

JUSTICE IN EASTERN UKRAINE DURING THE MILITARY AGGRESSION OF THE RUSSIAN FEDERATION

Research report:
Capacity of the Judiciary System to Ensure Justice
in the Armed Conflict in Eastern Ukraine.
Executive summary

2016 – 2017

KYIV – 2018



The study was conducted upon the initiative and with the organizational and financial support from the Human Rights and Justice Program Initiative of International Renaissance Foundation

FOREWORD

The armed conflict in Eastern Ukraine caused by the aggression of the Russian Federation (hereinafter – RF), led to tens of thousands of casualties, displacement of hundreds of thousands of people, as well as loss of property and business. Ukraine faced a vast layer of problems connected with the need to ensure justice and restore violated rights. War crimes, disappearances and extrajudicial arrests, exchange of prisoners outside of legal procedures, looting, increased pressure on judges from different sides, the challenges in restoring lost case files are only a tip of the iceberg. The scope of these problems has not been assessed yet.

How did the armed conflict affect the Ukrainian justice system and its capacity to ensure justice in war? How ready was it for these challenges? Is it capable of coping with these challenges today? Which problems were solved? Which issues need additional attention? Which problems can occur in the future, and what should be done to prevent them? We will try to answer these questions in this publication summarizing two years of work of a group of Ukrainian researchers initiated and supported by the International Renaissance Foundation.

We should make a note on the terminology. We used the term “armed conflict caused by the aggression of the Russian Federation” to describe the situation in eastern Ukraine. At the same time, experts, politicians, media professionals often call it a “hybrid war”. In fact, in addition to traditional means and methods of warfare, this conflict includes non-traditional means and methods. In particular, it was not an announced war. The Russian Federation is trying to hide its presence and participation in the armed conflict in Donbas and refers to the “independence” of the so-called Donetsk and Luhansk People’s Republics (hereinafter – the so-called DPR and LPR). Information attacks and threats, influence on the opinion of many people through the controlled media is an important component of this war. In this regard, the conflict in Donbas can be called a hybrid war from a political viewpoint.

However, the term “hybrid war” has not become a legal category yet and does not exist in legal instruments. In terms of international law, based on the UN General Assembly Resolution 3314 (14 December 1974), we can state that the RF committed aggression

against the sovereignty, territorial integrity and political independence of Ukraine¹. Moreover, in the situations in Crimea and Donbas the Russian Federation has committed almost all acts of aggression listed in the annex to the resolution, in particular:

- The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof,
- Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- The blockade of the ports or coasts of a State by the armed forces of another State;
- An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Therefore, the term “hybrid war” cannot be used to describe the situation in the East of Ukraine yet, but it is more suitable for political context. From the viewpoint of international law, the situation in Donbas is an ongoing aggression of the Russian Federation against Ukraine.

However, the Parliamentary Assembly of the Council of Europe took the first step to look at the term “hybrid war” as a legal category. On 26 April 2018, PACE adopted Resolution 2217 (2018)² and Recommendation 2130 (2018)³ entitled “Legal challenges related to hybrid war and human rights obligations”. The Assembly noted that today States are more and more often confronted with the phenomenon of “hybrid war”, which poses a new type of threat based on a combination of military and non-military means such as cyberattacks, mass

1 3314 (XXIX). Definition of Aggression // <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/739/16/IMG/NR073916.pdf?OpenElement>.

2 Resolution 2217 (2018) “Legal challenges related to hybrid war and human rights obligations”. Text adopted by the Assembly on 26 April 2018 (17th Sitting) // <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24762&lang>.

3 Recommendation 2130 (2018) “Legal challenges related to hybrid war and human rights obligations”. Text adopted by the Assembly on 26 April 2018 (17th Sitting) // <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24763&lang=en>.

disinformation campaigns, including fake news, in particular via social media, interference in election processes, disruption of communications and other networks and many others. Therefore, hybrid war can destabilise and undermine entire societies and cause numerous casualties. The increasingly widespread use of these new tactics, especially in combination, raises concerns about the adequacy of existing legal norms.

The Assembly pointed out that there is no universally agreed definition of “hybrid war” and there is no “law of hybrid war”. However, it is commonly agreed that the main feature of this phenomenon is “legal asymmetry”, as hybrid adversaries, as a rule, deny their responsibility for hybrid operations and try to escape the legal consequences of their actions. They exploit lacunas in the law and legal complexity, operate across legal boundaries and in under-regulated spaces, exploit legal thresholds, are prepared to commit substantial violations of the law and generate confusion and ambiguity to mask their actions.

Accordingly, the Assembly called on member States to step up international co-operation in order to identify hybrid war adversaries and all types of hybrid war threats, as well as to establish the applicable legal framework. It means there is a chance that international law will give a legal definition of this phenomenon and identify legal remedies to counter hybrid war.

At the same time, Ukraine reacted to hybrid war in accordance with the national legislation not by introducing martial law but through an anti-terrorist operation (hereinafter – ATO). In 2018, the ATO was transformed into a new category entitled “measures to ensure national security and defense, response and deterrence of the military aggression of the Russian Federation in Donetsk and Luhansk regions”.

To identify the territories controlled by the Russian Federation through the so-called DPR and LPR, the authors have used various synonymic terms, such as ORDLO (certain districts of Donetsk and Luhansk regions as defined in the Minsk accords), or the occupied territory (areas) as defined in the national legislation, or the territory of Ukraine outside of the control of Ukrainian government.

We should note that challenges related to the occupation of the Crimean peninsula by the RF were outside the scope of this study.

The justice system in the authors’ understanding includes the judiciary, the law enforcement, as well as other entities tasked with ensuring the rule of law, namely lawyers, forensic experts etc.

To understand the impact of the RF aggression on access to justice in eastern Ukraine, we set the aim to assess the capacity of Ukrainian justice system to operate within the armed conflict in eastern Ukraine and ensure the right to fair trial, as well to develop recommendations to increase capacity in these directions.

Capacity of Ukrainian justice system to fulfill the need for justice can be assessed under the following criteria:

- 1) Availability of infrastructure, trained personnel and financial resources;
- 2) Sufficiency of legal framework;
- 3) Compliance with access to justice standards;
- 4) Ability to conduct effective investigation and fair prosecution for conflict-related crimes.

In 2016-2017, invited experts and civil society organizations conducted the following activities to diagnose existing issues:

- Analysis of legislation and draft laws related to administration of justice during the armed conflict in eastern Ukraine caused by the RF aggression, as well as infrastructure amendments (20 laws and 80 draft laws and related documents reviewed);
- Collection and analysis of statistics relating to the justice system operations in 2013-2017 (the last year prior to the conflict and four years of the conflict);
- Collection of information about related studies (20 studies that reflect the topic of justice in the East of Ukraine during the armed conflict to some extent);
- Monitoring of 214 court hearings in different categories of cases in Donetsk and Luhansk regions located near the ATO area, as well as in other courts in conflict-related cases; monitoring of the technical condition of 52 buildings and resources for administrative operations of the courts in Donetsk and Luhansk regions in November 2016 – April 2017;
- Selection and analysis of 400 court decisions in cases related to the RF aggression in eastern Ukraine (criminal cases, cases on compensation of damage to health, life, property; cases on the rights of internally displaced persons and participants of hostilities; cases on establishment of legal facts in the occupied territories etc.);
- Analysis of almost 750 publications in electronic media on the topic (in particular, investigation of crimes related to the RF aggression in eastern Ukraine, arrests and detention without court decisions, exchange of prisoners, the work of courts, prosecution and investigation authorities near the ATO zone, trials in conflict-related cases);
- Interviews with 40 persons involved in administration of justice in criminal, administrative, and civil cases – judges (10), public prosecutors (2), investigators (11), lawyers (4), victims (5), accused persons (5), a forensic expert, a human rights defender, and a representative of the Ombudsman's Office who live and work in Donetsk and Luhansk regions. Some interviewees had moved from the non-government controlled areas (interviews took place in March-May 2017).

Outcomes of these activities were recorded in a diagnostic table with a list of identified problems, methods used to identify these problems, and relevant sources of information. Later, these results were systematized and processed by experts who identified the list of key issues related to organization and administration of justice in the context of the RF aggression.

In July-August 2017, these problems were discussed in four focus groups (judges, prosecutors, and investigators, lawyers and human rights defenders). The aim of focus groups was to evaluate identified problems and possible solutions from the viewpoint of different stakeholders.

In addition, questionnaires were used to evaluate the scale of identified problems and relevance of solutions. Responses to the questionnaires were provided by 100 judges (40 judges in Donetsk region, 29 judges in Luhansk region, 31 judge in Kyiv region); 100 prosecutors (43 prosecutors in Donetsk region, 34 prosecutors in Luhansk region, and 23 prosecutors in Kyiv); 100 investigators (37 investigators in Donetsk region, 31 investigators in Luhansk region, and 32 investigators in Kyiv); 85 lawyers (37 lawyers in Donetsk region, 17 lawyers in Luhansk region, and 31 lawyer in Kyiv); and 70 human rights defenders (27 in Donetsk region, 18 in Luhansk region, and 25 in Kyiv).

Experts have prepared this report based on these diagnostics and verification tools. The structure of this report is based on the groups of identified issues. It includes recommendations for improving the situation in the field of justice during the armed conflict in eastern Ukraine.

The authors would like to thank the judges, prosecutors, investigators, lawyers, human rights defenders, forensic experts, trial observers, and experts from civil society organizations who contributed to this report. The authors are especially grateful to the International Renaissance Foundation and its team for organizing the conduct of this study.

KEY FINDINGS AND RECOMMENDATIONS

Immediately after the Revolution of Dignity, the Russian Federation (hereinafter – the RF) annexed the Crimean peninsula and started promoting the divide of Ukraine. The imbalanced state authorities, weakness and lack of motivation of the law enforcement prevented them from stopping the activities of militants coordinated by the RF, including the seizure of key state authorities in Donetsk and Luhansk regions.

As a result, the Ukrainian government announced an anti-terrorist operation (hereinafter – the ATO) in the East of Ukraine. Even in the absence of a declared war, there is now a large-scale armed conflict. Though it takes place on Ukrainian land, it is in fact international.

The so-called Minsk agreements were an attempt of political regulation of the conflict. In general, they reduced the level of hostilities but preserved the conflict.

Most courts, prosecutor's offices, internal affairs bodies (police), as well as penitentiary institutions in Donetsk and Luhansk regions found themselves in the occupied area and ceased operations in 2014. Only some of them were evacuated and started working in other cities. State authorities in the government-controlled areas took over the powers of the bodies that had stopped working.

For two years, a group of Ukrainian experts supported by the International Renaissance Foundation studied the impact of the aggression of the Russian Federation on the justice system in Ukraine, challenges faced by the state, and its response.

Below is an overview of key facts and issues identified during the study, as well as recommendations of the experts.

1

INSTITUTIONAL CAPACITY OF THE JUSTICE SYSTEM INSTITUTIONS

1.1

There are serious challenges in ensuring independence and impartiality of judges, prosecutors, and investigators in Donetsk and Luhansk regions. On the one hand, these are long-standing issues: clans of officials and oligarchs had controlled authorities in the justice system. However, new forms of dependence have emerged as well.

The most common form of influence on administration of justice, according to the judges from Donetsk and Luhansk regions, are threats to relatives in the temporarily occupied territories. According to prosecutors, it is dependence on political structures and pressure from of the local government. Investigators, lawyers and human rights defenders considered corruption to be the most common type of influence.

There were recorded cases of the arrests of judges in the ORDLO territory controlled by the Russian Federation. The fact that judges have relatives or valuable property in the non-government controlled areas has negative impact on administration of justice. At the same time, on average, judges in Donetsk and Luhansk regions were less likely to complain about interference than their colleagues across Ukraine were.

Judges and prosecutors fear for their safety when working on conflict-related cases. Moreover, people who facilitated occupation of certain areas of Ukraine are still serving in state authorities in the field of access to justice. As a rule, it has negative impact on judges' and prosecutors' ability to ensure administration of justice.

1.2

Many courts in Donetsk and Luhansk regions are understaffed for general and conflict-related reasons (difficulties in arranging accommodation in a new place of residence, threats to physical security, lack of reserve staff etc.).

Two thirds of interviewed judges in Donetsk and Luhansk regions thought their workload had increased during the armed conflict. At the same time, average workload of judges in Donetsk and Luhansk regions is lower than the national average with exception to local general courts.

The prosecutor's offices and, especially, police investigation units experience shortage of human resources. The lack of investigators near the contact line has paralyzed investigation in most criminal cases.

The majority of prosecutors in Donetsk and Luhansk regions reported an insignificant conflict-related increase in their workload. At the same time, more than half of police

investigators in Donetsk and Luhansk regions faced a significant increase in workload that had a negative impact on effectiveness of investigation. This issue is more serious in localities closer to the contact line. Investigation of criminal cases is also impeded by excess workload of expert institutions.

The armed conflict led to a significant increase of caseload for lawyers in the free legal aid system, especially in Luhansk region.

1.3

Judicial officials do not have sufficient training in international humanitarian law and sometimes lack skills required to perform their tasks. There are different reasons, including lack of experience, lack of motivation for work and professional development, higher education system flaws, non-competitive hiring, lack of high-quality legislation and consistent practice etc.

At the same time, there is extremely high demand among judicial officials for specialized training on issues related to the armed aggression of the RF in eastern Ukraine. There are specialized training programs on the topic of Russian armed aggression and its impact on administration of justice, but they are offered with delays.

1.4

Judicial officials from Donetsk and Luhansk regions are less satisfied with material and technical resources in comparison to their colleagues from Kyiv. Since the beginning of the Russian aggression, their conditions of work have worsened in most cases. Situation with resources for police investigators is the most challenging.

Judicial officials are least satisfied with the accommodation and household situation.

A comprehensive approach to these issues **should encompass the following:**

- completing the planned consolidation of courts, filling vacant positions of judges, prosecutors and investigators in eastern Ukraine, including through transfers from other regions (*competent authorities – State Court Administration of Ukraine, High Qualification Commission of Judges of Ukraine, High Council of Justice, the President of Ukraine*);
- specialized training for judges, prosecutors, investigators, and lawyers, in particular, on international humanitarian law and combating inconsistent application of laws (*competent institutions – institutions of education and advanced professional training of judges, prosecutors, lawyers with involvement of international and local experts*);
- developing a procedure to prevent assignment of conflict-related cases to judges with ties to the occupied territories and recommending judges to refrain from visits to the occupied territories (*competent authority – Council of Judges of Ukraine*);

- developing and adopting a concept and necessary legislative framework for a specialized court on international crimes with the involvement of international judges (in the capacity of lay judges), as well as international prosecutors and investigators; implementing relevant decisions after de-occupation of Donbas (*competent authorities – Ministry of Justice of Ukraine, Judicial Reform Council /advisory body to the President of Ukraine/, Verkhovna Rada of Ukraine*);
- introducing the state support program for officials of the justice system resettled from the occupied territories or living in high-risk environment (*competent authorities – Cabinet of Ministers of Ukraine, State Court Administration of Ukraine, Verkhovna Rada of Ukraine*).

2

LEGAL FRAMEWORK FOR ADMINISTRATION OF JUSTICE IN UKRAINE

2.1

Ukrainian justice system had no algorithms for operating during the armed conflict. The legislation does not provide any instructions for the functioning of the justice system in hostilities.

After the occupation of certain areas of Donetsk and Lugansk regions of Ukraine (hereinafter – ORDLO), the legislator took steps to ensure access to courts in the government-controlled areas for residents of the occupied territories. The legislator also introduced court summons and notices online, which can be used, *inter alia*, in cases of ORDLO residents.

The Military Prosecutor’s Office has been reinstated upon the President’s initiative but its powers are exercised outside the scope of military sphere more often. A possibility of establishing military (war crime) courts has been declared. The Parliament took steps to increase effectiveness of criminal proceedings, including restrictions on certain rights that raise doubt about their constitutionality.

However, many existing and potential problems remain unsolved. Moreover, introduction of the measures to ensure national security and defense, response and deterrence of the military aggression of the Russian Federation in Donetsk and Luhansk regions through Presidential orders with restricted access increased the level of legal uncertainty.

To solve these problems, **the following steps are necessary:**

- to revoke temporary provisions of the laws awarding some of the investigating judge powers to the prosecutors in the ATO area and possibility to detain a person for more than 72 hours (*competent authorities – Ministry of Justice of Ukraine, Verkhovna Rada of Ukraine*);

- to bring the authority of military prosecutor's offices in line with the Constitution of Ukraine and the aim of the law establishing this institution, in particular it should be removed from the control of the Headquarters of the Armed Forces of Ukraine (*competent authorities – Verkhovna Rada of Ukraine, Prosecutor General*);
- to introduce electronic storage of court case files (their copies) to prevent loss of files (*competent authorities – the High Council of Justice, State Court Administration of Ukraine*);
- to introduce legislative provisions allowing for prompt deployment of mobile justice authorities capable to ensure justice in special circumstances during escalation of hostilities (*competent authority – Verkhovna Rada of Ukraine*);
- to define the policy of justice system authorities (algorithms) for situations of blockade, seizure of premises, or hostilities through by-laws and subsidiary regulations (*competent authorities – Ministry of Justice of Ukraine, State Court Administration of Ukraine, the High Council of Justice, Council of Judges of Ukraine, Council of Prosecutors of Ukraine, Ministry of Justice of Ukraine, Security Service of Ukraine*);
- to introduce legislative amendments eliminating ambiguity in qualification of crimes committed during the armed conflict caused by the Russian aggression, in particular, crimes of terrorism, creation a criminal organization, illegal militarized and armed group, or participation in their activities (*competent authorities – Ministry of Justice of Ukraine, Verkhovna Rada of Ukraine*);
- to introduce legislative amendments addressing legal consequences of serving a sentence in the occupied territories, as well as the release from prison, taking into consideration that the person is not merely a criminal, but also a victim of Russian aggression (*competent authorities – Ministry of Justice of Ukraine, Verkhovna Rada of Ukraine*);
- to identify mechanisms for remote questioning of witnesses and other trial participants in the occupied territory, as well as methods to collect samples for forensic assessments (*competent authorities – Ministry of Justice of Ukraine, Verkhovna Rada of Ukraine*);
- to introduce legislative amendments to preserve specific legal safeguards of fair trial established in connection with ATO in case it is replaced by measures to ensure national security and defense, response and deterrence of the military aggression of the Russian Federation in Donetsk and Luhansk regions in accordance with the Law of Ukraine "On the state policy to ensure state sovereignty of Ukraine in the temporarily occupied territories of Donetsk and Luhansk regions" (*competent authorities – Ministry of Justice of Ukraine, Verkhovna Rada of Ukraine*);
- to publish the orders related to continuation or termination of the ATO with the start of the operation to ensure national security and defense, response and deterrence of the military aggression of the Russian Federation in Donetsk and Luhansk regions (*competent authority – President of Ukraine*).

2.2

The case law regarding the obligation for Ukraine to compensate damages resulting from terrorist acts is inconsistent due to ambiguity of the legal framework (even at the stage of cassation). So far, it has not been in favor of the plaintiffs.

The case law in Ukrainian courts that obliges the RF to compensate damages in relation to events in eastern Ukraine is in favor of the victims. The Russian Federation authorities do not challenge these court decisions. At the same time, the decisions have not been executed.

Ukraine is not applying sufficient effort to implement paragraph 24 of the UN General Assembly Resolution "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law" (A/RES/60/147 adopted on 16 December 2005) regarding the development of means of informing the general public and, in particular, victims of gross violations of international human rights law and serious violations of international humanitarian law of the rights and remedies addressed by these Basic Principles and Guidelines.

The following measures should be taken to ensure actual compensation of damages inflicted by the Russian aggression:

- to develop and offer an effective mechanism for compensation of damages resulting from the military aggression of the Russian Federation for individuals and legal persons based on legislation and case law; to hold an awareness-raising campaign to implement the mechanism; to develop a methodology for applications for recovery of property of the RF in execution of court judgements against the RF (*competent authority - Ministry of Justice of Ukraine*);
- to undertake more effective efforts on international level to create a mechanism for compensating victims of the armed aggression of the Russian Federation similar to the UN Compensation Commission established under the UN Security Council Resolution 687 (1991) (*competent authority - Ministry of Foreign Affairs of Ukraine*).

2.3

Once state authorities ceased operations in the occupied territories, execution of court decisions became more difficult if the authority was party to the case. Execution of court decisions where the debtor is in the occupied territory is complicated.

There is no extension of time limits for proceedings if the property or debtors are in the temporarily occupied territories. It is objectively impossible to execute these decisions, and time limits for execution of a court decision are likely to expire.

The procedure for the plaintiff to obtain an enforcement document in a case where materials are in the occupied areas is extremely complicated; it requires that lost files be restored. Courts often reject restoring lost documents even having accurate information about the court decision in the Unified State Register of Court Decisions.

In order to address problems with execution of court decisions caused by the aggression of the Russian Federation, Ukrainian authorities **should take the following steps:**

- to include temporary occupation and armed aggression of the Russian Federation into the list of grounds for postponement of presentation of enforcement letters for execution or renewal of time limits (*competent authorities – Ministry of Justice of Ukraine, Verkhovna Rada of Ukraine*);
- to prepare a compilation of case law on disputes related to execution of court decisions (*competent authorities – Supreme Court, Courts of appeal*);
- to develop template algorithms for execution of court decisions in cases related to the aggression of the Russian Federation in the form of methodological recommendations to state and private executive services (*competent authority – Ministry of Justice of Ukraine*);
- to resolve the issue of plaintiff replacement in cases where state authorities remaining in the occupied territories are under temporary shutdown (*competent authorities – Ministry of Justice of Ukraine, Verkhovna Rada of Ukraine*).

2.4

The state is wasting resources by prosecuting persons for offences committed under constraints and threat to life.

Excessive caseload can increase significantly after de-occupation and reintegration of the areas of Donetsk and Luhansk regions.

In the process of optimizing caseload in the justice system during de-occupation, the state needs to strike a balance between allowing impunity and gaining trust of the residents of reintegrated territories.

To ensure justice and prevent incapacitation of legal system, **it is necessary** to expand the list of legal remedies for exemption from liability on the grounds of coercion. In this situation, it is necessary to strike a balance between preventing impunity and establishing credibility with the residents of relevant areas (exemption from criminal liability for persons who voluntarily abandoned criminal activities; exemption from punishment for persons convicted of crimes (amnesty); special measures – reconciliation or pardon) (*competent authorities – Ministry of Justice of Ukraine, Ministry for Temporarily Occupied Territories and Internally Displaced Persons of Ukraine, Verkhovna Rada of Ukraine*).

2.5

The status of the persons held in detention (captivity) in the territory outside of Ukraine's control remains undetermined.

Procedures for prisoner exchange during the armed conflict in Ukraine remain beyond the scope of legal regulations. For the purposes of exchange, Ukrainian authorities use various legal avenues within criminal and criminal procedure law (release from detention with subsequent search warrants, proceedings are closed by the investigator (following the exchange) while the decision to close proceedings is canceled by the prosecutor), verdicts based on agreements without imprisonment, prison sentence with subsequent pardon etc.).

In order to address the gaps, the following is **necessary**:

- to introduce legislative amendments determining the status of persons who took part in the armed conflict caused by the aggression of the Russian Federation along with legal safeguards for this category of persons, in particular during exchanges (*competent authorities – Ministry of Justice of Ukraine, Verkhovna Rada of Ukraine*);
- to define exchange procedures in line with criminal law and criminal procedure through by-laws and subsidiary regulations (*competent authorities – Ministry of Justice of Ukraine, Prosecutor General, Security Service of Ukraine*).

2.6

National criminal legislation of Ukraine is not in conformity with international law. The title of Chapter XX of the Special Section of the Criminal Code "Criminal offenses against peace, security of mankind and international legal order" is outdated and its contents are contradictory. Ukrainian version of implementation of core crimes against international law has significant shortcomings.

These shortcomings can only be eliminated through amendments to the legislation of Ukraine on criminal liability aimed to bring it in line with international law. Most importantly, it is **necessary** to define international crimes (genocide, crimes against humanity, war crimes, and the crime of aggression) as offences in a separate chapter in the Special Section of the Criminal Code in accordance with the Rome Statute, in particular:

- to bring article 437 of the Criminal Code of Ukraine (aggression) in compliance with Article 8bis of the Rome Statute;
- to establish liability for crimes against humanity based on Article 7 of the Rome Statute;
- to ensure comprehensive implementation of international law provisions on war crimes (key reference point – Article 8 of the Rome Statute);
- to eliminate discrepancy between the definition of genocide under the criminal law of Ukraine and international law (*competent authorities – Ministry of Justice of Ukraine, Verkhovna Rada of Ukraine*).

3

ACCESS TO JUSTICE

3.1

The delay on behalf of central authorities made it impossible to remove case files and materials of enforcement proceedings (ongoing and completed) from the occupied territories and the conflict zone. Leaving materials of enforcement proceedings in the temporarily occupied territory led to obstacles for execution of court decisions. Legal mechanisms for restoring lost cases and documents have significant gaps.

To reduce the negative impact of these issues, it is **necessary**:

- to introduce legislative amendments providing possibility to issue certified copies of court decisions and enforcement documents and duplicates based on the Unified State Register of Court Decisions without restoring lost case files; to introduce a possibility to restore lost proceedings in cases without a final court decision (*competent authorities – Ministry of Justice of Ukraine, Verkhovna Rada of Ukraine*);
- to prepare a compilation of case law on restoring court cases and enforcement proceedings for all categories of cases (*competent authorities – Supreme Court and relevant Courts of Appeal*);
- to develop recommended algorithms for justice system authorities in relation to persons who were in remand prisons in Donetsk and Luhansk regions at the beginning of the aggression of the RF, persons convicted by the “courts” of the so-called DPR and LPR, and persons who served sentences in the occupied territory (*competent authorities – Ministry of Justice of Ukraine, Prosecutor General, Ukrainian Parliament Commissioner for Human Rights, Supreme Court*);
- to launch the Integrated Judiciary Information System, ensure that electronic court is fully operational, and integrate the system with information systems and registers used for execution of court decisions and operations of the criminal justice system (*competent authorities – The High Council of Justice, State Court Administration of Ukraine*).

3.2

Addressing the issue of access to courts for ORDLO residents and protecting their rights is necessary for successful reintegration of these territories. While ORDLO residents are not deprived of access to court in the government-controlled areas, physical access is significantly impeded.

Due to the lack of institutions providing services in the field of justice, residents of the non-government controlled areas face significant restrictions in their ability to receive basic services, such as notarization of documents or receiving birth or death certificates.

The rights of physical and legal persons in the ORDLO to participate in court hearings is significantly curtailed due to lack of possibilities to ensure direct notification about the date, time and place of a court hearing.

In order to improve access to justice for ORDLO residents, **the following measures should be taken:**

- to accompany the launch of the Integrated Judiciary Information System with an awareness-raising campaign on access to justice provided by the System, as well as create conditions for obtaining electronic digital signature or other methods for identification of persons (for instance, near entry-exit checkpoints – in Ukrposhta (mail service) offices, courts, state banks, etc.);
- to provide clarification as to whether state registration of birth or death in the occupied territory can take place based on documents issued by the occupation authorities without preliminary establishment of such facts by courts pursuant to article 2(3) of the Law of Ukraine "On the state policy to ensure state sovereignty of Ukraine in the temporarily occupied territories of Donetsk and Luhansk regions" (*competent authority – Ministry of Justice of Ukraine*); in case the procedure for establishment of these facts by courts is still valid – to exempt ORDLO residents from the court fees (*competent authorities – Ministry of Justice of Ukraine, Verkhovna Rada of Ukraine*).

3.3

Court fees were a significant problem for victims trying to bring their applications before the courts. Courts are often geographically remote from displaced persons, which impedes their physical access to court. These issues were partially solved in 2018 with the Law of Ukraine "On the state policy to ensure state sovereignty of Ukraine in the temporarily occupied territories of Donetsk and Luhansk regions".

Notification of IDPs taking part in trials is often difficult since it is not possible to establish their actual place of residence.

In order to improve access to justice for internally displaced persons, **the following measures should be taken:**

- to launch the Integrated Judiciary Information System, ensure that electronic court is fully operational (*competent authorities – the High Council of Justice, State Court Administration of Ukraine*);
- to envision additional measures in procedural codes for the court to establish place of residence of a party to proceedings (respondents, third parties etc.) who is a displaced person, in particular, to add possibility to use the State Register of Voters and the State Register of Internally Displaced Persons along with the Unified Register of Internally Displaced Persons (*competent authorities – Ministry of Justice of Ukraine, Verkhovna Rada of Ukraine*).

3.4

There are exemptions from court fees for ATO participants, but the regulations are contradictory.

The term for applying to court for participants in hostilities in personnel disputes during the ATO is too short. Participants of the ATO face restrictions to their participation in court hearings in person. Often, the defendant cannot exercise his/her right to participate in appeal proceedings.

ATO participants face strict prosecution for (alleged) crimes.

In order to improve access to justice for ATO participants, **the following measures should be taken:**

- to eliminate discrepancies in regulations on court fees for war veterans (*competent authorities – Ministry of Justice of Ukraine, Verkhovna Rada of Ukraine*);
- to establish a rule that the time of service and rehabilitation is excluded from the period for application to court concerning rights in employment relations (*competent authorities – Ministry of Justice of Ukraine, Verkhovna Rada of Ukraine*);
- to introduce legislative amendments preventing situations where participation in hostilities of a party to proceedings will not result in suspension of civil, economic or administrative case proceedings except when the party has a representative (*competent authorities – Ministry of Justice of Ukraine, Verkhovna Rada of Ukraine*);
- to ensure direct participation of a suspect in appellate review of the case or rulings of the first-instance court by default, i.e. if the suspect or his/her representative has not submitted a motion for videoconference participation or relevant consent (*competent authorities – courts, Ministry of Internal Affairs of Ukraine*);
- to prepare a compilation of case law on proceedings related to the armed conflict caused by the Russian aggression in order to ensure consistent application of the law and evaluation of prosecution actions (*competent authorities – Supreme Court and Courts of Appeal, National School of Judges of Ukraine, Prosecutor General's Office, National Academy of Prosecution Service of Ukraine*).

3.5

The following issues were identified in relation to arbitrary arrest, detention, as well as enforced disappearance.

Qualification of the armed conflict as an antiterrorist operation created an issue with the legal status of all participants (terrorists, combatants, occupants etc.). It has direct impact on the status of imprisoned persons. The problem will persist or even exacerbate with the introduction of the measures to ensure national security and defence, response and deterrence of the military aggression of the Russian Federation in Donetsk and Luhansk regions.

Other problems include arbitrary arrest and detention, as well as lack of alternatives to custodial measure of restraint in case of “grave” articles of the Criminal Code of Ukraine, such as article 110 (trespass against territorial integrity and inviolability of Ukraine).

Investigation of arbitrary arrests, detention, enforced disappearances, as well as prosecution of perpetrators, is usually ineffective.

Ukraine has ratified the International Convention for the Protection of All Persons from Enforced Disappearance. According to the Convention, the widespread or systematic practice of enforced disappearance constitutes a crime against humanity, and each State Party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law.

In order to improve counteraction to arbitrary arrests, detention, and enforced disappearances, **the following measures are necessary:**

- to ensure effective prosecution and fair trial in all cases of enforced disappearances (*competent authorities – Investigation Authorities, Prosecutor’s Office, Courts*);
- to ensure access to detention facilities and detainees for representatives of relevant international mechanisms (*competent authorities – Security Service of Ukraine, Ministry of Justice of Ukraine*);
- to take appropriate action for comprehensive implementation of the International Convention for the Protection of All Persons from Enforced Disappearance, in particular to establish criminal liability for enforced disappearance as defined in Article 2 of the Convention, namely arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law (*competent authorities – Ministry of Justice of Ukraine, Verkhovna Rada of Ukraine*).

3.6

There were also issues concerning public hearings in cases related to Russian aggression.

There is widespread illegal practice of holding court hearings outside of courtrooms – hearings in every fifth case took place in judges’ offices. Court hearings in Donetsk and Luhansk regions start with delays more often than in other regions.

There were individual cases when trial observers (monitors) were denied or restricted in access to a court or a court hearing, which gives rise to concerns.

In many cases, there is no announcement of the case or composition of the court. In several cases, judges attempted to obstruct audio recording of the hearing. In one out of three cases, courts do not follow proper procedure for announcement of the decision following trial.

Plea deals in criminal proceedings outside of court proceedings, including determination of penalty, are not public.

In some cases, court decisions are based on testimonies of witnesses who had not been questioned in court.

Half of all court buildings in Donetsk and Luhansk regions do not accommodate the needs of persons with disabilities.

In order to improve the situation related to the openness of court proceedings, **the following steps should be taken:**

- to take measures to equip court buildings for unimpeded access and participation in court hearings of persons with reduced mobility; to provide courts with appropriate number of courtrooms (*competent authority – State Court Administration of Ukraine*);
- hearings in cases following plea agreements in court proceedings should be held in accordance with the general rule on open court hearings (*competent authorities – Courts*);
- to continue the positive practice of broadcasting trials online through technical means of the courts in open cases with public importance (*competent authorities – Courts, State Court Administration of Ukraine*);
- to improve the training of judges and court staff on the following issues: implementation of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, in particular, the right to a public hearing; implementation of legislative provisions on unrestricted video- and audio recording of court hearings; public pronouncement of court decisions etc. (*competent authority – National School of Judges of Ukraine and local experts*);
- to raise awareness among chiefs of administrative staff of courts on the requirement of public hearings, to ensure regular monitoring of compliance with the requirement and impose disciplinary sanctions for violations thereof (*competent authorities – chiefs of administrative staff of courts*).

4

PROSECUTION OF CRIMES COMMITTED DURING THE MILITARY AGGRESSION OF THE RUSSIAN FEDERATION

4.1

Responsibility for crimes, as well as other offences has to be inevitable – otherwise, it fosters disrespect towards the state and its authorities and increases the prevalence and severity of crime.

The number of committed, registered, investigated and prosecuted crimes has increased significantly since 2014. Existing procedural mechanisms are insufficient for effective counteraction to violations caused by the aggression of the Russian Federation. The prevalence of crime and concealment of crimes are relatively high while investigation is ineffective.

Since 2014, the Verkhovna Rada of Ukraine tried to establish conditions to ensure certainty of punishment for the crimes committed during the military aggression of the RF against Ukraine.

Perpetrators can escape justice by staying in the temporarily occupied territories.

Crimes in the non-government controlled areas remain unpunished. Many cases proceed with trial in absentia when the defendants are in the non-government controlled areas.

Perpetrators can escape justice if the record of proceedings or data storage device with a record of proceedings are missing from case files. Appellate courts often revoke verdicts based on the lack of such records or storage devices in case files.

The following **measures are necessary** to address the problem of impunity:

- to take effective action to prevent underreporting of crimes committed by military personnel, in particular against civilians in the conflict zone, as well as crimes committed by military service members against their colleagues (*competent authorities – Prosecutor General, Minister of Defense of Ukraine*);
- to address disciplinary bodies with regard to imposing liability on judges, administrative court staff who allowed the absence of the record of proceedings or data storage device with a record of proceedings in case files (*competent authorities – Prosecutor General, Courts of Appeal*);
- to ensure proper mechanisms to search for persons who had committed crimes in Ukraine and prevent their escape to the areas temporarily outside of Ukrainian government's control (*competent authorities – Ministry of Internal Affairs of Ukraine, State Border Guard Service of Ukraine*).

4.2

The law has increased criminal liability for military offences for Ukrainian military service members.

In practice, there is widespread criminal prosecution of the ATO participants for actions that do not constitute criminal offences. However, there are cases of unreasonable mitigation of punishment for dangerous crimes, including under pressure. There are also widespread cases of bias towards military service members in determination of their liability. Commission of crime during the ATO in some cases is considered a mitigating circumstance and an aggravating factor in other cases.

To increase the fairness of criminal legal assessment of the actions of military service members, **it is necessary:**

- to ensure proper investigation of military crimes, in particular, taking into account circumstances for exemption from criminal responsibility (*competent authorities – State Bureau of Investigations of Ukraine, Prosecutor General*);
- to prepare a compilation of case law in criminal cases against members of the Armed Forces of Ukraine, in particular on application of the Criminal Code provisions on exemption from criminal liability, adherence to general principles of determination and exemption from punishment, as well as measures of restraint for members of the armed forces (*competent authorities – Supreme Court, Courts of Appeal*).

4.3

Qualification of crimes committed by members of the Armed Forces of the RF, citizens of Ukraine and foreign members of the so-called DPR and LPR who took part in hostilities depends of clear determination of the status of the armed conflict in eastern Ukraine and its participants. For a long time there has been no such determination.

With regard to criminal (or terrorist) nature of the organized armed groups of the so-called DPR and LPR, their activities violate Ukrainian legislation and should be assessed from the criminal law perspective. However, courts often do not recognize the fact that DPR and LPR are terrorist organizations as common knowledge. Therefore, it is necessary to prove the “terrorist nature” of these organizations in each case. As a result, there is no consistency in qualification of similar crimes.

To ensure consistent practice in prosecution of the members of Armed Forces of the RF in the ORDLO, citizens of Ukraine and foreign members of the so-called DPR and LPR who took part in hostilities, **the following measures are necessary:**

- to define the legal status of the members of Armed Forces of the RF in the ORDLO, citizens of Ukraine and foreign members of the so-called DPR and LPR who took part in hostilities (*competent authorities – Ministry of Justice of Ukraine, Verkhovna Rada of Ukraine*).
- to introduce legal amendments to define the procedure for compensation for victims of crimes when perpetrators are convicted in absentia, i.e. in special court proceedings (*competent authorities – Ministry of Justice of Ukraine, Verkhovna Rada of Ukraine*).
- to prepare a compilation of criminal case law on cases of the members of the RF Armed Forces in the ORDLO, citizens of Ukraine and foreign members of the so-called DPR and LPR who took part in hostilities; to ensure consistent application of the law in matters related to the armed aggression of the Russian Federation against Ukraine by courts with different specializations in accordance with the procedure established by law (*competent authorities – Supreme Court, courts of appeal*).

4.4

The most serious obstacle for implementation of “Home is waiting for you” program is that it does not apply to persons who committed crimes under articles 110-2 (financing actions, committed with the purpose of the violent change or overthrow of constitutional order or the assumption of state power, change of the territorial measures or state border of Ukraine), 111 (treason), 114 (espionage), 255 (creation of a criminal organization), 258-3 (financing terrorism), and 263 of the Criminal Code of Ukraine (unlawful handling of weapons, ammunition or explosives) – if a person has taken action required by the law proving that s/he sincerely repented and facilitated prevention of harmful consequences of his/her illegal actions.

To increase effectiveness of “Home is waiting for you” program, it is necessary to extend it to persons who had committed crimes mentioned above and include a wider number of Criminal Code articles that allow exemption from criminal liability (*competent authority – Security Service of Ukraine*).

2018