



**COMMUNICATION SUBMITTED UNDER ARTICLE 15
OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT**

SITUATION IN UKRAINE:

**WAR CRIMES AND CRIMES AGAINST
HUMANITY COMMITTED IN PRISONS SEIZED
AND CONTROLLED BY ANTI-GOVERNMENT
FORCES**

September 2020

TABLE OF ABBREVIATIONS

ATO	Anti-Terrorist Operation
CF	Correctional Facility
DPR	Donetsk Peoples' Republic
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FIDH	International Federation for Human Rights
IAC	International Armed Conflict
ICC	International Criminal Court
ICTY	International Criminal Tribunal for the Former Yugoslavia
KHPG	Kharkiv Human Rights Protection Group
LPR	Luhansk Peoples' Republic
NIAC	Non-International Armed Conflict
PTDC	Pre Trial Detention Centre
SBU	Ukrainian State Security
UAF	Ukrainian Armed Forces

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I. INTRODUCTION

1. The Kharkiv Human Rights Protection Group (KHPG) and the International Federation for Human Rights (FIDH) submit the following Communication under Article 15 of the Rome Statute to the International Criminal Court (ICC Statute).
2. This Communication is focused on crimes committed against detainees who had been serving their sentences, or were remanded into custody, in prisons located in Luhansk and Donetsk provinces of Eastern Ukraine at the time of the outbreak of armed conflict in the region in 2014. An estimated 16,200 prisoners in some 36 prisons had unwittingly found themselves in the epicentre of a conflict zone, and by December 2014, had become *de facto* prisoners of anti-government forces and the self-proclaimed authorities of the Luhansk and Donetsk “Peoples’ Republics” (known as LPR and DPR). The Communication also contains evidence of crimes against prisoners who were detained and/or “convicted” by anti-government forces following the outbreak of the armed conflict.
3. The prisoners may be categorised into the following groups:
 - Those who were convicted and whose sentence had entered into force before the outbreak of the armed conflict;
 - Those who were convicted and were remanded in custody but whose sentence had not entered into force before the outbreak of the armed conflict;
 - Those who were remanded into custody and were being tried in a court of first instance prior to the outbreak of the armed conflict;
 - Those who were remanded into custody and were subject to a pre-trial investigation prior to the outbreak of the armed conflict; and
 - Those who were detained and/or “convicted” by anti-government forces following the outbreak of the armed conflict.
4. The purpose of this Communication is to document and seek accountability for crimes against a vulnerable and largely forgotten group of people who seem to have slipped through the gaps of human rights advocacy and international justice efforts. Whilst these prisoners are for the most part civilians, they do not fall neatly into the international humanitarian law categories of civilian internees or

‘prisoners of war’. An overwhelming number of them occupy a unique status, having first been imprisoned by *de jure* Ukrainian authorities and subsequently abandoned to their fate in the custody of anti-government forces and LPR and DPR *de facto* authorities. Those who were convicted by Ukrainian courts have been subjected to a new set of rules on parole, early release and amnesty. Those who were remanded into custody but not yet convicted found themselves tried and judged by a new set of pseudo-judicial organs working within a completely new legal framework.

5. This legal ‘grey area’ rendered the prisoners vulnerable to arbitrary detention, ill treatment and extra-judicial punishment. As set forth in this Communication, the prisoners were exposed to conduct that amounts to crimes under Article 5 of the ICC Statute, namely war crimes and crimes against humanity. These crimes were sufficiently grave to merit a full investigation and prosecutions at the ICC. The victims’ status as persons convicted or suspected of committing crimes should not deprive them of the protections due to them under international law, as civilians caught up in armed conflict.
6. To this end, the Filing Parties respectfully request the Prosecutor of the International Criminal Court to consider the information set forth in this Communication, with the view to investigating and prosecuting those responsible for the alleged crimes.

II. EXECUTIVE SUMMARY

7. From March 2014, separatist paramilitaries backed by Russian armed and security forces (anti-government forces) began seize control over territory in Donetsk and Luhansk provinces in Eastern Ukraine. The Government of Ukraine launched a military operation to re-establish its authority over the breakaway region. By the summer of 2014, anti-government forces established self-proclaimed “republics” named Donetsk Peoples’ Republic (DPR) and Luhansk Peoples’ Republic (LPR). By December 2014, anti-government forces had established a firm foothold over approximately 7% of Ukraine’s territory, and the armed conflict gradually morphed into low-intensity protracted trench warfare.
8. In the course of hostilities, 36 prisons containing 16,200 prisoners from all over Ukraine, fell under the control of anti-government forces. The Government of Ukraine took no or no adequate steps to evacuate the prisoners away from active hostilities. Thus, the vast majority of prisoners were simply abandoned to their fate, and were effectively transferred into the custody of anti-government forces. These prisoners included persons convicted and sentenced by Ukrainian courts, as well as those awaiting trial in pre-trial detention. For many people in the latter category, criminal case files setting out allegations against them were destroyed, taken to Government-controlled territory or lost. Gradually, the newly minted *de facto* courts and prosecuting authorities ‘re-created’ their case-files and ‘tried’ them in proceedings that lacked independence, impartiality and fairness. Others had their Ukrainian sentences ‘revised’ by the new authorities. None benefited from Ukrainian parole and early release laws that they were entitled to.
9. Once the prisons were seized by anti-government forces, prisoners experienced a marked deterioration in their detention conditions. Their first encounter with the new authorities was usually marked by indiscriminate violence, abuse, intimidation and debasement. Those perceived to be ‘pro-government’ (based on place of origin, language, statements or clothes) were subjected to the harshest forms of abuse and violence. For some – depending on the group or warlord in charge – systematic violence persisted for months and years. The prisons began to run out of food, leading to starvation and extortion by the new prison authorities.

The armed conflict raging outside the prison walls regularly knocked out heating, electricity and water supplies, damaged prison buildings and killed or injured prisoners. The prison authorities did nothing to safeguard prisoners' lives – most of them would run to shelter while the prisoners remained locked in their cells. To make matters worse, anti-government forces used the prisons to launch attacks on Ukrainian government positions, attracting retaliatory fire that led to deaths, injury and trauma. Starving, unwashed, cold and in constant fear, prisoners languished in partially destroyed cells. Breaks in artillery fire were filled with violence at the hands of soldiers on break from combat.

10. This conduct took place in the context of and was associated with an armed conflict between Russian-backed (and controlled) anti-government forces and Ukrainian armed forces and paramilitary battalions. Further or alternatively, the conduct was part of the anti-government forces' widespread or systematic attack on the civilian population, pursuant to a policy to commit such an attack.
11. This Communication is based on 266 interviews conducted by KHPG with former and current prisoners, as well as information received from the Government of Ukraine and open sources. KHPG and FIDH (the Filing Parties) analysed the information using the Rome Statute of the International Criminal Court (ICC Statute). Based on evidence presented in this Communication, there is a reasonable basis to believe that the following ICC Statute crimes have taken place between April 2014 and August 2020, in prisons controlled by anti-government forces in Eastern Ukraine:
 - War crime of unlawful confinement (ICC Statute, Article 8(2)(a)(vii)) and/or crime against humanity of imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law (ICC Statute, Article 7(1)(e));
 - War crime of denying fair and regular trial (ICC Statute, Article 8(2)(a)(vi)) or the war crime of sentencing without due process (ICC Statute, Article 8(2)(c)(iv));
 - War crime of cruel or inhuman treatment (ICC Statute, Article 8(2)(c)(i) and/or Article 8(2)(a)(ii));

- War crime of outrages upon personal dignity (ICC Statute, Article 8(2)(c)(ii) or Article 8(2)(b)(xxi)); and/or
- Crime against humanity of other inhumane acts (ICC Statute, Article 7(1)(k).

12. Additionally, further investigation is needed to determine whether the alleged forms of cruel or inhuman treatment amount to the war crime and/or crime against humanity of torture (ICC Statute, Article 8(2)(a)(ii), Article 8(2)(c)(i) and/or Article 7(1)(f)). Further investigation is also needed to determine whether the elements of the crime of using protected persons as shields are made out (ICC Statute, Article 8(2)(b)(xxiii)).

13. The Filing Parties submit that the alleged conduct is sufficiently grave to be admissible under Article 17(1)(d) of the ICC Statute. The crimes set forth in this Communication have affected thousands of vulnerable prisoners, leading to serious injury and long lasting trauma. Moreover, the Filing Parties understand that although Ukrainian authorities may be willing to investigate and prosecute members of anti-government forces for crimes set forth in this Communication, they are unable to do so due to the lack of access to evidence and suspects, and the absence of relevant provisions in the Criminal Code of Ukraine (Article 17(1) of the ICC Statute). Furthermore, there are no substantial reasons to believe that an investigation would not serve the interests of justice (Article 53(1)(c) of the ICC Statute).

14. For the foregoing, the Filing Parties respectfully request the ICC Prosecutor to seek authorisation to open a full investigation into crimes alleged in this Communication.

III. FILING PARTIES

15. This Article 15 Communication is being submitted by KHPG and FIDH.
16. The Kharkiv Human Rights Protection Group (KHPG) is a Ukrainian non-governmental non-profit human rights organization, founded in 1989 as part of Kharkiv Memorial Society. KHPG protects human rights as part of specific cases, processing up to 3 thousand written applications every year, keeping the Ukrainian state and public informed about human rights and analysing the observance of human rights and fundamental freedoms in Ukraine. KHPG is striving to improve the situation in Ukraine when it comes to such issues as the right to life; torture and ill-treatment; arbitrary detentions; freedom of speech and information; the right to privacy; the rights of vulnerable groups such as convicted prisoners, people living with HIV/AIDS (PLWH), drug addicts, asylum seekers and others.
17. Established in 2003, KHPG's strategic litigation centre handles up to 200 strategic cases a year in domestic courts and the European Court of Human Rights (ECtHR). KHPG's strategic litigation centre lawyers have won over 120 cases in the ECtHR that involved Articles 2, 3, 5, 6, 8, 13 and others of the European Convention on Human Rights (ECHR), with over 400 cases pending examination by the ECtHR, more than half of those concerning crimes committed during the conflict in the country's east. In 2016-2018 KHPG conducted 46 monitoring visits to settlements located near the contact line to collect information about these crimes. This Communication was prepared by KHPG employees Hanna Ovdienko, Gennady Tokarev and Yevgeniy Zakharov.
18. Documentation of information and the preparation of this Communication was made possible through grants from The United Nations Development Programme in Ukraine, International Renaissance Foundation, European Commission, Open Society Foundations, National Endowment for Democracy (United States) and the Democracy Commission of the United States Embassy in Ukraine. KHPG also worked together with Donbas SOS and the Ukrainian Helsinki Human Rights Union in various aspects of information collection.

19. The International Federation for Human Rights (FIDH) is an international and independent human rights NGO established in 1922, uniting today 192 member organisations in 117 countries around the world. FIDH's mandate is to take action for the protection of victims of human rights violations, for the prevention of these violations and to bring perpetrators to justice. In order to do so, FIDH works with its member and partner organisations to document human rights violations, conduct advocacy work as well as strategic litigation in support of victims' rights to truth, justice and reparation. One of FIDH priorities is to fight impunity and protect populations from the most serious crimes.
20. FIDH International Secretariat's headquarters are based in Paris (France) and FIDH has a delegation to the International Criminal Court (ICC) in The Hague (the Netherlands) since 2004. FIDH has been bringing representatives of member and partner organisations to The Hague to increase their capacity relating to international justice, the ICC and documenting serious human rights violations, to strengthen their strategic litigation and to enable an improved relationship between them and the different ICC organs. FIDH has also submitted numerous Communications under Article 15 of the ICC Statute to the Office of the Prosecutor of the ICC on different situations where ICC Statute crimes were or are committed and no genuine national investigations and prosecutions are undertaken. FIDH's delegation in The Hague also closely monitors the ICC activities and participates in various consultations of the Court with NGOs, especially relating to victims' rights.
21. FIDH's member organisation in Ukraine is the Center for Civil Liberties (CCL), which joined FIDH in 2016. However, FIDH has been working on the human rights situation in Ukraine since before 2016, with many partner organisations, including KHPG, the Eastern-Ukrainian Center for Civic Initiatives (EUCCI), and other members of the Coalition "Justice for Peace in Donbas", as well as civil society organisations working on Maidan events and Crimea. In February 2020, FIDH joined the CivilM+ platform, where it continues its collaboration with Ukrainian, Russian and international NGOs for the resolution of the armed conflict in Eastern Ukraine.
22. With its member and partner organisations, FIDH has conducted several advocacy missions in Ukraine to call for accountability for crimes committed

since 2014, in particular during the Maidan events and in the context of the armed conflict in Eastern Ukraine and violations committed in Crimea. FIDH also strengthened its partners' capacity to document human rights violations with a litigation purpose, through training sessions in Kharkiv and Kiev, focusing in particular on the documentation and litigation of sexual and gender-based crimes. In October 2018, FIDH submitted an Article 15 communication on Sexual Crimes in the Conflict in Eastern Ukraine.¹ It has also continuously advocated for effective remedies for victims of human rights violations committed in Ukraine at regional and international fora.

23. For the purpose of this Communication, FIDH hired Alexandre Prezanti, partner of Global Diligence LLP, as a consultant to assist KHPG and FIDH with the documentation and analysis of the evidence and the drafting of this Communication. The finalisation of this Communication was made possible with the support of the Ministry of Foreign Affairs of the Netherlands.

¹ FIDH and EUCCI, 'Communication under Article 15 of the Rome Statute of the International Criminal Court: Sexual crimes in the conflict in Eastern Ukraine', October 2018.

IV. METHODOLOGY

A. Sources

24. The following sources of information were particularly used during the preparation of this Communication:
- a. 16 in person interviews with detainees who were transferred from the conflict zone to other Ukrainian regions or were released after having served their sentences;
 - b. 41 phone interviews with detainees still being held in prisons located on territory controlled by anti-government forces.
 - c. 12 replies to inquiries sent in accordance with the Law of Ukraine “On Access to Public Information” from the Ministry of Justice, Ukrainian State Security, Ministry of Internal Affairs, Ministry of Defence, State Criminal Enforcement Service of Ukraine, State Penitentiary Service and the Ombudsman.
 - d. Daily government reports on the situation in the conflict zone, as well as reports from other sources on the conflict including those prepared by the Organization for the Security and Co-operation in Europe (OSCE) and the UN monitoring missions in Ukraine.
25. At the stage of determining which sources to use, we encountered considerable difficulties due to the inaccessibility of prisons located on territory controlled by anti-government forces. The procedure established by anti-government forces does not allow visits to prisons by national or international monitors. That is why we used information from the daily and periodic reports of international organizations exclusively for assessing the risks to the prisoners’ lives arising from the shelling of certain settlements. We also discovered that media outlets of the “LPR” and “DPR” are not covering human rights abuses in prisons, aside from the incidents when artillery missiles struck prison grounds directly, resulting in casualties among the prisoners. Consequently, the above sources were treated as secondary and had no significant effect on the contents of this Communication.
26. We mainly relied on the testimonies of persons that were held in prisons located on territory controlled by anti-government forces at the time of

documentation. We talked on the phone and hotlines with those who remain in the temporarily occupied territory, with 192 prisoners and two employees interviewed in this manner. All interviewees were informed of the purpose of the interviews in advance. For the purposes of this Communication we also conducted 9 monitoring visits to prisons located in government-controlled territory between December 2017 and May 2018, during which we interviewed 63 inmates who had been transferred there from the conflict zone. We also interviewed six people who had been released from prisons controlled by anti-government forces, after serving their sentence, as well as three family members of detainees. This Communication contains only the testimonies of those interviewees who had consented to this submission.

27. Thus, we interviewed 266 people, covering all prisons located on the territory controlled by anti-government forces, although it should be mentioned that not all prisons are represented equally due to communication problems in certain prisons (specifically at the Luhansk PTDC and Michurinska CF No. 57) as well as due to poor cell-phone connection in LPR/DPR-controlled territory. The majority of interviewed detainees are from the Yenakiyivska CF No. 52, Donetsk CF No. 124, Makiyivska CF No. 32 and Zakhidna CF No. 97, which is why our information about these prisons is more complete.

28. For general official information we sent inquiries to the State Criminal Enforcement Service of Ukraine, the Ministry of Justice, State Judicial Administration of Ukraine, the Ombudsman and the National Policy of Ukraine regarding the legal status of prisoners held in prisons under LPR/DPR control, their numbers, conditions of detention as well as transfer mechanisms. We also used publicly available sources from the Internet, printed media and official websites of government agencies.

B. Survey Methodology

29. While working on this Communication, we developed a methodology for collecting and processing information concerning ICC Statute crimes perpetrated against persons in detention. This methodology included set questions as well as a list of sources that could provide reliable information about relevant prisons.

30. The collection of testimonies from persons held in detention in LPR/DPR-held territory was to be conducted in accordance with a specific plan. Thus, we developed a questionnaire for interviewing persons held in places of detention (see Annex B).
31. The questionnaire contains questions about the following:
- a. General information about the respondent;
 - b. Date and term of the sentence as well as the court that delivered it;
 - c. Administration of “justice” by the quasi-judicial bodies of the so-called “LPR/DPR”;
 - d. Mechanism of prison takeover and persons that carried it out, as well as the role of prison personnel in this;
 - e. The use of inmates in prisons as human shields during shelling;
 - f. The shelling of prisons, destruction of prison buildings, injuries and deaths among the inmates;
 - g. Evacuation mechanism and the reasons why it was not effective;
 - h. Absence of identification documents among the inmates; difficulties they face when crossing the contact line;
 - i. Conditions of detention after the capture of prisons (heating, water supply, electricity, food, medical care, etc.);
 - j. Instances of torture and other forms of ill-treatment experienced by respondents or other persons; forced labour, forced participation in the hostilities, restrictions on correspondence and meetings with family members, illegal searches; and
 - k. Ability to apply for a transfer to other regions of Ukraine, the mechanism of such transfers, as well as the problems encountered by respondents after a transfer.
32. The survey was confidential and would normally last from 30 minutes to 2 hours for each person.

C. Methodology for collecting, verifying and sorting information on prisons located in LDP/DPR-held territory

33. Information collected during the survey was entered into KHPG's database, which allowed us to consolidate data on widespread ICC Statute crimes and obtain various statistics on victims and suspected perpetrators, sorting them by type, dates and location of the violation. These statistics have been used to present allegations put forth in this Communication.
34. However, in addition to automatic software-assisted consolidation, we also analysed each interview individually. During the first stage of the analysis, the information provided in the questionnaire was checked for presence of the elements of ICC Statute crimes. If there were any, we would qualify the findings in accordance with the ICC Statute.
35. During the second stage, the already processed questionnaires were grouped by type in accordance with the following criteria: legal qualification of the criminal act, location where the act was committed, and the time and date of its commission.
36. Given that our main source of information was the testimony of victims of crimes themselves, and that our sampling of the victims was rather limited due to external circumstances (lack of access to prisons, low number of prisoners transferred to government-controlled territory, limited phone communication with prisoners on LDP/DPR-held), the information collected had to be verified. We introduced a rule that information would be considered reliable if confirmed by at least three respondents. At the same time, some of the information could not be verified in this way due to an insufficient number of respondents. The information not confirmed by three respondents would be considered plausible. Information confirmed by some respondents but disputed by others was considered questionable.

D. Analysis of collected data

37. This Communication concerns a specific category of victims of crimes committed during the conflict in Eastern Ukraine, namely persons held in prisons

on territory controlled by anti-government forces. Analysis of the information provided by the victims themselves differs significantly from the study of other crimes, since respondents can provide information not only about themselves but also about many other victims that were detained in the same prisons, and thus had an analogous experience. When there are two or more respondents from the same prison, it allows us to judge not only the respondent's situation with regard to abuses and crimes, but also that of the majority of inmates of that particular prison. Several (up to five) respondents from the same prison make it possible to see the full picture of crimes committed at that prison. More than ten respondents make it possible to speak not only about the general situation at the prison, but also about specific cases of crimes committed against persons other than the respondents. This approach to data analysis allowed us to demonstrate the possibility that the actual number of victims is greater than those we interviewed. Such forms of ill treatment as mass beatings, inhuman conditions of detention and the use of prisoners as human shields against shelling during hostilities were clearly perpetrated not only against the respondents, but also against all other prisoners detained at the same prisons.

V. FACTUAL BACKGROUND

A. Outbreak of Armed Conflict in Eastern Ukraine

38. In November 2013 protests erupted in Kyiv and other cities across Ukraine in response to President Yanukovich's decision to step back from an association agreement with the European Union, endemic corruption and economic stagnation (the *Euromaidan* protests).² The protests eventually turned violent as riot police and protesters clashed in Kyiv's Maidan Square and other city centres.³ Daily clashes continued until the end of February 2014. In Kyiv alone, the violence led to more than 100 deaths (including 18 police officers) and thousands of injuries.⁴

39. On 23 February 2014, President Yanukovich fled Ukraine with the help of Russian Special Forces,⁵ and was replaced by a new interim government, marking the end of his presidency and ushering in a new interim government.⁶ On the same day, Russia's President Vladimir Putin officially launched the 'operation for returning Crimea to Russia'.⁷ In the midst of events in Kyiv, pro and anti-Euromaidan protesters began to clash in city centres on the Crimean Peninsula.⁸

2 BBC, 'Ukraine crisis: Timeline', 13 November 2014, available at: <https://www.bbc.co.uk/news/world-middle-east-26248275>.

3 For a visual representation of the violence see Vice, 'Ukraine Burning', 20 February 2014, available at: <https://www.youtube.com/watch?v=7eTuFAR169s>.

4 OHCHR, Accountability for killings in Ukraine from January 2014 to May 2016, available at: https://www.ohchr.org/Documents/Countries/UA/OHCHRThematicReportUkraineJan2014-May2016_EN.pdf,

5 Россия 1, "Крым. Путь на Родину", Кондрашов А., available at: https://russia.tv/brand/show/brand_id/59195/ (last accessed: 12/06/2016); See also: BBC, Putin: Russia Helped Yanukovich to Flee Ukraine, 24 October 2014, available at: <http://www.bbc.com/news/world-europe-29761799> (last accessed: 20/04/2016).

6 Постанова Верховної Ради України № 757-VII "Про самоусунення Президента України від виконання конституційних повноважень та призначення позачергових виборів Президента України", 22 лютого 2014, available at: <http://zakon3.rada.gov.ua/laws/show/757-18> (last accessed: 12/06/2016).

7 Россия 1, "Крым. Путь на Родину", Кондрашов А., available at: https://russia.tv/brand/show/brand_id/59195/; See also: BBC, "Putin Reveals Secrets of Russia's Crimea Takeover Plot", 9 March 2015, available at: <http://www.bbc.com/news/world-europe-31796226>.

8 In Simferopol, thousands of pro-Euromaidan protesters gathered in front of the Parliament building – Interfax Ukraine, "Crimean Tatars, pro-Russia supporters approach Crimean parliament building", 26 February 2014, available at: <http://en.interfax.com.ua/news/general/192882.html>; In Sevastopol tens of thousands protested against the new authorities in Kyiv – The Guardian, "Ukraine crisis fuels secession calls in pro-Russian south", 23 February 2014, available at: <http://www.theguardian.com/world/2014/feb/23/ukraine-crisis-secession-russian-crimea>; In Kerch protesters attempted to remove the Ukrainian flag from the city hall flag-pole – Unian, "В Керчи митингующие сорвали украинский флаг и мэрии и повесили российский", 23 February 2014, available at: <http://www.unian.net/politics/888686-v-kerchi-mitinguyuschie-sorvali-ukrainskiy-flag-i>

On 27 February 2014, the Crimean Supreme Council was stormed and captured by armed men with unmarked uniforms.⁹ Parliamentarians inside the building held an emergency session at gunpoint, during which they dismissed the constitutionally mandated government and installed Sergey Aksyonov – then leader of a three-seat minority Russian Unity party – as Chairman of the Council of Ministers of Crimea and *de facto* head of Crimea.¹⁰

40. On 1 March 2014, the Russian Parliament granted President Putin the right to use military force in Ukraine ‘to protect Russian interests’.¹¹ On the same day, the now *de facto* head of Crimea – Aksyonov – asked President Putin to provide assistance to ‘ensure peace’ in Crimea.¹² Between 1 and 23 March 2014, an invading force made up of Russian armed forces (dubbed ‘little green men’¹³) and privately funded militias (the so-called ‘Crimean Self Defence’) stormed and seized Ukrainian military and state assets.¹⁴

41. On 16 March 2014, occupying forces held a ‘referendum’ on the independence of the Crimean Peninsula in violation of Ukrainian and international law.¹⁵ The

merii-i-povesili-rossiyskiy.html.

9 Reuters, “Ukraine leader warns Russia after armed men seize government HQ in Crimea”, 27 February 2014, available at: <http://www.reuters.com/article/us-ukraine-crisis-crimea-idUSBREA1P23U20140227>; Interfax-Ukraine, “Здание крымского Парламента и Правительства захвачены неизвестными”, 27 February 2014, available at: <http://interfax.com.ua/news/general/193046.html>; The Guardian, “Crimean parliament seized by unknown pro-Russian gunmen”, 27 February 2014, available at: <http://www.theguardian.com/world/2014/feb/27/crimean-parliament-seized-by-unknown-pro-russian-gunmen>; The involvement of Russian Forces in the capture of the Parliament of Crimea was confirmed by Russian Admiral Igor Kasatonov (former commander of the Black Sea Fleet) – cited in Putin.War: An Independent Expert Report, May 2015, p.14, available at: <http://4freerussia.org/putin.war/Putin.War-Eng.pdf>.

10 Official Website of the *de facto* Council of Crimea, ‘Решение ВР АРК ‘№1656-6/14 "О назначении Аксенова С.В. на должность Председателя Совета министров Автономной Республики Крым"’, 27 Feb. 2014, available at: <http://crimea.gov.ru/act/11636>

11 Постановление Совета Федерации “Об использовании Вооруженных Сил Российской Федерации на территории Украины”, 1 марта 2014, available at: <http://www.council.gov.ru/activity/legislation/decisions/39979/>; It has been alleged that the law was procedurally defective as Parliament lacked quorum. Lenta.Ru. “Сбой какой-то в машине, да? Как Совет Федерации разрешил Путину ввести войска на Украину”, Ключкин А., Дмитриев Д., 13 марта 2014, available at: <https://lenta.ru/articles/2014/03/13/sovet/>.

12 BBC, “Ukraine crisis: Crimea leader appeals to Putin for help”, 1 March 2014, available at: <http://www.bbc.co.uk/news/world-europe-26397323>.

13 BBC, “‘Little green men’ or ‘Russian invaders’?”, 11 March 2014, available at: <https://www.bbc.co.uk/news/world-europe-26532154>.

14 BBC, “Ukraine Crisis: Timeline”, 13 November 2014, available at: <https://www.bbc.co.uk/news/world-middle-east-26248275>.

15 OSCE, “OSCE Chair says Crimean referendum in its current form is illegal and calls for alternative ways to address the Crimean issue”, 11 March 2014, available at: <http://www.osce.org/cio/116313>; European Commission for Democracy Through Law (Venice

referendum was not monitored by independent or internationally recognised observers, and was overwhelmingly condemned by the international community.¹⁶ On 17 March 2014, following a disputed vote for independence, the Supreme Council of Crimea declared independence from Ukraine, requisitioned Ukrainian state property on the Peninsula and submitted its request to accede to the Russian Federation.¹⁷ On 18 March 2014, the ‘Agreement on the accession of the Republic of Crimea to the Russian Federation’ was signed in the Kremlin.¹⁸ The agreement was ratified and signed into law on 21 March 2014.¹⁹

Commission), Opinion: On whether the decision taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to organise a referendum on becoming a constituent territory of the Russian Federation or restoring Crimea’s 1992 Constitution is compatible with constitutional principles”, Council of Europe, 21 March 2014, available at: <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282014%29002-e>;

Рішення Конституційного Суду України у справі за конституційними поданнями виконуючого обов’язки Президента України, Голови Верховної Ради України та Уповноваженого Верховної Ради України з прав людини щодо відповідності Конституції України (конституційності) Постанови Верховної Ради Автономної Республіки Крим "Про проведення загальнокримського референдуму" (справа про проведення місцевого референдуму в Автономній Республіці Крим), 14 березня 2014, available at: <http://www.ccu.gov.ua/doccatalog/document?id=242321>

16 European Union External Action, “The EU non-recognition policy for Crimea and Sevastopol”, March 2016, available at: http://eeas.europa.eu/top_stories/pdf/the-eu-non-recognition-policy-for-crimea-and-sevastopol-fact-sheet.pdf; UNGA, “Resolution adopted by the General Assembly on 27 March 2014: 68/262 – Territorial integrity of Ukraine”, A/RES/68/262, 1 April 2014; UNSC, “Draft Resolution S/2014/189”, 15 March 2014; NATO, “North Atlantic Council statement on the situation in Ukraine”, 2 March 2014, available at: http://www.nato.int/cps/en/natolive/official_texts_107681.htm

17 Постановление ГС РК “О независимости Крыма”, 17 марта 2014, available at: <http://crimea.gov.ru/act/11748>; Постановление ГС РК “О национализации предприятий и имущества морского транспорта сферы управления Министерства инфраструктуры Украины и Министерства аграрной политики и продовольствия Украины, расположенных на территории Республики Крым и г. Севастополя”, 20 марта 2014, available at: <http://crimea.gov.ru/act/11761>; Договор между Российской Федерацией и Республикой Крым о принятии в Российскую Федерацию Республики Крым и образовании в составе Российской Федерации новых субъектов подписан в г. Москве 18 марта 2014, available at: http://www.consultant.ru/document/cons_doc_LAW_160398/; See also BBC, “Crimean parliament formally applies to join Russia”, 17 March 2014, available at: <http://www.bbc.co.uk/news/world-europe-26609667>.

18 Договор между Российской Федерацией и Республикой Крым о принятии в Российскую Федерацию Республики Крым и образовании в составе Российской Федерации новых субъектов подписан в г. Москве 18 марта 2014, available at: http://www.consultant.ru/document/cons_doc_LAW_160398/ (last accessed: 12/06/2016); See also: Kremlin.ru, “Agreement on the accession of the Republic of Crimea to the Russian Federation signed”, 18 March 2014, available at: <http://en.kremlin.ru/events/president/news/20604>.

19 Федеральный конституционный закон N 6-ФКЗ “О принятии в Российскую Федерацию Республики Крым и образовании в составе Российской Федерации новых субъектов - Республики Крым и города федерального значения Севастополя”, 21 марта 2014, available at: http://www.consultant.ru/document/cons_doc_LAW_160618/19bbbf6a6e5a06c0d9e8d958af6464287880b069/; BBC, “Ukraine: Putin signs Crimea annexation”, 21 March 2014, available at: <http://www.bbc.co.uk/news/world-europe-26686949>.

42. Meanwhile, anti-Euromaidan protests appeared across cities in Eastern Ukraine in March 2014, calling for Russian language rights, federalisation and greater ties with Russia.²⁰ On 4 March 2014, the Regional State Administration building in Donetsk was stormed by pro-Russia protesters led by self-appointed peoples' governor – Pavel Gubarev.²¹ On 6 March 2014, the Ukrainian State Security (SBU) retook the building and arrested Gubarev and 70 of his supporters.²² On 9 March, the Luhansk Municipal Administration building was stormed by protesters demanding a referendum on the region's accession to Russia, proclaiming Alexandr Kharitonov as the region's 'peoples' Governor'.²³ Clashes between pro and anti Russia protesters and Ukrainian law enforcement took place in Donetsk, Luhansk, Kharkiv, Odessa, Mariopol and other towns across Eastern Ukraine in March.²⁴ On 22 March 2014, Crimea's *de facto* premier Sergei Aksyonov issued a call to arms to the people of southern and eastern Ukraine in a video released on YouTube.²⁵ On 6 and 7 April 2014, pro-Russian protestors and armed militiamen stormed local administration and SBU buildings in Donetsk and Luhansk, seizing caches of weapons.²⁶ Protesters declared the birth of the 'peoples' republics' – dubbed Donetsk Peoples' Republic (DPR) and Luhansk Peoples' Republic (LPR) – calling on unification with Russia.²⁷

20 Reuters, 'Tide of opinion turns against Russia in Ukraine's east', 5 March 2014, available at: <http://news.trust.org/item/20140304195551-n3lid/>.

21 The Telegraph, 'Ukraine crisis: separatist in Donetsk proclaims 'people's government'', 4 March 2014, available at: <https://www.telegraph.co.uk/news/worldnews/europe/ukraine/10676785/Separatist-in-Donetsk-proclaims-peoples-government.html>.

22 The Telegraph, 'Pro-Russian leader arrested in Donetsk as Kiev hits back', 6 March 2014, available at: <https://www.telegraph.co.uk/news/worldnews/europe/ukraine/10681786/Pro-Russian-leader-arrested-in-Donetsk-as-Kiev-hits-back.html>.

23 BBC, 'Ukraine crisis: Inside tent HQ of new 'peoples governor' of Lugansk', 11 March 2014, available at: <https://www.bbc.co.uk/news/av/world-europe-26540197/ukraine-crisis-inside-tent-hq-of-new-peoples-governor-in-luhansk>; Kharitonov was arrested by the SBU on 14 March 2014 – Interfax, 'SBU detains self-declared 'governor' of Luhansk region Kharytonov', 14 March 2014, available at: <https://en.interfax.com.ua/news/general/195932.html>.

24 RT, 'Ukraine's east on fire: Kharkov demands referendum, Donetsk prosecutor's HQ stormed', 16 March 2014, available at: <https://www.rt.com/news/ukraine-kharkov-rights-donetsk-202/>.

25 "Крым: обращение Сергея Аксёнова к Юго-Востоку Украины", 9 March 2014, available at: <https://www.youtube.com/watch?v=bZ4TSIE8Zs0>.

26 KyivPost, 'Police: Protesters seize weapons in Ukrainian Security Service's building in Luhansk', 7 April 2014, available at: <https://www.kyivpost.com/article/content/ukraine-politics/protesters-seize-weapons-in-ukrainian-security-services-building-in-luhansk-police-342289.html>.

27 BBC, 'Ukraine crisis: Protesters declare Donetsk 'republic'', 7 April 2014, available at: <https://www.bbc.co.uk/news/world-europe-26919928>; UN News Centre, "Unrest in eastern Ukraine risks 'seriously destabilizing' entire country – UN rights official", 16 April 2014, available at: http://www.un.org/apps/news/story.asp?NewsID=47601#.V2o_Vut97IU; The Guardian, "Ukraine crisis: Pro-Russia forces lay siege to official buildings in east – live", 14 April 2014, available at:

43. On 12 April 2014, former Russian Federal Security Service (FSB) colonel Igor Girkin (also known as Strelkov) led a group of militants from Crimea into Donbas, assuming control over administrative, police and SBU buildings in the city of Slavyansk.²⁸ On 15 April 2014, Ukraine's acting President, Olexander Turchynov, announced the start of an 'anti-terrorist operation' (ATO) to liberate occupied areas.²⁹ On 11 May 2014, anti-government forces held 'self-rule' referendums in occupied parts of Donetsk and Luhansk Provinces, declaring independence from Ukraine.³⁰ On 12 May 2014, Donetsk and Slavyansk-based anti-government forces were consolidated under one commander structure.³¹
44. Clashes between anti-government militias and Ukrainian Armed Forces (UAF) intensified in May 2014. On 2 May 2014, anti-government forces downed two UAF Mi-24 helicopters and captured the surviving crewmembers.³² In response, the UAF began to use heavy artillery on separatist positions in and around Slavyansk.³³ On 29 May 2014, anti-government forces shot down a UAF helicopter carrying fourteen soldiers and National Guard General Kulchytskyi.³⁴
45. By July 2014, the UAF re-asserted authority and control over Sieverodonetsk, Stanytsia-Luhanska, Lysychansk, Popasna, Marjinka, Savur-Mohyla, Debaltseve and other smaller towns in Donetsk and Luhansk provinces.³⁵ On 5 July 2014, an

<https://www.theguardian.com/world/2014/apr/14/ukraine-deadline-withdraw-cities-approaches>; The Atlantic, "Battling for Control of Eastern Ukraine", 17 April 2014, available at: <http://www.theatlantic.com/photo/2014/04/battling-for-control-of-eastern-ukraine/100719/>.

28 BBC, 'Ukraine gunmen seize buildings in Sloviansk', 12 April 2014, available at: <https://www.bbc.com/news/world-europe-27000700>.

29 BBC, 'Ukraine says Donetsk 'anti-terror operation' under way', 16 Apr. 2014, available at: <https://www.bbc.co.uk/news/world-europe-27035196>.

30 BBC, 'Ukraine rebels hold referendums in Donetsk and Luhansk', 11 May 2014, available at: <https://www.bbc.co.uk/news/world-europe-27360146>.

31 КР, 'Командующий самообороной Славянска Игорь Стрелков: Задержанные наблюдатели — кадровые разведчики', 26 April 2014, available at: <https://www.kp.ru/daily/26225.7/3107725/>.

32 BBC, 'Ukraine crisis: Sloviansk rebels down army helicopters', 2 May 2014, available at: <https://www.bbc.co.uk/news/world-europe-27250026>.

33 KyivPost, 'Donetsk separatists say three civilians killed in Ukrainian government shelling of Sloviansk', 7 June 2014, available at: <https://www.kyivpost.com/article/content/war-against-ukraine/donetsk-separatists-say-three-civilians-killed-in-ukrainian-government-shelling-of-sloviansk-351057.html>.

34 Guardian, 'Ukraine military helicopter shot down by pro-Russia rebels over Slavyansk', 29 May 2014, available at: <https://www.theguardian.com/world/2014/may/29/ukraine-military-helicopter-shot-down-slavyansk>.

35 UNHRC, 'Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Ukraine', UN Doc. A/HRC/27/75, 19 Sep. 2014, para. 17 ('As of 30 July 2014, "safe corridors", unilaterally established by the Ukrainian forces, have enabled people to leave

offensive by the UAF pushed anti-government forces out of Slavyansk.³⁶ On 17 July 2014, Malaysia Airlines flight MH17 from Amsterdam was shot down over the Donetsk Oblast', killing all 298 passengers and crew.³⁷ An international investigation has concluded that MH17 was downed by anti-government forces using a Russian-made BUK missile, transported to Eastern Ukraine from Kursk, Russia, in late June 2014.³⁸

46. On 14 August 2014, a convoy of some twenty armoured personnel carriers and other vehicles with official Russian military plates reportedly entered Ukraine near the separatist-controlled Izvaryne border crossing.³⁹ NATO Secretary General Anders Fogh Rasmussen called the incident a 'Russian incursion' into Ukraine.⁴⁰ Between 22 and 25 August 2014, Russian artillery, personnel, and what Russia called a 'humanitarian convoy' were reported to have crossed the border into Ukrainian territory without the permission of the Ukrainian government.⁴¹ The incursion was followed by a counter-offensive by anti-government forces that stalled the UAF's advance on Donetsk and Luhansk. Between August and December 2014, anti-government forces re-gained some of the territory lost to the UAF. Intense fighting led to hundreds of casualties in battles for Donetsk Airport,

the cities of Donetsk, Horlivka and Luhansk') available at: http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/27/75.

36 BBC, 'Ukraine crisis: Rebels abandon Sloviansk stronghold', 5 July 2014, available at: <https://www.bbc.co.uk/news/world-europe-28174104> (last accessed: 4/12/2018).

37 The Guardian, 'Malaysia Airlines Plane MH17 "Shot down" in Ukraine — as it Happened', 17 July 2014, available at: <http://www.theguardian.com/world/2014/jul/17/malaysia-airlines-plane-crashesukraine-live>. See also BBC News, 'Downing of MH17 jet in Ukraine "may be war crime" – UN', 28 July 2014, available at: <http://www.bbc.com/news/world-europe-28520813>.

38 Netherlands Public Prosecution Service, "MH17: The Criminal Investigation by Joint Investigation Team", available at: <https://www.prosecutionservice.nl/topics/mh17-plane-crash/criminal-investigation-jit-mh17>; See also Bellingcat report, 'MH17: Source of the Separatist's Buk', 9 Nov. 2014, (presenting evidence that 'separatists transported [the] Buk missile system through their territory on July 17'), available at: <https://web.archive.org/web/20141109132619/https://www.bellingcat.com/wp-content/uploads/2014/11/Origin-of-the-Separatists-Buk-A-Bellingcat-Investigation1.pdf>

39 Ukrinform "Inn August 2014 Russia organized the direct invasio to Donbas region - Office of Gerenarl Prosecutor", 14 August 2017, available at:

<https://www.ukrinform.ua/rubric-ato/2285766-u-serpni-2014-roku-rosia-organizuvala-prame-vtorgnenna-na-doneccinu-gpu.html>

40 YouTube, "AP: Fogh Rasmussen slams Russia over Ukraine actions", 3 August 2015, available at: <https://www.youtube.com/watch?v=JFhAZwnjDog>.

41 Reuters, "Russian aid convoy checked; military vehicles mass near Ukraine", 15 August 2014, available at: <https://www.reuters.com/article/us-ukraine-crisis-convoy/russian-aid-convoy-checked-military-vehicles-mass-near-ukraine-idUSKBN0GF0D020140815>.

Debaltseve and Shchastya.⁴² On November 12, NATO commander Gen Philip Breedlove stated that Russian military equipment and Russian combat troops had been seen entering Ukraine in columns over several days.⁴³ On 25 January 2015, an anti-government artillery attacks on Mariopol resulted in heavy civilian casualties.⁴⁴

47. On 11 February 2015, the warring parties signed Minsk II – a ceasefire agreement calling for the withdrawal of heavy artillery.⁴⁵ Several major ceasefire violations took place throughout 2015, most notably the battle for Debaltseve in February 2015, Marinka in June 2015 and Skyrokyne.⁴⁶ From September 2015, the warring parties have made little or no concrete territorial acquisitions.⁴⁷ The contact line – a 480km stretch between the UAF and anti-government forces – has become a *de facto* border, with four road-traffic checkpoints in Donetsk Province and one pedestrian checkpoint in Luhansk Province.⁴⁸ The bulk of military action has taken place in and around settlements lying directly on the contact line. Despite numerous attempts to agree to binding ceasefires along with troop and/or equipment withdrawal, the conflict has continued in the form of low-intensity trench warfare – characterised by intermittent artillery and mortar shelling across the contact line, mining and booby-trapping of neutral territory, sporadic sniper fire and reconnaissance missions.

42 Press release to the Office of the United Nations High Commissioner for Human Rights report on the human rights situation in Ukraine, released 8 October 2014, available at: <http://www.un.org.ua/en/information-centre/news/1870>.

43 Guardian, “Russian tanks and troops crossing into Ukraine, says NATO commander”, available at: <http://www.theguardian.com/world/2014/nov/12/russian-tanks-troops-crossing-into-ukraine-nato-supreme-commander>.

44 Euronews, “At least 20 killed in rocket attack on Ukraine’s Mariupol”, 24 January 2015, available at: <https://www.youtube.com/watch?v=HXbcUo507ME>; BBC, “Rockets kill 30 in Mariupol as rebels launch offensive”, 24 January 2015, available at: <https://www.bbc.co.uk/news/world-europe-30967949>.

45 Financial Times, “Full text of the Minsk Agreement”, 12 February 2015, available at: <https://www.ft.com/content/21b8f98e-b2a5-11e4-b234-00144feab7de>.

46 Guardian, “Ukrainian soldiers share horrors of Debaltseve battle after stinging defeat”, 18 February 2015, available at: <https://www.theguardian.com/world/2015/feb/18/ukrainian-soldiers-share-horrors-of-debaltseve-battle-after-stinging-defeat>.

47 The only settlements known to have changed hands during the period of documentation are the villages of Vodianoe, Hovoluhanskoe and Kominternove in Donetsk Province.

48 Foundation101.org, ‘8 million people crossed the contact line in 2016’, 2 Feb. 2017, available at: <https://www.foundation101.org/en/news/20170202>.

B. Ukrainian Prisons in Donetsk and Luhansk Provinces Prior to the Outbreak of Armed Conflict

48. Prior to the outbreak of armed conflict in Eastern Ukraine, Donetsk and Luhansk provinces had the highest concentration of prisons of any region of Ukraine, and the highest number of persons in detention. All prisons were located in cities, towns and other urbanised areas. At the start of 2014, there were:

- In Luhansk Region – 16 prisons⁴⁹ including: two pre-trial detention centres, two correctional centres, one penitentiary institution, three low security correctional facilities, seven medium security correctional facilities, one maximum security correctional facilities, one medical penitentiary institution.
- In Donetsk Region – 20 prisons⁵⁰ including: three pre-trial detention centres, two correctional centres, two penitentiary institutions, three low security correctional facilities, 10 medium security correctional facilities, one maximum security correctional facility, one medical penitentiary institution.

49. The estimated prison population at the start of 2014 in the parts of Luhansk and Donetsk provinces that fell under the control of anti-government forces was 16,200.

C. Impact of the Outbreak of Armed Conflict on Prisoners in Eastern Ukraine

50. Prisons located in Donetsk and Luhansk provinces remained largely unaffected during the first months of the conflict. Hostilities were being conducted at a safe distance from the prisons, whilst detained persons and prison authorities did not envisage that the armed conflict would last or impact on Ukraine's territorial integrity. From June 2014 onwards, prisons began to receive direct hits from artillery fire, and the conditions of detention deteriorated. Between August

49 Bryanka CF no. 11, Alchevsk CF no. 13, Perevalsk CF no. 15, Krasnolutsk CF no. 19, Komisarove CF no. 22, Chornukhino CF no. 23, Petrovske CF no. 24, Sukhodilsk CF no. 36, Slovianoserbsk CF no. 60, Sverdlovsk CF no. 38, Seleznevka CF no. 143, Luhansk CC no. 134, Shterivsk CC no. 137, Luhansk PI no. 17 and Starobilsk PTDC.

50 Artemivsk PI no. 6, Mariupol PTDC, Mariupol CC no. 138, Dzerzhinsk CF no. 2, Selidove CF no. 82, Priazovska CF no. 127, Zhdanivka CF no. 3, Kalinin CF no. 27, Torez CF no. 28, Kirov CF no. 33, Makiivka CF no. 32, Yenakiyev CF no. 52, Michurin CF no. 57, Mikitino CF no. 87, Western CF no. 97, Volnovakha CF no. 120, Donetsk CF no. 124, Snizhynska CF no. 127, Kyseliv CC no. 125, Donetsk PI no. 5.

and December 2014, the 15 (out of 16) prisons⁵¹ located in Luhansk region, and 14 out of 20 prisons located in Donetsk province,⁵² fell under the control of anti-government forces.

1. Reprisals against “pro-Ukrainian” prisoners

51. According to interviewed prisoners, the majority did not support anti-government forces.⁵³ Nevertheless, some prison authorities⁵⁴ sided with anti-government forces in April and May 2014, with detrimental consequences for prisoners with actual or perceived pro-Ukrainian views. Thus, “pro-Ukrainian” prisoners (identified based on expressed views, accents or television preferences) were subjected to disciplinary action by prison authorities, including solitary confinement, threats of physical violence, prohibition on visitors and phone calls, and the interception or blocks on correspondence.⁵⁵ From June 2014, Ukrainian television channels were blocked in prisons, and replaced with Russian television channels.⁵⁶

52. Prisoners from Western Ukraine were disproportionately targeted by prison authorities.⁵⁷ Some allege that they were threatened with physical violence and even execution in the event that anti-government forces take power in the region.⁵⁸ Detainees also contend that they were prohibited from speaking Ukrainian in the presence of prison authorities.⁵⁹

51 Bryanka CF no. 11, Alchevsk CF no. 13, Perevalsk CF no. 15, Krasnolutsk CF no. 19, Komisarove CF no. 22, Chornukhino CF no. 23, Petrovske CF no. 24, Sukhodilsk CF no. 36, Slovianoserbsk CF no. 60, Sverdlovsk CF no. 38, Seleznevska CF no. 143, Luhansk CC no. 134, Shterivsk CC no. 137, Luhansk PI no. 17.

52 Zhdanivka CF no. 3, Kalinin CF no. 27, Torez CF no. 28, Kirov CF no. 33, Makiivka CF no. 32, Yenakiyevo CF no. 52, Michurin CF no. 57, Mikitino CF no. 87, Western CF no. 97, Volnovakha CF no. 120, Donetsk CF no. 124, Snizhynska CF no. 127, Kyseliv CC no. 125, Donetsk PI no. 5.

53 Interview with a prisoner from Yenakiyevo CF no. 52 // KHPG Archive, SLC’s fund, inventory 4, file 07.

54 Interview with a prisoner from Yenakiyevo CF no. 52 // KHPG Archive, SLC’s fund, inventory 4, file 07

55 Interview with a prisoner from Yenakiyevo CF no. 52 // KHPG Archive, SLC’s fund, inventory 4, file 07

56 Interviews with prisoners from muliply CF // KHPG Archive, SLC’s fund, inventory 4, file 07

57 Interview with a prisoner from Donetsk CF no. 124// KHPG Archive, SLC’s fund, inventory 4, file 07

58 Interview with a prisoner from Yenakiyevo CF no. 52 // KHPG Archive, SLC’s fund, inventory 4, file 07

59 Interview with a prisoner from Michurin CF no. 57// KHPG Archive, SLC’s fund, inventory 4, file 07

2. Deaths, injuries and trauma from shelling

53. Between June and September 2014, the security situation in Luhansk and Donetsk prisons deteriorated, as the armed conflict became widespread and engulfed towns and cities where prisons were located.⁶⁰ Active hostilities began to ease from mid-2015, however, some prisons, particularly Mikitino CF no. 87 and Michurin CF no. 57 in Horlivka, continued to regularly experience artillery strikes.⁶¹

54. The following prisons were damaged from direct artillery strikes:

- Kirovske CF no. 33 – on 25 June 2014 dormitories were damaged from shelling;⁶²
- Michurin CF no. 57 – on 22 July 2014, dormitories and workshops were damaged from shelling, resulting in two prisoners' deaths and unknown number of injuries;⁶³
- Donetsk CF no. 124 – on 10 August 2014, barracks and workshops were damaged from shelling, resulting in one prisoner death, 10 injured and nearly 100 escapees;⁶⁴
- Slovianoserbsk CF no. 60 – between June and August 2014 shell fragments fell on the territory of the facility;⁶⁵
- Makiivka CF no. 32 – on 21 August 2014, the second floor of dormitories was destroyed from shelling, resulting in four deaths and eight injured;⁶⁶
- Torez CF no. 28 – in August 2014 shelling led to the death of one prisoner, and two injuries;⁶⁷

60 Most notably in the following settlements: Donetsk, Makiivka, Horlivka, Torez, Zhdanivka, Kirovske, Snizhne of Volnovakha District of Donetsk Region and Khrustalniy (Krasniy Luch town), Petrovske, Perevalsk, Sverdlovsk, Slovianoserbsk District of Luhansk Region.

61 Interviews with prisoners from multiple CFs // KHPG Archive, SLC's fund, inventory 4, file 07.

62 Interview with a prisoner from Kirovsk CF no. 33 // KHPG Archive, SLC's fund, inventory 4, file 07

63 State criminal executive service "Michurin CF was shelling", available at: <http://www.kvs.gov.ua/peniten/control/main/uk/publish/article/757958>

64 Interview with a prisoner from Yenakiyev CF no. 52 // KHPG Archive, SLC's fund, inventory 4, file 07.

65 Interview with a prisoner from Slovyanoserbsk CF no. 60 // KHPG Archive, SLC's fund, inventory 4, file 07

66 Interview with a prisoner from Makiyivska CF no.32 // KHPG Archive, SLC's fund, inventory 4, file 07

67 Interview with a prisoner from Torez CF no.28 // KHPG Archive, SLC's fund, inventory 4, file 07

- Petrovske CF no. 24 – between August - September 2014 the perimeter fencing was destroyed from shelling.⁶⁸
- Volnovakha CF no.120 – in September 2014 shelling hit the perimeter fencing wounding one prison employee.⁶⁹ Five convicts were killed that day.
- Luhansk PTDC - from April to September 2014. At that time there were active battles around the city of Lugansk.
- Kalinin CF no. 27 – in September 2014 artillery shells damaged the laundry, courtyard, workshops and perimeter fence.⁷⁰
- Chornukhino CF no. 23 – January to February 2015 multiple artillery attacks resulting in multiple injuries and extensive building damage. Prison authorities eventually abandoned the prison and prisoners to their fate.⁷¹
- Yekanakiyev CF no. 52 – in February 2015 artillery shells destroyed the mess hall and all stocks of food, killing one and injuring two persons.⁷²
- Michurin CF no. 57 – in February 2015 artillery shell damages roof of detention building, killing two and injuring at least three persons.⁷³
- Luhansk PTDC – throughout 2015 artillery shells hit mess hall and checkpoint.⁷⁴
- Makiivka CF no. 32 – in the spring of 2015 over 20 artillery hits on dormitories, mess hall, lavatory and workshops, killing four persons.⁷⁵
- Mikitino CF no. 87 – in April 2015 artillery shell fell on an administrative building.⁷⁶
- Michurin CF no. 57 – in summer of 2016 artillery shells fell onto the territory of the colony which started a fire and destroyed a part of the barracks.⁷⁷

68 Interview with a prisoner from Petrovske CF no.24 // KHPG Archive, SLC's fund, inventory 4, file 07

69 Interview with a prisoner from Volnovakha CF no. 120 // KHPG Archive, SLC's fund, inventory 4, file 07

70 Interview with a prisoner from Kalinin CF no. 27// KHPG Archive, SLC's fund, inventory 4, file 07

71 Interview with a prisoner from Chornuhino CF no. 23// KHPG Archive, SLC's fund, inventory 4, file 07

72 Interview with a prisoner from Yenakiyev CF no. 52// KHPG Archive, SLC's fund, inventory 4, file 07

73 Interview with a prisoner from Michurin CF no. 57// KHPG Archive, SLC's fund, inventory 4, file 07

74 Interview with a prisoner from Luhansk PTDC // KHPG Archive, SLC's fund, inventory 4, file 07

75 Witness 11 (Makiivka CF no. 32)

76 Interview with a prisoner from Mikition CF no. 87// KHPG Archive, SLC's fund, inventory 4, file 07

77 Interview with a prisoner from Michurin CF no. 57// KHPG Archive, SLC's fund, inventory 4, file 07

55. The shelling caused immense fear and anxiety to prisoners in affected prisons.⁷⁸ Prison authorities were clearly not prepared for the armed conflict and did not know what to do during the shelling. Prisoners were not brought to the bomb shelters, and those who were being held in the cells were not allowed to move to corridors.⁷⁹

3. Direct attacks on and capture of prisons

56. In the first months of the armed conflict, only four prisons were attacked by anti-government forces: Donetsk CF no. 124, Donetsk PI no. 5, Makiivka CF no. 32 and Yenakiyev CF no. 52. The first three were captured by anti-government forces, whilst Yenakiyev CF no. 52 was apparently attacked for the purpose of freeing two prisoners (who were subsequently returned to the prison in 2015).⁸⁰

57. By December 2014, the 15 (out of 16) prisons⁸¹ located in Luhansk region, and 14 out of 20 prisons located in Donetsk region,⁸² fell under the control of anti-government forces.

4. Conditions of detention

58. From June 2014, conditions of detention in prisons in Luhansk and Donetsk provinces began to gradually deteriorate. Sometimes all institutions without exception had interruptions of power and water supply because of the damage to the utility networks during the hostilities (Luhansk PTDC did not have power for near a month).⁸³ There were interruptions in food supply to prisons, due to armed conflict in or blockades of the settlements.⁸⁴ The worst food shortages took place

78 Interviews with prisoners from multiply CF // KHPG Archive, SLC's fund, inventory 4, file 07

79 Interviews with prisoners from multiply CF // KHPG Archive, SLC's fund, inventory 4, file 07

80 Interview with prisoners from Yenakiyev CF no. 52 // KHPG Archive, SLC's fund, inventory 4, file 07

81 Bryanka CF no. 11, Alchevsk CF no. 13, Perevalsk CF no. 15, Krasnolutsk CF no. 19, Komisarove CF no. 22, Chornukhino CF no. 23, Petrovske CF no. 24, Sukhodilsk CF no. 36, Slovianoserbsk CF no. 60, Sverdlovsk CF no. 38, Seleznevka CF no. 143, Luhansk CC no. 134, Shterivsk CC no. 137, Luhansk PI no. 17.

82 Zhdanivka CF no. 3, Kalinin CF no. 27, Torez CF no. 28, Kirov CF no. 33, Makiivka CF no. 32, Yenakiyev CF no. 52, Michurin CF no. 57, Mikitino CF no. 87, Western CF no. 97, Volnovakha CF no. 120, Donetsk CF no. 124, Snizhynska CF no. 127, Kyseliv CC no. 125, Donetsk PI no. 5.

83 Interview with prisoners from Luhansk PTDC // KHPG Archive, SLC's fund, inventory 4, file 07

in Zakhidna CF no. 97, where prisoners were reported to have swollen, distended stomachs, muscle atrophy and even died from starvation.⁸⁵

59. Many prison employees stopped going to work, most problematically medical staff.⁸⁶ Shortages in the supply of medicines and hygiene products led to dependence on humanitarian aid.⁸⁷ Some prisons became effectively shut off from the outside world. Prisoners were no longer allowed visits or phone calls, and were not allowed out of their cells for exercise.⁸⁸ From September 2014, it was no longer possible to send and receive letters and parcels to/from the rest of Ukraine.⁸⁹

5. Access to justice

60. From June 2014, due to the escalating armed conflict and associated transportation issues, most court hearings for prisoners detained in Eastern Ukraine were suspended. From 20 August 2014, the suspension of court hearings in conflict-affected regions was rendered into law.⁹⁰

61. In many cases, court officers abandoned court buildings in Eastern Ukraine. Some court officers took case materials and computers with them, whilst others abandoned them inside court buildings or burned them.⁹¹ In other cases, persons in remand on territory controlled by anti-government forces were being investigated or tried by organs located on government-controlled territory (with no access to those organs or case files).⁹² As a result, many detainees found themselves under the authority of anti-government forces with no or incomplete case file records on

84 Interview with prisoners from Luhansk PTDC // KHPG Archive, SLC's fund, inventory 4, file 07

85 Interview with prisoners from Zakhidna CF no. 97 // KHPG Archive, SLC's fund, inventory 4, file 07

86 Interviews with prisoners from multiply CF // KHPG Archive, SLC's fund, inventory 4, file 07

87 Interviews with prisoners from multiply CF // KHPG Archive, SLC's fund, inventory 4, file 07

88 Interview with prisoners from Yenakiyev CF no.52 // KHPG Archive, SLC's fund, inventory 4, file 07

89 Interviews with prisoners from multiply CF // KHPG Archive, SLC's fund, inventory 4, file 07

90 Article 1 of the Law of Ukraine "On the administration of justice and criminal proceedings in connection with the ATO".

91 Interview with prisoners from multiply CF // KHPG Archive, SLC's fund, inventory 4, file 07

92 Interview with prisoners from multiply CF // KHPG Archive, SLC's fund, inventory 4, file 07

the same territory.⁹³ Similarly, on 6 September 2014, the Ukrainian Prosecutor's Office of Donetsk Region moved across the conflict line into government-controlled territory.⁹⁴ As a result, prisoners who found themselves on territory controlled by anti-government forces lost all access to and communication with Ukrainian prosecuting authorities.⁹⁵

D. The Government's Failure to Evacuate Prisoners from the Conflict Zone

62. The Government of Ukraine failed to evacuate prisoners located in the conflict zone, exposing them to risks of injury, death and other serious human rights violations. This failure resulted from several contributing factors, including underestimating the seriousness of the crisis, lack of planning and preparation, mismanagement and incompetence by local and national authorities, some prison authorities siding with anti-government forces, and the lack of cooperation from anti-government forces. The Filing Parties contend that had evacuations been ordered in the first months of the conflict (April-May 2014), it would have been possible to evacuate the entire prison population. Conversely, by the time the Government of Ukraine began to consider the issue, anti-government forces had already secured a significant amount of territory and established quasi-state institutions.

63. From March until November 2014, the Government took no or no serious steps to evacuate prisoners from the conflict zone. The only exception to this was the evacuation of female prisoners from Chervonopartizansk CF no. 68 on 28 June 2014. This facility was evacuated based on the initiative of local prison authorities. The evacuation was also made possible due to cooperation from the so-called Dryomov Cossacks – the anti-government forces in charge of the area (the group was strongly opposed to LPR authorities). In spite of these favourable circumstances, the evacuation was delayed by over a month, and eventually conducted under heavy shelling in extremely dangerous conditions.⁹⁶

93 Interviews with prisoners from multiply CF // KHPG Archive, SLC's fund, inventory 4, file 07

94 Interview with prisoners from Donetsk PTDV // KHPG Archive, SLC's fund, inventory 4, file 07

95 Interviews with prisoners from multiply CF // KHPG Archive, SLC's fund, inventory 4, file 07

96 Interview with a prisoner from Chervonopartizansk CF no. 68 // KHPG Archive, SLC's fund, inventory 4, file 07.

64. It was not until 4 November 2014 that the National Security and Defence Council of Ukraine adopted a decree “*On Urgent Measures Concerning the Stabilization of the Social and Economic Situation in Donetsk and Luhansk Regions*”, ordering the Ministry of Justice to take urgent measures to evacuate detained persons and prison staff from the conflict zone.⁹⁷ It took the President of Ukraine a further 10 days to approve the decree – an undue delay in the context of an ongoing armed conflict.⁹⁸
65. On 18 November 2014 the Ministry of Justice held an inter-ministerial meeting to discuss the evacuation of prisoners from the conflict zone.⁹⁹ During the meeting a decision was made to evacuate prisoners from Yenakiyev CF no. 52. The question about the evacuation of other prisons was not raised at all. Yenakiyev CF no. 52 was selected for evacuation because it was located in ‘no man’s land’ – avoiding the need for negotiations with anti-government forces. A further reason was the high probability of death and injury at the facility from shelling. An evacuation was attempted on 28 November 2014,¹⁰⁰ but was abandoned as the authorities felt they were unable to guarantee prisoners’ and employees’ safety.¹⁰¹
66. From 1 December 2014, the Ukrainian authorities effectively lost contact with prison authorities in prisons located on territory controlled by anti-government forces. In parallel, Ukrainian authorities stopped funding these prisons from the national budget.¹⁰²

97 Decree of the Security Council of Ukraine “On urgent measures to stabilize the socio-economic situation in Donetsk and Luhansk regions”, available at: <https://zakon.rada.gov.ua/laws/show/875/2014#Text>

98 Presidential Approval of Decree of the Security Council of Ukraine “On urgent measures to stabilize the socio-economic situation in Donetsk and Luhansk regions”, available at: <https://zakon.rada.gov.ua/laws/show/875/2014#Text>

99 Information provided by the SPS in response to an inquiry concerning a specific person.

100 Interview with a prisoner from Yenakiyev CF no.52 // KHPG Archive, SLC’s fund, inventory 4, file 07.

101 Prisoners believe that the operation failed because of an error: Reply of the SCES to information request // KHPG Archive, SLC’s fund, inventory 4, file 07.

102 Reply to the KHPG’s request by the State criminal executive service of Ukraine // KHPG Archive, SLC’s fund, inventory 4, file 07.

E. The Integration of Ukrainian Prisons into LPR/DPR De Facto Structures

67. From May 2014, anti-government forces began to acquire quasi-state institutions and enact and enforce their own laws on the territory under their control. Ukrainian prisons were gradually brought under these new structures, and made subject to a new set of *de facto* laws and regulations.
68. On 17 July 2014 Regulation no. 17-4 of the so-called Council of Ministers of the DPR created the ‘Ministry of Internal Affairs of the DPR’, with a mandate to ensure the execution of punishments, detention of suspects, accused persons and convicts in custody, as well as other functions formerly performed by Ukrainian prison authorities.¹⁰³ The so-called Ministry of Internal Affairs was made responsible for forming and implementing state policy and rules on the execution of criminal punishments, detention of persons suspected or convicted of crimes, and the maintenance of law and order in prisons.¹⁰⁴ On 2 September 2015, responsibility for prisons was transferred from the so-called Ministry of Internal Affairs to the so-called Ministry of Justice of the DPR.¹⁰⁵ On territory controlled by LPR authorities, existing prisons were brought under the jurisdiction of the so-called Ministry of Internal Affairs of the LPR from December 2014.¹⁰⁶
69. Prison employees who did not quit following the outbreak of armed conflict became employees of the new quasi-state structures. It has been reported that due to a shortage in available staff, the prisons hired former employees who had been fired for disciplinary offences as well as former convicts.¹⁰⁷ This reportedly led to an increase of violence by prison staff towards prisoners.¹⁰⁸

103 Decree “On forming of the Ministry of Internal Affairs in DPR”, available at: <https://gisnpa-dnr.ru/org/0011-ministerstvo-vnutrennih-del-donetskoj-narodnoj-respubliki/page/4/>

104 Ministry of Internal Affairs in DPR, available at: <https://gisnpa-dnr.ru/org/0011-ministerstvo-vnutrennih-del-donetskoj-narodnoj-respubliki/page/4/>

105 Regulation no. 17-25 of 2 September 2015 “On Transfer of the State Penitentiary Service of the Ministry of Internal Affairs of Donetsk People’s Republic to the Jurisdiction of the Ministry of Justice of Donetsk People’s Republic”.

106 The Department on execution of punishment of the Ministry of Internal Affairs in LPR, available at: <https://uinlr.su/>

107 Interview with a prisoner from Yenakiyev CF no. 52 // KHPG Archive, SLC’s fund, inventory 4, file 07.

108 Interview with a prisoner from Yenakiyev CF no. 52 // KHPG Archive, SLC’s fund, inventory 4, file 07.

VI. CONTEXTUAL ELEMENTS OF CRIMES

70. Contextual (also known as *chapeau*) elements distinguish international crimes from domestic crimes and human rights violations. For an act to qualify as an international crime its contextual elements must be established through evidence to the requisite standard.¹⁰⁹

71. The Filing Parties submit that criminal conduct set forth in this Communication may amount to two types of international crimes listed under Article 5 of the ICC Statute – war crimes¹¹⁰ and crimes against humanity.¹¹¹ The contextual requirement for all war crimes is that the act took place in the context of and was associated with an armed conflict.¹¹² A crime against humanity must be perpetrated as part of a widespread or systematic attack against a civilian population pursuant to a state or organisational policy to commit such an attack.¹¹³ A single act may qualify as a war crime and a crime against humanity concurrently.¹¹⁴

A. Contextual Elements of War Crimes

72. For criminal conduct to constitute a war crime it must take place in the context of and be associated with an armed conflict. An armed conflict is defined as ‘a resort to armed force between States or protracted violence between governmental authorities and organized armed groups or between such groups within a State’.¹¹⁵

109 At this stage, the applicable evidential standard is 'reasonable basis to believe'. The 'reasonable basis to believe' standard in Article 53(1)(a) of the ICC Statute is the lowest evidentiary standard provided for in the Statute. The information available to the Prosecutor is neither expected to be 'comprehensive' nor 'conclusive.' It must be understood within the context in which it operates: the standard should be construed and applied against the underlying purpose of the procedure in Article 15(4) of the Statute, which is to prevent the Court from proceeding with unwarranted, frivolous, or politically motivated investigations that could have a negative effect on its credibility. Nor does all the information under this standard need to necessarily point to one conclusion: ICC, Situation in the Republic of Kenya, 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya,' 31 March 2010, paras. 27-35.

110 As defined in Article 8 of the ICC Statute

111 As defined in Article 7 of the ICC Statute

112 ICC Elements of Crimes, Article 8 *et seq.*

113 See ICC Statute, Article 7(1).

114 Washington College of Law, 'The Practice of Cumulative Charging at the International Criminal Court', May 2010, available at: <https://www.wcl.american.edu/impact/initiatives-programs/warcrimes/our-projects/icc-legal-analysis-and-education-project/reports/report-11-the-practice-of-cumulative-charging-at-the-icc/>.

115 ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, ("Tadić Interlocutory

An armed conflict is distinct from mere ‘internal disturbances’ (i.e. riots or isolated incidents of violence) based on its level of intensity and the level of organisation of the conflicting parties.¹¹⁶ A qualifying indicator of the requisite level of intensity is the collective nature of hostilities and the use of armed forces as opposed to law enforcement.¹¹⁷ Other factors to consider in evaluating intensity, include the seriousness of attacks and potential increase in armed clashes, their spread over territory and over a period of time, the increase in the number of government forces, the mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and, if so, whether any resolutions on the matter have been passed.¹¹⁸ The requisite level of organisation is a certain command structure and the capacity to sustain military operations.¹¹⁹

73. An armed conflict involving violence between two sovereign States is an international armed conflict (IAC), whilst a non-international armed conflict (NIAC) is confined to the borders and politics of one State. A civil war may nevertheless qualify as an IAC as a result of the support and participation of external State actors.¹²⁰ Political, financial and logistical support from a foreign State to a ‘domestic’ rebel group does not necessarily render the conflict ‘international’. An IAC requires evidence of either (1) presence and direct participation of foreign troops in the conflict; (2) a foreign power exercising ‘overall control’ over organised rebel forces;¹²¹ or (3) military occupation, partial

Appeal Decision”).

116 Requiring the armed groups to have as a minimum a certain command structure and the capacity to sustain military operations: see ICTY, *Prosecutor v. Limaj*, Judgment, IT-03-66-T, 30 November 2005, para. 94-170.

117 ICTY, *Prosecutor v. Limaj*, Judgment, IT-03-66-T, 30 November 2005, para. 135-170.

118 ICTY, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-T, Trial Chamber, Judgment, 27 September 2007, para. 407.

119 ICTY, *Prosecutor v. Limaj*, Judgment, IT-03-66-T, 30 November 2005, para. 94-134.

120 ICTY, *Prosecutor v. Tadić*, Appeals Judgment, IT-94-1-A, 15 July 1999, para 84.

121 Overall control requires the foreign State’s participation in the organisation, co-ordination or planning of military operations. However, it is not necessary to prove that the foreign State issued specific orders, directed each individual operation or instructed the commission of specific acts: ICTY, *Prosecutor v. Tadić*, Appeals Judgment, IT-94-1-A, 15 July 1999, paras. 131, 137; ICTY, *Prosecutor v. Naletilic and Martinovic*, Judgment, IT-98-34, 31 March 2003, para. 198.

or total,¹²² by a foreign power. An IAC and NIAC may exist in parallel on the territory of the same State at the same time.¹²³

74. The Filing Parties submit that an armed conflict has existed on the territory of Ukraine from the start of the Russian invasion of the Crimean Peninsula on or around 23 February 2014, and continued to exist at the time of submission of this Communication. To date, the conflict has led to 13 000 deaths (including over 3 000 civilians), and has displaced nearly 1.5 million persons.¹²⁴

75. Furthermore, there is a reasonable basis to believe that the conflict in Eastern Ukraine may be qualified, at least in part and during certain intervals, as an IAC – as a result of (1) the direct engagement of Russian forces in the hostilities, (2) Russia’s level of control over the anti-government forces, and/or (3) Russia’s military occupation of parts of Ukraine.

1. Direct engagement of Russian forces in hostilities

76. On 23 February 2014, Russian President Vladimir Putin ordered the launch of a military operation aimed at ‘returning Crimea to Russia’.¹²⁵ The first sightings of unauthorised presence of Russian armed forces on the territory of Ukraine took place in Crimea on or around 26 February 2014.¹²⁶ On 1 March 2014, Russia’s Parliament approved the use of military force on the territory of Ukraine ‘to

122 Defined as the placing of territory under the actual authority or effective control of a hostile force: ICTY, *Prosecutor v. Naletilić & Martinović*, Judgement, IT-98-34, 31 March 2003, para. 217; ICTY, *Prosecutor v. Naletilić & Martinović*, Judgement, IT-98-34, 31 March 2003, para. 217; ECtHR, *Chiragov and others v. Armenia*, Judgement (Grand Chamber), 13216/05, 16 June 2015, para. 96. See also ECtHR, *Al-Skeini and others v. United Kingdom*, Judgement (Grand Chamber), 55721/07, 7 July 2011, para. 89; ECtHR, *Al-Jedda v. United Kingdom*, Judgement (Grand Chamber), 27021/08, 7 July 2011, para. 42.

123 1986 *Nicaragua case*, ICJ Reports, p. 114; Tadić Appeals Judgment, para. 84.

124 United Nations, “Conflict-related civilian casualties in Ukraine, March 2020”, available at: <http://www.un.org.ua/en/information-centre/news/4871-conflict-related-civilian-casualties-in-ukraine-march-2020>; UNHCR, “Registration of Internal Displacement”, 4 June 2020, available at: <https://app.powerbi.com/view?r=eyJrIjoiY2RhMmExMjgtZWRIIMS00YjcwLWI0MzktNmEwNDkwYzdmYTM0IiwidCI6ImU1YzM3OTgxLTY2NjQtNDEzNC04YTJTY1NDNkMmFmODBiZSIsImMiOj9>.

125 Россия 1, “Крым. Путь на Родину”, Кондрашов А., available at: https://russia.tv/brand/show/brand_id/59195/ (last accessed: 12/06/2016); See also: BBC, “Putin Reveals Secrets of Russia’s Crimea Takeover Plot”, 9 March 2015, available at: <http://www.bbc.com/news/world-europe-31796226> (last accessed: 20/04/2016).

126 The Globe and Mail, “Globe in Ukraine: Russian-backed fighters restrict access to Crimean city”, 26 February 2014, available at: <http://www.theglobeandmail.com/news/world/tension-in-crimea-as-pro-russia-and-pro-ukraine-groups-stage-competing-rallies/article17110382/#dashboard/follows/?cmpid=tgc>.

protect Russian interests'.¹²⁷ Throughout March 2014, Russian armed forces, state security and proxy paramilitary groups invaded the Crimean Peninsula – sovereign territory of Ukraine – taking over the regional Parliament,¹²⁸ Ukrainian military bases, navy vessels, administrative buildings, telecommunications, media and other strategic positions.¹²⁹

127 Постановление Совета Федерации “Об использовании Вооруженных Сил Российской Федерации на территории Украины”, 1 марта 2014, available at: <http://www.council.gov.ru/activity/legislation/decisions/39979/>; It has been alleged that the law was procedurally defective as Parliament lacked quorum. Lenta.Ru. “Сбой какой-то в машине, да? Как Совет Федерации разрешил Путину ввести войска на Украину”, Ключкин А., Дмитриев Д., 13 марта 2014, available at: <https://lenta.ru/articles/2014/03/13/sovets/>.

128 The involvement of Russian Forces in the capture of the Parliament of Crimea was confirmed by Russian Admiral Igor Kasatonov (former commander of the Black Sea Fleet) – cited in Putin.War: An Independent Expert Report, May 2015, p.14, available at: <http://4freerussia.org/putin.war/Putin.War-Eng.pdf>; See also Reuters, “Ukraine leader warns Russia after armed men seize government HQ in Crimea”, 27 February 2014, available at: <http://www.reuters.com/article/us-ukraine-crisis-crimea-idUSBREA1P23U20140227>; Interfax-Ukraine, “Здание крымского Парламента и Правительства захвачены неизвестными”, 27 February 2014, available at: <http://interfax.com.ua/news/general/193046.html>; The Guardian, “Crimean parliament seized by unknown pro-Russian gunmen”, 27 February 2014, available at: <http://www.theguardian.com/world/2014/feb/27/crimean-parliament-seized-by-unknown-pro-russian-gunmen>.

129 On 2 March, Ukrainian marine military detachment was surrounded in Feodosiya – Українська правда, “У порт Феодосії зайшов десантний корабель РФ – ЗМІ”, 1 березня 2014, available at: <http://www.pravda.com.ua/news/2014/03/1/7016756/>; On 2nd March a military base was surrounded in Perevalne – ITV News, “Extraordinary stand-off at Crime military base”, 2 March 2014, available at: <http://www.itv.com/news/update/2014-03-02/extraordinary-stand-off-at-crimea-military-base/>; On 2nd March the Ukrainian Navy building came under siege in Sevastopol – Pravda.ua, “Російські військові штурмують українську частину в Севастополі”, 2 March 2014, available at: <http://www.pravda.com.ua/news/2014/03/2/7016948/>; On 22nd – 23rd March, Russian forces stormed and seized the Novofedorivka and Belbek Ukrainian airbases – The Washington Post, “Russian forces storm one of the last Ukrainian military outposts in Crimea”, 23 March 2014, available at: https://www.washingtonpost.com/world/monitors-set-to-deploy-to-ukraine-to-try-to-contain-crisis/2014/03/22/742e4898-b1a4-11e3-a49e-76adc9210f19_story.html; The Wall Street Journal, “Confrontation at Crimea Air Base Defused—For Now”, 4 March 2014, available at: <http://www.wsj.com/news/articles/SB10001424052702304360704579419493589067568?mg=reno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2F%2FSB10001424052702304360704579419493589067568.html>; On 2nd March Sudak radar station was overrun – Українська правда, “Російські військові в Криму вивозять зброю з військових частин України”, 2 березня 2014, available at: <http://www.pravda.com.ua/news/2014/03/2/7016937/>; NavalToday.com, “Ukrainian Warship Thwarts Attack in Sevastopol”, 4 March 2014, available at: <http://navaltoday.com/2014/03/04/ukrainian-warship-thwarts-attack-in-sevastopol/>; CBCNews, “U.S. warns Russia as soldiers seize barracks, border posts, ferry terminal”, 3 March 2014, available at: <http://www.cbc.ca/news/world/u-s-warns-russia-against-threatening-ukraine-navy-1.2557443>; KyivPost, “Gunmen seize Simferopol television station, turn off Channel 5, 1+1, turn on Rossiya 24”, 6 March 2014, available at: <https://www.kyivpost.com/article/content/ukraine/gunmen-seize-simferopol-television-station-turn-off-channel-5-11-turn-on-rossiya-24-338610.html>; Ukrinform, “Russian military capture border department Shcholkino”, 8 March 2014, available at: <http://www.ukrinform.net/rubric-politics/1629808-russian-military-capture-border-department-shcholkino-318304.html>; Interfax Ukraine, “About 50 armed men in military uniform seize Simferopol Airport in early hours of Friday”, 28 February 2014,

77. From April 2014, anti-government forces, led and coordinated by Russian military commanders and State Security agents,¹³⁰ began to seize control of administrative and security buildings in towns and cities across Eastern Ukraine, including Donetsk, Luhansk, Kharkiv, Slavyansk, Horlivka and Kramatorsk.¹³¹ This was swiftly followed by mobilisation of Russian troops to the border of Ukraine, camp build-ups along the border and supporting artillery fire being launched from the territory of the Russian Federation.¹³²

78. In response, the interim government of Ukraine launched a military counter-offensive to restore its control over the occupied territories (initially dubbed the ‘Anti Terrorist Operation’ or ATO). The conflict quickly escalated into all-out war involving the use of heavy artillery, tanks, howitzers, aircraft, anti-aircraft missiles, as well as light infantry combat operations by both sides.¹³³ Following Ukrainian military successes in July 2014 in Sievierodonetsk, Sloviansk, Stanytsia-Luhanska, Lysychansk, Popasna, Marinka, Savur-Mohyla and Debaltseve,¹³⁴ anti-government commanders began to call for Russia’s direct

available at: <http://en.interfax.com.ua/news/general/193305.html>; Ukrinform, “Озброєні люди узяли під контроль аеропорти в Криму”, 28 February 2014, available at: <http://www.ukrinform.ua/rubric-regions/1624882-ozbroe-ni-lyudi-uzjali-pid-kontrol-aeroporti-v-krimu-1912865.html>.

130 See YouTube, “И.Стрелков vs Н.Стариков "ЦЕНТРСИЛЫ / СИЛАЦЕНТРА," January 22, 2015, available at: <https://www.youtube.com/watch?v=G04tXnvKx8Y>.

131 OSCE, ‘Latest from the Special Monitoring Mission in Ukraine – 14 April 2014’, 14 April 2014 (‘The situation in Donetsk and Luhansk districts continued to cause concerns owing to the observed presence of masked individuals in several towns of the Oblast’, occupying several administrative buildings’, citing the towns of Kharkiv, Luhansk, Donetsk, Yenakiyev, Debaltseve, Horlivka, Mariupol) available at:

<https://web.archive.org/web/20140419044139/http://www.osce.org/ukrainemonitoring/117777>; OSCE, ‘Latest from the Special Monitoring Mission to Ukraine - based on information received up until 23 April 2014, 19:00’, 24 April 2014 (citing above towns, as well as Sloviansk), available at:

<http://www.osce.org/ukraine-smm/117995>; UNHRC, ‘Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Ukraine’, UN Doc. A/HRC/27/75, 19 Sep. 2014, para. 9 (‘[G]roups of armed men unlawfully seized public buildings and police and security facilities in cities and towns across the Donetsk and Luhansk Oblast’s’) available at:

http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/27/75

132 Atlantic Council, “Hiding in Plain Sight: Putin’s War in Ukraine”, May 2015, available at: <http://www.atlanticcouncil.org/publications/reports/hiding-in-plain-sight-putin-s-war-in-ukraine-and-boris-nemtsov-s-putin-war>; Bellingcat, “Origin of Artillery Attacks on Ukrainian Military Positions in Eastern Ukraine Between 14 July 2014 and 8 August 2014”, available at: <https://www.bellingcat.com/wp-content/uploads/2016/02/bellingcat-origin-of-artillery-attacks-02-12-15-final1.pdf>.

133 Armament Research Services, ‘Raising Red Flags: An Examination of Arms & Munitions in the Ongoing Conflict in Ukraine’, November 2014, available at: <http://armamentresearch.com/Uploads/Research%20Report%20No.%203%20-%20Raising%20Red%20Flags.pdf>.

134 OSCE, ‘Latest from the OSCE Special Monitoring Mission to Ukraine, based on information received by 18:00hrs, 29 July (Kyiv time)’, (‘Severodonetsk... was retaken by the Ukrainian army’), available at: <http://www.osce.org/ukraine-smm/122077>; OSCE, ‘Latest from OSCE

military intervention,¹³⁵ which came in the form of a large force mobilised on the border, shipments of arms, supplies and equipment, cross-border artillery attacks and targeted territorial incursions.¹³⁶ By November 2014, anti-government forces had cemented their control over 17,000km² of occupied territory, organised themselves into quasi-state entities (the LPR and DPR), held independence referenda, elections and appointed heads of State.¹³⁷ Despite a decrease in intensity from March 2015, the conflict continues to date in the form of protracted low-

Special Monitoring Mission to Ukraine (SMM) based on information received as of 18:00hrs, 30 July 2014 (Kyiv time)', 31 July 2014 ('[R]egional administration' in charge at Lysychansk), available at: <http://www.osce.org/ukraine-smm/122145>; UNHRC, 'Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Ukraine', UN Doc. A/HRC/27/75, 19 Sep. 2014, para. 17 ('As of 30 July 2014, "safe corridors", unilaterally established by the Ukrainian forces, have enabled people to leave the cities of Donetsk, Horlivka and Luhansk') available at: http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/27/75; Bellingcat, 'Origin of artillery attacks on Ukrainian military positions in Eastern Ukraine between 14 July 2014 and 8 August 2014', 17 Feb. 2015, p. 2 (Map from National Security and Defense Council of Ukraine showing UAF control over settlements) available at: https://www.bellingcat.com/wp-content/uploads/2016/02/bellingcat_-_origin_of_artillery_attacks_02-12-15_final1.pdf; p. 5 ('Ukraine's armed forces began an offensive in the first half of July 2014, which led to regained control over Slavyansk, Kramatorsk, and other towns and villages in the northern part of the Donetsk Oblast'), available at: https://www.bellingcat.com/wp-content/uploads/2015/09/russia_s_path_s_to_war.pdf; ('[T]he pro-Russia militias under the command of Igor Girkin aka Strelkov retreated to Donetsk from the cities of Slovyansk, Kramatorsk, Kostyantynivka, Artemivsk and Debaltseve.'), available at: <https://www.opendemocracy.net/od-russia/jaroslav-koshiw/donetsk-separatists-in-dispute%E2%80%93khodakovsky-vs-strelkov>

135 Radio Free Europe, 'In Ukraine, Separatist Commander 'Strelkov' Seems to be Getting Frustrated', 9 Aug. 2014, available at: <https://www.rferl.org/a/ukraine-rebels-military-situation-frustration-strelkov/26522352.html>; The Star, 'Pro-Russia rebels plead for troops as Ukrainian Army advances', 3 Aug. 2014, available at: https://www.thestar.com/news/world/2014/08/03/prorussia_rebels_plead_for_troops_as_ukrainian_army_advances.html; Open Democracy, 'Donetsk separatists in dispute – Khodakovsky vs Strelkov', 11 Aug. 2014, ('[Leaders of the separatist movement] have repeatedly appealed to President Putin for Russia to intervene directly'), available at: <https://www.opendemocracy.net/od-russia/jaroslav-koshiw/donetsk-separatists-in-dispute%E2%80%93khodakovsky-vs-strelkov>; Reuters, 'Some Ukrainian rebels vent frustration with Putin', 20 July 2014, available at: <http://www.reuters.com/article/uk-ukraine-crisis-rebels/some-ukrainian-rebels-vent-frustration-with-putin-idUKKBN0FZ1ME20140730>.

136 A. Zverev and A. Prentice, 'Kiev Accuses Russia of Sending More Tanks to East Ukraine', Reuters, 20 February 2015, <http://www.reuters.com/article/2015/02/20/us-ukraine-crisis-idUSKBN0LO13420150220>; Bellingcat, 'Origin of artillery attacks on Ukrainian military positions in Eastern Ukraine between 14 July 2014 and 8 August 2014', 17 Feb. 2015, available at: https://www.bellingcat.com/wp-content/uploads/2016/02/bellingcat_-_origin_of_artillery_attacks_02-12-15_final1.pdf; *Financial Times*, 'Russia Has "Well Over 1,000 Troops" in Ukraine, Nato Warns', 29 August 2014, <http://www.ft.com/intl/cms/s/0/8275bec4-2ea2-11e4-afe4-00144feabdc0.html#slide0>. See also A. Croft, 'More Than 1,000 Russian Troops Operating in Ukraine: NATO', Reuters, 28 August 2014, <http://www.reuters.com/article/2014/08/28/us-ukraine-crisis-nato-idUSKBN0GS1D220140828>; Reuters, 'NATO saw "Russian incursion" into Ukraine – Rasmussen' (15 Aug. 2014), available at: <https://www.reuters.com/article/uk-ukraine-crisis-nato-chief/nato-saw-russian-incursion-into-ukraine-rasmussen-idUKKBN0GF12V20140815>.

137 Telegraph, 'Alexander Zakharchenko named prime minister of eastern Ukraine after "election"', 3 Nov. 2014, available at: <https://www.telegraph.co.uk/news/worldnews/europe/ukraine/11204982/Alexander-Zakharchenko-named-prime-minister-of-eastern-Ukraine-after-election.html>

intensity trench warfare along the 480km contact line between the warring parties, involving occasional flare-ups and persistent use of artillery.¹³⁸

79. Other evidence of Russia's direct involvement includes the arrest of 10 Russian paratroopers on Ukrainian territory in August 2014,¹³⁹ the arrest and confessions of two Russian military intelligence officers on Ukrainian territory in May 2015,¹⁴⁰ and the capture of a Russian corporal taking part in hostilities in Luhansk province in June 2017.¹⁴¹ Russian army equipment has also been observed, captured or destroyed on Ukrainian territory, including several a T-72B3 tanks (2013 model) with markings linking it to Russia's 6th Tank Brigade,¹⁴² and convoys of armoured vehicles entering Ukraine from Russia from June through August 2014.¹⁴³ The widespread use of Russian military by anti-government forces has also been documented by the Armament Research Services, documenting the presence of 60 types of ammunition and 70 vehicle models, sniper rifles, anti-tank and anti-aircraft guns.¹⁴⁴ UK-based Bellingcat

138 Radio Free Europe, 'Ukrainian forces, rebels pull back tanks in Donetsk', 20 Oct. 2015, available at: <https://www.rferl.org/a/ukraine-forces-rebels-pull-back-tanks-in-donetsk/27316997.html>; Information Analysis Centre, 'Зведені дані щодо ситуації в зоні АТО – 23 жовтня', 23 Oct. 2015, available at: <http://mediarnbo.org/2015/10/23/zvedeni-dani-shhodo-situatsiyi-v-zoni-ato-23-zhovtnya/>; Novorossia.su, 'Басурин: Обстановка в ДНР обострилась, за сутки зафіксовано 26 обстрілів со сторони ВСУ', 4 Nov. 2015, available at: <https://novorossia.su/news/basurin-obstanovka-v-dnr-obostrilas-za-sutki-zafiksirovano-26-obstrelov-so-storony-vsuv>. OSCE, 'Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30, 22 December 2016', 23 Dec. 2016, available at: <http://www.osce.org/ukraine-smm/291076>; Ukraine Today, "'Bloodiest battle in 5 months": Ukrainian troops repel 3 militant attacks near Svitlodarsk', 19 Dec. 2016, available at: <https://web.archive.org/web/20161220221743/http://uatoday.tv/society/bloodiest-battle-in-5-months-ukrainian-troops-repel-3-militant-attacks-near-svitlodarsk-849788.html>; TASS, 'LPR militias: Kiev forces fire over 150 shells near Kalinovka village', 19 Dec. 2016, available at: <http://tass.com/world/920335>. Guardian, 'Violence flares un war-weary Ukraine as US dithers and Russia pounces', 14 Feb. 2017, available at: <https://www.theguardian.com/world/2017/feb/14/avdiivka-frontline-ukraine-war-russia-backed-separatists>.

139 RadioSvoboda, "The Russian paratroopers detained in Donbass told what they were doing in Ukraine", available at: <https://www.radiosvoboda.org/a/26551060.html>

140 Youtube, "The detained captain of the GRU RF Yevgeny Erofeev gives evidence. Video the Security service", available at: <https://www.youtube.com/watch?v=EJ2GG00qSB4>

141 Radiosvoboda "7 proofs of Russia's military presence in Donbas, which the OSCE "did not see", available at: <https://www.radiosvoboda.org/a/29565423.html>

142 Radiosvoboda "7 proofs of Russia's military presence in Donbas, which the OSCE "did not see", available at: <https://www.radiosvoboda.org/a/29565423.html>

143 Bellingcat report, 'MH17: Source of the Separatist's Buk', 9 Nov. 2014, (presenting evidence that 'separatists transported [the] Buk missile system through their territory on July 17'), available at: <https://web.archive.org/web/20141109132619/https://www.bellingcat.com/wp-content/uploads/2014/11/Origin-of-the-Separatists-Buk-A-Bellingcat-Investigation1.pdf>

144 Armament Research Services, 'Raising Red Flags: An Examination of Arms & Munitions in the Ongoing Conflict in Ukraine', November 2014, available at: <http://armamentresearch.com/Uploads/Research%20Report%20No.%203%20-%20Raising%20Red>

researchers analysed satellite images of the Ukrainian-Russian border and discovered at least 60 places where it had been crossed from the Russian side without authorization. New routes were laid in July, August and September of 2014, during the period of the most intense fighting near the border. Five of these crossings were particularly large-scale. There is evidence of Russian forces being deployed along the border and bringing into Ukrainian territory large numbers of military vehicles and equipment. Furthermore, direct links were demonstrated between the crossings and Russia's military bases.¹⁴⁵

80. In 2019 the British agency Forensic Architecture collected the largest database of video and photo evidence of Russia's involvement in the armed conflict in Ukraine, with close to 300 Russian military vehicles documented near Ilovaysk and Luhansk.¹⁴⁶ Russia's direct military involvement has also been confirmed by the NATO's Supreme Commander,¹⁴⁷ and at least partially in statements by the Russian Ministry of Defence,¹⁴⁸ and President Putin.¹⁴⁹ Moreover, a number of witnesses identify perpetrators of physical violence in the prisons as 'Russians' or 'members of the Russian special forces'.¹⁵⁰ Consequently, the direct engagement of Russian forces in hostilities in Ukraine renders the conflict, at least in part and during certain intervals, an IAC.¹⁵¹

2. Russia's control over anti-government forces

[%20Flags.pdf](#).

145 Bellingcat, "Putin's undeclared war: Russian artillery strikes against Ukraine in the summer of 2014", available at: <https://ru.bellingcat.com/novosti/ukraine/2016/12/21/putins-undeclared-war-summer-2014-russian-artillery-strikes-against-ukraine/>

146 The Battle of Ilovaisk, Mapping Russian Military Presence in Eastern Ukrain in August–September 2014, available at: <https://ilovaisk.forensic-architecture.org/>

147 Reuters, 'Russia unlikely to meet Ukraine peace deal deadline, NATO says', 2 Dec. 2015, available at: <https://www.reuters.com/article/us-ukraine-crisis-nato/russia-unlikely-to-meet-ukraine-peace-deal-deadline-nato-says-idUSKBNOTL1FA20151202>.

148 The Wall Street Journal, 'Russia said to redeploy special-ops forces from Ukraine to Syria', 23 Oct. 2015, available at: <https://www.wsj.com/articles/russia-said-to-redeploy-special-ops-forces-from-ukraine-to-syria-1445636834>; Fox News, 'Russia said to redeploy special-ops forces from Ukraine to Syria', 25 Oct. 2015, available at: <http://www.foxnews.com/world/2015/10/24/russia-said-to-redeploy-special-ops-forces-from-ukraine-to-syria.html>.

149 Guardian, 'Vladimir Putin press conference: "Russian military personnel were in Ukraine" – as it happened', 17 Dec. 2015, available at: <https://www.theguardian.com/world/live/2015/dec/17/vladimir-putins-annual-press-conference-live>.

150 Witness 2, Witness 4, Witness 5 and Witness 7.

151 The ICC Prosecutor appears to agree with this assessment: ICC Office of the Prosecutor, 'Report on Preliminary Examination Activities 2017', 4 Dec. 2017, paras/ 94-95, available at: https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE_ENG.pdf.

81. There is mounting evidence of Russia’s control over anti-government forces and the so-called LPR and DPR’s political, financial and military structures.¹⁵² According to former Russian State Security (FSB) colonel and self-appointed ‘Supreme Commander’ of anti-government forces – Igor Girkin – the separatist movement was organised and led by the Kremlin.¹⁵³ According to Girkin, all major personnel decisions during his time in Donbas (including the decision to replace him) were made, or at least approved, by Vladislav Surkov – former aide to the President of the Russian Federation on Ukraine, Abkhazia and South Ossetia.¹⁵⁴ Furthermore, according to Girkin, a Russian military command centre – headed by Russian Colonel General Tkachev (call-sign ‘Dolphin’¹⁵⁵) – was set up in Krasnodar (Russian Federation), to which he personally reported twice daily.¹⁵⁶
82. There is also evidence that key battles have been led by Russian battalions and supported by artillery fire launched from the territory of the Russian Federation.¹⁵⁷ Moreover, a former Kremlin aid has claimed that the invasion of Ukraine had been planned and prepared by the Russian executive for years.¹⁵⁸
83. Accordingly, there is a reasonable basis to believe that Russian executive exercises ‘overall control’ over anti-government forces operating in Eastern Ukraine, rendering the conflict an IAC.

152 Medium, ‘Breaking Down the Surkov Leaks’, Oct. 2016, available at: <https://medium.com/dfrlab/breaking-down-the-surkov-leaks-b2feec1423cb>; Armament Research Services, ‘Raising Red Flags: An Examination of Arms & Munitions in the Ongoing Conflict in Ukraine’, November 2014, available at: <http://armamentresearch.com/Uploads/Research%20Report%20No.%203%20-%20Raising%20Red%20Flags.pdf>; Reuters, ‘Moscow is bankrolling Ukraine rebels: ex-separatist official’, 5 Oct. 2016, available at: <https://www.reuters.com/article/us-ukraine-crisis-separatists/moscow-is-bankrolling-ukraine-rebels-ex-separatist-official-idUSKCN1251UQ>.

153 See YouTube, “И.Стрелков vs Н.Стариков "ЦЕНТРСИЛЫ / СИЛАЦЕНТРА," January 22, 2015, available at: <https://www.youtube.com/watch?v=G04tXnvKx8Y>.

154 The Insider, ‘Игорь Гиркин (Стрелков): «К власти и в Донецкой, и в Луганской республике Сурков привел бандитов», 8 Dec. 2017, available at: <https://theins.ru/politika/83281>.

155 Bellingcat, ‘Russian Colonel General Identified as Key MH17 Figure’, 8 Dec. 2017, available at: <https://www.bellingcat.com/news/uk-and-europe/2017/12/08/russian-colonel-general-delfin/>.

156 The Insider, ‘Игорь Гиркин (Стрелков): «К власти и в Донецкой, и в Луганской республике Сурков привел бандитов», 8 Dec. 2017, available at: <https://theins.ru/politika/83281>.

157 Atlantic Council, “Hiding in Plain Sight: Putin’s War in Ukraine,” May 2015, available at: <http://www.atlanticcouncil.org/publications/reports/hiding-in-plain-sight-putin-s-war-in-ukraine-and-boris-nemtsov-s-putin-war>; Radio Free Europe, “Vostok Battalion, A Powerful New Player In Eastern Ukraine,” 30 May 2014, available at: <http://www.rferl.org/content/vostok-battalion-a-powerful-new-player-in-eastern-ukraine/25404785.html>.

158 See YouTube, “Andrei Illarionov, NATO Parliamentary Assembly, Vilnius, May 31st, 2014,” 4 June 2014, available at: <https://www.youtube.com/watch?v=J8ISQpbfoBI>.

3. Russia's occupation of Ukraine

84. Lastly, Russia's occupation of Ukraine's Crimean peninsula renders the conflict an IAC over the entire territory of Ukraine. In the alternative, the direct and indirect involvement of Russia in hostilities in Eastern Ukraine (described above) may also be qualified as a form of belligerent occupation by the Russian Federation. That is, Russia might be occupying Eastern Ukraine through direct engagement in hostilities or through Russia's continuous control and management of LPR and DPR's political, financial and military structures,¹⁵⁹ and the support of its military for anti-government forces, which demonstrate that these so-called 'peoples' republics' are a mere front for the Russian occupation of a part of Ukrainian sovereign territory.

B. Contextual Elements of Crimes Against Humanity

85. For criminal conduct to constitute a crime against humanity, it must be part of a widespread or systematic attack against the civilian population (or identifiable group of civilians) pursuant to a State or organisational policy to commit such an attack.¹⁶⁰ An 'attack', for the purposes of the ICC Statute, is a 'sustained campaign or operation carried out against the civilian population,'¹⁶¹ that may be made up of 'episodes reaching varying levels of intensity at different location and at different times.'¹⁶² An attack may therefore be defined as the sum of all of its underlying

159 Medium, 'Breaking Down the Surkov Leaks', Oct. 2016, available at: <https://medium.com/dfrlab/breaking-down-the-surkov-leaks-b2feec1423cb>; Armament Research Services, 'Raising Red Flags: An Examination of Arms & Munitions in the Ongoing Conflict in Ukraine', November 2014, available at: <http://armamentresearch.com/Uploads/Research%20Report%20No.%203%20-%20Raising%20Red%20Flags.pdf>; Reuters, 'Moscow is bankrolling Ukraine rebels: ex-separatist official', 5 Oct. 2016, available at: <https://www.reuters.com/article/us-ukraine-crisis-separatists/moscow-is-bankrolling-ukraine-rebels-ex-separatist-official-idUSKCN1251UQ>.

160 See Article 7(1) of the ICC Statute.

161 ICC Elements of Crimes, Introduction to Article 7 of the Statute, para. 3.

162 ICC, Situation in the Republic of Cote d'Ivoire, "Decision on the prosecutor's provision of further information regarding potentially relevant crimes committed between 2002 and 2010," ICC-02/11-36, 22 February 2012, para. 36.

crimes.¹⁶³ The attack must be widespread or¹⁶⁴ systematic.¹⁶⁵ The term ‘widespread’ is a quantitative measure referring to the scale of the attack in terms of its geographic reach, the frequency of underlying crimes, the prevalence of perpetrators and the number of civilians targeted.¹⁶⁶ The term ‘systematic’ refers to the organised nature of the underlying crimes and the improbability of their random occurrence.¹⁶⁷ The term ‘civilian population’ refers to civilians who are not members of regular armed forces, dissident armed forces or other organised armed groups.¹⁶⁸ The civilian population must be the “primary object of the attack in question and cannot merely be an incidental victim.”¹⁶⁹ However, the attack need not target the entire civilian population,¹⁷⁰ as long as its victims constitute an identifiable group rather than randomly selected individuals.¹⁷¹ The policy element of the definition requires the attack to display elements of planning and

163 “Commission of the acts referred to in Article 7(1) of the Statute constitute the attack itself and, beside the commission of the acts, no additional requirements for the existence of an attack should be proven,” ICC, Situation in the Central African Republic, *Prosecutor v. Bemba*, ‘Decision Pursuant to Article 61(7)(a) and (b) of the ICC Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo,’ ICC-01/05-01/08-424, 15 June 2009, para. 75.

164 “This contextual element applies disjunctively, such that the alleged acts must be either widespread or systematic,” ICC, Situation in the Republic of Kenya, ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya,’ ICC-01/09-19-Corr, 31 March 2010, para. 94.

165 “Only the attack, and not the alleged individual acts are required to be ‘widespread’ or ‘systematic,’” ICC, Situation in the Republic of Kenya, ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya,’ ICC-01/09-19-Corr, 31 March 2010, para. 94.

166 ICC, Situation in the Central African Republic, *Prosecutor v. Bemba*, “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo,” ICC-01/05-01/08-424, 15 June 2009, para. 83; Widespread attacks have been defined by the Court as being large-scale and involving a high number of victims as well as extending for a period longer than a few months, involving a large number of acts and affecting large geographical areas: *Prosecutor v. Bashir*, Warrant of Arrest for Omar Hassan Ahmad Al Bashir (Pre-Trial Chamber I) ICC-02/05-01/09 (4 March 2009); The attack can, however, also be widespread if the geographical area is small as long as a large number of victims is concerned: *Prosecutor v. Blé Goudé*, Decision on the Confirmation of Charges (Pre-Trial Chamber I) ICC-02/11-02/11 (11 December 2014).

167 ICC, Situation in the Democratic Republic of the Congo, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ‘Decision on the confirmation of charges,’ ICC-01/04-01/07-717, para. 394; Indicative of such an organised nature is the existence of a pattern, plan or motive: *Prosecutor v. Bashir*, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (Pre-Trial Chamber I) ICC-01/05-01/09 (4 March 2009).

168 See Addition Protocol II, Article 1.

169 ICC, Situation in the Central African Republic, *Prosecutor v. Bemba*, ‘Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo,’ ICC-01/05-01/08-424, 15 June 2009, para. 77.

170 ICC, Situation in the Central African Republic, *Prosecutor v. Bemba*, ‘Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo,’ ICC-01/05-01/08-424, 15 June 2009, para. 76.

171 ICC, Situation in the Central African Republic, *Prosecutor v. Bemba*, ‘Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo,’ ICC-01/05-01/08-424, 15 June 2009, para. 77.

organisation (as opposed to a series of spontaneous and isolated acts of violence).¹⁷² A policy to commit the attack may be inferred from evidence of repeated perpetration of the same acts, the mobilisation of armed forces, and the methods employed to implement the attack.¹⁷³ It may also be inferred from evidence of deliberate failure by those in effective control to take action to prevent the underlying crimes.¹⁷⁴ When non-state groups commit the attack, what matters is not the formal nature of a group and the level of its organisation but its capability to perform acts which infringe on basic human values.¹⁷⁵

86. Since the breakout of hostilities in 2014, documentation by international organisations and civil society has revealed a picture of systematic targeting of civilians, through violence, arbitrary detention, persecution and the denial of basic fundamental rights.¹⁷⁶ Civilians in and around the conflict zone have become the hostages of a geopolitical conflict beyond their control. Fuelled by perpetual disinformation campaigns, the warring parties' policies towards civilians have been informed by anger, fear and mistrust, creating a false binary view of

172 ICC, Situation in the Democratic Republic of the Congo, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Decision on the confirmation of charges," ICC-01/04-01/07-717, para. 396.

173 ICC, Situation in The Democratic Republic of Congo, *Prosecutor v. Katanga*, 'Judgment', ICC-01/04-01/07, 7 March 2014, para. 1109; ICC, Situation in the Republic of Kenya, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya," ICC-01/09-19-Corr, 31 March 2010, para. 121.

174 ICC Elements of Crimes, Introduction to Article 7 of the Statute, footnote 6; ICC, Situation in The Democratic Republic of Congo, *Prosecutor v. Katanga*, 'Judgment', ICC-01/04-01/07, 7 March 2014, para. 1108.

175 ICC, Situation in the Republic of Kenya, 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya', ICC-01/09-19-Corr, 31 March 2010, paras. 90; 93: setting out the following guidelines for a qualifying non-state organisation: (i) whether the group is under a responsible command, or has an established hierarchy; (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic against a civilian population; (iii) whether the group exercises control over part of the territory of a State; (iv) whether the group has criminal activities against the civilian population as a primary purpose; (v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; (vi) whether the group is part of a larger group, which fulfils some or all of the above mentioned criteria.

176 OHCHR, 'Civilians in Ukraine continue to suffer – UN report', 8 Dec. 2016, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20999>; Amnesty International, 'Abductions and Torture in Eastern Ukraine', 2014, available at: http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/UKR/INT_CAT_NGO_UKR_18677_E.pdf; Human Rights Watch, 'World Report 2017', available at: <https://www.hrw.org/world-report/2017/country-chapters/ukraine>; IPHR, "Fighting Impunity in Eastern Ukraine", 7 October 2015, available at: <https://www.iphronline.org/new-report-fighting-impunity-in-eastern-ukraine-20151007.html>; FIDH-CCL, "Eastern Ukraine: Civilians Caught in the Crossfire", October 2015, available at: <https://www.fidh.org/en/region/europe-central-asia/ukraine/ending-impunity-in-eastern-ukraine-new-report-reveals-the-urgency-to>

civilians' allegiances – either one of 'us' (read Ukrainian, Russian, Orthodox, patriot) or one of 'them' (read separatist, *pravosek*, *Banderavyts*, fascist, *Moskal'*, KGB).¹⁷⁷ As a result, both warring parties have repeatedly and systematically attacked civilians on account of their actual or perceived membership of the opposing camp. In addition, there is evidence that separatist paramilitary groups are using the same security and military structures to attack civilians to extort property and business assets on territory under their control.¹⁷⁸

87. According to latest estimates, the conflict has led to 13,000 deaths (including over 3 000 civilians), and has displaced nearly 1.5 million persons.¹⁷⁹ Countless civilians have been arbitrarily detained and ill-treated in custody.¹⁸⁰ According to the UN human rights office, “enforced disappearances, arbitrary detention, torture and ill-treatment remain deeply entrenched practices”.¹⁸¹ FIDH has previously documented the prevalence of sexual crimes against civilian detainees in detention facilities across the conflict zone.¹⁸² In areas under the control of anti-government

177 Euromaidan Press, ‘Deception, Disinformation, and Doubt: Hybrid Warfare in Eastern Ukraine’, 23 May 2017, available at: <http://euromaidanpress.com/2017/05/23/hybrid-warfare-in-eastern-ukraine-deception-disinformation-and-doubt/>.

178 BBC, ‘Slave labour in prisons in eastern Ukraine’, 3 Oct. 2016, available at: <https://www.bbc.com/news/magazine-37512356> (last accessed: 27/06/2018); Lug-info.com, ‘Бандиты "Бэтмена" держали в подвале женщин, требуя от них переоформить дом на главаря бандгруппы’, 5 Jan. 2015, available at: <http://lug-info.com/news/one/bandity-betmena-derzhali-v-podvale-zhenschin-trebuya-ot-nikh-pereoformit-dom-na-glavarya-bandgruppy-821> (last accessed: 25/05/2018) - the group was accused of detaining and ill treating two women at the facility demanding that they transfer their property to Vednov; Курсом Правды и Единения, ‘Бандитская ЛНР. Свидетельство ополченца’, 10 Feb. 2015, available at: <http://xn--e1ajp.com.ua/9-glavnyj-razdel/1757-banditskaya-lnr-svidetelstvo-opolchentsa.html>; See also DPR accusations against the Great Don Army group - A table summarizing the accusations has been leaked and is accessible here: <https://www.facebook.com/photo.php?fbid=205662579882108&set=pcb.205662959882070&type=3&theater>.

179 United Nations, “Conflict-related civilian casualties in Ukraine, March 2020”, available at: <http://www.un.org.ua/en/information-centre/news/4871-conflict-related-civilian-casualties-in-ukraine-march-2020>; UNHCR, “Registration of Internal Displacement”, 4 June 2020, available at: <https://app.powerbi.com/view?r=eyJrIjoiY2RhMmExMjgtZWRIWmZktNmEwNDkwYzdmYTM0IiwidCI6ImU1YzZM3OTGxLTY2NjQtNDEzNC04YTBlTY1NDNkMmFmODBiZSIsImMiOjhh9>.

180 Amnesty International and Human Rights Watch, “You Don’t Exist: Arbitrary Detentions, Enforced Disappearances, and torture in Eastern Ukraine”, 2016, available at: <https://www.amnesty.org/download/Documents/EUR5044552016ENGLISH.PDF>; OHCHR, “Report on the human rights situation in Ukraine 16 November 2019 to 15 February 2020”, March 2020, paras. 50-53, available at: https://www.ohchr.org/Documents/Countries/UA/29thReportUkraine_EN.pdf.

181 OHCHR, “Report on the human rights situation in Ukraine 16 February to 15 May 2016”, June 2016, paras. 29-42, available at: https://www.ohchr.org/Documents/Countries/UA/Ukraine_14th_HRMMU_Report.pdf.

182 FIDH and EUCCI, ‘Communication under Article 15 of the Rome Statute of the International Criminal Court: Sexual crimes in the conflict in Eastern Ukraine’, October 2018. FIDH-EUCCI press statement and Q&A “Accountability for conflict-related sexual crimes in Eastern Ukraine”, 25 September 2018, available at: <https://www.fidh.org/en/region/europe-central-asia/ukraine/>

forces, the targeting of civilians suspected of pro-Ukrainian leanings manifests itself in extra-judicial killings,¹⁸³ arbitrary arrests and detentions,¹⁸⁴ the systematic use of torture and other forms of cruel and inhuman treatment (such as slave labour¹⁸⁵) against detainees and the denial of due process and fundamental rights.¹⁸⁶ In the absence of official statistics and access for international monitors, it is impossible to give an accurate figure for the number of civilians who have been interred, however it is likely to be in the thousands.¹⁸⁷

88. Treatment of civilians in prisons administered by anti-government forces follows a recurrent pattern of arbitrary arrest without judicial warrant or charge, denial of due process, inhuman conditions of detention, ubiquitous violence and intimidation by the guards, ill-treatment by interrogators frequently amounting to torture, forced labour, humiliation and in some instances, sexual violence. The language and substance of accusations levied against actual or perceived ‘pro-Kyiv’ civilians at these facilities mirrors the rhetoric of anti-government leaders and the anti-Ukrainian media propaganda campaign. There is therefore a reasonable basis to believe that anti-government authorities have perpetrated a widespread and systematic attack against civilians perceived to be in opposition to the anti-government movement, which is part of a policy to commit such an attack.

two-ngos-call-for-an-icc-investigation-into-conflict-related-sexual-23647

183 Euromaidan Press, ‘Executed in Donbas: activists present data on 95 extrajudicial killings’, 8 June 2017, available at: <http://euromaidanpress.com/2017/06/08/executed-in-donbas-report-introduced/>.

184 Meduza, ‘Locked up in the Donbas: A look at the mass arrests and torture of civilians in Donetsk and Lugansk’, 7 March 2016, available at: <https://meduza.io/en/feature/2016/03/07/locked-up-in-the-donbas> (last accessed: 27/06/2018).

185 BBC, ‘Slave labour in prisons in eastern Ukraine’, 3 Oct. 2016, available at: <https://www.bbc.com/news/magazine-37512356>.

186 OHCHR, ‘Ukraine conflict: They forgot there are people here, civilians tell UN’, 12 Sept. 2017, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22049>.

187 US State Department, ‘Ukraine 2017 Human Rights Report’, available at: <https://www.state.gov/documents/organization/277473.pdf> (last accessed: 27/06/2018).

VII. ILLEGAL DETENTION AND PUNISHMENT WITHOUT DUE PROCESS

A. Overview

89. Following the outbreak of the armed conflict in Eastern Ukraine, Ukrainian authorities gradually ceded territory to anti-government forces, and in the process, effectively abandoned an estimated 16,200 of prisoners detained in 36 prisons located on territory controlled by anti-government forces. The prisoners were *de facto* transferred into the custody of LPR/DPR ‘authorities’. The prisoners included individuals convicted by Ukrainian courts, as well as those remanded in custody and awaiting trial and/or convictions. As LPR/DPR forces solidified their control and created quasi-state and judicial organs, they began to try and punish those held on remand, and revise the sentences of those already convicted. Such trials and sentencing revisions are conducted by ‘courts’ and authorities that lack independence, impartiality and fairness, and regularly violate due process. Moreover, Ukrainian prisoners are denied early release and sentence reduction measures to which they are entitled under Ukrainian law. As such, an unknown number of prisoners are being held arbitrarily and are being punished without due process. All conduct took place in the context of and was associated with the armed conflict in Eastern Ukraine, and/or was part of the anti-government forces’ widespread or systematic attack on (a part of) the civilian population. There is therefore a reasonable basis to believe that conduct set forth in this section amounts to the following crimes under the ICC Statute:

- War crime of unlawful confinement (ICC Statute, Article 8(2)(a)(vii)) or the war crime of cruel treatment (ICC Statute, Article 8(2)(c)(i));
- War crime of denying fair and regular trial (ICC Statute, Article 8(2)(a)(vi)) or the war crime of sentencing without due process (ICC Statute, Article 8(2)(c)(iv)); and/or
- Crime against humanity of imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law (ICC Statute, Article 7(1)(e)).

90. Crimes described in this section have had a serious and lasting impact on thousands of prisoners and their loved ones. These allegations, backed by credible evidence, merit full investigation by the ICC Prosecutor.

B. Factual Findings

91. Between April and December 2014, the Government of Ukraine progressively lost effective control over approximately 7% of its territory in Luhansk and Donetsk provinces. In the course of the Government's retreat, an estimated 16,200 of prisoners located across 36 prisons were abandoned to anti-government forces. With the exception of prisoners successfully evacuated from LPR/DPR-controlled territory, the vast majority of prisoners were effectively transferred into the custody of anti-government forces and *de facto* LPR/DPR quasi-state structures.¹⁸⁸

92. Amongst the prisoners transferred into LPR/DPR custody were:

- Those who were convicted and whose sentence had entered into force before the outbreak of armed conflict;
- Those who were convicted and were remanded in custody but whose sentence had not entered into force before the outbreak of armed conflict;
- Those who were remanded in custody and were being tried in a court of first instance prior to the outbreak of armed conflict; and
- Those who were remanded in custody and were subject to a pre-trial investigation prior to the outbreak of the armed conflict.¹⁸⁹

93. In addition, the LPR/DPR *de facto* authorities have subsequently used the same prisons to detain and punish civilians and members of anti-government forces for violating their newly minted laws.¹⁹⁰

1. LPR/DPR *de facto* courts lack independence, impartiality and fairness

188 See Section V(E) – The Integration of Ukrainian Prisons into LPR/DPR *De Facto* Structures

189 Reply of the Ombudsperson on the KHPG's request.// KHPG Archive, SLC's fund, inventory 4, file 07.

190 Interview with a prisoner from Yenakiyevu CF no.52 // KHPG Archive, SLC's fund, inventory 4, file 07.

94. Whilst information about LPR/DPR quasi-judicial processes is scant, there is mounting evidence that *de facto* courts and prosecuting authorities in LPR/DPR lack independence and impartiality, and fail to meet the minimum standards of fair justice.
95. Early attempts at justice by anti-government forces resembled Bolshevik military tribunals and Stalinist show-trials. For example, the self-appointed ‘Supreme Commander’ of DPR forces – Igor Girkin – introduced a Stalin-era decree of 22 June 1941 to administer martial law through a so-called ‘military field tribunal’.¹⁹¹ Girkin presided over some of the hearings, and signed off on all of its orders.¹⁹² The tribunal’s *de facto* protocols reveal the absence of fundamental due process guarantees such as adequate time and facilities to prepare a defence, effective assistance of counsel, right to examine and cross-examine witnesses, presumption of innocence and right to appeal. In LPR-controlled Alchevsk, ‘Prizrak Battalion’ commander – Alexey Mozgovoy – presided over a so-called ‘Novorossiia peoples’ court’. In a video posted online, two men can be seen ‘tried’ by the public, without witnesses, lawyers or evidence – just a series of allegations read out by a paramilitary commander with a show of hands to decide on whether the suspects ought to be shot or sent to the front lines.¹⁹³
96. From mid-2014, DPR/LPR *de facto* authorities began to establish *de facto* courts and emit *de facto* criminal laws applicable to territory under their

191 YouTube, ‘Игорь Стрелков - «Я говорю правду или молчу», Часть 2’, 6 Sept. 2016, available at: <https://www.youtube.com/watch?v=ltmgN3jzv0s>; Execution orders cite the decree: KyivPost, ‘Documents show Russian separatist commander signed off on executions of three men in Sloviansk’, 11 July 2014, available at: <https://www.kyivpost.com/article/content/ukraine-politics/documents-reveal-shadowy-russian-rebel-commander-signed-off-on-executions-of-three-men-in-sloviansk-355580.html>.

192 ViceNews on YouTube, ‘Missing Civilian Bodies found in Mass Graves: Russian Roulette (Dispatch 63)’, 31 July 2014, available at: https://www.youtube.com/watch?v=UBsEkF_GY0E&t=0s&index=64&list=PLnyZ1uZkeJ_wTcARCwyXpnOSnBoMFAEqZ; KyivPost, ‘Documents show Russian separatist commander signed off on executions of three men in Sloviansk’, 11 July 2014, available at: <https://www.kyivpost.com/article/content/ukraine-politics/documents-reveal-shadowy-russian-rebel-commander-signed-off-on-executions-of-three-men-in-sloviansk-355580.html>.

193 YouTube, ‘Первый народный суд Новороссии’, 30 October 2014, available at: https://www.youtube.com/watch?v=T2Ymaq4m1zY&feature=emb_logo; The New Republic, ‘Sentenced to Death with a Show of Hands’, 17 November 2014, available at: <https://newrepublic.com/article/120289/alexey-mozgovoy-show-trial-igor-ananeyev-eastern-ukraine>.

control.¹⁹⁴ LPR/DPR *de facto* criminal law and procedure largely mimics Ukrainian law, with some important distinctions. First, LPR/DPR *de facto* law enforcement and security forces do not require judicial approval to conduct arrests and are not subject to judicial supervision.¹⁹⁵ Second, there are no appellate courts on LPR-controlled territory, depriving detainees of the right to appeal convictions.¹⁹⁶

97. Limited information about the functioning of these *de facto* courts demonstrates their lack of independence, impartiality and fairness. The UN human rights office has noted “a consistent pattern of arbitrary detention, often amounting to enforced disappearance, torture and ill-treatment of conflict-related detainees in both self-proclaimed ‘republics’”, noting that year-long ‘pre-trial investigations’ often result in self-incriminating ‘confessions’.¹⁹⁷ The use of torture is endemic during interrogations, and sometimes includes the threat or use of sexual violence.¹⁹⁸ These torture-tainted confessions are then extensively used in LPR/DPR *de facto* courts.¹⁹⁹ There are no effective mechanisms for investigating claims of torture and other forms of ill treatment in LPR/DPR custody.

98. Other fair trial concerns include openly biased judges, closed hearings, the absence of presumption of innocence and the absence of effective legal counsel.²⁰⁰ Whilst ‘legal aid’ exists on paper, in reality lawyers often seek payment from defendants’ family members, and have been reported to collude with prosecuting authorities.²⁰¹

194 History of the courts’ system in the DPR, available at: <https://supcourt-dpr.su/istoricheskiy-formulyar>

195 Criminal procedure code of DPR, Article 117, available at: <https://gisnpa-dnr.ru/npa/0002-240-ihc-20180824/>

196 Without trial and investigation: how for years people have been waiting for the revision of the verdict in the self-proclaimed "LPR", DonbasSOS, 15 February 2018, available at: <http://www.donbasssos.org/15022017-3/>

197 OHCHR, ‘Report on the human rights situation in Ukraine 16 November 2019 to 15 February 2020’, March 2020, para. 64, available at: https://www.ohchr.org/Documents/Countries/UA/29thReportUkraine_EN.pdf.

198 *Ibid.*, para. 69.

199 *Ibid.*, para. 88.

200 *Ibid.*, paras. 89-90.

201 *Ibid.*, para. 89-90; Respondent K, who served at Yeanakiyevska CF no.52, the KHPG database

99. Witness 3 was sentenced to 10 months of imprisonment by the LPR-controlled Zhovtnevy District Court in March 2018, for the alleged crime of stealing a mobile phone. The phone in question was later found by the complainant, however Witness 3 was nevertheless convicted with no possibility of appeal as no appeal courts exist on LPR-controlled territory.²⁰²

100. Witness 8 – who holds pro-Ukrainian views and has the Ukrainian coat of arms tattooed on his chest - was arrested in March 2015 on suspicion of theft. He was handcuffed and brought to the Kuibyshev District police station in the trunk of a car (although he had been told that he was being taken to the airport to be shot). At the police station he was beaten to force him to confess. Between March and June 2015, Witness 8 was kept incommunicado in the basement of the Kuibyshev Conscription Office. No one, not even his mother, was informed about his arrest and whereabouts. He was occasionally taken to the police station for interrogation where investigators aimed at extracting a confession to at least one crime, promising that he would not have to serve prison time. Witness 8 eventually agreed and only then was his arrest officially registered. He was taken to Donetsk PTDC, where he was kept in pre-trial detention for two years. On 6 March 2017, Witness 8 was convicted and sentenced to three years custody by a DPR-controlled court, despite there being no evidence against him.²⁰³

101. Witness T was detained on suspicion of espionage at a checkpoint near the town of Yenukiyev. He was first brought to a police station, and later taken to the *Izolyatsia* detention and interrogation centre in Donetsk, where he was subjected to cruel interrogation techniques possibly amounting to torture: Witness T was beaten for several consecutive hours and strangled. He was forced to work for more than 12 hours a day without rest or food. He also witnessed the abuse of many other detainees (including those detained for non-political crimes), for the purpose of extracting confessions. He also claims that one co-detainee held on suspicion of robbery was beaten to death. Witness T was not given any access to legal counsel throughout his detention, until trial. His court-appointed lawyer did not defend his interests, but when his relatives hired another lawyer, the court

202 Interview with a prisoner from Sukhodolsk CF no.36 // KHPG Archive, SLC's fund, inventory 4, file 07.

203 Witness 8 (Donetsk PTDC).

refused to re-assign his defence counsel without providing grounds. During the trial, the Witness was not given an opportunity to interrogate prosecution witnesses, and was removed from the courtroom during trial on several occasions, without justification.²⁰⁴

2. Detainees ‘tried’ or ‘re-sentenced’ by LPR/DPR *de facto* authorities

102. An unknown number of detainees were being held in pre-trial custody at the point of the outbreak of conflict. After Ukrainian prosecutorial and court officials abandoned administrative and court buildings, case files in relation to these detainees were left behind, destroyed or taken onto government-controlled territory.²⁰⁵ Thus, many detainees left on territory controlled by anti-government forces had no or only partial case files in relation to their alleged wrongdoing. The new *de facto* authorities then proceeded to ‘re-create’ these case files, and to process cases through newly created ‘courts’, in accordance with their new laws and rules of procedure.²⁰⁶

103. Witness 2 was arrested in 2012 and placed into pre-trial detention at Luhansk PTDC. His case was being heard at Sverdlovsk District Court (1st instance) in Luhansk Province. His last hearing took place in July 2014. Subsequent hearings were cancelled on account of the armed conflict. There was no progress in his case for two years while he remained in Luhansk PTDC. In mid-2016 he was visited by an LPR *de facto* prosecutor who said that if he were to confess, he would get no more than four years and would be released for time serviced. The prosecutor also said that if Witness 2 refused, he would be facing new charges and his detention would last much longer. Witness 2 agreed, and on 15 June 2016 the LPR-controlled Sverdlovsk Court sentenced him to four years in prison, despite not having a case file or conducting an investigation.²⁰⁷

104. A number of prisoners who had been convicted by Ukrainian courts before the outbreak of conflict report that their sentences are being ‘automatically revised’ by LPR/DPR *de facto* authorities. As a result, sentences may be reduced or

204 Witness T, (Makiivka CF no.32)

205 Reply of the Ministry of Justice of Ukraine on the KHPG’s request // KHPG Archive, SLC’s fund, inventory 4, file 07.

206 Respondent R, who served at the Donetsk detention center, the KHPG database

207 Witness 2 (Luhansk LTDC)

extended, depending on the new *de facto* laws and the *de facto* courts decisions. Sentence revision proceedings are held in absentia and without legal representation – with prisoners only finding out about changes to their sentences after the fact.²⁰⁸ For certain crimes, life terms may be ‘revised’ to capital punishment, as this form of punishment is recognised by LPR/DPR *de facto* authorities. A number of Ukrainian detainees have been threatened with such revisions,²⁰⁹ whilst there are reports of executions taking place on LPR/DPR controlled territories.²¹⁰

3. Ukrainian convicts entitled to early release on parole

105. According to Article 81 of the Criminal Code of Ukraine, all persons convicted by Ukrainian courts are entitled to early release on parole on the condition of displaying good behaviour during detention.²¹¹ Similar provisions exist in the so-called criminal codes of LPR and DPR, with important distinctions (e.g.: prisoners are entitled to release on parole after serving $\frac{2}{3}$ of the sentence in Ukraine and $\frac{3}{4}$ of the sentence in DPR).²¹² However, in practice, LPR and DPR *de facto* authorities systematically denied early release on parole to prisoners convicted by Ukrainian courts, especially if the prisoner in question expressed the intention to travel to government-controlled territory.²¹³ Early release is reportedly subject to the payment of a bribe.²¹⁴ Moreover, persons released by LPR/DPR *de facto* authorities risked re-arrest and detention by Government authorities who refused to recognise the legitimacy of such early releases.²¹⁵

208 Interview with a prisoner from Donetsk PTDC // KHPG Archive, SLC’s fund, inventory 4, file 07.

209 Interview with a prisoner from Donetsk PTDC // KHPG Archive, SLC’s fund, inventory 4, file 07.

210 Donetsk News, “Смертная казнь в «Л-ДНР» – правозащитники дали оценку”, 4 November 2018, available at: <https://dnews.dn.ua/news/694574>.

211 Criminal Code of Ukraine, available at: <https://zakon.rada.gov.ua/laws/show/2341-14>.

212 ‘Criminal Code of DPR’, Article 79, available at: <https://dnrsovet.su/zakonodatelnaya-deyatelnost/dokumenty-verhovnogo-soveta-dnr/ugolovnyj-kodeks-donetskoj-narodnoj-respubliki/>; ‘Criminal Code of LPR’, Article 82, available at: <https://nslnr.su/zakonodatelstvo/normativno-pravovaya-baza/1870/>.

213 Interview with a prisoner from Yenakiyev CF no. 52 // KHPG Archive, SLC’s fund, inventory 4, file 07.

214 Interview with a prisoner from Yenakiyev CF no. 52 // KHPG Archive, SLC’s fund, inventory 4, file 07.

215 Interview with a prisoner from Donetsk CF no. 124 // KHPG Archive, SLC’s fund, inventory 4, file 07.

4. Ukrainian convicts entitled to sentence reductions under Savchenko law

106. On 26 November 2015, the President of Ukraine signed into law an amendment to the Criminal Code that gave all Ukrainian prisoners retroactive sentence reductions for time served in pre-trial detention.²¹⁶ Each day served in pre-trial detention in the conflict zone accounts for two days off the prison sentence.²¹⁷ The law was brought in to address rampant violations of the right to trial without undue delay and prolonged pre-trial detention in Ukraine.²¹⁸ An estimated 7,500 prisoners were released from custody in government-controlled territory pursuant to this law.²¹⁹

107. However, there is no equivalent provision in LPR/DPR *de facto* legislation. Consequently, Ukrainians remanded into pre-trial custody in Eastern Ukraine who were subsequently transferred into LPR/DPR custody have not benefited from this law. Thus, an unknown number of prisoners continued to serve prison sentences in LPR/DPR-controlled prisons for months (in some cases years) after they were entitled to release under Ukrainian law.²²⁰

108. It should be noted that the law on sentence reduction – known as ‘Savchenko Law’ – was repealed on 17 June 2017.²²¹

216 ЗАКОН УКРАЇНИ Про внесення зміни до Кримінального кодексу України щодо удосконалення порядку зарахування судом строку попереднього ув'язнення у строк покарання, 26 November 2015, available at: <https://zakon.rada.gov.ua/laws/show/838-19#Text>.

217 *Ibid*,

218 Antydot, “Why was Savchenko's law needed”, 27 June 2017, available at: <https://antydot.info/analytics/navischo-buv-potriben-zakon-savchenko/>

219 112.UA, “What is Savchenko’s law? Questions and answers”, 28 September 2016, available at: <https://112.international/article/what-is-savchenkos-law-questions-and-answers-9823.html>.

220 Respondent P, who served at the Donetsk CF no.124, the KHPG database

221 LAW OF UKRAINE "On Amendments to the Criminal Code of Ukraine Concerning the Rule of Execution of Sentences and Enrollment in Pre-Trial Detention", available at: <https://zakon.rada.gov.ua/laws/show/2046-19#n5>

C. ICC Statute Crimes: Unlawful Detention and Punishment without Fair Trial

1. Applicable law

109. Unlawful detention is incompatible with the principle of humanity²²² and may amount to a war crime²²³ or crime against humanity.²²⁴ The unlawful nature of detention is assessed on a case-by-case basis, focusing on the legitimacy of the grounds for detention, the detainer's legal powers and compliance with minimum procedural safeguards.²²⁵ The legal basis for the initial deprivation of liberty must apply throughout the entire period of detention. If at any time the original legal basis ceases to apply, an initially lawful deprivation of liberty will become unlawful.²²⁶

110. In the context of an IAC or occupation, civilians may be detained if and only for as long as there are serious and legitimate reasons to believe that they may seriously prejudice the security of the detaining party.²²⁷ Interned civilians must be kept in adequate conditions,²²⁸ must be promptly informed, in a language they understand, of the reasons for the internment,²²⁹ and provided with an opportunity to challenge their internment.²³⁰ The detention of civilians in the context of and associated with an IAC or occupation, which fails to comply with these rules, may be prosecuted as a war crime of unlawful confinement.²³¹

111. In the context of a NIAC, detention which is not grounded in applicable domestic law,²³² or does not comply with the minimum safeguards set out in

222 ICRC, Rule 99. Deprivation of Liberty, Customary IHL, available at: https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule99.

223 ICC Statute, Article 8(2)(a)(vii).

224 ICC Statute, Article 7(1)(e).

225 ICRC, Rule 99. Deprivation of Liberty, Customary IHL, available at: https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule99.

226 See ICTY, Trial Chamber II, *Prosecutor v. Milorad Krnojelac*, "Judgement," IT-97-25-T, 15 March 2002, para. 114

227 Article 42 of Geneva Convention IV; Article 78 of Geneva Convention IV; See also: ICTY, *The Prosecutor v. Delalić et al.*, Judgment, IT-96-21-T, 16 November 1998, para. 576.

228 Article 22 and Articles 25-32 of Geneva Convention III.

229 Additional Protocol I, Article 75(3); Article 9(2) ICCPR; Article 5(2) ECHR.

230 Article 43 of Geneva Convention IV; Article 9(4) ICCPR; Article 5(4) ECHR.

231 ICC Statute, Article 8(2)(a)(vii).

232 E.g.: as a result of a lawful conviction, for the purposes of bringing a person to trial, to prevent the spread of disease or to effect an extradition.

international human rights law²³³ may be qualified as the war crime of cruel treatment.²³⁴ During pre-trial proceedings, “detention should be an exception and as short as possible”,²³⁵ while the time limit for bringing a detained person before a judge “must not exceed a few days”.²³⁶ For the deprivation of liberty to continue to be lawful during trial and post-conviction, proceedings must not violate the defendant’s right to a fair trial.²³⁷

112. Unlawful detention may also be prosecuted as a crime against humanity, where the detention of civilians is in violation of fundamental rules of international law and takes place as part of a widespread or systematic attack on the civilian population.²³⁸ International law requires detention to be grounded in applicable domestic law and procedure, “which itself must not be arbitrary and the enforcement of this law in a given case must not take place arbitrarily”.²³⁹ The arbitrariness of domestic law, or its application, is measured by assessing compliance with the minimum safeguards set out in international human rights law: i.e. to be informed, at the time of arrest, of the reasons for the arrest and be promptly informed of any charges; to be brought promptly before a judge or other officer authorized by law to exercise judicial power and to be brought to trial within a reasonable time or released; to take proceedings before a court, in order that that court may decide without delay on the lawfulness of the detention and order release if the detention is not lawful.²⁴⁰

233 See ICCPR, Article 9; ECHR, Article 5.

234 ICC Statute, Article 8(2)(c)(i).

235 Office of the High Commissioner for Human Rights, “*General Comment No. 08: Right to liberty and security of persons (Art. 9)*,” Sixteenth Session, 30 June 1982, para. 3

236 Office of the High Commissioner for Human Rights, “*General Comment No. 08: Right to liberty and security of persons (Art.9)*,” Sixteenth Session, 30 June 1982, para. 2

237 See ICCPR, Article 14; ECHR, Article 6: The right to a fair and public hearing by a competent, independent and impartial tribunal established by law; The right to be presumed innocent until proven guilty; To have adequate time and facilities to prepare a defence; To be tried without undue delay; To be defend oneself through legal assistance of his/her own choosing; To examine witnesses against him/her and to have witnesses examined on his/her behalf under the same conditions; To have free assistance of an interpreter if required; Not to be compelled to testify against oneself on to confess guilt; To appeal and conviction or sentence; Not to be tried twice for the same crime.

238 ICC Statute, Article 7(1)(e).

239 ICTY, Trial Chamber II, *Prosecutor v. Milorad Krnojelac*, “Judgement,” [IT-97-25-T], 15 March 2002, para. 114.

240 See ICCPR, Article 9; ECHR, Article 5.

113. Furthermore, punishing a civilian or other protected person without due process may amount to a war crime in the context of a NIAC.²⁴¹ The lack of due process is demonstrated by showing that the punishment had not resulted from a judgment pronounced by a court, or if it had, that the court was not ‘regularly constituted’, that is, ‘it did not afford the essential guarantees of independence and impartiality, or ‘did not afford all other judicial guarantees generally recognised as indispensable under international law’.²⁴² In the context of an IAC, this conduct may be qualified as the war crime of depriving a protected person of a fair and regular trial.²⁴³

2. Analysis

114. First, there is an overarching question as to whether anti-government forces – being non-state actors with no legitimacy or recognition under national or international law – have any legal authority to detain civilians and other protected persons. Without such legal authority, the continued detention of Ukrainian prisoners by anti-government forces may be considered arbitrary, unless there are serious and legitimate reasons to believe that they may seriously prejudice the security of the detaining party.²⁴⁴ There is no evidence that all 16,200 persons being held in prisons on LPR/DPR-controlled territory constitute a threat to the security of the highly militarised anti-government forces. The legitimacy of continued detentions must be examined on a case-by-case basis.

115. Second, it is well established that LPR/DPR *de facto* courts and *de facto* prosecuting authorities lack requisite independence, impartiality and fairness to conduct trials and sentencing reviews that could be considered ‘fair and regular’ by international standards.²⁴⁵ The widespread use of arbitrary arrest, ill treatment and torture during investigation, and reliance on torture-tainted confessions in *de facto* courts deprive defendants of fair and regular trial. Evidence of widespread judicial bias, closed proceedings and a lack of access to independent and effective

241 ICC Statute, Art. 8(2)(c)(iv).

242 ICC Elements of Crimes, Art. 8(2)(c)(iv).

243 ICC Statute, Article 8(2)(a)(vi).

244 Article 42 of Geneva Convention IV; Article 78 of Geneva Convention IV; See also: ICTY, *The Prosecutor v Delalić et al.*, Judgment, IT-96-21-T, 16 November 1998, para. 576.

245 Fourth Geneva Convention, Article 5 and Articles 66-75; Protocol I, Article 75(4); ECHR, Article 6, ICCPR, Article 14.

legal counsel also makes fair trial all but impossible. The ‘automatic revision’ of sentences for convicted prisoners without the participation of defendants or their legal representatives is a further violation of due process, particularly when such revisions result in harsher sentences. As such, all prisoners who have been tried and sentenced by LPR/DPR *de facto* courts, or who have had their sentences revised by LPR/DPR *de facto* authorities, are being held arbitrarily and have been deprived of fair and regular trial.

116. Third, Ukrainian prisoners convicted by Ukrainian courts are entitled to early release by law – either by application of the early release provisions in Article 81 of the Criminal Code of Ukraine, or by virtue of the ‘Savchenko’ law on sentence (reduction during the period of its application). Prisoners being held in prisons on LDP/DPR-controlled territory who qualify for release on these grounds but continue to be detained are being held arbitrarily, as the original legal basis for their detention no longer applies.²⁴⁶

117. All forms and variants of arbitrary detention and denial of due process described in this section took place and were associated with the armed conflict described in section VI of this Communication. Prisoners were transferred into the custody of anti-government forces after Ukrainian authorities lost effective control over parts of Donetsk and Luhansk provinces as a result of the armed conflict. The armed conflict continues to date, preventing the Government of Ukraine from exercising its authority over the prisons and applying its laws over LPR/DPR-held territory. For reasons set out in section VI, the armed conflict that led to these violations is (at least in part) an IAC. LPR/DPR authorities and their Russian minders are fully aware of the conflict and its link to these violations. As such, there is a reasonable basis to believe that relevant members and commanders of the LPR/DPR and their Russian minders or facilitators are responsible for the war crime of unlawful confinement²⁴⁷ and the war crime of denying fair and regular trial.²⁴⁸ Alternatively, in the context of a NIAC, the arbitrary detention of any individual with no legitimacy, justification or due process amounts to the war

246 See ICTY, Trial Chamber II, *Prosecutor v. Milorad Krnojelac*, “Judgement,” IT-97-25-T, 15 March 2002, para. 114

247 ICC Statute, Article 8(2)(a)(vii).

248 ICC Statute, Article 8(2)(a)(vi).

crime of cruel treatment.²⁴⁹ The arbitrary punishment and the illegal revision of sentences by LPR/DPR *de facto* authorities amounts to the war crime of sentencing without due process.²⁵⁰

118. Further, or in the alternative, the arbitrary detention of civilians by LPR/DPR *de facto* authorities is part of the widespread or systematic attack on the civilian population described in section VI. Torture-tainted interrogations and the systematic denial of due process is a key feature of LPR/DPR policy, and a key means by which the *de facto* authorities maintain fear and control over the population. The arbitrary nature of detention and denial of due process described in this section falls squarely into the anti-government forces' attack on all actual or perceived opponents of their rebellion, and other 'undesirables' and extortion targets. Moreover, there is credible evidence that actual or perceived pro-Ukrainian prisoners are deliberately targeted by LPR/DPR *de facto* authorities through denials or early release²⁵¹ and the imposition of harsher sentences through the 'automatic revision' process.²⁵² As such, the LPR/DPR *de facto* authorities' arbitrary detention of civilians and systematic denial of due process amounts to the crime against humanity of imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law.²⁵³

D. Conclusion

119. For the foregoing, there is a reasonable basis to believe that the arbitrary detention, punishment and systematic denial of due process to prisoners being held on LPR/DPR-controlled territory amounts to the following ICC Statute crimes:

- a. **War crime of unlawful confinement** (ICC Statute, Article 8(2)(a)(vii) or the **war crime of cruel treatment** (ICC Statute, Article 8(2)(c)(i));
- b. **War crime of denying fair and regular trial** (ICC Statute, Article 8(2)(a)(vi)) or the **war crime of sentencing without due process** (ICC Statute, Article 8(2)(c)(iv)); and/or

249 ICC Statute, Article 8(2)(c)(i).

250 ICC Statute, Article 8(2)(c)(iv).

251 Respondent R, who served at the Donetsk CF no.124, the KHPG database

252 Respondent R, who served at the Donetsk CF no.124, the KHPG database

253 ICC Statute, Article 7(1)(e).

- c. **Crime against humanity of imprisonment or other severe deprivation of physical liberty** in violation of fundamental rules of international law (ICC Statute, Article 7(1)(e)).

120. The Filing Parties aver that these crimes are grave and respectfully request the ICC Prosecutor to fully investigate the alleged crimes with a view to prosecuting those responsible.

VIII. CRUEL, INHUMAN AND DEGRADING TREATMENT OF PRISONERS

A. Overview

121. All witnesses interviewed by the Filing Parties noted a marked deterioration in the conditions of their detention following the outbreak of conflict and the prisons' takeover by anti-government forces. Prisoners note an increase in unprovoked and gratuitous violence – usually perpetrated by prison guards and members of anti-government paramilitary forces and/or Russian special forces. Almost all male prisoners report being subjected to some forms of violence, but the most severe violence was reserved for those perceived as being 'pro-Ukrainian'. Physical violence was often accompanied by psychological violence and degrading treatment – taking such forms as threats, verbal abuse, forced nudity, forced exercises and singing and other debasing conduct. All prisoners report inadequate conditions of detention – including cold and overcrowded cells, lack of adequate food and water, lack of access to medical care and the prison authorities' failure to protect prisoners from the dangers of armed conflict. All conduct took place in the context of and was associated with the armed conflict in Eastern Ukraine, and/or was part of the anti-government forces' widespread or systematic attack on (a part of) the civilian population. There is therefore a reasonable basis to believe that conduct set forth in this section amounts to the following crimes under the ICC Statute:

- War crime of cruel or inhuman treatment (ICC Statute, Article 8(2)(c)(i) and/or Article 8(2)(a)(ii));
- War crime of outrages upon personal dignity (ICC Statute, Article 8(2)(c)(ii) or Article 8(2)(b)(xxi));
- Crime against humanity of other inhumane acts (ICC Statute, Article 7(1)(k)).

122. Further investigation is needed to determine whether individual acts or the cumulative effect of all or some of the above forms of inhuman treatment amount to the war crime and/or crime against humanity of torture (ICC Statute, Article 8(2)(a)(ii), Article 8(2)(c)(i) and/or Article 7(1)(f)).

123. Crimes described in this section have had a serious and lasting impact on thousands of prisoners and their loved ones. These allegations, backed by credible evidence, merit full investigation by the ICC Prosecutor.

B. Factual Findings

124. The majority of prisoners detained in facilities that fell under the control of anti-government forces experienced violence, cruelty and abuse that resulted in different levels of physical or mental injury. The extent of the violence and other forms of cruel treatment varied from prison to prison, largely dependant on the groups and persons in effective control of the geographic location. Witnesses report a spike in violence and cruelty in 2014 – 2015: during and in the immediate aftermath of the territorial takeover by anti-government forces. Whilst inhuman treatment continued throughout the period of documentation, witnesses report a marked decline in its frequency and intensity, after anti-government forces secured their territory and began to establish quasi-state institutions.²⁵⁴ Prisoners have no organs or authorities to complain to or seek redress from in LPR/DPR-controlled prisons. The cumulative effect of conduct set forth in this section drove some prisoners to self-harm.²⁵⁵

1. Physical violence

125. In 2014-2015, physical violence toward prisoners was pervasive in the majority of documented prisons.²⁵⁶ Physical violence was used at least once against 65% of the witnesses, and about 30% experienced systematic violence. The Filing Parties estimate that at least 9,000 prisoners experienced some form of physical violence that went over and above lawful sanction. The degree and frequency of violence in each prison varied with the group or commander in effective control over the territory in question. The majority of documented cases of violence took place between November 2014 and March 2015, in Horlivka (Mikitino CF no. 87, Michurin CF no. 57), Makiivka (Makiivka CF no. 32),

254 Interviews with a prisoners from multiply CF // KHPG Archive, SLC's fund, inventory 4, file 07.

255 Interview with a prisoner from Makiyivska CF no. 32// KHPG Archive, SLC's fund, inventory 4, file 07.

256 E.g.: In Michurin CF no. 57, all respondents have experienced beatings: Interview with a prisoner from Yenakiyevo CF no.52 // KHPG Archive, SLC's fund, inventory 4, file 07.

Luhansk (PTDC) and Slovianoserbsk (Slovianoserbsk CF no. 60).²⁵⁷ During this period, prisoners were most often exposed to violence for their political stance, for having been born in Western Ukraine, for speaking Ukrainian, for adhering to religions other than the Russian Orthodox Church, and/or for disobeying prison authorities in some other way.²⁵⁸ Prisoners held in facilities in and around Horlivka – controlled at the time by Igor Bezler²⁵⁹ – reported the worst and most frequent types of violence and cruelty throughout this period.²⁶⁰

126. Throughout 2014, prisons were raided by bands of anti-government paramilitaries, leading to episodes of severe and indiscriminate violence.²⁶¹ Militiamen would enter the prisons and administer beatings and threats to virtually all prisoners, in order to force them into submission to the new authorities, or to anticipate any insubordination.²⁶² Prisoners were punched, kicked and beaten with objects, insulted and stripped naked, had all personal belongings confiscated and exposed to verbal abuse and intimidation.²⁶³ Such raids were particularly prevalent in Krasnolutsk CF no. 19 and Michurin CF no. 57 prisons.²⁶⁴ Such incidents were also documented in Yenakiyev CF no. 52²⁶⁵ and Chervonopartizansk CF no. 68.²⁶⁶

127. The ‘new’ prison authorities also used physical violence as a means of administering discipline or punishing insubordination. Prisoners were

257 Interviews with prisoners from multiple CFs // KHPG Archive, SLC’s fund, inventory 4, file 07.

258 E.g.: Witness 7 (Krasnolutsk CF no. 19) was severely beaten for having a Ukrainian flag; Witness 4 (Krasnolutsk CF no. 19) was beaten for having slippers painted in Ukrainian colours; Witness 11 reports that anyone using Ukrainian words was harassed or beaten in Makiivka CF no. 32.

259 See FIDH and EUCCI, “Communication under Article 15 of the Rome Statute of the International Criminal Court: Sexual crimes in the conflict in Eastern Ukraine”, October 2018, section V(F); See also The New Republic, “I met Igor Bezler, the Russian rebel who said “We have just shot down a plane”, 18 July 2014, available at: <https://newrepublic.com/article/118770/who-igor-bezler-russian-rebel-implicated-malaysia-flight-17>.

260 Interview with a prisoner from Mykytiv CF no. 97 // KHPG Archive, SLC’s fund, inventory 4, file 07.

261 Interview with a prisoner from Torez CF no.28 // KHPG Archive, SLC’s fund, inventory 4, file 07.

262 *Ibid.*

263 *Ibid.*

264 Interview with a prisoner from Michurin CF no. 57 // KHPG Archive, SLC’s fund, inventory 4, file 07.

265 Interview with prisoners from multiple CFs // KHPG Archive, SLC’s fund, inventory 4, file 07.

266 Interview with a prisoner from Chervonopartyzansk CF no. 68 // KHPG Archive, SLC’s fund, inventory 4, file 07.

systematically punched and kicked in response to any and all infractions, even very minor ones. Most documented cases of physical violence as a regular form of punishment took place in Yenakiyev CF no. 52, Krasnolutsk CF no. 19 and Donetsk CF no. 124.²⁶⁷

128. Below are some examples of physical violence experienced by witnesses:

a. Witness 1 serving his sentence at Bryanka CF No. 11. Within the first weeks of the takeover in May 2014, the majority of prisoners were systematically beaten: combatants would take prisoners out of their cells into the corridors and courtyard. Prisoners were told to raise their hands and walk. Soldiers would come up to prisoners in turn and hit them. Some of the prisoners had to be taken to the infirmary after this ‘exercise’. Witness 1 also recalls that from mid-2014 (and every six months after that), anti-government forces would organise ‘special forces training’ in the prison, using prisoners as human punching bags. On another occasion, Witness 1 was taken up to see members of anti-government forces who tried to convince him to join their ranks. Upon his refusal, Witness 1 received punches or kicks to his back.²⁶⁸

b. Witness 2 held in Luhansk PTDC recalls that men whom he identifies as members of Russian special forces (OMON and SOBR), would regularly visit the prison and subject prisoners to random acts of violence. Witness 2 sustained multiple injuries from these beatings, including a fractured skull and bruises all over his body. Witness 2 also claims that all prisoners (except for women) were subjected to such beatings, and that at least one 18 year-old prisoner died as a result of the beatings. Witness 2 tried to complain to prison and LPR *de facto* authorities to no avail.²⁶⁹

c. Witness 4 held in Krasnolutsk CF no. 19 recalls being taken out into the prison courtyard by what he identifies were Russian special forces (ROSNAZ). The prisoners were ordered to strip naked and were

267 Interviews with prisoners from multiply CF // KHPG Archive, SLC’s fund, inventory 4, file 07.

268 Interview with a prisoner from Bryanka CF no. 11 // KHPG Archive, SLC’s fund, inventory 4, file 07.

269 Interview with a prisoner from Luhansk PTDC // KHPG Archive, SLC’s fund, inventory 4, file 07.

indiscriminately beaten by the soldiers, who threatened to ‘kick off their genitals for good’. The prisoners were then presented to a so-called ‘prosecutor’, who asked if they were being mistreated. Anyone who complained would be beaten again. Such beatings were administered once every 30 or 60 days. On one occasion, Witness 4 was held down by two guards, while a third beat him with a baton and a deputy warden applied pressure onto his chest which caused a long-term injury. On other occasions, Witness 4 was beaten for having slippers painted in Ukrainian colours. Witness 4 recalls that those who complained or those who were charged with grave crimes received the worst beatings. He recalls seeing some prisoners with broken ribs and legs. On the last occasion in early 2018, Witness 4 was subjected to ‘stretching’ – where two people pull on the legs while a third presses his weight down on the victim. This technique caused the Witness 4 a lot of pain.²⁷⁰

- d. Witness 7 was held in Krasnolutsk CF no. 19. A Ukrainian flag was discovered in his personal belongings. In October 2014, the Witness and five other inmates were separated from other prisoners and made to stand facing the wall. Then soldiers put Witness 7 on the ground and started hitting his back, buttocks and legs. During the next four days Witness 7 could barely breathe and suspected that he had fractured ribs, but no medical assistance was provided to him.²⁷¹
- e. Witness 9 was beaten with batons until he could not walk and threatened with rape as part of an extortion racket at Volnovakha CF no. 120.²⁷²
- f. Witness 11 was beaten by a prison warden assistant in Donetsk PTDC for saying that he would like to leave DPR-controlled territory as soon as he was released.²⁷³

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Witness 4 (Krasnolutsk CF no. 19).
Witness 7 (Krasnolutsk CF no. 19).
Witness 9 (Volnovakha CF no. 120).
Witness 11 (Makiivka CF no. 32).

2. Psychological violence and humiliation

129. In addition to beatings and other forms of physical violence, members of anti-government forces LPR/DPR-controlled prison authorities used psychological violence, humiliation and other forms of mental pressure to intimidate or punish prisoners.

130. For example, at the Luhansk PTDC, the national anthems of the Russian Federation and LPR were played at very high volumes every evening.²⁷⁴ In Krasnolutsk CF no. 19 and Slovianoserbsk CF no. 60, prisoners report being forced to do squats and push-ups and repeatedly say that they ‘love the prison authorities’.²⁷⁵ Threats, insults and other forms of mental pressure were pervasive across all prisons. Prisoners serving life sentences were threatened with having their sentences revised to death penalties.²⁷⁶

131. In Donetsk PTDC, Witness 8 – who has Ukrainian insignia tattooed on his chest – was placed in a cell with 25 anti-government militiamen. As a result of the threats and abuse he received, he hardly slept over a period of six months.²⁷⁷

132. In Krasnolutsk CF no. 19, prisoners report being exposed to public beatings, ridicule, being forced to do squats or push-ups in front of others, being forced to publicly declare loyalty to prison authorities and anti-government forces, being subjected to bright lights in the cells all through the night and other forms of psychological violence.²⁷⁸

133. In Sukhodilsk CF no. 36, Witness 5 recalls being constantly told that no one would ever help him, and that the constant psychological pressure and physical violence drove a number of prisoners to commit suicide. Witness 5 also recalls that prisoners were made to run around in the street naked during winter, do

274 Interview with a prisoner from Luhansk PTDC // KHPG Archive, SLC’s fund, inventory 4, file 07.

275 Interview with a prisoner from Krasnolutsk CF no. 19 // KHPG Archive, SLC’s fund, inventory 4, file 07.

276 Interview with a prisoner from Yenakiyev CF no. 52 // KHPG Archive, SLC’s fund, inventory 4, file 07.

277 Witness 8 (Donetsk PTDC).

278 Interview with a prisoner from Crasnolutsk CF no. 19 // KHPG Archive, SLC’s fund, inventory 4, file 07.

squats, sing Russian folk songs or the Russian anthem, and were beaten if they did not know the lyrics.²⁷⁹

134. In Zakhidna CF no. 97, prisoners were punished for minor violations by being locked up for up to half a day naked and handcuffed in ‘the closet’ – a small space with no heating or access to water or toilet.²⁸⁰

135. Other prisoners report constant threats of physical violence, arbitrary bans on visits from relatives or access to mobile phones.²⁸¹

3. Conditions of detention

136. Conditions of detention deteriorated across all documented prisons from mid-2014, with the worst conditions being reported in Yenakiyevo CF no. 52, Makiivka CF no. 32, Kalinin CF no. 27, Slovianoserbsk CF no. 60, Donetsk CF no. 124 and Volnovakha CF no. 120.

137. In Donetsk CF no. 124 and Kalinin CF no. 27, prisoners were forced to remain in partially destroyed cells after a series of artillery attacks damaged windows and the overall structural integrity of the buildings.²⁸² The prisoners were not moved from damaged cells, and no repairs were carried out. When winter came at the end of 2014, prisoners had to cover windows with plywood to protect themselves from the cold and snowdrifts (which effectively cut out all natural light).²⁸³

138. In the winter of 2014-2015 most of the prisons had no heating, with temperature inside cells falling below zero degrees Celsius. Prisoners were forced to put on every piece of clothing they owned. In Zakhidna CF no. 97, the temperature in the cells went down to minus seven degrees Celsius.²⁸⁴ At Yenakiyevo CF no. 52, some prisoners were given small stoves, while inmates of other prisons had to buy stoves with funds obtained from family members.²⁸⁵ Those serving life sentences at Yenakiyevo CF no. 52 were denied access to

279 Witness 5 (Sukhodilsk CF no. 36).

280 Witness 10 (Zakhidna CF no. 97).

281 E.g.: Witness 6 (Skizhynsk CF no. 127) was not allowed pen or paper and could not communicate with relatives.

282 Interview with a prisoner from Kalinin CF no. 27 // KHPG Archive, SLC’s fund, inventory 4, file 07.

283 Interview with a prisoner from Makiivka CF no. 32 // KHPG Archive, SLC’s fund, inventory 4, file 07.

284 Witness 12 (Zakhidna CF no. 97).

stoves and forced to make fires in their cells with whatever they could get their hands on: wooden furniture, clothing and paper. They also used these fires to boil water.²⁸⁶

139. All prisons experienced power cuts.²⁸⁷ In some prisons, power was turned on and off according to a power-saving schedule. In other prisons, power outages lasted for days and even weeks. Yenakiyevo CF no. 52 had no power for a period of 50 days.²⁸⁸ Makiivka CF no. 32 had no power for a period of two weeks.²⁸⁹ Prisoners in cells with plywood over windows remained in darkness for hours or even days.

140. There was no hot water in any of the documented prisons for a period of six months in 2014-2015. Cold water, was generally available, but would sometimes be cut off for up to a week as a result of heavy shelling. During these times prisoners were unable to maintain basic hygiene. This was especially hard on women. As a result of this, prisoners were exposed to infestations of insects and parasites, and experienced skin inflammation. Even small scratches could take a long time to heal.²⁹⁰ Prisoners report not having access to a bath or shower for periods of up to three months.²⁹¹

141. During episodes of heavy shelling, prisoners were not allowed to leave their cells for weeks: to prevent deaths or injuries or because there simply was not enough personnel left to supervise them.²⁹² This left prisoners without fresh air, exercise or basic hygiene for prolonged periods of time.

285 Interview with a prisoner from Yenakiyevo CF no. 52 // KHPG Archive, SLC's fund, inventory 4, file 07.

286 Interview with a prisoner from Yenakiyevo CF no. 52 // KHPG Archive, SLC's fund, inventory 4, file 07.

287 Interviews with prisoners from multiple CFs // KHPG Archive, SLC's fund, inventory 4, file 07.

288 Interview with a prisoner from Yenakiyevo CF no. 52 // KHPG Archive, SLC's fund, inventory 4, file 07.

289 Interview with a prisoner from Makiivska CF no. 32 // KHPG Archive, SLC's fund, inventory 4, file 07.

290 Interview with prisonerw from Slovyanoserbsk CF no 60 and Makiivska CF no 32 // KHPG Archive, SLC's fund, inventory 4, file 07.

291 Interview with a prisoner from Yenakiyevo CF no. 52 // KHPG Archive, SLC's fund, inventory 4, file 07.

292 Interview with a prisoner from Yenakiyevo CF no. 52 // KHPG Archive, SLC's fund, inventory 4, file 07.

142. Prisoners in Luhansk PTDC allege that six prisoners are cramped into cells designed to house three.²⁹³ A prisoner in Donetsk PTDC says that 30 people were held in a cell built for 20.²⁹⁴

4. Access to food and water

143. Food shortages were experienced in nearly all LDP/DPR-controlled prisons, with some prisons experiencing chronic food shortages and starvation in mid-2014 to mid-2015. Food shortages were reported by 80% of all interviewed witnesses, across nearly all documented prisons.

144. On 1 December 2014, the Government of Ukraine cut off all food supplies to prisons on LDP/DPR-controlled territory.²⁹⁵ LDP/DPR failed or refused to adequately meet the ensuing shortages. Prisons quickly depleted stocks and had to rely on Russian humanitarian aid and food parcels organised by prisoners and their families. Such efforts were hampered by prison officials and anti-government militiamen, who confiscated or diverted food aid and parcels.²⁹⁶ In some cases, local *de facto* authorities expressly refused to distribute food to prisons.²⁹⁷ Some prison authorities encouraged food trade among prisoners (and took a cut from the transaction),²⁹⁸ artificially inflated food prices to up to twice the going rate,²⁹⁹ and even made prisoners pay for humanitarian aid.³⁰⁰ Prisoners experienced periods of starvation lasting between two and twelve months. Much depended on the geographic location of the prison, and predisposition of the prison authorities and paramilitaries in effective control.

293 Witness 3 (Luhansk PTDC).

294 Witness 10 (Donetsk PTDC).

295 Reply of the Ministry of Justice of Ukraine to information request // KHPG Archive, SLC's fund, inventory 4, file 07.

296 E.g.: Witness 7 (Krasnolutsk CF no. 19).

297 Interview with a prisoner from Yenakiyev CF no. 52 // KHPG Archive, SLC's fund, inventory 4, file 07.

298 Interview with a prisoner from Yenakiyev CF no. 52 // KHPG Archive, SLC's fund, inventory 4, file 07

299 On average, a packet of buckwheat could cost between 50 and 70 UAH, with the standard price being only 20 UAH (reported at Sloviadoserbsk CF no. 60 and Krasnolutsk CF no. 19).

300 E.g.: Witness 10 (Zakhidna CF no. 97).

145. The blockade of Luhansk in July 2014 completely cut off food supplies to Luhansk PTDC. Prisoners were forced to rely exclusively on food parcels from family members, who themselves were experiencing food shortages.³⁰¹

146. In Yenakiyevo CF no. 52, prisoners report starving for almost half a year. In December 2014, the prison had stocks to feed prisoners for several months following the cut-off from the Government of Ukraine. However, in February 2015 the prison's mess hall was completely destroyed by an artillery shell, destroying the stocks and the only place to prepare food. No food products entered the prison until the end of February 2015. Prisoners relied entirely on food parcels from relatives and friends. Deliveries were also arranged from government-controlled areas, where food was 2-3 times cheaper, although this fell foul of prison authorities who were unable to take a cut off the transaction. For several months, prisoners received plain cabbage soup and 100-150 grams of soup per day.³⁰²

147. In Makiivka CF no. 32, prisoners received watery soup and occasionally porridge. When power was cut out, the prisoners made their own 'buns' over open fires in their cells.³⁰³

148. Witnesses reported the worst food shortages in Zakhidna CF no. 97, which lasted until the autumn of 2016.³⁰⁴ 80-90% of all prisoners suffered from some form of malnutrition, with some weighing less than 45kg.³⁰⁵ One serving of food there consisted of 150 grams of soup, which was essentially water and cabbage. Active hostilities and artillery strikes prevented relatives from delivering food parcels. Prisoners' hands and feet were swollen and they would often collapse and pass out from hunger.³⁰⁶ Prisoners reportedly suffered from dystrophy, distended stomachs, and 30-40% weight loss.³⁰⁷ A total of ten prisoners are reported to have died from hunger in Zakhidna CF no. 97.³⁰⁸

301 Interview with a prisoner from Luhansk PTDC // KHPG Archive, SLC's fund, inventory 4, file 07.

302 Witnesses 14, 15 and 16 (Yenakiyevo CF no. 52).

303 Witness 11 (Makiivka CF. no. 32).

304 Witness 10 (Zakhidna CF no. 97).

305 Witness 12 (Zakhidna CF no. 97).

306 *Ibid.*

307 *Ibid.*

308 Witness 10 (Zakhidna CF no. 97).

149. Other examples include Snizhynsk CF no. 127, where bread rations were extremely small, with porridge and (sometimes) vegetable mixes;³⁰⁹ Krasnolutsk CF no. 19, where prisoners received boiled sauerkraut and a one or two slices of bread; and Kirov CF no. 33, where prisoners only ate steamed pearl barley.³¹⁰ All protest about food shortages was met with violence from prison administrators.³¹¹

150. Access to food finally improved from mid-2015, with humanitarian aid coming in from Russia. However, even this aid was reportedly siphoned off by prison authorities and militias, while in Donetsk CF no. 124, prisoners were made to pay for humanitarian aid.³¹²

151. Prisoners also experienced shortages of drinking water. This occurred in prisons that were located in the vicinity of active hostilities, or after artillery attacks damaged water pipes or water-treatment facilities. Water shortages were felt most acutely in Volnovakha CF no. 120, where tap water was restricted to two hours per day (subsequently no tap water at all), and prisoners resorted to digging wells.³¹³

5. Access to medical care

152. Access to medical care and medicines significantly deteriorated following the outbreak of conflict, increasing prisoner mortality rates. Many medical professionals fled the conflict zone and LPR/DPR-controlled areas. The Government of Ukraine stopped supplying prisons with vital medicines. Prison hospitals and clinics continue to rely almost exclusively on humanitarian aid from the Russian Federation for medical supplies and medicines (with some emergency supplies provided by the ICRC).³¹⁴ Relatively adequate access to medical care and

309 Witness 6 (Snizhynsk CF no. 107): the witness reports having lost 40kg during her stay at the prison.

310 Interviews with prisoners from Kirov CF no. 33 and Krasnolutsk CF no. 19 // KHPG Archive, SLC's fund, inventory 4, file 07.

311 Interview with a prisoner from Yenakiyev CF no. 52 // KHPG Archive, SLC's fund, inventory 4, file 07.

312 Interview with a prisoner from Donetsk CF no. 124 // KHPG Archive, SLC's fund, inventory 4, file 07.

313 Witness 9 (Volnovakha CF no. 120).

314 Interview with a prisoner from Yenakiyev CF no. 52 // KHPG Archive, SLC's fund, inventory 4, file 07.

medicines was only maintained at Donetsk CF no. 124 and Alchevsk CF no. 13 – both prisons house specialised medical facilities.

153. Most prisons only allowed prisoners to travel to hospitals and clinics in case of medical emergencies. Medicines had to be procured by friends and relatives. In some cases, ill patients were confined to isolated prison cells and left to die.³¹⁵ Witness 6 developed epileptic seizures from stress and starvation, but was not offered any medical help.³¹⁶

154. Prisoners were denied or were charged for dental care.³¹⁷ There was a critical shortage of cardiologists, oncologists and neurologists across the DPR/LPR-territory. Power outages and inadequate storage led to further shortage of medical supplies that needed to be kept at constant temperature.³¹⁸ Medicine shortage had the biggest impact on people that depended on medicines, such as people with HIV/AIDS who did not receive anti-retroviral therapy for months after the takeover by anti-government forces.³¹⁹

6. Failure to protect detainees from armed conflict

155. Most documented prisons were affected by the armed conflict during the active part of hostilities in 2014 – 2015. Some prisons, particularly Mikitino CF no. 87 and Michurin CF no. 57 in Horlivka, are still regularly experiencing artillery strikes.³²⁰ Prisons in targeted urban areas and those situated close to the contact line sustained the most attacks. At least 13 prisons sustained heavy damage, injury and loss of life from artillery attacks (see section IV(C)(2)). Prison authorities systematically failed to protect prisoners during the attacks.

156. Prison authorities in Yenakieyvo CF 52 and Mikitino CF no. 87 are reported to have fled from the prison for up to a month during heavy fighting in the vicinity,

315 Interview with a prisoner from Donetsk PTDC // KHPG Archive, SLC's fund, inventory 4, file 07.

316 Witness 6 (Snizhynsk CF no. 107).

317 Interview with a prisoner from Yenakiyevvo CF no. 52 // KHPG Archive, SLC's fund, inventory 4, file 07.

318 Interview with a prisoner from Slovyanoserbksk CF no. 60 // KHPG Archive, SLC's fund, inventory 4, file 07.

319 Interview with a prisoner from Donetsk CF no. 124 // KHPG Archive, SLC's fund, inventory 4, file 07.

320 Interviews with prisoners from multiple CFs // KHPG Archive, SLC's fund, inventory 4, file 07.

leaving the administration of prison facilities to ‘senior’ prisoners.³²¹ In Yenakievo CF no. 52, prisoners report being stuck in their prison cells during artillery attacks, while the guards and other members of prison authorities hid in bomb shelters.³²² At one point up to 200-300 shells were falling on or around the prison every day.³²³ Injuries sustained in the course of shelling were treated by other prisoners or left untreated, as there were no in-house medics and prisoners were rarely taken to hospitals.³²⁴

157. In other prisons, bomb shelters were too far to reach during attacks, and no adequate systems were put in place to get prisoners to bomb shelters in a timely and efficient manner.³²⁵ In at least one prison, prison authorities allegedly extorted money from prisoners for using bomb shelters during attacks.³²⁶

158. Most notably, in January – February 2015, prison authorities of Chornukhino CF no. 23 left prisoners to their fate during a period of heavy fighting in the prison’s vicinity. Once remaining on prison grounds became unsustainable, rather than organising an evacuation, prison authorities simply opened the gates and abandoned the premises. The prisoners fled, reaching Ukrainian government positions, other prisons or simply disappeared.³²⁷

321 Interview with a prisoner from Yenakiyev CF no. 52 // KHPG Archive, SLC’s fund, inventory 4, file 07.

322 E.g.: Witness 4 (Krasnoluts CF no. 19); Witness 6 (Donetsk PTDC).

323 Witnesses 14, 15 and 16 (Yenakiyev CF no. 52).

324 Interview with a prisoner from Yenakiyev CF no.52 // KHPG Archive, SLC’s fund, inventory 4, file 07.

325 Interview with a prisoner from Yenakiyev CF no. 52 // KHPG Archive, SLC’s fund, inventory 4, file 07.

326 Interview with a prisoner from Yenakiyev CF no. 52 // KHPG Archive, SLC’s fund, inventory 4, file 07.

327 Antydot, “Chornuhinska koloniya”, available at: <https://antydot.info/publicistics/chornuhynska-koloniya/>, <https://www.unian.ua/war/1042465-penitentsiarna-slujba-vtratila-zvyazok-z-kolonieyu-23-chornuhine.html>, <https://www.youtube.com/watch?v=bFcSFnTkNNs>

C. ICC Statute Crimes: Cruel, Inhuman and Degrading Treatment and Torture

1. Applicable Law

159. The infliction of severe physical or mental pain and suffering in the context of an armed conflict may qualify as the war crime of cruel or inhuman treatment.³²⁸ The pain and suffering threshold is a question of fact that must be decided on a case-by-case basis, based on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim.³²⁹ Qualifying conduct includes, but is not limited to, beatings³³⁰ and threats of physical violence,³³¹ inadequate conditions of detention (including overcrowding, lack of sanitation and hygiene, inadequate food and drinking water, un-addressed spread of infectious diseases, poor ventilation and lack of natural light, no access to exercise, no or limited external communications),³³² denial of appropriate medical care,³³³ and holding detainees in conditions of enforced disappearance.³³⁴ The war crime of ‘outrages upon personal dignity’ is a form of ‘particular humiliating and degrading treatment’³³⁵ inflicted in the knowledge that it could cause serious humiliation and degradation,³³⁶ and where the resultant harm relates to an individual’s human dignity.³³⁷ It is not necessary for the act to directly harm the physical or mental well being of the victim, provided it causes real and lasting suffering to the individual arising from

328 ICC Statute, Article 8(2)(c)(i) in NIAC and Article 8(2)(a)(ii) in IAC.

329 ECtHR, *Kudla v Poland*, Judgment, para 91.

330 ECtHR, *Ireland v United Kingdom*, Judgment 5310/71, 18 January 1978; ECtHR, *Tomasi v France*, Judgment, 12859/87, 21 August 1992.

331 ECtHR, *Gäfgen v Germany*, Judgment, 1 June 2010.

332 ECtHR, *Kalashnikov v Russia*, Judgment, 15 July 2002, Geneva Convention IV, Article 55; Additional Protocol II to the Geneva Conventions, Article 69; ICCPR, Article 10(1).

333 ECtHR, *Mouisel v France*, Judgment, 21 May 2003; ECtHR, *Gorodnichev v Russia*, Judgment, 31 November 2007; Geneva Convention IV, Article 56.

334 ICRC, “Rule 98: Enforced Disappearance”, Customary IHL, available at: https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter32_rule98 (last accessed: 5/05/2016).

335 ICC Statute, Article 8(2)(c)(ii) in NIAC and Article 8(2)(b)(xxi) in IAC.

336 ICTY, *Prosecutor v Kunarac et al.*, Judgement, paras 512-514.

337 ICTY, *The Prosecutor v. Kordic&Cerkez*, Trial Judgement, 26 February 2001, para. 245.

the humiliation or ridicule.³³⁸ In the context of a widespread or systematic attack against a civilian population, the infliction of great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act may amount to the crime against humanity of ‘other inhumane acts’.³³⁹

160. The most severe forms of physical or mental pain or suffering and/or the cumulative effect of systematic or persistent cruel and inhuman treatment, may reach the threshold of torture. The pain and suffering threshold for the crime of torture is a question of fact that must be decided on a case-by-case basis. Acts such as interrogations under threat to life,³⁴⁰ rape and sexual assault,³⁴¹ beating, electric shocks, mock executions,³⁴² and psychological abuse³⁴³ have all qualified as torture. When charged as a war crime,³⁴⁴ it must be demonstrated that the conduct was perpetrated for a particular purpose, such as obtaining information or a confession, punishment, intimidation or coercion, or for any reason based on discrimination of any kind.³⁴⁵ When charged as a crime against humanity,³⁴⁶ torture does not require proof of a specific purpose or the involvement of a public official.³⁴⁷ However, it does require evidence that the victim was in the custody or control of the perpetrator, and that the pain and suffering was not inherent in or incidental to, lawful sanctions.³⁴⁸

2. Analysis

338 ICTY, Zlatko Aleksovski, Judgment, para 56.

339 ICC Statute, Article 7(1)(k); *see also* ICC Elements of Crimes, Article 7(1)(k), Crime against humanity of other inhumane acts.

340 ICTR, The Prosecutor v Akayesu, Judgement, ICTR-96-4-T, 2 September 1998, para. 682.

341 ICTR, The Prosecutor v Akayesu, Judgement, ICTR-96-4-T, 2 September 1998, para. 682 and 597, respectively.

342 Human Rights Committee, *Muteba v. Zaire*, Communication n°124/1982, Report of the Human Rights Committee, UN Doc. A/39/40, pp. 182 ff; *Gilboa v. Uruguay*, Communication n°147/1983, Report of the Human Rights Committee, UN Doc. A/41/40, pp. 128 ff.

343 *Estrella v. Uruguay*, Communication n°74/1980, Report of the Human Rights Committee, UN Doc. A/38/40, pp. 150 ff.

344 ICC Statute, Arts. 8(2)(a)(ii), 8(2)(c)(i).

345 *Nb.* This list of purposes is meant to be representative and non-exhaustive. ICTY, The Prosecutor v. Delalic et al., Judgment, IT-96-21-T, 16 November 1998, para. 470. Furthermore, the qualifying purpose need not be the only or main purpose for the torture. ICTY, The Prosecutor v. Delalic et al., Judgment, IT-96-21-T, 16 November 1998, para. 470.

346 ICC Statute, Article 7(1)(f).

347 ICTY, The Prosecutor v. Kunarac et al., Judgment, IT-96-23-T & IT-96-23/1-T, 22 February 2001, paras. 488-495.

348 ICC Elements of Crimes, Article 7(1)(f).

161. There is credible evidence that prisoners were subjected to cruel and inhuman treatment in all documented prisons. Whilst severe physical or mental pain and suffering (or ‘great suffering or serious injury’) must be established on a case-by-case basis, there is a reasonable basis to believe that the cumulative effect of physical violence, psychological violence, routine debasement and humiliation, inhuman conditions of detention, inadequate food and water, no or little access to medical care and the prison authorities’ unwillingness or inability to protect prisoners from hostilities, amounts to cruel and degrading treatment or inhumane acts.
162. Incidents of physical violence documented in Bryanka CF no. 11, Luhansk PTDC, Krasnolutsk CF no. 19, Volnovakha CF no. 120 and Donetsk PTDC led to severe injuries and suffering and qualify as cruel or inhuman treatment in and of themselves. All male prisoners at these prisons were subjected to physical violence – usually in the form of punches, kicks and hits with batons and other objects. On occasion, the violence involved other painful techniques, such as applying pressure to the chest or ‘stretching’. The physical violence was often accompanied by verbal abuse, threats and intimidation.
163. In some prisoners, such as Krasnolutsk CF no. 19, Sukhodilsk CF no. 36, Zakhida CF no. 97, Luhansk PTDC, Donetsk PTDC and Slovianoserbsk CF no. 60, physical violence was accompanied by humiliation and debasement – with prisoners being forced to strip naked in public, sing songs and proclaim love for prison authorities. Such treatment was clearly intended to degrade and humiliate prisoners, and struck at the very core of their human dignity.
164. Conditions of detention between 2014 and 2015 fell far below all recognisable international standards, and must be qualified as cruel or inhuman. Most prisoners were kept in unheated, overcrowded prison cells, sometimes in sub-zero temperatures. Some prisoners were deprived of natural light. Others were kept awake with bright electric lights. Damage from artillery attacks deprived prisoners of electricity, light, heating and water for prolonged periods of time. Prison authorities were unable to meet even the most basic hygiene needs for months on end. Most prisoners report a chronic lack of food, leading to injuries and even deaths. The problem was compounded by prison authorities and anti-government

forces who actively deprived prisoners of food, diverted humanitarian aid, or made prisoners pay for it. In such conditions, disease – such as tuberculosis – became widespread and uncontrolled, while there was no or very little access to medical care.

165. Finally, the prison authorities had a duty of care to protect prisoners from injury, death and trauma associated with armed conflict. Instead, many prison authorities fled to bomb shelters during artillery attacks, abandoning prisoners to their fate in prison cells unequipped to withstand such attacks. The constant fear and trauma associated with such conditions is a form of cruel and inhuman treatment.

166. Whether the cumulative effect of all or some of the above-listed forms of treatment resulted in such severe suffering and injury so as to qualify as torture needs to be examined on a case-by-case basis through further investigation.

167. All forms of cruel, degrading or inhuman treatment described in this section took place and were associated with the armed conflict described in section VI of this Communication. Prisoners were transferred into the custody of anti-government forces after Ukrainian authorities lost effective control over parts of Donetsk and Luhansk provinces as a result of the armed conflict. The armed conflict continues to date, preventing the Government of Ukraine from exercising its authority over the prisons and applying its laws over LPR/DPR-held territory. For reasons set out in section VI, the armed conflict that led to these violations is (at least in part) an IAC. Moreover, a number of witnesses identify perpetrators of physical violence in the prisons as ‘Russians’ or ‘members of the Russian special forces’.³⁴⁹ LPR/DPR *de facto* authorities and their Russian minders are fully aware of the conflict and its link to these violations. As such, there is a reasonable basis to believe that direct perpetrators and facilitators of the above-described conduct, and their superiors, are responsible for the war crime of cruel or inhuman treatment,³⁵⁰ and/or the war crime of outrages upon personal dignity.³⁵¹

168. Further or in the alternative, cruel, degrading or inhuman treatment described in this section is (at least in part) part of the widespread or systematic attack on the

349 Witness 2, Witness 4, Witness 5 and Witness 7.

350 ICC Statute, Article 8(2)(c)(i) in NIAC and Article 8(2)(a)(ii) in IAC.

351 ICC Statute, Article 8(2)(c)(ii) in NIAC and Article 8(2)(b)(xxi) in IAC.

civilian population described in section VI. Violence and other forms of cruel and inhuman treatment perpetrated against prisoners who spoke Ukrainian or who displayed Ukrainian flags or symbols forms part of the anti-government forces' attack on all actual or perceived opponents of their rebellion, and other 'undesirables'. Such conduct – causing great suffering, or serious injury to body or to mental or physical health, amounts to the crime against humanity of other inhumane acts.³⁵²

D. Conclusion

169. For the foregoing, there is a reasonable basis to believe that the physical and psychological violence, humiliation, inadequate conditions of detention, lack of sufficient food and water, no or limited access to medical care and the prison authorities' failure to protect prisoners from the armed conflict, amount to the following ICC Statute crimes:

- g. **War crime of cruel or inhuman treatment** (ICC Statute, Article 8(2)(c) (i) and/or Article 8(2)(a)(ii));
- h. **War crime of outrages upon personal dignity** (ICC Statute, Article 8(2) (c)(ii) and/or Article 8(2)(b)(xxi));
- i. **Crime against humanity of other inhumane acts** (ICC Statute, Article 7(1)(k)).

170. Further investigation is needed to determine whether individual acts or the cumulative effect of all or some of the above forms of inhuman treatment amount to the war crime and/or crime against humanity of torture (ICC Statute, Article 8(2)(a)(ii), Article 8(2)(c)(i) and/or Article 7(1)(f)).

171. The Filing Parties aver that these crimes are grave and respectfully request the ICC Prosecutor to fully investigate the alleged crimes with a view to prosecuting those responsible.

352 ICC Statute, Article 7(1)(k); *see also* ICC Elements of Crimes, Article 7(1)(k), Crime against humanity of other inhumane acts.

IX. ATTACKS LAUNCHED FROM OR NEAR PRISONS

A. Overview

172. From the outset of the armed conflict, anti-government forces launched multiple artillery, tank and howitzer attacks against Ukrainian and other pro-government forces from or near prisons. Tall prison walls and prison buildings were used as cover for military equipment and combatants. Anti-government forces clearly expected retaliatory attacks from pro-government forces, and moved their equipment and combatants shortly after launching attacks. Anti-government forces were well aware that this military tactic would likely cause severe injury, suffering and potential deaths inside the prisons, and proceeded regardless. Consequently, there is a reasonable basis to believe that such conduct amounts to the war crime of cruel or inhuman treatment (ICC Statute, Article 8(2)(c)(i) and/or Article 8(2)(a)(ii)).

173. Further investigation is needed to determine whether in some or all of the documented instances, the elements of the crime of using protected persons as shields are made out (ICC Statute, Article 8(2)(b)(xxiii)).

174. Crimes described in this section have had a serious and lasting impact on thousands of prisoners and their loved ones. These allegations, backed by credible evidence, merit full investigation by the ICC Prosecutor.

B. Factual Findings

175. Numerous prisoners recall seeing anti-government forces use heavy artillery and other military equipment from or near the prisons' territory. Equipment such as Grad and Uragan missile launchers, tanks and howitzer launchers were positioned near the prison walls to provide temporary cover against retaliatory fire. This equipment would then be used to attack positions of the Ukrainian army and other pro-government forces. After the attacks, the equipment would be moved to other positions, while Ukrainian armed forces and pro-government battalions counter-attacked, often hitting and damaging prison buildings and injuring or killing prisoners and staff. Such tactics have been recorded throughout the armed conflict. Specific incidents backed by witness testimony include:

- Heavy artillery volleys launched from under the walls of Kalinin CF no. 27;³⁵³
- Grad volleys launched from under the walls of Torez CF no. 28;³⁵⁴
- Grad volleys launched from under the walls of Makiivka CF no. 32;³⁵⁵
- Tank shells launched from under the walls of Kirovsk CF no. 33;³⁵⁶
- Grad volleys launched from under the walls of Sukhodilsk CF no. 36;³⁵⁷
- Grad volleys launched from (and military vehicles hidden in) a quarry near Yenakiyevo CF no. 52;³⁵⁸
- Shelling launched from (and military vehicles hidden) from under the walls of Michurin CF no. 57;³⁵⁹
- Grad volleys launched from under the walls of Slovyanoserbsk CF no. 60;³⁶⁰
- SPA and howitzer volleys launched from under the walls of Mikitino CF no. 87;³⁶¹
- Heavy artillery volleys launched near Zakhidna CF no. 97;³⁶²
- Uragan volleys launched from (and military positions hidden) under the walls of Donetsk CF no. 124.³⁶³

353 Interview with a prisoner from Kalinin CF no. 27 // KHPG Archive, SLC's fund, inventory 4, file 07

354 Interview with a prisoner from Torez CF no. 28 // KHPG Archive, SLC's fund, inventory 4, file 07

355 Interview with a prisoner from Makiivska CF no. 32 // KHPG Archive, SLC's fund, inventory 4, file 07

356 Interview with a prisoner from Kirovsk CF no. 33 // KHPG Archive, SLC's fund, inventory 4, file 07

357 Interview with a prisoner from Sukhodilsk CF no. 36 // KHPG Archive, SLC's fund, inventory 4, file 07

358 Interview with a prisoner from Yenakiyevo CF no. 52 // KHPG Archive, SLC's fund, inventory 4, file 07

359 Interview with a prisoner from Michurin CF no. 57 // KHPG Archive, SLC's fund, inventory 4, file 07

360 Interview with a prisoner from Slovyanoserbsk CF no. 60 // KHPG Archive, SLC's fund, inventory 4, file 07

361 Interview with a prisoner from Mikition CF no. 87 // KHPG Archive, SLC's fund, inventory 4, file 07

362 Interview with a prisoner from Zakhidna CF no. 97 // KHPG Archive, SLC's fund, inventory 4, file 07

363 Interview with a prisoner from Donetsk CF no. 124 // KHPG Archive, SLC's fund, inventory 4, file 07

176. As noted in section VI(C)(2) above, retaliatory strikes from Ukrainian and pro-government forces led to extensive destruction, injury and deaths among prisoners. Furthermore, as noted in section VI(B)(6) above, prison authorities were unable or unwilling to safeguard prisoners from such attacks, which caused the surviving prisoners severe trauma and other hardships (e.g.: lack of water, food or electricity for prolonged periods of time).

C. ICC Statute Crimes: Cruel, Inhuman and Degrading Treatment and Torture

1. Applicable Law

177. The infliction of severe physical or mental pain and suffering in the context of an armed conflict may qualify as the war crime of cruel or inhuman treatment.³⁶⁴ The pain and suffering threshold is a question of fact that must be decided on a case-by-case basis, based on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim.³⁶⁵

178. The International Criminal Tribunal for the former Yugoslavia (ICTY) has recognised that the exposure of civilians to the risk of military attacks or hostile fire may constitute cruel or inhuman treatment.³⁶⁶ The ICTY Appeals Chamber relied on Article 23 of the Third Geneva Convention and Articles 28 and 83 of the Fourth Geneva Convention, to hold that the placement of ‘protected persons’ in the line of fire – or their use as human shields – may constitute inhuman or cruel treatment.³⁶⁷ The separate war crime of using protected persons as shields is listed in the ICC Statute under Article 8(2)(b)(xxiii) – requiring proof that the perpetrator intended to shield a military objective from attack or shield, favour or

364 ICC Statute, Article 8(2)(c)(i) in NIAC and Article 8(2)(a)(ii) in IAC.

365 ECtHR, *Kudla v Poland*, Judgment, para 91.

366 ICTY, *Prosecutor v. Naletilic and Martinovic*, Judgment, 31 March 2003, para. 334.

367 ICTY, *Prosecutor v. Blaskic*, Judgment, 29 July 2004, para. 652-653.

impede a military operation by taking advantage of the location of one or more civilians.³⁶⁸

2. Analysis

179. There is credible evidence that anti-government forces had developed and systematically used a military tactic of placing military equipment and launching heavy armament attacks from or near the prisons. Such tactics have been witnessed in at least 11 documented prisons. Prison walls and prison building were used by the anti-government forces to shield military equipment and personnel during attacks, after which the equipment would be moved on, leaving the prison exposed to retaliatory strikes. It can therefore be inferred that anti-government forces knew and expected retaliatory attacks on the prisons, in full knowledge of the damage that this would cause to the prison buildings, and the potential injury and loss of life to the prisoners. Consequently, anti-government forces recklessly launched attacks from or near prisons knowing that their attacks would lead to severe injury, suffering and possible deaths among prisoners and prison staff. There is also credible evidence that Ukrainian armed forces and/or pro-government paramilitaries did in fact launch retaliatory attacks, which did in fact lead to injury, suffering, trauma and death amongst prisoners.

180. It is unclear from the available evidence whether the perpetrators of this conduct intended to use the prisoners themselves to shield military equipment and personnel from retaliatory attacks. Thus, further investigation is necessary to determine whether the war crime of using protected persons as human shields is made out.

181. The conduct described in this section took place in and was associated with the armed conflict described in section VI of this Communication. Moreover, for reasons set out in section VI, the armed conflict that led to these violations is (at least in part) an IAC. LPR/DPR authorities and their Russian minders are fully aware of the conflict and its link to these violations. As such, there is a reasonable basis to believe that direct perpetrators and facilitators of the above-described

conduct, and their superiors, are responsible for the war crime of cruel or inhuman treatment.³⁶⁹

D. Conclusion

182. For the foregoing, there is a reasonable basis to believe that the military tactic of launching attacks from or near prisons used extensively by anti-government forces caused severe suffering, injury and trauma, and amounts to the **war crime of cruel or inhuman treatment** (ICC Statute, Article 8(2)(c)(i) or Article 8(2)(a)(ii)).
183. Further investigation is needed to determine whether in some or all of the documented instances, the elements of the crime of using protected persons as shields are made out (ICC Statute, Article 8(2)(b)(xxiii)).
184. The Filing Parties aver that these crimes are grave and respectfully request the ICC Prosecutor to fully investigate the alleged crimes with a view to prosecuting those responsible.

X. JURISDICTION

185. On 25 February 2014, the Parliament of Ukraine submitted a Declaration recognising the jurisdiction of the ICC for the purposes of identifying, prosecuting and judging the authors and accomplices of acts committed on the territory of Ukraine between 21 November 2013 and 22 February 2014.³⁷⁰ The Declaration was lodged with the Registrar of the International Criminal Court on 17 April 2014.³⁷¹ On 8 September 2015, the Foreign Minister of Ukraine submitted a further declaration to the ICC Registrar, accepting “the jurisdiction of the Court for the purpose of identifying, prosecuting and judging the perpetrators and accomplices of acts committed in the territory of Ukraine since 20 February 2014”.³⁷² On 29 September 2015, the ICC Prosecutor announced the extension of the preliminary examination into the Situation in Ukraine to include alleged crimes occurring after 20 February 2014 in Crimea and Eastern Ukraine.³⁷³

186. Although Ukraine is not a State Party of the ICC, pursuant to Article 12(3) of the ICC Statute, the two aforementioned declarations grant the ICC jurisdiction over crimes listed in Article 5 of the ICC Statute committed by nationals of any state on the territory of Ukraine from 21 November 2013 onwards.³⁷⁴

187. All conduct alleged in this Communication amounts to war crimes and/or crimes against humanity – listed in Article 5 and defined in Articles 7 and 8 of the ICC Statute. The conduct took place on the territory of Ukraine, between April 2014 and August 2020.³⁷⁵ Any facts relating to events that fall outside the Court’s temporal and/or territorial parameters are included “in order to clarify the context,

370 Declaration of the Verkhovna Rada of Ukraine, 25 February 2014, available at: http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/ukraine/Pages/ukraine.aspx.

371 Embassy of Ukraine, Communication N. 61219/35-673-384, 9 April 2014; Note Verbale of the Acting Minister for Foreign Affairs of Ukraine, Mr. Andrii Deshchytsia, 17 April 2014.

372 ICC, Ukraine, “Declaration lodged by Ukraine under Article 12(3) of the ICC Statute”, 8 September 2015, available at: http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/ukraine/Pages/ukraine.aspx.

373 ICC, “ICC Prosecutor extends preliminary examination of the situation in Ukraine following second article 12(3) declaration”, ICC Press Release (online), 29 September 2015, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=pr1156>.

374 These jurisdictional parameters were preliminarily confirmed by the ICC Prosecutor: ICC Prosecutor, ‘ICC Prosecutor extends preliminary examination of the situation in Ukraine following second article 12(3) declaration’, Press Release, 29 Sept. 2015, available at: https://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/ukraine/Pages/ukraine.aspx.

establish by inference the elements of criminal conduct occurring subsequently, or to demonstrate a [consistent] pattern of conduct”.³⁷⁶

375 From the perspective of international law, Ukrainian territory occupied by anti-government forces and/or Russian armed forces continues to be the territory of Ukraine for the purposes of territorial jurisdiction of the ICC. The fact that separatist ‘republics’ have been unilaterally declared by anti-government forces, in violation of Ukraine’s sovereignty and territorial integrity, does not deprive the ICC of its jurisdiction over ICC Statute crimes taking place on that territory after 21 November 2013.

376 ICTR, *The Prosecutor v. Simon Bikindi* [ICTR-01-72-T] Judgement of Trial Chamber III, para. 24; See also: Rule 93 of the ICTY Rules of Procedure and Evidence.

XI. ISSUES RELATING TO ADMISSIBILITY

188. According to Article 53(1) of the ICC Statute, in deciding whether to initiate an investigation, the Prosecutor shall consider whether the situation is or would be admissible under Article 17 of the ICC Statute (complementarity and gravity), and whether there are any substantial reasons to believe that an investigation would not serve the interests of justice. These criteria require constant reassessment, as each situation may evolve with time and action (or inaction) by national investigative and prosecuting authorities or as new evidence comes to light. What follows is a brief assessment of ICC admissibility criteria, made on the basis of circumstances at the time of filing, in relation to crimes set forth in this Communication.

A. Complementarity

189. According to the principle of complementarity, ICC prosecutions are impeded in cases that are, or have been, subject to genuine proceedings by other competent authorities.³⁷⁷ The key question is whether there are any relevant and genuine national investigations or prosecutions in relation to the criminal conduct in question.³⁷⁸ The assessment must be case specific, namely, whether existing national proceedings encompass the same persons, for the same conduct, as are being investigated and prosecuted by the ICC. The ICC Appeals Chamber has confirmed that this assessment cannot be undertaken on the basis of hypothetical national proceedings that may or may not take place in the future: it must be based on the concrete facts as they exist at the time. The absence of any national proceedings is sufficient to render a case admissible.³⁷⁹ Only if there are relevant national proceedings, the ICC Prosecutor shall then assess ‘whether such national proceedings are vitiated by an unwillingness or inability to genuinely carry out the

377 ICC Statute, Article 17(1)(a)–(c).

378 ICC-01/04-01/07, Situation in the Democratic Republic of Congo, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ‘Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case’, Appeals Chamber I, 25 September 2009, para 78.

379 *Ibid.* “It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17 (1) (d) of the Statute. This interpretation of article 17 (1) (a) and (b) of the Statute also finds broad support from academic writers who have commented on the provision and on the principle of complementarity.”

proceedings’.³⁸⁰ In assessing unwillingness to investigate or prosecute, the Office of the Prosecutor shall consider whether (a) the proceedings were or are being undertaken for the purpose of shielding the person concerned from criminal responsibility for crimes within the ICC jurisdiction, (b) there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice, and (c) the proceedings were or are not conducted independently or impartially and in a manner consistent with an intent to bring the person concerned to justice. In any case, prior to the identification of specific suspects or charges, the inquiry is largely premature.³⁸¹

190. Notwithstanding the fact that some limited national proceedings having taken place with respect to the crimes committed in the context of the armed conflict in Eastern Ukraine, the Filing Parties submit that Ukrainian authorities are both unwilling and unable to investigate and prosecute the conduct set forth in this Communication.

191. Ukrainian prosecutors are notably reluctant to investigate and prosecute conduct by Ukrainian authorities for their responsibility in abandoning prisoners to anti-government forces, failing to protect prisoners from the dangers associated with armed conflict, or switching allegiances to anti-government forces. Whilst over 50 complaints and victim reports were filed under 135 of the Criminal Code of Ukraine (abandoning persons in danger) and part 3 of Article 258 of the Criminal Code of Ukraine (terrorism), they have been transferred to and from various investigative bodies without any genuine investigative action being taken. By 2017, all complaints were referred to the Velyko-Novosilkiv Police Department – a village police unit that lacks capacity to conduct genuine investigations into these allegations.³⁸² The authorities' unwillingness to

380 ICC-01/11-01/11, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ‘Decision on the Admissibility of the Case Against Abdullah Al-Senussi’, Pre-Trial Chamber 1, 11 October 2013, para 210; see also ICC-OTP, Policy Paper on Preliminary Examinations, November 2013, para 49.

381 ICC, Situation in Bangladesh/Myanmar, ‘Decision pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar’, 14 Nov. 2019, para 115 (“Given the open-ended nature of the Request—there are at present no specific suspects or charges—and the general nature of the available information, the Chamber sees no need to conduct a detailed analysis, as this would be largely speculative.”)

382 Reply on the KHPG’s request to the National police of Ukraine // KHPG Archive, SLC’s fund, inventory 4, file 07

investigate this crime is also confirmed by their refusal to recognize victims of human rights violations as injured parties in criminal proceedings.³⁸³ Without this status, victims have no means of influencing the course and results of the investigation, or of requesting certain investigative actions. Those who tried submitting such requests were refused.³⁸⁴ Victims report that they have not been questioned by relevant investigative authorities in relation to information provided to the police.³⁸⁵ According to unofficial sources, no one has even been charged as part of investigations into Ukrainian authorities' conduct.³⁸⁶

192. Whilst Ukrainian authorities may be willing to investigate and prosecute conduct by members of anti-government forces in LPR/DPR-controlled prisons, they are unable to do so effectively. First, with the exception of a broadly formulated provision criminalising 'war crimes' (Article 438 of the Criminal Code of Ukraine), ICC Statute crimes and grave breaches of the Geneva Conventions, including the war crimes and crimes against humanity described in this Communication, have not been incorporated into the Criminal Code of Ukraine. As such, most investigations in relation to the armed conflict in Eastern Ukraine are done through the prism of the crime of terrorism (Article 258 of the Criminal Code of Ukraine), which does not adequately qualify or encompass the criminal conduct described in this Communication. Second, Ukrainian authorities have no access to LPR/DPR-controlled territory, and therefore cannot conduct investigative actions *in situ*, or reach suspects, many victims and key witnesses. Moreover, victims who are still held in LPR/DPR-controlled prisons are unable to contact Ukrainian authorities due to the absence of postal communication and restrictions and censorship of telephone communications.³⁸⁷

193. LPR and DPR *de facto* investigative and prosecuting authorities are also unwilling to consider complaints about arbitrary detention and ill-treatment in

383 Reply to KHPG's request addressed to the National police of Ukraine // KHPG Archive, SLC's fund, inventory 4, file 07

384 Application of victim to the National police of Ukraine with reply // KHPG Archive, SLC's fund, inventory 4, file 07

385 Application of victim to the National police of Ukraine with reply // KHPG Archive, SLC's fund, inventory 4, file 07

386 Application of victim to the National police of Ukraine with reply // KHPG Archive, SLC's fund, inventory 4, file 07

387 Interview with a prisoner from the Donetsk CF no.124 // KHPG Archive, SLC's fund, inventory 4, file 07

prisons on the territory under their control. Victims who have filed such complaints have received no replies from LPR/DPR *de facto* authorities.³⁸⁸

194. The Filing Parties are not aware of any complaints filed to Russian authorities in relation to criminal conduct in prisons under LPR/DPR control. Russia has repeatedly denied having any authority or control over LPR/DPR *de facto* authorities, or having any involvement on LPR/DPR-controlled territory. As such, Russian authorities would not be willing to conduct investigations and prosecutions in relation to crimes set forth in this Communication.

B. Gravity

195. Under Article 17(1)(d) of the ICC Statute, a case may be determined to be inadmissible when it is ‘not of sufficient gravity to justify further action by the Court’. An assessment of gravity is based on the scale, nature, and manner of commission of crimes, and their impact.³⁸⁹ *Scale* refers to the number of direct and indirect victims, the extent of the damage caused by the crimes, in particular the bodily or psychological harm caused to the victims and their families, or their geographical or temporal spread. The *nature* of the crimes refers to the specific elements of each offence, with a particular focus on killings, sexual violence, crimes against children, persecution and the imposition of conditions of life on a group calculated to bring about its destruction. The *manner of commission* requires an examination of the means employed to execute the crime, the degree of participation and intent of the perpetrator, the extent to which the crimes were systematic or result from a plan or organised policy or otherwise resulted from the abuse of power or official capacity, and elements of particular cruelty, including the vulnerability of the victims and any discriminatory motives. The *impact* of crimes refers to the suffering endured by the victims, their increased vulnerability; the terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities.³⁹⁰

388 Interview with a prisoner from the Donetsk CF no.124 // KHPG Archive, SLC’s fund, inventory 4, file 07

389 Regulation 29(2) of the Regulations of the Office of the Prosecutor; ICC, The Office of the Prosecutor, “*Policy Paper on Preliminary Examinations*,” November 2013, para 61 and ICC, Pre Trial Chamber I, Situation in Darfur, Sudan, *Prosecutor v. Bahar Idriss Abu Garda*, “Decision on the Confirmation of Charges,” [ICC-02/05-02/09- 243-Red], 8 February 2010, para. 31

390 Criteria were paraphrased from ICC Office of the Prosecutor, “*Policy Paper on Preliminary Examinations*”, November 2013, available at: <https://www.icc-cpi.int/iccdocs/otp/OTP->

196. The Filing Parties estimate that 16,200 prisoners were held across 36 prisons that fell under the control of anti-government forces in 2014. Whilst LPR/DPR *de facto* authorities have not released information about the number of prisoners currently being held in the prisons, former and current prisoners state that all prisons appear to be filled to capacity (suggesting that the current number of prisoners may be even greater than 16,200).³⁹¹ It is also not known how many persons have been ‘convicted’ and detained by anti-government forces, or have had their sentences ‘revised’ or parole rights revoked. In the Filing Parties’ estimation, thousands of individuals are being held arbitrarily in LPR/DPR-controlled prisons, with no recourse to independent, impartial and fair judicial organs.

197. It is also not known precisely how many prisoners have been subjected to violence and other forms of cruel or inhuman treatment. However, violence, physical, verbal and psychological abuse, chronic food shortages, inadequate conditions of detention, lack of medical care and the unnecessary exposure to the dangers of armed conflict have been documented to varying degrees across all LPR/DPR-controlled prisons. Most notably, the use of violence, starvation and exposure to artillery fire was rife in nearly all documented prisons from mid-2014 to mid-2015. As such, thousands of prisoners have been subjected to some degree of cruel or inhuman treatment described in this Communication.

198. The nature of crimes documented in this Communication is reprehensible and grave. People in detention have been deprived of their liberty and the ability to look after themselves or to make key life decisions. This makes prisoners particularly vulnerable to abuse, violence, disease and malnutrition. These vulnerabilities are amplified in the context of an armed conflict and separatism. Detaining authorities have a duty of care towards prisoners – to keep them safe and prevent unnecessary injury, suffering and death. This duty is even more relevant in the context of an armed conflict, requiring detaining authorities to go above and beyond what is normally expected of them, to ensure that prisoners are not adversely affected by conflict and conflict-related shortages. If necessary, the

[Policy Paper Preliminary Examinations 2013-ENG.pdf](#) (last accessed: 7.09.2016).

391 Interview with a prisoner from the Donetsk CF no.124 // KHPG Archive, SLC’s fund, inventory 4, file 07

prisoners must be moved to a safer location, or transferred into the custody of authorities that are able to guarantee their safety and well-being.

199. Evidence presented in this Communication demonstrates that far from exercising their duty of care towards prisoners, LPR/DPR *de facto* authorities deliberately or recklessly exposed prisoners to violence, abuse, inhuman conditions of detention, food shortages and death or injury from armed conflict. In some cases, the violence and abuse was deliberately targeted towards certain groups of prisoners who were taken for actual or perceived opponents and critics of anti-government forces. In such cases, LPR/DPR *de facto* authorities and their Russian minders abused their power over prisoners to instil fear and subordination. In other cases, exposure to cruel and inhuman conditions of detention was done indiscriminately – either because the authorities did not consider prisoners to be a priority, because they sought to actively punish prisoners, or through pure mismanagement and recklessness.

200. The pain, injury and physical or psychological ailment suffered by thousands of prisoners as a result of inadequate conditions of detention will undoubtedly have a lasting effect on their minds and bodies. Many prisoners were forced to starve for months on end, subsisted in cold dark cells, abandoned to their fate and/or abused with impunity by combatants and prison authorities. Moreover, the documented systematic use of prison facilities to launch attacks from or near prisons, coupled with the lack of safety measure for prisoners, has undoubtedly led to lasting trauma.

201. In a sense, the prisoners in question have been punished thrice over – once by Ukrainian courts and authorities who placed them in detention, a second time by Ukrainian authorities who abandoned them in the middle of an armed conflict, and a third time by anti-government forces who subjected them to arbitrary detention, cruel and inhuman treatment. For all of the above reasons, the scale, nature and impact of the documented conduct on prisoners is of the outmost gravity.

C. Interests of Justice

202. Article 53(1)(c) of the ICC Statute provides that the OTP shall consider whether, ‘taking into account the gravity of the crime and the interests of victims,

there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice'. Unlike jurisdiction and admissibility, which require an affirmative finding, the 'interests of justice' is a countervailing consideration: the OTP must assess whether there are substantial reasons to believe that an investigation *would not serve* the interests of justice.³⁹² According to the OTP's stated practice, 'there is a strong presumption that investigations and prosecutions will be in the interests of justice, and therefore a decision not to proceed on the grounds of the interests of justice would be highly exceptional'.³⁹³ In making a determination, the OTP 'will consider, in particular, the interests of victims, including the views expressed by the victims themselves as well as by trusted representatives and other relevant actors'.³⁹⁴

203. Until very recently, this issue had been a straightforward and uncontroversial one at the ICC. However, on 12 April 2019, the ICC Pre-Trial Chamber sought to depart from this approach, imposing additional tests for the assessment of interests of justice.³⁹⁵ Following a brief appellate interval triggered by the PTC ruling, the status quo has been restored.³⁹⁶ In reaffirming the OTP's historical methodology, the ICC Appeals Chamber found that when proceeding *proprio motu* pursuant to Article 15, the OTP has great discretion.³⁹⁷ In such cases, its determinations regarding the interests of justice shall not be subject to PTC review.³⁹⁸ Moreover,

392 ICC-OTP, Report on Preliminary Examination Activities 2019, 5 December 2019, para 8. *See also* ICC Statute, Article 53(1) (regarding '[i]nitiation of an investigation') ('The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether: [...] (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.');

ICC-01/09, *Situation in the Republic of Kenya*, PTC II, 'Request for authorisation of an investigation pursuant to Article 15', 26 November 2009, paras 60, 63.

393 ICC-OTP, Policy Paper on Preliminary Examinations, November 2013, para 71.

394 ICC-OTP, Policy Paper on Preliminary Examinations, November 2013, para 68. *Nb.* Such actors include community, religious, political or tribal leaders, States, and intergovernmental and non-governmental organisations.

395 *See* ICC-02/17, *Situation in the Islamic Republic of Afghanistan*, PTC II, 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Islamic Republic of Afghanistan', 12 April 2019 (the 'Afghanistan Article 15 Decision'), para 87

396 ICC-02/17, *Situation in the Islamic Republic of Afghanistan*, Appeals Chamber, 'Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan', 5 March 2020 (the 'Afghanistan Appeal Decision').

397 *Afghanistan Appeal Decision*, paras 30, 31.

398 *Afghanistan Appeal Decision*, paras 34–46.

the Appeals Chamber took the opportunity to emphasize a number of points,³⁹⁹ two of which are worth noting: (i) As Article 53(1) is formulated in the negative, the Prosecutor ‘need not affirmatively determine that an investigation would be in the interests of justice’,⁴⁰⁰ and (ii) A key aspect of the assessment is ‘the gravity of the crimes and the interests of victims as articulated by the victims themselves’.⁴⁰¹

204. Taking into consideration the gravity of the crimes described in this Communication and the impact of these crimes on the victims and communities in Eastern Ukraine, as well as the entire population of Ukraine, there is nothing to suggest that opening an investigation would not serve the interests of justice. Victims who have provided statements for the purpose of this Communication support the requested investigation and prosecutions at the ICC. To the Filing Parties’ best knowledge, there are no other reasons to believe that an investigation into the conduct set forth in this Communication would not serve the interests of justice.

399 Afghanistan Appeal Decision, para 48 (‘Having determined in relation to the Prosecutor’s first ground of appeal that the Pre-Trial Chamber erred in considering the ‘interests of justice’ when deciding on the Prosecutor’s Request, the Appeals Chamber sees no need to address the Prosecutor’s second ground of appeal. However, the interpretation given to the term ‘interests of justice’ as it appears in article 53(1)(c) of the Statute by the Pre-Trial Chamber has been the subject of extensive submissions before the Appeals Chamber and has provoked much commentary from the academic community and civil society. The concept of the ‘interests of justice’ is of significance under the Statute, particularly for the Prosecutor who remains obliged to consider it in her assessment under articles 15(3) and 53(1) of the Statute. For this reason, the Appeals Chamber is of the view that it is appropriate to provide some observations on the Pre-Trial Chamber’s approach to this concept.’)

400 Afghanistan Appeal Decision, para 49.

401 Afghanistan Appeal Decision, para 49.

.XII. CONCLUSION AND REQUEST

205. The Filing Parties submit that based on evidence presented in this Communication, there is a reasonable basis to believe that the following ICC Statute crimes have taken place between April 2014 and August 2020, in prisons controlled by anti-government forces in Eastern Ukraine:

- War crime of unlawful confinement (ICC Statute, Article 8(2)(a)(vii)) and/or crime against humanity of imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law (ICC Statute, Article 7(1)(e));
- War crime of denying fair and regular trial (ICC Statute, Article 8(2)(a)(vi)) or the war crime of sentencing without due process (ICC Statute, Article 8(2)(c)(iv));
- War crime of cruel or inhuman treatment (ICC Statute, Article 8(2)(c)(i) and/or Article 8(2)(a)(ii));
- War crime of outrages upon personal dignity (ICC Statute, Article 8(2)(c)(ii) or Article 8(2)(b)(xxi)); and/or
- Crime against humanity of other inhumane acts (ICC Statute, Article 7(1)(k)).

206. Additionally, further investigation is needed to determine whether the alleged forms of cruel or inhuman treatment amount to the war crime and/or crime against humanity of torture (ICC Statute, Article 8(2)(a)(ii), Article 8(2)(c)(i) and/or Article 7(1)(f)). Further investigation is also needed to determine whether the elements of the crime of using protected persons as shields are made out (ICC Statute, Article 8(2)(b)(xxiii)).

207. The Filing Parties submit that the alleged conduct is sufficiently grave to be admissible under Article 17(1)(d) of the ICC Statute. Moreover, the Filing Parties understand that although Ukrainian authorities may be willing to investigate and prosecute members of anti-government forces for crimes set forth in this Communication, they are unable to do so due to the lack of access to evidence and suspects, and the absence of relevant provisions in the Criminal Code of Ukraine. (Article 17(1) of the ICC Statute). Furthermore, there are no substantial reasons to

believe that an investigation would not serve the interests of justice (Article 53(1) (c) of the ICC Statute).

208. For the foregoing, the Filing Parties respectfully request the ICC Prosecutor to seek authorisation to open a full investigation into crimes alleged in this Communication.

Done in Paris and Kharkiv, on 22 September 2020

SIGNATURES

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