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HANDBOOK

Handbook for Legal Professionals in Ukraine

Ensuring the Fairness of Conflict-Related Trials

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Executive summary

This handbook, developed by the T.M.C. Asser Institute, is a resource for Ukrainian legal professionals handling conflict-related cases to ensure compliance with fair trial standards. It emphasises the importance of understanding Ukrainian constitutional and procedural laws alongside international (and European) human rights, humanitarian, and criminal law. Even with Ukraine's derogations from some human rights treaties during the conflict, certain elements of the right to a fair trial must be ensured. The handbook covers crucial aspects of ensuring fairness in conflict-related cases, including upholding the presumption of innocence, ensuring independent and impartial courts, promoting adversarial proceedings and the right to a defence, respecting rights during investigations and pre-trial detention, addressing the length of proceedings, approaching evidence properly, and in absentia trials. It recommends legislative amendments to align with international standards while empowering practitioners to utilise existing frameworks to develop practice.

Keywords

International criminal law, human rights law, fair trial, criminal law, Ukraine

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Introduction

As conflict-related cases continue to be brought and adjudicated in Ukrainian courts, practitioners involved at all stages of the proceedings must ensure the fairness of the trials in line with domestic, regional and international legal obligations. Public scrutiny, coupled with ongoing supervision of Ukraine by the European Court of Human Rights (ECtHR), EU accession criteria focused on the rule of law in Ukraine and monitoring by national and international civil society organisations and human rights bodies mean that domestic conflict-related trials will be in the spotlight. Given that denial of a fair trial is also a crime under international criminal law, the fairness of these trials is of particular importance in order to demonstrate Ukraine's willingness to conduct legitimate trials domestically, a factor which will affect the complementarity of international processes and the effectiveness of justice and accountability.

The fairness of conflict-related trials can be enhanced through legislators addressing discrepancies between domestic law and regional and international law standards. However, the applicability of international and European law and jurisprudence domestically means that practitioners can already act using the existing legislative framework, even where it is restrictive or vague. Fairness depends on consistency of the action being taken by investigators, prosecutors, defence counsel and judges of all instances in Ukraine, as well as the development of practice.

This Handbook for Legal Professionals is designed to be a resource to assist professionals involved in conflict-related trials to navigate the particularities of conflict-related cases in line with the international and European law on fair trials. It was developed by the T.M.C. Asser Institute under the 'Restoring Dignity and Justice in Ukraine' programme, funded by the Ministry of Foreign Affairs of the Netherlands, and implemented by a consortium led by the International Development Law Organization (IDLO) in partnership with the T.M.C. Asser Institute, the Center for International Legal Cooperation (CILC), and the Netherlands Helsinki Committee (NHC).

The material contained in the Handbook is based on open-source research into Ukrainian domestic law and international and European fair trial standards, as well as consultations with practitioners in trainings, roundtables and events held since 2023 under the 'Restoring Dignity and Justice in Ukraine' programme. All excerpts included in the Handbook from sources only available in Ukrainian are unofficial translations. Although focused solely on the fairness of proceedings, the content of the Handbook builds upon existing resources for practitioners in conflict-related cases developed by the T.M.C. Asser Institute or its partners, including:

- The 'Basic Investigative Standards for Documenting International Crimes in Ukraine' (Global Rights Compliance (through the MATRA-Ukraine Project), May 2023);
- The 'Benchbook on the Adjudication of International Crimes' (Global Rights Compliance (through the MATRA-Ukraine Project), UpRights, and USAID Justice for All Activity, June 2023);

- The 'Fair Trial Indicators: Monitoring Conflict-related Criminal Trials' (T.M.C. Asser Institute (through the MATRA-Ukraine Project), March 2024); and
- The 'Defence Counsel Handbook: A Guide For Ukrainian Lawyers Practising in Domestic War Crimes Cases' (M. O'Leary, C. Rohan and A. Yakovliev, with USAID Justice for All Activity, in partnership with the Coordination Centre for Legal Aid Provision, Ukrainian Bar Association and International Bar Association, December 2024).

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HOW TO USE THIS HANDBOOK

- The Handbook is split into sections as noted in the contents page below.
- The online versions are searchable by keywords and domestic and international legal provisions and case law.
- Each section starts with a summary and provides a table of applicable Ukrainian and international legislation on the issue.
- The structure of each section (or subsection where applicable) is as follows:
  - Ukrainian law;
  - International law;
  - International jurisprudence;
  - Ukrainian practice and applicability of international law and jurisprudence thereto; and
  - Recommendations for practitioners.

Section 1. The national, international and European law regulating the fairness of trials

SUMMARY

- **Practitioners in Ukraine need to be well-versed in both the national and international and European laws that govern the fairness of trials. This awareness is fundamental for constructing sound legal arguments and reasoning.**
- Domestically, the right to a fair trial and associated guarantees can most often be found in the Constitution of Ukraine and the Criminal Procedure Code, as amended.
- Fair trial rights are also detailed in international and European human rights law, humanitarian law, and criminal law.
- Ukraine has submitted notifications to derogate from certain human rights during the ongoing conflict. However, even though the right to a fair trial is not listed as a non-derogable right, the Human Rights Committee (HRC) has clarified that the fundamental requirements of a fair trial must always be respected.
- Ukraine adheres to a monist legal approach, meaning international treaties ratified by the Verkhovna Rada are incorporated into its domestic legal system and hold a higher hierarchical status than national law. This framework strongly encourages Ukrainian practitioners to interpret domestic law concerning fair trials in line with applicable international legal regimes and European Court of Human Rights (ECtHR) jurisprudence.
- The Constitutional Court of Ukraine (ConCU) serves as an important forum for assessing the compatibility of Ukrainian domestic laws with constitutional human rights guarantees, including fair trial rights.
- Ukrainian and Russian individual applicants can still apply to the ECtHR regarding fair trial violations if committed by Ukraine (despite Russia's withdrawal), provided domestic remedies are exhausted. The CoM CoE oversees the implementation of ECtHR judgments.
- Ensuring adherence to the rule of law and respect for human rights is a prerequisite for Ukraine's accession to the European Union (EU). The European Commission's 2024 report highlighted areas where Ukraine needs to improve regarding fair trial guarantees and the functioning of the judiciary.
- The fact that denial of a fair trial is an international crime implies that both Russian and Ukrainian legal or judicial actors could be held individually criminally responsible for such conduct.

1. This section outlines the domestic and international and European sources of fair trial guarantees practitioners in Ukraine should be aware of. In addition to Ukrainian domestic law, practitioners should be aware of international and European standards and

jurisprudence for interpretation and supplementation. With several legal regimes regulating the fairness of trials in Ukraine, practitioners should be mindful of the variations between the regimes and how they interact.

2. The awareness of practitioners of the applicable law regulating the fairness of trials is key in order to construct argumentation or reasoning on this basis. However, practitioners must also be aware of their individual obligations to uphold fair trial guarantees, and in which instances they may individually be found liable for violations of fair trial rights or the denial of a fair trial as a crime. For example, under Ukrainian law and international and European human rights and humanitarian law, it is Ukraine *as a state* that should uphold fair trial guarantees. This means that certain practitioners involved in trial processes such as investigators and prosecutors, as representatives of the state investigative or prosecutorial authorities, and judges as representatives of courts (also considered state bodies), are *obliged* to uphold fair trial guarantees.

3. The actions of defence agents cannot be attributed to the state in order to find a violation of fair trial guarantees under international and European human rights or humanitarian law, nor under domestic law. However, their actions are inherent to the fairness of proceedings as a whole, and they are bound by their rules of professional practice and ethics. It is worth noting that in theory, any individual practitioner involved in a trial process who denies a fair trial could be held criminally responsible under international criminal law where the elements of this as a crime are established.

1.1 Ukrainian law

4. With regards to domestic law, the right to a fair trial and associated rule of law and human rights guarantees are enshrined in the Constitution of Ukraine, particularly in Chapter II (Human and Citizens' Rights, Freedoms and Duties), as well as Article 129 on the administration of justice and principles of judicial proceedings. Further rules regulating the justice system and functions of practitioners in Ukraine, such as the 2012 Law On the Bar and Practice of Law and the 2016 Law on the Judiciary and the Status of Judges, have been developed as part of significant judicial reform efforts in Ukraine. Reform remains ongoing in cooperation with the Council of Europe (particularly the Venice Commission) and in light of the European Commission's assessments of Ukraine with a view to EU membership (see European Commission, 'Ukraine 2024 Report').

5. The Criminal Procedure Code of Ukraine (CPC) reinforces and elaborates on these fair trial, rule of law, and human rights guarantees *within criminal cases*. The CPC has undergone multiple amendments since the outbreak of conflict in 2014, including 13 rounds of amendments since 24 February 2022, some of which resulted from the imposition of martial law (see Ukrainian Legal Advisory Group 'NEEDS ASSESSMENT OF UKRAINE'S JUSTICE SYSTEM: Delivering Meaningful Justice to the Victims and Survivors of the Armed Conflict' pp. 54-55).

1.2 International and European Human Rights Law

6. In terms of international and European standards, fair trial rights are contained in international and European human rights and humanitarian law (due to the ongoing conflict). International and European human rights law (IHRL – note this abbreviation encompasses both international and European human rights law) mainly regulates the relationship between the state and individuals within its jurisdiction, placing limits on state interference with the freedoms of individuals. A number of international and European human rights treaties set out the minimum guarantees for a fair trial. In particular, Ukraine must adhere to the guarantees contained in the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR), both of which not only protect the right to a fair trial itself (Article 6 ECHR and Article 14 ICCPR), but contain a range of other fundamental rights relevant to the fairness of proceedings (Articles 3, 5, 7 and 8 ECHR, and Articles 7, 9, 10 and 15-17 ICCPR). The drafting of the original 1996 Ukrainian Constitution was directly influenced by the ECHR, which entered into force in Ukraine in September 1997. The ECHR and the ECtHR's jurisprudence are recognised as a source of law in Ukraine (see 2006 Law on the implementation of decisions and application of the practice of the ECtHR).

7. The obligations stemming from the ECHR and ICCPR continue to apply during situations of armed conflict, including situations of occupation (International Court of Justice (ICJ), Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, paras 111-112; ECtHR, Al-Skeini and Others v. United Kingdom, para 138). Nonetheless, the ECHR and ICCPR allow Member States to derogate from certain obligations in times of war, or other emergencies which "threaten the life of the nation" and "the existence of which is officially proclaimed" (Article 15 ECHR, Article 4 ICCPR). A *derogation* in this sense refers to 'the suspension or suppression of a law under particular circumstances,' and should be distinguished from a *limitation* (see How Does Law Protect in War?, 'Derogations'). Certain rights permit *limitations* or *interference* in certain circumstances and this is made clear in the specific wording of the respective right(s). There are certain obligations under both the ECHR and ICCPR from which no derogation is permitted, such as the right not to be subjected to torture or inhuman or degrading treatment or punishment (Article 15(2) ECHR, Article 4(2) ICCPR). Even though the right to a fair trial is not listed as a non-derogable right, the HRC has clarified regarding Article 14 ICCPR (CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency, para 16) that the fundamental requirements of a fair trial must always be respected.

8. Each international and regional human rights treaty of relevance has its own monitoring body, such as the ECtHR (in respect of the ECHR) and the HRC in respect of the ICCPR, which interprets the application of fair trial rights. It is important to note that the ECtHR and the HRC may take different approaches in interpreting comparable human rights provisions and that a clear analysis of the specific regime will remain necessary.

9. There are also significant differences in terms of the binding nature of the decisions of the HRC and the ECtHR. The HRC's Decisions (on Communications), General Comments, and Concluding Observations are not binding on Ukraine, but do represent an authoritative

interpretation of the ICCPR (see G.L. Neuman, 'Giving Meaning and Effect to Human Rights: The Contributions of Human Rights Committee Members', pp. 2-5). Yet, the judgments of the ECtHR against Ukraine are binding on Ukraine, and domestic authorities are required to implement the Court's decisions. Where discrepancies in interpretation by the HRC and ECtHR of rights contained in the treaties arise, practitioners must try to find a harmonised solution. However, they should first and foremost rely on the ECtHR's interpretation due to its enforcement powers in the Ukrainian context.

1.3 International Humanitarian Law

10. International Humanitarian Law (IHL) is a body of international law that applies only once an armed conflict has begun and equally to all sides of the conflict. It can apply concurrently with international and European human rights law but will, in situations of international armed conflict ('IAC' – see further below), constitute the principal legal regime out of the two where conduct relates directly to the armed conflict or situations of occupation. IHL regulates the conduct of armed conflict and seeks to limit its humanitarian consequences by (a) restricting the means and methods of warfare that parties to a conflict may employ, and (b) ensuring the protection and humane treatment of persons who are not, or no longer, taking part in direct hostilities.

11. The relevant IHL provisions with respect to fair trials can be found in customary international humanitarian law (see ICRC, 'International humanitarian Law Databases') and the 1949 Geneva Conventions and their Additional Protocols, which Ukraine has ratified. IHL protects the following persons: combatants in the field and at sea who have laid down their arms or are *hors de combat* (a combatant who, physically or morally, cannot continue to fight), prisoners of war ('POWs'), civilians who do not participate in hostilities, and persons involved in certain fields within the context of armed conflict, such as medical staff, religious personnel, and humanitarian aid workers, among others. Different rules apply depending on whether the conflict is classified as an IAC or a *non-international* armed conflict ('NIAC'). An IAC is defined as those with at least two States are involved. Situations of occupation are also considered an IAC. A NIAC is defined as those which are restricted to the territory of a single State, involving either armed dissidents fighting that State, or armed groups fighting each other. The conflict in Ukraine has been classified as an IAC from May 2014 onwards, therefore rules applicable to IACs have applied since this date (see Schmitt 'Ukraine Symposium – Classification of the Conflict(s)').

12. Fair trial guarantees are contained in customary IHL (ICRC, Customary IHL Database, Rule 100: Fair Trial Guarantees). IHL treaty law also provides standards applicable in IACs including:
    - The right of all members of the armed forces of a Party to a conflict to participate directly in hostilities (Additional Protocol I, Article 43(2));
    - The right of Ukraine or Russia to try persons alleged to have committed crimes under national law or war crimes (Third Geneva Convention, Article 129);
    - On the fairness of criminal proceedings against POWs (Third Geneva Convention, Articles 96-108);

- On the fairness of criminal proceedings against civilians interned during conflict or in occupied territories (Fourth Geneva Convention, Articles 54, 64-75, and 117-126);
- Fundamental fair trial guarantees for anyone who finds themselves in the power of a Party to the conflict who do *not* benefit from more favourable treatment under the Conventions (e.g., POW status under the Third Geneva Convention), such as combatants who fail to distinguish themselves from the civilian population when they are participating in hostilities (Additional Protocol I, Article 75).

13. Such rules create obligations on parties to a conflict. However, it is only possible to enforce these rules where violations of these guarantees constitute the grave breach of depriving a protected person of a fair and regular trial under Article 130 of the Third Geneva Convention, Article 147 of the Fourth Geneva Convention and Article 85(4)(e) of Additional Protocol I. This is because grave breaches are particularly serious violations which parties to a conflict are obligated to repress and prosecute. Together with other serious violations of IHL, grave breaches constitute war crimes. ICL criminalises the grave breach of denial of a fair trial (see below).

1.4 International Criminal Law

14. International Criminal Law (ICL) is a body of international law that defines international crimes –particularly serious violations of international law – and the procedures to hold individuals responsible for committing them. The denial of fair trial has been codified in ICL (either as a war crime or a crime against humanity) as 'wilfully depriving a prisoner of war or civilian [or other protected person] of the rights of fair and regular trial.' This description follows the respective 'grave breach' of the Geneva Conventions and Additional Protocol I under IHL.

15. For example, the crime is contained in the statutes of international and hybrid courts and tribunals as follows:
    - Rome Statute of the International Criminal Court, Article 8(2)(a)(vi);
    - Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, Article 6;
    - Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Article 2(f);
    - Statute of the Special Court for Sierra Leone, Article 3(1)(g);
    - Statute of the International Tribunal for Rwanda, Article 4(1)(g);
    - Law on Specialist Chambers and Specialist Prosecutor's Office, Articles 14(1)(a)(vi) and 14(1)(c)(iv).

16. The denial of fair trial as a crime often follows from other commonly charged international crimes, especially the crime of arbitrary detention, and can subsequently act as a 'gateway' crime by countenancing numerous other international crimes, such as murder, extermination, and inhumane acts (DePiazza, 'Denial of Fair Trials as an International Crime: Precedent for Pleading and Proving it under the Rome Statute' (2017) 15 Journal of

International Criminal Justice 257-289). German and Japanese perpetrators were tried for denial of a fair trial as international crimes at the post-Second World War military tribunals (see The United Nations War Crimes Commission, Law Reports of Trials of War Crimes Perpetrators, Volume V, London, 1948).

17. Other notable examples include the *Duch* case before the Extraordinary Chambers in the Courts of Cambodia (Kaing Guek Eav (alias Duch) (No. 001/18-07-2007/ECCC/TC)), in which the grave breaches charge of denying a fair trial was subsumed as part of the crime against humanity charge of arbitrary imprisonment, and the case of The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (Al Hassan) (ICC-01/12-01/18) before the ICC, which is a recent example of the Court considering the crime of denial of a fair trial in the context of a non-international armed conflict.

18. Since Article 438 of the Criminal Code of Ukraine (CCU) refers to 'any other violations of rules of the warfare recognized by international instruments consented to by [*sic*] binding by the Verkhovna Rada (Parliament) of Ukraine' thereby encompassing fair trial violations in IHL, the denial of a fair trial falls within the scope of this crime.

1.5 Implications of Ukraine's derogations from human rights treaties during ongoing conflict

19. In June 2015, Ukraine submitted a notification to derogate from specific obligations under the ECHR and its Additional Protocols. This notification has been subject to periodic amendments. A partial withdrawal of the derogation occurred in December 2019, with a subsequent update in April 2021. However, this was superseded by a new notification in March 2022, which was further extended in June and September 2022. Similarly, Ukraine notified its intention to derogate from the ICCPR in June 2015, with periodic updates. In March 2022, a further notification was submitted, with updates and extensions thereafter (see Council of Europe, 'Reservations and Declarations for Treaty No.005 - Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 005)').

20. The effect of Ukraine's derogations remains a complex question. In 2022, the Council of Europe prepared a legal analysis of the derogation made by Ukraine under Article 15 of the ECHR and Article 4 of the ICCPR, in part to respond to questions asked by the Ukrainian judiciary (Council of Europe, 'Legal Analysis'). Analysis from this report, as it affects the application of legal regimes on fair trials by Ukrainian practitioners, is summarised below.

21. The delineation of non-derogable rights differs across treaties, resulting in variations in the scope of derogation clauses. Article 15 of the ECHR and Article 2 of Protocol No. 13 to the ECHR specify the non-derogable rights of the ECHR. Most human rights treaties have similar specifications. However, Article 4 (2) of the ICCPR is silent about the *ne bis in idem* prohibition, which is non-derogable according to Article 4 (3) of Protocol No. 7 to the ECHR.

22. Human rights treaty bodies have expanded the understanding of non-derogable rights through interpretative jurisprudence. For instance, the HRC has noted that states cannot invoke derogations as justifications for violations of international humanitarian law or

peremptory norms of international law (including 'deviating from fundamental principles of fair trial, including the presumption of innocence') (HRC, General Comment No. 29, para 11). Furthermore, it notes that where the violation of the right could also constitute a crime of humanity amounting to individual criminal responsibility, a derogation cannot be invoked as justification for deviation in times of emergency (see above link, paras 12-13). Indeed, since IHL encompasses numerous peremptory norms and absolute prohibitions, derogations invoked due to armed conflict cannot disregard these rules solely on the basis of their omission from human rights treaty derogation clauses. The legal regime of a derogation operates concurrently with IHL, and should take into account its applicable rules and prohibitions (see Council of Europe, 'Legal Analysis', para 65).

23. The practical effect of these interpretative nuances is the emergence of discrepancies in the understanding of non-derogable rights across different human rights regimes and between human rights law and IHL, necessitating reconciliation. In the context of Ukraine's derogations, the following inconsistencies pertaining to fair trial rights are observable (a table analysing all of Ukraine's derogations is provided in the Council of Europe's legal analysis, at Figure 3):

    - Right to a Fair Trial (Article 14 ICCPR/Article 6 ECHR): Ukraine has twice notified derogations from this right, despite certain elements of the right to a fair trial being recognised as non-derogable by the HRC and customary international humanitarian law. The initial derogation from Article 6 of the ECHR was withdrawn in November 2019, but reinstated in March 2022.
    - *Ne Bis in Idem* (double jeopardy) (Article 14(7) ICCPR): Ukraine has also twice derogated from this right, which is non-derogable under Article 4(3) of Protocol No. 7 to the ECHR, thereby rendering the derogation under the ICCPR invalid. Furthermore, this right is considered an integral component of fair trial guarantees under the ICCPR and is deemed non-derogable by the HRC's interpretative jurisprudence.
    - Right to an Effective Remedy (Article 2(3) ICCPR/Article 13 ECHR): This right is classified as non-derogable, as it constitutes a treaty obligation inherent to the ICCPR as a whole. Under the ECHR, it is deemed essential for the protection of other substantive rights, including non-derogable rights. Nonetheless, Ukraine continues to derogate from this right.

24. In addition, as the right to privacy, for example, which Ukraine derogated from, already allows for limitations for the purposes of 'national security' and 'public safety', the derogation as an extra step appears to have been unnecessary.

25. It is crucial to emphasise that a mere declaration of derogation does not absolve a state from its obligations to adhere to fundamental principles and safeguards in implementing derogatory measures. Specifically, the implementation of derogations during emergencies must be grounded in legality, necessity, proportionality, equality, and fairness, applied judiciously to individual circumstances. Similarly, the implementation cannot disregard other obligations under international law (e.g. IHL), necessitating a harmonious application of various legal regimes that may emerge during a state of emergency. The HRC has noted that since certain elements of the right to a fair trial are explicitly guaranteed under IHL

during armed conflict, there can be no justification for derogation from these guarantees during emergency situations (HRC, General Comment No. 29, para 16).

26. The complexities of Ukraine's derogations still require further resolution. Yet, practitioners in Ukraine at a minimum should be aware that certain elements of the right to a fair trial must be guaranteed throughout the entire derogation period.

1.6 Applicability of international and European law and jurisprudence domestically

27. The rules regarding the applicability and hierarchy of international and European law vis-à-vis Ukrainian domestic law, coupled with the practice of employing international and European standards to bolster argumentation and reasoning, makes a strong case that Ukrainian practitioners should interpret Ukrainian law regulating the fairness of trials in line with the applicable international and European legal regimes.

28. Ukraine follows a monist approach by which international treaties accepted or ratified by Ukraine are incorporated into its domestic legal system, without having to be transposed by specific national laws. Article 9 of the Constitution states '[i]nternational treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine'. Indeed, Article 19 of the 2004 Law on international agreements of Ukraine provides that international treaties are part of national legislation and have higher hierarchical status than national law ('Benchbook on the Adjudication of International Crimes' para 171). Article 9(4) of the CPC states that '[w]herever provisions of this Code contradict an international treaty, ratified by the Verkhovna Rada of Ukraine, provisions of the corresponding international treaty of Ukraine shall apply.'

29. The Ukrainian Constitutional Court has recognised (see Case No. 1-1/2016, para 2.3) the doctrine of taking a 'friendly attitude' to international and European law when interpreting constitutional provisions. This doctrine has been applied by the courts of general jurisdiction, including the Supreme Court and appellate courts in interpreting the provisions of human rights law (see e.g., Supreme Court of Ukraine, Case No. 454/143/17-ц, para 43; Supreme Court of Ukraine, Case No. 640/3701/20, para 71; Donetsk Court of Appeal, Case No. 234/15614/18, 20 March 2019). Specifically, Article 17 of the 2006 Law on the implementation of decisions and application of the practice of the ECtHR instructs domestic courts to apply the ECHR and the ECtHR case law as 'sources of law'. Furthermore, Article 9 (5) of the CPC provides that the criminal procedural legislation of Ukraine shall be applied with due regard to the case law of the ECtHR.

30. In practice, it has been argued that Ukrainian judges and state officials' references to the ECtHR jurisprudence have not been consistently or correctly applied with sufficient analysis (see Gnatovskyy and Ioffe 'Twenty Years of the ECHR in Ukraine'). This may have been aggravated by the ambiguity of the 2006 Law on the implementation of decisions and application of the practice of the ECtHR that stipulates that only the judgements against Ukraine must be translated into the Ukrainian language and published by the state authorities (Articles 1 and 6). Other ECtHR case law may not be properly 'promulgated' according to the law (see Article 57(2) of the Constitution of Ukraine, para 7 of the Review

of the Supreme Court of Ukraine Practice, and the respective Decree of President of Ukraine). It is also likely due to the lack of fluency of Ukrainian practitioners in the official languages of the ECtHR, a problem faced in other Member States as well.

31. In cases concerning Article 438 of the CCU (see T.M.C. Asser Institute, Strategic Recommendations for the Judiciary: A review of war crimes judgements in Ukraine, 2025), practitioners have referred to international and European human rights law and jurisprudence, especially when making arguments or providing reasoning relating to procedural issues, such as *in absentia* proceedings, or the standard of proof. These are not currently made consistently or with detailed analysis. However, they do include references to ECtHR cases against Member States other than Ukraine. Ukrainian practitioners in Article 438 cases regularly refer to IHL treaties, most often by virtue of the wording of Article 438 itself which refers to 'any other violations of rules of the warfare recognized by international instruments consented to by [*sic*] binding by the Verkhovna Rada (Parliament) of Ukraine', which includes the Geneva Conventions and their Additional Protocols. Yet this is usually to establish *the crime in question*, rather than as a basis for making arguments or analysing the accused's fair trial guarantees. Similarly, some reference is made to jurisprudence of international criminal tribunals in the judgements of Article 438 CCU cases, though generally not in terms of fair trial guarantees. Nonetheless, jurisprudence of international and hybrid criminal courts and tribunals is a useful interpretative source in navigating upholding fair trials in conflict-related cases and determining the contours and application of the crime of denial of a fair trial.

32. This Handbook seeks to enhance accessibility to using international and European standards by providing references throughout to relevant ECtHR, IHL and ICL sources, both the law itself, and jurisprudence, which practitioners can cite or rely upon in their argumentation or reasoning.

1.7 Further considerations for practitioners in applying fair trial standards

1.7.1 The role of the Ukrainian Constitutional Court

33. The Constitutional Court of Ukraine (ConCU) may be an important forum to navigate the compatibility of Ukrainian domestic laws applicable in conflict-related trials with human rights guarantees (including fair trial rights) contained in the Constitution, also in conformity with international and European treaties (see Verfassungsblog on Matters Constitutional 'Wartime Constitutionalism and the Politics of Constitutional Review in Ukraine'). According to Articles 147, 150, 151, 151-1 of the Constitution of Ukraine and Article 7 of the Law on the Constitutional Court of Ukraine (13 July 2017 № 2136 – VIII), the powers of the Court include 'deciding on conformity to the Constitution of Ukraine (constitutionality) of laws of Ukraine and other legal acts of the Verkhovna Rada of Ukraine, acts of the President of Ukraine, acts of the Cabinet of Ministers of Ukraine, legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea [and] official interpretation of the Constitution of Ukraine; providing opinions on conformity to the Constitution of Ukraine of applicable international treaties of Ukraine or those international treaties that are submitted to the Verkhovna Rada of Ukraine for its consent to their binding nature',

among others (see Constitutional Court of Ukraine 'Note on appeals to the Constitutional Court of Ukraine with a request for information').

34. The ConCU can also request *amicus curie* opinions from the Venice Commission of the Council of Europe, on comparative constitutional and international law issues (see Venice Commission of the Council of Europe). For example, although the request was made by the Prime Minister of Kosovo, an opinion was sought from the Venice Commission regarding Kosovo's provisions within its Criminal Procedure Code on *in absentia* trials (see Opinion No. 985 / 2020).

35. According to Article 36(5)(2) of the Law on the Judiciary and the Status of Judges the Supreme Court can request the ConCU to provide an opinion on the constitutionality of laws, other legal acts, as well as the official interpretation of the Constitution of Ukraine. This fosters interaction between the court system and the ConCU, as the courts of first and second instances may refer issues to the Plenum of the Supreme Court with a suggestion that it requests the ConCU to provide an opinion (see Antsupova 'Judiciary In Ukraine: Evolution Through The Systemic Deficiencies And Everlasting Reforms'). In addition, since 2017, individuals and legal entities have been able to lodge complaints before the ConCU where there has been a final court ruling on the case in question, and where the complaint concerns violations of the constitutional norms in ordinary laws applied by the ordinary courts in the case. This opens the door for legal representatives of both Russian and Ukrainian accused in conflict-related cases to lodge a complaint where they believe there has been a violation of constitutional norms, including fair trial guarantees, through the ordinary laws applied by the ordinary courts. It is important to note that according to the ConCU's guidance on 'The main points to pay attention to when filing a constitutional complaint' (para I.), a Russian citizen may complain to the ConCU. This is however subject to the condition that they qualify as a 'foreigner residing in Ukraine' and a court of last instance must have violated their rights (Article 151(1) Constitution of Ukraine).

36. For example, the Case of constitutional complaints of Onishchenko Ruslan Ilyich, Havrylyuk Dmytro Mykhailovych regarding the compliance with the Constitution of Ukraine (constitutionality) of part six of Article 615 of the Criminal Procedure Code of Ukraine (case on guarantees of judicial control over observance of the rights of persons held in custody) before the ConCU addressed the rights of the accused under martial law, focusing on Article 615(6) CPC, which allowed automatic extensions of pre-trial detention without judicial oversight, for up to two months (see below, Section 6). The Court ruled this provision unconstitutional, citing violations of personal liberty, the right to a fair trial, and the right to legal defence, as guaranteed by the Constitution. It emphasised that decisions on the pre-trial detention or deprivation of liberty of an accused must be based on a 'reasoned court decision' and that individuals must be released in the absence of such a decision. The Court rejected the argument that derogations from the ECHR and the ICCPR justified the measure. Constitutional justices clarified that derogations cannot override constitutional guarantees or be applied arbitrarily. The ruling relied on ECtHR jurisprudence, referencing cases such as Witold Litwa v. Poland, S., V. and A. v. Denmark,

and Brogan and Others v. the United Kingdom, underscoring the need for judicial control over detention decisions even in times of armed conflict.

37. The implications of a ConCU ruling declaring the unconstitutionality of an applied norm in criminal proceedings due to its effect on fair trial rights remains unclear due to the lack of a right to a re-trial in Ukrainian domestic law (see below, Section 10). Yet, ongoing ECtHR scrutiny and enforcement against Ukraine would imply that Ukrainian or Russian individuals affected by application of a norm in proceedings which was declared unconstitutional in its effect on their fair trial rights could then apply to the ECtHR which can request measures to resolve the matter (see below).

1.7.2 ECtHR scrutiny and enforcement

38. Russia withdrew from the Council of Europe on 15 March 2022 and was expelled from the Council of Europe on 16 March 2022 (see Resolution CM/Res(2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe). The ECtHR will deal with applications directed against Russia in relation to alleged violations of the Convention that occurred until 16 September 2022.

39. Practitioners should note that Russia's withdrawal does not affect the possibility of Russian individual applicants to apply to the Court regarding violations of fair trial rights if committed by Ukraine, since Ukraine remains a party to the ECHR. In practice, however, this would require Russian individual applicants to exhaust domestic remedies in Ukraine before taking their case to the ECtHR. In *in absentia* cases, this may require an accused to engage in the proceedings, but the right to appeal in *in absentia* cases does not always necessitate the accused's appearance in person (see Section X below).

40. The Committee of Ministers of the Council of Europe (CoM CoE) supervises the implementation of ECtHR judgements. It can exercise supervision over a case and assess what individual or general measures have been taken to implement the judgement. Individual measures would ensure that an individual applicant is restored to the extent possible to the previous legal status that he or she had before the violation of the ECHR, whereas general measures relate to more systemic issues, and are taken to prevent future violations similar to those found by the Court. The cases under enhanced supervision by the CoM CoE against Ukraine predominantly concern issues related to unlawful arrests, length of detention on remand, violations of right to life, ill-treatment by police, poor detention conditions and lack of adequate medical treatment, as well as excessive lengths of criminal and civil proceedings and lack of effective remedy. Practitioners should also, therefore, take note of the individual and/or general measures being assessed in such cases, to ensure that their practice ensuring the fairness of trial proceedings aligns with ECtHR authority.

1.7.3 European Commission scrutiny

41. Practitioners should also be aware that ensuring adherence to the rule of law and respect for human rights is required by the EU for Ukraine's accession. In its Ukraine 2024 Report accompanying the 2024 Communication to the European Parliament, the Council, the

European Economic and Social Committee and the Committee of Regions on EU enlargement policy, the European Commission made observations and recommendations related to fair trial guarantees requiring improvement in light of Ukraine's accession to the EU (see European Commission 'Ukraine 2024 Report'). It states 'the EU's founding values include the rule of law and respect for human rights. An effective (independent, high-quality and efficient) judicial system and an effective fight against corruption are of paramount importance, as is respect of fundamental rights in law and in practice' (see above link, p. 28). The Commission makes observations and recommendations relating to the functioning of the judiciary, including its independence and impartiality, the quality of justice, and efficiency.

42. In particular, the report states: 'Ukraine needs to address systemic or structural issues raised by the Court notably in the areas of judiciary, law enforcement and human rights and to ensure systematic and timely enforcement of ECtHR judgements' (see above link, p. 37). It also highlights that '[d]espite legal improvements and some improvements in individual facilities and in investigations, torture and ill treatment remain an issue of concern in Ukraine's prison and detention system' (p. 37), and that '[p]rocedural rights are outlined and protected in the Law on the judiciary and status of judges and in the Criminal Procedure Code, but their implementation suffers from inefficiencies and weaknesses in the judicial system. Ukraine's legislation has yet to be aligned with the EU acquis' (p. 42). Systemic or structural reforms required by the EU for accession rest with the state, but many of the recommendations also depend on strengthened adherence to the rule of law and fair trial guarantees by practitioners involved in trial processes.

1.7.4 Complementarity

43. The fact that denial of a fair trial is an international crime in Ukraine means that Russian or Russian-affiliated legal or judicial actors operating in Russia-controlled territories in Ukraine could be held individually criminally responsible for denying a fair trial as a war crime. However, if conflict-related trials are not carried out in line with fair trial guarantees, also Ukrainian judges and practitioners who intentionally deny a fair trial could be prosecuted for this conduct as a war crime in Ukraine, at the International Criminal Court ('ICC'), or in a third domestic court under the principle of universal jurisdiction.

44. The ICC is designed to be a court of last resort that is complementary to national criminal jurisdictions, only acting where State parties are unwilling or unable to investigate and prosecute perpetrators of international crimes over which they have jurisdiction. The Rome Statute describes 'inability' as a state being 'unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings' as a result of the 'total or substantial collapse or unavailability of its national judicial system' (Rome Statute, Article 17(3)). While this is unlikely to apply to Ukraine in current circumstances, Ukraine must show genuine willingness to hold international crimes cases. Under the Rome Statute, unwillingness is defined as investigations conducted in a manner that 'shield[s] the person concerned from criminal responsibility' for international crimes, where there is 'unjustified delay[s] in the proceedings' that obstructs justice, or, where investigations are conducted in a non-independent or non-impartial manner (Rome Statute, Article 17(2)). Therefore, if

the ICC finds that Ukraine is unwilling to hold domestic practitioners criminally accountable for denying a fair trial to an accused in a conflict-related crimes case, it could theoretically step in to hold a Ukrainian individual practitioner criminally liable.

Section 2 - Application of substantive law on conflict-related crimes in line with the principle of legality

SUMMARY

- In Ukraine, the application of substantive law for conflict-related crimes must adhere to the principle of legality, a cornerstone of fair trial standards in domestic and international and European law, and which encompasses the requirement that the law is written, the prohibition of retroactivity, legal specificity and strict construction.
- Certain provisions under the CCU may raise concerns with regards to specificity, such as Article 438 and 111. The introduction of Law 4012-IX has not resolved these concerns.
- ECtHR jurisprudence clarifies that while 'blanket references' in criminal law, such as Article 438 CCU, are not per se incompatible with Article 7 ECHR, the law must enable individuals to foresee what conduct may trigger criminal liability.
- **Article 58 of Ukraine's Constitution should be interpreted by practitioners in line with Article 7 of the ECHR, bringing 'international law' within the meaning of law that criminalises conduct.**
- **ECtHR jurisprudence supports practitioners using international law to enhance legal certainty provided it is accessible and foreseeable.** This is the case where references are made to international treaties ratified by Ukraine and customary international law in force at the time of the commission of the crime.
- In conflict-related cases, **Ukrainian practitioners could be referring to customary international law (and treaties or statutes reflective thereof) for delineating elements of crimes, modes of liability, such as command responsibility, or joint criminal enterprise or defences.**
- **Such sources of international law may also be applied retroactively by practitioners provided that such retroactive application does not disadvantage the accused. The ECtHR assesses this on a case-by-case basis, examining whether the defendant could reasonably have foreseen criminal liability under the applicable international legal framework at the time of the conduct.**
- Given the complexity of navigating the application of substantive law in conflict-related cases in line with the principle of legality, **practitioners may also wish to refer to the practice of other national jurisdictions which have faced similar challenges and are bound by the ECHR, such as in the Balkan region, Kosovo, and Armenia.**

45. In conflict-related cases in Ukraine, practitioners must ensure that the application of the substantive provisions covering conflict-related crimes, including modes of liability and defences, comply with the principle of *nullum crimen sine lege* (the principle of legality).

Sources of this principle in domestic and international and European law can be found below.

46. Ensuring that the law is applied in compliance with this principle can also affect the adherence to other fair trial guarantees under Ukrainian and international and European law, including the accused's right to be informed of the charges (see below, Section 6) (where they were a combatant), not to be charged for directly participating in hostilities (see below, Section 6), or the presumption of innocence (see below, Section 3), and that the burden of proof has been met by the prosecution (see below, Section 3).

Table 1 Legal sources for the principle of legality (nullum crimen sine lege)

Ukrainian law	IHRL	IHL	ICL	Other
• Constitution of Ukraine, Article 58	• ECHR, Article 7 • ICCPR, Article 15 Both these Articles are non-derogable in times of war or public emergency (*see* ECHR, Article 15, and ICCPR, Article 4)	• Third Geneva Convention (as applicable to POWs), Article 99 • International Committee of the Red Cross ('ICRC'), 'Commentary to Geneva Convention III (2020)', Article 99, para 3959 • Fourth Geneva Convention, Article 67 • ICRC, 'Commentary to Geneva Convention IV (1958), pp. 341-342) • Additional Protocol I, Article 75(4)(c) • Recognised as customary international	• Rome Statute, Article 22	• A general principle of law as defined in Article 38(1)(c) of the Statute of the International Court of Justice • A *jus cogens* norm (a peremptory norm of international law, *see* Report of the International Law Commission, 29 April–7 June and 8 July–9 August 2019, A/74/10, p. 171)

		humanitarian law (*see* ICRC, Rule 101)		

47. The principle of legality ensures that the prosecution of a defendant is based on specific and clear legal provisions that existed at the time the crime was committed, to create legal certainty, predictability and foreseeability. It incorporates four corollary principles:
    (1) the principle of written law, that a crime may only be defined by the law itself,
    (2) that the law is prohibited from being applied retrospectively and that the act must already exist in law,
    (3) the principle of specificity or certainty, that the law must be clear and precise detailing both objective and subjective elements of crimes, and
    (4) that the law must be strictly construed, and that it is prohibited to extend by analogy.

2.1 Scope of application

48. The principle of legality applies to all criminal offences, modes of liability, and defences. It 'imposes on criminal judges a duty of interpretative restraint and significantly limits the scope for dynamic interpretation to the detriment of an accused.' (see A. Grabert, Dynamic Interpretation in International Criminal Law: Striking a Balance between Stability and Change, (Herbert Utz Verlag, June 2015), p. 13). Whilst it should be 'the crucial guidepost in the interpretative process', judges handling conflict-related cases are often presented with new situations that do not fall under the existing law, and therefore 'a certain degree of dynamism is required in order to cope with minor alterations' (see above, p. 20). New characteristics of armed conflicts and emerging recognition of certain types of conduct by the international community are continuous challenges to the already existing legal frameworks. Indeed, it is clear that flexibility is key for any criminal justice system to work.

2.2 Conflict-related cases in Ukraine: substantive law and the principle of legality

49. In conflict-related cases in Ukraine, practitioners must apply substantive law contained in the CCU. The ratification of the Rome Statute by Ukraine took effect on 1 January 2025, alongside the adoption of an implementing law (Law No. 4012-IX), which came into effect on 24 October 2024. This law partially implements the Rome Statute provisions into the CCU. For the first time, crimes against humanity—mostly aligned with the Rome Statute—have been codified, and a version of command responsibility has been introduced. Yet, many ongoing cases relate to conduct which occurred prior to the ratification, and therefore questions arise as to how practitioners should apply the substantive law in Ukraine in these cases so as to comply with the principle of legality.

50. Specifically,
    (1) Were the provisions of the CCU applicable at the time of the offence sufficiently certain, and does the ratification of the Rome Statute by Ukraine and introduction of implementing legislation change this?

(2) To what extent can additional sources of law be used to clarify existing provisions without extending the law by analogy or violating the prohibition of retroactive application?

51. Prior to the adoption of implementing Law No. 4012-IX, Article 438 of the CCU, most commonly used in conflict-related cases in Ukraine, prohibited 'Violations of rules of the warfare', namely '[c]ruel treatment of prisoners of war or civilians, deportation of civilian population for forced labor, pillage of national treasures on occupied territories, use of methods of the warfare prohibited by international instruments, or any other violations of rules of the warfare recognized by international instruments consented to by [*sic*] binding by the Verkhovna Rada (Parliament) of Ukraine, and also giving an order to commit any such actions', noting that such a crime 'shall be punishable by imprisonment for a term of eight to twelve years' but that '[t]he same acts accompanied with a murder, - shall be punishable by imprisonment for a term of ten to fifteen years, or life imprisonment.' Law No. 4012-IX did not change the description of this Article, but renamed the title 'War Crimes'.

52. Article 438 CCU is a blanket provision, which makes reference to 'international instruments', or 'international instruments consented to by [*sic*] binding by the Verkhovna Rada' with respect to 'use of methods of warfare' and 'any other violations of rule of the warfare' respectively. It is not clear from this reference whether the Article criminalises *all* violations of IHL, or only those considered as serious violations of IHL or war crimes. It is also not clear whether the references to international instruments are restricted to IHL treaties only, or additional sources of international law (see Benchbook on the Adjudication of International Crimes, para 153). The renaming of the Article under Law No. 4012-IX suggests that it would now be more restrictively interpreted as encompassing serious violations of IHL or war crimes, rather than *all* violations of IHL, however this has not been explicitly clarified. The new version also does not clarify the meaning of 'international instruments'. Neither version of the Article provides detail on the contextual, material and subjective elements of the crimes encompassed within the Article.

53. The lack of specificity within the provision has resulted in inconsistent practice on the scope of the crime, and the sources of international law which can be relied upon to clarify the scope (see Asser Institute, Strategic Recommendations for the Judiciary). While practitioners refer to IHL in their argumentation and reasoning, references do not always correspond to grave breaches or war crimes. Very limited reference is made to sources of international criminal law, which provide more detail on contextual, material and mental elements of crimes. Many practitioners consulted with for this report had concerns regarding Article 438 CCU's format as a blanket provision, noting the complexity it adds to qualifying conduct as a specific crime, establishing the material and mental elements of a crime, and that it requires in-depth knowledge of IHL and other relevant legal acts, including the Rome Statute, which not all practitioners possess. It was clear from the consultations that opinions on the scope of the Article and applicable legal sources for further clarification varies greatly between prosecutors, judges and defence lawyers, and also within those groups.

54. Additional provisions within the CCU relating to conflict-related cases also suffer from a lack of specificity, such as Article 111 on collaborationism and aiding and abetting the aggressor state (ZMINA, 'Collaborationism and abetting the aggressor state: practice of legislative application and prospects for improvement, Analytical report', 2023). Similarly, while Law No. 4012-IX introduced Article 31, the mode of liability of command responsibility, the Article does not correspond to the definition under international law (both treaties and customary law).

2.3 Application of international law to provide certainty/interpretation of national legislation

55. To determine whether further certainty in the substantive law is required as a result of the principle of legality, and to what extent international sources can be relied upon to provide this, it is important to note that Article 58 of the Constitution of Ukraine varies from Article 7 of the ECHR. Article 58 of the Constitution of Ukraine reads 'laws and other normative legal acts have no retroactive force, except in cases where they mitigate or annul the responsibility of a person. No one shall bear responsibility for acts that, at the time they were committed, were not *deemed by law* to be an offence.' However, Article 7 of the ECHR reads:

> 1. No one shall be held guilty of any criminal offence on account of any act or omission which *did not constitute a criminal offence under national or international law* at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
> 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

56. It is important to note that Article 7(2) is not an extension of the concept of 'law' under Article 7(1), but is rather clarifying the criminalisation under Article 7(1). In the absence of any domestic commentary clarifying the meaning of 'law' within the Ukrainian Constitution, and in line with the hierarchy of applicable law regulating fair trial guarantees as noted in Section 1 above, the Constitution should be interpreted in line with the ECHR so as to include international law within the meaning of 'law'.

57. The ECtHR has found that using the 'blanket reference' or 'legislation by reference' technique in criminalising acts or omissions is not in itself incompatible with the requirements of Article 7 ECHR. Yet, the referencing provision and the referenced provision, read together, must enable the individual concerned to foresee, if needs be with the help of appropriate legal advice, what conduct would make them criminally liable. The Court states that the most effective way of ensuring clarity and foreseeability is for the reference to be explicit, and for the referencing provision to set out the constituent elements of the offence. It notes that the referenced provisions may not extend the scope of criminalisation as set out by the referencing provision (ECtHR, Advisory opinion concerning the use of the "blanket reference" or "legislation by reference" technique in the

definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law [GC], 2020, para. 74; Saakashvili v. Georgia, 2024, paras. 145-146, Kononov v. Latvia, para. 185).

58. This means that reference to international law standards can be used to provide further certainty, for example by delineating the elements of the offence, mode of liability or defence, provided that it is accessible and foreseeable to the accused. In terms of accessibility, the ECtHR has considered whether the law is public, (in the case of international law) it has been incorporated into domestic law, or its inclusion within customary international law (ECtHR, Korbely v. Hungary [GC], 2008, paras. 74-75, and Vasiliauskas v. Lithuania [GC], 2015, paras. 167-168). Referring to such standards will only be foreseeable where reference is made to the standards of international law applicable at the time the offence was committed. The concept of 'international law' for this purpose has included:
    (1) International treaties ratified by the State in question (the ICCPR in ECtHR, Streletz, Kessler and Krenz v. Germany [GC], 2001, paras. 90-106 or the 1948 Convention for the Prevention and Suppression of the Crime of Genocide in the case of Germany in ECtHR, Jorgic v. Germany, 2007, para 106), and/or
    (2) customary international law (see the definition of genocide in customary international law in 1953 in ECtHR, Vasiliauskas v. Lithuania [GC], 2015, paras. 171-175; the Laws and Customs of War in 1944 in Kononov v. Latvia [GC], 2010, paras. 205-227; and customary international law prohibiting the use of mustard gas in international conflicts in Van Anraat v. the Netherlands (dec.), 2006, paras. 86-97).

2.4 International and European law's position on the retroactive application of criminal law

59. Article 7 ECHR unconditionally prohibits the retroactive application of criminal law where it is to an accused's disadvantage (CoE, Guide on Article 7, para 48, ECtHR, Del Río Prada v. Spain [GC], 2013, para 116; Kokkinakis v. Greece, 1993, para 52).

60. However, Article 7(2) provides an exception to this rule by allowing introduction of criminal punishment for acts that were criminalised by international law 'applicable at the material time' (Vasiliauskas v. Lithuania [GC] paras 165-166). National practice on the non-retroactivity of the law is complex and varies greatly (see e.g. ECtHR, Advisory opinion concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law, [GC], 2020, paras 36-40). The ECtHR has held that there is no violation of the principle of non-retroactivity where an accused's conviction is based on international law in force at the time. For example, the ECtHR found no violation of Article 7 with regards to a conviction for war crimes, at the time not codified in Latvian legislation, but considered as customary international law (ECtHR, Kononov v. Latvia [GC], 2010, paras. 244-246). Similarly, the Court held that command responsibility could be retroactively applied given its customary international law nature (ECtHR, Milanković v. Croatia, 2022, para. 53).

61. Thus, it would not be unconstitutional nor in violation of the principle of legality under Article 7 ECHR for Ukrainian practitioners to apply international law in force at the time the act was committed to the extent that it provides further certainty in delineating the elements of crimes, modes of liability or defences. Relevant sources of law include (to the extent they reflect customary international law): the statutes and case law of international criminal courts and tribunals (particularly the International Criminal Tribunal for the former Yugoslavia (ICTY)), the Rome Statute, and other international legal instruments (see Benchbook on the Adjudication of International Crimes, para. 173 onwards). While not ratified by Ukraine at the time of the commission of the many offences, these sources contain the most modern and comprehensive criminalisation of serious violations of IHL and set out the material and subjective elements of those violations as crimes.

62. They reflect customary international law to the extent that they provide detail on the crimes corresponding to serious violations of IHL, grave breaches or war crimes under IHL, or the modes of liability of command responsibility or joint criminal enterprise, for example (ECtHR, Milanković v. Croatia, and ICTY, Tadić Appeals Judgement, para. 220).

63. Practically speaking, this means that practitioners could be referring to customary international law (and ICL statutes reflective thereof) on the elements of, for example, the international crimes of inhumane treatment (see Benchbook on the Adjudication of International Crimes, para 248 onwards) and wilfully causing great suffering (Benchbook on the Adjudication of International Crimes, para 291 onwards) to clarify the contextual, material and mental elements of the crime of 'cruel treatment of civilians' under Article 438 CCU, for example. They could also apply elements of modes of liability recognised as customary, such as joint criminal enterprise, to further delineate forms of liability under the CCU such as commission as part of a group under Article 28 (Benchbook on the Adjudication of International Crimes, paras 1442-1452).

64. It is important to highlight that not all elements of international crimes, modes of liability and defences codified in international criminal courts and tribunals' statutes, or the Rome Statute are reflective of custom. For example, while a definition of crimes against humanity may have been introduced in Ukraine by virtue of Law No. 4012-IX corresponding to the Rome Statute definition under Article 7, that definition is not considered customary, and indeed the statutes of the international criminal tribunals also vary in definitions. In this sense, the retroactive application of crimes against humanity under Law No. 4012-IX may not comply with the principle of legality.

65. In addition to the jurisprudence of the ECtHR, practitioners may also find it useful to consider the practice of other states which have faced similar challenges in interpreting blanket provisions in conflict-related cases in line with international law, and retroactive application of 'new' legislation criminalising international crimes, such as:

    (1) Bosnia & Herzegovina, Croatia and Serbia (see International Criminal Law Services (now resting with the Institute for International Criminal Investigations), 'International Criminal Law & Practice, Training Materials for: Bosnia & Herzegovina, Croatia and Serbia. Supporting the Transfer of Knowledge and

Materials of War Crimes Cases from the ICTY to National Jurisdictions', Section 5: The Domestic Application of International Law, 2014);

(2) Kosovo (see Organization for Security and Co-operation in Europe Mission in Kosovo, 'Kosovo's War Crimes Trials: An Assessment Ten Years On 1999 – 2009', May 2010, pp. 9-10); and

(3) Armenia (see ECtHR, Advisory opinion concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law, [GC], 2020).

Section 3 - Ensuring the presumption of innocence is respected

SUMMARY

- The presumption of innocence applies to all stages of criminal proceedings, starting from the investigation and continuing through the trial and appeal stages.
- **The prosecution bears the burden of proof to establish guilt beyond a reasonable doubt.** In conflict-related cases, the requirement of proof beyond a reasonable doubt applies to each element of each of the charged crimes and to each element of the forms of liability charged in the indictment.
- Where there is a lack of specificity in charges it is challenging to identify the elements of crimes or modes of liability that must be proven, and therefore whether they have been proven beyond a reasonable doubt, which could lead to violations of both the principle of legality and the presumption of innocence.
- ECtHR jurisprudence makes clear that certain evidentiary approaches may lead to a violation of the presumption of innocence, and the right to a fair trial more broadly, such as where a verdict convicting an accused is not sufficiently reasoned as to discrepancies and contradictions in the evidentiary record or where the prosecution relied upon evidence obtained through methods of coercion.
- **Public authorities should refrain from making public statements affirming the guilt of the accused and the media should avoid news coverage prior to the issuance of verdicts as it may undermine the presumption of innocence.** Considering the wording used so as to avoid breaches of the presumption of innocence is especially important where Ukrainian authorities are notifying suspects in *in absentia* cases.
- The actions of all actors involved in the trial processes will be relevant to an overall determination of whether the presumption of innocence is guaranteed. **Unprofessional conduct by defence counsel, the lack of an effective defence, or issues with the equality of arms in proceedings could indicate violations of the presumption of innocence.**
- **Judges must also demonstrate independence and impartiality, and ensure that their judgements are reasoned and robust to reflect the fact there has been no pre-judgement of guilt.** Scrutiny of the actions of defence counsel and judges will be even more acute in *in absentia* cases where the accused is not actively participating in the proceedings.

66. Practitioners in Ukraine must ensure that the presumption of innocence is respected in all trials, and especially conflict-related trials, to ensure that the trial is fair. The presumption applies throughout criminal proceedings in their entirety, from the investigation stage to the reasons given in a judgment acquitting the accused (i.e., the reasoning in the judgment cannot reflect an opinion that the accused is in fact guilty) and appeal proceedings, even if the accused is found guilty during the first-instance proceedings.

67. It is therefore critical that practitioners in Ukraine involved in conflict-related trials are all aware of the law regulating the presumption of innocence, referred to below, and take action to avoid possible scenarios in their day-to-day work which could give rise to breaches as detailed in this section. It is important to note that the presumption of innocence is inextricably linked to other fair trial guarantees and can also be exemplified by violations thereof. Such guarantees include the right to remain silent and not to incriminate oneself (see below, Section 7), the right to an independent and impartial tribunal (see below, Section 4), rights connected to the adversarial nature of proceedings (see below, Section 5), approaches to evidence (see below, Section 9) or the right to a reasoned opinion (see below, Section 4), among others.

Table 2 Sources of law on presumption of innocence

Ukrainian law	IHRL	IHL	ICL	Other
• Constitution of Ukraine, Article 62 • CPC, Articles 7(1)[10] and 17	• ECHR, Article 6(2) • ICCPR, Article 14(2) Note that Ukraine derogated from Articles 6 and 14 under martial law, but the practical effect of this derogation may be limited (see above analysis)	• Additional Protocol I, Article 75(4)(d) (applicable to POWs) • The presumption of innocence is recognised as customary international humanitarian law (*see* ICRC, Rule 100)	• Rome Statute, Article 66	

3.1 Proof beyond a reasonable doubt

68. As per Ukrainian and international and European law, the presumption of innocence entails that the burden of proof (beyond a reasonable doubt) is on the prosecution, and any doubt should benefit the accused (Constitution of Ukraine Article 62 and CPC Article 17, as well as ECHR, Article 6(2) and ICCPR, Article 14(2)). The prosecution must inform the accused of the charges against them, in order for the accused to prepare and present their defence case, and bring sufficient evidence to the court to convict the accused (ECtHR, Barberà, Messegué and Jabardo v. Spain, para 77; Janosevic v. Sweden, para 97). The presumption of innocence will be violated where the burden of proof shifts from the prosecution to the defence (ECtHR, Telfner v. Austria, para 15).

69. In conflict-related cases, the requirement of proof beyond a reasonable doubt applies to each element of each of the charged crimes and to each element of the forms of liability charged in the indictment. It also applies to all evidence regarding the visual identification of the accused, for example. Like all elements of an offence, the identification of an accused must be proved by the prosecution beyond a reasonable doubt. A defence case could seek to raise a reasonable doubt as to the sufficiency of the evidence to satisfy the prosecution's burden of proof (Defence Counsel Handbook, Section 4.1). For example, the defence could argue that the prosecution witnesses are not credible or reliable or that the chains of command or military structures assumed in the prosecution charges are incorrect or that the accused has an alibi. Thereafter, it will be for the court to assess whether each element of each of the charged crimes and each element of the forms of liability charged in the indictment has been met beyond a reasonable doubt by the prosecution.

70. Yet, in consultations with Ukrainian practitioners, it has been highlighted that in many conflict-related cases, there may be insufficient evidence to demonstrate the level of responsibility or mode of liability of the accused, such as only indirect evidence to show the accused gave an order, or insufficient evidence to demonstrate that the accused in a commander position knew his subordinates were going to carry out a crime, or of the commander-subordinate relationship. As noted above, judgments analysed in Article 438 CCU cases (see Strategic Recommendations for the Judiciary) have shown that individual responsibility has been assumed where there is only evidence of a unit being present in a location, with no other evidence to support the accused's role or level of participation in a crime presented in the judgement.

71. Ukrainian practitioners raised other issues related to the burden of proof, including doubts over the civilian or military nature of a target. For example, where property was stolen, it could be dual use, such as a car or fuel, and there are questions over whether it was being used for military purposes, which practitioners note are not always examined in detail by the courts in their assessments. Furthermore, practitioners highlighted that evidence may be unreliable or insufficient more broadly, such as witness testimony that was obtained by the investigator or prosecutor in advance and then not subject to direct examination (including cross-examination) at trial (which is permitted under martial law, see below, Section 9), or where the identification of the accused cannot be demonstrated visually in court where an accused is *in absentia*. Other examples include where witness evidence is based on hearsay, or where electronic evidence is potentially unreliable or only proves certain facts (e.g. ownership of a device) but not in itself, the elements of a crime or the liability of the accused.

72. In certain conflict-related cases, appeals have been raised on behalf of the accused related to the prosecution's meeting of the burden of proof, such as where there are doubts as regards the identification of the accused, the assumption of liability based on the existence of an armed group in a particular area, or where the element of 'coercion' was not proved in establishing the crime of forced conscription. However, despite the Ukrainian court's reflection of ECtHR jurisprudence, including the cases of Korobov v. Ukraine or Ireland v. UK, the appeals have been largely rejected.

73. Where there is a lack of specificity in charges (see below, Section 6), it is challenging to identify the elements of crimes or modes of liability that must be proven, and therefore whether they have been proven beyond a reasonable doubt, which could lead to violations of both the principle of legality and the presumption of innocence. Furthermore, the ECtHR has made clear that certain evidentiary approaches may lead to challenges related to the presumption of innocence, and the right to a fair trial more broadly, such as where a verdict convicting an accused is not sufficiently reasoned as to discrepancies and contradictions in the evidentiary record (ECtHR, Ajdarić v. Croatia, paras 46–52), or where the prosecution relied upon evidence obtained through methods of coercion (ECtHR, Saunders v. the United Kingdom, paras 68-70). Practitioners therefore must ensure that the burden of proof has been met by the prosecution in conflict-related cases, through presentation of a robust case on the basis of reliable and sufficient evidence.

3.2 Public statements affirming the guilt of the accused

74. The fairness of a trial requires proceedings to be public and transparent (see below, Section 4). However, the words of practitioners involved in trials, and public authorities, communicating information to the public regarding the trial, as well as media to an extent, matter in terms of evidencing that the presumption of innocence has not been violated. The ECtHR has noted that a statement that someone is merely suspected of having committed a crime would not necessarily violate the presumption of innocence (ECtHR, Garycki v. Poland, para 67), but a clear declaration, in the absence of a final conviction, that an individual has committed a crime would be a violation (Ismoilov and Others v. Russia, para 166; Nešťák v. Slovakia, para 89).

75. The presumption of innocence may be infringed not only by a judge or court but also by other public authorities, such as police officials (ECtHR, Allenet de Ribemont v. France, paras 37 and 41), or prosecutorial authorities (ECtHR, Daktaras v. Lithuania, para 42 and Khuzhin and Others v. Russia, para 96). Public authorities should refrain from making public statements affirming the guilt of the accused and the media should avoid news coverage undermining the presumption of innocence (HRC, GC No. 32, para 30). The authorities are still able to inform the public about the criminal investigations taking place, in so far as this is done with all the discretion and circumspection necessary to ensure that the presumption of innocence is respected (ECtHR, Garycki v. Poland, 2007, para 69).

76. The ECtHR has held that statements by judges are subject to stricter scrutiny than those by investigative authorities (Pandy v. Belgium, para 43). It is certainly the case that presumption of innocence will be violated if a judicial decision reflects an opinion that an accused is guilty before he has been proved guilty according to law (ECtHR, Minelli v. Switzerland, para 37). In the ECtHR case of Grubnyk v. Ukraine, the applicant submitted that the Odessa Prymorsky District Court ('District Court') had stated in the initial detention order that he 'had committed a particularly grave offence', thus prejudging the outcome of the proceedings against him. The ECtHR found that it could only read that statement as an expression of the District Court's opinion that the applicant had indeed been guilty of the particularly grave offence of which he had merely been suspected, and not convicted, at the time. Such poor wording might have been a technical error by the District Court, but it

had at no point subsequently been acknowledged or rectified by the courts or by any other domestic authority. The Court found that there had accordingly been a violation of the applicant's right to be presumed innocent, in breach of Article 6(2) ECHR.

77. The ECtHR has considered some cases against Ukraine regarding public statements affirming the accused's guilt. For example, in the case of Krivolapov v. Ukraine, the ECtHR held that statements made by the investigator and Security Service officials to the mass media in respect of the criminal proceedings against the applicant were far from discreet or circumspect. They amounted to an unqualified declaration of his guilt without even specifying what stage the proceedings were then at: the applicant's full identity was disclosed to the public and he was labelled as a murderer and a falsifier of a highly sensitive criminal case. Moreover, the Court observed that those statements were disseminated on many occasions in a documentary, which had been created with the direct support of high-level State authorities and which contained extracts from the video of the applicant's confession to the police. The Court considered that such statements of the State officials encouraged the public to believe the applicant to be guilty and prejudged the assessment of the facts by the relevant judicial authority, finding a violation of Article 6(2) ECHR.

78. This reasoning was confirmed again in the later case of Korban v. Ukraine, in which the Court held that 'the statements made by high-ranking officials [prosecutors and members of political parties] to the mass media in respect of the criminal proceedings against the applicant were far from discreet or circumspect. His identity was known to the public and he was labelled as a leader of a criminal organisation involved in a number of serious criminal offences [...]. As such, those statements could not but have encouraged the public to believe the applicant guilty before he had been proved guilty according to the law', finding a violation of Article 6(2) ECHR (ECtHR, Korban v. Ukraine, para 231).

79. It is important to note that a violation of the presumption of innocence cannot be found where a statement is made about the accused regarding a crime they are not charged with. For example, in the Mbarushimana Case at the ICC, the Prosecutor publicly referred to the defendant as a 'genocidaire', yet this was not found to violate the presumption of innocence, because the statement did not imply a prejudgment as Mbarushimana had not been charged with genocide at the ICC or any other court (see M. Coleman, 'Language Matters: The Role of the Presumption of Innocence in Seeking Justice During the Russia-Ukraine Conflict', *OpinioJuris*, 30 June 2022).

80. Ensuring the wording does not violate the presumption of innocence does require nuance, especially in conflict-related cases. The indictments against the accused prepared by the prosecution in Ukraine often contain wording that an accused 'committed' an offence. Authorities should endeavour to use language such as 'alleged', 'accused', and 'suspected' in order to avoid violations of the presumption of innocence.

81. There have also been examples of Ukrainian authorities making notices of suspicion and statements regarding proceedings publicly online (including on social media channels such as Telegram) that could indicate pre-judgment. For example, in the case against the first Russian POW tried for war crimes in Ukraine after the full-scale invasion of Ukraine in

2022, Vadim Yevgenievich Shishimarin, the UN Office of the High Commissioner for Human Rights ('OHCHR') reported that the Security Service of Ukraine ('SBU') had published the confession of the defendant online before the trial had taken place (OHCHR, 'Situation of human rights in Ukraine: 1 February to 31 July 2022', para 100).

82. Considering the wording used so as to avoid breaches of the presumption of innocence is especially important where Ukrainian authorities are publicly notifying suspects in *in absentia* cases (see below, Section 10), since Ukrainian prosecutors consulted noted the challenges in ensuring that the wording of the notices of suspicion issued on the website of the Office of the Prosecutor General and in the mass media do not violate the presumption of innocence. Practice could be developed to create guidance, protocols or templates which are consistently employed and ensure careful use of language.

3.2 Actions of defence counsel during proceedings

83. Ensuring compliance with the presumption of innocence also depends on actions taken by actors involved in the proceedings. Defence counsel must zealously represent the accused and be given the opportunity to effectively do so. Unprofessional conduct by defence counsel, the lack of an effective defence, or issues with the equality of arms in proceedings (see below, Section 5) could indicate violations of the presumption of innocence.

84. For example, the Ukrainian NGO Media Initiative for Human Rights have reported that where defence lawyers have been appointed via legal aid, they only raised objections against the indictment initially presented by the prosecution in 10% of the cases examined. Defence counsel would often align with the prosecutors during trial hearings, and the majority of verdicts unfavourable to the accused were not appealed. The Ukrainian Bar Association has also reported that defence lawyers have sometimes adopted a passive attitude during hearings, been late, intermittently attended, or joined via video-link from a car. Defence counsel should endeavour to remedy this conduct to uphold the presumption of innocence.

3.3 Actions of judges during proceedings

85. In addition to the actions of defence counsel, since an accused has the right to be tried by an independent and impartial court (see below, Section 4), judges must demonstrate subjective and objective impartiality. Judges must not be influenced by personal biases and shall not improperly favour the interests of one party at the expense of the other when rendering their judgement (HRC, Karttunen v. Finland, para 7.2; ECtHR, Incal v. Turkey, para 65). However, it is not only how the judges perceive their own lack of bias, but also must demonstrate an appearance of impartiality to a reasonable observer (ECtHR, Grieves v. the United Kingdom, para 69). Another factor of relevance is the balance between the authority and powers of judges in conflict-related cases (especially investigative judges) and the prosecution. Indeed, as mentioned above, the recent Ukrainian Constitutional Court decision considering the constitutionality of martial law on the extensions of pre-trial detention by the prosecution in the absence of a reasoned ruling by an investigative judge was held to violate the presumption of innocence (at para 7.2).

86. It is crucially important that the reasoning in judgements is adequate and complies with the right to a reasoned opinion (see further below, Section 4) to demonstrate that the presumption of innocence has not been violated. In judgements in Article 438 CCU cases analysed (see Strategic Recommendations for the Judiciary), there is often limited assessment of evidence reflected (see below, Section 9), and of defence arguments. Although Article 374(3)(2) CPC states that the reasoning section of the judgement must contain a presentation of the assessment of evidence in support of circumstances considered proven by the court, as well as reasons for not taking into account particular evidence, the evidence considered is usually provided in a list form, without a comprehensive examination of its relevance, admissibility, reliability or sufficiency. This leads to a lack of clarity within the judgements as to the evidentiary weight of circumstantial evidence, for example, or how various pieces of evidence corroborate each other.

87. The only evidence narrated in greater detail in the judgements is victim or witness testimony. However, inconsistencies in evidence and/or exculpatory evidence are not considered in detail in the analysed judgements (see e.g., Case No. 243-6186-20 and Case No. 734-2129-22). Furthermore, in certain cases, the courts have invoked Article 349 CPC, limiting themselves to assessing the case only by interrogating the accused (see e.g., Case No. 638-1343-23 and Case No. 535-2100-22). Especially where cases involve the accused's guilty plea, the judgements do not reflect an assessment of that plea as part of the overall evidence presented so as to ensure the burden of proof has been met. Judges in Ukraine should ensure that their judgements are reasoned and robust to reflect the fact there has been no pre-judgement of guilt. Scrutiny of the actions of defence counsel and judges in this will be even more acute in *in absentia* cases where the accused is not actively participating in the proceedings (see below, Section 10).

Section 4 – Courts, Judges and Judgements

SUMMARY

- **Practitioners throughout the trial process in Ukraine must ensure that the accused's right to a public hearing by a competent, independent and impartial court is upheld. This is a right that is not only to be ensured through the practice of courts on an institutional level, but also by judges themselves, who must act with independence from the prosecution and free from biases.**
- The independence and impartiality of the courts and judges are fundamental, requiring freedom from political interference, personal biases, and the presence of objective impartiality. The nature of conflict-related cases, and the personal effect of the war on judges in Ukraine makes this question complex and nuanced.
- While the concepts of independence and impartiality are distinct, they are closely linked, with the ECtHR often considering them together.
- The principle of public proceedings includes both public hearings and the public delivery of judgments. **Where the publicity and transparency of proceedings or reasoning is not granted, adequate reasoning must be provided by courts.**
- **Judges must also provide a reasoned opinion.** The judgments must clearly state the basis for the decisions, to ensure the parties understand the verdict and to uphold the rights of the defence, including the right to appeal.
- The structure and content of judgments, especially in conflict-related cases, should be comprehensive, addressing contextual elements, *actus reus*, and *mens rea*, with a clear presentation of factual findings, analysis of evidence and legal analysis.
- Providing a reasoned opinion demonstrates that judges uphold fair trial guarantees throughout the process and ensures that convictions do not violate the principle of legality and/or the presumption of innocence.

88. Practitioners throughout the trial process in Ukraine must ensure that the accused's right to a public hearing by a competent, independent and impartial court is upheld. This is relevant not only to the practice of courts on an institutional level, but also the judges themselves, who must ensure that they act with independence from the prosecution and free from biases. Judges must also provide a reasoned opinion.

89. Practitioners should therefore take note of the sources of domestic and international and European law regarding the right to a public hearing by an independent and impartial court, or aspects thereof, and the right to a reasoned opinion. While these rights relate to the trial proceedings as a whole, it is important to note that they are reiterated in law with reference to specific stages of trials, such as during the review of the accused's pre-trial detention (see below, Section 6), or in relation to appeal proceedings.

Table 3 Sources of law on public hearing by an independent and impartial court and the right to a reasoned opinion

Ukrainian law	IHRL	IHL	ICL	Other
• Constitution of Ukraine, Articles 6 and 129 • CPC, Article 21(1) • CPC, Article 27 (on the publicity and openness of court proceedings) • Law of Ukraine on the Judiciary and Status of Judges, Articles 1, 6 and 7 (independence and impartiality of courts and judges) and 11 (openness of court proceedings)	• ECHR, Article 6(1) • ICCPR, Article 14(1) Note that Ukraine derogated from Articles 6 ECHR and 14 ICCPR under martial law, but the practical effect of this derogation may be limited (see above analysis)	• Geneva Conventions, Common Article 3 • Third Geneva Convention, Article 84 (2) • Fourth Geneva Convention, Articles 66 and 71 • Additional Protocol I, Article 75(4) • This right is recognised as customary international humanitarian law as part of the right to a fair trial (*see* ICRC, Rule 100)	• Rome Statute, Articles 40 and 67(2) • ICTY Statute, Articles 13 and 21	
Right to a reasoned opinion				
Ukrainian law	**IHRL**	**IHL**	**ICL**	**Other**
• Constitution of Ukraine, Article 29(2) • CPC, Articles 370 and 374	• ECHR, Article 6(1) • ICCPR, Article 14(1)		• Rome Statute, Article 74(7) • ICTY Statute, Article 23(2)	• ICC Chambers Practice Manual

4.1 Independent and impartial court established by law

90. The independence and impartiality of the courts and judges in Ukraine are guaranteed under the Constitution of Ukraine, Article 6 and the Law of Ukraine on the Judiciary and Status of Judges, Articles 1, 6 and 7. Under international and European law, Article 6(1) ECHR and Article 14(1) ICCPR require that proceedings must be before an 'independent and impartial tribunal' established by law. While both concepts entail different considerations, there is nonetheless a close link between the independence of a court and objective impartiality. In this sense, the ECtHR often considers the requirements together (ECtHR, Findlay v. the United Kingdom, para 73). The requirement for independence and impartiality not only applies to the court itself, but also to judges and jurors (ECtHR, Holm v. Sweden, para 30). It is also important to note that for the purposes of reviewing an accused's arrest and/or detention (see below, Sections 6 and 7), an accused must be brought before a judge who is independent, impartial and objective (ECtHR, Schiesser v. Switzerland, para 31; HRC, Bazarov et al. v. Uzbekistan, para 8.2; HRC, Musaeva v. Uzbekistan, para 9.3; HRC, Zheludkova v. Ukraine, para 8.3).

91. The guarantees are similar under IHL, which provides for a 'regularly constituted court' (Common Article 3, Additional Protocol I, Article 75(4)) or 'properly constituted' (Fourth Geneva Convention, Article 66) or 'competent' court (Fourth Geneva Convention, Article 71), and independence and impartiality when it comes to trying POWs (Third Geneva Convention, Article 84(2).

4.1.1 Objective and subjective elements of impartiality

92. Independence means the absence of political interference of the executive and legislative powers within the judiciary, as well as the existence of adequate guarantees of the judicial function (ECtHR, Ninn-Hansen v. Denmark (dec.)). When it comes to impartiality, the ECtHR has distinguished between subjective and objective approaches. The subjective approach aims to assess the personal conviction or interest of a given judge in a particular case, whereas the objective approach aims to determine whether he or she offered sufficient guarantees to exclude any legitimate doubt in this respect (Kyprianou v. Cyprus [GC], para 118; Piersack v. Belgium, para 30; and Grieves v. the United Kingdom [GC], para 69). Indeed, the internal component of impartiality refers to the fact that judges must not be influenced by personal biases and shall not improperly favour the interests of one party at the expense of the other when rendering their judgement (HRC, Karttunen v. Finland, para 7.2; ECtHR, Incal v. Turkey, para 65). The external facet demands a court to additionally hold an appearance of impartiality to a reasonable observer.

93. Regarding the subjective aspect, the ECtHR has held that the personal impartiality of a judge must be presumed until there is proof to the contrary (ECtHR, Kyprianou v. Cyprus [GC], para 119). On objective impartiality, the existence of national procedures for ensuring impartiality, namely rules regulating the withdrawal of judges, is a relevant factor (ECtHR, Guide on Article 6, para 76). For instance, where a trial judge in a criminal court has also made pre-trial decisions in the case, this is not by itself definitive as to cause a fear of lack of impartiality on the part of a judge (ECtHR Fey v. Austria, para 30). However in certain cases before the ECtHR, where investigative judges have considered evidence for example,

and then later presided over the trial, doubts over objective impartiality did arise (*ECtHR*, De Cubber v. Belgium, paras 27-30 and Bulut v. Austria, para 33-34). Where a judge has already ruled on similar but unrelated criminal charges or already tried a co-accused in separate criminal proceedings, this is not in itself sufficient to cast doubt on that judge's impartiality in a subsequent case (ECtHR, Kriegisch v. Germany (dec.)).

4.1.2 Personal knowledge and public statements

94. The ECtHR has also noted that where a member of a court has some personal knowledge of one of the witnesses in a case, it would not necessarily mean that they will be prejudiced in favour of that person's testimony, and impartiality would need to be determined on a case-by-case basis (ECtHR, Guide on Article 6, para 89). However, where a court president publicly used expressions which implied that he had already formed an unfavourable view of the applicant's case before presiding over the court hearing the case in question, his statements were such as to justify objectively the accused's fears as to his impartiality (ECtHR, Buscemi v. Italy, para 68). Similarly, objective impartiality was also found where a judge engaged in public criticism of the defence and publicly expressed surprise that the accused had pleaded not guilty (Lavents v. Latvia, para 119).
95. In the case of Kryvolapov v. Ukraine (see also Section 3 above), the ECtHR held that public statements made by investigators in charge and other public officials who referred to an accused as a murderer amounted to an unqualified declaration of his guilt, violating Article 6(2) ECHR (the presumption of innocence). The statements had also been disseminated on many occasions in a documentary, which had been created with the direct support of high-level State authorities, containing extracts from the video of the applicant's confession to the police. If violations of the presumption of innocence such as this one were not addressed by courts in the course of proceedings, this may also indicate objective impartiality on the part of the court.

4.1.3 Independence and impartiality: Ukrainian procedure and practice

96. Concerning the situation in Ukraine, several procedural aspects are of concern. First, the enhanced prosecutorial power at pre-trial stages, somewhat limiting the power of investigative judges, under Article 615 of the CPC introduced under martial law, raised questions over the independence of the judiciary. Indeed, the Constitutional Court of Ukraine ruled 'that the legislator's regulation of the procedure for resolving the issue of extending the term of detention as a preventive measure in a manner that does not involve the participation of a court (judge) entails a violation of the constitutional right of everyone to judicial protection (part one of Article 55 of the Constitution of Ukraine)' (see Case No 3-88/2022, para 6.4).

97. It is also notable that in conflict-related cases in Ukraine, applications for recusal and self-recusal have been high. The grounds for recusal are contained in Article 75 CPC, and include 'where he/she personally, his/her close relatives or family members are concerned with the outcome of the proceeding', or where there are 'other circumstances which cast doubt on the judge's impartiality'. Yet, since the majority of judges in Ukraine may be personally affected by similar conduct to what has occurred in a case before them, or may have connections within the local area to people affected by the case before them, the

question of impartiality is complex. In Donetsk and Luhansk, for example, often recusal or self-recusal applications are due to family, friendly or personal relations with one of the participants in the case or previous participation in the consideration of the case (including related cases), though not all applications are granted and practice is inconsistent.

98. Furthermore, attempts have been made by the accused in certain cases (including criminal cases) to interfere with the impartiality of judges through filing legal action against them. It is also clear that judges are operating in a context in which there are pressures from the media, public and international scrutiny, all of which can impact how they preside over trials. Therefore, clear guidance by the Ukrainian Supreme Court, or other body regulating the practice and ethics of the judiciary, could assist in identifying scenarios which may be in violation of both domestic and international and European rules on independence and impartiality.

4.2 Publicity and transparency of proceedings

99. The principle of the public nature of court proceedings entails two aspects: the holding of public hearings and the public delivery of judgments (ECtHR, Tierce and Others v. San Marino, para 93; Sutter v. Switzerland, para 27).

4.2.1 Right to a public hearing

100. The Constitution of Ukraine stipulates that the openness of trials is a main principle of judicial proceedings (Article 129). This is also reiterated in Article 27 CPC, which notes that as a general rule, proceedings are to be conducted openly in criminal trials in Ukraine. Media only require permission of the court to film or broadcast (Article 27(6) CPC).

101. Article 27(2) notes certain circumstances in which an investigating judge may decide to hold proceedings *in camera*, namely: if the accused is a minor; when considering a case related to a crime against sexual freedom and the sexual integrity of a person; where there is a need to prevent the disclosure of information about personal and family life, or circumstances that may degrade the dignity of an individual; if conducting proceedings in an open court session might result in the disclosure of information protected by law; and/or where there is a necessity to ensure the safety of individuals participating in criminal proceedings. Furthermore, martial law does not explicitly restrict attendance of the public at hearings, but recommendations from the Council of Judges of Ukraine (mainly tasked with ensuring the independence of courts and judges) note that in regions that are more dangerous due to the invasion, access to hearings may be restricted for non-participants (Media Initiative for Human Rights, 'How are war-related court cases progressing? Interim findings of MIHR monitoring', 17 July 2023).

102. ECtHR jurisprudence has found that as a general rule, the public nature of criminal proceedings is necessary to ensure that the administration of justice cannot evade public scrutiny, and to maintain confidence in the courts (ECtHR, Seipan v. Austria, para 27; ECtHR, Krestovskiy v. Russia, *para* 24; ECtHR, Sutter v. Switzerland, para 26). This is also confirmed by the HRC, which has commented that the hearing must generally be open to

the general public, which includes members of the media, and is not, for instance, limited to a particular category of persons (HRC, GC No. 32, para 29).

103. However, the ECHR 'permits the press and the public to be excluded from all or part of a trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice' (*ECtHR*, Suslov and Batikyan v. Ukraine, para 122). The ECtHR has accepted that it may be necessary, on occasion, and temporarily, to restrict the public nature of criminal proceedings, i.e. hold them *in camera*, in order to, for example, protect the safety or privacy of witnesses or to promote the free exchange of information and opinion in the interests of justice (ECtHR, B. and P. v. United Kingdom, para 37). Even if there is classified information in the case file, this does not automatically justify limiting the publicity of the trial. In such circumstances, the court must have determined that limiting publicity was necessary to protect a compelling government interest and must ensure that the secrecy of the proceedings was only limited to protect that interest (ECtHR, Belashev v. Russia, para 83; ECtHR, Welke and Bialek v. Poland, para 77). Courts should consider all possible alternatives to ensure safety and security in the courtroom and give preference to a less strict measure over a stricter one when it can achieve the same purpose (ECtHR, Krestovskiy v. Russia, para 29).

104. The ECtHR has noted that before excluding the public from criminal proceedings, the national court must make a specific finding that exclusion is necessary to protect a compelling public interest and must limit secrecy to the extent necessary to preserve that interest. The Court has held that it is relevant, when determining whether a decision to hold criminal proceedings *in camera* was compatible with the right to a public hearing under Article 6, whether public interest considerations were balanced with the need for openness, whether all evidence was disclosed to the defence and whether the proceedings as a whole were fair (ECtHR, Suslov and Batikyan v. Ukraine, para 122).

105. In the same case, the Court held that the (non-)violation of the defendant's right to a public hearing *vis-à-vis* the exclusion of the public and the press does not necessarily correlate with the existence of any actual damage to the defendant's exercise of his other procedural rights, including those protected under Article 6(3) ECHR (para 123). The ECtHR found that the Ukrainian District Court in question had allowed for the publicity of the whole trial to be restricted, without judicial reasoning, on the basis of vague claims from victims' relatives about security and privacy considerations. The District Court did not explore methods of restricting parts of the trial, or certain persons connected to the accused from the courtroom, and none of these deficiencies were remedied by the higher courts. All of these actions constituted a violation of the right to a fair trial under Article 6(1) ECHR (paras 124-127).

4.2.2 Public delivery of judgments

106. Article 27(7) CPC requires that judgments are publicly pronounced and decisions and judgements of courts are available on the Unified State Register of Court Decisions. Article 374(2) CPC prescribes that the name of the defendant is to be included in the introduction of the judgement. However, Ukrainian law does provide for restrictions on the principle of open justice, which could include the anonymisation of personal information in limited conditions, such as prescribed by the Law of Ukraine on Access to Court Decisions (No. 3262-IV as amended) for security reasons or under martial law. Furthermore, under martial law, courts are permitted to pronounce only the decision's introduction and operative parts publicly, as long as they also deliver the full text of the verdict to the participants of the court proceedings on the day of its pronouncement (Article 615(15) CPC and Third Judicial Chamber of the Criminal Cassation Court of the Supreme Court, Case No. 638/4224/22 (13 September 2023).

107. The requirement of the public pronouncement of judgements is reiterated in Article 6(1) ECHR, Article 14(1) ICCPR and Article 75(4) Additional Protocol I. To safeguard against arbitrariness, the accused and the public must be able to understand the verdict that has been given (ECtHR, Dombo B.V. v. The Netherlands, para 32, Lhermitte v. Belgium, para 67; Taxquet v. Belgium, para 90). This is also critical to allow the defendant to properly exercise their right to appeal (ECtHR, Hadjianastassiou v. Greece, paras. 34-37).

108. In practice, many conflict-related crimes cases in Ukraine have been fully or partially open to the public and media except cases concerning conflict-related sexual violence or where the families of victims and witnesses are located in the temporarily occupied territories and their safety may be a concern (UBA, 'Report on the Results of the Project "The Trial Monitoring In War Crimes Cases"', December 2023, p. 10). However, some 'artificial barriers' have been put in place by judges or court administration, such as requests for journalists or trial monitors to read and sign a 'memo for media workers', or 'submit a petition to "attend an open court session"'(Media Initiative for Human Rights, 'How are war-related court cases progressing? Interim findings of MIHR monitoring', 17 July 2023. See also UBA report above, p. 11).

109. On analysis of Article 438 CCU cases, it has been noted that often the reasoning as to why certain cases or parts thereof are held *in camera* is not detailed (see Strategic Recommendations for the Judiciary). Transcripts and recordings of proceedings are not available on the Unified State Register. In certain cases, only the operative part of the judgement is released as per Article 615 CPC, and there appears to be a standard practice of anonymisation of all the parties to the case, their legal representatives and the presiding judges in the judgements, without reasoning as to the deviation from Article 374(2) CPC. Overall, the courts must enhance their reasoning as to restrictions on the publicity of proceedings and judgements, demonstrating that they have considered all possible and lesser measures, and providing analysis and grounds for their decisions in this regard.

4.3 The right to a reasoned opinion

110. Article 29(2) of the Constitution of Ukraine requires that decisions regarding the detention of an accused must be reasoned (see also decision of the Constitutional Court of Ukraine Case No 3-88/2022). Furthermore, Article 370 CPC contains a requirement that the judgement of a court should adequately and with sufficient clarity state the reasons on which decisions are based. Article 374 CPC specifies that a judgement should contain three parts: (1) introduction; (2) reasoning section; and (3) operative section, and details what information should be contained in each part. There is no requirement in the CPC for the court to reproduce the text of the indictment (see also Benchbook on the Adjudication of International Crimes, para 1951). Parts 2-4 of Article 374 CPC outline the requirements for the content of each section of a judgement. These requirements generally apply with the same logic to judgments across all categories, including those concerning international crimes (see Benchbook, Chapter 3).

111. The right to a reasoned opinion has developed as part of assessing the fairness of trials by the ECtHR and HRC (see e.g. ECtHR Moreira Ferreira v. Portugal (N°2), para 84, HRC, Henry v. Jamaica, Communication No. 230/87, para 8.4; HRC, 'General Comment 32: Article 14: Right to equality before courts and tribunals and to a fair trial', CCPR/C/GC/32, 23 August 2007, para 49). The ECtHR has found that the proper administration of justice demands that judgments of courts and tribunals should adequately state the reasons on which they are based (Papon v. France (dec.)). Reasoned decisions will demonstrate to the parties that they have been heard, that judges have based their reasoning on objective arguments, and also uphold the rights of the defence. Indeed, as noted above, the accused's right of appeal is affected where the judgment does not provide reasoning (Hadjianastassiou v. Greece; and Boldea v. Romania).

112. The ECtHR has held that the extent of the duty to give reasons varies from case to case (Ruiz Torija v. Spain, para 29). However, while courts are not obliged to give a detailed answer to every argument raised (Van de Hurk v. the Netherlands, para 61), it must be clear from the decision that the essential issues of the case have been addressed (see Boldea v. Romania, para 30). A specific and explicit reply must be given to the arguments that are decisive for the outcome of the case (ECtHR, Moreira Ferreira v. Portugal, para 84). Ignoring a specific, pertinent, and important point made by the accused may constitute a violation of the right to a fair trial (ECtHR, Nechiporuk and Yonkalo v. Ukraine, para 280, ECtHR, Zhang v. Ukraine, para 73) and judgments which did not reflect an assessment of 'obvious discrepancies' in witness testimonies and within material evidence may not be adequately reasoned (ECtHR, Adjaric v. Crotia, para 51). Convictions based on inadequately reasoned judgements could also indicate violations of the principle of legality (see above, Section 2) and the presumption of innocence (see above, Section 3).

4.3.1 International practice and guidelines

113. The ICC Chambers Practice Manual, which considers findings and analysis of judgment practices at the ICTY and ICTR, as well as its own Trial Chambers, could be used by Ukrainian courts as a complementary tool when considering the structure and content of a

judgement in conflict-related cases. The Manual notes that it is important to bear in mind that a judgement in these cases is '"addressed" to the accused, the prosecution, and the participating victims. However, there are other relevant audiences which can be kept in mind in terms of the content, structure, and drafting including the Appeals Chamber, victims and affected communities more broadly and States, academics, NGO's, and others interested in the work of the Court.' (ICC Chambers Practice Manual, p. 12). Furthermore, the Manual notes that flexibility in the structure of a judgement is essential to account for the unique characteristics and complexities of each case. For instance, the nature of the crimes and the specific elements that need to be established may require tailored approaches. Similarly, the presentation of evidence may vary—whether organised by witness, crime site, or another method—depending on the scope and specifics of the case. Additionally, the number of accused persons can significantly influence the structure, particularly in the assessment of individual criminal responsibility (ICC Chambers Practice Manual, pp. 9 and 15). Nonetheless, there should be consistency on core sections and order which can be replicated in each case with the variations that may be needed due to the nature of the case (ICC Chambers Practice Manual, p. 15).

114. The ICC's approach to structuring judgements includes clear and distinct sections that address contextual elements, *actus reus*, and *mens rea*, ensuring both factual findings and legal analysis are systematically presented. ICC judgments often feature explicit headings, such as Findings of Fact, Legal Framework, and Assessment of Facts vis-à-vis the Law, ensuring the reasoning behind decisions is clear, logically sequenced, and linked to the evidence presented.

4.3.2 Right to a reasoned opinion: practice of Ukrainian courts

115. In an analysis of Article 438 CCU cases, only few judgements analysed used headings or sub-headings to delineate sections. The length of the judgements analysed varies significantly, yet this was not representative of the complexity of the cases. In terms of the contextual elements, most judgements analysed include a section, often without a heading, describing not only the existence of an international armed conflict with the Russian Federation in the period specified in the charges (a necessary contextual element for all war crimes), but also referencing and discussing the crime of aggression. This section is frequently disproportionate in length to the rest of the judgement outlining the facts of the case and reasoning of the court and even without adequately addressing the additional required contextual elements.

116. In a report from June 2023, the Ukrainian Legal Advisory Group (ULAG) states that there is often no distinction made between reasoning provided in cases involving ordinary offences and war crimes, and that the 'context' is often 'copy pasted from the Notices of Suspicion and indictments' (p. 50), and does not provide sufficient detail on the nexus between the conflict and the actions of the accused, which aligns with the findings of the present analysis.

117. The reasoning sections of judgements are particularly brief. Very few explicitly discuss the arguments or evidence advanced by the defence or prosecution in the reasoning or

analysis of evidence section, nor do they breakdown the analysis by legal element (contextual, *actus reus* and *means rea*) as has been typically done at the ICC or the *ad hoc* tribunals (see ICC Chambers Practice Manual). In some cases, particularly where judges restrict themselves to the operative parts under Article 615 CPC or where a simplified procedure is employed under Article 349, the reasoning is especially limited. It is also important to note that decisions taken at the pre-trial stages, particularly where investigative judges permit a preventative measure and review the lawfulness of arrest and detention, also do not reflect an analysis of evidence regarding lawfulness and arbitrariness (see below, Section X).

118. While it has been suggested that the Supreme Court of Ukraine could play a role in setting a precedent for how to structure judgements and provide reasoning in conflict-related cases (see ULAG, p. 126), there is also no legislative hurdle precluding courts of first instance to establish a practice of a structured approach to judgement drafting and reasoning in line with international best practice in such cases.

119. Judgements issued by international courts and tribunals in conflict-related cases may be distinguishable from the judgements which are issued in the Ukrainian domestic context or other national contexts, since the former concern cases against those most responsible for the crimes, which are complex and lengthy. In Ukraine, the judgements are not as extensive or detailed due to the current incident-based system, where direct perpetration cases remain prevalent and a less complex set of facts and evidence is being considered by the courts.

120. However, practical guidance can be sought from the judgement drafting process on an international level, especially if case building on the part of the prosecution aims towards establishing chains of command in the future. At a minimum, certain elements from drafting practices at the international criminal courts and tribunals (such as the ICC Chambers Manual) should be incorporated. Detailed guidance on judgment drafting including reasoning can be found in the Benchbook on the Adjudication of International Crimes, Chapter 3. Judgements are a demonstration of how judges have upheld other fair trial guarantees throughout the trials, therefore judges should endeavour to ensure they are as reasoned as possible.

Section 5 – Adversarial proceedings

SUMMARY

Adversarial proceedings and equality of arms

- In Ukraine, the adversarial process is fundamental to the criminal justice system. Practitioners in conflict-related cases must ensure the accused can effectively participate and present their case without being at a disadvantage to the prosecution, upholding fair trial guarantees.

Access to a lawyer

- **Law enforcement officers in Ukraine should endeavour to ensure that access to a lawyer is granted from the moment of questioning to ensure an accused's right to defence, against self-incrimination, and a fair trial. Where counsel is appointed after initial questioning and allegations are raised by the accused that evidence was obtained without access to a lawyer, such allegations should be raised by them in the context of proceedings.**
- **Investigative judges should also exercise oversight over the accused's access to counsel during pre-trial stages as part of their review as to the lawfulness and/or arbitrariness of the accused's detention. Where evidence is presented at trial stages from early questioning where there are complaints regarding lack of access to counsel, judges should ensure that any admission of such evidence should not compromise the overall fairness of the trial.**

Effective defence

- Effective defence requires 'practical and effective' legal assistance, meaning **lawyers should not face undue restriction or interference and must zealously represent the accused.**

Access to an interpreter

- **Defence counsel must actively protect their clients' interpretation rights by requesting services early, verifying client's understanding throughout proceedings, and immediately objecting to inadequate interpretation**. Similarly, **court administration should arrange qualified interpreters**. Since **Ukrainian judges** bear the ultimate responsibility for safeguarding the fairness of the proceedings, they **bear the ultimate responsibility of ensuring the availability of translation or interpretation services for an accused who does not understand the language of the court.**

Examination of witnesses

- The accused's right to examine witnesses is a crucial aspect of effective participation and defence. **Taking action to examine witnesses will be part of an effective strategy of defence counsel. The balancing act between ensuring the accused's right to examine witnesses in proceedings and preventing the retraumatisation of victims and/or witnesses will be a matter for judicial control.**

Right to appeal

- Observations suggest a low rate of appeals in conflict-related cases and a need for detailed analysis of appeal grounds by appellate courts. **Defence counsel must take action to appeal proceedings on behalf of their client in conflict-related cases, including**

on bases related to the fairness of proceedings. Lack of a reasoned opinion of a trial court in itself may be a basis for appeal. Effective exercising of rights to appeal and consideration of defence arguments on appeal will be crucial to ensure the accused's right of access to a court and fairness of proceedings overall, as well as (where procedural violations are alleged), the right to an effective remedy.

121. In Ukraine, the adversarial process is fundamental to the criminal justice system. Practitioners involved in conflict-related cases must ensure that **an accused is able to effectively participate in proceedings and given a reasonable opportunity to present their case under conditions that do not place them at a disadvantage to the prosecution**.

122. **An accused must be able to:**
   (1) **Access effective legal representation;**
   (2) **Access an interpreter;**
   (3) **Have adequate time and facilities to prepare their defence;**
   (4) **Exercise the right to call, examine, and cross-examine witnesses; and**
   (5) **Exercise the right to appeal.**

123. Some of these rights will be exercised through defence counsel representing the accused and exercising them will also indicate that the accused has been effectively defended. The sources of these rights are found below. If these are not met, this could also demonstrate violations of the presumption of innocence and/or the independence and impartiality of a court (see Sections 3 and 4 respectively). Ensuring the adversarial nature of proceedings will also be particularly important where the case is held *in absentia* (see Section 10 below).

Table 4 Legal sources relevant to adversarial proceedings and rights of the accused

Adversarial nature of proceedings and equality of arms				
Ukrainian law	**IHRL**	**IHL**	**ICL**	**Other**
• Constitution of Ukraine, Articles 129 (2) and (4) • CPC, Articles 7(1)(15) and 7(3)	• ECHR, Article 6(1) • ICCPR, Article 14(1) Note that Ukraine derogated from Articles 6 ECHR and 14 ICCPR under martial law, but the practical effect of this		• Rome Statute Article 67(1) • ICTY Statute, Article 21(4)	

	derogation may be limited			
Effective participation of the accused				
Ukrainian law	**IHRL**	**IHL**	**ICL**	**Other**
• CPC, Articles 42 (rights of the accused), and 336 (remote participation)	• ECHR, Article 6(1)			
Access to a lawyer				
Ukrainian law	**IHRL**	**IHL**	**ICL**	**Other**
• Constitution of Ukraine, Articles 29 and 129 • CPC, Articles 7(1)(13), 20 Chapter III, 49 and 54 • The Law of Ukraine 'On Free Legal Aid' (No. 3460-VI)	• ECHR, Article 6(3)(d) • ICCPR, Article 14(3)	• Third Geneva Convention, Article 105 (as applicable to POWs) • Fourth Geneva Convention, Article 72 • Additional Protocol I, Article 75(4)(a) • This right is recognised as customary international humanitarian law as part of the right to a fair trial (*see* ICRC, Rule 100)	• Rome Statute, Article 67(1) • ICTY Statute, Article 21(4)	
Effective defence				
Ukrainian law	**IHRL**	**IHL**	**ICL**	**Other**
• CPC, Articles 46 and 47 • Quality Standards for Providing	• ECHR, Article 6(3)(c)			

Free Secondary Legal Aid in Criminal Proceedings, approved by the Ministry of Justice of Ukraine on February 25, 2014, No. 386/5 • Rules of Professional Conduct, established in 2012 pursuant to the Law of Ukraine 'On the Bar and Practice of Law'				
Access to an interpreter				
Ukrainian law	**IHRL**	**IHL**	**ICL**	**Other**
• CPC, Articles 29 and 42(3)(18)	• ECHR, Article 6(3)(e) • ICCPR, Article 14(3)(f)	• Third Geneva Convention, Article 105 (as applies to POWs) • Fourth Geneva Convention, Article 72 • This right is recognised as customary international humanitarian law as part of the right to a fair trial (*see* ICRC, Rule 100)	• Rome Statute, Article 67(1) • ICTY Statute, Article 21(4)	
Adequate time and facilities to prepare a defence				

Ukrainian law	IHRL	IHL	ICL	Other
• CPC, Article 42, 46, and 48	• ECHR, Article 6(3)(b) • ICCPR, Article 14(3)(b)	• Third Geneva Convention, Article 105 (as applies to POWs) • Fourth Geneva Convention, Article 72 • This right is recognised as customary international humanitarian law as part of the right to a fair trial (*see* ICRC, Rule 100)	• Rome Statute, Article 67(1) ICTY Statute, Article 21(4)	
Examination of witnesses				
Ukrainian law	**IHRL**	**IHL**	**ICL**	**Other**
• CPC, Articles 22, 42(4)(1), 232(1) and 336(1) and (4)	• ECHR, Article 6(3)(d), • ICCPR, Article 14(3)(e)	• Third Geneva Convention, Article 105(1) (as applicable to POWs)	• Rome Statute, Article 67(1) • ICTY Statute, Article 21(4)	
Right to an appeal				
Ukrainian law	**IHRL**	**IHL**	**ICL**	**Other**
• Constitution of Ukraine, Article 129 • CPC, Articles 42(4)(6), Chapters 31, 32 and 34, Articles 392 and 419, 424 and 442	• Protocol No. 7 to the ECHR, Article 2 • ECHR, Article 13 • ICCPR, Article 14(5)	• Third Geneva Convention, Article 106 (as applicable to POWs) • Fourth Geneva Convention, Article 73		

		• The right has also been recognised as a 'basic component of fair trial rights in the context of armed conflict' (ICRC, Rule 100)		

5.1 Adversarial nature and equality of arms

124. The actions of defence counsel, and judges, who exercise judicial control over proceedings, will be key to ensure the adversarial nature of proceedings and equality of arms. The adversarial nature of criminal proceedings is recognised in Article 129(4) of the Constitution of Ukraine and Article 7(1)(15) of the CPC. It closely relates to the principle of equality of arms, recognised in Article 129(2) of the Constitution and Article 7(3) CPC. The adversarial nature of proceedings and equality of arms are inherent to the right to a fair trial under Article 6(1) ECHR. The principle of equality of arms is also recognised as part of the right to a fair trial under Article 14(1) ICCPR (HRC, General Comment No. 32, paras 7 and 13). The notion of equality in proceedings is also contained in Article 67(1) of the Rome Statute and 21(4) of the ICTY Statute.

125. At the ECtHR, the adversarial nature of proceedings means 'in principle the opportunity for the parties to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision' (CoE, Guide on Article 6, para 93). Equality of arms entails that each party in criminal proceedings is given a reasonable opportunity to present their case under conditions that do not place them at a disadvantage to their opponent (CoE, Guide on Article 6, para 92, ECtHR, Lazarenko v. Ukraine, para 36). Since the principles are closely linked, the ECtHR often treats them together (CoE, Guide on Article 6, para 93). The principles are also connected with the rights of the defence under Article 6(3) ECHR (CoE, Guide on Article 6, para 95). The HRC reiterates similar protections (HRC, Smith v. Jamaica , para. 10.4).

126. **Some examples of violations of the right to a fair trial due to a lack of equality of arms identified by the ECtHR include**: only a prosecutor being present at appeal proceedings against an accused (ECtHR, Zhuk v. Ukraine, para 35); non-disclosure of evidence to the defence (ECtHR, Kuopila v. Finland, para 38); limiting access of the accused to his case file or other documents on public-interest grounds (ECtHR, Matyjek v. Poland, para 65). The HRC similarly has found limiting the right to appeal to the prosecutor to be in breach of equality of arms (HRC, Weiss v. Austria, para. 9.6). In situations where the accused would be unable to participate in the proceedings on equal grounds due to financial limitations,

the HRC notes that the court may be required to provide the accused with free assistance of an interpreter (HRC, General Comment No. 32, para 13).

127. However, it should be noted that **disclosure of evidence is not an absolute right** and in some cases, it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. In these cases, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities. For example, non-disclosure of the identity of a witness to the defence (or the anonymity of a witness) could be remedied where it is disclosed to an investigative judge who is able to question them (ECtHR, Doorson v. the Netherlands, para 72; Van Mechelen and Others v. the Netherlands, para 54).

5.2 Effective participation of the accused

128. The rights of the accused in terms of participation in criminal proceedings are outlined in Article 42 CPC, and **many of these are exercised through defence counsel**. An accused may participate in proceedings via video conference in certain circumstances regulated by Article 336 of the CPC, but 'the participants to the criminal proceedings shall be ensured the possibility to hear and observe the course of court proceedings, to put questions and get answers, to exercise other procedural rights granted them' (Article 336(3) CPC).

129. The right of an accused to effective participation as part of the right to a fair trial under Article 6 ECHR encompasses (i) his or her right to be present and (ii) to hear and follow the proceedings (ECtHR, Stanford v. the United Kingdom, para 26). Participation via video link thus does not necessarily infringe the accused's fair trial rights, provided that they are able to follow the proceedings without technical impediments and are able to confidentially communicate with their defence counsel throughout (ECtHR, Marcello v. Italy, paras 63-67). When assessing effective participation, authorities must also consider an accused's vulnerabilities or impairments, and make the necessary adjustments to ensure effective participation (ECtHR, Blokhin v. Russia, para 195).

5.3 Access to a lawyer

130. The **right of an accused person to a defence** is provided for in Articles 29, 59 and 129 of the Constitution of Ukraine, and Articles 7(1)(13) and 20 of the CPC. The participation of defence counsel is also regulated under Chapter 3 of the CPC. The accused in Ukraine have the right to effective legal representation from detention onwards, either self-chosen or state appointed. These protections are enshrined in ECHR Article 6(3)(d), guaranteeing **three separate rights:** 'to defend oneself in person, to defend oneself through legal assistance of one's own choosing and, subject to certain conditions, to be given legal assistance free' (CoE, Guide on Article 6, para 276, ECtHR, Pakelli v. Germany, para 31).

131. This right is also provided for under Article 14(3) ICCPR (see HRC, General Comment No. 32, paras 37-38), and under IHL and customary law (Third Geneva Convention, Article 105 (as applicable to POWs), Fourth Geneva Convention, Article 72, and Additional

Protocol I, Article 75(4)(a), ICRC, Rule 100). The rights to a defence and to legal assistance are also contained in the Rome Statute, Article 67(1) and ICTY Statute, Article 21(4).

132. In Ukraine, the accused **can choose to defend themselves**, or should be able to choose their own lawyer, and where they do not have the means, to **have a lawyer appointed to them at no cost by the state** (Article 29, Constitution of Ukraine and Articles 20(2)-(3) and 42(2)(3) CPC).

133. According to Article 49 CPC, defence counsel can be appointed by the court where the accused has not or cannot appoint one, including pursuant to the law regulating legal aid. The Law of Ukraine 'On Free Legal Aid' (No. 3460-VI) defines the types of free legal aid (primary and secondary) and outlines the categories of persons entitled to receive it, particularly in criminal proceedings. It establishes the system of free secondary legal aid, ensuring access to a lawyer for detained persons, suspects, and accused persons who fall under certain criteria or if it is required by the interests of justice. The Coordination Centre for Legal Aid Provision (CCLAP) and regional and local centres are responsible for organising, managing, and monitoring the provision of free legal aid, including assigning lawyers to eligible individuals. More information on the legal aid system in Ukraine can be found in 'Legal Aid System in Ukraine: An Overview', 2014.

134. The ECtHR has found the following conduct to be in breach of the right to legal assistance:

- **Where the accused has waived legal assistance in criminal proceedings but that waiver is provided in the context of ill-treatment** (Bogdan v Ukraine, para. 54). An accused can waive their right to legal assistance (CPC, Article 54, ECtHR, Pishchalnikov v. Russia, para 77). However, authorities must be able to show that the accused who waives this right 'could reasonably have foreseen what the consequences of his conduct would be' (CoE, Guide on Article 6, para 288).
- **Where legal assistance is not provided in a timely manner.** The right of an accused to be given the opportunity to personally defend themselves, or to have the legal assistance of counsel is to be granted from the moment of detention according to Article 29 of the Constitution of Ukraine. An accused should be allowed the assistance of a lawyer from the early stages of questioning according to the ECtHR, and 'promptly' according to the HRC (see HRC, General Comment No. 32, para 34). For example, where an applicant alleged his right to legal assistance had been breached as his waiver had not been valid due to ill-treatment, the ECtHR held that any conversation between a detained criminal suspect and the police must be treated as formal contact and cannot be characterised as an informal interview or questioning (Bogdan v Ukraine, para 52). The ECtHR held that 'it is inherent in the privilege against self-incrimination, the right to silence and the right to legal assistance that a person "charged with a criminal offence" for the purposes of Article 6 has the right to be notified of these rights' (para 43).
- **Where law enforcement agencies erroneously classify the offence with the ulterior purpose of effectively denying defendants legal assistance** (Balitskiy v. Ukraine, paras 40 and 52). This case is currently under standard supervision by the CoM CoE (see further here).

135. As an exception, the ECtHR has held that an urgent need to avert serious adverse consequences for life, liberty or physical integrity in a given case may amount to a compelling reason to restrict access to legal advice for the purposes of Article 6 of the ECHR (Bogdan v. Ukraine, para 41). However, even where compelling reasons may justify denial of access to a lawyer, this must not unduly prejudice the overall fairness of the proceedings as a whole (ECtHR, Salduz v. Turkey [GC], para 55, Bogdan v. Ukraine, para 42).

136. **Overall, law enforcement officers in Ukraine should endeavour to ensure that access to a lawyer is granted from the moment of questioning to ensure an accused's right to defence, against self-incrimination (see Section 7 below), and a fair trial. Where counsel is appointed after initial questioning and allegations are raised by the accused that evidence was obtained without access to a lawyer, such allegations should be raised in the context of proceedings.**

137. **Investigative judges should also exercise oversight over the accused's access to counsel during pre-trial stages as part of their review as to the lawfulness and/or arbitrariness of the accused's detention (see Section 6 below, HRC, General Comment No. 35, para 58, and HRC, Butovenko v. Ukraine, para 7.6). Further, where evidence is presented at trial stages from early questioning where there are complaints regarding lack of access to counsel, judges should ensure that any admission of such evidence should not compromise the overall fairness of the trial.**

5.4 Effective defence

138. The participation and duties of defence counsel in criminal proceedings are outlined in Articles 46 and 47 of the CPC. Further duties of counsel are provided for in the Quality Standards for Providing Free Secondary Legal Aid in Criminal Proceedings, approved by the Ministry of Justice of Ukraine on February 25, 2014, No. 386/5 (see Defence Counsel Handbook, Annex 4), and the Rules of Professional Conduct, established in 2012 pursuant to the Law of Ukraine 'On the Bar and Practice of Law'.

139. Article 6(3)(c) ECHR enshrines the right to 'practical and effective' legal assistance (CoE, Guide on Article 6, para 296). The ECtHR has held that where the accused is provided with legal assistance, it is not sufficient to formally appoint a lawyer, rather the **legal assistance must be effective in practice** (ECtHR, Artico v. Italy, para 33). Lawyers **must not be subject to any restriction, influence, pressure or undue interference** at the time of advising and representing defendants, nor should appointed lawyers engage in overt misbehaviour or incompetence, so as to be manifestly incompatible with the interest of justice (HRC, Taylor v. Jamaica, para 6.2). Defence counsel have the duty to zealously represent the accused and 'to do so in a manner which is consistent with counsel's legal and ethical obligations to the trial court and to the client' (Defence Counsel Handbook, Chapter II (4)). This will involve ensuring that the rights of the accused are respected and exercised, including the right to adequate time and facilities to prepare a defence, the right to an interpreter, the right to examine witnesses, and to appeal (see below).

140. The ECtHR has held the following to be potential violations of the right to an effective defence:
    - Interception of communications between the accused and their legal counsel or excessive restriction of legal visits (ECtHR, Zagaria v. Italy, para 36, and Öcalan v. Turkey [GC], para 135).
    - A lawyer failing to act on behalf of the accused (Artico v. Italy, paras 33 and 36)
    - A lawyer neglecting a crucial procedural obligation, beyond merely adopting an ineffective line of defence or presenting flawed argumentation (Czekalla v. Portugal, paras 65 and 71).

141. The ECtHR has held that violations of the accused's right to a fair trial would be violated **only if no intervention was made where the failure of counsel to provide effective representation is manifest or has been sufficiently highlighted** (ECtHR, Kamasinski v. Austria, para 65). This means that courts are not required to intervene in every instance where the defence counsel has not acted, since the independence of the legal profession means that the management of the defence is primarily a matter between the accused and their representative.

142. **Specific aspects of conflict-related cases may impact the possibility of effective defence in these cases.** For example, under martial law (Article 615 CPC) investigators and prosecutors may decide that the defence counsel participate in the proceedings remotely. It has been reported that remote participation is favoured by many counsel, but that this has caused technical issues which may impact the effectiveness of the defence (Ukrainian Bar Association (UBA), 'Report on the Results of the Project "The Trial Monitoring In War Crimes Cases"', December 2023, p. 16).

143. **Challenges also arise from a lack of substantive knowledge of international criminal law.** The appointment of defence counsel to international crimes cases is not related to their substantive knowledge, while such knowledge is essential to the provision of effective defence. CCLAP maintains a list of counsel which demonstrate motivation to represent the accused in conflict-related cases and which are deemed competent, having completed trainings provided by international partners. However, there is no centralised body coordinating the educational activities for defence counsel in these cases mirroring the Prosecution Training Centre or the National School for Judges. Sufficient knowledge of applicable law will be essential to the provision of an effective defence.

144. **Moreover, there have been reports noting that in conflict-related cases, Ukrainian defence counsel have adopted a passive attitude**. For example, the Media Initiative for Human Rights reported that where defence lawyers have been appointed, they only raised objections against the indictment initially presented by the prosecution in 10% of the cases examined. Defence counsel would often align with the prosecutors during trial hearings, and the majority of verdicts unfavourable to the accused were not appealed (see Media Initiative for Human Rights, 'How are war-related court cases progressing? Interim findings of MIHR monitoring', 17 July 2023). The UBA has also reported that defence lawyers have sometimes adopted a passive attitude during hearings, been late, intermittently attended,

or joined via video-link from a car (UBA, 'Report on the Results of the Project "The Trial Monitoring In War Crimes Cases"', December 2023, p. 17).

145. **Overall, ensuring effective defence will involve zealous representation and active argumentation by counsel, and adequate support from coordinating bodies, including CCLAP, UBA and the Ukrainian National Bar Association.** However, it is important to note that defence is most effective where defence counsel are protected from external pressures, such as negative perceptions within society, and security concerns. Such pressures can only be alleviated through coordinated state-level action to recognise the role of the defence in conflict-related cases to ensure the equality of arms and fairness and communicate this viewpoint to the general public. This would also involve creating channels of communication between defence counsel and the media in this regard.

5.5 Access to an interpreter

146. An accused must be given **access to an interpreter where they do not understand or speak the language being used by the court**. The CPC provides for this right under Article 29 and 42(3)(18), and it is also recognised as part of the accused's right to a fair trial under Article 6(3)(e) ECHR and Article 14(3)(f) ICCPR. The right is similarly required under Article 105 of the Third Geneva Convention, Article 72 of the Fourth Geneva Convention and is recognised as customary IHL in ICRC, Rule 100. The right is also contained in the Rome Statute, Article 67(1) and ICTY Statute, Article 21(4). **This is a right that should be provided from the investigation stage,** and is linked to the accused's right to be informed of the charges in a language he or she understands, and the right of the accused to effectively participate in proceedings (see HRC, General Comment No. 32, para 19).

147. The right to interpretation covers all stages of proceedings, from initial investigation to final appeal. It applies to not only oral proceedings, but also key documents, evidence, and written charges. The accused must be able to understand the proceedings and communicate effectively with their lawyer to mount a proper defence ((ECtHR, Kamasinski v. Austria, para 74; ECtHR, Hermi v. Italy [GC], para 70).

148. The ECtHR has found violations of the right of access to an interpreter in Ukraine where cases involved a Russian-speaking accused (see ECtHR, Mikheyev v. Ukraine, Yakovlev v. Ukraine, and Sviridov v. Ukraine). NGO reports have also noted instances of Ukrainian judges proceeding with hearings even when the accused's interpreters have not appeared (International Society for Human Rights, 'The right to a fair trial in Ukraine', 173). This is particularly problematic in *in absentia* proceedings where notification materials may lack Russian translation (see Section 10 below).

149. Defence counsel must actively protect their clients' interpretation rights by requesting services early, verifying client's understanding throughout proceedings, and immediately objecting to inadequate interpretation. Any interpretation failures should be documented for potential appeal. Similarly, court administration should arrange qualified interpreters. Since Ukrainian judges bear the ultimate responsibility for safeguarding the fairness of the proceedings, they bear the ultimate responsibility of ensuring the availability of translation

or interpretation services for an accused who does not understand the language of the court (ECtHR, Hermi v. Italy [GC], para 72). Ultimately, the failure to provide adequate interpretation renders proceedings fundamentally unfair and may constitute grounds for overturning convictions on appeal.

5.6 Adequate time and facilities to prepare a defence

150. The CPC provides, under Article 42(3)(3), that an accused **must be able to consult with defence counsel**. Article 42 also provides the accused with rights to **access records and collect evidence** as part of their right to defence. Such rights are also extended to defence counsel acting on behalf of their client by virtue of Articles 46 and 48 CPC.

151. Having sufficient time for consultation with counsel and reviewing disclosed evidence will be essential in ensuring the accused has adequate time and facilities to prepare a defence, a right provided for under Article 6(3)(b) ECHR and Article 14(3)(b) ICCPR. This right is also required under IHL, in the Third Geneva Convention, Article 105 (as applicable to POWs) and the Fourth Geneva Convention, Article 72, and recognised as customary (see ICRC, Rule 100) as part of the accused's right to a fair trial. The right is also contained in the Rome Statute, Article 67(1) and ICTY Statute, Article 21(4).

152. According to the ECtHR, what constitutes **'adequate' time** depends on case-specific factors: the nature of the proceedings, the complexity and stage of the case and the usual workload of a legal counsel (ECtHR, Gregačević v. Croatia, para 51; ECtHR, Gafgaz Mammadov v. Azerbaijan, para 76; ECtHR, Mattick v. Germany, 5-8). This ensures that the accused is protected from a 'hasty' trial (ECtHR, Kröcher and Möller v. Switzerland, paras 14-15; ECtHR, Borisova v. Bulgaria, para 40; ECtHR, Malofeyeva v. Russia, para 115).

153. Issues with regard to 'adequate time' can arise, for example, if the defence was given limited time to inspect a file (ECtHR, Huseyn and Others v. Azerbaijan, paras 174-178; ECtHR, Iglin v. Ukraine, paras 70-73; ECtHR, Nevzlin v. Russia, paras 144-150), or was not given additional time after certain occurrences in the proceedings (e.g., changes in the indictment or the introduction of new evidence by the prosecutor) to adjust their position (ECtHR, Miminoshvili v. Russia, para 141; ECtHR, Pélissier and Sassi v. France, para 62; ECtHR, G.B. v. France, paras 60-62).

154. The **'adequate facilities'** encompass the physical and logistical conditions that assist or may assist the accused in the preparation of their defence (ECtHR, Mayzit v. Russia, para 79). For example, if an accused is detained, the conditions of their detention, transport, food, etc. are relevant factors (ECtHR, Razvozzhayev v. Russia and Ukraine and Udaltsov v. Russia, para 252; ECtHR, Mayzit v. Russia, para 81; ECtHR, Moiseyev v. Russia, para 221; ECtHR, Barberà, Messegué and Jabardo v. Spain, para 70).

155. **For 'facilities' to be adequate,** they must permit the accused to read and write with a reasonable degree of concentration, and be conducive to getting enough rest to enable the accused to follow the proceedings, make submissions, take notes and consult with/instruct

their lawyers (ECtHR, Razvozzhayev v. Russia and Ukraine and Udaltsov v. Russia, paras 253-254).

156. The ECtHR and HRC have also held that the accused must be granted access to the necessary files and disclosure of evidence required for them to mount a defence (ECtHR, Rowe and Davis v. the United Kingdom, para 59; ECtHR, Leas v. Estonia, para 76; HRC, Pustovoit v. Ukraine, para 9.2). They must have been provided all relevant evidence that has been or could have been collected by the competent authorities in order to potentially exonerate themselves or to obtain a reduction in their sentence. An accused does not have to be granted direct access to the case file provided that they are informed of the material in the file by their lawyer (ECtHR, Kremzow v. Austria, para 52).

157. **Practice in Ukrainian courts have been found lacking in this respect.** The OHCHR has recorded various instances in which Russian POWs, although formally assigned legal counsel, were prevented by Ukrainian authorities from contacting them before the court hearings. As hearings would often take place online, POWs were effectively deprived of their right to communicate with their lawyers in confidential terms (see V. Gvozdiy, 'The rule of law in Ukraine during martial law: Review of changes to the criminal process').

158. Ukrainian defence lawyers have also reportedly faced challenges to obtain certain personal documents of the accused or their relatives on time for the preliminary or trial hearings. Also, there have been cases in which some evidential materials have reached courts after the individuals at issue had already been convicted, thus depriving the accused and their lawyers of the possibility of accessing all relevant evidence (see Justice Info, 'Inside courts where Ukrainian judges try Ukrainian POWs').

159. **The 'facilities' available to the accused in preparing a defence in Ukraine are comparably more limited than the prosecution.** Defence counsel acting in conflict-related cases in Ukraine currently do not have access to the same infrastructure as the prosecution, including security to conduct site visits or technological equipment. The resources available to defence counsel, who are often acting alone without investigation teams, are also comparably more limited. In addition, consultations between lawyers and their clients will not be possible in *in absentia* cases, and thus it is even more essential that as much evidence is disclosed by the prosecution as possible to the defence, and adequate time is provided to review this material.

160. Whether these factors impact the accused's right to adequate time and facilities to prepare their defence has not yet been tested before the ECtHR**. Consideration may be required by legislators, and CCLAP, as to how to coordinate enhanced 'facilities' in this regard. In the meantime, defence counsel must raise arguments where this right is not respected, which judges must duly consider.**

5.7 Examination of witnesses

161. **One crucial aspect of the accused's effective participation and right to an effective defence is the ability to examine witnesses.** Under Article 22 of the CPC, 'the prosecution shall be required to ensure the presence of witnesses for the prosecution during trial so that the defence can enjoy their right to examine them before an independent and impartial court.' The accused also has the right to request that witnesses for the defence be summoned and examined at the same conditions as witnesses for the prosecution (Article 42(4)(1) CPC, see also Section 5.1 above)

162. **In order to avoid the retraumatisation of witness and/or for their protection, certain restrictions on examination may be permissible under Ukrainian law.** For example, it is possible to obtain and use the testimony of a victim or witness by the court by interrogating via a video conference while broadcasting from another room (Article 322(1), 336(1) and 336(4), CPC). The Supreme Court, in its decision of 19 November 2019 in Case No. 750/5745/15-к (proceedings *No. 51-10195км18*), held:

> certain flexibility is inherent in the principle of direct examination, like any other general principle, when applied in specific circumstances. Depending on the circumstances, this principle is implemented in various forms, as the court must coordinate it with other principles of the criminal process and/or the legitimate interests of society or individuals. For instance, the principle of direct examination is subject to certain legitimate restrictions in the case of interrogation of a person to whom security measures were applied or who is not physically present in the courtroom (Article 232 of the CPC), and such legitimate restrictions cannot be considered a violation of the principle of direct examination. Additionally, in most cases, courts of appeals and cassation base their conclusions on the testimony given in the court of first instance since multiple interrogations of the person in courts of different instances without valid reasons would not only be burdensome for such a person, participants, and society but would also contradict the very essence of the system of different court instances.

163. Furthermore, as noted below (see Section 9), extrajudicial testimony may be admissible in certain circumstances, and other protective measures may be available for vulnerable witnesses (see Benchbook on the Adjudication of International Crimes, paras 1863-1876).

164. The accused's right to examine witnesses is also contained in ECHR, Article 6(3)(d), ICCPR, Article 14(3)(e), and in IHL under Article 105(1) of the Third Geneva Convention (with respect to POWs). The right is also contained in the Rome Statute, Article 67(1) and ICTY Statute, Article 21(4). **Detailed guidance for defence counsel in terms of the examination and cross-examination of witnesses in conflict-related cases can be found in the Defence Counsel Handbook, Chapter II(7).**

165. **According to the ECHR, all witnesses should normally be produced in the accused's presence with a view to ensuring an adversarial process in which context he or she has an adequate and proper opportunity to challenge and question them,** either when they make their statements or at a later stage of the proceedings (ECtHR Al-Khawaja and Tahery v. United Kingdom, para. 118 and Schatschaschwili v. Germany, para. 103). This right is not unlimited, and Article 6(3)(d) of the ECHR does not require the attendance and examination of every witness on the accused's behalf, rather it aims for full equality of arms in the matter (ECtHR, Perna v. Italy para 29). The HRC makes a similar assessment of this right (HRC, General Comment No. 32, para 39).

166. Likewise, the ECtHR does not consider the right to cross-examination to be absolute. It has held that a trial will not necessarily be unfair where certain restrictions have been imposed on the manner in which the questioning takes place in cases where witnesses are particularly vulnerable (ECtHR, Accardi and Others v. Italy). However, the accused should be able to question a witness about factors relating to his or her credibility (ECtHR, Pichugin v. Russia).

167. **Taking action to examine witnesses will be part of an effective strategy of defence counsel. However, the balancing act between ensuring the accused's right to examine witnesses in proceedings, and preventing the retraumatisation of victims and/or witnesses will be a matter for judicial control. The Benchbook on the Adjudication of International Crimes provides detailed guidance on how Ukrainian judges can navigate this balancing act, at para 1877.**

5.8 Right to appeal

168. A critical safeguard in terms of the rights to effective participation and effective defence is accused's **right to appeal. The right to appeal may also be the essential remedy for procedural violations throughout the trial process.** The accused's right to appeal is provided for in Article 129 of the Constitution of Ukraine and Article 42(4)(6) of the CPC. Chapters 31 and 32 CPC provide more detail on appellate procedure in Ukraine, and Chapter 34 governs criminal proceedings among discovery of new or exceptional circumstances. Appeals of first instance judgements may be lodged in courts of appeal in Ukraine on grounds of facts or law. However, Article 392 CPC states that judgements cannot be appealed where the appellant objects against circumstances that have not been contested by anyone during the initial trial.

169. Where judgements have been issued in simplified court proceedings or in proceedings where a reconciliation agreement or a guilty plea was reached, further limitations on grounds for appeal apply. Appeals to the Criminal Cassation Court must be on legal grounds (Article 424 CPC) within the scope of the cassation complaint, since the role of these cassation proceedings is to ensure consistent application by the courts of first and appellate instances of Ukrainian criminal law (for more detail on grounds for appeal in Ukraine, see Paliukh & Sen, Grounds for Appeals and Other Judicial Reliefs in Criminal Proceedings in Ukraine, December 2023). Articles 419 and 442 CPC set out the contents that must be included in a judgement of a court of appeal and the cassation court respectively.

170. A convicted person's right to an appeal of any sentence with a view to quashing or revising the sentence or the reopening of the trial is guaranteed under Article 2 of Protocol No. 7 to the European Convention on Human Rights, Article 14(5) ICCPR, Third Geneva Convention, Article 106 and Fourth Geneva Convention, Article 73. The right has also been recognised as a 'basic component of fair trial rights in the context of armed conflict' (ICRC, Rule 100). Where there are allegations of procedural violations, an accused must also have access to an effective remedy under Article 13 ECHR. The right to a retrial is also an important safeguard in trials *in absentia* (see Section 10 below).

171. **International standards require that appeal rights be meaningful and accessible:**
- The right to appeal a conviction must be communicated to the accused, including all the necessary information to enable appeal proceedings to be launched in a timely manner (ICRC, 'Commentary to Geneva Convention III (2020)', Article 106, para 4161).
- It is not sufficient that the right to appeal is exercised before a higher court. This court also must be independent and impartial and fair trial guarantees must be upheld at the appeal stage as well (ECtHR, Meftah and Others v. France, para 40).
- Appeals should also not be found to be inadmissible on 'excessive formalism' (ECtHR, Walchli v. France, para 29; ECtHR, Evaggelou v. Greece, para 23).
- Exercising pressure in order to prevent lodging of appeal will deprive the defendant of an effective right to appeal and may interfere with the right of access to a court under Article 6(1) ECHR (ECtHR, Marpa Zeeland B.V. and Metal Welding B.V. v. The Netherlands, paras 46-51).
- The convicted person must receive access to a reasoned, written trial judgment, as well as other documents, including trial transcripts in order to exercise the right to appeal (HRC, General Comment No. 32, para 49).
- Appellate courts may not merely endorse the reasons for the lower court's decision in dismissing an appeal, where the first-instance court's judgment lacks adequate reasoning, such as 'relying on evidence that has been expressly objected to as inadmissible without providing a response to such an argument' (ECtHR, Shabelnik v. Ukraine (No. 2), paras 50–55).

172. **Current practice in Ukraine reveals serious deficiencies in exercising appeal rights.** Early in the conflict in Ukraine, the OHCHR reported that state-appointed lawyers in Ukraine have been reported as asking their clients to sign waivers of their right to appeal even though this is not foreseen in Ukrainian legislation or as avoiding challenging clearly unfavourable convictions (OHCHR, 'Human rights in the administration of justice in conflict-related criminal cases in Ukraine: April 2014 – April 2020', paras 61-62). According to the Media Initiative for Human Rights, the majority of war crimes verdicts they had monitored were not appealed, especially those detrimental to the accused (Media Initiative for Human Rights, 'How are war-related court cases progressing? Interim findings of MIHR monitoring', 17 July 2023). Similarly, the UBA reported that out 44 judgments on conflict-related cases heard between 24 February 2022 and 15 October 2023 analysed, only 10 were appealed (UBA, 'Report on the Results of the Project "The Trial Monitoring In War Crimes Cases"', December 2023, p. 6).

173. In an analysis of Article 438 CCU cases (see Strategic Recommendations for the Judiciary), only 14 out of 54 cases were appealed, with only 2 reaching the Supreme Court. The following grounds of appeal were identified in the cases where judgments of first-instance courts were appealed to the regional courts of appeal:
- there were doubts around the identification of accused;
- the crime (or elements thereof) was not proved beyond a reasonable doubt;
- the conditions regarding *in absentia* proceedings were not established (especially notification);
- the sentence was too severe and did not reflect mitigating circumstances;
- the sentence was too lenient and did not reflect aggravating circumstances;
- the evidence was obtained in violation of human rights obligations;
- no interpretation was provided to the accused.

174. **The majority of appeal judgements analysed upheld the original verdict without detailed analysis of the grounds for appeal.** In several cases, the parties withdrew their appeals and asked the courts to close the proceedings (see, e.g., Case No. 535-244-22, and Case No. 554-3925-22). However, in the *Shishimarin* case concerning an Article 438(2) CCU conviction (murder) (Case No. 760-5257-22), the Kyiv Court of Appeals partially granted the appeal, reducing the sentence to 15 years of imprisonment from life imprisonment, while maintaining the conviction under Article 438(2). The Court addresses the facts, legal framework, and procedural errors in the first-instance judgement, correcting findings on aggravating factors and revising the sentence. However, it provides limited engagement with the defence's arguments that the accused was carrying out a lawful order from his commander to shoot a combatant.

175. **Both appeals which reached the Supreme Court were unsuccessful.** The case initially pronounced by the Darnytskiy Regional Court in the Kyiv city region of 24 April 2023 (Case No. 753-14148-21) reached the Supreme Court, to consider the element of 'coercion' required for the crime of forced conscription (or compelling service in hostile forces) under Article 51 of the Fourth Geneva Convention. The appeal was ultimately rejected. Similarly, Case No. 588-1009-22, initially pronounced by the Trostianets District Court of Sumy Region, reached the Supreme Court on the grounds of the severity of the sentence, but the Supreme Court refused to open proceedings stating that the previous courts had correctly applied the law.

176. **Defence counsel must take action to appeal proceedings on behalf of their client in conflict-related cases, including on bases related to the fairness of proceedings. Given the observations relating to the reasoning of judgements in such cases (see Section 4 above), lack of a reasoned opinion of a trial court in itself may be a basis for appeal. Effective exercising of rights to appeal and consideration of defence arguments on appeal will be crucial to ensure the accused's right of access to a court and fairness of proceedings overall, as well as (where procedural violations are alleged), the right to an effective remedy.**

Section 6 - Ensuring specificity in grounds for arrest and/or charges

SUMMARY

- **Ukrainian authorities must ensure that any person deprived of liberty is informed without delay of the legal and factual grounds for arrest and of the charges in a language they comprehend.**
- Ensuring specificity of the charges in the indictment, in a language the accused can understand, will also be a pre-requisite for adequate notification as required where trials are held *in absentia*. The principle of legality requires additional efforts to be made to clearly identify, with reference to international law, the crimes and modes of liability the accused is charged with in the case. This requires additional steps of clarification beyond charging an accused with 'any other violations of rules of the warfare' under Article 438 CCU, for example.
- **In their charges, prosecutors should endeavour to refer not only to IHL rules, but also to sources of international criminal law (in compliance with the principle of legality), which detail the crime and its contextual, material and mental elements, as well as the accused's level of responsibility.**
- **Judicial oversight of the lawfulness of an accused's arrest and/or detention must be automatic and prompt following an arrest.** An accused also has the right to challenge the lawfulness themselves before the courts and a speedy review as a result. The determination on whether the accused's arrest and detention are lawful and not arbitrary will depend on whether there is the existence of a 'reasonable suspicion' that the accused has committed an offence. This suspicion must be based on verifiable and objective evidence. It will also depend on whether the arrest and/or detention is reasonable and justified by other reasons in addition to the suspicion itself.
- Ukraine's derogation from its international human rights obligations regarding deprivation of liberty do not negate the concurrent application of IHL standards and domestic law provisions. Moreover, the measures taken under the derogation cannot be arbitrary.
- **The courts therefore have an opportunity (and obligation) to consider the specificity of charges at the pre-trial stages. However, further opportunities are possible under Ukrainian law throughout the trial process to request modification, dropping of charges, or reclassification.**
- **It is critically important that Ukrainian judges are aware that issues with the specificity of charges delineated by the prosecution do not absolve them of ensuring that any conviction of the accused complies with the principle of legality and the presumption of innocence. Assessment of whether the prosecution has met the burden of proof to show that the accused has committed a crime which is prescribed by law, certain and foreseeable to the accused must nonetheless be carried out by courts. This assessment must also be reflected in the reasoning, which must comply with the right to a reasoned**

opinion. Where sufficient reasoning in this regard is not provided, this may provide a ground for appeal by defence counsel.

- Specificity of charges and ensuring that any conviction of the accused complies with the principle of legality and the presumption of innocence is also linked to the right of an accused not to be charged for directly participating in hostilities under IHL. **Prosecutors in Ukraine may endeavour to provide more granular detail on the accused's level of involvement in the offence in the charges, and courts should demonstrate assessment of that involvement in their reasoning.**

177. Law enforcement authorities and prosecutors in Ukraine must ensure that the accused is informed in a timely manner of the substantive grounds of arrest and that the charges are clearly specified in order to ensure that fair trial guarantees under Ukrainian and international and European law are adhered to. Additionally, where they were a combatant (this includes members of armed forces), an accused must not be charged for directly participating in hostilities as long as they comply with IHL ('combatants' privilege').

178. Without specificity in the charges, it may be challenging for other practitioners involved in the trial process, such as defence lawyers and judges, to ascertain which crime or mode of liability the prosecution has the burden to prove, and therefore whether this burden has been met. While prosecutors delineate the charges at the outset of a case, defence lawyers can challenge the clarity and specificity of the charges, and judges have the ability the review the charges at various points during the trial process, and take action.

179. For example, this issue may arise during pre-trial stages, where counsel and courts are ensuring that the deprivation of the accused's liberty is neither unlawful nor arbitrary. This is ensured through prompt judicial review of or speedy review (*where habeas corpus procedure is used*) of the accused's arrest and detention, or later in the trial process. Regardless, such challenges and action seeking to clarify the charges will be fundamental to providing an effective defence (see above, Section 5), providing a reasoned opinion (see above, Section 4) and ensuring that the principle of legality (see above, Section 2), and presumption of innocence are not violated (see above, Section 3).

180. While prosecutors should therefore be aware of the Ukrainian and international and European law of relevance (noted below), defence lawyers and judges in Ukraine in Ukraine should also actively refer to such provisions in their argumentation and reasoning regarding the charges.

Table 5 Sources of law related to specificity of charges/grounds for arrest

Prohibition of unlawful or arbitrary arrest or deprivation of liberty				
Ukrainian law	**IHRL**	**IHL**	**ICL**	**Other**
• Constitution of Ukraine, Article 29 • CPC, Article 12(1)	• ECHR, Article 5(1) • ICCPR, Article 9(1)	• Third Geneva Convention (as applicable	• Rome Statute, Article 8(2)(a)(vii) (war crime of	

	Note that Ukraine derogated from Articles 5 ECHR and 9 ICCPR under martial law, but the practical effect of this derogation may be limited (see below analysis)	to POWs), Article 103 • Fourth Geneva Convention, Article 147 (grave breach of unlawful confinement) • The prohibition of arbitrary deprivation of liberty is recognised as customary international humanitarian law (*see* ICRC, Rule 99)	unlawful confinement) • ICTY Statute, Article 2(g) (war crime of unlawful confinement)	
Right to be informed of the substantive grounds for arrest or detention				
Ukrainian law	**IHRL**	**IHL**	**ICL**	**Other**
• Constitution of Ukraine, Article 29 • CPC, Article 29(2)	• ECHR, Articles 5(2) and 6(3)(a) • ICCPR, Article 9(2)	• Third Geneva Convention (as applicable to POWs), Article 104 • Fourth Geneva Convention, Article 71(2) • Additional Protocol I, Article 75(3) • This right is recognised as customary international humanitarian law as part of general fair trial guarantees		

		(*see* ICRC, Rule 100)		
Prompt and automatic judicial review of the accused's arrest and detention				
Ukrainian law	**IHRL**	**IHL**	**ICL**	**Other**
• Constitution of Ukraine, Article 29 • CPC, Article 12(2)	• ECHR, Article 5(3) • ICCPR, Article 9(3)			
Speedy review of the lawfulness of arrest and detention (*habeas corpus*)				
Ukrainian law	**IHRL**	**IHL**	**ICL**	**Other**
• Constitution of Ukraine, Article 29 • CPC, Article 206	• ECHR, Article 5(4) • ICCPR, Article 9(4)			
Right of combatants to direct participation in hostilities (combatants' privilege)				
Ukrainian law	**IHRL**	**IHL**	**ICL**	**Other**
		• Additional Protocol I, Article 43(2)		

6.1 Informing the accused at the outset and specificity of charges

181. Any person arrested must be told, promptly, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if they see fit, to apply to a court to challenge its lawfulness. The content of the information provided is important. The ECtHR has held that the sufficiency of the content for the purposes of Article 5(2) ECHR must be assessed in each case according to its special features, but reference to the legal provision under which an accused is being arrested alone will be insufficient (ECtHR, Fox, Campbell and Hartley v. the United Kingdom, paras 40-41; Kerr v. the United Kingdom, Section A). The ECtHR has determined that the information provided does not need to be provided in a specific form, nor consist of a complete list of the charges held against the arrested person (ECtHR, Nowak v. Ukraine, para 63). It has been held that parliamentary statements will be insufficient 'informing' of the grounds of arrest (ECtHR, Saadi v. the United Kingdom, para 53). In the case of Nowak v. Ukraine, describing the accused as an 'international thief' was also deemed insufficient by the ECtHR under Article 5(2) ECHR. The HRC has opined that the content must include 'enough factual specifics to indicate the substance of the complaint, such as the wrongful act and the identity of an alleged victim' (HRC, GC No. 35, para 25; HRC, Ilombe and Shandwe v. Democratic Republic of the Congo, para 6.2).

182. In criminal matters, the ECtHR has found that, for the purposes of Article 6(3)(a) ECHR, the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair (Pélissier and Sassi v. France [GC], para 52; Sejdovic v. Italy [GC], para 90). The right to be informed of the nature and the cause of the accusation must also be considered in the light of the accused's right to prepare his defence under Article 6(3)(b) ECHR (Pélissier and Sassi v. France [GC], para 54; Dallos v. Hungary, para 47).

183. The ECtHR has, however, not found a violation of Article 5(2) ECHR where the suspects were informed of reasons for arrest by broadly referencing a legal provision, but more detailed references to the conduct in question was provided during initial questioning. The case of Kerr v. the United Kingdom illustrates this. The ECtHR noted that following his arrest, the applicant was interrogated about several specific matters: i.a., 'his suspected involvement in a recent bomb explosion at a military barracks, his membership of a proscribed organisation'. The Court noted that the questioning went beyond the mere reference to a legal basis for arrest that was provided at the outset. The Court therefore concluded that 'there [was] no reason to suppose that these periods of questioning were not such as to enable the applicant to understand why he was arrested and why he was suspected of being concerned in the commission, preparation or instigation of acts of terrorism and to have more than a reasonable idea of the charges which he was facing' (Section A).

184. Furthermore, where a warrant of arrest is written in a language which the arrested person does not understand, Article 5(2) ECHR will be complied with only if the applicant is later interrogated, and made aware of the reasons for his arrest, in a language which he understands (Delcourt v. Belgium, Commission decision of 7 February 1967 referred to in the Commission's report of 1 October 1968).

185. Under Ukrainian law, a charge should detail the specific criminal act and provide a legal basis for prosecution (Article 291, CPC). This accords with Article 6(3)(a) ECHR, which stipulates that the accused has the right not only to be informed of the acts he is alleged to have committed and on which the accusation is based (the cause of the accusation), but also of the legal characterisation given to those acts (the nature of the accusation) (Mattoccia v. Italy, para 59; Penev v. Bulgaria, paras 33 and 42). The ECtHR has held, however, that it is not necessary for the information to mention the evidence on which the charge is based (X. v. Belgium (dec); Collozza and Rubinat v. Italy). As with Article 5(2), Article 6(3)(a) does not specify a form that the information must be provided in.

186. Whilst Article 6(3)(a) does not specify that the relevant information should be given in writing or translated in written form for a foreign defendant, a defendant not familiar with the language used by the court may be at a practical disadvantage if he is not also provided with a written translation of the indictment into a language which he understands (Kamasinski v. Austria, para 79; Hermi v. Italy [GC], para 68). Ensuring specificity of the charges in the indictment, in a language the accused can understand, will also be a pre-

requisite for adequate notification as required where trials are held *in absentia* (see below, Section 10).

187. The blanket nature of Article 438 CCU and vagueness of other relevant provisions under the CCU has resulted in a lack of specificity within indictments in Ukraine thus far. This can be seen from judgements in Article 438 CCU cases, which often recite the indictments (see Strategic Recommendations for the Judiciary). As discussed above, in Section 2, the principle of legality requires additional efforts to be made to clearly identify, with reference to international law, the crimes and modes of liability the accused is charged with in the case. This requires additional steps of clarification beyond charging an accused with 'any other violations of rules of the warfare' under Article 438 CCU, for example. Prosecutors should endeavour to refer not only to IHL rules in their charges, but also sources of international criminal law (in compliance with the principle of legality), which detail the crime and its contextual, material and mental elements, as well as the accused's level of responsibility.

188. Often in Article 438 CCU cases analysed (see Strategic Recommendations for the Judiciary), there is a lack of information as to the accused's level of participation in an offence, or the level of liability or responsibility of the accused detailed in the charges and/or the reasoning provided by the courts throughout the trial proceedings. In certain cases, individual responsibility is assumed where there is only evidence of a unit being present in a location, and no other evidence to support the accused's role or level of participation in a crime. This could be an argument employed as part of a defence strategy, therefore prosecutors in Ukraine may endeavour to provide more granular detail on the accused's level of involvement in the offence in the charges, and courts should demonstrate assessment of that involvement in their reasoning.

6.2 Review throughout proceedings

189. There are opportunities for the grounds for arrest or charges to be reviewed by various actors during the trial process. Firstly, under Ukrainian law, the prosecutor can make amendments to an indictment drawn up by the investigator, or draw up indictments or motions concerned independently (Article 36 CPC).

190. Furthermore, Article 29 of the Constitution of Ukraine and 206 of the CPC also encompass the accused's automatic right to prompt judicial review of the lawfulness of his or her arrest and/or detention (under Article 5(3) ECHR and 9(3) ICCPR), as well as the right to challenge the lawfulness of arrest and/or detention (the *habeas corpus* procedure under Article 5(4) ECHR and 9(4) ICCPR). These forms of review will normally be carried out by investigative judges at the pre-trial stage in Ukraine.

191. The lawfulness of the arrest and detention may be assessed in connection with the prohibition of arbitrary or unjustified deprivations of liberty (Article 5(1) ECHR, 9(1) ICCPR). In this sense, in order to meet the requirement of lawfulness, detention must be 'in accordance with a procedure prescribed by law'. This means that where a national law provides for the deprivation of liberty, it must be sufficiently accessible, precise and

foreseeable in its application. There will therefore need to be the existence of clear legal provisions for ordering detention, for extending detention, and for setting time-limits for detention; and the existence of an effective remedy by which the applicant can contest the lawfulness and length of his continuing detention (ECtHR, J.N. v. the United Kingdom, para 77). The practice of automatically renewing pre-trial detention without any precise legal basis is contrary to Article 5(1) (ECtHR, Svipsta v. Latvia, para 86). Courts should also take into account 'arbitrariness', which would include, among other factors (see below, Section 7), where there was no relationship of proportionality between the ground of detention relied on and the detention in question (see ECtHR, Guide on Article 5, para 42).

192. It is important to note that under IHL, the detention of combatants as POWs until the end of active hostilities to prevent them from rejoining the military of the State on which they depend or returning to the battlefield is lawful (Third Geneva Convention, Articles 21 and 118). Similarly, the Fourth Geneva Convention permits the internment and placing in assigned residence of protected persons and other civilians both in the territory of a belligerent State and in an occupied territory when doing so is necessitated by security considerations (Fourth Geneva Convention, Articles 42 and 78). Detention as a POW or civilian internee as per the rules of IHL may not constitute arbitrary detention in light of ECtHR jurisprudence (ECtHR, Hassan v United Kingdom). Conversely, unlawful confinement, in violation of the rules of IHL, could constitute a war crime (see above). Practitioners should ensure a distinction is made between grounds for detention as a POW or civilian internee, and grounds for arrest and detention where charged with a criminal offence. From the perspective of IHL, it is most important to be aware that if charged with a crime, a POW may be confined while awaiting trial 'if it is essential to do so in the interests of national security' (Third Geneva Convention, Article 103).

193. A period of detention is, in principle, lawful if it is based on a court order. However, the absence or lack of reasoning in detention orders is one of the elements taken into account by the ECtHR when assessing the lawfulness of detention under Article 5(1) (ECtHR, S., v. and A. v. Denmark [GC], para 92). Pre-trial detention '[e]ffected for the purpose of bringing him before the competent legal authority' is justified under Article 5(1)(c) ECHR, where there is a reasonable suspicion concerning an existing offence in relation to which criminal proceedings are pending (ECtHR, Kurt v. Austria [GC], 2021, para 187), or when it is reasonably considered necessary to prevent his committing an offence. While reasonable suspicion must exist at the time of the arrest and initial detention, it must also be shown that the suspicion continued and remained 'reasonable' throughout the detention where it is extended (ECtHR, Selahattin Demirtaş v. Turkey (no. 2) [GC], 2020, para 320).

194. A 'reasonable suspicion' that a criminal offence has been committed means that there must be facts or information which would satisfy an objective observer that the person concerned may have committed an offence (ECtHR, Erdagöz v. Turkey, para 51; and Fox, Campbell and Hartley v. the United Kingdom, para 32), and the suspicion must be justified by verifiable and objective evidence. The ECtHR has held that vague and general references to a legal provision or unspecified 'case material' will not be sufficient to justify the 'reasonableness' of a suspicion (ECtHR, Akgün v. Turkey, paras 156 and 175). The Court has found that uncorroborated hearsay evidence of an anonymous informant was held to

be insufficient to lead to a 'reasonable suspicion' of the applicant being involved in mafia-related activities (ECtHR, Labita v. Italy [GC], para 156 onwards). However, the Court has also accepted that concrete and detailed statements of an anonymous witness can constitute a sufficient factual basis for a reasonable suspicion in the context of organised crime (ECtHR, Yaygin v. Turkey *(dec.)*, paras 37-46).

195. The requirement of a reasonable suspicion also requires that the facts can be reasonably considered to fall under a legal provision stipulating a criminal offence at the time when the acts occurred (ECtHR, Selahattin Demirtaş v. Turkey (no. 2) [GC], para 317). For example, the ECtHR has held that arrest and detention on suspicion of having committed a crime of mass disorder would not meet the threshold of reasonable "suspicion" if it was arbitrary or formed as part of a strategy. The "strategy" could refer to a situation where Ukrainian authorities attempt to put an end to a peaceful protest on the basis of the existence of reasonable suspicion (ECtHR, Shmorgunov and Others v. Ukraine, paras 464-477). Furthermore, authorities do not have *carte blanche* to order the detention of an individual during the state of emergency without any verifiable evidence or information or without a sufficient factual basis satisfying the minimum requirements of Article 5(1)(c) (ECtHR, Akgün v. Turkey, para 184).

196. Where justification for arrest and/or detention is based on the risk of the accused committing an offence, the ECtHR has held that authorities must show convincingly that the person concerned would in all likelihood have been involved in the concrete and specific offence, had its commission not been prevented by the detention (Kurt v. Austria [GC], para 186; S., v. and A. v. Denmark [GC], paras 89 and 91). However, it is important to note that this ground does not permit a policy of general prevention directed against an individual or a category of individuals who are perceived by the authorities as being dangerous or having the ability to commit unlawful acts, such as members of the Russian armed forces. The ECtHR also notes that arrest and detention of the accused on these grounds must be necessary and a proportionate measure to achieve the stated aim (Ladent v. Poland, 55-56).

197. Where the judges review the arrest and/or detention, the authorities must also give other relevant and sufficient grounds, beyond only reasonable suspicion of an offence, to justify the detention (ECtHR, Merabishvili v. Georgia [GC], para 222). Whether it is reasonable for an accused to remain in detention must be assessed on a case-by-case basis. However, allowing for continued detention following the review can be justified 'only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention' (ECtHR, Guide on Article 5, para 206). According to the ECtHR, the key reasons which may justify detention include (a) the risk that the accused will fail to appear for trial; (b) the risk that the accused, if released, would take action to prejudice the administration of justice, or (c) commit further offences, or (d) cause public disorder (Buzadji v. the Republic of Moldova [GC], para 88; Tiron v. Romania, para 37; Smirnova v. Russia, para 59; Piruzyan v. Armenia, para 94). However, authorities' reasoning on those points cannot be abstract, general or stereotyped (Merabishvili v.

Georgia [GC], 2017, para 222). The protection of public order is particularly relevant in cases involving charges of war crimes (Milanković and Bošnjak v. Croatia, para 154).

198. Where an applicant challenges the lawfulness of his or her arrest and/or detention themselves (invoking *habeas corpus)*, they have a right to a speedy judicial decision concerning the lawfulness of detention (Article 5(4) ECHR and 9(4) ICCPR). During a review on the accused's challenge, a court does not need to address every argument contained in the accused's submissions. However, the court cannot treat as irrelevant, or disregard, concrete facts that could affect the 'lawfulness' of the arrest or detention (ECtHR, Ilijkov v. Bulgaria, para 94). The ECtHR has held that a court must give adequate reasons, and not only provide repeated stereotyped decisions that provide no answer to the arguments of the defendant (ECtHR, G.B. and Others v. Turkey, para 176).

6.3 Effect of Ukraine's derogations from ICCPR and ECHR

199. It is important to note that while Ukraine has derogated from the right to liberty and security under Article 5 ECHR and 9 ICCPR during martial law, the HRC has noted that the mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not give right to a *carte blanche*. The fundamental guarantee against arbitrary detention is non-derogable, in the sense that the reasons for derogation (such as public emergency) cannot justify a deprivation of liberty that is unreasonable or unnecessary under the circumstances. The existence and nature of a public emergency which threatens the life of the nation may, however, be relevant to a determination of whether a particular arrest or detention is arbitrary (HRC, Özçelik et al. v. Turkey, No. CCPR/C/125/D/2980/2017, 26 March 2019). Therefore, courts would still have to consider the arbitrariness of arrest and/or detention, which could include considerations such as whether there is inappropriateness, injustice, lack of predictability and due process of law, as well as a lack of reasonableness, necessity and/or proportionality (HRC, GC No. 35, para 12).

200. Further to the analysis on Ukraine's derogations above at Section 1, the implementation of derogations during emergencies must be grounded in legality, necessity, proportionality, equality, and fairness, applied judiciously to individual circumstances. The Constitutional Court of Ukraine in Case No 3-88/2022 has also noted that the derogations from Articles 5 ECHR and 9 ICCPR do not negate the rights contained in the Constitution itself, which must still remain operationalised. It found therefore that Article 615(6) of the CPC, introduced under martial law and which allowed for decisions on extension of pre-trial detention by prosecutors, rather than an investigative judge (who should provide a reasoned opinion), was unconstitutional and in violation of the rights to liberty and security, judicial protection and the presumption of innocence.

6.4 Review of arrest and detention: practice of Ukrainian courts

201. While there is a legal basis for the review processes assessing the lawfulness and arbitrariness of the accused's arrest and detention within Ukrainian law, the practice of the Ukrainian courts is currently subject to the supervision of the CoM CoE in the Ignatov

group of cases. The CoM CoE has noted that in several recent judgments the ECtHR have found violations of Article 5(4) ECHR because the domestic courts failed to address the applicants' complaints concerning the lawfulness of their arrest, be it under the *habeas corpus* procedure (Article 206 of CCP) or other legal frameworks to which the applicants resorted. In general, the CoM CoE notes that Ukraine has not provided sufficient information regarding recent decisions.

202. The first check and balance on the grounds for arrest, detention and/or the charges against the accused will be carried out during these review processes by investigative judges in Ukraine. Yet, while decisions in Article 438 CCU cases demonstrate that the 'reasonable suspicion' requirement is analysed by Ukrainian courts, there is often insufficient reasoning to demonstrate assessment of the evidence provided by the prosecution, beyond reproduction or reference to the prosecutors' submissions. Instead, courts often rely on the seriousness of the charges against the applicants and use formulaic reasoning without addressing specific facts or considering alternative preventive measures. Ukrainian courts must ensure that such actions do not represent consistent practice which could indicate an arbitrary strategy to convict Russian or Ukrainian individuals for participation in the conflict. Similar measures were already found to violate Article 5(1)(c) of the ECHR in the case of Shmorgunov and Others v. Ukraine, at paras 464-477.

6.5 Challenges related to guilty pleas

203. Early review of the charges will also be relevant in considering an accused's guilty plea. For example, the accused may plead guilty even where they disagree with or do not fully understand the charges, and therefore a guilty plea should not in itself be taken as confirmation of a 'reasonable suspicion' or that the prosecution's burden of proof has been met later in the proceedings (see e.g. Shmorgunov and Others v. Ukraine, para 467, where the accused pled guilty in order to receive medical treatment). Legal analysis of the Shishimarin case has also highlighted how a lack of specificity in the charges may be problematic from the perspective of an accused's guilty plea.

6.6 The court's role in reviewing and amending the charges

204. It may be that the courts encourage the prosecution to amend the charges or drop certain charges, or reclassify the offence, either through querying the lawfulness of the detention at the pre-trial stage, or later during the trial process. This could also be raised by defence lawyers. Trial judges also play a key role in reviewing the indictment as per Article 314 CPC at the preliminary hearing ('preparatory court session'). If the charges are found to be vague or lack sufficient detail, the court has the authority to demand further clarification or even to refuse the indictment to uphold fair trial rights (Article 314(2)-(3) CPC).

205. At the trial stage, once the case has moved beyond the preparatory session, judges have very limited options to address deficiencies in the charges, as they are generally bound by the charges as presented (Article 337 CPC). However, they still have some tools to address deficiencies in the charges, including by requesting additional evidence or clarification from

the prosecution, especially when the defence raises specific concerns. This may indirectly influence the prosecution by creating a situation where the prosecutor considers withdrawing or modifying charges. For instance, if it becomes clear that the evidence is insufficient, the prosecutor may opt to amend the indictment, drop specific charges, or reclassify the offence. The courts may also, as per Article 337(3) CPC, change the legal qualification of the criminal offence to a less severe classification than initially charged, without expanding the scope of the charges, if it benefits the accused.

206. In the case of reclassification of the offence during the course of the proceedings, the ECtHR has found that the accused must be afforded the possibility of exercising his defence rights in a practical and effective manner, and in good time (Pélissier and Sassi v. France [GC], para 62; Block v. Hungary, para 24). The ECtHR has held that defects in the notification of the charge could also be remedied in the appeal proceedings. This depends on the accused having the opportunity to advance his defence before the higher courts, in respect of the reformulated charge(s), and to contest his conviction in respect of all relevant legal and factual aspects (Zhupnik v. Ukraine, paras 39-43).

207. It is critically important that Ukrainian judges are aware that issues with the specificity of charges delineated by the prosecution do not absolve them of ensuring that any conviction of the accused complies with the principle of legality and the presumption of innocence (see above, Sections 2 and 3). Therefore, assessment of whether the prosecution has met the burden of proof to show that the accused has committed a crime that is prescribed by law, certain and foreseeable to the accused must nonetheless be carried out by courts. This assessment must also be reflected in the reasoning, which must comply with the right to a reasoned opinion (see above, Section 4). Where sufficient reasoning in this regard is not provided, this may provide a ground for appeal by defence counsel.

6.7 Combatants' privilege

208. Specificity of charges and ensuring that any conviction of the accused complies with the principle of legality and the presumption of innocence (see above, Sections 2 and 3) is also linked to the right of an accused not to be charged for directly participating in hostilities. Under IHL, members of the armed forces of a Party to a conflict are combatants, which means they have the right to participate directly in hostilities (Additional Protocol I, Article 43(2)). This in turn means that combatants may not be prosecuted for merely participating in the hostilities, provided they abide by the applicable rules of IHL.

Section 7 – Aspects of investigations and pre-trial detention

SUMMARY

- Ukrainian legal practitioners must ensure that investigative practices and decisions concerning pre-trial detention strictly adhere to national and international fair trial guarantees. **Law enforcement authorities and prosecutors are obliged to avoid techniques that infringe upon the accused's right to privacy, protection from self-incrimination, or the absolute prohibition of torture and inhuman treatment. Defence counsels are urged to act diligently by raising any such allegations at pre-trial and trial stages, and investigative judges must scrutinise allegations, including during review of the lawfulness and/or arbitrariness of arrest and detention.**
- Any interference with the private or family life of the accused, including surveillance, searches, and seizures, must be legally authorised, necessary in a democratic society, and proportionate to a legitimate aim in compliance with ECtHR jurisprudence. **Practitioners, especially prosecutors and investigative judges, are advised to conduct robust legal assessments in accordance with ECtHR jurisprudence, provide reasoned decisions justifying such measures, and ensure *ex post facto* judicial authorisation is prompt and substantively adequate.**
- **Practitioners must uphold the accused's right to remain silent and not to incriminate oneself. Defence lawyers should challenge any evidence obtained through coercion or deception, and judges must exclude such evidence where it undermines the fairness of proceedings.** It is specifically recommended that confessions, especially by POWs, not be treated as preconditions for release via exchange, and courts must ensure that guilty pleas are assessed with full regard to procedural safeguards.
- Torture and inhuman or degrading treatment are absolutely prohibited and any evidence obtained thereby must be deemed inadmissible. **Law enforcement must abstain from abusive practices and the State Bureau of Investigations is tasked with conducting prompt and impartial investigations into allegations of torture and inhuman or degrading treatment. In the context of ongoing criminal proceedings against an accused alleging torture or inhuman or degrading treatment, defence counsel must proactively review detention records and raise any allegations before investigative judges. Judges at all stages are required to provide detailed reasoning when confronted with such claims**, including distinguishing whether conduct meets the threshold for torture, inhuman, or degrading treatment as defined under the ECtHR and international law.

209. Ukrainian practitioners must ensure that aspects of the investigation and the accused's pre-trial detention comply with fair trial guarantees. The relevant sources are noted below. Law enforcement authorities and prosecutors involved in the investigation of conflict-related cases must ensure that investigative techniques used do not breach the accused's rights to privacy, against self-incrimination, or the prohibition of torture and inhuman or

degrading treatment. Where there are allegations by an accused that such techniques have been used, authorities should ensure that effective investigations into those allegations are carried out. However, in the context of the existing criminal proceedings, defence counsel should also act zealously to protect their client's interests and raise these allegations at pre-trial and/or trial stages.

210. Investigative judges, in exercising judicial control over the pre-trial stages, should address such allegations in the context of their review of the lawfulness and/or arbitrariness of the accused's arrest and/or detention (see Section 6 above). At the trial stage, where evidence is presented that may have been obtained through such investigative techniques, judges should consider whether admitting unlawfully obtained evidence breaches the fairness of the trial as a whole (see Section 9 below).

Table 6 Sources of law on aspects of investigations and pre-trial detention

Right to private and family life				
Ukrainian law	**IHRL**	**IHL**	**ICL**	**Other**
• Constitution of Ukraine, Articles 29-32 • CPC, Articles 7(1)(6)–(9), 7(2), 13–15, 258	• ECHR, Article 8 • ICCPR, Article 17			
Right to remain silent and not to incriminate oneself				
Ukrainian law	**IHRL**	**IHL**	**ICL**	**Other**
• Constitution of Ukraine, Article 63 • CPC, Articles 7(1)(11), 18, 42(3)(4)	• ECHR, Article 6 • ICCPR, Article 14(3)(g)	• Additional Protocol I, Article 75(4) • The right to remain silent and not to incriminate oneself is recognised as customary international humanitarian law as part of the right to a fair trial (*see* ICRC, Rule 100)	• Rome Statute, Article 55 • ICTY Statute, Article 21(4)(g)	
Prohibition of torture and inhuman or degrading treatment				

Ukrainian law	IHRL	IHL	ICL	Other
• Constitution of Ukraine, Article 28 • CPC, Articles 11 and 87	• ECHR, Article 3 • ICCPR, Article 7	• Third Geneva Convention, Articles 17(4) and 130 • Fourth Geneva Convention, Articles 32 and 147 • Additional Protocol I, Articles 75(2) and 85 • Common Article 3	• Rome Statute, Articles 7(1)(f), 8(2)(a)(ii), 8(2)(c)(ii) • ICTY Statute, Articles 2(b), 3, 5(f), 5(i)	• The prohibition of torture is recognised as a *jus cogens* norm (see ECtHR, Advisory opinion on the applicability of statutes of limitation to prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture [GC], para 59))

7.1 Non-interference in private and family life

211. Conflict-related cases may require certain investigative techniques to be used by law enforcement agencies and prosecutors, including searches and seizures, surveillance and wiretapping, undercover operations, covert investigative measures, and/or forensic examinations. However, law enforcement agencies in Ukraine must ensure that any interferences with the accused's right to private and family life carried out in the context of investigations in conflict-related cases are in accordance with the law, necessary in a democratic society and in the interests of a legitimate aim.

212. Ukrainian law provides for the right to:
- Personal inviolability (Constitution of Ukraine, Article 29);
- The inviolability of his or her home, possessions or property (Constitution of Ukraine, Article 30, CPC, Articles 7(1)(6) and 7(1)(9), 13 and 15);
- Privacy or confidentiality of correspondence (Constitution of Ukraine, Article 31, CPC, Articles 7(1)(7) and 14, and 258); and
- Private and family life (Constitution of Ukraine, Article 32, CPC, Articles 7(1)(8), 7(2) and 15).

213. **Interferences with the right to the inviolability of a home and privacy of correspondence are only permitted pursuant to a reasoned court decision, and on specific grounds, including the need to preserve human life or property, where it is in the context of a criminal investigation.**

214. The right to private and family life and non-interference therein is provided for under Article 8 ECHR and Article 17 ICCPR. According to the HRC, 'unlawful' interferences refer to those which (i) take place without a legal basis or in violation of the law, or (ii) are undertaken on the basis of a law which does not comply with the provisions, aims and objectives of the ICCPR (HRC, GC No. 16, para 3). Under the ECHR regime, interference can be justified if (i) it is in accordance with the law, (ii) necessary in a democratic society, (iii) in the interests of a legitimate aim. According to the ECHR a 'legitimate aim' means in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. To assess whether interference is 'necessary in a democratic society', the ECtHR has balanced the interests of Member States with the rights of the accused, and implies that there must be a **pressing social need** (the meaning of which is to be determined by domestic authorities but subject to review by the ECtHR) (see CoE, Guide on Article 8, paras 34-35). The ECtHR has also considered whether the measure taken was proportionate to the legitimate aims pursued (ECtHR, Z v. Finland, para 94).

215. The right to private and family life is also closely connected to rights related to the treatment of persons. Certain treatment of individuals (e.g. strip-searches ECtHR, Wainwright v. United Kingdom, para 43 or poor conditions of detention, Raninen v. Finland, para 63) have been found by the ECtHR to constitute a violation of the right to private and family life (while not amounting to torture or inhuman or degrading treatment (see below)).

216. Where domestic law requires judicial authorisation for an investigative technique that may interfere with the right to private and family life, conducting such investigative measures without the required judicial authorisation may amount to a violation of Article 8. This issue has arisen in the context of Ukraine (ECtHR, Berlizev v. Ukraine, paras 38-39, and Lysyuk v. Ukraine, paras 50-55). The decision-making process with respect to interference in private and family life must be fair and ensure due respect for the interests protected under Article 8 (CoE, Guide on Article 8, para 44). Therefore, where a measure is carried out before judicial authorisation is obtained (*ex post facto* authorisation), the courts must examine several factors to determine whether Article 8 has been violated. These include whether the judicial review and authorisation was carried out within a reasonable time and the quality of the decision (see CoE, Guide on Article 8, para 46, and ECtHR, Hambardzumyan v. Armenia, paras 63-68).

217. Even where investigative techniques contravene the right to respect for private and family life or the right to a fair trial at the investigation stage, the use of evidence collected using those techniques later in a criminal trial does not necessarily render the proceedings as a whole unfair (ECtHR, Khan v. The United Kingdom, paras 69-83). Fairness can still be

ensured if the defence has been given the opportunity to challenge the authenticity of the evidence and oppose its admission; or the quality of the evidence was taken into consideration at trial, including the circumstances under which it was obtained and whether these circumstances cast doubt on its reliability or accuracy (see below, Section 9).

218. **A particular challenge arises in conflict-related cases in Ukraine given the increased powers granted to the prosecution under martial law, allowing prosecutors to authorise investigative techniques when investigative judges cannot perform their duties** (CPC, Article 615). This raises untested questions about compliance with rights to non-interference in private and family life contained in both domestic and international and European law. Neither ConCu nor the ECtHR has ruled on this issue. However, the ConCU's decision regarding Article 615(6) may be indicative of unconstitutionality (see Case No 3-88/2022 above).

219. **It is important, where prosecutors are overseeing such actions by investigators, that they assess the measure in light of ECtHR jurisprudence. Where investigative judges are making decisions with regards to the necessity of such measures, they must provide adequate reasoning to demonstrate their assessment of whether the measure complies with ECtHR requirements.**

7.2 The right to remain silent and not to incriminate oneself

220. The right to remain silent is contained in Article 63 of the Constitution of Ukraine and 7(1)(11), 18 and 42(3)(4). The ECtHR has also considered the right to remain silent and the privilege against self-incrimination as generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6 (CoE, Guide on Article 6, para 120). The right is also treated as part of the accused's right to a fair trial under Article 14(3)(g) ICCPR. The right is also contained in Article 75(4)(4) Additional Protocol I, and is recognised as customary international humanitarian law (see ICRC, Rule 100). It is also found in the statutes of international criminal courts and tribunals, such as Article 55 of the Rome Statute and 21(4)(g) ICTY Statute.

221. At the ECtHR, the right to remain silent applies from the point at which the suspect is questioned by the police (ECtHR, John Murray v. the United Kingdom, para 45). Since the right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seeks to prove its case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused, the ECtHR has held that the right is closely linked to the presumption of innocence contained in Article 6(2) of the ECHR (ECtHR, Saunders v. the United Kingdom, para 68).

222. The right to remain silent and refrain from self-incrimination is not absolute. The ECtHR has considered the nature and degree of compulsion; the existence of any relevant safeguards in the procedure; and the use to which any material so obtained is put in its determination as to whether the fairness of the trial has been violated (ECtHR, Jalloh v. Germany, para 101; ECtHR, O'Halloran and Francis v. the United Kingdom, para 55; ECtHR, Ibrahim and Others v. The United Kingdom, para 269).

223. Examples from international practice of when the right to remain silent and not to incriminate oneself have found to have breached the fairness of a trial include:
- **Where a suspect is obliged to testify under threat of sanctions and either testifies as a result or is sanctioned for refusing to testify** (ECtHR, Saunders v. the United Kingdom, paras 68-69; ECtHR, Heaney and McGuinness v. Ireland, paras 54-55; ECtHR, Brusco v. France, para 44);
- **Where physical or psychological pressure, often in the form of torture, is applied to obtain real evidence or statements** (ECtHR, Jalloh v. Germany, para 100; ECtHR, Gäfgen v. Germany, paras 166-168; HRC, GC No. 32, para 41; HRC, Taran v. Ukraine, see also below, Section 7.3); and
- **Where the authorities use deception to elicit information that they were unable to obtain during questioning.** For example, in the case of Allan v. United Kingdom at the ECtHR, where an accused opted to remain silent during questioning but then a confession was obtained by a police informer sharing a cell with the accused, and that confession was used in evidence, this was found to breach the right to a fair trial (at para 50).

224. It is important to note that not all evidence obtained in breach of the right to remain silent and not to incriminate oneself would be inadmissible where other safeguards are put in place to render the trial fair as a whole (see Section 9 below). However, any evidence in criminal proceedings that was obtained through torture, or inhuman treatment will render the proceedings as a whole unfair (see below, Section 7.3.2).

225. **The application of these standards is of immediate relevance given documented instances of coercive detention practices in Ukraine.** Between 24 February 2022 and 23 May 2023, the OHCHR reported 65 cases in which civilians were detained by Ukrainian security forces in unofficial facilities, often *incommunicado*, for a period ranging from several hours to 4.5 months, with a reported aim of coercing detainees to confess guilt or incriminate fellow detainees (OHCHR, 'Detention of civilians in the context of the armed attack by the Russian Federation against Ukraine: 24 February 2022- 23 May 2023', para 13). Furthermore, between 24 February 2022 and 23 February 2023, the OHCHR reported 13 instances in which Russian POWs in the hands of Ukrainian authorities have been pressured into admitting guilt by prosecutors, the SBU and/or Ukrainian defence lawyers as the only way to secure their release via prisoner exchange (OHCHR, 'Treatment of prisoners of war and persons hors de combat in the context of the armed attack by the Russian Federation against Ukraine: 24 February 2022 – 23 February 2023)', para 123).

226. **Judges in Ukraine must ensure that a conviction is not solely or mainly based on the accused's silence or on a refusal to answer questions or to give evidence.** However, courts may also draw inferences from an accused's silence where the situation clearly calls for an explanation from them, to assess the persuasiveness of the prosecution's evidence. The procedure under Article 349 CPC (simplified procedure) is often employed in Article 438 CCU cases in Ukraine where there has been a guilty plea (see Sections 3 and 9). However, **where courts do not consider confessions or guilty pleas with consideration of the safeguards in place to ensure the fairness of the proceedings as a whole, this could give**

rise to a violation of the accused's right to a fair trial. This would be especially so if allegations were raised by an accused or their defence counsel in proceedings alleging that evidence given was provided as a result of torture or inhuman or degrading treatment. **Action taken by counsel and judges throughout the proceedings to raise such allegations are therefore fundamental**.

227. It also is critical that practitioners in Ukraine do not develop practice whereby a confession by a POW accused of a conflict-related crime becomes a prerequisite for release via exchange – **rather, prisoner exchange and an accused's participation in a conflict-related crime should not be considered as interconnected processes.**

7.3 Torture, inhuman or degrading treatment

228. The right to human dignity and the prohibition against torture and inhuman or degrading treatment is provided for under Article 28 of the Constitution of Ukraine and Article 11 CPC. Evidence obtained through torture or inhuman or degrading treatment will be inadmissible in criminal proceedings (Article 87 CPC).

229. The prohibition against torture and inhuman or degrading treatment is also contained in Article 3 ECHR, Article 7 ICCPR, and the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (which Ukraine has ratified), Article 1. It is also contained in the Third Geneva Convention (applicable to POWs) in Article 17(4) and violations of the prohibition are deemed to constitute a grave breach under Article 130 of the same Third Geneva Convention. Similar provisions are contained in the Fourth Geneva Convention, Articles 32 and 147, and Additional Protocol I, Articles 75(2) and 85 also prohibit torture. The related right to human dignity is also provided for under Article 10(2) ICCPR and Common Article 3 to the Geneva Conventions. Violations of this right are moreover considered a grave breach under Additional Protocol I, Article 85. In addition, torture and inhuman or degrading treatment or outrages upon personal dignity constitute war crimes or crimes against humanity under ICL (Rome Statute, Article 7(1)(f) and 8(2)(a)(ii) and 8(2)(c)(ii) and ICTY Statute, Article 2(b), 3, and 5(f) and (i)). The prohibition of torture is also treated as a *jus cogens* or peremptory norm in international law (ECtHR, Advisory opinion on the applicability of statutes of limitation to prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture [GC], para 59).

7.3.1 Distinguishing between torture, inhuman or degrading treatment

230. **The prohibition against torture and inhuman or degrading treatment under the ECHR and ICCPR is absolute and non-derogable**. Torture constitutes **infliction of severe pain or suffering** (both physical and mental). Under international and European human rights law, and when considered as a war crime, it also must be **intentionally inflicted for such purposes as:** obtaining information or a confession, punishment, to intimidate or coerce the individual or a third person, or for any reason based on discrimination of any kind (ECtHR, Selmouni v. France, para 97). For an act to amount to the crime against humanity of torture under Article 7(f) of the Rome Statute, this purposive element does not need to be established. However, unlike torture as a war crime or human rights violation, torture

as a crime against humanity requires the individual who was subjected to severe pain or suffering to have been in the custody or under the control of the perpetrator (Rome Statute, Article 7(2)(e) and ICC, Elements of Crimes, Article 7(1)(f) Element Three).

231. The prohibition of torture applies regardless of the victim's conduct (ECtHR, Ireland v. the United Kingdom, paras 163, 167), and when individuals make allegations of torture during detention, these must be promptly and impartially investigated by the competent authorities (CoE, Guide on Article 3, para 4, HRC, GC No. 20, para 14).

232. **Inhuman or degrading treatment is ill-treatment that does not rise to the level of torture as it does not have sufficient severity, intentionality or purpose**. However, for the ECtHR, for conduct to amount to 'ill-treatment' it must reach a 'minimum level of severity [that] involves actual bodily injury or intense physical or mental suffering' (ECtHR, Ireland v. the United Kingdom, para 167; ECtHR, V. v. the United Kingdom, para 71; ECtHR, Costello-Roberts v. the United Kingdom, para 30). Ill-treatment has been considered 'inhuman' if it was, among other things, premeditated, applied for hours at a time and caused either actual bodily injury or intense physical and mental suffering, and 'degrading' if it caused its victims to experience feelings of fear, anguish and inferiority capable of humiliating and debasing them (ECtHR, V. v. the United Kingdom, para 71; ECtHR, Labita v. Italy, para 120). Examples of specific forms of conduct that reach the thresholds of 'torture', 'inhuman treatment' and 'degrading treatment' are outlined in detail in CoE, Guide on Article 3.

233. When the situation concerns an individual detained and subject to the conduct of law enforcement officers, any conduct by law enforcement that diminishes human dignity will constitute a violation of Article 3 ECHR (ECtHR, Bouyid v. Belgium, paras 100-101). This does not prohibit use of force or measures of restraint by state agents in the context of an arrest, but such measures must not be excessive (ECtHR, Shmorgunov and Others v. Ukraine, para 359).

7.3.2 Evidence obtained by torture, inhuman or degrading treatment

234. Similarly to Ukrainian law, the jurisprudence of the ECtHR and HRC have held that the use of any evidence in criminal proceedings that was obtained through torture or inhuman treatment will render the proceedings as a whole unfair (ECtHR, Zamferesko v. Ukraine, para 70, HRC, Butovenko v. Ukraine, paras 7.9-7.10). The ECtHR has held that 'incriminating evidence – whether in the form of confession or real evidence – obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture – should never be relied upon as proof of the victim's guilt, irrespective of its probative value' (ECtHR, Jalloh v. Germany, para 105, see also Sections X and 9 below). The use of evidence obtained through torture or ill-treatment amounts to a violation of the right to a fair trial regardless of whether the victim of the treatment was the defendant or a third party (where the accused witnessed ill-treatment on a third party) (ECtHR, Kormev v. Bulgaria, paras 89-90).

7.3.3 Torture, inhuman or degrading treatment: practice in Ukraine

235. In 2023, the OHCHR reported many instances of torture and ill-treatment of Russian POWs by Ukrainian forces, including beatings, threats of violence or execution, being forced to sing, mock executions, electrocution, stabbing or shooting at legs, and exhaustive physical exercises (OHCHR, 'Treatment of prisoners of war and persons hors de combat in the context of the armed attack by the Russian Federation against Ukraine: 24 February 2022 – 23 February 2023'). A Russian civilian sailor who was detained by Ukrainian authorities died from a chronic condition due to the lack of adequate medical care (OHCHR, 'Report on the human rights situation in Ukraine: 1 August 2022 – 31 January 2023', para 11).

236. Further allegations have been made by those accused of collaborative activities of having been beaten during their arrest and subjected to torture and ill-treatment during interrogations by Ukrainian authorities (ibid. and see also Report of the Independent International Commission of Inquiry on Ukraine, 15 March 2023, paras 87-89 and Report of the Independent International Commission of Inquiry on Ukraine, 19 October 2023, paras 70-73).

237. The nature of torture and/or ill-treatment by Ukrainian police, mostly in order to obtain confessions, and the lack of effective investigations into complaints and effective remedy in this regard, is an issue currently under supervision by the CoM CoE in the Kaverzin group of cases, and considered systemic. In its most recent examination of the cases, the CoM noted that strategic and legislative developments to address these issues had been initiated and are in implementation. It also praised the Custody Records System, which is designed to record and monitor all actions taken by police officers with respect to a detained person. The Ukrainian government informed the CoM that free legal aid centres and the National Police are working together to ensure automatic exchange of information between the custody records system and the free legal aid information system.

238. However, the CoM also noted that there was a lack of effective and prompt investigations of ill-treatment by the State Bureau of Investigations ('SBI'), and that '[w]hile it is understandable that, in view of the ongoing aggression of Russia, the significant part of the law enforcement agencies' resources had to be redirected to investigating war crimes and crimes related to threats to national security, this does not exempt the authorities from their continuous obligation to effectively prevent and combat impunity for ill-treatment' (see above link).

239. The CoM referred to reports by the CoE's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and the Ukrainian Ombudsperson, which highlighted that allegations of physical ill-treatment (shortly after apprehension, in the vehicle or at the police establishment, before questioning), excessive use of force upon apprehension and psychological pressure still persisted.

240. Inhuman and/or degrading treatment due to overcrowding, poor material conditions and inadequate nutrition in police establishments, pre-trial detention centres and prisons,

as well as during transportation between detention facilities or to courts, and lack of effective preventive and compensatory remedies in all these respects, as well as force-feeding are also issues under supervision by the CoM against Ukraine in the Sukachov case.

241. Furthermore, structural problems of a lack of adequate and timely medical care in detention and continued absence of domestic remedies in this respect are also under supervision in the Logvinenko and Isayev cases.

242. **In the Article 438 CCU cases analysed (see Strategic Recommendations for the Judiciary), no decisions of investigative judges, as well as trial and appeal judgements considered allegations of torture, inhuman or degrading treatment raised by the accused or on behalf of the accused by their defence counsel**. This stands in contrast to reports by OHCHR indicated above, which indicate ill-treatment against Russian POWs. Such allegations were, however, considered in cases concerning charges under Article 111 CCU (relating to collaborative activity) (see e.g. Case No. 760/6039/23, Proceedings No. 1-pcs/760/2821/23, in which the defence counsel argued that the accused was tortured and beaten in detention, and the investigative judge considered the applicability of ECtHR jurisprudence and ordered a medical examination under Article 206(6) CPC)).

243. **Law enforcement agencies and practitioners involved in conflict-related cases in Ukraine must all take action to prevent and respond to allegations of torture and inhuman or degrading treatment against an accused in criminal proceedings. This involves abstention from this practice by those with responsibility for the arrest of the accused, transfer of the accused (e.g. from a POW camp to another pre-trial detention facility), those involved in questioning the accused, and officers in charge of the conditions of an accused's detention. It also involves effective investigation into allegations by the SBI.**

244. **However, action can also be taken by other actors in the context of the ongoing criminal proceedings against an accused. Defence counsel must be more proactive in protecting the interests of their client (regardless of whether the client is Ukrainian or Russian), including by reviewing the records of the client's pre-trial detention and questioning, raising motions regarding the accused's ill-treatment to an investigative judge or arguments in the context of a review of arrest and detention by an investigative judge (see Section 6 above).**

245. **Similarly, investigative judges must respond to such allegations in accordance with national and international and European jurisprudence, providing adequate reasoning. Judges at trial and appeal stages must revisit any allegations where evidence is presented that was obtained in violation of the prohibition of torture and inhuman or degrading treatment, as it must be rendered inadmissible, with reasoning provided. Overall, the arguments by counsel and the reasoning of the courts may only be sufficient where it is clearly articulated whether the conduct amounts to torture or inhuman or degrading treatment specifically.**

Section 8 – Avoiding excessive length of proceedings

SUMMARY

- **Practitioners must ensure that the length of proceedings in conflict-related criminal cases is not excessive** to comply with an accused's right to a trial within a reasonable time as guaranteed under Ukrainian and international and European law.
- The 'reasonableness' of the length of the proceedings is to be determined on a case-by-case basis. Factors of relevance include the complexity of the case; the applicant's conduct; and the conduct of the relevant administrative and judicial authorities as well as the significance of the case for victims and the accused.
- It is clear that the time taken for trial proceedings in Ukraine in conflict-related cases may be affected by the ongoing conflict and the complexities of those cases. However, considering the majority of the cases being considered so far are single-incident, direct perpetration cases that do not group together several incidents, victims and perpetrators into complex cases, it may not always be possible to rely on the complexity of the case to justify delays in proceedings.
- The right to a trial within a reasonable time must also not be affected by prosecutorial delay, or delays at pre-trial stages. In Ukraine, there are no time restrictions on pre-trial investigations of war crimes, genocide, aggression and the use of weapons of mass destruction. However, certain timeframes still apply at the pre-trial stages, such as the right to be informed promptly of the grounds for arrest and/or charges, and prompt or speedy review of the grounds for arrest and/or pre-trial detention.
- **Any unjustified delays throughout investigations and/or proceedings must be addressed throughout proceedings by practitioners involved, through raising arguments on behalf of the accused (defence counsel), or by judges of all instances.**

246. Practitioners must ensure that the length of proceedings in conflict-related criminal cases is not excessive. While it is recognised that the nature of these cases and the fact that trials are proceeding during an ongoing conflict will inevitably affect the length of proceedings, practitioners must ensure that delays are not caused as a result of their, or other practitioners' conduct. Any unjustified delays throughout investigations and/or proceedings must be addressed to ensure the accused's right to prompt and/or speedy review of their arrest and detention, and trial within a reasonable time. Sources of such rights in Ukrainian and international and European law are provided below, which practitioners can refer to in their argumentation and reasoning.

Table 7 Sources of law on excessive length of proceedings

Trial within a reasonable time				
Ukrainian law	**IHRL**	**IHL**	**ICL**	**Other**
• CPC, Article 28 • Law of Ukraine on the Judiciary and Status of Judges, Article 7(1)	• ECHR, Article 6(1) • ICCPR, Article 14(3)(c) Note that Ukraine derogated from Articles 6 ECHR and 14 ICCPR under martial law, but the practical effect of this derogation may be limited (see above analysis)	• Third Geneva Convention (as applicable to POWs), Article 103 • Fourth Geneva Convention, Article 71(2) • This right is recognised as customary international humanitarian law as part of the right to a fair trial (*see* ICRC, Rule 100)	• Rome Statute, Articles 64(2) and (3) and 67(2) • ICTY Statute, Articles 20(1) and 21(4)(c)	•
Timeframes at the pre-trial stage				
• Constitution of Ukraine, Article 29 • CPC, Articles 12(2) (review of arrest and/or detention), 206 (*habeas corpus* and 219(2) as amended in 2023 (time limits for pre-trial investigation)	• ECHR, Articles 5 (2) (3) and (4) • ICCPR, Articles 9 (2) (3) and (4)	• Third Geneva Convention, Article 104 (as applicable to POWs) • Fourth Geneva Convention, Article 71(2) • Additional Protocol I, Article 75(3) • The right to be informed of the grounds for arrest and/or detention		

		promptly is recognised as customary international humanitarian law as part of the right to a fair trial (*see* ICRC, Rule 100)		

247. Under Article 28 CPC, 'each procedural action or procedural decision shall be performed or adopted within reasonable time. Reasonable time shall be deemed time that is objectively necessary for the performance of procedural actions and the adoption of procedural decisions. Reasonable time may not exceed the time limits prescribed by this Code for individual procedural actions or for adoption of individual procedural decisions.'

248. The right to a trial within a reasonable time is also considered to be part of the right to a fair trial under international and European human rights law (Article 6(1) ECHR and 14(3)(c) ICCPR) and the purpose of this right is to avoid keeping persons too long in a state of uncertainty about their fate and to ensure that provisional detention is not too long, but also serves the more abstract interests of justice (see HRC, GC No. 32, para 35, also ECtHR, Wemhoff v. Germany, para 18; ECtHR, Kart v. Turkey, para 68; ECtHR, Grigoryan v. Armenia, para 129).

249. Under the ECHR regime, 'reasonable time' begins to run at, among others, the time of arrest, the time when the person was charged or when they were questioned (ECtHR, Wemhoff v. Germany, para 19; ECtHR, Deweer v. Belgium, para 42). This time period extends to cover the entirety of the proceedings in question, including appeal proceedings and the determination of sentence (ECtHR, Wemhoff v. Germany, para 18; ECtHR, König v. Germany, para 98; HRC, Rouse v. Philippines, para 7.4).

250. IHL provides support for respecting this right in times of armed conflict: according to Article 103 of the Third Geneva Convention, which applies to proceedings against POWs, '[j]udicial investigations relating to a prisoner of war shall be conducted as rapidly as circumstances permit and so that his trial shall take place as soon as possible.' The Fourth Geneva Convention notes that accused persons should be brought to trial 'as rapidly as possible' (Article 71(2)).

251. The right to a trial without undue delay is recognised as a rule of customary international humanitarian law (see ICRC, Rule 100). As such, this right is also contained in statutes of international criminal courts and tribunals. For example, the Rome Statute requires expeditiousness of proceedings (Article 64(2) and (3)), as well as reiterates the right of the accused to be tried without undue delay (*see* Article 67(1)(c)). Similar provisions were also contained in the statute of the International Criminal Tribunal for the former Yugoslavia (e.g. ICTY Statute, Article 20(1) and Article 21(4)(c)).

252. In general, reasonableness of the length of the proceedings must be determined on a case-by-case basis (*see e.g.*, GC No. 32, para 35; ECtHR, Viezzer v. Italy, para 17; ECtHR, Boddaert v. Belgium, para 36; ECtHR, Sizov v. Russia, para 59). Article 28(3) of the CPC determines factors relevant to the determination of whether the duration of criminal proceedings has been reasonable: the complexity of the case; the applicant's conduct; and the conduct of the relevant administrative and judicial authorities as well as the significance of the case for victims and the accused. This largely aligns with ECtHR jurisprudence (ECtHR, König v. Germany, para 99; ECtHR, Neumeister v. Austria, para 21; ECtHR, Liblik and Others v. Estonia, para 91; ECtHR, Pélissier and Sassi v. France, para 67).

253. The complexity of the case may stem from the number of charges laid, the number of people involved in the proceedings (i.e., defendants and witnesses), or the international dimension of the case (ECtHR, Neumeister v. Austria, para 20; ECtHR, Arewa v. Lithuania, para 52). The applicant's conduct relates to situations where it appears, objectively, as if the suspect intended to delay the investigation, for example, by systematically challenging judges (ECtHR, Eckle v. Germany, para 82 and I.A. v. France, para 121). Finally, the conduct of the relevant administrative and judicial authorities relates to the States' duty to organise their judicial systems so that their courts can meet the requirement to hold trials in a reasonable time (ECtHR, Abdoella v. the Netherlands, para 44). Delays cannot be justified if proceedings may have been delayed due to, for example, political troubles in the region, staff shortages, or the excessive workload of the courts, and with the State not taking the necessary action to rectify the delay (ECtHR, Baggetta v. Italy, paras 20-25; HRC, Fillastre and Bizouarn v. Bolivia, para 6.5).

8.1 Complexities of the conflict and conflict-related cases

254. It is clear that the time taken for investigations and trial proceedings in Ukraine in conflict-related cases may be affected by the ongoing conflict and the complexities of those cases. For example, in Khlebik v Ukraine, which concerned difficulties arising from the conflict in Eastern Ukraine where the applicant's appeal against his conviction was delayed because his case file was in an area outside the Ukrainian government's control, the ECtHR did not find a violation of Article 6(1) of the Convention since the hostilities led to extraordinary circumstances and the Ukrainian authorities had done everything in their power to rectify the situation.

255. However, prior to the full-scale invasion, between April 2014 and April 2020, the OHCHR documented 140 conflict-related criminal trials in Ukraine lasting more than 2 years, along with 15 such trials lasting more than 4 years. In many of these cases, it found that neither the conduct of the accused nor the complexity of the case justified the length of the proceedings (OHCHR, para 52). Even currently, **considering the majority of the cases referred in the analysis of Article 438 CCU cases (see Strategic Recommendations for the Judiciary) were single-incident, direct perpetration cases that do not group together several incidents, victims and perpetrators into complex cases, it may not always be possible to rely on the complexity of the case to justify delays in proceedings**.

256. The CoM CoE is exercising ongoing supervision over Ukraine regarding the length of both civil and criminal proceedings. In terms of criminal proceedings, these issues were

raised in the Merit group proceedings, namely the excessive length of proceedings and the lack of effective remedies domestically where there has been excessive length (violations of Articles 6(1) and 13 of the ECHR). **The Committee recognises the severe challenges faced by Ukraine's justice system in the context of ongoing conflict. However, it still believes further general measures need to be taken to resolve these issues, and in particular the fact that there appears to be no domestic remedy where there has been a violation of the excessive length, which it deems a problem that has remained unresolved for 20 years. It notes this is also critical from the perspective of the EU Commission when it comes to Ukraine's EU accession.**

8.2 Delays by prosecution or at pre-trial stages

257. The right to a trial within a reasonable time must also not be affected by prosecutorial delay, or delays at pre-trial stages. In Ukraine, there are no time restrictions on pre-trial investigations of war crimes, genocide, aggression and the use of weapons of mass destruction (Article 219(2) CPC). However, certain timeframes still apply at the pre-trial stages. As noted in Section 6 above, any person arrested must be told, promptly, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if they see fit, to apply to a court to challenge its lawfulness.

258. The law varies on when this information must be provided to the accused. Under Article 29 of the Constitution of Ukraine, everyone arrested or detained must be informed 'without delay' of the reasons for his or her arrest or detention. International and European law varies on when the information should be provided. Under the ICCPR, the basis of the arrest must be provided immediately upon arrest, with the criminal charges to be provided promptly (Article 9(2) ICCPR). However, both grounds for arrest and the charges are taken together under the ECHR and the Geneva Conventions, which require that they are provided 'promptly' to the accused (Article 5(2) ECHR, Third Geneva Convention, Article 104 (as applicable to POWs); Fourth Geneva Convention, Article 71(2); Additional Protocol I, Article 75(3)).

259. The law does not explicitly define 'promptness', and practice varies. ECtHR jurisprudence has noted that the reasons for arrest 'need not be related in its entirety by the arresting officer at the very moment of the arrest' (ECtHR, Fox, Campbell and Hartley v. the United Kingdom, para 40). Instead, whether the promptness of the information conveyed is sufficient 'must be assessed in each case according to its special features' (ECtHR, Guide on Article 5, para 166). The ECtHR has noted that promptness will be satisfied where the accused is informed of the reasons of arrest within a few hours (ECtHR, Fox, Campbell and Hartley v. the United Kingdom, para 40) but not where there was a delay of 76 hours (ECtHR, Saadi v. the United Kingdom, paras 55-56). Yet, the HRC has found that a delay of two days in informing the victim of the charges against him was a violation of Article 9(2) of the ICCPR (HRC, Bondar (on behalf of Ismailov) v. Uzbekistan, para 7.2). Practitioners should therefore endeavour to ensure that the timeframe for informing is as short as possible.

260. The review by a judge to determine the lawfulness or arbitrariness of the accused's arrest and/or detention must be prompt and automatic, a timeframe which must be assessed in relation to the specific facts of each case (ECtHR, Wemhoff v. Germany, para 10; ECtHR, De Jong, Baljet and Van Den Brink v. the Netherlands, paras 51-52; ECtHR, Aquilina v. Malta, para 48; HRC, McLawrence v. Jamaica, para 5.6). Article 29 of the Ukrainian Constitution and 12(2) of the CPC specifies that this review must take place as soon as is practically possible and specifies a timeframe of 72 hours. Comparing that with international and European standards, according to the ECtHR, to be considered prompt, the time period between the applicant's detention and the first automatic review of that detention cannot exceed four days (ECtHR, McCay v. the United Kingdom, para 47; ECtHR, Oral and Atabay v. Turkey, para 43; ECtHR, Năstase-Silivestru v. Romania, para 32). However, the HRC has set a fixed maximum time of 48 hours (or 24 hours for minors), and any delay longer than that must remain absolutely exceptional and substantively justified (HRC, GC No. 35, para 33; HRC, Medjnoune v. Algeria, para 8.7).

261. Where an applicant challenges the lawfulness of his or her arrest and/or detention themselves (invoking *habeas corpus)*, they have a right to a speedy judicial decision concerning the lawfulness of detention (Article 5(4) ECHR and 9(4) ICCPR). 'Speedily' is less urgent than 'promptly' in case of an automatic review (ECtHR, E. v. Norway, para 64; Brogan and Others v. the United Kingdom, para 59).

262. Even prior to the full-scale invasion, the OHCHR noted a case after the arrest of a woman on suspicion of planning to detonate explosives in central Kyiv, and despite the availability of compelling evidence against her, the prosecution delayed the proceedings by failing to call its witnesses and failing to present its case. After approximately 2 years of hearings during which the court only considered the extension of her pre-trial detention, without addressing the unreasonable delays stemming from the conduct of the prosecution, the woman pleaded guilty (OHCHR, para 53). Article 615(6) CPC, introduced under martial law, which allowed automatic extensions of pre-trial detention by the prosecution, without judicial oversight for up to two months, was also found by the Constitutional Court of Ukraine to be unconstitutional, constituting violations of personal liberty, the right to a fair trial, and the right to legal defence, as guaranteed by the Constitution and the ECtHR (see Case No 3-88/2022).

263. As noted above (see Section 6), the practice of the Ukrainian courts in terms of granting and extensions of pre-trial detention is also currently subject to the supervision of the CoM CoE in the *Ignatov* group of cases. The CoM has noted that the time limits for criminal suspects to be held in the custody of the police or other law enforcement agencies (maximum of 72 hours) appeared to be duly respected in the police establishments visited. However, this still does not align fully with the HRC's fixed maximum time of 48 hours.

264. **Overall, all practitioners involved in conflict-related trial proceedings must ensure that timeframes established by law are respected throughout pre-trial proceedings taking into account ongoing conflict and the complexity of conflict-related cases. Pre-trial hearings before investigative judges will be the first check and balance on whether there are any undue delays. Defence counsel must uphold the rights of their clients at this point and**

investigative judges should take action as part of their reviews of the lawfulness and/or arbitrariness of the detention to address any concerns at an early stage. The expeditiousness of the proceedings must also be ensured by trial judges, and could play a role in appellate proceedings regarding fairness.

Section 9 – Approaches to Evidence

SUMMARY

- **Practitioners should ensure evidence is admissible, reliable and sufficient in line with binding jurisprudence from the ECtHR, demonstrating analysis of this in their argumentation and reasoning.**
- Ukrainian law adopts a system of free assessment of evidence, empowering judges to evaluate relevance and reliability without rigid rules.
- Evidence may be inadmissible if obtained in violation of fair trial rights or procedural rules, such as actions without a warrant, through torture, violating the accused's right to a defence, obtaining testimony or explanations from a person who has not been advised of his/her right to refuse to give evidence or answer questions, or where these were obtained in violation of this right or violating the right to cross-examination.
- The CPC generally requires direct examination of evidence, meaning testimonies must be given orally to the court, and courts generally cannot rely on testimonies given to investigators or prosecutors, with limited exceptions.
- The ECtHR consistently holds that the right to a fair trial does not require specific rules of evidence, as this is a matter for domestic law. However, evidence obtained through torture is always inadmissible, and evidence obtained through inhuman and degrading treatment may also render a trial unfair, especially if it bears on the conviction or sentence.
- **Conflict-related cases increasingly use novel forms of evidence, such as digital evidence, which practitioners must ensure courts adequately assess for reliability and sufficiency, with this assessment reflected in the reasoning.**
- The use of indirect evidence, including circumstantial and hearsay evidence, is also common. While Ukrainian law and ECtHR jurisprudence allow hearsay, it cannot be solely relied upon, and its weight depends on factors like whether it was given under oath or subject to cross-examination.
- Extrajudicial testimony is permissible under the CPC in exceptional circumstances, such as a threat to a person's life or health, or under martial law if procedural guarantees are observed and the interrogation is videotaped. The ECtHR employs a tripartite test to determine if a conviction based on an absent witness's testimony breached the right to a fair trial, considering the reason for absence, whether the testimony was sole or decisive, and if sufficient counterbalancing factors existed.
- **Judges' reasoning in judgments must reflect their assessment of all evidence, including reasons for not considering certain evidence, and address inconsistencies or exculpatory evidence.**

265. Conflict-related cases often require assessment of varied and novel forms of evidence presented to establish the elements of crimes. Since the right to a fair trial under international and European human rights law does not demand a specific approach to evidence, different approaches are taken across domestic jurisdictions, at human rights

bodies and courts and international criminal courts and tribunals. While such varied approaches are permitted, certain approaches to evidence have been held by the ECtHR to violate fair trial guarantees, including not only the right to a fair trial itself, but also the rights to privacy, prohibitions against torture or ill-treatment, the presumption of innocence, adversarial proceedings and right to a reasoned opinion. **Practitioners should therefore ensure evidence is admissible, reliable and sufficient in line with binding jurisprudence from the ECtHR, demonstrating analysis of this in their argumentation and reasoning.**

Table 8 Legal framework regulating approaches to evidence

Ukrainian law	IHRL	IHL	ICL	Other
• CPC, Articles 23, 86, 87, 89, 94, 95(4), 97, 225, 349, 374(3)(2), 615(11)	• ECHR, Article 6 • ICCPR, Article 14 Approaches to evidence are considered as part of an assessment of the accused's overall right to a fair trial. Both these Articles are non-derogable in times of war or public emergency (*see* ECHR, Article 15, and ICCPR, Article 4)	• Third Geneva Convention (as applicable to POWs), Article 105 • Fourth Geneva Convention, Article 72 • Additional Protocol I, Article 75(4)(g) These Articles relate to the right to a defence and to examine witnesses (see Section 5 above) • Right to examine witnesses recognised as customary international humanitarian law as part of the right to a fair trial (*see* ICRC, Rule 100)	• Rome Statute, Article 69	

9.1 Evidence admissibility and evaluation

266. The CPC adopts a system of **free assessment of evidence**, allowing judges to evaluate its relevance and reliability without rigid rules (CPC, Article 94). Judges are tasked with conducting a 'comprehensive, complete, and impartial examination of all circumstances in criminal proceedings', using their internal conviction to assess various criteria such as **relevance, admissibility, reliability and sufficiency** (taking into account interconnection between various pieces of information).

267. Information is admissible in Ukraine if it has been obtained in accordance with the procedure established by the CPC (CPC, Article 86 (1)), but it is **inadmissible if it was obtained in violation of fair trial rights or procedural rules** (CPC, Article 87 and 89). This would include, e.g.:
- undertaking procedural measures without a warrant;
- obtaining information by using torture, or inhuman and degrading treatment;
- violating the accused's right to a defence;
- obtaining testimony or explanations from a person who has not been advised of his/her right to refuse to give evidence or answer questions, or where these were obtained in violation of this right or violating the right to cross-examination.

268. Ukraine adopts a general rule of direct examination of evidence, where testimonies must be given orally to the court (Articles 23 and 95(4) CPC). The court cannot in general rely upon testimonies given to investigators or prosecutors (Article 95(4)), though there are certain exceptions as detailed below. This safeguard is designed to avoid situations where evidence is obtained at pre-trial stage through inhuman or degrading treatment or torture (see Benchbook on the Adjudication of International Crimes, para 1837). The Supreme Court has emphasised the need to comply with the principle of direct examination of evidence, including in its resolutions of 1 February 2021 in *Case No. 127/4546/16-к* (proceedings No. 51-4127км18), and of 19 November 2019 in Case No. 750 /5745/15-к (proceedings No. 51-10195км18).

269. The ECtHR has consistently held that the right to a fair trial (Article 6 ECHR) does not require the adoption of any particular rules of evidence because that is a matter for regulation under domestic law (see e.g., Schenk v. Switzerland, paras 45-46). Specifically, it has held that the 'the admissibility of evidence is primarily a matter for regulation by national law and as a general rule, it is for the national courts to assess the evidence before them' subject to the overall requirement of ensuring the fairness of the trial. (Van Mechelen and Others v. The Netherlands, para. 50).

270. **There are indeed varied approaches to evidence on domestic and international levels, and unique evidential complexities in conflict-related cases**. The ICC, for example, uses the umbrella of 'admissibility', assessing whether evidence is admissible based on its *prima facie* relevance, reliability and its probative value, which **must outweigh any prejudicial**

effect on the trial's fairness (Article 69 Rome Statute). Admissibility is distinct from 'evidentiary weight', which at the ICC refers to the relative importance attached to each item of evidence in deciding whether a particular fact is proven or not. Weight is determined on the basis of the quality (reliability and credibility) of evidence. The assessment of evidentiary weight is also very much linked to the burden of proof, and whether it has been met in a specific case.

271. A **key consideration** in terms of the compliance of approaches to evidence with the right to a fair trial is whether, in line with the requirement of adversarial proceedings, the defence has had the opportunity to challenge the authenticity and reliability of evidence and to oppose its use and the opportunity to examine any relevant witnesses (ECtHR, Adjaric v Croatia*)*. This is also of relevance to the notions of equality of arms and the presumption of innocence (see Sections 5 and 3 above).

272. In terms of the evaluation of evidence, while the ECtHR does not dictate how evidence is to be examined, it has held that the right to a fair trial would be violated where the evaluation of the evidence is arbitrary or capricious. This could be the case where:
- where there are reasons to be concerned about the authenticity or reliability of particular evidence put before the court;
- where indirect evidence is relied upon;
- the evidence was obtained in circumstances where the rights of the defence could not be secured; or
- the reasoning in support of a conviction is inadequate in demonstrating an assessment of the evidence (see J. McBride, 'The Case Law of The European Court Of Human Rights on Evidentiary Standards in Criminal Proceedings', Council of Europe, paras 21-29).

273. The nature of conflict-related cases means that use of indirect evidence or evidence which requires enhanced scrutiny may occur, and in certain instances courts may need to rely upon extrajudicial testimony. **Practitioners must therefore ensure that such evidence is evaluated in line with domestic and ECtHR jurisprudence and the evaluation thereof is reflected in the court's reasoning, as detailed below.**

9.2 Illegally obtained evidence and admissibility

274. Similar to the approach at the ICC, the ECtHR has held that solely the fact that evidence has been obtained illegally will not lead to the proceedings as being unfair in itself (ECtHR, Parris v. Cyprus *(dec.)*). Further, where evidence on which a conviction was based had been obtained in breach of the right to privacy, for example, this may also not mean that a trial is necessarily unfair (see above, Section 7). The fairness of a trial in such incidences will hinge on whether the rights of the defence have been respected and the strength of the evidence, especially where there are no doubts as to its authenticity (see J. McBride, 'The Case Law of The European Court Of Human Rights on Evidentiary Standards in Criminal Proceedings', Council of Europe, para 99).

275. However, **there are certain instances in which use of evidence will render a trial unfair** such as (i) use of evidence obtained in breach of the right against self-incrimination, or (ii) of a confession obtained without presence of defence counsel. The ECtHR has held that 'incriminating evidence – whether in the form of confession or real evidence – obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture – **should never be relied upon as proof of the victim's guilt**, irrespective of its probative value' [emphasis added] (ECtHR, Jalloh v. Germany, para 105). The HRC has also found Ukraine in violation of the right to a fair trial where courts had failed to appropriately evaluate a forced (torture-tainted) confession that was then used as inculpating evidence (HRC, Butovenko v. Ukraine paras 7.9 – 7.10).

276. While evidence obtained by torture **must always be inadmissible**, **evidence obtained through the use of inhuman and degrading treatment will only** render a trial unfair where that evidence has a bearing on the conviction or sentence against the accused (see ECtHR, Harutyunyan v. Armenia, para 66, Zamferesko v. Ukraine, para 70, Jalloh v. Germany, paras 107-108, and Gäfgen v. Germany, para 187, and HRC, General Comment No. 32, para 6).

277. The use of evidence obtained through torture or ill-treatment amounts to a violation of the right to a fair trial regardless of whether the victim of the treatment was the defendant or a third party (where the accused witnessed) (ECtHR, Othman (Abu Qatada) v. The United Kingdom, paras 263 and 267).

278. However, it is important to note that the ECtHR employs the test of whether there was a 'real risk' that evidence was obtained via torture. This necessitates that the defence must substantiate any arguments to this effect (ECtHR, El Haski v. Belgium, para 92). Recently, in the Al Hassan case at the ICC, the Court decided to employ a modified version of this 'real risk' test, finding that the defence had not established that statements given by the accused to the Office of the Prosecutor were procured through torture. As a result, the evidence was deemed admissible. This finding has been heavily criticised for shifting the burden of proof to the defence (see J. Goodman-Palmer, 'The ICC's Use of Evidence Obtained by Torture Sets a Dangerous Precedent' 2024).

9.3 Digital Evidence

279. In conflict-related cases, novel forms of evidence, such as digital evidence, are increasingly used. The reliability and sufficiency of such evidence must be adequately addressed by courts, with that assessment reflected in the reasoning in order to ensure the accused's right to a fair trial. The Benchbook on the Adjudication of International Crimes contains detailed guidance on Ukrainian and international and European standards regulating digital evidence in conflict-related trials at Chapter II, Part 2. Further information is also available in the Basic Investigative Standards, Section 5).

280. The ECtHR has considered domestic courts' assessments of digital evidence in terms of the accused's right to a fair trial, and has found violations in several instances:

- e.g. in the Balazs v. Hungary case, the ECtHR found a failure on the part of the prosecution to substantiate why the assailant's social media post could not be

definitively associated with the incident in question, nor why the perpetrator's motive could not reasonably be inferred from the posts. The domestic court was also held to have ignored encouraging comments posted by the assailant's acquaintances, with one pointing on the Internet to a film scene containing an overly intolerant and racist message and widely known as such.

- In Ciorap v. Republic of Moldova (No. 5), the ECtHR held that the right to a fair trial was breached where an investigator did not obtain an original video recording of a search during which ill-treatment was allegedly inflicted notwithstanding a complaint that the copy used was incomplete susceptible to manipulation due to its electronic format.
- In Üçdağ v. Turkey, the ECtHR found that there was no adequate explanation provided by the courts as to why the sharing of a social media post of two photographs implied praising, condoning and encouraging the methods entailing coercion, violence, and threats used by a terrorist organisation.

281. In Article 438 CCU judgements analysed, it is evident that digital or open-source evidence, including social media posts, has been used as evidence in many of the cases. Yet, the judgements do not assess the reliability of that evidence, which normally involves specific analysis. **Practitioners should therefore ensure that the reliability and sufficiency of such evidence is proven, referring to international and European guidance on digital evidence in conflict-related cases. Where there are doubts, these should be raised by defence, assessed by the courts, and the analysis of the evidence should be reflected in the courts' reasoning.**

9.4 Indirect evidence

282. **Conflict-related trials may also involve substantial indirect evidence, including circumstantial and hearsay evidence**. The CPC defines hearsay evidence as 'a statement made orally, in writing or in another form about a certain fact, which is based on the explanation of another person' (Article 97(1) CPC). Article 97 CPC allows for the restriction of the principle of direct examination of testimony and the admissibility of hearsay evidence in cases where the court is deprived of the opportunity to interrogate a person who provided initial explanations, on the grounds provided for in Article 97(3) of the CPC of Ukraine (such as serious disease, waiver or non-appearance), or, in exceptional circumstances, if such testimony is admissible evidence under other evidence admissibility rules (Article 97(2) CPC). According to Article 97(2) CPC, the court will need to take into take into account: the value of the explanations and testimonies; other evidence; the persuasiveness of the information; the possibility of refuting the statements in question; the interrelation of testimony with the interests of the participants in the criminal proceedings; and the possibility to interrogate the person providing the testimony, or the reasons for the impossibility of such interrogation.

283. In its Resolution of 17 January 2023 in Case No. 753/13113/18 (proceedings No. 51-6км21), the Supreme Court of Ukraine held that:

"90. […] when deciding on the admissibility of hearsay evidence, the court is obliged to consider, among other things, the circumstances under which primary

explanations have been provided, whether these circumstances inspire confidence in their reliability, the persuasiveness of information concerning the fact of provision of primary explanations, the difficulty of refuting hearsay evidence for the party against whom they are directed, etc.
91. In addition, under part six of Article 97 of the CPC, hearsay evidence cannot be admissible evidence of the fact or circumstances for which they are provided if it is not supported by other evidence recognized as admissible according to rules other than the provisions of part two of this article."

284. **There is a large body of case law from the ECtHR which allows the use of indirect evidence, and considers that it does not necessarily violate the right to a fair trial** (see J. McBride, 'The Case Law of The European Court Of Human Rights on Evidentiary Standards in Criminal Proceedings', Council of Europe, para 34). **There are important differences between circumstantial and hearsay evidence.** Circumstantial evidence was found to be a sufficient basis for a conviction under certain conditions: (i) it had to be sufficient to establish the guilt of the accused, and (ii) it had to be produced in the presence of the accused at a public hearing, allowing the defence to challenge it (ECtHR, Alberti v Italy). **The use of hearsay evidence is more restricted.** As with Ukrainian law, the ECtHR notes that hearsay evidence **cannot be solely relied upon and must be carefully addressed to ensure the fairness of a trial** (J. McBride above, para 41).

285. At international criminal courts and tribunals hearsay evidence is generally admissible but usually gets accorded lower evidentiary value. The weight given to hearsay evidence depends on, i.a., whether the statement was provided under oath; subject to cross-examination; given before a judge; first-hand or removed; made through many layers of translation; or made contemporaneously to the events (see ICC, Ruto & Sang Common LRV Joint Reply, para. 41, ICTY, Prosecutor v. Kordić & Čerkez, IT-95-14/2, Decision on Appeal Regarding Statement of a Deceased Witness, 21 July 2000, paras 23-28).

286. **Consideration must be given by Ukrainian practitioners to the sufficiency of indirect evidence, and the interconnection between such evidence and other sources of evidence in the proceedings, and this must be reflected in the courts' reasoning.**

9.5 Extrajudicial testimony

287. **The nature of conflict-related trials may also necessitate the use of extrajudicial testimony (testimony provided outside of the courtroom).** This is possible under two provisions of the CPC: Article 225 and Article 615.

288. **Under Article 225 CPC, in case of danger that a particular piece of evidence may disappear, it is 'deposited' for the court for further use during the trial on the merits.** In other words, a witness or a victim is questioned by the investigating judge, and their testimony is subsequently 'deposited' for the court for further use as evidence during the trial on the merits. This process is only permitted in exceptional circumstances, defined as where there is 'a threat to the person's life and health, their serious illness, [or] other

circumstances that may prevent interrogating them in court or affect the completeness or reliability of testimony'.

289. When considering deposited evidence at trial, judges must assess compliance with the accused' procedural rights during interrogation (such as notification of charges and presence of defence counsel and interpreter), and whether there are reasonable doubts as to the reliability of the deposited testimony, including whether it contradicts other evidence in the record. Where there are doubts, judges can choose to require further questioning of the witness (Articles 96(4) and 225(4)-(5) CPC). Where this is not possible, any doubts should be resolved in the accused's favour (Article 17(4) CPC). The Supreme Court of Ukraine has consistently upheld the reliability of witness testimonies obtained under Article 225 of the CPC, even when defence counsel wasn't present during the initial questioning, as long as certain procedural safeguards were met (*Case No. 346/164/18* (23 September 2019), *Case No. 640/19897/16-к*, (30 April 2020) and *Case No. 539/379/18* (13 January 2021), *see also* Benchbook on the Adjudication of International Crimes, paras 1855-1858).

290. **In addition, under Article 615(11) CPC, introduced under martial law, Ukrainian courts may use extrajudicial testimony to substantiate its conclusions, provided that procedural guarantees are observed, and the entire interrogation is videotaped.** The Supreme Court of Ukraine has held that when an absent witness's testimony is used, especially where it is decisive, courts must ensure a fair trial (*Case No. 753/13113/18* (Proceedings No. 51-6км21). This means providing the defence ample opportunity to challenge such evidence, scrutinising its acquisition and credibility, and ensuring the 'beyond a reasonable doubt' standard is met. The Court held that courts must consider the defence's inability to cross-examine and apply ECtHR principles (described below).

291. As noted above in Section 5, all witnesses should normally be produced in the accused's presence so that he or she has an adequate and proper opportunity to challenge and question them (ECtHR Al-Khawaja and Tahery v. United Kingdom, para. 118 and Schatschaschwili v. Germany, para. 103). However, the right to cross-examination is not absolute, and extrajudicial testimony is permitted under certain circumstances according to ECtHR jurisprudence. To determine whether conviction based on the testimony of an absent witness breached the right to a fair trial, the ECtHR has developed a tripartite test (Al-Khawaja and Tahery v. United Kingdom, para 119-147 and Schatschaschwili v. Germany paras 105-109 and 116):

1. Was there was a good reason for the non-attendance of the witness;
2. Was the evidence of that absent witness the sole or decisive basis for the conviction or, if not, was its weight significant or its admission such that it may have handicapped the defence; and
3. Were there sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured?

292. The Benchbook on the Adjudication of International Crimes, paras 1882-1897, J. McBride, 'The Case Law of The European Court Of Human Rights on Evidentiary Standards

in Criminal Proceedings', and Council of Europe, paras 68-85 provide detailed analysis of this test, including on **the reasons for non-attendance.** Of particular interest for the Ukrainian context is the extent to which fear constitutes a good reason for non-attendance (Al-Khawaja and Tahery v. United Kingdom, paras 123-134). In criminal proceedings concerning sexual abuse, certain measures may be taken for the purpose of protecting the victim, which may result in their non-attendance. The ECtHR has not yet ruled on whether the risk of trauma or revictimisation through criminal proceedings for adult victims of crimes not involving sexual violence may be a good reason for absence, anonymity, or other special measures (see Benchbook on the Adjudication of International Crimes, paras 1895).

293. However, even where there is a good reason for non-attendance, **where a conviction is based solely or to a decisive degree on the testimony of an unexamined witness, this may breach the accused's fair trial rights**. In terms of part 2 of the test (the 'sole or decisive' test), courts must show that they are aware that untested evidence of an absent witness carries less weight and detailed reasoning is required as to why it is considered reliable, while having regard also to the other evidence available.

294. Further, in terms of part 3 of the test, **judicial authorities may be required to take measures that counterbalance the handicaps under which the defence labours** (ECtHR, Aigner v. Austria, para 37, S.N. v. Sweden, para 47). Even in the absence of good reason for non-attendance and even where a conviction is based solely and decisively on the testimony of an absent witness, a trial may nevertheless be fair if there are sufficient counterbalancing factors (as outlined in the case of Schatschaschwili v. Germany, at paras 125-131). As examples, the following safeguards have been considered:

- Whether the court has approached untested evidence with caution;
- Where video-recordings of an absent witness' questioning are shown with a view to assessment by those in court;
- Where the court has considered other corroborative evidence;
- Where the defence have been given the opportunity to examine an absent witness during pre-trial questioning, or at trial indirectly by writing; or
- Where a defendant has been given the opportunity to give their version of events and cast doubt on the reliability and credibility of an absent witness (see Benchbook on the Adjudication of International Crimes, para 1893).

295. **Consideration of extrajudicial testimony will often arise in cases involving vulnerable victims and witnesses. In such cases, a careful balancing act will need to be struck between protecting the rights of the accused and the right to private life of the victims.** For instance, the ECtHR has found that a sexual violence victim's rights were violated when she was subjected to an extensive cross-examination involving inappropriate questioning by the defendant (ECtHR, Y. v. Slovenia, paras 103, 106-109, 114-115). However, in the *Bocos-Cuesta v. the Netherlands* case, a Dutch court refused to let the defendant hear the testimony of the minor victims. The court's reasoning was that the defendant's interest in hearing them was outweighed by their interests 'in not being forced to relive a possibly very traumatic experience'. However, the ECtHR found this to be in breach of the right to a fair trial, as the court did not properly substantiate this decision (ECtHR, Bocos-Cuesta v.the Netherlands, para 71).

296. As noted above, the Ukrainian legislation and practice of the Supreme Court largely aligns with ECtHR jurisprudence in terms of extrajudicial testimony. **However, practitioners should endeavour to demonstrate, in argumentation and reasoning, that the requirements under domestic and international and European legislation and jurisprudence are complied with when considering extrajudicial testimony in conflict-related proceedings to ensure fairness of the trial overall.**

9.6 Assessment of evidence in judgment reasoning

297. As noted in the above analysis, demonstrating compliance with the right to a fair trial in terms of approaches to evidence will often be a matter of judicial control and must be reflected in the court's reasoning. Article 374(3)(2) CPC states that the reasoning section of the judgement must contain a presentation of the assessment of evidence in support of circumstances considered proven by the court, as well as reasons for not taking into account particular evidence. This should include evidence presented by both the prosecution and the defence.

298. The ECtHR has held that the right to a fair trial has been violated where, e.g.:
- there has been a failure to explain the reasons for not allowing testimony to be given by certain witnesses whom the defence submitted could provide exculpatory evidence (ECtHR, Vidal v. Belgium, paras 52-54);
- no explanation has been given for a conviction based on the same evidence that had previously led to the accused's acquittal (ECtHR, Salov v. Ukraine, para 92);
- a judgment leading to the conviction of an accused did not address exculpatory evidence and deficiencies in evidence that is incriminating (ECtHR, Gradinar v. Moldova, paras 111-115).
- judgments did not reflect an assessment of 'obvious discrepancies' in witness testimonies and within material evidence. This may also demonstrate a violation of the requirement to prove a case beyond reasonable doubt and/or the presumption of innocence (ECtHR, Nechiporuk and Yonkalo v. Ukraine, para. 280, ECtHR, Zhang v. Ukraine, para. 73, ECtHR, Adjaric v. Croatia, para. 51).

299. International criminal proceedings often deal with thousands of pieces of evidence, which is distinct from the Ukrainian conflict-related cases currently proceeding, since those are often single incident cases. As a result, while the judges of international criminal courts and tribunals are bound to consider the complete evidentiary record, the judgements tend to provide reasoning by including detailed assessments of key pieces of evidence, or clusters of evidence.

300. Regarding the practice of Ukrainian courts, as noted in Section 4, while judges may have assessed evidence in the courtroom, the judgements do not reflect that assessment in detail. The evidence considered is usually provided in a list form, without a comprehensive examination of its relevance, admissibility, reliability or sufficiency. The only evidence narrated in greater detail in the judgements is victim or witness testimony. However, inconsistencies in evidence and/or exculpatory evidence are not considered in detail in the

analysed judgements (see e.g., Case No. 243-6186-20 and Case No. 734-2129-22). In certain cases, courts have also invoked Article 349 CPC following guilty pleas, limiting themselves to investigating the circumstances of the proceedings by interrogating the accused (see e.g., Case No. 638-1343-23 and Case No. 535-2100-22).

301. The judgements analysed also do not reflect an assessment of the evidentiary weight of each piece of evidence, specifically how that evidence 'establishes the circumstances of the case being proven' as required by the CPC. This leads to a lack of clarity within the judgements as to the evidentiary weight of circumstantial evidence, for example, or how various pieces of evidence corroborate each other. The interconnection between various pieces of evidence is a required part of the assessment of evidence under the CPC, and is also essential when dealing with indirect evidence or extrajudicial testimony.

Section 10 – *In absentia* proceedings

SUMMARY

- While the right to a fair trial generally requires the accused to be present, trials may proceed in absentia under specific conditions within Ukrainian and international and European law.
- For trials *in absentia* to comply with the right to a fair trial, it must be clearly established that the accused has been made aware of the proceedings and attempted to avoid trial and/or waived their right to appear in court and defend themselves.
- The ECtHR jurisprudence indicates that mere formal notification may be insufficient; there must be 'objective factors' demonstrating the accused's knowledge of the proceedings, and there must be an opportunity for a retrial in the case that an accused did not avoid trial and/or waive their right to appear.
- **Ukrainian practitioners must endeavour to adopt a practice in terms of notification that requires additional steps taken beyond formal notification, especially in the absence of an explicit legal basis for a retrial in Ukraine.**
- **The Supreme Court of Ukraine could develop a checklist that identifies the minimum additional steps, such as notification in the language of the accused, which will be required to comply with ECtHR standards.**
- **It could also be useful to introduce a legislative amendment requiring, or develop consistent practice in obtaining, written consent of a POW prior to an exchange of their waiver of their right to appear and defend themselves.**
- The absence of a clear legal basis for the right to a retrial in *in absentia* proceedings in Ukraine is problematic. **This is a matter that can be best resolved through legislative amendment. In the absence of such a provision, actions of practitioners in ensuring that the accused has waived their right to appear through adequate notification is even more important where possible in the circumstances.**
- Even in *in absentia* proceedings, the accused retains the right to a defence, which must be active and effective; the presence of legal representation alone does not guarantee fairness.

302. The right to a fair trial generally requires an accused person to be tried in their presence. However, *in absentia* trials are permissible under Ukrainian and international and European law and have been common in the context of conflict-related cases. Practitioners should be aware that such trials are only permissible under certain conditions and that Ukrainian law is not fully aligned with international and European standards on this issue. Until these issues are ironed out through legislative amendments, practitioners can still take action to ensure that the conditions required to comply with standards set through the binding jurisprudence of the ECtHR are met as far as possible in such cases.

303. Holding proceedings *in absentia* also has practical implications for practitioners involved in the trial, since to comply with fair trial guarantees, they will still have to ensure that the

proceedings remain adversarial (see Section 5 above), that evidence is adequately examined (see Section 9 above) and that the presumption of innocence of the accused is not violated (see Section 3 above). The sources of law relating to the right of the accused to be present at their trial and regulating trials *in absentia* can be found below.

Table 9 Legal framework on the presence of the accused and in absentia proceedings

Ukrainian law	IHRL	IHL	ICL	Other
• CPC, Articles 135, 297 and 323.	• ECHR, Article 6(3)(d) • ICCPR, Article 14(3)(d) Note that Ukraine derogated from Articles 6 ECHR and 14 ICCPR under martial law, but the practical effect of this derogation is limited (see above analysis).	• Additional Protocol I, Article 75(4)(e)	• Rome Statute, Articles 63(1), 67(1)(d) and 63(2) on the presence of the accused. • ICTY Statute, Article 21(4)(d) on presence of the accused. • Statute of the Special Tribunal for Lebanon, Article 16(d) on the presence of accused, and Rules of Procedure and Evidence, Rule 106 (on trials *in absentia*).	• The ICRC has provided commentary regarding the right to be present at trial, especially for POWs at para 4103 of Rule 105.

304. **Article 297 and Article 323 CPC regulate special pre-trial investigations or judicial proceedings (*in absentia* proceedings) in Ukraine,** permitting them when the suspect, except for a minor, hides from pre-trial investigation bodies and court, or the investigator and the court to avoid criminal liability and/or is declared internationally wanted.

305. Under Article 281 of the CPC, if, during the pre-trial investigation, the whereabouts of the suspect is unknown, or he/she has left and/or stays in the temporarily occupied

territory of Ukraine or outside Ukraine and does not appear without good reason at the summons of the investigator or public prosecutor, the prosecutor puts such a suspect on a wanted list. The suspect must have been duly notified of the summons. Under Article 323 of the CPC a court can permit special judicial proceedings against such accused following a motion of the public prosecutor. Such motion must be supplemented by records proving that the accused was aware or must have been aware of the criminal proceedings that have been initiated.

306. The accused's right to be present as their trial is considered as part of the right to a fair trial under Article 6(3)(d) ECHR and 14(3)(d) ICCPR, as well as under Additional Protocol I, Article 75(4). However, *in absentia* proceedings are permitted under certain conditions, as detailed below (see e.g. HRC, General Comment No. 32, para 36). It must be noted that under IHL, *in absentia* proceedings are not permitted where the accused is a POW, given that their presence at trial can be ensured by the authorities (ICRC, Rule 105, para 4103).

10.1 Notification and waiver

307. **For trials *in absentia* to comply with the right to a fair trial, it must be clearly established that the accused has been made aware of the proceedings and attempted to avoid trial and/or waived their right to appear in court and defend themselves** (Article 281 CPC, ECtHR, Sejdovic v. Italy, para 86). The CoE has noted that notification also relates to the right of a person charged with an offence under Article 6(3)(a) ECHR to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him, which is still applicable even if he or she is absent from the trial (see CoE, Overview of the European standards regarding criminal proceedings held in absentia, 2024, para 66).

308. In terms of notification in Ukrainian proceedings, under Articles 135 and 297 CPC, a person shall be summoned to an investigator, public prosecutor, investigating judge, or court by means of a summons that shall be served on him/her or sent by mail, electronic mail, or facsimile communication, by telephone or cable. If the individual concerned is temporarily out of his/her place of residence, the summons shall be delivered against the signature to his/her adult family member or to another individual who resides together with the addressee, to the homeowner association at the place of residence, or to the administration at the place of employment. The summons to a person residing abroad shall be served under an international treaty on legal assistance ratified by the Verkhovna Rada of Ukraine and, in the absence of the same — through the diplomatic (consular) mission.

309. Under Articles 135(8) and 297(5) of the CPC, if the summons of an individual, in respect of whom there are sufficient grounds to believe that he/she has left Ukraine and/or resides in the temporarily occupied territory of Ukraine, or the territory of the state recognised by the Verkhovna Rada of Ukraine as the aggressor state, and thus cannot be reasonably served on him/her under above rules, it shall be published in mass media of nationwide circulation and on the official website of the Prosecutor General's Office.

310. **The ECtHR has held that where an accused has not been notified in person of criminal proceedings against them, waiver should not be presumed on the basis that the authorities have undertaken formal notice requirements** (ECtHR, Sejdovic v. Italy, Grand Chamber Judgement, para 87; ECtHR, Colozza v. Italy Judgement, para 28). Neither the ICCPR nor the ECHR confer on the accused a right to notice in a specific form, but the ECtHR looks for **'objective factors'** that demonstrate that an accused person had sufficient knowledge of the proceedings against them such that they may be said to have waived their right to attend (ECtHR, Yeger v. Turkey Judgement, para 33; ECtHR, Sejdovic v. Italy, Grand Chamber Judgement, para 100). For examples of sufficient and insufficient notification at the ECtHR, see the cases of Coniac v. Romania, Judgement, paras 53-55, M.T.B. v. Turkey Judgement, paras 51-53, Sejdovic v. Italy, Grand Chamber Judgement, paras 96-100 (descriptions are found in the Benchbook on the Adjudication of International Crimes, paras 1676-1678).

311. At the Special Tribunal for Lebanon (STL), the only post-Nuremberg internationalised criminal tribunal that permitted trials *in absentia*, chambers determined that 'all reasonable efforts' were made to serve the indictment on the accused or otherwise give them notice as well as to secure their appearances before the STL, and that the accused had absconded (Statute of the STL, Article 22, Rules of Procedure and Evidence, Rule 106). The Trial Chamber has held that 'reasonable efforts' had been taken where the tribunal had made efforts to notify the accused of proceedings and to procure their attendance through measures including the transmission of the indictment to the relevant authorities, ensuring its publication in the media, press releases and statements by STL representatives, including direct appeals from the STL President, as well as the issuance of domestic and international arrest warrants. The Trial Chamber also relied on extensive efforts by the Lebanese authorities, including multiple attempts to serve the accused persons at their last known residences, family homes, and places of employment, publication of the indictments in coordination with the STL, posting the indictments and images of the accused in public, and providing these documents to local officials in the accused's respective neighbourhoods (STL, *Prosecutor v. Ayyash et al.*, Decision to Hold Trial In Absentia, paras 5-13, 23, 25-28, 30, 32, 33-34, 44, 46, 47-111; STL, *Prosecutor v. Merhi*, Decision to Hold Trial In Absentia, paras 7-62, 81-82, 84-111).

312. **Compliance by Ukrainian practitioners with the formal notification requirements under the CPC may not be sufficient to comply with ECtHR jurisprudence**. In an analysis of Article 438 CCU cases in Ukraine, Ukrainian courts and counsel frequently refer to the ECtHR cases of Somogyi v. Italy and Colozza v. Italy regarding sufficient notice, but the practice is not uniform, including in the application of international and European standards (see Strategic Recommendations for the Judiciary). However, many first instance courts and also the Supreme Court of Ukraine are emphasising in their judgments the additional steps that have been taken by the prosecutor in terms of notice when deciding whether to hold the trials *in absentia* (e.g. Supreme Court of Ukraine, Case No. 242/3982/16-к, where notice was provided in the Russian language, and the ruling of Solomianskyi District Court of the city of Kyiv of 12 September 2022, in Case No. 760/6081/22). **Practitioners in Ukraine must endeavour to develop consistent practice on notification in conflict-related cases, which should include additional steps beyond formal notification requirements. The**

Supreme Court of Ukraine could develop a checklist which identifies the minimum additional steps, such as notification in the language of the accused, which will be required to comply with ECtHR standards.

313. One additional consideration is the interaction between the CPC and the law regulating the exchange of POWs in Ukraine (Law of Ukraine No. 2472-IX of 28 July 2022). If it is decided that a POW will be exchanged, criminal proceedings against that person will be suspended until the exchange has taken place and then once they are exchanged, the proceedings may continue *in absentia*, if formal notification by publication of the summons in Ukrainian media and on the OPG website is carried out. However, in the Posder v Croatia case at the ECtHR, which concerned similar proceedings against a POW who was exchanged, the Court found that it wouldn't have been possible for the authorities to reach the accused to provide notice, so the accused's waiver should not have been presumed, and he should have been entitled to a retrial. **It could therefore be useful to introduce a legislative amendment requiring, or develop consistent practice in obtaining, written consent of a POW prior to an exchange of their waiver of their right to appear and defend themselves (see further Benchbook on the Adjudication of International Crimes, para 1644).**

10.2 Right to a retrial

314. There is no explicit reference to the right to a retrial in *in absentia* proceedings in Ukraine. The ECtHR has held that there must also be an opportunity for an accused person convicted *in absentia* to initiate a new trial or review of the merits of the case, on issues of law and fact where it has not been established that he waived his right to appear and to defend himself, or that he intended to escape trial (ECtHR, Coniac v. Romania Judgement, para. 49; ECtHR, Sejdovic v. Italy, para. 82). Refusal of this opportunity has been found to be a 'flagrant denial of justice', which would render proceedings 'manifestly contrary to the provisions of Article 6 or the principles embodied therein' (ECtHR, Sanader v. Croatia Judgement, para. 71).

315. An example particularly relevant to Ukraine is the Sanader v. Croatia case before the ECtHR. It concerned an applicant who was convicted *in absentia* of war crimes linked to the conflicts following the dissolution of the former Yugoslavia. The applicant had been out of the reach of the Croatian courts because, at the time that he was charged and tried, he was residing in occupied territory outside the control of the Croatian State (para. 75). It was held that 'in the particular circumstances of the [...] case, given that the gravity of the crime at issue which, although not susceptible to statutory limitation periods, was commensurate with great public interest and the interest of the victims to see the justice being done, the Court accepts that holding a hearing in the applicant's absence was not in itself contrary to Article 6' (para 77). However, since it had not been shown that the accused had any knowledge of his prosecution and of the charges against him or that he sought to evade trial or unequivocally waived his right to appear in court, the Court concluded that in such circumstances the applicant should be able to be heard in proceedings involving a fresh determination of the legal and factual merits of the case against him (paras 77-78).

316. The Court held in the *Sanader* case that a provision of Croatian law allowing for a retrial, which demanded the accused's presence at trial, and another that allowed the accused to challenge the judgment only by presenting new evidence or facts, was disproportionate and insufficient to comply with the ECHR (paras 79-94). Indeed, the accused must not be required to surrender to exercise their right to be retried (para 77). However, the ECtHR has held that the reopening of the time allowed for appealing against a conviction *in absentia*, where the defendant was entitled to attend the hearing in the court of appeal and to request the admission of new evidence, allowed the possibility of a fresh factual and legal determination of the criminal charge, so that the proceedings as a whole could be said to have been fair (ECtHR, Sejdovic v. Italy Grand Chamber Judgement, para. 85).

317. The right to a retrial was explicitly noted within the *in absentia* provision of the Statute of the STL (Article 22). **Whether other available legislative bases of appeal in Ukraine would be sufficient to comply with the ECHR is an issue which has not yet been tested domestically or before the ECtHR (see further Benchbook on the Adjudication of International Crimes, paras 1659-1667). This is a matter that can be best resolved through legislative amendment. In the absence of such a provision, actions of practitioners in ensuring that the accused has waived their right to appear through adequate notification is even more important where possible in the circumstances.**

10.3 Right to defence

318. Accused persons do not lose the right to a defence where they do not appear in person (ECtHR, Sejdovic v. Italy, para. 91). Article 52(8)(2) of the CPC states that the participation of the defence counsel of persons who are under special pre-trial investigation or special judicial proceedings is mandatory from the moment the corresponding procedural decision is made. However, as the ECtHR has held, the presence of legal representation alone does not ensure fairness. The defence must be active and effective, and the proceedings must be fair as a whole, even in the accused's absence (see ECtHR, Hermi v. Italy).

319. There are several resources available providing more information for practitioners on trials *in absentia*, including the Benchbook on the Adjudication of International Crimes, paras 1627-1690, the Defence Counsel Handbook, para 4.2, and the Strategic Recommendations for the Judiciary.

Conclusion & Recommendations

It is in the Ukrainian legislator's interests to amend Ukrainian legislation regulating the fairness of trials and criminal procedure to align with international and European standards, to reflect commitment to EU accession criteria, implement and execute ECtHR judgements and to demonstrate willingness to adjudicate fair conflict-related cases domestically. Yet, this Handbook makes clear that practitioners in proceedings – including police, investigators, prosecutors, defence counsel and judges can, and in some cases are obliged, to take action utilising existing legislative frameworks (and applicable international and European law), to ensure the fairness of proceedings. **Key recommendations which have been highlighted in the Handbook include:**

- Practitioners in Ukraine need to be well-versed in both the national and international and European laws that govern the fairness of trials. This awareness is fundamental for constructing sound legal arguments and reasoning.

On applying substantive law on conflict-related crimes in line with the principle of legality:

- Article 58 of Ukraine's Constitution should be interpreted by practitioners in line with Article 7 of the ECHR, bringing international law within the meaning of law that criminalises conduct.
- ECtHR jurisprudence supports practitioners using international law to enhance legal certainty provided it is accessible and foreseeable.
- Ukrainian practitioners could be referring to customary international law (and treaties or statutes reflective thereof) delineating elements of crimes, modes of liability, such as command responsibility, or joint criminal enterprise or defences.
- Such sources of international law may also be applied retroactively by practitioners provided that such retroactive application does not disadvantage the accused (in line with ECtHR jurisprudence).
- Practitioners may also wish to refer to the practice of other national jurisdictions that have faced similar challenges and are bound by the ECHR, such as in the Balkan region, Kosovo, and Armenia.

On ensuring the presumption of innocence is respected:

- The prosecution bears the burden of proof to establish guilt beyond a reasonable doubt.
- Public authorities should refrain from making public statements affirming the guilt of the accused and the media should avoid news coverage prior to the issuance of verdicts as it may undermine the presumption of innocence.
- Considering the wording used so as to avoid breaches of the presumption of innocence is especially important where Ukrainian authorities are notifying suspects in *in absentia* cases.
- Unprofessional conduct by defence counsel, the lack of an effective defence, or issues with the equality of arms in proceedings could indicate violations of the presumption of innocence.
- Judges must also demonstrate independence and impartiality and ensure that their judgements are reasoned and robust to reflect the fact there has been no pre-judgement of guilt.

On courts, judges and judgements:

- Practitioners throughout the trial process in Ukraine must ensure that the accused's right to a public hearing by a competent, independent and impartial court is upheld. This is a right that is not only to be ensured through the practice of courts on an institutional level, but also by judges themselves, who must act with independence from the prosecution and freedom from biases.

- Where the publicity and transparency of proceedings or reasoning is not granted, adequate reasoning must be provided by courts.
- Judges must also provide a reasoned opinion.

On adversarial proceedings:

- Law enforcement officers in Ukraine should endeavour to ensure that access to a lawyer is granted from the moment of questioning to ensure an accused's right to defence, against self-incrimination, and a fair trial. Where counsel is appointed after initial questioning and allegations are raised by the accused that evidence was obtained without access to a lawyer, such allegations should be raised by them in the context of proceedings.
- Investigative judges should also exercise oversight over the accused's access to counsel during pre-trial stages as part of their review as to the lawfulness and/or arbitrariness of the accused's detention.
- Where evidence is presented at trial stages from early questioning where there are complaints regarding lack of access to counsel, judges should ensure that any admission of such evidence should not compromise the overall fairness of the trial.
- Defence lawyers should not face undue restriction or interference and must zealously represent the accused.
- Defence counsel must actively protect their clients' interpretation rights by requesting services early, verifying client understanding throughout proceedings, and immediately objecting to inadequate interpretation. Similarly, court administration should arrange qualified interpreters.
- Ukrainian judges bear the ultimate responsibility of ensuring the availability of translation or interpretation services for an accused who does not understand the language of the court.
- Taking action to examine witnesses will be part of an effective strategy of defence counsel. The balancing act between ensuring the accused's right to examine witnesses in proceedings, and preventing the retraumatisation of victims and/or witnesses will be a matter for judicial control.
- Defence counsel must take action to appeal proceedings on behalf of their client in conflict-related cases, including on bases related to the fairness of proceedings. Lack of a reasoned opinion of a trial court in itself may be a basis for appeal.

On ensuring specificity in grounds for arrest and/or charges:

- Ukrainian authorities must ensure that any person deprived of liberty is informed without delay of the legal and factual grounds for arrest and of the charges in a language they comprehend.
- In their charges, prosecutors should endeavour to refer not only to IHL rules, but also sources of international criminal law (in compliance with the principle of legality), which detail the crime and its contextual, material and mental elements, as well as the accused's level of responsibility.
- Judicial oversight of the lawfulness of an accused's arrest and/or detention must be automatic and prompt following an arrest.
- The courts therefore have an opportunity (and obligation) to consider the specificity of charges at the pre-trial stages, but further opportunities are possible under Ukrainian law throughout the trial process to request modification, dropping of charges, or reclassification.
- Ukrainian judges should be aware that issues with the specificity of charges delineated by the prosecution do not absolve them of ensuring that any conviction of the accused complies with the principle of legality and the presumption of innocence. Assessment of whether the prosecution has met the burden of proof to show that the accused has committed a crime that is prescribed by law, certain and foreseeable to the accused must nonetheless be carried out

by courts. This assessment must also be reflected in the reasoning, which must comply with the right to a reasoned opinion. Where sufficient reasoning in this regard is not provided, this may provide a ground for appeal by defence counsel.

- Prosecutors in Ukraine may endeavour to provide more granular detail on the accused's level of involvement in the offence in the charges, and courts should demonstrate assessment of that involvement in their reasoning.

On aspects of investigations and pre-trial detention:

- Practitioners, especially prosecutors and investigative judges, are advised to conduct robust legal assessments of interferences with the private and family life of an accused in investigations in accordance with ECtHR jurisprudence, provide reasoned decisions justifying such measures, and ensure ex post facto judicial authorisation is prompt and substantively adequate.
- Practitioners must uphold the accused's right to remain silent and not to incriminate oneself. Defence lawyers should challenge any evidence obtained through coercion or deception, and judges must exclude such evidence where it undermines the fairness of proceedings. It is specifically recommended that confessions, especially by POWs, not be treated as preconditions for release via exchange, and courts must ensure that guilty pleas are assessed with full regard to procedural safeguards.
- Law enforcement must abstain from torture and inhuman or degrading treatment and the State Bureau of Investigations is tasked with conducting prompt and impartial investigations into allegations. In the context of ongoing criminal proceedings against an accused alleging torture or inhuman or degrading treatment, defence counsel must proactively review detention records and raise any allegations before investigative judges. Judges at all stages are required to provide detailed reasoning when confronted with such claims, including distinguishing whether conduct meets the threshold for torture, inhuman, or degrading treatment as defined under the ECtHR and international law.

On avoiding excessive length of proceedings:

- Practitioners must ensure that the length of proceedings in conflict-related criminal cases is not excessive and any unjustified delays throughout investigations and/or proceedings must be addressed throughout proceedings by practitioners involved, through raising arguments on behalf of the accused (defence counsel), or by judges of all instances.

On approaches to evidence:

- Practitioners should ensure evidence is admissible, reliable and sufficient in line with binding jurisprudence from the ECtHR, demonstrating analysis of this in their argumentation and reasoning.
- Conflict-related cases increasingly use novel forms of evidence, such as digital evidence, which courts must adequately assess for reliability and sufficiency, with this assessment reflected in the reasoning.
- Judges' reasoning in judgments must reflect their assessment of all evidence, including reasons for not considering certain evidence, and address inconsistencies or exculpatory evidence.

On* in absentia *proceedings:

- Ukrainian practitioners must endeavour to adopt a practice in terms of notification which requires additional steps taken beyond formal notification, especially in the absence of an explicit legal basis for a retrial in Ukraine.

- The Supreme Court of Ukraine could develop a checklist which identifies the minimum additional steps, such as notification in the language of the accused which will be required to comply with ECtHR standards.
- It could also be useful to introduce a legislative amendment requiring, or develop consistent practice in obtaining, written consent of a POW prior to an exchange of their waiver of their right to appear and defend themselves.
- In the absence of a clear legal basis for the right to a retrial in *in absentia* proceedings, actions of practitioners in ensuring that the accused has waived their right to appear through adequate notification is even more important where possible in the circumstances.

About this project

This brief is part of the 'Restoring Dignity and Justice in Ukraine' consortium programme, focusing on advancing accountability for international crimes committed in Ukraine. The programme is funded by the Dutch Ministry of Foreign Affairs and is implemented by the International Development Law Organisation (IDLO), in partnership with the T.M.C. Asser Instituut, the Center for International Legal Cooperation (CILC), and the Netherlands Helsinki Committee (NHC).

The project aims at institutional strengthening and capacity development needs of the key parties in Ukraine dealing with international crimes: prosecutors, police, judges, as well as journalists and civil society organisations. We believe that with the support of the international community, Ukraine can advance accountability for these crimes.

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