

THEMATIC REPORT

Access to Justice and the Conflict in Ukraine

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1. Summary

The OSCE Special Monitoring Mission to Ukraine (SMM), in accordance with its mandate, continues to “monitor and support respect for human rights and fundamental freedoms” including the ability of people to access essential justice services.¹ In this regard, the SMM has monitored the implications of the relocation of all judicial, prosecution and administrative services from non-government- to government-controlled areas due to the conflict in Donetsk and Luhansk regions. This report considers constraints on access to effective and fair judicial services caused by a combination of actions taken by the “Donetsk People’s Republic” (“DPR”) and “Lugansk People’s Republic” (“LPR”), the loss of government control over certain areas and the relocation of government services. Although the SMM’s findings do not allow for a comprehensive assessment, due to access restrictions and the extent of the justice system affected by the conflict, monitoring activities have established that multiple factors have restricted individuals’ access to effective legal remedies and infringed on the right to a fair trial. These factors include the absence of legitimate and effective judicial services in non-government-controlled areas, the diminished capacity of relocated courts and prosecution offices and movement restrictions between government- and non-government-controlled areas. The relocation of all justice services from the Autonomous Republic of Crimea and the City of Sevastopol (Crimea) have led to similar concerns for persons displaced from Crimea.

Access to justice for people living in “DPR”- and “LPR”-controlled areas remains severely limited. Courts, prosecution offices and notary services were completely removed by the Government from areas not under its control in response to the conflict and to the seizure of documents and premises by separatists. Following the withdrawal of government services, the “DPR” and “LPR” established parallel “justice systems” which operate outside of the Ukrainian legal system. These “systems” serve as the only “justice” provider in non-government-controlled areas, but face significant challenges including: reliance on an uncertain, ad hoc and non-transparent legal framework which is subject to constant change; shortages of professional staff; and, in certain instances, “courts” which have no operational capacity. The result of the removal of government services combined with the deficiencies in the parallel “systems” directly impacts people throughout “DPR”- and “LPR”-controlled areas.

In addition to an absence of legitimate and effective justice services in “DPR”- and “LPR”-controlled areas, people throughout Donetsk and Luhansk regions face considerable challenges in accessing courts and prosecution offices relocated to government-controlled

¹ OSCE, Permanent Council Decision No. 1117, Deployment of an OSCE Special Monitoring Mission to Ukraine, PC.DEC/1117, 21 March 2014.

areas. These challenges include the loss, destruction and confiscation of case files prior to and during the relocation process including the intentional destruction of case files by “DPR” and “LPR”. This loss of files has led to the suspension or complete termination of many pending legal proceedings. People in non-government-controlled territory attempting to submit claims or attend court hearings in government-controlled territory are also often forced to travel long distances through conflict-affected areas. The inability of the Ukrainian postal service to operate in “DPR”- and “LPR”-controlled areas also prevents notice of proceedings.

Courts and prosecution offices in government-controlled areas have also had their ability to administer justice negatively impacted by the relocation process. Restoration of lost case files has proven difficult, and at times impossible, and a lack of clear legislative guidelines further impedes the process. Many courts lack emergency action plans that are essential to allow case files to be effectively relocated in the event of an emergency. Furthermore, while judges, prosecutors and support staff continue to work to overcome these issues, they face serious resource constraints and the inherent challenge of being recently relocated to entirely new premises. Even where a final judgment is rendered, enforcement is often impossible where property or people of interest remain in “DPR”- and “LPR”-controlled areas.

The process of court relocation, and the development of parallel “justice” systems, has also led to the arbitrary deprivation of liberty of people in government- and “DPR”- and “LPR”-controlled areas. In government-controlled areas, people are subject to continued detention as the loss of case files prevents convicted people from lodging an appeal. Moreover, pre-trial detainees accused of serious crimes are subject to indeterminate periods of detention as prosecutors attempt to rebuild case files. In “DPR”- and “LPR”-controlled areas, people deprived of their liberty are subject to newly established parallel “systems” which are non-transparent and raise fair trial concerns.

Based on these findings, the SMM emphasizes the paramount importance of ensuring access to justice for all in line with the Constitution of Ukraine and international commitments, regardless of the consequences of the ongoing conflict. The SMM, accordingly, calls on all authorities and those claiming to control areas outside government control to ensure that case files are where possible restored and individuals are released from illegal or arbitrary detention. The SMM further calls on the Government of Ukraine to develop guidance on restoration of case files and emergency action plans and on the international community to support these efforts.

2. Introduction

As of December 2015, Ukrainian justice services remain completely absent from “DPR”- and “LPR”-controlled areas in Donetsk and Luhansk regions following the seizure of public premises by armed groups and the loss of effective control and subsequent removal by the Government of all judicial services from non-government-controlled areas. Parallel “justice systems”, established by “DPR” and “LPR”, remain largely non-operational, face serious resource constraints and are not capable of operating throughout all non-government-controlled areas. This section provides a brief overview of the process of relocation of courts and prosecution offices in the context of the conflict in Ukraine.

In April 2014, armed groups began to seize government buildings in Donetsk and Luhansk regions. On 13 April 2014, the Government announced the creation of an Anti-Terrorism Operation (ATO).² As the situation escalated between the Government and the newly formed “DPR” and “LPR”, the Government began to lose control over certain parts of the region and “LPR” and “DPR” members began to take control of government buildings, including courts and prosecution offices. Many prosecutors, judges and court staff were forced to leave their facilities due to seizure of court buildings³ while artillery strikes and shelling damage rendered other buildings unsafe⁴. By August 2014, the Government of Ukraine began to prepare for the total relocation of all court and prosecution offices due to loss of control over certain areas. During this period, ongoing fighting separated the region into government- and non-government-controlled areas divided by a “contact line”. Although many court buildings had already been vacated, on 2 September 2014 the jurisdiction of courts in non-government-controlled areas was transferred to government-controlled areas.⁵ Prosecution offices were also relocated to government-controlled areas during the summer and fall of 2014.

² See Decree of the President of Ukraine “On Decision of the Council of National Security and Defence of Ukraine of 13 April 2014 “On Immediate Measures to Rebuff Terrorism Threat and to Retain Territorial Integrity of Ukraine” of 14 April 2014, no. 405/2014.

³ For example, the Donetsk Regional Appeals Court was seized by irregular armed groups in September 2014 and all case files were left behind including 716 civil cases, 516 criminal cases and 16 administrative cases. Interview with relocated Donetsk Regional Appeals Court, 8 July 2015. Interlocutors from the Kramatorsk City Court (Donetsk region) reported that armed people took case files from courts in the region and, in the instances of Kirovskiy District Court, Sovietskiy District Court and Girnytskiy District Court of Makiivka city (Donetsk region), staff were prevented from taking case files from the building. Interview with Kramatorsk City Court (Donetsk region), 2 June 2015.

⁴ The Sloviansk City-District Court (Donetsk region) reported that case files in the buildings were damaged during shelling. Interview with Sloviansk City-District Court (Donetsk region), 9 June 2015. It was reported that no case files were transferred from the Pervomaisk City Court (Luhansk region) and it is suspected they were all destroyed during the shelling of the city. Interview with Rubizhne City Court (Luhansk region), 8 June 2015.

⁵ See Annex I for maps of relocated courts.

As of the publication of this report, no Ukrainian courts or prosecution offices operate in “DPR”- and “LPR”-controlled areas or in Crimea. Ukrainian courts and prosecution offices in government-controlled areas have temporarily been assigned jurisdiction over non-government-controlled areas. As a result, civilians are required to travel to government-controlled areas to access court and prosecution services. Parallel “justice systems” in non-government-controlled areas are not in compliance with Ukrainian law, largely non-transparent and limited in their capacity.

3. Methodology

From May through August 2015, the SMM met with various interlocutors in Donetsk, Luhansk, Kharkiv, Dnepropetrovsk and Zaporizhzhia regions as well as Kyiv city. Interlocutors included judges, prosecutors and employees of courts, prosecution offices, legal aid offices, lawyer’s associations and members of civil society.⁶ The SMM also met with, or received information from, representatives of the Prosecutor General’s Office and the State Court Judicial Administration in Kyiv and their representative offices at the regional level. Citations contained in this report refer to meetings with representatives from these various institutions. While the relocation of courts and prosecution offices from Crimea is addressed in this report, the emphasis of this report is on the situation in Donetsk and Luhansk regions. This report analyses the specific access to justice issues caused by the crisis in Ukraine and does not intend to address possible systemic deficiencies within the legal system of Ukraine.⁷

4. International and Domestic Legal Standards

The term “access to justice” can encompass a broad set of established rights. For the purpose of this report access to justice refers to state obligations to ensure the right of all people to access effective, timely and fair justice services. These rights are enumerated as fundamental principles within the Constitution of Ukraine as well as in its international commitments, including under international conventions to which Ukraine is a party. These

⁶ SMM Monitors conducted these interviews in Kyiv and Kharkiv, Dnepropetrovsk, Zaporizhzhia, Luhansk and Donetsk regions.

⁷ For information on the state of the legal system of Ukraine *see for example* The World Justice Project (WJP) Rule of Law Index 2015, Ukraine.

conventions include the European Convention on Human Rights (ECHR)⁸ and International Covenant on Civil and Political Rights (ICCPR).⁹ Moreover, access to justice rights including due process guarantees, rule of law commitments and right to effective remedies are an integral part of the OSCE Human Dimension commitments affirmed by OSCE participating States, including by Ukraine.¹⁰

The Constitution of Ukraine sets out obligations rooted in fundamental rule of law principles. These include that constitutional rights and freedoms are guaranteed and cannot be abolished¹¹ and that issues related to judicial systems, judicial proceedings and the status of judges are to be determined exclusively by the laws of Ukraine.¹² The ECHR also provides specific guarantees related to fair trial rights and the right to an effective remedy which, as noted by the OSCE Office for Democratic Institutions and Human Rights, are concepts considered integral to a larger “access to justice” framework which ensures the right to access effective, timely and fair court and prosecution services.¹³ Article 13 of the ECHR obliges State Parties to provide an effective remedy to address violations of the Convention. While States have discretion in how to comply with this obligation, effective remedies must be accessible, capable of providing redress and offering reasonable prospects of success.¹⁴ Article 6 of the ECHR, addressing fair trial rights, includes guarantees of procedural rights, the right of access to a court¹⁵, the right to enforcement of judgments¹⁶ and the right to

⁸ See Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) of 4 November 1950, 213 U.N.T.S. 222, entered into force in respect of Ukraine on 11 September 1997.

⁹ See International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI) of 19 December 1966, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force in respect of Ukraine on 23 March 1976; the Optional Protocol to the ICCPR allowing individual communication procedure entered into force in respect of Ukraine on 25 July 1991.

¹⁰ See for example Concluding Document of Vienna, the Third Follow-up Meeting, Vienna, 15 January 1989 (*Questions Relating to Security in Europe: Principles*); Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, 29 June 1990; Charter of Paris for a New Europe/Supplementary Document to Give Effect to Certain Provisions Contained in the Charter of Paris for a New Europe, Paris, 21 November 1990 (*A New Era of Democracy, Peace and Unity*); Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, Moscow, 3 October 1991; Concluding Document of Budapest, 6 December 1994 (*Decisions: VIII. The Human Dimension*); Document of the Thirteenth Meeting of the Ministerial Council, Ljubljana, 5-6 December 2005 (*Decisions: Decision No. 12/05 on Upholding Human Rights and the Rule of Law in Criminal Justice Systems*); Document of the Fourteenth Meeting of the Ministerial Council, Brussels, 4-5 December 2006 (*Decisions: Decision No. 5/06 on Organized Crime*); and Document of the Sixteenth Meeting of the Ministerial Council, Helsinki, 4-5 December 2008 (*Decisions: Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area*).

¹¹ Art. 22 (2), Constitution of Ukraine of 28 June 1996.

¹² Art. 92 (1) (14), Constitution of Ukraine of 28 June 1996.

¹³ See Legal Digest of International Fair Trial Rights, OSCE Office for Democratic Institutions and Human Rights, 2012.

¹⁴ Practical Guide on Admissibility Criteria, Council of Europe, European Court of Human Rights, 2011, p. 17. See also Footnote 10 outlining OSCE Human Dimension commitments including on the right to effective remedies.

¹⁵ See *Golder v. the United Kingdom*, Judgement, ECtHR §§26-40, no. 4451/70, 21 February 1975. See also Footnote 10 outlining OSCE Human Dimension commitments including on the right to a fair trial.

finality of court decisions¹⁷. Article 14 of the ICCPR further requires that “all persons shall be equal before the courts and tribunals” and in criminal trials “everyone shall be guaranteed the right to a fair and public hearing by a competent, independent and impartial tribunal established by law”¹⁸. In addition to these basic rights, numerous international instruments and opinions further support the conclusion that basic procedural protections and due process rights are essential aspects of all human rights and should be protected.¹⁹

Finally, the SMM observes that on 21 May 2015, the Parliament of Ukraine (Verkhovna Rada) passed Resolution “On Ukraine’s Derogation from Certain Commitments under the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms” stating its intent to derogate from certain provisions of the ECHR and ICCPR.²⁰ Ukraine transmitted a notification announcing this decision on 5 June 2015 to the Secretary-General of the United Nations²¹ and Note Verbale on 9 June 2015 to the Secretary General of the Council of Europe²². The SMM recalls that while derogations from certain obligations are permissible under the ECHR and ICCPR, such derogations should be limited “to the extent strictly required by the exigencies of the situation”²³, that the principles of legality and rule of law must be respected during a state

¹⁶ See *Hornsby v. Greece*, Judgement, ECtHR, §§40-45, no. 18357/91, 19 March 1997.

¹⁷ See *Brumărescu v. Romania*, Judgement, ECtHR §§60- 65, no. 28342/95, 28 October 1999.

¹⁸ See UN Human Rights Committee, General Comment No. 32. Article 14: Right to equality before courts and tribunals and to a fair trial.

¹⁹ See for example UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions, 20 May 1997; Basic Principles on the Independence of the Judiciary, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August to 6 September 1985, U.N. Doc. A/CONF.121/22/Rev.1 at 59 (1985); Strengthening Basic Principles of Judicial Conduct, ECOSOC Resolution 2006/23, 27 July 2006; On the Independence, Efficiency and Role of Judges, Recommendation No. R (94) 12, the Council of Europe, Committee of Ministers to Member States; Montreal Declaration Universal Declaration on the Independence of Justice of 10 June 1983, the First World Conference on the Independence of Justice; European Charter on the Statute for Judges, Council of Europe, 10 July 1998; The Universal Charter of the Judge, International Association of Judges, 17 November 1999.

²⁰ See Resolution of the Verkhovna Rada of Ukraine "On Declaration of the Verkhovna Rada of Ukraine “On Ukraine’s Derogation from Certain Commitments under the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms” of 21 May 2015, no. 462-VIII.

²¹ Derogation contained in a Notification from the Permanent Mission of Ukraine to the United Nations, 5 June 2015. Ukraine expressed its wish to derogate from paragraph 3 of Article 2 (right to an effective remedy), Article 9 (right to liberty and security of person), Article 12 (right to liberty of movement), Article 14 (right to a fair trial) and Article 17 (right to privacy, family, home or correspondence).

²² Derogation contained in a Note Verbale from the Permanent Representation of Ukraine at the Council of Europe, 5 June 2015. Ukraine expressed its wish to derogate from Article 5 “Right to liberty and security”, Article 6 “Right to a fair trial”, Article 8 “Right to respect for private and family life” and Article 13 “Right to an effective remedy”.

²³ European Convention on Human Rights, Article 15; International Covenant on Civil and Political Rights, Article 4.

of emergency²⁴ and the derogating measures have to be withdrawn when no longer needed.²⁵ Furthermore, the SMM reaffirms that measures derogating from a State's international obligations must be taken in strict conformity with the procedural requirements laid down in international instruments and must not be discriminatory on any ground.²⁶ During a state of public emergency participating States should endeavour to ensure that the normal functioning of the legislative bodies is guaranteed to the highest possible extent and that the legal guarantees necessary to uphold the rule of law remain in force.²⁷

5. SMM Findings in Donetsk and Luhansk Regions

5.1. Relocation of Courts and Prosecution Offices

Beginning in Summer 2014, shortly after the loss of control by the Government of Ukraine over certain areas of Donetsk and Luhansk regions, the Government undertook a series of measures intended to relocate all courts from areas no longer under its control. The Law of Ukraine "On Administration of Justice and Criminal Proceedings in connection with Anti-Terrorism Operation" of 12 August 2014 (Law on Administration of Justice)²⁸ required Ukrainian High Specialized Courts to prepare a list of courts in government-controlled areas to assume jurisdiction from courts in "DPR"- and "LPR"-controlled areas which could no longer operate due to the security situation.²⁹ Beginning in September 2014, and pursuant to these lists and additional orders, eight courts were relocated, and ultimately transferred, to areas under government control. During the same period, 51 additional first instance

²⁴ See UN Human Rights Committee, General Comment 29, States of Emergency (article 4) of 31 August 2001, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001).

²⁵ See *Brannigan and McBride v. the United Kingdom*, 26 May 1993, §§ 47 and 54, Series A no. 258-B.

²⁶ See article 25 of Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, 29 June 1990.

²⁷ See article 28 of Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, Moscow, 3 October 1991.

²⁸ See Law of Ukraine "On Administration of Justice and Criminal Proceedings in connection with Anti-Terrorism Operation" of 12 August 2014, no. 1632-VII.

²⁹ Law of Ukraine "On Administration of Justice and Criminal Proceedings in connection with Anti-Terrorism Operation" of 12 August 2014, no. 1632-VII, Article 1(1), Article 1(4). The State Court Administration of Ukraine was responsible for drafting a list of these courts in the Anti-Terrorist Operation (ATO) zone and to submit this list to the respective heads of high specialised courts who were to alter jurisdiction of courts as appropriate.

courts, constituting all other courts in non-government-controlled areas, were closed and their jurisdiction was transferred to district courts in areas under government control.³⁰

The eight relocated courts comprised all commercial, administrative and appeals courts in Donetsk and Luhansk regions. These courts are: Donetsk District Administrative Court (relocated to Sloviansk)³¹; Luhansk District Administrative Court (relocated to Sievierodonetsk)³²; Donetsk Administrative Appeals Court (relocated to Kramatorsk)³³; Donetsk Regional Commercial Court (relocated to Kharkiv)³⁴; Luhansk Regional Commercial Court (relocated to Kharkiv)³⁵; Donetsk Commercial Appeals Court (relocated to Kharkiv)³⁶; Luhansk Regional Appeals Court (relocated to Sievierodonetsk)³⁷; and Donetsk Regional Appeals Court (relocated to Artemivsk)³⁸.

As noted, all other courts besides the eight relocated courts, which included 18 district courts in Luhansk region and 33 district courts in Donetsk region, were closed and their jurisdiction was transferred to courts in government-controlled areas in Donetsk, Luhansk, Dnepropetrovsk and Zaporizhzhia regions.³⁹ These courts were of general jurisdiction and

³⁰ See Annex I.

³¹ Order of High Administrative Court of Ukraine “On Renewal of Operation of Donetsk District Administrative Court on Administration of Justice in Relation to Change of the Court Location” of 15 December 2014, no. 262. The jurisdiction of Donetsk District Administrative Court was temporarily transferred to Zaporizhzhia District Administrative Court from 2 September 2014 until 22 December 2014.

³² Order of High Administrative Court of Ukraine “On Renewal of Operation of Luhansk District Administrative Court” of 27 March 2015, no. 70. The jurisdiction of Luhansk District Administrative Court was temporarily transferred to Kharkiv District Administrative Court from 2 September 2014 until 27 March 2015.

³³ Order of High Administrative Court of Ukraine “On amending Order of High Administrative Court of Ukraine “On Ensuring the Hearing of the Administrative Cases, Falling under Jurisdiction of Administrative Courts Located on the Area of Anti-Terrorist Operation”” of 1 December 2014, no. 252. The jurisdiction of Appellate Administrative Court of Donetsk was temporarily transferred to Appellate Administrative Court of Kharkiv from 2 September 2014 until 1 December 2014.

³⁴ Order of High Commercial Court of Ukraine “On Renewal of Operation of the Donetsk Regional Commercial Court” of 24 April 2015, no. 21-p. The jurisdiction of the Donetsk Regional Commercial Court was temporarily transferred to the Zaporizhzhia Regional Commercial Court until 27 April 2015.

³⁵ Order of High Commercial Court of Ukraine “On Renewal of Operation of the Luhansk Regional Commercial Court” of 2 April 2015, no. 18-p.

³⁶ Order of High Commercial Court of Ukraine “On Renewal of Operation of the Appellate Commercial Court of Donetsk” of 9 April 2015, no. 19-p. The jurisdiction of Appellate Commercial Court of Donetsk was temporarily transferred to Appellate Commercial Court of Kharkiv from 2 September 2014 until 14 April 2015.

³⁷ Order of High Specialized Court for Civil and Criminal Cases “On Renewal of Operation of Luhansk Regional Appeals Court” of 16 February 2015, no. 11/0/38-15”. The jurisdiction of Luhansk Regional Appeals Court was temporarily transferred to Kharkiv Regional Appeals Court for the period of 2 September 2014 until 17 February 2015.

³⁸ Order of the High Specialized Court of Ukraine for Civil and Criminal Cases “On Renewal of Operation of Donetsk Regional Appeals Court” of 21 May 2015, no. 33/0/38-15. Prior to relocation, the Donetsk Regional Appeals Court had offices in Donetsk city and in Mariupol. The office in Mariupol remains functional while the office in Donetsk city was relocated to Artemivsk. The jurisdiction of that part of the Donetsk Regional Appeals Court that was located in Donetsk city was temporarily transferred to Zaporizhzhia Regional Appeals Court until 26 May 2015.

³⁹ The High Specialized Court for Civil and Criminal Cases adopted a decision listing all of the courts of general jurisdiction which territorial jurisdiction had been transferred. See Order of the High Specialized Court for Civil

responsible for all first instance civil or criminal cases except administrative and commercial cases. For example, the Sloviansk City-District Court (Donetsk region) assumed the jurisdiction of three closed district courts from Horlivka city (Donetsk region).⁴⁰ While the jurisdiction of these 51 courts was ordered to be transferred by September 2014⁴¹, many courts had already been evacuated, or their staff had been forcibly removed, prior to this date⁴².

Prosecution offices were also relocated to government-controlled areas.⁴³ In contrast to courts, however, there do not appear to be any explicit orders governing the process by which prosecutor's offices were to be relocated. The Prosecutor General's Office informed the SMM that as the situation worsened the public prosecution offices of Donetsk region and Luhansk region were relocated to Mariupol and Sievierodonetsk respectively⁴⁴ and 34 district prosecution offices were relocated from non-government-controlled areas to Mariupol⁴⁵. The SMM was also informed that some prosecutors have had charges filed

and Criminal Cases "On Determination of Territorial Jurisdiction of Cases" of 2 September 2014, no. 2710/38-14.

⁴⁰ These courts are the Kalinivskyi District Court, Mykytivskyi District Court and Central District Court of Horlivka city (Donetsk region). See Order of the High Specialised Court for Civil and Criminal Matters of 2 September 2014 no. 2710/38-14.

⁴¹ See Order of High Specialized Court for Civil and Criminal Cases "On Determination of Territorial Jurisdiction of Cases" of 2 September 2014, no. 2710/38-14.

⁴² The SMM notes that in November 2014 the Government of Ukraine ordered to cease funding for all state institutions. See OSCE SMM thematic report "Findings on Formerly State-Financed Institutions in the Donetsk and Luhansk Regions" of 30 March 2015.

⁴³ The SMM observed that Military Public Prosecution Offices of Donetsk and Luhansk Garrisons of the Southern Region of Ukraine were also established in response to the conflict in accordance with Art.7(2), para 2 of the Law of Ukraine "On Public Prosecution" of 14 October 2014, no. 1697-VII, which stipulates that "in the event of exceptional circumstances if in certain administrative-territorial units Public Prosecution Offices are not operational [...] their functions shall be performed by Military Public Prosecution Offices if so decides General Prosecutor." The SMM notes, however, that these offices are not within the scope of this report.

⁴⁴ Information provided by Prosecutor General's Office to SMM, Letter of 3 June 2015, no. 14/1-222Вих-15. The letter provided by the Prosecutor General's Office provided statistics and information concerning the relocation of prosecution offices in Donetsk and Luhansk regions as well as in Crimea. The SMM notes that the letter is not publicly available but the content is used in this report. With respect to the relocation of prosecution offices, the Prosecutor General's Office reported that nearly all the property of 20 prosecution offices in the Donetsk region was destroyed including 27 buildings and 45 vehicles, with the office further reporting that 29 buildings and 22 vehicles were destroyed in the Luhansk region. The relocated Luhansk Regional Prosecutor's Office reported, for example, that in April 2014, separatists took control of its premises. Interview with relocated Luhansk Regional Prosecutor's Office, 17 June 2015.

⁴⁵ This information was provided on the official website of the relocated Donetsk Regional Prosecution Office and during an interview with this office on 27 May 2015. During this relocation, the SMM was informed that approximately half of the three hundred staff in the head office in Donetsk (out of 1200 total in the Region) moved to Mariupol from July through October 2014, with other staff relocating to offices throughout government-controlled areas in Donetsk. Interview with relocated Donetsk Regional Prosecutor's Office, 27 May 2015.

against them for remaining in non-government-controlled areas and working with parallel “justice systems”.⁴⁶

5.2. Access to Justice Challenges

5.2.1. Absence of Justice Services in Non-Government-Controlled Areas

The SMM has found that the actions taken by all sides have led to serious concerns over the lack of access for people to effective and transparent legal services in non-government-controlled areas. The seizure by armed groups, affiliated with “DPR” and “LPR”, of court and prosecution premises and confiscation of case files contributed, in part, to the inability of government services to operate in the region. The Government’s subsequent withdrawal of all legal services, including basic services such as notarisation of documents and issuance of birth and death certificates, has left “DPR” and “LPR” parallel “justice systems” as the only remaining “legal service providers”. These “systems”, however, do not co-operate or comply with Ukrainian legislation, remain underfunded and understaffed, are largely non-transparent and operate in an extremely difficult environment. The absence of any government services, combined with deficiencies in parallel “justice systems”, leads to the denial of basic rights of people residing in “DPR”- and “LPR”-controlled areas.

With no government services remaining in non-government-controlled areas, people can only access the Ukrainian justice system by travelling to government-controlled areas. Following this withdrawal, the Government passed additional legislative acts intended to address the situation in certain areas of Donetsk and Luhansk regions. These acts, however, have also impeded access to legal services for people residing in non-government-controlled areas.⁴⁷ For example, an order from the Ministry of Justice suspended access by notaries to the State Registries from non-government-controlled areas of the Luhansk and Donetsk regions, defined by the Ministry of Justice, until the end of the Anti-Terrorism Operation.⁴⁸ The provisions of the order stipulate that residents of areas not under government control

⁴⁶ The SMM was informed that 28 prosecutors are alleged to have committed the crime of treason based on allegations that they remain in areas not under government control and cooperate with “DPR”. Interview with Sloviansk District Prosecution Office (Donetsk region), 9 June 2015.

⁴⁷ The ECHR has affirmed certain obligations by a State party with respect to the recognition of basic legal rights such as births, deaths and marriages. *Loizidou v. Turkey*, Judgement, European Court of Human Rights, §45, no. 15318/89, 18 December 1996; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J., 21 June 1971.

⁴⁸ Order of the Ministry of Justice of Ukraine “On Urgent Measures to Protect the Rights of Citizens in the Anti-Terrorist Operation” of 17 June 2014, no. 953/5..

must use the services of notaries located in government-controlled areas but access to these services is often difficult for people in “DPR”- and “LPR”-controlled areas. Basic services are therefore inaccessible including issuing power of attorney, purchasing or selling real property interests, drafting wills, inheriting property and travel with minors across certain borders.⁴⁹ Further compounding these problems are reports that “DPR” have stored and sealed notary files and refused their transfer to Ukrainian authorities.⁵⁰ For example, a notary officer who relocated to Mariupol stated that less than ten percent of files in on-going matters were able to be taken when temporary access to an area in which files were left behind was provided. The notary stated that “DPR” authorities will not allow the remainder of the files to be removed. Files left behind included inheritance-related files preventing individuals from establishing their rights to an inheritance certificate.⁵¹

Similarly, in light of the absence of all government agencies in non-controlled areas, it is impossible to obtain birth certificates and death certificates.⁵² People are required to be physically present to obtain such a birth certificate in government-controlled areas⁵³ and, as documents issued by the “DPR” and “LPR” are not recognised by Ukrainian authorities, this trip must be undertaken if parents wish to travel with their children abroad, or apply for social assistance, both of which requires a birth certificate⁵⁴. Similarly, without death certificates, relatives cannot inherit property of the deceased.⁵⁵ A representative of the Starobilsk District Ministry of Justice Department cited a case of a child born in Krasnodon who was issued a birth certificate by the “LPR”, but this certificate was not recognised by Ukrainian authorities and the family was required to travel to a government-controlled area to order another birth certificate.⁵⁶

In the absence of government services, parallel “justice systems” established by “DPR” and “LPR” represent the only “justice providers” operating in the region. These “systems”, however, remain largely non-operational, face serious constraints and raise considerable access to justice concerns particularly with respect to due process and fair trial rights.

⁴⁹ See Order of the Ministry of Justice of Ukraine “On Procedure for Providing Notary Services by Ukrainian Notaries” of 22 February 2012, no. 296/5.

⁵⁰ Interview with Novoazovsk State Notary Office (Donetsk region), 4 June 2015.

⁵¹ Interview with Novoazovsk State Notary Office (Donetsk region), 4 June 2015.

⁵² In order to obtain a death certificate an individual must normally submit a medical certificate of death within three days to the Ministry of Justice of Ukraine. Otherwise the fact of death must be established by means of judicial procedures. See Order of the Ministry of Justice of Ukraine “On Approval of Regulations on State Registration of Civil Status Acts in Ukraine” of 18 October 2000, no. 52/5.

⁵³ Interview with Starobilsk District Ministry of Justice Department (Luhansk region), 19 June 2015; Interview with relocated Donetsk Regional Ministry of Justice Department (Donetsk region), 27 May 2015.

⁵⁴ Interview with Starobilsk District Ministry of Justice Department (Luhansk region), 19 June 2015. On 9 August 2015, the SMM met with civilians in Luhansk region confirming this issue and reiterating the high cost and travel time to reach government-controlled areas.

⁵⁵ Order of the Ministry of Justice of Ukraine “On Procedure for Providing Notary Services by Ukrainian Notaries” of 22 February 2012, no. 296/5, Chapter 10 (2).

⁵⁶ Interview with Starobilsk District Ministry of Justice Department (Luhansk region), 19 June 2015.

With respect to the “LPR” parallel “justice system”, as of July 2015, members of the “LPR” “Prosecutor’s Office” informed the SMM that no “courts” operated in the area, with an expectation that they may start in the fall of 2015⁵⁷, but that “prosecutors” carry out limited competencies.⁵⁸ The SMM has also received inconsistent statements concerning the applicable law: members of the “Public Security Service” informed the SMM that they use the USSR Criminal Code of 1964; the “Prosecutor’s Office” informed the SMM on 21 July 2015 that Ukrainian legislation is applied in criminal proceedings; “LPR” members, however, on 15 July 2015 referred to the introduction of “legislation” such as the “Law on Prosecution Office” of 30 June 2014 and the “Code of Criminal Procedure” which was projected to be applied from August or September 2015. The “People’s Council” further announced on 8 September 2015 the adoption of the “Civil Code”. In addition to the complicated legal framework, interlocutors from “LPR” have stated that they face challenges in recruiting professionals including judges, prosecutors and support staff, further compounding the challenges involved in establishing an entirely new justice system. Shortages include recruitment of “judges” as many “candidates” have moved to government-controlled territory.⁵⁹

In contrast to the “LPR” “justice system”, “representatives” of the “DPR” “Justice Department” and “Prosecutor’s Office” have asserted their “justice system” has become operational. The SMM, however, has not been able to directly monitor the extent to which this “system” has been implemented and observes that statements concerning the creation of this parallel “justice system” suggest that this system, which intends to function as a legal system serving millions of individuals, was formed in a short period without transparency and in an ad hoc manner.

According to interlocutors, “DPR” “courts” include a “supreme court”, “city” and “district” “courts” and “specialized” “courts” including “arbitration courts” and “military courts”.⁶⁰ On 20 May 2015, a “General Prosecutor” stated that the “judicial system” is in the process of being established with “courts” operational in Horlivka, Makiivka, Starobesheve, Amrosiivka, Khartsyzk, Shakhtarsk, Yenakieve, Novoazovsk, Telmanove, Dokuchaevsk and Yasinuvata. In addition to “first instance courts”, SMM was informed that there is a single “court of appeal”, the “Supreme Court”, which was formed in 2014 by “Temporary Orders” of the “Council of Ministers”. “Courts” are currently processing new cases and cases which were taken from Ukrainian authorities.⁶¹ The “DPR” reported as of 14 July 2015 that over 20,000

⁵⁷ Interview with “LPR” “Antratsyt District Prosecution Office”, 10 July 2015. The SMM further spoke with a member of the “LPR” “General Prosecutor’s Office” who confirmed courts were non-operational at the time of the interview but that the “LPR” intended to open 20 courts in their region.

⁵⁸ Interview with “LPR” “Ministry of Justice” (Luhansk city), 17 March 2015; Interview with “LPR” “Antratsyt District Prosecution Office”, 10 July 2015.

⁵⁹ Interview with “LPR” “Ministry of Justice”, 17 March 2015.

⁶⁰ Interview with “DPR” “Supreme Court”, 14 July 2015.

⁶¹ Interview with “DPR” “General Prosecution Office”, 20 May 2015.

court cases and materials were processed or currently before “courts”, including criminal, civil and administrative cases⁶² and that 4,855 “court proceedings” had commenced against 5,673 people, with a total of 1,113 people kept in “custody”.⁶³

The SMM was informed that the “legislative framework” of the “DPR” is also in a state of constant change. The “General Prosecution Office” noted that Ukrainian laws are used in certain instances including in family, tax and private property “cases”.⁶⁴ New “legislation”, however, is being instituted on a regular basis, including a “Constitution”. “Legislation” is drafted in “People’s Councils” but, in urgent situations, the “DPR” “Cabinet of Ministers” can vote and promote new “laws”.⁶⁵ The “legislative framework” is complicated and includes references to Ukrainian criminal laws, the “Constitution of DPR”, the “Declaration of Independence of DPR” and the “Criminal Code” of 17 August 2014.⁶⁶ The “Decree of DPR Council of Ministers” “No. 9-1” of 2 June 2014, amended by “Decree” “No. 1-1” of 10 January 2015, allows laws of other states to be implemented so long as they do not conflict with the “highest acts” of the “DPR”.⁶⁷ There is no specific “Code of Procedure” and this area of the “law” is still governed by the Ukrainian Criminal Procedure Code of 1960.⁶⁸ The “DPR” has also referred to the establishment of a “law on legal aid” and a “DPR Lawyers Council” to provide legal aid services.

“DPR” members have also informed the SMM of the appointment of “judges” and “prosecutors”, the establishment of a provisional “ombudsperson office”, “penitentiary system” and other functions. Forty-six “judges” were reportedly inaugurated into the “legal system” in January 2015 in addition to those already working in the system in 2014.⁶⁹ Similar to the “LPR” “justice system”, however, interlocutors reported to the SMM that the “DPR” “justice system” also faces shortages in professional staff.⁷⁰

The SMM observes that the absence of effective and transparent judicial services, coupled with the removal and obstruction of services by the Government, raises serious access to justice concerns for people in “DPR”- and “LPR”-controlled areas. As the “DPR”- and “LPR”- “justice systems” are largely undeveloped and unable to provide many basic services to people in the region, flexible solutions must be adopted in order to ensure that basic legal

⁶² Interview with “DPR” “Supreme Court”, 14 July 2015 and information obtained from publicly available “DPR” websites.

⁶³ Interview with “DPR” “Supreme Court”, 14 July 2015. The SMM is unable to verify the basis for the alleged 1,113 individuals currently kept in custody.

⁶⁴ Interview with “DPR” “General Prosecution Office”, 20 May 2015.

⁶⁵ Interview with “DPR” “General Prosecution Office”, 20 May 2015.

⁶⁶ Interview with “DPR” “Supreme Court”, 14 July 2015.

⁶⁷ Interview with “DPR” “Supreme Court”, 14 July 2015.

⁶⁸ Criminal Procedure Code of Ukraine of 28 December 1960, no. 1001-05. The SMM notes that this Criminal Procedure Code is no longer effective as a matter of Ukrainian law, as it was replaced with a new Criminal Procedure Code of Ukraine of 13 April 2012, no. 4651-VI on 19 November 2012.

⁶⁹ Interview with “DPR” “General Prosecution Office”, 20 May 2015.

⁷⁰ Interview with “DPR” “General Prosecution Office”, 20 May 2015.

rights, including government benefits and property rights, are realized as guaranteed by the ECHR and the Constitution of Ukraine and as enumerated in Ukraine's international commitments.

5.2.2. Lost Case Files

One of the most significant effects of the sudden relocation of courts and prosecution offices was the loss of case files in ongoing and completed court proceedings. Case files were lost with the sudden departure, or forced removal, of staff from court and prosecution offices or the destruction of court and prosecution facilities by shelling.⁷¹ For example, the relocated Donetsk Administrative Appeals Court reported that gunmen took over the building, threw away case files, and staff were forced to rent a truck to transport whatever files they could find.⁷² Similarly, no case files were able to be transferred from the Yasynuvata City-District Court (Donetsk region) with some being destroyed or burnt.⁷³ The Luhansk Regional Prosecution Office was unable to take any case files, with only some personal files able to be taken after their building was taken over by irregular armed groups.⁷⁴ Often, courts and prosecution offices were required to prioritise which files to take given limited means.⁷⁵ Case materials from the Donetsk Regional Prosecution Office were unable to be transferred as the materials were looted or destroyed during the seizure

⁷¹ Numerous incidents were reported to this effect during interviews with courts and prosecution offices. Court premises were seized or taken over by armed persons, with incidents of court equipment and files destroyed, robbed or thrown into the streets. Interview with Donetsk Administrative Court of Appeal, 26 May 2015; Interview with Donetsk Commercial Court of Appeal, 8 July 2015. "LPR" members were reported to have forbidden the transfer of case files. Interview with Sievierodonetsk City Court, 16 June 2015; Interview with relocated Luhansk Regional Appeals Court, 12 June 2015. Additional reports suggested that attempts to transfer case files were prevented at checkpoints by armed persons who searched cars and persons for such files. Interview with Kramatorsk City Court (Donetsk region), 2 June 2015. Buildings were burned, looted and destroyed by shelling. Interview with Sloviansk City-District Court (Donetsk region), 9 June 2015; Interview with relocated Donetsk Regional Prosecution Office, 1 July 2015.

⁷² Interview with relocated Donetsk Administrative Appeals Court, 26 May 2015.

⁷³ Interview with Druzhkivka City Court (Donetsk region), 10 June 2015.

⁷⁴ Interview with relocated Luhansk Regional Prosecutor's Office, 17 June 2015.

⁷⁵ Interview with Artemivsk District Prosecution Office (Donetsk region), 24 June 2015. Similarly, Rubizhne City Court reported that no case files were transferred from Pervomaisk and it appears that all of them were most likely destroyed during the shelling of the city. Interview with Rubizhne City Court (Luhansk region), 8 June 2015.

of the building by armed groups.⁷⁶ Where files remained in former premises, staff reported that they are often prevented from removing files in “LPR”- and “DPR”-controlled areas.⁷⁷

The loss of these case files has a direct impact on people’s ability to ensure their legal claims are adjudicated. Courts and prosecution offices attempt to restore case files where possible, but where a case file cannot be restored by the court, the proceedings in civil cases are often terminated and parties are required to resubmit their claims. Where parties cannot locate the original case materials or documents, it may be impossible for them to bring any claim to court. For example, the Head of the Lysychansk City Court (Luhansk region) stated that where an individual does not have the documents necessary to file or continue a civil case, and is unable to travel to “LPR”-controlled areas to retrieve them, they have no recourse to pursue the case.⁷⁸ Moreover, as criminal trials require evidence of a non-documentary nature, e.g. witnesses and physical evidence, these have proven particularly difficult to restore and may have significant implications for detained people. The Head of the Lysychansk City Court (Luhansk region) stated in this regard that the inability to visit crimes scenes, collect evidence and to contact and interview witnesses meant that they were unable to restore thirteen out of fourteen case files that were transferred.⁷⁹

5.2.3. Freedom of Movement and Notice of Proceedings

Civilians face significant challenges in accessing court and prosecution services due to freedom of movement constraints. Relocated institutions are often located far from the area in which they exercise jurisdiction, forcing interested parties to travel long distances from “DPR”- and “LPR”-controlled areas to government-controlled areas. During these trips people are subject to lengthy delays at checkpoints, further exposing them to active hostilities,⁸⁰ as well as increased costs of travel⁸¹. For example, from January through June 2015, the Starobilsk District Ministry of Justice Department reported a significant decrease in visits, noting that only one person had come from “DPR”- and “LPR”-controlled areas to

⁷⁶ Interview with Department for Protection on the Rights and Freedoms of Children, relocated Donetsk Regional Prosecution Office, 1 July 2015.

⁷⁷ The relocated Luhansk Regional Appeals Court reported that an irregular armed group refused to allow the removal and transfer of case files from the original location. Interview with relocated Luhansk Regional Appeals Court, 12 June 2015.

⁷⁸ Interview with Head of Lysychansk City Court (Luhansk region), 29 May 2015.

⁷⁹ Interview with Head of Lysychansk City Court (Luhansk region), 29 May 2015.

⁸⁰ The SMM continues to monitor freedom of movement across the contact line. Challenges for civilians include significant delays and exposure to hostilities, as well as difficulties in accessing essential goods and services. See OSCE SMM Thematic Report “Protection of Civilians and their Freedom of Movement in the Donetsk and Luhansk Regions” of 13 May 2015.

⁸¹ Interview with Kramatorsk City Court (Donetsk region), 2 June 2015.

obtain a duplicate property certificate.⁸² Moreover, the Donetsk Administrative Appeals Court reported that the Ukrainian legal system does not allow files to be sent electronically, so people are forced to personally deliver their documents, requiring potentially lengthy travel to file a case.⁸³ Courts attempt to overcome these issues by being flexible in their scheduling, preferring afternoon sessions to provide more time to travel⁸⁴, updating websites in order for people to obtain information online rather than travel to the court where possible⁸⁵ and communicating via Skype or email⁸⁶. Courts have also instituted the possibility of filing claims on the court's website or through telephone communications in order to overcome some of these issues⁸⁷ although these solutions cannot be adopted with respect to criminal matters⁸⁸.

Individuals located in non-government-controlled areas also experience challenges in receiving notice of pending cases as the postal service does not work in these areas. As a result, some courts reported that they can only provide notice through government newspapers which may not reach the intended recipients in areas not under government control.⁸⁹ Courts are attempting to overcome these issues with, for example, the Kreminna District Court (Luhansk region), posting a schedule of hearings on its website in order to ensure that people from non-government-controlled areas are notified.⁹⁰

Despite these challenges, new cases continue to be brought from non-government-controlled areas. For example, the Sloviansk City-District Court (Donetsk region) reported that between September 2014 and June 2015, 1,041 cases, including 962 civil, 37 criminal, and 11 administrative cases⁹¹ were brought by people from non-government-controlled areas with 813 final judgments issued in these cases.⁹² Courts reported that civil, administrative and commercial cases included: debt cases⁹³, bank loans⁹⁴, wage and salary

⁸² Interview with Starobilsk District Ministry of Justice Department (Luhansk region), 19 June 2015.

⁸³ Interview with Donetsk Administrative Appeals Court, 26 May 2015.

⁸⁴ For example, the Donetsk District Administrative Court informed the SMM on 23 May 2015 that those travelling to the court in Sloviansk from Mariupol experienced significant travel times. Other courts reported similar challenges.

⁸⁵ *See for example* Alchevsk City Court (Luhansk region) [e-access: <http://alm.lg.court.gov.ua/sud1201/>], Yenakieve City Court (Donetsk region) [e-access: <http://enm.dn.court.gov.ua/sud0517/>].

⁸⁶ Interview with Troitske District Court (Luhansk region), 10 July 2015.

⁸⁷ Interview with relocated Luhansk Regional Appeals Court, 12 June 2015.

⁸⁸ Interview with Starobilsk District Court (Luhansk region), 11 June 2015.

⁸⁹ Artemivsk City-District Court (Donetsk region) informed the SMM that it publishes announcements in the "Uriadovyi Kurier" newspaper. Interview with Artemivsk City-District Court (Donetsk region), 17 May 2015.

⁹⁰ Interview with Kreminna District Court (Luhansk region), 17 July 2015. Numerous interlocutors from various courts reported similar measures to the SMM.

⁹¹ SMM notes that the additional cases not disaggregated out of the 1,041 total cases had not been specifically referenced by the interlocutor.

⁹² Interview with Sloviansk City-District Court (Donetsk region), 9 June 2015.

⁹³ Interview with relocated Donetsk Regional Ministry of Justice Department, 27 May 2015.

complaints, divorce and alimony proceedings, pensions, taxes, custody proceedings⁹⁵ and re-registration of enterprises including coalmines⁹⁶. With respect to administrative cases, for example, courts reported that many cases continued to be filed as enterprises registered in Ukraine, but operating on both sides of the contact line, pay taxes in Ukrainian territory.⁹⁷ With respect to commercial cases, bankruptcy cases were reported as particularly problematic due to issues related to liquidation of enterprises located on non-government-controlled territory.⁹⁸ Criminal cases under investigation relating to “DPR”- and “LPR”-controlled areas include terrorism and separatism charges, alcohol-related offences, illegal use of weapons⁹⁹, thefts, murder and illegal occupation of private houses¹⁰⁰. Prosecution offices further reported allegations presented to their offices of enforced disappearances near the contact line, often related to ransom¹⁰¹, including cases involving people acting as intermediaries in prisoner exchanges, people contacting relatives of dead ATO participants offering to retrieve their bodies from the ATO zone for money and reports of kidnappings for ransom in non-government-controlled areas¹⁰². Finally, notary offices have primarily dealt with inheritance, title and property registration or re-registration cases.¹⁰³

5.2.4. Absence of Legal Aid in Non-Government-Controlled Areas

Civilians in “DPR”- and “LPR”-controlled areas face challenges in accessing Ukrainian legal aid services following the relocation of legal aid offices from non-government-controlled areas. For example, the government-funded Luhansk Regional Centre for Free Secondary Legal Aid was relocated to Milove in August 2014 with case files left behind.¹⁰⁴ While prior

⁹⁴ The Artemivsk City-District Court (Donetsk region) reported 500 new cases brought from areas not under government control with the majority related to bank loans. Interview with Artemivsk City-District Court (Donetsk region), 17 May 2015.

⁹⁵ Interview with Dzerzhynsk City Court (Donetsk region), 8 July 2015.

⁹⁶ Interview with Starobilsk District Court (Luhansk region), 11 June 2015.

⁹⁷ Interview with relocated Donetsk District Administrative Court, 23 May 2015. Dzerzhynsk City Court (Donetsk region) reported that from June 2014 through May 2015 the court had received 615 cases concerning violation of border control procedures. Most cases were dismissed by the court due to the particular circumstances involved in crossing the border in light of the conflict. Interview with Bilovodsk District Court (Luhansk region), 8 June 2015.

⁹⁸ Interview with relocated Luhansk Regional Commercial Court, 8 June 2015; Interview with relocated Donetsk Commercial Appeals Court, 8 July 2015.

⁹⁹ Interview with Starobilsk District Court (Luhansk region), 11 June 2015.

¹⁰⁰ Interview with Artemivsk District Prosecution Office (Luhansk region), 24 June 2015.

¹⁰¹ Interview with Mariupol City Prosecution Office (Donetsk region), 26 June 2015.

¹⁰² Interview with relocated Donetsk Regional Prosecution Office, 22 April 2015.

¹⁰³ Interview with Novoazovsk State Notary Office (Donetsk region), 4 June 2015.

¹⁰⁴ Interview with relocated Luhansk Regional Centre for Free Secondary Legal Aid, 25 June 2015.

to the conflict 100 private attorneys collaborated with the centre, only 24 attorneys remain affiliated with the office since its relocation.¹⁰⁵ The government-funded Donetsk Regional Public Legal Aid Service noted that its primary challenge as a result of this relocation was addressing criminal cases in which case files were not restored but the person has remained in detention.¹⁰⁶ Additional challenges are similar to those affecting courts and prosecution offices, and include difficulty in travelling across the contact line to reach these offices. Due to these impediments, the SMM was informed that individuals located in “DPR”- and “LPR”-controlled areas are generally not using, or do not have access to, legal aid services.¹⁰⁷ Moreover, legal aid providers are unable to provide services in non-government-controlled areas. In Mariupol city, for example, legal aid lawyers reported that while they are invited to provide legal aid in “DPR”-controlled areas, they do not feel safe travelling to these areas for fear of personal security and that legal aid, as a result, is limited to government-controlled areas.¹⁰⁸

Interlocutors have reported some positive developments with respect to access to legal aid providers located in government-controlled areas. Two new legal aid offices are scheduled to open in Luhansk region in 2015 focusing on socially vulnerable categories of people including IDPs, war veterans, de-mobilised soldiers and minors.¹⁰⁹ Other legal aid providers have also adapted to the relocation and lack of access to “DPR”- and “LPR”-controlled areas with the Novoaidar and Sievierodonetsk District Ministry of Justice Departments establishing primary legal aid hotline services intended to allow people residing in “DPR”- and “LPR”-controlled areas to request assistance.¹¹⁰

5.3. Administration of Justice Challenges

In addition to the direct access to justice considerations outlined in the previous section of this report, the process of relocation and the ongoing conflict have impaired courts’ ability to adjudicate cases. This is due to resource constraints, enforcement challenges, lack of

¹⁰⁵ Interview with relocated Luhansk Regional Centre for Free Secondary Legal Aid, 25 June 2015.

¹⁰⁶ Interview with Donetsk Regional Public Legal Aid Service, 25 May 2015.

¹⁰⁷ Interview with Donetsk Regional Collegium of Attorneys, 27 May 2015; Krasnoarmiisk City-District Court (Donetsk region), 24 June 2015. The SMM observes that this issue is also affected by the fact that people in non-government controlled areas are not accessible to law enforcement or court services, and therefore criminal cases brought against them are rarely processed.

¹⁰⁸ Interview with Donetsk Regional Public Legal Aid Service (located in Mariupol), 25 May 2015. The service stated that approximately 90% of legal aid attorneys are unwilling to travel to “DPR”-controlled areas.

¹⁰⁹ Interview with Luhansk Regional Centre for Free Secondary Legal Aid, 25 June 2015.

¹¹⁰ Interview with Novoaidar and Sievierodonetsk District Ministry of Justice Departments (Luhansk region), 10 June 2015.

clear guidelines to restore case files and a failure to develop adequate emergency action plans.

5.3.1. Resource Constraints

Relocated courts and prosecution offices, as well as courts which have assumed new jurisdictional responsibilities, suffer from resource constraints and other operational impediments including staffing shortages, limited equipment and difficult working conditions. In spite of this, judges, prosecutors and staff work to the best of their abilities and often go above and beyond their obligations. Many courts reported shortages of basic resources, including computers with, for example, the head of a court interviewed by the SMM stating the need to take out a USD 3,000 private loan to assist in relocating the court.¹¹¹ Many court and prosecution offices also await renovation or construction or have requested additional funds for new premises.¹¹² For example, the relocated Luhansk Regional Appeals Court stated that the court planned to move to the ground floor of a refurbished school building and that when additional funds become available additional floors of the building will be rehabilitated.¹¹³ The relocated Luhansk Regional Commercial Court, relocated Donetsk Regional Commercial Court and relocated Donetsk Commercial Appeals Court also noted specific logistical challenges including: the capacity of State Court Administration to finance relocation of court staff; lengthy bureaucratic processes to acquire new premises; a lack of financial support; and an insufficient budget for renovation.¹¹⁴ The Prosecutor General's Office also reported a significant need of equipment in their offices in light of relocation.¹¹⁵

The SMM also received reports that judges, prosecutors and, in particular, support staff were often unable, or unwilling, to relocate, leading to reduced staff numbers. For example, the relocated Luhansk Regional Commercial Court reported that while 37 Judges relocated,

¹¹¹ Most offices reported significant resource constraints and financial challenges. Common requirements included the need for more computers, printers, staff and office space.

¹¹² An office in Artemivsk is currently under construction intended for civil and criminal chambers of the relocated Donetsk Regional Appeals Court, with plans to relocate the criminal chamber to Artemivsk City-District Court (Donetsk region). Interview with relocated Donetsk Regional Appeals Court, 08 July 2015.

¹¹³ Interview with relocated Luhansk Regional Appeals Court, 12 June 2015.

¹¹⁴ Interviews with relocated Luhansk and Donetsk Regional Commercial Courts on 8 June 2015, 8 July 2015 and 20 July 2015.

¹¹⁵ Courts and prosecution offices stated that the type of equipment needed includes: computers, monitors, printers, flash drives, and other technology necessary to conduct investigations and trials. Courts and prosecution offices further reported inadequate office space. Finally, while not directly requested, based on the findings contained in this report, the SMM has determined that courts and prosecution offices would benefit from additional assistance in creating emergency action plans and developing stronger electronic databases.

four remained in Luhansk with two approaching retirement age, one quitting of their own volition, and another staying due to family circumstances.¹¹⁶ While 42 of 45 Judges were able to relocate with the relocated Donetsk Regional Commercial Court, only 40 out of 120 support staff moved with the court.¹¹⁷ 14 judges from the Luhansk Regional Appeals Court resigned and refused to relocate with the court¹¹⁸ while seven declined to move to the relocated Donetsk Regional Appeals Court¹¹⁹. Many relocated staff members live far from their families, who remain in “DPR”- and “LPR”-controlled areas, and often have to pay for a second apartment in the area to which they were relocated.¹²⁰ Some prosecutors and judges also refused to relocate to government-controlled areas.¹²¹ Additional logistical problems include reports of requirements for some judges transferred from “LPR” areas to await official re-appointment to the court to which they were re-appointed.¹²² Finally, courts have reported problems in ensuring that people detained in government-controlled areas are able to attend criminal trials leading to delays in court hearings. For example, the Starobilsk Detention Centre was reported as the only available place of detention in government-controlled areas in the Luhansk region. Courts in Luhansk region far from this detention centre face challenges in bringing people for testimony or to attend hearings, forcing the court to hold video conferences or requesting transfer of venue by the relocated Luhansk Regional Appeals Court to another district court.¹²³

5.3.2. Restoration of Case Files

The effect of the loss of case files, as outlined in Section 5.2.2 of this report, is compounded by challenges that courts and prosecution offices face in restoring these files. These include a lack of clear instructions, the loss or lack of access to evidence, difficulty in accessing witnesses, long travel times in the region, the inability to provide notice to parties or witnesses, inability to gain access to crime scenes, the complete lack of communication with people in “DPR”- and “LPR”-controlled areas and a lack of co-operation between defence attorneys and prosecutors.¹²⁴ The inaccessibility of non-government-controlled areas and

¹¹⁶ Interview with relocated Luhansk Commercial Court, 8 June 2015.

¹¹⁷ Interview with relocated Donetsk Commercial Court, 8 July 2015 and 20 July 2015.

¹¹⁸ Interview with relocated Luhansk Regional Appeals Court, 12 June 2015.

¹¹⁹ Interview with relocated Donetsk Regional Appeals Court, 8 July 2015.

¹²⁰ Interview with Kostiantynivka City-District Court (Donetsk region), 6 July 2015. Interview with relocated Donetsk Regional Appeals Court, 8 July 2015.

¹²¹ Some judges were reported to have remained in order to take care of sick relatives or ensure their property was safe. Interview with Svatove District Court (Luhansk region), 12 June 2015.

¹²² Interview with Lysychansk City Court (Luhansk region), 29 May 2015.

¹²³ Interview with Popasna District Court (Luhansk region), 13 July 2015.

¹²⁴ The lack of cooperation was pointed out by many parties including representatives of a collegium of attorneys in Donetsk on 27 May 2015.

the difficulty in travelling across the contact line is a particular problem in gathering evidence, accessing files left behind and serving notice to parties in court proceedings. Accordingly, courts have been forced to adapt a flexible approach to restoring case files. Such accommodations include allowing for documentary evidence rather than live testimony in order to limit people's travel to the court.¹²⁵ Despite these efforts, many case files are impossible to restore because the necessary evidence, including documents or witness testimony, remains in non-government-controlled areas.¹²⁶

The success rate for restoring cases is often dependent on the type of case. Because documentary evidence was easier to transfer than live testimony or physical evidence, courts reported that civil and administrative cases, which are far more reliant on documentary evidence, have proven easier to restore.¹²⁷ For example, the relocated Donetsk District Administrative Court reported that while many case files were lost during the occupation of the courthouse by armed people, most case files have been restored in first instance administrative cases through the participation of the parties.¹²⁸ Electronic registries of cases were also kept, and although they often only include basic details of a case¹²⁹, some civil case files have been restored based on the information stored in these registries¹³⁰. Criminal cases, however, have proven more difficult to restore as witness testimony before a court and material evidence is often required which raises serious fair trial rights considerations as evidence may not be available or detained people may face suspended trials. For example, the Rubizhne City Court (Luhansk region) stated that due to lack of evidence, including witnesses and documentation, detainees would likely have to be released.¹³¹ Similarly, the Kostiantynivka City-District Court (Donetsk region) has been able to continue criminal cases which were successfully transferred but was forced to suspend cases for individuals who are detained in Donetsk as no information can be acquired.¹³² The Sloviansk District Prosecution Office informed the SMM that it has been able to restore approximately six cases per week with a priority on cases related to the most serious crimes such as murder and rape.¹³³

¹²⁵ Interview with Kramatorsk City Court (Donetsk region), 2 June 2015.

¹²⁶ The Artemivsk District Prosecution Office, for example, noted that most case files in criminal cases are difficult to restore as the office is unable to obtain the relevant evidence. Interview with Artemivsk District Prosecution Office (Donetsk region), 24 June 2015.

¹²⁷ The SMM was consistently informed of this fact by courts, prosecution offices and representatives of the Donetsk Regional Collegium of Attorneys.

¹²⁸ Interview with relocated Donetsk District Administrative Court, 23 May 2015. The relocated Luhansk District Administrative Court reported a similar situation with nearly all files being restored. Interview with Luhansk District Administrative Court, 12 June 2015.

¹²⁹ Interview with Druzhkivka District Court (Donetsk region), 10 June 2015.

¹³⁰ Interview with Markivka District Court (Luhansk region), 21 July 2015.

¹³¹ Interview with Rubizhne City Court (Luhansk region), 8 June 2015.

¹³² Interview with Kostiantynivka City-District Court (Donetsk region), 6 July 2015.

¹³³ Interview with Sloviansk District Prosecution Office (Donetsk region), 9 June 2015.

A lack of clear and explicit guidelines from central authorities has further limited the ability of courts and prosecution offices to restore case files. The Law on Administration of Justice provides that where a case file cannot be transferred, then trial proceedings “shall be processed based on documents submitted by parties”. This provision is vague and does not provide clear instructions to courts.¹³⁴ Accordingly, courts and prosecution offices have been forced to take an ad hoc approach to restoring these files. In civil, administrative and commercial cases, the SMM has found that the majority of courts required that where it was impossible to transfer a case file, parties are required submit a request for restoration of the file. Where a case file cannot be restored in a civil, administrative or commercial case, courts have often terminated proceedings and required resubmission of the original claim.¹³⁵ In particular, many courts reported that case files in civil cases would only be restored automatically where there was an “enacted judicial decision” and that in all other cases the parties would be required to file their case again.¹³⁶ The Kramatorsk City Court (Donetsk region) informed the SMM that parties are obligated to refile a claim in civil matters unless a judicial decision was made in a given case.¹³⁷ Other interlocutors reported similar circumstances.¹³⁸

While courts have been able to formulate some ad hoc strategies to allow restoration of non-criminal cases, criminal cases have proven far more difficult to restore. The SMM observes that the Criminal Procedure Code requires that if “collected materials are insufficient to accurately restore records of lost criminal proceedings, the court, by its ruling, closes proceedings... and advises the participants in court proceedings to re-file the same application when necessary documents are available”.¹³⁹ A Draft Law has also been registered at the Verkhovna Rada intended to allow for partial restoration of criminal case files.¹⁴⁰ The Prosecutor General’s Office noted to the SMM that while there is no access to

¹³⁴ Interview with Artemivsk District Prosecution Office (Donetsk region), 24 June 2015, referencing to the Law of Ukraine “On Administration of Justice and Criminal Proceedings in Connection with Anti-Terrorism Operation” of 12 August 2014, no. 1632-VII.

¹³⁵ For example, the High Commercial Court and High Administrative Court issued specific regulations requiring that upon submission by written application of a party, a court shall order restoration of a lost case file. The court should rely upon: 1) preserved part of the case file; 2) documents and copies of documents submitted by parties; 3) final judgments in enforcement process; and 4) retrieved data from the Unified State Registry of Judicial Decisions and the Automatic System of Court Workflow. See Informative Letter of the High Commercial Court of Ukraine “On Certain Issues of Applying the Law of Ukraine “On Ensuring Rights and Freedoms and Legal Status of the Temporary Occupied Territory of Ukraine” (addressed to the commercial courts) of 5 June 2014, no. 01-06/745/2014; Resolution of Plenum of High Commercial Court of Ukraine “On Certain Issues of the Practice of Application of the Commercial Procedural Code of Ukraine by the First Instance Courts” of 26 December 2011, no. 18.

¹³⁶ Interview with Kramatorsk City Court (Donetsk region), 2 June 2015.

¹³⁷ Interview with Kramatorsk City Court (Donetsk region), 2 June 2015.

¹³⁸ Interview with relocated Donetsk Regional Appeals Court (Mariupol Office), 27 May 2015.

¹³⁹ Art. 531(3), Criminal Procedure Code of Ukraine of 13 April 2012, no. 4651-VI.

¹⁴⁰ See Draft Law of Ukraine “On Amending Certain Legislative Acts of Ukraine to Strengthen Protection of Human Rights in Criminal Justice” of 21 May 2015, no. 2930.

criminal proceedings in areas no longer under government-control, “all possible measures have been put in place to reinstate lost criminal proceedings through obtaining information from the General Log for pre-trial investigations, getting copies of experts’ conclusions, written responses from the law enforcement bodies and supervisory bodies, and subject to feasibility, repeat interrogation of people and other investigative actions”.¹⁴¹ Further, as of June 2015, the Prosecutor General’s Office stated that there were approximately 57,000 criminal proceedings from the Ministry of Internal Affairs, 164 tax police cases and 64 cases from the Security Service of Ukraine pending on “DPR”- and “LPR”-controlled areas.

5.3.3. Absence of Emergency Action Plans

While many of the circumstances which led to the loss of case files and immediate evacuation of facilities could not have been planned for, the absence of Emergency Actions Plans (EAPs) contributed to the inability to transfer and remove case files. An EAP may be defined in various ways, and include different components, but should at a minimum protect staff and where possible essential court materials during an emergency, including ensuring that case materials are electronically stored or copied so that they may be retained even where they are damaged, destroyed or taken by third parties. One component of such a plan, for example, is the creation of electronic backups of court documents and files. While the Government passed legislation requiring that case files in pending matters before designated courts should be transferred¹⁴², this legislation was largely ineffective, in particular for courts which had already been evacuated or had been taken over by illegal armed groups. In this regard, courts noted that the legislation requiring the transfer of case files was passed after many courts had already been evacuated. Additional legislation was subsequently passed to address these issues¹⁴³, but this legislation only provides procedural responsibilities within the court system without setting out specific instructions or best practices on how to create and implement an effective EAP¹⁴⁴.

The SMM found during its monitoring activities that there is still an absence of EAPs in some courts and prosecution offices in government-controlled areas of Donetsk and Luhansk

¹⁴¹ Information provided by Prosecutor’s General’s Office to SMM, Letter of 3 June 2015, no. 14/1-222 вих-15.

¹⁴² Art. 1, 2, Law of Ukraine “On Administration of Justice and Criminal Proceedings in connection with Anti-Terrorism operation” of 12 August 2014, no. 1632-VII.

¹⁴³ Decree of the State Court Administration of Ukraine “On Organisational Matters on Implementation of Provisions of the Law of Ukraine “On Administration of Justice and Criminal Proceedings in connection with the Anti-Terrorism Operation” of 22 September 2014, no. 124.

¹⁴⁴ Decree of the State Court Administration of Ukraine “On Organisational Matters on Implementation of Provisions of the Law of Ukraine ‘On Administration of Justice and Criminal Proceedings in Connection with the Anti-Terrorism Operation’” of 22 September 2014, no. 124, for example, requires heads of a court in ATO to order relocation if necessary and for such orders to be sent to the State Court Administration.

regions. Courts did report positive developments, including the Druzhkivka City Court (Donetsk region) which stated that the Supreme Court had provided certain recommendations including keeping personal employment record books at the place of residence of court employees.¹⁴⁵ The Artemivsk City-District Court (Donetsk region) stated that it had an EAP in place to evacuate staff and most important judicial files which was developed in co-ordination with the local administration including the possibility of supplying of transport vehicles to the Court if necessary in light of an emergency.¹⁴⁶ Courts have also reported that new cases are being scanned and stored in an electronic data base.¹⁴⁷ Other courts, however, have reported inadequate EAPs with, for example, four of the 11 district courts visited by the SMM in Kramatorsk having no EAP in place at all.¹⁴⁸ Courts also reported that in the absence of instructions on how to create an EAP, they have relied on staff with experience in relocation and the transfer of court materials during an evacuation.¹⁴⁹

EAPs remain critical as courts continue to report actual or potential threats which would require evacuation from their premises. For example, the Popasna District Court (Luhansk region) was forced to evacuate in July 2014 and again in February 2015 due to proximity to conflict-affected areas and intensity of shelling.¹⁵⁰ Interlocutors further reported in June 2015 that 321 pending case materials were evacuated from the Stanytsia-Luhanska District Court (Luhansk region) due to frequent shelling in the area.¹⁵¹ During the evacuation, case and personal files of court employees, electronic databases, as well as furniture and equipment, were transported in heavy trucks and cars to the Novopskov District Court (Luhansk region) with approximately half of the case files left in the building in Stanytsia-Luhanska.¹⁵²

Finally, courts have reported that volunteer battalions in the region have attempted to influence the work of courts, particularly in terrorism and separatism related cases. In one instance, an interlocutor reported that individuals presented themselves at the court with balaclavas and guns and surrounded the court, with the situation calming following meetings with government representatives.¹⁵³ This threat is not an isolated incident and the

¹⁴⁵ Interview with Druzhkivka City Court (Donetsk region), 10 June 2015.

¹⁴⁶ Interview with Artemivsk City-District Court (Donetsk region), 17 May 2015.

¹⁴⁷ Interview with Rubizhne City Court (Luhansk region), 8 June 2015.

¹⁴⁸ Some courts reported that a plan was in place, but could not provide specific details. Other courts stated they understood the importance of such plans, but had not taken any measures to implement them at the time of the interview. The Kramatorsk City Court (Donetsk region) stated, during an interview on 2 June 2015, that it believed it was an important issue which the Supreme Court of Ukraine would likely rule on in the near future.

¹⁴⁹ Interview with Starobilsk District Court (Luhansk region), 11 June 2015.

¹⁵⁰ Interview with Popasna District Court (Luhansk region), 13 July 2015.

¹⁵¹ Interview with Novopskov District Court (Luhansk region), 11 June 2015.

¹⁵² Interview with Head of Territorial State Court Administration Office (Luhansk region), 1 July 2015.

¹⁵³ Interview with Starobilsk District Court (Luhansk region), 11 June 2015.

presence of voluntary battalion members may increase tensions during proceedings involving members of the respective groups.¹⁵⁴

5.3.4. Inability to Enforce Judgements

The inability to enforce court decisions issued by Ukrainian courts in non-government-controlled areas in light of the absence of state enforcement services is an additional, and fundamental, challenge faced by the Ukrainian justice system. This lack of enforcement has an effect on nearly all proceedings, as courts are unable to summon witnesses, leading to significant delays in many trials.¹⁵⁵ Even where courts overcome this issue, and where a final judgement is reached, enforcement is often impossible if the person or property is situated in non-government-controlled areas as courts reported that there often is no possibility of enforcement. Exceptions exist, with, for example, the relocated Donetsk Regional Ministry of Justice Department in Kramatorsk (Donetsk region) reporting approximately 100 instances in which people came from non-government-controlled areas to voluntarily pay their debt.¹⁵⁶ This solution is, however, entirely dependent on the good will of individual people. The inability for all parties to find a solution to the issue of enforcement directly limits the ability of individuals to access effective remedies.

Lack of enforcement mechanisms often directly impairs the adjudication of civil and criminal cases. Resolving criminal cases is often not possible, as law enforcement officers are unable to arrest accused people and courts are unable to compel witnesses who are located on “DPR”- and “LPR”-controlled areas to testify. Following a final judgment in civil cases, courts often cannot enforce the decision against enterprises and institutions which have not registered in government-controlled areas, with unpaid wage cases a specific problem in this regard.¹⁵⁷ Land tenure and inheritance disputes are also problematic with the relocation process leading to incomplete land registration databases, as are alimony cases where an individual responsible for payment resides in non-government-controlled areas.¹⁵⁸ Debt and finance-related cases were reported as acutely problematic, with courts reporting that companies in non-government-controlled areas often respond to requests from courts that they are not subject to the jurisdiction of the court. For example, the Druzhkivka City Court (Donetsk region) reported that companies in some instances respond to the court that they are “part of [‘DPR’], therefore there is no liability or responsibility in Ukrainian territory”.¹⁵⁹

¹⁵⁴ Interview with Sievierodonetsk City Court (Luhansk region), 16 June 2015.

¹⁵⁵ Interview with Dzerzhynsk City Court (Donetsk region), 8 July 2015.

¹⁵⁶ Interview with relocated Donetsk Regional Ministry of Justice Department, 27 May 2015.

¹⁵⁷ Interview with relocated Luhansk Regional Appeals Court, 12 June 2015.

¹⁵⁸ Interview with Novoaidar District Ministry of Justice Department (Luhansk region), 10 June 2015.

¹⁵⁹ Interview with Druzhkivka City Court (Donetsk region), 10 June 2015.

The Regional Justice Department, located in Kramatorsk (Donetsk region), noted that its enforcement service has approximately 750,000 debt collection cases which it is unable to enforce in non-government-controlled areas.¹⁶⁰

However, some progress in addressing gaps through legislation was noted, with the relocated Donetsk Regional Ministry of Justice Department¹⁶¹ stating that recent legislation has been effective and improved property registration¹⁶². The relocated Luhansk Regional Ministry of Justice Department, currently located in Sievierodonetsk, has also introduced special procedures to allow for alternative forms of settlements, including social benefits, where records have been lost.¹⁶³ There have been reports of the Government providing subsidies to injured parties in court cases in which the responsible party was not able or available to make the court ordered payment.¹⁶⁴

5.4. Unlawful Detention or Deprivation of Liberty

The relocation of courts and prosecution offices, and the lack of a developed and legitimate legal system in “DPR”- and “LPR”-controlled areas, has resulted in potentially illegal and arbitrary detention of people in both government- and non-government-controlled areas.

5.4.1. Government-Controlled Areas

In government-controlled areas, due to the loss of case files and difficulties caused by the relocation of judicial services, some individuals are unlawfully detained. People remaining in detention include those who were detained but not convicted of a crime, those who were convicted at a first instance court and awaiting an appeal when the case file was lost and those who have been arrested since court relocation but the court is unable to examine the necessary evidence due to lack of access to non-government-controlled areas. Interlocutors reported that those detained for minor crimes in government-controlled areas were often

¹⁶⁰ Interview with relocated Donetsk Regional Ministry of Justice Department, 27 May 2015.

¹⁶¹ Interview with relocated Donetsk Regional Ministry of Justice Department, 27 May 2015.

¹⁶² See Order of the Ministry of Justice of Ukraine “On Provisional Measures for Providing Services to Register Property Rights for Real Estate Objects Located within the Territory of Luhansk and Donetsk Regions” of 15 August 2014, no. 1354/5; and Order of the Ministry of Justice of Ukraine “On Carrying Out Registration Actions with Regard to Legal Entities and Private Individuals-Entrepreneurs Located or Registered on the Occupied Area and ATO Area” of 5 November 2014, no. 1849/5.

¹⁶³ Interview with relocated Luhansk Regional Ministry of Justice Department in Sievierodonetsk, 19 May 2015.

¹⁶⁴ Interview with Novoaidar District Ministry of Justice Department (Luhansk region), 10 June 2015.

released where a case file was lost.¹⁶⁵ However, people detained for major crimes, including rape and murder, are often kept in detention without legal basis for alleged reasons of public security and order.¹⁶⁶ The relocated Luhansk Regional Prosecution Office, on 20 April 2015, also informed the SMM of four juveniles who were convicted of serious crimes prior to the conflict, but the case files were lost during relocation. At the time of the interview, these people remained imprisoned due to the seriousness of the crimes. The SMM was informed by the Starobilsk District Court (Luhansk region) of 60 persons convicted at a first instance court of serious crimes who are imprisoned in government-controlled areas awaiting an appeal but whose case files remain in non-government-controlled areas. The interlocutors noted that these persons may be released due to the inability to move forward with the cases.¹⁶⁷ The SMM was also informed of eleven persons who remain in detention in government-controlled Starobilsk awaiting trial but where no case file was transferred. The interlocutor reported that the detainees will have to be released due to lack of evidence.¹⁶⁸

The SMM notes that in order to extend detention periods for people against whom there is enough evidence to allow for continued detention, courts use provisions of the Criminal Procedure Code which allow detention to be extended for a reasonable period, up to sixty days, for convicted people awaiting an appeal.¹⁶⁹ Courts indicated, however, that there is no proper definition of what constitutes a “reasonable time of detention” when considering extending detention.¹⁷⁰ The SMM notes that under the Criminal Procedure Code of Ukraine the aggregate detention period for pre-trial detention shall not exceed six months for crimes of small and medium gravity, and twelve month for grave and especially grave crimes.¹⁷¹

Interlocutors also reported instances in which a determination was made by authorities that detention was required but where no clear legal basis for this detention was present. Examples included fear that upon release the individual would join armed groups¹⁷² and the potential for the creation of unlawful paramilitary groups¹⁷³. In order to address these

¹⁶⁵ Interview with Artemivsk District Prosecution Office (Donetsk region), 24 June 2015.

¹⁶⁶ Interview with Artemivsk District Prosecution Office (Donetsk region), 24 June 2015. The Prosecutor shared that this issue has been addressed to the Supreme Court and other higher authorities but there is a legal gap in resolving the issue. People appealing prison sentences remain in Artemivsk Detention Center while criminal cases are being restored as stated by the Artemivsk City-District Court (Donetsk region) on 17 May 2015. The Rubizhne City Court (Luhansk region) reported to the SMM on 8 June 2015 that 11 individuals were likely to be released due to lack of evidence.

¹⁶⁷ Interview with Starobilsk District Court (Luhansk region), 11 June 2015; relocated Luhansk Regional Prosecution Office, 17 June 2015; Sievierodonetsk City Court (Luhansk region), 16 June 2015.

¹⁶⁸ Interview with Rubizhne City Court, 8 June 2015.

¹⁶⁹ Interview with Markivka District Court (Luhansk region), 21 July 2015.

¹⁷⁰ Interview with Markivka District Court (Luhansk region), 21 July 2015.

¹⁷¹ Art. 197(3), Criminal Procedure Code of Ukraine of 13 April 2012, no. 4651-VI.

¹⁷² Interview with relocated Donetsk Regional Appeals Court, 8 July 2015.

¹⁷³ Interview with relocated Luhansk Regional Prosecution Office, 17 June 2015.

issues, prosecution offices, such as the Sloviansk District Prosecution Office (Donetsk region), are prioritizing cases to ensure due process rights are not violated.¹⁷⁴

Individuals remaining in detention due to lost or destroyed case files or the inability for the court to otherwise proceed in their case have also begun to appeal their detention to the European Court of Human Rights.¹⁷⁵ Prosecution offices have also reported that individuals have appeared before courts in government-controlled areas and presented “DPR” issued certificates stating they were preliminarily released prior to the completion of their sentence. For example, dozens of persons were reported to have appeared in Artemivsk with such certificates.¹⁷⁶ The prosecution office noted there is no legal procedure to handle these cases, and that they have registered these cases and incorporated them into a probationary regime.¹⁷⁷

5.4.2. Non-Government-Controlled Areas

In “DPR”- and “LPR”-controlled areas, the SMM has also received reports of people “detained” under the auspices of “DPR” and “LPR” “justice systems” as well as people remaining in “detention” in non-government-controlled areas who continue to serve Ukrainian ordered prison sentences. The SMM was not in a position to visit detention facilities due to a number of factors including security and access restrictions, and therefore cannot confirm these accounts first hand. At the outset, the SMM notes that all people detained in these areas have limited or no access to an effective legal system as Ukrainian authorities have no capability to visit or enforce decisions for these people. As detailed in Section 5.2.1 of this report, “LPR” and “DPR” parallel “systems” face serious limitations on their operations. Accordingly, people imprisoned by “LPR” and “DPR” are subject to potentially arbitrary sentences and are subject to “legal systems” which rest on an unclear legal basis, which limits the ability of the persons affected to appeal potentially arbitrary or unlawful “detention”.

Beyond these concerns, members of “LPR” have explicitly confirmed that individuals in penitentiaries located in Luhansk will remain imprisoned until a functioning court system can be established. In this regard, a member of the “LPR” “Prosecution Office” stated that, as of 6 July 2015, 150 individuals convicted under Ukrainian law remain in “detention” and that these people would remain in prison until courts become operational. An “LPR”

¹⁷⁴ Interview with Sloviansk District Prosecution Office (Donetsk region), 9 June 2015.

¹⁷⁵ Interviews with Starobilsk District Court (Luhansk region), 11 June 2015 and relocated Luhansk Regional Appeals Court, 12 June 2015.

¹⁷⁶ Interview with Artemivsk District Prosecution Office (Donetsk region), 24 June 2015.

¹⁷⁷ Interview with Artemivsk District Prosecution Office (Donetsk region), 24 June 2015.

“prosecutor” further reported that approximately 500 people were awaiting trial in “pre-trial detention facilities” as of 6 July 2015 in “LPR”-controlled areas.¹⁷⁸ The SMM was unable to determine whether these people were deprived of their liberty by the “LPR” or were convicted by Ukrainian courts. “DPR” members reported to the SMM that as of 14 July 2015, 1,113 people were held in “custody” under their “justice system”.¹⁷⁹

While the SMM has not been able to access or make a determination concerning people held in detention centres in non-government-controlled areas, it has been provided additional reports concerning these people. For example, on 24 July 2015 an interlocutor informed the SMM that a relative was sentenced on 19 June 2013 to five years of imprisonment by the Sievierodonetsk City Court (Luhansk region) was released by the relocated Luhansk Regional Appeals Court, pursuant to the Law “On Amnesty in 2014” of 8 April 2014.¹⁸⁰ However, the interlocutor stated to the best of his or her knowledge the person remained imprisoned at Detention Centre No. 17 “LPR”-controlled territory. Courts located in government-controlled areas have also been unable to confirm whether prisoners detained in non-government-controlled areas have been released. In this regard, the Artemivsk City-District Court (Donetsk region) referred to approximately twelve accused people who having been acquitted by the Zhdanivka City Court (Donetsk region) who the court interlocutors believe to still remain in detention.¹⁸¹ Other courts have reported similar circumstances with the Donetsk Regional Appeals Court (now relocated to Artemivsk) stating that the detention period has expired for approximately 100 people convicted by first instance courts who await an opportunity to lodge an appeal. While past mediation efforts were undertaken to resolve this issue between the Government and the “DPR” and “LPR”, the situation of these people remains unknown.¹⁸² The Druzhkivka City Court (Donetsk region) informed the SMM that approximately 24 relatives of people imprisoned in non-government-controlled areas came to the court to complain about their relatives remaining in prison despite being legally entitled to release.¹⁸³

¹⁷⁸ Interview with “LPR” “Prosecution Office”, 6 July 2015. The SMM further observes that as “courts” are currently non-operational, the manner in which these people were convicted remains unclear.

¹⁷⁹ Interview with “DPR” “Supreme Court”, 14 July 2015 and information obtained from publicly available “DPR” websites. The SMM is unable to verify the basis for the alleged 767 people currently kept in custody.

¹⁸⁰ See Art. 2, Law of Ukraine “On Amnesty in 2014” of 8 April 2014, no. 1185-VII: individuals imprisoned for non-violent crimes are subject to early release if they have served at least one-fourth of their sentence.

¹⁸¹ Interview with Artemivsk City-District Court (Donetsk region), 17 May 2015.

¹⁸² Interview with relocated Donetsk Regional Appeals Court, 8 July 2015. The Sloviansk City-District Court (Donetsk region), on 9 June 2015, informed the SMM that there was a short period of cooperation concerning detained individuals in the latter half of 2014, during which time 15 people were released, but that the current situation remains unknown.

¹⁸³ Interview with Druzhkivka City Court (Donetsk region), 10 June 2015.

6. Crimea

Following the annexation of Crimea in March 2014, on 15 April 2014 the Government passed the Law of Ukraine “On Securing Rights and Freedoms of Citizens and Legal Status of Temporarily Occupied Territory of Ukraine” (“Law on Rights and Freedoms”)¹⁸⁴ which transferred territorial jurisdiction of Crimean courts to courts located in Kyiv.¹⁸⁵ Crimean courts were ordered to cease adjudication of cases by 15 May 2014 with all pending and future cases to be filed with and adjudicated by designated courts in Kyiv.¹⁸⁶ Courts located in Crimea were further required to transfer their case files in pending matters within ten days of entry into force of the abovementioned law.¹⁸⁷ In contrast to courts in Donetsk and Luhansk, however, no case files or property was transferred.¹⁸⁸ Judges interested in relocating to the mainland were required to submit an application.¹⁸⁹

With respect to prosecution offices and pending prosecution investigations, the Law on Rights and Freedoms states that investigative jurisdiction over crimes committed in Crimea are determined by the Prosecutor General of Ukraine.¹⁹⁰ The relocated Prosecution Office of

¹⁸⁴ See Law of Ukraine “On Securing Rights and Freedoms of Citizens and Legal Status of Temporarily Occupied Territory of Ukraine” of 15 April 2014, no. 1207-VII. The SMM was provided information on transfer of jurisdiction by the following institutions: Kyiv City Court of Appeals (Letter of 18 June 2015, no. 22-ц; Letter of 20 July 2015, no. 26949), Kyiv City Commercial Court (Letter of 19 June 2015, no. 01-18/432), Kyiv Regional Commercial Court (Letter of 8 July 2015, no. 2312/15), Kyiv Commercial Appeals Court (Letter of 17 June 2015, no. 09-24/2609/15), Kyiv City Administrative Court (Letter of 22 June 2015, no. 06-5/14/15), Kyiv Regional Administrative Court, and Kyiv Administrative Appeals Court (Letter of 30 June 2015, No. 01-19/5821). These letters are not publicly available.

¹⁸⁵ Law of Ukraine “On Securing Rights and Freedoms of Citizens and Legal Status of Temporarily Occupied Territory of Ukraine” of 15 April 2014, no. 1207-VII in its Article 12(1) lists specific courts which jurisdiction shall be transferred to designated courts in Kyiv. For example, jurisdiction over administrative cases in first instance was transferred to administrative courts of Kyiv as designated by the Kyiv Administrative Appeals Court. Article 12(2) further states that case materials concerning pre-trial investigation shall be furnished to the investigative authorities as determined by the General Prosecutor’s Office.

¹⁸⁶ A survey of decisions from the Unified State Register of Court Decisions of Ukraine shows most Crimean-based courts ceased administration of justice at the end of March 2014. However, some courts located in Crimea continued to register decisions until mid-January 2015. The SMM could not identify if such decisions were adopted in compliance with Ukrainian legislation.

¹⁸⁷ Art. 12(1), Law of Ukraine “On Securing Rights and Freedoms of Citizens and Legal Status of Temporarily Occupied Territory of Ukraine” of 15 April 2014, no. 1207-VII.

¹⁸⁸ Information provided by Prosecutor General’s Office to SMM, Letter of 3 June 2015, no. 14/1-222вих-15.

¹⁸⁹ On 25 April 2014, the Council of Judges of Ukraine adopted a decision allowing temporary assignment of judges to courts of the same level and with similar jurisdiction. See Decision of the Council of Judges of Ukraine “Concerning Legal and Social Protection of Judges and Members of Their Families of Autonomous Republic of Crimea and the city of Sevastopol” of 25 April 2014, no. 18. The President of Ukraine has adopted a number of decrees that have relocated Crimean judges to other courts on a permanent basis. See for example Decree of the President of Ukraine “On Transfer of Judges” of 23 April 2014 no. 430/2014, whereby 22 judges were relocated.

¹⁹⁰ Art. 12(2), Law of Ukraine “On Securing Rights and Freedoms of Citizens and Legal Status of Temporarily Occupied Territory of Ukraine” of 15 April 2014, no. 1207-VII.

the Autonomous Republic of Crimea is located in Kyiv and composed of 45 employees.¹⁹¹ City and district prosecutor's offices have not been relocated and have ceased operations. Moreover, 422 employees of the Prosecutor's Office of the Autonomous Republic of Crimea have been dismissed for violation of the oath of the prosecutor.¹⁹² With respect to restoration of lost case files, the Prosecutor General's Office stated that there is a lack of legislative regulations regarding the procedure of renewal of lost case files which remain in Crimea.¹⁹³

While the scope of this report does not cover the impact on the relocation of justice services for people in Crimea, the SMM monitored the effect of relocation on people in the mainland of Ukraine. With few case files transferred and no effective enforcement mechanism in place, individuals faced access to justice challenges similar to those present in Donetsk and Luhansk regions. These constraints relate to restoration of case files and enforcement and notification issues, as the Government has lost control over the region and the Post Office of Ukraine does not accept any communication addressed to Crimea. These issues also impact pending civil cases, with a representative from the NGO Regional Centre for Human Rights stating that only four out of 30 cases known to the NGO which pertained to Crimea were able to proceed to trial.¹⁹⁴ Additional challenges include inability to pay court fees due to bank restrictions and a refusal by Ukrainian courts to recognize documents issued in Crimea¹⁹⁵ with, for example, death certificates obtained in Simferopol not recognized by notaries in mainland Ukraine¹⁹⁶.

Individuals also face challenges in filing cases with courts in Kyiv which received jurisdiction from courts closed in Crimea. For example, interlocutors reported claims which relate to real estate matters were refused by courts.¹⁹⁷ People also reported reluctance to file claims involving property issues given the absence of government control of the region.¹⁹⁸ Moreover, as jurisdiction was transferred to different courts in Kyiv, individuals are often not aware of which court has jurisdiction over their particular claim.

¹⁹¹ The total number of prosecutor staff in Crimea prior to the relocation was 887 people.

¹⁹² Information provided by Prosecutor General's Office to SMM, Letter of 3 June 2015, no. 14/1-222вих-15.

¹⁹³ Information provided by Prosecutor General's Office to SMM, Letter of 3 June 2015, no. 14/1-222вих-15.

¹⁹⁴ Interview with NGO Regional Centre for Human Rights, 3 June 2015.

¹⁹⁵ Interview with Ukrainian Helsinki Human Rights Union, 31 May 2015.

¹⁹⁶ Interview with Public Notary in Lysychansk (Luhansk region), 10 June 2015.

¹⁹⁷ Interview with Ukrainian Helsinki Human Rights Union, 31 May 2015.

¹⁹⁸ Interview with Ukrainian Helsinki Human Rights Union, 31 May 2015.

7. Concluding Observations

All people, irrespective of their place of residence, should enjoy access to legitimate and effective justice services. The SMM has formulated the following recommendations and observations to address the challenges outlined in this report:

- All concerned should work together to ensure that individuals in “DPR”- and “LPR”-controlled areas have access to Ukrainian justice services including advance notice of and participation in judicial hearings and reasonable access to birth and death certificates, diplomas and other essential legal documents;
- Ukrainian authorities should identify temporary measures to ensure that these justice services are provided to all its citizens in a reasonable place in government-controlled territory without undue delay until normal court services are resumed;
- All concerned should ensure that case files and court and prosecution records remaining in non-government-controlled areas should be made accessible and provided to the Ukrainian authorities;
- Ukrainian authorities should introduce legislation to address legal obstacles impeding the effective administration of justice, including through elaboration and dissemination of guidance on restoration of case files and development of emergency action plans;
- All concerned should ensure the release or transfer of all persons who have served their sentence, or have no prospect of being issued a final and legitimate judicial sentence;
- Ukrainian judicial bodies should ensure that detention periods as outlined in Ukrainian legislation are respected and that lost or missing case files do not lead to arbitrary periods of detention;
- Ukrainian authorities are encouraged to work with relevant OSCE executive structures, notably ODIHR, to assist in these endeavours; and
- States, international organizations and non-governmental organizations should assist Ukrainian authorities in identifying solutions to the concerns identified in this report and as outlined by Ukrainian authorities.

Annex I: Maps



Relocation of courts in Donetsk region



Annex II: Applicable Law

I. Applicable Domestic Law

- Criminal Procedure Code of Ukraine of 28 December 1960, no. 1001-05 [Electronically available at <http://zakon2.rada.gov.ua/laws/show/1001-05>].
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II. Applicable International Law and Reference Materials

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