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## **PRINCIPLE OF COMPLEMENTARITY: INTERNATIONAL JUSTICE IN UKRAINE**



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## Executive Summary

The ongoing armed conflict in Ukraine has generated new and brought existing challenges into a sharper focus within international and domestic justice systems. In 2015 the International Criminal Court (hereafter - the “Court”, the “ICC”) started a preliminary examination of the events in Crimea as well as in Eastern Ukraine to determine whether a full investigation is warranted to ensure accountability for grave crimes. One of the elements that is being assessed by the Court during the preliminary examination stage is Ukraine’s ability and willingness to genuinely investigate and prosecute grave international crimes under the principle of complementarity<sup>1</sup>. The ICC cannot replace national justice system and provide a universal solution for Ukraine’s. However, it may complement it while the main burden to carry out the investigations and prosecutions of crimes committed during armed conflict remains on the state itself. The Court has limited capacity and resources<sup>2</sup> and given the number of situations under either its preliminary examination or investigation, it steps only if the state is genuinely unwilling or unable to conduct those investigations itself. In 6 years of the armed conflict it has come to light that for Ukraine to be able to effectively tackle the issue of accountability for grave international crimes, apart from cooperating with the ICC, its domestic legal system requires fundamental changes and one way to ensure such changes is by following in footsteps of those many countries that had to set up separate accountability mechanisms in order to ensure that when justice for grave international crimes is delivered it is done with adherence to the highest legal principles and standards.

To assess the current state of domestic pre-trial investigations and courts in order to provide recommendations for domestic legal system as related to ensuring justice for grave international crimes committed during the armed conflict in Ukraine the following has been analysed:

- practical application of principle of complementarity in the situation of Ukraine;
- current approaches to pre-trial investigations which include: legal classification of the offenses allegedly committed, competence and jurisdiction of the law enforcement authorities and particulars of supervision of such investigations, domestic courts’ approaches to considering cases of alleged grave crimes;
- an overall intention and ability of the domestic legal system to ensure accountability for grave international crimes.

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<sup>1</sup> According to the position of the ICC’s Office of the Prosecutor lately confirmed in its 2019 Report on Preliminary Examinations, conflict in Crimea is qualified as an international armed conflict, and conflict in eastern Ukraine as a non-international armed conflict in parallel with international armed conflict.

| Report on Preliminary Examination Activities (2019): <https://www.icc-cpi.int/itemsDocuments/191205-rep-otp-PE.pdf>.

<sup>2</sup> 9 situations at the preliminary examination stage and 12 situations at the stage of investigation.

## Methodology

The report was inspired by the discussion and recommendations developed by leading national and international justice specialists, the ICC's Office of the Prosecutor, representatives of domestic prosecutorial authorities and Ministry of Justice during international conference "Accountability for Grave Crimes: International Criminal Court and Other Complementarity Options for Ukraine" held in Kyiv on June 10-11, 2019.<sup>3</sup>

The report is based on the number of relevant legal documents, ICC's case-law and other accountability mechanisms, national legislative provisions which set the rules determining the investigative jurisdiction of law enforcement agencies; the powers of investigation and public prosecution bodies; the particulars pertaining to the operation of law enforcement authorities, in particular, with regard to the special procedures of pre-trial investigation, criminal law provisions; and the practice of domestic courts.

Official statistics published on the website of the Office of Prosecutor General was used to demonstrate the current number of criminal prosecutions.

With the aim of getting more detailed practical information on the investigations currently underway, the classification of the alleged violations, coordination among law enforcement authorities and challenges faced by them, official requests for information were sent to the Prosecutor General's Office of Ukraine, the Office of the Prosecutor of the Autonomous Republic of Crimea, the Office of the Prosecutor of Donetsk oblast, the Office of the Prosecutor of Lugansk oblast, the State Bureau of Investigation, the Territorial Department of the State Bureau of Investigation located in the city of Kramatorsk, the National Police of Ukraine, the Head Department of the National Police of Ukraine in Donetsk oblast, the Head Department of the National Police of Ukraine in Luhansk oblast, the Head Department of the National Police of Ukraine in the Autonomous Republic of Crimea and Sevastopol city, the Chief Investigative Department of the Security Service of Ukraine, and the Department of the Security Service of Ukraine in Donetsk and Lugansk oblasts. The responses received were used on during the analysis.

In addition, the following were considered: Global Rights Compliance mobile application "Basic Investigative Standards for Investigations of International Crimes"<sup>4</sup>,

<sup>3</sup> [https://www.facebook.com/pg/ULAGroup.lawyers/photos/?tab=album&album\\_id=811083389292230&tn\\_=-UCH-R](https://www.facebook.com/pg/ULAGroup.lawyers/photos/?tab=album&album_id=811083389292230&tn_=-UCH-R)

<sup>4</sup> 'Basic Investigative Standards (BIS) for First Responses to International Crimes' | Global Rights Compliance, 2016: <https://www.globalrightscompliance.com/en/publications/basic-investigative-standards-bis-for-first-responders-to-international-crimes>.

their reports “Ukraine and the International Criminal Court”<sup>5</sup> and “Enforcement of International Humanitarian Law in Ukraine”<sup>6</sup>; research study “Justice in Eastern Ukraine during Military Aggression of the Russian Federation”<sup>7</sup>; report of Human Rights Watch “Pressure Point: The ICC’s Impact on National Justice. Lessons from Colombia, Georgia, Guinea and the United Kingdom”<sup>8</sup>, Open Society Justice Initiative’s book “Options for Justice: A Handbook for Designing Accountability Mechanisms for Grave Crimes”<sup>9</sup> and recommendations by international experts during the side- event on Ukraine on the margins of the 18th Assembly of State Parties held on December 5, 2019<sup>10</sup>.

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5 ‘Ukraine and the International Criminal Court’ | Global Rights Compliance, 2016: <https://www.globalrightscompliance.com/en/publications/ukraine-and-the-international-criminal-court>.

6 ‘The Enforcement of International Humanitarian Law in Ukraine’ | Global Rights Compliance, 2016: <https://www.globalrightscompliance.com/en/publications/the-enforcement-of-international-humanitarian-law-in-ukraine>.

7 Justice in Eastern Ukraine during Military Aggression of the Russian Federation / Research, 2018: [https://pravo.org.ua/img/books/files/1532451371justice\\_in\\_eastern\\_ukraine\\_engl.pdf](https://pravo.org.ua/img/books/files/1532451371justice_in_eastern_ukraine_engl.pdf)

8 ‘Pressure Point: The ICC’s Impact on National Justice. Lessons from Colombia, Georgia, Guinea and the United Kingdom’ | Human Rights Watch, 2018: <https://www.hrw.org/report/2018/05/03/pressure-point-iccs-impact-national-justice/lessons-colombia-georgia-guinea-and?fbclid=IwAR3iStcf8oWMRbs84Ow7WLwwpQnkt5z9aql-FgdcSPSgeqBo3Y-BUJYjziU#>.

9 Open Society Justice Initiative, Options for Justice: A Handbook for Designing Accountability Mechanisms for Grave Crimes” : <https://www.justiceinitiative.org/publications/options-justice-handbook-designing-accountability-mechanisms-grave-crimes>

10 <https://www.publicinternationalallawandpolicygroup.org/lawyering-justice-blog/2019/12/7/asp18-side-event-accountability-for-grave-crimes-the-icc-and-complementarity-options-for-ukraine>

# 1. Principle of Complementarity

“As a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success”.

Statement by Mr. Luis Moreno-Ocampo, June 16, 2003 Ceremony for the Solemn Undertaking of the Chief Prosecutor <sup>11</sup>

The International Criminal Court is the Court of last resort. The basis for its *modus operandi* is the principle of complementarity which is enshrined in Article 17 of the Rome Statute and it governs the exercise of the Court’s jurisdiction. The Statute recognises that States have the primary responsibility to prosecute grave crimes committed on their territories or which their nationals became victims of. The ICC may only exercise jurisdiction where national legal systems fail to do so, including where they purport to act but, in reality, are unwilling or unable to genuinely carry out the investigations. The principle of complementarity is based both on respect for the state jurisdictions and on considerations of efficiency and effectiveness, since the presumption is that States will generally are best placed for the access to evidence, witnesses, and territories where the alleged crimes have been committed to carry out proceedings.<sup>12</sup> Moreover, there are limits on the number of prosecutions the ICC, a single institution, can feasibly conduct due to limited human and financial resources in comparison to the number conflict and respective scale of alleged consequences. Nonetheless, the complementarity regime serves as a mechanism to encourage and facilitate the compliance of States with their primary responsibility to investigate and prosecute core crimes. Where States fail to genuinely carry out proceedings, the Prosecutor must be ready to move decisively with ICC proceedings.<sup>13</sup> Such proceedings will provide independent and impartial justice, demonstrate the determination of the international community to repress international crimes, and demonstrate the real prospect of ICC action, thus encouraging prosecution by States in the future. <sup>14</sup>

Informed by the spirit of the principle and by the limited resources of the Court,

11 Informal Expert Paper: the Principle of Complementarity in Practice: <https://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf>

12 Ibid;

13 Ibid;

14 Ibid;

the concept itself has evolved over the years.<sup>15</sup> The Office of the Prosecutor (hereafter – “OTP”) has come to recognise its role in encouraging national systems to effectively investigate and prosecute grave crimes and conceptually such conduct has become known as “positive complementarity”. Positive complementarity has been defined by Human Rights Watch as “the range of efforts by international partners, international organizations, and civil society groups to assist national authorities to carry out effective prosecutions of international crimes. These efforts include legislative assistance, capacity building, and advocacy and political dialogue to counter obstruction”<sup>16</sup>

Reason for the evolvment is two-fold. On the one hand, it is important for the states to develop and strengthen their domestic justice-related processes which can be stimulated by pressure from the victims, civil society and international partners. Particularly because domestic prosecutions of international crimes typically face a standard set of obstacles: lack of political will to support national authorities in their efforts to conduct independent investigations; lack of legislative and institutional framework. Domestic authorities often fail to comprehend the need for installing special investigative procedures and standards to bring them in line with international standards of investigation and adjudication of international crimes. Prosecutions of mass atrocity crimes also require specialised expertise, resources and support, including witness protection, cooperation of other states in effecting arrest warrants, etc. In such instance, positive complementarity can be viewed as a process of mutual assistance between the OTP and domestic system whereby domestic authorities are encouraged to develop and strengthen their capacity and the OTP encourages and supports those efforts in order to achieve the best quality of justice. But on the other hand, while it is not entirely impossible to amend the situation with exerting great efforts from the domestic authorities’ and international community, often regardless of how advanced those efforts are, both domestic and those of the ICC, and depending on the scale of the conflict’s harm, they may still be not sufficient enough to ensure absolute defeat of impunity and achievement of justice.

The principle of complementarity and the legal framework underpinning it has been the subject of frequent debate and competing interpretations. The ICC’s jurisprudence to date has helped frame some of the elements of the principle.<sup>17</sup> But the scope of the principle ranges from those who consider the ICC’s core mandate as a court of last resort ought to be construed conservatively, and those who see value in a

<sup>15</sup> Ibid;

<sup>16</sup> Supra at 8

<sup>17</sup> Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (hereinafter Prosecutor v. Muthaura et al.), ICC-01/09-02/11-274, 30 August 2011; Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang (hereinafter Prosecutor v. Ruto et al.), ICC-01/09-01/11-307, 30 August 2011. Some of the issues re-emerged in the case Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi (hereinafter Prosecutor v. Gaddafi) ICC-01/11-01/11 with respect to Libya.

broader approach that would capture the idea of “positive complementarity”.<sup>18</sup>

Considering the above this report, using the situation in Ukraine, attempts to take a practical look at the principle of complementarity as a principle which although rooted in the ICC and the Rome Statute System, nevertheless governs the overall ability and/or willingness of a state to effectively prosecute international crimes enhanced and supported by not only the ICC as a primary assessor, but also other international stakeholders interested in administering international justice.

In order to assess any state’s ability and/or willingness to prosecute international crimes it is crucial to look at key fundamental elements: political will, legislative and institutional framework and resources.

Political will or otherwise state’s authorities’ intention to create conditions under which designated authorities are encouraged, facilitated and certainly not undermined or impeded in their efforts to ensure effective investigations and prosecutions of international crimes. One of the essential ingredients for creating political will is pressure from the international community. Political will is thereby formed at both domestic and international levels.

One such manifestation of political will is ratification, adoption of whatever laws and amendments to the existing legislation necessary to allow authorities to investigate, prosecute and adjudicate cases of alleged international crimes without any legislative obstacles. This includes both substantive and procedural laws, including specific ones relating, for instance, to the organisation of judiciary. While institutional framework implies setting up of special structures within investigative, prosecutorial bodies and judiciary are tasked exclusively with ensuring accountability for grave crimes.

Finally, availability of the resources is crucial. While creating structures and adopting the legislation may not require additional funds, steps such as, for instance, ratification of international treaties, may require payment of annual contributions. Furthermore, setting up of specialised structures within investigative, prosecutorial bodies and courts, would require substantial funds for providing training, technical support and maintenance, safety and security for the staff, experts’ assistance in developing witness – protection programs, setting up office of the defence counsel, etc.

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18 Concept Paper on Complementarity. Proposed Next Steps for 2020, prepared by co-focal points, Australia and Romania.

## 2. Political Will as the State's Intention to Ensure Justice

For Ukraine, the issue of political will in the context of justice system in the situation of armed conflict is quite controversial. In 2000, Ukraine signed the Rome Statute, thus expressing its intention to accede to it, but at the time failed to ratify it. Reason for it then was provided in the Constitutional Court of Ukraine decision, whereby it concluded that provisions of paragraph 10 of the Preamble and article 1 of the Rome Statute which assert that “ the ICC... shall be complementary to national criminal jurisdictions” were found inconsistent with article 124 of the Constitution of Ukraine, given that “Justice in Ukraine is administered exclusively by the courts” (meaning domestic courts) and, therefore, Ukraine’s accession to the Rome Statute according to part 2, article 9 of the Constitution of Ukraine would be possible only if upon adoption of the relevant amendment<sup>19</sup>. On the other hand, the conclusion seemed inconsistent from the perspective of Ukraine’s cooperation with other international judicial mechanisms, given that four years earlier the Ukrainian parliament adopted the Law of Ukraine “On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950”.<sup>20</sup> This meant that the European Court of Human Rights (hereinafter “ECHR”) started to exercise its jurisdiction over Ukraine in cases involving violations of the Convention rights upon the exhaustion of domestic remedies. Conceptually speaking, the ICC operates under a similar complementarity principle as the ECHR. Therefore, one cannot help but think that such a conclusion by the Constitutional Court was prompted by political rather than legal decision.

Following the Maidan events which developed into fully-fledged armed conflict in Crimea and Donbas, Ukraine, seeking ways to resist the attacks by the Russian Federation, submitted two declarations to the ICC regarding the Maidan events and the events in Crimea and eastern Ukraine with a request for the ICC to activate its

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<sup>19</sup> Conclusion of the Constitutional Court of Ukraine in the case following the constitutional request from the President of Ukraine for providing the conclusion on compliance of the Rome Statute of the International Criminal Court with the Constitution of Ukraine (Rome Statute case), July 11, 2001: <https://zakon.rada.gov.ua/laws/show/v003v710-01#Text>.

<sup>20</sup> Law of Ukraine “On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950”: <https://zakon.rada.gov.ua/laws/show/475/97-9p#Text>

jurisdiction over the territory of Ukraine under article 12 (3) of the Rome Statute<sup>21</sup>. Following the activation of the Court's jurisdiction over Ukraine's territory the ICC's Office of the Prosecutor (hereafter – "the OTP") started a preliminary examination in the situation of Ukraine. At the same time, the issue of amendment to the Constitution of Ukraine to ensure the possibility for ratifying the Statute gained new relevance, and it was resolved in 2016 by adopting the Law of Ukraine "On Amending the Constitution of Ukraine (Concerning Justice)"<sup>22</sup> through the amendments to article 124 of the Constitution of Ukraine which provided for recognition of the ICC jurisdiction, but with a 3- year delay, that is, with effect from June 30, 2019. At the time of the preparation of the report and six years of the ongoing armed conflict later numerous statements made by politicians and the Government on ensuring accountability of those responsible for crimes committed during the armed conflict, remain just that – political declarations and Ukraine is yet to ratify the Statute.

A similar situation persists in respect of implementing international criminal legal standards into domestic legal system. It is clear that current national legislation is not sufficient to ensure effective accountability processes in respect of either substantive or procedural law. During the past four years, civil society and academic community, with the support of international community, insist on the harmonisation of Ukrainian legislation with international standards and, although previous parliament adopted the first version of a respective draft law in the first reading, after the new government came to power the process had to be reset and its progress is no less difficult or ambivalent. As for setting up a necessary infrastructure within investigative prosecutorial and judicial authorities, when the armed conflict broke out in 2014, investigators, prosecutors and judges found themselves in a very challenging position. There were allegations of war crimes being committed, they had to be investigated. For the first time since Ukraine's independence, prosecutors, investigators and judges had to investigate and adjudicate cases under unprecedented conditions with lack of access to territory, lack of experience in investigating war crimes, lack of technical support and resources, lack of suitable legislative framework in place.

Exactly with the aim of ensuring adequate accountability processes, with the efforts of certain public prosecutors and civil society, on the one hand, and given the need for effective cooperation with the OTP on the other hand, the specialised Department for supervision of crimes in the situation of armed conflict (hereafter – "the Department") was set up within the Office of the Prosecutor General (hereinafter – "OPG"). And although setting up of the Department was a necessary step for ensuring critically important accountability processes, it was only that- a first step. At the same time, to ensure smooth and efficient operation at the investigative level, there is a need to establish appropriate "mirror" departments within Security Service of Ukraine

(hereafter – “SSU”), the National Police of Ukraine (hereafter – “NPU”), and the courts require appropriate reorganisation as well. At this point in time all these required changes look like an impossible undertaking.

Moreover, one of the crucial tasks is to provide research and technical facilities, create witness protection programs, provide appropriate security with the support of international experts, from investigators to prosecutors and judges, who have the requisite experience, knowledge and skills and who will be able to share them with Ukrainian investigators and prosecutors, and also to ensure protection of the accused – all these require additional funding. Therefore, the issue of the State’s readiness to look for and allocate additional financial resources is a matter of will and intent.

Thus, the ambivalence ever present in the attitude of the Ukrainian government towards the issues of accountability for grave crimes suggests that the intention to ensure the efficiency of these processes is fanciful and remains at the level of political declarations. Furthermore, despite the fact that relevant ministries such as the Ministry of Justice and the Ministry of Foreign Affairs have an understanding of the importance of fighting impunity, the Office of the President and the majority of MPs, Ministry of Interior, remain either antagonistic or indifferent towards ensuring justice and accountability for grave crimes.

### 3. Domestic Criminal Investigations: Legislative and Organisational Framework

Armed conflict in Ukraine essentially consists of two different conflicts: one in Crimea and one in eastern Ukraine (also “Donbas” or “Donetsk and Lughansk oblasts”). February 20, 2014 is considered to be the date when the occupation of the Crimean Peninsula began, and this date is fixed in the domestic legislation.<sup>23</sup> The Office of the Prosecutor of the International Criminal Court classifies everything that happened on the territory since then as an international armed conflict<sup>24</sup>. At the beginning of April 2014, violent protests broke out in some cities of Donetsk and Lughansk oblasts in response to which the Government of Ukraine launched an Anti-Terrorist Operation (hereafter – “ATO”) on April 13, 2014<sup>25</sup>. On April 30, 2018, ATO was changed into the Joint Forces Operation (hereafter – “JFO”)<sup>26</sup>. In so far as conflict classification is concerned, as opposed to Crimea, which has been classified as an “international armed conflict” by the OTP and as “occupation” by a number of international bodies, including UN General Assembly<sup>27</sup>, events in Donbas have only be classified by the OTP at the preliminary examination stage as an “international armed conflict in parallel to the non-international armed conflict”.<sup>28</sup> At the national level though the relevant legislation refers to the armed aggression by the Russian Federation” and “temporary occupation of territories” when defining events in Donbas applying the legislation for peacetime.<sup>29</sup>

Nonetheless, existing preliminary conflict classification is also indicative of the alleged war crimes and crimes against humanity that have possibly been committed both in Crimea and Donbas. Each of these crimes requires an appropriate legal assessment at the national level by domestic authorities responsible for procedural supervision and oversight in accordance with the national legislation.

23 Law of Ukraine “On Ensuring the Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine” dated 15.04.2014: <https://zakon.rada.gov.ua/laws/show/1207-18>.

24 Office of the Prosecutor, International Criminal Court Report on Preliminary Examination Activities 2019: <https://www.icc-cpi.int/itemsDocuments/191205-rep-otp-PE.pdf>.

25 Decree of the President of Ukraine “On the Decision of the National Security and Defense Council of Ukraine dated April 13, 2014 “On Urgent Measures to Overcome the Terrorist Threat and Preserve the Territorial Integrity of Ukraine” dated 14.04.2014 № 405/2014: <https://zakon.rada.gov.ua/laws/show/405/2014>.

26 Decree of the President of Ukraine “On the Decision of the National Security and Defense Council of Ukraine dated April 30, 2018 “On the Large-Scale Anti-Terrorist Operation in Donetsk and Luhansk Oblasts” dated 30.04.2018 № 116/2018: <https://zakon5.rada.gov.ua/laws/show/116/2018>.

27 Ibid at 20, § 271 and A/Res/74/17, Problems of Militarization of the Autonomous Republic of Crimea and the City of Sevastopol, Ukraine as well as parts of the Black Sea and the Sea of Azov, Resolution Adopted by General Assembly on 9 December 2019: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/400/94/PDF/N1940094.pdf?OpenElement>

28 Ibid at 20 §266

29 Law of Ukraine “On the Specifics of the State Policy to Ensure State Sovereignty of Ukraine in the Temporarily Occupied Territories of Donetsk and Luhansk Oblasts” dated 18.01.2018: <https://zakon.rada.gov.ua/laws/show/2268-19>.

## Pre-Trial Investigations of Grave Crimes in Ukraine

Depending on the legal classification of crimes, pre-trial investigation may be conducted by the NPU, the SSU and the State Bureau of Investigation (hereafter – “SBI”)<sup>30</sup>. In accordance with the existing categories of crimes, each of them has the following jurisdiction:

- the NPU investigates all ordinary crimes<sup>31</sup>. In the context of the armed conflict in eastern Ukraine and in Crimea, NPU is a investigating authority to investigate disappearances, illegal deprivation of liberty or participation in illegal armed groups;
- the SSU investigates crimes which are of particular public danger, violation of the State order and territorial integrity and grave crimes defined in the Criminal Code of Ukraine – waging of an aggressive war, violating the laws and customs of the war etc.<sup>32</sup>;
- SBI investigates crimes committed by officials including military personnel<sup>33</sup>.

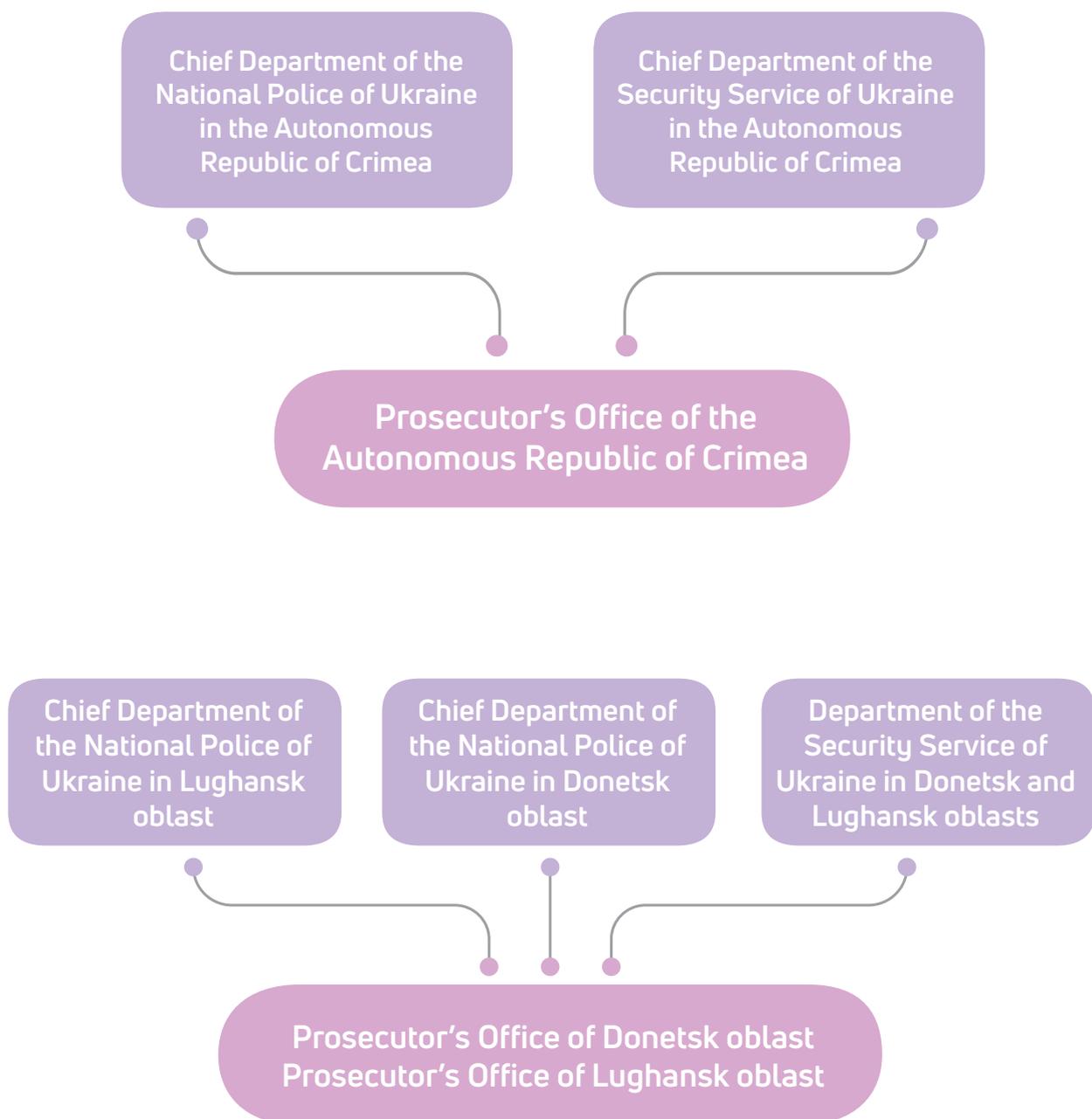
30 Art. 216, the Criminal Procedure Code of Ukraine dated 19.12.2012

31 Relevant provisions of the Criminal Code: 115 (willful killing, and also cases in the category “missing persons”), 146 (unlawful deprivation of liberty or kidnapping, 146-1 (enforced disappearance), 147 (hostage taking), 185 (theft), 186 (plundering), 187 (robbery), 194 (willful destruction or damage of property), 260 (creation of paramilitary or armed groups not provided for by law), 289 (illegal possession of a vehicle), 341 (seizure of State-owned or public buildings or structures). | Response from the Chief Investigative Department of the National Police of Ukraine, 06.09.2019, to the request for information by ULAG. Criminal Code of Ukraine 05.04.2001: <https://www.legislationline.org/documents/section/criminal-codes/country/52/Ukraine/show>

32 Relevant provisions of the Criminal Code of Ukraine: 109 (Actions aimed at forceful change or overthrow of the constitutional order or take-over of government), 110 (Violation of territorial integrity and inviolability of Ukraine), 110<sup>2</sup> (Financing of actions committed to forcefully change or overthrow the constitutional order or take over government, change the borders of the territory or the State border of Ukraine), 111 (High treason), 112 (Threatening to the life of a statesman or a public official), 113 (Sabotage), 114 (Espionage), 114<sup>-1</sup> (Hindering the lawful activities of the Armed Forces of Ukraine and other military formations), 201 (Smuggling), 258-258<sup>5</sup> (Crimes related to terrorist activities: act of terrorism, implication into commission of an act of terrorism, public calls to commit an act of terrorism, creation of a terrorist group or a terrorist organization, facilitation to the commission of an act of terrorism, financing of terrorism), 328 (Disclosure of state secrets), 330 (Transfer or collection of information constituting privileged information collected in the course of operational search, counterintelligence activities, in the realm of national defense), 332<sup>1</sup> (Violation of the procedure for entry to the temporarily occupied territory of Ukraine and departure from it), 332<sup>2</sup> (Illegal crossing of the state border of Ukraine), 422 (Disclosure of military information that constitutes state secret or loss of documents or materials containing such information), 436 (Propaganda of war), 437 (Planning, preparation, initiation and waging of an aggressive war), 438 (Violation of laws and customs of the warfare), 441 (Ecocide), 442 (Genocide), 443 (Trespass against life of a foreign state representative), 444 (Crimes against internationally protected persons and institutions), 447 (Mercenaries). This list is indicative, since the Criminal Procedure Code of Ukraine contains a larger number of articles and some of them are not relevant to current events in Ukraine. | Article 216, Criminal Procedure Code of Ukraine 19.12.2012, Criminal Code of Ukraine 05.04.2001: <https://www.legislationline.org/documents/section/criminal-codes/country/52/Ukraine/show>

33 Art. 216, Criminal Procedure Code of Ukraine

According to the general rule in Ukraine investigations are allocated according to the territorial principle<sup>34</sup>: location where a crime is committed determines the relevant territorial department of the investigative body and the regional Prosecutor's office which should provide procedural oversight. Therefore, according to the general rules of the Criminal Procedure Code of Ukraine, from the institutional perspective the pre-trial investigation process schematically looks as follows:



## Department for Supervision in Criminal Proceedings of the Crimes Committed in Armed Conflict

In practice, however, with the ongoing armed conflict and the nature of the crimes allegedly committed it became clear that general approach provided for by the domestic criminal framework became ineffective and there was a need to seek alternative solutions. One of them was granting an investigative function to the prosecutorial authorities. According to the criminal procedure legislation, it was temporary and was part of a transition period until the activation of SBI which was set up in 2016<sup>35</sup>. But since the activation of SBI, the prosecution authorities no longer have the investigative function and from November 19, 2019, investigations of conflict-related cases were transferred to SSU or SBI. The Prosecutor's offices have retained only the function of supervision and oversight<sup>36</sup>.

In 2014-2015, there was a need for a criminal procedure response to the existing challenges, in particular, to the ongoing hostilities. For this reason, a decision was made to reinstate the system of military prosecution authorities which operated from 2014<sup>37</sup> to 2019<sup>38</sup> and made it much more difficult to comply with the principles determining investigative jurisdiction in the context of crimes committed in Donbas. There is no any explanation as to how war crimes all of a sudden were included in the scope of military crimes, which were originally the subject to investigation and procedural supervision by regional military prosecution authorities. Investigations into war crimes were conducted by the Department for the Investigation of Crimes against Peace, Security and Humankind and International Crimes within the Chief Military Prosecutor's Office created at that time<sup>39</sup>. So, the Department's jurisdiction covered, in particular, investigations of waging aggressive war by RF in Donbas, ill-treatment of prisoners of war and civilian population. In addition, cases of shelling were being documented

35 According to Article 1 of the CPU Transitional Provisions, after the SBI has been established, criminal proceedings initiated by investigators of public prosecution authorities shall be carried out by them until completion of a relevant pre-trial investigation, but no longer than for two more years. The process of setting up SBI was launched in November 2017 (upon appointment of SBI's Head by the Presidential [Decree](https://www.president.gov.ua/documents/3862017-23082) dated 22.11.2017: <https://www.president.gov.ua/documents/3862017-23082>). In other words, in November 2019, the two-year time limit stipulated for completion of pre-trial investigations by public prosecution authorities expired.

36 Art. 36, Criminal Procedure Code of Ukraine dated 19.12.2012: <https://zakon.rada.gov.ua/laws/show/4651-17#n2054>.

37 Law of Ukraine "On Amending the Law of Ukraine "On Public Prosecutor's Office" with Regard to Establishment of the Military Prosecutor's Offices" dated 14.08.2014: <https://zakon.rada.gov.ua/laws/show/1642-18>.

38 Law of Ukraine "On Amending Some Legislative Acts of Ukraine with Regard to Priority Measures to Reform the Public Prosecution Authorities" dated 19.09.2019: <https://zakon.rada.gov.ua/laws/show/113-20>.

39 [https://www.gp.gov.ua/ua/news.html?\\_m=publications&\\_t=rec&id=161672](https://www.gp.gov.ua/ua/news.html?_m=publications&_t=rec&id=161672)

and investigated by the Department for the Investigation of Crimes Committed in the Temporary Occupied Territories within the Prosecutor General’s Office of Ukraine<sup>40</sup>. As a result of the reform initiated by the newly appointed at the time Prosecutor General, both Departments were subsequently abolished.

On October 21, 2019, Prosecutor General of Ukraine signed an Executive Order establishing the Department for Supervision in Criminal Proceedings of the Crimes Committed in the Armed Conflict (hereafter – the Department). Starting from January 2, 2020, upon completion of the abovementioned reform, the relevant Department has been operating as part of the Prosecutor General’s Office. The Department focuses its work on supervising the investigations of crimes committed “in the temporarily occupied territory of the Autonomous Republic of Crimea and the city of Sevastopol and the temporarily occupied areas of Donetsk and Luhansk”.<sup>41</sup> The scope of the Department’s jurisdiction includes procedural supervision over the relevant investigative authorities such as NPU and SSU and analytical work aimed at processing documented evidence and coordinating ongoing criminal investigations. However, majority of investigations are still a responsibility of regional law enforcement authorities, and the Department merely provides general supervision over their work.



Ideally, the Department should operate with a focus exclusively on war crimes and crimes against humanity applying international legal standards. Given that people residing in Crimea and Donbas are the population that Ukraine as the State has an obligation to protect, and also given that ordinary crimes continue to be committed, it would make better sense for the regional prosecution offices (of the Autonomous Republic of Crimea, Donetsk and Luhansk oblasts) to exercise their jurisdiction over ordinary crimes. While the Department, as prototype of a war crimes unit, which exists in the EU countries, such as Sweden, France, Germany, the Netherlands, etc., would only oversee investigations of grave crimes.

40 [https://www.gp.gov.ua/ua/news.html?\\_m=publications&\\_c=view&\\_t=rec&id=229949](https://www.gp.gov.ua/ua/news.html?_m=publications&_c=view&_t=rec&id=229949)

41 <https://mtot.gov.ua/en/v-gpu-stvoreno-departament-z-viskovih-zlochiv>

## Legal Classification of the Armed Conflict in Ukraine

Aside from the rules for determining investigative jurisdiction and organization of pre-trial investigations it would be equally important to look in more detail at legal classification of crimes allegedly committed during armed conflict in Ukraine by the domestic authorities. The Criminal Code of Ukraine does not contain as many offences as the Rome Statute of the International Criminal Court and the Rome Statute is yet to be implemented into domestic legislation. Before 2014 it did not seem to be of any concern, but following annexation and subsequent occupation of Crimea it was becoming abundantly clear that national legal provisions needed to be adjusted and their scope needed to be substantially increased so as to include better quality definition of war crimes and introduce crimes against humanity into CCU. Currently there are two articles in the CCU that have practical application to alleged grave crimes committed in Crimea and Donbas: article 437 (Waging of an aggressive war<sup>42</sup>) and article 438 (violation of laws and customs of the war<sup>43</sup>). Available statistical data demonstrates how these articles have been applied since 2014 with regard to both situations – the data shows the number of investigations opened under these articles<sup>44</sup>:

	Art. 437 of CCU	Art. 438 of CCU
2014	1	1
2015	38	4
2016	11	6
2017	21	14
2018	4	5
2019	6	12
2020 <sup>45</sup>	3	183

42 Planning, preparation or waging of an aggressive war or a military conflict, and also participating in conspiracy to commit such acts. As an aggravating circumstance, the Code indicates conducting of an aggressive war or aggressive military operations / article 437, CCU

43 Ill-treatment of prisoners of war or civilians, deportation of civilian population for forced labor, pillage of national treasures on occupied territories, use of methods of the warfare prohibited by international law, other violations of laws and customs of the warfare provided for by international treaties consented to be binding by the Verkhovna Rada of Ukraine, and also giving an order to commit any such actions. As an aggravating circumstance- the same acts, if they are combined with willful murder / article 438, CCU

44 Statistical Information on the website of the Office of the Prosecutor General: [https://www.gp.gov.ua/ua/stst2011.html?dir\\_id=113897&libid=100820&c=edit&c=fo](https://www.gp.gov.ua/ua/stst2011.html?dir_id=113897&libid=100820&c=edit&c=fo).

45 The data is shown according to the reports published on the website of the Office of the Prosecutor General as of May 2020.

Alleged offences committed by the authorities of the RF are reported to the law enforcement authorities of the Autonomous Republic of Crimea in exile by the residents of the peninsula, IDPs and NGOs. The most widespread allegations concern illegal searches of the premises, detention of those who do not agree with the policies of the RF and subsequent trials<sup>46</sup>.

Most of the investigations are opened under article 438 of the CCU, namely:

- murder;
- torture or inhuman treatment intentionally causing great suffering, or serious bodily harm;
- illegal deportation or transfer or illegal detention of a person;
- compelling a person to serve in the armed forces of a hostile power;
- intentionally depriving a person of the right to a fair trial;
- taking of hostages;
- large-scale destruction and expropriation of property which is not justified by military necessity and is carried out illegally and without purpose<sup>47</sup>.

Along with these offenses, investigations are also opened under ordinary criminal articles, but for the purposes of the report we will only focus on the classification of grave crimes at the national level.

The situation with legal classification of offenses committed during the armed conflict in eastern Ukraine is less consistent. The main problem is still how to correctly assess the acts committed by representatives of self-proclaimed “Lughansk and Donetsk People’s Republics” (hereafter- “L/DPR”) from the perspective of domestic criminal legislation. In practice, depending on the investigative jurisdiction of a respective law enforcement authority, the investigations are opened under art. 258 (“Terrorism”), 258-3 (“Creation of a Terrorist Group or a Terrorist Organization”), 258-5 (“Financing of Terrorism”), 260 (“Creation of an Illegal Paramilitary or Armed Groups”), 437 (“Waging of an Aggressive War”), 438 (“Violation of Laws and Customs of War”)<sup>48</sup>.

According to the statistics published on the website of the Prosecutor General’s Office of Ukraine <sup>49</sup>, since the beginning of the armed conflict in eastern Ukraine, the

46 Response of the Prosecutor’s Office of the Autonomous Republic of Crimea to the Request for Information by ULAG, 29.10.2019. Collected information prepared by the Prosecutor’s Office of the Autonomous Republic of Crimea on human rights violations in the temporarily occupied Peninsula, 16.10.2019: <https://ark.gp.gov.ua/ua/news.html?m=publications&c=view&t=rec&id=259688>.

47 Response of the Prosecutor’s Office of the Autonomous Republic of Crimea to the Request for Information by ULAG, 29.10.2019.

48 Criminal Code of Ukraine dated 05.04.2001: <https://zakon.rada.gov.ua/laws/show/2341-14>.

49 Statistical Information on the website of the Prosecutor’s General Office of Ukraine: [https://www.gp.gov.ua/ua/stst2011.html?dir\\_id=113897&libid=100820&c=edit&c=fo](https://www.gp.gov.ua/ua/stst2011.html?dir_id=113897&libid=100820&c=edit&c=fo).

following number of criminal investigations have been opened:

	Art. 258 of CCU	Art. 258-3 of CCU	Art. 258-5 of CCU	Art. 260 of CCU
2014	1499	478	54	457
2015	1295	849	138	543
2016	1865	391	84	536
2017	1385	277	74	431
2018	950	175	51	396
2019	909	164	33	305
2020 <sup>50</sup>	271	73	12	181

There is no consistent term used to define party to the conflict in criminal investigations. The authorities use a variety of terms, the application of which does not appear to be well-substantiated or well-argued: “a party to an armed conflict”<sup>51</sup>, “terrorist organisation”<sup>52</sup>, “illegal armed group”<sup>53</sup>, “separatists”, “terrorists”, etc. This inconsistency in the use of terminology without clear instruction and lack of argument is also reflected in the domestic courts’ decisions thereby generating ambiguous and unclear case-law.

In addition, similar to the situation with Crimea-related investigations, they are opened under “ordinary” criminal provisions, such as “attempt at one’s life, health and freedom”, “illegal seizure of property”, etc. In the period from April 13, 2014 to August

50 The data is shown according to the reports published on the website of the Prosecutor General’s Office, as of May 2020.

51 As for the Donbas events, so far Ukrainian courts have delivered only one sentence on the charges of committing a crime provided for by Art. 438 of the CCU, with simultaneous qualification under the following articles: p.1 art.258-3, p.5 art.27, p.2 art. 28, p.2 art.437 of the CCU / Sentence passed by Sloviansk Town and District Court of Donetsk oblast dated 01.06.2017: <http://reyestr.court.gov.ua/Review/66885637>.

52 “...The mentioned terrorist organization is stable, has a well-defined hierarchy and structure consisting of the so-called “political” and “power” blocks, and is also characterized by the allocation of functions among its participants who are assigned respective responsibilities in accordance with the plan of joint criminal actions. The leaders of the above-mentioned “blocks” of the terrorist organization “Donetsk People’s Republic” are charged with guidance, organization of actions and control over activities of their subordinate accomplices of the crime with the assistance of leaders of the groups which were part of these blocks. At the same time, leaders and members of the so-called “power” block (armed groups not provided for by law) are responsible for ensuring sustainable terrorist organization by way of an armed resistance, illegal counteraction and interference with performance of official duties by law enforcement officials and servicemen of the Armed Forces of Ukraine. In their turn, representatives of the so-called “political” block are responsible for organizing the collection and receipt of material and financial assistance from other members of the terrorist organization and persons loyal to terrorist activities, which also ensures the existence of this terrorist organization...” / Sentence passed by Vilnianskyi District Court of Zaporizhia oblast dated 30.11.2018: <http://reyestr.court.gov.ua/Review/78221802>.

53 « PERSON\_2 realized that an illegal armed group of which he was a member operated illegally within Ukraine’s territory and that its members used weapons, committed acts of terrorism, seized State and local government buildings, murdered people, caused explosions, arson and other actions which endangered the life and health of people, caused significant damage to property and led to other serious consequences, with the purpose of undermining public safety, intimidating the population, provoking military conflict and international complications, and making an impact on decision-making by public authorities, local self-government bodies, and also that they demonstrated armed resistance and illegal countering and obstructed law enforcement officers of Ukraine and military personnel of the Armed Forces of Ukraine involved in the anti-terrorist operation in performing their official duties... ” / Sentence of Volnovakha District Court of Donetsk oblast dated 16.03.2017: <http://reyestr.court.gov.ua/Review/65429973>.

28, 2019, Chief Department of NPU in Donetsk oblast alone opened 39,297 criminal investigations into alleged offense committed during armed conflict<sup>54</sup>. In response to ULAG's Request for information, Chief Department of NPU in Luhansk oblast did not provide any statistical data<sup>55</sup>, and the SSU refused to provide any information altogether.<sup>56</sup> Yet, it is the SSU that has investigative jurisdiction over grave crimes which were referred to it from the Department for the Investigation of Crimes against Peace, Security and Humankind and International Crimes within Chief Military Prosecutor's Office: ill-treatment of prisoners of war, waging of an aggressive war, etc. It is impossible to assess the effectiveness of these investigations at the moment, but there are reasons to believe that any progress is lacking. In fact, the situation with pre-trial investigations has reverted back to 2014, when criminal investigations into grave crimes were being accumulated with no real developments.

Granting of amnesties is another unresolved issue at the domestic level. There is a blanket provision prohibiting criminal persecution of persons who participated in the events in Donetsk and Luhansk oblasts<sup>57</sup>. These provisions have not entered into force yet but, nevertheless, they indicate Ukraine's position with regard to the armed conflict in Donbas and introduce the agreements reached within the framework of the Minsk negotiations<sup>58</sup> into national legislation. However, many questions are already being raised as to whom exactly this amnesty may be granted to and also its terms and conditions. There is no indication that there is understanding among the lawmakers that amnesty is granted only to those individuals judgements against whom have become final and binding or those who have had their trials but judgements have not become final<sup>59</sup> and that international law does not allow for amnesties for grave crimes. There is a great risk that if it comes to it political decision to grant amnesties will trump any legal provisions.

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54 Response of Chief Department of NPU in Donetsk oblast dated 28.08.2019 to the Request for Information by ULAG

55 Response of Chief Department of NPU in Luhansk oblast dated 28.08.2019 to the Request for Information by ULAG

56 Response of Chief Investigative Department of the SSU dated 05.09.2019 to the Request for Information by ULAG

57 Article 3. By virtue of law, the State guarantees that persons- participants of the events in Donetsk and Lugansk oblasts shall not be subjected to criminal prosecution, shall not be made liable under criminal or administrative law and shall not be punished. Public authorities and their officials, enterprises, institutions, and organizations of all ownership patterns shall be prohibited to discriminate, persecute and hold accountable individuals for events which occurred in Donetsk and Luhansk oblasts. / Law of Ukraine "On the Special Procedure of Local Self-Government in Certain Areas of Donetsk and Luhansk Oblasts" dated 16.09.2014: <https://zakon.rada.gov.ua/laws/show/1680-18#Text>.

58 5. To ensure that pardons and amnesties are granted by enacting the law prohibiting the persecution and punishment of persons in connection with events which occurred in certain areas of Donetsk and Luhansk Oblasts of Ukraine. // Full text of the documents adopted at the Minsk negotiations / Tyzhden, 12.02.2015: <https://tyzhden.ua/Politics/129751>.

59 Art. 86 CCU.

## Harmonisation of Domestic Legislation with International Legal Standards

While there are obvious limitations with application of existing domestic legislation, unwillingness of the parliament to implement international humanitarian and criminal law standards contributes to the inability of the domestic legal system to ensure justice for grave international crimes in Ukraine. The initiatives proposed during past 6 years of armed conflict in respect of amending domestic legislation have been accompanied by extensive discussions in government circles which are yet to yield any positive results. Thus, for instance, it took almost 3 years for the Parliament to vote on draft law “On Amending Some Legislative Acts of Ukraine Concerning Harmonisation of Criminal Legislation with the Standards of International Law” in the first reading. However, following the change of power and parliament there was never a time for the second and final reading. Owing to the efforts of the working group convened at the initiative and with the support of the Office of the Prosecutor General which among others included international and domestic experts, members of civil society, the Parliament’s Committee on Law Enforcement approved the new version of the draft law and registered it for the vote at the Parliament under the title “On Amending Some Legislative Acts of Ukraine Concerning Implementation of the Provisions of International Criminal and Humanitarian Law” (№ 2689<sup>60</sup>). However, there has been no further movement since then, save for the new round of discussions among the policymakers.

Despite all the efforts and resources that have already been put into drafting and promoting the draft law, the prospects of its adoption remain uncertain due to certain provisions causing fear of potential accountability for government officials and politicians:

- provisions of the draft law propose to introduce a range of new offences into the CCU, at the same time providing for retrospectivity of the application of these new offences: if a crime of genocide, a crime of aggression, a crime against humanity or a war crime was committed it would be recognized as a crime under Ukraine’s criminal legislation at the time when it was allegedly committed. Here it clashes with the principle enshrined in paragraph 2 of article 5 of the CCU which provides if a newly criminalised offense carries a more severe punishment it cannot be applied retrospectively<sup>61</sup>;
- the prospect of the criminal investigations under article 438 of Ukraine’s Criminal

60 Draft Law “On Amending Some Legislative Acts of Ukraine Concerning Implementation of the Provisions of International Criminal and Humanitarian Law”, № 2689 dated 27.12.2019: [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=67804](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=67804).

61 Criminal Code of Ukraine dated 05.04.2001: <https://zakon.rada.gov.ua/laws/show/2341-14>.

Code, which are underway, also remain uncertain. A change of provisions of this article may entail new problems for the ongoing investigations from the procedural point. Despite its broad wording being atypical for CCU, it allows to draw reasoning for its application from other sources of law including the IHL and ICL. However, once it is broken down into more concrete offences according to the draft law, thousands of ongoing investigations will need to either be reclassified and the reasoning will need to be amended or they would need to be closed and reopened again under the new provisions.

- proposals regarding changes to be made to the CCU follow the logic of IHL and ICL which differ radically from the provisions of national legislation in their spirit and essence. For instance, Ukrainian legislation does not contain a concept of “command responsibility” whereas, it is inconceivable not to consider this element from the perspective of the international criminal law. Some may argue, that it is a matter of interpretation of the existing provisions, however, it is important to bear in mind that practical approaches to interpretations of the legal provisions in Ukraine remain very narrow in scope, especially by the relevant state authorities. Unless something is spelled out in the legislation, it as a rule will unlikely be followed;
- provisions of international humanitarian law, along with responsibility of a State for actions of its agents impose an obligation to bring to responsibility representatives of a party to a conflict for grave crimes<sup>62</sup>. Furthermore, customary international law prohibits application of statute of limitations for prosecutions of war crimes and crimes against humanity.<sup>63</sup> This is yet another issue for Ukraine to resolve. One

62 No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article. / The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field of 12.08.1949, Art. 51: [https://zakon.rada.gov.ua/laws/show/995\\_151#o236](https://zakon.rada.gov.ua/laws/show/995_151#o236). The Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12.08.1949, Art. 52: [https://zakon.rada.gov.ua/laws/show/995\\_152#Text](https://zakon.rada.gov.ua/laws/show/995_152#Text). The Geneva Convention Relative to the Treatment of Prisoners of War 12.08.1949, Art. 131: [https://zakon.rada.gov.ua/laws/show/995\\_153#o632](https://zakon.rada.gov.ua/laws/show/995_153#o632). The Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12.08.1949, Art. 148: [https://zakon.rada.gov.ua/laws/show/995\\_154#n597](https://zakon.rada.gov.ua/laws/show/995_154#n597).

63 The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 / The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field 12.08.1949, Art. 49: [https://zakon.rada.gov.ua/laws/show/995\\_151#o236](https://zakon.rada.gov.ua/laws/show/995_151#o236). The Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea dated 12.08.1949, Art. 50: [https://zakon.rada.gov.ua/laws/show/995\\_152#Text](https://zakon.rada.gov.ua/laws/show/995_152#Text). The Geneva Convention Relative to the Treatment of Prisoners of War of 12.08.1949, Art. 129: [https://zakon.rada.gov.ua/laws/show/995\\_153#o632](https://zakon.rada.gov.ua/laws/show/995_153#o632). The Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12.08.1949, Art. 146: [https://zakon.rada.gov.ua/laws/show/995\\_154#n597](https://zakon.rada.gov.ua/laws/show/995_154#n597).

No statutory limitation shall apply to the following crimes, irrespective of the date of their commission: (a) War crimes as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, particularly the “grave breaches” enumerated in the Geneva Conventions of 12 August 1949 for the protection of war victims; (b) Crimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, eviction by armed attack or occupation and inhuman acts resulting from the policy of apartheid, and the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed. / Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 26.11.1968, Art. 1: [https://zakon.rada.gov.ua/laws/show/995\\_168#Text](https://zakon.rada.gov.ua/laws/show/995_168#Text).

way to resolve it would be by introducing the principle of universal jurisdiction into domestic legislation<sup>64</sup>. However, this initiative also faces fierce opposition from the policy and lawmakers.

As Ukraine's experience to date demonstrates, existing domestic legislation does not respond in the timely manner to the need for amendments. Each delayed reaction of the Ukrainian government added to the accumulation of issues which in turn have been adding to the growing impunity and pushing domestic legal system further into a state of limbo. The foot-dragging of relevant processes and the lack of political will for decision-making has impacted negatively on the current state of work of domestic law-enforcement authorities and courts. Under the circumstances and in order to avoid further complications it is important for those responsible for ensuring responsibility for grave crimes is to look for alternative approaches to interpreting existing legislation. Even under current domestic legislation, correct legal classification of grave crimes is possible when applied resourcefully. In this aspect, it is crucial to treat the provisions of article 438 of the Criminal Code not as a rule containing an ambiguous offense but as a provision making it possible to directly apply treaty provisions with a special focus on obtaining and supporting it with good quality evidence. In addition, there is still an open question of ratification of the Rome Statute of the International Criminal Court by Ukraine, which would ensure implementation of provisions into domestic law.

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64 Universal Jurisdiction: a Preliminary Survey of Legislation Around the World / Amnesty International, 2012: <https://www.amnesty.org/download/Documents/24000/ior530192012en.pdf>.

## Standards of Investigation of Grave Crimes in Ukraine

In the context of the current provisions of Ukraine's Criminal Procedure Code, investigations of grave crimes encounter a range of problematic aspects which negatively impact efficiency. On the one hand, criminal investigations should comply with requirements of domestic criminal procedural legislation. On the other hand, the complexity of these crimes requires radically different approaches.

Analysing their own work pertaining to investigating international crimes, domestic law enforcement authorities have identified a range of issues which impede any progress:

- lack of access to the territory where a crime was committed (temporarily occupied territory and the line of engagement) making it difficult to obtain evidence and in some cases altogether impossible to conduct investigative or procedural actions;<sup>65</sup>
- the need for legislative changes to pre-trial investigations and court trials in since current procedural requirements significantly complicate and sometimes even render it impossible to investigate and make certain important decision;<sup>66</sup>
- no possibility to obtain ID document of suspects who reside in non-government-controlled territories which impedes preparation of a Notice of Suspicion, putting a suspect on the wanted list, as well as conducting covert investigative actions;<sup>67</sup>
- lack of sufficient technical facilities for conducting covert investigative activities under article 263 of the Criminal Procedure Code of Ukraine;<sup>68</sup>
- majority of persons suspected of committing crimes hide in the territory not controlled by Ukraine and in the Russian Federation, which makes it impossible to detain them and conduct pre-trial investigations. It is impossible to put these persons on the international wanted list, since they are considered as those who have committed a "political offense" or an "offense related to a political one".<sup>69</sup>

Along with the above-mentioned issues, there is a range of problems in criminal procedural legislation which are of the essential for ensuring effective pre-trial

65 Response of the Prosecutor's Office of the Autonomous Republic of Crimea 29.10.2019; Response of Chief Investigative Department NPU, 06.09.2019; Response of the Chief Department NPU 28.08.2019; Response of Chief Department of NPU in Lughansk oblast 28.08.2019, Response of the Prosecutor's Office of Luhansk oblast to 04.09.2019

66 Ibid;

67 Ibid; Article 263 of the CPCU: Article 263. Collecting information from transport telecommunication networks. Full text of the article: [https://www.legislationline.org/download/id/6454/file/Ukraine\\_CPC\\_2013\\_am2015\\_en.pdf](https://www.legislationline.org/download/id/6454/file/Ukraine_CPC_2013_am2015_en.pdf)

68 Ibid;

69 Ibid;

investigations. In particular, restoration of lost case files in non-government-controlled areas; ensuring of the possibility to appeal procedural decisions in the situation of an armed conflict; the issue of validity of the decisions made by authorities; determining the legality of the detention period, etc. Although these issues do not directly pertain to the facts of committing grave crimes, they are generally related to the consequences of the armed conflict in the territory of Ukraine. For this reason, they are not covered in detail in the report, but the need to address them should not be underestimated.

However, issues described below require urgent address so as to ensure progress in the investigations of grave crimes in Ukraine.

## Statutory limitations for Pre-trial Investigations of Grave Crimes

Article 219 of the Criminal Procedure Code of Ukraine sets the time limits for conducting pre-trial investigations including “grave and particularly grave crimes” (so-called “Lozovyi Amendment”). Among other provisions of the CCU, it also covers articles 437 and 438. Investigative authorities according to the Lozovyi Amendment have 18 months starting from the date when offence is entered in the Unified Register of Pre-Trial Investigations. There is a possibility of extension of the time limit, but no longer than 12 months from the date on which a person is notified that he/she is suspected of committing “grave or particularly grave crime”.<sup>70</sup>

Given the complexity of grave crimes investigations and the scope of facts, evidence, witnesses and victims, it becomes impossible to adhere to these limitations. Furthermore, customary international law strictly prohibits to impose any statutory limitations in case of grave crimes. Therefore, Lozovyi’s Amendment constitutes a breach of customary international law and it must be repealed as soon as possible.

## Investigations and Trials in the Absence of the Accused (in absentia)

On October 07, 2014, the Criminal Procedure Code of Ukraine was amended so as to introduce a procedure for trying cases in the absence of the accused (in absentia)<sup>71</sup>. On May 12, 2016 new rules of procedure for special investigations were introduced, subject to the established conditions, it could be applied to the following: crimes committed against territorial integrity and state order of Ukraine, including

<sup>70</sup> Criminal Procedure Code of Ukraine dated 19.12.2012: <https://zakon.rada.gov.ua/laws/show/4651-17#n2054>.

<sup>71</sup> Law of Ukraine «On Amendments to the Criminal and Criminal Procedure Codes of Ukraine with Regard to Inevitability of Punishment for Certain Crimes Against National Security, Public Safety and Corruption Crimes” of 07.10.2014: <https://zakon.rada.gov.ua/laws/show/1689-18#n28>.

grave international crimes provided that the suspect was absconding.<sup>72</sup>

As a result of applying these rules in practice, a range of issues arises with regard to investigations in the absence of the accused:

- special investigation may be conducted in a case of a suspect who is hiding from investigation and judicial authorities to evade criminal responsibility and who is put on an interstate and / or international wanted list.<sup>73</sup> Before requesting an investigating judge to issue an order to initiate special investigation, an investigator or a public prosecutor should put the suspect on an international and/or interstate wanted list. Since this procedure is not clearly regulated and national legislation of Ukraine does not elaborate on the concept of “interstate wanted list”, there is no consistent practice at the domestic level. For the purpose of applying to Interpol, an investigator or a public prosecutor files a request through the Department of Inter-Police Cooperation of the National Police of Ukraine. Upon reviewing of the requests by Interpol, national pretrial investigative authorities are faced with the greatest problems: requests for putting the persons who are suspected of serious crimes in the territory of Crimea, Donetsk and Luhansk oblasts on the international wanted list are denied with reference to article 3 of the Constitution of Interpol<sup>74</sup> on the basis that such prosecution is of political nature. Thus, if there is no confirmation that a person has been put on the international and/or interstate wanted list, provisions of the Criminal Procedure Code does not allow for the special procedure to go ahead. Other investigators only issue an order to put a person on the wanted list and then file a request with the investigating judge which more often than not is denied;
- in the period from 2016 to 2018 the Criminal Procedure Code of Ukraine provided for an alternative to putting a person on the wanted list. With the aim of implementing the in absentia related provisions amendments introduced cl. 20-1 of the Transitional Provisions of the Criminal Procedure Code of Ukraine.<sup>75</sup> Special investigation was extended to apply to suspects who had been hiding from investigative and judicial authorities for more than six months to evade criminal liability and/or suspects concerning whom it was de facto established that he/she was outside of Ukraine, in the temporarily occupied territory of

72 Special investigation is applied: to the crimes referred to investigative jurisdiction of the Security Service of Ukraine (Articles 109, 110, 110<sup>2</sup>, 111, 112, 113, 114, 114<sup>1</sup>, 115, parts 2-5 of Art. 191 (in case of abuse of office by an official), articles 209, 255-258, 258<sup>1</sup>, 258<sup>2</sup>, 258<sup>3</sup>, 258<sup>4</sup>, 258<sup>5</sup>, 348, 364, 365, 368, 368<sup>2</sup>, 379, 400, 436, 436<sup>1</sup>, 437, 438, 439, 440, 441, 442, 443, 444, 446, 447 of the Criminal Code of Ukraine); with regard to a suspect who is hiding from investigation and court bodies to evade criminal liability and has been put on an interstate and / or international wanted list, or who has been hiding from investigation and court bodies for more than six months to evade criminal liability and/or where there is actual evidence that he/she is outside of Ukraine, in the temporarily occupied territory of Ukraine, or in the area of the anti-terrorist operation.

73 Criminal Procedure Code of Ukraine dated 19.12.2012: <https://zakon.rada.gov.ua/laws/show/4651-17#n2054>.

74 Constitution of the International Criminal Police Organization Interpol, 13.06.1956: [https://zakon.rada.gov.ua/laws/show/995\\_142](https://zakon.rada.gov.ua/laws/show/995_142).

75 Law of Ukraine “On Amending Some Legislative Acts of Ukraine in Respect of Activities of the Prosecutor General’s Office” dated 12.05.2016: <https://zakon.rada.gov.ua/laws/show/1355-19#n9>.

Ukraine or in the area of the JFO. In such a case, the requirement to put him/her on the international / interstate wanted list was not strict. The provisions set forth in the final sections of the Code meant that their application period was limited in time. According to cl. 20-1, the provisions were in force “not later than commencement of operation of the State Bureau of Investigation”, namely before November 27, 2018;

- regarding notification of a person, CCP of Ukraine prescribes serving a summons to the last known address or whereabouts via publications in printed media and on the official website of pre-trial authorities<sup>76</sup>. Immediately after publication of the summons, the suspect is deemed to be appropriately informed about its contents. But given the category of cases and the fact that the majority of suspects are in the territory not controlled by Ukraine or in Russia, the question arises as to whether this way of informing a suspect may be deemed as sufficient for the purposes of ensuring right of the accused to fair trial. The situation becomes exacerbated by the lack of postal communications with non-government-controlled areas which does not allow for the use of provisions of art. 42, 135, 278 of the Criminal Procedure Code of Ukraine;<sup>77</sup> these territories are a part of Ukraine and, therefore, the mechanism of international legal assistance cannot be applied; a serious risk to life, health and freedom of movement prevents from serving Notices of Suspicions and Summons to Appear in person;
- during trial preparation stage, a preliminary hearing must be held according to Ukraine’s CPC. However, current provisions on special investigation do not apply at the preliminary hearing stage, and therefore, in practical terms, investigators or prosecutors encounter different approaches used by the courts. Part 2, article 314 of Ukraine’s Criminal Procedure Code for preliminary hearing to be held with participation of the accused. Despite the fact that a trial may be held in the absence of the accused (part 3, article 323 of the Ukrainian CPC), such a trial requires that a preliminary court hearing be held, and the latter is impossible without participation of the accused; article 335 of the Ukrainian CPC contains a mandatory provision that in case the accused evades proceedings in court, he/she should be put on the wanted list and the court proceedings should be stopped. This often grounds to a halt an investigation and any further progress is impossible;
- after SBI started to operate, the in absentia procedure does not apply and the proceedings which have been commenced but not completed before expiration of the validity period of the Transitional Provisions may not be further continued due to the lack of proper regulation of the procedure at the preliminary hearing

76 Criminal Procedure Code of Ukraine dated 19.12.2012: <https://zakon.rada.gov.ua/laws/show/4651-17#n2054>.

77 Article 42 Status of a Suspect or an Accused; article 135 Procedure for Issuing Summons in Criminal Proceedings; article 278 Serving Written Notice of Suspicion: [https://www.legislationline.org/download/id/6454/file/Ukraine\\_CPC\\_2013\\_am2015\\_en.pdf](https://www.legislationline.org/download/id/6454/file/Ukraine_CPC_2013_am2015_en.pdf)

and other stages of court proceedings. At the practical level, as a consequence, courts do not allow for preventative measures to be imposed in criminal proceedings in cases of this category, and courts also do not permit special pre-trial investigation on the grounds that the persons concerned do not gain status of a suspect;

- if pre-trial preventative measures are to be applied to a suspect in in absentia proceedings, they need to be systematically reviewed. General provisions of the Criminal Procedure Code provide for an investigating judge's order on the application of a certain type of pre-trial preventative measures to clearly specify the period of its validity. Therefore, in the context of in absentia proceedings, when the situation with the unavailability of the suspect/the accused in the proceedings does not change, it would result in wasting time and resources to regularly review the issue of selecting a pre-trial preventative measure

Over the course of armed conflict there have been several initiatives to review relevant provisions of Criminal Procedure Code of Ukraine and adopt the necessary amendments so as to allow for in absentia trials they yet to yield any positive results.

## Search for an Accused/Suspect

Furthermore, in practice investigators and prosecutors refer to the range of issues related to the search of a suspect/accused. According to Article 281 of the Criminal Procedure Code of Ukraine, a suspect whose whereabouts are unknown or outside of Ukraine may be put on the wanted list during pre-trial investigation<sup>78</sup>. Respective procedural orders ordering a search of a suspect/accused mention a term of the order's validity. In the context of criminal investigations of grave crimes in Ukraine, the vast majority of suspects are either in non-government-controlled areas or in RF. Therefore, any time restrictions applied to the search of persons adds to procedural difficulties in the investigation process.

## Evidence

Investigation of grave international crimes require proving of each of the contextual elements of a crime supported by relevant evidence. Such an approach would generate clarity into the circumstances under which an alleged crime has been committed, i.e.– the armed conflict in the territory of Ukraine and its classification which would also assist to define the status of an alleged perpetrator. Article 91 of the Criminal Procedure Code of Ukraine defines the list of “circumstances” to be proved in

criminal proceedings<sup>79</sup>. They do not explicitly comprise such contextual elements as an existence of an armed conflict in the territory, but in this respect a broader approach should be used to the “circumstances under which a criminal offense is committed” and through the prism of this overarching circumstance the rest of the elements of crime must be investigated.

The situation of the armed conflict and the need for a different approach to investigations also requires to review the sources of evidence permitted by the CPC. Moreover, close cooperation with international courts shows that Ukraine’s domestic legislation contains much stricter requirements in terms of the evidence that can be used as compared to the relevant international standards. In the absence of access to the territory where grave crimes have allegedly been committed, and given that most evidence is obtained from open sources (for example, photos and video files), the question of verification of evidence remains unsolved. One of the purposes of any investigation is to demonstrate that the evidence is appropriate, admissible, and sufficient. Thus, for example, when it comes to using video files from open sources in the process, it should be proved that they can actually be used as evidence. There is no procedure or regulation in place that would govern the validation process. In practice, national courts do not always accept evidence if obtained from open sources. Furthermore, the nature of committed acts may require a specific type of forensic examinations which is not provided for by national case-law or rules of procedure. For example, there is still an open question with regard to the unified methodology for determining the pecuniary damage caused as a result of shellings. Within the relevant criminal proceedings, allegations of pecuniary damage can be evidenced from a number of sources but when a special expert examination is requested to confirm the damage, expert institutions do not have a single developed methodology to apply to estimate the damage.

## Organisation of Pre-Trial Investigations

During the period from 2014 to 2019 domestic investigative and judicial authorities did not tackle grave crimes as a special category which required an altogether different, a unified, coherent and consistent approach. A great number of different law enforcement authorities were engaged in investigations and prosecutions with no clear division of jurisdiction which resulted in duplication of pending investigations<sup>80</sup>,

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79 Ibid;

80 For example, typical situation arises when territorial departments of the National Police of Ukraine open criminal investigation under article 146 of Ukraine’s Criminal Code into the allegations of illegal detention of persons by the self-proclaimed representatives of “L/DPR” and, at the same time, these persons were also given a status of victims in the criminal investigations conducted by the Department for Investigation of Crimes Against Peace, Security of Mankind and International Offences of the Chief vMilitary Prosecutor’s Office within the Prosecutor General’s Office of Ukraine under Art. 438 of Ukraine’s Criminal Code.

use of different approaches to legal classification to the same sets of facts<sup>81</sup>, using different quality of evidence<sup>82</sup>, and lack of coordination between these authorities. Based on the information we were able to collect when preparing the report, it is very difficult to estimate the efficiency of the process. As compared with the status of investigations related to eastern Ukraine events, the organisational approach used by Crimean authorities was reformed in 2016. Following efforts by the Prosecutor's Office of the Autonomous Republic of Crimea aimed at coordination, revision and developing investigative methodologies the work of the Office overall has resulted in better clarity and order. On the other hand, the nature of the conflict in Donbas differs significantly, with ongoing hostilities, lack of responsible government authorities and greater number of investigations which causes more difficulties in bringing order to the process of accountability.

As demonstrated by the analysis of procedural problems pertaining to investigation of grave crimes in Ukraine, there is an urgent need for amendments to the Criminal Procedure Code of Ukraine. The nature of war crimes and crimes against humanity requires a differing approach, not only in terms of legal classification, but investigative procedures too. The Criminal Procedure Code of Ukraine urgently needs amendments to its provisions. It is the procedural problems which cause greatest hindrance to the progress of investigations. One of the solutions would be to create a separate special procedure for investigating armed conflict-related grave crimes.

81 This is also negatively reflected in court judgments where the following arguments may be found: «...The court also notes that the Criminal Code of Ukraine criminalizes an aggressive war, namely the large-scale armed conflict which is underway for many years, in which millions of people participate, which involves a very high degree of intensity and a very large number of victims. In other words, aggressive actions committed by the Russian Federation against Ukraine (participation of Russian mercenaries on the side separatists as well as on the side of the Armed Forces of Ukraine, use of military equipment provided by Russia by the territory uncontrolled by the Ukrainian government, and likewise, use by Ukraine of military equipment provided by other foreign States), in this case, do not fall within the definition of an aggressive war. Furthermore, the nature of the internal armed conflict which has emerged in eastern Ukraine testifies to the fact of its origin and occurrence within one sovereign state, and the economic sanctions imposed on the State of Russia for its participation in this conflict do not testify to its absence » | Separate Opinion of Judge Velychko V.O. regarding the Sentence passed by Krasnoarmiiskiy Town and District Court dated 22.09.2017: <http://reyestr.court.gov.ua/Review/69051772>.

82 Which, in its turn, has a negative effect on the rationale of court judgments: « an organization may be recognized as a terrorist organization and / or the fact of its creation may be established exclusively by a court of law, and if a certain person is accused of participating in such an organization and in this connection no separate court decision exists to recognize it as a terrorist organization, when bringing in an indictment, the Prosecutor should provide specific factual data demonstrating that the organization concerned has a terrorist nature (with all of its signs), and also that it carries out terrorist activities, and should also provide evidence to support this...  
... When a sentence is grounded on certain resolutions, statements and appeals of the Verkhovna Rada of Ukraine regarding recognition of "DPR" as a terrorist organization, this is also largely doubtful, since the indictment of PERSON \_1 does not contain any reference to these documents and, therefore, their study goes beyond the scope of proof in this criminal prosecution. Moreover, in any case, the circumstances and conclusions established by these documents may not have a pre-trial relevance for the court » | Separate Opinion of Judge Kofanov A.V. concerning criminal prosecution on the charges under p.1 art.258-3 of Ukraine's Criminal Code, Vilniansk town, 30.11.2018: <http://reyestr.court.gov.ua/Review/78221894>.

## Domestic Trials

Lack of quality at the investigative level impacts negatively on the quality of trials. However, it is not the only reason. As a result of insufficient knowledge and skill in applying IHL and IL standards, domestic case-law related to conflict events remains superficial and inconsistent. During almost six years of trials for various categories of crimes, the sentences passed have been more of a compromise solution: to administer justice, yet without going into too much trouble of applying special knowledge and standards.

In addition, in practically all cases courts follow blindly legal position outlined by the investigators or the prosecutors, without probing the evidence and applying judicial consideration to the contents of case files. As an example, while in decisions related to events in Crimea, for instance, reference is made to the occupation of the peninsula<sup>83</sup>, in cases concerning the situation in the eastern Ukraine courts in many cases have been persistent in considering those cases through the prism of terrorism legislation without good quality high legal standard judicial reasoning<sup>84</sup>

### Terrorist Activities and/or Armed Conflict

In the context of the events in Eastern Ukraine, domestic courts' reasoning does not contain any arguments in support of terrorism related charges. On the one hand, they make a point to formally comply with listing of the requirements for a "terrorist organization" outlined by the Law of Ukraine "On Combating Terrorism": presence of a stable association of three or more persons; distribution of functions among these persons; existence of mandatory rules of conduct for preparing and committing acts of terrorism and the respective purpose of its activities<sup>85</sup>. On the other hand, the following is used as the argument to support the position:

83 Decision of Kherson City Court of Kherson Oblast dated 10.12.2019: <http://reyestr.court.gov.ua/Review/86236772>. Decision of Sviatoshynskiy District Court of Kyiv City 10.12.2019: <http://reyestr.court.gov.ua/Review/86225005>.

84 Decision of Kherson City Court of Kherson Oblast dated 10.08.2018: <http://reyestr.court.gov.ua/Review/75817799>. Decision of Ternopil City and District Court of Ternopil Oblast dated 10.12.2018: <http://reyestr.court.gov.ua/Review/78531540>. Decision of Lyschansk Town Court of Luhansk Oblast dated 28.08.2018: <http://reyestr.court.gov.ua/Review/83911406>.

85 « The characteristics of a certain organization provided for in article 1 of the Law (presence of a stable association of three or more persons; distribution of functions between these persons; existence of mandatory rules of conduct for preparing and committing acts of terrorism) and the respective purpose of its activities (breach of public security, intimidation of the population, provocations of a military conflict or international complication, impact on decision-making, acts or omissions by public authorities and local self-government bodies) established in criminal prosecution is the basis for recognizing the relevant activities as terrorist. In such a case, such recognition is made by a court of law in a particular prosecution on the basis of available materials. It is not required to have in place a separate court judgment or a decision of a legislative or executive body recognizing certain activity as terrorist to bring a person to criminal liability under article 258-3 of the Criminal Code...» | Ruling of the Supreme Court dated 05.07.2018: <http://www.reyestr.court.gov.ua/Review/75241808>.

«...the circumstance of “DPR” activities as a terrorist organization is confirmed by the Addresses of the Verkhovna Rada of Ukraine to the United Nations, European Parliament, the Parliamentary Assembly of the Council of Europe, NATO Parliamentary Assembly, the OSCE Parliamentary Assembly, the GUAM Parliamentary Assembly and national parliaments of the States worldwide appealing thereto to recognise Russian Federation as an aggressor State, as adopted by Resolution of the Verkhovna Rada of Ukraine of January 27, 2015 No. 129-VIII, Declaration of the Verkhovna Rada of Ukraine to the International Criminal Court on Ukraine’s recognition of the International Criminal Court’s jurisdiction over crimes against humanity and war crimes committed by the State’s senior officials of the Russian Federation and the leaders of “DPR” and “LPR” terrorist organizations, which led to extremely grave consequences and mass murder of Ukrainian nationals” adopted by Resolution of the Verkhovna Rada of Ukraine of 4 February 2015 No. 145-VIII, Declaration of the Verkhovna Rada of Ukraine “On the Fighting of the Armed Aggression of the Russian Federation and Overcoming Its Consequences” adopted by Resolution of the Verkhovna Rada of Ukraine dated April 21, 2015 No. 337-VIII in which “DPR” and “LPR” are defined as terrorist organizations»<sup>86</sup>

As seen from the quote such judgments refer to the adopted by domestic parliament diplomatic declarations, such as the declaration on the acceptance of the International Criminal Court’s jurisdiction, and legislative acts as a source of evidence of the fact that self-proclaimed “L/DPR” are “terrorist organisations” instead of considering each element of the crime assessing how well it has been evidenced international law. Such limited sub-par approach to reasoning may result in violation of international legal standards and complete discrediting of national legal system particularly in the eyes of the victims of grave crimes.

## Accountability of Foreign Officials in Domestic Courts

The problem of accountability of the Russian officials or those who acted in the official capacity and, therefore, could be considered as agents of the Russian state in domestic courts remains unresolved<sup>87</sup>. While in the case of Crimea there is more clarity as to the status of the perpetrators and no feasible possibility of access to them, in case

<sup>86</sup> Ruling of the Supreme Court dated 05.07.2018: <http://www.reyestr.court.gov.ua/Review/75241808>.

<sup>87</sup> Under Rule 149 of customary international humanitarian law, a State is responsible for violations of international humanitarian law attributable to it, including violations committed by its organs, including its armed forces; violations committed by persons or entities it empowered to exercise elements of governmental authority; violations committed by persons or groups acting in fact on its instructions, or under its direction or control; violations committed by private persons or groups which it acknowledges and adopts as its own conduct: [https://ihl-databases.icrc.org/customary-ihl/rus/docs/v1\\_rul\\_rule149](https://ihl-databases.icrc.org/customary-ihl/rus/docs/v1_rul_rule149). As mentioned in the Judgment of the International Tribunal for the Former Yugoslavia in the case of against Anto Furundja: the provisions of international humanitarian law impose obligations upon States and other entities in an armed conflict, but first and foremost address themselves to the acts of individuals, in particular to State officials or more generally, to officials of a party to the conflict or else to individuals acting at the instigation or with the consent or acquiescence of a party to the conflict.- judgment of 10 December 1998, § 140: <https://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>.

of Donbas, there are two types of perpetrators: Ukrainian nationals, whose alleged actions can be adjudicated on by the national courts, but there are also Russian nationals who acted in the official capacity and who may be subject of functional immunities.

To this end, there are several issues pertaining to the overall ability of the domestic courts to deal with issue of accountability of foreign nationals that are worth to be considered.

General provision of cl. 1, article 6 of the Criminal Code of Ukraine provides that persons who have committed a crime in the territory of Ukraine are subject to criminal responsibility<sup>88</sup>. But in practice, in the context of grave crimes committed during armed conflict, this provision is limited in application. Under international law, when performing their functions, State agents enjoy functional immunity which according to customary international law protects them from domestic prosecution by opposing party to the conflict<sup>89</sup>. Although this rule is no longer absolute, and practice of states is evolving as to allow for domestic prosecutions of those accused of grave crimes in the territory of the aggrieved party to the conflict, nevertheless it very much depends on each individual situation. One of the conditions that need to be fulfilled for the state to be able to go around the issue of functional immunities in the case of grave crimes is to have universal jurisdiction.<sup>90</sup>

Another persisting problem is how to determine the jurisdiction of national courts conflict-related cases. Today, domestic courts increasingly start to use practice whereby courts decide on compensation of the damage as a result of the “armed aggression of the Russian Federation”. And the respondent in such cases is Russia<sup>91</sup>. Cases of this type tried by national courts breach the principle of jurisdictional immunity of a state which protects it from prosecution.<sup>92</sup> But most importantly, such cases deal with the fact that

88 Ibid

89 Immunities of State Officials, International Crimes, and Foreign Domestic Courts / Dapo Akande, Sangeeta Shah // European Journal of International Law, Volume 21, Issue 4, November 2010, Pages 815–852, <https://doi.org/10.1093/ejil/chq080>.

90 Report of the International Law Commission: Sixty-ninth session (1 May – 2 June and 3 July – 4 August 2017): [https://legal.un.org/docs/?path=..%2Ffilc%2Freports%2F2017%2Fenglish%2Fchp7.pdf&lang=EN&fbclid=IwAR0e86ecRSKeyBTziRbPEGQwud2uiwFa8ue8aAi\\_n4GhCtZnStvHAhgeFo](https://legal.un.org/docs/?path=..%2Ffilc%2Freports%2F2017%2Fenglish%2Fchp7.pdf&lang=EN&fbclid=IwAR0e86ecRSKeyBTziRbPEGQwud2uiwFa8ue8aAi_n4GhCtZnStvHAhgeFo).

91 « Given that the plaintiffs request for a provisional remedy to the amount of the damage caused to them by the military aggression of the Russian Federation in relation to Ukraine, namely in the amount of UAH 3,813,509.16 (three million eight hundred thirteen thousand five hundred and nine Hryvnia 16 kopecks), which as of the day of signing the request for provisional remedy is equivalent to EUR 120,000.00 (one hundred twenty thousand Euro 00 euro cents) at the official exchange rate of the National Bank of Ukraine, the Court considers it necessary to take measures which will guarantee real implementation of the future judgment in this case » / Ruling of Krasnopillia District Court of Sumy Oblast dated 13.09.2018: <http://www.reyestr.court.gov.ua/Review/76526271>.

92 A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention. / UN Convention on Jurisdictional Immunities of States and Their Property dated 02.12.2004, Art . 5: [https://zakon.rada.gov.ua/laws/show/995\\_e50#Text](https://zakon.rada.gov.ua/laws/show/995_e50#Text). Jurisdictional Immunities of the State (Germany v. Italy), judgement of 3 February 2012: <https://www.icj-cij.org/files/case-related/143/143-20120203-JUD-01-00-EN.pdf>.

crimes are committed in the context of armed conflict but within the framework of civil law. Under these conditions, the actual circumstances of a crime and its perpetrators are not focused on, but there is a presumption of the State's culpability for the damage caused. In fact, such cases bring to naught the weight of criminal investigations and their purpose to establish objective truth and the circumstances under which certain acts have been committed.

The nature of cases pertaining to the commission of grave crimes is new to the judicial practice of Ukraine. Major problems which have a negative impact on the quality and efficiency of pre-trial investigations are negatively echoed in court judgments as well. There is a reason for concern in a situation when quite a few judges of high instance courts maintain that domestic judges have sufficient expert knowledge and skill to adjudicate cases of such complexity and there is no need for assistance of international experts. However, given the experience of many other countries which have been affected by armed conflicts, it is obvious that where administration of justice is concerned, no country was able to put in place efficient processes without resorting to international assistance. Moreover, if such practice continues without appropriate legal and institutional reforms, it will not yield the expected result, namely, bringing the perpetrators to accountability, which will not only negatively affect fragile domestic legal system it, it will prevent victims from obtaining their justice and will continue to nurture the culture of impunity.

## 4. Conclusions and recommendations

The scale of the problems outlined in this report demonstrates that currently domestic legal system when it comes to delivering justice for grave crimes requires a conceptually different approach. Cooperation with the International Criminal Court has provided a significant impetus to review and assess its ability. And although the ICC is a key stakeholder interested in the efficient functioning of the domestic system, its limited capacity and resources mean that a great majority of grave crimes will remain without proper investigation if the State does not realise the profound need to ensure efficiency of domestic legal system and does not assume this responsibility. Given the current state of the justice system the main recommendation would be to set up a special mechanism of accountability for grave crimes. Such mechanisms exist in most countries which have encountered the situation of an armed conflict. Depending on the complexity of the political situation and access to resources and the peculiarities of each conflict, there are three types of accountability mechanisms: national (Democratic Republic of the Congo, Uganda, Argentina, Mexico), hybrid (Bosnia, Guatemala, Lebanon) and international (International Criminal Tribunal for the Former Yugoslavia, International Criminal Tribunal for Rwanda).<sup>93</sup> Each of these types has its own advantages and disadvantages, therefore, when searching for a working model of an accountability mechanism for Ukraine due regard should be given to the national legal system and the scale of an armed conflict. One of the fundamental factors to also take into consideration is the correct classification of the armed conflict.

The true value of an accountability mechanism is that it becomes a cornerstone of justice system in respect of grave crimes whose sole purpose is to ensure international justice is served efficiently and effectively: from evidence gathering and investigation to trials. Once an accountability mechanism is in place, existing domestic legal system whose ability is limited to dealing with ordinary crimes is no longer expected to process grave international crimes.

With setting up of the Department a first step has been made in that direction. For effective and efficient operation of the future accountability mechanism, the following should be done:

### domestic proceedings:

1. to set up “mirror” departments within the NPU and SSU with a subject-matter

<sup>93</sup> Open Society Justice Initiative, *Options for Justice. A Handbook for Designing Accountability Mechanisms for Grave Crimes*, New York, 2018

specialisation in grave crimes;

2. to ensure essential legal framework is in place: ratification of Rome Statute of the; CCU and CPCU are harmonised with IHL and ICL; investigation standards have been brought in line with international standards;

3. to identify judges who will be extensively trained in IHL and ICL application for further professional engagement within the accountability mechanism;

4. to allocate funds in the state budget for logistical and technical support and engagement of international expert assistance.

### setting up of accountability mechanism:

1. under the auspices of the Ministry of Justice of Ukraine, jointly with the Ministry of Foreign Affairs of Ukraine to establish a platform of domestic and international experts, with a view to developing the mandate for the accountability mechanism for alleged grave crimes committed during armed conflict in Ukraine;

2. experts are to analyse existing accountability mechanisms and develop recommendations as to the changes to the organisational structure of the legal system and legal framework of Ukraine with a view to ensuring efficient functioning of the accountability mechanism; develop recommendations as to the amendments to the Law of Ukraine “On Courts and Status of the Judges” and Constitution of Ukraine depending on the selected type of accountability mechanism;

3. to hold consultations with international partners, national and international civil society organisations on the quality and functional feasibility of the developed model of the accountability mechanism in order to receive feedback and generate support for its implementation;

4. to conduct a high-level advocacy campaign with the joint participation of governmental authorities and civil society organisations to ensure legitimacy of its mandate and its future decisions.

### international support:

1. cooperation with the International Criminal Court is based on the principle of “positive complementarity”. This means that the Office of the ICC Prosecutor is more actively engaged with domestic authorities. Although at the current stage of preliminary examination it may be impractical, but efficiency of communication may be enhanced by, for instance, interacting not only with law enforcement authorities and civil society, but also with the Ministry of Justice, Ministry of Foreign Affairs, and the Office of the President;

2. international partner countries and international organisations put pressure to produce high-quality results in the administration of justice for grave crimes, on the one

hand, and on the other hand, provide opportunities for obtaining technical assistance and expert support when setting up accountability mechanism and throughout its mandate. They are actively involved in setting up of the accountability mechanism, for example, by organising and holding consultations with relevant stakeholders on the development of the mandate, etc;

3. subject to ratification of the Rome Statute, Ukraine is allowed to become a member of the European Network for investigation and prosecutions of genocide, crimes against humanity and war crimes (EU Genocide Network) to enable exchange and further development of good practices.<sup>94</sup>

This Report is prepared by Ukrainian  
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