HUMAN RIGHTS COMPLIANT CRIMINAL JUSTICE SYSTEM IN UKRAINE

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Expert Comments on the Draft Law of Ukraine "On Support for Criminal Proceedings and Enforcement of Punishments, Which Are Precluded as a Result of Armed Aggression, Temporary Occupation of the Territory of Ukraine"

These expert comments have been prepared under the auspices of the Council of Europe Project "Human Rights Compliant Criminal Justice System in Ukraine" on the basis of expertise by Mr. Jeremy McBride

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The opinions expressed in this document belong to the author and do not necessarily reflect the official position of the Council of Europe.

A. Introduction

1. These expert comments concern the Draft Law of Ukraine "On Support for Criminal Proceedings and Enforcement of Punishments, Which Are Precluded as a Result of Armed Aggression, Temporary Occupation of the Territory of Ukraine" ("the Draft Law").

2. The Draft Law has been prepared by the Ministry of Justice of Ukraine.

3. The goal of the Draft Law is, according to its Explanatory Note, to "protect constitutional rights, freedoms and interests of persons in the course of criminal proceedings, enforcement of punishments that are precluded as a result of armed aggression, temporary occupation of the territory of Ukraine".

4. The expert comments review the compliance of the Draft Law with European standards, particularly the European Convention on Human Rights ("the European Convention"), as elaborated in the case law of the European Court of Human Rights ("the European Court").

5. The expert comments first consider the rationale for the Draft Law as set out in the Explanatory Note. They then review the provisions in the Draft Law, section by section, before providing an overall conclusion as to their compatibility with European standards. In addition, the expert comments identify certain other legislative changes that appear to be required to pursue proceedings in respect of alleged offences arising from armed aggression and the temporary occupation of Ukraine in a manner that is effective while still compatible with European standards.

6. *Recommendations for any action that might be necessary to ensure compliance with European standards – whether in terms of modification, reconsideration or deletion - are italicized*.

7. The expert comments have been developed by Mr. Jeremy McBride[1] under the auspices of the Council of Europe's Project "Human Rights Compliant Criminal Justice System in Ukraine". They have been based on English translations of the Draft Law and its Explanatory Note provided by the Council of Europe's Secretariat.

B. The Rationale

8. According to the section of the Explanatory Note dealing with the rationale for the adoption of the Draft Law, this legislative proposal was developed pursuant to the Action Plan for the implementation of the Strategy of deoccupation and reintegration of the temporarily

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occupied territory of the Autonomous Republic of Crimea and the city of Sevastopol as approved by the Cabinet of Ministers of Ukraine.[2]

9. However, this section of the Explanatory Note also indicates that the need for legislation to determine measures to protect constitutional rights, freedoms and interests of persons in the course of criminal proceedings, enforcement of punishments that are precluded as a result of armed aggression, temporary occupation of the territory of Ukraine stems from actions taken by the Russian Federation not only in the Autonomous Republic of Crimea but also in certain areas of the Donetsk and Luhansk Oblasts.

10. Nonetheless, it is not clear from the Explanatory Note whether the scope of the Draft Law is restricted to any particular territory of Ukraine. Certainly, its provisions could also be relevant for efforts to address the impact on conduct of criminal proceedings and the enforcement of punishments consequent upon the aggression and occupation of other parts of Ukraine that commenced on 24 February 2022.

11. Moreover, the bulk of the section of the Explanatory Note concerned with the rationale for the adoption of the Draft Law focuses on the obligation for Ukraine to execute the judgment of the European Court in *Kurochenko and Zolutukin v. Ukraine* ("the *Kurochenko* case").[3]

12. Both applicants in the *Kurochenko* case had been the object of criminal proceedings in respect of offences alleged to have been committed in the Luhansk Region.[4] Prior to the occupation of part of that region, the first applicant had been convicted but only a bill of indictment had been issued in respect of the second applicant.

13. Subsequent to the occupation, the applicants had sought – in the unoccupied part of the region - the restoration of the files in their cases for purpose respectively of an appeal against conviction and the discontinuance of the proceedings.

14. However, the case file of the first applicant was only partially restored and nothing of case file concerning the second applicant was restored. As a result of the prolonged failure to examine the criminal proceedings concerning the two applicants, the European Court found two discrete violations of Article 6(1) of the European Convention.

15. In respect of the first applicant, the failure was attributed to a lack of diligence on the part of the prosecution authorities in seeking to restore the case file – which was possible under Article 524-31 of the Criminal Procedure Code where a judgment had been rendered - thereby preventing a court from examining the appeal against his conviction.

16. In the absence of any comparable provision for a case such as that of the second applicant, in which no judgment had yet been delivered, the inability to seek the restoration of the file

[2] By Order 1171-r , dated 29 September 2021.
[3] Nos. 20936/16 and 53257/16, 11 February 2021.
[4] Murder, theft and carjacking in the case of the first applicant and unlawful coal mining in the case of the second applicant.

meant that the authorities were prevented from examining whether maintaining the proceedings against him was – in the absence of any prospect of progress – still in the public interest, as well as whether such a public interest outweighed the prejudice which the pending proceedings caused him to suffer.

17. In finding a violation of Article 6(1), the European Court emphasized the need for such an examination to be conducted given that the second applicant, unlike the first applicant,[5] had not been convicted by any court and that he was accused of a relatively less serious offence which did not appear to have direct implications for the rights of any third party under Articles 2 and 3 of the European Convention.

18. The Explanatory Note does not distinguish between the findings in respect of the two applicants but correctly identifies the essential failing in respect of the second one as the absence of any procedure to seek the restoration of his case file.

19. The absence of such a procedure is undoubtedly a legislative omission. However, the Explanatory Note does not explicitly state that the Draft Law is intended to rectify this omission, despite referring to the obligation under Article 46(1) of the European Convention to execute the judgments of the European Court.

20. Moreover, it is important to bear in mind that rectifying the legislative omission – although essential to address the lacuna about which the European Court was concerned - will not be sufficient to preclude future violations of Article 6(1) of the European Convention since, as the finding in respect of the first applicant in the *Kurochenko* case underlines, the existence of a procedure is not a guarantee that it will be used in an effective manner.

21. In any event, the adoption of the provisions of the Draft Law would go beyond making arrangements for the restoration of case files in cases where there has been no judgment as they would also deal with: the invalidation of certain acts; the closure of criminal proceedings; the suspension of pre-trial investigations; the length of such investigations where re-opened; the enforcement of court sentences; trials; the review of court decisions; and a consequential amendment to the Criminal Procedure Code. The existing provision in Article 524 of the latter regarding restoration of case files would not be affected.

[5] As well as the applicant in the earlier case of *Khlebik v. Ukraine*, no. 2945/16, 25 July 2017, in which no violation of Article 6 was found. In the discussion of this case in the Explanatory Note, there is a typographical error as this refers to it as the *Kurochenko* case. There was also a finding of no violation of Article 6(1) for similar reasons to that in to *Khlebik* in *Tsezar and Others v. Ukraine*, no. 73590/14, 13 February 2018.

C. Section by section analysis

Section I. General Provisions

22. This section deals with the purpose of the Draft Law, the laws and regulations on support for criminal proceedings and enforcements of punishments which are precluded (hereafter "precluded criminal proceedings" and "precluded enforcement of sentences"), general principles and the scope of the Draft Law.

23. The purpose stated for the Draft Law in Article 1 would be the same as the goal referred to in the Explanatory Note, namely, to "protect constitutional rights, freedoms and interests of persons in the course of criminal proceedings, enforcement of punishments that are precluded as a result of armed aggression, temporary occupation of the territory of Ukraine".

24. This purpose is not, as such, problematic. However, a more accurate – and less grandiose - indication of the purpose of the Draft Law would be that its provisions aim to overcome certain obstacles to the conduct of criminal proceedings and the enforcement of sentences that have resulted from armed aggression, temporary occupation of the territory of Ukraine.

25. The first paragraph of Article 2 would list the relevant laws providing the basis for the precluded criminal proceedings and enforcement of sentences, as well as referring to unspecified statutory instruments that also provide such a basis for them.

26. It seems likely that the statutory instruments being referred to are ones that have been adopted pursuant to powers in the specific legislation cited but this is by no means certain.

27. *Thus, the lack of precision regarding the statutory instruments concerned could be avoided by adding an indication that they have been adopted pursuant to such powers or, if appropriate, provisions in other specified Laws*.

28. The second paragraph is quite different in character since it would not – despite the heading to Article 2 - involve a statement of the relevant laws and regulations for precluded criminal proceedings and enforcement of sentences. Rather, it would invalidate certain acts while allowing them to be taken into account by courts in certain circumstances.

29. The acts that are invalidated are decisions and documents issued by an illegal authority, which include but are not limited to ones involving "the release of a person or on serving a sentence".

30. Although "an illegal authority" is elaborated so as to cover an officer or official, it is not clear from the text of paragraph 2 what is the basis for regarding either of these as "illegal" and this is not something addressed elsewhere in the Draft Law.

31. Undoubtedly, the intention is to cover persons who have not been appointed pursuant to the relevant laws of Ukraine (including presumably authorities of the Russian Federation given that the Draft Law would apply to persons serving sentences in that State[6]) or, if so, their appointment has been invalidated as a result of their conduct. It is understood that the Law "On Ensuring Civil Rights and Freedoms, and the Legal Regime on the Temporarily Occupied Territory of Ukraine" (Law No.1207-VII of 15/04/2014 does define an illegal authority and this is probably the definition that the drafters had in mind. However, it is important for all concerned that there be no uncertainty as to when an authority is to be regarded as "illegal", which could be resolved by a specific reference to Law No.1207-VII of 15/04/2014 in paragraph 2.

32. *There is thus a need to specify the basis for terming an authority as "illegal" by including a specific reference to Law No.1207-VII of 15/04/2014 in paragraph 2.*

33. It would not be inappropriate to regard decisions or documents relating to release of a person or the serving of a sentence to be invalid and to have no legal consequences if it is issued by an illegal authority.

34. However, the present provision would not be so limited, despite the rest of the Draft Law being only concerned with criminal proceedings and the enforcement of sentences. Instead, the reference to release and serving a sentence are, as a result of the use of "including", only illustrations of what could be the subject of "any act (decision, document)".

35. Indeed, the present formulation is broad enough to cover transfers of property, the award of custody over children and the termination of marriages. This effect is undoubtedly precluded by the persons to whom Article 4 specifies the Draft Law as being applicable, namely, those linked to various aspects of criminal proceedings and the serving of sentences.

36. Nonetheless, it would avoid any uncertainty as to what would be invalidated if it was specifically stated that the acts affected are those concerned with the conduct of criminal proceedings and the serving of sentences.

37. *There is thus a need to limit the first sentence of paragraph 2 to acts concerned with the conduct of criminal proceedings and the serving of sentences.*

38. The stipulation in the second sentence as to account being taken of the acts referred to in the first sentence also lacks precision as to the context in which such account is to be taken since there is no indication as to what function is being performed by the court authorized to do this. It may be that the intention is for such account to be taken of the acts concerned in the proceedings dealt with in Sections II-IV of the Draft Law. This would seem appropriate but there should be no uncertainty in this regard.

[6] Article 4.1(2).

39. *There is thus a need to specify the proceedings in which the invalidated acts can be taken into account*.

40. The general principles referred to are ones found in the Criminal Procedure Code and the other legislation cited in Article 2.1. They are not inappropriate but, given the applicability of that legislation, the need for the restatement of these principles seems unnecessary.

41. *Consideration should thus be given as to the need to retain this provision in the Draft Law*.

42. The stipulation in Article 4 as to the scope of the Draft Law is suitably precise and does not require any comment.

Section II. Support for Criminal Proceedings

43. The first paragraph of Article 5 would provide that precluded criminal proceedings are to be "supported" according to the provisions of the criminal procedure laws and regulations, subject to the specifics defined in the Draft Law.

44. The concept of support for criminal proceedings is not one found in the Criminal Procedure Code and it does not seem a particularly apposite term for the specific issues covered by this Section. Nonetheless, this is not of great significance as it is the substance of the provisions dealing with those issues that is really important.

45. Thus, paragraph 2 of Article 5 would identify how the pre-trial investigation authority for precluded criminal proceedings is to be determined and paragraph 3 would provide for the entry in the Unified Register of Pre-Trial Investigation of information on the appointment of the investigator, inquirer and prosecutor to continue such proceedings where the files (in whole or in part) have been destroyed or lost or held due to armed aggression or temporary occupation or are held by illegal authorities.

46. These provisions are sufficiently clear and appropriate.

47. However, although paragraph 3 would allow for the continuation of the precluded criminal proceedings in cases where the case files are destroyed, lost or illegally held, there is no specific provision concerning the restoration of the case file. This may be implied in the authorisation to continue the proceedings but is in marked contrast to the duty of restoration in Articles 12 and 13 to enable a court to adopt a decision on the merits or to review a court decision.

48. Certainly, given that the finding of a violation of Article 6(1) of the European Convention in respect of the second applicant in the *Kurochenko* case was cited in the rationale for the Draft Law, it would be desirable for restoration to be dealt with explicitly.

49. Furthermore, effective execution of the *Kurochenko* judgment would benefit with both a clear duty to seek the restoration of the files destroyed, lost or illegally held.

50. *There is thus a need to include in Article 5 a duty to seek, insofar as possible, the restoration of case files that have been destroyed or lost or are illegally held*.

51. Article 6 would allow for the closure of criminal proceedings in two circumstances, namely, where the perpetrator has not been identified and the statute of limitations has expired.

52. The first possibility – dealt with in paragraph 1 – refers to such closure where the perpetrator has not been identified on the grounds defined by Article 284 of the Criminal Procedure Code. However, none of those grounds relate to the identification of the perpetrator. Rather, they are concerned with matters such as the absence of evidence of an offence being committed or of a particular person having committed it.

53. Moreover, there is no clear linkage between the problem of identifying the perpetrator and the files being destroyed, lost or illegally held.

54. It is undoubtedly appropriate for a case to be closed where the perpetrator cannot be identified. However, in the context of the Draft Law, it would be appropriate to specify that closure of the criminal proceedings is allowed where, despite all feasible steps being taken to restore the case files concerned, it has not proved possible to identify the perpetrator of the alleged offence.

55. Such a requirement can be seen, by contrast, in Article 7 in the phrase allowing suspension of a pre-trial investigation where:

> the performed investigative (detective) and other procedural actions, the conduct of which is necessary and possible, fail to support the establishment of facts and circumstances required to conclude the pre-trial investigation.

56. *There is thus a need to introduce such a pre-condition for closure of criminal proceedings into paragraph 1*.

57. The second possibility for closure – dealt with in paragraph 2 – would concern those cases where the statute of limitations has expired. This would, however, be made subject to a proviso excluding such a possibility in the case of the commission of offences of an especially grave crime against human life or health or of a crime punishable by life imprisonment.

58. Although the proviso is welcome, it is insufficient as the penalties prescribed for the offences concerned with torture in Articles 121 and 127 of the Criminal Code do not satisfy the threshold in Article 12.5 of imprisonment for a term exceeding ten years or life imprisonment to be classified as an especially grave crime. Moreover, the proviso would not apply to offences involving the infliction of physical pain and/or mental suffering which could amount to forms of ill-treatment other than torture, which are also proscribed by Article 3 of the European Convention.

59. The limited nature of the proviso is unsatisfactory as any event, the European Court has repeatedly held that

> where a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance for the purposes of an "effective remedy" that criminal proceedings and sentencing are not time-barred.[7]

60. *There is thus a need to widen the proviso so that there can be no closure of proceedings in respect of offences involving any form of ill-treatment covered by Article 3 of the European Convention solely on account of the expiry of the statute of limitations.*

61. Provision would be made by Article 7 for the suspension of pre-trial investigation and also for its re-opening.

62. As already noted,[8] there is an appropriate qualification on the suspension of a pre-trial investigation in a case where the file is destroyed, lost or illegally held that is authorized in paragraph 1, namely, that necessary and possible investigative and other procedural actions have failed to support the establishment of facts and circumstances required for that investigation to be concluded.

63. There is equally appropriate provision in paragraph 2 for the re-opening of suspended proceedings by a wide range of interested persons[9] where:

> sufficient evidence has been obtained to identify the perpetrator of a criminal offence or the obtained evidence offers opportunities for such evidence to be obtained.

64. Article 8 would regulate the computation of the permissible length of a pre-trial investigation – both between the re-opening of the proceedings and the service of a notice of suspicion and after such a notice has been served - in a manner consistent with the requirements of the Criminal Procedure Code.

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[7] *Abdulsamet Yaman v. Turkey*, no. 32446/96, 2 November 2004, at para. 50, reiterated, e.g., in *Okkali v. Turkey*, no. 52067/99, 17 October 2006, at para. 76, *Savin v. Ukraine*, no. 34725/08, 16 February 2012, at para. 67 and *Mocanu and Others v. Romania* [GC], no. 10865/09, 17 September 2014, at para. 326.

[8] See para. 5~~5~~7 above.

[9] It is assumed that the term "whistle-blower" is defined in other legislation.

65. This provision does not, therefore, require any further comment.

Section III. Enforcement of Court Sentences

66. The provisions in this Section would deal with the situation of persons who have been convicted but whose sentences were either not enforced or were (or are being) enforced by illegal authorities in the temporarily occupied territory or within the Russian Federation.

67. Although the applicability of these provisions is entirely clear where the enforcement is or was in temporarily occupied territory or the Russian Federation, the formulation – at least in English – is a little unclear where the sentences were simply not enforced. This is because a reading of the text in paragraph 1 of Article 9 does not necessarily link the non-enforcement to the conduct of the illegal authorities. It is doubtful if it was not intended to have such a link and it may be that the text is clearer in the Ukrainian original.

68. *There is thus a need to ensure that the Ukrainian text does link the non-enforcement of sentences to the illegal authorities or the Russian Federation*.

69. Paragraph 1 of Article 9 would also provide for the sentences that were not enforced or were (are being) enforced by illegal authorities to be discharged in most cases due to the expiry of the limitation periods prescribed in Article 80 of the Criminal Code.

70. However, there is an exception for certain offences, namely, sentences to life imprisonment or sentences for crimes against peace, security of mankind and international legal order. Such an exception is not inappropriate. However, it is insufficient as it does not cover offences involving ill-treatment contrary to Article 3 of the European Convention which, as already noted,[10] should not be subject to any limitation period.

71. *There is thus a need to widen the proviso so that it also covers offences involving any form of ill-treatment proscribed by Article 3 of the European Convention.*

72. Paragraph 2 of Article 9 and Article 10 would deal with those cases where the limitation period has not expired or the offence is one to which the proviso applies.

73. The effect of these provisions would be to require a court to determine the portion of the sentence served or the discharge of the person concerned on probation on a motion from the penitentiary authority or from the convict, her/his lawyer and/or legal representative, close relative or family member.

[10] See paras. 58-60 above.

74. In calculating this, the court has to include in this portion the period between the date of the conviction (the enforcement of which was precluded) and the date when the court determines the portion of the sentence served. However, this will not apply in the case of persons who evade serving a sentence and/or have been put on a wanted list.

75. There is no specific provision for this calculation to include any sentence enforced by illegal authorities in temporarily occupied territory or within the Russian Federation but, as already noted,[11] there seems to be a possibility of account being taken of information relating to this. Nonetheless it would be more appropriate for specific provision to be made for account to be taken of any such period of enforcement in order to ensure that there is no risk of this being overlooked.

76. *Paragraph 2 of Article 10 should thus provide for the determination of the portion of a sentence served to take account of any period of enforcement by illegal authorities in temporarily occupied territory or within the Russian Federation*.

77. Paragraph 5 of Article 10 would rightly provide for the possibility of appeal against a decision determining the portion of a sentence served.

78. There is no specific provision authorizing the serving of the portion of the sentence that has not been served. This is also not covered by the Criminal Code and, insofar as it is not dealt with by the Penitentiary Code of Ukraine, this is an omission that would have to be remedied.

79. *There is thus a need to establish whether there is already a provision authorizing the serving of the portion of a sentence that has not been served and, if there is not, to include one in Article 10.*

80. There is appropriate provision in Article 11 for social case work services to be provided to persons whose conviction is being or has been reviewed to determine the portion of the sentence served.

Section IV. Trial and Review of Court Decisions

81. The provisions in this Section would deal with the conduct of trials and the review of court decisions, as well as the restoration for this purpose of files that have been destroyed or lost or are illegally held.

82. The provisions in Article 12 are concerned with the imposition an obligation to restore files that have been destroyed or lost or are illegally held, the determination of the court to handle

[11] See paras. 33-37 above.

the relevant proceedings and the determination of the time limit for any appeal where that had been precluded by the destruction, loss or illegal holding of the files.

83. These provisions are appropriate.

84. Paragraph 1 of Article 13 would set out a useful approach for a court to follow where files need to be restored, while paragraph 2 would authorise the re-opening of proceedings only where the files are sufficient for this purpose.

85. In the event that the files are insufficient for the re-opening of proceedings, paragraph 3 of Article 13 would allow for the proceedings to be suspended.

86. Such a suspension is subject to the statute of limitations in Article 49 of the Criminal Code. However, the latter provision is problematic in that it does not preclude the application of a limitation period to offences that would constitute ill-treatment despite this being contrary to Article 3 of the European Convention, as has already been noted.[12]

87. *There is thus a need to modify paragraph 3 so that it does not subject the suspension of the proceedings to the operation of the statute of limitations in Article 49 of the Criminal Code where offences constituting ill-treatment under Article 3 of the European Convention are involved*.

88. Article 14 would authorise a court to resolve any procedural matters that may arise after the adoption of a court decision and also to eliminate any contradictions that arise when enforcing court decisions against convicts who have served or are serving sentences in temporarily occupied territory or in the Russian Federation, as well as ones against those released on probation or were subjected to compulsive medical or educational measures who had stayed in temporarily occupied territory or in the Russian Federation.

89. The actual need for latter authorisation is questionable given that Article 537 of the Criminal Procedure Code – which is explicitly referred to for this purpose in paragraph 2 of Article 14 – should already be applicable as a result of Article 2.1 of the Draft Law. Nonetheless, it is preferable for there to be no ambiguity on this point.

90. The provisions in Article 15 would be to similar effect to those in Article 13 except that they deal with the difficulties posed for conducting review in appeal or cassation as a result of files having been destroyed or lost or being illegally held.

91. The only difference is that these provisions authorize the closure of the proceedings where the files are insufficient for review in appeal or cassation and an application for review of the closure decision may not be made after the expiry of the statute of limitations stipulated in Article 49 of the Criminal Code.

[12] See paras. 58-60 above.

92. As with the similar provision in Article 13 on suspension of proceedings, the provision in paragraph 4 of Article 15 limiting application for review of closure decisions is problematic in that it allows the application of a limitation period to offences that would constitute ill-treatment despite this being contrary to Article 3 of the European Convention.

93. *There is thus a need to modify paragraph 4 so that it does not subject the limit on applications for review of closure decisions to the operation of the statute of limitations in Article 49 of the Criminal Code where offences constituting ill-treatment under Article 3 of the European Convention are involved*.

Section V. Final and transitional provisions

94. The provisions in this section would concern: the entry into force of the Draft Law: an amendment to the Criminal Procedure Code making an exception for its provisions to the prohibition on the application of any law contradicting the Code to be applied in criminal proceedings; the bringing of subordinate legislation into line with the Draft Law; and making it clear that the provisions of the Draft Law are also applicable to proceedings conducted according to a procedure in force before the Code became effective.

95. All these provisions are appropriate.

D. Other possible changes required

96. There is no doubt that the continued aggression and occupation of parts of Ukraine beyond those already occupied which commenced on 24 February 2022 will pose further difficulties for the conduct of criminal proceedings in respect of offences committed while this is ongoing.

97. These difficulties will go beyond those resulting from files being destroyed, lost or illegally held.

98. There will certainly be circumstances making it difficult, if not impossible, to gather evidence relating to possible offences, both contemporaneously and after their occurrence, in order to constitute case files in the first place.

99. Moreover, even where it is physically possible to conduct a pre-trial investigation and to bring a case before a court, the organisation of the prosecutorial and court system on a territorial basis may either preclude or impede the investigation and prosecution of some cases.

100. The positive obligation to investigate offences that affect the right to life and the prohibition on ill-treatment under Articles 2 and 3 of the European Convention requires that the investigation be promptly undertaken, thorough and competent and be capable of leading to a prosecution of the perpetrator where this is appropriate.

101. This obligation continues notwithstanding the derogation lodged with the Secretary-General under Article 15 of the European Convention in respect of measures taken in response to the aggression and occupation of parts of Ukraine since 24 February 2022 since the rights under Articles 2 and 3 are non-derogable.

102. As the *Khlebik* and *Kurochenko* cases illustrate, some understanding can be shown by the European Court in the fulfilment of practical difficulties that impede the conduct of judicial proceedings that affect the right to a fair trial under Article 6 of the European Convention.

103. It may be that some allowance of a similar nature might be made for difficulties in fulfilling the obligations under Articles 2 and 3, notwithstanding their non-derogable nature.

104. However, it should be recalled that the violation of Article 6(1) in respect of the second applicant in the *Kurochenko* case arose because of a failure to make legislative and other changes in the domestic legal framework. It can be expected that a similar view might be taken of a failure to address both legislative and practical difficulties that might stand in the way of conducting investigations and trials where steps to surmount them could have been taken.

105. In this connection, therefore, it might be desirable to consider whether some of the existing provisions in the Criminal Procedure Code and the Law on the Public Prosecution Service are such that such proceedings can be successfully pursued and lead to satisfactory outcomes.

106. In particular, it may be that some special arrangements should be made, such as the creation of specialised investigation and prosecution units and courts that are not territorially based.

107. In addition, consideration should be given as to whether there might be some simplification of approaches to charging and the conduct of proceedings so as to prevent the latter from becoming unduly lengthy, while still ensuring the fairness of the proceedings. The latter will also require the ready availability of legal advice and assistance to those against whom proceedings are instituted.

108. In this connection, it is noted that the amendments made to Article 615 of the Criminal Procedure Code allow for the prosecutor to exercise the functions of the investigative judge in the event of martial law, emergency and various other situations. This might not be considered by the European Court to be, in itself, inconsistent with the obligations under Article 5(3) of the European Convention so long as there is a valid derogation under Article 15.

109. However, it should be recalled that the possibility of the lawfulness of the detention being challenged before a court (as required by Article 5(4) has - together with guaranteed access to a lawyer and the ability to notify someone about the deprivation of liberty - been regarded by the European Court as an important safeguard where the exercise of judicial control for the purpose of Article 5(3) is subject to a derogation.[13]

110. It is doubtful whether the provisions in paragraphs 3 and 4 of the amended Article 615 of the Criminal Procedure Code will be seen by the European Court as sufficient to meet the safeguard of a remedy consistent with Article 5(4) which it expects where there has been such a derogation.

111. Thus, paragraph 3 is limited to notifying the superior prosecutor and the court about the decisions taken by a prosecutor but does not envisage any action being taken by them.

112. Moreover, paragraph 4 potentially delays challenges to decisions by a prosecutor for a prolonged period of time, which may not meet the speediness requirement in Article 5(4) and it is not evident that this will be considered acceptable by the European Court.[14]

113. Of course, the intention may also be to derogate from Article 5(4). However, it is questionable whether this has been made sufficiently clear in the notification sent to the Secretary General of the Council of Europe.[15] Certainly, it may be unwise to assume that this will be accepted as having been effected by the European Court.

114. Although derogation affecting the right to challenge the lawfulness of detention is widely seen as inadmissible under other human rights treaties, that has not been the view taken so far by the European Court.[16]

115. However, where the European Court did accept a derogation to Article 5(4), it emphasised that there was still some other, relatively effective, safeguard against abuse.

116. It is appreciated that the circumstances will be particularly difficult in the cases where Article 615 is being relied upon. However, the existence of provision for effective and independent oversight over the exercise of investigative judge's powers by prosecutors could be seen as the minimum acceptable safeguard against the possibility of abuse. This

[13] *Aksoy v. Turkey*, no. 21987/93, 18 December 1996, at para. 82.

[14] In *Mehmet Hasan Altan v. Turkey*, no. 13237/17, 20 March 2018, the European Court accepted a delay of fourteen months for a challenge to detention before the constitutional court in a case that was seen as a complex one, being one of the first of a series of cases raising new and complicated issues concerning the right to liberty and security and freedom of expression under the state of emergency following the attempted military coup. However, the backdrop to that the delay was that there still continued to be a possibility for anyone in pre-trial detention to apply in the ordinary courts for release at any stage of the proceedings and to lodge an objection if the application is rejected.

[15] The Council of Europe expert comments regarding Ukraine's derogation with respect to certain obligations under Article 5 of the European Convention on Human Rights is being prepared and shall be additionally communicated to the Ukrainian authorities.

[16] *Ireland v. United Kingdom*, no. 5310/71, 18 January 1978.

is not provided by paragraph 3 at present as, has been seen, there is no explicit expectation of any action being taken by either the senior prosecutor or the court after being notified.

117. Furthermore, the oversight suggested should continue so long as the detention is being continued, with the need for this to occur being demonstrated by the prosecutor.

118. It should also be noted that there is nothing in Article 615 that addresses the need for arrangements regarding the provision of legal assistance to those detained and the notification of others about having been detained.

119. At the same time, there will be a need to ensure that prosecutions are not discredited by unfounded allegations of ill-treatment. This will require effective scrutiny of any such allegations by the State Bureau of Investigation and again specialized units within it might be the most effective way of ensuring such scrutiny.

E. CONCLUSION

120. It is clear that the Draft Law contains provisions that are seeking to respond to significant difficulties for criminal proceedings resulting from the temporary occupation of parts of Ukraine and that its provisions could be relevant for circumstances both before and after 24 February 2022.

121. However, there is scope for improving the formulation of certain provisions.

122. In particular, there is a need to specify the legislation that determines the definition of "illegal authority" and "temporarily occupied territory".

123. In addition, there should be a specific obligation to seek the restoration of case files that have been destroyed or lost or are illegally held in those cases that have not yet been brought to a court so that the judgment in the *Kurochenko* case can be executed.

124. Also, the provisions dealing with the suspension and closure of cases should not be inconsistent with the inapplicability of statutes of limitation to offences engaging the prohibition of ill-treatment under Article 3 of the European Convention.

125. Finally, consideration should be given to adopting other measures to ensure the effective investigation and prosecution of offences connected with the aggression and temporary occupation of Ukraine since 24 February 2022 and for improving the safeguards against abuse in the amended Article 615 of the Criminal Procedure Code.