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促进和保护所有人权——公民权利、政治权利、
经济、社会及文化权利，包括发展权

对乌克兰的访问

强迫或非自愿失踪问题工作组的报告*，**

概要

乌克兰的人权状况很复杂，主要因为其东部地区的武装冲突仍在持续，冲突各方继续在接触线两侧实施暴力和侵权。¹

由于大多数强迫失踪事件源自东部的冲突，所以应优先考虑立即结束有关各方之间的敌对行动，履行《明斯克协定》中预设的所有义务，以及国际人道主义法和人权法规定的一般义务。

工作组回顾，即使在武装冲突期间，也必须尊重人权，包括绝对禁止强迫失踪，同时努力减轻人们的痛苦。委员会还回顾，强迫失踪在任何情况下都是禁止的，包括战争状态或任何其他公共紧急状态。² 这项禁止是不可克减的，顿涅茨克和卢甘斯克事实上的当局也必须遵守。

失踪者亲属的痛苦和煎熬不能被用于政治目的。必须采取果断措施，帮助失踪者家属寻找他们消失的亲人，向他们提供赔偿——包括心理、经济和其他支持，并将犯罪者绳之以法。工作组注意到在立法上取得一些进展，特别是在对乌克兰刑法作出若干修正的《失踪人员法律地位法》中将强迫失踪定为刑事犯罪。

* 本文件因提交过程中的技术错误而迟交。

** 本报告概要以所有正式语文分发，附于概要之后的报告本身仅以提交语文和俄文分发。

¹ 见 A/HRC/39/CRP.5，第123段。

² 《保护所有人免遭强迫失踪宣言》第7条；《保护所有人免遭强迫失踪国际公约》第一条。



然而，乌克兰的法律和《刑法》都有待进一步改进，以便与适用的国际标准保持完全一致。

有罪不罚尤其是一个严重的问题；没有任何人因强迫失踪而受到法律制裁。通常是在指称责任人被认定支持武装冲突对立方的情况下才启动调查，而且调查中双方不进行合作。

在被俄罗斯联邦临时占领的乌克兰克里米亚自治共和国和塞瓦斯托波尔市 (Sevastopol)，作为占领国的俄罗斯联邦有责任保护平民，也有责任对那里犯下的侵犯人权行为，包括强迫失踪负责。克里米亚的人权状况令人担忧，也因为俄罗斯联邦继续对该半岛的居民适用其法律——违背其作为占领国根据《日内瓦第四公约》承担的义务，不允许包括联合国人权事务高级专员办事处在内的国际监察员进入该半岛。

工作组重申愿意继续与乌克兰政府进行建设性对话，并毫无保留地支持乌克兰全面执行《保护所有人免遭强迫失踪宣言》。

工作组重申全力声援强迫失踪受害者，包括那些遭受这种令人发指的侵犯人权和严重刑事犯罪行为之害的家属们。他们的持续痛苦是一份活生生的证据，证明在被强迫失踪者命运和下落得到澄清之前，强迫失踪是一种持续性的侵权行为。

Annex

Report of the Working Group on Enforced or Involuntary Disappearances on their visit to Ukraine

Contents

	<i>Page</i>
I. Introduction	4
A. Background	5
B. General situation of enforced disappearances	6
C. Situation in the territory controlled by the Government of Ukraine	6
D. Situation in the territory controlled by the self-proclaimed “Donetsk People’s Republic” and “Luhansk People’s Republic”	14
E. Situation in the Autonomous Republic of Crimea and the city of Sevastopol	15
II. Conclusions	15
III. Recommendations	16
A. Government of Ukraine	16
B. Self-proclaimed “Donetsk People’s Republic” and “Luhansk People’s Republic”	18
C. Russian Federation, in relation to Crimea	19
D. International community	19

I. Introduction

1. A delegation of the Working Group on Enforced or Involuntary Disappearances conducted an official visit to Ukraine from 11 to 20 June 2018.
2. The delegation was composed of the Vice-Chair of the Working Group, and Tae-Ung Baik, Luciano Hazan and Henrikas Mickevicius, members of the Working Group.
3. At the outset, the Working Group wishes to thank the Government of Ukraine for extending an invitation to visit the country, and for the efforts made before and during the visit to facilitate its smooth undertaking. It also thanks the de facto authorities in Donetsk and Luhansk for the cooperation during the visit in the territory under their control.
4. The Working Group also wishes to thank the human rights monitoring mission in Ukraine for the continuous support during the visit.
5. The Working Group met, inter alia, with the representatives of the Ministry of Foreign Affairs, the Ombudsperson of Ukraine (the national preventive mechanism), the Supreme Court, the Ministry of Internal Affairs, the Ministry of Justice, the State Criminal Enforcement Service and the Centre for Free Legal Aid, the Security Service of Ukraine, the Ministry of Defence, the National Police in Kyiv and Mariupol, the Office of the Prosecutor General in Kyiv and the Military Prosecutors in Kyiv and Kramatorsk.
6. The delegation also met with the “ombudsperson” of the self-proclaimed “Donetsk People’s Republic”, the “forensic bureau” in Donetsk, the “acting minister of foreign affairs” of the self-proclaimed “Luhansk People’s Republic” and the representative of the “Luhansk People’s Republic” in the Working Group on Humanitarian Issues of the Trilateral Contact Group on Ukraine in Minsk.
7. The Working Group held a series of meetings with the persons subjected to enforced disappearances and relatives of disappeared persons throughout the country, and met representatives of civil society, including non-governmental organizations, and lawyers. It thanks all stakeholders met, and in particular the survivors of enforced disappearances and the relatives of disappeared persons who shared their testimonies with the Working Group.
8. The Working Group received information from the Government, victims and civil society organizations, and held discussions with all stakeholders on the measures to prevent and eradicate enforced disappearances, as well as issues relating to truth, justice and reparation for victims.
9. The Working Group visited Kyiv, Mariupol, Donetsk, Luhansk, Kramatorsk and Pokrovska. Unfortunately, it was not able to visit Crimea in the context of its country visit to Ukraine, although it received information relevant to the present report from several stakeholders.
10. The experts wish to emphasize that the politicization of humanitarian issues resulting from the armed conflict has a direct and severe impact on the human rights of victims of enforced disappearances, including the right to truth, justice and adequate reparation. Decisive measures have to be taken to assist family members who are looking for their loved ones, to identify and punish perpetrators and to provide reparation and psychosocial assistance to all affected victims.
11. There is almost total impunity for acts of enforced disappearances on both sides of the contact line, mainly due to a lack of interest and political will. In Kyiv as well as in the territory controlled by the “Donetsk People’s Republic” and the “Luhansk People’s Republic”, the Working Group perceived little interest in pursuing cases unless the perpetrator was identified as someone supporting the opposite side. Bringing to justice anyone from one’s own side appears to be perceived as “unpatriotic”.
12. In the present report, the Working Group also describes a number of developments between June 2018, when the visit was conducted, and the submission of the report to the Human Rights Council.

A. Background

13. Following the Maidan events of November 2013 – February 2014, which led to the departure of the incumbent President Yanukovich and a change in Government, the Autonomous Republic of Crimea and the city of Sevastopol (hereinafter Crimea) were occupied by the Russian Federation in March 2014. In April 2014, anti-Maidan activists, allegedly supported by individuals and groups from the Russian Federation, took control over administrative buildings in a number of regional centres in eastern Ukraine, including Donetsk and Luhansk. On 14 April 2014, an anti-terrorist operation was launched to regain government control over the places controlled by armed groups. On 11 May 2014, armed groups in Donetsk and Luhansk organized so-called “referendums” on the “sovereignty” of the self-proclaimed “Donetsk People’s Republic” and the self-proclaimed “Luhansk People’s Republic”, which under Ukrainian law were illegal and failed to meet international standards. Since May 2014, armed groups have been controlling considerable parts of Donetsk and Luhansk regions. In May 2014, Petro Poroshenko was elected the President of Ukraine; in November 2014, the new Verkhovna Rada (parliament) was elected.

14. The hostilities with the armed groups, which from April 2014 were bolstered by the influx of foreign fighters, weapons and ammunition, including from the Russian Federation, rapidly escalated to the level of an armed conflict and had a heavy death toll on civilians. By June 2018, the number of conflict-related civilian deaths exceeded 3,000, and the number of civilian injuries was estimated at between 7,000 and 9,000. Ceasefire and disengagement measures agreed by the Trilateral Contact Group in Minsk in September 2014 and in February 2015 (the Minsk agreements), as well as a number of subsequent ceasefire regimes agreed in Minsk contributed to the overall decrease in hostilities, but failed to stop the conflict. In April 2018, the Ukrainian Law “On Particular Aspects of Public Policy Aimed at Safeguarding the Sovereignty of Ukraine over the Temporarily Occupied Territory of the Donetsk and Luhansk regions of Ukraine” entered into force. The law refers to the armed aggression by the Russian Federation against Ukraine, and formally assigns the areas in eastern Ukraine that are not controlled by the Government as “under the occupation of the Russian Federation”. The Government of the Russian Federation does not consider itself a party to the armed conflict in eastern Ukraine, and has consistently denied the presence of regular Russian troops on the territory of Ukraine during the entire period of conflict.

15. Armed conflict in eastern Ukraine heavily affected the situation of people resident in the conflict zone. As at May 2018, more than 1.5 million internally displaced persons were registered with Government, while many choose not to register as such, given the bureaucratic barriers involved and the perceived stigma, as well as the minimal financial support for registered internally displaced persons. Civilians resident in the immediate proximity to the contact line every day face the risk of being shelled or targeted by small arms and light weapons fire, or of tripping a mine or explosive remnant of war; furthermore, their access to social and other services is limited. Numerous families are separated by the contact line, the crossing of which is challenging, if not dangerous. In territory controlled by armed groups, residents are exposed to arbitrariness of various security and “administrative” structures, which has resulted in numerous human rights abuses. International monitors have been repeatedly denied access to places of detention in territory controlled by armed groups. The freedoms of expression, assembly, association and religion have been severely muzzled in both Donetsk and Luhansk.

16. Since 2014, the Government of Ukraine has carried out a number of institutional reforms, which included the re-establishment of the national police and creation of the National Anti-Corruption Bureau and the Specialized Anti-Corruption Prosecutor’s Office in 2015, of the National Agency for the Prevention of Corruption in 2016, and of the State Bureau of Investigation in 2017 (which became operational in November 2018). In June 2016, a comprehensive judicial reform process was launched to strengthen the independence and accountability of the judiciary. In 2015, the President of Ukraine approved the national human rights strategy; the Government subsequently approved the relevant plan of action for its implementation up to 2020.

B. General situation of enforced disappearances

17. Over the years, the Working Group has transmitted nine cases of enforced disappearances to the Government of Ukraine, of which six are still outstanding. The cases relate to disappearances between 1995 and 2015, reportedly perpetrated mainly by officers of the Security Service of Ukraine (SBU).

18. Two of the individuals whose cases were clarified were released from detention, while one individual was found dead.

19. As in virtually all countries facing the issue of enforced disappearances, in Ukraine the number of cases reported to the Working Group is not illustrative of the real dimension of the problem, but a small sample.

20. During its visit, the Working Group heard numerous accounts of disappearances occurring in particular at the beginning of the conflict in the East and its aftermath, notably in 2014 and 2015. The stories indicated that all parties to the conflict had been responsible for such acts, with the allegations pointing mainly at the SBU and volunteer battalions, and at the security services established by the de facto authorities in Donetsk and Luhansk. According to the delegation of the International Committee of the Red Cross in Ukraine, it is estimated that there are more than 1,500 missing persons as a result of the conflict in Eastern Ukraine.³ During and since its visit, the Working Group has received a number of new reports alleging disappearances.

21. The Working Group has recalled that all parties to the conflict in Ukraine have obligations under both human rights law and international humanitarian law prohibiting enforced disappearances under any circumstances, including situations of armed conflict.

C. Situation in the territory controlled by the Government of Ukraine

1. Legislation and institutional framework

22. The Working Group commends the Ukrainian authorities for their efforts to set up a comprehensive legal framework for the protection and promotion of human rights. The Constitution of Ukraine provides for non-exhaustive list of protected human rights, including the right to life, the prohibition of torture and the right to personal freedom and security. Ukraine, one of the founding States Members of the United Nations, has ratified all major international human rights treaties: the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Optional Protocol to the Convention against Torture, the International Covenant on Civil and Political Rights, the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child and the Optional Protocols thereto on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography, and the Convention on the Rights of Persons with Disabilities.

23. In particular, the Working Group welcomes the ratification by Ukraine of the International Convention for the Protection of All Persons from Enforced Disappearance in 2015, as well as its recognition of the competence of the Committee on Enforced Disappearances to receive individual communications under article 31. It is essential that the ratification of the Convention be followed by its effective implementation in the national legal system, and that judges, prosecutors and other relevant officials – including from the military and security institutions – are familiarized with its principles, concepts and specific norms.

³ See <http://ua.icrc.org/2018/10/04/international-experts-gather-in-kyiv-to-catalyze-action-for-missing-persons-eng/>.

24. The Working Group welcomes the adoption of the Law “On the Legal Status of Missing Persons” in the aftermath of its visit in July 2018. The law defines the legal status of missing persons and provides legal regulations with respect to the determination of, and accounting and search for missing persons, and the rights of victims and their relatives, and corresponding State obligations. This is an important step towards the creation of a legal framework to address enforced disappearances and to guarantee the rights of victims. These efforts should however be continued, given that the law is incomplete and conceptually inconsistent; the fact that certain provisions are not in full conformity with international law raises questions with regard to the scope of application and modes of implementation of its various provisions.

25. In particular, it is difficult to determine which norms of the law are applicable to all missing persons and which ones concern those who went missing in “special circumstances”. During its visit, the Working Group was given an indication that the intention of the law was to define legal status and to ensure certain rights of those who went missing during the conflict in the eastern part of the country and of their relatives. The adopted law provides for more extensive scope of its application, stipulating – in line with its title, which suggests the inclusion of all missing within it – that it covers “legal relations connected with obtaining of the legal status of missing persons in situations of an armed conflict, due to hostilities, domestic insurgency, emergency situations of natural or man-made disasters, other events that can cause mass death of people, as well as of the persons missing as a result of any other circumstances” (art. 3). The open-ended list of the situations covered in which persons may go missing suggests that the law is applicable to all disappearances, enforced disappearances as defined in international law.

26. The law however excludes the phrase “any other circumstances” in many of its articles, in particular in the section regulating the creation and functioning of the Commission on Persons Missing due to Special Circumstances – an inter-institutional task force authorized to, inter alia, coordinate accounting and searches for missing persons, and to maintain the Unified Register of Persons Missing due to Special Circumstances.⁴ To illustrate the point, it seems that only information about those missing during anti-terrorist or military operations, notably in the context of the conflict in the Donetsk and Luhansk regions, will be entered into the Unified Register, while information about enforced disappearances occurring not in “special circumstances” will not, and the Commission will not deal with such cases. Rather, such information will be managed by the national police. From the humanitarian and human rights perspective, this exclusion is hardly acceptable; the law itself recognizes this by prohibiting, in its article 7, any discrimination between missing persons and their relatives based on, inter alia, the territory of disappearance or other criteria.

27. The Working Group encourages the Commission to be proactive in finding ways to address a number of questions relating to the application of the law, either in its internal regulation due to be developed by the Commission and approved by the Government as the first task upon its formation, or by initiating legislative amendments and other pieces of legislation or through victim-oriented interpretations of the law. The International Convention for the Protection of All Persons from Enforced Disappearance, which in accordance with article 2 (2) of the law has priority over it in cases of conflict, and the Declaration should also be employed to clarify and align its provisions with applicable

⁴ The Commission on Persons Missing due to Special Circumstances, formally established on 10 April 2019 by the Order of the Cabinet of Ministers of Ukraine no. 248-p. The Commission comprises 16 members representing the national police, the Office of the Prosecutor General, the State Service on Emergency Situations, the Ministry of Temporarily Occupied Territories and Internally Displaced Persons of Ukraine, the Anti-Terrorist Centre of the Security Service of Ukraine, the Armed Forces of Ukraine and the Civil Military Cooperation, the Secretariat of the Parliamentary Committee on Human Rights, the Office of the Ukrainian Parliamentary Commissioner for Human Rights, the National Military History Museum of Ukraine and the National Red Cross Society. Notably, families of missing persons, their associations and non-governmental human rights organizations will not be represented.

international legal standards. Further comments on the new law will be included in the corresponding sections of the report.

28. The Working Group welcomes the introduction of new article 146 (1) to the Criminal Code of Ukraine following the adoption of the Law “On the Legal Status of Missing Persons” in July 2018. According to this new legal provision, the arrest, detention, abduction or imprisonment of a person in any other form committed by a representative of the State,⁵ including a foreign one, with the subsequent refusal to recognize the fact of such arrest, detention, abduction or imprisonment of a person in any other form or concealment of information on the fate or whereabouts of such person, is punishable by imprisonment for a term of three to five years.

29. The Working Group considers important the introduction of an autonomous crime of enforced disappearance in the legislation, as the lack thereof has created a situation whereby acts of enforced disappearances have been investigated by different investigative bodies under crimes such as murder, abduction and arbitrary deprivation of liberty, which is highly problematic in terms of the specific investigation required from the outset in cases of enforced disappearances.

30. While the Working Group appreciates the introduction of this specific provision, it still notes some gaps in the definition. In particular, it notes that the penalties foreseen do not seem to correspond to the severity threshold required by international law, which requires them to be commensurate to the extreme seriousness of the crime, as evidenced by the prohibition of admitting any privilege, immunity or special exemption in cases of enforced disappearances (art. 16 (3) of the Declaration) and States’ obligation to ensure that perpetrators do not benefit from amnesties or similar exempting measures (art. 18 of the Declaration).

31. The Working Group also reaffirms the view that an enforced disappearance is a prototypical continuous crime (A/HRC/16/48, para. 39), meaning, *inter alia*, that the crime continues for the whole period when it is committed, that is until the fate or whereabouts of the disappeared person are clearly established, irrespective of whether that person is alive or dead. Consequently, cases of enforced disappearance can and should be investigated, prosecuted and tried if they commenced before and continue after they have been criminalized in national law. Preferably, legislation should expressly mention that enforced disappearance is a continuous crime or the Supreme Court should guide Ukrainian judiciary accordingly.

32. The law criminalizing enforced disappearances covers some modes of indirect liability: “ordering the commission of actions referred to in paragraph one [...] or failure for a leader who has become aware of the commission of the actions referred to in paragraph one [...] to ask his subordinate measures for their termination and failure to notify the competent authorities of the crime shall be punishable by imprisonment for a term of five to seven years”. However, this provision does not meet the international standards for superior responsibility as provided for in article 6 (1)(b) of the Convention.

33. The law should in addition make no provisions for defence on the grounds of receiving an order or instruction to commit an enforced disappearance, and that anyone

⁵ There is a note to the article clarifying that “a representative of a State in this article shall mean an official, as well as a person or group of persons, acting with permission, with the support or with the consent of the state. The representatives of a foreign state for the purposes of in this article shall include persons who act as civil servants of a foreign state or who are servicemen in the armed forces, police authorities, state security agencies, intelligence agencies, or persons who are holding positions in the specified bodies or any of the other state bodies or bodies of local self-government of a foreign state formed in accordance with its legislation, or who are acting on the order of such persons, as well as representatives of irregular illegal armed groups, armed gangs and groups of mercenaries set up by, subordinated to, managed and funded by the Russian Federation, as well as representatives of the occupation administration of the Russian Federation, composed of its state bodies and structures that are functionally responsible for the management of the temporarily occupied territories of Ukraine, and representatives of the self-proclaimed bodies controlled by the Russian Federation, which usurped the exercise of power functions in the temporarily occupied territories of Ukraine.”

receiving such an order or instruction has the right and the duty not to obey. The introduction of such a legal provision should be supported by appropriate training of law enforcement, intelligence and military officers. On the other hand, the criminal law could envision mitigating circumstances for those who took part in committing enforced disappearances but who are instrumental in bringing the victims forward alive or voluntarily provide information contributing to clarification of the cases of enforced disappearances.⁶

34. Lastly, the Working Group was informed that no effective civil law provisions were available to victims of enforced disappearance to claim their rights. The Working Group recalls that, in accordance with the Declaration, in addition to criminal penalties, enforced disappearances render their perpetrators and the State or State authorities that organize, acquiesce in or tolerate such disappearances may be liable under civil law.⁷ The Working Group was also informed of the forthcoming reform of the security sector. It received consistent information that the SBU had been operating, especially at the height of the armed conflict in the East, without any real scrutiny and had enjoyed exceptionally broad powers, including those of law and order, investigation of crimes and the detention of individuals, including in places of detention that were not officially recognized. This should be changed with a view to revoking law-enforcement and related functions and ensuring civilian control over the security and intelligence services, including effective oversight by the legislative branch.⁸

35. The Working Group was also informed of an ongoing reform providing for the creation of the new State Bureau of Investigation. The State Bureau of Investigation took over the investigative jurisdiction from the Prosecutor's Office, specifically in relation to crimes involving senior public officials, judges, officers of law enforcement or national anti-corruption bodies, and certain crimes relating to military service. The SBU continues, however, to exercise investigative functions in relation to the crimes against national security, smuggling, terrorism, crimes relating to the protection of State secrets and crimes "against peace, security of mankind and the international legal order" (art. 216 (2) of the Criminal Code of Procedure). The Working Group is concerned that the SBU retains investigative powers, including possibly for cases of enforced disappearance or other international crimes. It is also concerned that cases of enforced disappearance may be investigated by different investigative bodies, depending on who the perpetrator of the enforced disappearance is.

36. The State is under an obligation in international law to ensure that the institution in charge of investigating enforced disappearances has the necessary powers, resources and requisite knowledge to conduct investigations effectively. In addition, it is of outmost importance that investigative officials are familiar with the phenomenon and legal concept of enforced disappearances, including their legal and factual complexity, latent character, specificity of evidence and methods of its collection, and definition and roles of victims in pretrial investigations. Exchanges with legal professionals – judges, prosecutors and investigators – during the visit revealed an obvious need for this kind of legal training.

2. Truth

37. The Working Group, in its general comment on the right to the truth in relation to enforced disappearance, stated that this right means the right to know about the progress and results of an investigation, the fate or whereabouts of disappeared persons, and the circumstances of the disappearance, and the identity of the perpetrator(s) (A/HRC/16/48, para. 39).

38. The experts observed that, while a number of those who were forcefully disappeared at the beginning of the conflict have been released within simultaneous releases under the

⁶ See Declaration, art. 4.2 and Convention, art. 7.2.

⁷ See Declaration, art. 5.

⁸ See principle 36 (c) of the updated Set of Principles for the protection and promotion of human rights through action to combat impunity.

Minsk agreements, or otherwise released or their whereabouts have been clarified, many others remain unaccounted for.

39. The experts were concerned that the list of those detained or captured during the conflict was seldom revealed to the concerned families, who were therefore left in the uncertainty and anguish as to the fate of their loved ones, also noting that there was currently an impasse in the process of simultaneous releases of detainees in the context of the Minsk agreements. The most recent simultaneous release was on 27 December 2017. The Working Group recommends that families on both sides of the contact line be informed about the fate of their disappeared relatives and whether they are on the lists of detainees to be simultaneously released.

40. It is very important that all existing information concerning the whereabouts of the persons be shared among the parties, on a humanitarian basis. Even if more difficult while the conflict persists, all possible efforts must be made so that information available in the archives in the State institutions are made available to those in charge of the search for disappeared persons.

41. The experts also regretted the fact that, in May 2018, an attempt by relatives of disappeared persons from both sides to meet in order to join forces in trying to locate their loved ones was frustrated by the SBU, which prevented them from crossing the contact line. Such initiatives should be facilitated and supported rather than discouraged and obstructed.⁹

42. The Working Group received information on the existence of unidentified graves on both sides of the contact line. While some bodies had been exhumed, identified and handed over to the families, others had not been yet exhumed or secured. It is of utmost importance that exhumation and identification be conducted as soon as possible, with the help of international organizations, and guaranteeing internationally recognized standards, including respect for victims, their cultural traditions and religious beliefs. The Working Group also received information that there was no centralized system of data collection on burial sites or centralized collection of DNA samples; it is therefore concerned about the reported misidentification of remains.

43. The Working Group hopes that the new Law “On the Legal Status of Missing Persons” will provide an impetus and clear structure for the efforts to account and to search for missing persons, for the identification and preservation of graves, and for the exhumation and identification of the remains of missing persons. Indeed, the law provides that any person has the right to know the fate of his/her missing relatives, including their whereabouts, circumstances of death, if he/she lost his/her life, place of burial and the right to receive their remains. Regrettably, however, the Working Group has noted that the obligations of the Commission depend on whether it is dealing with the case of a person missing in “special circumstances”, on the one hand, or a person missing and that does not fall into that category, on the other; furthermore, the rationale behind a number of provisions describing the Commission’s powers and functions is unclear.

44. In particular, the Commission has been given the power to create, in cooperation with other State institutions, and to manage search groups (humanitarian missions) to locate those who went missing in “special circumstances” specifically in the territory controlled by armed groups. Its role in searching for other missing persons is, however, less defined. It seems that the national police are responsible, although the Commission has a power to “collect and manage the information necessary for the search for missing persons”, that is, all missing persons. The purpose of this function is ambiguous, given that information about persons missing outside of “special circumstances” cannot be entered into the Unified Register of Persons Missing due to Special Circumstances, which the Commission is assigned to manage. It seems that the only way for cases of persons who disappeared under circumstances other than special ones to be registered, and thus for such disappearances to become accounted for, is to lodge a complaint with the national police. Assuming that a decision is taken to initiate pretrial investigations, information indicating that an enforced

⁹ See Convention, art. 24.7.

disappearance occurred will be entered into the Unified Register of Pretrial Investigations, and the search for forcibly disappeared persons will be conducted as a part of the criminal investigation. Additionally, it is not clear how information and evidence that could serve to initiate or substantiate a criminal proceeding would be shared between the Commission, the national police and the judiciary. Lastly, the Commission's role in investigating and preserving burial sites, and in exhumations and the identification of remains is also unclear; the Working Group notes, however, that article 22 (1) of the law provides for the adoption of special legislation in this regard.

3. Justice

45. The Working Group notes that there is almost total impunity for acts of enforced disappearance; in fact, according to the information it received, only a few State officials have been convicted for the crime of illegal deprivation of liberty under article 146 of the Criminal Code. In all these cases, however, the whereabouts of the victims were known. According to the most recent information from the Office of the Prosecutor, between 2 August 2018 and 14 January 2019, 20 criminal proceedings were initiated under article 146 of the Criminal Code; two of them were closed, however, owing to absence of *corpus delicti*, leaving therefore 18 cases under investigation. In this regard, the Working Group emphasizes that the State duty to investigate, prosecute and try enforced disappearances exhaustively and impartially extends until the truth of the victim is established,¹⁰ even if and when the enforced disappearance is investigated and prosecuted under other offences.

46. As at the time of writing, in none of the investigations had the suspects been found and/or formally charged. It was also unclear whether these cases involved Ukrainian State officials or rather representatives of the armed groups and/or self-proclaimed bodies. Trials in absentia have been initiated by a special unit in the Office of the General Prosecutor for acts conducted by armed groups relating to the conflict, though they are very difficult to investigate and prosecute owing to the lack of access to the parts of the territory that are not under the Government's control.

47. This lack of accountability for disappearances occurring in the context of the conflict essentially depends on a combination of factors, notably the lack of political will – particularly on the part of relevant State authorities to seriously investigate these crimes, unless they concern disappearances occurring at the hands of armed groups of the “Donetsk People's Republic” or the “Luhansk People's Republic” – and the loopholes in the legal framework, particularly due to the absence of an autonomous crime of enforced disappearance in the Criminal Code. The lack of legal knowledge about the crime of enforced disappearance and of special investigative practices is also a factor. The Working Group also received information in relation to the excessive length of proceedings.

48. The Working Group emphasizes that, while the de facto authorities in Donetsk and Luhansk may incur in responsibility under international law for their conduct, this does not diminish the State's obligation to take all possible measures, including judicial ones, to protect the human rights of the population in the part of territory outside its control. At the same time, there should be no double standards when it comes to accountability for enforced disappearances; all acts that may constitute enforced disappearances should be investigated and prosecuted, irrespective of the perpetrator.

49. The Working Group was informed that there has been an issue with regard to which authority was competent to investigate and prosecute disappearances committed by the volunteer battalions – which operated at least with State acquiescence and with little or no control at the beginning of the conflict – before they were completely integrated into the armed forces or the police in 2015. During its visit, the Working Group heard numerous allegations of disappearances carried out by volunteer battalions, such as the Azov Battalion and the Right Sector. The lack of specific investigative bodies with clear competence and responsibility to investigate acts of enforced disappearance has also affected the effectiveness in the investigation of this crime.

¹⁰ See Declaration, art. 13.6 and Convention, art. 24.6.

50. The Working Group notes that criminal acts perpetrated by State agents have been investigated and prosecuted by the Military Prosecutor under the supervision of the General Prosecutor. The new State Bureau of Investigation (see para. 35 above), which should better guarantee the independence of proceedings, would take over all cases under investigation as of the end of 2019. In accordance with the new law criminalizing enforced disappearance, it is important that investigations of all allegations thereof come within the competence of the State Bureau of Investigation – rather than having investigations scattered among different investigative bodies – and that the effective continuation of the cases currently managed by the Military Prosecutor be ensured.

51. The Working Group also received reports by a significant number of individuals about the existence of unofficial places of deprivation of liberty, especially at the beginning of the conflict, including that managed by the SBU in Kharkiv between 2014 and 2016. It received credible and detailed descriptions of SBU Kharkiv as a major clandestine detention centre for conflict-related detainees from across Ukraine, who were transferred there to be tortured while being held incommunicado in a context that met the elements of the crime of enforced disappearance. The allegations of torture in the facility included suffocation with a gas mask, the dislocation of joints, the administration of electric shock, and mock executions. Detainees also received death threats and threats of a sexual nature against themselves and members of their families, and were denied access to medical care. Torture would usually continue until the detainee signed a self-incriminating statement.¹¹ This facility was later allegedly refurbished to alter the former cells to cover up the crimes committed there.

52. The authorities have either denied this or indicated that the investigation could not verify until now the existence of such a place. There were also several allegations of individuals being held in other unofficial detention facilities, including in Kramatorsk, Mariupol, Odessa and Pokrovsk. Consistent allegations of torture and other forms of ill-treatment in these places were also received. All these allegations should be promptly and independently investigated.

53. The Working Group emphasizes that, in accordance with article 10 (1) and (2) of the Declaration, any person deprived of liberty should be held in an officially recognized place of detention and, in conformity with national law, be brought before a judicial authority promptly after detention. Accurate information on the detention of such persons and their place or places of detention, including transfers, should be made promptly available to their family members and lawyer.

54. The lack of accountability for these crimes also depends on the difficult access to justice for victims. While noting the Government's efforts to create a system of free legal aid,¹² the system does not appear to be effective and functioning for victims of enforced disappearance.

4. Reparation

55. All victims of enforced disappearance have the right to full reparation, which includes compensation, satisfaction, restitution, rehabilitation and guarantees of non-repetition, as provided for in article 19 of the Declaration on the Protection of All Persons from Enforced Disappearance.

56. The Working Group received testimonies regarding the difficult economic situation that relatives of disappeared persons experience. Particularly, it noted how mothers, wives and children were left in economic hardship with little or no support. At the same time, the

¹¹ Office of the United Nations High Commissioner for Human Rights (OHCHR) report on the human rights situation in Ukraine from 16 November 2017 to 15 February 2018, para. 65.

¹² The Government informed the Working Group that Ukraine had developed a system of free legal aid consisting of 550 access points (23 regional centres, 96 local centres and 433 legal aid bureaux), with 3,000 lawyers involved, 500,000 telephone consultations performed and clients represented in 270,000 criminal cases and 180,000 civil cases. It also indicated that the Ministry of Justice had implemented the all-Ukrainian legal awareness project "I Have a Right!" as a huge legal awareness-raising campaign to provide access to justice for everyone.

Working Group did not come across any case in which the relatives of a disappeared person had been compensated or been provided with any psychological, social, medical or other assistance from the State. There is an urgent need to develop a national reparations policy that takes account of the specific needs of women and children.

57. While the Working Group notes that the newly adopted Law on the Legal Status of the Missing Persons provides for relatives of missing persons the right to receive a “survivor’s pension” one month after the registration of a person as disappeared, it regrets that, while children receive the pension irrespective of whether they were dependents of the disappeared, the parents and spouse only receive it if they have lost their livelihood because of the disappearance, which consequently adds a burden to prove it. Furthermore, the pension is paid as long as the victim retains his or her status of missing person; the payments are terminated when the location, place of burial or location of the remains of the missing person is clarified. Relatives are entitled then to seek a survivor’s pension on a general ground in accordance with the general legislation on State pensions. This scheme for supporting relatives of disappeared persons does not conform with the definition of a reparation in the Declaration and the Convention, which, once again, has priority over the newly adopted law.

58. The relevant State authorities may consider looking for guidance in the study of the Working Group on enforced and involuntary disappearances and economic, social and cultural rights, in which it highlighted the fact that the right to obtain redress for acts of enforced disappearances includes medical and psychological care, and guarantees of employment or property (A/HRC/30/38/Add.5, para. 59). In its general comment on article 19 of the Declaration, the Working Group established a broad interpretation of the right to obtain redress for acts of enforced disappearance, including medical and psychological care and rehabilitation for any form of physical or mental damage, and to legal and social rehabilitation, guarantees of non-repetition, restoration of personal liberty, family life, citizenship, employment or property, return to one’s place of residence and similar forms of restitution, satisfaction and reparation that might remove the consequences of the enforced disappearance (E/CN.4/1998/43, para. 75).¹³ If a person is subjected to enforced disappearance, States have an obligation to provide prompt, adequate and effective reparation to all those who have suffered harm as a result of the disappearance.

59. The Working Group also stresses that, for the purpose of reparation, the definition of a victim of enforced disappearance is broad, and includes a disappeared person as well as anyone who suffers direct harm as a result of the disappearance. The approach taken by the law differs in that a survivor’s pension may be awarded only to relatives of the disappeared person listed explicitly in the law.

5. Prevention

(i) Awareness-raising, training and human rights education

60. In order to prevent the recurrence of enforced disappearances, it is essential to properly educate present and future generations, and to provide society in general, and civil servants in particular, with adequate human rights training. The Working Group emphasizes the importance of including the necessary education and information regarding the relevant provisions of the Declaration in training given to law enforcement personnel, civil or military, public officials and other persons who may be involved in the custody or treatment of any person deprived of liberty. Professional training for judges, prosecutors and lawyers is also essential.

(ii) Registration of deprivation of liberty

61. According to article 10 (3) of the Declaration, an official up-to-date register of all persons deprived of their liberty should be maintained in every place of detention and all States should take steps to maintain centralized registers. The Working Group noted that such a centralized system does not yet exist in Ukraine, although it did observe that a bill

¹³ See also A/HRC/22/45, paras. 46–47.

addressing that issue would shortly be tabled in Parliament. The Working Groups also notes the additional information provided by the Government about the adoption, on 6 September 2017, of resolution No. 608 creating the Unified Register of Sentenced and Remanded Prisoners, and that the software for the Unified Register would be completed, with subsequent training for staff on how to administer the register. The beginning of a full-scale operation of the register is scheduled for 1 September 2019.

62. As also noted by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the system for transferring detainees also appears to have gaps in terms of registration and of detainees' contact with lawyers and the outside world, especially in the case of individuals accused of crimes in connection with the conflict in the East (CAT/OP/UKR/1, paras. 49-52).

(iii) Victim and witness protection

63. The Working Group met with a number of victims of enforced disappearance who were released after having been detained secretly for periods varying from a few days to several months. Many of them reported having been threatened by the perpetrators after their release.

64. In addition to ensuring accountability for crimes, Ukraine should develop an adequate system of protection for victims and witnesses outside the control and purview of the regular law enforcement apparatus, and also investigate and sanction any kind of pressure or act of intimidation or reprisal against any person participating in investigations.

D. Situation in the territory controlled by the self-proclaimed “Donetsk People’s Republic” and “Luhansk People’s Republic”

65. The Working Group also visited certain districts of the Donetsk and Luhansk regions, which are not under control of the Government of Ukraine. In these districts, the “officials” of the “Donetsk People’s Republic” and the “Luhansk People’s Republic” act as the de facto authorities. The Working Group visited the region following several very troubling reports of serious human rights violations committed in these territories, including numerous acts that are tantamount to enforced disappearance.

66. The experts noted how the systems of administrative and preventive detention in the “Donetsk People’s Republic” and the “Luhansk People’s Republic” particularly raised concern, as they allow for the deprivation of liberty of a person without effective judicial supervision for 30 and 60 days respectively, on the suspicion of involvement in certain illegal activities. The fact that during this period there is no obligation to reveal the whereabouts of the person to the relatives or lawyers virtually renders the system an authorization to “disappear” individuals.¹⁴

67. Another cause for deep concern is the fact that several detainees that had been released from detention in these regions reported having been held in unofficial places of detention under very dire conditions and, in a number of instances, of having been subjected to torture and ill-treatment. The fate and whereabouts of other individuals who disappeared in 2014 are still unknown.¹⁵ The de facto authorities in Donetsk and Luhansk are responsible for the acts committed in the territory under their control and for the human rights violations committed by those acting on their behalf, including acts that are tantamount to enforced disappearance.

68. The Working Group recommends that the de facto authorities in Donetsk and Luhansk ensure unimpeded access of the Office of the United Nations High Commissioner for Human Rights (OHCHR) and other independent international observers to all places of deprivation of liberty, in accordance with international standards.

¹⁴ See also the report on the human rights situation in Ukraine from 16 May to 15 August 2018, (A/HRC/39/CRP.5), para. 51.

¹⁵ *Ibid.*, para. 55.

69. In meetings with the “ombudsperson” of the “Donetsk People’s Republic” and the representative of the “Luhansk People’s Republic” in the Working Group on Humanitarian Issues of the Trilateral Contact Group on Ukraine in Minsk, the Working Group was informed about the impasse in the process of simultaneous releases of detainees, and their readiness to reactivate it. The Working Group urges all involved to depoliticize this process and to consider the issue of disappeared persons a purely humanitarian one.

E. Situation in the Autonomous Republic of Crimea and the city of Sevastopol

70. Unfortunately, the Working Group was not able to visit Crimea in the context of its country visit to Ukraine.

71. According to reliable information received, there have been 42 cases of enforced disappearances in Crimea since March 2014. To date, 28 individuals have been released, two have been detained, one is reported dead and 11 are still disappeared. In 2014, most of the perpetrators reportedly belonged to the Crimean Self Defence Forces. In the following years, most disappearances were reportedly perpetrated by officers of the Russian Federal Security Service (FSB). In none of those cases have perpetrators been brought to justice.¹⁶

72. After its visit, the Working Group welcomed the information that a meeting had been planned between the ombudspersons of Ukraine and the Russian Federation to discuss the issue of missing persons in Crimea, and to visit those who have been detained. While the meeting was indeed held, the Working Group regrets the information that the relationship between the two entities deteriorated thereafter, to the detriment of the victims of human rights violations.

73. As the occupying Power according to international law,¹⁷ the Working Group requests the Russian Federation to take measures to ensure the clarification of the whereabouts of the persons that are still disappeared and the protection of all those residents in Crimea from enforced disappearances, and recommends that independent human rights monitoring missions be allowed to visit the region in order to assess the situation.¹⁸

II. Conclusions

74. The situation of human rights in Ukraine is complex, notably owing to the persistence of the armed conflict in the eastern regions, where violations and abuses by all parties to the conflict on either side of the contact line continue to be documented.¹⁹

75. As most instances of enforced disappearance stem from the conflict in the East, priority should be given to the immediate ending of hostilities between all involved and to implementing all obligations foreseen in the Minsk agreements, as well as their general obligations deriving from both international humanitarian and human rights law.

76. The Working Group recalls that, even during armed conflicts, human rights must be respected, with an absolute prohibition of enforced disappearances, while

¹⁶ According to the most recent OHCHR report on the situation of human rights in the temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol, Ukraine from 13 September 2017 to 30 June 2018, four enforced disappearances occurred during the reporting period. In addition, in 11 cases of enforced disappearance that occurred prior to the reporting period, the victims were still missing as at 30 June 2018. The Russian Federation authorities often either refused to register a case, or suspended previously initiated investigations. To date, none of the perpetrators has been brought to justice.

¹⁷ See General Assembly resolution 72/190, para. 3 (a).

¹⁸ *Ibid.*, para. 5.

¹⁹ A/HRC/39/CRP.5, para. 123.

efforts must be made to alleviate human suffering. The Working Group recalls that enforced disappearances are prohibited under any circumstance, including situations of armed conflict or any other public emergency.²⁰ This prohibition is non-derogable and must be respected also by the de facto authorities in Donetsk and Luhansk.

77. The pain and anguish of relatives of disappeared persons cannot be used for political purposes. Decisive measures must be taken to assist family members who are looking for their disappeared loved ones, to provide them with reparation – including psychosocial, economical and other support – and to bring perpetrators to justice. The Working Group notes some legislative progress, notably with the criminalization of enforced disappearance by the Law on the Legal Status of the Missing Persons, which introduced amendments to the Criminal Code of Ukraine. However, both the law and the Criminal Code should be improved to bring them fully into line with applicable international standards.

78. Impunity, in particular, is a serious problem; there have been no cases of perpetrators being brought to justice for enforced disappearances. Investigations are usually initiated for cases where the persons allegedly responsible are identified as supporting the opposite side in the armed conflict, while there is no cooperation between the parties.

79. In the Autonomous Republic of Crimea and the city of Sevastopol temporarily occupied by the Russian Federation, the Russian Federation, as the occupying Power, is responsible for the protection of the civilian population, as well as for the human rights violations committed therein, including enforced disappearances. The situation of human rights in Crimea is a matter of concern, also given that the Russian Federation continues to apply its laws to the residents of the peninsula - contrary to its obligations as an occupying Power under the Fourth Geneva Convention – and to deny access to the peninsula to international monitors, including OHCHR.²¹

80. The Working Group reiterates its willingness to continue its constructive dialogue with the Government of Ukraine, and offers its unreserved support for the full implementation of the Declaration on the Protection of All Persons from Enforced Disappearance.

81. The Working Group reaffirms its solidarity with the victims of enforced disappearance, including the families of persons subjected to this heinous violation of human rights and grave criminal offence. Their continued suffering is living proof that enforced disappearance is a continuous violation until the fate and whereabouts of a forcibly disappeared person is clarified.

III. Recommendations

82. In the light of the above, the Working Group makes the recommendations below.

A. Government of Ukraine

1. Legislation and institutional framework

83. The Working Group recommends that the introduced legislation criminalizing enforced disappearance be improved through:

- (a) The introduction of penalties commensurate to the seriousness of the crime;

²⁰ Declaration on the Protection of All Persons from Enforced Disappearance, art. 7;

International Convention for the Protection of All Persons from Enforced Disappearance, art. 1.

²¹ OHCHR report on the human rights situation in Ukraine from 16 August to 15 November 2018, para. 115.

(b) The express mention that enforced disappearance is a continuous crime to which amnesties or immunities cannot be applied;

(c) The establishment of the responsibility of superiors following the international standards, as provided for in article 6 of the Convention for the Protection of All Persons from Enforced Disappearance.

84. The Working Group also recommends that the Government of Ukraine:

(a) Ensure in legislation and in practice that the deprivation of liberty is carried out only by appropriate law-enforcement agencies;

(b) Ensure prompt and effective implementation of the Unified Register of Sentenced and Remanded Prisoners in order to create a nationwide digitalized system of registration of all persons deprived of liberty;

(c) Ensure that the newly created State Bureau of Investigation has the resources necessary to effectively carry out investigations and its officers be acquainted with the legal concept of enforced disappearance;

85. The Working Group also invites the Government to submit as soon as possible its report to the Committee on Enforced Disappearances on the implementation of the International Convention for the Protection of All Persons from Enforced Disappearance.

2. Truth

86. The Working Group recommends that the Government of Ukraine:

(a) Adopt a comprehensive strategy and plan for the search for and identification, excavation and proper investigation of existing burial sites, and for the identification of new ones;

(b) Ensure preservation of sites and the protection of the chain of custody of samples, and build the forensic capacity of investigators, prosecutors and the judiciary, ensuring that they have adequate resources;

(c) Ensure access to relevant, including confidential, information, in particular to archives, in order to facilitate the localization of undiscovered gravesites, to speed up the search for missing persons, and to clarify cases of enforced disappearances;

3. Justice

87. The Working Group recommends that the Government of Ukraine:

(a) Ensure effective investigations into allegations of enforced disappearance committed by State actors or by individuals acting with the authorization, support or acquiescence of the State;

(b) Carry out all investigations, prosecutions and judicial proceedings in accordance with the principles of due diligence and impartiality, taking into account the complexity of enforced disappearances, the context in which they occurred and the patterns that explain why the events occurred, and ensure that there are no omissions in the gathering of evidence or in the development of lines of investigation;

88. The parliament should avoid the reintroduction of military justice for crimes committed by the military; in this regard, the Working Group has consistently emphasized that, in accordance to article 16 (2) of the Declaration, those alleged to have committed enforced disappearances should be tried only by the competent civilian courts of the State, and not by any other special tribunal, in particular military courts.

89. The Working Group also recommends that the Government:

(a) Ensure that persons who have or are alleged to have committed offences of enforced disappearance do not benefit from any special amnesty law or similar measures that might have the effect of exempting them from criminal liability;

(b) Take all measures to bring those responsible for enforced disappearances to justice, including by seeking the extradition of those who are currently abroad;

(c) Guarantee that the authorities in charge of investigations have the jurisdictional, logistic and scientific resources necessary to collect and process evidence, and notably the power to have access to all places, documents and information relevant to investigations, including on the possible location of victims' remains;

(d) Ensure that SBU no longer performs investigative functions, particularly with regard to cases of enforced disappearance or other international crimes, and that all cases of enforced disappearances are investigated by an independent, specialized and appropriately trained body of investigators.

90. The Working Group recalls that victims have the right to be informed about the progress and results of investigations, and should have the opportunity to participate in and be heard during investigative and judicial proceedings, regarding both the clarification of the enforced disappearance and the punishment of those responsible, and in seeking fair compensation.

91. The Working Group also recommends that the Government digitalize the judicial system and the prisoners' registry. An official up-to-date register of all persons deprived of their liberty must be maintained in every place of detention, in accordance with article 10 (3) of the Declaration.

4. Reparations

92. The Working Group recommends that the Government of Ukraine:

(a) Develop, as a matter of urgency, a reparations policy that takes into account the specific needs of women and children, and make adequate provisions for it;

(b) Develop a gender-sensitive policy and plan of action to provide support to and rehabilitation for families of forcibly disappeared persons, including specific measures to support families of disappeared persons whose death has been confirmed through truth-seeking processes.

(c) Create a comprehensive system of reparations that includes professional and victim-oriented psychosocial assistance for relatives of disappeared persons in relation to the physical, mental and economic consequences resulting from the absence of the disappeared person;

(d) Ensure that the mechanisms created under the new Law on Missing Persons for social and other allowances comply with international standards.

93. The Working Group invites the Government of Ukraine to submit within 90 days of the date of the presentation of the present report to the Human Rights Council a timetable of the steps that it will take to implement the present recommendations.

B. Self-proclaimed "Donetsk People's Republic" and "Luhansk People's Republic"

94. The Working Group recommends that the self-proclaimed "Donetsk People's Republic" and "Luhansk People's Republic":

(a) Lift restrictions on OHCHR operations;

(b) Ensure unimpeded and confidential access by OHCHR and other international observers to detainees and places of deprivation of liberty in the territory under their control;

(c) Repeal the systems of administrative and preventive detention in the “Donetsk People’s Republic” and the “Luhansk People’s Republic”, as they allow for the deprivation of liberty of a person without effective supervision, for 30 or 60 days respectively, on the mere suspicion of involvement in certain illegal activities.

C. Russian Federation, in relation to Crimea

95. The Working Group recommends that the Russian Federation take measures to ensure the protection of all residents in Crimea from enforced disappearance, and that independent human rights monitoring missions be allowed to visit the region in order to assess the situation.

D. International community

96. The Working Group recommends that the international community continue to engage all parties involved to implement all obligations foreseen in the Minsk agreements, in particular with regard to missing persons.
