

THE UKRAINIAN JUDICIAL SYSTEM IN A TIME OF ARMED CONFLICT

Briefing paper
November 2022



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Table of contents

1. BACKGROUND	4
<i>The Russian Federation's invasion of Ukraine.....</i>	<i>4</i>
<i>Applicability of international humanitarian law and international human rights law</i>	<i>6</i>
<i>The judiciary in Ukraine.....</i>	<i>7</i>
<i>The Role of the Judiciary in times of war or other emergency.....</i>	<i>8</i>
<i>Derogations from human rights treaties.....</i>	<i>9</i>
2. ADMINISTRATION OF JUSTICE ON THE TERRITORIES UNDER UKRAINIAN CONTROL	13
<i>Initial impact on the functioning of the judicial system</i>	<i>13</i>
<i>The functioning of the bodies of judicial self-governance</i>	<i>14</i>
<i>Shortage of judges</i>	<i>16</i>
<i>Transfer of case files when courts cannot function.....</i>	<i>17</i>
<i>Limiting access to the database of cases.....</i>	<i>18</i>
<i>Consideration of cases in courts under martial law</i>	<i>19</i>
<i>Arrest and detention under martial law.....</i>	<i>21</i>
<i>Persons detained in relation to the conduct of hostilities.....</i>	<i>24</i>
3. ADMINISTRATION OF THE UKRAINIAN JUSTICE SYSTEM IN THE TERRITORIES OCCUPIED BY THE RUSSIAN FEDERATION.....	26
4. THE WORK OF DEFENCE LAWYERS IN OCCUPIED AREAS AND AREAS UNDER THE CONTROL OF THE UKRAINIAN GOVERNMENT	28
5. CONCLUSIONS.....	30

This briefing paper has been prepared by the International Commission of Jurists (ICJ) to provide a preliminary assessment of the impact of the ongoing armed conflict between the Russian Federation and Ukraine on the judicial system of Ukraine, and on the capacity of the judicial system to provide access to courts and to effective remedies for human rights violations during the conflict. The paper describes the steps taken by the judiciary and other authorities to ensure the continued operation of the Ukrainian judicial system during the conflict. It stresses the importance of the justice system functioning effectively even the times of emergency and analyses some of the issues which have emerged due to the derogations from international human rights obligations during martial law in Ukraine.

1. BACKGROUND

The Russian Federation's invasion of Ukraine

1.1 On 24 February 2022, the Russian Federation launched its military invasion against Ukraine. The operations began three days after the Russian Federation's official recognition of the Eastern Ukrainian regions of Donetsk and Luhansk as independent States,¹ following an address by the Russian President Vladimir Putin in which he announced² a "special military operation".³ The UN General Assembly, in its resolution of 2 March 2022, qualified this attack as an act of aggression in violation of Article 2(4) of the UN Charter.⁴ On 7 March, the UN Human Rights Council strongly condemned "the aggression against Ukraine of the Russian Federation",⁵ while the UN Secretary General called it "the most serious global peace and security crisis in recent years".⁶ The International Commission of Jurists (ICJ) equally considers that Russia's military invasion constitutes an aggression,⁷ which, under UN General Assembly Resolution 3314 (XXIX) is defined as "[...] the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations [...]".⁸ The Russian Federation's actions would also fall within the definition of aggression under the Rome Statute for the International Criminal Court,⁹ though the Court does not presently have jurisdiction over aggression in respect of the Russian Federation. The view that this is an aggression is prevalent among States, UN bodies and international legal scholars.¹⁰

1.2 On 16 March 2022, the International Court of Justice issued an order for provisional measures in a case brought by Ukraine against the Russian Federation alleging a violation of the Genocide Convention.¹¹ The Court decided as a provisional measure that "the Russian Federation shall immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine".¹² The European Court of Human Rights (ECtHR), in a case brought by Ukraine, also issued interim measures, ordering that the Russian Federation *inter alia* does not attack civilian objects, and that it ensures safety of medical establishments.¹³

¹ Address of the President of the Russian Federation, 21 February 2022, <http://kremlin.ru/events/president/news/67828>.

² Russian Federation Announces 'Special Military Operation' in Ukraine as Security Council Meets in Eleventh-Hour Effort to Avoid Full-Scale Conflict, <https://www.unmultimedia.org/avlibrary/asset/2714/2714673/>.

³ Address of the President of the Russian Federation, 24 February 2022, <http://kremlin.ru/events/president/news/67843>.

⁴ UN Doc. A/ES-11/L.1, *Aggression against Ukraine*, 1 March 2022. The Resolution was adopted in a GA Emergency Session called for by the UN Security Council by Resolution 2623(2022) under the Uniting for Peace resolution as the Security Council was prevented to exercise its primary responsibility for peace and security.

⁵ Resolution 49/1 adopted by the Human Rights Council on 4 March 2022, *Situation of human rights in Ukraine stemming from the Russian aggression*.

⁶ Secretary-General's remarks to the General Assembly on Ukraine, 23 February 2022, <https://www.un.org/sg/en/content/sg/statement/2022-02-23/secretary-generals-remarks-the-general-assembly-ukraine>.

⁷ International Commission of Jurists, *Ukraine: Russia must end aggression and all parties must respect international law*, <https://www.icj.org/ukraineid10hrc49/>.

⁸ General Assembly Resolution, Definition of Aggression, 3314 (XXIX), article 1.

⁹ Amendments to the Rome Statute of the International Criminal Court Kampala, 11 June 2010, *Adoption of Amendments on the Crime of Aggression*, C.N.651.2010.TREATIES-8.

¹⁰ General Assembly Resolution, *Aggression against Ukraine*, A/ES-11/L.1, 1 March 2022; *The deteriorating human rights situation in Ukraine stemming from the Russian aggression*, A/HRC/S-34/L.1, 11 May 2022.

¹¹ International Court of Justice, *Ukraine institutes proceedings against the Russian Federation and requests the Court to indicate provisional measures*, <https://www.icj-cij.org/public/files/case-related/182/182-20220227-PRE-01-00-EN.pdf>.

¹² International Court of Justice, Order, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, 2022 16 March General List No. 182, <https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-00-EN.pdf>, para 86.

¹³ The European Court grants urgent interim measures in application concerning Russian military operations on Ukrainian territory, ECHR 068 (2022), 01.03.2022.

1.3 To date the Russian authorities have taken no steps to comply with these measures and the unlawful partial occupation and active military actions continue.¹⁴ Despite the changing fronts of hostilities and Ukraine's success in regaining control over its territories occupied by Russian forces, Russia continues to occupy significant parts of Ukrainian territory, in violation of international law, and there is reliable evidence of widespread indiscriminate attacks and direct attacks on civilians and civilian objects by Russian forces, in violation of obligations under international humanitarian law as well as international human rights law. A report by the OSCE Moscow Mechanism, issued on 13 April 2022, found "clear patterns of IHL violations by the Russian forces on many of the issues investigated. This concerns in particular their conduct of hostilities. It is not conceivable that so many civilians would have been killed and injured and so many civilian objects, including houses, hospitals, cultural property, schools, multi-story residential buildings, administrative buildings, penitentiary institutions, police stations, water stations and electricity systems would have been damaged or destroyed if Russia had respected its IHL obligations in terms of distinction, proportionality and precautions in conducting hostilities in Ukraine".¹⁵ The report further found that "[s]ome violations and problems were also identified regarding practices of Ukraine. The Mission is in particular concerned about the treatment of prisoners of war, originally considered criminals, and treated in ways that are incompatible with Geneva Convention III."¹⁶

1.4 A second OSCE Moscow Mechanism report on Ukraine, published on 14 July 2022 has largely confirmed the findings of the first report and specified that international human rights law had been extensively violated during the armed conflict in Ukraine, and that some of the most serious violations included "[...] targeted killing of civilians, including journalists, human rights defenders, or local mayors; unlawful detentions, abductions and enforced disappearances of such persons; large-scale deportations of Ukrainian civilians to Russia; various forms of mistreatment, including torture, inflicted on detained civilians and prisoners of war; the failure to respect fair trial guarantees; and the imposition of the death penalty".¹⁷ The report found further evidence of commission of war crimes: "[t]he events concerning the towns of Bucha and Irpin, that were visited by the mission, are two emblematic examples of these grave breaches of IHL under the Geneva Conventions and their Additional Protocols, which constitute war crimes."¹⁸

1.5 In a report of 17 October 2022, the International Commission of Inquiry on Ukraine, established by resolution of the UN Human Rights Council,¹⁹ analysed events during late February and March 2022 in the four regions of Kyiv, Chernihiv, Kharkiv, and Sumy. The Commission found that "an array of war crimes, violations of human rights and international humanitarian law have been committed in Ukraine since 24 February 2022. As detailed in this report, Russian armed forces are responsible for the vast majority of the violations identified by the Commission. The Commission has also found instances in which Ukrainian armed

¹⁴ OHCHR, Russian Federation, <https://www.ohchr.org/en/countries/russian-federation>.

¹⁵ Report of the OSCE Moscow Mechanism's mission of experts, *Report On Violations Of International Humanitarian And Human Rights Law, War Crimes And Crimes Against Humanity Committed In Ukraine Since 24 February 2022*, page 93.

¹⁶ *Ibid.*

¹⁷ Report of the OSCE Moscow Mechanism's mission of experts, *Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity Committed in Ukraine (1 April – 25 June 2022)*, page 4.

¹⁸ *Ibid.*, page 114.

¹⁹ In resolution 49/1, *On the situation of human rights in Ukraine stemming from the Russian aggression*, adopted on 4 March 2022, the Human Rights Council decided to urgently establish an Independent International Commission of Inquiry, comprising three human rights experts, to be appointed by the President of the Human Rights Council for an initial duration of one year. The Commission of Inquiry was mandated to complement, consolidate and build upon the work of the UN Human Rights Monitoring Mission in Ukraine (HRMMU), in close coordination with HRMMU and the Office of the United Nations High Commissioner for Human Rights (<https://www.ohchr.org/en/hr-bodies/hrc/iic/hr-ukraine/index>).

forces have violated international humanitarian law, including two situations in which they committed war crimes".²⁰

Applicability of international humanitarian law and international human rights law

1.6 Human rights law and international humanitarian law are both applicable to the armed conflict between the Russian Federation and Ukraine.

1.7 The conduct of armed conflicts anywhere in the world is regulated by international humanitarian law (IHL), including the four Geneva Conventions of 1949, and their two Additional Protocols of 1977, and rules of customary international law.²¹ International humanitarian law has clear boundaries delimiting the conduct that can be considered an armed conflict; the widely accepted test is that articulated in the early authoritative Pictet Commentaries to the Geneva Conventions²² and by the International Criminal Tribunal for the Former Yugoslavia²³ and affirmed also by the International Committee of the Red Cross.²⁴ This assessment looks to (a) the identity and level of organization of the parties to the conflict, and (b) the scale and intensity of the conflict. Under these criteria, the armed conflict in Ukraine should be qualified as an international armed conflict to which international humanitarian law applies.

1.8 It is now well established that the application of IHL does not displace the application of international human rights law. The principle that the protections of international human rights law do not cease in times of armed conflict has been affirmed repeatedly by the International Court of Justice.²⁵

1.9 In its General Comment 31 on the nature of obligations imposed on States parties to the ICCPR, the Human Rights Committee confirmed that:

"...the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive."²⁶

1.10 The Human Rights Committee has expressed that: "the applicability of the regime of international humanitarian law during an armed conflict does not preclude the application of

²⁰ *Report of the Independent International Commission of Inquiry on Ukraine*, A/77/533, 18 October 2022, para 109.

²¹ ICRC, *The Geneva Conventions of 1949 and their Additional Protocols*, <https://www.icrc.org/en/document/geneva-conventions-1949-additional-protocols>.

²² ICRC, Pictet Commentary, Convention (IV) relative to the Protection of Civilian Persons in Time of War, at pp 35-36, available at <http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=AE2D398352C5B028C12563CD002D6B5C&action=openDocument>

²³ International Criminal Tribunal for the Former Yugoslavia (ICTY), Opinion and Judgment of 7 May 1997, *Prosecutor v. Dusko Tadic*, No. IT-94-1-T, para. 562.

²⁴ International Committee of the Red Cross (ICRC), Opinion Paper, *How is the Term 'Armed Conflict' Defined in International Humanitarian Law*, March 2008, www.icrc.org.

²⁵ International Court of Justice (ICJ), Advisory Opinion of 8 July 1996, *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, para.25; ICJ, Advisory Opinion of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, para.106; ICJ, Judgment of 3 February 2006, *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, para. 119.

²⁶ Human Rights Committee, General Comment No. 31, 'Nature of the general legal obligation imposed on states parties to the Covenant', UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para 11.

the Covenant, including Article 4 which covers situations of public emergency which threaten the life of the nation".²⁷ While States may derogate from certain provisions under international human rights instruments, this should "be strictly required by the exigencies of the situation" both in time and territory, and certain rights remain non-derogable.²⁸

The judiciary in Ukraine

1.11 Ukraine's inheritance of the Soviet judicial system, in which the judiciary was not independent from the executive, made the reform of the judiciary a priority since Ukraine's independence in 1991.²⁹ The most comprehensive reforms, which included constitutional changes related to the judicial system, were instituted after the change of government in Ukraine in 2014 as a result of the Maidan events.³⁰ Under legislative changes introduced through amendments to the Constitution of Ukraine and the Law "On the Judiciary System and the Status of Judges" of 2016, Ukraine established a new Supreme Court; and introduced life appointment for judges, removing judicial dismissal powers from political bodies.³¹

1.12 The present court system consists of:

- Courts of the first instance, consisting of circuit courts (criminal and civil jurisdiction), circuit administrative courts, and circuit commercial courts;
- Courts of appeals, consisting of appellate courts (criminal and civil jurisdiction), appellate administrative courts, and commercial appellate courts;
- The Supreme Court (consisting of Civil Cassation Court, Criminal Cassation Court, Commercial Cassation Court, Administrative Cassation Court and the Grand Chamber of the Supreme Court), High Anti-corruption Court and High Court of Intellectual Property;
- The Constitutional Court of Ukraine.

1.13 Importantly, in the 2016 reform, all issues related to the selection, promotion and dismissal of judges became the exclusive competence of judicial self-governance bodies – the High Qualifications Commission of Judges (HQCJ) and the High Council of Justice (HCJ). A one-time evaluation of all sitting judges was introduced according to criteria of competence, integrity and professional ethics. Two special bodies were established to support the work of the HQCJ: the Public Integrity Council, consisting of 20 members, including representatives of civil society, whose main task was to evaluate candidates for judicial positions for compliance with professional ethics and integrity criteria; and the Public Council of International Experts,

²⁷ Human Rights Committee, *Concluding Observations: Second Periodic Report of Israel*, UN Doc CCPR/CO/78/ISR (2003), para 11.

²⁸ International Covenant on Civil and Political Rights (ICCPR), Article 4.

²⁹ *Ukraine's Judiciary Reform: 5 Things to Know* <http://euromaidanpress.com/2017/03/16/ukraines-judiciary-reform-5-things-to-know/>.

³⁰ Formed in March 2015 as a consultative body to the President, the Constitutional Commission produced a draft of amendments to the Constitution of Ukraine regarding the judiciary, aimed at fighting corruption, renewing the judiciary, and regulating a number of issues connected to the problems of independence, impunity and public accountability of the judiciary. To address the issue of judicial independence, a number of standards were proposed: lifetime appointment of judges; limitation of the President's and the Parliament's authority to decide on judges' careers; the introduction of the new High Council of Justice with judges elected by their peers constituting the majority.

³¹ Before, judges were appointed by the Parliament, now they are appointed by the President on recommendation of the High Council of Justice.

consisting of six international experts, which was tasked with carrying out such evaluations for judicial positions at the High Anti-corruption Court.³²

1.14 On 13 July 2021, the Verkhovna Rada, the Ukrainian Parliament, passed legislation to relaunch the HJC and HCJ after a period of a pause in their work (see below paras.2.7-2.10). Yet, effective implementation of the reform was interrupted by the start of the armed conflict.

1.15 Before the conflict, Ukraine's judicial system was already weak, and there were inadequate legal guarantees and protection of judicial independence. In its Opinion of 2020, the Venice Commission observed that "due to the numerous unfinished and incoherent attempts to reform the judiciary, the Ukrainian Judiciary rest[ed] in a stage of transition."³³ Expressing concern at the lack of effort to ensure judicial independence, the UN Human Rights Committee recommended that, in order to comply with its obligations under the ICCPR, Ukraine should:

"refrain from interfering in the judiciary and safeguard, in law and in practice, the full independence and impartiality of judges and the independence and effective autonomy of prosecutors by, inter alia, ensuring that the procedures for the selection, appointment, promotion, transfer and removal of judges and prosecutors comply with the Covenant and relevant international standards, including the Basic Principles on the Independence of the Judiciary".³⁴

1.16 The conflict has inevitably placed the Ukrainian courts under immense pressure and affected the ability of the justice system to function as normal. In the longer term, the Ukraine judicial system will need to be further reformed and strengthened. Such reforms are needed both to fairly administer justice and uphold human rights and the rule of law in general, and in particular to equip the judicial system to play its role in ensuring accountability through fair trials, for war crimes and other international crimes committed by all parties to the conflict.³⁵ Reforms of the judiciary are likely to be given particular impetus by Ukraine's ambitious plans for reforms as an EU candidate State.³⁶

The Role of the Judiciary in times of war or other emergency

1.17 In any time of crisis, including that arising from war or other public emergency, the judiciary plays a central role in the protection of human rights, acting as an essential check on the other branches of the State and ensuring that laws and administrative measures comply with international human rights law and the rule of law.³⁷ To ensure the observance of the

³² Ukraine - Joint amicus curiae brief on certain questions related to the election and discipline of the members of the High Council of Justice, adopted by the Venice Commission at its 132nd Plenary Session (Venice, 21-22 October 2022), CDL-AD(2022)023-e.

³³ European Commission for Democracy Through Law (Venice Commission) *Ukraine joint opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on Draft Amendments to the Law 'On the judiciary and the status of judges' and certain laws on the activities of the Supreme Court and judicial authorities (draft law no. 3711)* Adopted by the Venice Commission at its 124th online Plenary Session (8-9 October 2020), para. 35.

³⁴ *Concluding observations on the eighth periodic report of Ukraine*, CCPR/C/UKR/CO/8, 9 February 2022, para. 44.

³⁵ E.g. PILPG, Expert Roundtable: *Presentation of Draft Legislation for a High War Crimes Court for Ukraine*, <https://www.publicinternationallawandpolicygroup.org/expert-roundtable-high-war-crimes-court-ukraine>.

³⁶ European Parliament resolution of 23 June 2022 on the candidate status of Ukraine, the Republic of Moldova and Georgia (2022/2716(RSP)).

³⁷ International Commission of Jurists, *ICJ Declaration on Access to Justice and Right to a Remedy in International Human Rights Systems*, Adopted in Geneva, Switzerland, 12 December 2012, Principle 3; Legal

rule of law and the protection of human rights, any declaration of a state of emergency and any emergency measure adopted under it, must be subject to effective judicial oversight.³⁸

1.18 As the UN Special Rapporteur on states of emergency and human rights highlighted:

“[S]tates of emergency are not tantamount to the rule of the arbitrary. They are an institution of the rule of law involving a series of measures designed to come into force only when a crisis situation arises and which remain in reserve during ordinary periods. Therefore, whatever the political dimension which may be attributed to a given state of emergency, its legal nature is such that the acts which constitute it (proclamation, ratification, etc.) and the measures which are adopted when it is in force (suspension or restriction of certain rights, etc.) must lie within the framework of the principles governing the rule of law and are thus subject to controls”.³⁹

1.19 International human rights law therefore requires that during the armed conflict, in the territory under its control, Ukraine should continue to uphold human rights through the judicial system, including the core elements of the right to a fair hearing, the right to liberty and the right to an effective remedy for violations of human rights.

Derogations from human rights treaties

1.20 The Ukrainian judicial system has a crucial role to play in upholding human rights and the rule of law in the context of its application of martial law and the derogations which Ukraine has made from its international human rights law obligations during the conflict.

1.21 On 24 February 2022, the day of the start of the military attack of the Russian Federation against Ukraine, Ukrainian President Volodymyr Zelensky declared martial law to be enacted throughout Ukraine.⁴⁰ With reference to this law, all national TV channels were combined into one platform⁴¹ and operation of 11 opposition political parties was suspended.⁴² Ukraine further limited the application of some Constitutional rights, and lodged notice of extensive derogations in respect of its obligations under both the International Covenant on Civil and Political Rights (ICCPR), and the European Convention on Human Rights (ECHR). The notification was done pursuant to requirements under these two instruments, which require that States must communicate the derogation, the measures undertaken and the extent to which they derogate from their obligations under the relevant human rights treaty to the treaty's depository.⁴³

Commentary to the ICJ Geneva Declaration, <https://www.icj.org/wp-content/uploads/2011/05/ICJ-genevadeclaration-publication-2011.pdf>, page 34.

³⁸ *ICJ Declaration on Access to Justice and Right to a Remedy in International Human Rights Systems*, op cit, Principle 1; Legal Commentary to the ICJ Geneva Declaration, page 6.

³⁹ Sixth Annual Report and list of States which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency, presented by Mr. Leandro Despouy, Special Rapporteur appointed pursuant to Economic and Social Council resolution 1985/37, UN Doc. E/CN.4/Sub.2/1993/23, 29 June 1993, para. 52.

⁴⁰ Law of Ukraine On Approval of the Decree of the President of Ukraine “On the Imposition of Martial Law in Ukraine”, № 2102-IX, 24 February 2022.

⁴¹ Decree of the President of Ukraine, №152/2022, <https://www.president.gov.ua/documents/1522022-41761>; Ukraine president signs decree to combine national TV channels into one platform, <https://www.reuters.com/world/europe/citing-martial-law-ukraine-president-signs-decree-combine-national-tv-channels-2022-03-20/>; Ukraine President Zelensky signs decree creating unified national news source, <https://www.jurist.org/news/2022/03/ukraine-president-zelensky-signs-decree-creating-unified-national-news-source/>.

⁴² Decree of the President of Ukraine, №153/2022; <https://www.president.gov.ua/documents/1532022-41765>;

⁴³ ICCPR, Article 4.3; European Convention on Human Rights (ECHR), Article 15.3.

1.22 Article 4 of the ICCPR provides that:

"In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."

1.23 With a similar, but somewhat distinct formulation, article 15.1 of the European Convention provides:

"1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."

1.24 With the exception of those derogations that are lawful and permissible for specific rights as provided for under these treaties, Ukraine is otherwise bound by its obligations under international human rights law, including in situations of non-international and international armed conflict (see above paras.1.6-1.10).⁴⁴

1.25 Under both the ICCPR and ECHR, States "may take measures derogating from their obligations ... to **the extent strictly required** "to meet a specific threat to the life the nation."⁴⁵ They may not do so in a manner that discriminates, in purpose or effect. Critically, derogating measures must comply with the principles of necessity and proportionality, including as to duration, geographical coverage and material scope of the state of emergency and related measures of derogation.⁴⁶

1.26 These strict requirements of necessity and proportionality mean that "derogation" is not tantamount to "suspension of rights". Derogation only narrows the scope of application of a right, not its general application. As the Human Rights Committee has put it, "In practice, this will ensure that no provision of the Covenant, however validly derogated from will be entirely inapplicable to the behaviour of a State party."⁴⁷

1.27 Both the ICCPR and ECHR expressly provide that certain rights may never be the subject of a derogation. These include freedom from torture and other cruel, inhuman or degrading treatment or punishment, most elements of the right to life, freedom from slavery and servitude; and freedom from retroactive criminal liability (*nullum crimen sine lege*).⁴⁸ The ICCPR, in addition, makes non-derogable freedom from imprisonment merely on the ground of inability to fulfil a contractual obligation, the right to recognition of as a person before the law, and freedom of thought, conscience and religion (Article 4 ICCPR). In addition, the jurisprudence of the supervisory organs has made clear that other rights are effectively non-

⁴⁴ See, OHCHR, International Legal Protection of Human Rights in Armed Conflict, New York and Geneva, 2011, https://www.ohchr.org/sites/default/files/Documents/Publications/HR_in_armed_conflict.pdf.

⁴⁵ ICCPR Article 4.1, ECHR Article 15.1.

⁴⁶ Human Rights Committee, General Comment no. 29, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August para 4.

⁴⁷ *Ibid.*

⁴⁸ ICCPR Articles 4.2, ECHR Article 15.2.

derogable. These include the right to an effective remedy for a violation of rights and the fundamental requirements of the rights to a fair trial and to liberty.⁴⁹

1.28 In its initial notice of derogation from both instruments in March,⁵⁰ Ukraine indicated that for the period of martial law in regions of Ukraine⁵¹ it had derogated from its obligations concerning the rights to freedom from forced or compulsory labour, the right to liberty, rights to respect for private life, freedom of religion or belief, freedom of expression, freedom of association and assembly, the right to peaceful enjoyment of possessions, the rights of children to special measures of protection, the right to education, freedom of movement and rights to an effective remedy and to equality and non-discrimination.⁵²

⁴⁹ Human Rights Committee, General Comment no. 29, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, paras. 14-16.

⁵⁰ Ukraine: Notification under Article 4 (3) 1, Reference: C.N.65.2022.TREATIES-IV.4 (Depositary Notification); Council of Europe, Directorate of Legal Advice and Public International Law, Note Verbale, Strasbourg, 22 March 2022, <https://rm.coe.int/0900001680a5b0b0>; Derogations were made under both the ICCPR and the ECHR in respect of rights in those instruments equivalent to Ukrainian constitutional rights limited under martial law, including: the right to the inviolability of home – Article 30 of the Constitution (Articles 17 of the ICCPR and Article 8 of the ECHR), secrecy of correspondence, telephone conversations and other correspondence – Article 31 of the Constitution (Articles 19 and 20 of the ICCPR and Article 10 of the ECHR), freedom from interference from family life – Article 32 of the constitution (Articles 17 of the ICCPR and Article 8 of the ECHR), freedom of movement and free choice of residence – Article 33 of the Constitution (Articles 12 and 13 of the ICCPR and Article 2 of the Option Protocol 4 to the ECHR), freedom of expression and thought – Article 34 of the constitution (Articles 19 of the ICCPR and Articles 9 and 10 of the ECHR), right to participate in State affairs – Article 38 of the Constitution (Articles 25 of the ICCPR and Article 10 of the ECHR), the right to peaceful assembly – Article 39 of the Constitution (Articles 21 of the ICCPR and Article 11 of the ECHR), right to property – Article 41 of the Constitution (Articles 25 of the ICCPR and Article 1 of the Option Protocol to the ECHR), the right to the entrepreneurial activity – Article 42 of the Constitution (Articles 17 of the ICCPR and Article 1 of the Additional Protocol to the ECHR), the right to work – Article 43 of the Constitution (Articles 22, 25 of the ICCPR and Article 14 of the ECHR), the right to a strike – Article 44 of the Constitution (Articles 21, 22 of the ICCPR and Article 11 of the ECHR); right to education – Article 53 of the Constitution (Articles 24, 25 of the ICCPR and Article 2 to the Additional Protocol to the ECHR). Furthermore, Ukraine derogated from the obligations under articles 3, 8 (paragraph 3), 9, 12, 13, 17, 19, 20, 21, 22, 24, 25, 26, 27 of the Covenant and articles 4 (paragraph 3), 8, 9, 10, 11, 13, 14, 16, Articles 1, 2 of the Additional Protocol, Article 2 of Protocol No. 4 to the Convention, in respect of measures introduced under martial law.

⁵¹ A state of emergency in Ukraine was imposed on the territory of Vinnytsia, Volyn, Dnipropetrovsk, Zhytomyr, Zakarpattia, Zaporizhia, Ivano-Frankivsk, Kyiv, Kirovohrad, Lviv, Mykolaiv, Odesa, Poltava, Rivne, Sumy, Ternopil, Kharkiv, Kherson, Khmelnytskyi, Cherkasy, Chernivtsi, Chernihiv regions, the city of Kyiv from 00 hours 00 minutes on February 24, 2022 for a period of 30 days.

⁵² Ukraine: notification under Article 4 (3) 1, Reference: C.N.65.2022.TREATIES-IV.4 (Depositary Notification); Council of Europe, Directorate of Legal Advice and Public International Law, Note Verbale, Strasbourg, 22 March 2022, <https://rm.coe.int/0900001680a5b0b0>; Derogations were made under both the ICCPR and the ECHR in respect of rights in those instruments equivalent to Ukrainian constitutional rights limited under martial law, including: the right to the inviolability of home – Article 30 of the Constitution (Articles 17 of the ICCPR and Article 8 of the ECHR), secrecy of correspondence, telephone conversations and other correspondence – Article 31 of the Constitution (Articles 19 and 20 of the ICCPR and Article 10 of the ECHR), freedom from interference from family life – Article 32 of the constitution (Articles 17 of the ICCPR and Article 8 of the ECHR), freedom of movement and free choice of residence – Article 33 of the Constitution (Articles 12 and 13 of the ICCPR and Article 2 of the Option Protocol 4 to the ECHR), freedom of expression and thought – Article 34 of the constitution (Articles 19 of the ICCPR and Articles 9 and 10 of the ECHR), right to participate in State affairs – Article 38 of the Constitution (Articles 25 of the ICCPR and Article 10 of the ECHR), the right to peaceful assembly – Article 39 of the Constitution (Articles 21 of the ICCPR and Article 11 of the ECHR), right to property – Article 41 of the Constitution (Articles 25 of the ICCPR and Article 1 of the Option Protocol to the ECHR), the right to the entrepreneurial activity – Article 42 of the Constitution (Articles 17 of the ICCPR and Article 1 of the Additional Protocol to the ECHR), the right to work – Article 43 of the Constitution (Articles 22, 25 of the ICCPR and Article 14 of the ECHR), the right to a strike – Article 44 of the Constitution (Articles 21, 22 of the ICCPR and Article 11 of the ECHR); right to education – Article 53 of the Constitution (Articles 24, 25 of the ICCPR and Article 2 to the Additional Protocol to the ECHR). Furthermore, Ukraine derogated from the obligations under articles 3, 8 (paragraph 3), 9, 12, 13, 17, 19, 20, 21, 22, 24, 25, 26, 27 of the Covenant and articles 4 (paragraph 3), 8, 9, 10, 11, 13, 14, 16, Articles 1, 2 of the Additional Protocol, Article 2 of Protocol No. 4 to the Convention, in respect of measures introduced under martial law.

1.29 Ukraine subsequently notified of further derogations in relation to specific aspects of the right to fair trial,⁵³ right to liberty and right to an effective remedy, in particular as regards judicial review of pre-trial detention.⁵⁴

1.30 The provisions applying under Ukrainian martial law carry direct implications for the administration of justice and the functioning of the judiciary and the court system, and in particular pre-trial detention. They are considered further below.

⁵³ Although the right to a fair trial is not listed among non-derogable rights under the ICCPR, “derogating from normal procedures required under article 14 in circumstances of a public emergency should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation. The guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights: General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial, para. 6.

⁵⁴ Council of Europe, Directorate of Legal Advice and Public International Law, Notification of Declaration, 24 March 2022, <https://rm.coe.int/1680a5ef57>; Council of Europe, Directorate of Legal Advice and Public International Law, Notification of Communication, 21 June: <https://rm.coe.int/0900001680a6f9f1>.

2. ADMINISTRATION OF JUSTICE ON THE TERRITORIES UNDER UKRAINIAN CONTROL

Initial impact on the functioning of the judicial system

2.1 According to the Law of Ukraine on the Legal Regime of the Martial Law, “the powers of courts, bodies and institutions of the justice system, provided by the Constitution of Ukraine, in the conditions of the legal regime of martial law may not be limited”.⁵⁵ Furthermore, “reduction or acceleration of any form of justice is prohibited”.⁵⁶ Should it be the case that administration of justice is not possible by courts operating in the territory where martial law is imposed, the judicial bodies of Ukraine may change the territorial jurisdiction in which court cases are heard, or change the location of courts in the manner prescribed by law.⁵⁷

2.2 In practice, and unsurprisingly given the abruptness and speed of the invasion, it appears that the Ukraine judiciary was not logistically ready to operate during an armed conflict waged on most of its territory, including, Kyiv, the capital. Nor was it in a position to consider and adapt where necessary the legal and operational framework to administer justice in a time of all-out war. Reportedly, courts throughout Ukraine discontinued operation for days or even weeks, and judges and court administrative personnel stopped going to their respective courts, including the higher courts. Court cases were suspended. However, judges were instructed to be in touch with the court management.⁵⁸ As a consequence of the invasion, many judges along with other Ukrainians were displaced: some judges left the regions of Ukraine where they had lived, others took their employment documents and left Ukraine. While some judges and court personnel remained present in courts, the ICJ heard that it took several weeks before the court proceedings actually resumed.

2.3 According to the information provided by the judiciary, in Ukraine in the beginning of August 2022, 98 (14%) courts of appeal and local courts stopped administering justice, and 75 (9%) courts were damaged or fully destroyed.⁵⁹ According to this information, 66 of the total number of 777 court premises suffered serious impacts, such as broken windows, damage or destruction to ceilings, interior doors and internal partitions between offices and electrical or heating infrastructure. There was often no heating, drainage, or electricity supply and nine court premises were completely destroyed.⁶⁰

2.4 On 3 March 2022, Verkhovna Rada (the Parliament) of Ukraine amended the law "On the Judiciary and the Status of Judges." The amendments were directed at cases where administration of justice is impossible “for objective reasons” during the state of emergency “in connection with a natural disaster, hostilities, measures with regard to the fight against terrorism or other emergencies.” In such circumstances, the territorial jurisdiction of cases

⁵⁵ The Law of Ukraine on the Legal Regime of the Martial Law, 389-VIII, article 12².

⁵⁶ *Ibid.*, article 26.2.

⁵⁷ *Ibid.*, article 26.3.

⁵⁸ Recommendations on the work of courts under martial law of 3 March 2022, <https://yur-gazeta.com/golovna/rsu-opublikovala-rekomendaciyi-shchodo-roboti-sudiv-v-umovah-voennogo-stanu.html#>.

⁵⁹ The State Judicial Administration informs about the administration of justice in war conditions as of August 1, 2022 [ДСА України інформує про здійснення правосуддя в умовах війни станом на 01 серпня 2022 року], <https://dsa.court.gov.ua/dsa/pres-centr/news/1301857/>.

⁶⁰ The State Judicial Administration informs about the administration of justice in war conditions as of August 1, 2022 [ДСА України інформує про здійснення правосуддя в умовах війни станом на 01 серпня 2022 року], <https://dsa.court.gov.ua/dsa/pres-centr/news/1301857/>; Supreme Court of Ukraine, *Ukrainian courts destroyed as a result of Russian aggression*, https://www.youtube.com/watch?v=L1Xfc1WvusM&ab_channel=%D0%92%D0%B5%D1%80%D1%85%D0%B%D0%B2%D0%BD%D0%B8%D0%B9%D0%A1%D1%83%D0%B4.

under consideration could be changed “by a decision of the Supreme Justice Council following a proposal of the Supreme Court President”.⁶¹ The designated court should be the court nearest to the one that cannot administer justice or another court.⁶² However, as amended by the Ukraine Parliament by Law No. 2128-IX,⁶³ in case of the absence of a functioning Supreme Council of Justice and introduction of the emergency or martial law, it is the Supreme Court President that takes decisions regarding the secondment of judges to other courts.⁶⁴

2.5 As explained in the following section, the High Council of Justice (HCJ), for reasons unrelated to the armed conflict, was already not functional at the start of the conflict when, on 22 February 2022, ten members of this body resigned.⁶⁵ Since then the SCJ has not been operational. Thus, it is the Supreme Court President who is currently taking decisions to change the jurisdiction of local courts⁶⁶ and appeal courts.⁶⁷

2.6 At least 133 courts⁶⁸ in various regions of Ukraine have since changed their territorial jurisdiction due to the inability to administer justice during the current armed conflict.⁶⁹ As of late June 2022, more than 200 first instance judges from the occupied territories had been relocated to the territories controlled by the Ukrainian government and another 200 were in the process of such secondment.⁷⁰

The functioning of the bodies of judicial self-governance

2.7 While many courts, resumed their work once the initial shock of the invasion had passed, the key bodies of the self-governance of the judiciary, in particular the HQCJ and the HCJ could not resume their work as of the date of publishing this briefing paper. The ICJ understands that this has created disruption in terms of the staffing and other issues related to the judicial administration, which have not been resolved due to a combination of the procedures governing these bodies and the application of martial law as a consequence of the ongoing armed conflict.

⁶¹ The Law of Ukraine on the Judiciary and the Status of Judges, of 02.06.2016 № 1402-VIII, article 147.7.

⁶² *Ibid.*

⁶³ Law of Ukraine “On Amendments to Chapter XII “Final and Transitional Provisions” of the Law of Ukraine “On the Judiciary and the Status of Judges” to ensure the stable functioning of the judiciary during the absence of an authorized member of the High Council of Justice”, No. 2128-IX,

⁶⁴ The Law of Ukraine “On the Judiciary and the Status of Judges”, Chapter XII, para 56.

⁶⁵ *The High Council of Justice has officially stopped working*, <https://sud.ua/ru/news/publication/230125-vysshiy-sovet-pravosudiya-ofitsialno-prekratil-rabotu>.

⁶⁶ Supreme Court, *Announcement by the Supreme Court President, About the start of the procedure for the secondment of judges of local courts located in the territories where hostilities are taking place, the territorial jurisdiction of which was changed by the orders of the Chairman of the Supreme Court*, https://supreme.court.gov.ua/userfiles/media/new_folder_for_uploads/supreme/vidr_2022/Oqosh_vidr_2022.pdf.

⁶⁷ *Ibid.*

⁶⁸ *The State Judicial Administration norms about the administration of justice in war conditions as of August 1, 2022*, [ДСА України інформує про здійснення правосуддя в умовах війни станом на 01 серпня 2022 року], <https://dsa.court.gov.ua/dsa/pres-centr/news/1301857/>.

⁶⁹ *The order of determining the territorial jurisdiction of cases, the list of courts whose territorial jurisdiction has been changed due to the inability to administer justice during martial law (summary table)*, https://supreme.court.gov.ua/supreme/gromadyanam/terutor_pidsudnist/; *The list of courts whose territorial jurisdiction has been changed due to the inability to administer justice during martial law*, https://supreme.court.gov.ua/userfiles/media/new_folder_for_uploads/supreme/war/Zagalna_tablica_sudiv_6_1.pdf.

⁷⁰ ILAC Rule of Law Report: *Under Assault: A Status Report on the Ukrainian Justice System in Wartime*, <https://www.ibanet.org/document?id=ILAC-Report-on-the-Ukrainian-Justice-System-in-Wartime-2022-July>, page 17.

2.8 The HQCJ, a body created in 2016 to facilitate judicial reform, has powers to evaluate the competence and integrity of sitting judges and to organize evaluation of judges, including recommendation for judicial positions.⁷¹ Consisting of 16 members, it can exercise its function when at least 11 of its members are appointed.⁷² In 2019, the operation of the HQCJ was terminated by law.⁷³ In 2021, another law was adopted to resume the work of the HQCJ.⁷⁴ Under the new procedure, a Competition Commission was to appoint members of the HQCJ.⁷⁵ The Competition Commission, consisting of three international members and three Ukrainian members, with the casting vote of the international members. It started its work and announced a competition for membership of the HQCJ at the end of January 2022.⁷⁶ Applications were to be accepted between 4 February and 4 March 2022, but this process was disrupted by the invasion.⁷⁷ On 13 July 2022, the HQCJ held its first meeting since the Russian invasion and resumed the application process from 15 July to 22 August 2022, and later drew up the final list of candidates to be interviewed for membership of the HQCJ. However, at the time of publishing this briefing paper, the HQCJ had not yet re-started its operation, thus preventing any new selection and appointment of judges.

2.9 The HCJ, the other essential body in the administration of the judiciary, was also created by the law of 2016.⁷⁸ Consisting of 21 members, the HCJ, among other functions, has the power to recommend judges for appointment by the President; to establish disciplinary bodies and carry out disciplinary procedures; to consider and adjudicate complaints against judges; to take decisions on dismissal of judges; and to approve the arrest and detention of judges or temporary removals of judges.⁷⁹ Following a series of crises and attempts to reform the HCJ,⁸⁰ in 2021 a law was passed by Verkhovna Rada to relaunch the HCJ and establish an Ethics Council. The Ethics Council consists of three international members and three Ukrainian members, with the casting vote of the international members. It was established to carry out a one-time assessment of acting members of the HCJ and to scrutinize candidates for membership of the HCJ.⁸¹ Nonetheless, in January 2022, the acting head of the HCJ and another member resigned,⁸² followed by the resignation from the HCJ of two members of the Bar Association "due to the establishment of discriminatory requirements for HCJ Members during judicial reform and restriction of the independence of the status of advocates –

⁷¹ Law of Ukraine "On the judiciary and the status of judges", Chapter 3. High Qualification Commission of Judges of Ukraine.

⁷² Law of Ukraine "On the judiciary and the status of judges", Article 92 paras 3 and 4.

⁷³ Law of Ukraine "On introducing amendments to the Law of Ukraine "On the judicial system and the status of judges" and some laws of Ukraine regarding the activities of judicial governance bodies", No 193-IX, of 16 October 2019.

⁷⁴ Law of Ukraine "On amendments to the Law of Ukraine "On the Judiciary and the Status of Judges" and some laws of Ukraine regarding the resumption of the work of the High Qualification Commission of Judges of Ukraine", No 1629-IX, of 13 July 2021.

⁷⁵ *Ibid.*, Article I.1(5) concerning Article 95¹.

⁷⁶ *The competitive commission for the selection of candidates for the positions of members of the High Qualification Commission of Judges of Ukraine began its work and announced the competition*, [Конкурсна комісія з добору кандидатів на посади членів Вищої кваліфікаційної комісії суддів України розпочала свою роботу і оголосила конкурс], <https://court.gov.ua/archive/1247213/>.

⁷⁷ *Ibid.*

⁷⁸ Law of Ukraine "On the High Council of Justice", of 21 December 2016, No 1798-VIII, <https://zakon.rada.gov.ua/laws/show/1798-19#Text>.

⁷⁹ *Ibid.*, Article 3 (The Powers of the High Councils of Justice).

⁸⁰ Venice Commission, *Ukraine - Law on amending selected legislative acts concerning procedure for election (appointment) of members of the High Council of Justice and activities of disciplinary inspectors of the High Council of Justice*, 21 October 2021, CDL-REF(2021)081-e, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-REF\(2021\)081-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2021)081-e).

⁸¹ Law of Ukraine "On amendments to certain legislative acts of Ukraine on the procedure for election (appointment) to the positions of members of the High Council of Justice and the activities of disciplinary inspectors of the High Council of Justice", 14 July 2021, № 1635-IX.

⁸² *Tainted top judicial officials resign ahead of reform*, <https://kyivindependent.com/national/tainted-top-judicial-officials-resign-ahead-of-reform>.

representatives of the legal community.”⁸³ In disagreement with the checks of all the members, ten members resigned on 22 February 2022, thus terminating the work of the HJC due to the lack of the necessary quorum of 15 members.⁸⁴ Following the first interviews for the positions of the members of the HCJ which started on 21 February 2022, the Ethics Council changed its Rules of procedure to be able to continue its work during the war. Since then, one member of the HCJ was found not compliant with the criteria of professional ethics and integrity, leading to his resignation. The lists of the candidates submitted by the Parliament of Ukraine, Congress of Judges and the Congress of Representatives of Higher Legal Educational Establishments and Research Institutions was also processed. This resulted in the election of two new members of the HCJ under the quota of the Parliament of Ukraine, and one new member of the HCJ under the quota of the Congress of Representatives of Higher Legal Educational Establishments and Research Institutions. Although these preliminary steps have been taken, so far the HCJ has not begun work.

2.10 Therefore, since the start of the Russian invasion, some of the key functions of administration of the judiciary have not been performed. This has prevented the appointment of judges, disciplinary actions against judges as well as termination of contracts or dismissals of judges for professional misconduct. This also means that judges who wish to resign their positions are effectively unable to do so, in the absence of an operational procedure.

Shortage of judges

2.11 According to the estimates of October 2021, approximately three thousand judicial positions were vacant in Ukraine.⁸⁵ According to other estimates, there is a shortage of 40 per cent in terms of the established quota of judges. As a result, the burden of this shortage is shared by the sitting judges. The ICJ understands that pressure on them is even heavier given the fact that cases are often transferred from the courts located in the territories currently under Russian military occupation. The ICJ was told that this often leads to unsustainable workloads and very long working hours for judges.

2.12 It appears that this situation can only be rectified by restoration of the HQCJ and the HCJ, thereby allowing for the appointment of new judges.

2.13 The shortage of judges may be further exacerbated in the coming year as the government has adopted a budget for the year 2023 where expenses for the judiciary will be reduced to by about three billion hryvnias (more than EUR 81 million) with a total budget for the judiciary of around twenty billion hryvnias (about EUR 541 million).⁸⁶ The Supreme Court

⁸³ *Representatives of the Bar in the HCJ resigned because of disagreement with unconstitutional status restrictions*, <https://en.unba.org.ua/activity/news/7396-representatives-of-the-bar-in-the-hcj-resigned-because-of-disagreement-with-unconstitutional-status-restrictions.html>.

⁸⁴ Hromadske, *The Supreme Council of Justice ceased to exercise its powers: 10 members resigned at once. What now?* [Вища рада правосуддя припинила виконувати повноваження: звільнилися відразу 10 членів. Що тепер?], <https://hromadske.ua/posts/visha-rada-pravosuddya-pripinila-vikonuvati-povnovazhennya-zvilnilisya-vidrazu-10-chleniv-sho-teper>.

⁸⁵ *Ukraine lacks about 3,000 judges — Supreme Court judges* [В Україні не вистачає близько 3 тисяч суддів — суддя ВС], <https://nv.ua/ukr/ukraine/events/v-ukrajini-ne-vistachaye-suddiv-silki-same-novini-ukrajini-50188509.html>; *What can the authorities do for the fastest possible implementation of laws on the HQCJ and SCJ and unblocking the judicial system* Що може зробити влада для максимально швидкої імплементації законів щодо ВККС та ВРП і розблокування судової системи, <https://zn.ua/ukr/internal/kadrova-kriza-v-sudakh-statistika-prichini-prohnoz.html>.

⁸⁶ *Funding of courts in Ukraine will be reduced by almost UAH 3 billion: what indicators are included in the State Budget 2023* [Фінансування судів в Україні скоротять майже на 3 млрд грн: які показники закладені у Держбюджет-2023], <https://sud.ua/uk/news/publication/249263-finansuvannya-sudiv-v-ukrayini-skorotyat->

is expected to be one of the courts most affected by the reduced budget as its budget will be reduced from 1.5 billion to 1 billion hryvnias.⁸⁷ Its staff is expected to be reduced by some 30 per cent and the salaries of those who remain are expected to be reduced 20 per cent.⁸⁸

Transfer of case files when courts cannot function

2.14 According to the recommendations of the Supreme Court, cases considered by courts in the territory of active hostilities in the course of the current armed conflict, if possible, should be transferred to other courts.⁸⁹ This applies to those cases that are pending consideration and high-profile cases: files of criminal proceedings; proceedings against minors; proceedings for particularly serious crimes; and other cases, the consideration of which “may be essential for the rights of the participants in the process”.⁹⁰

2.15 However, in practice, the recommendations have been beset by problems. Besides the obvious logistical difficulties involved in asking the parties to the proceedings to attend before a court of a different region, especially in a time of armed conflict, the ICJ has been told that many of the case files have been lost which has significantly hampered consideration of cases. In such cases the procedure of “recovery of lost materials” was used. If for any reason the case file has not been referred to another court and the casefile has been lost in the territory of the court that has jurisdiction, the following possible options appear to be used in practice:

1. Where there is a first instance court decision, the case may be reopened in accordance with the rules of procedure;
2. Where there is not yet a first instance court decision, a fresh lawsuit may be filed. Accordingly, the hearing will recommence from the beginning.⁹¹

2.16 The ICJ understands that greater use of remote participation in proceedings has been used particularly often by the courts and that this has increased their capacity to operate during the armed conflict (see further below paras.2.24-2.28). This is broadly in line with the recommendation of the UN Human Rights Council, in a resolution of 2020, which called on states “to make available to judiciaries current information and communications technology and innovative online solutions, enabling digital connectivity, to help to ensure access to justice and respect for the right to a fair trial and other procedural rights, including in extraordinary situations.”⁹² As the ICJ has explained elsewhere, where a hearing takes place through remote participation with the free and fully informed consent of the parties, it does not in general give rise to concerns under international human rights law, provided that sufficient safeguards are in place to protect due process, including confidential access to a

[mayzhe-na-3-mlrd-grn-yaki-pokazniki-zakladeni-u-derzhbyudzheta-2023?fbclid=IwAR0yDShLXklg02PSch1MyH_ZosRRiv322iBfMghrtpdEUWegdQT8Rahcd_E](https://www.legalaid.gov.ua/publikatsiyi/robo-ta-sudiv-na-period-diyi-voyennogo-stanu/).

⁸⁷ *The apparatus of the Supreme Court will be reduced by 30%, they also want to reduce the number of assistant judges: what is known* [Апарат Верховного Суду скоротять на 30%, хочуть скоротити і помічників суддів: що відомо], <https://sud.ua/uk/news/publication/249286-apparat-verkhovnogo-suda-budet-sokraschen-na-30-khotyat-sokratit-i-pomoschnikov-sudey>.

⁸⁸ *Ibid.*

⁸⁹ Law of Ukraine “On Amendments to the Law of Ukraine” On the Judiciary and the Status of Judges “on Changing the Jurisdiction of Courts” №2112-IX.

⁹⁰ *Recommendations for the courts of first and appellate instance in case of seizure of the settlement and / or court or imminent threat of its seizure approved by the Order of the Supreme Court on March 13, 2022 N 6/0 / 9-22.*

⁹¹ *The work of courts during martial law*, <https://www.legalaid.gov.ua/publikatsiyi/robo-ta-sudiv-na-period-diyi-voyennogo-stanu/>.

⁹² Resolution 44/9 (16 July 2020), *Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers* <https://undocs.org/en/A/HRC/RES/44/9>, paras 17- 18

lawyer. However, in criminal trials, or in judicial review of detention following arrest or detention, an accused should not be denied the right to be physically present in court. In other proceedings, a remote hearing should take place only with the consent of the parties, except where there is a reasoned judicial decision to hold the decision remotely and where it is justified as reasonable and proportionate in the context of an emergency.⁹³

2.17 Greater reliance has also been placed on electronic documents. Although there has not been established a unified system of digitization of files of Ukrainian courts, many courts carried out an independent digitization of their case files. However, the absence of a unified system has meant that servers were physically located in the court buildings. Reportedly, in some courts in areas affected by the conflict, this led to either destruction of those files or leaving them behind. In any event, it was often difficult to use them in new proceedings.

2.18 A further difficulty has been that when cases have been transferred to new courts, they have been assigned to new judges rather than to judges that considered the cases initially, as judges are not always transferred to the same courts as their case files. Besides, when a case is transferred, the courts will begin consideration afresh, regardless of the stage at which the proceedings were at the time of the termination of the work of the court from which the files were moved. The ICJ was informed that in practice, given an already large backlog of cases, such cases they were sometimes not prioritized and were postponed.

2.19 Finally, as the progress of the conflict changed and some territories under Russian occupation reverted to the effective control of the Ukrainian government, the ICJ understands that some courts which had ceased to function have reopened and resumed their work. However, it appears that no procedure is in place for such situations to ensure that the cases which were taken from these courts would be returned. Thus, such courts start their work “from scratch” while their old cases are delayed in the courts to which they had been transferred.

Limiting access to the database of cases

2.20 According to the Law of Ukraine on Access to Judicial Decisions, everyone has the right to access to judicial decisions which are published on the Unified State Register of Judicial Decisions.⁹⁴ The State Register includes all decisions of the courts of general jurisdiction.⁹⁵ Access to the Unified State Register of Judicial Decisions was limited at the beginning of the armed conflict. The following message was published on its website <https://reyestr.court.gov.ua/>: “In order to prevent the threat to life and health of judges and participants in the trial during martial law, access to the Unified State Register of Judgments and the electronic service of proceedings tracking has been temporarily suspended.” The State Judicial Administration’s (SJA) decision on this could not be found in the public domain.⁹⁶

⁹³ International Commission of Jurists, *Videoconferencing, Courts and Covid 19, Recommendations based on International Standards*, November 2020, <https://icj2.wpeneginepowered.com/wp-content/uploads/2021/04/Universal-videoconferencing-courts-and-covid-Advocacy-2020-ENG.pdf>; International Commission of Jurists, *The Courts and COVID-19*, 5 May 2020, <https://icj2.wpeneginepowered.com/wp-content/uploads/2020/05/Universal-ICJ-courts-covid-Advocacy-Analysis-brief-2020-ENG.pdf>.

⁹⁴ Law of Ukraine “On access to judicial decisions”, No 3262-IV of 22 December 2005, Articles 2 and 3.

⁹⁵ *Ibid.*, Article 3.3.

⁹⁶ Official website: State Judicial Administration of Ukraine [Державна судова адміністрація України], <https://dsa.court.gov.ua/dsa/>.

2.21 Subsequently, the SJA announced its decision to restore access to the register for judges and law enforcement officials by putting them on the lists of authorized persons.⁹⁷ Lawyers did not have access to the database as a result of which the Ukrainian National Bar Association (UNBA) raised concerns about unjustified restrictions for lawyers in its letter stating that:

"[...] these changes [did] not provide lawyers with access to the Unified State Register of Judgments, which [was] contrary to the provisions of the Constitution of Ukraine".⁹⁸ Therefore, the UNBA asked the SJA to make the data of the register accessible for lawyers "in order to ensure a fair trial in court and ensure that the person exercises the right to effective and high-quality protection."⁹⁹

2.22 Later, access was restored with the following note: "Access to the Register is carried out in test (limited) mode. In order to prevent threats to the life and health of judges and litigants, as well as in the event of signs of a cyber threat, access to the Register or certain decisions in it may be restricted."¹⁰⁰ Currently, full access to decisions is available.¹⁰¹

2.23 In 2021, the Law of Ukraine introducing the Unified Judicial Information and Telecommunication System was adopted.¹⁰² According to this law, cases, including those concerning arrests and detention, are distributed automatically through this automated system. Under martial law, when there is no technical possibility of access to the Unified Judicial Information and Telecommunication System, which ensures random distribution of cases.¹⁰³ The chairperson of the Court, or the deputy chairperson in their absence, allocates hearings for judicial review of detention between judges, and in their absence - "in the order of priority and ensuring uniform workload. In the absence of the chairperson of the court and their deputy, the distribution of materials of criminal proceedings between judges is provided by the oldest judge."¹⁰⁴

Consideration of cases in courts under martial law

2.24 Following the invasion, and the occupation of certain regions and the ongoing conflict in parts of Ukraine, the operation of each court depends on the situation in the region where the court is located, the type of proceedings, and the technical capacity of courts.¹⁰⁵ The Supreme Court officially announced that during the period of martial law in force "in case of danger to the life and health of court visitors, court staff, judges" the decision would be made to temporarily terminate consideration of cases by a particular court.¹⁰⁶ Participants in court

⁹⁷ The SJA of Ukraine has restored access to the Unified State Register of Judgments, <https://dsa.court.gov.ua/dsa/pres-centr/news/1266748/>.

⁹⁸ The Constitution of Ukraine, Articles 59, 131-2.

⁹⁹ The Ukrainian National Bar Association has called on the SJA to restore lawyers' access to the Unified Register of Court Decisions, <https://unba.org.ua/news/7369-naau-zaklikala-dsa-ponoviti-dlya-advokativ-dostup-do-edinogo-reestru-sudovih-rishen.html>.

¹⁰⁰ Unified state register of court decisions, <https://reyestr.court.gov.ua/>.

¹⁰¹ Official website of the Unified State Register of Judicial Decisions, <https://reyestr.court.gov.ua/>.

¹⁰² The Law of Ukraine "On amendments to certain legislative acts of Ukraine regarding the provision of phased implementation of the Unified Judicial Information and Telecommunication System, № 1416-IX.

¹⁰³ Carrying out criminal proceedings under martial law, https://jurliga.ligazakon.net/ru/news/210957_osushchestvlenie-ugolovnogo-proizvodstva-v-usloviyakh-voennogo-polozheniya-zakon-vstupil-v-silu.

¹⁰⁴ Ibid.

¹⁰⁵ The judiciary and war: how the courts work, <https://yur-gazeta.com/dumka-eksperta/sudochinstvo-ta-viyna-yak-pracyuyut-sudi.html>.

¹⁰⁶ The Supreme Court, Specificities of administration of justice in the territory where martial law is introduced, <https://supreme.court.gov.ua/supreme/gromadyanam/kontakts/>.

proceedings have the opportunity to apply for consideration of the case in their absence, adjournment of cases in connection with hostilities and/or for consideration of cases by videoconference.¹⁰⁷ Such requests can be sent electronically to the e-mail address of the court or through a personal account in the system "Electronic Court", as well as by mail.¹⁰⁸

2.2 The Council of Judges of Ukraine has published recommendations for the work of judges during the period in which martial law applies.¹⁰⁹ It recommends that, in the event that a party to proceedings is unable to appear in court due to danger to life, or cannot apply for adjournment of the case or for consideration of the case by videoconference in connection with work on critical infrastructure, joining the Armed Forces of Ukraine, territorial defence, voluntary military formations, etc., courts administering justice are recommended to postpone the consideration of cases (except for urgent court proceedings).¹¹⁰

2.26 The Council of Judges of Ukraine has recommended that courts should encourage the parties to participate in proceedings through videoconferencing or to hold hearings without the participation of the parties.¹¹¹ Access of those who are not parties to the proceedings is limited under these recommendations.¹¹² The recommendations do not elaborate how limited such access should be and do not give any guidance as to the circumstances or situations where such access may be limited and to what extent.

2.27 Under the Council of Judges' recommendations, hearings concerning detention and extension of detention may not be adjourned.¹¹³ By contrast, the Council recommends that cases that are not urgent should be considered only with the written consent of all participants in the proceedings.¹¹⁴ The recommendations do not provide guidance as to which cases may be considered urgent.

2.28 In addition, at present, the following categories of cases are temporarily not considered by the courts:

- If the decision concerns lives on companies or individuals in the occupied territories;
- If the decisions concern penalties in favour of a citizen of Russia or an enterprise in the Russian Federation.¹¹⁵

¹⁰⁷ *Ibid.*

¹⁰⁸ Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine to Ensure the Phased Implementation of the Unified Judicial Information and Telecommunication System", № 1416-IX of 27 April 2021.

¹⁰⁹ *The Council of Judges of Ukraine has published recommendations for the work of courts under martial law* <https://yur-gazeta.com/golovna/rsu-opublikovala-rekomendaciyi-shchodo-roboti-sudiv-v-umovah-voennogo-stanu.html>.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Ibid.*; Order of the Supreme Court of 4 March 2022.

¹¹³ *The Council of Judges of Ukraine has published recommendations for the work of courts under martial law, op cit.*

¹¹⁴ Decision of the Council of Judges of Ukraine "On taking urgent measures to ensure the sustainable functioning of the judiciary in Ukraine in the context of the termination of the GRP and martial law in connection with the armed aggression on the part of Russia" 24.02.2022.

¹¹⁵ Law of Ukraine "On Amendments to Section XIII" Final and Transitional Provisions "of the Law of Ukraine" On Enforcement Proceedings" of 15.03.2022 № 2129-IX, Resolution of the Cabinet of Ministers of 03.03.2022 № 187 "On ensuring the protection of national interests in future claims of the state of Ukraine in connection with the military aggression of the Russian Federation" <https://zakon.rada.gov.ua/laws/show/187-2022-%D0%BF#Text>.

Arrest and detention under martial law

2.29 As mentioned above, following the invasion, Ukraine derogated from specific rights under the ICCPR and the ECHR. Among others, the derogation concerned articles 9 ICCPR and article 5 ECHR, which protect the right to liberty and contain a number of specific guarantees against arbitrary detention. In the note verbale lodged on 20 June to both the ICCPR and ECHR in respect of the law of 14 April 2022 No. 2201 "On Amendments to the Criminal Procedure Code of Ukraine to Improve the Procedure for Conducting Criminal Proceedings within Martial Law Regime", the Ukrainian government stated that "the application of Law No. 2201 necessitates derogation in respect of Articles 2 (paragraph 3), 9, 14 and 17 of the International Covenant on Civil and Political Rights and Articles 5, 6, 8 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms." In addition, the previous Notification of 24 March on the Criminal Code and pre-trial detention in relation to Law 2111 – IX states that "the application of the norms of this law necessitate deviation from Ukraine's obligations under paragraph 3 of Article 2, Articles 9, 14 of the International Covenant on Civil and Political Rights and Article 5, 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms."¹¹⁶

2.30 Under the Criminal Procedure Code of Ukraine, no one may be subject to arrest without a decision of an investigative judge, save in cases defined by the Code.¹¹⁷ Yet, in August 2014, in apparent contradiction or exception to this provision, Article 615 of the Criminal Procedure Code, authorized prosecutors in Ukraine to arrest persons for up to 30 days in cases of any of the following situations: declaration of state of martial law; impossibility of a judge to exercise their functions; against persons charged under certain articles of the Criminal Procedure Code, which were listed in the law.¹¹⁸

2.31 On 8 May 2022, the Criminal Procedure Code of Ukraine was further amended¹¹⁹ to establish that, in the event of introduction of martial law and if "there is no objective possibility for the investigating judge to exercise judicial powers in regard to certain specified¹²⁰ or other grave or particularly grave alleged crimes under the Criminal Code, the head of the "relevant prosecution body" can exercise such functions by a motion of the prosecutor or an investigator upon an agreement by the prosecutor.¹²¹ Under article 208 of

¹¹⁶ Council of Europe, Notification of Declaration, JJ9334C Tr./005-289, Strasbourg, 24 March 2022, <https://rm.coe.int/0900001680a5ef58%20>.

¹¹⁷ Criminal Procedure Code of Ukraine (CPCU), Article 207.

¹¹⁸ Law of Ukraine "On amendments to the Criminal Procedure Code of Ukraine regarding the special regime of pre-trial investigation in a state of martial law, a state of emergency or in the area of an anti-terrorist operation" No 1631-VII of 12 August 2014.

¹¹⁹ By Law of Ukraine "On Amendments to the Criminal Procedure Code of Ukraine to Improve the Procedure for Conducting Criminal Proceedings in Martial Law", № 2201-IX of 14 April 2022.

¹²⁰ Criminal Code of Ukraine articles: 140 compulsory prosecution, 163 Consideration of a request for temporary access to things and documents, 164 Decision on temporary access to things and documents, 170 Seizure of property, 173 Resolving the issue of seizure of property, 186 Deadlines for consideration of the application for a precautionary measure, 187 Ensuring the arrival of a person to consider a request for the application of a precautionary measure, 189 Consideration of a request for permission to detain for the purpose of a pretext, 190 The decision on the permission for the maintenance concerning, 206 General responsibilities of a judge for the protection of human rights, 219 Terms of pre-trial investigation, 232 Interrogation, identification by videoconference during the pre-trial investigation, 233 Intrusion into a person's home or other property, 234 Search, 235 Decision on permission to search a person's home or other property, 245 – 248 Obtaining samples for examination, Reading of technical devices and technical means that have the functions of photo, filming, video recording, or means of photo, filming, video recording, Grounds for conducting covert investigative (search) actions.

¹²¹ Carrying out criminal proceedings under martial law [Здійснення кримінального провадження в умовах воєнного стану: Закон набрав чинності], https://jurliga.ligazakon.net/news/210957_zdysnennya-kriminalnogo-provazhennya-v-umovakh-vonnogo-stanu-zakon-nabrav-chinnost.

the Criminal Procedure Code (apprehension by an authorized person)¹²² or where there are reasonable circumstances that give grounds to believe that escape is possible to evade criminal responsibility of a person suspected of committing a crime, an authorized official¹²³ could authorize detention of such an individual for up to 216 hours (i.e. nine days) without the decision of the investigating judge, court or resolution of the head of the prosecutor's office.¹²⁴

2.32 The law provided that persons detained without the decision of an investigating judge, court or decision of the head of the prosecutor's office during martial law must be released or taken to the investigating judge, court or head of the prosecutor's office no later than two hundred and sixteen hours from the moment of detention.¹²⁵

2.33 In August 2022, the Criminal Procedure Code was further amended¹²⁶ to remove the powers to authorize arrest from the prosecution thus bringing the law in compliance with the Constitution of Ukraine according to which, as confirmed by the Constitutional Court of Ukraine, "restriction of the constitutional right to freedom and personal integrity must be carried out in compliance with the constitutional guarantees of protection of the rights and freedoms of a person and a citizen and exclusively on the basis of a motivated court decision".¹²⁷

2.34 The decision to remove these powers from the prosecution is a welcome development, in line with rights to liberty and protection from arbitrary detention guaranteed under ICCPR Article 9 and ECHR Article 5. However, the changes to the competence of the prosecution did not extend as far as abolishing the prosecutor's authority to extend the detention period. Detention may be extended up to one month by the head of the relevant prosecutor's office and may be extended many times within the pre-trial investigation period.¹²⁸ In case there is no "objective possibility to complete pre-trial investigation and appeal to the court with an indictment, request for coercive measures of a medical or educational nature, [or] request for release from criminal liability" the term of pre-trial investigation in criminal proceedings is suspended based on a decision of the prosecutor and is renewed if the grounds for suspension cease to exist.¹²⁹ Prior to the suspension of the pre-trial investigation, the prosecutor is obliged to decide on the extension of the detention period.¹³⁰

2.35 These provisions are not in compliance with Ukraine's international legal obligations. The UN Human Rights Committee, the supervisory body of the ICCPR, has set out at length the permissible limits of derogation of article 9 in two General Comments, General Comment 29, concerning derogations in states of emergency, and General Comment 35, concerning the right to liberty under article 9.

¹²² CPCU, Article 208: Detention by an authorized official, https://kodeksy.com.ua/kriminal_no-protsesual_nij_kodeks_ukraini/statja-208.htm.

¹²³ A person who is authorised to carry out arrest (CPCU, Article 191.6).

¹²⁴ Law of Ukraine "On Amendments to the Criminal Procedure Code of Ukraine on Improving the Procedure for Conducting Criminal Proceedings in Martial Law", of 14 April 2022, N 2201-IX.

¹²⁵ *Carrying out criminal proceedings under martial law [Здійснення кримінального провадження в умовах воєнного стану: Закон набрав чинності]*, https://jurliga.ligazakon.net/news/210957_zdysnennya-kriminalnogo-provazhennya-v-umovakh-vonnogo-stanu-zakon-nabrav-chinnost.

¹²⁶ Law of Ukraine, "On amendments to the Criminal Procedure Code of Ukraine regarding the improvement of certain provisions of pre-trial investigation under martial law", № 2462-IX of 27 July 2022.

¹²⁷ Paragraph 13 of subsection 2.1 of paragraph 2 of the motivational part of the Decision of 23 November 2017 No. 1/2017.

¹²⁸ Criminal Procedure Code of Ukraine, Article 615.2(2).

¹²⁹ *Carrying out criminal proceedings under martial law [Здійснення кримінального провадження в умовах воєнного стану: Закон набрав чинності]*, *op cit*.

¹³⁰ *Ibid*.

2.36 In General Comment 29 the Committee made clear that derogations would be impermissible and invalid if they resulted in "arbitrary deprivations of liberty or by deviat[ions] from fundamental principles of fair trial".¹³¹ In particular the Committee stated that, in order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant.¹³²

2.37 In General Comment 35, the Committee made clear that

"...article 9 applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While rules of international humanitarian law may be relevant for the purposes of the interpretation of article 9, both spheres of law are complementary, not mutually exclusive. [...]"

65. Article 9 is not included in the list of non-derogable rights of article 4, paragraph 2, of the Covenant, but there are limits on States parties' power to derogate. States parties derogating from normal procedures required under article 9 in circumstances of armed conflict or other public emergency must ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation. Derogating measures must also be consistent with a State party's other obligations under international law, including provisions of international humanitarian law relating to deprivation of liberty, and non-discriminatory[...].

66. [.....]The fundamental guarantee against arbitrary detention is non-derogable, insofar as even situations covered by article 4 cannot justify a deprivation of liberty that is unreasonable or unnecessary under the circumstances. During international armed conflict, substantive and procedural rules of international humanitarian law remain applicable and limit the ability to derogate, thereby helping to mitigate the risk of arbitrary detention. Outside that context, the requirements of strict necessity and proportionality constrain any derogating measures involving security detention, which must be limited in duration and accompanied by procedures to prevent arbitrary application... including review by a court

67.[T]he right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention must not be diminished by measures of derogation.

2.38 In addition to protecting against arbitrary deprivation of liberty, the right to habeas corpus and similar remedies are also essential both to review the lawfulness of detention and for preventing torture and ill-treatment, enforced disappearance, incommunicado detention and other violations of human rights that are non-derogable.¹³³ The authority responsible for determining the lawfulness of a deprivation of liberty must be a judicial body, independent of the executive branch of government.¹³⁴ Prosecutors do not generally qualify as judicial officers

¹³¹ Human Rights Committee, General Comment No. 29, States of Emergency (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 11.

¹³² HRC, General Comment 29, para 16.

¹³³ HRC, General Comment 35, paras 64-67; See also, International Commission of Jurists, *Legal Commentary to the ICJ Geneva Declaration*, *op cit.*, page 144.

¹³⁴ ECtHR, *Sakik and others v. Turkey*, Application N° 23878/94, 23879/94, 23880/94, 23882/94, 23881/94, , Judgment of 22 October 2002 para. 31; the Inter-American Court of Human Rights, Advisory Opinion N° OC-8/87 of 30 January 1987, Habeas corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), paras. 35 and 42; Principle M(5)(e) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

for this purpose as they do not to have the necessary institutional objectivity and impartiality to act as judicial officers in determining the legality of detention.¹³⁵

2.39 Ukrainian law as it now stands allows for prolonged arbitrary detention that is impermissible under international law. In the case of the expiration of the court decision on detention and the “impossibility” of consideration by the court of the question of extending the period of detention in accordance with the procedure established by the Criminal Procedure Code, detention is considered extended until the relevant issue is resolved by the court, but for no more than two months.¹³⁶ It is highly unlikely that the threshold of “impossibility” of judicial review by courts could ever be achieved and therefore it can never be necessary to deprive a person of liberty for this prolonged period.

Persons detained in relation to the conduct of hostilities

2.40 In the first weeks of the military invasion by Russia, one specific issue which the Ukraine courts encountered difficulties was detention of Russian combatants and civilians taking direct part in hostilities. The ICJ heard reports that in the first phase of the armed conflict, fighters were apprehended, and brought to, for example, a detention facility. In such cases, in the absence of specifically designated places for prisoners of war (POW), such detention facilities rejected captured Russian soldiers because their detention was not authorised by a court. For this reason, often the prosecutorial bodies would charge the captured Russian soldiers with a crime of illegal border crossing or other crimes related to national security in order for a court to decide on their arrest and detention.¹³⁷ The ICJ heard reports that in some of these proceedings, the Ukrainian language was used and the soldiers concerned were not fully aware of the details of the charges against them.

2.41 Such treatment of combatants is not in accordance with the protection to which they were entitled to under international humanitarian law as POWs. International humanitarian law provides for combatant privilege, as a result of which combatants cannot be prosecuted solely for participation in the armed conflict.¹³⁸

2.42 Article 4 of Geneva Convention III provides that persons may be held as POWs if they “have fallen into the power of the enemy” and if they fall within one of the six categories specified in Article 4(A) including, for example, members of armed forces of a party to the international armed conflict, members of other armed forces who profess allegiance to a party to the conflict, members of militias fulfilling certain conditions, and persons who accompany the armed forces, such as civilian contractors and war correspondents. When Article 4 of

¹³⁵ HRC: *Kulomin v Hungary*, UN Doc. CCPR/C/50/D/521/1992 (1996) §11.3, *Reshetnikov v Russian Federation*, UN Doc. CCPR/C/95/D/1278/2004 (2009) §8.2, *Zheludkova v Ukraine*, UN Doc. CCPR/C/75/D/726/1996 (2002) §8.3, HRC Concluding Observations: Tajikistan, UN Doc. CCPR/CO/84/TJK (2005) §12; See WGAD, China, UN Doc. E/CN.4/2005/6/Add.4 (2004) §§32(c), 78(a); Inter-American Court: *Acosta-Calderón v Ecuador*, (2005) §§79-81, *Chaparro Álvarez and Lapo Iñiguez v Ecuador*, (2007) §§84-86.

¹³⁶ CPCU, Article 615.2(5); The Law of Ukraine “On Amendments to the Criminal Procedure Code of Ukraine on Improving the Procedure for Conducting Criminal Proceedings in Martial Law”, 14 April 2022, N 2201-IX.

¹³⁷ The first report of the OSCE Moscow Mechanism, *op cit*, p.10, records reports of POWs being held in detention centres, and affirms that this is contrary to Geneva Convention III Article 21. The report notes a tendency in the early stages of the conflict for all POWs to be considered as criminals or potential criminals. It noted that “Even on 3 April 2022, the Ukrainian General Prosecutor’s Office informed the Mission that concerning POWs prosecutors “organize work on supervision of the detention conditions and compliance with international humanitarian law, developing standards for the investigation of war crimes committed with the participation of the prisoners of war.” (p.11) and that the Ukrainian Prosecutor General’s office had charged some Russian POWs “with violating Ukraine’s territorial integrity, killings, and illegal crossings of the Ukrainian border” (p.12)

¹³⁸ Additional Protocol 1 to the Geneva Conventions, Article 43.2.

Geneva Convention III is applicable, POWs may be subject to internment in a POW camp, or to close confinement in certain circumstances.

2.43 The entitlement to hold a POW captive lasts until the cessation of active hostilities in the international armed conflict. At the same time, members of the armed forces of a party to an international armed conflict may be prosecuted for violations of IHL, in particular war crimes, or other crimes under international law such as genocide or crimes against humanity. With regard to such persons, Article 119(5) of Geneva Convention III acts as an exception to the obligation under Article 118 to release or repatriate POWs without delay after the cessation of active hostilities.¹³⁹

2.44 With respect to persons who do not enjoy protected POW status and who may be charged with criminal offenses, the protection of human rights law and Additional Protocol I to the Geneva Conventions, article 75(4), which largely mirror those protections, are applicable.

2.45 It appears that the arrests and orders for detention of combatants in the initial stage of the armed conflict arose from lack of awareness of what law should be applied in such situations – amongst judges, prosecutors as well as lawyers.¹⁴⁰ The problem was addressed only later when the Cabinet of Ministers published a Decree on the Rules of detention of prisoners of war.¹⁴¹ The ICJ understands that many of the criminal cases were closed following this clarification.

¹⁴⁰ First OSCE Moscow Mechanism report, *op cit*, p.12: “the Ministry for Reintegration of the Temporarily Occupied Territories of Ukraine assured the Mission that Russian POWs will only be prosecuted for war crimes and that the initial approach of prosecutors had been caused by a misunderstanding of IHL”

¹⁴¹ Cabinet of Ministers Decree of 5 April 2022 No 413, <https://zakon.rada.gov.ua/laws/show/413-2022-%D0%BF?lang=en#Text>.

3. ADMINISTRATION OF THE UKRAINIAN JUSTICE SYSTEM IN THE TERRITORIES OCCUPIED BY THE RUSSIAN FEDERATION¹⁴²

3.1 There is little information available about the operation of courts in the occupied territories of Ukraine administered by the Russian Federation as an occupying power under IHL. Therefore, this report does not address their work.

3.2 The Constitution of Ukraine guarantees the administration of justice in time of war.¹⁴³ As in peacetime, only courts can hear cases.¹⁴⁴ Therefore, the courts in Ukraine continue to administer justice at a distance in regard to cases falling under the jurisdiction of the courts located in the territories occupied or under the effective or overall control of Russian forces.

3.3 As mentioned above, when judicial bodies are not functional, the President of the Supreme Court has the powers to transfer cases under consideration from insecure areas to safe cities of Ukraine controlled by the government.¹⁴⁵ The Supreme Court may transfer cases to other cities only during martial law and 30 days after.¹⁴⁶ This period may be extended.¹⁴⁷ In the first days of the war, according to the chair of the Supreme Court Vsevolod Knyazev, it was necessary to relocate 30-40 courts a day.¹⁴⁸ So, for example, cases of the economic court of the Nikolaev area are considered by the economic court of the Odessa area, and the Kherson appeal moved to Dnieper.

3.4 On 13 March 2022, an order of the President of the Supreme Court №6/0/9-22, approved recommendations to the courts of first and appellate instances in case of seizure of an area and/or court or imminent threat of its seizure:

- any chair or judge of a court should act and make decisions depending on the situation with the priority task of preserving human life and health;
- if a locality is occupied, judges and court personnel should await evacuation corridors established by the authorities;
- if possible, measures should be taken to remove case files, especially those that are in court proceedings or are particularly important. Otherwise, ensure their safety in safes in the courtroom. But if there is a risk to life and health in the removal of such cases, they should be left in court;
- Documents containing state secrets should be destroyed;
- It is recommended that steps are taken to copy the contents of the servers and export them as soon as possible. At the same time, mantles, badges and court seals are subject to export. If the latter cannot be removed, they shall be destroyed;

¹⁴² This section concerns only the territories occupied after 24 February 2022.

¹⁴³ The Constitution of Ukraine, Articles 64 and 55.

¹⁴⁴ *Ibid.*, Article 124.

¹⁴⁵ Law of Ukraine "On amending part seven of Article 147 of the Law of Ukraine "On the Judiciary and the Status of Judges" regarding the determination of territorial jurisdiction of court cases, no 2112-IX of 3 March 2022.

¹⁴⁶ *How the judicial system works during the war. Interview with the President of the Supreme Court [Як працює судова система під час війни. Інтерв'ю із головою Верховного Суду]* <https://suspipline.media/220869-ak-pracue-sudova-sistema-pid-cas-vijni-intervu-iz-golovou-verhovnogo-sudu/>.

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

- documents containing state secrets must also be destroyed;
- judges and court staff who still remain in the occupied territories should avoid negotiating with the occupiers, disagree with offers of cooperation and wait for evacuation corridors.¹⁴⁹

3.5 The security of the courts is overseen by the State Judicial Administration (SJA).¹⁵⁰ The SJA or its territorial offices may request the Supreme Court to transfer a court to a new location and send the relevant files.¹⁵¹ The Supreme Court may also be appealed to by the chairs of courts themselves or by a group of judges.¹⁵² The Supreme Court assesses the workload in the courts, taking account of the distance from the relevant area to ensure safety of the participants in the process.¹⁵³

3.6 The transfer mechanism has also been applied to the judges themselves, who were previously based in areas occupied by Russian forces. They are temporarily relocated to other courts.¹⁵⁴

3.7 It appears that not all judges have been able to leave the territories under the control of the Russian Federation. It is unclear at this stage how many judges continued their work as judges under the occupying powers, despite the instruction not to cooperate.

3.8 According to the Supreme Court President, judges who remain in uncontrolled territories are subject to pressure.¹⁵⁵ However the fate of many of them remains unknown.¹⁵⁶ At the start of the conflict, it was not always safe for anyone, including judges, to travel through humanitarian corridors: for example, judge Lyubov Kharechko of the Chernihiv Court of Appeal tried to leave the occupied territory with her family, but was killed in a shooting, and her family members were in a severe medical condition, the Supreme Court said.¹⁵⁷

¹⁴⁹ *Recommendations for the courts of first and appellate instance in case of seizure of the settlement and / or court or imminent threat of its seizure approved by the Order of the Supreme Court on March 13, 2022 N 6/0 / 9-22.*

¹⁵⁰ Decision of the High Council of Justice, On approval of the Regulation on the State Judicial Administration of Ukraine of 17 January 2019 № 141/0 / 15-19.

¹⁵¹ Law on Amendments to the Law of Ukraine "On the Judiciary and the Status of Judges" on Changing the Jurisdiction of Courts.

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ Decision of the High Council of Justice on approval of the Procedure for sending a judge to another court of the same level and specialization (as a temporary transfer) 01/24/2017 № 54/0 / 15-17.

¹⁵⁵ "It is dangerous for judges to travel through humanitarian corridors" — justice in Ukraine during the war, <https://suspiilne.media/222932-suddam-nebezpecno-viizdzati-gumanitarnimi-koridorami-pravosudda-v-ukraini-pid-cas-vijni/>.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

4. THE WORK OF DEFENCE LAWYERS IN OCCUPIED AREAS AND AREAS UNDER THE CONTROL OF THE UKRAINIAN GOVERNMENT

4.1 Lawyers, along with judges and prosecutors, play an essential role in upholding the rule of law and ensuring that human rights are guaranteed.¹⁵⁸ International law and standards on the role of lawyers recognize that lawyers are key actors in the justice system and the protection of human rights¹⁵⁹ as “essential agents of the administration of justice”.¹⁶⁰ The UN Basic Principles on the Role of Lawyers provide that:

Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.¹⁶¹

4.2 Lawyers, like others, enjoy freedom of association and expression. International standards on the independence of lawyers also affirm the importance of self-governing institutions of the legal profession as well as the independence of bar associations in ensuring the fair and effective administration of justice.¹⁶²

4.3 The Ukraine National Bar Association is established as a non-State self-governing organization with mandatory membership for all lawyers whose goal is “to provide legal defence, representation and other types of legal services on a professional basis, and independently resolve issues of its organization and operation”.¹⁶³ According to the law, the UNBA operates “for the purpose of ensuring proper practice of law, compliance with the professional guarantees, protection of lawyers’ professional rights, ensuring high level of professionalism of lawyers and resolution of the issues associated with the disciplinary liability of lawyers”.¹⁶⁴ It is recognized as part of the justice system.¹⁶⁵

4.4 Reportedly, since the beginning of the conflict many Ukrainian lawyers have left their usual jobs and moved abroad or to “safer” regions of Ukraine.¹⁶⁶ Some were mobilized to join the Armed Forces, some joined the territorial defence, and some volunteered.¹⁶⁷ It is estimated that since the start of the hostilities about 30 per cent of Ukrainian law firms have been shut down.¹⁶⁸ According to the Bar Association’s own statistics, 90 per cent of lawsuits

¹⁵⁸ UN Human Rights Council Resolution, Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers, UN Doc. A/HRC/29/L.11 (2015).

¹⁵⁹ See, ICJ Practitioners Guide No. 1, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*, p. 63. Available at: <https://icj2.wpenginpowered.com/wp-content/uploads/2012/04/International-Principles-on-the-Independence-and-Accountability-of-Judges-Lawyers-and-Prosecutors-No.1-Practitioners-Guide-2009-Eng.pdf>.

¹⁶⁰ Basic Principles on the Role of Lawyers, *op. cit.*, Principle 12.

¹⁶¹ *Ibid.*, Principle 14.

¹⁶² Basic Principles on the Role of Lawyers, principles 23-25.

¹⁶³ Law of Ukraine “On Bar and Legal Practice”, *op. cit.*, article 2-1.

¹⁶⁴ *Ibid.*, article 4.

¹⁶⁵ Article 131-2 Constitution of Ukraine “Advocacy is available in Ukraine to provide professional legal assistance. The independence of the bar is guaranteed”

¹⁶⁶ The information was announced at a meeting of the Bar Council of Ukraine, there were no official publications on this issue.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ukrainian Lawyers Share Tales Of War And Ways To Help*, <https://www.law360.com/pulse/in-house/articles/1480686/ukrainian-lawyers-share-tales-of-war-and-ways-to-help>.

have been suspended.¹⁶⁹ Lawyers reportedly often provide information on a free basis to the public concerning war-related questions, including through online chat services with free legal information, while some provide legal assistance while based outside of Ukraine.

4.5 There is no information as to how many lawyers have stayed in the territories under effective Russian control and continued to practice, yet, it is clear that there is very little possibility for lawyers to operate in these areas. Assuming that certain occupying authorities, courts, and law enforcement agencies have been operative in the territories occupied by Russian forces since 24 February 2022, it should be expected, as is usually the case in the territories occupied by Russia (unrecognized DPR and LPR), that special authorization would need to be obtained from these authorities for the right to practice law.¹⁷⁰ The right to legal practice granted on the basis of the laws of Ukraine will not be recognized there as is already happened the case in the Ukraine territories occupied by Russia (unrecognized Donetsk People's Republic, Luhansk People's Republic and Crimea). This, in turn, creates conditions where some people who remain in the occupied territories are denied access to justice and legal aid, which ultimately leads to human rights violations, as the right to legal representation and to free choice of a lawyer is significantly reduced.

¹⁶⁹ The information was announced at a meeting of the Bar Council of Ukraine, there were no official publications on this issue

¹⁷⁰ International Commission of Jurists, *Between the Rock and the Anvil: Lawyers under Attack in Ukraine*, ICJ Mission Report, April 2020, <https://www.icj.org/wp-content/uploads/2020/05/Ukraine-Between-the-rock-and-the-anvil-Publications-Reports-Mission-report-2020-ENG.pdf>.

5. CONCLUSIONS

5.1 The Russian invasion and ensuing armed conflict between the Russian Federation and Ukraine has carried devastating consequences for the lives of all persons in Ukraine, with casualties mounting every day. The effective and fair administration of justice in the country, not surprisingly, has not been spared. Courts are not fully operational and exceptional laws and measures have been taken which do not sit comfortably with the rule of law and human rights guarantees. On the other hand, the justice system of Ukraine has demonstrated resilience and ability to adapt to this crisis situation. The justice system has continued to function albeit in a limited manner, despite the invasion and the occupation of parts of the country. It is crucial that the courts have continued to operate, and that lawyers have continued to provide legal services, to the greatest extent possible, in order to uphold human rights and ensure access to justice people in Ukraine, including in light of Ukraine's derogations from some of its international human rights law obligations.

5.2 It is unfortunate that the bodies of judicial self-governance, in particular, the HQCJ and the HCJ have not been able to resume their work, which has hampered the governance of the judiciary and in particular has left the justice system unable to ensure that a sufficient number of judges are in place. It is important to prioritize the relaunch of the work of these two essential bodies while ensuring that their composition and procedures can ensure an independent and fair governance of the judiciary, including a fair judicial appointments process.

5.3 While the ongoing armed conflict places severe strains on the State's financial resources, it is essential that the judiciary is able to fairly and effectively administer justice and that its budget is sufficient for this purpose. Both judges and court personnel should be sufficient in number to ensure access to justice. Judges and other court personnel also have rights to fair remuneration and decent conditions of work, and these protections also provide important safeguards for the independence of the judiciary. In consultation with the judiciary, efforts should be made to restore the budget of the courts to normal levels sufficient to ensure the effective administration of justice.

5.4 It is a welcome development that most of the judicial powers of prosecutors in regard to detention, which were granted under martial law at the outset of the conflict, have now been removed, but the remaining powers of prosecutors to authorize extensions of detention remain in conflict with international law and standards and must be reformed. Courts should scrutinise the application of martial law in practice to ensure that it limits human rights to the least extent possible, in accordance with its obligations under the ICCPR and ECHR, including as concerns the principles of necessity and proportionality. In particular, every effort should be made to maintain judicial review of detention in as many cases as possible.

5.5 Ukraine should strive to further optimise the operation of the courts as much as possible in the circumstances, however any use of videoconferencing and remote hearings should ensure that they do not undermine the fairness of the proceedings.

5.6 The guarantees of the right to liberty and fair trial, as provided under articles 9 and 14 of the ICCPR, articles 5 and 6 of the ECHR, and article 75 of Additional Protocol to the Geneva Conventions must be fully applied. Courts must be able to immediately conduct a review of a person's detention both upon arrest and whenever detainees seek to have the lawfulness of their detention reviewed.

5.7 Persons seeking and needing to access the courts for the prevention or remedy of violations of human rights must not have their rights to do so violated and their access to justice frustrated, and therefore such cases should be expressly included within the category of “urgent” cases.

5.8 The right to a fair trial includes the right to a public trial. Therefore, the general public should be able to access court hearings where this does not endanger their safety, including through online access.

5.9 Lawyers must be able to promptly access their clients, including those in detention, and to access information concerning their cases in order to represent their clients effectively.

5.10 International support for the Ukrainian judicial system, including by the UN Special Procedures, Council of Europe institutions, the EU institutions and other international agencies and stakeholders, should be increased both in the short term, and in the longer-term to enable the justice system to investigate and prosecute international crimes in accordance with international law and standards, and to rebuild and strengthen the justice system and ensure its independence following the conflict.

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