



# Organization for Security and Co-operation in Europe Office for Democratic Institutions and Human Rights

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## NOTE VERBALE

The OSCE Office for Democratic Institutions and Human Rights (ODIHR) presents its compliments to the Delegations of the OSCE participating States and, in accordance with paragraph 7 of the 1991 Moscow Document, has the honour to herewith transmit the observations of the mission of experts established under the Moscow Mechanism, invoked by 45 OSCE participating States following bilateral consultations with Ukraine, together with a description of action Ukraine has taken or intends to take upon it.

ODIHR avails itself of this opportunity to renew to the Delegations of the OSCE participating States the assurances of its highest consideration.

Warsaw, 19 April 2024



To the  
Delegations of the OSCE participating States

# **REPORT ON VIOLATIONS AND ABUSES OF INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW, WAR CRIMES AND CRIMES AGAINST HUMANITY, RELATED TO THE ARBITRARY DEPRIVATION OF LIBERTY OF UKRAINIAN CIVILIANS BY THE RUSSIAN FEDERATION**

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## **I. GENERAL OBSERVATIONS AND EXECUTIVE SUMMARY**

On 29 February 2024, the delegations of 45 OSCE participating States, after consultation with Ukraine, invoked the Moscow Mechanism under paragraph 8 of the Moscow Document. They requested that the OSCE Office for Democratic Institutions and Human Rights (ODIHR) enquire with Ukraine whether it would invite a mission of experts to address the arbitrary deprivation of liberty of Ukrainian civilians by the Russian Federation. Following on this inquiry, Ukraine established, on 14 March 2024, a mission composed of three experts – Prof. Veronika Bílková (Czech Republic), Dr. Cecilie Hellestveit (Norway) and Dr. Elīna Šteinerte (Latvia).

The mandate of the Mission was to: *“build upon previous findings and establish the facts and circumstances surrounding possible contraventions of relevant OSCE commitments, violations and abuses of human rights, and violations of international humanitarian law and international human rights law, as well as possible cases of war crimes and crimes against humanity, associated with or resulting from the arbitrary deprivation of liberty of Ukrainian civilians by the Russian Federation; and to collect, consolidate, and analyze this information with a view to offer recommendations, as well as provide the information to relevant accountability mechanisms, as well as national, regional, or international courts or tribunals that have, or may in future have, jurisdiction”*.

The Mission built on the reports produced by the three earlier Missions of Experts established under the Moscow Mechanism in March and May 2022 and March 2023. When drafting its report, the Mission used several methods of fact-finding and it relied on various sources, mainly written materials, interviews and testimonies, as well as submissions that came via a special email channel established for these purposes by ODIHR. On 18-24 March 2024, the three experts undertook a visit to Ukraine, where they met representatives of various Ukrainian State organs, representatives of civil society and victims and witnesses, and visited places where Ukrainian civilians had been detained during the period of Russian temporary occupation in spring 2022 in the Kyiv region (mainly Bucha and Irpyn).

The Mission established that since spring 2014, a large number of Ukrainian civilians have been arbitrarily deprived of liberty by the Russian Federation – acting directly through its organs or, in 2014-2022, through its proxies in the so-called Donetsk and Luhansk People’s Republics. Although the context of ongoing international armed conflict between Ukraine and the Russian Federation makes establishing the exact number of such civilians impossible, the Mission has concluded that this number is large and can be measured in the thousands. Arbitrary deprivation of liberty of Ukrainian civilians started in the unlawfully annexed Crimea in spring 2014, and quickly spread to the areas of the Donetsk and Luhansk regions controlled by the so-called People’s Republics. Since the outbreak of the full-scale invasion on 24 February 2022, this practice has become pervasive in all the areas that have got under the temporary occupation of the Russian Federation. Although the concrete modalities of the detention somewhat differ from one region to another, the overall scheme of the Russian Federation arbitrarily detaining large numbers of Ukrainian civilians both in the initial and prolonged stages of the temporary occupation remains constant and appears to be a defining feature of the Russian Federation’s policy in the temporarily occupied territory.

International humanitarian law (IHL) and international human rights law (IHRL) establish legal grounds enabling Parties to the conflict to deprive civilians belonging to the other party to the conflict of their liberty. The Mission, however, concluded that for the overwhelming majority of Ukrainian civilians detained by the Russian Federation, these grounds have not been met and their deprivation of liberty has thus been arbitrary. Although no grounds for detention have in most cases been formally communicated to the detained civilians, the most commonly indicated reasons seem to be associated with: (a) perceived support to the Ukrainian armed forces and/or affiliation with the armed forces; (b) perceived support of Ukraine and/or rejection of Russia’s “special military operation”; (c) perceived involvement in or support for international terrorism

and/or extremism; (d) the intention to force cooperation; and (e) the intention to spread fear in the population of the temporarily occupied territories. Some of these reasons are clearly unlawful (reasons (b), (d) and (e)). Others could be lawful (reasons (a) and (c)) but only to the extent that the strict conditions for the internment of civilians stated in Articles 43(1) and 78(1) of the Geneva Convention IV (GCIV) and confirmed by IHRL instruments, making such detention exceptional and temporary, are respected. The Mission also recalls that the practice of subjecting civilian detainees to prisoner-of-war (POW) internment is unlawful, as they need to be treated as civilians under the GCIV. Moreover, the detention can never be based on other, ulterior purposes such as harassment or reprisals. This, however, seem to be the case in many instances. The Mission concludes that in the overwhelming majority of cases of Ukrainian civilians detained by the Russian Federation, the detention lacks lawful grounds and, as such, amounts to arbitrary deprivation of liberty.

Moreover, to be lawful and non-arbitrary, every instance of the deprivation of liberty needs to follow certain procedural guarantees stemming from both IHL and IHRL. These include: (a) the obligation to inform persons deprived of liberty of the reasons for the detention, (b) the obligation to provide persons deprived of liberty with an opportunity to challenge the lawfulness of their detention; (c) periodic reviews of the detention; (d) information obligations; (e) fair trial guarantees; (f) the prohibition of collective detention; and (g) the prohibition of incommunicado detention and enforced disappearances. Special guarantees also need to be provided to individuals belonging to vulnerable groups or to persons enjoying privileges and immunities under international law.

The Mission concludes that Ukrainian civilians deprived of liberty by the Russian Federation have been consistently denied these guarantees. A vast majority of detained civilians are never informed about the grounds for their detention, and they have no possibility to challenge the lawfulness of their detention either in its initial stage or at any moment thereafter. There also does not seem to be any periodic, regular review of the lawfulness of this detention carried out by the Russian authorities. Moreover, the Russian authorities consistently fail to fulfil the information obligations stemming from the GCIV and the Additional Protocol I (API). There is nothing suggesting that the mandate of the Russian National Information Bureau (NIB) would extend to civilian detainees and that a regular channel of communication, concerning civilian detainees, would be put in place either directly between the Parties to the conflict or through a third actor (Protecting Powers, the International Committee of the Red Cross (ICRC), the Central Tracing Agency (CTA), etc.). The Russian Federation also does not seem to provide special guarantees to individuals belonging to vulnerable groups, such as children or persons with disabilities and to persons enjoying privileges and immunities under international law. It has disrespected and continues to disrespect the special status of three staff members of the OSCE Special Monitoring Mission (SMM), arbitrarily detaining for almost two years now and subjecting them to trial for activities carried out while working for the SMM.

Moreover, and notwithstanding arbitrary deprivation of liberty in and of itself being a serious violation of IHRL and IHL, the Mission has further established that this violation has been conducive to other serious violations of these two bodies of law. Ukrainian civilians detained by the Russian Federation have been subjected to torture and other cruel, inhuman or degrading treatment or punishment, sexual violence and other forms of serious mistreatment. They have endured harsh conditions of detention and have been denied contact with the outside world, turning their deprivation of liberty into incommunicado detention and enforced disappearances. The Mission has also recorded cases of extrajudicial killings of arbitrarily detained Ukrainian civilians. Other detained civilians have been denied fundamental fair trial guarantees in criminal prosecutions. They have been tried under the legislation which should not apply to them in the first place and their procedural rights and the right to defence and legal assistance have not been respected. The Mission recalls that the denial of fundamental fair trial guarantees renders in and of itself any detention related to the criminal prosecution arbitrary.

Based on these findings, the Mission has reasonable grounds to believe that the vast majority of the instances of detentions of Ukrainian civilians by the Russian Federation either do not meet the lawful grounds for detention foreseen by IHL and IHRL, or do not meet the procedural guarantees imposed by the two bodies of law, or both. As such they amount to arbitrary deprivation of liberty under both IHL and IHRL. Ukrainian civilians subjected to such arbitrary deprivation of liberty are entitled to immediate and unconditional release. The Mission notes that it has only been able to establish a very limited number of cases when Ukrainian civilians arbitrarily deprived of their liberty have been released, usually without any explanation, by the Russian authorities. IHL and IHRL also set out a clear right to remedy to all those who have been arbitrarily deprived of liberty. This right includes the right of the victim and their relatives to an effective remedy, including cessation of violations, restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. The Mission was unable to establish any evidence of the Russian Federation respecting these rights.

Finally, the Mission notes that the practice of arbitrary deprivation of liberty of Ukrainian civilians has occurred on a massive scale and has revealed signs of a systematic, consistent, deliberate pattern of conduct targeting specifically Ukrainian civilians. This makes the Mission conclude that there are reasonable grounds to believe that both the war crime of “*unlawful confinement*” and the crime against humanity consisting of “*imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law*” have been committed by individuals involved in the arbitrary deprivation of liberty of Ukrainian civilians, including members of the Russian armed forces or occupying authorities. It is for judicial bodies operating at the national or international level to identify concrete individuals who should be held criminally responsible on those grounds.

The Mission furthermore recalls that under international law, States have the obligation to respect and to ensure respect for IHL; the obligation to respect, protect and fulfil human rights; and the obligation to prevent, repress, investigate, and prosecute war crimes and crimes against humanity. Such obligations apply not only to the Parties to the conflict but also all other States bound by the applicable IHL, IHRL or international criminal law (ICL) instruments or by the relevant rules of customary international law. There are various different legal and institutional mechanisms (such as Protecting Powers, the ICRC, the CTA, the Working Group on Arbitrary Detention (WGAD), the Working Group on Enforced or Involuntary Disappearances (WGEID), or the ICC) that can, and shall, be used to ensure that the practice of arbitrary deprivation of liberty of Ukrainian civilians by the Russian Federation be discontinued, reparation be provided and those held responsible bear legal consequences for their acts in the nearest foreseeable future.

In light of these conclusions, the Mission formulated recommendations, addressed to the Russian Federation, to Ukraine, to other States and to international organizations. Among them, the Mission would like to highlight the recommendations to:

- (a) Immediately and urgently cease the practice of arbitrary deprivation of liberty of Ukrainian civilians and to unconditionally release all those thus detained;
- (b) Urgently ensure or facilitate the safe release, return to place of residence, accommodation in third countries, or repatriation, of the arbitrarily detained Ukrainian civilians;
- (c) Provide Ukrainian civilians deprived of liberty with procedural guarantees foreseen by IHRL and IHL and ensure that all detained Ukrainian civilians are treated in a manner respectful of their inherent dignity, held in humane conditions and afforded full fair trial guarantees;
- (d) Ensure immediate, safe and unfettered access for the ICRC to all facilities where Ukrainian civilians are being detained, both in the temporarily occupied territories and in the Russian Federation; and
- (e) Ensure the right of those subjected to arbitrary deprivation of liberty, and their relatives, to an effective remedy, including cessation of violations, restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

## II. INTRODUCTION AND MANDATE

On 29 February 2024, the delegations of 45 OSCE participating States (Albania, Andorra, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Netherlands, North Macedonia, Norway, Poland, Portugal, Romania, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Türkiye, the United Kingdom, and the United States of America), after consultation with Ukraine, invoked the Moscow Mechanism under paragraph 8 of the Moscow Document. They requested that the OSCE Office for Democratic Institutions and Human Rights (ODIHR) enquire with Ukraine whether it would invite a mission of experts to address the arbitrary deprivation of liberty of Ukrainian civilians by the Russian Federation. Following on this inquiry, Ukraine established, on 14 March 2024, a mission composed of three experts – Prof. Veronika Bílková (Czech Republic), Dr. Cecilie Hellestveit (Norway) and Dr. Elīna Šteinerte (Latvia).

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By virtue of paragraph 7 of the Moscow Document, the Mission of Experts had three weeks to complete the mandate. It therefore delivered its report on 4 April 2024. During the drafting of the report, the Mission was supported administratively and logistically by ODIHR. The experts wish to underline that, in line with the rules of the Moscow Mechanism, ODIHR did not in any way interfere with the substantive work of the Mission, which operated in a fully independent, neutral, and impartial way.

The Mission built on the reports produced by the previous three Missions of Experts established under the Moscow Mechanism in March and May 2022 and in March 2023. The first two reports provided a comprehensive overview of possible contraventions of OSCE commitments, and violations and abuses of international human rights law and international humanitarian law, as well as possible cases of war crimes and crimes against humanity, that occurred during the first four months of the full-fledged armed conflict between the Russian Federation and Ukraine (24 February – 25 June 2022).<sup>1</sup> The two reports addressed arbitrary deprivation of liberty of the civilian Ukrainian population mainly in their sections dealing with treatment of detainees (Section IV.E.4.C of the MM Report I and Section IV.A.4 of the MM Report II) and with the right to liberty and security (Section V.B.3 of the MM Report I and Section V.A.3 of the MM Report II). The third report focused on possible violations of international law resulting from the forcible transfer of children within parts of Ukraine’s territory temporarily controlled or occupied by Russia and/or their deportation to the Russian Federation.<sup>2</sup>

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<sup>1</sup> Wolfgang Benedek, Veronika Bílková, Marco Sassòli, *Report on Violations of International Humanitarian And Human Rights Law, War Crimes And Crimes Against Humanity Committed In Ukraine Since 24 February 2022*, OSCE, Vienna, 13 April 2022 (MM Report I); and Veronika Bílková, Laura Guercio, Vasilka Sancin, *Report on Violations of International Humanitarian and Human Rights Law, War Crimes And Crimes Against Humanity Committed In Ukraine (1 April – 25 June 2022)*, OSCE, Vienna, 14 July 2022 (MM Report II).

<sup>2</sup> Veronika Bílková, Cecilie Hellestveit, Elīna Šteinerte, *Report on Violations and Abuses of International Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity, related to the Forcible*



### III. SCOPE OF THE MANDATE AND METHODOLOGY

#### A. SCOPE OF THE MANDATE

The Mission was tasked to focus on possible violations of international law “associated with or resulting from the arbitrary deprivation of liberty of Ukrainian civilians by the Russian Federation”. This task determined the material, personal, territorial, and temporal scope of the mandate and of the report.

*Ratione materiae*, the Mission focused on cases of arbitrary deprivation of liberty, which includes any form of deprivation of liberty imposed on a person for any period of time without his or her consent, which is not based on a permissible ground for deprivation of liberty in international law, which has not been imposed in accordance with procedures established by law, or which otherwise violates international law (including lack of legal certainty, failure of the deprivation of liberty to meet the conditions of necessity and proportionality, etc.). Arbitrary deprivation of liberty may occur in a variety of settings in which individuals are detained, including military detention, security detention, administrative detention, forced hospitalization or other types of detention. The key elements of arbitrary deprivation of liberty is the failure of such deprivation to respect the international safeguards in relation to its lawful grounds as well as to the procedure.

*Ratione personae*, the Mission’s mandate was to focus on the arbitrary deprivation of liberty of Ukrainian civilians by the Russian Federation. The focus was therefore on Ukrainian citizens whose liberty has been restricted by the *de jure* or *de facto* authorities of the Russian Federation and who, at the same time, have not qualified for or have been denied any other status under international law, in particular that of prisoners of war. At the same time, cases of Ukrainian citizens who would be subject to arbitrary deprivation of liberty by the Russian Federation outside the context of the current armed conflict (for example, Ukrainian citizens convicted in the Russian Federation for an ordinary criminal offence committed on Russian territory and subject to irregularities during their detention) are left outside the scope of this mandate. Nor did the Mission deal with cases of Ukrainian citizens arbitrarily deprived of their liberty by other actors, including Ukrainian authorities. Finally, foreign citizens deprived of their liberty by the Russian Federation, in connection with the armed conflict in Ukraine, are not discussed in this report either, even if they are detained together with Ukrainian civilians.<sup>3</sup>

*Ratione territoriae*, the Mission dealt with arbitrary deprivation of liberty that originated in the territory of Ukraine, within the internationally recognized borders of this country. The Mission took account of the UN General Assembly Resolution 68/262 of 27 March 2014,<sup>4</sup> which underscored that “the referendum held in the Autonomous Republic of Crimea and the city of Sevastopol on 16 March 2014, having no validity, cannot form the basis for any alteration of the status of the Autonomous Republic of Crimea or of the city of Sevastopol”<sup>5</sup> and called upon States, international organizations and specialized agencies not to recognize any alteration of the status of those regions.<sup>6</sup> It also took account of the UN General Assembly Resolution ES-

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*Transfer and/or Deportation of Ukrainian Children to the Russian Federation*, OSCE, Vienna, 4 May 2023 (MM Report III).

<sup>3</sup> This is the case, for instance, of the Spanish humanitarian worker Mariano García Calatayud, who was detained by the occupying authorities on 19 March 2022 in Kherson and has been held incommunicado since then. In spring 2023, the Russian authorities acknowledged his detention but provided no legal grounds for it. His fate and whereabouts since then remain uncertain. See Óscar Gutiérrez, *Rusia encarcela en un limbo a miles de civiles ucranios*, *El País*, 9 agosto 2023.

<sup>4</sup> UN Doc. A/RES/68/262, *Territorial integrity of Ukraine*, 1 April 2014.

<sup>5</sup> *Ibidem*, para 5.

<sup>6</sup> *Ibidem*, para 6.

11/4 of 12 October 2022,<sup>7</sup> which embraced the same approach with respect to the Donetsk, Luhansk, Kherson and Zaporizhzhia regions of Ukraine.

*Ratione temporis*, the Mission included cases of arbitrary deprivation of liberty of Ukrainian civilians by the Russian Federation that occurred since February 2014 when the armed conflict between the Russian Federation and Ukraine began with the temporary occupation and unlawful annexation of Crimea and the active support of the so-called Donetsk and Luhansk People's Republics by the Russian Federation. The report was completed on 4 April 2024, and consequently events that occurred after 31 March 2024 could not be included in the report.

## B. METHODOLOGY

The Mission followed the same methodology as the previous missions of experts established under the Moscow Mechanism in relation to Ukraine in 2022 and 2023. It also based its approach upon the Manual on Human Rights Monitoring, issued by the Office of the UN High Commissioner for Human Rights (OHCHR),<sup>8</sup> and the Ukraine Monitoring Initiative Methodology, developed by ODIHR.<sup>9</sup>

When drafting the report, the Mission used several methods of fact-finding, including desk research, open-source research techniques, online and in-person interviews and on-site visits.

First, the Mission collected and analysed various written materials. These materials included: a) international legal instruments, especially the applicable treaties of international human rights and international humanitarian law, b) legal acts enacted by individual States, especially Ukraine and the Russian Federation, c) resolutions adopted by international bodies, d) case-law of international and national judicial and quasi-judicial bodies, e) statements issued by States, f) reports published by international organizations, g) reports published by non-governmental organizations, h) media reports, and i) scholarly texts. Some of these materials were used as a source of information, others served as a basis for legal analysis. Of particular relevance were materials dealing specifically with arbitrary deprivation of liberty of Ukrainian civilians by the Russian Federation, such as the two reports issued by the OHCHR,<sup>10</sup> as well as reports and other texts produced by *Independent International Commission of Inquiry on Ukraine* (IICIU)<sup>11</sup> and reports on the human rights situation in Ukraine issued by the OHCHR<sup>12</sup> and ODIHR.<sup>13</sup>

Second, the Mission conducted over 40 online or in-person interviews, with representatives of international organizations and of NGOs, human rights defenders, lawyers, journalists,

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<sup>7</sup> UN Doc. A/RES/ES-11/4, *Territorial integrity of Ukraine: defending the principles of the Charter of the United Nations*, 13 October 2022.

<sup>8</sup> See the 2001 OHCHR *Training Manual on Human Rights Monitoring and the 2011 OHCHR Manual on Human Rights Monitoring (Revised edition)*, available at <https://www.ohchr.org/en/publications/policy-and-methodological-publications/manual-human-rights-monitoring-revised-edition>

<sup>9</sup> *Ukraine Monitoring Initiative Methodology*, 17 July 2023, available at <https://www.osce.org/odihr/548611>

<sup>10</sup> OHCHR, *Arbitrary Detention, Torture and Ill-Treatment in the Context of Armed Conflict in Eastern Ukraine 2014-2021*, 2 July 2021 (OHCHR *Detention Report 2021*) and OHCHR, *Detention of Civilians in the Context of the Armed Attack by the Russian Federation against Ukraine (24 February 2022 – 23 May 2023)*, 27 June 2023 (OHCHR *Detention Report 2023*).

<sup>11</sup> UN Doc. A/HRC/52/62, *Report of the Independent International Commission of Inquiry on Ukraine*, 15 March 2023 (IICIU *Report 2023*); UN Doc. A/HRC/55/66, *Report of the Independent International Commission of Inquiry on Ukraine*, 5 March 2024 (IICIU *Report 2024*); UN Doc. A/HRC/52/CRP.4, *Conference room paper of the Independent International Commission of Inquiry on Ukraine*, 29 August 2023 (IICIU *Conference Paper*).

<sup>12</sup> For instance, OHCHR, *Human Rights Situation During the Russian Occupation of Territory of Ukraine and its Aftermath (24 February 2022 – 31 December 2023)*, 20 March 2024 (OHCHR *Human Rights Report 2024*).

<sup>13</sup> ODIHR, *Interim Report on reported violations of international humanitarian law and international human rights law in Ukraine*, 20 July 2022 (ODIHR *Interim Report I*); ODIHR, *Second Interim Report on reported violations of international humanitarian law and international human rights law in Ukraine*, 14 December 2022 (ODIHR *Interim Report II*); ODIHR, *Third Interim Report on reported violations of international humanitarian law and international human rights law in Ukraine*, 17 July 2023 (ODIHR *Interim Report III*); ODIHR, *Fourth Interim Report on reported violations of international humanitarian law and international human rights law in Ukraine*, 12 December 2023 (ODIHR *Interim Report IV*).

scholars, and victims and witnesses. When conducting interviews with victims and witnesses (or any other persons of interest to the Mission), the Mission adopted a trauma-informed approach, guided by the principles of no-harm and informed consent. The Mission took a conscious decision not to interview children and persons who face a high risk of re-traumatization. All interviews took place in safe places or over secure online platforms and the notes from these interviews were not made accessible to any external actors. The notes, including the interview transcripts, will be destroyed after the completion of the mandate.

Third, on 18-24 March 2024, the three experts visited Ukraine. During their visit, they conducted interviews with representatives of Ukrainian national authorities, including the National Information Bureau, the Ministry of Interior of Ukraine, the Office of the Prosecutor General of Ukraine, the Coordination Headquarters for the Treatment of Prisoners of War, the Mission of the President of Ukraine in the Autonomous Republic of Crimea, and the Ukrainian Parliament Commissioner for Human Rights. The Mission also held meetings with representatives of international community and of civil society, including human rights defenders, and lawyers. The experts would like to thank the Ukrainian authorities and ODIHR for the assistance in the organization of the visit.

Fourth, the Mission received nearly 80 valuable submissions through a special email channel established for these purposes by ODIHR from a wide variety of stakeholders globally.

The Mission applied the “reasonable grounds to believe” standard of proof in its assessment of the factual and legal aspects of the phenomenon under consideration.<sup>14</sup> This standard was considered to be met when at least two credible primary sources independently confirmed the veracity of certain facts or information. The Mission actively sought to verify and cross-check all data used in this report. When this was not possible or when different sources provided different data, this is indicated in the report. References to the relevant sources of information are included in the report.

The “reasonable grounds to believe” standard is less strict than the criminal standard of proof “beyond reasonable doubt”. The latter standard is met when the inference drawn is the only reasonable inference that can be drawn from the evidence presented.<sup>15</sup> Given the time constraints and the tools and resources available to the Mission, it was impossible to meet this higher standard of proof in this report. The Mission therefore refrains from making any allegations related to criminal responsibility of concrete individuals. Establishing this responsibility is the task of national or international criminal courts.

One day after its establishment, the Mission sent a letter to the Permanent Missions of Ukraine and of the Russian Federation to International Organizations in Vienna, inviting the two countries which are the most directly concerned by the mandate of the Mission to cooperate and to share all the relevant information at the disposal of their respective national authorities. The letters also included lists of institutions from which the Mission sought information and contacts. The Mission regrets to note that whereas Ukraine responded to the letter and provided its cooperation, the Russian Federation left the letter unanswered and provided no cooperation. Consequently, when ascertaining the position of the Russian Federation on the issues considered under the mandate, the Mission had to rely on publicly available sources, such as official statements and the Russian media. The two letters, together with the reply from the Permanent Mission of Ukraine to International Organizations in Vienna, are attached to this report (see Annex I and Annex II).

In fulfilling its mandate, the Mission faced several challenges. The most serious were the short time frame of the mandate (three weeks) and the limited resources available to the Mission.

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<sup>14</sup> This standard is used extensively in international instruments, see for instance Article 58 of the ICC Statute and Article 12 of the CAT.

<sup>15</sup> See ICTY, *Prosecutor v. Milomir Stakić*, Case IT-97-24-A, Appeals Judgment, 22 March 2006, para 219. See also Article 66(3) of the Rome Statute of the ICC.

These two factors were compounded by the large amount of disinformation and fake news in the public sphere. To overcome the latter challenge, the Mission adopted a very careful approach to verifying the available information and adhered strictly to the "reasonable grounds to believe" standard of evidence mentioned above.

### **C. APPLICABLE INTERNATIONAL LEGAL STANDARDS**

The Mission was tasked to establish the facts and circumstances surrounding “*possible contraventions of relevant OSCE commitments, violations and abuses of human rights, and violations of international humanitarian law and international human rights law, as well as possible cases of war crimes and crimes against humanity, associated with or resulting from the arbitrary deprivation of liberty of Ukrainian civilians by the Russian Federation*”. The applicable legal standards are: a) relevant OSCE commitments, b) international humanitarian law (IHL), c) international human rights law (IHRL), and d) regulation of war crimes and crimes against humanity under international criminal law (ICL).

These four sets of standards are not separate from each other, but have important overlaps and interrelationships. The same act, such as the torture of a civilian detainee, may at the same time constitute a violation of all of these standards, giving rise both to the responsibility of the State to which the act is attributed and to the individual criminal responsibility of specific individuals who committed, ordered, instigated or were otherwise involved in that act. As indicated above, this report does not attempt to identify such individuals, and its analysis with respect to the latter set of standards is therefore limited to identifying acts that may constitute war crimes or crimes against humanity, provided that the responsible individuals can be identified through criminal proceedings.

#### **1. OSCE COMMITMENTS**

The OSCE and, previously, the CSCE participating States have developed certain commitments that shall guide their behaviour. Such commitments have been adopted unanimously by all participating States – including Ukraine and the Russian Federation.<sup>16</sup>

The 1991 Moscow Document in its para 23.1 contains a list of commitments related to the deprivation of liberty. Under this list, participating States commit to ensure, *inter alia*, that:

- (i) no one will be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law;*
- (ii) anyone who is arrested will be informed promptly in a language which he understands of the reason for his arrest, and will be informed of any charges against him;*
- (iii) any person who has been deprived of his liberty will be promptly informed about his rights according to domestic law;*
- (iv) any person arrested or detained will have the right to be brought promptly before a judge or other officer authorized by law to determine the lawfulness of his arrest or detention, and will be released without delay if it is unlawful; /.../*
- (vi) any person arrested or detained will have the right, without undue delay, to notify or to require the competent authority to notify appropriate persons of his choice of his arrest, detention, imprisonment and whereabouts; any restriction in the exercise of this right will be prescribed by law and in accordance with international standards; /.../*
- (ix) a detained person or his counsel will have the right to make a request or complaint regarding his treatment, in particular when torture or other cruel, inhuman or degrading treatment has been applied, to the authorities responsible for the administration of the place of detention and to higher authorities, and when necessary, to appropriate authorities vested with reviewing or remedial power;*

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<sup>16</sup> See *OSCE Human Dimension Commitments, Vol. I Thematic Compilation, 3<sup>rd</sup> Edition, Vol. II. Chronological Compilation, Vol. III*, OSCE-ODIHR, Warsaw, 2012.

*(x) such request or complaint will be promptly dealt with and replied to without undue delay; if the request or complaint is rejected or in case of inordinate delay, the complainant will be entitled to bring it before a judicial or other authority; neither the detained or imprisoned person nor any complainant will suffer prejudice for making a request or complaint;*

*(xi) anyone who has been the victim of an unlawful arrest or detention will have a legally enforceable right to seek compensation.*

In the 1999 Istanbul Charter for European Security, the participating States declare that “*in order to enhance the protection of civilians in times of conflict, we will seek ways of reinforcing the application of international humanitarian law*”.

## **2. INTERNATIONAL HUMANITARIAN LAW**

International humanitarian law (IHL) is a branch of public international law which applies specifically in times of armed conflicts. It consists of two main parts:

- a) the Geneva law, which protects victims of war, i.e. those who are not, or no longer, taking part in hostilities and find themselves in the hand of the other party to the conflict (wounded, sick, shipwrecked, prisoners of war, civilians in the occupied territories, etc.); and
- b) the Hague law, which regulates the conduct of hostilities and restricts means and methods of warfare (military tactics, targeting, precautionary measures, etc.).

IHL applies both in international and non-international armed conflicts and it binds all (State or non-state) parties to such conflicts. The conflict between the Russian Federation and Ukraine is an international armed conflict. This conflict started in February 2014, with the temporary occupation and unlawful annexation of Crimea and the active support of the so-called Donetsk and Luhansk People’s Republics by the Russian Federation. It turned into a full-scale armed conflict between the two countries after the Russian invasion of Ukraine on 24 February 2022. Ukraine and the Russian Federation are both State parties to the four Geneva Conventions (1949, GC), Additional Protocol I to these Conventions (1977, API) and several other IHL treaties. They are also bound by the rules of customary IHL.<sup>17</sup>

The prohibition of arbitrary deprivation of liberty of civilians is enshrined in Articles 42 (applicable to aliens in the territory of a party to the conflict) and 78 (applicable to civilians in the occupied territory) of the GCIV. The detention of medical and religious personal is further regulated by Article 28, 30 and 32 of the GCI and Articles 36-37 of the GCII. The rule is also considered customary in nature.<sup>18</sup>

IHL contains a general obligation of parties to the conflict to treat all civilians and persons *hors de combat* humanely.<sup>19</sup> This general obligation is specified through a series of prohibitions, including *inter alia* the prohibition of torture and cruel, inhuman or degrading treatment;<sup>20</sup> the prohibition of rape and other forms of sexual violence;<sup>21</sup> the prohibition of hostage-taking;<sup>22</sup> or the prohibition of collective punishments.<sup>23</sup>

Furthermore, IHL enshrines specific guarantees for persons deprived of their liberty. A detailed regulation of how such persons shall be treated is contained in Part III, Section IV of the GCIV (Regulations for the Treatment of Internees), Article 75(4-6) of API and Chapter VII of the ICRC Study on Customary IHL (Persons Deprived of Their Liberty). Under this regulation,

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<sup>17</sup> Jean-Marie Henckaerts, Louise Doswald-Beck (Eds.), *Customary International Humanitarian Law, Volume I: Rules, Volume II: Practice*, Cambridge University Press, Cambridge, 2005.

<sup>18</sup> Rule 99 of the ICRC Study on Customary IHL.

<sup>19</sup> Common Article 3 of the GCs, Article 75(1) of the API and Rule 87 of the ICRC Study on Customary IHL.

<sup>20</sup> Common Article 3 of the GCs, Article 75(2)(a)(ii) of the API and Rule 90 of the ICRC Study on Customary IHL.

<sup>21</sup> Common Article 3 of the GCs, Article 75(2)(b) of the API and Rule 93 of the ICRC Study on Customary IHL.

<sup>22</sup> Common Article 3 of the GCs, Article 75(2)(c) of the API and Rule 96 of the ICRC Study on Customary IHL.

<sup>23</sup> Article 75(2)(d) of the API and Rule 103 of the ICRC Study on Customary IHL.

persons deprived of their liberty shall, *inter alia*, be informed of the reasons for their interment; be provided with adequate food, water, clothing, shelter and medical attention; be held in premises which are removed from the combat zone and which safeguard their health and hygiene; have their personal data recorded and passed over to the ICRC and their families; and be allowed to receive visitors, especially close relatives, to the degree practicable. Civilians may only be interned on the grounds foreseen in IHL and shall be released as soon as the reasons which necessitated internment no longer prevail. Vulnerable groups of civilians, for instance children, benefit from certain additional guarantees, i.e., they should be held in quarters separated from those of adults (except when accommodated with their family members).<sup>24</sup>

If accused of any crime, persons deprived of their liberty are entitled to the standard guarantees of fair trial,<sup>25</sup> including the principle of legality, the presumption of innocence, the right to defence, the right to examine witnesses, or the protection against repeated prosecution for the same offence (*ne bis in idem*). IHL also provides guarantees against forcible transfers and deportations of civilians, especially from and to occupied territories.<sup>26</sup>

### 3. INTERNATIONAL HUMAN RIGHTS LAW

International human rights law (IHRL) lays down obligations for States to respect, protect and fulfil human rights to all individuals within their territory or under their jurisdiction. The main sources of IHRL are universal and regional treaties. The most fundamental rules of IHRL also form part of customary international law and are of peremptory nature. IHRL applies both in times of peace and in times of armed conflict, where the guarantees granted by non-absolute human rights may be temporarily suspended (derogation).

This Mission recalls that the obligation to respect, protect and fulfil human rights applies not only within the territory of the States but that there is “*a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a /.../ State outside its own territorial boundaries*”.<sup>27</sup> One of these exceptional circumstances is the effective control resulting from lawful or unlawful military action that a state exercises, directly or through a subordinate local administration, over an area outside its national territory.<sup>28</sup> The responsibility to respect, protect and fulfil human rights of individuals living on occupied territories thus primarily falls upon the Occupying Power, although there might be certain residual positive obligations falling on the territorial state.<sup>29</sup>

In line with the conclusions reached by the previous Missions, this Mission concludes that certain parts of the Ukrainian territory have been under the effective control of the Russian Federation since 2014.

This is, first, the case of the Autonomous Republic of Crimea and the City of Sevastopol, which have been unlawfully occupied and annexed by the Russian Federation since February 2014. Russia does not deny having jurisdiction over these areas, albeit incorrectly asserting that they are part of its national territory. In *Ukraine v. Russia (Re Crimea)*, the European Court of Human Rights (ECtHR) held, albeit on a preliminary basis, that “*the jurisdiction of /Russia/ over Crimea is in the form or nature of “effective control over an area” rather than in the form*

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<sup>24</sup> Article 82 of the GCIV, Article 77(4) of the API and Rule 120 of the ICRC Study on Customary IHL.

<sup>25</sup> Article 75(4) of the API and Rules 100-101 of the ICRC Study on Customary IHL.

<sup>26</sup> Article 49 of the GCIV and Rule 129 of the ICRC Study on Customary IHL.

<sup>27</sup> ECtHR, *Al-Skeini and Others v. United Kingdom*, Application No. 55721/07, Judgment (GC), 7 July 2011, para 132.

<sup>28</sup> ECtHR, *Loizidou v. Turkey (preliminary objections)*, Application No. 15318/89, Judgment, 23 March 1995, para 62; *Cyprus v. Turkey*, Application No. 25781/94, Judgment (GC), 10 May 2001, para 76. See also UN Doc. CCPR/C/21/Rev.1/Add.13, *General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, para 10.

<sup>29</sup> ECtHR, *Ilascu and Others v. Moldova and Russia*, Application 48787/99, Judgment (GC), 8 April 2004, paras 332-352.

or nature of territorial jurisdiction”.<sup>30</sup> Similarly, the UN Working Group on Arbitrary Detention (WGAD) in 2021, when considering individual communication concerning a detention that occurred in Crimea in 2018, attributed the responsibility over this detention to the Russian Federation “purely because its authorities are implicated in the detention”, and adopted the Opinion “without prejudice to the legal status of Crimea and the resolutions of the General Assembly”.<sup>31</sup> Notably, the Russian Federation engaged with the WGAD in responding to that communication thus indicating its acceptance of responsibility over the circumstances of the case.<sup>32</sup> That the Russian Federation is responsible for the protection of IHRL in the Autonomous Republic of Crimea and the City of Sevastopol was also tacitly accepted by the Russian Federation, and confirmed by the International Court of Justice (ICJ), in the case related to the application of one of the UN human rights instruments, the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, in those regions.<sup>33</sup>

Second, the Russian Federation has also, since spring 2014 exercised effective control over certain parts of the Donetsk and Luhansk regions. In 2014-2022, the control was largely exercised through a subordinate local administration of the so-called Donetsk and Luhansk People’s Republics. Since 24 February 2022 and, especially, since the unlawful annexation of the Donetsk and Luhansk regions on 30 September 2022, these Ukrainian regions have been under the direct effective control of the Russian Federation.

Third, certain other Ukrainian regions and areas have, for a shorter or longer period, been under the effective control of the Russian Federation, since the outbreak of the full-scale invasion of Ukraine on 24 February 2022, as well. This has been the case of the two regions unlawfully annexed on 30 September 2022, the Kherson and Zaporizhzhia regions, but also of certain other areas of Ukraine (especially areas within the Kyiv, Sumy, Kharkiv, Chernihiv, Mykolaiv, and Odesa regions).

Ukraine and the Russian Federation are both parties to the main universal and some regional IHRL treaties. At the universal level, they are both bound by the *International Covenant on Civil and Political Rights* (1966, ICCPR) and its first Optional Protocol (1966, ICCPR-OP), the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984, CAT), the *Convention on the Rights of the Child* (1989, CRC) and the *Convention on the Rights of Persons with Disabilities* (2008, CRPD). Ukraine has, in addition, ratified the *International Convention for the Protection of all Persons from Enforced Disappearance* (2006, ICPPED).

At the regional level, the Russian Federation is party to the *CIS Convention on Human Rights and Fundamental Freedoms* (1995, CHRFF) and Ukraine is party to the *European Convention on Human Rights* (1950, ECHR). The Russian Federation was party to the latter instruments in 1998-2022. Yet, following its exclusion from the Council of Europe,<sup>34</sup> the country ceased to be bound by the ECHR by 16 September 2022. The ECtHR remains competent to consider and decide upon applications directed against the Russian Federation that relate to alleged violations of the ECHR having occurred before 16 September 2022 (Article 58(2) of the ECHR).

The Russian Federation has not derogated from its human rights obligations under any of IHRL treaties. This means that the Russian Federation is bound by the full set of human rights

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<sup>30</sup> ECtHR, *Ukraine v. Russia (Re Crimea)*, Applications Nos 20958/14 and 38334/18, Judgment (GC), 16 December 2020, para 349.

<sup>31</sup> UN Doc. A/HRC/WGAD/2021/56, *Opinion No. 56/2021 concerning Server Mustafayev (Russian Federation)*, 13 January 2022, para 72.

<sup>32</sup> *Ibidem*, paras 57-69.

<sup>33</sup> ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Judgment, 31 January 2024, section III.

<sup>34</sup> *Resolution CM/Res(2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe*, 16 March 2022.

obligations arising in respect to it from these instruments. This is confirmed by the Human Rights Committee (HRC) concluding observations on the Eighth periodic report of the Russian Federation issued on 1 December 2022 (and referring to the period 2012-2019) in which the HRC makes no reference to any derogations and examines the full set of obligations arising from the ICCPR.<sup>35</sup>

The prohibition of arbitrary deprivation of liberty derives from the right to personal liberty which is safeguarded by Article 3 of the Universal Declaration of Human Rights (UDHR) and Article 9 of the ICCPR. Article 3 of the UDHR merely stipulates that “/e/veryone has the right to life, liberty and security of person”. Elaborating on this, Article 9 of the ICCPR specifies that “no one shall be deprived of /.../ liberty except on such grounds and in accordance with such procedure as are established by law“ (para 1). Article 9 also indicates certain guarantees that must be respected to guard against arbitrary deprivation of liberty. They include: a) the right to be informed about the reasons for arrest and charges (in case of arrest); b) the right to be promptly brought before a competent authority and to have the trial within a reasonable time (in case of criminal prosecution), c) the right to *habeas corpus* (in case of any deprivation of liberty), and e) the right to an enforceable right to compensation (in case of unlawful arrest).

The content of these guarantees and of the right to liberty and security, as granted by Article 9 of the ICCPR, has been clarified by the UN Human Rights Committee in its General Comment No. 35 (2014)<sup>36</sup> and in its views on periodical reports and on individual cases.

In 1991, moreover, a Working Group on Arbitrary Detention (WGAD) was established by the UN Commission on Human Rights.<sup>37</sup> The UN Human Rights Council, which replaced the Commission in 2006, has continued the mandate, renewing it on a triennial basis.<sup>38</sup> In 1997, the UN Commission on Human Rights explained that the WGAD was tasked “to investigate cases of detention imposed arbitrarily or otherwise inconsistently with the relevant international standards”<sup>39</sup> and that, hence, the terms “arbitrary detention” and “arbitrary deprivation of liberty” were to be seen as synonymous. The WGAD has adopted a broad understanding of the terms deprivation of liberty, arguing it occurs “when a person is being held without his or her free consent”.<sup>40</sup> This deprivation is arbitrary, if it falls under one of five categories distinguished by the WGAD: 1) the absence of legal basis for the deprivation of liberty; 2) the deprivation of liberty resulting from the legitimate exercise of human rights as protected by international law; 3) the total or partial non-observance of the international norms relating to the right to a fair trial; 4) prolonged administrative custody of asylum seekers, refugees or migrants; and 5) deprivation of liberty based on discrimination.<sup>41</sup> In the context of the present report, it is especially important to also note that the *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court* expressly state that the right to bring proceedings before a court to challenge the arbitrariness and lawfulness of detention and to obtain without delay appropriate and accessible remedies is not derogable under international law and apply even in times of war and armed conflict.<sup>42</sup>

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<sup>35</sup> UN Doc. CCPR/C/RUS/CO/8, *Concluding observations on the eighth periodic report of the Russian Federation*, 20 November 2015.

<sup>36</sup> UN Doc. CCPR/C/GC/35, *General comment No. 35: Article 9 (Liberty and security of person)*, 16 December 2014 (HRC GC No. 35).

<sup>37</sup> Commission on Human Rights resolution 1991/42, *Question of Arbitrary Detention*, 5 March 1992.

<sup>38</sup> The most recent renewal occurred in 2022, UN Doc. A/HRC/RES/51/8, *Arbitrary detention*, 12 October 2022.

<sup>39</sup> Commission on Human Rights resolution 1997/50, *Question of arbitrary detention*, 15 April 1997, para 5 of the preamble.

<sup>40</sup> UN Doc. A/HRC/36/37, *Report of the Working Group on Arbitrary Detention*, 19 July 2017, para 51.

<sup>41</sup> UN Doc. A/HRC/36/38, *Methods of work of the Working Group on Arbitrary Detention*, 13 July 2017, para 8.

<sup>42</sup> UN Doc. A/HRC/30/37, *United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, 6 July 2015, Principle 4.



The ECHR grants the right to liberty and security in its Article 5. Unlike Article 9 of the ICCPR, Article 5 does not use the term arbitrary deprivation of liberty but the ECtHR in its case-law has repeatedly stated that the main aim of the provision is to “*give the individual adequate protection against arbitrary interference*”.<sup>43</sup> Any interference with the right to liberty as guaranteed by Article 5 of the ECHR would be either not based on one of the legitimate grounds for the deprivation of liberty indicated in para 1, or one which is conducted without adequate procedural guarantees. Article 5 of the 1995 CIS CHRFF, which also protects the right to liberty and security is largely modelled on Article 5 of the ECHR and has the same structure, though the list of substantive grounds for lawful deprivation of liberty and the list of procedural guarantees are both shorter.

In its resolution 51/8, adopted in 2022, the UN Human Rights Council noted that “*persons who are unlawfully or arbitrarily deprived of their liberty are vulnerable to extrajudicial killings, torture and other cruel, inhuman or degrading treatment or punishment, enforced disappearances and other human rights violations and abuses, such as sexual and gender-based violence*”.<sup>44</sup> Persons unlawfully or arbitrarily deprived of liberty are vulnerable to other human rights violations and abuses as well, such as interferences with the right to private and family life, the denial of basic economic and social rights (e.g., the right to the enjoyment of the highest attainable standard of physical and mental health, the right to education, to right to food, or the right to water). These various acts constitute all violations of IHRL.

#### 4. INTERNATIONAL CRIMINAL LAW

International criminal law (ICL) prohibits certain acts to individual human beings. If carried out, these acts – known as crimes under international law – give rise to individual criminal responsibility for the perpetrators and may be prosecuted at the national or international level. Current ICL recognizes four crimes under international law: a) the crime of aggression, b) the crime of genocide, c) crimes against humanity, and d) war crimes. Since the mandate of the Mission refers specifically to crimes against humanity and war crimes, this report therefore limits its attention to these two crimes.

The definitions of crimes against humanity and war crimes are provided for in the Rome Statute of the ICC (1998, as amended in 2010 and 2017) and the relevant provisions are considered to reflect the rules of customary international law. Neither the Russian Federation, nor Ukraine are State Parties to the Rome Statute. Yet, on 9 April 2014 and 8 September 2015, respectively, Ukraine, by means of two declarations made under Article 12(3) of the Rome Statute, accepted the jurisdiction of the ICC with respect to crimes against humanity and war crimes, committed on its territory from 21 November 2013 to 22 February 2014 and from 20 February 2014 onwards, respectively.<sup>45</sup>

Crimes against humanity are violent acts “*committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack*”.<sup>46</sup> Such acts include, *inter alia*, murder; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery; enforced disappearance of persons; or other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.<sup>47</sup> All States have, under customary international law, the obligation to prevent

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<sup>43</sup> ECtHR, *Selahattin Demirtaş v. Turkey* (No. 2), Judgment (GC), 22 December 2020, para 249. See also ECtHR, *El-Masri v. "The Former Yugoslav Republic of Macedonia"*, Judgment (GC), 13 December 2012, para 230.

<sup>44</sup> UN Doc. A/HRC/RES/51/8, *Arbitrary detention*, 12 October 2022, para 2.

<sup>45</sup> See the Declaration by Ukraine lodged under Article 12(3) of the ICC Statute, 8 September 2015, available at [https://www.icc-cpi.int/iccdocs/other/Ukraine\\_Art\\_12-3\\_declaration\\_08092015.pdf](https://www.icc-cpi.int/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf)

<sup>46</sup> Article 7 of the Rome Statute of the ICC.

<sup>47</sup> Article 7 of the Rome Statute of the ICC.

and punish crimes against humanity.<sup>48</sup> Neither Ukraine nor the Russian Federation have included crimes against humanity as a specific category of crimes into their criminal codes.

War crimes are violations of the most fundamental rules of IHL. These are grave breaches of the Geneva Law, as well as other serious violations of the laws and customs of war, especially qualified violations of the Hague Law. They include, *inter alia*, wilful killing; torture or inhuman treatment; wilfully causing great suffering, or serious injury to body or health; unlawful confinement; or taking of hostages.<sup>49</sup> All States have, under treaty and customary international law, the obligation to investigate war crimes allegedly committed by their nationals or on their territory and prosecute the suspects. Both Ukraine and the Russian Federation have provisions on war crimes in their criminal codes, albeit the lists of such crimes are much shorter than in the Rome Statute.<sup>50</sup>

It is important to recall that crimes against humanity and war crimes are not mutually exclusive categories, and a single act may qualify as both. The same act can moreover also give rise to the responsibility of the State, to which the act is attributed (i.e., the State whose *de iure* or *de facto* organs committed the relevant act), for violations of IHL and/or IHRL.

## 5. OTHER INTERNATIONAL LEGAL STANDARDS

In addition to the legal standards explicitly indicated in the mandate, certain other international legal standards are of relevance for this report. This is mainly the case of the resolutions and reports on the protection of civilians in armed conflicts adopted within the UN.

The topic was included in the agenda of the UN bodies in the mid-1990s. Since then, over 10 resolutions dealing with the protection of civilians in armed conflicts in general or with the protection of certain specific groups of civilians, such as journalists or humanitarian workers, have been adopted by the UN General Assembly, the UN Security Council, and the UN Human Rights Council and 20 reports, either general or with a focus on the situation in particular countries, issued by the UN Secretary General.<sup>51</sup> Although arbitrary deprivation of liberty of civilians is occasionally mentioned in these sources, no resolution or report concentrates is specifically devoted to the discussion of this topic.

Arbitrary deprivation of liberty of civilians has moreover been discussed in the case law of international and hybrid criminal tribunals, especially the International Criminal Tribunal for the Former Yugoslavia (*Delalić*,<sup>52</sup> *Kordić & Čerkez*,<sup>53</sup> *Prlić*<sup>54</sup>) or the Extraordinary Chambers in the Courts of Cambodia (Case No. 02<sup>55</sup>). Moreover, in the case concerning *US Diplomatic and Consular Staff in Tehran*, the ICJ noted that “*wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights*”.<sup>56</sup>

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<sup>48</sup> *Draft articles on Prevention and Punishment of Crimes Against Humanity*, in UN Doc. A/74/10, *Report of the International Law Commission on the work of its Seventy-first session*, Official Records of the General Assembly, Seventy-first session, Supplement No. 10, August 2019, pp. 11-21.

<sup>49</sup> Article 8(2)(a) of the Rome Statute of the ICC.

<sup>50</sup> See Article 438 of the Criminal Code of Ukraine and Article 356 of the Criminal Code of the Russian Federation.

<sup>51</sup> See UN Documents for Protection of Civilians, available at <https://www.securitycouncilreport.org/un-documents/protection-of-civilians/>

<sup>52</sup> ICTY, *Prosecutor v. Delalić et al. (Čelebići)*, Case IT-96-21-A, Appeal Judgement, 20 February 2001.

<sup>53</sup> ICTY, *Prosecutor v. Kordić & Čerkez*, Case IT-95-14/2-A, Appeal Judgement, 17 December 2004.

<sup>54</sup> ICTY, *Prosecutor v. Prlić et al.*, Case IT-04-74, Appeal Judgment, 29 November 2017.

<sup>55</sup> ECCC, Case No. 002/19-09-2007/ECCC/TC, 27 March 2019.

<sup>56</sup> ICJ, *United States Diplomatic and Consular Staff in Tehran (USA v. Iran)*, Judgments, ICJ Reports 1980, para 91.

## **IV. OVERVIEW OF THE FACTUAL SITUATION**

Since Russia's attack on Ukraine in 2014, many Ukrainian civilians have found themselves in detention by the Russian authorities. The scale and complexity of the phenomena increased with the full-scale invasion of 2022, across multiple places of detention, primarily in the occupied areas of Ukraine, as well as in the territory of the Russian Federation but also of Belarus. Aside from the timeline, the phenomena of detaining Ukrainian civilians must also be examined from the geographical scope since the scale of detentions was yet again different in Crimea, following its illegal annexation in 2014 and yet again different in temporarily occupied territories, such as areas in the Kyiv, Kherson or Zaporizhzhia regions. What is also clear is that the overwhelming majority of those deprivations of liberty are arbitrary under international law either because they are not grounded in the permissible grounds for detention or violate procedural requirements for lawful detention or both, phenomena which will be analysed in-depth in Sections V.

### **A. THE NUMBER OF UKRAINIAN CIVILIANS ARBITRARILY DEPRIVED OF LIBERTY BY THE RUSSIAN FEDERATION**

The precise number of Ukrainian civilians who have been or remain arbitrarily deprived of liberty by the Russian Federation remains uncertain. While multiple stakeholders underlined to the Mission the difficulty of extracting the precise numbers in the difficult context of ongoing war, more than 35000 Ukrainians are currently listed as “*missing under special circumstances*” in the Unified Registry of the Missing Persons of the Ukrainian Ministry of Internal Affairs.<sup>57</sup> 16000 of them are registered as civilians, while the remaining are listed as POW and children.<sup>58</sup> The Office of the Ombudsman of Ukraine informed the Mission of around 1700 cases of Ukrainian civilians arbitrarily deprived of their liberty by the Russian authorities since 2014, with the vast majority of these cases stemming from the time of the full scale invasion of 2022.<sup>59</sup> Numbers in the thousands have also been presented by various civil society actors who work specifically with arbitrary detention of Ukrainian civilians, especially victims and their families. However, in order to understand these differences in numbers, multiple reasons must be considered of which the most important are: (a) the ongoing war, (b) the heterogeneous nature of the category of “civilians arbitrarily deprived of liberty”, and (c) the system for registering Ukrainian civilians in Russian detention.

#### **1. ARBITRARY DETENTION DURING AN ONGOING WAR**

The full-scale invasion by the Russian Federation against Ukraine has lasted for over two years. Ongoing hostilities and belligerent occupation of Ukrainian territory continuously expose Ukrainian civilians to the risk of detention by agents acting on behalf of the Russian Federation. Ukrainians already in detention may be released, transferred to criminal proceedings, exchanged or die, while Ukrainian civilians continue to be detained by the Russian Federation for reasons associated with the armed conflict. The number of civilians in detention by the Russian Federation therefore constantly evolves.

Consequently, poor transparency commonly associated with armed conflict, compounded by lack of access to areas occupied by the Russian Federation, complicates the reliability of numbers. The ongoing war of aggression has also given rise to a very high number of Ukrainian missing persons whose whereabouts are either not known or not officially confirmed at the present time. The situation is further compounded by the attitude of the Russian Federation as the sources and testimonies collected by the Mission overwhelmingly suggest that the information provided by the Russian Federation concerning the fate of Ukrainian civilians is scarce, inadequate and fragmented.

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<sup>57</sup> Ministry of Internal Affairs, Office of the Commission of the Unified Registry, meeting Kyiv, 21 March 2024.

<sup>58</sup> The Ukrainian Parliament Commissioner for Human Rights, meeting, Kyiv, 20 March 2024.

<sup>59</sup> *Ibidem*.

All this means that the numbers from the Unified Registry of the Missing Persons of the Ukrainian Ministry of Internal Affairs noted above are only provisional and the stakeholders in Kyiv informed the Mission of the nearly definite prospect of the numbers increasing significantly, recalling that the Unified Register was only launched in May 2023. What is however clear from the Mission's numerous meetings with stakeholders in Kyiv as well as the diverse reports examined, is that while the numbers of Ukrainian civilians arbitrarily deprived of their liberty by Russia was officially measured in the hundreds in the period between 2014 and 2022, since the full-scale invasion this is measured in the thousands.

Additional factors linked to the war also add to the uncertainty. For example, knowledge about the fate of citizens of Mariupol remains inaccessible, in terms of how many were killed and how many are missing and if any among those missing have been arbitrarily detained. There may be many cases of civilians who have died in detention and whose remains have not yet been retrieved. The Office of the Prosecutor General of Ukraine is responsible for mandating competent forensic investigations for processing and identification of the remains, but the process is bureaucratic and slow.<sup>60</sup> Civilian victims of arbitrary deprivation of liberty and related crimes may be located outside of Ukraine, which makes it difficult to track them and record their cases and testimonies.<sup>61</sup> Furthermore, many civil society organizations working on these issues in areas currently under temporary occupation by the Russian Federation were substantially weakened in the wake of the full-scale invasion. While some activists joined the Ukrainian Armed Forces,<sup>62</sup> others were detained by the Russian forces,<sup>63</sup> and yet others currently work in an extremely constrained and dangerous environment. For these composite reasons, the precise number of civilian Ukrainians in Russian detention remains elusive.

## **2. HETEROGENOUS NATURE OF THE CATEGORY OF “CIVILIANS ARBITRARILY DEPRIVED OF LIBERTY”**

Mapping the scope and nature of the arbitrary detention of Ukrainian civilians by the Russian Federation is further complicated by the diverse composition of the group referred to as “civilians”. While it is intuitive that Ukrainians who are not members of the Ukrainian armed forces, and therefore not combatants, fall into the category of “civilians”, this is not always so clear against the complex backdrop of the facts and the laws applicable to the current armed conflict between the Russian Federation and Ukraine.

Detention practices by the Russian Federation in the occupied Crimea following 2014 occurred in a situation of full Russian military control, meticulously targeting civilian Ukrainians of a particular stature in the hundreds. Russian detention practices extended in scope and nature with the full-scale invasion of 2022, encompassing new regions and other categories of Ukrainian civilians.<sup>64</sup> The Russian Federation henceforth detained Ukrainian civilians in the midst of hostilities and in newly occupied territory, numbering in the tens (or even hundreds) of thousands. The group Ukrainian civilians in detention by the Russian Federation is therefore extremely composite.

Ukrainian civilians detained by the Russian Federation for reasons associated with the conflict range from journalists and mid-level community leaders performing their professional activities in ways perceived to be detrimental to the Russian occupational authority, or Ukrainians who do not have required Russian documents in unlawfully annexed territory,<sup>65</sup> to civilians suspected of links to Ukrainian defence efforts as the Russian army invaded their territory. For

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<sup>60</sup> Office of the Prosecutor General of Ukraine, meeting, Kyiv, 20 March 2024.

<sup>61</sup> *Ibidem*.

<sup>62</sup> Stakeholder-meeting, Berlin 16 March 2024.

<sup>63</sup> Office of the Prosecutor General of Ukraine, meeting, Kyiv, 20 March 2024.

<sup>64</sup> The Ukrainian Parliament Commissioner for Human Rights, meeting Kyiv, 20 March 2024.

<sup>65</sup> Testimonies 3, 4, 5 and 18 (on file with the authors); Mission of the President of Ukraine in the Autonomous Republic of Crimea, meeting with stakeholders, Kyiv, 20 March 2024.

example, ODIHR in 2023 confirmed “*the Russian Federation’s practice of targeting individuals based on their real or perceived support of, or assistance to Ukrainian armed forces, for being formerly associated with, or having relatives or friends who served in the Ukrainian armed forces, for refusing to cooperate with occupation authorities, or for allegedly holding pro-Ukrainian or anti-Russian views*”.<sup>66</sup> The category comprises civilians suspected of providing intelligence information to the Ukrainian Armed Forces (UAF) on the whereabouts of Russian military assets, relatives of members of the UAF,<sup>67</sup> and professionals associated with the Ukrainian anti-terrorist operation in Donbas after 2014, including law-enforcement officials or legal professionals.<sup>68</sup>

It further includes citizens of Ukraine unwilling to take up work for the Russian occupying power, such as civilian employees working at the Zaporizhzhia nuclear power plant,<sup>69</sup> civilian employees at the State Emergency Services of Ukraine,<sup>70</sup> prison-staff,<sup>71</sup> employees in local administration<sup>72</sup> or teachers,<sup>73</sup> or simply persons accused of or suspected of showing signs of “disloyalty” to the occupier.<sup>74</sup> The category of Ukrainian civilians in detention by the Russian Federation also includes persons working for international organizations at the time of the full-scale invasion, including the three OSCE Special Monitoring Mission staff members, detained and subsequently charged with “treason” or “espionage” despite the OSCE making it plain that these personnel are being prosecuted for activities directly stemming from their work under the OSCE mandate.<sup>75</sup> Moreover, some 2000 Ukrainian sentenced persons in Ukrainian prisons were moved to Russian in 2022, some of whom were re-detained despite having served their sentences.<sup>76</sup> Consequently, the group Ukrainian civilians in detention by the Russian Federation consists of persons from a variety of regions, periods and with diverging (presumed) grounds for initial and prolonged detention.

In this regard, the Mission also finds it appropriate to make a comment on the terminology of “civilians”. Under the legal regimes applicable to these detainees, the term “civilians” is not straightforward, as IHL and IHRL differ in this respect. IHRL does not use the term “civilians”, as any civilian is simply an individual under IHRL. IHL in international armed conflict (IAC) on the contrary uses the term “civilians” in its two branches, the Hague law (regulations of means and methods of warfare) and the Geneva law (protection of victims of war). The mandate of this Mission exclusively concerns Geneva law. All Ukrainians, both combatants and civilians, who are not or no longer taking part in hostilities and find themselves in the hands of the enemy power are “victims of war” in the terminology of the GCs.<sup>77</sup> Whereas detained combatants have the status of POW, detained civilians qualify as “protected persons” under the GCs.<sup>78</sup> To avoid terminological confusion, this report uses the term “civilians”.

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<sup>66</sup> ODIHR *Interim Report IV*, *op. cit.*, para 43.

<sup>67</sup> ZMINA Stakeholder-meeting, Kyiv, 20 March 2024.

<sup>68</sup> Association of Relatives of Political Prisoners by the Kremlin, documented 110 cases of people detained by Russian federation or units controlled by Russia in Zaporizhzhia i 2022 17 of whom had worked with the ATO. Stakeholder-meeting, Kyiv, 20 March 2024.

<sup>69</sup> OHCHR *Human Rights Report 2024*, *op. cit.*, para 96.

<sup>70</sup> *Ibidem*, para 105.

<sup>71</sup> *Ibidem*.

<sup>72</sup> ICIU *Conference Paper*, *op. cit.*, para 672; Ukrainian Office of the Prosecutor General, *Unlawful Confinement of Civilians*, Briefing document submitted to the Mission, 31 March 2024, p. 7.

<sup>73</sup> ICIU *Conference Paper*, *op. cit.*, para 672; Ukrainian Office of the Prosecutor General, *Unlawful Confinement of Civilians*, Briefing document submitted to the Mission, 31 March 2024, p. 7.

<sup>74</sup> Ukrainian Office of the Prosecutor General, *Unlawful Confinement of Civilians*, Briefing document submitted to the Mission, 31 March 2024, p. 3.

<sup>75</sup> Testimonies 7, 21 and 39 (on file with the authors).

<sup>76</sup> Testimony 39 (on file with the authors).

<sup>77</sup> See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the *Protection of Victims of International Armed Conflicts* (emphasis added).

<sup>78</sup> See Article 4(1) of the GCIV.

### 3. SYSTEM FOR REGISTERING UKRAINIAN CIVILIANS IN RUSSIAN DETENTION

A final complication for accurately ascertaining the numbers lies in the system for registering and communicating the presence of civilian Ukrainians deprived of liberty by the Russian Federation, be this arbitrary detention or not. According to the information gathered and testimonies received by the Mission, while the system is still somewhat fragmented on the Ukrainian side, it is non-existent on the Russian side, and constrained by legitimate obligations of confidentiality at the ICRC. The result is that the number of “confirmed” civilian Ukrainians in detention by the Russian Federation varies considerably from one source to another.

Several Ukrainian agencies are involved in efforts to register and update lists of Ukrainian civilians who are missing, including those in detention, resulting in a proliferation of lists operating according to different criteria and methodologies for both unconfirmed and confirmed cases. The number of estimated or unconfirmed Ukrainian civilians in Russian detention therefore differ between the agencies.<sup>79</sup> In an attempt to streamline numbers, as already noted above, a *Unified Register of Missing Persons under Special Circumstances* was launched on 1 May 2023.<sup>80</sup> In September 2023, the Ministry of Internal Affairs was assigned to maintain this Unified Register with a dedicated Secretariat.<sup>81</sup> Lists from different agencies are currently in the process of being assembled in this Unified Register. Almost 2000 names are added to the list each week.<sup>82</sup> However, the process is done manually and is consequently slow.<sup>83</sup> Several interlocutors told the Mission that they expect the current number of 35000 of missing persons to increase, underlining the preliminary nature of current numbers provided.<sup>84</sup>

The Secretariat, responsible for the Unified Registry, sets the current number of civilian missing persons at 8717. Of these, 2108 are minors, while 1686 are registered as “*unlawfully deprived of liberty*”.<sup>85</sup> Among these 1686, the ICRC has confirmed 868, while 818 have been confirmed by other sources. The total number of civilians in Russian detention according to the methodology of the UN mission is 1784.<sup>86</sup> According to the Office of the Ombudsman, in the years between 2014-2022, 375 persons from Crimea, Luhansk or Donetsk were “unlawfully detained or unlawfully sentenced”. 95% were convicted and received long sentences.<sup>87</sup> After the full-scale invasion, the Office of the Ombudsman has registered 1700 civilian Ukrainians “unlawfully detained or unlawfully sentenced” by the Russian Federation.<sup>88</sup> There are people with disabilities and women among them.<sup>89</sup> The current number of Ukrainians “unlawfully sentenced” by the Russian Federation was put at 986.

The Office of the Prosecutor operates with the number 14600 for civilian Ukrainians “detained illegally in occupied territory”.<sup>90</sup> The National Information Bureau of Ukraine (UNIB) operates with 14000 “unconfirmed detained civilians”, while the number of confirmed detained is around 2000, almost 900 of which have been confirmed by the ICRC. According to the UNIB, the number of civilians forcibly transferred into temporarily occupied territory or deported to the Russian Federation amounts to 120000, which includes civilian detainees who have been transferred or deported to Russia.<sup>91</sup>

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<sup>79</sup> Mission meetings with various agencies in Kyiv, 19 – 22 March 2024.

<sup>80</sup> The Ukrainian Parliament Commissioner for Human Rights, meeting, Kyiv, 20 March 2024.

<sup>81</sup> Ministry of Internal Affairs, Office of the Commission of the Unified Registry, meeting Kyiv, 21 March 2024.

<sup>82</sup> The Ukrainian Parliament Commissioner for Human Rights, meeting, Kyiv, 20 March 2024.

<sup>83</sup> Ministry of Internal Affairs, meeting Kyiv, 21 March 2024.

<sup>84</sup> The Ukrainian Parliament Commissioner for Human Rights, meeting, Kyiv, 20 March 2024.

<sup>85</sup> Ministry of Internal Affairs, Office of the Commission of the Unified Registry, meeting Kyiv, 21 March 2024.

<sup>86</sup> UN Monitoring Mission to Ukraine, digital meeting with the Mission, 25 March 2024.

<sup>87</sup> The Ukrainian Parliament Commissioner for Human Rights, meeting Kyiv, 20 March 2024.

<sup>88</sup> *Ibidem*.

<sup>89</sup> *Ibidem*.

<sup>90</sup> Office of the Prosecutor General of Ukraine, meeting, Kyiv, 20 March 2024.

<sup>91</sup> National Information Bureau, meeting, Kyiv, 21 March 2024.

A different category of persons deprived of their liberty by the Russian Federation concerns civilian sentenced persons who were serving sentences in different penal colonies in the Kherson region before February 2022. The number of confirmed Ukrainian sentenced persons transferred to penal colonies in the Russian Federation ranges from 1600 to 2000, of which approximately 600 have been located. 248 have been released, of which 230 were re-arrested and placed in immigration detention.<sup>92</sup>

## **B. PRACTICES RELATED TO THE ARBITRARY DEPRIVATION OF LIBERTY OF UKRAINIAN CIVILIANS BY THE RUSSIAN FEDERATION**

The Mission has been able to broadly distinguish four different situations in which the arbitrary deprivation of liberty of Ukrainian civilians by the Russian Federation has most commonly taken place. The situations reveal different patterns as to the scale, complexity and targets of the detention practices. Such practices differ with location, period and intensity of hostilities and distinction between the following four situations can be broadly made: (a) unlawfully annexed Crimea, (b) frontlines, (c) initial occupation, and (d) prolonged occupation.

### **1. UNLAWFULLY ANNEXED CRIMEA**

The Russian Federation began its temporary occupation of Ukrainian territory in Crimea in February 2014, when the Autonomous Republic of Crimea and the City of Sevastopol were, upon an invalid referendum, unlawfully annexed to the Russian Federation.<sup>93</sup> Russian citizenship was imposed on all residents.<sup>94</sup> Crimea is currently the only region of Ukraine subject to a policy of automatic citizenship. The Russian Federation applies the Russian legislation *in toto* to occupied Crimea. As already noted earlier, the detention practices in Crimea reflect the strive by the Russian authorities for forced integration of the Crimean society into the Russian Federation.<sup>95</sup> While selected areas occupied and annexed by the Russian Federation since 2022 have been moving towards a situation of resemblance with Crimea,<sup>96</sup> the practice of enforced disappearances reportedly resumed in Crimea after the 2022.<sup>97</sup>

The arbitrary detentions in the context of mass political protests to the illegal annexation of Crimea have been widespread, starting with the so-called “Case of February 26” in 2014 when large number of people were detained following anti-annexation rally in Simferopol. Since then, the Office of the Ukrainian Ombudsman reports 208 political prisoners in Crimea, specifying that 125 of those are Crimean Tatars.<sup>98</sup> The Office of the Ukrainian Prosecutor General puts this figure slightly higher and at the time of its visit to Kyiv the Mission was informed of at least 217 Crimean residents who are citizens of Ukraine being held in places of deprivation of liberty due to politically motivated and/or religious criminal prosecution, 134 of whom are representatives of the indigenous Crimean Tatar people although independent journalists, society activists, some religious groups and those who continue to resist the illegal occupation of the peninsula are also being persecuted and prosecuted.<sup>99</sup>

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<sup>92</sup> Testimony 39 (on file with the authors); OHCHR *Human Rights Report 2024*, *op. cit.*, para 149.

<sup>93</sup> For details, see OHCHR, *Report on the situation of human rights in the temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol (Ukraine)*, September 2017, paras 20-28; and OHCHR, *Ten Years of Occupation by the Russian Federation: Human Rights in the Autonomous Republic of Crimea and the City of Sevastopol*, 28 February 2024.

<sup>94</sup> OHCHR, *Report on the situation of human rights in the temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol (Ukraine)*, 2017, paras, 55-57.

<sup>95</sup> OHCHR, *Ten Years of Occupation by the Russian Federation: Human Rights in the Autonomous Republic of Crimea and the City of Sevastopol, Ukraine*, 28 February 2024.

<sup>96</sup> *Ibidem*.

<sup>97</sup> CrimeaSOS, stakeholder-meeting, Kyiv, 20 March 2024; see also CrimeaSOS, *Enforced Disappearances in Crimea During the Russian Occupation in 2014-2020*, 2021.

<sup>98</sup> It all started in Crimea, *Ombudsman of Ukraine*, 2024; CrimeaSOS, *Crimea 2023. The Second Year of Full-Scale War*, 2023.

<sup>99</sup> Office of the Prosecutor General, meeting Kyiv, 20 March 2024.

## 2. FRONTLINES

The second category comprises situations of military invasion, where the Russian forces attempt to establish effective control over an area. After the full-scale invasion of 24 February 2022, the Russian Federation captured territory in the Chernihiv, Donetsk, Kharkiv, Kherson, Kyiv, Luhansk, Mykolaiv, and Zaporizhzhia regions of Ukraine. While in some locations the capture was swift, the city of Mariupol was under siege for nearly three months, subjected to intensive bombardment.<sup>100</sup> By the end of 2023, checkpoints remained widespread throughout the temporarily occupied territories, mainly close to the frontline, and included mobile checkpoints whose locations often changed depending on military considerations<sup>101</sup> and with allegations of civilians who disappeared while passing through checkpoints.<sup>102</sup>

According to the information gathered and testimonies received by the Mission, during the initial phase of the invasion and along the moving frontline, extensive arbitrary detention of civilians was a part of a wider pattern of Russian armed forces' use of violence and repression. This effort targeted a wide circle of civilians perceived to be assisting Ukrainian forces or opposing the advancing troops and the ensuing occupation.<sup>103</sup> The Russian armed forces targeted men more frequently for suspected participation in hostilities or in pro-Ukrainian groups.<sup>104</sup> This phase is characterized by broad arbitrary detention practices, based on very rudimentary structures, by Russian military/servicemen, and often by makeshift, unofficial detention centres.<sup>105</sup> Intensive search for Ukrainians with links to the Ukrainian armed forces, including former members of the Ukrainian Armed Forces (UAF), civilians who were suspected of links to the Security Services of Ukraine (SBU), or persons likely to be experienced with handling weapons (such as hunters).<sup>106</sup> The Russian armed forces were reportedly proceeding based on compiled lists of such persons whom they immediately apprehended, detained and interrogated.<sup>107</sup> Russian forces would also target family members of such persons.<sup>108</sup> In some areas, numerous civilians have been reportedly arbitrarily detained and transferred out of the area and further into areas of prolonged occupation or into the Russian Federation.

## 3. INITIAL OCCUPATION

The third situation materializes in areas subject to effective control by the military forces of the Russian Federation and brings about the establishment of a system intended to impose the authority of the Occupying Power. This particularly concerns those regions of Ukraine that fell under the Russian temporary occupation after the full-scale invasion of 24 February 2022, specifically the areas within the Chernihiv, Donetsk, Kharkiv, Kherson, Kyiv, Luhansk, Mykolaiv and Zaporizhzhia regions.<sup>109</sup> Ukrainian armed forces launched a counteroffensive which by the end of November 2022 resulted in the recapture of all of Mykolaiv region, except the territories of the Kinburn Spit, nearly all of Kharkiv region, the city of Kherson and areas of Kherson region on the right bank of the Dnipro river.<sup>110</sup> These regions therefore did not experience occupation beyond this stage.

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<sup>100</sup> OHCHR *Human Rights Report 2024, op. cit.*, para 31.

<sup>101</sup> *Ibidem*, para 60.

<sup>102</sup> *Ibidem*, para 57.

<sup>103</sup> OHCHR, *Killings of civilians: summary executions and attacks on individual civilians in Kyiv, Chernihiv, and Sumy regions in the context of the Russian Federation's armed attack against Ukraine*, 7 December 2022; OHCHR *Detention Report 2023, op. cit.*; OHCHR *Human Rights Report 2024, op. cit.*, paras 37 et seq.

<sup>104</sup> OHCHR *Human Rights Report 2024, op. cit.*, para 59.

<sup>105</sup> *Ibidem*, paras 35-96.

<sup>106</sup> *Ibidem*, para 38.

<sup>107</sup> Office of the Prosecutor General, meeting Kyiv, 20 March 2024; OHCHR *Human Rights Report 2024, op. cit.*, para 38.

<sup>108</sup> OHCHR *Human Rights Report 2024, op. cit.*, para 38.

<sup>109</sup> OHCHR *Human Rights Report 2024, op. cit.*

<sup>110</sup> *Ibidem*, para 32.



According to the information gathered and testimonies received by the Mission, this phase is characterized by an extended and sophisticated system of mapping and filtration of all Ukrainian citizens of the territory.<sup>111</sup> Notably, during this phase, the Russian forces and administration would establish an extended system of filtration, with the objective to register, map and collect personal data, biometric samples/DNA of the inhabitants in an area, and to establish database with an overview of the population.<sup>112</sup> Filtration facilities would be established throughout the territory. For example, a detailed mapping of the filtration-system in Donetsk shows that the system of filtration can be seen as a four-tier system consisting of *ad hoc* registration points, facilities for holding those awaiting registration (schools etc.), interrogation centres (for extraction of information concerning the person and others), and finally prisons (typically correction colonies).<sup>113</sup>

The testimonies received by the Mission indicate that while Russian armed forces initially targeted individuals perceived as posing a security threat, over time, a wider net was cast to include any person perceived to oppose the temporary occupation.<sup>114</sup> The Russian authorities at this phase would arbitrarily detain and threaten broader categories of civilians whom they perceive as opposing their occupation, including journalists, civil servants, public officials and civil rights activists.<sup>115</sup> The occupying authorities also would begin to change the systems of governance and administration to bring them into conformity with Russian laws and standards,<sup>116</sup> therefore seeking local officials to serve the occupation regime. They would offer incentives such as promotions, higher salaries and special protection to induce cooperation.<sup>117</sup> If such persuasion failed, Russian armed forces would in some cases resort to arbitrary detention, torture or ill-treatment. The OHCHR documented 37 cases in which local officials (26 men, 11 women) were detained, tortured, ill-treated or received threats against family members, in occupied areas of Kharkiv, Kherson, Mykolaiv and Zaporizhzhia regions.<sup>118</sup>

#### 4. PROLONGED OCCUPATION

The fourth situation consists of the transition into prolonged occupation and unlawful annexation, when the Russian Federation solidifies its hold over Ukrainian territory controlled by its armed forces. This is especially the case of the four Ukrainian regions (Donetsk, Luhansk, Kherson, and Zaporizhzhia) unlawfully annexed, upon invalid referenda, by the Russian Federation on 30 September 2022. This led to a *de facto* and complete imposition of Russian political, legislative, and administrative systems in the temporarily occupied territory.<sup>119</sup> On 19 October 2022, the Russian Federation formally imposed martial law in the territory of Ukraine that it illegally annexed, providing for a wide range of measures under “new” domestic law that may be implemented “if required”, including internment.<sup>120</sup> Thus the system in these regions increasingly resembles that installed in Crimea following its illegal annexation 2014.

The testimonies received by the Mission indicate that during prolonged occupation, a climate of fear is relied upon to solidify control over the residents, suppress dissent and opposition, and induce compliance. At least 32 laws were adopted between October and December 2022 to

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<sup>111</sup> Testimonies 19, 30 and 31 (on file with the authors).

<sup>112</sup> Testimonies 19, 30 and 31 (on file with the authors).

<sup>113</sup> Kaveh Khoshnood, Nathaniel Raymond et al., *System of Filtration: Mapping Russia's Detention Operations in Donetsk Oblast*, Humanitarians Research Lab at Yale School of Public Health: New Haven, 25 August 2022.

<sup>114</sup> OHCHR *Human Rights Report 2024*, *op. cit.*

<sup>115</sup> *Ibidem*, para 39.

<sup>116</sup> *Ibidem*, para 108 et seq.

<sup>117</sup> *Ibidem*, para 83.

<sup>118</sup> *Ibidem*, para 85.

<sup>119</sup> On 13 October 2022, the UN General Assembly adopted resolution ES-11/4 on *Territorial integrity of Ukraine: defending the principles of the Charter of the United Nations*, which condemned the organization of the ‘referenda’ and the attempted unlawful annexation of oblasts of Ukraine.

<sup>120</sup> Russian Federation, Decree No. 756 of 20 October 2022 ‘*On the imposition of martial law in the territories of the ‘Donetsk People’s Republic, Luhansk People’s Republic, Zaporizhzhia and Kherson oblast’*’.

align administrative processes in the temporarily occupied territories with the Russian systems in wide-range of areas such as taxation, banking, inheritance, social protection and social services.<sup>121</sup> A system was established whereby “patron” (“шефство”) regions in the Russian Federation “assisted” the occupied regions in implementing the required changes in infrastructure, education, healthcare, while a presidential decree provided financial benefits for Russian civil servants who worked temporarily in the temporarily occupied territory.<sup>122</sup>

In April 2023, the Russian Federation adopted a decree concerning the legal status of individuals without Russian citizenship in the temporarily occupied territory of Ukraine.<sup>123</sup> This led to Ukrainians residing in the occupied areas of Zaporizhzhia, Kherson, Donetsk and Luhansk regions being considered as “foreigners”, unless they obtained Russian citizenship. The decree also provides that the Ukrainian citizens residing in the temporarily occupied territories without a Russian passport may be deported if their “extremist activities” threaten the national security. Given the broad definition of the term “extremist activities” in Russian legislation (see Section V.A.2), persons may risk deportation for expressing pro-Ukrainian views or criticizing official Russian narratives regarding the war.

Throughout 2023 and 2024 the Russian authorities have continued to impose Russian legal and administrative systems in the temporarily occupied territories.<sup>124</sup> Intimidation and violence have been relied on to coerce members of key public sector professions to cooperate with Russian occupying authorities. According to the testimonies received by the Mission, those who resist, risk arbitrary detention, violence, and other reprisals. Residents without a Russian passport are especially singled out by the occupying authorities, experiencing harsher treatment, restrictions on their freedom of movement as well as arbitrary detention.<sup>125</sup>

### **C. THE PROCESS OF THE ARBITRARY DEPRIVATION OF LIBERTY OF UKRAINIAN CIVILIANS BY THE RUSSIAN FEDERATION**

According to the Ukrainian National Information Bureau, the numbers of identified detention facilities in different regions under control of the Russian belligerent and occupying power are as follows: 28 in the Donetsk region, 19 in the Luhansk region, 39 in the Zaporizhzhia region, 28 in the Kharkiv region, 16 in the Kherson region and 45 in the territory of the Russian Federation.<sup>126</sup> However, information about these detention facilities remains rudimentary, and is based primarily on reports compiled by NGOs or testimonies of former detainees.<sup>127</sup>

#### **1. PLACES OF DETENTION**

Ukrainian civilians arbitrarily deprived of liberty by the Russian Federation are, especially in the initial stages of detention, confined in different makeshift, unofficial centres, which proliferated at the early stages of the full-scale invasion in 2022.<sup>128</sup> The Office of the General Prosecutor of Ukraine has identified 164 such places, and has 5600 reported cases of “unlawful

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<sup>121</sup> OHCHR *Human Rights Report 2024*, *op. cit.*, para 109.

<sup>122</sup> Указ Президента РФ от 17 октября 2022 г. № 752 "Об особенностях командирования лиц, замещающих государственные должности Российской Федерации, федеральных государственных гражданских служащих, работников федеральных государственных органов, замещающих должности, не являющиеся должностями федеральной государственной гражданской службы, на территории Донецкой Народной Республики, Луганской Народной Республики, Запорожской области и Херсонской области".

<sup>123</sup> Указ Президента РФ от 27 апреля 2023 г. № 307 "Об особенностях правового положения отдельных категорий иностранных граждан и лиц без гражданства в Российской Федерации".

<sup>124</sup> OHCHR, *Report on the Human Rights Situation in Ukraine (1 December 2023 – 29 February 2024)*, 26 March 2024, para 68.

<sup>125</sup> OHCHR *Human Rights Report 2024*, *op. cit.*

<sup>126</sup> National Information Bureau of Ukraine, meeting, Kyiv, 20 March 2024.

<sup>127</sup> Kaveh Khoshnood, Nathaniel Raymond et al., *System of Filtration: Mapping Russia's Detention Operations in Donetsk Oblast*, Humanitarians Research Lab at Yale School of Public Health: New Haven, 25 August 2022.

<sup>128</sup> Office of the Prosecutor General of Ukraine, meeting, Kyiv, 20 March 2024; OHCHR *Human Rights Report 2024*, *op. cit.*, para 41.

confinement” in make-shift detention centres.<sup>129</sup> In such centres, treatment is reported to be particularly harsh.<sup>130</sup> In later stages of detention, Ukrainian civilians are usually detained in regular, official detention places such as pre-trial detention centres (SIZO), temporary isolation cells (IVS), or penitentiary institutions and colonies. Most such places are located in Crimea but also facilities on the territory of the Russian Federation, and purportedly even in Belarus, are thus utilized. Regardless of the type of detention facilities and whether they are official or not, it has been reported to the Mission that there is normally a link to the Federal Security Service (FSB) or penitentiary authorities,<sup>131</sup> most notably through regular visits by FSB agents and officers from the Investigation Committee for the purpose of interrogations.<sup>132</sup>

## **2. FILTRATION PROCEDURE**

Filtration is a process of security checks and personal data collection during which many civilians were arbitrarily detained for periods from several days, week or even months.<sup>133</sup> Filtration measures are aimed at identifying those who do not welcome the occupation, or who work for the authorities or military forces of Ukraine, or their relatives.<sup>134</sup> The main goal is for the Detaining Power to separate those who will remain loyal to Ukraine from those who will accept the Russian authority. For example, in Mariupol, filtration centres were established outside of the city, and those who did not pass filtration were consequently not given permission to re-enter the city.<sup>135</sup> Filtration may take place in many different types of facilities: registration points, camps or other places of internment, interrogation centres, torture chambers, or prisons.<sup>136</sup> Both the FSB (including military counterintelligence) and FSE (Russian penitentiary authority) assign their own officers to oversee filtration in particular regions.<sup>137</sup>

The Ukrainian Office of the General Prosecutor has identified 121 filtration points, and instituted several criminal proceedings related to such points.<sup>138</sup> The true reason for the filtration system in the occupied areas appears to have as its primary task to identify persons who work for public authorities, local self-government bodies, participate in rallies, support Ukrainian authorities, help the Armed Forces of Ukraine, serve(d) in law-enforcement agencies, participated in the Joint Forces Operation (ATO), are relatives of the military, have Ukrainian content in their mobile terminals or are journalists, teachers, scientists or politicians.<sup>139</sup> After filtration, people are either released or transferred to a detention facility for further detention, commonly in the form of internment or criminal proceedings.<sup>140</sup>

## **3. DETENTION FOR SECURITY REASONS OR CRIMINAL PROCEDURE**

According to the testimonies received by the Mission, a large group of Ukrainian civilians are arbitrarily detained for reasons of security by the Russian Federation. The Mission was unable to locate any information concerning the existence of internment camps dedicated to civilian internees. Rather, all information strongly suggests that POW and civilian internees are kept in mixed quarters, or at the same locations.<sup>141</sup> Some facilities reportedly host civilians, POW and

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<sup>129</sup> Office of the Prosecutor General of Ukraine, meeting, Kyiv, 20 March 2024.

<sup>130</sup> Stakeholder-meeting, NGO/Office, Kyiv, 20 March 2024.

<sup>131</sup> Ministry of Internal Affairs, meeting, Kyiv, 21 March 2024.

<sup>132</sup> *Ibidem*.

<sup>133</sup> See OHCHR *Detention Report 2023*.

<sup>134</sup> Office of the Prosecutor General of Ukraine, meeting, Kyiv, 20 March 2024.

<sup>135</sup> Kaveh Khoshnood, Nathaniel Raymond et al., *System of Filtration: Mapping Russia's Detention Operations in Donetsk Oblast*, Humanitarians Research Lab at Yale School of Public Health: New Haven, 25 August 2022.

<sup>136</sup> Ministry of Internal Affairs, meeting, Kyiv, 21 March 2024.

<sup>137</sup> *Ibidem*. Testimonies 40, 41 (on file with the authors).

<sup>138</sup> Office of the Prosecutor General of Ukraine, meeting, Kyiv, 20 March 2024.

<sup>139</sup> Ministry of Internal Affairs, meeting, Kyiv, 21 March 2024.

<sup>140</sup> Stakeholder-meeting, NGO/Office, Kyiv, 20 March 2024.

<sup>141</sup> Stakeholder-meeting, NGO/Office, Kyiv, 20 March 2024; Office of the Prosecutor General of Ukraine, meeting, Kyiv, 20 March 2024; Ministry of Internal Affairs, meeting, Kyiv, 21 March 2024.

sentenced persons in three different units of the same detention facility.<sup>142</sup> In other instances, civilians are reportedly co-located with POW in the same facility, but in separate buildings.<sup>143</sup> The Mission was unable to identify a clear system for the internment of civilians.

Some reports at the disposal of the Mission suggest that the interment system was very rudimentary in the initial phases of the full-scale invasion, whereby civilians and POW would be kept in the same detention facilities.<sup>144</sup> Reportedly, as the conflict became protracted and the number of interned civilians grew, the Occupying Power reshuffled the arrangements, and at least in certain prisons separated civilians from ordinary sentenced persons, keeping them in separate buildings or units.<sup>145</sup> While the Russian system for the detention of Ukrainian civilians seems to have developed since 2022, the Mission was unable to identify internment structures in line with the requirements of the GCIV. The information received by the Mission suggests that a majority of arbitrarily detained civilians in Crimea are subject to criminal prosecution, while in the regions of Kherson, Zaporizhzhia, Donetsk and Luhansk, the majority of arbitrarily detained Ukrainian civilians are kept under the authority of counter intelligence units and no criminal proceedings are ongoing.<sup>146</sup>

Furthermore, after the full-scale invasion, prosecutions of Ukrainian civilians in the temporarily occupied territories have increased considerably.<sup>147</sup> On 31 July 2023, the Russian authorities adopted a federal law proclaiming a retroactive extension of the Russian criminal jurisdiction over the occupied Ukrainian regions of Donetsk, Luhansk, Kherson, and Zaporizhzhia, with respect of all crimes committed there both after and before the temporary occupation.<sup>148</sup> The law provides for a new criminal justification ("*if/an act/ was aimed at protecting the interests of Russia, "Luhansk" and "Donetsk People's Republics", their citizens, population, and organisations*" (Section 2 § 2)). In addition, under Section 8 of the same law, the Russian Federation acknowledges the legal force of all judicial decisions delivered in the unlawfully annexed territories which entered into force before 30 September 2022. In September 2023, the Supreme Court of the Russian Federation announced the operationalization of the Russian court system in the occupied Ukrainian regions of Donetsk, Luhansk, Zaporizhzhia and Kherson.<sup>149</sup>

Finally, on 5 December 2023, the Russian authorities announced that since 27 September 2023 they had appointed 436 federal judges in the temporarily occupied territory of Ukraine. Another 14 judges were appointed in the occupied areas of Donetsk, Zaporizhzhia and Kherson regions on 4 January 2024.<sup>150</sup> Most of the judges were citizens of the Russian Federation.<sup>151</sup> The establishment of courts presided over by judges from the Russian Federation applying Russian law resulted in complete Russian judicial control over the temporarily occupied territory, including arbitrarily detained Ukrainian civilians. Consequently, Ukrainian civilians in the temporarily occupied territories are facing prosecution for activities that were legal in Ukraine,

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<sup>142</sup> Stakeholder-meeting, Berlin 16 March 2024; Ministry of Internal Affairs, meeting, Kyiv, 21 March 2024.

<sup>143</sup> Testimonies 1, 2 and 34 (on file with the authors); Mission of the President of Ukraine in the Autonomous Republic of Crimea, meeting with stakeholders, Kyiv, 20 March 2024.

<sup>144</sup> Testimonies 1 and 34 (on file with the authors).

<sup>145</sup> ); Mission of the President of Ukraine in the Autonomous Republic of Crimea, meeting with stakeholders, Kyiv, 20 March 2024.

<sup>146</sup> ZMINA, stakeholder-meeting, Kyiv, 20 March 2024; Testimonies 40 and 41 (on file with the authors).

<sup>147</sup> ); Mission of the President of Ukraine in the Autonomous Republic of Crimea, meeting, Kyiv, 20 March 2024.

<sup>148</sup> Федеральный закон от 31 июля 2023 г. № 395-ФЗ "О применении положений Уголовного кодекса Российской Федерации и Уголовно-процессуального кодекса Российской Федерации на территориях Донецкой Народной Республики, Луганской Народной Республики, Запорожской области и Херсонской области".

<sup>149</sup> OHCHR, *Report on the Human Rights Situation in Ukraine (1 August to 30 November 2023)*, December 2023, paras 41 and 42.

<sup>150</sup> Указ Президента Российской Федерации от 04.01.2024 № 13 "О назначении судей федеральных судов и о представителях Президента Российской Федерации в квалификационных коллегиях судей субъектов Российской Федерации".

<sup>151</sup> OHCHR *Human Rights Report 2024*, op. cit.

involving their legitimate exercise of rights.<sup>152</sup> For example, according to publicly accessible court records, since March 2022 courts in Crimea have convicted 625 people (380 men and 245 women) for the administrative offence of “*discrediting the Russian armed forces*”.<sup>153</sup>

The Mission was also informed of the amendments to the federal law on the status of lawyers<sup>154</sup> introduced at the end of 2023 which aim to tighten the requirements for Russian legal profession, including a provision that a lawyer would lose a licence for being absent from the territory of Russian Federation for a period exceeding 12 months.<sup>155</sup> Recalling that some of Russian lawyers have been instrumental in bringing about the end of arbitrary deprivation of liberty of some Ukrainian civilians in Russia, but have had to flee the country themselves subsequently for fear of or actual persecution and continue their work from abroad, this measure appears to be aimed at curtailing the freedom of legal profession in Russia.

## V. DEPRIVATION OF LIBERTY OF UKRAINIAN CIVILIANS BY THE RUSSIAN FEDERATION

The protection of personal liberty is considered an important value and is guaranteed by IHL and IHRL. Although neither body of law contains an absolute prohibition of the deprivation of liberty, they both clearly set out the situations in which such deprivation is lawful and provide legal, mostly procedural guarantees that must be respected to avoid arbitrary deprivation of liberty which is prohibited under both regimes.

The Mission recalls that during the period of armed conflict, the two bodies of law apply at the same time. As declared by the ICJ, “*some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law*”.<sup>156</sup> In relation to deprivation of liberty, the HRC has held that the two regimes “*are complementary, not mutually exclusive*”.<sup>157</sup> It also confirmed that “*rules of international humanitarian law may be relevant for the purposes of the interpretation of Article 9 /of the ICCPR/*”.<sup>158</sup>

In some areas, e.g., concerning the grounds for detention or internment, IHL may operate as *lex specialis*. In other areas, e.g., concerning the guarantees of the deprivation of liberty, IHRL may contain more specific rules. Moreover, the two branches may have different relevance at different stages of the armed conflict, with IHL largely taking over when the deprivation of liberty occurs in the midst of hostilities and IHRL coming to the fore once the deprivation of liberty is distant from the area of combat, is protracted or occurs in the territories subject to belligerent occupation.

Personal liberty of individuals pertains to “*their freedom from confinement of the body, not a general freedom of action*”.<sup>159</sup> Deprivation of personal liberty occurs whenever this freedom is restricted and the person is being held in confinement without his or her free consent (i.e., the person is unable to leave at will). IHL distinguishes two types of deprivation of liberty – detention and internment. Detention consists in the deprivation of liberty pursuant to a decision

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<sup>152</sup> *Ibidem*, para 111.

<sup>153</sup> Article 2P.3.3 of the Code of Administrative Offenses of the Russian Federation; Articles 207.3 and 280.3 of the Criminal Code of the Russian Federation.

<sup>154</sup> Федеральный закон от 31 мая 2022 г. № 63-ФЗ “Об адвокатской деятельности и адвокатуре в Российской Федерации”.

<sup>155</sup> Правительство подготовило поправки в законопроект о внесении масштабных изменений в Закон об адвокатуре, *Адвокатская газета*, 10 октября 2023.

<sup>156</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I. C.J. Reports 2004, p. 136., para 106.

<sup>157</sup> HRC GC No. 35, *op. cit.*, para 64.

<sup>158</sup> *Ibidem*.

<sup>159</sup> *Ibidem*, para 3.

taken by a judicial body.<sup>160</sup> Internment consists in the deprivation of liberty based on security concerns, pursuant to a decision taken by an administrative, military or another body. The two terms are however not defined in a consistent manner by various sources of international or national law. IHRL also distinguishes various forms of deprivation of liberty detention (often understood as pre-trial or administrative), imprisonment (following a sentence) confinement in an institution (psychiatric institution or compulsory quarantine), house arrest, etc. Moreover, detention in IHRL does not always entail a decision by a judicial body. The terminology, however, is again not uniform.

Lawful deprivation of liberty must be based on one of the legitimate grounds foreseen by the relevant IHL or IHRL instruments and must respect the legal guarantees provided for in such instruments. As the WGAD held, “*the deprivation of liberty is not only a question of legal definition, but also of fact. If the person concerned is not at liberty to leave, then all the appropriate safeguards that are in place to guard against arbitrary detention must be respected and the right to challenge the lawfulness of detention before a court afforded to the individual*”.<sup>161</sup> Similarly, in its resolution 37/3, the UN Human Rights Council identified “*certain practices that are applied to persons in detention in violation of human rights and the rule of law*” as encompassing “*detention without a legal basis, contrary to the principle of habeas corpus, the deprivation of due process of law, of access to legal counsel and/or of an opportunity to challenge the legality of their detention before a court /.../*”.<sup>162</sup>

The absence of a legitimate ground or the failure to abide by one of the guarantees renders the deprivation of liberty unlawful and arbitrary. The notion of arbitrariness is different from, and broader than the notion of unlawfulness, as it also includes “*elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality*”.<sup>163</sup> Arbitrary deprivation of liberty is prohibited under both IHL and IHRL. It may constitute a crime against humanity<sup>164</sup> and/or a war crime.<sup>165</sup>

## **A. GROUNDS FOR THE DEPRIVATION OF LIBERTY**

### **1. GROUNDS FOR THE DEPRIVATION OF LIBERTY UNDER IHL AND IHRL**

The grounds for lawful deprivation of liberty are determined both by IHL and IHRL. In situations of IAC, the GCIII and GCIV are seen to provide legal grounds for the internment of specific groups of persons for reasons associated with the armed conflict.<sup>166</sup> In *Hassan v. The United Kingdom* (2014), the ECtHR states that “*by reason of the coexistence of the safeguards provided by international humanitarian law and by the Convention in time of armed conflict, the grounds of permitted deprivation of liberty set out in /Article 5/ should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under /the GCIII and GCIV/*”.<sup>167</sup> Similarly, the HRC held that “*security detention authorized and regulated by and complying with international humanitarian law in*

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<sup>160</sup> For instance, the HRC defines detention as “*the deprivation of liberty that begins with the arrest and continues in time from apprehension until release*”. HRC GC No. 35, *op. cit.*, para 11.

<sup>161</sup> UN Doc. A/HRC/36/37, *Report of the Working Group on Arbitrary Detention*, 19 July 2017, para 56. See also UN Doc. A/HRC/30/37, *United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, 6 July 2015, para 2; and UN Doc. A/HRC/19/57, *Report of the Working Group on Arbitrary Detention*, 26 December 2011, paras 59 and 61.

<sup>162</sup> UN Doc. A/HRC/RES/37/3, *Integrity of the judicial system*, 9 April 2018, para 2.

<sup>163</sup> HRC GC No. 35, *op. cit.*, para 12.

<sup>164</sup> See Article 7(1)(e) of the Rome Statute of the ICC, which qualifies as a crime against humanity “*imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law*”.

<sup>165</sup> See Article 147 of the GCIV and Article 8(2)(a)(vii) of the Rome Statute of the ICC, which qualify as a war crime “*unlawful confinement*” of protected persons.

<sup>166</sup> See Article 27(4) of the GCIV and article 21 of the GCIII.

<sup>167</sup> ECtHR, *Hassan v. The United Kingdom*, Application no. 29750/09, Judgment (GC), 16 September 2014, para 104.

*principle is not arbitrary*".<sup>168</sup> Thus, whereas the two bodies of law are both applicable in times of armed conflict, the *lex specialis* of IHL, related to the grounds of detention or internment, have to be taken into account in the interpretation of the relevant IHRL standards.

### **A) Grounds for Detention or Internment Under IHL**

IHL establishes three main legal regimes under which individuals may be lawfully deprived of their liberty.

The first legal regime applies to medical and religious personnel.<sup>169</sup> Such personnel may be retained (not detained) "*only in so far as the state of health, the spiritual needs and the number of prisoners of war require*".<sup>170</sup>

The second legal regime applies to persons who are interned as prisoners of war (POW) under the GCIII.<sup>171</sup> POW are persons with an established link to the armed forces of a Party to the conflict who belong to one of the categories indicated in Article 4 of the GCIII, and who have fallen in the hands of the enemy. The Detaining Power is entitled to "*subject prisoners of war to internment*".<sup>172</sup> Such internment is not a punitive measure but aims at ensuring that the persons will not be able to re-join their armed forces and participate in hostilities again. Most of the categories of persons indicated in Article 4 of the GCIII are combatants, i.e., members of the armed forces of a Party to a conflict (other than medical personnel and chaplains) who "*have the right to participate directly in hostilities*".<sup>173</sup> By means of exception, the POW status is also granted to two categories of civilians, namely civilians who accompany the armed forces with their formal authorization without actually being members thereof (civilian members of military aircraft crews, war correspondents, or supply contractors, etc.), and members of the merchant marine and the crews of civil aircraft of the Parties to a conflict.<sup>174</sup> Privileges following from POW status include the right not be prosecuted for lawful acts of war and the respect for the guarantees foreseen in Articles 82-108 of the GCIII. POW may be interned for the duration of active hostilities.<sup>175</sup>

The third legal regime, which is of the utmost relevance for this report, applies to protected persons, i.e., persons who "*at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals*"<sup>176</sup> and who, at the same time, are not subject to the regime of GCIII. Civilians, with the exceptions of the two categories stated above, qualify as protected persons. Internment is the most severe measure of control to which the enemy belligerent may expose protected persons, including civilians.<sup>177</sup> Civilians who are in the territory of the enemy and are not repatriated, may be interned or placed in assigned residence "*only if the security of the Detaining Power makes it absolutely necessary*".<sup>178</sup> Civilians who are in temporarily occupied territory may be interned or placed in assigned residence "*if the Occupying Power considers it necessary, for imperative reasons of security*".<sup>179</sup> The two measures reflect the more general right of Parties to the conflict to "*take such measures of control and security in regard of protected persons as may be necessary as a result of the war*".<sup>180</sup>

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<sup>168</sup> HRC GC No. 35, *op. cit.*, para 64.

<sup>169</sup> Articles 28, 30 and 32 of the GCI and Articles 36 and 37 of the GCII.

<sup>170</sup> Article 28(1) of the GCI. See also Article 37(2) of the GCII.

<sup>171</sup> Article 21 of the GCIII.

<sup>172</sup> Article 21(1) of the GCIII.

<sup>173</sup> Article 43(2) of the API.

<sup>174</sup> See Article 4(A)(4) and (5) of the GCIII.

<sup>175</sup> Article 118 of the GCIII.

<sup>176</sup> Article 4(1) of GCIV.

<sup>177</sup> Articles 41(1) and 78(1) of the GCIV.

<sup>178</sup> Article 42(1) of the GCIV.

<sup>179</sup> Article 78(1) of the GCIV.

<sup>180</sup> Article 27(4) of the GCIV.

It is the Detaining Power who determines if a person is entitled to the privilege of POW status under GCIII. If there is a doubt whether a person having committed a belligerent act and having fallen in the hands of the enemy is entitled to POW status, their status shall be determined by a competent tribunal established under Article 5 of the GCIII and Article 45(1) of the API. Until the determination is made, the person shall enjoy protection as POW. The tribunal will decide if the person is entitled to protection under GCIII or under GCIV.

Whereas internment of POW can be a rule, internment of civilians must be exceptional. The former is bestowed upon all members of the armed forces, perceived to constitute *ipso facto* a security threat to the enemy belligerent, the latter is contextual and based on individual assessment. As held by the International Criminal Trial for the former Yugoslavia (ICTY) in the *Delalić Case*, “*internment and assigned residence, whether in the occupying power’s national territory or in the occupied territory, are exceptional measures to be taken only after careful consideration of each individual case. Such measures are never to be taken on a collective basis*”.<sup>181</sup> Although it is primarily for each Party to the conflict to determine when its security is at stake, the terms “absolutely necessary” and “imperative reasons of security” must be interpreted restrictively and based on an individualized assessment of each individual case, underscoring the principle of exceptional nature of internment. Internment can only be put in place if the Party to the conflict “*has serious and legitimate reasons to think that /a certain person/ may seriously prejudice its security by means such as sabotage or espionage*”.<sup>182</sup> In other words, if this Party has “*good reason to think that the person concerned, by his activities, knowledge or qualifications, represents a real threat to its present or future security*”,<sup>183</sup> then such a person may be interned.

The exceptional nature of the internment of civilians also entails that unlike POW, they may not be interned for the duration of active hostilities but only for as long as the absolute necessity or the imperative reasons of security remain valid. As the ICRC Commentary to the GCIV stipulates, “*internment and assigned residence are to cease as soon as the reasons for adopting such measures no longer exist*”.<sup>184</sup> There are procedural guarantees (e.g., regular reviews by competent judicial or other bodies) put in place to ensure that the exceptional, temporary nature of the internment or placement in assigned residence is respected. It is important to add that such internment is again of preventive, not punitive nature.

A separate ground for depriving the liberty of civilians is detention in the course of criminal proceedings against them or as part of a sentence imposed upon their conviction for a criminal offence. Since a person interned under GCIV does not have the POW-privilege not to be prosecuted for mere participation in hostilities, the same activity that prompted a civilian to be interned under GCIV may eventually lead the Detaining Power to transfer the civilian to pre-trial detention, in which case the grounds for the deprivation of liberty of the civilian changes. In temporarily occupied territories, the criminal legislation and criminal courts in place prior to the temporary occupation shall in principle remain applicable and operational, although the Occupying Power may promulgate criminal provisions necessary for its own protection.<sup>185</sup>

The GCIV provides for internment or simple imprisonment as the only penalties that shall be imposed on “*protected persons who commit an offence which is solely intended to harm the Occupying Power, but which does not constitute an attempt on the life or limb of members of the occupying forces or administration, nor a grave collective danger, nor seriously damage the property of the occupying forces or administration or the installations used by them*”.<sup>186</sup>

<sup>181</sup> ICTY, *Prosecutor v. Delalić et al. "Celebici"*, Case I.T-96-21, Trial Judgment, 16 November 1998, para 578.

<sup>182</sup> *Ibidem*, para 576 (emphasis in the original).

<sup>183</sup> *Ibidem*, para 577.

<sup>184</sup> ICRC, *Convention (IV) relative to the Protection of Civilian Persons in Time of War*. Geneva, 12 August 1949. *Commentary of 1958*, Article 46 - Cancellation of restrictive measures.

<sup>185</sup> Article 64 of the GCIV.

<sup>186</sup> Article 68(1) of the GCIV.



Internment foreseen in this provision is, again, not a punitive but a security measure and it is fully subject to the guarantees applicable to internment stipulated above. The GCVI moreover explicitly prohibits collective punishment.<sup>187</sup>

### **B) Grounds for Detention or Internment Under IHRL**

IHRL also provides that “*no one shall be deprived of his liberty except on such grounds /.../ as are established by law*”.<sup>188</sup> Some of the IHRL instruments, moreover, indicate what such grounds may be. Both the ECHR – applicable to the Russian Federation until 16 September 2022 –, and the CHRFF identify “*the lawful detention of a person after conviction by a competent court*”<sup>189</sup> as one of such grounds. Another ground cited in the two instruments is “*the lawful arrest or detention of a person*”,<sup>190</sup> although the ECHR adds that the arrest or detention shall be carried out “*for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law*”.<sup>191</sup> Obligations not to act in a certain way, i.e., not to commit a criminal offence, as well as to perform a specific act, i.e., to leave a certain area, fall under this provision. Both the ECHR and the CHRFF add certain other grounds for deprivation of liberty, of which the most relevant for this report is “*the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so*”.<sup>192</sup> The legal grounds are described in rather general terms and it is for other bodies of law (national law or one of the other branches of international law) to give them specific content. In the context of armed conflict, the interpretation of such grounds is largely informed by the applicable rules of IHL identified above.

IHRL accommodates all the types of the deprivation of liberty foreseen by IHL, including internment of civilians provided under Articles 42 and 78 of the GCIV. The HRC warns that internment (also known as security detention or administrative detention) “*presents severe risks of arbitrary deprivation of liberty*”.<sup>193</sup> As such, it should only be resorted to in “*the most exceptional circumstances*”, when “*a present, direct and imperative threat is invoked to justify the detention of persons considered to present such a threat*”.<sup>194</sup> The burden of proof to establish that this condition is met lies with the Detaining States and it increases with the length of the detention. This regulation in essence mirrors that provided by IHL.

IHRL does not limit itself to requiring that legal grounds be established by law. It also requires that such law has certain qualities. Most importantly, the law needs to be specific enough for individuals to be able to understand under which circumstances they may be lawfully deprived of their liberty,<sup>195</sup> i.e. the law needs to meet the criteria of legal certainty. Overly vague and broad laws have been rejected as an adequate legal basis for deprivation of liberty meeting the requirements of Article 9 of the ICCPR.<sup>196</sup> Further requirements relate to the way in which the law is implemented, and the legal grounds are interpreted. First, IHRL bodies have specified that any arrest or detention as punishment for the legitimate exercise of fundamental rights and freedoms will always be arbitrary, including deprivation of liberty as a result of exercise of

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<sup>187</sup> Article 33 of the GCIV.

<sup>188</sup> Article 9(1) of the ICCPR. See also the CSCE 1991 Moscow Document, para 23.1(i).

<sup>189</sup> Article 5(1)(a) of the ECHR and Article 5(1)(a) of the CHRFF.

<sup>190</sup> Article 5(1)(b) of the ECHR and Article 5(1)(b) of the CHRFF.

<sup>191</sup> Article 5(1)(b) of the ECHR.

<sup>192</sup> Article 5(1)(c) of the ECHR.

<sup>193</sup> HRC GC No. 35, *op. cit.*, para 15.

<sup>194</sup> *Ibidem*.

<sup>195</sup> ECtHR, *Khlaifia and Others v Italy*, Application No. 16483/12, Judgment (GC), 15 December 2016, para 92; see WGAD Opinion WGAD Opinion No. A/HRC/WGAD/2017/15, para 67; HRC GC No. 35, *op. cit.*, para 22.

<sup>196</sup> WGAD Opinions A/HRC/WGAD/2020/86 and A/HRC/WGAD/2020/77.

freedom of opinion and expression and freedom of religion.<sup>197</sup> Second, deprivation of liberty is arbitrary if it is discriminatory in nature, i.e., if it “constitutes a violation of international law on the grounds of discrimination /.../, that aims towards or can result in ignoring the equality of human beings”.<sup>198</sup> Third, a deprivation of liberty subsequent to a trial which was marked by the total or partial non-observance of the international norms relating to the right to a fair trial, established in the relevant IHRL instruments accepted by the States concerned, of such gravity as to give the deprivation of liberty an arbitrary character.<sup>199</sup>

## **2. PURPORTED GROUNDS FOR THE DEPRIVATION OF LIBERTY OF UKRAINIAN CIVILIANS BY THE RUSSIAN FEDERATION**

In Section III of this report, the Mission established that a large number of Ukrainian civilians have been subjected to deprivation of liberty by individuals and authorities acting on behalf or under the effective control of the Russian Federation. According to the information gathered and testimonies of stakeholders collected by the Mission, in the vast majority of cases, the detaining authorities did not specify reasons for the deprivation of liberty altogether<sup>200</sup> or provided vague and broad justifications which are difficult and even impossible to subsume under one of the grounds for the deprivation of liberty provided for by IHL or IHRL. The most commonly indicated reasons are associated with: (a) perceived support to the Ukrainian armed forces and/or affiliation with the armed forces; (b) perceived support of Ukraine and/or rejection of Russia’s “special military operation”; (c) perceived involvement in or support for international terrorism and/or extremism; (d) the intention to force cooperation; and (e) the intention to spread fear in the population of the temporarily occupied territories.

### ***A) Deprivation of liberty based on perceived support to the Ukrainian armed forces and/or affiliation with the armed forces***

In relation to the deprivation of liberty based on perceived support to the Ukrainian armed forces and/or affiliation with the armed forces, the Mission recorded many testimonies of civilians being detained because they used to be in the armed forces of Ukraine themselves in the past<sup>201</sup> or because their family members, even distant family members were, at the time of the detention or previously, members of Ukrainian armed forces.<sup>202</sup> The Mission received testimonies suggesting that in the wake of attacks against Russian military targets, Russian forces would detain civilians in the surrounding area caught with binoculars or with information on their mobile phones that could indicate that they had provided target coordinates to the Ukrainian side prior to the attacks.<sup>203</sup> Several former detainees also referred to their “status” as “suspected provider of coordinates”. Other civilians were detained because of being in possession of such items as “military-style or tactical clothes, off-road camouflaged vehicles, civilian firearms, amateur radio-equipment, binoculars, telescopes and civilian drones”<sup>204</sup> or because of their perceived interest in military tanks, vehicles and other such equipment.<sup>205</sup>

Whether the affiliation with and the support to the Ukrainian armed forces could constitute a lawful ground for the deprivation of liberty of Ukrainian civilians by the Russian Federation

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<sup>197</sup> HRC GC No. 35, *op. cit.*, para 17. See also WGAD Opinions Nos. A/HRC/WGAD/2020/37, A/HRC/WGAD/2019/6, A/HRC/WGAD/2019/12, A/HRC/WGAD/2018/2, A/HRC/WGAD/2019/17, A/HRC/WGAD/2019/66, and A/HRC/WGAD/2021/23.

<sup>198</sup> UN Doc. A/HRC/36/38, *Methods of work of the Working Group on Arbitrary Detention*, 13 July 2017, para 17.

<sup>199</sup> *Ibidem*, para 8 (c).

<sup>200</sup> On numerous occasions the stakeholders informed the Mission that the reasons provided were a mere statement in Russian “Так надо” [“It’s required”]. Testimonies 21, 23, 40 and 41 (on file with authors).

<sup>201</sup> OHCHR *Detention Report 2023*, *op. cit.*, paras 47-50; ODIHR *Interim Report IV*, *op. cit.*, para 43; IICIU *Conference Paper*, *op. cit.*, paras 487 and 524.

<sup>202</sup> ODIHR *Interim Report IV*, *op. cit.*, para 43.

<sup>203</sup> Testimonies 12, 19, 20 and 28 (on file with the authors).

<sup>204</sup> OHCHR *Detention Report 2023*, *op. cit.*; para 40; OHCHR *Detention Report 2021*, *op. cit.*, para 62.

<sup>205</sup> Testimonies 21, 24 and 42 (on file with the authors).

depends on the nature of such affiliation and support and on the context in which confinement takes place, namely, whether it occurs in the midst of ongoing hostilities, or is distant from an area of combat.

As the ICTY held in the Delalić Case, “*subversive activity carried on inside the territory of a party to the conflict, or actions which are of direct assistance to an opposing party, may threaten the security of the former, which may, therefore, intern people or place them in assigned residence if it has serious and legitimate reasons to think that they may seriously prejudice its security by means such as sabotage or espionage*”.<sup>206</sup> At the same time, “*the mere fact that a person is a national of, or aligned with, an enemy party cannot be considered as threatening the security of the opposing party where he is living and is not, therefore, a valid reason for interning him or placing him in assigned residence. /.../ The fact that an individual is male and of military age should not necessarily be considered as justifying the application of these measures*”.<sup>207</sup>

Thus, the affiliation with and the support to the Ukrainian armed forces can only become the lawful ground for detention, if the acts manifesting such affiliation or support constitute a security threat for the Occupying Power and imperative reasons of security require internment. Mere suspicion that a person might engage in the support of Ukrainian armed forces, based on their distant involvement in such forces, on their views, on their physical composition, on their age or gender or on any other general feature, would not be sufficient for those purposes. Many instances reported to the Mission concerned targeted searches by the Russian armed forces in initial stages of the full-scale armed conflict for persons involved with the Ukrainian anti-terror operations in Donbas several years back, including law-enforcement officials and legal professionals.<sup>208</sup> While some instances may appear to constitute legal grounds for internment, most seem to be based on broad and impersonal presumptions that are insufficient for internment under the GCIV.

In some cases, moreover, internment appear to be based on ulterior motives, such as harassment or reprisals, clearly in breach of IHL and IHRL. The Mission also received testimonies that some civilians who had previously completed their military service and had been interned for this reason, were being held as POW. While Article 4(B)(1) of the GCIII provides a very narrow ground for interning (recently) former military personnel in occupied territory as POW, this does not extend to civilians who once served in Ukrainian armed forces. The Mission underscores that to hold civilians under a too broad interpretation of the grounds for POW internment in Article 4 of the GCIII is unlawful and amounts to arbitrary deprivation of liberty under both IHL and IHRL.

#### ***A) Deprivation of liberty based on perceived support of Ukraine and/or rejection of Russia’s “special military operation”***

In relation to the deprivation of liberty based on perceived support of Ukraine and/or rejection of Russia’s “special military operation”, the Mission notes numerous occasions when Ukrainian civilians were detained merely because the Russian authorities found them to be in possession of such Ukrainian symbols as the flag of Ukraine, patriotic literature, brochures about volunteers assisting civilians, traditional shirts with Ukrainian embroidery and other symbols association with Ukrainian state and cultural traditions, deemed to be “patriotic”.<sup>209</sup> Further,

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<sup>206</sup> ICTY, *Prosecutor v. Delalić et al. “Celebici”*, Case I.T-96-21, Trial Judgment, 16 November 1998, para 576.

<sup>207</sup> *Ibidem*, para 577.

<sup>208</sup> Testimonies 19, 20 and 28 (on file with the authors). The Association of Relatives of Political Prisoners by the Kremlin documented 110 cases of people detained by Russian federation or units controlled by Russia in Zaporizhzhia in 2022, 17 of whom had worked with the ATO. See also IICIU *Conference Paper*, *op. cit.*, para 502; ); Mission of the President of Ukraine in the Autonomous Republic of Crimea, meeting with stakeholders, Kyiv, 20 March 2024.

<sup>209</sup> IICIU *Report 2024*, *op. cit.*, para 74; ODIHR *Interim Report IV*, *op. cit.*, para 43.

especially men would be asked to strip, and their bodies would be inspected for any tattoos perceived to bear Ukrainian symbolism.<sup>210</sup>

Any symbols associated with the Ukrainian would usually be called by the detaining authority “Nazi symbols”, the people detained would be called “Nazis” and accused of failing to support or even of countering the Russian Federation’s “special military operation” in Ukraine. Similarly to this, civilian mobile phones and other devices would be searched and seized because the content found on such devices would be seen as expression of “*real or perceived pro-Ukrainian views or affiliation with Ukrainian political entities, including persons who peacefully protested against Russian occupation in public spaces or via social media*”.<sup>211</sup> Such practices were recorded during the filtration procedure, in home searches as well as in what seems to be random, unauthorized ‘stop-and-search’ practice on the street.

Notably, in the filtration-system set up in 2022 following the establishment of effective military control by the Russian forces in Kherson and Zaporizhzhia, the Russian occupational authority seemed to systematically target persons for their loyalties. The Mission was informed that in the city of Mariupol,<sup>212</sup> civilians were called out of the city for such filtration, and if they failed to be cleared for reasons of suspected hostility towards the Russian Federation, they would not be allowed back to their habitual place of residence and could instead face internment of various duration.<sup>213</sup> Assigned residence or internment associated with filtration in many cases bear the hallmarks of methods of collective intimidation and suppression rather than measures taken for “imperative reasons of security”.

The instances of the deprivation of liberty for reasons associated with the support of Ukraine have been particularly prominent in Crimea. Many of the cases have also resulted in criminal prosecution. In its report issued on 26 March 2024, the OHCHR documents that: “*According to publicly accessible court records, since March 2022 courts in Crimea have convicted 625 people (380 men and 245 women) for the administrative offence of “discrediting the Russian armed forces”, and 84 people (54 men and 30 women) for “displaying Nazi symbols or showing disrespect for the Russian state”. OHCHR found that in 70 % of the cases related to charges of “displaying Nazi symbols”, individuals were prosecuted for expressing pro-Ukrainian opinions or displaying Ukrainian symbols, such as posting on social media pictures with the Ukrainian State emblem or singing Ukrainian songs. In addition, seven people received prison sentences for violations of similar articles in the Criminal Code 105 of these convictions occurred during the reporting period, similar to the previous three months (when 106 individuals were convicted of such offences)*”.<sup>214</sup>

Having pro-Ukrainian feelings and being opposed to the Russian temporary occupation is not a lawful ground for the deprivation of liberty of Ukrainian civilians under IHL or IHRL. Inhabitants of occupied territories do not bear any obligation of loyalty to the Occupying Power and, in fact, “*it is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile Power*”.<sup>215</sup> Having and even manifesting their position does not, of itself, constitute “an imperative reason of security” justifying the internment of such persons. Rather, it constitutes a legitimate and lawful exercise of the rights and freedoms granted by IHRL, especially the rights to freedom of thought and of expression.<sup>216</sup> Pursuant to well-established

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<sup>210</sup> OHCHR *Detention Report 2023*, *op. cit.*, para 52; IICIU *Conference Paper*, *op. cit.*, paras 499 and 502.

<sup>211</sup> OHCHR *Detention Report 2023*, *op. cit.*, para 52; IICIU *Conference Paper*, *op. cit.*, para 502.

<sup>212</sup> Kaveh Khoshnood, Nathaniel Raymond et al., *System of Filtration: Mapping Russia’s Detention Operations in Donetsk Oblast*, Humanitarians Research Lab at Yale School of Public Health: New Haven, 25 August 2022.

<sup>213</sup> *Ibidem*.

<sup>214</sup> OHCHR, *Report on the Human Rights Situation in Ukraine (1 December 2023 – 29 February 2024)*, 26 March 2024, para 86.

<sup>215</sup> Article 45 of the *Regulations concerning the Laws and Customs of War on Land, annex to the Convention IV respecting the Laws and Customs of War on Land*, 18 October 1907.

<sup>216</sup> See Articles 18 and 19 of the ICCPR, Article 10 of the ECHR and Article 10 of the CHRFF.

jurisprudence of the HRC and the WGAD, deprivation of liberty resulting merely from the exercise of fundamental rights and freedoms, including the rights to freedom of thought and of expression, amounts to arbitrary deprivation of liberty.<sup>217</sup> This applies regardless of whether the deprivation of liberty has the form of the internment or of detention following a criminal conviction for the lawful exercise of the fundamental rights and freedoms.

***B) Deprivation of liberty based on perceived involvement in or support for international terrorism and/or extremism***

In relation to the deprivation of liberty based on perceived involvement in or support for international terrorism and/or extremism, the detaining authorities would often interpret the presence of Ukrainian “patriotic” symbols, rejection of Russia’s “special military operation” and/or actual or perceived support to the Ukrainian armed forces as evidence of “international terrorism”, or “extremism”, claiming this to be the reason for the detention. This practice seems to increase as the temporary occupation becomes engrained and with the effort of assimilation of such territories into the Russian Federation through unlawful annexation. Ukrainian civilians suspected of involvement in or support for international terrorism and/or extremism are often subjected to criminal prosecution, either in the temporarily occupied territory or in the territory of the Russian Federation. Their deprivation of liberty is thus justified as a pretrial detention in the period preceding the trial and regular imprisonment following the trial (and conviction).

The Mission recalls that “*it shall not be the general rule that persons awaiting trial shall be detained in custody*”.<sup>218</sup> While pre-trial detention may be resorted to in the course of criminal proceedings, it shall never be mandatory. Individual circumstances of each case must always be examined, a view clearly expressed by the HRC<sup>219</sup> and shared by the WGAD.<sup>220</sup> The ICCPR clearly stipulates that “*anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer /.../ and shall be entitled to trial within a reasonable time or to release*”.<sup>221</sup> The HRC has agreed that what is “promptly” may vary depending on objective circumstances of each case, but required that “*delays should not exceed a few days from the time of arrest*” specifying that “*48 hours is ordinarily sufficient to transport the individual and to prepare for the judicial hearing; any delay longer than 48 hours must remain absolutely exceptional and be justified under the circumstances*”.<sup>222</sup> The rationale behind this requirement is to minimize the risk of ill-treatment which is also one of the key reasons why the presentation before the judicial authority must take place in person.<sup>223</sup> Moreover, to ensure that any detention, including pre-trial detention, is used as a measure of last resort, the decision to keep a person in any form of detention must be periodically reviewed to ascertain of the justification for continued detention.<sup>224</sup>

The Mission further recalls that the lawfulness of detention linked to criminal prosecution depends on the presence of “*reasonable suspicion of having committed an offence*”<sup>225</sup> (pre-trial detention) and the availability of fair trial guarantees (both pre-trial detention and detention upon conviction). As the ECtHR held in *Tsirlis and Kouloumpas v. Greece*, detention following a conviction which “*had not basis under domestic law or was arbitrary*”,<sup>226</sup> could not be

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<sup>217</sup> UN Doc. A/HRC/30/37, *United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, 6 July 2015, para 10.

<sup>218</sup> Article 9(3) of the ICCPR.

<sup>219</sup> HRC GC No. 35, *op. cit.*, para 38.

<sup>220</sup> See also WGAD Opinions Nos. 53/2018, 16/2018, 24/2015, 57/2014; See also UN Doc. A/HRC/19/57, *Report of the Working Group on Arbitrary Detention*, 26 December 2011, paras 48-58.

<sup>221</sup> Article 9(3) of the ICCPR.

<sup>222</sup> HRC GC No. 35, *op. cit.*, para 33.

<sup>223</sup> *Ibidem*, para 34.

<sup>224</sup> *Ibidem*, para 12.

<sup>225</sup> Article 5(1)(c) of the ECHR.

<sup>226</sup> ECtHR, *Tsirlis and Kouloumpas v. Greece*, Applications Nos 19233/91 and 19234/91, Judgment, 29 May 1997, para 62.

considered as lawful but would in itself be arbitrary. This would also be the case, if the criminal prosecution would pursue other purposes than the pursuance of justice, such as spreading fear, harassing the civilian population or forcing collaboration (see below in this subsection).

The testimonies collected by the Mission suggest that the vast majority of Ukrainian civilians detained on account of, or even formally charged with, international terrorism and/or extremism have not been involved in any acts of violence, let alone acts of violence whose primary purpose would be to spread terror among the civilian population. Their alleged involvement in terrorism and/or extremism has usually consisted, according to the Russian authorities and/or Russian courts, of the possession of Ukrainian symbols, negative attitude towards the Russia's "special military operation" or some form of affiliation with the Ukrainian military forces (such as previous membership or having a family member in these forces). As established previously, such factors in themselves do not constitute lawful grounds for the deprivation of liberty and the detention or internment on such basis is therefore unlawful and arbitrary under the regimes of IHL and IHRL. The Mission thus concludes that whereas pre-trial detention and detention after conviction could in principle be lawful, the lawfulness is made conditional on the presence of certain guarantees (review, fair trial guarantees, etc.), that do not seem to be available to the vast majority of the Ukrainian civilians detained by the Russian Federation (see also Section VI.B.2 on Fair Trial Guarantees).

### ***C) Deprivation of liberty based on the intention to force collaboration***

In relation to the deprivation of liberty based on the intention to force collaboration with the occupying authorities, the Mission gathered information and received numerous testimonies of civilians being detained to force them to collaborate with the Occupying Power. The frequent target are community leaders or persons in strategic positions, such as mayors and other local officials, journalists, employees of strategic infrastructure, such as hydraulic stations and nuclear power plants, or educational personnel.<sup>227</sup> Already in 2022, the OHCHR documented the case of the head of the local community in Izium (Kharkiv Region), who was repeatedly detained and mistreated by Russian servicemen with the aim of forcing him to cooperate with them.<sup>228</sup> Instances of persons being (repeatedly) detained with the aim of forcing them to cooperate with occupying authorities have also been documented by the ODIHR mission.<sup>229</sup>

While the Occupying Power is vested with a certain authority to compel inhabitants to perform certain regular tasks,<sup>230</sup> this authority does not extend to deprivation of liberty for the purpose of forcing any form of collaboration. The Mission recalls that the Occupying Power is forbidden "to compel the inhabitants of occupied territory to swear allegiance to the hostile Power".<sup>231</sup> It is also forbidden "to force the inhabitants of territory occupied by it to furnish information about the army of the other belligerent, or about its means of defense".<sup>232</sup> An occupying power which changes the legislation in violation of GCIV and subsequently compels inhabitants to cooperate under the threat of deprivation of liberty, is exposing such inhabitants to an unbearable situation, as the belligerent party on whom they depend may hold them criminally accountable for such cooperation.<sup>233</sup> Subjecting civilians to internment in order to break their

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<sup>227</sup> IICIU Report 2023, *op. cit.*, para 61; ODIHR Interim Report IV, *op. cit.*, para 44; IICIU Conference Paper, *op. cit.*, paras 85, 494, 518 and 524; Truth Hounds, *In a Nuclear Prison: How Rosatom Turned Europe's Largest Nuclear Power Plant into a Torture Chamber and How can the World Stop it*, 23 September 2023.

<sup>228</sup> OHCHR Detention Report 2023, *op. cit.*, para 54.

<sup>229</sup> ODIHR Interim Report IV, *op. cit.*, para 43. IICIU Conference Paper, *op. cit.*, para 709.

<sup>230</sup> Article 40(2) of the GCIV.

<sup>231</sup> Article 45 of the Regulations concerning the Laws and Customs of War on Land, annex to the Convention IV respecting the Laws and Customs of War on Land, 18 October 1907.

<sup>232</sup> Article 45 of the Regulations concerning the Laws and Customs of War on Land, annex to the Convention IV respecting the Laws and Customs of War on Land, 18 October 1907.

<sup>233</sup> Закон України No. 2108-IX "Про внесення змін до деяких законодавчих актів України щодо встановлення кримінальної відповідальності за колабораційну діяльність", 3 березня 2022; Criminal Code of Ukraine, Articles 111-1 and 111-2, see also OHCHR Human Rights Report 2024, *op. cit.*, paras 167-176.

will and make them cooperate with the Occupying Power amounts to unlawful and arbitrary deprivation of liberty, as well as to the violation of other IHL and IHRL standards (including the prohibition of torture and inhuman or degrading treatment).

**D) Deprivation of liberty based on the intention to spread fear in the population of the temporarily occupied territory**

In relation to the deprivation of liberty based on the intention to spread fear in the population of the temporarily occupied territory, the Mission received numerous testimonies of many instances of civilians being detained for such purposes. Similarly as in the previous instance, prominent local figures, such as mayors or other local officials, journalists, human rights defenders, lawyers or teachers, are often targeted. For instance, in 2023, the ODIHR reported a witness from Kherson region stating: *“From the very beginning, the occupying authorities opted to terrorize the most active citizens. /.../ They knew their names, their addresses and so on. They eliminated or intimidated these people. So, the purpose was clearly to intimidate the population and eliminate activists”*.<sup>234</sup>

The Mission recalls that *“acts or threats of violence the primary purpose of which is to spread terror among the civilian population”*,<sup>235</sup> constitutes a violation of IHL. Detaining prominent local figures to spread fear in the population may also qualify as a form of hostage taking, which is clearly incompatible with both IHL and IHRL. Deprivation of liberty for such purposes would therefore not only be unlawful and arbitrary in nature, but it would most likely violate other rules of IHL and IHRL.

**B. LEGAL GUARANTEES AGAINST ARBITRARY DEPRIVATION OF LIBERTY**

In addition to lawful grounds, deprivation of liberty needs to follow certain legal, mostly procedural guarantees. If such guarantees are not provided (in law or in fact), such deprivation of liberty is unlawful and arbitrary. The guarantees are again indicated both in IHL and in IHRL and they apply not only in the initial stage of the deprivation of liberty but, in fact, throughout the whole period of detention or internment.

In IHL, the guarantees concerning the deprivation of liberty of civilian persons are provided in Articles 42-43 of the GCIV (civilians in the territory of the enemy) and Articles 64-78 of the GCIV (civilians in the occupied territory). Article 75 of the API stipulates fundamental guarantees that shall be enjoyed by all *“persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under IHL”* (para 1). Some of the rules contained in these provisions are now considered customary in nature.<sup>236</sup> In IHRL, Article 9 of the ICCPR, Article 5 of the ECHR and Article 5 of the CHRFF are applicable. The standards have been further specified in the case-law of the respective bodies (HRC, WGAD, ECtHR, etc.) and in various soft law instruments, for example the 1988 *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*<sup>237</sup> and the 2015 *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*.<sup>238</sup>

The main guarantees provided in these instruments are: a) the obligation to inform persons deprived of liberty of the reasons for the detention, b) the obligation to provide persons deprived of liberty with an opportunity to challenge the lawfulness of the detention; c) the availability of periodic reviews, d) information obligations; e) fair trial guarantees; f) the prohibition of

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<sup>234</sup> ODIHR *Interim Report III*, *op. cit.*, para 43.

<sup>235</sup> Article 51(2) of the API.

<sup>236</sup> See Rules 99 and 118-128 of the ICRC Study on Customary IHL.

<sup>237</sup> UN Doc. A/RES/43/173, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, 9 December 1988 (UN *Body of Principles* 1988).

<sup>238</sup> UN Doc. A/HRC/30/37, *United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, 6 July 2015 (UN *Basic Principles* 2015).

collective detention; and g) the prohibition of incommunicado detention and of enforced disappearances. Special guarantees also need to be provided to individuals belonging to vulnerable groups or to persons enjoying privileges and immunities under international law.

The Mission recalls that all these guarantees stem from the general obligation for the States to have a legal framework in place which would not only stipulate the grounds for the deprivation of liberty but also prescribe the procedure to be followed in such cases. Thus, Article 78 of the GCIV indicates that “*decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention*” (para 1). Article 9 of the ICCPR notes, in the same spirit that “*no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law*” (para 1). The legal framework would be part of the domestic law, but it needs to respect the minimal guarantees foreseen by IHL and IHRL instruments. Nothing prevents States from granting higher standards in their domestic legal orders.

### **1. OBLIGATION TO INFORM PERSONS DEPRIVED OF LIBERTY OF THE REASONS FOR THIS DEPRIVATION**

The first requirement for every instance of deprivation of liberty is that the reasons for such deprivation, and the legal basis for it, must be communicated to the person concerned. Article 75(3) of the API holds that “*any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken*”. Article 9(3) of the ICCPR notes that “*anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him*”. A similar provision is included in the Article 5(2) of the ECHR (“*Everyone who is arrested shall be informed promptly /.../ of the reasons for his arrest and of any charge against him*”) and Article 5(2) the CHRFF (“*Everyone who is arrested shall be informed, at the time of his arrest, /.../ of the reasons for his arrest*”) as well as in the 1991 Moscow Document (para 23.1(ii)).

These provisions suggest that the obligation to inform arises in two different contexts and has two different forms. First, there is the obligation to inform any person deprived of liberty of the reasons for this deprivation. Although the terms used to describe the status of the persons differ, the commentaries to the relevant instruments, make it clear that these terms are to be understood broadly, as referring to “*any apprehension of person that commences a deprivation of liberty*”.<sup>239</sup> The obligation thus extends beyond detention in the criminal justice context and applies “*regardless of the formality or informality with which the arrest is conducted and regardless of the legitimate or improper reason on which it is based*”.<sup>240</sup> The HRC has in fact expressly noted that even when “*so-called preventive detention is used, for reasons of public security, /.../ information of the reasons must be given*”.<sup>241</sup> Second, if the deprivation of liberty takes place within the criminal justice context, the person also has to be informed about the criminal charges brought against him/her.

There is a qualitative distinction between the two obligations. The obligation to inform of the reasons for arrest is aimed to enable the persons to seek release if they believe that the reasons are invalid or unfounded. The information thus must include not only general legal basis but also the factual aspects to indicate the substance of the wrongdoing.<sup>242</sup> The notification of the charges is the information of the crimes of which the person is suspected or accused of but do not require as much detail regarding the charges as would be later needed to prepare for the

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<sup>239</sup> HRC GC No. 35, *op. cit.*, para 13.

<sup>240</sup> *Ibidem*, para 24.

<sup>241</sup> HRC, *General Comment No. 8: Article 9 (Right to Liberty and Security of Persons)*, 30 June 1982, para 4.

<sup>242</sup> HRC GC No. 35, *op. cit.*, para 25.



trial.<sup>243</sup> Consequently, the ICCPR indicates that while the reasons for arrest must be provided “at the time of arrest”, the notice of criminal charges must be provided “promptly”, which is not necessarily “at the time of arrest”.<sup>244</sup> Whereas the CHRFF also requires that the reasons for arrest be provided “at the time of arrest”, the API and the ECHR suggest that the detained persons shall be informed “promptly”. The HRC has accepted that while in general, “at the time of arrest” shall mean “*immediately upon arrest*”,<sup>245</sup> there are “*exceptional situations*” when “*such communication may not be possible*”.<sup>246</sup> Even in such situations, however, information about the reasons for the deprivation of liberty must be provided as soon as possible. The ICRC noted that “*even in time of armed conflict, detaining a person for longer than, say, ten days without informing the detainee of the reasons for his detention would be contrary to this paragraph /Article 75(3)/*”.<sup>247</sup>

The information must be communicated in the language that the detained person understands. While oral notification is sufficient, the manner of the notification needs to reflect the specific conditions of the detained persons. For example, a person belonging to vulnerable groups, such as a person with disabilities or a child, may require special manner of communication. As already indicated, the information must include both the general legal basis and the factual aspects for the detained person to be able to understand why they are being deprived of liberty and to enable them to challenge the lawfulness of the detention. The completeness of the information shall be assessed in light of this purpose. The notification must “*concern the official basis for the arrest, not the subjective motivations of the arresting officer*”.<sup>248</sup> In some instances, the reasons for the detention may become apparent from the context in which the detention took place, from previous communication (e.g., arrest warrant) or from interrogations. Even then, however, the detained person is entitled to have the reasons for the deprivation of liberty formally communicated to them and these cannot be left solely to their estimations.

The present Mission received numerous testimony which overwhelmingly indicates that the Russian Federation, when detaining Ukrainian civilians, has consistently failed to abide by the obligation to inform these civilians of the reasons for their detention. The cases of deprivation of liberty communicated to the Mission, of which there are hundreds, all indicate that the initial detention of Ukrainian civilians by the agents of Russian Federation takes place in a form akin to an arrest whereby the agents would either hold a Ukrainian civilian at a filtration point, on the street or other public place, or arrive at their home. The Mission has not encountered a single case when an individual would be arrest on the basis of an arrest warrant. The absolute vast majority of cases are characterized by the detaining agents not even communicating who they are, even though in most cases this can be deduced from them manning the filtration point, wearing a military uniform of the Russian armed forces or that of the FSB and clearly exercising authority during the moment of detention.<sup>249</sup> While the wearing of Russian army uniform suggests that the detaining authority belongs to the Russian Federation, it does not indicate further important details such as exact unit or name of the person executing the arrest. Moreover, a large number of detentions communicated to the Mission have been carried out by individuals dressed only partially in uniforms or wearing civilian clothing.<sup>250</sup> Fundamentally, knowing which authority has detained the person in question allows tracing that person thus

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<sup>243</sup> *Ibidem*, paras 29-30.

<sup>244</sup> *Ibidem*, para 30.

<sup>245</sup> *Ibidem*, para 27.

<sup>246</sup> *Ibidem*.

<sup>247</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977. *Commentary of 1987*, Article 75 - Fundamental guarantees, para 3073.

<sup>248</sup> HRC GC No. 35, *op. cit.*, para 25.

<sup>249</sup> Testimonies 26 and 27 (on file with the authors); OHCHR *Detention Report 2021*, *op. cit.*, paras 70-73.

<sup>250</sup> Testimonies 24 and 41 (on file with the authors).

servicing as an important safeguard against arbitrary detention, incommunicado detention as well as enforced disappearances.

The vast majority of Ukrainian civilians deprived of their liberty by the Russian Federation were not informed about the reasons for their detention at the time of arrest or promptly, i.e., within a reasonable period thereafter. Many of them, in fact, remained in detention for several weeks, months or years and were sometimes even released without ever being told what the alleged grounds for their detention was. In some instances, detained persons were told that they would or had been held in administrative detention but no details as to the reasons for this detention were provided.<sup>251</sup> In other instances, very vague and broad grounds (such as support for “Nazism” or the lack of the cooperation with the Russian authorities) were provided, making it difficult for the detained persons to challenge such grounds. For instance, the OHCHR collected evidence of Ukrainian civilians, mostly men, detained during the filtration procedure and held from one to several months mostly incommunicado in various detention centres, including the penal colony near Olenivka. Upon release, some were not provided any information on the grounds for their detention, whereas other were told that they had been under administrative detention, without any specification.<sup>252</sup> Hundreds of cases of this type have been communicated to the Mission<sup>253</sup> and documented by international organizations<sup>254</sup> and civil society actors.<sup>255</sup> Based on these testimonies, the Mission concludes that the Russian Federation has consistently failed to inform Ukrainian civilians deprived of their liberty by the Russian authorities of the grounds for such a deprivation of liberty.

## **2. OBLIGATION TO PROVIDE PERSONS DEPRIVED OF LIBERTY WITH AN OPPORTUNITY TO CHALLENGE THE LAWFULNESS OF THE DETENTION**

The second guarantee requires that persons deprived of their liberty be able to challenge the lawfulness of such deprivation of liberty. Article 43 of the GCIV stipulates that “*any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose*”. Article 78(1) of the GCIV indicates that “*decisions regarding such assigned residence or internment shall be made according to a regular procedure /.../. This procedure shall include the right of appeal for the parties concerned*”. Article 9(4) of the ICCPR holds that “*anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful*”. The ECHR grants the same right in its Article 5(4) and the CHRFF in its Article 5(3). The right is also considered customary in nature.<sup>256</sup>

The right to challenge the lawfulness of the deprivation of liberty enshrines the principle of *habeas corpus* in international law,<sup>257</sup> a peremptory norm of international law, which applies to all forms of deprivation of liberty,<sup>258</sup> including “*situations of detention under administrative and other fields of law, including military detention, security detention, detention under counter-terrorism measures*”<sup>259</sup> as well as “*detention during armed conflicts and emergency*

<sup>251</sup> OHCHR *Detention Report 2023*, *op. cit.*, para 60.

<sup>252</sup> *Ibidem*.

<sup>253</sup> Testimonies 21, 22, 23, 24, 26, 27, 40, 41, 42 and 43 (on file with the authors).

<sup>254</sup> OHCHR, *Report on the Human Rights Situation in Ukraine (1 December 2023 – 29 February 2024)*, 26 March 2024, para 82; OHCHR *Detention Report 2021*, *op. cit.*, para 57; ODIHR *Interim Report IV*, *op. cit.*, paras 42-45, 47; IICIU *Report 2023*, *op. cit.*, para 63; Center for Civil Liberties, *Prisoner’s Voice*, 2023.

<sup>255</sup> Media Initiative for Human Rights, *Arbitrary detentions and capture of civilian hostages in the northern regions of Ukraine*, 2023; ZMINA, *Enforced Disappearances and Arbitrary Detentions of Active Citizens During The Full-Scale Armed Aggression By Russia Against Ukraine*, 2023.

<sup>256</sup> UN Doc. A/HRC/22/44, *Report of the Working Group on Arbitrary Detention*, 24 December 2012, para 47.

<sup>257</sup> *Ibidem*, para 47; HRC GC No. 35, *op. cit.*, para 39; UN *Basic Principles 2015*, *op. cit.*, para. 3.

<sup>258</sup> UN *Basic Principles 2015*, *op. cit.*, para. 11.

<sup>259</sup> *Ibidem*, para. 47 (a); HRC GC No. 35, *op. cit.*, para 40.

*situations, administrative detention for security reasons, and the detention of individuals considered civilian internees under international humanitarian law*".<sup>260</sup> As clarified by the *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, the right to challenge the legality of detention *"is not to be suspended, rendered impracticable, restricted or abolished under any circumstances, even in times of war, armed conflict or public emergency that threatens the life of the nation and the existence of which is officially proclaimed"*.<sup>261</sup>

Indeed, any form of detention should be ordered by, or be subjected to the effective control of, a judicial or other authority under the law, whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence.<sup>262</sup> In the context of the armed conflict, it is for the Detaining Power to decide, whether the lawfulness of the internment of civilians will be considered by a judicial body (court) or an administrative body (board). The formulation, however, suggests that the decision shall never be left to an individual person but, rather *"it will be a joint decision, and this offers /.../ a better guarantee of fair treatment"*.<sup>263</sup> Regardless of its nature and composition, *"the judicial or administrative body reviewing the decision of a party to a conflict to detain an individual must bear in mind that such measures of detention should only be taken if absolutely necessary for reasons of security"*.<sup>264</sup> As the ICTY held, *"the fundamental consideration must be that no civilian should be kept in assigned residence or in an internment camp for a longer time than the security of the detaining party absolutely demands"*.<sup>265</sup>

The present Mission did not receive even a single case where this obligation was fulfilled or saw any evidence of attempts by the Russian authorities to fulfil it. While this does not exclude the possibility that it has been met in some individual cases, it is nevertheless clear that it has been violated in the absolute majority of instances of detention of Ukrainian civilian by the Russian Federation. The violation is closely linked to the previously identified failure by the Russian authorities to inform Ukrainian civilians deprived of their liberty about the reasons (factual and legal grounds) for their detention, which makes it difficult and even impossible for them to challenge the lawfulness of their detention. Many of them, moreover, are placed in conditions which offer no access to any outside bodies, including courts or administrative bodies. They are also denied contact with a lawyer. In this regard, it is important to recall that *"practices that render /.../ review effectively unavailable to an individual, including incommunicado detention, also amount to a violation"*.<sup>266</sup> It is, moreover, important to recall that the right to *habeas corpus* must be ensured without delay<sup>267</sup> and therefore any instances when detained persons might be brought before a judicial authority weeks and months subsequent to their detention do not meet the legal requirements of IHL and IHRL. The Mission concludes that such requirements are not met with respect to Ukrainian civilians deprived of liberty by the Russian Federation, as these civilians are consistently denied the possibility to challenge the lawfulness of their detention.

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<sup>260</sup> UN *Basic Principles* 2015, *op. cit.*, para 9.

<sup>261</sup> *Ibidem*, Principle 4.

<sup>262</sup> See UN *Body of Principles* 1988, *op. cit.*, Principle 4. See also WGAD Opinions Nos. A/HRC/WGAD/2021/72, A/HRC/WGAD/2020/89, A/HRC/WGAD/2018/79, A/HRC/WGAD/2018/35, A/HRC/WGAD/2017/93, A/HRC/WGAD/2021/75, A/HRC/WGAD/2017/66 and A/HRC/WGAD/2017/46.

<sup>263</sup> *Convention (IV) relative to the Protection of Civilian Persons in Time of War*. Geneva, 12 August 1949. *Commentary of 1958*, Article 78 - Security measures. Internment and assigned residence. Right of appeal.

<sup>264</sup> ICTY, *Prosecutor v. Zdravko Mucić aka "Pavo", Hazim Delić, Esad Landžo aka "Zenga", Zejnil Delalić*, Case IT-96-21-T, Trial Judgment, 16 November 1998, para 581.

<sup>265</sup> *Ibidem*, para 581.

<sup>266</sup> HRC GC No. 35, *op. cit.*, para 46.

<sup>267</sup> UN *Basic Principles* 2015, *op. cit.*, Principle 8.

### 3. AVAILABILITY OF PERIODIC REVIEWS

The third guarantee consists of the regular, periodic review of the deprivation of liberty. This guarantee is specifically foreseen by IHL instruments with respect to internment of civilians. Article 43(2) of the GCIV stipulates that “*if the internment or placing in assigned residence is maintained, the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit*”. Similarly, Article 78(2) of the GCIV provides that “*in the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power*”.

Unlike the initial review, which takes place at the request of the detained person, the subsequent periodical reviews are automatic. Although the wording suggests that the periodic review does not need to take place in the absence of the initial review, i.e., in cases when the detention is not challenged, the Mission recalls that internment of civilians is by its very nature a preventive, exceptional and temporary measure and that “*each interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist*”.<sup>268</sup> Fulfilling this obligation in the absence of a regular review of the lawfulness of internment of individual civilians might be difficult. As noted by the ICRC, the main point of the periodic review is “*that no protected person should be kept in assigned residence or in an internment camp for a longer time than the security of the Detaining State demands*”.<sup>269</sup> The periodic review twice a year is the minimal requirement, but nothing prevents the Detaining Power from opting for a higher standard.

IHRL does not explicitly foresee any such regular review, but the right of persons deprived to their liberty to challenge the lawfulness of this deprivation remains in place for the whole period of the detention and can be used repeatedly.

The Mission has not received any information suggesting that such a regular review of the legality of the detention of Ukrainian civilians has been introduced in the Russian Federation. Given that in the vast majority of cases, such civilians have no means of challenging the lawfulness of their detention, it is highly unlikely that there would be an automatic, regular review of lawfulness of their detention.<sup>270</sup> The Mission received no testimony to suggest this nor did it establish this in any of the numerous reports issued by international organizations or civil society organizations. The Mission therefore concludes that this guarantee is also not respected by the Russian Federation and that in view of the Russian Federation’s extensive internment practices following the 2022 full-scale invasion, this amounts to arbitrary deprivation of liberty on a massive scale.

### 4. INFORMATION OBLIGATIONS

The fourth guarantee relates to the deprivation of liberty consists of information obligations imposed on the Detaining Power primarily by IHL. By virtue of Article 122 of the GCIII, upon the outbreak of a conflict and in all cases of occupation, each belligerent party “*shall instate an official Information Bureau for prisoners of war who are in its power*”. By virtue of Article 136 of the GCIV, each belligerent party shall also “*establish an official Information Bureau responsible for receiving and transmitting information in respect of the protected persons who are in its power*”. One single NIB can be established to cater for both POW and detained civilians. The tasks of the NIB under the GCIV pertain to the protection of needs of individual civilians in the hands of the enemy party and to the legitimate needs of the enemy belligerent in terms of knowledge about their own civilians in enemy hands.

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<sup>268</sup> Article 132 of the GCIV.

<sup>269</sup> *Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949. Commentary of 1958, Article 43 - Non-repatriated persons VI. Procedure.*

<sup>270</sup> See also Memorial, Свои среди чужих, Адвокатская Улица, 3. 7. 2023; Testimonies 2,8,12.

Each Party to the conflict shall, within the “shortest possible period”, give its NIB information of any measure taken by it concerning any protected persons who are kept in custody for more than two weeks, who are subjected to assigned residence or who are interned.<sup>271</sup> It shall also require its various departments to provide the NIB promptly with information concerning all changes pertaining to these protected persons, as, for example, transfers, releases, repatriations, escapes, admittances to hospitals, births and deaths.<sup>272</sup> The information received by the NIB shall be of such a character as to make it possible to identify the protected person.<sup>273</sup> Information regarding the state of health of internees who are seriously ill or seriously wounded shall be supplied regularly and if possible every week.<sup>274</sup>

The NIB shall forward such information “by the most rapid means” to the enemy belligerent through the intermediary of the Protecting Powers or of the Central Tracing Agency (CTA) of the ICRC.<sup>275</sup> The CTA is tasked with ensuring exchange of information between the national information bureaux of the two belligerent States, as well as the transmission of information to the families concerned.<sup>276</sup> The CTA has the mandate to collect and centralize information on the fate and whereabouts of all persons fallen in the hands of the enemy, including detained civilians. The NIB shall also reply to all enquiries received regarding protected persons, coming from relatives, lawyers or other actors.

Ukraine established its National Information Bureau (UNIB) of Ukraine for Prisoners of War, Forcibly Deported and Missing Persons in March 2022.<sup>277</sup> The UNIB is under the management of the Ministry of Reintegration of Temporarily Occupied Territories and it caters both for POW and for civilian detainees. Moreover, in March 2022, the Coordination Headquarters for the Treatment of Prisoners of War (CHQ) was established in Ukraine in order to bring back Ukrainian soldiers fallen into enemy hands.<sup>278</sup> In February 2024 the CHQ mandate was formally extended to include Ukrainian civilian detainees.<sup>279</sup> The CHQ is a coordination body headed by General Budanov, head of Military Intelligence, and includes a range of Ukrainian agencies.<sup>280</sup> CHQ has established a working-group that will deal with civilians. An electronic registry of Ukrainian civilians detained by the Russian Federation has also been established to facilitate communication with families and guarantee accurate information. The CHQ has regional offices in four other locations besides Kyiv tasked with communication with families and non-governmental organizations.<sup>281</sup>

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<sup>271</sup> Article 136(2) of the GCIV.

<sup>272</sup> Article 136(2) of the GCIV.

<sup>273</sup> Article 138 of the GCIV.

<sup>274</sup> Article 138(2) of the GCIV.

<sup>275</sup> Article 137 of the GCIV.

<sup>276</sup> Article 123 of the GCIII and Article 140 of the GCIV.

<sup>277</sup> Розпорядження Кабінету Міністрів України від 17 березня 2022 р. № 228-р “Про визначення державного підприємства, яке виконує функції Національного інформаційного бюро”.

<sup>278</sup> Постанова Кабінету Міністрів України від 11 березня 2022 р. № 257 “Про утворення Координаційного штабу з питань поводження з військовополоненими”.

<sup>279</sup> Постанова Кабінету Міністрів України від 27 лютого 2024 р. № 208 “Деякі питання поводження з військовополоненими”.

<sup>280</sup> Office of the President, Ministry of Justice, Ministry of Justice, State Border Guard Service, Ministry for Reintegration of the Temporarily Occupied Territories, Ministry of Foreign Affairs, Commissioner for Human rights of the Verkhovna Rada, Advisor-Commissioner of the President of Ukraine for Issues of Rehabilitation of Combatants, Government Commissioner for cases of the European Court of Human Rights, Ministry of Health, Ministry of Veteran Affairs, Office of the Prosecutor General, Security Services, Joint Center for Coordination of Search and Release of Illegally Deprived Persons as a Result of Aggression against Ukraine, Ministry of Defense, Ukrainian Armed Forces, National Police, National Guard, National Security and Defense Council of Ukraine, Commissioner for Missing Persons Under Special Circumstances, Ministry of Economy, National Agency on Civil Service, Local authorities, Public associations Coordination Headquarter for the Treatment of POWs, meeting Kyiv, 22 March 2024.

<sup>281</sup> Coordination Headquarters for the Treatment of POW, meeting Kyiv, 22 March 2024. The regional offices are located in Mykolaiv, Vinnytsia, Kharkiv and Lviv.

In 2014, a United Centre was created under the Security Services of Ukraine (SBU) to liberate civilian and military detainees in Luhansk and Donetsk.<sup>282</sup> After 2022, the geographical scope of its responsibility was broadened to all areas invaded by Russian forces. Ukraine in 2018 adopted the *Law on the Legal Status of Missing Persons*<sup>283</sup> and subsequently established a Central Register for Missing Persons. After 2022 the mandate was broadened to encompass all of Ukraine. The Ombudsman's office has a legal mandate to address the rights of Ukrainian citizens also in the Russian Federation, coordinating with his Russian counterpart. The Ombudsman's office deals with issues like the return and release of POW, civilian detainees and the reunification of families/return of children. In meetings with the Mission, the Ombudsman's office conveyed that out of 100 requests to the Russian authorities, the Russian counterpart replies to around 20%.<sup>284</sup>

The Russian Federation stated in August 2022 that it had established a National Information Bureau (RNIB) in line with the GCIII in February of 2022.<sup>285</sup> The RNIB is located in the Ministry of Defence. According to the information available to the Mission, the RNIB only caters for POW and does not have a mandate to cater for civilian detainees. In fact, the Russian Federation seems to deny that it detains any Ukrainian civilians. In the vast majority of cases in which various stakeholders, including Ukrainian authorities, relatives and Ukrainian or Russian lawyers, have inquired about the whereabouts of certain Ukrainian civilians for whom there were serious grounds to believe that they were detained by the Russian Federation, there was no reply from the Russian authorities. Less than 20% of such inquiries were responded to, sometimes in a contradictory manner (with one Russian authority denying the detention and another confirming it).<sup>286</sup>

The Mission established that there is currently no regular channel of communication through which the Russian Federation would fulfil its information obligation vis-à-vis Ukraine, foreseen in Article 137 of the GCIV.<sup>287</sup> The lack of mandate of the RNIB to cater for civilian detainees is a serious institutional deficiency, which not only in and of itself violates the GCIV but it also has cascading effects, negatively affecting a large number of additional rights bestowed upon civilians who find themselves in enemy detention under the GCIV.

The absence of any regular channel of communication also has a negative effect on the search of missing persons. By means of Article 33 of the API, "*as soon as circumstances permit, and at the latest from the end of active hostilities, each Party to the conflict shall search for the persons who have been reported missing by an adverse Party. Such adverse Party shall transmit all relevant information concerning such persons in order to facilitate such searches*". To be able to implement this obligation, each Party to the conflict shall record the information "*in respect of such persons who have been detained, imprisoned or otherwise held in captivity for more than two weeks as a result of hostilities or occupation, or who have died during any period of detention*".<sup>288</sup> Information concerning persons reported missing shall be transmitted either directly or through the Protecting Powers, the CTA or national Red Cross society.

Since the outbreak of the full-scale invasion of Ukraine by the Russian Federation on 24 February 2022, more than 30000 Ukrainian citizens, mostly civilians, have been reported as missing. Over the same period, moreover, the ICRC has received more than 115000 tracing

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<sup>282</sup> The Ukrainian Parliament Commissioner for Human Rights, meeting, Kyiv, 20 March 2024.

<sup>283</sup> Закон України № 38 "Про правовий статус осіб, зниклих безвісти", 2018.

<sup>284</sup> Ukrainian Parliament Commissioner for Human Rights, meeting, Kyiv, 20 March 2024.

<sup>285</sup> Замминистра обороны России Александр Фомин провел брифинг для иностранных военных атташе, *Министр обороны России*, 3 August 2022.

<sup>286</sup> Ukrainian Parliament Commissioner for Human Rights, meeting Kyiv, 20 March 2024.

<sup>287</sup> See also the 1991 Moscow Document (para 23.1(vi)), which stipulates that "*any person arrested or detained will have the right, without undue delay, to notify or to require the competent authority to notify appropriate persons of his choice of his arrest, detention, imprisonment and whereabouts*"

<sup>288</sup> Article 33(2)(a) of the API.

requests from families in both Ukraine and Russia. Since May 2023, a Unified Register of Missing Persons has been operational in Ukraine, within the Ministry of Interior. During the visit to Kyiv, the Mission was informed by the Ukrainian authorities that there was again no regular channel of communication about these persons established with the Russian Federation. The Mission wishes to add that the information obligations of Parties to a conflict are not limited to the communication between them. Article 43 of the GC stipulates that the Detaining Power “shall, as rapidly as possible, give the Protecting Power the names of any protected persons who have been interned or subjected to assigned residence, or who have been released from internment or assigned residence”. Any judicial or administrative decisions concerning such persons shall also be notified “as rapidly as possible” to the Protecting Power. The provision applies to civilians detained in the territory to the party of a conflict and it requires that names and decisions be communicated without any delay (as rapidly as possible) and automatically, without any need of request. There is a caveat foreseen in the provision under which protected person may object to information being communicated in this way, when they consider that such communication could have dangerous consequences for them or their families.<sup>289</sup> The Mission received no information suggesting that this obligation would be complied with by the Russian Federation with respect to Ukrainian civilian detainees.

Moreover, Article 105 of the GCIV stipulates that “immediately upon interning protected persons, the Detaining Powers shall inform them, the Power to which they owe allegiance and their Protecting Power of the measures taken for executing the provisions of the present Chapter /on the relations between the interned persons and the exterior/. The Detaining Powers shall likewise inform the Parties concerned of any subsequent modifications of such measures”. The Protecting Powers shall also be informed “of all proceedings instituted by the Occupying Power against protected persons in respect of charges involving /.../ imprisonment for two years or more”.<sup>290</sup> The Mission again received no information suggesting that these obligations would be complied with by the Russian Federation with respect to Ukrainian civilian detainees.

The Mission furthermore wishes to recall that, so far, no Protecting Powers have been appointed by the parties to the IAC between the Russian Federation and Ukraine. The tasks of such powers are thus to a large extent assumed by the ICRC as a substitute.<sup>291</sup> The Mission recalls that by means of Articles 76(7) and 143 of the GCIV, detained civilians have the right to be visited by delegates of Protecting Powers or of the ICRC. The exercise of this right obviously requires that the Protecting Powers or the ICRC know where detained civilians are located (and that there are detained civilians).

The ICRC has a presence on both sides of the frontline, and in line with the organization’s mandate, it serves as a neutral intermediary between the parties in relation to victims of war.<sup>292</sup> The ICRC protection teams work with UNIB and RNIB, and the ICRC also engages with detention visits. However, it is the assumption of the Mission that the apparent lack of a NIB for civilians on the Russian side complicates this task for the ICRC. In addition to the NIB, the ICRC gets information from relatives of detainees (inquiry conditioned on consent by family) or open-source data. The ICRC has received more than 31000 individual cases since February 2022, of which around 8000 have been solved in the sense that the person has been confirmed to be either deceased or captured. This leaves around 23000 still unaccounted for.<sup>293</sup>

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<sup>289</sup> *Convention (IV) relative to the Protection of Civilian Persons in Time of War*. Geneva, 12 August 1949. *Commentary of 1958*, Article 43 - Non-repatriated persons VI. Procedure.

<sup>290</sup> Article 71(2) of the GCIV.

<sup>291</sup> See Article 5(3) of the API.

<sup>292</sup> Article 136 of the GCIV.

<sup>293</sup> Russia-Ukraine international armed conflict: 23,000 people reported missing, *ICRC*, 20 February 2024.

## 5. FAIR TRIAL GUARANTEES

The last guarantee, or rather set of guarantees, are fair trial guarantees. These guarantees primarily apply when Ukrainian civilians deprived of their liberty by the Russian Federation face criminal prosecution during their detention. Yet, the most fundamental guarantees are applicable in all types of (judicial, administrative, or other) proceedings, including those related to the *habeas corpus*. They encompass the right to have the case considered by a competent, impartial and independent (judicial or administrative) body, the right to have access to this body (overlapping with the right to challenge the lawfulness of detention), and the right to appeal (overlapping with the right to periodic reviews). As indicated above, the Mission received no information suggesting that Ukrainian civilians deprived of liberty by the Russian Federation would be able to challenge the lawfulness of their detention (*habeas corpus*) or that periodic reviews of this (continued) lawfulness would take place. In the absence of such procedures, fair trial guarantees are obviously not respected by the Russian Federation.

## 6. SPECIAL GUARANTEES FOR VULNERABLE PERSONS AND PERSONS ENJOYING PRIVILEGES AND IMMUNITIES UNDER INTERNATIONAL LAW

All persons deprived of their liberty during an armed conflict enjoy the legal guarantees identified in the previous subsections. In addition, individuals belonging to vulnerable groups, as well as individuals enjoying privileges and immunities under international law, benefit from certain additional guarantees. While most of these additional guarantees concern treatment rather than detention as such, some are of relevance in the latter area as well.

Typically, the CRC requires that in all decisions concerning a child, including any form of detention, the best interests of the child must be the prime consideration.<sup>294</sup> Children should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time.<sup>295</sup> In the criminal justice context, the Committee on the Rights of the Child has required further safeguards including a presentation of the child before a judge within 24 hours of the arrest, avoiding pre-trial detention and requiring especially speedy trial, a standard also required by the HRC in relation to children.<sup>296</sup> For persons with disabilities, Article 14 of the CRPD prohibits deprivation of liberty on the basis of disability.<sup>297</sup> In the context of the present report, it is recalled that the Russian Federation is a State Party to both the CRC and CRPD.

The forcible transfer of Ukrainian children to the temporarily occupied territories or Russian Federation was the mandate of the 2023 Moscow Mechanism which issued a separate report on the phenomena.<sup>298</sup> In the context of the present report, the Mission recalls that deprivation of liberty occurs when a person is unable to leave a place at will which means that many children who have been forcibly transferred to the temporarily occupied territories or Russian Federation may find themselves detained, especially those who have been placed in children's institutions. The Mission also gathered information and received testimonies of children being detained in a similar fashion to that described above in relation to adults. Often children would be detained with their parents, including in cases of collective detention. However, especially the practice of detention of children appears to be deployed in relation to boys aged 14-17yrs,<sup>299</sup> seemingly as they are perceived to be of "fighting age", thus representing a "threat" to the Russian authorities. Such instances of deprivation of liberty would follow a similar pattern as one

<sup>294</sup> HRC GC No. 35, *op. cit.*, para 62.

<sup>295</sup> Article 37(b) of the CRC. See also UN Doc. CRC/C/GC/24 (2019), *General Comment No. 24 on children's rights in the child justice system which declares in para 16 diversion to be "the preferred manner of dealing with children in the majority of cases"*, 18 September 2019; HRC GC No. 35, *op. cit.*, para 18.

<sup>296</sup> UN Doc. CRC/C/GC/24 (2019), *General Comment No. 24 on children's rights in the child justice system which declares in para 16 diversion to be "the preferred manner of dealing with children in the majority of cases"*, 18 September 2019, para 90; HRC GC No. 35, *op. cit.*, paras 33, 38 and 59.

<sup>297</sup> Article 14(1)(b) of the CRPD. See also HRC GC No. 35, *op. cit.*, para 19.

<sup>298</sup> MM Report III, *op. cit.*, paras 95-97.

<sup>299</sup> OHCHR *Detention Report 2023*, *op. cit.*, paras 81-83.



observed in relation to adults: the detaining authorities would not specify the reasons for detention, no charges would follow, and children could also be held incommunicado and even disappeared. The 2023 OHCHR report also documents particularly disturbing cases where some 90 children were detained and used as human shields by Russian armed forces in Kyiv and Chernihiv regions in February and March 2022.<sup>300</sup> These are serious violations of Article 9 of the ICCPR, Articles 37 and 40 of the CRC as well as Article 75 of the API. The Mission furthermore received no information that interned adult civilians would have the possibility to “request that their children who are left at liberty without parental care shall be interned with them”,<sup>301</sup> that the information about the evacuated children would be passed over to Ukraine and the CTA<sup>302</sup> or that children would be accorded priority in release or repatriation.<sup>303</sup> These are additional guarantees beneficial to children established under IHL.

IHL also provides for special treatment in respect of pregnant women and mothers with infants or young children. Such women when arrested, detained or interned for reasons related to the armed conflict “shall have their cases considered with the utmost priority”.<sup>304</sup> They shall also be accorded priority in release or repatriation.<sup>305</sup> The latter obligation also applies to children, the wounded and sick, and to “internees who have been detained for a long time”,<sup>306</sup> as individuals belonging to these groups are also considered vulnerable. The Mission is not in the possession of any information demonstrating that the Russian Federation takes vulnerability of individuals belonging to certain groups into account when depriving Ukrainian civilians of liberty or deciding upon their release.

Certain persons moreover enjoy privileges and immunities under international law. This is the case of the diplomatic personnel and of persons working for international organizations. Yet, in April 2022, four staff members of the OSCE Special Monitoring Mission (SMM), all Ukrainian nationals, were detained in the Eastern regions of Ukraine controlled (then) by the so-called Donetsk and Luhansk People’s Republics. Two other staff members of the OSCE SMM were detained at the end of April 2022.<sup>307</sup> As of 31 March 2024, three of them, Messrs. Vadym Golda, Maxim Petrov, and Dmytro Shabanov, remain deprived of their liberty. In September 2022, Messrs. Petrov and Shabanov were sentenced to 13 years in prison for alleged treason consisting in passing secret information to the US intelligence services. The trial was held by the so-called Supreme Courts of the so-called Luhansk People’s Republic and the proceedings were held entirely behind closed doors.<sup>308</sup> Mr. Golda has also been charged with a criminal offence but the trial seems to be still ongoing. All the three staff members have been detained by the Russian Federation for almost two years now. The OSCE and its Participating States have repeatedly called for their release, stressing that these staff members “still enjoy their functional legal protection as OSCE staff”.<sup>309</sup> The continued detention of staff members of the OSCE SMM is incompatible with OSCE commitments arising in respect to Russia.<sup>310</sup>

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<sup>300</sup> *Ibidem*, para 83.

<sup>301</sup> Article 82(2) of the GCIV.

<sup>302</sup> Article 78(3) of the API.

<sup>303</sup> Article 132(2) of the GCIV.

<sup>304</sup> Article 76(2) of the API.

<sup>305</sup> Article 132(2) of the GCIV.

<sup>306</sup> Article 132(2) of the GCIV.

<sup>307</sup> Stephanie Liechtenstein, Fate of OSCE personnel detained in separatist-controlled areas of eastern Ukraine hangs by a thread, *Security and Human Rights Monitor*, 27 May 2022.

<sup>308</sup> Stephanie Liechtenstein, OSCE Ukrainian staff members sentenced in Russian-separatist kangaroo court, *Politico*, 20 September 2022.

<sup>309</sup> Delegation of the EU to the International Organisations in Vienna, Russia’s detention of OSCE officials as part of its war of aggression against Ukraine, *OSCE Permanent Council No.1442, Vienna*, 21 September 2023. See also OSCE SMM Acting Head of Mission refutes claims and denounces persecution of national Mission members, demands immediate and unconditional release of those deprived of their liberty, *OSCE*, 25 July 2022.

<sup>310</sup> See *CSCE and the New Europe - Our Security is Indivisible*, Decisions of the Rome Council Meeting, Rome, 1993, para 11.

## 7. PROHIBITION OF COLLECTIVE DETENTION

The Mission furthermore recalls that the grounds for the deprivation of liberty have to be assessed on an individual basis. It is axiomatic that international law prohibits detention of groups of persons without treating the case of each detainee individually. Yet, the Mission gathered information and received testimony that the Russian authorities regularly resort to such deprivations of liberty imposed on a collective of civilians. One of the most prominent cases reported widely is the detention of some 360 residents of the village of Yahidne in Chernihiv region in March 2022 in the basement of the local school for about a month.<sup>311</sup>

The OHCHR also reports the case in Hostomel (Kyiv region), when Russian armed forces detained 38 individuals, including 16 children, together in the basement of a multi-storey residential building on 13 Proskurivska Street and held individuals there in February-March 2022.<sup>312</sup> These are examples of *prima facie* violations of, *inter alia*, Article 9 of the ICCPR, amounting to collective arbitrary deprivation of liberty.

## 8. PROHIBITION OF INCOMMUNICADO DETENTION AND ENFORCED DISAPPEARANCES

The Mission finally recalls that keeping all the information about detained civilians secret and totally denying them any communication with the outside world amounts to incommunicado detention, which is prohibited under international law.<sup>313</sup> It may also amount to enforced disappearance, which consists of “*the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law*”.<sup>314</sup> Enforced disappearance is also prohibited under international law, both through the special instrument, the ICPPED, to which, however, the Russian Federation is not State Party, and through the combination of various human rights violated by that practice.

The 2006 ICPPED expressly states that “*no one shall be subjected to enforced disappearance*” (para 1) and that “*no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance*” (para 2). For those States that are not parties to the ICPPED, such as the Russian Federation, the prohibition of enforced disappearances stems from the combination of several human rights, especially the right to life, the right to liberty and security, the prohibition of arbitrary detention and torture and other cruel, inhuman or degrading treatment or punishment. In 1980, the UN Commission on Human Rights established the Working Group on Enforced or Involuntary Disappearances (WGEID),<sup>315</sup> whose mandate has been regularly renewed since then.<sup>316</sup> Noting that the WGEID derives its mandate from the UN Charter, the same as all other Special Procedures of the Human Rights Council, the WGEID is able to exercise jurisdiction over all Member States of the UN, including the Russian

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<sup>311</sup> OHCHR *Detention Report 2023*, *op. cit.*, para 76. See also *Plight of civilians in Ukraine*, OHCHR *Press Release*, 10 May 2022; *Ukrainian villagers count dead after weeks confined in school basement*, *Reuters*, 8 April 2022; *In Yahidne, Ukraine, a Battered School Holds Memories of Trauma*, *New York Times*, 19 November 2022; *War in Ukraine: The tragedy of Yahidne, a village trapped in Russia's failed offensive on Kyiv*, *Le Monde*, 17 February 2023.

<sup>312</sup> OHCHR *Detention Report 2023*, *op. cit.*, para 74.

<sup>313</sup> See WGAD Opinions Nos. A/HRC/WGAD/2020/36; A/HRC/WGAD/2018/44; and A/HRC/WGAD/2018/35. See also ECtHR, *Aksoy v Turkey*, Application No. 21987/93, Judgment 18 December 1996, paras 82 and 84.

<sup>314</sup> Article 2 of the ICPPED.

<sup>315</sup> Commission on Human Rights resolution 20 (XXXVI), *Question of Missing and Disappeared Persons*, 29 February 1980.

<sup>316</sup> The most recent renewal occurred in 2020, UN Doc. A/HRC/RES/45/3, *Enforced or involuntary disappearances*, 8 October 2020.

Federation, irrespective of the scope of its treaty obligations. The WGEID uses the definition of enforced disappearance enshrined in the ICPPED. Moreover, enforced disappearance constitutes an aggravated form of arbitrary detention also under the ICCPR.<sup>317</sup>

The testimonies collected by the Mission and those collected by international organizations and civil society actors suggest that the Russia Federation has, consistently and deliberately, resorted to such incommunicado detentions with respect to Ukrainian civilians. The general allegation related to the Russian Federation by the WGEID in 2022 records 293 cases of enforced disappearances, including of civilians, noting that the “*highest number of cases has been recorded in the Kyiv, Kherson and Zaporizhzhia regions. Several of the enforced disappearances were presumably carried out by members of the Russian intelligence agencies, as witnesses noted the specific manner of communication, the different uniforms from those of the regular Russian military, and the usage of the special equipment*”.<sup>318</sup>

The OHCHR observed a pattern of Russian armed forces and occupying authorities refusing to either acknowledge the fact of detention or to disclose information about the detainees’ fate and whereabouts to relatives, lawyers and other persons concerned for prolonged periods of time.<sup>319</sup> The information gathered and testimonies received by the Mission confirm this.<sup>320</sup> In many cases, the detaining authorities would not reveal the place where the detained person would be taken, often saying that a person would be released in a few days.<sup>321</sup> When this would not happen, the family members would search for their relative, the authorities would deny holding them even though the family would receive confirmation of them having the custody of the relative through other sources such as others who have been released.<sup>322</sup>

The families would not receive any notification that their relatives had been transferred to another location, even to the territory of Russia.<sup>323</sup> When families would enquire with the Russian authorities, they would receive no reply or a general message, commonly months later, that a person was being held without disclosing the exact location or even broadly indicating the region.<sup>324</sup> However, the Mission also heard many testimonies of when family members had received no information concerning their family members who were last seen being taken by the Russian authorities months,<sup>325</sup> and even over two years ago.<sup>326</sup> Recalling the absolute prohibition of incommunicado detention and enforced disappearances under the IHL and IHRL, the Mission concludes that the Russian Federation has violated these prohibitions.

### C. CONCLUSIONS

The Mission recalls that IHL and IHRL establish legal grounds enabling Parties to the conflict to deprive civilians, belonging to the other party to the conflict, of their liberty. Some civilians, namely civilians who accompany the armed forces with their formal authorization without actually being members thereof (civilian members of military aircraft crews, war correspondents, or supply contractors, etc.), and members of the merchant marine and the crews of civil aircraft of the Parties to a conflict may be detained together with members of the armed

<sup>317</sup> HRC GC No. 35, *op. cit.*, para 17. See also WGAD Opinions Nos. 77/2020, 38/2021 and 25/2022.

<sup>318</sup> WGEID, *General allegation: Russian Federation*, 127th session (9-13 May 2022), para 1.

<sup>319</sup> OHCHR *Detention Report 2023*, *op. cit.*, para 68. See also ODIHR *Interim Report III*, *op. cit.*, para 45. Testimonies 21, 22, 35 and 43 (on file with the authors).

<sup>320</sup> CrimeaSOS, *Enforced Disappearances in Crimea During the Russian Occupation in 2014-2020*, 2021; Crimea SOS, *Enforced Disappearances in Kherson Region under the Russian Occupation: Victims, Abductors and Specific Patterns (02/22 – 02/23)*, 2023.

<sup>321</sup> Testimonies 21, 24, 26, 27, 40, 41, 42 and 43 (on file with the authors). OHCHR *Detention Report 2023*, *op. cit.*, para 70; ODIHR *Interim Report IV*, *op. cit.*, para 47.

<sup>322</sup> Testimonies 21 and 22 (on file with the authors). OHCHR *Detention Report 2023*, *op. cit.*, para 70; ODIHR *Interim Report IV*, *op. cit.*, para 49.

<sup>323</sup> Testimonies 18, 21 and 22 (on file with the authors). OHCHR *Detention Report 2023*, *op. cit.*, paras 70-71.

<sup>324</sup> Testimonies 18 and 21 (on file with the authors); OHCHR *Detention Report 2023*, *op. cit.*, para 71.

<sup>325</sup> Testimonies 18, 21, 22 and 43 (on file with the authors).

<sup>326</sup> Testimonies 18, 21, 23 (on file with the authors); Center for Civil Liberties, *Prisoner’s Voice*, 2023.

forces of a Party to a conflict and they are entitled to a POW status under the GCIII. All other civilians are to be considered protected persons under the GCIV and the API. Such civilians may be interned only in exceptional situations, “*if the security of the Detaining Power makes it absolutely necessary*” (Article 42(1) of the GCIV – civilians in the territory of the enemy) or “*if the Occupying Power considers it necessary, for imperative reasons of security*” (Article 78(1) of the GCIV – civilians in occupied territory).

The Mission established that a large number of Ukrainian civilians have been deprived of their liberty by the Russian Federation. Although no grounds for detention have in most cases been formally communicated to the detained persons, the most commonly indicated reasons seem to be associated with: (a) perceived support to the Ukrainian armed forces and/or affiliation with the armed forces; (b) perceived support of Ukraine and/or rejection of Russia’s “special military operation”; (c) perceived involvement in or support for international terrorism and/or extremism; (d) the intention to force cooperation; and (e) the intention to spread fear in the population of the temporarily occupied territories.

The Mission concluded that reasons (b), (d) and (e) can never constitute lawful grounds for the deprivation of liberty and therefore— all instances of deprivation based solely on one of these reasons therefore amount to unlawful and arbitrary deprivation of liberty of Ukrainian civilians. Some of these instances may also amount to violations of other rules of international law, such as the prohibition of hostage taking or the prohibition of “*acts or threats of violence the primary purpose of which is to spread terror among the civilian population*”.<sup>327</sup> Reasons (a) and (c) may constitute lawful grounds for the deprivation of liberty, this may, however, be so only if, and to the extent that the strict conditions for the internment of civilians stated in Articles 43(1) and 78(1) of the GCIV and confirmed by IHRL instruments (Articles 9 of the ICCPR, Article 5 of the ECHR and Article 5 of the CHRFF), making such internment exceptional and temporary, are respected and the internment is not based on other, ulterior purposes such as harassment or reprisals. The Mission concludes that these requirements clearly have not been met by the Russian Federation and therefore all deprivations of liberty of Ukrainian civilians falling under these categories are also unlawful and arbitrary.

The Mission moreover recalls that to be lawful and non-arbitrary, any instance of the deprivation of liberty must also respect procedural guarantees.

The Mission moreover established that to be lawful and non-arbitrary, any instance of the deprivation of liberty needs to follow certain legal, mostly procedural guarantees. These guarantees stem from both IHL and IHRL and encompass: a) the obligation to inform persons deprived of liberty of the reasons for the detention, b) the obligation to provide persons deprived of liberty with an opportunity to challenge the lawfulness of the detention; c) the availability of periodic reviews, d) information obligations; e) fair trial guarantees; f) the prohibition of collective detention; and g) the prohibition of incommunicado detention and of enforced disappearances. Special guarantees also need to be provided to individuals belonging to vulnerable groups or to persons enjoying privileges and immunities under international law.

The Mission concluded that Ukrainian civilians deprived of their liberty by the Russian Federation have been consistently denied all these guarantees. The testimonies collected by the Mission as well as reports by various international organizations and civil society actors clearly show that an absolute vast majority of detained civilians are never informed about the concrete, individual grounds for their detention. These civilians have no possibility to challenge the lawfulness of their detention either in its initial stage or at any moment thereafter of its (often very long) duration and there does not seem to be any periodic, regular review of the lawfulness of this detention carried out by the Russian authorities. The Russian authorities also consistently fail to fulfil the information obligations stemming from the GCIV and the API. There is nothing

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<sup>327</sup> Article 51(2) of the API.

suggesting that the mandate of the RNIB would extend to civilian detainees and that a regular channel of communication, concerning civilian detainees, would be put in place either directly between the Parties to the conflict or through a third actor (Protecting Powers, the ICRC, the CTA, etc.). The Russian Federation also does not seem to provide special guarantees to individuals belonging to vulnerable groups, such as children, persons with disabilities or pregnant women, and to persons enjoying privileges and immunities under international law. It has disrespected the special status of three staff members of the OSCE SMM, holding them in detention for almost two years now.

The Mission concludes that by depriving a large number of Ukrainian civilians of liberty in the absence of lawful grounds and without providing them with the basic legal guarantees, the Russian Federation has violated numerous provisions of IHL and IHRL, including Articles 43 and 78 of the GCIV, Article 75 of the API, Articles 9 and 14 of the ICCPR, Article 5 of the ECHR and Article 5 of the CHRFF. These deprivations of liberty are arbitrary under both IHL and IHRL. They may amount, and do amount in many cases of which the Mission has received testimonies, to the acts of incommunicado detention and of enforced disappearance, which are absolutely prohibited by IHL and IHRL.

The Mission also concludes that there are reasonable grounds to believe that the war crime of “*unlawful confinement*”<sup>328</sup> as well as the crime against humanity consisting of “*imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law*”<sup>329</sup> have been committed by individuals involved in the arbitrary deprivation of liberty of Ukrainian civilians, including members of the Russian armed forces or occupying authorities.

The war crime of unlawful confinement occurs when, in the context of an IAC, the perpetrator confines or continues to confine one or more persons, protected under one or more of the GCs, being aware of the context and the protected status. The ICTY clearly stated that this war crime is committed both in case of “*the involuntary confinement of a civilian where the security of the Detaining Power does not make this absolutely necessary*” and when “*the detaining party does not respect the basic procedural rights of the detained persons and does not establish an appropriate court or administrative board*”.<sup>330</sup> As the Mission established in this Section, the arbitrary deprivation of liberty of Ukrainian civilians by the Russian Federation has combined both these forms.

The crime against humanity of imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law occurs when the perpetrator imprisoned or otherwise severely deprived one or more persons of physical liberty, the gravity of the conduct was such that it was in violation of fundamental rules of international law and the perpetrator was aware of the factual circumstances establishing the gravity of the conduct. Moreover, the conduct must have been committed as part of a widespread or systematic attack directed against a civilian population and with the knowledge of such attack. As the Mission established in this Section, the practice of arbitrary deprivation of liberty of Ukrainian civilians has occurred on a massive scale and has revealed signs of a systematic, consistent, deliberate pattern of conduct targeting specifically Ukrainian civilians. This leads the Mission to conclude that the contextual element of crime against humanity is present and that at least some instances of the arbitrary deprivation of liberty of Ukrainian civilians may qualify as crimes against humanity.

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<sup>328</sup> Article 147 of the GCIV and Article 8(2)(a)(vii) of the Rome Statute of the ICC.

<sup>329</sup> Article 7(1)(e) of the Rome Statute of the ICC.

<sup>330</sup> ICTY, *Prosecutor v. Delalić et al. (Čelebići)*, Case IT-96-21-A, Appeal Judgement, 20 February 2001, para 320; See also ICTY, *Prosecutor v. Kordić & Čerkez*, Case IT-95-14/2-A, Appeal Judgment, 17 December 2004, para 73.

## VI. TREATMENT OF UKRAINIAN CIVILIANS DEPRIVED OF LIBERTY BY THE RUSSIAN FEDERATION

While the treatment of Ukrainian civilians who have been detained by Russia is not the prime focus of the mandate of the present Mission, it is impossible to examine the phenomena without also looking into the treatment that such civilians have endured and very likely continue to be subjected to. Moreover, it must be underscored that in some instance the treatment subsequent to the detention may affect the status of that detention in international human rights law rendering the detention arbitrary.

Similar as with the grounds and guarantees for detention, the treatment during the detention is regulated concurrently by IHL and IHRL. Again, IHL operates as *lex specialis* in some areas (for instance, it contains a very detailed legal regime for the treatment of POW) but IHRL is more detailed and specific in other areas (for instance, concerning the guarantees of fair trial). For civilians deprived of liberty in the context of an armed conflict, Sections III and IV of Part III of the GCIV are of particular importance. Some of the rules enshrined in these sections are now considered customary and are enshrined in the ICRC Study on Customary International Humanitarian Law (especially Rules 118-128). In IHRL, in addition to the general instruments (ICCPR, ECHR and CHRFF), special instruments focusing on the prohibition of torture (CAT and the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* – ECAT) and on the protection of special categories of persons (CRC, CRPD) are particularly relevant. As indicated above, the Russian Federation has not derogated from any guarantees offered by IHRL instruments and those thus remain applicable in full.

IHL and IHRL foresee quite a comprehensive legal regime applicable to treatment of civilians detained in the context of an armed conflict. The main elements of this regime are: a) the principle of human treatment and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment; b) fair trial guarantees; and c) certain other guarantees applicable to detained civilians in general or to some particular groups of such civilians.

### A. HUMANE TREATMENT AND PROHIBITION OF TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

The obligation of the State to treat everyone it has deprived of their liberty with “*with humanity and with respect for the inherent dignity of the human person*” is encapsulated in Article 10 of the ICCPR, which applies to all forms and places of detention, including private ones.<sup>331</sup> Also *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* in its very first principle states that “*/a//l persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person*”.<sup>332</sup> This is a positive obligation imposed in relation to persons who, because of their status as persons deprived of their liberty, are in situations of particular vulnerability. Although not listed in Article 4 of the ICCPR, this obligation is nowadays considered as non-derogable in nature.<sup>333</sup>

The guarantee of humane treatment is also foreseen by IHL. Article 27 of the GCIV stipulates that protected persons shall be treated humanely “*at all times*”. This is, on a more general level, confirmed by Article 75(1) of the API and the Common Article 3 to the GCs. The rule is considered customary in nature.<sup>334</sup> Article 37 of the GCIV stresses the obligation of human treatment in respect of “*protected persons who are confined pending proceedings or serving a*

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<sup>331</sup> HRC, *General comment No. 21: Article 10 (Humane treatment of persons deprived of their liberty)*, 10 April 1992, para 2.

<sup>332</sup> UN *Body of Principles* 1988, *op. cit.*

<sup>333</sup> UN Doc. CCPR/C/21/Rev.1/Add.11, *General Comment No. 29: States of Emergency (article 4)*, 31 August 2001, para 13(a).

<sup>334</sup> See Rule 87 of the ICRC Study on Customary IHL.

*sentence involving loss of liberty*”. There is, however, no doubt that the obligation, as part of fundamental guarantees of IHL, applies to all detained persons, whatever the context and legal ground for their detention.

The requirement of humane treatment is considered to be an overarching concept, which needs to be further specified. This is usually done in a negative way, by identifying certain acts which are clearly at odds with the requirement of humane treatment. Extrajudicial killings, torture and other cruel, inhuman or degrading treatment or punishment certainly falls under these acts, as do various forms of sexual violence, including rape. The Mission received numerous testimonies indicating that such acts have been pervasive in the course of the deprivation of liberty of Ukrainian civilians, both in the initial stage and during protracted detention. Due to the widespread nature of torture and sexual violence, and due to the severity of these violations of IHL and IHRL, this subsection devotes considerable attention to them.

## 1. EXTRAJUDICIAL KILLINGS

Extrajudicial killings (also extrajudicial executions or extra-legal killings) arise from the deliberate killing of individuals outside of any legal framework. Such acts violate the right to life, enshrined in Article 6 of the ICCPR, Article 2 of the ECHR and Article 2 of the CHRFF. The right to life is considered one of the peremptory norms of IHRL. Extrajudicial killings constitute one of the most serious violations of this norm. The seriousness of the violation is further compounded if there is an absence of efficient investigation or, even, if the acts of extrajudicial killings are officially condoned and rewarded. The Mission recalls that extrajudicial killings can be attributed to a State both when there is evidence that persons were unlawfully deprived of life by State agents or with the connivance or acquiescence of such agents, and when the State authorities failed to take reasonable measures available to them to protect the right to life of the persons.<sup>335</sup> In 1982, the UN Economic and Social Council set up the mandate of the Special Rapporteur on summary or arbitrary executions,<sup>336</sup> which has been regularly renewed since then. Acts of extrajudicial killings may also amount to war crimes or crimes against humanity.<sup>337</sup>

In spring 2022, the report issued by Moscow Mechanism II concluded that there are reasonable grounds to conclude that instances of extrajudicial killings had been committed, including against Ukrainian civilians, by the Russian authorities.<sup>338</sup> It highlighted the events that had occurred in Bucha in spring 2022, where over 400 bodies were found after the liberation of the area by the Ukrainian army. There are testimonies and evidence showing that a large number of those persons were killed after being detained by the Russian authorities, often after repeated torture and mistreatment. During its visit to Bucha, the Mission was informed that almost 50 inhabitants from the town, for many of whom there is evidence that they had been detained by the Russian authorities, still remain missing as of March 2024 and there is a suspicion that some of the almost 80 unidentified bodies might be theirs. The Mission recalls that the incident in Bucha has never been investigated by the Russian Federation. In fact, when the events in Bucha were already common knowledge, the Russian president Vladimir Putin congratulated the unit that had operated in Bucha for “*great heroism and courage*” and awarded it the title of Guards for protecting Russia’s sovereignty.<sup>339</sup>

Another notorious case of extra-judicial killing of a detained civilian is that of Reshat Ametov, a Crimean Tatar from the Simferopol region. Mr Ametov was arrested, by unidentified men in military-style jackets, during a protest on 3 March 2014 in Simferopol. According to mobile

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<sup>335</sup> ECtHR, *Mahmut Kaya v. Turkey*, Application No. 22535/93, 28 March 2000, paras 87 and 101.

<sup>336</sup> Economic and Social Council Resolution 1982/35, *Summary or arbitrary executions*, 7 May 1982

<sup>337</sup> Articles 7(1)(a) and 8(2)(a)(i) of the Rome Statute of the ICC.

<sup>338</sup> MM Report II, *op. cit.*, pp. 61-63.

<sup>339</sup> Hannah Ritchie, Masha Angelova, Rob Picheta, Putin gives honorary title to Russian brigade accused of war crimes in Bucha, *CNN*, 19 April 2022.

operators, immediately after his arrest, he was brought to the office of “Russian Unity” in Simferopol. 13 days later, his body bearing marks of violent death was found outside the town of Belogorsk. The incident has not been properly investigated by the Russian occupational authorities in Crimea. Other instances of extrajudicial killings have been documented, since 2014, by international organizations and civil society actors.<sup>340</sup> The reports suggest that such instances often occur in the context of arbitrary deprivation of liberty. The Mission concludes that extrajudicial killings of Ukrainian civilian detainees by the Russian authorities, as well as the failure to investigate properly allegations of such killings, constitute a serious violation of IHRL and IHL and may amount to a war crime and a crime against humanity.

## **2. TORTURE AND CRUEL, INHUMAN AND DEGRADING TREATMENT OR PUNISHMENT IN IHL AND IHRL**

The prohibition of torture and other cruel, inhuman or degrading treatment or punishment enshrined in Article 7 of the ICCPR,<sup>341</sup> Article 3 of the ECHR, Article 3 of the CHRFF, Common Article 3 of the GCs, Article 32 of the GCs, Article 75(2) of the API, in CAT and in ECAT. It is customary in nature and ranks among very few generally recognized peremptory norms of international law.<sup>342</sup> It is one of the few absolute rights which cannot be derogated from even in circumstances of armed conflict.<sup>343</sup> It applies to all persons at all times, including to all persons deprived of their liberty. It has a broad scope and meaning. As the HRC held, “*not only may persons deprived of their liberty not be subjected to treatment that is contrary to article 7 [of the ICCPR], /.../ neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons*”.<sup>344</sup>

Torture is defined as “*any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity*”.<sup>345</sup> As clarified by the HRC, the prohibition of torture “*relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim*”.<sup>346</sup> While neither CAT or ICCPR define “other cruel, inhuman or degrading treatment or punishment”, it is clear that torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.<sup>347</sup>

Although each case must be investigated and assessed individually, the information gathered as well as testimonies received by the Mission clearly indicate widespread and systematic use

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<sup>340</sup> Amnesty International, *Summary Killings During The Conflict In Eastern Ukraine*, 2014; OHCHR, *Report on The Human Rights Situation in Ukraine (1 February to 31 July 2022)*, 27 September 2022, para 35-39; OHCHR, *Report on the Human Rights Situation in Ukraine (1 February to 31 July 2023)*, 5 October 2023, para 50.

<sup>341</sup> HRC, *General comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)*, 10 March 1992, para 2.

<sup>342</sup> UN Doc. CAT/C/GC/2, *General Comment No. 2. Implementation of article 2 by States parties*, 24 January 2008, para 1. See also ICTY, *Prosecutor v Furundzija*, Case IT-95-17/1-T, Trial Chamber, 10 December 1998, paras 153-157.

<sup>343</sup> See Articles 1 and 2 (2) of the CAT, Articles 4(2) and 7 of the ICCPR, Articles 3 and 15(2) of the ECHR.

<sup>344</sup> HRC, *General comment No. 21: Article 10 (Humane treatment of persons deprived of their liberty)*, 10 April 1992, para 3.

<sup>345</sup> Article 1 of the CAT.

<sup>346</sup> HRC, *General comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)*, 10 March 1992, para 5.

<sup>347</sup> Manfred Nowak, Elizabeth McArthur, *The United Nations Convention against Torture. A Commentary*, Oxford University Press, 2008, p. 539. See also S. Joseph, M. Castan, *The International Covenant on Civil and Political Rights. Cases, Materials, and Commentary*. 3<sup>rd</sup> Ed., Oxford University Press, 2013, p. 234.



of torture by the Russian authorities against detained Ukrainian civilians. This view is shared by other international mandate holders, including the OHCHR<sup>348</sup> and ODIHR.<sup>349</sup> The ICIU has also recently concluded that the use of torture against detained Ukrainians, including civilians, is widespread and systematic.<sup>350</sup> The UN Special Rapporteur following her 2023 visit to Ukraine not only concluded that the practice of torture by the Russian authorities against Ukrainian detainees, including civilians, was widespread and systemic,<sup>351</sup> but even declared that “*Russia’s armed aggression is becoming synonymous with torture and other inhuman cruelty*”.<sup>352</sup>

The torture manifests not only as infliction of severe physical and mental pain and suffering at the time of detention and subsequently but is also can be brought about by most appalling conditions of detention, denial of food, water, and sanitation and by holding individuals incommunicado and in many instances subjecting them to enforced disappearances. The subsequent sections shall examine each of these phenomena in more detail.

### 3. TREATMENT AT THE MOMENT OF DETENTION

In the context of deprivation of liberty, the positive obligation of humane treatment and well as the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment commences from the moment of detention. This means that the manner in which a person is detained as well as how the person is treated during the detention must comply with the absolute prohibition of torture and other cruel, inhumane or degrading treatment or punishment.

The information gathered as well as the testimonies received by the Mission indicate excessive use of violence and severe intimidations during detentions of Ukrainian civilians.<sup>353</sup> This has manifested through detentions executed by a disproportionately large number of detaining officers, usually masked with balaclava-style face coverings, forcing entry into a dwelling or forcing a person into a vehicle on the street.<sup>354</sup> This would be commonly accompanied by various officers shouting, intimidating the person,<sup>355</sup> punching, kicking and twisting arms.<sup>356</sup>

The detained person would often be handcuffed, hooded, usually with a sack over their head or woollen hat pulled over their eyes but at times also with a plastic bag: “*The next time they arrived was on 3 October [2022]. ‘The police’ were accompanied by Russian soldiers. ... The Russians handcuffed me, put a hat over my eyes and wrapped me with duct tape. They put another bag on top. My handcuffed hands were pulled back and I was wrapped in duct tape from my elbow to shoulders. /.../ It looked like a kidnapping. I was put in a car and driven for quite a while. They brought me to some village, took me to a room that resembled a KPZ [a cell in a police station]. In this room, there were traces of blood on the walls and on the floor.*”<sup>357</sup>

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<sup>348</sup> OHCHR *Human Rights Report 2024*, *op. cit.*, para 40; OHCHR *Detention Report 2023*, *op. cit.*, para 88.

<sup>349</sup> ODIHR *Interim Report IV*, *op. cit.*, para 9; ODIHR *Interim Report III*, *op. cit.*, para 6.

<sup>350</sup> ICIU *Report 2024*, *op. cit.*, para 79; ICIU *Conference Paper*, *op. cit.*, para 534.

<sup>351</sup> UN Doc. A/HRC/55/52/Add.1, *Visit to Ukraine. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Alice Jill Edwards, 15 February 2024, para 50.

<sup>352</sup> UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Russia’s war in Ukraine synonymous with torture*, *Press Release*, 10 September 2023.

<sup>353</sup> Testimonies 21, 23, 24 and 41 (on file with the authors).

<sup>354</sup> Testimonies 21 and 41 (on file with the authors). See also ZMINA, *Torture and Ill-Treatment of Civilian Population In Ukrainian Territories That Were Under Russian Occupation*, 2023.

<sup>355</sup> Testimonies 23, 24, 41 and 42 (on file with the authors).

<sup>356</sup> Testimonies 24, 26 and 27 (on file with the authors). See also Amnesty International. *Like A Prison Convoy” Russia’s Unlawful Transfer and Abuse of Civilians in Ukraine During ‘Filtration’*, 2022, p. 21.

<sup>357</sup> Testimony of the survivor, recorded in V. Chovgan, M. Romanov, V. Melnychuk, “*Nine Circles of Hell*”: *Places of Detention in Ukraine under the Russian Occupation. March 2022 – December 2022*, Dignity, Copenhagen, 2024, pp. 24-25. See also ODIHR *Interim Report IV*, *op. cit.*, para 60; Testimonies 40 and 42 (on file with the authors).

#### 4. TREATMENT DURING THE INITIAL PHASE OF DETENTION

The information gathered and testimonies received by the Mission further indicate that the phase of detention immediately following the apprehension was consistently dominated by extremely harsh treatment of the detained Ukrainian civilians. The victims and their families testified to the Mission of endless humiliation, shouting and intimidation,<sup>358</sup> punching, kicking and beating, including beating with various objects,<sup>359</sup> administering of electric shocks,<sup>360</sup> cutting of fingers,<sup>361</sup> sexual assaults and rape<sup>362</sup> and subsequent denial of medical assistance, with the victim usually left in a cold, dark cell.<sup>363</sup> The IICIU states that “[I]n detention, torture was committed to extract information about the Ukrainian armed forces and persons cooperating with them. Perpetrators used torture methods which the Commission has described in its previous reports, including beatings using various tools and the administration of electric shocks with tasers and the so-called “tapik””.<sup>364</sup>

While the Mission gathered some information<sup>365</sup> as well as received testimonies<sup>366</sup> of detentions and torture being used to extract monetary gain, the prevailing aim of such treatment in the absolute majority of cases appears to have been to coerce confessions from the victims or coerce information from them regarding others who would be of ‘interest’ to the Russian authorities such as members of Ukrainian armed forces or to force cooperation.

As documented by the ODIHR, “torture was generally used either during interrogation sessions with the aim of extracting information or confessions, or to force victims to cooperate with the occupying authorities, or as a punishment. One male survivor from Zaporizhzhia region described his experience to ODIHR as follows, “On the first day, from 16:00 to 22:00 hours, I was interrogated. When I came back, I could not lie down because my body was full of bruises from the beating... If the man asking questions did not like my answer, the people behind me would beat me with a stick and he would repeat the question maybe five or six times until I changed my response or until he gave up and went to the next question. If he liked my answer, he would ask the next question”.<sup>367</sup>

The OHCHR also describes “widespread practices of torture or ill-treatment by Russian armed forces, law enforcement and penitentiary authorities. Torture and ill treatment appear to have been carried out to force victims to confess to providing assistance to Ukrainian armed forces, to compel them to cooperate with the occupying authorities, or to intimidate those with pro-Ukrainian views. Perpetrators used methods of torture or ill-treatment such as punching and cutting detainees, putting sharp objects under fingernails, hitting with batons and rifle butts, strangling, waterboarding, electrocution, stress positions for long periods, exposure to cold temperatures or to a hot box, deprivation of water and food, and mock executions or threats”.<sup>368</sup>

It is also evident from all sources that the treatment was inflicted by the Russian authorities or by those acting on its behalf, albeit the exact authority changed depending on the stage of detention: “around July 2022, prison guards from the Russian Federation that looked “professional” replaced Russian armed forces who initially ran this facility and members of the FSB, referred to as “investigators”, conducted the interrogations. They gave orders to the

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<sup>358</sup> Testimony 24 (on file with the authors).

<sup>359</sup> Testimonies 40 and 42 (on file with the authors).

<sup>360</sup> Testimonies 26, 27 and 41 (on file with the authors).

<sup>361</sup> Testimony 40 (on file with the authors).

<sup>362</sup> Testimony 42 (on file with the authors).

<sup>363</sup> Testimonies 26 and 27 (on file with the authors).

<sup>364</sup> IICIU Report 2024, *op. cit.*, para 76.

<sup>365</sup> ODIHR Interim Report IV, *op. cit.*, para 58; ODIHR Interim Report III, *op. cit.*, para 6; ZMINA, *Torture and Ill-Treatment of Civilian Population in Ukrainian Territories That Were Under Russian Occupation*, 2023.

<sup>366</sup> Testimonies 26 and 27 (on file with the authors).

<sup>367</sup> ODIHR Interim Report IV, *op. cit.*, para 58.

<sup>368</sup> OHCHR Detention Report 2023, *op. cit.*, para 88.

guards concerning treatment to be inflicted on the detainees, including in preparation for interrogations, which mainly meant beating and administering electric shocks. For instance, one victim overheard conversations where FSB representatives instructed the guards to “work” with a detainee, after which he understood that the guards would submit the detainee to such treatment. Another victim heard an order being given: “do what is needed to prepare them”, after which he was submitted to beatings and electric shocks. On the next day, he was brought for interrogation, and asked whether he was ready to talk.”<sup>369</sup>

Finally, it is apparent that this initial phase of detention was particularly characterized by Ukrainian civilians being held incommunicado and/or in unofficial, even make-shift detention facilities.<sup>370</sup> Although not always, in most cases, following a “confession”, civilians would be transferred to more permanent structures for detention such as SIZOs, IVS and/or prisons and penal colonies.

## 5. TREATMENT FOLLOWING THE INITIAL STAGES OF DETENTION

The phase following the initial period of detention most commonly appears to take place in official detention facilities such as temporary isolation cells (IVS), pre-trial detention facilities (SIZO) and prisons and penal colonies. However, this does not mean that the treatment to which civilians were subjected to during the initial detention phase ceases: “Five former detainees said that they were subjected to various forms of ill-treatment and torture in the facility and eight said that they heard or saw Russian armed forces torture and ill-treat others. The methods of torture included severe beatings with rifles, electric shocks with tasers, mock executions, and threats of execution of family members. Several people reported that they or others sustained severe injuries from the treatment, including lost teeth, broken ribs, legs, or fingers.”<sup>371</sup>

It is evident from the information gathered and testimonies received by the Mission that also this stage of detention is characterized by further “pursuits” of confessions and information: “Four former detainees recounted how they and other detainees were subjected to interrogations accompanied by beatings with batons, rifle butts, or a cable, electric shocks referred to as “a call to Lenin”, strangling with a cable, and shooting with rubber bullets, including near the ears of the victims. Interrogators reportedly referred to one of the victims as a “terrorist” and a “nazi”. Former detainees also witnessed the death of three persons following torture, including one employee of the Zaporizhzhia Nuclear Power Plant.”<sup>372</sup> Indeed, there are cases of torture of such a severity, that also the OHCHR has verified and documented detained Ukrainian civilians dying as a direct result of the inflicted treatment.<sup>373</sup>

The Mission also gathered information and received testimonies of harsh regime inflicted upon the Ukrainian civilians detained: “Every ten days there were camera searches /.../ You were ordered out of camera, standing against the wall, with your legs spread painfully apart and they [guards] would push them apart further. Some fell. All your things thrown around trampled and spat on and then you had minutes to put things back in order or punishment. Punishments were for everything- putting your cup on the wrong side of the table or towel hanged wrongly- punished by 3hrs standing.”<sup>374</sup> The testimonies gathered by the UN Special Rapporteur on Torture provide further insights into the regime and treatment to which the detained Ukrainian civilians have been subjected to: “The use of “humiliation ceremonies” in which captives were abused and ridiculed appeared common place. One individual described how he was required to run “the gauntlet”, an approximate seventy-meter corridor while being

<sup>369</sup> IICIU Report 2024, *op. cit.*, para 78.

<sup>370</sup> Testimonies 24, 26, 27, 40, 41 and 42 (on file with the authors). See also ZMINA, *Enforced Disappearances and Arbitrary Detentions of Active Citizens During The Full-Scale Armed Aggression By Russia Against Ukraine*, 2023.

<sup>371</sup> IICIU Conference Paper, *op. cit.*, para 538.

<sup>372</sup> *Ibidem*, para 559.

<sup>373</sup> OHCHR Human Rights Report 2024, *op. cit.*, para 40.

<sup>374</sup> Testimonies 26 and 27 (on file with the authors).

*punched and beaten by Russian personnel. Another individual recalled how he and other prisoners were set upon by dogs, while Russian officials laughed and filmed them. He described one of the dogs mauling his leg, which caused him to fall over and lose consciousness.*<sup>375</sup> Furthermore, there is clear evidence of treatment calculated about to bring humiliation and offend any national, patriotic feelings that the detained Ukrainian civilians might have. Many reported harsh punishments for speaking Ukrainian, singing Ukrainian songs as well as being forced to sing the Russian anthem and swear allegiance to the Russian flag.<sup>376</sup> One particularly disturbing testimony was from a victim who told the Mission how the Russian authorities, during an interrogation, carved “RF” for “Russia” on his buttocks with a knife.<sup>377</sup>

## **6. CONDITIONS OF DETENTION AND TREATMENT**

Further to the treatment and regime of detention to which the detained Ukrainian civilians have been and continue to be subjected to at the hands of the Russian authorities, there are also clear reports of widespread inhuman conditions of detention<sup>378</sup> which amount to cruel, inhuman or degrading treatment or punishment and in many cases to torture.

The IICIU documents extensively the inhuman conditions in a large number of detention facilities. For example: “[T]he conditions of confinement were inhuman. According to former detainees, women and men, sometimes more than 40 at a time, were held in a room of about 20 square m, making the space overcrowded. There was no light and no heating in the room, detainees were sleeping on the concrete floor, and a bucket served as toilet. Food was poor and made many of them sick.”<sup>379</sup> Similarly: “[T]he conditions of confinement at the facility were inhuman. According to former detainees, they were held in several garages of about 16 square meters in size, with up to 16 persons in one garage. There were no windows, the detainees slept on the concrete floor, and there was only a bucket for toilet, which they could empty only every three days. Food was poor. One woman was held in a storage room in one of the buildings.”<sup>380</sup>

The UN Special Rapporteur on Torture also documents congested, overcrowded conditions, very poor provision of food so much so that people had lost dangerous amount of weight due to close starvation, poor light and ventilation, constantly cold facilities, poor sanitary conditions and practically no provisions for personal hygiene.<sup>381</sup>

The information gathered and testimonies received by the Mission confirm these findings: detainees were unable to shower for weeks,<sup>382</sup> the provision of food was practically lacking<sup>383</sup> and detainees were relying on families to either bring food or in case the detainee was moved to a facility in the territory of Russia, the family members would be able to purchase food via online shops attached to the detention facilities.<sup>384</sup> Civilians being held in small cells, with poor or no provision of beds, mattresses and bedding<sup>385</sup> and at times, no out-of-cell time, no possibilities for fresh air and/or exercise, women being held together with men<sup>386</sup> and practically no toilet facilities<sup>387</sup> were reported to the Mission.

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<sup>375</sup> UN Doc. A/HRC/55/52/Add.1, *Visit to Ukraine. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Alice Jill Edwards, 15 February 2024, para 37.

<sup>376</sup> Testimonies 26 and 27 (on file with the authors).

<sup>377</sup> Testimony 28 (on file with the authors).

<sup>378</sup> IICIU *Conference Paper*, *op. cit.*, para 534.

<sup>379</sup> *Ibidem*, para 537.

<sup>380</sup> *Ibidem*, para 545.

<sup>381</sup> UN Doc. A/HRC/55/52/Add.1, *Visit to Ukraine. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Alice Jill Edwards, 15 February 2024, paras 41-42.

<sup>382</sup> Testimonies 19, 24, 26, 27, 32 and 34 (on file with the authors).

<sup>383</sup> Testimonies 26, 27, 30, 32 and 34 (on file with the authors).

<sup>384</sup> Testimonies 21, 22 and 43 (on file with the authors).

<sup>385</sup> Testimonies 19, 20, 26, 27, 30, 32 and 34 (on file with the authors).

<sup>386</sup> Testimonies 19, 26, 27, 30 and 34 (on file with the authors).

<sup>387</sup> Testimonies 19, 20, 26, 30 and 41 (on file with the authors). See also IICIU *Conference Paper*, *op. cit.*, para 602.

## 7. SEXUAL VIOLENCE

The previous sections have already noted the prevalence of sexual violence perpetrated against detained Ukrainian civilians by the Russian authorities. The IICIU reports “*numerous instances of sexual and gender-based violence committed by Russian authorities and persons supporting them in detention facilities, or otherwise during detention. This included rape and sexual violence as war crimes, which can also amount to torture. In some cases, perpetrators threatened detainees with rape and sexual violence. Victims were both women and men, with a majority of men, and both civilians and prisoners of war. Cases were documented in Donetsk, Kharkiv, Kherson, Kyiv, Luhansk regions, in Ukraine, and in the Russian Federation.*”<sup>388</sup>

The Mission gathered information and received testimonies of various forms of sexual violence, including requiring women detainees to change clothes and/or strip in front of male officers,<sup>389</sup> forced nudity, especially during filtration<sup>390</sup> but also during detention,<sup>391</sup> threats of and sexual violence, electroshocks to genitals<sup>392</sup> and nipples,<sup>393</sup> threats of rape against the detainee or family member<sup>394</sup> and rape: “*Russian armed forces repeatedly detained a civilian woman in several locations in Kherson and Mykolaiv regions. /.../ In early August 2022, /a/ group of Russian servicemen arrested her and brought her to a police detention facility in Snihurivka (Mykolaiv region). She was held incommunicado for three days, interrogated, and beaten with a plastic bottle filled with water. Then she was transferred to Nova Kakhovka (Kherson region) and detained incommunicado until mid-September 2022 in a makeshift cell in the passport office inside a former police station. She was interrogated and tortured by officers of the FSB, who subjected her to sexual violence, including by attaching wires to her nipples and administering electric shocks. They also threatened to rape her and showed her a phallic object sheathed with a condom. When released, she returned home to find that Russian soldiers had been stationed in her house and stolen her property*”.<sup>395</sup>

The Mission also received reports of gender aspects to detention as some women reported being held together with men,<sup>396</sup> having to go to toilet with male guards watching<sup>397</sup> and not being provided with sanitary hygiene products.<sup>398</sup> In this context, it must be emphasized that rape and other forms of sexual violence may also amount to torture.<sup>399</sup> Sexual and gender-based violence

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<sup>388</sup> A/HRC/55/52/Add.1, *Visit to Ukraine. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Alice Jill Edwards, 15 February 2024, para 599.

<sup>389</sup> Testimony 41 (on file with the authors).

<sup>390</sup> IICIU *Conference Paper, op. cit.*, para 569; see Kaveh Khoshnood, Nathaniel Raymond et al., *System of Filtration: Mapping Russia’s Detention Operations in Donetsk Oblast*, Humanitarians Research Lab at Yale School of Public Health: New Haven, 25 August 2022, p. 22. Testimonies 28 and 32 (on file with the authors).

<sup>391</sup> Amnesty International, *Like A Prison Convoy” Russia’s Unlawful Transfer and Abuse of Civilians in Ukraine During ‘Filtration’*, 2022, p. 23.

<sup>392</sup> IICIU *Conference Paper, op. cit.*, para 601; UN Doc. A/HRC/55/52/Add.1, *Visit to Ukraine. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Alice Jill Edwards, 15 February 2024, para 43. ODIHR *Interim Report III, op. cit.*, para 67.

<sup>393</sup> OHCHR *Detention Report 2023, op. cit.*, para 88.

<sup>393</sup> IICIU *Report 2024, op. cit.*, para 89.

<sup>394</sup> Kaveh Khoshnood, Nathaniel Raymond et al., *System of Filtration: Mapping Russia’s Detention Operations in Donetsk Oblast*, Humanitarians Research Lab at Yale School of Public Health: New Haven, 25 August 2022, p. 30.

<sup>395</sup> OHCHR *Detention Report 2023, op. cit.*, para 43; Kaveh Khoshnood, Nathaniel Raymond et al., *System of Filtration: Mapping Russia’s Detention Operations in Donetsk Oblast*, Humanitarians Research Lab at Yale School of Public Health: New Haven, 25 August 2022, p. 54.

<sup>396</sup> Testimonies 26 and 27 (on file with the authors).

<sup>397</sup> Testimony 24 (on file with the authors).

<sup>398</sup> Testimony 41 (on file with the authors).

<sup>399</sup> For example, ICTY, *Prosecutor v. Delalić et al.*, Case IT-96-21-T, Judgement, 16 November 1998, paras. 475-496; ICTR, *Prosecutor v. Akayesu*, Case ICTR-96-4T, Judgement, 2 September 1998, para. 687.

also constitutes human rights violations, including the freedom from torture or cruel, inhuman or degrading treatment,<sup>400</sup> the right to equality,<sup>401</sup> and the right to health.<sup>402</sup>

## **8. DENIAL OF CONTACTS WITH THE OUTSIDE WORLD**

Ensuring that all detained persons have a meaningful contact with the outside world is a crucial guarantee of lawfulness of detention (see Section V.B.3). It is, however, also an important safeguard against torture and other cruel or inhuman or degrading treatment and punishment as well as a right of every detainee. Such contact, usually through contact with family members, is also an important factor in ensuring that the detained person receives the legal assistance required in their case.

All the information gathered and testimonies received by the Mission indicate that denial of the contact with the outside world is a common place practice for the Ukrainian civilians detained by the Russian authorities. As already noted in Section VI.A.4, the initial detention would usually take place without notifying a third party/family member of the fact of detention as well as where the person is held. In the vast majority of cases, the family members would identify the whereabouts of their loved ones themselves through word of mouth, but even when they would arrive at the detention facility, even if the custody of their relative would be acknowledged, any contact with them would be denied.<sup>403</sup>

## **9. DENIAL OF MEDICAL ASSISTANCE**

The information gathered and testimonies received by the Mission also indicate consistent denial of medical assistance to the Ukrainian civilians detained by the Russian authorities.<sup>404</sup> Such denial of medical assistance would not only be in relation to the injuries sustained as a result of torture and other cruel, inhuman or degrading treatment or punishment which Ukraine civilians underwent in detention,<sup>405</sup> but also extend to denial of routine medical care, including medications that people may need to take regularly.<sup>406</sup> The OHCHR has described the provision of medical care as abysmal.<sup>407</sup> As already noted (Section VI.A.4) detainees have died due to the injuries suffered as a result of torture and other cruel, inhuman degrading treatment or punishment. Equally, there are also reports of detainees dying due to ignoring health problems in the penitentiary facilities as well as Crimean political prisoners being sent for forced psychiatric examinations.<sup>408</sup> It is recalled in this context that denial of medical assistance is not only a denial of the right to health,<sup>409</sup> but may also amount to a violation of prohibition of torture and other cruel, inhuman or degrading treatment or punishment<sup>410</sup> or even the right to life.<sup>411</sup>

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<sup>400</sup> Article 7 of the ICCPR and Article 1 of the CAT.

<sup>401</sup> Article 1-5 of the Convention on the Elimination of All Forms of Discrimination against Women.

<sup>402</sup> Article 12 of the International Covenant on Economic, Social and Cultural Rights; Article 12 of the Convention on the Elimination of All Forms of Discrimination against Women.

<sup>403</sup> Testimonies 21, 26 and 27 (on file with the authors).

<sup>404</sup> OHCHR *Human Rights Report 2024*, *op. cit.*, para 56; IICIU *Conference Paper*, *op. cit.*, para 834; ODIHR *Interim Report IV*, *op. cit.*, para 52; see also Kaveh Khoshnood, Nathaniel Raymond et al., *System of Filtration: Mapping Russia's Detention Operations in Donetsk Oblast*, Humanitarians Research Lab at Yale School of Public Health: New Haven, 25 August 2022, p. 12.

<sup>405</sup> OHCHR *Detention Report 2021*, *op. cit.*, paras 14-15; Testimony 40 (on file with the authors).

<sup>406</sup> Testimonies 26, 27 and 41 (on file with the authors); see also UN Doc. A/HRC/55/52/Add.1, *Visit to Ukraine. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Alice Jill Edwards, 15 February 2024, para 40.

<sup>407</sup> OHCHR, *Arbitrary Detention, Torture and Ill-Treatment in the Context of Armed Conflict in Eastern Ukraine 2014-2021*, 2 July 2021, para 4.

<sup>408</sup> CrimeaSOS, *Crimea 2023. The Second Year of Full-Scale War*, 2023, p. 33.

<sup>409</sup> Article 12 of the International Covenant on Economic, Social and Cultural Rights; Article 12 of the Convention on the Elimination of All Forms of Discrimination against Women.

<sup>410</sup> Article 7 of the ICCPR.

<sup>411</sup> Article 3 of the ICCPR.

## B. FAIR TRIAL GUARANTEES

Fair trial guarantees are, again, foreseen by both IHRL and IHL. IHRL has traditionally had a leading role in this respect, as it contains very detailed regulations (Article 14 of the ICCPR, Article 6 of the ECHR and Article 6 of the CHRFF). It is accepted that “*deviating from fundamental principles of fair trial /.../ is prohibited at all times*”,<sup>412</sup> including during an armed conflict. IHL confirms that, as it ranks “*the generally recognized principles of regular judicial procedure*”<sup>413</sup> among the fundamental guarantees applicable to all persons in the power of the other Party to the conflict (Article 75(4) of the API). As indicated above (Section V.B.5), fair trial guarantees apply primarily when Ukrainian civilians arbitrarily deprived of liberty by the Russian Federation face criminal prosecution, although their core is also relevant for the review of the lawfulness of the detention in itself.

Fair trial guarantees encompass mainly: (a) the guarantees related to the adjudicative body; (b) the guarantees related to the charges (individual criminal responsibility, *nullum crimen sine lege*), (c) the guarantees related to the proceedings (public nature, presumption of innocence), and (d) the guarantees related to the defence and legal assistance. The Mission recalls that arbitrary deprivation of liberty also occurs “*/w/when the total or partial non-observance of the international norms relating to the right to a fair trial, /.../ is of such gravity as to give the deprivation of liberty an arbitrary character*”.<sup>414</sup> It is therefore important to scrutinize whether the fair trial guarantees have been respected in the criminal and other proceedings to which Ukrainian civilians have been subjected by the Russian Federation.

The Mission collected testimonies indicating that while, on the one hand, the reviews of the lawfulness of the detention have not been carried out, criminal prosecution of Ukrainian civilians detained by the Russian Federation has been, on the other hand, very common. For instance, between 2014-2024, over 200 persons were sentenced for, or charged with, serious crimes in occupied Crimea. Crimean Tatars and members of certain religious groups (Jehovah’s witnesses and persons allegedly associated with Hizb-ut-Tahrir) have been most commonly targeted.<sup>415</sup> Detained civilians from other regions of Ukraine have, however, been subjected to criminal prosecution as well, either in the temporarily occupied territory (their home region or another region, often Crimea) or in the territory of the Russian Federation. Transfers and deportations of such detainees from one place of detention to another, again both within the temporarily occupied territory and to/in the territory of the Russian Federation (as well as, not commonly, the territory of Belarus), have accompanied such prosecutions.

### 1. GUARANTEES RELATED TO THE ADJUDICATIVE BODY

IHRL and IHL concur in requiring that any adjudicative body taking decisions in relation to the detention of civilians, whether judicial or administrative in nature, as well as any judicial body deciding in criminal matters, must “*afford the strongest possible guarantees of competence, impartiality and independence*”.<sup>416</sup> In criminal proceedings, moreover, such body must be “*an impartial and regularly constituted Court respecting the generally recognized principles of regular judicial procedure*”,<sup>417</sup> or, in other words, “*a competent, independent and impartial tribunal established by law*”.<sup>418</sup>

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<sup>412</sup> UN Doc. CCPR/C/GC/32, *General Comment No. 32 Article 14: Right to equality before courts and tribunals and to a fair trial*, 23 August 2007, para 6.

<sup>413</sup> Article 75(4) of the API.

<sup>414</sup> UN Doc. A/HRC/36/37, *Report of the Working Group on Arbitrary Detention*, 19 July 2017, para 8 (c).

<sup>415</sup> See It all started in Crimea, *Ombudsman of Ukraine*, 2024; CrimeaSOS, *Enforced Disappearances in Crimea During the Russian Occupation in 2014-2020*, 2021. See also WGAD Opinion A/HRC/WGAD/2021/56.

<sup>416</sup> UN *Body of Principles* 1988, *op. cit.*, para f) of the preamble.

<sup>417</sup> Article 75(4) of the API.

<sup>418</sup> Article 14(1) of the ICCPR. See also Article 6(1) of the ECHR and Article 6(1) of the CHRFF.

The Mission recalls that by means of Article 64 of the GCIV, inhabitants of occupied territory shall in principle remain subject to the criminal legislation enacted by the territorial sovereign and “*the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws*”.<sup>419</sup> It also recalls that by means of Article 66 of the GCIV, inhabitants of occupied territory suspected of violations of criminal legislation enacted by the Occupying Power (under Article 64(2) of the GCIV) may be “*handed over /.../ to /.../ properly constituted, non-political military courts, on condition that the said courts sit in the occupied country*”. Finally, the Mission recalls that “*individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power /.../, are prohibited, regardless of their motive*”.<sup>420</sup>

The Mission received numerous testimonies of Ukrainian civilians being transferred from the territory of Ukraine to the territory of the Russian Federation for the purposes of criminal prosecution, before regular courts of the Russian Federation. While such courts are certainly established by law, their competence to deal with offences which were allegedly committed by citizens of Ukraine in the temporarily occupied territory raises doubts. Moreover, engaging in mass forcible transfer of Ukrainian civilians from the temporarily occupied territory to the territory of the Russian Federation constitutes a clear violation of IHL and IHRL.

## 2. GUARANTEES RELATED TO THE CHARGES

Article 75(3) of the API stipulates that “*no one shall be convicted of an offence except on the basis of individual penal responsibility*”. The charges brought against the detained (or, in fact, any other) persons thus have to be individualized and rely to their personal acts and behaviour, not to any presumptive positions they may take in view of their nationality, age or gender. Moreover, individuals may only be accused or convicted of a criminal offence on account of any act or omission which constituted a criminal offence under the national or international law to which they were subject at the time when it was committed (*nullum crimen sine lege*);<sup>421</sup> and may not have a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed (*nulla poena sine lege*).<sup>422</sup> Individuals may also not be prosecuted or punished “*for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure*”<sup>423</sup> (*ne bis in idem*).

The Mission received information that a large number of Ukrainian civilians arbitrarily deprived of their liberty by the Russian Federation have been charged with or, even, already convicted on various criminal charges, most commonly the charges of international terrorism, participation in extremist association, treason, or one of the offences newly introduced into the Russian legal order with relation to the so-called “special military operation”.<sup>424</sup>

The Mission recalls that in occupied territory, the criminal legislation of the territorial sovereign shall in principle remain applicable. The full replacement of this legislation by that of the Occupying Power is incompatible with Article 64 of the GCIV. The Occupying Power may enact its own laws, if this is necessary “*to ensure the security of the Occupying Power*”.<sup>425</sup> Such laws, however, should never be misused to punish the inhabitants of occupied territories for the lack of support to the temporary occupation. And yet, in the occupied regions of Ukraine, especially those unlawfully annexed by the Russian Federation in 2014 and 2022, the Ukrainian criminal law has been fully replaced by the Russian criminal law, and, in 2014-2024 by the

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<sup>419</sup> Article 64 of the GCIV.

<sup>420</sup> Article 49(1) of the GCIV.

<sup>421</sup> Article 7 of the ECHR, Article 7 of the CHRFF, Article 75(4)(c) of the API.

<sup>422</sup> Article 7 of the ECHR, Article 7 of the CHRFF, Article 75(4)(c) of the API.

<sup>423</sup> Article 75(4)(h) of the API. See also Article 14(7) of the ICCPR.

<sup>424</sup> For an overview, see Татьяна В. Молчанова, Екатерина И. Таранина, Преступность в условиях специальной военной операции, *Криминологический журнал*, № 3, 2023, pp. 139-147.

<sup>425</sup> Article 64(2) of the GCIV.



criminal law of the so-called Donetsk and Luhansk People's Republics, modelled on the Russian criminal law. The Russian criminal law has been applied to the inhabitants of the temporarily occupied territories in full (see also Section IV.C.3), including the provisions which, by their very nature, are reserved for the citizens of the Russian Federation, such as treason<sup>426</sup> or one of the offences related to the so-called "special military operation".<sup>427</sup> Moreover, in the four regions unlawfully annexed in 2022, the Russian legislation has been applied retroactively. All these practices violate IHRL and IHL standards, including the fundamental principle *nullum crimen sine lege*.

The Mission also recalls that while the prevention and suppression of terrorist and extremist activities may constitute lawful grounds for the deprivation of liberty of persons involved in such activities, in the context of an IAC, the terms "terrorism" and "extremism" must not be used to denote any activity carried out by, or in the support of, the enemy. In fact, IHL contains its own provisions prohibiting "*measures of terrorism*"<sup>428</sup> and "*acts or threats of violence the primary purpose of which is to spread terror among the civilian population*".<sup>429</sup> These provisions take account of the fact that "*acts of violence related to a state of war almost always give rise to some degree of terror among the population and sometimes also among the armed forces*"<sup>430</sup> and they limit the war-time notion of terrorism to acts intentionally aimed at spreading fear in the civilian population.

Article 361 of the Criminal Code of the Russian Federation defines international terrorism as an act of a person "*who, outside the territory of the Russian Federation, commits an explosion, arson or other actions endangering the life, health, freedom or inviolability of citizens of the Russian Federation for the purpose of violating the peaceful coexistence of states and peoples or directed against the interests of the Russian Federation*" (para 1) or by anyone financing, encouraging, recruiting, arming or otherwise involving a person in the commission of such an act. Article 282.1 of the Criminal Code (Extremist Association) applies to a person who establishes or participates in an extremist association, i.e., an organized group of persons for the preparation or commission of crimes of an extremist nature. Extremism is defined in the Federal Law No. 114-FZ of 25 July 2002 *On Counteraction to Extremist Activity* and the definition is very broad.<sup>431</sup> The Mission recalls that the Concluding Observations of the HRC as well as the report of the Special Rapporteur on Russia which both analyse the Russian legal framework applicable to "terrorism" and "extremism", concluded that they lack the requisite degree of precision and are being used to curtail legitimate freedoms of opinion, expression and association, leading to arbitrary deprivation of liberty.<sup>432</sup>

As indicated above (see Section V.A.2.C), the testimonies received by the Mission suggest that Ukrainian civilians arbitrarily detained by the Russian Federation are commonly charged with treason, international terrorism, extremism or one of the offences linked to the so-called special

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<sup>426</sup> See Article 275 of the Criminal Code of the Russian Federation. The crime can only be committed by citizen of the Russian Federation.

<sup>427</sup> See, for instance, Article 280.3 of the Criminal Code of the Russian Federation (*Public actions aimed at discrediting the use of the Armed Forces Forces of the Russian Federation for the purpose of protection interests of the Russian Federation and its citizens given, maintaining international peace and security*).

<sup>428</sup> Article 33 of the GCIV.

<sup>429</sup> Article 51(2) of the API.

<sup>430</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, *Commentary of 1987*, Article 51 - Protection of the civilian population, para 1940.

<sup>431</sup> Федеральный закон от 25 июля 07.2002 г. № 114-ФЗ "*О противодействии экстремистской деятельности*". For a critical assessment, see Venice Commission, Opinion, No. 660/2011 *on the Federal Law on Combating Extremist Activity of the Russian Federation*, CDL-AD(2012)016, 20 June 2012.

<sup>432</sup> UN Doc. A/HRC/54/54, *Situation of human rights in the Russian Federation*, Mariana Katzarova. 18 September 2023, paras 43, 64-69; UN Doc. UN Doc. CCPR/C/RUS/CO/8, *Concluding observations on the eighth periodic report of the Russian Federation*, 1 December 2022, paras 18-19.

military operation merely based on the possession of Ukrainian symbols, negative attitude to the temporary occupation or some form of affiliation with the Ukrainian military forces (such as previous membership or having a family member in these forces). There are also testimonies suggesting that some civilians have been charged merely because of the combination of characteristics they revealed (nationality, age, sex, etc.). The Mission notes that those practices are hardly in line with the principles of individual criminal responsibility and the other guarantees related to the charges and, as such, constitute violations of IHRL and IHL.

### 3. GUARANTEES RELATED TO THE PROCEEDINGS

IHRL and IHL foresee various guarantees that apply in the course of criminal proceedings or with respect to them. Thus, as already noted (see Sections V.A.2 and V.B.1), anyone detained on a criminal charge shall be promptly informed about these charges and be promptly brought before a judge and shall be entitled to trial within a reasonable time (without undue delay).<sup>433</sup> The trial shall, in principle, be held in public and in the presence of the accused.<sup>434</sup> Presumption of innocence needs to be respected.<sup>435</sup> Accused persons must not be compelled to testify against themselves and to confess guilt.<sup>436</sup> Everyone convicted has the right to have their conviction and sentenced being reviewed by a higher tribunal according to law.<sup>437</sup> There are also special guarantees put in place to reflect the increased vulnerability if the accused is a child.<sup>438</sup>

The Mission recalls that the jurisprudence of the WGAD clearly indicates that confessions made in the absence of legal representation are not admissible as evidence in criminal proceedings.<sup>439</sup> Further, the admission into evidence of a forced confession taints the entire proceedings, regardless of whether other evidence was available to support the verdict.<sup>440</sup> Such practice therefore not only violates the absolute prohibition of torture, but also denies the presumption of innocence and the right not to be compelled to confess guilt. Deprivation of liberty subsequent to such court proceedings is consequently arbitrary.

The Mission gathered information and received numerous testimonies of Ukrainian civilian detainees being deprived of one or several (or all) of these procedural guarantees. Persons would be deprived of their liberty for weeks, months or even years before being informed about criminal charges against them and brought to a court.<sup>441</sup> The trials commonly take place behind closed doors, as can be exemplified by the trials of the two staff members of the OSCE SMM, Messrs. Petrov and Shabanov (see Section V.B.6) or defendants themselves would be excluded from the proceedings.<sup>442</sup> The detained persons are forced, often by means of torture, to confess guilt and testify against themselves. Alternatively, they are offered lower sentence (or acquittal) if they start collaborating with the Russian occupational authorities or provide false testimonies against other persons. No special guarantees for accused children or accused with special needs (older persons, persons with disabilities) are provided. The Mission concludes that the disrespect of the procedural guarantees of the fair trial amounts to a violation of IHRL and IHL,

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<sup>433</sup> Articles 9(3) and 14(3)(b) of the ICCPR.

<sup>434</sup> Article 14(3)(d) of the ICCPR and Article 75(4)(e) of the API.

<sup>435</sup> Article 14(2) of the ICCPR, Article 6(2) of the ECHR, Article 6(2) of the CHRFF and Article 75(4)(d) of the API.

<sup>436</sup> Article 14(3)(g) of the ICCPR and Article 75(4)(f) of the API.

<sup>437</sup> Article 14(5) of the ICCPR.

<sup>438</sup> Article 14(4) of the ICCPR and Articles 37 and 40 of the CRC.

<sup>439</sup> UN Doc. A/HRC/45/16, *Report of the Working Group on Arbitrary Detention*, 24 July 2020, para 53. See also WGAD Opinions Nos A/HRC/WGAD/2019/73, para. 91; A/HRC/WGAD/2019/59, para. 70; A/HRC/WGAD/2019/14, para. 71; A/HRC/WGAD/2014/14, para 22.

<sup>440</sup> See WGAD Opinions Nos A/HRC/WGAD/2019/73, para. 91; A/HRC/WGAD/2019/59, para. 70;; A/HRC/WGAD/2019/32, para. 43; A/HRC/WGAD/2018/52, para. 79(i); A/HRC/WGAD/2015/34, para. 28; A/HRC/WGAD/2012/ 43, para. 51.

<sup>441</sup> IICIU *Report 2024, op. cit.*, para 83.

<sup>442</sup> WGAD Opinion A/HRC/WGAD/2021/56.

mainly Article 14 of the ICCPR and Article 75 of the API and it renders the trial, as well any detention linked to it, arbitrary.

#### **4. GUARANTEES RELATED TO THE DEFENCE AND LEGAL ASSISTANCE**

Article 14(3)(d) recognizes the right of all persons subjected to criminal prosecution “*to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it*”. The same right is enshrined in Article 6(3)(c) of the ECHR and Article 6(3)(c) of the CHRFF. Article 72(1) of the GCIV also provides that “*accused persons shall have the right to present evidence necessary to their defence/.../. They shall have the right to be assisted by a qualified advocate or counsel of their own choice, who shall be able to visit them freely and shall enjoy the necessary facilities for preparing the defence*”. In case of serious charge, an advocate or counsel must be provided to the accused, subject to his/her consent, either by the Protecting Power or, if it is not functioning, by the Occupying Power.<sup>443</sup>

The Mission received consistent testimonies of arbitrarily detained Ukrainian civilians being denied meaningful opportunity to prepare their defence and being denied access to legal assistance from the moment of their apprehension.<sup>444</sup> Sometimes, lawyers have been appointed by the Russian Federation. Yet, most of those lawyers would commonly advise their clients against their interests, exercise pressure on them to sign a confession, and would even be present during their torture. Lawyers appointed by the Russian Federation would also require special payments from their clients or their families, promising them better treatment and a lower sentence if such payment, apparently a bribe, is provided. In those rare cases when the family has been able to hire a lawyer, that lawyer – whether of Ukrainian or Russian nationality – would face difficulties in gaining access to their client in detention, the lawyer-client confidentiality privilege would not be respected, and lawyers often would only be able to converse with their clients in court rooms.<sup>445</sup> All these are serious violations of the fair trial rights, especially of Articles 9(4), 14(3)(b) and (d) of the ICCPR and Article 72(1) of the GCIV, and they are again in and of themselves capable of rendering detention linked to criminal prosecution arbitrary.

#### **C. OTHER GUARANTEES OF TREATMENT**

Since internment of civilians takes place as an exceptional measure which forces the civilians into facilities under the authority of the enemy belligerent, it exposes detained civilians to a range of potential abuses and limitations. The detailed provisions of the GCIV are intended to assuage some of these concerns by way of absolute obligations on the Detaining Power.<sup>446</sup>

The Detaining Power shall ensure that members of the same family are lodged together in the same place of internment.<sup>447</sup> Women shall be kept in separate quarters from men, and shall be supervised by females.<sup>448</sup> Civilians shall be accommodated separately from POW and in particular from convicted prisoners.<sup>449</sup> Many instances reported to the Mission suggest that there are no facilities for families and that civilians in many instances are accommodated together with POW, and sometimes in the same overall facilities as sentenced persons.<sup>450</sup>

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<sup>443</sup> Article 72(2) of the GCIV. See also the CSCE 1991 Moscow Document, para 23.1(v).

<sup>444</sup> UN *Basic Principles* 2015, *op. cit.*, Principles 8 and 9. See also UN Doc. A/HRC/45/16, *Report of the Working Group on Arbitrary Detention*, 24 July 2020, para 51. See also WGAD Opinion A/HRC/WGAD/2021/56.

<sup>445</sup> WGAD Opinion A/HRC/WGAD/2021/56, paras 88-90.

<sup>446</sup> See notably Article 79 et seq of the GCIV.

<sup>447</sup> Article 82(2) of the GCIV.

<sup>448</sup> Article 75(5) of the GCIV.

<sup>449</sup> Article 84 of the GCIV.

<sup>450</sup> Testimonies 1, 2, 12, 16, 19, 20, 27, 28, 30, 32 and 34 (on file with the authors).

The Detaining Power is also bound to take all necessary and possible measures to ensure that civilians are accommodated in buildings or quarters which afford every possible safeguard as regards hygiene and health, and to provide food and clothing.<sup>451</sup> Yet, the Mission recorded many testimonies of civilians who had been detained, for shorter or longer periods, in facilities that in no manner comply with the obligations under GCIV, and were occasionally deprived of their footwear and proper clothing.<sup>452</sup> Further, IHL prohibits any victimization, punishment, or reduction of food rations.<sup>453</sup> However, the Mission received multiple testimonies describing how deprivation of water and food was commonplace, also on occasion as punishment or as means to extract information.<sup>454</sup>

Another obligation on the Detaining Power is to avoid setting up places of internment in areas particularly exposed to the dangers of war.<sup>455</sup> In line with the duty of a belligerent power to evacuate civilians – including protected persons pertaining to the enemy belligerent – from the zone of hostilities, the Detaining Power may be obliged to localize the places of internment away from the frontlines.<sup>456</sup> However, such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Even in such cases, the persons shall be transferred back to their homes as soon as hostilities in the area in question have ceased.<sup>457</sup> Based on multiple sources and testimonies, it is the understanding of the Mission that useful information about the geographical location of places of internment has not been provided to Ukraine in line with the GCIV.<sup>458</sup>

The Mission was also informed of a large number of Ukrainian sentenced persons, all Ukrainian civilians, transferred to the Russian Federation, mainly in 2022, who have served their sentences.<sup>459</sup> The Mission learnt that some of these prisoners had been released only to be immediately re-detained based on alleged violations of Russian migration law under Russian administrative law since they would not have their immigration status regularized, and consequently placed in detention centres for illegal migrants.<sup>460</sup> Many of them have thus found themselves with an impossible choice: to accept Russian citizenship, with the Russian authorities persistently offering such, or to remain in immigration detention without a clear prospect as to how long that would last. The Mission concludes that such re-detention based on grounds that were entirely beyond the control of the concerned persons amount to arbitrary deprivation of liberty. Moreover, the practice of *de facto* forceful imposition of citizenship on victims of war through duress by conditioning liberty from detention on the condition of swearing allegiance to the hostile power through the acceptance of citizenship, violates the norms of IHL.<sup>461</sup>

The Mission concludes that the Russian Federation on all central accounts fails to comply with the specific requirements related to the treatment of civilians interned under the GCIV.

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<sup>451</sup> Article 85 of the GCIV.

<sup>452</sup> Testimonies 19, 20, 27, 28, 30 and 34 (on file with the authors).

<sup>453</sup> Article 100 of the GCIV.

<sup>454</sup> Testimonies 1, 2, 19, 20, 27, 28 and 34 (on file with the authors).

<sup>455</sup> Article 83(1) of the GCIV.

<sup>456</sup> Article 49(2) of the GCIV.

<sup>457</sup> Article 49(2) of the GCIV.

<sup>458</sup> Articles 83 (2), 89 and 90 of the GCIV.

<sup>459</sup> OHCHR, *Report on the Human Rights Situation in Ukraine (1 February to 31 July 2023)*, 5 October 2023, para 95.

<sup>460</sup> Testimony 39 (on file with the authors); OHCHR, OHCHR, *Report on the Human Rights Situation in Ukraine (1 February to 31 July 2023)*, 5 October 2023, para 95. The OHCHR also noted difficulties in terms of prisoners' return to Ukraine from Russia after release, related to the lack of valid travel documents, as they fall under the category of people for whom the State Migration Service of Ukraine does not issue necessary certificates of return.

<sup>461</sup> Articles 50, 55 and 56 of the GCIV and articles 14(1) and 69 of the API.

## **D. CONCLUSIONS**

While arbitrary deprivation of liberty in and of itself is a serious violation of IHRL and IHL, the Section has further established that this violation has been conducive to other serious violations of these two bodies of law. The Mission regrets to conclude that Ukrainian civilians arbitrarily deprived of liberty by the Russian Federation have been, on a large scale, subjected to practices such as extrajudicial killings, torture and other cruel, inhuman or degrading treatment or punishment, sexual violence, or the denial of basic fair trial guarantees. Upon detention, civilians are exposed to regular mistreatment, involving torture and sexual violence, calculated to bring about humiliation, forced confessions or subjugate and scare people into submission to and cooperation with the occupying forces. They are denied any contact with the outside world, including their families. They have to endure harsh conditions as they are held in unofficial places of detention, subjected to violent regimes, and denied food, water and medical assistance. They are forced to sleep on cold floors, without mattresses and bedding – that is, if the overcrowded situations allow them to lie down at all. The conditions of detention are unhygienic, lack basic sanitation and there is often no proper ventilation or light.

The total denial of contacts with the outside world has resulted in Ukrainian civilians being held incommunicado and even being subjected to enforced disappearances, thus also forcing whole families into the state of victimhood, desperate for any news of their relatives, which in many cases now already exceeds two years. Regrettably, arbitrary deprivation of liberty of some Ukrainian civilians also has cost the ultimate price, that of their life, as the Mission has recorded cases of extrajudicial killings. For others, arbitrary deprivation of liberty has meant total denial of the most fundamental fair trial guarantees. Ukrainian civilians are tried under legislation which should not apply to them in the first place, in violation of the principle of legality and retroactivity. Their procedural rights and the right to defence and legal assistance are not respected. The Mission recalls that the denial of fundamental fair trial guarantees renders in and of itself any detention related to criminal prosecution arbitrary.

## **VII. RELEASE FROM THE ARBITRARY DEPRIVATION OF LIBERTY AND REMEDIES**

As shown in Section IV of this report, a very large number of Ukrainian civilians have been and continue to be arbitrarily deprived of liberty by the Russian Federation purportedly for reasons associated with the armed conflict. Their detentions are arbitrary since the substantive and procedural requirements of the IHL and IHRL are not met, as evidenced by the analysis in Sections V and VI of this report. It follows from there that the IHL and IHRL require that all such civilians would be released immediately. In addition to that, IHL also lists a number of grounds which would necessitate release of civilians from a detention, provided that such detention is lawful in the first place. While it is emphasized that these are of no direct relevance to the cases of arbitrary deprivation of liberty since that necessitates immediate release in itself, the report will examine them briefly nevertheless. Both IHRL and IHL also establish remedies that shall be provided in case of arbitrary deprivation of liberty.

### **A. GROUNDS FOR ENDING THE ARBITRARY DEPRIVATION OF LIBERTY OF CIVILIAN DETAINEES**

Both IHRL and IHL are very clear in that civilians may be deprived of liberty only for so long as the grounds for such deprivation exist and that they “*shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist*”.<sup>462</sup> IHL moreover, provides avenues, through which civilian detainees may be freed even before this condition is met, by means of release, repatriation or

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<sup>462</sup> Article 75(3) of the API.

exchange. IHL also clearly stipulates that the deprivation of liberty of civilian detainees shall end at the latest with the end of the armed conflicts, though there are certain caveats to this rule. It is once again underscored that these avenues only apply to detention that is lawful and not arbitrary. In general, thus, it is possible to distinguish three main ways in which lawful and non-arbitrary deprivation of liberty of civilian detainees may end: (a) release in the absence of grounds for deprivation of liberty, (b) release during hostilities or occupation, and (c) release after the close of hostilities. If deprivation of liberty of civilians continues in disregard of the substantive and procedural law dictated by IHL and IHRL, it becomes arbitrary.

### **1. RELEASE IN THE ABSENCE OF GROUNDS FOR DEPRIVATION OF LIBERTY**

Under IHL, an important principle governing internment of civilians is that this form of deprivation of liberty must end as soon as the individual ceases to pose a real threat. A civilian held in internment must be released when the reasons which necessitated the internment no longer exist.<sup>463</sup> In view of the rapid progression of events in armed conflict, a person deemed to be a threat may soon not pose the same threat after changes in circumstances on the ground. The right to challenge the lawfulness of detention and the obligation of periodic reviews of such lawfulness discussed above (Sections V.B.2 and V.B.3) are key guarantees to ensure that the grounds for internment were and continue to be met. The obligation on the Detaining Power to ensure a review-process in compliance with the GCIV is absolute. Absent such review-process, even an initially lawful internment would cease to be lawful, amounting to arbitrary deprivation of liberty under both IHL and IHRL. In other words, if procedural guarantees of detention are not available, the internment is not or no longer lawful and constitutes arbitrary deprivation of liberty under both IHL and IHRL. The present Mission received numerous testimonies from former internees indicating that such procedural guarantees are indeed not available. This indicates a breach of the Russian Federation's obligations under the GCIV.

The Mission previously established that some of the Ukrainian civilians detained by the Russian Federation are presumed to be POW. Under the GCIII, POW can be held in captivity for the whole duration of the conflict and need only be released at the cessation of active hostilities.<sup>464</sup> This regime differs from the regime applicable to civilians who can only be interned, when "*absolutely necessary*"<sup>465</sup> or when "*necessary for imperative reasons of security*".<sup>466</sup> As mentioned above (Section V.A.1.A), whereas internment of POW can be a rule, internment of civilians must be exceptional. It is therefore paramount to determine the correct status of a person and to avoid relying on too broad an understanding of POW status. This determination shall be carried out by a competent tribunal, as foreseen in Article 5 of the GCIII and Article 45(1) of the API. While this is not an ordinary tribunal, it must still comply with certain requirements in terms of composition, competence and procedure to enable individual status determination and avoid arbitrary decisions.<sup>467</sup> Status-review by a competent tribunal is the procedural guarantee to secure that persons who are in fact civilians are not interned as POW.

In cases where the Detaining Power is relying on a broad POW-presumption, persons who are civilians may end up in POW-detention. Not merely will this effectively deprive civilians of the review-process reserved for civilians, it will also unjustly prolong their detention until the end of hostilities. If civilians are erroneously interned under the GCIII, and the status-review mechanism is non-existent, dysfunctional or operating with too extensive categories, detained civilians are being arbitrarily deprived of their liberty.

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<sup>463</sup> Article 132(1) and 133 (1) of the GCIV, Article 75(3) of the API and Rule 128 of the ICRC Study on Customary IHL.

<sup>464</sup> Article 118(1) of the GCIV.

<sup>465</sup> Article 42(1) of the GCIV.

<sup>466</sup> Article 78(1) of the GCIV.

<sup>467</sup> ICRC, *Updated Commentary on the Third Geneva Convention (III) Relative to the Treatment of Prisoners of War*, 2021 para 1125.

The Mission has not been able to establish any evidence attesting that such a tribunal would be established and status-review would be carried out by the Russian Federation with respect to detained Ukrainian civilians. On the contrary, it has encountered numerous cases without such review being carried out and civilians being “labelled” as POW despite them objecting to such determination.<sup>468</sup> One example is the case of Ukrainian citizen Nikita Shkryabin, from Kharkiv, who ended up in POW-internment in March 2022 despite being a civilian who had not participated in hostilities. Although he indicated to the Russian authorities that he should not qualify as POW, no status review took place. His lawyer also attempted to have his status reviewed by the Military Prosecutors Office and military courts, but to no avail.<sup>469</sup>

## 2. RELEASE DURING HOSTILITIES OR OCCUPATION

Civilians deprived of their liberty in the context of an armed conflict may be released even when the grounds for their internment continue to apply. Article 132(2) of the GCIV explicitly stipulates that *“the Parties to the conflict shall /.../ endeavour during the course of hostilities, to conclude agreements for the release, the repatriation, the return to places of residence or the accommodation in a neutral country of certain classes of internees, in particular children, pregnant women and mothers with infants and young children, wounded and sick, and internees who have been detained for a long time”*.

The Mission received many testimonies and gathered reports suggesting that it is a common practice for interned civilians to pay ransom in exchange for release,<sup>470</sup> with some authorities in charge of detention facilities explicitly demanding payment for release. Such practices would not only amount to arbitrary deprivation of liberty but hostage taking, which is clearly prohibited under both IHL and of IHRL.<sup>471</sup> Hostage-taking is defined as the detention of a person, combined with threats to continue to detain the hostage, in order to compel a third party to do any act as an explicit or implicit condition for the release of the hostage.<sup>472</sup> Deprivation of liberty amounting to hostage-taking may constitute a war crime.<sup>473</sup>

Numerous reports and testimonies received by the Mission further suggest a widespread practice to release individuals on certain conditions. While IHL permits imposition of conditions when releasing civilians who have been lawfully detained,<sup>474</sup> such conditions must be within the confines of the law. Contrary to this, the Mission has received numerous accounts concerning conditions of release such as forced declarations of allegiance to the Detaining Power, promises of future collaboration, video-taping of forced confessions concerning past collaboration, and signature of confession “on blank paper” to be filled out later.<sup>475</sup> Some of these cases imply that the condition for release will incriminate the Ukrainian civilian under Ukrainian law.<sup>476</sup> While such practice may be unlawful in and of itself, the situation of duress produced by the absence of effective safeguards and review-mechanisms for the civilian Ukrainians in internment, substantially increases the gravity of such practices.

The Mission encountered a different set of conditions for release concerning Ukrainian civilians from areas under Russian temporary occupation who are forced to agree to leave these areas, in some cases amounting to deportation, despite IHL prohibiting individual or mass forcible

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<sup>468</sup> Testimonies 19 and 43 (on file with the authors).

<sup>469</sup> Memorial, *Свои среди чужих, Адвокатская Улица*, 3. 7. 2023.

<sup>470</sup> Testimonies 12, 16, 39.

<sup>471</sup> Article 34 of the GCIV and Article 75 (2) c of the API.

<sup>472</sup> Article 1 of the International Convention against the Taking of Hostages.

<sup>473</sup> Article 147 of the API and Article 8(2) (viii) of the Rome Statute of the ICC.

<sup>474</sup> Article 43(1) of the GCIV.

<sup>475</sup> Testimonies 2, 34, 39 (on file with the authors).

<sup>476</sup> Закон України № 2108-IX “Про внесення змін до деяких законодавчих актів України щодо встановлення кримінальної відповідальності за колабораційну діяльність”, 2022.

transfers or deportations of protected persons.<sup>477</sup> This prohibition is absolute in the sense that no exception is permissible apart from those provided for in Article 49 of the GCIV. In the midst of ongoing hostilities, the Occupying Power may temporarily evacuate or retain civilians for reasons of their own safety or if imperative military reasons so demand.<sup>478</sup> The Mission has received numerous testimonies to the effect that deportation is a forced condition for “voluntary” release.<sup>479</sup> Deprivation of liberty of civilians as a measure to achieve their unlawful deportation from occupied territory is clearly unlawful.

The Mission also received testimonies suggesting that in several of the exchanges between Ukraine and the Russian Federation, Ukrainian civilians detained by Russia were exchanged for Russian POW. According to the Ukrainian Coordination Headquarters for the Treatment of POW, out of the 3135 persons freed in 51 exchanges with the Russian Federation since March 2022, 147 were civilians (119 men and 28 women).<sup>480</sup> The NIB operates with the number of 149, of which 121 were men and 28 women.<sup>481</sup> In terms of age, the statistics of the NIB show that 5 women and 19 men were over 60 years, 15 women and 57 men were between 41-60 years old, while 8 women and 45 men were between 21-40 years old.<sup>482</sup> The Mission received testimonies suggesting that Ukrainian civilians were intentionally being detained for the very purpose of exchange with Russian POW. Such practice would violate IHRL and IHL and would amount to arbitrary deprivation of liberty and to hostage taking.

### **3. RELEASE AFTER THE CLOSE OF HOSTILITIES**

Finally, internment of civilians who are lawfully deprived of liberty for reasons related to the conflict shall cease “*as soon as possible*” after the close of hostilities.<sup>483</sup> If civilians are deprived of liberty beyond the general close of military operations or termination of the occupation, they continue to benefit from the relevant provisions of the GCs until their final release, repatriation or re-establishment.<sup>484</sup> Unjustifiable delay in the repatriation of civilians is a war crime.<sup>485</sup> Upon the close of hostilities or occupation, the Parties to the conflict and all other States Parties to the GCs shall endeavour to ensure the return of all internees to their last place of residence, or to facilitate their repatriation.<sup>486</sup> Since the armed conflict between the Russian Federation and Ukraine is still ongoing at the time of the submission of this report, this regulation does not apply at the moment. Moreover, it is once again stressed that this would only apply in cases of lawful deprivation of liberty. However, as noted above, the Mission has received reports of thousands of Ukrainian civilians still being deprived of liberty by the Russian authorities arbitrarily, which is the very heart of the mandate of this Mission.

### **B. REMEDIES FOR ARBITRARY DEPRIVATION OF LIBERTY**

As the Permanent Court of International Justice stated in the *Chorzów Factory* case: “*It is a principle of international law that the breach of an engagement involves an obligation to make a reparation in an adequate form.*”<sup>487</sup> Consequently, since any deprivation of liberty is only permissible under IHRL and IHL under clearly stipulated, permissible grounds and executed with the strict adherence to the procedural guarantees indicated, if this is not the case, the deprivation of liberty violates IHRL and IHL and is arbitrary. In such instances those who have

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<sup>477</sup> Article 49(6) of the GCIV, Rule 130 of the ICRC Study on Customary IHL. See also Nuremberg Military Tribunals, *Case of the United States of America v Erhard Milch*, 17 April 1947.

<sup>478</sup> Article 49(2) and (5) of the GCIV.

<sup>479</sup> Testimonies 20, 27, 28, 39.

<sup>480</sup> Coordination Headquarters for the Treatment of POW, meeting Kyiv, 22 March 2024.

<sup>481</sup> National Information Bureau, meeting, Kyiv, 21 March 2024.

<sup>482</sup> Statistics shared by the National Information Bureau, meeting, Kyiv, 21 March 2024.

<sup>483</sup> Article 118(1) of the GCIII.

<sup>484</sup> Article 3(b) and 75(6) of the API.

<sup>485</sup> Article 84(4)(b) of the API.

<sup>486</sup> Article 134 of the GCIV.

<sup>487</sup> *Factory at Chorzów*, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 21.



been thus detained, have the enforceable right to compensation (and to remedy more broadly). This right is expressly provided for in Article 9(5) of the ICCPR, Article 5(5) of the ECHR and Article 5(4) of the CHRFF. This is a specific obligation in relation to those who have been subjected to the violation of the absolute prohibition of arbitrary deprivation of liberty, and can be seen as stemming from the general right to remedy for violations of human rights as enshrined in Article 8 of the UDHR, Article 2(3) of the ICCPR, Article 13 of the ECHR and Article 19 of the CHRFF. That “*a State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused*”<sup>488</sup> is also considered a customary rule under IHL. The two bodies of law partly differ here in that whereas IHRL establishes the individual right to compensation, IHL traditionally focuses on reparation provided at the inter-state level. In the recent decades, however, the individual right to reparation has started to be discussed under IHL as well.

### 1. FORMS OF REMEDIES FOR ARBITRARY DEPRIVATION OF LIBERTY

The WGAD in its Deliberation No. 10 on reparations for arbitrary deprivation of liberty<sup>489</sup> has confirmed that all victims of arbitrary deprivation of liberty are entitled to an enforceable right before the competent national authority to prompt and adequate reparations,<sup>490</sup> requiring that such reparations are to be proportional to the gravity of the violations and the harm suffered.<sup>491</sup> The WGAD sets out five forms of reparations:

- i) **Restitution**, which is to restore the victim to the original situation before the violations of his/her rights.<sup>492</sup> It is the very basis of the right to remedy and in the case of arbitrary deprivation of liberty this first and foremost means that the victim of arbitrary deprivation of liberty must be released immediately and unconditionally to ensure that the grave human rights violation that they have been subjected to, i.e. the arbitrary deprivation of liberty, ceases immediately. In those cases when a victim has been sentenced by a court, the requirement of unconditional release also means that their criminal convictions must be quashed, and their criminal records expunged.<sup>493</sup> It further encompasses the obligation of full, independent and impartial investigation of circumstances of each case of arbitrary deprivation of liberty.<sup>494</sup>
- ii) **Rehabilitation**, which should include medical, psychological and other care, as well as the legal and social services that the victim of arbitrary deprivation of liberty may require,<sup>495</sup> which all should be free of charge, based on free consent of the victim and take into account the circumstances and needs of the victim. Treatment on an individual, family or collective basis should also be provided.

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<sup>488</sup> Rule 150 of the ICRC Study on Customary IHL. See also the CSCE 1991 Moscow Document, para 23.1(xi).

<sup>489</sup> UN Doc. A/HRC/45/16, *Deliberation No. 10 on reparations for arbitrary deprivation of liberty*, 24 July 2020, Annex I.

<sup>490</sup> *Ibidem*, para 7; See also UN *Basic Principles* 2015, *op. cit.*, para. 92; UN Doc. A/RES/60/147, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, 21 March 2006, para. 17.

<sup>491</sup> UN Doc. A/HRC/45/16, *Deliberation No. 10 on reparations for arbitrary deprivation of liberty*, 24 July 2020, Annex I, para 7; See also UN Doc. A/RES/60/147, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, 21 March 2006, para. 15.

<sup>492</sup> UN Doc. A/HRC/45/16, *Deliberation No. 10 on reparations for arbitrary deprivation of liberty*, 24 July 2020, para 10; see also UN Doc. A/RES/60/147 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, 21 March 2006, para. 19.

<sup>493</sup> See WGAD Opinions Nos. A/HRC/WGAD/2021/15, para 98; A/HRC/WGAD/2020/41, para 85; A/HRC/WGAD/2020/10, para 84; A/HRC/WGAD/2018/84, para 77; A/HRC/WGAD/2018/40, para 53.

<sup>494</sup> See WGAD Opinions A/HRC/WGAD/2020/83, para 90; A/HRC/WGAD/2020/10, para 85; A/HRC/WGAD/2021/48, para 89; A/HRC/WGAD/2022/26, para 100.

<sup>495</sup> UN Doc. A/HRC/45/16, *Deliberation No. 10 on reparations for arbitrary deprivation of liberty*, 24 July 2020, Annex I, para 11.

- iii) **Satisfaction**, which is aimed at repairing non-quantifiable, intangible damage suffered by the victim<sup>496</sup> which could include such measures as public apologies, the verifications of facts and public and complete disclosure of the truth. This is specifically and intrinsically linked to the right to truth since “*victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations*”.<sup>497</sup>
- iv) **Compensation**, which must be granted in an appropriate and proportional manner, considering the gravity of the violation and the circumstances of the case.<sup>498</sup> This measure is aimed at addressing the physical and psychological damage experienced by the victim of arbitrary deprivation of liberty<sup>499</sup> and also be aimed at addressing any non-material harm or moral damage caused, which includes damage caused to the victim, such as loss of reputation, stigma, or broken family or community relations.<sup>500</sup>
- v) **Guarantees of non-repetition**,<sup>501</sup> which are aimed at preventing the recurrence of a situation that gave rise to violations of human rights and could include such measures as repealing or amending laws or regulations that are found to be in breach of international obligations,<sup>502</sup> ensuring ongoing training of public law enforcement officers and, inter alia, members of the armed forces and security forces, medical personnel, public defenders, guards and custody officers and ensuring independent oversight over all places of deprivation of liberty by international organizations such as the ICRC and independent national organizations such as National Human Rights Institutions and independent civil society organizations.

## 2. REMEDIES FOR ARBITRARY DEPRIVATION OF LIBERTY OF UKRAINIAN CIVILIANS

In the context of the present Mandate, the Mission has not established any instances of any form of reparations exercised by the Russian Federation in relation to the arbitrarily detained Ukrainian civilians. The Mission has received testimonies of some Ukrainian civilians having been able to obtain release through judicial proceedings in Russia with the assistance of Russian legal professionals. While there are a couple of hundreds of such cases, the Mission welcomes these releases albeit it notes that these do not fulfil the requirements of full remedies and reparations owed by the Russian Federation under IHRL.

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<sup>496</sup> *Ibidem*, paras 12-13.

<sup>497</sup> UN Doc. A/RES/60/147 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, 21 March 2006, para 24. See also OHCHR *Detention Report 2023*, *op. cit.*, para 33; UN Doc. CCPR/C/GC/36, *General comment No. 36. Article 6: right to life*, 3 September 2019, para 58.

<sup>498</sup> UN Doc. A/HRC/45/16, *Deliberation No. 10 on reparations for arbitrary deprivation of liberty*, 24 July 2020, Annex I, paras 14-15.

<sup>499</sup> UN Doc. A/RES/60/147 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, 21 March 2006, para 20.

<sup>500</sup> UN Doc. A/HRC/45/16, *Deliberation No. 10 on reparations for arbitrary deprivation of liberty*, 24 July 2020, Annex I, paras 15.

<sup>501</sup> UN Doc. A/HRC/45/16, *Deliberation No. 10 on reparations for arbitrary deprivation of liberty*, 24 July 2020, Annex I, paras 16-17; see also UN Doc. CCPR/C/51/D/458/1991, *Albert Womah Mukong v. Cameroon*, UN Doc. CCPR/C/78/D/856/1999, *Alex Soteli Chambala v. Zambia*, UN Doc. CCPR/C/121/D/2764/2016, *Achille Benoit Zogo Andela v. Cameroon*, UN Doc. CCPR/C/39/D/305/1988, *Hugo van Alphen v. Netherlands*, UN Doc. CCPR/C/78/D/981/2001, *Teofila Casafranca de Gomez v. Peru*, UN Doc. CCPR/C/103/D/2024/2011, *Arshidin Israi v. Kazakhstan*, UN Doc. CCPR/C/108/D/2094/2011, *F.K.A.G. et al. V. Australia*, UN Doc. CCPR/C/120/D/2147/2012 *Yan Melnikov v. Belarus*.

<sup>502</sup> See for example WGAD opinions A/HRC/WGAD/2019/77, para 55; A/HRC/WGAD/2019/15, para 58.

Equally, the Mission has received testimonies of some Ukrainian civilians being released as a part of exchanges of POW between Ukraine and Russia. However, in the view of the Mission, while the ultimate release of the arbitrarily detained Ukrainian civilians is undeniably welcome, the practice does not satisfy the obligations of Russia under IHL and IHRL since these sets of obligations require unconditional release of these victims.

The Mission has not been able to establish any other forms of remedies offered and/or implemented by the Russian Federation in relation to the Ukrainian civilians arbitrarily deprived of their liberty by the Russian authorities.

However, some steps have been taken by other States and the international and regional organizations aimed at compelling the Russian Federation to do so.<sup>503</sup> This includes the UN General Assembly resolution A/RES/ES-11/5 of 14 November 2022 *Furtherance of remedy and reparation for aggression against Ukraine*, which “/recognizes that the Russian Federation must be held to account for any violations of international law in or against Ukraine, including its aggression in violation of the Charter of the United Nations, as well as any violations of international humanitarian law and international human rights law, and that it must bear the legal consequences of all of its internationally wrongful acts, including making reparation for the injury, including any damage, caused by such acts”.<sup>504</sup> The Resolution further recommends “the creation by Member States, in cooperation with Ukraine, of an international register of damage to serve as a record, in documentary form, of evidence and claims information on damage, loss or injury to all natural and legal persons concerned, as well as the State of Ukraine, caused by internationally wrongful acts of the Russian Federation in or against Ukraine, as well as to promote and coordinate evidence-gathering”.<sup>505</sup>

Subsequent to this, at the Council of Europe level, the Committee of Ministers of the Council of Europe, adopted a Resolution, establishing the Register of Damages mentioned in the United Nations General Assembly Resolution,<sup>506</sup> creating the administrative apparatus of the Registry. According to the resolution, the Register is to serve as a record and “shall receive and process information on claims of damage and evidence; categorise, classify and organise such claims, assess and determine the eligibility of claims for inclusion in the Register and record the eligible claims for the purposes of their future examination and adjudication. The Register shall not have any adjudication functions with respect to such claims, including determination of responsibility and allocation of any payments or compensation”.<sup>507</sup> On 16 November 2023 the Conference of Participants of the Register of Damage for Ukraine elected its Board<sup>508</sup> and the Board held its inaugural meeting on 14 December 2023.<sup>509</sup> Thus, the exact modalities of the Register’s operation remain to be seen and, above all, great difficulty is how to enforce these obligations on an unwilling State remains.

### C. CONCLUSIONS

The Mission has reasonable grounds to believe that thousands of Ukrainian civilians have been deprived of their liberty by the Russian authorities. Since these deprivations of liberty either do not meet the lawful grounds for detention under IHL and IHRL, or do not satisfy the procedural guarantees imposed by the same two bodies of law, or both, they are arbitrary, as already clearly

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<sup>503</sup> IICIU Conference Paper, *op. cit.*, paras 951-989.

<sup>504</sup> UN Doc. A/RES/ES-11/5, *Furtherance of remedy and reparation for aggression against Ukraine*, 14 November 2022, para 2.

<sup>505</sup> *Ibidem*, para 4.

<sup>506</sup> CM/Res(2023)3, *Resolution of the Committee of Ministers establishing the Enlarged Partial Agreement on the Register of Damage Caused by the Aggression of the Russian Federation Against Ukraine*, 12 May 2023.

<sup>507</sup> *Ibidem*, Article 1.

<sup>508</sup> Council of Europe, The Conference of Participants of the Register of Damage for Ukraine elects its Board, *Press Release*, 16 November 2023.

<sup>509</sup> Council of Europe, The Board of the Register of Damage for Ukraine holds its inaugural meeting, *Press Release*, 14 December 2023.

established in Sections V of the present report. Therefore, these Ukrainian civilians are victims of arbitrary deprivation of liberty under both IHL and IHRL. They are, consequently, entitled to immediate and unconditional release. The grounds for release that IHL establishes with respect to lawful instances of deprivation of liberty, such as voluntary release during hostilities or occupation or release after the close of hostilities, are of mere informative value for the report. The Mission notes that it has only been able to establish a very limited number of cases, when Ukrainian civilians arbitrarily deprived of their liberty have been released, usually without any explanation, by the Russian authorities.

IHL and IHRL set out a clear right to remedy to all those who have been arbitrarily deprived of their liberty. This right includes the right of the victim and their relatives to an effective remedy, including cessation of violations, restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. The Mission was unable to establish any trace of evidence of even an attempt on behalf of the Russian Federation to cease the practice of arbitrary deprivation of liberty of Ukrainian civilians. In fact, the only formalized releases that have been brought about with the involvement of Russian Federation are those when it had wrongfully and illegally classified Ukrainian civilians as POW and released them as part of POW exchanges with Ukraine. This is not only a blatant violation of the GCIV but also highly suggestive of the Russian Federation's entirely unlawful motive for detaining the Ukrainian civilians in the first place. Equally, there has been no provision of any other remedies such as full restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. In fact, the failure of the Russian Federation to reply to the request for cooperation with the present Mission, let alone actual cooperation, is indicative of its attitude towards the arbitrary deprivation of Ukrainian civilians by its own agencies.

## **VIII. ACCOUNTABILITY FOR VIOLATIONS OF IHL AND IHRL AND FOR POTENTIAL WAR CRIMES AND CRIMES AGAINST HUMANITY**

In the previous sections the report has clearly established that many instances of the detention of Ukrainian civilians by the Russian Federation amount to arbitrary deprivation of liberty, involving various violations of IHL and IHRL. It has also found credible evidence to argue that some of these violations could, if responsible individuals are identified, amount to war crimes and crimes against humanity. In this section, in line with the mandate of “*collecting, consolidating, and analyzing /.../ information with a view to /.../ provide the information to relevant accountability mechanisms, as well as national, regional, or international courts or tribunals that have, or may in future have, jurisdiction*”, the Mission identifies the obligations arising for States in the three main areas of international law (IHL, IHRL, ICL) relevant for this report. It also provides an overview of accountability mechanisms available in these three areas.

### **A. ACCOUNTABILITY UNDER IHL**

By means of specific treaty provisions and through customary rules, IHL imposes on States a series of obligations which apply not only to the Parties to the conflict but largely also to other States. However currently there are no specific IHL accountability mechanisms akin to those established under IHRL and ICL.

#### **1. OBLIGATIONS OF STATES UNDER IHL**

By virtue of Common Article 1 of the four GCs, all States have the obligation “*to respect and to ensure respect for the present Convention in all circumstances*”. This obligation is not limited to the Parties to the conflict but in its latter part it also extends to all Parties to the GCs, comprising all States in the world. The obligation *to respect* entails the obligation for the State to do everything that can realistically be done in the given circumstances to ensure that the rules

of IHL are respected by its armed forces, its other organs as well as other persons or groups acting on its instructions, or under its direction or control. The obligation *to ensure respect* means the obligation of States, including those not Parties to the conflict, to take all possible measures, given the circumstances, to ensure that the rules of IHL are respected in the conflict. The obligation to respect and to ensure respect is considered a rule of customary law.<sup>510</sup>

As noted in the ICRC Study on Customary International Humanitarian Law, “*the obligation of States to respect international humanitarian law is part of their general obligation to respect international law*”.<sup>511</sup> The violations of the obligation to respect IHL, i.e., the breach of certain rules of IHL attributable to a State triggers the responsibility of this State under the rules on the State responsibility.<sup>512</sup> It is important to recall that States are responsible for acts committed by their organs even if when carrying out such acts, the organs exceed their authority or contravene instructions.<sup>513</sup> It is also important to once again recall that States are responsible for acts carried out by a person or group of persons who are “*in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct*”.<sup>514</sup>

The State responsible for violations of IHL has new, additional obligations. First, it has the continued duty to perform the obligation breached.<sup>515</sup> Second, it is obliged to cease the violation and to offer appropriate assurances and guarantees of non-repetition.<sup>516</sup> Third, it must provide full reparation – in the form of restitution, compensation or satisfaction – for the injury caused by the internationally wrongful act.<sup>517</sup>

In the present case, the State responsible for the violations of IHL committed by, and in the course of, arbitrary deprivation of liberty of Ukrainians citizens, i.e., the Russian Federation, has the obligations to:

- i) respect all relevant rules of IHL applicable to Ukrainians arbitrarily deprived of liberty by the Russian Federation;
- ii) immediately terminate all instances of arbitrary deprivation of liberty of Ukrainian civilians, immediately stop violating the rules of IHL applicable during the detention, and offer assurances and guarantees of non-repetition of such acts; and
- iii) provide reparation, involving *inter alia* facilitating and assisting all arbitrarily detained Ukrainian civilians with release, repatriation, return to their place of residence or accommodation in third countries, in line with its obligations under IHL, ensuring immediate access to independent bodies, especially the ICRC, to all places of deprivation of liberty, and providing financial compensation and adequate satisfaction (apology, criminal prosecution of individuals responsible for the violations of IHL) to the Ukrainian civilians who have been arbitrarily detained as well as to Ukraine.

States parties to the GCs but not parties to the armed conflict are obliged to “*exert their influence, to the degree possible, to stop violations of international humanitarian law*”.<sup>518</sup> This implies a negative obligation not to encourage, aid or assist the commission of violations of IHL and a positive obligation to take measures, either collectively or individually, to prevent or end such violations.

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<sup>510</sup> Rules 139 and 144 of the ICRC Study on Customary IHL.

<sup>511</sup> Jean-Marie Henckaerts, Louise Doswald-Beck (Eds.), *Customary International Humanitarian Law, Volume I: Rules*, Cambridge University Press, Cambridge, 2005, p. 495.

<sup>512</sup> *Draft articles on Responsibility of States for internationally wrongful acts*, in UN Doc. A/56/10, *Report of the International Law Commission on the work of its Fifty-third session*, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10, November 2001, pp. 43-59.

<sup>513</sup> *Ibidem*, Article 7.

<sup>514</sup> *Ibidem*, Article 8.

<sup>515</sup> *Ibidem*, Article 29.

<sup>516</sup> *Ibidem*, Article 30.

<sup>517</sup> *Ibidem*, Articles 31 and 34-37.

<sup>518</sup> Rule 144 of the ICRC Study on Customary IHL.

## 2. ACCOUNTABILITY MECHANISMS UNDER IHL

IHL does not establish any specific accountability mechanisms akin to the procedures before the judicial and quasi-judicial bodies under IHRL or the ICC under ICL. Yet, there are certain specific institutions and mechanisms mandated to provide accountability avenues. Such institutions and mechanisms are more rudimentary and less institutionalized than in IHRL and ICL. While this in no way affects the absolute and binding nature of the obligations under IHL, it does offer certain flexibility in terms of mechanisms, allowing for accommodation to the very diverse situations to which IHL applies.

One mechanism foreseen by IHL that could play a useful role in the area considered in the present report, but which also thus far has not been put in place, is that of *Protecting Powers*. Protecting Powers are third States designated by one party to the conflict and accepted by the other party to the conflict and tasked to safeguard the interests of the former party and of its citizens.<sup>519</sup> Protecting Powers ensure indirect communication between the parties to a conflict when the diplomatic relations between them are severed. Several of the provisions of IHL applicable to civilians and detained civilians, including Articles 43, 71-76 and 83 of the GCIV and Article 33 of the API, explicitly mention Protecting Powers and attribute some tasks to them. Yet, the institute of Protecting Power has been in principle out of use since the times of the World War II and it has not been employed in the context of the current conflict either. However, the massive scale of the conflict in Ukraine as well as the systematic and widespread nature of violations of IHL, including numerous instances of arbitrary deprivation of liberty of Ukrainian civilians, give reason to consider the establishment of Protecting Powers in order to strengthen the mechanisms to ensure compliance with the rules and obligations in place to protect victims of war, including civilian detainees.

Article 5(3) of the API clearly stipulates that in the absence of a designation or acceptance of Protecting Powers, the *International Committee of the Red Cross (ICRC)* shall be recognized as their substitute. It is indeed a standard practice in the armed conflicts of the past decades that the ICRC assumes tasks entrusted to Protecting Powers. Moreover, the ICRC also exercises a host of other activities under the mandate conferred on it by the four GCs and the API. The ICRC operates under the principle of confidentiality and it is usually not possible to learn the full extent of its activities in a particular conflict, or with respect to a particular issue. The ICRC has, however, issued several statements confirming that it has been dealing with the issue under consideration by this Mission. In Spring 2022, it set up a special institution, the Central Tracing Agency Bureau (CTAB) for the humanitarian crisis in Ukraine. The CTAB “collects, centralizes, and transmits information about the fate and whereabouts of people, both military and civilians deprived of their liberty, who have fallen in the hands of the enemy”.<sup>520</sup>

Another institution established by IHL, more specifically by Article 90 of the API, is the *International Fact-Finding Commission (IFFC)*. The IFFC is a permanent body composed of 15 experts which may investigate allegations of grave breaches and serious violations of IHL committed in international armed conflicts. It is notorious that despite being set up already in 1991, the IFFC has so far never been used in practice. Due to the withdrawal from the IFFC mechanism by the Russian Federation in 2019, it is not likely that the current conflict would mark a shift in this respect. Instead, the fact-finding tasks related to the conflict in Ukraine have been entrusted to *ad hoc* bodies, namely the four missions of experts established in 2022-2024 under the OSCE Moscow Mechanism and the *Independent International Commission of Inquiry on Ukraine*, set up in March 2022 by the UN Human Rights Council.

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<sup>519</sup> See Article 11 of the GCIV and Article 5 of the API.

<sup>520</sup> ICRC’s Central Tracing Agency Bureau for the International Armed Conflict in Ukraine: Providing answers to families, ICRC, 2 June 2022, available at <https://www.icrc.org/en/document/central-tracing-agency-missing-persons-ukraine>

Furthermore, IHL also provides for an obligation on each High Contracting Party to search for, prosecute or extradite persons alleged to have committed, or to have ordered to be committed, war crimes, including grave breaches of the GCs, and to bring such persons, regardless of their nationality, before its own courts. The State may also hand such persons over for trial to another State Party, provided that the latter has established a *prima facie* case.<sup>521</sup> The obligation to search for and submit an alleged offender to prosecution is not conditional on any jurisdictional consideration.

## **B. ACCOUNTABILITY UNDER IHRL**

IHRL also imposes various obligations on States, primarily the State which has a jurisdiction over a particular individual(s). In case of violations of IHRL, the rules on the responsibility of the State apply as well. Yet, they are modified – mostly for the benefit of individual victims of IHRL violations – through specific human rights treaties. Moreover, various political as well as quasi-judicial and, even, judicial bodies have been set up at the universal and regional level to monitor the compliance with the obligations stemming from IHRL and to consider individual or inter-State complaints alleging violations of IHRL.

### **1. OBLIGATIONS OF STATES UNDER IHRL**

Under IHRL, States have both negative and positive obligations. The negative obligations consist of the obligation to respect human rights, i.e., to refrain from interfering with such rights in a way that could not be justified under the relevant human rights instrument. The positive obligations comprise the obligation to protect human rights, i.e., to ensure that the enjoyment of human rights by an individual is not compromised by an action of or failure to act by other individuals, and the obligation to fulfil human rights, i.e., to take positive actions to ensure the enjoyment of such rights by individuals. The positive obligations also include the obligations to duly investigate any alleged violations of IHRL. The State has those obligations with respect to “*all individuals within its territory and subject to its jurisdiction*”.<sup>522</sup> As explained in Section III.C.3, jurisdiction is not limited to the territory of the State but may extend beyond it, either due to the exercise of an effective control over some parts of the territories of another State or due to the specific control over concrete individuals.

Violations of IHRL give rise to the responsibility of the State to which such violations are attributed. Again, the State is responsible for the acts or omissions of its own organs as well as of those who act on its behalf or under its effective control. The State may also be responsible for acts carried out by individuals and groups that are not under its effective control, if it fails to display adequate due diligence to prevent such acts (under the obligation to protect). The responsible State again remains bound by the continued duty to perform the obligation breached. It also has the obligation to cease the violation, offer appropriate assurances and guarantees of non-repetition and provide adequate reparations which can and must take various forms. The content of these obligations, including the form and beneficiary of reparation, are specified in various human rights treaties. Those treaties typically stipulate that in addition to other States Parties, individual victims of violations are also entitled to bring claims to relevant international or national bodies and to receive reparations.

In IHRL there is no provision similar to the Common Article 1 of the GCs imposing the obligation to “ensure respect” for IHRL on third States. Yet, human rights are of *erga omnes* (or, in case of treaty provisions, *erga omnes partes*) nature. As such, they are “*the concern of all States. /.../ all States can be held to have a legal interest in their protection*”.<sup>523</sup> The most fundamental human rights, such as the right to life or the prohibition of torture, are moreover considered to belong to the imperative norms of international law (*jus cogens*). Serious breaches

<sup>521</sup> Article 146 of the GCIV and Articles 85(1) and (3) and Article 88 (2) of the API.

<sup>522</sup> Article 2(1) of the ICCPR.

<sup>523</sup> ICJ, *Barcelona Traction, Light, and Power Company, Ltd (Belgium v Spain)*, Judgment, ICJ Rep 1970, p. 3, para 33.

of *jus cogens* entail the obligations of all States: a) not to recognize as lawful a situation created by such a serious breach, nor render aid or assistance in maintaining this situation; b) to cooperate to end through lawful means any such serious breaches.

## 2. ACCOUNTABILITY MECHANISMS UNDER IHRL

IHRL establishes various political as well as quasi-judicial and, even, judicial bodies to monitor the compliance by States with the obligations stemming from IHRL and/or to consider individual or inter-State complaints alleging violations of IHRL. Such bodies exist both at the universal and at the regional level.

At the *universal* level, the UN Human Rights Council (HRC), composed by the representatives of 47 States,<sup>524</sup> may address any human rights violations and make recommendations on them. The HRC has already taken several steps in response to the act of aggression by the Russian Federation against Ukraine and the allegations of serious breaches of IHRL (and of IHL) committed in the ensuing conflict.

First, in March 2022, it established the Independent International Commission of Inquiry on Ukraine (*IICIU*) and having received its report in March 2023, it decided to extend its mandate in further year on 4 April 2023.<sup>525</sup> To date, the IICIU has delivered four reports and a conference paper which all together represent an extensive documentation of violations of IHRL and IHL in the context of conflict in Ukraine.

Secondly, on 12 May 2022, the HRC held a special session on the deterioration of human rights situation in Ukraine stemming from the Russian aggression. The resolution adopted during this session demanded all parties to the conflict “*to refrain from any human rights violations and abuses in Ukraine*”.<sup>526</sup> Since then, in its subsequent regular sessions, the HRC has adopted two Resolutions on the situation of human rights in Ukraine stemming from the Russian aggression as well as on the human rights situation in Russia, which, *inter alia*, express strong condemnation of enforced disappearances,<sup>527</sup> call for the complete exchange of prisoners of war, the release of all unlawfully detained persons and the return of all internees and of civilians forcibly transferred and deported, including children,<sup>528</sup> and call for the immediate and unconditional release of all those arbitrarily detained or forcibly disappeared.<sup>529</sup>

Thirdly, in October 2022, the HRC established the mandate of the *Special Rapporteur* on the situation of human rights in the Russian Federation<sup>530</sup> and, in April 2023, appointed Ms. Mariana Katarova (Bulgaria) as the first mandate holder. The mandate of the Special Rapporteur was extended again in October 2023, with the scope of the mandate enhanced with the inclusion of the issue of persons deported by Russia, especially children.<sup>531</sup>

The HRC has also established a system of Special Procedures, which is currently comprised of 46 thematic and 14 country-specific mandates – Special Rapporteurs or Working Groups. The Special Procedures enjoy a universal coverage in that, by virtue of their mandates being established by the HRC and therefore being anchored in the UN Charter, they can engage with any State irrespective of its treaty obligations. This is a significant advantage if compared with the UN treaty bodies as the latter can only engage with States parties to their respective treaties.

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<sup>524</sup> The membership of the Russian Federation in the HRC was suspended by the UN General Assembly in April 2022, resulting in the withdrawal of the Russian Federation from the HRC. See UN Doc. A/RES/ES-11/3, *Suspension of the rights of membership of the Russian Federation in the Human Rights Council*, 8 April 2022.

<sup>525</sup> UN Doc. A/HRC/51/L.41/Rev.1, *op. cit.*, para 18.

<sup>526</sup> UN Doc. A/HRC/RES/S-34/1, *The deteriorating human rights situation in Ukraine stemming from the Russian aggression*, 16 May 2022, para 1.

<sup>527</sup> UN Doc. A/HRC/RES/52/32, *Situation of human rights in Ukraine stemming from the Russian aggression*, 11 April 2023.

<sup>528</sup> *Ibidem*, paras 5 and 8.

<sup>529</sup> UN Doc. A/HRC/RES/54/23, *Situation of human rights in the Russian Federation*, 12 October 2023, para 2.

<sup>530</sup> *Ibidem*.

<sup>531</sup> *Ibidem*, paras 2 and 4.



The Special Procedures do not have strict enforcement powers; however, they can raise issues of concern with the State in question through the urgent communications procedure. Some of them, such as the Working Group on Arbitrary Detention (**WGAD**), also have quasi-judicial functions and can receive allegations concerning individual cases.

The mandate of the WGAD is particularly relevant to the present mandate as it is directly concerned with allegations of arbitrary deprivation of liberty. Moreover, through its so-called regular communications procedure, the WGAD is able to receive submissions containing allegations of arbitrary deprivation of liberty. Such submissions can come from anyone, be this a physical person, a victim or family member, or an inter-governmental and non-governmental organization, national human rights institution and even Governments.<sup>532</sup> The WGAD does not disclose who has submitted the allegations and refer to all as “sources” and the submissions may concern one or more persons, although each person must be named.<sup>533</sup> The key element to enable the WGAD to be seized of the matter is the consent from the alleged victim(s) to be named in the communications with the State who is alleged to be depriving the person of their liberty arbitrarily and WGAD’s public Opinions and other documents. Noting that the WGAD often receives allegations concerning individuals who are still in detention, the consent may be provided by other authorized person, such as a family member. The regular communications procedure is written and culminates with the adoption of an Opinion of the WGAD on the concrete set of facts presented to it by the source, with the State having a right of reply.<sup>534</sup> To date, there appears to have been only one case arising from the context of the ongoing armed conflict in Ukraine considered by the WGAD which the WGAD considered with a clarification “that it has addressed the Russian Federation in this case purely because its authorities are implicated in the detention of Mr. Mustafayev. The present opinion is given without prejudice to the legal status of Crimea and the resolutions of the General Assembly”.<sup>535</sup>

A somewhat similar procedure for examining individual allegations of enforced disappearances also exists under the framework of another Special Procedure mechanism, the Working Group on Enforced and Involuntary Disappearances (**WGEID**). The WGEID strives to assist families in determining the fate or whereabouts of their disappeared relatives who are placed outside the protection of the law and it does so through a number of procedures developed.<sup>536</sup> Notably, just as in the case of the WGAD, also the WGEID can receive reports of persons disappeared from anyone, including inter-governmental organizations and Governments.<sup>537</sup> In May 2022, the WGEID examined and adopted a general allegation regarding Russia which records 293 cases of enforced disappearances, also of Ukrainian civilians, in the context of Russia’s invasion of Ukraine.<sup>538</sup>

There are other Special Procedure mandate holders that are of particular relevance to the subject matter of the present Mission. In terms of country-specific mandate, the newly established Special Rapporteur on the situation of human rights in the Russian Federation has already been noted. In terms of thematic mandates, in addition to the WGAD and WGEID, other relevant mandates include the Special Rapporteur on Torture and other Inhuman or Degrading Treatment or Punishment, Special Rapporteur on freedom of religion or belief and Special Rapporteur on freedom of expression and Special Rapporteur on freedom of association and assembly. It is once again recalled that States, international organizations, civil society organizations and individuals may engage the Special Procedures.

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<sup>532</sup> UN Doc. A/HRC/36/38, *Methods of work of the Working Group on Arbitrary Detention*, 13 July 2017, para 12.

<sup>533</sup> *Ibidem*, paras 9-12.

<sup>534</sup> *Ibidem*, paras 15-20.

<sup>535</sup> UN Doc. A/HRC/WGAD/2021/56.

<sup>536</sup> UN Doc. A/HRC/WGEID/1, *Methods of work of the Working Group on Enforced or Involuntary Disappearances*, 6 April 2023, paras 10-13.

<sup>537</sup> *Ibidem*, para 12.

<sup>538</sup> WGEID, *General allegation: Russian Federation*, 127th session (9-13 May 2022).

In addition to the HRC, the UN human rights system encompasses ten human rights treaty bodies, composed of individual experts, established in accordance with individual human rights treaties and their optional protocols. These bodies monitor the implementation of and respect for the relevant treaties predominantly through the consideration of national reports that States have to submit periodically. Some of them also consider individual or inter-State complaints alleging violations of rights guaranteed by individual treaties, but this competence is usually granted by optional protocols or subject to an opt-in mechanism. The Russian Federation has not recognized the inter-State procedures under both the ICCPR and CAT. However, it has recognized the competence of treaty bodies to consider individual complaints under the ICCPR and the CAT. Thus, victims of arbitrary deprivation of liberty or their relatives could submit applications to the HRC established under the Optional Protocol to the ICCPR, or the UN Committee against Torture, established under the CAT.<sup>539</sup>

In relation to the CAT, Russia has also accepted the enquiry procedure which can be initiated if the Committee “receives reliable information which appears to contain well-founded indication that torture is being systematically practised in the territory of that State Party”.<sup>540</sup> While this procedure is initiated by the Committee itself, in practice all enquiry procedures have been based on information submitted to it by various non-governmental organizations.<sup>541</sup> Therefore other States Parties, inter-governmental as well as non-governmental organizations could seek to report to the Committee, asking to trigger the enquiry procedure. It is, however, likely to render limited results since the procedure rests on the cooperation of the State Party that is subjected to the procedure.

Finally, again in respect to the CAT, a dispute settlement mechanism is envisaged in its Article 30 in cases of “/a/ny dispute between two or more States Parties concerning the interpretation of application of this Convention which cannot be settled through negotiation”.<sup>542</sup> In such cases, if agreement cannot be reached within 6 months from the date of the request for arbitration, any of those Parties may refer the dispute to the ICJ. While Article 30 (2) of the CAT allows States to opt-out of this provision, the Russian Federation is bound by it. Recalling that the CAT requires its States Parties to, *inter alia*, effectively investigate all allegations of torture as well as bring the perpetrators to justice, any State Party to the CAT might consider invoking the Article 30 procedure on the basis of apparent failure of the Russian Federation to apply the provisions of the CAT effectively in relation to the arbitrary detention and subsequent treatment of Ukrainian civilians by its authorities.

In the context of oversight over the places of deprivation of liberty, the work of the Ukrainian National Preventive Mechanism (NPM), established in accordance with the Optional Protocol to the CAT (OPCAT) must be noted.<sup>543</sup> As stipulated in Article 4 of the OPCAT, NPMs are to have access to all places of deprivation of liberty to ascertain that those in such facilities are treated humanely. It is important to recall that the term “deprivation of liberty” does not only encompass the institutions from the criminal justice system such as prisons and police stations, but also other settings such as medical care (for example, psychiatric institutions) and social care as well as any unofficial places where people may be held.<sup>544</sup> Therefore the mandate of the Ukrainian NPM could be usefully employed to ascertain of the treatment of all those detained. While the Russian Federation is not a State Party to the OPCAT, given it has custody of Ukrainian citizens in its institutions, the mandate of the Ukrainian NPM could be extended to cover such facilities and the treatment of Ukrainian civilians in them.

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<sup>539</sup> Article 22 of the CAT.

<sup>540</sup> Article 20(1) of the CAT.

<sup>541</sup> Manfred Nowak, Elizabeth McArthur, *The United Nations Convention against Torture. A Commentary*, Oxford University Press, 2008, p. 661.

<sup>542</sup> Article 30(1) of CAT.

<sup>543</sup> On 19 September 2006 Ukraine designated the Parliament Commissioner for Human Rights as its NPM.

<sup>544</sup> UN Docs CAT/C/50/2, para. 67; CAT/OP/ECU/2, para. 51; CAT/OP/SEN/RONPM/1, paras. 30–31.

At the **regional** level, the most robust human rights system exists within the Council of Europe, based on the European Convention on Human Rights (ECHR) and the case-law of the European Court of Human Rights (ECtHR). The Mission recalls that due to the exclusion of the Russian Federation from the Council of Europe, the country ceased to be bound by the ECHR on 16 September 2022, though the ECtHR continues to have the competence to consider cases related to events having occurred within the jurisdiction of the Russian Federation prior to that date.

As noted in the previous reports, since 2014, several inter-State applications have been submitted by Ukraine against the Russian Federation. Under the conditions set in Articles 34 and 35 of the ECHR, individuals considering themselves victims of violations of human rights enshrined in the ECHR can submit an individual application to the ECtHR. The Mission was not in a position to verify whether any such individual applications pertaining specifically to the topic under consideration in this report have been submitted. The Mission also recalls that on 11 June 2022, the Russian Federation adopted a law stipulating that the country “*will not implement decisions of the European Court of Human Rights entering into force after 15 March 2022*”.<sup>545</sup> The law does not exempt the Russian Federation from its obligation to respect the decisions of the ECtHR concerning the acts occurred prior to 16 September 2022.

### C. ACCOUNTABILITY UNDER ICL

The obligation for States to prevent, repress, investigate and prosecute war crimes and crimes against humanity stems from IHL treaties and from customary international law. Accountability mechanisms exist both at the international and at the national level and there have been arrest warrants already issued by the ICC for a number of individuals, including for the practice of forcible transfer or deportation of Ukrainian children.

#### 1. OBLIGATIONS OF STATES UNDER ICL

The four GCs and the API explicitly identify acts which qualify as grave breaches. Article 85(5) of the API confirms that “*grave breaches /.../ shall be regarded as war crimes*”. The Rome Statute of the ICC confirms that the category of **war crimes** nowadays encompasses both grave breaches of the GCs (and serious violations of Common Article 3 of the GCs) and other serious violations of the laws and customs applicable in international or non-international armed conflict. It provides a lengthy catalogue of war crimes in its Article 8. States have the obligation to “*enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention /.../*”.<sup>546</sup> They also have to “*search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and /.../ bring such persons, regardless of their nationality, before /their/ own courts*”.<sup>547</sup> Customary international law extends these obligations to other types of war crimes. It furthermore specifies that States *must* establish and exercise territorial and personal jurisdiction over war crimes (crimes committed by their nationals or armed forces, or on their territory) and *may* establish but if they do so *must* exercise universal jurisdiction.<sup>548</sup> Both Ukraine and Russia have introduced certain war crimes into their criminal codes.<sup>549</sup>

**Crimes against humanity** have not so far been codified in a special treaty. Yet, Article 7 of the ICC Rome Statute contains a list of acts which “*when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack*”,<sup>550</sup> amount to crimes against humanity. Under customary international law, all States have an

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<sup>545</sup> Федеральный закон от 11 июня 2022 г. № 183-ФЗ “О внесении изменений в отдельные законодательные акты Российской Федерации и признании утратившими силу отдельных положений законодательных актов Российской Федерации”, пара 7(a).

<sup>546</sup> Article 49 GCI, Article 50 GCII, Article 50 GCIII, Article 129 GCIV, Article 145 API.

<sup>547</sup> *Ibidem*.

<sup>548</sup> Rules 157-158 CIHL.

<sup>549</sup> See, especially, Section XX of the Ukrainian Criminal Code and Section XII of the Russian Criminal Code.

<sup>550</sup> Article 7(1) of the Rome Statute of the ICC.

obligation to prevent, prosecute and punish crimes against humanity.<sup>551</sup> For those purposes, they must take the necessary measures to ensure that these crimes constitute offences under their criminal law and that their organs have jurisdiction over such crimes based on the principles of territoriality, personality, and universality. Each State must also “ensure that its competent authorities proceed to a prompt, thorough and impartial investigation whenever there is reasonable ground to believe that acts constituting crimes against humanity have been or are being committed in any territory under its jurisdiction”.<sup>552</sup> Unlike other States, neither Ukraine nor the Russian Federation have included the category of crimes against humanity as such into their criminal codes.<sup>553</sup> When implementing the obligation to punish crimes against humanity, they thus would need to resort either to war crimes or to general “ordinary” offences (murder, rape, hostage taking, etc.).

## 2. ACCOUNTABILITY MECHANISMS UNDER ICL

The investigation and prosecution of war crimes and crimes against humanity should primarily take place at the *national* level – in the countries where the crimes were allegedly committed (territoriality) or from where the alleged perpetrators come (personality) or, on a subsidiary basis, in any other countries in the position to carry out the investigation and the prosecution (universality). The Mission welcomes the efforts by Ukraine and by certain other countries, to investigate alleged war crimes and crimes against humanity and, in some cases, to initiate prosecution. It also welcomes the establishment of the Joint Investigation Team (JIT), comprised of teams from Estonia, Latvia, Lithuania, Poland, Romania, Slovakia, and Ukraine and supported by Eurojust, tasked to look into allegations of core international crimes committed in Ukraine.<sup>554</sup> The Mission has been informed that some of the investigations, especially those carried out by the Office of the Prosecutor General of Ukraine, pertain to the arbitrary deprivations of liberty of Ukrainian civilians.<sup>555</sup>

Core international crimes may also be investigated and prosecuted at the *international* level. This is the case with alleged war crimes and crimes against humanity committed in Ukraine, which have been under investigation by the ICC Office of the Prosecutor since 2 March 2022. On 17 March 2023, the ICC issued the first arrest warrants related to the situation in Ukraine, pertaining to the forcible transfer or deportation of Ukrainian children to the temporarily occupied territories or to the territory of the Russian Federation. The arrest warrants are directed against the President Putin and the Commissioner Ms. Lvova-Belova. On 5 March 2024 the second set of two arrest warrants were issued by the ICC, this time against Sergei Kobylash, a lieutenant-general in the Russian Armed Forces, and Viktor Sokolov, an admiral in the Russian Navy, for alleged war crimes of directing attacks at civilians, causing excessive harm to civilians and the crime against humanity of inhumane acts. By the time of the submission of the report, none of the four arrest warrants had been executed and there was no information available about any steps being taken by the ICC in the case concerning arbitrary deprivation of liberty of Ukrainian civilians by the Russian Federation.

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<sup>551</sup> *Draft articles on Prevention and Punishment of Crimes Against Humanity*, in UN Doc. A/74/10, *Report of the International Law Commission on the work of its Seventy-first session*, Official Records of the General Assembly, Seventy-first session, Supplement No. 10, August 2019, pp. 11-21.

<sup>552</sup> *Ibidem*, Article 8.

<sup>553</sup> In Ukraine, a legal act implementing the Rome Statute, which shall include into the Ukrainian legal order the category of crimes against humanity, was adopted by the Verkhovna Rada in May 2021 but so far has not been signed into Law by the President. See *Проект Закону No. 2689 про внесення змін до деяких законодавчих актів України щодо імплементації норм міжнародного кримінального та гуманітарного права*.

<sup>554</sup> For more details, see Eurojust and the war in Ukraine, *Eurojust*, available at <https://www.eurojust.europa.eu/eurojust-and-the-war-in-ukraine>

<sup>555</sup> Office of the Prosecutor General of Ukraine, meeting, Kyiv, 20 March 2024.

## IX. GENERAL CONCLUSIONS

The Mission was tasked to focus on possible violations of international law “*associated with or resulting from the arbitrary deprivation of liberty of Ukrainian civilians by the Russian Federation*”. Although the context of ongoing international armed conflict between Ukraine and the Russian Federation makes establishing the exact number of Ukrainian civilians arbitrarily deprived of liberty by the Russian Federation impossible, this Mission has concluded that this number is large and can be measured in the thousands. The Mission has reasonable grounds to believe that the overwhelming majority of such Ukrainian civilians have been deprived of their liberty arbitrarily by the Russian Federation, acting directly through its organs or, in 2014-2022, through its proxies in the so-called Donetsk and Luhansk People’s Republics.

Arbitrary deprivation of liberty of Ukrainian civilians started in the occupied and unlawfully annexed Crimea in spring 2014, and quickly spread to the areas of the Donetsk and Luhansk regions controlled by the so-called People’s Republics. Since the outbreak of the full-scale invasion on 24 February 2022, this practice has become pervasive in all the areas that have got under the temporary occupation of the Russian Federation (especially areas within the Chernihiv, Kharkov, Kherson, Kyiv, Sumy, and Zaporizhzhia regions, as well as, again, in Crimea and the Donetsk and Luhansk regions). Although the concrete modalities of the detention somewhat differ from one region to another, the overall scheme of the Russian Federation arbitrarily detaining large numbers of Ukrainian civilians both in the initial and prolonged stage of the temporary occupation remains constant and appears to be a defining feature of the Russian Federation’s policy in the temporarily occupied territory.

IHL and IHRL establish legal grounds enabling Parties to the conflict to deprive civilians belonging to the other party to the conflict of their liberty. The Mission, however, concludes that the deprivation of liberty of the overwhelming majority by the Ukrainian civilians by the Russian Federation has taken place outside this legal framework. Although in most cases no grounds for detention have been formally communicated to the detained Ukrainian civilians, the most commonly indicated reasons seem to be associated with: (a) perceived support to the Ukrainian armed forces and/or affiliation with the armed forces; (b) perceived support of Ukraine and/or rejection of Russia’s “special military operation”; (c) perceived involvement in or support for international terrorism and/or extremism; (d) the intention to force cooperation; and (e) the intention to spread fear in the population of the temporarily occupied territories. Some of these reasons are clearly unlawful (reasons (b), (d) and (e)). Others could be lawful (reasons (a) and (c)) but only to the extent that the strict conditions for the internment of civilians stated in Articles 43(1) and 78(1) of the GCIV and confirmed by IHRL instruments, making such detention exceptional and temporary, are respected. Moreover, the detention can never be based on other, ulterior purposes such as harassment or reprisals. This, however, seems to be the case in many instances. The Mission also recalls that the practice of subjecting civilian detainees to POW-internment is unlawful, as they need to be treated as civilians under the GCIV. The Mission concludes that in the overwhelming majority of cases of Ukrainian civilians detained by the Russian Federation, the detention lacks lawful grounds and, as such, amounts to arbitrary deprivation of liberty.

Moreover, to be lawful and non-arbitrary, every instance of the deprivation of liberty needs to follow certain procedural guarantees stemming from both IHL and IHRL. These include: (a) the obligation to inform persons deprived of liberty of the reasons for the detention, (b) the obligation to provide persons deprived of liberty with an opportunity to challenge the lawfulness of their detention; (c) periodic reviews of the detention; (d) information obligations; (e) fair trial guarantees; (f) the prohibition of collective detention; and (g) the prohibition of incommunicado detention and enforced disappearances. Special guarantees also need to be provided to individuals belonging to vulnerable groups or to persons enjoying privileges and immunities under international law.

The Mission concludes that Ukrainian civilians deprived of liberty by the Russian Federation have been consistently denied these guarantees. The testimonies collected by the Mission as well as reports by various international organizations and civil society actors show that a vast majority of detained civilians are never informed about the grounds for their detention. These civilians also have no possibility to challenge the lawfulness of their detention either in its initial stage or at any moment thereafter and there does not seem to be any periodic, regular review of the lawfulness of this detention carried out by the Russian authorities. The Russian authorities also consistently fail to fulfil the information obligations stemming from the GCIV and the API. There is nothing suggesting that the mandate of the Russian NIB would extend to civilian detainees and that a regular channel of communication, concerning civilian detainees would be put in place directly between the Parties to the conflict or through a third actor (Protecting Powers, the ICRC, the CTA, etc.). The Russian Federation also does not seem to provide special guarantees to individuals belonging to vulnerable groups, such as children, persons with disabilities or pregnant women, older persons, and to persons enjoying privileges and immunities under international law. It has disrespected and continues to disrespect the special status of three staff members of the OSCE SMM, detaining them for almost two years now and subjecting them to trial for activities carried out while working for the SMM.

Moreover, and notwithstanding arbitrary deprivation of liberty in and of itself being a serious violation of IHRL and IHL, the Mission has further established that this violation has been conducive to other serious violations of these two bodies of law. Ukrainian civilians detained by the Russian Federation have been subjected to torture and other cruel, inhuman or degrading treatment or punishment, sexual violence and other forms of serious mistreatment. They have endured harsh conditions of detention and have been denied contact with the outside world, turning their deprivation of liberty into incommunicado detention and enforced disappearances. The Mission has further recorded cases of extrajudicial killings of arbitrarily detained Ukrainian civilians. Other detained civilians have been denied fundamental fair trial guarantees in criminal prosecutions. They have been tried under legislation which should not apply to them in the first place and their procedural rights and the right to defence and legal assistance have not been respected. The Mission recalls that the denial of fundamental fair trial guarantees renders in and of itself any detention related to the criminal prosecution arbitrary.

Based on these findings, the Mission has reasonable grounds to believe that since the vast majority of the instances of detentions of Ukrainian civilians by the Russian Federation either do not meet the lawful grounds for detention under IHL and IHRL, or do not satisfy the procedural guarantees imposed by the same two bodies of law, or both, they amount to arbitrary deprivation of liberty under both IHL and IHRL. Ukrainian civilians subjected to such arbitrary deprivation of liberty are entitled to immediate and unconditional release. The Mission notes that it has only been able to establish a very limited number of cases when Ukrainian civilians arbitrarily deprived of their liberty have been released, usually without any explanation, by the Russian authorities.

IHL and IHRL set out a clear right to remedy to all those who have been arbitrarily deprived of their liberty. This right includes the right of the victim and their relatives to an effective remedy, including cessation of violations, restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. The Mission was unable to establish any trace of evidence of even an attempt on behalf of the Russian Federation to cease the practice of arbitrary deprivation of liberty of Ukrainian civilians. In fact, the only formalized releases that have been brought about with the involvement of Russian Federation are those when it had wrongfully and illegally classified Ukrainian civilians as POW and released them as part of POW exchanges with Ukraine. This is not only a blatant violation of the GCIV but also highly suggestive of the Russian Federation's entirely unlawful motive for detaining the Ukrainian civilians in the first place. Equally, there has been no provision of any other remedies such as full restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

Finally, as established in this report, the practice of arbitrary deprivation of liberty of Ukrainian civilians has occurred on a massive scale and has revealed signs of a systematic, consistent, deliberate pattern of conduct targeting specifically Ukrainian civilians. This makes the Mission conclude that there are reasonable grounds to believe that both the war crime of “*unlawful confinement*”<sup>556</sup> and the crime against humanity consisting of “*imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law*”<sup>557</sup> have been committed by individuals involved in the arbitrary deprivation of liberty of Ukrainian civilians, including members of the Russian armed forces or occupying authorities. It is for judicial bodies operating at the national or international level, including the ICC, to identify concrete individuals who should be held criminally responsible on those grounds.

The Mission furthermore recalls that under international law, States have the obligation to respect and to ensure respect for IHL; the obligation to respect, protect and fulfil human rights; and the obligation to prevent, repress, investigate, and prosecute war crimes and crimes against humanity. Such obligations apply not only to the Parties to the conflict but also all other States bound by the applicable IHL, IHRL or ICL instruments or by the relevant rules of customary international law. There are various different legal and institutional mechanisms (such as the Protecting Powers, the ICRC, the CTA, the WGAD, the WGEID, or the ICC) that can, and shall, be used to ensure that the practice of arbitrary deprivation of liberty of Ukrainian civilians by the Russian Federation be discontinued, reparation be provided and those held responsible bear legal consequences for their acts in the nearest foreseeable future

## **X. RECOMMENDATIONS**

In the remits of the present mandate, the Mission makes the following recommendations, addressed not only to the Russian Federation and Ukraine but also to all other States and international organizations.

### **A. TO THE RUSSIAN FEDERATION**

- (1) Immediately cease the practice of arbitrary deprivation of liberty of Ukrainian civilians and unconditionally release all those thus detained.
- (2) Immediately apply to Ukrainian civilians detained by the Russian Federation the legal regime of the GCIV and the API, cease the unlawful practice of subjecting civilians to POW-internment, and immediately establish appropriate review-mechanisms to ensure that civilians are not arbitrarily detained under either the GCIV or the GCIII.
- (3) Immediately bring to an end the co-location of Ukrainian civilians arbitrarily detained with POW in violation of Article 184 of the GCIV.
- (4) Ensure that any deprivation of liberty exercised by its authorities complies with the fundamental requirements of IHRL and IHL and especially:
  - (i) Obligation to base every instance of deprivation of liberty solely on the grounds permissible under IHL and IHRL, ensuring that these grounds are not overly broad and vague, and/or lead to detention based on discrimination;
  - (ii) Obligation to inform persons deprived of liberty of the reasons including factual and legal basis, for the detention and of any charges against them;
  - (iii) Obligation to provide persons deprived of liberty with an opportunity to challenge the lawfulness of the detention;
  - (iv) Obligation to carry out periodic reviews of the lawfulness of the detention;
  - (v) Obligation to communicate information concerning detained civilians to Ukraine either directly or through a third actor, including but not limited through the ICRC and the CTA;

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<sup>556</sup> Article 147 of the GCIV and Article 8(2)(a)(vii) of the Rome Statute of the ICC.

<sup>557</sup> Article 7(1)(e) of the Rome Statute of the ICC.

- (vi) Obligation to ensure judicial oversight over each instance of deprivation of liberty respecting fundamental fair trial guarantees; and
  - (vii) Obligation to refrain from collective detention.
- (5) Immediately establish a National Information Bureau (NIB) in full compliance with Article 136 of the GCIV and ensure an appropriate structure of coordination for this purpose which includes all relevant Russian stakeholders.
  - (6) Without delay, compile, provide and promptly update comprehensive lists of the names and whereabouts of all Ukrainian civilians deprived of their liberty by the Russian authorities in accordance with Articles 105 of the GCIV, and to share such lists with the UNIB and the CTA with utmost urgency.
  - (7) Ensure immediate, safe and unfettered access for the ICRC to all facilities where Ukrainian civilians are being detained, both in the temporarily occupied territories and in the Russian Federation, in line with Article 143 of the GCIV. Provide the ICRC with full list of its places of deprivation of liberty, including any unofficial ones, as well as of all people kept in such, keeping the information under constant review.
  - (8) Ensure immediate, safe, and unfettered access to the National Preventive Mechanism of Ukraine, established in accordance with the OPCAT, to places of deprivation of liberty in the temporarily occupied territories as well as to such places in the Russian Federation where Ukrainian civilians are held.
  - (9) Ensure full respect for the right of the detained Ukrainian civilians to communicate with their families.
  - (10) Immediately cease the practice of holding people incommunicado and/or subjecting them to enforced disappearances. To this end, ensure that persons deprived of their liberty are held only in an officially recognized places of detention and accurate information on the detention of such persons and their place or places of detention, including transfers, is made promptly available to their family members, their counsel or to any other persons having a legitimate interest in the information.
  - (11) Ensure effective searches of allegedly forcibly disappeared persons and investigations to be undertaken into alleged enforced disappearances committed by its authorities.
  - (12) Ensure that all detained Ukrainian civilians are treated in a manner respectful of their inherent dignity, held in humane conditions and afforded full fair trial guarantees.
  - (13) Immediately end and prevent all acts that may amount to extrajudicial killings, torture and other cruel, inhumane or degrading treatment or punishment, sexual violence or any other ill-treatment of Ukrainian civilians by its own armed forces and other authorities and to immediately conduct prompt, full and impartial investigation into all allegations of such acts. Prosecute those responsible and ensure that the penalties applied are commensurate with the gravity of crimes committed.
  - (14) Ensure the right of victims of arbitrary deprivation of liberty, and their relatives, to an effective remedy, including cessation of violations, restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.
  - (15) Seek assistance and good offices of a third country to bring about an end the practice of arbitrary deprivation of liberty of Ukrainian civilians and consider the establishment of Protecting Powers as envisaged in Article 9 of the GCIV and Article 5 of the API.

## **B. TO UKRAINE**

- (1) Continue with its efforts, at all levels of authority, to seek information about and compile lists of all Ukrainian civilians detained by the Russian Federation. Urgently increase its multi-agency efforts to collect and duly verify data of all Ukrainian civilians who have been detained by the Russian authorities.
- (2) Redouble its efforts in seeking out the civilians who are held incommunicado and/or have been subjected to enforced disappearances by the Russian Federation as well as identifying any unofficial and official places of deprivation of liberty in the temporarily



occupied territories and the territory of the Russian Federation and of Belarus, where the arbitrarily detained Ukrainian civilians are held.

- (3) Continue to strengthen the communication with families of civilian detainees, including using information from released detainees to collect and systematize information and passing this to their families.
- (4) Continue with its efforts to investigate all allegations of arbitrary deprivation of liberty of Ukrainian citizens by the Russian Federation promptly, thoroughly, and independently as well as allegations of their ill-treatment, including extrajudicial killings, torture or sexual violence, and to prosecute those responsible, ensuring that the penalties applied are commensurate with the gravity of crimes committed.
- (5) Continue providing medical, psychological, social and other support to all civilians and their families who have been released following arbitrary deprivation of liberty by the Russian Federation.
- (6) Support the victims of arbitrary deprivation of liberty and their relatives, including enforced disappearances, perpetrated by Russia in the effective exercise of their rights to an effective remedy, including cessation of violations, restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.
- (7) Make full use of the international mechanisms which might provide redress to the victims of arbitrary deprivation of liberty, including the regular communications procedure of the WGAD and the general allegation mechanism of the WGEID and make full use of the dispute settlement mechanism envisaged in Article 30 of CAT.
- (8) Support its National Preventive Mechanism, established in accordance with the OPCAT, in seeking from the Russian Federation immediate, safe, and unfettered access to all institutions in the temporarily occupied territories and in the Russian territory where Ukrainian civilians are detained.
- (9) Ensure that its legislation/criminal practices regarding unlawful collaboration with the Russian occupying power take appropriate account of the situation of duress to which civilian Ukrainians arbitrarily detained by the Russian Federation are exposed.
- (10) Seek assistance and good offices of a third country to bring about an end to the practice of arbitrary deprivation of liberty of Ukrainian civilians and to consider the establishment of Protecting Powers as envisaged in Article 9 of the GCIV and Article 5 of the API.

### **C. TO OTHER STATES**

- (1) Take note of, and act upon, the obligation to “*respect and ensure respect*” of IHL foreseen in Common Article 1 of the GCs and to take appropriate measures in this regard.
- (2) Provide urgently, individually and collectively, all necessary assistance to Ukraine to support its multi-agency efforts to collect and duly verify data of all Ukrainian civilians, who have been arbitrarily deprived of their liberty by Russia.
- (3) Provide urgently, individually and collectively, all necessary assistance, including logistical, know-how and financial, to Ukraine to support its efforts to locate the Ukrainian civilians who have been arbitrarily detained, held incommunicado and/or subjected to enforced disappearances by Russia as well as identifying any unofficial and official places of deprivation of liberty in the temporarily occupied territories and Russian Federation where the arbitrarily detained Ukrainian civilians are held.
- (4) Provide urgently, individually and collectively, all necessary assistance, including logistical, know-how and financial, to Ukraine to support its efforts in the provision of rehabilitation, medical, psychological, social and other support to all civilians (and their families) who have been returned following arbitrary deprivation of liberty by the Russian Federation.
- (5) Exercise domestic criminal jurisdiction with respect to any allegations of war crimes, crimes against humanity and torture perpetrated against arbitrarily detained Ukrainian civilians that they are competent to prosecute.

- (6) Unequivocally support, individually and collectively, the role of the ICRC as envisaged in the GCs, especially with respect to the safe, full and unfettered access to all places of deprivation of liberty, collection and transmittal of data of persons detained and maintenance of family contact.
- (7) Actively and effectively support the work of the Council of Europe Register of Damage Caused by the Aggression of the Russian Federation Against Ukraine.
- (8) Take initiatives to propose to Ukraine and the Russian Federation the establishment of Protecting Powers as envisaged in Article 9 of the GC IV and Article 5 of the API to come to the assistance on issues pertaining to detained civilians.
- (9) Proactively offer their good offices to Ukraine and the Russian Federation to urgently facilitate the safe release, return to place of residence, accommodation in third countries, or repatriation, of the arbitrarily detained Ukrainian civilians.

#### **D. TO INTERNATIONAL ORGANIZATIONS**

- (1) Provide urgently all necessary assistance, including logistical, know-how and financial, to Ukraine to support its multi-agency efforts to collect and duly verify data of all Ukrainian civilians, who have been arbitrarily deprived of liberty by the Russian Federation.
- (2) Provide urgently all necessary assistance, including logistical, know-how and financial, to Ukraine to support its efforts to locate the Ukrainian civilians who have been arbitrarily detained, held incommunicado and/or subjected to enforced disappearances by the Russian Federation.
- (3) Provide urgently all necessary assistance, including logistical, know-how and financial, to Ukraine to support its efforts in the provision of rehabilitation, medical, psychological, social and other support to all civilians (and their families) who have been returned following arbitrary deprivation of liberty by the Russian Federation.
- (4) Proactively offer their good offices to Ukraine and the Russian Federation to urgently facilitate the safe release, return to place of residence, accommodation in third countries or repatriation of the arbitrarily detained Ukrainian civilians.
- (5) Unequivocally support the role of the ICRC as envisaged in the GCs, especially with respect to the safe, full and unfettered access to all places of deprivation of liberty, collection and transmittal of data of persons detained and maintenance of family contact.
- (6) Make full use of the international mechanisms which might provide redress to the victims of arbitrary deprivation of liberty, including the regular communications procedure of the WGAD and the general allegation mechanism of the WGEID as well as make full use of the dispute settlement mechanism envisaged in Article 30 of CAT.
- (7) Increase the efforts to consolidate and coordinate the work, outcomes and recommendations of various UN, OSCE, Council of Europe and EU bodies to ensure effective synergies and strategic implementation of the recommendations made.

## **COMMENTS BY UKRAINE**

### **TO THE REPORT ON VIOLATIONS AND ABUSES OF INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW, WAR CRIMES AND CRIMES AGAINST HUMANITY, RELATED TO THE ARBITRARY DEPRIVATION OF LIBERTY OF UKRAINIAN CIVILIANS BY THE RUSSIAN FEDERATION**

1) In the Chapter V.B.4 "Information Obligations" it is stated that "The Mission furthermore wishes to recall that, so far, no Protecting Powers have been appointed by the parties to the IAC between the Russian Federation and Ukraine."

In this regard, it is important to note that the Ministry of Foreign Affairs of Ukraine has initiated the study of the issue of identifying a third country to represent Ukraine's interests. Based on the results of this work, the Ukrainian Side has developed modalities and legal status of the future agreement on representation of Ukraine's interests in the Russian Federation with the potential Protecting Power. As of today, no consent has been received from the Russian Federation for a third country to perform the function of representing Ukraine's interests on its territory.

2) The Report accurately mentions that the practice of the arbitrary deprivation of liberty of Ukrainian civilians by the Russian Federation has started in 2014 in the temporarily occupied territory of the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine. In this regard, it is important to note that the Crimean Tatar indigenous people of Ukraine remains the most affected by the cases of the arbitrary deprivation of liberty by the Russian occupation administration on the Crimean Peninsula.

3) With regard to the information provided in the Chapter III.C.4. "International Criminal Law", the Office of the Prosecutor General of Ukraine notes that on March 2, 2022, the International Criminal Court (hereinafter referred to as the ICC) started his own investigation into the crimes committed during the Russian aggression against Ukraine.

The Office of the Prosecutor General as the central body in charge of cooperation with the ICC is carrying out collection and transfer of evidence of crimes of the Russian Federation to the ICC, and thus is ensuring systematic cooperation with the Office of the Prosecutor of the International Criminal Court (hereinafter - the OP ICC).

According to Article 618 of the Criminal Procedure Code of Ukraine, the Office of the Prosecutor General examines the requests of the ICC and organizes their implementation, sends evidence to the ICC, ensures the storage of evidence and protection of information at the request of the ICC, exercises other powers arising from the obligations of Ukraine in connection with recognition of the jurisdiction of the ICC or provided for by the Criminal Procedure Code of Ukraine.

On September 14, 2023, the ICC "field office" was opened in the city of Kyiv, that strengthened the investigation of war crimes and other international crimes by the OP ICC.

With regard to the information provided in the Chapter VIII.C.2. "Accountability Mechanisms under ICL", the Office of the Prosecutor General of Ukraine notes that the Joint Investigation Team (hereinafter - JIT) was established on 25.03.2022 by the Prosecutors General of Ukraine, Lithuania and Poland to ensure a coordinated investigation of the crime of aggression, Russia's violations of the laws and customs of war and other war crimes. Estonia, Latvia, Slovakia and Romania joined the JIT as parties, as well as Eurojust, the Office of the Prosecutor of the International Criminal Court and Europol as participants. Since the creation of the JIT, its scope of investigation has been expanded due to the inclusion of the crime of genocide and crimes against humanity; the parties established the International Centre for the Prosecution of the Crime of Aggression against Ukraine (ICPA), the purpose of which is to gather information and evidence in order to be prepared for the prosecution of the political and military leadership of the Russian Federation; currently the term of operation of the JIT is extended until 25.03.2026.

It is important to note that as of today, the Office of the Prosecutor General is actively invoking the application of the principle of universal jurisdiction by other countries and is developing cooperation with them. More than 20 countries are conducting their own investigations of international crimes (war crimes, crimes against humanity) committed by the members of the Armed Forces of the Russian Federation on the territory of Ukraine. Own investigations are carried out as structural investigations on the collection of the evidence base, and as investigations based on the principle of partial universal jurisdiction.

Russia must immediately stop the occupation of the territory of Ukraine and withdraw the troops of the Russian Federation and Russia-backed armed groups from all over the territory of Ukraine within its internationally recognized borders and its territorial waters in order to prevent further violations and oppression of human rights and violation of international humanitarian law in Ukraine, in accordance with the Resolution of the UN General Assembly ES-11/1 "Aggression against Ukraine", adopted on March 2, 2022, and the binding order of the International Court of Justice on provisional measures of March 16, 2022.

Prof. Veronika Bílková (Czech Republic)  
Dr. Cecilie Hellestveit (Norway)  
Dr. Elīna Šteinerte (Latvia)

Prague-Oslo-Riga, 16 March 2024

His Excellency  
Mr Alexander Lukashevich, Ambassador  
Permanent Representative of the Russian Federation to the OSCE

cc Mr. Matteo Mecacci  
Director of the Office of Democratic Institutions and Human Rights (ODIHR)

Representatives of 45 invoking Participating States and of Ukraine

Your Excellency,

On 29 February 2024, the delegations of 45 OSCE participating States, after the consultation with Ukraine, invoked the Moscow Mechanism under paragraph 8 of the Moscow Document. They requested that ODIHR enquire with Ukraine whether it would invite a mission of experts to *“build upon previous findings and establish the facts and circumstances surrounding possible contraventions of relevant OSCE commitments, violations and abuses of human rights, and violations of international humanitarian law and international human rights law, as well as possible cases of war crimes and crimes against humanity, associated with or resulting from the arbitrary deprivation of liberty of Ukrainian civilians by the Russian Federation; and to collect, consolidate, and analyze this information with a view to offer recommendations, as well as provide the information to relevant accountability mechanisms, as well as national, regional, or international courts or tribunals that have, or may in future have, jurisdiction”*. Following on this inquiry, Ukraine established, on 14 March 2024, a mission composed of the three experts undersigned below. The mission of experts shall deliver its report by 4 April 2024.

The mandate of the mission pertains to events which, while originating in the territory of Ukraine and concerning Ukrainian citizens, also involve acts purportedly carried out by persons acting on behalf or under the control of the Russian Federation. Since, by virtue of Paragraph 6 of the Moscow document, *“the mission may receive information in confidence from any individual, group or organization on questions it is addressing”*, we would like to invite the

Russian Federation to cooperate with our mission and to share with us any information it may have that could assist us in fulfilling our mandate. We would particularly welcome information from, and contacts with, the following authorities:

- the National Information Bureau,
- the Office of the High Commissioner for Human Rights in the Russian Federation,
- the Federal Security Service of the Russian Federation,
- the Ministry of Defense of the Russian Federation,
- the Ministry of Interior of the Russian Federation.

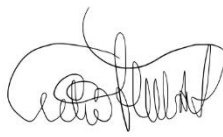
We would be grateful to receive copies of any written communications, including letters, that any of these or other authorities from the Russian Federation have sent to any authorities in Ukraine on the subject matter of the present mandate, the arbitrary deprivation of liberty of Ukrainian civilians by the Russian Federation. We would also appreciate if you could provide us with a total number and a list of Ukrainian civilians who have been deprived of liberty, on whatever grounds, by the Russian Federation since March 2014.

We thank you in advance for acknowledging the receipt of this letter and for kindly providing us with a response to it. In view of the time frame envisaged for the Mission, we shall appreciate to receive your reply by 24 March 2024.

Yours sincerely,



Veronika Bílková



Cecilie Hellestveit



Elīna Šteinerte

Prof. Veronika Bílková (Czech Republic)  
Dr. Cecilie Hellestveit (Norway)  
Dr. Elīna Šteinerte (Latvia)

Prague-Riga-Oslo, 16 March 2024

Her Excellency  
Ms. Viktoriia Kuvshynnykova, Chargée d'Affaires a.i,  
Permanent Mission of Ukraine to the International Organizations in Vienna

cc Mr. Matteo Mecacci  
Director of the Office of Democratic Institutions and Human Rights (ODIHR)

Representatives of 45 invoking Participating States and of Ukraine

Your Excellency,

On 29 February 2024, the delegations of 45 OSCE participating States, after the consultation with Ukraine, invoked the Moscow Mechanism under paragraph 8 of the Moscow Document. They requested that ODIHR enquire with Ukraine whether it would invite a mission of experts to *“build upon previous findings and establish the facts and circumstances surrounding possible contraventions of relevant OSCE commitments, violations and abuses of human rights, and violations of international humanitarian law and international human rights law, as well as possible cases of war crimes and crimes against humanity, associated with or resulting from the arbitrary deprivation of liberty of Ukrainian civilians by the Russian Federation; and to collect, consolidate, and analyze this information with a view to offer recommendations, as well as provide the information to relevant accountability mechanisms, as well as national, regional, or international courts or tribunals that have, or may in future have, jurisdiction”*. Following on this inquiry, Ukraine established, on 14 March 2024, a mission composed of the three experts undersigned below. The mission of experts shall deliver its report by 4 April 2024.

The mandate of the mission pertains to events which originate in the territory of Ukraine and concern Ukrainian citizens. We therefore consider that your country might be in possession of information and materials relevant for the completion of our mission. Since, by virtue of Paragraph 6 of the Moscow document, *“the mission may receive information in confidence from any individual, group or organization on questions it is addressing”*, we would like to invite Ukraine to collaborate with our mission. We would particularly welcome information from, and contacts with, the following authorities:

- the Office of the Prosecutor General
- the Ministry of Defence
- the Ministry of Reintegration of the Temporarily Occupied Territories of Ukraine, including the National Information Bureau and the Office of the Commissioner for Persons Disappeared Under Special Circumstances
- President's Representative for the Autonomous Republic of Crimea
- Ukraine Parliament Commission for Human Rights
- the Ministry of Interior
- National Police
- the Ministry of Social Affairs
- Relevant civil society organizations

We would be grateful to receive copies of any written communications, including letters, that any of these offices or indeed others from Ukraine have sent to any authorities in the Russian Federation on the subject matter of the present mandate. We would also appreciate if you could provide us with a total number and a list of Ukrainian civilians whom you deem to be arbitrarily deprived of liberty by the Russian Federation since March 2014.

We thank you in advance for acknowledging the receipt of this letter and for kindly providing us with a response to it. In view of the time frame envisaged for the Mission, we shall appreciate to receive your reply by 24 March 2024.

Yours sincerely,



Veronika Bílková



Cecilie Hellestveit



Elīna Šteinerte





**Permanent Mission of Ukraine**  
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in Vienna

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Nº 4131/36-180/7-40395

Vienna,  
19 March 2024

**Dear experts,**

In response to your letter of 16 March 2024 let me first sincerely thank you for your willingness to act as experts of the mission of the OSCE Human Dimension Moscow Mechanism to address the arbitrary deprivation of liberty of Ukrainian civilians by the Russian Federation.

Since the very beginning of the Russian aggression against Ukraine in 2014, and later with the full-scale invasion of Ukraine by Russia on 24 February 2022, the Russian Federation has arbitrarily detained large numbers of civilians in Ukraine, who have become victims of abductions, kidnapping, enforced disappearances and other forms of arbitrary deprivation of liberty.

In order to address this extremely grave situation, which endangers life and health of thousands of Ukrainian citizens, President Volodymyr Zelenskyy's Peace Formula contains a special point, according to which, on 26 February 2024, the International Platform for the Release of Civilians illegally detained by the Russian Federation has been established to consolidate international efforts on this track.

We believe that your mission's activities and future report will significantly contribute to the international efforts seeking the release of all Ukrainian civilians from the Russian captivity, as well as to the accountability mechanisms to ensure justice and hold to account the masterminds and perpetrators of Russia's crimes.

The Ukrainian Side stays ready to maintain close cooperation with your mission of experts, and to provide you with all the necessary support and information.

We look forward to your visit to Ukraine on 20-22 March 2024.

Please accept, dear experts, the assurances of my highest consideration.

**Viktoriia KUVSHYNNYKOVA**

**Chargée d'Affaires a.i.,  
Permanent Mission of Ukraine to the  
International Organizations in Vienna**

**Ms. Veronika Bílková  
Ms. Cecilie Hellestveit  
Ms. Elīna Šteinerte**

**Prague  
Oslo  
Riga**