

# A Difficult Road to Justice

The role of Ukrainian civil society  
in documenting the conflict in  
Eastern Ukraine

**Helsinki Foundation for Human Rights  
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*A difficult road to justice. The role of Ukrainian civil society  
in documenting the conflict in Eastern Ukraine*  
Report



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# List of abbreviations

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<b>ATO</b>	Anti-Terrorist Operation
<b>“DPR”</b>	“Donetsk People’s Republic”
<b>EECP</b>	entry-exit crossing point
<b>ECHR</b>	European Court of Human Rights
<b>GCAs</b>	government-controlled areas
<b>HRMMU</b>	United Nations Human Rights Monitoring Mission in Ukraine
<b>ICC</b>	International Criminal Court
<b>ICRC</b>	International Committee of the Red Cross
<b>IDP</b>	internally displaced person
<b>IHL</b>	international humanitarian law
<b>“LPR”</b>	“Luhansk People’s Republic”
<b>NGCAs</b>	non-government-controlled areas
<b>NGO</b>	non-governmental organization
<b>OSCE SMM</b>	Organization for Security and Cooperation in Europe (OSCE)’s Special Monitoring Mission to Ukraine

# Executive summary

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This report focuses on the role of Ukrainian civil society organizations in documenting the conflict in Eastern Ukraine and provides an account of the NGO-documenters' contribution to the pursuit of justice. Specifically, it **investigates the connection between documentation and justice, looking at how documentation is produced and later used – either directly and indirectly – to achieve justice, understood as the restoration of rights of victims, as well as the prosecution of perpetrators of crimes.** It aims to identify the structural and functional constraints involved in this process and to provide recommendations to the various stakeholders who are part of it. The research which forms the basis of this report was conducted between mid-2019 and the end of 2020. Twenty-nine semi-structured in-depth interviews were collected with the current and former representatives of Ukrainian NGOs, the Ukrainian Ministry of Justice and the Office of the Prosecutor General, inter-governmental and international organizations in Ukraine and abroad, the Office of the Prosecutor of the International Criminal Court, as well as experts in international criminal law. Other sources of information include monitoring and documentation reports published by NGOs, reports of international organizations, as well as data published by Ukrainian institutions.

The report describes the **initial reaction of the civil society sector** to the mass-scale violations of human rights and humanitarian law occurring during the military conflict in Eastern Ukraine which consisted in providing assistance to persons affected by the conflict, including the victims of various crimes. This soon led to a realisation that crimes need to be documented in a systematic way so that they are not forgotten. Over the years, the Ukrainian NGOs, assisted by international experts and donors, gradually expanded their expertise in research methods as well as human rights and humanitarian law, and their work became more professional and structured. Today, most NGOs active in the area of conflict documentation also implement other activities that are a natural continuation of their documentation work. These include the provision of legal assistance to conflict victims, strategic litigation in cases that have the potential to bring about systemic change, advocacy targeted at Ukrainian authorities and international institutions, as well as communication with the public.

Since 2014, Ukrainian NGOs have collected information on a **wide spectrum of conflict-related violations**, including the gravest crimes such as killings, imprisonment and torture, sexual violence, the problem of missing persons, the consequences of indiscriminate shelling resulting in the loss of lives and the destruction of civilian infrastructure, the secondary impact of the conflict on the social rights of internally displaced persons (IDPs) and residents of the settlements near the contact line, the situation of vulnerable groups, as well as environmental issues. Some areas have been given less attention than others and may need further investigation in the future, most notably the crimes committed by the Ukrainian side. A more thorough

documentation and systemization of the existing information on the early period of the conflict (2014-2015) is also needed. Due to the lack of physical access, restricted availability of information and risks to personal security, the knowledge about the human rights situation in the co-called “DPR” and “LPR” is limited and requires continuous monitoring through available means.

One of the most important **sources of conflict-related information** is interviews with victims and witnesses of violations who provide first-hand accounts of the crimes. These people are also the most vulnerable parties in the process of documenting the alleged crimes, due to their often poor physical and psychological well-being and precarious financial circumstances. Many of the victims are still in need of legal support and, as a result of this, many organizations find it necessary to incorporate legal aid in their work or, at the very least, provide information where such aid can be accessed. Managing victims’ expectations is crucial to avoid disappointment and a sense of being “used” by the NGOs, which may lead to a decrease in trust towards the entire sector. Information on the situation on both sides of the contact line is also extensively collected from open sources, which include reports published by government agencies, UN and OSCE monitoring missions in Ukraine – the two most important international entities directly involved in monitoring activities, mass media, social media and satellite imagery. Open sources are commonly used and considered very helpful in terms of corroborating victims’ and witnesses’ accounts.

In spite of the attempts to bring together the efforts and activities of various NGOs working in the area of conflict documentation, in particular to create a common database of collected information and evidence, the establishment of **mechanisms of intrasectoral cooperation** have proven to be unsuccessful. Several reasons underlie this failure, including a strong competition for funding, management issues, ambitions of individual NGOs and their leaders, as well mutual distrust which occasionally leads to conflicts. While there is currently a number of databases with conflict-related information coordinated by different NGOs, and the competition for funding continues to be a permanent factor affecting the cooperation within the sector to this day also leading to some duplication in the area of documentation, there are, however, also some positive examples of cooperation between NGOs regarding, for example, the transfer of information between the databases, the contribution of information to other NGOs’ submissions to judicial organs or to joint analytical reports, as well as some coordination in providing assistance to the victims and advocacy activities.

From the early days, Ukrainian NGOs involved in documenting the conflict have sought **cooperation with external stakeholders**, among others with international organizations in Ukraine and abroad, as well as with other international institutions. The OSCE and UN monitoring missions and the civil society organizations are familiar with each other’s work which can be described as complementary given the different political mandates, thematic focus, and work methods of both types of entities. Ukrainian NGOs are members of several international thematic networks and platforms. Additionally, there are also instances of bilateral cooperation between Ukrainian civil society organizations and international partners.

The vast majority of Ukrainian NGOs involved in documenting the Donbas conflict carry out their work within the framework of projects supported by various types

of **donors**. Most NGO representatives report challenges in securing sufficient and continuous funding which, subsequently results in problems with planning and executing activities as well as with the payment of salaries and paying and retaining qualified staff in the sector. The interviewees also note that there is currently less funding available for documentation activities as compared to the period of 2014-2015, leading to enhanced competition between the NGOs. This can be explained by a decrease in recent years of international attention to the conflict in Eastern Ukraine as well as “donor fatigue” – a sense of disappointment with the results that are not as fast as expected or disproportionate to the resources invested, in particular with regard to the slow pace of institutional reforms in Ukraine. At the same, the interviews with NGO representatives reveal a sense of misunderstanding, and at times frustration, in their relations with donors who expect tangible results to be achieved within the project cycle which in many cases is impossible to achieve. This is particularly challenging for projects where documentation is used for the domestic or international prosecution of crimes or restoration of victims’ rights through the court system. Another important factor is the heavy reliance of NGOs on donor funding combined with, in general, NGOs’ lack of experience and opportunities for funding diversification strategies.

**Professional burnout** is one of the key challenges facing Ukrainian civil society organizations engaged in documenting the war. Several years of an ongoing conflict have had an enormous impact, especially on the activists working directly in the conflict-affected areas and those who come into direct contact with the victims. At the same time, the NGO activists rarely see quick results of their work which can be discouraging, especially if combined with low wages and job insecurity. This, in turn, leads to the outflow of skilled labour from the sector.

The second part of the report focuses on the **role and use of documentation in restoring justice** and describes the challenges related to this process. Over the years, there has been some progress in addressing a number of conflict-related human rights challenges at the national level, in particular with regard to the **situation of victims**. While it is difficult to unequivocally attribute this progress solely to the activity of NGOs, it is clear that civil society organizations, with their dedication and persistence in advocating for change as well as their ability to come together in matters concerning victims’ rights, has been a major driving force behind those processes. Their efforts have contributed, among others, to the improvement of the legal status of IDPs, civilians who were injured and became disabled as a result of hostilities or have lost their property, families of missing persons, and persons serving their sentences in the non-government-controlled areas (NGCAs). While significant challenges remain, including the actual implementation of the adopted laws, not least the lack of proper budgetary allocations, Ukrainian civil society organizations continue to dedicate efforts aimed at keeping the issue of victims’ rights on the political agenda of subsequent cabinets.

The progress has been weaker in the area of **accountability for crimes** committed in the context of the armed conflict in Eastern Ukraine. The prosecution of such crimes has generally proven to be challenging for the Ukrainian law enforcement institutions, due to both the absence of the alleged perpetrators in the territories

under the control of the government and the lack of access of Ukrainian investigators to crime scenes in the NGCAs as well as to a number of systemic deficiencies within the Ukrainian law enforcement and judiciary which include inadequate legal provisions, poor organization of work, insufficient training of personnel, funding shortages, and understaffing. When faced with this reality, victims are reluctant to report crimes and remain interested in the course of the proceedings related to their cases. In addition to that, the availability of state-funded legal aid for the victims is insufficient. This situation forces the victims to rely on the assistance of non-governmental organizations and – often – on international judicial mechanisms.

In addition to domestic remedies, victims of the conflict, the Ukrainian state, and Ukrainian civil society organizations have used **mechanisms at the international level** to seek justice for the crimes committed in the armed conflict. This includes, most notably, international courts such as the International Criminal Court (ICC) and the European Court of Human Rights (ECHR). NGOs have submitted a number of communications to the ICC regarding the violations committed in the conflict and their perpetrators based on the information collected through documentation. They have also represented victims of the conflict in a number of cases submitted to the ECHR. The procedures before those institutions, however, are extremely lengthy and can be affected by a variety of political considerations. Therefore, civil society organizations have also explored alternative forms of accountability, for example under universal jurisdiction – a legislative framework that allows a domestic court of a country to claim criminal jurisdiction beyond the country's borders, regardless of where the crime was committed (and in some cases regardless of the nationality or residence of the perpetrator). While several European countries have universal jurisdiction laws which allow them to prosecute cases under this mechanism, the effectiveness of such proceedings depends on the specific country's laws, institutional capacities and political interest to investigate a particular case. Sanctions constitute another alternative form of accountability. These political measures (for example, in the form of travel bans or asset freezes) are targeted at countries and/or individuals as an expression of strong condemnation regarding their responsibility for violations of international law. As no court verdict is required for sanctions, the evidence threshold for violations is lower which also means that they can be enforced rapidly – in contrast to justice as traditionally understood. In the absence of definite progress regarding international court trials they may remain the only viable option for any kind of accountability. Importantly, sanctions, as justice-related mechanisms that take place outside courtrooms, can be used in parallel with criminal trials and much of the documentation collected by NGOs may serve multiple purposes and be utilized by several different mechanisms and procedures.

# Introduction

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The events which unfolded in the Spring of 2014 in Eastern Ukraine in the aftermath of Russia's involvement in supporting the separatist movement, preceded by the Euromaidan events and the annexation of Crimea, led to the eruption of the largest military conflict in Europe since the Balkan Wars of the 1990s. According to official data of United Nations agencies, by the end of 2020 more than 3,300 civilians were killed and more than 7,000 were injured.<sup>1</sup> Over 3,000 people (soldiers as well as civilians) were held in illegal detention facilities, facing torture and other forms of abuse, including sexual violence (data from 2018).<sup>2</sup> Up to 1,500 persons went missing.<sup>3</sup> Over 50,000 civilian homes were destroyed or damaged as a result of hostilities (as of 2019)<sup>4</sup> and close to 1.5 million were forced to abandon their homes in the conflict zone and became internally displaced persons (IDPs).<sup>5</sup> Even though the intensity of the combat activities has significantly decreased since the active phase of 2014-2015, there are still exchanges of fire along the demarcation line, leading to civilian casualties. In spite of numerous ceasefires, the situation should not be considered stable and the possibility of military operations starting again cannot be excluded. In addition, the civilian population residing in proximity to the contact line (an estimated 600,000 people on both sides<sup>6</sup>) remains vulnerable to indirect negative consequences of war, such as problems with transport infrastructure, access to basic services, including healthcare and education, as well as restrictions on the freedom of movement across the contact line and the risks posed by ecological contamination. Since 2014, parts of Donetsk and Luhansk regions – the so-called Donetsk People's Republic ("DPR") and Luhansk People's Republic ("LPR") remain under the control of separatist formations and are, thus, outside of the effective

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1. Office of the United Nations High Commissioner for Human Rights, *Report on the human rights situation in Ukraine for 1 August 2020 – 31 January 2021*, 2021, available at: <https://bit.ly/3gbqOKM> (accessed 30 February 2021).

2. Tomak, M., Brodik, P., Volkova N., Pavliuk, A. and I. Vynokurov, *Prisoners of war: international practice as to release of POWs, civilian detainees and political prisoners. Conclusions for Ukraine*, 2018, Ukrainian Helsinki Human Right Union, available at: <https://bit.ly/35JfX6C> (Ukrainian), <https://bit.ly/3if1fJi> (English, executive summary) (accessed 20 January 2021).

3. International Committee of the Red Cross, *International Day of Disappeared in Ukraine: "Families of those who went missing in the Donbas need to know the fate of their loved ones"*, 31 August 2020, available at: <https://bit.ly/3stYsjl> (accessed: 26 February 2021).

4. Office of the United Nations High Commissioner for Human Rights, *Report on the human rights situation in Ukraine for 16 August – 15 November 2019*, 2019, available at: <https://bit.ly/3aWnL82> (accessed 23 February 2021).

5. Number of registered IDPs, Ministry of Social Policy of Ukraine, 21 December 2020, available at: <https://www.msp.gov.ua/news/19501.html> (accessed 21.02.2021).

6. Office of the United Nations High Commissioner for Human Rights, *Report on the human rights situation in Ukraine for 16 February – 31 July 2020*.

jurisdiction of the Ukrainian authorities. In those territories human rights violations such as illegal arrests, extortions and ill-treatment of civilians by representatives of the law enforcement agencies, abductions and forceful confiscation of private property occur on a daily basis.

Very early into the conflict it became apparent that there was a need to systematically collect information about the war-related violations and abuses. These research activities are most often referred to as “monitoring” and/or “documentation”, where monitoring is understood as a process of reviewing the available data and conducting observations with the aim of identifying or excluding the occurrence of violations, while documentation is the process of recording, in various formats, the information about incidences of violations. The war-related violations fall within various legal categories, most notably the violations of international humanitarian law (IHL) and/or violations of human rights.<sup>7</sup> The process of monitoring and documenting war-related violations draws on the methods and general rules of social inquiry but is also characterised by a unique set of traits and challenges.

From very early on, two main actors have engaged in the documentation of violations committed in the armed conflict in Donbas – Ukrainian civil society organizations and international organizations. The mission of most Ukrainian NGOs working with the Donbas conflict has been not only to document but also respond to the needs of various groups of conflict victims whose rights have been violated. In fact, at the beginning of the conflict, most of the NGOs later involved in documentation acted as first respondents by providing immediate humanitarian, social, and legal assistance to persons who suffered as a result of hostilities, were injured, unlawfully imprisoned, or became forcibly displaced. To this day, most NGOs working on documentation projects also engage in activities aimed at, on the one hand, helping the victims in the restoration of their rights and, on the other hand, seeking justice for the perpetrators of crimes. In practice, this has been done in several different ways, including through individual legal support, strategic litigation in cases that have the potential to bring about systemic changes, as well as through advocacy at national and international levels. The information collected is extensively used in those activities.

Monitoring missions established by international organisations – the United Nations as well as the Organization for Security and Cooperation in Europe (OSCE) – have been the main actors in terms of recording violations and monitoring the human rights situation on behalf of the international community to support international political processes related to the Donbas conflict. The United Nations Human Rights Monitoring Mission in Ukraine (hereinafter: HRMMU, UN Monitoring Mission),<sup>8</sup> established following the Euromaidan events, has been reporting since 2014 and is present on

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7. In very general terms, human rights law was developed primarily for peacetime and applies to all persons within the jurisdiction of a state, while IHL governs the conduct of hostilities during war. IHL aims to protect persons who are not taking direct part in hostilities (civilians and combatants hors de combat, such as the wounded, the sick or prisoners of war). Both systems aim to protect the lives, the health, and the dignity of individuals, albeit from different angles; there are important differences between them, concerning their origins, the scope of application, the bodies that implement them. International Committee of The Red Cross, *What is the difference between IHL and human rights law?*, 2015, available at: <https://bit.ly/20zn5g5> (accessed 25 February 2021). See also: footnote 23.

8. Report of the United Nations Human Rights Monitoring Mission in Ukraine: <https://bit.ly/3v3dLSf>.

both sides of the contact line, although its operation in the non-government-controlled areas (NGCAs) is restricted. HRMMU's mandate comprises of, among other things, the collection of information about patterns of violations and reporting on them publicly, passing non-public reports to Ukrainian institutions responsible for rule of law and human rights protection (i.e. Ukrainian government and law enforcement), referring victims in need of legal assistance to national NGOs as well as advising them how to use the UN human rights mechanisms, and maintaining dialogue on human rights compliance with the *de facto* authorities of "DPR" and "LPR". The OSCE Special Monitoring Mission to Ukraine (OSCE SMM, OSCE mission), deployed in the Spring of 2014, is a civilian mission tasked with observing and reporting in an impartial way on the security situation in the whole of Ukraine, in particular on ceasefire violations near the contact line and in other hotspots, as well as with facilitating dialogue on the ground between all sides of the conflict. A specific Human Dimension Unit within the OSCE mission is responsible for human rights monitoring activities, focusing on the impact of the conflict on civilians (mostly reporting on civilian casualties and establishing their causes). These activities, however, are only supplementary to the OSCE SMM's core security monitoring function. Both missions' work in the human rights area can be described as thematically parallel but complementary in scope, and the documentation of individual human rights violations conducted by HRMMU is more in-depth (documentation, follow-up with the victims, referrals and advocacy).<sup>9</sup> Nonetheless, the UN mission does not carry out fully fledged investigations that lie within the competences of national law enforcement structures.<sup>10</sup> Neither of the missions engage in providing legal assistance to victims or pursuing court cases as these activities go beyond their mandates. In this sense, the role and the activities of Ukrainian civil society and international organizations in documenting the conflict can be seen as complementary.

This report focuses on the unique role of Ukrainian civil society organizations in documenting the conflict and provides an account of NGOs' documentation of crimes and the contribution of this toward the pursuit of justice. The Helsinki Foundation for Human Rights (HFHR), based in Warsaw, has been supporting Ukrainian civil society organizations since long before the beginning of the conflict. Following the outbreak of the Donbas war, HFHR became engaged in the efforts to collect information about ongoing and systemic violations first through direct participation in monitoring missions, and later predominantly by providing methodological training and guidance to Ukrainian NGOs, as well as by supporting them financially through joint projects and re-granting. Seven years of this involvement resulted in an idea of looking at the course and outcomes of this work, its success and challenges from a broader perspective, beyond what is usually reported by grantees to their donors. Most importantly, however, the goal was to give a voice to the NGOs documenting the violations, whose daily work is to listen to the voice of others – those who have suffered or witnessed the tragedy of war. An entire new specialization has emerged

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9. Interview with an HRMMU representative.

10. *Ibid.*

within civil society, with NGOs and activists facing challenges not only common within the whole sector, but also those specific to the area of war-related documentation. While Ukrainian NGOs have also been involved in documenting violations related to Euromaidan events, the annexation of Crimea, and its subsequent occupation, this report focuses on the activities of organizations covering the Donbas conflict, for two main reasons. The first is related to the political context of these events, the distinct nature of violations and, as a consequence, the mechanisms that are used in the pursuit for justice and accountability. The second reason is the fact that the NGOs themselves tend to have regional and thematic specializations. In particular, only a handful of NGOs are involved in documenting violations in both Donbas and Crimea and most of them focus on one or the other. **The report focuses on the connection between documentation and justice, looking at how documentation is produced and later used – either directly or indirectly – to achieve justice, understood as the restoration of rights of victims as well as the prosecution of perpetrators of crimes. It aims at identifying structural and functional constraints in this process and providing recommendations to the various stakeholders who are part of it.**

The research which forms the basis of this report was conducted between mid-2019 and the end of 2020. Twenty-nine semi-structured in-depth interviews were collected with the current and former representatives of Ukrainian NGOs, the Ukrainian Ministry of Justice and the Office of the Prosecutor General, inter-governmental and international organizations in Ukraine and abroad, the Office of the Prosecutor of the International Criminal Court, as well as experts in international criminal law. Interviews were collected in person in Kyiv, Kharkiv, Brussels and Berlin, as well as online. At some of the interviews several representatives of the same organization took part, while in a couple of instances an interviewee was asked for an additional interview to follow up on a specific topic or angle (both cases were counted as one interview). In addition to that, a review of NGOs' monitoring and documentation reports published between 2014 and 2020 was conducted. For contextual and statistical information, we have also used the reports of the UN and OSCE missions, International Committee of the Red Cross (ICRC), as well as the data published by Ukrainian institutions.



# Ukrainian NGOs as conflict documenters

# 1.1. The organizational field

Since the onset of the armed conflict, a number of Ukrainian civil society organizations have become involved in the practice of monitoring and documenting human rights and humanitarian law violations perpetrated in Donbas. Such organizations include both those with an established record in human rights monitoring and documentation in Ukraine which long preceded the outbreak of the conflict (for example: Ukrainian Helsinki Human Rights Union, UHHRU and the Kharkiv Human Rights Protection Group, KHRPG) and a number of younger organizations. The events of 2013 and 2014 – the Revolution of Dignity and the initial eruption of violence in Eastern Ukraine – led to a boom in the establishment of new non-government initiatives and organizations as well as to the re-orientation of activities of some other NGOs towards conflict-related issues. Examples of such organizations include: Charitable Foundation “East SOS” (Vostok SOS) or the Human Rights Centre “Postup”, Public Organization “Donbas SOS”, Eastern Ukrainian Centre for Civic Initiatives (EUCCI), Truth Hounds, Luhansk Regional Human Rights Center “Alternative”, Centre for Civic Liberties (CCL), Human Rights Group “Sich”, Charitable Foundation “Right to Protect” (Pravo na Zakhist), Public Organization “Shore of Peace” (Mirny Bereg) among others.

Most of the younger organizations started as volunteer-based initiatives and projects, often led by Euromaidan activists, and only later developed into more stable entities with a formal legal status. A number of persons in charge of these initiatives originally come from the conflict-affected areas of Ukraine and were personally affected by the outbreak of war:

*I come from Eastern Ukraine and I became interested in the conflict because the conflict came to my doorstep. So I'd rather say it was the conflict that became “interested” in me (...). I was living peacefully in Luhansk back then, doing some human rights work. I was also to some extent engaged in political activity, I participated in the Maidan protests. And then the “Russian spring” started and our city, along with many other cities, was captured by armed groups, large part of which came from the outside, from the Russian Federation. They told us that this is now a territory under Russia’s protectorate, and for those who have different views there was no place – they should either renounce their views or be destroyed. And what they said, they did. Most of my friends who actively expressed their pro-Ukrainian, pro-democratic positions were forced to leave (...).<sup>11</sup>*

11. Interview with an NGO representative.

*(...) I found out that my close friend (...) had been captured and detained in an illegal prison in a basement. He was kept there for two weeks, then two weeks in the former Directorate for Combating Organized Crime. They killed people in front of his eyes, they broke his arm, his wrist was fractured (...).<sup>12</sup>*

12. Interview with an NGO representative.

Initially, the volunteer-based initiatives aimed primarily at helping the victims of the conflict. These activities included providing assistance to civilians fleeing the combat zone, organization of transport, delivering humanitarian aid, and facilitating access to housing for displaced persons. A number of hotlines were launched whereby NGO representatives and volunteers provided information and legal advice. The hotlines received calls from persons who had been affected by the conflict: those who had been wounded or had their property destroyed, whose relatives had been killed, disappeared, as well as convicts serving their sentences in the separatist-held territories. Soon into this process, through the interaction with persons affected by the conflict, activists realized that these individuals are an important source of information about the various violations taking place in the areas affected by military operations as well as in the breakaway territories, and that it was necessary to document these crimes:

*From the beginning we felt that we needed to react somehow to the situation that was developing around us and try to mitigate the negative impact it had on the many people we knew. And so we started helping those who found themselves in a difficult situation as a result of the occupation and, among others, we almost immediately started documenting the crimes connected with this aggression.<sup>13</sup>*

13. Interview with an NGO representative.

*And when I began to learn all this, I had the first impulse, the first thoughts that these facts should somehow be recorded. In any case, the people who committed these crimes must be held accountable for them. (...) All this led me to the idea that crimes are being committed, and they are not regular crimes, they have different grounds, the reason people are detained is different. And it needs to be investigated, it needs to be recorded, otherwise it is all forgotten.<sup>14</sup>*

14. Interview with an NGO representative.

There is also an example of an organization established specifically with the aim of documenting violations, with a particular focus on crimes against international humanitarian law (IHL) and the preparation of evidence for the International Criminal

Court (ICC). The organization – Truth Hounds – was set up on the basis of an informal initiative launched earlier by the International Partnership for Human Rights (IPHR), an international NGO. The initiative consisted in recruiting and providing training to a group of volunteers who were then tasked with collecting evidence of crimes committed in Donbas. Over the years, the group of volunteers professionalized, and eventually transformed into a registered non-governmental organization.

Referring to the beginning of conflict documentation in Eastern Ukraine, most NGO representatives speak about their initial lack of experience and expertise. Even the established NGOs, which had the structures, resources, and experience in documenting human rights abuses during peace time, did not necessarily have the skills and competences needed for documenting war-related violations. This problem was common not only in the NGO sector, but also among Ukrainian law enforcement agencies, such as the police, government prosecutors, and the state security agency which were not prepared to investigate and prosecute serious human rights and humanitarian law violations:

***There was complete chaos and almost all national organs and structures were paralyzed; also international institutions did not immediately understand the developments in Ukraine and did not know how to react to the violations.<sup>15</sup>***

15. Interview with an NGO representative.

In most cases, conflict documentation for everyone meant a new and unexplored field of activities which required learning on the spot. In addition to the problem of insufficient professional capacities, which gradually increased thanks to trainings and mentoring provided by various experts and organizations (including from abroad), the NGOs soon faced the challenge of how to store the recorded information. In 2014 it was not immediately clear what to do with the ever-growing body of data so that it could be properly preserved. In spite of the challenges encountered and the mistakes committed along the way (related, for example, to the loss of information or contamination of evidence), Ukrainian NGOs played a critical role as in the first years of the conflict as, owing to their presence on the ground and flexibility, they were able to react fast and to document events as they unfolded.

With time, documentation – initially a chaotic process aimed at preserving as much conflict-related information as possible – became more professional and structured. NGOs' knowledge of the field increased through numerous field trips to Donbas and their methodologies improved as a result of extensive training in human rights and humanitarian law as well as in research methods. It comprised the standards of documenting violations for various purposes, including for its future use as evidence in courts, interviewing standards for the work with victims of violence, the use of technology for documentation and open source investigation techniques (e.g. analyzing data from satellite images or social media):

*There is a big difference between how we document now and how we did it before. The process is much more structured than in the Spring and Autumn of 2014 when we were just running around with our eyes wide open trying to film, write down and record everything, without actually knowing what to do with it next. Now we have the experience and knowledge, we have certain algorithms (...).<sup>16</sup>*

16. Interview with an NGO representative.

*At the beginning we were just volunteers and we were doing this work without actually knowing any standards of documenting and we were learning everything in practice. Now we are working according to international standards and we undertake special efforts to make sure that the rights of the people whose stories we are documenting are not violated, so that there is no retraumatization. We cooperate with an organization of psychologists and psychotherapists who also support our specialists and teach them how to conduct interviews so that they too are protected against stress and traumatization.<sup>17</sup>*

17. Interview with an NGO representative.

*(...) [W]e have already gained experience, not only in documenting, but also in developing tools for collecting information. For example, how to write requests [for public information] to get what you need (...). State bodies do not have a clear methodology for how to store information on, for example, places of detention. In Luhansk and Donetsk regions, government agencies collect and store information in different ways.<sup>18</sup>*

18. Interview with an NGO representative.

Ukrainian NGOs have received substantial financial support and capacity-building assistance from abroad. International experts provided trainings in Ukraine and helped the NGOs to develop their expertise. NGOs activists took part in exchange programmes whereby they could learn from the experience of civil society sectors in other conflict or post-conflict countries (e.g. in Georgia or in the Balkans). Over time, NGOs also established useful contacts in Ukraine, including at public institutions, such as the government authorities responsible for the issues related to the Donbas conflict, local administrations, and representatives of local law enforcement, other Ukrainian civil society organizations (e.g. NGOs specialized in the provision of humanitarian and psychological aid) and local activists, some of whom also received training and were engaged in documentation projects. This has greatly facilitated the work involved in documenting violations, improving the access to information, referring victims to

appropriate services victims, implementing recommendations, and engaging directly with the population of the conflict-affected areas. As a result of the above processes, the NGOs have grown in size and many volunteer-based initiatives have transformed into professional organizations officially registered under Ukrainian law.

Today, most NGOs active in the area of conflict documentation also implement other activities related to the issue of conflict-related violations and are often a natural continuation of documentation work where the information collected is used for specific purposes. The following categories of activities can be identified:

1. Legal assistance,
2. Strategic litigation (national and international),
3. Advocacy (national and international),
4. Communication with the public (national and international).

Legal assistance comprises activities aimed at solving various legal and administrative issues that affected victims of the armed conflict, for example the acquisition of the IDP status, restoration of lost documents, receiving social benefits, searching for missing relatives, compensation for destroyed property, among others. For the purposes of documentation, many of the beneficiaries of NGO legal services also provide testimonies regarding the violations they have suffered or witnessed. Depending on the situation, NGOs also refer the victims and witnesses they interview to other organizations who are better equipped to provide legal aid in general or regarding a particular matter and/or to public institutions. Legal assistance can take the form of either primary or secondary legal aid. The former is limited to legal advice and drafting of non-procedural documents for submission to various institutions of central, regional, and local administrations responsible for a specific issue. The latter covers the drafting of procedural documents and legal representation in courts and is usually provided where proceedings before the administrative authorities or the law enforcement have been unsuccessful or when there is no administrative path to solve an issue.

Strategic litigation is the identification and pursuit of legal cases as part of a strategy to promote rule of law and human rights. It focuses on individual cases in order to bring about a systemic change. These cases set important legal precedents by publicly exposing injustices, raising awareness and bringing about systemic changes in legislation, policy, and practice. As a result, strategic litigation can have a lasting impact on the situation of a large number of people at the national, regional, or international level. A representative of an NGO providing legal assistance which in some cases is followed by strategic litigation explains the process:

***When we obtain the information, for example when implementing the monitoring missions or receiving information from legal consultations, there are things that are of interest to us and we then consider areas for strategic litigation, we take the case and continue with deeper legal support. (...) It is up to our resources, the significance of the case, and the possibility of dealing with it, because sometimes it is impossible to achieve results, for example when all the traces of perpetrators are in the uncontrolled territories.<sup>19</sup>***

19. Interview with an NGO representative.

In countries where gross human rights violations are committed and impunity is prevalent, the only way to durably improve the victims' situation is to use all available legal avenues, not only at the national level, but also at the international level. In Ukraine, NGOs pursue important cases by assisting the victims in submitting applications to the European Court of Human Rights (ECHR) in which they seek remedies for the harm suffered. They also use the collected information on the crimes committed in the course of the conflict that may potentially serve as evidence in future trials and submissions to the ICC. Chapter II of this report addresses in a more in-depth way the use of documentation for pursuing justice before both institutions.

An important aspect and a follow-up of the process of war-related documentation has been its use for advocacy purposes. The target of advocacy activities are Ukrainian legislative and executive authorities, as well as international institutions who are in a position to exert pressure on Ukrainian decision-makers (for example, international organizations such as the UN, OSCE or the European Commission as well as individual governments of foreign countries). The purpose of advocacy is to raise awareness among domestic and international stakeholders about the various problems resulting from human rights and humanitarian law violations and demand action to address those challenges. Monitoring, documentation, and the regular provision of legal aid to various groups affected by the conflict allow the NGOs to gain an in-depth understanding and knowledge of the legal and administrative challenges that have a negative impact on the state's ability to mitigate the negative consequences of the conflict and provide adequate protection of the victims' rights. The NGOs use their expertise to promote specific policy and legal solutions. They participate in working groups on war-related issues dedicated, among other things, to reforming the justice system and improve the situation of various groups affected by the conflict (for example, IDPs, persons who lost their property as a result of hostilities, convicts serving their sentences in the occupied territories who request to be transferred to the government-controlled areas, and families of missing persons):

*We attend roundtables and committees in parliament and have discussions (...), we joined the advocacy campaign for ratifying the Rome Statute<sup>20</sup> and adopting changes to the national criminal code.<sup>21</sup>*

21. Interview with an NGO representative.

*We also do analytical work on legislation, prepare proposals of draft laws related to the conflict, with some advocacy for those draft laws.<sup>22</sup>*

22. Interview with an NGO representative.

An important element of the work of the majority of NGOs, is also communication with the public to raise awareness about the human rights aspects of the conflict. The information collected in the process of documentation is subjected to quantitative and qualitative analyses and presented in the form of thematic reports which are made publicly available. Such reports typically deal with specific kind of violations committed over a longer period of time (e.g. sexual violence in the conflict, destruction of objects of civilian infrastructure), describe a variety of violations committed in a particular city or area (case studies of particular cities) or a particular group of conflict victims (IDPs, missing persons in the conflict) (see section 1.2. for more information about thematic areas of documentation). Depending on the content, they aim to reach various audiences – authorities, expert community or the general public – both in Ukraine and abroad. They usually provide a set of recommendations on how to improve legislation and/or administrative practice. Information deriving from the monitoring and documentation work is also promoted through various forms targeted towards ordinary citizens, for example through art exhibitions. Some of the NGO representatives who were interviewed note the necessity, in addition to preparing reports, to work more substantially on fostering involvement of ordinary citizens and encouraging civic activism. Examples of such activities include the development of volunteering programmes to involve young people in the human rights work, carrying out campaigns and calls for action in both real life and social media (for example, signing petitions, writing letters of support to political prisoners), holding public discussions with representatives of local communities in the Luhansk and Donetsk regions about war-related issues, and encouraging local activists to engage in human rights activism.

20. Rome Statute is the treaty that established the International Criminal Court, adopted at a diplomatic conference in Rome, Italy on 17 July 1998. For more information on the ratification of the Rome Statute see: 2.1.1. Responsibility of the perpetrators of severe crimes and 2.2.1. International Criminal Court.

## 1.2. Topics

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Since 2014, Ukrainian NGOs have been collecting information on a wide spectrum of conflict-related topics. The choice of topics depends primarily on the particular organization's interests, factors such as the availability of data, access to persons and territories, as well the expectations of donors providing funding for monitoring and documentation activities. This section presents an overview of the topics that have been extensively researched and presented in the form of public reports. It also highlights some areas that have been given less attention and may need further investigation in the future. The section is divided into five parts. The first part (1.2.1.) focuses on the gravest crimes such as killings, imprisonment and torture, sexual violence, as well on the problem of missing persons. The second part (1.2.2.) addresses the consequences of indiscriminate shelling resulting in the loss of lives and destruction of civilian infrastructure. The third part (1.2.3.) presents research on the secondary impact of the conflict related to social rights of IDPs and residents of the settlements near the contact line, situation of vulnerable groups (e.g. children or the elderly), as well as environmental issues. The fourth (1.2.4.) part summarizes the documentation collected on the violations committed in the NGCAs. While documenting the events directly related to the conduct of hostilities, described in the two first parts, some Ukrainian NGOs focused exclusively on the crimes committed by the Russian side, while others included information on the crimes committed by both sides. The issue of documenting the alleged crimes committed by the Ukrainian side and the various challenges related to it are discussed separately in the fifth part of this section (1.2.5.).

### 1.2.1. Deprivation of life, detention and torture, sexual violence, and missing persons

Several studies have covered cases of intentional deprivation of life/killings off the battlefield<sup>23,24</sup> in the context of the armed conflict. The evidence collected by NGOs concerns extrajudicial executions, separate murders, and death by torture in Eastern Ukraine is extensive, in particular with regard to the period between April 2014 and the end of 2015.<sup>25</sup> The killings occurred in the conflict area along the contact line, with the vast majority committed in the NGCAs and some cases in the government-controlled areas (GCAs). Among the unlawfully executed were captured Ukrainian servicemen, persons identified as political enemies (members of pro-Ukrainian organizations, dissenters and vocal critics of Russia and the separatist movement), journalists and media representatives, religious figures, entrepreneurs, and persons murdered for their property. Evidence suggesting that these crimes were committed in a systematic and planned manner was also collected, for example the existence of “execution lists” on a regional, city, and even village level, as well as the presence of special places for carrying out executions.

Extensive documentation, concerning cases of illegal detention and torture,<sup>26</sup> has also been gathered. One of the early examples was a 2015 report on places of illegal

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23. The killing of combatants during active hostilities is a reality of war and not illegal per se. However, international humanitarian law (IHL) (including all Geneva Conventions as well as the Rome Statute of the International Criminal Court) does prohibit the killing of persons not taking an active part in hostilities, including civilians and other protected persons, and combatants who have laid down their arms or have become hors de combat due to sickness, injuries, or detention. These rules apply also to non-international armed conflicts. The killing of civilians and persons hors de combat is also prohibited under international human rights law, however in different terms. Human rights treaties lay down the prohibition of “arbitrary deprivation of the right to life” which is non-derogable (applicable at all times) and encompasses, among others, unlawful killing in the conduct of hostilities, i.e., the killing of civilians and persons hors de combat. The determination of what is an “arbitrary” deprivation of life is subject to legal interpretation. While some human rights courts have said that in the case of killings which occurred in the course of hostilities, it should be determined by the applicable *lex specialis*, which in this case is the law of armed conflicts, other courts and bodies, without referring to IHL, pointed to factors such as proper precautions, limitation of the use of force to the degree strictly necessary, and investigations of suspicious deaths as important measures to ensure that a loss of life is not “arbitrary”. See: *Rule 89. Violence to Life*, in: Henckaerts and, J.M. and L. Doswald-Beck, *Customary International Humanitarian Law*, Volume I: Rules, ICRC, Cambridge University press, 2005, pp. 311-314, available at: [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_ru\\_rule89](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_ru_rule89) (accessed 16 January 2021).

24. This section addresses the documentation of murder and extrajudicial executions of persons due to their specific characteristics, while section 1.2.2. addresses documentation of the cases of civilian’s death as a result of indiscriminate shelling.

25. Zakharov, E. (ed.), *Violent crimes committed during the armed conflict in Eastern Ukraine between 2014–2018*, Kharkiv Human Rights Protection Group, Public Organization “Shore of Peace”, 2018, available at: <http://khpg.org/files/doc/1552984577.pdf> (English), <http://khpg.org/files/doc/1552984376.pdf> (Ukrainian), (accessed 16 January 2021); International Partnership for Human Rights and Truth Hounds, *Fighting impunity in Eastern Ukraine violations of international humanitarian law and international crimes in Eastern Ukraine*, 2015, available at: <https://bit.ly/2XMarel> (English) (accessed 16 January 2021); International Federation for Human Rights and Center for Civil Liberties, *Civilians Caught in the Crossfire*, 2015, available at: <https://bit.ly/3pCWj3V> (English), <https://bit.ly/3r0bTa2> (Ukrainian) (accessed 16 January 2021); Centre for Civil Liberties, *The “Chemical Triangle” of the Region of Lugansk during the occupation: hostages, tortures and extrajudicial executions – report on visit of the monitoring group to Severodonetsk, Lysychansk and Rubizhne during December 6–11, 2014*, available at: <https://bit.ly/2XRpWt0> (English), <https://bit.ly/2NfLjLF> (Ukrainian) (accessed 16 January 2021).

26. Illegal detention and torture can constitute a violation of both IHL and human rights law and therefore may be assigned respective legal categories under more than just one legal document. As this overview aims to just familiarize the reader with the war-related topics that have been subject to documentation by Ukrainian NGOs it is arranged thematically and does not focus on the legal qualification of crimes.

detention<sup>27</sup> which was a result of a monitoring study conducted jointly by several members of the Coalition of public organizations and initiatives “Justice for Peace in Donbas”<sup>28</sup> in close cooperation with the Ukrainian Parliamentary Commissioner for Human Rights. It was based on testimonies of individuals (both civilians and military members) who had been illegally detained in the Donetsk and Luhansk regions by pro-Russian military groups, collected during monitoring visits to places of detention on the liberated territories. The findings reveal gross and systemic violations of the rights of detainees, comprising of extrajudicial killings and deaths resulting from torture, witnessing torture, inhumane conditions and cruel treatment including the so-called “parades of war prisoners” – forced marches of prisoners in central squares of cities, often recorded on cameras, where they were exposed to verbal and physical aggression from the locals. Persons subjected to the abuses included militants as well as civilian captives, in particular if they were detained in relation with their pro-Ukrainian activities (e.g. support for the Ukrainian army and volunteer battalion, espionage, expression of Ukrainian patriotism, etc.). Individuals who belong to the latter groups are referred to by the Ukrainian side as political prisoners and, along with Ukrainian nationals held by the occupying authorities of the Russian Federation in Crimean Peninsula as well as in the Russian Federation, are eligible to be released as result of agreements between the two sides of the conflict on mutual release of prisoners (so-called “prisoner exchanges”).<sup>29</sup>

A number of other reports were drafted covering the more recent period of the conflict and based on more in-depth research into the system of oppression maintained through the unlawful confinement of persons in the NGCAs. The evidence collected reveals how detainees are denied the right to a fair trial and subjected to ill-treatment (including denial of proper medical aid), threats, torture, humiliation, and intimidation.<sup>30</sup> Contact with relatives is not allowed. Detainees are subjected to forced labour, consisting mostly in building military facilities and restoring infrastructure. The release of detainees takes place after “inspections” with the use of physical and psychological pressure. A report, in the form of a case study, of the functioning of a specific place of detention – the seat of the former Luhansk Regional Administration in the city of Luhansk – was also prepared, based on multiple testimonies of persons detained in this facility over several years.<sup>31</sup>

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27. Bielousov I.L., A.O. Korynevych, O.A. Martynenko, O.V. Matviychuk, O.M. Pavlichenko, Y.V., Romensky and S.P. Shvets, *Surviving Hell: Testimonies of Victims on Places of Illegal Detention in Donbas*, 2015, available at: <https://bit.ly/3sXG0Rq> (English), <https://bit.ly/3pkDtyi> (Ukrainian), <https://bit.ly/39hGKJj> (Russian) (accessed 16 January 2021).

28. For more information on the Coalition see: <https://jfp.org.ua/>.

29. For more information see: Tomak, M., Brodik, P., Volkova N., Pavliuk, A. and I. Vynokurov, *Prisoners of war: international practice as to release of POWs, civilian detainees and political prisoners. Conclusions for Ukraine*.

30. Denysenko, D. and V. Novikov, *Pravove svavillia v ORDLO* [Lawlessness in certain regions of Donetsk and Luhansk oblasts], Luhansk Oblast Human Rights Center “Alternatyva”, 2017, available at: <https://bit.ly/3nMyHln> (Ukrainian only) (accessed: 15 January 2021).

31. Yanova, H. (author) and V. Shcherbachenko (ed., maps), *Imprisoned in the “LPR Government” Building: Analytical Report*, NGO Eastern-Ukrainian Centre for Civic Initiatives, 2018, available at: <https://bit.ly/35SkH9J> (English), <https://bit.ly/3nTSXrC> (Ukrainian) (accessed 16 February 2021).

Cases of conflict-related sexual violence have also been documented, most of them in connection with other crimes, in particular illegal detention.<sup>32</sup> The level of violence depends on several factors, including the conflict phase, distance from the line of contact and the entity exercising control over the area. The majority of recorded cases took place during the active phase of hostilities, in detention facilities created by illegal armed groups in the self-proclaimed “LPR” and “DPR” as well as, on a significantly smaller scale, by the Ukrainian military and members of volunteer armed groups. The research indicates that sexual violence in illegal detention facilities was used as a form of torture, intimidation and humiliation of combatants belonging to the other side and political opponents. In the opinion of the NGOs, however, the scale of sexual violence may be much larger in reality than indicated by the evidence. At times, the evidence of recorded cases is fragmented, for instance, with a disproportionately low number of testimonies coming from the actual victims as compared to testimonies of witnesses. Additionally, sexual violence still remains an underreported problem due to the social stigma and the reluctance of victims to come forward.<sup>33</sup>

Another type of documented violations is conflict-related disappearances of members of the military and civilians. According to a report prepared by an NGO specializing in this matter, while most enforced disappearances occurred in unknown circumstances, most common patterns include disappearances/kidnappings perpetrated by the military, armed groups and law enforcement representatives, persons who went missing in combat, on check-points, or in detention.<sup>34</sup> Due to the nature of the crimes, the NGO research work has also focused on monitoring the process of searching for missing persons (the functioning of databases/registers and operating procedures, the provision of information regarding missing persons or unidentified remains to families, and coordination between different state agencies), as well as on monitoring action undertaken by the Ukrainian state to assist the families of missing persons (for example, the issuing of relevant documents to relatives, as well as social and financial aid).<sup>35</sup>

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32. Shcherbachenko, V. and H. Yanova (eds.), *War without rules: gender-based violence in the context of the armed conflict in Eastern Ukraine*, Eastern-Ukrainian Centre for Civic Initiatives, 2017, available at: <https://bit.ly/3quZXgs> (English), <https://bit.ly/3bOmAl0> (Ukrainian) (accessed 17 January 2021); Shcherbachenko, V., Yanova, H. and O. Pavlichenko, *Unspoken pain: gender-based violence in the conflict zone of Eastern Ukraine*, Eastern-Ukrainian Centre for Civic Initiatives, 2017, available at: <https://bit.ly/35Qb1N1> (accessed 17 January 2021); Ukrainian Helsinki Human Rights Union, *Report on the results of monitoring visit on the topic “Problems of gender-based violence in the conflict zone”*, 2015, available at: <https://bit.ly/39EkHeF> (accessed 17 January 2021).

33. It is also important to note that in NGO studies, sexual violence was analyzed as part of a wider phenomenon of conflict-related gender-based violence (GBV) which encompasses different forms of sexual, physical, and psychological violence against women and men because of their social (gender) roles which have a temporal, geographic, and/or causal connection with the armed conflict. It also includes, for example, domestic violence in families in the settlements near the frontline or in veteran’s families.

34. Public Organization “Shore of Peace”, *De vony? Analitychnyi zvit [Where are they? Analytical report]*, 2018, available at: <https://bit.ly/38Qx3B9> (Ukrainian only) (accessed 17 January 2021).

35. Charitable Foundation “East SOS”, *Missing persons: problems with regulation of the legal status of persons missing during the armed conflict in Ukraine*, 2016, available at: <https://bit.ly/39lIFqi> (accessed 17 January 2021); Center for Civil Liberties, *For the Sake of One Name Search for missing persons and identification of unidentified victims of armed conflict in Donetsk and Luhansk regions*, 2015, available at: <https://bit.ly/2XPMjZ2> (English), <https://bit.ly/39lXeJd> (Ukrainian) (accessed 17 January 2021).

With regard to all severe human rights violations described in this section, it could generally be said that the vast majority of them were committed in the early years of the conflict when disorder, lawlessness, illegal detention and civilian casualties were common. This is also confirmed by the fact that most cases of violations (estimated at up to 80-90%) recorded by the HRMMU during the Mission's operation in Ukraine occurred in 2014-2015.<sup>36</sup> As a matter of fact, monitors still occasionally come across and document some cases from this period. In recent years, however, the overall security situation has improved significantly, and the amount of conflict related deaths, injuries, imprisonment and torture has substantially decreased.

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<sup>36</sup>. Interview with an HRMMU representative.

### 1.2.2. Attacks on civilians and the destruction of civilian infrastructure

Extensive documenting of crimes has been carried out by Ukrainian civil society organizations on the topic of civilian casualties and damage to residential areas and city infrastructure. Throughout the years, NGOs have organized hundreds of monitoring missions to Luhansk and Donetsk regions to collect eyewitness accounts and material evidence as well as gathered open source information and data provided by the state and local government agencies. This resulted in the publication of a number of reports.<sup>37</sup> They describe the deliberate attacks (shelling, airstrikes) against the civilian population or individual non-combatants resulting in deaths and injuries, as well as indiscriminate attacks, launched in the knowledge that they could cause incidental loss of life (for example, with the use of methods such as unguided rockets and cluster munitions). Multiple cases of deliberate attacks against civilian objects were also documented. Many of those civilian losses were a consequence of a recurrent practice of deploying military units and conducting hostilities from residential areas or in close proximity to civilians and civilian objects which amounted to using them as “human shields”, a practice which the IHL has declared to be unlawful. The attacks on civilians and civilian objects took place on both the controlled and uncontrolled territory (with the vast majority in settlements lying directly on the contact line or in its vicinity) and were perpetrated by the separatist and pro-Russian forces as well as by Ukrainian government military units and pro-Ukrainian paramilitaries. The largest number of attacks took place in the early phase of the conflict (2014-2015), however they also continued to a lesser degree in the following years, despite numerous ceasefires.

There are also examples of studies and reports that address specific issues related to attacks on civilian targets. For example, information was gathered confirming the international character of the Donbas war, including evidence of cross-border shelling coming from the territory of the Russian Federation, as well as the direct

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<sup>37</sup> Zakharov, Y. (ed.), *The loss of civilian population, the destruction of housing and infrastructure as a result of the armed conflict in Eastern Ukraine – Report*, Kharkiv Human Rights Protection Group, 2018, available at: <https://bit.ly/3oAft9d> (English), <https://bit.ly/3ovCjyJ> (Ukrainian) (accessed 15 January 2021); International Partnership for Human Rights and Truth Hounds, *Attacks on civilians and civilian infrastructure in Eastern Ukraine. Period covered: March 2014 – November 2017*, 2017, available at: <https://bit.ly/2MnCaQS> (accessed 15 January 2021); International Partnership for Human Rights and Truth Hounds, *Scorching winter 2016-2017. An analysis of the shelling of settlements in Eastern Ukraine*, 2017, available at: <https://bit.ly/2YuOSjl> (accessed 15 January 2021); International Partnership for Human Rights and Truth Hounds, *Fighting impunity in Eastern Ukraine violations of international humanitarian law and international crimes in Eastern Ukraine*; Truth Hounds, International partnership for Human Rights, *Investigation of the deadly incident near Volnovakha on January 13th, 2015*, 2015, available at: <https://bit.ly/3r03GTg> (accessed 15 January 2021); Bodnar, A., Nekrasova, A. and S. Schlegel (eds), *Making life go on: how the war in Donbas affects civilians*, Charitable Foundation “East SOS”, Civic Committee for the Protection of the Constitutional Rights and Freedoms of Citizens, Human Rights Civil Research Centre, Moloda Prosvita Prykarpattya, Eastern Ukrainian Centre for Civic Initiatives and Crisis Media Centre Siverskiy Donets, 2018, available at: <https://bit.ly/3sqQN6d> (English), <https://bit.ly/2XL0PRu> (Ukrainian), <https://bit.ly/2XLELX7> (Russian) (accessed 15 January 2021); Luhansk Oblast Human Rights Center “Alternatyva”, *Vraty tsyvilnoho naseleння vnaslidok voiennoho konfliktu na Skhodi Ukraїny (2014-2018)* [Civilian casualties as a result of the military conflict in Eastern Ukraine (2014-2018)], 2017, available at: <https://bit.ly/3amG4Bw> (Ukrainian only) (accessed: 15 January 2021).

military intervention of the country's troops in Ukraine.<sup>38</sup> Conclusions were drawn on the basis of analyses of the circumstances of the attacks in particular settlements, corroborated by satellite images, eyewitness testimonies, and posts in social networks. A report was prepared covering violations committed against children in the conflict zone, including incidences of deaths and injuries caused by indiscriminate shelling, attacks on educational institutions, and the establishment of military bases and prisons on their premises.<sup>39</sup> A number of violations were also documented during the mass evacuation of residents from the areas of combat. They resulted both from inadequate measures and deliberate obstruction as well as from the attacks on the so-called "humanitarian corridors", points of gathering, and means of transport.<sup>40</sup> They have led to civilian injuries and deaths, including minors kept in orphanages and penitentiary institutions, hospital patients, and the elderly residents of collective housing institutions.

A number of case studies were also prepared, describing the situation in particular frontline settlements, now under the control of Ukraine, that have been severely affected by the hostilities in the "hot" phase of the conflict, as well as by the breaches of the ceasefire in the later years (for example, Stanytsia Luhanska,<sup>41</sup> Popasna,<sup>42</sup> Marinka<sup>43</sup>, Kramatorsk,<sup>44</sup> and Mariupol).<sup>45</sup> Another example is a study covering the wartime history of the city of Sloviansk which found itself under the occupation of Russia-backed separatists during several months of 2014, describing the development

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38. International Partnership for Human Rights, Norwegian Helsinki Committee and Ukrainian Helsinki Human Rights Union, *Where did the shells come from: investigation of cross-border attacks in Eastern Ukraine*, 2017, available at: <https://bit.ly/2MIVzeR> (accessed 15 January 2021).

39. Truth Hounds, *No country for young: monitoring of attacks on children and schools during three years of the war at Donbas*, 2017, available at: <https://bit.ly/3cp0qNi> (Ukrainian), <https://bit.ly/2NMMfqV> (Russian), <https://bit.ly/3t6sVWQ> (executive summary in English) (accessed 15 January 2021).

40. Center for Civil Liberties and the Ukrainian Helsinki Human Rights Union, *"Trapped" Civilians: Obstruction of evacuation of civilians during the armed conflict in Donetsk and Luhansk regions*, 2015, available at: <https://bit.ly/2YvihKj> (English), <https://bit.ly/2YvihKj> (Ukrainian) (accessed 15 January 2021).

41. Bida, O.A. and O.A. Martynenko, *Story of a city. Stanytsia Luhanska*, Ukrainian Helsinki Human Rights Union, 2018, available at: <https://bit.ly/2LRbKqc> (accessed 15 January 2021).

42. Snehiryov, V., Movchan, S. and S. Rybalko, *Story of a City. Popasna under Fire*, Ukrainian Helsinki Human Rights Union, 2018, available at: <https://bit.ly/2KqghLA> (English), <https://bit.ly/3quQQMN> (Ukrainian) (accessed 15 January 2021).

43. Bida, O.A. and O.A. Martynenko, *Story of a city. Marinka: in the line of fire*, Ukrainian Helsinki Human Rights Union, 2018, available at: <https://bit.ly/3oSkWcw> (English) (accessed 15 January 2021).

44. Avramenko, R., Valko, S. and V. Cooper, *Rockets hit residential area in Kramatorsk, Ukraine – Report of a Civic Solidarity Platform field mission for documentation of war crimes*, International Partnership for Human Rights, 2015, available at: <https://bit.ly/3spogOz> (English) (accessed 15 January 2021).

45. International Partnership for Human Rights, *Investigation of the shelling of Mariupol on January 24th 2015*, Report of a Civic Solidarity Platform field mission for documentation of war crimes, 2015, available at: <https://bit.ly/3AWaqHB> (English) (accessed 15 January 2021); Snehiryov, V., Martynenko, O., Bida, O. and S. Movchan, *Story of a city. liberation and defense of Mariupol*, Ukrainian Helsinki Human Rights Union, 2018, available at: <https://bit.ly/38KVkiU> (Ukrainian), <https://bit.ly/38KBXzC> (executive summary in English) (accessed 15 January 2021).

of the conflict with a focus on human rights violations.<sup>46</sup> Information was also collected on the destruction of particular types of civilian infrastructure. For example, one report covers attacks on healthcare facilities, including shelling from heavy weapons that also killed and injured a number of health professionals as well as cases of troops and weapons being stationed in hospitals and other medical facilities.<sup>47</sup> Another report covers the impact of military operations on the objects of vital civilian infrastructure, including facilities providing gas, electricity, water, and heat supplies which resulted in the disruption of the supplies necessary for the survival of the civilian population.<sup>48</sup> The impact of the war on the protection of cultural heritage was also documented, for example, in a report describing cases of intentional or accidental damage to cultural sites as a result of shelling, transformation of sites of culture, religion, art and science into military sites, as well as robbery, and misappropriation of cultural property in Eastern Ukraine.<sup>49</sup>

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46. Udovenka, A. (ed.), *Misto, z iakoho pochalasja vi'na* [The city from which the war began], Eastern Ukrainian Center for Public Initiatives, Charitable Foundation "East SOS", Human Rights Center for Public Studies, NGO Moloda Prosvita Prykarpattya, Public Committee for the Protection of Constitutional Rights and Freedoms of Citizens, 2020, available at: <https://bit.ly/3qow01A> (Ukrainian) [accessed 15 January 2021].

47. Denysenko, D., Novykov, V. and A. Korynevyh, *Forbidden target: healthcare facilities under shelling, Monitoring report on the use of methods and means of warfare against civilian healthcare facilities prohibited by international law during the armed conflict in Eastern Ukraine*, Luhansk Oblast Human Rights Center "Alternative", 2017, available at: <https://bit.ly/3bQ7stY> (English), <https://bit.ly/2XFvBeC> (Ukrainian) [accessed 15 January 2021].

48. Denysenko, D. and V. Novykov, *Survival test: Everyday life of housing and utilities infrastructure for civilian population in the conflict zone. Report on the monitoring of application in the armed conflict in Eastern Ukraine of means and methods prohibited by international treaties of conducting military operations on the objects of infrastructure and communications necessary for the survival of the civilian population*, Luhansk Oblast Human Rights Center "Alternative", 2018, available at: <https://bit.ly/39EmRLt> (English), <https://bit.ly/3ssNuvs> (Ukrainian) [accessed 15 January 2021].

49. Bushchenko, A. (ed.), *With the shield or on the shield? Protection of cultural property in the situation of armed conflict in the east of Ukraine*, Ukrainian Helsinki Human Rights Union, 2016, available at: <https://bit.ly/2MkMKlv> (English), <https://bit.ly/39zuHXL> (Ukrainian) [accessed 15 January 2021].

### 1.2.3. Secondary impacts of the conflict: social rights, the situation of vulnerable groups, and environmental issues

The war in Donbas has not only directly led to the loss of lives, severe violations of human rights and humanitarian law, as well as destruction of private property and public infrastructure, but it has also had a negative impact on living conditions and the social rights of various groups of persons as well as on the local environment. The problems described in this section are an indirect result of the hostilities, but can also be exacerbated by the lack of or inadequate protection and policies.

The armed conflict has caused mass migratory movements within the boundaries of the country, with many former residents of the now NGCAs becoming internally displaced in other parts of Ukraine, both in government-controlled parts of the Luhansk and Donetsk region as well in central and western parts of the country. The situation of IDPs has been a matter of interest of Ukrainian NGOs, which monitor the observance of their social and political rights (e.g. right to work, pensions and housing, electoral rights)<sup>50</sup> as well as engage in providing direct assistance to this group of conflict victims. Also, in spite of the decrease in the intensity of hostilities, the humanitarian situation at the frontline requires continuous monitoring right up to the present day. The NGOs conduct monitoring missions to frontline settlements in order to gather data on the observance of social rights of civilians and their access to basic services such as education and healthcare, water and electricity supplies, basic goods and medicines, the labour conditions of employees of public services, as well as on the relations between the military and civilians in small isolated villages and the impact of political decisions on the security situation on the ground (e.g. the consequences of withdrawal of troops in several areas, ceasefire agreements, etc.).<sup>51</sup> Additionally, another set of problems relate to the freedom of movement across the contact line, including issues related to accessibility and mode of operation of

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50. Bushchenko, A.P. (ed.), *Lost in papers: observing social rights of internally displaced persons*, Ukrainian Helsinki Human Rights Union, Kyiv, 2017, available at: <https://bit.ly/3piDgMa> (English), <https://bit.ly/2MrORty> (Ukrainian) (accessed 25 January 2021); Charitable Foundation "Right to Protection", *Protracted temporality: how IDPs live in collective centres*, 2019, available at: <https://bit.ly/36cPyxZ> (English), <https://bit.ly/3hC05cq> (Ukrainian) (accessed 25 January 2021).

51. Charitable Foundation "East SOS", *Selyshcha v oblozi: obmezhenia svobody peresuvannia u naselenykh punktakh poblyzu linii rozmezhuвання u Donets'kii i Luhans'kii oblastiakh* [Villages under siege: restrictions on freedom of movement in settlements near the demarcation line in Donetsk and Luhansk regions], 2020, available at: <https://bit.ly/3ch7gEF> (Ukrainian only) (accessed 25 January 2021); Malinowski, P., Rieutskyi, K., Shukan, J. and M. Szczepanik, *Disengagement of armed forces in the conflict zone in Donbas*. Report based on the findings of the international DRA/VOSTOK SOS human rights monitoring mission to Ukraine, Deutsch-Russische Austausch e. V. (DRA), Berlin, 2020, available at: <https://bit.ly/2VT785w> (accessed 25 January 2021); Truth Hounds, *Pochuty Donbas. Priama mova vi nyzlochyny proty ukraintsiv u pryfrontovykh naselenykh punktakh donechchyny i luhanshchyny za period: serpen' 2018 — serpen' 2019* [Hear Donbas. Direct language of war crimes against Ukrainians in frontline settlements of Donetsk and Luhansk region for the period: August 2018 – August 2019], Information report based on recorded evidence in field missions, 2019, available at <https://bit.ly/3rbpATx> (Ukrainian) (accessed 25 January 2021); Novykov, V. and V. Novykova, *Underestimated line of defense. Report on conditions for medical and social workers, utility workers, employees of the State Emergency Service in the line of duty during an armed conflict*, Luhansk Oblast Human Rights Center "Alternative", 2020, available at: <https://bit.ly/340hGqn> (English), <https://bit.ly/3ipYzeh> (Ukrainian) (accessed 15 May 2021); Bodnar, A. et al. (eds.) *Making life go on: how the war in Donbas affects civilians*.

entry-exit crossing points (EECPs), necessary documents and permits, rules for transporting of goods, etc.<sup>52</sup>

NGO monitoring activities have also focused on the impact of the conflict on the situation of vulnerable groups, such as children, the elderly, and persons with disabilities.<sup>53</sup> Monitoring projects have paid attention to the conditions pertaining to education in schools located near the frontline, investigating the scale of damage caused by shelling and the progress in rebuilding and restoration, current security (for example, the functioning of shelters), the availability of staff and funding, the impact of the war on students' and teachers' health and psychological well-being and the availability of professional psychological aid.<sup>54</sup> The impact of the war on children was also addressed in the context of the direct involvement of children, including minors under the age of 15, in the activities of armed units, with the majority of documented cases concerning illegal armed groups recorded on the territory outside of Ukraine's control.<sup>55</sup> With regard to the elderly persons residing in close proximity to the contact line, NGOs have investigated the problem of inadequate material, social, and humanitarian support provided by the state (in particular to the elderly whose mobility is restricted), a shortage of social workers and resources to provide home-based care, a lack of state oversight over private institutions of collective housing, a burdensome application procedure for social payments, as well as the linking of pensions for citizens of Ukraine who live in the NGCAs to the IDP status, practically impeding access to pensions.<sup>56</sup> A study of the situation of persons with disabilities in the context of war, concerning itself with problems relating to their integration into safe territorial communities including inaccessibility of accommodation facilities for IDPs, a lack of adequate and timely medical treatment, as well as a lack of social, legal and psychological assistance was also conducted.<sup>57</sup> Additionally, a study on the rights of civilian persons with disabilities resulting from injuries sustained during the

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52. Monthly reports of the Charitable Foundation "Right to Protection", for example: monthly report *Crossing the contact line* for November 2020, available at: <https://r2p.org.ua/en/en-eeep-report-november-2020/> (English) (accessed 25 January 2021).

53. Bushchenko, A. (ed.), *Growing up at gunpoint: children's rights in the light of the military conflict in Eastern Ukraine*, Ukrainian Helsinki Human Rights Union, 2016, available at: <https://bit.ly/3oiX7cA> (accessed 25 January 2021).

54. Likhachev, V., *Education in the line of fire: access to education near the front lines*, Charitable Foundation "East SOS", 2018, available at: <https://bit.ly/3sY7dmQ> (English), <https://bit.ly/3oiU6t4> (Russian) (accessed 25 January 2021); Bushchenko, A. (ed.), *Growing up at gunpoint: children's rights in the light of the military conflict in Eastern Ukraine*.

55. Burov, S., Lazarenko, O., Yanova, H., Nekrasova, A. and V. Shcherbachenko, *Involvement of children in armed formations during the military conflict in Donbas*, Eastern-Ukrainian Centre For Civic Initiatives, 2016, available at: <https://bit.ly/3cejZHY> (accessed 25 January 2021); Denysenko, D. and V. Novikov, *Pravove svavillia v ORDLO* [Lawlessness in certain regions of Donetsk and Luhansk oblasts].

56. Denysenko, D. and V. Novikov, *Face to face with war: the impact of armed conflict on the rights of the elderly*, Luhansk Regional Human Rights Center "Alternative", 2018, available at: <https://bit.ly/3oPm14G> (English), <https://bit.ly/39zOZzk> (Ukrainian), <https://bit.ly/3nP9xsF> (Russian) (accessed 25 January 2021).

57. Bushchenko, A. (ed.), *Rights of persons with disability in the armed conflict in the East of Ukraine*, Ukrainian Helsinki Human Rights Union, 2016, available at: <https://bit.ly/2YcDV63> (English), <https://bit.ly/3qWonzD> (Ukrainian) (accessed 25 January 2021).

hostilities detailed their problems with obtaining the status of persons with war-related disabilities, subsequently blocking them from claiming social security benefits.<sup>58</sup>

The armed conflict and related military activities have led to significant environmental degradation in the Donbas region which has historically been at the heart of the industrial sector in Ukraine and was already one of the most polluted regions in the country. Several NGO reports have addressed the various aspects of war-related ecological damage, including destruction of water supply systems as a result of shelling and heavy metal contamination, flooding of mines, damage to agricultural enterprises, land, and nature reserves as well as extensive fires leading to large-scale deforestation – all a result of military activity.<sup>59</sup> War takes a significant toll upon the environment which, subsequently, has a negative impact on the residents, leading to violations of social rights, negative effects upon the local labour market, especially for women, as well as impeding the transition away from coal to sources of renewable energy.<sup>60</sup>

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58. Kerymov, L. and N. Alyab'eva, *Pravo na sotsial'nuyu zashchitu grazhdanskikh lits s invalidnost'yu, poluchenny v rezul'tate voennogo konflikta na Donbasse* [The right to social protection of civilians with disabilities resulting from the military conflict in Donbass], 2020, available at: <https://bit.ly/2M4Klfm> (Russian) [accessed 25 January 2021].

59. Bushchenko, A. (ed.), *On the brink of survival: damage to the environment during armed conflict in east of Ukraine*, Ukrainian Helsinki Human Rights Union, 2017, available at: <https://bit.ly/3qN3ruH> (Ukrainian), <https://bit.ly/2YgKm7P> (English summary) [accessed 25 January 2021].; Duprey, B. and O. Bondarenko, *Assessing environmental impact of armed conflict: the case of Eastern Ukraine*, Truth Hounds, 2019, available at: <https://bit.ly/3sVzWZo> [accessed 25 January 2021].

60. Nekrasova, A. and V. Shcherbachenko (eds.), *The real price of coal in the wartime Donbas: a human rights perspective*, Eastern Ukrainian Center for Civic Initiatives, 2017, available at: <https://bit.ly/3iJeUiv> (English), <https://bit.ly/3sQsgrv> (Ukrainian) [accessed 25 January 2021].

#### 1.2.4. The situation in the non-government-controlled areas (NGCAs)

Owing to a lack of physical access, restricted availability of information, and risks to personal security, information about the human rights situation in the co-called “DPR” and “LPR” is limited.<sup>61</sup> Although there is no NGO monitoring or documentation on the ground, several organizations compile regular reports about the situation in the separatist republics based upon open sources, including the local media and public announcements by the republics’ authorities.<sup>62</sup> Additionally, a number of thematic reports have been prepared on the basis of interviews with victims and witnesses who have left the republics (for example, on illegal places of detention described in section 1.2.1) as well as with informants currently living there.

One of the problems that received attention from NGOs was the situation of persons serving their sentences in the separatist territories who had been convicted by Ukrainian authorities before the conflict. In comparison to other groups of persons deprived of their liberty described in section 1.2.1., in particular those detained on political grounds or as a result of their participation in military activities who could be included in the so-called “prisoner exchanges”, convicts received much less attention from both separatist and Ukrainian authorities. Information about the situation of convicts came directly from them; as soon as their right to external communication (generally not respected in the first months of the conflict) was restored, they contacted helplines operated by organizations providing assistance to conflict victims:

***We were receiving many phone calls from prisoners serving their sentences in the occupied territories. It was officially estimated that around 16,000 of them remained on the other side. Our helpline was free and they could easily call us, so the interest was huge. We also realized that no one in Ukraine was taking care of those people.***<sup>63</sup>

<sup>63</sup>. Interview with an NGO representative.

***We were contacted by persons who remained in penal institutions in non-controlled territories – former Ukrainian prisons in which people are serving sentences for crimes committed before 2014, that is, crimes not related to the war. Accordingly, we realized that this is a big problem. We started to search through Google and saw that some institutions had been shelled. We didn’t know what happened to the people, we didn’t have access to them, but we needed to explore this topic (...).***<sup>64</sup>

<sup>64</sup>. Interview with an NGO representative.

<sup>61</sup>. See also section 1.3. for more information on methodological challenges.

<sup>62</sup>. For example: “Newsletter on the events in the “people’s republics” of Eastern Ukraine” – part of the program “Human Rights Monitoring in Eastern Ukraine” coordinated by DRA e.V., available at: [www.civicmonitoring.org](http://www.civicmonitoring.org) (accessed 15 January 2021); monthly “Review of human rights violations on the temporarily occupied parts of the Luhansk and Donetsk regions” prepared by Charitable Foundation “East SOS”, available at: <https://vostok-sos.org/en/category/news/> (accessed 15 January 2021).

***With the start of the conflict, all of the proceedings stopped, and these people stayed in prisons without court proceedings. This is a violation of the European Convention of Human Rights (article 6, the right to a fair trial). There were other problems, for example, the difficulty of relatives to meet them. Prisons were also close to places of violence, near to the contact line. They were subject to many shootings. There were killed and wounded persons, some buildings were destroyed. Only one prison colony was transferred. It was very clear that prisoners needed to be moved. And for that, they needed to access legal assistance.***<sup>65</sup>

<sup>65</sup>. Interview with an NGO representative.

In the framework of the NGO work with the convicts, a number of testimonies were collected from those individuals who wished to share their stories in addition to receiving legal advice. As a result, thanks to the efforts of several organizations, a report on the rights of convicts in the NGCAs was published in 2018.<sup>66</sup> It described the situation in penal colonies in 2014-2015 during the phase of active hostilities when, in addition to the problems mentioned above, the convicts also faced hunger and lacked proper medical assistance. In most colonies they were subject to forced labour and beatings. The report also addresses the question of legal and administrative impediments to the effective transfer procedure of convicts to the Ukraine-controlled territory.

The NGOs have also collected evidence of systematic violations of the right to freedom of religion with regard to religious denominations other than that of the Orthodox Church of the Moscow Patriarchate.<sup>67</sup> These violations include attacks on churches and confiscation of church property, cases of abduction, torture and other ill-treatment, as well as the murder of clergy members and the prohibition of religious practice by the members of the Protestant, Evangelical and Catholic churches, Jehovah's Witnesses, and Muslims. They were committed by the members of illegal armed groups, de facto authorities, as well as by some religious representatives who provided moral and spiritual support for illegal armed groups involved in severe human rights abuses. Although most violations were committed in the acute phase of the conflict, some forms of religious persecution continue to this day.

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<sup>66</sup>. Zakharov, E. and N. Melnik (eds.), *The rights of convicts detained in the ORDLO [certain regions of Donetsk and Luhansk oblasts]*, 2018, available at: <http://khpg.org/files/doc/1539109506.pdf> (English), <http://khpg.org/files/doc/1539109440.pdf> (Ukrainian) [accessed: 15 January 2021].

<sup>67</sup>. Truth Hounds and International Renaissance Foundation, *War in religious dimension: attacks on religion in Crimean and Donbas region*, 2019, available at: <https://bit.ly/3nSqi1> [accessed: 15 January 2021]; Novitchkova, A., Tomak, M., Valko, S. and V. Cooper, *When god becomes the weapon. Persecution based on religious beliefs in the armed conflict in eEastern Ukraine*, Center for Civil Liberties and International Partnership for Human Rights, 2015, Brussels and Kyiv, available at: <https://bit.ly/3blBdwQ> (English), <https://bit.ly/2XljptF> (Ukrainian) [accessed: 15 January 2021].

Violations of the rights of sexual minorities, including homophobic laws based on similar Russian legislation, physical abuse, threats, and summary punishments inflicted by armed gangs, lack of legal protection of victims, as well as wide-spread societal homophobia, were also confirmed in the non-government-controlled part of the Donetsk and Luhansk regions.<sup>68</sup>

Information on violations of the right to private property in the NGCAs was also collected.<sup>69</sup>

It covers instances of violations of the right to private ownership of housing in relation to those who left the territory of the NGCAs through its unlawful seizure and use, nationalization by the self-proclaimed authorities of the so-called “DPR” and “LPR” of the property of the persons who are accused of crimes against the “republics” or continue to work for the law enforcement agencies of Ukraine, seizure and illegal use of the property of entrepreneurs, practice of misappropriation during illegal detentions and searches, as well as documented cases of the unjustified seizure of vehicles, their re-registration to license plate numbers of the so-called “LPR” and “DPR”, and their subsequent use by unidentified individuals. The local law enforcement agencies are not able or willing to conduct effective investigations of such events, especially when they concern the actions of the illegal armed units.

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<sup>68</sup> ADC Memorial (with the support of the Centre for Civil Liberties), *Violation of LGBTI Rights in Crimea and Donbass: The Problem of Homophobia in Territories Beyond Ukraine’s Control – Human Rights Report*, 2016, available at: <https://bit.ly/35Mbgsq> (English), <https://bit.ly/2UIrNee> (Russian) (accessed: 15 January 2021).

<sup>69</sup> Denysenko, D. and V. Novikov, *Pravove svavillia v ORDLO* [Lawlessness in certain regions of Donetsk and Luhansk oblasts].

### 1.2.5. Crimes committed by the Ukrainian side

During interviews conducted for the purpose of this study, NGO representatives and other experts frequently brought up the issue of crimes committed by Ukrainian nationals when asked about the examples of topics and areas that have not yet been sufficiently documented. Most of them expressed the view that even given the evident difference in the scale of crimes committed by both sides (with Russia as the aggressor state and the armed groups acting as its proxies committing a much higher number of crimes), there is an imbalance in favour of NGO reports focusing on the crimes perpetrated by the enemy.

With a few exceptions,<sup>70</sup> the topic of war crimes committed by the Ukrainian side has rarely been addressed by Ukrainian NGOs, at least in the form of public reports – for two main reasons. The first is related to the limited access to victims' testimonies. It is very difficult for NGOs to approach the victims who reside in the NGCAs without putting them, as well as NGO staff themselves, at risk. The victims residing in the Ukraine-controlled side are similarly reluctant, out of fear of retaliation and further persecution, to speak about any violations they have experienced from the Ukrainian military or law enforcement. As a result of this, at present civil society organizations only have access to the testimonies of a small fraction of persons whose rights have been violated by Ukrainian actors in the conflict zone. The second reason is related to the current political context in which the Ukrainian NGOs are operating. With a still ongoing military conflict in the east, the Ukrainian government and political establishment support a narrative that presents Ukrainian soldiers in an unequivocally favourable light and, subsequently, are reluctant to discuss the possibility of their involvement in war crimes or attempt to justify the crimes committed by Ukrainians by the necessity to protect the country:

***In the Ukrainian context, their own soldiers are seen as saviours and protectors, a raised (critical) voice provokes opposition to the idea, even fear, in the eyes of MPs. They have to say publicly that they won't allow this to happen. It is still a common belief, especially among those who took up a gun and went to Donbas, that the protection of Ukraine can be by any means possible. But defending the state is not about the line drawn on the map but protecting the people as well.***<sup>71</sup>

<sup>71</sup> Interview with an NGO representative.

<sup>70</sup> Gladun, A., Valko, S., Movchan, S., Martynenko, O. and Y. Smelyanska, *Unlawful detentions and torture committed by Ukrainian side in the armed conflict in Eastern Ukraine*, Ukrainian Helsinki Human Rights Union, Kharkiv Human Rights Protection Group and Truth Hounds, 2017, available at: <https://bit.ly/2McpKLL> (English), <https://bit.ly/39obEQ9> (Ukrainian) (accessed: 15 January 2021); Shcherbachenko, V. and H. Yanova (eds.), *War without rules: gender-based violence in the context of the armed conflict in Eastern Ukraine*; International Federation for Human Rights and Center for Civil Liberties, *Civilians Caught in the Crossfire*.

*The data we came across [regarding destroyed property] indicate that in the occupied territories there has been greater destruction of civilian property than on the Ukraine-controlled side. The Ukrainian army (ZSU) felt offended by the implicit allegations that it was to blame for this destruction (...).<sup>72</sup>*

72. Interview with an NGO representative.

*[Regarding a report on the crimes committed by the Ukrainian side published by the organization<sup>73</sup>] [There was a] very small reaction from Ukrainian politicians. They all know about these crimes, but they were all told to ignore and to hide these facts. No reaction on the report on violent crimes (...). There is no desire to look for these violations during the war, it is not a popular topic. There are critical attitudes from colleagues too (some NGOs).<sup>74</sup>*

74. Interview with an NGO representative.

Some of the NGO representatives who were interviewed indicated that, even though they do not actively disseminate information on the crimes committed by the Ukrainian side, they document such crimes and assist their victims. Some of them also make efforts, in the framework of a non-public dialogue, to make Ukrainian political and military authorities aware of the importance of properly investigating and prosecuting the perpetrators of such crimes as well as to the necessity of undertaking measures to prevent their occurrence in the future.

*We know that there is a risk that the enemy may use our data against Ukraine, this is a problem. But we don't want to live in a place that has torture, illegal detention, because it would be no different from Russia. In this case, we cannot win this war. We will only win if our state will be really free and democratic. It is our duty to speak about these crimes.<sup>75</sup>*

75. Interview with an NGO representative.

*It is about the understanding within the society that criminals have to be punished, no matter which side they fought on.<sup>76</sup>*

76. Interview with an NGO representative.

The acknowledgement that both sides have committed violations (even though the scale of violations committed by Russian and its proxies is much bigger) and that civilians on both sides have suffered as a result of the conflict is very important for the reconciliation process:

<sup>73</sup>. Gladun, A. et al., *Unlawful detentions and torture committed by Ukrainian side in the armed conflict in Eastern Ukraine*.

*We have to understand that violations were on our side, too. If we take the disappeared, in one third of the cases I came across those persons went missing on the Ukrainian side, at a Ukrainian checkpoint, for example. Two thirds disappeared on the separatist territory. In my opinion, the value of the information we have collected is that it can contribute to mutual forgiveness, it shows that war is bad no matter 'whose' war it is, violations are similar, and everyone is suffering.<sup>77</sup>*

77. Interview with an NGO representative.

*Human rights and a human rights-based approach to reconciliation form a solid basis that is difficult to argue with. I can argue about the Russian and Ukrainian language or the history of Lenin and Bandera. And there may be different opinions. But if there is a fact of violation, a fact of crime on any side, then it is difficult not to admit it. The main thing is to properly collect and present these facts so that there are no doubts about reliability (although anyway, some people will have doubts). But this is what can become the basis for transitional justice, for reconciliation, for the search for points that unite us. When we communicate with people in non-controlled territories, and when we talk about crimes, no one argues that people should not be held accountable for torture in places of detention. And if Ukrainians were involved in torture, they too should be held accountable. Documentation is extremely important. It will have a great impact on the process of future reconciliation and a fair approach to resolving the conflict.<sup>78</sup>*

78. Interview with an NGO representative.

As interviewees have pointed out, proper documentation of events is essential in order to avoid history being rewritten and used for political purposes:

*Without the investigation of everything that has happened, without a proper reconstruction of these events, a peaceful dialogue is not possible. We need to know everyone who had committed crimes by their names, we need to know the names of the victims, and to learn about the reasons and driving factors of this war (...). All blind spots in our most recent history create clean sheets for propagandists who will write their own version, and this most probably won't work to our advantage.<sup>79</sup>*

79. Interview with an NGO representative.

Furthermore, with regard to the crimes of Ukrainian units, it is also in the interest of Ukrainian human rights organizations, as a failure to do so may directly affect their credibility, in particular in Eastern Ukraine where the level of trust in Ukrainian institutions is generally lower. As a representative of an NGO which holds regular meetings in local communities in Donbas admits, impartiality is a crucial factor which affects attitudes towards their documentation work:

*If the Ukrainian military commits crimes, then we also register this information. For example, in a project on medical facilities, we have a hospital, which was allegedly shelled by Ukrainians. There is a statement by Ukrainian officials that yes, it was the liberation of the city of Krasnyi Lyman, we warned citizens that there would be a liberation. But we still document everything. We are often asked this question at meetings. At almost every meeting that we hold in the Luhansk or Donetsk regions, there will be someone who raises their hand and with scepticism asks the question 'You are such patriots, but do you also document the violations of the Ukrainian military?'. We say 'yes'. And immediately it becomes easier, because we do not play on one side only. Of course, such facts are fewer, but we do document them.<sup>80</sup>*

<sup>80</sup>. Interview with an NGO representative.

# 1.3. Methods

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One of the most important sources of conflict-related information are interviews with victims and witnesses of violations who can provide first-hand accounts of the crimes. Depending on the thematic specialization and activities of a specific organization, potential interviewees can be found through NGOs' networks of contacts (e.g. local documenters, volunteers), among the persons who approach them for legal aid, or during staff visits to the towns and villages near the contact line, entry-exit crossing points (EECPs), hospitals, as well as other places where victims and witnesses reside. Snowball sampling (chain-referral sampling), where respondents are asked to refer other persons who might provide relevant information, is often used. Throughout the years, most NGOs have developed structured questionnaires and interview scenarios for the study of the topics in which they specialize and which have been adapted to solicit specific information for particular purposes (e.g. preparation of thematic reports, legal submissions, etc.). Moreover, some questionnaires contain additional questions about the presence of foreign (Russian) military equipment, weapons, and soldiers in the area where the respondent resided. This is to help collect as much evidence as possible on Russia's engagement in the Donbas war in parallel with the collection of specific thematic information. Whenever possible, those documenting the violations make audio- and video-recordings of the interviews. Recording is important for future work on the case, however it requires victims' informed consent and is not always possible due to security concerns (see also: 1.5. Relations with victims).

Monitoring visits are planned in advance on the basis of the information collected and according to the topics of interest, resources, conditions of access, and other factors. However, as indicated by most NGO representatives, some degree of flexibility is also important, as new information is often found on the spot, requiring further investigation and/or interviewing of additional respondents. In addition to interviews, visual materials such as photographs and videos are gathered. Ballistic evidence used to identify the type of weapon that was used for a particular crime, in addition to other details of the event, may also be collected. Depending on the topic of a monitoring visit, external experts can also be invited to participate. In general, in recent years, in comparison to the period of 2014-2015, there have been much fewer cases of violations directly connected with hostilities, such as shelling or cases of persons being killed, injured, disappearing, or being illegally detained; therefore, there is also less material evidence to collect and much fewer recent victims' reports. However, as observed by some organizations, it is not uncommon for a victim or witness to come forward and give a testimony several years after the crime was committed – for reasons that can be deeply personal and/or related to the sense of security and degree of trust towards Ukrainian institutions (both the law enforcement and NGOs). Additionally, for the studies that investigate some particular violations it is common for the NGOs to proactively search (instead of only working with the incoming reports) for victims and

witnesses of specific violations. With regard to the secondary impact of the conflict upon the situation of various groups of the population, as a result of many of the issues having not yet been resolved, there is a continuous need to monitor the rights of conflict-affected persons and the actions undertaken by the states in their regard.

One of the challenges of the documentation and monitoring work is travel restrictions and barriers to accessing certain locations, as noted by one of the NGO representatives in the government-controlled areas (GCAs) of Donbas:

***Moving around the Luhansk and Donetsk regions is a rather difficult thing, because there are many check points, especially if we come closer to the demarcation line. We are often asked where and why we are going. We always prepare special letters for both the local documenters and for ourselves, in which we describe the purpose of our visit, we put a stamp. In some cases, we write requests to ministries, for example, we wrote a letter to medical institutions in order to receive a support letter from the minister for our research. With such a letter, even with a photocopy, we can go. If they stop us, then we show it. That is, the main difficulty is misunderstandings at check points about who we are and where we are going, why we are doing this and what we need. But I would not say that this is too big a problem, especially for those who live there now. Our [local] documenters have already adapted (...).<sup>81</sup>***

81. Interview with an NGO representative.

Because of the lack of physical access, collection of information about the violations occurring in the NGCAs poses a great challenge. NGOs collect information from victims and witnesses who have crossed into the government-controlled side and from informal networks of contacts in the separatist-held territory. Detainees released in the framework of periodic mutual releases of prisoners are an important source of information about the human rights and humanitarian situation of places of detention in the NGCAs. Furthermore, information is collected through reports made by the residents of the so-called “DPR” and “LPR” who call NGO helplines providing information and legal assistance to various groups of conflict victims, providing that they consent to their cases being documented. This, however, is associated with a much greater personal risk for the persons reporting violations (see also: 1.5. Relations with victims). Local contacts in the separatist-held republics are also facing a great risk of reprisals. Therefore, collection of information directly from persons in the NGCAs must be approached with extreme caution (no recording, use of encrypted communication channels, etc.).

Information on the situation on both sides of the contact line is also extensively collected from open sources, which include public reports published by government agencies (army and police reports, reports of the de-facto authorities in DPR and LPR), reports of the UN and OSCE monitoring missions in Ukraine, mass media (online newspapers and

information sites), social media, online maps and satellite imagery. Open sources can provide extremely useful knowledge, including unofficial information, about the course of the conflict, the deployment of troops, civilian losses, or the state of destruction of various buildings as a result of hostilities. They can also be useful in identifying victims and witnesses as well as tracing the perpetrators of crimes. Since 2014, most Ukrainian NGOs have taken part in trainings on open source intelligence gathering and online investigations, some of them with leading world experts in this area (such as Bellingcat). In addition to general information published by government agencies and other public institutions, NGOs also submit requests for specific public information related to the topic of their research (e.g. requests for information from local authorities about the number of victims with a particular status in the area under their jurisdiction, etc.).

The collected information is subject to verification. The quality of this process varies between organizations, but the information received from one source is usually cross-checked against one or more other sources (a method referred to in social sciences as “triangulation”), such as interviews, mass media, or public reports. Open sources are commonly used and considered very helpful to corroborate the interviewees’ accounts:

***It is one of the best ways to know what exactly happened – always check and doubt the words of witnesses to prove they are not just making assumptions. It is also easy to check witness words combining them with open data, satellite images and social media.***<sup>82</sup>

82. Interview with an NGO representative.

For example, with regard to the events of 2014-2015 when the frontline changed frequently, it is often necessary to establish who controlled a particular territory or site at a given time. In the case of persons deprived of their liberty, the information can be verified through consultations with military prosecutors, the UN monitoring mission and the ICRC. As mentioned by one NGO representative who worked at a helpline and received calls from convicts in the NGACs in the early years of the conflict when no institutions had access to places of detention, multiple corroborating testimonies testified to the high probability of violations:

***The information coming from penitentiary institutions in the breakaway territories is in principle impossible to verify. The convicts would sometimes tell us stories that were so horrific that it made them hard to believe, even for me, but as those calls and stories were coming en masse, it seemed impossible they could have been made up [e.g. mass hunger in the 97. “red” colony in the so-called “DPR” in the early months of the conflict, reportedly resulting in 10 deaths].***<sup>83</sup>

83. Interview with an NGO representative.

Once verified, new information is sorted into special databases. Although efforts have been made to create a single unified NGO database of war-related information, NGOs continue to use different systems of data storage, albeit with some degree of cooperation and exchange of information. At present, there are several NGO-managed databases with war-related information based on different software.<sup>84</sup> As mentioned by several NGO representatives, there is a recurring debate within the sector about the possibilities of further strengthening such cooperation in order to increase the quality of evidence-gathering as well as the subsequent chances of this evidence being used by law enforcement agencies in Ukraine.

The information is subject to various forms of data analysis. The organizations that work with national and international justice mechanisms focus on identifying perpetrators, victims, and witnesses of violations and finding connections with other events and persons already present in the database (collected previously). An important part of this work is also the assignment of specific legal categories to events and actions that have been documented. It consists of, among other things, verifying whether they fulfil the criteria of a violation of the standards of humanitarian law:

*We combine and collect everything to a case to be investigated and to point towards an alleged perpetrator of the violation. We give legal qualification based on IHL [international humanitarian law]. From the first appearance it can be [a violation of] IHL but then it can turn out to be an example of legitimate warfare. (...) [W]e do it both on the spot and afterwards. [We know] how to distinguish between a war crime and legitimate warfare. We always ask particular questions about distance, firing positions, type of weapon, military options, use of civilians as a human shield and/or military target.<sup>85</sup>*

<sup>85</sup>. Interview with an NGO representative.

<sup>84</sup>. For example, members of the Coalition “Justine for Peace in Donbas” use a database developed on the basis of Memex Patriarch – an intelligence management software enabling secure input, storing, analysis and sharing of intelligence information, used by law enforcement agencies; its work is coordinated by the Eastern Ukrainian Centre for Civic Initiatives. The NGO Truth Hounds uses the Investigation Documentation System (I-DOC) – a tool developed specifically for recording and analysing information about violations of international human rights and criminal law, providing capabilities to catalogue documentation and evidence, criminal incidents and contextual facts, suspects and institutions involved, victims and witnesses, in a way that facilitates the investigation and preparation of case files for trials. I-DOC was used earlier by the Norwegian Helsinki Committee and proved effective in terms of documenting crimes committed during Chechen wars; it was later adapted to the context of Donbas and Crimea. The system is also now used in part by Ukrainian law enforcement agencies. At least three other NGOs have their own separate databases, developed on other software, e.g. HURIDOCS/Uwazi – an open-source database application designed specifically for human rights defenders or Oracle/MySQL – a general open-source relational database management system. Some other NGOs, especially smaller ones, store their data in the form of case file archives and spreadsheets.

This work, carried out consistently throughout the years, has allowed the NGOs to gather extensive information on war-related events and to prepare case files of persons suspected of committing violations that can be transferred to law enforcement agencies. Apart from this, the information can be subject to statistical analyses as well as various forms of qualitative analysis, for example for the purpose of preparing thematic reports and various creative projects such as exhibitions, graphic novels, or campaign videos.

# 1.4. Relations with victims

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Victims, their relatives, as well as witnesses are a key source of information about the violations committed by both sides during the conflict. They are also the most vulnerable parties in the process of documentation and, therefore, those who benefit from the information they provide should always take their best interests into consideration at all stages of the process of documentation, including afterwards when decisions are taken as to the further use of the information collected.

Representatives of the NGOs report several operational and ethical challenges in their work with the victims. Some of those challenges are related to the victims' psychological well-being. As with the victims of any other armed conflict, most victims of the war in Eastern Ukraine are persons who have experienced negative, highly stressful events of various degrees of severity, including direct threats to life, have feared for the lives and health of relatives, lost or have been deprived of property and/or have been forced to permanently leave their places of residence. Exposure to severe psychological trauma combined with war-related socio-economic stressors, can result in a number of adjustment and anxiety disorders, including Post-Traumatic Stress Disorder (PTSD) which, as suggested by one study, is prevalent among the IDPs (32%) yet in the vast majority of cases (74%) not recognised and adequately treated.<sup>86</sup> According to another study, almost 40% of the residents of Donetsk and Luhansk have experienced trauma resulting in depression, anxiety, and PTSD.<sup>87</sup> While physical injuries are evident, mental health issues often remain hidden due to a strong stigma in Ukrainian society.

In practical terms, interviewing trauma survivors requires a specific set of knowledge and skills that the NGOs needed to develop in order for this process to be effective and to prevent exposing interviewees to a risk of re-traumatization. Fragmentation of the narratives provided by interviewees, memory gaps, and avoidance of certain topics, all of which are typical for persons who have undergone trauma, may pose recurring difficulties for documenters, especially if the testimonies being collected are to be used by law enforcement agencies or in a court of law. As one NGO representative explains:

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<sup>86</sup>. Roberts B., Makhshvili, N. and J. Javakhishvili, *Hidden Burdens of Conflict: Issues of mental health and access to services among internally displaced persons in Ukraine*, International Alert/GIP-Tbilisi/London School of Hygiene and Tropical Medicine, 2017, available at: <https://bit.ly/2ZUSThV> [accessed 28 December 2020].

<sup>87</sup>. Kyiv Institute of Sociology and Swiss Cooperation Bureau, *Mental health in Donetsk and Luhansk oblasts – 2018*, 2018, available at: <https://bit.ly/3qX1Ym2>, [accessed 28 December 2020].

*Our clients, due to their trauma, sometimes cannot speak directly, they describe some remote places or events, they recall some memories in a very unstructured manner, they lose concentration and it is very difficult to focus their attention, this process is taking a lot of time... and at the same time you don't want to be rough with them... they talk to us voluntarily, we are not representing the law enforcement after all to put such a pressure on them.*

*(...)*

*People also find it hard to talk about torture and humiliation they have experienced, sexual violence, if it happened too... This information needs to be dragged out of them, so to say, piece by piece. And they often prefer to talk about someone else, that this thing happened not to them but to their neighbour, even though the neighbour had already told us exactly the same story.<sup>88</sup>*

<sup>88</sup>. Interview with an NGO representative.

Most of the NGO representatives who were interviewed described how victims initially lacked trust towards their documentation work. This distrust stemmed from factors such as their unwillingness to recall and share painful experiences from the past with strangers as well as fear and/or lack of understanding of what will happen with the information they provide. That fear is often closely linked with the sense of insecurity and lack of trust towards state institutions, especially law enforcement agencies. In the volatile political environment many victims, in particular those residing in the east, feel that they are not sufficiently protected from potential reprisal from the perpetrators. Gaining victims' trust requires time and effort on behalf of the organizations.

Seeking victims' and witnesses informed consent for the use of information they provide is a standard procedure among the documenters. Most organizations have developed special forms, to be signed by their informants, where they ask for written consent for the various ways of using information (internal/public use – in the media, storing in a database, transfer to national law enforcement agencies and/or the ICC, transfer to other NGOs for analytical purposes, etc.) as well as for audio- and video-recording. However, this requirement can sometimes be waived, as one NGO representative admits, if the interviewee wishes to remain anonymous and/or believes signing the document may put them at risk and the testimony is particularly valuable for understanding the broader picture.<sup>89</sup> The same representative also notes that the issue of information transfer between the various NGOs remains a challenge due to legal ambiguity surrounding rules governing the transfer of data collected by one organization-member to the common database.

Even if consent is provided for passing the information further, there are cases where additional precautions may be necessary in order to prevent potential risks of putting the victim in danger. This risk is serious in the case of persons residing in the

<sup>89</sup>. Interview with an NGO representative.

separatist-held territories, especially in very difficult cases like the one of convicts. As noted by the representative of an NGO working with this group of persons, they face a genuine risk of reprisals should their contact with the organization become known to the authorities and that they disclosed information inconvenient for the local regime.<sup>90</sup> In the best case scenario, they would have their mobile phones taken away, but they could also be severely beaten and tortured. In the event of such a scenario, there was no effective possibility of helping them. For that reason, the NGO representative was always very cautious with revealing information about her sources, even if they ask her to do so; she would not only seek permission from the respondent but also double check their situation and any potential risks of sharing such information.

Many of the persons who have suffered material and non-material losses as a result of the conflict were and still are in need of legal aid. This includes a variety of issues such as restoration of identity documents, recognition of various statuses entitling them to receive certain rights and/or social assistance, compensation for lost property, as well as prosecution of perpetrators of the crimes committed against them. In general, the government of Ukraine provides free legal services to victims of human rights violations in Donbas on the territory controlled by Ukraine. Nevertheless, in the immediate proximity of the conflict zone the provision of such aid is neither effective nor comprehensive. The mental and physical condition of the victims often does not allow them to act in the defence of their interests. Another problem is the poor financial situation of many victims, in particular those who have been deprived of their property. On the territory controlled by illegal armed formations, legal services are practically unavailable and abuses towards the victims may continue. While not all organizations working in the area of documentation provide legal services to conflict victims, many of them find it necessary, for ethical reasons, to incorporate legal aid in their work or, as a minimum, to provide information where such aid can be accessed. Providing such assistance is a crucial step in the process of developing a relationship based on trust:

*From the very beginning, a level of trust between us and our clients develops because, apart from documentation (...) they can count on complex assistance from our side, psychological, social and secondary legal aid. We also offer secondary legal aid such as applications to the European Court of Human Rights. It is no secret that the rights of former captives and civilian hostages are not sufficiently protected in Ukraine, therefore many of our clients need to turn to the ECHR for help. So probably because of that they find it easier to talk to us. There is a level of trust thanks to the fact that this is not only documentation but we accompany them in solving their various problems and represent them, so they can have their rights restored and return to normal social life.<sup>91</sup>*

<sup>91</sup>. Interview with an NGO representative.

<sup>90</sup>. Interview with an NGO representative.

However, the provision of legal aid requires additional funds and solving individual cases can take longer than the project cycle, so there is a risk that aid may be discontinued due to funding shortages. Furthermore, oftentimes even if legal assistance is provided, it does not meet the expectations of the persons who are receiving it – the procedures are lengthy and burdensome and in many areas systemic deficiencies do not allow for the full recognition of their rights until changes are introduced in the national legislation and/or administrative practice. Therefore, as mentioned by a number of NGO representatives, victims and their families need to be given clear explanations regarding the organization’s mandate to document violations, as well as any additional services they are offered:

***I think you owe honesty to your sources. I was always trying to make it very clear what can be and cannot be done, both with regard to the information they give us – for what purpose it will be used, as well as what kind of assistance they can count on.<sup>92</sup>***

92. Interview with an NGO representative.

Managing victims’ expectations is crucial in avoiding disappointment and a sense of being “used” by the NGOs which may lead to a decrease in trust towards the entire sector:

***Many NGOs come to ask their stories, they get tired of it. It depends on how patient they are, some are willing to tell their stories several times and are ready to wait for good things coming after that. Others tell their story only once or twice and then give up on all NGOs – ‘they are all bad – just spending money of international donors’. Sometimes it’s a lack of professionalism with the provision services. Some kind of fraud, abuse of trust. Help is promised but nothing is done.<sup>93</sup>***

93. Interview with an NGO representative.

Apart from providing legal aid, several organizations involve victims in the other areas of their work, in particular in advocacy activities. This offers them a platform for participating in the political process and representing their own interests in a way that increases their competences and sense of agency. For the NGOs it offers a possibility to remain in touch with the victims and increase the legitimacy and the impact of their advocacy efforts. There are also NGO activities aimed at the various categories of victims and groups at risk (e.g. civilians living in proximity of the contact line) that increase their legal literacy, raise awareness about the various conflict-related local issues, and encourage active participation in the decision-making process at the local level.

## 1.5. Cooperation within the sector

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Since the beginning of the conflict and the documentation work, it was clear for the NGO documenters that certain mechanisms of cooperation and coordination should be established to avoid repeated questioning of the same victims and witnesses, increase the impact upon authorities, and improve communication with international institutions such as the ICC. In December 2014, a number of Ukrainian organizations decided to join forces and signed a memorandum establishing the Coalition “Justice for Peace in Donbas”.<sup>94</sup> Today, the Coalition remains an informal union composed of 17 human rights NGOs, some of which have been active in the field of human rights for many years and others which were established only when the conflict started. Development of the Coalition was stimulated by donors and development partners (initially, the two main donors were the UNDP and the International Renaissance Foundation) whose intent was to bring together the efforts and activities of various NGOs working on the conflict. Initially, the Coalition’s thematic focus was the documentation of human rights violations committed during the conflict, however, later on it extended to include activities related to accountability and peace-building.

At the core of the idea of establishing the Coalition was the intent to have a common database where the rapidly growing body of information could be transferred and safely stored for verification and future use in terms of preparing analytical materials and use in judicial proceedings. Digital information management was initially a challenge for NGOs and there was no detailed plan nor clear understanding of how such a common instrument would work. Several possibilities were considered with regard to the software, including both open access and commercial options, systems previously used specifically for documenting humanitarian law and human rights violations, as well as the systems used by law enforcement and intelligence agencies. The input of data started with the 2015 monitoring missions relating to illegal places of detention. Later on, however, the Coalition experienced coordination problems which had a negative impact on trust and cooperation between the partners and, as a result, the database was only used by some members, while others contributed to it only occasionally or not at all. Several organizations subsequently established their own databases.<sup>95</sup>

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<sup>94</sup>. Coalition’s website: <https://jfp.org.ua>.

<sup>95</sup>. For more information, see footnote 84.

When asked about the reasons which impeded closer cooperation, interviewees pointed to management issues (unclear rules and coordination mechanisms), strong personal ambitions of individual NGO leaders, as well as competition for funding. Some interviewees also mentioned a lack of equality-based partnership, or even a generational conflict, between the “old” well-established NGOs with rich experience, expertise, and resources and the younger generation of NGO leaders (many of whom are IDPs from Eastern Ukraine as well as former Euromaidan activists) who often feel dominated by the former. Today, the Coalition still exists formally and, even though it is not particularly operational in the wider sense, it is effective and beneficial in selected areas. For example, database operators from those NGOs who still contribute their data to the database regularly, exchange information and participate in joint trainings; the Coalition is also useful as a common banner for advocacy activities where the NGO position can be expressed.<sup>96</sup> As pointed out by some interviewees from outside of the Ukrainian NGO sector, the idea of strong cooperation, and in particular – of extensive data-sharing – has been a very ambitious project from the very beginning and it is not unique to Ukraine that it has not worked as expected. As noted by those interviewees, similar problems persist in NGO sectors in other conflict-affected countries as well as in other thematic areas where coalitions and networks develop.<sup>97</sup>

Even to this day, competition for funding continues to be an ongoing factor affecting the levels of cooperation within the sector. For many NGOs, having their own database and their own collection of data became a much desired asset that could be presented to potential donors who were opposed to the idea of openness and sharing. Interviewees from both inside and outside the sector often describe competition between the NGOs as “unhealthy”, with some actors focused on becoming popular with donors, for example through intensive presence in the media, without always doing enough substantive work, while the hard work of others goes unnoticed. Furthermore, in the process of competing for donors’ attention and the funding that comes with it, some organizations submit a large number of project proposals and seek to “document everything” which leads to the problem of duplication in the area of documentation: repetitive reports and questioning of the same victims.

The problem of duplication in the area of documentation is related to several factors. Firstly, following approximately two years of intense hostilities in 2014 and 2015, the war in Eastern Ukraine has evolved into a “frozen conflict” with much fewer military confrontations, casualties, as well as attacks on civilians and civilian infrastructure, albeit without a peace treaty or other political framework resolving the conflict to

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<sup>96</sup>. For example, joint submission to the Universal Periodic Review, highlighting the human rights violations that resulted from the armed conflict in Donbas: Coalition “Justice for Peace in Donbas”, *Submission to the Universal Periodic Review (UPR), 3rd cycle, 2017*, available at: <https://bit.ly/2LWS2cu> (English), <https://bit.ly/3508nr9> (Russian) (accessed: 16 January 2021).

<sup>97</sup>. While this section focuses on cooperation in the area of conflict documentation, it should be noted that other thematic coalitions have been formed by the Ukrainian NGOs whose activities relate to the conflict (but do not focus on documentation). A notable example is an informal coalition of NGOs focusing on social and political rights of internally displaced persons and those who reside on the temporarily occupied territories of Ukraine as well as other groups of conflict victims. Among others, the NGOs prepare joint reports and advocacy statements, for example: *Mid-term NGO Report on the Universal Periodic Review of Ukraine (with regard to protecting the rights of victims of armed conflict)*, 2020, available at: <https://bit.ly/39CaAqH> (accessed: 16 January 2021).

the satisfaction of both sides. With a few exceptions where some supplementary research is needed (but should not substantially change the general picture), most violations directly linked to hostilities have already been documented and very few recent cases can be found. As an HRMMU representative notes:

***Eastern Ukraine now is not like some other conflict-affected countries where documentation of human rights violations is very difficult due to the fact that hostilities are ongoing and human rights monitors – in the situation of security-related restrictions on their operations – face a tremendous challenge of documenting too many incidents of human rights violations that accompany the hostilities. So when you speak about conflict-related human rights violations in Ukraine – they have been documented fairly well already. If you put aside the period of 2014-2015 where there are still gaps, the more recent cases are well documented.***<sup>98</sup>

<sup>98</sup>. Interview with an HRMMU representative.

At the same time, over the last couple of years, the NGOs working on documentation have grown in number, size, and qualifications which has led to increased expectations from donors. The resources of the latter, however, have been shrinking rather than expanding. This has led to a certain supply-demand asymmetry. While trying to secure funding and respond to thematic trends popular with the donors, NGOs sometimes research the same topics, even if there is not much new information available, and/or they interview the same victims. One particular group of victims was mentioned by interviewees in this context are former detainees released from detention in the NGCAs and transferred to Ukraine in the framework of mutual releases of prisoners (“prisoner exchanges”):

***If you speak about problems then yes, many organizations rush to document the same crimes, they interview the same victims. For example, following each release of captives, they interview the released who are in rehabilitation programmes in military hospitals and in other places. Immediately, up to 10 national NGOs working on documentation turn up to interview them; and I’m not even counting the journalists who also arrive to collect their stories. This is because it is easy, comfortable, these people are all in one place, in Kyiv, so of course everyone wants to take advantage of this opportunity.***<sup>99</sup>

<sup>99</sup>. Interview with an NGO representative.

In the case of released prisoners, the problem of a lack of coordination and exchange of information is particularly visible. The practice of multiple interviews collected by several different organizations, even if for different purposes (e.g. analytical or for judicial proceedings) may not only unnecessarily re-traumatize the victims (who are also interviewed by Ukrainian law enforcement agencies) but also undermine their trust towards the NGOs:

***As soon as there is a release of detainees, several organizations request to interview them, and document their stories, and some of our clients perceive this insistency as an attempt to make money from their suffering. And then it is very difficult to build trust with those who have experienced this kind of attitude.<sup>100</sup>***

100. Interview with an NGO representative.

It should be noted, however, that even with the decrease in violations directly related to hostilities, areas remain which have been less extensively documented. Some of them were mentioned in section 1.2 which presented an overview of documentation topics. They include the gaps in information on the events of 2014-2015 as well as the violations committed by the Ukrainian side. Moreover, numerous violations of social rights resulting from the secondary effects of the conflict, including the specific rights of various vulnerable groups, persist to this day and require proper monitoring and documentation.

Furthermore, in spite of the fact that macro-level coordination of the sector is limited, there are, however, some positive examples of cooperation of NGOs in terms of the transfer of information between the databases as well as joint contributions of information to other NGOs' submissions to the ICC or to joint analytical reports. The 2015 report on places of illegal detention, as well as the 2020 book, focused on the story of war in the city of Slovyansk, both already mentioned in previous sections, were referred to as successful examples of products prepared jointly or to which several NGOs contributed their previously collected information. To a certain extent, the NGOs also divide their tasks with regard to the responsibilities towards the victims. Only a certain number of NGOs have the capacity to provide in-house legal support, meaning that those who do not offer such services need to refer persons in need to other organizations. Organizations with legal support sections may focus on all or only selected issues (for example, criminal cases against perpetrators of crimes, restoration of social rights of a particular group of victims) and provide only a certain type of services (for example, only primary or secondary assistance). Therefore, depending on victims' individual cases, they are often referred to different organizations. At the same time, for the sake of preserving limited resources, situations where one person receives legal assistance from more than one NGO are generally avoided (although misunderstandings and duplication do sometimes occur). NGOs also cooperate in the area of advocacy activities, for example they prepare joint statements to draw the attention of authorities to human rights violations, develop proposals for changes in the legislation, and conduct awareness-raising campaigns.

# 1.6. Cooperation with international organizations and institutions

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From very early on, Ukrainian NGOs involved in documenting the conflict have sought cooperation with external stakeholders, among others – with international organization in Ukraine and abroad as well as with other international institutions.

International organizations, such as the two most important entities directly involved in monitoring activities – the OSCE and UN monitoring missions in Ukraine generally avoid extensive formal cooperation with Ukrainian civil society organizations in order to remain neutral from the perspective of the international community. National NGOs in particular, when situated in a conflict or post-conflict setting, can be perceived as biased. Furthermore, international organizations are also restricted by the limitations of their respective mandates that delineate a strict format of interactions and do not allow for engaging in certain activities. In particular, there are limitations with regard to what the international organizations can share externally (usually it is only the information contained in periodic public reports). They can, however, use the information provided by the NGOs. As indicated by an HRMMU representative, the Mission's officers are attentive readers of NGO reports and find them useful.<sup>101</sup> They use information on specific cases rather than the analytical parts (descriptions of patterns) that NGOs provide in their reports because it is strictly the Mission's own mandate to reveal and describe those patterns by themselves. Also, as stated by the same official, in many areas the Mission is better positioned than the NGOs to research and document, owing to a better access to persons, territories, and information (for example, in the area of civilian casualties) and has greater political leverage. However, consulting the reports prepared by NGOs is still very useful and can provide additional evidentiary support or information that might have been overlooked. Therefore, as proposed by another HRMMU representative who participated in the same interview, the role of NGOs and the Mission can be seen in terms of complementarity, especially in situations where NGOs can be more direct and open as they are not restricted by the same limitations:

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<sup>101</sup>. Interview with an HRMMU representative.

**Even if the UN has more authority and power, NGOs have more discretion in what they can say, where they can say it, and how.<sup>102</sup>**

<sup>102</sup>. Interview with an HRMMU representative.

While addressing the topic of cooperation with international organizations, one of the interviewees from the civil society sector also mentioned the question of civil society expectations with regard to international organizations that go beyond the process of documentation and concern themselves with accountability and justice. He indicated that, in spite of the wishes of human rights organizations, the question of justice for the inhabitants of Eastern Ukraine who have suffered human rights violations is not at the centre of the political peacebuilding process in which international actors are involved; in his opinion, the main reason for this situation is the concern that focusing on justice-related aspects of the conflict may hinder the efforts for finding political solutions to the conflict.<sup>103</sup> As a matter of fact, the actions of inter-governmental organizations such as the UN and the OSCE depend on the one hand on their mandate and, on the other hand, on the political will of their member-states which are driven by a complex set of often conflicting interests.

Ukrainian NGOs are members of several international platforms. One of them is the Coalition for the International Criminal Court (CICC), a global network of non-governmental organizations from 150 countries working in partnership to eradicate impunity for international crimes and to ensure that the ICC is fair, effective, and independent.<sup>104</sup> The CICC and its NGO-members work in partnership, also within specific countries, to strengthen international support and cooperation with the ICC, and to advance stronger national laws that deliver justice to victims of war crimes, crimes against humanity, and genocide. From as early as the mid-2000s, the work of the CICC in Ukraine has focused on advancing the ratification and implementation of the Rome Statute.<sup>105</sup> The outbreak of the war has reactivated these efforts.<sup>106</sup> At present, several Ukrainian NGOs are part of the CICC network; however, they are not formally associated in a national Coalition for the ICC, as it is frequently the case in other countries. The CICC Secretariat works closely with Ukrainian NGOs, assists them in their advocacy work and grants them access to international stakeholders which, in the case of Ukraine, includes European Union institutions and the ICC itself.<sup>107</sup> It also

<sup>103</sup>. Interview with an NGO representative.

<sup>104</sup>. For more information see the CICC's website: <https://www.coalitionfortheicc.org/>.

<sup>105</sup>. For more information on the process of ratification of the Rome Statute by Ukraine see: see: 2.1.1. Responsibility of the perpetrators of severe crimes and 2.2.1. International Criminal Court.

<sup>106</sup>. For example, in September 2019, the CICC and its members sent a letter to President Volodymyr Zelensky in which they called on the Ukrainian government to "immediately ratify the Rome Statute of the International Criminal Court, which Ukraine signed in 2000 and take all necessary measures to fight impunity for grave international crimes at the domestic level", available at: <https://www.coalitionfortheicc.org/document/letter-president-ukraine-icc-rome-statute-ratification> (accessed 12 January 2021).

<sup>107</sup>. Interview with a CICC representative.

supports members' participation at annual sessions of the ICC Assembly of States Parties to the Rome Statute where civil society organizations have the opportunity to meet with all representatives of ICC States Parties to discuss various issues as well as organize thematic meetings in the form of side-events on the margins of official sessions. In the future, if the Ukrainian case reaches the investigation stage, the participation of NGOs in the CICC, combined with an increased cooperation between them at the national level, may be useful for advocating with the Court and States to demand adequate financial and human resources be dedicated to the investigation, including to set up an ICC field office, as was the case of the investigation in Georgia.

Another important international network is the CivilM+ platform.<sup>108</sup> It brings together about 20 public organizations and experts from Ukraine, Russia, and EU member states with the aim to “*restore Donbas as a peaceful, integrated and developed region of democratic Ukraine and Europe*” through the implementation of projects in the areas of peacekeeping, transitional justice, dialogue, and human rights. The activities consist of organizing public awareness-raising events, expert conferences and meetings, as well as the preparation of analytical materials to disseminate verified and balanced information about the processes related to the conflict in Eastern Ukraine with the goal of encouraging greater interest and involvement by decision makers in European countries in the process of conflict resolution in Donbas. Importantly, the platform's design provides the opportunity for civil society actors from both sides of the conflict – Ukraine and Russia – to exchange ideas and maintain a dialogue based on shared values in spite of a highly challenging political environment.

Three other international platforms were mentioned by interviewees as being relevant for the area of conflict documentation. Several Ukrainian NGOs have cooperated with the International Federation for Human Rights – a Paris-based international human rights NGO association with nearly 200 members and a mission to “*defend all civil, political, economic, social and cultural rights as set out in the Universal Declaration of Human Rights.*”<sup>109</sup> Examples of international cooperation include the preparation of joint submissions to the ICC.<sup>110</sup> In the framework of the European Co-ordination Committee on Human Rights Documentation (ECCHRD) – a network bringing together organizations and institutions involved in the process of producing human rights information – Ukrainian NGOs participate in annual meetings of librarians, documentation, and communication specialists, which provides an opportunity to share expertise and experience from various contexts.<sup>111</sup> The annual Human Dimension Implementation Meetings hosted by the OSCE Office for Democratic Institutions and Human Rights (ODIHR) in Warsaw have for many years served as a platform for sharing monitoring reports with the international audience as well as for advocacy activities.

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108. CivilM+ platform website: <https://civilmplus.org/en/>.

109. Website of the International Federation for Human Rights (fr. Fédération internationale pour les droits humains, FIDH) <https://www.fidh.org>.

110. For more information see footnotes 229, 230 and 231.

111. Website of the European Co-ordination Committee on Human Rights Documentation (ECCHRD): <http://www.ecchrd.org/>.

In the framework of cooperation with DRA e.V. – an international NGO based in Berlin, Ukrainian organizations participate in international human rights monitoring missions to the Ukraine-controlled part of Donbas which bring together NGO activists from Ukraine, Russia, Poland, as well as other countries. As a result of those missions, reports are published which, rather than collecting evidence to be used in justice-related procedures, aim at raising awareness among European politicians, other stakeholders, and European societies at large about the human rights aspect of the conflict in Eastern Ukraine.<sup>112</sup> The goal is to offer a first-hand and people-centred perspective on the conflict, something which is often missing in political debates.<sup>113</sup> The reports have covered issues such as the situation of residents in the settlements near the frontline in terms of security, access to humanitarian aid and healthcare, freedom of movement, environmental concerns, as well as the functioning of local military-civil administrations<sup>114</sup> and their relations with local residents.

Additionally, there are also instances of bilateral cooperation between Ukrainian civil society organizations and international partners, for example, Truth Hounds' cooperation with International Partnership for Human Rights on a number of reports cited in the previous section. Another example is the partnership between the NGO "Right to Protection" and Human Rights Watch in advocacy activities regarding the rights of pensioners in the conflict.<sup>115</sup> These types of partnerships allow international organizations that do not have offices in Ukraine to access information on the ground, while the local partners receive greater visibility at the international level, subsequently helping them in their advocacy efforts. In cooperating with a local NGO, a Human Rights Watch employee indicates:

***“We cannot replicate what Pravo na Zakhist [Right to Protection] does, but we can draw attention to the issue in a different way than they do. We can try to look at it from a bigger perspective and try to imagine how someone who doesn't understand this issue, how we can make it alive for them and put it in front of people who are not already immersed in the issue. And we can make it an international issue.”<sup>116</sup>***

<sup>116</sup>. Interview with an NGO representative.

In addition to the above stakeholders, Ukrainian NGOs also cooperate with representatives of foreign governments, providing them with information upon request and seeking their support in advocacy activities as well as with think-tanks and research institutions interested in issues related to the conflict.

<sup>112</sup>. Reports are available at: <https://civicmonitoring.org/category/monitoring-reports/>.

<sup>113</sup>. Interviews with a DRA e.V. representative.

<sup>114</sup>. Temporary local government units concentrated on the territories of Donetsk and Luhansk regions of Eastern Ukraine due to the ongoing war; established by the President, formally within the Anti-Terrorist Centre of the Security Service of Ukraine or as part of the Joint Operational Headquarters of the Armed Forces of Ukraine.

<sup>115</sup>. Human Rights Watch, *Ukraine: People with Limited Mobility Can't Access Pensions*, 2020, available at: <https://bit.ly/3kSGkx7> (accessed 25 February 2021).

## 1.7. Donor fatigue and funding shortages

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The vast majority of Ukrainian NGOs involved in documenting the Donbas conflict and related activities carry out their work within the framework of projects supported by various categories of donors and international assistance partners. They include international organizations such as United Nations Development Programme (UNDP), OSCE Office for Democratic Institutions and Human Rights (ODIHR), foreign and domestic non-governmental organizations and private non-profit foundations (e.g. Norwegian Helsinki Committee, Helsinki Foundation for Human Rights, International Renaissance Foundation, National Endowment for Democracy, Sigrid Rausing Trust and other). This work is also supported, either directly or indirectly, by a number of national governments of Western countries as part of their strategic policies in Ukraine and in Eastern Europe.

Most interviewed NGO representatives reported challenges related to securing sufficient and continuous funding. For the majority of organizations, especially smaller ones, the project-based system of work entails temporary gaps in funding which may last for up to several months, or even discontinuation of funding for certain activities. The instability of funding translates into problems with planning and executing activities as well as with maintaining the payments at a decent level and keeping qualified staff in the sector:

*We are just thinking maybe the project will be finished in a year and a half, probably we will need to move elsewhere, find another job or something. It is not just about me, it is a concern for other people as well, as many are leaving or have left, because they don't understand their own role in the future.<sup>117</sup>*

117. Interview with an NGO representative.

*This translates into low payments and has a negative impact on employees' motivation. Most employees are driven by deep internal motivation, perhaps also anger directed against those who let this situation happen, and a wish to restore justice, but low payments combined with severe professional burnout take a high toll on them. Some of them leave to work for international organizations and government structures.<sup>118</sup>*

118. Interview with an NGO representative.

As mentioned by one NGO representative, it is particularly difficult when the funding for legal or social assistance to conflict victims is discontinued but, as their problems have not been resolved by that time, the latter continue to turn to the organization for help:

***People do not know that our project has ended. They are not familiar with our project cycle, they continue to call, ask for advice. They ask when we will come to meet them. This can clearly contribute to burnout. You have to do this, but there is no project for it. This is certainly hard. From my point of view, such activity should be continuous. It cannot be stopped.***<sup>119</sup>

<sup>119</sup>. Interview with an NGO representative.

A similar problem concerns the work on identifying and collecting evidence against the perpetrators of crimes and completing their case files so that they can be transferred to law enforcement agencies. Only the uninterrupted continuity of this work can ensure it is successful.

There are several factors underlying the problem of funding shortages. As reported by most interviewees, there is currently less funding for documentation activities than it was available in 2014-2015. Subsequently, competition between the NGOs has increased. Some interviewees have noted that the presence of Ukrainian NGOs in the conflict area has visibly decreased, as many Kyiv-based organizations have fewer resources for travel and, unless they have a field office in Donetsk or Luhansk, they now travel to the region only sporadically. As indicated by an HRMMU representative, the decrease in funding can be explained by a reduction in international attention to the conflict in Eastern Ukraine compared with the initial years of the conflict, and to what is often referred to as “donor fatigue” – a sense of tiredness and disappointment with the results that are not as fast as expected or disproportionate to the resources invested.<sup>120</sup> This donor fatigue, when coupled with how international attention is moving towards other conflict zones, has a knock-on effect upon the level of public interest in documentation and monitoring reports. In particular, this has affected the NGOs which struggle to solicit donor support for their work and likewise struggle to reach a wider audience.<sup>121</sup> Additionally, as noted by another NGO representative, there is also a sense of disillusionment within the international community about the problems of internal governance and the slow pace of general reforms in Ukraine (not only in conflict-related areas):

<sup>120</sup>. Interview with a UNHRMM representative.

<sup>121</sup>. Interview with a UNHRMM representative.

*In my opinion, Western people got tired of Ukraine, because our authorities could not conduct the necessary reforms and change the situation in its essence. Why should we support Ukraine if they cannot improve the situation? Internal problems are much more dangerous than those coming from Russia. If our state can improve conditions of life, it will be the main argument against the war. It is necessary to separate business from the state (...). And there is also very little trust for state bodies, which is a permanent phenomenon. (...) Reforms in such conditions are difficult.<sup>122</sup>*

122. Interview with an NGO representative.

Another important factor is the heavy reliance of NGOs on donor funding combined with, in general, the NGOs' lack of experience and opportunities for funding diversification strategies. As indicated by a UNDP representative:

*Fundraising among the general population is difficult for human rights or anti-corruption activities. The state does not provide funding for this type of activity. We attempt to help them [the NGOs] through our institutional support programme, mostly at the subnational level. One of the key criteria of effectiveness of institutional support is financial sustainability, and we also try to show our NGO partners how to diversify activities, introduce some paid activities, some crowdfunding activities, but it is not an easy job. Currently, many donors still have ongoing programmes for supporting civil society organisations in Ukraine. For this reason, many NGOs find it easier to concentrate their resource mobilisation efforts on applying to the donors' calls for proposals, rather than investing efforts into mobilising resources from their constituencies or the other local sources. They are not yet ready to think strategically for the future.<sup>123</sup>*

123. Interview with a UNDP representative.

The UNDP representative indicates the important role of donors and development partners in promoting a more strategic approach to sustainability, including the need for them to pay more attention to grantees' sustainability plans as well as to look at how their work fits into the general picture of what has already been done in the area of documentation (the issue of coordination and creating synergies) and which areas still need to be supported (such as the issue of complementarity and non-duplication). Other experts point out that while donors generally avoid, for good

reasons, the interference with the NGO methods of work on the ground, they should also pay greater attention to the quality and effectiveness of this work.<sup>124</sup>

At the same, however, the interviews with NGO representatives reveal a sense of misunderstanding and, at times, frustration with their relations with donors. As pointed out by several interviewees, donors expect tangible results within the project cycle which, in many cases, is impossible to achieve. Documentation involves a huge workload beyond the sole process of interviewing victims and retrieving information from sources. It also includes work in terms of verification, storage (coding of information into databases), and data analysis that requires significant resources, however such work is not immediately visible until the final product (such as a report) is published. Many organizations struggle to secure funding for those activities. Additionally, even when legal assistance is successful and the case results in a criminal conviction or compensation for the victim(s), such cases are usually preceded by months or even years of legal work. Cases of effective domestic prosecution of crimes are to date extremely rare and, at an international level, obtaining justice may take years or decades. As explained by an expert in international law:

***They [donors] are results-driven. So they give money to documentation projects (...) expecting tangible results. And for them this means prosecution, prison sentences and so forth. In other words, it is very difficult to explain to donors that this is not how international criminal law works. It is also very difficult to “sell” pure documentation process to donors. Most donors do not really want to hear that you are collecting evidence for some future cases in 30 years. So, what I am worried about is that as time goes on, both donors and also implementers will just become disillusioned (...) and focus on other projects.***<sup>125</sup>

<sup>125</sup>. Interview with an NGO representative.

The NGO representatives also raise the issue of donor's limited understanding of some of their strategies (for example, engagement with ordinary Ukrainians in order to develop networks of active citizens that is a lengthy yet important way of fostering social change<sup>126</sup>). Institutional funding, in place of project-based funding, offers NGOs a way of financing that allows them to plan their activities from a long-term perspective; however, such forms of funding are very difficult to secure.

While thinking about sustainability it is also important to mention that it is not only about securing continued funding for NGOs, but also the so called “sustainability of effects” – ways of ensuring they are not short-lived and, instead remain visible long after the project or even the entire activity of an NGO is discontinued. The UNDP

<sup>124</sup>. Interview with an expert in international law.

<sup>126</sup>. Interview with a NGO representative.

representative notes, for example, that stronger links to national strategies and priorities, as well as the sharing of good practices, developed in conflict-affected areas with partners in other regions of Ukraine may help increase sustainability.<sup>127</sup> This way of thinking is visible among some NGOs, for example those which provide trainings on documentation to civilians, representatives of the law enforcement and other institutions:

*We try to make it sustainable with the amount of funding we receive from donors. We focus on sustainability for when the funding is over, whether it's work with law enforcement or other. We raise the capacity of civilians, to make them civil documenters, we train them and tell them how to record and preserve evidence. Only five/six years with the war, it is still the initial phase, but the start has been made, the change of mindset has occurred. So I'm being more optimistic.<sup>128</sup>*

<sup>128</sup>. Interview with an NGO representative.

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<sup>127</sup>. Interview with a UNDP representative.

# 1.8. Professional burnout

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A number of the NGO representatives who were interviewed identified professional burnout as one of the key challenges facing NGOs engaged in documenting the war. The years of ongoing conflict have had an enormous impact, especially on those working directly in the conflict-affected area and those who come into direct contact with the victims while collecting testimonies, providing legal or social assistance, documenting, and reporting the crimes committed:

*Professional burnout is a big problem, not only for the documentation department, but also for other employees. However, it is true that documenters are particularly affected because they come across a massive amount of distressing information (...). Talking to the victims is difficult; as a rule, they are traumatized people, many even heavily (...). And of course, our employees are empathetic people – I just think a non-empathetic person wouldn't take up such a job in the first place – and this empathy also makes them suffer. Not everyone has handled it well.<sup>129</sup>*

129. Interview with an NGO representative.

*Over these years I have interviewed and talked to so many people, and I was doing this all by myself... I have come across so many gruesome stories. And those disappeared... I would see them even in my dreams. It was tough.*

*(...)*

*After half a year I felt I could not talk to convicts any more. I couldn't talk to them. I cried. You see, if you talk to people over the phone, if we don't look each other in the eyes, and they really need to vent, they start talking about such details that they perhaps would have never told me if we talked face to face. They talk about their personal feelings, the humiliating conditions they lived in, like rats in those facilities. (...) I think that this kind of work cannot be done for longer than 6 months without a break"<sup>130</sup>*

130. Interview with an NGO representative.

*At some point, I wanted to stop documentation activities, because it hurts. You are permanently focused on things that traumatize you psychologically, you relive this pain all the time. You feel the problems of these people, you constantly hear new stories, you don't forget them, they remain in the subconscious forever.<sup>131</sup>*

131. Interview with an NGO representative.

The interviewees recount that work-related stress was the highest in the early years (2014-2015) of the conflict due to intense military confrontations, resulting in a high number of victims and large-scale destruction, as well as events such as the release of prisoners happening more frequently. At this point in time, the NGOs had very little experience and limited resources available, plus there was also a high level of uncertainty about possible political developments, creating a greater risk to documenters' personal safety. There was also the added pressure of the responsibility of recording information that was important but might not have been available later:

*I worked without a break, no matter if there was a project or not, if this was only volunteering, because I really wanted to record all those stories. I realized that this was vital information that could not be lost. For example, on shelling from the Russian side. (...) I had this patriotic motivation. I wanted to collect more information, to do more.<sup>132</sup>*

132. Interview with an NGO representative.

The responsibility for the information collected and how it is used, for the victims who provided their testimonies as well as for the networks of contacts established throughout the years, remains an important factor for the documenters to keep going in spite of the fatigue and the high and emotional burden:

*Even at the moment when the thought came to stop the documentation, I realized that this is impossible now. Too much information has been collected, too many contacts, too many stories that we have stored, and you can't stop just like this. Then it will all be gone. This work is incomplete, there should be a cycle after which we can say 'so, we collected, published, transferred, we transferred contacts and someone carries this on'. That is, you will feel that our work is not in vain.<sup>133</sup>*

133. Interview with an NGO representative.

However, as the interviewees admit, they rarely see quick results from their work; publishing reports, which document the violations committed and recommendations for how to address the legal and policy gaps so that the perpetrators are held accountable and the victims receive proper assistance, is just the beginning of a process that can lead to positive change. In spite of NGOs' efforts in the advocacy area, their influence on these processes is limited, as such processes are strongly affected by political considerations and may take months or years. Procedures brought before international courts, such as the ECHR and the ICC, can take even longer. The lack of immediate success can affect workers' morale and can be discouraging, especially if combined with low wages and a shortage of funding in other areas. This, in turn, has led to the outflow of skilled workforce from the sector:

***Burnout is a key factor. If you ask other organizations that are engaged in documenting, then everyone will tell you they have faced personnel outflow. People leave, few have been doing this for five years. Only the leaders of the organizations remain, they still have some kind of motivation, and the people who come to such organizations for work, leave. For them, this is emotional burnout on the one hand, on the other hand, the salary is not so high. They can receive the same salary in more psychologically comfortable working conditions.***

(...)

***When people leave, then skills leave with them. These are specific skills (...) that are not taught at universities. It's not just like at the enterprise when he took a new seller, and he knows how to sell goods. Here, another specificity is personnel. All personnel involved in documentation are very mobile, they quit, move or change their profession. I can think of at least five people who left this work and most likely forever. Several people went to work for other NGOs or international organizations.<sup>134</sup>***

134. Interview with an NGO representative.

Some organizations do provide some form of psychological support for their employees. This can come in the form of psychological consultations (with specialists within the sector or external experts), supervisions, burnout prevention sessions, and rehabilitation holidays. However, in general these forms of support are neither systematic nor widely available; they are highly dependent on the availability of dedicated funding.

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The role, use,  
and challenges  
of documenting  
**violations to  
obtain justice**

## 2.1. Domestic procedures

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### 2.1.1. Responsibility of the perpetrators of severe crimes

The prosecution of crimes committed in the context of the armed conflict in Eastern Ukraine has proved to be challenging for Ukrainian institutions, for a number of reasons. One of them is the absence of the alleged perpetrators in the territories under the control of the government as well as the lack of access of Ukrainian investigators to crime scenes and witnesses in the NGCAs which, consequently, makes conducting investigations extremely difficult. However, as pointed out by several interviewees, the inefficacy of prosecution is also a result of a number of systemic deficiencies within the Ukrainian law enforcement and judiciary.

For a number of years, one of the major challenges was the absence of norms and procedures in Ukrainian law for the prosecution of crimes committed in the context of war in accordance with the standards of international criminal law. Harmonization of Ukraine's Criminal and Criminal Procedural Codes – in line with the standards of international criminal law – has been a long-term advocacy goal of a number of Ukrainian NGOs.<sup>135</sup> In May 2021, the Verkhovna Rada eventually passed a law which provides for the full implementation of the provisions of international criminal and humanitarian law to criminal prosecution for international crimes (genocide, crimes of aggression, crimes against humanity, and war crimes) and ensures compliance with international obligations to prevent impunity for such crimes.<sup>136</sup> The new law allows the prosecutor's office and pre-trial investigation bodies to carry out adequate criminal legal qualification of acts that take place in the NGCAs, with the subsequent prosecution of those guilty of such acts. Moreover, and importantly, the crimes which qualify as violations of international criminal law would no longer be subject to a statute of limitations or amnesty (which would previously have been possible if crimes were classified under separate parts of the Criminal Code).<sup>137</sup> This concerns, in particular, the grave crimes such as the killings, illegal deprivation of people's liberty, and torture committed in the first phase of the conflict.

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<sup>135</sup> For example, by the Center for Civil Liberties: *Draft law on harmonization of the Criminal Code of Ukraine with the provisions of international law*, available at: <https://bit.ly/3s6kEzY> (Ukrainian) (accessed 17 February 2021).

<sup>136</sup> UNN, Rada ukhvalyla zakon pro voiennykh zlochynttsiv [The Rada passed a law on war criminals], 20 May 2021, available at: <https://bit.ly/3fU8rtN> (Ukrainian) (accessed 27 May 2021); text of the law: Verkhovna Rada of Ukraine, Draft Law No. 2689 *On amendments to certain legislative acts of Ukraine concerning the implementation of norms of international criminal and humanitarian law* of 27 December 2019, Verkhovna Rada of Ukraine, available at: [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=67804](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=67804) (Ukrainian) (accessed 17 February 2021).

<sup>137</sup> Coynash, H., *After 7 years, Ukraine takes the first step towards punishing war crimes*, Kharkiv Human Rights Protection Group, 18 September 2020, available at: <http://khhpg.org/en/1600383057> (accessed 17 February 2021).

As the draft law is modelled on the Rome Statute of the ICC, members of Ukraine's civil society have previously expressed hope that, with its adoption, members of the Verkhovna Rada will "run out of excuses" for not ratifying the Rome Statute itself, which will be an important signal on both an international and domestic level.<sup>138</sup> Most importantly, however, there are expectations that aligning Ukrainian legislation with international law will equip national authorities with the necessary legal framework to support the effective investigation and prosecution of international crimes at home, building on the creation in January 2020 of the specialized Department for supervision over criminal proceedings related to armed conflict at the Office of the Prosecutor General of Ukraine (OPG), composed of two offices – one for the Donetsk and Luhansk region and the other for Crimea. It is result of a major reform in the framework of which the Department has been tasked with prosecuting conflict-related crimes and international cooperation in matters concerning the armed conflict in Eastern Ukraine and Crimea (including Ukraine's communication with ICC) – functions which have previously been divided between several different OPG units. Moreover, since 2019, all investigative functions were passed to the National Police, State Security Services, as well as the State Bureau of Investigations (a law enforcement body that investigates criminal proceedings involving law enforcement officers, judges, and senior officials), while the OPG only gives procedural guidance and is primarily tasked with prosecution only (prior to 2019 it also had the power to investigate via military prosecutors working for the OPG). Currently, the Department is composed of around 40 prosecutors dealing with matters related to Eastern Ukraine. There are also two specialized departments within the state prosecutor's offices in the Donetsk and Luhansk regions and specialized Prosecutor's Office of the Autonomous Republic of Crimea (all of them specialize in crimes related to armed conflict).<sup>139</sup>

While the expectations are high with regard to improving the effectiveness of prosecuting crimes committed in the conflict, there are also fears that deep systemic deficiencies will take years to resolve. As noted by one NGO representative, the Ukrainian law enforcement and justice systems were already ineffective before the war and the conflict has exacerbated some of these problems. Among the problems indicated by the NGOs are those related to the lack of organization of work as well as problems concerning jurisdiction. As one NGO lawyer pointed out, with regard to investigations for example, cases of illegal deprivation of liberty which lie within the jurisdiction of the police can – under the current law – be investigated by police officers in other regions of the country, despite the fact that they occurred in Donbas.<sup>140</sup> As a result, cases are being examined by officers who know little about

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<sup>138</sup> Coynash, H., *After 6 years of Russian aggression, Ukraine's legislators think 'it's not the right time' to punish war crimes*, Kharkiv Human Rights Protection Group, 24 July 2020, available at: <http://khpg.org/en/1595372185> (accessed 17 February 2021). See also: 2.2.1. International Criminal Court.

<sup>139</sup> Interview with the representative of the Office of the Prosecutor General of Ukraine.

<sup>140</sup> Interview with an NGO representative. See also: Shcherbachenko V. (ed.), *Crimes without punishment: human rights violations in the context of the armed conflict in Eastern Ukraine*, Eastern-Ukrainian Centre for Civic Initiatives, 2018, available at: <https://bit.ly/38MhrP9> (English), <https://bit.ly/3ssuLQG> (Ukrainian), <https://bit.ly/39xcida> (Russian) (accessed 16 February 2021).

the specific Donbas context. Also, generally speaking, criminal cases related to the armed conflict are not handled by a single investigative body, but remain scattered among various police and security service units throughout Ukraine. According to the same interviewee, a solution for this problem would be a specific state organ or an inter-agency group tasked with investigating war-related crimes across the entire country and composed of police and SBU officers.

According to the NGO lawyers who were interviewed, the quality of investigations and court proceedings is not satisfactory. Investigative bodies treat cases of war-related crimes, such as wounding, killing, torture, or deprivation of liberty or enforced disappearances very superficially, seeing no prospects for an effective investigation. Investigations are conducted without a plan and investigative activities are often inconsistent. There are unjustified delays in organizing the necessary forensic assessments and interrogation of all important witnesses. There is also a problem with the transfer of information between the law enforcement and the military (e.g. regarding the shelling of residential areas resulting in civilian deaths and injuries, as well as destruction of property). Victims are often not adequately informed about the proceedings and the possibility of participating in investigations is restricted. In the rare cases when victims request certain investigative measures to be undertaken, their requests are ignored. A breach of reasonable time limits for a court case is also typical. The interviewees note that the law enforcement agencies are particularly reluctant to investigate and prosecute crimes committed by the members of the Ukrainian military, police, or other armed forces as cases of terrorism against the Ukrainian state have more chances of being prosecuted (however, the NGOs note also instances of abuse of power and procedural violations in such procedures).<sup>141</sup>

NGO representatives suggest that some of the aforementioned deficiencies are due to a lack of capacity on the side of the law enforcement agencies.<sup>142</sup> This includes insufficient training on criminal investigative methods adapted for the context of war.<sup>143</sup> The NGO representatives also noted that individual investigators at the law enforcement institutions are frequently underpaid and overburdened with cases, subsequently having a negative effect upon their motivation. Also, the fact that their work is evaluated on the basis of quantitative indicators (number of cases opened, number of cases referred to courts) results in very low quality of individual investigations. Furthermore, in recent years the law enforcement agencies have undergone a number of reforms, which has led to significant staff rotation and even the replacement of entire units by new, unexperienced employees. In the opinion of many NGO representatives, increasing the qualifications and motivation of investigators (which would also include raising their salaries) is a necessary step toward more effectively prosecuting war-related crimes.

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<sup>141</sup>. See also: Shcherbachenko V. (ed.), *Crimes without punishment: human rights violations in the context of the armed conflict in Eastern Ukraine*.

<sup>142</sup>. Interview with an NGO representative.

<sup>143</sup>. As a positive example of using such methods one interviewee mentions the Dutch investigation of the downing of the flight MH17 where new investigative methods and forensic techniques, including open-source intelligence, were used allowing to build the case despite the fact that investigators did not have access to the separatist-held territories.

A number of problems also relate to the judiciary. Understaffing and insufficient funding of courts in Ukraine has been one of the factors affecting the length and quality of proceedings since even before the beginning of the armed conflict. In addition to the pre-existing challenges, the relocation of courts from the NGCAs<sup>144</sup> has led to a significant increase in the workload of individual courts in the Ukrainian government-controlled parts of the Luhansk and Donetsk regions. Ukrainian authorities try to mitigate the effects of war by relocating staff; however, this is not effective as temporarily relocated staff tend to be less engaged in investigations.<sup>145</sup> Moreover, the relocation of the courts away from the areas adjacent to the demarcation line significantly limits people's access to the courts and, as a result, the legal protection of the rights of residents within the NGCAs as well as of persons residing in the immediate proximity of the contact line who have no financial means to travel.<sup>146</sup> Among the relatively small number of cases that have reached courts, very few progress and conclude with an actual conviction.<sup>147</sup> Furthermore, as reported by the HRMMU in relation to conflict-related cases brought before the Ukrainian judicial system between 2014 and 2020, suspects were generally charged with crimes against the national security of Ukraine or certain crimes against public security, including affiliation with armed groups (i.e. *not* for war crimes).<sup>148</sup> The UN Mission has also identified a number of systemic violations in such proceedings (including violations of the right to liberty and security, to legal counsel, and to a fair hearing by a competent, independent, and impartial tribunal). However, there have also been indications of recent positive changes in the approach to conflict-related cases and the government's willingness to comply with its international obligations to prosecute serious violations of international law.<sup>149</sup>

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144. During 2014-2015, the courts located in the NGCAs were closed and their location was changed; territorial jurisdiction was transferred to the courts in the territory controlled by the government of Ukraine.

145. Centre for Civil Liberties, *Justice in Exile: Observance of the right to a fair trial in the east of Ukraine, including the territory that is temporarily not controlled by the Ukrainian government*, 2016, available at: <https://bit.ly/3qsK5vf> (English), <https://bit.ly/37o0f1w> (Ukrainian) [accessed 16 February 2021]; Kuibida, R. and M. Halabala (eds), *Justice in Eastern Ukraine during the military aggression of Russian Federation*, International Renaissance Foundation, 2018, available at: <https://bit.ly/2ZmUrkm> (English), <https://bit.ly/2LUjNTs> (Ukrainian) [accessed 16 February 2021].

146. Hrytsenko, N. and Pantiukhina, S., *Ensuring the right to access to justice of IDPS and residents of the temporarily occupied territories of Donetsk and Luhansk regions*, 2020, available at: <https://bit.ly/3yMk7Hs> (Ukrainian), <https://bit.ly/3wGGWKP> (English summary) [accessed 29 May 2021].

147. Martynenko, O. (ed.), *Transitional justice and the armed conflict in Ukraine: problems of holding perpetrators accountable and helping victims*, CivilM+ platform, 2020, available at: <https://bit.ly/20BJxVG> (Russian), <https://bit.ly/3u5mzGL> (English summary) [accessed 16 February 2021].

148. Office of the United Nations High Commissioner for Human Rights, *Human Rights in the Administration of Justice in Conflict-Related Criminal Cases in Ukraine (April 2014 –April 2020)*, 2020, available at: <https://bit.ly/3dudzL2b> [accessed 20 February 2021].

149. Jordash, W. and A. Mykytenko, *International Criminal Court is no panacea for Ukraine*, Atlantic Council – UkraineAlert, 17 December 2020, available at: <https://bit.ly/3s9LuXY> [accessed 20 February 2021].

In 2014, the so-called “trials in absentia” – special judicial proceedings that allow to try defendants who are not in the Ukrainian territory provided that evidence and witnesses are present were introduced in the law.<sup>150</sup> But the mechanisms are still imperfect. As an NGO lawyer notes, for many years, judges often refused a prosecutors’ requests to try the accused in absentia and there was no procedure in the law to appeal such refusal.<sup>151</sup> In his opinion, refusals to grant a trial in absentia, based on what he considers a legal loophole, affected the rights of a significant number of civilian victims of severe crimes committed in the course of the conflict. The NGO he works for has been engaged in promoting changes in the law so that court decisions on refusing prosecutor’s requests for trial in absentia can be appealed. In April 2021, amendments were introduced to the Code of Criminal Procedure of Ukraine, which state that evasion from appearing on summons of an accused who is wanted internationally *and/or* has left Ukraine *and/or* is present in the NGCAs or in Russia, is legal grounds for granting a special pre-trial investigation or special court proceedings (previously, a court could consider such a measure in the absence of the suspect only if the prosecutor proved that the suspect is internationally wanted).<sup>152</sup> At the same time, in the opinion of a legal expert, the amended law raises new questions about the application of the provisions of the Criminal Procedure Code (in particular regarding the functioning of special pre-trial investigations as well as declaring a person to be on the international wanted list and its different interpretation by courts, lawyers, and law enforcement agencies) and opens up opportunities for abuses.<sup>153</sup> However, it remains to be seen how this law will be implemented in practice. Furthermore, the NGO lawyer mentioned above also points out that the current territorial jurisdiction (whereby cases are decided by courts located in the territories where the crimes have been committed) has a negative impact on the independence of judges and the quality of trials. In his opinion, it is not unheard of that in Luhansk and Donetsk regions judges sometimes “sabotage” cases, either openly or indirectly (for example, cases are dismissed or passed to other judges on the grounds that it is not safe for the judges to rule on them as they have relatives in the occupied territories, etc.).<sup>154</sup> The interviewee believes that the law should be changed and cases of graves crimes

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150. Novykova, V., ‘Features of the investigation of military crimes committed by representatives of illegal armed formations battling on the side of so called “LPR” and “DPR”’, in: Krivenko, S. and V. Novykov, War crimes in Donbas. Challenges of holding of perpetrators to account, CivilM+ platform, 2020, pp. 6-11, available at: <https://bit.ly/38JT2K3> [English], <https://bit.ly/3dlcpts> [Ukrainian], <https://bit.ly/2NCbfRW> [Russian] (accessed 16 February 2021).

151. Interview with an NGO representative.

152. Verkhovna Rada of Ukraine, Draft Law No. 2164 *On amendments to the Criminal Procedure Code of Ukraine to Improve certain provisions in connection with the conduct of a special pre-trial investigation* of 27 April 2021, Verkhovna Rada of Ukraine, available at: [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=66916](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=66916) [Ukrainian] (accessed 31 May 2021).

153. Didienko, A., *Zminy do Kryminal'noho protsesual'noho kodeksu Ukrainy shchodo protsedury in absentia* [Amendments to the Criminal Procedure Code of Ukraine regarding the procedure in absentia], LCF Law Group, 6 May 2021, available at: <https://bit.ly/2TAUB8a> [Ukrainian] (accessed 31 May 2021).

154. Interview with an NGO representative. The problems related to the independence of judges in Donetsk and Luhansk regions were also addressed in the study: Kuibida, R. and M. Halabala (eds), *Justice in the Eastern Ukraine during the military aggression of Russian Federation*, International Renaissance Foundation.

committed in Donbas should be decided by Ukrainian courts in other regions of the country. An argument for that solution would also be that in most cases the victims and witness do not live in Donbas anyway, not to mention the fact that hearings can also be conducted online, if necessary. In spite of the extensive criticism of the functioning, neutrality, and effectiveness of Ukrainian courts in the Donetsk and Luhansk regions, the law remains – at least for the moment – unchanged.

The systemic deficiencies of the law enforcement and judiciary systems, described above, along with the generally low trust towards law enforcement agencies, are some of the reasons for why victims are often reluctant to report crimes and often lose interest in the proceedings related to their cases. Some NGOs have also pointed out that many of the victims are IDPs and they feel discriminated against by the Ukrainian state as a whole, which prevents them from approaching Ukrainian institutions. Furthermore, it was also indicated that on a national scale, the availability of legal information and mechanisms of public legal aid for the victims is insufficient. As a result, many crimes are underreported. On the other hand, some NGOs have also noted that nowadays more victims are willing to provide consent for the transfer of their testimonies to national investigative bodies, because they feel more confident and secure than in the first months of the conflict when they were too frightened to come forward. Nowadays, it is not uncommon for NGOs to collect and transfer victims' testimonies concerning the years 2014-2015 to state agencies, yet the victims generally remain reluctant to approach the police or security services directly.

With the changes within the OPG structure, there are hopes and expectations that the effectiveness of prosecution of crimes committed in the context of the armed conflict will increase. As indicated by both the representative of the Department for supervision over criminal proceedings related to armed conflict at the OPG as well as the NGOs, for several years already there has been ongoing and constructive cooperation with regard to expanding the expertise in IHL for prosecutors and investigators. It includes offering trainings, often led by international experts, to prosecutors working within the OPG in Kyiv and at the regional level, sharing good practices, guidelines, and documentation methodology. Additionally, drawing on the positive experience of cooperation between the Prosecutor's office of the Autonomous Republic of Crimea and the civil society sector,<sup>155</sup> the OPG is developing its cooperation with NGOs regarding gathering information on war crimes committed in the context of the conflict in Donbas:

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<sup>155</sup>. Law enforcement agency under the state government, since 2014 temporarily relocated to Kyiv.

*This works generally well for Crimea, and we're trying this for Donbas. We reach out to Ukrainian NGOs, make requests for information. Sometimes victims prefer to talk to human rights organizations instead of officials, but we try to work in this sphere as well. Last week we had a meeting with NGOs, encouraging them to talk to victims so they show up and provide testimony. NGOs can also provide information concerning, for example, the shelling of buildings. For us, it doesn't matter so much from which source the information comes, but it has to be reliable. Information gathered is of course not evidence, so the OPG has to conduct an interview itself (i.e. work done by NGOs can only be used at the operational level). Photos and other materials can be used as information, but only evidence collected by the OPG can be brought before the courts.<sup>156</sup>*

156. Interview with the representative of the Office of the Prosecutor General of Ukraine.

The provision of information by NGOs helps to support the investigation in cases where prosecutors have no or insufficient evidence to start an investigation. The NGOs, with victims' consent, pass the testimonies and other materials to law enforcement officers; they can also provide advice on the possible qualification of crimes as IHL violations, wherever appropriate. Apart from evidence in individual cases, the OPG prosecutors are interested in collecting information about specific patterns of violations (for example, about illegal places of detention or destruction of civilian infrastructure) for the purpose of supporting the Ukrainian case before the ICC. The OPG has also recently reached out to some organizations with proposals to submit a joint communication to the ICC, based on the information collected by both institutions.<sup>157</sup>

In general, the NGOs perceive the collaboration with the OPG as a positive thing, although some interviewees also believe that greater clarity with regard to its purpose – as well as a discussion on mutual expectations – are needed if sharing of information and transfer of the massive amount of documentation collected by NGOs is to become more systemic. Remaining independent from government structures is important for NGOs, as well as an at least equal emphasis put on building cases before the ICC and on the improvement of the effectiveness of prosecution and trial procedures at home. As underlined by several interviewees, ICC is the most appropriate institution to deal with high-profile cases, while the majority of perpetrators will be held accountable before Ukrainian institutions. As the law enforcement institutions in Ukraine undergo frequent reforms, it is also important that their senior management holds on to their strategic goals, as it takes time for positive changes to take effect at a local level.

157. *Ibid.*

## 2.1.2. The rights of victims of the conflict

As of now, victims of the conflict as a particular social group do not have a separate legal status in Ukrainian legislation. For many years, there has been no single state policy in Ukraine regarding the registration of civilians affected by armed conflict. Various central and local government bodies created their own records, which sometimes contained repetitive or contradictory information.<sup>158</sup> The lack of a strategic approach and uniform methodology created obstacles in the proper assessment of losses and damage to civilians and made it more difficult to create an effective state policy for this category of citizens. According to an NGO representative, there has been some progress in this regard concerning the gathering of data on civilians who have suffered as a result of the conflict by the OPG branches in the Donbas region:

*If we talk about wounded civilians, databases of people affected by the conflict have now been created in Luhansk<sup>159</sup> and Donetsk prosecutors' offices. That is, already at the state level. If a person has suffered (their property was taken or they were injured), then they can contact the prosecutor's office, provide their data and then, after some time, the state will have a list of people who have suffered in the conflict. If then there will be trials against the Russian Federation or DPR/LPR groups, then a list of victims will be already formed. (...) We [the civil society] have always said that we need a database of victims of human rights violations. (...) The feeling is now from the new government that the processes are beginning to move from a dead point. The same database, interaction with the prosecutor's office.<sup>160</sup>*

<sup>160</sup>. Interview with an NGO representative.

The protection of the rights of conflict victims has become an important part of the National Human Rights Strategy<sup>161</sup> – a policy document adopted in 2015 which outlines state activities on the observance and enforcement of human rights and freedoms. According to the document, human rights protection is to be ensured, among others, through the establishment of efficient mechanisms aimed at preventing and combatting violations of the right to life and freedom from torture, release of hostages

<sup>158</sup>. Luhansk Oblast Human Rights Center "Alternatyva", *Vtraty tsyvil'noho naseleennia vnaslidok voiennoho konfliktu na Skhodi Ukraïny (2014-2018)* [Civilian casualties as a result of the military conflict in Eastern Ukraine (2014-2018)].

<sup>159</sup>. Additional information on the database of the Luhansk Prosecutor's Office is available on the website: <https://bit.ly/3hZafEC> (accessed 27 May 2021).

<sup>161</sup>. President of Ukraine, Decree of the No. 501/2015 *On approval of the National Human Rights Strategy of Ukraine* of 25 August 2015, available at: <https://bit.ly/3bAs33I> (Ukrainian) (accessed 23 February 2021).

and their social and psychological rehabilitation, effective investigation and accessible legal remedies for the victims, provision of support for IDPs (including assistance in fulfilment of basic livelihood needs, social adaptation, access to education), as well as the adoption of measures aimed at protecting the rights of citizens of Ukraine residing in the NGCAs. While the situation of some groups of people who have suffered as a result of the war has since been regulated in the law and some of their problems have been solved, other groups of victims continue to face challenges related to the recognition and fulfilment of their rights, on both legislative and practical levels. These problems include the lack of formal recognition of their status as victims of war, complicated administrative procedures, and lack of relevant funding leading to practical difficulties in accessing financial, social and psychological assistance and rehabilitation, as well as receiving compensation for material and non-material losses incurred. Civil society organizations, drawing on their experience working in the area of the protection of the rights of persons affected by the armed conflict, advocated for amendments to the Strategy and its Action Plan which would cover a broad group of conflict victims by introducing systemic changes.<sup>162</sup> The overall level of implementation of the 2015 strategy was critically evaluated by the civil society sector which indicated that only minor progress has been made during the five years of its existence.<sup>163</sup> In March 2021, a new National Human Rights Strategy was adopted;<sup>164</sup> in the opinion of organizations working on the topic of the rights of conflict victims, the new document includes many of the solutions proposed by the NGO sector and articulates the protection needs of various groups of conflict victims (in particular: residents of the territories adjacent to the contact line, residents of NGCAs, and families of missing persons) more explicitly than the previous Strategy.<sup>165</sup> However, its success largely depends on the development of an Action Plan and the concrete actions that will be undertaken by the Ukrainian authorities in the coming years.

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162. See for example an appeal to the President of Ukraine: <https://r2p.org.ua/zvernennya-nuo-shhodo-strategiyi-prav-lyudyny/> (Ukrainian) (accessed 23 February 2021).

163. For example: Ukrainian Helsinki Human Rights Union, *Hromads'kist' rozcharovana: riven' implementatsii Natsional'noi stratehii u sferi prav liudyny skladaiie vs'oho 28%* [The civil society is disappointed: the level of implementation of the National Strategy for Human Rights is only 28%], available at: <https://bit.ly/3uF2sy5> (Ukrainian) (accessed 30 May 2021).

164. President of Ukraine, Decree of the No. 119/2021 *On the National Human Rights Strategy of Ukraine* of 24 March 2021, available at: <https://bit.ly/3fXXNIE> (Ukrainian) (accessed 30 May 2021).

165. Charitable Foundation "Right to Protection", *Національна стратегія у сфері прав людини — чинна. Огляд від юристів БФ «Право на захист»* [Natsionalna stratehiiu u sferi prav liudyny — chynna. Ohliad vid iurystiv BF «Pravo na zakhyst»], 29 March 2021, available at: <https://r2p.org.ua/nacjonalna-strategiya-prav-lyudyny-oglyad/> (accessed 30 May 2021); Ukrainian Helsinki Human Rights Union, *Ukraina otrymala onovlenu Natsionalnu stratehiu u sferi prav liudyny* [Ukraine has received an updated National Human Rights Strategy], 25 March 2021, available at: <https://bit.ly/3c4gcMB> (Ukrainian) (accessed 30 May 2021).

## Civilian deaths and casualties

Between the 14th of April, 2014, and the 31st of January, 2021, the UN mission recorded a total of 3,375 conflict-related civilian deaths and the total death toll of injured civilians is estimated to exceed 7,000.<sup>166</sup> In spite of this, the state has not adopted a special law nor established a national mechanism to provide injured civilians and the families of civilians killed with compensation for the harm suffered (although a draft law was proposed and registered in 2019<sup>167</sup>). NGO representatives note that there are promising examples of cases where courts have ruled in favour of the residents of front-line villages, ordering the state to pay compensation for moral damage caused by the death of relatives and loss of health as a result of hostilities. These cases are of crucial importance to the restoration of the rights of numerous other victims who have suffered non-material damage in the course of the conflict.

Currently, a measure exists in the Ukrainian legislation providing for the possibility of receiving a special status by persons with an established disability resulting from injuries incurred during the hostilities. In 2018, amendments were introduced to the Law “On the Status of War Veterans and Guarantees of Their Social Security”<sup>168</sup>, defining the procedure for obtaining the status of a person with disability as a result of the war in Donbass as well as expanding the list of benefits and allowances for this group of persons. In practice, however, between the date when the law came into force and December 2020, only 122 people were granted this status, whereas the majority of injured civilians still do not receive adequate social assistance.<sup>169</sup> The law contains discriminatory provisions that significantly limit the number of individuals entitled to receive the status of a person with war-related disabilities, excluding the civilians who sustained injuries in the territories beyond the control of the Ukrainian government.<sup>170</sup> Furthermore, the procedure for obtaining the status is very complicated and burdensome and the social security measures linked with it are not sufficient to adequately respond to the specific needs of this group of victims. Civil society organizations are active in advocating for changes in the law and procedures that would allow for the timely and effective provision of the state assistance they require.

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<sup>166</sup>. Office of the United Nations High Commissioner for Human Rights, *Report on the human rights situation in Ukraine for 1 August 2020 – 31 January 2021*, available at: <https://bit.ly/3vtBqLw> (accessed 28 May 2021).

<sup>167</sup>. Verkhovna Rada of Ukraine, Draft Law No. 1115 *On the status and social protection of civilians who suffered as a result of hostilities and armed conflicts* of 29 August 2019, available at: [http://search.ligazakon.ua/l\\_doc2.nsf/link1/JI00140A.html](http://search.ligazakon.ua/l_doc2.nsf/link1/JI00140A.html) (Ukrainian) (accessed 23 February 2021).

<sup>168</sup>. Verkhovna Rada of Ukraine, Law No. 3551-XII *On the status of war veterans and guarantees of their social security* of 22 October 1993, available at: <https://zakon.rada.gov.ua/laws/show/3551-12> (Ukrainian) (accessed 23 February 2021).

<sup>169</sup>. Kerymov, L. and N. Alyab'eva, *Pravo na sotsial'nyuy zashchitu grazhdanskikh lits s invalidnost'yu, poluchennyoy v rezul'tate voennogo konflikta na Donbasse* [The right to social protection of civilians with disabilities resulting from the military conflict in Donbas].

<sup>170</sup>. Only two categories of injured civilians are eligible to apply: 1) those who were injured before the 1st of December, 2014; 2) those who were injured after the 5th of May, 2015, in the territory controlled by the government of Ukraine or in locations on the contact line. All persons injured after the 1st of December, 2014, in the territory not controlled by the Ukrainian government as well as persons injured between the 1st of December, 2014, and the 5th of May, 2015, (during that period there was no clear definition of which territories are not controlled by the government) are not entitled to obtain the status of a person with disability resulting from the war.

As mentioned at the beginning of this section, civilians who have received injuries or other health damage, but who have not been formally diagnosed with a disability, as well as adult family members of persons who died as a result of the conflict, are not covered by a special law (either legal or social protection of the state in the form of compensation, medical and psychological rehabilitation, etc.). Since 2017, Ukrainian legislation allows for victim status to be granted to various groups of children affected by the conflict, including children of servicemen who were killed or wounded in Eastern Ukraine, children who fell victim to violence, IDP children, as well as children residing in the Donetsk and Luhansk regions.<sup>171</sup> While no specific benefits or social services for children who have received this status have been approved, they are covered by the provisions of other national laws pertaining to social protection of children which grant them various financial and social benefits, although those protection measures are often not clearly specified and are subject to interpretation. Civil society organisations also point out that, in spite of an enormous need, no adequate conditions have yet been created by the state in terms of social reintegration and medical, psychological, and pedagogical rehabilitation for children affected by the conflict.<sup>172</sup>

### Victims of illegal imprisonment

According to available data, more than 3,000 people (soldiers as well as civilians) went through illegal detention facilities in the self-proclaimed “LPR” and “DPR” during the course of the conflict in Ukraine, most of them in the early years of the conflict (2014-2015).<sup>173</sup> As of 2021, most of them have been released, while 280 (out of whom over 230 civilians) were still in detention, according to the data of the Ukrainian Parliamentary Commissioner for Human Rights.<sup>174</sup> It should be noted, however, that these are only approximate figures and the real number of detainees could be much higher. The release of prisoners takes place within the framework of politically agreed mutual releases of prisoners (so-called “prisoner exchanges”). While these exchanges are generally considered a necessary and important step forward in building peace in Ukraine, the practical side of their implementation raises significant human rights concerns. Although a number of exchanges have already taken place, they are not regulated in Ukrainian law. In practice, following

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171. Cabinet of Minister of Ukraine, Resolution of the No. 268 *On the approval of the Procedure for granting the status of the child who suffered as a result of military actions and armed conflicts* of 5 April 2017, available at: <https://zakon.rada.gov.ua/laws/show/268-2017-%D0%BF#Text> (Ukrainian) [accessed: 16.01.2021].

172. Coalition of NGOs (NGO “Donbass SOS”, NGO “Krym SOS”, CF “Right to Protection”, CF “Vostok-SOS”, NGO “Public holding “GRUPA VPLYVU”, NGO “ZMINA. Human Rights Center”, NGO “Crimean Human Rights Group”), *Mid-term NGO Report on the Universal Periodic Review of Ukraine (with regard to protecting the rights of victims of armed conflict)*, 2020, available at: <https://bit.ly/39CaAqH> [accessed: 16.01.2021].

173. Tomak, M., Brodik, P., Volkova N., Pavliuk, A. and I. Vynokurov, *Prisoners of war: international practice as to release of POWs, civilian detainees and political prisoners. Conclusions for Ukraine*.

174. RBK-Ukraina, *Liudmyla Denisova: U 2020 rotsi povidomlen' pro porushennia prav hromadiian stalo na 40% bil'she* [Lyudmila Denisova: In 2020, there were 40% more reports of violations of citizens' rights], 22 April 2021, available at: <https://bit.ly/3wGcaC6> (Ukrainian) [accessed 28 May 2021].

a political directive, the Ukrainian courts release from detention the persons who are in the process of being prosecuted by Ukrainian state organs so that they could be transferred and the conditions of political agreements on the mutual release are fulfilled. This practice raises doubts as to its legal basis and the independence of the court system and may jeopardize the goal of investigating and prosecuting war criminals. The December 2019 prisoner exchange which included several Berkut<sup>175</sup> officers, who were under trial for serious crimes committed against protesters during the Euromaidan protest, was subject to strong criticism as undermining the rule of law by effectively ending judicial processes without a clear legal rationale.<sup>176</sup>

While the situation of prisoners in the NGCAs this is primarily within the mandate of international organizations such as the UN mission or the ICRC, and the issue of their release is addressed in the framework of international negotiations, Ukrainian NGOs play an important role in providing direct assistance to persons released from captivity who are present in the government-controlled part of Ukraine. At the moment, persons released from captivity receive free medical treatment in a military hospital where they are all temporarily placed after their release. At this point, they can also get their documents reissued and register for social benefits. Based on a resolution of the Cabinet of Ministers,<sup>177</sup> starting from the exchange that took place in December 2017, they also receive 100,000 UAH per person as one-time state payment; however, this is considered problematic as it does not cover nearly 3,000 individuals who had been released prior to that date.<sup>178</sup> The right to state compensation for persons who had been released from captivity at earlier points in time is subject to litigation by civil society lawyers.<sup>179</sup>

According to the information provided by a representative of an NGO working with this group of victims, most of the former detainees become IDPs as they need to leave their houses and families located in the occupied part of Donbas and start their lives from scratch; even though the resolution mentioned above obligates the authorities to provide support in finding accommodation to former detainees who became internally displaced, in practice they rely a great deal on NGOs for help in terms of material and social assistance.<sup>180</sup> At the time of writing, a draft law<sup>181</sup> that envisages complex

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175. Special police units (riot police), dissolved in 2014 after the agency's involvement in brutal pacification of the Euromaidan protests.

176. Wesolowsky, T., *Price To Pay: Release Of Former Ukrainian Riot Police In Prisoner Swap Sparks Anguish, Debate*, RFE/RL, 30 December 2019, available at: <https://bit.ly/3uwKTSj> (accessed 23 February 2021).

177. Cabinet of Ministers of Ukraine, Resolution No. 38 *On some issues concerning social support for persons who have been illegally deprived of their personal liberty* of 31 January 2018, available at: <https://zakon.rada.gov.ua/laws/show/38-2018-%D0%BF#Text> (Ukrainian) (accessed 25 February 2021).

178. Interview with an NGO representative.

179. Ukrainian Helsinki Human Rights Union, *Chy mozhut' otrymaty zvil'neni z polonu v 2014-2016 rokakh dopomohu vid Derzhavy?* [Can persons released from captivity in 2014-2016 receive assistance from the State?], 9 January 2020, available at: <https://bit.ly/3wStnlp> (Ukrainian) (accessed 31 May 2021).

180. Interview with an NGO representative.

181. Verkhovna Rada of Ukraine, Draft Law No. 8205 *On the legal status and social guarantees of persons illegally deprived of liberty, hostages or convicts in the temporarily occupied territories of Ukraine and abroad* of 27 March 2018, available at: [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=63748](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=63748) (Ukrainian) (accessed 25 February 2021).

forms of state support for these groups of victims is being drawn up by lawmakers. In the opinion of one of the NGO representatives who was interviewed, even though imperfect, the draft law would indeed increase the protection of former detainees by obligating the state to provide specialized treatment, education, legal and social aid, as well as psychological counselling.<sup>182</sup> The latter is of particular importance as many former detainees were subjected to torture or other forms of violence (including sexual) and are in need of specialised psychological support.

### Persons whose property has been destroyed as a result of shelling

It is estimated that over 50,000 civilian homes have been destroyed or damaged as a result of hostilities since the beginning of the armed conflict.<sup>183</sup> Since the early days of the conflict, NGOs have highlighted the need to provide compensation to Donbas residents who lost their houses as a result of the war. However, as pointed out by one of the NGO representatives, a major problem has been the lack of legal clarity as to whether the Ukrainian state should be deemed responsible for compensating owners of property destroyed by the Russian or separatist military.<sup>184</sup>

A compensation mechanism was enshrined in Ukrainian law only recently (in July 2019) when the Cabinet of Ministers adopted a resolution introducing amendments to the legislation governing compensation for destroyed property.<sup>185</sup> However, in the opinion of the civil society sector, these regulations had significant deficiencies. Under this legislation only those who remained at their previous place of residence *and/or* within the relevant geographical area had the right to compensation (of up to 300,000 UAH). Thus, IDPs who crossed the borders of residential areas near the demarcation line could not receive compensation, nor could persons who were evacuated or resettled from their homes. Following criticism, the government adopted, in September 2020, another resolution which changed some of these provisions, granting the right to compensation to persons who had left their (entirely) destroyed property, provided that the property in question was located in the GCAs.<sup>186</sup> The same resolution allows owners of partially damaged property to claim compensation, however only if they are residing in this place of residence *and/or* within the relevant geographical area. In spite of these improvements in the legislation, numerous problems remain, including the ineffective functioning of commissions responsible for reviewing applications for

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<sup>182</sup>. Interview with an NGO representative.

<sup>183</sup>. Office of the United Nations High Commissioner for Human Rights, *Report on the human rights situation in Ukraine for 16 August – 15 November 2019*.

<sup>184</sup>. Interview with an NGO representative.

<sup>185</sup>. Cabinet of Ministers of Ukraine, Resolution No. 947 *On approval of the order of granting and defining of the amount of financial aid to victims of emergency situations and the amount of monetary compensation to victims whose houses (apartments) are destroyed owing to the emergency situation of military character caused by armed aggression of the Russian Federation* of 18 December 2013 (as amended on 10 July 2019 and 2 September 2020), available at: <https://zakon.rada.gov.ua/laws/show/947-2013-%D0%BF#Text> (Ukrainian) (accessed 25 February 2021).

<sup>186</sup>. Cabinet of Ministers of Ukraine, Resolution No. 767 *The issue of payment of monetary compensation to victims whose houses (apartments) were destroyed as a result of a military emergency caused by the armed aggression of the Russian Federation* of 2 September 2020, available at: <https://bit.ly/3wLwYbR> (Ukrainian) (accessed 30 May 2021).

compensation, transparency of the procedure for on-site inspections, as well as the lack of dedicated funding from the state budget.<sup>187</sup> Also, a great obstacle in obtaining compensation is the problem of proving the ownership of destroyed or damaged property, as not all applicants are in the possession of the necessary documents. As of early 2021, as a result of all issues indicated above, the actual number of persons who benefited from compensation for destroyed property is very low. The civil society sector, in the framework of a working group established at the office of the Ukrainian Parliamentary Human Rights Commissioner, continues to work on the further development of the mechanisms regulating the right to compensation. Concurrently, in the framework of strategic litigation, NGOs are bringing before court a number of individual cases involving residents of frontline settlements whose property was destroyed as a result of the war.

### Missing persons

Establishing the exact number of persons who went missing in the course of the conflict in Eastern Ukraine presents some enormous challenges. Here, the sources available provide inconsistent figures. While the ICRC registered about 1,500 cases of disappearances in relation to the conflict (with over 750 of those still unaccounted for in 2020)<sup>188</sup>, an NGO dealing with the search for missing people has collected data on 1,288 people (as of 2018).<sup>189</sup> Yet the President's Commissioner for Peaceful Settlement of the Conflict in the Donetsk and Luhansk regions and a representative of Ukraine during the negotiations in Minsk stated in 2018 that the list of missing persons prepared by the Security Service of Ukraine which is used during negotiations contains just 294 names.<sup>190</sup> In the opinion of the UN mission, many of those reported as missing persons may be dead, with their bodies either not yet found or identified.<sup>191</sup> Also, some individuals may currently be held *incommunicado* in places of detention controlled by armed groups where independent international monitors are denied access.

The "Law on the legal status of missing persons" was adopted in July 2018 and entered into force the following month.<sup>192</sup> Its adoption was a result of intensive advocacy work on the part of civil society organizations. The law provides that the status of a missing person is granted from the moment the applicant submits a statement

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187. Coalition of NGOs, *Mid-term NGO Report on the Universal Periodic Review of Ukraine (with regard to protecting the rights of victims of armed conflict)*.

188. International Committee of the Red Cross, *International Day of Disappeared in Ukraine: "Families of those who went missing in the Donbas need to know the fate of their loved ones."*

189. Public Organization "Shore of Peace", *De vony? Analitychnyi zvit* [Where are they? Analytical report], 2018.

190. Press release of the Verkhovna Rada of Ukraine of 30 August 2018, available at: <https://www.rada.gov.ua/news/Povidomlennya/161513.html> (Ukrainian) [accessed: 26 February 2021].

191. Office of the United Nations High Commissioner for Human Rights, *Report on the human rights situation in Ukraine for 16 May – 15 August 2017*, available at: <https://bit.ly/3bWaWtJ> [accessed 23 February 2021].

192. Verkhovna Rada of Ukraine, Law No. 5435 *On the legal status of missing persons* of 12 July 2018, available at: <https://zakon.rada.gov.ua/laws/show/2505-19#Text> (Ukrainian) [accessed: 26 February 2021].

confirming the disappearance of the person concerned, or by a court decision. It also introduces an article on “enforced disappearance” into the Ukrainian Criminal code. It provides for the creation of a unified register of persons who have disappeared in special circumstances and establishes the Commission on Persons Missing due to Special Circumstances – a consultative and advisory body to the Cabinet of Ministers composed of representatives of relevant ministries, law enforcement agencies, and national and international organizations dealing with missing persons which will coordinate activities of various governmental institutions involved in the tracing and identification of missing persons and providing support to their families. The law also defines the procedure for searching and identifying human remains.

Even though the law represents significant progress in improving the situation of the families of missing persons, human rights organizations remain concerned about its lengthy and ineffective implementation process. Most importantly, the Commission was established with a significant delay<sup>193</sup> and as of early 2021 it had not yet started its work; legislative obstacles concerning the election of its chairman are cited as the main impediments to the process.<sup>194</sup> The mechanisms of accounting for missing persons and the exchange of information between governmental and non-governmental organizations, as well as mechanisms of state support for relatives of missing persons, are still being developed. There are problems in terms of ineffective investigations and limited access of the family members to information about the course of the proceedings even though under the new law, public authorities authorized to register and/or search for missing persons are obliged to provide information on the progress and results of their actions. The ineffectiveness of the state in addressing the problem of missing persons has been subject to strong criticism and disappointment for their relatives, some of whom formed a civil society organization which, in response to the lack of action by the state in this regard, created its own register of missing persons.<sup>195</sup> The organisation also demands that the Commission, as well as its working groups in the regions in question, start their work as soon as possible, and that the families of the missing persons be included as members. They also believe that a representative of this body should be involved in the international peace process (specifically, the works of the Trilateral Contact Group<sup>196</sup>). The international community has also put pressure on Ukrainian institutions

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193. Cabinet of Ministers of Ukraine, Order of the No. 248-p *On the establishment of the Commission on Persons Missing due to Special Circumstances* of 10 April 2019, available at: <https://zakon.rada.gov.ua/laws/show/248-2019-%D1%80#Text> (Ukrainian) [accessed 23 February 2021].

194. Ukrinform, *Komisiiia z pytan' znyklykh bezvisty mozzhe rozpochaty povnottsinnu robotu z bereznia 2021 roku – Zarets'ka* [The Commission on Missing Persons can start full-fledged work in March 2021 – Zaretska], 29 November 2021, available at: <https://bit.ly/3fw3TdY> (Ukrainian) [accessed 30 May 2021].

195. Radio Svoboda, «Stvoriuiemo reiiestr, shchob zibraty dani pro vsikh». *Choho vymahaiut' rodychi znyklykh bezvisty na Donbasi?* [‘We are creating a register to collect data on everyone.’ What do the relatives of the missing in Donbass demand?], 16 April 2021, available at: <https://bit.ly/2RZVrdY> (Ukrainian) [accessed 30 May 2021].

196. Trilateral Contract Group for the peaceful settlement of the situation in Eastern Ukraine is a group of representatives of Ukraine, the Russian Federation, and the OSCE in Europe formed as means to facilitate a diplomatic resolution to the war in Donbas.

to intensify their efforts, particularly in regard to assisting the families of the missing who, in addition to enduring emotional suffering, also struggle to support themselves financially and face administrative challenges.<sup>197</sup>

### Internally Displaced Persons (IDPs)

The armed conflict in Ukraine resulted in the largest mass displacement of people since the end of World War II. It is estimated that more than two million people were forced to leave their homes in Eastern Ukraine and in Crimea. According to Ukraine's Ministry of Social Policy, by the end of 2020, 1.46 million people had been registered as IDPs,<sup>198</sup> of whom just over 600 thousand were pensioners.<sup>199</sup> Many of the IDPs reside in the war-affected area, in the government-controlled parts of the Donetsk and Luhansk regions, as well as in Kharkiv, Dnipro, and Kyiv. Many continue to live in areas close to the line of contact in the hope they will one day be able to return home. While the status of IDPs is regulated in the law, discriminatory practices persist, in particular with regard to the payment of pensions and social benefits as well as, until recently, electoral rights.

In June 2014, the Verkhovna Rada of Ukraine passed the Law "On Ensuring the Rights and Freedoms of Internally Displaced Persons" which defines the requirements for obtaining the status as well as the scope of rights and protection granted to IDPs.<sup>200</sup> The law outlines the responsibilities and competencies of state bodies with regard to IDPs aimed at the "*creation of conditions for voluntary return of such persons to the abandoned place of residence or integration at the new place of residence in Ukraine*". The law also prohibits discrimination and promotes the social protection of displaced persons. In order to reinforce the law, the Cabinet of Ministers and its Ministries adopted a number of bylaws enshrining specific social benefits provided to IDPs; in particular, in October 2014 the Government adopted a resolution regulating the provision of monthly targeted assistance to cover living expenses, including housing and communal services.<sup>201</sup> In addition, IDPs of a retirement age, persons with disabilities, low-income families, and other persons in difficult life circumstances have the right to receive social services in accordance with the current legislation.

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197. International Committee of the Red Cross, *International Day of Disappeared in Ukraine: "Families of those who went missing in the Donbas need to know the fate of their loved ones"*.

198. Number of registered IDPs, Ministry of Social Policy of Ukraine, 21 December 2020, available at: <https://www.msp.gov.ua/news/19501.html> (accessed 21.02.2021).

199. Martynenko, O. (ed.), *Transitional justice and the armed conflict in Ukraine: problems of holding perpetrators accountable and helping victims*.

200. Verkhovna Rada of Ukraine, Law No. 1706-VII *On ensuring the rights and freedoms of internally displaced persons* of 1 June 2014 [with further amendments], available at: <https://zakon.rada.gov.ua/laws/show/1706-18#Text> [Ukrainian] [accessed 25 February 2021].

201. Cabinet of Ministers, Resolution No. 505 *On providing monthly targeted assistance to internally displaced persons to cover living expenses, including housing and communal services* of 1 October 2014, available at: <https://zakon.rada.gov.ua/laws/show/505-2014-%D0%BF#Text> [Ukrainian] [accessed 25 February 2021].

A key problem that the IDPs face is the restoration of documents of civil records such as birth and death certificates that were lost during hostilities and evacuation, as well as the establishment of legal facts in the NGCAs in accordance with Ukrainian law. Under the current Ukrainian law, it is necessary to start a court proceeding in order to have the documents issued in the NGCAs recognized according to Ukrainian law. In spite of the massive scale of such requests and advocacy efforts of NGOs, the government has still not introduced an effective administrative procedure for establishing the facts of birth and death that occurred in the NGCAs (so that certificates could be issued directly at civil registry offices) and such certificates can only be obtained through a court decision. This creates an additional financial and organizational burden for persons who are forced to cross the contact line and go to a court and obtain a decision which they later need to present in a civil registry office. This ultimately leads to a decrease in the number of civil records registered in accordance with Ukrainian law and to a widening gap between the residents of NGCAs and the Ukrainian state. In addition to that, it is also an additional burden for the courts.

The provisions governing the payment of pensions to retired IDPs have, for many years, raised concerns of human rights organizations. Residents of the NGCAs are deprived of the opportunity to receive pension benefits in the territory controlled by the government of Ukraine if they are not registered as IDPs. These rules are not only discriminatory, as they violate their constitutional right to a pension, but also lead to a significant distortion of statistics pertaining to the number of IDPs (as many residents of NGCAs formally register as IDPs but in reality have not left their place of residence). In addition, a number of pensioners are physically unable to cross the line of conflict and register as IDPs due to old age or disability, etc. Pensioners who have received a certificate of IDP registration are also subjected to additional restrictions when receiving their pension benefits. In particular, they are required to undergo identification in the Pension Fund of Ukraine at the time the pension is awarded, as well as physical identification at the JSC «State Savings Bank of Ukraine» (Ukrainian: Oschadbank) every six months, and in some residential areas there is a practice of checking the pensioners' actual place of residence. In case of failure to pass this identification, pension payments are suspended. In addition, all payments to IDPs are made only through the accounts of JSC State Savings Bank of Ukraine, without the possibility of choosing another bank. Local departments of the Ministry of Social Policy, in an effort to combat what in their opinion constitutes fraudulent pension claims, regularly suspend the payment of pensions and benefits to IDPs pending verification of their physical presence in government-controlled territories, requiring recipients to go through a burdensome reinstatement process.<sup>202</sup> In 2018, the Supreme Court ruled that the termination of the payment of an IDP pension is illegal and may constitute unlawful interference with the applicant's right.<sup>203</sup> Following this decision, the courts of the first instance have satisfied thousands of similar claims.

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<sup>202</sup>. Coalition of NGOs, *Mid-term NGO Report on the Universal Periodic Review of Ukraine (with regard to protecting the rights of victims of armed conflict)*.

<sup>203</sup>. *Ibid.*

Nevertheless, problems remain with the effective payment of pensions arrears due to the fact that the government has not developed a separate procedure for such payments and the existence of discriminatory procedural provisions pertaining to IDP-pensioners.<sup>204</sup>

During nearly six years of the armed conflict in Ukraine, IDPs were discriminated against with respect to their voting rights. They could not participate in the elections for the Verkhovna Rada in 2014 and 2019 and were deprived of the possibility to participate in local elections in 2015.<sup>205</sup> Removing the restriction on the IDPs right to vote was the subject of advocacy efforts on the part of civil society organizations.<sup>206</sup> Eventually, at the end of 2019, the parliament adopted a new election code that included proposals from NGOs, which amended the rules restricting the electoral rights of IDPs, making it possible for them to participate in local elections in 2020.<sup>207</sup>

While a number of positive steps were undertaken to protect the social rights of IDPs, there are also a number of systemic deficiencies that impede the process of their integration into host communities. One of them is the lack of a government strategy and the absence of financial resources to address economic and social marginalization. According to the law, the government should provide IDPs with housing, but authorities do not take effective steps to do so.<sup>208</sup> A shortage of employment opportunities and the generally weak economy particularly affect IDPs, forcing many to live in inadequate housing, such as collective centres and temporary accommodation. Some IDPs, in particular those residing in conflict-affected areas, often lack sufficient sanitation, shelter, and access to potable water. The arrival of large groups of IDPs to certain areas led to tensions arising from competition for scarce resources (e.g. during enrolment to pre-schools and kindergartens). Many of the gaps in coverage in terms of accommodation, employment, provision of healthcare, and psychological rehabilitation are filled by volunteers, charities, and human rights organizations.

### Persons living along the demarcation line

An estimated 600,000 people live in the proximity of the contact line (on its both sides).<sup>209</sup> The situation of residents in settlements in the Donetsk and Luhansk regions located in GCAs remains difficult. The problems include challenges in accessing basic services as well as restrictions on freedom of movement. A significant number

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204. *Ibid.*

205. Martynenko, O. (ed.), *Transitional justice and the armed conflict in Ukraine: problems of holding perpetrators accountable and helping victims*.

206. For example: NGO "Group of influence", *Legislative initiative on IDPs electoral rights*, available at: <https://www.vplyv.org.ua/archives/3727> (Ukrainian) (accessed 23 February 2021).

207. Martynenko, O. (ed.), *Transitional justice and the armed conflict in Ukraine: problems of holding perpetrators accountable and helping victims*.

208. *Ibid.*

209. Office of the United Nations High Commissioner for Human Rights, *Report on the human rights situation in Ukraine for 16 February – 31 July 2020*.

of public servants, including teachers, healthcare personnel, and social workers have left the area. This has resulted in difficulties in the implementation by the state of its basic tasks in these territories. It is especially important because many old, sick, and disabled people remain in the area. This situation is aggravated by various bureaucratic difficulties and the generally poor economic situation in the region. Many small towns in the frontline zone are difficult to reach and regularly come under fire. At regional and local levels, the Donbas region is governed by the so-called military-civil administration, the functioning of which does not meet democratic standards and was foreseen as a temporary solution. In the opinion of civil society representatives, given the prolonged nature of the conflict, it is necessary to restore and develop local government administration. Residents of conflict-affected areas also face restrictions in terms of passing through the entry-exit crossing point (EECPs). Although the situation has improved over the years with regard to physical conditions (in particular at the EECP in Stanytsia Luhanska – the only crossing point in the Luhansk region), the accessibility, operational regime, as well the length of the proceedings at the checkpoints remain a matter of concern. NGOs engaging in monitoring the EECPs also provide assistance to individual persons whose right might have been violated<sup>210</sup> as well as intervene in other situations to solve systemic issues.<sup>211</sup>

### Rights of persons residing in the NGCAs

According to the limited information available, the human rights situation in the NGCAs is dire. The issue of illegal places of detention centres still remains. The *de facto* authorities of the “republics” have developed a complex system of repression in order to silence any opposition or discontent. According to the data obtained by partner NGOs from persons released from captivity, as well as through monitoring of open sources (media, social networks), illegal arrests and court hearings are used in particular against those who express pro-Ukrainian views. Detention is enforced on the basis of so-called “administrative arrest” – a preventive measure imposed without trial or charge that in practice can last up to several months and the use of torture is common. The Ukrainian NGOs’ possibilities to address these violations are limited and access to places of detention is extremely limited, even for international organizations. Most of the social problems existing in government-controlled Ukraine, mentioned previously, are also applicable to the NGCAs. There are restrictions preventing crossing the contact line. Authorities of the so-called “republics” do not allow the delivery of humanitarian aid from Ukraine or European countries, despite the challenging conditions, such as the lack of medical supplies. The so-called Donbas reintegration bill<sup>212</sup> adopted by the Ukrainian parliament in January 2018,

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210. For example, legal intervention to help a family to recover the money for the treatment of cancer wrongly confiscated at the EECP: <https://bit.ly/2ZKh07y> (Ukrainian).

211. For example: an open appeal to the Commander of the Joint Forces concerning human rights violations during the crossing the demarcation line, <https://vostok-sos.org/zvernennia-komanduvach-oos/> (Ukrainian).

212. Law No. 7163 on ‘Special aspects of state policy to ensure Ukraine’s state sovereignty in temporarily occupied areas in the Donetsk and Luhansk regions’, available at: [proszę o zamianę linka na: https://zakon.rada.gov.ua/laws/show/2268-19#Text](https://zakon.rada.gov.ua/laws/show/2268-19#Text) (Ukrainian) [accessed 23.02.2021].

has been criticized by human rights organizations as focused primarily on political aspects while failing to defend the interests of people living in the occupied territories of Eastern Ukraine.<sup>213</sup>

A group that has attracted particular attention from Ukrainian NGOs is that of persons serving their sentences in penitentiary facilities in the NGCAs where maltreatment and violence are common. As of November 2014 there were 16,200 such persons in the so-called “DPR” and “LPR”.<sup>214</sup> Reports and advocacy efforts on the part of NGOs, supported by international institutions, have drawn the attention of Ukrainian authorities, including the Verkhovna Rada Human Rights Commissioner, to this topic. As a result, transfers of more than 450 convicts to Ukraine-controlled territory were carried out between 2014 and 2019.<sup>215</sup> According to an NGO dealing with this matter, under increased public attention, the abuses of prisoners have also decreased.<sup>216</sup> A parliamentary working group was created, with the participation of civil society organizations, to develop draft legislation regulating the status of convicts.<sup>217</sup> Unfortunately, however, the final version developed following the consultations with relevant authorities did not meet the expectations of human rights organizations. Among other things, it has failed to adequately address the question of compensation as well as formally regulate the procedure for the transfer of prisoners. In the end, the law was never adopted and the political interest in this issue has decreased over time. In the context of regulated procedures likewise lacking in the “DPR” and “LPR”, decisions relating to individual transfers are largely arbitrary and taken in the framework of closed negotiations:

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<sup>213</sup>. Coynash, H., *Donbas reintegration law poses human rights risks and doesn't help hold Russia to account*, Kharkiv Human Rights Protection Group, 18 January 2018, available at: <http://khpg.org/en/1516240294> (accessed 21 February 2021).

<sup>214</sup>. Zakharov, E. and N. Melnik (eds.), *The rights of convicts detained in the ORDLO [certain regions of Donetsk and Luhansk oblasts]*.

<sup>215</sup>. Ukrinform, *Sixty more convicts transferred from occupied Donbas to government-controlled Ukraine*, 24 May 2019, available at: [accessed 23.02.2021].

<sup>216</sup>. Interview with an NGO representative.

<sup>217</sup>. Verkhovna Rada of Ukraine, Draft Law No. 8560 *On the settlement of the legal status of persons in respect of whom the legislation of Ukraine on criminal liability, criminal procedural, criminal-executive legislation has been violated as a result of armed aggression, armed conflict and temporary occupation of the territory of Ukraine*, of 5 July 2018, available at: [http://search.ligazakon.ua/l\\_doc2.nsf/link1/JH6LS00A.html](http://search.ligazakon.ua/l_doc2.nsf/link1/JH6LS00A.html) (Ukrainian) (accessed 23 February 2021).

*“(...) Not all have been transferred, unfortunately (...). And at the moment, no one really knows how many convicts remain on the other side. (...) There are a number of issues here. For example, the separatist authorities of both “republics” refuse to transfer persons who have permanent registration in the occupied territories of Donetsk and Luhansk regions, or in Crimea. Furthermore, the “LPR” authorities also refuse to transfer persons serving life sentences. Concerning transfers from “DPR”, there have been cases of refusals, among others, of persons sentenced for the crimes in which the victims are residents of the “republic”, or persons who at the beginning of the ATO [Anti-Terrorist Operation] they were under arrest in a pre-trial detention centres, and were later sentenced by illegal courts of the so-called “DPR”.*<sup>218</sup>

218. Interview with an NGO representative.

Both before and after the release, the convicts require legal aid. Such assistance is provided by specialized NGOs and consists of preparing applications to the Ukrainian Parliament Commissioner for Human Rights as well to the quasi-state bodies of “DPR” and “LPR”, for the inclusion of a particular person in the list of persons who wish to be transferred to the GCAs, as well as applications to the Ukrainian state for compensation for pecuniary and non-pecuniary damage on account of spending a long time under the control of illegal armed groups. Due to the inefficiency and/or unavailability of domestic legal remedies, a number of cases concerning convicts have also been lodged with the ECHR and are currently pending decisions by the court.

## 2.2. International procedures

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In addition to the domestic remedies described above, international remedies have also been sought by victims of the conflict, the Ukrainian state, and Ukrainian civil society to seek justice for the crimes committed in the armed conflict. This includes international courts such as the International Criminal Court, the European Court of Human Rights and the International Court of Justice, national judicial mechanisms in individual countries, as well as political interventions in the form of foreign sanctions. This section presents an overview of these procedures with a focus on the role of civil society organizations, and discusses their potential effectiveness in the pursuit of justice.

### 2.2.1. International Criminal Court

#### Understanding the ICC

Since its establishment in 2002, the International Criminal Court (ICC) has been tasked with the prosecution of perpetrators of international crimes. Based in The Hague, the ICC is either requested to investigate by a state that has signed and ratified the Rome Statute (the foundational treaty of the ICC<sup>219</sup>), or by the UN Security Council, or an investigation is initiated on the initiative of the Office of the Prosecutor (OTP) and is subject to pre-trial judicial oversight. In both scenarios, the Office of the Prosecutor conducts a “preliminary examination” to assess whether there is a reasonable basis to proceed with an investigation. The Court functions on the principle of complementarity, meaning it only intervenes when a state is unable or unwilling to deliver justice for the gravest violations of international law. Unlike human rights courts, which hold states responsible for violations, the ICC focuses on individual perpetrators of violations under international criminal law, in particular for war crimes and/or crimes against humanity. Given the nature of the crimes, these are mostly persons in decision-making positions. The ICC may step in when perpetrators risk escaping justice and punishment by means of the national court system. Low-ranked perpetrators, by contrast, are more likely to be prosecuted through domestic courts.<sup>220</sup> In historical terms, the ICC has been known to focus disproportionately on cases stemming from Africa but nowadays the multitude of preliminary examinations suggests no particular geographical focus.

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<sup>219</sup>. UN General Assembly, *Rome Statute of the International Criminal Court*, 17 July 1998, available at: <https://www.refworld.org/docid/3ae6b3a84.html> (accessed 27 February 2021).

<sup>220</sup>. United Nations, *Fulfil International Criminal Court's Potential, End Impunity, Ensure Justice for Victims*, Secretary-General Urges States Parties to Rome Statute, available at: <https://www.un.org/press/en/2017/sgsm18808.doc.htm> (accessed 18 August 2020); International Criminal Court, *Understanding the International Criminal Court*, available at: <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf> (accessed 18 August 2020).

The Rome Statute is the primary document of international law that regulates the set-up and functions of the ICC. While signature and ratification by state parties are important for the purpose of international criminal adjudication, there are other means available to cooperate with the ICC. For instance, Ukraine signed but never ratified the Rome Statute because of its alleged incompatibility with the country's constitution, back in 2001<sup>221</sup>. However, Ukraine accepts ICC jurisdiction in practice on the basis of two declarations lodged at the Court, first in reference to events at Maidan (on 17 April 2014), and second accepting the ICC's jurisdiction with respect to alleged crimes committed in all its territory since the 20th of February, 2014, (on the 8th of September, 2015).<sup>222</sup> The second declaration sets no time limit on the jurisdiction of the ICC, which means that the Court may proceed on similar terms as in the case of countries that ratified the Rome Statute. Additionally, Ukraine ratified an agreement on immunities and privileges of ICC staff, which facilitates both logistical and legal cooperation.<sup>223</sup> Nevertheless, not being a state party to the Rome Statute means that Ukraine cannot refer the situation to the ICC and is, therefore, dependent not only on the conclusions of the preliminary examination of the OTP (which would also be required in the event of a referral), but also on judicial approval for investigation by the Pre-Trial Chamber (PTC).

The preliminary examination of the situation in Ukraine was opened on the 25th of April, 2014, on the basis of the first declaration lodged by the Ukrainian government (and extended in 2015 following the second declaration). In the case of Ukraine, as in other cases where there has been no referral by a state-signatory, a decision to open an investigation taken following the preliminary examination by the OTP, is later subject to judicial review. This review creates additional scrutiny in terms of the threshold criteria such as admissibility, jurisdiction, and the interests of justice, which need to be met before proceeding to the stage of an official criminal investigation.<sup>224</sup> Being a relatively new institution, the ICC has only completed and closed a small number of cases. There are multiple concerns about the length of examination, the available

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221. Democracy Reporting International, *Ukraine and the International Criminal Court: A Constitutional Matter*, Briefing paper 60, December 2015, available at: <https://bit.ly/3rNhRve> (accessed 18 August 2020).

222. These declarations were lodged under article 12(3) regarding the acceptance of ICC jurisdiction by non-members. See: Article 12 of the Rome Statute and <https://www.icc-cpi.int/ukraine>.

223. Marchuk, I. 'Dealing with the Ongoing Conflict at the Heart of Europe: On the ICC Prosecutor's Difficult Choices and Challenges in the Preliminary Examination into the Situation of Ukraine', in: Bergsmo, M. and C. Stahn, *Quality Control in Preliminary Examination*, 2018, Brussels: Torkel Opsahl Academic EPublisher, pp. 371–97; Global Rights Compliance, *Ukraine and the International Criminal Court*, 2016, available at: <https://bit.ly/3ajvaxR> (accessed 18 August 2020).

224. This is not the case for preliminary examinations that are referred by the United Nations Security Council or a State Party of the Rome Statute. Jurisdiction refers to whether the Court can prosecute individuals (of a certain country) for international crimes on a given territory, whereas admissibility takes both the gravity of the case and complementarity of the ICC with national justice systems into account. Interests of justice is less strictly defined, with differing views between the OTP and a number of ICC judges, and has been subject to criticism in the case of Afghanistan: Akande, D. and T. de Souza Dias, *The ICC Pre-Trial Chamber Decision on the Situation in Afghanistan: A Few Thoughts on the Interests of Justice*, EJIL: Talk!, 18 April 2019, available at: <https://bit.ly/3b3P0RI> (accessed: 15 January 2021).; Office of the Prosecutor of the ICC, *Policy Paper on the Interests of Justice*, 2007, available at: <https://bit.ly/2ZW9iCB> (accessed 18 August 2020).

resources and to what extent the early-stage review process takes. In addition to legal considerations, political considerations also need to be taken into account, such as the degree of cooperation with concerned states, access to alleged perpetrators and witnesses, and whether the interests of justice can be met through a trial.<sup>225</sup>

For a number of years, the OTP has been providing interim reports on preliminary examination activities for each country on a yearly basis in order to outline the progress made for each case, the focus of the prosecutor's work, and a possible timeline for the near future. These interim reports generally present clues as to which violations of international criminal law are being considered and whether additional information is required before concluding the preliminary examination. For instance, with regard to Eastern Ukraine, the 2016 interim report mentioned a focus on the classification of the conflict, being non-international, international, or both in parallel.<sup>226</sup>

### Ukrainian civil society and the ICC

In the framework of the preliminary examination, the OTP looked into a wide range of alleged international crimes committed in Ukraine. With regard to Eastern Ukraine, the OTP examined the context of civilian deaths in the armed hostilities, the use of heavy weaponry and intentional attacks on civilians and civilian infrastructure, murder, torture and ill-treatment in detention, sexual and gender-based crimes, as well as the use of child soldiers.<sup>227</sup> In this process, as well at later stages, the office accepts that, under Article 15 of the Rome Statute, any relevant information pertaining to possible crimes, past and present, against humanity and other types of international crimes allegedly committed in the context of Ukraine.<sup>228</sup> It is important to note, however, that the OTP is not limited to those sources when it conducts preliminary examinations – it can also obtain information from public sources or request it from states, UN institutions, inter-governmental and non-governmental organisations, among others.

In practical terms, the OTP does not favour one particular source of information over another, which means it accepts any relevant submissions from state authorities, investigative bodies, non-government organizations, international organizations, and private individuals. Also, there is no prescribed format for the submission of information to the OTP nor any detailed instructions of how the facts and context

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<sup>225</sup>. The policy of the OTP on the (statutory) criteria that are applied during preliminary examination are explained in detail in: International Criminal Court, *Policy Paper on Preliminary Examinations*, 2013, available at: <https://bit.ly/3nEPFdr> (accessed 3 May 2021). For critical analyses see for example: Luban, D., 'The 'Interests of Justice' at the ICC: A Continuing Mystery, Just Security, 17 March 2020, available at: <https://bit.ly/3diMSn7> (accessed 18 September 2020); Cloet, Q., 'Ukraine May Need to Look Beyond the ICC for Justice', *Open Global Rights*, 24 July 2019, available at: <https://bit.ly/3dbVFXH> (accessed 18 September 2020).

<sup>226</sup>. International Criminal Court, *Report on Preliminary Examination Activities 2016*, 14 November 2016, available at: [https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE\\_ENG.pdf](https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf) (accessed 18 August 2020).

<sup>227</sup>. Cloet, Q., 'International Justice on Hold', *New Eastern Europe*, November-December 2019, p. 93, available at: <https://neweasterneurope.eu/2019/11/13/international-justice-on-hold/> (accessed 18 September 2020).

<sup>228</sup>. Office of the Prosecutor of the ICC, *Report on preliminary examination activities in 2019*, 5 December 2019, available at: <https://www.icc-cpi.int/itemsDocuments/191205-rep-otp-PE.pdf> (accessed 18 September 2020).

of alleged crimes should be described. It is left entirely to the submitting individual, organization, or authority to choose the most appropriate format.<sup>229</sup>

Over the years, a number of communications to the OTP were lodged by Ukrainian NGOs, based on the information collected on the ground in the process of documenting war-related violations, often with the support of international experts in humanitarian law. Such submissions pertained to, among other things, conflict-related sexual crimes,<sup>230</sup> attacks on civilians and civilian infrastructure,<sup>231</sup> war crimes and crimes against humanity committed in prisons seized and controlled by anti-government forces,<sup>232</sup> as well as persecution based on religious beliefs.<sup>233</sup>

There are differing views among civil society organizations and international legal experts as to what constitutes the best format for submissions to the ICC. These range from providing raw information only (which leaves the legal analysis up to the team of the OTP) to more detailed reports that provide extensive legal analysis of the submitted information.

The reason underlying the OTP's unequivocal stance with regard to the format of submissions is that it does not wish to discourage relevant submissions by imposing requirements on the format. As stated during an interview with a representative of the ICC OTP, the OTP neither encourages nor discourages any analysis of the information.<sup>234</sup> However, the interviewee still raises a number of important points with regard to communications. Some of them are of a general nature and refer to the proper understanding of the ICC mandate, and the preliminary examination procedure in particular, which may be unfamiliar to organizations that did not previously engage with international criminal law and its application in the context of armed conflict. First of all, an understanding of the Rome Statute, and the Elements of Crimes,<sup>235</sup> can help to guide information providers to include factual information that is relevant to the specific elements of ICC crimes (which may differ from the information relevant for domestic crimes or human rights violations). Ukrainian CSOs have clearly built capacity in this regard since the early days of the conflict and this is reflected in their work. Secondly, she points to possible confusion that can arise between preliminary examinations and investigations at the ICC – an institutional

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<sup>229</sup>. Coalition for the ICC, *How to File a Communication to the ICC prosecutor*, available at: <https://coalitionfortheicc.org/how-file-communication-icc-prosecutor> (accessed 18 September 2020).

<sup>230</sup>. International Federation for Human Rights, *Two NGOs call for an ICC investigation into conflict-related sexual crimes in Eastern Ukraine*, 25 September 2018, available at: <https://bit.ly/3qle7ku> (accessed 13 December 2020).

<sup>231</sup>. Truth Hounds and International Partnership for Human Rights, *Attacks on civilians and civilian infrastructure in Eastern Ukraine*, 20 February 2018, available at: <https://bit.ly/3qlejQK> (accessed 13 December 2020).

<sup>232</sup>. International Federation for Human Rights and Kharkiv Human Rights Protection Group, *Perpetrators of crimes against prisoners in Eastern Ukraine must be held accountable*, 24 September 2020, available at: <https://bit.ly/3qjq7mE> (accessed 13 December 2020).

<sup>233</sup>. Truth Hounds, *War in Religious Dimension: Attacks on Religion in Crimea and Donbas Region*, 2019, available at: <https://bit.ly/3b5FMPZ> (accessed 13 December 2020).

<sup>234</sup>. Interview with a representative of the ICC Office of the Prosecutor (OTP).

<sup>235</sup>. International Criminal Court, *Elements of Crimes*, 2011, available at: <https://bit.ly/3uf4NAv> (accessed: 2 May 2021).

arrangement that is different from other international courts. At the stage of the preliminary examination, the OTP uses the information provided by communication senders (and from other sources) to draw “reasonable basis” conclusions on whether an investigation should be opened, considering the requirements set out in the Rome Statute. Information provided at this stage may also (later) provide possible leads for any future investigation (if one is opened). Although the quality of information is important, the threshold of evidence at the preliminary examination stage is lower than the one applied at trial and the assessment focuses on whether (or not) there is a “reasonable basis” to believe the criteria for investigation (set out in the Rome Statute) are met.

Two more specific points were also made by the ICC representative. One of them concerns witness statements – although references to the original sources that have been used in the preparation of submissions are in general very helpful, with due consideration to protection and security concerns of individuals, if a situation moves to the investigation stage, representatives of the OTP are in any case obliged to conduct witness interviews and collect evidence directly in order to establish the facts of a case. Therefore, in many cases, submitting the information collected about the relevant events only, while securely storing details of victims and witnesses of crimes who have been interviewed by the NGOs, and provided informed consent for being contacted by the ICC should such need arise, may be an optimal solution.<sup>236</sup> In line with the above, an interviewed international legal expert also suggests presenting, as part of a communication, only a roadmap of information with summaries of witness statements while keeping files with data on witnesses separately for potential future use.<sup>237</sup> This would help to prevent the risks related to contamination of statements or breaches of confidentiality (in the case of witnesses identified in a submission). Another point raised by the ICC OTP representative with regard to submission is the importance of being transparent about the methodology utilized: where the facts came from (description of sources) and how they were established (methods of investigation, data collection and processing) are crucial to the OTP’s evaluation process. Any methodological limitations the NGOs have faced should, ideally, also be acknowledged.<sup>238</sup>

Because of the particular set-up of the ICC, and thanks to unique access to sites and witnesses, civil society organizations can play an important role in the early stages of the international justice process. However, because the ICC only acknowledges the receipt of communicated information and does not directly report or provide feedback on the content and the quality of the submissions, there are no obvious means to identify successful submissions and effective documenters. This may create an impression of information being sent to a “black box”, and is a challenge for civil society organizations in terms of their relations with donors, who are interested in measurable outcomes of project activities related to monitoring and documentation.

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<sup>236</sup>. Interview with a representative of the ICC Office of the Prosecutor (OTP).

<sup>237</sup>. Interview with an expert in international law.

<sup>238</sup>. Interview with a representative of the ICC Office of the Prosecutor (OTP).

On the receiving end, the OTP keeps a separate file for each sender (individual or organizational) who communicates information to the ICC. In case of additional and multiple communications, these remain together in the original sender file. As a consequence, the aggregate information can contain hundreds of pages because most NGOs opt to provide as much data as possible – including full witness statements and audio-visual material that is added as an attachment. An OTP staff member has confirmed that some communications alone probably reach ten thousand or more pages, requiring factual and legal analysis by the preliminary examination team.

Representatives of the ICC and the OTP visited Ukraine at least once a year during the preliminary examination, where they met with civil society organizations in both public and private gatherings. Larger gatherings are organized with the support of the International Renaissance Foundation, bringing together a group of civil society organizations working on monitoring and documentation, or are facilitated by the CICC. ICC representatives also meet individually with civil society organizations as and when this is requested. According to the interviewed ICC OTP representative, while the ICC staff cannot reveal the details of the case analysis or give an opinion on the substance of communications received at this stage, they can, however, provide an opportunity for the NGO to ask clarifying questions regarding the procedure itself. At the same time, for the ICC, meetings with information providers also provide an opportunity to seek clarifications, such as with regard to their methodology, for example.

Because of the involvement of Ukrainian civil society organizations in the early stages of a process of international justice at the ICC, many hopes and expectations have been put on the court to end impunity for alleged perpetrators in the armed conflict in Eastern Ukraine. However, the limited feedback on communications and the procedural complexity – with multiple stages and reviews – has proved to be a challenge for Ukrainian organizations.

### Current status and expectations

On the 11th of December, 2020, the Prosecutor of the International Criminal Court (ICC) Fatou Bensouda announced the completion of the preliminary investigation of the situation in Ukraine.<sup>239</sup> Bensouda stated that the statutory criteria for opening an investigation into the situation in Ukraine have been met, concluding that:

***There is a reasonable basis at this time to believe that a broad range of conduct constituting war crimes and crimes against humanity within the jurisdiction of the Court have been committed in the context of the situation in Ukraine.***

<sup>239</sup>. International Criminal Court, *Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination in the situation in Ukraine*, 11 December 2020, available at: <https://bit.ly/3agXZLk> (accessed 20 December 2020).

In the latest interim report on preliminary examination activities for 2020, the OTP states that:

***The criteria for proceeding with an investigation are met with respect to subject-matter, admissibility and the interests of justice.***<sup>240</sup>

240. International Criminal Court, Report on Preliminary Examination Activities 2020, 14 December 2020, p. 72, available at: <https://bit.ly/3b-86J5w> (accessed 15 January 2020).

The findings of the Prosecutor's Office include three broad clusters of crimes: "(i) crimes committed in the context of the conduct of hostilities; (ii) crimes committed during detentions; and (iii) crimes committed in Crimea."<sup>241</sup> The next step in the process will be a request made by the Prosecutor to the judges of the PTC to authorize a full investigation. Given that the current prosecutor's term ends on the 15th of June, 2021, she will work together with the incoming (elected) prosecutor to prepare an application to the PTC.<sup>242</sup>

Prior to the December 2020 report, the absence of a clear time-frame for each preliminary examination was the subject of criticism by the interviewed civil society organizations. One representative highlights that "after some years, we understood that ICC capacity is very low, the process is long, we started to look for other ways how to bring the perpetrators to justice",<sup>243</sup> even though the organization continues to cooperate with the ICC. A similar sentiment is voiced at an international non-government organization working on Ukraine: "The problem is that the ICC is very slow; the Office of the Prosecutor especially, it does not have terms or statutory limitations for completing/bringing to a close the different stages of proceedings."<sup>244</sup> However, another international NGO representative suggests that Ukrainian civil society organizations are not too demanding when it comes to the OTP and speeding up the preliminary examination: "In other situations, NGOs are more vocal about the time it is taking and how slowly it is moving."<sup>245</sup>

While the OTP receives regular criticism, including from international legal experts, for the fact there is no time-frame attached to preliminary examinations, the complexity and variety of such early-stage procedures should not be overlooked. The OTP "collected and reviewed information from a variety of sources about national proceedings related to potential cases identified by the OTP in its subject matter assessment." It also made requests to the national authorities of Ukraine and the

241. International Criminal Court, Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination in the situation in Ukraine.

242. International Criminal Court, Report on Preliminary Examination Activities 2020.

243. Interview with an NGO representative.

244. Interview with an NGO representative.

245. Interview with an NGO representative.

Russian Federation – and only received responses from Ukraine.<sup>246</sup> While there is an interest to do preliminary examinations as quickly as possible, the admissibility stage often takes up a lot of time because it involves an assessment of the complementarity (with national authorities) and gravity of potential cases.<sup>247</sup> As the interviewed ICC OTP representative concurs, there is no point in starting an investigation if it is going to be subject to inadmissibility challenges immediately, or dedicating resources to an investigation if the state is willing and able to investigate and prosecute the perpetrators themselves. However, she admits that these factors can be very difficult to assess.<sup>248</sup>

Given the complementarity principle embedded in the ICC's foundational treaty, the ICC's involvement should not simply raise expectations of international justice but can also act as an encouragement to justice closer to home by increasing the capacity of domestic investigative services and the general prosecutor's office to gather information (with the help of civil society organizations), investigate, prosecute, and try cases. This is confirmed by one international legal expert, indicating that "*if you can build the capacity for domestic prosecutions, that is the best place to do it. If you do not, then the ICC is the best place.*"<sup>249</sup> Ukraine's OPG is actively working on the expansion of expertise in IHL for prosecutors and investigators – conducting trainings, creating guidelines, especially because a lot of work is done on the regional level – as well as cooperating more closely with the ICC through the exchange of information about ongoing investigations at the national level.

A number of civil society organizations in Ukraine have come to understand that the ICC is not a panacea when it comes to the prosecution of alleged war crimes and crimes against humanity. Even with the OTP concluding that there are sufficient merits to an investigation and this decision being accepted by the PTC, it would be the beginning of a long path towards international justice.<sup>250</sup> Importantly also, if the case proceeds to the investigation and trial phase, as the experience of other countries shows, it is likely that only a small number of high-profile individuals will be prosecuted (provided they are apprehended and handed over to The Hague which is a challenge in itself) while other perpetrators will have to be tried by domestic courts. Nevertheless, the stage of investigation is accompanied by more resources allocated to the OTP to gather evidence in Ukraine, speak to witnesses, and potentially even create a local presence (field office) to communicate with the local society. In addition, at this stage arrest warrants can be sent out and – if needed – announced publicly.

As with the preliminary examination, there is no fixed time-limit set for arrest warrants, trials, and verdicts, and it is an open question for each country how long it would take to see a conclusion to a process of international justice. Witnesses may no longer be alive by then and states may also grow wary about a continued reliance

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<sup>246</sup>. International Criminal Court, *Report on Preliminary Examination Activities 2020*.

<sup>247</sup>. *Ibid.*

<sup>248</sup>. Interview with a representative of the ICC Office of the Prosecutor (OTP).

<sup>249</sup>. Interview with an expert in international law.

<sup>250</sup>. See: Jordash, W. and A. Mykytenko, *International Criminal Court is no panacea for Ukraine*.

upon the ICC for ending impunity to perpetrators of international crimes. Furthermore, there are also domestic challenges in Ukraine, in particular the reluctance of Ukrainian politicians to push for the ratification of the Rome Statute (although progress has been lately made on the basis of a recently adopted compromise draft bill enabling punishment, in full accordance with international law, for war crimes and crimes against humanity).<sup>251</sup> The said reluctance is largely the result of unease over the possible prosecution of the alleged crimes committed by the Ukrainian armed forces, volunteer battalions, security service, or other formations and the OTP's obligation of impartiality and looking at perpetrators on both sides of the armed conflict.<sup>252</sup> This is how interviewees explained this reluctance:

***Ukrainian policy on this question is that 'our soldiers are saints and we must not investigate their actions'.<sup>253</sup>***

<sup>253</sup>. Interview with an NGO representative.

***[I]n fact they are afraid that these will be used against Ukrainian soldiers and volunteers, who also tortured and killed. We know about this; our reports have cases committed on both sides (...).<sup>254</sup>***

<sup>254</sup>. Interview with an NGO representative. See also: Jordash, W. and A. Mykytenko, *International Criminal Court is no panacea for Ukraine*.

In sum, the ICC's possible role in finding justice in the context of the armed conflict in Ukraine is likely to be one piece of the puzzle and not a silver bullet for civil society. The OTP's activities are most effective in tandem with a number of other initiatives, through the domestic justice system and supported by regional human rights courts, so judges in The Hague can focus on major perpetrators who risk escaping trial and conviction for alleged crimes. The information gathered by civil society organizations for submissions to the ICC also serves other purposes and can be used by national authorities and offer both leads and contextual information for other forms of adjudication.

<sup>251</sup>. Draft Law No. 2689 *Amendments to Certain Legislative Acts of Ukraine on the Implementation of International Criminal and Humanitarian Law* (proposed December 2019) has been approved by the Parliamentary Committee in early February 2020 and passed in the parliament of Ukraine (Verkhovna Rada) in its first reading in September 2020. Available at: [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=67804](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=67804) (accessed 20 August 2020). See also: 1.1. Responsibility of the perpetrators of severe crimes.

<sup>252</sup>. Marchuk, I. 'Dealing with the Ongoing Conflict at the Heart of Europe: On the ICC Prosecutor's Difficult Choices and Challenges in the Preliminary Examination into the Situation of Ukraine.'

## 2.2.2. European Court of Human Rights

### Understanding the ECHR

The European Court of Human Rights is the judicial organ that supervises whether state signatories protect and enforce the rights laid down in the Convention for the Protection of Human Rights and Fundamental Freedoms (agreed in 1950 and entered into force in 1953, hereinafter: Convention.)<sup>255</sup> From its foundation in 1959 until 1998 it was not a full-time and permanent body but composed of chosen members from a consultative assembly. Since 1998, it has been a full-time judicial institution mandate with the control of states' observance of the Convention and its protocols – their implementation and enforcement. It serves as a court of final resort for individuals who consider their human rights to have been violated but have exhausted the national legal system. It also hears cases referred to by enterprises, NGOs, or groups of individuals, as well as inter-state cases.<sup>256</sup>

In the last couple of decades, a number of reforms have been implemented to address the increasing number of cases, including the introduction of admissibility criteria (entered into force on the 1st of June, 2010). Thereafter, a single judge may reject inadmissible applicants on grounds related to the content, the time-frame, and the applicant(s) in question. In short, any application should relate to one or more rights specified in the Convention; applicants must have taken their case first to national courts up to the highest possible level and only then proceed to ECHR (within six months of a final national decision) with no other procedure for international investigation already taking place; and the applicant(s) must be personally and directly affected through a violation of the convention and suffer a significant disadvantage.<sup>257</sup>

Compared to individual applications, inter-state cases are rather rare: as of late 2020 there have only been 24 inter-state cases since the Convention entered into force in 1953, with nine inter-state cases currently pending before the court. As with an individual application, a state must set out the facts and alleged violations with arguments in application against another state, which is then received by the court and communicated to the respondent state. After communication, the respondent state is invited to submit observations to the case. Unlike in individual applications, a larger chamber of seven judges decides on admissibility of the case, may grant interim-measures, as well as a possible referral or relinquishment to the grand chamber (comprising seventeen judges) for an eventual judgment.<sup>258</sup>

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<sup>255</sup>. Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, available at: <https://www.refworld.org/docid/3ae6b3b04.html> (accessed 27 February 2021).

<sup>256</sup>. European Court of Human Rights, *The ECHR in 50 questions*, available at: <https://bit.ly/2ZkRLn7> (accessed 15 September); Merrills, J. G., 'European Court of Human Rights', *Encyclopædia Britannica*, available at: <https://bit.ly/3tW80Kw> (accessed 15 September).

<sup>257</sup>. European Court of Human Rights, *Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention*, 13 May 2004, available at: <https://bit.ly/2N7jNA5> (accessed 15 September).

<sup>258</sup>. European Court of Human Rights, *Q&A on Inter-State Cases*, August 2020, available at: <https://bit.ly/3u6Hfyi> (accessed 15 September).

Ukraine signed and ratified the Convention in 1997, which gives both the state and its nationals the possibility to lodge complaints at the court, following the above-mentioned admissibility criteria. There are currently five inter-state cases pending before the ECHR, two of which were relinquished to the court's grand chamber and three of which will be decided by a chamber. Below is an overview:<sup>259</sup>

**Before the grand chamber:**

1. *Ukraine v. Russia (re Crimea) (nos. 20958/14 and 38334/18)* lodged with the Court by Ukraine on the 13th of March, 2014, and the 26th of August, 2015, respectively, regarding the systematic human rights violations committed by the Russian Federation in Crimea.

On the 14th of January, 2021, the Grand Chamber of the ECHR issued a decision on admissibility of the case *Ukraine v. Russia (re Crimea) (application no. 20958/14)* in which it declared, by a majority, that the application is partly admissible. The Court also considered it appropriate to examine both the admissibility and the merits of the complaint regarding the "transfer of convicts" from Crimea to correctional institutions within the territory of Russia as well as another inter-State application, *Ukraine v. Russia (no. 38334/18)* lodged on 11 August 2018, in which that complaint was also raised, at the same time as the merits stage of these proceedings. In consequence, it joined application no. 38334/18 to the present case.

2. *Ukraine and Netherlands v. Russia (no. 8019/16)* concerning the Russian Federation exercising control over separatists and armed groups operating in Eastern Ukraine.

The case *Ukraine v. Russia (re Eastern Ukraine) (no. 8019/16)* was lodged together with *Ukraine v. Russia (re Crimea)* on the 13th of March, 2014, and on the 9th of February, 2016, it was subject to reorganization (geographical division) by the court. On the 27th of November, 2020, the Grand Chamber decided to join to the application *Ukraine v. Russia (re Eastern Ukraine)* two other inter-State applications that were pending before a Chamber:

- *Ukraine v. Russia (II) (no. 43800/14)* lodged on the 13th of June, 2014, concerning the abduction of three groups of children in Eastern Ukraine and their temporary transfer to Russia on three occasions between June and August 2014;
- *The Netherlands v. Russia (no. 28525/20)*, lodged on the 10th of July, 2020, concerning the shooting down on the 17th of July, 2014, of the Malaysia Airlines flight MH17 over Eastern Ukraine.

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<sup>259</sup> European Court of Human Rights, *Ukraine: Press Country Profile*, February 2021, available at: [https://www.echr.coe.int/Documents/CP\\_Ukraine\\_ENG.pdf](https://www.echr.coe.int/Documents/CP_Ukraine_ENG.pdf) (accessed 14 May 2021).

### **Before a chamber:**

1. *Ukraine v. Russia (VIII)* (no. 55855/18) lodged on the 29th of November, 2018, concerning the naval incident that took place in the Kerch Strait in November 2018.
2. *Ukraine v. Russia (IX)* (no. 10691/21) lodged on the 19th of February, 2021, concerning the complaints on an ongoing administrative practice by the Russian Federation consisting of targeted assassination operations against perceived opponents of the Russian Federation, in Russia and on the territory of other States.

Over the years, the court has reorganised a number of applications submitted by Ukraine and attempted to divide most claims into a geographical separation between Crimea and Eastern Ukraine. The grand chamber has seized upon these after being relinquished by the chamber dealing with these applications, on the 7th of May, 2018, given the weight and importance of the claims. In response to the changes described above, the Government Agent before the ECHR – a special representative of the Ministry of Justice of Ukraine who responds to and communicates with the ECHR on behalf of the Ukrainian government indicates the following:

***In principle, the joining of all the applications by the ECHR in two major cases, was a correct thing to do, because in 2017 Russia started to deploy delaying tactics, to run one case against another. This was an attempt not to have one considered before another. It was the correct thing to do by the Court.<sup>260</sup>***

<sup>260</sup>. Interview with the Government Agent before the European Court of Human Rights, Ministry of Justice of Ukraine.

Since the beginning of the armed conflict, in addition to the inter-state cases, a large number of individual cases (over 6,500) concerning the hostilities both in Eastern Ukraine and Crimea have been presented before the court. They concern violations such as unlawful imprisonment, torture, injuring and killing of civilians, and damage to property as a result of indiscriminate shelling. The list also includes well-known claims related to the downing of the MH17 flight as well as the imprisonment of Oleg Sentsov. Applications are lodged in different configurations, with claims against Ukraine, against the Russian Federation, or even against both state parties.<sup>261</sup>

With regard to individual applications, the Ukrainian Ministry of Justice only keeps track of cases for which it has been informed by the court. In the context of the conflict, these are cases wherein Russia is named as a principal violator of the applicant's rights and Ukraine is indicated as an auxiliary violator (who is required to fulfil certain positive obligations towards the victim), cases involving detention where both state parties are identified, and cases directed specifically against Ukraine from persons allegedly residing in the uncontrolled territories. If cases are not communicated to the Ministry, then it has no knowledge of the claims and contents therein.

<sup>261</sup>. European Court of Human Rights, *Ukraine: Press Country Profile*.

The case law and practice developed to date by the ECHR in relation to situations of armed conflict is very broad and diverse. It encompasses cases concerning the establishment of jurisdiction over a particular war-torn territory, cases arising from Article 2 of the Convention (the right to life), Article 3 (prohibition of torture) and Article 7 (punishment solely on the basis of law), cases related to issues of post-conflict settlement (primarily the legality of amnesties for war criminals), and cases involving universal jurisdiction and recognition of the jurisdiction of international criminal tribunals.<sup>262</sup> While certain expectations as to the ECHR's stance on some issues can be assumed, the complexity of this jurisprudence, as well as the individual characteristics of each conflict, make the predictions about the potential results of the cases related to the conflict in Ukraine very difficult.

### Ukrainian civil society and the ECHR

Ukrainian civil society plays an important role in the pursuit of justice before the ECHR, with several organizations extensively engaged in providing both legal assistance and representation in individual cases. As stated by one Ukrainian NGO that has represented clients in nearly 100 cases at the Court, most of these complaints were lodged both against Ukraine and Russia: "*our position is that Ukraine is also to blame for some part of those violations, as it does not protect the rights of its citizens*".<sup>263</sup>

The application process is not without its challenges. In recent years, many individual applications have been declared inadmissible by the court. In 2019 alone, 2,227 cases were declared inadmissible and removed from the registry. The ECHR took this step when cases were presented with insufficient evidence and supporting documents, thereby not showing a violation of the Convention and a significant disadvantage resulting from it. One legal expert explains the difficulty of having a case declared admissible by the ECHR:

***[T]he main problem with ECHR is the question of jurisdiction, in all of the cases – the first question is ‘please give arguments that Russia has jurisdiction over Donbas.’ It is difficult from an NGO position to collect this evidence. Much is based on videos on photos, but not on a situation where we can make this link obvious.***<sup>264</sup>

<sup>264</sup>. Interview with an NGO representative.

Negative experiences with individual lawyers have made the work more difficult for all civil society organizations. In 2018, a Ukrainian lawyer was permanently

<sup>262</sup>. Yevseev, A. 'Crimes committed in armed conflict in the light of the legal position of the European Court of Human Rights', in: Krivenko, S. and V. Novykov, *War crimes in Donbas. Challenges of holding perpetrators to account*, CivilM+ platform, 2020, available at: <https://bit.ly/38JT2K3> (English), <https://bit.ly/3dlcpfs> (Ukrainian), <https://bit.ly/2NCbfRW> (Russian) [accessed 16 February 2021].

<sup>263</sup>. Interview with an NGO representative.

barred from supporting both pending and future applications, over claims on behalf of deceased applicants and the forgery of submitted documents.<sup>265</sup>

There is also a problem related to the fulfilment of the time-related admissibility criteria and the lack of knowledge about these requirements. For instance, as reported during interviews with lawyers from a number of NGOs, many former detainees who were subjected to humiliating treatment and torture were not aware of the necessity to lodge an application within six months of the date on which a final domestic decision was taken. Civil society organizations play an important role in extending information about possible legal remedies to victims of violations.

With regard to the inter-state cases, the information collected by the NGOs is useful as evidence that substantiates the claims made by the Ukrainian government. The Ministry of Justice's approach to the inter-state cases is not only to provide evidence for Russia's military presence in the NGCAs but also to shed light on Russian economic and administrative control of these territories. For the purpose of preparing evidence and argumentation, the Ministry works with civil society organizations on different levels: to acquire general information about Russia's involvement collected by NGOs during their documentation activities and to use the evidence from individual cases of NGO clients for the purpose of strengthening the inter-state cases:

***Being a user, I can only give a positive assessment of the quality [of information] from Ukrainian NGOs. It depends on how you use it of course, but there is, for example, information which we cannot get from other sources, including from state organs, when they have not been able to do this kind of investigation so far. In such cases they are extremely useful.***<sup>266</sup>

<sup>266</sup>. Interview with the Government Agent before the European Court of Human Rights, Ministry of Justice of Ukraine.

### Current status and expectations

Hitherto, the Court has only decided on the admissibility of the case of *Ukraine v. Russia (re Crimea)* on the 14th of January, 2021,<sup>267</sup> while the other cases – including those regarding Eastern Ukraine – await a first hearing in the future. The decision regarding the admissibility of the Crimean cases, meaning that the Court will proceed to consideration of the case on its merits, was positively received in Ukraine. In particular, of crucial importance is that the Court recognized Russia's exercise of effective control over Crimea since February 2014, which indicates its legal responsibility under the Convention for the alleged severe human rights violation on the peninsula (also for several weeks prior to the annexation).

<sup>265</sup>. New Eastern Europe, *International Justice on Hold*, p. 93.; European Court of Human Rights, *Ukrainian lawyer permanently barred from representing applicants before the European Court of Human Rights*, 12 December 2018, available at: <https://bit.ly/3jOpDCg> (accessed 15 September 2020).

<sup>267</sup>. European Court of Human Rights, *Complaints brought by Ukraine against Russia concerning a pattern of human-rights violations in Crimea declared partly admissible*, 14 January 2021, Press release, available at: <https://bit.ly/3b3Mea3> (accessed 14 February 2021).

Furthermore, one of the important recent developments has been the fact that the inter-state application lodged by the government of The Netherlands against the Russian Federation over its role in the downing of the MH17 flight was joint to the Ukrainian case regarding Eastern Ukraine and the applications are examined together which is expected to have a significant impact on both the inter-state case as well as on individual cases. As a result of the Court's decision taken in late December 2020, relatives of the victims of the downing of MH17, whose individual applications are pending before the Court, were added to the Donbas case as third parties.

While there is still a significant number of applications awaiting a decision, all of those related to the armed conflict which have not otherwise been declared inadmissible have been given the status of 'pending'. As indicated by one organization which had lodged several applications alleging violation of the right to effective legal remedy – because there was no court decision at the national level – the cases have been a waiting judgment for several years already: “they are ‘stuck’ at the European Court and no one knows how long they will stay there”.<sup>268</sup> The pending status of all individual cases related to both Eastern Ukraine and Crimea is the consequence of the ECHR's decision to prioritise a decision on five inter-state cases between Ukraine and the Russian Federation, to determine the jurisdiction of the state party. In several instances, Ukraine has argued that Russia should be treated as an occupying power and therefore responsible for violations of human rights stipulated in the Convention.<sup>269</sup> With the recent decision on admissibility of the inter-state Crimean case, there are expectations that ECHR decisions on individual Crimean cases will follow. However, the situation is different for Eastern Ukraine, and experts have indicated that this process may last much longer as the issue of Russia's effective control over part of the Donbas territory is more complex.<sup>270</sup> As stated by an NGO representative, there is no reliable prognosis about when those cases could be decided (“It is a long process and we always tell our clients that it will a couple of years before they can receive a decision.”)<sup>271</sup> It is important to make the clients aware of this fact but also to encourage them to remain interested in the case:

**There is some hope though. If you look at other conflicts, for example Nagorno-Karabakh, Georgia or Turkey, judgements have eventually been issued...the most important thing is that applicants live to see it and they don't lose interest.**<sup>272</sup>

<sup>272</sup>. Interview with an NGO representative.

<sup>268</sup>. Interview with an NGO representative.

<sup>269</sup>. European Court of Human Rights, *Grand Chamber to examine four complaints by Ukraine against Russia over Crimea and Eastern Ukraine*, 9 May 2018, available at: <https://bit.ly/3rVtzEr> (accessed 15 September 2020).

<sup>270</sup>. Milanovic, M., *ECtHR Grand Chamber Declares Admissible the Case of Ukraine v. Russia re Crimea*, EJIL: Talk!, 15 January 2021, available at: <https://bit.ly/3tYCW7R> (accessed 14 February 2021).

<sup>271</sup>. Interview with an NGO representative.

It should also be noted that other developments are likely to have an impact on the pathway to justice through the ECHR. Most notably, the Russian Federation's repeated threats to withdraw from the Convention and attempt to escape control by the Court may have moved closer to reality because of recent changes in the Russian constitution which would give domestic law supremacy over international law.<sup>273</sup> This could mean a greater likelihood of non-implementation of the Court's decisions, as well as a dismissal of a significant number of ongoing international legal cases where the Russian Federation is directly implicated.<sup>274</sup>

### 2.2.3. International Court of Justice

#### Understanding the ICJ

The International Court of Justice is the principal judicial organ of the United Nations, which gives both advisory opinions to UN bodies and agencies and settles inter-state disputes. It is as a successor to the inter-war Permanent Court of Justice – upon which the current ICJ statute and jurisdiction is based.<sup>275</sup> Since its establishment in 1945, the Court has been based in The Hague. While member states of the United Nations are party to the Court's statute, this does not automatically translate into ICJ jurisdiction over each issue or dispute that arises between members. There are several ways in which the Court can have jurisdiction. First, in the form of dispute settlement and an adversarial trial between states ("contentious issues"), second, through the implementation of interim measures pending a final judgement ("incidental jurisdiction") and third, in providing advisory opinions to UN bodies and agencies. Proceedings can be commenced both through special bilateral (or multilateral) agreements or by means of a unilateral application.<sup>276</sup>

In most contentious issues, either explicit consent should be given by all state parties for the ICJ to have jurisdiction over the matter or jurisdiction is assigned via a convention or treaty that is presently in force. Alternatively, an optional declaration of consent to compulsory jurisdiction can be lodged by state parties. Before the ICJ decides whether it has jurisdiction, responding states can make preliminary objections to argue against further proceedings by the Court. If the ICJ, however, decides it has jurisdiction, responding states are asked to file a memorial addressing the claim made by the applicant state(s).<sup>277</sup>

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<sup>273</sup>. Heinrich Boll Stiftung, *A Classic Dilemma: Russia's Threat to Withdraw from the Council of Europe*, 21 February 2018, available at: <https://eu.boell.org/en/2018/02/21/classic-dilemma-russias-threat-withdraw-council-europe> (accessed 15 September 2020); Ioffe, Y., *The Amendments to the Russian Constitution: Putin's Attempt to Reinforce Russia's Isolationist Views on International Law?*, EJIL: Talk!, 29 January 2020, available at: <https://bit.ly/3jKomfx> (accessed 15 September 2020).

<sup>274</sup>. Government of The Netherlands, *The Netherlands brings MH17 case against Russia before European Court of Human Rights*, 10 July 2020, available at: <https://bit.ly/2Za3rZQ> (accessed 15 September 2020).

<sup>275</sup>. International Court of Justice, *The International Court of Justice: Handbook*, available at <https://www.icj-cij.org/files/publications/handbook-of-the-court-en.pdf> (accessed 20 August 2020), pp. 12-19.

<sup>276</sup>. *Ibid.*, pp. 49-50.

<sup>277</sup>. *Ibid.*, pp. 59-62.

A decision is the most common result of proceedings at the ICJ – although discontinuance of the entire case or part of the case through withdrawal by the parties is possible in some situations. A judgement is delivered in public and is based on a majority opinion with the option of dissenting opinions. There is no appeal available once a decision has been made on the merits of the case. While the Court's judgement is binding and final, questions arise about the enforcement of this compulsory jurisdiction. According to the UN Charter, member states accept any ICJ decision as binding and final and strive to comply with it. In practice, it rarely happens that a judgement remains unimplemented.<sup>278</sup>

While the ICJ and ICC are two international courts, it should be stressed they are two different, unaffiliated bodies that focus on different types of international law. The ICC does not belong to the United Nations system and therefore does not closely cooperate with the ICJ nor share its jurisdiction. Unlike the ICC, the ICJ has no possibility to try individuals accused of international crimes – it also does not have a prosecutor with the ability to initiate proceedings.<sup>279</sup> Finally, it should be noted that the United Nations Security Council (UNSC) also disposes of means to recommend, adjudicate, or use veto case enforcement in disputes.<sup>280</sup>

### Ukrainian civil society and the ICJ

Only member states of the UN have the possibility to bring a case before the ICJ. There is no direct path for UN agencies, civil society organizations, or individuals to lodge an application at the Court. In the context of the armed conflict of Ukraine, any international crime committed but not recognised or backed by an applicant state has no chance of being considered. As such, within the context of the armed conflict in Eastern Ukraine, only cases submitted by Ukraine or Russia stand a chance of being accepted by the ICJ. The ICJ may, however, receive information from public international organizations (such as the EU and OSCE).

For the above reason, Ukrainian civil society organizations have shown only a limited interest in the ICJ beyond the current proceedings taking place in The Hague, although legal experts and state authorities have kept a close eye on the possible ramifications for other international court cases.

### Current status and expectations

On the 16th of January, 2017, Ukraine lodged an application instituting proceedings against the Russian Federation on the basis of the International Convention for the Suppression of the Financing of Terrorism of the 9th of December, 1999, (hereinafter: ICSFT) and of the International Convention on the Elimination of All Forms of Racial

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<sup>278</sup>. *Ibid.*, pp. 69-77.

<sup>279</sup>. International Court of Justice, *What differentiates the from the International Criminal Court and the ad hoc international criminal tribunals?*, available at: <https://www.icj-cij.org/en/frequently-asked-questions> (accessed 20 August 2020).

<sup>280</sup>. Johnstone I., 'Legislation and Adjudication in the Un Security Council: Bringing down the Deliberative Deficit', *The American Journal of International Law*, vol. 102, no. 2, 2008, pp. 275-308. JSTOR, available at: [www.jstor.org/stable/30034539](http://www.jstor.org/stable/30034539) (accessed 20 August 2020).

Discrimination of the 21st of December, 1965, (hereinafter: CERD). Case 166 is also known as *Ukraine v. Russian Federation*.<sup>281</sup> The proceedings are grounded on the fact that both Ukraine and Russia are parties to ICSFT and CERD. Ukraine instituted proceedings against Russia and requested the Court to indicate provisional measures to be applied by the ICJ aimed at safeguarding the rights claimed under the conventions. In the part of the application concerning Eastern Ukraine, the Ukrainian government claims alleged violations in the form of instigating an armed insurrection against the authority of the Ukrainian state, military intervention, financing acts of terrorism, and violating the human rights of millions of Ukraine's citizens including their right to life.<sup>282</sup> In response, the Court found that conditions required by its statute for it to indicate provisional measures were met only with regard to Crimea and CERD.<sup>283</sup> With regard to Eastern Ukraine and ICSFT, the Court observed that, while the acts to which Ukraine refers have given rise to the death and injury of a large number of civilians, the Ukrainian government was said to not have provided sufficient evidence that those acts constitute financing acts of terrorism.<sup>284</sup>

Since then, Ukraine has presented its memorial (in 2018) clarifying the grounds for the Russian Federation's alleged violations of the two international conventions. Meanwhile, in the same year, Russia provided its preliminary objections in response to the memorial, in an attempt to disprove the ICJ's jurisdiction in the disputed matter.<sup>285</sup> By means of a Court order on the 8th of November, 2019, the ICJ found that it has jurisdiction to entertain the claims made by Ukraine and that the application should be considered admissible (based on Article 24, paragraph 1, of ICSFT; and Article 22 of CERD).<sup>286</sup> Subsequently, Russia has been requested to present a counter-memorial to Ukraine's claims under the conventions – for which it was granted a time-limit extension until the 8th of April, 2021.<sup>287</sup>

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<sup>281</sup>. International Court of Justice, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, [Developments related to the case] available at: <https://www.icj-cij.org/en/case/166> (accessed 20 August 2020).

<sup>282</sup>. *Ibid.*

<sup>283</sup>. It has ruled that Russia must refrain from imposing limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the Mejlis, and ensure the availability of education in the Ukrainian language.

<sup>284</sup>. Article 2.1 of ICSFT defines the crime of terrorist financing as the offense committed by "any person" who "by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out" an act "intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act".

<sup>285</sup>. International Court of Justice, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*.

<sup>286</sup>. *Ibid.*

<sup>287</sup>. *Ibid.*

While the ICJ may eventually find the Russian Federation at fault, in due time, and that it has violated the above-mentioned conventions, it remains hard to predict how the judgment would be enforced upon a permanent member of the UNSC. Nevertheless, a future ICJ ruling could create jurisprudence related to Russia's alleged role in the armed conflict via its support of separatist groups in the NGCAs and which in turn would have an impact on decisions made by other international courts as well as regional and domestic courts.

#### 2.2.4. District Court of The Hague (MH17)

##### Understanding the MH17 Trial

One month after the flight MH17 crashed in Eastern Ukraine on the 17th of July, 2014, killing 298 passengers, a Joint Investigation Team (JIT) was set up to oversee a criminal investigation into the crash. The public prosecutor of the Netherlands gathered relevant authorities from Belgium, Ukraine, Australia, and Malaysia (whose nationals were among the victims), to pursue investigative activities with the goal of establishing the cause and responsibility for the airplane crash. The JIT works on the basis of interviews, official documents, as well as open-source information. On the 28th of September, 2016, at a press conference, the JIT gave a preliminary conclusion about the cause of the crash, namely that MH17 was shot down by a Buk missile from a rebel-controlled area in Eastern Ukraine. The investigators retraced the missile system's transportation back to Russia and preliminarily identified a number of suspects. Two years later, the JIT provided more details about a Russian brigade (53rd anti-aircraft brigade in Kursk) allegedly responsible for the convoy carrying the missile into the NGCAs in Eastern Ukraine.<sup>288</sup>

On the 5th of July, 2017, the countries involved in the JIT decided that any future prosecution and trial of suspects would take place in the Netherlands under Dutch law. To this end, an agreement was concluded between the Netherlands and Ukraine to facilitate the countries' international cooperation during the prosecution and trial. While the Dutch took active steps to hold the perpetrators to account, they were supported in this effort by other EU member states, the EU institutions as well as NATO. Earlier, in 2015, the idea of a UN tribunal was explored as a means to investigate the MH17 crash but was rejected by the Russian Federation. A Malaysian draft resolution at the UNSC to finalize the technical investigation and ensure cooperation on the criminal investigation was vetoed by Russia.<sup>289</sup>

Given the inertia at the United Nations, the Dutch prosecution service proceeded with the plan to prosecute individuals considered responsible for the crash under

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<sup>288</sup>. MH17 Trial, *Timeline*, available at: <https://www.courtmh17.com/en/timeline/timeline-mh17-trial> (accessed 8 September 2020); BBC News, *MH17 missile owned by Russian brigade, investigators say*, 24 May 2018, available at: <https://www.bbc.com/news/world-europe-44235402> (accessed 8 September 2020).

<sup>289</sup>. MH17 Trial, *Timeline*; The Guardian, *Russia rejects calls for UN tribunal to prosecute MH17 suspects*, 26 June 2015, available at: <https://bit.ly/379iF5L> (accessed 15 September 2020); UN News, *Security Council fails to adopt proposal to create tribunal on crash of Malaysian Airlines flight MH17*, 29 July 2015, available at: <https://bit.ly/3b2ztNa> (accessed 8 September 2020).

Dutch law – three Russians and one Ukrainian citizen were issued an international arrest warrant. On the 19th of June, 2019, a list of four suspects was announced as part of a case that would be brought before the District Court of The Hague. JIT identified the four as Igor Girkin, Sergei Dubinsky, and Oleg Pulatov from Russia, as well as Ukrainian Leonid Kharchenko. Later that month, the court appointed all judges and set the first hearing for the 9th of March, 2020. In the meantime, the suspects were ordered to appear before the court by means of a writ of summons prepared by the prosecution. While the first hearings have taken place in the first half of 2020, they are expected to last at least until the end of November 2021 with the possibility of additional hearings added in the future.<sup>290</sup>

### Ukrainian civil society and the MH17 trial

Since the investigation has been led by a group of public authorities, civil society organizations have hitherto played no major role in the JIT and the ongoing trial. Although there may have been contacts between the investigative team and civil society organizations during the initial stages of the investigation, all public information points to JIT's primary reliance on open-source data for the purpose of gathering evidence against the alleged perpetrators.<sup>291</sup> According to a lawyer from one Ukrainian civil society organization, this use of new investigative methods, including the use of open-source intelligence has its benefits, because it has allowed JIT to pursue its investigation in the context of an ongoing war and without direct access to the NGCAs.<sup>292</sup> Moreover, evidence presented as part of the MH17 trial will also be of importance to other cases, and results of the criminal investigation will be able to be used in criminal investigations in other countries. As an official of Ukraine's Ministry of Justice highlights:

***Of course we are looking very closely at the MH17 case, when all the evidence of the Joint Investigative Team (JIT) was made public, we immediately collected and translated and filed it with the Court as further evidence of Russian involvement. Basically, this is very simple proof of the Russian boots on the ground, as a means to prove effective control.***<sup>293</sup>

<sup>293</sup>. Interview with the Government Agent before the European Court of Human Rights, Ministry of Justice of Ukraine.

<sup>290</sup>. BBC News, *MH17: Four charged with shooting down plane over Ukraine*, 19 June 2019, available at: <https://www.bbc.com/news/world-europe-48691488> (accessed 15 September 2020); MH17 Trial, *Court dates*, available at: <https://www.courtmh17.com/en/timeline/court-dates> (accessed 8 September 2020); , MH17 Trial, *Summary of the Day in Court 3 July 2020*, available at: <https://bit.ly/3aZgByC> (accessed 8 September 2020).

<sup>291</sup>. MH17 Magazine, *Open source research*, March 2018, available at: <https://bit.ly/2LLpEdL> (accessed 15 September 2020).

<sup>292</sup>. Interview with an NGO representative.

In November 2018, the JIT also made an appeal for witnesses who could testify about the involvement of “*individuals within the military and administrative hierarchy who enabled the shooting down of MH17 in Eastern Ukraine using a BUK TELAR.*” This appeal was announced together with recorded conversations, their summaries, and a number of questions about additional individuals with an alleged role in the planning and execution of military operations.<sup>294</sup> Apart from this, the MH17 trial has mostly focused on relatives of the deceased or those related to the deceased.

Civil society organizations have been closely following developments nonetheless, because the MH17 trial has provided some impetus for other ongoing activities related to the conflict in Eastern Ukraine. One civil society representative indicates that it was only possible to get Igor Girkin on Interpol’s Red Notice list through the Dutch court case: “*Because of MH17 he is there now.*”<sup>295</sup> One donor organization representative also notes that: “*the shooting down of the MH-17 plane provoked an international response and a joint investigation*” and has been the exception to the general rule that “*there is a very limited interest and willingness on behalf of the EU and other international actors to participate in re-establishing justice and rule of law.*”<sup>296</sup>

### Current status and expectations

As indicated in the previous section, The Netherlands also decided to lodge an application against the Russian Federation at the ECHR, in addition to the ongoing MH17 Trial. This was meant to support individual cases that were already brought before the ECHR by the relatives of some of the deceased passengers.<sup>297</sup> While the inter-state case (and its related individual cases) before the ECHR may take years before a judgement, there is a high chance that the District Court of The Hague will rule on the case sooner rather than later. One advantage to the Dutch trial is the fact that conviction can happen in absentia and, therefore, does not depend on the presence of the suspects. At present, only one out of four defendants (Oleg Pulatov) has a lawyer representing him. With most of the defendants not making use of their right to a lawyer, the proceedings are likely to be concluded more quickly. However, in 2020 the court granted the defence its request to conduct additional investigations.<sup>298</sup> As of early 2021, the case is still in the pretrial review stage, and the trial as to the merits of the case is expected to start in June 2021.<sup>299</sup>

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<sup>294</sup>. Politie, *MH17 Witness Appeal* November 2019, available at: <https://bit.ly/3d8caUT> (accessed 8 September 2020).

<sup>295</sup>. Interview with an NGO representative.

<sup>296</sup>. Interview with an NGO representative.

<sup>297</sup>. Euronews, *Dutch government to take Russia to European court over the downing of Flight MH17*, 10 July 2020, available at: <https://bit.ly/37aWg8d> (accessed 15 September 2020).

<sup>298</sup>. RFE/RL, *Court In MH17 Trial Grants Defense Request For Additional Investigations*, 3 July 2020, available at: <https://bit.ly/3rOL8G5> [accessed: 15.09.2020]; Deutsche Welle, *Flight MH17 families seek answers as suspects face trial in absentia*, 8 December 2019, <https://bit.ly/3d90LnF> (accessed 15 September 2020).

<sup>299</sup>. MH17 Trial, *Hearing on the merits in the MH17 criminal trial expected in June 2021*, available at: <https://bit.ly/3yHqSKS> (accessed 8 March 2021).

## 2.2.6. Universal jurisdiction

### Understanding universal jurisdiction

Universal jurisdiction is a recognized principle of international law, which derives, inter alia, from the Geneva Conventions that enshrine the obligation to search and prosecute perpetrators of serious violations of humanitarian law,<sup>300</sup> as well as from the UN Convention against Torture, which places an obligation upon the state parties to establish universal jurisdiction over cases of torture.<sup>301</sup> In practice, universal jurisdiction is a legislative framework that allows a domestic court of a country to claim criminal jurisdiction beyond the country's borders, regardless of where the crime was committed (and in some cases regardless of the nationality or residence of the perpetrator). A famous example was the case of the Chilean dictator Augusto Pinochet who was arrested in the UK in 1998 following an extradition request issued by the Spanish National Court. More recently, in 2014, a French court convicted Pascal Simbikangwa, a former senior intelligence chief from Rwanda, of genocide and complicity in crimes against humanity and sentenced him to 25 years in prison.<sup>302</sup> The use of universal jurisdiction has grown in recent years, with the situation in Syria being "an engine of the development of legislation and practice" as a result of the lack of other avenues for accountability for perpetrators of graves crimes (namely, the limited jurisdiction of the ICC in Syria as the country is not a party to the Rome Statute, as well as the blocking of the creation of the ad hoc tribunal by the veto power of Russia and China).<sup>303</sup> An important characteristic of universal jurisdiction, which also differentiates it from criminal liability under the Rome Statute, is the fact that the alleged perpetrators currently holding an official position of the head of state and or other senior position in the government of the home country are immune from prosecution. While this norm is not explicitly defined, it is based on customary international law and reflected in judicial practice.<sup>304</sup>

Several European countries including Austria, Finland, France, Germany, Hungary, Italy, Norway, Norway, Spain, Sweden, Switzerland, The Netherlands, and the UK have universal jurisdiction laws implemented which allow them to prosecute cases under

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300. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention) [art. 49, 52]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea [art. 50, 53]; Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) [art. 129, 132]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) [art. 146, 149].

301. UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, Art. 5 (2), available at: <https://www.refworld.org/docid/3ae6b3a94.html> (accessed 27 February 2021).

302. Human Rights Watch, *The Long Arm of Justice: Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands*, 2014, available at: <https://bit.ly/3aJWd5K> (accessed 22 February 2021).

303. Gnezdilova, O., 'Looking for ways to hold accountable those responsible for war crimes and crimes against humanity during the armed conflict in Eastern Ukraine', in: Krivenko, S. and V. Novykov, *War crimes in Donbas. Challenges of holding of perpetrators to account*, CivilM+ platform, 2020, pp. 19-32, available at: <https://bit.ly/38JT2K3> (English), <https://bit.ly/3dlcpfs> (Ukrainian), <https://bit.ly/2NCbfRW> (Russian) (accessed 16 February 2021).

304. *Ibid.*

this mechanism.<sup>305</sup> However, after the initial enthusiasm, in a number of countries restrictions have subsequently been added to the existing legislation in relation to the nationality, residence, or presence in the territory of an alleged perpetrator of crimes. In Belgium, most notably, a universal jurisdiction law was repealed in favour of a (more restrictive) extraterritorial jurisdiction law.<sup>306</sup> In most countries war crimes and crimes against humanity under international law do not have statutes of limitation. Not all countries, however, allow for the prosecution of crimes that occurred before the adoption of laws on universal jurisdiction (e.g. the German law is not retroactive in this regard).<sup>307</sup> Also, depending on the national legislation, the proceedings may be initiated with the defendant in the country or before they enter the country (then an international arrest warrant is issued). Some countries (The Netherlands, Germany, and France) have specialized war crimes units within the national law enforcement agencies to investigate and prosecute crimes under international jurisdiction.<sup>308</sup>

An important role in identifying suspects, as well as victims and witnesses, is played by national immigration services which can detect such persons for example during the refugee status determination procedure when applicants for international protection are requested to provide a detailed account of their personal history in the country of origin.<sup>309</sup> International cooperation is also key to the successful investigation of cases under universal jurisdiction, which includes the effective exchange of information about individuals and sharing evidence. The European Network for investigation and prosecution of genocide, crimes against humanity, and war crimes ('Genocide Network') was established in 2002 as part of the European Union Agency for Criminal Justice Cooperation (Eurojust) in order to facilitate close cooperation between the national authorities when investigating and prosecuting the crime of genocide, crimes against humanity, and war crimes in order to ensure perpetrators do not attain impunity within the Member States.<sup>310</sup> In June 2016, a cooperation agreement was signed between Eurojust and Ukraine, with the first Liaison Prosecutor for Ukraine commencing duties in August 2018.

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305. Jessberger, F., *Towards a 'complementary preparedness' approach to universal jurisdiction – recent trends and best practices in the European Union*, Briefing, Policy Department, EU Directorate-General for External Policies, 2018, cited in: Gnezdilova, O., 'Looking for ways to hold accountable those responsible for war crimes and crimes against humanity during the armed conflict in Eastern Ukraine.'

306. International Justice Resource Center, *Universal jurisdiction*, available at: <https://bit.ly/3ahly5t> (accessed 18 September 2020); General Assembly of the United Nations, *Observations by Belgium on the scope and application of the principle of universal jurisdiction*, available at: <https://bit.ly/3b7n6zv> (accessed 18 September 2020); International Federation for Human Rights, *Universal jurisdiction: annual review*, 2016, available at: [https://www.fidh.org/IMG/pdf/ujar\\_2016.pdf](https://www.fidh.org/IMG/pdf/ujar_2016.pdf) (accessed 18 September 2020).

307. Gnezdilova, O., 'Looking for ways to hold accountable those responsible for war crimes and crimes against humanity during the armed conflict in Eastern Ukraine.'

308. For more information about the functioning of those units see: Human Rights Watch, *The Long Arm of Justice: Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands*, 2014, available at: <https://bit.ly/3aJWd5K> (accessed 22 February 2021).

309. Gnezdilova, O., 'Looking for ways to hold accountable those responsible for war crimes and crimes against humanity during the armed conflict in Eastern Ukraine.'

310. Website: <https://www.eurojust.europa.eu/judicial-cooperation/practitioner-networks/genocide-network>.

In some countries, the investigation can be initiated at the request of NGOs.<sup>311</sup> For example, in Germany, NGOs also have the right to file a complaint with the federal prosecutor and request that a war crime or crime against humanity be investigated. Argentina is currently conducting an investigation with regard to the Rohingya genocide, initiated by an NGO. In Switzerland, an investigation can be launched on the basis of an NGO complaint in advance of the accused arriving in the country. In 2017, an NGO requested an investigation into the former the Inspector General of Police of Gambia, Ousman Sonko, suspected of torture and crimes against humanity. Upon the prosecutor's decision to start the proceeding, he was later detained at the immigration centre, where he applied for asylum. Switzerland is also currently investigating the members of the Syrian regime accused of committing war crimes in 1982. The investigation was initiated by an NGO with the support of the victims of the crimes. In addition to formally requesting investigations, local and international NGOs have the potential to be a valuable source of information and contacts.

### Civil society organizations and universal jurisdiction, status, and expectations

In the context of the armed conflict in Ukraine, civil society organizations have been exploring the concept and practical implications of universal jurisdiction through expert workshops and dialogue with representatives of countries and domestic prosecutors' offices.<sup>312</sup> A representative of an international NGO speaks to this below:

***(...) the only viable option is exploring the possibility of universal jurisdiction. I had interactions with local authorities in different European countries, responsible for these applications, and they have no kind of information. There are no actors reaching out to them and asking for investigations. This is something that could be done. I'm not saying this will bring immediate results, it's the first time we are trying it now, (...) and from the few interactions with authorities, I kind of get a sense there might be opportunities there.***<sup>313</sup>

313. Interview with an NGO representative.

The same interviewee explains that in light of lengthy and ineffective international court proceedings, as well as the growing disregard of non-democratic governments for human rights standards, exploring new avenues for seeking justice is necessary:

311. TRIAL International, *Universal Jurisdiction Annual Review*, 2020, available at: <https://bit.ly/3umXR4T> (accessed 16 February 2021).

312. For example: International Partnership for Human Rights, *Facilitating exchange on universal jurisdiction between local and expert NGOs*, 17 December 2019, available at: <https://bit.ly/3piBmua> (accessed 18 September 2020).

*I think this paradigm of human rights documentation, sharing it, then providing recommendations, and the government acting on it – this doesn't work in practice. It doesn't work for authoritarian countries like Russia, Azerbaijan, etc. but it also doesn't work for less authoritarian states. I'm not just talking about state responsibility, which has failed in practice, but also the ICC instruments which target individuals; despite their potential they are also not effective. Either we continue with the same methods as a civil society, taking a similar approach, and hope for change, or we tell ourselves 'this doesn't make a difference', and ask big questions: 'what can I do/change to make a difference?' (...) [We] also need to be critical about possibilities in terms of how information collected as a result of the documentation process can be used. Approach it more creatively. Spend less resources on writing communications to the ICC, but tell it to the world, explore different methods in getting the message across, knocking on doors in different countries. Ask critical questions and think outside of the box."<sup>314</sup>*

314. Interview with an NGO representative.

One advantage is the fact that the pathway of universal jurisdiction does not exclude ongoing efforts in international courts to achieve adjudication for crimes committed during the conflict. Much of the collected documentation may serve multiple purposes and meet the requirement of both the ICC and national jurisdictions:

*In applying standards of criminal law, the ICC standard should suffice in most jurisdictions (only the UK one is stricter, i.e. the standard of proof). In both, the focus is on individual responsibility."<sup>315</sup>*

315. Interview with an NGO representative.

So far, few of the meetings and information exchanges have resulted in the lodging of applications or the commencement of trials. In practical terms, the narrowing down of universal jurisdiction laws in some countries may be the most challenging obstacle in bringing about applications to domestic courts. As the NGO representative cited above admits, after an initial surge of interest in the early 2000s, many countries have narrowed down the applicability of this universal jurisdiction. For this reason, optimism about universal jurisdiction is not shared across-the-board. While some international lawyers see it as a promising avenue, in the opinion of one interviewed international legal expert:

*[U]niversal jurisdiction is great if and where it works. What I want to say is that it has some serious limitations. In the end, the best place is still to do things at home. So in Ukraine, if you can build the capacity for domestic prosecutions, that is the best place to do it. If you do not, then the ICC is the best place. While universal jurisdiction is growing, it still has serious limitations. Every country has a different system and different laws, but they share one thing: unless the accused or some of the suspects reside in or travel to the country, then there is no way anything will happen. No question about it.<sup>316</sup>*

316. Interview with an international legal expert.

In other words, the prospect and outcome of applications under universal jurisdiction is entirely dependent on a country's domestic legal framework and to what degree the existing conditions can be met. Given the high number of potential suspects, from both past and present conflicts, the country's institutional capacities, as well as a political interest to investigate a particular case, also play an important role.

#### 2.2.5. Sanctions

##### Understanding sanction regimes

For a considerable time in history, sanctions have been used as an alternative means to a direct military confrontation. They rely on diplomatic effort to target countries and/or individuals for the protection of national interests or in response to threats to peace and security. Both sovereign states and international actors have relied upon sanctions in the form of tariffs, armament limitations, travel bans, exclusion from the financial system, as well as recalling diplomatic staff and representation in a country. For instance, the UNSC has voted in favour of sanctions in the context of international terrorism, nuclear proliferation, as well as situations of conflict.<sup>317</sup>

In situations where lengthy international court trials do not reach a verdict, sanctions are a means that can be applied, enforced, and extended rapidly by states and the international community as a message of strong condemnation regarding the responsibility of states and individual perpetrators of violations of international law. Also, their reach is comprehensive in comparison to international courts and sanctions have been used in the past to target both heads of state and top-level decision makers as well as low-ranked officials and private individuals. Since the decision to impose sanctions is often based on a political consideration (rather than a legal verdict), in practice the evidence threshold for violations is lower.<sup>318</sup>

317. United Nations Security Council, *Sanctions*, available at: <https://bit.ly/3bF90pa> (accessed: 18.09.2020).

318. European Parliament, *Briefing: EU sanctions: A key foreign and security policy instrument*, May 2018, available at: <https://bit.ly/3jACTui> (accessed: 18.09.2020).

In recent years, efforts have focused on the Magnitsky Act, which was passed by the United States Congress in 2012 to punish Russian officials involved in the death of Sergei Magnitsky.<sup>319</sup> Since 2016, the act has been given a more global character to include any human rights offenders.<sup>320</sup> The objective of the act is to impose asset freezes and travel restrictions (to the United States) for individuals placed on the list. Among other things, targeted individuals are also excluded from the United States banking system. Both US Congress and the President (through executive orders) have designated more than 680 individuals, entities, vessels, and aircraft as targets – with reference to Russia’s involvement in Ukraine.<sup>321</sup> Other Magnitsky-styled sanction mechanisms have been passed during the Trump presidency, such as the Countering America’s Adversaries Through Sanctions Act (CAATSA) – a US federal law that provides sanctions for individuals involved in serious human rights violations.<sup>322</sup>

In the EU, a number of restrictive measures have been implemented since 2014 in response to actions undermining or threatening the territorial integrity, sovereignty, and independence of Ukraine, which comprise diplomatic, economic, and travel restrictions for individuals and entities.<sup>323</sup> As of early 2021, 177 people and 48 entities are subject to these EU restrictive measures.<sup>324</sup> The United Kingdom has recently decided to create its own sanctions lists for human rights violations and abuses – modelled on the Magnitsky Act – after it had been part of the EU regime until Brexit.<sup>325</sup>

### Ukrainian civil society and international sanctions, status, and expectations

There has been communication and exchange of information between the State Department and the U.S. Embassy in Ukraine and Ukrainian civil society organizations regarding potential targets for the sanctions’, including barring of entry to the US as well as economic sanctions such as asset freezes or seizure. Over the years of documenting violations, Ukrainian NGOs have collected substantial evidence pointing to the responsibility of particular individuals for severe human rights abuses committed

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319. US Congress, *S.1039 – Sergei Magnitsky Rule of Law Accountability Act of 2012*, available at: <https://www.congress.gov/bill/112th-congress/senate-bill/1039> (accessed 18.09.2020).

320. US Congress, *S.284 – Global Magnitsky Human Rights Accountability Act*, available at: <https://www.congress.gov/bill/114th-congress/senate-bill/284> (accessed 18.09.2020).

321. Congressional Research Service, *U.S. Sanctions on Russia*, 17 January 2020, available at: <https://fas.org/spp/crs/row/R45415.pdf> (accessed 18.09.2020). Table B-1. U.S. Sanctions on Russia for Which Designations Have Been Made provides a detailed overview of the targets and designations in relation to Ukraine.

322. U.S. Department of the Treasury, *Countering America’s Adversaries Through Sanctions Act*, available at: <https://bit.ly/3qd59Wy> (accessed 18.09.2020). Section 228 of CAATSA applies to human rights violations that occurred in the territories occupied or otherwise forcibly controlled by Russia after 2 August 2017

323. European Council – Council of the European Union, *EU restrictive measures in response to the crisis in Ukraine*, 2021, available at: <https://bit.ly/3a5LFxo> (accessed 18.09.2020).

324. *Ibid.*

325. The FCPA Blog, *UK imposes first ‘Magnitsky sanctions’: here’s the list*, 15 July 2020, available at: <https://bit.ly/3q8JleF> (accessed 18.09.2020); The Guardian, *‘Magnitsky sanctions’: who are those being targeted by UK?*, 6 Jul 2020, available at: <https://bit.ly/3a63o7F> (accessed 18.09.2020).

in the course of the armed conflict. International civil society organizations are partnering up with Ukrainian actors to file designation requests to state authorities and advocate for the expansion and maintenance of sanctions. However, according to one civil society member, the restrictive character of the original Magnitsky Act made it difficult to designate many of the individuals responsible for human rights violations during the armed conflict:

***The Magnitsky Act was developed for pursuing Russians, but despite the fact they [the perpetrators] had refused the citizenship of Ukraine and became Russian citizens, they still were recognised as Ukrainians. They could not be included in the list because they did not fit the criteria.<sup>326</sup>***

<sup>326</sup>. Interview with an NGO representative.

In comparison, the Global Magnitsky Act holds greater promise for the inclusion of perpetrators without Russian citizenship. So far, there is only a limited number of individuals on the list, although this list is expected to grow. The same civil society organization also approached other countries with legislation inspired upon the (Global) Magnitsky Act, such as Canada and some of the Baltic States:

***We were trying to seek direct contact with state representatives responsible for these sanctions regimes and we also had several meetings here in Ukraine to include them and to create such a list.<sup>327</sup>***

<sup>327</sup>. Interview with an NGO representative.

It must also be noted that this pathway has shown a number of limitations including examples of political pressure to end sanctions.<sup>328</sup> Previous diplomatic sanctions against Russia decided by the Council of Europe were lifted in 2019 in an attempt to improve channels of communication, much to the disappointment of civil society organizations.<sup>329</sup> Second, even if sanctions are successfully imposed by a country, they may never have an impact on the targeted individuals. As noted by a civil society representative, “most of the abusers do not have any assets in the US and they would probably never travel to the US or very rarely abroad”<sup>330</sup>. An EU-wide Magnitsky Act, a thematic human rights sanction mechanism, may arguably be the most effective mechanism because of the EU’s proximity to Ukraine and the more

<sup>328</sup>. Carnegie Europe, *The Temptation of Ending Sanctions on Russia*, 13 February 2016, available at: <https://carnegieeurope.eu/strategieurope/62763> (accessed: 18.09.2020).

<sup>329</sup>. Reuters, *Council of Europe readmits Russia, five years after suspension over Crimea*, 25 June 2019, available at: <https://reut.rs/3q99UjN> (accessed: 18.09.2020).

<sup>330</sup>. Interview with an NGO representative.

realistic chance that perpetrators have assets within the EU and continue to travel to member states of the Union. The proposal for the new sanction regime was tabled by the Netherlands in 2018, and the necessary legislation formally establishing the EU Global Human Rights Sanctions Regime was adopted in December 2020.<sup>331</sup>

Sanctions constitute an alternative to justice as traditionally understood. Importantly however, they lack essential elements that are part of a court trial, most notably the principle of presumption of innocence of the accused and their right to defence, therefore they can be challenging from a legalistic point of view. Nevertheless, in the absence of definite progress regarding international court trials, they may remain the only viable option for any accountability. Sanctions regimes are also arguably the most promising field with regard to holding accountable those who committed crimes in the armed conflict in Ukraine. Moreover, monitoring and documentation of human rights violations and international crimes serves a wider purpose here, as they also help to inform the political decision-making process that extends beyond Ukraine. Civil society organizations can provide input on possible targets without relying on extensive analysis of the evidence and detailed provision of information (as required for legal adjudication). Importantly, sanctions, as justice-related mechanisms that take place outside courtrooms, can be used in parallel with criminal trials. An international legal expert, below, explains his belief of how holding perpetrators accountable for the crimes committed should be seen more broadly than just criminal trials:

***Oftentimes people focus on criminal accountability. And I understand why. But there are so many other things that can be done in terms of documentation, memory and other examples, such as civil remedies, naming and shaming, getting people terminated from their (government jobs) things like that. There are different types of accountability. I have spent my life on criminal accountability, and I think those others are as important or maybe more important, because they are attainable and feasible. Let me put it in another way. It is not an either or not. You want to do it all. The important thing is to do all of it. And this brings us back to the beginning of the conversation: where is the challenge for civil society, for NGOs – it is to think about: how do I do all of it? Or rather, do I want to do all of it? Because you can do different things for different types of accountability.***<sup>332</sup>

<sup>332</sup>. Interview with an expert in international law.

<sup>331</sup>. European Parliament, *EU human rights sanctions – Towards a European Magnitsky Act*, Briefing paper of December 2020, European Parliamentary Research Service, available at: <https://bit.ly/3bP4Ls5> [accessed 15 March 2021].



# Conclusions & Recommendations

# Conclusions

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Throughout the years, Ukrainian civil society organizations have undertaken enormous efforts to document the violations committed in the armed conflict in Donbas. Ukrainian NGOs are, however, not the only actors involved in this activity, as others – most notably, the UN and OSCE monitoring missions, under their respective mandates – have played a leading role in recording violations and monitoring the human rights situation on behalf of the international community as part of wider efforts to support the international political process related to the Donbas conflict. The role of the NGOs, nonetheless, is unique and in a way complimentary to the activities of international organizations. NGOs in many ways acted as first responders to the violations by providing immediate assistance to persons who suffered as a result of hostilities, were wounded, unlawfully imprisoned, or became forcibly displaced. Their role from the beginning was not only documenting and analytical work, but also responding to the needs of various groups of conflict victims whose rights had been violated, as well as seeking justice for the perpetrators of crimes. This has been done in several different ways, including through strategic litigation as well as advocacy at both the national and international level that focuses on bringing about systemic changes (which international organizations do not do). The purposeful collection of information through documenting war-related violations is very important in this process. Moreover, the act of permanently monitoring the current human rights situation of various groups that continue to suffer from repercussions of the war, combined with their close contact with the reality on the ground, have been vital to ensuring the protection of the rights of victims who suffered during the conflict. NGOs enjoy a greater freedom than international organization in passing the collected information to other bodies, including to law enforcement agencies and courts, as well as greater discretion in making requests from the Ukrainian government and institutions so that the rights of conflict victims, in particular vulnerable groups, are respected.

Since 2014, Ukrainian NGOs have collected information on a wide spectrum of conflict-related violations, including the most serious of crimes such as murder, imprisonment, torture, sexual violence, as well on the problem of missing persons, the consequences of indiscriminate shelling resulting in the loss of lives and destruction of civilian infrastructure, the secondary impact of the conflict on the social rights of IDPs and residents of the settlements near the contact line, the impact upon vulnerable groups, as well as environmental issues. Some areas have been given less attention than others and may need further investigation in the future, most notably the crimes committed by the Ukrainian side. A more thorough documentation and systemization of the existing information on the early period of the conflict (2014-2015) is also needed. Due to the lack of physical access, the restricted availability of information, and risks to personal security, a full understanding of the human rights situation in the co-called “DPR” and “LPR” is limited and requires continued monitoring through available means.

In spite of attempts to bring together the efforts and activities of various NGOs working on conflict documentation, in particular to create a common database of collected information, the establishment of mechanisms of close cooperation have proved unsuccessful. Several reasons underlie this failure, including strong competition for funding, management issues, ambitions of individual NGOs and their leaders, as well as mutual distrust which has occasionally led to conflicts. While there is currently a number of separate databases coordinated by different NGOs and the competition for funding continues to be a permanent factor affecting the cooperation within the sector to this day (leading also to the problem of duplication in the area of documentation), there are also some positive examples of cooperation between NGOs regarding the transfer of information between the databases, contribution of information to other NGOs' submissions to the ICC or to joint analytical reports, as well as some coordination in providing assistance to the victims and advocacy activities.

Most NGO representatives report challenges in securing sufficient and continuous funding, subsequently resulting in problems with planning and executing activities as well as with maintaining wages at a decent level and retaining qualified staff in the sector. The interviewees also noted that there is currently less funding available for documentation activities as compared to the period of 2014-2015, leading to much stronger competition between the NGOs. This can be explained by a waning international attention upon the conflict in Eastern Ukraine compared with previous years and "donor fatigue". At the same time, the interviews with NGO representatives reveal a sense of misunderstanding, and at times frustration, in their relations with donors who expect tangible results within the project cycle which, in many cases, is impossible to achieve, in particular in relation to the use of documentation in the domestic or international prosecution of crimes, restoration of victim's rights through courts, as well as influencing government policy. Another important factor is the heavy reliance of NGOs on donor funding combined with, in general, the NGOs' lack of experience and opportunities for funding diversification strategies.

Another major challenge is the professional burnout of civil society activists. Several years of the ongoing conflict have had an enormous impact, especially on those working directly in the conflict-affected area and those who come into direct contact with the victims. At the same time, the NGO activists rarely see quick results of their work; which can be discouraging, especially when combined with low wages. This, in turn, has led to the outflow of skilled labour from the sector.

Over the years, there has been some progress in addressing a number of conflict-related human rights challenges at the national level, in particular with regard to the situation of victims. While it is difficult to unequivocally attribute this progress solely to the activity of NGOs, it is clear that civil society organizations, with their dedication and persistence in terms of advocating for changes, as well as their ability to come together in matters of concerning victims' rights, has been a major driving force behind those processes. Civil society efforts have contributed to the improvement of the legal status of IDPs and the actual realization of their social and political rights. Moreover, their efforts have helped to effectively improve the situation of persons serving their sentences in the NGCAs, some of whom were transferred to the government-controlled side, as well as helping to lift some restrictions upon people's freedom of movement

across the contact line. NGOs should also be credited with the improvement of legal regulations concerning compensation for civilians who were injured and became disabled as a result of hostilities, lost their property and families of missing persons. These regulations, however, are yet to be translated into effective mechanisms and administrative practices allowing all victims to fully benefit from the protection provided by the state. While there are still significant challenges, many of which concern the actual implementation of the provisions by competent authorities, including the lack of proper budgetary allocations, Ukrainian civil society organizations have continued their efforts to keep victims' rights on the political agenda of subsequent cabinets. As noted by one of the NGO representatives who was interviewed, good outcomes, on both individual and systemic levels, are generally more difficult to achieve when they require significant government funding (as is the case of the overdue benefit payments owed to a number of pensioners). On the other hand, problems of an administrative nature that are not connected with grave human rights violations (for example, registering as an IDP, getting birth and death certificates as well as passports reissued, crossing the contact line, granting IDPs' the right to participate in local elections, as well as facilitating the access to university education to students from the occupied territories) are usually resolved more easily.<sup>333</sup>

Progress has been somewhat slower in terms of holding accountable those who committed crimes during the armed conflict in Eastern Ukraine. The prosecution of such crimes has generally proven to be challenging for the Ukrainian law enforcement institutions, due to the absence of the alleged perpetrators in the territories under the control of the government, the lack of access of Ukrainian investigators to crime scenes in the NGCAs, as well as a number of systemic deficiencies within the Ukrainian law enforcement and judiciary. However, the recent creation of a specialized Department for supervision over criminal proceedings related to the armed conflict at the OPG and the willingness of this department to cooperate with civil society organizations, as well as harmonization of Ukrainian Criminal and Criminal Procedural Codes with international law, have provided some glimmers of hope in terms of more effectively prosecuting crimes committed during the conflict. Yet deep systemic problems remain and will take years to resolve, as the Ukrainian law enforcement and justice systems were already ineffective before the war and the conflict has exacerbated some of these problems. These problems include the poor organization of work, as well as the jurisdiction of law enforcement agencies and courts. Various agencies involved in different aspects of accountability for the crimes (such as the police, prosecution, and security services) cooperate poorly and the transfer of information and evidence is impeded. The quality of investigations of cases of killing, inflicting injury, torture, deprivation of liberty, or enforced disappearances, leaves much to be desired. Victims are often not adequately informed about the proceedings, which take an unreasonable amount of time, and the possibility of participating in investigations is restricted. There are several factors underlying these problems, including a lack of capacity among the law enforcement agencies, insufficient training on criminal

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<sup>333</sup>. Interview with an NGO representative.

investigative methods adapted for the context of war, low wages, and frequent staff rotation. Law enforcement agencies are particularly reluctant to investigate and prosecute crimes committed by the members of the Ukrainian military, police, or other agencies. A number of problems also concern the judiciary which, likewise, suffers from understaffing and insufficient funding. Systemic violations occur during criminal proceedings (including violations of the rights to liberty and security, legal counsel, and a fair hearing by a competent, independent, and impartial tribunal). There are also problems with the effective conduct of “trials in absentia”. The Ukrainian courts in the Donetsk and Luhansk regions, in particular, have been the subject of much criticism in terms of their lack of efficiency, neutrality, and effectiveness.

When faced with this reality, victims are reluctant to report crimes and quickly lose interest in the proceedings related to their cases. Additionally, the availability of state-funded legal aid for victims is insufficient. This situation forces the victims to rely on the assistance of non-governmental organizations and – often – on international judicial mechanisms. The latter, however, also do not bring immediate results and can be affected by political considerations. NGOs report a lack of motivation among clients to cooperate, especially if it places some burden on them too (for example sending applications, attending several interviews, some of which require travelling) and/or there is little feedback about the course of the case. They also often refuse because they do not have money, time, or their health situation does not allow for it. Many also doubt the willingness of both Ukrainian and international courts to consider their cases. Following years of neglect of their rights and needs, there is a feeling of distrust towards the national authorities, in particular among those who have suffered in the conflict. Such distrust is also intensified by influential Russian propaganda. Consequently, one of the greatest challenges in the area of accountability for war-related crimes has been keeping the victims interested in pursuing cases. An interviewed NGO representative who, in addition to his work in Ukraine, also collected testimonies for the ICC and represented victims of the 2008 Russian aggression on Georgia before the ECHR, and whose many clients had passed away before any decisions were issued by international courts, notes that “*justice only makes sense when served on time*”.<sup>334</sup>

Civil society organizations’ human rights work in both the areas – of protecting the victims of conflict and persecuting those responsible for the crimes – is also affected by certain additional structural factors that make it difficult for the NGOs to bring about changes. One of them is the instability characterizing the Ukrainian political scene. Frequent changes in the Cabinet of Ministers and in other important state institutions, as well as continual institutional reforms, make the advocacy work of NGOs very challenging; in particular, it is difficult to develop and follow up on road maps and action plans of a strategic character that are designed to gradually solve the existing problems in a longer perspective, require long-term funding plans, and evaluation of long-term progress. Furthermore, the Ukrainian society at large is tired of the protracted conflict and its interest in it is limited, unless its consequences

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334. Interview with an NGO representative.

directly affect their lives, which makes it challenging to keep the conflict-related human rights issues high on the political agenda. In this regard, Ukrainian civil society plays an important role as a beacon of human rights, as indicated during an interview with a UNDP representative:

***Our perception of civil society organizations is that they are often a key driving force (...), or at least instrumental support to the government and public institutions, because public institutions are always in some kind of transition (elections, a new head of the institutions, because of the political situation, etc.). Civil society keeps the transition smoother, but it also pushes and advocates for more important issues.***<sup>335</sup>

335. Interview with an UNDP representative.

There are also a number of challenges on the international stage. With the conflict soon entering its eighth year, and with the political interests of Russia, Ukraine, and third party countries clashing during the peace process, permanent solutions seem unattainable in the short term future. In recent years, the situation in Eastern Ukraine has gradually transformed into what can be called a “frozen conflict”. It is characterized by a lack of political will of the conflicted parties, as well as of the international community, to resolve the conflict, and a certain fatigue and decrease of interest of all actors involved. In addition to that, as feared by human rights NGOs, there is a risk that focusing on matters of justice and accountability for the crimes committed will be seen by these actors as a potential impediment to the peace process. Subsequently, the path to justice for the victims of human rights violations and their families becomes even more difficult. NGOs believe, however, that justice as part of political dialogue with Ukraine must remain on the agenda.

Another problem caused by a declining interest in the Donbas conflict, as well as international attention moving towards other conflict zones, is “donor fatigue” – gradual withdrawal of donor funding from the areas that do not bring quick and tangible outcomes. This has an especially negative impact upon the smaller NGOs that are less sustainable. However, the inability to demonstrate immediate results from work in the area of accountability sector is a challenge for all of the organizations; the impossibility of seeing the effects of one’s own efforts, combined with the emotional burden of documentation work and the expectations of the victims, affect the motivation and well-being of their staff and, eventually, their ability to continue their work.

In spite of these problems, documentation work by NGO actors remains essential to obtaining justice for violations committed in the Donbas conflict. Importantly, however, its impact and effectiveness will be more accurately evaluated in the perspective of decades, rather than years or months. Furthermore, justice cannot be achieved without the concerted effort of many actors (the Ukrainian state, NGOs, the international community, etc.). Also, while this study has focused on the role of documentation in the context of justice, documentation of war-related violations also

has the potential to contribute to peace-building and reconciliation efforts in Ukraine through the information work with society which is one of the pillars of transitional justice – a term describing the ways countries emerging from periods of conflict and repression address large-scale or systematic human rights violations that “normal” justice systems are not adequately equipped to respond to.<sup>336</sup> Documentation is crucial for establishing the record of events and the facts related to the war and, as has been pointed out by several interviewees, it is also indispensable in avoiding history being rewritten and used for political purposes. Moreover, what is also important for the reconciliation process is the acknowledgement that both sides have committed violations (even though the Russian Federation is the aggressor state and the scale of violations committed by Russian and its proxies is much larger) and that civilians on both sides have suffered as a result of the conflict.

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<sup>336</sup>. See for example: International Centre for Transitional Justice, *What is transitional justice?*, available at: <https://www.ictj.org/about/transitional-justice> (accessed 4 March 2021).

# Recommendations

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Considering all of the above the following recommendations are proposed.

## To NGOS:

### » **Continue the process of monitoring and documenting human rights violations in the armed conflict**

In particular, documentation is still needed in the following areas:

1. Filling in the gaps in existing knowledge on violations directly resulting from the war. While a significant amount of information has already been collected, there are still areas that require research. One of them is the documentation and systematization of information about serious violations of human rights and humanitarian law committed in the “hot” phase of the conflict (2014-2015) that would help to complement and systematize existing knowledge. Another area is the violations committed by the Ukrainian side. This requires the continuation of monitoring and documentation activities, as well as the activities that accompany this process, such as improving and supplementing databases and providing legal support to victims. This is important both in terms of justice, as well as establishing a solid historical record of events that would help to prevent unfounded interpretations.
2. Investigation of the secondary impact of the war (including the long-term perspective) on the situation of various groups in Ukrainian society. The war has had a negative impact on many groups in Ukraine, including those who have suffered the loss of their relatives, their health and property, become displaced, or continue to reside in war-affected settlements of the Donbas region. To date, the problems of these groups have only partially been resolved. Furthermore, new problems may arise as a result of political decisions taken to resolve the conflict (for example, the withdrawal of troops near the contact line).
3. Monitoring of the actions of the Ukrainian authorities in the areas concerning the prosecution of war-related crimes and the realization of the rights of conflict victims. After several years of conflict, legislation and administrative practice aimed at addressing the consequences of the conflict have developed and can be subject to evaluation. Also, the processes of prosecution of war-related crimes at the national level has also been ongoing, and subsequent judicial practices need to be monitored.
4. Monitoring of the human rights situation in the NGCAs. The situation in the NGCAs, with regard to the respect for fundamental rights and freedoms, remains an underreported area. In addition, the monitoring of legal and administrative changes introduced by the de facto authorities of “DPR” and “LPR” and their long-term implications is essential for the prospective reintegration process with government-controlled Ukraine.

Within the framework of NGO documentation activities, it is necessary to improve mechanisms that help to prevent duplication. If close cooperation and exchange of information is not possible, civil society organizations should establish mechanisms to, where possible, reduce duplication with regard to the selection of topics, interviewing witnesses, and providing legal assistance.

» **Reflect critically on the effectiveness of documentation work and explore new avenues**

There is an increasing understanding among NGOs that documentation and monitoring reports are not an aim in itself but rather a means that serves to achieve wider goals. However, for many civil society actors, using documentation products to achieve meaningful change remains a challenge. This is not only because of a lack of strategic planning but also due to a number of structural constraints including donor's preference for short-term projects and the overall decrease in donor support, as well as objective difficulties related to particular human rights issues (for example, the reluctance of Ukrainian authorities to introduce certain measures, as they need to be accompanied by significant budgetary allocations and/or lengthy proceedings at international courts). Notwithstanding these difficulties, documentation should be continued, but also accompanied with a critical reflection about why the information is collected, what can be done with it, and whether these actions bring a desired change (outcome/effectiveness evaluation). Sometimes, this process may require rethinking the entire strategy of particular NGOs, especially if they work on a number of diverse topics. Given the limited resources and capacities, some NGOs may wish to select just one or a handful of topics in which they have expertise, or focus on a type of activity they do best (for example: documentation, legal analysis, legal aid or strategic litigation, advocacy), at the same time forming strategic alliances with other actors to achieve a particular goal. If necessary, the activities should be modified and adapted to the current context. With regard to the question of accountability, alternative ways of seeking justice (including but not limited to sanctions or universal jurisdiction) should be further explored. Holding perpetrators accountable for the crimes committed should be seen more broadly than just criminal trials, and documentation may be used for justice-related mechanisms that take place outside courtrooms.

» **Work with Ukrainian institutions to introduce effective systemic measures for the protection of victims' rights and prosecution of war crimes committed in Donbas**

In light of the current imperfect legislation and practices, the continuation of national advocacy activities remains necessary. These activities should be aimed at encouraging Ukrainian authorities to adopt strategic policies, laws, and practical solutions that help to increase the effectiveness of law enforcement institutions and improve the situation of various groups of victims of the conflict. Also, in many cases, in order to give rise to a systemic change, it is necessary to bring cases before national courts on behalf of the victims. This should be done in parallel to the work of documenting alleged crimes, but it should also become increasingly important in the work NGOs. Advocacy efforts require cooperation with the parliament of Ukraine, government, and its specialized agencies, the justice system and relevant authorities and institutions in the regions. Establishing partnerships built on mutual trust in a

volatile political environment is difficult but remains important for systematic work with state institutions whereby NGOs can provide expertise and recommendations, develop proposals for laws and policies, and become engaged in some activities (as in the case of NGO cooperation with the OPG). The aim of these activities should be for civil society organizations to fill in existing gaps and to assist – not replace – national authorities becoming fully operational and effective under their respective mandates.

» **Mobilize efforts of the international community in order to bring perpetrators of human rights violations and war crimes to justice**

The problem of impunity of the perpetrators of human rights violations and war crimes cannot be resolved without the coordinated efforts of the international community. This concerns crimes committed by both the representatives of illegal armed groups backed by Russia and by Ukrainian formations. However, the conflict in Eastern Ukraine no longer makes the headlines in the international and national media of Western countries and, in the light of other political events, it is not a priority in their government foreign affairs agendas. Within the ongoing Minsk peace process to regulate the conflict, political issues – and not human rights – dominate the agenda. It is therefore important for Ukrainian civil society organizations to continue their cooperation with international judicial institutions. As a result of a recent decision of the Office of the Prosecutor of the ICC to recommend a full-fledged investigation into the situation in Ukraine, the ICC prosecutors will likely start collecting data relating to the crimes committed in Donbas for which NGOs have already gathered extensive documentation. NGOs could participate in this process and assist the ICC prosecutor by facilitating access to information, victims, and witnesses. NGOs should also continue to work with the international community (within the framework of bilateral and multilateral dialogue) in order to put pressure on the Ukrainian government to fulfil its international obligations, in particular with respect to ratification of the Rome Statute of the ICC, conducting of effective investigations of violations committed by both parties to the conflict, and protecting the rights status of the various groups who have been affected by the armed conflict. In addition to informing political circles, it is important to draw the attention of Western societies to the human rights dimension of the armed conflict in Ukraine, to the importance of the issue of justice for the crimes committed, as well as to the plight of the civilian population. The human aspect of the events is particularly important, so that information about the conflict is not limited to numbers or descriptions of military activities in a distant and little known region of the world.

» **Stay connected with Ukrainian society by providing information, encouraging civic engagement, and fostering social dialogue**

Civil society organizations have an important role to play in providing truthful and reliable information about not only the crimes committed in the conflict as a result of the Russian aggression, but also those committed by the Ukrainian side. Raising public awareness about the need for accountability for the crimes committed in Donbas and compensation for the civilian population is a precondition for the peacebuilding process. This discussion should be extended to cover the role of

international institutions, such as the ICC, in this process, the options available in terms of transitional justice mechanisms, as well as future visions of the re-integration of the occupied regions. It is also important for local communities in Donbas to be involved as active participants of social dialogue wherein they are permitted to share their concerns, expectations, and views on the question of post-conflict reconciliation. Therefore, it is crucial that Ukrainian NGOs are in touch with inhabitants and members of civil society organizations in Eastern Ukraine (and, wherever possible, also with the communities on the other side of the demarcation line), support the development of local activism and human rights initiatives, and facilitate access to decision-makers at the national level.

### **To donors:**

- » Donors, especially those whose priorities include human rights, should continue to dedicate resources to projects involving documenting and monitoring violations in the region, in particular to those that: 1) fill in gaps in the existing knowledge of war-related violations; 2) investigate the impact of the war on the situation of various groups in Ukrainian society; 3) monitor the actions of the Ukrainian authorities responsible for realizing the rights of conflict victims; 4) document the human rights situation in the NGCAs;
- » Documenters should be paid adequately and in proportion to the challenges and risks of their work and this should be reflected in project budgets;
- » Donors should also put more emphasis on the need for NGOs involved in documenting and monitoring to avoid duplication and to ensure a high level of quality (including reports based on the results of documentation activities); this may require improved coordination between various donors as well as closer dialogue between NGOs and donors about mutual expectations;
- » Donors should have a clear understanding of the specificity of projects involving the use of documenting crimes in the pursuit of justice (restoring the rights of victims of violations and holding perpetrators accountable for crimes) which is a lengthy and complex process, and often with no tangible results within the project lifecycle; long-term funding of such projects allows for better planning and more effective execution of activities aimed at achieving strategic goals;
- » While Ukrainian NGOs, in general, have over the years acquired the necessary expertise and experience in documenting violations, smaller NGOs, civic activists, and volunteers in the Luhansk and Donetsk regions of Ukraine continue to require support and training in areas such as documentation methods, litigation, and advocacy, so that they can defend human rights more effectively at a local level; similarly, as is the case with documentation, coordination of such training is needed in order to avoid duplication and providing the same trainings to the same persons;
- » Ukrainian NGOs involved in documenting violations should be supported in achieving financial sustainability (for example, through trainings of project proposal writing, fundraising, and ways of diversifying funds);

- » Donors could also support NGOs by facilitating access to international institutions as well as by connecting them with organizations from other countries that have dealt with armed conflicts for peer-to-peer learning, sharing best practices, and moral support;
- » As the problem of professional burnout has become prevalent in the sector, donors should address it as a serious sustainability issue and dedicate relevant resources for supervision, psychological counselling, as well as rehabilitation programmes for civil society documenters.

### **To the Government of Ukraine:**

- » Improve the effectiveness of national mechanisms (including the functioning of relevant registers and databases) pertaining to gathering information about the crimes committed in relation to the conflict in Donbas, their perpetrators, and their victims
- » Continue to cooperate with civil society organizations in areas that can benefit from their expertise in documenting war-related violations and protecting the rights of conflict victims;
- » Continue the reforms of law enforcement agencies and the judiciary which are aimed at increasing the effectiveness of prosecuting persons accused of committing crimes during the armed conflict;
- » Adopt policies, laws, and practical solutions aimed at protecting the rights of conflict victims in areas that still need regulation (for example: civilians who have incurred injuries, but who have not been diagnosed with a disability, family members of persons who died as a result of the conflict, victims of illegal imprisonment, pensioners residing in the NGCAs, among others);
- » Allocate relevant budgetary resources necessary for the effective functioning of compensation mechanisms;
- » Remove discriminatory provisions that restrict certain groups of victims from exercising their rights;
- » Eliminate bureaucratic barriers that restrict access to legal remedies and social protection of conflict victims.

### **To the international community (foreign governments, inter-governmental, and non-governmental international organization, experts, and members of the public):**

- » Keep the Donbas conflict on the political agenda;
- » Support Ukrainian civil society organizations in their dialogue with Ukrainian authorities with a goal to strengthening the mechanisms of protection of the rights of conflict victims and prosecution of perpetrators of crimes (including through diplomatic pressure);
- » Support efforts aimed at bringing to justice perpetrators of serious crimes (including through mechanisms such as sanctions and universal jurisdiction);
- » Support Ukrainian NGOs in delivering their message to international stakeholders (including through facilitating access to foreign governments and international institutions);

- » Continue to provide tailored expertise to Ukrainian NGOs (e.g. trainings and assistance in terms of preparing submission to international bodies);
- » Keep the public interested in issues related to the Donbas conflict (through work with journalists, organizing observation missions, etc.).

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