

The Enforcement of International Humanitarian Law in Ukraine



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Abbreviations

ATO	Anti-Terrorist Operation
DPR	Donetsk People's Republic
DRC	Democratic Republic of Congo
GRC	Global Rights Compliance
HRMMU	Human Rights Monitoring Mission in Ukraine
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDPs	Internally Displaced Persons
IHL	International Humanitarian Law
LPR	Luhansk People's Republic
OHCHR	Office of the United Nations High Commissioner for Human Rights
OSCE	Organization for Security and Co-operation in Europe
PGO	Prosecutor General's Office
SBU	Security Service of Ukraine
SCSL	Special Court for Sierra Leone
UHHRU	Ukrainian Helsinki Human Rights Union

Executive Summary

Global Rights Compliance (“GRC”) has conducted an extensive analysis of Ukraine’s current approach to prosecuting war-related crime and its compliance with prevailing international humanitarian law (“IHL”) standards. This report aims to provide useful guidance to the Government of Ukraine and its prosecuting authorities on how to approach their international obligations to prosecute serious violations of IHL and other serious violations of international law.

In its Report entitled “The Domestic Implementation of International Humanitarian Law in Ukraine”,¹ GRC demonstrated that Ukraine’s current law and associated legal measures, in particular the Criminal Code of Ukraine, require a series of modifications to allow effective penal sanctions for the full range of serious violations of IHL. However, as will be discussed throughout this Report, the current legal framework still allows a range of prosecutions for IHL violations. In particular, Article 438 of the Criminal Code, whilst suffering from a degree of vagueness and lack of specificity,² allows the prosecution of an array of war crimes. Therefore, whilst amending the Criminal Code of Ukraine to allow for fair and effective prosecutions of the full range of serious violations of IHL is critical to ensure full accountability and compliance with Ukraine’s international obligations, using the current version of the Criminal Code, particularly Article 438, to its optimal effect is the focus of this Report.

The Report reviews a representative sample of the available public information concerning Ukraine’s investigation and prosecution of international crimes over a six-month period (from February to August 2016) and analyses the steps that Ukraine has taken towards meeting their obligations.

GRC’s analysis shows that Ukraine’s investigations and prosecutions do not appear to currently involve any consistent pattern of prosecuting alleged perpetrators for serious violations of IHL as either domestic or international crimes (war crimes, crimes against humanity or genocide). Moreover, the very few relevant prosecutions that take place are usually prosecuted as domestic crimes such as murder and kidnapping and tend to lead to relatively low sentences.

Most of the prosecutions of combatants for war related violations appear to focus on domestic (ordinary) crimes involving conduct alleged to amount to waging aggressive war or membership in terrorist or other prescribed groups (for the separatists) and military disciplinary type offences alleging forms of military negligence or indiscipline for failing in the war effort (for pro-Ukrainian government individuals).

¹ GRC, ‘The Domestic Implementation of International Humanitarian Law in Ukraine’ (May 2016).

² See *infra*, para. 176.

Finally, the Report outlines how these failures might be immediately remedied, at least in part, through more effective use of the current Criminal Code. GRC recognises that this is a developing situation and is aware that the Chief Military Prosecutor's Office of Ukraine has indeed begun to consider the use of Article 438 in bringing prosecutions for war crimes.

GRC has conducted a review of a draft bill prepared by the Human Rights Agenda aimed to amend the Criminal Code of Ukraine and is preparing an array of Practice Instructions which will provide a comprehensive package of reforms concerning IHL accountability mechanisms.

Introduction

The details of the commencement of the current conflict in Ukraine are well known and will not be reiterated in detail here. However, in order to contextualise the information concerning the likely violations of IHL and other serious violations of international law occurring in Ukraine, it is necessary to describe in brief the development of the conflict.

Between 18 and 20 February 2014, pro-government forces attacked protesters at Maidan causing multiple deaths and serious injuries. According to the United Nations Human Rights Monitoring Mission in Ukraine (“HRMMU”),³ 90 people were killed during this three-day period alone, with reports alleging that this was mostly from sniper fire from government security forces.⁴ In total, between December 2013 and February 2014, 121 people were killed, either as a result of severe beatings or gunshots.⁵ Shortly after, the President – Viktor Yanukovich – fled the country and a new government was installed.

At the end of February 2014, following the attacks on the Maidan protesters and the departure of President Yanukovich, the Autonomous Region of Crimea became populated by unidentified armed men (alleged to have been Russian military)⁶ who, in addition to occupying government buildings and acquiring *de facto* control of the region, organised a “referendum” on 16 March 2014 on the question of Crimean annexation to the Russian Federation. This referendum was contrary to the Ukrainian Constitution⁷ and its implementation was reportedly riddled with electoral irregularities.⁸

³ In March 2014, the Office of the United Nations High Commissioner for Human Rights deployed a Human Rights Monitoring Mission to Ukraine to evaluate and report on the human rights situation and to provide support to the Government of Ukraine in the promotion and protection of human rights. As part of its work, the Mission prepares monthly reports describing the human rights situation and makes recommendations. See United Nations Ukraine, UN Human Rights Monitoring Mission in Ukraine, <www.un.org.ua/en/information-centre/news/1870> accessed 20 April 2016.

⁴ Office of the United Nations High Commissioner for Human Rights (“OHCHR”) ‘Report on the Human Rights Situation in Ukraine’ (15 April 2014) para. 57 <www.un.org.ua/images/stories/Report_15_April_2014_en.pdf> accessed 20 April 2016: Those who died included 101 Maidan protesters, 17 police officers, 2 members of the non-governmental organisation named “Oplot” and a Crimean Tatar.

⁵ *Ibid.*

⁶ See for example ‘In the Crimea there is an armed invasion of Russia – Kunitsyn’ *Ukrayins'ka Pravda* (Ukraine, 28 February 2014) <www.pravda.com.ua/news/2014/02/28/7016712/> accessed 20 April 2016. See also ‘Putin acknowledges Russian military servicemen were in Crimea’ *Russia Times* (17 April 2014) <www.rt.com/news/crimea-defense-russian-soldiers-108/> accessed 20 April 2016.

⁷ See Constitution of Ukraine, Law of Ukraine No. 254к/96-BP, 28 June 1996, Art. 73: which provides that “[i]ssues on altering Ukraine’s territory shall be resolved exclusively through an *all-Ukrainian referendum*” (emphasis added); see also Decision of the Constitutional Court of Ukraine in the case referred to pursuant to the constitutional procedure by the Acting President of Ukraine, Head of the Verkhovna Rada of Ukraine and Ukrainian Parliament Commissioner for Human Rights regarding the conformity of the Decree of the Verkhovna Rada of the Autonomous Republic of Crimea on the All-Crimean Referendum with the Constitution of Ukraine (the case on a local referendum in the Autonomous Republic of Crimea) No.2-rp/2014 (14 March 2014) <<http://zakon0.rada.gov.ua/laws/show/v002p710-14>> accessed 20 April 2016.

⁸ The identified violations include: (i) additional voters lists; (ii) harassment and arbitrary detentions of those protesting the referendum; (iii) harassment and persecution of journalists trying to report violations; (iv) voting at home organised in an impromptu manner; and (v) presence of military groups widely believed to be fully or in part composed of Russians. The UN General Assembly declared that the referendum “had no validity”. For more details, see OHCHR, ‘Report on the Human Rights Situation in Ukraine’ (15 April 2014) para. 6 <www.un.org.ua/images/stories/Report_15_April_2014_en.pdf> accessed 11 April 2016.

The results indicated that more than 95% of those participating in the referendum supported joining the Russian Federation.⁹ Accordingly, the “Treaty on Accession of the Republic of Crimea to the Russian Federation” was signed between the representatives of the parties on 18 March 2014 and promptly ratified by the Russian Federal Assembly.¹⁰ International condemnation was quick to follow.¹¹

Shortly after the events in Crimea, eastern Ukraine began to destabilise. In Donetsk and Luhansk oblasts,¹² groups began to protest against the “coup” in Kyiv and what they alleged to be discrimination against the Russian-speaking population in Ukraine.¹³ These protesters declared their desire for closer ties with Russia. In April 2014, armed conflict broke out between armed separatists in the east (allegedly supported by Russia) and the law enforcement agencies located in eastern Ukraine.

On 11 May 2014¹⁴, pro-Russian separatists organised a “referendum” on the sovereignty of the Donetsk and Luhansk oblasts, the results of which (89.07% and 96.20%, respectively, “in favour” of independence) were allegedly falsified, did not satisfy basic fair election standards and violated the Constitution of Ukraine.¹⁴ Shortly thereafter, the local separatists declared the areas of Donetsk and Luhansk to be the “Donetsk People’s Republic” (“DPR”) and “Luhansk People’s Republic” (“LPR”), respectively.

Since the conflict erupted, a number of attempts have been undertaken to negotiate an end to the hostilities, with the so-called “Minsk Agreements” being the most prominent.¹⁵ On 5 September 2014, representatives from Ukraine, the Russian Federation, the “Donetsk People’s Republic” and the “Luhansk People’s Republic” signed the first Minsk Protocol. The Protocol provided for, *inter alia*, an immediate ceasefire, the release of all illegally detained persons, and the decentralisation of authority and monitoring functions for the Organization for Security and Co-operation in Europe (“OSCE”). However, the ceasefire was allegedly

⁹ ‘97% of Crimean population voted for joining Russia’ *Tyzhden.ua* (17 March 2014) <<http://tyzhden.ua/Video/105065>> accessed 20 April 2016.

¹⁰ The Treaty was ratified by the federal law of the Russian Federation of 21.03.2014 N 36-Φ3 entitled ‘On Ratification of the Treaty Between the Russian Federation and the Republic of Crimea on Accession of the Republic of Crimea to the Russian Federation and the Formation of New Subjects in the Russian Federation’ adopted on the 349th (extraordinary) session of the Council of the Federation <<http://council.gov.ru/activity/meetings/40481/results>> accessed 20 April 2016.

¹¹ See for example United Nations General Assembly (“UNGA”) Res 68/262 ‘Territorial Integrity of Ukraine’ (1 April 2014) UN Doc A/RES/68/262 <www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a_res_68_262.pdf> accessed 20 April 2016: with 100 votes in support, 11 votes against and 58 abstentions, the resolution supported the territorial integrity of Ukraine and called on state parties and international organisations neither to recognise any alterations in the territorial structure of Ukraine, nor to take any actions that could be interpreted as such recognition.

¹² Region in Ukrainian.

¹³ See for example ‘Ukraine crisis: Timeline’ *BBC* (13 November 2014) <www.bbc.com/news/world-middle-east-26248275> accessed 20 April 2016.

¹⁴ Constitution of Ukraine, Art. 73: “[i]ssues on altering Ukraine’s territory shall be resolved exclusively through an *all-Ukrainian referendum*” (emphasis added). See also ‘The Farce of the “Referendum” in Donbas’ (OSW, 14 May 2014) <www.osw.waw.pl/en/publikacje/analyses/2014-05-14/farce-referendum-donbas> accessed 20 April 2016.

¹⁵ Protocol on the Results of Consultations of the Trilateral Contact Group (OSCE, 5 September 2014) <www.osce.org/home/123257> accessed 20 April 2016.

broken shortly after the signing of the Protocol, most notably during heavy shelling of the city of Mariupol in January 2015.¹⁶

Eventually, an additional package of measures was adopted in Minsk in February 2015. The new measures stated that by the end of 2015 all the conditions of the Minsk agreement should be met.¹⁷ However, the terms of this agreement were violated from the outset and the fighting continued.¹⁸ As of May 2016, neither the Government of Ukraine nor the separatists have fully complied with the terms of Minsk.¹⁹

Aside from efforts to end the conflict, the Government of Ukraine has begun to take steps to address the crimes that have been committed during the conflict, relying upon both international and domestic mechanisms. Concerning the international mechanisms, the Government of Ukraine submitted two “Declarations” to the International Criminal Court (ICC), accepting its jurisdiction to investigate ICC crimes (including crimes against humanity and war crimes) committed in Ukraine during the ongoing conflict.

In sum, by filing its first declaration with the ICC on 17 April 2014, the Government of Ukraine invited the ICC Prosecutor to investigate violations that allegedly occurred at Maidan between 21 November 2013 and 22 February 2014.²⁰ On 8 September 2015, the Government of Ukraine submitted a second declaration to the ICC, accepting the jurisdiction of the Court for the purpose of identifying and prosecuting the perpetrators and accomplices of IHL violations committed on the territory of Ukraine from 20 February 2014 onwards.²¹ The ICC is currently conducting a preliminary examination of the situation in Ukraine.²²

¹⁶ UN Secretary-General ‘Statement Attributable to the Spokesperson for the Secretary-General on Ukraine’ (United Nations, 24 January 2015) <www.un.org/sg/statements/index.asp?nid=8350> accessed 11 April 2016.

¹⁷ *Ibid.*

¹⁸ ‘The militants fired 112 strokes, hit Debaltseve 88 times in the course of one day of “silence”’ *Ukrayins’ka Pravda* (Ukraine, 16 February 2015) <www.pravda.com.ua/news/2015/02/16/7058687/> accessed 20 April 2016.

¹⁹ *See for example* ‘Militants continue to attack ATO forces in violation of the Minsk agreements - headquarters said’ *UNIAN* (Ukraine, 6 March 2016) <www.unian.ua/war/1284203-boyoviki-prodovjuyut-obstrili-sil-ato-u-porushennya-minskih-domovlenostey-shtab.html> accessed 20 April 2016; ‘ATO: militants have used self-propelled artillery units to the Mariupol direction’ *Ukrayins’ka Pravda* (Ukraine, 8 April 2016) <www.pravda.com.ua/news/2016/04/8/7104801/> accessed 20 April 2016; ‘Lavrov is trying to shift responsibility for failure of Minsk on Ukraine’ *Ukrayins’ka Pravda* (Ukraine, 4 February 2016) <www.pravda.com.ua/news/2016/02/4/7097801/> accessed 20 April 2016.

²⁰ Declaration Lodged by Ukraine under Article 12(3) of the Statute (9 April 2014) (‘Ukrainian Declaration accepting the jurisdiction of the ICC’) <www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/997/declarationRecognitionJurisdiction09-04-2014.pdf> accessed 20 April 2016: The Government of Ukraine lodged a declaration under Article 12(3) of the Rome Statute accepting the jurisdiction of the ICC over alleged crimes committed on its territory from 21 November 2013 to 22 February 2014. This Declaration was made even though Ukraine is not a State Party to the Rome Statute.

²¹ Declaration of the Verkhovna Rada of Ukraine ‘On the recognition of the jurisdiction of the International Criminal Court by Ukraine over crimes against humanity and war crimes committed by senior officials of the Russian Federation and leaders of terrorist organizations “DNR” and “LNR”, which led to extremely grave consequences and mass murder of Ukrainian nationals’ (8 September 2015) (‘Second Ukrainian Declaration accepting the jurisdiction of the ICC’) <www.icc-cpi.int/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf> accessed 20 April 2016.

²² *See* ‘OTP Policy Paper on Preliminary Examinations’ Office of the Prosecutor, ICC (November 2013) <www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Policy%20Paper%20Preliminary%20Examinations%20%202013.pdf> accessed 20 April 2016.

Concerning the domestic efforts, the Government of Ukraine has initiated several prosecutions of suspects allegedly involved in human rights and IHL violations in eastern Ukraine. A representative sample of the alleged crimes being prosecuted is found in Annex A - *Sample of Domestic Prosecutions*. In general, when relevant prosecutions occur (which is rare), Ukrainian prosecutorial authorities are prosecuting alleged suspects for a range of national, or ordinary crimes, rather than international crimes.

The Anti-Terrorist Operation (“ATO”) Zone

The armed conflict that developed in eastern Ukraine led to the establishment of an ATO Zone. On 14 April 2014, the acting President of Ukraine adopted an order enacting the decision of the National Security and Defence Council announcing the Anti-Terrorist Operation for Eastern Ukraine.²³ The Law of Ukraine on Combating Terrorism provides for the creation of a special regime pursuant to the ATO.²⁴ Ukrainian law defines an “anti-terrorist operation” as coordinated special measures aimed at the prevention and termination of terrorist activity, the release of hostages, the protection of the security of the population, and the neutralisation of terrorists and terrorist activities.²⁵

The Security Service of Ukraine (“SBU”), National Police, Ministry of Defence of Ukraine, Armed Forces of Ukraine, Ministry of Internal Affairs and the National Guard of Ukraine²⁶ are the primary actors responsible for the implementation of the state’s response to terrorism and the manner in which the ATO is organised and implemented.²⁷

Reported Violations of IHL and other Serious Violations of International Law

The armed conflict has led to a humanitarian crisis. The Ministry of Social Policy of Ukraine reported that, as of January 2016, the number of internally displaced persons (“IDPs”) in Ukraine totalled around 1.6 million.²⁸ Further, human rights organisations and activists have reported numerous violations of IHL and international human rights law.

²³ Decree of the President of Ukraine ‘On the Decision of the National Security and Defence Council on Immediate Measures Aimed at Combatting the Terrorist Threat and Maintenance of the Territorial Integrity of Ukraine’, No. 405/2014 (14 April 2014) <<http://zakon2.rada.gov.ua/laws/show/405/2014>> accessed 20 April 2016); ‘Turchynov Announces the Launch of a Large-Scale Anti-Terrorist Operation’ (*Comments.ua*, 13 April 2014) <<http://ua.comments.ua/politics/227818-turchynov-zayaviv-pro-pochatok-masshtabnoi.html>> accessed 20 April 2016.

²⁴ Law of Ukraine ‘On the fight against Terrorism’, No. 638-IV (20 March 2003) Art. 1 <<http://zakon5.rada.gov.ua/laws/show/638-15>> accessed 20 April 2016.

²⁵ *Ibid.*

²⁶ Law of Ukraine ‘On the National Guard of Ukraine’, No. 876-VII (13 March 2014) Art. 1 <<http://zakon5.rada.gov.ua/laws/show/876-18>> accessed 20 April 2016.

²⁷ Law of Ukraine ‘On the fight against Terrorism’, Arts. 4-5.

²⁸ ‘Number of IDPs exceeded 1.5 million’ *Ukrayins'ka Pravda* (Ukraine, 18 January 2016) <www.pravda.com.ua/news/2016/01/18/7095787/> accessed 20 April 2016.

From mid-April 2014 to 31 May 2016, HRMMU recorded at least 9,404 fatalities and at least 21,671 injuries from the Armed Forces of Ukraine, civilians and members of the armed separatist groups in the conflict area of eastern Ukraine.²⁹ An estimated 2,000 civilians were killed during the same period, with an additional 298 persons killed as a result of the downing of the Malaysia Airplane (“MH17”).³⁰

Although no cogent information or evidence currently exists to suggest that genocide is taking place on the territory of Ukraine, HRMMU monitoring since 2014 suggests that conduct that may amount to war crimes, or possibly crimes against humanity, is occurring in the ATO zone.

HRMMU reports consistently outline a range of facts that suggest the following is taking place in the conflict areas: First, there appears to be a widespread occurrence of illegal detention and associated crimes. The HRMMU has recorded allegations of armed groups engaging in illegal detention,³¹ arbitrary detention,³² and kidnapping of civilians by armed groups,³³ including people with disabilities and pregnant women.³⁴ During detention, civilians appear to have been subjected to ill-treatment,³⁵ sexual violence,³⁶ torture,³⁷ as well as being denied access to legal assistance³⁸ and held in detention incommunicado.³⁹ There is also evidence that armed groups have arbitrarily executed Ukrainian soldiers.⁴⁰

²⁹ OHCHR ‘Accountability for killings in Ukraine from January 2014 to May 2016’ (14 July 2016) paras. 31, 60 <http://www.ohchr.org/Documents/Countries/UA/OHCHRThematicReportUkraineJan2014-May2016_EN.pdf> accessed 21 July 2016.

³⁰ OHCHR ‘Accountability for killings in Ukraine from January 2014 to May 2016’ (14 July 2016) paras. 32, 60 <http://www.ohchr.org/Documents/Countries/UA/OHCHRThematicReportUkraineJan2014-May2016_EN.pdf> accessed 21 July 2016.

³¹ OHCHR, ‘Accountability for Killings in Ukraine from January 2014 to May 2016’ (14 July 2016) paras.53, 58 <http://www.ohchr.org/Documents/Countries/UA/OHCHRThematicReportUkraineJan2014-May2016_EN.pdf> accessed 21 July 2016.

³² OHCHR, ‘Report on the human rights situation in Ukraine’ (15 June 2014) para.154 <www.ohchr.org/Documents/Countries/UA/HRMMUReport15June2014.pdf> accessed 20 April 2016; OHCHR, ‘Report on human rights situation in Ukraine’ (15 May 2014) para. 101 <www.ohchr.org/Documents/Countries/UA/HRMMUReport15May2014.pdf> accessed 20 April 2016.

³³ OHCHR, ‘Report on the human rights situation in Ukraine’ (15 December 2014) para. 41 <www.ohchr.org/Documents/Countries/UA/OHCHR_eighth_report_on_Ukraine.pdf> accessed 20 April 2016.

³⁴ OHCHR, ‘Report on the human rights situation in Ukraine’ (16 May to 15 August 2015) paras. 45, 46 <www.ohchr.org/Documents/Countries/UA/11thOHCHRreportUkraine.pdf> accessed 20 April 2016.

³⁵ *Ibid*, para. 44.

³⁶ *Ibid*, para. 48; OHCHR ‘Report on the human rights situation in Ukraine’ (15 July 2014) para. 52 <www.ohchr.org/Documents/Countries/UA/HRMMUReport15June2014.pdf> accessed 20 April 2016.

³⁷ OHCHR, ‘Report on the human rights situation in Ukraine’ (16 September 2014) para.40; OHCHR, ‘Report on the human rights situation in Ukraine’ (16 May to 15 August 2015) para. 46.

³⁸ OHCHR, ‘Report on the human rights situation in Ukraine’ (16 August to 15 November 2015) para.5.

³⁹ OHCHR, ‘Report on the human rights situation in Ukraine’ (16 May to 15 August 2015), para. 46; OHCHR ‘Report on the human rights situation in Ukraine’ (17 August 2014) para. 49 <www.ohchr.org/Documents/Countries/UA/UkraineReport28August2014.pdf> accessed 20 April 2016; OHCHR, ‘Report on the human rights situation in Ukraine’ (16 August to 15 November 2015) paras. 34; OHCHR, ‘Report on the human rights situation in Ukraine’ (16 November 2015 to 15 February 2016) para. 12.

⁴⁰ OHCHR, ‘Report on the human rights situation in Ukraine’ (16 May to 15 August 2015), para. 43.

The evidence also extends to Ukrainian law enforcement authorities/Armed Forces/SBU and volunteer battalions.⁴¹ HRMMU has recorded allegations of illegal detention, arbitrary detention, ill-treatment,⁴² forced labour, torture,⁴³ sexual violence,⁴⁴ deaths in custody,⁴⁵ the denial of lawyers to detainees by Ukrainian law enforcement bodies and security entities,⁴⁶ and incommunicado detention.⁴⁷ HRMMU has also recorded allegations of clandestine, illegal places of detention, operated by the voluntary battalions and Ukrainian law enforcement bodies where detainees are ill-treated.⁴⁸ The SBU have been consistently accused of engaging in arbitrary detention,⁴⁹ torture, enforced disappearances of people suspected of “separatism and terrorism”, ill-treatment and reprisals upon the release of such persons.⁵⁰

HRMMU’s monitoring also suggests the commission of a variety of other criminal acts in and around the combat zone. HRMMU has recorded allegations of killings,⁵¹ enforced disappearances,⁵² sexual violence,⁵³ extortion of money,⁵⁴ abductions,⁵⁵ and various forms of public humiliation and other forms of cruelty.⁵⁶ Additionally, HRMMU’s monitoring has alleged that Ukrainian law enforcement authorities, the Armed Forces, the SBU, and volunteer battalions, may have committed a range of crimes. HRMMU has recorded a range of

⁴¹ OHCHR ‘Accountability for killings in Ukraine from January 2014 to May 2016’ (14 July 2016) para. 62: OHCHR observes, particularly with regards to crimes allegedly committed by individuals belonging to the ranks of Ukrainian military and law enforcement, an ‘apparent lack of motivation’ to carry out investigative actions into alleged cases of killings, torture and ill-treatment. This leads to impunity and also provides some alleged perpetrators with opportunities to escape justice.

⁴² OHCHR ‘Report on the human rights situation in Ukraine’ (16 September 2014) para. 54 <www.ohchr.org/Documents/Countries/UA/OHCHR_sixth_report_on_Ukraine.pdf> accessed 20 April 2016; OHCHR ‘Report on the human rights situation in Ukraine’ (16 August to 15 November 2015) paras. 42, 43, 46.

⁴³; OHCHR ‘Report on the human rights situation in Ukraine’ (16 August to 15 November 2015) paras. 42, 43, 46.

⁴⁴ OHCHR, ‘Report on the human rights situation in Ukraine’ (16 May to 15 August 2015) para. 50.

⁴⁵ OHCHR ‘Accountability for killings in Ukraine from January 2014 to May 2016’ (14 July 2016) para. 51 <http://www.ohchr.org/Documents/Countries/UA/OHCHRThematicReportUkraineJan2014-May2016_EN.pdf> accessed 21 July 2016: The majority of these allegations pertaining to the death of people in custody were received in relation to the initial stages of the conflict (June 2014 – February 2015). Most of these deaths have reportedly been caused by torture and ill-treatment, or by inadequate medical aid or a complete lack thereof.

⁴⁶ OHCHR, ‘Report on the human rights situation in Ukraine’ (16 May to 15 August 2015) paras. 50, 51, 52, 53.

⁴⁷ OHCHR, ‘Report on the human rights situation in Ukraine’ (15 June 2014) para. 152;

⁴⁸ OHCHR, ‘Report on the human rights situation in Ukraine’ (15 November 2014) para. 10 <www.ohchr.org/Documents/Countries/UA/OHCHR_seventh_reportUkraine20.11.14.pdf> accessed 20 April 2016.

⁴⁹ On 18 December 2014 for example, *Viacheslav Kazantsev* was detained by the SBU in the Donetsk region pursuant to Article 258 of the Ukrainian Criminal Code (terrorism). He died 7 days later in hospital after being admitted to the emergency department with grievous bodily injuries. A criminal investigation into his death was launched on 14 January 2015, but no progress has been reported as of 1 June 2016. See OHCHR ‘Accountability for killings in Ukraine from January 2014 to May 2016’ (14 July 2016) paras. 102-103 <http://www.ohchr.org/Documents/Countries/UA/OHCHRThematicReportUkraineJan2014-May2016_EN.pdf> accessed 21 July 2016.

⁵⁰ OHCHR, ‘Report on the human rights situation in Ukraine’ (15 July 2014) para. 13; OHCHR, ‘Report on the human rights situation in Ukraine’ (15 December 2014) para. 9.

⁵¹; OHCHR, ‘Report on the human rights situation in Ukraine 15 May 2014’ para. 94; OHCHR, ‘Report on the human rights situation in Ukraine’ (15 July 2014) para. 47; OHCHR, ‘Report on the human rights situation in Ukraine’ (16 May to 15 August 2015) para. 36.

⁵² OHCHR, ‘Report on the human rights situation in Ukraine’ (16 May to 15 August 2015) paras. 36, 37.

⁵³ *Ibid*, para. 39.

⁵⁴ *Ibid*.

⁵⁵ *Ibid*.

⁵⁶ OHCHR, ‘Report on the human rights situation in Ukraine’ (16 September 2014) paras. 54, 55.

executions and torture⁵⁷ and enforced disappearances.⁵⁸ For example, HRMMU has documented specific allegations of enforced disappearances, arbitrary detention and ill-treatment by the members of volunteer battalions such as “Aydar”, “Dnipro-1”, “Kyiv-1” and “Kyiv-2”.⁵⁹

Concerning military methods, HRMMU has reported a range of activities that appear to have violated the principle of distinction between civilians and those actively taking part in hostilities in both government and opposition armed-group controlled areas of Donetsk and Luhansk regions.⁶⁰ This conduct has included indiscriminate shelling that has led to death, injury and damage to property.⁶¹ There have been reports of the use of unlawful weapons, particularly the use of cluster munitions in both urban and rural areas.⁶² HRMMU has also recorded the presence of anti-personnel mines in the conflict-affected area that have caused civilian casualties.⁶³

HRMMU’s information concerning IHL and human rights violations is generally corroborated by civil society organisations. They too have monitored and recorded a variety of violations ranging from illegal detention;⁶⁴ (frequent) torture;⁶⁵ sexual violence;⁶⁶ extrajudicial

⁵⁷ *Ibid*, para. 31. See also Accountability for killings in Ukraine from January 2014 to May 2016’ (14 July 2016) para. 38 – 40 <http://www.ohchr.org/Documents/Countries/UA/OHCHRThematicReportUkraineJan2014-May2016_EN.pdf> accessed 21 July 2016; HRMMU has also received many allegations of executions of persons *hors de combat* as well as of persons who had surrendered. While the actual scale of the violence is difficult to determine – due to a lack of witnesses and access to information – HRMMU estimates there to have been dozens of incidents, particularly during the period of June 2014 – February 2015. There also appears to be an almost complete lack of accountability. OHCHR is unaware of any cases where alleged perpetrators, both members of armed groups or members of the Ukrainian forces, were held responsible for executing captured individuals.

⁵⁸ OHCHR, ‘Report on the human rights situation in Ukraine’ (15 July 2014) para. 79; OHCHR, ‘Report on the human rights situation in Ukraine’ (17 August 2014) para. 44.

⁵⁹ OHCHR, ‘Report on the human rights situation in Ukraine’ (16 September 2014) para. 42.

⁶⁰ OHCHR, ‘Report on the human rights situation in Ukraine’ (16 November 2015 to 15 February 2016) para. 23.

⁶¹ *Ibid*, paras. 24, 29; OHCHR, ‘Report on the human rights situation in Ukraine’ (15 July 2014) para. 30; OHCHR, ‘Report on the human rights situation in Ukraine’ (16 September 2014) para. 4; OHCHR, ‘Report on the human rights situation in Ukraine’ (15 November 2014) para. 25; OHCHR, ‘Report on the human rights situation in Ukraine’ (15 December 2014) para. 5; OHCHR, ‘Report on the human rights situation in Ukraine’ (16 May to 15 August 2015) para. 4; OHCHR, ‘Report on the human rights situation in Ukraine’ (16 August to 15 November 2015) paras. 21, 23.

⁶² OHCHR, ‘Report on the human rights situation in Ukraine’ (15 November 2014) para. 8.

⁶³ OHCHR, ‘Report on the human rights situation in Ukraine’ (16 November 2015 to 15 February 2016) para. 24.

⁶⁴ Justice for Peace in Donbas, ‘Surviving Hell: Testimonies of victims of illegal detention in Donbas’ (2015) 26-37 <<http://khpg.org/files/docs/1444128406.pdf>> accessed 20 April 2016. See also Human Rights in Ukraine, ‘2014 Report’ (2015) 67.

⁶⁵ Justice for Peace in Donbas, ‘Surviving Hell: Testimonies of victims of illegal detention in Donbas’ (2015) 55-75. See also Centre for Civil Liberties, ‘The “Chemical Triangle” of the Region of Lugansk during the occupation: hostages, torture and extrajudicial executions: Report on visit of the monitoring group of the Centre for Civil Liberties to Severodonetsk, Lysychansk and Rubinzhne during December 6-11, 2014’ (5 January 2015) (“The “Chemical Triangle” Report”) <http://ccl.org.ua/wp-content/uploads/2013/07/7_zvit-final-all-engl.pdf> accessed 20 April 2016; Human Rights in Ukraine, ‘2014 Report’ (2015) 67.

⁶⁶ Ukrainian Helsinki Human Rights Union (“UHHRU”), ‘Report on the Results of Monitoring Visit of the Ukrainian Helsinki Human Rights Union: Problems of gender-based violence in the conflict zone’ (11-16 August 2015) <<http://old.helsinki.org.ua/files/docs/1446546966.pdf>> accessed 20 April 2016. See also ‘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’ 62nd Session (October 2015) <http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/RUS/INT_CEDAW_NGO_RUS_22003_E.pdf> accessed 20 April 2016.

executions;⁶⁷ various forms of assault;⁶⁸ the destruction of property;⁶⁹ and the forced removal of civilians from their homes.⁷⁰

In sum, the above-mentioned, authoritatively sourced information, provides the grounds for a reasonable basis to believe that a number of war crimes may have occurred and a suspicion that crimes against humanity may be occurring in, or connected to, the ATO Zone. The range of IHL violations or other violations of international law potentially include the following:

- War crimes common to international and non-international armed conflicts:⁷¹
 - Wilful killing/murder;⁷²
 - Torture or inhuman treatment;⁷³
 - Intentionally directing attacks against the civilian population or against individual civilians not taking direct part in hostilities;⁷⁴
 - Committing outrages upon personal dignity, in particular, humiliating and degrading treatment;⁷⁵ and
 - Committing rape, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;⁷⁶
- War crimes only applicable to international armed conflicts:

⁶⁷ Human Rights in Ukraine, '2014 Report' (2015) 67. See also The "Chemical Triangle" Report.

⁶⁸ UHHRU, 'Report on the Results of Monitoring Visit of the UHHRU Monitoring of human rights violation of residents in Svatove (destruction of urban infrastructure, injuries) due to improper storage of ammunition' (3-7 November 2005) ("Report on the Monitoring Visit to Svatove") <<http://helsinki.org.ua/files/docs/1448103949.pdf>> accessed 20 April 2016; Human Rights in Ukraine, '2014 Report' (2015) 67.

⁶⁹ Report on the Monitoring Visit to Svatove.

⁷⁰ Human Rights in Ukraine, '2014 Report' (2015) 67.

⁷¹ For a definition of international and non-international armed conflicts see *infra* paras. 189, 212-217.

⁷² Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 ("Geneva Convention I") Art. 50; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 ("Geneva Convention II") Art. 51; Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 ("Geneva Convention III") Art. 130; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 ("Geneva Convention IV") Art. 147; Geneva Conventions, Common Art. 3; UN General Assembly, Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 U.N.T.S. 90 (as amended) ("Rome Statute") Arts. 8(2)(a)(i), 8(2)(c)(i).

⁷³ Geneva Convention I, Art. 50; Geneva Convention II, Art. 51; Geneva Convention III, Art. 130; Geneva Convention IV, Art. 147; Geneva Conventions, Common Art. 3; Rome Statute, Arts. 8(2)(a)(ii)-1, 8(2)(c)(i).

⁷⁴ Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 ("Additional Protocol I"), Arts. 51(2), 85(3); Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 ("Additional Protocol II") Arts. 4(2)(d), 13(2); Rome Statute, Arts. 8(2)(b)(i), 8(2)(e)(i).

⁷⁵ Additional Protocol I, Art. 75(2)(b); Geneva Conventions, Common Art. 3; Rome Statute, Arts. 8(2)(b)(xxi), 8(2)(c)(ii).

⁷⁶ Geneva Convention IV, Art. 27(2); Additional Protocol I, Art. 75(2)(b); Additional Protocol II, Art. 4(2)(e); Rome Statute, Arts. 8(2)(b)(xxii), 8(2)(e)(vi).

- Wilfully causing great suffering, or serious injury to body or health;⁷⁷
- Unlawful confinement;⁷⁸
- Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;⁷⁹ and
- Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians;⁸⁰
- Crimes against humanity:
 - Murder;⁸¹
 - Imprisonment or other severe deprivation of physical liberty;⁸²
 - Torture;⁸³
 - Rape;⁸⁴
 - Sexual violence;⁸⁵
 - Persecution;⁸⁶ and
 - Other inhumane acts.⁸⁷

It is the generally accepted legal view that the violations of IHL and other serious violations of international criminal law committed in Ukraine may amount to war crimes, and possibly crimes against humanity, but not genocide. Based on an analysis of the available information being collected by HRMMU and civil society organisations within Ukraine (summarised above⁸⁸), GRC agrees with this view. Accordingly, this Report's assessment of the Ukrainian authorities' compliance with its international obligations to investigate and prosecute these crimes will focus on the responsibilities that arise in the face of persuasive evidence of the commission of war crimes and (possibly) crimes against humanity in the conflict zones.

Structure of the Report

⁷⁷ Geneva Convention I, Art. 50; Geneva Convention II, Art. 51; Geneva Convention III, Art. 130; Geneva Convention IV, Art. 147; Rome Statute, Art. 8(2)(a)(iii).

⁷⁸ Geneva Convention I, Art. 50; Geneva Convention II, Art. 51; Geneva Convention III, Art. 130; Geneva Convention IV, Art. 147; Rome Statute, Art. 8(2)(a)(vii)-2).

⁷⁹ Additional Protocol I, Art. 51(2); Rome Statute, Art. 8(2)(b)(ii).

⁸⁰ Additional Protocol I, Art. 85(3)(b); Rome Statute, Art. 8(2)(b)(iv).

⁸¹ Rome Statute, Art. 7(1)(a).

⁸² Rome Statute, Art. 7(1)(e).

⁸³ Rome Statute, Art. 7(1)(f).

⁸⁴ Rome Statute, Art. 7(1)(g).

⁸⁵ Rome Statute, Art. 7(1)(g).

⁸⁶ Rome Statute, Art. 7(1)(h).

⁸⁷ Rome Statute, Art. 7(1)(k).

⁸⁸ See *supra*, para 16-21.

Following the Introduction, Part I - *Ukraine's Conflict and International Crimes* - provides the context for the Report, namely a brief overview of the ongoing conflict in eastern Ukraine and the range of international crimes that appear to be occurring based on publically available information. Part II - *Ukraine's Obligations to Prosecute Violations of IHL and other Serious Violations of International Law* - discusses Ukraine's treaty based and customary law obligations to prosecute such violations, including those that may be attributed to those individuals at the leadership level and therefore relevant for prospective prosecution at the ICC.

Part III - *Ukraine's Domestic Prosecution of Conflict-Related Crimes* – reviews a representative sample of the available public information concerning Ukraine's current investigation and prosecution of international crimes and analyses the steps that Ukraine has taken towards meeting those obligations (as outlined in Part II).

As will be discussed in Part IV, there is persuasive evidence of the commission of a range of war crimes (and, potentially, crimes against humanity) in the east of Ukraine. The approaches to prosecution appear to eschew any meaningful focus on the misconduct of combatants towards civilians. This pattern suggests that this evidence is being disregarded, or at least being investigated or prosecuted in manner that is not sufficient to fulfil Ukraine's international obligations to prosecute and provide an effective penal sanction for all serious violations of IHL.

Finally, the *Conclusion* discusses this apparent failure to prosecute IHL violations and other serious violations of international law as well as how it might be immediately remedied, at least in part, through more effective use of the current Criminal Code. The *Conclusion* sets out a number of steps that Ukrainian prosecutors should take to make use of its domestic criminal framework – particularly Article 438 of the Criminal Code - to prosecute, as war crimes, conduct that is presently not the subject of criminal charges in Ukrainian courts (or is otherwise being prosecuted as ordinary crimes). This section outlines the various war crimes and their elements that appear to be relevant to the suspected violations that have occurred and appear to be ongoing. It further outlines how these 'facts' might form the basis of viable war crimes charges that would enable Ukraine to take significant steps towards the appropriate prosecution of IHL and other serious violations of international law and the fulfilment of its obligations to provide effective penal sanctions and the repression of ongoing violations of IHL.

Ukraine's Obligations to Prosecute Violations of IHL and other Serious Violations of International Law

The Applicability of IHL

There is a common misconception in Ukraine that the Government of Ukraine's characterisation of the armed conflict as an ATO prevents the applicability of IHL. However, this is incorrect. The applicability of IHL is determined whenever the factual situation of an armed conflict meets the required threshold criteria irrespective of the parties to the conflict's view. An armed conflict - not a formal declaration of war (which the establishment of the ATO zone appears to be designed to avoid) or recognition of the situation as an armed conflict - is the trigger for the applicability of IHL.⁸⁹ Under international law, an armed conflict exists "whenever there is resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State".⁹⁰

Once IHL is applicable, there arises a concomitant obligation to investigate and prosecute serious violations of IHL, a duty delineated in a number of treaties that apply to acts committed in both international and non-international armed conflicts.⁹¹ In particular, the Geneva Conventions oblige states to enact legislation on penal sanctions for grave breaches of the Geneva Conventions and Additional Protocol I, to search for any persons accused of such violations, and to prosecute or extradite them to another state for prosecution.⁹²

Furthermore, under customary international law,⁹³ states must investigate any war crimes allegedly committed by their nationals, or on their territory, and, if appropriate, prosecute suspects. Indeed, state practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.⁹⁴

⁸⁹ Geneva Convention I, Arts. 2, 3; Geneva Convention II, Art. 2, 3; Geneva Convention III, Arts. 2, 3; Geneva Convention IV, Arts. 2, 3; Additional Protocol I, Arts. 1, 3; Additional Protocol II, Art. 1.

⁹⁰ *Prosecutor v. Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) Case No. ICTY-94-1-AR72 (2 October 1995) ("*Tadić* Interlocutory Appeal Decision") para. 70.

⁹¹ See for example UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277, Art. 6; Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 240 ("Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict"), Art. 28; UN General Assembly, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1485 UNTS 85, Art. 7; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (adopted 3 September 1992, entered into force 1997) 1974 UNTS 45, Art. VII(1); Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (adopted 26 March 1999, entered into force 9 March 2004) 2253 UNTS 172 ("Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict"), Arts. 15-17.

⁹² Geneva Convention I, Art. 49; Geneva Convention I, Art. 50; Geneva Convention III, Art. 129, Geneva Convention IV, Art. 146.

⁹³ See GRC, 'Domestic Implementation of International Humanitarian Law in Ukraine' (May 2016) 74.

⁹⁴ ICRC 'Prosecution on War Crimes - Rule 158' (ICRC, 2009) <www.icrc.org/customary-ihl/eng/docs/v1_rul_rule158> accessed 20 April 2016.

Other Serious Violations of International Law

Genocide and crimes against humanity are not serious violations of IHL but they are international crimes. They can be committed at any time, regardless of whether an armed conflict exists or not. The obligation to prosecute these crimes stems from different international sources of law. It should, however, be noted that conduct amounting to genocide or crimes against humanity may also amount to war crimes if committed during an armed conflict and it meets the required threshold criteria. As a result, an individual can be prosecuted for genocide, crimes against humanity and/or war crimes for the same conduct.⁹⁵

Under the Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”) and customary international law, genocide shall be punishable and individuals who committed genocide shall be punished.⁹⁶ As a state party to the Genocide Convention since 1954, Ukraine has incorporated the offence of genocide into its Criminal Code.⁹⁷ Article I of the Genocide Convention states that “genocide, whether committed in time of peace or in time of war, is a crime under international law which they (the Contracting Parties) undertake to prevent and to punish”.

Crimes against humanity are crimes under the Rome Statute and customary international law.⁹⁸ Any State that ratifies the Rome Statute (or issues a declaration under Rule 12(3) of the Statute, as Ukraine has done⁹⁹) must ensure that the crimes under the Statute, including crimes against humanity, are criminalised in their domestic legislation. However, the Criminal Code of Ukraine does not criminalise crimes against humanity. The following section will discuss, among others, alternatives to the lack of crimes against humanity in the Criminal Code of Ukraine.

Normative Desirability to Prosecute International Crimes

⁹⁵ See for example *Prosecutor v. Mucić et al* (Appeals Judgment) Case No. ICTY-96-21-A (20 February 2001) para 412; *Prosecutor v. Jelisić* (Appeals Judgment) Case No. ICTY-95-10-A (5 July 2001) para. 82; *Prosecutor v. Kronjelac* (Trial Judgment) Case No. ICTY-97-25-T (15 March 2002) para. 503; *Prosecutor v. Kunarac, Kovač and Vuković* (Appeals Judgment) Case No. ICTY-96-23 & ICTY-96-23/1-A (12 June 2002) para. 173; *Prosecutor v. Naletilić and Martinović* (Trial Judgment) Case No. ICTY-98-34-T (31 March 2003) para. 718; *Prosecutor v. Musema* (Appeals Judgment) Case No. ICTR-96-13-A (16 November 2001) paras. 358-370.

⁹⁶ Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277, Arts. III, IV. See also Johan D. van der Vyver, ‘Prosecution and Punishment of the Crime of Genocide’ (1999) 23(2) Fordham International Law Journal 286, 296.

⁹⁷ Criminal Code of Ukraine, Art. 442.

⁹⁸ Rome Statute, Art. 7. See also *Prosecutor v. Tadić* (Decision on the Defence Motion on Jurisdiction) ICTY-94-1 (10 August 1995), para. 4.

⁹⁹ Although the Government of Ukraine has not ratified the Rome Statute, it has accepted the jurisdiction of the ICC. Based on the two Declarations identified above, the jurisdiction of the ICC in relation to its preliminary examination in Ukraine extends to events from 21 November 2013 for an indefinite period and includes prosecutions for any war crime, crime against humanity or genocide falling under the ICC’s governing law - the Rome Statute.

States are accorded significant flexibility in prosecuting crimes occurring during conflict. There is no ‘one size fits all’ approach to ensure fulfilment of these obligations.¹⁰⁰ As observed by the International Criminal Tribunal for the former Yugoslavia (“ICTY”):

looking at the various international instruments governing humanitarian law and criminal law, it would appear that there is no written rule which obligates States to prosecute serious breaches of international humanitarian law on the basis of international law on war crimes.¹⁰¹

Ordinary crimes charges may therefore be appropriate for the prosecution of conduct amounting to war crimes or other violations of international law. However, prosecuting such conduct as international crimes (rather than ordinary crimes) may more accurately encompass the relevant misconduct and in doing so more accurately describe the events and the gravity of the violation. As discussed by the South African Constitutional Court in the context of considering charges for numerous ordinary crimes, including conspiracy to kill hundreds of members of the South West Africa People’s Organisation in Namibia in the 1980s, there exists an “international consensus on the normative desirability of prosecuting war criminals”¹⁰² and there is a duty on states to “provide effective penal sanctions” for persons involved in violations of international law as provided for by Article 146 of Geneva Convention IV.¹⁰³ Thus, the Constitutional Court found that the nature of the charges in the overall context of international law and South Africa’s international obligations should have been taken into consideration by the Supreme Court of Appeal.¹⁰⁴

As is outlined in detail in Annex B - *Elements of a Selection of Specific Crimes*, war crimes and other serious violations of international law, such as crimes against humanity, are committed in specific contexts (for example, with a specific nexus to an armed conflict or as part of a “widespread” or “systematic” attack on a civilian population) that shape the violations and place them into their overall context. Capturing this conduct by relying upon “ordinary” domestic crimes is often very difficult and sometimes impossible.

An appropriate legal equivalent may not exist in the domestic legal framework.¹⁰⁵ For example, it is unlikely that international crimes such as wilfully depriving a prisoner of war the rights of a fair trial, or the wrongful use of signs such as the Red Cross, which both may

¹⁰⁰ See GRC, ‘Domestic Implementation of International Humanitarian Law in Ukraine’ (May 2016) 74.

¹⁰¹ *Prosecutor v. Hadžihasanović and Kubura*, Trial Judgment, Case No. ICTY-01-47-T (15 March 2006) para. 259.

¹⁰² Constitutional Court of South Africa, *S. v. Basson* (CCT30/03A) [2005] ZACC 10 (9 September 2005) para. 184 <www.saflii.org/za/cases/ZACC/2005/10.html> accessed 20 April 2016.

¹⁰³ Constitutional Court of South Africa, *S. v. Basson* (CCT30/03) [2004] ZACC 13 (10 March 2004) paras. 117 - 123 <www.saflii.org/za/cases/ZACC/2004/13.html> accessed 20 April 2016.

¹⁰⁴ Constitutional Court of South Africa, *S. v. Basson* (CCT30/03A) [2005] ZACC 10 (9 September 2005) para. 185.

¹⁰⁵ R Rissing-van Saan, ‘The German Federal Supreme Court and the Prosecution of International Crimes Committed in the Former Yugoslavia’ (2005) 3 *Journal of International Criminal Justice* 381, 395-396.

amount to serious violations of IHL, will have a domestic equivalent in the legislation of most countries.¹⁰⁶

More specifically, an “implicit requirement” of the grave breaches regime of the Geneva Conventions is that sanctions should reflect the gravity of the conduct.¹⁰⁷ Generally speaking, therefore, adapting domestic laws for the proper punishment of breaches of the Geneva Conventions is complex.¹⁰⁸ Accordingly, the Commentary to the Geneva Conventions states that it is preferable that a special law is enacted domestically for these breaches to ensure they provide “an adequate penalty for each”.¹⁰⁹

In sum, “the fact that the Geneva Conventions and general international law do allow states to prosecute grave breaches on the basis of ordinary criminal law does not mean that any charge suffices to satisfy the requirements of the grave breaches regime as long as some kind of prosecution takes place”.¹¹⁰ It is necessary that the relevant prosecution is meaningful, that the charges correspond to the gravity of the crime, and that the charges entail “effective penal sanctions”.¹¹¹

As such, an indictment should reflect the context and characteristics of the crime to the greatest extent possible.¹¹² The same applies to the consequent punishment. Charging domestic crimes may remove essential aspects of the perpetrators action, knowledge, intent and motivation, thereby making it difficult, if not impossible, to achieve this goal. As one commentator correctly observes, international crimes occur within contexts that possess “elements that operate as qualifiers of gravity and restrictors of international jurisdiction to extraordinarily offensive crimes”.¹¹³ In other words, removing the above contexts may deprive the violation of its true nature and gravity and undermine the likelihood of an appropriate penal sanction.

Of course, in some legal systems, the absence of appropriate international crimes (*i.e.*, crimes against humanity) will leave prosecutors with no choice between charging conduct as

¹⁰⁶ Geneva Convention III, Art. 130; Additional Protocol I, Art. 85(3)(f); W Ferdinandusse, ‘The Prosecution of Grave Breaches in National Courts’ (2009) 7 *Journal of International Criminal Justice* 723, 730.

¹⁰⁷ *Ibid*, 731.

¹⁰⁸ J S Pictet (ed.) *Commentary on the Geneva Conventions of 12 August 1949, Vol. III* (ICRC 1958) 629; J S Pictet (ed.) *Commentary on the Geneva Conventions of 12 August 1949, Vol. VI* (ICRC 1958) 590.

¹⁰⁹ ICRC, ‘Commentary of Article 147 of Geneva Convention IV’ (ICRC, 1958) para. 17 <www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=21B052420B219A72C1257F7D00587FC3> accessed 20 April 2016.

¹¹⁰ W Ferdinandusse, ‘The Prosecution of Grave Breaches in National Courts’ (2009) 7 *Journal of International Criminal Justice* 723, 731.

¹¹¹ Geneva Convention, Art. 49; Geneva Convention II, Art. 50; Geneva Convention III, Art. 129; Geneva Convention IV, Art. 146. See also W Ferdinandusse, ‘The Prosecution of Grave Breaches in National Courts’ (2009) 7 *Journal of International Criminal Justice* 723, 731.

¹¹² W Ferdinandusse, ‘The Prosecution of Grave Breaches in National Courts’ (2009) 7 *Journal of International Criminal Justice* 723, 726.

¹¹³ X Agirre Aranburu, ‘Methodology for the Criminal Investigation of International Crimes,’ in A Smeulers (ed.), *Collective Violence and International Criminal Justice: An Interdisciplinary Approach* (Intersentia 2010) 367; E Fry, *The Contours of International Prosecutions: As Defined by Facts Charges, and Jurisdiction* (Eleven International Publishing 2015) 21.

an international crime or an ordinary crime. They will instead be forced to pursue the most serious ordinary crime charges applicable to the case.¹¹⁴ However, in such circumstances it should be ensured that the ordinary criminal law is utilised optimally and as far as possible reflects the gravity of the crime; room should be left for the proceedings and judgment to reflect the international background and context of the case.¹¹⁵

Moreover, prosecuting international criminal conduct may bring significant transitional justice benefits that might not result from the prosecution of only ordinary crimes. In particular, prosecuting international crimes can play an important history-telling function that not only provides victims and posterity with a more accurate record of the occurrence, but also assists in marking the perpetrator's conduct more accurately, which in turn may assist transitional justice efforts and the fight against impunity.¹¹⁶ Arguably, this might assist in the overall aim of restoring peace and security, as the prosecutions should bring a truer sense of accountability and closure in turn resulting in greater prospects for national reconciliation within the affected population.¹¹⁷

In sum, although the use of ordinary criminal law to prosecute war crimes is not contrary to states' international legal obligations, cogent legal and normative reasons exist to favour the prosecution of such conduct as international crimes.

Charging Obligations Arising from ICC Jurisdiction

Introduction

As described above,¹¹⁸ the appropriate charging of international crimes that occur during conflict situations is an obligation demanded by international instruments, including the Geneva Conventions and the Genocide Convention, as well as customary law. These obligations are similar to the obligations that arise as a consequence of a state signing and ratifying the Rome Statute or otherwise being subject to the ICC's jurisdiction.

¹¹⁴ L Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford University Press 2003) 100 - 101; W Ferdinandusse, 'The Prosecution of Grave Breaches in National Courts' (2009) 7 *Journal of International Criminal Justice* 723, 726.

¹¹⁵ L Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford University Press 2003) 100-101; W Ferdinandusse, 'The Prosecution of Grave Breaches in National Courts' (2009) 7 *Journal of International Criminal Justice* 723, 726.

¹¹⁶ J D Ohlin, 'Goals of International Criminal Justice and International Criminal Procedure', in G. Sluiter et al. (eds), *International Criminal Procedure: Principles and Rules* (Oxford University Press 2013) 59. See generally E Fry, *The Contours of International Prosecutions: As Defined by Facts Charges, and Jurisdiction* (Eleven International Publishing 2015) 14-15, citing R Cryer et al., *An Introduction to International Criminal Law and Procedure* (2nd edn, Cambridge University Press 2010) 30-35; J Jackson, 'Faces of Transnational Justice: Two Attempts to Build Common Standards Beyond National Boundaries', in J Jackson et al. (eds), *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Mirjan Damaška* (Hart Publishing 2008) 226; UN Security Council, Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies, (23 August 2004) UN Doc. S/2004/616, para. 38.

¹¹⁷ E Fry, *The Contours of International Prosecutions: As Defined by Facts Charges, and Jurisdiction* (Eleven International Publishing 2015) 14.

¹¹⁸ See *supra*, paras. 29-33.

As will be discussed,¹¹⁹ where the ICC has jurisdiction and where the ICC Prosecutor determines that sufficient information exists to form a reasonable basis to believe that alleged crimes falling within the jurisdiction of the Court have been committed, she will examine whether the prospective cases are admissible at the ICC. In particular, the Prosecutor will consider whether the relevant state has initiated *adequate* investigations or prosecutions into those crimes. These assessments, and the concomitant questions that arise for states concerning their domestic prosecutions for international crimes, will be discussed below.¹²⁰

Apart from jurisdiction arising from ratification of the Rome Statute, the ICC has jurisdiction where:

- The state in question has ‘declared’ that it accepts the jurisdiction of the ICC without ratifying the Statute; or
- The United Nations Security Council (“UNSC”) refers a situation to the Court.

In any of these instances, states have associated obligations to pursue national prosecutions of conduct amounting to international crimes. It should be recalled that the ICC is a court of last resort. It is not intended to replace national criminal justice systems, but must complement them. The ICC will, in general, only hear cases against leadership. That is because the Court has an express policy of pursuing those most responsible. Whilst it retains jurisdiction over other cases where, for instance, they are of particular gravity or it is in the public interest for the ICC to pursue them, in general terms, lower level prosecutions should be brought domestically.

As outlined briefly above,¹²¹ on 17 April 2014, Ukraine filed a Declaration with the ICC accepting jurisdiction of the Court over crimes that occurred at Maidan between 21 November 2013 and 22 February 2014.¹²² On 8 September 2015, the Government of Ukraine submitted a second request to the ICC, accepting the jurisdiction of the Court for the purpose of identifying, prosecuting and judging the perpetrators and accomplices of IHL violations committed on the territory of Ukraine from 20 February 2014 to the present.¹²³ Due to these Declarations permitting the ICC to investigate international crimes under its jurisdiction (genocide, crimes against humanity and war crimes), the ICC is currently conducting a preliminary examination of the conflict in Ukraine.

The preliminary examination by the ICC Prosecutor will encompass four ‘phases’ in order to fully determine the situation or case before her: (i) *Phase one*: an initial assessment of all the information received as communicated to the ICC Prosecutor; (ii) *Phase two*: the formal commencement of a preliminary examination focusing on whether the alleged crimes fall

¹¹⁹ See *infra*, paras. 50-52.

¹²⁰ See *infra*, paras. 54 et seq.

¹²¹ See *supra*, para. 10.

¹²² Ukrainian Declaration accepting the jurisdiction of the ICC.

¹²³ Second Ukrainian Declaration accepting the jurisdiction of the ICC.

within the jurisdiction of the Court; (iii) *Phase three*: the consideration of issues relating to the admissibility of the crimes alleged; and (iv) *Phase four*: the consideration of issues relating to the interests of justice. At the completion of the preliminary examination, the ICC Prosecutor will file a Report with the ICC's Pre-Trial Chamber, characterised as an "Article 53(1) Report" that will outline her conclusions.¹²⁴

As will be described below,¹²⁵ in the event that the Prosecutor concludes that the state is not willing or able to genuinely investigate or prosecute the case that she is prospectively examining, she will (almost certainly) conclude that the case is "admissible" and apply to the Court to prosecute the case at the ICC. Whether the state is prosecuting the case through ordinary criminal charges or international crimes, the adequacy of this approach - namely whether the conduct being prosecuted is substantially the same as that sought to be prosecuted at the ICC - will be a principal focus of this determination. In circumstances where the ICC Prosecutor has determined that there is a reasonable basis for proceeding to an investigation into crimes of genocide, crimes against humanity or war crimes, there will need to be an additional scrutiny upon the adequacy of domestic or ordinary criminal charges (than would be the case with international charges) and this analysis may be a determining factor concerning whether the state is permitted to conduct the trial: or whether the ICC deems the case admissible and seeks to have the respective trials held at the ICC. This will be further discussed below.¹²⁶

Complementarity

The principle of admissibility encompasses the concepts of complementarity and gravity.¹²⁷ The present discussion is limited to the issue of complementarity. It is this aspect of the admissibility question that will focus upon the appropriateness/sufficiency of the state's domestic investigations and trials. The complementarity principle is established in Article 17(1)(a)-(c) and affirmed in paragraph 10 of the Preamble and Article 1 of the Statute. It provides that the ICC shall be "complementary to national criminal jurisdictions".¹²⁸ Complementarity can be described as concerning whether genuine investigations and prosecutions are being conducted at a national level sufficient to warrant a finding that the ICC does not have the right to try the relevant cases. It involves an analysis by the ICC Prosecutor of steps taken by national courts to investigate or prosecute the alleged crimes against specific individuals encompassed by the preliminary examination.¹²⁹ Annex B outlines the precise questions that the ICC will be required to address in relation to specific war crimes.

¹²⁴ OTP Policy Paper on Preliminary Examination, paras. 77-84.

¹²⁵ See *infra*, para. 52.

¹²⁶ See *infra*, paras. 79-86.

¹²⁷ Rome Statute, Arts. 17(1)(a)-(c) (complementarity) , 17(1)(d) (gravity).

¹²⁸ Rome Statute, preamble.

¹²⁹ Rome Statute, Arts. 18(1),19(2)(b).

When addressing issues of complementarity, the ICC Prosecutor will need to consider: (i) the likely groups of persons subject to investigation; and (ii) the crimes within the jurisdiction of the Court that are likely to be the focus of an investigation.¹³⁰ The ICC Prosecutor must then consider:

- a. Whether there are, or have been, national investigations or prosecutions relevant to the preliminary examination.¹³¹ If not, then this factor alone is sufficient to make the case admissible at the ICC;¹³²
- b. If there have been national investigations or prosecutions, the ICC Prosecutor will assess whether these relate to the potential cases being examined by the ICC Prosecutor. Principal amongst the questions raised are whether the same person and the same conduct are being investigated by the ICC Prosecutor and whether the focus is on those most responsible for the most serious crimes.
- c. If the answer is yes, the ICC Prosecutor will examine whether the national proceedings are vitiated by an unwillingness or inability to genuinely carry out the proceedings:¹³³
 - i. In considering an unwillingness to prosecute, the ICC will consider: (a) the existence of proceedings designed to shield an individual from ICC jurisdiction; (b) an unjustifiable delay in the proceedings; and (c) whether the proceedings fail to be impartial or independent;¹³⁴ and
 - ii. In considering an inability to prosecute, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the

¹³⁰ *Situation in the Republic of Kenya* (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya) ICC-01/09-19-Corr (31 March 2010) paras. 50, 182,188; *Situation in the Republic of Côte d'Ivoire* (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire) ICC-02/11-14 (3 October 2011) paras. 190-191,202-204.

¹³¹ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case) ICC-01/04-01/07-1497 (25 September 2009) para. 78.

¹³² *Ibid.*

¹³³ OTP Policy Paper on Preliminary Examinations, para. 49; The ICC has said that “the evidence related, *inter alia*, to the appropriateness of the investigative measures, the amount and type of resources allocated to the investigation, as well as the scope of the investigative powers of the persons in charge of the investigation ... which are significant to the question of whether there is no situation of ‘inactivity’ at the national level, are also relevant indicators of the State’s willingness and ability genuinely to carry out the concerned proceedings”: *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (Decision on the Admissibility of the Case Against Abdullah Al-Senussi) ICC-01/11-01/11-466-Red (11 October 2013) (“Decision on the Admissibility of the Case Against Abdullah Al-Senussi”) para. 210.

¹³⁴ Rome Statute, Art. 17(2); OTP Policy Paper on Preliminary Examinations, paras. 51-58; *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi) ICC-01/11-01/11-344-Red (31 May 2013) (“Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi”) paras. 199-215; Decision on the Admissibility of the Case against Abdullah Al-Senussi, para. 235.

state is unable to obtain the accused or the necessary evidence and testimony or is otherwise unable to carry out its proceedings;

- d. In the event that the ICC concludes that the national proceedings are either unwilling or unable, the ICC will (subject to the other ICC requirements) have jurisdiction over the crimes.

As such, the principle of complementarity provides a lens through which the appropriateness/sufficiency of the current efforts of the Government of Ukraine to prosecute conduct that may amount to international crimes arising from, or connected to, the ATO Zone may be adjudged. In particular, and as will be discussed, there can be little doubt that current Ukrainian investigatory and prosecutorial activity is insufficient to meet the ICC's threshold tests. Even though the Government of Ukraine has initiated prosecutions for war-related crimes, the available information suggests that the investigations and prosecutions address the smallest fraction of the IHL violations occurring in the ATO zone. Moreover, those investigations and prosecutions are centred upon specific national crimes and not international crimes, which in many instances fail to adequately capture the gravity of the conduct alleged. Accordingly, when viewed through the ICC's three-part complementarity test there appears to be inactivity at the domestic level that is inconsistent with Ukraine's obligations to pursue penal sanction for serious violations of IHL. This approach to national prosecutions will lead to cases being tried at the ICC and not domestically. The precise meaning of this test will be discussed below. It will then be followed by an analysis of the Government of Ukraine authorities' investigation and prosecution of IHL violations and other serious violations of international law and an overall assessment of the steps that Ukraine has taken in pursuance of its obligations to provide effective penal sanctions for those crimes.¹³⁵

Assessment One: Whether there is, or has been, an investigation or prosecution of the case by the state

As outlined above,¹³⁶ the ICC will consider whether there are relevant ongoing or completed investigations or prosecutions of a situation under consideration by the ICC by a state that has jurisdiction over it. Inactivity by a state satisfies the complementarity requirements.¹³⁷

To satisfy this criterion, at least one state with jurisdiction over the case must be actively investigating or prosecuting the case.¹³⁸

¹³⁵ See *infra*, sections *Ukraine's Domestic Prosecution of Conflict-Related Crimes* and *Conclusion: Short Term Recommendations*.

¹³⁶ See *supra*, para. 52.

¹³⁷ *The Prosecutor v Thomas Lubanga Dyilo* (Decision concerning Pre Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga) Case No. ICC-01/04-01/06-8 (24 February 2006) ("*Lubanga* Decision concerning Pre Trial Chamber I's Decision of 10 February 2006") para. 29.

¹³⁸ *Ibid*, 30.

Assessment Two: Same Person and Conduct Test?

For the ICC to be satisfied that the domestic investigation covers the same “case” as that before a Court, it must be demonstrated that: a) the person subject to the domestic proceedings is the same person against whom the proceedings before the Court are being conducted; and b) the conduct that is subject to the national investigation is substantially the same conduct that is alleged in the proceedings before the Court.¹³⁹ The domestic investigation and prosecution of a case must correspond in specific respects to the case being examined by the ICC.¹⁴⁰ Therefore, capturing the nature and gravity of the crime is vital.¹⁴¹

Whether the state pursues investigations and prosecutions into ordinary domestic crimes or international crimes, the ICC will consider whether the chosen approach encompasses the same conduct as the conduct the ICC wishes to prosecute - namely, war crimes, crimes against humanity or genocide.¹⁴² To satisfy this part of the criterion, the state must be taking “concrete and progressive investigative steps to ascertain whether the person is responsible for the conduct alleged against him before the Court”.¹⁴³ The state must be investigating substantially the same conduct and what this means will vary on a case-by-case basis,

¹³⁹ Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi, paras. 61, 74, 76,77: the Chamber recalled that the “same person, same conduct” test was initially elaborated in *Lubanga* Decision concerning Pre Trial Chamber I’s Decision of 10 February 2006, para. 31. This test was later recalled in: *The Prosecutor v. Ahmad Muhammad Harun (‘Ahmad Harun’) and Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)* (Decision on the Prosecution Application under Art. 58(7) of the Statute) ICC-02/05-01/07-I-Corr (27 April 2007) para. 24; *The Prosecutor v. Germain Katanga* (Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga) ICC-01/04-01/07-4 (6 July 2007) para. 20 (public redacted version in ICC-01/04-01/07- 55); *The Prosecutor v. Mathieu Ngudjolo Chui* (Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui) ICC-01/04-01/07-262 (6 July 2007) para. 21; *Prosecutor v. Omar Hassan Ahmad Al Bashir* (Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-2-Conf (4 March 2009) para. 50 (public redacted version in ICC-02/05-01/09-3); and *Prosecutor v. Bahr Idriss Abu Garda* (Decision on the Prosecutor’s Application under Article 58) ICC-02/05-02/09-I-Conf (7 May 2009) para. 4 (public redacted version in ICC-02/05-02/09-12-Anxl). The same approach was taken by Pre-Trial Chamber II in *Prosecutor v. Kony et al.* (Decision on the Admissibility of the Case under Article 19(1) of the Statute) ICC-02/04-01/05-377 (10 March 2009) paras. 17-18; *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* (Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute) ICC-01/09-01/11-101 (30 May 2011) para. 54; *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute) ICC-01/09-02/11-96 (30 May 2011) para. 48. Lastly, the same position was adopted by Pre-Trial Chamber III in *Prosecutor v. Jean-Pierre Bemba Gombo* (Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo) ICC-01/05-01/08-14-tENG (10 June 2008) para. 16.

¹⁴⁰ *Lubanga* Decision concerning Pre Trial Chamber I’s Decision of 10 February 2006, para. 31.

¹⁴¹ B Broomhall, ‘The International Criminal Court: A Checklist for National Implementation’ in M Cherif Bassiouni (ed), *ICC Ratification and National Implementing Legislation* (Nouvelles Etudes Penales 13 quarter 1999) 113, 149-151. See also D Robinson, ‘The Rome Statute and Its Impact on National Law’, in A Cassese et al, *The Rome Statute of the International Criminal Court* (Oxford University Press 2002) 1861; L E Carter, ‘The Principle of Complementarity and the International Criminal Court: the Role of *Ne Bis in Idem*’ (2010) 8 Santa Clara Journal of International Law 165, 194.

¹⁴² Rome Statute, Arts. 17(1) and 20(3). See also Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi, paras. 85-88; Decision on the Admissibility of the Case Against Abdullah Al-Senussi, para. 66.

¹⁴³ Decision on the Admissibility of the Case Against Abdullah Al-Senussi, para. 66: citing Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi, paras. 54, 55,73; *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’) ICC-01/09-02/11-274 (30 August 2011) paras. 1 , 40: These investigative steps may include “interviewing witnesses, suspects collecting documentary evidence, or carrying out forensic analysis”.

according to the facts and circumstances of each case. An individualised analysis of the facts is required for each matter.¹⁴⁴

The “same person, same conduct test” was first elaborated in the *Lubanga* case.¹⁴⁵ In that case, the national judicial system had taken a great deal of action towards investigation, including the issuance of two warrants of arrest and the holding of the relevant suspect (Thomas Lubanga) in the *Centre Penitenciaire et de Reeducation de Kinshasa*.¹⁴⁶ Nevertheless, these actions were deemed insufficient to make the case inadmissible because the national proceedings, although encompassing the same person, did not encompass the same conduct that was the subject of the case before the Court.¹⁴⁷ In particular, the Pre-Trial Chamber noted that the warrants of arrest issued by the Democratic Republic of Congo (“DRC”) made no reference to the alleged policy and practice of enlisting child soldiers (the principal focus of the ICC case) and thus the DRC could not be “considered to be acting in relation to the specific case before the Court”.¹⁴⁸

Furthermore, satisfaction of this criterion is not dependent upon the *legal categorisation* of the conduct but the conduct itself that is the focus of the national proceedings.¹⁴⁹ Accordingly, the question does not rest upon whether the investigation or prosecution is for international crimes or ordinary domestic crimes. It was a deliberate decision of the drafters of the Rome Statute not to distinguish between ordinary crimes and international crimes, and instead focus on the “conduct” prosecuted.¹⁵⁰ If the investigation or prosecution covers the same conduct, irrespective of the precise delineation, the ICC will deem it sufficient to reach a finding of inadmissibility.¹⁵¹ As observed, “[t]he question of whether domestic investigations are carried out with a view to prosecuting ‘international crimes’ is not determinative of an admissibility challenge”,¹⁵² and “a domestic investigation or prosecution for ‘ordinary crimes’, to the extent

¹⁴⁴ Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi, para. 77; Decision on the Admissibility of the Case Against Abdullah Al-Senussi, para. 66.

¹⁴⁵ *Lubanga* Decision concerning Pre Trial Chamber I’s Decision of 10 February 2006, para. 31. See also fn 134 for a list of the cases that have subsequently recalled the test.

¹⁴⁶ *Ibid*, para. 36.

¹⁴⁷ *Ibid*, para. 37.

¹⁴⁸ *Ibid*, paras. 37-39.

¹⁴⁹ Decision on the Admissibility of the Case Against Abdullah Al-Senussi, para. 66.

¹⁵⁰ Decision on the admissibility of the case against Saif Al-Islam Gaddafi, paras. 86-87 and fns 138-139; citing UNGA, ‘Report of the Ad Hoc Committee on the Establishment of an International Criminal Court’ 50th Sess., Supp. No. 22, A/50/22 (1995) paras. 43, 179. See also ‘Summary of the Proceedings of the Ad Hoc Committee during the period 3-13 April 1995’ A/AC.244/2 (*Ad hoc* Committee) para. 105; UNGA, ‘Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I (Proceedings of the Preparatory Committee During March-April and August 1996)’ 51st Sess., Supp. No. 22, A/51/22 (13 September 1996) para. 171. See also ‘Composite paper: Complementarity: Concrete Suggestions to the ILC Draft made in the Course of the Discussion’ (2 April 1996) draft Article 42; ‘Annex: Complementarity: a compilation of concrete proposals made in the course of discussion for amendment of the ILC Draft Statute (Preparatory Committee on the Establishment of an International Criminal Court -25 March-12 April 1996’ A/AC.249/CRP.9/Add.I (8 April 1996) draft Article 42. The reference to ordinary crimes was excluded from the 1998 Draft Statute: ‘Draft Statute for the International Criminal Court. Part 2. Jurisdiction, Admissibility and Applicable Law’ A/AC.249/1998/CRP.8 (2 April 1998) draft Article 13; ‘Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute & Draft Final Act’ A/Conf.183/2/Add.I (14 April 1998) draft Article 18.

¹⁵¹ Decision on the admissibility of the case against Saif Al-Islam Gaddafi, para. 88.

¹⁵² *Ibid*, para. 85.

that the case covers the same conduct, shall be considered sufficient”.¹⁵³ Accordingly, as outlined and expressly found by the ICC, the absence of domestic legislation allowing the prosecution of war crimes, crimes against humanity or genocide, whilst creating “admissibility” obstacles, does not *per se* render a case admissible at the ICC.¹⁵⁴

Further guidance on the “same conduct” test may be found in the ICC’s Libya complementarity determination. It was argued in the case of *Al-Senussi* (ex-Minister of Intelligence of Libya) that the fact that the international crime of persecution as a crime against humanity could not be charged at the national level (although it might be considered at the sentencing stage) due to a lack of local law, should lead to a judicial finding that Libya was not investigating the same case and that the case was therefore admissible before the ICC.¹⁵⁵ The ICC Appeals Chamber was not persuaded.¹⁵⁶ It approved the finding of the Pre-Trial Chamber that in the circumstances there was no need to charge the international crime of “persecution” (even though the ICC case was principally premised on this crime). The requirement that the domestic case covers substantially (and not identically) the same conduct provided Libya with a degree of flexibility when deciding how to pursue the case at the domestic level – an assessment of whether the “domestic case *sufficiently mirrors* the case before the court” is what is required.¹⁵⁷

In determining that the conduct underlying the charge of persecution as a crime against humanity was sufficiently covered by the Libyan proceedings,¹⁵⁸ the Appeals Chamber considered the various offences envisaged at the domestic level and the overall context of the case that was underpinned by crimes against civilians and the use of the Security Forces to suppress those demonstrating against a political regime.¹⁵⁹ Furthermore, as to the specific element of targeting a group or person based on political, racial or other groups – as required for persecution – the Appeals Chamber accepted that a Libyan judge could include discrimination on grounds constituting the international crime of persecution as an aggravating feature during sentencing.¹⁶⁰ Accordingly, it is possible for a state to pursue a technically different offence, if the facts are appropriately and substantially included, and the gravity and magnitude of the alleged offending is at some stage incorporated.¹⁶¹

¹⁵³ *Ibid*, para. 88.

¹⁵⁴ *Ibid*.

¹⁵⁵ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled ‘Decision on the admissibility of the case against Abdullah Al-Senussi’) ICC-01/11-01/11 OA 6 (24 July 2014) (“Appeals Judgment on the appeal of the ‘Decision on the admissibility of the case against Abdullah Al-Senussi’”) para. 118.

¹⁵⁶ *Ibid*, para. 118.

¹⁵⁷ *Ibid*, para. 119 [emphasis added].

¹⁵⁸ *Ibid*, para. 122.

¹⁵⁹ *Ibid*, para. 120.

¹⁶⁰ *Ibid*, para. 121.

¹⁶¹ L Finlay, ‘Does the International Criminal Court Protect Against Double Jeopardy: An Analysis of Article 20 of the Rome Statute’ (2008-2009) 15 U.C. David Journal of International Law and Policy 221, 229.

Similar issues arose in the *Gaddafi* case at the ICC. The ICC Prosecutor sought to charge Saif Al-Islam Gaddafi with a long list of alleged acts of murder and persecution as crimes against humanity.¹⁶² At the domestic level, Libya was investigating Gaddafi for a range of charges covering the same factual incidents as the ICC’s murder and persecution charges. However, in the domestic case they were not charged specifically as persecution or crimes against humanity.¹⁶³

In considering the matter, the ICC Pre-Trial Chamber raised “specific concerns regarding the ordinary crimes in relation to which Mr Gaddafi was being investigated”.¹⁶⁴ Nevertheless, they ruled that the same case was being investigated.¹⁶⁵ For the persecution charge, one of the Chamber’s main concerns was that the omission of a persecutory intent might mean that the crime charged did not sufficiently capture his conduct. However, the Pre-Trial Chamber resolved this apparent deficit through a conclusion (similar to that in the *Al-Senussi* case) that “although persecutory intent is not an element of any of the crimes against Mr Gaddafi, it is an aggravating factor which is taken into account in sentencing under Article 27 and 28 of the Libyan Criminal Code”.¹⁶⁶

Therefore, the Pre-Trial Chamber found that the plethora of charges advanced by Libya did not cover “all aspects of the offences” to be brought under the Rome Statute.¹⁶⁷ However, these charges had the potential to “sufficiently capture” his conduct along with the persecutory intent under “Articles 27 and 28 of the Libyan Criminal Code”.¹⁶⁸

A key concern for the Chamber was clearly whether the crimes charged met the gravity of the offences adequately. In this respect, the critical questions will often revolve around whether the ordinary crimes charged contain similar physical and mental elements, as well

¹⁶² Decision on the admissibility of the case against Saif Al-Islam Gaddafi, paras. 79-83: Namely, Mr Gaddafi allegedly used his control over relevant parts of the Libyan State apparatus and Security Forces to deter and quell, by any means, including by the use of lethal force, the demonstrations of civilians, which started in February 2011 against Muammar Gaddafi’s regime; in particular, that Mr Gaddafi activated the Security Forces under his control to kill and persecute hundreds of civilian demonstrators or alleged dissidents to Muammar Gaddafi’s regime, across Libya, in particular in Benghazi, Misrata, Tripoli and other neighbouring cities, from 15 February 2011 to at least 28 February 2011.

¹⁶³ Decision on the admissibility of the case against Saif Al-Islam Gaddafi, para. 37: Libya argued that the investigation concerned the same individual conduct by Mr. Gaddafi as the murder and persecution alleged by the ICC Prosecutor. The charges covered crimes against the person with a broad temporal scope and financial crimes dating back to 2006. The geographic scope was also said to take place in numerous places throughout Libya; para. 112-2: The ordinary crimes charged were intentional murder, torture, incitement to civil war, indiscriminate killings, misuse of authority against individuals, arresting people without just cause, and unjustified deprivation of personal liberty pursuant to Arts. 368, 435, 293, 296, 431, 433 and 434 of the Libyan Criminal Code. In addition, the potential charges of: insulting constitutional authorities pursuant to Art. 195, devastation, rapine and carnage pursuant to Art. 202, civil war pursuant to Art. 203, conspiracy pursuant to Art. 211, attacks upon the political rights of a Libyan pursuant to Art. 217, arson pursuant to Art. 297, spreading disease among plants and livestock pursuant to Art. 362, concealment of a corpse pursuant to Art. 294, aiding members of a criminal association pursuant to Art. 322, use of force to compel another pursuant to Art. 429, and search of persons pursuant to Art. 432 of the Libyan Criminal Code.

¹⁶⁴ *Ibid*, para. 108.

¹⁶⁵ *Ibid*, para. 113.

¹⁶⁶ *Ibid*, para. 111.

¹⁶⁷ *Ibid*, para. 113.

¹⁶⁸ *Ibid*.

as whether they are able to be properly contextualised as part of a widespread or systematic attack on a civilian population (to correspond to crimes against humanity) or through a nexus to an armed conflict (to correspond to war crimes). These latter contexts are important aspects of defining the scope, magnitude and gravity of the specific conduct and are often difficult to encompass within the elements constituting ordinary crimes.

In making the “same conduct, same case” assessment, the ICC will also consider the domestic crimes sentencing regime. As noted, a significant disparity in sentence may be a factor weighing against “allowing” the state to continue the prosecution domestically.¹⁶⁹ Domestic crimes may not provide for an adequate or comparable penal sanction and this will militate against a finding that the “same case” is being prosecuted at the domestic level. For some domestic offences, this issue may be more easily resolved. For example, depending upon the state in question, a domestic offence of murder may attract similar sentencing to a crime against humanity – both resulting in the most severe penalties.¹⁷⁰ However, with other offences this convergence may be less obvious: for example, pillaging prosecuted as mere theft may lead to a vastly different sentence.¹⁷¹

Therefore, although charging domestic offences may be sufficient, such an approach must be considered less than ideal and, in view of the ICC’s nascent ‘same case’ test, may continue to involve a significant and avoidable degree of uncertainty. It is difficult to predict the ICC’s precise calculation when considering domestic charges and weighing them against their own findings concerning genocide, crimes against humanity and war crimes. The explanatory jurisprudence is still in its infancy. Attempting to assess the correspondence between international crimes and domestic (ordinary) crimes is not a precise science. There can be real difficulty determining what ordinary crime should be charged to adequately capture conduct alleged to constitute an international crime. In the final analysis, such an approach places the state at a heightened risk of losing the admissibility argument on the basis of inaction resulting from deficits in domestic law and practice failing to provide the legal prohibitions for the full range of conduct encapsulated within the ICC Statute.¹⁷²

Third assessment: Are the national proceedings vitiated by an unwillingness or inability to genuinely carry out the proceedings?

If the ICC deems that there is relevant investigative or prosecutorial activity at the domestic level concerning the same conduct, the next assessment will be to determine whether these proceedings represent a genuine attempt to hold the individual accountable for their conduct. As previously noted, a determination of either unwillingness *or* an inability is sufficient to

¹⁶⁹ B Broomhall, ‘The International Criminal Court: A Checklist for National Implementation’ in M Cherif Bassiouni (ed), *ICC Ratification and National Implementing Legislation* (Nouvelles Etudes Penales 13 quarter 1999) 149.

¹⁷⁰ J Kleffner, ‘The Impact of Complementarity on National Implementation of Substantive International Criminal Law’ (2003) 1 *Journal of International Criminal Justice* 86, 97.

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*, 96-97, citing B Broomhall, ‘The International Criminal Court: A Checklist for National Implementation’ in M Cherif Bassiouni (ed), *ICC Ratification and National Implementing Legislation* (Nouvelles Etudes Penales 13 quarter 1999) 149.

remove a case from the domestic jurisdiction and make it “admissible” before the ICC (i.e., so that it must be tried at the ICC).¹⁷³

“Unwilling”

The first criterion requires an assessment of whether a state is “unwilling” to genuinely conduct national proceedings of the case. In order to determine unwillingness in a particular case, the ICC will consider whether: (a) the domestic proceedings were or are being undertaken or a decision was made at the domestic level for the purpose of shielding a person from criminal responsibility; (b) there has been an unjustifiable delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; and (c) the proceedings are not conducted impartially or independently and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.¹⁷⁴

Pre-Trial Chamber I at the ICC addressed the issue of unwillingness in the *Al-Senussi* decision on admissibility.¹⁷⁵ After satisfying itself that there was a relevant investigation at the domestic level, the Pre-Trial Chamber assessed whether conditions existed which indicated that Libya was unwilling to genuinely carry out proceedings against Al-Senussi.¹⁷⁶

When determining whether Libya was unwilling genuinely to carry out the proceedings, the Pre-Trial Chamber recognised that any assessment of the willingness (and ability) to carry out appropriate proceedings must be assessed in light of the relevant domestic law and procedures.¹⁷⁷ It further stated that an evidentiary debate on unwillingness or inability only arises when there are doubts as to the genuineness of the domestic proceedings. In those circumstance the the state must substantiate the concrete circumstances of the case.¹⁷⁸

Concerning Libya’s unwillingness to carry out criminal proceedings, the Pre-Trial Chamber considered a number of issues, including: (i) the quantity and quality of evidence collected by Libya as part of their investigation of the suspect, Mr Al-Senussi; (ii) the scope, methodology and resources of the investigation; (iii) the recent progress of the case, namely the transfer of it to the Accusation Chamber;¹⁷⁹ and (iv) other comparable proceedings being conducted.¹⁸⁰

¹⁷³ *Ibid*; OTP Policy Paper on Preliminary Examinations, para. 49; Decision on the Admissibility of the Case Against Abdullah Al-Senussi, para. 210: evidence related, *inter alia*, to the appropriateness of the investigative measures, the amount and type of resources allocated to the investigation, as well as the scope of the investigative powers of the persons in charge of the investigation ... which are significant to the question of whether there is no situation of ‘inactivity’ at the national level, are also relevant indicators of the State’s willingness and ability genuinely to carry out the concerned proceedings.

¹⁷⁴ Rome Statute, Art. 17(2). See also OTP Policy Paper on Preliminary Examinations, paras. 50-55.

¹⁷⁵ Decision on the admissibility of the case against Abdullah Al-Senussi, paras. 169- 293.

¹⁷⁶ *Ibid*, para. 202.

¹⁷⁷ *Ibid*, para. 208.

¹⁷⁸ *Ibid*.

¹⁷⁹ *Ibid*, para. 289.

¹⁸⁰ *Ibid*.

Regarding the need to consider whether the Government of Libya was shielding Al-Senussi from criminal responsibility for crimes within the jurisdiction of the Court,¹⁸¹ the Chamber considered that there was no indication to warrant a finding of “unwillingness” on this basis.¹⁸²

Concerning whether the Libyan proceedings were tainted by an unjustified delay that in the concrete circumstances was inconsistent with an intent to bring Mr Al-Senussi to justice, the Chamber observed that in the specific circumstances of the case – which had broad temporal, geographic and material parameters – a period of less than 18 months between the commencement of the investigation in relation to Mr Al-Senussi and the referral of the case against him to the Accusation Court, could not be considered an unjustified delay.¹⁸³ Thus, the Chamber was satisfied that the national investigations were not being conducted in a manner that was inconsistent with the intent to bring Mr Al-Senussi to justice.¹⁸⁴

Concerning the independence and impartiality of the national proceedings, not only must it be shown that the proceedings are not being conducted independently or impartially, the determination also requires a demonstration that the proceedings are not being conducted in a manner that, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.¹⁸⁵

The Appeals Chamber in the Al-Senussi case noted that the consideration of impartiality and independence is familiar in the area of human rights law and human rights standards.¹⁸⁶ However, the Appeals Chamber noted that the determination of independence and impartiality “is not one that involves an assessment of whether the due process rights of a suspect have been breached *per se*”.¹⁸⁷ Instead, the notions of independence and impartiality must be seen in light of Article 17(2)(c) which is primarily concerned with whether the national proceedings are being conducted in a manner that would enable the suspect to evade justice.¹⁸⁸

However, the Chamber considered that there might be circumstances where violations of the suspect’s rights will be egregious enough for a finding that the proceedings are “inconsistent with an intent to bring that person to justice”.¹⁸⁹ When discussing egregious violations of the

¹⁸¹ *Ibid*, para. 202.

¹⁸² *Ibid*, para. 290.

¹⁸³ *Ibid*, paras. 227-229 and 291.

¹⁸⁴ *Ibid*, para. 292.

¹⁸⁵ Rome Statute, Art. 17(2)(c); Appeals Judgment on the appeal of the ‘Decision on the admissibility of the case against Abdullah Al-Senussi’, para. 220.

¹⁸⁶ Appeals Judgment on the appeal of the ‘Decision on the admissibility of the case against Abdullah Al-Senussi’, para. 220.

¹⁸⁷ *Ibid*, para. 230.

¹⁸⁸ *Ibid*, para. 221.

¹⁸⁹ *Ibid*.

suspect's rights, the Appeals Chamber noted that proceedings that were little more than predetermined preludes to executions would be sufficient to render a case inadmissible.¹⁹⁰

In addition to this more extreme example, less extreme circumstances may also suffice, such as when the violations of the rights of the suspect are so egregious that it is clear that the international community would not accept that the accused was being brought to any genuine form of justice. Whether a case will ultimately be admissible in such circumstances will necessarily depend upon its precise facts.¹⁹¹

“Unable”

In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the state is unable to obtain the accused, or the necessary evidence and testimony, or is otherwise unable to carry out its proceedings. Factors that should be considered include: (i) a lack of necessary personnel, such as judges, investigators, prosecutor; (ii) a lack of substantive or procedural penal legislation to criminalise crimes under the ICC's jurisdiction rendering the system “unavailable”; (iii) a lack of access rendering the system “unavailable”; (iv) obstruction by uncontrolled elements rendering the system “unavailable”; and (v) amnesties or immunities rendering the system “unavailable”.¹⁹²

It is difficult to gauge how inability will be adjudged in specific cases. The ICC has a broad discretion to look at the state's whole system of criminal justice. It is case and situation specific.

In the *Lubanga* case, the ICC determined that DRC's judicial system was “able” within the meaning of Article 17. In making this determination, it took account of certain changes in the DRC's national judicial system, which resulted in, *inter alia*, the issuance of two warrants of arrest by the competent DRC authorities for Mr Lubanga and resulted in DRC proceedings against him.¹⁹³

In the *Al-Senussi* case, the ICC focused on whether Libya was unable to obtain the necessary evidence and testimony as a result of a “total or substantial collapse or unavailability” of the national judicial system.¹⁹⁴ Whilst making this determination, the Pre-Trial Chamber examined the evidence already gathered by Libya and the stage of the proceedings reached at the national level to determine if relevant factual circumstances existed that prevented these steps.¹⁹⁵ In particular, the Chamber considered the security situation in Libya, specifically the

¹⁹⁰ *Ibid*, para. 230.

¹⁹¹ *Ibid*.

¹⁹² ICC ‘Informal Expert Paper: The Principle of Complementarity in Practice’ ICC-01/04-01/07-1008-AnxA (30 March 2009) para. 50 <www.icc-cpi.int/iccdocs/doc/doc654724.PDF> accessed 20 April 2016.

¹⁹³ *Prosecutor v. Thomas Lubanga Dyilo* (Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58) Case No. ICC-01/04-01/06-8-US-Corr (10 February 2006) para. 36

¹⁹⁴ *Ibid*, at para. 295.

¹⁹⁵ Decision on the admissibility of the case against Abdullah Al-Senussi, para. 296.

absence of effective protection programmes for witnesses and the fact that certain detention facilities were yet to be transferred under the authority of the Ministry of Justice, as critical questions having a direct and relevant bearing on the investigation.¹⁹⁶

The Pre-Trial Chamber determined that the domestic proceedings had not been prejudiced by the security challenges as demonstrated by the “progressive and concrete investigative” steps already taken. The fact that Libya had been able to provide a considerable amount of evidence collected as part of its investigation was a critical factor.¹⁹⁷ The Pre-Trial Chamber stated that the evidence need not comprise all possible evidence and that there was no indication that evidence collection had ceased.¹⁹⁸ As such, the Chamber decided that, taking into account all the relevant circumstances, a concrete examination did not lead to a conclusion that there was an inability to obtain relevant evidence or testimony. Therefore, no inference arose that Libya was not able to carry out proceedings genuinely.¹⁹⁹

Conversely, in the *Gaddafi* case, the Pre-Trial Chamber ruled that Libya was unable to obtain the necessary information and evidence to carry out the proceedings against Gaddafi in compliance with Libyan national law.²⁰⁰ In particular, the Chamber noted that Libya had not yet been able to secure the transfer of Mr Gaddafi from his place of detention under the custody of the Zintan militia into state authority.²⁰¹ Further, the inability of judicial and governmental authorities to provide adequate witness protection resulted in a lack of capacity to obtain the necessary testimony for the proceedings.²⁰²

It should also be noted that the broad phrase “otherwise unable to carry out its proceedings” under Article 17(3) serves as a catch-all clause of inability to cover “a variety of situations that may arise during domestic proceedings”.²⁰³ It provides the ICC with the broadest of discretions in assessing ability. The phrase within Article 17(3) may include an assessment of procedural rights such as the availability of lawyers for suspects that constitute an impediment to the progress of proceedings.²⁰⁴ For example, in *Al-Senussi*, the defence argued that the Libyan authorities were “otherwise unable” to conduct genuine proceedings against Mr Al-Senussi given that he has had no access to legal representation and other fundamental rights had allegedly been violated.²⁰⁵ The Chamber observed that Libya’s capacity to carry out proceedings was not affected *per se* by the security situation, and that

¹⁹⁶ *Ibid*, para. 297.

¹⁹⁷ *Ibid*, paras. 297-299.

¹⁹⁸ *Ibid*, para. 298.

¹⁹⁹ *Ibid*, para. 301.

²⁰⁰ Decision on the admissibility of the case against Saif Al-Islam Gaddafi, para. 205.

²⁰¹ *Ibid*, para. 206.

²⁰² *Ibid*, para. 209.

²⁰³ J T Holmes, ‘Complementarity: National Courts Versus the ICC’ in A Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press 2002) 678; see also M El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Brill 2008) 224.

²⁰⁴ Decision on the admissibility of the case against Saif Al-Islam Gaddafi, paras. 212-214.

²⁰⁵ Decision on the admissibility of the case against Abdullah Al-Senussi, para. 183.

recent court appearances had not been prevented.²⁰⁶ Libya argued that it was making efforts to appoint a lawyer and the delays were not insurmountable but due to the transitional context and security difficulties and did not amount to inability.²⁰⁷

The Pre-Trial Chamber ruled that the problem of legal representation *could* become fatal to the progress of proper proceedings.²⁰⁸ However, the decision had to be made at the time of the admissibility proceedings (i.e., not forecasting into the future).²⁰⁹ The Chamber noted that, in contrast to the previous *Gaddafi* decision, whereas Gaddafi was not under the control of the state, Al-Senussi was,²¹⁰ and several local lawyers had indicated their willingness to represent him.²¹¹ The Chamber had no reason to dispute this and so found that it could not conclude that Al-Senussi's case would be impeded from proceeding further on the grounds that Libya would be unable to adequately address the security concerns and ensure proper legal representation.²¹² It was not therefore able to conclude that Libya was unable to otherwise carry out its proceedings.²¹³ This is one example of how the ICC may proceed in relation to this residual category. Due to the paucity of cases thus far, there is little other guidance available to date. However, the provision appears to provide the ICC with a wide discretion to consider all aspects of the specific judicial system in its determination of the state's actual ability to proceed with an investigation or trial at the domestic level.

The Burden of Proof: Complementarity

In the event the ICC prosecutor declares particular conduct that has occurred in Ukraine as admissible and opens a formal investigation, the burden of proof for proving that the case is inadmissible before the Pre-Trial Chamber - and as such should be tried in Ukraine - would fall on Ukraine. Consequently, Ukraine would be required to substantiate the investigatory or prosecutorial steps it is taking to demonstrate its willingness and ability to prosecute the same conduct as that pursued by the ICC. Mere assurances made by Ukraine will not suffice.

The state must show that it is taking concrete and progressive steps to ascertain whether the person is responsible for the conduct alleged in the proceedings before the Court.²¹⁴ As noted above,²¹⁵ the assessment of the subject matter of the domestic proceedings must focus on the alleged conduct and not on its legal characterisation.²¹⁶

²⁰⁶ *Ibid*, para. 303.

²⁰⁷ *Ibid*, para. 306.

²⁰⁸ *Ibid*, para. 307.

²⁰⁹ *Ibid*, para. 307.

²¹⁰ *Ibid*, para. 308.

²¹¹ *Ibid*.

²¹² *Ibid*.

²¹³ *Ibid*, para. 309.

²¹⁴ *Ibid*, para. 66.

²¹⁵ *See supra*, paras. 59-61.

²¹⁶ Decision on the admissibility of the case against Abdullah Al-Senussi, para. 88.

Ukraine's Domestic Prosecution of Conflict-Related Crimes

This section of the Report looks at available public information concerning the Government of Ukraine authorities' investigation and prosecution of IHL violations and other serious violations of international law and assesses the steps that Ukraine has taken in pursuance of its obligations to provide effective penal sanctions for those crimes. As outlined, Annex A is a representative sample of the Government of Ukraine's recent and current investigations and prosecutions for IHL violations or other serious violations of international law alleged to be taking place in, or connected to, the ATO Zone.

Between the 4th March and 5th April, GRC reviewed the Ukrainian "Unified Register of the Court Decisions" ("Case Register") in order to form a considered view concerning how the cases related to the armed conflict in the east of Ukraine are being prosecuted and adjudicated domestically. According to the Law "On Access to the Court Decisions",²¹⁷ Ukrainian courts of general jurisdiction must publish all their decisions on the Case Register no later than the day following their adoption and signature. As a result, the database provides information on cases from the time of the first court's decision. It contains various types of substantive and procedural information such as the case proceedings number, a brief summary of the facts, and the relevant court. The Case Register does not contain any personal information related to the accused, his/her counsel, witnesses, or victims. It should be noted that the Case Register and the Judiciary have been criticised for failing to publish all the court decisions.²¹⁸ For example, it has been found that two judges at the Henichesk district court of the Kherson region only published 43% of their decisions.²¹⁹ As a consequence, GRC accepts that the information on the Case Register may not provide a complete overview of all prosecutions related to the crimes committed in the east of Ukraine. Nevertheless, it appears to provide sufficient information to ascertain current practices and trends that form the basis of our preliminary recommendations.²²⁰

²¹⁷ Law of Ukraine on Access to Court Decisions No. 3262-IV [Online resource]. – 22 December 2005. – Accessed: <<http://zakon3.rada.gov.ua/laws/show/3262-15>> (last visited: 20 April 2016).

²¹⁸ Bohdan Bondarenko, Yulia Raschupkina, 'Analysis of work of Unified state register of court decisions', Information website of the Kharkiv Human Rights Protection Group (6 September 2009 <<http://khpg.org.ua/ru/index.php?id=1241614436>> accessed 20 April 2016; see also Ksenia Mahnushevskaya, 'Council of Judges refused to help State Judicial Administration with filling Unified state register of court decisions: now database might remain half empty, the staff employees will wait for unpaid anxieties' Law and Business (Kyiv, 13-16 June 2015) <http://zib.com.ua/ua/116873-rada_suddiv_vidmovilasya_dopomogti_dsau_z_napovnennyam_reest.html> accessed 20 April 2016.

²¹⁹ Minutes of the working group of Henichesk District Court, Kherson Region (13 May 2014) <http://zib.com.ua/ua/print/85359-virobnicha_narada__11_vid_13052014.html> accessed 20 April 2016.

²²⁰ See *infra*, p. 99.

In summary, the Case Register appears to show the following practices and trends concerning the activities of Ukrainian prosecution authorities in relation to conduct that may amount to serious violations of IHL or other violations of international law:

- A pattern of generally failing to prosecute IHL violations or other serious violations of international law as international crimes;
- A pattern of charging ‘separatists’ (or those suspected of assisting the military effort of the separatists in eastern Ukraine) with one or more domestic crimes under the Criminal Code of Ukraine, including:
 - Articles 437(2): Waging an Aggressive War;²²¹
 - Article 255: Creation of a Criminal Organisation;²²²
 - Article 258(3): Participation in a Terrorist Group or Terrorist Organisation;²²³

²²¹ *Case of Starkov* No. 225/5523/15-к (Judgement) Dzerzhynsk city court of the Donetsk Region (25 September 2015); *Case of Philipov* (Judgement) Prymorskyi district court of the Zaporizhyya Region (12 February 2016); *Case of Horbunov* No. 328/67/16-к (Judgement) Tokmak district court of the Zaporizhyya Region (25 February 2016);); *Case of Oleh Kartashov* No. 221/2405/15-к (Decision) Volnovakha District Court of the Donetsk Region (22 April 2016); *Case of Valery Ivanov* No. 420/3026/15-к (Decision) Novopokrov District Court of the Lugansk Region (28 April 2016); *Case of Andriy Lanher* No. 235/9442/15-к (Decision) Krasnoarmiysk City District Court of the Donetsk Region (15 April 2016); *Case of Fedir Degilevych* No. 326/195/16-к (Decision) Berdyansk City District Court of the Zaporizhyya Region (21 April 2016); *Case No. 235/89/16-к* (Decision) Kostiantynivka City District Court of the Donetsk Region (26 April 2016); *Case of Koloschuk Viktor and Zarochunchev Oleksandr* No. 263/15014/15-к (Decision) Criminal Chamber of the Appellate Court of the Donetsk Region (29 March 2016); *Case of Yerofeyev and Aleksandrov* No. 752/15787/15-к (Judgement) Holosiyiv district court of Kyiv (18 May 2016); *Case of Iryna Novikova* No. 265/7705/15-к (Decision) Ordzhonikidze District Court of Mariupol City (28 April 2016); *Case of Oleksandr Shestak* No. 225/6623/15-к (Decision) Dzerzhynsk City Court of the Donetsk Region (28 March 2016); and *Case of Vitaliy Nesvyckiy* No. 235/9919/15-к (Decision) Krasnoarmiysk City District Court of the Donetsk Region (8 April 2016).

²²² *Tornado Cases* No. 756/16332/15-к (Decision) Obolon district court of Kyiv (4 May 2016).

²²³ *Case of Seledtsov* No. 161/338/16-к (Judgement) Lutsk city district court of the Volyn Region (23 February 2016); *Case of Vakula* No. 761/11988/15-к (Judgement) Selydiv city court of the Donetsk Region (15 January 2016); *Case No. 243/4875/14* (Judgement) Slovyansk district court of the Donetsk Region (13 January 2015); *Case No. 310/8512/14-к* (Judgement) Berdyansk district court of the Zaporizhyya Region (19 February 2015); *Case of Horbunov* No. 328/67/16-к (Judgement) Tokmak district court of the Zaporizhyya Region (25 February 2016);); *Case of Oleh Kartashov* No. 221/2405/15-к (Decision) Volnovakha District Court of the Donetsk Region (22 April 2016); *Case of Valery Ivanov* No. 420/3026/15-к (Decision) Novopokrov District Court of the Lugansk Region (28 April 2016); *Case of Andriy Lanher* No. 235/9442/15-к (Decision) Krasnoarmiysk City District Court of the Donetsk Region (15 April 2016); *Case of Fedir Degilevych* No. 326/195/16-к Berdyansk City District Court of the Zaporizhyya Region (21 April 2016); *Case of Yevgen Parovin* No. 325/266/16-к (Decision) Pryazovsk District Court of the Zaporizhyya Region (5 May 2016); *Case No. 235/89/16-к* (Decision) Kostiantynivka City District Court of the Donetsk Region (26 April 2016); *Case of Yerofeyev and Aleksandrov* No. 752/15787/15-к (Judgement) Holosiyiv district court of Kyiv (18 May 2016); *Case of Iryna Novikova* No. 265/7705/15-к (Decision) Ordzhonikidze District Court of Mariupol City (28 April 2016); *Case of Oleksandr Shestak* Case No. 225/6623/15-к (Decision) Dzerzhynsk City Court of the Donetsk Region (28 March 2016); *Case No. 423/1063/15-к* (Judgement) Popasna district court of the Luhansk Region (14 January 2016); *Case No. 428/1476/15-к* (Judgement) Severodonetsk city court of the Luhansk Region (21 October 2015); *Case No. 225/3461/15-к* (Judgement) Dobropil city court of the Donetsk Region (9 November 2016); *Case No.239/621/15-к* (Judgement) Kramatorsk City Court of the Donetsk Region (8 February 2016); *Case No.263/9391/15-к* (Decision) Zhovtnevyi district court of Mariupol of the Donetsk Region (11 August 2015); *Case No. 263/6222/15-к* (Decision) Zhovtnevyi district court of Mariupol city of the Donetsk Region (4 June 2015) ; *Case No. 266/2069/15-к* (Decision) Appellate Court of the Donetsk Region (29 October 2015); *Case No. 263/1057/15-к* (Decision) Zhovtnevyi District Court of Mariupol of the Donetsk Region (26 January 2015); *Case No.428/9748/15-к* (Decision) Severodonetsk city court of the Luhansk Region (30 September 2015); *Case No. 221/2304/15-к* (Decision) Volnovakha district court of the Donetsk Region (21 July 2015); *Case No. 243/4875/14* (Judgement) Slovyansk district court of the Donetsk Region (13 January 2015); *Case No. 219/8206/15-к* (Judgement) Artemivsk City Court of the Donetsk Region (18 November 2015); *Case No. 229/1522/15-к* (Judgement) Druzhkivskiy City Court of the Donetsk Region (30 October 2015).

- Article 260 (2): Participation in Unlawful Paramilitary or Armed Formations;²²⁴
- Article 110: Trespass against the Territorial Integrity and Inviolability of Ukraine;²²⁵
- Article 263(1): Unlawful Handling of Weapons;²²⁶
- Article 332-1(2): Violation of the Procedure for Entry in the Temporarily Occupied Territory of Ukraine and Exit Therefrom;²²⁷ and
- Article 341: Capture of State Building;²²⁸
- A pattern of generally prosecuting or charging Ukrainian (government/military) officials for a range of domestic crimes, such as:

²²⁴ Case No. 243/4875/14 (Judgement) Slovyansk district court of the Donetsk Region (13 January 2015); *Case of Philipov* (Judgement) Prymorskyi district court of the Zaporizhya Region (12 February 2016); *Case of Koloschuk Viktor and Zarochuncev Oleksandr* No. 263/15014/15-к (Decision) Criminal Chamber of the Appellate Court of the Donetsk Region (29 March 2016); Case No. 243/10160/15-к (Judgement) Sloviansk City Court of the Donetsk Region (19 November 2015); Case No. 233/4799/14-к (Judgement) Konstantynivka City District Court of the Donetsk Region (25 December 2014); Case No. 233/2476/15-к (Judgement) Konstantynivka City District Court of the Donetsk Region (2 July 2015); Case No. 185/3279/15-к (Judgement) Pavlograd City District Court of Dnipropetrovsk Region (14 May 2015); *Case of Ilyashenko Rayisa* No. 219/254/16-к (Judgement) Artemivsk City District Court of the Donetsk Region (28 January 2016); Case No. 225/4564/15-к (Judgement) Dzerzhynsk City Court of Donetsk Region (31 August 2015); *Case of Horbachov* No. 415/3534/14-к (Judgement) Lysychansk city court of the Luhansk Region (14 January 2016); Case No. 243/4875/14 (Judgement) Slovyansk district court of the Donetsk Region (13 January 2015).

²²⁵ Art. 110(1) criminalises “Wilful actions committed to change the territorial boundaries or national borders of Ukraine in violation of the order provided for in the Constitution of Ukraine (254к/96-BP) and also public appeals or distribution of materials with appeals to commit any such actions”; *see for example*: Case No. 235/89/16-к (Decision) Kostiantynivka City District Court of the Donetsk Region (26 April 2016); Art. 110(2) criminalises trespass against the territorial integrity of Ukraine “if committed by a member of public authorities or repeated by any person, or committed by an organized group, or combined with inflaming national or religious enmity”: *See for example*: Case No 235/481/16-к (Decision) Appellate Court of the Donetsk Region (17 March 2016); Art. 110(3) criminalises acts of trespass “if they caused the killing of people or any other grave consequences”; *See for example*: *Case of Seledtsov* No. 161/338/16-к (Judgement) Lutsk city district court of the Volyn Region (23 February 2016).

²²⁶ *See for example*: *Case of Starkov* No. 225/5523/15-к (Judgement) Dzerzhynsk city court of the Donetsk Region (25 September 2015); *Case of Kulmatytskyi* No. 200/13169/15-к (Judgement) Babushkynskyi district court of the Dnipropetrovsk Region (21 September 2015); *Case of Seledtsov* No. 161/338/16-к (Judgement) Lutsk city district court of the Volyn Region (23 February 2016); Case No. 310/8512/14-к (Judgement) Berdyansk district court of the Zaporizhya Region (19 February 2015); *Case of Horbunov* No. 328/67/16-к (Judgement) Tokmak district court of the Zaporizhya Region (25 February 2016); *Case of Oleh Kartashov* No. 221/2405/15-к (Decision) Volnovakha District Court of the Donetsk Region (22 April 2016); Case No. 235/481/16-к (Decision) Appellate Court of the Donetsk Region (17 March 2016); *Case of Andriy Lanher* No. 235/9442/15-к (Decision) Krasnoarmiysk City District Court of the Donetsk Region (15 April 2016); *Case of Fedir Degilevych* No. 326/195/16-к (Decision) Berdyansk City District Court of the Zaporizhia Region (21 April 2016); *Case of Yevgen Parovin* No. 325/266/16-к (Decision) Pryazovsk District Court of the Zaporizhia Region (5 May 2016); *Case of Yerofeyev and Aleksandrov* No. 752/15787/15-кк (Judgement) Holosiyiv district court of Kyiv (18 May 2016); Case No. 233/2476/15-к (Judgement) Konstantynivka City District Court of the Donetsk Region (2 July 2015); Case No. 185/3279/15-к (Judgement) Pavlograd City District Court of the Dnipropetrovsk Region (14 May 2015); *Case of Kulmatytskyi* No. 200/13169/15-к (Judgement) Babushkynskyi district court of the Dnipropetrovsk Region (21 September 2015); Case No. 243/4875/14 (Judgement) Slovyansk district court of the Donetsk Region (13 January 2015); Case No. No.229/1522/15-к (Judgement) Druzhkivskyi City Court of the Donetsk Region (30 October 2015).

²²⁷ *See for example*: *Case of Starkov* No. 225/5523/15-к (Judgement) Dzerzhynsk city court of the Donetsk Region (25 September 2015); *Case of Yerofeyev and Aleksandrov* No. 752/15787/15-кк (Judgement) Holosiyiv district court of Kyiv (18 May 2016).

²²⁸ *Case of Seledtsov* No. 161/338/16-к (Judgement) Lutsk city district court of the Volyn Region (23 February 2016).

- Article 365: Excess of Authority or Official Powers²²⁹
- Article 409(3): Desertion;²³⁰
- Article 425: Neglect of Duty in Military Service;²³¹ and
- Article 426: Inaction of Military Authorities;²³²
- The occasional prosecution of conduct that may amount to IHL violations or other serious violations of international law; as domestic crimes, including:
 - Article 115: Murder;²³³
 - Article 121: Intended Grievous Bodily Harm;²³⁴
 - Article 127(2): Torture Repeated or Committed by a Group of Persons upon Prior Conspiracy, or Based on Racial, National or Religious Intolerance;²³⁵
 - Article 146: Illegal Confinement or Abduction of a Person;²³⁶
 - Article 153 (2): Violent Unnatural Gratification of Sexual Desire;²³⁷
 - Article 289 (2): Carjacking;²³⁸ and
 - Article 342 (2): Resistance to Representative of State Authority.²³⁹

In sum, as noted in the Section of this Report entitled *Reported Violations of IHL and other Serious Violations of International Law*,²⁴⁰ the publically available information (as collected

²²⁹ Case No. 415/1468/15-к (Judgement) Lysychansk city court of the Luhansk Region (6 July 2015); *Tornado Cases* No. 756/16332/15-к (Decision) Obolon district court of Kyiv (4 May 2016); *Case of Agafonov* No. 638/18003/15-к (Decision) Appellate Court of Kharkiv Region (23 November 2015).

²³⁰ *Case of the servicemen of the 51 separate infantry brigade* No. 408/133/15, Volodymyr Volynskiy City Court of the Volyn Region.

²³¹ Case No. 234/11343/15-к (Judgement) Kramatorsk city court of the Donetsk Region (12 August 2015).

²³² Case No. 243/7099/14 (Judgement) Slovyansk district court of the Donetsk Region (18 December 2014); Case No. 185/9886/14-к (Judgement) Pavlograd district court of the Dnipropetrovsk Region (17 December 2014).

²³³ *Case of Oleksandr Svidro*, Artemivsk District Court of Donetsk Region; *The case of killing of 2 women by Ukrainian servicemen* "In the Donetsk Region it was revealed the murder of two women by soldiers", Prosecutor's Office of the Donetsk Region (17 June 2015) <http://don.gp.gov.ua/ua/news.html?_m=publications&_c=view&_t=rec&id=157759> last accessed 23 June 2016; Case No. 233/3431/15-к (Judgement) Kostiantynivka city court of the Donetsk Region (4 November 2015); Case No. 235/7/15-к (Judgement) Krasnoarmiysk district court of the Donetsk Region (2 November 2015).

²³⁴ "Ukrainian military organised lynch law in Talakovk, killing a man" (Obozrevatel.Investigations, 1 June 2015) <<http://obozrevatel.com/crime/35127-ukrainskie-voennyye-ustroili-samosud-v-talakovke-i-ubili-muzhchynu.htm>> last accessed 23 June 2016; Case No. 219/5483/15-к (Judgement) Artemivsk city court of the Donetsk Region (29 January 2016).

²³⁵ *Tornado Cases as above* No. 756/16332/15-к (Decision) Obolon district court of Kyiv (4 May 2016).

²³⁶ *Case of Kulmatytskyi* No. 200/13169/15-к (Judgement) Babushkynskiy district court of the Dnipropetrovsk Region (21 September 2015); Case No. 234/31/15-к (Judgement) Kramatorsk city court of the Donetsk Region (13 January 2015); Case No. 431/52/15-к (Judgement) Starobilsk district court of the Luhansk Region (6 January 2015); Case No. 233/1146/15-к (Judgement) Konstantynivsk district court of the Donetsk Region (18 March 2015); *Tornado Cases* No. 756/16332/15-к (Decision) Obolon district court of Kyiv (4 May 2016); *Case of Agafonov* No. 638/18003/15-к (Decision) Appellate Court of the Kharkiv Region (23 November 2015).

²³⁷ *Tornado Cases* No. 756/16332/15-к (Decision) Obolon district court of Kyiv (4 May 2016).

²³⁸ *Ibid.*

²³⁹ *Ibid.*

²⁴⁰ See *supra*, paras. 14-23.

by HRMMU and civil society organisations) points to the large-scale occurrence of a range of alleged war crimes. Additionally, whilst further information would need to be gathered to fully assess the nature and scope of other crimes, crimes against humanity may also have been committed.²⁴¹ Despite this, as a general rule, the Government of Ukraine does not appear to be prosecuting these crimes either as ordinary or international crimes. The following Section considers these conclusions in more detail.

A pattern of not generally prosecuting IHL violations or other serious violations of international law as international crimes

The list of cases identified in Annex A appears to reflect a reluctance to prosecute IHL violations or other serious violations of international law as international crimes. From the publically available sources reviewed, it appears that no prosecutions of the international crimes of genocide, crimes against humanity or war crimes have taken place. More generally, the publically available information shows that the vast majority of conduct during the conflict in eastern Ukraine (suggesting the commission of war crimes and possibly crimes against humanity) has not been prosecuted at all. As discussed below, at least in the case of War Crimes and the use of Article 438, this pattern may well be beginning to change.

Concerning genocide, the lack of prosecutions is unsurprising. While Article 442 of the Ukrainian Criminal Code permits the prosecution of genocide, the available information (from authoritative sources such as HRMMU and civil society organisations) does not suggest that genocide is taking place on the territory of Ukraine. Whilst this conclusion would need to be examined more closely and GRC does not purport to have conducted a comprehensive analysis of this issue, it should be noted that genocide is a very specific offence. It is a special intent crime that requires proof of acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group. Those acts are: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; and (e) forcibly transferring children of the group to another group.²⁴² For these specific acts to amount to genocide it is required that the perpetrator has formed a specific intent, often referred to as a special intent. Therefore, given these specific demands, in the final analysis, it may well be very difficult to show that genocide is currently occurring anywhere on Ukrainian territory.

Concerning crimes against humanity, Ukraine's legal measures do not allow for the prosecution of this international crime. While this failure is of concern in relation to Ukraine

²⁴¹ See also OHCHR 'Accountability for killings in Ukraine from January 2014 to May 2016' (14 July 2016) 4 <http://www.ohchr.org/Documents/Countries/UA/OHCHRThematicReportUkraineJan2014-May2016_EN.pdf> accessed 21 July 2016.

²⁴² Rome Statute, Art. 6.

fully complying with its international legal obligations, as discussed in Part III - *Ukraine's Obligations to Prosecute Violations of IHL and other Serious Violations of International Law* – the Government of Ukraine may still go some distance towards fulfilling its obligations if it prosecuted and punished the relevant conduct (that could be legally characterised as a crime against humanity) as ordinary crimes, provided that the charges correspond to the gravity of the crime and the charges entail effective penal sanctions. As noted throughout this Report, there is no absolute international legal obligation for a state to prosecute crimes against humanity as an international crime. As explained in Part III - *Ukraine's Obligations to Prosecute Violations of IHL and other Serious Violations of International Law* - the ICC itself does not make this demand for the prosecution of crimes against humanity even for those at the highest leadership level. However, there still exists an obligation to prosecute the underlying conduct as ordinary offences in domestic law. In order to fulfil its international obligations, Ukraine ought to be investigating and/or prosecuting this conduct *now* through the most corresponding and serious ordinary charges contained in the domestic Criminal Code. The available information suggests this is not taking place.

Concerning Ukraine's approach to the prosecution of war crimes, the Criminal Code of Ukraine permits the prosecution of a range of war crimes through Article 438, which generically provides for the criminal punishment of "violations of the laws and methods of warfare". This Article criminalises any use of the means of warfare prohibited by international law, which encompasses international treaties and customary international law.²⁴³ It also criminalises any other violations of the laws and customs of war recognised by international instruments ratified by Ukraine. This includes violations of the laws of war stemming from the Geneva Conventions and their Additional Protocols, as well as other violations enforced by other treaties ratified by Ukraine, including the Convention for the Protection of Cultural Property in the Event of Armed Conflict, its First Protocol,²⁴⁴ and the Weapons Treaties.²⁴⁵

Additionally, Ukraine's Criminal Code allows the prosecution of a range of more specific crimes that also amount to war crimes. These are contained in Chapter XIX (19) entitled "Crimes Against the Established Order of the Military Service - (military crimes)" and Chapter XX (20) entitled "Crimes against Peace, Security of Humanity and International Order". In relation to Chapter XIX (19), the incorporated crimes consist of crimes prosecuted only in relation to members of the Armed Forces of Ukraine, the National Guard of Ukraine, the State

²⁴³ Ukraine has ratified all international treaties encompassing the means of warfare prohibited under customary international law.

²⁴⁴ First Protocol for the Protection of Cultural Property in the Event of Armed Conflict (adopted May 14 1954, entered into force 7 August 1956) 249 UNTS 358.

²⁴⁵ See for example Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (adopted 13 January 1993, entered into force 24 April 1997) 1974 UNTS 45; Amended Protocol II to the Convention on Certain Conventional Weapons on the Use of Mines, Booby-Traps and Other Devices (adopted 3 May 1996, entered into force 3 December 1998) UN CCW/CONF.I/ 16; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, (adopted 18 September 1997, entered into force 1 March 1999) 2056 UNTS 211.

Border Guard Service of Ukraine, the Security Service of Ukraine and other entities related to defence. These crimes include:

- Article 432: “Marauding”, defined as “[s]tealing from the dead or wounded on the battlefield” (punishable by imprisonment for a term of three to ten years) – equivalent to the serious violation of “despoliation of the wounded, sick, shipwrecked or dead”;²⁴⁶
- Article 433: “Violence against Population in the Zone of Hostilities” (punishable by imprisonment for a term of three to eight years) – equivalent to several serious violations of IHL such as torture or inhuman treatment, including biological experiments; wilfully causing great suffering or serious injury to body or health; pillage or other taking of property contrary to international humanitarian law; or destroying property not required by military necessity;²⁴⁷ and
- Article 434: “Ill-Treatment of Prisoners of War” (punishable by imprisonment for a term up to three years) – equivalent to the grave breach of the Geneva Conventions of torture or inhuman treatment, including biological experiments.²⁴⁸

In relation to Chapter XX (20), the relevant Articles related to prosecuting HL violations include:

- Article 439 “Use of Weapons of Mass Destruction” (punishable by imprisonment for a term of eight to twelve years / by imprisonment for a term of eight to fifteen years or life imprisonment in case of death or any other grave consequences) – equivalent to the serious violation of “using prohibited weapons”.²⁴⁹

Even with the availability of these ‘war crimes’ provisions (contained in Ukraine’s Criminal Code), little or none of the relevant alleged conduct appearing to amount to war crimes seem (on the basis of publically available judgments within the period of GRC’s research) to be under investigation or prosecution. The reasons for this deficit are outside the parameters of this Report. However, the Government of Ukraine’s characterisation of the operation in the east as an ATO (and not an armed conflict) may well be partly responsible for disabling or inhibiting the prosecuting authorities from pursuing war crimes charges. Ukrainian human rights activists and NGOs have also pointed out that the lack of domestic expertise in investigating and adjudicating international crimes as well as the failure to ratify the Rome Statute greatly contribute to the fact that the majority of offences committed in the east are

²⁴⁶ Despoliation of the wounded, sick, shipwrecked or dead is a serious violation of IHL under customary international humanitarian law. See ICRC, ‘Rule 156 - Definition of War Crimes’ (ICRC, 2009) <www.icrc.org/customary-ihl/eng/docs/v1_rul_rule156#Fn_21_60> accessed 20 April 2016.

²⁴⁷ These are serious violations of IHL under the Geneva Conventions, customary international humanitarian law, and the Rome Statute, Art. 8.

²⁴⁸ Geneva Convention I, Art. 50; Geneva Convention II, Art. 51; Geneva Convention III, Art. 130; Geneva Convention IV, Art. 147.

²⁴⁹ Serious violation of IHL under customary international humanitarian law. See ICRC, ‘Rule 156 - Definition of War Crimes’ (ICRC, 2009) <www.icrc.org/customary-ihl/eng/docs/v1_rul_rule156#Fn_21_60> accessed 20 April 2016; Rome Statute, Art. 8 also expressly lists a range of prohibited weapons.

currently characterised as ordinary crimes.²⁵⁰ Nonetheless, whatever the underlying cause for the failures to prosecute, such an approach fails to meet international standards. As discussed in Part III - *Ukraine's Obligations to Prosecute Violations of IHL and other Serious Violations of International Law* - so long as the constituent factors establishing the existence of an armed conflict are demonstrated, the characterisation of an armed conflict as an ATO (or any other factual or legal characterisation) does not displace the applicability of IHL nor remove the correlative prosecutorial obligations. As will be further discussed below at Part IV – *Conclusions: Short Term Recommendations*,²⁵¹ in Ukraine's current situation, there can be no doubt that an armed conflict is on-going in the east of Ukraine, that IHL is applicable, and that a range of violations have taken place that amount to war crimes that ought to have been investigated or prosecuted as such using one or more of the relevant 'war crimes' Articles in the Criminal Code.

Therefore, on the face of it, it would appear that Ukraine is not fulfilling its international obligations to prosecute conduct amounting to war crimes as international crimes. For instance, there are no public cases on the Case Register (within the period of GRC's research) where the law enforcement agencies of Ukraine have relied upon Article 438 (and upon international instruments ratified by Ukraine) to prosecute. However, GRC is aware that the practice in this area is evolving and that the Chief Military Prosecutor's Office of Ukraine, in particular, has already begun investigations under this Article. It may be that, in time, prosecutions under this Article will become more common.

As regards prosecuting relevant conduct as ordinary domestic crime, Ukraine does not, at present, appear to be doing this. In light of the range and seriousness of suspected war crimes, even if a large volume of this conduct was being prosecuted as ordinary crimes, it is unlikely that these prosecutions could in all instances fulfil the obligation to prosecute serious violations of IHL in a meaningful manner i.e. with the charges corresponding to the gravity of the crimes and amounting to effective penal sanctions.²⁵² Similarly, it is unlikely that in cases aimed at the leadership level, they would be capable of satisfying the ICC's complementarity assessment that requires, not only investigative or prosecutorial activity, but that the domestic investigation, prosecution, and trial of a case must correspond in specific respects – substantially the same conduct - to the case (that would be) examined by the ICC.²⁵³ As discussed above,²⁵⁴ war crimes are committed in specific contexts (with a specific nexus to

²⁵⁰ For more information see Center for Civil Liberties, 'Searching for Justice: Investigation of Crimes Connected to the Violation of the Right to Life, Right to Liberty and Personal Security, Freedom from Torture Committed in the ATO Zone: Gaps in the Activities of Investigation Authorities and Recommendations of Human Rights Activists' (2016) pp. 5, 8, 30, 54 <http://ccl.org.ua/wp-content/uploads/2016/06/Spravedlivist_CCL_MF_Weblow-1.pdf> accessed 29 July 2016.

²⁵¹ See *infra*, paras. 141 et seq.

²⁵² Ward Ferdinandusse 'The Prosecution of Grave Breaches in National Courts' (2009) 7 *Journal of International Criminal Justice* 723, 731.

²⁵³ *Lubanga* Decision concerning Pre Trial Chamber I's Decision of 10 February 2006 para. 31; Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi paras. 61, 74, 76,77. For more information see footnote 134.

²⁵⁴ See *supra*, para. 36.

an armed conflict) that shape the violations and place them into their overall context. Adequately capturing all of this conduct through the pursuit of domestic offences is unlikely to be possible.

For example, as noted,²⁵⁵ the range of IHL violations or other violations of international law identified by various groups, such as OHCHR, UHHRU, Centre for Civil Liberties, during this conflict potentially include war crimes such as “intentionally directing attacks against the civilian population as such or against individual civilians not directly taking part in hostilities”²⁵⁶ and “intentionally directing attacks against civilian objects, that is, objects which are not military objectives”²⁵⁷ and “intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians”.²⁵⁸ It is difficult to see how these highly particularised war crimes (encompassing highly specific conduct) could be adequately captured by the ordinary crimes contained in Ukraine’s Criminal Code.

As outlined in Annex B,²⁵⁹ these highly particularised war crimes encompass a range of specific conduct and intentions aimed at specific prohibitions on attacks against civilian populations and objects that are shaped by the existence of an armed conflict. They involve proscriptions designed to achieve optimal protection of the civilian population, encompassing, *inter alia*:

- The deliberate targeting of, and damage to, civilian populations or objects;
- The principles of distinction and proportionality;
- The case-by-case assessment of the distinction between the civilian population and combatants, or between civilian and military objectives;
- Assessments of incidental damage to civilian populations and objects;
- Knowledge of possible incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated; and
- Direct and indirect intent (recklessness) to target civilians or civilian objects.

As such, although it *may* be possible to more easily find domestic equivalents, with sufficient gravity, that correspond to (arguably less specialised) war crimes such as wilful

²⁵⁵ See *supra*, para. 16.

²⁵⁶ Additional Protocol I, Arts. 51(2), 85(3); Additional Protocol II, Arts. 4(2)(d), 13(2); Rome Statute, Arts. 8(2)(b)(i), 8(2)(e)(i).

²⁵⁷ Additional Protocol I, Art. 51(2); Rome Statute, Art. 8(2)(b)(ii).

²⁵⁸ Additional Protocol I, Art. 85(3)(b); Rome Statute, Art. 8(2)(b)(iv).

²⁵⁹ See Annex B.

killing/murder,²⁶⁰ torture or inhuman treatment,²⁶¹ or even committing outrages upon personal dignity, in particular humiliating and degrading treatment,²⁶² this may not be possible for many others. To adequately capture the essential aspects of the perpetrators' action, knowledge, intent and motivation and other indices of conduct and associated gravity with regard to the type of war crimes enumerated above through the prosecution of only ordinary crimes, is likely to prove at the very least challenging and, in many instances, simply impracticable.

In sum, it is difficult to conclude that the existing domestic offences contained in Ukraine's Criminal Code provide a reasonable opportunity to prosecute the full range and gravity of the war crimes that appear to be occurring in the east of Ukraine. At the very least, some of the conduct needs to be prosecuted pursuant to the Ukrainian Criminal Code's 'war crimes' Articles that are sufficiently specific or broad to encapsulate the particular type and range of specific conduct.

As noted, it is unlikely that these 'ordinary crime' prosecutions would suffice to amount to effective penal sanctions, or, in the leadership cases, properly encompass substantially the same conduct as the conduct that will (likely) be examined by the ICC. Some of the violations are very likely to require the prosecution of international crimes (at least, war crimes, if not crimes against humanity) to amount to effective penal sanctions. In these circumstances, the dearth of prosecutions using the war crimes Articles contained in Ukraine's Criminal Code is a strong indication of the Government of Ukraine's on-going failure to fulfil its international obligations.

A pattern of charging 'separatists' (or those suspected of assisting the military effort of the separatists in eastern Ukraine) with one or more domestic crimes under the Criminal Code of Ukraine

The Government of Ukraine's prosecutions of combatants for conduct relating to the ATO Zone appears largely restricted to the prosecution of separatists (whether Ukrainian or Russian) and the Ukrainian military. The nature of the charging of crimes appears designed to demarcate the "aggressors" on the one side (the separatists) and those who fail in their military duty on the Government of Ukraine's side (non-separatists).

The charges against the separatists focus on domestic, ordinary crimes. The publicly available information does not provide any examples of the Government of Ukraine prosecuting separatists for international crimes. The ordinary crimes charged include:

²⁶⁰ Geneva Convention I, Art. 50; Geneva Convention II, Art. 51; Geneva Convention III, Art. 130; Geneva Convention IV, Art. 147; Geneva Conventions, Common Art. 3; Rome Statute, Arts. 8(2)(a)(i),8(2)(c)(i)-1).

²⁶¹ Geneva Convention I, Art. 50; Geneva Convention II, Art. 51; Geneva Convention III, Art. 130; Geneva Convention IV, Art. 147; Geneva Conventions, Common Art. 3; Rome Statute, Arts. 8(2)(a)(ii)-1,8(2)(c)(i)-3).

²⁶² Additional Protocol I, Art. 75(2)(b); Geneva Conventions, Common Art. 3; Rome Statute, Arts. 8(2)(b)(xxi),8(2)(c)(ii).

- Trespass against territorial integrity and inviolability of Ukraine (Article 110);
- Creation of a criminal organisation (Article 255);
- Acts of terrorism crimes (Article 258);
- Public incitement to commit a terrorist act (Article 258-2);
- Participation in a terrorist group or terrorist organisation (Article 258-3);
- Financing terrorism (Article 258-5);
- Participation in unlawful paramilitary or armed formations (Article 260);
- Unlawful handling of weapons (Article 263);
- Violation of the Procedure for Entry in the Temporarily Occupied Territory of Ukraine and Exit Therefrom (Article 332(1)); and
- Waging aggressive war (Article 437).

As can be seen, separatists are often charged for membership of proscribed groups, although there is some inconsistency in approach. Some alleged separatists have been charged with creating a terrorist group or terrorist organisation (Article 258-3) and others with creating unlawful paramilitary or armed formations (Article 260). Some have been charged with both types of crimes. In both types of cases, some individuals have been charged with waging war (Article 437).

The most frequent prosecutions of separatists have involved alleged *participation* in terrorist DPR/LPR formations and the assistance of DPR/LPR armed groups in activities against Ukraine (Articles 258 and 258-3).²⁶³ Some individuals have also been charged with financing terrorism for providing direct financial aid to DPR groups (Article 258-5).²⁶⁴ Very few cases are related to the actual commission of *specific* terrorist acts (Article 258).²⁶⁵ There are some

²⁶³ For example: Case No.263/9391/15-к (Decision) Zhovtnevyi district court of Mariupol of the Donetsk region (11 August 2016): the accused was financing terrorist activities (Art. 258-5); Case No.221/2304/15-к (Decision) Volnovakha district court of the Donetsk region (21 July 2015): the accused joined the terrorist organisation 'Donetsk People's Republic' with the purpose of committing grave and especially grave crimes under the direction of unknown persons, and took an active part in the preparation and organisation of a number of crimes until mid-March 2015 – he was charged with Art. 258-3(1) (participation in a terrorist group or organisation); Case No. 243/4875/14 (Judgement) Slovyansk district court of the Donetsk Region (13 January 2015): the Accused allegedly performed the following tasks: conducted armed resistance, illegal combating and preventing the activity of police officers and soldiers of the Armed Forces of Ukraine; participating in the seizure of settlements, buildings and other facilities in the Donetsk Region; constructing and strengthening checkpoints, equipping firing positions and other engineering structures; protecting checkpoints and other objects captured by the terrorist organisation against the Ukrainian Police and the Armed Forces of Ukraine; verifying information on the movement of Ukrainian military units; following instructions from the leaders of the terrorist organisation (he was found guilty under Art. 258-3 (participation in a terrorist group or organisation), Art. 260 (participation in unlawful paramilitary or armed formations) and Art. 263 (Unlawful handling of weapons, ammunition or explosives).

²⁶⁴ Case No.263/9391/15-к (Decision) Zhovtnevyi district court of Mariupol of the Donetsk region (11 August 2016); Case No.263/6222/15-к, (Decision) Zhovtnevyi district court of Mariupol city of the Donetsk region (4 June 2015); Case No. 266/2069/15-к (Decision) Appellate Court of the Donetsk Region (29 October 2015).

²⁶⁵ Case No. 428/1476/15-к (Judgement) Severodonetsk city court of the Luhansk Region (21 October 2015); Case of *Yerofeyev and Aleksandrov* No. 752/15787/15-кк (Judgement) Holosiyiv district court of Kyiv (18 May 2016) (Art. 258(3) – act of terrorism).

prosecutions for promoting terrorism (Article 258-2), for instance, for guiding terrorist acts and encouraging or calling for terrorist acts.²⁶⁶

The participation in terrorist groups involves an array of alleged criminal conduct that amounts to aiding the war effort but largely eschews reference to attacks on individuals, such as:

- Actively providing terrorists with transport;
- Working at DPR's checkpoints;
- Organising communication between DPR units, exploring locations to deploy equipment, personnel;
- Ensuring the protection of important installations, equipment and weapons of DPR units;
- Conducting trainings of DPR fighters; and
- Carrying out intelligence tasks surveillance on the positions of the Armed Forces of Ukraine.²⁶⁷

The relatively fewer cases that alleged the creation of and participation in unlawful paramilitary or armed formations (Article 260) that supported the DPR, alleged various similar activities that again encompassed the operations of the alleged illegal armed groups in aiding the war effort but largely eschews reference to attacks on individuals such as taking part in acts against Ukraine (e.g. taking over the Slovyansk City Council²⁶⁸), the conduct of duties at check points, participation in armed patrols, the storage of ammunition, using weapons received from their superiors, or cooking food for the DPR.²⁶⁹

As made plain in this Report, whilst the Government of Ukraine has a sovereign right to follow its own prerogatives and priorities in charging crimes during conflict, this only extends so far. Prosecutions must still satisfy international standards. The aforementioned prosecutions appear to altogether ignore evidence of conduct that might link either the separatists or the non-separatists to serious violations of IHL or other international crimes. In many cases, although the court appeared to recognise (and discuss) that the terrorist groups, to which the specific accused belonged, were involved in criminal activities that could amount to war crimes (such as killing civilians, endangering the lives and health of civilians, causing significant property damage and other grave consequences, and intimidating the civilian

²⁶⁶ See Case No. 263/1057/15-к (Decision) Zhovtnevyi District Court of Mariupol of the Donetsk Region (26 January 2015).

²⁶⁷ See for example *Case of Seledtsov* No. 161/338/16-к (Judgement) Lutsk city district court of the Volyn Region (23 February 2016); *Case of Vakula* No. 761/11988/15-к (Judgement) Selydiv city court of the Donetsk Region (15 January 2016); Case No. 243/4875/14 (Judgement) Slovyansk district court of the Donetsk Region (13 January 2015).

²⁶⁸ Case No. 243/4875/14 (Judgement) Slovyansk district court of the Donetsk Region (13 January 2015).

²⁶⁹ See for example *Case of Philipov* (Judgement) Prymorskyi district court of the Zaporizhyya Region (12 February 2016); Case No. 243/10160/15-к (Judgement) Sloviansk City Court of the Donetsk Region (19 November 2015); Case No. 233/4799/14-к (Judgement) Konstantynivka City District Court of the Donetsk Region (25 December 2014); Case No. 233/2476/15-к (Judgement) Konstantynivka City District Court of the Donetsk Region (2 July 2015).

population), in the majority of the cases found on the Case Register, the accused were not charged with directly committing these acts or, at least, assisting in any manner in the commission of the crimes as accomplices.²⁷⁰ Instead, they were charged with (merely) participating in a terrorist organisation or an illegal armed group (Article 258-3 or Article 260).²⁷¹

For example, in one case the facts alleged that the accused was an active member of the military division of the terrorist organisation “DPR”. Within the period from May 2014 to June 2014, as directed by the head of the DPR, the accused, along with unidentified members of the illegal military unit, was alleged to have followed orders at checkpoints of the DPR and engaged in a range of conduct that created a danger to the life and health of people and caused significant property damage and other grave consequences.²⁷² Whilst it is not possible to identify *specifically* which war crimes might have been applicable to this range of conduct, there is no evidence on record to show they were explored or were the subject of the trial. Instead, the accused was found guilty pursuant to Article 258-3 (participation in a terrorist group or terrorist organisation), Article 263 (unlawful handling of weapons, ammunition or explosives) and Article 309 (illegal production, making, purchasing, storage, transportation or sending of narcotics, psychotropic substances or their analogues).²⁷³

Another example of this pattern arises in the *Case of Viktor Seledcov*. In this case, the accused joined the so-called “self-defence group” in Crimea in February 2014 that was established as a part of the political party “Russian block”. Then, between February and August 2014, he joined DPR formations in the east of Ukraine. During this time, he was charged, among others, with patrolling the streets, being involved in the illegal detention of pro-Ukrainian citizens, organising military training for the personnel of the special battalion “8 Company”, and carrying out checkpoints duties. Again, whilst the available information does not reveal the precise appropriateness of prosecuting any violations of IHL, it is instructive that the charges were limited to allegations of trespass against the territorial integrity and

²⁷⁰ Case No. 221/2304/15-к (Decision) Volnovakha district court of the Donetsk region (21 July 2015); Case No. 219/8206/15-к (Judgement) Artemivsk City Court of the Donetsk Region (18 November 2015); Case No. 239/621/15-к (Judgement) Selydivskiyi city court of the Donetsk Region (11 March 2016); Case No. 229/1522/15-к (Judgement) Druzhkivskiyi City Court of the Donetsk Region (30 October 2015); *Case of Vakula* No. 761/11988/15-к (Judgement) Selydiv city court of the Donetsk Region (15 January 2016); *Case of Seledtsov* No. 161/338/16-к (Judgement) Lutsk city district court of the Volyn Region (23 February 2016).

²⁷¹ See for example: Art. 258-3: *Case of Seledtsov* No. 161/338/16-к (Judgement) Lutsk city district court of the Volyn Region (23 February 2016); *Case of Vakula* No. 761/11988/15-к (Judgement) Selydiv city court of the Donetsk Region (15 January 2016); Case No. 310/8512/14-к (19 February 2015) Berdyansk District Court of the Zaporizhya Region; *Case of Horbunov* No. 328/67/16-к (Judgement) Tokmak district court of the Zaporizhya Region (25 February 2016); *Case of Oleh Kartashov* No. 221/2405/15-к (Decision) Volnovakha District Court of the Donetsk Region (22 April 2016); *Case of Valery Ivanov* No. 420/3026/15-к (Decision) Novoposkov District Court of the Lugansk Region (28 April 2016); *Case of Andriy Lanher* No. 235/9442/15-к (Decision) Krasnoarmiysk City District Court of the Donetsk Region (15 April 2016); Art. 260: *Case of Koloschuk Viktor and Zarochuncev Oleksandr* No. 263/15014/15-к (Decision) Criminal Chamber of the Appellate Court of the Donetsk Region (29 March 2016); Case No. 243/10160/15-к (Judgement) Sloviansk City Court of Donetsk Region (19 November 2015); Case No. 233/4799/14-к (Judgement) Konstantynivka City District Court of Donetsk Region (25 December 2014).

²⁷² Case No. 310/8512/14-к (Judgement) Berdyansk district court of the Zaporizhya Region (19 February 2015).

²⁷³ *Ibid.*

inviolability of Ukraine (Article 110(3)), capturing a state building (Article 341), the unlawful handling of weapons (Article 263(1)) and participation in a terrorist organisation (Article 258-3(1)).²⁷⁴ There appears to have been no reflection upon actual conduct that might amount to crimes against the civilian population.

The final separatist case that GRC reviewed is that of *Vitalii Horbachov*. Vitalii Horbachov, an operative worker of the LPR, planned the kidnapping of a civilian in order to obtain information on his activity and members of his family. He forced the victim to enter his car by using his weapon. During the illegal detention, unidentified men, acting upon the order of Vitalii Horbachov in furtherance of the plan, started to beat the victim with automatic weapons causing him physical pain. Finally, Vitalii Horbachov, with other unidentified persons, took the victim to his house and left him there. Vitalii Horbachov was charged and convicted of kidnapping, carjacking and participating in an unlawful paramilitary or armed formation.²⁷⁵ Although the evidence appears to give rise to a number of potential war crimes, including torture, inhuman treatment or causing great suffering, none of these were pursued.

A pattern of generally prosecuting or charging Ukrainian government and military officials (non-separatists) for a range of domestic crimes

On the few occasions that the Government of Ukraine's own military troops have been prosecuted, it is for ordinary military offences that allege forms of indiscipline or military failures or negligence that have undermined the war effort. The Case Register suggests that the main focus of these prosecutions are:

- Disobedience;²⁷⁶
- Failure to comply with orders;²⁷⁷
- Resistance to a commander or coercion of a commander into breaching the official duties;²⁷⁸

²⁷⁴ *Case of Seledtsov* No. 161/338/16-к (Judgement) Lutsk city district court of the Volyn Region (23 February 2016): See for another example: *Case of Starkov* No. 225/5523/15-к (Judgement) Dzerzhynsk city court of the Donetsk Region (25 September 2015): the Accused illegally crossed the Ukrainian border where he acted as Chief of missile and artillery weapons service. He handed the weapons and ammunition over to other members of the terrorist organisation, who used them to conduct the aggressive war against Ukraine and commit crimes against the Armed Forces of Ukraine. He was charged with waging aggressive war (Art. 437(2)); breaching the rules concerning entering and leaving the temporarily occupied territory (Art. 332-1(2)) and unlawfully handling weapons (Art. 263(1)).

²⁷⁵ *Case of Horbachov* No. 415/3534/14-к (Judgement) Lysychansk city court of the Luhansk Region (14 January 2016).

²⁷⁶ See for example *Case of Holik Dmytro* No. 219/3828/15-к (Judgement) Artemivsk City District Court of Donetsk Region (15 February 2016); *Case of Maliuta Dmytro* No. 419/353/16-к (Judgement) Novoaydar District Court of the Luhansk Region (11 February 2016); *Case of Pryluchnyi Serhiy* No. 500/4397/15-к (Judgement) Izmail City District Court of the Odesa Region (4 November 2015).

²⁷⁷ See for example *Case of Titar Oleksandr* No. 373/1783/15-к (Judgement) Pereiaslav-Khmelnytskyi City District Court of the Kyiv Region (7 July 2015).

²⁷⁸ See for example *Case of Rozumii Rustam* No. 222/812/15-к (Judgement) Volodar District Court of the Donetsk Region (20 July 2015); *Case of Pavlenko Oleksandr* No. 221/747/15-к (Judgement) Volnovakha District Court of Donetsk Region (29 April 2015).

- Threats or violence against a commander;²⁷⁹
- Violation of statutory rules of conduct of military servants not subordinated to each other;²⁸⁰
- Desertion;²⁸¹
- Abuse of power;²⁸² and
- Prosecutions regarding negligent military conduct alleged to have damaged military efforts or objectives.²⁸³

In contrast, there have only been a few cases involving the alleged murder of civilians by Ukrainian Military servicemen.²⁸⁴

Although it appears that the relevant facts in such cases show that the accused were suspected of involvement in conduct that appears to give rise to a reasonable suspicion of serious violations of IHL, they were not charged with this conduct either as ordinary or international war crimes offences. A good illustration of the approach to these prosecutions concerns the case of Svyatoslav Maksimov.²⁸⁵ Sviatoslav Maksymov, police officer, 2nd Platoon, 2nd Company, Battalion of “Luhansk-1” Special Police Patrol, was alleged to be on duty at a checkpoint in the Luhansk region. According to the Case Register, Sviatoslav Maksimov attempted to stop an individual to check his papers. After giving him a signal using an electric lighter and ordering him to stop, the driver failed to obey. Svyatoslav Maksimov then shot the driver, who died at the hospital. Although the available evidence suggests that the accused may have committed murder or unlawful killing as a war crime, this was not charged and instead the accused was charged with excess of authority or official powers

²⁷⁹ See for example *Case of Cherniavsky Dmytro* No. 219/11264/15-к (Judgement) Artemivsk City District court of the Donetsk Region (25 February 2016); *Case of Bakai Oleksandr* No. 219/25/16-к (Judgement) Artemivsk City District court of the Donetsk Region (17 February 2016); *Case of Fedorchuk Andriy* No. 428/8866/15-к (Judgement) Severodonetsk City Court of the Luhansk Region (18 September 2015).

²⁸⁰ See for example *Case of Dovbenko Andriy* No. 570/3006/15-к (Judgement) Rivne District Court of the Rivne Region (9 October 2015); *Case of Horbenko Ivan* No. 226/3496/15-к (Judgement) Dmytrov City Court of the Donetsk Region (10 November 2015).

²⁸¹ *Case of the servicemen of the 51 separate infantry brigade* No. 408/133/15, Volodymyr Volynskiy City Court of the Volyn Region, which is related to servicemen of the 51 separate infantry brigade who crossed the Russian boarder claiming that they were trying to avoid attacks from the terrorists. The prosecution was based on Art. 409.

²⁸² See for example, prosecutions under Art. 36(6): *Case of Seledtsov* No. 161/338/16-к (Judgement) Lutsk city district court of the Volyn Region (23 February 2016); *Case of Agaŋonov* No. 638/18003/15-к (Decision) Appellate Court of the Kharkiv Region (23 November 2015); *Svyatoslav Maksimov case*, (Judgement) Lysychansk city court of the Luhansk Region (6 July 2015). Each of these is covered in detail below. See *infra*, pp. 120-276.

²⁸³ Case No. 243/7099/14 (Judgement) Slovyansk district court of the Donetsk Region (18 December 2014); see also Case No. 185/9886/14-к (Judgement) Pavlograd district court of the Dnipropetrovsk Region (17 December 2014). Arts. 425 and 426 - e.g. the *Ilovaisk battle* case where hundreds of Ukrainian soldiers were killed by separatists after Ukrainian forces made an agreement with separatists to allow them to retreat which was not respected by the separatists.

²⁸⁴ Case No. 233/3431/15-к (Judgement) Kostiantynivka city court of the Donetsk Region (4 November 2015); Case No. 235/7/15-к (Judgement) Krasnoarmiysk district court of the Donetsk region (2 November 2015); *The case of killing of 2 women by Ukrainian servicemen (Prosecutor's Office of Donetsk Region, 17 June 2015)* <http://don.gp.gov.ua/ua/news.html?_m=publications&_c=view&_t=rec&id=157759> last accessed 24 June 2016.

²⁸⁵ Case No. 415/1468/15-к (Judgement) Lysychansk city court of the Luhansk Region (6 July 2015).

(Article 365).²⁸⁶ The court found him guilty and sentenced him to seven years of imprisonment with the deprivation of the right to hold a post at law enforcement bodies for 3 years and deprivation of his special rank.²⁸⁷

Similarly, in the *Oleksandr Agafonov* case, the accused are alleged to have been involved in the death of Oleksandr Agafonov, who was taken from the police station by two armed men. Mr. Agafonov was allegedly killed as a result of injuries inflicted by SBU officers. In particular, on 14 November 2014, Mr. Agafonov, his wife and his child were stopped at a checkpoint in Iziuum. Mr. Agafonov was then brought to the police station for an interview. Although he was not formally detained, he was under the control of the police. During this detention it is alleged he was removed by the SBU, beaten and returned, but later died from shock and a closed blunt injury to the chest.²⁸⁸ Two officers of the Central SBU Office in Kyiv have been charged under Articles 146 (kidnapping) and 365 (abuse of authority) of the Criminal Code.²⁸⁹ The trial was set to begin in March 2016.²⁹⁰ However, the accused were not charged with murder pursuant to Article 115 or any associated war crime. Accordingly, although the paucity of information prevents definitive conclusions from being drawn, the available information suggests, not only that the murder/unlawful killing was not pursued as a potential war crime, but that the domestic charge of murder was altogether absent from the prosecution and the eventual penal sanctions are (consequently) disproportionately low.

In sum, the available information suggests that Ukraine is failing to prosecute its own service men or military with due regard for the full extent or gravity of their conduct (especially as regards acts against civilians or those *hors de combat*) or with due regard to the normative desirability of prosecuting international crimes. Instead, the focus appears to be on prosecuting conduct that amounts to military failures or negligence unrelated to apparent violations of IHL or other serious violations of international law.

An occasional prosecution of conduct amounting to IHL violations and other serious violations of international law as domestic crimes

As indicated above,²⁹¹ the available public information suggests that on the rare occasions that cases focused upon combatants' treatment of civilians or those *hors de combat* find their way into a Ukrainian courtroom, they are prosecuted through reliance on a range of domestic offences contained in their domestic Criminal Code.

²⁸⁶ Case No. 415/1468/15-к (Judgement) Lysychansk city court of the Luhansk Region (6 July 2015).

²⁸⁷ Case No. 415/1468/15-к (Judgement) Lysychansk city court of the Luhansk Region (6 July 2015).

²⁸⁸ OHCHR, 'Report on the Human Rights Situation in Ukraine' (16 February to 15 May 2015) para. 106, ft 36 <www.ohchr.org/Documents/Countries/UA/10thOHCHRreportUkraine.pdf> accessed 20 April 2016.

²⁸⁹ OHCHR, 'Report on the Human Rights Situation in Ukraine' (16 August to 15 November 2015) para. 114 <www.ohchr.org/Documents/Countries/UA/12thOHCHRreportUkraine.pdf> accessed 20 April 2016.

²⁹⁰ OHCHR, 'Report on the Human Rights Situation in Ukraine' (16 November 2015 to 15 February 2016) para. 71 <www.ohchr.org/Documents/Countries/UA/Ukraine_13th_HRMMU_Report_3March2016.pdf> accessed 20 April 2016.

²⁹¹ See *supra*, para. 99.

The principle ordinary crimes used are outlined above.²⁹² From this range, the most commonly used are Article 115 – murder (up to life imprisonment) and Article 146 - kidnapping (up to ten years of imprisonment).

A typical example of the use of these charges arose in the *Tornado* cases. In those cases “Tornado” members were charged with the following crimes:

- Torture (Article 127(2));
- Illegal Confinement (Article 146(3));
- Rape (Article 153(2));
- The creation of a criminal organisation (Article 255(1));
- Carjacking (Article 289(2));
- Resistance to representative of state authority (Article 342(2)); and
- Excess of authority or official powers (Article 365(2)).

The Tornado were allegedly a volunteer patrol company of special police forces of Ukraine.²⁹³ In one case, domestic criminal proceedings were commenced against a number of the group: Yuriy Shevchenko, Mykyta Svyrydovsky, Mykyta Kust, Roman Ivash, Andriy Demchuk, Borys Gulchuk, Maksym Glebov, and Ruslan Onishchenko.²⁹⁴ It is alleged that the indicted members of the battalion tortured and ill-treated civilians who had been unlawfully deprived of their liberty.

In particular, according to the allegations advanced by the Chief military prosecutor of Ukraine, Mr. Matios, Mr. Onishchenko (the commander of the “Tornado” Company) created the illegal armed formation and between January and April 2015 encouraged his subordinates to commit especially grave crimes, including the illegal detention of the local population, murder, torture and sexual violence. This is alleged to have included detaining at least ten people, and torturing, electrocuting, beating, raping and killing some of the men and sexually abusing a woman.²⁹⁵ Apparently, several of the crimes were videotaped.²⁹⁶ On the face of the available evidence, there is no explanation nor any immediately apparent reason that would explain or justify the absence of war crimes charges (including wilful killing/murder,²⁹⁷

²⁹² *Ibid.*

²⁹³ OHCHR, ‘Report on the Human Rights Situation in Ukraine’ (16 November 2015 to 15 February 2016) para. 123 <www.ohchr.org/Documents/Countries/UA/11thOHCHRreportUkraine.pdf> accessed 20 April 2016.

²⁹⁴ *Tornado* Cases No. 756/16332/15-к (Decision) Obolon district court of Kyiv (4 May 2016).

²⁹⁵ “‘Tornado’ Crimes: a Person Chained to Sports Equipment and Raped’ (112.UA; 2015) <<http://ua.112.ua/mnenie/zlochyny-tornado-pryviazaly-liudynu-do-sportyvnoho-snariada-i-zgvaltuvaly-18-238616.html>> accessed 20 April 2016.

²⁹⁶ “‘Tornado’ Soldiers Arrested for Torture and Gang Rape – Matios’ (112.UA; 2015) <<http://112.ua/ato/boytsy-tornado-zaderzhany-za-pytki-i-grupповoe-iznasilovanie-matios-238141.html>> accessed 20 April 2016.

²⁹⁷ Wilful killing: Geneva Convention VI, Art. 147; Rome Statute, Art. 8(2)(a)(i); murder: Geneva Conventions, Common Art. 3; Rome Statute, Art. 8(2)(c)(i)-1).

torture,²⁹⁸ cruel treatment,²⁹⁹ inhuman treatment,³⁰⁰ causing great suffering,³⁰¹ confinement,³⁰² outrages upon personal dignity,³⁰³ rape,³⁰⁴ or sexual violence³⁰⁵) for this range of conduct.

A similar pattern may be observed in the *Oleksandr Agafonov* case discussed above.³⁰⁶ As outlined, Mr. Agafonov was allegedly killed as a result of injuries inflicted by SBU officers who have been charged under Articles 146 (illegal confinement) and 365 (abuse of authority) of the Criminal Code.³⁰⁷ Again, from an evidential perspective, there is neither explanation nor any immediately apparent reason that would explain or justify the absence of war crimes charges (including wilful killing/murder,³⁰⁸ torture,³⁰⁹ cruel treatment,³¹⁰ inhuman treatment,³¹¹ causing great suffering,³¹² confinement,³¹³ or outrages upon personal dignity,³¹⁴) for this range of conduct.

The *Volodymyr Kulmatytsky* case³¹⁵ gives rise to similar questions concerning the absence of war crimes charges. The accused persons in this case were charged with illegal confinement (Article 146(2)) and illegally handling arms (Article 263(1)). It is alleged that Mr Kulmatytsky, former deputy mayor of Sloviansk, was kidnapped by three soldiers and one commander (Mr A) of the Battalion Dnipro-1 (Ukrainian police) and murdered later that day by Mr A. Mr A was informed that Mr Kulmatytsky was involved in financing DPR formations. On 28 January 2015, he ordered three soldiers to go to Mr Kulmatytsky's house to verify the information. Mr A followed them later. In summary, it is alleged that Mr Kulmatytsky and his

²⁹⁸ International armed conflict: Geneva Convention VI, Art. 147; Rome Statute, Art. 8(2)(a)(ii)-1; Non-international armed conflict: Geneva Conventions, Common Art. 3; Rome Statute, Art. 8(2)(c)(i)-4).

²⁹⁹ Geneva Conventions, Common Art. 3; Rome Statute, Art. 8(2)(c)(i)-3).

³⁰⁰ Geneva Convention VI, Art. 147; Rome Statute, Art. 8(2)(a)(ii)-2.

³⁰¹ Geneva Convention VI, Art. 147; Rome Statute, Art. 8(2)(a)(iii).

³⁰² Geneva Convention VI, Art. 147; Rome Statute, Art. 8(2)(a)(vii)-2).

³⁰³ International armed conflict: Additional Protocol I, Art. 75(2)(b); Rome Statute, Art. 8(2)(b)(xxi); Non-international armed conflict: Geneva Conventions, Common Art. 3; Rome Statute, Art. 8(2)(c)(ii).

³⁰⁴ International armed conflict: Geneva Convention IV, Art. 27(2); Additional Protocol I, Art. 75(2)(b); Rome Statute, Art. 8(2)(b)(xxii)-1; Non-international armed conflict: Additional Protocol II, Art. 4(2)(e); Rome Statute, Art. 8(2)(e)(vi).

³⁰⁵ International armed conflict: Geneva Convention IV, Art. 27(2); Additional Protocol I, Art. 75(2)(b); Rome Statute, Art. 8(2)(b)(xxii)-6; Non-international armed conflict: Additional Protocol II, Art. 4(2)(e); Rome Statute, Art. 8(2)(e)(vi)-6).

³⁰⁶ See *supra*, para. 120.

³⁰⁷ OHCHR, 'Report on the Human Rights Situation in Ukraine' (16 August to 15 November 2015) para. 114 <www.ohchr.org/Documents/Countries/UA/12thOHCHRreportUkraine.pdf> accessed 20 April 2016.

³⁰⁸ Wilful killing: Geneva Convention VI, Art. 147; Rome Statute, Art. 8(2)(a)(i); Murder: Geneva Conventions, Common Art. 3; Rome Statute, Art. 8(2)(c)(i)-1).

³⁰⁹ International armed conflict: Geneva Convention VI, Art. 147; Rome Statute, Art. 8(2)(a)(ii)-1; Non-international armed conflict: Geneva Conventions, Common Art. 3; Rome Statute, Art. 8(2)(c)(i)-4).

³¹⁰ Geneva Conventions, Common Art. 3; Rome Statute, Art. 8(2)(c)(i)-3).

³¹¹ Geneva Convention VI, Art. 147; Rome Statute, Art. 8(2)(a)(ii)-2.

³¹² Geneva Convention VI, Art. 147; Rome Statute, Art. 8(2)(a)(iii).

³¹³ Geneva Convention VI, Art. 147; Rome Statute, Art. 8(2)(a)(vii)-2).

³¹⁴ International armed conflict: Additional Protocol I, Art. 75(2)(b); Rome Statute, Art. 8(2)(b)(xxi). Non-international armed conflict: Geneva Conventions, Common Art. 3; Rome Statute, Art. 8(2)(c)(ii).

³¹⁵ *Case of Kulmatytskyi* No. 200/13169/15-к (Judgement) Babushkynskyi district court of the Dnipropetrovsk Region (21 September 2015).

driver were driven into a forest and unlawfully killed. The bodies of Mr Kulmatytsky and his driver were found on 31 January 2015.³¹⁶ Mr A. – the only suspect of murder – was killed (or killed himself) during the investigation of the case when police attempted to apprehend him.³¹⁷ The other accused were found guilty of kidnapping (Article 146(2)) and unlawful handling of weapons (Article 263). They were sentenced to 4 years of imprisonment with a 3-year probation period.³¹⁸

As can be seen in Annex A,³¹⁹ there are several other examples that involve similar facts and plot a similar prosecutorial route. At a minimum, they point to a policy, informal or otherwise, of prosecuting combatants for crimes against civilians or those *hors de combat*³²⁰ relying on domestic crimes, not war crimes.

Moreover, they also raise a further concern: the domestic crimes charged often appear not to adequately encompass the facts or the overall severity of the case. Indeed, whilst the alleged conduct encompasses crimes involving the detaining (kidnapping) and killing of suspected collaborator civilians by soldiers, this conduct often appears to be prosecuted with less emphasis on the most serious crimes (e.g. murder/unlawful killing) and more on the lesser serious aspect (e.g. kidnapping) with the consequence that the final sentences appear not to reflect the overall gravity of the criminal conduct.³²¹

However, it should also be noted that these types of prosecutorial charging decisions are case-specific and the logic and discretion exercised when deciding on the most appropriate charges may not be immediately apparent, even though it may still be reasonable and proper. As will be discussed in the *Conclusions: Short Term Recommendations*, prosecutorial discretion concerning which cases and charges to pursue are complex decisions involving the consideration of a range of criteria, including the rights of the victim, the strength of the evidence, the need for expeditious proceedings, the demands of the investigation and many others. Not every charging decision that pursues lesser charges, or seeks a lower sentence

³¹⁶“Law Enforcement Officers Found Dead Deputy of Scandalous Ex-mayor of Sloviansk Shtepa” (*TCH.ua*, 2015) <<http://tsn.ua/ukrayina/pravoohorongi-znayshli-mertvim-zastupnika-skandalnogo-eks-mera-slov-yanska-shtepi-406392.html>> accessed 20 April 2016.

³¹⁷ OHCHR, ‘Report on the Human Rights Situation in Ukraine’ (16 August to 15 November 2015) para. 113 <www.ohchr.org/Documents/Countries/UA/12thOHCHRreportUkraine.pdf> accessed 20 April 2016.

³¹⁸ See Annex A

³¹⁹ See Annex A

³²⁰ 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> accessed 20 April 2016: the literal meaning of the term *hors de combat* is “out of fight”; it describes combatants who have been captured or wounded or who are sick or shipwrecked, or who have laid down their arms or surrendered, and thus are no longer in a position to fight.

³²¹ Criminal Code of Ukraine, Art. 115: murder is punishable by a maximum sentence of 15 years’ imprisonment; Article 146: illegal confinement is punishable by a maximum sentence of five years’ imprisonment (when committed by a group of persons upon prior conspiracy, or by a method dangerous to the victim’s life or health, or causing bodily suffering to him or her, or with the use of weapons) and 10 years’ imprisonment (when committed by an organized group, or when it caused any grave consequences).

than the apparent conduct appears to warrant, can be labelled wrong, overly lenient or otherwise reflective of prosecutorial inattention or error.

However, Ukrainian's prosecutions, particularly the pursuit of ordinary crimes (and the overall leniency) as discussed, cannot be divorced from the overall prosecutorial context described in this section of the Report. It must be seen in the context of an apparent failure to investigate and prosecute the majority of the misconduct, consistently identified by HRMMU and civil society organisations, that points decidedly to the commission of war crimes. When seen in this context, a reasonable inference arises that there exists a policy, informal or otherwise, to avoid prosecuting war crimes as international crimes or, even, as ordinary crimes.

Conclusion: Failure to Provide Effective Penal Sanctions

Currently Ukraine's pattern of prosecutions suggest that it is failing in its obligations, *inter alia*, to take steps to adopt or provide effective penal sanctions for violations of IHL and other serious violations of international law, including to search for persons alleged to have committed, or to have ordered to be committed, such serious violations and to bring such persons, regardless of their nationality, before its own courts or hand them over for trial to another state party.³²²

As outlined above, both the starting point for this discussion and its conclusion is the humanitarian crisis that has engulfed eastern Ukraine and the numerous violations of IHL and other serious violations of international law reported by a variety of sources, chief amongst them the HRMMU. The figures relating to civilian casualties and suspected crimes are stark and raise serious IHL concerns. There can be little doubt that a range of conduct that may amount to war crimes (or, even, possibly, crimes against humanity) is occurring in the ATO zone.³²³

Obviously, it is not possible in the abstract to delineate with a degree of certainty the full range of serious violations of IHL that may be occurring in the territory of Ukraine. However, as outlined in Part II of this Report,³²⁴ HRMMU and civil society organisation's reporting suggest that the following war crimes may be amongst those most commonly occurring:

- War crimes common to international and non-international armed conflicts:
 - Wilful killing/murder;³²⁵

³²² Geneva Convention I, Art. 49; Geneva Convention II, Art. 50; Geneva Convention III, Art. 129; Geneva Convention IV, Art. 146; Additional Protocol I, Art. 86.

³²³ See *supra*, para. 22.

³²⁴ See *supra*, paras. 16-23.

³²⁵ Geneva Convention I, Art. 50; Geneva Convention II, Art. 51; Geneva Convention III, Art. 130; Geneva Convention IV, Art. 147; Geneva Conventions, Common Art. 3; Rome Statute, Arts. 8(2)(a)(i), 8(2)(c)(i)-1).

- Torture or inhuman treatment;³²⁶
- Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;³²⁷
- Committing outrages upon personal dignity, in particular humiliating and degrading treatment;³²⁸ and
- Rape, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;³²⁹
- War crimes only applicable to international armed conflicts:
 - Wilfully causing great suffering, or serious injury to body or health;³³⁰
 - Unlawful confinement;³³¹
 - Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;³³² and
 - Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians.³³³

In sum, it is the generally accepted view of experts that IHL violations and other serious violations of international criminal law committed in Ukraine may amount to war crimes, and possibly crimes against humanity, but (probably) not genocide. On an analysis of the available information being collected by HRMMU and civil society organisations within Ukraine (summarised above³³⁴), GRC agrees with this view.

On the basis of the publicly available information, it is highly unlikely that Ukraine is fulfilling its treaty and customary law obligations to prosecute international crimes that are occurring on its territory. As outlined above, there are very few domestic prosecutions focused upon the main objectives of IHL, namely the protection of civilians and those *hors de combat*. As may be seen from Annex A, there has been a dearth of prosecutions of the type of conduct amounting to violations of IHL and when there has been a prosecution, it is doubtful that the offences charged properly reflect the gravity or range of the conduct alleged.

³²⁶ Geneva Convention I, Art. 50; Geneva Convention II, Art. 51; Geneva Convention III, Art. 130; Geneva Convention IV, Art. 147; Geneva Conventions, Common Art. 3; Rome Statute, Arts. 8(2)(a)(ii)-1 and 8(2)(c)(i)-3).

³²⁷ Additional Protocol I, Arts. 51(2), 85(3); Additional Protocol II, Arts. 4(2)(d), 13(2); Rome Statute, Arts. 8(2)(b)(i), 8(2)(e)(i).

³²⁸ Additional Protocol I, Art. 75(2)(b); Geneva Conventions, Common Art. 3; Rome Statute, Arts. 8(2)(b)(xxi), 8(2)(c)(ii).

³²⁹ Geneva Convention IV, Art. 27(2); Additional Protocol I, Art. 75(2)(b); Additional Protocol II, Arts. 4(2)(e); Rome Statute, Arts. 8(2)(b)(xxii), 8(2)(e)(vi).

³³⁰ Geneva Convention I, Art. 50; Geneva Convention II, Art. 51; Geneva Convention III, Art. 130; Geneva Convention IV, Art. 147; Rome Statute, Art. 8(2)(a)(iii).

³³¹ Geneva Convention I, Art. 50; Geneva Convention II, Art. 51; Geneva Convention III, Art. 130; Geneva Convention IV, Art. 147; Rome Statute, Art. 8(2)(a)(vii)-2).

³³² Additional Protocol I, Art. 51(2); Rome Statute, Art. 8(2)(b)(ii).

³³³ Additional Protocol I, Art. 85(3)(b); Rome Statute, Art. 8(2)(b)(iv).

³³⁴ See *supra*, paras. 16-21.

Naturally, the fulfilment of these obligations cannot be decided in the abstract. As will be discussed in more detail below,³³⁵ a Prosecutor has a wide discretion concerning the selection and charging of crimes. Moreover, the exercise of that discretion will depend on a range of factors, including the capabilities of the legal system and the legal framework (e.g. the detail and scope of the Criminal Code and other related legal measures) that exists to allow appropriate investigations and prosecutions into serious violations of IHL.

Nonetheless, the pattern of prosecutions is instructive. In particular, the majority of the relevant prosecutions - connected to misconduct in the ATO Zone - appear to eschew any focus on the treatment of civilians by combatants in favour of prosecuting offences tied to individuals' status as separatists (terrorists, etc.) or non-separatists (negligent military conduct). In light of the available information of a large range and significant number of war crimes being committed in the east of Ukraine, these few prosecutions cannot amount to a fulfilment of Ukraine's obligations to provide effective penal sanction for serious violations of IHL.

Accordingly, at a minimum, in light of Ukraine's international obligations to provide penal sanctions, there can be little room to doubt that the Government of Ukraine ought to be prosecuting conduct amounting to war crimes using the specific Articles in the Criminal Code combined with or alongside, when consistent with the gravity of the conduct, ordinary crime prosecutions. How this might be achieved, will be discussed below.³³⁶

³³⁵ See *infra*, paras. 143-144.

³³⁶ See *infra*, Part IV – *Conclusions: Short Term Recommendations*.

Conclusion - Short Term Recommendations

Plainly, prosecuting a significant volume of IHL violations and other serious violations of international law is a highly technical and complex task. All prosecutions of IHL violations, using international or national crimes, are challenging endeavours requiring international legal expertise and practice. As outlined in GRC's analysis of IHL implementation, Ukraine's law and associated legal measures require modification to ensure the effective implementation and enforcement of IHL.³³⁷ Accordingly, there are no easy paths to the fulfilment of Ukraine's IHL obligations.

However, there are a number of practical steps that Ukraine's prosecutors could immediately take to move towards ensuring effective penal sanctions for serious violations of IHL. These will be discussed below and may be summarised as follows:

- **Follow international fair trial principles in charging international crimes.** Ensure that decisions concerning case selection, prioritisation and charging are made with respect for the law and in accordance with IHL and human rights principles;
- **Acknowledge the existence of an armed conflict.** Establishing and accepting that an armed conflict exists in eastern Ukraine sufficient to trigger the application of IHL (whether or not the Government of Ukraine continues to characterise their operations as ATO);
- **Prosecute with reliance upon international crimes.** Focusing on prosecuting using Article 438 [War Crimes] of the Criminal Code;
- **Use domestic crimes when appropriate or when the relevant international crime is not available.** When relying upon ordinary crimes to provide penal sanctions for IHL violations, ensure that substantially the same conduct is being pursued with the availability of an appropriate penal sanction reflecting the gravity of the corresponding international crime.

Follow international fair trial principles in charging international crimes

The *selection* of war crimes cases for prosecution and *prioritisation* in terms of investigatory and prosecutorial resources is an important and complex task. These decisions can inform both *how* international crimes are tried as well as *when* they are charged. There are many considerations that must be borne in mind to ensure respect for human rights principles and the law as well as to ensure ongoing legitimacy of the overall prosecution. Accordingly, no exhaustive list may be drawn and the issues are to a degree context-specific.³³⁸

³³⁷ GRC, 'Domestic Implementation of International Humanitarian Law in Ukraine' (May 2016) 47.

³³⁸ R E Fife, 'Criteria for Prosecution of International Crimes: The Importance for States and the International Community of the Quality of the Criminal Justice Process for Atrocities, in Particular of the Exercise of Fundamental Discretion by Key Justice Actors' in M Bergsmo (ed) *Criteria for Prioritizing and Selecting Core International Crimes Cases* (Torkel Opsahl

As with prosecutors in general, those seeking to prosecute IHL violations have and must exercise their inherent discretion in enforcing the law. A prosecuting attorney must have the power and discretion to decide on various issues, including deciding whether or not to seek the prosecution of an individual, what crimes she or he will be charged with, and the appropriate penal sanction to seek. International standards dictate that when initiating investigations and preparing indictments that broad discretion may only be exercised in accordance with full respect for the law and in accordance with recognised principles of human rights.³³⁹ At a minimum, this requires impartiality and independence in the *selection* of cases. There can be no discrimination in the enforcement or application of the law based on impermissible motives such as race, colour, religion, opinion or national and ethnic origin.³⁴⁰ Consistent with these requirements, the fair prosecution of all sides to the conflict, rather than selective prosecutions of one warring faction over another, is essential.

Respect for the principle of equality does not mean mathematical equality. However, when launching international prosecutions, the importance of investigating and prosecuting all those who are suspected of committing international crimes cannot be understated. Otherwise, there is a risk of “victor’s justice” – that is, only the “losers” in a conflict are prosecuted, with the “winners” evading prosecution. This negatively impacts the integrity of the prosecution and the judicial process, ultimately undermining the legitimacy of the proceedings as a whole.

On the other hand, it is to be expected that a country emerging from a conflict will have a vast number of alleged crimes to process. With that in mind, national prosecutors will ordinarily be unable to investigate and prosecute each of these alleged crimes within a reasonable time.³⁴¹ With inherent limitations in the quantity of crimes that can be prosecuted during a conflict, prosecutors need to prioritise certain cases over others. This requires a clear policy, or internal guidelines, on how to achieve the fair and balanced exercise of this prosecutorial discretion.

The UN Guidelines on the Role of the Public Prosecutor (1990) provide that when prosecutors are vested “with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution”.³⁴²

Academic EPublisher, 2nd ed, 2010) 20-21 <www.fichl.org/fileadmin/fichl/documents/FICHL_4_Second_Edition_web.pdf> accessed 20 April 2016.

³³⁹ *Prosecutor v. Mucić et al.* (Appeals Chamber Judgement) Case No. ICTY-96-21-A (20 February 2001) para. 604. See also H B Jallow, ‘Prosecutorial Discretion and International Criminal Justice’ (2005) 3 *Journal of International Criminal Justice* 145.

³⁴⁰ *Prosecutor v. Mucić et al.* (Appeals Chamber Judgement) Case No. ICTY-96-21-A (20 February 2001) para. 605.

³⁴¹ V Tochilovsky, ‘Post-Conflict Criminal Justice: Practical and Policy Considerations’, in M Bergsmo (ed) *Criteria for Prioritizing and Selecting Core International Crimes Cases* (Torkel Opsahl Academic EPublisher, 2nd ed, 2010) 238 <www.fichl.org/fileadmin/fichl/documents/FICHL_4_Second_Edition_web.pdf> accessed 20 April 2016.

³⁴² Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders ‘Guidelines on the Role of Prosecutors’ (Havana, 27 August to 7 September 1990) UN Doc A/CONF.144/28/Rev.I, 189

Establishing internal guidelines has benefits both internally and externally. Those that define case prioritisation need to be:

- clear and precise;
- publicly available;
- free of political and confidence-generating formulations (the criteria should not be inherently biased or formulated in biased terms; their formulation should find a balance between breadth and concision);
- applied equally and transparently; and
- effectively enforced.³⁴³

All of these requirements mean, *en masse*, that the Guidelines can work to combat allegations of selective prosecutions based on ethnicity, nationality,³⁴⁴ or other improper criteria. Internally, guidelines with these characteristics ensure decisions follow a prescribed prosecutorial strategy, enable consistency in the exercise of prosecutorial discretion, permit a more efficient allocation of limited resources and, most importantly, ensure equality before the law.³⁴⁵

Externally, these guidelines justify how cases are selected with regards to the public, including to the victims of the crimes themselves. They also work to combat perceptions that the discretion is employed either politically or arbitrarily. Finally, guidelines work as a tool to combat political pressures and, accordingly, strengthen the independence of prosecutors.³⁴⁶

In addition to the above, criteria have also been identified as key considerations to be addressed when considering case *prioritisation*. In particular, the Forum for International Criminal and Humanitarian Law, after an extensive review of domestic jurisdictions such as Bosnia and Herzegovina, Serbia, Croatia, Argentina, Cambodia, and Canada, as well as international tribunals such as the ICTY or International Criminal Tribunal for Rwanda

<www.unodc.org/documents/congress//Previous_Congresses/8th_Congress_1990/028_ACONF.144.28.Rev.1_Report_Eighth_United_Nations_Congress_on_the_Prevention_of_Crime_and_the_Treatment_of_Offenders.pdf> accessed 20 April 2016; See similar views from the Council of Europe Committee of Ministers, 'The Role of Public Prosecution in the Criminal Justice System' Recommendation Rec(2000)19 adopted by the Committee of Ministers on 6 October 2000 at the 724th meeting of the Ministers' Deputies <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804be55a>> accessed 20 April 2016.

³⁴³ C Angermaier, 'Essential Qualities of Prioritization Criteria: Clarity and Precision; Public Access; Non-Political and Confidence-Generating Formulations; Equal and Transparent Application; and Effective Enforcement' in Morten Bergsmo (ed) *Criteria for Prioritizing and Selecting Core International Crimes Cases* (2nd edn, Torkel Opsahl Academic EPublisher: Oslo, 2010) 201-204.

³⁴⁴ V. Tochilovsky, 'Post-Conflict Criminal Justice: Practical and Policy Considerations' in M Bergsmo (ed) *Criteria for Prioritizing and Selecting Core International Crimes Cases* (Torkel Opsahl Academic EPublisher, 2nd ed, 2010) 238

³⁴⁵ *Ibid.*

³⁴⁶ *Ibid.*, 202.

(“ICTR”), emphasises the importance of adopting a prosecutorial policy containing clear case prioritisation criteria.³⁴⁷

A number of prioritisation criteria have been identified as key:

- “Gravity, scale and nature of the crime”:³⁴⁸ rather than considering the position of the suspect (or any other considerations), the highest priority should be afforded to the most serious crimes. Therefore, the prosecution should identify the suspects’ role and the extent of participation in the incidents, as well as their control over the crimes.³⁴⁹
- “Precise demographic and area conflict analysis”:³⁵⁰ priority must be afforded to areas in which crimes were concentrated.³⁵¹
- “Effect that war crimes prosecutions have on the whole community”: in other words, it is suggested that there is benefit in seeing prosecutions of the largest number of perpetrators.³⁵² Of course, as discussed above, this should not be focused on achieving some form of “ethno-religious balancing”.³⁵³ The criteria should focus on the crime and its characteristics.³⁵⁴

In addition to these criteria, practical concerns will also need to be factored into a consideration of case prioritisation:

- The status of the evidence:³⁵⁵ if the availability of witnesses or evidence in a given case is poor, then it may be necessary to delay (or forego) the case in order secure those witnesses or the evidence.
- The possibility of arrest: for example, if an accused is in custody, the detention and its length feeds into the consideration of reasonableness under the fundamental rights of the domestic system and the European Court of Human Rights, such as the right to be tried within a reasonable time.³⁵⁶

³⁴⁷ C Angermaier, ‘Essential Qualities of Prioritization Criteria: Clarity and Precision; Public Access; Non-Political and Confidence-Generating Formulations; Equal and Transparent Application; and Effective Enforcement’ in M Bergsmo (ed) *Criteria for Prioritizing and Selecting Core International Crimes Cases* (Torkel Opsahl Academic EPublisher, 2nd ed, 2010) 201.

³⁴⁸ M Tokača, ‘Introductory Remarks on the Characteristics of Effective Criteria for the Prioritization of Core International Crimes Cases’ in M Bergsmo (ed) *Criteria for Prioritizing and Selecting Core International Crimes Cases* (Torkel Opsahl Academic EPublisher, 2nd ed, 2010) 198.

³⁴⁹ V Tochilovsky, ‘Post-Conflict Criminal Justice: Practical and Policy Considerations’, in M Bergsmo (ed) *Criteria for Prioritizing and Selecting Core International Crimes Cases* (Torkel Opsahl Academic EPublisher, 2nd ed, 2010) 239.

³⁵⁰ M Tokača, ‘Introductory Remarks on the Characteristics of Effective Criteria for the Prioritization of Core International Crimes Cases’ M Bergsmo (ed) *Criteria for Prioritizing and Selecting Core International Crimes Cases* (Torkel Opsahl Academic EPublisher, 2nd ed, 2010) 198.

³⁵¹ *Ibid*, 199.

³⁵² *Ibid*.

³⁵³ *Ibid*.

³⁵⁴ *Ibid*.

³⁵⁵ V Tochilovsky, ‘Post-Conflict Criminal Justice: Practical and Policy Considerations’, in M Bergsmo (ed) *Criteria for Prioritizing and Selecting Core International Crimes Cases* (Torkel Opsahl Academic EPublisher, 2nd ed, 2010) 239.

³⁵⁶ *Ibid*, 239-240: citing *Jabłoński v. Poland* App No. 33492/96 (ECtHR, 21 December 2000) para. 102; *Abdoella v. The Netherlands*, App no. 12728/87 (ECtHR, 25 November 1992) para.24.

Acknowledge the existence of an armed conflict

As discussed, war crimes are committed in specific contexts. As will be discussed below,³⁵⁷ the list of elements of the crimes varies according to the nature of the armed conflict – international or non-international.

In exercising his/her discretion concerning the charges to pursue, the prosecutor must form a view concerning the armed conflict, including whether it may be international or non-international and the range of war crimes suggested on the available information. These preliminary assessments are critical to any balanced choice of whether ordinary charges are genuinely appropriate and correspond to the conduct and gravity suggested by the most proximate, prospective war crime. The ICC's assessment of whether the ordinary crimes encompass substantially the same conduct that is alleged in the proceedings before the Court³⁵⁸ is a useful barometer of this question. What it means will vary on a case-by-case basis, according to the facts and circumstances of each case; an individualised analysis of the facts is required for each matter. Only by understanding the overall context and the gravity, may the prosecutor select ordinary charges, for instance relying on Articles 258-1 (commission of a terrorist act) or 258-4 (facilitating the commission of a terrorist act), that provide genuine alternatives that represent reasonable and proportionate penal sanctions for prohibited conduct (e.g. terrorist conduct consisting of several murders and several acts of other physical or mental injury to civilians could begin to look like war crimes or crimes against humanity).

In order to ensure a balanced approach to this same conduct assessment, the prosecutor should form views concerning the parties to the conflict; their *modus operandi*; the attribution of specific incidents; the military or civilian structures; the character of targets; the number of casualties; and other information that would allow the suspected acts of the specific individual

³⁵⁷ See *infra*, section - *Prosecute with reliance upon international crimes*, paras. 168 et seq.

³⁵⁸ Decision on the Admissibility of the Case Against Abdullah Al-Senussi paras. 61, 74,76 - 77. The Chamber recalls that the “same person, same conduct” test was initially elaborated in: Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi para. 31. This test was later recalled in: *The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman* (Decision on the Prosecution Application under Article 58(7) of the Statute) ICC-02/05-01/07-I-Corr (27 April 2007) para. 24; *The Prosecutor v. Germain Katanga* (Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga) ICC- 01/04-01/07-4 (6 July 2007) para. 20 (public redacted version in ICC-01/04-01/07-55); *The Prosecutor v. Mathieu Ngudjolo Chui* (Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui) ICC-01/04-01/07-262 (6 July 2007) para. 21. The same approach was followed in: *The Prosecutor v. Kony et al* (Decision on the Admissibility of the Case under Article 19(1) of the Statute) ICC-02/04-01/05-377 (10 March 2009) paras. 17-18; *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* (Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute) ICC-01/09-01/11-101 (30 May 2011) para. 54; *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute) (30 May 2011) ICC-01/09-02/11-96 (30 May 2011) para. 48. This jurisprudence of the Pre-Trial Chambers was later confirmed by the Appeals Chamber which, however, referred to “the same individual and substantially the same conduct”: *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Art. 19(2)(b) of the Statute’) ICC- 01/09-02/11-274 (30 August 2011) para. 39.

to be placed into the context of the armed conflict or any attack on the civilian population. This assessment must also include ensuring an adequate and proportionate sentence commensurate with the seriousness of the violation.

Furthermore, in order to establish the applicability of IHL and thereafter to pursue the specific war crimes charges that apply to these conflicts, any Ukrainian prosecutor must be satisfied of the contextual elements common to war crimes. Whilst it may prove difficult in the circumstances of a particular violation to define the nature of the armed conflict, and therefore which precise war crimes should be the focus of the prosecution, as the threshold criteria show (as outlined below³⁵⁹), the existence of *an* armed conflict in Ukraine cannot reasonably be disputed. Therefore, as a starting point and as a review of the applicable criteria demonstrates, any Ukrainian prosecutor with the mandate to prosecute serious violations of IHL may safely assume the existence of one or both types of armed conflict in the territory of eastern Ukraine.

Moreover, in many instances, as will also be apparent, the subsequent assessments concerning the establishment of the remaining contextual elements common to war crimes committed in either or both an international armed conflict and a non-international armed conflict will also prove uncontroversial. As will be discussed below,³⁶⁰ these include establishing as essential elements that there was a close connection, or a 'nexus', between the criminal act and the armed conflict as a whole and that the perpetrator was aware of the factual circumstances that established the existence of an armed conflict.

In practical terms, the establishment of the armed conflict (of either or both kinds) of sufficient scope and intensity becomes a defining measurement of these common elements.

Once the armed conflict is established and the alleged perpetrator is shown to be a combatant acting in an official capacity (even whilst acting outside of those official duties), the question of the nexus and the perpetrators' awareness often becomes a logical inference for the purposes of establishing the context for consideration of the specific acts that may within that context constitute war crimes.

The real difficulty may be assessing the nature of the existing armed conflict. However, in many instances it may be possible to proceed without definitively establishing the nature of the conflict. This circumvention will lead to extending the applicable law *i.e.* it will lead to a reliance upon the IHL standards that apply to both international and non-international armed conflicts, such as Common Article 3 and specific customary law prohibitions.

³⁵⁹ *Ibid.*

³⁶⁰ *Ibid.*

International tribunals have consistently held that the core provisions of Common Article 3, which relate to non-international armed conflict, form part of customary international law.³⁶¹ The ICTY Appeals Chamber in the *Celebici* case, has stated with regard to the crimes under Common Article 3 that “[i]t is logical that this minimum be applicable to international conflicts as the substance of these core rules is identical. In the Appeals Chamber’s view, something which is prohibited in internal conflicts is necessarily outlawed in an international conflict where the scope of the rules is broader.”³⁶² The ICTY Trial Chamber reiterated that Common Article 3 “applies regardless of the internal or international character of the conflict.”³⁶³

The Special Court for Sierra Leone (“SCSL”) Appeals Chamber, in the *CDF* case, has also held that both Common Article 3 and Article 4 of Additional Protocol II define the fundamental guarantees of humane treatment: “All the fundamental guarantees share a similar character. In recognising them as fundamental, the international community set a benchmark for the minimum standards for the conduct of armed conflict.”³⁶⁴

Further, the ICTY has identified a body of customary international humanitarian law applicable to both international and non-international armed conflict. It includes: attacks against civilians (Common Article 3, Article 51 of Additional Protocol I and Article 13 of Additional Protocol II),³⁶⁵ attacks against civilian objects (Article 52 of Additional Protocol I);³⁶⁶ the prohibition on the destruction and devastation of property, including cultural property (Article 23 of the 1907 Hague Convention, Article 19 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, Article 53 of Additional Protocol I and Article 16 of Additional Protocol II);³⁶⁷ and religious objects (Articles 1, 2, 3, 4, and 19 of the Hague Convention for

³⁶¹ *Tadić* Interlocutory Appeal Decision paras. 102 and 137; *Prosecutor v. Mucić et al* (Trial Judgment) Case No. ICTY-96-21-T (16 November 1998) para. 298; *Mucić et al* (Appeals Chamber Judgment) Case No. ICTY-96-21-A (20 February 2001) paras. 143, 147 and 150; *Prosecutor v. Norman, Fofana and Kondewa* (Decision on Preliminary Motion on Lack of Jurisdiction *Materiae*: Nature of the Armed Conflict) Case No. SCSL-04-14-AR72(E) (25 May 2004) paras. 21-24; citing *Prosecutor v. Akayesu*, (Trial Judgment) Case No. ICTR-96-4-T (2 September 1998) paras. 601-617; *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v. United States of America*) [1986] ICJ Rep 14, paras. 218-219, 255.

³⁶² *Prosecutor v. Mucić et al* (Appeals Chamber Judgment) Case No. ICTY-96-21-A (20 February 2001) para. 150.

³⁶³ *Prosecutor v. Naletilić and Martinović* (Trial Judgment) Case No. ICTY-98-4-T (31 March 2003) para. 228; citing *Tadić* Interlocutory Appeal Decision para. 102; *Prosecutor v. Mucić et al* (Appeals Chamber Judgment) Case No. ICTY-96-21-A (20 February 2001) para. 150.

³⁶⁴ *Prosecutor v. Hinga Norman* (Decision on Preliminary Motion based on Lack of Jurisdiction (Child Recruitment)) Case No. SCSL-2004-14-AR72(E) (31 May 2004) para. 28; citing Amicus Curiae Brief of the United Nations Children’s Fund (UNICEF) (21 January 2004) para. 65. See also *Prosecutor v. Sessay, Kallon and Gbao* (Trial Judgment) Case No. SCSL-04-15-T (2 March 2009) para. 65.

³⁶⁵ *Tadić* Interlocutory Appeal Decision paras. 100–118; *Prosecutor v. Strugar* (Trial Judgment) Case No. ICTY-01-42-T (31 January 2005) paras. 220–222.

³⁶⁶ See for example *Prosecutor v. Strugar* (Trial Judgment) Case No. ICTY-01-42-T (31 January 2005) paras. 223–226; *Prosecutor v. Hadžihasanović and Kubura* (Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98bis Motions for Acquittal) Case No. ICTY-01-47-AR73.3 (11 March 2005) paras. 26–30.

³⁶⁷ See for example *Prosecutor v. Strugar* (Trial Judgment) Case No. ICTY-01-42-T (31 January 2005) paras. 227–230; *Prosecutor v. Hadžihasanović and Kubura* (Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98bis Motions for Acquittal) Case No. ICTY-01-47-AR73.3 (11 March 2005) paras. 44-48.

the Protection of Cultural Property in the Event of Armed Conflict);³⁶⁸ the prohibitions on plunder and pillage (Common Article 3, Articles 28 and 47 of the Hague Regulations, and Article 4 of Additional Protocol II);³⁶⁹ and the prohibition on the use of chemical weapons.³⁷⁰

As for Ukraine, Article 438 appears to only encompass customary law requirements with regards to violations of the means of warfare (use of prohibited weapons). For the other IHL violations (i.e., methods of warfare) Article 438 only refers to international treaties ratified by Ukraine.

Therefore, as a general proposition, although there can be no doubt that an armed conflict exists in the east of Ukraine and has existed since at least 14 April 2014,³⁷¹ refraining from defining the nature of the armed conflict may ensure an equal protection for protected persons during both types of conflicts and that the most appropriate charges are pursued at the domestic level. In any event, as Ukrainian courts still have to rule on the scope of application of IHL provisions, there is nothing objectionable about a prosecutor charging an array of crimes that may occur in one or both types of conflict i.e., ensuring that the suspected conduct is characterised (if possible) as both war crimes in international and non-international armed conflicts thereby allowing the courts to conduct the final assessment and allowing one set of war crimes charges to proceed to final adjudication. Indeed, given the uncertainties that prevail in any war crime prosecution, this may well be a prudent way of proceeding. This is a common approach at the international level.³⁷²

In sum, any Ukrainian prosecutor should advance with absolute confidence that the legal threshold for the existence of an armed conflict sufficient to trigger the applicability of IHL can be readily established, regardless of the nature of the conflict. The legal parameters of these assessments are set out below.³⁷³ This is a reasonable starting point for consideration of which war crimes may arise and who may be responsible and should be adopted forthwith.

Prosecute with reliance upon international crimes

³⁶⁸ See for example *Tadić* Interlocutory Appeal Decision paras. 86-87, 98, 127; *Hadžihasanović* and *Kubura* (Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98bis Motions for Acquittal) Case No. ICTY-01-47-AR73.3 (11 March 2005) paras. 47-48.

³⁶⁹ See for example *Prosecutor v. Hadžihasanović* and *Kubura* (Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98bis Motions for Acquittal) Case No. ICTY-01-47-AR73.3 (11 March 2005) paras. 37-38.

³⁷⁰ *Tadić* Interlocutory Appeal Decision paras. 120–124.

³⁷¹ On 14 April 2014, the Acting President of Ukraine, Oleksandr Turchynov launched the ATO. For details see On Decision of the National Defence and Security Council of 13 April 2014 On Immediate Measures on Overcoming the Terrorist Threat and on Maintenance of Territorial Integrity of Ukraine: Decree of the President of Ukraine No. 405/2014 [Online resource]. - 14 April 2014. - Accessed: <<http://zakon5.rada.gov.ua/laws/show/405/2014>> (last visited: 20 April 2016).

³⁷² See for example *Prosecutor v. Strugar* (Trial Judgment) Case No. ICTY-01-42-T (31 January 2005) para. 277; *Prosecutor v. Kordić and Cerkez* (Indictment) Case No. ICTY-95-14/2-PT (30 September 1998) see for example Count 5; *Prosecutor v. Martić* (Amended Indictment) Case No. ICTY-95-11 (9 September 2003) see for example Count 19; *Prosecutor v. Mucić et al* (Indictment) Case No. ICTY-96-21 (19 March 1996) see for example Counts 33 and 36; *Prosecutor v. Tadić* (Second Amended Indictment) Case No. ICTY-94-1-T (14 December 1995) see for example Counts 2 and 5.

³⁷³ See *infra*, para. 188 et seq.

As discussed above,³⁷⁴ the available information being collected by HRMMU and civil society organisations within Ukraine, at a minimum, suggests the large-scale occurrence of war crimes. Any prosecutor engaged with the task of prosecuting one or more of these violations using the currently available law and legal measures will need to assess the Criminal Code against the available facts. In short, once the prosecutor is satisfied that there is a reasonable prospect of establishing the common elements of one or more types of war crimes s/he will need to form a view concerning the precise Article of the Criminal Code to use to prosecute the conduct and how to frame the precise charges amounting to war crimes. This analysis will also include whether to use the war crimes Articles in the Criminal Code (generally speaking, Article 438) or to use, when appropriate to the gravity of the conduct, ordinary criminal charges. These issues will be discussed below.³⁷⁵

As noted above,³⁷⁶ Ukraine's Criminal Code does allow for the prosecution of a range of IHL violations, particularly through Article 438, as well as certain crimes as contained in Chapter XIX (19) entitled "Crimes Against the Established Order of the Military Service - (military crimes)" and Chapter XX (20) entitled "Crimes against Peace, Security of Humanity and International Order".

Article 438 of the Criminal Code of Ukraine generically provides for the criminal punishment of "violations of the laws and customs of war", which refers to the means of the warfare prohibited by international law, or any other violations of rules and customs of the warfare recognised by international instruments ratified by Ukraine.

Article 438 outlines the following crimes and associated sanctions:

1. Cruel treatment of prisoners of war or civilians, deportation of civilian population for forced labour, pillage of national treasures on occupied territories, use of means of warfare prohibited by international law, or any other violations of the laws and customs of war recognised by international instruments consented to by binding by the Verkhovna Rada of Ukraine, and also giving an order to commit any such actions, - shall be punishable by imprisonment for a term of eight to twelve years.
2. The same acts accompanied with an intended murder, - shall be punishable by imprisonment for a term of ten to fifteen years, or life imprisonment.

Article 438 criminalises any use of means of warfare prohibited by international law, which encompasses international treaties and customary international law. Ukraine has ratified most of the treaties regulating the means of warfare, such as the 1907 Hague Convention, Additional Protocol I to the Geneva Conventions and most of the weapons treaties (except the Convention on Cluster Munitions). These treaties prohibit or restrict the use of certain

³⁷⁴ See *supra*, paras. 16-23.

³⁷⁵ See *infra*, paras. 232 et seq.

³⁷⁶ See *supra*, para 97.

types of weapons (*i.e.*, anti-personnel mines, cluster munitions). To date, Ukraine has ratified all the treaties regulating the means of warfare covering all the norms of customary international law. As a result, prosecutors can merely rely on the provisions of IHL treaties, instead of referring to customary international law.

In addition, Article 438 makes direct reference to all the international treaties ratified by Ukraine and generally criminalises all other violations of the laws and customs of war (methods of warfare) listed in the Geneva Conventions and Additional Protocols, as well as other violations enforced by other treaties ratified by Ukraine, including the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and the Weapons Treaties.

As will be discussed, Ukraine has ratified the principle and relevant IHL instruments that encompass the violations of the laws and customs of war that appear to arise on the available facts. In particular, Ukraine has ratified the four Geneva Conventions (I-IV) and their Additional Protocols, namely:

- Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field;
- Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea;
- Geneva Convention (III) relative to the Treatment of Prisoners of War;
- Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War;
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts; and
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts.

Geneva Convention I - the first of the four Conventions adopted in 1949 - seeks to protect wounded and sick soldiers on land, but also medical and religious personnel, medical units and medical transports. Geneva Convention II provides similar protections, but to soldiers at sea and to hospital ships. Geneva Convention III protects soldiers under the authority or control of opposition forces. Finally, Geneva Convention IV provides protection to civilians in times of war, including occupation. In 1977, the two Additional Protocols listed above were adopted. They enhanced protection for victims of armed conflict. Additional Protocol I further regulated the means and methods of international armed conflicts. Additional Protocol II for the first time adopted protections relating entirely to non-international armed conflicts.

Therefore, Article 438 provides substantial opportunities to prosecute IHL violations arising in the east of Ukraine. There is no doubt that this exercise will be complicated. As discussed in detail in GRC's Report "The Domestic Implementation of International Humanitarian Law in

Ukraine³⁷⁷, Article 438 (i) suffers, in and of itself, from a lack of specificity and if not approached with due care may in practice lead to violations of the principles of legality and culpability; (ii) even when it is read in parallel with the Military Manual, lacks the identification and adequate particularisation of many serious violations of IHL; (iii) the associated penal sanctions appear inadequate; (iv) is not rectified by other relevant provisions of the Criminal Code of Ukraine concerning accountability gaps; and (v) appears not to include violations of methods of warfare under customary international law.

Nonetheless, in GRC's view, any domestic prosecutor may still use Article 438 provided these issues are properly considered and taken into account. Taking as the departure point the fact that Article 438 makes direct reference to all the international treaties ratified by Ukraine, as well as criminalising any use of means of warfare prohibited by international law, which encompasses both international treaties and customary international law, there is a need to define which serious violations of IHL are criminalised under Article 438 (and which violations fall outside).

While the Geneva Conventions and Additional Protocols provide some indications of which crimes may fall within Article 438, they are not sufficient to identify all the serious violations of IHL that need to be prosecuted for three main reasons: (i) the Geneva Conventions and Additional Protocols provide a list of war crimes that are limited to grave breaches (and not inclusive of all serious violations of IHL); (ii) for the other serious violations of IHL, prosecutors and judges will have to identify which violations of their provisions may amount to *serious* violations of IHL as all the violations of the Geneva Conventions and Additional Protocols do not amount to war crimes; and finally (iii) some serious violations of IHL are not contained in the Geneva Conventions and Additional Protocols.³⁷⁸ As a consequence, the Geneva Conventions and Additional Protocols do not offer a clear and complete overview of all the war crimes that should be criminalised and therefore should fall under Article 438 of the Criminal Code of Ukraine.

Due regard will need to be had to the Rome Statute which contains a fuller codification of war crimes. The Rome Statute not only references most of the grave breaches of the Geneva Conventions and Additional Protocol I, but also most of the other serious violations of IHL (methods of warfare³⁷⁹) that fall under Article 438. The Rome Statute includes six categories of crimes:

³⁷⁷ GRC, 'The Domestic Implementation of International Humanitarian Law in Ukraine' (May 2016).

³⁷⁸ See for example the war crimes of destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war, declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party, and pillaging a town or place, even when taken by assault which are respectively contained in the Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 1 Bevans 643 ("1907 Hague Convention") Art. 23(1)(g), Art. 23(1)(g) , Art. 28.

³⁷⁹ The means of warfare prohibited in the Rome Statute will not be analysed in the following paragraphs as the Rome Statute does not offer an effective alternative to identifying relevant war crimes related to the use of prohibited weapons. Due to the difficulties in reaching consensus between the states, the Rome Statute only encompasses a few types of

Category 1: Grave breaches of the Geneva Conventions. They include:

- Wilful killing;³⁸⁰
- Torture;³⁸¹ and
- Wilfully causing great suffering, or serious injury to body or health.³⁸²

Category 2: Grave breaches of Additional Protocol I. They include:

- Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;³⁸³ and
- The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory.³⁸⁴

Category 3: Other serious violations of IHL applicable in international armed conflict contained in the various IHL treaties (*i.e.*, Geneva Conventions, Additional Protocol I or the Hague Regulations). They include:

- Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;³⁸⁵ and
- Killing or wounding treacherously individuals belonging to the hostile nation or army.³⁸⁶
- Category 4: Violations of Common Article 3 applicable in non-international armed conflict. They include:
 - Torture;³⁸⁷ and
 - Taking of hostages.³⁸⁸

weapons. For example, it does not refer to the war crimes of using weapons of mass destruction, biological or chemical weapons, or anti-personnel mines. Art. 8(2)(b)(xx) allows a future expansion of the Rome Statute through the adoption of an Annex to the Statute. Such Annex has, however, never been adopted. GRC suggests directly referring to all the weapons treaties ratified by Ukraine to identify which weapons are prohibited and which war crimes charges might be pursued. See also GRC, 'The Domestic Implementation of International Humanitarian Law in Ukraine' (May 2016) 183-184.

³⁸⁰ Rome Statute, Art. 8(2)(a)(i); Geneva Convention I, Art. 50; Geneva Convention II, Art. 51; Geneva Convention III, Art. 130; Geneva Convention IV, Art. 147.

³⁸¹ Rome Statute, Art. 8(2)(a)(ii); Geneva Convention I, Art. 50; Geneva Convention II, Art. 51; Geneva Convention III, Art. 130; Geneva Convention IV, Art. 147.

³⁸² Rome Statute, Art. 8(2)(a)(iii); Geneva Convention I, Art. 50; Geneva Convention II, Art. 51; Geneva Convention III, Art. 130; Geneva Convention IV, Art. 147.

³⁸³ Rome Statute, Art. 8(2)(b)(i); Additional Protocol I, Arts. 85(3)(a), 51(2).

³⁸⁴ Rome Statute, Art. 8(2)(b)(viii); Additional Protocol I, Art. 85(4)(a).

³⁸⁵ Rome Statute, Art. 8(2)(b)(xv); Hague Regulations IV, Art. 23(h).

³⁸⁶ Rome Statute, Art. 8(2)(b)(xi); Additional Protocol I, Art. 37(1); Hague Regulation IV, Art. 23(b).

³⁸⁷ Rome Statute, Art. 8(2)(c)(i)-4; Geneva Conventions, Common Art. 3(1)(a).

³⁸⁸ Rome Statute, Art. 8(2)(c)(iii); Geneva Conventions, Art. 3(1)(b); Additional Protocol II, Art. 4(2)(c).

Category 5: Other serious violations of IHL applicable in non-international armed conflict contained in various the IHL treaties (*i.e.*, Additional Protocol II). They include:

- Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;³⁸⁹ and
- Pillaging a town or place, even when taken by assault.³⁹⁰
- Category 6: Other serious violations of customs applicable in non-international armed conflict derived from customary international law. They are:
 - Killing or wounding treacherously a combatant adversary;³⁹¹ and
 - Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict.³⁹²

However, the Rome Statute did not codify all the IHL violations contained in IHL treaties (Category 7(a)) and some IHL violations only recognised as serious under customary international law (Category 7(b)). For example, the Rome Statute does not directly encompass the following violations:

- Collective punishments;³⁹³
- Despoliation of the wounded, sick, shipwrecked or dead;³⁹⁴ and
- Using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including by impeding relief supplies.³⁹⁵

As a result, prosecutors must bear in mind that, while the Rome Statute may provide valuable insights on how to identify violations of the laws and customs of war that fall under Article 438, there is a degree of difference between the conduct covered by Article 8 of the Rome Statute and the conduct encapsulated by Article 438. Ukrainian prosecutors will only be able to apply war crimes contained in Categories 1 to 5. Regarding the crimes not contained in Article 8 of the Rome Statute, Article 438 only covers category 7(a). Categories 6 and 7(b) crimes do not fall within Article 438 as they are serious violations of IHL (methods of warfare) derived from customary international law.

³⁸⁹ Rome Statute, Art. 8(2)(e)(i); Additional Protocol II, Arts. 13(2), 4(2)(d).

³⁹⁰ Rome Statute, Art. 8(2)(e)(v); Additional Protocol II, Art. 4(2)(g).

³⁹¹ Rome Statute, Art. 8(2)(e)(ix); ICRC, 'Rule 65 – Perfidy' (ICRC, 2009) <www.icrc.org/customary-ihl/eng/docs/v1_rul_rule65> accessed 20 April 2016.

³⁹² Rome Statute, Art. 8(2)(e)(xii); ICRC, 'Rule 50 - Destruction and Seizure of Property of an Adversary' (ICRC, 2009) <www.icrc.org/customary-ihl/eng/docs/v1_rul_rule156#Fn_21_60> accessed 20 April 2016.

³⁹³ International armed conflicts: Geneva Convention III, Art. 87(3); Geneva Convention IV, Art. 33(1); Additional Protocol I, Art. 75(2)(d); Non-international armed conflicts: Additional Protocol II, Art. 4(2)(b). See also ICRC, 'Rule 103 - Collective Punishment' (ICRC, 2009) <www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter32_rule103?OpenDocument&highlight=civilians#Fn_12_3> accessed 20 April 2016.

³⁹⁴ During international armed conflict: 1906 Geneva Convention; ICRC, 'Rule 156 - Definition of War Crimes' (ICRC, 2009) <www.icrc.org/customary-ihl/eng/docs/v1_rul_rule156#Fn_21_60> accessed 20 April 2016.

³⁹⁵ During non-international armed conflict: Additional Protocol II; ICRC, 'Rule 156 - Definition of War Crimes' (ICRC, 2009) <www.icrc.org/customary-ihl/eng/docs/v1_rul_rule156#Fn_21_60> accessed 20 April 2016.

In summary, the express terms of Article 438 provide for (i) the criminal punishment of the use of means of warfare prohibited by international law³⁹⁶ (contained in several international treaties ratified by Ukraine, such as the weapons treaties and the 1907 Hague Convention, and customary international law); and (ii) the methods of warfare prohibited by international instruments ratified by Ukraine³⁹⁷ which encompass categories 1 to 5 war crimes listed in the Rome Statute and category 7(a) war crimes not contained in the Rome Statute.

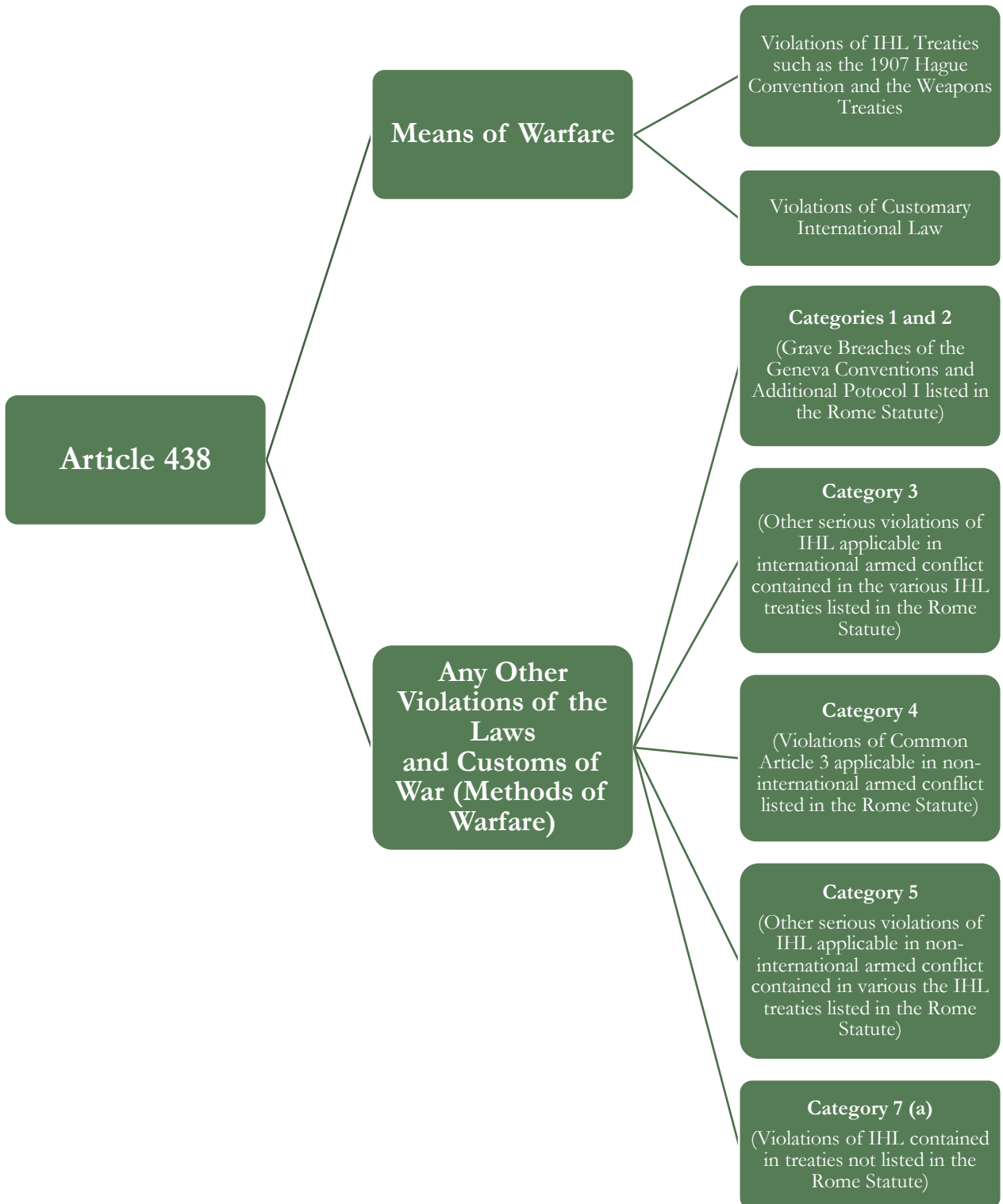
Annex C – Violations of Methods of Warfare Falling under Article 438 and their International Sources, based on the Rome Statute, IHL Treaties, and the ICRC’s Study of Customary IHL,³⁹⁸ clearly identifies: i) all the serious violations of IHL (Violations of Methods of Warfare) contained in the Rome Statute; ii) any IHL Treaties and customary international law; and iii) indicates the crimes falling under Article 438.

³⁹⁶ Prohibited means of warfare relate to the use of certain prohibited weapons, such as anti-personnel mines, weapon of mass destructions, weapon the primary effect of which is to injure with fragments which cannot be detected by x-ray or mine, booby-trap or other device which is designed or of a nature to cause superfluous injury or unnecessary suffering.

³⁹⁷ Methods of warfare regulate the way weapons are used and the general conduct of all those engaged in the armed conflict, such as the prohibition of attacking civilians or the prohibition to attack undefended localities. As noted above, part (ii) does not include customary international law.

³⁹⁸ ICRC, ‘Rule 156 - Definition of War Crimes’ (ICRC, 2009) <www.icrc.org/customary-ihl/eng/docs/v1_rul_rule156#Fn_21_60> accessed 20 April 2016.

The war crimes falling under Article 438 may be summarised as follows:



Further, for completeness, Ukrainian prosecutors may also rely upon other parts of Ukraine’s Criminal Code that more specifically criminalises certain crimes as contained in Chapter XIX

of the Code, entitled “Crimes Against the Established Order of the Military Service - (military crimes)”. This Chapter lists crimes prosecuted only in relation to members of the Armed Forces of Ukraine, the National Guard of Ukraine, the State Border Guard Service of Ukraine, the Security Service of Ukraine and other entities related to defence. The crimes include “Violence against Population in the Zone of Hostilities”³⁹⁹ and “Ill Treatment of Prisoners of War”.⁴⁰⁰ In addition, Chapter XX (20) entitled “Crimes against Peace, Security of Humanity and International Order” allows the prosecution of the use of weapons of mass destruction.⁴⁰¹

As such, the Ukrainian Criminal Code, particularly Article 438, allows the prosecution of a wide range of war crimes committed during an international and a non-international armed conflict that could encompass the wide range of conduct seemingly occurring in the east of Ukraine. Any Ukrainian prosecutor should have in mind all the crimes contained in Annex C when deciding which specific crimes to charge pursuant to Article 438.

Moreover, it should also be observed that at the time of the adoption of the Geneva Conventions and Additional Protocols, states did not elect to define the elements of the crimes, leaving these issues to be decided by national legislators and prosecutors. However, over the last two decades or more, national and international courts and tribunals have developed detailed jurisprudence related to the elements of war crimes that can serve as useful guidelines for understanding Article 438 and the war crimes it encompasses.⁴⁰² In addition, the ICC published a document called “Elements of Crimes” clarifying the contextual elements of any war crimes, as well as the elements of each specific crime that may also serve as useful guidelines for any national prosecutor.⁴⁰³ The crimes and their elements that appear most relevant to Ukrainian prosecutors in light of the likely crimes occurring in the ATO zone are listed in Annex C. Any Ukrainian prosecutor will need to consider from the outset when deciding how to prosecute international crimes the following: (i) the overall contextual elements of war crimes that must be proven for both international armed conflicts and non-international armed conflicts; and (ii) all the crimes encompassed by Article 438 of the Criminal Code and their elements. The following are the minimum considerations for the prosecutor to bear in mind when deciding on the applicability of the law are set out below.

³⁹⁹ Criminal Code of Ukraine, Art. 433 “Planning, preparation and waging of an aggressive war”.

⁴⁰⁰ Criminal Code of Ukraine, Art. 434 “Violation of rules of the warfare”.

⁴⁰¹ Criminal Code of Ukraine, Art. 439 “Use of Weapons of Mass Destruction”.

⁴⁰² ICRC, ‘Commentary of Article 51 of Geneva Convention I’ (ICRC, 2016) <www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=21B052420B219A72C1257F7D00587FC3#_Toc444332966> accessed 20 April 2016.

⁴⁰³ ICC, Elements of Crimes (2011) ISBN No. 92-9227-232-2 (“ICC Elements of Crimes”) <www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf> accessed 20 April 2016.

International Armed Conflict

Category 1 Crimes: Grave breaches of the Geneva Conventions

In international criminal law, category 1 war crimes require the existence of three common elements: (i) the conduct took place in the context of an international armed conflict (nexus requirement); (ii) the victims or property were/was protected under one or more of the Geneva Conventions; and (iii) the perpetrator was aware of the factual circumstances that established the existence of an armed conflict. In addition to these three elements, the ICC further requires proof that the perpetrator was aware of the factual circumstances that established that protected status.⁴⁰⁴

(i) The conduct took place in the context of an international armed conflict

The existence of an international armed conflict

First, prosecutors must prove that an international armed conflict existed at the time of the commission of the criminal act. There is no general definition of “international armed conflict” in IHL.⁴⁰⁵ In the *Bemba* case, the ICC Pre-Trial Chamber concluded that: “[...] an international armed conflict exists in case of armed hostilities between States through their respective armed forces or other actors acting on behalf of the State.”⁴⁰⁶ The ICTY adopted a similar approach.⁴⁰⁷ Citing the Commentary on the Geneva Convention IV, the ICTY Trial Chamber in the *Celebići* case stated that:

In its adjudication of the nature of the armed conflict with which it is concerned, the Trial Chamber is guided by the Commentary to the Fourth Geneva Convention, which considers that “[a]ny difference arising between two States and leading to the intervention of members of the armed forces” is an international armed conflict and “[i]t makes no difference how long the conflict lasts, or how much slaughter takes place”.⁴⁰⁸

The ICTY, as confirmed by the ICC,⁴⁰⁹ also stated that an armed conflict of internal character can evolve into an international armed conflict or be international alongside an internal armed conflict if: “(i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State”.⁴¹⁰

⁴⁰⁴ ICC Elements of Crimes (2011) *see for example* 13.

⁴⁰⁵ *Prosecutor v. Bemba* (Confirmation of Charges Decision) Case No. ICC-01/05-01/08 (15 June 2009) para. 220.

⁴⁰⁶ *Prosecutor v. Bemba* (Confirmation of Charges Decision) Case No. ICC-01/05-01/08 (15 June 2009) para. 223.

⁴⁰⁷ *Prosecutor v. Tadić* (Trial Judgment) Case No. ICTY-94-1-T (7 May 1997) para. 561; *Prosecutor v. Mucić et al.* (Trial Judgment) Case No. ICTY-96-21-T (16 November 1998) para. 209; *Prosecutor v. Furundžija* (Trial Judgment) Case No. ICTY-95-17/1-T (10 December 1998) para. 59; *Prosecutor v. Aleksovski* (Trial Judgment) Case No. ICTY-95-14/1-T (25 June 1999) para. 43; *Prosecutor v. Jelisić* (Trial Judgment) Case No. ICTY-95-10-T (14 December 1999) para. 29; *Prosecutor v. Blaškić* (Trial Judgment) Case No. ICTY-95-14-T (3 March 2000) para. 63.

⁴⁰⁸ *Prosecutor v. Mucić et al.* (Trial Judgment) Case No. ICTY-96-21-T (16 November 1998) para. 208.

⁴⁰⁹ *Prosecutor v. Lubanga* (Trial Judgment) Case No. ICC-01/04-01/06 (14 March 2012) para. 541.

⁴¹⁰ *Prosecutor v. Tadić* (Appeals Judgment) Case No. ICTY-94-1-A (15 July 1999) para. 84.

The test to determine whether participants in an armed conflict may be regarded as acting on behalf of another state thereby rendering the conflict international can be answered affirmatively on the basis of three scenarios: (i) when it exercises “overall control” (and not “effective control”) of the participants; (ii) “specific instructions” are issued and followed by another state to participants in the conflict (or they subsequently publicly approve the conduct of the participants); and (iii) the “assimilation of individuals to State organs” occurs.

The criteria for establishing that another state exercised “overall control” of the participants in the conflict were discussed by the ICTY Appeals Chamber in the *Prosecutor v. Tadić* case, and later adopted by the ICC:⁴¹¹

The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of de facto State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts.⁴¹²

The “specific instructions” test may also be applicable when the participants, who are not otherwise members of any armed forces, nevertheless have acted as a *de facto* state organ. The ICTY Appeals Chamber held that:

Where the question at issue is whether a single private individual or a group that is not militarily organised has acted as a de facto State organ when performing a specific act, it is necessary to ascertain whether specific instructions concerning the commission of that particular act had been issued by that State to the individual or group in question; alternatively, it must be established whether the unlawful act had been publicly endorsed or approved ex post facto by the State at issue.⁴¹³

Concerning the “assimilation of individuals to State organs”, this does not depend upon state instructions but relates to actual behaviour within the structure of a state, regardless of any possible requirement of state instructions.⁴¹⁴

The Nexus Requirement

Prosecutors must then establish that there was a close connection, or a ‘nexus’, between the criminal act and the armed conflict as a whole.

A close connection between the acts of the perpetrator and the armed conflict can be shown even if actual combat activities were not occurring in the region at the time and in the place

⁴¹¹ *Prosecutor v. Lubanga* (Trial Judgment) Case No. ICC-01/04-01/06 (14 March 2012) para. 541.

⁴¹² *Prosecutor v. Tadić* (Appeals Judgment) Case No. ICTY-94-1-A (15 July 1999) para. 137. See also *Prosecutor v. Mucić et al.* (Appeals Judgment) Case No. ICTY-96-21-A (20 February 2001) para. 20.

⁴¹³ *Prosecutor v. Tadić* (Appeals Judgment) Case No. ICTY-94-1-A (15 July 1999) para. 137.

⁴¹⁴ *Prosecutor v. Tadić* (Appeals Judgment) Case No. ICTY-94-1-A (15 July 1999) para. 141.

where the crimes were allegedly committed.⁴¹⁵ The ICTY, for example, has held that it is sufficient for the crimes to be closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.⁴¹⁶ Therefore, the nexus requirement does not mandate a strict geographical or temporal coincidence between the acts of the accused and the armed conflict.⁴¹⁷

Further, the ICTY held the crimes must have been committed “in furtherance of or under the guise of the armed conflict” and that:

The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator’s ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed.⁴¹⁸

The Pre-Trial Chamber in *Katanga and Chui* adopted a similar approach:

The Chamber has defined that a crime has taken place in the context of, or in association with an armed conflict where ‘the alleged crimes were closely related to the hostilities’. This means that the armed conflict ‘must play a substantial role in the perpetrator’s decision, in his ability to commit the crime or in the manner in which the conduct was ultimately committed.’ It is not necessary, however, for the armed conflict to have been regarded as the ultimate reason for the criminal conduct, nor must the conduct have taken place in the midst of the battle.⁴¹⁹

The ICRC has summed up the factors that international tribunals and courts consider in assessing and establishing the existence of the ‘nexus’ requirement:

- The perpetrator was a combatant;
- The victim was a person protected under the Geneva Conventions or Additional Protocol I;
- The victim was a member of the armed forces of the opposing Party;
- The circumstances in which the crime was committed;
- The act may be said to serve the ultimate goal of a military campaign;

⁴¹⁵ *Prosecutor v. Tadić* (Trial Judgment) Case No. ICTY-94-1-T (7 May 1997) para. 573; *Prosecutor v. Kunarac* (Trial Judgment) Case No. ICTY-96-23-T & ICTY-96-23/1-T (22 February 2001) para. 568; *Prosecutor v. Prlić* (Trial Judgment) Case No. ICTY-04-74-T (29 May 2013) Vol. 1 para. 109; *Prosecutor v. Stakić* (Appeals Judgment) Case No. ICTY-97-24-A (22 March 2006) para. 342.

⁴¹⁶ *Ibid.*

⁴¹⁷ ICRC, ‘Commentary of Article 50 of Geneva Convention I’ (ICRC, 2016) para. 17 <www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=21B052420B219A72C1257F7D00587FC3> accessed 20 April 2016.

⁴¹⁸ *Prosecutor v. Kunarac* (Appeals Judgment) Case No. ICTY-96-23& ICTY-96-23/1-A (12 June 2002) para. 58.

⁴¹⁹ *Prosecutor v. Katanga and Chui* (Conformation of Charges Decision) Case No. ICC-01/04-01/07-717 (30 September 2008) para. 380 (footnotes contained in Katanga Decision omitted).

- The crime was committed with the assistance or with the connivance of the Parties to the conflict; and
- The crime was committed as part of or in the context of the perpetrator's official duties.⁴²⁰

(ii) The victims were/was protected under one or more of the Geneva Conventions

Prosecutors would also need to be satisfied that the victims fell within the notion of “protected persons” as defined in the Geneva Conventions.⁴²¹ In determining this question, the prosecutor should examine the facts concerning the victims and their status, namely whether there is evidence that they were persons protected under one or more of the Geneva Conventions.

For example, Article 4 of Geneva Convention IV defines protected persons as those:

[...]who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. Nationals of a State that is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

According to the ICC in the case of *Katanga and Chui*, the meaning of “in the hands of” in Geneva Convention IV (directly above) encompasses civilians who have fallen into the hands of a party to the conflict when that individual is in the territory under the control of such a party.⁴²²

Concerning the meaning of persons “of which they are not nationals”, the ICTY Appeals Chamber has found that although Geneva Convention IV seems to restrict protected persons to non-nationals, the domestic legal characterisation is not always dispositive. The ICTY Chamber held that “allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test”.⁴²³ The ICTY found that the nationality requirement of Geneva Convention IV should be based on “the

⁴²⁰ ICRC, ‘Commentary of Article 50 of Geneva Convention I’ (ICRC, 2016) para. 17 <www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=21B052420B219A72C1257F7D00587FC3> accessed 20 April 2016.

⁴²¹ See Geneva Convention I, Arts. 13, 24, 25, 26; Geneva Convention II, Arts. 13, 36, 37; Geneva Convention III, Art. 4; Geneva Convention IV; Arts. 4, 20.

⁴²² *Prosecutor v. Katanga and Chui* (Confirmation of Charges Decision) Case No. ICC-01/04-01/07-717 (30 September 2008) para. 292.

⁴²³ *Prosecutor v. Tadić* (Appeals Judgment) Case No. ICTY-94-1-A (15 July 1999) para. 166. See also *Prosecutor v. Zlatko Aleksovski* (Appeals Judgment) Case No. ICTY-95-14/1-A (24 March 2000) para. 152, *Prosecutor v. Mucić et al.* (Trial Judgment) Case No. ICTY-96-21-T (16 November 1998) para. 266; *Prosecutor v. Tihomir Blaskić* (Trial Judgment) Case No. ICTY-95-14-T (3 March 2000) para. 94.

substance of relations” (taking into consideration the different ethnicity of the victims and the perpetrators, and their bonds with the foreign intervening state).⁴²⁴

In short, in the Ukrainian context, even if the perpetrators and victims were Ukrainians, this would not necessarily preclude protection for the victims under Geneva Convention IV. The question would rest upon an analysis of the precise relationship between the victims or the perpetrators and any foreign intervening state, such as Russia. In the event that Ukrainian victims were found to have substantial relations with Russia, the victims may still fall under the protection of Geneva Convention IV, despite having the same formal nationality as the perpetrators.

(iii) The perpetrator was aware of the factual circumstances that established that protected status and the existence of an armed conflict

In addition to the above-mentioned elements, prosecutors must establish the mental element common to all war crimes. The Geneva Conventions do not provide any guidance on this. The jurisprudence of international courts and tribunals, however, provides useful guidance to prosecutors when they have to decide on the mental element applicable to grave breaches.

The ICTY and ICC both require that the accused was aware of the factual circumstances that established the existence of an armed conflict.⁴²⁵ It is not necessary to require a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international. It should only be established that the perpetrator was aware of the factual circumstances that established the existence of an armed conflict.⁴²⁶ Therefore, the Pre-Trial Chamber in *Katanga and Chui* stated that: “[...] it is not necessary for the perpetrator to have made the necessary value judgement to conclude that the victim did in fact have protected status under any of the 1949 Geneva Conventions.”⁴²⁷

Concerning the question of whether the perpetrator was aware of the factual circumstances that established that protected status; the ICTY does not require the establishment of this element.⁴²⁸ In contrast, at the ICC, the perpetrator needs to have been aware of the factual

⁴²⁴ *Prosecutor v. Mucić et al.* (Appeals Judgment) Case No. ICTY-96-21-A (20 February 2001) paras. 83,84; See also *Prosecutor v. Kordić and Čerkez* (Trial Judgment) Case No. ICTY-95-14/2-T (26 February 2001) paras. 147 et seq.

⁴²⁵ *Prosecutor v. Naletilić and Martinović* (Appeals Judgment) Case No. ICTY-98-34-A (03 May 2006) paras. 116,118-119; *Prosecutor v. Prlić et al.* (Trial Judgment) Case No. ICTY-04-74 (29 May 2013) Vol. 1 of 6, para. 109; ICC Elements of Crimes (2011) 13.

⁴²⁶ ICC Elements of Crimes (2011) 18.

⁴²⁷ *Prosecutor v. Katanga and Chui* (Confirmation of Charges Decision) Case No. ICC-01/04-01/07-717 (30 September 2008) para. 294.

⁴²⁸ ICRC, ‘Commentary of Article 50 of Geneva Convention I’ (ICRC, 2016) para. 17 <www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=21B052420B219A72C1257F7D00587FC3> accessed 20 April 2016. See e.g. *Prosecutor v. Tadić* (Trial Judgment) Case No. ICTY-94-1-T (7 May 1997) para. 578; *Prosecutor v. Tadić* (Appeals Judgment) Case No. ICTY-94-1-A (15 July 1999) paras. 163–166; *Prosecutor v. Kordić and Čerkez* (Trial Judgment) ICTY-95-14/2-T (29 February 2001) paras. 147–160; *Prosecutor v. Kordić and Čerkez* (Appeals Judgment) ICTY-95-14/2-A (17 December 2004) paras. 322–331; *Prosecutor v. Mucić et al.* (Trial Judgment) Case No. ICTY-96-21-T (16 November 1998) paras. 244–277; *Prosecutor v. Mucić et al.* (Appeals Judgment) Case No. ICTY-96-21-A (20 February 2001) paras. 52–106; *Prosecutor v. Blaškić* (Trial Judgment) Case No. ICTY-95-14-T (3 March 2000) paras. 125–133; *Prosecutor v. Blaškić* (Appeals Judgment) Case No. ICTY-95-14-A (29 July 2004) paras. 167–182; *Prosecutor v.*

circumstances that established the status of protected person.⁴²⁹ These are largely questions of inference to be drawn from the available evidence that establishes their protected status as civilians. In any war crimes trial at the international or national level, these issues are rarely of substantial *evidential* import and would unlikely play a decisive or dominant role in determining the applicability of IHL or the prospects of obtaining a conviction for the relevant crime.

Categories 2 and 3 War Crimes: Grave breaches of Additional Protocol I and other serious violations of IHL

In international criminal law, categories 2 and 3 war crimes require the establishment of two common elements: (i) the conduct took place in the context of and was associated with an international armed conflict (nexus requirement); (ii) the perpetrator was aware of the factual circumstances that established the existence of an armed conflict.⁴³⁰

The issues concerning the assessment of the existence of an international armed conflict and the perpetrators' awareness of the factual circumstances have been discussed above and will not be repeated.⁴³¹ They apply equally to categories 2 and 3 crimes. However, any prosecutor when considering whether to prosecute category 3 crimes (serious violations other than grave breaches) would need to consider additional elements.

When dealing with IHL violations other than grave breaches of the Geneva Conventions or Additional Protocol I, the prosecutor will need to be satisfied that the evidence established IHL violations that were serious, not minor, violations of the laws and customs of war. All the acts listed in category 3 should satisfy this requisite degree of seriousness. For a war crime to be charged under category 3, the ICTY Trial Chamber recalled that four conditions must be met:

- the violation must constitute an infringement of a rule of international humanitarian law;
- the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met;
- the violation must be serious, that is to say that it must constitute a breach of a rule protecting important values and the breach must involve grave consequences for the victim; and

Zlatko Aleksovski (Appeals Judgment) Case No. ICTY-95-14/1-A (24 March 2000) para. 151; *Prosecutor v. Naletilić and Martinović* (Trial Judgment) Case No. ICTY-98-34-T (31 March 2003) paras. 203–208; *Prosecutor v. Brđanin* (Trial Judgment) ICTY-99-36 –T (1 September 2004) paras. 125, 155, 585.

⁴²⁹ *Prosecutor v. Katanga* (Trial Judgment) Case No. ICC-01/04-01/07 (7 March 2014) para. 900.

⁴³⁰ ICC Elements of Crimes (2011) 13.

⁴³¹ See *supra*, paras. 195–199, 205–207.

- the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person.⁴³²

Non-International Armed Conflict

Category 4 Crimes: Violations of Common Article 3

In international criminal law, the two common elements of violations of Common Article 3 are: (i) the conduct took place in the context of an armed conflict not of an international character; and (ii) the victims were taking no active part in the hostilities.⁴³³ The ICC further requires that the perpetrator be aware of the factual circumstances that established this status and the existence of an armed conflict.⁴³⁴

(i) The conduct took place in the context of an armed conflict not of an international character

The existence of an “armed conflict not of an international character”

The test for the existence of non-international armed conflicts is set out under Article 8(2)(f) of the Rome Statute which reads:

Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.⁴³⁵

The ICC requires proof of two elements: (i) armed violence between governmental authorities and *organised* armed groups or between such groups within a state; and (ii) a degree of intensity of the conflict.⁴³⁶ The ICTY uses the same two-fold test.⁴³⁷

⁴³² *Prosecutor v. Boskoski and Tarculovski* (Trial Judgment) Case No. ICTY-04-82-T (10 July 2008) para. 296 (footnotes omitted).

⁴³³ *Prosecutor v. Haradinaj et al.* (Trial Judgment) Case No. ICTY-04-84-T (3 April 2008) para. 391; ICC Elements of Crimes (2011).

⁴³⁴ ICC Elements of Crimes (2011) 31.

⁴³⁵ The ICRC commentary on Common Art. 3 provides useful criteria for determining whether a non-international armed conflict exists: “1. That the Party in revolt against the *de jure* Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring the respect for the Convention. 2. That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military in possession of a part of the national territory. 3. (a) That the *de jure* Government has recognized the insurgents as belligerents; or (b) that it has claimed for itself the rights of a belligerent; or (c) that it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or (d) that the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of peace, or an act of aggression.” ICRC, ‘Commentary of Common Article 3’ (ICRC, 1958) <www.icrc.org/ihl/COM/380-600006?OpenDocument> accessed 20 April 2016.

⁴³⁶ *Prosecutor v. Lubanga* (Confirmation of Charges Decision) Case No. ICC-01/04-01/06 (29 January 2007) para. 229; *Prosecutor v. Mbarushimana* (Confirmation of Charges Decision) Case No. ICC-01/04-01/10 (16 December 2011) para. 97.

⁴³⁷ *Prosecutor v. Mrkšić et al.* (Trial Judgment) Case No. ICTY-95-13/1 (27 September 2007) para. 407; citing *Prosecutor v. Tadić* (Trial Judgment) Case No. ICTY-94-1-T (7 May 1997) paras. 562, 565-567; *Prosecutor v. Limaj et al.* (Trial Judgment) Case No. ICTY-03-66-T (30 November 2005) paras. 89-90; *Prosecutor v. Milutinović et al.* (Trial Judgment) Case No. ICTY-05-87-T, ICTY (26 February 2009) Vol. 2 para. 125.

First, prosecutors must establish that the armed conflict took place between governmental authorities and organised armed groups or between such groups within a state.⁴³⁸ The ICC explained “the involvement of armed groups with some degree of organisation and the ability to plan and carry out sustained military operations would allow for the conflict to be characterised as an armed conflict not of an international character.”⁴³⁹ In addition, “the armed groups in question [need] to have the ability to plan and carry out military operations for a prolonged period of time”.⁴⁴⁰

To satisfy this requirement, prosecutors are not required to establish that the group exercised control over part of the territory of the state or that the group acted under responsible command, like Additional Protocol II.⁴⁴¹ In this regard, the Rome Statute adopts a broader approach than the definition of non-international armed conflict of Additional Protocol II. The issue is whether it is sufficiently organised to be capable of carrying out protracted armed violence.⁴⁴² The ICC identified the following factors as being relevant to that analysis: the force or group’s internal hierarchy; the command structure and rules; the extent to which military equipment, including firearms, are available; the force or group’s ability to plan military operations and put them into effect; and the extent, seriousness, and intensity of any military involvement.⁴⁴³ None of these factors are individually determinative. The test, along with these criteria, should be applied flexibly when the Chamber is deciding whether a body was an organised armed group, given the limited requirement in Article 8(2)(f) of the Statute that the armed group was “organized”.⁴⁴⁴

In relation to the second requirement – the degree of intensity of the conflict – the conflict should reach a certain level of intensity that exceeds that of “internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of similar nature”.⁴⁴⁵ The violence must be more than sporadic or isolated to rise to the level of armed

⁴³⁸ *Prosecutor v. Mbarushimana* (Confirmation of Charges Decision) Case No. ICC-01/04-01/10 (16 December 2011) para. 103; *Prosecutor v. Lubanga* (Trial Judgment) Case No. ICC-01/04-01/06 (14 March 2012) paras. 512-513.

⁴³⁹ *Prosecutor v. Lubanga* (Confirmation of Charges Decision) Case No. ICC-01/04-01/06 (29 January 2007) para. 536.

⁴⁴⁰ *Prosecutor v. Bahar Idriss Abu Garda* (Decision on Confirmation of Charges) Case No. ICC-02/05-02/09 (8 February 2010) para. 91; see also *Mbarushimana* (Confirmation of Charges Decision) Case No. ICC-01/04-01/10 (16 December 2011) para. 103; *Prosecutor v. Naser Orić* (Trial Judgment) Case No. ICTY-03-68-T (30 June 2006) para. 254; *Prosecutor v. Haradinaj et al.* (Trial Judgment) Case No. ICTY-04-84-T (3 April 2008) paras. 60, 64, 393, 395,396; *Prosecutor v. Boskoski and Tarculovski* (Trial Judgment) Case No. ICTY-04-82-T (10 July 2008) paras. 199-205; citing *Prosecutor v. Limaj et al.* (Trial Judgment) Case No. ICTY-03-66-T (30 November 2005) paras. 46-129; *Prosecutor v. Dordević* (Trial Judgment) Case No. ICTY-05-87/1-T (23 February 2011) para. 1526; and *Prosecutor v. Lukić Milan & Lukić Sredoje* (Judgment) Case No. ICTY-98-32/1-T (20 July 2009) paras. 883,884.

⁴⁴¹ *Prosecutor v. Lubanga* (Confirmation of Charges Decision) Case No. ICC-01/04-01/06 (29 January 2007) para. 536.

⁴⁴² *Prosecutor v. Lubanga* (Confirmation of Charges Decision) Case No. ICC-01/04-01/06 (29 January 2007) para. 536.

⁴⁴³ *Prosecutor v. Limaj et al* (Trial Judgment) Case no. ICTY-03-66-T (30 November 2005) para. 90; *Prosecutor v. Haradinaj et al.* (Trial Judgment) Case No. ICTY-04-84-T (3 April 2008) para. 60; *Prosecutor v. Boškoski* (Trial Judgment) Case No. ICTY-04-82-T (10 July 2008) paras.199-203.

⁴⁴⁴ *Prosecutor v. Lubanga* (Trial Judgment) Case No. ICC-01/04-01/06 (14 March 2012) para. 537.

⁴⁴⁵ *Prosecutor v. Mbarushimana* (Confirmation of Charges Decision) Case No. ICC-01/04-01/10 (16 December 2011) para. 103; *Prosecutor v. Lubanga* (Trial Judgment) Case No. ICC-01/04-01/06 (14 March 2012) para. 515.

conflict and the courts have emphasised that acts of banditry, unorganised and short-lived insurrections, and terrorist activities are excluded from IHL prosecution.⁴⁴⁶

The ICTY established the key indicia as follows:

Various factors have been taken into account by Trial Chambers to assess the “intensity” of the conflict. These include the seriousness of attacks and whether there has been an increase in armed clashes, the spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and whether any resolutions on the matter have been passed. Trial Chambers have also taken into account in this respect the number of civilians forced to flee from the combat zones, the type of weapons used, in particular the use of heavy weapons and other military equipment, such as tanks and other heavy vehicles, the blockading or besieging of towns and the heavy shelling of towns, the extent of destruction and the number of casualties caused by shelling or fighting, the quantity of troops and units deployed; existence and change of front lines between the parties, the occupation of territory, and towns and villages, the deployment of government forces to the crisis area, the closure of roads, cease fire orders and agreements, the attempt of representatives from international organisations to broker and enforce cease fire agreements, the intensity, including the protracted nature, of violence which has required the engagement of the armed forces and the high number of casualties and extent of material destruction.⁴⁴⁷

The Nexus Requirement

As with war crimes committed during international armed conflicts, there must be shown to be a nexus between the crimes alleged and that conflict. Pursuant to the ICTY, the temporal and geographical scope of both types of armed conflicts extends beyond the exact time and place of hostilities.⁴⁴⁸ IHL extends from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a peaceful settlement is achieved. Thus, the norms of

⁴⁴⁶ *Prosecutor v. Dordević* (Trial Judgment) Case No. ICTY-05-87/1-T (23 February 2011) para. 1522.

⁴⁴⁷ *Prosecutor v. Dordević* (Trial Judgment) Case No. ICTY-05-87/1-T (23 February 2011) para. 1523. See also *Prosecutor v. Mrkšić et al.* (Trial Judgment) Case No. ICTY-95-13/1-T (27 September 2007) para. 407. See also *Prosecutor v. Limaj et al.* (Trial Judgment) Case no. ICTY-03-66-T (30 November 2005) para. 90; *Prosecutor v. Tadić* (Trial Judgment) Case No. ICTY-94-1-T (7 May 1997) paras. 565-567; *Prosecutor v. Blaškić* (Trial Judgment) Case No. ICTY-95-14-T (3 March 2000) para. 64: “it is not necessary to establish the existence of an armed conflict within each municipality concerned. It suffices to establish the existence of the conflict within the whole Region of which the municipalities are part”.

⁴⁴⁸ *Prosecutor v. Naser Orić* (Trial Judgment) Case No. ICTY-03-68-T (30 June 2006) para. 255. See also *Prosecutor v. Lukić Milan & Lukić Sredoje* (Trial Judgment) Case No. ICTY-98-32/1-T (20 July 2009) para. 868; *Prosecutor v. Boskoski and Tarculovski* (Trial Judgment) Case No. ICTY-04-82-T (10 July 2008) para. 298; *Prosecutor v. Dordević* (Trial Judgment) Case No. ICTY-05-87/1-T (23 February 2011) para. 1527; *Prosecutor v. Haradinaj et al.* (Trial Judgment) Case No. ICTY-04-84-T (3 April 2008) para. 396.

international humanitarian law apply regardless of whether actual combat activities are taking place in a particular location.⁴⁴⁹

The crimes do not have to be committed in the precise geographical region where an armed conflict is taking place at a given moment. To show that a link exists, it is sufficient that: “the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict”.⁴⁵⁰ As noted above,⁴⁵¹ with regard to international armed conflicts, it is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.⁴⁵²

It is also not necessary to show that the crime alleged took place during combat, that it was part of a policy or of a practice officially endorsed or tolerated by one of the parties to the conflict, or that the act was “in actual furtherance of a policy associated with the conduct of war or in the actual interest of a party to the conflict”.⁴⁵³ It is also not necessary to prove that the armed conflict was causal to the commission of the crime.⁴⁵⁴

However, as noted above with regard to international armed conflicts:

the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator’s ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established [...] that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict.⁴⁵⁵

The ICTY takes into account, *inter alia*, the following factors:

- That the perpetrator is a combatant;
- That the victim is a non-combatant;

⁴⁴⁹ *Prosecutor v. Naser Orić* (Trial Judgment) Case No. ICTY-03-68-T (30 June 2006) para. 255. See also *Prosecutor v. Milan Lukić & Sredoje Lukić* (Trial Judgment) Case No. ICTY-98-32/1-T (20 July 2009) para. 868; *Prosecutor v. Boskoski and Tarculovski* (Trial Judgment) Case No. ICTY-04-82-T (10 July 2008) para. 298; *Prosecutor v. Dordević* (Trial Judgment) Case No. ICTY-05-87/1-T (23 February 2011) para. 1527; *Prosecutor v. Haradinaj et al.* (Trial Judgment) Case No. ICTY-04-84-T (3 April 2008) para. 396.

⁴⁵⁰ *Prosecutor v. Tihomir Blaskić* (Trial Judgment) Case No. ICTY-95-14-T (3 March 2000) para. 66.

⁴⁵¹ See *supra*, para. 196.

⁴⁵² *Prosecutor v. Tadić* (Appeals Judgment) Case No. ICTY-94-1-A (15 July 1999) para. 70. See also *Prosecutor v. Milutinović et al.* (Trial Judgment) Case No. ICTY-05-87-T (26 February 2009) Vol. 2 para. 127.

⁴⁵³ *Prosecutor v. Dusko Tadić aka “Dule”* (Opinion and Judgment) Case No. ICTY-94-1-T (7 May 1997) para. 573. Endorsed in *Prosecutor v. Zdravko Mucić aka “Pavo”, Hazim Delić, Esad Landžo aka “Zenga”, Zejnil Delalić* (Trial Judgment) Case No. ICTY-96-21-T (16 November 1998) para. 195.

⁴⁵⁴ *Prosecutor v. Naser Orić* (Trial Judgment) Case No. ICTY-03-68-T (30 June 2006) para. 256. See also *Prosecutor v. Milomir Stakić* (Appeals Judgment) Case No. ICTY-97-24-A (22 March 2006) paras. 342, 347,348; citing *Prosecutor v. Kunarac* (Appeals Judgment) Case No. ICTY-96-23 & ICTY-96-23/1-A (12 June 2002) paras. 60,64; *Prosecutor v. Mrkšić et al.* (Trial Judgment) Case No. ICTY-95-13/1-T (27 September 2007) para. 423; *Prosecutor v. Boskoski and Tarculovski* (Trial Judgment) Case No. ICTY-04-82-T (10 July 2008) para. 293; *Prosecutor v. Dordević* (Trial Judgment) Case No. ICTY-05-87/1-T (23 February 2011) para. 1527; *Prosecutor v. Haradinaj et al.* (Trial Judgment) Case No. ICTY-04-84-T (3 April 2008) para. 397.

⁴⁵⁵ *Prosecutor v. Naser Orić* (Trial Judgment) Case No. ICTY-03-68-T (30 June 2006) para. 256.

- That the victim is a member of the opposing party;
- The fact that the act may be said to serve the ultimate goal of a military campaign; and
- That the crime is committed as part of or in the context of the perpetrator's official duties.⁴⁵⁶

(ii) The Victim did not take Active Part in the Hostilities

Prosecutors must demonstrate that the victim was not taking active part in the hostilities. Protected persons lose that protection only through direct participation in hostilities and for the duration of that participation.⁴⁵⁷

IHL does not have a unified definition of the notion of direct participation in hostilities. However, the Commentary on Article 13(3) of Additional Protocol II defines it as “acts of war that by their nature or purpose str[ike] at the personnel and materiel of enemy armed forces”.⁴⁵⁸ The ICTY explained that a person is considered to have taken part in hostilities when she/he participated in acts of war that by nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy's armed forces.⁴⁵⁹ The *Prlić* case at the ICTY further provided:

A Trial Chamber must therefore examine the question of participation in hostilities in each case, in light of the personal circumstances of the person at the time of the facts. The Appeals Chamber also pointed out that since participation in hostilities can be intermittent and discontinuous, a Trial Chamber could conclude that there was such participation if there is a nexus between the actions of the person and the alleged act of war. The Chamber will conduct this analysis on a case by case basis, considering the circumstances of each case.⁴⁶⁰

According to the *Tadić* Trial Judgment at the ICTY:

The protection embraces, at the least, all of those protected persons covered by the grave breaches regime applicable to conflicts of an international character: civilians, prisoners of war, wounded and sick members of the armed forces in the field and wounded, sick and shipwrecked members of the armed forces at sea.⁴⁶¹

In sum, the Prosecution is required to prove that the victims were “persons taking no active part in hostilities”, including by virtue of being civilians and persons who have laid down their

⁴⁵⁶ *Prosecutor v. Kunarac* (Appeals Judgment) Case No. ICTY-96-23& ICTY-96-23/1-A (12 June 2002) para. 59.

⁴⁵⁷ *Prosecutor v. Germaine Katanga* (Trial Judgment) Case No. ICC-01/04-01/07 (7 March 2014) paras. 789-790.

⁴⁵⁸ *Prosecutor v. Germaine Katanga* (Trial Judgment) Case No. ICC-01/04-01/07 (7 March 2014) paras. 789-790.

⁴⁵⁹ *Prosecutor v. Prlić et al.* (Trial Judgment) Case No. ICTY-04-74 (29 May 2013) para. 146; *Prosecutor v. Bagosora* (Trial Judgment) Case No. ICTR-98-41-T (18 December 2008) paras. 2237-2238.

⁴⁶⁰ *Prosecutor v. Prlić et al.* (Trial Judgment) Case No. ICTY-04-74 (29 May 2013) para. 146. See also *Prosecutor v. Bagosora* (Trial Judgment) Case No. ICTR-98-41-T (18 December 2008) paras. 2237 - 2238; *Prosecutor v. Tadić* (Trial Judgment) Case No. ICTY-94-1-T (7 May 1997) para. 616; and *Prosecutor v. Boskoski and Tarculovski* (Trial Judgment) Case No. ICTY-04-82-T (10 July 2008) para. 301.

⁴⁶¹ *Prosecutor v. Tadić* (Trial Judgment) Case No. ICTY-94-1-T (7 May 1997) para. 615.

arms or who have been placed hors de combat by virtue of sickness, wounds, detention or any other cause.⁴⁶² Therefore, in situations of detention, even if some of these victims have been participating actively in hostilities prior to their detention, if the crimes were committed when they were detained and unarmed, they may have ceased to be taking an active part in hostilities, and thus would have come under the protection of Common Article 3.⁴⁶³ It should be noted that the presence of combatants within groups of protected persons does not deprive those who are non-combatants of their protected status.⁴⁶⁴

Regarding the requirement that the victims are civilians not taking active part in hostilities, the ICTY, in the *Galić* case, underlined that “[t]he definition of a ‘civilian’ is expansive and includes individuals who at one time performed acts of resistance, as well as persons *hors de combat* when the crime was perpetrated”.⁴⁶⁵ However, in referring to the Article 50 of Additional Protocol I, the ICTY Trial Chamber in the *Perišić* case held that:

The term “civilian” is defined negatively as anyone who is not a member of the armed forces or of an organised military group belonging to a party to the conflict. Members of the armed forces and members of militias or volunteer corps forming part of such armed forces cannot claim civilian status. Neither can members of organised resistance groups. The Appeals Chamber has held that: “[T]he specific situation of the victim at the time the crimes are committed may not be determinative of his civilian or non-civilian status. If he is indeed a member of an armed organization, the fact that he is not armed or in combat at the time of the commission of crimes, does not accord him civilian status.”⁴⁶⁶

(iii) The perpetrator was aware of the factual circumstances that established the existence of an armed conflict and the protected status of the victim

The Prosecution must also demonstrate that the perpetrator was aware of the factual circumstance that established the existence of an armed conflict.⁴⁶⁷ It is not necessary to prove the accused’s knowledge of the facts pertinent to the internationality of an armed conflict but that the accused had knowledge of the factual circumstances on the existence of an armed conflict. The accused should have “sufficient awareness” of those factual circumstances.⁴⁶⁸

⁴⁶² *Prosecutor v. Lukić Milan & Lukić Sredoje* (Judgment) Case No. ICTY-98-32/1-T (20 July 2009) para. 870.

⁴⁶³ *Prosecutor v. Boskoski and Tarculovski* (Trial Judgment) Case No. ICTY-04-82-T (10 July 2008) para. 303.

⁴⁶⁴ *Prosecutor v. Laurent Semanza* (Judgement and Sentence) Case No. ICTR-97-20-T (15 May 2003) para. 515.

⁴⁶⁵ *Prosecutor v. Stanilav Galić* (Appeals Judgement) Case No. ICTY-98-29-A (30 November 2006) para. 144.

⁴⁶⁶ *Prosecutor v. Momcilo Perisic* (Trial Judgment) Case No. ICTY-04-81 (6 September 2011) para. 92.

⁴⁶⁷ ICC Elements of Crimes (2011) 13; *Prosecutor v. Naletilić and Martinović* (Appeals Judgment) Case No. ICTY-98-34-A (3 May 2006) para. 119.

⁴⁶⁸ *Prosecutor v. Boskoski and Tarculovski* (Trial Judgment) Case No. ICTY-04-82-T (10 July 2008) para. 295.

In addition, at the ICC, for category 4 crimes to be committed the perpetrator must also have been aware of the factual circumstances that established the status of the victims⁴⁶⁹ as “persons taking no active part in the hostilities.”⁴⁷⁰

Category 5 Crimes: Other Serious Violations of IHL

The two common elements of category 5 war crimes are: (i) as with category 4 war crimes, that the conduct took place in the context of an armed conflict not of an international character; and (ii) the perpetrator was aware of factual circumstances that established the existence of an armed conflict.⁴⁷¹ In contrast to category 4 war crimes, the ICC does not require it to be established at this stage that the victims were taking no active part in the hostilities and that the perpetrator be aware of the factual circumstances that established this status. Instead, this arises due to the nature of the object of the attack that varies according to the crimes. The element related to the object of the crime will therefore be established with the other contextual elements of each crime. For example, the specific crime of intentionally directing attacks against the civilian not taking direct part in hostilities requires to establish, as a contextual element, the civilian status of the victim, while the crime of “attacking protected objects” requires proof that the object of the attack was one or more buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives.

The elements of category 5 war crimes have already been discussed above.⁴⁷² The discussion equally applies to other serious violations of IHL in non-international armed conflict.

Use domestic crimes when appropriate or when the relevant international crime is not available

As outlined above,⁴⁷³ Ukraine must prosecute international crimes in furtherance of its obligations to provide effective penal sanctions. When there is a choice between charging an international crime or an ordinary crime, the war crime charges should generally be pursued to properly encompass and reflect the gravity of the conduct.⁴⁷⁴ Where appropriate, ordinary crimes may be charged in lieu of international crimes in circumstances where the relevant misconduct may be accurately and proportionately prosecuted and sanctioned. Most

⁴⁶⁹ *Prosecutor v. Germaine Katanga* (Trial Judgment) Case No. ICC-01/04-01/07 (7 March 2014) para. 793.

⁴⁷⁰ *Prosecutor v. Abdullah Banda Abakaer Nourain* (Confirmation of Charges Decision) Case No. ICC-02/05-03/09 (7 March 2007) para. 105.

⁴⁷¹ *Prosecutor v. Haradinaj et al.* (Trial Judgment) Case No. ICTY-04-84-T (3 April 2008) para. 391; ICC Elements of Crimes (2011) *see for example* Art.8 (2) (e) (ii), 35.

⁴⁷² *See supra*, paras. 208 et seq.

⁴⁷³ *See supra*, para. 29-30.

⁴⁷⁴ Ward Ferdinandusse, ‘The Prosecution of Grave Breaches in National Courts’ (2009) *Journal of International Criminal Justice* 7, 723 - 741, 726,731.

importantly, any prosecution must be meaningful and the charges should correspond to the gravity of the crime and amount to an effective penal sanction.

As discussed above,⁴⁷⁵ this assessment is an inexact science. However, as noted, the ICC's complementarity assessments provide a modicum of guidance concerning how to ensure that the ordinary offences charged accurately reflect the same conduct and gravity as would apply if war crimes or other international crimes were alternatively charged.

More particularly, special consideration should be given to terrorism crimes since they, as a consequence of their legal elements, may sometimes provide a basis for alleging courses of conduct that adequately encompass the same conduct as that encompassed by war crimes charges.

To ensure that terrorism-related crimes properly provide this basis, the domestic prosecutor should ask her/himself whether the charges relying on terrorism cover the same conduct, and whether they reflect a genuine attempt to hold the person properly and proportionately accountable. Alternatively, the prosecutor should consider whether the ordinary person might suspect that the domestic (in this instance, terrorism) crime charges fail to adequately encompass the scope and gravity of the relevant conduct. Ultimately the domestic prosecutor must ensure that, in the final analysis, the accused is prosecuted in a way which ensures proper accountability.

⁴⁷⁵ See *supra*, paras. 38-46.

Annex A

SAMPLE OF DOMESTIC PROSECUTIONS

Sample of Domestic Prosecutions

PART I: CASE LAW ON CRIMES COMMITTED IN DONBAS INVOLVING RUSSIAN SERVICEMEN, SEPARATISTS, CIVILIANS

Case Details	Accused	Decision Summary	Charge (According to the Criminal Code of Ukraine)	
CATEGORY 1: CASE LAW ON AGGRESSIVE WAR, TERRORISM AND MILITARY “COMPETENCE” TYPE OFFENCES				
WAGING AGGRESSIVE WAR				
1.	Case No. 221/3702/15-к ⁴⁷⁶ , 221/774/16-к ⁴⁷⁷ Volnovakha District Court, Donetsk Oblast	Oleksandr Sitnikov, Citizen of Ukraine	<p><u>Facts:</u> No information available.</p> <p><u>Procedure:</u> The Court found that the Accused had voluntarily and for financial gain joined armed forces of the Donetsk People’s Republic’s (“DPR”). The DPR has been labelled a “terrorist organisation” by the Ukrainian government.</p> <p>The Accused fully admitted his guilt. He was found guilty under Arts. 258-3 and 437 of the Criminal Code of Ukraine and sentenced to five years in prison. The Court ordered that his property not be confiscated.</p>	<p>Art. 258-3 (Creation of a terrorist group or terrorist organisation) 1. Creation of a terrorist group or terrorist organisation, the leadership of a group or organisation or participation in, as well as organisational or other support to the creation or activity of a terrorist group or terrorist organisation, - shall be punishable by imprisonment for a term of eight to fifteen years with or without confiscation of property.</p> <p>Art. 437 (Planning, preparation and waging of an aggressive war) 2. Conducting an aggressive war or aggressive military operations, - shall be punishable by</p>

⁴⁷⁶ Case No. 221/3702/15-к (Decision) Volnovakha District Court, Donetsk Oblast (29 March 2016).

⁴⁷⁷ Case No. 221/774/16-к (Decision) Volnovakha District Court, Donetsk Oblast (23 February 2016).

				<p>imprisonment for a term of ten to fifteen years.</p> <p><u>Other Articles</u></p> <p>Art. 28 (Criminal offense committed by a group of persons, or a group of persons upon prior conspiracy, or an organised group, or a criminal organisation)</p> <p>2. A criminal offence shall be held to have been committed by a group of persons upon prior conspiracy where it was jointly committed by several (two or more) persons who had conspired in advance, that is prior to the commencement of the offense, to commit it together.</p>
2.	<p>Case No. 235/9919/15-к⁴⁷⁸</p> <p>Krasnoarmiysk City District Court, Donetsk Oblast</p>	<p>Vitaliy Nesvyckiy, Citizen of Ukraine</p>	<p><u>Facts:</u></p> <p>No factual information available. The same court previously sentenced Nesvyckiy to 10 years in prison for violating Arts. 258-3(1) and 263(1) of the Criminal Code, though that judgment never came into force.</p> <p><u>Procedure:</u></p> <p>In light of the gravity of the allegations against Nesvyckiy and the previous judgment, the court ruled that he should remain in custody until 6 June 2016.</p>	<p>Art. 437(2) (Planning, preparation and waging of an aggressive war)</p> <p><u>Other Charges</u></p> <p>Art. 28(2) (Criminal offense committed by a group of persons, or a group of persons upon prior conspiracy, or an organised group, or a criminal organisation)</p>

⁴⁷⁸ Case of *Vitaliy Nesvyckiy*, No. 235/9919/15-к (Decision) Krasnoarmiysk City District Court, Donetsk Oblast (8 April 2016); Decision) Krasnoarmiysk City District Court, Donetsk Oblast (27 July 2016).

			<p>On 30 May 2016 the Court accepted the prosecutors' submission and scheduled the next hearing for 26 July 2016 via videoconference in order to question one of the co-accused.</p> <p>On 26 July 2016 the Court adjourned the hearing in the joint cases under Arts. 258-3(1), 263(1) and Arts. 28(2), 437(2) to 4 August 2016. Detention of accused was prolonged for 60 days until 23 September 2016.</p>	
WAGING AGGRESSIVE WAR AND PARTICIPATING IN AN unlawful paramilitary or armed formation				
3.	<p>Case No. 234/18927/15-к⁴⁷⁹</p> <p>Judgment, 12 February 2016</p> <p>Prymorskyi District Court, Zaporizhia Oblast</p>	<p>Philipov, Citizen of Ukraine</p>	<p><u>Facts:</u></p> <p>On 11 February 2015, the Accused allegedly joined a DPR armed group. The Accused and a group of other people allegedly came to a DPR recruiting station located in the Leninskyi district of Donetsk. The Accused was sent to the village of Telmanovo to serve as "soldier in the third automatic rifle platoon of the First Slavic Battalion".</p> <p>The Accused was allegedly posted at a checkpoint in Telmanovo, where he received a self-loading "Symonov" carbine with ammunition and a camouflage uniform.</p> <p>The Accused was alleged to have maintained an armed resistance; fought illegally; prevented Ukrainian law enforcement bodies and military servicemen involved in the Anti-Terrorist</p>	<p>Art. 437 (Planning, preparation and waging of an aggressive war)</p> <p>Art. 260 (Creation of paramilitary formations in contravention of laws)</p> <p>1. Creation of paramilitary formations in contravention of Ukrainian laws, or participation in their activities, - shall be punishable by imprisonment for a term of two to five years.</p> <p>2. Creation of armed formations in contravention of Ukrainian laws, or participation in their activities, - shall be punishable by imprisonment for a term of three to eight years with or without confiscation of property.</p>

⁴⁷⁹ Case of *Philipov*, No. 234/18927/15-к (Judgment) Prymorskyi District Court, Zaporizhia (12 February 2016).

		<p>Operation (“ATO”) from conducting their official duties; provided military support to DPR roadblocks in Donetsk Oblast; and strengthened the protection of seized buildings.</p> <p>Beginning in mid-March 2015, the Accused was said to have served food to members of the “First Slavic Battalion” as part of his duties as a chef.</p> <p>On 24 August 2015, he was placed in the DPR’s military guardhouse, where he stayed for 26 days. He was found near Zaitseve village near Horlivka (Donestk region), in late September 2015, by members of the Ukrainian military. He was heading on a date with a girl.</p> <p><u>Court findings:</u></p> <p>The Court found that the Accused had intentionally and directly participated in the activities of an illegal armed group fighting for the DPR, a “terrorist organisation”.</p> <p>The Accused was found guilty of violating para. 2 of Art. 260 of the Criminal Code of Ukraine and sentenced to three years in prison.</p> <p>Because of a lack of evidence, the Court acquitted the Accused of charges that he had violated para. 2 of Art. 28 and para. 2 of Art. 437. The Court noted that the prosecution had relied solely on the fact that the Accused joined an armed group in the DPR and that he was on duty at the checkpoint and conducted several rocket launches targeting Ukrainian tanks and unidentified vehicles.</p>	<p><u>Other Charges</u></p> <p>Art. 28 (Criminal offense committed by a group of persons, or a group of persons upon prior conspiracy, or an organised group, or a criminal organisation)</p>
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4.	<p>Case No. 263/15014/15-к Zhovtnevyi District Court of Mariupol, Donetsk Oblast Criminal Chamber of the Appellate Court of Donetsk Oblast (appeal)⁴⁸⁰</p>	<p>Viktor Koloschuk and Oleksandr Zarochuncev</p>	<p><u>Facts:</u> No information available.</p> <p><u>Procedure:</u> The indictment of the accused was overruled by the Zhovtnevyi District Court in Donetsk Oblast on 5 February 2016. The Prosecutor appealed the decision. On 29 March 2016, the Appellate Court upheld the prosecutor's appeal and sent the case to the Zhovtnevyi District Court. At a hearing held on 13 June, 2016, the Zhovtnevyi District Court ordered that the Accused remain in detention until 13 August. 5 August 2016 the Zhovtnevyi District Court ordered that the Accused remain in detention until 3 October, given the high flight risk and remaining risk that the accused would commit another crime, as well as the gravity of the alleged crime and the continuation of court proceedings.</p>	<p>Art. 437(2) (Planning, preparation and waging of an aggressive war) Art. 260(2) (Creation of paramilitary formations in contravention of laws) <u>Other Charges</u> Art. 28(2) (Criminal offense committed by a group of persons, or a group of persons upon prior conspiracy, or an organised group, or a criminal organisation)</p>
PARTICIPATION IN unlawful paramilitary or armed formations				
5.	<p>Case No. 415/3534/14-к Judgment of 28 September 2016⁴⁸¹</p>	<p>Horbachov, Citizen of Ukraine, civilian</p>	<p><u>Facts:</u> In June 2014, the Accused joined a military unit fighting in Lysychansk in Luhansk Oblast and became an active participant in the unit's activities.</p>	<p>Art. 260(2) (Creation of paramilitary formations in contravention of laws) Art. 146 (Illegal confinement or abduction of a person) 1. Illegal confinement or abduction of a person, - shall be punishable by</p>

480 *Case of Viktor Koloschuk and Oleksandr Zarochuncev*, No. 263/15014/15-к (Decision) Criminal Chamber of the Donetsk Oblast Appellate Court (29 March 2016); (Decision) Zhovtnevyj District Court of Mariupol (5 August 2016).

481 *Case of Horbachov*, No. 415/3534/14-к (Judgment) Lysychansk City Court, Luhansk Oblast (14 January 2016).

<p>Lysychansk City Court, Luhansk Oblast</p>	<p>From June 2014 to the end of July 2014, the Accused worked for the Luhansk People's Republic ("LPR"), where his duties included investigating crimes in Lysychansk, visiting the scenes of those crimes, and responding to calls received by his military unit.</p> <p>On 16 July 2014, the Accused, acting on a prior agreement with the unidentified persons, instructed a group of unidentified people to kidnap the victim.</p> <p>On the same day, at about 2.30 pm, the group of unidentified people, acting on instructions from the Accused, arrived at the victim's house brandishing automatic weapons.</p> <p>The group forced the victim into their vehicle and took him to the Lysychansk district oil department, where the Accused was waiting. They repeatedly threatened the victim.</p> <p>During the victim's detention, the group of unidentified people, taking verbal instructions from the Accused, beat the victim with automatic weapons, inflicting physical pain.</p> <p>During the victim's detention, the Accused, along with the group of unidentified people, attempted to extract information about the victim's family and activities. Later, they returned the victim to his home and disappeared.</p> <p>They forced the victim to give them a car owned by a local enterprise. No lease agreement or other documents legalising the transfer were found.</p>	<p>restraint of liberty for a term up to three years, or imprisonment for the same term.</p> <p>2. The same acts committed in regard of a minor, or for mercenary purposes, or in regard of two or more persons, or by a group of persons upon their prior conspiracy, or by a method dangerous to the victim's life or health, or causing bodily suffering to him or her, or with the use of weapons, or within a lasting period of time, - shall be punishable by restraint of liberty for a term up to five years, or imprisonment for the same term.</p> <p><u>Other Charges</u></p> <p>Art. 289 (Unlawful appropriation of a vehicle)</p>
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			<p><u>Court findings:</u></p> <p>Citing witnesses who saw the victim being forced into the car by the group of unknown men, including the Accused, who were carrying weapons, the Court found that the Accused abducted and inflicted physical harm on the victim.</p> <p>Regarding the misappropriation of a vehicle, the Court found that the Accused failed to prove that he had legitimate rights to the car.</p> <p>As a result, the Court found the Accused guilty of committing crimes under para. 2 of Art. 146, para. 2 of Art. 260, and para. 2 of Art. 289 of the Criminal Code of Ukraine, sentenced him to six years in prison and ordered the confiscation of his property.</p>	
6.	<p>Case No. 225/4564/15-к Judgment of 31 August 2015⁴⁸² Dzerzhynsk City Court, Donetsk Oblast</p>	<p>Citizen of Ukraine, civilian</p>	<p><u>Facts:</u></p> <p>The Accused was alleged to have been a part of a DPR group that carried out armed patrols in the city of Dzerzhynsk (Donetsk Oblast) and unlawfully detained people who violated the government-imposed curfew, illegally seized vehicles belonging to these people and returned them only after extracting “fines”. The Accused also followed his commanders’ orders, facilitating a chain of command inside his unit. He used weapons supplied by the commander of his group, including for the purposes of intimidation.</p>	<p>Art. 260(2) (Creation of paramilitary formations in contravention of laws)</p>

⁴⁸² Case No. 225/4564/15-к (Judgment) Dzerzhynsk City Court, Donetsk Oblast (31 August 2015).

			<p><u>Court findings:</u></p> <p>The Court found that Accused had committed the majority of his crimes, including using weapons for intimidation while under the influence of alcohol, with a full understanding of the essence and consequences of his actions. The Accused did not deny any of the charges.</p> <p>The Court held that both the Accused's confession and the material evidence against him presented by the prosecution were enough to prove his guilt. Taking into account his confession as a mitigating factor, the Court sentenced the Accused to four years in prison.</p>	
7.	<p>Case No.219/254/16-κ⁴⁸³</p> <p>Judgment of 28 January 2016</p> <p>Artemivsk City District Court, Donetsk Oblast</p>	<p>Rayisa Ilyashenko, citizen of Ukraine, civilian</p>	<p><u>Facts:</u></p> <p>The Accused is a civilian who provided members of the DPR with information about the location of Ukrainian military detachments.</p> <p><u>Court findings:</u></p> <p>The Accused signed a plea bargain, recognising her guilt and expressing her readiness to cooperate with authorities. The Accused and the Artemovsk City Prosecutor's Office agreed on a five year prison sentence, with a probation period to be determined later.</p> <p>The Court found that the Accused was physically and mentally capable of understanding that any facilitation of the activities of DPR members, let alone the provision of information about the</p>	<p>Art. 260(2) (Creation of paramilitary formations in contravention of laws)</p>

⁴⁸³ Case of *Ilyashenko Rayisa*, No. 219/254/16-κ (Judgment) Artemivsk City District Court, Donetsk Oblast (28 January 2016).

			<p>location of the Ukrainian military detachments, was not only illegal but could also be detrimental to the sovereignty and territorial integrity of Ukraine. The Accused couldn't ignore that such information would be used to target Ukrainian servicemen and, potentially, civilians.</p> <p>The Court validated the Accused's plea bargain and found her guilty and offered her two years of probation. The Court prohibited the Accused from leaving Ukraine during her probation.</p>	
8.	<p>Case No. 233/2476/15-к Judgment of 2 July 2015⁴⁸⁴ Konstantynivka City District Court, Donetsk Oblast</p>	<p>Citizen of Ukraine, civilian</p>	<p><u>Facts:</u> Between 2 February 2015 and 22 February 2015, the Accused joined the armed forces of the DPR. He picked up a grenade on a road, carrying and storing ammunition without authorisation.</p> <p><u>Court findings:</u> The Accused admitted his guilt before the Court and apologized for having committed the offence. Noting that both the prosecution and the defence agreed on the facts of the case, the Court decided not to assess the evidence related to uncontested circumstances. Having considered all the facts pursuant to the reliability, credibility and probability criteria, the Court found the Accused guilty. Taking into account the honest admission of the Accused's guilt, the Court sentenced him to three and a half years in prison.</p>	<p>Art. 260(2) (Creation of paramilitary formations in contravention of laws) <u>Other Charges:</u> Art. 263(1) (Unlawful handling of weapons, ammunition or explosives)</p>

⁴⁸⁴ Case No. 233/2476/15-к (Judgment) Konstantynivka City District Court, Donetsk Oblast (2 July 2015).

9.	<p>Case No. 185/3279/15-к⁴⁸⁵ Judgment of 14 May 2015 Pavlograd City District Court, Dnipropetrovsk Oblast</p>	<p>Citizen of the Russian Federation, civilian</p>	<p><u>Facts:</u> The Accused underwent special military training in Omsk Oblast in the Russian Federation. He then crossed the Ukrainian border, and acquired and carried firearms and ammunition without a permit. He also participated in a DPR military detachment and protected the separatists' headquarters. Later, he admitted his guilt to members of the Ukrainian military at a checkpoint in Debaltsevo (Donetsk Oblast), where was arrested and transferred to the state police. The Accused held that he had not used firearms against anyone, including civilians or members of the military. <u>Court findings:</u> The Court found that the Accused understood the unlawfulness of his actions (involvement with illegal armed groups on Ukrainian territory, acquiring firearms and carrying them without a permit, and facilitating the activities of armed groups in eastern Ukraine). However, while he was receiving medical treatment, the Accused voluntary got in touch with the Ukrainian Armed Forces. He recognised the unlawfulness of his actions and laid down his arms.</p>	<p>Art. 260(2) (Creation of paramilitary formations in contravention of laws) <u>Other Charges:</u> Art. 263(1) (Unlawful handling of weapons, ammunition or explosives)</p>
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⁴⁸⁵ Case No. 185/3279/15-к (Judgment) Pavlograd City District Court, Dnipropetrovsk Oblast (14 May 2015).

			<p>The Accused admitted his guilt and apologized for his actions. In delivering its verdict, the Court took into account the Accused's confession, and his acceptance of all of the facts of the case and all of the charges levied against him, sentencing him to three years and one month in prison.</p>	
10.	<p>Case No. 243/10160/15-к⁴⁸⁶ Judgment of 19 November 2015 Sloviansk City Court, Donetsk Oblast</p>	<p>Citizen of Ukraine, civilian</p>	<p><u>Facts:</u> The Accused joined the DPR and followed orders given to him. He carried a hunting gun and worked at a checkpoint.</p> <p><u>Court findings:</u> The Accused admitted his guilt and concluded a plea bargain with the prosecutor. The Accused promised to facilitate the investigation and to help track down his accomplices. He and the prosecutor agreed on a five-year prison sentence and a three-year probationary period during which the Accused is prohibited from leaving Ukraine.</p> <p>The Court found that the Accused purposefully came into contact with unlawful armed groups in Horlivka, Donetsk Oblast. The Accused familiarised himself with the unlawful aims, tasks, and duties of the DPR and wilfully joined the organisation. He received an order from a higher-ranking commander to guard one of Horlivka's checkpoints. The Accused carried weapons for that purpose, and inspected vehicles and persons</p>	<p>Art. 260(2) (Creation of paramilitary formations in contravention of laws)</p>

⁴⁸⁶ Case No. 243/10160/15-к (Judgment) Sloviansk City Court, Donetsk Oblast (19 November 2015).

			<p>passing through the checkpoint. The court held that he therefore contributed to the unlawful activities of unlawful armed groups within the DPR. Such activities resulted, <i>inter alia</i>, in the deaths of a number of people.</p> <p>The Court validated the plea bargain and concluded that the actions of the Accused did not directly lead to any deaths.</p>	
11.	<p>Case No. 233/4799/14-к⁴⁸⁷</p> <p>Judgment of 25 December 2014</p> <p>Konstantynivka City District Court, Donetsk Oblast</p>	<p>Citizen of Ukraine, civilian</p>	<p><u>Facts:</u></p> <p>The Accused joined the DPR and worked at a checkpoint.</p> <p><u>Court findings:</u></p> <p>The Accused admitted his guilt and concluded a plea agreement with the prosecutor. The Accused promised to facilitate the investigation and to help track down his accomplices. He and the prosecutor agreed on five-year prison sentence (without his property being confiscated) with a three-year probationary period during which he is prohibited from leaving Ukraine.</p> <p>The Court found that the Accused purposefully came into contact with unlawful armed groups in Donetsk Oblast. The Accused familiarised himself with the unlawful aims, tasks, and duties of the DPR and its members, and wilfully joined the organisation. He received an order from a higher-ranking commander to guard a checkpoint situated along the Sloviansk-Donetsk-Mariupol</p>	<p>Art. 260(2) (Creation of paramilitary formations in contravention of laws)</p>

⁴⁸⁷ Case No. 233/4799/14-к (Judgment) Konstantynivka City District Court, Donetsk Oblast (25 December 2014).

			<p>highway. The Accused carried weapons for that purpose, and inspected vehicles and persons passing through the checkpoint. The Court held that he therefore contributed to the unlawful activities of unlawful armed groups within the DPR. Such activities resulted, <i>inter alia</i>, in the deaths of a number of people.</p> <p>The Court validated the plea bargain. The Court concluded that the activities of the Accused did not directly lead to any deaths.</p>	
12.	<p>Case No. 233/4794/14-к⁴⁸⁸</p> <p>Judgment of 18 December 2014</p> <p>Konstantynivka City District Court, Donetsk Oblast</p>	<p>Citizen of Ukraine, civilian</p>	<p><u>Facts:</u></p> <p>The Accused joined the DPR and worked at one of the organisation's checkpoints.</p> <p><u>Court findings:</u></p> <p>The Accused admitted his guilt and agreed with the prosecutor to a plea bargain. The Accused promised to facilitate the investigation of the case and to help track down his accomplices. He and the prosecutor agreed on a five-year prison sentence (without his property being confiscated) and a three-year probationary period during which he is not allowed to leave Ukraine.</p> <p>The Court found that the Accused purposefully came into contact with unlawful armed groups in Konstantynivka, Donetsk Oblast. The Accused familiarised himself with the unlawful aims, tasks and duties of the DPR and its members and wilfully joined the organisation. He received an</p>	<p>Art. 260(2) (Creation of paramilitary formations in contravention of laws)</p>

⁴⁸⁸ Case No. 233/4794/14-к (Judgment) Konstantynivka City District Court, Donetsk Oblast (18 December 2014).

			<p>order from a higher-ranking commander to guard a checkpoint in Konstantynivka. The Accused carried weapons for that purpose, and inspected vehicles and persons passing through the checkpoint. The court held that he therefore contributed to the unlawful activities of unlawful armed groups within the DPR. Such activities resulted, <i>inter alia</i>, in the deaths of a number of people.</p> <p>The Court validated the plea bargain because it concluded that the Accused's actions did not directly lead to any deaths.</p>	
13.	<p>Case No. 225/6354/15-к⁴⁸⁹</p> <p>Judgment of 23 December 2015</p> <p>Dzerzhynsk City Court, Donetsk Oblast</p>	<p>Citizen of Ukraine, civilian</p>	<p><u>Facts:</u></p> <p>The Accused joined the DPR and worked at one of the organisation's checkpoints.</p> <p><u>Court findings:</u></p> <p>The Accused admitted his guilt and agreed with the prosecutor to a plea bargain. The Accused promised to facilitate the investigation of the case and to help track down his accomplices. He and the prosecutor agreed on a five-year prison sentence (without his property being confiscated) and a three-year probationary period during which he is not allowed to leave Ukraine.</p> <p>The Court found that the Accused purposefully came into contact with unlawful armed groups in Donetsk Oblast. The Accused familiarised himself with the unlawful aims, tasks, and duties of the</p>	<p>Art. 260(2) (Creation of paramilitary formations in contravention of laws)</p>

⁴⁸⁹ Case No. 225/6354/15-к (Judgment) Dzerzhynsk City Court, Donetsk Oblast (23 December 2015).

			<p>DPR and its members and wilfully joined the organisation. He received an order from a higher-ranking commander to guard the Kanalnyi checkpoint near the village of Mayorsk in Donetsk Oblast. The Accused carried weapons for that purpose, and inspected vehicles and persons passing through the checkpoint. The court held that he therefore contributed the to unlawful activities of unlawful armed groups within the DPR. Such activities resulted, <i>inter alia</i>, in the deaths of a number of people.</p> <p>The Court validated the plea bargain, concluding that the activities of the Accused did not directly lead to any deaths.</p>	
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14.	<p>Case No. 554/17800/14-к⁴⁹⁰ Judgment of 29 December 2014 Oktiabrskiy City Court, Poltava Oblast</p>		<p><u>Facts:</u> The Accused joined the DPR and guarded Kramatorsk City Council building in Donetsk Oblast. Armed groups seized the building and turned it into one of the DPR's headquarters.</p> <p><u>Court findings:</u> The Accused admitted his guilt and agreed with the prosecutor to a plea bargain. The Accused promised to facilitate the investigation of the case and to help track down his accomplices. He and the prosecutor agreed on a five-year prison sentence (without his property being confiscated) and a one-year probationary period during which he is not allowed to leave Ukraine.</p> <p>The Court found that the Accused purposefully came into contact with unlawful armed groups in Kramatorsk in Donetsk Oblast. The Accused familiarised himself with the unlawful aims, tasks and duties of the DPR and its members and wilfully joined the organisation. The Accused received arms, including Kalashnikovs, from unidentified representatives of armed groups in the DPR. His duties included repairing vehicles unlawfully used by the armed groups and guarding the Kramatorsk City Council building.</p> <p>The Court concluded that the activities of the Accused did not directly lead to any deaths and accepted his plea bargain.</p>	<p>Art. 260(2) (Creation of paramilitary formations in contravention of laws)</p>
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⁴⁹⁰ Case No. 554/17800/14-к (Judgment) Oktiabrskiy City Court, Poltava Oblast (29 December 2014).

WAGING OF AGGRESSIVE WAR AND PARTICIPTION IN A TERRORIST ORGANISATION				
15.	Case No. 225/5523/15-кк ⁴⁹¹	Volodymyr Starkov, citizen of the	<u>Facts:</u>	Art. 437 (Planning, preparation and waging of an aggressive war)

⁴⁹¹ Case of Starkov, No. 225/5523/15-к (Judgment) Dzerzhynsk City Court, Donetsk Oblast (25 September 2015).

<p>Judgment of 25 September 2015 Dzerzhynsk City Court, Donetsk Oblast</p>	<p>Russian Federation, Major in the Russian Armed Forces</p>	<p>On 4 March 2015, Starkov, acting on orders from the leadership of the Russian Armed Forces and working with 73 other unidentified Russian soldiers, illegally crossed the Russian border into Ukraine’s occupied territories.</p> <p>On 5 March 2015, Starkov entered the city of Donetsk, where he joined the DPR. The Ukrainian court refers to the latter as the “terrorist organisation (...) controled by the officials of Armed Forces of the Russian Federation”.</p> <p>Alleged to have taken part in the activities of DPR, from 3 May 2015 to 25 July 2015, the accused acted as “the chief of [the DPR’s] missile and artillery weapons service”, controlling the weapons, and storing and delivering weapons and ammunition.</p> <p>On 25 July 2015, Starkov was alleged to have been ordered by a person who was the “commander of the “DPR” military unit 08805”, to deliver, together with a Ukrainian citizen (also a member of DPR), firearms and ammunition from Donetsk to the town of Yasne.</p> <p>On the same day, Starkov, in accordance with the instructions above, left Donetsk with a truck full of firearms and ammunition and headed towards Yasne. He was stopped by Ukrainian law enforcement officers near the village of Berezove in Donetsk Oblast.</p> <p><u>Court findings:</u> The Court established that the Accused, acting according to criminal orders given by unidentified</p>	<p>2. Conducting an aggressive war or aggressive military operations, - shall be punishable by imprisonment of ten to fifteen years.</p> <p>Art. 258-3 (Creation of a terrorist group or terrorist organisation)</p> <p>1. Creation of a terrorist group or terrorist organisation the leadership of a group or organisation or participation in, as well as organisational or other support to the creation or activity of a terrorist group or terrorist organisation, - shall be punishable by imprisonment for a term of eight to fifteen years with or without confiscation of property.</p> <p><u>Other Charges:</u></p> <p>Art. 28(2) (Criminal offense committed by a group of persons, or a group of persons upon prior conspiracy, or an organised group, or a criminal organisation)</p> <p>Art. 332-1 (Violation of the rules regulating entry to the temporarily occupied territory of Ukraine and exit from it)</p> <p>Art. 263 (Unlawful handling of weapons, ammunition or explosives)</p>
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			<p>officers in the Russian Armed Forces, directly participated in the DPR's illegal activities and waged aggressive war against Ukraine.</p> <p>The Court found Starkov guilty of committing criminal offenses under para. 2 of Art. 28, para. 2 of Art. 437, para. 2 of Art. 28, para. 1 of Art. 258-3, para. 2 of Art. 332-1, and para. 1 of Art. 263 of the Criminal Code of Ukraine, sentencing him to 10 years in prison and confiscating all his property.</p>	
16.	<p>Case No. 328/67/16-кк⁴⁹²</p> <p>Judgment of 25 February 2016</p> <p>Tokmak District Court, Zaporizhia Oblast</p>	<p>Ivan Horbunov, citizen of the Russian Federation, civilian</p>	<p><u>Facts:</u></p> <p>From June 2013 to June 2014, before entering Ukraine, the Accused was alleged to have served as a scout sniper at a military base of the Russian peacekeeping forces.</p> <p>Between 1 and 2 September 2014, the Accused, while in the Russian city of Anapa, accepted an invitation from an unidentified person to become involved in the hostilities in Ukraine as a member of the DPR.</p> <p>On 3 September 2014, he illegally crossed the Ukrainian border through a checkpoint that was not controlled by Ukrainian forces. On 20 September 2014, the Accused joined the DPR. Thereafter he was appointed as a radio telephonist in the first infantry battalion of the DPR's "First Slavic Infantry Brigade".</p>	<p>Art. 437(2) (Planning, preparation and waging of an aggressive war)</p> <p>Art. 258- – 3 (Creation of a terrorist group or terrorist organisation)</p> <p>1. Creation of a terrorist group or terrorist organisation, the leadership of a group or organisation or participation in, as well as organisational or other support to the creation or activity of a terrorist group or terrorist organisation, - shall be punishable by imprisonment for a term of eight to fifteen years</p> <p><u>Other Charges:</u></p> <p>Art. 28(2) (Criminal offense committed by a group of persons, or a group of persons upon prior</p>

⁴⁹² Case of Horbunov, No. 328/67/16-к (Judgment) Tokmak District Court, Zaporizhia Oblast (25 February 2016).

		<p>On 28 December 2014, the Accused was appointed as a scout sniper in one of the DPR's military groups. He handled various firearms intended for the conduct of aggressive military operations against Ukrainian forces.</p> <p>From 20 September 2014 to 8 May 2015, the prosecution argued that his main responsibilities were:</p> <ul style="list-style-type: none"> organising communication between DPR military units; conducting reconnaissance in areas where Ukrainian personnel and equipment were deployed; protecting important fortifications, equipment and weapons controlled by DPR military detachments; and training DPR combatants. <p>On 8 May 2015, the Accused was released from military service, became a reservist, and was sent to the DPR's military commissariat in Donetsk. After the end of his military service, he remained in the DPR.</p> <p>On 19 June 2015, the Accused was arrested by Ukrainian servicemen at a checkpoint.</p> <p><u>Court findings:</u></p> <p>The Court found that the Accused was an accomplice to the use of armed force against members of Ukraine's ATO. His actions were found to be part of the Russia's broader war of aggression against Ukraine.</p>	<p>conspiracy, or an organised group, or a criminal organisation)</p> <p>Art. 263(1) (Unlawful handling of weapons, ammunition or explosives)</p>
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			The Accused was found guilty of committing crimes under para. 2 of Art. 437, para. 1 of Art. 258-3 and para. 1 of Art. 263 of the Criminal Code of Ukraine and sentenced to 11 years in prison.	
17.	Case No. 752/15787/15-кк ⁴⁹³ Judgment of 18 April 2016 Holosiyiv District Court, Kyiv	Yevgeny Yerofeyev and Aleksandr Aleksandrov, citizens of the Russian Federation, Captain and Sergeant in Main Russia's Intelligence Directorate	<p><u>Facts:</u> According to media reports, Aleksandrov and Yerofeyev were captured by Ukrainian troops near the town of Schastia in Luhansk Oblast on 16 May 2015. They were injured in a shootout, during which a Ukrainian soldier, Vadym Puhachov, was killed.</p> <p>The officers initially admitted to serving in the Russian military. Shortly thereafter, however, the Russian Ministry of Defence declared that the Accused were no longer serving in the Russian military at the time of their capture. The Accused said during their trial they had not been employed by the Russian army when they were captured, arguing instead that they had voluntarily joined the LPR's police force. The Accused claimed that they had been tortured and forced into offering their earlier testimony.</p> <p>Yerofeyev's defence lawyer was found dead in late March 2016 in Cherkasy Oblast, which borders Kyiv Oblast. The circumstances surrounding his death are unclear. His death significantly delayed the Court's judgment.</p> <p><u>Court findings:</u></p>	<p>Art. 437(2) (Planning, preparation and waging of an aggressive war) Art. 258- – 3(1) (Creation of a terrorist group or terrorist organisation) <u>Other Charges:</u> Art. 28(2) (Criminal offense committed by a group of persons, or a group of persons upon prior conspiracy, or an organised group, or a criminal organisation) Art. 201 (Smuggling) Art. 258-3 (1) (Creation of a terrorist group or terrorist organisation) Art. 263(1) (Unlawful handling of weapons, ammunition or explosives) Art. 332-1(2) (Breach of rules concerning entering and leaving the temporarily occupied territory) Art. 263 (Unlawful handling of weapons, ammunition or explosives)</p>

493 Case of Yevgeny Yerofeyev and Aleksandr Aleksandrov, 752/15787/15-к (Judgment) Holosiyiv District Court, Kyiv (18 May 2016).

			<p>Yerofeyev said he had not shot anyone, and that he was simply passing by when Pugachev was shot.</p> <p>The Court disagreed with the defence’s argument that the Accused were combatants and, thus, the actions committed by them were allowed by the laws of war and could not be qualified as crimes.</p> <p>The Court found that the Accused were sent to Ukraine to organise terrorist acts, to use and facilitate the use of weapons, and to contribute to the activities of a “terrorist organisation”. The verdict noted that the Accused wore uniforms that did not distinguish them as combatants. Because their activities were directly connected to the conduct of aggressive war, the court held that the two bore criminal responsibility for the crimes committed on Ukrainian territory.</p> <p>The Court found the Accused guilty of waging aggressive war, participating in a terrorist group, and commissioning a terrorist act. They were sentenced to 14 years in prison.</p> <p>On 25 May 2016, the two men were released from prison and returned to Russia in exchange for captured Ukrainian Pilot Nadezhda Savchenko, who had been held in a Russian prison for nearly two years.</p>	
18.	Case No. 423/1063/15-кк ⁴⁹⁴	Citizen of the Russian	<u>Facts:</u>	Art. 437(2) (Planning, preparation and waging of an aggressive war)

⁴⁹⁴ Case No. 423/1063/15-к (Judgment) Popasna District Court, Luhansk Oblast (14 January 2016).

	<p>Judgment of 14 January 2016 Popasna District Court, Luhansk Oblast</p>	<p>Federation, civilian previously convicted under Art. 111 of the Russian Criminal Code (causing grievous bodily injury).</p>	<p>Between 4 March 2015 and 3 July 2015, the Accused, along with other unidentified members of “Prizrak” and the “Platov 1st Cossack regiment”, (military groups in the LPR) became involved with LPR activities.</p> <p>The Accused fought against the Armed Forces of Ukraine and conducted reconnaissance on the movement of their units at LPR checkpoint 31, located in the village of Frunze in Luhansk Oblast. He also produced at least 6 intelligence reports on outings to explore Ukrainian military positions in the village of Zolote (Popasna District) and the settlements of Pervomaisk and Popasna in Luhansk Oblast. This reconnaissance was conducted with a view to launching an attack on Ukrainian servicemen stationed there.</p> <p><u>Court findings:</u></p> <p>The Court established that the Accused, intentionally acquired, carried, and kept ammunition without a permit, conspired to enter Ukraine in order to damage the interests of the state, participated in and contributed to the activities of terrorist organisations, and conspired to commit aggressive war.</p> <p>The Court found the Accused guilty of committing the crimes outlined in para. 1 of Art. 263, para. 2 of Art. 332-1, para. 1 of Art. 258-3, para. 2 of Art. 28 and para. 2 of Art. 437 of the Criminal Code of Ukraine.</p>	<p>Art. 258- 3(1) (Creation of a terrorist group or terrorist organisation)</p> <p><u>Other Charges:</u></p> <p>Art. 28(2) (Criminal offense committed by a group of persons, or a group of persons upon prior conspiracy, or an organised group, or a criminal organisation)</p> <p>Art. 263(1) (Unlawful handling of weapons, ammunition or explosives)</p> <p>Art. 332-1(2) (Breach of rules concerning entering and leaving the temporarily occupied territory)</p>
19.			<p><u>Facts:</u></p>	

	<p>Case No. 221/2405/15-к⁴⁹⁵к (formerly 221/770/16-кк) Volnovakha District Court, Donetsk Oblast</p>	<p>Oleh Kartashov, Citizen of Ukraine</p>	<p>No factual information available.</p> <p><u>Procedure:</u> On 22 April March 2016 the Court considered whether to place the defendant on probation, under arrest, or levy another punishment. The Court concluded that the gravity of charges against the Accused precluded a mild sentence. Thus, the court decided to prolong the detention of the Accused while his case is being considered.</p> <p>16 June 2016 detention of the Accused was prolonged for 60 days and next hearing was appointed on 8 July 2016 by video conference.</p> <p>11 August 2016 the court decided to prolong the detention of the Accused for another 60 days until 9 October 2016.</p>	<p>Art. 258- 3(1) (Creation of a terrorist group or terrorist organisation)</p> <p><u>Other Charges:</u> Art. 263(1) (Unlawful handling of weapons, ammunition or explosives)</p>
20.	<p>Case No. 235/481/16-к⁴⁹⁶к Appellate Krasnoarmiysk City District Court, Donetsk Oblast</p>		<p><u>Facts:</u> No factual information available.</p> <p><u>Procedure:</u> On 2 March 2016, the Krasnoarmiysk City District Court (Donetsk Oblast) decided to redirect this case to the Appellate Court of Donetsk Oblast in order to decide which court had territorial jurisdiction over the case.</p>	<p>Art. 437(2) (Planning, preparation and waging of an aggressive war)</p> <p>Art. 258- 3(1) (Creation of a terrorist group or terrorist organisation)</p> <p><u>Other Charges:</u> Art. 28(2) (Criminal offense committed by a group of persons, or a group of persons upon prior</p>

495 Case No. 221/2405/15-к (Decision) Volnovakha District Court, Donetsk Oblast (22 April 2016); (Decision) Volnovakha District Court, Donetsk Oblast (16 June 2016); (Decision) Volnovakha District Court, Donetsk Oblast (11 August 2016).

496 Case No. 235/481/16-к (Decision) Donetsk Oblast Appellate Court (17 March 2016); (Decision) Krasnoarmiysk City District Court of Donetsk Oblast (1 April 2016); (Decision) Krasnoarmiysk City District Court of Donetsk Oblast (6 May 2016); (Decision) Krasnoarmiysk City District Court of Donetsk Oblast (23 May 2016); (Decision) Krasnoarmiysk City District Court of Donetsk Oblast (18 July 2016).

			<p>The Appellate Court found that the Krasnoarmiysk City District Court of Donetsk Oblast had no reason to transfer the case to another court and that it should adjudicate the case itself. Namely, the Appellate Court found that the Krasnoarmiysk court's judges had no conflict of interest in the case (the Accused had never, in fact, worked at that Court), and that there were no other procedural mistakes in defining territorial jurisdiction when the case was referred to the Krasnoarmiysk City District Court. Preparatory court hearing by video conference between the Krasnoarmiysk City District Court of Donetsk Oblast and Ordzhonikidze District Court of Mariupol (Donetsk oblast) was postponed several times because the Accused did not appear before the Court.</p>	<p>conspiracy, or an organised group, or a criminal organisation) Art. 110(2) (Trespass against territorial integrity and inviolability of Ukraine) Art. 263(1) (Unlawful handling of weapons, ammunition or explosives)</p>
21.	<p>Case No. 420/3026/15-к⁴⁹⁷к Novopskov District Court, Luhansk Oblast</p>	<p>Valery Ivanov, citizen of the Russian Federation</p>	<p><u>Facts:</u> No factual information available. <u>Procedure:</u> The Court is in the process of hearing the case. Many witnesses participated in the proceedings via videoconference. For the duration of crimina proceedings the Accused has been held in custody. The Accused's complained that physical coercion was used against him during his arrest, he was</p>	<p>Art. 437(2) (Planning, preparation and waging of an aggressive war) Art. 258-3(1) (Creation of a terrorist group or terrorist organisation) <u>Other Charges:</u> Art. 28(2) (Criminal offense committed by a group of persons, or a group of persons upon prior conspiracy, or an organised group, or a criminal organisation)</p>

⁴⁹⁷ Case of Valery Ivanov, No. 420/3026/15-к (Decision) Novopskov District Court, Luhansk Oblast (28 April 2016); (Decision) Novopskov District Court, Luhansk Oblast (1 June 2016); (Decision) Novopskov District Court, Luhansk Oblast (22 June 2016); (Decision) Novopskov District Court, Luhansk Oblast (18 August 2016).

			threatened with a weapon, held in a pit and a plastic bag was put on his head when he was transferred between detention centres.	
22.	Case No. 235/9442/15-к ⁴⁹⁸ К Krasnoarmiysk City District Court, Donetsk Oblast	Andriy Lanher	<p><u>Facts:</u> The Accused is a member of the DPR. No other factual information available.</p> <p><u>Procedure:</u> As there were concerns that the Accused might obstruct the investigation and/or flee, the Court ordered that he be detained as a preventative measure. His detention was extended for 60 days several times over the course of the proceedings. The Accused is being held at Artemivsk UDPTSU penal institution No. 6 6, Donetsk Oblast.</p>	<p>Art. 437(2) (Planning, preparation and waging of an aggressive war) Art. 258-3(1) (Creation of a terrorist group or terrorist organisation)</p> <p><u>Other Charges:</u> Art. 263(1) (Unlawful handling of weapons, ammunition or explosives) Art. 28(2) (Criminal offense committed by a group of persons, or a group of persons upon prior conspiracy, or an organised group, or a criminal organisation)</p>
23.	Case No. 326/195/16-к ⁴⁹⁹ К Berdyansk City District Court., Zaporizhia Oblast	Fedir Degilevych, citizen of Ukraine	<p><u>Facts:</u> The Accused was a registered resident of Donetsk. He was detained by Ukrainian military servicemen. He is accused of violating of Art. 437 (1), 258-3(1) and 263 of the Criminal Code of Ukraine.</p> <p><u>Procedure:</u></p>	<p>Art. 437(2) (Planning, preparation and waging of an aggressive war) Art. 258-3(1) (Creation of a terrorist group or terrorist organisation)</p> <p><u>Other Charges:</u> Art. 263(1) (Unlawful handling of weapons, ammunition or explosives)</p>

498 *Case of Andriy Lanher*, No. 235/9442/15-к (Decision) Krasnoarmiysk City District Court, Donetsk Oblast (15 April 2016); (Decision) Krasnoarmiysk City District Court, Donetsk Oblast (31 May 2016); (Decision) Krasnoarmiysk City District Court, Donetsk Oblast (26 July 2016); (Decision) Krasnoarmiysk City District Court, Donetsk Oblast (19 August 2016).

499 *Case of Fedir Degilevych*, No. 326/195/16-к (Decision) Berdyansk City District Court, Zaporizhia Oblast (21 April 2016); (Decision) Berdyansk City District Court, Zaporizhia Oblast (17 June 2016); (Decision) Berdyansk City District Court, Zaporizhia Oblast (5 August 2016).

			<p>Initially the case was adjudicated by the Prymorsk District Court in Zaporizhia Oblast. Because there were concerns that the Accused might obstruct the investigation and/or flee, the Court ordered that he be detained as a preventative measure.</p> <p>On 23 February 2016, the Appellate Court in Zaporizhia Oblast decided to transfer the case to the Berdyansk City District Court in Zaporizhia Oblast, as the Prymorsk District Court was unable to form a three-judge panel.</p> <p>On 21 April 2016, the Berdyansk City District Court held another hearing. No progress was made in terms of analysing the facts of the case. The Court did, however, extend the detention of the Accused.</p> <p>17 June 2016 the court ordered that the accused remain in custody for 60 days—until 22 July 2016. Later, detention in UDPtSU penal institution No.11 in Zaporizhia oblast was prolonged until 14 October 2016.</p>	<p>Art. 28(2) (Criminal offense committed by a group of persons, or a group of persons upon prior conspiracy, or an organised group, or a criminal organisation)</p>
24.	<p>Case No. 325/266/16-кк⁵⁰⁰ (formerly 326/196/16-кк) Pryazovsk District Appellate Court, Zaporizhia Oblast</p>	Yevgen Parovin	<p><u>Facts:</u> The Accused is a member of the DPR. No other factual information is available.</p> <p><u>Procedure:</u> On 25 February 2016, the Appellate Court of Zaporizhia Oblast decided to transfer the case to the Pryazovsk District Court in Zaporizhia Oblast</p>	<p>Art. 437(2) (Planning, preparation and waging of an aggressive war) Art. 258-3(1) (Creation of a terrorist group or terrorist organisation) <u>Other Charges:</u></p>

⁵⁰⁰ Case of Yevgen Parovin. No. 325/266/16-к (Decision) Pryazovsk District Court of Zaporizhia Oblast (5 May 2016); (Decision) Appellate Court of Zaporizhia Oblast (7 June 2016); (Decision) Pryazovsk District Court of Zaporizhia Oblast (2 August 2016); (Decision) Appellate Court of Zaporizhia Oblast (26 August 2016).

			<p>because the Prymorsk District Court was not able to create a three-judge panel. On 29 February 2016, Parovin’s pre-trial detention was extended until 28 April 2016.</p> <p>The Pryazovsk District Court rejected the prosecution’s indictment for a number of reasons. Firstly, the Court found that the prosecution had failed to provide reliable evidence proving prior conspiracy. Secondly, the circumstances of the crime were described in an overly vague way, making it impossible for the Court to determine when the crime was committed. Thirdly, the Court ruled that the prosecution had failed to properly describe the role of the Accused in the hostilities led by the DPR. Furthermore, the Court did not believe that proper evidence had been supplied to prove that the Accused had played a commanding role in implementing the “DPR”’s illegal plans.</p> <p>The prosecution filed an appeal that was not satisfied by the Appellate Court of Zaporizhia Oblast.</p> <p>At the next hearing, the court decided to postpone the preparatory hearing and to authorise the Regional Legal Aid Centre to assign an advocate to take separate procedural action and defend the accused.</p> <p>The court also ordered that the accused remain in custody for 60 days—until 30 September 2016.</p>	<p>Art. 263(1) (Unlawful handling of weapons, ammunition or explosives)</p> <p>Art. 28(2) (Criminal offense committed by a group of persons, or a group of persons upon prior conspiracy, or an organised group, or a criminal organisation)</p>
25.			<p><u>Facts:</u></p>	

	<p>Case No. 235/89/16-к⁵⁰¹к Kostiantynivka City District Court, Donetsk Oblast</p>	<p>Citizen of the Russian Federation</p>	<p>No factual information available.</p> <p><u>Procedure:</u></p> <p>On 4 March 4 2016, the Kostiantynivka City District Court in Donetsk Oblast rejected the indictment due to the prosecution’s failure to provide a clear and logical reason why the crimes had been committed. In particular, the Court stressed that the prosecution had provided only a general description of unlawful conduct and the circumstances surrounding it, failing to provide the details of the Accused’s illegal acts. The prosecutor appealed the decision.</p> <p>On 18 April 2016, the Appellate Court of Donetsk Oblast partially satisfied the appeal. The Court ruled that according to Ukraine’s criminal procedural legislation, a court shall decide on the reasoning of specific circumstances and actions not during a preparatory hearing, but during ordinary court hearings. That is why the case was returned to the court of first instance.</p> <p>On 26 April 2016, the Kostiantynivka City District Court of the Donetsk Oblast accepted the case, opened the proceedings and decided upon having the Accused involved in the hearings by videoconference due to his detention.</p> <p>The court took measures to ensure that the Accused could participate in the hearing via videoconference. However, the Accused refused to participate in the hearing without explaining</p>	<p>Art. 437(2) (Planning, preparation and waging of an aggressive war) Art. 258-3(1) (Creation of a terrorist group or terrorist organisation) <u>Other Charges:</u> Art. 28(2) (Criminal offense committed by a group of persons, or a group of persons upon prior conspiracy, or an organised group, or a criminal organisation) Art. 332-1(1) (Breach of rules concerning entering and leaving the temporarily occupied territory) Art. 110(1) (Trespass against territorial integrity and inviolability of Ukraine)</p>
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501 Case No. 235/89/16-к (Decision) Kostiantynivka City District Court, Donetsk Oblast (26 April 2016); (Decision) Kostiantynivka City District Court, Donetsk Oblast (10 May 2016); (Decision) Kostiantynivka City District Court, Donetsk Oblast (5 July 2016); (Decision) Kostiantynivka City District Court, Donetsk Oblast (30 August 2016).

			<p>why he was unable to. The Court considered his conduct to be an abuse of the rights of the Accused and decided to consider his case <i>in absentia</i>. The Court in a hearing with participation of free legal counsel from the Regional Center of free legal aid in Donetsk oblast ordered that the Accused remains in custody—until 28 October 2016.</p> <p>By the Court Decision of 10 May 2016 the Accused was transferred from Mariupol UDPtSU penal institution No.7 in Donetsk region to Artemivsk UDPtSU penal institution No.6 to participate in court proceedings.</p>	
26.	<p>Case. No. 265/7705/15-к⁵⁰² (Case of Iryna Novikova) Ordzhonikidze District Court, Mariupol City, Donetsk Oblast</p>	<p>Iryna Novikova, no further information available</p>	<p><u>Facts:</u> No factual information available.</p> <p><u>Procedure:</u> The Accused asked to cancel a preventive measure in the form of detention. However, the Court refused to do so due to the gravity of the crimes she was accused of, the importance of the proceedings and the high probability she would not turn up to the next hearings. The Court also assigned a new defence lawyer to the Accused. The Accused could not pay for her lawyer, so she was assigned one from the Free Legal Aid Centre.</p>	<p>Art. 437(2) (Planning, preparation and waging of an aggressive war) Art. 258-3(1) (Creation of a terrorist group or terrorist organisation) <u>Other Charges:</u> Art. 27(5) (Types of accomplices)</p>

⁵⁰² Case of Iryna Novikova, No. 265/7705/15-к (Decision) Ordzhonikidze District Court, Mariupol City (28 April 2016); (Decision) Ordzhonikidze District Court, Mariupol City (12 August 2016).

			<p>On 22 June 2016 the Accused asked that she be released from custody referring to chronic illness that she has and to the need to take care of her children. The Court denied her request and ordered that her detention be extended until 10 October 2016, also ordering to receive information concerning the Accused health from Mariupol investigative isolator with indication of her requests for medical aid and whether such aid is possible to provide within the investigative isolator.</p>	
27.	<p>Case No. 225/6623/15-к⁵⁰³ Judgement of 4 July 2016 Dzerzhinsk City Court, Donetsk Oblast</p>	<p><i>Oleksandr Shestak</i>, Citizen of Ukraine</p>	<p><u>Facts:</u> No factual information available.</p> <p><u>Procedure:</u> On 28 March 2016 the defence asked for the Accused to be released from detention. However, the Court refused to do so and in fact prolonged his detention. The Court based its decision on the Accused's lack of social ties, residence in Donetsk (in an area not controlled by Ukraine), and the gravity of the crime allegedly committed. By the Judgement of 4 July 2016 the Court found the Accused guilty of crimes under Arts. 258-3(1), 28(2), and 437(2) and sentenced him to eleven years of imprisonment with full confiscation.</p>	<p>Art. 437(2) (Planning, preparation and waging of an aggressive war) Art. 258-3(1) (Creation of a terrorist group or terrorist organisation) <u>Other Charges:</u> Art. 28(2) (Criminal offense committed by a group of persons, or a group of persons upon prior conspiracy, or an organised group, or a criminal organisation)</p>
TERRORISM				

⁵⁰³ Case of *Oleksandr Shestak*, No. 225/6623/15-к (Decision) Dzerzhinsk City Court of Donetsk Oblast (28 March 2016); (Judgement) Dzerzhinsk City Court of Donetsk Oblast (4 July 2016).

28.	<p>Case No. 428/1476/15-кк⁵⁰⁴ Judgement of 21 October 2015 Severodonetsk City Court, Luhansk Oblast</p>	<p>Citizen of Ukraine, civilian</p>	<p><u>Facts:</u> At the end of July 2014, the Accused was alleged to have joined an LPR reconnaissance and sabotage group carrying out terrorist acts in Luhansk Oblast. In order to ensure the functioning of this group, the Accused found a place for men to stay and take shelter. In that location, members of the group established a transit point and a cache of ammunition and automatic weapons for the purpose of conducting subversive and sabotage activities in Severodonetsk and the surrounding areas. In addition, from late July 2014 to 22 August 2014, the Accused participated in the preparation and commission of a terrorist act in the village of Schedryscheve in Severodonetsk. In August 2014, the Accused gathered information on the deployment of ATO forces near Severodonetsk for the purpose of committing a terrorist act, using explosives, grenade launchers and small arms in an attempt to destroy Ukrainian law enforcement units. <u>Court findings:</u> The Court found that the Accused's actions were long-lasting, systematic and permanent enough to classify him as a member of the LPR. The Accused knowingly and willingly agreed to participate in illegal armed groups and the LPR.</p>	<p>Art. 258 (Terrorist Acts) 1. A terrorist Act, that is the use of weapons, explosions, fire or any other actions that exposed human life or health to danger or caused significant pecuniary damage or any other grave consequences, where such actions sought to violate public security, intimidate population, provoke an armed conflict, or international tension, or to exert influence on decisions made or actions taken or not taken by government agencies or local government authorities, officials and officers of such bodies, associations of citizens, legal entities, or to attract attention of the public to certain political, religious or any other convictions of the culprit (terrorist), and also a threat to commit any such acts for the same purposes, - shall be punishable by imprisonment for a term of five to ten years. 2. The same actions, if repeated or committed by a group of persons upon their prior conspiracy, or where these actions caused significant property damage or</p>
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504 Case No. 428/1476/15-к (Judgment) Severodonetsk City Court, Luhansk Oblast (21 October 2015).

			<p>The Court implicitly found that the duties of the Accused as a member of a sabotage and intelligence group directly supported the LPR and contributed to its purpose of committing terrorist acts.</p> <p>The Court did not find evidence that the Accused had used weapons, but it found that other members of the reconnaissance and sabotage group had.</p> <p>The Court found the Accused guilty of committing crimes under para. 2 of Art. 258 and para. 1 of Art. 258-3 and sentenced him to nine years in prison.</p>	<p>other grave consequences, - shall be punishable by imprisonment for a term of seven to twelve years.</p> <p>Art. 258-3 (Creation of a terrorist group or terrorist organisation)</p>
29.	<p>Case No. 263/1057/15-к⁵⁰⁵</p> <p>Zhovtnevyi District Court of Mariupol, Donetsk Oblast</p>	<p>Citizen of Ukraine, civilian</p>	<p><u>Facts:</u></p> <p>From December 2014 to January 2015, the Accused allegedly worked in Mariupol (Donetsk Oblast), supporting the ideology and slogans of representatives of the DPR. The Accused was alleged to have been active on the Internet forum Error! Hyperlink reference not valid., where his profile name was “Viktorovich”.</p> <p>The Accused posted the following message on the site: “How to end the civil war in Ukraine”. In that post, the Accused allegedly promoted terrorism as a way to achieve his and the DPR’s goals of independence and justice. In his posts, the Accused provided guidelines for terrorist acts</p>	<p>Art. 258-2(1) (Public incitement to commit a terrorist act)</p>

⁵⁰⁵ Case No. 263/1057/15-к (Decision) Zhovtnevyi District Court of Mariupol, Donetsk Oblast (26 January 2015).

			<p>and called for bombing the Kyiv channel reservoir in order to flood the city.</p> <p><u>Procedure:</u></p> <p>On 26 January 2015, the investigator, in consultation with the senior prosecutor, filed a motion to with the Court seeking the detention of the Accused. The Court granted the motion, <i>inter alia</i>, because of the gravity of the crimes in question and aggressive opposition of the Accused to warranted searches of his flat.</p> <p>Witnesses confirmed that the Accused was an ardent supporter of the politics of the Russian Federation.</p> <p>Thus, the Court had grounds on which to believe the Accused might flee and fail to turn up at the hearings. For this reason, the Court ordered for the Accused to be detained. While in detention, the Accused acted aggressively. Later, he repeatedly mentioned to the Court that he was injured during his detention.</p>	
30.	<p>Case No. 310/8512/14-кк⁵⁰⁶</p> <p>Judgment of 19 February 2015</p> <p>Berdyansk District Court, Zaporizhia Oblast</p>	<p>Citizen of Ukraine, civilian</p>	<p><u>Facts:</u></p> <p>In May 2014, the Accused, while in the Donetsk Oblast building of the Security Service of Ukraine (SBU), agreed to become a member of the DPR military as a commander of a mobile unit “Shield”. He later received a certificate confirming his membership.</p>	<p>Art. 258-3 (Creation of a terrorist group or terrorist organisation)</p> <p><u>Other Charges:</u></p> <p>Art. 263(1) (Unlawful handling of weapons, ammunition or explosives)</p> <p>Art. 309(1) (Illegal production, making, purchasing, storage,</p>

⁵⁰⁶ Case No. 310/8512/14-к (Judgment) Berdyansk District Court, Zaporizhia Oblast (19 February 2015).

		<p>The Accused, with other members of Shield, wore military uniforms and guarded checkpoints in Donetsk, near the SBU building. These services were rendered from May 2014 to June 2014. These activities were performed in accordance with orders received from representatives of the DPR. The activities of the Accused endangered the life and health of people and caused significant property damage and other grave consequences.</p> <p>In addition, between May and June 2014, the Accused, following orders from the leaders of the DPR and acting upon a prior agreement with other persons, transported food to areas that had been illegally captured by DPR military formations.</p> <p>In early August 2014, the Accused arrived in the town of Berdyansk, where he was detained by representatives of the SBU.</p> <p>Drugs, weapons, and explosives were found at the residence of the Accused on 9 August 2014.</p> <p><u>Court findings:</u></p> <p>The Accused did not admit to being guilty. He said he had volunteered for the DPR, bought the certificate of his involvement as a souvenir, and, when guarding the checkpoint, received food from ordinary kind-hearted people. He saw no harm in his activities whatsoever.</p> <p>The Court noted Ukrainian legislation on terrorism and one document from the Council of Europe. The Court also noted numerous</p>	<p>transportation or sending of narcotics, psychotropic substances or their analogues not for selling purposes)</p>
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			<p>uncertainties and contradictions in the Accused’s testimony. The Court concluded that the Accused was making statements to avoid responsibility, which were working to the detriment of justice. The Court also stressed that evidence from the prosecutor, experts, and witnesses constituted a reliable body of evidence against the Accused.</p> <p>The Court also found that the Accused had no right to possess, especially with a view to selling, the drug found in his apartment.</p> <p>The Court accordingly found the Accused guilty of committing an offense under para. 1 of Art. .258-3, para.1 of Art. 263 and para. 1 of Art. 309 of the Criminal Code of Ukraine and sentenced him to eight years in prison.</p>	
31.	<p>Case No. 161/338/16-к⁵⁰⁷ Judgment of 23 February 2016 Lutsk City District Court, Volyn Oblast</p>	<p>Viktor Seledtsov, citizen of Ukraine, civilian, resident of Crimea</p>	<p><u>Facts:</u> In March 2014, the Accused assisted in organising the referendum in Crimea on the peninsula’s separation from Ukraine and, consequently, its accession to the Russian Federation. The Accused, acting as a representative of the “Ruskyi Bloc” political party, went to Simferopol to take part in unlawful groups that suppressed protests held by the pro-Ukraine Crimean Tatars population, and to ensure the protection of rallies in support of the referendum on Crimea joining the Russian Federation.</p>	<p>Art. 258-3 (Creation of a terrorist group or terrorist organisation) <u>Other Charges:</u> Art. 110 (Trespass against territorial integrity and inviolability of Ukraine) Art. 341 (Capturing of government or public buildings or constructions) Art. 263 (Unlawful handling of weapons, ammunition or explosives)</p>

⁵⁰⁷ Case of Seledtsov, No. 161/338/16-к (Judgment) Lutsk City District Court, Volyn Oblast (23 February 2016).

		<p>On 19 March 2014, after the referendum took place, the Accused participated in the assault and capture of the headquarters of the Naval Forces of the Ministry of Defence of Ukraine stationed at Sevastopol. The Accused was awarded a medal “For Return of Crimea”.</p> <p>From 2 May 2014 to 23 September 2014, he participated in the activities of the DPR. During this time, the Accused also escorted and protected Ukrainian prisoners of war (POWs) who took part in the ATO. As commissioner of the “8 company” battalion, he conducted military training and taught a "young soldier" course for young volunteers. On 23 November 2015, he was caught with a RGD-5 grenade that he was carrying illegally.</p> <p><u>Court’s findings:</u></p> <p>The Court found that the actions of the Accused in Crimea violated para. 3 of Art. 110 of the Criminal Code of Ukraine, as well as under Art. 341. The Court found that, when committing the aforementioned unlawful acts, the Accused knew that they were detrimental to the sovereignty of Ukraine and might affect the territorial integrity of the country. He participated in an illegal self-defence group and repressed peaceful demonstrations in Crimea. The Court also agreed that the Accused wanted the state border of Ukraine to change illegally. According to the Court, the Accused deliberately participated in guarding one of the voting stations to legitimise the unlawful referendum in Crimea.</p>	
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			<p>The Court found that the Accused deliberately committed illegal acts inside the DPR and did not have any mental issues that would have absolved him from criminal responsibility.</p> <p>Eventually, the accused was found guilty of committing criminal offenses under para. 3 of Art. 110, para. 1 of Art. 258-3, Art. 341, and para. 1 of Art. 263 of the Criminal Code of Ukraine and sentenced to 12 years in prison.</p>	
32.	<p>Case No. 761/11988/15-к⁵⁰⁸ Judgment of 15 January 2016 Selydiv City Court, Donetsk Oblast</p>	<p>Vakula, Citizen of Ukraine, civilian, retired</p>	<p><u>Facts:</u> On 19 May 2015, members of the DPR and other unidentified persons armed with automatic weapons seized and blocked “Donetsk Railways”, a public Ukrainian company. Thereafter, the members of the DPR appointed the Accused head of the company.</p> <p>Between 19 May and 3 June 2015, the Accused actively cooperated with the DPR, executing the orders of its members and giving instructions as to how to use the railway to facilitate the group’s activities. Also, acting on verbal instructions from the Transport Minister of the DPR, the Accused issued and personally signed a number of decrees on the dismissal and transfer of Donetsk Railways staff, which gave the DPR full—and unlawful—control over the company.</p> <p>Further, the Accused instructed his subordinates to monitor—and personally monitored—the</p>	<p>Art. 258-3 (Creation of a terrorist group or terrorist organisation)</p>

⁵⁰⁸ Case of *Vakula*, No. 761/11988/15-к (Judgment) Selydiv City Court, Donetsk Oblast (15 January 2016).

			<p>movement of Donetsk Railways' freight to prevent the ingress of military equipment used by the Armed Forces of Ukraine into the ATO area.</p> <p>In addition, the Accused actively communicated and discussed the particulars of the economic activity of Donetsk Railways with DPR leaders, including the deputy chairman of the Verkhovna Rada of the DPR.</p> <p><u>Court findings:</u></p> <p>The Court found that the prosecution failed to prove that the actions of the Accused were a violation of para. 1 of Art. 258-3 of the Criminal Code of Ukraine.</p> <p>The prosecution did not provide evidence to prove that between 19 May 2014 and 3 June 2014 the Accused acted with criminal intent in his promotion the of the DPR's illegal activity.</p> <p>The Accused was acquitted.</p>	
33.	<p>Case No. 225/3461/15-к⁵⁰⁹</p> <p>Judgment of 9 November 2016</p> <p>Dobropil City Court, Donetsk Oblast</p>	<p>Citizen of Ukraine, civilian</p>	<p><u>Facts:</u></p> <p>The Accused participated in the DPR's terrorist activities.</p> <p>He applied to work for the "OPLOT" combat unit, which was stationed on the premises of the Donetsk military school.</p> <p>The Accused joined this combat unit as a mechanic and driver. He subsequently received a military ID from the DPR and was given the nickname "Beybik".</p>	<p>Art. 258-3(1) (Creation of a terrorist group or terrorist organisation)</p> <p><u>Other Charges:</u></p> <p>Art. 358(4) (Forgery of documents, stamps, seals or letterheads, and sale or use of forged documents)</p>

⁵⁰⁹ Case No. 225/3461/15-к(Judgment) Dobropil City Court, Donetsk Oblast (9 November 2016).

			<p>From December 2014 to 16 April 2015, the Accused took orders from the unit's leadership and defended OPLOT's "base". He also worked at a DPR checkpoint located in the city of Dokuchaevsk in Donetsk Oblast. There, he was armed and controlled the movement of vehicles and individuals through the checkpoint, inspected vehicles and their passengers, threatened people with weapons, carried out orders given by the checkpoint's leaders, and surveilled a nearby location.</p> <p><u>Court findings:</u></p> <p>The Court found that the Accused participated in the activities of the DPR and its military formations, and contributed to its terrorist activities by ensuring its functioning.</p> <p>The Accused was found guilty of committing a crime under para. 1 of Art. 258-3 and sentenced to eight years in prison.</p>	
34.	<p>Case No. 239/621/15-к⁵¹⁰</p> <p>Judgment of 8 February 2016</p> <p>Kramatorsk City Court, Donetsk Oblast</p>	<p>Citizen of Ukraine, civilian</p>	<p><u>Facts:</u></p> <p>No long before 29 January 2015, the Accused called 066-634-88-05 (a "DPR hotline") and entered into a criminal conspiracy. He informed the person who answered the phone of his desire to promote the activities of the DPR and to provide information on the deployment and movement of ATO forces.</p>	<p>Art. 258-3(1) (Creation of a terrorist group or terrorist organisation)</p>

⁵¹⁰ Case No. 239/621/15-k (Judgment) Kramatorsk City Court, Donetsk Oblast (8 February 2016).

		<p>Subsequently, in January and February 2015, the Accused, acting on a prior agreement with DPR, transmitted information on the movement of ATO forces to the DPR.</p> <p><u>Court findings:</u></p> <p>The Court found that the Accused’s argument that he was not guilty because the DPR was not a terrorist organisation was only meant to protect himself and avoid criminal liability. The Court rejected the Accused’s claims completely.</p> <p>The Court found that the aims of the DPR were quite clear, in fact, and were stated explicitly on numerous occasions. The Accused was thus said to have known that his contribution to the DPR’s armed groups could affect Ukraine’s territorial integrity and change the country’s borders. Moreover, according to the Court, the Accused must have understood that actions such as hindering the activities of the legitimate authorities in Donetsk Oblast and suppressing peaceful gatherings and the freedom of expression in the region, were unlawful.</p> <p>The Accused was found guilty of committing a crime under para. 1 of Art. 258-3 of the Criminal Code and was sentenced to nine years in prison. All his property was confiscated.</p>	
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35.	<p>Case No. 221/2304/15-к⁵¹¹</p> <p>Volnovakha District Court, Donetsk Oblast</p>	<p>Citizen of Ukraine, civilian</p>	<p><u>Facts:</u></p> <p>In November 2014, the Accused accepted an offer from an unknown person and joined the DPR, taking active part in the preparation and organisation of a number of crimes until mid-March 2015.</p> <p>In November 2014, the Accused joined “a law-enforcement” unit as a junior inspector of the security department of Volnovakha Penitentiary №120 located in the village of Olenivka in Donetsk Oblast.</p> <p>Therafter, the Accused and other insurgents, captured Penitentiary № 120 and presented himself as its new leader.</p> <p>After capturing the penitentiary, the Accused began serving as a guard for the DPR.</p> <p><u>Court Findings:</u></p> <p>During the pre-trial investigation, the Accused assisted in ending the DPR’s “terrorist activities” and disclosed crimes committed in connection with the establishment and activities of the organisation.</p> <p>The Court agreed with the investigator’s motion to release the Accused from the criminal liability under Art. 258-3(2) of the Criminal Code of Ukraine.</p>	<p>Art. 258-3 (Creation of a terrorist group or terrorist organisation)</p>
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⁵¹¹ Case No. 221/2304/15-к (Decision) Volnovakha District Court, Donetsk Oblast (21 July 2015).

36.	<p>Case No. 219/8206/15-к⁵¹²</p> <p>Judgment of 18 November 2015.</p> <p>Artemivsk City Court, Donetsk Oblast</p>	<p>Citizen of Ukraine, civilian, underage.</p>	<p><u>Facts:</u></p> <p>The Accused joined the DPR in Artemivsk, Donetsk Oblast on 15 April 2014. Between 15 April 2014 and 11 June 2015, he played an active role in the preparation and commission of a number of crimes. The Accused was one of the participants of the “power unit”.</p> <p>The Accused began guarding administrative buildings in Artemivsk, including the DPR headquarters there, on 11 May 2014. He wore camouflage clothing and carried a weapon.</p> <p>From mid-August 2014 to November 2014, the Accused served as a soldier in the “Slovyany” unit. He was charged with protecting Slovyany’s military base in Donetsk. In February 2015, he took the oath of the DPR. In March and April 2015, under the supervision of Russian experts, he undertook military training near Novoazovsk. In May 2015, he joined the “Vostok” battalion, a special military unit of the DPR. He worked at a checkpoint located near the village of Krasniy Partizan in Donetsk Oblast.</p> <p><u>Court Findings:</u></p> <p>The Court found that the Accused was aware that he was working for a group deemed to be a terrorist organisation. It found that he must have known that the group’s activities, including illegally handling weapons, committing terrorist</p>	<p>Art. 258-3(1) (Creation of a terrorist group or terrorist organisation)</p>
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⁵¹² Case No. 219/8206/15-k (Judgment) Artemivsk City Court of Donetsk Oblast (18 November 2015).

			<p>acts, taking over administrative buildings, killing, and orchestrating explosions and burnings not only violated core provisions in Ukrainian law, but posed a direct threat to the lives, health, and property of the people and territorial integrity of Ukraine. The actions of the DPR and its participants led to large-scale death, the destruction of numerous administrative and public buildings, and the pillage of property.</p> <p>Physical evidence, including a mobile phone, SIM-card, and a certificate of membership of “Vostok” as well as other evidence to prove the guilt of the Accused.</p> <p>The Court took into account the cooperation of the Accused, his sincere desire to help the investigation, and the fact the he was underage. Thus, the Court found the Accused guilty of a criminal offense under para. 1 of Art. 258-3 of the Criminal Code of Ukraine and sentenced him to five years in prison.</p> <p>He was released on probation for a period of two years.</p>	
37.	<p>Case No. 229/1522/15-к⁵¹³</p> <p>Judgment of 30 October 2015</p>	<p>Citizen of Ukraine, civilian, resident of Donetsk Oblast</p>	<p><u>Facts:</u></p> <p>In November 2014, the Accused called a member of the DPR’s “Ministry of State Security” and pledged his support. They agreed that the Accused would provide information about the</p>	<p>Art. 258-3(1) (Creation of a terrorist group or terrorist organisation)</p> <p><u>Other Charges:</u></p> <p>Art. 263(1) (Unlawful handling of weapons, ammunition or explosives)</p>

⁵¹³ Case No. 229/1522/15-к (Judgment) Druzhkivskiyi City Court, Donetsk Oblast (30 October 2015).

<p>Druzhkivskyi City Court, Donetsk Oblast</p>	<p>deployment of ATO forces and their means of support/equipment.</p> <p>On 28 November 2014, the Accused saw Ukrainian military equipment moving near the village of Novokalynove in Donetsk Oblast. He called his contact from the Ministry of State Security and informed him that six vehicles with personnel and three armoured personnel carriers were moving with weapons near the village of Novokalynove in Donetsk Oblast.</p> <p>On the same day, the Accused saw damaged military equipment belonging to the Armed Forces of Ukraine. Using his own mobile phone, he made a call to his contact in the Ministry of State Security. The Accused reported the damaged equipment moving towards the territory controlled by Ukraine.</p> <p><u>Court Findings:</u></p> <p>The Court found that the Accused acted intentionally, fully understanding the nature of his conduct. The Court also took into account a number of other issues. Firstly, the Court noted the cooperation of the Accused in investigating the case and establishing the chain of actions in the commission of the crime. Secondly, it noted that the Accused had admitted his guilt. Thirdly, the Court took into account the Accused's claim that he was not really into politics and only provided information to the man from the Ministry of State Security because he was his friend.</p>	
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			<p>Taking into account all of the above, the Court found the Accused guilty under para. 1 of Art. 258-3 of the Criminal Code of Ukraine and sentenced him to four years in prison.</p>	
38.	<p>Case No. 263/9391/15-к⁵¹⁴ Zhovtnevyi District Court of Mariupol, Donetsk Oblast</p>	<p>Citizen of Ukraine, civilian</p>	<p><u>Facts:</u> Between April 2014 and August 2015, the Accused was involved in financing the DPR's activities. The Accused worked with a group of people managing the finances of the DPR. Together, they created artificial organisations that were not registered with Ukrainian authorities. They include the so-called "National Bank of the DPR", "The Ministry of Income and Fees of DPR", and the "Finance Ministry of the DPR". The group's activities were aimed at the illegal collection of money from entrepreneurs conducting business in DPR-controlled territory, as well as the distribution of this money to support DPR groups financially and materially (including those groups directly connected with launching specific attacks against the Armed Forces of Ukraine). The Accused was said to have become involved with the DPR for business reasons, in particular to gain a monopoly on the extraction of coal and other minerals.</p>	<p>Art. 258-5(2) (Financing terrorism) 1. Financing terrorism, i.e. acts committed with the purpose of financial or material support of an individual terrorist or a terrorist group (organisation), organisation, preparation or commission of a terrorist Act, involvement in a terrorist act, public incitement to commit a terrorist act, to facilitate the commission of a terrorist act, the creation of a terrorist group (organisation), - shall be punishable by imprisonment for a term of five to eight years, with the deprivation of the right to occupy certain positions or engage in certain activities for a term up to two years and with forfeiture of property. 2. The same actions committed repeatedly or for selfish motives, or by a group of persons upon their</p>

⁵¹⁴ Case No. 263/9391/15-к (Decision) Zhovtnevyi District Court of Mariupol, Donetsk Oblast (11 August 2016).

		<p>“Sodejstvije LLC”, allegedly controlled by the Accused thanks to his relationship with the DPR, mined coal without the permission of the Government Ukraine, illegally sold it elsewhere in Ukraine, and transferred cash to the DPR for distribution among the group’s armed forces.</p> <p>The Accused transferred money to a special “budgetary” fund of the DPR. This money was subsequently redistributed among DPR military units and was used to purchase military hardware, equipment, ammunition, and engineering equipment used in the commission of terrorist acts against public authorities, law enforcement and other Ukrainian military formations.</p> <p>The Accused financed the DPR through a system of entrepreneurs registered in Ukraine and abroad. The Accused’s contribution to the budget of the DPR was claimed to be at least 20%.</p> <p><u>Procedure:</u></p> <p>The Court noted numerous breaches of Ukrainian law in the way the Accused conducted his mining business. The Court stressed that the Accused used the profits obtained from his business to fund terrorism, in particular to contribute to the purchase of weapons for armed groups in the DPR, which endangered many lives.</p> <p>The court noted that Ukrainian law allows for property—including copyrights, cash, bank accounts, shares, and corporate rights—of suspects or accused persons to be confiscated.</p>	<p>prior conspiracy or on a large scale, or if they caused significant property damage - shall be punishable by imprisonment for a term of eight to ten years, with the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years and with forfeiture of property.</p>
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			<p>The Court noted that both an investigative judge and a judge involved in trial proceedings may decide whether to confiscate property that was designed, prepared, or used to support a criminal offence.</p> <p>The Court also concluded that the Accused founded Sodejstvije and registered it in other people's names with the sole purpose of funding the DPR's unlawful activities.</p> <p>The Court decided to seize Sodejstvije coal being stored in a train station in Donetsk Oblast.</p>	
39.	<p>Case No. 263/6222/15-к⁵¹⁵</p> <p>Zhovtnevyi District Court of Mariupol, Donetsk Oblast</p>	<p>Citizen of Ukraine, civilian</p>	<p><u>Facts:</u></p> <p>From November 2014 to June 2015, the Accused (the director and founder of "Triest-Don LLC") and his acquaintances registered a number of companies, mostly LLCs, in territory controlled by the DPR. These companies were not properly registered according to Ukrainian law. The owners of the companies allegedly set up an illegal trade of fuel and lubricants. As a result of this activity, in February 2015, the Accused and others made a profit of over UAH 700,000. Twenty percent of that sum, or UAH 140,000, was paid to the DPR in tax, thus, according to the Ukrainian government, financing terrorism. The Accused and the companies he is associated with paid no taxes to Ukraine.</p> <p><u>Procedure:</u></p>	<p>Art. 258-5 (Financing terrorism)</p>

⁵¹⁵ Case No. 263/6222/15-к (Decision) Zhovtnevyi District Court of Mariupol, Donetsk Oblast (4 June 2015).

			<p>The court noted that Ukrainian law allows for property—including copyrights, cash, bank accounts, shares, and corporate rights—of suspects or accused persons to be confiscated. The Court noted that both an investigative judge and a judge involved in trial proceedings may decide whether to confiscate property that was designed, prepared, or used to support a criminal offence.</p> <p>The Court noted that the companies controlled by the Accused have considerable sums in their bank accounts. Given the numerous crimes the Accused and his businesses are allegedly involved in— including tax evasion and financing terrorism—the Court decided to confiscate the funds in the Accused’s bank accounts. No transfers may be made to or from it, except to pay for salaries or other budget expenditures.</p>	
40.	<p>Case No. 428/9748/15-к⁵¹⁶</p> <p>Severodonetsk City Court, Luhansk Oblast</p>	<p>Citizen of Ukraine, civilian</p>	<p><u>Facts:</u></p> <p>On 17 November 2014, the Accused started working as a deputy of an illegal organ of the LPR.</p> <p>On 11 May 2014, the Accused, having entered into a conspiracy with an unknown group of people, organised a referendum in the city Rubizhne in Luhansk Oblast. The Accused organised the referendum with a view to changing Ukraine’s borders.</p>	<p>Art. 258-5(2) (Financing terrorism)</p> <p>Art. 258-3(1) (Creation of a terrorist group or terrorist organisation)</p> <p><u>Other Charges:</u></p> <p>Art. 109 (Actions aimed at forceful change or overthrow of the constitutional order or take-over of government)</p> <p>Art. 110 (Trespass against territorial integrity and inviolability of Ukraine)</p>

⁵¹⁶ Case No. 428/9748/15-к (Decision) Severodonetsk City Court, Luhansk Oblast (30 September 2015).

			<p><u>Procedure:</u></p> <p>The Accused has been trying to get away. It was impossible for the investigation to explain the charges to the Accused as the latter fled and is in Luhansk which is temporarily not under the control of the Ukrainian Government.</p> <p>The Court found that the Accused acted deliberately.</p>	
41.	Case No. 266/2069/15-к ⁵¹⁷ Donetsk Oblast Appellate Court	Citizen of Ukraine, civilian, Director of “Antares-UA LLC”	<p><u>Facts:</u></p> <p>The Accused was allegedly a member of the DPR. He was accused of selling coal and using revenue to finance terrorism. On 15 May 2015, nine wagons of coal arrived in the Kramatorsk train station from separatist-controlled territory. “Antares-U LLC” owned and transported this coal.</p> <p><u>Procedure:</u></p> <p>The Court of first instance noted that the Accused had established relations with the “DPR”. He traded in coal illegally and directed a certain amount of his company’s profit to support the “DPR”. The Court found that the Accused was fully aware of the illegality of his actions.</p> <p>The Court noted that Ukrainian law allows for property—including copyrights, cash, bank accounts, shares, and corporate rights—of suspects or accused persons to be confiscated. The Court noted that both an investigative judge and a judge involved in trial proceedings may</p>	Art. 258-5(2) (Financing terrorism)

⁵¹⁷ Case No. 266/2069/15-к (Decision) Donetsk Oblast Appellate Court (29 October 2015).

			<p>decide whether to confiscate property that was designed, prepared, or used to support a criminal offence.</p> <p>The Court, thus, granted the request for confiscation on 18 June 2015. It explained its decision, <i>inter alia</i>, by saying that the profits from the sale of Antares-U’s coal would continue being used to fund terrorism and that subsequent confiscations might be necessary.</p> <p>The Accused appealed the Court’s decision. His appeal was upheld on 29 October 2015. The Donetsk Oblast Appellate Court noted that the confiscation was unreasonable and unnecessary.</p>	
PARTICIPATION IN A TERRORIST ORGANISATION AND participation in an unlawful paramilitary or armed formations				
42.	<p>Case No. 243/4875/14⁵¹⁸</p> <p>Judgment of 13 January 2015</p> <p>Sloviansk District Court, Donetsk Oblast</p>	<p>Citizen of the Russian Federation, civilian</p>	<p><u>Facts:</u></p> <p>In February 2014, together with other citizens of the Russian Federation, the Accused arrived in the Autonomous Republic of Crimea, where he became a member of the DPR. During this period, the Accused was paid to block the perimeter of companies belonging to the State Joint Stock Company “Chornomornaftogaz”. During this time, he met other persons who later became members of the DPR.</p> <p>The DPR has an established hierarchy and structure that consists of two principal blocks: political and military. In March 2014, after the Russian annexation of Crimea, the Accused and</p>	<p>Art. 258-3(1) (Creation of a terrorist group or terrorist organisation)</p> <p>Art. 260(2) (Creation of paramilitary formations in contravention of laws)</p> <p><u>Other Charges:</u></p> <p>Art. 263(1) (Unlawful handling of weapons, ammunition or explosives)</p>

⁵¹⁸ Case No. 243/4875/14 (Judgment) Sloviansk District Court, Donetsk Oblast (13 January 2015).

		<p>several other people received an offer to go to the eastern regions of Ukraine to plan, establish, and promote the annexation of these regions by the Russian Federation, as a part of the DPR's military block.</p> <p>According to the plan developed by leaders of the DPR, the Accused performed the following tasks:</p> <ul style="list-style-type: none"> - conducting armed resistance, combating and hindering the activity of Ukrainian police officers and military servicemen; - capturing settlements, buildings and other facilities in Donetsk Oblast; - constructing and strengthening checkpoints, and equipping firing positions and other structures; - protecting the DPR's checkpoints and other places captured by its members; - verifying information on the movement of Ukrainian military units; - following other instructions from the leaders of the DPR's military block. <p>On 6 April 2014, members of the DPR organised riots near the Donetsk Oblast State Administration, ultimately capturing the building and announcing the creation of the DPR. The "Declaration of Sovereignty of The DPR" and the "Act on The Independence of The DPR" were the republic's founding documents.</p> <p>On 12 April 2014, the Accused and a group of other people, acting in accordance with the instructions of the head of the DPR's military unit,</p>	
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		<p>arrived in the city of Sloviansk in Donetsk Oblast and stayed in the building of the Sloviansk City Division of the Department of the Security Service of Ukraine that had been seized by the “DPR”.</p> <p>On 15 April 2014, on instructions from the leaders of the DPR, the Accused participated in the capture of the Sloviansk City Council building.</p> <p>On 14 June 2014, at approximately 10 pm, the Accused and other men, armed with a “AKS-74” Kalashnikov automatic rifle and a “PM” gun, travelled in a KIA at high speed along the Kharkiv–Rostov highway, near the village of Yurkivkske in Donetsk Oblast. On the road they noticed checkpoint No.4, controlled by ATO forces. Realising that they would not be able to retreat and would be apprehended by Ukrainian forces, they decided to attack the checkpoint. Ukrainian forces were able to stop their attack and apprehend them.</p> <p><u>Court findings:</u></p> <p>The Court found that there was enough reliable evidence against the Accused. The charge was supported by the weapons and bullets the Accused used, the forensics, the fact that the Accused was recognized as a member of the DPR by a witness, and his own confession.</p> <p>Given the above facts, the Court found the Accused guilty of committing crimes under para. 1 of Art. 258-3, para. 2 of Art. 260, and para. 1 of Art. 263 of the Criminal Code of Ukraine and sentenced him to eight year in prison.</p>	
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CATEGORY 2: CASE LAW USING DOMESTIC CRIMES INSTEAD OF WAR CRIMES

43.	Case No. 415/3534/14-к ⁵¹⁹ Judgment of 14 January 2016 Lysychansk City Court, Luhansk Oblast	Horbachov, Citizen of Ukraine, civilian	See Case No. 4	Art. 260 (Creation of paramilitary formations in contravention of laws) Art. 146 (Illegal confinement or abduction of a person) <u>Other Charges</u> Art. 289 (Unlawful appropriation of a vehicle)
44.	Case No. 233/2520/15-к ⁵²⁰ Judgment of 22 May 2015 Kostiantynivka City District Court, Donetsk Oblast	Citizen of Ukraine, civilian	<u>Facts:</u> The Accused took an active part in riots on 16 March 2015. The riots were in response to traffic accidents involving Ukrainian servicemen, resulting in injuries to residents of Konstantinivka. The rioters surrounded a car belonging to an official and flipped it over while people were still inside it. The incident was organised with a view to lynch the people in the car, who were mistaken as Ukrainian servicemen. On the same day, they took over a hostel where Ukrainian policemen were staying. They damaged the front door of the hostel and ripped down all the defences, including the sandbags that the police had erected to secure the building. The company entered the first floor of the building and blocked all the policemen there. In doing so,	Art. 294(1) (Riots) 1. Organizing riots accompanied with violence against any person, riotous damage, arson, destruction of property, taking control of buildings or construction, forceful eviction of citizens, resistance to authorities with the use of weapons or any other things used as weapons, and also active participation in riots, shall be punishable by imprisonment for a term of five to eight years. Art. 186(1) (Robbery) 1. Overt stealing of somebody else's property (burglary), -

⁵¹⁹ Case of Horbachov.

⁵²⁰ Case No. 233/2520/15-к (Judgment) Kostiantynivka City District Court of Donetsk Oblast (22 May 2015).

			<p>the Accused and his accomplices also prevented the policemen from performing their duties.</p> <p>The Accused also stole a mobile phone from one of the policemen staying in the hostel.</p> <p><u>Court findings:</u></p> <p>The Court found that the Accused acted deliberately, fully understanding his actions and their possible consequences. Witnesses confirmed the facts proving the guilt of the Accused. The Accused himself admitted that he was guilty of all charges, and said he was willing to redeem his himself and never act in such an unlawful way again.</p> <p>Taking into account the above, the Court found that there were enough reasons to replace the Accused's six-years sentence with a three-years probationary period.</p>	<p>shall be punishable by a fine of 50 to 100 tax-free minimums of citizens' income, or community service for a term of 120 to 240 hours, or correctional labor for a term up to two years, or arrest for a term up to six months, or imprisonment for a term up to four years.</p>
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PART II: CASE LAW ON CRIMES COMMITTED IN DONBAS INVOLVING UKRAINIAN SERVICEMEN AND LAW ENFORCEMENT OFFICIALS

	Case Details	Accused	Decision Summary	Charge (According to the Criminal Code of Ukraine)
<i>CATEGORY 1: CASE LAW ON AGGRESSIVE WAR, TERRORISM, AND MILITARY "COMPETENCE"-TYPE OFFENCES</i>				
<i>CREATION OF A CRIMINAL ORGANISATION</i>				
1.		Yuriy Shevchenko, Mykyta Svyrydovsky,	<p><u>Facts:</u></p> <p>The Tornado was a volunteer patrol company in Ukraine's special police force. The members of</p>	Art. 255 (Creation of a criminal organisation)

<p>Case No. 756/16332/15-к⁵²¹ Obolon District Court, Kyiv</p>	<p>Mykyta Kust, Roman Ivash, Andriy Demchuk, Borys Hulchuk, Maksym Glebov, and Ruslan Onischenko. Citizens of Ukraine, Servicemen in the Volunteer patrol company “Tornado” of Ukraine’s special police force.</p>	<p>the squadron were accused of torturing and otherwise mistreating civilians, unlawfully depriving them of their liberty, and raping some men. They were said to have recording these acts on video. The alleged place of torture was the basement of a secondary school in the city of Privolie.</p> <p>According to the Prosecution, at least ten people were detained by Tornado members between January and April 2015. Among others, two victims claimed that they were beaten with sticks and tortured with shockers and electric generators, which were used on their scrotums, heads, spines, and legs. Kettlebells were attached to one of the victims to make it difficult for him to move. Tornado members chained a man to sports equipment and gang raped him; they videotaped the act then killed him. A woman was also tortured and raped.</p> <p><u>Procedure:</u></p> <p>The Court received numerous requests to release the men and hand down a softer preliminary decision. However, the Court found these requests to be unreasonable given the number and gravity of the charges (torture, creation of an unlawful enterprise, rape, sexual violence in an unnatural way) and extended the arrest of all the Accused.</p> <p>During a hearing on 30 June 2016, the prosecutor asked the Court to extend the</p>	<p>1. Creation of a criminal organisation for the purpose of committing a grave or special grave offense, and also leadership or participation in such organisation, or participation of offenses committed by such organisation, and also the organizing, running or facilitating a meeting (convention) of members of criminal organisations or organized groups for the purpose of development of plans and conditions for joint commission of criminal offenses, providing logistical support of criminal activities or coordination of activities of so associated criminal organisations or organized groups, - shall be punishable by imprisonment for a term of five to twelve years. (...)</p> <p>Art. 365 (Excess of authority or official powers by a law enforcement officer)</p> <p>1. Abuse of power or official authority, that is deliberate commission of a law enforcement officer acts that are clearly beyond its right or authority if they have caused substantial harm to legally</p>
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⁵²¹ *Tornado Cases*, No. 756/16332/15-к (Decision) Obolon District Court, Kyiv (4 May 2016).

			<p>detention of the Accused. The Accused's defence lawyer asked that the Court reduce the preventative restrictions placed on the Accused. Taking to account the gravity of the crimes, however, the court ordered their custody be extended until 05 September 2016.</p>	<p>protected rights, the interests of individual citizens, state and public interests, the interests of legal entities, - shall be punishable by restraint of liberty for a term up to five years or by imprisonment for a term of two to five years with the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years.</p> <p>2. Actions provided in the first part of this article, if accompanied by violence or threat of violence, use of weapons or special means or painful and those that offend personal dignity of the victim, actions, in the absence of torture, - shall be punishable by imprisonment for a term of three to eight years with the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years.</p> <p>Art. 146(3) – (Illegal confinement or abduction of a person)</p> <p>Art. 127 (Torture)</p> <p>1. Torture, that is an wilful causing of severe physical pain or physical or mental suffering by way of battery, martyrizing or other violent actions for the purpose of inducing</p>
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				<p>the victim or any other person to commit involuntary actions, including receiving from him/her or any other person information or confession, or for the purpose of punishing him/her or any other person for the actions committed by him/her or any other person or for committing of which he/she or any other person is suspected of, as well as for the purpose of intimidation and discrimination of him/her of other persons, - shall be punishable by imprisonment for a term of two to five years.</p> <p>2. The same actions repeated or committed by a group of persons upon prior conspiracy, or based on racial, national or religious intolerance, - shall be punishable by imprisonment for a term of five to ten years.</p> <p>Art. 153 (Violent unnatural gratification of sexual desire)</p> <p>1. Violent unnatural gratification of sexual desire combined with physical violence, or threat of violence, or committed by taking advantage of the victim's helpless condition, - shall be punishable by imprisonment for a term up to five years.</p>
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Excess of authority or official powers				
2.	Case No. 756/16332/15-к ⁵²² Obolon District Court, Kyiv	Tornado Cases	See Case No. 1	
3.	Case No. 638/18003/15-к ⁵²³ Kharkiv Oblast Appellate Court	Citizen of Ukraine, senior special agent for particularly important cases of the Counterintelligence Department of the	<p><u>Facts:</u> On the morning of 14 November, Oleksandr Agafonov was allegedly stopped at the Iziurm checkpoint in Kharkiv Oblast while driving to Donetsk with his wife and child. They were asked to go to the police station for an interview. Mr Agafonov was not formally detained, but was</p>	<p>Art. 365 (Excess of authority or official powers) 1. Excess of authority or official powers, that is a wilful commission of acts, by an official, which patently exceed the rights and powers vested in him/her, where it caused</p>

⁵²² *Ibid.*

⁵²³ *Case of Agafonov*, No. 638\18003\15-к (Decision) Appellate Court of Kharkiv Oblast (23 November 2015).

		<p>Head Department of the SBU in Kyiv city and Kyiv Oblast</p>	<p>held by the police. At 5 pm, a “filtering group” composed of two masked men not wearing uniforms and a SBU officer entered the police station and took Mr. Agafonov away. They brought him back at 9 pm. Upon his return, Mr. Agafonov was alive but complained that he was not feeling well. An hour later the medical team that the police called for Afagonov declared that he was dead. According to the doctors, Afagonov’s death was caused by shock and blunt-force injury to his chest.⁵²⁴</p> <p><u>Procedure:</u></p> <p>The two SBU officers were charged with exceeding their authority. They retained their positions, however, pending the investigation.⁵²⁵</p> <p>On 28 October 2015, the Court authorised the release of both men on bail (UAH 91,000).</p> <p>In subsequent hearings, the Court concluded that a considerable body of evidence supported the allegations against the Accused. In particular, the Court referred to the results of an examination of the premises where the Accused had allegedly kept the victim, forensic evidence, and witness statements.</p> <p>The Court also noted that the gravity of the alleged crime did not allow for the Accused to be released from detention.</p>	<p>any substantial damage to the legally protected rights and interest of individual citizens, or state and public interests, or interests of legal entities, - shall be punishable by the correctional labour for a term up to two years, or restraint of liberty for a term up to five years, or imprisonment for a term of two to five years, with the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years.</p> <p>2. Excess of authority or official powers accompanied with violence, use of weapons, or actions that caused pain or were derogatory to the victim's personal dignity, - shall be punishable by imprisonment for a term of three to eight years with the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years.</p>

524 Office of the United Nations High Commissioner for Human Rights, “Report on the human rights situation in Ukraine, 16 February to 15 May 2015”, para. 106.

525 *Ibid.*, para. 71.

4.	<p>Case No. 415/1468/15-к⁵²⁶ Judgment of 6 July 2015 Lysychansk City Court, Luhansk Oblast</p>	<p>Svyatoslav Maksimov, Citizen of Ukraine, law enforcement officer in platoon No. 2, company No. 2 of the patrol duty battalion of the special police “Luhansk - 1”</p>	<p><u>Facts:</u> The Accused, a law enforcement officer, participated in the ATO. On 7 October 2014, he was working at the “Carbonita” checkpoint on Pioneer Street in the Pervomaisky District of Luhansk Oblast. He stopped a car to check the driver’s documents. The driver ignored his requests and the Accused shot him. The victim was severely wounded and died at the hospital.</p> <p><u>Court findings:</u> The Court analysed the behaviour of the Accused, taking into account the principal human rights contained, <i>inter alia</i>, in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Law of Ukraine “On Police”. The Court noted that both documents provide for the respect of the rights, health and dignity of a person. The jurisprudence of the Court and laws specifying the scope of the professional duties of policemen address the proportionality and legitimate use of force.</p> <p>The Court stated that the behaviour of the victim was not exceptional. Although he did disobey the officer’s order, he surely did not pose any grave danger to society. The Accused understood this and deliberately acted with excess force.</p> <p>The Court found him guilty of exceeding his authority and sentenced him to seven years in</p>	<p>Art. 365(3) (Excess of authority or official powers by a law enforcement officer)</p>
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⁵²⁶ Case No. 415/1468/15-к (Judgment) Lysychansk City Court, Luhansk Oblast (6 July 2015).

			prison. He is also prohibited him from holding any law enforcement position for three years.	
DISOBEDIENCE				
5.	Case No. 219/3828/15-к ⁵²⁷ Judgment of 15 February 2016 Artemivsk City District Court, Donetsk Oblast	Dmytro Holik, Citizen of Ukraine, Captain in the Ukrainian Armed Forces.	<p><u>Facts:</u> The Accused failed to heed his commander's order that he be transferred out of his military unit in the Mykytiv District of Donetsk Oblast to a unit in the Artemivsk District of Donetsk Oblast. The Accused denied his guilt. He claimed he received no express instructions as to how or when to follow the order. Moreover, the Accused claimed that when he wanted to transfer units, he was prevented from doing so by other servicemen who came and held him back.</p> <p><u>Court findings:</u> The Court analysed numerous witness statements. It paid particular attention to statements given by other servicemen, who said the Accused had seen a hard copy of the order. Moreover, he had helped repair the cars that were to be taken to the unit in Artemivsk and even packed his things to leave. The Court concluded that the Accused had tried to pretend that he was willing to follow his superior's order. In reality, however, he tried to create a situation in which he would be prevented from leaving. The Court did not find the impossibility of the Accused to leave at a specific time as a</p>	<p>Art. 402(3) (Disobedience)</p> <p>1. Disobedience, that is an open refusal to comply with orders of a commander, and also any other wilful failure to comply with orders, - shall be punishable by service restrictions for a term up to two years, or custody in a penal battalion for a term up to two years, or imprisonment for a term up to three years.</p> <p>2. The same acts committed by a group of persons, or where they caused any grave consequences, - shall be punishable by imprisonment for a term of three to seven years.</p> <p>3. Disobedience committed in state of martial law or in a battle, - shall be punishable by imprisonment for a term of five to ten years.</p>

⁵²⁷ Case of Holik Dmytro, No. 219/3828/15-к (Judgment) Artemivsk City District Court, Donetsk Oblast (15 February 2016).

			<p>reasonable justification for not leaving at all and, thus, not following the order.</p> <p>Given the circumstances described above and the fact that the Accused had very good credentials at work as well as an underage daughter, the Court sentenced him to five years in prison with a one-year probationary period.</p> <p>The Accused has appealed the judgment. The case is currently being adjudicated by an appellate court.</p>	
6.	<p>Case No. 419/353/16-к⁵²⁸</p> <p>Judgment of 11 February 2016</p> <p>Novoaydar District Court, Luhansk Oblast</p>	<p>Dmytro Maliuta, Citizen of Ukraine, junior sergeant in the Ukrainian Armed Forces</p>	<p><u>Facts:</u></p> <p>The Accused ignored an order from the commander of his checkpoint in Grechyshkino (Luhansk Oblast) not to leave his post. He left and went to Severodonetsk to address personal matters.</p> <p><u>Court findings:</u></p> <p>The Accused acknowledged his guilt in full. During the pre-trial investigation, he concluded a plea bargain with the prosecutor, according to which the Accused agreed to pay fine.</p> <p>The Court found that the Accused had acted deliberately and was aware that he was breaking the law. However, the Court took into account the Accused's strong record, including his combat service, as well as the fact that he had a young child. Taking into account his confession, the Court found the Accused guilty but upheld the</p>	<p>Art. 402(3) (Disobedience)</p>

⁵²⁸ Case of Maliuta Dmytro, No. 419/353/16-к (Judgment) Novoaidarsk City District Court, Luhansk Oblast (11 February 2016)

			provisions of the plea agreement. The Accused was ordered to pay a fine of UAH 15,300 (approximately USD 565).	
7.	<p>Case No. 500/4397/15-к⁵²⁹</p> <p>Judgment of 4 November 2015</p> <p>Izmail City District Court, Odesa Oblast</p>	<p>Serhiy Pryluchnyi, Citizen of Ukraine, inspector in the State Border Service</p>	<p><u>Facts:</u> The Accused failed to execute his commander's order that he serve in the Bilhorod-Dnistrovskiy military unit in the ATO zone.</p> <p><u>Court findings:</u> The Accused partially admitted his guilt. He explained that he had not protested against serving in the ATO zone, but against that particular transfer, which would have would have separated him from his family. He said he was the family's breadwinner and was solely responsible for the support of his mother.</p> <p>The Court found the witnesses' statements credible. Fellow servicemen, as well as the commander who had given the order for the Accused to be transferred, confirmed the Accused's good reputation and the fact that it was the first time he had refused to follow orders from his superiors.</p> <p>The Court also noted that other servicemen had informed the Accused of the legal consequences of his actions on multiple occasions.</p> <p>The Court found the Accused guilty of failing to execute a commander's orders [Article 402(1)]. The Court also imposed certain professional</p>	<p>Art. 402(1) (Disobedience)</p>

⁵²⁹ Case of *Pryluchnyi Serhiy*, No. 500/4397/15-к (Judgment) Izmail City District Court, Odesa Oblast (4 November 2015).

			restrictions. For the period of one year, the Accused would not be entitled to any promotion or change of his military rank. Also, 10% of his salary will be transferred to the State.	
failure to comply with orders				
8.	Case No. 373/1783/15-к ⁵³⁰ Judgment of 7 July 2015 Pereiaslav-Khmelnytskyi City District Court, Kyiv Oblast	Oleksandr Titar, Citizen of Ukraine, serviceman in the Armed Forces of Ukraine	<p><u>Facts:</u> The Accused failed to inform the Prosecutor's Office that a soldier was absent from his military unit for more than one month.</p> <p><u>Court findings:</u> The Court recognised the plea bargain, which required the Accused to pay a fine. The Court noted the Accused's admission of guilt on all charges, his willingness to cooperate with investigators, positive references, and the fact that his actions did not lead to any grave consequences.</p> <p>The Accused was found guilty of failing to comply with a commander's orders [Art. 403(2)]. The Court approved the plea bargain and ordered the Accused to pay a fine of UAH 1,000 (approximately USD 37).</p>	<p>Art. 403(2) (Failure to comply with orders)</p> <p>1. Failure to comply with orders of a commander upon absence of elements specified in paragraph 1 of Article 402 of this Code, where it caused any grave consequences, - shall be punishable by service restrictions for a term up to two years, or custody in a penal battalion for a term up to one year, or imprisonment for a term up to two years.</p> <p>2. The same acts committed in state of martial law or in a battle, - shall be punishable by imprisonment for a term of three to seven years.</p>
resistance to a commander or coercion of a commander into breaching the official duties				
9.	Case No. 222/812/15-к ⁵³¹	Rustan Rozumii, Citizen of Ukraine,	<p><u>Facts:</u></p>	<p>Art. 404 (Resistance to a commander or coercion of a</p>

⁵³⁰ Case of Titar Oleksandr, No. 373/1783/15-к (Judgment) Pereiaslav-Khmelnytskyi City District Court, Kyiv Oblast (7 July 2015).

⁵³¹ Case of Rozumii Rustam, No. 222/812/15-к (Judgment) Volodar District Court, Donetsk Oblast (20 July 2015).

	<p>Judgment of 20 July 2015 Volodar District Court, Donetsk Oblast</p>	<p>Ukrainian infantryman</p>	<p>While under the influence of alcohol, the Accused threatened to kill other soldiers and fired his rifle three times. He was arrested shortly thereafter. On his way to the commander, the Accused resisted arrest and prevented the officers from carrying out their duties (he tried to strangle and beat the soldier escorting him). The Accused hit another serviceman in the head and ear, causing multiple injuries.</p> <p><u>Court findings:</u> The prosecutor and the Accused concluded a plea bargain. The Accused admitted his guilt and said he was sorry about committing the crimes. He also confessed to having consumed a great deal of alcohol on the night of the incident. Given the Accused's confession and witness and victim statements, the Court decided that the Accused was guilty. The Court concluded that the Accused's drunkenness was an aggravating factor.</p> <p>The Accused was found guilty of resistance to a person fulfilling his or her military duties during a special period [Article 404(3)]. He was also found guilty of threatening to kill, and there was reason to believe that his threat might be fulfilled [Article 129(1)]. Eventually, the Accused was sentenced to one year and one month of service in a disciplinary battalion.</p>	<p>commander into breaching the official duties)</p> <p>1. Resistance to a commander or any other person acting in discharge of military service duties, or coercion of these persons into breaching their duties, - shall be punishable by service restrictions for a term up to two years, or detention in a disciplinary battalion for a term up to two years, or imprisonment for a term of two to five years.</p> <p>2. The same acts committed by a group of persons, or with the use of weapons, or where they caused any grave consequences, - shall be punishable by imprisonment for a term of three to eight years.</p> <p>3. Any such acts as provided for by paragraph 1 or 2 of this Article, if they were committed in state of martial law or in a battle, - shall be punishable by imprisonment for a term of three to twelve years.</p>
10.		<p>Oleksandr Pavlenko, Citizen of Ukraine,</p>	<p><u>Facts:</u></p>	<p>Art. 404(1) (Resistance to a commander or coercion of a</p>

	<p>Case No. 221/747/15-к⁵³² Judgment of 29 April 2015 Volnovakha District Court, Donetsk Oblast</p>	<p>Lieutenant in the Armed Forces of Ukraine</p>	<p>On 17 January 2015, the Accused began to shoot his service rifle while drinking alcohol in Volnovakha. Representatives from his commandant's office arrived to subdue him. They were told that the Accused had threatened the police officers with his weapon before running away. When the Accused was found he resisted being arrested by people from his commandant's office.</p> <p><u>Court findings:</u></p> <p>The prosecutor and the Accused concluded a plea bargain. The Accused confessed, apologized for violating the law, and said that he was drunk during the incident. In light of the Accused's confession and witness and victim statements, the Court found the Accused guilty. The Court concluded that the Accused's drunkenness was an aggravating factor.</p> <p>The Accused was found guilty of resistance to a person fulfilling his or her military duties [Article 404(1)]. He was sentenced to two years in prison with a one-year probationary term.</p>	<p>commander into breaching the official duties)</p>
<p>threats or violence against a commander</p>				
<p>11.</p>	<p>Case No. 219/11264/15-к⁵³³ Judgment of 25 February 2016</p>	<p>Dmytro Cherniavsky, Citizen of Ukraine, serviceman</p>	<p><u>Facts:</u></p> <p>The Accused's Captain found him under the influence of alcohol. The Captain ordered the Accused to submit to a blood test. When the</p>	<p>Art. 405(3) (Threats or violence against a commander) 1. Threats of murder, or causing bodily injury to or battery of a</p>

⁵³² Case of Pavlenko Oleksandr, No. 221/747/15-к (Judgment) Volnovakha District Court, Donetsk Oblast (29 April 2015).

⁵³³ Case of Cherniavsky Dmytro, No. 219/11264/15-к (Judgment) Artemivsk City District Court, Donetsk Oblast (25 February 2016).

	<p>Artemivsk City District Court, Donetsk Oblast</p>		<p>captain returned the soldier had not yet had a blood test and was still behaving improperly. The Captain reprimanded the Accused for his behaviour, at which point the Accused punched the Captain in his left ear, lightly injuring the man.</p> <p><u>Court findings:</u></p> <p>The Court found that the Accused acted deliberately and was fully aware of the unlawfulness of his behaviour. The Court concluded that the Accused's drunkenness was an aggravating factor. The Accused was found guilty of causing bodily injury to a commander in connection with his military duties during a special period [Article 405(3)]. He was sentenced to five years of imprisonment with a two-year probationary period.</p>	<p>commander, or threats of destruction of his/her property in connection with his military service duties, - shall be punishable by custody in a penal battalion for a term up to two years, or imprisonment for the same term.</p> <p>2. Bodily injury, battery or any other violent acts in respect of a commander in connection with his/her military service duties, - shall be punishable by imprisonment for a term of two to seven years.</p> <p>4. Any such acts as provided for by paragraph 1 or 2 of this Article, if committed by a group of persons, or with the use of weapons, or in state of martial law or in a battle, - shall punishable by imprisonment for a term of five to ten years.</p>
12.	<p>Case No. 219/25/16-к⁵³⁴ Judgment of 17 February 2016</p>	<p>Oleksandr Bakai, Citizen of Ukraine, serviceman</p>	<p><u>Facts:</u></p> <p>The Accused was often undisciplined, failing to attend meetings or arriving late, etc. On 1 October 2015, the Accused, while under the influence of alcohol, was found by his superior in his military unit. His commander reprimanded</p>	<p>Art. 405(3) (Threats or violence against a commander)</p>

⁵³⁴ Case of Bakai Oleksandr, No. 219/25/16-к (Judgment) Artemivsk City District Court, Donetsk Oblast (17 February 2016).

	Artemivsk City District Court, Donetsk Oblast		<p>the Accused for his behaviour. The Accused punched him in his left ear, lightly injuring the man. He then threatened to kill his commander, who said that he was afraid that the Accused would follow through on his threats because he is a very tough man and very agitated at the time.</p> <p><u>Court findings:</u></p> <p>The Accused admitted to being guilty of all charges and apologized for his behaviour. According to his fellow servicemen, the Accused was on his best behaviour after the incident.</p> <p>The Accused was found guilty of threatening to murder and cause bodily injury to a commander in connection with his military duties during a special period [Article 405 (3)] and was sentenced to one year in prison.</p>	
13.	Case No. 428/8866/15-kr ⁵³⁵ Judgment of 18 September 2015 Severodonetsk City Court, Luhansk Oblast	Andriy Fedorchuk, Citizen of Ukraine, Lieutenant in the Ukrainian Armed Forces	<p><u>Facts:</u></p> <p>On 24 July 2015, the Accused came back from holiday under the influence of alcohol. His commander reprimanded him and ordered him to go to sleep. The Accused disobeyed the order and shot at his commander, who was not injured.</p> <p><u>Court findings:</u></p> <p>The Court found that the Accused had acted deliberately. The Accused admitted his guilt and apologized. The Court concluded that the Accused's drunkenness was an aggravating factor.</p>	Art. 405(4) (Threats or violence against a commander)

535 *Case of Fedorchuk Andriy* (Judgment) Severodonetsk City Court of Luhansk Oblast (18 September 2015) <<http://reyestr.court.gov.ua/Review/51727426>> accessed 19 May 2016.

			The Accused was found guilty of threatening to murder his commander while fulfilling his military duties, during special period [Article 405(4)] and was sentenced to five years in prison and two years of probation.	
violation of THE statutory rules of conduct of military servants not subordinated to each other				
14.	Case No. 570/3006/15-к ⁵³⁶ Judgment of 9 October 2015 Rivne District Court, Rivne Oblast	Andriy Dovbenko, Citizen of Ukraine, serviceman	<p><u>Facts:</u> On 24 March 2015, the Accused, while under the influence of alcohol, got into a fight with another soldier. The Accused stabbed the soldier in the neck, forearm, and right arm three times. The victim's injuries were mildly severe. The Accused also stabbed another soldier in the left arm, lightly injuring him.</p> <p><u>Court findings:</u> The Court found that the Accused had acted deliberately. The Accused admitted his guilt and apologized. The Court concluded that the Accused's drunkenness was an aggravating factor.</p> <p>The Court also found that all parties to the incident had the same understanding of the fight. The Accused was found guilty of violating Article 406(2). The Accused was sentenced to three years in prison, with a one-year probation period.</p>	<p>Article 406(2) (Violation of statutory rules of conduct of military servants not subordinated to each other)</p> <p>1. Violation of statutory rules of conduct of military servants not subordinated to each other, involving battery or any other violence, - shall be punishable by arrest for a term up to six months, or custody in a penal battalion for a term up to one year, or imprisonment for a term up to three years.</p> <p>2. The same act committed in respect of a several persons, or where it caused minor or medium grave bodily injury, or involved humiliation or debasement of a military serviceman, - shall be punishable by custody in a penal battalion for a term up to two</p>

⁵³⁶ Case of Dovbenko Andriy, No. 428/8866/15-к (Judgment) Rivne District Court of Rivne Oblast (9 October 2015).

				years, or imprisonment for a term of two to five years.
15.	Case No. 226/3496/15-к ⁵³⁷ Judgment of 10 November 2015 Dymyrov City Court, Donetsk Oblast	Ivan Horbenko, Citizen of Ukraine, serviceman	<p><u>Facts:</u> On 11 September 2015, the Accused, while under the influence of alcohol, got into a fight with another soldier. The Accused hit the other soldier's leg with a Kalashnikov rifle and then stabbed another soldier in the buttocks, lightly injuring the man.</p> <p><u>Court's findings:</u> The Court found that the Accused acted deliberately. He admitted to being guilty on all counts and apologized. The Court found that all parties to the incident had the same understanding of the incident. The Court concluded that the Accused's drunkenness was an aggravating factor. The Court also said it wanted to punish the Accused in a way that would help him change his behaviour. The Accused was found guilty of violating Article 406(2). He was sentenced to two years in prison, with a one-year probationary period.</p>	Article 406(2) (Violation of statutory rules of conduct of military servants not subordinated to each other)
NEGLECT OF DUTY IN MILITARY SERVICE				
16.		Citizen of Ukraine, servicemen	<u>Facts:</u>	Art. 425 (Neglect of duty in military service)

⁵³⁷ Case of Horbenko Ivan, 226/3496/15-к (Judgment) Dymyrov City Court of Donetsk Oblast (10 November 2015).

	<p><i>Case of the Battle of Ilovaisk</i>⁵³⁸</p>		<p>The Battle of Ilovaisk started on 7 August 2014, when the Armed Forces of Ukraine and pro-Ukrainian paramilitaries attempted to win the city of Ilovaisk back from pro-Russian insurgents affiliated with the DPR. Government forces were able to enter the city on 18 August but were quickly encircled by separatists. After days of encirclement, the government forces made an agreement with the separatists, supported by Vladimir Putin, allowing them to retreat from the city. The separatists did not honour this agreement, however, and killed many Ukrainian soldiers who tried to escape.</p> <p><u>Procedure:</u> The Military Prosecutor's Office has been investigating the Battle of Ilovaisk since 2014. The investigation is ongoing.</p>	<p>1. Neglect of duty in military service that caused any significant damage, - shall be punishable by a fine up to 100 tax-free minimum incomes, or service restrictions for a term up to two years, or imprisonment for a term of three years.</p> <p>2. The same act that caused any grave consequences, - shall be punishable by imprisonment for a term of three to seven years.</p> <p>4. Any such acts as provided for by paragraph 1 or 2 of this Article, if committed in state of martial law or in a battle, - shall be punishable by imprisonment for a term of five to eight years.</p>
<p>17.</p>	<p>Case No. 234/11343/15-к⁵³⁹ Judgment of 12 August 2015</p>	<p>Citizen of Ukraine, commander of the military unit A 1435, Lieutenant colonel</p>	<p><u>Facts:</u> The Accused joined the Armed Forces of Ukraine in 1993. Between 16 February 2015 and 16 May 2015, he worked in the ATO zone as the commander of military unit A 1435. He was tasked with improving the structure of the airfield and unit A 3546's defensive positions near Kramatorsk. While executing this task the</p>	<p>Art. 425(3) (Neglect of duty in military service)</p>

538 'The military prosecutor's office investigates 'Ilovaisk kotel' as 'negligent attitude' to the military service' *UNIAN* (Kyiv, 9 September 2014), <www.unian.ua/politics/960839-viyskova-prokuratura-rozslidue-ilovayskiy-kotel-yak-needbale-stavlennya-do-viyskovoji-slujbi.html> accessed 3 August 2016.

539 Case No. 234/11343/15-к (Judgment) Kramatorsk City Court, Donetsk Oblast (12 August 2015).

<p>Kramatorsk City Court, Donetsk Oblast</p>		<p>Accused was subordinate to the commander of unit A 3546.</p> <p>In March 2015, the commander of unit A 3546 decided to build a shelter to protect his men from shelling. The Accused offered to organise and oversee the construction of the shelter with other four people.</p> <p>On 11 March 2015, the shelter collapsed, killing one Ukrainian serviceman.</p> <p><u>Court findings:</u></p> <p>The Court found that the Accused had the mental and professional capacity to assess the situation and know that he would not be able to build the shelter. The Court stressed that the Accused was fully aware that the all the people he involved in the construction should have undergone a special examination in order to be declared fit for such work. The Accused neglected to do so.</p> <p>The Court found the Accused guilty of neglect of his military duty. This crime, which led to serious consequences, was committed in a “special period” that does not include martial law.</p> <p>The Court took into account the fact that the Accused fully admitted his guilt, apologized, had no previous convictions, was well-regarded by his colleagues, had a child, and was involved in the ATO. The Court found that it was possible to assign the Accused a softer punishment than those established in para. 3 of Art. 425 of the Criminal Code of Ukraine.</p>	
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			<p>Given the aforementioned circumstances, the Court decided to impose certain professional restrictions on the Accused, directing part of his income to the state budget.</p> <p>The court imposed professional restrictions on the Accused for two years and reduced his salary by ten percent. He cannot be promoted during this two-year period and his work during it cannot be taken into account when he is up for a promotion.</p>	
INACTION BY MILITARY AUTHORITIES				
18.	<p>Case No. 243/7099/14⁵⁴⁰</p> <p>Judgment of 18 December 2014</p> <p>Sloviansk District Court, Donetsk Oblast</p>	<p>Citizen of Ukraine, commander of the reconnaissance airborne company of unit A 1126</p>	<p><u>Facts:</u></p> <p>On 12 July 2013, the Accused began serving as commander of the reconnaissance airborne company in military unit A 1126, stationed in the town of Hvardiyske in Dnipropetrovsk Oblast.</p> <p>As commander, the Accused was the direct superior of all personnel in the company. He was responsible for preparing the company's defences; instilling military discipline; maintaining the company's weapons, ammunition, vehicles, and other property; and successfully carrying out combat missions.</p> <p>Between 7 and 18 April 2014, the Accused ordered a meeting of the company in Amvrosiivka, Donetsk Oblast in order to conduct training exercises.</p>	<p>Art. 426(2) (Omissions of military authorities)</p> <p>1. Willful failure to prevent a crime committed by a subordinate, or failure of a military inquiry authorities to institute a criminal case against a subordinate offender, and also wilful failure of a military official to act in accordance with his/her official duties, if it caused any significant damage, - shall be punishable by a fine of 50 to 200 tax-free minimum incomes, or service restrictions for a term up to two years, or imprisonment for a term up to three years.</p>

⁵⁴⁰ Case No. 243/7099/14 (Judgment) Sloviansk District Court, Donetsk Oblast (18 December 2014).

		<p>On 12 April 2014, the Accused ordered the creation of a detachment of 27 soldiers. They were charged with setting up observation posts along the road “Kharkiv-Rostov-on-Don”. The detachment included a unit headed by the Accused.</p> <p>On 13 April 2014, the detachment arrived at the “Dovzhanskyi” checkpoint. The soldiers were blocked by a group of unidentified civilians, who expressed their dissatisfaction with the military presence. The civilians believed that the soldiers were representatives of “Right Sector” (a far-right politico-military group) and demanded that they hand over their weapons and ammunition. At the same time, representatives from the LPR approached the detachment.</p> <p>The representatives of the government detachment and those of the LPR agreed that the detachment of Ukrainian soldiers would be escorted towards Artemivsk in Donetsk Oblast. They would be accompanied by a UAZ military vehicle and no less than 30 vehicles with the armed members of the LPR. As they travelled to Artemevisk, the Ukrainian soldiers were again ordered to surrender their weapons and ammunition, and urged join the LPR and the Russian Federation. After unsuccessful attempts to convince the soldiers, the LPR militants decided to divert the column to Sloviansk in Donetsk Oblast.</p> <p>Later, the soldiers were approached by an unknown man in civilian clothes who introduced</p>	<p>2. The same acts that caused any grave consequences, - shall be punishable by imprisonment for a term of three to seven years.</p>
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		<p>himself as the “People’s Mayor of Sloviansk”. He offered to give their weapons to the DPR.</p> <p>Thereafter, around 40 unidentified armed men surrounded the soldiers, intimidating them and saying that they had 5 minutes to hand over their weapons. Then, another group of 30 to 40 unarmed civilians (mostly women and children) began to take away weapons from the Ukrainian soldiers. The unidentified armed men, bearing no insignia or other identifying signs, approached the soldiers and took the rest of weapons, munitions and military vehicles from them.</p> <p><u>Court findings:</u></p> <p>The Military Prosecutor of the Southern Region of Ukraine and the Accused signed a plea bargain on 18 December 2014, which was later validated by the Court.</p> <p>The Court found that the Accused, in violation of Arts. 22, 28-38, 111, and 112 of the Internal Service Statute of the Armed Forces of Ukraine, intentionally did not fulfil his duties. In particular, he neither took measures to repel an attack on military personnel and equipment nor arrested the armed men who threatened the health and lives of Ukrainian servicemen. Such inaction had grave consequences, including the appropriation of weapons, ammunition and military equipment by unidentified armed persons.</p>	
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			<p>Accordingly, the Accused was found guilty of failing to fulfil his official duties and sentenced to two years in prison.</p> <p>Pursuant to Art. 58 of the Criminal Code, the sentence was replaced with professional restrictions. For the same period of two years, the Accused would not be entitled to any promotion or change of his military rank. Also, 10% of his salary will be transferred to the State.</p>	
19.	<p>Case No. 185/9886/14-к⁵⁴¹</p> <p>Judgment of 17 December 2014</p> <p>Pavlograd District Court, Dnipropetrovsk Oblast</p>	<p>Citizen of Ukraine, colonel, commander of military unit 3023</p>	<p><u>Facts:</u></p> <p>On 24 October 2013, the Accused was appointed commander of military unit 3023.</p> <p>At around 8 PM on 27 June 2014, nearly 100 armed DPR members threatened to attack the Accused's military unit using large-calibre small arms and mortars. The men demanded that the unit surrender its weapons and other military equipment. They also demanded that the unit leave the military camp they were occupying.</p> <p>In the course of their negotiations, 15 armed persons unlawfully entered the checkpoint at which unit 3023 was posted. Despite knowing this, the Accused failed to give an order to launch an attack. Even though his servicemen were ready to attack, the Accused ordered them to surrender. As a result, the armed men seized UAH 6166,727.50 worth of Ukrainian state property.</p>	<p>Art. 426(2) (Omissions of military authorities)</p>

⁵⁴¹ Case No. 185/9886/14-к (Judgment) Pavlograd District Court, Dnipropetrovsk Oblast (17 December 2014).

		<p><u>Court findings:</u></p> <p>The Court stressed that the Accused knew that he was responsible for the safety of his personnel, as well as their actions, will and morale.</p> <p>The Court established that the Accused was aware that after negotiations the armed members of the DPR would not leave the territory controlled by unit 3023, and that they had started to attack. The Court stressed that the Accused knew that his men were ready to fight. Nevertheless, the Accused failed to call for an attack, even though he could have done so using radios. Instead, the Accused ordered the unit to abandon their firing positions, leave their weapons in the storage rooms, and leave the military base.</p> <p>The Court found that the Accused had failed to organise an appropriate defence of his unit. His call to surrender undermined the National Guard's forces' belief in their own strength and in their ability to fight against the enemy. The Court also noted major material losses.</p> <p>The Court found the Accused guilty of violating para. 2 of Art. 426 of the Criminal Code of Ukraine. According to para. 2 of Art. 55⁵⁴² of the Criminal Code of Ukraine, the Court decided to</p>	
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542 Art. 55(2) of the Criminal Code of Ukraine states: "Deprivation of the right to occupy certain positions or engage in certain activities as additional punishment may also be imposed without reference to a sanction of an article (a sanction of a paragraph of an article) in the Special Part of this Code, if a court, having regard to the nature of the offense committed by a person in office or in connection with a certain activity, the character of the person convicted, and other circumstances of the case, decides that such person should be deprived of the right to occupy certain positions or engage in certain activities".

			deprive the Accused of the right to hold executive positions in the National Guard for a period of one year and six months.	
DESERTION				
20.	Case No. 408/133/15 ⁵⁴³ Volodymyr Volynskiy City Court, Volyn Oblast	Citizen of Ukraine, servicemen of the 51 st infantry brigade	<p><u>Facts:</u> On 25 July 2014, 40 servicemen of the 51st infantry brigade of the A2331 Volodymyr Volynskiy military base allegedly refused to carry out military duties, moved to the camp of the unlawful paramilitary formation in Sverdlovsk; and several days later crossed the border into the Russian Federation in order to escape a trap near Chervonopartyzansk. According to the military officer in the 51st Brigade, they had no other way of surviving further combat activities due to the lack of munition and weapons.</p> <p><u>Procedure:</u> The servicemen were detained by the Russian Federal Security border control service and returned to Ukraine. Upon the returning to Volodymyr Volynskiy, where their A2331 military base was located, criminal proceedings were opened against them.</p> <p>The case was initially adjudicated by the Bilovodskiy district court of Luhansk Region. The first two hearings were held via videoconference by Volodymyr-Volynskiy City Court of Volyn</p>	<p>Art. 409(3) (Evasion of military service by way of self-maiming or otherwise) <u>Other Charges</u></p> <p>Art. 28(2) (Criminal offense committed by a group of persons, or a group of persons upon prior conspiracy, or an organised group, or a criminal organisation)</p>

⁵⁴³ Case No. 408/133/15-к (Decision) Bilovodskiy District Court, Luhansk Oblast (21 January 2015); (Decision) Bilovodskiy District Court, Luhansk Oblast (6 March 2015); (Decision) Volodymyr-Volynskiy City Court, Volyn Oblast (1 April 2016).

			<p>region and the Appeals Court of Zaporizhia region because the Accused's defence lawyers were in Zaporizhia. Later the case was referred to Volodymyr-Volynskiy City Court.</p> <p>The Accused's defence lawyers were assigned through the Zaporizhzhya Legal Aid Centre. The defence lawyers requested that the Court dismiss the proceedings, arguing that the accused had not committed the crime. The Court dismissed the request.</p> <p>On 1 April 2016, the military prosecutor requested that the Court explain its rulings from 1 January 2016 and 26 February 2016. The Court dismissed the request.</p>	
THREATS OR VIOLENCE AGAINST A LAW ENFORCEMENT OFFICER				
21.	Case No. 229/411/16-к ⁵⁴⁴ Druzhkivskiy City Court, Donetsk Oblast	Citizen of Ukraine, junior sergeant and company commander of a machine-gun unit	<p><u>Facts:</u></p> <p>On 15 November 2015, the Accused, commander of the machine-gun company of military unit 2950, drove a car carrying industrial goods worth UAH 500.000 into the separatist-controlled village of Verhniotoretske in Donetsk Oblast. Neither his travel nor the transport of the goods was authorized. The Accused threatened the commander of a mobile unit coordinated by the SBU in the ATO with a grenade. Later, he threatened to kill a law enforcement officer with a hand-held grenade launcher.</p> <p><u>Court findings:</u></p>	<p>Art.345 (Threats or violence against a law enforcement officer)</p> <p>1. Threats of murder, violence, destruction or impairment of property made in respect of a law enforcement officer, or his close relatives in connection with his official duties, - shall be punishable by correctional labour for a term up to two years, or arrest for a term up to six months, or restraint of liberty for a term up to three years, or imprisonment for the same term.</p>

⁵⁴⁴ Case No. 229/411/16-к (Decision) Druzhkivskiy City Court, Donetsk Oblast (5 May 2016); (Decision) Druzhkivskiy City Court, Donetsk Oblast (14 June 2016).

		<p>The pre-trial investigation qualified the actions of the Accused as a violation of the prohibition on entering or leaving the occupied territories of Ukraine. The investigation found that the Accused's actions amounted to an attempt by a state official to use his official position to harm the interests of the state. It also found that he had threatened to murder a law enforcement official in connection with the fulfilment of his official duties.</p> <p>The Court found that the Accused understood his professional duties and prohibitions, acted deliberately, and understood the nature and potential consequences of his behaviour.</p> <p>In rendering its decision, the Court took into account that the Accused had apologized for his behaviour, that his actions had not caused any irreparable damage, and that he had a strong reputation among his fellow servicemen. The Court decided there was no reason to continue to detain the Accused. The Court ordered that the Accused be on his best behaviour, be available for communication with the prosecution if necessary, avoid contact with witnesses and other people involved in the case, and not leave the town where he lives.</p> <p>The prosecution appealed the decision. The Appellate Court partially upheld the arguments of the prosecution and returned the case for re-consideration by the court of the first instance.</p>	<p>2. Wilful battery of, or infliction of minor or medium grave bodily injury on a law enforcement officer or his close relatives, in connection with his/her official duties, - shall be punishable by restraint of liberty for a term up to five years, or imprisonment for a term up to six years.</p> <p>3. Wilful infliction of grave bodily injury on a law enforcement officer or his close relatives, in connection with his/her official duties, - shall be punishable by imprisonment for a term of five to twelve years.</p> <p>4. Any such actions as provided for by paragraph 1, 2 or 3 of this Article, if committed by an organized group, - shall be punishable by imprisonment for a term of seven to fourteen years.</p>
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			<p>A hearing was held on 16 June 2016. The Accused was not present at the hearing, but presented a medical certificate dated 10 June 2016 describing the poor state of his health (acute appendicitis and peritonitis) and confirming that he had been in the hospital since 01 June 2016. The Court took heed of the prosecutor’s opinion that it would be impossible to continue the hearing without the Accused, and decided to postpone the hearing until the Accused recovers.</p> <p>Later the proceedings were suspended until the Accused’s recovery.</p>	
CATEGORY 2: CASE LAW USING DOMESTIC CRIMES INSTEAD OF WAR CRIMES				
MURDER				
22.	<p>Case No. 233/3431/15-к⁵⁴⁵</p> <p>Judgment of 4 November 2015</p> <p>Kostiantynivka City Court, Donetsk Oblast</p>	<p>Citizen of Ukraine, junior sergeant in the “field post office B4750” military unit</p>	<p><u>Facts:</u></p> <p>On 29 April 2015, at about 7 pm, while the Accused was stationed at a checkpoint, a drunk civilian riding a motorcycle arrived and began swearing at the Ukrainian soldiers.</p> <p>The Accused suspected that the civilian was a DPR member and ordered another junior sergeant to drive him and the civilian to a border checkpoint to check whether the civilian was on the list of wanted persons connected to the “DPR”.</p>	<p>Art. 115(1) (Murder)</p> <p>1. Murder, that is wilful unlawful causing death of another person, - shall be punishable by imprisonment for a term of seven to fifteen years.</p>

⁵⁴⁵ Case No. 233/3431/15-к (Judgment) Kostiantynivka City Court, Donetsk Oblast (4 November 2015).

		<p>Although the civilian was not in that database, the soldier decided to detain him anyway and drove him to a deserted place beyond the checkpoint. During the ride, the civilian hit the Accused and ran out of the car.</p> <p>The Accused ordered the civilian to stop. The civilian ignored the order and continued running and swearing. The Accused fired four warning shots and then shot and killed the civilian.</p> <p><u>Court findings:</u></p> <p>The Court found that the Accused had acted deliberately and understood the essence of his actions. The Court found that the Accused was irritated and became disgusted with the victim. These feelings became stronger when the victim swore at him and hit him and attempted to flee.</p> <p>The Court concluded that the Accused's actions were not justified by the exigencies of the situation and that he had used disproportionate force against the victim.</p> <p>The Court found the Accused guilty of committing murder and sentenced him to eight years in prison.</p>	
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23.	<p>Case No. 235/7/15-к⁵⁴⁶</p> <p>Judgment of 2 November 2015</p> <p>Krasnoarmiysk District Court of Donetsk Oblast</p>	<p>Citizen of Ukraine, serviceman, senior gunner in the 30th infantry brigade</p>	<p><u>Facts:</u></p> <p>On 11 October 2014, a serviceman in the 30th infantry brigade met the Accused in “Shashlychnyi dvir” café in the town of Krasnoarmiysk, Donetsk Oblast. He informed the Accused that the taxi driver who had taken him to the café was a “separatist” and suggested that they kill him (separate criminal proceedings have been opened into the other serviceman’s actions). The Accused agreed.</p> <p>The servicemen divided the duties between them: they would ask the taxi driver to take them to a certain destination. The Accused would ask the driver to stop the car in a deserted place, and after stepping out of the car, distract him. The other serviceman would then kill the victim with his military-issue gun.</p> <p>After drinking alcohol, the servicemen travelled with the taxi driver to the village of Pisky in the Yasynuvaty district of Donetsk Oblast. The servicemen asked the driver to stop the car.</p> <p>While the Accused distracted the victim, the second serviceman shot him at least four times in the head, killing him.</p> <p>The servicemen hid the victim’s body in the forest and left the scene of the crime after destroying all the evidence in the car (the victim’s</p>	<p>Art. 115(2.12) (Murder)</p> <p>1. Murder, that is wilful unlawful causing death of another person, - shall be punishable by imprisonment for a term of seven to fifteen years.</p> <p>2. Murder: 1) of two or more persons; 2) of a young child or a woman who, to the knowledge of the culprit, is pregnant; 3) of a hostage or an abductee; 4) committed with special brutality; 5) committed by a method dangerous to the lives of many persons; 6) based on mercenary motives; 7) based on hooligan motives; 8) of a person or a person’s close relative in relation to that person’s official duties or public functions; 9) committed to conceal or facilitate another crime; 10) coupled with rape, or violent unnatural sexual intercourse; 11) committed as a contracted murder; 12) committed by a group of persons upon prior conspiracy; 13) committed by a person who has previously committed a murder, other than a murder provided for by Articles 116-</p>
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546 Case No. 235/7/15-к (Judgment) Krasnoarmiysk District Court, Donetsk Oblast (2 November 2015).

		<p>documents etc.). They decided to steal the victim's car.</p> <p><u>Court findings:</u></p> <p>The Court found that the two men had conspired to murder the victim. The Court established the intent of the Accused and the other serviceman to commit the crime.</p> <p>The Court found that the actions of the Accused violated para. 2 of Art. 115 of the Criminal Code of Ukraine. The Court also found the Accused guilty of violating para. 2 of Art. 289, since he illegally seized the victim's car.</p> <p>The court did not find any mitigating circumstances provided by Art. 66⁵⁴⁷ of the Criminal Code. Instead, the Court found aggravating circumstances provided for in Art. 67 (committing a crime while under the influence and causing grave consequences).</p> <p>The Accused was sentenced to 14 years in prison with the confiscation of certain property.</p>	<p>118 of this Code, - shall be punishable by imprisonment for a term of ten to fifteen years, or life imprisonment with forfeiture of property in the case provided for by subparagraph 6 of paragraph 2 of this Article. 14) based on racial, national or religious intolerance.</p> <p><u>Other Charges:</u></p> <p>Article 289 (Unlawful appropriation of a vehicle)</p>
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547 Art. 66 of the Criminal Code provides for circumstances that can mitigate punishment: "1. For the purposes of imposing a punishment, the following circumstances shall be deemed to be mitigating: 1) surrender, sincere repentance or actively assistance in detecting the offense; 2) voluntary compensation of losses or repairing of damages; 2-1) providing medical aid of other aid to the injured person after committing the offense; 3) the commission of an offense by a minor; 4) the commission of an offense by a pregnant woman; 5) the commission of an offense in consequence of a concurrence of adverse personal, family or other circumstances; 6) the commission of an offense under influence of threats, coercion or financial, official or other dependence; 7) the commission of an offense under influence of strong excitement raised by improper or immoral actions of the victim; 8) the commission of an offense in excess of necessary defense; 9) undertaking a special mission to prevent or uncover criminal activities of an organized group or criminal organisation, where this has involved committing an offense in any such case as provided for by this Code".

24.	Artemivsk District Court, Donetsk Oblast ⁵⁴⁸	Oleksandr Svidro, Citizen of Ukraine, Demobilised serviceman of the 92 nd separate reconnaissance brigade	<p><u>Facts:</u> The Accused allegedly shot a mobile unit near Shchastya. As a result, Dmytro Zharyk, an officer from the State Fiscal Service, and Andrew Haluschenko, a volunteer were killed.</p> <p><u>Procedure:</u> The next hearing is scheduled for 1 March 2016.</p>	Art. 115(2) (Murder)
25.	<i>The murder of two women by Ukrainian servicemen</i> ⁵⁴⁹	Citizens of Ukraine, servicemen	<p><u>Facts:</u> On 15 June 2015, in the village of Luhanske in the Artemivsk region of Donetsk Oblast, two women—a mother (77) and her daughter (45) were shot dead.</p> <p><u>Procedure:</u> During the investigation, two Ukrainian servicemen were arrested. They confessed that they had killed the victims because of their participation in a pro-Russian formation.</p>	Art. 115(2) (Murder)

INTENDED GRIEVIUS BODILY INJURIES

548 ‘Zmii and Krym could not be brought to a courtroom’, *Vechernii Kharkov* (Kharkiv, 26 February 2016) <<http://vecherniy.kharkov.ua/news/116976/>> accessed 3 August 2016.

549 “Na Donechchini rozkrito zukhvale vbivstvo viis’kovosluzhbovtsiami dvokh zhinok”, Prosecutor’s Office of Donetsk Oblast (17 June 2015), <http://don.gp.gov.ua/ua/news.html?_m=publications&_c=view&_t=rec&id=157759> accessed 4 August 2016.

26.	<i>The killing of 2 women by Ukrainian servicemen</i> ⁵⁵⁰⁵⁵¹	Citizens of Ukraine, servicemen	<p><u>Facts:</u> On 8 May 2015, in Talakov, Donetsk Oblast, three Ukrainian soldiers allegedly killed a man who had pro-Russian views. The soldiers allegedly decided to render justice themselves and “sentenced” the victim to the death penalty.</p> <p><u>Procedure:</u> The soldiers were arrested. There is no information on the progress of the investigation or court proceedings.</p>	Article 121 (Intended grievous bodily injury)
TORTURE				
27.	Case No. 756/16332/15-K ⁵⁵² Obolon District Court, Kyiv	Citizens of Ukraine, Servicemen of the Volunteer patrol company ‘Tornado’ of the special police forces of Ukraine	See Case No. 1	
ILLEGAL CONFINEMENT OR KIDNAPPING				

⁵⁵⁰ *Ibid.*

⁵⁵¹ “Ukrainskie voennye ustroili samosud v Talakovke, ubiv mizhchinu”, *Obozrevatel Investigations* (1 June 2015), <<http://obozrevatel.com/crime/35127-ukrainskie-voennye-ustroili-samosud-v-talakovke-i-ubili-muzhchinu.htm>> accessed 4 August 2016.

⁵⁵² *Tornado Cases Members.*

28.	<p>Case No. 200/13169/15-к⁵⁵³ Judgment of 21 September 2015 Babushkynskyi District Court of Dnipropetrovsk Oblast</p>	<p>Accused 1 – Citizen of Ukraine, policeman in platoon No 2 of company No 5 of the “Dnibr-1” special patrol police of the Ministry of Internal Affairs of Ukraine in Dnipropetrovsk Oblast; Accused 2 – Citizen of Ukraine, policeman in platoon No 2 of company No 5 of the “Dnibr-1” special patrol police of the Ministry of Internal Affairs of Ukraine in Dnipropetrovsk Oblast; Accused 3 - Citizen of Ukraine, policeman in platoon No 4 of company No 5 of the “Dnibr-1” special patrol police of the Ministry of</p>	<p><u>Facts:</u> In January 2015, the Accused were informed that Volodymyr Kulmatytskyi, the former deputy chairman of the city of Sloviansk in Donetsk Oblast, was involved in funding the “DPR”. On 28 January 2015, around 5 pm, the Accused arrived at Kulmatytskyi’s house in Sloviansk to verify this information. The Accused and their commander detained Kulmatytskyi and his driver. They took Kulmatytskyi and his driver in his car to a forest in the Oleksandrivsk district of Donetsk Oblast. Kulmatytsky, his driver, and the commander went deep into the forest. The Accused remained in the car. After some time, their commander came back alone explaining that Mr. Kulmatytskyi and his driver ran away. He gave them the registration of the victim’s car and ordered them to go to Dnipropetrovsk. The bodies of Volodymyr Kulmatytskyi and his driver were found on 31 January 2015. The commander died during the investigation (he was killed or killed himself while the police were trying to apprehend him). <u>Court findings:</u> All the Accused separately admitted their guilt in violating Arts. 146 and 263 of the Criminal Code</p>	<p>Art. 146(2) (Illegal confinement or abduction of a person) 1. Illegal confinement or abduction of a person, - shall be punishable by restraint of liberty for a term up to three years, or imprisonment for the same term. 2. The same acts committed in regard of a minor, or for mercenary purposes, or in regard of two or more persons, or by a group of persons upon their prior conspiracy, or by a method dangerous to the victim's life or health, or causing bodily suffering to him or her, or with the use of weapons, or within a lasting period of time, - shall be punishable by restraint of liberty for a term up to five years, or imprisonment for the same term. <u>Other Charges</u> Art. 263 (Unlawful handling of weapons, ammunition or explosives)</p>
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⁵⁵³ Case of *Kulmatytskyi*, No. 200/13169/15-к (Judgment) Babushkynskyi District Court, Dnipropetrovsk (21 September 2015).

		Internal Affairs of Ukraine in Dnipropetrovsk Oblast;	of Ukraine. The Court found that their unlawful actions stemmed from shared criminal intent. Because many weapons were found at homes of the Accused, the Court’s findings were in large part based on ballistics and forensics evidence. The Court took note of the confession of the Accused and their cooperation with the investigation. The Court thus found that the deliberate actions of Accused 1, Accused 2 and Accused 3 that resulted in the illegal detention and abduction of two persons violated para. 2 of Art. 146 of the Criminal Code. The Court sentenced them each to four years in prison.	
29.	Case No. 234/31/15-к ⁵⁵⁴ Judgment of 13 January 2015 Kramatorsk City Court of Donetsk Oblast	Accused 1 – Citizen of Ukraine, serviceman in the “field post office B5509” military unit; Accused 2 – Citizen of Ukraine, serviceman in the “field post office B5509” military unit; Accused 3 – Citizen of Ukraine, serviceman in the	<u>Facts:</u> In early October 2014, three servicemen in the “field post office B5509” military unit agreed to kidnap a person in order to get money from him. Accused 1 proposed a joint plan of action. The plan involved kidnapping the victim, transporting him to a safe place, and getting some money from him while threatening him with weapons. On 12 October 2014, the Accused drove, with weapons, to the entertainment complex “Viktoriya” in the town of Kramatorsk in Donetsk Oblast, waiting for the “rich-looking” man. When they saw the victim (a civilian) arrive by car, they	Art. 146 (Illegal confinement or abduction of a person) <u>Other Charges</u> Art. 189 (Extortion)

554 Case No. 234/31/15-к (Judgment) Kramatorsk City Court, Donetsk Oblast (13 January 2015).

		<p>“field post office B5509” military unit;</p>	<p>approached him, threatened him with weapons, and forced him sit in their vehicle. The servicemen then brought the victim to an uninhabited house on the outskirts of the town.</p> <p>The servicemen demanded a 200,000 UAH ransom, which the civilian’s brother paid on 13 October 2014.</p> <p>In court, the victim requested for approval of the reconciliation agreement between and the Accused servicemen. The prosecutor had no objection to this agreement, which was concluded on 9 January 2015 in Kramatorsk.</p> <p><u>Court findings:</u></p> <p>The Court found that the Accused entered into a criminal conspiracy aimed at enrichment by illegally obtaining money from the person they planned to kidnap. The Court ruled that each Accused had violated para. 2 of Art. 146 of the Criminal Code of Ukraine.</p> <p>In addition, the Court found that Accused 1 had extorted money from the victim. Extortion is defined in para. 1 of Art. 189 of the Criminal Code.</p> <p>Finally, the Court approved a reconciliation agreement.</p> <p>On the basis of Art. 75⁵⁵⁵ of the Criminal Code, the Court reduced the Accused 1’s sentence to</p>	
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555 Art. 75 of the Criminal Code (discharge on probation) provides: “1. Where, in imposing a punishment of correctional labour, service restriction for military servants, restraint of liberty, or imprisonment for a term not exceeding five years, a court, having regard to the gravity of an offense, the character of the culprit and other circumstances of the crime, finds that the convicted may be reformed without serving the punishment, it may order a discharge on probation. 2. In this case, the court shall order to discharge the convicted person from serving the sentenced

			<p>a three-year probationary period, under the condition that he does not commit a new crime and respects his duties such as visiting law-enforcement authorities and refraining from leaving Ukraine without special authorisation.</p> <p>Accused 2 and Accused 3 were put on probation for two years, with the same conditions, according to Arts. 75 and 76 of the Criminal Code.</p>	
30.	<p>Case No. 638/18003/15-к⁵⁵⁶</p> <p>Dzerzhinskiy District Court of Kharkiv, Kharkiv Oblast</p>		<p>See case No. 3</p>	
31.	<p>Case No. 233/1146/15-к⁵⁵⁷</p> <p>Judgment of 18 March 2015</p> <p>Konstantynivsk District Court of Donetsk Oblast</p>	<p>Citizen of Ukraine, serviceman of the “field post office B0624” military unit</p>	<p><u>Facts:</u></p> <p>On 28 May 2014, the Accused was called to work as a welder in the “field post office B0624” military unit.</p> <p>In September 2014, the Accused and a group of other men from his military unit decided to detain a resident of the city of Konstantynivka, Donetsk Oblast. They intimidated him and extracted</p>	<p>Art. 146(2) (Illegal confinement or abduction of a person)</p>

imposed on the condition that, during the probation period, this person commits no further criminal offenses and complies with the obligations imposed on him or her. 3. A probation period shall be from one to three years”.

⁵⁵⁶ Case of Agafonov.

⁵⁵⁷ Case No. 233/1146/15-к (Judgment) Konstantynivsk District Court, Donetsk Oblast (18 March 2015).

		<p>information about a possible meeting of members of military formations.</p> <p>The Accused and the commander of his division entered the house where the civilian and his family were. The division commander threatened the civilian with weapons.</p> <p>The head of the checkpoint and the division commander decided to take some of the civilian's belongings (a notebook, a watch, etc.) and ordered the civilian to give them money. They then left and suggested that the Accused and the volunteer to share the stolen belongings and engage in more extortion (USD 50.000). The volunteer agreed but the Accused refused.</p> <p><u>Court findings:</u></p> <p>The Court found that the Accused had acted deliberately and fully understood that his actions were illegal.</p> <p>On 16 March 2015, the Accused and the victim signed a reconciliation agreement according to which the Accused accepted a four-year prison sentence.</p> <p>The Accused confessed his guilt and aided the investigation. The Court approved the reconciliation agreement. The Court, found the Accused guilty of violating para. 2 of Art. 146 of the Criminal Code of Ukraine and sentenced him to a four years in prison.</p> <p>Under Art. 75 of the Criminal Code of Ukraine, the Accused was released on probation (for three years). He is prohibited from leaving</p>	
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			Ukraine without special permission during this probationary period.	
32.	Case No. 431/52/15-к ⁵⁵⁸ Judgment of 6 January 2015 Starobilsk District Court, Luhansk Oblast	Accused 1 – citizen of Ukraine, serviceman in the “field post office B0624” military unit. Accused 2 – serviceman in the “field post office B0624” military unit.	<p><u>Facts:</u></p> <p>On 14 August 2014, Accused 1 was conscripted as a mine clearance specialist.</p> <p>On 16 October 2014, Accused 1 illegally left the military camp in Polovynkyne village, Luhansk Oblast with his service weapons.</p> <p>He stopped a car along the road and asked the driver (a civilian) to take him somewhere. The civilian agreed.</p> <p>Then, the Accused asked the civilian to stop the car to pick up his friend (Accused 2).</p> <p>Having passed the checkpoint situated near the village of Pihorivka in the Starobilsky district of Luhansk Oblast, the Accused threatened the victim with weapons and forced him to stop the car and drive them to Svatove (also in Luhansk Oblast).</p> <p>The men were stopped by the police at a checkpoint. The victim told the police that he had been accosted by the Accused.</p> <p><u>Court findings:</u></p> <p>On 6 January 2015, the victim signed reconciliation agreements – a separate one with each Accused. The agreements provided for a five-year prison term for both Accused.</p>	Art. 146(2) (Illegal confinement or abduction of a person)

⁵⁵⁸ Case No. 431/52/15-к (Judgment) Starobilsk District Court, Luhansk Oblast (6 January 2015).

			<p>The Court found that the Accused had acted deliberately and fully understood that his actions were illegal.</p> <p>The Accused confessed their guilt and helped the investigation. The Court approved the reconciliation agreements. The Court found Accused 1 and Accused 2 guilty of violating para. 2 of Art. 146 of the Criminal Code of Ukraine and sentenced them to five years in prison, as negotiated in the reconciliation agreements.</p> <p>Under Art. 75 of the Criminal Code of Ukraine, both Accused were released on probation (for three years). They are prohibited from leaving Ukraine without special permission during this probationary period.</p>	
RAPE				
33.	Case No. 756/16332/15-k ⁵⁵⁹ Obolon District Court, Kyiv	Citizens of Ukraine, Servicemen of the Volunteer patrol company 'Tornado' of the special police forces of Ukraine	See Case No. 1	
HOOLIGANISM				

34.	Case No. 234/20478/15-к ⁵⁶⁰ Donetsk Oblast Appellate Court	Oleksandr Ruzhanskyi, Citizen of Ukraine, serviceman (volunteer)	<p><u>Facts:</u> On 8 July 2015, the Accused allegedly used his smoothbore gun to shot two people in a public place in Kramatorsk, Donetsk region. Media, however, reported that an investigation was launched in response to the Accused’s discussion about corruption within the military prosecutor’s offices. It was also reported that the Accused went on a hunger strike. He demanded an open hearing and that he be released, as well as meetings with Davit Sakvarelidze (a former deputy prosecutor general and reformer who exposed corruption within the PGO but was later dismissed by the Prosecutor General), the US Ambassador to Ukraine, and EU Ambassadors to Ukraine.</p> <p><u>Procedure:</u> The Accused appealed the ruling of the Kramatorsk City Court of Donetsk Oblast concerning his preventative detention. Taking into account the gravity of the crime, the Appellate Court dismissed the Accused’s appeal and confirmed the ruling of the Kramatorsk City Court to keep the accused in custody. It reasoned that otherwise the Accused might hide from law enforcement authorities, influence</p>	<p>Art. 296 (Hooliganism)</p> <p>1. Hooliganism, that is a serious disturbance of the public order based on motives of explicit disrespect to community in a most outrageous or exceptionally cynical manner, - shall be punishable by a fine of 500 to 1000 tax-free minimum incomes, or arrest for a term up to six months, or restraint of liberty for a term up to five years.</p> <p>2. The same actions committed by a group of persons, - shall be punishable by restraint of liberty for a term up to five years, or imprisonment for a term up to four years.</p> <p>3. Any such actions as provided for paragraphs 1 or 2 of this Article, if committed by a person previously convicted of hooliganism, or accompanied with resistance to authorities or a member of the public who carried out the duty of keeping public order, or to any other</p>
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⁵⁶⁰ *Case of Oleksandr Ruzhanskyi*, 234/20478/15-к (Decision) Volnovakha District Court, Donetsk Oblast (14 January 2016); “Zaapreshchovanii dobrovolets’, shcho rozpoviv pro nerukhomist’ prokurora sil ATO, ogolosiv goloduvannia”, *UNLAN* (16 January 2016), <<http://www.unian.ua/society/1238402-zareshchovaniy-dobrovolets-scho-rozpoviv-pro-neruhomist-prokurora-sil-ato-ogolosiv-goloduvannya.html>> accessed 4 August 2016.

			<p>witnesses, obstruct court proceedings, or commit another crime.</p>	<p>citizens who acted to stop the hooligan actions, - shall be punishable by imprisonment for a term of two to five years.</p> <p>4. Any such actions as provided for by paragraph 1, 2 or 3 of this Article, if committed with the use of firearms, or any cold arms, or any other thing specially adjusted or prepared in advance to cause bodily injury, - shall be punishable by imprisonment for a term of three to seven years.</p>
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Annex B

ELEMENTS OF A SELECTION OF SPECIFIC CRIMES

Elements of a Selection of Specific Crimes

International Armed Conflict

Category 1 Crimes

Wilful killing

Wilful killing requires it to be established that the perpetrator: (1) killed one or more persons; and (2) had the requisite intent. The jurisprudence of the ad hoc tribunals has defined murder (wilful killings) consistently as “the death of the victim which results from an act or omission by the accused, committed with the intent either to kill or to cause serious bodily harm with the reasonable knowledge that it would likely lead to death”.⁵⁶¹

Similarly the ordinary crime of murder under the Criminal Code of Ukraine requires the establishment of four elements: (1) an action (or omission) of the perpetrator; (2) the death of the victim; (3) a causal link between the action and the death of the victim; and (4) the intent of the perpetrator.⁵⁶² Ukrainian criminal law is therefore very similar to the elements of the war crime of murder. After demonstrating the contextual elements of war crimes, domestic prosecutors may thus rely on the ordinary crime of murder, along with the jurisprudence of the international tribunals, to interpret Article 438.

Physical Element

In international criminal law, the *actus reus* of wilful killing is the death of the victim as a result of the actions of the accused. Omissions as well as concrete actions can satisfy the *actus reus* element. Further, it must be established that the conduct of the accused was a substantial cause of the death of the victim.⁵⁶³

The physical perpetrator’s act or omission need not have been the sole cause of the victim’s death, it is sufficient that the “perpetrator’s conduct contributed substantially to the death of the person”.⁵⁶⁴

The jurisprudence of the ICTY does not require that the body of the victim be recovered. The death may be established by circumstantial evidence, provided that the only reasonable

⁵⁶¹ *Prosecutor v. Blagojević and Jokić* (Trial Judgment) Case No. ICTY-02-60-T (17 January 2005) para. 556. See also *Prosecutor v. Krstić* (Trial Judgment) Case No. ICTY-98-33-T (2 August 2001) para. 485; *Prosecutor v. Blaškić*, (Trial Judgment) Case No. ICTY-95-14-T (3 March 2000) para. 217; *Prosecutor v. Kordić and Čerkez* (Trial Judgment) Case No. ICTY-95-14/2-T (26 February 2001) para. 236; *Prosecutor v. Akayesu* (Trial Judgment) Case No. ICTR-96-4-T (2 September 1998) para. 589. See also *Prosecutor v. Germaine Katanga* (Trial Judgment) Case No. ICC-01/04-01/07 (7 March 2014) paras. 775-777.

⁵⁶² M.I. Melnyk and M.I. Khavroniuk, *Scientific and Practice Commentary to the Criminal Code of Ukraine* (7th edn Lurydychna Dumka 2010) Art. 115 <www.pravoznavec.com.ua/books/162/12121/28/#chapter> accessed 31 March 2016.

⁵⁶³ *Prosecutor v. Mucić et al.* (Trial Judgment) Case No. ICTY-91-21 (16 November 1998) para. 424.

⁵⁶⁴ *Prosecutor v. Lukić Milan & Lukić Sredoje* (Judgment) Case No. ICTY-98-32/1-T (20 July 2009) para. 903; *Prosecutor v. Milutinović et al.* (Judgment) Case No. ICTY-05-87-T (26 February 2009) Vol. 2, para. 137.

inference available from the evidence presented is that “the victim is dead as a result of acts or omissions of the accused or of one or more persons for whom the accused is criminally responsible”.⁵⁶⁵ Furthermore:

The Trial Chamber notes that relevant factors to be considered include proof of incidents of mistreatment directed against the victim, patterns of mistreatment and disappearances of other victims, the coincident or near-coincident time of death of other victims, the fact that the victims were present in an area where an armed attack was carried out, when, where and the circumstances in which the victim was last seen, behaviour of soldiers in the vicinity, as well as towards other civilians, at the relevant time, and lack of contact by the victim with others whom the victim would have been expected to contact, such as his or her family.⁵⁶⁶

For example, reducing the food rations of protected persons, resulting in their starvation and death is covered by the notion of willful killing.⁵⁶⁷ Further, ‘mercy killings’ intended to put wounded combatants “out of their misery” are prohibited.⁵⁶⁸

Mental Element

Regarding the intent to kill, international criminal law covers both ‘intent’ and ‘recklessness’. Some chambers have held that the perpetrator must have had the intent to kill, or to inflict serious bodily injury which, as it is reasonable to assume, was likely to lead to death.⁵⁶⁹ Others have required that the act be committed “with the intent to kill the victim or willfully causing serious bodily harm which the perpetrator should reasonably have known might lead to death”.⁵⁷⁰ Other Chambers have required an “indirect intent”, which “comprises the perpetrator’s knowledge that the death of the victim was the probable or likely consequence of his act or omission”.⁵⁷¹

⁵⁶⁵ *Prosecutor v. Lukić Milan & Lukić Sredoje* (Judgment) Case No. ICTY-98-32/1-T (20 July 2009) para. 904.

⁵⁶⁶ *Ibid.*

⁵⁶⁷ ICRC, ‘Commentary of Article 50 of Geneva Convention I’ (ICRC, 2016) para. 17 <www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=21B052420B219A72C1257F7D00587FC3> accessed 20 April 2016.

⁵⁶⁸ *Ibid.*

⁵⁶⁹ *Prosecutor v. Blaškić* (Trial Judgment) Case No. ICTY-95-14 (15 July 1999) para. 153. See also *Prosecutor v. Naletilić and Martinović* (Trial Judgment) Case No. ICTY-98-34-T (21 March 2003) para. 248.

⁵⁷⁰ *Prosecutor v. Setako* (Appeals Judgment) Case No. ICTR-04-81 (28 September 2011) para. 257; *Prosecutor v. Krstić* (Trial Judgment) Case No. ICTY-98-33-T (02 August 2001) para. 485; *Prosecutor v. Kvočka* (Trial Judgment) Case No. ICTY-98-30/1-T (02 November 2001) para. 132.

⁵⁷¹ *Prosecutor v. Orić* (Trial Judgment) Case No. ICTY-03-68 (30 June 2006) para. 348; *Prosecutor v. Limaj* (Trial Judgment) Case no. ICTY-03-66-T (30 November 2005) para. 241; *Prosecutor v. Stakić* (Trial Judgment) Case No. ICTY-97-24-T (31 July 2003) para. 587; *Prosecutor v. Brdanin* (Trial Judgment) Case No. ICTY-99-36-T (1 September 2004) para. 386.

Torture

There is no definition of torture in the Geneva Conventions. The case law of international courts and tribunals and the elaboration of the ICC Elements of Crimes have clarified the constitutive elements of the crime of torture.⁵⁷²

The ICTY, as well as the ICC, defines torture for the purposes of IHL as: (1) the infliction, by act or omission, of severe pain or suffering, whether physical or mental; (2) for such purposes as to obtain information or a confession, to punish, intimidate or coerce the victim or a third person, or to discriminate, on any ground, against the victim or a third person; and (3) the perpetrator should have the required intent.⁵⁷³

The ordinary crime of torture in the Criminal Code of Ukraine closely resembles the war crime of torture. Ukrainian criminal law defines torture as wilfully causing severe physical pain or physical or mental suffering by beating, torturing or committing other violent actions for the purpose of inducing the victim or any other person to commit involuntary actions, including obtaining information, testimonies, or a confession, to punish or intimidate the victims or other individuals.⁵⁷⁴ Domestic prosecutors need to establish: (1) the actions of the perpetrators - beating, torturing or other acts of violence; (2) the severe physical pain or physical or mental suffering of the victim; (3) a causal link between the actions and the pain or suffering of the victim; and (4) the direct intent of the perpetrator (the perpetrator acted for prohibited purposes).⁵⁷⁵ Domestic prosecutors may therefore rely on the ordinary crime of torture to interpret Article 438. International tribunals and courts have also developed very useful guidance.

Physical Element

Pursuant to international criminal law, prosecutors must establish the perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.⁵⁷⁶

The threshold of severe pain or suffering, be it physical or mental, has not been delineated. However, international tribunals define torture as severe pain or suffering, whether physical or mental, while cruel or inhuman treatment is generally defined as serious pain or

⁵⁷² ICRC, 'Commentary of Article 50 of Geneva Convention I' (ICRC, 2016) para. 17 <www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=21B052420B219A72C1257F7D00587FC3> accessed 20 April 2016.

⁵⁷³ *Ibid.* Elements of Crimes (2002) 14.

⁵⁷⁴ M.I. Melnyk and M.I. Khavroniuk, *Scientific and Practice Commentary to the Criminal Code of Ukraine* (7th edn lurydychna Dumka 2010) Art.127 <www.pravoznavec.com.ua/books/162/12133/28/#chapter> accessed 31 March 2016.

⁵⁷⁵ M.I. Melnyk and M.I. Khavroniuk, *Scientific and Practice Commentary to the Criminal Code of Ukraine* (7th edn lurydychna Dumka 2010) Art.127 <www.pravoznavec.com.ua/books/162/12133/28/#chapter> accessed 31 March 2016.

⁵⁷⁶ Elements of Crimes (2002) 14; *Prosecutor v. Mucić et al.* (Trial Judgment) Case No. ICTY-91-21 (16 November 1998) paras. 442, 471-2.

suffering.⁵⁷⁷ Lesser forms of mistreatment may constitute cruel or inhuman treatment.⁵⁷⁸ Prosecutors must evaluate the objective severity of the harm inflicted. Subjective criteria, such as the physical or mental effect of the treatment upon the particular victim and, in some cases, factors such as the victim's age, sex, or state of health will also be relevant in assessing the gravity of the harm.⁵⁷⁹ Indeed, the ICRC Commentary of Article 50 of Geneva Convention I provides that:

Some conduct which at first sight might not appear sufficiently serious to amount to torture could, because of its intensity, its duration or the manner in which it is implemented, amount to torture.⁵⁸⁰

Another element of torture is that it is committed for a specific purpose or motive. The ICTY has stated that such purpose or motive may include “the purpose to obtain information or a confession, to punish, intimidate or coerce the victim or a third person, or to discriminate, on any ground, against the victim or a third person. In the absence of these purposes or goals, even very severe infliction of pain would not be classified as torture.”⁵⁸¹

Further, the ICTY has also highlighted the fact that the act of torture does not need to cause a permanent injury or a physical injury, as mental harm is a recognised form of torture.⁵⁸² An ICTY Trial Chamber found that being forced to watch serious sexual attacks inflicted on a female acquaintance was torture for the forced observer. The presence of onlookers, particularly family members, also inflicts severe mental harm amounting to torture on a person being raped.⁵⁸³

Mental Element

Regarding the mental element, it must be established that the perpetrator meant to engage in the infliction of severe physical or mental pain or suffering upon one or more persons. Torture is a specific intent crime, as it must not only be committed deliberately (negligent or reckless behaviour cannot form the basis for responsibility for torture) and for prohibited purposes.⁵⁸⁴

⁵⁷⁷ *Prosecutor v. Kunarac, Kovac and Vuković* (Appeals Judgment) Case No. ICTY-96-23-T and ICTY-96-23/1-A (12 June 2002) para. 149; *Prosecutor v. Mrkšić et al.* (Trial Judgment) Case No. ICTY-95-13/1 (27 September 2007) para. 514.

⁵⁷⁸ *Prosecutor v. Naletilić and Martinović* (Judgment) Case No. ICTY-98-34-T (31 March 2003).

⁵⁷⁹ *Prosecutor v. Kvočka* (Trial Judgment) Case No. ICTY-98-30/1-T (2 November 2001) para. 143. See also *Prosecutor v. Martić* (Trial Judgment) Case No. ICTY-95-11 (12 June 2007) para. 75.

⁵⁸⁰ ICRC, ‘Commentary of Article 50 of Geneva Convention I’ (ICRC, 2016) para. 17 <www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=21B052420B219A72C1257F7D00587FC3> accessed 20 April 2016.

⁵⁸¹ *Prosecutor v. Haradinaj et al.* (Trial Judgment) Case No. ICTY-04-84 (29 November 2012) para. 418.

⁵⁸² *Prosecutor v. Mrkšić et al.* (Trial Judgment) Case No. ICTY-95-13/1 (27 September 2007) para. 514.

⁵⁸³ *Prosecutor v. Kvočka* (Trial Judgment) Case No. ICTY-98-30/1-T (02 November 2001) para. 149.

⁵⁸⁴ ICRC, ‘Commentary of Article 50 of Geneva Convention I’ (ICRC, 2016) para. 17 <www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=21B052420B219A72C1257F7D00587FC3> accessed 20 April 2016. See for example *Prosecutor v. Krnojelac* (Trial Judgment) Case No. ICTY-97-25 (15 March 2002) para. 184; *Prosecutor v. Kunarac* (Trial Judgment) Case No. ICTY-96-23-T&ICTY-96-23/1-T (22 February 2001) para. 497; *Prosecutor v. Furundžija* (Trial Judgment) Case No. ICTY-95-17/1-T (10 December 1998) para. 162; *Prosecutor*

Inhuman treatment

Inhuman treatment has been defined as “an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity”.⁵⁸⁵ Humane treatment is considered as the “cornerstone of all four Conventions”.⁵⁸⁶ The Geneva Conventions do not specifically define inhuman treatment. The term covers treatment that ceases to be humane and therefore encompasses acts that violate the basic principle of humane treatment.⁵⁸⁷

The Criminal Code of Ukraine does not contain any provisions criminalising serious mental or physical suffering or injury or serious attack on human dignity *per se*. Nevertheless, it contains two Articles that could assist in interpreting the war crime of inhuman treatment. For example, Article 121 (severe bodily harm), which criminalises wilful physical injuries that are dangerous to life or result in a loss of any organ or its functions, or caused a mental disease or any other health disorder, or Article 126 (battery) which criminalises blows, battery or other violent acts which cause physical pain but no bodily injuries. However, the Criminal Code does not criminalise mental injury or harm or serious attacks on human dignity.

Physical Element

To establish the crime of inhuman treatment/other inhumane acts, prosecutors must prove that the accused committed “an act of similar gravity and seriousness to the other enumerated crimes, with the intention to cause the [...] inhumane act. This important category of crimes is reserved for deliberate forms of infliction with (comparably serious) inhumane results that were intended or foreseeable and done with reckless disregard”.⁵⁸⁸ The seriousness of an act is determined on a case-by-case basis.⁵⁸⁹

The ICTY provides several examples of conduct that could be characterised as inhuman treatment: mutilation and other types of severe bodily harm, beatings and other acts of violence, serious physical and mental injury, forcible transfer, inhumane and degrading treatment, forced prostitution, forced disappearance, serious bodily or mental harm through such means as beatings, torture, sexual violence, humiliation, harassment, psychological abuses, and confinement in inhumane conditions.⁵⁹⁰

v. Akayesu (Trial Judgment) Case No. ICTR-96-4-T (2 September 1998) para. 594; *Prosecutor v. Mucić et al.* (Trial Judgment) Case No. ICTY-91-21 (16 November 1998) para. 468.

⁵⁸⁵ *Prosecutor v. Mucić et al.* (Trial Judgment) Case No. ICTY-91-21 (16 November 1998) para. 543; *see also* paras. 516 - 544.

⁵⁸⁶ *Prosecutor v. Delalić* (Trial Judgment) Case No. ICTY-96-21-A (16 November 1998) para. 532.

⁵⁸⁷ ICRC, ‘Commentary of Article 50 of Geneva Convention I’ (*ICRC*, 2016) para. 73 <www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=21B052420B219A72C1257F7D00587FC3> accessed 20 April 2016.

⁵⁸⁸ *Prosecutor v. Kayishema* (Trial Judgment) Case No. ICTR-95-1 (21 May 1999) para. 583.

⁵⁸⁹ *Prosecutor v. Kayishema and Ruzindana* (Trial Judgment) Case No. ICTR-95-1-T (21 May 1999) para. 151.

⁵⁹⁰ *Prosecutor v. Kvočka* (Trial Judgment) Case No. ICTY-98-30/1-T (02 November 2001) paras. 208 - 209.

Mental Element

In addition to the above-mentioned requirements, prosecutors must establish that perpetrators intended to commit the relevant material elements of the offence of inhumane treatment.⁵⁹¹

Causing great suffering

The offence of wilfully causing great suffering or serious injury to body or health was defined at the ICTY as an “act or omission that is intentional, being an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury”.⁵⁹² It is different from torture since it does not have to be committed for any particular purpose.⁵⁹³ It is also different from inhuman treatment, as wilfully causing great suffering would not cover harm relating solely to the victim’s human dignity.⁵⁹⁴

The Criminal Code of Ukraine does not contain any provisions criminalising causing great suffering *per se*. As noted, although Article 121 (severe bodily harm) and 126 (battery) could be used to interpret Article 438, they do not apply to mental injury and harm.

Physical Element

Prosecutors must demonstrate that the perpetrator caused great physical or mental suffering or serious injury to body or health, including the mental health, of one or more persons. Great suffering could be act or omission.⁵⁹⁵ The ICC Elements of Crimes, however, include ‘mental or physical’ only in relation to the suffering caused (and not the injury).⁵⁹⁶

To establish the requisite level of suffering, defined as ‘great’ or ‘serious’, the ICTY Trial Chambers relied on the ordinary meaning of these words:

The Oxford English Dictionary defines this word [‘serious’] as ‘not slight or negligible’. Similarly, the term ‘great’ is defined as ‘much above average in size, amount or intensity’. The Trial Chamber therefore views these quantitative expressions as providing for the basic requirement that

⁵⁹¹ ICRC, ‘Commentary of Article 50 of Geneva Convention I’ (ICRC, 2016) para. 17 <www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=21B052420B219A72C1257F7D00587FC3> accessed 20 April 2016.

⁵⁹² *Prosecutor v. Mucić et al.* (Trial Judgment) Case No. ICTY-91-21 (16 November 1998) para. 511; *Prosecutor v. Blaškić* (Trial Judgment) Case No. ICTY-95-14 (15 July 1999) para. 156.

⁵⁹³ *Prosecutor v. Mucić et al.* (Trial Judgment) Case No. ICTY-91-21 (16 November 1998) para. 511; *Blaškić* (Trial Judgment) Case No. ICTY-95-14 (03 March 2000) para. 156.

⁵⁹⁴ ICRC, ‘Commentary of Article 50 of Geneva Convention I’ (ICRC, 2016) para. 17 <www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=21B052420B219A72C1257F7D00587FC3> accessed 20 April 2016.

⁵⁹⁵ *Prosecutor v. Blaškić* (Trial Judgment) Case No. ICTY-95-14 (15 July 1999) para. 156; *Prosecutor v. Delalić* (Appeals Judgment) Case No. ICTY-96-21-A (20 February 2001) para. 424; *Prosecutor v. Kordić and Čerkez* (Trial Judgment) Case No. ICTY-95-14/2 (20 February 2001) para. 245; *Prosecutor v. Naletilić and Martinović* (Trial Judgment) Case No. ICTY-98-31 (31 March 2003) para. 339.

⁵⁹⁶ ICRC, ‘Commentary of Article 50 of Geneva Convention I’ (ICRC, 2016) para. 17 <www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=21B052420B219A72C1257F7D00587FC3> accessed 20 April 2016.

a particular act of mistreatment results in a requisite level of serious suffering or injury.⁵⁹⁷

The assessment of the seriousness of the pain is relative and must take into account all relevant circumstances, including the nature of the act or omission, the context in which it occurred, its duration and/or repetition, the physical, mental and moral effects of the act on the victim, and the personal circumstances of the victim, including, age, sex and health.⁵⁹⁸ According to the international tribunals and courts, causing serious bodily or mental harm does not necessarily mean that the harm is permanent and irremediable,⁵⁹⁹ but it “must go beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life”.⁶⁰⁰

For example, mutilation of the wounded, their exposure to useless and unnecessary suffering, or severe beatings or other severe forms of mistreatment of detainees can amount to causing great suffering or serious injury to body or health.⁶⁰¹

Mental Element

According to the commentary of Article 50 of Geneva Convention I (commenting all the grave breaches of the Geneva Conventions), the reference to ‘wilfully causing’ covers both ‘intent’ and ‘recklessness’.⁶⁰² This is also the approach taken by international courts and tribunals.⁶⁰³ It is not sufficient to prove that the alleged perpetrator knew that his or her act might possibly cause such suffering or injury.⁶⁰⁴

Confinement

The ICTY used the concept of ‘arbitrary imprisonment’ defined as the deprivation of liberty of the individual without due process of law.

⁵⁹⁷ *Prosecutor v. Delalić* (Trial Judgment) Case No. IT - 96-21-T (16 November 1998) para. 510.

⁵⁹⁸ See *Prosecutor v. Krnojelac* (Trial Judgment) Case No. ICTY-97-25 (15 March 2002) para. 131; *Prosecutor v. Delalić* (Trial Judgment) Case No. CC/PIU/364-E (16 November 1998) para. 536, citing *A v. UK*, App. No. 100/1997/884/1096 (ECtHR, 23 September 1998) para. 24.

⁵⁹⁹ *Prosecutor v. Akayesu* (Trial Judgment) Case No. ICTR-96-4-T (2 September 1998) para. 502.

⁶⁰⁰ *Prosecutor v. Kaing* (Trial Judgment) Case No. 001/18-07-2007/ECCC/TC (26 July 2010) para. 454. See also, *Prosecutor v. Krstić* (Trial Judgment) Case No. ICTY-98-33-T (02 August 2001) paras 511–513.

⁶⁰¹ ICRC, ‘Commentary of Article 50 of Geneva Convention I’ (ICRC, 2016) para. 17 <www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=21B052420B219A72C1257F7D00587FC3> accessed 20 April 2016.

⁶⁰² ICRC, ‘Commentary of Article 50 of Geneva Convention I’ (ICRC, 2016) para. 17 <www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=21B052420B219A72C1257F7D00587FC3> accessed 20 April 2016. See for example *Prosecutor v. Blaškić* (Trial Judgment) Case No. ICTY-95-14 (15 July 1999) para. 152.

⁶⁰³ *Prosecutor v. Blaškić* (Trial Judgment) Case No. ICTY-95-14 (15 July 1999) para. 152; *Prosecutor v. Dordević* (Trial Judgment) Case No. ICTY-05-87/1-T (23 February 2011) para. 1708; *Prosecutor v. Orić* (Trial Judgment) Case No. ICTY-03-68 (30 June 2006) para. 348; *Prosecutor v. Rukundo* (Trial Judgment) Case No. ICTR-2001-70-A (27 February 2009) para. 579.

⁶⁰⁴ *Prosecutor v. Martić* (Trial Judgment) Case No. ICTY-95-11 (12 June 2007) para. 60; *Prosecutor v. Strugar* (Trial Judgment) Case No. ICTY-01-42-T (31 January 2005) para. 235.

The Criminal Code of Ukraine also criminalises illegal confinement (Article 146). Prosecutors must establish: (1) the unlawful imprisonment of a person not carried out in accordance with the Constitution, laws of Ukraine and international treaties ratified by the Verkhovna Rada of Ukraine; (2) the victim was held in a place where s/he does not want to be and where s/he is unable to leave freely; and (3) the perpetrator was aware that s/he was arbitrarily detaining the victim.⁶⁰⁵ Domestic prosecutors may therefore rely on Article 146 and the jurisprudence of international tribunals and courts to interpret Article 438.

Similarly, the ICC has defined the elements of the crime of confinement as follows: (1) the perpetrator confined or continued to confine one or more persons to a certain location; and (2) the perpetrator had the requisite intent.⁶⁰⁶

In international criminal law, it is necessary to determine the legality of imprisonment as well as the procedural safeguards pertaining to the subsequent imprisonment of the person or group of persons in question.⁶⁰⁷ The imprisonment of civilians is considered unlawful where:

- Civilians have been detained in contravention of Article 42 of Geneva Convention IV, *i.e.*, they are detained without reasonable grounds to believe that the security of the Detaining Power makes it absolutely necessary; and
- The procedural safeguards required by Article 43 of Geneva Convention IV are not complied with in respect of detained civilians, even where initial detention may have been justified.⁶⁰⁸

The ICTY held that although there is no absolute right in the Geneva Conventions to freedom of movement, this does not mean that there is a general suspension of this right during armed conflict either.⁶⁰⁹ Therefore, a deprivation of an individual's liberty will be arbitrary and, therefore, unlawful if no legal basis can be called upon to justify the initial deprivation of liberty. If at any time the initial legal basis ceases to apply, the initially lawful deprivation of liberty may become unlawful at that time and be regarded as arbitrary imprisonment.⁶¹⁰

Article 42 of Geneva Convention IV allows the detention of an individual if he or she constituted a threat to the security of the state. It must be established that there exists, with respect to each individual who has been deprived of his liberty, reasonable grounds for such detention.⁶¹¹

⁶⁰⁵ M I Melnyk and M I Khavroniuk, *Scientific and Practice Commentary to the Criminal Code of Ukraine* (7th edn lurydychna Dumka 2010) Art. 146 <www.pravoznavec.com.ua/books/162/12702/28/#chapter> accessed 31 March 2016.

⁶⁰⁶ ICC Element of Crimes (2002) 17.

⁶⁰⁷ *Prosecutor v. Kordić and Čerkez* (Trial Judgment) Case No. ICTY-95-14/2 (26 February 2001) paras. 302-303.

⁶⁰⁸ *Ibid.*

⁶⁰⁹ *Prosecutor v. Mucić et al.* (Trial Judgment) Case No. ICTY-91-21 (16 November 1998) para. 565.

⁶¹⁰ *Prosecutor v. Krnojelac* (Trial Judgment) Case No. ICTY-97-25-T (15 March 2002) para. 114.

⁶¹¹ *Prosecutor v. Krnojelac* (Trial Judgment) Case No. ICTY-97-25-T (15 March 2002) paras. 123, 578; *Prosecutor v. Mucić et al.* (Trial Judgment) Case No. ICTY-91-21 (16 November 1998) paras. 323, 327.

The concept of “activities prejudicial or hostile to the security of the State” has been interpreted as including, above all, espionage, sabotage and intelligence activities for the enemy forces or enemy nationals. The individual’s political attitude towards the state is not sufficient.⁶¹²

Category 2 Crimes

Outrages upon personal dignity

Outrages upon personal dignity is broader than torture, inhuman treatment and causing great suffering or serious injury. It protects persons from humiliation and ridicule, rather than harm to the integrity and physical and mental well being of persons.⁶¹³

In international criminal law, the Prosecution must prove that: (1) the perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons; (2) the severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity; and (3) the accused intended and knew that the act or omission could have that effect.⁶¹⁴

The Criminal Code of Ukraine does not contain a similar crime.

Physical Element

At the ICC, humiliating and degrading treatment includes such treatment committed against dead persons. The Pre-Trial Chamber in *Katanga* stated that the core element of this war crime is the humiliation, degradation, or violation of the person’s dignity. These acts must also be committed with objectively sufficient gravity so as to be “generally recognized as an outrage upon personal dignity”.⁶¹⁵

The ICTY has held that the assessment of the physical element should not be based only on subjective criteria related to the sensitivity of the victim, but also on objective criteria related to the gravity of the act.⁶¹⁶ Further, it provides that “so long as the serious humiliation or degradation is real and serious”, there is no requirement that such suffering be lasting, or that

⁶¹² *Prosecutor v. Mucić et al.* (Trial Judgment) Case No. ICTY-91-21 (16 November 1998) para. 567.

⁶¹³ International Criminal Law Services, ‘International Criminal Law and Practice Training Materials, Module 8: War Crimes’ 48 <http://wcjp.unicri.it/deliverables/docs/Module_8_War_crimes.pdf> accessed 20 April 2016.

⁶¹⁴ ICC Elements of Crimes (2011) 33; *Prosecutor v. Kunarac et al.* (Trial Judgment) Case No. ICTY-96-23-T & ICTY-96-23/1-T (22 February 2001) paras. 511, 514; *Prosecutor v. Kunarac, Kovac and Vuković* (Appeals Judgment) Case No. ICTY-96-23-T & ICTY-96-23/1-A (12 June 2002) paras. 161, 163; *Prosecutor v. Mucić et al.* (Trial Judgment) Case No. ICTY-91-21 (16 November 1998) para. 543. See also *Prosecutor v. Haradinaj et al.* (Trial Judgment) Case No. ICTY-04-84 (29 November 2012) para. 132 (using ‘severe’ instead of ‘serious’); *Prosecutor v. Bagosora* (Trial Judgment) Case No. ICTR-98-41-T (18 December 2008) para. 2250; *Prosecutor v. Sesay et al.* (Trial Judgment) Case No. SCSL-04-15-T (2 March 2009) para. 175; *Prosecutor v. Brima et al.* (Trial Judgment) Case No. SCSL-04-16-T (20 June 2007) para. 716.

⁶¹⁵ ICC Elements of Crimes (2011) 33.

⁶¹⁶ *Prosecutor v. Aleksovski* (Trial Judgment) Case No. ICTY-95-14/1 (25 June 1999) para. 56; *Prosecutor v. Kunarac et al.* (Trial Judgment) Case No. ICTY-96-23-T & ICTY-96-23/1-T (22 February 2001) para. 504; *Prosecutor v. Kunarac* (Appeals Judgment) Case No. ICTY-90-23/1, (12 June 2002) paras. 162–163.

it is “necessary for the act to directly harm the physical or mental well-being of the victim”.⁶¹⁷ According to the ICTY:

[T]he seriousness of an act and its consequences may arise either from the nature of the act per se or from the repetition of an act or from a combination of different acts which, taken individually, would not constitute a crime within the meaning of Article 3 of the [1993 ICTY] Statute. The form, severity and duration of the violence, the intensity and duration of the physical or mental suffering, shall serve as a basis for assessing whether crimes were committed.⁶¹⁸

The ICC has provided several types of conduct considered severe enough to constitute outrages upon personal dignity, including: “compelling victims to dance naked on a table, using detainees as human shields or trench diggers; forcing detainees to relieve bodily functions in their clothing; imposing conditions of constant fear of being subjected to physical, mental, or sexual violence on detainees; forced incest, burying corpses in latrine pits; and leaving infants without care after killing their guardians”.⁶¹⁹

According to the ICC, “[t]his war crime requires that the perpetrator, by action or omission, caused the humiliation, degradation, or violation of the personal dignity of individuals: (i) who are aligned or whose allegiance is to a party to the conflict who is adverse or hostile to the perpetrator; and (ii) who are in the hands of the party to the conflict to which the perpetrator belongs”.⁶²⁰

Mental Element

In international criminal law, the Prosecution must also establish that the perpetrator had intent and knowledge about the grave acts of humiliation, degradation, or violation of the victim’s personal dignity. This subjective element includes, first and foremost, *dolus directus* of the first degree and *dolus directus* of the second degree.⁶²¹

International tribunals and courts have also held that:

the mens rea of the offence does not require that the Accused had a specific intent to humiliate or degrade the victims, that is, that he perpetrated the act for that very reason. The act or omission must, however, have been done intentionally and the Accused must have known “that his act or omission could cause serious humiliation,

⁶¹⁷ *Prosecutor v. Katanga and Chui* (Confirmation of Charges Decision) Case No. ICC-01/04-01/07 (30 September 2008) para. 369; citing *Prosecutor v. Kunarac et al.* (Trial Judgment) Case No. ICTY-96-23-T&ICTY-96-23/1-T (22 February 2001).

⁶¹⁸ *Prosecutor v. Aleksovski* (Trial Judgment) Case No. ICTY-95-14/1 (25 June 1999) para. 57.

⁶¹⁹ *Prosecutor v. Katanga and Chui* (Confirmation of Charges Decision) Case No. ICC-01/04-01/07 (30 September 2008) para. 371.

⁶²⁰ *Prosecutor v. Katanga and Chui* (Confirmation of Charges Decision) Case No. ICC-01/04-01/07 (30 September 2008) para. 368.

⁶²¹ *Prosecutor v. Katanga and Chui* (Confirmation of Charges Decision) Case No. ICC-01/04-01/07 (30 September 2008) para. 372; *Prosecutor v. Kunarac et al.* (Trial Judgment) Case No. ICTY-96-23-T&ICTY-96-23/1-T (22 February 2001) paras. 511, 514, citing *Prosecutor v. Mucić et al.* (Trial Judgment) Case No. ICTY-91-21 (16 November 1998) para. 543; *Prosecutor v. Kunarac* (Appeals Judgment) Case No. ICTY-90-23/1 (12 June 2002).

degradation or otherwise be a serious attack on human dignity.” The Chamber considers that there is no requirement to establish that the Accused knew of the “actual consequences of the act”, but only of its possible consequences.⁶²²

Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities

Attacks against civilians are grave breaches of Additional Protocol I (Article 85 and Article 51 of Additional Protocol I). Prosecutors must demonstrate that: (1) the perpetrator directed an attack; (2) the object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities; and (3) the perpetrator intended to target the civilians (individual or population).⁶²³

The Criminal Code of Ukraine does not contain any similar crime.

Physical Element

Prosecutors must demonstrate that an attack was launched.⁶²⁴ The ICTY jurisprudence has defined ‘attack’ as a course of conduct involving the commission of acts of violence.⁶²⁵ According to the ICTY, prohibited attacks are those launched deliberately against civilians in the course of an armed conflict and that are not justified by military necessity.⁶²⁶ They must have caused deaths and/or serious bodily injuries within the civilian population. Such attacks are in direct contravention of the prohibitions expressly recognised in international law including the relevant provisions of Additional Protocol I.⁶²⁷

The ICC interpreted such crimes as crimes perpetrated in any of the two following scenarios:

- When individual civilians not taking direct part in the hostilities or the civilian population are the sole target of the attack, or
- When the perpetrator launches the attack with two distinct specific aims:
 - A military objective, within the meaning of Articles 51 and 52 of Additional Protocol I; and simultaneously,

⁶²² *Prosecutor v. Sesay et al.* (Trial Judgment) Case No. SCSL-04-15-T (2 March 2009) para. 177; *Prosecutor v. Kunarac et al.* (Trial Judgment) Case No. ICTY-96-23-T&ICTY-96-23/1-T (22 February 2001) paras. 509-512, 514, 744; *Prosecutor v. Kunarac* (Appeals Judgment) Case No. ICTY-90-23/1 (12 June 2002) paras. 164-165.

⁶²³ ICC Elements of Crimes (2002) 18; *Prosecutor v. Stanilav Galić* (Appeals Judgment) Case No. ICTY-98-29-A (30 November 2006) para. 56.

⁶²⁴ *Prosecutor v. Katanga and Chui* (Confirmation of Charges Decision) Case No. ICC-01/04-01/07 (30 September 2008) para. 270.

⁶²⁵ *Prosecutor v. Krnojelac* (Trial Judgment) Case No. ICTY-97-25-T (15 March 2002) para. 54; *Prosecutor v. Kunarac et al.* (Trial Judgment) Case No. ICTY-96-23-T&ICTY-96-23/1-T (22 February 2001) para. 415.

⁶²⁶ *Prosecutor v. Kordić and Čerkez* (Trial Judgment) Case No. ICTY-95-14/2 (26 February 2001) para. 328; see also *Prosecutor v. Kordić and Čerkez* (Appeals Judgment) ICTY-95-14/2-A (17 December 2004) para. 67; *Prosecutor v. Strugar* (Trial Judgment) Case No. ICTY-01-42-T (31 January 2005) para. 280; *Prosecutor v. Tihomir Blaskić* (Trial Judgment) Case No. ICTY-95-14-T (3 March 2000) para. 180.

⁶²⁷ *Ibid.*

- The civilian population or individual civilians not taking direct part in the hostilities.⁶²⁸

The ICC considers that such crimes must be distinguished from situations where, in violation of the principle of proportionality, a disproportionate attack is intentionally launched with the specific aim of targeting a military objective, with the awareness that incidental loss of life or injury to civilians will or may occur as a result of such an attack. In such a case, the targeting of the civilian population is not the aim of the attack but only an incidental consequence thereof.⁶²⁹

More importantly, at the ICC, the attack must be directed against individual civilians not taking part in hostilities, or a civilian population that has not yet fallen into the hands of the adverse or hostile party to the conflict to which the perpetrator belongs.⁶³⁰ In accordance with the principles of distinction and protection of the civilian population, only military objectives may be lawfully attacked.⁶³¹ The concept of civilian is wider than that used for the grave breaches of the Geneva Conventions. It should be interpreted in light of Article 50(1) of Additional Protocol I as persons who are not members of the armed forces.⁶³²

According to the ICC:

[...] the term “civilian” applies to anyone who is not a combatant, and in case of doubt, the person shall be considered to be a civilian. Additionally, a civilian population comprises all civilians as opposed to members of armed forces and any other legitimate combatants. Further, pursuant to Article 50(3) of the AP I, the presence within the civilian population of individuals who do not fit within the definition of civilians does not deprive the entire population of its civilian character. Yet, civilians may lose protection only for such a time as they take direct part in hostilities or combat-related activities and not permanently. Further, the protection does not cease if such persons only use armed force in the exercise of their right to self-defence.⁶³³

Relying on the guidance provided by the ICRC, the ICC defined when a civilian is taking part in hostilities as when a civilian uses weapons or other means to commit violence against human or material enemy forces, unless in self-defence.⁶³⁴ It further held that supplying food

⁶²⁸ *Prosecutor v. Mbarushimana* (Confirmation of Charges Decision) Case No. ICC-01/04-01/10 (16 December 2011) paras. 142-144; *Prosecutor v. Katanga and Chui* (Confirmation of Charges Decision) Case No. ICC-01/04-01/07 (30 September 2008) paras. 273-274.

⁶²⁹ *Ibid.*

⁶³⁰ *Prosecutor v. Katanga and Chui* (Confirmation of Charges Decision) Case No. ICC-01/04-01/07 (30 September 2008) paras. 267-269.

⁶³¹ Additional Protocol I, Art. 52(2). See *Prosecutor v. Kordić and Čerkez* (Trial Judgment) Case No. ICTY-95-14/2 (26 February 2001) para. 327.

⁶³² *Prosecutor v. Martić* (Appeals Judgment) Case No. ICTY-95-11 (12 June 2007) (8 October 2008) paras. 297-300.

⁶³³ *Prosecutor v. Mbarushimana* (Confirmation of Charges Decision) Case No. ICC-01/04-01/10 (16 December 2011) para. 148. See also *Prosecutor v. Stanilav Galić* (Appeals Judgement) Case No. ICTY-98-29-A (30 November 2006) para. 136.

⁶³⁴ *Prosecutor v. Mbarushimana* (Confirmation of Charges Decision) Case No. ICC-01/04-01/10 (16 December 2011) para. 148.

and shelter and sympathising with one belligerent party are insufficient reasons to deny civilians protection against attack. The protection does not cease if such persons only use armed force in the exercise of their right to self-defence.⁶³⁵

Reprisals against the civilian population as such, or individual civilians, are prohibited in all circumstances, regardless of the behaviour of the other party, since “no circumstances would legitimise an attack against civilians even if it were a response proportionate to a similar violation perpetrated by the other party”.⁶³⁶

In addition, the civilian population does not need to be the sole and exclusive target of the attack.⁶³⁷ The ICTY further held that it is not necessary to establish that particular areas or zones be designated as civilian or military in nature. Rather, a distinction is to be made between the civilian population and combatants, or between civilian and military objectives. Such distinctions must be made on a case-by-case basis.⁶³⁸

Mental Element

Finally, prosecutors must establish that an attack was conducted intentionally with the knowledge, or when it was impossible not to know, that civilians were being targeted.⁶³⁹ It encompasses direct and indirect intent (recklessness). The intent to target civilians can be proved through inferences from direct or circumstantial evidence. There is no requirement of the intent to attack particular civilians; rather it is prohibited to make the civilian population, as well as individual civilians, the object of an attack.⁶⁴⁰

Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians

Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians is a grave breach of Additional Protocol I (Article 85(3)(b)) and a violation of Article 51 of Additional Protocol I.

Prosecutors need to establish that: (1) the perpetrator launched an attack; (2) the attack was such that it would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the

⁶³⁵ *Ibid.*

⁶³⁶ *Ibid.*, paras. 142-144.

⁶³⁷ *Ibid.*

⁶³⁸ *Prosecutor v. Milošević, D.* (Judgment) Case No. ICTY-98-29/1-A, ICTY (12 November 2009) para. 54 (footnotes omitted).

⁶³⁹ *Prosecutor v. Katanga and Chui* (Confirmation of Charges Decision) Case No. ICC-01/04-01/07 (30 September 2008) paras. 271, 275; *Prosecutor v. Tihomir Blaskić* (Trial Judgement) Case No. ICTY-95-14-T (3 March 2000) para. 180.

⁶⁴⁰ *Prosecutor v. Milošević, D.* (Trial Judgment) Case No. ICTY-98-29/1-A (12 November 2009) paras. 66-67 (footnotes omitted).

concrete and direct overall military advantage anticipated; and (3) the perpetrator knew of these possible consequences.⁶⁴¹

The Criminal Code of Ukraine does not contain a similar crime.

Physical Element

The first element is discussed above.⁶⁴² In addition, prosecutors must establish that the attack was disproportionate (such that it would cause incidental death or injury to civilians or damage to civilian objects and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated).

Under IHL, one type of indiscriminate attack violates the principle of proportionality: namely, an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.⁶⁴³ Prosecutors must therefore demonstrate the indiscriminate nature of the attack.

In order to comply with the principle of proportionality, precautions must be taken (Article 57(2) of Additional Protocol I). The practical application of the principle of distinction requires that those who plan or launch an attack take all feasible precautions to verify that the objectives attacked are neither civilians nor civilian objects, so as to spare civilians as much as possible. Prosecutors must therefore establish that the attack was carried out without taking necessary precautions to spare the civilian population or individual civilians, especially failing to seek precise information on the objects or persons attacked. This element has also been required by the ICTY:

The parties to a conflict are under an obligation to remove civilians, to the maximum extent feasible, from the vicinity of military objectives and to avoid locating military objectives within or near densely-populated areas. However, the failure of a party to abide by this obligation does not relieve the attacking side of its duty to abide by the principles of distinction and proportionality when launching an attack.⁶⁴⁴

In determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.⁶⁴⁵

It will be decided on a case-by-case basis, based on a variety of factors, including the means and method used in the course of the attack, the distance between the victims and the source

⁶⁴¹ ICC Elements of Crimes (2011) 19.

⁶⁴² See *supra*, para. 44.

⁶⁴³ Additional Protocol I, Art. 51(5).

⁶⁴⁴ *Prosecutor v. Milošević, D.* (Trial Judgment) Case No. ICTY-98-29/1-A (12 November 2009) para. 949 (footnotes omitted).

⁶⁴⁵ *Prosecutor v. Stanislav Galić* (Judgment and Opinion) Case No. ICTY-98-29-T (05 December 2003) para. 58.

of fire, the ongoing combat activity at the time and location of the incident, the presence of military activities or facilities in the vicinity of the incident, the status of the victims as well as their appearance, and the nature of the crimes committed in the course of the attack. In addition, the indiscriminate character of an attack can be indicative of the fact that the attack was indeed directed against the civilian population.⁶⁴⁶

The protection of civilians may cease entirely or be reduced or suspended in three exceptional circumstances: (i) when civilians abuse their rights; (ii) when, although the object of a military attack is comprised of military objectives, belligerents cannot avoid causing so-called collateral damage to civilians; and (iii) at least according to some authorities, when civilians may legitimately be the object of reprisals.⁶⁴⁷

Mental Element

Finally, prosecutors must establish that the attack was conducted intentionally with the knowledge, or when it was impossible not to know, that there was expectation of excessive civilian casualties.⁶⁴⁸ The intent to target civilians can be proved through inferences from direct or circumstantial evidence.⁶⁴⁹

Category 3 Crimes

Rape

Rape was not considered as a war crime *per se* at the ICTY but was established as part of other crimes such as torture or inhumane treatment. Although the ICTR Statute expressly includes rape, enforced prostitution and other forms of sexual violence as war crimes, these crimes were only considered as underlying acts of the offence of “outrages upon personal dignity”.⁶⁵⁰

In contrast, the Rome Statute expressly contains the war crime of rape. At the ICC, the Prosecution must establish that: (1) the perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body; and (2) the invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of

⁶⁴⁶ *Prosecutor v. Milošević, D.* (Trial Judgment) Case No. ICTY-98-29/1-A (12 November 2009) paras. 66-67 (footnotes omitted); *Prosecutor v. Tihomir Blaskić* (Trial Judgment) Case No. ICTY-95-14-T (3 March 2000) 512 (footnotes omitted).

⁶⁴⁷ *Prosecutor v. Kupreškić* (Trial Judgment) Case No. ICTY-95-16-T (14 January 2000) para. 522.

⁶⁴⁸ *Prosecutor v. Stanislav Galić* (Judgment and Opinion) Case No. ICTY-98-29-T (05 December 2003) para. 59.

⁶⁴⁹ *Prosecutor v. Stanislav Galić* (Judgment and Opinion) Case No. ICTY-98-29-T (05 December 2003) para. 60.

⁶⁵⁰ ICTR Statute, Art. 4(2).

giving genuine consent; and (3) the accused intended and knew that the penetration would occur in the ordinary course of events.⁶⁵¹

In Ukraine, the Criminal Code contains two provisions criminalising rape: Article 152 (Rape) and Article 153 (Violent unnatural gratification of sexual desire). Under the Criminal Code, the crime of rape is only a heterosexual act. Rape is defined as: (1) sexual intercourse between a man's and woman's genitals which can, as a general rule, lead to pregnancy; combined with (2) physical violence, threats of physical violence, or taking advantage of the victim's vulnerable condition; and (3) direct intent of the perpetrator. To contrast, violent unnatural gratification of sexual desire is: (1) the (homosexual or heterosexual) gratification of sexual desire (e.g., sodomy, lesbianism, *coitus per os* between a man and a woman or between men, *coitus per anum* between a man and a woman, sadistic sexual acts (for example, the penetration of the vagina with certain subject)); combined with (2) physical violence, threats of physical violence, or taking advantage of the victim's vulnerable condition; and (3) direct intent.⁶⁵²

Physical Element

The ICTY established the objective elements of penetration:

- The sexual penetration, however slight;
- Of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
- Of the mouth of the victim by the penis of the perpetrator.⁶⁵³

The SCSL stated that the penetration can be of any part of the body of either the victim or the accused with a sexual organ. "Any part of the body" includes genital, anal or oral penetration. It further clarified that both men and women can be victims of rape.⁶⁵⁴ In addition, the ICTR ruled that the act of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual.⁶⁵⁵

International tribunals and courts consider it necessary to establish that the victim could not be said to have voluntarily and genuinely consented to the act. The use or threat of force provides clear evidence of non-consent, but it is not required.⁶⁵⁶ Coercion can also take the form of intimidation, extortion and other forms of duress that prey on fear or desperation.

⁶⁵¹ ICC Elements of Crimes (2011) 28.

⁶⁵² M.I. Melnyk and M.I. Khavroniuk, *Scientific and Practice Commentary to the Criminal Code of Ukraine* (7th edn lurydychna Dumka 2010) Arts. 152, 153 <www.pravoznavec.com.ua/books/162/12169/28/#chapter> accessed 31 March 2016.

⁶⁵³ *Prosecutor v. Furundžija* (Trial Judgment) Case No. ICTY-95-17/1-T (10 December 1998) para. 185.

⁶⁵⁴ *Prosecutor v. Sesay et al.* (Trial Judgment) Case No. SCSL-04-15-T (2 March 2009) para. 146.

⁶⁵⁵ *Prosecutor v. Akayesu* (Trial Judgment) Case No. ICTR-96-4-T (2 September 1998) para. 596.

⁶⁵⁶ *Prosecutor v. Sesay et al.* (Trial Judgment) Case No. SCSL-04-15-T (2 March 2009) para. 147; *Prosecutor v. Kunarac et al.* (Appeals Judgment) Case No. ICTY-96-23&ICTY-96-23/1-A (12 June 2002) para. 129.

Coercion may also be inherent in certain circumstances,⁶⁵⁷ such as captivity.⁶⁵⁸ In some situations, even in the absence of force or coercion, a person cannot be said to genuinely have consented to the act, for example a person may not be capable of genuinely consenting if he or she is too young, under the influence of a substance, or suffering from an illness or disability.⁶⁵⁹

Mental Element

Finally, the SCSL has held that the invasion should be intentional and done in the knowledge that the victim was not consenting.⁶⁶⁰

Sexual Violence

Similarly to rape, the ICTY Statute does not expressly contain the war crime of sexual violence. In contrast, the Rome Statute incorporated this offence. The ICC requires prosecutors to establish that: (1) the perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent; (2) the conduct was of a gravity comparable to that of a grave breach of the Geneva Conventions; and (3) the perpetrators had the requisite intent and knowledge.⁶⁶¹

The ICTR defined sexual violence as:

any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.⁶⁶²

Prosecutors must prove that the act was of a sexual nature. According to the ICTY, this crime embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat or force or intimidation in a way that is degrading and humiliating for the victim's dignity.⁶⁶³ The ICC has held that not every act of violence that targets parts of the body commonly associated with sexuality should be considered an act of

⁶⁵⁷ *Prosecutor v. Kunarac et al.* (Trial Judgment) Case No. ICTY-96-23-T&ICTY-96-23/1-T (22 February 2001) paras. 438, 442; *Prosecutor v. Kunarac et al.* (Appeals Judgment) Case No. ICTY-96-23&ICTY-96-23/1-A (12 June 2002) paras 129,130.

⁶⁵⁸ *Prosecutor v. Furundžija* (Trial Judgment) Case No. ICTY-95-17/1-T (10 December 1998) para. 271.

⁶⁵⁹ See *Prosecutor v. Sesay et al.* (Trial Judgment) Case No. SCSL-04-15-T (2 March 2009) para. 148.

⁶⁶⁰ *Prosecutor v. Sesay et al.* (Trial Judgment) Case No. SCSL-04-15-T (2 March 2009) para. 150.

⁶⁶¹ ICC Elements of Crimes (2011) 10.

⁶⁶² *Prosecutor v. Akayesu* (Trial Judgment) Case No. ICTR-96-4-T (2 September 1998) para. 688; endorsed by *Prosecutor v. Rukundo* (Trial Judgment) Case No. ICTR-2001-70-A (27 February 2009) para. 379. See also *Prosecutor v. Milutinović et al.* (Trial Judgment) Case No. ICTY-05-87-T (26 February 2009) para. 199.

⁶⁶³ *Prosecutor v. Furundžija* (Trial Judgment) Case No. ICTY-95-17/1-T (10 December 1998) para. 186; *Prosecutor v. Brima et al.* (Trial Judgment) Case No. SCSL-04-16-T (20 June 2007) para. 720.

sexual violence.⁶⁶⁴ The determination of whether an act is of a sexual nature is inherently a question of fact. For example, the ICC found that the acts of forcible circumcision and penile amputation motivated by ethnic prejudice and that were intended to demonstrate cultural superiority of one tribe over the other do not qualify as other forms of sexual violence.⁶⁶⁵

Similarly to rape, prosecutors must demonstrate any form of coercion which proves the lack of consent, including acts or threats of violence, detention, and generally oppressive surrounding circumstances.⁶⁶⁶ Coercion does not necessarily involve physical force. Threats, intimidation, extortion and other forms of duress, which prey on fear or desperation, may constitute coercion.⁶⁶⁷ In certain circumstance, coercion and lack of consent can be inferred (*i.e.*, when a person is detained).⁶⁶⁸

Intentionally directing attacks against civilian objects, that is, objects which are not military objectives

The offence of attacking civilian objects is a serious violation of IHL (Article 52 of Additional Protocol I).⁶⁶⁹ Under IHL, civilian objects should not be attacked, except when they become military objectives. Military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.⁶⁷⁰

Similar to attacks against civilians, prosecutors must demonstrate that: (1) the perpetrator directed an attack; (2) the object of the attack was civilian objects, that is, objects which are not military objectives; and (3) the perpetrator intended such civilian objects to be the object of the attack.⁶⁷¹

The Criminal Code of Ukraine does not contain a similar crime.

Physical Element

First, an attack must have been launched. The Rome Statute of the ICC does not mention that the attack must have had a particular result. However the ICTY, as noted above, requires

⁶⁶⁴ *Prosecutor v. Katanga and Chui* (Confirmation of Charges Decision) Case No. ICC-01/04-01/07 (30 September 2008) paras. 265-266.

⁶⁶⁵ *Prosecutor v. Katanga and Chui* (Confirmation of Charges Decision) Case No. ICC-01/04-01/07 (30 September 2008) paras 265-266.

⁶⁶⁶ *Prosecutor v. Milutinović et al.* (Trial Judgment) Case No. ICTY-05-87-T (26 February 2009) para. 200; *Prosecutor v. Rukundo* (Trial Judgment) Case No. ICTR-2001-70-T (27 February 2009) para. 385.

⁶⁶⁷ *Prosecutor v. Akayesu* (Trial Judgment) Case No. ICTR-96-4-T (2 September 1998) para. 688; cited in *Prosecutor v. Rukundo* (Trial Judgment) Case No. ICTR-2001-70-T (27 February 2009) para. 381.

⁶⁶⁸ *Prosecutor v. Milutinović et al.* (Trial Judgment) Case No. ICTY-05-87-T (26 February 2009) para. 200; *Prosecutor v. Akayesu* (Trial Judgment) Case No. ICTR-96-4-T (2 September 1998) para. 688.

⁶⁶⁹ See *Prosecutor v. Strugar* (Trial Judgment) Case No. ICTY-01-42-T (31 January 2005) para. 223.

⁶⁷⁰ Additional Protocol I, Art. 52.

⁶⁷¹ ICC Element of Crimes (2002) 34.

that the attack caused death, serious injury to body or health, or being of the same gravity. It defines a prohibited attack as follows:

In short, prohibited attacks are those launched deliberately against civilians or civilian objects in the course of an armed conflict and are not justified by military necessity. They must have caused deaths and/or serious bodily injuries within the civilian population or extensive damage to civilian objects. Such attacks are in direct contravention of the prohibitions expressly recognised in international law including the relevant provisions of Additional Protocol I.⁶⁷²

Secondly, the object of the attack must be civilian objects, that is, objects which are not military objects. The ICTY considers that the presence of soldiers in a civilian object, like a tram, does not alter its civilian status.⁶⁷³

Mental Element

Finally, prosecutors must establish that the perpetrator intended such civilian objects to be the object of the attack.

Non-International Armed Conflict

Category 4 Crimes

Murder

The prohibition of 'murder' first appears as a grave breach of the Geneva Conventions, as well as in Common Article 3 (non-international armed conflict). It is widely accepted that there is no difference between the notion of 'wilful killing' and the notion of 'murder'.⁶⁷⁴

The discussion above in relation to international armed conflict equally applies to the crime of murder during a non-international armed conflict.⁶⁷⁵

Torture

The prohibition of torture is contained in Article 12 of the Geneva Convention I (international armed conflict), as well as in Common Article 3 (non-international armed conflict). There is

⁶⁷² *Prosecutor v. Kordić and Čerkez* (Trial Judgment) Case No. ICTY-95-14/2-T (26 February 2001) para. 328; see also *Prosecutor v. Strugar* (Trial Judgment) Case No. ICTY-01-42-T (31 January 2005) para. 280; *Prosecutor v. Blaškić* (Trial Judgment) Case No. ICTY-95-14 (15 July 1999) para. 180; *Prosecutor v. Kordić and Čerkez* (Appeals Judgment) ICTY-95-14/2-A (17 December 2004) para. 67.

⁶⁷³ *Prosecutor v. Milošević, D.* (Trial Judgment) Case No. ICTY-98-29/1-A (12 November 2009) para. 159 (footnotes omitted).

⁶⁷⁴ ICRC, 'Commentary of Article 50 of Geneva Convention I' (ICRC, 2016) para. 17 <www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=21B052420B219A72C1257F7D00587FC3> accessed 20 April 2016. See *Prosecutor v. Naletilić and Martinović* (Trial Judgment) Case No. ICTY-98-34-T (21 March 2003) paras. 248-249; *Prosecutor v. Mucić et al.* (Trial Judgment) Case No. ICTY-91-21 (16 November 1998) paras. 422-423; *Prosecutor v. Tadić* (Trial Judgment) Case No. ICTY-94-1-T (7 May 1997) paras. 235, 236, 237.

⁶⁷⁵ See *supra* paras. 1-7.

no indication in law or derived from practice that the term ‘torture’ has a different meaning in international and non-international armed conflict.⁶⁷⁶

The discussion above in relation to international armed conflict equally applies to the crime of torture during a non-international armed conflict.⁶⁷⁷

Cruel treatment

Cruel treatment has been defined as an intentional act or omission causing serious mental or physical suffering or injury or constituting a serious attack on human dignity.⁶⁷⁸

International criminal law requires prosecutors to establish the following elements: (1) an act or omission which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity; and (2) the conduct was intentional which, judged objectively, is deliberate and not accidental.⁶⁷⁹

Physical Element

First, prosecutors must establish that the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons. The ICTY held that the seriousness of the harm or injury must be assessed on a case-by-case basis, taking into account such factors as the severity of the alleged conduct, the nature of the act or omission, the context in which the conduct occurred, its duration and/or repetition, its physical and mental effects on the victim, and in some instances, the personal circumstances of the victim, including age, gender and health.⁶⁸⁰

To assess the severity of the pain or suffering, the ICTY held that it is not required that the suffering caused by the cruel treatment be “lasting”. The following factors, among others, should be taken into consideration: the age and health of the victim and the physical and mental effects of the crime on the victim.⁶⁸¹

The following conduct has been considered as cruel treatment: beatings, inhumane living conditions in a detention centre, attempted murder, use of human shields and trench digging,

⁶⁷⁶ ICRC, “Commentary of Common Article 3” (ICRC, 2016) para. 274 < www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC > accessed 20 April 2016.

⁶⁷⁷ See *supra* para. 8-14.

⁶⁷⁸ *Prosecutor v. Ntagerura et al.* (Trial Judgment) Case No. ICTR-99-46-T (25 February 2004) para. 765 (footnotes omitted).

⁶⁷⁹ ICC Elements of Crimes (2011) 32; *Prosecutor v. Mucić et al.* (Trial Judgment) Case No. ICTY-91-21 (16 November 1998) para. 552; *Prosecutor v. Jelisić* (Trial Judgment) Case No. ICTY-95-10-T (14 December 1999) para. 41; *Prosecutor v. Tihomir Blaskić* (Trial Judgment) Case No. ICTY-95-14-T (3 March 2000) para. 186; *Prosecutor v. Krstić* (Trial Judgment) Case No. ICTY-98-33-T (2 August 2001) para. 516; *Prosecutor v. Kvočka* (Trial Judgment) Case No. ICTY-98-30/1-T (02 November 2001) para. 159; confirmed in *Prosecutor v. Aleksovski* (Appeals Judgment) Case No. ICTY-95-14/1 (24 March 2000) para. 26; ICTY, *Prosecutor v. Mucić et al.* (Appeals Judgment) Case No. ICTY-96-21-A (20 February 2001) para. 424, *Prosecutor v. Kordić and Čerkez* (Trial Judgment) ICTY-95-14/2-T (29 February 2001) para. 265. See also, *Prosecutor v. Naletilić and Martinović* (Trial Judgment) Case No. ICTY-98-34-T (21 March 2003) para. 246.

⁶⁸⁰ *Prosecutor v. Lukić Milan & Lukić Sredoje* (Trial Judgment) Case No. ICTY-98-32/1 (20 July 2009) para. 957; *Prosecutor v. Orić* (Trial Judgment) Case No. ICTY-03-68 (30 June 2006) para. 352.

⁶⁸¹ *Prosecutor v. Martić* (Trial Judgment) Case No. ICTY-95-11 (12 June 2007) para. 80.

the failure to provide adequate medicine or medical treatment if it causes serious mental or physical suffering or injury, or constitutes a serious attack on human dignity.⁶⁸²

Mental Element

The ICTY requires that the perpetrator acted with the direct or indirect intent to commit cruel treatment. A perpetrator acts with the indirect intent to commit cruel treatment when he is aware that cruel treatment would be the probable consequence of his conduct, and he accepted that fact.⁶⁸³

Outrages upon personal dignity

The prohibition of outrages upon personal dignity is contained in Article 75 of Additional Protocol I (international armed conflict), as well as in Common Article 3 (non-international armed conflict). There is no indication in law or derived from practice that the term ‘outrages upon personal dignity’ has a different meaning in international and non-international armed conflict.

The discussion above in relation to international armed conflict equally applies to the crime of outrages upon personal dignity during a non-international armed conflict.⁶⁸⁴

Category 5 Crimes

Rape and Sexual Violence

Similarly, the prohibition of rape and sexual violence is contained in Article 75 of Additional Protocol I (international armed conflict), as well as Article 4 of Additional Protocol II (non-international armed conflict). There is no indication that rape or sexual violence has a different meaning in international and non-international armed conflict.

The discussion above in relation to international armed conflict equally applies to the crimes of rape and sexual violence during a non-international armed conflict.⁶⁸⁵

Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities

Attacks against civilians are grave breaches of Additional Protocol I (Article 85), violations of Article 51 of Additional Protocol I (international armed conflict) and Article 13 of Additional Protocol II (non-international armed conflict). This crime has a similar meaning in international and non-international armed conflict.⁶⁸⁶

⁶⁸² *Prosecutor v. Mrkšić et al.* (Trial Judgment) Case No. ICTY-95-13/1 (27 September 2007) para. 517.

⁶⁸³ *Prosecutor v. Prlić* (Trial Judgment) Case No. ICTY-04-74-T (19 May 2013) Vol. 1, para. 147 [unofficial translation].

⁶⁸⁴ See *supra* paras. 33-41.

⁶⁸⁵ See *supra* paras. 62-72.

⁶⁸⁶ See the elements of the war crime of attacking civilians in both types of armed conflicts: ICC Elements of Crimes (2011) 18 and 34.

The discussion above in relation to international armed conflict equally applies during a non-international armed conflict.⁶⁸⁷

⁶⁸⁷ See *supra* para. 42-51.

Annex C

VIOLATIONS OF METHODS OF WARFARE FALLING
UNDER ARTICLE 438 AND THEIR INTERNATIONAL
SOURCES

Violations of Methods of Warfare Falling under Article 438 and their International Sources

War Crimes	International Treaties	Rome Statute	Customary International Law	Article 438
Category 1: Grave breaches of the Geneva Conventions, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention				
Wilful killing	Geneva Conventions I to IV, Arts. 50, 51, 130, 147 respectively	Art. 8 (2)(a)(i)	X	X
Torture or inhuman treatment, including biological experiments	Geneva Conventions I to IV, Arts. 50, 51, 130, 147 respectively	Art. 8 (2)(a) (ii)	X	X
Wilfully causing great suffering, or serious injury to body or health	Geneva Conventions I to IV, Arts. 50, 51, 130, 147 respectively	Art. 8 (2)(a) (iii)	X	X
Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly	Geneva Conventions I to IV, Arts. 50, 51, 130, 147 respectively	Art. 8 (2)(a) (iv)	X	X
Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power	Geneva Convention III, Art. 130 Geneva Convention IV, Art. 147	Art. 8 (2)(a) (v)	X	X
Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial	Geneva Convention III, Art. 130 Geneva Convention IV, Art. 147	Art.8 (2)(a) (vi)	X	X
Unlawful deportation or transfer or unlawful confinement	Geneva Convention IV, Art. 147	Art. 8 (2)(a) (vii)	X	X
Taking of hostages	Geneva Convention IV, Art. 147	Art. 8 (2)(a) (viii)	X	X

Category 2: Grave breaches of Additional Protocol I				
Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities	Additional Protocol I, Arts. 85 (3) (a), 51(2)	Art. 8 (2)(b) (i)	X	X
Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated	Additional Protocol I, Arts. 85 (3)(b), 35 (3), 55 (1)	Art. 8 (2)(b) (iv)	X	X
Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives	Additional Protocol I, Art. 85 (3)(d) 1907 Hague Convention, Art. 25	Art. 8 (2)(b) (v)	X	X
Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion	Additional Protocol I, Art. 85 (3)(e) 1907 Hague Convention, Art. 23 (c)	Art. 8 (2)(b) (vi)	X	X
Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the	Additional Protocol I, Art. 85 (3)(f) 1907 Hague Convention, Art. 23 (f)	Art. 8 (2)(b) (vii)	X	X

Geneva Conventions, resulting in death or serious personal injury				
The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory	Additional Protocol I, Art. 85 (4)(a)	Art. 8 (2)(b) (viii)	X	X
Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives	Additional Protocol I, Arts. 85 (4)(d), 53 (a) and (c) 1907 Hague Convention, Arts. 27 (1), 56 Convention for the Protection of Cultural Property in the Event of Armed Conflict, Art. 4 (1) 1999 Optional Protocol to the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, Art. 15	Art. 8 (2)(b) (ix)	X	X
Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the	Additional Protocol I, Arts. 11 (2)(a), 11 (1) and (4)	Art. 8 (2)(b) (x)	X	X

health of such person or persons				
Category 3: Other serious violations of IHL applicable in international armed conflict contained in the various IHL treaties (<i>i.e.</i> , Geneva Conventions, Additional Protocol I or the Hague Regulations)				
Intentionally directing attacks against civilian objects, that is, objects which are not military objectives	Additional Protocol I, Art. 52 (1)	Art. 8 (2)(b) (ii)	X	X
Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict	Convention on the Safety of United Nations and Associated Personnel, Arts. 7 (1), 9 Additional Protocol I, Art. 71 (2)	Art. 8 (2)(b) (iii)	X	X
Killing or wounding treacherously individuals belonging to the hostile nation or army	Additional Protocol I, Art. 37 (1) 1907 Hague Convention, Art. 23 (b)	Art. 8 (2)(b) (xi)	X	X
Declaring that no quarter will be given	Additional Protocol I, Art. 40 1907 Hague Convention, Art. 23 (d)	Art. 8 (2)(b) (xii)	X	X
Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war	1907 Hague Convention, Art. 23 (g)	Art. 8 (2)(b) (xiii)	X	X
Declaring abolished, suspended or inadmissible in a court	1907 Hague Convention, Art. 23 (1) (h)	Art. 8 (2)(b) (xiv)		X

of law the rights and actions of the nationals of the hostile party				
Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war	1907 Hague Convention, Art. 23 (2)	Art. (2)(b) (xv)	8	X
Pillaging a town or place, even when taken by assault	1907 Hague Convention, Art. 28	Art. (2)(b) (xvi)	8	X
Committing outrages upon personal dignity, in particular humiliating and degrading treatment	Additional Protocol I, Arts. 75 (2)(b), 85 (4) (c)	Art. (2)(b) (xxi)	8	X
Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions	Additional Protocol I, Arts. 75 (2)(b), 76 (1) Geneva Convention IV, Art. 27 (2)	Art. (2)(b) (xxii)	8	X
Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations	Geneva Convention III, Art. 23 (1) Geneva Convention IV, Art. 28 Additional Protocol I, Arts. 51 (7), 58 (a)	Art. (2)(b) (xxiii)	8	X
Intentionally directing attacks against buildings, material, medical units and transport, and	Geneva Convention I, Arts. 19 (1), 20, 24, 35 (1), 36 (1)	Art. (2)(b) (xxiv)	8	X

personnel using the distinctive emblems of the Geneva Conventions in conformity with international law	Geneva Convention II, Arts. 22 (1), 23, 24 (1), 27 (1), 36 Geneva Convention IV, Arts. 18 (1) and (3), 20 (1) and (2), 21, 22 (1) and (2) Additional Protocol I, Arts. 12 (1) and (2), 15 (1) and (5), 21, 23 (1), 24			
Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions	Geneva Convention IV, Arts. 23 (1), 55 (1), 59 (1) Additional Protocol I, Arts. 54 (1), 54 (2)	Art. 8 (2)(b) (xxv)	X	X
Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities	Additional Protocol I, Art. 77 (2) Convention on the Rights of the Child, Art. 38 (2) and (3)	Art. 8 (2)(b) (xxvi)	X	X
Category 4: Violations of Common Article 3 applicable in non-international armed conflict				
Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture	Geneva Conventions, Common Article 3 (1)(a)	Art. 8 (2)(c)(i)	X	X
Committing outrages upon personal dignity, in particular humiliating and degrading treatment	Geneva Conventions, Common Article 3 (1)(c)	Art. 8 (2)(c)(ii)	X	X
Taking of hostages	Geneva Conventions, Common Article 3 (1)(b)	Art. 8 (2)(c)(iii)	X	X

	Additional Protocol II, Art. 4 (2)(c)			
The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable	Geneva Conventions, Common Article 3 (1)(d)	Art. 8 (2)(c)(iv)	X	X
Category 5: Other serious violations of IHL applicable in non-international armed conflict contained in various the IHL treaties (<i>i.e.</i> , Additional Protocol II)				
Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities	Additional Protocol II, Arts. 13 (2), 4 (2)(d)	Art. 8 (2)(e)(i)	X	X
Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law	Additional Protocol II, Arts. 9 (1), 11 (1)	Art. 8 (2)(e)(ii)	X	X
Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United	Convention on the Safety of United Nations and Associated Personnel, Arts. 7 (1), 9 Additional Protocol II, Arts. 9, 11 (1)	Art. 8 (2)(e)(iii)	X	X

Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict				
Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives	Additional Protocol II, Art. 16 1999 Optional Protocol to the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, Art. 15	Art. 8 (2)(e)(iv)	X	X
Pillaging a town or place, even when taken by assault	Additional Protocol II, Art. 4 (2)(g)	Art. 8 (2)(e)(v)	X	X
Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of Article 3 common to the four Geneva Conventions	Additional Protocol II, Arts. 4 (2)(e) and (f)	Art. 8 (2)(e)(vi)	X	X
Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities	Additional Protocol II, Art. 4 (2)(c) Convention on the Rights of the Child, Art. 38 (2) and (3)	Art. 8 (2)(e)(vii)	X	X
Ordering the displacement of the civilian population for reasons related to the conflict, unless the	Additional Protocol II, Art. 17 (1), first sentence	Art. 8 (2)(e)(viii)	X	X

security of the civilians involved or imperative military reasons so demand				
Declaring that no quarter will be given	Additional Protocol II, Art. 4 (1), first sentence	Art. 8 (2)(e)(x)	X	X
Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons	Additional Protocol II, Art. 5 (2)(e)	Art. 8 (2)(e)(xi)	X	X
Category 6: Other serious violations of customs applicable in non-international armed conflict derived from customary international law				
Killing or wounding treacherously a combatant adversary		Art. 8 (2)(e)(ix)	X	
Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict		Art. 8 (2)(e)(xii)	X	
Category 7(a): Other serious violations of international humanitarian law contained in IHL Treaties and not contained in the Rome Statute				
<i>Grave Breaches of Additional Protocol I</i>				
Launching an attack against works or installations containing dangerous forces in the knowledge that	Additional Protocol I, Art. 85 (3)(c)		X	X

such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a) (iii) [of API]				
Unjustifiable delay in the repatriation of prisoners of war or civilians	Additional Protocol I, Art. 85 (4)(b)		X	X
Practices of 'apartheid' and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination	Additional Protocol I, Art. 85 (4)(c)		X	X
Making demilitarized zones the object of attack	Additional Protocol I, Art. 85 (4)(d)		X	X
<i>Other serious violations of IHL committed during an international armed conflict</i>				
Collective punishments	Geneva Convention III, Art. 46 Geneva Convention IV, Art. 33 Additional Protocol I, Art. 75(2)(d) 1907 Hague Convention, Art. 50		X	X
Despoliation of the wounded, sick, shipwrecked or dead	1906 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Art. 28.		X	X
Attacking or ill-treating a parlementaire or bearer of a flag of truce	1907 Hague Convention, Art. 32		X	X
<i>Other serious violations of IHL committed during a non-international armed conflict</i>				
Slavery	Additional Protocol II, Art. 4		X	X
Using starvation of civilians as a method of	Additional Protocol II, Arts. 14 and 18		X	X

warfare by depriving them of objects indispensable to their survival, including by impeding relief supplies				
Collective punishments	Additional Protocol II, Art. 4(2)(b)		X	X
Category 7(b): Other serious violations of international humanitarian law under customary internal law only not contained in the Rome Statute or any other international treaties				
<i>Other serious violations of IHL committed during an international armed conflict</i>				
Slavery and deportation to slave labour			X	
<i>Other serious violations of IHL committed during a non-international armed conflict</i>				
Launching an indiscriminate attack resulting in death or injury to civilians, or an attack in the knowledge that it will cause excessive incidental civilian loss, injury or damage			X	
Making non-defended localities and demilitarized zones the object of attack			X	
Using human shields			X	

Common Citations

1907 Hague Convention - Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land

Additional Protocol I - Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts

Additional Protocol II - Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts

Appeals Judgment on the appeal of the ‘Decision on the admissibility of the case against Abdullah Al-Senussi’ - Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi (Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled ‘Decision on the admissibility of the case against Abdullah Al-Senussi’) ICC-01/11-01/11 OA 6 (24 July 2014)

Case Register - Unified Register of the Court Decisions

Decision on the Admissibility of the Case Against Abdullah Al-Senussi - The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi (Decision on the Admissibility of the Case Against Abdullah Al-Senussi) ICC-01/11-01/11-466-Red (11 October 2013)

Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi - The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi (Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi) ICC-01/11-01/11-344-Red (31 May 2013)

Geneva Convention I - Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field

Geneva Convention II - Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea

Geneva Convention III - Convention (III) relative to the Treatment of Prisoners of War

Geneva Convention IV - Convention (IV) relative to the Protection of Civilian Persons in Time of War

Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict - Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict

ICC Elements of Crimes - ICC, Elements of Crimes (2011) ISBN No. 92-9227-232-2

Lubanga Decision concerning Pre Trial Chamber I's Decision of 10 February 2006 - The Prosecutor v Thomas Lubanga Dyilo (Decision concerning Pre Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo) ICC-01/04-01/06-8 (24 February 2008)

MH17 - Downing of the Malaysia Airplane

Military Crimes - Crimes contained in Chapter XIX of the Criminal Code of Ukraine which only apply, among others, to Members of the Armed Forces and the State Security of Ukraine

Report on the Monitoring Visit to Svatove - UHHRU, 'Report on the Results of Monitoring Visit of the UHHRU Monitoring of human rights violation of residents in Svatove (destruction of urban infrastructure, injuries) due to improper storage of ammunition' (3-7 November 2015)

Rome Statute - Rome Statute of the International Criminal Court

Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict - Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (adopted 26 March 1999, entered into force 9 March 2004) 2253 UNTS 172

Second Ukrainian Declaration accepting the jurisdiction of the ICC - Declaration of the Verkhovna Rada of Ukraine "On the recognition of the jurisdiction of the International Criminal Court by Ukraine over crimes against humanity and war crimes committed by senior officials of the Russian Federation and leaders of terrorist organizations "DNR" and "LNR", which led to extremely grave consequences and mass murder of Ukrainian nationals" (8 September 2015)

Tadić Interlocutory Appeal Decision - Prosecutor v. Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) Case No. IT-94-1-AR72 (2 October 1995)

The "Chemical Triangle" Report - Centre for Civil Liberties, 'The "Chemical Triangle" of the Region of Lugansk during the occupation: hostages, torture and extrajudicial executions: Report on visit of the monitoring group of the Centre for Civil Liberties to Severodonetsk, Lysychansk and Rubinzhe during December 6-11, 2014' (5 January 2015)

Ukrainian Declaration accepting the jurisdiction of the ICC - Declaration Lodged by Ukraine under Article 12(3) of the Statute (9 April 2014)