

ASSER
INSTITUTE

Centre for International & European Law



Global
Rights
Compliance

March 2024



FAIR TRIAL INDICATORS

Monitoring Conflict-Related Criminal Trials in Ukraine



Fair Trial Indicators: Monitoring Conflict-Related Criminal Trials in Ukraine

1. Table of Contents

| | |
|--|----|
| 1. <i>Table of Contents</i> | 1 |
| 2. <i>INTRODUCTION</i> | 2 |
| 3. <i>METHODOLOGY</i> | 3 |
| 4. <i>TRIAL PROCESS IN UKRAINE</i> | 6 |
| 5. <i>EXPLAINER ON THE LAW ON FAIR TRIALS</i> | 7 |
| 6. <i>FAIR TRIAL INDICATORS: COMMENTARY AND EXAMPLES</i> | 10 |
| <i>Annex A: Fair Trial Indicators</i> | 39 |

This document was prepared by the [T.M.C. Asser Instituut](#), with contributions from [Global Rights Compliance](#).

The source of the cover page image is Wikimedia Commons.

Disclaimer

This document was prepared within the MATRA project "[Strengthening Ukraine's Capacity to Investigate and Prosecute International Crimes](#)" funded by the Dutch Ministry of Foreign Affairs. The Project is a joint initiative of the T.M.C. Asser Instituut and Global Rights Compliance. The views expressed in it are those of the T.M.C. Asser Instituut alone.



2. INTRODUCTION

As of the start of 2024, the Office of the Prosecutor General of Ukraine (OPG) has reported that over 130,000 conflict-related crimes have been registered.¹ Conflict-related cases have been brought to and adjudicated in Ukrainian courts since the outset of the conflict in 2014,² and since the full-scale invasion of Ukraine by the Russian Federation (Russia) from 24 February 2022, over 60 judgments have been delivered relating to violations of the laws and customs of war and genocide alone.³

Upholding the fairness of trials in general is a legal obligation of Ukraine as a state under multiple sources of law, including Ukrainian law, international human rights law and soft law.⁴ Denial of a fair trial in conflict-related cases is also a crime under Ukrainian law, international humanitarian law, and international criminal law.⁵ The fairness of trials in Ukraine can demonstrate continued commitment to upholding the rule of law, and is also of particular importance in conflict-related criminal trials in order to demonstrate Ukraine's willingness to conduct legitimate trials domestically, a factor which will affect the complementarity of international processes and the effectiveness of justice and accountability pursuits.

The fairness of trials depends on the actions of specific actors such as legislators and those involved in the trial process including law enforcement agencies during pre-trial phases, legal professionals, judges, and court administration. Whether fair trial obligations have been breached or the crime of denial of a fair trial has occurred will ultimately be a legal determination by Ukrainian national courts, as well as by international courts and human rights monitoring bodies depending on the relevant breach or crime.

Effective monitoring is also crucial in enhancing the fairness of trials in conflict-related cases. Since trial monitors are not part of the trial process (see below, principle of non-intervention), their role is not to directly uphold fair trial obligations nor make a legal determination as to fairness with a view to enforcing those obligations or criminal responsibility. Yet, civil society organisations (CSOs) or journalists can play an important role in monitoring the fairness of trials, increasing the transparency of the trial process, reporting on this to the public, and/or advocating for reforms.

The Fair Trial Indicators are designed to be a reference point for trial monitors on which factors may indicate the fairness or unfairness of conflict-related trials in Ukrainian courts based on fair trial standards contained in Ukrainian, international and European law.

¹ See <https://www.gp.gov.ua/>.

² Global Rights Compliance, 'The Enforcement of International Humanitarian Law in Ukraine', January 2022.

³ These crimes are codified in the Criminal Code of Ukraine (CCU), Articles 437 and 438. See also the [Unified State Register of Court Decisions](#).

⁴ See Section 4 for more information on the law on fair trials.

⁵ Ibid.



The project partners would like to acknowledge the support of civil society partners, journalists and lawyers actively involved in fair trial monitoring initiatives and/or conflict-related crimes matters who reviewed and provided feedback on early drafts of the Fair Trial Indicators and the Ukrainian Bar Association (UBA) for our continued cooperation on trial monitoring methodology in Ukraine.⁶

3. METHODOLOGY

How monitoring on the fairness of conflict-related criminal trials in Ukraine should be conducted will depend on *who* is conducting the monitoring and *why*.

Who?

The fairness of trials may be monitored by a diverse range of actors, such as CSOs (including through funded projects); independent journalists; or mass media, and their expertise, capacity and mandate will impact their approach to monitoring.

Why?

Monitors' objectives may include:

- Strengthening transparency of trial processes (*vis-à-vis* the accused and or public);
- Promoting legislative reform;
- Promoting judicial reform;
- Promoting capacity-building (of legislators or those involved in the trial process);
- Reporting the war crime of denial of a fair trial on behalf of a victim (such as someone who has been accused and tried for collaborative activity); or
- Defending human rights.⁷

How?

Ethical principles

Throughout the monitoring process, trial monitors should comply with certain ethical standards in order to guarantee adequate and effective monitoring that does not interfere with the proper functioning of the judicial system.⁸

- **Informed observation:** Trial monitors should be sufficiently acquainted with the particularities of the legal system and the judiciary at issue, as well as with all the available information concerning the substantial and formal specificities of the trials to be monitored. Monitors may wish to conduct some preliminary research in this regard.
- **Professionalism:** Trial monitors must comply with all rules applicable in the courtroom as well as show respect for all public officials involved in the judicial process.

⁶ See the Ukrainian Bar Association's latest "Monitoring of War Crimes Trials" project [report](#) dated December 2023.

⁷ For more information on the purposes of trial monitoring, see The Office of the High Commissioner for Human Rights (OHCHR), 'Manual on Human Rights Monitoring (Revised edition). Chapter 22: Trial Observation and Monitoring the Administration of Justice', 31; Organization for Security and Co-operation in Europe (OSCE), [Trial Monitoring: A Reference Manual for Practitioners \(Revised edition\)](#), 105-125.

⁸ OHCHR, 'Manual on Human Rights Monitoring (Revised edition). Chapter 22: Trial Observation and Monitoring the administration of justice', 18-19, 21-22, 31, 33; Howard Tumber, '[Journalists, War Crimes and International Justice](#)'.



- **Non-intervention:** Trial monitors should abstain from any act that interferes or appears to interfere with the ordinary functioning of the judiciary throughout all stages of the monitoring process. The principle of non-intervention applies to interactions with judges as well as with any other actor in the justice system who is involved in a case or might be influential in its outcome. Non-intervention does not necessarily stop trial monitors holding conversations with the legal professionals on administrative or general legal matters that do not affect the merits of individual cases or after the conclusion of cases.
- **Objectivity and impartiality:** No preference for any party or result should be shown by trial monitors at any stage of the process. Impartiality is especially relevant for the purpose of issuing reports. The appearance of impartiality and objectivity is as important as the actual compliance with these principles, as it has an impact in the rate of acceptance by institutions and the general public of the trial monitoring findings. Trial monitors may wish to sit in a neutral position within a courtroom; collect a diverse range of views through interviewing; refuse to engage in controversial discussions, and indicate where facts are 'alleged' only.
- **Confidentiality:** Trial monitors should refrain from disclosing sensitive or confidential material, obtained through interviews, for example, without the agreement of those who have provided it. Monitors should also seek to secure all their materials, whether physical or electronic.
- **A victim-centred approach:** Reporting in cases involving vulnerable victims and witnesses such as children or conflict-related sexual violence should be victim-centred. This requires compliance with the 'Do No Harm' principle, in that monitors should be aware of the possible negative impacts their reporting in these cases can have and prevent or minimise those impacts.⁹ While there is some practical guidance available for media on reporting in such cases,¹⁰ it is not advised that monitors interview victims and witnesses without adequate training.

Monitoring steps

Trial monitoring by a CSO through a funded trial monitoring project with a view to making recommendations for judicial reform may differ from that which is conducted by mass media to inform the public about a high-profile case. The monitoring process as a whole may comprise a combination of steps, including, but not limited to the following:

1. **Knowledge development:** To effectively monitor the fairness of conflict-related trials in Ukraine using the Fair Trial Indicators, it is recommended that monitors also develop a basic knowledge of the trial process in Ukraine (Section 3), the law on fair trials (Section 4), and the commentary to the Indicators (Section 5) at the outset of monitoring activities. This will guide them to identify fair trial issues that may have legal consequences throughout their monitoring steps, and in turn strengthen the reporting, advocacy or submissions that flow from the monitoring.

⁹ [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 85.

¹⁰ Human Rights First, [How to Responsibly Report War-Related Sexual Violence](#), November 2022.



2. **Preliminary research:** Before embarking on trial monitoring, monitors should conduct some preliminary research into the case background, parties and allegations. Monitors may wish to consider reports of international organisations or other monitors regarding the facts of the case and/or systemic indicators of fair trial issues (such as those referred to in Annex A examples).
3. **Attending hearings:** Monitors should consider any steps or permissions that are necessary in order to attend hearings, and review ethical principles relating to attendance and presence in the courtroom as below.
4. **Note-taking:** Monitors should take contemporaneous notes (or take notes immediately after proceedings, including through dictation), or record proceedings (where appropriate). The Clooney Foundation for Justice has created a [template](#) for note taking during trials that could be used.
5. **Reviewing judgments:** Monitors may wish to review judgments as uploaded onto [the Unified State Register of Court Decisions](#). The reasoning in judgments can be illuminating. For example, factors such as whether the judgments refer to international standards, whether an explanation of the determination of sentencing is included, whether the judgments reflect an adversarial process¹¹, or whether notification procedures were conducted (where a trial is held *in absentia*) can point to the fairness of a trial.
6. **Interviewing those involved in the trial:** It is not advised that trial monitors interview victims and/or witnesses without sufficient training. However, the legal professionals involved in trials may be able to share some insights on aspects of fairness after the conclusion of hearings, and possibly subject to confidentiality. To respect the principle of non-intervention (as above), it may only be possible to interview legal professionals at the end of the trial process.
7. **Reporting:** Reporting style will vary depending on the target audience. Monitors should aim for detailed and accurate reporting, noting that legal assertions should only be made if reviewed by a lawyer familiar with Ukrainian and international law on fair trials. This would especially be the case if trial monitors are aiming to submit a report to a human rights body or authorities in Ukraine (e.g. in case of an allegation of a denial of a fair trial). Monitors may wish to refer to Lionel Blackman, '[A Straightforward Guide for Criminal Court Trial Observers](#)' for guidance on reporting.

Indicators

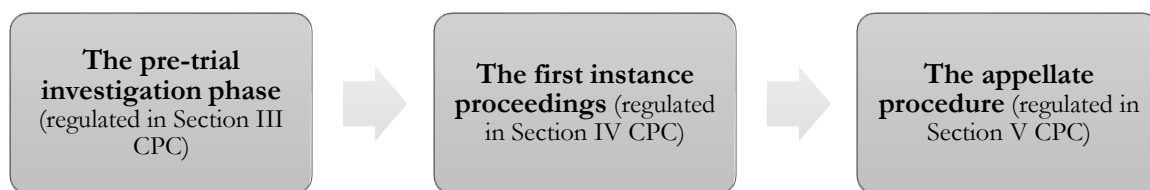
The **Fair Trial Indicators** included in Annex A for ease of access are designed to be a reference point for monitors throughout their monitoring steps. For example, monitors can take the Indicators as a questionnaire or checklist with them when attending hearings, they could use the Indicators as questions for the purposes of interviews, or as a means of analysis of notes taken during hearings with a view to structuring reports. Unlike during the trial phase, where

¹¹ In Ukraine, the adversarial process is fundamental to the criminal justice system, as enshrined in the Constitution of Ukraine, the Criminal Procedure Code of Ukraine, and other legal acts. These laws ensure that both parties to the criminal proceedings—the prosecution and the defence—have the right and opportunity to present their case, challenge evidence, and argue before an impartial court. The extent to which this system is applied can vary depending on the specifics of the case, the judges, and the lawyers involved.

monitors may be able to observe first-hand whether there are any indications that a trial is fair or unfair, indications of fairness or lack thereof during the pre-trial phase may only be evident second-hand. There could be indications in arguments made by the defence or accused themselves during the trial, or issues considered by judges either at trial or in their judgments, they could be referred to in interviews by the accused, legal professionals or others involved in the trial, or could be referred to in broader reports by international organisations and other national monitors.

4. TRIAL PROCESS IN UKRAINE

As per the Criminal Procedure Code of Ukraine (CPC),¹² criminal proceedings in Ukraine consist of the following stages:



Certain proceedings, due to their legal particularities, are dealt with through the so-called special procedures,¹³ which include criminal proceedings containing State secrets, criminal proceedings based on agreements, private criminal proceedings, or criminal proceedings in respect of underage persons.¹⁴

The **pre-trial investigation phase** is initiated when the investigator or public prosecutor registers an alleged criminal offence into the Integrated Register of Pre-Trial Investigations.¹⁵ This must be undertaken within a time span of 24 hours from the moment in which the incident becomes known by the relevant authorities.¹⁶ There are no time restrictions on pre-trial investigations of war crimes, genocide, aggression and the use of weapons of mass destruction, and investigations are conducted by investigators from pre-trial investigation agencies within the territorial jurisdiction where the alleged offence was committed.¹⁷ Compliance with the law by these agents during this phase is ensured and supervised by the public prosecutor.¹⁸ The defendants and victims – that is, those who have sustained moral, physical or material damages as a result of the criminal offence¹⁹ – as well as their legal representatives are entitled to participate in pre-trial investigations proceedings, among others, to challenge decisions of the investigators, public prosecutor and investigative judges, or to collect and produce evidence.²⁰

¹² [Law No. 4651-VI of 13 April 2012 on the Criminal Procedure Code of Ukraine.](#)

¹³ Regulated in [CPC](#), Section VI.

¹⁴ These may affect certain indicators, as contained in Annex A.

¹⁵ [CPC](#), Article 214.

¹⁶ [CPC](#), Article 214.

¹⁷ [CPC](#), Article 219(2).

¹⁸ [CPC](#), Article 36.

¹⁹ [CPC](#), Article 55.

²⁰ [CPC](#), Article 55.



Investigative judges play a key role in the pre-trial phase. Article 21 of Part 5 of the Law on the Judiciary and the Status of Judges entrusts them with the function of exercising the powers of judicial control over the observance of rights, freedoms and interests of individuals in criminal proceedings.²¹ This mandate grants investigative judges the power to approving the issuing of arrest warrants and detention measures, or declaring the initiation of investigations against suspects.²²

Court proceedings in **the first instance** go through two separate stages: preparatory proceedings and the trial proceedings. The preparatory court session is aimed at obtaining a decision by the court to, among others, return the case to the pre-trial investigation phase or schedule a trial session.²³ In this stage of the process, the public prosecutor, the accused, victims, civil plaintiffs, civil defendants and their legal representatives should be present except in cases foreseen by the law.²⁴

Judgments can be **appealed** by the parties to the case in the Court of Appellate Instance as prescribed by law,²⁵ and both first instance and appellate judgments can be appealed in certain instances to the Court of Cassation as part of the Supreme Court of Ukraine.²⁶ The Supreme Court of Ukraine may additionally revise judgments in very specific circumstances, including when an international court, the jurisdiction of which is recognised by Ukraine (such as the European Court of Human Rights (ECtHR)), finds that Ukraine has violated its obligations under international or European law.²⁷

The decree of martial law in 2022, which will remain in force at least until and foreseeably beyond 13 May 2024,²⁸ has introduced certain changes into the ordinary criminal proceedings, including the length of pre-trial investigations and the remote participation of defence lawyers. In situations where courts cannot operate at their regular locations, changes may be made to the territorial jurisdiction of cases or the court's physical location, and the establishment of extraordinary and specialised courts is strictly forbidden.²⁹ In addition, the law on amending the Criminal Code of Ukraine and the Criminal Procedure Code of Ukraine to establish the procedure for the exchange of persons as prisoners of war (POWs) may impact proceedings in conflict-related cases.³⁰

5. EXPLAINER ON THE LAW ON FAIR TRIALS

²¹ European Commission for Democracy through Law (Venice Commission) of the Council of Europe, '[Ukraine: Law on the Judiciary and the Status of Judges](#)'.

²² Transparency International Ukraine, '[Investigative / investigating judges in Ukrainian Law](#)'.

²³ [CPC](#), Article 55.

²⁴ [CPC](#), Article 55.

²⁵ [CPC](#), Article 392 and 393.

²⁶ [CPC](#), Article 424.

²⁷ [CPC](#), Article 445.

²⁸ Law of Ukraine [No. 10456](#) "On the Approval of the Decree of the President of Ukraine 'On Extending the Period of Martial Law in Ukraine'". See also [Communication contained in Note verbale No. 31011/32-119-101379 from the Permanent Representation of Ukraine](#).

²⁹ [The Law of Ukraine On the Legal Regime of Martial Law](#), Article 26.

³⁰ Law of Ukraine "[On amending Criminal Code, Criminal Procedure Code and other legislative acts concerning legal procedure of exchanges of prisoners of war](#)" No. 2472-IX of 28 July 2022.



Trial monitors will largely be monitoring factual circumstances that may indicate the fairness (or lack thereof) of trials *as prescribed by law*. There are multiple sources of law on fair trials of relevance to international crimes proceedings that Ukraine is obliged to comply with.

A number of international and European human rights treaties set out the minimum guarantees for a fair trial. In particular, Ukraine and Russia must adhere³¹ to the guarantees contained in the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR), both of which not only protect the right to a fair trial itself,³² but contain a range of other fundamental rights relevant to the investigation and prosecution stages of criminal proceedings. The obligations stemming from these treaties continue to apply during situations of armed conflict, including situations of occupation.³³ Each international and regional human rights treaty of relevance has its own monitoring body, such as the ECtHR in respect of the ECHR, and the Human Rights Committee (HRC) in respect of the ICCPR, which comes with its own interpretations and approaches to fair trial rights.

Fair trial obligations are also found in international humanitarian law (IHL), a body of international law that regulates the conduct of armed conflict and seeks to limit its humanitarian consequences. The relevant IHL provisions can be found in the 1949 Geneva Conventions and their Additional Protocols, both of which Ukraine and Russia are parties to. Both Ukraine and Russia are also bound by customary IHL.³⁴ IHL provides standards including:

- The right of all members of the armed forces of a Party to a conflict to participate directly in hostilities;³⁵
- The right of Ukraine or Russia to try persons alleged to have committed crimes under national law or war crimes.³⁶
- On the fairness of criminal proceedings against POWs (in IACs);³⁷
- On the fairness of criminal proceedings against civilians interned during conflict or in occupied territories (in international armed conflicts (IACs));³⁸ and
- Fundamental fair trial guarantees for anyone who finds themselves in the power of a Party to the conflict who do not benefit from more favourable treatment under the Conventions (e.g., POW status under the Third Geneva Convention), such as

³¹ Note that Russia withdrew from the Council of Europe on 15 March 2022 and was expelled from the Council of Europe on 16 March 2022, see [Resolution CM/Res\(2022\)2 on the cessation of the membership of the Russian Federation to the Council of Europe](#). The ECtHR will deal with applications directed against Russia in relation to alleged violations of the Convention that occurred until 16 September 2022.

³² [ECHR](#), Article 6; [ICCPR](#), Article 14.

³³ International Court of Justice (ICJ), [Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory](#), paras 111-112; ECtHR, [Al-Skeini and Others v. United Kingdom](#), para 138.

³⁴ Customary international law is a set of rules binding on all States derived from the consistent conduct of States ('State practice') acting out of the genuine belief that the law – as opposed to, e.g., courtesy or political advantages – required them to act that way ('*opinio juris*'). See ICJ, [North Sea Continental Shelf](#), paras 71-74, 77. See also Marco Sassòli, [International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare](#), 46. As part of their mission to promote IHL, the ICRC maintains a compilation of customary IHL, condensing the established practices into numerated rules accompanied by commentary as well as a collection of related practice. See ICRC, '[Customary IHL Database](#)'.

³⁵ [Additional Protocol I](#), Article 43(2).

³⁶ [Third Geneva Convention](#), Article 129.

³⁷ In IACs, [Third Geneva Convention](#), Articles 96-108.

³⁸ In IACs, [Fourth Geneva Convention](#), Articles 54, 64-75, and 117-126.



combatants who fail to distinguish themselves from the civilian population when they are participating in hostilities (in IACs).³⁹

International criminal law (ICL) is a body of international law that defines international crimes – particularly serious violations of international law – and the procedures to hold individuals responsible for committing them. The denial of fair trial has been codified in ICL, either as a war crime and/or crime against humanity, as “wilfully depriving a prisoner of war or civilian [or other protected person] of the rights of fair and regular trial.”⁴⁰

Monitors may also find it useful to refer to soft law relating to the fairness of trials, including:

- [Code of Conduct for Law Enforcement Officials](#)
- [Guidelines on the Role of Prosecutors](#)
- [Basic Principles on the Independence of the Judiciary](#)
- [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#)
- The United Nations Standard Minimum Rules for the Treatment of Prisoners ([the "Nelson Mandela Rules"](#)).

The Ukrainian law on fair trials is largely contained in the Constitution, the CPC, and the Law on the Judiciary and the Status of Judges.⁴¹ As noted above, the Ukrainian Constitutional Court has recognised the doctrine of taking a “friendly attitude” to international law when interpreting constitutional provisions.⁴² This doctrine has been applied by the courts of general jurisdiction, including the Supreme Court and appellate courts in interpreting the provisions of human rights law.⁴³ Accordingly, domestic provisions can be interpreted, as far as possible, in line with international law, including ICL, IHL and international human rights law. Therefore, in line with ICL, denial of a fair trial could also be considered as a war crime under Article 438 of the Criminal Code of Ukraine (CCU).

³⁹ [Additional Protocol I](#), Article 75.

⁴⁰ See [Rome Statute of the International Criminal Court](#); [Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea](#), Article 6; [Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991](#), Article 2(f); [Statute of the Special Court for Sierra Leone](#), Article 3(1)(g); [Statute of the International Tribunal for Rwanda](#), Article 4(1)(g); [Law on Specialist Chambers and Specialist Prosecutor's Office](#), Articles 14(1)(a)(vi) and 14(1)(c)(iv).

⁴¹ European Commission For Democracy Through Law (Venice Commission) Of The Council Of Europe, '[Ukraine: Law On The Judiciary And The Status Of Judges](#)'.

⁴² Constitutional Court of Ukraine, [Case No. 1-1/2016](#), para 2.3: “the Constitutional Court of Ukraine takes into account the provisions of international treaties in force approved by the Verkhovna Rada of Ukraine and the practice of interpretation and application of these treaties by international bodies whose jurisdiction is recognized by Ukraine”.

⁴³ See e.g., Supreme Court of Ukraine, [Case No. 454/143/17-u](#), para 43; Supreme Court of Ukraine, [Case No. 640/3701/20](#), para 71; Donetsk Court of Appeal, [Case No. 234/15614/18](#), 20 March 2019.

6. FAIR TRIAL INDICATORS: COMMENTARY AND EXAMPLES

The commentary to the Indicators below provides some basic legal context to each Indicator, as well as some examples of where the Indicator may already have been triggered in Ukraine. The examples were found through open-source research, including of Ukrainian CSOs conducting trial monitoring exercises, such as the Media Initiative for Human Rights, and the Ukrainian Bar Association together with the Ukrainian Helsinki Human Rights Union, as well as the reports of international organisations such as OHCHR. Noting that trial monitoring initiatives focused on conflict-related crimes cases were limited in Ukraine prior to the full-scale invasion, the scenarios are not intended to paint a full picture of all the potential violations of fair trials occurring but are rather to be considered as examples only.

| Indicator | Commentary | Examples |
|--|--|----------|
| Pre-trial investigation phase | | |
| 1. Were there any indications of tapping of telephone lines (i.e., wiretapping)? | These techniques used against the accused may indicate interference with their right to privacy, which is contained in Ukrainian and international human rights law, ⁴⁴ as long as there were no lawful justifications. ⁴⁵ | |
| 2. Were there any indications that evidence was obtained through unlawful secret surveillance (e.g., in violation of domestic law)? | | |

⁴⁴ [Constitution of Ukraine](#), Articles 31 and 32; [CPC](#), Articles 7(1)(6), (7) and (8); [ECHR](#), Article 8(2); [ICCPR](#), Article 17(1). For the case law, ECtHR, [Huvig v. France](#), paras 25-29 (wiretapping); ECtHR, [Bykov v. Russia](#), paras 69-83; ECtHR, [Khan v. The United Kingdom](#), para 34 (secret surveillance); ECtHR, [Khodorkovskiy and Lebedev v. Russia](#); HRC, [Sabirova and Sabirov v. Uzbekistan](#); paras 7.2-7.3; HRC, [Coronel et al v. Colombia](#), paras 2.1, 9.7 (unlawful search and seizure operations); HRC, [GC No. 16](#), para 8 (body searches).

⁴⁵ E.g., under [ECHR](#), Article 8(2), interference can be justified if it is in accordance with the law, necessary in a democratic society in the interests of a legitimate aim (see also [Huvig v. France](#), paras 26-29). The ECtHR has confirmed that 'necessity' for the purposes of Article 8 means that the interference must remain proportionate to the legitimate aim pursued (see [Z v. Finland](#), para 94). According to the HRC, 'unlawful' interferences refer to those that take place without a legal basis or in violation of the law, as well as to interferences undertaken on the basis of a law that does not comply with the provisions, aims and objectives of the [ICCPR \(GC No. 16\)](#), para 3). Ukraine's [CPC](#), Articles 13, 14, 15 and 258 (1) establish the conditions under which it is legally possible in Ukraine to interfere with the rights to the inviolability of the home or any other possession of a person, the confidentiality of communications, and the non-interference in private life.

| | | |
|---|--|--|
| <p>3. Were there any indications that evidence was obtained through unlawful search and seizure operations (e.g., without a search warrant)?</p> | | <p>There have been reports of officers from the Security Service of Ukraine (SBU) searching the homes of persons suspected of conflict-related offences in Ukraine and seizing objects such as computers and mobile phones without any search warrant.⁴⁶ In all such cases, the officers would return days or weeks after to conduct searches with an official authorisation and to report the seizing of the items that they had unlawfully collected in the previous house search.⁴⁷</p> |
| <p>4. Were there any indications that body searches were conducted without respect for the dignity of the person in question, or by agents of a different sex?</p> | | |
| <p>5. Were there any indications that samples were taken from a suspect for forensic analysis (i.e., failing to package the samples in front of the individual to ensure that they were not tampered with)?</p> | <p>International case law has also shown these techniques can render trial unfair,⁴⁸ unless the defence was given the opportunity to challenge the authenticity of the evidence and oppose its admission; or the quality of the evidence was taken into consideration at trial, including the circumstances under which it was obtained and whether these</p> | |

⁴⁶ OHCHR, '[Detention of civilians in the context of the armed attack by the Russian Federation against Ukraine: 24 February 2022- 23 May 2023](#)', para 137.

⁴⁷ OHCHR, '[Detention of civilians in the context of the armed attack by the Russian Federation against Ukraine: 24 February 2022- 23 May 2023](#)' para 137.

⁴⁸ ECtHR, [Horvatic v. Croatia](#), paras 78, 79-87 (samples); ECtHR, [Layijov v. Azerbaijan](#), paras 64-77 (planted evidence); HRC, [GC No. 16](#), para 8 (body searches).

| | | |
|--|--|---|
| <p>6. Were there any indications that planted evidence was used against an accused (i.e., evidence, such as drugs, weapons, etc., that were planted/placed by the investigator or police in the accused’s home, vehicle, etc.)?</p> | <p>circumstances cast doubt on its reliability or accuracy (see Indicators 31-32).⁴⁹</p> | <p>Cases have been reported in which the SBU planted evidence in the accused’s homes or in their belongings at checkpoints.⁵⁰</p> |
| <p>7. Were there any indications that the accused was arrested without a warrant?</p> | <p>The circumstances of the accused’s arrest and detention may indicate unlawfulness. The accused must be arrested on suspicion of an act or omission which was a criminal offence under national or international law at the time it was committed. The possibility of conviction must be reasonably foreseeable for the accused at the moment of the commission of the offence, although absolute certainty is not required.⁵¹ Likewise, the relevant laws codifying the crime at issue must have been sufficiently clear and accessible to the accused.⁵²</p> | <p>The OHCHR has documented cases of arbitrary and/or unlawful detention of Ukrainians carried out by Ukrainian security forces, including where the accused had been detained without an arrest warrant.⁵⁸ Although most of such arrests had allegedly been officially justified on the <i>in flagrante</i> exception⁵⁹ - which allows Ukrainian law enforcement officials to detain persons without an arrest warrant in cases of urgent need to prevent or stop criminality - they were related to alleged</p> |

⁴⁹ ECtHR, *Jalloh v. Germany*, para 96.

⁵⁰ OHCHR, ‘[Detention of civilians in the context of the armed attack by the Russian Federation against Ukraine: 24 February 2022- 23 May 2023](#)’ para 137.

⁵¹ ECtHR, *Scoppola v. Italy (No.2)*, paras 99- 109; ECtHR, *S.W. v. the United Kingdom*, para 35; ICC, *Prosecutor v. Abd-al-Rahman*, paras 85-86; International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Hadžihasanović et al.*, para 34; ICTY, *Prosecutor v. Milutinović et al.*, paras 37-39.

⁵² ECtHR, *S.W. v. the United Kingdom*, para 35; ICC, *Prosecutor v. Abd-al-Rahman*, paras 85-86; ICTY, *Prosecutor v. Milutinović et al.*, paras 37-39.

⁵⁸ OHCHR, ‘[Detention of civilians in the context of the armed attack by the Russian Federation against Ukraine: 24 February 2022 – 23 May 2023](#)’, para 10.

⁵⁹ [CPC](#), Article 208.

| | | |
|--|--|--|
| | <p>An accused may be tried for an international crime even if the conduct in question was not criminalised under national law at the time of commission.⁵³</p> | <p>offences committed between 2014 and 2020 and could not be excused on such clause since the arrests occurred after these dates.⁶⁰</p> |
| <p>8. What were the grounds for arrest?</p> | <p>An accused may not be punished more than once for the same act, or on the same charge (prohibition of double jeopardy (<i>non bis in idem</i>)).⁵⁴ Often the same act could amount to a number of different international crimes.⁵⁵ The principle of “double jeopardy” protects the accused from being subjected to multiple charges, convictions or punishments for the same act.</p> <p>Note that combatants (members of the armed forces of a Party to a conflict) may not be prosecuted for merely participating in the hostilities, provided they abide by the applicable rules of IHL.⁵⁶ POWs may, however, be prosecuted if they commit an offence under national law or an international crime.⁵⁷</p> | <p>On 3 March 2022, the Ukrainian Parliament amended the CPC in order to introduce Article 111-1, which criminalises the collaborative activity of citizens with an aggressor State.⁶¹ Under this provision, a wide spectrum of acts are punishable, including “denying the existence of an aggression against Ukraine, working for and transferring property to occupying authorities, or holding positions in courts or law enforcement authorities of the occupying power”.⁶² The OHCHR has repeatedly raised concerns about the vagueness and broadness of the</p> |

⁵³ ICRC, ‘[Commentary to Geneva Convention III \(2020\)](#)’, Article 99, para 3959. See also ECtHR, [Milankovic v. Croatia](#), paras 64-66; ECtHR, [Kononov v. Latvia](#), para 185.

⁵⁴ [Constitution of Ukraine](#), Article 61; [ECHR](#), Article 4 of Protocol 7; [ICCPR](#), Article 14(7); [Third Geneva Convention](#), Article 86 (in relation to POWs); [Fourth Geneva Convention](#), Article 117. See also ECtHR, [Marguš v. Croatia](#), para 114; ECtHR, [Sergey Zolotukhin v. Russia](#), para 58; ECtHR, [Nikitin v. Russia](#), para 35; ECtHR, [Kadusic v. Switzerland](#), para 82; ICC, [Prosecutor v. Ongwen](#), paras 9-45.

⁵⁵ ICRC, ‘[Commentary to Geneva Convention III \(2020\)](#)’, Article 86, para 3650.

⁵⁶ [Additional Protocol I](#), Article 43(2); ICRC, ‘[Commentary to Geneva Convention III \(2020\)](#)’, Introduction, para 20.

⁵⁷ [Third Geneva Convention](#), Articles 99 and Article 129 (in relation to POWs); ICRC, ‘[Commentary to Geneva Convention III \(2020\)](#)’, Article 99, para 3959.

⁶⁰ OHCHR, ‘[Detention of civilians in the context of the armed attack by the Russian Federation against Ukraine: 24 February 2022 – 23 May 2023](#)’, para 101.

⁶¹ [Law No. 2108-IX on Amendments to Certain Legislative Acts regarding the Establishment of Criminal Liability for Collaboration Activities](#).

⁶² OHCHR, ‘[Report on the human rights situation in Ukraine: 1 August 2022 – 31 January 2023](#)’, para 119.

| | | |
|--|--|---|
| | | <p>wording of Article 111-1 CPC.⁶³ The Ukrainian Cabinet of Ministers has registered hundreds of inquiries from citizens, business and municipalities about the lawfulness of their daily conduct.</p> <p>Under this new provision, the OHCHR has documented cases in which Ukrainian civilians have been prosecuted for quotidian acts in occupied villages, like maintaining one's job in the local administration, or offering to volunteer for civic activities.⁶⁴ Alarms have additionally been raised over the lack of proportionality of this amendment to the CPC, under which penalties include a sentence of life imprisonment.⁶⁵ Some of the activities penalised could also contradict the law of occupation under IHL, which presumes a certain level of cooperation between the occupation and local authorities.⁶⁶</p> |
|--|--|---|

⁶³ OHCHR, '[Report on the human rights situation in Ukraine: 1 August 2022 – 31 January 2023](#)', para 119; OHCHR, '[Ukraine: Türk reiterates call for a just peace](#)'.

⁶⁴ OHCHR, '[Report on the human rights situation in Ukraine: 1 August 2022 – 31 January 2023](#)', para 122.

⁶⁵ OHCHR, '[Report on the human rights situation in Ukraine: 1 August 2022 – 31 January 2023](#)', paras 119-120.

⁶⁶ OHCHR, '[Report on the human rights situation in Ukraine: 1 August 2022 – 31 January 2023](#)', para 119.

| | | |
|--|---|---|
| | | <p>In addition, the OHCHR has reported Ukrainian authorities convicting POWs from Russia-affiliated armed groups for activities amounting to a lawful participation in hostilities.⁶⁷ These acts have been reportedly penalised under the charges of trespass against territorial integrity, unlawful possession of firearms, membership in an unlawful armed formation and membership in a terrorist organisation.⁶⁸</p> |
| <p>9. At the time of arrest, was the accused informed, in simple, non-technical language that they could understand, of the essential legal and factual grounds for their arrest?</p> | <p>The information provided should be specific. A general statement (e.g., a government announcement) is not sufficient.⁶⁹ The reasons for arrest need not be detailed in their entirety by the arresting officer at the very moment of the arrest.⁷⁰ Yet, international jurisprudence has found that a delay of 76 hours in providing reasons for detention was not lawful.⁷¹</p> | <p>On 24 February 2022, 87 civilian Russian sailors were detained while their vessel was moored in the Odesa region.⁷² Their detention lasted for a period of eight months, during which the sailors were never communicated the reasons for their detention.⁷³ Ukrainian authorities neither provided any legal basis for the detention of the</p> |

⁶⁷ OHCHR, [‘Report on the treatment of prisoners of war and persons hors de combat in the context of the armed attack by the Russian Federation against Ukraine: 24 February 2022 – 23 February 2023’](#), para 121.

⁶⁸ OHCHR, [‘Report on the treatment of prisoners of war and persons hors de combat in the context of the armed attack by the Russian Federation against Ukraine: 24 February 2022 – 23 February 2023’](#), para 121.

⁶⁹ HRC, [GC No. 35](#), para 25; HRC, [Ilombe and Shandwe v. Democratic Republic of the Congo](#), para 6.2; ECtHR, [Saadi v. the United Kingdom](#), para 53; ECtHR, [Fox, Campbell and Hartley v. the United Kingdom](#), para 41; ECtHR, [Kerr v. the United Kingdom](#), 7-8; ECtHR, [Murray v. the United Kingdom](#), paras 13.2, 77.

⁷⁰ ECtHR, [Fox, Campbell and Hartley v. the United Kingdom](#), para 40. See also HRC, [GC No. 35](#), para 30.

⁷¹ ECtHR, [Saadi v. the United Kingdom](#), paras 55-56. See also HRC, [Bondar \(on behalf of Ismailov\) v. Uzbekistan](#), para 7.2, in which the Committee found that a delay of two days in informing the victim of the charges against him was a violation of Article 9(2) of the ICCPR.

⁷² OHCHR, [‘Detention of civilians in the context of the armed attack by the Russian Federation against Ukraine: 24 February 2022 – 23 May 2023’](#), para 123.

⁷³ OHCHR, [‘Detention of civilians in the context of the armed attack by the Russian Federation against Ukraine: 24 February 2022 – 23 May 2023’](#), para 123.

| | | |
|--|---|---|
| | | sailors, nor substantiated it on security grounds. ⁷⁴ |
| <p>10. What were the overall conditions of the accused's pre-trial detention?</p> | <p>An individual's physical liberty should be protected against arrest or detention that is unlawful and arbitrary.⁷⁵</p> <p>Indicators 11-20 may demonstrate that the accused's pre-trial detention was unlawful.</p> <p>Even if a deprivation of liberty is considered lawful, it may nevertheless be arbitrary.⁷⁶ This could be where there is inappropriateness, injustice, lack of predictability and due process of law, as well as a lack of reasonableness, necessity and/or proportionality.⁷⁷ For example, a deprivation of liberty will be arbitrary if there has been an element of bad faith or deception on the part of the authorities; there is no relationship between the ground of detention relied on and the place and conditions of detention; or the deprivation is not necessary to achieve the stated aim.⁷⁸</p> | <p>As above, the OHCHR has documented cases of arbitrary and/or unlawful detention of Ukrainians carried out by Ukrainian security forces, most of them affecting individuals who were under suspicion of having committed conflict-related offences.⁷⁹</p> <p>This includes instances in which Ukrainian security forces detained civilians in unofficial detention sites without court authorisation for a period up to four and a half months.⁸⁰</p> |

⁷⁴ OHCHR, '[Detention of civilians in the context of the armed attack by the Russian Federation against Ukraine: 24 February 2022 – 23 May 2023](#)', para 123.

⁷⁵ [Constitution of Ukraine](#), Article 29; [CPC](#), Articles 12 and 28-29; [ECHR](#), Article 5; [ICCPR](#), Article 9. See also ECtHR, [Engel and others v. the Netherlands](#), para 58; ECtHR, [Guzzardi v. Italy](#), para 92.

⁷⁶ ECtHR, [Creangă v. Romania](#), para 84; HRC, [GC No. 35](#), para 12.

⁷⁷ HRC, [GC No. 35](#), para 12.

⁷⁸ ECtHR, [Saadi v. the United Kingdom](#), paras 68-74; ECtHR, [James, Wells and Lee v. the United Kingdom](#), paras 191-195; HRC, [GC No. 35](#), para 12.

⁷⁹ OHCHR, '[Detention of civilians in the context of the armed attack by the Russian Federation against Ukraine: 24 February 2022 – 23 May 2023](#)', para 10.

⁸⁰ OHCHR, '[Detention of civilians in the context of the armed attack by the Russian Federation against Ukraine: 24 February 2022 – 23 May 2023](#)', paras 13-15.

| | | |
|---|---|--|
| <p>11. Was the accused segregated from convicted persons and not treated as if they were a convicted person?</p> | <p>An accused must be segregated from convicted persons and not treated as if they were a convicted person.⁸¹ Accused persons do not necessarily have to be kept in separate buildings – separate quarters would suffice.⁸²</p> <p>POWs should not be interned in penitentiaries, but rather in premises appropriate for the internment of POWs or camps specifically assembled for them except in particular cases which are justified by the interest of the prisoners themselves.⁸³</p> | <p>Although a considerable share of Russian POWs have been interned in pre-trial detention and penitentiary facilities, the OHCHR has made clear that all Russian POWs have so far always been separated from persons who were detained or convicted under criminal laws.⁸⁴</p> |
| <p>12. If the accused is a minor, were they separated from adults during pre-trial detention?</p> | <p>Pre-trial detention of minors should be used only as a measure of last resort; it should be as short as possible and, where detention is strictly necessary, minors should be kept apart from adults.⁸⁵ Where minors accused of crimes are detained, they must be separated from adults.⁸⁶</p> | <p>Reports suggest that, while juveniles are generally segregated from adults in the pre-trial stage, this guarantee is not complied with in some pre-trial detention facilities.⁸⁷</p> |
| <p>13. If the accused is a woman, was she separated from males during pre-trial detention?</p> | <p>Men and women should as far as possible be detained in separate institutions, or where there is only one institution,</p> | |

⁸¹ [ICCPR](#), Article 10(2)(a).

⁸² HRC, [Pinkney v. Canada](#), para 30.

⁸³ [Third Geneva Convention](#), Article 22. See also ICRC, '[Commentary to Geneva Convention III \(2020\)](#)', Article 22, paras 1994-1997.

⁸⁴ OHCHR, '[Report on the treatment of prisoners of war and persons hors de combat in the context of the armed attack by the Russian Federation against Ukraine: 24 February 2022 – 23 February 2023](#)', paras 111-112.

⁸⁵ ECtHR, [Nart v. Turkey](#), para 32.

⁸⁶ [ICCPR](#), Article 10(2)(b); [Convention on the Rights of the Child](#), Article 37(c). See also HRC, [GC No. 21](#), para 13; HRC, [Thomas v. Jamaica](#), para 6.5; Committee on the Rights of the Child, [GC No. 24](#), para 92. The HRC suggests that all persons under the age of 18 should benefit from the treatment of juveniles in accordance with article 10(2)(b) ICCPR ([GC No. 21](#), para 13).

⁸⁷ U.S. Department of State, '[Country Reports on Human Rights Practices: Ukraine](#)', 9.

| | | |
|--|---|---|
| | <p>separate premises.⁸⁸ In addition, in a prison for both men and women, the part of the prison where women are detained should be under the authority of a responsible woman staff member, and women prisoners should be attended to and supervised by female staff. No male staff member shall enter the part of the prison set aside for women unless accompanied by a woman staff member.⁸⁹</p> | |
| <p>14. Were there any indications that the accused was subjected to torture or inhuman or degrading treatment or punishment during their pre-trial detention?</p> | <p>The prohibition of torture is absolute, meaning that torture or inhuman or degrading treatment or punishment is not permitted under any circumstances, including for any asserted public interest, such as fighting terrorism or saving someone's life. This prohibition applies irrespective of the victim's conduct.⁹⁰ When individuals make allegations of torture during detention, these must be promptly and impartially investigated by the competent authorities.⁹¹</p> <p>Inhuman or degrading treatment is ill-treatment that does not rise to the level of torture as it does not have sufficient severity, intentionality or purpose.⁹² Ill-treatment has been considered inhuman if it was premeditated, applied for</p> | <p>Individuals prosecuted for the crime of 'collaborative activity' have reported to have been beaten during their arrest and subjected to torture and ill-treatment during interrogations by Ukrainian authorities.⁹⁶ In another example, a Russian civilian sailor who was detained by Ukrainian authorities died from a chronic condition due to the lack of adequate medical care.⁹⁷</p> <p>In 2023, the OHCHR also reported many instances of torture and ill-</p> |

⁸⁸ The United Nations Standard Minimum Rules for the Treatment of Prisoners ([the "Nelson Mandela Rules"](#)), Rule 11(a).

⁸⁹ The United Nations Standard Minimum Rules for the Treatment of Prisoners ([the "Nelson Mandela Rules"](#)), Rule 81.

⁹⁰ ECtHR, [Ireland v. the United Kingdom](#), paras 163, 167.

⁹¹ HRC, [GC No. 20](#), para 14.

⁹² See e.g., Commission on Human Rights, '[Report of the Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment](#)', para 39.

⁹⁶ OHCHR, '[Report on the human rights situation in Ukraine: 1 August 2022 – 31 January 2023](#)', para 11. See also [Report of the Independent International Commission of Inquiry on Ukraine](#), 15 March 2023, paras 87-89 and [Report of the Independent International Commission of Inquiry on Ukraine](#), 19 October 2023, paras 70-73.

⁹⁷ OHCHR, '[Report on the human rights situation in Ukraine: 1 August 2022 – 31 January 2023](#)', para 11.

| | | |
|--|---|---|
| | <p>hours at a time and caused either actual bodily injury or intense physical and mental suffering, and degrading if it caused its victims to experience feelings of fear, anguish and inferiority capable of humiliating and debasing them.⁹³</p> <p>Under international law and jurisprudence, the use of any evidence in criminal proceedings that was obtained through torture or inhuman treatment will render the proceedings as a whole unfair.⁹⁴ Incriminating evidence – whether in the form of a confession or real evidence – obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture – should never be relied upon as proof of the victim’s guilt (see also Indicator 15).⁹⁵</p> | <p>treatment of Russian POWs by Ukrainian forces, including beatings, threats of violence or execution, being forced to sing, mock executions, electrocution, stabbing or shooting at legs, and exhaustive physical exercises.⁹⁸</p> |
| <p>15. Were there any indications that the accused was coerced or pressured into admitting guilt?</p> | <p>Anyone charged with a criminal offence has a right to remain silent and refrain from self-incrimination.⁹⁹ An individual’s right to remain silent begins when they are questioned by the police,¹⁰⁰ and they must be informed of</p> | <p>Between 24 February 2022 and 23 February 2023, the OHCHR reported 13 instances in which Russian POWs in the hands of Ukrainian authorities have been pressured into admitting guilt by</p> |

⁹³ ECtHR, *V. v. the United Kingdom*, para 71; ECtHR, *Labita v. Italy*, para 120.

⁹⁴ ECtHR, *Gafgen v. Germany*, para 166; ECtHR, *Ibrahim and Others v. The United Kingdom*, para 254; ECtHR, *El Haski v. Belgium*, para 85. See also *CAT*, Article 15: “Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made”. ECtHR, *Zamferesko v. Ukraine*, para 70.

⁹⁵ *Constitution of Ukraine*, Article 62(3), “[a]n accusation shall not be based on illegally obtained evidence”. Under Ukrainian domestic legislation, evidence obtained by “subjecting a person to torture and inhuman or degrading treatment or threats to apply such treatment” is inadmissible, under Article 87(1) *CPC* read in conjunction with Article 87(2)(2) *CPC*. See also ECtHR, *Jalloh v. Germany*, para 105.

⁹⁸ OHCHR, ‘*Treatment of prisoners of war and persons hors de combat in the context of the armed attack by the Russian Federation against Ukraine: 24 February 2022 – 23 February 2023*’.

⁹⁹ *Constitution of Ukraine*, Article 63: “[a] person shall not bear responsibility for refusing to testify or to explain anything about himself or herself, members of his or her family or close relatives in the degree determined by law”; *CPC*, Articles 7(1)(11), 18(1), 18(2) and 42(3)(4); *ICCPR*, Article 14 (3)(g); *Additional Protocol I*, Article 75(4)(f).

¹⁰⁰ ECtHR, *John Murray v. the United Kingdom*, para 45.

| | | |
|--|--|---|
| | <p>this right and their right not to incriminate themselves when they are charged with a criminal offence.¹⁰¹</p> <p>Situations in which an accused is threatened with a sanction for refusing to testify, where the authorities deceive an accused to elicit information, or where psychological pressure is used, often in the form of torture to obtain a confession, may indicate a breach of this right.</p> <p>Where an accused is coerced or pressured into a confession, this may also indicate that the authorities have presumed guilt as well, which may also be a breach of international law (see Indicator 16 below).</p> | <p>prosecutors, the SBU and/or Ukrainian defence lawyers.¹⁰² According to the OHCHR, POWs were warned that proceedings against them would last for years and that they would not be exchanged if they did not confess guilt.¹⁰³ These events are partly explained by the changes introduced by the Ukrainian Parliament in July 2022 to amend procedures for the exchange of POWs, which can currently include those suspected, accused and convicted of war crimes.¹⁰⁴</p> <p>The OHCHR also reported 65 cases in which civilians were detained by Ukrainian security forces in unofficial facilities, often <i>incommunicado</i>, for a period ranging from several hours to 4.5 months, with a reported aim of coercing detainees to confess guilt or incriminate fellow detainees.¹⁰⁵</p> |
|--|--|---|

¹⁰¹ [CPC](#), Article 42(2)(2); ECtHR, [Ibrahim and Others v. The United Kingdom](#), para 272.

¹⁰² OHCHR, '[Treatment of prisoners of war and persons hors de combat in the context of the armed attack by the Russian Federation against Ukraine: 24 February 2022 – 23 February 2023](#)', para 123.

¹⁰³ OHCHR, '[Treatment of prisoners of war and persons hors de combat in the context of the armed attack by the Russian Federation against Ukraine: 24 February 2022 – 23 February 2023](#)', para 123.

¹⁰⁴ [Law of Ukraine 'On amending Criminal Code, Criminal Procedure Code and other legislative acts concerning legal procedure of exchanges of prisoners of war'](#).

¹⁰⁵ OHCHR, '[Detention of civilians in the context of the armed attack by the Russian Federation against Ukraine: 24 February 2022- 23 May 2023](#)', para 13.

| | | |
|---|--|---|
| <p>16. Were there any public statements made by law enforcement agencies affirming the guilt of the accused?</p> | <p>Such statements may indicate the presumption of innocence, as prescribed by Ukrainian and international law.¹⁰⁶</p> | <p>In the case against the first Russian POW tried for war crimes in Ukraine after the full-scale invasion of Ukraine in 2022, Vadim Yevgenievich Shishimarin, the OHCHR reported that the SBU had published the confession of the defendant online before the trial had taken place.¹⁰⁷</p> |
| <p>17. Were there any indications that the accused was discriminated against on the grounds of race, colour, sex, language or social origin?</p> | <p>An accused must not be discriminated against during the pre-trial investigation stage.¹⁰⁸ International law prohibits discrimination on the grounds of sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.¹⁰⁹</p> <p>This right is closely interconnected with other rights outlined in the above Indicators. Courts have chosen to consider the right to discrimination either as part of their</p> | |

¹⁰⁶ [Constitution of Ukraine](#), Article 62(1); [CPC](#), Article 17(1), “[a]n individual shall be considered innocent of the commission of a criminal offence and may not be imposed a criminal penalty unless their guilt is proved in accordance with the procedure prescribed in the present Code and is established in the court judgment of conviction which has taken legal effect”; [CPC](#), Article 7(1)(10) enshrines the presumption of innocence as a general principle of criminal proceedings in Ukraine; [Additional Protocol I](#), Article 75(4) applies this right to POWs; [ICCPR](#), Article 14(2), “[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law”; [ECHR](#), Article 6(2); Court of Bosnia and Herzegovina, [Prosecutor v. Samardžija](#), 15. For case examples concerning public statements by law enforcement agencies, see HRC, [GC No. 32](#), para 6. HRC, [Gridin v. Russian Federation](#), paras 3.5, 8.3. HRC, [Cedeño v. Bolivarian Republic of Venezuela](#), paras 2.17, 2.4.

¹⁰⁷ OHCHR, ‘[Situation of human rights in Ukraine: 1 February to 31 July 2022](#)’, para 100. While the OHCHR does not identify this case as that of Vadim Yevgenievich Shishimarin, organisations like JusticeInfo.net have asserted that the OHCHR’s account corresponds to his proceedings. See JusticeInfo.net, ‘[UN points to Russian crimes and Ukraine justice challenges](#)’, 11 October 2022.

¹⁰⁸ [Constitution of Ukraine](#), Articles 21 and 24; [CPC](#), Article 7(3) and 10; [ECHR](#), Article 14 and Article 1 of Protocol No. 12; [ICCPR](#), Articles 2 and 4. Note that while Ukraine has stated it will derogate from Article 14 ECHR under martial law (i.e. suspend a law under particular circumstances), it is not possible to derogate from the prohibition of discrimination under the ICCPR, and therefore the derogation does not have practical effect.

¹⁰⁹ [ECHR](#), Article 14.

| | | |
|---|---|--|
| | <p>consideration of other rights, or as a distinct issue.¹¹⁰ For example, if the guilt of the accused is presumed based on their Russian nationality, this could indicate both a violation of the presumption of innocence (see Indicator 16), and discrimination. The arrest and detention of an accused based on discriminatory grounds could indicate that it may be both unlawful and arbitrary (see Indicator 10).¹¹¹</p> | |
| <p>18. Did the accused have access to a lawyer during the pre-trial investigation phase?</p> | <p>One of the fundamental features of a fair trial is the right of everyone charged with a criminal offence to be effectively defended by a lawyer.¹¹²</p> <p>This right would apply e.g. when they are arrested on suspicion of having committed a criminal offence; they are taken into custody and questioned by the police; they are formally charged with a criminal offence; or when they are summoned for questioning without being deprived of their liberty.¹¹³</p> <p>The accused should be able to choose their own lawyer, and where they do not have the means, to have a lawyer</p> | <p>Most defendants considered “pro-Russian” or “pro-Russia-led forces” are represented by a lawyer from the Center for Free Secondary Legal Aid. However, it has been found that in some cases this contradicts the wishes of the accused, and lawyers are appointed in this way where practical obstacles have been put in place to the participation of the accused’s lawyer of choosing.¹¹⁹ Also, under martial law, investigators and prosecutors may now decide that the defence counsel</p> |

¹¹⁰ ECtHR, [‘Guide on Article 14 of the Convention \(prohibition of discrimination\) and on Article 1 of Protocol No. 12 \(general prohibition of discrimination\)’](#).

¹¹¹ HRC, [GC No. 35](#), para 17.

¹¹² [Constitution of Ukraine](#), Article 59; [CPC](#), Article 7(1)13 read in conjunction with Article 20(1) [CPC](#); [ECHR](#) Article 6(3); [ICCPR](#), Article 14(3)(b); ECtHR, [Salduz v. Turkey](#), para 51; ECtHR, [Ibrahim and Others v. the United Kingdom](#), para 255; ECtHR, [Simeonovi v. Bulgaria](#), para 112; [Additional Protocol I](#), Article 75(4)(a); [Fourth Geneva Convention](#), Article 72. The right to a defence by a qualified advocate or counsel is also explicitly guaranteed to POWs under the [Third Geneva Convention](#), Articles 99 and 105 (applicable to POWs).

¹¹³ ECtHR, [Simeonovi v. Bulgaria](#), para 111; ECtHR, [Dubois v. France](#), paras 45-46, 69-75; ECtHR, [Heaney and McGuinness v. Ireland](#), para 42; ECtHR, [Ibrahim and Others v. The United Kingdom](#), para 296; ECtHR, [John Murray v. the United Kingdom](#), paras 63-70.

¹¹⁹ International Society for Human Rights, [‘The right to a fair trial in Ukraine’](#), 22.

| | | |
|--|---|---|
| | <p>appointed to them at no cost by the state.¹¹⁴ The accused must also be granted prompt and regular access to counsel, with whom they must be able to meet in private and to communicate in confidential terms.¹¹⁵ Lawyers must not be subject to any restriction, influence, pressure or undue interference at the time of advising and representing defendants, nor should appointed lawyers engage in overt misbehaviour or incompetence, so as to be manifestly incompatible with the interest of justice.¹¹⁶</p> <p>There may be some compelling reasons for a delay in providing access to a lawyer, such as the potential for urgent and large scale loss of life, but even if there are compelling reasons for delay, the delay must also not unduly prejudice the overall fairness of the proceedings as a whole.¹¹⁷ This could occur, for example, where incriminating statements made during police interrogation without access to a lawyer are used for a conviction.¹¹⁸</p> | <p>remotely participate in proceedings.¹²⁰ It has been reported that remote participation is favoured by many counsel, but that this can cause technical issues which may impact the effectiveness of the defence.¹²¹</p> |
|--|---|---|

¹¹⁴ [Constitution of Ukraine](#), Article 59; [CPC](#), Articles 20(2), 20(3) and 42(3)(3); [ICCPR](#), Article 14(3) (d); [Third Geneva Convention](#) (applicable to POWs), Article 105. See also HRC, [Lindon v. Australia](#), para 6.5 and [Grinenko v. Ukraine](#), para 91.

¹¹⁵ [CPC](#), Articles 42(3)(3) and 46(5); HRC, [Khomidova v. Tajikistan](#), para 6.4; HRC, [GC No. 35](#), para 58.

¹¹⁶ HRC, [Taylor v. Jamaica](#), para 6.2.

¹¹⁷ ECtHR, [Salduz v. Turkey](#), para 55; ECtHR, [Ibrahim and Others v. the United Kingdom](#), paras 256-257, 260.

¹¹⁸ ECtHR, [Salduz v. Turkey](#), para 55; ECtHR, [Ibrahim and Others v. the United Kingdom](#), para 260.

¹²⁰ [CPC](#), Article 615, as introduced by [Law 2201-IX On Amendments to the Criminal Procedure Code of Ukraine regarding the improvement of the procedure for criminal proceedings under martial law of 14 April 2022](#).

¹²¹ Ukrainian Bar Association (UBA), [Report on the Results of the Project "The Trial Monitoring In War Crimes Cases"](#), December 2023, p. 16.

| | | |
|--|---|--|
| <p>19. Were there any indications that the accused was denied access to an interpreter where they could not understand or speak the language used by law enforcement agencies during the pre-trial investigation phase?</p> | <p>A suspect must be made aware, in a language they understand,¹²² of their right to interpretation when they are charged with a criminal offence.¹²³</p> <p>The absence of an interpreter can cast doubt on whether an accused was able to make informed choices during the proceedings.¹²⁴ This can have repercussions for the accused's other fair trial rights and may, therefore, undermine the fairness of the proceedings as a whole.¹²⁵</p> | |
| <p>20. Was the accused brought promptly before an investigative judge, and if not, were they released from custody pending trial?</p> | <p>An independent, impartial and objective judge must review an accused's arrest and detention promptly in their presence and with legal assistance provided.¹²⁶</p> <p>Continued detention may only be justified if:</p> <ul style="list-style-type: none"> • there is a reasonable suspicion that the person detained has committed an offence;¹²⁷ • it is considered necessary to prevent the person from committing an offence;¹²⁸ | <p>Under martial law, pre-trial detention before review by a judge has been extended from 72 hours to 216 hours. This amendment runs counter to the text of the Ukrainian constitution, which stipulates a maximum limit of 72 hours.¹³⁵ Investigative judges also now have less power over pre-trial detention measures or restraints.¹³⁶</p> |

¹²² ECtHR, [Vizgirda v. Slovenia](#), paras 86-87.

¹²³ [CPC](#), Article 42(2)(2); ECtHR, [Vizgirda v. Slovenia](#), para 86; ECtHR, [Wang v. France](#), paras 73-78.

¹²⁴ ECtHR, [Baytar v. Turkey](#), para 54.

¹²⁵ ECtHR, [Baytar v. Turkey](#), para 55.

¹²⁶ ECtHR, [Stephens v. Malta \(no. 2\)](#), para 53; HRC, [Wolf v. Panama](#), para 6.2. ECtHR, [Schuesser v. Switzerland](#), para 31; HRC, [Bazarov et al. v. Uzbekistan](#), para 8.2; HRC, [Musaeva v. Uzbekistan](#), para 9.3; HRC, [Zheludkova v. Ukraine](#), para 8.3. HRC, [GC No. 35](#), para 34.

¹²⁷ ECtHR, [Ireland v. the United Kingdom](#), para 196.

¹²⁸ Crucially, according to the ECtHR, 'the provision does not permit a policy of general prevention directed against individuals who are perceived by the authorities as being dangerous or having the propensity to commit unlawful acts' (see ECtHR, [Kurt v. Austria](#), para 186; ECtHR, [S., V. and A v. Denmark](#), paras 89, 91).

¹³⁵ [Constitution of Ukraine](#), Article 29; Valentyn Gvozdiy, '[The rule of law in Ukraine during martial law. Review of the criminal process](#)'.

¹³⁶ Valentyn Gvozdiy, '[The rule of law in Ukraine during martial law. Review of the criminal process](#)'.

| | | |
|---|--|---|
| | <ul style="list-style-type: none"> • there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty;¹²⁹ • the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee;¹³⁰ or • it is for the purpose of additional investigation or where a trial is justified.¹³¹ <p>According to the ECtHR, to be considered prompt, the time period between the applicant's detention and the first automatic review of that detention cannot exceed four days.¹³² However, the HRC has set a fixed a maximum time of 48 hours (or 24 hours for minors), and any delay longer than that must remain absolutely exceptional and substantively justified.¹³³</p> <p>If the individual deprived of liberty cannot be brought promptly before a judge, he or she has the right to be released from custody pending trial.¹³⁴</p> | <p>The OHCHR has reported different instances in which Ukrainian authorities have failed to bring detainees promptly before a judge - mostly concerning individuals held in unofficial detention sites.¹³⁷ These accounts include the case of a man who was detained by SBU officers in a sports facility from March 2022 to June 2022, when his detention was finally formalised by an investigating judge.¹³⁸</p> |
| <p>Trial stage (Note that the majority of these Indicators will also apply at appeal stages)</p> | | |

¹²⁹ ECtHR, '[Guide on Article 5 of the Convention: Right to Liberty and Security](#)', para 203.

¹³⁰ HRC, [Hill v. Spain](#), para 12.3; HRC, [Smantsev v. Belarus](#), para 10.3; HRC, [Basso v. Uruguay](#), para 10.2.

¹³¹ HRC, [GC No. 35](#), para 36.

¹³² ECtHR, [McCay v. the United Kingdom](#), para 47; ECtHR, [Oral and Atabay v. Turkey](#), para 43; ECtHR, [Năstase-Silivestru v. Romania](#), para 32. According to the HRC, examples of failure in promptness have included three days in [Borisenko v. Hungary](#), para 7.4; four days in [Freemantle v. Jamaica](#), para 7.4; and five days in [Nazarov v. Uzbekistan](#), para 6.2.

¹³³ HRC, [GC No. 35](#), para 33; HRC, [Medjnoune v. Algeria](#), para 8.7

¹³⁴ [Constitution of Ukraine](#), Article 29; [ECHR](#), Article 5(3); [ICCPR](#), Article 9(3).

¹³⁷ OHCHR, '[Detention of civilians in the context of the armed attack by the Russian Federation against Ukraine: 24 February 2022 – 23 May 2023](#)', paras 115-122.

¹³⁸ OHCHR, '[Detention of civilians in the context of the armed attack by the Russian Federation against Ukraine: 24 February 2022 – 23 May 2023](#)', para 117.

| | | |
|---|---|--|
| <p>21. Did the accused receive a trial within a reasonable time?</p> | <p>Everyone has a right to trial within a reasonable time.¹³⁹ The purpose of this right is to ensure that accused persons do not have to remain for too long in a state of uncertainty as to the outcome of the charges against them.¹⁴⁰</p> <p>Factors relevant to the determination of whether the duration of criminal proceedings has been reasonable include:</p> <ul style="list-style-type: none"> • The complexity of the case (e.g. the number of charges laid, the number of people involved in the proceedings (i.e., defendants and witnesses), or the international dimension of the case.¹⁴¹); • The applicant’s conduct (if the suspect intended to delay the investigation, for example, by systematically challenging judges¹⁴²); and • The conduct of the relevant administrative and judicial authorities.¹⁴³ Delays cannot be justified if proceedings may have been delayed due to, for example, political troubles in the region, staff shortages, or the excessive | <p>Prior to the full-scale invasion, between April 2014 and April 2020, the OHCHR documented 140 conflict-related criminal trials in Ukraine lasting more than 2 years, along with 15 such trials lasting more than 4 years.¹⁴⁵ In many of these cases, neither the conduct of the accused nor the complexity of the case justified the length of the proceedings.¹⁴⁶</p> <p>In some cases, the unreasonable delay was caused by the conduct of the prosecution.¹⁴⁷ For instance, after the arrest of a woman on suspicion of planning to detonate explosives in central Kyiv, and despite the availability of compelling evidence against her, the prosecution delayed the proceedings by failing to call its witnesses and failing to</p> |
|---|---|--|

¹³⁹ [Ukrainian Constitution](#), Article 129(7); [ECHR](#), Article 6(1); [ICCPD](#), Articles 9, 14(3)(c): “[i]n the determination of any criminal charge against him, everyone shall be entitled to be tried without undue delay”; Military Court of Appeals for Judea and Samaria, *Omar Farid Hassan Alkam v. the Military Prosecutor*; ICTR, [Prosecutor v. Kamuhanda](#), para 5.2; ICC, [Prosecutor v. Katanga and Ngudjolo](#), para 45.

¹⁴⁰ ECtHR, [Wemhoff v. Germany](#), para 18; ECtHR, [Kart v. Turkey](#), para 68; ECtHR, [Grigoryan v. Armenia](#), para 129. See also HRC, [GC No. 32](#), para 35: The right is “designed to avoid keeping persons too long in a state of uncertainty about their fate” and to ensure that provisional detention is not too long, but also serves the more abstract interests of justice.

¹⁴¹ ECtHR, [Neumeister v. Austria](#), para 20; ECtHR, [Arewa v. Lithuania](#), para 52.

¹⁴² ECtHR, [Eckle v. Germany](#), para 82. See also ECtHR, [I.A. v. France](#), para 121.

¹⁴³ ECtHR, [König v. Germany](#), para 99; ECtHR, [Neumeister v. Austria](#), para 21; ECtHR, [Liblik and Others v. Estonia](#), para 91; ECtHR, [Pélissier and Sassi v. France](#), para 67; HRC.

¹⁴⁵ OHCHR, ‘[Human rights in the administration of justice in conflict-related criminal cases in Ukraine: April 2014 – April 2020](#)’, para 52.

¹⁴⁶ OHCHR, ‘[Human rights in the administration of justice in conflict-related criminal cases in Ukraine: April 2014 – April 2020](#)’, para 52.

¹⁴⁷ OHCHR, ‘[Human rights in the administration of justice in conflict-related criminal cases in Ukraine: April 2014 – April 2020](#)’, para 53.

| | | |
|---|--|--|
| | <p>workload of the courts, and with the State not taking the necessary action to rectify the delay.¹⁴⁴</p> | <p>present its case.¹⁴⁸ After approximately 2 years of hearings during which the court only considered the extension of her pre-trial detention, without addressing the unreasonable delays stemming from the conduct of the prosecution, the woman pleaded guilty.¹⁴⁹</p> <p>In addition, reports have shown that there have been delays due to the difficulties in ensuring the presence of a state-appointed lawyer.¹⁵⁰ On the other hand, some have noted that certain conflict-related cases are proceeding very fast.¹⁵¹</p> |
| <p>22. Was the hearing public?</p> | <p>An accused is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.¹⁵²</p> <p>Under international law, exclusion of the public (including the media) from all or part of a trial may be justified only in</p> | <p>Many conflict-related crimes cases in Ukraine have been fully or partially open to the public and media.¹⁶¹ However, some “artificial barriers” have been put in place by judges or court administration, such as requests for</p> |

¹⁴⁴ ECtHR, [Baggetta v. Italy](#), paras 20-25; HRC, [Fillastre and Bizouarn v. Bolivia](#), para 6.5.

¹⁴⁸ OHCHR, ‘[Human rights in the administration of justice in conflict-related criminal cases in Ukraine: April 2014 – April 2020](#)’, para 53.

¹⁴⁹ OHCHR, ‘[Human rights in the administration of justice in conflict-related criminal cases in Ukraine: April 2014 – April 2020](#)’, para 53.

¹⁵⁰ Media Initiative for Human Rights, “[I was running away from your soldiers for five days.” The trial of the captured paratrooper from Pskov started in Irpin](#)’, 11 April 2023.

¹⁵¹ UBA, ‘[Report on the Results of the Project "The Trial Monitoring In War Crimes Cases"](#)’, December 2023, p. 18.

¹⁵² [CPC](#), Article 21(1); [ECHR](#), Article 6(1); [ICCPR](#), Article 14(1); [Third Geneva Convention](#), Article 48(2) (for POWs). [CPC](#), Articles 18 and 20, [Law Of Ukraine On The Judiciary And The Status Of Judges](#), Article 11. See also ECCC, [Prosecutor v. Kaing Guek Eav](#), paras 458-459.

¹⁶¹ UBA, ‘[Report on the Results of the Project "The Trial Monitoring In War Crimes Cases"](#)’, December 2023, p. 10.

| | | |
|--|--|--|
| | <p>the following circumstances: in the interests of morals, public order or national security in a democratic society; where the interests of juveniles or the protection of the private life of the parties is so required; or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.¹⁵³</p> <p>Under Ukrainian law, this is possible:</p> <ul style="list-style-type: none"> • If the accused is a minor; • When considering a case related to a crime against sexual freedom and the sexual integrity of a person; • Where there is a need to prevent the disclosure of information about personal and family life, or circumstances that may degrade the dignity of an individual; • If conducting proceedings in an open court session might result in the disclosure of a secret protected by law; and/or • Where there is a necessity to ensure the safety of individuals participating in criminal proceedings.¹⁵⁴ | <p>journalists or trial monitors to read and sign a “memo for media workers”, or “submit a petition to ‘attend an open court session’”.¹⁶² This contradicts Ukrainian law, under which media only need court permission to film or broadcast.¹⁶³ Furthermore, some issues with public access to online court hearings have been raised, since the Law of Ukraine On the Judiciary System and the Status of Judges provides that any Ukrainian citizen can attend any hearing, but only physically.¹⁶⁴</p> <p>In addition, most cases concerning conflict-related sexual violence or where the families of victims and witnesses are located in the temporarily occupied territories and their safety may be a concern have not been fully public.¹⁶⁵</p> |
|--|--|--|

¹⁵³ [ECHR](#), Article 6(1); [ICCPR](#), Article 14(1); [Additional Protocol I](#), Article 75(4)(i).

¹⁵⁴ [CPC](#), Article 27.

¹⁶² Media Initiative for Human Rights, ‘[How are war-related court cases progressing? Interim findings of MIHR monitoring](#)’, 17 July 2023. See also UBA, ‘[Report on the Results of the Project "The Trial Monitoring In War Crimes Cases"](#)’, December 2023, p. 11.

¹⁶³ [CPC](#), Article 27(6).

¹⁶⁴ Media Initiative for Human Rights, ‘[How are war-related court cases progressing? Interim findings of MIHR monitoring](#)’, 17 July 2023.

¹⁶⁵ Ukrainian Bar Association (UBA), ‘[Report on the Results of the Project "The Trial Monitoring In War Crimes Cases"](#)’, December 2023, p. 10.

| | | |
|--|--|---|
| <p>23. Was the court hearing the case independent?</p> | <p>Martial does not explicitly restrict attendance of the public at hearings, however recommendations from the Council of Judges of Ukraine (mainly tasked with ensuring the independence of courts and judges) note that in regions that are more dangerous due to the invasion, access to hearings may be restricted for non-participants.¹⁵⁵</p> | |
| <p>24. Were there indications of bias on the part of the judges or court?</p> | <p>There should also not be political interference of the executive and legislative powers within the judiciary, as well as the existence of adequate guarantees of the judicial function,¹⁵⁶ such as a process for the appointment of judges, their conditions for promotion, suspension, transfer or cessation, or the assurances of security of tenure of judges until the expiry of their term.</p> <p>Judges must not be influenced by personal biases and shall not improperly favor the interests of one party at the expense of the other when rendering their judgement.¹⁵⁷</p> <p>Biases may also indicate that judges presumed the guilt of the accused (see Indicator 16), e.g. if a judgment acquitting an accused reflects an opinion that an accused is guilty,¹⁵⁸</p> | <p>There have been some reports that judges have invited prosecutors to their office in advance of the trials in the absence of the defence and other participants.¹⁶⁶</p> |

¹⁵⁵ Media Initiative for Human Rights, '[How are war-related court cases progressing? Interim findings of MIHR monitoring](#)', 17 July 2023.

¹⁵⁶ [GC No. 32](#), para 19, HRC, [Oló Bahamonde v. Equatorial Guinea](#), para 9.4; ECtHR, [Ninn-Hansen v. Denmark](#).

¹⁵⁷ HRC, [Karttunen v. Finland](#), para 7.2; ECtHR, [Incal v. Turkey](#), para 65. See also the [Code of Judicial Ethics](#) of 22 February 2013.

¹⁵⁸ ECtHR, [Barberà, Messegué and Jabardo v. Spain](#), para 91; ECtHR, [Cleve v. Germany](#), para 41.

¹⁶⁶ UBA, '[Report on the Results of the Project "The Trial Monitoring In War Crimes Cases"](#)', December 2023, p. 14.

| | | |
|--|--|--|
| | <p>or is not sufficiently reasoned as to discrepancies and contradictions in the evidentiary record.¹⁵⁹</p> <p>A tribunal must additionally hold an appearance of impartiality to a reasonable observer.¹⁶⁰</p> | |
| 25. Was the accused present at their trial? | <p>The accused's presence at their trial is considered one of the essential requirements of the right to a fair trial.¹⁶⁷ In addition, an accused must be able to participate effectively in criminal proceedings.¹⁶⁸ This encompasses the right of the accused to be present during the trial, to hear and follow the proceedings.¹⁶⁹ Participation via video link does not necessarily infringe the accused's fair trial rights, provided that the applicant is able to follow the proceedings without technical impediments and is able to confidentially communicate with counsel throughout.¹⁷⁰</p> | <i>In absentia</i> trials are common in Ukraine, including in conflict-related cases. The UBA has reported that most conflict-related trials are held <i>in absentia</i> with the involvement of defence lawyers. ¹⁸¹ |
| 26. Was the accused able to effectively participate in their trial? | | |
| 27. If the accused was not present, were there indications that they had been duly notified on the date, time and place of the hearing? | | As per Article 297(5) of the Criminal Procedure Code of Ukraine, subpoenas to summon a suspect in the event of a special pre-trial investigation are sent to his last known place of residence or stay |

¹⁵⁹ ECtHR, [Ajdarić v. Croatia](#), paras 46–52.

¹⁶⁰ [Third Geneva Convention](#), Article 104; [Fourth Geneva Convention](#), Article 71(2); HRC, [GC No. 32](#), para 22; ECtHR, [Piersack v. Belgium](#), para 30; ECtHR, [Grievés v. the United Kingdom](#), para 69; ECtHR, [Kyprianou v. Cyprus](#), para 118; ECtHR, [Morice v. France](#), para 73; ICTY, [Prosecutor v. Furundžija](#), paras 189-191; ICTY, [Prosecutor v. Galić](#), paras 37-41; ICTR, [Prosecutor v. Akayesu](#), paras 203-207; ICTR, [Prosecutor v. Nahimana](#), paras 47-50. Note that the mere fact that the same judge twice exercised the same function in the same set of criminal proceedings is insufficient to show objective lack of impartiality (ECtHR, [Teslya v. Ukraine](#), 2020).

¹⁶⁷ The [ICCPR](#) stipulates that “[i]n the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: [...] [t]o be tried in his presence” (Article 14(3)(d)). A similar human right guarantee is also part of the [ECHR](#) (Article 3(c)). See also [Additional Protocol I](#), Article 75(4)(e); [ICRC Commentary to Geneva Convention III \(2020\)](#), Article 105, para 4101; ECtHR, [Jussila v. Finland](#), para. 40; ECtHR, [Hermi v. Italy](#); ECtHR, [Sejdovic v. Italy](#), paras 81, 84. See also [CPC](#), Article 262; [ECHR](#), Article 6(3)(d); [ICCPR](#), Article 14(3)(d).

¹⁶⁸ [CPC](#), Article 34; [ECHR](#), Article 6; ECtHR, [Murtazaliyeva v. Russia](#), para 91; [ECHR](#), Article 6; Ukrainian CPC, Article 34.

¹⁶⁹ [Stanford v. United Kingdom](#), Application no. 16757/90, Judgment, 23 February 1994, para. 26.

¹⁷⁰ ECtHR, [Marcello v. Italy](#), paras 63-67; ECtHR, [Asciutto v. Italy](#), paras 62-73; ECtHR, [Sakhnovskiy v. Russia](#), para 98.

¹⁸¹ Ukrainian Bar Association (UBA), [Report on the Results of the Project "The Trial Monitoring In War Crimes Cases"](#), December 2023, p. 6.

| | | |
|--|---|---|
| | <p>The authorities must consider an accused’s vulnerabilities or impairments, and make the necessary adjustments to ensure effective participation.¹⁷¹ Where the accused is a minor, the case must be “dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings”.¹⁷²</p> <p>In <i>absentia</i> trials, i.e., criminal proceedings that are conducted by a court of justice in which the accused/defendant is not physically present at these proceedings, are possible under Ukrainian law,¹⁷³ but only permitted in exceptional cases¹⁷⁴ under international law where:</p> <ul style="list-style-type: none"> • the accused was duly notified about the case;¹⁷⁵ • the accused is legally represented in the proceedings and has effective assistance of counsel; • the accused is prevented/ removed from attending their court hearings due to their own improper behaviour;¹⁷⁶ | <p>and must be published in mass media of nationwide distribution and on the official website of the Office of the Prosecutor General. Information about hearings is generally posted on the court websites and on notice boards in the court. However, concerns have been raised as to whether the process in Ukraine amounts to adequate notification, since many suspects may be in Russia or only speak the Russian language.¹⁸²</p> |
|--|---|---|

¹⁷¹ ECtHR, [Hasalíkova v. Slovakia](#), para 69.

¹⁷² ECtHR, [V. v. United Kingdom](#), para 86.

¹⁷³ [CPC](#), Article 297 (2) in respect of Articles 437 and 438.

¹⁷⁴ HRC, GC No. 13; HRC, [GC No. 32](#), para 36 ‘Equality before the courts and the right to a fair and public hearing by an independent court established by law’; Communication No. 16/1977, (Reported at: 78 ILR 18, 19, UNHR Comm. 1983), HRC, [GC No. 13](#); HRC, [Daniel Monguya Mbenge et al. v. Zaire](#), para 14.1; Roberto Bellelli, *International Criminal Justice: Law and Practice from the Rome Statute to Its Review* (Routledge, Taylor & Francis Group, 2010), fn 239, p 438. ; [GC No. 32](#), para 36.

¹⁷⁵ HRC, [Daniel Monguya Mbenge et al. v. Zaire](#), para 14.1; HRC, [Maleki v. Italy](#), para 9.

¹⁷⁶ Appellate Panel of the Court of BiH, [Prosecutor v. Janković](#), 8; ECtHR, [Idalov v. Russia](#), para 175; ECtHR, [Marguš v. Croatia](#), para 90; [Ananyev v. Russia](#), para 43.

¹⁸² UBA, [Report on the Results of the Project "The Trial Monitoring In War Crimes Cases"](#), December 2023, p. 14.

| | | |
|---|---|--|
| | <ul style="list-style-type: none"> • the accused has the right to retrial in their presence,¹⁷⁷ and/or • The accused is not a POW.¹⁷⁸ <p>Adequate notification should include:</p> <ul style="list-style-type: none"> • Timely and effective communication to enable the accused to prepare a defence adequately; and • Clear and understandable information on the charges, time, and place of the trial; and • Reasonable efforts to reach the accused through appropriate channels, considering individual circumstances.¹⁷⁹ Publication of summons in official gazettes may not be enough; additional measures should be undertaken to ensure personal notification, such as contacting family members or other means reasonably available to authorities.¹⁸⁰ | |
| <p>28. Did the accused have access to a lawyer during the trial?</p> | <p>See above Indicator 18.</p> | <p>See above Indicator 18. The OHCHR has recorded various instances in which Russian POWs, although formally assigned legal counsel, were prevented by Ukrainian authorities from contacting them before the court hearings.¹⁸³ As hearings would often</p> |

¹⁷⁷ See ECtHR, [Colozza v. Italy](#); ECtHR, [Somogyi v. Italy](#); ECtHR, [Mariani v. France](#); ECtHR, [Sejdovic v. Italy](#). In contrast, Ukrainian legislation regulating *in absentia* trials only allows defendants to be retried in their presence if they are located before the conviction is issued - afterwards, convicted persons are only entitled to an appeal ([CPC](#), Article 323.4).

¹⁷⁸ ICRC [Commentary to Geneva Convention III \(2020\)](#), para 4103.

¹⁷⁹ ECtHR, [Sejdovic v. Italy](#); ECtHR, [Medvedyev and Others v. France](#).

¹⁸⁰ [ECtHR, Medvedyev and Others v. France](#).

¹⁸³ Valentyn Gvozdiy, '[The rule of law in Ukraine during martial law: Review of changes to the criminal process](#)'.

| | | |
|--|--------------------------|---|
| | | <p>take place online, POWs were effectively deprived of their right to communicate with their lawyers in confidential terms.¹⁸⁴</p> <p>In addition, Media Initiative for Human Rights reported that where defence lawyers have been appointed, they only raised objections against the indictment initially presented by the prosecution in 10% of the cases examined.¹⁸⁵ Defence counsel would often align with the prosecutors during trial hearings, and the majority of verdicts unfavourable to the accused were not appealed.¹⁸⁶</p> <p>The UBA has also reported that defence lawyers have sometimes adopted a passive attitude during hearings, been late, intermittently attended, or joined via video-link from a car.¹⁸⁷</p> |
| <p>29. If the accused could not understand or speak the language used during the trial, did they have access to an interpreter?</p> | <p>See Indicator 19.</p> | <p>There have been some reports of Ukrainian judges proceeding with</p> |

¹⁸⁴ Valentyn Gvozdiy, [‘The rule of law in Ukraine during martial law: Review of changes to the criminal process’](#).

¹⁸⁵ Media Initiative for Human Rights, [‘How are war-related court cases progressing? Interim findings of MIHR monitoring’](#), 17 July 2023.

¹⁸⁶ Media Initiative for Human Rights, [‘How are war-related court cases progressing? Interim findings of MIHR monitoring’](#), 17 July 2023.

¹⁸⁷ UBA, [‘Report on the Results of the Project “The Trial Monitoring In War Crimes Cases”](#)’, December 2023, p. 17.

| | | |
|--|---|---|
| | | hearings even when the accused's interpreters have not appeared. ¹⁸⁸ |
| <p>30. Were there indications that the accused had inadequate time and facilities to prepare their defence?</p> | <p>The accused must be given adequate time and facilities to prepare their defence.¹⁸⁹</p> <p>Issues with regard to adequate time can arise, for example, if the defence was given limited time to inspect a file,¹⁹⁰ or was not given additional time after certain occurrences in the proceedings (e.g., changes in the indictment or the introduction of new evidence by the prosecutor) to adjust their position.¹⁹¹</p> <p>If an accused is detained, the conditions of their detention, transport, food, etc. are relevant factors for monitors to consider.¹⁹² For facilities to be adequate, they must permit the accused to read and write with a reasonable degree of concentration, and be conducive to getting enough rest to enable the accused to follow the proceedings, make submissions, take notes and consult with/instruct their lawyers.¹⁹³</p> | <p>Cases such as that of POW Leonid Huseinov have been processed at an exceptionally fast pace, with both preliminary and merits hearings being completed in less than an hour.¹⁹⁷ Proceedings against POW Vadim Shishimarin were finished after four hearings conducted over a period of approximately one month.¹⁹⁸ Likewise, while the start of the trial hearings of POW Maxim Kryshchuk was scheduled for 24 February 2023, he was convicted on 2 March 2023.¹⁹⁹</p> <p>Given the aforementioned conditions, defence lawyers have reportedly faced challenges to obtain certain personal documents of the defendants or their</p> |

¹⁸⁸ International Society for Human Rights, '[The right to a fair trial in Ukraine](#)', 173.

¹⁸⁹ [CPC](#), Article 48; [ECHR](#), Article 6(3)(b); [ICCPR](#), Article 14(3)(b). See also ECtHR, [Mayzit v. Russia](#), para 79; European Commission of Human Rights, [Jespers v. Belgium](#), para 55.

¹⁹⁰ ECtHR, [Huseyn and Others v. Azerbaijan](#), paras 174-178; ECtHR, [Iglin v. Ukraine](#), paras 70-73; ECtHR, [Nevzlin v. Russia](#), paras 144-150.

¹⁹¹ ECtHR, [Mimoshvili v. Russia](#), para 141; ECtHR, [Pélissier and Sassi v. France](#), para 62; ECtHR, [G.B. v. France](#), paras 60-62.

¹⁹² ECtHR, [Razvozhayev v. Russia and Ukraine and Udaltsov v. Russia](#), para 252; ECtHR, [Mayzit v. Russia](#), para 81; ECtHR, [Moiseyev v. Russia](#), para 221; ECtHR, [Barberà, Messegué and Jabardo v. Spain](#), para 70.

¹⁹³ ECtHR, [Razvozhayev v. Russia and Ukraine and Udaltsov v. Russia](#), paras 253-254.

¹⁹⁷ Justice Info, '[Inside courts where Ukrainian judges try Ukrainian POWs](#)'.

¹⁹⁸ Zmina, '["The first trial against the russian soldier" as an indicator of the state justice system of Ukraine](#)', 25 May 2022; Media Initiative for Human Rights, '[How are war-related court cases progressing? Interim findings of MIHR monitoring](#)', 17 July 2023.

¹⁹⁹ Media Initiative for Human Rights, '[How are war-related court cases progressing? Interim findings of MIHR monitoring](#)', 17 July 2023.

| | | |
|--|--|---|
| | <p>The accused must also be granted access to the necessary files and disclosure of evidence required for them to mount a defence,¹⁹⁴ and have been provided all relevant evidence that has been or could have been collected by the competent authorities in order to potentially exonerate themselves or to obtain a reduction in their sentence.¹⁹⁵</p> <p>An accused does not have to be granted direct access to the case file provided that they are informed of the material in the file by their lawyer.¹⁹⁶</p> | <p>relatives on time for the preliminary or trial hearings.²⁰⁰ Also, there have been cases in which some evidential materials have reached courts after the individuals at issue had already been convicted, thus depriving the accused and their lawyers of the possibility of accessing all relevant evidence.²⁰¹</p> |
| <p>31. Was the defence given the opportunity to challenge the authenticity of evidence or oppose its admission where it alleged that it had been gathered by way of techniques such as those in Indicators 1-6?</p> | <p>It is important to note that while investigative measures may contravene the right to privacy, if evidence collected in this way is later used in a criminal trial, the proceedings as a whole may still be fair if these Indicators are met.²⁰²</p> | |
| <p>32. If the defence argued that the evidence was gathered by way of techniques such as those in indicators 1-6, was the quality of this evidence taken into</p> | | |

¹⁹⁴ ECtHR, [Rowe and Davis v. the United Kingdom](#), para 59; ECtHR, [Leas v. Estonia](#), para 76; HRC, [Pustovoit v. Ukraine](#), para 9.2.

¹⁹⁵ European Commission of Human Rights, [Jespers v. Belgium](#), para 58.

¹⁹⁶ ECtHR, [Kremzow v. Austria](#), para 52.

²⁰⁰ Justice Info, '[Inside courts where Ukrainian judges try Ukrainian POWs](#)'.

²⁰¹ Justice Info, '[Inside courts where Ukrainian judges try Ukrainian POWs](#)'.

²⁰² ECtHR, [Khan v. The United Kingdom](#), paras 69-83.

| | | |
|---|---|---|
| <p>consideration at trial, including the circumstances under which it was obtained and whether these circumstances cast doubt on its reliability or accuracy?</p> | | |
| <p>33. Was the defence offered the same opportunities as the prosecution?</p> | <p>This Indicator relates to the principle of “equality of arms” which requires that each party in criminal proceedings is given a reasonable opportunity to present their case under conditions that do not place them at a disadvantage to their opponent.²⁰³ The trial must therefore represent an adversarial process. The defence must have the opportunity to bring witnesses, challenge the arguments and evidence presented by the prosecution, and cross-examine prosecution witnesses.²⁰⁴</p> <p>The principle of equality of arms was found to have been violated in the following cases:</p> <ul style="list-style-type: none"> • Where the accused was prevented from replying to submissions made by the prosecutor and had not been given a copy of the submissions beforehand;²⁰⁵ | <p>Some Ukrainian courts have delivered guilty verdicts the same day or the day after the preliminary hearing of a Russian POW, suggesting a lack of an adversarial process.²⁰⁹ Similarly, the lack of defence arguments as noted in Indicator 28 may indicate an imbalance.</p> <p>Additionally, in the trial of POW Vadim Shishimarin, the court did not accept the request of the defence lawyer to question Shishimarin's fellow servicemen who witnessed the crime due to the fact that they had been</p> |

²⁰³ [Ukrainian Constitution](#), Article 129; [CPC](#), Article 10; [Additional Protocol I](#), Article 75(4); HRC, [GC No. 32](#), para 13; ECtHR, [Ocalan v. Turkey](#), para 140; ECtHR, [Foucher v. France](#), para 34; ECtHR, [Bulut v. Austria](#), para 47; ECtHR, [Mammadov v. Azerbaijan](#), para 19; HRC, [Campbell v. Jamaica](#), para 6.4; ICTY, [Prosecutor v. Tadić](#), para 44; Committee of Ministers of the Council of Europe, [Pataki and Dunshirn v. Austria](#); Court of Bosnia and Herzegovina, [Prosecutor's Office of Bosnia and Herzegovina v. Samardžić](#), 7.

²⁰⁴ [ECHR](#), Article 6(3)(d); [ICCPR](#), Article 14(3)(e); [Third Geneva Convention](#), Article 105; [Fourth Geneva Convention](#), Article 72; HRC, [GC No. 32](#), para 39; HRC, [Rodríguez Orejuela v. Colombia](#), para 7.3; Court of Bosnia and Herzegovina, [Prosecutor's Office of Bosnia and Herzegovina v. Samardžić](#), 7; Court of Bosnia and Herzegovina, [Prosecutor's Office of Bosnia and Herzegovina v. Stankovic](#), 8. HRC, [Jansen-Gielen v. The Netherlands](#), para 8.2.

²⁰⁵ ECtHR, [Borgers v. Belgium](#), paras 22-29.

²⁰⁹ OHCHR, '[Treatment of prisoners of war and persons hors de combat in the context of the armed attack by the Russian Federation against Ukraine: 24 February 2022 – 23 February 2023](#)', para 124.

| | | |
|--|--|---|
| | <ul style="list-style-type: none"> • Where a defence lawyer was made to wait for fifteen hours before being given the chance to plead their case in the early hours of the morning;²⁰⁶ or • Where only the prosecution was entitled to appeal a decision.²⁰⁷ <p>In addition, where the burden of proof is placed on the defence to prove their innocence rather than the prosecution to prove guilt,²⁰⁸ this would also not indicate equality, but rather could indicate a presumption in favour of the guilt of the accused (see also Indicator 16).</p> | previously exchanged for Ukrainian POWs. ²¹⁰ |
| 34. What was the sentence pronounced? | An accused should not receive a heavier penalty than the one applicable at the time when the criminal offence was committed. ²¹¹ | |
| 35. Was the accused informed of their right to appeal? | The right to appeal must be communicated to the accused, including all the necessary information to enable appeal proceedings to be launched in a timely manner. ²¹² It is not sufficient that the right to appeal is exercised before a higher court. This court also must be independent and impartial and fair trial guarantees must be upheld at the appeal stage as well. ²¹³ | The OHCHR has reported that state-appointed lawyers in Ukraine have been reported as asking their clients to sign waivers of their right to appeal even though this is not foreseen in Ukrainian legislation or as avoiding challenging |

²⁰⁶ ECtHR, *Makhfi v. France*, paras 20-42.

²⁰⁷ HRC, *Weiss v. Austria*, para 9.6.

²⁰⁸ ECtHR, *Telfner v. Austria*, paras 18-20; *Constitution of Ukraine*, Article 62(2): “[n]o one is obliged to prove his or her innocence of committing a crime”.

²¹⁰ OHCHR, ‘*Report on the human rights situation in Ukraine: 1 August 2022 – 31 January 2023*’, para 100.

²¹¹ *Constitution of Ukraine*, Article 58; ECHR, Article 7; ICCPR, Article 15; *Third Geneva Convention*, Article 99 (in relation to POWs); *Fourth Geneva Convention*, Article 67; *Rome Statute of the International Criminal Court*, article 22(1); ICTY, *Prosecutor v. Aleksovski*, para 38; ICTY, *Prosecutor v. Delalić et al.*, para 576. In cases in which a later law imposes lighter penalties, the accused must benefit from the newly approved law, even though it was not applicable at the time of the commission of the offence (see HRC, *GC No. 29*, para 7; HRC, *Tofanyuk v. Ukraine*, para 11.3; ICTY, *Prosecutor v. Nikolić*, para 81).

²¹² ICRC, ‘*Commentary to Geneva Convention III (2020)*’, Article 106, para 4161.

²¹³ ECtHR, *Meftah and Others v. France*, para 40.

| | | |
|--|--|--|
| | | <p>clearly unfavourable convictions.²¹⁴ According to the Media Initiative for Human Rights, the majority of war crimes verdicts they had monitored were not appealed, especially those detrimental to the accused.²¹⁵ Similarly, the UBA reported that out of 44 judgments on conflict-related cases heard between 24 February 2022 and 15 October 2023 analysed, only 10 were appealed.²¹⁶ This challenge may become more acute in proceedings held <i>in absentia</i>, where the accused is not present to enforce their right to appeal.</p> |
|--|--|--|

²¹⁴ OHCHR, '[Human rights in the administration of justice in conflict-related criminal cases in Ukraine: April 2014 - April 2020](#)', paras 61-62.

²¹⁵ Media Initiative for Human Rights, '[How are war-related court cases progressing? Interim findings of MIHR monitoring](#)', 17 July 2023.

²¹⁶ UBA, '[Report on the Results of the Project "The Trial Monitoring In War Crimes Cases"](#)', December 2023, p. 6.



Annex A: Fair Trial Indicators

| Pre-trial investigation phase |
|--|
| 1. Were there any indications of tapping of telephone lines (i.e., wiretapping)? |
| 2. Were there any indications that evidence was obtained through unlawful secret surveillance (e.g., in violation of domestic law)? |
| 3. Were there any indications that evidence was obtained through unlawful search and seizure operations (e.g., without a search warrant)? |
| 4. Were there any indications that body searches were conducted without respect for the dignity of the person in question, or by agents of a different sex? |
| 5. Were there any indications that samples were taken from a suspect for forensic analysis (i.e., failing to package the samples in front of the individual to ensure that they were not tampered with)? |
| 6. Were there any indications that planted evidence was used against an accused (i.e., evidence, such as drugs, weapons, etc., that were planted/placed by the investigator or police in the accused's home, vehicle, etc.)? |
| 7. Were there any indications that the accused was arrested without a warrant? |
| 8. What were the grounds for arrest? |
| 9. At the time of arrest, was the accused informed, in simple, non-technical language that they could understand, of the essential legal and factual grounds for their arrest? |
| 10. What were the overall conditions of the accused's pre-trial detention? |
| 11. Was the accused segregated from convicted persons and not treated as if they were a convicted person? |
| 12. If the accused is a minor, were they separated from adults during pre-trial detention? |
| 13. If the accused is female, were they separated from males during pre-trial detention? |
| 14. Were there any indications that the accused was subjected to torture or inhuman or degrading treatment or punishment during their pre-trial detention? |
| 15. Were there any indications that the accused was coerced or pressured into admitting guilt? |
| 16. Were there any public statements made by law enforcement agencies affirming the guilt of the accused? |
| 17. Were there any indications that the accused was discriminated against on the grounds of race, colour, sex, language or social origin? |
| 18. Did the accused have access to a lawyer during the pre-trial investigation phase? |
| 19. Were there any indications that the accused was denied access to an interpreter where they could not understand or speak the language used by law enforcement agencies during the pre-trial investigation phase? |
| 20. Was the accused brought promptly before an investigative judge, and if not, were they released from custody pending trial? |
| Trial stage (Note that the majority of these Indicators will also apply at appeal stages) |
| 21. Did the accused receive a trial within a reasonable time? |
| 22. Was the hearing public? |
| 23. Was the court hearing the case independent? |
| 24. Were there indications of bias on the part of the judges or court? |



| |
|---|
| 25. Was the accused present at their trial? |
| 26. Was the accused able to effectively participate in their trial? |
| 27. If the accused was not present, were there indications that they had been duly notified on the date, time and place of the hearing? |
| 28. Did the accused have access to a lawyer during the trial? |
| 29. If the accused could not understand or speak the language used during the trial, did they have access to an interpreter? |
| 30. Were there indications that the accused had inadequate time and facilities to prepare their defence? |
| 31. Was the defence given the opportunity to challenge the authenticity of evidence or oppose its admission where it alleged that it had been gathered by way of techniques such as those in Indicators 1-6? |
| 32. If the defence argued that the evidence was gathered by way of techniques such as those in Indicators 1-6, was the quality of this evidence taken into consideration at trial, including the circumstances under which it was obtained and whether these circumstances cast doubt on its reliability or accuracy? |
| 33. Was the defence provided the same opportunities as the prosecution during the trial? |
| 34. What was the sentence pronounced? |
| 35. Was the accused informed of their right to appeal? |