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RESPECT FOR HUMAN RIGHTS DURING THE ARMED CONFLICT IN UKRAINE

JUDICIAL APPLICATION OF INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW

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DEFINITION OF THE RULES OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE TO THE ARMED CONFLICT IN UKRAINE

The armed Russian Federation began its aggression against Ukraine with annexation of the Autonomous Republic of Crimean in February 2014 and continued it with organization and support of illegal armed groups, which proclaimed so-called "people's republics" in Donetsk and Luhansk oblasts, in April 2014. This aggression posed, among numerous other problems, complex questions and tasks before the Ukrainian legal system. Undoubtedly, the key role in answering these questions belongs to Ukrainian judges. Whether or not the state of Ukraine can fulfill its responsibilities towards its citizens and the international community overall depends on the judges' readiness to understand the applicability of international humanitarian law standards to the armed conflict in Ukraine and to interpret and apply directly relevant provisions of international law and national legislation.

BASIC PRINCIPLES OF APPLYING INTERNATIONAL HUMANITARIAN LAW

International humanitarian law (IHL) or law of armed conflicts can be defined as the branch of international law limiting the use of violence in armed conflicts by: a) sparing those who do not or no longer directly participate in hostilities; b) restricting it to the amount necessary to achieve the aim of the conflict, which – independently of the causes fought for can only be to weaken the military potential of the enemy.¹

Treaties and international custom are main sources of IHL. **Treaties** have been a major source of IHL since the third quarter of the 19th century when the codification of laws and customs of war began. Today IHL is one of branches of international law which are best provided with rules enshrined in conventions. It should be noted that a lot of countries have assumed commitments under IHL multilateral treaties. For instance, all countries of the world without exception are parties to the 1949 Geneva Conventions (GC) I-IV.

Listed below are main treaties that are sources of IHL:

- In the sphere of protecting victims of armed conflicts:
 - (The First) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field dated August 12, 1949 (GC I);

¹ Sassòli M., Bouvier A., Quintin A. How Does Law Protect in War? – 3rd edition. Volume I. – Geneva: ICRC, 2011. – P. 93.

- (The Second) Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea dated August 12, 1949 (GC II);
 - (The Third) Geneva Convention Relative to the Treatment of Prisoners of War dated August 12, 1949 (GC III);
 - (The Fourth) Geneva Convention "Relative to the Protection of Civilian Persons in Time of War" dated August 12, 1949 (GC IV);
 - Additional Protocol (I) to the Geneva Conventions dated August 12, 1949 relating to the Protection of Victims of International Armed Conflicts, which was adopted on June 08, 1977 (AP I);
 - Additional Protocol (II) to the Geneva Conventions dated August 12, 1949 relating to the Protection of Victims of Non-International Armed Conflicts, which was adopted on June 08, 1977 (AP II);
 - Additional Protocol (III) to the Geneva Conventions dated August 12, 1949 relating to the Adoption of an Additional Distinctive Emblem, which was adopted on December 08, 2005 (AP III);
 - United Nations Convention on the Rights of the Child, adopted in New York on November 20, 1989;
 - Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, adopted in New York on May 25, 2000.
- In the sphere of protecting cultural property in case of armed conflict:
 - The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict dated May 14, 1954;
 - The First Protocol to The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, which was adopted on May 14, 1954;
 - The Second Protocol to The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, which was adopted on May 26, 1999;
- In the sphere of protecting the environment in case of armed conflict:
 - Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques, dated December 10, 1976;
- In the sphere of restricting or prohibiting use of certain means of warfare (weapons):
 - Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare dated June 17, 1925;
 - Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction dated April 10, 1972;
 - Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (CCWC) dated October 10, 1980 as amended on December 21, 2001;
 - Protocol on Non-Detectable Fragments dated October 10, 1980 (Protocol I to CCWC);
 - Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps, and Other Devices dated October 10, 1980 as amended on May 03, 1996 (Protocol II to CCWC);
 - Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons dated October 10, 1980 (Protocol III to CCWC);
 - Protocol on Blinding Laser Weapons dated October 13, 1995 (Protocol IV to CCWC);
 - Protocol on Explosive Remnants of War dated November 28, 2003 (Protocol V to CCWC);
 - The Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on their Destruction dated January 13, 1993;

- The Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on their Destruction dated September 18, 1997 (Ottawa Treaty);
- Convention on Cluster Munitions dated May 30, 2008;
- In the sphere of individual criminal liability for violation of IHL:
 - Rome Statute of the International Criminal Court dated July 17, 1998 (Rome Statute).

Ukraine is a party to all the above mentioned international treaties except for the 1998 Rome Statute, the 1999 Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, and the 2008 Convention on Cluster Munitions.

Custom remains one of the two major sources of IHL supplementing successfully even very detailed and complicated treaty-based regulation. Customary law rules are particularly important for those areas which are insufficiently regulated by conventions, especially in case of non-international armed conflicts. Agreement-based regulation of such conflicts is significantly weaker than regulation of international conflicts in terms of the number of standards and their sophistication. Every so often, international courts and tribunals (such as the International Court of Justice and international criminal tribunals) should resort to customary IHL.

To understand specifics of the sources of IHL, one should turn to one of its key provisions known as **Martens Clause**. This clause was introduced into the preamble to the 1899 Hague Convention on the Laws and Customs of War on Land at the proposal of the famous Russian international law scholar and diplomat, F.F. Martens, and later became a standalone standard which was included in subsequent IHL conventions with editorial changes. It was included in the article dealing with legal consequences of denunciation of GC I-IV (Articles 63/62/142/158) as well as to AP I Article 1 Item 2 where Martens Clause is worded in the following way: "In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."

Martens Clause has two major functions. First, despite a substantial increase in the number of entities for whom IHL is binding and in spite of rather detailed codification of IHL, not a single codification may be deemed complete and final. That is why Martens Clause prevents the validity of the presumption in IHL per which whatever is not prohibited by treaties is allowed. Accordingly, each party to an armed conflict must not only assess its plans and behavior for compliance with prohibitions contained in treaty-based IHL but also check their compliance with customs, principle of humanity and moral requirements.

Second, Martens Clause should be considered as a dynamic factor which emphasizes the applicability of IHL principles irrespective of subsequent changes in the classification of covered situations and further technological development. The International Court of Justice gave a positive assessment of this aspect of Martens Clause in its 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons. For this purpose, Martens Clause makes deviations from commitments under IHL, which are grounded by fundamental change of circumstances, illegal.

In addition to these two most important functions, Martens Clause should be considered when interpreting IHL rules. It can also be seen as an additional ground for resorting to International Human Rights Law in the context of armed conflicts. Martens Clause emphasizes the importance of customary IHL and encourages states to negotiate new treaties in this area.

Application of IHL is fully dependent upon existence of an armed conflict which can be of international or domestic nature. Traditionally, law of armed conflicts was a branch of international law which applied solely to wars between “subjects to international law”, i.e. States. The only exception relates to rare situations where parties to a civil war concluded agreements whereby they undertook to adhere to all or some laws and customs of war (for example, the 1936-1939 Civil War in Spain). With the inclusion of Common Article 3 to GC I-IV, the application of IHL was extended also to non-international armed conflicts (NIAC) despite the extent of their treaty regulation was and still is significantly smaller than regulation of international armed conflicts (IAC).

Treaty-based IHL does not contain a unified definition of an **armed conflict**. Instead, it focuses on defining an international armed conflict and a non-international armed conflict. Each of the two is subject to specific legal regime.

In case of international armed conflict the substantive scope of IHL application is defined pursuant to common Article 2 of GC I-IV and Article 1 of AP I. Common Article 2 covers three situations which are different by their nature. Each of them is considered as an international armed conflict, thus, serving a ground for application of the entire body of treaty-based and customary rules of IHL (except for rules which are specially designated for non-international armed conflicts).

First, common Article 2 concerns *cases of a declared war between two or several states*. There is a rule in international law according to which declaration of war establishes a state of war with another state, and IHL is applicable regardless of whether or not there are active combat operations. Such a situation emerged after many Latin American states had declared war to the Nazi Germany. Should there be no actual hostilities, the respective rules of IHL would remain moot. However, the IHL rules dealing will apply to the protection of foreigners (citizens of the adversary). At the same time, cases of formal declaration of war, which are dealt with by the Third Hague Convention of 1907, are extremely rare nowadays. Even when politicians state that their countries are in the state of war, such statements are never sufficiently clear and unambiguous as to lead to any legal consequences (for example, the statement of the Pakistani President about the state of war with India in 1965 or statements of the North Korea government about the state of war with the Republic of Korea and the U.S. in 2013).

Second, IHL is applied in case of an *actual armed conflict* arising between/among two or more states even should any of them do not recognize the state of war. Incorporation of this provision in GC I-IV solved one of biggest problems of IHL as it eliminated the need to prove the existence of a formal state of war to trigger the application of IHL rules. Besides, the threshold of applying this criterion in case of international armed conflicts is very low: IHL regulates even smallest armed conflicts between states without setting forth any requirements with regard to the conflict intensity.

Third, IHL standards regulating international armed conflicts are always applied in *all cases of partial or total occupation of the territory of a state, even if the said occupation meets with no armed resistance*. For instance, this was the case when Germany occupied Denmark in 1940. In the first place, IHL rules are applied to ensure protection of the civilian population.

The fourth situation where one applies IHL rules designated for regulation of international armed conflicts was included in AP I Article 1 (4). The latter reads: “... *armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.*” This provision, which was included in AP I on the demand of newly independent states that emerged as a result of decolonization, faced resistance of numerous western states.

As the decolonization process has virtually been completed, AP I Article 1(4) is of little practical importance.

As it has been already noted, the number of IHL treaty-based rules applicable to non-international armed conflicts is significantly smaller than of those which applicable to international armed conflicts. Common Article 3 of GC I-IV and AP II constitute the basis of the treaty-based regulation of non-international armed conflicts. In so doing, common Article 3 and Article I of AP II set forth different thresholds of their applicability. Thus, common Article 3 is applicable to virtually all non-international armed conflicts whereas AP II is applicable to a substantially smaller number of situations.

Common Article 3 of GC I-IV sets the **minimum humanitarian standard** which, according to the International Court, must be applied in all armed conflicts². The Article says that it will apply in the event of armed conflict not of an international character occurring in the territory of a state. In practice, two additional criteria of applicability of common Article 3 have been developed. First, armed groups must possess a *minimum level of organization* i.e. to be under responsible command, to be subject to military discipline, and to be able to meet IHL standards. Second, the armed conflict must feature a minimum degree of intensity. It is not easy to set the necessary minimum in this regard. The following criterion is used as a reference: if the police cannot overcome hostility on their own, and the state's armed forces need to be engaged, it means that the degree of intensity needed to trigger application of common Article 3 has been attained.

Application of AP II, whose rules supplement and develop provisions of common Article 3, is dependent upon meeting of a number of strict criteria set forth in Article 1(1) of the Additional Protocol. Hence, AP II will apply to all non-international conflicts which: (1) take place in the territory of a High Contracting Party (2) between its armed forces and dissident armed forces or other organized armed groups which, (3) being under responsible command, (4) exercise such control over a part of its territory (5) as to enable them to carry out sustained and concerted military operations and (6) to implement AP II.

Therefore, as compared to common Article 3, the scope of application of AP II is narrowed with regard to two major aspects. First, it concerns only those non-international armed conflicts in which one party is represented by government armed forces (whereas Article 3 applies also to non-international armed conflicts between non-government groups). Second, it concerns only those non-international armed conflicts in which anti-government forces exercise control over a certain part of the territory of the state.

It should be noted that customary rules of IHL which concern non-international armed conflicts are applied on the condition that the criteria needed to apply common Article 3 are met. In addition, Article 8 of the Rome Statute supported the definition of non-international armed conflicts developed in practices of international criminal tribunals³: "*a long-lasting armed conflict between government armed forces and organized armed groups or between such armed groups*", thus suggesting that the definition in AP II Article 1(1) is obsolete. At the same time, AP II Article 2(2) remains very much to the point. It requires to draw a clear line between non-international armed conflicts and situations where IHL is not applicable at all: "*This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts*".

² *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America, 1986), ICJ, § 218.

³ *The Prosecutor v. Duško Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995), ICTY, § 70.

OBLIGATIONS TO PROSECUTE PERSONS GUILTY OF WAR CRIMES UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Unlike International Humanitarian Law, where relevant obligations of a state are set forth in the texts of the conventions, in European human rights law the obligation to prosecute persons guilty of most serious violations of human rights has been developed in practice of the European Court of Human Rights (ECtHR) as a so-called "procedural obligation" under Articles 2 and 3 of the European Convention on Human Rights (ECHR). It includes the obligation "to carry out an effective investigation into alleged breaches of the substantive limb of these provisions"⁴. The Court also directly mentions the criminal component of this procedural obligation: "the Court has said many times that the effective judicial system required by Article 2 may, and under certain circumstances must, include recourse to the criminal law"⁵.

As Schabas⁶ specifies, requirements with regard to investigation of violations of Articles 2 and 3 in the context of armed conflict were mentioned for the first time by the Grand Chamber of ECtHR as long ago as in *Varnava and Others v. Turkey* case which concerned disappearances of people in 1974 during Turkey's invasion in Cyprus. The Grand Chamber emphasized that the investigation should be not only independent, accessible for the victim's family, reasonably fast, and include elements of the public control over the investigation itself and its results but also effective in a sense that it ought to be able to determine whether or not the death was caused wrongfully, and, if yes, to establish guilty persons and to punish them⁷.

ECtHR does not distinguish between offences committed as part of mass violence (for example, enforced disappearance as a crime against humanity) and other serious offences against the person. For example, it was established in *MC v. Bulgaria* case that the state had failed to meet its obligations with regard to effective investigation in a rape case because of obsolete provisions of the national legislation⁸.

It should be also noted that the state which is simultaneously a party to the European Convention of Human Rights and Rome Statute of the International Criminal Court (or at least has recognized the jurisdiction of the latter *ad hoc* as Ukraine did it in 2014 and 2015) may be deemed as one meeting its international obligations only on the condition that it carries out effective investigations of international crimes and holds guilty persons criminally liable under positive procedural obligations formulated by ECtHR with regard to Articles 2 and 3 of the ECHR as well as according to the "active complementarity" doctrine formulated by the Prosecutor of the International Criminal Court. This doctrine envisages that states must bear primary responsibility for preventing atrocities on their own territories and punishing for atrocity crimes. Likewise, double requirements are set with respect to any amnesty laws. The latter must meet the requirements of both the European Convention on Human Rights and international criminal law.

⁴ *Silih v. Slovenia* [GC], European Court of Human Rights, App. No. 71463/01, 9 April 2009, para. 153.

⁵ *Ibid.*, para. 194; *Mastromatteo v. Italy*, European Court of Human Rights, App. No. 37703/97, 24 October 2002, para. 90.

⁶ Schabas William A. Synergy or Fragmentation? International Criminal Law and the European Convention on Human Rights // *Journal of International Criminal Justice* 9 (2011), P. 609-632.

⁷ *Varnava and Others v. Turkey* [GC], European Court of Human Rights, App. Nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, 18 September 2009, Para. 191.

⁸ *MC v. Bulgaria*, App. No. 39272/98, 4 December 2003.

PRACTICAL APPLICATION OF INTERNATIONAL HUMANITARIAN LAW IN UKRAINE (2014-2017)

GENERAL REMARKS

Ukraine is a victim of the Russian Federation's aggression, which commenced on February 20, 2014, as a military operation of the RF Armed Forces targeted to capture part of the Ukrainian territory, namely the Crimean peninsula. This date is not even denied by the Ministry of Defense of the Russian Federation, since it is indicated on the departmental medal "For the Return of Crimea". Meanwhile, Viktor Yanukovich fled from Kiev only the next day, whereas the Verkhovna Rada's Resolution "On self-removal of the President of Ukraine from office and discharge of constitutional powers, and convocation of extraordinary elections of the President of Ukraine," which served the grounds for the Russian Federation's accusations of alleged "anti-constitutional coup d'Etat in Ukraine", was adopted only on February 22, 2014⁹.

Russia continues to supply weapons, ammunition and fuel to the occupied territory of Donbass through the uncontrolled area of the Ukrainian-Russian state border, to strengthen the units of the regular RF troops and illegal militant groups (hereinafter IMP)¹⁰ supported by the Russian Federation, as well as self-proclaimed Luhansk and Donetsk "Republics".

A common mistake among Ukrainian lawyers and the general public is the message that the International Humanitarian Law (IHL), including the provisions establishing criminal liability for violations of the laws and customs of war, does not apply because of the official position that refers to the military actions in eastern regions of Ukraine as an "anti-terrorist operation" (ATO). In addition, it is often claimed that the IHL and the provisions on criminal accountability for its violations ("violations of laws and customs of war" or war crimes) can not be applied by courts without imposing martial law in the manner prescribed by the Constitution of Ukraine and the Law of Ukraine "On Legal Regime of Martial Law".

The information available suggests that the situation within the territory of Crimea and Sevastopol amounts to an international armed conflict / ... / Additional information / ... / would suggest the existence of an international armed conflict in the context of armed hostilities in eastern Ukraine from 14 July 2014 at the latest, in parallel to the non-international armed conflict. [T]he Office is also examining allegations that the Russian Federation has exercised overall control over armed groups in eastern Ukraine - Office of the Prosecutor of the ICC, Report on Preliminary Situation Analysis (2016)

⁹ 10 FACTS ABOUT RUSSIAN MILITARY AGGRESSION AGAINST UKRAINE/ The Ministry of Foreign Affairs of Ukraine // <http://mfa.gov.ua/ua/page/open/id/5026>, date of referral: July 11, 2017.

¹⁰ Ibid.

Such a logic is erroneous and should not make the basis for the Ukrainian courts' approach to the issue. As is known, pursuant to Article 9(1) of the Constitution of Ukraine, any valid treaties consented to by the Verkhovna Rada of Ukraine are part of the national legislation of Ukraine. In accordance with Article 19 of the Law of Ukraine "On Treaties of Ukraine", they are applied in the manner stipulated for the national statutory provisions.

This fully applies to the Geneva Conventions of 1949, in particular to their common Articles 2 and 3 providing definitions of international and non-international armed conflicts, as well as to the two Additional Protocols of 1977, in particular Article 1 of the Additional Protocol I and Article 1 of the Additional Protocol II.

As is clear from the text of these articles, as analyzed above, a situation of armed conflict is almost always the issue of fact (except for a special case of formal declaration of war under Article 2 common to the four Geneva Conventions). In other words, IHL applies whenever the situation corresponds to one of those described in Common Articles 2 and 3 of the Geneva Conventions or Articles 1 of the two 1977 additional Protocols thereto.

Therefore, there are no insurmountable legal obstacles to the application by the Ukrainian courts of the articles of the Criminal Code of Ukraine, which provide for liability for war crimes, and above all, Article 438 ("Violations of laws and customs of war"). Moreover, the application of this article is not only a right but also a duty of the State. After all, under the already mentioned Geneva Conventions of 1949, which are part of the national statutory law of Ukraine, states are under an obligation to investigate serious violations of the IHL and to prosecute persons suspected of those (joint Article 49/50/129/146 of the Geneva Conventions).

HUMANITARIAN CHALLENGES AND VIOLATIONS OF THE INTERNATIONAL HUMANITARIAN LAW DURING THE CONFLICT

A recent UN report cites terrible figures: between February 16 and May 15, 2017, 36 civilians were killed in the Donbas, and 157 were injured. It is 48% higher than in the previous reporting period and 70% higher than over the same period last year. In general, 10,090 people were killed in the region since the outbreak of the imposed war, of which 2,777 civilians, while 23,966 were injured¹¹.

Data from the UN Human Rights Monitoring Mission in Ukraine (UNHRMMU) for the period since 2014 indicate that a certain range of behavior types that can be classified as war crimes (or crimes against humanity) have been observed in the ATO zone. In its reports, the UNHRMMU consistently outlines a number of facts that suggest that insurmountable there are instances in the conflict areas as follows. There are also reasons to suppose that cases of unlawful detention and accompanying crimes have been large-scale.

The UNHRMMU has reported on the militant groups involved in unlawful detention¹², arbitrary detention¹³ and abduction of civilians¹⁴, including of persons with special needs, and

¹¹ The value of the human rights in the days of the war. / Uryadovyy Kurier.

https://humanrights.org.ua/material/v_oon_nagadali_chomu_ukrajina_maje_rozsliduvati_zvaltuvannja_pid_chas_z_brojnego_konfliktu, date of referral: July 11, 2017.

¹² OHCHR, (Accountability for Killings in Ukraine from January 2014 to May 2016) (July 14, 2016) para. 53, 58 <http://www.ohchr.org/Documents/Countries/UA/OHCHRThematicReportUkraineJan2014-May2016_EN.pdf>, date of referral: July 21, 2016.

¹³ OHCHR, (Report on the human rights situation in Ukraine) (June 15, 2014) para. 154

<www.ohchr.org/Documents/Countries/UA/HRMMUReport15June2014.pdf>, date of referral: April 20, 2016;

OHCHR, (Report on human rights situation in Ukraine) (May 15, 2014) para. 101

<www.ohchr.org/Documents/Countries/UA/HRMMUReport15May2014.pdf>, date of referral: April 20, 2016.

¹⁴ OHCHR, (Report on the human rights situation in Ukraine) (December 15, 2014) para.41

<www.ohchr.org/Documents/Countries/UA/OHCHR_eighth_report_on_Ukraine.pdf>, date of referral: April 20, 2016.

pregnant women¹⁵. There is every reason to believe that during such detention, the civilians were subject to cruel treatment¹⁶, sexual abuse¹⁷, torture¹⁸, they were also denied free legal aid¹⁹ and the right to correspondence²⁰. There is also evidence indicating extrajudicial (arbitrary) executions of Ukrainian soldiers by the militant groups²¹. Similar statements also refer to representatives of the Ukrainian law-enforcement agencies and (or) the Armed Forces of Ukraine, and (or) the Security Service of Ukraine (SBU), as well as the volunteer battalions²². The UNHRMMU has reported on cases of unlawful detention, arbitrary detention, cruel treatment²³, forced labor, torture²⁴, sexual abuse²⁵, death in custody²⁶, refusal to provide defenders to persons detained by the Ukrainian law enforcement and security agencies²⁷, as well as incommunicado detention (prohibition of contacts with the outside world)²⁸. The UNHRMMU has also recorded files on underground illegal detention centers run by the volunteer battalions and Ukrainian law enforcement agencies where the detainees are being brutally abused²⁹. The SBU (Security Service of Ukraine) was alleged to have been involved in arbitrary detention³⁰, torture, forced disappearance of persons suspected of "separatism and

¹⁵ OHCHR, (Report on the human rights situation in Ukraine) (May 16 – August 15, 2015) para. 45, 46 <www.ohchr.org/Documents/Countries/UA/11thOHCHRreportUkraine.pdf>, date of referral: April 20, 2016.

¹⁵ The same, para. 44.

¹⁶ Ibid., para. 44.

¹⁷ Ibid., para. 48; OHCHR (Report on the human rights situation in Ukraine) (July 15, 2014) para. 52 <www.ohchr.org/Documents/Countries/UA/HRMMURreport15June2014.pdf>, date of referral: April 20, 2016.

¹⁸ OHCHR (Report on the human rights situation in Ukraine) (September 16, 2014) para. 40; OHCHR, (Report on the human rights situation in Ukraine) (May 16 – August 15, 2015) para. 46.

¹⁹ OHCHR (Report on the human rights situation in Ukraine) (August 16 – November 15, 2015), para.5.

²⁰ OHCHR, (Report on the human rights situation in Ukraine) (May 16 – August 15, 2015), para.46; OHCHR, (Report on the human rights situation in Ukraine) (August 17, 2014) para. 49.

<www.ohchr.org/Documents/Countries/UA/UkraineReport28August2014.pdf>, date of referral: April 20, 2016; OHCHR (Report on the human rights situation in Ukraine) (August 16– November 15, 2015) para. 34; OHCHR (Report on the human rights situation in Ukraine) (November 16, 2015 – February 15, 2016) para. 12.

²¹ OHCHR (Report on the human rights situation in Ukraine) (May 16 – August 15, 2015), para. 43.

²² OHCHR, (Accountability for killings in Ukraine from January 2014 to May 2016) (July 14, 2016) para. 62: OHCHR noticed – especially when it goes about a crime, (according to preliminary data) which were committed by the individuals who are the members of Ukrainian military troops and the law enforcement agencies- “the obvious lack of motives” for taking investigative actions on possible cases of murders, tortures and abuses. It leads to the impunity and gives some suspects the possibility of avoiding the justice.

²³ OHCHR, (Report on the human rights situation in Ukraine) (September 16, 2014) para. 54 <www.ohchr.org/Documents/Countries/UA/OHCHR_sixth_report_on_Ukraine.pdf>, date of referral: April 20, 2016 OHCHR, (Report on the human rights situation in Ukraine) (August 16 – November 15, 2015) para.42, 43, 46.

²⁴ OHCHR, (Report on the human rights situation in Ukraine) (August 16 – November 15, 2015) para.42, 43, 46.

²⁵ OHCHR, (Report on the human rights situation in Ukraine) (May 16 – August 15, 2015) para.50.

²⁶ OHCHR, (Accountability for killings in Ukraine from January 2014 to May 2016) (July 14, 2016) para. 51 <http://www.ohchr.org/Documents/Countries/UA/OHCHRThematicReportUkraineJan2014-May2016_EN.pdf>, date of referral: July 21, 2016: Majority of the reports about human deaths during the detention were received concerning initial stages of the conflict. (June, 2014 – February, 2015). According to the received data, majority of the cases of deaths were caused by torture or abuse, or inappropriate medical care or its absolute absence.

²⁷ OHCHR, (Report on the human rights situation in Ukraine) (May 16 – August 15, 2015) para.50, 51, 52, 53.

²⁸ OHCHR, (Report on the human rights situation in Ukraine) (June 15, 2014) para. 152.

²⁹ OHCHR, (Report on the human rights situation in Ukraine) (November 15, 2014) para. 10 <www.ohchr.org/Documents/Countries/UA/OHCHR_seventh_reportUkraine20.11.14.pdf>, date of referral: April 20, 2016.

³⁰ For instance, December 18, 2014 staff members of Security Service of Ukraine in Donetsk region *Vyacheslav Kazantsev* was detained on suspicion of committing a crime, provided by the article 258 (terrorist act) of the Criminal Code of Ukraine. He died in 7 days in the ambulance hospital after his arrival there with the grave bodily injury. Criminal proceeding on his death was opened on January 14, 2015, but by June 1, 2016 any progress in the investigation is unknown. Ref. OHCHR, (Accountability for killings in Ukraine from January 2014 to May 2016) (July 14, 2016) para. 102–103 <http://www.ohchr.org/Documents/Countries/UA/OHCHRThematicReportUkraineJan2014-May2016_EN.pdf>, date of referral: July 21, 2016.

terrorism", abusive treatment and application of reprisals against such persons after their release³¹.

Data provided by the UNHRMMU also indicate the commission of a number of other criminal acts in or near the area of hostilities. The UNHRMMU recorded acts of murder³², enforced disappearances³³, sexual abuse³⁴, extortion³⁵, kidnapping³⁶, various forms of public humiliation and cruelty³⁷. In addition, the UNHRMMU reported that law enforcement agencies of Ukraine, the Armed Forces of Ukraine, the Security Service of Ukraine and the volunteer battalions could commit a number of crimes. The UNHRMMU recorded a number of executions and torture³⁸, including enforced disappearances³⁹. In particular, the UNHRMMU documented specific reports of forced disappearances, arbitrary detention and abusive treatment by representatives of the volunteer battalions, including Aidar, Dnipro-1, Kyiv-1, and Kyiv-2⁴⁰.

Regarding the methods of warfare, the UNHRMMU reported on a range of measures based on which it could be assumed that the principle of distinction between the civilians and those who actively participate in hostilities, both from the territory controlled by Ukraine and from the territory under the control of the opposition militant groups of Donetsk and Luhansk oblasts, has been defied⁴¹. Such conduct involved indiscriminate shelling, which caused death, bodily injuries and damage to property⁴². There were reports of the use of illegal weapons, in particular, the use of cluster munitions in urban and rural areas⁴³. The UNHRMMU also recorded the presence of anti-personnel mines in the conflict area that resulted in casualties among the civilian population⁴⁴.

Ukrainian Helsinki Human Rights Union, Truth Hounds NGO and Kharkiv Human Rights Protection Group documented the detention of 23 people based on data from 20 interviews with victims and witnesses of events, as well as on photos and documents submitted by them. The

³¹ OHCHR, (Report on the human rights situation in Ukraine) (July 15, 2014) para. 13; OHCHR, (Report on the human rights situation in Ukraine) (December 15, 2014) para.9.

³² OHCHR, (Report on the human rights situation in Ukraine) (May 15, 2014) para. 94; OHCHR, (Report on the human rights situation in Ukraine) (July 15, 2014) para.47; OHCHR, (Report on the human rights situation in Ukraine) (May 16 – August 15, 2015) para. 36.

³³ OHCHR, (Report on the human rights situation in Ukraine) (May 16 – August 15, 2015) para. 36, 37.

³⁴ *Ibid.*, para. 39.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ OHCHR, (Report on the human rights situation in Ukraine) (September 16, 2014) para.54, 55.

³⁸ *Ibid.*, para. 31. *Ref. also to:* (Accountability for killings in Ukraine from January 2014 to May 2016) (July 14, 2016) para. 38–40 <http://www.ohchr.org/Documents/Countries/UA/OHCHRThematicReportUkraineJan2014-May2016_EN.pdf>, dte of referral: July 21, 2016: OHCHR also received many reports about the execution of the individuals who gave up or ceased to take part in hostilities in another way. (*hors de combat*). However, it is difficult to assess the real extent of such abuses because of the absence of witnesses and the access to information; according to estimates of OHCHR it goes about dozens of such cases, especially during the period from June, 2014 to February, 2015. Besides, preliminary information testifies almost a complete absence of the cases of bringing perpetrators to accountability. It is unknown about any cases in which the members of armed groups were brought to accountability for execution of captured Ukrainian soldiers or when Ukrainian soldiers were brought to accountability for execution of the members of armed groups

³⁹ OHCHR, (Report on the human rights situation in Ukraine) (July 15, 2014) para.79; OHCHR, (Report on the human rights situation in Ukraine) (August 17, 2014) para. 44.

⁴⁰ OHCHR, (Report on the human rights situation in Ukraine) (September 16, 2014) para.42.

⁴¹ OHCHR, (Report on the human rights situation in Ukraine) (November 16, 2015 – February 15, 2016) para. 23.

⁴² *Ibid.*, para. 24, 29; OHCHR (Report on the human rights situation in Ukraine) (July 15, 2014) para. 30; OHCHR, (Report on the human rights situation in Ukraine) (September 16, 2014) para. 4; OHCHR, (Report on the human rights situation in Ukraine) (November 15, 2014) para. 25; OHCHR, (Report on the human rights situation in Ukraine) (December 15, 2014) para. 5; OHCHR, (Report on the human rights situation in Ukraine) (May 16 – August 15, 2015) para. 4; OHCHR, (Report on the human rights situation in Ukraine) (August 16 – November 15, 2015) para. 21, 23

⁴³ OHCHR, (Report on the human rights situation in Ukraine) (November 15, 2014) para. 8.

⁴⁴ OHCHR, (Report on the human rights situation in Ukraine) (November 16, 2015 – February 15, 2016) para. 24.

victims' testimonies collected by the authors from various sources during the individual monitoring visits allow us to conclude on practicing arrests against the Donetsk and Lugansk oblasts local population, widespread in 2014 and 2015 on suspicion of "separatism"⁴⁵.

Such arrests were conducted in violation of Ukraine's Code of Criminal Procedure (hereinafter referred to as the CPC). The abduction and detention of the arrested persons at the inadequate facilities with no contact with the outside world allows us to qualify such arrests as enforced disappearances. It is alleged that torture was frequently applied to the detained persons, in particular during interrogations. The actions described in the report are violations of the national legislation of Ukraine, international human rights law and international humanitarian law. Overall, the UNHRMMU's data on human rights violations and international humanitarian law violations is being broadly confirmed by civil society organizations. They also monitored and recorded various violations, from unlawful detention⁴⁶, torture (cases of torture were very common)⁴⁷, sexual abuse⁴⁸, extrajudicial executions⁴⁹, various forms of assault⁵⁰, destruction of property⁵¹ and forced evictions of civilians from their homes⁵².

Therefore, the above information from authoritative sources provides reasonable grounds to consider it possible that a number of war crimes were committed and to suspect that crimes against humanity can continue in the ATO zone (or be related to it).

ANALYSIS OF THE NATIONAL LAW STATUS IN TERMS OF MEETING THE IHL REQUIREMENTS

The current legislation of Ukraine and the corresponding legal means (in particular, the Criminal Code of Ukraine) require a number of amendments to ensure the effectiveness of criminal penalties for all types of IHL violations. However, the existing statutory and regulatory framework in Ukraine still provides for holding accountable for a certain range of IHL violations, as discussed in this report. In particular, the content of the provisions under Article

⁴⁵ Illegal detention and torture committed by the Ukrainian side in the zone of armed conflict on the East of Ukraine / Ukrainian Helsinki Human Rights Union. - <https://helsinki.org.ua/publications/nezakonni-zatrymannya-ta-katuvannya-zdijsneni-ukrajinskoyu-storonoyu-v-zoni-zbrojnoho-konfliktu-na-shodi-ukrajiny/>

⁴⁶ Justice for Peace on the Donbass, «Those who survived the hell: Testimony of the victims about the places of illegal imprisonment on the Donbass» (2015) 26–37 <<http://khpg.org/files/docs/1444128406.pdf>>, date of referral: April 20, 2016. *Ref. also to* Ukrainian Helsinki Human Rights Union, (Human Rights in Ukraine, '2014 Report') (2015) 67 (further – «Human Rights in Ukraine, '2014 Report'») <<http://helsinki.org.ua/files/docs/1431611652.pdf>>, date of referral: April 20, 2016.

⁴⁷ Justice for Peace on the Donbass, «Those who survived the hell: Testimony of the victims about the places of illegal imprisonment on the Donbass» (2015) 55–75. *Ref. also to* Center for Civil Liberties, «“Chemical Triangle” of Luhansk region during the occupation: hostages, tortures and extrajudicial executions: Report of visit of the monitoring group of the Centre for Civil Liberties to Severodonetsk, Lysychansk and Rubizhne during December 6-11, 2014. (January 5, 2015) (further – «Report “Chemical Triangle”») <http://ccl.org.ua/wp-content/uploads/2013/07/7_zvit-final-all-engl.pdf>, date of referral: April 20, 2016; «Human Rights in Ukraine, '2014 Report'» (2015) 67.

⁴⁸ Ukrainian Helsinki Human Rights Union (further – «UHHRU»), «Monitoring visit “The problem of gender-based abuse in the conflict zone” according to the results of the monitoring visit of the Human rights activists to the zone of anti-terrorist operation» (August 11-16, 2015) <<http://old.helsinki.org.ua/files/docs/1446546966.pdf>>, date of referral: April 20, 2016. *Ref. also to* ('Communication within CEDAW on violations committed by the Russian Federation on the parts of Donetsk and Luhansk Regions of Ukraine, controlled by the anti-government armed groups which are under the effective control of the Russian Federation') session 62 (October, 2015) <http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/RUS/INT_CEDAW_NGO_RUS_22003_E.pdf>, date of referral: April 20, 2016.

⁴⁹ (Human Rights in Ukraine, '2014 Report' (2015) 67. *Ref. also to* «Report “Chemical Triangle”».

⁵⁰ UHHRU, Monitoring visit “Monitoring of human rights violations of citizens of Svatove (destruction of local infrastructure, physical injuries) as a result of improper storage of ammunition”: UHHRU monitors have visited the town of Svatove, Luhansk region. (November 3-7, 2015) (further – «Report according to the results of the monitoring visit to Svatove») <<http://helsinki.org.ua/files/docs/1448103949.pdf>>, date of referral: April 20, 2016; Human Rights in Ukraine, '2014 Report'» (2015) 67.

⁵¹ Global Rights Compliance LLP, Report «The Domestic Implementation of International Humanitarian Law in Ukraine» (November, 2016).

⁵² Ibid.

438 of the Criminal Code of Ukraine provides for the possibility of prosecution for a number of war crimes, although the degree of specificity and detail of this article is insufficient. Amending the Criminal Code of Ukraine to ensure fair and effective prosecution for a whole range of grave breaches of IHL remains crucial in combatting impunity for the most serious international crimes, including Ukraine's compliance with its international obligations under treaty and customary international laws.

The analysis of current legislation, of analytical materials from the available sources and of existing limited practice, as discussed later in this report, suggests that in Ukraine, there is currently no comprehensive model of investigation and prosecution on suspicion of grave breaches of IHL classified as crimes of a general criminal nature or international crimes (war crimes, crimes against humanity or the crime of genocide). In addition, the number of relevant prosecution cases remain very low. And all of them refer to criminal charges of "general criminal nature", that is, crimes with no links to the international component (in particular murder and abduction), which usually results in the application of relatively 'soft' forms of punishment.

Violations of the IHL and other grave violations of international law mentioned above, available open-source information (in particular, collected by the UNHRMMU and civil society organizations) indicate a significant prevalence of a number of possible war crimes.

Furthermore, although additional data is required to conduct in-depth assessment of the nature and scale of other crimes, crimes against humanity could have been committed⁵³. However, there are reasons to believe that Ukraine mostly does not ensure prosecution for such crimes, either as crimes of general criminal law or as international crimes. It should be emphasized once again that the Criminal Code of Ukraine still does not contain an article on crimes against humanity that would correspond to the current state of play in international criminal law and fail to meet the existing international obligations of Ukraine under general international law (its peremptory rules in particular).

Based on the information entered into the Unified Register of Court Decisions, one can draw conclusions about the conduct that may be qualified as grave IHL violations or other international law violations. At the same time, the courts practice several distinguished key approaches well described in the Global Rights Compliance Report (November 2016) as "algorithms":

- General lack of instances providing accountability for the IHL violations or other grave international law violations as international crimes;
- Regular indictments against "separatists" (or persons suspected of supporting the separatist militants' efforts in Eastern Ukraine) charging them with Article 437 (2): Conducting an aggressive war⁵⁴ and/or committing one or more common criminal offenses under the

⁵³ See also to OHCHR, (Accountability for killings in Ukraine from January 2014 to May 2016) (July 14, 2016) <http://www.ohchr.org/Documents/Countries/UA/OHCHRThematicReportUkraineJan2014-May2016_EN.pdf>, date of referral: July 21, 2016.

⁵⁴ *Case of Starkov* № 225/5523/15-к (Verdict) Dzerzhynsky Town Court of Donetsk region (September 25, 2015); *Case of Philipov* (Verdict) Primorsk District Court of Zaporizhzhia region (February 12, 2016); *Case of Gorbunov* № 328/67/16-к (Verdict) Tokmatsk District Court of Zaporizhzhia region (February 12, 2016); *Case of Oleg Kartashov* №221/2405/15-к (Decree) Volnovaha District Court of Donetsk region (April 22, 2016); *Case of Valery Ivanov* № 420/3026/15-к (Decision) Novopokrovsk District Court of Lugansk region (April 28, 2016); *Case of Andriy Langer* № 235/9442/15-к (Decision) Krasnoarmiysk City District Court of Donetsk region (April 15, 2016); *Case of Fedir Degilevich* № 326/195/16-к (Decision) Berdyansk City District Court of Zaporizhzhia region (April 21, 2016); *Case № 235/89/16-к* (Decision) Konstantynivsk City District Court of Donetsk region (April 26, 2016); *Case of Viktor Koloschuk and Olexandr Zarochunec* № 263/15014/15-к (Decision) Court of Appeals of Donetsk region (March 29, 2016); *Case of Yerofeyev and Alexandrov* № 752/15787/15-к (Verdict) Kyiv Golosiivsk District Court (May 18, 2016); *Case of Iryna Novikova* № 265/7705/15-к (Decision) Mariupol Ordzhonikidzevsk District Court (April 28, 2016); *Case of Olexandr Shestak* № 225/6623/15-к (Verdict)

Criminal Code of Ukraine, including; Article 255: Creation of a criminal organization⁵⁵; Article 258-3: Participation in a terrorist group or a terrorist organization⁵⁶; Article 260(2): Participation in activities of illegal paramilitary or armed groups⁵⁷; Article 110: Encroachment on the territorial integrity and inviolability of Ukraine⁵⁸; Article 263(1):

Dzerzhinsk Town Court of Donetsk region (March 28, 2016); *Case of Vitaly Nesvytsky* № 235/9919/15-к (Decision) Krasnoarmiysk City District Court of Donetsk region (April 8, 2016).

⁵⁵ *Case of Squadron «Tornado»* № 756/16332/15-к (Decision) Kyiv Obolon District Court (May 4, 2016).

⁵⁶ *Case of Seledcov* № 161/338/16-к (Verdict) Lutsk City District Court of Volyn region (February 23, 2016); *Case of Vakula* № 761/11988/15-к (Verdict) Selidivsk Town Court of Donetsk region (January 15, 2016); Case № 243/4875/14 (Verdict) Slovyansk City District Court of Donetsk region (January 15, 2013); Case № 310/8512/14-к (Verdict) Berdyansk City District Court of Zaporizhzhia region (February 19, 2015); *Case of Gorbunov* № 328/67/16-к (Verdict) Tokmatsk District Court of Zaporizhzhia region (February 25, 2016); *Case of Oleg Kartashov* № 221/2405/15-к (Decree) Volnovaha District Court of Donetsk region (April 22, 2016); *Case of Valery Ivanov and Andriy Langer* № 420/3026/15-к (Decision) Novopetrovsk District Court of Lugansk region (April 28, 2016); *Case of Andriy Langer* № 235/9442/15-к (Decision) Krasnoarmiysk City District Court of Donetsk region (April 15, 2016); *Case of Fedir Degilevich* № 326/195/16-к (Decision) Berdyansk City District Court of Zaporizhzhia region (April 21, 2016); *Case of Yevgen Parovin* № 325/266/16-к (Decision) Priazovsk District Court of Zaporizhzhia region (May 5, 2016); Case № 235/89/16-к (Decision) Konstantinivsk City District Court of Donetsk region (April 26, 2016); *Case of Yerofeyev and Alexandrov* № 752/15787/15-к (Verdict) Kyiv Golosiivsk District Court (May 18, 2016); *Case of Irina Novikova* № 265/7705/15-к (Decision) Ordzhonikidzevsk District Court of Mariupol (April 28, 2016); *Case of Olexandr Shestak* № 225/6623/15-к (Verdict) Dzerzhinsk Town Court of Donetsk region (March 28, 2016); Case № 423/1063/15-к (Verdict) Popasniansk District Court of Lugansk region (January 14, 2016); Case № 428/1476/15-к (Verdict) Severodonetsk City Court of Lugansk region (October 21, 2015); Case № 225/3461/15-к (Verdict) Dobropilsk City District Court of Donetsk region (November 9, 2016); Case № 239/621/15-к (Verdict) Kramatorsk Town Court of Donetsk region (February 8, 2016); Case № 263/9391/15-к (Decision) Mariupol Zhovtneve District Court of Donetsk region (August 11, 2015); Case № 263/6222/15-к (Decision) Mariupol Zhovtneve District Court of Donetsk region (June 4, 2015); Case № 266/2069/15-к (Decision) Court of Appeals of Donetsk region (October 29, 2015); Case № 263/1057/15-к (Decision) Mariupol Zhovtneve District Court of Donetsk region (January 26, 2015); Case № 428/9748/15-к (Decision) Severodonetsk District Court of Lugansk region (September 30, 2015); Case № 221/2304/15-к (Decision) Volnovaha District Court of Donetsk region (July 21, 2015); Case № 243/4875/14 (Verdict) Slovyansk City District Court of Donetsk region (January 13, 2015); Case № 219/8206/15-к (Verdict) Artemivsk District Court of Donetsk region (November 18, 2015); Case № 229/1522/15-к (Verdict) Druzhkivsk Town Court of Donetsk region (October 30, 2015).

⁵⁷ *Case of Seledcov* № 161/338/16-к (Verdict) Lutsk City District Court of Volyn region (February 23, 2016); *Case of Vakula* № 761/11988/15-к (Verdict) Selidivsk Town Court of Donetsk region (January 15, 2016); Case № 243/4875/14 (Verdict) Slovyansk City District Court of Donetsk region (January 13, 2015); Case № 310/8512/14-к (Verdict) Berdyansk City District Court of Zaporizhzhia (February 19, 2015); *Case of Gorbunov* № 328/67/16-к (Verdict) Tokmatsk District Court of Zaporizhzhia region області (February 25, 2016); *Case of Oleg Kartashov* № 221/2405/15-к (Decree) Volnovaha District Court of Donetsk region (April 22, 2016); *Case of Valery Ivanov* № 420/3026/15-к (Decision) Novopetrovsk District Court of Lugansk region (April 28, 2016); *Case of Andriy Langer* № 235/9442/15-к (Decision) Krasnoarmiysk City District Court of Donetsk region (April 15, 2016); *Case of Fedir Degilevich* № 326/195/16-к (Decision) Berdyansk City District Court of Zaporizhzhia (April 21, 2016); *Case of Yevgen Parovin* № 325/266/16-к (Decision) Priazovsk District Court of Zaporizhzhia region (May 5, 2016); Case № 235/89/16-к (Decision)) Konstantynivsk City District Court of Donetsk region (April 26, 2016); *Case of Yerofeyev and Alexandrov* № 752/15787/15-к (Verdict) Kyiv Golosiivsk District Court (May 18, 2016); *Case of Iryna Novikova* № 265/7705/15-к (Decision)) Mariupol Ordzhonikidzevsk District Court (April 28, 2016); *Case of Olexandr Shestak* № 225/6623/15-к (Verdict) Dzerzhynsky Town Court of Donetsk region (March 28, 2016); Case № 423/1063/15-к (Verdict) Popasniansk District Court of Lugansk region (January 14, 2016); Case № 428/1476/15-к (Verdict) Severodonetsk City Court of Lugansk region (October 21, 2015); Case № 225/3461/15-к (Verdict) Dobropilsk City District Court of Donetsk region (November 9, 2016); Case № 239/621/15-к (Verdict) Kramatorsk Town Court of Donetsk region (February 8, 2016); Case № 263/9391/15-к (Decision) Mariupol Zhovtneve District Court of Donetsk region (August 11, 2015); Case № 263/6222/15-к (Decision) Mariupol Zhovtneve District Court of Donetsk region (June 4, 2015); Case № 266/2069/15-к (Decision) Court of Appeals of Donetsk region (October 29, 2015); Case № 263/1057/15-к (Decision) Mariupol Zhovtneve District Court of Donetsk region (January 26, 2015); Case № 428/9748/15-к (Decision) Severodonetsk City Court of Lugansk region (September 30, 2015); Case № 221/2304/15-к (Decision) Volnovaha District Court of Donetsk region (July 21, 2015); Case № 243/4875/14 (Verdict) Slovyansk City District Court of Donetsk region (January 13, 2015); Case № 219/8206/15-к (Verdict) Artemivsk District Court of Donetsk region (November 18, 2015); Case № 229/1522/15-к (Verdict) Druzhkivsk Town Court of Donetsk region (October 30, 2015).

⁵⁸ Article 110 (1) provided criminal accountability for «Deliberate actions, committed to change the boundaries of the territory or state border of Ukraine on violation of the order, established by the Constitution of Ukraine, as well as, public appeals or distribution of materials with appeals for such actions»; *ref., e.g.*: Case № 235/89/16-к

Illegal handling of weapons⁵⁹; Article 332-1(2): Violation of the rules of entry into and exit from the temporarily occupied territory of Ukraine⁶⁰; Article 341: Capturing government buildings⁶¹;

- Holding liable or prosecution of officials (public authorities and /or military structures) of Ukraine for a number of common criminal offenses under the national law, in particular: Article 365: Abuse of power and authority or abuse of office⁶²; Article 409 (3): Evasion from military service and/or refusal to carry out one's military service duties⁶³; Article 425: Negligence towards military service⁶⁴; Article 426: Inaction of military authorities⁶⁵;
- Occasional prosecution of conduct, which may be classified as a violation of IHL or other grave international law violation, as a general criminal law offense stipulated by the national law, including as follows: Article 115: Murder⁶⁶; Article 121: Intentional grave bodily injury⁶⁷; Article 127 (2): Torture committed repeatedly or following prior conspiracy by a group of persons, or on racial, ethnic or religious grounds⁶⁸; Article 146: Illegal deprivation of liberty or abduction of a person⁶⁹; Article 153 (2): Enforced unnatural

(Decision) Konstyantynivsk City District Court of Donetsk region (April 26, 2016); article 110(2) provided criminal accountability for encroachment on territorial integrity and inviolability of Ukraine «if they are committed by the individual, who is the authority representative either repeatedly, or by a prior conspiracy by a group of persons, or combined with incitement to national or religious hatred»; *ref., e.g.*: Case № 235/481/16-к (Decision) Court of Appeals of Donetsk region (March 17, 2016); article 110(3) provided criminal accountability for pointed out Acts of encroachment if they «lead to the death of people or other grave consequences»; *ref., e.g.*: Case of *Seledcov* № 161/338/16-к (Verdict) Lutsk City District Court of Volyn region (February 23, 2016).

⁵⁹ *Ref., e.g.*: Case of *Starkov* № 225/5523/15-к (Verdict) Dzerzhynsky Town Court of Donetsk region (September 25, 2015); Case of *Kulmatytskyy* № 200/13169/15-к (Verdict) Dnipropetrovsk Babushkinsk District Court (September 21, 2015); Case of *Seledcov* № 161/338/16-к (Verdict) Lutsk City District Court of Volyn region (February 23, 2016); Case № 310/8512/14-к (Verdict) Berdyansk City District Court of Zaporizhzhia (February 19, 2015); Case of *Gorbunov* № 328/67/16-к (Verdict) Tokmatsk District Court of Zaporizhzhia region (February 25, 2016); Case of *Oleg Kartashov* № 221/2405/15-к (Decree) Volnovaha District Court of Donetsk region (April 22, 2016); Case № 235/481/16-к (Decision) Court of Appeals of Donetsk region (March 17, 2016); Case of *Andriy Langer* № 235/9442/15-к (Decision) Krasnoarmiysk City District Court of Donetsk region (April 15, 2016); Case of *Fedir Degilevich* № 326/195/16-к (Decision) Berdyansk City District Court of Zaporizhzhia (April 21, 2016); Case of *Yevgen Parovin* № 325/266/16-к (Decision) Priazovsk District Court of Zaporizhzhia region (May 5, 2016); Case of *Yerofeyev and Alexandrov* № 752/15787/15-к (Verdict) Kyiv Golosiivsk District Court (May 18, 2016); Case № 233/2476/15-к (Verdict) Konstyantynivsk City District Court of Donetsk region (July 2, 2015); Case № 185/3279/15-к (Verdict) Pavlograd City District Court of Dnipropetrovsk region (May 14, 2015); Case of *Kulmatytskyy* № 200/13169/15-к (Verdict) Dnipropetrovsk Babushkinsk District Court (September 21, 2015); Case № 243/4875/14 (Verdict) Slovyansk City District Court of Donetsk region (January 13, 2015); Case № 229/1522/15-к (Verdict) Druzhkivsk Town Court of Donetsk region (October 30, 2015).

⁶⁰ *Ref., e.g.*: Case of *Starkov* № 225/5523/15-к (Verdict) Dzerzhynsky Town Court of Donetsk region (September 25, 2015); Case of *Yerofeyev and Alexandrov* № 752/15787/15-к (Verdict) Kyiv Golosiivsk District Court (May 18, 2016).

⁶¹ Case of *Seledcov* № 161/338/16-к (Verdict) Lutsk City District Court of Volyn region (February 23, 2016).

⁶² Case № 415/1468/15-к (Verdict) Lysychansk Town Court of Lugansk (July 6, 2015); Case of *squadron «Tornado»* № 756/16332/15-к (Decision) Kyiv Obolon District Court (May 4, 2016); Case of *Agafonov* № 638/18003/15-к (Decision) Court of Appeals of Kharkiv region (November 23, 2015).

⁶³ Case against the *soldiers of 51st separate mechanized brigade* №408/133/15, Volodymyr-Volynskiy Town Court of Volyn region.

⁶⁴ Case № 234/11343/15-к (Verdict) Kramatorsk Town Court of Donetsk region (August 12, 2015).

⁶⁵ Case № 243/7099/14 (Verdict) Slovyansk City District Court of Donetsk region (December 18, 2014); Case № 185/9886/14-к (Verdict) Pavlograd City District Court of Dnipropetrovsk region (December 17, 2014).

⁶⁶ Case of *Olexandr Svidr*, Artemivsk District Court of Donetsk region; Case about the murder of two women by the combatants of Armed Forces of Ukraine», Prosecutor's Office of the Donetsk region (June 17, 2015)

<http://don.gp.gov.ua/ua/news.html?_m=publications&_c=view&_t=rec&id=157759>, date of referral: June 23, 2016; Case № 233/3431/15-к (Verdict) Konstyantynivsk City District Court of Donetsk region (November 4, 2015); Case № 235/7/15-к (Verdict) Krasnoarmiysk City District Court of Donetsk region (November 2, 2015).

⁶⁷ «Ukrainian soldiers took justice into their own hands in Talakivka and killed the man.» (Obozrevatel. Investigation, June 1, 2015) <<http://obozrevatel.com/crime/35127-ukrainskie-voennyye-ustroili-samosud-v-talakovke-i-ubili-muzhchinu.htm>>, date of referral: June 23, 2016; Case № 219/5483/15-к (Verdict) Artemivsk District Court of Donetsk region (January 29, 2016).

⁶⁸ Case of *squadron «Tornado»* № 756/16332/15-к (Decision) Kyiv Obolon District Court (May 4, 2016).

⁶⁹ Case of *Kulmatytskyy* № 200/13169/15-к (Verdict) Dnipropetrovsk Babushkinsk District Court (September 21, 2015); Case № 234/31/15-к (Verdict) Kramatorsk Town Court of Donetsk region (January 13, 2015); Case №

sexual act⁷⁰ 238; Article 28 (2): Car theft⁷¹; Article 342 (2): Resistance to the state authority officer⁷².

Regarding Ukraine's approach to prosecuting war crimes, the Criminal Code of Ukraine enables criminal prosecution for a number of war crimes under Article 438, which generally stipulates criminal penalties for "violating laws and customs of war." This article provides for criminal liability for any use of means of warfare prohibited by the international law, including international treaties and customary international law provisions⁷³. This article also establishes criminal liability for any other violations of laws and customs of war stipulated by the international regulatory acts ratified by Ukraine.

In addition to the above-mentioned typical mistake related to the refusal to qualify the situation in Ukraine as an armed conflict due to the absence of a martial law, the application of Article 438 of the Criminal Code of Ukraine is precluded by the application of a specific legal technique with reference to treaty and customary international law. This implies that the court should have deep knowledge of international humanitarian law and international criminal law, which, for objective reasons, is feasible neither in Ukraine, nor indeed in any other state. A possible solution could be the creation of a specialized court for war crimes, which judges would possess the required knowledge. However, in our opinion, it would be much more effective to specify Article 438 by envisaging a number of various *corpus delicti* for war crimes that would be arranged by objects of crime, yet in their content would correspond to Article 8 of the Rome Statute of the International Criminal Court.

In addition, the Criminal Code of Ukraine allows for prosecution for a number of more specific crimes also qualified as war crimes. These crimes are provided in Section XIX "Crimes against the established rules of military service (military offences)" and Section XX "Crimes against peace, security of mankind and international law and order" under a Special Part of the Criminal Code of Ukraine.

Regarding Section XIX of the Criminal Code of Ukraine, it contains a list of crimes for which only servicemen of the Armed Forces of Ukraine, National Guard of Ukraine, State Border Guard Service of Ukraine, Security Service of Ukraine and of other groups related to defense activities are prosecuted.

Thus, at the moment, Ukraine is not fulfilling to the full extent its international obligations on holding to account persons suspected of having committed war crimes or other crimes under international law. However, one can expect some progress related to the first verdict in which Ukraine has applied Article 438 to establish responsibility. On June 1, 2007, the Judicial Panel of Slovianskiy City-District Court of Donetsk Oblast found a Ukrainian national guilty of participation in the terrorist organization "DNR", assistance to the Russian Federation in conducting an aggressive war against Ukraine, and violations of laws and customs of war. In particular, the Court concluded that the defendant *"by acting deliberately, repeatedly, on personal motives related to the hostile attitude towards persons who participate in the anti-terrorist operation, in order to cause them physical suffering ..., //, fulfilling the tasks assigned to him, being aware that the servicemen of the Ukrainian Armed Forces who had been captured by the terrorist organization "DNR" withdrew from participating in the hostilities and were*

431/52/15-к (Verdict) Starobilsk District Court of Lugansk region (January 6, 2015); Case № 233/1146/15-к (Verdict)) Konstantynivsk City District Court of Donetsk region (March 18, 2015); *Case of squadron «Tornado»* № 756/16332/15-к (Decision) Kyiv Obolon District Court (May 4, 2016) *Case of Agafonov* № 638/18003/15-к (Decision) Court of Appeals of Kharkiv region (November 23, 2015).

⁷⁰ *Case of squadron «Tornado»* № 756/16332/15-к (Decision) Kyiv Obolon District Court (May 4, 2016).

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *See above*, para.14–23.

deprived of the opportunity to resist, acting in violation of the requirements of Art. 3 and Art. 68 of the Constitution of Ukraine, Art. 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950), Art. 13 and Art. 14 of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, committed brutal treatment of the Armed Forces of Ukraine captive military servicemen / ... / by regular applying to each of them mental violence that was displayed in threats of murder, other acts that posed a threat to their health, scared them and insulted them with boldness and cruelty, taking advantage of the defenselessness of the prisoners and the lack of opportunities for self-defense"⁷⁴.

In addition, some positive changes in the context of punishment for war crimes include the plans by G. Mamedov, Prosecutor of the Autonomous Republic of Crimea, aimed to combine with the said criminal proceeding (under Article 438 of the Criminal Code of Ukraine) criminal proceedings that involved investigation of the facts of unlawful appropriation and seizure of state property under Articles 191, 341 of the Criminal Code of Ukraine (more than 50 proceedings), as well as initial proceedings that involved investigations under other articles of the CCU (for example, "Sentsov's group" case proceeding instituted under Article 146 - illegal deprivation of liberty). The Prosecutor adds that more than 120 criminal proceedings instituted due to the facts of illegal deprivation of liberty of citizens and searches in their homes, including over 20 proceedings on the violation of journalists' rights and freedoms, will also be combined with this proceeding and they will be subject to a legal evaluation within the joint criminal procedure under Article 438 of the Criminal Code of Ukraine⁷⁵.

Indeed, there is not enough reasons to believe that such a prosecution for "general criminal offenses" will be sufficient to ensure the effectiveness of criminal punishment or, in the event of cases against senior officials, the proper coverage of the same types of conduct as the conduct that (possibly) will be considered the Interbational Criminal Court. There are quite good reasons to believe that some violations will require prosecution as for international crimes to ensure the effectiveness of criminal penalties (these are at least war crimes, if not crimes against humanity). In such circumstances, the lack of prosecution instances involving application of the Criminal Code of Ukraine articles on war crimes is a significant indication that Ukraine is currently not fulfilling its international obligations.

OCCASIONAL PROSECUTION FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS AS COMMON CRIMINAL OFFENSES STIPULATED BY THE NATIONAL LAW

According to the facts of the case, "Tornado" was a volunteer squadron made of a special police patrol service set under the Ministry of Internal Affairs of Ukraine⁷⁶. A national criminal proceeding regarding a number of the group's representatives was initiated, in particular concerning: Yuriy Shevchenko, Mykyta Sviridovsky, Mykyta Kusta, Roman Ivash, Andriy Demchuk, Boris Gulchuk, Maxim Glebov, and Ruslan Onyshchenko⁷⁷. It is stated that the listed members of the Tornado squadron tortured civilians who were illegally detained and abused them. In particular, according to the charges brought by Mr. Matios, Chief Military Prosecutor of Ukraine, Mr. Onishchenko (the commander of the Tornado squadron) created an illegal armed group and, during the period of January-April 2015, encouraged his subordinates to commit particularly serious crimes, including illegal detention of the local population, murder, torture and sexual abuse. It is alleged that such acts involved arrests of at least ten people and torturing them, electric torture, beatings, rape and murder of some of these people, including

⁷⁴ Case № 243/4702/17 (Verdict) Slovyansk City District Court of Donetsk region (June 1, 2017).

⁷⁵ Samar V. Checking the off-road / Dzerkalo tyzhnya. - <https://dt.ua/internal/perevirka-na-bezdorizhzi-246522.html>. – June 25, 2017.

⁷⁶ OHCHR, (Report on the Human Rights Situation in Ukraine) (November 16, 2015– February 15, 2016) para. 123 <www.ohchr.org/Documents/Countries/UA/11thOHCHRreportUkraine.pdf>, date of referral: April 20, 2016.

⁷⁷ Case of squadron «Tornado» № 756/16332/15-к (Decision) Kyiv Obolon District Court (May 4, 2016).

sexual abuse of a woman⁷⁸. There are grounds to assume that video was made of the several cases of such crimes⁷⁹. In the light of evidence available, there are reasons to believe that there is no explanation or any direct apparent reason to detail or justify the absence of charges with war crimes (including intentional murder and/or murder, torture, ill-treatment, inhuman treatment, causing severe suffering, deprivation of liberty, abuse of human dignity, rape or sexual abuse) due to the range of manifestations of such behavior⁸⁰.

The use of a similar algorithm can be observed in the case of Alexander Agafonov's murder. As it was mentioned, it is alleged that Mr. Agafonov's death was caused by murder - as a result of bodily injuries caused by SBU representatives charged under Articles 146 (illegal deprivation of liberty) and (abuse of power and authority) of the Criminal Code of Ukraine⁸¹. Again, in the light of evidence, there is no explanation, nor any direct obvious reasons to detail or justify the absence of prosecution for war crimes (including intentional murder and/or murder, torture, ill-treatment, inhumane treatment, causing severe suffering, deprivation of liberty or abuse of human dignity) due to the range of manifestations of such behavior⁸².

Related to the case of Volodymyr Kulmatytsky⁸³, similar questions arise regarding the absence of prosecution for war crimes. In this case, the persons concerned were charged with unlawful deprivation of liberty (under Article 146 (2)) and illegal handling of weapons (under Article 263 (1)). Mr. Kulmatytsky, a former Deputy Mayor of Sloviansk, is alleged to have been abducted by three soldiers and one commander (Mr. A) belonging to "Dnipro-1" battalion (part of the Ministry of Internal Affairs of Ukraine) and killed by Mr. A later that day. Mr. A received information that Mr. Kulmatytsky was involved in funding the DNR (Donetsk People's Republic). On January 28, 2015, he ordered the three subordinates to go to Mr. Kulmatytsky's house to verify the information. Mr. A joined them later. It is generally alleged that and his driver were taken to the forest and killed illegally. Mr Kulmatytsky's and his driver's bodies were found on January 31, 2015⁸⁴. Mr. A being the only murder suspect was killed (or committed suicide) during the investigation when the police officers tried to detain him. Other defendants were found guilty of human abduction (under Article 146 (2)) and illegal handling of weapons (under Article 263). They were sentenced to four years of imprisonment with a probationary period of three years.

The crimes outlined point to a policy (informal or of some other nature) of prosecution against combatants for crimes against civilians or those who have withdrawn from participation in hostilities (*hors de combat*)⁸⁵ by referring to general criminal offenses provided for by the national law, yet not to war crimes. However, Ukraine's prosecution for especially general

⁷⁸ «Crimes "Tornado": The person was tied to the sport projectile and raped.» (112.UA; 2015) <<http://ua.112.ua/mnenie/zlochyny-tornado-pryviazaly-liudynu-do-sportyvnoho-snariada-i-zgvaltuvaly-18-238616.html>>, date of referral: April 20, 2016.

⁷⁹ «"Tornado" combatants were detained for the tortures and group rape,- Matios» (112.UA; 2015) <<http://112.ua/ato/boycy-tornado-zaderzhany-za-pytki-i-grupповoe-iznasilovanie-matios-238141.html>>, date of referral: April 20, 2016.

⁸⁰ The listed crimes are prosecuted on the basis of a number of international treaties.

⁸¹ УВКПЛ, «Доповідь щодо ситуації з правами людини в Україні» (Report on the Human Rights Situation in Ukraine) (August 16– November 15, 2015) п.114 <www.ohchr.org/Documents/Countries/UA/12thOHCHRreportUkraine.pdf>, date of referral: April 20, 2016.

⁸² The listed crimes are prosecuted on the basis of a number of international treaties.

⁸³ *Case of Kulmatytskyy № 200/13169/15-к* (Verdict) Dnipropetrovsk Babushkinsk District Court (September 21, 2015).

⁸⁴ «Police officers found the Deputy ex-mayor Shtepa of Slovyansk to be dead.» (TSN.ua, 2015) <<http://tsn.ua/ukrayina/pravoohorongi-znayshli-mertvim-zastupnika-skandalnogo-eks-mera-slov-yanska-shtepi-406392.html>>, date of referral: April 20, 2016.

⁸⁵ ICRC, (Exploring Humanitarian Law: Glossary) (ICRC, 2009) 7 <www.icrc.org/eng/what-we-do/building-respect-ihl/education-outreach/ehl/ehl-other-language-versions/ehl-english-glossary.pdf>, date of referral: April 20, 2016: literal meaning of the term *hors de combat* – «out of combat operations»; this term is used for marking the combatants who were captured or injured, or who are sick or experienced a shipwreck, or laid down arms or gave up and, as a result, are not capable of taking part in combat operations anymore.

criminal offenses (and overall indulgence) - as discussed above - cannot be considered outside the general context of the prosecution outlined in this section of the report. Such a procedure should be considered in the context of the apparent lack of investigation and prosecution for most cases of unlawful conduct (reported by the UNHRMMU and civil society organizations), which clearly indicates the commission of war crimes. Consideration of the current situation in this context serves as the basis for a reasonable assumption claiming the existence of a policy (informal or otherwise) that involves evading the prosecution for war crimes as international crimes or even general criminal offenses.

CONCLUSIONS

1. The legal basis for prosecution of persons responsible for international crimes committed in the context of the armed conflict in the territory of Ukraine are the State's obligations under treaty and customary international humanitarian law. In addition, similar requirements to the state are put forward by the European Convention on Human Rights, in particular regarding positive obligations under Articles 2 and 3 of the Convention formulated by the European Court of Human Rights.
2. At present, the practice of prosecution carried out by Ukraine indicates the lack of effective criminal sanctions for the violations of IHL and other serious violations of international law. This includes the identification and tracing of persons suspected of committing (or giving order to commit) such crimes, as well as fulfillment of obligations to bring such persons to justice (irrespective of their nationality) by the national courts or to extradite them to another state⁸⁶.
3. The refusal of the Ukrainian authorities to impose a martial law does not prevent the courts from qualifying the situation in the Autonomous Republic of Crimea, the city of Sevastopol and certain areas of Donetsk and Lugansk oblasts as an armed conflict and applying the relevant rules of international humanitarian law applicable in the international armed conflict. The application of the Criminal Code of Ukraine articles concerning grave violations of the international humanitarian law, primarily Article 438, is the responsibility of the Ukrainian judiciary stemming from treaty and customary international humanitarian law, human rights and international criminal law.
4. The full implementation by Ukraine of its obligations to combat impunity for the most grave crimes against international law committed in the context of an armed conflict should be ensured by bringing the Criminal Code of Ukraine (in particular, Section XX of its Special Part, but also a number of General Provisions) in line with the current state of the international criminal law.
5. An important aspect of ensuring Ukraine's compliance with its obligations to combat impunity for the most grave crimes against the international law is to deepen the knowledge of judges, prosecutors and lawyers on international law, in particular international humanitarian law, human rights, and international criminal law.

⁸⁶ Geneva Convention I, article.49; Geneva Convention II, article.50; Geneva Convention III, article.129; Geneva Convention IV, article.146; Additional protocol I, article.86.