosecution, rather than those of their clients.[74] For instance, state-appointed lawyers often refused to support their clients' claims of unlawful detention, in one case reportedly arguing that his client was not unlawfully detained by the SBU, since they had held him in an "apartment", not in a detention facility.[75] In another case, a state-appointed lawyer insisted that her client sign a waiver of the right to appeal, even though national legislation does not foresee such a waiver.[76] In yet another case, a state-appointed lawyer encouraged his client to accept a plea bargain in exchange for a 10-year prison term, promising he would be released as part of a prisoner "exchange".[77] As he was never exchanged, the victim complained to the free legal aid centre, which only required him to write an explanation.

62. In numerous other documented cases, lawyers did not challenge court decisions unfavourable to their clients, such as arbitrary decisions to extend pre-trial detention, or refused to support their clients who wished to complain about human rights violations, including torture

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69 The first all-Ukraine survey on the satisfaction with the services provided by the free legal aid system was conducted by Kyiv International Institute of Sociology from August 2018 to July 2019 assessing 1,200 beneficiaries of the legal assistance. According to the survey, 85 per cent of the beneficiaries were satisfied with the services they received. Results of the survey are available at https://bit.ly/333luRj.

70 Article 14.3(d).

71 HRC, *General Comment No. 32*, para. 34; UN Basic Principles on the Role of Lawyers adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, Principles 16 and 22.

72 Constitution of Ukraine, article 59; CPC, article 52; Law of Ukraine On Free Legal Aid, No. 3460-VI of 2 June 2011, article 14. All individuals are entitled to free legal assistance when arrested on criminal charges, or when suspected or accused of a crime of special gravity regardless of their detention status. Vulnerable categories of people (*e.g.* minors, IDPs, low-income population) are also entitled to free legal aid.

73 OHCHR interviews, 23 April, 14 and 28 August 2019.

74 Constituent Congress of Advocates of Ukraine, Rules of Professional Conduct, article 8, available at https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/National_Regulations/DEON_National_CoC/EN_Ukraine_UNBA_Rules_of_Professional_Conduct.pdf; Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba 27 August to 7 September 1990, paras. 13(b) and 15, available at https://www.ohchr.org/en/professionalinterest/pages/roleoflawyers.aspx.

75 Prior to registering his arrest, the SBU officers held the detainee in an apartment. OHCHR interview, 18 April 2019.

76 OHCHR interview, 29 October 2018.

77 As part of the 'exchange' or simultaneous release of detainees, envisaged by the Minsk agreements. OHCHR interview, 28 February 2018. The 'exchange' procedure is not foreseen in the domestic legislation and therefore it never appeared in the plea bargain. The lawyer convinced his client to plead guilty in exchange for an unenforceable promise made by the prosecution and one can conclude that he therefore acted not in the best interests of his client.

or ill-treatment. While in some cases this can be part of the defence's tactics,[78] these individual examples of inaction by state-appointed lawyers may undermine the right of those accused to defend themselves, and risk legitimising these unlawful practices by State actors.

63. OHCHR is concerned about the lack of an effective mechanism to examine and address allegations of such misconduct by free legal aid lawyers. The existing mechanisms to ensure the quality of legal aid has proven ineffective, e.g. when detainees' complaints about refusals of the state-appointed lawyers to support their torture or ill-treatment complaints remained unaddressed.[79] In this regard, OHCHR welcomes the development of the peer review of the quality of services provided by free legal aid lawyers. It would enable effective assessment of its quality, which the free legal aid centres could not do due to the discretion the lawyers enjoy when exercising their functions in relation to their defence strategy.[80]

64. Private lawyers may be at risk for representing clients in conflict-related criminal cases. Throughout the reporting period, OHCHR documented 12 attacks against privately-contracted lawyers which are believed to have been motivated by their professional activities. The authorities' failure to ensure the security of lawyers, in particular whilst on court premises, and failure to effectively investigate such attacks violates the rights to security of the person and to legal counsel, as well as national protections against interference in the course of lawyers' work.[81]

65. In 2017 and 2018, OHCHR documented eight attacks by members of extreme right-wing groups against lawyers who defended individuals perceived as having 'anti-Ukrainian' views.[82] Six of these attacks occurred in the presence of police, who failed to intervene. Four defence lawyers were attacked on court premises,[83] and in two separate cases, lawyers' vehicles were set on fire.[84] In addition, OHCHR documented two cases where members of these groups harassed lawyers for defending individuals being prosecuted for alleged membership in the armed groups.[85]

66. OHCHR is concerned that investigations into documented attacks failed to lead to the identification and prosecution of perpetrators. Some attacks were caught on camera, raising questions about the willingness of the police to effectively investigate these cases. In addition, in the majority of documented cases, the attacks were classified as "hooliganism" rather than as violence against lawyers or their property. When investigators fail to take into account that the victims were targeted as members of a protected profession, this results in ineffective

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78 For instance, not to pursue their case in exchange for a reduced sentence. In this regard OHCHR notes that at least 25 defendants withdrew their appeals in order to be "exchanged" on 27 December 2017.

79 See, Ukrainian Parliament Commissioner for Human Rights (Ombudsperson), *Annual report of the Ombudsperson for 2019*, section 3.4, available at http://www.ombudsman.gov.ua/files/Dopovidi/Report-2019.pdf, and *Annual report of the Ombudsperson for 2018*, section 2.7, available at http://www.ombudsman.gov.ua/files/Dopovidi/Report-2018-1.pdf. The latter says that while there are standards of conduct, the lawyers can ignore their clients' complaints about ill-treatment or not to challenge other procedural decisions against them.

80 Meetings with free legal aid centres in Kharkiv and Dnipro in 2017. The coordinators of the centres stated that it would be difficult to terminate lawyers' contracts and they simply waited for the contracts to expire.

81 Basic Principles on the Role of Lawyers, paras. 17 and 18. Ukrainian legislation guarantees the security of lawyers *inter alia* by criminalizing any interference with the activity of lawyers (Article 398 concerning threats or violence against the defence lawyer or representative of a person of the Criminal Code, available at https://zakon.rada.gov.ua/laws/show/2341-14).

82 OHCHR, *Report on the human rights situation in Ukraine, 16 May – 15 August 2018,* para. 65, available at https://www.ohchr.org/Documents/Countries/UA/ReportUkraineMay-August2018_EN.pdf. The term "extreme right-wing groups" refers to political parties, movements and groups who blame vulnerable groups for societal problems and incite intolerance and violence against them. In Ukraine, extreme right-wing groups have perpetrated attacks against Roma and other minorities, including LGBTI. Through their actions, they undermine the fundamental principle of non-discrimination by propagating an ideology based on racism, discrimination, xenophobia and intolerance. See *Reports of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance*, A/HRC/35/42 of 26 April 2017 and A/HRC/18/44 of 21 July 2011.

83 OHCHR interviews, 16 May 2017, 14 and 15 August 2018; OHCHR trial observation, 28 September 2018.

84 OHCHR interviews, 21 February 2018 and 22 January 2019.

85 OHCHR interviews, 15 August and 28 September 2018.

investigations and impunity, as well as punishments which do not reflect the gravity of the crime committed.

67. While the frequency of attacks against lawyers dealing with conflict-related criminal cases has decreased since 2018, OHCHR notes that failure of the authorities to investigate these attacks remains of concern at the date of this report. Furthermore, the authorities' failure to prevent, intervene in, investigate and prosecute these attacks may contribute to a chilling effect for lawyers to take up such cases. This in turn may reduce the pool of defence counsel available for defendants in conflict-related cases, thus affecting their right to defend themselves.

D. Right to an independent tribunal

68. OHCHR observed that in conflict-related criminal cases, in particular between 2017 and 2018, the independence of judges was undermined by pressure from prosecutors and certain members of groups that promote violence, such as extreme right-wing groups. Further, police failed to prevent and to duly investigate attempts to interfere with justice in these cases.

69. The right to an independent tribunal is enshrined in article 14.1 of the ICCPR, in international humanitarian law as well as in Ukrainian criminal law and the Constitution.[86]

1. Interference by Government actors

70. The independence of tribunals is an important element of the right to a fair trial. States should take specific measures to protect judges from any form of influence or interference into their decision-making, including via specific guarantees in relation to their dismissal, and disciplinary, civil and criminal liability.[87] Judges should enjoy a certain level of immunity in respect of their judicial functions.[88] Provisions setting out criminal liability of judges must be formulated precisely enough to guarantee the independence and functional immunity of judges in the interpretation of the law, assessment of facts or weighing of evidence.[89]

71. The Constitution of Ukraine contains guarantees of independence and immunity of judges.[90] According to the Criminal Procedure Code the guarantees of immunity only concern arrest, detention and the bringing of charges, while there are no restrictions on launching investigations against judges.[91]

72. OHCHR documented seven cases between 2015 and 2018 where the independence of judges was jeopardized when judges found themselves under criminal investigation after issuing decisions in favour of defendants, for instance, by rejecting prosecutors' motions to keep defendants in pre-trial detention.[92] Judges felt under pressure because these investigations were initiated by the prosecution rather than individual claimants.[93]

73. These investigations were launched under article 375 of the Criminal Code, which criminalizes a "deliberately unjust verdict, decision, ruling or resolution" by a judge. However, it does not define the notion of "unjust decision", leaving room for an overly broad

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86 Criminal Code, Article 377; Constitution of Ukraine, Article 126.

87 Criminal action, including arrest, against a judge must only be allowed under circumstances ensuring that his or her independence cannot be influenced. Universal Charter of Judges, International Association of Judges, Article 7-2, available at https://www.unodc.org/res/ji/import/international_standards/the_universal_charter_of_the_judge/universal_charter_2017_english.pdf.

88 *Reports of the Special Rapporteur on the independence of judges and lawyers*, A/HRC/26/32, paras. 48-50, 52, 55, (available at https://undocs.org/en/A/HRC/26/32) and A/HRC/4/25/Add.2, paras. 30 and 82 (available at https://undocs.org/A/HRC/4/25/Add.2).

89 Republic of Moldova – Amicus Curiae Brief for the Constitutional Court on the Criminal liability of judges, adopted by the Venice Commission at its 110th Plenary Session (Venice, 10-11 March 2017), paras 47-48, available at https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)002-e.

90 Article 126. These guarantees include prohibition of any influence over a judge, prohibition of arrest and detention of a judge without approval of the High Council of Justice pending trial, functional immunity limited to the crime or disciplinary offence.

91 According to CPC, article 482 a judge cannot be arrested or detained without consent of the High Council of Justice, except if arrested while or immediately after committing a grave crime. By virtue of article 481 of the Criminal Procedure Code, only the Prosecutor General, their deputy or head of the regional prosecutor's office can authorize pressing charges against a judge.

92 Criminal Code, Article 375 criminalises the rendering by a judge of a "deliberately unjust verdict, decision, ruling or resolution".

93 OHCHR interviews, 7 March 2018, 16 April 2018, 1 August 2018.

interpretation by the prosecution.[94] OHCHR notes that the vague wording of the article was used by prosecutors to exert undue pressure on judges in contravention to the independence of the judiciary.

74. In one case, three judges were hearing a case against the former mayor of Sloviansk for allegedly assisting the armed groups to gain control over the city in April 2014. On 4 October 2017, after the judges released the former mayor under house arrest following over three years in pre-trial detention,[95] the Kharkiv Regional Prosecutor's Office launched a criminal case under article 375 against the judges for taking this decision. In March 2018, the same office launched a criminal case against another judge who released a member of the city council in another conflict-related case.

75. No formal charges were brought against the judges in either case, nor in the other five cases monitored by OHCHR. However, as of April 2020, all the investigations remained open, some for more than two years, adding pressure and creating a general chilling effect on the work of judges. This was compounded by pending obligatory qualification assessments for judges carried out as a part of ongoing judicial reform processes. In addition to evaluating judges' competencies, the assessment reviews their performance record. Open criminal investigations against them may negatively affect the assessment results.[96] Several judges confirmed to OHCHR that the ongoing assessments acted as a deterrent for them to rule against the requests of the prosecution in favour of defendants.

76. OHCHR is concerned that existing guarantees of judicial immunity only protect judges from the moment of arrest or the pressing of charges. The existing legislation does not protect judges from possible attempts by prosecutors to interfere with their independence through the launching of investigations against judges.[97]

2. Interference by members of groups that promote violence

77. OHCHR documented twelve cases where groups that promote violence, such as extreme right-wing groups, attacked, threatened and intimidated judges and other trial participants in conflict-related cases, attempting to unduly influence the outcome of the judicial process. OHCHR observed that the law enforcement bodies failed to prevent or stop the threats or attacks, which they often witnessed, and also failed to effectively investigate them.

78. In cases against Ukrainian soldiers prosecuted for grave human rights violations, members of these groups and other activists used intimidation to demand an end to the prosecution of "patriots" and the defendants' release from custody. In cases against individuals accused of links to the armed groups, they demanded that the defendants remain in pre-trial detention.[98] Although police launched investigations in several cases,[99] these were ineffective and no perpetrator has been brought to account, leading to a sense of impunity.[100]

79. For example, when the judges of Selydivskyi town court of Donetsk region acquitted the former 'head' of the 'supreme court' of 'Donetsk people's republic',[101] they were targeted

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94 After the close of the reporting period, on 11 June 2020, the Constitutional Court of Ukraine ruled article 375 unconstitutional and concluded that court decisions shall only be reviewed within appeal procedures. This would exclude assessment of a ruling as "unjust" under a separate proceeding brought under article 375. The Constitutional Court further ruled that the vagueness of the term "unjust" failed to meet the requirement of legal certainty and thus infringed on the independence of judges. Despite these findings, the Constitutional Court, in the same decision, postponed repeal of the article for six months, which will allow prosecutors to complete ongoing investigations and open new ones during this period. Full text of the decision is available at http://www.ccu.gov.ua/docs/3127.

95 The ruling of Leninskyi district court of Kharkiv of 20 September 2017, available at http://reyestr.court.gov.ua/Review/69076525.

96 Laws "On the restoration of trust in the judicial system in Ukraine", 1188-VII, 8 April 2014, "On ensuring the right to a fair trial", 192-VIII, 12 February 2015, "On judicial system and status of judges", 2 June 2016, 1402-VIII.

97 The guarantees of judicial immunity include special procedures for pressing charges, arrest and bail for judges. See, CPC, articles 481 and 482. OHCHR notes that investigations against judges of the High Anti-Corruption Court can only be launched by the Prosecutor General, whereas investigations can be launched against other judges by any investigator or prosecutor. CPC, article 480.

98 OHCHR interviews, 29 September and 16 November 2017, 22 May 2018.

99 Criminal Code, Article 376 prohibits any interference with the activity of judicial authorities.

100 OHCHR interviews, 29 August 2017, 8 August 2018.

101 Verdict of the Selydivskyi town court of Donetsk region of 12 June 2017, available at http://reyestr.court.gov.ua/Review/67209654.

by a hate campaign.[102] On 27 June 2017, members of National Corps and National Brigades extreme right-wing groups carried out a mock execution of a judge's puppet and threatened more "radical actions" should the judges adopt decisions in favour of members of the armed groups.[103] The judges complained to police but the investigation was only launched two months later and did not progress despite the availability of evidence and witnesses. The judges told OHCHR that the police did not interview them in the context of the investigation.[104]

80. OHCHR is concerned that in certain cases the prosecution or SBU may have assisted or encouraged such campaigns against judges. On at least ten occasions, OHCHR observed the appearance of undue collaboration or coordination between prosecutors or SBU officers and members of extreme right-wing groups in intimidating judges. In one such case, the SBU was seen ordering lunch for members of extreme right-wing groups who had demanded that judges deny release of a woman accused of support of armed groups on bail.[105] In the case before the Selydivskyi city court described above, the judges complained that the hate campaign against them was incited by the prosecution.

81. OHCHR recalls that any attack or intimidation directed at judges undermines the independence of the judiciary and that police must prevent and investigate these attacks, as both a matter of security and to protect judges and the judiciary from attempts to interfere with their independence.

E. Right to an effective remedy for violations by State forces

82. OHCHR observed that despite mechanisms in place for investigating and prosecuting human rights violations, perpetrators of violations committed during the prosecution of conflict-related crimes were rarely held to account. In particular, throughout the reporting period the majority of torture allegations against members of the military and law enforcement officers were disregarded, contributing to a climate of impunity allowing such violations to continue.

83. The right to an effective remedy is enshrined in article 2 of the ICCPR, and with regards to torture, in articles 12 and 13 of the Convention against Torture, as well as the Ukrainian Constitution, Civil Code and Criminal Code.[106] It is guaranteed by the requirement to investigate allegations of human rights violations promptly, thoroughly and effectively by independent and impartial bodies.

84. OHCHR is not aware of any case where the detainees' allegations and complaints of torture were effectively investigated. In some anecdotal cases, investigators closed the investigation without even interviewing the victim. In some of these cases, the prosecution did not formally recognize the complainants as victims, enabling the prosecution to close the cases without informing them.[107] Being unaware of the status of investigations, complainants were unable to challenge the closure of the investigations. In several cases, courts repeatedly ordered

[102] The judges argued that the hate campaign against them started with publications accusing them of supporting separatism in different media. The authors of these publications referred to information which could have only been obtained from the prosecution (notification of the judges of Selydivskyi town court of Donetsk region about interference into their professional activity submitted to the High Council of Justice on 27 June 2017, available at http://www.vru.gov.ua/content/file/1288-0-6-17_.pdf).

[103] Online report concerning the National Corps' action on their website, available at https://bit.ly/37SBuIV.

[104] OHCHR observed that the extreme right-wing groups employ the same tactic of interfering with the independence of judges in criminal proceedings that are not related to the armed conflict. Most notable in this regard is the case of 19 men prosecuted for mass disorder on 2 May 2014 in Odesa that resulted in the killing of six men. See OHCHR, *Report on the human rights situation in Ukraine, 16 November 2015 – 15 February 2016*, para. 100, available at https://www.ohchr.org/Documents/Countries/UA/Ukraine_13th_HRMMU_Report_3March2016.pdf. For more information about the 2 May trials, see *HRMMU Briefing note on Accountability for killings and violent deaths on 2 May 2014*, available at http://www.un.org.ua/images/documents/4671/Accountability%20for%20Killings%20and%20Violent%20Deaths%20on%202%20May%202014%20in%20Odesa_1.pdf.

[105] OHCHR interview, 20 September 2017.

[106] Constitution of Ukraine, Article 28, Civil Code, Article 289, Criminal Code, Article 127.

[107] The right to obtain information about the course of investigations into a person's complaint is linked to their procedural status as victims, which is granted upon the decision of the investigator.

the reopening of investigations into torture complaints, but the police or the military prosecutors closed the reopened investigations.[108]

85. Impunity of law enforcement agencies has been a concern since before the outbreak of the armed conflict in eastern Ukraine,[109] due in part to the lack of an effective and independent investigating authority. In this regard, OHCHR notes the establishment of the State Bureau of Investigation (SBI) on 27 November 2018, and the Specialized Department of the Prosecutor General's Office for prevention of torture and other human rights violations by law enforcement officers to deal with such human rights violations on 17 October 2019.

F. Right not to be compelled to testify against oneself or admit guilt

86. OHCHR is concerned by widespread allegations received throughout the reporting period of violations against the prohibition of forced confessions by Ukrainian law enforcement and security forces in conflict-related criminal proceedings. In some cases, defendants informed OHCHR they confessed as a result of torture, ill-treatment or other coercion. In other cases, defendants stated they felt they had to agree to plea bargains as they lost trust in the fairness of the proceedings due to the failure of procedural safeguards to address their human rights violations.

87. Article 14.3(g) of the ICCPR guarantees that a person shall not be compelled to testify against themselves or to confess guilt through "any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt".[110] According to international humanitarian law, no one shall be compelled to testify against himself or to confess guilt. Ukrainian legislation safeguards this right by imposing criminal responsibility for compelling a person to testify[111] and requiring courts to base their conclusions on statements the defendants made in front of them. Thus, the law allows defendants to withdraw testimonies made during the pre-trial stage with no negative inference allowed to be drawn.[112] The CPC also obliges courts to verify the voluntariness of plea bargains and to call any evidence necessary to do so.[113]

88. Despite these safeguards, violations of the right not to be compelled to testify against oneself or admit guilt persisted. OHCHR documented 55 cases of individuals who complained that they were forced to confess to being affiliated or linked with the armed groups on camera. In several cases, such videos were published on the official websites of the national police or SBU. In private interviews, detainees told OHCHR that they made these self-incriminating statements as a result of torture, ill-treatment or intimidation by SBU officers.

89. In one such case, a woman whose video confession of being linked to the armed groups of the self-proclaimed 'republics' was published by the SBU[114] told OHCHR she was beaten until she agreed to "confess" on camera. OHCHR notes that in her video confession, the woman has abrasions on her face and was visibly reading a prepared text.[115]

90. In addition to violating the prohibitions against torture and ill-treatment and against compelling one to testify against oneself, by publishing the video confessions, the Government may also be violating the presumption of innocence, as guaranteed by article 14.2 of the ICCPR and Ukrainian law.[116] The publishing of video confessions of persons detained in relation to the

[108] OHCHR interviews, 26 April 2016, 27 September 2017, 5 March 2018.
[109] This systemic concern predates the armed conflict in eastern Ukraine. See HRC, *Concluding Observations on the seventh periodic report of Ukraine*, para. 15, CCPR/C/UKR/CO/7, available at http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsmmmCeqXycPDoV5Gxrp8KtsHy5GodES9JN160zvbTpKt9tFNcLy3UfJ8sprv1qKbOuTFEfz8FwX%2bJW7yhAVTY8h%2bmdQjf2Ov6ZqsZ1azOcbe.
[110] HRC, *General Comment No. 32*, para. 41.
[111] Criminal Code, Article 373.
[112] CPC, Articles 23 and 95.
[113] Ibid, Article 474.6.
[114] The video confession was published on 19 December 2014.
[115] Video confession on SBU website available at https://www.youtube.com/watch?v=2ad8r4X_2TY&feature=emb_logo.
[116] See Opinion No. 83/2017 concerning Mahmoud Hussein Gommaa Ali (Egypt) adopted by the Working Group on Arbitrary Detention at its eightieth session, 20-24 November 2017, para. 79, available at https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session80/A_HRC_WGAD_2017_83.pdf.

armed conflict may also amount to humiliating and degrading treatment under international humanitarian law, in violation of the prohibition of outrages upon personal dignity.

91. OHCHR is concerned that, where torture and ill-treatment complaints were lodged by the victims, these were not effectively investigated. Conflict-related detainees told OHCHR that the Government's lack of effort to duly address allegations of forced confessions contributed to their state of duress.

92. OHCHR notes that the armed conflict has presented a number of challenges for the judicial system, which has not adopted a uniform approach to the status of the self-proclaimed 'republics'. Individuals linked with the self-proclaimed 'republics' have thus been prosecuted on charges of membership in a terrorist organisation or in an unlawful armed formation, crimes which carry different punishments. The prosecution used its discretion to classify the crime to pressure defendants to confess; those who cooperated with the investigation were prosecuted for the more lenient crime of membership in an unlawful armed formation rather than facing terrorism charges.[117] OHCHR recalls that the Special Rapporteur on Terrorism and Human Rights recommended that States ensure their national counter-terrorism legislation defines terrorist groups with sufficient clarity to distinguish them from ordinary criminal groups, and that there is no undue investigative or prosecutorial advantage in criminal cases due to confusion with terrorist cases.[118]

93. OHCHR observed that the automatic pre-trial detention of persons charged with conflict-related crimes and the protracted nature of their trials as outlined above often resulted in defendants' guilty pleas. Some defendants complained to OHCHR that the prosecutor threatened further delays and continued pre-trial detention if they did not plead guilty,[119] motivating them to enter a plea bargain.[120] Unsuccessful efforts to challenge the courts' rulings on pre-trial detention as well as the Government's failure to duly investigate their claims of torture and ill-treatment resulted in loss of hope for a fair trial, and defendants felt compelled to plead guilty.

94. When presented with plea bargains, courts failed to properly examine them. In 21 cases, OHCHR observed that courts accepted plea bargains without properly verifying their voluntariness, even in cases where the defendants had pled "not guilty" for more than two years, while in detention, or where they had persistently complained of being tortured or ill-treated. OHCHR observed that the judges failed to look into specific allegations that would suggest coercion to plead guilty, and merely asked the defendants whether their decision was voluntary. OHCHR is concerned that this does not properly take into account duress and thus fails as an effective judicial safeguard against forced confessions.

95. This may not only lead to miscarriages of justice, but also presents incentives for law enforcement or security forces to commit human rights violations to secure confessions and convictions in other criminal proceedings and may as well result in impunity for serious violations of international law.

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[117] Lack of statutory regulation on classification of crimes and guidance by the Supreme Court on the legal status of the self-proclaimed 'republics' results in them being either classified as criminal organizations (article 256 Criminal Code - possible punishment from three to five years in prison, e.g. verdict of Krasnoarmiiskyi town-district court of Donetsk region of 12 September 2018, available at http://reyestr.court.gov.ua/Review/76422313); unlawful armed formations (article 260 of the Criminal Code - possible punishment from three to eight years in prison, e.g. verdict of Oktiabrskyi district court of Poltava of 28 November 2014, available at http://reyestr.court.gov.ua/Review/42209113); or terrorist groups (article 258^3 Criminal Code - possible punishment from eight to fifteen years in prison,; e.g. verdict of Kostiantynivskyi town-district court of Donetsk region of 6 September 2018, available at http://reyestr.court.gov.ua/Review/76272295). In these cases, those convicted were prosecuted for collecting information regarding the movement of Ukrainian armed forces and sharing it with the self-proclaimed 'republics'. The Supreme Court failed to ensure the consistency of case law, instead advising first-instance courts to decide on a case-by-case basis whether the armed group in question is terrorist or not, and classify the crime of membership or links with them accordingly.

[118] *Final report of the Special Rapporteur on Terrorism and human rights Kalliopi K. Koufa - Specific Human Rights Issues: New Priorities, in Particular Terrorism and Counter-Terrorism* (E/CN.4/Sub.2/2004/40), para. 74, available at https://digitallibrary.un.org/record/526112.

[119] OHCHR interviews, 26 April 2015, 28 August 2019.

[120] OHCHR, *Report on the human rights situation in Ukraine 16 May to 15 August 2018,* para. 61.

G. Right to be present during one's trial

96. Since being introduced in October 2014, *in absentia* proceedings have been used to prosecute conflict-related crimes.[121] OHCHR is concerned, however, that the current procedure does not meet international human rights standards.

97. Under international human rights law, accused persons have the right to be present during trial, and when this trial is related to an armed conflict, this right is also protected by international humanitarian law.[122] Although *in absentia* proceedings appear to run counter to this right, they are not prohibited *per se* when certain conditions are met, including the possibility of retrial once the defendant has been located.[123]

98. Under Ukrainian law, however, a retrial following *in absentia* proceedings is only possible if the defendant has been located before the court delivered its verdict on the case.[124] After the verdict has been delivered, the defendant is only entitled to an appeal, not a retrial.

99. OHCHR notes that non-compliance of the legislation with international standards may lead other States to refuse to extradite defendants convicted *in absentia*, preventing the enforcement of verdicts[125] and hampering the right to an effective remedy and justice for victims of the initial crime.

VI. Human Rights Concerns in Armed Group-Controlled Territory

100. Noting OHCHR's mandate to promote and protect the human rights of everyone, everywhere, this report assesses how the human rights of persons living within territory controlled by the self-proclaimed 'republics' are affected when they exercise government-like functions. This assessment does not legitimize the self-proclaimed 'republics', their decisions and actions. Despite the restrictions imposed by both 'republics' regarding access to places of detention and 'court' hearings, human rights violations described in this part have been verified as per OHCHR standard methodology.

A. Framework applied by 'Donetsk people's republic' and 'Luhansk people's republic'

101. Both self-proclaimed 'republics' adopted 'constitutions'[126] in May 2014 which set forth a broad spectrum of fair trial guarantees, including separation of powers, equality before the court, right to liberty of persons and prohibition of arbitrary arrest, right to privacy, right to legal assistance, presumption of innocence, right not to testify against oneself, and the prohibition of double jeopardy and retroactive application of the criminal law.

102. The framework for processing criminal cases in territory controlled by 'Luhansk people's republic', adopted in April-August 2015, was based solely on relevant Russian Federation legislation. The framework regulating 'criminal proceedings' in territory controlled by 'Donetsk people's republic' was crafted in 2014-2015 based on the Criminal Procedure Code of Ukraine of 1960 (as amended on 29 June 2001[127]), and not the Criminal Procedure

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[121] Law on ensuring inevitability of punishment for certain crimes against national security of Ukraine, public security and corruption crimes, No. 1689-VII, available at https://zakon.rada.gov.ua/laws/show/1689-18#n27.

[122] ICCPR, Article 14.3(d).

[123] HRC, *Communications No. 16/1977, Mbenge v. Zaire*, para. 14.1; HRC, *General Comment No. 32*, para. 31. For the possibility of retrial, see Annex to Views of the Human Rights Committee, Article 5, para. 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, CCPR/C/66/D/699/1996/Corr.1, paras. 9.4-9.5. The European Court of Human Rights has also stated that the lack of opportunity to obtain a fresh determination of the charges against a person by a court in full respect of their defence rights, after being apprehended, constitutes a violation of the right to a fair trial. See, e.g., Colozza v Italy (para. 29), Sanader v. Croatia (para. 95).

[124] CPC, Article 323.4.

[125] According to article 3 of the Second Additional Protocol to the European Convention on Extradition of 5 June 1983, the requested Party may refuse to extradite a person convicted *in absentia* unless the requesting Party guarantees such person's right to retrial.

[126] 'Constitution' of 'Donetsk people's republic' adopted 14 May 2014, available at https://dnrsovet.su/konstitutsiya/; 'Constitution' of 'Luhansk people's republic' adopted 18 May 2014, available at https://nslnr/zakonodatelstvo/konstitutsiya/.

[127] The 2001 amendments provided for judicial control of detention and other improvements of the legal status of defendants.

Code of Ukraine of 2012 which was in force at that time.[128] Both self-proclaimed 'republics' continued to apply the Ukrainian legislation in force at the time of the adoption of their 'constitutions' to address any gaps in their 'legislation'.[129]

103. OHCHR is concerned that the 'criminal procedure code' of 'Donetsk people's republic', as applied, results in an imbalance favouring the 'prosecution' and infringing upon fair trial rights.[130] Importantly, this legislation provides no judicial control over pre-trial investigation and pre-trial detention, which is ordered solely by the 'prosecution'. OHCHR is further concerned that 'Donetsk people's republic' has instituted the death penalty. OHCHR is aware of two cases where a 'court' of 'Donetsk people's republic' imposed the death penalty,[131] however these 'sentences' have not been executed as of the date of this report. They nevertheless remain a concern, as other executions were carried out by the armed groups during the earlier years of the conflict (see para. 106 below).

104. Both self-proclaimed 'republics' established 'local courts'[132] based on the territorial structure of the Ukrainian judiciary, which operated in the territory until November 2014.[133]

105. Both self-proclaimed 'republics' took steps to establish a three-level 'court' system.[134] The 'supreme court' of 'Donetsk people's republic' began functioning on 9 January 2015. The 'supreme court' of 'Luhansk people's republic' began operations as a 'court of appeal and cassation' on 25 October 2018.

106. Before establishment of these systems, military formations operating in the self-proclaimed 'republics' held *ad hoc* 'military tribunals' or 'people's courts' as show trials either without any legal framework or following USSR martial law of the Second World War. Those

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[128] The 'order' of 'council of ministers' of 'Donetsk people's republic' "on application of the criminal procedure legislation in the territory of Donetsk people's republic during the transitional period" No. 7-58 of 31 May 2016, available at https://gisnpa-dnr.ru/npa/0003-7-58-2016-05-31/. In 2018, the rules were significantly changed and consolidated with the adoption of the 'criminal procedure code' and the 'laws' on intelligence-gathering, status of 'judges' and the 'judicial system'.

[129] Decision of the 'council of ministers' of 'Donetsk people's republic' No. 9-1 of 2 June 2014, available at https://supcourt-dnr.su/zakonodatelstvo/postanovlenie-soveta-ministrov-doneckoy-narodnoy-respubliki-o-primenenii-zakonov-na. See transitional provisions of the 'law' of 'Luhansk people's republic' "on legal acts in Luhansk people's republic" of 30 April 2015, available at https://nslnr.su/zakonodatelstvo/normativno-pravovaya-baza/937/. According to article 86.2 of the 'constitutions' of the 'republics', legislation in force prior to the adoptions of the 'constitutions', is in force to the extent it does not contradict the 'constitutions'.

[130] For example, the defence is limited in its ability to collect and present evidence, the 'court' acts as an assistant to the prosecution rather than an independent arbiter, and pre-trial detention is used excessively and could be applied by order of the prosecutor. The prosecutor was also empowered to order investigative actions impacting upon human rights. See Explanatory note to the draft Criminal Procedure Code of Ukraine No. 4651-VI of 13 April 2012, p.1-2, available at http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=42312. See also Opinion on the draft Criminal Procedure Code of Ukraine Prepared by the Justice and Human Dignity Directorate, Directorate General of Human Rights and Rule of Law, para. 10-20, of 2 November 2011, available at https://rm.coe.int/16802e707d.

[131] The first 'sentence' was 'pronounced' by the 'supreme court' in February 2016, against a man 'convicted' of raping and killing a child. The second was imposed on 18 July 2018 against a member of a gang which was 'convicted' of abduction, pillage and murder in 2014-2015.

[132] The head of the 'supreme court' of 'Donetsk people's republic' established 14 local 'courts' on 1 December 2014, and an additional one ('Debaltsevskyi town court') on 6 May 2015. On 21 April 2015, the head of the 'supreme court' ordered the creation of a 'military field court' as a local court. On 24 October 2015, the head of 'Luhansk people's republic' issued the 'order' prescribing the commencement of the operation of 15 local 'courts'. Another two local courts commenced activities on 3 and 28 December 2015 ('Rovenskyi town court' and 'Stakhanovskyi district court'. The latter acquired jurisdiction of the 'Pervomaiskyi town court', which did not commence operation).

[133] Decree of the Cabinet of Ministers No. 1085-p of 7 November 2014 suspended operations of governmental bodies, including courts, in specific locations of Donetsk and Luhansk regions. All 31 local courts of Donetsk region and all 17 local courts of Luhansk region were only officially closed down on 25 January 2018 by the High Council of Justice of Ukraine No. 182/0/15-18, decision available at www.vru.gov.ua/content/act/182_25.01_.2018_.docx.

[134] See the 'laws' "on the judicial system" of 'Donetsk people's republic' of 31 August 2018, article 4, and 'Luhansk people's republic' of 30 April 2015, article 18 para. 2. According to article 20 of the 'law' of 'Donetsk people's republic', the 'court of appeal' is to be created by 2022. In territory controlled by 'Luhansk people's republic' the 'supreme court' performs the functions of the appeal instance through an 'appeal chamber'.

'trials' led to arbitrary or summary executions and other violations of human rights law and international humanitarian law.[135]

B. Independent and impartial review of administrative detention and judicial review of pre-trial detention

107. OHCHR is concerned about the practice of administrative detention[136] widely applied through the use of 'administrative arrest' in territory controlled by 'Donetsk people's republic' and 'preventive detention' in territory controlled by 'Luhansk people's republic'.[137] These practices are contrary to requirements for administrative detention laid out in international human rights law and international humanitarian law, in particular in relation to independent and impartial review, and amounts to a violation of the rights to liberty and a fair trial.

108. International human rights law and international humanitarian law do not prohibit administrative detention for imperative reasons of security.[138] However, this type of deprivation of liberty must remain exceptional and comply with a number of requirements. In particular, it must not be used in contemplation of a criminal charge and prosecution, it must be shown that the threat cannot be addressed by other measures, it must be subject to prompt and regular review by a court or other tribunal possessing the same guarantees of independence and impartiality as the judiciary and the detainee must have access to independent legal advice.[139] As an important safeguard to prevent arbitrary deprivation of liberty, torture and ill-treatment, judicial control of detention constitutes an important component of the protection of human rights in the administration of justice.

109. In territory controlled by both self-proclaimed 'republics', administrative detention can be unilaterally ordered by an 'investigator' or 'prosecutor'. It provides for the arrest of individuals for up to 30 days, during which, the detainee does not see a 'judge', and 'courts' exercise no judicial control over the detention.[140] Moreover, OHCHR findings suggest that in territory controlled by 'Donetsk people's republic, 'administrative arrest' was often, sometimes repeatedly, reapplied on new grounds after the expiration of the initial 30 days. OHCHR notes that the lack of independent and impartial review of administrative detention by itself amounts to a violation.[141]

110. Moreover, according to 'legislation' of the self-proclaimed 'republics', individuals can be held under administrative detention to verify their involvement in crimes against national

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[135] OHCHR, *Accountability for killings in Ukraine from January 2014 to May 2016*, Annex I, paras. 42-46.

[136] In international human rights law, administrative detention (also known as security detention or preventive detention) is usually defined as arrest and detention of individuals outside the criminal law context, for example for reasons of security, including terrorism, as a form of preventive detention, as well as to restrain irregular migrants. See e.g. A/HRC/13/30, para. 77.

[137] In territory controlled by 'Donetsk people's republic', the practice of 'administrative arrest' was applied in accordance with the 'decree' of the 'council of ministers' of 'Donetsk people's republic' of 28 August 2014, which contradicted the 'constitution' of the 'republic' and was cancelled upon the adoption of the 'criminal procedure code' in August 2018. However, 'investigative bodies' of 'Donetsk people's republic' continue to apply 'administrative arrest' in accordance with another 'order' of the 'council of ministers' of 'Donetsk people's republic', which was not 'officially' published and constitutes an 'internal ruling'. 'Preventive arrest' in territory controlled by 'Luhansk people's republic' was introduced by amendments to the 'martial law' dated 2 February 2018. However, OHCHR documented cases where arbitrary detention on grounds similar to administrative detention was applied in territory controlled by 'Luhansk people's republic' before the adoption of the said amendments.

[138] A/HRC/43/35, paras. 19 and 20.

[139] Human Rights Committee, *General Comment No.35,* CCPR/C/GC/35.

[140] OHCHR findings suggest that people detained in territory controlled by the self-proclaimed 'republics' are rarely informed promptly and in an appropriate manner about the 'legal' basis for their detention, namely that they are being placed under administrative detention. In 70 cases, individuals told OHCHR they were forced to sign notes describing the reasons and 'legal basis' for their detention without being allowed to read them.

[141] According to the Working Group on Arbitrary Detention, "the use of 'administrative detention' under public security legislation [or] migration laws or other related administrative law, resulting in a deprivation of liberty for unlimited time or for very long periods without effective judicial oversight, as a means to detain persons suspected of involvement in terrorism or other crimes, is not compatible with international human rights law." Report of the Working Group on Arbitrary Detention, E/CN.4/2005/6, para. 77.

security.[142] OHCHR monitoring has found that administrative detention is widely used as a replacement for pre-trial detention in «criminal proceedings». During administrative detention, 'investigative bodies' conduct investigations against detainees without formally launching them. They collect evidence and testimony, including from detainees, which eventually are used to indict those detained. International human rights standards prohibit the application of administrative detention to replace pre-trial detention within the criminal justice system, as it is considered a violation of the fair trial rights of detainees.[143]

111. Information gathered through interviews with victims and their relatives established that those under administrative detention in territory controlled by the self-proclaimed 'republics' are held *incommunicado*. Furthermore, OHCHR found that in most cases, relatives were not provided with information about the detention during the initial period, and thus the practice may amount to enforced disappearance.[144] OHCHR is also concerned that since the adoption of the 'criminal procedure code' on 24 August 2018, 'prosecutors' in territory controlled by 'Donetsk people's republic' can order pre-trial detention without 'court' orders or judicial review. OHCHR notes that this practice amounts to a violation of the right of persons arrested to be brought before a judicial body and constitutes arbitrary detention.

C. Right not to be compelled to testify

112. OHCHR is concerned about consistent reports of torture and ill-treatment used to obtain "confessions" from detainees, which are then used in conflict-related 'trials'.[145] International human rights law and international humanitarian law prohibit the use of torture and ensure the right against self-incrimination. The right not to be compelled to testify against oneself extends to any direct or indirect physical or undue psychological pressure by the investigating authorities, and is an important safeguard of fair trial.[146] Compelling an accused person to confess through force or other duress violates both the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment and the right to a fair trial.[147]

113. OHCHR found that torture and intimidation of conflict-related detainees usually occurred during apprehension and administrative detention, when detainees were held *incommunicado*. Among the perpetrators were members of the 'ministries of state security', 'police', and armed groups of the self-proclaimed 'republics'. OHCHR documented cases where detainees were beaten, suffocated, deprived of food, water, toilet or sleep, and subjected to electric shocks, positional torture, mock executions and other forms of torture.[148] Documented patterns of intimidation included threats of execution, torture and sexual violence, often also against relatives of detainees, and threats of additional 'charges' of grave crimes. In particular, the existence of the death penalty under the 'criminal code' of 'Donetsk people's

[142] In 'Donetsk people's republic', this includes brigandage, participating in other organised criminal groups or committing grave crimes.

[143] Administrative detention would normally amount to arbitrary detention as other effective measures addressing the threat, including the criminal justice system, would be available (HRC General Comment No. 35, para. 15). OHCHR notes that within the framework of criminal justice, bail and pre-trial detention are effective measure addressing risks which might emerge due to the launch of the investigation against an individual.

[144] See International Convention for the Protection of All Persons from Enforced Disappearance, article 2.

[145] See also *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/HRC/40/59/Add.3, paras. 99-100, available at https://undocs.org/A/HRC/40/59/Add.3; OHCHR, *Report on the human rights situation in Ukraine, 16 February to 15 May 2018*, para. 48, available at https://www.ohchr.org/Documents/Countries/UA/ReportUkraineFev-May2018_EN.pdf; OHCHR, *Report on the human rights situation in Ukraine, 16 May to 15 August 2018*, paras. 52 and 54, available at: https://www.ohchr.org/Documents/Countries/UA/28thReportUkraine_EN.pdf; OHCHR, *Report on the human rights situation in Ukraine, 16 August to 15 November 2019*, para. 52, available at https://www.ohchr.org/Documents/Countries/UA/28thReportUkraine_EN.pdf; OHCHR, *Report on the human rights situation in Ukraine, 16 November 2019 to 15 February 2020*, Annex I, available at https://www.ohchr.org/Documents/Countries/UA/29thReportUkraine_EN.pdf.

[146] HRC, *General Comment No. 32*, para. 25.

[147] Ibid, para. 60.

[148] See also OHCHR, *Report on the human rights situation in Ukraine, 16 November 2019 to 15 February 2020*, Annex I.

republic',[149] has allowed the 'prosecution' to intimidate detainees with threats of additional charges that carry the death penalty.

114. OHCHR found that forced confessions obtained during administrative detention were recorded in writing or on video and then formalised into 'records of interrogations' after initiation of 'criminal proceedings'. Detainees signed the 'records' and did not withdraw their testimony in fear of further torture or ill-treatment, or threats made previously.

115. The frameworks of both self-proclaimed 'republics' neither oblige 'judges' to take measures to investigate allegations of torture and ill-treatment during pre-trial investigations, nor provide an independent body tasked to 'investigate' such allegations. Furthermore, OHCHR was informed that 'courts' often used confessions obtained during the 'investigation' even when the defendants subsequently withdrew them during 'trials'.[150]

D. Right to have adequate time and facilities to prepare one's defence and right to legal counsel

116. Individuals 'prosecuted' for conflict-related offences in territory controlled by both self-proclaimed 'republics' are unable to effectively defend themselves in 'courts' due to severe restrictions on the rights to defend oneself and to have assistance of counsel, as well as the practice of administrative detention described above. The right is also jeopardised by the lack of independence of lawyers associations. Defendants lack access to their lawyers and receive poor legal advice due to their lawyers' cooperation with 'prosecution'. OHCHR also notes the absence of a developed system of free legal aid and remuneration for legal aid lawyers.

117. The rights to prepare a defence and to legal counsel are affirmed in international human rights standards as indispensable guarantees of the right to a fair trial as well as in international humanitarian law in conflict related cases. Defendants in criminal cases must have adequate time and facilities to prepare their defence, which includes access to documents or evidence and ability to communicate with counsel of their own choosing.

118. OHCHR found that while in administrative detention, individuals are held *incommunicado* without the possibility of communicating with the outside world. They are not informed of the reasons for their detention, nor are provided access to information about criminal proceedings, which are conducted simultaneously, and are not provided access to defence lawyers, even during interrogation.[151] OHCHR documented 167 cases where detainees were interrogated without access to a lawyer while being held in administrative detention. Detainees' families receive no information about the arrest of, and investigation against, their loved ones and therefore cannot contract lawyers to defend them. This practice violates the right to prepare a defence because the accused do not enjoy timely and confidential access to counsel and are not provided with information about their 'prosecution'.

119. OHCHR documented seven cases where the detainees were not provided access to their criminal files until the 'court' started considering the cases.[152] The individual's lack of prior access to the criminal file amounts to a violation of their right to prepare a defence.

120. The 'legislation' of both self-proclaimed 'republics' foresees the right to legal assistance in criminal proceedings,[153] which can be provided free of charge when the participation of a lawyer is mandatory.[154] Defence lawyers are required to be certified in

[149] Article 43 of the 'criminal code' of 'Donetsk people's republic'.
[150] OHCHR interview, 12 January 2018.
[151] According to 'legislation' of the 'republics', the practice of administrative detention is not covered by the 'criminal procedure framework'. Hence, individuals subjected to administrative detention are not entitled to the rights and guarantees provided in the criminal procedure legislation, including the right to legal counsel. However as noted above, OHCHR has observed that these administrative detentions often lead to criminal procedures during which information gathered during these interrogations is used against the defendant.
[152] OHCHR interviews, 12 January 2018, 23 March 2018, 2, 14, 16 and 20 January 2020.
[153] In territory controlled by 'Donetsk people's republic', the relevant 'legislation' on the legal status and activities of defence lawyers was adopted on 20 March 2015 and the lawyers association was established on 20 June 2015. In territory controlled by 'Luhansk people's republic' the relevant 'legislation' was adopted on 28 August 2018 and the lawyers association was established on 9 January 2019.
[154] E.g. when the defendant is a minor or has a mental disability, or faces 'charges' of a 'crime' punishable by a life sentence or the death penalty ('Donetsk people's republic') or more than 15 years

territory controlled by the self-proclaimed 'republics', by making submissions to the 'ministries of justice', and in territory controlled by 'Luhansk people's republic', defence lawyers are also screened and certified by the 'ministry of state security'.[155] These procedures place lawyers at risk, as they may face criminal prosecution from the Ukrainian Government for liaising with terrorist organisations, which has deterred Ukrainian defence lawyers from practicing in territory controlled by the self-proclaimed 'republics'.[156] Many of those practicing law before the armed conflict have ceased their professional activities and left territory controlled by the self-proclaimed 'republics'. For these reasons, many individuals 'prosecuted' in territory controlled by 'Donetsk people's republic' complained to OHCHR of their inability to contract skilled and independent lawyers from a sufficiently large pool.

121. OHCHR further documented a widespread practice of impeding individuals' access to their lawyers, violating the right to legal assistance. In nine cases, individuals complained that they were forced by the 'ministries of state security' to either waive the right to a lawyer or to waive the right to a particular lawyer and accept representation by a free legal aid lawyer suggested by 'investigators'.[157] In 34 documented cases, lawyers were prevented from seeing their clients in detention for up to six months following arrest or the number of their meetings was limited.[158] Given that international human rights standards require that all detained persons shall be provided with prompt access to a lawyer and adequate time to consult with them, these practices amount to a violation of the right to communicate with the counsel.[159]

122. OHCHR is also concerned about the quality of legal assistance provided by defence lawyers, regardless of how they were contracted and whether they were paid. In 53 documented cases, individuals complained to OHCHR that their defence lawyers had neglected their duty to defend them or had not behaved in their best interest. In particular, they complained that their lawyers had interrogated them together with 'investigators', were absent during 'inquests' or 'court hearings', signed protocols of investigative processes despite not having participated in them, visibly neglected to defend them during 'court' hearings or even supported motions by the 'prosecution'.[160] At least 14 defendants told OHCHR they believed that lawyers could not provide adequate protection in territory controlled by the self-proclaimed 'republics' because of the flaws and excesses of the 'criminal system' in which they had to operate. Eleven individuals complained that their lawyers had not provided adequate representation because they had been intimidated or they were afraid to challenge the 'prosecution'.[161]

123. In 18 cases documented by OHCHR, 'state-appointed' defence lawyers demanded money from clients or their relatives to provide legal assistance or merely to inform relatives

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of imprisonment ('Luhansk people's republic'). Most of the conflict-related crimes in the 'republics' are considered grave crimes punishable by a life sentence or the death penalty ('Donetsk people's republic') or more than 15 years of imprisonment ('Luhansk people's republic'). Thus, participation of defence lawyers in conflict-related criminal cases is mandatory according to 'legislation' of both 'republics' and shall be ensured free of charge where the defendants cannot pay for it.

155 Article 36 of the 'law of Luhansk people's republic' 'on the bar and legal practice'.

156 Lawyers and accomplices of L/DPR are in Register of attorneys of Ukraine, available at https://lexinform.com.ua/podii/advokaty-i-prysluzhnyky-l-dnr-v-reyestri-advokativ-ukrayiny/. See also *Report of the Ukrainian Helsinki Human Rights Union - Defense Lawyers in Occupation*, p. 38, available at https://helsinki.org.ua/wp-content/uploads/2019/01/1_Advocates_occupation_2018.pdf. OHCHR notes that names of lawyers who acquired the status of attorneys in territory controlled by the 'republics' were published on Myrotvorets webpage. For more information about Myrotvorets webpage see OHCHR, *Report on the human rights situation in Ukraine 16 February to 15 May 2018*, para. 78, available at https://www.ohchr.org/Documents/Countries/UA/ReportUkraineFev-May2018_EN.pdf.

157 In some cases, 'investigators' intimidated victims and forced them to sign documents without being able to read them. Later the victims discovered that these documents had been waivers of legal counsel.

158 In a case, documented by OHCHR in territory controlled by 'Donetsk people's republic', the defence lawyer was allowed to see his clients only once a month.

159 See e.g. Basic Principles on the Role of Lawyers, para. 8.

160 In relation to negligence of lawyers during hearings, victims complained to OHCHR that their lawyers had played games on mobile phones, read files from other cases or had not followed statements of 'prosecutors' or 'judges'.

161 Victims also said to OHCHR that 'investigators' threatened them with violence and other negative consequences for them and their families in order to force the victims to instruct their lawyers not to act proactively in their cases.

about the status of the 'criminal proceedings'.[162] OHCHR is concerned that this situation may be caused by the absence of remuneration for lawyers providing free legal assistance.[163]

E. Right to a competent, independent and impartial tribunal

124. In territory controlled by the self-proclaimed 'republics', OHCHR documented systematic violations of the right to an independent and impartial tribunal, as a result of operations of 'courts' of military jurisdiction. These structures temporarily processed 'criminal cases' of all individuals charged with grave crimes, including conflict-related offences, in the absence of other 'courts' with jurisdiction over such cases. OHCHR notes that 'courts' of military jurisdiction of both 'republics' did not afford fair trial guarantees and did not meet requirements of independence and impartiality.

125. The 'military tribunal' of 'Donetsk people's republic' was created in August 2014 as a 'specialised court' of appeal with jurisdiction over crimes committed by military personnel.[164] Due to the absence of a general 'court' with relevant jurisdiction before February 2019, this 'military tribunal' tried civilians for grave crimes. OHCHR documented 69 criminal cases between 2016 and 2019 which were processed by the 'military tribunal'.

126. In one case the 'military tribunal' of 'Donetsk people's republic' 'convicted' and 'sentenced' a civilian to two years and eight months in prison for storing a hand grenade in his home. The 'judge' told OHCHR that it had no 'jurisdiction' over this 'case' by virtue of 'law', however, it had taken it on due to "significant public interest".

127. During the period of operation of the 'military tribunal' in territory controlled by 'Donetsk people's republic', its 'judges' were subordinated to the 'head' of the 'military tribunal',[165] who in turn was subordinated to the 'council of ministers' of the 'Donetsk people's republic'.[166] This hierarchy calls into question the 'military tribunal's independence.

128. The 'military court' of 'Luhansk people's republic', was established in August 2015 as a specialised 'court of first instance' with jurisdiction over crimes committed by military personnel.[167] Yet OHCHR documented 30 criminal 'cases' against civilians processed by the 'military court'.[168] This practice ceased after 25 October 2018 when the 'supreme court' commenced operation and took jurisdiction over conflict-related criminal cases.

129. International human rights law requires that judges are not influenced by personal bias or prejudice, nor favour one party over another. In territory controlled by both self-proclaimed 'republics', in 18 cases, OHCHR documented credible allegations of bias of 'judges' of various 'courts' against individuals accused of supporting the Government of Ukraine or tried for having pro-Ukrainian views. According to the accused, 'judges' unfailingly ignored or rejected their procedural motions and statements while granting all the motions of the 'prosecution'. Individuals interviewed also complained that 'judges' scolded and verbally abused them during

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[162] OHCHR interviews, 12 and 16 January 2018, 20 December 2018, 31 January 2019, 5 and 14 January 2020.

[163] Although the 'laws' of the 'republics' envisage remuneration for lawyers providing free legal assistance, there is no procedure for carrying it out. On 9 April 2015, the temporary statute on providing free secondary legal aid was introduced by an 'order' of the 'council of ministers' of the 'Donetsk people's republic'. It named lawyers associations as responsible for providing free secondary legal aid in cases where the presence of a defence lawyer is mandatory according to 'criminal legislation'. Although the statute to develop and approve the procedure for remuneration for secondary free legal aid was introduced by the 'ministry of finance', this procedure has not been implemented. In territory controlled by 'Luhansk people's republic', the legal act on remuneration for defence lawyers providing free legal aid has not been adopted.

[164] The 'decree' of the 'council of ministers' of 'Donetsk people's republic' "on approval of the Regulation 'on military courts in Donetsk people's republic'" of No.27-1 of 17 August 2014, available at https://supcourt-dpr.su/zakonodatelstvo/postanovlenie-soveta-ministrov-doneckoy-narodnoy-respubliki-ob-utverzhdenii-2; article 35.2 'criminal procedure code of 'DPR''.

[165] Item 6 of the 'decree' of the 'council of ministers' of 'Donetsk people's republic' "on approval of the Regulation 'on military courts in Donetsk people's republic'" of No.27-1 of 17 August 2014, available at https://supcourt-dpr.su/zakonodatelstvo/postanovlenie-soveta-ministrov-doneckoy-narodnoy-respubliki-ob-utverzhdenii-2.

[166] Ibid, para. 5.

[167] OHCHR is not aware of any rules in 'legislation' of 'Luhansk people's republic' granting the 'military court' jurisdiction over cases against civilians.

[168] OHCHR is not aware of any legal grounds for referring the said cases to the 'military court' instead of 'local courts'.

'hearings' for having a pro-Ukrainian position or treated them like convicts or traitors before pronouncing the 'verdicts'. Some individuals complained that the conduct of the 'judges' left an impression that the proceedings were merely show trials and the 'judges' simply followed formal procedural rules without any intent to consider the merits of the case.[169] In this regard, individuals interviewed said that 'judges' did not listen to their or their lawyers' statements, tolerated flaws of evidence presented by the 'prosecution', or failed to examine the evidence at all. OHCHR further notes that the systematic use of *in camera* 'trials' creates conditions for judges to express their bias freely.

F. Right to a public trial and right to be tried in one's presence

130. International human rights law stipulates that trials in criminal cases must generally be held orally and publicly, which ensures the transparency of proceedings and provides an important safeguard for the interest of the individual.[170] In conflict related cases, the right to be tried in one's presence and to a public trial is also protected by international humanitarian law.

131. In territory controlled by both self-proclaimed 'republics', conflict-related criminal cases were predominantly considered in closed 'hearings'.[171] 'Judges' justified the *in camera* 'hearings' by the need to protect 'state secrets',[172] however OHCHR observed that such decisions were taken in an almost automatic manner, without a thorough assessment of the reasonable grounds for this decision in each specific case.

132. In particular, 'courts' did not consider the reasonableness of holding only the parts of the hearings that involve 'state secrets' *in camera*. In territory controlled by 'Donetsk people's republic', usually only two 'hearings' were open to the public: the initial preliminary hearing during which the 'court' decides whether 'trial' will be held *in camera,* and the pronouncement of the 'verdict'. In one emblematic case, the 'judge' informed OHCHR prior to the preliminary hearing that the 'trial' would be closed, before the relevant motion of the 'prosecution' had even been submitted.[173]

133. In territory controlled by 'Luhansk people's republic', all 'court hearings' in conflict-related criminal cases that OHCHR followed were closed to the public. In addition, since their creation, the 'supreme courts' of the self-proclaimed 'republics', which have 'jurisdiction' to try grave crimes at first instance, have held all 'hearings' *in camera* too.[174] International human rights organisations, including OHCHR, were not allowed to observe closed 'hearings' despite regular requests for access.

134. Holding 'criminal trials' *in camera* without reasonable justification amounts to a violation of the right to a public trial, and raises questions about the fairness of such processes. While international human rights standards allow a court to exclude the public from a hearing for reasons of national security, the practice of holding an entire trial *in camera* without justification does not meet the requirement of this exception from the general principle of publicity.

135. OHCHR is concerned about the widespread denial of the right to be tried in one's presence in territory controlled by the self-proclaimed 'republics'. This right constitutes a major guarantee of the right to a fair trial in accordance with international human rights standards.[175] OHCHR documented 18 cases where defendants had not been brought for some 'court hearings' in their 'criminal proceedings', including bail 'hearings', preliminary 'hearings'[176] and pronouncements of 'verdicts'.

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169 OHCHR interviews, 12 and 16 January 2018, 14 and 15 January 2020.
170 HRC, *General Comment No. 32*, para. 28.
171 With the exception of cases of incitement to hatred and unlawful possession of weaponry.
172 According to the 'legislation' of the 'republics', the 'court' may conduct 'hearings *in camera*' when a state secret may be disclosed, the defendant is a minor, the crime is related to sexual assault, or to ensure the security of the parties to criminal proceedings.
173 OHCHR trial monitoring, June 2018.
174 OHCHR interviews 8 July 2019 and 2 January 2020.
175 ICCPR, Article 14.3(b).
176 In this regard, OHCHR notes that article 156 of the 'criminal procedure code' of the 'Donetsk people's republic' allows for a preliminary 'hearing' in absence of the defendant.

G. Right to appeal

136. OHCHR is concerned that 'court' structures of both self-proclaimed 'republics' do not guarantee the review of 'convictions' and 'sentences' by a higher tribunal, in violation of the right to appeal under international human rights law.[177]

137. To ensure the right to a review of a conviction and a sentence by a higher tribunal, the convicted person must have effective access to each of the reviewing instances.

138. In territory controlled by both self-proclaimed 'republics', appeals are carried out by 'supreme courts', which include 'appeal chambers'.[178] For grave crimes, including crimes against public security, the 'supreme courts' act as both a 'court' of first instance and an appeal 'court'.[179] This means that appeals can only be heard within the same 'supreme courts' and only under a cassation procedure, which prescribes review only for matters of the law.[180] This review procedure does not meet the three guarantees of the right to appeal enshrined in the international human rights law: the right to a review of a sentence by an instance independent from the trial court, the right to access all reviewing instances and the right to a substantive review of a sentence, including the sufficiency of evidence.[181]

139. In 'Luhansk people's republic', individuals 'convicted' by 'courts of first instance' who initiated an appeal remained in legal limbo due to the absence of a 'supreme court' until 25 October 2018. As a consequence, their sentences did not enter into force and they remained in pre-trial detention facilities, sometimes beyond the duration of their sentences.[182]

VII. Human Rights Concerns in Conflict-Related Criminal Proceedings in Crimea

140. The UN General Assembly has recognized Crimea as being temporarily occupied by the Russian Federation.[183] In the case of occupation, international humanitarian law and human rights law apply concurrently, and place protection obligations on both the occupying Power and the State whose territory is under occupation. As the occupying Power, the Russian Federation must respect its obligations under international human rights law in Crimea from the moment it acquired "effective control" over the territory.[184]

A. Retroactive application of criminal laws

141. According to international humanitarian law, protected persons shall not be arrested, prosecuted or convicted by the occupying Power for acts committed or for opinions expressed before the occupation, with the exception of breaches of the laws and customs of war. The courts shall apply only those provisions of law which were applicable at the time of the offence, and which are in accordance with general principles of law, in particular the principle that the penalty shall be proportionate to the offence. The principle of non-retroactive application of criminal law is further enshrined in international human rights law, according to which no one

[177] ICCPR, Article 14.5.

[178] The 'appeal chamber' of the 'supreme court' of 'Donetsk people's republic' performs the function of an 'appeal instance' until the establishment of a 'court of appeal' by 2022, according to the transitional provisions of the 'law' of 'on the judicial system'.

[179] Article 33.3 'criminal procedure code' of 'Luhansk people's republic' and article 35.1 'criminal procedure code' of 'Donetsk people's republic'.

[180] "Where the highest court of a country acts as the first and only instance, the absence of the right to review by a higher tribunal is not offset by the fact of being tried by the supreme tribunal of the State party concerned; rather, such a system is incompatible with the [ICCPR]". HRC, *General Comment No. 32*, para. 47.

[181] HRC, *General Comment No. 32*, paras. 45, 47 and 48.

[182] See OHCHR, *Report on Human Rights Situation in Ukraine 16 February to 15 May 2018*, para. 53.

[183] Resolutions 71/205, 72/190, 73/263, and 74/168.

[184] See ECtHR Judgment in the case of Loizidou v. Turkey (Preliminary objections), 23 March 1995, par. 62, available at http://hudoc.echr.coe.int/eng?i=001-57920. See also Article 42 of the 1907 Hague Regulations states: "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."

shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time of commission.[185]

142. OHCHR has documented conflict-related cases concerning 29 individuals (24 men and 5 women) who were convicted in Crimea pursuant to the laws of the Russian Federation for acts committed *before* the occupation began.

143. The majority of these cases concerned social media posts containing symbols, slogans or statements of organizations banned in the Russian Federation or materials considered extremist in the Russian Federation, but legal in Ukraine.[186] For instance, on 21 February 2017, a Crimean Tatar man from Kamenka was sentenced by a Crimean court to 11 days in detention for a social media post in 2013 featuring an organization prohibited in the Russian Federation.[187] In a similar case, a Crimean Tatar man from Bakhchysarai was sentenced to 12 days in detention for uploading to social media in 2011-2012 material featuring an organization prohibited in the Russian Federation and four folk songs of a Chechen singer containing anti-Russian rhetoric.[188] In both cases, the judges found the defendants guilty of promoting extremism and disregarded the fact that the alleged violations took place before the imposition of Russian Federation laws in Crimea criminalizing such conduct, in violation of the principle of legality.

B. Right to a fair trial

144. International human rights law provides that in the determination of any criminal charges, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. Other fair trial rights, applicable to any person facing criminal charges, include the presumption of innocence, the right to defend oneself or be assisted by a lawyer of one's own choice, the right to trial without undue delay and the right to appeal or review.[189]

145. Since the imposition of Russian Federation law in Crimea, fair trial rights in conflict-related cases have been a particular concern. Legal proceedings involving people perceived to be in opposition to the Russian Federation authorities in Crimea, as well as those accused of membership in banned religious groups, espionage and subversive activities in Crimea, often failed to uphold due process and fair trial guarantees.

1. Right to a public hearing

146. Court hearings dealing with allegations of *Hizb ut-Tahrir*[190] membership, espionage and subversive activities, which were likely to attract public attention, were held *in camera*, with the public, family members and media banned from the courtroom. As justification for the closed hearings, courts in Crimea mostly relied on the "need to ensure the safety of the participants in the proceedings" without mentioning specific reasons in support of the decision to restrict the defendants' right to a public hearing. OHCHR received information from the defendants' lawyers and relatives asserting that the practice of excluding the public from court hearings had been used to limit public awareness of trials, restrict public scrutiny and exert additional pressure on the defendants.

147. The right to a public hearing was further limited because the judgments in these cases were not published.[191]

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[185] ICCPR, Article 15.

[186] The Federal List of Extremist Materials was introduced by Federal Law *On Combating Extremist Activities*, No. 114-FZ, 25 July 2002.

[187] HRMMU interview, 23 February 2017.

[188] To justify the conviction, the judge referred to the "personal evaluation report" drawn up by the head of Bakhchysarai police, in which the defendant was described as "displaying hatred towards the Russian-speaking population and supporting anti-Russian propaganda". HRMMU interview, 5 April 2017.

[189] ICCPR, articles 14-15; European Convention on Human Rights and Fundamental Freedoms, article 6.

[190] *Hizb ut-Tahrir* is a Muslim group considered as a terrorist organization under Russian Federation law, while it is lawful under Ukrainian legislation.

[191] Even when a court establishes exceptional circumstances which would justify excluding the public from a trial, "the judgment, including the essential findings, evidence and legal reasoning must be made public" except where the interest of juveniles otherwise requires, or the proceedings concern matrimonial disputes or the guardianship of children. HRC, *General Comment No. 32*, para. 29 (CCPR/C/GC/32).

2. Right to an independent and impartial tribunal

148. Cases against civilians involving allegations of membership in banned religious groups, espionage and subversive activities in Crimea were typically assigned to military courts in the Russian Federation. Contrary to IHL, such trials were held by military courts sitting outside the occupied territory. without justification. As of 13 April 2020, OHCHR had documented the convictions of 26 Ukrainian citizens from Crimea (25 men and 1 woman) by military courts in the Russian Federation since the beginning of the occupation, while trials in military courts against a further 18 Ukrainian citizens from Crimea were ongoing.

149. Trials in military courts not only took place outside Crimea,[192] but also fell short of minimum fair trial standards established under international human rights law, including guarantees of impartiality.[193] OHCHR received credible allegations from lawyers that because of the special link between many judges of military courts and the state[194], they tend to favour the prosecution when assessing defence motions, oral statements or evidence. In particular, defence motions which invoked international humanitarian law provisions applicable to Crimea as an occupied territory were systematically rejected by military courts without justification. In one case, the defence argued that since Crimea is a temporarily occupied territory, under the Fourth Geneva Convention, a court may not apply Russian Federation criminal law to the defendant's actions. The court rejected this argument, stating in the verdict that the defendant is a Russian Federation citizen who committed a criminal offence in the Russian Federation and provided no further justifications for denial to apply IHL.[195]

150. OHCHR documented 25 conflict-related criminal cases, involving 43 men, where courts[196] delivered guilty verdicts in proceedings which failed to uphold the right to a fair hearing by a competent, independent and impartial tribunal.

151. OHCHR documented a pattern whereby defendants arrested on charges of sabotage or terrorism would be convicted of other charges based on questionable evidence, such as retracted confessions and contested witness testimony of arresting officers. Analysis of judgments in these cases also demonstrates that the initial sabotage and terrorism charges were brought against defendants in absence of any physical evidence. In these cases, courts failed to examine the reasons for the initial arrest, as well as to ascertain whether the new charges were not used solely in order to justify the defendants' arbitrary detention.

152. In two emblematic cases, Ukrainian citizens arrested under accusations of being part of Ukrainian sabotage groups sent to Crimea to commit terrorist acts were convicted of other charges and sentenced to prison terms. On 18 May 2017, one of the defendants was sentenced to three years of imprisonment on drug-related charges. He stated in court that the Federal Security Service (FSB) had tortured him and forced to self-incriminate on camera, which was presented as evidence. He also complained that the drugs found in his car had been planted by the FSB. No investigation was conducted to verify his claims regarding the forced confession or the evidence being planted.

153. In another emblematic case, on 4 August 2017, a court in Crimea sentenced a farmer with pro-Ukrainian opinions to three years and seven months in prison for possession of weapons and explosives. On 29 November 2016, he had affixed a sign to his house that read "Heavenly Hundred Street" in reference to protesters killed during the Maidan events in January and February 2014 in mainland Ukraine. Ten days later, FSB officers searched his home and allegedly found bullets and explosives in the attic, for which he was arrested. Although the forensic examination found no proof of the defendant's skin contact with the bullets and

[192] The first instance military court is seated in Rostov-on-Don, while appeal hearings often take place in the Moscow region.

[193] "Impartiality" of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties. The impartiality of the court and the publicity of proceedings are important aspects of the right to a fair trial within the meaning of article 14, paragraph 1. See HRC, Communication No. 387/1989, *Karttunen v. Finland*, Views adopted on 23 October 1992, para. 7.2.

[194] Acting or retired military officers have preferential rights to be appointed as judges of military courts. Law of the Russian Federation *On Military Courts of the Russian Federation*, Article 27.2.

[195] OHCHR reviewed 13 cases where similar motions were made at different stages of court proceedings. In all 13 cases, these motions were rejected.

[196] Including courts in the Russian Federation hearing cases concerning Ukrainian citizens living in Crimea.

explosives and the accused pleaded not guilty, claiming that the case against him was fabricated, the court convicted him solely on the basis of FSB testimony.

154. In at least 13 cases out of the total number of cases with verified fair trial violations, convictions were based primarily on the testimony of anonymous witnesses. These witnesses gave evidence while screened from the public gallery, using voice-altering equipment, preventing the judge and others from seeing or hearing them in their natural state. In none of these cases did judges verify that the interests of the witnesses in remaining anonymous could justify limiting the rights of the defence to fully cross-examine witnesses.

155. In seven documented cases out of the total number of cases with verified fair trial violations, judges overly relied on reports of prosecution experts examining the contents of the defendants' private conversations. In one particular case, the expert examination went far beyond resolving language issues, such as defining the meaning of particular words and expressions, and provided, in essence, a legal qualification of the defendants' actions. As a result, the crucial legal finding as to the involvement of the defendants in criminal activities was made by experts, and not by judges who merely endorsed the expert's conclusions. OHCHR also documented five cases which did not appear to respect the equality of arms. In these cases, judges admitted prosecution expert reports that contained clear shortcomings, failed to duly consider expert reports submitted by defence and denied defence motions to examine prosecution's experts in court. In one case, the defence expert witness raised credible doubts regarding the prosecution expert's academic credentials, distortion of the content of the examined conversations, and application of incorrect scientific methods. The judge held that the conclusions of prosecution expert reports were "substantiated and based on science", while alternative expert reports "do not indicate to the contrary", without providing proper rationale for giving weight to one report over the other.

156. In two high-profile cases, courts based convictions on pre-trial testimony which had been later retracted by the witnesses, lending support to views expressed by practicing lawyers that the judiciary favours the prosecution in criminal cases. In both of these cases, the witnesses retracted their pre-trial testimony against the defendants, who were accused of terrorism-related charges, alleging that their statements had been coerced through torture. Nevertheless, in both cases, the courts convicted the defendants based on the retracted testimony. In one case, the court failed to order an investigation into the witnesses' allegations of torture. In another case, the court referred to the results of the investigation carried out by the Russian Federation Investigative Committee, which concluded that the FSB actions had no elements of a crime, and pointed to the absence of comments or grievances from the witness noted in the protocol of his interrogation. The court excluded the witness' oral testimony in court, stating that the retraction of the previous statement was provided "with the intention to assist the defendant in avoiding criminal liability".

3. Right to legal counsel

157. As outlined above, the ICCPR guarantees the right to free and effective legal assistance provided by lawyers are guided by "generally recognized professional ethics", free from any pressure, restrictions or undue interference.[197]

158. The Russian Federation authorities in Crimea must respect the confidentiality of all communications and consultations between lawyers and their clients, and ensure that lawyers are able to perform their professional functions without intimidation, hindrance, harassment or improper interference.

159. Free legal assistance in Crimea is limited to defendants in criminal cases. OHCHR is concerned that State-appointed lawyers often do not act in the best interests of their clients, violating the accused's right to effective representation. OHCHR documented seven such criminal cases where the State-appointed lawyers seemed to have acted inconsistent with their clients' interests. In particular, lawyers failed to raise basic due process violations, ignored defendants' complaints of torture, objected to their own clients' motions during trial, and failed to take any action while present during ill-treatment of their clients by FSB officers.[198]

[197] See para. 58 above.

[198] See OHCHR, *Report on the Human Rights Situation in Ukraine, 16 August 2019 – 15 November 2019*, para. 91, available at https://www.ohchr.org/Documents/Countries/UA/28thReportUkraine_EN.pdf.

160. In one emblematic case concerning the 24 Ukrainian crew members captured by the Russian Federation near the Kerch Strait on 25 November 2018,[199] OHCHR documented the ill-treatment of one of the detained crew members, which took place in front of his free legal aid lawyer. In particular, FSB officers repeatedly jabbed his shoulder with significant force and verbally insulted him, while the lawyer failed to take any action. Later, during the interrogation, the same lawyer tried to convince the detained crew member to fully cooperate with the FSB and admit his guilt for the charge of illegal crossing the Russian state border.

161. In another emblematic case concerning the alleged storage of explosives, OHCHR documented that several free legal aid lawyers continuously acted to the detriment of their client throughout the trial. During the court hearings, the free legal aid lawyer objected to a number of his client's motions that concerned his right to examine prosecution witnesses. Acting more as a prosecution than a defence lawyer, he claimed *inter alia* that the motions should be dismissed as the defendant had failed to properly substantiate them and specify the full names of the witnesses. Other free legal aid lawyers, who represented the same defendant at different stages, failed to request a forensic medical examination of his injuries allegedly sustained as a result of torture by arresting officers, chatted with the prosecutor during the defendant's closing arguments in court and interrupted his presentation.

162. In five high-profile cases concerning charges of espionage or subversive activities, the FSB deliberately appointed for the defendants state legal aid lawyers and denied them access to their privately retained lawyers, thereby depriving the defendants of their right to be represented by legal counsel of their own choosing. In all five cases, the FSB used threats of ill-treatment, and promises of leniency or release from custody to coerce defendants to dismiss their private legal counsel.[200]

163. In one case, for instance, three Crimean Tatar defendants cancelled the contract with their lawyers after being prompted to do so by FSB officers and warned, through their family members, that having "pro-Ukrainian" counsels would damage their defence[201]. In another case, a man accused of planning a terrorist act terminated the contract with four privately-hired lawyers after the prosecution made it a condition for a plea bargain[202].

164. Lawyers also informed OHCHR that they had received threats of reprisals for discharging their professional duties. In one case, the lawyer of a Crimean Tatar man accused of spitting at a police officer during a house search was threatened by an investigator for "actively" defending his client. The investigator warned the lawyer he would "lose his license" and that it was a "matter of time" before he became a defendant himself.[203] In another case, during a hearing before the Supreme Court of Crimea, a prosecutor threatened a lawyer with legal action and motioned the court to inform the bar association about the lawyer's misconduct for quoting the Fourth Geneva Convention and referring to the Russian Federation as an occupying Power. Although in this case the judge refused to take action against the lawyer, this incident along with informal warnings received by the lawyer and his colleagues during private conversations with judges and FSB officers to stop invoking the legal status of Crimea as an occupied territory, has a chilling effect on their ability to properly exercise their professional functions.

165. On 25 January 2017, a Russian Federation lawyer, Nikolai Polozov, was forcefully brought to the FSB office in Simferopol for interrogation and asked to disclose details of a case concerning his client, Mejlis deputy chairman Ilmi Umerov. Despite being pressed to cooperate, he refused and invoked his duty to uphold attorney-client privilege and was released after two and a half hours. Then, on 14 February 2017, an appellate court upheld a first instance court's decision to enable the FSB investigator to interrogate the lawyer as a witness in a criminal case against his own client. In this decision, the judge argued that the interrogation of Nikolai

[199] On 25 November 2018, the Russian Federation naval forces attacked three Ukrainian naval vessels which it insisted had entered its territorial waters. Twenty-four crew members were captured, charged with illegal crossing of the Russian border, and initially detained in Crimea. See OHCHR, *Report on the Human Rights Situation in Ukraine, 16 November 2018 – 15 February 2019*, paras. 99-103; OHCHR, *Report on the Human Rights Situation in Ukraine*, 16 August 2019 – 15 November 2019, paras. 90-94.

[200] See, e.g., OHCHR, *Report on the Human Rights Situation in Ukraine, 16 August – 15 November 2019*, paras. 95-96, available at https://www.ohchr.org/Documents/Countries/UA/28thReportUkraine_EN.pdf.

[201] HRMMU interview, 13 October 2017.

[202] HRMMU interview, 2 March 2018.

[203] HRMMU interview, 30 November 2017.

Polozov as a witness did not interfere with his rights as a defence lawyer because it allegedly concerned facts which had happened prior to the moment when he assumed the defence of his client. This decision not only undermines the confidentiality of communications between lawyers and their clients, but also the ability of lawyers to perform their professional functions without intimidation, hindrance, harassment or improper interference.

166. On 7 December 2018, a district court in Simferopol sentenced a Crimean Tatar lawyer, Emil Kurbedinov, known for defending critics of Crimea's occupation and alleged members of organizations banned in the Russian Federation, to five days of administrative detention for disseminating extremist symbols through a social network. During a court hearing, the judge ignored the fact that the impugned content had been posted five years ago – prior to the imposition of Russian Federation legislation in Crimea – and denied over 40 motions of his defence team, including the motion to ensure the presence of a prosecutor, to question an expert witness and to recuse a presiding judge.

167. OHCHR notes that Mr. Kurbedinov's conviction followed a series of earlier incidents that indicate a pattern of deliberate intimidation, hindrance, harassment or interference by the Russian authorities in Crimea with his professional activities as a defence lawyer. In 2017, he was also prosecuted for social media posts. On 6 November 2018, police raided his office in Simferopol to serve him with a "formal warning" against engagement in extremism. Subsequently, on 18 December 2018, the Ministry of Justice of Crimea requested the bar association in Simferopol to renounce Kurbedinov's membership, which put him at risk of being disbarred.

VIII. Conclusions and Recommendations

168. OHCHR documented human rights violations occurring throughout the process of the administration of justice in conflict-related criminal cases before the Ukrainian judicial system. They run through all stages of criminal proceedings, starting at the time of arrest and ending with the approval of coerced plea bargains by courts, casting significant doubt on the fairness of the proceedings. Many human rights concerns described are not exclusive to conflict-related proceedings.

169. While most of these violations have persisted throughout the reporting period, OHCHR findings suggest that the frequency of attacks against lawyers and acts of pressure on judges by the prosecution and groups that promote violence has decreased since 2018. Additionally, the annulment of article 176.5 of the CPC in June 2019 has resulted in a decrease in violations of the right to liberty pending trial.

170. The majority of these violations could in fact be addressed through existing procedural safeguards, without legislative amendments, as they are for the most part a result of the authorities' lack of enforcement of relevant fair trial guarantees, or of the authorities tolerating violations when committed against individuals prosecuted for affiliation or links with the self-proclaimed 'republics'. In order to ensure compliance with the right to liberty of persons, all allegations of unlawful arrest should be investigated under article 371 of the Criminal Code. Courts must ensure that their decisions to remand defendants in custody pending trial are in line with the requirements of articles 176 and 177 of the Criminal Procedure Code, and lawyers should be disciplined for violations of the code of professional conduct. Similarly, any interference with the independence of judges should be investigated under articles 376 or 377 of the Criminal Code. Attacks against lawyers should trigger investigations under articles 397 to 400 of the Criminal Code, taking into account the victims' special status and protection needs. By virtue of article 474.6 of the Criminal Procedure Code, judges are authorized to request any documents they deem necessary when reviewing plea bargains, in order to ensure the genuineness of the defendants' intention to plead guilty.

171. Addressing other violations would require legislative amendments, as set out in the recommendations below.

172. In the self-proclaimed 'republics', OHCHR findings suggest that the bodies processing conflict-related cases are neither independent nor impartial, and the proceedings themselves are rife with violations of international human rights standards on fair trials, as well as arbitrary detention and use of torture and intimidation.

173. In Crimea, the continuing wholesale application of Russian Federation criminal legislation, as well as the manner in which criminal law and procedure are applied, violate both

international humanitarian law and international human rights law. Russian Federation authorities must respect their obligations as an occupying Power and ensure that general principles of law and fair trial rights are respected

174. The majority of the violations of international humanitarian law and international human rights law described in this report are systematic in nature, and may amount to war crimes.

175. The recommendations formulated below include measures for preventing further violations of the right to a fair trial, not only in conflict-related criminal cases. Some of the recommendations are drawn from previous OHCHR reports on the human rights situation in Ukraine, as they remain relevant.

176. Recommendations to the Government of Ukraine:

- *To the Parliament of Ukraine:*

    a) **Ensure that any legislation regarding criminal responsibility of judges corresponds to international standards guaranteeing their independence through functional immunity. The provisions that criminalize misconduct of judges should be formulated precisely enough to guarantee their independence and functional immunity in interpretation of the law, assessment of facts or weighing of evidence;**
    b) **Amend the procedure of launching investigations against judges to ensure better protection against attempts of influence through procedural safeguards for all judges;**
    c) **Amend the Criminal Procedure Code to allow a full retrial in criminal proceedings conducted *in absentia*, including after a verdict has been delivered, upon the request of the accused who has surrendered or has been detained by the Ukrainian authorities;**

- *To the State Bureau of Investigation:*

    d) **Conduct timely and effective investigations of all allegations of unlawful arrests, torture or ill-treatment perpetrated by the law enforcement agents in the context of prosecution of conflict-related crimes;**

- *To the Prosecutor General's Office:*

    e) **Ensure that attacks against judges and lawyers are accurately classified under the Criminal Code to reflect their true nature and gravity;**
    f) **Conduct timely and effective investigations into human rights violations allegedly perpetrated by military and law enforcement agents when prosecuting conflict-related crimes;**
    g) **Ensure that prosecutors do not unduly delay trials;**
    h) **Close all investigations against judges launched under article 375 of the Criminal Code of Ukraine;**

- *To the National Police, Security Service of Ukraine:*

    i) **Discontinue the wide interpretation of the concept of continuous crime in order to justify arrests without court warrant, and limit such arrests to situations where there is an urgent need to prevent or stop a crime;**

- *To the National Police*

    j) **Ensure that all attacks against lawyers are effectively responded to and investigated;**

- *To the Ministry of Justice:*

    k) **Register and transfer all complaints regarding the professional and ethical conduct of state-appointed lawyers in conflict-related criminal cases to the respective bar associations so that proper examinations can be carried out and, where justified, disciplinary actions can be imposed;**

- *To judges:*

    l) **Conduct assessments of the reasonableness and necessity of remanding individuals in custody, in line with the Criminal Procedure Code and international human rights standards;**
    m) **When considering plea bargains, where there are grounds to believe that the defendant has been subjected to torture or ill-treatment, or otherwise**

compelled to admit guilt, request any supporting evidence to verify the genuineness of the guilty plea;

n) Order investigation into all allegations of ill-treatment, torture, enforced disappearance, arbitrary arrest or detention;

o) Ensure that trials are not unduly delayed by addressing failures of parties to appear in court through existing procedural means, namely ordering compulsory attendance and imposing fines;

- *To the judicial authorities:*

p) Speed up the judicial reforms and expedite the selection process of judges in order to alleviate the understaffing of first-instance courts.

177. To the self-proclaimed 'Donetsk people's republic' and self-proclaimed 'Luhansk people's republic':

a) Halt the practice of 'preventive arrest' and 'administrative arrest';

b) Put an end to the consideration of entire 'criminal cases' in camera without justified reasons;

c) Cease the practice of compelling individuals to confess under torture and intimidation and stop using forced confessions in 'criminal cases';

d) Ensure immediate and unlimited access to legal counsel for all those detained or accused of 'crimes';

e) Halt the practice of violation of the right to be tried in one's presence.

178. To the self-proclaimed 'Donetsk people's republic':

a) Immediately halt the use of the death penalty and refrain from conducting executions connected to past proceedings;

b) Refrain from the practice of arbitrary pre-trial detention based on the 'order' of a 'prosecutor'.

179. To the international community, including the Government of the Russian Federation:

a) Use all available channels to influence the self-proclaimed 'republics' to ensure that human rights of individuals detained in the territory under their control are respected;

b) Use all available channels to influence the self-proclaimed 'republics' to discontinue the practices of arbitrary arrests and detention, enforced disappearance, torture and ill-treatment against individuals detained, and cease any practices that are violating their right to a fair trial.

180. In the context of the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, temporarily occupied by the Russian Federation, to the Government of the Russian Federation:

a) Facilitate safe and unfettered access to Crimea to enable the OHCHR Human Rights Monitoring Mission in Ukraine to carry out its mandate;

b) Respect the criminal laws in place in Crimea in 2014 before the beginning of the occupation, in particular by refraining from enforcing Russian Federation criminal legislation in Crimea;

c) Ensure prompt, independent, impartial, thorough and effective investigation of all allegations of all human rights violations, including ill-treatment, torture and enforced disappearances;

d) Ensure that the presumption of innocence and the prohibition of forced self-incrimination are respected;

e) Respect the right of a defendant to be assisted by a lawyer of one's own choice;

f) Cease the practice of using military courts for the prosecutions of civilians alleged to be members of banned religious groups or to have engaged in espionage and subversive activities in Crimea;

g) Ensure that private lawyers are able to perform their duties without intimidation, harassment or improper interference;

h) Ensure that members of the public have access to court hearings and that hearings in camera are only used in exceptional circumstances.

* * *

Annex I

Pokrovsk (formerly Krasnoarmiisk)

On 24 March 2015, unidentified armed men in military uniforms broke into Mr. P.'s house in Kurakhove (Government-controlled territory). After searching the house, the intruders tied and blindfolded Mr. P. and his friend Mr. B. (55 and 33 years old, respectively), and held them *incommunicado* in a basement in Pokrovsk for eight days. During this time, the captors interrogated them and demanded they confess to planning a terrorist act or the abduction of a Ukrainian soldier. The two men were kept separately, and regularly punched and beaten with batons and a wooden hammer (which the perpetrators called the "hammer of truth"). The captors also dislocated the men's arms, suffocated them, and subjected them to electric shocks. They also subjected Mr. B. to at least three mock executions by firing a gun above his head, and threatened to abduct and harm Mr. P.'s son-in-law. The victims were forced to write self-incriminating statements about their membership in the armed groups of the self-proclaimed 'Donetsk people's republic'.

On 25 March, an advisor to the Head of the SBU posted on Facebook that two saboteurs were being detained.[204] Having no information on Mr. P.'s whereabouts, his wife reported his abduction to police. She also approached the SBU and military forces, who denied involvement in her husband's abduction.

On 31 March when the abductors transferred the detainees to Mariupol and handed them over to the SBU, where their arrest was eventually officially registered, seven days late. The SBU officers showed both men their confessions and told them to repeat them to the investigator. In the absence of their state-appointed lawyers, and under threat of further torture, the victims signed formal self-incriminating statements and arrest protocols with falsified dates of apprehension.[205] On 3 April, a court placed them in pre-trial detention.

In December 2015 and June 2016, Mr. B. submitted two complaints to the prosecutor's office of unlawful detention and ill-treatment by abductors whom he believed were SBU. The Military Prosecutor's Office initiated an investigation, which, however, did not produce any results. The investigator allegedly only questioned both victims, and repeatedly attempted to close the investigation. Mr. B. successfully challenged these attempts and the court cancelled the investigator's decisions to close the investigation. This however, did not result in any progress as the prosecutors reportedly did not undertake any further steps to investigate Mr. B.'s complaint. The court also, dismissed as unfounded Mr. B.'s numerous motions requesting the prosecutor to conduct specific investigative action.[206]

Both victims complained about the quality of legal assistance from their state-appointed lawyers. Not only did both lawyers insist that they plead guilty in exchange for a reduced sentence, they also refused to support the defendants' complaints about the abduction and torture. Mr. B. had to draft his own complaint, and to challenge the investigator's decision to close the case on his own.

For over two years, the court only held hearings once a month, during which, it continually extended pre-trial detention for both defendants, despite the prosecutors' failure to show that it was reasonable and necessary.[207] On 14 September 2017, the court released Mr. P. under a personal commitment not to leave Ukraine and to appear in court.[208] Following this decision, the prosecution requested the High Council of Justice to formally discipline the judges. The

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[204] The post contains blurred pictures of two men, who can still be recognized as the two men abducted on 23 March 2015. Available at https://www.facebook.com/markian.lubkivskyi/posts/1553467821582510.

[205] According to the ruling of Zhovtnevyi district court of Mariupol of 3 April 2015, both men were arrested under article 208 of the Criminal Procedure Code in the evening of 31 March 2015. The ruling is available at http://reyestr.court.gov.ua/Review/48971204.

[206] See, e.g., rulings of the Artemivskyi town-district court of Donetsk region of 13 July 2016 (available at http://reyestr.court.gov.ua/Review/59467989) and of 5 August 2016 (available at http://reyestr.court.gov.ua/Review/59467884).

[207] The prosecution maintained that the defendants could flee once released; the court in return referred to article 176.5 of the Criminal Procedure Code.

[208] Ruling of Krasnoarmiiskyi town-district court of Donetsk region of 14 September 2017, available at http://reyestr.court.gov.ua/Review/68855569.

judges argued that such a request amounted to undue pressure by prosecutors and interfered with their independence in an on-going case.[209]

On 27 December 2017, Mr. B. was transferred to Donetsk as part of the simultaneous release of detainees. He told OHCHR that he agreed to the 'exchange' as it was the only way to be released. Mr. B. did not return to Government-controlled territory to attend trial, for fear of being re-arrested. His case was separated from that of Mr. P.'s and he was placed on a wanted list.

On 23 June 2018, Mr. P. was convicted of facilitating the activity of a terrorist organization by hosting his friend Mr. B. (who, although not convicted, was referred to as a member of the armed groups of the self-proclaimed 'Donetsk people's republic'), and sentenced to four years and eight months in prison.[210] He was released immediately due to the time he already served in pre-trial detention.[211]

Luhansk

On 12 March 2018, a woman attempting to cross the contact line at Stanytsia Luhanska was arrested by 'officers' of the self-proclaimed 'Luhansk people's republic'. The woman was handcuffed and taken to a nearby ambulance where she was searched, slapped, and her IDs, money and mobile phones were seized. The perpetrators explained she was suspected of collecting information for Ukrainian authorities.

Three armed men in balaclavas and camouflage uniforms put a bag over her head and brought her to the 'ministry of state security' in Luhansk, where she was tortured by four unidentified men for seven hours. The perpetrators applied electric shocks to her foot, punched her back, and struck her head with a book. They accused her of working for the Ukrainian authorities and forced her to "confess". At night, she was locked in a cell in what she believed was an unofficial detention centre. She described the food as poor, and told OHCHR that the cell had no sanitation facilities.

Over ten days, the victim was interrogated in the 'ministry of state security' for about five hours almost every day, during which she was again punched and beaten. She was also threatened with sexual violence, and told that her relatives would be detained. She was forced to confess to cooperating with the Ukrainian government. Medical checks after her release confirmed that the blows she received had damaged her ribs and lungs. During her detention, she had no contact with the outside world.

After another ten days, on 2 April 2018, the woman was brought to an 'investigator', who wrote out her testimony without interrogating her. She signed it without reading it, in exchange for being allowed to see her daughter. At around the same time, her daughter was notified about her detention and hired a lawyer who the 'investigator' said was permitted to take such cases. When the victim met the lawyer and showed her the bruises caused by the beatings, the lawyer commented, "*The sooner you're sentenced, the better*."

After several days, the woman was brought to a room in the 'ministry of state security' where several 'officers' were present with video equipment. One 'officer' pointed a gun at her head and forced her to read a confession, which was video-recorded and published online.

In June 2018, the woman was transferred to the SIZO in Luhansk and her case was referred to the 'military court' of 'Luhansk people's republic', which tried her in closed hearings. On 31 October 2018, the 'court' convicted her of 'state treason' and sentenced her to 12 years and 6 months in prison with confiscation of property. She appealed, but the 'supreme court' upheld the 'verdict'.

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[209] Complaint of judges of Krasnoarmiiskyi town-district court of Donetsk region regarding interference with their independence by the prosecution of 18 December 2017, available at http://www.vru.gov.ua/content/file/3575-0-6-17_.pdf.

[210] Verdict of Krasnoarmiiskyi town-district court of Donetsk region, available at http://reyestr.court.gov.ua/Review/74877447.

[211] Ibid. The court reduced the sentence at the ratio of one day spent in pre-trial detention counts as two days spent in prison.

In April 2019, the victim was transferred to a penal colony, from which she was released on 29 December 2019 as part of the simultaneous release.

Donetsk

On 11 June 2016, a group of 'patrol police officers' of the self-proclaimed 'Donetsk people's republic' approached a man on the street in Horlivka and took him for "a check" to the 'department of interior'. Once there, several unidentified 'operative officers' handcuffed the man and pinned him on the floor under a chair. They began to torture him to make him "confess", asking what illicit activities he was carrying out and for whom. The men put a gas mask on his face to suffocate him, and afterwards slapped his face while interrogating him. They continued to torture him intermittently until noon the following day, when they put a bag over his head and drove him to the 'Izoliatsiia' detention facility.

In 'Izoliatsiia', several men in balaclavas and camouflage uniforms brought him to a basement room and tied him to a table. They attached wires from a military field telephone to his limbs and administered electric shocks, ordering him to "confess" while gradually increasing the intensity of electricity. The perpetrators spilled water on him "*for better conductivity*" and punched him. At some point, his torturers escalated to an "*enhanced method*"; they stripped him, attached one electrode to his genitals and a second to a metal tube, which they pushed into his anus, and continued to shock him. The victim described the pain as unbearable, as if his pelvic area was tearing apart. In total, he was tortured for three hours, during which he fainted several times and vomited blood. He agreed to admit everything they instructed.

The victim was detained in 'Izoliatsiia' for two years, which was ordered by a 'prosecutor', initially as 'administrative arrest', and never reviewed by a 'judge'. During this entire time, the guards and some fellow detainees colluding with them beat, intimidated and ill-treated him.

In February 2017, an 'investigator' from the 'ministry of state security' interrogated the victim several times. During these interrogations, the 'investigator' did not question the victim but instead wrote down criminal activities which the man was accused of, and asked him to remember them all. When the victim met with a private lawyer contacted by his family, he complained about the torture, but the lawyer ignored it. The victim believes the lawyer was a part of the 'prosecutorial' system. She left the victim alone during several interrogations and did not attempt to defend him in 'court'.

In the summer of 2017, the victim's case was submitted to the 'military tribunal', which tried him in closed hearings. The man described the 'trial' as "a show" – the defence lawyer did nothing and the 'judge' asked him not to object to the 'prosecutor's' statements, but rather to repeat what he had told the 'investigator'. On 16 December 2017, the 'court' found the defendant guilty of espionage, an attempted terrorist act and illegal possession of explosives, and sentenced him to 22 years in prison and a 100,000 RUB (approximately 1,500 USD) fine. The 'judge' advised him not to appeal and to wait to be 'exchanged'.

On 29 December 2019, the victim was released from a penal colony as part of the simultaneous release.

Arrest and Detention of Oleh Sentsov by the Russian Federation

Oleh Sentsov, a filmmaker and a resident of Crimea with pro-Ukrainian views, was apprehended by the Russian FSB in Simferopol on 10 May 2014. The FSB officers physically attacked him near his home, beat him, and drove him from the scene without offering any explanation for his arrest. The perpetrators did not disclose to Mr. Sentsov where they were taking him or identify themselves as law enforcement officers. Upon arrival at the FSB building, the victim was tortured for about three hours while being pressured to incriminate himself and others in the coordination of alleged terrorist acts in Crimea. FSB officers beat Mr. Sentsov with their fists and a wooden bat, and suffocated him with a plastic bag until he fainted. He was also subjected to sexual violence; FSB officers stripped him and threatened to rape him with a bat. Mr. Sentsov was held in the FSB office overnight in unofficial detention and was only formally arrested the following day.

While in the temporary detention center in Simferopol, Mr. Sentsov was appointed a state-provided lawyer who appeared to have no genuine interest in working on his case. Mr Sentsov complained to the lawyer about the torture he suffered and the associated pressure to self-incriminate. The lawyer paid no attention to those allegations and took no action.

Mr. Sentsov was deported to the Russian Federation about a week later. Although he reported the torture both before and during trial, no charges have been brought against any individual involved. A Russian military court convicted Mr. Sentsov and sentenced him to 20 years of incarceration in a high-security prison, in spite of the fact that the main prosecution witness recanted in the court room saying he had been tortured to testify.

From autumn 2017 until his release in September 2019, he was held in the “White Bear” penal colony in Russia’s far north, thousands of kilometres away from Crimea.

Mr Sentsov reported numerous attempts by the FSB and penitentiary workers to compel him to accept Russian Federation citizenship. Requests from the Ukrainian consul and the Ukrainian ombudsperson to visit Mr. Sentsov were regularly refused by the authorities, on the grounds that Mr. Sentsov was a Russian Federation citizen.

Mr. Sentsov was released on 7 September 2019 as part of a simultaneous release of prisoners between Ukraine and the Russian Federation, after being pardoned by the President of the Russian Federation.