

# NEEDS ASSESSMENT OF UKRAINE'S JUSTICE SYSTEM:

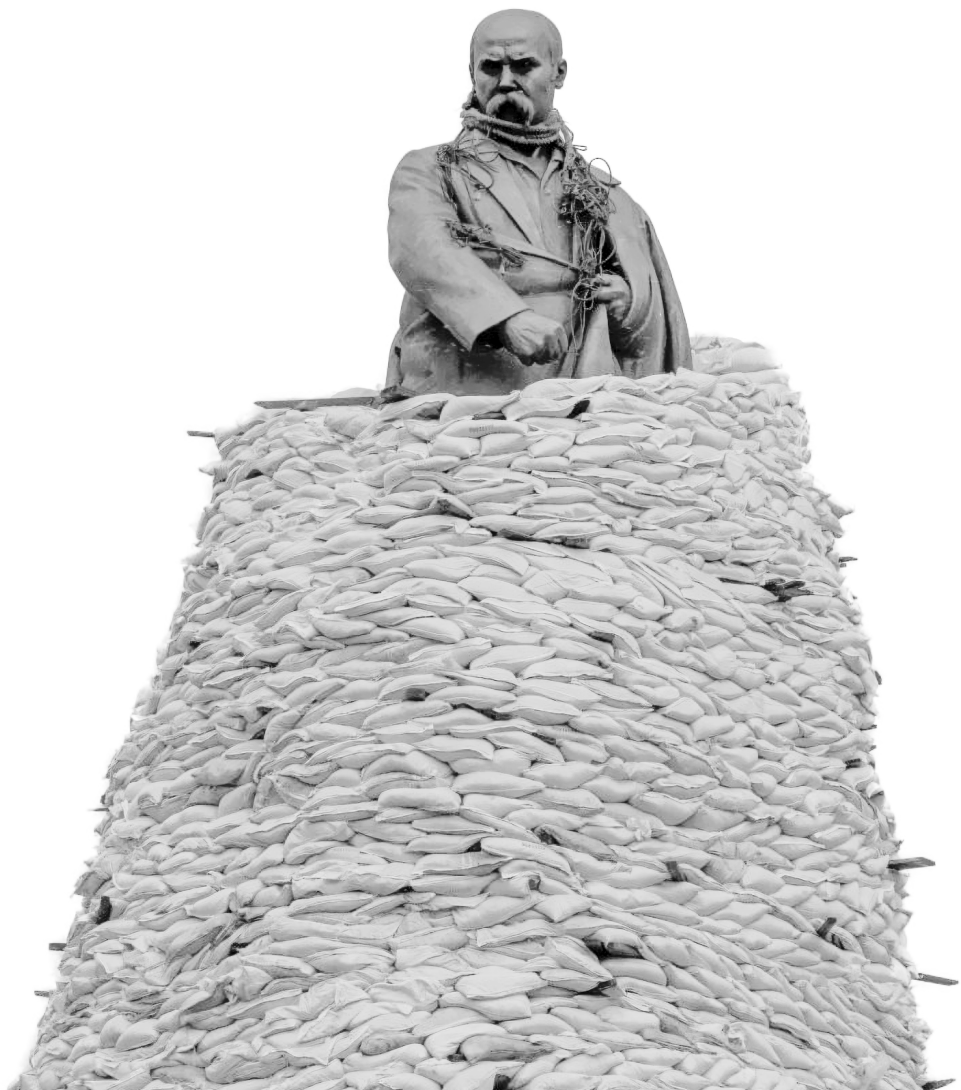
Delivering Meaningful Justice to  
the Victims and Survivors of the  
Armed Conflict



ULAG

UKRAINIAN  
LEGAL  
ADVISORY  
GROUP

Since the full-scale invasion, most of the monuments in Ukraine have been covered with sand bags and other materials to protect them from the shelling.

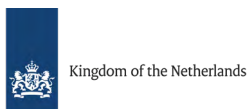


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Delivering Meaningful Justice to  
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Armed Conflict



Developed by the Ukrainian Legal Advisory Group (ULAG) – a Ukrainian NGO that works on Justice and Accountability in context of armed conflict. ULAG helps victims of grave crimes, society, and the state to overcome the aftermath of the war by crafting and promoting solutions that would ensure justice and accountability in Ukraine and globally.



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Kyiv, June 2024

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# List of Abbreviations and Acronyms

<b>ATO</b>	Anti-terrorist operation in the territory of certain regions of Ukraine		
<b>ARC</b>	Autonomous Republic of Crimea		
<b>ARC PO</b>	Prosecutor's Office of the Autonomous Republic of Crimea and the city of Sevastopol	<b>ICC OTP</b>	Office of the Prosecutor of the International Criminal Court
<b>CCU</b>	Criminal Code of Ukraine	<b>ICPA</b>	International Centre for the Prosecution of the Crime of Aggression against Ukraine
<b>CPCU</b>	Criminal Procedure Code of Ukraine	<b>JIT</b>	Joint investigation team
<b>'DPR'</b>	Self-proclaimed 'Donetsk People's Republic'	<b>'LPR'</b>	Self-proclaimed 'Luhansk People's Republic'
<b>ECHR</b>	European Convention on Human Rights	<b>MoIA</b>	Ministry of Internal Affairs of Ukraine
<b>ECtHR</b>	European Court of Human Rights	<b>NABU</b>	National Anti-Corruption Bureau of Ukraine
<b>ESBU</b>	Economic Security Bureau of Ukraine	<b>NGOs</b>	Non-governmental organisations
<b>EU</b>	European Union	<b>NPU</b>	National Police of Ukraine
<b>H CJ</b>	High Council of Justice	<b>OPG</b>	Office of the Prosecutor General
<b>ICC</b>	International Criminal Court	<b>PE</b>	Preliminary Examination
<b>SSU</b>	Security Service of Ukraine	<b>PoW</b>	Prisoner of war
<b>RS</b>	Rome Statute of the International Criminal Court	<b>SBI</b>	State Bureau of Investigation
<b>URPTI</b>	Unified Register of Pre-trial Investigations	<b>UN</b>	United Nations
		<b>UNGA</b>	United Nations General Assembly
		<b>UNHRC</b>	United Nations Human Rights Committee

# Foreword

“The worst form of injustice  
is pretended justice”

Plato

This report has been created in order to give voice to the people of Ukraine who have been bearing the brunt of the war and have suffered the consequences of the Russian aggression for more than 10 years now.

The report is a consolidated effort of a 5 year empirical research and analysis undertaken by the lawyers with international and domestic experience in representing victims of the armed conflict in Ukraine. It has been reviewed and verified confidentially by investigators, prosecutors and judges.

Its main objective is to provide policy makers at different levels with understanding of the kind of justice the Ukrainians are seeking, to what end they are seeking justice and to demonstrate that the existing mechanisms and efforts are not sufficient enough to ensure it. Its ultimate goal is to provide recommendations on the accountability pathways which are vital to develop in order to satisfy the demand for justice among victims and civil society representing them.



# Introduction and Research Methodology

It has been 10 years since the start of the armed conflict in the territory of Ukraine. It started with the annexation and occupation of the Crimean peninsula in February 2014 followed by the breakout of the armed hostilities in eastern Ukraine (“Donbas”, “Donbas region”). Although collectively it was always referred to as “armed conflict”, de facto, they were two different situations: while Crimea was a direct engagement between Russia and Ukraine, eastern Ukraine had an additional element of proxy engagement from Donetsk and Luhansk regions. Proxies largely consisted of the pro-Russian population of Ukraine who supported the idea of Russia’s control over Ukraine via establishing a pro-Russian government over the entire territory of Ukraine and acted with financial and ideological support of the Russian authorities.

While the Crimea situation was straightforward in terms of the legal classification of the armed conflict and definitions and as much was confirmed by several UNGA resolutions, the situation with eastern Ukraine was not as obvious and as clear cut.<sup>1</sup> In addition the ECtHR’s decision on admissibility of Ukraine’s interstate application against Russia on Crimea confirmed that Russian exercised “effective control over the area”.<sup>2</sup> At the time the International Criminal Court had opened a preliminary examination into the situation and defined the ongoing armed conflict in eastern Ukraine as international armed conflict in parallel to the non-international armed conflict.<sup>3</sup> Furthermore, the European Court of Human Rights assessing the events in Donbas in the inter-State case of Ukraine and the Netherlands against the Russian Federation, stated in relation to the admissibility of application that approximately after 11 May 2014 (after the so-called “referendum”), the self-proclaimed “DPR” and “LPR” formations reached sufficient level of organisation to assert that the Russian Federation exercised control over them.<sup>4</sup>

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- 1 Resolution № A/RES/68/262 // GA UN, 27.03.2014: [https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a\\_res\\_68\\_262.pdf](https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a_res_68_262.pdf) Resolution № A/RES/74/17 // GA UN, 09.12.2019: [https://digitallibrary.un.org/record/3841716/files/A\\_RES\\_74\\_17-EN.pdf](https://digitallibrary.un.org/record/3841716/files/A_RES_74_17-EN.pdf). Situation of human rights in the temporarily occupied territories of Ukraine, including the Autonomous Republic of Crimea and the city of Sevastopol / Resolution A/RES/78/221 // UN GA, 19.12.2023: <https://digitallibrary.un.org/record/4033013?ln=en>
  - 2 Ukraine v Russia (re Crimea), Application Nos: 20958/14 and 38334/18 // The European Court of Human Rights, Decision 16 January 2020: <https://hudoc.echr.coe.int/rus?i=002-13090>
  - 3 Report on the Preliminary Examination Activities (2019) // The Office of the Prosecutor, International Criminal Court, “Ukraine”, para. 266, p.68: <https://www.icc-cpi.int/sites/default/files/itemsDocuments/191205-rep-otp-PE.pdf>
  - 4 Ukraine and the Netherlands v. Russia, Application Nos.: 8019/16, 43800/14, 25525/20 // The European Court of Human Rights, Decision 30.11.2022: <https://hudoc.echr.coe.int/fre?i=001-222889>.

Consequently, there were allegations of grave international crimes in both situations throughout the years. Ukrainian authorities were attempting to investigate and prosecute them, however, these endeavours did not yield any meaningful results. The domestic system struggled due to lack of specialisation at the investigative, prosecutorial and judicial level, specialist knowledge, experience, expertise, resources, competences, suitable legal framework (the existing one has used contradictory approaches to the legal regime under which the ongoing conflict situation was interpreted by the relevant authorities).

Regional and international mechanisms were also ineffective in their response: the ECtHR was overwhelmed and buried under the sheer number of applications alleging the violations of the European Convention on Human Rights in the course of armed conflict; following a 5 year long PE, the ICC Prosecutor Bensuda decided to put on hold any decision as to the opening of the investigation into Ukraine until further notice due to lack of the resources at the end of 2020<sup>5</sup>; the UN Human Rights Committee had limited capacity to process the applications.

This was the state of the domestic and international justice systems at the time when Russia launched a full-scale invasion. This time around, the response from the international community was unprecedented in launching various justice and accountability related initiatives to complement the efforts of Ukraine's domestic authorities. However, the question of their effectiveness and fitness for purpose remains as relevant as ever.

Ukrainian Legal Advisory Group (ULAG) has been monitoring, analysing and evaluating justice and accountability landscape and response to Russia's aggression against Ukraine since 2014 through:

01. Representing victims of grave crimes (illegal detention, torture/ill treatment, conflict-related sexual violence, extrajudicial executions, etc) at all levels: domestic, regional and international;
02. Engaging with domestic authorities through trainings and consultations;
03. Engaging with international organisations and authorities;
04. Consistently monitoring, analysing, drafting relevant domestic legislation;
05. Engaging with legal advisors and officials of the supporting states;

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5 Report on the Preliminary Examination Activities (2020) // The Office of the Prosecutor, International Criminal Court, "Ukraine", para 289-290, p.72: <https://www.icc-cpi.int/sites/default/files/itemsDocuments/2020-PE/2020-pe-report-eng.pdf>.



**06.** Drawing lessons learned from other situations of armed conflict and studying approaches to justice and accountability in other context situations of armed conflicts.

In addition, ULAG consistently engages with the legal system representatives whose practical experience and knowledge was used to draw conclusions and to assess the ongoing situation in real time.

Therefore, findings in the report are based on primary and secondary sources:

- the results of the polls undertaken by ULAG in partnership with other Ukrainian organisations;
- focus groups with veterans and judges;
- informal and confidential interviews with investigators and prosecutors;
- analysis of current legislation and draft regulations;
- gaps in standards application identified through victims representation work;
- analysis of public statements, speeches and positions of representatives of the authorities,
- official statistics from public authorities;
- analysis of publicly available documents of specific institutions;
- analysis of strategies, plans and priorities of the law enforcement institutions.

This report was produced on the recommendation of experts who have extensive experience in developing the capacity of justice systems throughout the world and building effective accountability mechanisms to ensure justice and accountability for atrocity crimes in other armed conflicts.

It is expected that this report will become a useful tool for the policy makers in their decision-making process aimed at developing justice architecture capable of delivering effective and meaningful justice to the victims of the atrocity crimes in Ukraine. Another expectation is that such an approach, if effective, would be used to tackle impunity and ensure justice for the victims of all armed conflicts.

In our view, a 'Needs Assessment' is a vital exercise for future accountability in Ukraine which would ascertain the complex challenges which exist in the Ukrainian criminal justice system, as they relate to an ability to investigate and prosecute an overwhelming

number of perpetrators of ongoing atrocity crimes, involving vast numbers of victims. Indeed, any future Ukrainian justice strategy, or international and national proposals for achieving international justice, must be based upon a comprehensive mapping and needs assessment of Ukraine's capacity to investigate and prosecute crimes, as well as a similar mapping and assessment of victims.

It is hoped that in presenting empirical evidence of the 'gaps' in the Ukrainian system, a more 'tailored' international justice response could be proposed (almost certainly a 'hybrid-model'). It is also expected that international actors would be influenced in their positions, if they are presented with strong research and an assessment of Ukraine's legal capacity and justice architecture.

# Executive Summary

Ten years of armed conflict in Ukraine has left many of the victims and survivors of international crimes in a state of disappointment on the one hand and hope on the other. Disappointment among the population of Ukraine is due to lack of meaningful progress in achieving justice and perpetuating impunity of the perpetrators. First it had led to the occupation of Crimea, then to the armed hostilities in eastern Ukraine and finally to the full-scale invasion of the entire country – all while accompanied by tens of thousands international crimes. However, even after 10 years of lack of meaningful justice and accountability for flagrant violations of the international law, the victims are looking to the international community to ensure that those who caused them grave suffering and irreparable damage will be held responsible for their actions.

The occupation and the subsequent full-scale invasion of Ukraine by Russia has put to test the effectiveness and efficiency existing architecture of justice that the world can offer. In 10 years of the ongoing armed conflict in the territory of Ukraine and 2 years of the invasion have revealed, that even the most robust justice related response consisting of engagement of the existing accountability options and complementing them with specifically created and tailored mechanisms has not proven to be effective.

**Domestic justice system** is expected to carry the greatest burden by investigating and prosecuting most of the alleged crimes under international law. However, it has been faced with insurmountable challenges since 2014, such as: lack of suitable legislation, both substantive and procedural; low levels of capacity among investigators, prosecutors and judges to ensure meaningful impartial and fair investigations, prosecution and adjudication of grave international crimes; lack of effective infrastructure, in particular specialisation among the courts vis-à-vis allocation of cases of the alleged war crimes; low capacity of defence lawyers, their persecution and stigmatisation for defending “the enemy”; lack of effective infrastructure to ensure psychosocial support of the victims and witnesses and protection legislation and programs in place; lack of material and technical support of the authorities and courts; low capacity of the local penitentiary system to hold perpetrators of grave international crimes.

In the meantime, **the international and regional justice mechanisms** that have been engaged also lack capacity to complement the work of the domestic justice system and to bridge the existing gaps. The International Criminal Court, although has been steadfast in delivering arrest warrants for the Russian political leadership and two military commanders, remains limited in its capacity and resources to ensure justice for Ukrainian people; States, which opened investigations under the principle of universal jurisdiction

have been primarily focused on collecting information from Ukrainian refugees as part of their structural investigations and only opening the individual investigation where the alleged perpetrator or a victim had a nationality link to that state. Joint Investigative Team has been operational for over two years now, but its mandate, capacity and its role in the global justice and accountability ecosystem remains unclear. Finally, the role and capacity of the International Centre for Prosecution of the Crime of Aggression established as part of the future special tribunal remains ambiguous: although it has been tasked with documenting and investigating the crime of aggression, it remains unclear according to what definition and to what standards it should be investigated. Although Ukrainian Criminal Code contains a definition of the crime of aggression, in its essence it contradicts the definition contained in the Rome Statute as well as in the UNGA Resolution 1314.

While there is a strong interest to prosecute the crime of aggression, the political will to put in place a suitable mechanism or amend the Rome Statute accordingly to empower the ICC to do so appears to be divided.

The report demonstrates that there is an urgent need not to focus solely on the crime of aggression, but in order to deliver meaningful justice to the people of Ukraine, victims and survivors, it is crucial to develop a comprehensive justice and accountability architecture that will be capable of responding to the current needs and demands for justice effectively and efficiently.

To that end it is recommended to the both international community and Ukraine to consider developing **a three-tier accountability system:**

**TIER 1**      **The International Criminal Court** (likely focusing on senior civilian and military leaders, those ‘most responsible’ and particularly ‘challenging’ cases).

**TIER 2**      **A “hybrid”/internationalised mechanism with jurisdiction to investigate and prosecute all core crimes** (focusing – given the ICC’s current mandate – particularly at present on low and mid-level perpetrators). Its mandate should provide that capacity building and ‘legacy’ are integral to the mechanism’s operation, and that such a mechanism’s mandate will continue until it is ‘complete’ – that is when all required cases have been investigated and prosecuted.

**TIER 3**      **Specialised domestic mechanism** consisting of specialised investigative authority, specialised prosecutor’s office and specialised court or chambers at the Appeals and Supreme courts level (focusing on crimes against national security during armed conflict).

Regardless of when and whether the proposed justice architecture will be implemented in part or in its entirety, the following recommendations should be implemented as part of the broader law reform within the framework of the EU accession process:

**01.** Immediate ratification of the Rome Statute by Ukraine;

**02.** Criminal Code of Ukraine:

- all core crimes must be introduced and clearly defined in accordance with international definitions in addition to inclusion of command responsibility, retrospective application and principle of universal jurisdiction;
- review and amend articles 27-28 (complicity in committing crimes) to align them with the international standards on modes of participation, aiding and abetting and (possibly) joint criminal enterprise.

**03.** Criminal Procedure Code of Ukraine:

- review and amend article 216 to authorise National police to undertake investigations under Chapter XX;
- amend articles 89-91 a relevant for open- source evidence and align them with international standards such as Berkley Protocol in respect of verification and storage;
- amend provisions on/develop procedure on storage of physical evidence and chain of custody when investigating international crimes;
- develop procedure to make intelligence information admissible in the court of law;
- in relation to in absentia provisions (exclude: 436-447 offences against peace, security, humanity and international order (XX chapter) as the accused of these violations should be prosecuted in person as a matter of public interest and to ensure guarantees of the right to fair trial); include the right to retrial; as regards notification of a suspect: article 297(5) (notification via state press outlets) must not be applied in relation to armed conflict, instead it is recommended to place suspect on the national wanted list, notification must be made by all accessible means; institutions providing administrative, financial and social services must inform relevant investigator prosecutor's office once there is an application or a request for such services from a suspect);
- develop procedure in respect of investigating and prosecuting offences under the principle of universal jurisdiction.

- introduce provisions to provide for a necessary legal status of international experts and specialists in order to officially engage their expertise in criminal investigations.
  - amend provisions and relevant expert examinations methodologies to authorise the use of the equipment donated to Ukraine by the international partners within the framework of international technical assistance to ensure that information obtained as a result can become admissible evidence in national courts of law.
04. In respect of ensuring right to fair trial it is crucial to ensure execution of the relevant ECtHR judgements to avoid violations of the ECHR that regularly happen in practice in relation to the length of proceedings, length of pre-trial detention, right to defence counsel, etc. In respect of PoW who are subject to criminal prosecution with the view to exchange, develop procedure aligned with international standards;
  05. To develop victims and witness protection legislation and include victims – centered approach.
  06. The EU accession process takes considerable time and investment. At this juncture it is also a recommendation that the creation of the “hybrid”/internationalised accountability mechanism is seen as part of that process of long-term engagement and partnership, which could also assist with post war reconstruction and funding.

Russia’s war of aggression against Ukraine should be a catalyst for the world community to start creating a global justice system that will be capable of responding to the existing and future needs of those who have suffered the greatest harm caused by wars.

# Overview of the Past and Present Justice-Related Efforts

## National Level

The debate about justice processes to deal with the impact of the armed conflict in Ukraine has been ongoing for a number of years. While armed hostilities broke out as early as 2014, the start of the war in public discourse is often referred to as 24 February 2022, when Russia launched its full-scale invasion of Ukraine.<sup>6</sup> However, national and international judicial bodies have been investigating the consequences of the occupation of Crimea and armed hostilities in the territory of certain regions in Donetsk and Luhansk oblasts for ten years now.

Within a few months of the outbreak of the armed conflict, Ukraine legally recognised Crimea as an occupied territory. On 15 April 2014, the Law of Ukraine 'On Ensuring Civil Rights and Freedoms, and the Legal Regime on the Temporarily Occupied Territory of Ukraine' was adopted. This law acknowledged Russia's responsibility for these territories and denied any territorial rights that Russia might have had with regard to this region<sup>7</sup>. On 13 April 2014, an anti-terrorist operation was announced,<sup>8</sup> which had an impact on the legal classification of the events taking place in Donbas<sup>9</sup>. Subsequently, **the vast majority of alleged crimes committed during active hostilities were treated as acts of terrorism** and representatives of the illegal armed groups of the self-proclaimed 'LPR' and 'DPR' were regarded as members of terrorist organisations. The legal regime of the anti-terrorist operation was sufficient for Ukrainian courts to substantiate their decisions under Article 258 ('Act of terrorism') and Article 258-3 ('Creation of a terrorist group or terrorist organisation') of the Criminal Code of Ukraine.

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6 Example: <https://www.theguardian.com/artanddesign/2024/feb/21/two-years-of-war-in-ukraine-then-and-now>

7 The Law of Ukraine 'On Ensuring Civil Rights and Freedoms, and the Legal Regime on the Temporarily Occupied Territory of Ukraine,' No. 1207-VII, 15.04.2014: <https://zakon.rada.gov.ua/laws/show/1207-18#Text>.

8 "Nine Years ago Russia Unleashed War in Donbas": <https://www.ukrainianworldcongress.org/nine-years-ago-russia-unleashed-war-in-donbas/>.

9 Decree of the President of Ukraine 'On the Decision of the National Security and Defense Council of Ukraine dated 13 April 2014 "On Urgent Measures to Overcome the Terrorist Threat and Preserve the Territorial Integrity of Ukraine," No. 405/2014, 14.04.2014: <https://zakon.rada.gov.ua/laws/show/405/2014%23Text#Text>.

Alleged violations of the laws and customs of war have also been recorded since 2014, though in 2014 it was rather an exception than the rule that such acts were charged un-

Only one criminal offence was registered under this charge in 2014, while 1,499 offences were charged as acts of terrorism

der Article 438 ('Violation of rules and customs of war') of the Criminal Code of Ukraine. For example, only one criminal offence was registered under this charge in 2014, while 1,499 offences were charged as acts of terrorism<sup>10</sup>. Furthermore, alleged war crimes were also recorded under provisions relating to ordinary crimes, such as Article 115 ('Premeditated murder'), Article 146 ('Illegal confinement'), etc. of the Criminal Code of Ukraine. It is impossible to identify them in the general statistics in order to determine the exact number of different legal classification and charges. One can only say that this was a fairly common practice, as such charges were later changed to Article 438 of the CCU following the full-scale invasion. However, Article 438 of the CCU was more commonly used by the Ukrainian authorities to classify the events taking place on the Crimean Peninsula.

From 2020 onwards an increase in the number of registered criminal proceedings specifically regarding the violations of the laws and customs of war can be seen, although this could not be said to have become widespread<sup>11</sup>. At the same time, the case law in the proceedings under Article 438 of the CCU **had not been sufficiently developed during the eight years of the ongoing armed conflict**. By the start of 2022, there were three court decisions in such cases, and only one of them was against the defendant who was actually detained and physically present in the courtroom. The other two cases were considered in absentia. Moreover, those were the cases against lower-level perpetrators who were the representatives of illegal armed groups of the self-proclaimed 'LPR' and 'DPR.'

Russian soldiers who were captured and detained by Ukrainians as PoWs were prosecuted under Article 437 of the CCU ('Planning, preparation and waging of an aggressive war') in conjunction with Article 110 of the CCU ('Trespass against territorial integrity and inviolability of Ukraine') for crossing the border, being in the territory of Ukraine, participating in hostilities there and other provisions which concerned crossing of the border. In addition, the connection of the accused persons with the self-proclaimed 'LPR' and 'DPR' was categorised for charging purposes as an act of terrorism (Articles 258, 258-3 of the CCU). Later, throughout the duration of the ATO/JFO (Joint Forces Operation<sup>12</sup>), the convicted Russian soldiers were used as an 'exchange fund' for the detained Ukrainian

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10 Annexes 1 and 2.

11 Annexes 1 and 2.

12 Ukraine Declares 'Anti-Terrorist Operation in the Donbas' Officially Over: What Does That Mean?: <https://rusi.org/explore-our-research/publications/commentary/ukraine-declares-anti-terrorist-operation-donbas-officially-over-what-does-mean>



soldiers and civilian hostages in Donbas, so they did not actually serve their court-ordered sentences.

The situation concerning the investigation and prosecution of crimes under international law changed dramatically after 24 February 2022. **Since the start of Russia's full-scale invasion of Ukraine, virtually all acts committed in the armed conflict have been charged as violations of the laws and customs of war.** In 2022 alone, 60,387<sup>13</sup> criminal offences received this legal classification, and there were 53 463 offences registered in this category in 2023<sup>14</sup>. The registered number of offences charged under Article 438 of the CCU has grown consistently since. The Office of the Prosecutor General provides daily updates on the number of the investigations opened on the official website<sup>15</sup>. At the same time, there is a growing number of investigations classified as initiating and waging aggressive war, in line with the interpretation of the crime of aggression within Ukrainian law. Since February 2022, law enforcement agencies also regularly charge certain acts amounting to crimes under international law as crimes against the foundations of national security, especially acts committed in the territories liberated from Russian control by Ukrainian forces.

Since the full-scale invasion, the number of Russian military personnel detained as prisoners of war has increased significantly. This has led to the Ukrainian authorities to open proceedings against certain military personnel who were in Ukraine's custody. In February – March 2022, they were prosecuted under Article 110 ('Trespass against territorial integrity and inviolability of Ukraine'), Article 332-2 ('Illegal crossing of the state border of Ukraine'), and Article 437 ('Planning, preparation and waging of an aggressive war') of the CCU – in effect, for crossing the border and participating in armed hostilities. However, it is incontrovertible that the legal status of a prisoners of war provides for the guarantees to be granted to such persons in accordance with the Convention relative to the Treatment of Prisoners of War of 12 August 1949, protecting them from such prosecution<sup>16</sup>. As the Ukrainian authorities started to become aware of the combatant's immunity under the international humanitarian law, the proceedings against Russian soldiers gradually started to be opened for the violation of the laws and customs of war<sup>17</sup>. By

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13 As of 31.12.2022.

14 Annexes 1 and 2.

15 Official website of the Office of the Prosecutor General: <https://www.gp.gov.ua/>.

16 Geneva Convention relative to the Treatment of Prisoners of War, 12.08.1949: [https://zakon.rada.gov.ua/laws/show/995\\_153#o90](https://zakon.rada.gov.ua/laws/show/995_153#o90).

17 Shyshymarin case: court sentences Russian soldier for killing a civilian // Suspilne News, 23.05.2022: <https://suspilne.media/242293-sprava-sisimarina-sud-ogolosit-virok-rosijskomu-vijskovomu-za-vbivstvo-civilnogo/>. Appeal court sentences Russian military officer Shishimarin to 15 years instead of life imprisonment // Sudovy reporter, 29.07.2022: <https://sudreporter.org/apelyatsiynny-sud-davshy-viys%ca%b9kovomu-rf-shyshymarinu-15-rokiv-zamist%ca%b9-dovichnoho/>. The case of the invader Shyshymarin. Prosecutor General Kostin on the responsibility of Russian killers // TSN, 01.08.2022: [https://www.youtube.com/watch?v=NdpnV2zmNZ8&ab\\_channel=%D0%A2%D0%A1%D0%9D](https://www.youtube.com/watch?v=NdpnV2zmNZ8&ab_channel=%D0%A2%D0%A1%D0%9D). Andriy Kostin: 'Russia will use any excuse not to return our prisoners of war' // LB.UA, 19.09.2022: [https://lb.ua/news/2022/09/19/529761\\_andriy\\_kostin\\_rosiya\\_vikoristaie.html](https://lb.ua/news/2022/09/19/529761_andriy_kostin_rosiya_vikoristaie.html). Russian soldiers convicted for crimes committed in Buzova village // CHESNO, 22.12.2022: <https://www.chesno.org/post/5434/>.

late 2023, 470 people had been indicted on war crimes related charges (served a notice of suspicion), 316 indictments had been sent to court, and 73 people had been convicted<sup>18</sup> – it should be noted that these figures include both cases against actual detainees and those prosecuted in absentia. Such quick results raise questions as to the quality of the investigations and evidence collected.

After 24 February 2022, Russian officials were prosecuted in absentia under Article 110 of the CCU ('Trespass against territorial integrity and inviolability of Ukraine'), sometimes in conjunction with Article 437 of the CCU ('Planning, preparation and waging of an aggressive war'). In particular, Russian officials faced charges for the recognition of the 'independence' of the self-proclaimed 'L/DPR' and voting for the accession of certain regions of Ukraine to the Russian Federation<sup>19</sup>. Courts in different regions of Ukraine are already delivering verdicts in such proceedings despite the ongoing discussions as to whether such individuals enjoy immunity from prosecution<sup>20</sup>.

Following the full-scale invasion, the justice system of Ukraine has been trying to respond to society's demand for justice. Public trials in courts show that the state is primarily focused on punishing rather than achieving justice. A testament to that are the quick televised trials over low ranking Russian military personnel, formalistic approach to ensuring their defence<sup>21</sup>. Proving the individual criminal responsibility of accused persons to a level of "beyond reasonable doubt" for international crimes is a complex task that demands specific expertise, skills, and resources from all parties to the specific justice processes. Perhaps most importantly it requires the willingness of the state to ensure high quality of fair independent and impartial justice for accused persons and – crucially – victims.

Ensuring such a necessary quality of justice is undoubtedly challenging due to various objective reasons such as the ongoing armed conflict, as well as the overall lack of safety and security experienced in different parts of Ukraine. In addition, significant legislative limitations (see below) have given rise to problematic issues with criminal procedures. The result of these challenges, coupled with a significant public pressure for justice has led to a situation where investigations can be said to have been rushed and trials unduly expedited at the expense of high quality (including scrupulously fair) justice for parties to

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18 People want justice here and now, but it's a "long game" – Head of the OPG "war department" on the tribunal and Russian crimes / Yurii Bielousov // Telegraf, 08.01.2024: <https://telegraf.com.ua/ukr/intervju/2024-01-08/5826305-lyudi-khochut-spravedlivosti-tut-i-zaraz-ale-tse-gra-vdovgu-kerivnik-departamentu-viyini-ogp-pro-tribunal-ta-zlochyni-rosiyan-ch-1>. Interview with Prosecutor General Andriy Kostin // We are Ukraine, 15.07.2023: [https://www.youtube.com/watch?v=cMCWfQ7gt14&ab\\_channel=%D0%9C%D0%B8-%D0%A3%D0%BA%D1%80%D0%B0%D1%97%D0%BD%D0%B0](https://www.youtube.com/watch?v=cMCWfQ7gt14&ab_channel=%D0%9C%D0%B8-%D0%A3%D0%BA%D1%80%D0%B0%D1%97%D0%BD%D0%B0).

19 Message on the official Telegram page of the Security Service of Ukraine // 16.05.2023: <https://t.me/SBUkr/8317>.

20 Two more deputies of the state дума of the rf were sentenced to 15 years in prison // Ivano-Frankivsk Regional Public Prosecutor's Office, 05.06.2023: [https://ifr.gp.gov.ua/ua/news.html?\\_m=publications&\\_c=view&\\_t=rec&id=335241](https://ifr.gp.gov.ua/ua/news.html?_m=publications&_c=view&_t=rec&id=335241). Post on the official Facebook page of the Department of the Security Service of Ukraine in Ivano-Frankivsk region // 08.06.2023: [https://www.facebook.com/ssu.ivanofrankivsk/posts/pfbid02FeWgRjoQvLQDcCuCpM-gH8uZYVoMU1ZpWPbHTWN8S9XtQP3fVsHLnecoV6TuVj5Yul?ref=embed\\_post](https://www.facebook.com/ssu.ivanofrankivsk/posts/pfbid02FeWgRjoQvLQDcCuCpM-gH8uZYVoMU1ZpWPbHTWN8S9XtQP3fVsHLnecoV6TuVj5Yul?ref=embed_post).

21 See chapter on The Rights of Persons Suspected and Accused of Grave International Crimes.

the proceedings, as well as victims. The result of justice proceedings which do not meet the highest international standards calls into question the fairness and impartiality of Ukraine's justice system and consequently **its ability to deliver effective and meaningful justice to the victims of grave crimes.**

Based on the above, following **conclusions and characteristics of the national justice system** undertaking proceedings in relation to the the war in Ukraine can be identified:

- The armed conflict in Ukraine has been ongoing for ten years, presenting significant and often unavoidable challenges to the pursuit of justice for crimes under international law. However, the Ukrainian justice system has not yet effectively or efficiently adapted to these challenges in its legal and judicial system which have arguably existed before 2014. Rather the authorities have adopted an approach which has sought to conform or “make-do” with the current situation.

For instance, the Ukrainian authorities have largely maintained the same approach as that used for investigating and prosecuting “ordinary” crimes in cases of crimes under international law. This includes those involving the violations of laws and customs of war without the required consideration of the distinct characteristics of investigations and prosecutions involving international crimes.

- The immense impact of the armed conflict on the Ukrainian justice system has served to paralyse the justice system as a whole as well as hinder the enforcement of judgements in cases of ordinary crimes which continue to be committed on a daily basis.
- The national legal framework is not currently equipped to address the challenges posed by the armed conflict or to undertake investigations and prosecutions into all relevant international crimes which meet international standards. Present amendments to certain laws and regulations appear to be primarily reactive in nature and fail to tackle the more fundamental overall transformation to the Ukrainian legal framework which is required as a matter of priority.

On the other hand, the piecemeal process of making legislative changes does not consider how these changes in themselves might affect current investigative and prosecutorial practices, as well as ongoing justice processes which in turn could lead to further issues for practitioners and the judicial authorities as a result.

- The Ukrainian national legal framework currently primarily directs law enforcement agencies towards investigating individual and direct perpetrator offences. At the same time, most international crimes and related justice proceedings require a systematic analytical approach – including, for example, the investigation

of leadership and command structures, widespread and systematic gathering of different types of evidence, and investigations into direct perpetrators as well as higher-level indirect perpetrators, – rather than concentrating solely on individual direct perpetrators or discrete facts in silo.

In the case of crimes under international law, such systematic investigations will impact the legal classification of certain acts and the nature of the individual responsibility of certain perpetrators which may more appropriately reflect the nature of the commission of crimes under international law, perhaps committed as part of military operations or pursuant to a state policy.

- It appears that the future of Ukrainian national justice will involve holding trials in absentia for the crimes under international law. Indeed, the experience gained from ten years of the ongoing armed conflict in Ukraine demonstrates that these types of proceedings are the ones most frequently used by the Ukrainian justice system. However, it remains to be seen whether this approach is capable of ensuring that the perpetrators are actually brought to justice.

Presently, such trials serve as tools for producing statistics and creating a false impression that Ukraine is actively administering justice, while de facto the needs of victims are often overlooked by the authorities and courts, and perpetrators of grave crimes continue to evade accountability. In ten years of the armed conflict in Ukraine, there has not been a single documented instance, where a sentence issued as result of the trial in absentia has been carried out.

- Given the extensive volume of opened investigations resulting from the full-scale invasion, the Ukrainian justice system is currently primarily concentrated on investigating these incidents. Consequently, in practice, the internal policy of law enforcement agencies has placed incrementally less emphasis on the incidents involving crimes under international law that occurred in Crimea and Donbas before 24 February 2022.

These incidents have not been thoroughly examined, even though they are a significant phase and a root cause (impunity for the international crimes that had been committed during 2014-2022 arguably served as a foundation for continued commission of such crimes following the invasion as a matter of Russia's state policy) of the events that followed in 2022. The interests and rights of the victims of crimes committed from 2014-2022, therefore, remain neglected.

## International Level

Compared to the previous period of the armed conflict from 2014 to 2022 from the onset of the full-scale invasion, the international community has shown an exceptional level of attention to pursuing international justice in the context of the Ukrainian situation:

- 43 States Parties to the Rome Statute referred the situation in Ukraine for the investigation by the International Criminal Court. Consequently, the Office of the Prosecutor of the ICC has been conducting proceedings concerning the situation in Ukraine since March 2022<sup>22</sup>. Arrest warrants have already been issued for the Russian President and the Children's Ombudsperson<sup>23</sup>, later followed by the two arrest warrants against Russian military commanders<sup>24</sup>.
- Due to a large number of people displaced by Russia's war against Ukraine and now residing in the countries of Europe, America, and Asia, reportedly 26 states<sup>25</sup> have initiated legal proceedings under the principle of universal jurisdiction mechanism. Notably, the United States of America also amended its national legislation to make it easier pursue individual criminal responsibility of those allegedly responsible for grave crimes committed in Ukraine<sup>26</sup>.
- Eurojust has established a Joint Investigative Team (JIT), which included Lithuania, Poland, Ukraine, Estonia, Latvia, Slovakia, and Romania. The ICC also joined the JIT.<sup>27</sup>
- The United States of America, the European Union, and the United Kingdom have allocated funding and created the Atrocity Crimes Advisory Group to assist the OPG.<sup>28</sup>

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22 Situation in Ukraine // International Criminal Court: <https://www.icc-cpi.int/ukraine>.

23 Press release of the Office of the Prosecutor of the International Criminal Court on the situation in Ukraine // International Criminal Court, 17.03.2023: <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and#:~:text=Today%2C%2017%20March%202023%2C%20Pre.Ms%20Maria%20Alekseyevna%20Lvova%2DBelova>.

24 Situation in Ukraine: ICC judges issue arrest warrants against Sergei Ivanovich Kobylash and Viktor Nikolayevich Sokolov // International Criminal Court, 05.03.2024: <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-sergei-ivanovich-kobylash-and>.

25 Results of work on combating crimes committed in the context of armed conflict in 2023 // Office of the Prosecutor General, 18.01.2024: <https://www.gp.gov.ua/ua/posts/rezultati-roboti-z-protidii-zlocinam-vcinenim-v-umovax-zbroinogo-konfliktu-za-2023-rik>. The war of criminal justice: what are we fighting for? // JustTalk, 23.01.2024: [https://youtu.be/y58ndH4C4QY?si=Q\\_KNSWSGc0fFcwLx](https://youtu.be/y58ndH4C4QY?si=Q_KNSWSGc0fFcwLx). International cooperation of the Prosecutor General's Office. Key areas and results // Office of the Prosecutor General, 12.02.2024: <https://www.gp.gov.ua/ua/posts/miznarodne-spivrobotnictvo-ofisu-generalnogo-prokurora-klyucovi-napryami-ta-rezultati>. Annex 3.

26 Shah P, "Congress Passes Justice for Victims of War Crimes Act": <https://www.justsecurity.org/84588/senate-passes-justice-for-victims-of-war-crimes-act/>.

27 Eurojust and the war in Ukraine: <https://www.eurojust.europa.eu/eurojust-and-the-war-in-ukraine>.

28 The European Union, the United States, and the United Kingdom establish the Atrocity Crimes Advisory Group (ACA) for Ukraine // US Department of State, 25.05.2022: <https://www.state.gov/creation-of-atrocity-crimes-advisory-group-for-ukraine/>.

- Many countries, such as France and the Netherlands, have sent and continue to send national investigators and forensic experts to support their Ukrainian counterparts, organise trainings, and provide equipment for expert investigations and procedural actions.<sup>29</sup>
- New platforms, such as the Dialogue Group, are being established and existing ones are being used to address the issue of bringing perpetrators to justice, albeit primarily focusing on the senior leadership of the Russian Federation<sup>30</sup>, etc.
- The International Center for Prosecution of Crime of Aggression against Ukraine (ICPA) was opened in the Hague, the Netherlands, tasked with supporting the preparation of criminal cases of Russian military aggression against Ukraine by securing crucial evidence and facilitating case-building processes at an early stage<sup>31</sup>
- The Independent International Commission of Inquiry on Ukraine was established by the Human Rights Council on 4 March 2022 according to [resolution 49/1](#) to investigate all alleged violations and abuses of human rights, violations of international humanitarian law and related crimes in the context of the aggression against Ukraine by the Russian Federation.<sup>32</sup>
- The Council of Europe created a Register of Damages for Ukraine as a first step towards an international compensation mechanism for the victims of Russian Aggression.<sup>33</sup> On 2 April 2024 it was officially opened for submission of applications.<sup>34</sup>

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29 France sends police and forensic experts to Ukraine to capture evidence of Russian war crimes // Independent, 12.04.2022: <https://www.independent.co.uk/news/world/europe/russia-war-crimes-france-police-b2056074.html>. The war in Ukraine: Dutch support for investigations into war crimes // Government of the Netherlands, 26.07.2022: <https://www.government.nl/latest/news/2022/07/26/the-war-in-ukraine-dutch-support-for-investigations-into-war-crimes>. Training for Ukrainian judges begins under UK legal supervision // Government of the UK, 14.12.2022: <https://www.gov.uk/government/news/training-for-ukrainian-judges-begins-under-uk-legal-supervision>.

30 Ukraine Accountability Conference: a step towards justice // Government of the Netherlands, 14.07.2022: <https://www.government.nl/latest/news/2022/07/14/ukraine-accountability-conference/>. London to host major international meeting on war crimes // UK Government, 07.01.2023: <https://www.gov.uk/government/news/london-to-host-major-international-meeting-on-war-crimes>. UN General Assembly calls for immediate end to war in Ukraine // United Nations, 23.02.2023: <https://news.un.org/en/story/2023/02/1133847>. The Russian Federation's aggression against Ukraine: ensuring accountability for serious violations of international humanitarian law and other international crimes // Parliamentary Assembly of Council of Europe, 28.04.2022: <https://pace.coe.int/en/files/30024>. Bucha Declaration on accountability for the most serious crimes under international law committed on the territory of Ukraine // President of Ukraine, 31.03.2023: <https://www.president.gov.ua/en/news/buchanska-deklaraciya-sho-do-vidpovidalnosti-za-najtyazhchi-z-82005>.

31 International Centre for the Prosecution of the Crime of Aggression Against Ukraine opened in The Hague // Viktor Nazarenko, 03.07.2023: [https://war.ukraine.ua/war-news/international-centre-prosecution-crime-aggression-against-ukraine-opened-hague/#:~:text=The%20ICPA%20is%20a%20unique,International%20Criminal%20Court%20\(ICC\)](https://war.ukraine.ua/war-news/international-centre-prosecution-crime-aggression-against-ukraine-opened-hague/#:~:text=The%20ICPA%20is%20a%20unique,International%20Criminal%20Court%20(ICC).).

32 Human Rights Council, UNGA, Forty-ninth session, 28 February–1 April 2022, Resolution adopted by the Human Rights Council on 4 March 2022, Situation of human rights in Ukraine stemming from the Russian aggression, A/HRC/RES/49/1: <https://documents.un.org/doc/undoc/gen/g22/277/44/pdf/g2227744.pdf?token=ayzKvVXp5vkjiaqUQd&fe=true>

33 Council of Europe, Register of Damages. <https://www.coe.int/en/web/human-rights-rule-of-law/register-of-damage-for-ukraine>

34 Ibid, at <https://rd4u.coe.int/en/>

Due to a large number of diverse initiatives, **challenges exist in effectively coordinating the diverse number of international justice actors in a comprehensive and strategic manner**, avoiding the duplication of efforts, overcoming divergences in different legal frameworks of each actor and establishing common standards (such as the standards used for evidence collection, for example).

To that end the conveners of the Dialogue Group on Accountability for Ukraine – the ICC, the European Commission, Eurojust in cooperation with the Ukraine’s OPG, hosted and chaired by the Ministry of Foreign Affairs of the Kingdom of the Netherlands – launched a coordination mechanism that offered a platform to discuss and align national and international coordination efforts among key stakeholders.

In relation to the donation to Ukraine of trainings and other investigative and prosecutorial capacity, the failure to account for the unique aspects of the national context including the existing judicial architecture and, in particular, existing Ukrainian legislation relevant to investigating and prosecuting crimes under international law, brings two significant challenges:

01. It detracts from the working hours and staff, which in turn complicates on-ground efforts amid the already challenging circumstances of the ongoing armed conflict.
02. International partners’ advice and trainings have little to no practical effect due to the existing procedural legislative challenges related to their “legal status”, which they do not have under the current domestic legislation. This means that they are not allowed access to case files and their formal advice cannot be officially referred to in case file documents. In order to rectify the situation, such efforts need to be better streamlined, aligned with international standards, effectively coordinated and overseen.

## Public Demand for Justice

Lack of capacity of the Ukrainian domestic legal system to ensure effective justice and accountability adversely affects the ability of the national authorities and international partners to satisfy the Ukrainian public’s demand for justice.

This gap is exacerbated by the lack of political will from Ukraine’s political leadership to consider victims’ as well as the general public’s demands for justice as the positions

and expertise of the existing legal professional community, and other relevant groups including military veterans.<sup>35</sup>

In September and December 2022, the sociological group “Rating” conducted all Ukrainian public opinion polls, which included, in particular, a number of questions regarding the administration of justice in the aftermath of the war.<sup>36</sup>

The polls revealed that Ukrainians sought immediate justice and accountability: according to the majority of the respondents (75%), trials on war crimes in Ukraine should start as soon as possible, 23% of the respondents believe that it should be done after the end of the war.

As opposed to compensation for the damages suffered by the population of the country, punishment of the guilty was highlighted as the immediate priority: 75% of respondents believe that justice regarding war crimes should be based on the fair punishment of war criminals and only 21% believe compensation for the damage should take precedence.

At the same time, as demonstrated by the results of the national poll and the survey of professional groups, the respondents prefer legitimate forms of justice guaranteed by the legal system with 55% being against lynching; respondents from the judicial and veteran communities have also demonstrated a high level of expectations regarding trials related to war crimes based on the due process standards.<sup>37</sup>

The majority of the polls` respondents noting that existing negative attitudes and prejudices of the society towards the court and law enforcement systems continue to persist during the full-scale invasion. Such attitudes are based on high levels of corruption and distrust of systems in general.<sup>38</sup>

The interviewed respondents, both judges and veterans, have a sufficient level of understanding of the existing public demand. At the same time, there is awareness of threats

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35 Ukrainian Legal Advisory Group, Ukraine 5 AM Coalition, Capacity of Ukraine’s Judicial System to Ensure Accountability for Grave International Crimes Committed in the Course of the Russia’s Aggression against Ukraine: a Perspective of Judges, Veterans and the Demand for Justice by the Population of Ukraine: <https://ulag.org.ua/reports-and-materials/capacity-of-ukraines-judicial-system-to-ensure-accountability-for-grave-international-crimes-committed-in-the-course-of-the-russias-aggression-against-ukraine-a-perspective-of-judges-and-veterans-and-the-demand-for-justice-by-the-population-of-uk>

36 Results of the all-Ukrainian poll “Assessment of the damage caused by Russia’s war crimes in Ukraine”, September 2022, <https://zmina.ua/event/yakoyi-shkody-zavdayut-voyenni-zlochyny-rosiyi-ukrayinczyam-rezultaty-opytuvannya/>. Results of the all-Ukrainian poll “Legal protection of victims of Russia’s war crimes”, December 2022, [https://ratinggroup.ua/research/ukraine/pravoviy\\_zahist\\_postrazhdalih\\_v\\_d\\_vo\\_nnih\\_zlochyn\\_v\\_ros\\_23-26\\_grudnya\\_2022.html](https://ratinggroup.ua/research/ukraine/pravoviy_zahist_postrazhdalih_v_d_vo_nnih_zlochyn_v_ros_23-26_grudnya_2022.html).

37 Ibid at 34

38 Ibid.



that non-implementation, delay or non-compliance with public perceptions of justice can become a significant factor of destabilisation and reputational risks for Ukraine.<sup>39</sup>

In line with these results, the majority of the polls` respondents believe that special courts with the participation of domestic and international judges will be the most effective option for ensuring accountability for grave crimes (65% of respondents on average). The same opinion was expressed by some of the judges-respondents during focus groups and in-depth interviews. Another 22% of national poll participants consider international institutions effective, and only 7% consider national courts effective.<sup>40</sup>

The majority of the polls` respondents believe that special courts with the participation of domestic and international judges will be the most effective option for ensuring accountability for grave crimes (65% of respondents on average).

The position of professional groups, in particular judges and the veteran community **is somewhat different from the general public's assessments.** Thus, the collected opinions and ideas voiced by the judges during focus groups and in-depth interviews demonstrate the lack of a single vision and understanding the possible justice and accountability mechanisms can be used in Ukraine's situation. Different levels of understanding of the issues at hand pertaining to the standards of due process in international law combined with the overall exhaustion from the decades long judicial reform has resulted in a sceptical perception and attitude towards changes among judges. The dominant conservative assessment of the judicial system by the judges is that **it has enough capacity** to process all the crimes committed during armed conflict in Ukraine **albeit with some support and capacity building.** Instead, the interviewed **veterans mostly noted the need to use mixed (hybrid) mechanisms** for prosecuting persons who committed crimes in the course of the military aggression against Ukraine, whereby the efforts of the domestic authorities will be reinforced alongside by the international investigative, prosecutorial authorities and judges. In their opinion, this will not only ensure a higher level of compliance with the standards of due process, but also provide for an appropriate level of informing the world about the crimes committed by the Russian military.<sup>41</sup>

Lack of communication/outreach by the state authorities was noted by 60% of the national polls respondents. The indicators show that a significant part of the population has information about potential international crimes of the Russian Federation, or is directly

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39 Ibid.

40 Ibid.

41 Ibid.

affected by hostilities, but they do not report them to investigative authorities, in particular, due to lack of information about legal protection tools.

The initiated national tv marathon and other communication tools chosen by the government mainly focus on general information and the success of the investigation, without conducting legal and educational work to explain the importance of and pathways, algorithms to contacting the law enforcement agencies for the legal protection of victims.<sup>42</sup>

Certain categories of victims remain neglected, in particular, in anti-crisis communication. For example, families of those missing as a result of hostilities, who take a proactive position in searching for loved ones, may face a negative reaction from the authorities. At the same time, experts note that the dissatisfaction and disappointment of the victims can be used by the agents of the aggressor state to destabilise the situation in the country.

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42 Ibid.

# Political Will to Ensure Justice for Grave International Crimes



For present purposes political will is defined as the willingness of the state to implement the necessary reforms pertaining to legislation, infrastructure and allocating resources in order to ensure fair and effective international justice.

While overall Ukraine has made some progress in respect of necessary domestic legislative and infrastructural changes since the start of the armed conflict in 2014 (for example with the recent amendments to the Criminal procedure code on time limits on the investigations of what considered in Ukrainian Criminal code grave crimes, or incorporating provisions on cooperation with the ICC, albeit, not of high quality), the progress has been exceptionally slow and vastly insufficient.

Lack of political will to prioritise fair and effective justice could be seen in the part of Ukraine, as well as to an extent by the international community in the years preceding to the full-scale invasion through a number of examples, for instance, though not exhaustively: relentless and inappropriate political interferences<sup>43</sup>; a lack of political support where it would have been vital (e.g. failure by the President to sign the IHL implementation legislation, ratification of the Rome Statute); a failure to establish the necessary infrastructure, including in terms of capacity and expertise, at the level of investigative authorities and courts in a timely manner, failure to appoint competent professionals to relevant investigative, prosecutorial and judicial positions among others; and an overall failure to provide sufficient resources, where these were required to pursue fair and effective justice processes.

This has resulted in the failure to combat impunity, that in turn has led to the full-scale invasion of Ukraine by Russia. Had there been timely and effective prosecutions and those responsible for the alleged international crimes committed prior to the full-scale

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43 Kyiv Post, Deputy Prosecutor General Mamedov Says He Is Resigning // 27.07.2021: <https://archive.kyivpost.com/ukraine-politics/deputy-prosecutor-general-mamedov-says-he-is-resigning.html>. Collective Statement of NGOs on the Removal of Gunduz Mamedov from the Office // Zmina, 01.07.2021: <https://zmina.ua/en/statements-en/collective-statement-of-non-governmental-organisations-on-the-removal-of-mr-gunduz-mamedov-from-office/>.

invasion would have been brought to accountability, it is likely they would have served as a deterrent to the subsequent tragic events.

The international justice-related responses drastically changed following the full-scale invasion. Many of the solutions to the challenges that had already been identified before February 2022, but had not been prioritised by the Ukraine's government and/or by the international partners, continued to require implementation. Rather than implementing identified solutions or requirements for a fair and effective Ukrainian justice architecture, it appears that significant time and resources are being spent on "rediscovering" and "re-identifying" solutions rather than looking for effective ways to implement them. Examples include: lack of suitable legislations in place, approaches to prioritisation and classification of offences, resources required to deliver results, etc.<sup>44</sup>

Adherence to the rule of law has always been one of the most glaring blind spots of the Ukrainian state system. While every political leader has proclaimed their government's devotion to the rule of law since Ukraine gained independence in 1991 as to its critical role in Ukraine's democracy, the rule of law has never been a principle that has been unconditionally recognised, adhered to and followed through in practice. Judicial system of Ukraine has always struggled to be independent, fair and impartial. Oftentimes it has been widely used as a political instrument for *inter alia*, punishment, persecution and manipulation.<sup>45</sup>

The assessment of the Ukraine's adherence to the rule of law and fundamental rights in the report published by the European Commission for 2023 appears overall somewhat reserved. It recognized legislative progress that had already been made while identifying gaps that had yet to be removed, such as aligning domestic criminal law with international standards and stating that Ukraine has not ratified the Rome Statute<sup>46</sup>.

The national polls conducted throughout 2023 demonstrate a very telling picture from Ukrainian population's perspective that there was no confidence in the judicial system to be able to ensure fundamental rights in accordance with the principle of the rule of law. Thus, at the beginning of 2023 the level of distrust to the judicial system in general was at 59%<sup>47</sup> and towards the end of 2023 confidence in the justice system had not improved

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44 Ukrainian Legal Advisory Group, Principle of Complementarity: International Justice in Ukraine, 2019: <https://ulag.org.ua/reports-and-materials/principle-of-complementarity-international-justice-in-ukraine>.

45 Melnyk M., Law Enforcement authorities and Politics in Ukraine, Mirror of the Week, 2004: [https://zn.ua/ukr/politics\\_archive/pravoohoronnii\\_organii\\_i\\_politika\\_v\\_ukrayini.html](https://zn.ua/ukr/politics_archive/pravoohoronnii_organii_i_politika_v_ukrayini.html). There are already dozens. What Criminal Cases Have Been Opened against Poroshenko during Zelensky's Time, Novoye Vremia, 2022: <https://nv.ua/ukr/ukraine/politics/top-10-sprav-proti-poroshenka-za-zelenskogo-derzhzrada-vivezennya-chausa-maldivi-novini-ukrajini-50203294.html>. Unprecedented Pressure on Business by the Law Enforcement. Is it True and What are the Numbers Saying, *Economic Pravda*, 2023: <https://www.epravda.com.ua/weeklycharts/2023/10/18/705606/>.

46 The European Commission, Commission Staff Working Document, Brussels, 8 November 2023: [https://neighbourhood-enlargement.ec.europa.eu/system/files/2023-11/SWD\\_2023\\_699%20Ukraine%20report.pdf](https://neighbourhood-enlargement.ec.europa.eu/system/files/2023-11/SWD_2023_699%20Ukraine%20report.pdf).

47 Level of Trust to the Judiciary Has Grown, but level of Distrust Is Expressed by 59% – Razumkov Centre Revealed the Data, Judicial Legal Paper, 15 March 2023: <https://sud.ua/uk/news/publication/264685-uroven-doveriya-k-sudam-vyros-no-nedoverie-sudam-vyrazhayut-59-oproshennykh-tsentr-razumkova-obnarodoval-pokazateli>.

much with 58% being the national average of people who had no or very little confidence in the judicial system. Within some cities, lack of confidence was even higher – fluctuating between 63 -71%<sup>48</sup>.

The armed conflict 2014-2022 and the increased incidents of crimes under international law requiring justice which accompanied this period, should have served as a catalyst for the reform of the Ukrainian justice system. Instead the decades-long judicial reform remained in deadlock during the years prior to full-scale invasion and served to practically incapacitate the entire justice process. This being in addition to the lack of any genuine willingness to improve Ukraine’s domestic legislation, legal and judicial infrastructure, and to allocate required capacity and resources to tackle 2014-2022 conflict-related cases.

Since the full-scale invasion in February 2022, the progress that the EC commission refers to in its report<sup>49</sup> and the unlocking of previously deadlocked judicial reform as well as anti-corruption reforms have all undoubtedly been a result of the pressure and conditions of financial support from Ukraine’s international partners.<sup>50</sup> Of course ensuring international justice and accountability for the atrocity crimes is a matter of international relevance and concern. The domestic system should be seen as due to, and impacting on the demands placed on Ukraine as a state actor in the global justice “ecosystem”. Ensuring that Ukraine’s domestic legal system is fully and appropriately reformed, placing it in a position to be able genuinely to investigate and prosecute crimes under international law, as well as to cooperate and complement other international justice initiatives is cornerstone piece in the puzzle of truly international justice responses to the Ukraine conflict from 2014 to present. If this piece is missing, the rest of the puzzle will not come together.

There have been many justice-related initiatives launched by states<sup>51</sup> and international mechanisms since February 2022. Enormous amounts of resources have also been poured into ensuring accountability for grave crimes committed in Ukraine in the past two years. **Despite this, the domestic system remains significantly incapacitated.** The impact of such a lack of capacity is significant as Ukraine will be obliged to undertake the overwhelming majority of investigations and prosecutions arising from the present phase of the aggression. While the ICC and those states undertaking “universal jurisdiction” initiatives play a crucial role, the level of demands for international justice in Ukraine, a very limited capacity as well as so many other conflict situations requiring their attention. It is

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48 Confidential source.

49 Ibid at 46.

50 Transparency International, Ukraine’s Anti-Corruption Promises to IMF, November 25, 2021: <https://ti-ukraine.org/en/news/ukraine-s-anti-corruption-promises-to-imf/>. IMF Executive Board Completes the Third Review of the Extended Fund Facility Arrangement for Ukraine, March 21, 2024: <https://www.imf.org/en/News/Articles/2024/03/21/pr2496-ukraine-imf-executive-board-completes-third-review-eff>.

51 See previous section “International Level”.

clear, of course, that many of the challenges that Ukraine faces to pursue fair and effective international justice while the conflict continues are very significant (and would be significant for any state in a similar position), and to an extent beyond its control. However, very few, if any issues and challenges to pursuing genuine domestic justice for victims of Russian aggression in Ukraine are – in fact – insurmountable. Above all, victims have been demanding international justice since 2014, and these demands will continue to grow as tragically, the number of victims increases and crimes under international law continue to be committed. Yet victims have been promised justice and the expectation is that it will be delivered sooner rather than later.<sup>52</sup>

Therefore, it is crucial that political will to increase the capacity of Ukraine's domestic legal system at all levels **is generated in Ukraine, but also within the international community.** Ukraine's international partners must be willing to support international justice processes and mechanisms for Ukraine on the domestic Ukrainian level as well as the international one. As discussed, an effective and strengthened international justice response for Ukraine (which could serve as a model for other country situations) would serve to enhance the capacity of the entire global international justice system – which should be considered of the interest to the international community.

Ukraine requires a comprehensive, coherent, and strategic 'justice response' that is designed to strengthen Ukraine's legal framework and justice 'architecture' as a whole, rather than a somewhat reactionary and piecemeal approach to "capacity building"

However, any international justice 'solution' must be based on a thorough, genuine, impartial and comprehensive **analysis of quantitative and qualitative data which serves to demonstrate the current gaps and needs of the domestic system of Ukraine.** Ultimately, Ukraine requires a comprehensive, coherent, and strategic 'justice response' that is designed to strengthen Ukraine's legal framework and justice 'architec-

ture' as a whole, rather than a somewhat reactionary and piecemeal approach to "capacity building" which has been presently undertaken in relation to separate legal and judicial institutions in Ukraine by responding to their individual requests. They are oftentimes based on very limited and fragmented knowledge and understanding of how to genuinely ensure international justice for crimes committed in Ukraine.

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52 Russia must be held to account for every Ukrainian family killed, for every burned Ukrainian city and village, we have to restore justice – address by the President of Ukraine to the attendees of the Russian War Crimes exhibition in Davos, January 19, 2023: <https://www.president.gov.ua/en/news/rosiya-povinna-vidpovisti-za-kozhnu-znishenu-ukrayinsku-rodu-80469>. Putin will be tried and prosecuted for war crimes, Ukraine's prosecutor general vows, March 5, 2024: <https://www.youtube.com/watch?v=UHfpMGzSSVY>.

Every amendment to Ukraine's legal framework and legislation, every allocation of capacity and resources, every proposed domestic institutional response, and ultimately any international justice mechanism, response which will be required must be a puzzle piece, part of a comprehensive international justice response to the demands arising from the present conflict. But it must also be designed with legacy and the future in mind – which would include cementing a strengthened long-term international justice architecture for Ukraine. To formulate and implement such a response will require the strategic vision of Ukrainian and international leaders, relevant experts and other crucial stakeholders.

Above all, any justice response must be **effective and meaningful for victims and those affected by international crimes**. It must be steadfast, trustworthy and should allow those who have been bearing the brunt of the war, who lost their sons, daughters, children, parents, brothers, sisters to atrocity crimes not to become disillusioned with governments and political leaders have, to this point failed at building a system capable of delivering justice for the atrocities committed during the largest war in Europe in the past 70 years.

# Overview of Ukraine's Domestic Legislation

## Background to the Legislative Challenges

Over the past ten years of the ongoing armed conflict in Ukraine, there have been numerous amendments made to the criminal and criminal procedure laws. However, these amendments were not organised in a systematic manner due to the lack of practical strategic vision among policymakers and implementers of this legislation. Although there have been a number of strategies and strategic plans prepared by the international experts for the Office of the Prosecutor General (the OPG), they have remained unimplementable for the most part due to the lack of basic legislation in place. Those legislative amendments that have been adopted were chaotic and inconsistent with the needs and priorities, mostly of an ad-hoc and reactionary nature.

Instead, the legislators have needed to address the following fundamental challenges comprehensively:

- lack of access for the investigative authorities to some of the territories where the alleged violations took place;
- lack of jurisdiction for national police to investigate war crimes;
- to establish and regulate cooperation with the military in order to carry out tasks that are primarily the responsibility of law enforcement agencies but cannot be implemented due to the ongoing hostilities and restricted access to certain territories;
- the possibility to use classified intelligence information and open-source data as evidence;
- preservation of evidence for prolonged periods of time;
- moving of a large number of victims/survivors and witnesses within Ukraine or abroad and thus their unavailability during investigation;
- lack of access to perpetrators;



- protection of victims and witnesses from intimidation and various safety and security risks;
- insufficient fair trial guarantees;
- proportionality of sentences to the rank of perpetrators and degree of gravity of committed crimes;
- safeguards for the defence lawyers guaranteeing physical and mental safety and security;
- lack of capacity to ensure presence of the victims and witnesses who are based abroad or in the occupied territories for procedural actions or court proceedings;
- etc.

## Criminal Law

The provisions of Ukraine's Criminal Code concerning grave international crimes have remained unchanged since the outbreak of the armed conflict in Ukraine in 2014. In reality, most of the criminal investigations are opened in order to document violations of the laws and customs of war. Despite lengthy discussions and the ongoing need for aligning Ukrainian domestic criminal legislation with international law, including international humanitarian and criminal law, these changes have not been adopted by Ukrainian lawmakers. Consequently, when the Russian Federation invaded Ukraine on 24 February 2022, Ukrainian law enforcement agencies were 'ill-equipped' with the same legislative tools for the legal classification of crimes under international law, as they had been since 2014.

The legislative shortcomings particularly arise in relation to the **classification of grave international crimes**. As a result of the application of the legal regime which had been implemented during the so-called "anti-terrorist operation" from 2014-2018 and then "joint forces operation" from 2018 until 2022, the Ukrainian authorities have made extensive use in cases involving crimes under international law of the Criminal Code's provisions that establish criminal responsibility for the acts of terrorism (please see Annex 1). These include Article 258 'Act of terrorism,' Article 258-1 'Involvement in an act of terrorism,' Article 258-2 'Public incitement to commit an act of terrorism,' Article 258-3 'Creation of a terrorist group or terrorist organisation,' Article 258-4 'Facilitation to committing an act of terrorism,' and Article 258-5 'Financing of terrorism' of the Criminal Code of Ukraine. As a

result of the use of terrorism-focused legislation, amendments to the Criminal Code since 2014 have also addressed the specifics of criminal liability for such acts<sup>53</sup>.

Regarding the classification of the violations of international humanitarian law and human rights in the armed conflict, the Criminal Code of Ukraine was slightly amended through the addition of Article 146-1. This article addresses the legal classification of enforced disappearances, specifically those carried out by ‘representatives of “irregular illegal armed groups”, armed gangs and groups of mercenaries created by, subordinated to, managed and financed by the Russian Federation, as well as representatives of the occupation administration of the Russian Federation, which consists of its state bodies and structures functionally responsible for the administration of the temporarily occupied territories of Ukraine, and representatives of the self-proclaimed bodies controlled by the Russian Federation, which usurped the power functions in the temporarily occupied territories of Ukraine.’<sup>54</sup>

Conversely, the Criminal Code of Ukraine had been amended **13 times** within the 6 months of the active phase of the armed conflict in Ukraine in 2022<sup>55</sup>. Each of the laws

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- 53 Law of Ukraine ‘On Amendments to Criminal Code and Criminal Procedure Code of Ukraine Regarding Inevitability of Punishment for Certain Crimes Against Foundations of National Security, Public Safety, and Corruption Crimes,’ No. 1689-VII, 07.10.2014: <https://zakon.rada.gov.ua/laws/show/1689-18#n15>. Law of Ukraine ‘On Prevention and Counteraction to Legalisation (Laundering) of Proceeds from Crime, Financing of Terrorism and Financing of Proliferation of Weapons of Mass Destruction,’ No. 361-IX, 06.12.2019: <https://zakon.rada.gov.ua/laws/show/361-20#n898>.
- 54 Criminal Code of Ukraine, No. 2341-III, 05.04.2001: <https://zakon.rada.gov.ua/laws/show/2341-14#Text>. Law of Ukraine ‘On Legal Status of Persons Missing Under Special Circumstances,’ No. 2505-VIII, 12.07.2018: <https://zakon.rada.gov.ua/laws/show/2505-19#n239>.
- 55 Law of Ukraine ‘On Amendments to Certain Legislative Acts Regarding Establishment of Criminal Liability for Collaboration Activities,’ No. 2108-IX, 03.03.2022: <https://zakon.rada.gov.ua/laws/show/2108-20#n6>. Law of Ukraine ‘On Amendments to Certain Legislative Acts of Ukraine Regarding Strengthening of Criminal Liability for Production and Distribution of Prohibited Information Products,’ No. 2110-IX, 03.03.2022: <https://zakon.rada.gov.ua/laws/show/2110-20#n6>. Law of Ukraine ‘On Amendments to Criminal Code of Ukraine Regarding Strengthening of Liability for Crimes against Foundations of National Security of Ukraine under Martial Law,’ No. 2113-IX, 03.03.2022: <https://zakon.rada.gov.ua/laws/show/2113-20#n2>. Law of Ukraine ‘On Ensuring Participation of Civilians in Defence of Ukraine,’ No. 2114-IX, 03.03.2022: <https://zakon.rada.gov.ua/laws/show/2114-20#n18>. Law of Ukraine ‘On Amendments to Criminal Code of Ukraine Regarding Strengthening of Liability for Looting,’ No. 2117-IX, 03.03.2022: <https://zakon.rada.gov.ua/laws/show/2117-20#n2>. Law of Ukraine ‘On Amendments to Criminal Code of Ukraine and Other Legislative Acts of Ukraine on Determining Circumstances that Preclude Criminal Unlawfulness of Act and Provide for Combat Immunity in Conditions of Martial Law,’ No. 2124-IX, 15.03.2022: <https://zakon.rada.gov.ua/laws/show/2124-20#n5>. Law of Ukraine ‘On Amendments to Criminal Code of Ukraine on Improving Efficiency of Combating Cybercrime in Conditions of Martial Law,’ No. 2149-IX, 24.03.2022: <https://zakon.rada.gov.ua/laws/show/2149-20#n2>. Law of Ukraine ‘On Amendments to Article 263 of Criminal Code of Ukraine Regarding Abolition of Liability in Case of Voluntary Surrender of Weapons, Ammunition, Explosives or Explosive Devices,’ No. 2150-IX, 24.03.2022: <https://zakon.rada.gov.ua/laws/show/2150-20#n2>. Law of Ukraine ‘On Amendments to Criminal Code of Ukraine Regarding Liability for Illegal Use of Humanitarian Aid,’ No. 2155-IX, 24.03.2022: <https://zakon.rada.gov.ua/laws/show/2155-20#n2>. Law of Ukraine ‘On Amendments to Criminal and Criminal Procedure Codes of Ukraine Regarding Counteraction to Unauthorised Dissemination of Information on Shipment or Transportation of Weapons, Armaments and Ammunition to Ukraine, Movement, Disposition or Deployment of Armed Forces of Ukraine or Other Military Formations Created in Accordance with Laws of Ukraine, Committed During Martial Law or State of Emergency,’ No. 2160-IX, 24.03.2022: <https://zakon.rada.gov.ua/laws/show/2160-20#n6>. Law of Ukraine ‘On Amendments to Article 114<sup>2</sup> of the Criminal Code of Ukraine Regarding Improving of Liability for Unauthorised Dissemination of Information About Means of Countering Armed Aggression of Russian Federation,’ No. 2178-IX, 01.04.2022: <https://zakon.rada.gov.ua/laws/show/2178-20#n2>. Law of Ukraine ‘On Amendments to Criminal and Criminal Procedure Codes of Ukraine Regarding Improving of Liability for Collaboration Activities and Peculiarities of Application of Preventive Measures for Crimes Against Fundamentals of National and Public Security,’ No. 2198-IX, 14.04.2022: <https://zakon.rada.gov.ua/laws/show/2198-20#n6>. Law of Ukraine ‘On Amendments to Criminal Code, Code of Criminal Procedure and Other Legislative Acts of Ukraine Regarding Regulation of Procedure for Exchange of Persons as Prisoners of War,’ No. 2472-IX, 28.07.2022: <https://zakon.rada.gov.ua/laws/show/2472-20#n6>.

addressed the circumstances of the armed conflict and intended to improve criminal legislation. However, none of it managed to adequately address the shortcomings in the domestic legislation related to the investigation, prosecution and adjudication of grave international crimes. In particular, the following amendments have been made: the concept of 'collaboration' was introduced (Article 111-1 of the CCU); the provisions on high treason were amended (Article 111 of the CCU); the responsibility for cybercrimes was introduced (Article 361 of the CCU); as well as the responsibility for the misuse of humanitarian aid (Article 201-2 of the CCU); dissemination of information about military positions (Article 114-2 of the CCU), and aiding and abetting the aggressor state (Article 111-2 of the CCU).

Among the amendments, two aspects stand out. The first is the clarification of the status of civilians directly engaged in an armed conflict<sup>56</sup>. According to international humanitarian law, under certain circumstances, civilians or other persons who are protected under international humanitarian law lose the protection conferred upon them when they directly participate in hostilities, therefore becoming lawful military objectives. In the case that a civilian directly participates in hostilities, for the duration of the direct participation in hostilities, a civilian may be directly attacked as if they were a combatant.

The Criminal Code of Ukraine had been amended seemingly with a view to prevent civilians from being held criminally liable where they directly participate in hostilities, but the language of the amendment is unclear in relation to the scope of its application, and it applies solely where civilians 'use firearms against individuals engaged in the armed aggression against Ukraine'. The fact that this condition is included in the Final and Transitional Provisions of the CCU, rather than Section IX, suggests its temporary nature and raises the possibility of its selective application in practice. Furthermore, the legislation does not define the scope of 'individuals engaged in the armed aggression against Ukraine,' allowing room for significant interpretation challenges for those implementing the legislation at the level of law enforcement practice. Amongst the foreseeable problems of such legislation is the serious risk of arbitrary interpretation by both law enforcement and judicial authorities.

The second aspect is that the fulfilment of the duty to defend the Motherland, independence and territorial integrity of Ukraine is provided as a valid criminal defence (a condition that negates criminal liability) according to Article 43-1 of the CCU<sup>57</sup>. Its wording closely resembles that of combatant immunity in international humanitarian law, but

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56 Law of Ukraine 'On Ensuring Participation of Civilians in Defence of Ukraine,' No. 2114-IX, 03.03.2022: <https://zakon.rada.gov.ua/laws/show/2114-20#n18>.

57 Law of Ukraine 'On Amendments to Criminal Code of Ukraine and Other Legislative Acts of Ukraine Regarding Determining of Circumstances that Negate Criminal Unlawfulness of Act and Provide for Combat Immunity during Martial Law,' No. 2124-IX, 15.03.2022: <https://zakon.rada.gov.ua/laws/show/2124-20#n5>.

the national legislation introduces its own term, 'combat immunity'.<sup>58</sup> Such a provision is deeply problematic from an impartiality perspective as regards the rule of law, as well as in its human rights compliance, for example in relation to the right to life, right to an effective remedy, and the prohibition of discrimination amongst others. In practice, the legislation has meant that while Russian soldiers can be prosecuted under Article 115 ('Premeditated murder') of the CCU for killing Ukrainian soldiers, individuals who stand up to protect Ukraine's territorial integrity according to Article 43-1 of the CCU can be exempted from criminal prosecution. This provision, however, does not apply to the legal classification of acts under Article 438 of the CCU, which means there is no exemption from criminal prosecution for alleged war crimes.

The amendments to Ukraine's criminal legislation adopted during the first six months of the full-scale invasion primarily addressed the criminal prosecution of those who were allegedly facilitating the actions of the aggressor state on Ukrainian territory (the so-called collaborators); citizens of Ukraine who were believed to be acting against Ukraine's interests. Moreover, a closer examination of certain provisions reveals the duplication of already existing provisions. In particular, Article 111 of the CCU ('High treason'), Article 111-1 of the CCU ('Collaboration activities'), and Article 111-2 of the CCU ('Aiding and abetting aggressor state') have virtually the same elements of crime, and the rapidly evolving case law is attempting to delineate the scope of their application.

Crucially, the current version of the Criminal Code of Ukraine **does not provide jurisdiction for all crimes under international law, in line with the international standards:**

**Article 442 of the CCU ('Genocide')**<sup>59</sup> implements the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide<sup>60</sup> but alters the focus when

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58 Combat immunity is the exemption of military commanders, servicemen, and volunteers of the Territorial Defence Forces of the Armed Forces of Ukraine; law enforcement officers who in accordance with their duties participate in the defence of Ukraine; and persons defined by the Law of Ukraine 'On Ensuring Participation of Civilians in Defence of Ukraine' from liability, including criminal liability, for the loss of personnel, military equipment or other military property; consequences of using armed and other force while repelling armed aggression against Ukraine, or terminating (neutralising) an armed conflict, or performing other tasks for the defence of Ukraine while using any type of weapon (armament), the occurrence of which could not have been foreseen with reasonable care when planning and performing such actions (tasks) or which are covered by a justified risk, except in cases of violations of the laws and customs of war or the use of armed force as defined by international treaties ratified by the Verkhovna Rada of Ukraine. // Law of Ukraine 'On Defence of Ukraine,' No. 1932-XII, 06.12.1991: <https://zakon.rada.gov.ua/laws/show/1932-12#Text>.

59 Article 442. Genocide

1. Genocide, that is a wilfully committed act for the purpose of total or partial destruction of any national, ethnic, racial, or religious group by killing members of any such group or inflicting grave bodily injuries on them, creation of life conditions calculated for total or partial physical destruction of the group, decrease or prevention of childbearing in the group, or forceful transferring children of one group to another, – shall be punishable by imprisonment for a term of ten to fifteen years, or life imprisonment.
2. Public calls to genocide, and also making any materials with calls to genocide for the purpose of distribution, or distribution of such materials, – shall be punishable by arrest for a term up to six months, or imprisonment for a term up to five years.. // Criminal Code of Ukraine, № 2341-III, 05.04.2001: <https://zakon.rada.gov.ua/laws/show/2341-14#Text>

60 Convention on the Prevention and Punishment of the Crime of Genocide, UN GA Resolution 260 (III), 09.12.1948: [https://www.un.org/ru/documents/decl\\_conv/conventions/genocide.shtml](https://www.un.org/ru/documents/decl_conv/conventions/genocide.shtml). Ratified by Ukrainian SSR dated 15.11.1954.

defining the act. By accentuating the deliberate nature of the act, this article provides a peculiar interpretation of the concept of the special intent (*dolus specialis*) to commit genocide. Unlike the Genocide Convention, the provision does not require proof of special intent to destroy a group in whole or in part. Furthermore, Paragraph 2 of the article 442 CCU defines a separate element of the crime in the form of incitement to genocide, which, unlike international standards that include contextual elements of direct and public appeals, only includes the criteria of publicity. While the cases concerning allegations of genocide have not yet been considered in Ukrainian courts allowing for an examination of the elements of the crime and establishing how such cases will be considered by judges,<sup>61</sup> the crime of incitement to genocide as outlined in Article 442 Paragraph 2 of the CCU is currently being interpreted by national courts<sup>62</sup>;

**Crimes against humanity** are absent from the Criminal Code of Ukraine and are not criminalised within the scope of Ukrainian legislation;

**Article 437 of the CCU ('Planning, preparation and waging of an aggressive war')**<sup>63</sup> sets out the current provision on which investigations and prosecutions for the crime of aggression are based. However, the article falls short of international standards and is not in line with the Rome Statute definition, or comparable provisions in the relevant UNGA resolution. For example, under customary international law, the crime of aggression is considered a 'leadership' crime, concerning those persons who are most responsible for committing the crime. However, in the present CCU definition, the liable party in this provision is outlined broadly and also concerns all levels of perpetrators, including direct perpetrators, i.e. any sane natural person who has reached the age of sixteen<sup>64</sup>, in contrast to the definition found in the relevant UNGA resolution<sup>65</sup> and Article 8 bis of the Rome Statute of the International Criminal Court, where responsibility for the crime of

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61 President of the Supreme Court: Ukrainian courts will soon start hearing cases on Russian genocide en masse // *Ukrainska Pravda*, 04.03.2023: <https://www.pravda.com.ua/news/2023/03/4/7392022/>.

62 Notice of suspicion to T.M. Sergeytsev (original and translation) // Office of the Prosecutor General, 06.05.2022: <https://www.gp.gov.ua/ua/posts/povidomlennya-pro-pidozru-sjergjeicevu-tm-original-ta-perekklad>. Calls for genocide of the Ukrainian people – the court sentenced the director of the Russian propaganda TV channel "RT" // Office of the Prosecutor General, 17.02.2023: <https://www.gp.gov.ua/ua/posts/zakliki-do-genocidu-ukrayinskogo-narodu-sud-vinis-virok-rosiiskomu-propagandistskogo-telekanalu-rt>. In Ukraine, Russian propagandist Gasparyan was sentenced in absentia to 10 years in prison // *Livy Bereg*, November 15, 2023: [https://lb.ua/society/2023/11/15/584383\\_ukraini\\_rosiyskogo\\_propagandista.html](https://lb.ua/society/2023/11/15/584383_ukraini_rosiyskogo_propagandista.html). Ukrainian justice sanctions "call for genocide" // *Justice.Info*, 21.04.2023: <https://www.justiceinfo.net/uk/116826-%D1%83%D0%BA%D1%80%D0%B0%D1%97%D0%BD%D1%81%D1%8C%D0%BA%D0%B5-%D0%BF%D1%80%D0%B0%D0%B2%D0%BE%D1%81%D1%83%D0%B4%D0%B4%D1%8F-%D1%81%D0%B0%D0%BD%D0%BA%D1%86%D1%96%D0%BE%D0%B-D%D1%83%D1%94-%D0%B7.html>.

63 Article 437. Planning, preparation and waging of an aggressive war

1. Planning, preparation or waging of an aggressive war or armed conflict, or conspiring for any such purposes shall be punishable by imprisonment for a term of seven to twelve years.
2. Conducting an aggressive war or aggressive military operations shall be punishable by imprisonment for a term of ten to fifteen years. // Criminal Code of Ukraine, No. 2341-III, 05.04.2001: <https://zakon.rada.gov.ua/laws/show/2341-14#Text>.

64 Articles 18 and 22 of the Criminal Code of Ukraine // Criminal Code of Ukraine, № 2341-III, 05.04.2001: <https://zakon.rada.gov.ua/laws/show/2341-14#Text>.

65 Definition of aggression, General Assembly Resolution: <https://legal.un.org/avl/ha/da/da.html>.

aggression may extend to 'persons in a position effectively to exercise control over or to direct the political or military action of a State'.<sup>66</sup>

Additionally, article 437 CCU Ukraine does not include a definition of 'aggressive war,' nor does it refer to the UN documents that offer insight into the understanding of the term 'act of aggression'.<sup>67</sup> Instead, the legislation defines 'armed aggression'<sup>68</sup> and makes prominent use of the term 'repelling of armed aggression'.<sup>69</sup>

Such approaches enable law enforcement agencies to broadly construe acts within armed conflicts as aggressive war, leading to the prospect of large numbers of lower-level persons being charged with the crime of aggression. This does not reflect an international law understanding of, or approach to the crime, and risks undermining the 'leadership' nature and gravity of the crime.

Furthermore, the charging of lower-level Russian soldiers under article 437 CCU raises concerns regarding the applicability of combatant immunity, which bars the prosecution of combatants for mere participation in hostilities, unless such acts constitute war crimes. The broad nature of article 437 CCU also raises concerns regarding the principle of specificity which may result in charging practices that fall short of meeting international legal standards, including those of due process. Supreme Court's most recent interpretation of a 'perpetrator' of the crime reflects such a broad approach to defining the crime of aggression in Ukraine's domestic law;<sup>70</sup>

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66 Rome Statute of the International Criminal Court, 17.07.1998 [Eng]: <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

67 Ibid at 65.

68 Armed aggression is the use of armed force by another state or group of states against Ukraine. Any of the following actions shall be considered to be the armed aggression against Ukraine: invasion or attack of Ukrainian territory by the armed forces of another state or group of states; occupation or annexation of a part of the territory of Ukraine; blockade of ports, coasts or airspace, disruption of communications of Ukraine by the armed forces of another state or group of states; attack of the armed forces of another state or group of states on the military land, sea or air forces or civilian sea or air fleets of Ukraine; sending by or on behalf of another state of armed groups of regular or irregular forces which commit acts of armed force against Ukraine of such a serious nature that they are tantamount to the acts listed in indents five to seven hereof, including the significant participation of a third state in such acts; actions of another state(s) that allows its territory, which it has made available to a third state, to be used by that third state(s) to perform the actions referred to in indents five to eight hereof; use another state's or group of states' units of the armed forces located in the territory of Ukraine in accordance with international agreements concluded with Ukraine against a third state or group of states, other violations of the terms and conditions stipulated by such agreements, or prolongation of the stay of these units in the territory of Ukraine after the termination of the said agreements. / Article 1 // Law of Ukraine 'On Defence of Ukraine,' No. 1932-XII, 06.12.1991: <https://zakon.rada.gov.ua/laws/show/1932-12#Text>.

69 First introduced by Law of Ukraine 'On Peculiarities of State Policy on Ensuring State Sovereignty of Ukraine in Temporarily Occupied Territories in Donetsk and Luhansk Regions,' No. 2268-VIII, 18.01.2018: <https://zakon.rada.gov.ua/laws/show/2268-19#Text>.

70 47. ...for example: heads of states and governments; members of the parliaments; leaders of political parties; diplomats; heads of special services; commanders of the armed forces, subordinated to the state, but also of the illegal armed groups; other persons who de facto act as military commanders; heads of the executive departments tasked with the development and implementation of state policies and legal frameworks as related to the activities of the armed groups and arms circulation; heads whose legal status is not included in the notion of a "military commander" and those who exercise the power or control over those persons who participate in the aggressive war or aggressive military actions, who although are not in formal positions, but are capable of influencing military and political processes, connected with the planning, preparation, and launching of an aggressive war or armed conflict and conducting aggressive war or aggressive military activities/Supreme Court Resolution, case № 415/2182/20, 28.02.2024: <https://reyestr.court.gov.ua/Review/117555176>.

**Article 438 of the CCU ('Violation of rules and customs of warfare')**<sup>71</sup> outlines the legal classification of war crimes within the Criminal Code of Ukraine. The wording of the article differs from the general approach used in the CCU towards defining offences, as it is a blanket provision that makes reference to the provisions of international treaties ratified by Ukraine. In the practice of the conventions' application authorities have encountered difficulties with the quality of their translation, particularly as related to the terminology and even some of the provisions simply missing (for instance, article 51 of the Geneva Convention 4 is missing in the "Ukrainian" version).

A blanket nature of the article raises a question as to whether it complies with the principle of legal certainty which is a fundamental element of Ukrainian criminal law. In order to apply a legal classification effectively an investigator, a prosecutor, or a judge is required in practice to understand which international treaties the provision and relevant acts being investigated and prosecuted refer to. In order to act pursuant to article 438 CCU practitioners are therefore required to have an in-depth understanding and expertise on international humanitarian law as well as practical experience in its implementation.

Certain elements of war crimes are also detailed in other provisions of the Criminal Code of Ukraine, including Article 439 'Use of weapons of mass destruction', Article 445 'Illegal use of symbols of the Red Cross, Red Crescent, Red Crystal', as well as Article 432 'Marauding', and Article 433 'Violence against population in an operational zone'. These provisions pertain specifically to military personnel within the Armed Forces of Ukraine, Security Service of Ukraine, State Border Guard Service of Ukraine, National Guard of Ukraine, and other legally established military formations in accordance with Ukrainian law, as well as the State Special Transport Service, State Service for Special Communications and Information Protection of Ukraine, and any other legal persons as defined by law.<sup>72</sup> However, in reality, these provisions are also applied to members of the armed groups of the RF<sup>73</sup>.

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71 Article 438. Violation of rules and customs of war

1. Cruel treatment of prisoners of war or civilians, driving the civilian population to forced labour, pillage of national treasures on occupied territories, use of methods of the warfare prohibited by international instruments, or any other violations of rules and customs of war stipulated by international treaties, ratified by the Verkhovna Rada of Ukraine, and also issuing an order to commit any such actions shall be punishable by imprisonment for a term of eight to twelve years.
2. The same actions, where they are accompanied with premeditated murder shall be punishable by imprisonment for a term of ten to fifteen years or life imprisonment. // Criminal Code of Ukraine, No. 2341-III, 05.04.2001: <https://zakon.rada.gov.ua/laws/show/2341-14#Text>.

72 Criminal Code of Ukraine, No. 2341-III, 05.04.2001: <https://zakon.rada.gov.ua/laws/show/2341-14#Text>. The Legal Framework for Adjudicating War Crimes in Ukraine. Assessment Report and Recommendations on Ensuring Efficient and Fair Adjudication of War Crimes Cases // USAID Activity Office: Office of Democracy and Governance, 29.08.2022: <https://drive.google.com/file/d/1AKf1wtvKjv5VKoFuvFnd4nMI-IG2kOL9/view>.

73 Notice of suspicion to R.D. Kochermin (original and translation) // Office of the Prosecutor General, 12.05.2022: <https://www.gp.gov.ua/ua/posts/povidomlennya-pro-pidozru-kocerminu-rd-original-ta-pereklad>.

## Proposed Substantive Legislation

Without substantive changes to the domestic criminal code, Ukraine's ability to investigate and prosecute crimes under international law pursuant to international law standards is highly questionable. While Ukrainian authorities are currently able to conduct investigations and prosecutions, significant shortcomings in the domestic legal framework related to a number of issues, including definitions, domestication of crimes under

A lack of adequate domestic legislation will also undermine Ukraine's ability to conduct investigations and prosecutions in a manner that such activities could be complementary to other justice processes

international law and modes of individual responsibility will severely hamper domestic authorities' current and future justice efforts.

A lack of adequate domestic legislation will also undermine Ukraine's ability to conduct investigations and prosecutions in a manner that such activities could be complementary to other jus-

justice processes (see above) – most obviously central to the Rome Statute and the International Criminal Court's investigation, as well as other potential investigations and international justice developments outside of Ukraine.

It should be recognised that the drafting and adoption of implementing legislation can be a challenging process, requiring specialist legal expertise, as well as resources which may be already over-stretched in meeting demands for justice emerging from the ongoing conflict. However, the adoption of such legislation is a crucial process to enable effective domestic investigations and prosecutions and should be considered a significant priority.

Over the past ten years, there have been several attempts to amend the Criminal Code of Ukraine in order to align the interpretation of grave crimes with international law. Two of these attempts deserve particular attention.

On 20 May 2021, the Verkhovna Rada of Ukraine adopted the Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine Regarding Implementation of International Criminal and Humanitarian Law'<sup>74</sup> (No. 2689). On 7 June 2021, the law was passed to the President of Ukraine for approval by way of his signature and approval. However, there has been no update regarding the current status of this document ever since that date. It should be noted that even if the President of Ukraine puts his signature under the text of the law, a constitutional challenge may be brought to the Constitutional Court of

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74 Draft Law on Amendments to Certain Legislative Acts of Ukraine Regarding Implementation of International Criminal and Humanitarian Law, No. 2689, 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).



Ukraine to challenge its legality due to the violation of the procedure for adopting regulatory acts, namely the failure to adhere to the deadlines prescribed by the law.

The text of Draft Law No. 2689 represented a “middle ground” which considered both international legal practices and operational capacities of Ukraine’s domestic justice system to prosecute grave crimes. The draft law was developed by a number of stakeholders including Ukrainian law enforcement and judicial bodies, human rights groups, as well as international and domestic experts in international criminal law. The provisions relating to universal jurisdiction and command responsibility, the wording of the crime of aggression, and the retroactive application of the provisions remained a subject of debate throughout the whole period of the draft law consideration by the Parliament of Ukraine and beyond. Ultimately these provisions became the reason for failing to approve the Draft Law 2689 and its redrafting that followed.

In contrast to the Law No. 2689, a draft law ‘On Amendments to Criminal Code of Ukraine and Criminal Procedure Code of Ukraine’<sup>75</sup> (**No. 7290**) was officially registered with the Verkhovna Rada of Ukraine on 15 April 2022. The Explanatory Note accompanying this draft law indicates the need to adopt it that stems from the international armed conflict in Ukraine’s territory and extensive violations of international law committed by the Russian Federation. The contents of Draft Law No. 7290 duplicate the provisions of Law No. 2689 concerning the definitions of grave international crimes intended to be incorporated into the Criminal Code of Ukraine. **However, this draft law introduces fundamentally different approaches to a number of critical provisions, reflecting the contested nature of debates among stakeholders in their drafting.**

### **No command responsibility principle**

Firstly, Draft Law No. 7290 does not contain any provisions regarding the possibility to hold persons accountable for war crimes committed under the principle of command responsibility. Crimes under international law, which – because of their nature – require extensive and specific elements setting out modes of responsibility for different perpetrators in order to capture the level of responsibility, command, and contribution to crimes of the accused. The jurisprudence and legal frameworks of international mechanisms – such as the ICC or the ICTY – bear out the challenges of adequately capturing individuals’ responsibility for international crimes which are often exceptionally complex in their scale and commission; committed within often complicated military and civilian command and/or organisational structures;

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75 Draft Law On Amendments to Criminal Code of Ukraine and Criminal Procedure Code of Ukraine, No. 7290, 15.04.2022: <https://itd.rada.gov.ua/billInfo/Bills/Card/39449>.

by many direct and indirect perpetrators; with responsibility for crimes vesting in senior commanders to low-ranking members and; pursuant to significant planning.

In international criminal law, the principle of command responsibility allows for commanders to be held criminally liable for crimes committed by their subordinates. This will apply if the commander was in a position to prevent crimes committed by forces under their effective control and knew or should have known that the crime would be committed.<sup>76</sup>

As a result of legislation which does not adequately provide for the principle of command responsibility, it becomes impossible to deliver comprehensive and effective justice to the victims of the armed conflict. Indeed, Draft Law No 7290 does not solve the problem existing at the national level as the Criminal Code of Ukraine does not include command responsibility. Instead, the draft law suggests introducing a ground for prosecuting military commanders for their failure to act when their subordinates commit war crimes. However, this approach only addresses a small part of the overall concept of the principle of command responsibility, which is set out, for example, in Article 28 of the Rome Statute.<sup>77</sup>

### **Crime of aggression perpetrators are not specified**

Secondly, Article 437 of the CCU in the proposed draft law does not make any reference to the perpetrators, suggesting that an unlimited potential range of perpetrators can be prosecuted under this provision. This is likely designed to preserve the grounds for prosecuting those persons who have already been convicted

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76 Article 28 of the Rome Statute lays down that a military commander or a person “effectively” acting as a military commander is criminally responsible for crimes within the jurisdiction of the ICC committed by forces or persons under his effective command and control, or effective authority and control, where: · he either knew, or owing to the circumstances, should have known that the forces or persons were committing or about to commit such crimes; and · he failed to take all necessary and reasonable measures within his power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Similarly, a hierarchical superior in a non-military relationship with subordinates is criminally responsible for crimes within the jurisdiction of the ICC committed by subordinates under his effective authority and control, where: he knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; · the crimes concerned activities that were within his effective responsibility and control; and · he failed to take all necessary and reasonable measures within his power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

77 Ibid

since 2014 under Article 437 of the CCU and not create grounds for their possible release from liability.

### No universal jurisdiction principle

Thirdly, the provisions concerning the potential incorporation of the universal jurisdiction principle in Ukraine have been excluded from the text of the draft law.

### Retroactive application

A noteworthy concern arising out from the draft legislation lies in the possible introduction of a retrospective application of provisions concerning grave international crimes. Article 5(2) of the CCU stipulates that a law on criminal liability that establishes criminal unlawfulness of an act, augments criminal liability, or otherwise worsens an individual's situation shall not apply retroactively<sup>78</sup>. Due to this contradiction, the provision on the retroactive application of amendments to the Criminal Code of Ukraine might be recognised as incompatible with the Constitution of Ukraine.<sup>79</sup>

The only argument in favour of incorporating this provision into the draft law is that grave international crimes are rooted in customary international law. The severity of these crimes draws global attention, and the stance on criminalisation and universal prosecution of such acts is widely accepted across nations. Considering that these grave international crimes have already been criminalised at the international level, the retroactive application of these provisions within the framework of Ukraine's national legislation should be deemed acceptable.

The debates in the parliament around the contents of Law No. 2689 have shown that the issue of extending the temporal scope of criminal law provisions to align them with the principles of customary international humanitarian law and international criminal law remains contentious within the context of national law en-

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78 Criminal Code of Ukraine, No. 2341-III, 05.04.2001: <https://zakon.rada.gov.ua/laws/show/2341-14#Text>.

79 Decision of the Constitutional Court of Ukraine in a case opened upon a constitutional petition filed by 46 Ukrainian MPs seeking the official interpretation of provisions of Article 58 of the Constitution of Ukraine, Articles 6 and 81 of the Criminal code of Ukraine (case on the retroactive application of criminal law), No. 6-pn/2000, 19.04.2000: <https://zakon.rada.gov.ua/laws/show/v006p710-00#Text>.

forcement practices. The risks associated with the rejection of such a provision are quite high, potentially triggering a future review of these provisions by the Constitutional Court of Ukraine. However, without such amendments, the introduction of new articles into Section XXI of the Criminal Code of Ukraine will be meaningless, as the majority of crimes committed after 2014 and the full-scale invasion of Ukraine on 24 February 2022 will still be governed by the current version of Ukraine's criminal law.

Overall, a lack of alignment between national legislation and international standards continues to create a number of challenges. For example, the reliance on domestic legislation which does not meet international standards results in the inaccurate, inconsistent, and often arbitrary classification of acts. This, in turn, may lead to national prosecutorial and judicial practices which are ineffective and raise concerns about their fairness and compliance with human rights, paving the way for subpar and distorted justice for victims of grave crimes. Presently, an extensive number of proceedings are registered and opened under Article 438 of the CCU for the offences which do not pertain to war crimes, adding an unjustified burden on law enforcement agencies and leading to wasteful utilisation of already scarce resources.<sup>80</sup>

Additionally, proposals of the amendments do not include provisions pertaining to complicity in commission of international crimes. While provisions of the CCU<sup>81</sup> determine a general approach to the accountability of accomplices depending on their roles in committing criminal offences, they are not aligned with the international criminal law standards and do not allow for a broad interpretation such as equating them with "joint criminal enterprise" under *Tadic*<sup>82</sup> for instance. Insofar as proposed amendments to the CCU are concerned it would be important to propose those pertaining to the modes of participation in committing international crimes, **which would include joint criminal enterprise and aiding and abetting.**

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80 For example, actions such as the confiscation of vehicles and communication devices from civilians by the military, which could be substantiated by military necessity; the shelling of military positions within civilian areas; and the consequences for civilians caused by explosive remnants of war, among others.

81 Arts 27-28 CCU: <https://media.ellinikahoaxes.gr/uploads/2023/09/%D0%9A%D1%80%D0%B8%D0%B-C%D1%96%D0%BD%D0%B0%D0%BB%D1%8C%D0%BD%D0%B8%D0%B9-%D0%BA%D0%BE%D0%B4%D0%B5%D0%BA%D1%81-%D0%A3%D0%BA%D1%80%D0%B0%D1%97%D0%BD%D0%B8--on-April-5-2001-%E2%84%96-2341-III-Print-version.pdf>

82 Judgement, *Tadic* (IT-94-1), Appeals Chamber, 15 July 1999, para 185 et seq

## Criminal Procedure Law

The Criminal Procedure Code of Ukraine sets out the general principles and special rules of Ukraine's criminal procedure. The criminal procedure law in Ukraine has undergone multiple amendments since 2014, particularly in response to the armed conflict. However, these amendments have not provided a comprehensive resolution to the practical challenges that have been emerging, and those in relation to the investigation of international crimes are still being addressed using the procedure relevant for investigating ordinary crimes thereby leaving a significant gap in the application of the investigative standards.

Overall, the Criminal Procedure Code of Ukraine has undergone thirteen rounds of amendments since 24 February 2022. The amendments included various aspects, including: incorporating new articles of the Criminal Code of Ukraine into the references in the criminal procedure legislation<sup>83</sup>; defining specifics of pre-trial investigation during martial law<sup>84</sup>; outlining the peculiarities of application of pre-trial measures<sup>85</sup>; establishing protocols for cooperation with the International Criminal Court<sup>86</sup>; and regulating the process for the exchange of prisoners of war<sup>87</sup>. None of the adopted provisions have proven to substantially facilitate the investigation of grave international crimes.

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- 83 Law of Ukraine 'On Amendments to Certain Legislative Acts Regarding Establishment of Criminal Liability for Collaboration Activities,' No. 2108-IX, 03.03.2022: <https://zakon.rada.gov.ua/laws/show/2108-20#n6>. Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine Regarding Strengthening of Criminal Liability for Production and Distribution of Prohibited Information Products,' No. 2110-IX, 03.03.2022: <https://zakon.rada.gov.ua/laws/show/2110-20#n6>. Law of Ukraine 'On Amendments to Criminal and Criminal Procedure Codes of Ukraine Regarding Counteraction to Unauthorised Dissemination of Information on Shipment or Transportation of Weapons, Armaments and Ammunition to Ukraine, Movement, Disposition or Deployment of Armed Forces of Ukraine or Other Military Formations Created in Accordance with Laws of Ukraine, Committed During Martial Law or State of Emergency,' No. 2160-IX, 24.03.2022: <https://zakon.rada.gov.ua/laws/show/2160-20#n6>. Law of Ukraine 'On Amendments to Criminal and Criminal Procedure Codes of Ukraine Regarding Improving of Liability for Collaboration Activities and Peculiarities of Application of Preventive Measures for Crimes Against Fundamentals of National and Public Security,' No. 2198-IX, 14.04.2022: <https://zakon.rada.gov.ua/laws/show/2198-20#n6>.
- 84 Law of Ukraine 'On Amendments to the Criminal Procedure Code of Ukraine and the Law of Ukraine "On Pre-trial Detention" Regarding Further Regulation of Activities of Law Enforcement Agencies Under Martial Law,' No. 2111-IX, 03.03.2022: <https://zakon.rada.gov.ua/laws/show/2111-20#n5>. Law of Ukraine 'On Amendments to the Criminal Procedure Code of Ukraine and the Law of Ukraine "On Electronic Communications" to Improve Effectiveness of Pre-trial Investigation in "Hot Pursuit" and Counteracting Cyber Attacks,' No. 2137-IX, 15.03.2022: <https://zakon.rada.gov.ua/laws/show/2137-20#n5>. Law of Ukraine 'On Amendments to Criminal Procedure Code of Ukraine to Improve Procedure for Conducting Criminal Proceedings under Martial Law,' No. 2201-IX, 14.04.2022: <https://zakon.rada.gov.ua/laws/show/2201-20#n13>. Law of Ukraine 'On Amendments to the Criminal Procedure Code of Ukraine to Improve Certain Provisions of Pre-trial Investigation under Martial Law,' No. 2462-IX, 27.07.2022: <https://zakon.rada.gov.ua/laws/show/2462-20#n2>.
- 85 Law of Ukraine 'On Amendments to Criminal Procedure Code of Ukraine Regarding Procedure for Cancellation of Pre-trial Restraint for Military Service under Draft during Mobilisation for Special Period or its Change on Other Grounds,' No. 2125-IX, 15.03.2022: <https://zakon.rada.gov.ua/laws/show/2125-20#n2>. Law of Ukraine 'On Amendments to the Criminal Procedure Code of Ukraine Regarding Selection of Pretrial Restraint for Military Servicemen who Committed Military Crimes During Martial Law,' No. 2531-IX, 16.08.2022: <https://zakon.rada.gov.ua/laws/show/2531-20#n3>.
- 86 Law of Ukraine 'On Amendments to Criminal Procedure Code of Ukraine and Other Legislative Acts of Ukraine on Cooperation with International Criminal Court,' No. 2236-IX, 03.05.2022: <https://zakon.rada.gov.ua/laws/show/2236-20#n5>.
- 87 Law of Ukraine 'On Amendments to Criminal Code, Code of Criminal Procedure and Other Legislative Acts of Ukraine Regarding Regulation of Procedure for Exchange of Persons as Prisoners of War,' No. 2472-IX, 28.07.2022: <https://zakon.rada.gov.ua/laws/show/2472-20#n11>.

## Rules of the Investigative Jurisdiction

The investigation of grave international crimes falls under the jurisdiction of the state security service in accordance with the Criminal Procedure Code of Ukraine “CPCU” (Articles 436, 437, and 438 of the CCU)<sup>88</sup>. In 2016, when the armed conflict had already been ongoing, the State Bureau of Investigations was established. This led to the transfer of investigative authority away from the prosecutor’s office, with the transition completed by 2019. At the same time, the SSU retains exclusive jurisdiction over criminal proceedings arising from the armed conflict<sup>89</sup>. This directly contradicts the underlying rationale behind the reform of the SSU.<sup>90</sup>

In addition to the general provisions of the CPCU, Article 12 of the Law of Ukraine ‘On Ensuring Civil Rights and Freedoms, and the Legal Regime on the Temporarily Occupied Territory of Ukraine’ sets forth special rules concerning the areas under temporary occupation.<sup>91</sup> In practice, particularly following 24 February 2022, the implementation of this provision has led to confusion. Firstly, it applies only to the territories which are recognised as “occupied” at the legislative level. Presently, it only concerns Crimea. As for the other regions not under control of Ukrainian Government, there is an internal directive to extrapolate the same provision by the regional prosecutorial authorities, however it is not confirmed by the law. Existence of such an ambiguity makes the state position in court weak and open to defence challenge on procedural grounds and which may well result in a lost case.

Secondly, its application results in inconsistencies, as the investigative jurisdiction over cases involving grave international crimes committed on the Crimean Peninsula can only be determined by a decision from the Prosecutor General, whereas crimes committed in Donbas, Zaporizhzhia, and Kherson regions are handled under standard procedures. It means that if the territory is no longer under the control of Ukrainian authorities, the authorities with the relevant territorial jurisdiction could be transferred to the other territories under Ukraine’s control but continue to exercise jurisdiction over the uncontrolled territories. This provision was adopted as an additional legislative instrument for the period while the authorities restored their status quo due to the loss of control/occupation. Presently, the issue of jurisdiction has been resolved and therefore, **article 12 is unnecessary and leads to ambiguity and potential procedural vulnerability of a case in court.**

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88 Article 216 / Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

89 Clause 20-1 of the Transitional Provisions / Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

90 SSU reform and EU practices top agenda of expert roundtable in Kyiv: <https://www.euam-ukraine.eu/news/ssu-reform-and-eu-practices-top-agenda-of-expert-roundtable-in-kyiv/>.

91 The Law of Ukraine ‘On Ensuring Civil Rights and Freedoms, and the Legal Regime on the Temporarily Occupied Territory of Ukraine,’ No. 1207-VII, 15.04.2014: <https://zakon.rada.gov.ua/laws/show/1207-18#Text>.

During the martial law imposed on 24 February 2022, the amendments to the CPCU addressed the procedural aspects of pre-trial investigations under this legal regime. However, they did not include the specifics of investigating crimes under international law. In terms of investigative jurisdiction:

- An option of establishing interagency investigative groups involving multiple pre-trial investigative bodies was introduced; it can be done through a resolution issued by the head of the respective pre-trial investigative authority<sup>92</sup>. In practice, this means that interagency investigative groups consisting of investigators from the SSU and the NPU or SBI are set in order to investigate violations of the laws and customs of war in cases where an investigative authority that has no investigative jurisdiction under Article 438 of the CCU can be engaged, such as the NPU, for instance.

This is a solution that the parliamentarians came up with in order to provide the NPU with the authority to investigate alleged war crimes, which otherwise they do not have according to the CPCU.<sup>93</sup> However, it is important to note that creation of interagency investigative groups does not resolve the issue of the lack of jurisdiction for the national police. Their operation in practice is very time-consuming and cumbersome, which results in wasted time, resources and very likely lost evidence. NPU continues to be the first to arrive at the crime scenes, including those involving crimes under international law. However, as a consequence of the procedures currently employed, the admissibility of evidence collected by police officers prior to the establishment of an interagency investigative group could potentially be challenged in the court.

A much more straightforward and logical solution would be to amend the CPCU to allow the NPU to have an investigative jurisdiction to investigate crimes under international law. Alternatively – to foresee a separate procedure which would empower the prosecutors to determine the jurisdiction for the authorities to investigate such crimes.

- Reasons for changing investigative jurisdiction during martial law have been determined.<sup>94</sup> The pre-trial investigation could be delegated to another pre-trial inves-

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92 Article 39(4) 'The head of a pre-trial investigation body during martial law has the right—by their substantiated resolution agreed with the heads of the relevant pre-trial investigation bodies—to create interagency investigation teams and appoint a senior investigator within them to supervise the actions of other investigators.' / Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>. Law of Ukraine 'On Amendments to Criminal Procedure Code of Ukraine to Improve Procedure for Conducting Criminal Proceedings under Martial Law', No. 2201-IX, 14.04.2022: <https://zakon.rada.gov.ua/laws/show/2201-20#n13>.

93 Article 216, Criminal Procedure Code of Ukraine: <https://rm.coe.int/16802f6016>.

94 Article 36(5) 'The Prosecutor General (or person acting in their capacity), a head of the regional public prosecutor's office, their first deputies and deputies shall have the right to delegate (by their substantiated resolution) the pre-trial investigation of any criminal offence to another pre-trial investigation body, including a higher-level investigative unit

tigative authority or transferred to a higher-level investigative unit within the same authority as determined by a decision made by the relevant representative of the prosecutorial body. Given the large number of proceedings related to the armed conflict, the process of determining the investigative jurisdiction can stretch over several months – time which is effectively lost due to the lack of proper regulation.

The above amendments to the CPCU adopted since February 2022 were primarily introduced to facilitate the use and ensure the availability of human resources from various law enforcement agencies for the purpose of conducting pre-trial investigations and prioritising criminal proceedings by involving different tiers within the internal structure of law enforcement agencies. For example, the territorial departments of the SSU are located exclusively at the central regional level, whereas the NPU has investigative departments at the regional level and territorial units across all regions. While an SSU investigator needs to travel from the regional centre to crime scenes in various locations within the region, police investigators can arrive at the scene more swiftly from the cities, towns or districts.

As outlined above, it is clear that the procedural approach to investigative jurisdiction requires well-defined coordination among pre-trial investigative authorities and a comprehensive shared strategic vision of the general approaches and priorities guiding their operations. Nevertheless the mechanism of transferring the investigations between different authorities (“due to ineffectiveness of investigation”) remains the only working one envisaged by part 5 of the article 36 of the CPCU.<sup>95</sup>

The amendments introduced to the CPCU after 24 February 2022 increased expectations of the public prosecutor’s offices that they would play a more substantive role in ensuring the overall coordination of pre-trial investigative authorities in investigation of crimes, including under international law. For example, interagency investigative groups had to become a practical tool for better coordination and the use of a standardised approach to investigations of crimes under international law. Different investigative authorities have an opportunity to exchange their experience and share human resources whose

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within the same body in case of ineffective pre-trial investigation or in the presence of objective circumstances that make it impossible for the relevant pre-trial investigation body to function or conduct pre-trial investigation under the martial law.’ / Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>. Law of Ukraine ‘On Amendments to Criminal Procedure Code of Ukraine to Improve Procedure for Conducting Criminal Proceedings under Martial Law’, No. 2201-IX, 14.04.2022: <https://zakon.rada.gov.ua/laws/show/2201-20#n13>.

95 Criminal Procedure Code of Ukraine, Article 35.5: 5. “In case of ineffective pre-trial investigation, the Prosecutor-General of Ukraine, his deputies, public prosecutors of the Autonomous Republic of Crimea, oblasts, the cities of Kyiv and Sevastopol, and public prosecutors given the same status, shall have the right, by their own motivated rulings, to assign the conduct of pre-trial investigation of any criminal offence to another agency of pre-trial investigation including a higher-level investigation division within the same authority. It is forbidden to assign the conduct of pre-trial investigation of criminal offence referred to the investigative jurisdiction of the National Anti-Corruption Bureau of Ukraine to another agency of pre-trial investigation”: <https://rm.coe.int/16802f6016>.



work should have been overseen and managed by the prosecutors. However, in two years of such a mechanism's existence, its effectiveness remains undetermined.

### Rules of Courts' Jurisdiction

Ukraine's criminal procedure law does not contain any specific rules for establishing courts' jurisdiction over alleged grave international crimes. Ukrainian courts largely lack technical and legal capacity as well as experience to adjudicate cases related to international crimes. Currently, there is no special court (similar to the High Anti-Corruption Court) which would have a mandate to handle a specific category of cases involving crimes under international law. Consequently, there are no special rules governing subject-matter jurisdiction pertaining to crimes committed in the context of armed conflict.

The CPCU establishes two main types of jurisdiction over criminal proceedings:

01. Territorial jurisdiction determines that criminal proceedings are conducted by a court situated within the geographical area where the criminal offence was committed. If multiple criminal offences are committed, the trial will be held by the court geographically located in the area where the alleged offence of higher gravity took place. If the gravity of offences is equal, the trial will be held by the court in the area where the most recent criminal offence was committed. In cases where the location of the criminal offence cannot be determined, the case will be considered by the court which has the territorial jurisdiction over the area where the pre-trial investigation was completed<sup>96</sup>.
02. Instance jurisdiction determines the court responsible for conducting criminal proceedings based on the stage it has reached: whether it is the first instance, appeal instance, or cassation instance<sup>97</sup>.

In the context of armed conflict, amendments were made to the CPCU to introduce the possibility of transferring a case to a different court<sup>98</sup>. In essence, any court of first instance now has the authority to handle any case. During martial law, essentially there is no need to have the connection to the specific territory where the offence was committed. This creates a higher risk that the proceedings will be brought before a judge who

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96 Article 32 / Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

97 Article 33 / Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

98 Can be done before the trial in exceptional cases at the place of residence of the accused, the majority of victims or witnesses, as well as where it is impossible to administer justice by the respective court (in particular, in the case of martial law, anti-terrorist operation or measures to ensure national security and defence, repulsion and deterrence of the armed aggression of the Russian Federation in Donetsk and Luhansk regions). // Article 34 / Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>

In essence, any court of first instance now has the authority to handle any case...This creates a higher risk that the proceedings will be brought before a judge who has no experience with such cases.

has no experience with such cases. **This is what *de facto* is happening right now**<sup>99</sup>. Such proceedings are typically dealt with following the principles, standards, and methodologies used for ordinary criminal offences.

This adversely affects the quality of criminal processes. The line of reasoning behind war crimes verdicts following 24 February 2022 resembles the reasoning that applies to ordinary criminal offences. This is particularly evident in cases involving premeditated murder or robbery, which are classified under Article 438 of the Criminal Code of Ukraine<sup>100</sup>. The context of the armed conflict is outlined only in the background information part of the decision<sup>101</sup>, which is often copy pasted from the Notices of Suspicion and indictments and lacks description of contextual elements pertaining to the nature and circumstances of an alleged crime<sup>102</sup>. There are rare individual decisions in which attempts have been made to implement international legal standards<sup>103</sup>

### Timeframe for Pre-Trial Investigation

The CPCU clearly outlines the timeframe within which the pre-trial investigation in criminal proceedings must be completed. Up until 2014, the provisions regulating the matter determined the length of the investigation as linked to the moment when a person was notified of being a suspect. However, in 2018<sup>104</sup>, criminal procedural law underwent amendments to establish a clear period for the investigations from the moment it was opened.

99 Three more war crime verdicts were handed down in Poltava. An employee of the 'DPR Supreme Court' is one of the convicts // Media Initiative for Human Rights, 25.06.2022: <https://mipl.org.ua/u-poltavi-vynesly-shhe-try-vyroky-zavoyenni-zlochyny-sered-zasudzhennyh-pracivnyk-verhovnogo-sudu-dnr/>.

100 Decision of the Ivankiv District Court of Kyiv Region dated 28.06.2023: <https://reyestr.court.gov.ua/Review/111894270>.

101 Decision of the Irpin City Court of Kyiv Region dated 12.05.2023: <https://reyestr.court.gov.ua/Review/110824305>.

102 Notice of suspicion in committing a criminal offence issued to Oleksii Kroshkin // Office of the Prosecutor General, 01.09.2022: <https://www.gp.gov.ua/ua/posts/povidomlennya-pro-pidozru-u-vcinenni-kriminalnogo-pravoporushennya-kroskinu-oleksiyu>. Notice of suspicion and summons issued to I.Y. Serebrov and O.V. Sudakov on 04.07.2022, 05.07.2022, and 06.07.2022 (with Russian translation) // Office of the Prosecutor General, 17.06.2022: <https://www.gp.gov.ua/ua/posts/povidomlennya-pro-pidozru-ta-povistka-pro-viklik-serebrovu-iyu-ta-sudakovu-ov-na-04072022-05072022-ta-06072022-z-perekladom-na-rosiisku-movu>. Notice of suspicion and summons issued to A.D. Dil on 06.06.2022, 07.06.2022, and 08.06.2022 (with Russian translation) // Office of the Prosecutor General, 07.06.2022: <https://www.gp.gov.ua/ua/posts/povidomlennya-pro-pidozru-dil-ad-z-perekladom-na-rosiisku-movu>. Notice of suspicion and summons issued to O.V. Dudarev on 04.07.2022, 05.07.2022, and 06.07.2022 (original and translation) // Office of the Prosecutor General, 09.06.2022: <https://www.gp.gov.ua/ua/posts/povidomlennya-pro-pidozru-ta-povistki-pro-viklik-dudarjeva-ov-na-04072022-05072022-06072022-original-ta-pereklad>. Notice of suspicion and summons issued to S.I. Agafonov on 30.06.2022, 05.07.2022, and 11.07.2022 (original and translation) // Office of the Prosecutor General, 09.06.2022: <https://www.gp.gov.ua/ua/posts/povidomlennya-pro-pidozru-agafonovu-si>.

103 Supreme Court Decree, 28 Feb 202, case 753/14148/21: <https://reyestr.court.gov.ua/Review/117442733>; Kyiv Appellate Court Resolution, 10 July 2023, case № 753/14148/21, <https://reyestr.court.gov.ua/Review/113698929>; Darnytskyi Regional Court, Kyiv city, verdict 24 April 2023, case № 753/14148/21: <https://reyestr.court.gov.ua/Review/110409601>.

104 Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine Regarding Simplification of Pre-trial Investigation of Certain Categories of Criminal Offences', No. 2617-VIII, 22.11.2018: <https://zakon.rada.gov.ua/laws/show/2617-19#n586>.

Considering that grave international crimes are classified as grave or especially grave crimes according to the Criminal Code of Ukraine, the timeframe for pre-trial investigation starting from the moment when information is entered into the URPTI until the day a notice of suspicion is served to a person was 18 months. Such pre-trial investigations must have been completed within two months from the day when the notice of suspicion was served. This period could be extended, yet typically, within this category, it should not have exceeded twelve months from the date when the person was notified of suspicion with relation to a grave or especially grave crime.<sup>105</sup> This principle applied in particular to grave international crimes. This provision contradicted international due process standards, as investigations into grave crimes should not be time limited.

In the course of investigations, a variety of situations emerged concerning the application of this provision. Proceedings related to the aftermath of the armed conflict in Crimea and Donbas, registered following the 2018 implementation of the provisions, were integrated into the previously opened investigations. This was due to the fact that the new regulations were not retroactively applicable, and thus such investigations had no temporal limitations. Alternatively, another approach was also used whereby individual episodes were extracted from the ongoing investigations as new investigations, thereby initiating a new time period and providing law enforcement agencies with additional time for investigation.

The consequences of the full-scale invasion shed a light on a different perspective in relation to these provisions. In a situation where hundreds and thousands of proceedings were registered daily throughout Ukraine after 24 February 2022, the procedural burden on both the public prosecutor's offices and courts was not factored in, considering the investigation period and the need to extend it. As a result, starting from late August 2023, the time for proceedings registered in February 2022 started to run out. Initiating their extension could have paralysed the entire criminal justice system as it would have needed to be done in tens of thousands of the investigations. Otherwise, these investigations might have had to be closed due to the expiration of the pre-trial investigation period<sup>106</sup>.

Prosecutors were looking to the Parliament to address this issue<sup>107</sup>. Finally at the last minute the Verkhovna Rada of Ukraine (parliament) adopted the relevant law 'On Amendments to Criminal Procedure Code of Ukraine Regarding Peculiarities of Calculat-

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105 Article 219 / Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

106 The grounds for closing criminal proceedings are stipulated in Article 284 of the CPCU: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>. In particular, Paragraph 1 Subparagraph 3 may be used: 'no sufficient evidence has been obtained to prove the person's guilt in court, and options to obtain such evidence have been exhausted.'

107 We can almost certainly identify those who orchestrated the crimes committed by the occupiers – Head of War Department // Interfax Ukraine, 02.08.2023: [https://interfax.com.ua/news/interview/926527.html?fbclid=IwAR0fYe9\\_jq7IaczVpEwGuGFWoyaGhvJbsumgKZ0qm0XrXtfNMXBLKQO3j\\_4](https://interfax.com.ua/news/interview/926527.html?fbclid=IwAR0fYe9_jq7IaczVpEwGuGFWoyaGhvJbsumgKZ0qm0XrXtfNMXBLKQO3j_4)

ing Timeframe for Pre-trial Investigation under Martial Law'<sup>108</sup>. The provisions of this law introduced an exception to the investigation periods during martial law for proceedings where no person had been informed of being a suspect since the moment when the information about a criminal offence had been recorded in the URPTI and from the date martial law was introduced. The time limit for the pre-trial investigation was not set for proceedings under Articles 437–439 and Article 442 Paragraph 1 of the CCU (aka international crimes).

However, these provisions were changed again. Within the framework of reforming the Specialised AntiCorruption Prosecutor's Office new CPCU amendments were adopted in December 2023. Some of these amendments affected article 219 of the CPCU (time limits for pre-trial investigations).<sup>109</sup> The Law abolished any of the time period limitations for the pre-trial investigations having only left an obligation for the time period for completing pre-trial investigations following serving of the notice of suspicion.<sup>110</sup> This resulted in abolishing any of the previous amendments that concerned investigations of grave crimes. Therefore in the current version of the CPCU there are no clearly defined pre-trial investigation time limits.

### International Standards on the Statutory Limits

The general rule that statutory limitations do not apply to grave international crimes is a norm of customary international law<sup>111</sup>. Firstly, it refers to the statute of limitations which would prevent the prosecution of such cases after a certain period of time. The trials after World War II formed a practical approach later enshrined in the Convention on the Non-Applicability of Statutory Limitations to WWar Crimes and Crimes against Humanity (1968)<sup>112</sup> and the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes (1974)<sup>113</sup>. The work of the International Criminal Court, in ac-

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108 Law of Ukraine 'On Amendments to Criminal Procedure Code of Ukraine Regarding Peculiarities of Calculating Timeframe for Pre-trial Investigation under Martial Law,' No. 3341-IX, 23.08.2023: <https://zakon.rada.gov.ua/laws/show/3341-20#n2>.

109 Article 219 CPCU: <https://rm.coe.int/16802f6016>.

110 Law of Ukraine "Introducing the Amendments to the Criminal Procedure Code of Ukraine and other Legislative Acts of Ukraine concerning Autonomy of the Specialised Anti Corruption Prosecutor's Office" No 3509 – IX 08.12.2023 <https://zakon.rada.gov.ua/laws/show/3509-20#n14>.

111 Rule 160. Statutes of limitation may not apply to war crimes. / Customary IHL // ICRC: <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule160>.

112 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity // General Assembly of the United Nations, 26.11.1968: [https://www.un.org/en/genocideprevention/documents/atrocitiy-crimes/Doc.27\\_convention%20statutory%20limitations%20warcrimes.pdf](https://www.un.org/en/genocideprevention/documents/atrocitiy-crimes/Doc.27_convention%20statutory%20limitations%20warcrimes.pdf).

113 European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes // Council of Europe, 25.01.1974: <https://rm.coe.int/168007617f>. Конвенція набрала чинності для України 31.10.2008 // Верховна Рада України: [https://zakon.rada.gov.ua/laws/show/994\\_125#Text](https://zakon.rada.gov.ua/laws/show/994_125#Text).

cordance with the Rome Statute, is not subject to any statute of limitations for crimes under its jurisdiction<sup>114</sup>.

In addition, pre-trial investigation time limits may also restrict the investigation of grave international crimes, forcing the authorities to hand the case over for trial within a certain period defined by law. Article 4 of the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity obliges States Parties to abolish limitations under national law that may affect the prosecution of grave international crimes<sup>115</sup>. Based on the requirements of Articles 2 and 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court of Human Rights emphasises that the length of investigation of grave international crimes cannot be an argument rendering such investigation ineffective. The Court pointed out that the length of investigation in such cases is influenced by the gravity of the crimes committed, the large number of victims, and the significant public interest in the outcomes.<sup>116</sup>

There are several reasons for such an approach.<sup>117</sup> Firstly, grave international crimes by their nature encroach on the interests, peace and security of the entire international community. Therefore, not only the country where the crimes took place, but also the international community as a whole is interested in a proper response to such acts. Secondly, the legal norms prohibiting the commission of such crimes have no temporal restrictions and are universal in terms of international law. In addition, they are based on the provisions of customary law, which places such regulation beyond temporal limitations. Thirdly, effective justice is a key deterrent from such acts in the future. At the same time, the investigation of grave international crimes is closely linked to the restoration of violated human rights and is the basis for building trust and developing cooperation between states.

114 Article 29 Non-applicability of statute of limitations // Rome Statute of the International Criminal Court, 1998: <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

115 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity // General Assembly of the United Nations, 26.11.1968: [https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.27\\_convention%20statutory%20limitations%20warcrimes.pdf](https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.27_convention%20statutory%20limitations%20warcrimes.pdf).

116 Brecknell v. The United Kingdom, appl. # 32457/04 // ECHR, 27.11.2007: [https://hudoc.echr.coe.int/eng?i=001-83470\\_Association%2021%20December%201989%20and%20Others%20v.%20Romania%20appl.%2033810/07](https://hudoc.echr.coe.int/eng?i=001-83470_Association%2021%20December%201989%20and%20Others%20v.%20Romania%20appl.%2033810/07) // ECHR, 24.05.2011: [https://hudoc.echr.coe.int/eng?i=001-104864\\_Janowiec%20and%20Others%20v.%20Russia%20GC%20appl.%2055508/07%20and%2029520/09](https://hudoc.echr.coe.int/eng?i=001-104864_Janowiec%20and%20Others%20v.%20Russia%20GC%20appl.%2055508/07%20and%2029520/09) // ECHR, 21.10.2013: [https://hudoc.echr.coe.int/eng?i=001-127684\\_Aslakhanova%20and%20Others%20v.%20Russia%20appl.%202944/06%20and%208300/07%2050184/07%20332/08%2042509/10](https://hudoc.echr.coe.int/eng?i=001-127684_Aslakhanova%20and%20Others%20v.%20Russia%20appl.%202944/06%20and%208300/07%2050184/07%20332/08%2042509/10) // ECHR, 18.12.2012: <https://hudoc.echr.coe.int/eng?i=001-115657>.

117 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity // General Assembly of the United Nations, 26.11.1968: [https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.27\\_convention%20statutory%20limitations%20warcrimes.pdf](https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.27_convention%20statutory%20limitations%20warcrimes.pdf).

One of the fundamental tasks of justice for grave international crimes is to end impunity. The effectiveness of its implementation in practice depends on the cooperation of international justice mechanisms, such as the ICC, and national systems. Given the limited capacity of international justice mechanisms, national systems should be strengthened or rebuilt to ensure effective prosecution of such cases.<sup>118</sup>

The practice of different countries after the events of World War II has shown that the specialisation of investigative, prosecutorial and judicial bodies can ensure effective investigation of grave international crimes and distinguish approaches to their prosecution from ordinary crimes. Thus, the United States, Germany, Canada, the United Kingdom, and Australia were among the first countries to introduce investigation of grave international crimes into their national systems. The basis for their work was the conclusions of national commissions of inquiry into crimes committed in the territory of these countries.<sup>119</sup>

The adoption of the Rome Statute of the ICC, as well as proliferation of the application of the universal jurisdiction principle by different states, led them towards finding solutions to effectively incorporate the prosecution of grave international crimes into the national justice systems. In addition to establishing specialised units at the level of investigative, prosecutorial and judicial authorities that provide the appropriate level of expertise, building the infrastructure at the national level required an appropriate legislative framework. Germany, the Netherlands, Sweden and France are among the countries that have been able to implement such solutions.<sup>120</sup>

The effectiveness of such units directly depends on the political will to support their activities, the availability of necessary resources and a suitable quality

118 Paper on some policy issues before the Office of the Prosecutor // International Criminal Court, 2003: [https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905\\_Policy\\_Paper.pdf](https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf).

119 STRATEGIES FOR THE EFFECTIVE INVESTIGATION AND PROSECUTION OF SERIOUS INTERNATIONAL CRIMES: The Practice of Specialised War Crimes Units // Redress, FIGH, 2010: <https://redress.org/wp-content/uploads/2018/01/Dec-10-The-Pracice-of-Specialised-War-Crimes-Unit.pdf>.

120 The Long Arm of Justice: Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands // Human Rights Watch, 2014: <https://www.hrw.org/report/2014/09/17/long-arm-justice/lessons-specialized-war-crimes-units-france-germany-and/>. Universal Jurisdiction Law and Practice in the Netherlands // OSJI, Trials International, 2019: <https://trialinternational.org/wp-content/uploads/2019/05/Universal-Jurisdiction-Law-and-Practice-in-The-Netherlands.pdf>. Universal Jurisdiction Law and Practice In Germany // OSJI, Trials International, 2019: <https://trialinternational.org/wp-content/uploads/2019/05/Universal-Jurisdiction-Law-and-Practice-in-Germany.pdf>. Universal Jurisdiction Law and Practice in France // OSJI, Trials International, 2019: <https://trialinternational.org/wp-content/uploads/2019/05/Universal-Jurisdiction-Law-and-Practice-in-France.pdf>. Universal Jurisdiction Law and Practice in Sweden // OSJI, Trials International, 2020: <https://trialinternational.org/wp-content/uploads/2022/05/UJ-Sweden.pdf>.

of the legal framework for their work. In addition, the relevant units should be staffed by professional employees with specialist knowledge and skills in investigating grave international crimes. In addition to investigators, prosecutors and judges, specialisation may be required from experts and specialists involved in the investigation of specific crimes<sup>121</sup>. Therefore, additional state resources should be directed to the setting up and support of the relevant training and professional development programs.

The EU states, pursuant to the provisions of the Rome Statute of the ICC, have determined that the work of investigative authorities and migration services is fundamental in identifying the facts and perpetrators of grave international crimes. Establishing separate specialised units at the level of these authorities can ensure the implementation of the principle of complementarity in the work of the ICC by the relevant states. At the same time, the information obtained by such units becomes the basis for interstate cooperation.<sup>122</sup> For example, in the Netherlands, specialised units for grave international crimes were created in the immigration service, police and the prosecutor's office. Specialisation has also been introduced among investigating judges, judges of first instance and appellate courts. In addition, a separate unit within the Ministry of Justice ensures international cooperation in the investigation of such cases and develops general policies at the national level.<sup>123</sup>

States with the specialisation in the investigation of such cases based on the principle of universal jurisdiction have the judges at the first instance or appellate level who were trained to consider grave international crimes. For example, this approach has been implemented in the Netherlands as the final element in the establishment of the special war crimes unit. Other countries, on the other hand, have a separate procedure for reviewing this category of cases without a requirement for specialisation at the level of the judiciary. In Germany, a panel of 3-5 judges is formed to consider a specific incident of a grave international crime. In France, the relevant proceedings are considered by an ad hoc court consisting of three judges and six jurors.<sup>124</sup>

121 The Long Arm of Justice: Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands // Human Rights Watch, 2014: <https://www.hrw.org/report/2014/09/17/long-arm-justice/lessons-specialized-war-crimes-units-france-germany-and/>.

122 COUNCIL DECISION on the investigation and prosecution of genocide, crimes against humanity and war crimes 2003/335/JHA // The Council of the European Union, 8 May 2003: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003D0335>.

123 Universal Jurisdiction Law and Practice in the Netherlands // OSJI, Trials International, 2019: <https://trialinternational.org/wp-content/uploads/2019/05/Universal-Jurisdiction-Law-and-Practice-in-The-Netherlands.pdf>.

124 Universal Jurisdiction Law and Practice in the Netherlands // OSJI, Trials International, 2019: <https://trialinternational.org/wp-content/uploads/2019/05/Universal-Jurisdiction-Law-and-Practice-in-The-Netherlands.pdf>.

Given the scale of grave international crimes subject to investigation at the national justice system, specialisation only at the level of the judiciary may not be an adequate solution. For states directly affected by armed conflict, the establishment of separate specialised courts is a necessary step to ensure effective justice. They can be integrated into the national justice system or exist outside of the system, composed exclusively of national experts or include an international element – the design of such a court will depend on the requirements, the nature of the violations and its personal jurisdiction, the quality of national legislation, available financial resources and other factors.<sup>125</sup> In any case, such courts rely on the work of specialised units within the investigative and prosecutorial authorities.

One example of the successful operation of such a separate court is the Special Criminal Court for the Central African Republic. It was established as a **hybrid court (combining national and international experts)** within the national justice system and includes separate units of investigators, prosecutors and judges<sup>126</sup>. In addition to its work at the national level, the Court cooperates with other national justice mechanisms and the International Criminal Court.<sup>127</sup>

## Domestic Evidentiary Standards

### Sources and Status of Evidences

The CPCU does not determine a specific approach to gathering evidence and conducting procedural actions when investigating crimes under international law. The general rules of evidence and procedure in Ukraine require that evidence must be examined during the trial. Certain types of evidence collected during the pre-trial investigation will be relevant only for the preparation of a notice of suspicion and an indictment. Interviews of the victims and witnesses conducted during the investigation stage is inadmissible evidence in court unless their testimonies are examined during the trial in the presence of a judge. Protocols of procedural steps, physical evidence and expert conclusions obtained during investigation must be considered by the court. The standard procedure for conducting criminal proceedings is also applied in the context of the ongoing armed conflict

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125 Options for Justice: A Handbook for Designing Accountability Mechanisms for Grave Crimes // Open Society Foundation, 2018: <https://www.justiceinitiative.org/publications/options-justice-handbook-designing-accountability-mechanisms-grave-crimes/>

126 Central African Republic: First Trial at the Special Criminal Court // Human Rights Watch, 12.04.2022: <https://www.hrw.org/news/2022/04/12/central-african-republic-first-trial-special-criminal-court>

127 The Special Criminal Court Must Fill the Justice Gap Left by the ICC in Central African Republic // Opinio Juris, 23.10.2023: <https://opiniojuris.org/2023/10/23/the-special-criminal-court-must-fill-the-justice-gap-left-by-the-icc-in-central-african-republic/>



in Ukraine. However, since 2014, Ukrainian investigators and prosecutors were faced with the necessity to examine certain types of evidence that are not included in the criminal procedure law due to the distinct nature of investigations of crimes under international law.

*Information from open sources:*

Status of the open-source information can be analysed through the prism of several provisions of the CPCU. Firstly, Article 84 stipulates that the sources of evidence include testimony, material evidence, documents, and expert opinions<sup>128</sup>. Secondly, Article 99 outlines the types of information that can be deemed a document in criminal proceedings. Approved formats include photographs, audio and video recordings, as well as other media<sup>129</sup>. The definition is primarily focused on the treatment of information obtained from closed sources, yet courts evaluate the use of information from open sources **under these very same provisions**. Courts have the discretion to accept information from open source as admissible evidence if it was collected and documented in accordance with the requirements of the CPCU. However, other provisions of the law require investigators and prosecutors to present a written transcript of this information when using it in a criminal investigation. For instance, an inspection report which describes where the photo or video was published.<sup>130</sup>

The use of information from open sources became trendy in the investigation of grave international crimes in Ukraine, yet its handling by authorities and other stakeholders remains somewhat regulated with a low standard. Consequently, some prosecutors and investigators try to use data from open sources as evidence, albeit applying the same methodology prescribed by the CPCU used for closed source information under Article 99. There are neither requirements nor standards of verification of the open source information contained in the CPCU.

It is important to consider existing limitations of the Ukrainian procedural legislation in this area. For example, if relevant information was collected by a third party (an NGO) and is stored in a digital archive on the servers outside of Ukraine or a cloud, Ukrainian authorities cannot automatically use this information in their investigations as it would be inadmissible. The only way to “legalise” this information for the purposes of Ukraine’s CPC, is for the authorities to use these links as a tip of what to look for and retrace all the investigative steps as required by the CPC provided that the links are still available

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128 Article 84 Paragraph 2 / Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

129 Article 99 Paragraph 2 / Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

130 Article 237 / Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>. Law of Ukraine ‘On Amendments to the Criminal Procedure Code of Ukraine and the Law of Ukraine “On Electronic Communications” to Improve Effectiveness of Pre-trial Investigation in “Hot Pursuit” and Counteracting Cyber Attacks,’ No. 2137-IX, 15.03.2022: <https://zakon.rada.gov.ua/laws/show/2137-20#n5>.

The only way to “legalise” this information [collected by a third party] for the purposes of Ukraine’s CPC, is for the authorities to use these links as a tip of what to look for and retrace all the investigative steps

online in Ukraine and have not been deleted. Such an approach does not correspond with the international standards of preservation of information from open sources, it leads to loss of possibly important evidence and severe limitations of its use.

Furthermore, as mentioned above, treating information from open sources the same way as closed sources means that **there is no requirement for as rigorous verification as required by the international standards**. This leads to the unreliability of such evidence and undermines quality and fairness of the investigation.

Investigation of grave crimes requires technical solutions which will alleviate hardship experienced by the investigative authorities and facilitate better coordination among them. Following the start of the full-scale invasion, the OPG set up a webportal [warcrimes.gov.ua](https://warcrimes.gov.ua), which was presented to the general public as a “hub of digital evidence”<sup>131</sup>. Anyone can share information through the portal with the OPG including photos and videos from a place of an incident along with their contact information. On the one hand, the portal is an additional communication channel for witnesses and authorities<sup>132</sup>. On the other hand, using this information for the purposes of the investigation means that authorities must set up data protection protocols as well as ensure their preservation on the suitable servers. This remains a significant challenge for the authorities, and there is no publicly available information to this effect on the webportal. In addition, sharing of the data does not have any connection to a specific investigation and the evidence collection procedure. Therefore, authorities must spend time and resources to formally track down photo and/or video files with an attached statement from the original source.

The process of preserving such information is merely the first step to ensure its admissibility as evidence for grave international crimes. Although Article 99 of the CPCU refers to the verification of information by investigators or prosecutors, Ukrainian legislation lacks a prescribed algorithm for doing it. The verification of such information is left to the discretion of the investigators, and its admissibility as evidence – to the discretion of judges. This means that any electronic file, even if unverified, can potentially be used as evidence. It is only during the direct examination of the complete evidence that the court might raise concerns about its credibility, yet **there is no specific mechanism for**

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131 <https://warcrimes.gov.ua/>.

132 Results of work on combating crimes committed in the context of armed conflict in 2023 // Office of the Prosecutor General, 18.01.2024: <https://www.gp.gov.ua/ua/posts/rezultati-roboti-z-protidiyi-zlocinam-vcinenim-v-umovax-zbroinogo-konfliktu-za-2023-rik>.

**its verification at the pre-trial investigation phase.** Such approach ultimately affects the quality and objectivity of judgments.

## Standards

Open source information has become one of the types of evidence of grave international crimes. Currently, such data is being collected in the context of investigations into the situations in Syria, Myanmar, Libya and Ukraine as part of the work of various justice mechanisms.

Established by the UN, the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic (IIM) has become a hub that accumulates the collected data on alleged grave international crimes for subsequent proceedings in national, regional and international courts or tribunals<sup>133</sup>. The work of the mechanism ensures the continuous collection of relevant information in accordance with the standards of international criminal law, as well as an uninterrupted chain of custody of evidence at its disposal<sup>134</sup>. The 2018 report of the UN Commission of Inquiry on Syria states that the volume of video and other images – as well as the role played by social media – is unprecedented in any other accountability process with respect to international crimes<sup>135</sup>.

The Independent Investigative Mechanism for Myanmar, established by the UN, has the mandate to collect, among other things, “photographic, video or other audiovisual imagery or material, digital or other electronic items”<sup>136</sup>. The information obtained by the Mechanism was used in the ICJ case concerning alleged genocide in Myanmar<sup>137</sup>. At the same time, the Gambia, in parallel with the ICJ case, initiated legal proceedings against Facebook in the United States, pointing out that the social network began to delete content that could serve as evidence for justice processes. Facebook was actively used by Myanmar officials not only as a news portal, but also to disseminate information about various violations.

133 Resolution A/RES/71/248 // UN GA, 21.12.2016: <https://documents.un.org/doc/undoc/gen/n16/462/01/pdf/n1646201.pdf?token=tstYGBHou0jC1XtGYb&fe=true>.

134 Implementation of the resolution establishing the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011: Report of the Secretary-General // UN GA, 19.01.2017: <https://documents.un.org/doc/undoc/gen/n17/015/53/pdf/n1701553.pdf?token=Q9QxVkcUYSu3eptBGL&fe=true>.

135 Report of the Independent International Commission of Inquiry on the Syrian Arab Republic // UN, A/HRC/39/65, 09.08.2018: <https://digitallibrary.un.org/record/1641475>.

136 Letter dated 16 January 2019 from the Secretary-General addressed to the President of the General Assembly // UN GA, 21.01.2019: <https://iimm.un.org/wp-content/uploads/2022/02/N1901663.pdf>.

137 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar) // ICJ: <https://www.icj.org/case/178>.

In addition, given the ongoing investigation process, Facebook had to disclose personal information of users who disseminated such information in order to confirm its credibility.<sup>138</sup>

The work of the International Criminal Court is currently closely related to the assessment of the admissibility of open source data as evidence<sup>139</sup>. Rule 63(2) of the ICC Rules of Procedure and Evidence establishes the authority of the Chamber to assess freely, at its discretion, all evidence submitted in order to determine its relevance or admissibility<sup>140</sup>. This allows the Court to take a broad approach to evaluating evidence and examining its various types.

In the Bemba case, the Trial Chamber, in assessing media reports as evidence, noted that press reports may be admitted for limited purposes to be determined on a case-by-case basis, such as corroborating other pieces of evidence or assessing the prosecution's claim that the acts committed were known to the general public, which may have an impact on proving the accused's knowledge of the crimes charged<sup>141</sup>.

In the case against Al-Werfalli, the Court used videos from social media as evidence to issue an arrest warrant. The ICC admitted the posts by the Media Centre of the Al-Saiqa Brigade depicting instances of extrajudicial executions.<sup>142</sup> When considering the admissibility of open-source data in the Al Hassan case, the ICC found no procedural bars that precluded the admission of such information, provided that the relevance and probative value of each document is substantiated, and noted that consideration thereof would be better rendered in light of the entirety of the evidence<sup>143</sup>.

To systematise approaches to working with this category of information, the Berkeley Protocol on Digital Open Source Investigations was developed. Its stan-

138 Order in re: The Republic of the Gambia v. Facebook, Inc. // The Washington Post, 23.09.2021: [https://www.washingtonpost.com/context/order-in-re-the-republic-of-the-gambia-v-facebook-inc/6fd698bc-034f-43e2-a544-5592e174bc8a/?itid=ik\\_inline\\_manual\\_1](https://www.washingtonpost.com/context/order-in-re-the-republic-of-the-gambia-v-facebook-inc/6fd698bc-034f-43e2-a544-5592e174bc8a/?itid=ik_inline_manual_1).

139 The New Forensics: Using Open Source Information to Investigate Grave Crimes // Human Rights Center School of Law University of California, Berkeley, 2018: [https://www.law.berkeley.edu/wp-content/uploads/2018/02/Bellagio\\_report\\_2018\\_7.pdf](https://www.law.berkeley.edu/wp-content/uploads/2018/02/Bellagio_report_2018_7.pdf).

140 Rules of Procedure and Evidence // ICC, 2005: <https://www.icc-cpi.int/sites/default/files/RulesProcedureEvidenceEng.pdf>.

141 Decision on the admission into evidence of items deferred in the Chamber's 'Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute / Case of Prosecutor v Jean-Pierre Bemba Gombo // ICC, 27.06. 2013: [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2013\\_04725.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2013_04725.PDF).

142 Warrant of Arrest / Case of the Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli, Situation in Libya // ICC, 15.08.2017: [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2017\\_05031.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2017_05031.PDF).

143 Decision on Prosecution application submitting 63 open source exhibits into evidence / Case of the Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmood, Situation in Mali // ICC, 15.06.2021: [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021\\_05447.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_05447.PDF).

dards cover the possibility of using information on grave international crimes and serious human rights violations<sup>144</sup>. It describes approaches to identification and collection of such information, conditions for its preservation, verification, and further analysis. The Protocol sets out the basic principles that must be observed when working with open source information:

- *Professional principles*, which include accountability (open source investigators must be accountable for their actions, which can often be ensured through clear documentation, record-keeping and oversight), competency (open source investigators must have proper training and technical skills to execute the activities in which they engage), objectivity (open source investigators should understand the potential for personal, cultural and structural biases to affect their work and the need to take countermeasures to ensure objectivity), legality (open source investigations should comply with applicable laws, which means that investigators need to have a baseline understanding of the laws that apply to their work) and security awareness (investigators must be aware of their work and the consequences of their actions).
- *Methodological principles*, which include accuracy (only relying on credible materials for investigations), data minimization (digital information should only be collected and processed if it is justified for an articulable purpose, necessary for achieving that purpose; and proportional to the ability to fulfil that purpose), preservation (prevent undercollection of information so that relevant and potentially probative evidence is not lost), and security by design (organisations collecting information should invest in and implement appropriate technical and structural measures to ensure secure operations).
- *Ethical principles* which require adherence to the principle of dignity, humility, inclusivity, independence and transparency.<sup>145</sup>

The Berkeley Protocol standards are also used by the ICC as a requirement for working with open source information. In 2022, the Office of the Prosecutor of the ICC, together with Eurojust, presented the guidelines for civil society organisations on documenting international crimes and human rights violations

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144 Berkeley Protocol on Digital Open Source Investigations: A Practical Guide on the Effective Use of Digital Open Source and Information in Investigating Violations of International Criminal, Human Rights and Humanitarian Law // OHCHR, 03.01.2022: <https://www.ohchr.org/en/publications/policy-and-methodological-publications/berkeley-protocol-digital-open-source>.

145 Berkeley Protocol on Digital Open Source Investigations: A Practical Guide on the Effective Use of Digital Open Source and Information in Investigating Violations of International Criminal, Human Rights and Humanitarian Law // OHCHR, 03.01.2022: <https://www.ohchr.org/en/publications/policy-and-methodological-publications/berkeley-protocol-digital-open-source>.

for accountability purposes, which include references to the Berkeley Protocol in relation to investigating open-source information<sup>146</sup>.

The Office of the Prosecutor General also started to look for ways to implement Protocol's standards in practice, having formally instructed oblast prosecutor offices on requirements on how to document open source information. As discussed above practical implementation remains inadequate due to domestic legislative limitations.

*Intelligence data:*

In the context of the armed conflict, a significant volume of information relevant for investigating violations of international humanitarian law comes from the data obtained by intelligence agencies. However, the use of such data is prohibited according to the criminal procedural legislation of Ukraine. The CPCU establishes the principle of evidence admissibility, stipulating that evidence is admissible if acquired in accordance with the procedure outlined by this Code<sup>147</sup>. However, both the content and the means of obtaining intelligence information are classified as state secrets, the disclosure of which could jeopardise the national security of the state<sup>148</sup>.

Therefore, in reality, intelligence data remain outside the legal scope of criminal proceedings, as confirming the source or acquisition method of such information would be impossible. Even if amendments are made to the CPCU, allowing the use of intelligence data as evidence, it will be difficult to implement them in practice without the relevant decision by the intelligence agencies on declassifying the information, as they will violate the provisions of special legislation that pertains to protection of the classified information.

*Witness and victims testimony:*

As many witnesses or victims of grave international crimes have become internally displaced, fled the country, or are in the occupied territories, an opportunity to conduct remote interviews at the pre-trial investigation stage becomes crucial. The CPCU does grant the right to conduct interviews, as well as the identification of persons or items via video conference<sup>149</sup>. However, this can be procedurally implemented only within the territory under Ukraine's control, which falls under the jurisdiction of pre-trial investigation bodies.

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146 Documenting international crimes and human rights violations for accountability purposes: Guidelines for civil society organisations // OTP ICC, Eurojust, EUGN, 2022: [https://www.icc-cpi.int/sites/default/files/2022-09/2\\_Eurojust\\_ICC\\_CSOS\\_Guidelines\\_2-EN.pdf](https://www.icc-cpi.int/sites/default/files/2022-09/2_Eurojust_ICC_CSOS_Guidelines_2-EN.pdf).

147 Article 86 / Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

148 Law of Ukraine 'On State Secret', No. 3855-XII, 21.01.1994: <https://zakon.rada.gov.ua/laws/show/3855-12#Text>.

149 Article 232 / Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

In practice, investigators and prosecutors often look for solutions to address this challenge. It is easier when a person is in Ukraine-controlled territory, as the investigative action can be entrusted to the relevant local law enforcement agency. However, when a witness or a victim is abroad or in the occupied territory, the situation becomes more complex. Some proceedings involve communicating with such persons via a video call, and the outcomes of these conversations are documented in reports that are then included in the investigation file. While such reports may not carry the same weight as official interview records, they serve to preserve the information obtained. Nevertheless, CPCU envisages a general rule according to which in order to obtain a testimony, an investigator or a prosecutor must interview them. Another common practice is to interview people abroad at Ukrainian embassies, as those are considered Ukrainian territory and fall under national jurisdiction. Such methods do not eliminate the need for their direct examination during trial.

The CPCU also allows for an interview of a party to an investigation before an investigating judge during the pre-trial investigation phase<sup>150</sup>. During the martial law regulation under part 11 of art. 615 CPCU allows the use of videorecording of the witness, victim or a suspect (provided there is also a defence lawyer present) in the court, without the need to record the video before an investigating judge.<sup>151</sup> This option is particularly important given the risk of losing testimony over time, especially considering the duration of investigations and the context of armed conflict. The interview process is similar to that used during court proceedings and is applicable to witnesses and victims. An amendment from 28 July 2022 allowed for following the same interviewing procedure for those persons regarding whom an authorised entity made a decision to exchange as a prisoner of war<sup>152</sup>.

However, since the court directly examines evidence, the testimony obtained during the pre-trial investigation may be struck out during the trial due to the lack of opportunity to examine this person in the courtroom during the hearing. Even if the proper procedure

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150 ...due to existence of other circumstances that may make interviewing them in court impossible or affect the completeness or reliability of testimony (in particular, a threat to witness's or victim's life and health, their serious illness, or other circumstances), a party to criminal proceedings may file a motion with the investigating judge requesting such witness or victim to be interrogated in court session, including simultaneous interrogation of two or more already interviewed persons... // Article 225 / Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

151 "Testimony obtained during the interrogation of a witness, a victim, including the simultaneous interrogation of two or more already interrogated persons, in criminal proceedings carried out under martial law, may be used as evidence in court only if the course and results of such interrogations were recorded using available technical means of video recording. Testimony obtained during the interrogation of a suspect, including the simultaneous interrogation of two or more already interrogated persons, in criminal proceedings conducted under martial law, may be used as evidence in court only if a defense lawyer participated in such interrogation, and the course and results of the interrogation were recorded using available technical means of video recording." Part 11 of Article 615 / Criminal Procedure Code of Ukraine, No. 4651-VI, 04/13/2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

152 Law of Ukraine 'On Amendments to Criminal Code, Code of Criminal Procedure and Other Legislative Acts of Ukraine Regarding Regulation of Procedure for Exchange of Persons as Prisoners of War', No. 2472-IX, 28.07.2022: <https://zakon.rada.gov.ua/laws/show/2472-20#n11>.

is followed, the court may initiate a re-examination of a witness or disregard their testimony when making a decision<sup>153</sup>.

*International experts:*

Foreign experts have been engaged in the investigations of crimes committed in the context of armed conflict since 2014 and this has become particularly widespread practice following the full-scale invasion. At the same time, the CPCU has not yet established a clear regulation outlining the procedural status of such persons. Carrying out any type of legal examination by international or external experts is strictly prohibited and foreign experts require official accreditation according to Ukrainian law in order to be engaged in other matters;<sup>154</sup> procedural status of an expert is confined to providing advice in a very limited specific area of expertise whereby there is no availability of internal specialists.<sup>155</sup>

Engaging foreign experts as legal specialists might be perceived as an attempt to substitute the functions pertaining to the justice system, as this competence is typically associated with investigators, prosecutors, and judges.

Lack of a clearly defined legal status leads to questions regarding certainty of allowing them access to the investigation case files, their engagement as psychologists or specialists when providing conclusions or recommendations<sup>156</sup>. For instance, there is an ongoing debate about whether providing such access could potentially be seen as disclosure of confidential pre-trial investigation information and responsibility of the person who shared the materials.

*Evidence collected using technical means:*

A similar situation exists with the use of new technical equipment provided to Ukraine in the form of technical assistance for investigating grave international crimes. For example, mobile DNA laboratories are an exceptionally useful tool, particularly when

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153 Article 225 / Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

154 Article 242 / Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

155 Article 71 / Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

156 Article 222. Impermissibility of disclosing information of pre-trial investigation

1. Information of pre-trial investigation may be disclosed only with permission of the investigator or public prosecutor, and in the scope they deem possible.
2. Investigator, public prosecutor shall advise persons who learned information of pre-trial investigation in connection with having participated therein, of their duty not to disclose such information without his permission. Unlawful disclosure of information of pre-trial investigation shall entail criminal liability established by law. // Article 222 / Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.



investigating mass graves, enabling swift body identification<sup>157</sup>. However, in reality, the results of the examination from such a lab cannot be included as evidence into the case file as evidence since such technical equipment is not listed as an examination tool according to the existing domestic standards. Instead methods and equipment that are allowed are restricted to those listed in CPCU, they are a lot less efficient and a lot more resources and time consuming. For these tools to actually enhance the process of collecting evidence, they must be integrated into the national expert methodology.

### Investigation Protocols during the Period of Martial Law

The CPCU outlines a distinct set of rules governing criminal proceedings during the period of martial law. Since 24 February 2022, these provisions have undergone several rounds of amendments<sup>158</sup>, which hinders the establishment of a sustainable legislative and implementation practice built upon a strategic vision. Instead, it looks like an ad-hoc adjustment of provisions to correspond with existing practices. During the period of martial law:

- if the URPTI is unavailable, an investigator or prosecutor issues a resolution to open a pre-trial investigation (though the information should be entered into the URPTI at the earliest opportunity; the moment when the resolution is issued is considered to be the start of the investigation). Under normal circumstances, the information about an offence must be entered into the URPTI within 24 hours.

The shift to a paper-based mode introduced the risk of multiple regions or different law enforcement agencies concurrently registering proceedings for the same incident, and it is impossible to check this information. The only authority capable of monitoring such duplications is the OPG, and it implies that the Office must undertake a thorough analysis and make decisions as to systematisation of these investigations;

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157 Ukraine receives second French mobile DNA laboratory to work in regions of active hostilities // Office of the Prosecutor General, 10.05.2023: <https://www.gp.gov.ua/ua/posts/ofis-genprokurora-peredav-drugu-francuzku-mobilnu-laboratoriyu-dnk-ministerstvu-yusticiyi-dlya-roboti-u-regionax-aktivnix-boiovix-dii>. The Office of the Prosecutor General handed over a French mobile DNA laboratory to the Ministry of Justice to work in the regions of active hostilities // Office of the Prosecutor General, 31.08.2023: <https://www.gp.gov.ua/ua/posts/ofis-genprokurora-peredav-francuzku-mobilnu-laboratoriyu-dnk-ministerstvu-yusticiyi-dlya-roboti-u-regionax-aktivnix-boiovix-dii>. Dnipropetrovsk forensic experts received a mobile DNA laboratory // Government portal, 10.05.2023: <https://www.kmu.gov.ua/news/dnipropetrovski-sudovi-eksperty-otrymaly-mobilnu-dnk-laboratoriiu>.

158 Law of Ukraine 'On Amendments to the Criminal Procedure Code of Ukraine and the Law of Ukraine "On Pre-trial Detention" Regarding Further Regulation of Activities of Law Enforcement Agencies Under Martial Law,' No. 2111-IX, 03.03.2022: <https://zakon.rada.gov.ua/laws/show/2111-20#n5>. Law of Ukraine 'On Amendments to the Criminal Procedure Code of Ukraine and the Law of Ukraine "On Electronic Communications" to Improve Effectiveness of Pre-trial Investigation in "Hot Pursuit" and Counteracting Cyber Attacks,' No. 2137-IX, 15.03.2022: <https://zakon.rada.gov.ua/laws/show/2137-20#n5>. Law of Ukraine 'On Amendments to Criminal Procedure Code of Ukraine to Improve Procedure for Conducting Criminal Proceedings under Martial Law,' No. 2201-IX, 14.04.2022: <https://zakon.rada.gov.ua/laws/show/2201-20#n13>. Law of Ukraine 'On Amendments to the Criminal Procedure Code of Ukraine to Improve Certain Provisions of Pre-trial Investigation under Martial Law,' No. 2462-IX, 27.07.2022: <https://zakon.rada.gov.ua/laws/show/2462-20#n2>.

- a search or inspection of a person's residence or other property or a search of a person can be conducted without witnesses present, as long as the investigative action is continuously recorded. This practice simplified the evidence collection process, especially in dangerous areas, but increased the risk of violations in context of investigative actions. Under such circumstances, the search report and the recording stand as the only evidence following the search, and they cannot be corroborated through the testimony of external witnesses;
- the head of a public prosecutor's office may exercise certain powers of an investigating judge<sup>159</sup>. Most judges expressed critical reservations about this innovation, as it substantially augments the authority of a public prosecutor's office and diminishes additional oversight by the court throughout the pre-trial investigation<sup>160</sup>;
- the timeframe for certain procedural actions has been removed and replaced with the directive 'to be carried out immediately'<sup>161</sup>. In such cases, the practical application of the principle of legal certainty becomes compromised. For instance, if previously a search needed to be conducted within a specified time period, otherwise the search warrant would become void, and any evidence seized would be deemed inadmissible, the determination of 'immediate' is now subject to the investigator's and prosecutor's discretion and can be justified in various ways;

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159 Relates to the powers provided for in Articles 140 (Compulsory attendance), 163 (Consideration of the motion for provisional access to items and documents), 164 (Ruling on the provisional access to items and documents), 170 (Procedure for attachment of property), 173 (Disposing the issue of property attachment), 206 (General duties of a judge regarding the protection of human rights), 219 (Time limits for pre-trial investigation), 232 (Conducting interrogation or identification in the mode of video conference during pre-trial investigation), 233 (Entering home or any other property of a person), 234 (Search), 235 (Ruling to authorise a search or any other property of a person), 245 (Obtaining samples for examination), 245-1 (Taking readings of technical devices and technical means that have the functions of photo, film, video recording, or photo, film, video recording means), 246 (Grounds for covert investigative (detective) actions), 247 (Investigating judge who considers requests to conduct covert investigative (detective) actions), 248 (Examination of the request to obtain permission for the conducting of a covert investigative (detective) action), 250 (Conducting a covert investigative (detective) action before investigating judge adopts a ruling), 294 (General provisions for extending time limit for pre-trial investigation) of the CPCU. // Article 615 / Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

160 Capacity of Ukraine's Judicial System to Ensure Accountability for Grave International Crimes Committed in the Course of the Russia's Aggression Against Ukraine: A Perspective of Judges and Veterans, and the Demand for Justice by the Population of Ukraine / Ukrainian Legal Advisory Group NGO, Institute for Peace & Common Ground NGO with the support of the project 'Urgent EU support for civil society' implemented by ISAR Ednannia with the financial support of the European Union, as well as with the support of the Ukraine 5AM Coalition and Association for the Development of Judicial Self-Government of Ukraine // Kyiv, 2023: <https://drive.google.com/file/d/1UDltnn-hLCSTPBYoPaW0mCjG4nex1BeMK/view?fbclid=IwAR3lTutF4Xavgrl7bnhQLP9sBuofTqjLQDpon7Qpc3YRhVU1X-CoHvnV0tM>.

161 Applies to procedural actions provided for in Articles 220 (Consideration of motions during pre-trial investigation), 221 (Review of records of pre-trial investigation before its completion), 304 (Time limits for challenging decisions, acts or omissions of the investigator, inquiring officer or public prosecutor, its return or refusal to open proceedings), 306 (Procedure for consideration of complaints regarding decisions, acts or omissions of the investigator, inquiring officer or public prosecutor during pre-trial proceedings), 308 (Complaining against failure to respect reasonable time), 376 (Pronouncement of a judgement), 395 (Procedure and time limits for appeal), 426 (Procedure and time limits for cassation appeal) of the CPC of Ukraine // Article 615 / Criminal Procedure Code of Ukraine, No. 4651-VI, 13. 04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

- a person can be detained without a decision from an investigating judge or court, which creates a risk of arbitrary detention;
- the head of the public prosecutor's office may extend the duration of the decision to keep a person in custody upon the request of the prosecutor or upon the request of an investigator agreed upon with the prosecutor. This practice removes judicial review from the process, as the decision regarding detention can be made automatically, instead of scrutinising the grounds for detention;
- court's jurisdiction over the cases is determined in accordance with the territorial principle over the pre-trial investigation body that concluded the pre-trial investigation, or alternatively, the court can be assigned in accordance with the procedure provided for by law;
- the testimony of a witness, victim, or an accused (subject to the participation of a defence counsel during the interview) can be admitted as evidence in court, provided that the interview is recorded using authorised technical means. This provision essentially eliminates the option of conducting interviews before an investigating judge under the general provisions of criminal procedure. In contrast to the procedure outlined in Article 225 of the CCU, a judge does not have an opportunity to ask questions during such an interview and oversee the interview process;
- the defence lawyer of a suspect or accused may participate in the investigation remotely;
- copies of the casefile must be kept in an electronic format by the inquiry officer, investigator, or prosecutor;
- the court may limit the announcement of the judgement to the resolution part only, while ensuring that the complete text of the judgement is provided to the parties on the same day when the judgement is pronounced.<sup>162</sup>

The enacted rules are often in contradiction with the general provisions of criminal process. For instance, the rules regarding the time scope and the delegation of judicial powers to the public prosecutor's office have introduced a risk of potential abuse of their authority. Decisions were made even in situations where there was an option to refer to the investigating judge through the standard procedure. In particular, this practice posed

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162 Article 615 / Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>. The Legal Framework for Adjudicating War Crimes in Ukraine. Assessment Report and Recommendations on Ensuring Efficient and Fair Adjudication of War Crimes Cases // USAID Activity Office: Office of Democracy and Governance, 29.08.2022: <https://drive.google.com/file/d/1AKf1wtvKjv5VKoFuvFnd4nMI-Ig-2kOL9/view>.

a risk to the proper gathering of evidence<sup>163</sup>. The emphasis was placed on expeditious decision-making at the expense of adhering to the principles of due process. Furthermore, due to the frequent amendments to these provisions, it becomes a challenge to establish a consistent approach to their effective practical implementation.

It is important to highlight the necessity of maintaining digital copies of criminal proceedings. On the one hand, this approach increases chances of safeguarding them in the midst of the ongoing armed conflict, which adds an extra risk of their destruction. On the other hand, the procedure and regulations for storing such records are yet to be established, including the issues of requiring a specific format, storing them on a personal computer or the relevant authority's server, etc. Therefore, there is still a risk of losing files in a digital format if they are not properly stored. Despite the fact that the provisions of the CPCU on electronic criminal proceedings<sup>164</sup> have been in force since 15 December 2021, this system has not been put into practical operation yet. Presently, there are ongoing discussions among prosecutorial and investigative authorities as to the development of such a system, its functions and interface, and inclusion of certain technical solutions for the conflict-related violations<sup>165</sup>. Reportedly, a new E-case management system is supposed to become a solution to the issue, with the subsequent possibility of connecting judicial authorities to it. Within this system, the SMEREKA database should function as a basis for structuring evidence of war crimes<sup>166</sup>.

### Proceedings In Absentia

The procedure for conducting special pre-trial investigations and hearing cases in the absence of the accused (in absentia) was introduced into the CPCU on 7 October 2014<sup>167</sup>.

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163 Capacity of Ukraine's Judicial System to Ensure Accountability for Grave International Crimes Committed in the Course of the Russia's Aggression Against Ukraine: A Perspective of Judges and Veterans, and the Demand for Justice by the Population of Ukraine / Ukrainian Legal Advisory Group NGO, Institute for Peace & Common Ground NGO with the support of the project 'Urgent EU support for civil society' implemented by ISAR Ednannia with the financial support of the European Union, as well as with the support of the Ukraine 5AM Coalition and Association for the Development of Judicial Self-Government of Ukraine // Kyiv, 2023: <https://drive.google.com/file/d/1UDltnn-hLCSTPBYoPaW0mCjG4nex1BeMK/view?fbclid=IwAR3lTutF4Xavgrl7bnhQLP9sBuofTqgjLQDpon7Qpc3YRhVU1X-CoHvnV0tM>.

164 Article 106-1 / Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>. The Law of Ukraine 'On Amendments to Criminal Procedure Code of Ukraine on Introduction of Information and Telecommunication System of Pre-trial Investigation,' No. 1498-IX, 01.06.2021: <https://zakon.rada.gov.ua/laws/show/1498-20#Text>.

165 Estonian Partners Have Announced Tender to Develop System Management Modules for Pre-Trial Investigations "Smereka" // Office of the Prosecutor General 11.05.2023: <https://www.gp.gov.ua/ua/posts/estonski-partneri-ogolo-sili-tender-na-rozrobku-moduliv-sistemi-upravlinnya-dosudovimi-rozsliduvannyami-smereka>.

166 Results of work on combating crimes committed in the context of armed conflict in 2023 // Office of the Prosecutor General, 18.01.2024: <https://www.gp.gov.ua/ua/posts/rezultati-roboti-z-protidiiyi-zlocinam-vcinenim-v-umovax-zbroinogo-konfliktu-za-2023-rik>.

167 Article 7

The matter and manner of criminal proceedings in the absence of a suspect or accused (in absentia) shall comply with the fundamentals of criminal proceedings specified in part 1 of this Article, having regard to the features established by law. The prosecution shall use all possibilities provided for by law to observe the rights of a suspect or accused (in particular, the rights to protection, access to justice, secrecy, non-interference in private life) in criminal proceedings in the absence of the suspect or accused (in absentia). / Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

This mechanism was expected to facilitate the prosecution for crimes committed in the context of the armed conflict in Ukraine's territory. However, it continues to receive significant criticism, especially concerning its adherence to the human rights standards.

Cases may be heard in absentia based on a decision made by the investigating judge and only for a specific list of criminal offences<sup>168</sup>. Currently, a prerequisite for opening such proceedings is that a suspect is evading the investigative and judicial authorities by residing in the temporarily occupied territory of Ukraine or in a state recognised by the Verkhovna Rada of Ukraine as an 'aggressor state' with the intention of avoiding criminal liability and/or is listed on the international wanted list<sup>169</sup>.

From 2018 to 2021, the practice of conducting proceedings in absentia was effectively halted. Up to that point, the requirement to place an individual on the international or interstate wanted list was discretionary.

However, the jurisdiction of pre-trial investigation bodies was about to be changed with the establishment of the State Bureau of Investigation, so the Transitional Provisions of the CPCU contained amendments regarding the in absentia procedure<sup>170</sup>. Consequently, the practice of in absentia proceedings was suspended starting from 27 November 2018, because law enforcement agencies were unable to place individuals on the international wanted list, and the procedure for placing a person on the interstate wanted list was not established. In 2021, amendments were made to the criminal procedure law<sup>171</sup>, introducing a new procedure for handling cases in absentia:

- a new requirement for initiating a special investigation was introduced, which involves a suspect evading a summons, i.e., failing to appear without a valid reason on more than two occasions<sup>172</sup>;
- a procedure for notifying a person of a summons has been established, which includes sending it via post, email, or fax, as well as making a phone call or sending a telegram. If it is reasonably impossible to deliver such a summons to the person,

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168 Provided for in Articles 109, 110, 110-2, 111, 111-1, 111-2, 112, 113, 114, 114-1, 114-2, 115, 116, 118, 121(2), 127(2), 146(2,3), 146-1, 147, 191(2-5) (in case of abuse of office by an official), 209, 255-258, 258-1, 258-2, 258-3, 258-4, 258-5, 348, 364, 364-1, 365, 365-2, 368, 368-2, 368-3, 368-4, 369, 369-2, 370, 379, 400, 408, 436, 436-1, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447 of the Criminal Code of Ukraine. // Article 297-1 / Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

169 Article 297-1 / Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

170 Clause 20-1 of the Transitional Provisions / Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

171 Law of Ukraine 'On Amendments to the Criminal Procedure Code of Ukraine to Improve Certain Provisions Regarding Special Pre-trial Investigation,' No. 1422-IX, 27.04.2021: <https://zakon.rada.gov.ua/laws/show/1422-20#n27>.

172 Article 139 Paragraph 5 / Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

it will be published in nationally distributed mass media and on the official website of the Office of the Prosecutor General<sup>173</sup>;

- if there is information indicating that the person is located within the territory of a foreign state, a request for international legal assistance is sent to facilitate the serving of the suspect with a summons;
- when requesting a special pre-trial investigation from the investigating judge, it is mandatory to provide evidence demonstrating the person's departure to or presence in the temporarily occupied territory of Ukraine or the Russian Federation, along with the circumstances confirming that the person is hiding with the intent to avoid criminal liability;
- it is necessary to apply to the investigating judge or court with a request to impose a preventive measure in the form of detention on such a person;
- the decision to initiate a search for the suspect can be made by an investigator or a prosecutor<sup>174</sup>;
- if the accused appears at the trial stage, the accused and their defence lawyer have the right to submit a request for the re-examination of specific evidence that was examined in the absence of the accused<sup>175</sup>.

In absentia proceedings have been widely used by the judicial system since 2014, particularly following 24 February 2022. For example, **while great majority of the proceedings under Article 438 of the CCU are against detained Russian military, 75% of the total number of cases are considered in the absence of the accused. As for the Article 437 of the Criminal Code of Ukraine, all 138 verdicts were delivered in absentia**<sup>176</sup>.

However, the quality of the criminal procedure legislation governing this matter does not align with the standards of a fair trial.

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173 Article 135 / Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

174 Article 281 / Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

175 Article 323 / Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>. The Legal Framework for Adjudicating War Crimes in Ukraine. Assessment Report and Recommendations on Ensuring Efficient and Fair Adjudication of War Crimes Cases // USAID Activity Office: Office of Democracy and Governance, 29.08.2022: <https://drive.google.com/file/d/1AKf1wtvKjv5VKoFuvFnd4nMI-IG-2kOL9/view>.

176 People want justice here and now, but it's a "long game" – Head of the OPG "war department" about the tribunal and the crimes of Russians (part 1) / Yurii Bielousov // Telegraf, 08.01.2024: <https://telegraf.com.ua/ukr/intervju/2024-01-08/5826305-lyudi-khochut-spravedlivosti-tut-i-zaraz-ale-tse-gra-vdovgu-kerivnik-departamentu-viyni-ogp-pro-tribunal-ta-zlochyni-rosiyan-ch-1>.

01. There is ongoing debate regarding the process of notifying the person and whether it can be deemed appropriate. The website of the Office of the Prosecutor General, along with the “State Courier” publication, can hardly be regarded as accessible sources of information in the occupied territories or within the territory of the Russian Federation where most of the Ukrainian websites, particularly government related, are blocked.
02. The legislation does not offer additional possibilities for suspects or defendants to appeal against decisions made in absentia beyond the standard procedures. Current interaction of the CPCU does not envisage an unconditional right of the accused who received an in absentia sentence, to have their case re-examined, which contradicts the ECtHR caselaw and potentially violated their right to fair trial.
03. Due to the *non bis in idem* principle, in absentia judgments, having their procedural deficiencies and limited possibilities for appeal, notably diminish the likelihood of securing justice through the International Criminal Court or other mechanisms.

The trial over the downing of flight MH17 in Donbas on 17 July 2014 was an exception in the aftermath of the armed conflict in Ukraine. Despite the fact that the case was heard in absentia, much attention was paid to the adherence of fair trial standards both during the pre-trial investigation and trial. In particular, the efforts of the prosecutor’s office and the JIT were to ensure that the defendants were aware of the proceedings against them, resulting in one of the subjects of the proceedings engaging his own lawyer to represent him. Also, the trial itself was conducted within the jurisdiction of the Netherlands, in accordance with the standards and requirements of their process. In addition, all the defendants were low- or mid-level perpetrators, as opposed to senior perpetrators.

### Standards Regarding Trials In Absentia

In the context of exercise of the right to a fair trial, in absentia proceedings are turned to in the situations where no clear assurance is obtained that a person may be physically present during the trial and fully defend him/herself, or where a person tries to evade justice. Furthermore, in the case of *Sanader vs. Croatia*<sup>177</sup>, the ECtHR determined that given the severity of the committed war crimes, strong public interest and the intention of the victims to achieve justice in such crimes, the use of in absentia court proceedings did not violate the right to a fair trial provided that at the same time the rights of the accused were not ignored. In its case-law, the ECtHR analysed, in particular, what was meant by ‘due

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177 Case of *Sanader v. Croatia*, ECHR, appl. no. 66408/12, judgement 12.02.2015: <https://hudoc.echr.coe.int/en-g?i=001-151039>.

notice: 'informing a person about the prosecution commenced against him/her is such an important step that it should be made in accordance with procedural and legal requirements on the merits which can ensure effective exercise of the right of the accused; it is not enough to have a vague and informal knowledge'<sup>178</sup>.

In 1983, the UN Human Rights Committee in the case of *Mbenge v. Zaire* noted that in absentia procedure is not illegal by itself because there is the presumption that the State takes all the steps to properly inform the accused about the proceedings against him: 'Judgement in absentia requires that, notwithstanding the absence of the accused, all due notification has been made to inform him of the date and place of his trial.' The UN Committee was of the view that the State did not implement proper steps to inform the accused appropriately, and that Article 14(3) of the International Covenant on Civil and Political Rights was violated by the fact that he learned about his trial in his absence from the media<sup>179</sup>.

As for the position of the International Criminal Court with regard to this issue, presently the main source of guidance are the two decisions in *Saif Al-Islam Gaddafi* case<sup>180</sup>. The Pre-trial Chamber noted that it was not up to the Chamber to challenge the correctness, nature or qualification of judgments passed by national courts of States, unless there were compelling reasons to do so. During in absentia trial, the court should grant the accused the whole range of procedural rights and guarantees, and in case the accused turns in during the trial or even after the verdict is delivered in absentia, the accused should have the opportunity for a review of his case in court.

Furthermore, in the above-mentioned case and in the case *v. Jean-Pierre Bemba Gombo*<sup>181</sup> ICC separately emphasised the adherence to the *non bis in idem* principle. Thus, in the context of in absentia proceedings, there are several aspects taken into consideration when an international court or tribunal is to consider whether a national court's verdict is consistent with this principle and would not create grounds for a retrial. Those include: thoroughness and quality of the process at the national level, proper classification of acts, and prevention of amnesties or pardons for grave international crimes.

178 Case of *Sejdovic v. Italy*, ECHR, appl. no. 56581/00, judgement 01.03.2006: <https://hudoc.echr.coe.int/fre?i=001-72629>. Case of *Stoyanov v Bulgaria*, ECHR, appl. no. 25714/05, judgement.

179 Communication No. 16/1977, (Reported at: 78 ILR 18, 19, UNHR Comm. 1983), para 14.1.

180 Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute' / In the case of Prosecutor v. Saif Al-Islam Gaddafi, Situation in Libya // ICC, 05.04.2019: [https://www.icc-cpi.int/CourtRecords/CR2019\\_01904.PDF](https://www.icc-cpi.int/CourtRecords/CR2019_01904.PDF).

181 Decision on the Admissibility and Abuse of Process Challenges / In the case of Prosecutor v. Jean-Pierre Bemba Gombo, Situation in the CAR // ICC, 24.06.2010: [https://www.icc-cpi.int/CourtRecords/CR2010\\_04399.PDF](https://www.icc-cpi.int/CourtRecords/CR2010_04399.PDF).



The most recent decision of the ICC which considers in absentia trial at the national level was the position of the Court's Appeals Chamber in the case of Saif Al-Islam Gaddafi<sup>182</sup>. Thus, the Court noted that despite the fact that Mr. Gaddafi attended a number of hearings via video-link and that his counsel attended some hearings, this trial may not have been regarded as held in the presence of the accused. This was also the Libyan Government's position. At the same time, the judgement rendered by the trial court under Libya's legislation may not be considered final since according to the procedural laws Mr. Gaddafi has the right to a review of the sentence delivered in absentia. To confirm the correctness of bringing a person to justice, for the ICC it is important that the trial against this person is fair and this person has the opportunity to appeal against the judgement to a higher court.

There is an exemplary resolution adopted by the Committee of Ministers of the Council of Europe, Resolution (75)11 of 19 January 1973 'On the Criteria Governing Proceedings Held in the Absence of the Accused'. This Resolution is a document of soft law; however, it confirms the presence of European consensus in the matters of establishing the validity of charges under in absentia procedure. The Resolution sets forth the standards regarding the content of the summons, the opportunities for the accused to exercise their rights in the proceedings and additional guarantees of retrial of the case<sup>183</sup>.

Such countries as Denmark, the Netherlands, Germany, Sweden and others allow trials in absence of the accused under the following conditions: the accused has been properly notified about the trial; the sentence he/she can get does not exceed 3 years (this is the maximum sentence in the said countries and concerns Austria); the charges are mostly about financial crimes or crimes against property; he/she is guaranteed the right to defence; he/she is guaranteed the right to retrial.

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182 Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute' / In the case of Prosecutor v. Saif Al-Islam Gaddafi, Situation in Libya // ICC, 05.04.2019: [https://www.icc-cpi.int/CourtRecords/CR2019\\_01904.PDF](https://www.icc-cpi.int/CourtRecords/CR2019_01904.PDF).

183 1) The accused must be served with a summons to appear in court and prepare his defence. 2) The summons must clearly state the consequences of the defendant's failure to appear at the trial (including the initiation of the proceedings in absentia as a consequence of the failure to appear). 3) The court must order an adjournment if it considers personal appearance of the accused, who had been served with a summons, to be indispensable or if there is reason to believe that he has been prevented from appearing. 4) The accused must not be tried in his absence (in absentia), if it is possible and desirable to transfer the proceedings to another state or to apply for extradition. 5) Where the accused is tried in absentia, evidence must be taken in the usual manner and the defence must have the right to intervene. 6) A judgement passed in absentia must be notified to the accused according to the rules governing the service of the summons to appear and the time limit for lodging an appeal must not begin to run until the convicted person has had effective knowledge of the judgement so notified, unless it is established that he has deliberately sought to evade justice. 7) Any person tried in absentia must be able to appeal against the judgement by whatever means of recourse would have been open to him, had he been present. 8) A person tried in absentia on whom a summons has not been served in due and proper form shall have a remedy enabling him to reconsider the case both on issues of law and fact. 9) A person tried in absentia, but on whom a summons has been properly served is entitled to a retrial, in the ordinary way, if that person can prove that his absence and the fact that he could not inform the judge thereof were due to reasons beyond his control.

## Joint Investigation Teams (JITs)

Collaboration between states in criminal proceedings is one of the forms of international cooperation. In accordance with Article 523 of the Criminal Procedure Code of Ukraine, international cooperation in criminal proceedings encompasses the necessary actions to facilitate international legal assistance, such as serving documents, conducting specific procedural actions, extraditing persons who have committed a criminal offence, temporarily transferring persons, taking over criminal prosecution, transferring convicted persons, and executing sentences. It's worth noting that international treaties ratified by Ukraine may establish additional forms of cooperation in criminal proceedings beyond those outlined in the Code<sup>184</sup>.

The criminal procedure law of Ukraine allows for the creation of joint investigative teams to carry out pre-trial investigations of criminal offences committed across multiple states or when the interests of these states are implicated. Members of JITs work closely together, streamlining primary investigative objectives, conducting procedural actions, and sharing information. Their activities are overseen and coordinated by the initiator of the JIT or one of its members.<sup>185</sup>

The CPCU provisions concerning international cooperation pertain to the provision of assistance within specific criminal proceedings. Cooperation should entail a clear division of tasks among team members and a joint vision of the intended outcome of such proceedings. These requirements are set out in the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters. According to the provisions of this protocol, a joint investigation team may be established, in particular, in cases where:

- the investigation of crimes by one Party necessitates complex and extensive investigative measures involving other Parties;
- multiple Parties are investigating crimes, the circumstances of which demand coordinated and collaborative actions on the respective Parties' territories.<sup>186</sup>

The regulations governing the operation of a JIT as a form of international legal cooperation in criminal proceedings are applicable to investigations involving all categories of crimes, including grave international crimes. Since 24 February 2022, Ukraine has been

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184 Article 528 / Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

185 Article 571 / Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

186 Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, 08.11.2001: [https://zakon.rada.gov.ua/laws/show/994\\_518#Text](https://zakon.rada.gov.ua/laws/show/994_518#Text).

promoting the use of JITs as a tool to investigate crimes under international law and collaborate with other countries conducting national investigations into these matters.

Despite the limited resources, active phase of the armed conflict on the territory of Ukraine, and challenges of undertaking various investigative actions amidst ongoing hostilities, Ukrainian law enforcement agencies aim to achieve rapid progress in the investigation of war crimes. The JIT established to investigate the crash of MH17 flight on 17 July 2014 and the subsequent trial based on its findings held in the Netherlands are often referred to as an example of good practice of Ukraine's efforts in this area. When comparing the current interstate JIT set up following the full-scale invasion with the MH17 case JIT, what is often ignored is that **the latter was focused on investigating a sole incident rather than examining all the crimes under international law.**

In case of the investigation into the MH17 shutdown, the goals and objectives of the investigation, the judicial jurisdiction of the proceedings, and the evidence collection standards were all well-defined. Instead, the new JIT became the basis for a large-scale effort to collect evidence of the crime of aggression committed against Ukraine and the creation of the International Center for the Prosecution of the Crime of Aggression against Ukraine (ICPA).<sup>187</sup> Its task is to process a massive volume of information and operate without a clear jurisdictional basis for future prosecution of this crime.

Experience in investigating grave international crimes of the current JIT members is very limited. This results in increased workload on its members and generates great expectations from those interested in successful prosecution of crime of aggression. Nevertheless, the issue of where the collected evidence will be used in relation to the crime of aggression and other alleged grave international crimes remains unresolved. In particular, there is a question of how the JIT and the ICC, both involved in the work of the ICPA, will interact together. Considering that the practice of the JIT investigating grave international crimes is new, this initial experience can serve as a valuable foundation for similar situations in the future, and it is important to develop it into an effective mechanism.

### CPCU Standards of Cooperation with the International Criminal Court

On 3 May 2022, the CPCU was updated to include a section that details the special provisions of cooperation with the International Criminal Court (ICC)<sup>188</sup>. While certain provisions within this section are linked to the ratification of the Rome Statute of the ICC and

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187 Ukraine: International Centre for the prosecution of Russia's crime of aggression against Ukraine starts operations today // European Commission, 03.07.2023: [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_3606](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3606).

188 Law of Ukraine 'On Amendments to Criminal Procedure Code of Ukraine and Other Legislative Acts of Ukraine on Cooperation with International Criminal Court,' No. 2236-IX, 03.05.2022: <https://zakon.rada.gov.ua/laws/show/2236-20#n5>.

are not yet legally binding<sup>189</sup>, it should be highlighted that the newly adopted amendments are to be applied in conjunction with the declarations of the Verkhovna Rada under article 12(3) of the Rome Statute on accepting the ICC jurisdiction<sup>190</sup>.

This section regulates Ukraine's cooperation with the international judicial authority, yet there is no proper legal basis for this cooperation in the form of an international legal instrument ratified by Ukraine. This could be either the ratification of the Rome Statute or an official cooperation agreement between Ukraine and the International Criminal Court. Mere declarations acknowledging the Court's jurisdiction and amendments to the CPCU are not sufficient to establish that Ukraine has taken on commitments before the ICC. Consequently, there is no certainty that the provisions related to the arrest of persons upon the ICC's request, their subsequent detention, and the particulars of execution of the Court's requests will not be altered unexpectedly and will be consistently implemented.

In practice, the extent of cooperation depends on the rapport between the relevant bodies of Ukraine (in particular, the OPG) and the ICC, their mutual vision for such cooperation, and their joint willingness to collaborate **which is of temporary nature and depends on the political will of the Government currently in place**. Moreover, referring to the Rome Statute as an international legal document in the national law is inappropriate, as it is not a source of law for Ukraine and does not entail any binding commitments.

Upon examining the adopted provisions as a whole, **the following observations can be made:**

- the provisions effectively establish Ukraine's rights at the level of a full-fledged state party to the Court. Specifically, they allow Ukraine to appeal against ICC's decisions or submit requests to the Court;

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189 Article 617 (3) of the CPCU

The provisions within this section shall also apply to the handling of International Criminal Court's requests for the investigation of crimes against the administration of justice by the International Criminal Court. Article 636 (3–5) of the CPCU

3. The International Criminal Court's decision on a fine and/or confiscation shall be forwarded by Ukraine's central authority to the court located where the person is residing or serving their sentence, or where the property in question is located. This decision shall be enforced within thirty days, following the procedure established in Article 535 of this Code.

4. The International Criminal Court's decision on a fine and/or confiscation shall be enforced without prejudice to the rights of bona fide third parties.

5. Any property or income generated from the sale of real estate, or, where relevant, from the sale of other property obtained from the enforcement of the decision mentioned in Paragraph 4 of this Article, shall be transferred to the International Criminal Court. // Law of Ukraine 'On Amendments to Criminal Procedure Code of Ukraine and Other Legislative Acts of Ukraine on Cooperation with International Criminal Court,' No. 2236-IX, 03.05.2022: <https://zakon.rada.gov.ua/laws/show/2236-20#n5>.

190 Law of Ukraine 'On Amendments to Criminal Procedure Code of Ukraine and Other Legislative Acts of Ukraine on Cooperation with International Criminal Court,' No. 2236-IX, 03.05.2022: <https://zakon.rada.gov.ua/laws/show/2236-20#n5>.

- the footnote to Section IX<sup>2</sup> limits its scope only to ‘persons who committed the armed aggression on behalf of the Russian Federation or the aggression of another state against Ukraine.’ This stipulation contradicts the principle of comprehensive investigation upheld by the Office of the Prosecutor of the ICC;
- the provisions – in the cooperation context – lean heavily on the terminology of the Rome Statute and its interpretation in accordance with its provisions. However, this specific terminology has not been incorporated into national legislation, primarily due to the absence of an official Ukrainian translation of the Rome Statute<sup>191</sup> thus its use will remain limited and interpretation broad and not necessarily in line with the established standards;
- the provisions permit the transfer of proceedings to the ICC. Yet, the legal implications of such a decision in view of other provisions of criminal procedure law remain unspecified. In particular, what exactly happens to the parallel proceedings opened in Ukraine in this instance and what basis for subsequent decisions would be;
- a conflict arises concerning management of evidence. The ICC adheres to its own standards, which affect the admissibility of evidence during court proceedings. At the same time, the provisions of Ukraine’s national legislation have not been harmonised and aligned with the Court’s standards which leads to broad discrepancies and lack of legal certainty in their application.<sup>192</sup>

On 20 September 2022, the Verkhovna Rada of Ukraine amended the said section of the CPCU as a response to practical problems in the implementation of the adopted provisions. The amendments allow the proceedings to be carried out not only by the ICC Prosecutor, but also by the Court’s personnel authorised by the Prosecutor and mentioned in the request. Furthermore, these proceedings conducted on Ukrainian territory by

the Court’s authorised personnel require the approval from the Prosecutor General of Ukraine<sup>193</sup>. Essentially, the power to decide on the evidence collection by the representa-

Essentially, the power to decide on the evidence collection by the representatives of the Office of the Prosecutor of the ICC in Ukraine rests solely with the Prosecutor General of Ukraine

191 The Verkhovna Rada’s website hosts a document labelled as the ‘official translation.’ However, a translation can only be official when the international legal instrument has been ratified and endorsed by the official institution that governs its application.

192 Section IX-2 / Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

193 The Law of Ukraine ‘On Amendments to Article 624 of Criminal Procedure Code of Ukraine Regarding Improving Cooperation with International Criminal Court When Conducting Proceedings on Territory of Ukraine,’ No. 2598-IX, 20.09.2022: <https://zakon.rada.gov.ua/laws/show/2598-IX#Text>.

tives of the Office of the Prosecutor of the ICC in Ukraine rests solely with the Prosecutor General of Ukraine. This grants them the discretion, for instance, to choose which pieces of information from the criminal proceedings can be shared with the ICC upon request, whether or not to grant access to the suspects, or which crime scenes the ICC's investigators and prosecutors are permitted to inspect.

## Specific Legal Provisions

### Preservation of Evidence

Alongside the process of evidence collection, the issue of its preservation comes to the fore. In the context of international courts, the manner in which evidence related to grave international crimes is preserved has a direct impact on its admissibility in subsequent court hearings. Presently, Ukrainian legislation offers somewhat narrow criteria for preserving evidence during the pre-trial investigation phase. Thus, an investigator or prosecutor in criminal proceedings can seize:

- material evidence;
- items and documents that are prohibited from circulation (unless the owner has a permission to purchase and store them);
- identification documents of detainees, suspects, or accused (defendants);
- any other documents pertinent to the case at hand;
- money and other valuables found during the seizure of the property of suspects, accused, defendants, or persons who bear material liability for their actions, which can be seized to compensate for material damages or enforce a sentence in terms of property confiscation<sup>194</sup>.

Existing procedure does not provide for a mechanism for the long-term preservation of evidence in digital formats (as it predominantly relies on paper-based documentation) and storage. It also does not establish guidelines for accessing designated storage sites. Consequently, the matter of dedicated servers for holding digital data, which serves as

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194 Paragraph 4 // Order 'On Approval and Enactment of Instructions on Procedure for Seizure, Accounting, Storage, and Transfer of Material Evidence in Criminal Cases, Valuables, and Other Property by Inquiry Bodies, Pre-trial Investigation Bodies, and Courts' / Office of the Prosecutor General of Ukraine, Ministry of Internal Affairs of Ukraine, State Tax Administration of Ukraine, Security Service of Ukraine, Supreme Court of Ukraine, State Judicial Administration of Ukraine, No. 51/401/649/471/23/125, 27.08.2010: <https://zakon.rada.gov.ua/laws/show/v0051900-10#Text>.

evidence in criminal cases, remains unresolved both in terms of legislative regulation and practical implementation.

Following the full-scale invasion, the Office of the Prosecutor General was granted storage space on Microsoft and Amazon servers, as international aid, to store evidence in a digital format. Yet, it is not clear how this digitally stored information should be protected. There is no national legislation to regulate this issue which means **it is a vulnerability which will be exploited by defence once a case goes to trial**. In addition, the OPG are using other technical programmes for processing evidence such as Palantir, Microsoft Azure and Skydio drones, which use is not regulated either.<sup>195</sup>

There are also ongoing discussions about establishing an independent information system centred around the OPG, designed to preserve and analyse evidence of grave international crimes. The SMEREKA system is supposed to enhance the coordination and performance of prosecutors, along with improving procedural guidance<sup>196</sup>. However, it will be used for all criminal proceedings within the e-Case database, which aims to digitalise criminal proceedings, rather than being exclusive to grave international crimes. Discussions concerning the technical decisions and special systems such as SMEREKA must also include development of specialised legal regulations aimed at protection and storage of the data, considering security risks posed by the international armed conflict.

Issues frequently emerge regarding the preservation of large-sized material evidence. Responsibility for storing it primarily falls on the pre-trial investigation bodies and the court. These items can also be entrusted for storage to businesses, state institutions, and organisations, a process which must be duly documented with a corresponding protocol<sup>197</sup>. In this context, it is entirely appropriate to raise questions about the places where items like shell fragments or confiscated military equipment – potentially critically important evidence in war crime trials – are stored.

Weapons and ammunition are typically stored in the commercial units of the Ministry of Internal Affairs (MoIA) and Security Service of Ukraine, as well as their regional and local departments following inspections, and also state forensic centres, military unit

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195 Results of Countering Crimes Committed during Armed Conflict 2023/Office of the Prosecutor General, 18. 01.2024 <https://www.gp.gov.ua/ua/posts/rezultati-roboti-z-protidiiyi-zlocinam-vcinenim-v-umovax-zbroinogo-konfliktu-za-2023-rik>.

196 Estonian partners to announce tender for the development of modules for SMEREKA pre-trial investigation management system // Office of the Prosecutor General, 11.05.2023: <https://www.gp.gov.ua/ua/posts/estonski-partneri-ogolosili-tender-na-rozrobku-moduliv-sistemi-upravlinnya-dosudovimi-rozsliduvannyami-smereka>.

197 Paragraph 12 / Order 'On Approval and Enactment of Instructions on Procedure for Seizure, Accounting, Storage, and Transfer of Material Evidence in Criminal Cases, Valuables, and Other Property by Inquiry Bodies, Pre-trial Investigation Bodies, and Courts' / Office of the Prosecutor General of Ukraine, Ministry of Internal Affairs of Ukraine, State Tax Administration of Ukraine, Security Service of Ukraine, Supreme Court of Ukraine, State Judicial Administration of Ukraine, No. 51/401/649/471/23/125, 27.08.2010: <https://zakon.rada.gov.ua/laws/show/v0051900-10#Text>.

warehouses, or warehouses of designated state enterprises or organisations<sup>198</sup>. Given the ongoing armed conflict on the territory of Ukraine and the continuous artillery, drone, and missile attacks since 24 February 2022, there is an increased risk of the destruction of the physical evidence, as many storage locations are targeted. For example, mobile phones of Russian soldiers – potential evidence sources – often do not make it into criminal investigations. They are either confiscated in the field by military personnel without passing them on to the investigative authorities or destroyed in combat.

When a court makes a decision in criminal proceedings or decides to close it, the issue of seized evidence is also addressed<sup>199</sup>. In the context of investigating grave international crimes, evidence obtained in one proceeding may be relevant for another. Thus, it is crucial that the protocols for evidence preservation and related procedural decisions acknowledge the possible impact that the evidence may have **on the investigation of other alleged grave international crimes**.

### Protection of Victims and Witnesses

Protecting witnesses is crucial when ensuring justice for grave international crimes. Victims, being vital bearers of critical information, face threats not only to their life and health but also to their families and loved ones. Alongside the investigations into the alleged international crimes committed in Ukraine since 2014, there have been numerous cases when witnesses, who could provide information helping to hold Russia accountable, were assassinated.<sup>200</sup>

**At present, Ukrainian law does not adequately address the issue of witness protection.** The 1993 Law of Ukraine ‘On Ensuring the Security of Persons Participating in Criminal Proceedings’,<sup>201</sup> remains the only piece of legislation on this matter. It only underwent minor revisions following the introduction of the new Criminal Procedure Code of Ukraine in 2012 and its subsequent amendments. Its provisions also extend to safeguarding victims of grave international crimes.

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198 Paragraph 16 // Order ‘On Approval and Enactment of Instructions on Procedure for Seizure, Accounting, Storage, and Transfer of Material Evidence in Criminal Cases, Valuables, and Other Property by Inquiry Bodies, Pre-trial Investigation Bodies, and Courts’ / Office of the Prosecutor General of Ukraine, Ministry of Internal Affairs of Ukraine, State Tax Administration of Ukraine, Security Service of Ukraine, Supreme Court of Ukraine, State Judicial Administration of Ukraine, No. 51/401/649/471/23/125, 27.08.2010: <https://zakon.rada.gov.ua/laws/show/v0051900-10#Text>.

199 Article 374 / Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

200 Building an effective witness protection programme in criminal proceedings related to the armed conflict / Analytical report // Ukrainian Legal Advisory Group, 2021: <https://ulag.org.ua/uk/reports-and-materials/-3>.

201 The Law of Ukraine ‘On Ensuring the Security of Persons Participating in Criminal Proceedings,’ No. 3782-XII, 23.12.1993: <https://zakon.rada.gov.ua/laws/show/3782-12#Text>.



The law includes the following available witness protection measures:

- personal protection, protection of residence and property;
- provision of special personal protective equipment and alerting of potential danger;
- use of technical devices for monitoring and intercepting phone calls and other communications, visual surveillance;
- alteration of documents and appearance;
- change of workplace or place of study;
- relocation to a different residence;
- admission into pre-school educational institutions or social protection institutions;
- guaranteeing the confidentiality of personal data;
- closed trial.<sup>202</sup>

Since 2014, security measures have been implemented for the participants in criminal proceedings concerning crimes linked to the armed conflict at various stages. While this practice has not been universally adopted, it has been applied in certain cases. Courts have opted to alter the personal details of witnesses<sup>203</sup> and examine them in closed sessions<sup>204</sup>. Yet, in reality, these measures often fall short of adequately protecting witnesses. Even if their personal details are altered, the background details of a case can still hint

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202 Article 7 / The Law of Ukraine 'On Ensuring the Security of Persons Participating in Criminal Proceedings,' No. 3782-XII, 23.12.1993: <https://zakon.rada.gov.ua/laws/show/3782-12#Text>.

203 Case No. 243/1713/15-k. Sloviansk City District Court in Donetsk Region found an officer from the patrol service of Sloviansk City Department of the MD of MoIA of Ukraine in Donetsk Region guilty of involvement in a terrorist organisation, as outlined in Article 258-3 Paragraph 1 of the CCU. It was established that the accused had acted in the interests of the so-called 'Donetsk People's Republic' and had been involved in the illegal detention of individuals, forcing them to labour at checkpoints. Four witnesses, who had been unlawfully detained and forced into work by the accused, received protection. Based on their requests and in accordance with Article 66(1) Subpara. 8 of the Criminal Procedure Code of Ukraine and Article 2 of the Law of Ukraine 'On Ensuring the Security of Persons Participating in Criminal Proceedings,' the personal data of these witnesses were altered. The court found the defendant guilty and sentenced him to 8 years of imprisonment.

204 Case No. 234/16107/17. The person is accused of committing crimes under Art. 260(2) of the CCU 'Creation of armed groups that contravene the Ukrainian laws or participation in their operations,' in particular, participation in the activities of the 'Donetsk People's Republic.' During the pre-trial investigation, the investigator altered the personal data of the witnesses to safeguard them. Furthermore, the prosecutor representing the prosecution in the court requested that the witnesses be interviewed in a closed court session from a separate room using a method that would prevent the identification of the person providing the testimony, in line with Article 352(9) of the CPCU. He requested that the Kramatorsk PD of the MDNP in Donetsk region, whose investigation unit was responsible for the pre-trial investigation of this case, calls the witnesses to a separate room without revealing their real personal data and takes measures to prevent their identification. The court approved the prosecutor's request, highlighting that 'with the armed conflict still active, there is a valid concern that the witnesses, whom the prosecution claims have disclosed the illegal actions of [the accused], might be in danger should their identities be revealed.' / Ruling of the Kramatorsk City Court in Donetsk Region on interviewing witnesses dated 23 April 2019.

at their identities. Furthermore, during the trial, as the court examines the evidence, there is a risk that the identities of these protected individuals might be inadvertently revealed.

After the full-scale invasion, in some categories of cases, in particular, conflict-related sexual violence, the practice of applying protection measures to victims is being introduced, although current Ukrainian legislation provides for such protection only for witnesses. In particular, these individuals have their personal information altered. During an investigation there is uncertainty regarding how investigators, victims representatives, and the court should proceed given the lack of clear guidelines at the legislative level.

Ukraine's existing witness protection legislation needs an overhaul, both regarding the types of protective measures offered and the regulatory oversight of human resources responsible for implementing these measures in practice. On 12 July 2021, the Verkhovna Rada of Ukraine registered two draft laws centred on enhancing the security of those involved in criminal proceedings, and others acting in the interests of justice (Reg. No. 5752<sup>205</sup> and Reg. No. 5751<sup>206</sup>). Both draft laws aim to reform Ukraine's existing witness protection framework, asserting that the existing system is substantively and cost-ineffective. It was also noted that those provisions should apply to criminal proceedings related to the commission of 'war crimes and other international crimes. The parliament has yet to fully examine the merits of both documents.

In order to effectively protect victims of grave international crimes, Ukraine's witness protection system should consider various factors. These include evaluating the significance of the information a witness offers, ensuring proper protection of the witnesses' personal information, addressing challenges related to access to territories and people, understanding the dynamics of the armed conflict and ongoing hostilities, and accounting for the length of the domestic legal proceedings.

### Legal Status of a Victim of an Armed Conflict

Until now, there is no clear definition of the status of a victim of an armed conflict at the legislative level. Current discussions aimed at defining this category primarily revolve around the provision of social protection and legal guarantees rather than the need to align the national legislation with international law in this regard. Instead of investigating the actual harm inflicted due to or in the course of an armed conflict, determining the legal status is tied to bureaucratic procedures.

For instance, discussions which started in 2014 about the legal status of those unlawfully detained in the armed conflict on the territory of Ukraine centred around potential

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205 [https://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=72473](https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=72473)

206 [https://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=72472](https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=72472)

financial aid for such individuals or their families, rather than providing guarantees pertaining to their legal status granted under international humanitarian law. It was only in 2022 that a law was adopted that defined the category of persons deprived of their liberty in connection with the armed conflict, as well as social guarantees for the families of such persons and issues of their social support upon their return. At the same time, the issue of special guarantees for such persons within the justice process is not raised in the document, except for their right to receive free legal aid<sup>207</sup>.

After 24 February 2022, discussions expanded to other categories of victims of the violations of the laws and customs of war. On 17 June 2022, the Cabinet of Ministers of Ukraine set up the Coordination Centre (Staff) for the Protection of Rights of Persons Deported or Forcibly Displaced due to the Armed Aggression of the Russian Federation against Ukraine<sup>208</sup>. The activities of the Coordination Centre primarily focus on the general category of victims rather than a specific legal status of such individuals. On the other hand, there is also a pressing need to precisely define the category of 'deported or forcibly displaced persons,' which is not included in Ukraine's national legislation. In its operations, the Headquarters concentrates on issues related to persons who, due to the armed conflict, ended up in Russian territory through deportation, evacuation, or self-imposed exile and wish to return to Ukraine. Although the actual range of persons receiving assistance from the Headquarters goes beyond deported civilians, they are all categorised as such by the Centre for the purposes of its activities.

The problem with initiatives that seek to define and regulate the status of particular groups of victims affected by the armed conflict is that while this status is linked to the fact that grave international crimes were committed against these individuals, it does not include a thorough examination of the circumstances and nature of these offences.

For instance, if a civilian was injured as a result of the anti-terrorist operation or other measures to ensure national security and defence, repulsion and deterrence of the armed aggression of the Russian Federation in Donetsk and Luhansk regions, they were required to provide (among other documents) an excerpt from the Unified Register of Pre-trial Investigations on the initiation of criminal investigation concerning their injury from ammunition and/or other documents confirming status as a victim in the investigation<sup>209</sup>. However, a document merely confirming the fact that the criminal proceedings were opened

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207 Law of Ukraine 'On Social and Legal Protection of Persons Who Were Deprived of Personal Liberty as a Result of Armed Aggression Against Ukraine and Members of their Families,' No. 2010-IX, 26.01.2022: <https://zakon.rada.gov.ua/laws/show/2010-20#Text>.

208 Resolution of the Cabinet of Ministers of Ukraine 'On Establishment of Coordination Headquarters for Protection of Rights of Persons Deported or Forcibly Displaced in Connection with Armed Aggression of Russian Federation against Ukraine,' No. 708, 17.06.2022: <https://zakon.rada.gov.ua/laws/show/708-2022-%D0%BF#Text>.

209 Resolution of the Cabinet of Ministers of Ukraine titled 'Certain Issues of Establishing Connection between Disability and Wounds or other Damages to Health,' No. 306, 25.04.2018: <https://zakon.rada.gov.ua/laws/show/306-2018-%D0%BF#n19>.

**does not give a clear understanding of the circumstances of the case.** In addition to defining various categories of victims, it is also important to define the general status of a 'victim of armed conflict' in Ukraine's national legislation. This would streamline the process of registering victims, evaluating the scale of harm they have endured, and ensuring protective measures are in place for them. Simply categorising victims is not enough, as every instance of harm must be duly examined and confirmed.

# Operation and Capacity of Investigative Authorities to Investigate International Crimes

Since the onset of the armed conflict in Ukraine, pre-trial investigation authorities have been faced with unprecedented challenges. It is their direct legal responsibility to swiftly respond to criminal offences, investigate crime scenes, and conduct pre-trial investigations. Instead, the prosecution authorities remain under the impression that the 2012 Criminal Procedure Code of Ukraine reduced the responsibility of investigators for the quality and outcomes of their performance, shifting it towards those responsible for procedural oversight. However, the Code's approach emphasises a more quality engagement between pre-trial investigation and prosecution bodies, suggesting that the success of criminal proceedings hinges on their effectively coordinated efforts.

In accordance with Article 38 of the CPCU, the entities responsible for pre-trial investigations include: investigative units of the National Police, the Security Service, and the State Bureau of Investigation; the detective unit and the internal control unit of the National Anti-Corruption Bureau of Ukraine; and detective units of the Economic Security Bureau of Ukraine<sup>210</sup>. The general rules on jurisdiction of these organs concerning grave international crimes are detailed in the section above<sup>211</sup>.

Despite facing significant challenges since 2014 that necessitated a shift in their approach, it was not until 2021 that the pre-trial investigative authorities began to specialise in addressing the consequences of the armed conflict. The Office of the Prosecutor General, the National Police of Ukraine, and the Security Service of Ukraine decided to establish dedicated investigative units. These units focus on crimes committed in the context of the armed conflict and operate at the level of the main investigative departments and territorial branches in Donetsk and Luhansk regions<sup>212</sup>. However, this decision lost its rel-

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210 Article 38 / Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

211 See Overview of Ukraine's domestic legislation.

212 Iryna Venediktova's facebook post, 14.07.2021: <https://www.facebook.com/Venediktovalryna/posts/pfbid0Lx-2hHmPdf2YpDrnGA8tGH7C1PnhL3ut2dWKhNHKBKzWBeAezfJD9Femg2MTKo1bI>. The SSU and National Police to create units to investigate crimes in the context of armed conflict // ZN.UA / 14.07.2021: <https://zn.ua/ukr/UKRAINE/v-sbu-ta-natspolitsiji-stvorjat-pidrozdili-dlja-rozsliduvannja-zlochyniv-v-umovakh-zbrojnoho-konfliktu.html>.

evance after 24 February 2022. The consequences of the armed conflict were recorded in different regions of Ukraine, so the scale of the events required the extension of the specialisation of investigative bodies to other regions. Therefore, some investigative bodies subsequently decided to introduce specialisation at the level of other regions, while others cannot afford this approach due to the peculiarities of their internal structure and lack of staff. But even against all these initiatives, **an important step would be to prioritise investigations of grave crimes for the pretrial investigative authorities**. The general scale of crimes committed, length of the investigations, low prospect of real prosecutions of the perpetrators result in deprioritisation of such cases by authorities.

## Security Service of Ukraine

The internal structure of investigative units of the security services is based on the territorial and subject matter principles. Since 2014, both the Main Department of the SSU in the Autonomous Republic of Crimea and the Main Department of the SSU in Donetsk and Luhansk regions were the ones primarily focused on the armed conflict. Certain significant criminal proceedings have fallen under the jurisdiction of the Main Investigation Department of the SSU. The establishment of a dedicated unit within the Main Investigation Department of the SSU specialising on pre-trial investigation of criminal cases arising in the context of the armed conflict only began in the latter half of 2021 and was finalised in the spring of 2022. However, the regional branches of the SSU still lack such specialised units<sup>213</sup>.

The Security Service of Ukraine has significantly fewer investigators compared with the National Police of Ukraine. The law states that the general number of the SSU employers is 27,000 during peacetime and 31,000 during special periods and include not just investigators but all the staff. These figures are set by the President of Ukraine upon the recommendation of the head of the SSU within the constraints of the State Budget of Ukraine<sup>214</sup>. Moreover, compared to the police, the territorial structure of the security service is less extensive, covering only the regional level, which means that fewer personnel are involved in the work.

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213 Yuriy Bielousov, War Department of the Office of the Prosecutor General: 'There is competition between us and investigative journalists. This is good, but there are risks.' / Andrii Chernikov // Detector Media, 05.08.2022: <https://detector.media/infospace/article/201635/2022-08-05-yuriy-bielousov-departament-viyny-ofisu-genprokuro-ra-mizh-namy-i-zhurnalistamy-rozsliduvachamy-vynykla-konkurenciya-tse-dobre-ale-ie-ryzyky/>. People want justice here and now, but it's a "long game" – Head of the OPG "war department" on the tribunal and Russian crimes / Yuriy Bielousov // Telegraf, 08.01.2024: <https://telegraf.com.ua/ukr/intervju/2024-01-08/5826305-lyudi-khochut-spravedlivosti-tut-i-zaraz-ale-tse-gra-vdovgu-kerivnik-departamentu-viyni-ogp-pro-tribunal-ta-zlochyni-rosiyan-ch-1>.

214 The number of employees of the Security Service of Ukraine shall be determined by the President of Ukraine upon the proposal of the Head of the Security Service of Ukraine, based on the needs for reliable protection of the state security of Ukraine, and within the limits of expenditures provided for the maintenance of the Security Service of Ukraine in the State Budget of Ukraine. / Article 19 // Law of Ukraine 'On Security Service of Ukraine,' No. 2229-XII, 25.03.1992: <https://zakon.rada.gov.ua/laws/show/2229-12#Text>.

The SSU investigators have the primary procedural duty to investigate grave international crimes committed on the territory of Ukraine. Based on the rules of jurisdiction set forth in Article 216 of the CPCU, they are responsible for crimes against Ukraine's national security as well as crimes against peace, human security, and international law and order. Consequently, if another pre-trial investigation body registers criminal proceedings with preliminary classification under articles within the SSU's jurisdiction, such proceedings are transferred to the security service for further investigation or assigned to another pre-trial investigation body afterwards.

Article 36 of the CPCU allows for the transfer of criminal proceedings either to another pre-trial investigation body or another unit within the same body. This procedure is actively used in criminal proceedings related to the armed conflict which allows the National Police of Ukraine or the State Bureau of Investigation to investigate alleged violations of the laws and customs of war. The decision to reassign the case due to another authority's ineffectiveness can be justified, for example, by the failure to take the necessary measures within the criminal proceedings, failure to conduct the necessary investigative actions, failure to comply with the prosecutor's instructions, or other grounds.

After the CPCU introduced the possibility of creating interagency investigation groups, the process of transfer of the proceedings between different pre-trial investigation bodies was simplified. In practice, however, the use of such a mechanism has remained limited and the process of transfer as was mentioned above is regulated by part 5 of article 36 of the CCU (ineffectiveness of investigation). However, the SSU remains the leading body in all proceedings and must assign investigators for such a group in each case. Consequence of such a complicated approach is that while the transfer of the proceeding between one authority to another is taking place, **the process of investigation itself is put on hold** and in the three to four months that it takes to reactivate it, valuable evidence is lost, witnesses become unavailable due to them moving, etc.

Based on an internal agreement between the pre-trial investigation and prosecution authorities, the Security Service of Ukraine is focusing on investigating the following incidents under Article 438 of the Criminal Code of Ukraine:

- attacks on vital civilian infrastructure, cultural heritage sites, nuclear facilities, educational and medical institutions, grain storage facilities, as well as attacks on civilian targets resulting in widespread destruction and significant civilian casualties;
- large-scale theft of food (grain crops, etc.);
- cases of ill-treatment or other unlawful acts against prisoners of war;
- deportations and unlawful transfer of population.

Additionally, the SSU deals with situations involving the operations of headquarters, commandant's offices, and command posts of enemy troops and other occupation authorities. These are investigated under Article 438, but are also related to crimes against the foundations of national security.

The practice of investigating grave international crimes by the Security Service of Ukraine **has a number of challenges that need to be addressed:**

### The SSU prioritises investigating offences against the foundation of national security

Under martial law in Ukraine, these crimes come to the forefront of the SSU's work. The SSU addresses security concerns both in the territory beyond active hostilities and in the liberated areas<sup>215</sup>. Consequently, along with the registered proceedings concerning grave international crimes, the number of registered offences against national security is increasing<sup>216</sup>;

### Security service investigators lack experience in dealing with violent crimes

A large percentage of violations of the laws and customs of war contain acts of violence, including premeditated murder, torture and ill-treatment, sexual violence, unlawful detentions, etc. Typically, general criminal offences such as these fall under the responsibility of the police. SSU investigators thus often lack hands-on experience dealing with recording torture or corpses of the deceased victims. Investigators need to have basic skills in

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215 In accordance with its main tasks, the Security Service of Ukraine is obliged to: ...assist in ensuring the regime of martial law and state of emergency in case of their declaration, as well as in eliminating the consequences of natural disasters, major accidents, catastrophes, epidemics, epizootics, and other emergencies... / Article 24 Paragraph 1 Subparagraph 11 // Law of Ukraine 'On Security Service of Ukraine,' No. 2229-XII, 25.03.1992: <https://zakon.rada.gov.ua/laws/show/2229-12#Text>.

216 As of 12.12.2022, 18,508 criminal offences against the foundations of national security were registered, including: 11,764 under Art. 110 of the CCU, 1,907 under Art. 111 of the CCU, 3,756 under Art. 111-1 of the CCU, 355 under Art. 111-2 of the CCU, 63 under Art. 113 of the CCU, and 663 criminal offences of other types (starting from 24.02.2022). / Official telegram channel of the Office of the Prosecutor General: [https://t.me/pgov\\_ua/8061](https://t.me/pgov_ua/8061). Kherson region: SSU detains collaborators who threatened to shoot people for refusing to 'vote' in pseudo-referendum / Security Service of Ukraine, 12.12.2022: <https://ssu.gov.ua/novyny/sbu-zatrymala-na-khersonshchyni-kolaborantiv-yaki-pohrozhuvaly-rozstrilom-za-vidmovu-holosuvaty-na-psevdoreferendumi>. SSU identifies six Russian generals who gave orders to seize Ukrainian cities in Kharkiv region / Security Service of Ukraine, 12.12.2022: <https://ssu.gov.ua/novyny/sbu-identyfikovala-6kh-rosiiskyykh-heneraliv-yaki-viddavaly-nakazy-na-zakhoplennia-ukrainskykh-mist-na-kharkivshchyni>. Kherson: SSU detains Russian agent who adjusted shelling of Ukrainian positions on the southern front / Security Service of Ukraine, 02.12.2022: <https://ssu.gov.ua/novyny/sbu-zatrymala-u-khersoni-rosiiskoho-ahenta-yakyy-koryhuvav-obstrily-pozysii-zsu-na-pivdennomu-fronti>. Lyman: SSU detains collaborator who offered Russian MREs in exchange for support of occupation authorities / Security Service of Ukraine, 01.12.2022: <https://ssu.gov.ua/novyny/sbu-zatrymala-v-lymani-kolaborantku-yaka-proponovala-sukhpaiky-z-rf-v-obmin-na-pidtrymku-okupatsiinoi-vlady>. SSU identifies collaborators who initiated 'accession' of Donetsk region to the rf / Security Service of Ukraine, 17.11.2022: <https://ssu.gov.ua/novyny/sbu-identyfikovala-kolaborativ-yaki-initsiuvaly-pryiednannia-donechchyny-do-rf>. 'SSU conducts stabilisation measures and detects collaborators and traitors in Kherson region,' Vasyl Maliuk / Security Service of Ukraine, 14.11.2022: <https://ssu.gov.ua/novyny/sbu-provodyt-stabilizatsiini-zakhody-ta-viyavliaie-kolaborativ-i-zradnykiv-na-khersonshchyni-vasyl-maliuk>. SSU detains enemy propagandist who prepared fake news for Soloviov's talk show / Security Service of Ukraine, 12.11.2022: <https://ssu.gov.ua/novyny/sbu-zatrymala-vorozhoho-ahitatora-yakyy-hotuvav-feiky-dlia-tokshou-soloviiova>. SSU exposes over 700 collaborators since the start of full-scale invasion / Security Service of Ukraine, 10.11.2022: <https://ssu.gov.ua/novyny/z-pochatku-povnomasshtabnoho-vtorhnennia-sbu-vykryla-ponad-700-kolaborativ>. SSU identifies new collaborators who joined the occupation 'moia of the rf' in Zaporizhzhia and carry out mass repressions / Security Service of Ukraine, 03.11.2022: <https://ssu.gov.ua/novyny/sbu-identyfikovala-novykh-kolaborativ-yaki-vstuplyly-do-okupatsiinoho-mvd-rf-na-zaporizhzhii-i-provodiat-masovi-represii>.



working with victims of such crimes. Additionally, there should be special expert units for taking biological samples and collecting physical evidence<sup>217</sup>. The gaps in professional experience can lead to repeat victimisation and negatively affect the quality of the evidence gathered;

### SSU investigators need specialised and systematic training in dealing with grave crimes

The need for training on the specifics of war crimes investigation and international standards for working with them remains relevant. Although the armed conflict in Ukraine has been ongoing since 2014 and the scale of its consequences increased significantly after 24 February 2022, the training programmes for SSU investigators in this regard were isolated and not systematic. Given the investigators' experience and their exclusive jurisdiction over these types of crimes, they should be prioritised for professional training among other law enforcement bodies.

### A significant share of the information handled by the SSU investigators is classified

Given the nature of its functions, most of the information collected by the Security Service is intelligence. According to SSU leadership, this information, among other things, forms the basis of investigations into the consequences of the armed conflict on the territory of Ukraine<sup>218</sup>. However, under Ukrainian criminal procedural law, this information may often be deemed as inadmissible evidence<sup>219</sup>, since the procedure for obtaining it is classified, protected by law and cannot be disclosed<sup>220</sup>. Therefore, such information alone will not be sufficient for the investigation to prove that a crime has been committed<sup>221</sup>;

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217 SSU discovers another torture chamber of ruscists in liberated Kherson / Security Service of Ukraine, 16.11.2022: <https://ssu.gov.ua/novyny/sbu-vyivavla-shche-odnu-kativniu-rashystiv-u-zvilnenomu-khersoni>. Kherson region: SSU detains rf militant who shot at civilians / Security Service of Ukraine, 14.11.2022: <https://ssu.gov.ua/novyny/sbu-zatrymala-na-khersonshchyni-boiovyka-rf-yakyi-striliav-u-myrne-naselennia>. russia continues to use globally banned phosphorus bombs against Ukraine / Security Service of Ukraine, 01.11.2022: <https://ssu.gov.ua/novyny/rosiia-prodovzhuie-vykorystovuvaty-proty-ukrainy-zaboroneni-u-vsomu-sviti-fosforni-bomby>.

218 SSU's Head Maliuk: 'We Ukrainians just like cotton a lot' // Interfax-Ukraine, 27.10.2022: <https://interfax.com.ua/news/interview/868357.html>.

219 Article 86 / Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

220 In accordance with the procedure established by this Law, state secrets include information: ...in the sphere of state security and law enforcement: ...on the means, content, plans, organisation, financing and logistical support, forms, methods and results of operational search, intelligence and counterintelligence activities; on persons who cooperate or previously cooperated on a confidential basis with the bodies conducting such activities; on the composition and specific persons who are undercover staff members of bodies conducting operational search, intelligence, and counterintelligence activities... / Article 8 Paragraph 1 Subparagraph 4 Indent 3 // Law of Ukraine 'On State Secret,' No. 3855-XII, 21.01.1994: <https://zakon.rada.gov.ua/laws/show/3855-12#Text>.

221 According to the Office of the Prosecutor General, on 21 June 2023 at the Coordination council session the decisions were made as to the significance of the intelligence when gathering evidence. However, it was not discussed or disclosed how such information gathering was to be implemented and how it would be used as evidence//Office of the Prosecutor General 18.01.2024: <https://www.gp.gov.ua/ua/posts/rezultati-roboti-z-protidiyi-zlocinam-vcinenim-v-umovax-zbroinogo-konfliktu-za-2023-rik>

## Heavy workload for SSU investigators in the regions.

The organisation of work within the SSU is such that the majority of criminal proceedings are handled by territorial units, while the Main Investigation Department of the SSU investigates cases of exceptional importance, with priorities set by the department itself. Hence, the main work in areas affected by the armed conflict and those liberated from Russian control remains the responsibility of the regional departments. Until now, the SSU has not developed effective solutions to strengthen the resources in the regions. Consequently, against the background of escalating demands from these areas, the regional departments are forced to organise work on the ground on their own or, as an alternative solution, to transfer proceedings to other investigative authorities;

## Low motivation of SSU investigators

The heavy workload, lack of human resources, and prioritisation within the SSU adversely affect staff motivation. Although Ukrainian criminal procedure law leaves the SSU investigators with the entire burden of addressing grave international crimes, they are still ill-equipped to meet the challenge. Additionally, the question of reforming SSU is still open, with plans to streamline its functions and downsize its personnel<sup>222</sup>.

Amidst the ongoing armed conflict, the SSU's focus remains on addressing security rather than investigating grave international crimes. Following 24 February 2022, the agency's official position is that their attention has also turned to the work with internal human resources, with one of its current priorities is defined as 'self-cleansing of the system'<sup>223</sup>. In practice, however, in order to increase human resources SSU uses possibilities of drafting and increases its human resources by hiring former investigators and prosecutors who had failed attestation during the reform in 2019. In addition, discussions around the reform of the Security Service of Ukraine have been ongoing since 2019<sup>224</sup>. The main point regarding the investigation of grave international crimes is that SSU investigators may lose their investigative functions, and their jurisdiction will be distributed among other authorities. In particular, jurisdiction over crimes under Article 438 of the CCU should be

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222 SSU Reform // Security Service of Ukraine: <https://ssu.gov.ua/reforma-ssu>.

223 SSU Head Maliuk: 'We Ukrainians just like cotton a lot' // Interfax-Ukraine, 27.10.2022: <https://interfax.com.ua/news/interview/868357.html>. Acting SSU Head Vasyl Maliuk: 'Cleansing of the SSU is one of the main priorities today.' / Security Service of Ukraine, 27.10.2022: <https://ssu.gov.ua/novyny/ochyshchennia-sbu-odyn-z-holovnykh-priorytetiv-sohodni-vo-holovy-sluzhby-vasyl-maliuk>.

224 SSU Reform // Security Service of Ukraine: <https://ssu.gov.ua/reforma-ssu>. On 10.03.2022, the Draft Law on Amendments to Law of Ukraine 'On Security Service of Ukraine' Regarding Improving Organisational and Legal Framework of Security Service of Ukraine (Reg. No. 3196) was registered in the Verkhovna Rada: [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=68347](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=68347). On 20.05.2020, during the second first reading, it was sent back for revision. On 26.10.2020, the revised draft law No. 3196-d was registered: [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=70243](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=70243). On 28.01.2021, it was adopted in the first reading.

transferred to the State Bureau of Investigation. Presently, discussions on the content of this reform are ongoing, but the process has been suspended due to martial law<sup>225</sup>.

## National Police of Ukraine

The National Police of Ukraine has the largest number of personnel compared to other pre-trial investigation authorities. The total number of the NPU employees is just under 140,000 people<sup>226</sup>. This number is connected to the scope of tasks performed by the NPU, such as maintaining public safety and order. As a result, NPU branches are extensively distributed across the country, covering the level of regions, oblasts, cities, districts within cities, as well as interregional territorial bodies<sup>227</sup>. Among them number of police investigators before full-scale invasion was under 15 000 people, and after – 8 300.

Since 2014, the NPU has mainly worked with grave international crimes at the regional level despite their lack of direct jurisdiction. In order for the NPU to investigate the offences they classified them under provisions of ordinary crimes, for instance, 146 (kidnapping as opposed to enforced disappearance during armed conflict) 115 (murder as opposed to unlawful killing), 127 (torture), 260 (participation in the illegal armed group) all in connection with the armed conflict in eastern Ukraine. According to the territorial principle, this matter became the responsibility of the Main Department of the National Police in the Autonomous Republic of Crimea and the city of Sevastopol, the Main Department of the National Police in Donetsk region, the Main Department of the National Police in Luhansk region, as well as their territorial units<sup>228</sup>. In the autumn of 2021, a dedicated department for organising investigations of crimes committed during the armed conflict was established within the Main Investigation Department of the NPU.

Following the full-scale invasion of Ukraine by the Russian Federation, the Main Investigation Department of the NPU faced the task of organising the work of the regional departments to ensure proper documentation of the consequences of the armed conflict in Ukraine<sup>229</sup>. A special group was set up at the level of the Main Investigation Department of the NPU under the coordination of the Department for Investigation of Crimes Committed in the Armed Conflict. This group, tasked with documenting the crimes of the Russian Federation and the Re-

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225 Amid the war, the process of reforming the SSU was put on hold // Ukrinform, 08.11.2022: <https://www.ukrinform.ua/rubric-polytics/3610215-v-umovah-vijni-proces-reformuvanna-sbu-postavili-na-pauzu-deputat.html>.

226 Article 13 (5) // Law of Ukraine 'On National Police of Ukraine,' No. 580-VIII, 02.07.2015: <https://zakon.rada.gov.ua/laws/show/580-19#Text>.

227 Article 15 // Law of Ukraine 'On National Police of Ukraine,' No. 580-VIII, 02.07.2015: <https://zakon.rada.gov.ua/laws/show/580-19#Text>.

228 Structure of the National Police of Ukraine // National Police of Ukraine: <https://www.npu.gov.ua/pro-policiju/struktura-nacionalnoyi-policiji>.

229 'It is important to structure and prioritise the array of information about each fact of war crimes committed by the rf,' Kateryna Pavlichenko // National Police of Ukraine, 19.05.2022: <https://www.kmu.gov.ua/news/masiv-informaciyi-pro-kozhen-fakt-voyennih-zlochyniv-vchynenih-rf-vazhlivo-strukturuvati-ta-prioritezuvati-katerina-pavlichenko>.

public of Belarus on the territory of Ukraine, included staff from the Cyber Police Department, the Strategic Investigations Department, the Patrol Police Department, the Criminal Investigation Department, the Criminal Analysis Department, and the Department for the Protection of Interests of Society and the State of the NPU<sup>230</sup>. The group's tasks include collecting and documenting evidence of grave international crimes not only for domestic criminal proceedings but also for international authorities, pre-trial investigations and searching for assets that belong to the Russian state<sup>231</sup>.

Given that nearly every region has been affected to varying degrees by either direct hostilities or missile attacks, the issue of specialisation of police units in relation to offences committed in the context of the armed conflict has not been discussed. Nevertheless, in order to implement the decision of the coordination council of the law enforcement headed by the Prosecutor general, not only the territorial units at public prosecutor's offices were established, but corresponding units were created in nine regional investigative departments of the police in areas most affected by the armed conflict: Kyiv, Chernihiv, Sumy, Kharkiv, Lughansk, Donetsk, Zaporizzhia, Kherson, Dnipro, Mykolayiv. A separate unit operates in the department that deals with Crimea. Investigators at the regional level are either involved in documenting and investigating alleged violations of the laws and customs of war directly on the territory of their own region or are seconded to other regions<sup>232</sup>.

Following 24 February 2022, NPU investigators took over most of the workload of the SSU in documenting and investigating grave international crimes. Approximately 90 per cent of the opened investigations into the allegations remain with the NPU, although according to the CPC of Ukraine they still lack the jurisdiction<sup>233</sup>. Upon agreement between the pre-trial investigation and prosecution authorities, NPU investigators investigate the following incidents under Article 438 of the CCU:

- premeditated unlawful killings,
- mass graves,
- sexual violence,
- ill-treatment of civilians,
- circumstances surrounding the operation of places of mass detention of civilians and their ill-treatment,

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230 National Police to create a special group to document crimes of Russia and Belarus against Ukraine // [LB.ua](https://lb.ua/society/2022/04/18/513842_natspolitsii_stvorili_spetsgrupu_z.html), 18.04.2022: [https://lb.ua/society/2022/04/18/513842\\_natspolitsii\\_stvorili\\_spetsgrupu\\_z.html](https://lb.ua/society/2022/04/18/513842_natspolitsii_stvorili_spetsgrupu_z.html).

231 National Police to create a special group to document crimes of Russia and Belarus against Ukraine // [LB.ua](https://lb.ua/society/2022/04/18/513842_natspolitsii_stvorili_spetsgrupu_z.html), 18.04.2022: [https://lb.ua/society/2022/04/18/513842\\_natspolitsii\\_stvorili\\_spetsgrupu\\_z.html](https://lb.ua/society/2022/04/18/513842_natspolitsii_stvorili_spetsgrupu_z.html).

232 NPU investigators investigate almost 7,500 war crimes // Main Department of the National Police in Chernihiv region, 18.04.2022: <https://cn.npu.gov.ua/news/slidchi-natspolitsii-rozsliduyut-mayzhe-75-tisyach-voennikh-zlochiviv>.

233 Head of the National Police: during the war, materials on 126 sabotage groups were found and transferred to the SBU / Oksana Gerontieva // Interfax-Ukraine, 10.10.2023: <https://interfax.com.ua/news/interview/940311.html>.

- missing persons in the occupied territories,
- unlawful deprivation of liberty,
- looting of property,
- attacks on civilian objects (other than those investigated by the SSU).

Based on this, **the following challenges in their operations can be identified:**

**police remain the first to arrive at the scene.** Police remain the first to arrive at the scene. In addition to ensuring security on the ground, the investigative and operational units of the NPU found themselves having to inspect crime scenes, even when those incidents fell outside their jurisdiction<sup>234</sup>.

It is the police that gather evidence at the sites of shelling and other consequences of the armed conflict<sup>235</sup>. In addition to promptly responding to offences, the NPU manages the 102 hotline where anyone can report an offence and wait for the arrival of an NPU patrol team;

**criminal proceedings regarding the consequences of the armed conflict fall outside the jurisdiction of the NPU.** Criminal proceedings regarding the consequences of the armed conflict on the territory of Ukraine fall outside the jurisdiction of the NPU. The preliminary legal classification of events on the territory of Ukraine puts them into the category of crimes against the foundations of national security or crimes against peace, human security, and international law and order<sup>236</sup>. Crimes within

234 Since the onset of russia's full-scale invasion into Ukraine, investigators from the National Police of Ukraine have initiated 49,001 criminal proceedings related to crimes committed on Ukrainian soil by members of the russian armed forces and their associates. Of these: 37,487 under Article 438 of the Criminal Code of Ukraine (Violation of rules of the warfare); 9,129 under Article 110 of the Criminal Code of Ukraine (Trespass against territorial integrity and inviolability of Ukraine); 2,197 under Article 111-1 of the Criminal Code of Ukraine (Collaboration), 103 under Article 111 of the Criminal Code of Ukraine (High treason), 37 under Article 113 of the Criminal Code of Ukraine (Sabotage), etc. / Crimes committed by the russian military during the full-scale invasion of Ukraine (as of 16.12.2022) // National Police of Ukraine, 16.12.2022: <https://www.npu.gov.ua/news/zlochyny-vchyneni-viiskovymy-rf-pid-chas-pov-nomasshtabnoho-vtorhnennia-v-ukrainu-stanom-na-16122022>.

235 Donetsk region: Police document consequences of 26 russian fire attacks // National Police of Ukraine, 16.12.2022: <https://www.npu.gov.ua/news/politseiski-zadokumentuvaly-naslidky-26-rosiiskyykh-vohnevykh-atak-na-donechchyni>. Kherson region: Police open 22 criminal proceedings on war crimes of russian army // National Police of Ukraine, 09.12.2022: <https://www.npu.gov.ua/news/politsiia-vidkryla-22-kryminalni-provadhennia-za-faktamy-voienykh-zlochyniv-rosiiskoi-armii-na-khersonshchyni>. Kherson region: Police open 51 criminal proceedings on war crimes of russian army // National Police of Ukraine, 16.12.2022: <https://www.npu.gov.ua/news/politsiia-vidkryla-51-kryminalne-provadhennia-za-faktamy-voienykh-zlochyniv-rosiiskoi-armii-na-khersonshchyni>. Sumy region: Police document consequences of artillery shelling by russian troops // National Police of Ukraine, 07.12.2022: <https://www.npu.gov.ua/news/politsiia-sumshchyny-dokumentuie-naslidky-artyleryiskyykh-obstriliv-rosiiskymy-viiskamy>. [https://t.me/UA\\_National\\_Police/19373](https://t.me/UA_National_Police/19373). [https://t.me/Klymenko\\_MVS/752](https://t.me/Klymenko_MVS/752).

236 Law enforcers serve suspicion notice to russian state дума deputy for encroachment on territorial integrity of Ukraine // National Police of Ukraine, 13.12.2022: <https://www.npu.gov.ua/news/pravookhorontsi-povidomyly-pro-pidozru-deputatu-rosiiskoi-derzhdumy-za-posiahannia-na-terytorialnu-tsilisnist-ukrainy>. Law enforcers

these categories fall under the exclusive jurisdiction of the SSU. However, police investigators continue to document them and register relevant criminal proceedings;

### investigating in the areas liberated from Russian control requires significant resources

Investigating in the areas liberated from Russian control requires significant resources. As practice has shown, the scale of the territories liberated as a result of hostilities requires the simultaneous engagement of a significant number of investigators<sup>237</sup>. Given the risk of losing evidence at crime scenes, investigative teams work simultaneously in several locations<sup>238</sup>.

Moreover, the specifics of the violations of the laws and customs of war requires the involvement of experts and specialists in various fields to collect samples and work with physical evidence<sup>239</sup>. At the same time, the liberated areas pose risks for personnel

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served suspicion notices to six generals of the russian army // National Police of Ukraine, 12.12.2022: <https://www.npu.gov.ua/news/pravookhorontsi-povidomyly-pro-pidozru-shistom-heneralam-armii-rf>. Investigators served a notice of suspicion to a woman who allegedly collaborated with the occupiers while serving as the village head in Kharkiv region during the occupation // National Police of Ukraine, 30.11.2022: <https://www.npu.gov.ua/news/obiniala-posadu-starosty-sela-na-kharkivshchyni-pid-chas-okupatsii-slidchi-povidomyly-pro-pidozru-mistsevii-meshkantsi-u-kolaboratsiinii-diiialnosti>. Police investigators serve a notice of suspicion of high treason to Kherson region resident // National Police of Ukraine, 02.12.2022: <https://www.npu.gov.ua/news/slidchi-politsii-povidomyly-pro-pidozru-meshkantsiu-khersonshchyny-v-derzhavni-zradi>. Mykolaiv investigators serve local resident a notice of suspicion of supporting russia's armed aggression // National Police of Ukraine, 02.12.2022: <https://www.npu.gov.ua/news/mykolaivski-slidchi-politsii-oholosyly-mistsevomu-zhyteliu-pidozru-u-pidtrymtsi-zbroinoi-ahresii-rosii>. Collaborator was served a notice of suspicion by the National Police // National Police of Ukraine, 03.12.2022: <https://www.npu.gov.ua/news/za-materialamy-natspolitsii-povidomleno-pro-pidozru-kolaboranttsi>.

237 Kyiv hosts a workshop on the specifics of police work in the context of russia's armed aggression // National Police of Ukraine, 01.12.2022: <https://www.npu.gov.ua/news/u-kyievi-prokhodyt-praktychnyi-seminar-pro-osoblyvosti-roboty-politsii-v-umovakh-zbroinoi-ahresii-rf>. Report of the National Police of Ukraine on the results of work in 2022 // Cabinet of Ministers of Ukraine: [https://www.kmu.gov.ua/storage/app/sites/1/17-civik-2018/zvit2022/Zvit\\_polic\\_2022.pdf](https://www.kmu.gov.ua/storage/app/sites/1/17-civik-2018/zvit2022/Zvit_polic_2022.pdf).

238 Homes destroyed by shelling, rampant looting, and building seizures: Luhansk police document russian war crimes. // National Police of Ukraine, 03.12.2022: <https://www.npu.gov.ua/news/ruinuvannia-pomeshkan-vnaslidok-obstriliv-maroderstvo-ta-znyknennia-liudei-luhanski-politseiski-dokumentuiut-voienni-zlochyny-rosii>. Luhansk region: Police document war crimes of russian military in Svatove district // National Police of Ukraine, 07.12.2022: <https://www.npu.gov.ua/news/luhanshchyna-politseiski-dokumentuiut-voienni-zlochyny-rosiiskyykh-viiskovykh-na-terytorii-svativskoho-raionu>. Specialised investigative teams document crimes of the russian army in de-occupied Kherson // National Police of Ukraine, 17.11.2022: <https://www.npu.gov.ua/news/v-deokupovanomu-khersoni-spetsializovani-slidcho-operatyvni-hrupy-dokumentuiut-zlochyny-armii-rf>. The National Police has mobile teams that document crimes committed against children in the context of war // National Police of Ukraine, 16.11.2022: <https://www.npu.gov.ua/news/u-natspolitsii-pratsiuiut-mobilni-hrupy-iaki-dokumentuiut-zlochyny-vchyneni-v-umovakh-viiny-shchodo-ditei>.

239 As part of a specialised mobile unit, police officers document instances of sexual violence by occupiers in Kherson region // National Police of Ukraine, 14.12.2022: <https://www.npu.gov.ua/news/na-khersonshchyni-politseiski-u-sk-ladi-spetsialnoi-mobilnoi-hrupy-vyivliaiut-ta-rozsliduiut-fakty-vchynennia-rosiiskymy-viiskovymy-seksualnoho-nasyistva-proty-myrnoho-naselennia>. Mykolaiv region: Law enforcers exhume bodies of residents of de-occupied Shyrokye community killed by russian military // National Police of Ukraine, 08.12.2022: <https://www.npu.gov.ua/news/na-deokupovanii-terytorii-mykolaivshchyny-pravookhorontsi-provodiut-ekshumatsiiu-til-meshkantsiv-shyrokivskoi-hromady-iakykh-vbyly-viiskovi-rf>. 'National Police completes exhumation of bodies from mass graves in Izyum,' Serhii Panteleiev // Ministry of Internal Affairs of Ukraine, 23.09.2022: <https://mvs.gov.ua/news/nacpoliciya-zaversuje-eksgumaciyu-til-iz-misc-masovogo-poxovannya-v-misti-izyum-sergii-panteleiev>. Police conduct investigative actions in Kherson pre-trial detention centre // National Police of Ukraine, 19.11.2022: <https://www.npu.gov.ua/news/politseiski-provodiut-slidchi-dii-u-khersonskomu-sizo>.

due to mining, which often limits the access of investigators and operatives to crime scenes<sup>240</sup>;

### investigators need special training on implementation of international standards when dealing with grave crimes

Investigators need special on the job training on implementation of international standards for documenting and investigating grave international crimes. Considering the significant number of NPU investigators in the investigation of grave international crimes and the specifics of such investigations, the demand for training in international humanitarian and criminal law remains very high. The shortcomings of national legislation force the NPU to devise practical solutions for handling electronic evidence, gathering information from witnesses' testimony, and analysing information about alleged perpetrators<sup>241</sup>. Moreover, despite the experience in investigating serious crimes, investigators must consider the specifics of international law when investigating grave international crimes so that the collected evidence is relevant not only for the domestic justice system, but also for international mechanisms;

### the workload of the NPU consists of not only conflict-related pre-trial investigation files but also general law enforcement duties

The workload of the NPU consists of not only conflict-related pre-trial investigation files but also general law enforcement duties. In addition to the challenges faced in investigating grave international crimes, the NPU must also carry out their regular duties and functions<sup>242</sup>. Specifically, the NPU handles general criminal offences that still take place during the armed conflict, as well as ensures law and order in areas under its jurisdiction<sup>243</sup>.

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240 Kherson region: Police have implemented stabilisation measures in over 200 settlements, according to Yevhenii Yenin // National Police of Ukraine, 23.11.2022: <https://www.npu.gov.ua/news/na-khersonshchyni-politsiia-zabez-pechuie-stabilizatsiini-zakhody-u-ponad-200-naselenykh-punktakh-ievhenii-ienin>.

241 The Ministry of Internal Affairs has created an information database of war criminals identified during the Russian aggression // Detector Media, 03.08.2023: <https://detector.media/infospace/article/215104/2023-08-03-mvs-stvo-rylo-informatsynu-bazu-voennykh-zlochyntsyv-vyavlenykh-pid-chas-rosiyskoi-agresii/>. Almost 250,000 invaders and collaborators have been added to the War Criminal database // Ukrinform, 22.12.2023: <https://www.ukrinform.ua/rubric-ato/3803727-u-bazu-voennij-zlocinec-vnesli-vze-majze-250-tisac-zagarnikiv-i-kolaborantiv.html>.

242 Ihor Klymenko: 'Ten teams of explosives experts are currently working in Kherson region' // National Police of Ukraine, 15.11.2022: <https://www.npu.gov.ua/news/narazi-na-khersonshchyni-pratsiuiut10-hrup-vybukhotekhniv-ihor-klymenko>.

243 Kharkiv region: Police responded to 1,566 calls from citizens in one day // National Police of Ukraine, 13.11.2022: <https://www.npu.gov.ua/news/politsiia-kharkivshchyni-za-dobu-vidreahuvana-na-1566-povidomlen-vid-hromadian>. Head of NPU Ihor Klymenko: 'National Police implements stabilisation measures in Kherson' // National Police of Ukraine, 12.11.2022: <https://www.npu.gov.ua/news/natsionalna-politsiia-provodyt-stabilizatsiini-zakhody-v-kher-soni-hlava-vidomstva-ihor-klymenko>. Ihor Klymenko: 'Police resume work in the de-occupied part of Kherson region, but it is extremely dangerous for citizens to return due to massive mine contamination' // National Police of

As a result, the workload of the NPU increases several times over compared to other pre-trial investigation authorities, especially in the areas liberated from Russian control<sup>244</sup>.

## State Bureau of Investigation

After its establishment, the State Bureau of Investigation has effectively taken over the jurisdiction previously held by the public prosecutor's office. In fact, it began to fully function on 27 November 2018<sup>245</sup>, and exactly a year later, in line with paragraph 1 of the Transitional Provisions of the CPCU<sup>246</sup>, the public prosecutor's offices no longer had the authority to conduct pre-trial investigations and have investigators on staff.

Pursuant to Article 216 of the CPCU, the SBI has jurisdiction over crimes committed by persons with a special status: representatives of public and civil service, members of anti-corruption bodies, as well as to the crimes against the established order of the military service (military crimes) under Section XIX of the Criminal Code of Ukraine<sup>247</sup>. On

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Ukraine, 11.11.2022: <https://www.npu.gov.ua/news/politsiia-vidnovliuie-robotu-na-deokupovanii-chastyni-kherson-shchynny-ale-hromadianam-povertatysia-vkrai-nebezpechno-cherez-masove-minuvannia-ihor-klymenko>.

244 Denys Monastyrskyi: 'Police resumed work in 182 out of 229 de-occupied settlements on Dnipro's right bank in Kherson region // National Police of Ukraine, 15.11.2022: <https://www.npu.gov.ua/news/denys-monastyrskyi-politsiia-vidnovyia-svoiu-robotu-u-182-iz-229-deokupovanykh-naselenykh-punktakh-pravoberezhzhia-khersonshchynny>. Ihor Klymenko: 'The training programme for future police officers will incorporate lessons learned from working in the de-occupied territories.' // National Police of Ukraine, 10.11.2022: <https://www.npu.gov.ua/news/dosvid-roboty-na-deokupovanykh-terytoriakh-uvide-do-prohramy-pidhotovky-maibutnikh-politseiskykh-ihor-klymenko>. Citizens' awareness is the key to safe life: Police conduct outreach activities in the liberated territories of Snihurivka district // National Police of Ukraine, 19.11.2022: <https://www.npu.gov.ua/news/obiznanist-hromadian-zaporuka-bezpechnoho-zhyttia-politseiski-provodiat-informatsiino-roziasniuvalni-robotu-na-zvilnenykh-terytoriakh-snihurivshchynny>.

245 History / State Bureau of Investigation: <https://dbr.gov.ua/istoriya>.

246 Clause 1 of the Transitional Provisions / Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

247 4. Investigators from units of the State Bureau of Investigations of Ukraine shall conduct pre-trial investigation of criminal offences:

1) committed by the President of Ukraine, whose powers have been terminated, the Prime Minister of Ukraine, a member of the Cabinet of Ministers of Ukraine, First Deputy and Deputy Ministers, a member of the National Council of Ukraine on Television and Radio Broadcasting, the National Commission for State Regulation of Financial Services Markets, National Commission on Securities and Stock Market, the Antimonopoly Committee of Ukraine, Chairman of the State Committee for Television and Radio Broadcasting of Ukraine, Chairman of the State Property Fund of Ukraine, his First Deputy and Deputy, member of the Central Election Commission, Member of Parliament of Ukraine, Commissioner for Human Rights, Director of the National Anti-Corruption Bureau of Ukraine, Director of the Economic Security Bureau of Ukraine, Prosecutor General, his first deputy and deputy, Chairman of the National Bank of Ukraine, his First Deputy and Deputy Chairman, Head of the National Bank of Ukraine, his First Deputy and Deputy, Chairman of the National Agency for the Prevention of Corruption, his Deputy, the Secretary of the National Security and Defence Council of Ukraine, his First Deputy and Deputy, the Permanent Representative of the President of Ukraine to the Autonomous Republic of Crimea, his First Deputy and Deputy, Adviser or Assistant to the President of Ukraine, Chairman of the Verkhovna Rada of Ukraine, Prime Minister of Ukraine, a judge, a law enforcement officer, a person whose office belongs to A category, except where the pre-trial investigation of these criminal offences is under the jurisdiction of the National Anti-Corruption Bureau of Ukraine in accordance with part 5 of this Article;

2) committed by officials of the National Anti-Corruption Bureau of Ukraine, Deputy Prosecutor General – Head of the Specialised Anti-Corruption Prosecutor's Office or other prosecutors of the Specialised Anti-Corruption Prosecutor's Office, except when the pre-trial investigation of these criminal offences is under the jurisdiction of detectives of the internal control unit of the National Anti-Corruption Bureau of Ukraine in accordance with part 5 of this Article;



the one hand, SBI jurisdiction is not connected to grave international crimes or investigation of such offences. On the other hand, in practice, there is a question of investigating cases where Ukrainian servicemen have allegedly committed these crimes. Especially given that some of the violations of the laws and customs of war that could potentially be committed by Ukrainian military personnel<sup>248</sup> are envisaged in Chapter XIX of the Criminal Code of Ukraine: Article 426 'Inaction of military authorities', Article 432 'Marauding', Article 433 'Violence against population in an operational zone', Article 434 'Ill-treatment of prisoners of war', Article 435 'Unlawful use or misuse of the Red Cross, Red Crescent, Red Crystal symbols'<sup>249</sup>.

In April 2022, the SBI also provided a response to Russia's full-scale invasion of Ukraine by establishing a dedicated unit within the Main Investigation Department. Its task is to conduct pre-trial investigations into military offences, offences against peace, human security, and international law and order committed as a result of the Russian Federation's aggressive war against Ukraine, with the participation of the representatives of other countries<sup>250</sup>. Investigators of this department were engaged in documenting the aftermath of the armed conflict in Kyiv, Sumy, and Chernihiv regions<sup>251</sup>. Based on the public statements from the SBI leadership, this format of work was made possible through an interagency investigation team involving other pre-trial investigative bodies<sup>252</sup>. In practice, however, investigation files were passed on the basis of part 5 article 36 CPCU for a short period of time and eventually were passed back on to SSU.

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- 3) against the established procedure for military service (military criminal offences), except for criminal offences provided for by Article 422 of the Criminal Code of Ukraine. // Article 216 / Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.
- 248 Servicemen of the Armed Forces of Ukraine, the Security Service of Ukraine, the State Border Guard Service of Ukraine, the National Guard of Ukraine and other military groups formed in accordance with the laws of Ukraine, the State Special Transport Service, the State Special Communications and Information Protection Service of Ukraine, as well as other persons specified by law, shall be liable under the respective Articles of this Section. / Article 401 Paragraph 2 // Criminal Code of Ukraine, No. 2341-III, 05.04.2001: <https://zakon.rada.gov.ua/laws/show/2341-14#Text>.
- 249 Criminal Code of Ukraine, No. 2341-III, 05.04.2001: <https://zakon.rada.gov.ua/laws/show/2341-14#Text>.
- 250 SBI establishes special investigation department to investigate Russian military offences / State Bureau of Investigation, 07.04.2022: <https://dbr.gov.ua/news/dbr-stvorilo-specialne-slidche-upravlinnya-shho-rozsliduvatime-vijskovi-zlochiny-rf>.
- 251 SBI establishes special investigation department to investigate Russian military offences / YouTube, 07.04.2022: [https://www.youtube.com/watch?v=9umrtE1n9v4&t=1s&ab\\_channel=%D0%94%D0%B5%D1%80%D0%B6%D0%B0%D0%B2%D0%BD%D0%B5%D0%B1%D1%8E%D1%80%D0%BE%D1%80%D0%BE%D0%B7%D1%81%D0%BB%D1%96%D0%B4%D1%83%D0%B2%D0%B0%D0%BD%D1%8C](https://www.youtube.com/watch?v=9umrtE1n9v4&t=1s&ab_channel=%D0%94%D0%B5%D1%80%D0%B6%D0%B0%D0%B2%D0%BD%D0%B5%D0%B1%D1%8E%D1%80%D0%BE%D1%80%D0%BE%D0%B7%D1%81%D0%BB%D1%96%D0%B4%D1%83%D0%B2%D0%B0%D0%BD%D1%8C). Oleksii Sukhachov: 'SBI completed documenting crimes of russian military in Irpin. The investigative team will continue its work in Sumy region.' / State Bureau of Investigation, 19.04.2022: <https://dbr.gov.ua/news/dbr-zadokumentuvalo-zlochiny-rosijskih-vijskovih-v-irpeni-grupa-slidchih-prodovhit-robotu-v-sumskij-oblasti-oleksij-suhachov>. Oleksii Sukhachov: 'SBI continues to thoroughly document aggressor's crimes against civilians: Chernihiv region is next.' / State Bureau of Investigation, 19.05.2022: <https://dbr.gov.ua/news/dbr-prodovzhue-retelno-dokumentuvati-zlochiny-agresora-proti-mirnogo-naseleennya-na-cherzi-chernigivshhina-oleksij-suhachov>. SBI documented about 20 cases of torture of local residents of Trostianets in one week / State Bureau of Investigation, 27.04.2022: <https://dbr.gov.ua/news/za-tizhden-dbr-zadokumentuvalo-blizko-20-faktiv-katuvannya-miscevogo-naseleennya-trostyancya>.
- 252 Oleksii Sukhachov: 'SBI is actively involved in repelling russian aggression.' / State Bureau of Investigation, 11.05.2022: <https://dbr.gov.ua/news/dbr-bere-aktivnu-uchast-u-vidbiti-agresii-rosijskoi-federacii-oleksij-suhachov/>. Head of the SBI's Main Investigation Department Oleksandr Udovychenko: 'A number of criminal proceedings are being investigated against companies whose beneficiaries are russian citizens and in which state-owned enterprises have a stake.' / Tetiana Bodnia // Censor.NET, 27.04.2022: <https://censor.net/ua/resonance/3336798/nachalnyk-golovного-slidchogo-upravlinnya-dbr-oleksandr-udovychenko-rozsliduyetsya-nyzka-kryminalnyh>.

As SBI investigators stepped up their efforts in the liberated regions, they focused their activities on investigating the actions of officials of various levels, their possible collaboration with the Russian side<sup>253</sup>, and any potential breaches of the laws and customs of war in this context<sup>254</sup>. Grave international crimes remain outside the SBI's specialisation and are rare compared to other criminal offences. This suggests that the public prosecutor's offices do not rely enough on the additional investigative resources of the SBI, leaving them out of the overall effort.

The public prosecutor's offices do not rely enough on the additional investigative resources of the SBI, leaving them out of the overall effort.

In general, the SBI has the smallest number of human resources compared to the National Police and the Security Service of Ukraine. Pursuant to Article 9 of the Law of Ukraine 'On the State Bureau of Investigation,' the maximum number of SBI employees can be 1,600<sup>255</sup>. Against the background of discussions about the potential reform of the Security Service of Ukraine and the transfer of jurisdiction over crimes against the foundations of national security and

grave international crimes to the State Bureau of Investigation, **the primary concern is whether the SBI's number of employees is sufficient to cope with the significant workload of dealing with the consequences of the armed conflict.** If this reform is adopted at the legislative level, it will necessitate a prompt decision on changing the internal structure of the SBI and expanding the number of investigators.

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253 Former law enforcement officer from Kherson, who works for occupants, will be brought to court following the SBI investigation / State Bureau of Investigation, 30.11.2022: <https://dbr.gov.ua/news/za-materialami-dbr-pered-sudom-postane-ekspravoohoronec-z-hersonu-yakij-pracyue-na-okupantiv>. Kharkiv region: SBI's efforts led to the detention of 19 traitors in de-occupied territories / State Bureau of Investigation, 29.11.2022: <https://dbr.gov.ua/news/za-rezultatami-roboti-dbr-na-deokupovanih-teritoriyah-harkivshhini-zatrimano-19-zradnikiv>. SBI serves a notice of suspicion of high treason to Mariupol tax officer who collects money for occupiers / State Bureau of Investigation, 25.11.2022: <https://dbr.gov.ua/news/dbr-povidomilo-pro-pidozru-u-derzhavnij-zradi-podatkivici-z-mariupolya-yaka-zbirae-groshi-dlya-okupantiv>. SBI serves notice of suspicion to the head of Kupiansk occupation police department / State Bureau of Investigation, 24.11.2022: <https://dbr.gov.ua/news/dbr-povidomilo-pro-pidozru-ochilnici-vid-dilu-okupacijnoi-policii-kupyanska>.

254 SBI detains collaborators from Kherson detention centre who illegally detained Ukrainian patriots / State Bureau of Investigation, 28.11.2022: <https://dbr.gov.ua/news/dbr-zatrimalo-kolaborantiv-z-hersonskogo-sizo-yaki-nezakkonno-utrimovali-ukrainskih-patriotiv>. SBI completes special investigation into commander of russian ship that fired at Mariupol / State Bureau of Investigation, 23.11.2022: <https://dbr.gov.ua/news/dbr-zavershilo-specrozsliduvannya-shhodo-komandira-rosijskogo-korablya-yakij-obstrilyuvav-mariupol>. An indictment is sent to court against the traitor who carried out filtration measures in the temporarily occupied territory / State Bureau of Investigation, 19.11.2022: <https://dbr.gov.ua/news/do-sudu-skerovano-obvinuvalni-akt-shhodo-zradnika-yakij-provodiv-filtracijni-zahodi-na-timchasovo-okupovanih-teritorii1>.

255 Article 9 / Law of Ukraine 'On the State Bureau of Investigation' dd. 12.11.2015, No. 794-VIII: <https://zakon.rada.gov.ua/laws/show/794-19#Text>.

## Other Pre-Trial Investigation Bodies

According to the CPCU, the jurisdiction of other pre-trial investigation bodies do not include grave international crimes. Yet, certain aspects of their work are connected to the investigation of the consequences of the armed conflict in Ukraine after 24 February 2022.

**The National Anti-Corruption Bureau** is a part of the system of anti-corruption system<sup>256</sup>, so its jurisdiction covers corruption offences perpetrated by officials<sup>257</sup>. Following Russia's full-scale invasion of Ukraine, NABU detectives also gathered evidence related to the consequences of the armed conflict in Ukraine, which included examining information from open sources and documenting their findings. According to official statements by NABU, its detectives also participated in the pre-trial investigation of violations of the laws and customs of war in the Kyiv region<sup>258</sup>.

At the same time, NABU's work is also closely related to the tracing and seizing assets of the Russian Federation within the **Task Force** – the Interagency Working Group on Prosecution of Persons Responsible for Aggression Against Ukraine, Tracing, Seizure and Further Confiscation of Their Assets<sup>259</sup>. Its work involves analysing assets of both private individuals and legal entities to identify beneficiaries based in the Russian Federation. They are also being checked for any involvement in the encroachment on the territorial integrity of Ukraine within the framework of the so-called 'umbrella proceedings' on the fact of Russia's full-scale invasion of Ukraine. As publicly mentioned, the results of the Task Force's efforts could serve as a source of compensation for the consequences of Russia's actions on the territory of Ukraine. However, in 2023, the Task Force's activity became less noticeable. Most likely, this is due to a large number of problems both at the level of legislation and at the level of political discussions related to the process of

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256 Articles 191, 206-2, 209, 210, 211, 354, 364, 366-2, 366-3, 368, 368-5, 369, 369-2, 410 of the Criminal Code of Ukraine.

257 Article 216 / Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

258 On two fronts: NABU's performance in H1 2022 / NABU, 10.08.2022: <https://nabu.gov.ua/novyny/na-dva-fronty-rezultaty-roboty-nabu-u-pershomu-pivrichchi-2022-roku>. Rebuffing the aggressor: NABU's contribution in almost half a year since the invasion / NABU, 11.08.2022: <https://nabu.gov.ua/novyny/vidsich-agresoru-vnesok-nabu-za-mayzhe-piv-roku-z-pochatku-vtorgnennya>.

259 Anyone can contribute to the seizure and confiscation of the aggressor's property: Ukraine launched a portal for reporting assets of persons involved in the russian aggression against Ukraine / Office of the Prosecutor General, 30.03.2022: <https://www.gp.gov.ua/ua/posts/kozen-moze-dolucitisya-do-arestu-ta-konfiskaciyi-maina-agresora-v-ukrayini-zapustili-portal-povidomlen-pro-aktivi-osib-pricetnix-do-agresiyi-rf-proti-ukrayini>. 100 days of the Task Force's work: The assets of those involved in Russian aggression must be used to compensate for Ukraine's damages / 25.06.2022: <https://www.gp.gov.ua/ua/posts/uivdon2hznzow>. Andriy Kostin: 'The primary objective of the Task Force is to swiftly redirect the assets of those involved in crimes against Ukraine to the victims of aggression as a compensation.' / Office of the Prosecutor General, 16.08.2022: <https://gp.gov.ua/ua/posts/task-force>. Andriy Kostin held the first working meeting of the renewed Task Force / Office of the Prosecutor General, 09.09.2022: <https://gp.gov.ua/ua/posts/andrii-kostin-proviv-perse-roboce-zasidannya-onovlenoyi-task-force?fbclid=IwAR1ycn75gX-8qi8iF9zAVI62jVncfPaQuvrPcRclOw3bivmM2NaMOU5ZFLM>.

seizing Russian assets. Additionally, the High Anti-Corruption Court of Ukraine is already considering cases on the recovery of assets and issuing relevant decisions<sup>260</sup>.

**The Economic Security Bureau of Ukraine** is a relatively new law enforcement authority in the Ukrainian system<sup>261</sup>. Its jurisdiction is related to the so-called 'economic crimes'<sup>262</sup> and is quite removed from investigating the consequences of the armed conflict in Ukraine. Nevertheless, ESBU investigators are also involved in the search and seizure of Russian assets within the Task Force<sup>263</sup>.

The role of the NABU and the ESBU in investigating the consequences of the armed conflict on the territory of Ukraine is related to the analysis of the economic conditions for activities of Russian and Belarusian entities in Ukraine. Discussions are still ongoing regarding the legal framework for the seizure of their assets and subsequent recovery. The possibility of establishing legislative mechanisms that would allow their resources to be used as a compensation fund for damages from the armed conflict is also under consideration.

**During the armed conflict, Ukraine's pre-trial investigation authorities remain the ones who are responsible for responding to and documenting the offences.** The quality and effectiveness of their efforts determines the content and scope of evidence collected for grave international crimes, which later becomes the basis for administering justice.

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260 Reparations for Ukraine: models, prospects, challenges / Analytical report // Dnistrianskyi Center, 2023: <https://dc.org.ua/news/vidshkoduвання-dlya-ukrayiny-modeli-perspektyvy-vyklyky-analitychna-dopovid>. Confiscation of Russian assets: problems and risks of the HACC practice / Markiyana Bem // Yurydychna Hazeta, 09.06.2023: <https://jur-gazeta.com/dumka-eksperta/konfiskaciya-rosijskih-aktiviv-problemi-i-riziki-praktiki-vaks.html>.

261 Law of Ukraine 'On the Economic Security Bureau,' No. 1150-IX, 28.01.2021: <https://zakon.rada.gov.ua/laws/show/1150-20#Text>.

262 Articles 191, 199, 200, 203-2, 204, 205-1, 206, 206-2, 210, 211, 213, 212-1, 218-1, 219, 220-1, 220-2, 222, 222-1, 223-1, 224, 229, 231, 232, 232-1, 232-2, 233 of the Criminal Code of Ukraine / Article 216 // Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

263 ESBU seized russian and belarusian assets for UAH 30 billion / Economic Security Bureau, 18.05.2022: <https://esbu.gov.ua/news/30-mlrd-griven-vartist-aktiviv-rosiyi-ta-bilorusi-na-yaki-beb-zabezpechilo-nakladennya-areshtu>. ESBU secures seizure of russian property worth over UAH 600 million / Economic Security Bureau, 08.06.2022: <https://esbu.gov.ua/news/beb-zabezpechilo-nakladennya-areshtu-na-majno-rosiyi-vartisty-ponad-600-mln-grn>. ESBU seized property of a russian citizen worth almost UAH 1.3 billion / Economic Security Bureau, 29.06.2022: <https://esbu.gov.ua/news/beb-areshtovalo-majno-gromadyanina-rf-na-sumu-majzhe-1.3-mlrd-grn>. ESBU initiated seizure of assets from russian and belarusian companies amounting to UAH 360 million / Economic Security Bureau, 04.07.2022: <https://esbu.gov.ua/news/za-inicijatyvu-beb-zaareshtovano-majno-kompanij-rf-ta-rb-na-360-mln-grn>. Corporate rights worth UAH 2.3 billion and 35 real estate units of a company associated with the russian federation were seized / Economic Security Bureau, 09.08.2022: <https://esbu.gov.ua/news/areshtovano-korporatyvni-prava-na-23-mlrd-hrn-ta-35-obiektiv-nerukhomosti-pidpriemstva-i-ake-poviazano-z-rf>. ESBU seizes property of a company linked to russia for UAH 350 million / Economic Security Bureau, 17.08.2022: <https://esbu.gov.ua/news/beb-areshtovalo-maino-kompanii-poviazanoi-z-rf-na-350-mln-hrn>. Assets of a former state дума deputy from the 'united russia' party seized by the ESBU / Economic Security Bureau, 29.08.2022: <https://esbu.gov.ua/news/beb-vystupaie-za-pryshvydshennia-vprovadzhenia-sanktsiinoi-polityky-initsiiovano-stvorennia-mizhvidomchoi-robochoi-hrupy>. ESBU seizes over UAH 5 million in offices of a meat processing plant linked to russia / Economic Security Bureau, 20.10.2022: <https://esbu.gov.ua/news/beb-vyluchylo-ponad-5-mln-hrn-v-ofisakh-miaso-kombinatu-poviazanoho-z-rf>. ESBU transfers assets of prominent russian businessmen worth UAH 10 billion to ARMA / Economic Security Bureau, 23.11.2022: <https://esbu.gov.ua/news/beb-peredalo-v-upravlinnya-arma-aktiv-vidomih-rosijskih-biznesmeniv-na-10-mlrd-grn>. Over UAH 2.2 billion added to Ukraine's budget from assets of russia and belarus seized by the ESBU / Economic Security Bureau, 07.12.2022: <https://esbu.gov.ua/news/ponad-2.2-mlrd-griven-u-dohid-ukrayini-vid-areshtovanih-beb-aktiviv-rf-ta-rb>. ESBU seizes the inventory of a company associated with the russian federation and belarus worth over UAH 50 million / Economic Security Bureau, 13.12.2022: <https://esbu.gov.ua/news/beb-areshtovalo-tmc-kompaniyi-povyazanoyi-z-rf-ta-rb-vartisty-ponad-50-mln-grn>.

Each law enforcement authority faces its own unique challenges in this regard, but their collective effort requires coordination. Since no single pre-trial investigative body can cope with the investigation of the consequences of the armed conflict on the territory of Ukraine on its own, the allocation of their resources depends on the decisions of procedural supervisors in criminal proceedings. Furthermore, the rules of jurisdiction set out in the CPCU require amendments that will resolve procedural conflicts and allow the investigative bodies to avoid dependence on the SBU in such investigations and to conduct investigations independently. However, the main challenge for each law enforcement authority is to increase qualification and develop competences of investigators through practical and continuous learning of effective application of international humanitarian and criminal law standards.

# Operation and Capacity of Prosecutor's Offices to Prosecute International Crimes

The system of prosecutor's offices in Ukraine is complementary to the pre-trial investigation bodies. Their functions are related to supporting public prosecution in court, organisation and procedural oversight in criminal investigations, coordination of the investigative authorities' activities aimed at discovering, documenting and investigating crimes and representing the interests of people or the state in court<sup>264</sup>. Until 2019, when the State Bureau of Investigation was launched, they had also been conducting pre-trial investigations<sup>265</sup>. The prosecution system is organised on a basis of territorial jurisdiction: local district public prosecutor's office, regional prosecutor's offices, and the Office of the Prosecutor General's Office as the highest body<sup>266</sup>.

In 2019–2020, a large-scale reform of prosecutorial bodies took place. It included the disbandment of military prosecutor's offices, attestation of prosecutors at all levels, reduction of the number of prosecutors by 5,000, and selection of new prosecutors at all levels<sup>267</sup>. The reform was carried out in several phases, but this period dramatically changed the specialisation of prosecutors' offices in prosecuting crimes related to the armed conflict as the practice of former military prosecutors became the responsibility of other units within the system.

Before Russia's full-scale invasion of Ukraine, the main burden of investigating grave international crimes was placed on the prosecutor's offices in the regions affected by the armed conflict (Donetsk Regional Prosecutor's Office, Luhansk Regional Prosecutor's

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264 Article 131-1 / Constitution of Ukraine, 28.06.1996: <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#n5259>. Article 2 / Law of Ukraine 'On Public Prosecutor's Office,' No. 1697-VII, 14.10.2014: <https://zakon.rada.gov.ua/laws/show/1697-18#Text>.

265 Clause 1 of the Transitional Provisions // Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

266 Article 7 / Law of Ukraine 'On Public Prosecutor's Office,' No. 1697-VII, 14.10.2014: <https://zakon.rada.gov.ua/laws/show/1697-18#Text>

267 Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine on Priority Measures for Reforming Public Prosecutor's Office,' No. 113-IX, 19.09.2019: <https://zakon.rada.gov.ua/laws/show/113-20/sp:max50:nav7:-font2#n53>.

Office<sup>268</sup>, and the Prosecutor's Office of the Autonomous Republic of Crimea and the city of Sevastopol<sup>269</sup>), as well as on specific units within the OPG<sup>270</sup>.

In October 2019, the Prosecutor General of Ukraine issued an order establishing the Department for the Supervision of Criminal Proceedings in Crimes Committed in the Context of Armed Conflict (hereinafter, the Department) within the Office of the Prosecutor General of Ukraine. De facto, it became the first separate dedicated entity at the highest level of the prosecutor's office where all conflict-related cases were accumulated, including the alleged crimes committed both in the Crimean Peninsula and in certain districts of Donetsk and Luhansk regions. The Department's work was separated from the related structural units within the OPG, which were responsible for supervising criminal proceedings investigated by the Security Service of Ukraine and the National Police of Ukraine and facilitate international legal cooperation<sup>271</sup>.

Following 24 February 2022, the internal structure of the public prosecutor's offices sought to adapt to new challenges. It was the "War's Department" that had to organise the work of the regional and district prosecutor's offices in conflict-affected regions. The

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268 A specialised department was established within Donetsk Regional Prosecutor's Office to supervise criminal proceedings related to crimes committed in the context of the armed conflict / Official website of Donetsk Regional Public Prosecutor's Office, 23.01.2020: [https://don.gp.gov.ua/ua/news.html?\\_m=publications&t=rec&id=265314](https://don.gp.gov.ua/ua/news.html?_m=publications&t=rec&id=265314).

A specialised department was established within Luhansk Regional Prosecutor's Office to supervise criminal proceedings related to crimes committed in the context of the armed conflict / Official website of Luhansk Regional Public Prosecutor's Office, 24.01.2020: [https://lug.gp.gov.ua/ua/news.html?\\_m=publications&c=view&t=rec&id=265363](https://lug.gp.gov.ua/ua/news.html?_m=publications&c=view&t=rec&id=265363).

269 About the Public Prosecutor's Office of the Autonomous Republic of Crimea and the city of Sevastopol / Official website of the Public Prosecutor's Office of the Autonomous Republic of Crimea and the city of Sevastopol <https://ark.gp.gov.ua/ua/histark.html>.

270 In 2015, the system of military prosecutor's offices in Ukraine underwent specialisation to address the consequences of the armed conflict in Ukraine. A dedicated Military Prosecutor's Office of the Anti-Terrorist Operation Forces was set up, covering the regions of Donetsk, Luhansk, Kharkiv, and Zaporizhzhia. A specific Department for the Investigation of Crimes against Peace, Human Security, and International Law and Order was established within the Main Military Prosecutor's Office. Additionally, a separate Department for the Investigation of Crimes Committed in the Temporarily Occupied Territories of the Office of the Prosecutor General was subordinated to the Chief Military Prosecutor. As a result of the 2019 reform of the prosecution service, the existing military prosecutor's offices were dissolved and the Department for the Supervision of Criminal Proceedings Related to Crimes Committed in the Context of Armed Conflict was established within the Office of the Prosecutor General, effectively succeeding the above mentioned units of the Main Military Prosecutor's Office. // OPG creates a department to investigate crimes related to Russia's aggression against Ukraine / Radio Svoboda, 03.09.2015: <https://www.radiosvoboda.org/a/27224665.html>. Order of the Prosecutor General of Ukraine 'On Peculiarities of Activities of Military Prosecutor's Offices', № 12gn, 29.08.2014: <https://zakon.rada.gov.ua/laws/show/v0012900-14#Text>. OPG creates Military Prosecutor's Office of the ATO Forces / Ukrainska Pravda, 13.08.2015: [https://www.pravda.com.ua/news/2015/08/13/7077763/index\\_amp](https://www.pravda.com.ua/news/2015/08/13/7077763/index_amp). OPG creates a department to investigate crimes related to Russia's aggression against Ukraine / Radio Svoboda, 03.09.2015: <https://www.radiosvoboda.org/a/27224665.html>. Principle of Complementarity: International Justice in Ukraine // ULAG, 2019: <https://ulag.org.ua/reports-and-materials/principle-of-complementarity-international-justice-in-ukraine>.

271 Considering the specialisation outlined by the orders of the Prosecutor General, supervision of legal compliance during the pre-trial investigation by investigators and inquiry officers of pre-trial investigation bodies (except for detectives of the National Anti-Corruption Bureau of Ukraine) within criminal proceedings related to crimes against the foundations of national security of Ukraine, public safety, peace, human security, and international law and order, inviolability of state borders, and other criminal offences committed in the context of the armed conflict in the temporarily occupied territories of the Autonomous Republic of Crimea and the city of Sevastopol, Donetsk and Luhansk regions, or related to the armed aggression of the Russian Federation against Ukraine, – will be carried out by the heads and prosecutors of structural units that supervise criminal offences committed in the context of the armed conflict. // Paragraph 7 Subparagraph 3 Indent 6 of the Order of the Prosecutor General 'On Organisation of Prosecutors' Activities in Criminal Proceedings', No. 309, 30.09.2021: <https://zakon.rada.gov.ua/laws/show/v0309905-21#Text>.

scale of events across all regions of Ukraine called for a swift and coordinated response not only from the prosecution authorities but also from pre-trial investigation bodies. Hence, the Office of the Prosecutor General and its decisions received heightened attention. The scope of OPG powers and its coordinating role in a large number of criminal proceedings required it to define benchmarks and markers for the overall work on the consequences of the armed conflict, as well as priority steps for investigators and prosecutors on the ground. But changes within the system are still in progress:

- Since May 2022, the Department has undergone structural changes in respect of both staff and internal structure<sup>272</sup>. The staff that was recruited had no previous experience of prosecuting grave international crimes and or started to obtain it only following the full-scale invasion<sup>273</sup>.

In September 2022, the Department expanded to include a new unit for procedural oversight in pre-trial investigation and public prosecution in criminal proceedings for crimes related to sexual violence<sup>274</sup>. A dedicated department was also set up to conduct procedural oversight in criminal proceedings concerning the crime of genocide and incitement to it. Furthermore, collaboration with the JIT necessitated the creation of a specialised relevant unit within the Department working on joint investigations. Overall, during the two years of the active conflict, the Department's staff has grown to more than 100 employees. At this stage, it is hard to say whether there will be no additional changes to its structure.

- Since 24 February 2022, various units within the OPG tried to demonstrate their active participation in investigating the consequences of the armed conflict. The relevant proceedings have become the focus of the work of various OPG departments that oversee, in particular, security agencies, the National Police of Ukraine, the SBI, as well as the Specialised Environmental Prosecutor's Office and the Department for the Protection of Children's Interests.

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272 The OPG reorganises the 'War Department' in the context of hostilities / Ukrainska Pravda, 24.05.2022: <https://www.pravda.com.ua/news/2022/05/24/7348333/>.

273 Post on the Facebook page of the Office of the Prosecutor General, 24.05.2022: <https://www.facebook.com/pgo.gov.ua/posts/376882107807962>. Yurii Bielousov heads the Department for the Supervision of Criminal Proceedings Related to Crimes Committed in the Context of Armed Conflict within the Office of the Prosecutor General. / Ukrinform, 24.05.2022: <https://www.ukrinform.ua/rubric-society/3491351-departament-vijni-ofisu-genprokurora-ocoliv-urij-belousov.html>.

274 Post on the Facebook page of Prosecutor General Andriy Kostin, 24.09.2022: <https://www.facebook.com/AndriyKostinUa/posts/pfbid02N4kdY2kxsNDxS9dZWJFQzNicSKvt7hDHarkfD1N64vMJJj57xNUcnABmh9vtJpW8l>. Andriy Kostin on the investigation of sexual violence crimes: 'Perpetrators will be punished, and victims will be protected and given justice' / Office of the Prosecutor General, 24.09.2022: <https://gp.gov.ua/ua/posts/andrii-kostin-pro-rozsliduvannya-zlociniv-seksualnogo-nasilstva-vinni-otrimayut-pokarannya-a-postrazdali-zaxist-i-spravedlivist>. Sexual crimes during the war: Bucha, Irpin, Kherson / INTERVIEW / Prosecutor Iryna Didenko // We are Ukraine, 19.01.2023: [https://www.youtube.com/watch?v=U5\\_2umKX-ZM&ab\\_channel=%D0%9C%D0%B8-%D0%A3%D0%BA%D1%80%D0%B0%D1%97%D0%BD%D0%B0](https://www.youtube.com/watch?v=U5_2umKX-ZM&ab_channel=%D0%9C%D0%B8-%D0%A3%D0%BA%D1%80%D0%B0%D1%97%D0%BD%D0%B0).



The internal allocation of responsibilities within the prosecution system makes it possible for other structural units to examine the certain elements of the armed conflict, thus this responsibility is not limited War Crimes Department<sup>275</sup>. However, it does place an additional responsibility on the Department to coordinate with other OPG units and is required to establish effective communication with them.

- A dedicated unit has been established within the Department of International Legal Cooperation within the OPG specifically to facilitate collaboration with the International Criminal Court. Its task is to implement the provisions of the criminal procedure law and coordinate all communication with the ICC during its work in Ukraine<sup>276</sup>. In 2023 following the decision of the prosecutor General these functions were attributed to the Department of International Legal Cooperation.<sup>277</sup> Presently the War Crimes Department executes only certain OTP requests which concern undertaking certain investigative steps in criminal proceedings which the prosecutors of the Department are responsible for.
- The OPG also established a Coordination Centre for Victims and Witnesses Support (hereinafter – the Centre). Reportedly, the task of the Centre is to offer the victims and witnesses of the alleged grave crimes comprehensive informational support at all stages of criminal proceedings, coordinate the provision of legal, psychological, medical, and social assistance by the relevant services and non-governmental organisations, and to take necessary steps to prevent retraumatisation<sup>278</sup>.

The Centre is expected to focus on communicating with victims in the context of their participation in criminal proceedings. Yet, the question of providing mechanisms for their protection remains open. In addition, the regulations and other statutory documents have not been adopted yet therefore, its powers, functions, and basis for engagement with other departments within the OPG, investigative authorities and courts remain unknown.

- Also, some representatives of the War Crimes Department the Department of International Legal Cooperation and Investigators of the Main Investigative Department of SSU make up the Ukrainian team at the International Center for the Prosecution of Crime of Aggression against Ukraine;

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275 Order of the Prosecutor General 'On Organisation of Prosecutors' Activities in Criminal Proceedings,' No. 309, 30.09.2021: <https://zakon.rada.gov.ua/laws/show/v0309905-21#Text>.

276 Order of the Prosecutor General 'On Organisation of Prosecutors' Activities in Criminal Proceedings,' No. 309, 30.09.2021: <https://zakon.rada.gov.ua/laws/show/v0309905-21#Text>.

277 Regulations on the Department of International Legal Cooperation of the Office of the Prosecutor General // Order of the Prosecutor General No. 259, September 12, 2023: <https://gp.gov.ua/ua/posts/normativni-dokumenti-prokuraturi>

278 Join the Team of the Coordination Centre for Victims and Witnesses Support: Applications Open for Vacant Positions // Office of the Prosecutor General, 27.06.2023: <https://www.gp.gov.ua/ua/posts/stan-castinoyu-komandi-koordinacijnogo-centru-pidtrimki-i-svidkiv-ogoloseno-nabir-na-vakantni-posadi>.

- Donetsk and Luhansk Regional Public Prosecutor's Offices, as well as some district prosecutor's offices in these regions, were forced to relocate due to ongoing hostilities in the area. In fact, these prosecutor's offices have already been displaced twice since the onset of the armed conflict in Ukraine in 2014. This situation significantly affects the morale, social security, and safety of the prosecutors.
- Dedicated departments for the procedural oversight specifically in this category of criminal proceedings were established at the level of regional prosecutor's offices most affected by the consequences of the armed conflict (Sumy, Chernihiv, Kyiv, Kharkiv, Zaporizhzhia, and Kherson regions)<sup>279</sup>.

Throughout the entire history of the prosecution service in Ukraine, **political will has been the main factor influencing their work**. The process of appointing the Prosecutor General and their role in the system of power distribution determines their involvement in the relevant internal and external political processes. Consequently, government reshuffling or changes in political strategies result in replacement of a Prosecutor General<sup>280</sup>. Such decisions automatically lead to reassignments in administrative posts in prosecutor's offices at different levels and to changes in the structure of the prosecution service units<sup>281</sup>.

This practice adversely affects the system's sustainability, consistency of approaches in criminal proceedings, and communication with lower-level prosecutor's offices. In fact, in such conditions, it is impossible to build a stable structure and ensure that the resources invested in its development will not be devalued due to its weakening and possible subsequent changes. Currently, Prosecutor General is a presidential nominee, their candidacy must be supported by simple majority of Ukraine's parliament<sup>282</sup>. Since 2019 Ukraine has changed a Prosecutor General three times, two of the PGs including those

279 Yurii Bielousov's facebook post, 19.10.2022: <https://www.facebook.com/100000285088919/posts/pfbid033URdcRiTREpDbnXFPLmdAktBkix4SGdwpbCKBnBvQTc8BtD7LnvHHuEk1uC8AeGyl/>.

280 On the dismissal of Yurii Lutsenko from the post of the Prosecutor General of Ukraine / Decree of the President of Ukraine, No. 636/2019, 29.09.2019: <https://zakon.rada.gov.ua/laws/show/636/2019#Text>. Lutsenko writes a letter of resignation / Ukrainska Pravda, 29.09.2019: <https://www.pravda.com.ua/news/2019/08/29/7224738/>. On the appointment of R. Riaboshapka as the Prosecutor General / Decree of the President of Ukraine, No. 638/2019, 29.09.2019: <https://zakon.rada.gov.ua/laws/show/638/2019#Text>. Why Prosecutor General Riaboshapka is dismissed / BBC Ukraine, 05.03.2020: <https://www.bbc.com/ukrainian/news-51746278>. On passing a no-confidence motion against Prosecutor General Riaboshapka / Resolution of the Verkhovna Rada of Ukraine, No. 526-IX, 05.03.2020: <https://zakon.rada.gov.ua/laws/show/526-IX#Text>. On the appointment of I. Venediktova as the Prosecutor General / Decree of the President of Ukraine, No. 90/2020, 17.03.2020: <https://zakon.rada.gov.ua/laws/show/90/2020#Text>. Venediktova's appointment: A bad month for Ukraine just got worse – world press / Radio Svoboda, 18.03.2020: <https://www.radiosvoboda.org/a/30495358.html>. On the removal of the Prosecutor General from office / Decree of the President of Ukraine, No. 500/2022, 17.07.2022: <https://www.president.gov.ua/documents/5002022-43325>. On dismissal of I. Venediktova from the post of the Prosecutor General / Decree of the President of Ukraine, No. 518/2022, 19.07.2022: <https://zakon.rada.gov.ua/laws/show/518/2022#Text>. The President appointed Andriy Kostin as the Prosecutor General: The main task of the Public Prosecutor's Office is to bring all Russian war criminals to justice / Office of the President of Ukraine, 28.07.2022: <https://www.president.gov.ua/news/prezident-priznachiv-andriya-kostina-generalnim-prokurorom-n-76713>.

281 Post on the official Telegram page of the Office of the Prosecutor General, 25.01.2023: [https://t.me/pgo\\_gov\\_ua/8997](https://t.me/pgo_gov_ua/8997).

282 Art 40, Law on Prosecution Service, art 131 Constitution of Ukraine.

who held the Office during the full-scale invasion had no prosecutorial background. Each newly appointed PG also replaces his core team including deputies responsible for supervising the work of the departments, including a War Crimes Department. None of those who are currently holding supervisory positions have had an experience or background in investigating or prosecuting atrocity crimes. This is not to say that there is a lack of available prosecutors with the relevant background, however, as a general rule, they are not appointed to the positions of authority due to political reasons.

For instance, changes within the prosecution system also had implications for the work related to the armed conflict. In June 2021, the Department was removed from the jurisdiction of the supervising Deputy Prosecutor General and was directly subordinated to the Prosecutor General<sup>283</sup>. This decision caused outrage in civil society because the overall management of work related to the armed conflict requires specific knowledge of international standards, and the fact that it was motivated from politics rather than had valid reasoning<sup>284</sup>.

Paragraph 11 of the Recommendation Rec (2000)19 to Member States on the Role of Public Prosecution in the Criminal Justice System of the Committee of Ministers of the Council of Europe stipulates that 'States should take appropriate measures to ensure that public prosecutors are able to perform their professional duties and responsibilities without unjustified interference or unjustified exposure to civil, penal or other liability...'<sup>285</sup>. The Explanatory Memorandum to the Recommendation explains that 'there are two requirements for the proper functioning of Public Prosecution in all circumstances: on the one hand, public prosecutors must enjoy independence... and in particular to be able to act whatever interests at stake, "without unjustified interference" (unjustified, i.e. in cases other than those provided in the law)... On the other hand, there must be provision for public prosecutors—given the substantial powers they enjoy and the consequences that the exercise of those powers can have on individual liberties— to be made liable at disciplinary, administrative, civil and criminal level for their personal shortcomings, and such provision must be within reasonable limits in order not to encumber the system'<sup>286</sup>. Con-

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283 Order of the Prosecutor General 'On Distribution of Duties between Management of Prosecutor General's Office' dated 08.07.2021, No. 226: <https://gp.gov.ua/ua/posts/2021>.

284 Prosecutor General's moves: Why was Gyunduz Mamedov removed? / Left Bank, 10.07.2021: [https://lb.ua/news/2021/07/10/488988\\_genprokurorski\\_manevri\\_shcho.html](https://lb.ua/news/2021/07/10/488988_genprokurorski_manevri_shcho.html). The public is calling on Zelenskyy to ensure the independent work of the 'War Department' without Venediktova's influence / ZMINA, 02.07.2021: <https://zmina.ua/statements/gromadskist-prosyt-zelenskogo-zabezpechyty-nezalezhnu-robotu-departamentu-vijny-bez-vplyvu-venediktovoyi/>. Prosecutor General takes over the 'War Department' after transferring it to Yakubovskiy / Suspilne, 01.07.2021: <https://suspilne.media/143846-genprokurorka-zabrala-sobi-departament-vijni-pisla-peredaci-akubovskomu/>.

285 Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe to member states on the role of public prosecution in the criminal justice system, adopted by the Committee of Ministers of the Council of Europe at the 724th meeting of Ministers' Deputies on 6 October 2000: [https://supreme.court.gov.ua/userfiles/Rec\\_2000\\_19\\_2000\\_10\\_6.pdf](https://supreme.court.gov.ua/userfiles/Rec_2000_19_2000_10_6.pdf).

286 Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe to member states on the role of public prosecution in the criminal justice system, adopted by the Committee of Ministers of the Council of Europe at the 724th meeting of Ministers' Deputies on 6 October 2000: [https://supreme.court.gov.ua/userfiles/Rec\\_2000\\_19\\_2000\\_10\\_6.pdf](https://supreme.court.gov.ua/userfiles/Rec_2000_19_2000_10_6.pdf).

sultative Council of European Prosecutors, which was tasked with providing opinions on matters related to the implementation of the Recommendation, highlighted in Paragraph 15 of its Opinion that “Independence” means that prosecutors are free from unlawful interference in the exercise of their duties to ensure full respect for and application of the law and the principle of the rule of law and that they are not subjected to any political pressure or unlawful influence of any kind<sup>287</sup>.

Documenting and examining the consequences of the armed conflict has become the main reason for active presence of the prosecution authorities in the public sphere, and, accordingly, an additional strengthening of the political role of the Prosecutor General, both domestically and internationally. In response to the public demand for coverage of events and their assessment, the official information channels of the OPG, along with the Prosecutor General’s own social media pages, have become crucial sources for summaries about the investigations and prosecutions of conflict related violations and a source of information about the incidents of attacks. Information about the number of registered criminal offences, the outcomes of pre-trial investigations, and the number of affected individuals and critical infrastructure continue to be updated daily.

After 24 February 2022, the War Crimes Department itself has paid much attention to maintaining an active role in the public sphere<sup>288</sup>. Presentation of this information has given the leadership of the prosecutor’s office additional opportunities to become an active voice reflecting the consequences of the war for international partners. As a result, the prosecutor’s office has become more involved in representing the interests of national justice at various international platforms, such as the UN, PACE, Eurojust, the ICC, and the EU, and others.

Such active public presence **puts into jeopardy independence and integrity of the investigations**. Very often in order to demonstrate its active and important role in ensuring justice, representatives of the Office publish their opinions on social media and in the newspaper and TV interviews, thereby creating certain expectations among the population while investigations are still ongoing. Such an approach has two types of adverse consequences:

01. Undue pressure of investigators and prosecutors working on a case to deliver certain results that might not be possible to deliver;
02. If the promised results are not delivered general public’s distrust starts to build otherwise chasing an unattainable result adversely affects quality of investigation.

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287 Paragraph 1 of Opinion No. 13(2018) of the CCPE “Independence, accountability and ethics of prosecutors,” Consultative Council of European Prosecutors, 23 November 2018: <https://rm.coe.int/opinion-13-ccpe-2018-ukr/1680939322>.

288 Post on the Facebook page of Iryna Didenko, 21.01.2023: <https://www.facebook.com/Didenko.Iryna/posts/pfbid-02khJs8Z9eBdW3fgmKkHdZBirYMvVDtCXjrGbu5WcT7uGHGJsDZxtHbboTfHpACuu5l>.

The national legislation of Ukraine, including the CPCU, also includes control over the effectiveness of criminal proceedings as one of the main functions of the prosecutor's offices. In addition to direct procedural oversight and supporting public prosecution in court, senior-level prosecutor's offices should provide guidance to their lower-level counterparts. However, in the context of armed conflict, this work also requires separate approaches to grave international crimes, which must be implemented at the level of pre-trial investigation bodies. **Currently, the prosecution system should find effective ways to address several pressing challenges:**

### **inconsistency in the distribution of functions between structural units.**

Inconsistency in the distribution of functions between structural units. The basic distribution of functions within the prosecution service depends on the tasks and jurisdiction over carrying out oversight. The situation within the prosecutor's office after 24 February 2022 has shown that having a dedicated unit for armed conflict does not necessarily prevent its functions from being duplicated by others. The speed with which changes can be made to the organisational structure and internal documents of the prosecution service does not guarantee a stable distribution of functions. Such an approach is also demonstrated by the Order of the Prosecutor General No 309, which defines general approaches to organisation of activities of the prosecutor's offices during criminal proceedings.

Despite its need to separate war crimes related offences as responsibility of the War Crimes Department, instead such investigations are also prosecuted by specialist ecological department or others.<sup>289</sup> Specifically, a risk remains that specialisation in grave international crimes may be transferred to units that provide procedural oversight for security agencies, given that the jurisdiction over such proceedings remains with the Security Service of Ukraine. Until a sustainable approach to the structure of the War Crimes Department is ensured, implementing strategic approaches in practice has proved exceptionally challenging.

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289 On the organisation of the prosecutor's activities in criminal proceedings// Prosecutor General's Order No 309, 30 Sept 2021: <https://zakon.rada.gov.ua/laws/show/v0309905-21#Text>.

## backlogged system due to documenting the consequences of the armed conflict by registering criminal proceedings

Recording in the Unified Register of Pretrial Investigations remains the only mechanism to formally document consequences of the armed conflict. After 24 February 2022, due to a large number of violations, hundreds of criminal investigations under Article 438 of the Criminal Code of Ukraine continue to be opened every day, regardless of whether the acts committed actually constitute such a crime.

In addition, the constant updating of statistical data on their number their public coverage on the resources of the OPG turned them into information portals<sup>290</sup>. In fact, this process has replaced the documentation mechanism which currently does not exist at the state level. Using the provisions of Article 214 of the CPCU<sup>291</sup> and formal elements of criminal offences arising from the armed conflict, the URPTI has become a daily summary of events. This approach does not streamline the investigation, but rather overloads the investigative and prosecutorial authorities with procedural obligations, thereby unnecessarily complicating any comprehensive analysis of the events.

## lack of a unified investigative strategy and uncertainty of priorities in the investigation.

Given the duration of the armed conflict in Ukraine and the significant number of registered criminal offences, their investigation requires the introduction of unified approaches and systematisation of information within the investigations. The scale of the consequences of the armed conflict requires both the consideration of international standards when investigating and qualifying the committed acts, and also proper coordination among all participants in the proceedings. Given the functions of the prosecutor's office, this duty remains within its area of responsibility. In 2023, the OPG adopted several documents outlining unified approaches to prosecuting this category of cases. These include the strategy

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290 The official information channels of the Office of the Prosecutor General provide daily updates on newly registered criminal offences: <https://gp.gov.ua/>.

291 Investigator, inquiring officer or public prosecutor shall immediately but in any case no later than within 24 hours after submission of a report, notification on a criminal offence that has been committed or after he has learned on his own from any source about circumstances which are likely to indicate that a criminal offence has been committed, to enter the information concerned in the Unified Register of Pre-Trial Investigations, to initiate investigation, and, within 24 hours of entering such information, to provide the applicant with an extract from the Unified Register of Pre-Trial Investigations. // Article 214 / Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

for working with victims<sup>292</sup> and the strategic plan for the prosecution of international crimes for 2023–2025<sup>293</sup>.

While these documents may be a good starting point, unless they include practical implementation mechanisms both would be of little or no use. They would be the most complex part to implement because they would require reassessment of the entire system and most importantly answering a question of whether it is fit for purpose as well significant changes to the existing legislation in a comprehensive and holistic manner rather than using an ad-hoc, fragmented approach<sup>294</sup>.

### deprioritisation of the consequences of the armed conflict on the territory of Ukraine prior to the full-scale invasion.

In coordinating the work of regional public prosecutor's offices, the War Crimes Department itself shifted its focus exclusively to the consequences of events after 24 February 2022, leaving aside the consequences of the armed conflict in Crimea and Donbas since 2014. Nonetheless, the degree of independence of individual structural units of the prosecutor's offices allows them to move independently in this direction. This applies primarily to regional public prosecutor's offices, which are responsible for investigating these events. In particular, the ARC Prosecutor's Office continues to implement its own strategy of work under the temporary occupation of the Crimean Peninsula, operating within its own jurisdiction<sup>295</sup>.

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292 Regarding the organisation of the work of public prosecutor's offices in supporting victims and witnesses of war crimes and other international crimes // Order of the Prosecutor General, No. 103, 11.04.2023: <https://zakon.rada.gov.ua/laws/show/v0103905-23#Text>.

293 Strategic Plan for the Exercise of Prosecutorial Authority in the Field of Criminal Prosecution for International Crimes for 2023-2025 // Approved by the Prosecutor General, 15.09.2023: <https://www.gp.gov.ua/ua/posts/strategichni-plan-shhodo-realizaciyi-povnovazhen-organiv-prokuraturi-u-sferi-kriminalnogo-peresliduvannya-za-vcinennya-miznarodnix-zlociniv-na-2023-2025-roki>.

294 Prosecutor is not just an accuser, but a defender of victims: New approaches to handling cases of conflict-related sexual violence presented at the Office of the Prosecutor General // Office of the Prosecutor General, 14.10.2022: <https://gp.gov.ua/ua/posts/prokuror-ne-obvinuvac-a-zaxisnik-postrazdalix-v-ofisi-genprokurora-prezentuvati-novi-pidxodi-do-vedennya-sprav-shhodo-seksualnogo-nasilstva-povyazanogo-z-konfliktom>. Protection, respect, justice. New approaches to investigating war crimes involving sexual violence / Andriy Kostin // Ukrainska Pravda, 13.10.2022: <https://www.pravda.com.ua/columns/2022/10/13/7371795/>.

295 The Strategy for the Development of the Public Prosecutor's Office of the Autonomous Republic of Crimea under the Temporary Occupation for 2019-2021 was approved / Official website of the Public Prosecutor's Office of the Autonomous Republic of Crimea and the city of Sevastopol, 10.10.2018: [https://ark.gp.gov.ua/ua/news.html?\\_m=publications&\\_c=view&\\_t=rec&id=238365&fbclid=IwAR1BRzAjUSHNr5N\\_ui8yLMTmXICBjb7DbI0qfd1GFS3ZSOHX7Hr-W1JndDkQ](https://ark.gp.gov.ua/ua/news.html?_m=publications&_c=view&_t=rec&id=238365&fbclid=IwAR1BRzAjUSHNr5N_ui8yLMTmXICBjb7DbI0qfd1GFS3ZSOHX7Hr-W1JndDkQ). The Office of the Prosecutor General is developing a Strategy for Combating Crimes Committed in the Context of Armed Conflict // Office of the Prosecutor General, 17.02.2022: <https://gp.gov.ua/ua/posts/ofis-genprokurora-rozroblyaje-strategiyu-protidiyi-zlocinam-vcinennim-v-umovax-zbroinogo-konfliktu>.

## lack of qualified personnel

After 2014, the demand for training in international law among prosecutors remained high. Before 24 February 2022, the need primarily came from bodies operating in certain districts in Donetsk and Luhansk regions, the Crimean Peninsula, and specialised units at the highest level of the prosecution system.

After the full-scale invasion, absolutely all prosecutors at all levels felt the need to acquire basic knowledge of international humanitarian law and international criminal law. While some international and national organisations provide training for prosecutors in individual prosecutor's offices, the need still remains. Among the array of available training programs at the national level, as well as training opportunities abroad, it is the responsibility of heads of structural units to send prosecutors to such trainings. As a result, an approach to assembling teams sent to attend a training may be selective and based on various reasons – there is no specific criterion or selection mechanism over who should be prioritised and how relevant certain aspects to their work.

At the same time, the system of in-service training remains the main source of knowledge gaining for prosecutors. International humanitarian law was added to the list of topics, but the official format is not sufficient to accommodate everyone interested in attending in a short time<sup>296</sup>. Additionally, availability of qualified trainers who are able to work with prosecutors remains relevant. While national training programmes are based on national legal practice, which lacks components on the international law standards. International programmes are detached from real domestic context and due to a language barrier very often lost in translation. Naturally there is a lack of standardised approach to knowledge sharing and application and as a result prosecutors get different quality of knowledge and skills which directly affects the quality and consistency of their work.

Stability in the functioning of the system and the availability of clear strategic approaches affect the effectiveness of work of the prosecution service. Continuous and inconsistent changes in the War Crimes Department and other units engaged in investigating the consequences of the armed conflict have resulted in an outflow of profession-

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296 Catalogue of training programmes // Training Centre for Prosecutors of Ukraine: <https://ptcu.gp.gov.ua/uk/prokuroram/>.



al staff with experience. Instead, the change and expansion of the Department's staffing structure and the selection process for vacant positions have generated a new demand for training of prosecutors in international humanitarian law and international criminal law.

As of yet, **no unified approach has been presented** for handling the tens of thousands of recorded criminal offences in the context of the armed conflict, and this number continues to grow daily. Rather than assessing its own resources and the capacity of the national justice system to investigate grave international crimes to identify and effectively respond to the challenges, the public position of the prosecutor's office is often declared to the effect that while prosecutors and investigators need assistance in certain specific aspects of the investigations, the system has enough capacity to tackle the vast majority. However, the existing limitations in the legislative, structural and resource related aspects (for example, the level of salaries of the prosecutors remains outside of the scope of priorities when the state budget is formed every year as opposed to that of the investigators and judges. This affects motivation of the staff, the human resources turnover and stability of the system as a whole), lack of quality control systems in place, political dependence all indicate that **there are serious capacity issues that will not be resolved with inconsistent ad-hoc solutions**<sup>297</sup>.

Rather than assessing its own resources and the capacity of the national justice system... the public position of the prosecutor's office is...that while it needs assistance in certain specific aspects of the investigations, the system has enough capacity

297 Andriy Kostin: 'It's time for the rule of law to end impunity' / Office of the Prosecutor General, 05.10.2022: <https://gp.gov.ua/ua/posts/andriy-kostin-nastav-cas-verxovenstvu-prava-poklasti-krai-bezkarnosti>. Six months after the full-scale invasion: Achievements and challenges for the Ukrainian justice system / JustTalk, 01.09.2022: <https://justtalk.com.ua/post/6-misyatsiv-pislyia-povnomasshtabnogo-vtorgnennya-zdobutki-ta-vikliki-dlya-ukrainskoi-sistemi-pravosuuddya>. Yurii Bielousov's facebook post, 19.10.2022: <https://www.facebook.com/100000285088919/posts/pfbid033URdcRiTREpDbnXFPLmdAktBkx4SGdwpbCKBnBvQTc8BtD7LnvHHuEk1uC8AeGyL/>. Ukraine's true detectives: the investigators closing in on Russian war criminals / The Guardian, 20.10.2022: <https://www.theguardian.com/world/2022/oct/20/ukraine-true-detectives-investigators-closing-in-on-russian-war-crimes>. 'The Hunters.' A monologue by Yurii Bielousov, Head of the War Department of the Office of the Prosecutor General, on how Ukraine investigates war crimes / Грати, 02.11.2022: <https://graty.me/uk/monologue/mislivczi-monolog-kerivnika-departamentu-vijni-ofisu-genprokurora-yuriya-b%D1%94lousova-pro-te-yak-ukra%D1%97na-rozslidu%D1%94-vo%D1%94n-ni-zlochyni/>. Prosecutor Yurii Bielousov: When we enter Mariupol, we will see that there are many times more war crimes // RBC-Ukraine, 02.11.2023: <https://www.rbc.ua/rus/news/prokuror-yuriy-belousov-koli-zaydemo-mariupol-1698873665.html>. Yurii Bielousov, Prosecutor General's Office: Propagandists should bear the same responsibility as those who commit war crimes // Detector Media, 03.11.2023: <https://detector.media/infospace/article/218903/2023-11-03-yuriy-bielousov-ofis-genprokurora-propagandysty-mayut-nesty-taku-zh-vidpovidalnist-yak-i-ti-khto-vchynyaie-voieni-zlochyny/>. YURII BELOUSOV: "WE CAN'T LOSE UKRAINE'S LEGAL BATTLE" // Justice.Info, 11.07.2023: <https://www.justiceinfo.net/en/119268-yuriy-belousov-we-cant-lose-ukraine-legal-battle.html>. Head of the Department of War: We can almost certainly identify those who led the crimes committed by the occupiers // Interfax-Ukraine, 02.08.2023: [https://interfax.com.ua/news/interview/926527.html?fbclid=IwAROfYe9\\_jq7IaczVpEwGuGFWoyaGhvJbsumgKZ0qm0XrXtfnMXBLKQ03i\\_4](https://interfax.com.ua/news/interview/926527.html?fbclid=IwAROfYe9_jq7IaczVpEwGuGFWoyaGhvJbsumgKZ0qm0XrXtfnMXBLKQ03i_4).

People want justice here and now, but it's a "long game" – the head of the "war department" of the OGP about the tribunal and the crimes of the Russians (part 1) / Yurii Bielousov // Telegraf, 08.01.2024: <https://telegraf.com.ua/ukr/intervju/2024-01-08/5826305-lyudi-khochut-spravedlivosti-tut-i-zaraz-ale-tse-gra-vdovgu-kerivnik-departamentu-vijni-ogp-pro-tribunal-ta-zlochyni-rosiyan-ch-1>. Civilian hostages must be returned, and it's not about an exchange – the head of the OGP "war department" about Russian torture chambers and the inevitability of punishment (part 2) / Yurii Bielousov // Telegraf, 09.01.2024: <https://telegraf.com.ua/ukr/intervju/2024-01-09/5826716-tsvilnikh-zaruchnikiv-maemo-povernuti-i-tse-ne-pro-obmin-glava-departamentu-vijni-ogp-pro-rosiyski-kativni-i-nevidvorotnist-pokarannya-ch-2>.

# Operation and Capacity of the Courts of Law to Administer Justice for International Crimes

Ukraine's courts system is divided into courts of first instance (local courts), appeal, and cassation), have territorial jurisdiction and specialisation. Criminal proceedings are within the jurisdiction of general courts and are conducted in local courts and appeal courts, with the Supreme Court serving as the court of cassation.<sup>298</sup> Since the onset of the armed conflict in Ukraine in 2014, there have been recurring discussions about reinstating the military court system<sup>299</sup>. This stems partly from the reform of the military prosecutor's office, which was abolished in 2019<sup>300</sup>. Some voice concerns regarding the fitness of civilian courts to administer justice in cases that involve military personnel<sup>301</sup>. However, such proposals have not yet gained enough traction<sup>302</sup>.

The challenges faced by the judicial system as a result of the armed conflict have accumulated and multiplied the issues already encountered in the work of other authorities. The courts are responsible for making decisions in criminal proceedings; hence, all substantive or procedural legal challenges that arise during an investigation should be addressed by a judge.

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298 Articles 17 and 18 // Law of Ukraine 'On Judiciary and Status of Judges,' No. 1402-VIII, 02.06.2016: <https://zakon.rada.gov.ua/laws/show/1402-19#Text>.

299 Military courts: back into the ranks / Yevhen Sydorov // Ukrainska Pravda, 19.05.2015: <https://www.pravda.com.ua/columns/2015/05/19/7068292/>. The reintroduction of military courts in Ukraine faces resistance... by the Constitution itself? // Law and Business, 18.09.2015: <https://zib.com.ua/ua/118588.html>.

300 Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine on Priority Measures for Reforming Public Prosecutor's Office,' No. 113-IX, 19.09.2019: <https://zakon.rada.gov.ua/laws/show/113-20#n53>.

301 Does Ukraine need military courts? / Oleksandr Kniaziuk // Yurydychna Hazeta, 21.09.2022: <https://jur-gazeta.com/publications/sferi-praktiki/viyskove-pravo/chi-potribni-ukrayini-viyskovi-sudi-.html>. Supreme Court judge: 'Ukraine needs to restore military justice,' // Ukrinform, 10.10.2021: <https://www.ukrinform.ua/rubric-ato/3330357-ukraini-treba-povernuti-viyskove-pravosudda-sudda-vs-u.html>.

302 'It is unlikely that we will establish military courts in wartime conditions' / Vsevolod Kniazhev // Pravo.UA, 08.04.2022: <https://pravo.ua/malo-imovirno-shcho-v-umovakh-voiennoho-chasu-my-stvorymo-viyskovi-sudy-holova-vs-vsevolod-kniazhev/>.

## Judicial Reform

Judicial reform has been underway in Ukraine since 2015<sup>303</sup>. The need for it arose due to the process of Ukraine's integration into the EU and to bring the national governance standards in line with those of the EU, in particular, to '...continue reforming the judiciary and the judicial system to further strengthen the independence, impartiality, and professionalism of the judiciary and courts...' <sup>304</sup>. The reform was launched with the adoption of the new Law 'On the Judiciary and Status of Judges' in 2016<sup>305</sup>. The key elements of the reform included:

- amendments to the Constitution of Ukraine in the area of justice, including the possibility for the Verkhovna Rada of Ukraine to consider the ratification of the Rome Statute of the International Criminal Court (the provision entered into force on 30 June 2019)<sup>306</sup>;
- the creation of the Supreme Court as the highest level of the Ukrainian justice system<sup>307</sup>;
- the possibility of holding an open competition for the positions of judges<sup>308</sup>;
- the establishment of the High Council of Justice to oversee the organisational aspects of the judiciary, including the appointment, dismissal, and transfer of judges<sup>309</sup>;

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303 Issues of the Judicial Reform Council // Decree of the President of Ukraine, No. 826/2014, 27.10.2014: <https://zakon.rada.gov.ua/laws/show/826/2014#Text>. About the Legal Reform Commission // Decree of the President of Ukraine, No. 421/2019, 21.06.2019: <https://zakon.rada.gov.ua/laws/show/421/2019#n12>.

304 EU-Ukraine Association Agenda for the Preparation and Facilitation of the Implementation of the Association Agreement, 23.11.2009: [https://zakon.rada.gov.ua/laws/show/994\\_990#Text](https://zakon.rada.gov.ua/laws/show/994_990#Text). Association Agreement // Cabinet of Ministers of Ukraine: <https://www.kmu.gov.ua/diyalnist/yevropejska-integraciya/ugoda-pro-asociaciyu>. Recommendations of the European Commission on the Status of Ukraine's Membership in the EU // Delegation of the European Union to Ukraine, 17.06.2022: [https://www.eeas.europa.eu/delegations/ukraine/%D1%80%D0%B5%D0%BA%D0%BE%D0%BC%D0%B5%D0%BD%D0%B4%D0%B0%D1%86%D1%96%D1%97-%D1%94%D0%B2%D1%80%D0%BE%D0%BF%D0%B5%D0%B9%D1%81%D1%8C%D0%BA%D0%BE%D1%97-%D0%BA%D0%BE%D0%BC%D1%96%D1%81%D1%96%D1%97-%D1%89%D0%BE%D0%B4%D0%BE-%D1%81%D1%82%D0%B0%D1%82%D1%83%D1%81%D1%83-%D1%83%D0%BA%D1%80%D0%B0%D1%97%D0%B-D%D0%B8-%D0%BD%D0%B0-%D1%87%D0%BB%D0%B5%D0%BD%D1%81%D1%82%D0%B2%D0%BE-%D0%B2-%D1%94%D1%81\\_uk?s=232](https://www.eeas.europa.eu/delegations/ukraine/%D1%80%D0%B5%D0%BA%D0%BE%D0%BC%D0%B5%D0%BD%D0%B4%D0%B0%D1%86%D1%96%D1%97-%D1%94%D0%B2%D1%80%D0%BE%D0%BF%D0%B5%D0%B9%D1%81%D1%8C%D0%BA%D0%BE%D1%97-%D0%BA%D0%BE%D0%BC%D1%96%D1%81%D1%96%D1%97-%D1%89%D0%BE%D0%B4%D0%BE-%D1%81%D1%82%D0%B0%D1%82%D1%83%D1%81%D1%83-%D1%83%D0%BA%D1%80%D0%B0%D1%97%D0%B-D%D0%B8-%D0%BD%D0%B0-%D1%87%D0%BB%D0%B5%D0%BD%D1%81%D1%82%D0%B2%D0%BE-%D0%B2-%D1%94%D1%81_uk?s=232). 'Essential for the Country's Survival: Why Judicial and Constitutional Reforms are Important for Every Ukrainian' // Liga.Business, 17.01.2023: <https://biz.liga.net/ua/all/all/article/uslovie-vyjivaniya-strany-pochemu-sudebnaya-i-konstitutsionnaya-reformy-vajny-dlya-kajdogo>. G7 ambassadors emphasise that judicial reform is one of the pivotal prerequisites for Ukraine's integration into the EU // Espresso, 01.12.2022: <https://espresso.tv/posli-g7-nagadali-shcho-reforma-pravosuddya-odna-z-klyuchovikh-umov-dlya-rukhu-ukraini-do-es>.

305 Law of Ukraine 'On Judiciary and Status of Judges,' No. 1402-VIII, 02.06.2016: <https://zakon.rada.gov.ua/laws/show/1402-19#Text>.

306 Law of Ukraine 'On Amendments to Constitution of Ukraine (Regarding Justice),' No. 1401-VIII, 02.06.2016: <https://zakon.rada.gov.ua/laws/show/1401-19#n6>.

307 Law of Ukraine 'On Amendments to Constitution of Ukraine (Regarding Justice),' No. 1401-VIII, 02.06.2016: <https://zakon.rada.gov.ua/laws/show/1401-19#n6>. Law of Ukraine 'On Judiciary and Status of Judges,' No. 1402-VIII, 02.06.2016: <https://zakon.rada.gov.ua/laws/show/1402-19#Text>.

308 Law of Ukraine 'On Amendments to Constitution of Ukraine (Regarding Justice),' No. 1401-VIII, 02.06.2016: <https://zakon.rada.gov.ua/laws/show/1401-19#n6>.

309 Law of Ukraine 'On Amendments to Constitution of Ukraine (Regarding Justice),' No. 1401-VIII, 02.06.2016: <https://zakon.rada.gov.ua/laws/show/1401-19#n6>. Law of Ukraine 'On High Council of Justice,' No. 1798-VIII, 21.12.2016: <https://zakon.rada.gov.ua/laws/show/1798-19#Text>.

- the establishment of the High Anti-Corruption Court, which is currently the only specialised court within the Ukrainian justice system to invite and engage international experts in the selection of judges<sup>310</sup>;
- a change of judicial self-government bodies<sup>311</sup>;
- a gradual increase in the salaries of judges to ensure their integrity;
- stripping the public prosecutor's office of its extrinsic functions: overseeing the protection of human and civil rights and freedoms; overseeing the adherence to the laws on these issues by executive authorities, local self-government bodies, their officials and employees (the so-called 'general oversight'); overseeing the adherence to the laws in the execution of courts decisions in criminal cases, as well as in the application of other coercive measures related to the restriction of personal freedom of citizens.<sup>312</sup>

Majority of the problems in implementing the reform arose in relation to the new process for selecting and appointing judges. The establishment and launch of the High Council of Justice spanned almost six years, during which the rules governing its activities were twice radically amended<sup>313</sup>. The challenges included blocking the participation of international experts in the process of selecting judicial self-government bodies, and influence on the appointment processes by other judicial authorities (the Constitutional Court of Ukraine and the Kyiv District Administrative Court)<sup>314</sup>. In February 2022, a few days before Russia's full-scale invasion of Ukraine, the HCJ's work was completely blocked, as 10 of the 21 members resigned and it lost the necessary quorum. Only at the beginning of 2023, during an extraordinary congress of judges, 8 new members to the High Council of Justice were elected, allowing it to restart its work<sup>315</sup>.

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310 Law of Ukraine 'On High Anti-Corruption Court.' No. 2447-VIII, 07.06.2018: <https://zakon.rada.gov.ua/laws/show/2447-19#Text>.

311 Law of Ukraine 'On Amendments to Constitution of Ukraine (Regarding Justice),' No. 1401-VIII, 02.06.2016: <https://zakon.rada.gov.ua/laws/show/1401-19#n6>.

312 Amendments to the Constitution to launch judicial reform. How will it work? // Centre of Policy and Legal Reform, 30.09.2016: <https://pravo.org.ua/infographics/zminy-do-konstyutsiyi-shho-zapuskayut-sudovu-reformu-yak-tse-pratsyuvatyme-infografika/>.

313 Law of Ukraine 'On Amendments to Law of Ukraine "On Judiciary and Status of Judges" and Certain Laws of Ukraine on Activities of Judicial Self-governance Bodies,' No. 193-IX, 16.10.2019: <https://zakon.rada.gov.ua/laws/show/193-IX#Text>. Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine Regarding Procedure for Election (Appointment) to Positions of Members of High Council of Justice and Activities of Disciplinary Inspectors of High Council of Justice,' No. 1635-IX, 14.07.2021: <https://zakon.rada.gov.ua/laws/show/1635-20#Text>.

314 Judicial Reform in Ukraine: a Brief Overview // DeJure Foundation: <https://dejure.foundation/library/sudova-reforma-v-ukraini-scho-zminylos-za-try-roky>. On the status of independence of judges in Ukraine. Annual report for 2020 // Approved by decision No. 1797/0/15-21 of the High Council of Justice dated 5 August 2021: [https://hcj.gov.ua/sites/default/files/field/file/shchorichna\\_dopovid\\_za\\_2020\\_rik\\_pro\\_stan\\_zabezpechennya\\_nezalezhnosti\\_suddiv\\_ukrayini.pdf](https://hcj.gov.ua/sites/default/files/field/file/shchorichna_dopovid_za_2020_rik_pro_stan_zabezpechennya_nezalezhnosti_suddiv_ukrayini.pdf).

315 A 'pivotal' judicial congress: Why is it important for Ukraine? // DW, 13.01.2023: <https://www.dw.com/uk/znakovij-zizd-suddiv-comu-ce-vazlivo-dla-ukraini/a-64381404>.

Furthermore, for a long time, there were no regulated criteria to be applied during the competition for judicial candidates. As per the amendments to the Constitution of Ukraine, three entities at once: the Congress of Judges, the President of Ukraine, and the Verkhovna Rada of Ukraine – in accordance with their quota for appointments – could set their own criteria for the competition, form commissions, and determine the involvement of international experts and civil society representatives. In practice, the criterion of ‘integrity’ sparked the most controversy as it was interpreted differently by different competition commissions, including those selecting candidates for the High Council of Justice<sup>316</sup>.

### The Impact of the Long-Term Judicial Reform

Due to the problems that arose during the six years by the judicial system in the appointments to the governing judicial bodies, the cleansing of the judiciary and lustration following the Revolution of Dignity, there has been a **growing shortage of judges in the system**<sup>317</sup>. The issue became particularly acute in 2020 when the five-year term since the initial appointment of judges after the reform elapsed, but the issue of their indefinite term was not resolved<sup>318</sup>. At present, the system faces a shortage of judges amounting to 30–35% of the total number of positions.<sup>319</sup>

For example, as of 1 January 2022, there were 1632 vacant positions out of a total of 7304 of judges in local and appellate courts<sup>320</sup>. In 2020, there were 4991 judges authorised to hear cases, which is just 70.9% of the total number of positions, while the corresponding figure in 2019 was 67.9% (4772 judges)<sup>321</sup>.

The situation affected access to courts, case processing times, and the overall functioning of individual courts:

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316 Judicial Reform in Ukraine: Why the Work of the Ethics Council is so Important / Robert Cordy // Left Bank, 31.10.2022: [https://lb.ua/blog/robert\\_kordi/534319\\_sudova\\_reforma\\_ukraini\\_chomu\\_robota.html](https://lb.ua/blog/robert_kordi/534319_sudova_reforma_ukraini_chomu_robota.html).

317 ‘We will have a lot of problems with courts for the next 30 years if the reform fails,’ Roman Maselko // Suspilne news, 08/31/2022: <https://suspilne.media/276954-mi-otrimaemo-problemni-sudi-na-najblizci-30-rokiv-akso-reforma-provalitsa-roman-maselko/>.

318 Head of the Council of Judges of Ukraine appeals to the President of Ukraine to appoint judges // Council of Judges of Ukraine, 26.05.2021: <https://rsu.gov.ua/ua/news/golova-radi-suddiv-ukraini-zvernuvsa-do-prezidenta-ukraini-z-prohannam-priznaciti-suddiv>.

319 Oleh Prudvyus: ‘Staff shortage in courts is not merely a problem, it is verging on a disaster’ // Judiciary of Ukraine, 29.12.2021: <https://court.gov.ua/press/news/1235749>. ‘We will have a lot of problems with courts for the next 30 years if the reform fails,’ Roman Maselko // Suspilne news, 08/31/2022: <https://suspilne.media/276954-mi-otrimaemo-problemni-sudi-na-najblizci-30-rokiv-akso-reforma-provalitsa-roman-maselko/>. Domestic justice is facing a personnel crisis // Holos Ukrainy, 24.12.2021: <http://www.golos.com.ua/article/354686>.

320 Annual Report of the Ukrainian Parliament Commissioner for Human Rights on Observance and Protection of Human and Civil Rights and Freedoms in Ukraine in 2021: <https://ombudsman.gov.ua/storage/app/media/uploaded-files/schoricha-dopovid-2021.pdf>.

321 Overview of justice data in 2020 // Judiciary of Ukraine: [https://court.gov.ua/userfiles/media/new\\_folder\\_for\\_uploads/main\\_site/ogl\\_2020.pdf](https://court.gov.ua/userfiles/media/new_folder_for_uploads/main_site/ogl_2020.pdf).

- The workload distribution for judges depends on the number of positions filled in the courts. If a judge works overtime due to inability to redistribute the workload within the court, the available time for procedural deadlines to resolve issues and deliver decisions is reduced;
- Judges are forced to postpone case hearings as they are physically unable to comply with the deadlines. In particular, pre-trial investigation bodies have complained that judges fail to make decisions on motions for permission to conduct a special pre-trial investigation, which should be considered within ten days from the date of the request submission. Instead, such requests remain pending in court sometimes for months;
- The shortage of judges in courts makes it impossible for certain local courts to function, thereby severely restricting the right of individuals to access justice (for example, in 2021 Ukraine had the highest number of applications against – 59 at the ECtHR raising length of the proceedings<sup>322</sup>, in 2023 although the number was reduced to 38 (full-scale invasion was likely a factor), it was still the highest among member states<sup>323</sup>)

Thus, in 2019, one judge of a local general court considered an average of 1080 cases per year. In 2020, this figure was 872 cases per year.<sup>324</sup> While criminal proceedings are only a part of this data, first instance judges still bear the heaviest workload. Moreover, there is a significant staffing issue with court administrative personnel. As of 22 November 2022, courts of various instances had 4606 vacant positions, including judicial assistants, trial secretaries, court administrators, IT experts, consultants, and more.<sup>325</sup>

The length of the reform, coupled with constant changes, leaves a lot of room for the development of the judiciary. Attention is paid to the development of democratic processes based on a network governance approach, the development and effectiveness of the standards of ethics and integrity, and to promoting transparent collaboration between branches of government<sup>326</sup>. Another important factor that requires attention is the formation and implementation of courts budgets based on their needs and equitable distribution of funds among the them<sup>327</sup>.

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322 The European Court of Human Rights, Facts and Figures & Overview, ECHR in Facts and Figures 2021: <https://www.echr.coe.int/facts-and-figures-and-overview>.

323 ECtHR, Statistical reports, Violations by Article and State: <https://www.echr.coe.int/statistical-reports>.

324 Overview of justice data in 2020 // Judiciary of Ukraine: [https://court.gov.ua/userfiles/media/new\\_folder\\_for\\_uploads/main\\_site/ogl\\_2020.pdf](https://court.gov.ua/userfiles/media/new_folder_for_uploads/main_site/ogl_2020.pdf).

325 Vacancies in courts // State Judicial Administration of Ukraine, 22.11.2022: <https://dsa.court.gov.ua/dsa/pres-centr/news/1349197/>.

326 Judicial Reform: How not to Lose the Meaning or 'Personnel is Key' / Kostiantyn Kharakoz // Ukrainska Pravda, 24.09.2023: <https://www.pravda.com.ua/columns/2023/09/24/7421204/>.

327 Judicial Reform: How not to Lose the Meaning or 'Personnel is Key' / Kostiantyn Kharakoz // Ukrainska Pravda, 24.09.2023: <https://www.pravda.com.ua/columns/2023/09/24/7421204/>.

## The Impact of the Changes in the Territorial Jurisdiction of the Courts

Ukrainian legislation authorises the High Council of Justice to change the jurisdiction of a court upon the recommendation from the Head of the Supreme Court to the nearest territorial court if administration of justice is impossible due to objective reasons:

- during martial law;
- during a state of emergency;
- in connection with a natural disaster;
- in connection with military operations;
- in connection with anti-terrorism measures;
- in connection with other extraordinary circumstances.<sup>328</sup>

Since the beginning of the armed conflict on the territory of Ukraine in 2014, the operation of courts in the Autonomous Republic of Crimea and the city of Sevastopol, and certain districts of Donetsk and Luhansk regions has become objectively impossible. The administration of justice in these areas was significantly hindered by the ongoing hostilities; the threat to the safety and security of judges; the occupation of territory or the establishment of Russian control over certain areas; and the inability to access court facilities. After 24 February 2022, similar problems also occurred in Sumy, Chernihiv, Kyiv, Zaporizhzhia, Kharkiv, Kherson, and Mykolaiv regions. Therefore, decisions have been made on numerous occasions to change the territorial jurisdiction of these courts.<sup>329</sup>

In particular, as of 7 August 2023 the territorial jurisdiction of 14 courts in Donetsk region, 3 courts in Zhytomyr region, 18 courts in Zaporizhzhia region, 4 courts in Kyiv region, 16 courts in Luhansk region, 3 courts in Mykolaiv region, 4 courts in Sumy region, 24 courts in Kharkiv region, 23 courts in Kherson region, 26 courts in Chernihiv region, 30 courts in the Autonomous Republic of Crimea and the city of Sevastopol was changed<sup>330</sup>.

In the context of Russia's full-scale invasion of Ukraine, the Supreme Court provided recommendations to the courts of first instance and appellate court in the event of the seizure of settlements:

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328 Article 147 (7) // Law of Ukraine 'On Judiciary and Status of Judges,' No. 1402-VIII, 02.06.2016: <https://zakon.rada.gov.ua/laws/show/1402-19#Text>.

329 Order on determining the jurisdiction of cases // Supreme Court: [https://supreme.court.gov.ua/supreme/gromady-anam/terutor\\_pidsudnist/](https://supreme.court.gov.ua/supreme/gromady-anam/terutor_pidsudnist/).

330 List of courts with altered territorial jurisdiction due to the challenges of administering justice during martial law. // Supreme Court, 31.08.2022: [https://supreme.court.gov.ua/userfiles/media/new\\_folder\\_for\\_uploads/supreme/roz-poryadjennya/Zagalna\\_tablica\\_sudiv\\_31\\_08\\_2022.pdf](https://supreme.court.gov.ua/userfiles/media/new_folder_for_uploads/supreme/roz-poryadjennya/Zagalna_tablica_sudiv_31_08_2022.pdf)

- preserving human life and health is a priority for the court administration;
- it is recommended to use evacuation corridors and leave the settlement;
- if possible, courts should remove active cases, particularly those pending before judges, or at least the most important (high-profile) cases should be removed;
- courts should digitalise case files and prepare servers with data on human resources and accounting or other portable storage devices with this information for transportation;
- any relocated files must be transferred to the court with the appropriate territorial jurisdiction.<sup>331</sup>

It remains to be seen how effectively these recommendations are implemented in practice. Following 24 February 2024 security situation has been changing in different regions, therefore, the main responsibility for decision-making was placed on the judges of the courts in question.

The security situation in the regions varies depending on the regaining or loss of control by Ukraine over the territories.<sup>332</sup> However, courts in Crimea have not been functioning since 2014. The process of restoring territorial jurisdiction is influenced by various factors including: the degree of damage to the court's physical infrastructure (in particular, its premises); the territory where the court is located, including whether it has been demined; the functionality of systems vital for the court operation (power and water supply, communication); the availability of other authorities and services in the region; the ability of judges returning to the area to maintain a normal standard of living (e.g. condition of residential premises, operation of communication systems, etc.). All these have an enormous impact on the quality of justice that the domestic judicial system has the capacity to ensure.

### Challenges Faced by the Judiciary

During the in-depth and focus groups interviews **judges themselves have identified several ways in which the armed conflict has affected their work:**

331 Guidelines for courts of first instance and courts of appeal in case of an occupation of a community and/or court or an imminent threat of such occupation / Order of the President of the Supreme Court, No. 6/0/9-22, 13.03.2022 // Supreme Court: [https://supreme.court.gov.ua/userfiles/media/new\\_folder\\_for\\_uploads/supreme/war/Recomendatsii.pdf](https://supreme.court.gov.ua/userfiles/media/new_folder_for_uploads/supreme/war/Recomendatsii.pdf)

332 List of courts with altered territorial jurisdiction due to the challenges of administering justice during martial law. // Supreme Court, 18.11.2022: [https://supreme.court.gov.ua/userfiles/media/new\\_folder\\_for\\_uploads/supreme/rozporjadjennya/Zagalna\\_tablica\\_sudiv\\_18\\_11\\_2022.pdf](https://supreme.court.gov.ua/userfiles/media/new_folder_for_uploads/supreme/rozporjadjennya/Zagalna_tablica_sudiv_18_11_2022.pdf) List of courts with restored territorial jurisdiction // Supreme Court, 18.11.2022: [https://supreme.court.gov.ua/userfiles/media/new\\_folder\\_for\\_uploads/supreme/rozporjadjennya/18\\_11\\_2022\\_Vidnovleno\\_pidsudnist.pdf](https://supreme.court.gov.ua/userfiles/media/new_folder_for_uploads/supreme/rozporjadjennya/18_11_2022_Vidnovleno_pidsudnist.pdf)



**The caseload.** In addition to severe delays in the appointment of judges,<sup>333</sup> there is uneven caseload distribution in the first instance courts in the areas directly affected by hostilities or where courts had to relocate as a result of the armed conflict. The general rules of territorial jurisdiction assign to such courts the proceedings related to international crimes, as allegedly the majority of them are committed in their territorial jurisdiction. These courts are seeing a significant increase in the number of cases related to crimes against the foundations of Ukraine's national security, which are systematically topped off by cases out of the liberated territories or areas affected by the armed conflict. Ukrainian courts have begun to develop practice of considering such cases since 2014, but after 24 February 2022, the number of regions where this practice has become relevant has grown considerably. However, the judges there lack experience, knowledge and resources to consider cases of international crimes.<sup>334</sup>

**Lack of caselaw.** Before 24 February 2022, cases with legal classification under Articles 437 and 438 of the CCU that were brought to court were rare, and such practice was an exception to the general legal classification of the consequences of the armed conflict. The situation changed following Russia's full-scale invasion of Ukraine with a significant number of cases of this category brought to court, both in relation to detainees/PoWs and under special procedure (in absentia). However, this influx did not result in generating a consistent approach by the judiciary.<sup>335</sup>

Additionally, multiple amendments to Ukraine's criminal and criminal procedure legislation have led to a situation where the established approaches lost their sense due to changes in legal norms or such changes contradicted the general newly created approaches to considering cases. For instance, the active application of Article 615 (delegating powers of investigating judge to a prosecutor during martial law) of the CPCU raises questions about the appropriateness of the evidence collected under its procedure, which allows the use of the prosecutor's decision without appealing to the investigating judge.<sup>336</sup>

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333 We should not anticipate any new judge selections by the HQCJ until hostilities cease // Sudovo-yurydychna hazeta, 05.01.2023: <https://sud.ua/uk/news/publication/258471-do-okonchaniya-voennykh-deystviy-novogo-otbora-sud-ey-ot-vkks-zhdat-ne-stoit>.

334 Capacity of Ukraine's Judicial System to Ensure Accountability for Grave International Crimes Committed in the Course of the Russia's Aggression Against Ukraine: A Perspective of Judges and Veterans, and the Demand for Justice by the Population of Ukraine / Ukrainian Legal Advisory Group NGO, Institute for Peace & Common Ground NGO with the support of the project 'Urgent EU support for civil society' implemented by ISAR Ednannia with the financial support of the European Union, as well as with the support of the Ukraine 5AM Coalition and Association for the Development of Judicial Self-Government of Ukraine // Kyiv, 2023: <https://drive.google.com/file/d/1UDJttnnhLCSTPBYPaW0mCjG4nex1BeMK/view?fbclid=IwAR3ITutF4Xavgrl7bnhQLP9sBuofTqgjLQDpon7Qpc3YRhVU1XCoHvnV0tM>.

335 Criminal jurisdiction during martial law: the Criminal Court of Cassation of the Supreme Court discussed its performance in 2022 // Supreme Court, 01.02.2023: <https://court.gov.ua/press/news/1376764/>.

336 Capacity of Ukraine's Judicial System to Ensure Accountability for Grave International Crimes Committed in the Course of the Russia's Aggression Against Ukraine: A Perspective of Judges and Veterans, and the Demand for Justice by the Population of Ukraine / Ukrainian Legal Advisory Group NGO, Institute for Peace & Common Ground NGO with the support of the project 'Urgent EU support for civil society' implemented by ISAR Ednannia with the financial support of the European Union, as well as with the support of the Ukraine 5AM Coalition and Association for the Development of Judicial Self-Government of Ukraine // Kyiv, 2023: <https://drive.google.com/file/d/1UDJttnnhLCSTPBYPaW0mCjG4nex1BeMK/view?fbclid=IwAR3ITutF4Xavgrl7bnhQLP9sBuofTqgjLQDpon7Qpc3YRhVU1XCoHvnV0tM>.

**Inefficiency of the system of in-service training of judges.** Since 2014, there has been a demand among judges for specialised training in international law caused by the need to consider cases of international crimes. However, within the system of in-service training of judges, such training programmes on international criminal and humanitarian law were not introduced or were selective and thus limited in their content.<sup>337</sup> International and non-governmental organisations offered training activities on international law applicable in armed conflict, but they failed to reach a significant number of judges.<sup>338</sup> Although judges themselves expressed the need for further training in the application of international humanitarian law, many of them particularly the ones in the regions do not have access to such training programmes.<sup>339</sup>

**Lack of interaction with other authorities within the justice system.** Judges have pointed out that law enforcement agencies have retained a focus on quantitative indicators in their work, which directly affects the quality of procedural documents and of evidence collected. Often the priority is given to the speed of proceedings over substance. Each institution in the justice system should carry their own share of responsibility in the chain to ensure an effective justice process. Instead, such an approach of law enforcement authorities results in shifting their part of responsibility to the courts as the ultimate decision-makers. Furthermore, judges have noted in the polls the low level of training of investigators, prosecutors, and lawyers in international humanitarian law.<sup>340</sup>

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337 Standardised training programme for judges of local general courts of criminal specialisation / National School of Judges of Ukraine: <http://nsj.gov.ua/files/16721488002.%20%D0%BC%D1%96%D1%81%D1%86%D0%B5%D0%B2%D1%96%20%D0%B7%D0%B0%D0%B3%D0%B0%D0%BB%D1%8C%D0%BD%D1%96%20%D0%BA%D1%80%D0%B8%D0%BC%D1%96%D0%BD%D0%B0%D0%BB%D1%8C%D0%BD%D1%96.pdf>. Standardised training programme for judges of criminal chambers of appeal courts / National School of Judges of Ukraine: <http://nsj.gov.ua/files/16721487916.%20%D0%90%D0%BF%D0%B5%D0%BB%D1%8F%D1%86%D1%96%D0%B9%D0%BD%D1%96%20%D0%B7%D0%B0%D0%B3%D0%B0%D0%BB%D1%8C%D0%BD%D1%96%20-%20%D0%BA%D1%80%D0%B8%D0%BC%D1%96%D0%BD%D0%B0%D0%BB%D1%8C%D0%BD%D1%96.pdf>. Application of International Humanitarian Law and International Criminal Law: Training Materials for Seminar Participants // National School of Judges, USAID New Justice Program, 2019: [https://newjustice.org.ua/wp-content/uploads/2020/02/Curricula\\_NJ\\_IHL\\_ICL\\_2019\\_UKR-1.pdf](https://newjustice.org.ua/wp-content/uploads/2020/02/Curricula_NJ_IHL_ICL_2019_UKR-1.pdf).

338 Training course 'Protection of human rights in the context of the armed conflict in Ukraine' // Ukrainian Helsinki Human Rights Union: <https://helsinki.org.ua/activities/kurs-mgp/page/2/>. Judges and lawyers invited to human rights courses // Law and Business, 16.01.2023: <https://zib.com.ua/ua/154457.html>. UK to train Ukrainian judges to carry out war crimes trials for Russian soldiers // Sky News, 14.12.2022: <https://news.sky.com/story/uk-to-train-ukrainian-judges-to-carry-out-war-crimes-trials-for-russian-soldiers-12767724>.

339 Capacity of Ukraine's Judicial System to Ensure Accountability for Grave International Crimes Committed in the Course of the Russia's Aggression Against Ukraine: A Perspective of Judges and Veterans, and the Demand for Justice by the Population of Ukraine / Ukrainian Legal Advisory Group NGO, Institute for Peace & Common Ground NGO with the support of the project 'Urgent EU support for civil society' implemented by ISAR Ednannia with the financial support of the European Union, as well as with the support of the Ukraine 5AM Coalition and Association for the Development of Judicial Self-Government of Ukraine // Kyiv, 2023: <https://drive.google.com/file/d/1UDltnnhLCST-PBYoPaW0mCjG4nex1BeMK/view?fbclid=IwAR3lTutF4Xavgrl7bnhQLP9sBuofTqgjLQDpon7Qpc3YRhVU1XCoHvnV0tM>. War Crimes Judicial Education: a Needs Assessment Report // USAID Activity Office: Office of Democracy and Governance, 29.08.2022: [https://drive.google.com/file/d/14k6\\_gP3jU7oZdquen1Tp28MOqmNfZPYp/view](https://drive.google.com/file/d/14k6_gP3jU7oZdquen1Tp28MOqmNfZPYp/view).

340 Capacity of Ukraine's Judicial System to Ensure Accountability for Grave International Crimes Committed in the Course of the Russia's Aggression Against Ukraine: A Perspective of Judges and Veterans, and the Demand for Justice by the Population of Ukraine / Ukrainian Legal Advisory Group NGO, Institute for Peace & Common Ground NGO with the support of the project 'Urgent EU support for civil society' implemented by ISAR Ednannia with the financial support of the European Union, as well as with the support of the Ukraine 5AM Coalition and Association for the Development of Judicial Self-Government of Ukraine // Kyiv, 2023: <https://drive.google.com/file/d/1UDltnnhLCST-PBYoPaW0mCjG4nex1BeMK/view?fbclid=IwAR3lTutF4Xavgrl7bnhQLP9sBuofTqgjLQDpon7Qpc3YRhVU1XCoHvnV0tM>.

**Safety concerns.** Judges who consider cases related to the armed conflict face an increased risk to their personal safety and security. Since 2014, judges have reported receiving threats directed at them or their families<sup>341</sup>. The key factor affecting their safety is the public perception of these cases and the attitude of people, which is manifested both through their activity on social media and provocations during court hearings. Hate speech against judges who attempt to maintain fair and impartial proceedings is becoming a common occurrence, which is also a form of pressure on the court by society. Judges also highlight that the impact of the armed conflict on society is expressed, among other things, through a heightened negative perception of the judicial system.

The widespread availability of weapons, particularly in the regions directly affected by the armed conflict poses an additional risk to participants in the judicial process. Judges refer to several types of threats, including: direct attacks on the court or individual judges; provocations and disruptions during court hearings; demonstrative actions to intimidate and exert certain pressure on judges; continued interference by law enforcers in specific cases; pressure on family members of judges who found themselves in the territories occupied by the Russian Federation and/or by their proxies; instances of individual retaliation from relatives or groups/communities that supported the accused of committing a war crime. Additionally, there may be other factors that cause a negative or more aggressive attitude towards judges. Examples include a judge's lack of military experience ('a civilian sentencing a military officer'); gender aspects (when a civilian female judge delivers a verdict to a male military serviceman); or the judge's status of an internally displaced person. As a procedural tool to protect themselves, they often use recusal in proceedings, but its implementation directly depends on the judge's personal conviction and perception of both the case and the surrounding circumstances.<sup>342</sup>

**Working conditions of the courts.** After the start of Russia's full-scale invasion and the armed conflict spreading across all of Ukraine, its impact became noticeable in the day-to-day operations of the courts. The daily missile attacks forced revision of a working mode during air raid alerts ensuring security as the conditions would allow: availability of a shelter in or near the court building, taking technical breaks in court sessions in case of danger, postponing court hearings, and restricting transportation of detainees, suspects,

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341 Justice in Eastern Ukraine in the Context of the Armed Aggression of the Russian Federation. Report on the Study of the Judicial System's Capacity to Deliver Justice in the Context of the Armed Conflict in Eastern Ukraine (2016-2017) // International Renaissance Foundation, 2018: [https://www.irf.ua/content/files/justice\\_in\\_eastern\\_ukr.pdf](https://www.irf.ua/content/files/justice_in_eastern_ukr.pdf).

342 Capacity of Ukraine's Judicial System to Ensure Accountability for Grave International Crimes Committed in the Course of the Russia's Aggression Against Ukraine: A Perspective of Judges and Veterans, and the Demand for Justice by the Population of Ukraine / Ukrainian Legal Advisory Group NGO, Institute for Peace & Common Ground NGO with the support of the project 'Urgent EU support for civil society' implemented by ISAR Ednannia with the financial support of the European Union, as well as with the support of the Ukraine 5AM Coalition and Association for the Development of Judicial Self-Government of Ukraine // Kyiv, 2023: <https://drive.google.com/file/d/1UDltnn-hLCSTPBYoPaW0mCjG4nex1BeMK/view?fbclid=IwAR3lTutF4Xavgrl7bnhQLP9sBuofTqgjLQDpon7Qpc3YRhVU1X-CoHvnV0tM>.

and the accused to the courtroom. Due to the pressure of limited procedural timeframe, heavy caseload, some judges are forced to continue working even during air raid alerts.<sup>343</sup>

Other factors affecting the working conditions in the courts include daily challenges associated with the lack of communication and Internet connection, blackouts and power cuts that prevent technical recording of sessions or remote hearings<sup>344</sup>. Courts still lack backup power supply (generators) or autonomous means of communication to hold hearings remotely. The conditions in which courts operate after the restoration of their territorial jurisdiction in areas liberated from Russian control deserve special mention. The effectiveness of court operations is directly influenced by the living conditions in a particular area and the state of court buildings and services provided.<sup>345</sup>

**Court resources.** The issue of insufficient funding of the courts has deteriorated over the course of the armed conflict in Ukraine. Judges raise concerns about the financial and technical support of the courts: the availability of adequate premises, appropriate equipment to ensure the court operations and enable remote trials, as well as adequately resourced court convoys, to which judges often have to adapt when scheduling hearings. The state budget requirements and the availability of funding determine the possibility to appoint new judges and ensure that there is adequate and sufficient staff to meet the

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343 Judicial proceedings amidst blackouts and missile attacks: analysis by JustTalk / Yulia Lisova // JustTalk, 26.01.2023: <https://justtalk.com.ua/post/sudochinstvo-y-umovah-blekautiv-i-raketnih-atak-analiz-justtalk>.

344 Judicial proceedings amidst blackouts and missile attacks: analysis by JustTalk / Yulia Lisova // JustTalk, 26.01.2023: <https://justtalk.com.ua/post/sudochinstvo-y-umovah-blekautiv-i-raketnih-atak-analiz-justtalk>.

345 Capacity of Ukraine's Judicial System to Ensure Accountability for Grave International Crimes Committed in the Course of the Russia's Aggression Against Ukraine: A Perspective of Judges and Veterans, and the Demand for Justice by the Population of Ukraine / Ukrainian Legal Advisory Group NGO, Institute for Peace & Common Ground NGO with the support of the project 'Urgent EU support for civil society' implemented by ISAR Ednannia with the financial support of the European Union, as well as with the support of the Ukraine 5AM Coalition and Association for the Development of Judicial Self-Government of Ukraine // Kyiv, 2023: <https://drive.google.com/file/d/1UDltnnhLCSTPBYPaW0mCjG4nex1BeMK/view?fbclid=IwAR3lTutF4Xavgrl7bnhQLP9sBuofTqgjLQDpon7Qpc3YRhVU1X-CoHvnV0tM>. The experience of restoring the Ivankiv District Court in Kyiv region after the occupation // State Judicial Administration of Ukraine, 04.06.2022: [https://dsa.court.gov.ua/dsa/inshe/courts\\_work\\_war/1281409/](https://dsa.court.gov.ua/dsa/inshe/courts_work_war/1281409/). How the Makariv District Court in Kyiv region survived the occupation and resumed its work after the liberation // State Judicial Administration of Ukraine, 21.06.2022: [https://dsa.court.gov.ua/dsa/inshe/courts\\_work\\_war/1286588/](https://dsa.court.gov.ua/dsa/inshe/courts_work_war/1286588/). Courts in times of war: Evacuation from Bakhmut and rescue of the Donetsk Court of Appeal from Mariupol // State Judicial Administration of Ukraine, 18.07.2022: [https://dsa.court.gov.ua/dsa/inshe/courts\\_work\\_war/1296891/](https://dsa.court.gov.ua/dsa/inshe/courts_work_war/1296891/). Courts in times of war: A difficult story of occupation, liberation, and rapid resumption of work of the Irpin City Court in Kyiv region // State Judicial Administration of Ukraine, 28.07.2022: [https://dsa.court.gov.ua/dsa/inshe/courts\\_work\\_war/1301023/](https://dsa.court.gov.ua/dsa/inshe/courts_work_war/1301023/). Courts in times of war: Vinnytsia Court of Appeal's experience of preparation and assistance to courts from the war zone // State Judicial Administration of Ukraine, 03.08.2022: [https://dsa.court.gov.ua/dsa/inshe/courts\\_work\\_war/1302981/](https://dsa.court.gov.ua/dsa/inshe/courts_work_war/1302981/). Court work through the prism of war // State Judicial Administration of Ukraine, 21.10.2022: <https://ml.zt.court.gov.ua/sud0614/pres-centr/news/1336251/>. Courts in times of war: E-court and experience of setting up remote work of the Luhansk District Administrative Court // State Judicial Administration of Ukraine, 03.11.2022: [https://dsa.court.gov.ua/dsa/inshe/courts\\_work\\_war/1341888/](https://dsa.court.gov.ua/dsa/inshe/courts_work_war/1341888/). Sumy District Administrative Court: Preserving life when encircled by the enemy and self-organising the operations // State Judicial Administration of Ukraine, 16.11.2022: [https://dsa.court.gov.ua/dsa/inshe/courts\\_work\\_war/1346949/](https://dsa.court.gov.ua/dsa/inshe/courts_work_war/1346949/). Despite the destruction, the Vuhledar City Court in Donetsk region seeks to restore its best practices // State Judicial Administration of Ukraine, 22.11.2022: [https://dsa.court.gov.ua/dsa/inshe/courts\\_work\\_war/1349284/](https://dsa.court.gov.ua/dsa/inshe/courts_work_war/1349284/). Teamwork of the Leninskyi District Court in the city of Kharkiv during the war // State Judicial Administration of Ukraine, 16.12.2022: [https://dsa.court.gov.ua/dsa/inshe/courts\\_work\\_war/1359167/](https://dsa.court.gov.ua/dsa/inshe/courts_work_war/1359167/). New work formats and active volunteering efforts of the Seventh Administrative Court of Appeal // State Judicial Administration of Ukraine, 19.12.2022: [https://dsa.court.gov.ua/dsa/inshe/courts\\_work\\_war/1360003/](https://dsa.court.gov.ua/dsa/inshe/courts_work_war/1360003/). President of the Supreme Court Vsevolod Kniyazev on the 2023 vision for the judiciary, exclusive interview // Sudovo-yurydychna hazeta, 09.01.2023: <https://sud.ua/uk/news/publication/258731-glava-verkhovnogo-suda-vsevolod-kniyazev-o-vizii-dlya-sudebnoy-vlasti-na-2023-god-eksklyuzivnoe-intervyu>.

needs of the court.<sup>346</sup> Given the transfer of judges and shifts in the territorial jurisdiction, the resources allocated to their work should be redistributed in accordance with the existing caseload and adjusted for the needs arising from the circumstances of the ongoing armed conflict, however, concerns are raised that it does not happen on a regular and orderly basis.<sup>347</sup>

**Challenges in public communication of cases related to the armed conflict.** Amidst the ongoing armed conflict, proper communication about trials and their results remains a challenge for the judicial system of Ukraine. Trials on war crimes and crimes against the foundations of national security remain open to the public unless the court opts for a closed hearing. However, the legal language of the court decisions remains difficult for the general public to understand and may often be the subject of manipulation in the media. Communication of certain decisions remains a challenge due to differences of perceptions between the population in the occupied or non-government controlled areas and areas that remain under Ukraine's control. This in turn jeopardises reconciliation process by the time the territories are liberated and returned under Ukraine's control<sup>348</sup>.

National courts operating in the conditions of armed conflict remain the driving force behind the development of national case law concerning grave international crimes. First instance courts have significant caseload in this category of cases. Between 2014 and 24 February 2022 court hearings in such cases were rare and judges tried to postpone the proceedings because they did not want to consider such cases as they considered them politically charged and also they lacked necessary knowledge and experience in international criminal and humanitarian law. Following the full-scale invasion, courts found

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346 Remuneration of judges and benefits for resigned judges: What challenges may be expected by judges in 2023 // Sudovo-yurydychna hazeta, 27.09.2022: <https://sud.ua/uk/news/publication/250351-sudeyskoe-voznagrazhdenie-i-vyplaty-sudyam-v-otstavke-kakie-problemy-mogut-ozhidat-sudey-v-2023-godu>. President of the Supreme Court Vsevolod Kniazev on the 2023 vision for the judiciary, exclusive interview // Sudovo-yurydychna hazeta, 09.01.2023: <https://sud.ua/uk/news/publication/258731-glava-verkhovnogo-suda-vsevolod-knyazev-o-vizii-dlya-sudebnoy-vlasti-na-2023-god-eksklyuzivnoe-intervyu>.

347 Capacity of Ukraine's Judicial System to Ensure Accountability for Grave International Crimes Committed in the Course of the Russia's Aggression Against Ukraine: A Perspective of Judges and Veterans, and the Demand for Justice by the Population of Ukraine / Ukrainian Legal Advisory Group NGO, Institute for Peace & Common Ground NGO with the support of the project 'Urgent EU support for civil society' implemented by ISAR Ednannia with the financial support of the European Union, as well as with the support of the Ukraine 5AM Coalition and Association for the Development of Judicial Self-Government of Ukraine // Kyiv, 2023: <https://drive.google.com/file/d/1UDItnnhLCSTPBYoPaW0mC-jG4nex1BeMK/view?fbclid=IwAR3ITutF4Xavgrl7bnhQLP9sBuofTqgjLQDpon7Qpc3YRhVU1XCoHvnV0tM>. Justice in Eastern Ukraine in the Context of the Armed Aggression of the Russian Federation. Report on the Study of the Judicial System's Capacity to Deliver Justice in the Context of the Armed Conflict in Eastern Ukraine (2016-2017) // International Renaissance Foundation, 2018: [https://www.irf.ua/content/files/justice\\_in\\_eastern\\_ukr.pdf](https://www.irf.ua/content/files/justice_in_eastern_ukr.pdf).

348 Capacity of Ukraine's Judicial System to Ensure Accountability for Grave International Crimes Committed in the Course of the Russia's Aggression Against Ukraine: A Perspective of Judges and Veterans, and the Demand for Justice by the Population of Ukraine / Ukrainian Legal Advisory Group NGO, Institute for Peace & Common Ground NGO with the support of the project 'Urgent EU support for civil society' implemented by ISAR Ednannia with the financial support of the European Union, as well as with the support of the Ukraine 5AM Coalition and Association for the Development of Judicial Self-Government of Ukraine // Kyiv, 2023: <https://drive.google.com/file/d/1UDItnnhLCSTPBYoPaW0mC-jG4nex1BeMK/view?fbclid=IwAR3ITutF4Xavgrl7bnhQLP9sBuofTqgjLQDpon7Qpc3YRhVU1XCoHvnV0tM>. Communication of war-related cases by the judiciary: 10 questions and answers / Valeriia Rybak, Nazarii Boiarskyi // Human Rights Vector NGO, 2022. Judicial Administration of War Crime Cases: Needs Assessment and Recommendations for Courts on Effective Administration of War Crime Cases // USAID Activity Office: Office of Democracy and Governance, 29.08.2022: <https://drive.google.com/file/d/1aaf076kEdvWM7Rrw87oCNqa6gEQOq03F/view>.

themselves under huge pressure due to the need to consider cases related to international crimes regularly without the possibility to delay proceedings or recuse themselves.

Since the beginning of the armed conflict in 2014, the Supreme Court of Ukraine has considered only one case pertaining to the article 438 of the CCU violation.<sup>349</sup> Despite the opportunity to analyse and determine basic principles in classification of the alleged crime as a violation of laws and customs of war, the court has failed to set a precedent in interpretation that could be used as guidance by the courts of the lower instances.<sup>350</sup> However, the decision of the first instance court was progressive in part which concerned the analysis of the elements of crime under article 438 and is different to the similar decisions in this category of cases.<sup>351</sup>

One case under article 437 (waging the war of aggression) reached the cassation chamber of the Supreme Court. For more than three years the decision was being postponed. Despite lengthy discussions and consultations at the Supreme Court pertaining

Since 2014, the Supreme Court of Ukraine has considered only one case pertaining to the article 438 of the CCU violation. One case under article 437 (waging the war of aggression) reached the cassation chamber of the Supreme Court.

to the definition of a “perpetrator”, following the full-scale invasion doubts arose as to whether the decision will be issued at all. On 28 February 2024 the Supreme Court finally adopted the long-awaited decision.<sup>352</sup> As a result the Grand Chamber of the Supreme Court reached a conclusion that the status of accused did not fall under the definition of a “perpetrator” under article 437 CCU, therefore their previous sentence was overturned and case dismissed.

While investigative and prosecutorial bodies are introducing specialised units investigating international crimes, there is no discussion pertaining to a similar initiative at the courts level<sup>353</sup>

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349 Criminal Cassation Chamber of the Supreme Court has considered for the first time criminal case as regards the violation of laws and customs of war (art 438 CCU) // Supreme Court, 29 Feb 2024: <https://supreme.court.gov.ua/supreme/pres-centr/news/1565349/>.

350 The Supreme Court Decree, case № 753/14148/21, 28.02.2024: <https://reyestr.court.gov.ua/Review/117442733/>; Kyiv Appellate Court case № 753/14148/21, 10.07.2023: <https://reyestr.court.gov.ua/Review/113698929/>.

351 Darnytskyi Regional Court of the Kyiv city, case № 753/14148/21, 24.04.2023: <https://reyestr.court.gov.ua/Review/110409601/>.

352 The Grand Chamber of the Supreme Court determined the definition of a “perpetrator” in Art. 437 of the Criminal Code of Ukraine “Planning, preparation, initiation and waging of an aggressive war” // Supreme Court, 28.02.2024: <https://supreme.court.gov.ua/supreme/pres-centr/news/1564458/>. The Supreme Court Decree, case № 415/2182/20, 28.02.2024: <https://reyestr.court.gov.ua/Review/117555176/>.

353 Draft Law on Amendments to the Law of Ukraine “On the Judiciary and the Status of Judges” on the Introduction of Specialization of Judges in Consideration of Military Criminal Offences, Criminal Offences Against Peace, Human Security and International Law and Order // Verkhovna Rada of Ukraine, № 10301, 29.11.2023: <https://itd.rada.gov.ua/billInfo/Bills/Card/43315>.

01. In the majority of the proceedings concerning grave international crimes, it is not always possible to predict which court will have the jurisdiction to hear the case (due to the principle of territorial jurisdiction).
02. There is an automatic case distribution system within the courts that distributes cases among the judges of the same court. Therefore, in practice, it may be difficult to predict which judge will be appointed to consider the case.
03. Thirdly, in addition to the cases on alleged war crimes, a larger number of cases related to the consequences of the armed conflict is considered, such as crimes against the foundations of national security. There is a good number of judges who support the initiative to introduce a specialisation in grave international crimes within the courts system.<sup>354</sup> However, effectiveness of such specialisation can only be ensured if this approach is applied at all levels of the justice system and works in concert with one another.

A combination of challenges in the investigation of the proceedings poses obstacles to ensuring an objective and impartial trial. Cases against detained Russian servicemen after 24 February 2022 activated the debate on the ability of Ukrainian national courts to consider such cases objectively and impartially. There are concerns about the capacity to ensure the right to a fair trial in the context of these trials. In particular, these are related to protection against self-incrimination, coercion to confess guilt through the possibility of using the prisoner of war exchange procedure, and the exercise of the right to defence<sup>355</sup>. Judges rely on the investigative and prosecutorial authorities to ensure the quality of evidence and proper proof in the process, which is the cornerstone of ensuring the right to a fair trial and objectivity.

Nonetheless, providing a good response to the public demand for justice remains a challenge for the Ukrainian court system. The impact of personal experience of the parties to the criminal proceedings as victims of the armed conflict on impartiality of proceedings is also a matter of concern. Some judges see a risk if a particular judge or their family members suffered harm as a result of the armed conflict. When evidence is insufficient, judges may delay the trial or issue guilty verdicts based on society's and or

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354 Capacity of Ukraine's Judicial System to Ensure Accountability for Grave International Crimes Committed in the Course of the Russia's Aggression Against Ukraine: A Perspective of Judges and Veterans, and the Demand for Justice by the Population of Ukraine / Ukrainian Legal Advisory Group NGO, Institute for Peace & Common Ground NGO with the support of the project 'Urgent EU support for civil society' implemented by ISAR Edhannia with the financial support of the European Union, as well as with the support of the Ukraine 5AM Coalition and Association for the Development of Judicial Self-Government of Ukraine // Kyiv, 2023: <https://drive.google.com/file/d/1UDltnn-hLCSTPBYoPaW0mCjG4nex1BeMK/view?fbclid=IwAR3lTutF4Xavgrl7bnhQLP9sBuofTqgjLQDpon7Qpc3YRhVU1X-CoHvnV0tM>.

355 Report on the human rights situation in Ukraine, 1 February to 31 July 2022 // Office of the UN High Commissioner for Human Rights, 27.09.2022, pp. 98–105: <https://ukraine.un.org/sites/default/files/2022-09/ReportUkraine-1Feb-31Jul2022-ua.pdf>.

political expectations as opposed on sufficient grounds.<sup>356</sup> Moreover, judges hesitate to issue acquittals in these cases due to potential reactions they may cause among public and political leadership.

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356 Capacity of Ukraine's Judicial System to Ensure Accountability for Grave International Crimes Committed in the Course of the Russia's Aggression Against Ukraine: A Perspective of Judges and Veterans, and the Demand for Justice by the Population of Ukraine / Ukrainian Legal Advisory Group NGO, Institute for Peace & Common Ground NGO with the support of the project 'Urgent EU support for civil society' implemented by ISAR Ednannia with the financial support of the European Union, as well as with the support of the Ukraine 5AM Coalition and Association for the Development of Judicial Self-Government of Ukraine // Kyiv, 2023: <https://drive.google.com/file/d/1UDltnn-hLCSTPBYoPaW0mCjG4nex1BeMK/view?fbclid=IwAR3lTutF4Xavgrl7bnhQLP9sBuofTqgjLQDpon7Qpc3YRhVU1X-CoHvnV0tM>.



# The Role of the International Accountability Mechanisms

## Investigation by the Office of the Prosecutor of the International Criminal Court

Ukraine has a long and complicated relationship with the International Criminal Court. On 20 January 2000, Ukraine signed the Rome Statute of the ICC. In the following year the Constitutional Court of Ukraine decided that Ukraine could not ratify the Rome Statute as it contradicted Article 124 of the Constitution of Ukraine as a complementary to the national justice institution.<sup>357</sup>

Following the Revolution of Dignity in 2013 and the outbreak of the armed conflict in Ukraine, there had been increasingly frequent discussions among government officials at various levels about engaging the International Criminal Court in the investigation of those events. As a result, the Verkhovna Rada of Ukraine adopted two declarations recognising the Court's jurisdiction. The first declaration concerned the events of Maidan between 21 November 2013 and 22 February 2014<sup>358</sup>. The second concerned the consequences of the armed conflict on the territory of Ukraine in relation to the annexation and occupation of Crimea and armed hostilities in Donetsk and Luhansk regions<sup>359</sup>. As the second declaration covered the period from 20 February 2014 with no end date, the ICC also has jurisdiction over events after 24 February 2022. The declaration specifically

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357 Opinion of the Constitutional Court of Ukraine in the case based on the constitutional petition from the President of Ukraine to provide an opinion on the compliance of the Rome Statute of the International Criminal Court with the Constitution of Ukraine (the Rome Statute case), No. 3-v/2001, 11.07.2001: <https://zakon.rada.gov.ua/laws/show/v003v710-01#Text>.

358 Declaration of the Verkhovna Rada of Ukraine to the International Criminal Court on the Recognition of the Jurisdiction of the International Criminal Court by Ukraine over Crimes against Humanity Committed by Senior Officials of the State, which Led to Extremely Grave Consequences and Mass Murder of Ukrainian Nationals during Peaceful Protests within the Period from 21 November 2013 to 22 February 2014, 25.02.2014: <https://zakon.rada.gov.ua/laws/show/790-18#Text>. Declaration on Ukraine's recognition of the jurisdiction of the International Criminal Court, 09.04.2014: <https://www.icc-cpi.int/sites/default/files/itemsDocuments/997/declarationRecognitionJurisdiction09-04-2014.pdf>.

359 Resolution of the Verkhovna Rada of Ukraine 'On the Declaration of the Verkhovna Rada of Ukraine "On the Recognition of the Jurisdiction of the International Criminal Court by Ukraine over Crimes against Humanity and War Crimes by Senior Officials of the Russian Federations and Leaders of the Terrorist Organisations "DPR" and "LPR," which Led to Extremely Grave Consequences and Mass Murder of Ukrainian Nationals," 04.02.2015: <https://zakon.rada.gov.ua/laws/show/145-19#Text>. Declaration on Ukraine's recognition of the jurisdiction of the International Criminal Court, 08.09.2015: [https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine\\_Art\\_12-3\\_declaration\\_08092015.pdf#search=ukraine](https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf#search=ukraine)

draws attention to the actions of ‘...senior officials of the Russian Federation and leaders of the terrorist organisations “DPR” and “LPR”...’<sup>360</sup>

Despite the fact that the Office of the Prosecutor of the ICC had been presenting its preliminary conclusions on the situation in Ukraine since 2015, the issue of joining the ICC as a full-fledged state party had not been on Ukraine’s political agenda for many years. However, during the negotiations on Ukraine’s membership in the European Union, the ratification of the Rome Statute was identified as one of the key conditions. On 16 September 2014, the Association Agreement between Ukraine and the European Union and the European Atomic Energy Community was ratified<sup>361</sup>. Article 8 of the Agreement stipulates that ‘The Parties shall cooperate in promoting peace and international justice by ratifying and implementing the Rome Statute of the International Criminal Court (ICC) of 1998 and its related instruments’. In response to this provision, the Ukrainian Constitution was amended in 2016 to enable the consideration of the ratification of the Rome Statute. This amendment entered into force on 30 June 2019.<sup>362</sup>

Although the need to join the ICC has been discussed at the legislative level multiple times since 2019, it is yet to happen. The key reservation against ratification is that the Ukrainian military is against ratification along with various other excuses. One of the most recent official decisions of the Ukrainian government states that the issue of ratification of the Rome Statute will be considered **within one year after the end/termination of martial law in Ukraine**<sup>363</sup>.

On 2 March 2022, the ICC Prosecutor opened an investigation into the situation in Ukraine following the referral by 43 ICC states parties pursuant to Article 14 of the Rome Statute.<sup>364</sup>

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360 Resolution of the Verkhovna Rada of Ukraine ‘On the Declaration of the Verkhovna Rada of Ukraine “On the Recognition of the Jurisdiction of the International Criminal Court by Ukraine over Crimes against Humanity and War Crimes by Senior Officials of the Russian Federations and Leaders of the Terrorist Organisations “DPR” and “LPR,” which Led to Extremely Grave Consequences and Mass Murder of Ukrainian Nationals,” 04.02.2015: <https://zakon.rada.gov.ua/laws/show/145-19#Text>.

361 Association Agreement between Ukraine, of the one part, and the European Union, the European Atomic Energy Community and their Member States, of the other part: [https://zakon.rada.gov.ua/laws/show/984\\_011#Text](https://zakon.rada.gov.ua/laws/show/984_011#Text)

362 Law of Ukraine ‘On Amendments to Constitution of Ukraine (Regarding Justice),’ No. 1401-VIII, 02.06.2016: <https://zakon.rada.gov.ua/laws/show/1401-19#n6>.

363 On Approval of the Action Plan for the Implementation of the Recommendations of the European Commission Presented in the Progress Report of Ukraine within the framework of the European Union Enlargement Package 2023 / Order // Cabinet of Ministers of Ukraine ,No. 133-p, 09.02.2024: <https://www.kmu.gov.ua/npas/pro-zatverdzhennia-planu-zakhodiv-z-vykonannia-rekomendatsii-ievropeiskoi-komisii-predstavlenykh-u-t90224>.

364 Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: “I have decided to proceed with opening an investigation.”, 28.02.2022: <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening.Statement> of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation, 02.03.2022: <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states>.

Since March 2022, the ICC Prosecutor Karim A.A. Khan KC has already visited Ukraine five times.<sup>365</sup> The ICC investigators are working directly in the field, with a total of 42 investigators, experts, and other Court personnel were deployed to Ukraine<sup>366</sup>. In particular, these include experts from the Netherlands provided by the country in support for the ICC investigation. All communication between the Office of the ICC Prosecutor and the Ukrainian authorities is carried out through the Office of the Prosecutor General, following the amendments to the Criminal Procedure Code of Ukraine.<sup>367</sup>

In March 2023, the ICC issued arrest warrants for Vladimir Putin and Maria Lvova-Belova on charges of alleged war crimes, namely the unlawful deportation and unlawful transfer of children from Ukrainian territory to the Russian Federation under Articles 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute<sup>368</sup>. Also in March 2023, an agreement was signed to open a “field office” of the International Criminal Court in Ukraine.<sup>369</sup>

On 5 March 2024 Pre-Trial II issued two more arrest warrants for two Russian military commanders for the war crime of directing attacks at civilian objects (Article 8(2)(b)(ii) of the Rome Statute) and the war crime of causing excessive incidental harm to civilians or damage to civilian objects (Article 8(2)(b)(iv) of the Rome Statute), and the crime against humanity of inhumane acts under article 7(1)(k) of the Rome Statute.<sup>370</sup>

The International Criminal Court remains the main accountability mechanism for grave crimes committed in the territory of Ukraine. Its investigation of the Ukraine situation is of interest not only to Ukraine but also other states. Additional financial support and engagement of experts from other countries to assist the investigation create an expectation of tangible outcomes from the ICC for this situation. At the same time, it is important to objectively assess the Court’s capacity pertaining to its work in Ukraine:

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365 ICC Prosecutor Karim A. A. Khan KC concludes fourth visit to Ukraine: “Amidst this darkness, the light of justice is emerging” // International Criminal Court, 07.03.2023: <https://www.icc-cpi.int/news/icc-prosecutor-karim-khan-kc-concludes-fourth-visit-ukraine-amidst-darkness-light-justice>

366 ICC Prosecutor Karim A.A. Khan QC announces deployment of forensics and investigative team to Ukraine, welcomes strong cooperation with the Government of the Netherlands, 17.05.2022: <https://www.icc-cpi.int/news/icc-prosecutor-karim-aa-khan-qc-announces-deployment-forensics-and-investigative-team-ukraine>.

367 Law of Ukraine ‘On Amendments to Criminal Procedure Code of Ukraine and Other Legislative Acts of Ukraine on Cooperation with International Criminal Court,’ No. 2236-IX, 03.05.2022: <https://zakon.rada.gov.ua/laws/show/2236-20#n5>.

368 Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova // International Criminal Court, 17.03.2023: <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and/>. Statement by Prosecutor Karim A. A. Khan KC on the issuance of arrest warrants against President Vladimir Putin and Ms Maria Lvova-Belova // International Criminal Court, 17.03.2023: <https://www.icc-cpi.int/news/statement-prosecutor-karim-khan-kc-issuance-arrest-warrants-against-president-vladimir-putin>.

369 Ukraine and International Criminal Court sign an agreement on the establishment of a country office // International Criminal Court, 23.03.2023: <https://www.icc-cpi.int/news/ukraine-and-international-criminal-court-sign-agreement-establishment-country-office>. International Criminal Court to open a country office in Ukraine // Suspilne news, 23.03.2023: <https://susplne.media/423465-v-ukraini-vidkrietsa-predstavnictvo-miznarodnogo-krimalno-go-sudu/>.

370 Situation in Ukraine: ICC judges issue arrest warrants against Sergei Ivanovich Kobylash and Viktor Nikolayevich Sokolov: <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-sergei-ivanovich-kobylash-and>

**the Court's jurisdiction over Ukraine excludes the crime of aggression.**

The Court's jurisdiction over Ukraine excludes the crime of aggression. Considering the requirements of the Rome Statute as well as strict limitations of the Kampala Amendment, and the fact that neither party to the armed conflict has joined the ICC – the Court cannot consider the crime of aggression committed against Ukraine. The ICC Prosecutor also explicitly mentioned these constraints in his statement on the opening of the investigation.<sup>371</sup>

**the ICC does not have the resources to investigate all the crimes committed in Ukraine.**

The ICC does not have the resources to investigate all the crimes committed in Ukraine. According to the statistics of the Ukrainian authorities, alleged violations of international criminal and humanitarian law in Ukraine are recorded daily and number is in the hundreds of thousands. Taking into account the Court's capacity, one cannot say that it will investigate absolutely all grave international crimes. The most optimistic forecasts suggest that the ICC will take up to five cases, but further consideration of other crimes will be left to either Ukraine's domestic system or a special accountability mechanism should one be established in future.<sup>372</sup>

**It is unclear which individuals will be prosecuted by the Court**

It is unclear which individuals will be prosecuted by the Court. Ukraine expects that the ICC will be able to prosecute senior officials of the Russian Federation, referring to the fact that 'their immunity is irrelevant to the prosecution by the Court.'<sup>373</sup> The court's updated policy on situation completion takes into account the availability of perpetrators to stand trial. Therefore, potentially, when identifying potential perpetrators before the ICC, it is possible to consider not only top, but also mid-level perpetrators, but ultimately will depend on the possibility of execution of arrest warrants issued by the Court.<sup>374</sup>

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371 Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation, 02.03.2022: <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states>.

372 Head of the Supreme Court: 99% of Russian war crimes will be considered by Ukrainian courts // Interfax Ukraine, 13.07.2023: <https://interfax.com.ua/news/general/922677.html>

373 'He has functional immunity': Venediktova explains why Ukraine has not opened a case against Putin, 28.03.2022: <https://suspijne.media/222604-mae-funkcionalnij-imunitet-venediktova-poasnila-comu-ukraina-ne-vidkryla-spravu-proti-putina/>. War crimes of the Russian army in Ukraine. 28.03.2022 / Iryna Venediktova, Prosecutor General of Ukraine: [https://www.youtube.com/watch?v=vae6XuM6ZGk&ab\\_channel=MediaCenterUkraine-Ukrinform](https://www.youtube.com/watch?v=vae6XuM6ZGk&ab_channel=MediaCenterUkraine-Ukrinform).

374 Policy on Situation Completion / the International Criminal Court, 15.06.2021: <https://www.icc-cpi.int/sites/default/files/itemsDocuments/20210615-Situation-Completion-Policy-eng.pdf>.

**cooperation of the ICC with Ukrainian authorities has a number of obstacles under national legislation of Ukraine**

Cooperation of the ICC with Ukrainian authorities has a number of obstacles under national legislation of Ukraine. On 3 May 2022, the Criminal Procedure Code of Ukraine was amended to include provisions on cooperation with the International Criminal Court<sup>375</sup>. The ability of the Office of the ICC Prosecutor to collect evidence, access crime scenes, approach witnesses and detainees is carried out within the constraints determined by Ukrainian law and in accordance with the procedures established for investigations in Ukraine. Ukraine's often restrictive regulations (such as the powers of the Prosecutor General to ultimately decide whether the ICC investigators will have access to the necessary information) may adversely affect Ukraine's cooperation with the ICC and jeopardise the quality of the ICC's investigation.

**communication on behalf of Ukraine and the ICC is carried out by the Office of the Prosecutor General, with various structural units involved in the process.**

Communication on behalf of Ukraine and the ICC is carried out by the Office of the Prosecutor General, with various structural units involved in the process. The issue of international legal cooperation is under the authority of the relevant department at the Office of the Prosecutor General, which in turn has a separate unit for cooperation with the ICC. In addition, specialised unit within the War Crimes Department of the OPG is tasked with responding to the requests from the OTP of the ICC which they receive in relation to the investigations the Department is responsible for. There is also a unit that ensures cooperation with the JIT, which includes the ICC among their members. The coherency of internal communication processes within the OPG also affects the nature of its cooperation with the Court, given the scope of powers vested in the Prosecutor General in this domain. On the other hand, the excessive powers of the Prosecutor General to decide on granting the ICC staff permission to conduct procedural actions in Ukraine means there is broad scope for arbitrary decision-making.

**the Court needs to continuously attract additional resources to conduct investigations.**

The Court needs to continuously attract additional resources to conduct investigations. Every year, the Assembly of States Parties to the ICC approves the Court's budget for the following year, which allocates funds depending on the workload in the situations of ongoing investigations and preliminary examinations. States which referred Ukraine's situation to the ICC so far have

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375 Law of Ukraine 'On Amendments to Criminal Procedure Code of Ukraine and Other Legislative Acts of Ukraine on Cooperation with International Criminal Court,' No. 2236-IX, 03.05.2022: <https://zakon.rada.gov.ua/laws/show/2236-20#n5>.

been supporting the Court's investigative efforts. But this support has mostly been by way of voluntary contributions rather than increasing the Court's regular budget in proportion to the number of investigations and overall resources required and secondments. For example, the Netherlands sent its own experts to join the team of investigators from the Office of the ICC Prosecutor in Ukraine.<sup>376</sup> The continuation of the ICC's work in Ukraine will require the continued support of States Parties, both in terms of expertise and funding.<sup>377</sup> Voluntary contributions make the ICC vulnerable and dependent on the will of the states; moreover disproportionate distribution of the resources internally results in some of the Court's organs lacking the capacity to perform their functions in accordance with their mandate.

### The ICC is vulnerable to external sanctions which may be imposed by powerful non-States Parties

The ICC is vulnerable to external sanctions which may be imposed by powerful non-States Parties. Issuance of arrest warrants against Israeli top government officials has resulted in the US serious threats to sanction the ICC. Should the relevant law be adopted, the ICC will be forced to cease its operations in countries of investigations, including the investigation in Ukraine.<sup>378</sup>

## JIT Investigations

The work of joint investigation teams is one of the forms of cooperation between states in criminal proceedings.<sup>379</sup> The legal basis for such collaboration is set out in the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters.<sup>380</sup> According to its provisions, a joint investigation team may be set up, in par-

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376 ICC sends 42-member team to probe alleged war crimes in Ukraine / Aljazeera, 17.05.2022: <https://www.aljazeera.com/news/2022/5/17/icc-sends-largest-ever-investigative-team-to-war-torn-ukraine>

377 Russian war crimes in Ukraine: EU supports the International Criminal Court investigation with €7.25 million / European Commission, 08.06.2022: [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_22\\_3543](https://ec.europa.eu/commission/presscorner/detail/en/IP_22_3543).

378 Volkova, N., Cutting US Support for ICC because of Israel would hurt Ukrainian War Victims, <https://www.usatoday.com/story/opinion/2024/05/31/israel-icc-arrest-warrants-republican-sanctions-ukraine/73883944007/>.

379 In accordance with Article 523 of the Criminal Procedure Code of Ukraine, international cooperation in criminal proceedings encompasses the necessary actions to facilitate international legal assistance, such as serving documents, conducting specific procedural actions, extraditing persons who have committed a criminal offence, temporarily transferring persons, taking over criminal prosecution, transferring convicted persons, and executing sentences. // Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

380 Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, 08.11.2001: [https://zakon.rada.gov.ua/laws/show/994\\_518#Text](https://zakon.rada.gov.ua/laws/show/994_518#Text).

ticular, in situations where: a State Party's investigations into criminal offences require difficult and demanding investigations having links with other Parties; a number of State Parties are conducting investigations into criminal offences in which the circumstances of the case demand coordinated, concerted action in the State Parties involved. At the same time, it is necessary to have a clear understanding of the objectives and purpose of the investigation, as well as the process and location of the prosecution based on its outcomes.

Following 24 February 2022, Ukraine allegedly decided to use the successful experience of the JIT in the case of the MH17 crash,<sup>381</sup> but in relation to the international crimes committed as a result of the full-scale invasion. On 26 March 2022, the Prosecutors General of Ukraine, Poland, and Lithuania signed an agreement to establish a joint investigation team into alleged war crimes and crimes against humanity on the territory of Ukraine. According to the Office of the Prosecutor General, the JIT will focus on the collection, secure storage and rapid exchange of information and evidence of war crimes collected during investigations in the territory of the participating countries, as well as criminal intelligence.<sup>382</sup> Eurojust has supported the agreement and emphasised that joining was open to all EU member states.<sup>383</sup>

At the time, the then Prosecutor General, Iryna Venediktova, called on other countries that had also opened investigations into the situation in Ukraine to join the JIT. On 25 April 2022, the Office of the ICC Prosecutor joined the JIT as an observer.<sup>384</sup> In addition, Estonia, Latvia, and Slovakia also became members of the JIT on 31 May 2022.<sup>385</sup> Romania also joined the JIT on 13 October 2022<sup>386</sup> and Europol in 2023.<sup>387</sup> States which have

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381 On 17 November 2022, the court delivered a judgement, convicting three defendants and acquitting the fourth. The court highlighted the circumstances of the armed conflict in Donbas, the ties between the self-declared republics and Russia, and the matter of the defendants' immunities. Additionally, the court also awarded compensation to the victims in the amount of EUR 16 million. // Summary of the day in court: 17 November 2022 – Judgement: <https://www.courtmh17.com/en/news/2022/summary-of-the-day-in-court-17-november-2022--judgment.html>.

382 An announcement on the Facebook page of the Office of the Prosecutor General regarding the establishment of a joint investigation team, 25.03.2022: <https://www.facebook.com/pgo.gov.ua/posts/337459418416898>.

383 Eurojust supports joint investigation team into alleged core international crimes in Ukraine / Eurojust, 28.03.2022: <https://www.eurojust.europa.eu/news/eurojust-supports-joint-investigation-team-alleged-core-international-crimes-ukraine>.

384 Statement by ICC Prosecutor, Karim A.A. Khan QC: Office of the Prosecutor joins national authorities in Joint Investigation Team on international crimes committed in Ukraine / International Criminal Court, 25.04.2022: <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-office-prosecutor-joins-national-authorities-joint>. The Office of the ICC Prosecutor to join the joint investigation team of Ukraine, Lithuania, and Poland to investigate Russian crimes / Office of the Prosecutor General, 25.04.2022: <https://www.gp.gov.ua/ua/posts/ofis-prokuro-ra-mks-prijednavsya-do-spilnoyi-slidcoyi-grupi-ukrayini-litvi-ta-polshhi-shhodo-rozsliduvannya-zlociniv-rf>.

385 Post on the Facebook page of Prosecutor General Iryna Venediktova, 31.05.2022: <https://www.facebook.com/VenediktovaIryna/posts/pfbid03446GXkTE5vVerT15dXcSVNygrV4shRnSKAhpbu3exKLAwxXBDEs78RRNrl>.

386 Romania becomes seventh member of joint investigation team on alleged core international crimes committed in Ukraine / Eurojust, 13.10.2022: <https://www.eurojust.europa.eu/news/romania-becomes-seventh-member-joint-investigation-team-alleged-core-international-crimes/>.

387 Agreement to extend the joint investigation team into alleged core international crimes in Ukraine for two years: <https://www.eurojust.europa.eu/news/agreement-extend-joint-investigation-team-alleged-core-international-crimes-ukraine-two-years#:~:text=The%20aim%20of%20the%20JIT,taken%20forward%20to%20the%20ICC>.

the most substantive and consistent experience in investigating and prosecuting grave crimes under the principle of universal jurisdiction, such as Germany, the Netherlands, France, Switzerland did not join the JIT.

On the part of Ukraine, structural investigation, which includes all the recorded incidents of the full-scale invasion of Ukraine by the Russian Federation, is investigated in the framework of the JIT. As reported by the Office of the Prosecutor General at the time of the establishment of the JIT, cooperation between the countries should include interviewing individuals who left the territory of Ukraine as a result of the armed conflict and seizing property of those involved in war crimes committed on the territory of Ukraine.<sup>388</sup> The investigations by other countries also pertain to the allegations of international crimes committed as a result of the armed conflict in Ukraine without focusing on individual cases.

The JIT has indeed become a rather large entity whose work requires clear guidelines at the level of a joint agreement. As an example, the JIT that investigated the MH17 case, was set up to investigate a concrete incident and it set the following as the objectives of its work: to identify those responsible for the downing of the flight and to gather evidence for the prosecution of those responsible. The countries agreed that Dutch standards would be applied to the investigation, and that cooperation between the countries allowed the Dutch and Australian investigators to conduct investigative actions in Ukraine's territory together with Ukrainian authorities.<sup>389</sup> No such agreement in the case of the current JIT is publicly available.

The efficiency and effectiveness of the JIT ultimately depends on a clear vision of its end goal and a strategy that can ensure concrete results. **Presently there does not appear to be an end goal clearly defined nor is there a strategy.** The aim has been defined as "to facilitate investigations and prosecutions in the States concerned, as well as those that may be taken forward to the ICC".<sup>390</sup> To this end JIT member States document the information from Ukrainian refugees and OSINT. Although the ICC is mentioned as a mechanism which could use the information, it is clear that the ICC will only be able to use limited information collected by the JIT states only pertinent to their investigations. In addition, there is no clarity as to the procedural standards which are used by different states to collect the information. Although the European Network for Investigation and Prosecution of Genocide, crimes against humanity and war crimes ('Genocide Network') is playing the role of the coordinator, members of the JIT use their own legislation as a legal basis for documentation **which means that investigative standards used by different**

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388 An announcement on the Facebook page of the Office of the Prosecutor General regarding the establishment of a joint investigation team, 25.03.2022: <https://www.facebook.com/pgogov.ua/posts/337459418416898>.

389 The criminal investigation by the Joint Investigation Team (JIT): <https://www.prosecutionservice.nl/topics/mh17-plane-crash/criminal-investigation-jit-mh17>.

390 Supra at 358



**states within the JIT also differ.** This may affect the quality of the information collected and its status as potential evidence, depending on where the documented crimes will ultimately be prosecuted. In order to clearly identify the ultimate role of JIT and its added value in the myriad of various accountability initiatives there needs to be an overall strategy and vision of the justice and accountability architecture for the situation in Ukraine.

The establishment of the JIT in such a format with the Prosecutor of the ICC and Europol as participants has been unprecedented in many respects. Ukraine has been put in a rather challenging situation as a result of non-ratification and non-implementation of the Rome Statute, which means that its procedural standards remain unaligned with the rest of the JIT members. Furthermore, Ukraine is not a member of Eurojust or Europol. Consequently, there are questions as to its access to information that has been collected and documented by other JIT's member states, but also the use of its information in the domestic proceedings, bearing in mind that **Ukrainian legislation does not allow the use of information collected and/or stored by third parties**, such as Core International Crimes Evidence Database (CICED).<sup>391</sup>

## International Centre for the Prosecution of the Crime of Aggression (ICPA)

Russia's war of aggression against Ukraine has been a *raison d'être* of the 2-year ongoing negotiations between Ukraine and the international community as to the possible options for prosecuting the crime of aggression. While no final solution has been decided upon, on 3 July 2023, a first step towards it emerged when the ICPA was opened in The Hague<sup>392</sup>. The Centre brings together prosecutors from different countries, not only from the JIT participating states. In particular, the U.S. government has appointed a special prosecutor for the crime of aggression to assist the Centre. The Centre operates with the support of Eurojust, which also administers the evidence database that is filled and analysed as part of its work.<sup>393</sup> It is not yet clear by which accountability mechanism the Centre's evidence will be used, but the Ukrainian side believes that its activities will reinforce the future mechanism(s) for prosecuting the crime of aggression.<sup>394</sup>

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391 Core International Crimes Evidence Database: <https://www.eurojust.europa.eu/core-international-crimes-evidence-database>

392 Ukraine: International Centre for the prosecution of Russia's crime of aggression against Ukraine starts operations today // European Commission, 03.07.2023: [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_3606](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3606).

393 The International Centre for the Prosecution of the Crime of Aggression against Ukraine (ICPA) officially launches its work in The Hague // Office of the Prosecutor General, 03.07.2023: <https://www.gp.gov.ua/ua/posts/v-gaazi-oficiino-rozpocav-svoyu-robotu-miznarodnii-centr-z-peresliduvannya-za-zlocin-agresiyi-proti-ukrayini-icpa>. Prosecutor General discussed the work of the International Centre for the Prosecution of the Crime of Aggression (ICPA) with the President of Eurojust // Office of the Prosecutor General, 11.09.2023: <https://www.gp.gov.ua/ua/posts/genprokuror-obgovoriv-z-prezidentom-jevroyustu-robotu-miznarodnogo-centru-z-peresliduvannya-za-zlocin-agresiyi-icpa>.

394 The International Centre for the Prosecution of the Crime of Aggression against Ukraine (ICPA) officially launches

**Currently, the progress of the work of ICPA is stalled because of the lack of legal basis for collecting evidence of the crime of aggression:** it is unclear which definition of the crime of aggression to be used when documenting evidence for future prosecutions. On the one hand there is article 437 of CCU and broad definition of a “perpetrator” proposed by the Supreme Court’s most recent decision (see section Overview of Ukraine’s Domestic Legislation) on the other hand there is a Rome Statute and the UN resolution 3314 which gives a polar opposite definition (highest level of political and military leadership with decision-making powers). This challenge will be solved once there is a consensus reached on the kind of accountability mechanism which will be mandated to prosecute the crime of aggression in the case of Ukraine.

## Investigations by States Under the Principle of Universal Jurisdiction

The implementation of the principle of universal jurisdiction (UJ) has become one of the forms of international support for justice related processes in Ukraine. In total, according to official reports, 26 countries have launched investigations into the alleged international crimes as a result of the Russia’s full-scale invasion of Ukraine<sup>395</sup>.

The principle of universal jurisdiction enables other states to investigate grave international crimes that have been committed beyond their borders. Although it can be a powerful tool for ensuring justice and accountability for the most serious crimes, investigations and prosecution under this principle come with its own set of challenges, rooted not only in the complexity of prosecuting grave crimes, but also country specific legislation and prosecutorial strategies, priorities and capacities of each national justice system. From Ukraine’s perspective the following challenges have already become apparent:

### States’ Experience in Prosecuting Grave Crimes

Many states that have opened investigations have not had much experience in investigating and prosecuting grave international crimes. On the one hand, there are states like France, Germany, Sweden, and the Netherlands, that have a developed state practice, methodology, strategies and case law related to war crimes charges, crimes against humanity, and even genocide. These states have dedicated units within their law enforcement agencies that have long been working with cases similar to those being committed

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its work in The Hague // Office of the Prosecutor General, 03.07.2023: <https://www.gp.gov.ua/ua/posts/v-gaazi-ofi-ciino-rozpocav-svoyu-robotu-miznarodnii-centr-z-peresliduvannya-za-zlocin-agresiyi-proti-ukrayini-icpa>.

395 Post on the Facebook page of Prosecutor General Iryna Venediktova, 03.06.2022: <https://www.facebook.com/VenediktovaIryna/posts/pfbid0kjeiNNYM9DYzCEuTas7v9WbiqETbGzFQ3ZvK9UB4rSLAVorvupcuNSbXa2yGp6RXI>. The war of criminal justice: what are we fighting for? Yurii Bielousov // JustTalk, 23.01.2024: <https://youtu.be/y58ndH-4C4QY?si=22DbwcmwlmTzclZu> Annex No. 3.

in Ukraine and have opened either structural or individual investigations (France, Germany, Lithuania) involving their own nationals as victims.

On the other hand, countries such as Poland, Lithuania, Latvia, and Slovakia, despite having a universal jurisdiction provision in their national legislation, lack a solid practical experience in using it. They mostly focus on collecting information as part of their structural investigations from Ukrainian refugees who temporarily settled in those states. They also have access to Europol, Eurojust where they can all exchange information, use databases and coordinate with one another.

### Constraints of the Principle of Universal Jurisdiction Application

Each country has its own set of rules and limitations pertaining to the prosecution of grave international crimes. For instance, some states like France have only opened incidents specific investigations involving French nationals in order to prosecute under the principle France requires for war crimes, crimes against humanity and genocide residence ties with the alleged perpetrator. Same is true for Austria.<sup>396</sup> Switzerland subscribes to the “conditional” or “limited” conception of universal jurisdiction, the exercise of which is subject to two conditions: (a) The presumed offender is in Swiss territory; (b) The presumed offender has not been extradited to another competent jurisdiction.<sup>397</sup>

The US now has similar legislation to that of Germany and Sweden following the adoption of the Justice for Victims of War Crimes Act (JVWC) in 2023.<sup>398</sup> The JVWC changed the scope and reach of the United States’ ability to prosecute war criminals. There no longer needs to be the US nationality of a victim or a perpetrator link and anybody who commits a war crime anywhere in the world can be prosecuted by the United States if they are present there. The new law also removed the statute of limitations, although without the retroactive effect. There is no possibility of prosecution for crimes against humanity or the crime of aggression as it is only limited to war crimes.<sup>399</sup>

Furthermore, the majority of the European, with the exception of France for instance, and the US national criminal law systems do not permit in absentia trials as their greatest risk is failure to ensure the right of an accused to fair trial, hence the requirement of the accused’s presence or nationality or residence link in some jurisdictions to the prosecuting state.

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396 Information and Observations by Austria:[https://www.un.org/en/ga/sixth/78/universal\\_jurisdiction/austria\\_e.pdf](https://www.un.org/en/ga/sixth/78/universal_jurisdiction/austria_e.pdf)

397 Swiss Confederation Federal Department of Foreign Affairs (DFAE) Directorate of Public International Law, The scope and application of the principle of universal jurisdiction, 24 April 2020: [https://www.un.org/en/ga/sixth/75/universal\\_jurisdiction/switzerland\\_e.pdf](https://www.un.org/en/ga/sixth/75/universal_jurisdiction/switzerland_e.pdf)

398 S. 4240 – Justice for Victims of War Crimes Act <https://www.congress.gov/bill/117th-congress/senate-bill/4240>

399 Perlman, A, Introductory Note to the Justice for Victims of War Crimes Act (U.S.), 5 Jan 2023: <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/A942F71C8EE80401639F1BD21C445668/S0020782923000281a.pdf/the-justice-for-victims-of-war-crimes-act-us.pdf>.

Some states appear to have more progressive UJ laws than others, in principle, allowing the victims to have a direct access to a pre-trial judge through civil party application or requiring only the presence and availability of victims and witnesses to enable the authorities to take direct testimonies. However, the reality differs, in so far as lengths to which states are willing to go to physically secure individual perpetrators to ensure they stand trial there. On the one hand, naturally, it is an issue of available resources but on the other, it is their willingness and intention to dedicate those resources, not only of their units, but of the official and covert police and intelligence networks.

### Issue of Resources

Ultimately intention and resources are the driving and ultimate factor when states set the rules and make a call as to whether open investigations under the UJ principle or not. One example, Germany having tested different strategies in various other situations, for instance, when prosecuting members of the ISIS for the crimes against yazidis decided, that unless there was a very good prospect of the execution of an arrest warrant, it will not be opening individual investigations even if the victims reside in Germany and available for investigative actions.<sup>400</sup> Typically units are small and have a very limited capacity, therefore investing in individual investigations as opposed to structural ones that are unlikely to result in successful prosecutions would not be a step states would be willing to take often.

Even structural investigations require substantial resources (time, funding, human resources). For instance, by September 2022, the Minister of Justice of Poland reported that they had already interviewed 1,200 refugees in the country and while the war rages on in Ukraine, the number of victims of and witnesses to the atrocity crimes who continue to flee grows.<sup>401</sup> Therefore, states which collect information from the victims, should also conduct some outreach activities to manage the victims expectations in relation to the prospects of opening investigations based on their reporting of crimes.

### Principle of Complementarity and Principle of Universal Jurisdiction

One argument in favour of states applying a universal jurisdiction principle to be more decisive and proactive is that provided they are states parties to the ICC they are expected to act in the spirit of the Rome Statute by adhering to the principle of complementarity. In such a case effective coordination becomes key to managing all the ongoing investiga-

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400 The European Centre for Constitutional and Human Rights, Sexual violence by members of the Russian armed forces: A renewed call to the German authorities to investigate: [https://www.ecchr.eu/fileadmin/user\\_upload/QA\\_CRSV\\_Counterstatement.pdf?fbclid=IwZXh0bgNhZW0CMTEAAAR1wD39oXYC8\\_9BviN7XjQSSbN4wPt\\_Oo6N-j1OGxi3SI0SxsFi4l0J0VgQ\\_aem\\_ARsLZnuqLxqHYO20WLn1ekFjgJts7e7d\\_Xny0ZV4l\\_r7qrifoTfH3NTGutmxcbNqc-JKTIQt93afFKhezKTBoLoX7](https://www.ecchr.eu/fileadmin/user_upload/QA_CRSV_Counterstatement.pdf?fbclid=IwZXh0bgNhZW0CMTEAAAR1wD39oXYC8_9BviN7XjQSSbN4wPt_Oo6N-j1OGxi3SI0SxsFi4l0J0VgQ_aem_ARsLZnuqLxqHYO20WLn1ekFjgJts7e7d_Xny0ZV4l_r7qrifoTfH3NTGutmxcbNqc-JKTIQt93afFKhezKTBoLoX7)

401 Post on the Facebook page of the Prosecutor General, 07.09.2022: <https://www.facebook.com/pgo.gov.ua/posts/fbfbid0jEp3dqwVWM37UX8LyJkGzwMSrsez3NL2LnmKNrKfqziodaV4sUJAbfr4bBi7tb5ql>.

tions by different states also vis-a-vis the ICC investigation of the Ukraine situation. There is an obligation in the CCU to investigate every crime.<sup>402</sup> Ukraine opens investigations into every single incident regardless of whether it is being investigated by other states or other institutions. National investigations under the universal jurisdiction principle, therefore should complement both Ukraine's and the ICC's efforts in those instances, where both lack capacity.

However, the reality of the situation is such that Ukraine's legislation lacking essential provisions such as crimes against humanity or command responsibility means that states' investigations operate on different levels of quality and capacity altogether and therefore, coordination and cooperation of all states and institutions involved becomes even a greater challenge. Moreover, should investigations under the principle of universal jurisdiction result in successful arrest warrants and Ukraine will decide to request an extradition, there will also be a dilemma of Ukraine's capacity to ensure impartial, objective and fair trials.

## Assistance from Other States

Although the armed conflict in Ukraine has been ongoing since 2014, official reports from state authorities on **international assistance from other countries** only began to appear after 24 February 2022. For instance, several missions of French experts worked, inter alia, on collecting evidence in Kyiv region<sup>403</sup> and were involved in investigating events in Kharkiv region.<sup>404</sup> France also donated a mobile DNA laboratory to the Office of the Prosecutor General and trained ten Ukrainian experts in the use of the provided materials and equipment.<sup>405</sup> In addition, forensic experts from Slovakia<sup>406</sup> and Polish experts worked in Ukraine to examine the sites affected by shelling in Kyiv, Mykolaiv and Borodianka<sup>407</sup>.

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402 Article 2, CCU: <https://media.ellinikahoaxes.gr/uploads/2023/09/%D0%9A%D1%80%D0%B8%D0%BC%D1%96%D0%BD%D0%B0%D0%BB%D1%8C%D0%BD%D0%B8%D0%B9-%D0%BA%D0%BE%D0%B4%D0%B5%D0%BA%D1%81-%D0%A3%D0%BA%D1%80%D0%B0%D1%97%D0%BD%D0%B8--on-April-5-2001-%E2%84%96-2341-III-Print-version.pdf>

403 French experts arrived to Ukraine to help investigate Russian war crimes / Office of the Prosecutor General, 12.04.2022: <https://www.gp.gov.ua/ua/posts/francuzki-eksperti-pribuli-do-ukrayini-dlya-dopomogi-u-rozsliduvan-ni-vojennix-zlociniv-uf>.

404 Message on the official Twitter page of the Embassy of France in Ukraine, 27.09.2022: [https://twitter.com/FranceenUkraine/status/1574707683072032768?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwtterm%5E1574707683072032768%7Ctwgr%5Ece56b0020ed7efaf96c9f691ef7997195f3c05fe%7Ctwcon%5Es1\\_&ref\\_url=https%3A%2F%2Fmil.in.ua%2Fuk%2Fnews%2Ffrantsuzki-slidchi-dopomagatymut-rozsliduvaty-zlochyny-rosijskyh-vijskovyh-v-izyumi%2F](https://twitter.com/FranceenUkraine/status/1574707683072032768?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwtterm%5E1574707683072032768%7Ctwgr%5Ece56b0020ed7efaf96c9f691ef7997195f3c05fe%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fmil.in.ua%2Fuk%2Fnews%2Ffrantsuzki-slidchi-dopomagatymut-rozsliduvaty-zlochyny-rosijskyh-vijskovyh-v-izyumi%2F). Prosecutor General discusses practical assistance to Ukraine in documenting incidents of atrocities in Kharkiv region with the President of the National Assembly of France / Office of the Prosecutor General, 04.10.2022: <https://gp.gov.ua/ua/posts/generalnii-prokuror-obgovoriv-z-golovoyu-nacionalnix-zboriv-franciyi-prakticnu-dopomogu-ukrayini-u-fiksaciyi-faktiv-zvirstv-na-xarkivshhini>.

405 France hands over a mobile DNA lab to the Office of the Prosecutor General // Office of the Prosecutor General, 20.07.2022: <https://gp.gov.ua/ua/posts/franciya-peredala-ofisu-genprokurora-mobilnu-laboratoriyu-dnk>.

406 Post on the Facebook page of Prosecutor General Iryna Venediktova, 21.04.2022: <https://www.facebook.com/Venediktovalryna/posts/373149118156096>.

407 Poland is preparing a new mission of experts to help Ukrainian law enforcers in documenting war crimes // Office of the Prosecutor General, 03.10.2022: <https://gp.gov.ua/ua/posts/polshha-gotuje-novu-misiyu-ekspertiv-dlya-dopomogi-ukrayinskim-pravooxorontsiam-u-fiksaciyi-vojennix-zlociniv>.

Rules governing engagement and participation of experts are contained in the Criminal Procedure Code of Ukraine which does not provide for such a procedure of providing international assistance to Ukrainian law enforcement as visits of foreign experts to Ukraine. Despite public expressions of support of this format of cooperation, **the evidence obtained by these experts is inadmissible in official proceedings**. Thus, for instance, findings from mobile DNA laboratories must undergo forensic verification by the state approved forensic examination centres, the conclusion of which can then be included in the case file.<sup>408</sup> In practice, investigators and prosecutors do not understand how to properly and officially utilise all such international assistance.

Another permanent form of assistance to Ukrainian law enforcement agencies with investigations was established by the United States of America, the United Kingdom, and the European Union<sup>409</sup>. **The Atrocity Crimes Advisory Group (ACA)** for Ukraine was established to support the Office of the Prosecutor General.<sup>410</sup> The primary objective of the group is to streamline coordination and communication efforts to ensure implementation and development of best practices, avoid duplication of efforts, and encourage the expedient deployment of financial resources and skilled expert personnel to respond to the needs of the OPG as their beneficiary. The ACA activity is composed of the following elements: the work of the Advisory Group to the OPG, made up of experienced war crimes prosecutors, investigators, military analysts, forensic specialists, and other experts based in the region on a permanent basis; Mobile Justice Teams composed of both international and Ukrainian experts, which are created and deployed to increase the capacity of the OPG War Crimes Unit and regional prosecutors to conduct field investigations.<sup>411</sup>

The ACA has actively supported the Office of the Prosecutor General in its efforts to investigate grave international crimes. This support ranges from general advice on the

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408 Ministry of Justice of Ukraine, Order on Approval of the Instruction about Appointment and Processing of Forensic Examinations and Expert Research and Scientific Methodical Recommendations in Matters Pertaining to the Preparation and Appointment of Forensic Examination and Expert Research: <https://zakon.rada.gov.ua/laws/show/z0705-98#Text>.

409 EU, US, and UK establish Atrocity Crimes Advisory Group (ACA) for Ukraine: joint statement // UK Government, 25.05.2022: <https://www.gov.uk/government/news/joint-statement-eu-us-and-uk-establish-atrocity-crimes-advisory-group-aca-for-ukraine>. Atrocity Crimes Advisory Group (ACA) for Ukraine // Delegation of the European Union to Ukraine, 26.05.2022: [https://www.eeas.europa.eu/delegations/ukraine/%D0%B4%D0%BE%D1%80%D0%B0%D0%B4%D1%87%D0%B0-%D0%B3%D1%80%D1%83%D0%BF%D0%B0-%D0%B7-%D1%80%D0%BE%D0%B7%D1%81%D0%BB%D1%96%D0%B4%D1%83%D0%B2%D0%B0%D0%BD%D0%BD%D1%8F-%D0%B2%D0%BE%D1%94%D0%BD%D0%BD%D0%B8%D1%85-%D0%B7%D0%BB%D0%BE%D1%87%D0%B8%D0%BD%D1%96%D0%B2-%D0%BD%D1%96%D0%B2-%D1%96-%D0%B7%D0%BB%D0%BE%D1%87%D0%B8%D0%BD%D1%96%D0%B2-%D0%BF%D1%80%D0%BE%D1%82%D0%B8-%D0%BB%D1%8E%D0%B4%D1%8F%D0%BD%D0%BE%D1%81%D1%82%D1%96-%D0%B4%D0%B3%D0%B2%D0%B7\\_uk?s=232](https://www.eeas.europa.eu/delegations/ukraine/%D0%B4%D0%BE%D1%80%D0%B0%D0%B4%D1%87%D0%B0-%D0%B3%D1%80%D1%83%D0%BF%D0%B0-%D0%B7-%D1%80%D0%BE%D0%B7%D1%81%D0%BB%D1%96%D0%B4%D1%83%D0%B2%D0%B0%D0%BD%D0%BD%D1%8F-%D0%B2%D0%BE%D1%94%D0%BD%D0%BD%D0%B8%D1%85-%D0%B7%D0%BB%D0%BE%D1%87%D0%B8%D0%BD%D1%96%D0%B2-%D0%BD%D1%96%D0%B2-%D1%96-%D0%B7%D0%BB%D0%BE%D1%87%D0%B8%D0%BD%D1%96%D0%B2-%D0%BF%D1%80%D0%BE%D1%82%D0%B8-%D0%BB%D1%8E%D0%B4%D1%8F%D0%BD%D0%BE%D1%81%D1%82%D1%96-%D0%B4%D0%B3%D0%B2%D0%B7_uk?s=232).

410 Iryna Venediktova and the Atrocity Crimes Advisory Group inspected the sites of Russian war crimes in Bohdanivka // Office of the Prosecutor General, 17.06.2022: <https://www.gp.gov.ua/ua/posts/iryna-venediktova-razom-z-atrocity-crimes-advisory-group-oglyanuli-miscya-vcinennya-vojenniv-zlociniv-rf-v-bogdanivci>. EU Project Pravo-Justice II continues to contribute to the work of Atrocity Crimes Advisory Group // Pravo-Justice, 20.06.2022: <https://www.pravojustice.eu/post/eu-project-pravo-justice-ii-continues-contribute-work-atrocity-crimes-advisory-group>.

411 The European Union, the United States, and the United Kingdom establish the Atrocity Crimes Advisory Group (ACA) for Ukraine // US Department of State, 25.05.2022: <https://www.state.gov/creation-of-atrocity-crimes-advisory-group-for-ukraine/>.

overall work organisation and the development of strategic approaches in similar proceedings, to the assessment of individual cases, preparation of legal analysis and collection of evidence on the ground. In practice, **it was the ACA that was expected to assume coordination functions carried out by the public prosecutor's offices.**<sup>412</sup> Specifically, the ACA facilitated the creation of a specialised unit for conflict-related sexual violence within the War Department of the OPG. The ACA's efforts, as highlighted in public statements by the OPG "have pioneered a unique model of international cooperation in the investigation of grave international crimes".<sup>413</sup>

While lack of the national authorities' capacity to investigate and prosecute such an immense number of alleged atrocity crimes generates a need for the international assistance, engagement and participation of international experts puts in jeopardy the integrity of the investigations and undermines the chances of successful prosecutions in courts at the domestic level. Incidentally, Ukraine's legislation does not allow for retroactive application. Therefore, even if the law was amended so as to grant a proper legal status to international experts, investigations, where there has already been such an interference, could still be considered as "contaminated".

Separately, back in 2021, the OPG established the International **Expert Council on Crimes Committed in the Context of the Armed Conflict.**<sup>414</sup> It brings together national and international experts in international law, representatives of non-governmental organisations and journalists. However, it is difficult to fully assess the significance and outcomes of the Council's work, given the ongoing discussions on various proposals and the ever-expanding scope of its topics.<sup>415</sup> However, when the Council examines various aspects of the investigation of grave inter-

Even if the law was amended so as to grant a proper legal status to international experts, investigations, where there has already been such an interference, could still be considered as "contaminated"

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412 One year of war crimes investigation. Interview with the Head of the OPG's War Department Yurii Bielousov // JustTalk, 02.03.2023: <https://justtalk.com.ua/post/rik-rozsliduvannya-voennih-zlochyniv-intervyu-z-yuriem-belousovim-nachalnikom-departamentu-vijni-ogp-tekstova-versiya>.

413 Ibid

414 Post on the Facebook page of Prosecutor General Iryna Venediktova, 10.08.2021: <https://www.facebook.com/Venediktovalryna/posts/pfbid027encTJZ45dL92mAjZ21FU8W6SMJb6UJEicxEPMdNxyv2VAGXFW4AUmgFHTJ-DA5qml>.

415 Post on the Facebook page of Prosecutor General Iryna Venediktova, 25.09.2021: <https://www.facebook.com/Venediktovalryna/posts/pfbid033uErSNDqLMJCnNBSLmdA4ZCQe8PZZAmA5DeLzpP7LjtQT8L4BprBj2fVeCExrB-4Gl>. Post on the Facebook page of Prosecutor General Iryna Venediktova, 12.10.2021: <https://www.facebook.com/Venediktovalryna/posts/pfbid02hBboSQscV5cmxWixgS1pvi1327LxaaUUsUyXvQihspBvA16dB3AHZrwRHR1g8L-R1l>. Andrii Kostin discussed the annual outcomes of cooperation with the International Expert Council // Office of the Prosecutor General, 30.08.2023: <https://www.gp.gov.ua/ua/posts/za-rik-mi-doveli-shho-spivpracya-organiv-prokuraturi-ta-gromadskogo-sektoru-moze-davati-prakticnij-rezultat-dlya-krayini-ta-dlya-koznogo-z-nas-andrii-kostin-pid-cas-zustrici-z-miznarodnoyu-radoyu-ekspertiv>.

national crimes, its thematic panels **do not coordinate with each other**, each promoting solutions in their designated thematic areas in silos.

For instance, one of the outputs of the CRSV sub working group was the draft Law of Ukraine 'On Amendments to Criminal Procedure Code of Ukraine Regarding Improving the Procedure for Pre-trial Investigation and Trial in Criminal Proceedings on Crimes Related to Sexual Violence Committed in Context of Armed Conflict' (Reg. No. 9351 dd. 05.06.2023<sup>416</sup>). The draft proposes amendments to the CPCU exclusively in the context of investigating conflict-related sexual violence. At the same time, the rules of criminal procedure require general amendments to facilitate the investigation of grave international crimes, which this draft does not address.

It is quite difficult to analyse the efforts of other states to investigate the consequences of the armed conflict in Ukraine after 24 February 2022 through the prism of the legislation:

01. While Ukrainian criminal procedure law defines the forms of international legal cooperation between states through bilateral and multilateral treaties, not all actions of states clearly fall within their scope. Firstly, Ukraine's national legislation refers to specific criminal proceedings within which international legal assistance can be provided. Given the number of proceedings related to the consequences of the armed conflict in Ukraine, it is difficult to determine which specific incident requires international assistance. Ultimately, from the common-sense perspective, all these proceedings require such assistance.
02. In order to receive international legal assistance, a state must make a formal request based on a treaty on legal assistance between states. Such a request should specify the scope of the assistance and detail the procedural actions required.
03. According to the CPCU, foreign experts do not have a legal status in Ukraine and they cannot provide formal assistance in the domestic investigations. Instead, the framework of international legal assistance envisages their cooperation with the national authorities and participation in their activities within criminal proceedings.<sup>417</sup>

Provided that Ukraine is a civil law system unless their status is defined in national legislation one cannot presume that these experts have an official role in criminal proceed-

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416 Draft Law of Ukraine 'On Amendments to Criminal Procedure Code of Ukraine Regarding Improving Procedure for Pre-trial Investigation and Trial in Criminal Proceedings on Crimes Related to Sexual Violence Committed in Context of Armed Conflict' // Reg. No. 9351 dd. 05.06.2023 <https://itd.rada.gov.ua/billInfo/Bills/Card/41960>.

417 Section IX International Cooperation in Criminal Proceedings // Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.



ings, as well as authority or legal capacity to undertake procedural actions. This creates a problem of admissibility of information obtained through the work of such experts. There is a risk that the evidence collected may not meet the criterion of legality. Considering that international experts assist in the investigation of specific criminal proceedings, there is also a challenge of granting them access to the case files as such actions may be perceived as breaching the confidentiality and integrity of the pre-trial investigation. The consequence of disregarding these rules may result in lost cases in courts due to the violations of procedure.

Granting international experts access to the case files as such actions may be perceived as breaching the confidentiality and integrity of the pre-trial investigation

While Ukrainian justice system authorities welcome the assistance of foreign counterparts in the investigation of war crimes they cannot benefit from it without a proper legal basis. **If international expert support is to be considered an effective form of collaboration with law enforcement agencies a relevant legislative framework must be created.**

# Participation of Victims of Grave International Crimes in Justice Related Processes

## Status of Victims in Justice Process

Ukrainian national legislation does not contain a definition of the term “victim”. However, those who have suffered from the crimes during armed conflict can actively participate in criminal proceedings. The CPCU provides for three procedural statuses that survivors of grave international crimes may have:

**Applicant:** an individual or legal entity that has filed a complaint or report of a criminal offence with a public authority authorised to initiate a pre-trial investigation, and is not a victim.<sup>418</sup> The applicant’s rights in the proceedings are limited, as this person has not suffered as result of the crime, but only informs the law enforcement authorities of the circumstances known to him or her for the purpose of opening a criminal investigation. Therefore, the procedural status of an applicant allows them to:

- receive a document from the relevant authority confirming the acceptance and registration of their report, in particular, an extract from the Unified Register of Pre-trial Investigations;
- provide items and documents to substantiate their report; and
- receive information about the completion of the pre-trial investigation<sup>419</sup>.

**“The one who suffered”** (direct translation): an individual who has suffered moral, physical or material damage as a result of a criminal offence, as well as a legal entity that has sustained material damage.<sup>420</sup> Their legal status provides them the most extensive possibilities to participate in the justice process. On the one hand, the investigations are

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418 Article 60 // Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

419 Article 60 // Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

420 Article 55 // Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

aimed at discovering the circumstances of the harm caused to such an individual, and on the other hand, they provide an opportunity for redress based on the outcome of the investigation. Their procedural status provides for the following rights:

- the possibility to appoint a representative and participate in the proceedings through the representative or directly;
- the right to be informed about the progress of the proceedings, the content and substance of the suspicion/charge, and procedural decisions concerning the suspect/accused, including the possibility to get access to the contents of the case file and obtain copies of relevant documents;
- the possibility to submit evidence during the investigation and trial;
- the right to participate in investigative (search) and other procedural actions;
- the right to provide explanations or refuse to do so;
- the possibility to seek protection for themselves, close relatives or family members, property, and residence, when there are legitimate grounds for that;
- the right to appeal against procedural decisions;
- the right to compensation for damage inflicted by the criminal offence in accordance with the procedure provided for by the law; and
- the opportunity to express their opinion during sentencing.<sup>421</sup>

The CPCU also requires from the “victim” to maintain confidentiality of the pre-trial investigation and appear in a timely manner when summoned by an investigator, prosecutor, investigating judge, or court to participate in procedural actions<sup>422</sup>.

**Witness:** an individual who knows or may know circumstances to be proved in criminal proceedings and is summoned to testify.<sup>423</sup> The possibilities granted to a witness based on their procedural status are exclusively related to the information they can provide as evidence. For this role in criminal proceedings, it does not matter whether the person has suffered from the crime, but rather the information they can provide to the investigators.

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421 Article 56 // Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

422 Article 57 // Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

423 Article 65 // Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

Thus, the status of a witness does not grant one the right to seek redress for the harm suffered. The CPCU provides for the following rights of a witness:

- to know in connection with what and in which criminal proceeding they are being interviewed;
- to receive professional legal aid from a lawyer during the proceedings;
- to refuse to testify if it may harm the person or their family;
- to use notes and documents when giving evidence in cases where the testimony relates to any calculations and other details which are difficult to keep in memory;
- to get access to the interview report and request it to be adjusted, amended, or supplemented with comments, as well as to make such amendments and comments by their own hand; and
- to apply for security in cases provided by the law.<sup>424</sup>

Under Ukrainian criminal procedure law, any information deemed legally classified is excluded from the information that a witness may disclose.<sup>425</sup> Therefore, even if a person has such confidential information, it cannot be the subject of their testimony in the proceedings. At the same time, a witness in criminal proceedings is required to provide only truthful information, as there is criminal liability for providing knowingly false testi-

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424 Article 66 // Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

425 The following persons may not be interrogated as witnesses:

1. a defence counsel, a representative of a victim, civil plaintiff, civil defendant, a legal entity in whose respect proceedings are taken, a legal representative of a victim, civil plaintiff in criminal proceedings – with regard to circumstances which they became aware of as a result of their fulfilling functions of a representative or defence counsel;
2. defence attorneys – about information which constitutes attorney-client privilege;
3. notaries – about information which constitutes notarial secret;
4. medical workers and other persons who in connection with the performance of professional or official duties became aware of disease, medical checkup, examination and results thereof, intimate and family sides of a person's life – about information which constitutes physician-patient privilege;
5. clergymen – about what a believer confessed to them;
6. journalists – about confidential information of professional nature provided on condition of non-disclosure of its author or source;
7. judges and jurors – about discussion in the deliberations room of issues which arose during adoption of court decision, except for criminal proceedings in the case related to the adoption by a judge (judges) of a knowingly wrong judgement or ruling;
8. individuals who participated in concluding and fulfilling a conciliation agreement in criminal proceedings – about circumstances which they became aware of as a result of participation in concluding and fulfilling a conciliation agreement;
9. persons to whom security measures have been applied – about their bona fide personal data;
10. persons who are aware of bona fide information about individuals in respect of whom security measures have been applied – about such information;
11. experts – about the explanation of their opinions. / Article 65 // Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

mony<sup>426</sup>. Moreover, witnesses are cautioned about criminal responsibility for refusing to provide statements.

## Access of Survivors to Justice

Numerous issues within the Ukrainian justice system affect the level of public trust in the relevant authorities among the population. Since the onset of the armed conflict in 2014, the survivors' demand for justice has increased significantly, but the perception of the justice system's effectiveness has not adapted to properly respond to such a demand.<sup>427</sup> In particular, the results of the nationwide polls show that six months after the full-scale Russian invasion only 5% of respondents had contacted Ukrainian law enforcement agencies in relation to the armed conflict.<sup>428</sup> When asked about the mechanisms of justice for grave international crimes committed in Ukraine, 5% of respondents expressed confidence in the effectiveness of Ukrainian courts. Conversely, 63% of respondents mentioned special courts with the participation of national and international judges, and 23% leaned towards international institutions.<sup>429</sup> Meanwhile, non-governmental organisations enjoy a much higher level of public trust at 41.1%, compared to law enforcement agencies like the NPU at 27.3%, prosecutors at 11.4%, and courts at 11.3%<sup>430</sup>.

Since 2014, a large number of non-governmental organisations have focused their work on documenting armed conflict-related violations in Ukraine. Starting with the events in the Crimean Peninsula and Donbas, and across the entire country since 2022, evidence of grave international crimes and significant human rights violations has been continuously collected in Ukraine.<sup>431</sup> NGOs are not restricted by the criminal procedure legislation, so many challenges faced by law enforcement agencies are not relevant for their activities. Specifically, the work of NGOs has made it possible to record the events in the occupied Crimea. In turn, NGOs have taken on the responsibility to provide support to

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426 Article 67 // Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

427 Attitudes of Ukrainian citizens towards the judiciary (7–14 February 2019) // Razumkov Centre: <https://razumkov.org.ua/napriamky/sotsiologichni-doslidzhennia/stavlennia-gromadian-ukrainy-do-sudovoi-systemy>. Court Public Trust Barometer (report on the results of the 1st stage of CAWI online survey)/ International Renaissance Foundation in partnership with the Open Society Initiative for Europe (OSIFE) with the financial support of the Embassy of Sweden in Ukraine, and with the assistance of the USAID New Justice Program; NGO 'Institute for Applied Humanitarian Research': Kharkiv, 2020: [https://newjustice.org.ua/wp-content/uploads/2021/03/Public\\_Trust\\_Barometer\\_Report\\_1st\\_Stage\\_2020\\_UKR.pdf](https://newjustice.org.ua/wp-content/uploads/2021/03/Public_Trust_Barometer_Report_1st_Stage_2020_UKR.pdf).

428 Assessment of the damage caused by Russia's war crimes in Ukraine (15–19 September 2022) // Sociological Group 'Rating': [https://ratinggroup.ua/files/ratinggroup/reg\\_files/rg\\_ukraine\\_losses\\_102022\\_press.pdf](https://ratinggroup.ua/files/ratinggroup/reg_files/rg_ukraine_losses_102022_press.pdf).

429 Assessment of the damage caused by Russia's war crimes in Ukraine (15–19 September 2022) // Sociological Group 'Rating': [https://ratinggroup.ua/files/ratinggroup/reg\\_files/rg\\_ukraine\\_losses\\_102022\\_press.pdf](https://ratinggroup.ua/files/ratinggroup/reg_files/rg_ukraine_losses_102022_press.pdf).

430 Survey on attitude towards courts (9–14 October 2020) // Razumkov Centre: <https://rm.coe.int/annex-1-representative-survey/1680a0c2af>.

431 In particular, after 24.02.2022 two coalitions of NGOs were created to document the consequences of the armed conflict in Ukraine: 'Ukraine 5AM' comprising over 30 NGOs as well as individual experts (<https://www.5am.in.ua/>), and 'Tribunal for Putin' with around 20 NGOs as participants (<https://ccl.org.ua/campagins/trybunal-dlya-putina/>).

survivors of the armed conflict, which includes assistance in tackling humanitarian and social issues, as well as legal aid, such as representing them in national and international justice related processes (victims representation).

Due to the large number of NGOs addressing related issues pertaining to documenting grave international crimes, it is important to ensure cooperation between them. Since 2014, the situation has persisted where the same survivors can be interviewed by representatives of different NGOs, which increases the risk of re-traumatisation. Moreover, with the ongoing investigation by the ICC into the situation in Ukraine, the existence of multiple versions of survivors' testimonies may negatively affect the Court's proceedings or even render their testimony irrelevant to the Court. And although the ICC together with Eurojust published the Guidelines on documentation, they are rarely adhered to.<sup>432</sup>

On the flip side, some of the survivors are so anxious to get justice that they are willing to tell their stories as many times as they can and to people (NGOs, investigators, journalists) who will listen. A balance needs to be also struck between the strict requirements of formal investigation, where a victim should not be interviewed multiple times and the need to promote legislative changes through advocacy which is most effective when it is based on real stories and testimonies of the victims and survivors.

In turn, NGOs try to cooperate with national justice institutions and highlight the systemic problems faced by survivors. The authorities also facilitate this interaction by engaging civil society in discussions on issues related to the armed conflict or aspects of the authorities' activities. However, the biggest challenge for NGOs is how to make the information they collect admissible in criminal proceedings. According to the general rules of the CPC of Ukraine, such information cannot be used as evidence in the proceedings. Potentially, such data may be considered as:

**hearsay:** the CPCU allows for the use of hearsay evidence. Procedurally, this means that representatives of NGOs who have collected the relevant information should testify as witnesses. However, compared to other types of evidence obtained directly, such information will have less probative value in criminal proceedings<sup>433</sup>;

**material evidence:** material evidence collected directly by NGOs at crime scenes also cannot be used in accordance with the CPC requirements. If the proper procedures for collection are not followed, there is a risk that such evidence will be declared inadmissible in court<sup>434</sup>;

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432 Documentation Guidelines for Civil Society Organisations, <https://www.eurojust.europa.eu/sites/default/files/assets/eurojust-icc-csos-guidelines.pdf>.

433 Article 97 // Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

434 Article 98 // Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

**appeals:** given the challenges in the information exchange between NGOs and law enforcement agencies, the most effective method for domestic criminal proceedings is still the exchange of information. This involves providing written information as to the facts of the alleged crimes committed and the relevant contacts of the survivors with their permission. This method ensures that the data source is verified and the information about the data source can be attached to the proceedings. Therefore, the direct collection of evidence will be the responsibility of the authorities<sup>435</sup>.

Regarding the engagement of survivors in criminal proceedings, the procedural status of “the one who suffered” offers the most opportunities to protect their rights. These range from the ability to present evidence in criminal proceedings to the right to file a civil lawsuit for compensation for damages within a criminal case. Such a person, either in person or through the lawyer can actively participate in the criminal proceedings, stir in a certain direction, and receive up-to-date information about its outcomes. However, **this requires being proactive**, as even to receive updates about the investigation is not automatic, it is necessary to contact and keep in regular touch with the investigator or prosecutor in the case.

The legislation on free legal aid defines certain categories of survivors of armed conflict among the aid recipients, which should make legal services more accessible. These categories include:

- Internally displaced persons;
- Ukrainian citizens residing in the temporarily occupied territory on issues related to the protection of violated, unrecognised, or disputed rights, freedoms, or interests of individuals (including compensation for harm resulting from restrictions on the exercise of ownership of real estate or the destruction or damage of such property) in connection with the Russian Federation’s armed aggression and the temporary occupation of Ukrainian territory;
- Victims of criminal offences against sexual freedom and sexual inviolability, torture or ill-treatment during hostilities or armed conflict – in criminal proceedings initiated upon the commission of such criminal offences;
- Persons in respect of whom, in accordance with the Law of Ukraine ‘On Social and Legal Protection of Persons Deprived of Personal Liberty as a Result of Armed Aggression Against Ukraine and Members of their Families’, the fact of deprivation of personal liberty as a result of the armed aggression against Ukraine was estab-

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435 Article 214 // Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

lished – during such deprivation of liberty and after release in connection with the protection of rights and legitimate interests violated due to deprivation of personal liberty as a result of armed aggression against Ukraine.<sup>436</sup>

The Office of the Prosecutor General has now taken over the function of communicating with survivors. A separate internal document was adopted within the prosecutor's office that defines approaches to working with survivors of grave international crimes<sup>437</sup>. This document provides for the introduction of a support mechanism through the following components:

- The establishment of a Coordination Centre for Victim and Witness Support<sup>438</sup>.
- The introduction of coordinators for victim and witness support who will act as part of the Coordination Centre.
- The work of the Interagency Working Group to improve coordination between state authorities and non-governmental organisations.
- The establishment of a referral mechanism based on institutional arrangements between the Coordination Centre, law enforcement agencies, ministries and departments, and other support services to take measures to protect and comply with security mechanisms, provide counselling, and other relevant assistance to witnesses and victims.<sup>439</sup>

The mechanism suggests specific actions such as the establishment of a record-keeping system, assessment of the risk of retraumatisation, and provision of clarifications on the rights of victims and witnesses during proceedings<sup>440</sup>. Despite the proposed mea-

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436 Article 14 // Law of Ukraine 'On Free Legal Aid,' No. 3460-VI, 02.06.2011: <https://zakon.rada.gov.ua/laws/show/3460-17#Text>.

437 Regarding the organisation of the work of public prosecutor's offices in supporting victims and witnesses of war crimes and other international crimes // Order of the Prosecutor General, No. 103, 11.04.2023: <https://zakon.rada.gov.ua/laws/show/v0103905-23#Text>.

438 Join the Team of the Coordination Centre for Victims and Witnesses Support: Applications Open for Vacant Positions // Office of the Prosecutor General, 27.06.2023: <https://www.gp.gov.ua/ua/posts/stan-castinoyu-komandi-koordinacii-nogo-centru-pidtrimki-poterpilix-i-svidkiv-ogoloseno-nabir-na-vakantni-posadi>.

439 Regarding the organisation of the work of public prosecutor's offices in supporting victims and witnesses of war crimes and other international crimes // Order of the Prosecutor General, No. 103, 11.04.2023: <https://zakon.rada.gov.ua/laws/show/v0103905-23#Text>.

440 The Office of the Prosecutor General, in collaboration and coordination with other agencies, will undertake the following measures to implement the Support Mechanism (where relevant, initial and subsequent phases should be planned and implemented based on the knowledge database developed under the UNDP's witness management model):

1. Set up a Coordination Centre within the Office of the Prosecutor General to efficiently develop and implement the focal point project, and proceed with the recruitment of personnel for the Coordination Centre.
2. Draft job descriptions for the focal points.
3. Design a training curriculum and create proper working conditions for the focal points.
4. Draft guidelines (standard operating procedures) for the focal points.
5. Recruit the focal points.



asures, the adopted mechanism **does not cover the protection of victims and witnesses. Rather, it centres on tackling social, psychological, and legal issues associated with their participation in criminal proceedings.** The process of interoperability with pre-trial investigation authorities is still unresolved, as both the Coordination Centre and the mechanism were instituted exclusively on the basis of the OPG and regional prosecutor's offices. It remains unclear how the Support Centre will communicate with other authorities. Presently the only available format is through an establishment of another interagency working group, however, all its communications will be advisory in nature and not likely taken into consideration by the other participants.

Finally, the lack of witness and victims protection programmes and legislation makes it unclear how the authorities will ensure their safety and security should they decide to actively engage with them. **The Support Center is presently operating as a referral entity to other external organisations that provide the actual assistance.**

Given the lack of unified approaches to working with survivors of atrocity crimes in accordance with international standards (in particular, measures to prevent victims from the risk of re-traumatisation and effective witness protection measures<sup>441</sup>), not all survivors feel prepared to actively engage in the process. Its length, the need to participate in a large number of procedural actions and provide testimony multiple times both at the pre-trial investigation and trial, the potential direct interaction with the accused during the trial, or even trials in absentia of the accused, which does not guarantee the execution of the court's decision and lack of quality state support – all of this negatively impacts the mental well-being of survivors and their intention to see the process through.

Furthermore, the initiatives adopted to date do not introduce a systemic approach to assisting survivors; instead, they propose ad-hoc solutions. For

Victims and survivors should be placed at the centre, whereas presently they are mostly regarded and treated as means to an end by the domestic justice system.

6. Develop an electronic case management system with appropriate identification tools, taking into account the informed consent of victims and witnesses and maintaining their privacy and confidentiality (this system should be integrated with the existing electronic criminal proceedings system).
7. Establish standard protocols for individually assessing risks of secondary and repeated victimisation, intimidation, retaliation, and the need for protection (from both physical and psychological risks).
8. Establish an Interagency Working Group to facilitate interagency cooperation mechanisms, including a referral mechanism, between the Coordination Centre, law enforcement agencies, various ministries and departments, and other support services. This is aimed at implementing protective measures, ensuring adherence to security protocols, offering counselling, providing other relevant assistance to witnesses and victims, and ensuring coordination.
9. Implement measures to raise awareness among victims and witnesses about their rights and available protection measures and support services. / Regarding the organisation of the work of public prosecutor's offices in supporting victims and witnesses of war crimes and other international crimes // Order of the Prosecutor General, No. 103, 11.04.2023: <https://zakon.rada.gov.ua/laws/show/v0103905-23#Text>.

441 Ukrainian Legal Advisory Group, Developing Effective Witness Protection Programmes in Armed Conflict: <https://ulag.org.ua/uk/reports-and-materials/-3>

these initiatives to have a sustainable impact and establish consistent practices, an appropriate system aimed at victim identification and support must be developed and maintained by experienced and competent professionals at all levels and reinforced by appropriate legislative framework. Victims and survivors should be placed at the centre of the justice-related efforts whereas presently they are mostly regarded and treated as means to an end by the domestic justice system.

# The Rights of Persons Suspected and/or Accused of Grave International Crimes

## Safeguards under Criminal Procedure Law of Ukraine

The presumption of innocence determines the scope of the rights and guarantees provided by the Constitution of Ukraine and criminal legislation to someone who is being prosecuted.<sup>442</sup> In this context, the functions of law enforcement agencies and prosecutors are related to proving a person's guilt in committing a criminal offence. Considering that justice for the alleged conflict-related crimes in Ukraine is administered based on general criminal procedure rules, alleged perpetrators of grave international crimes have the same possibilities to protect their rights in criminal proceedings as any other individual facing criminal accountability.

Ukrainian criminal procedure law outlines fundamental rights and guarantees for all participants in the process. The legislation distinguishes two statuses for the perpetrator: a suspect (a person who has been notified of suspicion as prescribed by Articles 276–279 of the CPCU, or a person detained on suspicion of committing a criminal offence, or a person in respect of whom a notice of suspicion has been drawn up but not served due to failure to establish the whereabouts of the person, provided all measures have been used as specified by the CPCU to serve the notice of suspicion) and an accused (a person whose indictment has been submitted to the court as prescribed by Article 291 of the CPCU)<sup>443</sup>.

Such persons in criminal proceedings have the right to:

- know of the essence of the criminal offence and the contents of the notice of suspicion or charge against them;
- receive information about their rights, possibilities to protect their rights and the available procedural mechanisms;

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442 Article 62 // Constitution of Ukraine, 28.06.1996: <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>.

443 Article 42 // Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

- be represented in the proceedings by a defence counsel and receive qualified legal aid;
- play an active role in procedural actions and protect their rights in the course of the investigation. For example: to remain silent as regards the suspicion or charges against them or refuse to answer questions at any time; to provide explanation or testimony about the suspicion or charges, or refuse to provide those at any time; to collect and submit evidence to the investigator, prosecutor, or investigating judge; during the procedural actions, to ask questions, submit comments, and raise objections to the conduct of the procedural actions that are recorded in the protocol; to file a request to undertake specific procedural actions, security measures for themselves, their family members, close relatives, property, residence, etc.;
- have access to the criminal case file and to receive copies of procedural documents; and
- appeal against procedural decisions.<sup>444</sup>

In addition to this, the accused has a broader set of procedural rights since they acquire this status at the trial stage and, accordingly, should be able to defend their rights before the court. These include, for example, the right to: participate in the cross examination of the prosecution witnesses during the trial or request their examination, as well as request the summoning and examination of defence witnesses under the same conditions as prosecution witnesses; collect and submit evidence to the court; express their opinion on motions of other parties during the trial; deliver statements during court debates, etc.<sup>445</sup>.

When notified of the relevant procedural status, the suspect or accused must also receive a reminder as to their rights and responsibilities, which is mandatory according to the CPCU<sup>446</sup>.

When foreign nationals face criminal prosecution, they have additional procedural rights to:

- use their native language, receive copies of procedural documents in their native language or any other language they are proficient in, and, if necessary, use the services of an interpreter at the expense of the state; and

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444 Article 42 Paragraph 3 / Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

445 Article 42 Paragraph 4 / Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

446 Article 42 Paragraph 8 / Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

- meet with a representative of their country's diplomatic or consular mission, which the administration of the detention facility is obliged to provide.<sup>447</sup>

## The Right to Defence

The CPCU provides for mandatory participation of a defence counsel in criminal proceedings. Such functions may be performed only by an advocate listed in the Unified Register of Advocates of Ukraine, or in respect of whom the Unified Register of Lawyers of Ukraine does not contain information on suspension or termination of their right to practice law<sup>448</sup>. The right to a defence counsel in criminal proceedings is granted to:

- a suspect;
- a person in respect of whom there is sufficient evidence to notify of suspicion of committing a criminal offence, but who has not been notified of suspicion due to their death;
- accused;
- convicted;
- acquitted;
- a person in respect of whom compulsory medical or educational measures are to be applied or the issue of their application is being considered;
- a person in respect of whom extradition<sup>449</sup> to a foreign state is to be considered<sup>449</sup>.

Such persons may either choose a defence counsel on their own or exercise the right to receive free legal aid in accordance with Article 14 of the Law 'On Free Legal Aid'.<sup>450</sup> Giv-

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447 Article 42 // Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

448 Article 45 Paragraph 2 / Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

449 Article 45 Paragraph 1 / Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

450 The following categories of persons are entitled to free secondary legal aid in accordance with this Law and other relevant laws of Ukraine:...5) persons who are considered to be detained in accordance with the provision of the criminal procedure legislation – for legal services provided for in Article 13 Paragraph 2 Subparagraphs 1 and 3 of this Law; 6) persons for whom a preventive measure in the form of detention has been applied – for legal services provided for in Article 13 Paragraph 2 Subparagraphs 1 and 3 of this Law; 7) persons for whom, as per the Criminal Procedure Code of Ukraine, a defence counsel is appointed by an investigator, prosecutor, investigating judge, or court either to provide defence or conduct a specific procedural action in criminal proceedings related to them; persons sentenced to imprisonment, detention in a disciplinary battalion for military personnel, or restraint – for all types of legal services provided for in Article 13 Paragraph 2 of this Law... // Law of Ukraine 'On Free Legal Aid,' No. 3460-VI, 02.06.2011: <https://zakon.rada.gov.ua/laws/show/3460-17#Text>.

en that the majority of criminal cases related to grave international crimes are considered in the absence of the suspect/accused or involve detained Russian military personnel who are unable to use the services of lawyers in Ukraine of their choice, a defence counsel from the free legal aid system is appointed to them by the investigating judge. They may be engaged for the entirety of the process or in a one-off procedural action.

In theory, the mechanism of free legal aid enables the suspect/accused to be properly represented and protect their rights in the process. Certain actions within criminal proceedings require the mandatory presence of a defence counsel, a stipulation put in place to ensure the admissibility of evidence.

**Defence lawyers with experience in cases under Article 438 of the CCU indicate the challenges they have encountered:** negative public reaction to the defence of the accused/suspect; lack of established case law, consequently guidance; lack of access to the suspect/accused; the need to acquire new knowledge and skills; and overt or covert bias among the judges, which inevitably results in a guilty verdict, negating the purpose of an effective defence. The defence lawyers also highlight the negative public perception of adequate defence to persons accused of war crimes. The stereotypical association of a defence lawyer with their client is particularly evident in such cases, impacting how defence lawyers are perceived in this context.<sup>451</sup>

The greatest threat for the defence lawyers in conflict-related cases is to their life and health<sup>452</sup>. This is especially true when clients choose their own defence counsels<sup>453</sup>. On the other hand, engagement of defence lawyers from the state's free legal aid system may raise questions over their personal impartiality. The state, in this case, acts as a customer of services, controls the quality and limits their provision, which in turn may become a factor affecting defence counsel's strategies and decision in the process. In addition, a lawyer may be affected by the consequences of the armed conflict, which may be felt in the course of their work as a defence counsel for a Russian military officer charged with grave international crimes. For example, after 24 February 2022 there were

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451 Defence Counsel in War Crimes Cases in Ukraine / A Needs Assessment Report // USAID Activity Office: Office of Democracy and Governance, 13.06.2023: <https://drive.google.com/file/d/1k-dArOu7mo8B4a82L8jqZWHLchdD-nty9/view>. Resolution on the protection of the work of members of the Ukrainian National Bar Association (UNBA) // European Criminal Bar Association (ECBA), 06.05.2023: [https://ecba.org/extdocserv/letters/20230506\\_Resolution\\_UNBA\\_work.pdf](https://ecba.org/extdocserv/letters/20230506_Resolution_UNBA_work.pdf)

452 Why Ukrainian lawyers defend Russian prisoners of war // DW, 09.12.2022: <https://www.dw.com/uk/statisti-ci-profesionali-comu-ukrainski-advokati-zahisaut-polonenih-rosian/a-64021082>. The UNBA appeals to the OPG and MoIA regarding the attack on lawyer Rybin // Ukrainian National Bar Association, 06.06.2017: <https://unba.org.ua/news/2432-naau-zvernulasya-do-gpu-ta-mvs-z-privodu-napadu-na-advokata-ribina.html>. Between a Rock and a Hard Place: Attacks on Lawyers in Ukraine / Mission Report // International Commission of Jurists in Ukraine, 2020: [https://www.icj.org/wp-content/uploads/2020/05/Ukraine-Between-the-rock-and-the-anvil-Publications-Reports-Mission-report-2020-UKR.pdf?fbclid=IwAR0Ozj9ciBefw5ZcuPVYtMynkqaeB\\_sivUwIJJrv5WYucDPq4WGHCS5flkc](https://www.icj.org/wp-content/uploads/2020/05/Ukraine-Between-the-rock-and-the-anvil-Publications-Reports-Mission-report-2020-UKR.pdf?fbclid=IwAR0Ozj9ciBefw5ZcuPVYtMynkqaeB_sivUwIJJrv5WYucDPq4WGHCS5flkc)

453 Court interrogates victim of Russian crimes in Bucha: Chronology of events // Media Initiative for Human Rights, 25.11.2022: <https://mipl.org.ua/sud-dopytav-poterpilogo-vid-zlochyniv-rosiyan-u-buchi-hronologiya-podij/>.

cases where lawyers sided with the prosecution during court hearings<sup>454</sup> or did not draw the court's attention to the need to thoroughly investigate all circumstances of the case during the public trial of the Russian servicemen.<sup>455</sup>

Similarly, instances of violations of the right to defence in cases of Russian prisoners of war are cited in the Report of the Office of the UN High Commissioner for Human Rights (OHCHR) on the Treatment of Prisoners of War and Persons Hors De Combat in the Context of the Armed Attack by the Russian Federation Against Ukraine. For example: '...Although all the defendants were assigned free legal aid lawyers, in a number of cases, they could only meet them for the first time or consequently during court hearings, which often took place via teleconference. These defendants were thus deprived of the right to speak confidentially with their lawyers before the hearings and the right to prepare a defence. Moreover, some interviewees claimed their lawyers sided with the prosecutors, advising them to plead guilty for a swifter release as part of an exchange. POWs were told by prosecutors, SBU officers, and sometimes their lawyers, that if they did not plead guilty, the investigations and court proceedings in their case would last for years with little prospects of release upon exchange'<sup>456</sup>.

Another scenario emerges in cases tried in absentia. **Often, defence lawyers appointed from the free legal aid system play a role that is merely to ensure formal compliance with the requirements of the criminal procedure legislation.** In some instances, defence lawyers in such proceedings do not actively participate in the process<sup>457</sup>. In these cases, the prosecution presents all information about the alleged illegal actions of the suspect or accused to the court, and the presence of a defence counsel is merely a procedural

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454 Why Ukrainian lawyers defend Russian prisoners of war // DW, 09.12.2022: <https://www.dw.com/uk/statisti-ci-profesionali-comu-ukrainski-advokati-zahisaut-polonenih-rosiana/a-64021082>. The UNBA appeals to the OPG and MOIA regarding the attack on lawyer Rybin // Ukrainian National Bar Association, 06.06.2017: <https://unba.org.ua/news/2432-naau-zvernulasya-do-gpu-ta-mvs-z-privodu-napadu-na-advokata-ribina.html>.

455 'They never give you the client's name first.' What it's like to be a lawyer for a Russian soldier who brought war to your country // Sudovyi reporter, 02.08.2022: <https://sudreporter.org/nikoly-ne-nazyvayut%CA%B9-spochatku-prizvyshche-kliyenta-yak-tse-buty-advokatom-viys%CA%B9kovosluzhbovtysya-rf-yakyy-pryshov-z-viynoyu-v-tvoyu-krayinu/>. The court delivers a verdict in just three sessions for the Russian who killed a civilian: Documenting a landmark trial. // Media Initiative for Human Rights, 23.05.2022: <https://mipl.org.ua/sud-za-try-zasidannya-dijshov-do-vyroku-u-spravi-rosiyany-na-yakij-ubyv-czyvilnogo-fiksuyemo-istorychnyj-proczes/>. Trial of a Russian soldier: Shishimarin's sentence to be announced on 23 May // Suspilne news, 20.05.2022: <https://suspilne.media/241474-23-travna-sud-mae-ogolositi-virok-u-spravi-sisimarina/>. In a court in Poltava region, the defence for the accused Russian military personnel requests the minimum sentence for them. // Ukrinform, 26.05.2022: <https://www.ukrinform.ua/rubric-regions/3492703-u-sudi-na-poltavsini-zahist-obvinuvaceni-vijskovih-rf-prosit-dla-nih-minimalnogo-pokaranna.html>.

456 Report of the Office of the UN High Commissioner for Human Rights on the Treatment of Prisoners of War and Persons Hors De Combat in the Context of the Armed Attack by the Russian Federation Against Ukraine (the report covers the period from 24 February 2022 to 23 February 2023), Clause 123. // <https://www.ohchr.org/sites/default/files/documents/countries/ukraine/2023/23-03-24-Ukraine-thematic-report-POWs-ENG.pdf>.

457 PASSIVE INVOLVEMENT OF A DEFENCE COUNSEL IN ABSENTIA TRIALS IS A SIGNIFICANT VIOLATION OF THE RIGHT TO DEFENCE, PREVENTING THE COURT FROM DELIVERING A LAWFUL AND WELL-FOUNDED VERDICT // Advokat POST, 08.12.2021: <https://advokatpost.com/pasynna-uchast-zakhysnyka-u-kryminalnomu-provadhenni-za-protseduroiu-in-absentia-ie-istotnym-porushenniam-prava-na-zakhyst-shcho-pereshkodzhaie-sudu-ukhvalyty-zakonne-i-obgruntovane-rishennia/>. SPECIAL PRE-TRIAL INVESTIGATION PROCEDURE FOR CRIMINAL OFFENCES CONDUCTED IN ABSENTIA // Advokat POST, 10.11.2022: <https://advokatpost.com/protsedura-spetsialnoho-dosudovoho-rozsliduvannia-kryminalnykh-pravoporushen-in-absentia/>.

formality to ensure the legality of the entire process. **In other trials, defence counsel actively present their case even in the absence of the accused.** They use all the shortcomings and gaps of criminal and criminal procedure legislation, as well as prosecution's shortcomings during the investigation, to strengthen the defence position.<sup>458</sup> However, such a proactive and earnest disposition may result in tragic outcomes from public hatred and persecution to murder.<sup>459</sup>

At the same time, the national legislation of Ukraine and international standards<sup>460</sup> governing the legal practice safeguards are designed to ensure the independence and impartiality of a defence counsel in the process, the conditions for effective professional activity and proper defence. In particular, they provide for protection against interference with a lawyer's legal stance or association of the lawyer with the client, the counsel's personal safety; a prohibition on holding defence lawyers liable for their statements in a case (including those reflecting the client's position) or comments in the media, as long as they do not breach the counsel's professional duties; and the possibility for a defence lawyer to refuse to represent a client in case of a conflict of interest<sup>461</sup>.

Unfortunately, there were violations of the rights of lawyers working on cases related to the consequences of the war **even before the full-scale invasion.** For instance, the report of the Office of the United Nations High Commissioner for Human Rights titled 'Human Rights in the Administration of Justice in Conflict-Related Criminal Cases in Ukraine'<sup>462</sup> cites 12 documented attacks against privately contracted lawyers between 2014 and 2020 which are believed to have been motivated by their professional activities. The report further expresses concern over the authorities' failure to prevent and investigate these incidents. Investigations into documented attacks mentioned in the report failed to lead to the identification or prosecution of perpetrators. Given the demand for

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458 Defence Counsel in War Crimes Cases in Ukraine / A Needs Assessment Report // USAID Activity Office: Office of Democracy and Governance, 13.06.2023: <https://drive.google.com/file/d/1k-dArOu7mo8B4a82L8jqZWHLchdDnty9/view>. Chernihiv Court of Appeal does not satisfy the appeal of Krasnoyartsev's lawyer, convicted of a war crime // Media Initiative for Human Rights, 23.01.2024: <https://mipl.org.ua/chernigivskiy-apelyacziyniy-sud-ne-zadovolnyv-skargu-advokata-krasnoyarczeva-zasudzhenogo-za-voyennyj-zlochyn/>.

459 Radio Liberty, Who Ordered the Assassination of the Defence Lawyer of Russian Servicemen from State Intelligence Service, 25 March, 2016: <https://www.radiosvoboda.org/a/27635906.html>

460 UN Basic Principles on the Role of Lawyers // <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-role-lawyers> Draft Recommendation No. R (2000) 21 of the Committee of Ministers to member states on the freedom of exercise of the profession of lawyer // <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804d0fc8>.

461 Article 23 // Law of Ukraine 'On the Bar and Practice of Law', No. 5076-VI, 05.07.2012: <https://zakon.rada.gov.ua/laws/show/5076-17#Text>. The conflict of interest shall be understood as a contradiction between the lawyer's personal interests and their professional rights and duties to the client, which might affect the lawyer's objectivity or impartiality in fulfilling their professional duties, as well as the performance or failure to perform certain actions during their practice of law. / Article 9 // Rules of Professional Conduct approved by 2017 Reporting and Election Congress of Advocates of Ukraine, 09.06.2017: [https://unba.org.ua/assets/uploads/legislation/pravila/2017-06-09-pravila-2017\\_596f00dda53cd.pdf](https://unba.org.ua/assets/uploads/legislation/pravila/2017-06-09-pravila-2017_596f00dda53cd.pdf). Defence Counsel in War Crimes Cases in Ukraine / A Needs Assessment Report // USAID Activity Office: Office of Democracy and Governance, 13.06.2023: <https://drive.google.com/file/d/1k-dArOu7mo8B4a82L8jqZWHLchdDnty9/view>.

462 Report by the Office of the United Nations High Commissioner for Human Rights titled 'Human Rights in the Administration of Justice in Conflict-Related Criminal Cases in Ukraine' // <https://www.ohchr.org/sites/default/files/2022-08/Ukraine-admin-justice-conflict-related-cases-en.pdf>.



justice and the general pain inflicted by the Russian aggression on Ukrainian society, the situation may potentially escalate after the full-scale invasion when thousands of cases on international crimes will be sent by investigative authorities to courts and public trials will begin.

The facts above and risks in criminal proceedings related to the consequences of the armed conflict in Ukraine indicate potential challenges to ensuring the right to a fair trial. Despite the negative public sentiment towards alleged perpetrators of grave international crimes, in order to ensure a legal process in line with international standards, it is crucial to ensure their effective implementation at every stage of the proceedings: from ensuring equal guarantees for the defence to amending relevant legislation. At the same time, training of lawyers in international humanitarian law and international criminal law is an important step along with the training of other participants in the criminal process.<sup>463</sup>

## Capacity of the Penitentiary System of Ukraine

The penitentiary system of Ukraine comprises 182 institutions, including 29 located in the area of Donetsk and Luhansk regions outside of Ukraine's control and 5 in the Crimean Peninsula, and 7 facilities in other areas under Russian control.<sup>464</sup> There are no convicts held in 39 facilities (of which 22 are correctional colonies) due to the optimisation of the system. As of 1 January 2023, there were 42,726 detainees in penitentiary institutions and remand facilities, including 27,179 individuals in 61 active penitentiary institutions, out of which 20,978 people were in medium and maximum security correctional colonies.<sup>465</sup>

Discussions have been ongoing for years about the limited capacity of the detention facilities. The length of court proceedings, repeated application of preventive measures in the form of detention, and the lack of resources needed to renovate the penal system's facilities lead to overcrowding in both temporary detention facilities (remand centres) and prisons.<sup>466</sup> Since 2017, the system has been trying to optimise existing penal institutions

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463 Defence Counsel in War Crimes Cases in Ukraine / A Needs Assessment Report // USAID Activity Office: Office of Democracy and Governance, 13.06.2023: <https://drive.google.com/file/d/1k-dArOu7mo8B4a82L8jqZWHLchdDnty9/view>.

464 Regarding prisons in the temporarily occupied territory // State Criminal Executive Service of Ukraine, 18.05.2022: <https://kvs.gov.ua/new/note/12134/>. Denys Maliuska on the work of the staff of penitentiary institutions in the temporarily occupied territories // Official Facebook page of the Ministry of Justice of Ukraine, 18.05.2022: <https://www.facebook.com/minjust.official/videos/532988844832767/>.

465 General description of the State Criminal Executive Service of Ukraine // State Criminal Executive Service of Ukraine: <https://kvs.gov.ua/wp-content/uploads/2023/01/%D1%87%D0%B8%D1%81%D0%B5%D0%B%D1%8C%D0%BD%D1%96%D1%81%D1%82%D1%8C-%D0%BD%D0%B0-%D1%81%D1%96%D1%87%D0%B5%D0%BD%D1%8C-2023.pdf>.

466 Remand centres are overcrowded, in particular, due to judicial reform // Judicial-Legal Gazette, 11.10.2018: <https://sud.ua/ru/news/publication/126835-slidchi-izolyatori-perepovneni-zokrema-cherez-sudovu-reformu>. Ukrainian remand centres are 80% full – Criminal Executive Service // Radio Liberty, 09.07.2020: <https://www.radiosvoboda>.

by inactivating certain places of detention and relocating convicts to facilities with better conditions.<sup>467</sup> At the same time, the general conditions of detention in such places remain the subject of individual applications to the European Court of Human Rights, and its decisions allege systemic violations of human rights guarantees.<sup>468</sup>

Following the full-scale invasion of Ukraine by the Russian Federation, the available penitentiary facilities were reassessed. These institutions were supposed to be used to ensure the detention of Russian military personnel, both those who were detained as prisoners of war and those who were later convicted by the Ukrainian courts. Thus, 51 detention facilities and 1 camp for the detention of prisoners of war were created from the available resources of the penitentiary system at the expense of existing places of detention.<sup>469</sup> The detained prisoners are isolated in these areas, and their regime of detention includes compulsory labour. According to the Ukrainian Minister of Justice, these facilities comply with the requirements of international humanitarian laws, which define guarantees for prisoners of war.<sup>470</sup>

The greatest challenges in practice began to arise when captured Russian servicemen started to be prosecuted by national authorities. At the stage of investigation, they are not subject to preventive measures in accordance with the requirements of the CPCU. This approach is based on the idea that there is no risk of their absconding from justice, as they are already in places of deprivation of liberty within the meaning of IHL.

Some of the POW detention facilities continue to operate as remand centres, where Russian military personnel are held separately from other detainees, but within the same facility. This approach further complicates the normal routine of the facility: prisoners have to be additionally guarded, as other detainees may pose a threat to their lives and

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[org/a/news-ukrayinski-sizo/30713839.html](https://kvs.gov.ua/new/note/3674/). In search of the optimal proportion... or a few facts about the closure of institutions // State Criminal Executive Service of Ukraine, 15.06.2020: <https://kvs.gov.ua/new/note/3674/>

467 On the procedure for optimising the activities of pre-trial detention centres, penitentiary institutions and penitentiary enterprises // Resolution of the Cabinet of Ministers of Ukraine, no. 396, 07.06.2017: <https://zakon.rada.gov.ua/laws/show/396-2017-%D0%BF#Text>

468 Violation by article and be state // European Court of Human Rights: <https://www.echr.coe.int/documents/d/echr/stats-violation-2023-eng>. Problematic issues of Ukraine's implementation of ECHR judgments on human rights violations in places of detention: how to change the situation? // Ministry of Justice of Ukraine, 19.03.2021: <https://minjust.gov.ua/news/ministry/problemni-pitannya-vikonannya-ukrainoyu-rishen-espl-schodo-porushen-prav-lyudini-u-miststyah-nesvobodi-yak-zminiti-situatsiyu>

469 POW stations and a camp were established in the institutions of the SCES of Ukraine // State Criminal Executive Service of Ukraine, 20.06.2022: <https://kvs.gov.ua/new/note/12359/>.

470 Denys Maliuska on the labour of prisoners of war // Official Facebook page of the Ministry of Justice of Ukraine, 22.06.2022: [https://www.facebook.com/watch/?v=542833134232000&extid=NS-UNK-UNK-UNK-IO5\\_GK0T-GK-1C&ref=sharing](https://www.facebook.com/watch/?v=542833134232000&extid=NS-UNK-UNK-UNK-IO5_GK0T-GK-1C&ref=sharing). A camp for prisoners of war // Official Facebook page of the Ministry of Justice of Ukraine, 21.06.2022: [https://www.facebook.com/watch/?v=5242953055795461&extid=NS-UNK-UNK-UNK-IO5\\_GK0T-GK-1C&ref=sharing](https://www.facebook.com/watch/?v=5242953055795461&extid=NS-UNK-UNK-UNK-IO5_GK0T-GK-1C&ref=sharing). In Ukraine, prisoners of war of different nationalities and religions are held in detention stations // Official Facebook page of the Ministry of Justice of Ukraine, 09.06.2022: [https://www.facebook.com/watch/?v=967901050553857&extid=NS-UNK-UNK-UNK-IO5\\_GK0T-GK1C&ref=sharing](https://www.facebook.com/watch/?v=967901050553857&extid=NS-UNK-UNK-UNK-IO5_GK0T-GK1C&ref=sharing). Meeting with the UN Human Rights Monitoring Mission in Ukraine // State Criminal Executive Service of Ukraine, 08.06.2022: <https://kvs.gov.ua/new/note/12214/>. Since 24 February, hundreds of Russian servicemen have been captured or have surrendered // Official Facebook page of the Ministry of Justice of Ukraine, 31.05.2022: [https://www.facebook.com/watch/?v=1604263103291110&extid=WA-UNK-UNK-UNK-IO5\\_GK0T-GK1C&ref=sharing](https://www.facebook.com/watch/?v=1604263103291110&extid=WA-UNK-UNK-UNK-IO5_GK0T-GK1C&ref=sharing).

health. In addition, Russian prisoners of war have limited access to communication with the outside world. Any contact with the detainees is carried out only with the permission of the investigator in the criminal proceedings against them. And given the context of the armed conflict and their Russian citizenship, such persons are ultimately able to communicate only with their defence counsel from the free legal aid system which could potentially be classified as a violation of the Geneva Conventions (III).

A distinct legal status in criminal proceedings is provided for convicted persons – an accused whose court verdict of guilty has entered into force.<sup>471</sup> The type of institution where an individual is placed is determined by the sentence. Considering that the penalty for grave international crimes under the CCU is either a fixed-term imprisonment or life imprisonment, the relevant facilities for the execution of such sentences are general correctional colonies.<sup>472</sup>

Official statistics do not specify how many inmates in penitentiary institutions were convicted of grave international crimes among the total number of prisoners. It is also impossible to establish how many Russian prisoners of war have actually been transferred to serve their sentences after their conviction (as of 01 January 2024, a total of 73 sentences were passed under Article 438 of the Criminal Code of Ukraine)<sup>473</sup>. Given the processes of exchanging such persons for captured Ukrainian military personnel, it remains an open question how long they are held in detention facilities or how quickly they are repatriated to the RF as part of prisoner swap.<sup>474</sup> Such information is difficult to verify in practice as access to court decisions under Article 438 of the CCU in the register of court decisions is limited, and information on decisions on the release of persons from serving their sentences and pardons is classified.

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471 Article 43 // Criminal Procedure Code of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2054>.

472 There are the following types of correctional colonies: minimum security with lenient detention conditions; minimum security with general detention conditions; medium security – these are designated, in particular, for women serving life sentences; women whose life sentences were commuted to a fixed-term imprisonment; men sentenced to imprisonment for the first time for serious or particularly grave crimes; men who previously served a sentence of imprisonment. The maximum security sections in such colonies are designed to accommodate men sentenced to life imprisonment and men sentenced to a fixed-term imprisonment designated serve their sentence in cell-type premises in a of a maximum security level correctional facility; maximum security level – these are designated for men sentenced to life imprisonment; men convicted of intentional particularly grave crimes who previously served a sentence of imprisonment; men transferred from medium security level colonies. / Article 18 // Criminal Executive Code of Ukraine, No. 1129-IV, 11.07.2003: <https://zakon.rada.gov.ua/laws/show/1129-15#Text>.

473 People want justice here and now, but it's a "long game" – the head of the OGP "war department" about the tribunal and the crimes of Russians / Yuriy Bielousov// Telegraf, 08.01.2024: <https://telegraf.com.ua/ukr/intervju/2024-01-08/5826305-lyudi-khochut-spravedlivosti-tut-i-zaraz-ale-tse-gra-vdovgu-kerivnik-departamentu-viyni-ogp-pro-tribunal-ta-zlochini-rosiyan-ch-1>.

474 The Prosecutor General's Office does not rule out the exchange of Russian Shishimarin, who was sentenced to life imprisonment // Hromadske, 25.05.2022: <https://hromadske.ua/posts/v-ofisi-genprokurora-ne-viklyuchayut-ob-min-rosiyanina-shishimarina-yakogo-zasudili-do-dovichnogo-uvyaznennya>. Head of the War Department of the Prosecutor General's Office: Occupants who tortured, raped or killed civilians are not designated for exchanges – Interfax-Ukraine, 02.08.2023: <https://interfax.com.ua/news/general/926523.html>. RUSSIAN SOLDIERS EXCHANGED WITH UKRAINE: WHAT HAPPENS AFTER // Justice.Info, 31.10.2023: <https://www.justiceinfo.net/en/124026-russian-soldiers-exchanged-with-ukraine-what-happens-after.html>.

Based on the statistics of the registered grave international crimes in Ukraine, the number of potential convicted persons who could be placed to serve their sentences in the relevant facilities may exceed the number of persons currently held in penal penitentiary institutions. That is assuming that these individuals will be prosecuted and serve their sentences in Ukraine in all proceedings initiated at the national level. These demands do not correspond to the existing infrastructure of the system, particularly regarding the number of correctional colonies, and are not factored into the calculation of budget allocations needed for the development of the penal system<sup>475</sup>.

Claims that the national justice system is able to handle all registered proceedings for grave international crimes overlook among other things the factor of execution of the sentences

Claims that the national justice system is able to handle all registered proceedings for grave international crimes overlook among other things the factor of execution of the sentences. There may not be enough space in the penitentiary system for the anticipated number of convicts. On the one hand, most trials are currently held in absentia, which so far removes the problem of how to execute a

court sentence in practice. On the other hand, in anticipation of the enforcement of such verdicts in the future and potential extradition of convicts from other states, **the penitentiary system must be prepared to accommodate these individuals, ensuring that the conditions will not violate prisoners' human rights.**

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475 Government adopts draft law on changes to the functioning of penitentiary and pre-trial detention facilities under martial law // Ministry of Justice of Ukraine, 19.12.2022: <https://minjust.gov.ua/news/ministry/uryad-priynyav-za-konoproekt-schodo-zmin-funktsionuvannya-ustanov-vikonannya-pokaran-ta-ustanov-poperednogo-uvyaznennya-v-umovah-voennogo-stanu>.

# Conclusions and Recommendations

Since the ancient times philosophers, law and policymakers, advocates, activists have been debating the meaning of “justice”. From Plato’s “Republic” and Kant’s “Metaphysics of Morals” to modern definitions of justice, the concept has greatly evolved and expanded in various dimensions and by adding on different elements to it over the centuries. The nature of the evolution of justice has been weaved from the lessons learned based on humanity’s accumulated experience and evolution of the world as well as human values. Accountability as one of the elements of justice was articulated over 2000 years ago and to this day, if ensured properly, is perceived as one of the fundamental deterrents of future injustice including that which is caused by wars.<sup>476</sup> Russia’s war against Ukraine has had a profound effect on geopolitical, geo-economic and geo-social status quo of the world, caused tectonic shifts and deepened divisions and its effect will continue to reverberate throughout the decades to come. Unless the world provides a consolidated, streamlined and coherent justice response, the global chasm that has been created will only continue to expand.

For over 10 years, Russia’s war of aggression and its annexation and occupation of Ukrainian territory has caused ever-increasing harm and injustice to the Ukrainian people, including through the commission of crimes under international law – for example, illegal detention, torture, rape, murder, forcible transfer or deportation, imposition of its citizenship, destruction of critical civilian infrastructure, the abduction of children and many more. It is well established that all of these allegations would amount to violations of international humanitarian and international criminal law, as well as international human rights law. The scale of the violations is also immense in terms of the widespread and often systematic nature of crimes committed, as well as the quantitative and qualitative gravity. If such crimes or violations are not investigated and prosecuted, or perpetrators are not deterred in their actions through being held accountable, on the international stage this may set another precedent of impunity, and may provide a level of encouragement to other states or actors which may be inclined to employ similar methods of warfare – inevitably posing a threat to humanity and the international legal order.

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476 Plato, Republic, c 375 BC.

In Ukraine truth, justice and reparations for victims and survivors are inevitably interconnected with effective accountability of individual perpetrators through fair trials. Such justice related processes are necessary for the entire population to heal and to be given hope in the form of eventual accountability for all of the injustices that have been caused throughout the last decade. Absent effective and meaningful justice, generations will likely harbour hatred, dissatisfaction, pain and suffering which may erode society, adversely affecting its future progress and development.

Nevertheless, Ukraine – perhaps uniquely – compared to other states in the world suffering from the consequence of wars received an unprecedented international justice-related response in reaction to Russia’s full-scale invasion in February 2022. The reaction of the international community to the invasion demonstrated and proved two crucial points:

01. that dealing with the consequences of the full-scale invasion is not and should not be only Ukraine’s responsibility, particularly in ensuring justice and accountability for grave international crimes, rather this is the responsibility of the entire international community;
02. justice and accountability is one of the most important elements of how states respond to atrocities committed during warfare.

Overall, in as much as both statements are valid, Ukraine’s experience so far has demonstrated that **a comprehensive, effective and fair international justice response, on the international and Ukrainian level can only be properly achieved when effective and appropriate (tailored to ‘needs’ where necessary) international and domestic mechanisms, as well as a strengthened and comprehensive justice architecture are put in place.** Of course, it is crucial to provide that the challenges facing Ukraine to pursue international justice are very significant – including challenges related to the scale of ongoing-criminality and significant difficulties to investigate and prosecute crimes under international law during an ongoing conflict. Indeed, many of these challenges would not be unique to Ukraine: many states would face struggles to pursue justice in similar circumstances.

However, these challenges notwithstanding, this report has presented a ‘needs assessment’ which is a vital exercise for future accountability in Ukraine and which has aimed to ascertain the complex challenges which exist in the Ukrainian criminal justice system. In particular ‘accountability gaps’ as they relate to Ukraine’s ability to investigate and prosecute an overwhelming number of individual and senior-level perpetrators of ongoing atrocity crimes, involving vast numbers of victims. Indeed, any future Ukrainian justice strategy, or international and national proposals for achieving international justice, should be based upon a comprehensive mapping and needs assessment of Ukraine’s capacity to investigate and prosecute crimes vis-à-vis the capacity and resources of the

international and regional justice mechanisms engaged, as well as a similar mapping and assessment of victims.

It is hoped that in presenting empirical evidence of the ‘gaps’ in the Ukrainian system, a more ‘tailored’ international justice response can be considered and proposed. It is also envisaged that international actors should be influenced in their positions, having been presented with an assessment of Ukraine’s legal capacity and justice architecture.

In this regard, the current report has assessed that there are multiple pertaining challenges both at the domestic and international levels which must urgently be overcome to pursue international justice:

- The Ukrainian legal system does not currently have adequate technical and legal capacity to administer fair and effective justice and truth, justice and reparations for victims and reach the human rights standards demanded by the European Convention on Human Rights and other human rights treaties. Addressing this requires substantial legislative, infrastructural and resource -related changes.
- Taking into account the scale and number of expected cases, international institutions and third-states undertaking domestic investigations have very limited capacity to address the enormous scale of atrocity crimes committed in Ukraine. Where these responses are occurring they demonstrate a fragmented approach to international justice and accountability solutions;
- The existing architecture of justice in Ukraine and internationally is not fit to provide sufficient and effective response to the scale of atrocities caused by the Russian war of aggression against Ukraine.

Based on the above assessment the most effective and efficient solution to deal with such an enormous scale of violations requires urgent and further consideration. While further details could be ascertained and set out in further reports, it appears most appropriate at this stage, and based on the assessment carried out, that a strategic international justice response would require a comprehensive and complementary ‘tiered’ accountability architecture – supported by relevant compensation and reparations mechanism(s).

In respect of **justice and accountability mechanism(s)**, accountability architecture would consist of:

## **TIER 1**

The International Criminal Court (likely focusing on senior civilian and military leaders, those ‘most responsible’ and particularly ‘challenging’ cases).

## TIER 2

A “hybrid”/internationalised mechanism with jurisdiction to investigate and prosecute all core crimes (focusing – given the ICC’s current mandate – particularly at present on low and mid-level perpetrators). Its mandate should provide that capacity building and ‘legacy’ are integral to the mechanism’s operation, and that such a mechanism’s mandate will continue until it is ‘complete’ – that is when all required cases have been investigated and prosecuted.

## TIER 3

Specialised domestic mechanism consisting of specialised investigative authority, specialised prosecutor’s office and specialised court or chambers at the Appeals and Supreme courts level (focusing on crimes against national security during armed conflict).

In relation to the ICC, **it is imperative that Ukraine ratifies the Rome Statute and the Kampala Amendments without any further delay and implements it into the domestic system**<sup>477</sup>. This will allow for better cooperation not only with the ICC itself but also with other states parties in relation to obligations and opportunities provided by the Rome Statute. These include: the execution of arrest warrants; the distribution of the Court’s resources; Ukraine’s official “presence” at the Assembly of States Parties to the Rome Statute; Ukraine’s nomination and potential participation in Court’s elections of judges and principals.

The implementation of the above broad strategic justice architecture should allow the ICC to share the enormous burden that currently rests upon it to conduct investigations and prosecutions into those most responsible, as well as in the form of expectations from a huge number of victims the Ukrainian authorities. The ICC has significant advantages: in the obligatory nature of cooperation from its state parties, and a clear legal

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477 On August 21, 2024 Verkhovna Rada of Ukraine adopted the law “On ratification of the Rome Statute of the International Criminal Court and its amendments” (<https://zakon.rada.gov.ua/laws/show/3909-20#Text>). President of Ukraine has signed it on August 24, 2024. However, as its provisions state, the law on Ratification enters into force simultaneously with the law on implementation of the Rome statute, namely the “Draft Law on Amendments to the Criminal and Criminal Procedural Codes of Ukraine in connection with the ratification of the Rome Statute of the International Criminal Court and its amendments” (<https://itd.rada.gov.ua/BILLINFO/Bills/Card/44725>), as per the article 3 of the Law on Ratification. As of September 5, 2024, the “implementation law” is yet to be considered by the Parliament.

When ratifying the Rome Statute, Ukraine also intends to invoke article 124 of the Statute. the Law on Ratification states: ‘Ukraine declares that for a period of seven years after the entry into force of the Rome Statute for Ukraine, it does not accept the jurisdiction of the International Criminal Court over the crimes set forth in Article 8 (as amended), where the crime is alleged to have been committed by its nationals.’

ULAG, in line with the statement of the Coalition for the ICC (<https://www.coalitionfortheicc.org/news/ukraine-moves-towards-ratification-icc-rome-statute>) and other organisations, called on the government of Ukraine to refrain from article 124 application, raising concerns over the negative impact it might have on international justice processes, particularly handled by the Court in Ukraine. (<https://ulag.org.ua/news/almost-there-ratification-rome-statute/>)



mandate to investigate senior-leaders without any possibility of immunity, as well as the necessary authority and experience in investigating and prosecuting grave international crimes. Further, in the future, in the proposed architecture, the sharing of evidence between the ICC and an internationalised mechanism could also be foreseen, as was successfully achieved between the ICTY and the Bosnian War Crimes Chambers. Related, Article 93 (10) of the Rome Statute envisions a cooperation framework with State Parties, where the ICC-OTP can share evidence with member states.

However, two crucial points should be borne in mind by Ukrainian authorities and victims, which are that the ICC:

01. operates under the principle of complementarity, and consequently the largest burden based on the complementarity obligation rests on the domestic authorities to investigate and prosecute Rome Statute crimes;
02. has limited and scarce resources – particularly when considering the resources which will be required to pursue comprehensive justice in Ukraine – and furthermore, the Court is currently investigating in 12 situation countries, including Ukraine.

In relation to complementarity, Ukrainian domestic authorities' capacity to prosecute grave international crimes is extremely limited and in 10 years of the ongoing war it has not been built to a sufficient degree. All the efforts that have been undertaken by the international community in building the capacity has yielded little or no meaningful effect due to the reasons discussed above. In order to build the capacity of Ukraine's domestic legal system, it appears **necessary to establish a "hybrid"/internationalised accountability mechanism** which could be based and on numerous examples of and draw lessons learned from previously established mechanisms, for example in Bosnia and Herzegovina, Sierra Leone, or Central African Republic.

In establishing a "hybrid"/internationalised mechanism, **various possibilities exist for the legal basis of such a mechanism**. For example, one option could be to consider the Council of Europe's recent developments concerning the Special Tribunal for the crime of aggression, which could serve as a legal basis for a hybrid response, with its subject-matter jurisdiction expanded to include other core international crimes. But in the alternative, the UN General Assembly could provide perhaps the most legitimate and broadly global legal basis and counterpart in a hybrid arrangement. Such a legal framework could also strengthen state cooperation obligations, as well as addressing potential immunities challenges. Of course, the nature of a hybrid justice response does not require restriction of a legal basis or potential counterparts to one body. Roles could be played by any or all of the CoE, the UN, the EU, alongside Ukraine.

Insofar as the hybrid/internationalised mechanism issues related to the legal framework and modalities of such a model require significant consideration. However, briefly, “hybrid” tribunals present several distinct characteristics that sets them apart from purely domestic or purely international tribunals.

- “Hybrid” tribunals often utilise both domestic and international sources of law, and thus – generally – incorporate elements of existing domestic criminal law, while also addressing serious violations of international criminal, human rights and humanitarian law through the incorporation of such legal frameworks.
- “Hybrid” tribunals may also include both domestic and international personnel. The employment of ‘mixed’ staff should – if properly carried out – promote capacity building within the domestic legal and judicial system, through the incorporation of knowledge and experience from international personnel.
- Finally, hybrid tribunals can be located in or close to the affected state which should ensure that the affected population is able to access criminal proceedings which can, in turn, contribute to an effective and meaningful future justice process.

Canvassing all the options to create a “hybrid model” is beyond the scope of this report, however it is worth noting that there is no standard model for establishing a “hybrid” tribunal as such, which enables a measure of flexibility and tailoring of any design to suit particular needs of a state or situation. However, existing state practice reflects that “hybrid” tribunals have been established: (i) under UN administration; (ii) by bilateral agreement; (iii) as a domestic court with international elements; and (iv) by Security Council resolution.

Presently, one of the primary obstacles raised to the establishment of a hybrid tribunal for Ukraine is the required amendment to the Constitution of Ukraine which is impossible to enact while there is martial law in place. Consequently, the establishment of such a tribunal will only be possible after lifting of the martial law. Alternatively, an internationalised court outside of Ukraine’s jurisdiction may be established, whereby Ukraine will ‘transfer’ part of its jurisdiction to such an international mechanism, this should avoid the need to amend the Constitution of Ukraine while martial law is still in place. In both instances, legislative amendments to the CPCU, Law of Ukraine on National Police, on State Security Service, State Bureau of Investigations and Public Prosecutor’s Office<sup>478</sup> and Judiciary and Status of Judges<sup>479</sup> will be required.

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478 Law on the Public Prosecutor’s Office of Ukraine (unofficial translation): [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2014\)047-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2014)047-e)

479 Law of Ukraine on Judiciary and Status of Judges: ([https://vkksu.gov.ua/sites/default/files/field/file/lu\\_jst.pdf](https://vkksu.gov.ua/sites/default/files/field/file/lu_jst.pdf))

Other challenges to be overcome in the establishment of a 'hybrid' mechanism include the necessary level of domestic and international political will to establish such a mechanism; the overcoming of personal immunities through a suitable 'international element' in the hybrid's design and legal basis; and clearly defined jurisdiction to avoid jurisdictional conflicts with other international justice processes, and mechanisms including principally the ICC. However, many of these challenges have been considered in the design and implementation of other hybrid justice responses, which could serve as examples from which a design suitable to Ukraine's situation could be adopted.

Third tier envisages **a specialisation at the domestic level**. It can be based on the anti-corruption model implemented in Ukraine. This tier is needed in order to process fairly and objectively all the alleged crimes that concern crimes of collaboration, high treason, propaganda, terrorism and adjacent alleged violation that fall into the category of crimes against national security in the context of armed conflict. Although they do not fall into the category of international crimes, there have been thousands of such investigations pending. It will require relevant amendments to: Law of Ukraine on SBI to expand its jurisdiction to include offences against national security (currently it is only limited to the state officials/accused of abuse of power, military crimes, etc) and Law on SSU to remove investigative jurisdiction in respect of armed conflict related violations, Law of Ukraine on Public Prosecutors' Office, Law of Ukraine on Judiciary and Status of Judges and CPCU.

The ICC and "hybrid"/internationalised tribunal are the only two possible options to provide truly impartial justice to a great number of victims of international crimes. Ukraine, as a party to the armed conflict, cannot reasonably be expected to fulfill this crucial mission.

All three tiers will also require cooperation agreements in place between one another and clearly distinguished subject matter jurisdiction. Furthermore, as the top two tiers may have to have an overlapping jurisdiction, namely war crimes and crimes against humanity, for instance, it will be critical to put in place clear prosecutorial strategies vis-à-vis perpetrators.

Regardless of when and whether proposed architecture will be implemented in part or in its entirety, **the following recommendations should be implemented as part of the broader law reform within the framework of the EU accession process:**

#### **Criminal Code of Ukraine:**

- all core crimes introduced and clearly defined in accordance with international definitions in addition to inclusion of command responsibility, retrospective application and principle of universal jurisdiction.

- Review and amend articles 27-28 (complicity in committing crimes) to align them with the international standards on modes of participation, aiding and abetting and (possibly) joint criminal enterprise;

#### **Criminal Procedure Code of Ukraine:**

- Review and amend article 2016 to authorize national police to undertake investigations under Chapter XX;
- Amend articles 89-91 a relevant for open-source evidence and align them with international standards such as Berkley Protocol in respect of verification and storage;
- To amend provisions on/develop procedure on storage of physical evidence and chain of custody when investigating international crimes;
- To develop procedure to make intelligence information admissible in the court of law
- In relation to in absentia provisions (exclude: 436-447 offences against peace, security, humanity and international order (XX chapter) as the accused of these violations should be prosecuted in person as a matter of public interest and to ensure guarantees of the right to fair trial); include the right to retrial; as regards notification of a suspect: Article 297(5) (notification via state media outlets) must not be applied in relation to armed conflict, instead it is recommended to place suspect on the national wanted list, notification must be made by all accessible means; institutions providing administrative, financial and social services must inform relevant investigator prosecutor's office once there is an application or a request for such services from a suspect );
- To develop procedure in respect of investigating and prosecuting offences under the principle of universal jurisdiction.
- introduce provisions to provide for a necessary legal status of international experts and specialists in order to officially engage their expertise in criminal criminal investigations.
- amend provisions and relevant expert examinations methodologies to authorise the use of the equipment donated to Ukraine by the international partners within the framework of international technical assistance to ensure that information obtained as a result can become admissible evidence in national courts of law.

**In respect of ensuring right to fair trial** it is crucial to ensure execution of the relevant ECtHR judgements to avoid violations of the ECHR that regularly happen in practice in relation to the length of proceedings, length of pre-trial detention, right to

defence counsel, etc. In respect of PoW who are subject to criminal prosecution with the view to exchange, develop procedure aligned with international standards.

**To develop victims and witness protection legislation and include victims – centered approach.**

The EU accession process takes considerable time and investment. At this juncture **it is also a recommendation that the creation of the “hybrid”/internationalised accountability mechanism is seen as part of that process of long-term engagement and partnership**, which could also assist with post war reconstruction and funding.

Based on past experiences, implementation of these recommendations will require significant time, resources, but most importantly a clear strategic vision of the decision makers.

It is imperative that donor and expert community, civil society, governmental intuitions and international organisations work in concert with one another, learn to build a high degree of trust, install effective quality control systems and ensure efficient coordination in streamlining all their efforts.

Considering that Ukraine is only one of many situations that require effective justice related solutions, there is a need to adapt the global justice and accountability architecture to make it fit to respond effectively and efficiently to the existing and future needs of the people.

# Annex 1

## Registered Criminal Offences Related to the Consequences of the Armed Conflict (2014–2022)<sup>480</sup>

Articles of CCU	2014	2015	2016	2017	2018
Art. 110 of CCU 'Trespass against territorial integrity and inviolability of Ukraine'	285	217	93	136	165
Art. 111 of CCU 'High treason'	65	80	126	89	127
Art. 258 of CCU 'Act of terrorism'	1499	1295	1865	1385	950
Art. 258-1 of CCU 'Involvement in an act of terrorism'	7	1	2	1	0
Art. 258-3 of CCU 'Creation of a terrorist group or terrorist organisation'	478	849	391	277	175
Art. 258-4 of CCU 'Facilitation to committing an act of terrorism'	11	7	1	2	0
Art. 258-5 of CCU 'Financing of terrorism'	54	138	84	74	51
Art. 260 of CCU 'Creation of unlawful paramilitary or armed groups'	457	543	536	431	396
Art. 437 of CCU 'Planning, preparation and waging of an aggressive war'	1	38	11	21	4
Art. 438 of CCU 'Violation of rules of the warfare'	1	4	6	14	5
Art. 442 of CCU 'Genocide'	2	2	0	1	2
Art. 447 of CCU 'Mercenaries'	1	0	1	1	0

Articles of CCU	2019	2020	2021	2022	2023
Art. 110 of CCU 'Trespass against territorial integrity and inviolability of Ukraine'	135	140	149	10487	573
Art. 111 of CCU 'High treason'	123	145	208	1957	739
Art. 258 of CCU 'Act of terrorism'	909	465	332	95	14
Art. 258-1 of CCU 'Involvement in an act of terrorism'	1	0	1	1	0
Art. 258-3 of CCU 'Creation of a terrorist group or terrorist organisation'	164	123	136	148	126
Art. 258-4 of CCU 'Facilitation to committing an act of terrorism'	1	1	2	1	1
Art. 258-5 of CCU 'Financing of terrorism'	33	37	50	40	10
Art. 260 of CCU 'Creation of unlawful paramilitary or armed groups'	305	376	213	276	43
Art. 437 of CCU 'Planning, preparation and waging of an aggressive war'	6	4	8	67	24
Art. 438 of CCU 'Violation of rules of the warfare'	12	223	172	60387	53463
Art. 442 of CCU 'Genocide'	4	2	3	22	5
Art. 447 of CCU 'Mercenaries'	1	36	2	7	3

<sup>480</sup> Data sourced from the information on registered criminal offences and outcomes of their pre-trial investigations. // Office of the Prosecutor General: <https://gp.gov.ua/ua/posts/pro-zareyestrovani-kriminalni-pravoporushennya-ta-rezultati-yih-dosudovogo-rozsliduvannya-2>.

# Annex 2

## Outcomes of Investigation of Criminal Offences Related to the Consequences of the Armed Conflict (2014–2022)

Articles of the CCU	Registered criminal offences	Criminal offences where persons were served with a notice of suspicion	Criminal offences with proceedings in which the pre-trial investigation was suspended under Article 280 of the CPCU due to the unknown whereabouts of the suspect	Criminal offences with proceedings in which pre-trial investigation was suspended under Article 280 of the CPCU due to execution of procedural actions within the framework of international cooperation	Criminal offences with proceedings sent to court with an indictment	Criminal offences in which proceedings were closed
Art. 110 of CCU	285	99	40	0	49	37
Art. 111 of CCU	65	36	18	0	8	2
Art. 258 of CCU	1499	55	27	0	11	16
Art. 258-1 of CCU	7	1	2	0	1	0
Art. 258-3 of CCU	478	274	114	0	34	20
Art. 258-4 of CCU	11	5	1	0	4	1
Art. 258-5 of CCU	54	5	2	0	3	6
Art. 260 of CCU	457	291	40	0	197	34
Art. 437 of CCU	1	0	0	0	0	0
Art. 438 of CCU	1	0	0	0	0	0
Art. 442 of CCU	2	0	0	0	0	0
Art. 447 of CCU	1	0	0	0	0	0

2015							
Articles of the CCU	Registered criminal offences	Criminal offences where persons were served with a notice of suspicion	Criminal offences with proceedings in which the pre-trial investigation was suspended under Article 280 of the CPCU due to the unknown whereabouts of the suspect	Criminal offences with pre-trial proceedings in which pre-trial investigation was suspended under Article 280 of the CPCU due to execution of procedural actions within the framework of international cooperation	Criminal offences with proceedings sent to court with an indictment	Criminal offences in which proceedings were closed	
Art. 110 of CCU	217	74	8	0	62	6	
Art. 111 of CCU	80	23	46	0	7	10	
Art. 258 of CCU	1295	50	1	0	35	12	
Art. 258-1 of CCU	1	0	0	0	0	0	
Art. 258-3 of CCU	849	547	261	0	203	31	
Art. 258-4 of CCU	7	6	1	0	5	0	
Art. 258-5 of CCU	138	10	4	0	5	46	
Art. 260 of CCU	543	240	43	0	155	35	
Art. 437 of CCU	38	23	9	0	10	2	
Art. 438 of CCU	4	0	0	0	0	0	
Art. 442 of CCU	2	0	0	0	0	0	
Art. 447 of CCU	0	0	0	0	0	0	



2016							
Articles of the CCU	Registered criminal offences	Criminal offences where persons were served with a notice of suspicion	Criminal offences with proceedings in which the pre-trial investigation was suspended under Article 280 of the CPCU due to the unknown whereabouts of the suspect	Criminal offences with proceedings in which pre-trial investigation was suspended under Article 280 of the CPCU due to execution of procedural actions within the framework of international cooperation	Criminal offences with proceedings sent to court with an indictment	Criminal offences in which proceedings were closed	
Art. 110 of CCU	93	41	3	0	33	5	
Art. 111 of CCU	126	77	27	0	50	8	
Art. 258 of CCU	1865	25	3	0	20	4	
Art. 258-1 of CCU	2	0	0	0	0	3	
Art. 258-3 of CCU	391	160	43	0	66	21	
Art. 258-4 of CCU	1	0	0	0	0	0	
Art. 258-5 of CCU	84	8	3	0	3	15	
Art. 260 of CCU	536	227	61	0	125	30	
Art. 437 of CCU	11	8	0	0	4	0	
Art. 438 of CCU	6	1	0	0	0	0	
Art. 442 of CCU	0	0	0	0	0	0	
Art. 447 of CCU	1	0	0	0	0	0	

Articles of the CCU	Registered criminal offences	Criminal offences where persons were served with a notice of suspicion	Criminal offences with proceedings in which the pre-trial investigation was suspended under Article 280 of the CPCU due to the unknown whereabouts of the suspect	Criminal offences with proceedings in which pre-trial investigation was suspended under Article 280 of the CPCU due to execution of procedural actions within the framework of international cooperation	Criminal offences with proceedings sent to court with an indictment	Criminal offences in which proceedings were closed
<b>2017</b>						
Art. 110 of CCU	136	81	7	1	63	6
Art. 111 of CCU	89	35	10	0	13	8
Art. 258 of CCU	1385	23	6	0	6	6
Art. 258-1 of CCU	1	0	0	0	0	0
Art. 258-3 of CCU	277	117	18	0	59	12
Art. 258-4 of CCU	2	1	0	0	1	0
Art. 258-5 of CCU	74	17	4	1	7	3
Art. 260 of CCU	431	330	64	0	139	42
Art. 437 of CCU	21	17	6	0	10	1
Art. 438 of CCU	14	5	3	0	0	1
Art. 442 of CCU	1	0	0	0	0	0
Art. 447 of CCU	1	0	0	0	0	0

Articles of the CCU	Registered criminal offences	Criminal offences where persons were served with a notice of suspicion	Criminal offences with proceedings in which the pre-trial investigation was suspended under Article 280 of the CPCU due to the unknown whereabouts of the suspect	Criminal offences with proceedings in which pre-trial investigation was suspended under Article 280 of the CPCU due to execution of procedural actions within the framework of international cooperation	Criminal offences with proceedings sent to court with an indictment	Criminal offences in which proceedings were closed
<b>2018</b>						
Art. 110 of CCU	165	78	7	0	61	2
Art. 111 of CCU	127	31	12	0	12	6
Art. 258 of CCU	950	13	1	0	12	0
Art. 258-1 of CCU	0	0	0	0	0	0
Art. 258-3 of CCU	175	66	7	0	26	4
Art. 258-4 of CCU	0	0	0	0	0	0
Art. 258-5 of CCU	51	14	1	0	11	6
Art. 260 of CCU	396	336	50	0	80	41
Art. 437 of CCU	4	3	0	0	2	0
Art. 438 of CCU	5	0	0	0	0	1
Art. 442 of CCU	2	0	0	0	0	1
Art. 447 of CCU	0	0	0	0	0	0

2019							
Articles of the CCU	Registered criminal offences	Criminal offences where persons were served with a notice of suspicion	Criminal offences with proceedings in which the pre-trial investigation was suspended under Article 280 of the CPCU due to the unknown whereabouts of the suspect	Criminal offences with pre-trial proceedings in which pre-trial investigation was suspended under Article 280 of the CPCU due to execution of procedural actions within the framework of international cooperation	Criminal offences with proceedings sent to court with an indictment	Criminal offences in which proceedings were closed	
Art. 110 of CCU	135	68	3	0	54	5	
Art. 111 of CCU	123	32	1	0	11	12	
Art. 258 of CCU	909	6	1	0	4	1	
Art. 258-1 of CCU	1	0	1	0	0	0	
Art. 258-3 of CCU	164	59	7	0	18	4	
Art. 258-4 of CCU	1	0	1	0	0	1	
Art. 258-5 of CCU	33	3	3	0	1	4	
Art. 260 of CCU	305	268	27	0	35	21	
Art. 437 of CCU	6	2	0	0	2	0	
Art. 438 of CCU	12	3	3	0	0	1	
Art. 442 of CCU	4	0	0	0	0	1	
Art. 447 of CCU	1	1	0	0	0	0	

2020							
Articles of the CCU	Registered criminal offences	Criminal offences where persons were served with a notice of suspicion	Criminal offences with proceedings in which the pre-trial investigation was suspended under Article 280 of the CPCU due to the unknown whereabouts of the suspect	Criminal offences with proceedings in which pre-trial investigation was suspended under Article 280 of the CPCU due to execution of procedural actions within the framework of international cooperation	Criminal offences with proceedings sent to court with an indictment	Criminal offences in which proceedings were closed	
Art. 110 of CCU	140	48	12	0	34	7	
Art. 111 of CCU	145	45	6	0	17	14	
Art. 258 of CCU	465	24	0	0	19	6	
Art. 258-1 of CCU	0	0	0	0	0	0	
Art. 258-3 of CCU	123	51	7	0	18	2	
Art. 258-4 of CCU	1	0	0	0	0	1	
Art. 258-5 of CCU	37	2	0	0	2	0	
Art. 260 of CCU	376	291	20	0	48	27	
Art. 437 of CCU	4	3	0	0	2	0	
Art. 438 of CCU	223	6	7	0	1	0	
Art. 442 of CCU	2	0	0	0	0	1	
Art. 447 of CCU	36	1	2	0	1	0	

2021							
Articles of the CCU	Registered criminal offences	Criminal offences where persons were served with a notice of suspicion	Criminal offences with proceedings in which the pre-trial investigation was suspended under Article 280 of the CPCU due to the unknown whereabouts of the suspect	Criminal offences with proceedings in which pre-trial investigation was suspended under Article 280 of the CPCU due to execution of procedural actions within the framework of international cooperation	Criminal offences with proceedings sent to court with an indictment	Criminal offences in which proceedings were closed	
Art. 110 of CCU	149	64	6	1	58	13	
Art. 111 of CCU	208	64	16	0	16	9	
Art. 258 of CCU	332	1	1	0	0	3	
Art. 258-1 of CCU	1	0	0	0	0	0	
Art. 258-3 of CCU	136	45	3	0	24	4	
Art. 258-4 of CCU	2	0	0	0	0	0	
Art. 258-5 of CCU	50	3	1	0	1	11	
Art. 260 of CCU	213	126	9	0	49	10	
Art. 437 of CCU	8	5	1	1	3	0	
Art. 438 of CCU	172	13	5	0	7	0	
Art. 442 of CCU	3	0	0	0	0	0	
Art. 447 of CCU	2	0	0	0	0	0	

2022							
Articles of the CCU	Registered criminal offences	Criminal offences where persons were served with a notice of suspicion	Criminal offences with proceedings in which the pre-trial investigation was suspended under Article 280 of the CPCU due to the unknown whereabouts of the suspect	Criminal offences with proceedings in which pre-trial investigation was suspended under Article 280 of the CPCU due to execution of procedural actions within the framework of international cooperation	Criminal offences with proceedings sent to court with an indictment	Criminal offences in which proceedings were closed	
Art. 110 of CCU	10487	179	69	1	95	100	
Art. 111 of CCU	1957	609	227	0	269	89	
Art. 258 of CCU	95	1	0	0	1	6	
Art. 258-1 of CCU	1	0	0	0	0	0	
Art. 258-3 of CCU	148	80	9	0	58	8	
Art. 258-4 of CCU	1	0	0	0	0	0	
Art. 258-5 of CCU	40	2	0	0	0	3	
Art. 260 of CCU	276	186	81	0	89	15	
Art. 437 of CCU	67	6	5	0	0	2	
Art. 438 of CCU	60387	135	70	0	47	33	
Art. 442 of CCU	22	5	0	0	4	3	
Art. 447 of CCU	7	3	0	0	3	3	

2023							
Articles of the CCU	Registered criminal offences	Criminal offences where persons were served with a notice of suspicion	Criminal offences with proceedings in which the pre-trial investigation was suspended under Article 280 of the CPCU due to the unknown whereabouts of the suspect	Criminal offences with proceedings in which pre-trial investigation was suspended under Article 280 of the CPCU due to execution of procedural actions within the framework of international cooperation	Criminal offences with proceedings sent to court with an indictment	Criminal offences in which proceedings were closed	
Art. 110 of CCU	573	160	18	0	132	8	
Art. 111 of CCU	739	334	22	0	249	22	
Art. 258 of CCU	14	6	0	0	3	0	
Art. 258-1 of CCU	0	0	0	0	0	0	
Art. 258-3 of CCU	126	83	3	1	70	2	
Art. 258-4 of CCU	1	1	0	1	0	0	
Art. 258-5 of CCU	10	1	0	0	0	0	
Art. 260 of CCU	43	26	5	0	17	0	
Art. 437 of CCU	24	7	3	0	1	0	
Art. 438 of CCU	53463	46	17	0	16	4	
Art. 442 of CCU	5	2	1	0	1	0	
Art. 447 of CCU	3	1	0	0	1	0	



# Annex 3<sup>481</sup>

No	State	Legislative requirements	Information on the investigation into the situation in Ukraine
1	Germany	Regulations: German Code of Crimes against International Law <sup>482</sup> . Scope: genocide, crimes against humanity, war crimes, and the crime of aggression. Requirements for opening proceedings: no specific legal requirements for opening an investigation.	The investigation generally concerns the consequences of the armed conflict in Ukraine. On 08 March 2022, the German Prosecutor General announced the launch of an investigation into war crimes committed on the territory of Ukraine, in particular, attacks on civilian infrastructure and the use of cluster munitions <sup>483</sup> . The media also reported that Bundestag member Thomas Heilmann filed a claim to open criminal proceedings against Timofey Sergeytsev, alleging that the latter incited genocide through his article titled 'What Russia Should Do With Ukraine.' <sup>484</sup>
2	France	Regulations: Criminal Procedure Code of France <sup>485</sup> . Scope: genocide, crimes against humanity, war crimes, and the crime of aggression. Requirements for opening proceedings: suspect's residence in France; dual criminality or the ratification of the Rome Statute either by the state where the crimes were committed or by the state of the suspect's citizenship (not applicable to genocide); prosecutorial discretion; and subsidiarity with other jurisdictions.	The investigation concerns the deaths of French citizens: On 16 March 2022, the Prosecutor's office of the Specialised Unit for crimes against humanity and war crimes Central Directorate for Crimes Against Humanity and war crimes initiated an investigation into the murder of French citizen, Pierre Zakrevsky, killed in Horenka on 14 March 2022 <sup>486</sup> . On 06 April 2022, the Prosecutor's office informed about the opening of criminal cases in relation to the consequences of the armed conflict in Ukraine, in particular, the events in Mariupol, Hostomel, and Chernihiv <sup>487</sup> .
3	Spain	Regulations Organic Law 6/1985 <sup>488</sup> . Scope: genocide, crimes against humanity, war crimes. Requirements for opening proceedings: the perpetrator is a Spanish citizen; the perpetrator is a foreigner with permanent residence in Spain; the perpetrator is in Spain and was denied extradition.	The investigation generally concerns the consequences of the armed conflict in Ukraine. On 08 March 2022, the Spanish Public Prosecutor's Office initiated an investigation into alleged violations of international humanitarian law by the Russian Armed Forces <sup>489</sup> .

481 Results of work on combating crimes committed in the context of armed conflict in 2023 // Office of the Prosecutor General, 18.01.2024: <https://www.gp.gov.ua/ua/posts/rezultati-roboti-z-protidii-zlocinam-vcinenim-v-umovax-zbroinogo-konfliktu-za-2023-rik>. The war of criminal justice: what are we fighting for? // JustTalk, 23.01.2024: [https://youtu.be/y58ndH4C4QY?si=Q\\_KNSWSGc0fFcwLx](https://youtu.be/y58ndH4C4QY?si=Q_KNSWSGc0fFcwLx). International cooperation of the Prosecutor General's Office. Key areas and results // Office of the Prosecutor General, 12.02.2024: <https://www.gp.gov.ua/ua/posts/miznarodne-spirovitnictvo-ofisu-generalnogo-prokurora-klyucovi-napryami-ta-rezultati>.

482 German Code of Crimes against International Law, 26.06.2002: [https://www.gesetze-im-internet.de/englisch\\_vstgb/englisch\\_vstgb.pdf](https://www.gesetze-im-internet.de/englisch_vstgb/englisch_vstgb.pdf).

483 Generalbundesanwalt ermittelt wegen Verdachts auf russische Kriegsverbrechen // Spiegel, 08.03.2022: <https://www.spiegel.de/politik/deutschland/ukraine-generalbundesanwalt-ermittelt-wegen-verdacht-auf-russische-kriegsverbrechen-a-20b9eb86-3c2d-4487-a411-cbe1ae458022>.

484 CDU-Abgeordneter erstattet Anzeige wegen Aufrufs zum Völkermord // Frantfurter Allegemeine, 08.04.2022: <https://www.faz.net/aktuell/feuilleton/medien/cdu-abgeordneter-erstattet-anzeige-wegen-aufrufs-zum-voelker-mord-17945217.html>.

485 Universal Jurisdiction Law and Practice in France // Trial International, February 2019: <https://trialinternational.org/wp-content/uploads/2019/05/Universal-Jurisdiction-Law-and-Practice-in-France.pdf>.

486 France opens war crime probe into death of Irish journalist killed in Ukraine // The Journal.ie, 16.03.2022: <https://www.thejournal.ie/brothers-pierre-zakrzewski-ukraine-5712982-Mar2022/>.

487 France to investigate war crimes against citizens in Ukraine // Euractiv, 06.04.2022: [https://www.euractiv.com/section/politics/short\\_news/france-to-investigate-war-crimes-against-citizens-in-ukraine/](https://www.euractiv.com/section/politics/short_news/france-to-investigate-war-crimes-against-citizens-in-ukraine/).

488 The 2014 Reform of Universal Jurisdiction in Spain // Dr. Rosa Ana Alija Fernández: [https://zis-online.com/dati/artikel/2014\\_13\\_883.pdf](https://zis-online.com/dati/artikel/2014_13_883.pdf).

489 Spain opens probe into 'serious violations' by Russia in Ukraine // The Local.es, 08.03.2022: <https://www.thelocal.es/20220308/spain-opens-probe-into-serious-violations-by-russia-in-ukraine/>.

4	Poland	<p>Regulations: Criminal Code of Poland<sup>490</sup>.</p> <p>Scope: genocide, crimes against humanity, war crimes, and the crime of aggression.</p> <p>Requirements for opening proceedings: a crime against the interests of the Republic of Poland committed by a foreigner abroad; a crime against targeting a Polish citizen; a crime against a Polish legal entity or a structural unit that is not a legal entity; a foreigner who committed a terrorist act abroad.</p>	The investigation generally concerns the consequences of the armed conflict in Ukraine. In March 2022, the Public Prosecutor's Office of Poland initiated proceedings regarding the preparation and conduct of an aggressive war <sup>491</sup> .
5	Czech Republic	<p>Regulations: Criminal Code of the Czech Republic<sup>492</sup>.</p> <p>Scope: genocide, crimes against humanity, war crimes.</p> <p>Requirements for opening proceedings: if the crime is recognised by the law of the country where it was committed; if the perpetrator was detained in the Czech Republic and not extradited to another country (or other authority for investigation); if the crime was committed by a foreigner or a stateless person who has not been issued a residence permit for the benefit of a company or individual doing business with the Czech Republic through representative offices in any way.</p>	The investigation generally concerns the consequences of the armed conflict in Ukraine. On 19 April 2022, the Czech police launched an investigation into the use of prohibited weapons and unlawful hostilities and violations of IHL in general <sup>493</sup> .
6	Slovakia	<p>Regulations: Criminal Code of Slovakia<sup>494</sup>.</p> <p>Scope: genocide, crimes against humanity, war crimes.</p> <p>Requirements for opening proceedings: can be carried out in respect of foreigners, other conditions are unknown.</p>	The investigation generally concerns the consequences of the armed conflict in Ukraine. According to media reports, the Slovak public prosecutor's office has initiated an investigation, though details are not disclosed <sup>495</sup> .
7	Romania	<p>Regulations: Criminal Code of Romania<sup>496</sup>.</p> <p>Scope: genocide, crimes against humanity, war crimes.</p> <p>Requirements for opening proceedings: the crime was committed outside Romania by a stateless person; the crime was committed by a foreigner or stateless person who does not reside permanently in Romania, provided that the crime is criminalised in the country where it was committed.</p>	The investigation generally concerns the consequences of the armed conflict in Ukraine. According to media reports, the Public Prosecutor's Office of Romania has proceedings for crimes against humanity <sup>497</sup> .

490 Statement by Professor Zdzislaw Galicki at the 68th Session of the UN GA "The scope and application of the principle of universal jurisdiction", 18.10.2013: [https://www.un.org/en/ga/sixth/68/pdfs/statements/universal\\_jurisdiction/poland.pdf](https://www.un.org/en/ga/sixth/68/pdfs/statements/universal_jurisdiction/poland.pdf)

491 Polish prosecutors launch investigation into Russia's attack on Ukraine // The First News, 01.03.2022: <https://www.thefirstnews.com/article/polish-prosecutors-launch-investigation-into-russias-attack-on-ukraine-28331>.

492 Universal Jurisdiction, a Preliminary Survey of Legislation Around / Amnesty International, 2012: <https://www.amnesty.org/en/wp-content/uploads/2021/06/ior530192012en.pdf>.

493 Tiskové sdělení ze dne 19. 4. 2022 / VSZ.PRA, 19.04.2022: <https://verejnazaloba.cz/vsz-praha-aktuality/tiskove-sdeleni-ze-dne-19-4-2022/>.

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8	Estonia	<p>Regulations: Criminal Code of Estonia<sup>498</sup>.</p> <p>Scope: crimes against humanity, war crimes, genocide, the crime of aggression, propaganda of war, production and distribution of prohibited weapons.</p> <p>Requirements for opening proceedings: the act constitutes a criminal offence under Estonian criminal law and is punishable in the place where it was committed; or if no punishment is provided for in the place where the act was committed: if the act is committed against an Estonian citizen or a legal entity registered in Estonia; the perpetrator is an Estonian citizen at the time of the act or becomes an Estonian citizen after the act is committed; or the perpetrator is a foreigner who has been detained in Estonia and not extradited.</p>	The investigation generally concerns the consequences of the armed conflict in Ukraine. Estonia has initiated an internal structural investigation into war crimes and crimes against humanity committed in Ukraine and is cooperating with Eurojust on the matter <sup>499</sup> .
9	Latvia	<p>Regulations: Criminal Code of Latvia<sup>500</sup>.</p> <p>Scope: genocide, crimes against humanity, war crimes, and the crime of aggression.</p> <p>Requirements for opening proceedings: foreigners without a permanent residence permit in the Republic of Latvia, who have committed a criminal offence on the territory of another state, in cases stipulated by international agreements binding on the Republic of Latvia, irrespective of the legislation of the state where the crime was committed, provided that they have not been prosecuted for this crime in another state.</p>	The investigation generally concerns the consequences of the armed conflict in Ukraine. The State Security Service of Latvia (VDD) has opened criminal proceedings into war crimes and crimes against humanity and peace committed by the Russian armed forces in Ukraine <sup>501</sup> .
10	Lithuania	<p>Regulation: Criminal Code of Lithuania<sup>502</sup>.</p> <p>Scope: crimes against humanity, war crimes, environmental crimes.</p> <p>Requirements for opening proceedings: there are no requirements for citizenship of the perpetrator and place of commission of the crime, but it must be a criminal offence in the state where the alleged crime was committed.</p>	The investigation generally concerns the consequences of the armed conflict in Ukraine. The Prosecutor General's Office of Lithuania announced that it had launched an investigation into alleged crimes against humanity and war crimes in Ukraine <sup>503</sup> . In February 2024, striving to begin prosecution in absentia, a prosecutor addressed the court to identified individuals from 'DPR' forces in question as suspects for participating in military aggression of the Russian Federation against Ukraine and for illegal detention, deprivation of liberty, imprisonment and killing of Lithuanian film director Kvedaravičius in spring 2022. Upon a court decision, all three have been declared as suspects. <sup>504</sup>

498 Criminal Code of the Republic of Estonia: <https://www.derechos.org/intlaw/est.html>.

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11	Norway	<p>Regulation: Criminal Code of Norway<sup>505</sup>.</p> <p>Scope: war crimes, crimes against humanity, genocide.</p> <p>Requirements for opening proceedings: alleged perpetrator is resident in Norway, or is a citizen of another Scandinavian country, or is resident in that country and is present in Norway; or the alleged perpetrator is located in Norway; if the suspected foreign perpetrator does not reside or stay in Norway, s/he can only be investigated and prosecuted if the victim is a Norwegian citizen or resides in Norway.</p>	According to official reports, Norway sent its experts to assist in the ICC investigation <sup>506</sup> .
12	Sweden	<p>Regulation: Criminal Code of Sweden<sup>507</sup>.</p> <p>Scope: genocide, crimes against humanity, war crimes, and the crime of aggression.</p> <p>Requirements for opening proceedings: the presence or residence of the suspect in Sweden is not necessary for the establishment of jurisdiction of Swedish courts over international crimes. An investigation will not be launched if the suspect's absence hinders an effective investigation of the crime. If there is no reasonable chance of apprehending the suspect in Sweden, the prosecution will not initiate an investigation. The accused must appear in court at a trial.</p>	The investigation generally concerns the consequences of the armed conflict in Ukraine. The Swedish Prosecutor's Office has initiated a preliminary investigation into alleged war crimes in Ukraine <sup>508</sup> .
13	Switzerland	<p>Regulation: Criminal Code of Switzerland<sup>509</sup>.</p> <p>Scope: genocide, crimes against humanity, war crimes.</p> <p>Requirements for opening proceedings: the offence is also subject to prosecution at the place of commission or if criminal law jurisdiction does not apply at the place of commission, the suspect remains in Switzerland and has not been extradited to another country.</p>	The investigation primarily focuses on the consequences of the armed conflict in Ukraine. On 22 March 2022, the Attorney General of Switzerland announced the creation of a task force to collect evidence from refugees about alleged war crimes in Ukraine <sup>510</sup> .

505 Universal Jurisdiction Law and Practice in Norway / Open Society Justice Initiative, January 2020: <https://www.justiceinitiative.org/publications/universal-jurisdiction-law-and-practice-in-norway>.

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14	Canada	Regulation: Law on crimes against humanity and war crimes <sup>511</sup> .  Scope: genocide, crimes against humanity, war crimes.  Requirements for opening proceedings: the perpetrator must be located in Canada.	The Royal Canadian Mounted Police (RCMP) has launched a national investigation into alleged war crimes and crimes against humanity committed in Ukraine. The police are collecting 'important information and evidence' from Ukrainians entering Canada who are willing to provide it, with the aim of using the information in future criminal investigations <sup>512</sup> .
15	Austria	Regulation: Criminal Code of Austria <sup>513</sup> .  Scope: genocide, crimes against humanity, war crimes, and the crime of aggression.  Requirements for opening proceedings: the perpetrator or victim is an Austrian citizen; the act violates other Austrian national interests; the perpetrator is a foreigner permanently residing in Austria, or is in Austria and cannot be extradited.	The investigation generally concerns the consequences of the armed conflict in Ukraine. According to official reports, the Austrian Ministry of Justice has been considering the possibilities of domestic legislation to open an investigation into alleged war crimes committed in Ukraine <sup>514</sup> .
16	Italy	Regulation: Criminal Code of Italy <sup>515</sup> .  Scope: genocide, crimes against humanity, war crimes, torture.  Requirements for opening proceedings: the perpetrator is on the territory of Italy and there is a request from the Minister of Justice or a report or complaint from the injured party.	On 13 May 2022, it was announced that prosecutors from Bari, southern Italy, had opened an initial investigation into war crimes committed in Ukraine. As part of the investigation, numerous refugees who arrived in Puglia, Italy, have provided testimony. <sup>516</sup>
17	USA	Regulations: federal laws <sup>517</sup> , for example, the War Crimes Act of 1996.  Scope: gross violations of human rights, including genocide, torture, the recruitment or use of child soldiers, war crimes.  Requirements for opening proceedings: connection with the state, only representatives of the Department of Justice can initiate proceedings, high-level approval required <sup>518</sup> .	On 6 December 2023, the United States announced the indictment of four Russian servicemen for torture, inhuman treatment, and unlawful imprisonment of a US citizen in Ukraine after the full-scale invasion in February 2022. <sup>519</sup>  In addition, the U.S. Special Prosecutor for the Crime of Aggression has joined the ICPA <sup>520</sup> .

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18	Great Britain	<p>Regulations: Criminal Justice Act 1988<sup>521</sup>, Geneva Conventions Act 1957<sup>522</sup>, International Criminal Court Act 2001<sup>523</sup>.</p> <p>Scope: crime of torture, grave breaches of the Geneva Conventions; restricted form of universal jurisdiction over crimes under the Rome Statute of the International Criminal Court – war crimes, crimes against humanity and genocide.<sup>524</sup></p> <p>Requirements for opening proceedings: as for crimes under the Rome Statute prosecution might be brought against those resident in the UK, or of British nationality; temporal application of acts; investigation need to be approved by the Attorney General.<sup>525</sup></p>	<p>Since 2022, the UK police have been collecting eyewitness accounts of grave international crimes committed in Ukraine to support the investigation by the International Criminal Court.<sup>526</sup></p>
19	Ireland	<p>Regulations: the Constitution of Ireland; Geneva Conventions Act 1962, 1998; ICC Act 2006; Criminal Justice Act 2000; Air Navigation and Transport Act 1973; Air Navigation Act 1975; Extradition Act 1987; Maritime Security Act 2004.<sup>527</sup></p> <p>Scope: piracy, grave breaches of the Geneva Conventions and the Additional Protocol I, torture.<sup>528</sup></p> <p>Requirements for opening proceedings: presence of the perpetrator; prosecutorial discretion.<sup>529</sup></p>	<p>No official statements regarding Ireland investigation on war crimes on Ukrainian territory under principle of universal jurisdiction were provided. At the same time, the Government of Ireland supports the ICC investigation on Ukraine situation.<sup>530</sup></p>

521 Criminal Justice Act, 1988: <https://www.legislation.gov.uk/ukpga/1988/33/section/134>.

522 Geneva Conventions Act 1957, available at: <https://www.legislation.gov.uk/ukpga/Eliz2/5-6/52/section/1>.

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20	Finland	<p>Regulations: Criminal Code, Decree on the Application of Chapter 1, Section 7 of the Criminal Code.<sup>531</sup></p> <p>Scope: genocide, crimes against humanity, war crimes, and torture, counterfeiting, drug-related offences, hijacking and sabotaging aircraft, attacks against internationally protected persons, hostage taking, unlawful handling of nuclear material, unlawful involvement in chemical weapons, and piracy and other unlawful acts against the safety of maritime navigation, as well as perhaps other crimes under international treaties ratified by Finland that carry an obligation to either extradite or prosecute, and terrorism.<sup>532</sup></p> <p>Requirements for opening proceedings: acts that were criminal offences according to the law in force at the time of their commission; for crimes committed abroad by a Finn or a person equivalent to a Finn, or against a Finnish citizen/entity/resident, the offence must also be punishable under the law of the place of commission (double criminality); may only be initiated by order of the Prosecutor-General.<sup>533</sup></p>	<p>On December 2023 Finnish police started a preliminary investigation into Voislav Torden, a suspected mercenary with the neo-Nazi Rusich group in Ukraine.</p> <p>Prosecutors say Torden is suspected of crimes against captured or wounded Ukrainian soldiers that took place in eastern Ukraine before Russia's full-scale assault on the country began in February 2022.<sup>534</sup></p>
21	Albania	<p>Regulations: the Criminal Code of the Republic of Albania.<sup>535</sup></p> <p>Scope: crimes against humanity, war crimes, genocide, crimes with terrorist purposes, torture.<sup>536</sup></p> <p>Requirements for opening proceedings: the establishment of the fact that the foreigner who has committed the crime outside the territory of Albania is present in the territory of Albanian; the alleged offender is not extradited.<sup>537</sup></p>	<p>No official statements regarding Albanian investigation on war crimes on Ukrainian territory under principle of universal jurisdiction were provided. At the same time, the Government of Albania supports the ICC investigation on Ukraine situation.<sup>538</sup></p>

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22	Denmark	<p>Regulations: the Penal Code.<sup>539</sup></p> <p>Scope: torture, grave breaches of the Geneva Conventions, genocide.<sup>540</sup></p> <p>Requirements for opening proceedings: the perpetrator is present in Denmark at the time when formal legal proceedings are initiated.<sup>541</sup></p>	The Danish police have been collecting eyewitness accounts of grave international crimes committed in Ukraine to support the investigation by the International Criminal Court. <sup>542</sup>
23	Bulgaria	<p>Regulations: the Criminal Code.<sup>543</sup></p> <p>Scope: aggression, genocide, apartheid, war crimes in international and non-international armed conflict and torture during armed conflict, as well as over crimes listed in treaties authorizing states parties to exercise such jurisdiction.<sup>544</sup></p> <p>Requirements for opening proceedings: prosecution of mere ordinary crimes can be barred by statute of limitations; prosecutions of serious crimes (crimes of general nature) can only be initiated by the prosecutor.<sup>545</sup></p>	In the beginning of February 2024 Bulgarian authorities states about preparing amendments to the country's criminal code to allow prosecution of core crimes committed in Ukraine. <sup>546</sup>
24	The Netherlands	<p>Regulations: International Crimes Act of 19 June 2003.<sup>547</sup></p> <p>Scope: genocide, war crimes, crimes against humanity, torture, piracy.<sup>548</sup></p> <p>Requirements for opening proceedings: Investigations into a general situation are not possible, unless the victim(s) and/or the alleged perpetrator(s) are Dutch nationals. In other cases, Dutch authorities are therefore only competent to investigate universal jurisdiction cases if the suspect is present on the territory during the investigation.<sup>549</sup></p>	Following Russia's full-scale invasion of Ukraine, the Dutch law enforcement agencies are collecting evidence of grave international crimes. <sup>550</sup>

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25	Hungary	<p>Regulations: the Criminal Code 2012.<sup>551</sup></p> <p>Scope: crimes against humanity, war crimes.<sup>552</sup></p> <p>Requirements for opening proceedings: criminal proceedings on the basis of universal jurisdiction can only be initiated by the order of the Prosecutor General of Hungary.<sup>553</sup></p>	<p>No official statements regarding investigation on war crimes on Ukrainian territory under principle of universal jurisdiction were provided. At the same time, Government of Hungary supports the ICC investigation on Ukraine situation.<sup>554</sup></p>
26	Slovenia	<p>Regulations: the Criminal Code 2008.<sup>555</sup></p> <p>Scope: war crimes, crimes against humanity, torture.<sup>556</sup></p> <p>Regulations: approval by the Minister of Justice.<sup>557</sup></p>	<p>No official statements regarding investigation on war crimes on Ukrainian territory under principle of universal jurisdiction were provided. At the same time, Government of Slovenia supports the ICC investigation on Ukraine situation.<sup>558</sup> Also Slovenia takes part in the OSINT taskforce created by Europol.<sup>559</sup></p>

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# Annex 4

## Reviewer: Investigator of the Security Service of Ukraine

Comments to the publication:

- There are ongoing discussions among the judges of the Supreme Court regarding the notion of a perpetrator of the crime of aggression. Many of them still do not understand why all members of the Russian Armed Forces cannot be perpetrators of the crime under Article 437 of the Criminal Code of Ukraine. I have encountered this opinion in my work.
- Accountability, among other things, implies not only the passing of a sentence, but also its execution. It is still unclear what to do with the verdicts passed in the course of a special pre-trial investigation and special trial (in absentia). They are only being accumulated in the absence of a vision of what to do with them in the future.
- The problem with the quality of legislation and the need for amendments due to the challenges of the armed conflict could be solved if Ukraine had a strategy that would define our vision of the armed conflict in legal terms. Ad hoc changes in legislation currently address only one specific issue addressed by the amendments. In general, this does not reflect the situation in practice, as there is no comprehensive approach to this issue.
- At the central level, the events from February 2014 to 24 February 2022 are not investigated as part of the international armed conflict. All criminal proceedings (with a few exceptions) have been sent to the regions, and in the current situation, the regions do not have the resources to investigate them. Therefore, in general, all the consequences of the armed conflict that took place before the full-scale invasion in Crimea and Donbas have faded into the background.
- There is an issue with the certification of equipment for conducting forensic examinations in Ukraine. In addition, as for equipment for rapid tests, Ukrainian legislation only provides for full-fledged examinations during the investigation, not for such tests.
- Although all crimes related to the armed conflict fall under the jurisdiction of Security Service investigators according to the Criminal Procedure Code of Ukraine, a substantial number of criminal proceedings that are investigated by them do not relate to the armed conflict and are outside of the scope of the SSU jurisdiction.

Investigators are overburdened with proceedings under Articles 191, 205, 364 of the Criminal Code of Ukraine, among others. In this situation, complaints about the lack of staff to effectively conduct investigations prescribed by law are in this case unfounded.

- Solution for the National Police to investigate criminal proceedings under Article 438 of the Criminal Code of Ukraine as a result of a formal procedure that recognizes the SSU investigations ineffective is in itself ineffective. This approach can hardly be called a solution to the problem of jurisdiction. At the same time, the case files of each such proceeding contain a decision that the SBU investigators cannot conduct an effective investigation.
- In practice, investigators use intelligence information and data obtained through such activities, but the criminal procedural legislation of Ukraine does not recognize this type of evidence. Unfortunately, there are also no initiatives to amend the legislation on this issue.
- While there have been discussions about reforming the Security Service of Ukraine for several years, there is still no document that answers the question of exactly what the SSU should be.
- In practice, interagency investigative teams have not replaced the need to resolve issues with the jurisdiction of other investigative bodies under Article 438 of the Criminal Code of Ukraine. Such groups are created with police investigators precisely to strengthen the investigation team in a particular criminal proceeding, and not to undermine the rules of jurisdiction. The establishment of such teams does not mean that the proceedings are transferred to another body. Investigations under Article 438 of the Criminal Code of Ukraine are transferred through the procedure of concluding that investigation by security service investigators was ineffective.
- Working on arguments in proceedings under Article 438 of the Criminal Code of Ukraine requires investigators' time, which they are sorely lacking. It is necessary to understand the different types of war crimes and how to describe them properly, and there is a lack of capacity to do so. At the same time, there is a critical lack of caselaw of national courts that could help in this work. Therefore, such proceedings mostly use approaches and arguments from investigations of ordinary crimes.
- It remains uncertain which judicial body will hear cases of international crimes in the territory of Ukraine. It must be effective. The Russian Federation and its accomplices may also create a tribunal to investigate Ukraine's actions. Therefore,

we need to find a solution for a body that can help bring justice in respect of grave international crimes.

- As for mobile DNA laboratories, in accordance with our legislation and existing methodologies, molecular genetic examinations, including comparative ones, are conducted in a stationary expert institution. Mobile laboratories accelerate the identification procedure, but are not used for identification examinations in criminal proceedings. Their results cannot be considered as equivalent to stationary examinations, and therefore cannot be used as evidence during the investigation. To resolve this problem, it is necessary to make changes to the methods of conducting expert examinations.
- With regard to duplication of criminal proceedings on the same facts of crimes, the law mandates that each victim's statement is registered, and only then, the issue of merging with an existing one or investigating separately is raised. As a result, when one crime is committed and there are several victims, criminal proceedings are registered based on the statements of each victim and then merged. Unfortunately, there is no other way. Therefore, it is necessary to select and systematize all open investigations.
- In essence, all authorities involved in the investigation preserve the evidence collected wherever possible. This primarily concerns material evidence. It is difficult to find a place, but everyone tries to ensure its safety.
- Over the past two years, many processes related to receiving state aid are also linked to criminal proceedings and some kind of victim status document. In 2022-2024, we recognized as victims all those who had lost property, lost a family member, or simply had to change their place of residence due to the war. This is wrong. However, lawyers keep sending such petitions in the interests of the victims, and there is no solution to this. Victims need to receive from the investigator a memo on the rights and obligations of the victim and an extract from the URPTI on their application. They are not interested in anything else because these documents are listed in the list of documents required to receive financial assistance from the state.
- A great challenge for security service investigators is the lack of skills and knowledge required to deal with international crimes. No specialized training programs are offered for this purpose. At the same time, the motivation and desire of the investigators themselves to develop and acquire these skills remains an open question as does their availability.

- A significant workload on security investigators results from the investigation of criminal proceedings under articles outside the jurisdiction of the SSU. This takes away resources both from different departments and at the local level. If this issue is resolved, additional resources will be freed up to investigate war crimes. Despite the ongoing armed conflict, there is a lack of priority for investigating violations of the laws and customs of war by pre-trial investigation bodies. This decision should be made at the level of the heads of various bodies, including pre-trial investigation bodies, and investigators should see and feel this priority. Only this can change approaches to work.

## Reviewer: Judge

Comments to the publication:

The issue of execution of sentences in absentia is quite relevant nowadays, as their number is increasing, but there is no single approach to ensuring their implementation. It is presumed that such sentences should be sent for execution to central authorities (for example, to the Border Guard Service to track possible border crossings by the convicted person; to the Security Service of Ukraine, which has search files on such persons that, supposedly, may be the basis for detention in the future, although this is a violation of human rights, since the only basis for detention of a convicted person is a sentence, the resolution part of which should clearly state that “The term of serving the sentence shall be counted from the date of detention of the person in the execution of this sentence”). Given that the very procedure for consideration of cases in absentia raises certain concerns of the international community, but also with the number of sentences that will be delivered in Ukraine under this procedure, the execution of such sentences should be carefully considered to ensure that 1) they are actually executed and 2) Ukraine avoids long-term negative consequences caused by the complaints to international courts regarding human rights violations.

## Reviewer: National Police of Ukraine Investigator

Comments to the publication:

- In general, it is important for the work of the police that an alternative jurisdiction provision for grave international crimes under the Criminal Code of Ukraine be introduced into national legislation, in particular, to allow police investigators to investigate them during martial law.
- Currently, specialized investigative units for investigating crimes committed in the context of the armed conflict have been established and are operating in 10 investigative departments of the National Police, namely in Kyiv, Chernihiv, Sumy, Kharkiv, Luhansk, Donetsk, Zaporizhzhia, Kherson, Dnipro and Mykolaiv regions. Additionally, since the occupation of the Crimean Peninsula, the NPU has established the Main Department of the National Police in the Autonomous Republic of Crimea and the city of Sevastopol, which has an investigative unit for crimes committed by the occupation authorities of the peninsula since 2014.

## Reviewer: Prosecutor

Comments to the publication:

- The cases of illegal border crossing in the context of participants in the armed conflict on the territory of Ukraine were additionally charged at the level of national practice, in addition to Articles 110 and 437 of the Criminal Code of Ukraine. Although the approach was changed, the practice of opening investigations into such incidents was introduced.
- The training of judges in international humanitarian law features different positions offered by international and national experts during educational programs. This consequently affects their opinions in criminal proceedings and the fact that they create their own approaches when considering cases. Such an approach may contradict international standards in practice and be followed by other national courts in proceedings on similar facts.
- In most proceedings on violations of the laws and customs of war, defence attorneys take a passive stance. As a result, this may affect the fairness of the process as a whole.
- The Criminal Procedure Code of Ukraine offers different approaches to the evidence obtained during the pre-trial investigation in terms of the prospects of using it in court. While the protocols of investigative actions (including inspections and searches), expert opinions, and material evidence may be taken into account by the court, the testimony of witnesses and victims must be examined by the court directly. This creates an additional risk of re-traumatization for victims, as their testimony at the investigation stage can only become an integral basis for the preparation of notices of suspicion and indictments. At the same time, during court hearings, they will have to testify anew in each proceeding where the victim has the status of a victim or witness.
- In practice, there is still a problem with the interviewing of victims and witnesses who relocated abroad. According to the Criminal Procedure Code of Ukraine, video-conference communication with them and the resulting report are not considered evidence. The process of interviewing does not equate in status to interrogation, so the Criminal Procedure Code of Ukraine provides that the investigator or prosecutor needs to interrogate the interviewed persons to obtain their testimony. Given the number of persons abroad whose testimony may be useful in criminal proceedings, it is necessary to look for ways to obtain information from them that can be used as evidence in criminal proceedings.



- The current CPC of Ukraine does not provide for the unconditional right to retrial of the accused convicted by a court in a special court proceeding. Given the ECtHR case law, this approach may lead to decisions on violations of Article 6 of the ECHR by Ukraine, with the need for a retrial as an appropriate remedy. In future, this shortcoming may be exploited by the Russian Federation by initiating mass complaints to the ECtHR by Russian military personnel convicted in absentia.
- There is an urgent need to address at the legislative level social protection and financial support of prosecutors conducting procedural actions in the areas of hostilities. Unlike investigators of the Security Service of Ukraine and the National Police, the legislation does not currently provide for social protection for prosecutors and their families in case of death or injury in the performance of their duties, including in the investigation of international crimes. This issue requires amending the Law of Ukraine “On the Prosecutor’s Office”. On 12 June 2023, parliamentarians submitted the relevant bill to the Verkhovna Rada of Ukraine (Draft Law No. 9380 of Ukraine “On Amendments to the Law of Ukraine ‘On the Prosecutor’s Office’ on Guarantees for Prosecutors Exercising Powers in Criminal Proceedings in the Areas of Military (Combat) Operations”). However, it has not yet been submitted to the session floor for consideration.
- Ukrainian legislation sets a limit on the number of employees of the Security Service of Ukraine. These figures cover all employees, including not only investigators. In reality, their number is much lower than the official figures, which consequently affects their ability to cover the entire range of investigations under their jurisdiction.
- In practice, the introduction of interagency investigative teams in the Criminal Procedure Code of Ukraine did not solve the problems that arose with the jurisdiction of proceedings under Article 438 of the Criminal Code of Ukraine. The tool of interagency investigative teams has not become widespread, but is a separate and temporary measure to assist SSU investigators by NPU investigators in conducting priority investigative actions or a large number of them. This does not fundamentally affect the effectiveness of the investigation, and the transfer of criminal proceedings in accordance with Article 36 of the CPC of Ukraine remains the only mechanism to reduce the workload of SBU investigators.
- - The priority of Ukraine’s security agencies throughout the armed conflict since 2014 has been to investigate crimes against the foundations of national security, as compared to grave international crimes. The SSU increased its attention to these proceedings after Russia’s full-scale invasion of Ukraine, but the scale of the events did not change the agency’s overall approach.

- After Russia's full-scale invasion of Ukraine, the SSU tried to find ways to increase its human resources. As a solution, the SSU used a mobilization process to recruit former prosecutors who had failed or refused to pass the certification to the SSU's investigative units.
- Prosecutors' offices bear a significant burden of investigating the consequences of the armed conflict and criminal proceedings in general. Against this background, decisions on social and material support for employees are disproportionate to the functions they perform. Compared to law enforcement and judicial authorities, the support of prosecutors is neglected and is considerably lower. This affects both the motivation of employees and the stability of the entire prosecution system.

## Reviewer: Prosecutor

Comments to the publication:

- Especially after Russia's full-scale invasion of Ukraine, it became clear that regional issues remain the responsibility of the relevant state authorities at the regional level. The interests of victims and attention to the prosecution of events in the Crimean Peninsula and Donbas since 2014 have been the responsibility of law enforcement and justice authorities in the respective regions, and have not received adequate attention from the center in terms of general policy development.
- At the national level, Ukraine and its law enforcement agencies had high expectations for Interpol as an effective mechanism for tracking down suspects in proceedings related to the armed conflict. However, after the first requests in 2014, it became clear that it was impossible to use it in practice.
- Several problems have been identified in the qualification of crimes under Article 438 of the Criminal Code of Ukraine and the application of the provisions of international humanitarian law treaties ratified by Ukraine. The first is the quality of translation of texts into Ukrainian. Different terms could be used in the conventions, or some Ukrainian versions of the documents may have missing parts of articles. Secondly, not all conventions have official translations into Ukrainian. This situation has a negative impact on the practice and clarity of interpretation of the relevant provisions in criminal proceedings. The issue of changing the translation remains unresolved.
- The jurisdiction of the investigating authorities under Article 438 of the Criminal Code of Ukraine remains a practical challenge. Perhaps, as an option for legislative amendments, Article 216 of the Criminal Procedure Code of Ukraine should provide for the possibility for the prosecutor to determine the jurisdiction of international / war crimes / those specified in Chapter XX of the Criminal Code of Ukraine to any of the pre-trial investigation bodies. This may be a justified decision because not only the SSU, but also the NPU and the SBI are involved in such investigations. If each of these agencies is granted jurisdiction over the investigations, in practice, there may be competition between them, and the prosecutor may be the regulatory authority in this case.
- The need to recognize information obtained through intelligence activities as evidence has long been debated. Alternatively, by analogy with the documents provided for in Article 99(2)(2) of the Criminal Procedure Code of Ukraine, it is possible to add "by intelligence agencies in compliance with the Law of Ukraine 'On Intelligence'. This law has similar principles as the Law of Ukraine "On Operational and Investigative Activities" (Articles 13-28).

- Conducting interrogations of victims and witnesses located abroad via video conferencing may potentially be perceived as a violation of the requirements of Section IX of the Criminal Procedure Code of Ukraine and conventions/treaties on mutual assistance in criminal matters, as it may be interpreted as interference with the sovereign rights of the host state. Therefore, in practice, this option is definitely not a solution to the problem for interrogating such persons.
- As for the regulation of involvement of foreign experts in criminal proceedings, it is possible to propose that the Criminal Procedure Code of Ukraine provide for the possibility for an investigator or prosecutor to obtain advisory opinions in a special field, a kind of *amicus curiae*, whose recommendations cannot be obtained in another procedural manner.
- The provisions of the Criminal Procedure Code of Ukraine in some respects provide for too much control by the judiciary during the pre-trial investigation. This approach generally also affects the workload of courts and their resources required to hear proceedings.
- In general, the issue of interrogations at the pre-trial investigation stage is somewhat losing its relevance. Interrogation protocols drawn up at the investigation stage are irrelevant to the court, given the principle of direct examination of evidence. They can only be used to prosecute a person for giving false testimony. At the same time, there is a competition between the requirements of Article 225 and Part 11 of Article 615 of the Criminal Procedure Code of Ukraine. As a way to unify this procedure, it may be worthwhile to provide for some safeguards, such as conducting such interrogation with the participation of a lawyer, to ensure the right to cross-examination.
- Ukrainian legislation, given the conditions and challenges of the armed conflict, should underscore the investigation of war crimes as a priority for pre-trial investigation bodies. It is important to ensure that these investigations become the focus of their work, and not just a pretext for media appearances. At the same time, the effectiveness of the investigation should be clearly controlled by the internal management. The current approach leads to the situation when agencies that do not have jurisdiction under Article 438 of the Criminal Code of Ukraine investigate proceedings on a residual basis.
- In practice, both judges and pre-trial investigation and prosecution agencies are affected by the consequences of the armed conflict. Massive missile attacks, general insecurity, risks to energy infrastructure, and security conditions at the workplace all require changes in approaches to work and its organization.

- The practice of investigations shows that many people are not aware that they are actually victims of war crimes. People consider themselves victims when damage is done to their health and property, but sometimes they do not realize this either.

For notes



