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Accountability for Conflict-Related Sexual Crimes committed in Eastern Ukraine Q&A

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1. What is an Article 15 Communication to the ICC ?

Pursuant to Article 15(2) of the ICC Statute, “States, organs of the United Nations, intergovernmental or non-governmental organizations or other reliable sources” can send information to the ICC Prosecutor on crimes within the jurisdiction of the Court. These pieces of information, that can take various forms, are commonly called “Communications”. At the preliminary examination stage, the ICC Prosecutor does not conduct a full-fetched investigation and makes his or her decision on whether to proceed with an investigation based on the information collected by his or her office and the information provided by States, organisations and individuals. That is why, in practice, Article 15 Communications are crucial to launching investigations and prosecutions at the ICC.

The ICC Office of the Prosecutor declares having received, to date, more than 10 000 of such Communications on various situations.

2. Why does the ICC have jurisdiction to consider the FIDH-EUCCI Communication ?

Although Ukraine is not a State Party and did not ratify the ICC Statute, Ukrainian authorities lodged two declarations, pursuant to Article 12(3) of the ICC Statute, granting the ICC jurisdiction over international crimes committed on the territory of Ukraine from 21 November 2013 onwards.

All conduct alleged in this FIDH-EUCCI Communication amounts to war crimes and/or crimes against humanity, as defined in Articles 7 and 8 of the ICC Statute, which took place on the territory of Ukraine, during the period starting from February 2014.

On 25 April 2014, the ICC Office of the Prosecutor announced having opened a preliminary examination of the situation in Ukraine, which is still ongoing. FIDH and EUCCI call upon the ICC Prosecutor to open a full investigation into the situation of Ukraine and include sexual crimes into the scope of its investigation.

3. What are sexual crimes ? What sexual crimes have been committed in Eastern Ukraine ?

Although there is not one all-encompassing and consolidated definition of sexual crimes, the ICC Office of the Prosecutor provides the following definition in its 2014 Policy Paper on Sexual and Gender-Based Crimes:

“Sexual crimes: Sexual crimes that fall under the subject-matter jurisdiction of the ICC are listed under articles 7(1)(g), 8(2)(b)(xxii), and 8(2)(e)(vi) of the Statute, and described in the Elements of Crimes (Elements). In relation to ‘rape’, ‘enforced prostitution’, and ‘sexual violence’, the Elements require the perpetrator to have committed an act of a sexual nature against a person, or to have caused another to engage in such an act, by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power, or by taking advantage of a coercive environment or a person’s incapacity to give genuine consent. An act of a sexual nature is not limited to physical violence, and may not involve any physical contact – for example, forced nudity. Sexual crimes, therefore, cover both physical and non-physical acts with a sexual element.”¹

1. Office of the Prosecutor of the International Criminal Court, Policy Paper on Sexual and Gender-Based Crimes, June 2014, available at: <https://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>

The ICC Statute explicitly lists the following sexual crimes that may amount to crimes against humanity (Article 7(1)(g)) and/or war crimes (Article 8(2)(b)(xxii) and 8(2)(e)(vi)): rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence.

Types of documented sexual crimes committed in Eastern Ukraine and described in this FIDH-EUCCI Communication include rape (including attempts or threats of rape), other forms of sexual violence such as electrocution of genital areas, enforced prostitution, sexual slavery, humiliation and cruel treatment of a sexual nature, forced nudity and damage (including attempted or threatened) to sexual organs.

It is to be noted that, due to chronic underreporting of sexual crimes and limited access to potential victims and witnesses on separatist-held territory, the cases set out in the Communication are likely to constitute the very tip of the iceberg of sexual crimes in Eastern Ukraine. Nevertheless, FIDH and EUCCI aver that the information set forth is sufficient to justify a full investigation by the ICC Prosecutor into these and other sexual crimes associated with the conflict in Eastern Ukraine.

4. Where in Ukraine were conflict-related sexual crimes committed ? And on which detention facilities is the FIDH-EUCCI Communication focusing ?

Based on the evidence documented by FIDH and EUCCI to date, sexual crimes were committed mainly in illegal detention facilities (unofficial places of detention where civilians, combatants and other protected persons are arbitrarily held with no judicial supervision) on separatist-held territory in Eastern Ukraine, the so-called Donetsk (DPR) and Luhansk Peoples' Republics (LPR). Other organisations have also reported conflict-related sexual crimes committed on territory controlled by the Government of Ukraine and perpetrated by pro-Ukrainian forces.

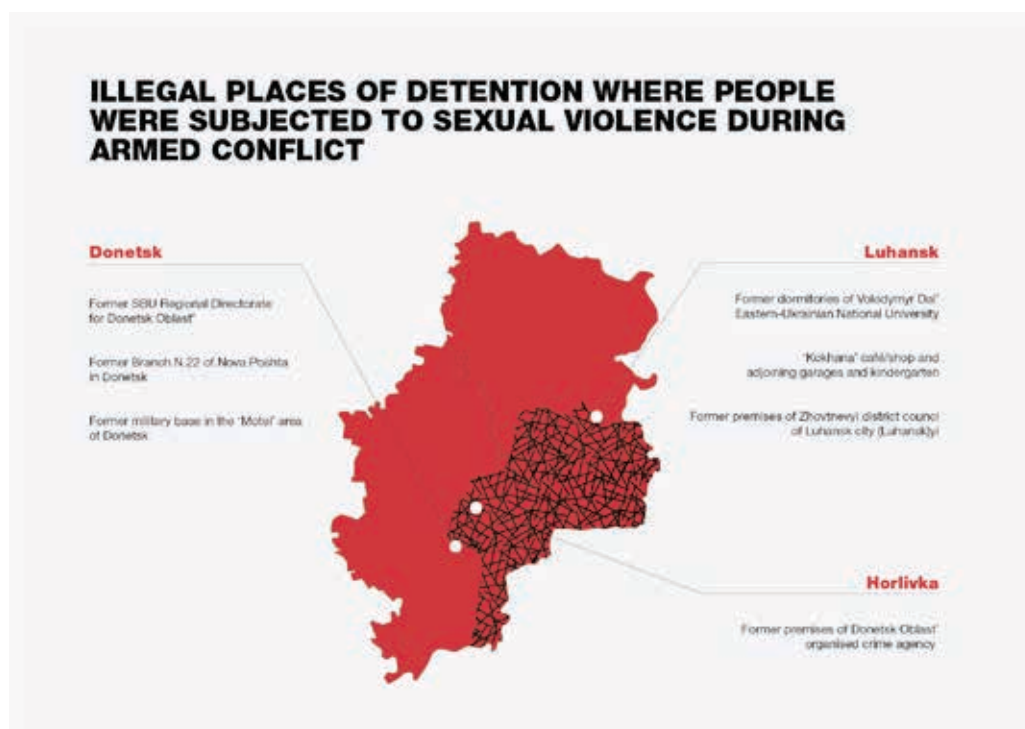
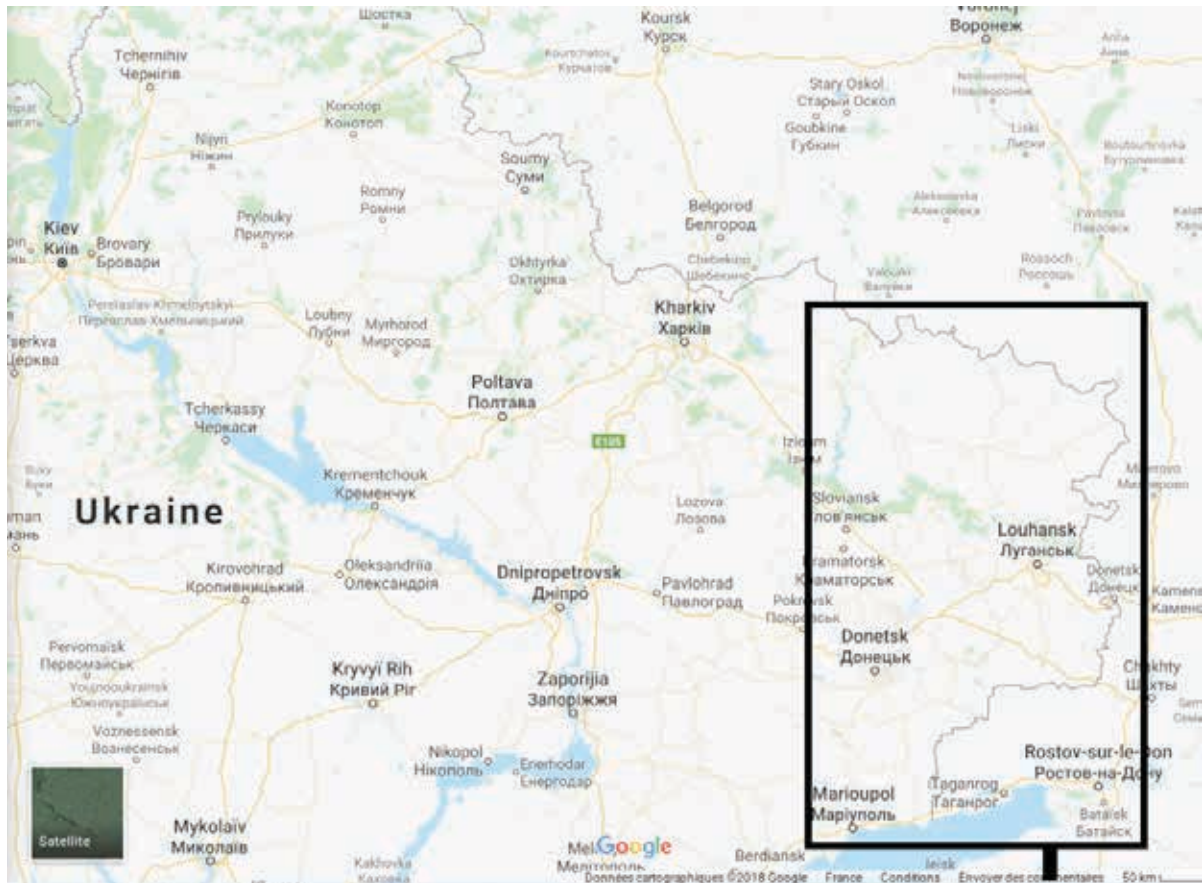
Information reviewed by FIDH and EUCCI reveals the existence of at least 200 illegal detention facilities on separatist-held territory in Eastern Ukraine (and reveals the exact location of at least 120 facilities). For 42 of these facilities located on separatist-held territories, there is some evidence of sexual and/or gender-based violence and discrimination.²

According to evidence reviewed by FIDH and EUCCI and set forth in this Communication, there is a reasonable basis to believe that sexual war crimes and/or crimes against humanity took place in at least seven separatist-controlled detention facilities, and that those crimes are sufficiently grave to merit a full investigation by the ICC Prosecutor. These seven facilities also serve as illustrative examples of the different types of sexual crimes occurring in the conflict area, including the use of rape and sexual violence to punish pro-Ukrainian combatants, use of sexual violence and threats of sexual violence to extract confessions or extort property, as well as rape, and enforced prostitution perpetrated against women for the purpose of combatants' sexual gratification.

2. Eastern-Ukrainian Centre for Civic Initiatives, 'War Without Rules: Gender-based Violence in the Context of the War in Eastern Ukraine', 2017, available at: https://jfp.org.ua/system/reports/files/110/en/gon_eng_web.pdf (last accessed 02/05/2018).

The **seven facilities** examined in the Communication are:

- Former SBU Regional Directorate for Donetsk Oblast’;
- Former Branch N.22 of Nova Poshta in Donetsk;
- Former military base in the ‘Motel’ area of Donetsk;
- Former premises of Donetsk Oblast’ organised crime agency (Horlivka);
- Former dormitories of Volodymyr Dal’ Eastern-Ukrainian National University (Luhansk);
- ‘Kokhana’ café/shop and adjoining garages and kindergarten (Luhansk); and
- Former premises of Zhovtnevyi district council of Luhansk city (Luhansk).



FIDH and EUCCI have identified a further sixteen detention facilities in separatist-controlled areas, for which there is *prima facie* evidence of sexual crimes associated with the armed conflict in Eastern Ukraine and/or perpetrated as part of a widespread and/or systematic attack on the civilian population in separatist-controlled Eastern Ukraine.

5. Who are the alleged perpetrators ?

The outbreak of conflict in Eastern Ukraine has led to the breakdown of social order, morality and the rule of law in separatist-controlled territories, so-called Donetsk (DPR) and Luhansk Peoples' Republics (LPR). In 2014, a plethora of separatist paramilitary groups established their authority over urban and rural areas, dismantled established legal and administrative structures, and established a Soviet-inspired warlord autocracy. *Ad hoc* detention facilities sprung up across separatist-held areas. Prior to Zakharchenko and Plotnytskyi's campaigns to consolidate power over their respective territories in 2015, each facility was controlled and administered by a different paramilitary group, without any form of judicial oversight. For all intents and purposes, detainees at these facilities were captives, detained at the pleasure and mercy of the paramilitary group in control and the warlord in charge.

The alleged perpetrators of the sexual crimes committed in the seven detention facilities in separatist-controlled territories described in the FIDH-EUCCI Communication are members and leaders of the paramilitary group or institution in charge of each of these facilities, linked to separatist forces, led and coordinated by key Russian players.

Other organisations also reported sexual crimes associated with the conflict in Eastern Ukraine committed on territory controlled by the Government of Ukraine, perpetrated by members of the Ukrainian armed forces, volunteer battalions and state security services (SBU).

6. How do the documented sexual crimes committed in Eastern Ukraine qualify as war crimes and crimes against humanity ?

Sexual crimes explicitly listed in the ICC Statute are rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence³.

For a sexual crime to constitute a **war crime** it must take place in the context of and be associated with an armed conflict, be it an international or non-international armed conflict. An armed conflict is defined as "a resort to armed force between States or protracted violence between governmental authorities and organized armed groups or between such groups within a State".⁴ An armed conflict involving violence between two sovereign States is an international armed conflict, whilst a non-international armed conflict is confined to the borders and politics of one State. A civil war may nevertheless qualify as an international armed conflict as a result of the support and participation of external State actors. Political, financial and logistical support from a foreign State to a 'domestic' rebel group does not necessarily render the conflict 'international'. An international armed conflict requires evidence of either (1) presence and direct participation of foreign troops in the conflict; (2) a foreign power exercising 'overall control' over organised rebel forces; or (3) military occupation by a foreign power. An international and non-international armed conflict may exist on the territory of the same State at the same time.

The situation in Eastern Ukraine undeniably meets the 'armed conflict' threshold. Moreover, as a result of Russia's direct military intervention and control over rebel forces, the conflict may, at least in part, be classified as an international armed conflict.

3. Article 7(1)(g) as crimes against humanity; Article 8(2)(b)(xxii) as war crimes in international armed conflicts; Article 8(2)(e)(vi) in non-international armed conflicts.

4. ICTY, *Prosecutor v. Tadić, Case No. IT-94-1-AR72*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, ("*Tadić* Interlocutory Appeal Decision").

For a sexual crime to constitute a **crime against humanity**, it must be part of a widespread or systematic attack against the civilian population (or identifiable group of civilians) pursuant to a State or organisational policy to commit such an attack.⁵ An attack may be defined as the sum of all of its underlying crimes. Sexual crimes explicitly listed in Article 7(1)(g) of the ICC Statute as crimes against humanity are rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.

Since the breakout of hostilities in 2014, documentation by international organisations and civil society operating in Eastern Ukraine has revealed a picture of systematic targeting of civilians, through violence, arbitrary detention, persecution and the denial of basic fundamental rights.⁶ At the time of writing, the estimated civilian death toll stood at 2700, with up to 9000 injured.⁷ Civilians in an around the conflict zone have become the unwitting hostages of a political and ideological conflict beyond their control. Fuelled by perpetual disinformation campaigns, separatist forces, groups and institutions have repeatedly and systematically attacked civilians on account of their actual or perceived membership of the opposing camp.

The sexual crimes described in this FIDH-EUCCI Communication include rape (including attempts or threats of rape), other forms of sexual violence such as electrocution of genital areas, enforced prostitution, sexual slavery, humiliation and cruel treatment of a sexual nature, forced nudity and damage (including attempted or threatened) to sexual organs. Based on the evidence presented, there is a reasonable basis to believe that sexual crimes amounting to war crimes and/or crimes against humanity took place in at least seven separatist-controlled detention facilities.

7. Are Ukrainian authorities genuinely investigating and prosecuting sexual crimes ? Are so-called LPR and DPR authorities genuinely investigating and prosecuting sexual crimes ? (complementarity)

To the best of FIDH and EUCCI knowledge, at the time of writing, there have been no genuine efforts by Ukrainian or separatist authorities to investigate and prosecute sexual crimes set forth in this Communication.

According to information received by the OHCHR from the Chief Military Prosecutor of Ukraine, as of December 2016, only three criminal proceedings involving sexual and gender-based violence (SGBV) had been launched against members of Ukrainian or separatist forces.⁸ Only one of these cases – prosecuting members of a pro-Kyiv paramilitary group – went to trial returning convictions for sexual crimes and is currently on appeal.⁹ The cases do not relate to conduct set forth in the Communication. There is no publicly available information on other criminal investigations by Ukrainian authorities in relation to crimes alleged in this Communication, or other sexual crimes associated with the conflict in Eastern Ukraine. Although case files may have been nominally

5. See Article 7(1) of the ICC Statute.

6. OHCHR, 'Civilians in Ukraine continue to suffer – UN report', 8 Dec. 2016, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20999> (27/06/2018); Amnesty International, 'Abductions and Torture in Eastern Ukraine', 2014, available at: http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/UKR/INT_CAT_NGO_UKR_18677_E.pdf (last accessed: 27/06/2018); Human Rights Watch, 'World Report 2017', available at: <https://www.hrw.org/world-report/2017/country-chapters/ukraine> (last accessed: 27/06/2018).

7. UN Security Council, '8270th Meeting (PM) - As Civilians Bear Brunt of Four-year-old Conflict in Ukraine, Continued Ceasefire Violations Test Credibility of Global Community, Officials Warn Security Council', 29 May 2018, available at: <https://reliefweb.int/report/ukraine/civilians-bear-brunt-four-year-old-conflict-ukraine-continued-ceasefire-violations> (last accessed: 27/06/2018).

8. OHCHR, 'Conflict-related sexual violence in Ukraine: 14 March 2014 to 31 January 2017', 11 Feb. 2017, para. 114, available at: <http://www.refworld.org/docid/58a6b1a94.html>.

In the aim of this Communication, EUCCI sent request to the Chief Military Prosecutor's Office in Ukraine. The Prosecutor's Office was asked to provide data in respect to the number of criminal proceedings involving SGBV that had been launched (and went to trial) against members of Ukrainian or separatist forces in 2014-2018. However, The Prosecutor's Office refused to allow access to information on the grounds that record of the range of the number of criminal proceedings involving SGBV against members of Ukrainian or separatist forces is not kept by this authority.

The Prosecutor's Office provided only general information on the number of criminal proceedings involving SGBV that had been launched (and went to trial) in the Donetsk and Luhansk Oblast's' in 2014-2018. This information concerns all criminal proceedings with SGBV, which do not therefore necessarily reflect on the armed conflict.

9. RadioFreeEurope, 'In Ukraine, Both Sides To Appeal Verdicts In Tornado Battalion Case', 10 April 2017, available at: <https://www.rferl.org/a/in-ukraine-both-sides-to-appeal-verdicts-in-tornado-battalion-case/28420645.html> (last accessed: 22/06/2018).

opened in relation to some of the crimes, the lack of any evidence of progress in these cases indicates that Ukrainian authorities are either unwilling or unable to conduct genuine proceedings in relation to such crimes.

Separatist authorities in so-called DPR and LPR have enacted basic “constitutional provisions” and “criminal laws”, largely transposing legislation applicable in the Russian Federation and Ukraine. “Constitutional documents” include prohibitions against torture, cruel, inhuman and degrading treatment (Article 14(3)), while “criminal laws” include ‘crimes against sexual freedom and inviolability’. Formal justice mechanisms are limited and quasi-judicial initiatives by paramilitary groups lack fairness, independence or the safeguards of a proper judicial processes.¹⁰ In one well-publicised example, a trial of two suspected perpetrators of sexual violence turned into public victim blaming by the local warlord.¹¹ There is therefore no indication that any of the sexual crimes set forth in the Communication have been subject to genuine efforts by separatist or Russian authorities to bring those responsible to account for this conduct.

8. Are the sexual crimes described in the Communication of “sufficient gravity to justify” ICC’s action? (gravity)

Under Article 17(1)(d) of the ICC Statute, a case may be determined to be inadmissible when it is ‘not of sufficient gravity to justify further action by the Court’. An assessment of gravity is based on the scale, nature, and manner of commission of crimes, and their impact.¹²

There is no doubt that sexual crimes in general, and those presented in this Communication in particular, have had an enormous detrimental impact on victims and witnesses. Former detainees recall experiencing and witnessing acute physical and psychological trauma. Organisations providing medical, psychological and social care for victims of sexual violence highlight the long lasting trauma and difficulties in attaining recovery.¹³ The impact is borne not only by the direct victim or witness, but also by the families and wider communities. Unlike most other crimes, victims of sexual crimes endure psychological trauma, stigmatisation and isolation long after the physical injuries have healed.

As to the scale of perpetration – it is evident that information collected by the Filing Parties and other actors on sexual crimes in Eastern Ukraine is likely to represent just a fraction of the actual scale of perpetration. According to the United Nations, ‘[c]ases of sexual violence are usually under-reported, including because of a general unease about this issue, as well as the stigma and trauma associated with it’.¹⁴ In addition to underreporting, a large number of potential victims are on territory controlled by separatist forces and therefore beyond the reach of FIDH and EUCCI documentation. Notwithstanding these challenges, FIDH and EUCCI have identified at least seven detention facilities where sexual crimes appeared to have been part and parcel of the detention strategy, affecting multiple victims on more than one occasion.

As to the manner of commission of the sexual crimes, FIDH and EUCCI note the cruelty and dehumanisation reported by victims and witnesses in separatist-held detention facilities. Evidence demonstrates that certain perpetrators took particular pleasure in perpetrating sexual violence. Whether the perpetration of sexual crimes was a matter of policy for separatist authorities and/or specific institutions is yet to be determined on further investigation.

10. OHCHR, ‘Conflict-related sexual violence in Ukraine: 14 March 2014 to 31 January 2017’, 11 Feb. 2017, para. 126-127, available at: <http://www.refworld.org/docid/58a6b1a94.html>

11. Youtube, ‘Первый народный суд Новороссии’, 2014, available at: <https://youtu.be/T2Ymaq4m1zY> (last accessed: 02/05/2018)

12. Regulation 29(2) of the Regulations of the Office of the Prosecutor; ICC, The Office of the Prosecutor, “Policy Paper on Preliminary Examinations,” November 2013, para 61 and ICC, Pre Trial Chamber I, Situation in Darfur, Sudan, *Prosecutor v. Bahar Idriss Abu Garda*, “Decision on the Confirmation of Charges,” [ICC-02/05-02/09- 243-Red], 8 February 2010, para. 31

13. Report of the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/31/57, 5 January 2016, available at: http://www.un.org/ga/search/view_doc.asp?symbol=A/HRC/31/57 (last accessed: 28/06/2018).

14. OHCHR Report, para. 5 (Executive Summary).

9. What is the next step for the ICC Prosecutor following this submission ?

For the ICC to open an official investigation it must be satisfied that there is a “reasonable basis to believe” that war crimes and/or crimes against humanity may have been committed. At this stage, the Communication need not “prove” the commission of war crimes and/or crimes against humanity.

The Prosecutor has an obligation to examine the information received. This takes the form of a preliminary examination, which can lead to the opening of an official investigation, if the Prosecutor is authorised by the Pre-Trial Chamber.

During the preliminary examination stage, the Office of the Prosecutor evaluates if the admissibility criteria (complementarity and gravity) have been met.

The ICC Office of the Prosecutor officially opened a preliminary examination into the situation in Ukraine on 25 April 2014. Initially, the preliminary examination concerned the so-called “Maidan events”, but on 29 September 2015, the Prosecutor announced the extension of the preliminary examination of the situation in Ukraine to include alleged crimes occurring after 20 February 2014 in Crimea and Eastern Ukraine. As of December 2017, the Office of the Prosecutor received a total of 70 Communications under Article 15 of the ICC Statute in relation to crimes alleged to have been committed since 21 November 2013.

This Communication aims to support the Prosecutor’s ongoing preliminary examination of the situation in Ukraine and to persuade the Prosecutor to open of a full investigation into ICC Statute crimes committed in Ukraine, including sexual crimes.

10. Who are the filing parties of the Communication ?

The **International Federation for Human Rights (FIDH)** is an international and independent human rights NGO established in 1922, uniting today 184 member organisations in 112 countries around the world. FIDH’s mandate is to take action for the protection of victims of human rights violations, for the prevention of these violations and to bring perpetrators to justice. In order to do so, FIDH works with its member and partner organisations to document human rights violations, conduct advocacy work as well as strategic litigation in support of victims’ rights to truth, justice and reparation. One of FIDH priorities is to fight impunity and protect populations from the most serious crimes.

FIDH International Secretariat’s headquarters are based in Paris (France) and FIDH has a delegation to the International Criminal Court (ICC) in The Hague (the Netherlands) since 2004. FIDH has been bringing representatives of member and partner organisations to The Hague to increase their capacity relating to international justice, the ICC and documenting serious human rights violations, to strengthen their strategic litigation and to enable an improved relationship between them and the different ICC organs. FIDH has also submitted numerous Communications under Article 15 of the ICC Statute to the Office of the Prosecutor of the ICC on different situations where ICC Statute crimes were or are committed and no genuine national investigations and prosecutions are undertaken. FIDH’s delegation in The Hague also closely monitors the ICC activities and participates in various consultations of the Court with NGOs, especially relating to victims’ rights.

FIDH’s member organisation in Ukraine is the Center for Civil Liberties (CCL), which joined FIDH in 2016. However, FIDH has been working on the human rights situation in Ukraine since before 2016, with many partner organisations, including the Eastern-Ukrainian Center for Civic Initiatives (EUCCI), the Kharkiv Human Rights Group and other members of the Coalition “Justice for Peace in Donbas”, as well as civil society organisations working on Maidan events and Crimea.

With its member and partner organisations, FIDH has conducted several advocacy missions in Ukraine to call for accountability for crimes committed since 2013, in particular during the Maidan events and in the context of the armed conflict in Eastern Ukraine and violations committed in

Crimea. FIDH also strengthened its partners' capacity to document human rights violations with a litigation purpose, through training sessions in Kharkiv and Kyiv, focusing in particular on the documentation and litigation of sexual and gender-based crimes. It also continuously advocated for effective remedies for victims of human rights violations committed in Ukraine at regional and international fora.

For the purpose of this Communication, FIDH hired **Alexandre Prezanti**, partner of Global Diligence LLP, as a consultant to assist EUCCI and FIDH with the documentation and analysis of the evidence and the drafting of this Communication.

The **Eastern-Ukrainian Center for Civic Initiatives (EUCCI)** is a non-governmental, non-profit organisation established in December 2002 in Luhansk, Ukraine. The mission of EUCCI is to develop and maintain the ability of the Ukrainian society to face current challenges based on the principles of democracy and the rule of law through education, advocacy, and research.

Since the beginning of the armed conflict in Donbas, main activities of the organisation include documentation of gross human rights violations that occurred during the conflict in Eastern Ukraine; facilitation of the restoration of peace in the east of the country. The organisation has been documenting conflict-related human rights violations, *inter alia* sexual and gender-based violence, illegal detention, torture, an involvement of children in armed groups, human trafficking, and forced labour.

In December 2014, EUCCI, together with 15 human rights NGOs, established a Coalition "Justice for Peace in Donbas" for documenting human rights violations during the armed conflict in Donbas.¹⁵ With donor's support, EUCCI and its partners have created a joint electronic database of human rights violations that occurred in Eastern Ukraine during the armed conflict.

Collected data was presented in reports regarding gender-based violence and places of illegal detention, which EUCCI present at the OSCE Human Dimension Implementation Meeting in Warsaw every year since 2015. Presentation of the reports was also held by EUCCI in Germany, Austria, and France (for diplomatic missions, political parties, academic institutions, the media, and the public). In early 2017 EUCCI prepared and presented the submission for the 66th CEDAW session, which concerned conflict-related gender-based violence and included recommendations for the government of Ukraine. In 2017 EUCCI coordinated a submission of the thematic report for the Universal Periodic from the Coalition "Justice for Peace in Donbas". During 2017-2018 EUCCI published and presented several reports about human rights violations during the military conflict in Donbas.

15. For more information about the Coalition "Justice for Peace in Donbas", please visit its website: <https://jfp.org.ua/coalition/pro-koalitsiiu?locale=en>

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ABOUT FIDH

FIDH takes action for the protection of victims of human rights violations, for the prevention of violations and to bring perpetrators to justice.

A broad mandate

FIDH works for the respect of all the rights set out in the Universal Declaration of Human Rights: civil and political rights, as well as economic, social and cultural rights.

A universal movement

FIDH was established in 1922, and today unites 184 member organisations in 112 countries around the world. FIDH coordinates and supports their activities and provides them with a voice at the international level.

An independent organisation

Like its member organisations, FIDH is not linked to any party or religion and is independent of all governments.

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