

Ukraine's Parliament Commissioner for Human Rights: Strengthening Human Rights Promotion and Protection?

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ABSTRACT

Ukraine's national human rights institution (NHRI), the Parliament Commissioner for Human Rights (PCHR), is a single-leader human rights ombudsman institution. The PCHR enjoys GANHRI A-status accreditation denoting full compliance with the UN Paris Principles, which are authoritative international standards for NHRIs. The PCHR has human rights protection and promotion mandates, serves as Ukraine's OPCAT National Preventive Mechanism, fights gender discrimination and informally prioritizes children's rights. Assessed against the Paris Principles, the PCHR has a relatively robust legislative framework but it has some deficiencies and the PCHR is underfunded. Other extra-legal factors influence the PCHR's effectiveness. The character of the outgoing Commissioner was instrumental in strengthening the PCHR's effectiveness since 2012. However, a resistant administration, legislators who try to curb the PCHR's independence, shallow democracy, internal armed conflict, a weak human rights culture and the PCHR's mixed popular legitimacy impede improved performance, and continued or new deficiencies may reduce the PCHR's effectiveness.

I. INTRODUCTION

After the collapse of the Soviet Union, Ukraine gained its independence in 1991.² Its Constitution was adopted by the Parliament ("Verkhovna

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2. RAJAN MENON & EUGENE RUMER, CONFLICT IN UKRAINE: THE UNWINDING OF THE POST-COLD WAR ORDER 21 (2015).

Rada” or “Rada”) in 1996.³ The Parliament Commissioner for Human Rights (PCHR) “exercises parliamentary control over the observance of constitutional human and citizens’ rights and freedoms.”⁴ The PCHR is Ukraine’s national human rights institution (NHRI).⁵ NHRIs are independent public sector institutions with express human rights promotion and protection mandates.⁶ There are two main types of NHRIs: multi-member human rights commissions and human rights ombudsman institutions that are usually led by a single ombudsperson.⁷ The PCHR is a human rights ombudsman institution. Its independence from the executive and legislative branches of government is protected through its inclusion in the Constitution and various legislative guarantees, including election of the Commissioner by the Rada.⁸

The 2013–2014 Euromaidan demonstrations (also called the Revolution of Dignity) in Ukraine were followed by the collapse of the Viktor Yanukovich regime, Russia’s annexation of Crimea, and the Russian-supported armed conflict in Eastern Ukraine.⁹ These events were accompanied by extensive human rights and humanitarian law violations impacting the Euromaidan protestors, internally displaced persons (IDPs), and persons remaining in the conflict zone.¹⁰ These are layered on top of multiple, longer-standing human rights breaches such as: torture and ill-treatment by

3. UKR. CONST. See ALEXANDER BIRYUKOV & INNA SHYROKOVA, LAW AND LEGAL SYSTEM OF UKRAINE 8 (2005); MARIA POPOVA, POLITICIZED JUSTICE IN EMERGING DEMOCRACIES: A STUDY OF COURTS IN RUSSIA AND UKRAINE 53 (2012) [hereinafter *Politicized Justice*].

4. See Linda C. Reif, *The Shifting Boundaries of NHRI Definition in the International System*, in HUMAN RIGHTS, STATE COMPLIANCE, AND SOCIAL CHANGE: ASSESSING NATIONAL HUMAN RIGHTS INSTITUTIONS 52, 52–54 (Ryan Goodman & Thomas Pegram eds., 2012).

5. See *Chart of the Status of National Institutions Accredited by the Global Alliance of National Human Rights Institutions, Accreditation status as of 26 May 2017*, GLOBAL ALLIANCE OF NATIONAL HUMAN RIGHTS INSTITUTIONS (GANHRI), 8 (2017) [hereinafter *GANHRI Accreditation Chart*]. See also *infra* text accompanying notes 109–125 for an explanation on NHRIs.

6. See Linda C. Reif, *The Shifting Boundaries of NHRI Definition in the International System*, in HUMAN RIGHTS, STATE COMPLIANCE, AND SOCIAL CHANGE: ASSESSING NATIONAL HUMAN RIGHTS INSTITUTIONS 52, 52–54 (Ryan Goodman & Thomas Pegram eds., 2012).

7. See *id.* at 71–73. A few human rights ombuds institutions have multiple ombudspersons, e.g. Bosnia-Herzegovina Human Rights Ombudsman Institution.

8. See *infra* text accompanying notes 148–152.

9. See MENON & RUMER, *supra* note 2 at ix–xv. See also *infra* text accompanying note 176.

10. See, e.g., Office of the U.N. High Comm’r for Human Rights (OHCHR), Conflict-Related Sexual Violence in Ukraine 14 March 2014 to 31 January 2017, U.N. Doc. A/HRC/34/CRP.4 (Mar. 16, 2017) [hereinafter *Conflict-Related Sexual Violence*]; Office of the U.N. High Comm’r for Human Rights (OHCHR), Rep. on the human rights situation in Ukraine 16 August to 15 November 2016 [hereinafter *August to November 2016 Report*]; U.N. Human Rights Council, Rep. of the Special Rapporteur on extrajudicial, summary or arbitrary executions on his mission to Ukr., U.N. Doc. A/HRC/32/39/Add.1 (May 4, 2016) [hereinafter *Special Rapporteur Report*]; Amnesty International, “*You Don’t Exist*”: *Arbitrary Detentions, Enforced Disappearances, and Torture in Eastern Ukraine* (2016) (detailing rights violations by Ukraine state actors, paramilitaries and separatists); Office of the U.N. High Comm’r for Human Rights (OHCHR), *Report on the human rights situation in Ukraine 16 May to 15 August 2016* [hereinafter *May to August 2016 Report*]; Office of the U.N. High Comm’r for Human Rights (OHCHR), *Report on the human rights situation in Ukraine 16 November 2015 to 15 February 2016* [hereinafter *November 2015 to February 2016 Report*].

law enforcement officials;¹¹ a dysfunctional judicial process;¹² discrimination and violence against the LGBTI community, women, and minorities;¹³ and egregious violations of children's rights.¹⁴ The PCHR has operated in this difficult human rights environment since its inception. The Global Alliance of National Human Rights Institutions (GANHRI) has given the PCHR A-status accreditation, denoting full compliance with the UN Paris Principles, the authoritative international standards for NHRIs.¹⁵

I argue that, reflective of its GANHRI A-status accreditation, the PCHR has a relatively robust formal legal architecture and independence, but some legislative and operational reforms are needed; in addition, the NHRI is underfunded given its multiple formal mandates to protect and promote human rights, prevent torture and other ill-treatment, fight gender discrimination, and protect data.¹⁶ I further argue that beyond the Paris Principles, extra-legal factors impact the ability of NHRIs such as the PCHR to achieve full effectiveness. These factors are the character of the NHRI leadership, the receptivity or resistance of the executive and legislative branches of government to the work of the NHRI, the country's overall democratic environment, including any conflict situation and the human rights culture, and the popular legitimacy of the institution. Applying these factors to the PCHR, the strong character of the outgoing PCHR Commissioner, Valeriya Lutkovska—evidenced through her independent actions and collaboration with non-governmental organizations (NGOs) and the international community—has improved the performance of the PCHR since the Euromaidan, changing it from a politicized institution to one that has achieved some effectiveness in practice.¹⁷ However, deficiencies in the other extra-legal factors have prevented the PCHR from improving its performance, and its achievements since the Euromaidan can be easily compromised or lost through existing or new deficiencies in these extra-legal factors.¹⁸ In particular, the legislative and executive branches periodically resist cooperation and try to weaken the independence of the PCHR.¹⁹ Ukraine's shallow democracy, internal conflict situation, and weak human rights culture hinder the ability of the PCHR to fulfil all of its mandates, and require it to

11. See U.N. Comm. Against Torture, Concluding observations on the sixth periodic report of Ukraine, U.N. Doc. CAT/C/UKR/CO/6 (Dec. 12, 2014), ¶ 14 [hereinafter *CAT Concluding Observations 2014*].

12. See *infra* text accompanying notes 87–104.

13. See U.N. Human Rights Comm., Concluding observations on the seventh periodic report of Ukraine, U.N. Doc. CCPR/C/UKR/CO/7 (Aug. 22, 2013) ¶¶ 8–12 [hereinafter *HRC Concluding Observations 2013*].

14. See *infra* text accompanying notes 229–232.

15. See *GANHRI Accreditation Chart*, *supra* note 5, at 8; G.A. Res. 48/134, Paris Principles, (Dec. 20, 1993).

16. See *infra* text accompanying notes 135–137 on the additional formal mandates.

17. See *infra* text accompanying notes 293–317.

18. See *infra* text accompanying notes 318–348.

19. See *infra* text accompanying notes 318–334.

place greater emphasis on human rights promotion.²⁰ Finally, the PCHR has found it difficult to build popular legitimacy, illustrated by the different perceptions of NGOs and the public about the PCHR and the outgoing Commissioner.²¹

II. THE LEGAL SYSTEM OF UKRAINE

A. Introduction

As a post-Soviet state, Ukraine was faced with transforming its communist law structure. Central and East European countries had to draft constitutions, pass laws and construct democratic state institutions, including courts, to try to establish legal systems based on the rule of law and human rights. These countries often looked to other civil law nations in Western Europe and their early adopter neighbors to find constitutional and legal models suitable for transplantation and adaptation.²²

As discussed further below, Ukraine has moved slowly towards the rule of law, good governance, and the realization of human rights.²³ While the 2004 Orange Revolution raised hopes of public sector reforms, they were not realized given the governmental infighting and increased corruption, although there were some improvements in political rights and civil liberties, including freedom of expression.²⁴ After the 2010 election of Viktor Yanukovich as President, a democratic recession ensued and human rights deteriorated.²⁵ After the change in government in 2014 following the Euromaidan protests, Ukraine started an extensive reform process requiring

20. See *infra* text accompanying notes 335–341.

21. See *infra* text accompanying notes 342–348.

22. See generally Rett R Ludwickowski, *Constitutional Culture of the New East-Central European Democracies*, 29 GA. J. INT'L & COMP. L. 1 (2000); Rett R Ludwickowski, *Mixed Constitutions — Product of an East-Central European Melting Pot*, 16 B.U. INT'L L.J. 1 (1998); RETT R LUDWIKOWSKI, *CONSTITUTION-MAKING IN THE REGION OF FORMER SOVIET DOMINANCE* (1996); Gianmaria Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, 43 AM. J. COMP. L. 93 (1995) (e.g. Poland with its historical constitutional tradition and earlier democratization). See also RETT R LUDWIKOWSKI, *CONSTITUTION-MAKING IN THE REGION OF FORMER SOVIET DOMINANCE* 92 (1996); BIRYUKOV & SHYROKOVA, *supra* note 3, at 1, 7.

23. See *infra* text accompanying notes 24–27, 60–65. See generally BEYOND THE EUROMAIDAN: COMPARATIVE PERSPECTIVES ON ADVANCING REFORM IN UKRAINE (Henry E. Hale & Robert W. Ortung eds., 2016) [hereinafter *Beyond the Euromaidan*]; MENON & RUMER, *supra* note 2, at 145–155.

24. See Alexander Pivovarsky, *Stuck in Transition: Successes and Failures of Economic Reform in Ukraine*, in BEYOND THE EUROMAIDAN, 221, 226–227; Daphne Athanasouli, *Corruption in Ukraine in Comparative Perspective*, in BEYOND THE EUROMAIDAN, 80, 95–96; MENON & RUMER, *supra* note 2, at 32–44. The Orange Revolution broke out after unfair elections resulted in the initial election of Yanukovich as President. Another vote was held, resulting in the election of Viktor Yushchenko as President and Julia Tymoshenko as Prime Minister, although the two soon fell out. See MENON & RUMER, *supra* note 2. See also *infra* text accompanying notes 30–32 on the 2004 constitutional amendment.

25. See LARRY DIAMOND, *IN SEARCH OF DEMOCRACY* 84, 87 (2016); MENON & RUMER, *supra* note 2, at 44–86.

constitutional, legislative, and institutional change.²⁶ However, the extent of the changes that are needed, the impact of additional human rights challenges posed by the internal armed conflict, the undue influence of the oligarchs over the political process, the widespread corruption in the public sector, and the weak legal culture will make successful reforms difficult to achieve.²⁷

B. Ukraine: Constitution and Civil Law System

The 1996 Constitution established Ukraine as a republic with a semi-presidential system.²⁸ However, during some periods, such as the Yanukovich presidency, it has been characterized as a “superpresidential” system.²⁹ The Constitution was amended in 2004 to try to reduce presidential powers and create a more balanced division of powers between the President, Prime Minister, and Rada.³⁰ In 2010, after the election of Yanukovich, Ukraine’s Constitutional Court held that the 2004 amendments were unconstitutional on the grounds that the constitutional procedures for the review and adoption of constitutional amendments were violated.³¹ After Yanukovich’s departure in February 2014, the Rada revived the 2004 reforms.³² Ukraine’s Constitution states that the nation is based on the rule of law,³³ and contains a broad range of human rights.³⁴ M. Koziubra argues that these formal human rights guarantees have not been accepted in the domestic legal culture and “they remain if not entirely

26. See Paul D’Anieri, *Establishing Ukraine’s Fourth Republic: Reform after Revolution*, in *BEYOND THE EUROMAIDAN*, *supra* note 23, at 3.

27. See *id.* See also Taras Kuzio, *Oligarchs, the Partial Reform Equilibrium, and the Euromaidan Revolution*, in *BEYOND THE EUROMAIDAN*, *supra* note 23, at 181–199; Serhiy Kudelia, *Corruption in Ukraine: Perpetuum Mobile or the Endplay of Post-Soviet Elites?*, in *BEYOND THE EUROMAIDAN*, *supra* note 23, at 61–77; ANNA REID, *BORDERLAND: A JOURNEY THROUGH THE HISTORY OF UKRAINE* 238–257 (2015).

28. UKR. CONST., chs. IV–VI. In a semi-presidential system, a popularly elected president with substantive powers coexists with a prime minister and cabinet, and all are responsible to parliament. See Robert Elgie, *The Politics of Semi-Presidentialism*, in *SEMI-PRESIDENTIALISM IN EUROPE* 1, 12 (Robert Elgie ed., 1999).

29. See Oleksandr Fisun, *Ukrainian Constitutional Politics: Neopatrimonialism, Rent-seeking, and Regime Change*, in *BEYOND THE MAIDAN*, *supra* note 23, at 105–106, 116; BIRYUKOV & SHYROKOVA, *supra* note 3, at 5–7. Superpresidentialism occurred, despite a formal semi-presidential system, when the President accrued additional *de facto* power through influence over a dominant party in the Rada and over local governments. See Fisun, *supra* note 29, at 105–106, 116–117.

30. See Fisun, *supra* note 29, at 113–115; UKR. CONST., chs. IV–VI.

31. On Making Changes in the Constitution of Ukraine, *The Bulletin of the Constitutional Court of Ukraine (Visnyk Konstytutsiinoho Sudu Ukrainy)*, No 2222-IV (2010).

32. See Fisun, *supra* note 29, at 116–121.

33. UKR. CONST., art. 8.

34. UKR. CONST., ch. I, arts. 10 (minority language), 13–14 (property rights), Ch. II, arts. 21–68 (civil, political, economic, social and environmental rights). See Ganna Yudkivska, *Ukraine on the way to democracy: Role and achievements of the European Court of Human Rights*, in *THE IMPACT OF THE ECHR ON DEMOCRATIC CHANGE IN CENTRAL AND EASTERN EUROPE: JUDICIAL PERSPECTIVES* 457, 459 (Iulia Motoc & Ineta Ziemele eds., 2016) (explaining that many constitutional rights were drafted to comply with European Convention on Human Rights).

alien, then at least are not defined in the legal consciousness of a significant part of the population.”³⁵

Ukraine’s legal history is founded on the civil law of the Russian Empire, followed by the Soviet “legal nihilist” and “rule by law” regimes.³⁶ While Ukraine was left with a heritage of Soviet laws and legal culture, during the transition it built a new civil law system based on the German tradition.³⁷ Post-independence laws passed by the Rada include the core codes of a civil law nation and a wide range of other legislation.³⁸ The legislation is described as being poorly drafted, containing gaps and minimal detail, inconsistent, slow to be implemented, and ineffective.³⁹ Koziubra notes that legislation has often been passed under the influence of unrestrained lobbying and “under the carpet agreements.”⁴⁰

C. Ukraine’s Judicial System

As is the case with many civil law systems, the Constitution divides the judicial branch into two elements: (1) the courts of ordinary jurisdiction, with the Supreme Court at the apex, which hear civil, criminal, administrative and commercial law cases and (2) the Constitutional Court.⁴¹

Ukraine’s Constitutional Court has sole jurisdiction over constitutional law matters, including interpretation and application of constitutional human rights, and its decisions are legally binding and cannot be appealed.⁴² Constitutional courts are endowed with different combinations of abstract and concrete review of laws. Ukraine’s Constitutional Court has a mainly abstract review function, i.e. examining the constitutionality of legislative provisions without application to an actual case, and a limited concrete review role for constitutional issues that arise in specific cases.⁴³ Constitutions in Central and Eastern Europe generally permit listed indi-

35. See M. Koziubra, *Rule of Law – Fundamental Principle of the Legal and Political System of Ukraine*, LAW UKR. LEGAL J. 93, 101 (2012).

36. See POPOVA, *supra* note 3, at 52–53.

37. See Angelika Nußberger, *The Reception Process in Russia and Ukraine*, in A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS 603, 613 (Helen Keller & Alec Stone Sweet eds., 2008); BIRYUKOV & SHYROKOVA, *supra* note 3, 1, 7.

38. See BIRYUKOV & SHYROKOVA, *supra* note 3, 8–9 (explaining that Soviet laws remain in effect unless and until repealed or superseded).

39. See *id.* Nußberger, *supra* note 37, at 611; Oesten Baller, *The Quality of Administrative Law: An Inventory of the Russian Federation and Ukraine*, in EAST EUROPEAN FACES OF LAW AND SOCIETY: VALUES AND PRACTICES 51, 92 (William B. Simons ed., 2014).

40. See Koziubra, *supra* note 35, at 105.

41. UKR. CONST., Chs. VIII (Justice), XII (Constitutional Court). The constitutional court is another legal transplant in Central and East European countries. See WOJCIECH SADURSKI, RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE 13 (2014) at 13.

42. UKR. CONST., arts. 147, 150–153. See SADURSKI, *supra* note 41, at 23; V. Tykhyi, *The Legal Nature of the Constitutional Court of Ukraine, Powers, Decisions, and Opinions*, LAW UKR. LEGAL J. 135 (2012); Kataryna Wolczuk, *The Constitutional Court of Ukraine: The Politics of Survival*, in CONSTITUTIONAL JUSTICE, EAST AND WEST 327, 327 (Wojciech Sadurski ed., 2002).

43. UKR. CONST., arts. 150–151. See SADURSKI, *supra* note 42, at 13–14, 18–19.

viduals to initiate constitutional court review, and the country's human rights ombudsman is often included.⁴⁴ In Ukraine, the PCHR has the power to initiate Constitutional Court review as discussed in detail below.

Ukraine's judicial branch is systemically dysfunctional and politicized.⁴⁵ While the formal independence of Ukraine's judiciary may be satisfactory, there is weak *de facto* independence.⁴⁶ This is due to factors such as the promotion of politically sympathetic judges, dependence of lower ranked judges on higher ranked judges, and a history of politicization of the judiciary's governance bodies (formerly, High Council of Justice).⁴⁷ Maria Popova argues that "de jure independence allows Ukrainian incumbents to use de facto judicial dependence to achieve political goals while hiding behind a façade of court independence."⁴⁸ There was also periodic overt political interference with the formal independence of the courts.⁴⁹ For example, when court decisions disfavored persons linked to the Kuchma regime and, later, to the post-Orange Revolution Yushchenko presidency, the judges were removed from office as a result of complaints made against them to the High Council of Justice.⁵⁰ The judicial branch has also suffered from the corrosive effects of corruption stemming from factors such as the continuation of communist attitudes, the retention of officials steeped in this culture, and the perpetually low judicial salaries.⁵¹ One consequence of all of the above is low public trust in the judiciary. Koziubra opined that public confidence in Ukraine's courts was "exceedingly low"⁵² and Daniel Beers noted "the data suggest that public trust in the judiciary has been declining in recent years."⁵³ Additionally, Popova argued that executive interference in the judiciary has continued even after the supposedly reform-minded post-Euromaidan government assumed power in 2014.⁵⁴

44. See SADURSKI, *supra* note 42, at 15; Kucsko-Stadlmayer, *The Legal Structures of Ombudsman-Institutions in Europe*, in EUROPEAN OMBUDSMAN – INSTITUTIONS, *supra* note 4 at 51–52.

45. See Maria Popova, *Ukraine's Politicized Courts*, in BEYOND THE EUROMAIDAN, *supra* note 23, at 143; Koziubra, *supra* note 35, at 106, 111–114 (noting that Constitutional Court decisions often reflect "political advisability, and not the rule of law").

46. Popova, *supra* note 45, at 143–145; Koziubra, *supra* note 45, at 111.

47. Popova, *supra* note 45, at 149–157. For more on judicial self-government bodies, see Popova, *supra* note 3, at 56–60; Michal Bobek & David Kosan, *Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe*, 15 GERMAN L. J. 1257 (2014).

48. Popova, *supra* note 45, at 155.

49. Popova, *supra* note 3, at 148–154, 162–164. (explaining that Julia Tymoshenko was Prime Minister during the Yushenko presidency, a government that was elected after the Orange Revolution on a reform platform that was not realized). For more on Yanukovich's use of the criminal justice process against his political competitors, see *infra* text accompanying notes 98–103.

50. Popova, *supra* note 3, at 148–154, 163–164.

51. Daniel J. Beers, *Judicial Reform in Comparative Perspective: Assessing the Prospects in Ukraine*, in BEYOND THE EUROMAIDAN: COMPARATIVE PERSPECTIVES ON ADVANCING REFORM IN UKRAINE (Henry E. Hale and Robert W. Orttung ed., 2016), *supra* note 23, at 166. Koziubra, *supra* note 35, at 113.

52. Koziubra, *supra* note 35, at 111. Nußberger, *supra* note 37, at 650.

53. Beers, *supra* note 51, at 166.

54. Popova, *supra* note 45, at 154. See *infra* text accompanying notes 61–63 on initial reforms to Ukraine's judicial branch.

D. *Application of International Law in the Domestic Legal System*

Ukraine is a monist state with respect to the domestic application of treaty law. The Constitution states that treaties to which Ukraine has given its consent under international law and have been approved by the Rada become part of the domestic legal system.⁵⁵ Ukrainian statute law establishes a hierarchy that ranks these treaties above domestic legislation and below the Constitution, so that in the event of a conflict between a treaty provision and domestic legislation, the treaty provision will prevail.⁵⁶ Ganna Yudkivska states “Ukrainian scholars note that . . . the situation in practice is different. In particular, the national procedure for application of ratified international treaties by courts is not clearly defined in the legislation.”⁵⁷ However, the European Convention on Human Rights (ECHR) and jurisprudence of the European Court of Human Rights (ECtHR) are treated in a distinct fashion: the Law of Ukraine on the Enforcement of Judgments and the Application of the Case-Law of the European Court of Human Rights requires all Ukrainian courts to apply the ECHR and ECtHR judgments in their decision-making although, as discussed further below, in practice the legislative directive has often been overlooked.⁵⁸ According to a former Constitutional Court judge, Ukraine takes a dualist approach to customary international law “unless it is in some way connected to a particular treaty provision.”⁵⁹

E. *Constitutional, Judicial and Legal Reform*

Since 2014, the United Nations (UN) and other international actors have made numerous recommendations to Ukraine’s government to undertake constitutional, legal, and judicial reforms.⁶⁰ For example, constitutional amendments and implementing legislation to try to strengthen the independence and integrity of the ordinary courts entered into force on September 30, 2016.⁶¹ One element of the legal reform is designed to “cleanse” the judiciary of politicized and corrupt judges and this, together with the

55. See UKR. CONST., art 9. Nußberger, *supra* note 37, at 626. Yudkivska, *supra* note 34, at 460.

56. See Nußberger, *supra* note 37, at 626; see also Yudkivska, *supra* note 34.

57. Yudkivska, *supra* note 34, at 460.

58. See, e.g., Equal Rights Trust & LGBT Human Rights Nash Mir Center, *In the Crosscurrents: Addressing Discrimination and Inequality in Ukraine* (August 2015) at 229, <http://www.equalrightstrust.org/ertdocumentbank/In%20the%20Crosscurrents%20Addressing%20Discrimination%20and%20Inequality%20in%20Ukraine.pdf> [<https://perma.cc/44GA-3FM5>]; Law of Ukraine on the Enforcement of Judgments and the Application of the Case-Law of the European Court of Human Rights, 2006, art. 17; *infra* text accompanying notes 89–90.

59. See *In the Crosscurrents*, *supra* note 34, at 230 (interview with Professor Mykola Kozyubra).

60. See, e.g., *supra* notes 10–11, 13.

61. OHCHR, *Ukraine human rights situation 16 August to 15 November 2016*, *supra* note 10, §182–192.

OHCHR, *Ukraine human rights situation 16 May to 15 August 2016*, *supra* note 10, §18–24. Ukraine Law “On amendments to the Constitution of Ukraine (regarding the judiciary)”, No 1401-VII, June 2, 2016. Ukraine Law “On the judicial system and the status of judges”, No 1402-VIII, June 2, 2016.

effects of post-Euromaidan lustration of some judges, is expected to exacerbate the understaffing of the ordinary courts.⁶² Implementation of legislation to enhance the independence of the High Council of Justice from the executive branch entered into force on January 5, 2017 and the body was subsequently renamed the Supreme Council of Justice.⁶³

Ukraine is also addressing constitutional human rights reform based on UN and European rights instruments.⁶⁴ Ukraine has already taken steps to try to improve human rights protection and promotion. For example, in 2015 the government adopted a National Human Rights Strategy (NHRS) and a National Human Rights Action Plan (NHRAP) to implement the Strategy was adopted in late 2015 and revised in 2016 after consultations with stakeholders.⁶⁵

III. UKRAINE: INTERNATIONAL HUMAN RIGHTS LAW OBLIGATIONS

A. *United Nations Human Rights Law*

Ukraine has been a UN individual member state since the birth of the organization in 1945: initially as the Ukrainian Soviet Socialist Republic and as Ukraine after its independence on August 24, 1991.⁶⁶ It has become a party to many UN human rights treaties including the: International Covenant on Civil and Political Rights (ICCPR);⁶⁷ International Covenant on Economic, Social and Cultural Rights (ICESCR);⁶⁸ Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);⁶⁹ Convention on the Rights of the Child (CRC) and its substantive Protocols;⁷⁰ Convention on the Rights of Persons with Disabilities;⁷¹ Convention

62. *Ukraine human rights situation 16 August to 15 November 2016*, *id.* (all judges appointed prior to entry into force of constitutional amendments will be examined for their competence, professional ethics and integrity, and those failing the assessment can be dismissed).

63. *Id.* § 192. The Law of Ukraine “On the High Council of Justice,” 2017.

64. Council of Europe Commissioner for Human Rights, *Report by Nils Muijnicks Following his Visit to Ukraine From 29 June to 3 July 2015*, CommDH(2015)23, (November 3, 2015), at § 64, <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2840224&SecMode=1&DocId=2324534&Usage=2> [<https://perma.cc/85FY-TVUB>].

65. OHCHR, *Ukraine human rights situation 16 November 2015 to 15 February 2016*, *supra* note 10, § 20, § 173-174. OHCHR, *Ukraine human rights situation 16 May to 15 August 2016*, *supra* note 10, § 30.

66. Charter of the United Nations, Oct. 24, 1945, 1 U.N.T.S. XVI. UN Member States, <http://www.un.org/en/member-states/> [<https://perma.cc/SM8R-853E>].

67. International Covenant on Civil and Political Rights (ICCPR), (1966) 999 U.N.T.S. 171 (in force March 23, 1976, Ukraine signed March 20, 1968 and ratified November 12, 1973).

68. International Covenant on Economic, Social and Cultural Rights, (1966) 993 U.N.T.S. 3 (in force January 3, 1976, Ukraine signed March 20, 1968 and ratified November 12, 1973).

69. Convention on the Elimination of all Forms of Discrimination against Women (1979) 1249 U.N.T.S. 13 (in force September 3, 1981, Ukraine signed July 17, 1980 and ratified March 12, 1981).

70. Convention on the Rights of the Child, (1989) 1577 U.N.T.S. 3 (in force September 2, 1990, Ukraine signed February 21, 1990 and ratified August 28, 1991); Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, UN GA Res 54/263, UN Doc A/RES/54/263, Annex (in force February 12, 2002, Ukraine signed September 7, 2000 and

against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);⁷² and Optional Protocol to the CAT (OPCAT).⁷³

The ICCPR permits states parties to make limited derogations from their treaty obligations in times of public emergency which threaten the life of the nation, the existence of which is officially proclaimed, to the extent strictly required by the exigencies of the situation provided the measures are not inconsistent with their other international obligations and are not discriminatory.⁷⁴ Faced with internal conflict, starting in June 2015, Ukraine notified the UN that it was derogating from its ICCPR obligations in Russian-occupied Crimea and some of its ICCPR obligations in the eastern regions of Donetsk and Luhansk.⁷⁵

B. European Human Rights Law

Ukraine became a member of the Council of Europe (COE) on November 9, 1995.⁷⁶ The COE human rights regime centers on the European Convention on Human Rights (ECHR), its protocols and the European Court of Human Rights (ECtHR), which interprets and applies the ECHR in actions brought by persons subject to the jurisdiction of the relevant state party.⁷⁷ Ukraine became a ECHR party on September 11, 1997.⁷⁸ It has ratified all of the ECHR's substantive protocols in force.⁷⁹ Ukraine has also ratified some of the other COE human rights treaties, including on torture prevention and minority rights.⁸⁰ The ECHR also permits states parties to

ratified July 11, 2005); Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, UN GA Res 54/263, UN Doc A/RES/54/263, Annex (in force January 18, 2002, Ukraine signed September 7, 2000 and ratified July 3, 2003).

71. Convention on the Rights of Persons with Disabilities, UN GA Res 61/106, Annex I, UN Doc A/RES/61/106; (2006) 2515 U.N.T.S. 3 (in force January 24, 2007, Ukraine signed September 24, 2008 and ratified February 4, 2010).

72. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (1984) 1465 U.N.T.S. 85 (in force June 26, 1987, Ukraine signed on February 27, 1986 and ratified on February 24, 1987).

73. Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), 2375 U.N.T.S. 237 (in force June 22, 2006, Ukraine signed on February 23, 2005 and ratified on September 19, 2006).

74. International Covenant on Civil and Political Rights, *supra* note 67, art 4(1). Art 4(2) lists non-derogable rights.

75. UN, *Ukraine: Notification Under Article 4(3)*, Ref C.N.416.2015.TREATIES-IV.4 (Depositary Notification), June 5, 2015, (derogations from ICCPR arts 2(3), 9, 12, 14, 17). UN, *Ukraine: Notification Under Article 4(3)*, Ref C.N.656.2015.TREATIES-IV.4 (Depositary Notification), November 27, 2015. UN, *Ukraine: Notification under Article 4(3)*, C.N.502.2016.TREATIES-IV.4 (Depositary Notification), July 6, 2016. OHCHR, *Ukraine human rights situation 16 November 2015 to 15 February 2016*, *supra* note 10, §169–170. UN Human Rights Council, *supra* note 10, § 25.

76. Nußberger, *supra* note 37, at 610.

77. European Convention on Human Rights, Nov. 4, 1950, E.T.S No. 5.

78. Council of Europe, Chart of Signatures and Ratifications, <http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/chartSignature/3> [<https://perma.cc/D6XJ-LERP>].

79. *Id.* Ukraine has signed Protocols 15 and 16 which are not yet in force.

80. European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Nov. 26, 1987, E.T.S No.126. (ratified May 5, 1997). Protocol No 1 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Nov.

make limited derogations to their obligations in time of war or other public emergency threatening the life of the nation to the extent strictly required by the exigencies of the situation provided such measures are not inconsistent with their other international law obligations.⁸¹ In 2015 Ukraine notified the COE that it was derogating from some of its ECHR obligations in Eastern Ukraine.⁸²

The ECtHR receives large numbers of cases against some Central and Eastern European states, including Ukraine.⁸³ By the end of 2015, Ukraine ranked first of forty-seven states in the number of pending cases against it.⁸⁴ The ECtHR has issued many judgments finding Ukraine in violation of its ECHR obligations.⁸⁵ Keller and Sweet note:

A State may be formally monist but nonetheless treat the Convention as alien, foreign law, leaving it without much force in the domestic order. Such has been the case . . . in Russia, Slovakia, Turkey . . . and the Ukraine. In these latter States, a surface, systemic monism is belied by a lack of commitment to the ECHR among political officials, and by massive structural problems in the functioning of judicial institutions.⁸⁶

Multiple weak domestic institutions in Ukraine, including the judiciary, contribute to poor compliance with ECHR obligations.⁸⁷ Where there is compliance, execution of judgments is exceedingly slow.⁸⁸ Despite the legislation requiring the courts to apply the ECHR and ECtHR jurisprudence,

4, 1993, E.T.S No. 151. (ratified November 7, 2001). Protocol No 2 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Nov. 4, 1993, E.T.S No. 152. (ratified November 7, 2001). European Charter for Regional or Minority Languages, Nov. 5, 1992, E.T.S. No. 148. (ratified September 19, 2005). Framework Convention for the Protection of National Minorities, Feb. 1, 1995, E.T.S. No. 157. (ratified January 26, 1998). European Social Charter (Revised), May. 3, 1996. E.T.S No. 163. (163) on. (ratified December 21, 2006.) Additional Protocol for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows, Nov. 8, 2001. E.T.S. No. 181. (ratified September 30, 2010).

81. European Convention on Human Rights, *supra* note 77, art 15(1). Art 15(2) lists the non-derogable rights, *id.*

82. Derogations made to arts 5, 6, 8 & 13, Ukraine ICCPR Derogation, *supra* note 75; European Court of Human Rights, *Annual Report 2015* (Strasbourg: European Court of Human Rights, 2016) at 13 [hereinafter *ECtHR Annual Report 2015*]; COE, Notification of Declarations: Ukraine, Ref JJ8172C Tr/005-190 (July 1, 2016).

83. Keller & Sweet, *supra* note 37, at 12. European Court of Human Rights, *supra* note 82, at 188–189.

84. European Court of Human Rights, *supra* note 82 (13,832, i.e. 21.4% of total cases).

85. *Id.* at 197. Over 1995–2015, Ukraine ranked 6th out of 47 states in the number of ECHR violations, *id.* at 198–199.

86. Keller & Sweet, *supra* note 37, at 684–685.

87. Courtney Hillebrecht, *The power of human rights tribunals: Compliance with the European Court of Human Rights and domestic policy change*, (2014), 20:4 EUR. J. INT'L REL. at 1102. Nußberger, *supra* note 37, at 650. See, e.g., René Provost, *Teetering on the Edge of Legal Nihilism: Russia and the Evolving European Human Rights Regime*, (2015), 37 HUM. RTS. Q. 289.

88. Council of Europe, Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights: 9th Annual Report of the Committee of Ministers, Mar. 2015, at 78, <https://>

most commentators state that Ukraine's Constitutional Court and ordinary courts have seldom cited or relied on the ECHR or ECtHR in their decisions in the past.⁸⁹ However, based on her analysis of recent judgments, Yudkivska feels that this judicial attitude has started to change, especially on the part of the Constitutional Court and administrative courts.⁹⁰

Many of the ECtHR judgments reflect the systemic dysfunction of Ukraine's judicial system. In 2015, there were fifty-one judgments against Ukraine, fifty of which found violations of the ECHR.⁹¹ The largest number concerned violations of the Article 3 prohibition on inhuman or degrading treatment and lack of investigation thereof, the Article 5 right to liberty and security and the Article 6 right to a fair trial, which prohibits overly long court proceedings.⁹²

Further, ECHR violations involving the judiciary and the judicial process include a lack of enforcement of domestic decisions including judgment debts,⁹³ flawed criminal procedure laws,⁹⁴ deficient and biased judicial behavior,⁹⁵ and a politicized and unfair judicial discipline process.⁹⁶ The systemic failure to implement ECtHR judgments was illustrated in *Bochan v Ukraine (No. 2)*, where the ECtHR Grand Chamber heard a follow-up application arguing that Ukraine's Supreme Court had not implemented the ECtHR's earlier judgment.⁹⁷ The ECtHR held that Ukraine had violated the ECHR Article 6(1) right to a fair hearing because, in the applicant's extraordinary appeal based on the ECtHR judgment, the Supreme Court "grossly misrepresented" the ECtHR judgment findings, amounting to gross arbitrariness or a denial of justice.⁹⁸

rm.coe.int/168062fe2d [https://perma.cc/ATE5-KZ49]. In 2014, the average length of time to execute leading judgments stood at 7.4 years.

89. Equal Rights Trust & LGBT Human Rights Nash Mir Center, *supra* note 58. Nußberger, *supra* note 37, at 628, 667. Yudkivska, *supra* note 34, at 461–462.

90. Yudkivska, *supra* note 34, at 481–488. Equal Rights Trust & LGBT Human Rights Nash Mir Center, *supra* note 58, at 229. The Constitutional Court referred to ECHR and ECtHR cases "over 80 times" since its inception to February 2015.

91. ECtHR *Annual Report 2015*, *supra* note 82 at 197.

92. *Id.*

93. See, e.g., *Yuri Nikolayevich Ivanov v. Ukraine*, App No 40450/04 (October 15, 2009) (in over 300 cases, failure to honor judgment debts, here judgment debt to pay pension arrears).

94. See, e.g., *Ruslan Yakovenko v. Ukraine*, App No 5425/11 (June 4, 2015) (criminal appeals negatively affect right to liberty, violated Protocol 7, art 2); *Shvyda v. Ukraine*, App No 17888/12 (October 30, 2014) (criminal appeal only permitted after prison term served, Protocol 7, art 2 violated).

95. See, e.g., *Bochan v. Ukraine*, App No 7577/02 (May 3, 2007) (insufficient reasons in court decisions, partiality of Supreme Court violated art 6(1)).

96. *Oleksandr Volkov v. Ukraine*, App No 21722/11 (January 9, 2013) (Supreme Court judge dismissal violated arts 6, 8 given systemically unfair and politicized High Council of Justice/Rada disciplinary process, ECtHR required his reinstatement); COE Commissioner for Human Rights, "Ukraine: The independence and efficiency of the judiciary must be protected as a matter of priority" (November 25, 2011).

97. See *Bochan v. Ukraine (No. 2)*, App No 22251/08 (February 5, 2015); see also *Bochan v. Ukraine*, *supra* note 95, ¶¶ 33–39, 42–58.

98. *Bochan v. Ukraine (No 2)*, *id.*, ¶¶ 63–64.

Executive branch political abuse of the criminal justice system was evident during the Kuchma and Yanukovich regimes. In the *Gongadze* case, a journalist disappeared and was murdered during the Kuchma presidency; evidence showed that there was police involvement and the police engaged in an extremely slow and deficient investigation.⁹⁹ The ECtHR held that Ukraine violated the procedural aspects of the rights to life in ECHR Article 2, the prohibition of degrading treatment in Article 3 (given the effects on his widow) and the right to an effective remedy in Article 13.¹⁰⁰ Yanukovich started his presidency by targeting political opponents through the criminal justice system. In particular, former Prime Minister Julia Tymoshenko was the subject of trumped up charges, convicted in 2011 and subjected to poor conditions in prison, leading to several applications to the ECtHR.¹⁰¹ In *Tymoshenko v Ukraine*, the ECtHR held that Ukraine had violated, *inter alia*, ECHR Article 5, the right to liberty and security, for the unlawful and arbitrary nature of Tymoshenko's pre-trial detention and the absence of a review procedure.¹⁰² *Tymoshenko v Ukraine No 2*, which argued that the government had engaged in political abuse of the criminal trial process, was ended by a friendly settlement in December 2014 after the end of the Yanukovich regime.¹⁰³ Yuriy Lutsenko, Tymoshenko's Minister of the Interior, was charged and convicted of similar offences after Yanukovich came to power, resulting in two ECtHR judgments finding that Ukraine's treatment of him during his pre-trial detention and during his trial violated the ECHR.¹⁰⁴

In other areas, Ukraine has violated core ECHR rights of detainees and prisoners, including the right to liberty and security in Article 5 through overly long detention,¹⁰⁵ and the Article 3 prohibition of torture and other ill-treatment through their mistreatment¹⁰⁶ and poor sanitary and health

99. *Gongadze v. Ukraine*, No 34056/02 (November 8, 2005).

100. *Id.* at §§175-194.

101. *Tymoshenko v. Ukraine*, Eur. Ct. H.R. (April 30, 2013); *Tymoshenko v. Ukraine No 2*, Eur. Ct. H.R. (December 16, 2014); Popova, "Ukraine's Politicized Courts", *supra* note 45, at 145-149.

102. *Tymoshenko v. Ukraine*, *supra* note 101, ¶¶ 262-288.

103. *Tymoshenko v. Ukraine No 2*, *supra* note 101; European Court of Human Rights Press Release, "European Court discontinues examination of second case brought by former Ukrainian Prime Minister Tymoshenko," ECHR 023 (2015) (January 21, 2015). Tymoshenko was released from prison in February 2014. *Id.*

104. *Lutsenko v. Ukraine*, Eur. Ct. H.R. (July 3, 2012) (pre-trial detention conditions violated art 5 right to liberty and security), <http://hudoc.echr.coe.int/eng?i=001-112013> [<https://perma.cc/RM4X-8622>]; *Lutsenko v. Ukraine No 2*, Eur. Ct. H.R. (June 11, 2015) (lack of food/water and placement in a metal cage during trial violated art 3 prohibition of inhuman or degrading treatment), <http://hudoc.echr.coe.int/eng?i=001-155092> [<https://perma.cc/CY4V-6FTZ>]; Popova, "Ukraine's Politicized Courts," *supra* note 45 at 145-149.

105. *See, e.g., Kharchenko v. Ukraine*, Eur. Ct. H.R. (February 10, 2011) (lawfulness & length of pre-trial detention, art 5 violated), <http://hudoc.echr.coe.int/eng?i=001-103260> [<https://perma.cc/Y8D9-KXB4>].

106. *See, e.g., Kaverzin v. Ukraine*, Eur. Ct. H.R. (May 15, 2012) (inadequate medical care of prisoner tortured in police custody violated art 3) <http://hudoc.echr.coe.int/eng?i=001-110895> [<https://perma.cc/LK63-QEML>]; *Salakhov and Islyamova v. Ukraine*, (March 14, 2013) (inadequate medical care of detainee & handcuffing in prison violated art 3), <http://hudoc.echr.coe.int/eng?i=001-117134>

conditions in the facilities.¹⁰⁷ Ukraine has also violated the right to freedom of assembly due to the absence of supportive legislation enabling peaceful protest.¹⁰⁸

IV. NATIONAL HUMAN RIGHTS INSTITUTIONS (NHRIs)

The international human rights system emphasizes the establishment of independent NHRIs by states to promote and protect human rights, and implement the state's international human rights law obligations. The Paris Principles, a soft law instrument adopted by the UN General Assembly in 1993, contain standards that focus on the contents of a NHRI's legal framework and the provision of sufficient financial resources by the government; this in turn provides that the NHRI has sufficient independence and formally broad human rights promotion and protection mandates.¹⁰⁹ GANHRI, the global network of NHRIs, has interpreted the Paris Principles through its General Observations and applies both in its accreditation process.¹¹⁰ GANHRI accredits NHRIs with A-status (full compliance with the Paris Principles) or B-status (partial Paris Principles compliance), and C denotes "no status."¹¹¹ GANHRI accreditation is a gatekeeper- and reputation-affecting mechanism that permits only A-status NHRIs to participate fully in the UN human rights system and, increasingly, in other UN procedures.¹¹² Regional international organizations have also moved to rely on compliance with the Paris Principles as a means of assessing NHRIs.¹¹³

[<https://perma.cc/W5PF-HLX3>]; *Korneykova and Kornekov v. Ukraine*, (March 24, 2016) (detainee shackled in hospital when giving birth & subsequent poor health/living conditions violated art 3), <http://hudoc.echr.coe.int/eng?i=001-161543> [<https://perma.cc/872U-CYM6>].

107. See, e.g., *Kaverzin v. Ukraine*, *id.*; *Salakhov and Islyamova v. Ukraine*, *id.*; *Korneykova and Kornekov v. Ukraine*, *id.*; *Yudkivska*, *supra* note 34, at 475–476.

108. See, e.g., *Vyerentsov v. Ukraine*, (April 11, 2013) (detention for failure to obtain permit when law did not require one, systemic problem, articles 6, 7, 11 violated), <http://hudoc.echr.coe.int/eng?i=001-118393> [<https://perma.cc/MSA5-5JSA>].

109. Paris Principles, *supra* note 15. See, e.g., Katerina Linos & Tom Pegram, "The Language of Compromise in International Agreements" 70 INT'L ORG 587 (2016); GAUTHIER DE BECO & RACHEL MURRAY, A COMMENTARY ON THE PARIS PRINCIPLES ON NATIONAL HUMAN RIGHTS INSTITUTIONS (Cambridge: Cambridge University Press, 2015).

110. GANHRI: <<http://nhri.ohchr.org>> (formerly International Coordinating Committee of NHRIs (ICC)); GANHRI Sub-committee on Accreditation: <<http://nhri.ohchr.org/EN/AboutUs/IC-CAccreditation/Pages/default.aspx>>; GANHRI General Observations (2013) in de Beco & Murray, *supra* note 109, at 152 [GANHRI GOs].

111. GANHRI Accreditation Chart, *supra* note 5.

112. UN GA Res 70/163 (December 17, 2015), UN Doc A/RES/70/163 (February 10, 2016) ¶ 16 (encouraging all relevant UN mechanisms and processes to enhance participation of Paris Principles compliant NHRIs); UN Human Rights Council, "NGOs and NHRIs": <<http://www.ohchr.org/EN/HRBodies/UPR/Pages/NgosNhris.aspx>>.

113. Reif, "The Shifting Boundaries of NHRI Definition in the International System", *supra* note 6 at 58-61. In Europe, see EU Fundamental Rights Agency (FRA) reports and COE Parliamentary Assembly Res 1959, "Strengthening the institution of ombudsman in Europe" (2013) art 4.5 (member

A NHRI must be independent, including through the provision of adequate funding.¹¹⁴ A NHRI must have broad human rights promotion and protection mandates covering all human rights.¹¹⁵ Since the Paris Principles are based on an advisory human rights commission model, they emphasize human rights promotion responsibilities. A NHRI should be empowered to: advise government on ratification and implementation of human rights treaties and domestic law reform to ensure harmonization of domestic law with the state's international human rights obligations; engage in human rights research, education, training and public awareness-raising; recommend new laws, measures and ways to end human rights violations; interact with the international and regional human rights systems and other NHRIs; develop relationships with relevant NGOs and other civil society actors; and consult with other human rights institutions.¹¹⁶ Human rights protection responsibilities are defined to include activities that seek to prevent and combat actual human rights violations, including monitoring, inquiries, own-motion investigations, bringing court actions and using alternative dispute resolution.¹¹⁷ However, the Paris Principles do not require NHRIs to investigate public complaints.¹¹⁸ Although the Paris Principles do not explicitly mention the private sphere, GANHRI General Observation 1.2 states that NHRI mandates "should. . . extend to the acts and omissions of both the public and private sectors."¹¹⁹ Almost no NHRIs, including the PCHR, are adjudicative bodies and they cannot issue decisions that are legally binding on public or private actors, although they may be able to initiate court actions or intervene in litigation. For example, many NHRIs that take the form of human rights ombudsman institutions in Latin America and Central and East Europe can bring constitutionality, *amparo*, or other types of human rights actions before their constitutional or supreme courts.¹²⁰

GANHRI's interpretation and application of the Paris Principles has led to a narrowing of the definition of a NHRI: only national human rights commissions or institutes and national human rights ombudsman institu-

states with ombudsman institutions must consider seeking GANHRI/ICC accreditation in light of the Paris Principles.)

114. Paris Principles, "Composition and guarantees of independence and pluralism", ¶¶ 2-3, *supra* note 15; GANHRI GOs e.g. 1.1, 1.8-1.10, *supra* note 110.

115. GANHRI GOs 1.2-1.5, *supra* note 110; Paris Principles, "A. Competence and responsibilities", ¶ 3, *supra* note 114.

116. GANHRI GO 1.2, *supra* note 110; Paris Principles, "A. Competence and responsibilities", ¶¶ 1-2, "Methods of operation", *supra* note 114.

117. GANHRI GOs 1.2, 2.10, *supra* note 110.

118. Paris Principles, "Additional principles concerning the status of commissions with quasi-judicial competence", *supra* note 15; GANHRI GO 2.10, *supra* note 110.

119. *See supra* note 110.

120. Linda C. Reif, "Transplantation and Adaptation: The Evolution of the Human Rights Ombudsman," 31 BOSTON COLLEGE THIRD WORLD L.J. 269 (2011) at 304-307 ["Transplantation and Adaptation"].

tions are capable of achieving full compliance with the Paris Principles.¹²¹ National human rights ombudsman institutions are heavily concentrated in Latin America and Central and Eastern Europe, and scattered throughout other parts of the world.¹²² By May 2017, 121 institutions had been accredited by GANHRI, of which 78 NHRIs had A-status and 33 national institutions had B-status.¹²³ Europe had 27 NHRIs with A-status, including 16 human rights ombudsman institutions, most of which are in Central and Eastern Europe.¹²⁴ The 10 European NHRIs with B-status included 6 human rights ombudsman institutions, the majority of which are also in Central and East Europe.¹²⁵

V. UKRAINE'S NHRI: PARLIAMENT COMMISSIONER FOR HUMAN RIGHTS (PCHR)

A. Background

The first NHRI in Central and East Europe was Poland's Commissioner for Human Rights, established in the late 1980s.¹²⁶ Poland's NHRI was created in the form of a human rights ombudsman, and it was this model that was subsequently copied or adapted throughout the region.¹²⁷ Ukraine followed suit when it established the PCHR. Scandinavian ombudsman institutions and the human rights ombudsman institutions of regional neighbors Poland, Hungary, and Russia influenced constitutional and legislative drafters.¹²⁸ The PCHR's legal framework was established in a 1997 law (PCHR Law) and began operations in 1998.¹²⁹

121. See *supra* text accompanying note 7.

122. Reif, "Transplantation and Adaptation", *supra* note 120, at 284–289.

123. GANHRI Accreditation Chart, *supra* note 5.

124. *Id.* (in Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Croatia, Finland, Georgia, Hungary, Latvia, Lithuania, Poland, Portugal, Russian Federation, Serbia, Spain and Ukraine).

125. *Id.* (in Austria, Bulgaria, Cyprus, Macedonia, Montenegro and Slovenia).

126. Linda C. Reif, *The Ombudsman, Good Governance and the International Human Rights System* (Leiden: Martinus Nijhoff Pub, 2004) at 157–163 [*The Ombudsman*]; Poland Commissioner for Human Rights: <<https://www.rpo.gov.pl/en>>.

127. Reif, *The Ombudsman*, *supra* note 126, at 155–168, 265–282; *European Ombudsman – Institutions*, *supra* note 4, at 449–454 (only Belarus lacks a NHRI); Richard Carver, "National Human Rights Institutions in Central and Eastern Europe: The Ombudsman as Agent of International Law" in *Assessing NHRIs*, *supra* note 6, at 181.

128. Ukraine PCHR, "The Ukrainian Parliament Commissioner for Human Rights – the Ukrainian Model of Ombudsman" ["Ukrainian Model of Ombudsman"]. On Sweden's and Finland's parliamentary ombudsman institutions having human rights mandates before 1996, see Reif, *The Ombudsman*, *supra* note 126, at 6, 138.

129. Ukraine Constitution, *supra* note 3, at arts 55, 85(17), 101, 150; Law of Ukraine "On the Ukrainian Parliament Commissioner for Human Rights" (December 23, 1997) [PCHR Law].

B. Overview

The PCHR is an institution that exerts indirect parliamentary control over other branches and levels of government.¹³⁰ Everyone has the constitutional right to appeal to the PCHR for the protection of his or her rights.¹³¹ It works to uphold the rights in human rights treaties binding Ukraine, the Constitution and other domestic human rights laws.¹³² Other PCHR objectives are: ensuring observance of and respect for human rights by all levels of government and their officials; prevention of human rights violations, including any form of discrimination; and human rights promotion.¹³³ The broad protection, prevention and promotion mandates cover both the public and private sectors.¹³⁴ The PCHR was given multiple new mandates in the past decade. In 2008 it was empowered to combat gender-based discrimination, including gender-based violence.¹³⁵ In 2012, the PCHR was designated as Ukraine's OPCAT National Preventive Mechanism (NPM).¹³⁶ Starting in 2014, the PCHR was given a personal data protection (privacy) mandate.¹³⁷ In addition, the PCHR enjoys a number of the litigation powers given to human rights ombudsman institutions, namely bringing actions before the Constitutional Court and other courts. The PCHR's priority areas through 2017 include: prevention of torture and inhuman or degrading treatment; IDP rights; children's rights; the rights of mobilized military personnel; combating discrimination, especially gender-based inequality; and protecting socio-economic rights.¹³⁸

The PCHR can investigate public complaints (called appeals) and complaints by Rada deputies, and the Commissioner can launch investigations on her own initiative.¹³⁹ The PCHR cannot investigate complaints that are being examined by the courts or the substance of court judgments.¹⁴⁰ However, it has jurisdiction over judicial administrative conduct, e.g. pro-

130. Stern, *supra* note 4, at 429.

131. UKR. CONST., *supra* note 3, art 55.

132. *Id.* at arts 55, 101; PCHR Law, *supra* note 129, art 3(1); Ukraine PCHR, *Strategic Plan of Activity of the Ukrainian Parliament Commissioner for Human Rights for 2016-2017* (2016) [hereinafter *Strategic Plan for 2016-17*] at 8.

133. PCHR Law, *supra* note 129, at arts 2–3, 13.

134. *Id.* at art 18.

135. *Id.* at art 13(13); UN Committee on the Elimination of Violence Against Women, *Concluding Observations: Ukraine*, UN Doc CEDAW/C/UKR/CO/7 (February 5, 2010), ¶ 9 (pursuant to equal rights legislation); UN Economic Commission for Europe, *National Mechanisms for Gender Equality in South-East and Eastern Europe, Caucasus and Central Asia: Regional Study* (2010) at 73; *In the Crosscurrents*, *supra* note 58 at 258-271.

136. PCHR Law, *supra* note 129, at art 19.

137. PCHR Law, *supra* note 129, at art 3(7).

138. PCHR 2016-2017 Strategic Plan, *supra* note 132, at 12; *In the Crosscurrents*, *supra* note 58, at 328.

139. PCHR Law, *supra* note 129, at arts 3, 16–17, 21; “Ukrainian Model of Ombudsman”, *supra* note 128; Ukrainian PCHR, “Admissibility criteria for petitions to the Commissioner”, <www.ombudsman.gov.ua/en/page/applicant/admissibility-criteria-for-petitions-to-the-commissioner/>.

140. PCHR Law, *supra* note 129, at arts 4, 17; “Ukrainian Model of Ombudsman”, *supra* note 128.

cedural flaws such as delays in court proceedings.¹⁴¹ The PCHR has strong legislative powers to support investigations, litigation and other activities, including rights freely to visit and inspect the premises and documents of public authorities and private entities, and freely and without notice to visit and inspect places where persons are involuntarily held and interview those persons.¹⁴² It applies legality assessment standards to determine whether human rights obligations have been violated, i.e., Ukrainian human rights treaty obligations, constitutional protections and domestic law.¹⁴³ As a NHRI, the PCHR is a non-adjudicative body that is supplemental to the courts and to other types of complaint mechanisms.¹⁴⁴ Much of its work culminates in proposals and recommendations for improvements in law and practice. Public and private actors must cooperate with the PCHR, consider PCHR recommendations directed at them and provide the PCHR with a timely and reasoned written response.¹⁴⁵

The PCHR operated for a decade before it applied for GANHRI accreditation. In April 2008, the PCHR received B-status accreditation.¹⁴⁶ In March 2009, the PCHR received A-status accreditation, connoting full compliance with the Paris Principles, and it maintained its A-status when it was reaccredited by GANHRI in October 2014.¹⁴⁷

C. Independence

Linking a NHRI such as the PCHR with the legislative rather than the executive branch is needed to protect its independence given that the executive and administrative authorities, including police and prison officials, commit many human rights violations. The PCHR is elected by and submits annual and special reports to the Rada, the legislative branch of the government.¹⁴⁸

However, NHRIs should have independence from all branches of government, including the legislature. In this vein, other legislative provisions further protect the independence of the PCHR. The PCHR Law stipulates that the Commissioner performs her duties independently of other state bodies and officials, is elected for a five-year term on a date that does not coincide with legislative elections, has immunities during her tenure, is protected from arbitrary removal from office and then can only be removed

141. PCHR Law, *supra* note 129; “Ukrainian Model of Ombudsman”, *supra* note 128.

142. PCHR Law, *supra* note 129, at arts 13, 22.

143. Text accompanying *supra* note 132; Stern, *supra* note 4 at 429. Some ombuds institutions can also apply extra-legal assessment standards of e.g. proper or just conduct.

144. PCHR Law, *supra* note 129, art 4.

145. *Id.* at art 22; Stern, *supra* note 4, at 430.

146. GANHRI Accreditation Chart, *supra* note 5.

147. See, e.g., GANHRI Accreditation Chart, *supra* note 5; ICC/GANHRI, *Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA)* (Geneva, 27-31 October, 2014) 3 [hereinafter *SCA Report*].

148. Ukraine Constitution, *supra* note 3, art 85(17); PCHR Law, *supra* note 129, arts. 5–6, 18.

by a majority vote of the Rada.¹⁴⁹ The PCHR cannot be removed if the Rada is dissolved or a state of emergency or martial law is declared.¹⁵⁰ Public and private actors are prohibited from interfering with the activities of the PCHR.¹⁵¹ The PCHR has good formal budgetary independence and the Rada and executive branch “shall provide necessary conditions” for the work of the Commissioner and staff.¹⁵² However, while the PCHR Law gives the Commissioner control over Secretariat staff appointments and dismissals, it applies Ukrainian civil service legislation to the staff.¹⁵³

D. Appointment Process for Commissioner, Pluralism, and Accessibility

The Chair of the Rada or a minimum of twenty-five percent of Rada parliamentary deputies propose names of candidates for Commissioner.¹⁵⁴ This provision has been criticized by GANHRI as being too limited, because it excludes qualified candidates who would be able to apply for the post if an open competition was held.¹⁵⁵ Overly narrow application procedures or qualification requirements are relatively common deficiencies in the legal architecture of human rights ombudsman institutions.¹⁵⁶ GANHRI recommended that the PCHR impress on the government that a:

clear, transparent and participatory selection and appointment process for membership of the NHRI's decision-making body must be included in relevant legislation, regulations or binding administrative guidelines. . . . A process that promotes merit-based selection and ensures pluralism is necessary to ensure the independence of, and public confidence in, the senior leadership of a NHRI.¹⁵⁷

In contrast to some NHRIs in Central and Eastern Europe, the person appointed as PCHR is not required to have legal expertise, although she must have human rights protection experience.¹⁵⁸ As Carver notes, “the success of ombudsmen without a legal qualification . . . suggests that this knowledge is not a sine qua non for the effective defense and promotion of human

149. PCHR Law, *supra* note 129, at arts 4–5, 9, 20.

150. *See id.* at art 4.

151. *See id.* at art 20.

152. *See id.* at art 12 (the PCHR drafts its budget which is approved by the Rada and included as a separate item in state budget); *see also* GANHRI GO, *supra* note 110, at 110.

153. *See* PCHR Law, *supra* note 129, art 10. GANHRI GO 2.4 states that NHRIs should be statutorily empowered to hire their staff and determine their staff structure and skills, but is not explicit on application of civil service legislation to the NHRI.

154. *See* PCHR Law, *supra* note 129, at art 6.

155. *See* SCA Report, *supra* note 147, at 36.

156. *See* Linda C. Reif, Professor, University of Alberta, Human Rights Ombudsman Institutions as GANHRI Accredited National Human Rights Institutions (NHRIs): Benefits, Challenges and Limitations (Nov. 16, 2016) at 99 [hereinafter Human Rights Ombudsman Institutions].

157. SCA Report, *supra* note 147, at 36 (based on Paris Principle B.1 and GANHRI GO 1.8 “[s]election and appointment of the decision-making body of NHRIs”).

158. *See* PCHR Law, *supra* note 129, at arts 5, 8.

rights.”¹⁵⁹ GANHRI has been critical of qualification requirements that set too high a bar because they can restrict the diversity of eligible candidates.¹⁶⁰

As an ombudsman, the PCHR has a single-leader format, although Representatives (deputies) can be appointed by the Commissioner to oversee defined areas; seven were in place by early 2017.¹⁶¹ The Paris Principles are based on a multi-member commission model and require that its members reflect the pluralist makeup of the nation.¹⁶² NHRI member pluralism has been interpreted in the case of single-member institutions such as human rights ombudsman institutions to mean that the entirety of the staff should reflect the diversity of the nation in terms of gender, minority status, disability, etc.¹⁶³ In the 2014 PCHR accreditation review, staff diversity was not raised as an issue.¹⁶⁴

In the past, the COE Commissioner for Human Rights and the UN Human Rights Committee have pointed out that the PCHR needed to facilitate public access to the institution by establishing regional offices.¹⁶⁵ GANHRI addresses accessibility of NHRIs in the context of the need for adequate funding including funding, if possible, to establish “a permanent regional presence.”¹⁶⁶ By early 2017, the accessibility of the PCHR was enhanced through the establishment of eight regional offices.¹⁶⁷

E. Human Rights Protection, Monitoring, and OPCAT NPM Mandates

1. Post-Euromaidan and Internal Conflict Environment

The PCHR is playing important roles in the post-Euromaidan human rights planning and implementation processes. For example, the NHRAP was drafted with the input of the PCHR, civil society and international actors.¹⁶⁸ The PCHR has approved a plan to monitor the implementation

159. Carver, *supra* note 127, at 187.

160. Reif, “Human Rights Ombudsman Institutions”, *supra* note 156, at 100.

161. See PCHR Law, *supra* note 129, at art 11. See e.g., UKRAINIAN PARLIAMENT COMMISSIONER FOR HUMAN RIGHTS, *Representatives of the Commissioner* [<https://perma.cc/P65T-A5Y7>] (demonstrating the creation of representatives for: social, economic and humanitarian rights; rights of the child, non-discrimination and gender equality; rights of internally displaced persons; constitutional appeals and the right to access public information; personal data protection; observance of rights of military personnel; and public relations and IT).

162. Paris Principles, *supra* note 15, at 1.

163. See GANHRI GO, *supra* note 110, at 1.7; Reif, Human Rights Ombudsman Institutions, *supra* note 156 at 100 (GANHRI often flags lack of diversity amongst human rights ombuds staff).

164. See SCA Report, *supra* note 147, at X.

165. Thomas Hammarberg, “European Human Rights Standards and Ukraine” (2011) Law Ukr Legal J 70 at 73; Human Rights Committee 2013, *supra* note 13, ¶ 8.

166. GANHRI GO, *supra* note 110, at 1.10.

167. See UKRAINIAN PARLIAMENT COMMISSIONER FOR HUMAN RIGHTS, *Regional Offices of the Ukrainian Parliament Commissioner for Human Rights*, <https://perma.cc/GX5E-XCMM> (last visited Feb. 10, 2018).

168. See, e.g., *November to February 2016 Report*, *supra* note 10, at ¶ 173 (involving the UN, COE, OSCE & EU).

of the NHRAP and NHRS in collaboration with other domestic and international actors, and has made this an institutional priority.¹⁶⁹

The PCHR is operating in an internal conflict situation. The Paris Principles do not cover this scenario, although GANHRI General Observation 2.6 on NHRIs operating during a coup d'état or emergency calls on NHRIs to comply with their mandates strictly and operate with extra vigilance and independence.¹⁷⁰ In October 2015, the PCHR, with UNDP support, organized an international conference in Kiev, which was attended by many NHRI representatives and other stakeholders and culminated in the adoption of the Kyiv Declaration on the Role of National Human Rights Institutions in Conflict and Post-Conflict Situations (Kyiv Declaration).¹⁷¹ The Kyiv Declaration recognizes that NHRIs fulfill important roles in conflict and post-conflict situations by working to implement international human rights and humanitarian law.¹⁷² It emphasizes that NHRIs must be neutral and should engage in *inter alia* preventing, monitoring, and addressing violations of human rights and humanitarian law regardless of who is responsible; promoting dialogue between all disputants; engaging and collaborating with state, civil society, and other actors; engaging in human rights promotion including awareness raising, education, and training (including military and law enforcement actors); and human rights reporting to national and international human rights mechanisms.¹⁷³ The Kyiv Declaration reaffirms that NHRIs are human rights defenders who should not be threatened or subjected to reprisals for their work and who should have functional immunity to work in conflict zones.¹⁷⁴

The PCHR, however, cannot enter Crimea since it was annexed to Russia.¹⁷⁵ The dominant view is that Crimea's break from Ukraine and annexation to Russia are invalid under international law.¹⁷⁶ Further, the PCHR

169. See, e.g., INTERNATIONAL OMBUDSMAN INSTITUTE, *Ukraine: Commissioner for Human Rights Approved Plan for Realization of National Strategy in the Field of Human Rights*, (April 6, 2014), <https://perma.cc/EJ3E-X4AP>; INTERNATIONAL OMBUDSMAN INSTITUTE, *Ukraine: Implementation of the National Strategy in the Field of Human Rights Requires Qualified Experts*, (August 1, 2016), <https://perma.cc/K578-T5NN>.

170. See *supra* note 110.

171. See generally *International Conference: The Role of National Human Rights Institutions in Conflict and Post-Conflict Situations, Final Report* (Kyiv, Ukraine, October 21-22, 2015).

172. See generally *id.*

173. See generally *id.*

174. See generally *id.*

175. See generally PCHR, *Annual Report of the Ukrainian Parliament Commissioner for Human Rights Summary: 2014* [hereinafter *2014 Annual Report Summary*]; see also *supra* note 134 at 13–14.

176. See e.g., Thomas D. Grant, "Annexation of Crimea" 109 AM J INTL L 68, 95 (2015); UN General Assembly Res 68/262 (adopted March 27, 2014), UN Doc A/RES/68/262 (April 1, 2014). Ukraine is arguing that Russia has violated its international law obligations due to its actions in Crimea and Eastern Ukraine, see , European Court of Human Rights, *Ukraine: Press country profile* (October 2017) (interstate actions launched by Ukraine against Russia); International Court of Justice, Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russian Federation), Order for Provisional Measures (April 19, 2017), Pending Case.

only has access to the government-controlled territory in the “anti-terrorist operation zone” in the Eastern Ukraine conflict area.¹⁷⁷ Thus, most of its investigative, monitoring and human rights promotion work to support IDPs and others impacted by the conflict is carried out in government-controlled territory.¹⁷⁸ Protection of IDPs is one of the institution’s current priorities.¹⁷⁹

2. *Public Complaints-Handling and Special Proceedings*

In its earlier years of operation, the major types of human rights complaints lodged with the PCHR concerned police torture of detainees, long pre-trial detention periods, violence against journalists and breaches of their right to freedom of expression, children’s rights violations, and breaches of economic and social rights.¹⁸⁰ Since 1998, the PCHR has received many complaints concerning violations of the rights to a fair trial and judicial protection (e.g. long delays and the improper execution of court judgments) and violations of criminal procedure laws.¹⁸¹ This parallels the subject matter of complaints made to the ECtHR.¹⁸² In 2014, the PCHR received over 35,000 petitions, mainly from individuals.¹⁸³ The rights violation profile has not changed markedly since the PCHR started operations. The largest number of rights violations concerned judicial protection, the right to appeal, police misconduct and the treatment of persons deprived of their liberty followed by violations of the rights to life, dignity, liberty and privacy and family life.¹⁸⁴ Social, economic, children’s and equality rights violations were also common.¹⁸⁵ In particular, there is discrimination against women (including gender violence),¹⁸⁶ the LGBTI community,¹⁸⁷ and the

177. See generally Ukrainian Parliament Commission for Human Rights, *Monitoring Places of Detention in Ukraine: State of Implementation of the National Preventive Mechanism 2014 Report* (Kyiv, 2015) [hereinafter 2014 NPM Report], at 17; 2014 *Annual Report Summary*, *supra* note 175, at 20.

178. See parallel justice system in Donetsk & Luhansk regions, including a “provisional ombudsman”, OSCE SMM, *Access to Justice and the Conflict in Ukraine* (December 2015) at 16 [OSCE, *Access to Justice*]; see also a new Crimean human rights commissioner, OSCE ODIHR and HCNM, *Report of the Human Rights Assessment Mission on Crimea (6-18 July, 2015)* (September 17, 2015) at 4–5 [hereinafter *Crimea Report*].

179. *Strategic Plan for 2016-17*, *supra* note 132, at 12.

180. See generally, “Ukrainian Model of Ombudsman”, *supra* note 128; “Ombudsman decries police abuses in Ukraine”, *BBC Monitoring Service* (April 18, 2003); “Ombudswoman Reports on Human Rights”, 5:15 RFE/RL (April 22, 2003).

181. See generally, “Ukrainian Model of Ombudsman”, *supra* note 128; *Strategic Plan for 2016-17*, *supra* note 132, at 8.

182. Also, the ECtHR occasionally relies on domestic human rights ombudsman reports, including those of the PCHR, to provide relevant factual information in cases they are hearing, e.g. *Kaverzin v Ukraine*, *supra* note 106, ¶¶ 55-59 (use of PCHR reports on widespread torture & other ill-treatment of detainees by police).

183. 2014 *Annual Report Summary*, *supra* note 175, at 92–94 (few complaints by legal entities and Rada members).

184. *Id.*

185. *Id.* at 60–80, 93–94; 2016-17 *Strategic Plan*, *supra* note 132, at 8–9.

186. 2014 *Annual Report Summary*, *supra* note 175, at 64–65, 93; Committee Against Torture 2014, *supra* note 11, at ¶ 14 (chronic high levels of domestic violence).

Roma and other minorities in Ukraine.¹⁸⁸ The gender equality mandate authorizes the PCHR to *inter alia* monitor, investigate complaints, launch discrimination claims in the courts, make submissions in judicial proceedings on the court's request, and make law reform proposals.¹⁸⁹

The PCHR launches "special proceedings" for the highest-profile cases and those indicating systemic problems.¹⁹⁰ Many of these proceedings are based on complaints received and a few are PCHR own-motion investigations.¹⁹¹ Recent special proceedings have found state violations of the rights of Euromaidan protestors, systemic violations of the procedural rights of detainees, and multiple violations of the rights of persons with addictions.¹⁹²

3. Constitutional Court Actions

The PCHR has the power to launch abstract constitutional review actions before the Constitutional Court, which, if successful, result in the legislative provision or executive act being found unconstitutional and of no effect.¹⁹³ The PCHR can request that the Constitutional Court find the following unconstitutional, typically based on constitutional rights guarantees: (1) acts of the President, (2) acts of the Cabinet of Ministers, (3) laws and other legal acts of the Rada, and (4) legal acts of the Rada of the Autonomous Republic of Crimea.¹⁹⁴ The PCHR also has the power to apply to the Constitutional Court to request that it provide an official interpretation of the Constitution and laws of Ukraine.¹⁹⁵

187. 2014 *Annual Report Summary*, *supra* note 175, at 63; LGBT Human Rights Nash Mir Center, *A New Beginning: LGBTI situation in Ukraine in 2016* (Kyiv, 2017) at 33–50 (discrimination and violence against LGBTIs); LGBT Human Rights Nash Mir Center, *The Face of Hatred: Crimes and incidents motivated by homophobia and transphobia in Ukraine in 2014–2016* (Kyiv, 2016); *In the Crosscurrents*, *supra* note 58.

188. 2014 *Annual Report Summary*, *supra* note 175, at 61–62; UN Committee on the Elimination of All Forms of Racial Discrimination, Concluding Observations: Ukraine, UN Doc CERD/C/UKR/CO/22-23 (October 4, 2016), ¶¶ 11–14 (racist hate speech and hate crimes against Roma and other minorities), 19–22 (situation of Roma).

189. See *In the Crosscurrents*, *supra* note 58, at 270. See also Law of Ukraine "on Principles of Prevention and Combatting Discrimination in Ukraine" art 10); 2014 *Annual Report Summary*, *supra* note 175, at 93.

190. See 2014 *Annual Report Summary*, *supra* note 175, at 29.

191. See *id.* (of the 118 special proceedings in 2013, only 7 were own-motion).

192. See *id.* at 29–30. See also Ukrainian Parliamentary Commissioner for Human Rights, *Infringement of Human Rights and Freedoms in Ukraine The events of November 2013–February 2014*, Special Report (2014) [hereinafter *Infringement of Human Rights and Freedoms in Ukraine*].

193. UKR. CONST., *supra* note 3, art 150 (PCHR (referred to by former title Authorized Human Rights Representative of the Verkhovna Rada), President, a minimum of 45 Rada deputies, Supreme Court & Crimea Rada can apply for abstract review); PCHR Law, *supra* note 129, at art 13(3).

194. See UKR. CONST., *supra* note 3, art 150; PCHR Law, *supra* note 129, at arts 13(3), 15. See generally, "Ukrainian Model of Ombudsman," *supra* note 128; Stern, *supra* note 4, at 430. Although persons cannot bring actions before the Constitutional Court they can complain to the PCHR which can launch an action, Baller, *supra* note 39, at 91.

195. PCHR Law, *supra* note 129, at arts 13(3), 15.

Constitutional Court cases brought by the first Commissioner included successful actions to recognize trade union rights, the right to contest the conduct of Prosecutor Office officials engaged in pretrial investigations and the unconstitutionality of legislation permitting special detention of persons suspected of vagrancy.¹⁹⁶ Nowadays the PCHR regularly launches Constitutional Court proceedings. In 2016, for example, this included a successful case arguing that mental health legislation that provided for the involuntary confinement of persons based solely on the decision of a psychiatrist without judicial review was unconstitutional.¹⁹⁷ Another action brought by the PCHR in 2016, arguing that legislation requiring advance permission from the public authorities for certain public religious ceremonies and processions was also found to be unconstitutional.¹⁹⁸ Further, the PCHR challenged successfully the constitutionality of criminal procedure code provisions, which result in prolonged and arbitrary detention of accused persons.¹⁹⁹

4. *Actions in Other Courts*

Human rights ombudsman institutions in Central and Eastern Europe, including the PCHR, often have additional powers to launch or intervene in actions before courts of ordinary jurisdiction.²⁰⁰ Article 55 of the Constitution, giving persons the right to ask the PCHR to protect their rights, also gives everyone the right to challenge in court the decisions, acts or omissions of public authorities and officials at all levels of governance.²⁰¹ Derived from this, the PCHR is empowered to appeal to courts of ordinary jurisdiction handling civil matters to protect the rights of persons who are unable to do so themselves due to health and “any other appropriate reasons.”²⁰² Civil and administrative procedure codes also permit the PCHR in specific instances to bring actions in civil and administrative courts on behalf of individuals who cannot defend their own interests where the cases

196. “Ukrainian Model of Ombudsman”, *supra* note 128, at 128.

197. See Ukraine Constitutional Court, Decision No. 2-rp/2016 (June 1, 2016), English Summary: <http://www.ccu.gov.ua/en/docs/289>; “Ukraine: Constitutional Court decides on compulsory hospitalization of incapacitated persons,” *IOI Newsletter* (June 13, 2016).

198. See Ukraine Constitutional Court, Decision No. 6-rp/2016 (September 8, 2016), English Summary: <http://www.ccu.gov.ua/en/docs/289> (Court also relied on ECHR arts 9 and 11).

199. See, e.g., Ukraine Constitutional Court, Decision No. 1-r (November 23, 2017), English Summary: <http://www.ccu.gov.ua/en/docs/2027> (Court relied on *inter alia* ECHR and ECtHR jurisprudence); PCHR, “On the constitutional petition of the Ombudsperson the Constitutional Court of Ukraine rendered a decision that is important for development of legal system”, *Press Release* (November 24, 2017); OHCHR, *Ukraine human rights situation 16 August to 15 November 2016*, *supra* note 10, ¶ 223(g) (art 176(5)).

200. Institutions have different combinations of access to courts, see *European Ombudsman – Institutions*, *supra* note 4, at 53-56.

201. UKR. CONST., *supra* note 3, art 55.

202. PCHR, *Procedural Rights of the Commissioner*, <https://perma.cc/W3GH-Z5FC>; PCHR Law, *supra* note 129, art 13(10); Stern, *supra* note 4, at 431.

raise human rights issues or the national or public interest.²⁰³ The PCHR can also attend all types of court proceedings, including criminal proceedings, to monitor whether the court has complied with procedural rights.²⁰⁴ However, the PCHR does not have the powers to engage in human rights litigation in commercial disputes, prosecute public officials, or act as defense counsel in criminal proceedings.²⁰⁵

5. OPCAT NPM: “Ombudsman Plus” Model

The UN OPCAT is designed to improve the protection of persons deprived of their liberty and improve state compliance with the CAT through *inter alia* the establishment by states parties of one or more independent domestic NPMs structured to give due consideration to the Paris Principles.²⁰⁶ The NPM conducts regular visits to facilities where persons are involuntarily confined, carries out examinations and interviews, makes recommendations to the government to prevent torture and other prohibited treatment of confined persons, proposes law reform and publishes public annual reports.²⁰⁷ The OPCAT Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) also makes visits.²⁰⁸ While the NPMs address predominantly public sector conduct, they have jurisdiction over private facilities where freedom is restricted by state order, instigation, consent or acquiescence.²⁰⁹

Many European countries have designated their national human rights ombudsman institution as their country's OPCAT NPM, either alone or in an “Ombudsman Plus” format.²¹⁰ In 2012, Ukraine adopted the latter model, designating the PCHR, an Expert Council, human rights NGOs and over 200 individual civil monitors as the country's NPM.²¹¹ The

203. CIVIL PROCEDURE CODE OF UKRAINE, art 45; CODE OF ADMINISTRATIVE PROCEDURE OF UKRAINE, art. 60; PCHR, *Procedural Rights of the Commissioner*, *supra* note 202; Stern, *supra* note 4, at 431; *see also supra* text accompanying note 189 (PCHR also litigates discrimination claims).

204. PCHR, *Procedural Rights of the Commissioner*, *supra* note 202; PCHR Law, *supra* note 129, art 13(10).

205. PCHR, *Procedural Rights of the Commissioner*, *supra* note 202.

206. OPCAT, *supra* note 73, Preamble, arts 1, 3–4, 17–21; Paris Principles, *supra* note 15.

207. OPCAT, *supra* note 73 (emphasis added); Association for the Prevention of Torture, Asia Pacific Forum and OHCHR, *Preventing Torture: An Operational Guide for Human Rights Institutions*, Part II (2010).

208. OPCAT, *supra* note 73, arts 2, 4–16.

209. OPCAT, *supra* note 73, art 4.

210. ASSOCIATION FOR THE PREVENTION OF TORTURE (APT) OPCAT DATABASE, <https://perma.cc/KDT5-A7WZ> (in OPCAT states in Europe, ombuds as sole NPM used in Albania, Armenia, Austria, Azerbaijan, Bulgaria, Cyprus, Czech Republic, Estonia, Finland, Georgia, Greece, Hungary, Lithuania, Luxembourg, Macedonia, Montenegro, Norway, Poland, Portugal, Romania, Spain and Sweden, while ombuds plus model used in Croatia, Denmark, Moldova, Serbia, Slovenia and Ukraine).

211. *Ukraine: OPCAT Status*, *supra* note 210; Association for the Prevention of Torture, *Beyond the Traditional: Protecting the Rights of Palliative Patients*, PUTTING PREVENTION INTO PRACTICE. 10 YEARS ON: THE OPTIONAL PROTOCOL TO THE UN CONVENTION AGAINST TORTURE (Geneva: APT, 2016) 14 [hereinafter *Beyond the Traditional*]; PCHR LAW, *supra* note 129, arts. 13(8), 19-1. An Expert Council (composed of human rights NGO representatives, with international organization observers) works with the PCHR on training, planning, conducting visits, drafting reports & public awareness raising activi-

PCHR established a separate NPM department, issues a separate NPM annual report submitted to the Rada, President, Cabinet of Ministers (including the Prime Minister) and the media, and collaborates with NGOs, other NPMs and international organizations.²¹² The PCHR makes unannounced visits to the many places where persons are deprived of their liberty, including police stations, detention facilities, prisons, psychiatric institutions, orphanages and military units.²¹³ Based on these visits and interviews, the PCHR makes proposals to the public authorities and facilities on action that should be taken to prevent torture and other covered ill treatment.²¹⁴ In recent years, the PCHR has worked with Rada committees to amend laws or draft new legislation to improve the conditions for persons held involuntarily.²¹⁵ In 2015, the NPM added hospices and palliative hospital wards to its inspection schedule, making recommendations to combat the poor conditions and misuse of palliative care.²¹⁶

The NPM work is a massive and challenging undertaking given that there are thousands of places of detention, and the detentions during the Euromaidan protests and internal conflict added to the workload.²¹⁷ As the NPM, the PCHR gained access to the Eastern Ukraine conflict zone, monitored the rights of vulnerable people there, and advocated successfully for the evacuation of persons deprived of their liberty from the conflict zone.²¹⁸ The NPM indirectly monitors Crimea since it can no longer access the area.²¹⁹ By early 2016, the NPM had seen a “gradual improvement of material conditions in places of deprivation of liberty, however the problem of observance of human rights continues to be very severe for penitentiary institutions, institutions of social security and psychiatric institutions.”²²⁰ In May 2016, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions reported that the NPM has relative freedom to conduct unannounced visits to detention and prison facilities, “and that this access provides an effective system of protection of the rights of detainees.”²²¹ However, the Special Rapporteur cautioned that while the NPM is appar-

ties, Ukrainian Parliament Commissioner for Human Rights, *Monitoring of Custodial Settings in Ukraine: Status of Implementation of the National Preventive Mechanism 2013 Report* (Kyiv, 2014) at 11 [hereinafter 2013 NPM Report].

212. PCHR Law, *supra* note 129, art 19-1(5); 2013 NPM Report, *supra* note 211, at 8–9; *infra* text accompanying notes 269–270, 273–275, 288–291 (NPM collaboration activities).

213. PCHR Law, *supra* note 129, arts 13, (8), 19-1; *Beyond the Traditional*, *supra* note 211, at 14.

214. PCHR Law, *supra* note 129, arts 19–1(3).

215. *Beyond the Traditional*, *supra* note 211, at 16.

216. *Id.* at 14–16.

217. 2014 NPM Report, *supra* note 177, at 7–16; UN Subcommittee on Prevention of Torture, 2016 Visit to Ukraine: Observations and Recommendations Addressed to the State Party, UN Doc CAT/OP/UKR/3 (May 18, 2017) ¶ 16 [hereinafter SPT 2017 Ukraine Report]. On the Euromaidan protests see *supra* text accompanying note 9.

218. 2014 NPM Report, *supra* note 177, at 5–6; *Beyond the Traditional*, *supra* note 211, at 16.

219. *Crimea Report*, *supra* note 178, at 77. On Crimea see *supra* text accompanying notes 175–176.

220. PCHR 2016–2017 Strategic Plan, *supra* note 132, at 9.

221. UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *supra* note 10, ¶ 47 (but detainees still at high risk of TB & HIV infection).

ently successful in its preventive capacity, it “cannot fully act as an accountability mechanism, since it can only make recommendations to the Office of the Prosecutor, which is not compelled to take up cases.”²²² This reflects a misunderstanding of the role of NPMs, which are designed to be purely preventive and recommendatory in nature,²²³ and of the subsequent OPCAT obligations of the authorities, which are to examine the NPM’s recommendations and engage in meaningful dialogue with it on implementation.²²⁴

The 2017 SPT report on Ukraine approved of the NPM’s often unannounced visits to numerous places of detention and its strong relationships with civil society.²²⁵ However, it criticized the government’s failure to provide the NPM with sufficient resources, to allow the NPM access to state security service facilities, and to establish a procedure to consider implementation of NPM recommendations.²²⁶ The SPT also noted that the NPM was overly reactive and not perceived as separate from the PCHR, and recommended that Ukraine assist the NPM to increase its public profile through awareness-raising campaigns.²²⁷

6. Children’s Rights Focus

There are serious children’s rights deficits in Ukraine. Although the nation is a party to the Convention on the Rights of the Child (CRC) and its substantive Protocols, and there are many domestic laws relating to children, these legal obligations are ineffective.²²⁸ There is violence against minors both in the home and in public sector facilities.²²⁹ Ukraine has a large number of orphans and abandoned children who are placed in state institutions; conditions in these facilities are appalling, including abuse and human trafficking.²³⁰ The rights of disabled children are not respected, including their institutionalization and targeting for organ trafficking.²³¹

222. *Id.*, ¶ 52.

223. OPCAT, *supra* note 73, arts. 1, 3, 17, 19(b)–(c); *supra* text accompanying note 207.

224. *Id.*, art. 22.

225. SPT 2017 Ukraine Report, *supra* note 217, ¶ 17.

226. *Id.* ¶ 16–20.

227. *Id.* ¶ 18–21.

228. UN Committee on the Rights of the Child (CtRC), *Concluding Observations: Ukraine (CRC)*, UN Doc CRC/UKR/CO/3–4 (April 21, 2011), ¶¶ 8–9 [hereinafter CtRC 2011]; Irina Zhylinkova, *Children’s Rights in Post-Soviet Ukraine*, 17 INT’L J CHILDREN’S RIGHTS 647, 647–649, 660 (2009); Roksolana Stasiv, *The Results of the Last Economic Crisis for the Family Life in Ukraine*, JOGI TANULMANYOK 391, 392 (2012).

229. CtRC 2011, *supra* note 228, ¶¶ 41–42.

230. CtRC 2011, *supra* note 228, ¶¶ 46–47, 50–51, 52–53; Zhylinkova, *supra* note 228, at 653, 660; COE Commissioner June 29, 2015 Report, *supra* note 64, ¶ 37; Disability Rights International, *No Way Home: The Exploitation and Abuse of Children in Ukraine’s Orphanages* (2015) [hereinafter *No Way Home*]; Stasiv, *supra* note 228, at 395–396.

231. CtRC 2011, *supra* note 228, ¶¶ 46–47, 50–51, 52–53; UN Committee on the Rights of Persons with Disabilities, *Concluding Observations: Ukraine*, UN Doc CRPD/C/UKR/CO/1 (October 2, 2015) ¶¶ 13–14, 20–21, 32–33 [hereinafter CtRPD 2015]; Zhylinkova, *supra* note 228, at 654–655; *No Way Home*, *supra* note 230.

Conflict in East Ukraine has negatively affected education and many IDPs are children.²³²

In 2007 and 2011, the CRC Committee on the Rights of the Child (CtRC) recommended that Ukraine establish a separate independent mechanism for children's rights in full conformity with the Paris Principles, specifically recommending the creation of an ombudsman for children.²³³ Yanukovich established the Commissioner of the President of Ukraine for Children's Rights (CPUCR) in 2011 by executive decree.²³⁴ The CPUCR is mandated to facilitate the domestic realization of children's rights based on Ukraine's international children's rights obligations.²³⁵ However, as an executive appointee, the CPUCR has little or no independence since the President can easily dismiss the Commissioner for criticizing the conduct of the authorities.²³⁶ Accordingly, the CPUCR does not meet the core requirement of independence set by the CtRC for the national institutions needed to implement the CRC.²³⁷ Also, it is not a NHRI and can never fully comply with the Paris Principles.

The PCHR had made children's rights one of its priority areas before the creation of the CPUCR. In response to the large number of complaints from or on behalf of children in the late 2000s, the PCHR heightened its focus on children by establishing a Department for Child Protection, Non-discrimination and Gender Equality and, in 2010, appointing a Representative for Child Protection, Non-Discrimination and Gender Equality.²³⁸ The CtRC has praised PCHR special reporting on children's rights, its prioritization of combatting violence against and trafficking of children, and its ability to receive and investigate complaints from children.²³⁹

The PCHR's NPM function intersects with children's rights. Disability Rights International (DRI) recognizes that the PCHR has called on the government and international actors to protect institutionalized children threatened by the Eastern Ukraine conflict, but they argue that the NPM mandate is inadequate to combat the maltreatment of children in state-run

232. Human Rights Watch, *Studying Under Fire: Attacks on Schools, Military Use of Schools during the Armed Conflict in Eastern Ukraine* (February 2016).

233. CtRC 2011, *supra* note 228, ¶ 16; UN CtRC, *Concluding Observations: Ukraine*, (CRC Optional Protocol #2), UN Doc CRC/C/OPSC/UKR/CO/1 ¶ 28 (June 28, 2007).

234. President of Ukraine Decree, Commissioner of President of Ukraine on Children's Rights, No 811/2011 (August 11, 2011, as am).

235. *Id.*

236. See, e.g., Stasiv, *supra* note 228, at 393.

237. CtRC, *General Comment No 2: The Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child*, UN Doc CRC/GC/2002/2 (October 4, 2002); COE Commissioner June 29, 2015 Report, *supra* note 64, ¶ 4 (a children's rights commissioner has also been established in the rebel-held Donetsk region).

238. CtRC 2011, *supra* note 228, ¶ 15; *Ukrainian Model of Ombudsman*, *supra* note 128. See also rights of child section and children's home page on PCHR web site.

239. CtRC 2011, *supra* note 228, ¶ 15; PCHR, *State of Observance and Protection of the Rights of the Child in Ukraine* (UNICEF, December 2010), <https://perma.cc/842A-Z6T6>.

institutions.²⁴⁰ DRI argues that the NPM pays insufficient attention to orphanages and its torture prevention mandate leaves the NPM unable to combat the poor treatment of children with disabilities, and “NPM recommendations focus on improving physical conditions and services within institutions — rather than advocating for their closure and transition to a community-care based model.”²⁴¹

The PCHR, not the CPUCR, is a member of the European Network of Ombudspersons for Children (ENOC).²⁴² The views of the CtRC have also changed, in line with the approach of GANHRI, to prefer one NHRI responsible for all human rights, including children's rights, rather than multiple thematic institutions.²⁴³ It is now rare for the CtRC to recommend that a country establish a children's rights ombudsman and, usually, the CtRC finds that a NHRI with a strong focus on children's rights is acceptable.²⁴⁴ Accordingly, the PCHR as an A-accredited NHRI with a children's rights focus is close to meeting the basic requirements for an independent children's rights institution, and could do so if it designated a Representative and a department to focus solely on children's rights.²⁴⁵

F. Human Rights Promotion

The PCHR has human rights promotion responsibilities to: (1) assist government in bringing Ukrainian human rights legislation into conformity with international and constitutional obligations through law reform proposals, (2) raise public awareness of human rights and (3) develop and improve international cooperation in human rights protection.²⁴⁶ There are no explicit legislative provisions allowing the PCHR to engage in human rights research, education, or training of public officials or advocate that Ukraine adhere to international human rights instruments.²⁴⁷ However, in 2012, the PCHR set up an Advisory Council of individuals with human rights protection experience to perform consultations, conduct research, and

240. *No Way Home*, *supra* note 230, at 10, 36–37.

241. *Id.* But see, e.g., ZIK Information Agency, *Lutkovska Reacted to the Orphans' Rights Violation at the Subcarpathian Centre* (May 19, 2016), <https://perma.cc/3AAH-BULW> (PCHR has investigated poor conditions in several orphanages).

242. ENOC, <https://perma.cc/E2MP-X89X> (PCHR is an associate member, i.e. an institution actively trying to meet the full membership criteria). Independent NHRIs with a sufficient focus on children can become full members.

243. Linda C. Reif, “Independent Children's Rights Institutions” in Martin D. Ruck, Michele Peterson-Badali and Michael Freeman eds., *Handbook of Children's Rights: Global and Multidisciplinary Perspectives* (Routledge, 2017) 398 at 403–404.

244. Reif, *id.*

245. *Id.* at 399; Linda C. Reif, *The Future of Thematic Children's Rights Institutions in a National Human Rights Institution World: The Paris Principles and the UN Committee on the Rights of the Child*, in 37 *HOUSTON J INT'L L* 433, 439–442 (2015) (need independence and a sufficient legislative or operational focus on children's rights in the form of appointment of a commissioner or deputy ombudsperson for children's rights and/or the establishment of an internal department or unit for children's rights).

246. PCHR Law, *supra* note 129, arts. 3, 13(3).

247. *Id.*

issue proposals for improvement of human rights protection.²⁴⁸ Overall, promotional activities are linked with all of the human rights within PCHR jurisdiction. The PCHR has interpreted its human rights promotion responsibilities liberally, and GANHRI recognizes that in practice “it carries out a wide variety of activities to promote human rights.”²⁴⁹ Nonetheless, GANHRI has encouraged the PCHR to promote a full spectrum of international and domestic human rights, including economic, social and cultural rights, and to call on the government to amend the PCHR legislation to expand formally its promotional mandate.²⁵⁰

With respect to raising awareness of human rights, the PCHR notes that “[o]nly by changing the legal conscience and culture of society in general and its individual members in particular will it be possible to assert a new system of values based on the principles of democracy, rule of law and respect to [sic] human rights.”²⁵¹ PCHR awareness raising activities include publishing reports, promoting human rights education through the media and informational publications, educating children and youth about their CRC rights, and advising complainants about legal matters.²⁵² Pursuant to its law reform mandate, the PCHR states that over the years it has persuaded the government to ratify a number of treaties that directly or indirectly protect human rights.²⁵³ In 2016, for example, the PCHR proposed reform of the political party law as it applied to Crimea and amendment of the draft education law to protect the language rights of ethnic minorities.²⁵⁴

The PCHR has engaged in various activities to promote anti-discrimination. In general, these activities have targeted education, including providing non-discrimination training for judges, lawyers and members of the police, as well as reviewing legislation and making reform proposals.²⁵⁵ Actions to promote LGBTI rights include supporting the Equality March and

248. *Id.*, art. 10(4) (authorized in the 1997 statute); PCHR, *Advisory Council*, <https://perma.cc/C7UW-DYCS>.

249. October 2014 ICC SCA Report, *supra* note 147, at 35.

250. *Id.*, based on Paris Principles, *supra* note 15, “Competence and Responsibilities”, §§ 1–3, & GANHRI GO 1.2, *supra* note 110.

251. *Ukrainian Model of Ombudsman*, *supra* note 128.

252. See, e.g., *Ukrainian Model of Ombudsman*, *id.*; PCHR, “Ombudsman’s Office is an active participant of legal education process among children and youth in Ukraine,” *Press Release* (December 22, 2016).

253. See *Ukrainian Model of Ombudsman*, *id.* (including the UN Refugee Convention, Convention Against Transnational Organized Crime and its Anti-Trafficking Protocol and Convention on the Rights of Persons with Disabilities).

254. International Ombudsman Institute, “Ukraine: Issue of registration of political parties eliminated due to initiative of Commissioner for Human Rights” (Jan. 13, 2016); Ukrainian Parliament Commissioner for Human Rights, “Ms. Valeriya Lutkovska applied to the Verkhovna Rada of Ukraine concerning adoption of amendments to the draft law “On Education” (Nov. 28, 2016) (based on Constitutional and European human rights obligations). See also *supra* note 189 (discussing the responsibility to make law reform proposals under the gender equality mandate).

255. *In the Crosscurrents*, *supra* note 58, at 327–328.

other LGBTI events and advocating for legislative amendments to improve their rights.²⁵⁶

G. Interaction and Collaboration with International and Domestic Human Rights Actors

The Paris Principles state that NHRIs shall cooperate with the UN, regional organizations and other NHRIs, maintain consultations with other domestic human rights institutions and develop relationships with human rights and other relevant NGOs.²⁵⁷ NHRIs are bridges between the international human rights law system and the domestic systems in which they operate.

H. Interaction with the International Human Rights System

In addition to trying to persuade the government to implement its international human rights obligations as articulated by UN human rights treaty committees and regional human rights bodies, NHRIs also should provide international human rights bodies with independent information on their state's failure to comply with its international obligations.²⁵⁸

Pursuant to the Paris Principles as interpreted by GANHRI, NHRIs should not participate in the preparation of state reports. Rather, they should submit independent shadow reports to the UN Human Rights Council's Universal Periodic Review (UPR), treaty body committees and special procedure mechanisms.²⁵⁹ NHRIs should also monitor and promote the implementation of the recommendations made by these international human rights bodies.²⁶⁰ The PCHR Law states that the Commissioner "participates in the preparation of" the human rights reports that Ukraine submits to international human rights treaty bodies.²⁶¹ This legislative provision should be repealed to comply with GANHRI soft law and replaced with a general provision enabling the PCHR to interact with the international human rights system.

During Lutkovska's tenure, the PCHR has interacted with the UN human rights system. The PCHR made a submission in the second cycle of the UPR of Ukraine in 2012 in which it detailed the major human rights violations occurring in Ukraine.²⁶² After Lutkovska was appointed, the

256. *A New Beginning*, *supra* note 187, at 12.

257. Paris Principles, *supra* note 15, "Competence and responsibilities", § 3(e), "Methods of operation" §§ (f)-(g).

258. GANHRI GO 1.4, *supra* note 110.

259. Paris Principles, *supra* note 15, "Competence and responsibilities", § 3(d); GANHRI GO 1.4, *supra* note 110.

260. GANHRI GO 1.4, *supra* note 110.

261. PCHR Law, *supra* note 129, art. 19.

262. UN Human Rights Council, "Summary of Stakeholders' Information", UN Doc A/HRC/WG.6/14/UKR/3 (July 20, 2012) at 2, 11. PCHR also made a submission during the first cycle, but was criticized in a parallel submission by the Ukrainian Helsinki Human Rights Union for being

PCHR also began to submit shadow (or alternative) reports to UN treaty committees when Ukraine's periodic state reports were being considered.²⁶³ For example, most recently the PCHR submitted its shadow report to the CEDAW Committee. The shadow report described difficulties in implementing CEDAW rights in Ukraine and PHCR's recommendations on how to improve the state's compliance with its CEDAW obligations.²⁶⁴

I. Collaboration with International and Domestic Human Rights Actors

The PCHR has also actively collaborated with international and domestic actors to improve human rights in Ukraine, support other NHRIs, and obtain support from international actors and NHRIs to strengthen its position in a difficult domestic environment. The PCHR sees its "close cooperation" with these actors and the "trust from the human rights defenders' community" as two of the strengths of the institution.²⁶⁵

1. Collaboration with Ukraine Civil Society Actors

The PCHR collaborates with human rights NGOs and other civil society actors in a variety of ways. Civil society actors were active in proposing nominees for the PCHR's Advisory Council and human rights actors count among its members.²⁶⁶ In 2014, most of the PCHR's special proceedings for high-profile and systemic investigations were carried out with the "active involvement of NGOs", taking advantage of their subject matter expertise and counseling experience.²⁶⁷ The PCHR also supports human rights NGOs, for example, by publicizing the NGO shadow report to Ukraine's eighth periodic report to the CEDAW Committee.²⁶⁸ As discussed above, Ukrainian civil society actors are included in the OPCAT NPM with the PCHR, undertaking 300 monitoring visits in 2016.²⁶⁹ The International Renaissance Foundation has collaborated with the PCHR on the NPM mechanism, assisting with the publication of the second annual

ineffectual and politicized, UN Human Rights Council, "Summary of Stakeholders' Information", UN Doc A/HRC/WG.6/2/UKR/3 (Apr. 3, 2008) at 2 [hereinafter UPR 1st Cycle].

263. Shadow reports to UN treaty committees for: CEDAW (2017), CRPD (2015), ICESCR (2014), ICCPR (2013), OHCHR, "Information From NHRIs: Ukraine": <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en>.

264. International Ombudsman Institute, "Ukraine: Parliament Commissioner for Human Rights presents alternative report on the rights of women in Ukraine", (Mar. 3, 2017); CEDAW Committee, "Concluding Observations: Ukraine", UN Doc CEDAW/C/UKR/CO/8 (Mar. 3, 2017).

265. PCHR 2016-2017 Strategic Plan, *supra* note 132, at 10.

266. Advisory Council, *supra* note 248, at 28.

267. 2014 Annual Report Summary, *supra* note 175, at 20.

268. PCHR, "The presentation of Alternative report of nongovernmental organizations on fulfillment by Ukraine of the Convention on the Elimination of All Forms of Discrimination against Women was held," *Press Release* (December 20, 2016) (on file with the PCHR's website).

269. PCHR, "Ms. Valeriya Lutkovska: "You, representatives of civil society, are the best partners for us," *Press Release* (December 10, 2016).

NPM report and training and supporting the civil society monitors who work with the PCHR to carry out the visits to places of confinement.²⁷⁰

2. Collaboration with Other NHRIs and Classic Ombudsman Institutions

NHRIs network with each other through GANHRI and regional NHRI networks. In addition to its participation in GANHRI, the PCHR is also a member of the European Network of NHRIs (ENNHRI) and the International Ombudsman Institute.²⁷¹ Lithuania's human rights ombudsman institution is a partner in an EU-funded capacity building project to strengthen the PCHR.²⁷² On a regional basis, the PCHR collaborates with Georgia's NHRI given their common human rights concerns and similar mandates, in particular the OPCAT NPM work, combatting discrimination, and human rights protection in occupied territories.²⁷³

The PCHR tries to cooperate with Russia's NHRI (High Commissioner for Human Rights) to assist Ukrainians held in Crimea and Russia through meetings and information sharing, resulting in the transfer of a small number of Ukrainian prisoners from Crimea.²⁷⁴ GANHRI has supported this initiative, asking the PCHR "to continue and expand this cooperation as the need arises."²⁷⁵

3. Collaboration with the UN and European Organizations

There has been strong collaboration between the PCHR and the COE, Organization for Security and Cooperation in Europe (OSCE), and UN bodies.²⁷⁶ This is supported by monitoring and human rights assessment mis-

270. International Renaissance Foundation, *Annual Report–2015*, at 48; International Renaissance Foundation, *Annual Report–2014*, at 19; (one of the International Renaissance Foundation's aims is to build an open, pluralist, participatory and democratic society in Ukraine) [<https://perma.cc/WTT2-VQC3>].

271. ENNHRI Member List, <https://perma.cc/6MWK-YMZ4>; International Ombudsman Institute Member List, <https://perma.cc/ZHQ4-FSVY> (global organization of classic and human rights ombudsmen institutions).

272. "Lithuania/EU Twinning Project to strengthen the capacity of the Ukrainian Parliament Commissioner for Human Rights", *IOI News* (February 21, 2017).

273. UNDP, "National Human Rights Institutions of Ukraine and Georgia: Sharing Experiences" (November 21, 2014).

274. See, e.g., Press Release, PCHR, *12 Ukrainian Prisoners were Transferred from the Temporary (sic) Occupied Territory of Crimea to the Mainland of Ukr.* (March 17, 2017) (on file with PCHR's website); *Lutkouska and Moskalkova discuss the transfer of Ukrainian inmates being held in penitentiaries of Russia and the Crimea*, Gordonua, <https://perma.cc/Q4RQ-73JS> (March 6, 2017); *Lutkouska — is for meeting with Russia's ombudsman*, ZIK Information Agency (June 15, 2016), <https://perma.cc/K6P9-FEBZ>.

275. October 2014 ICC SCA Report, *supra* note 147 at 35. See also *Crimea Report*, *supra* note 178 at 9.

276. OSCE, <https://perma.cc/LVU7-55NE> (Ukraine is a participating state); OSCE Office for Democratic Institutions and Human Rights, <https://perma.cc/NP84-VBRX>; OSCE High Commissioner on National Minorities, [<https://perma.cc/U6XB-62SX>]; Memorandum of Understanding Between the Government of Ukraine and the Organization for Security and Cooperation in Europe (OSCE) (July 13, 1999) arts. 1–2, 5 (framework for joint projects and establishment of OSCE Project Coordinator in Kyiv focused on human rights, good governance and rule of law); OSCE Special Monitoring Mission to Ukraine, <https://perma.cc/5A93-8E5M>; OSCE Office for Democratic Institutions and

sions in Ukraine, and usually consists of technical assistance, information, and training. The COE, especially through the COE Commissioner for Human Rights, works to enhance the capacity of the PCHR and, as discussed below, publicly supported the independence of the Commissioner when she was threatened with removal.²⁷⁷ The COE and EU are working to strengthen the PCHR's capacity with respect to its work to prevent discrimination and protect data.²⁷⁸ A concluded COE-PCHR project encouraged Ukraine to ratify the COE Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention).²⁷⁹

The UN has a human rights monitoring mission in Ukraine.²⁸⁰ The UNDP provides support for sustainable human development in Ukraine, including democratization and human rights initiatives.²⁸¹ The UNDP considers itself to be “a long standing and sustainable partner” of the PCHR.²⁸² One recent initiative includes the collaboration leading to the Kyiv Declaration.²⁸³ Collaboration between the PCHR, UNDP, GANHRI and other international and domestic actors on the role of NHRIs in conflict and post-conflict settings has continued after the adoption of the Kyiv Declaration.²⁸⁴ Also, in early 2016, the UNDP and PCHR launched a joint project on strengthening the capacity of the PCHR, focusing on the challenges of decentralization, human rights awareness-raising, and gender equality.²⁸⁵ This capacity strengthening project includes assistance in monitoring and combatting violations of the rights of IDPs and supporting

Human Rights, *ODIHR in Ukraine Factsheet*; OSCE Office for Democratic Institutions and Human Rights and High Commissioner on National Minorities, Human Rights Assessment Mission in Ukraine, *Human Rights and Minority Rights Situation* (The Hague/Warsaw, May 12, 2014); OSCE et al, *Crimea Report*, *supra* note 178; OSCE, *Access to Justice*, *supra* note 178; On COE, *see supra* text accompanying notes 76–77 and *infra* text accompanying notes 277–279, 288. On UN bodies *see infra* text accompanying notes 280–288, 291.

277. COE Commissioner for Human Rights, <https://perma.cc/V32N-FB5Q>; COE, Action Plan for Ukraine 2015-2017 GR-DEM(2015) (January 13, 2015) at §§ 5, 5.3. See also COE, Co-operation with Ukraine — Immediate Measures Package (April-December 2014) at 16, 18, <https://perma.cc/7Z54-KHM7>; COE Commissioner for Human Rights, Country Report: Ukraine, <https://perma.cc/T4PD-CWEE> (monitoring of overall human rights situation).

278. COE, *Action Plan for Ukraine 2015-2017*, *supra* note 277, at 32, § 5.3.

279. Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), CETS No 210 (entered into force August 1, 2014, Ukraine signed on November 7, 2011); COE, <https://perma.cc/RJ8M-AW9L>. Ukraine had not ratified by December 2017.

280. UN Human Rights Monitoring Mission in Ukraine, [<https://perma.cc/52AQ-LHQR>].

281. GANHRI, *Global conference discusses roles of NHRIs in protecting the rights of conflict-affected populations and vulnerable groups* (November 24, 2016) [“Global conference”]; UNDP in Ukraine, <https://perma.cc/52AQ-LHQR>; *infra* text accompanying notes 282-286, 288 (on UNDP collaboration with PCHR).

282. *National Human Rights Institutions adopt joint Declaration in Kyiv*, News (October 22, 2015), [<https://perma.cc/JJ5L-U6M2>].

283. See *supra* text accompanying notes 171–174 on the Kyiv Declaration adopted by NHRIs and other stakeholders.

284. GANHRI, “Global conference,” *supra* note 281.

285. Democratic Governance, Human Rights and Civil Society Development Praxis Portal, “From Good to Great: Strengthening Capacities of the Ombudsperson of Ukraine” (February 19, 2016).

their reintegration.²⁸⁶ The COE Commissioner for Human Rights and Office of the UN High Commissioner for Human Rights (OHCHR) have supported the PCHR in the development and implementation of Ukraine's NHRS and NHRAP through stakeholder meetings and advice.²⁸⁷

Since 2014, international organizations have placed high priority on the PCHR/NPM torture prevention and monitoring work. The NPM's monitoring visits have been strengthened through the assistance of the UNDP, OSCE and COE.²⁸⁸ The collaboration between the OSCE and the PCHR focuses on monitoring and preventing torture and ill-treatment in prisons and detention centers.²⁸⁹ The COE has trained PCHR staff on human rights prevention, monitoring, and reporting, and organized an international conference on effective investigations into the Euromaidan violence.²⁹⁰ The OHCHR has also collaborated with the NPM, including training on documentation and investigations.²⁹¹

VI. PCHR ACHIEVEMENTS AND DEFICIENCIES IN STRENGTHENING HUMAN RIGHTS PROTECTION AND PROMOTION IN UKRAINE

A. *Achievements and Deficiencies in Paris Principles Compliance*

The PCHR complies fully with the Paris Principles according to GANHRI and the UN.²⁹² In 2014, GANHRI “commend[ed] the PCHR for continuing to be an effective national human rights institution, carrying out a broad range of activities to promote and protect human rights, despite the volatile political situation in which it currently operates.”²⁹³ In late 2016, the OHCHR's Head of Mission to Ukraine stated “Ukraine is fortunate to have a strong, independent and fully functioning national human rights institution, which under the leadership of Commissioner Valeriya Lutkoska [sic] plays a fundamental role in addressing many of today's human rights challenges in the country.”²⁹⁴

286. UNDP, Magdy Martínez-Solimán: Statement at the Fourth Annual Seminar for National Human Rights Institutions (NHRIs): NHRI's Role in Conflict and Fragile Contexts (June 17, 2016).

287. COE, *Co-operation with Ukraine — Immediate Measures Package*, *supra* note 277; COE Commissioner for Human Rights, *Report by Nils Mui_nieks Following His Visit to Ukraine From 21 to 25 March 2016*, ComMDH 27 (July 11, 2016), ¶¶ 72, 85; COE Commissioner June 29, 2015 Report, *supra* note 64, ¶ 3, Appendix; COE Commissioner, *Annual Activity Report 2013* at 24.

288. 2014 NPM Report, *supra* note 177, at 5.

289. Activities of the OSCE Project Coordinator in Ukraine: <https://perma.cc/HC97-RP4H>.

290. COE, *Co-operation with Ukraine — Immediate Measures Package*, *supra* note 277; COE, *Action Plan for Ukraine 2015-2017*, *supra* note 277, at §§ 5.1, 5.3.

291. See, e.g. OHCHR, *Conflict-Related Sexual Violence*, *supra* note 10 at 2, ¶ 21, 37 (implementing the Istanbul Protocol: Manual on the Effective Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) <https://perma.cc/9NCK-99QL>; OHCHR, *Ukraine human rights situation 16 August to 15 November 2016*, *supra* note 10, ¶ 200.

292. Based on its GANHRI A-status accreditation, *supra* text accompanying notes 146-147.

293. October 2014 ICC SCA Report, *supra* note 147 at 35.

294. “Global conference”, *supra* note 281.

The Paris Principles address mainly the legal architecture of a NHRI and adequate funding. As described above, the PCHR has a solid legal framework. However, there are some deficiencies in the NHRI's legal foundation. In particular, it needs: a more explicit and expansive human rights promotion mandate; a more open, transparent, and participatory process for selecting the Commissioner; and less bureaucratic influence over the PCHR staff. In late 2015, the Rada adopted a law "On the Civil Service" that *inter alia* empowers a special commission to nominate and appoint the PCHR's Chief of Staff and then permits the latter to employ additional PCHR staff members.²⁹⁵ This law contravenes the Paris Principles and General Observation 2.4 because it limits the PCHR's independence.²⁹⁶ The OHCHR has called on the Rada to amend the legislation to eliminate this interference; the legislature is considering amendments.²⁹⁷ Further, the UN Special Rapporteur and SPT have stated that the NPM must be given oversight of and access to all places where persons are involuntarily confined.²⁹⁸

As described above, the PCHR under the current Commissioner has instituted operating practices that have improved the positive impact of the NHRI, including setting priorities to achieve results given resource constraints, improving transparency and collaborating with civil society actors. However, it needs to implement additional operating practices to further improve human rights protection and promotion concerning vulnerable populations who are less likely to appeal to the NHRI. For example, the PCHR needs to increase the number of own-motion investigations it conducts, placing a higher priority on the human rights of children, the LGBTI community, persons with disabilities and other vulnerable groups. Given the importance of children's rights, if legislative prioritization of this population is not feasible, the PCHR should increase its focus on children by creating a department or unit devoted entirely to children's rights headed by a Representative. More generally, the PCHR should make more explicit references to and use of Ukraine's UN and European treaty obligations in more of its work. This is easily done given the monist approach to treaties, and will also assist in the domestic implementation of Ukraine's international rights commitments.

As discussed above, the PCHR is not provided with the financial resources necessary to fulfill its multiple mandates. It is not unique in this

295. Ukraine, Law, *On the Civil Service*, No. 2490 (December 10, 2015); OHCHR, *Ukraine human rights situation 16 November 2015 to 15 February 2016*, *supra* note 10, at 10.

296. See, e.g., Ukraine, Law, *On the Civil Service*, No. 2490 (December 10, 2015); GANHRI Accreditation Chart, *supra* note 15, at 3 ("Composition and guarantees of independence and pluralism"); See also GANHRI GO 2.4, *supra* note 110, at 13 (stating staff should be selected based on an open, transparent and merit based selection process).

297. OHCHR, *Ukraine human rights situation 16 November 2015 to 15 February 2016*, *Supra* note 10, at 2, ¶ 214(m); OHCHR, *Ukraine human rights situation 16 May to 15 August 2016*, *supra* note 10, ¶ 186, 208(g).

298. UN Human Rights Council, *supra* note 10, at 2; SPT 2017 Ukraine Report, *supra* note 217, at 25.

respect as many NHRIs are underfunded.²⁹⁹ Resource constraints have resulted in departure of professional staff because their salaries are non-competitive and there is inadequate staff training.³⁰⁰ The UN Human Rights Committee, Committee against Torture, SPT and GANHRI have recommended that the PCHR ask the government for sufficient financial and other resources to enable it to fulfill all its mandates.³⁰¹

At the same time, additional mandates potentially could be given to the PCHR. The UN Committee on the Rights of Persons with Disabilities (CtRPD) recommended that Ukraine establish an independent monitoring framework under Article 33(2) of the UN CtRPD in compliance with the Paris Principles.³⁰² In late 2014, a Commissioner for the Rights of People with Disabilities was created by presidential decree but it is not independent as required by the CtRPD's guidelines.³⁰³ Designation of the A-status PCHR as the framework would satisfy these guidelines. The OSCE High Commissioner on National Minorities has also suggested that another PCHR Representative could be appointed for minority rights.³⁰⁴ The PCHR would need additional resources if one or more of these mandates are added to its oversight responsibilities.

Compliance with the Paris Principles does not always mean that the NHRI is effective in practice. The list of NHRIs with GANHRI A-status accreditation includes those in Russia, Egypt, Zimbabwe and Haiti.³⁰⁵ GANHRI's accreditation process has been criticized for its failure to look beyond the Paris Principles and scrutinize the actual effectiveness of NHRIs.³⁰⁶

Additional extra-legal factors that influence NHRI effectiveness even if it has a strong legal foundation and adequate funding include the character of the NHRI leadership, the relative receptivity or resistance of the executive and legislative branches of government to the NHRI's work, the overall democratic environment, including armed conflict situations and the

299. UN Office of the High Commissioner for Human Rights, *Survey on National Human Rights Institutions: Report on the Findings and Recommendations of a Questionnaire Addressed to NHRIs Worldwide*, at 17, 53 (July 2009).

300. PCHR, *supra* note 132, at 10–11; But see, *supra* text accompanying notes 165–167, at 19 (showing regional representation is improving).

301. See, e.g., Human Rights Committee 2013, *supra* note 13, ¶¶ 7–8; Committee against Torture 2014, *supra* note 11, ¶ 16; SPT 2017 Ukraine Report, *supra* note 217, ¶ 19; October 2014 ICC SCA Report, *supra* note 146, at 36–37 (based on Paris Principle B.2 and ICC GO 1.10). On the longer term under-resourcing see Hammarberg, *supra* note 165, at 73.

302. See CtRPD 2015, *supra* note 231, ¶ 61.

303. See CtRPD, *Rules of Procedure*, ¶¶ 8–17, UN Doc CRPD/C/1/Rev.1, Annex (October 10, 2016); see also *In the Crosscurrents*, *supra* note 58, at 329–330.

304. See OSCE HCNM, *Address by Astrid Thors to the Roundtable "On Strengthening the Institutional Framework Related to Inter-Ethnic Relations in Ukraine in the Context of Decentralization"* (Kyiv, March 10, 2016).

305. GANHRI Accreditation Chart, *supra* note 5.

306. See, e.g., Peter Rosenblum, *Tainted Origins and Uncertain Outcomes: Evaluating NHRIs*, in 52 HUMAN RIGHTS, STATE COMPLIANCE, AND SOCIAL CHANGE: ASSESSING NATIONAL HUMAN RIGHTS INSTITUTIONS 297 (Ryan Goodman & Thomas Pagram eds., 2012).

human rights culture in the country, and the popular legitimacy of the NHRI.

B. PCHR Achievements and Deficiencies: Extra-legal Factors

1. Character of Commissioner

The personal character of the NHRI leadership is not addressed by the Paris Principles, but nonetheless is a crucial factor contributing to the effectiveness of a NHRI.³⁰⁷ It is especially important for single-leader human rights ombudsman institutions, in contrast to multiple member NHRIs, such as human rights commissions, where the weaknesses of one commissioner can be compensated for by the strengths of others. An NHRI leader must have the courage to criticize the government for human rights violations and continue to recommend reform even in the event of pushback. NHRI leaders should be politically neutral and impartial. Effectiveness of and trust in the NHRI are easily lost when its leadership is politicized.³⁰⁸

The first Commissioner, Nina Karpachova, a former Crimea parliamentary deputy, held the position for fourteen years until Lutkovska was elected.³⁰⁹ Karpachova was considered ineffectual and she became overtly politicized with her election as a Rada deputy for the Party of Regions for most of 2006 in violation of the PCHR Law.³¹⁰ She was reelected Commissioner in 2007 because Rada deputies voting for her knew she would be compliant.³¹¹

Lutkovska had been a senior bureaucrat and, in 2011–12, was Ukraine's representative before the ECtHR, including for the *Tymoshenko* and *Lutsenko* cases.³¹² She was elected Commissioner during the Yanukovich presidency, supported by the Party of Regions.³¹³ Despite this inauspicious link, immediately after her appointment Lutkovska distanced herself from the government, publicized her commitment to human rights protection, implemented changes to make PCHR operations more transparent and pro-

307. See REIF, *supra* note 126, at 408. Expertise is also important and is covered by the Paris Principles.

308. This is seen on occasion with some Latin American NHRIs such as Venezuela and Nicaragua. See Thomas Pegrām, *National Human Rights Institutions in Latin America: Politics and Institutionalization*, in 52 HUMAN RIGHTS, STATE COMPLIANCE, AND SOCIAL CHANGE: ASSESSING NATIONAL HUMAN RIGHTS INSTITUTIONS 221 (Ryan Goodman & Thomas Pegrām eds., 2012); GANHRI, *Report and Recommendations of the Sub-Committee on Accreditation (SCA)* (Geneva, May 2016) at 5–52 (Venezuela).

309. “Ukrainian Model of Ombudsman,” *supra* note 128; Mustafa Najem, “Valeriia Lutkovska: People, in the Party of Regions, they have no idea whom they are dealing with,” *Ukrainska Pravda* (April 26, 2012) [English translation].

310. Oleksandr Serdiuk & Roman Petrov, “Ukraine: A constitutional design between façade democracy and effective transformation?” in Leonardo Molino & Wojciech Sadurski, eds, *Democratization and the European Union: Comparing Central and Eastern European post-communist countries* (Abingdon: Routledge, 2010) 170 at 189–190; UPR 1st Cycle, *supra* note 262; PCHR Law, *supra* note 129, art. 8.

311. Serdiuk & Petrov, *supra* note 310, at 190.

312. See *Ombudsman Biography*, PCHR, <http://www.ombudsman.gov.ua/en/page/secretariat/ombudsman/biography/> [https://perma.cc/7H68-NDNM]; see also Najem, *supra* note 309.

313. See Najem, *id.*

fessional, and stated that PCHR cooperation with human rights NGOs was an institutional priority.³¹⁴ Lutkovska substantially increased collaboration with human rights NGOs and other civil society actors by *inter alia* establishing the Advisory Council envisaged in the 1998 legislation, creating Expert Councils and working with NGOs in the NPM.³¹⁵ She has also increased communication with the media.³¹⁶ The problem of past government disregard of PCHR recommendations has been attacked with the use of a follow-up review to address non-compliance issues.³¹⁷ The enhanced media presence also means that the PCHR can publicize government inaction.

2. Executive and Legislative Government Branch Resistance to PCHR and Their Attempts to Weaken PCHR Independence

Since the executive area of government commits most public sector human rights abuses that a NHRI will investigate and critique, and because NHRI leaders are appointed by and answerable to the executive, an assertive NHRI can easily have its independence circumscribed. Accordingly, the optimal means of protecting the independence of a NHRI is to have its leadership appointed by and answerable to the legislature. This is the case with the PCHR.

There is excessive bureaucratic influence over PCHR staff matters.³¹⁸ Also, GANHRI recognized executive branch threats to the PCHR with the onset of the Euromaidan crisis, and called on the government to ensure the protection of the Commissioner and her staff in carrying out their human rights mandates.³¹⁹ However, subsequently, Ukraine's legislature presented the greatest risk to the PCHR's independence. In 2014-2015, a group of Rada deputies attempted to remove the Commissioner from office, alleging that the PCHR was inactive during the Euromaidan and lacked independence.³²⁰ In response, the PCHR argued that it had actively monitored

314. See *id.*; see also *Ukrainian Parliament Commissioner for Human Rights* website (June 7, 2012), http://www1.ombudsman.gov.ua/index.php?option=com_content&view=article&id=1725:-q-q&catid=14:2010-12-07-14-44-26&Itemid=75 [https://perma.cc/LJX5-CW6S].

315. *Supra* text accompanying notes 248, 266–270.

316. See запроваджено традицію регулярних щомісячних прес-ланчів для представників [“Ombudsman’s Office introduces a new tradition of regular monthly press-lunches for the media representatives”], UKRAINE PARLIAMENT COMMISSIONER FOR HUMAN RIGHTS, (May 18, 2012), http://www1.ombudsman.gov.ua/index.php?option=com_content&view=article&id=1658:2012-05-18-13-17-26 [https://perma.cc/2UAK-ZFBU]; see also Koval, *supra* note 314.

317. See *Ukrainian Parliament Commissioner for Human Rights*, “Monitoring the first months of Valeriia Lutkovska’s activity as ombudsman” (June 20, 2012), http://www1.ombudsman.gov.ua/index.php?option=com_content&view=article&id=1789:2012-06-20-10-06-26&catid=228:2012&Itemid=230 [https://perma.cc/XDS7-QTSS].

318. See *supra* text accompanying notes 152–153, 295–297.

319. See ICC, *Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA)* (Geneva, March 17–21, 2014) at 20 (reaccreditation deferred due to Ukraine’s domestic environment) [hereinafter ICC March 2014 *Report and Recommendations*].

320. See IOI, “Ukraine: Public Statement of the Ukrainian Parliament Commissioner for Human Rights” (June 18, 2015); “Komitet vidkhliv propozytsii pro zminu ombudsmena” [“The Committee

human rights and collaborated with civil society during this period, including its 2014 special report on Euromaidan human rights violations.³²¹ Human rights NGOs and other civil society actors actively resisted the Rada initiative and supported the Commissioner.³²² They defended the PCHR as the only public sector institution that protected human rights and enjoyed public support during and after the Euromaidan.³²³ International support for the Commissioner came from the COE Commissioner for Human Rights who criticized the legislative proposal for its interference with the PCHR's independence contrary to the Paris Principles.³²⁴ After Lutkovska's five-year term ended in April 2017, the appointment process for a new Commissioner became politicized.³²⁵ Two of the three candidates initially proposed were lawmakers, and a different political party supported each of the three.³²⁶ In addition, the Rada passed regulations under the PCHR Law to overturn the secret vote required by the legislation that has produced a legal stalemate.³²⁷ Human rights NGOs decried the Rada's behavior and sent an open letter to the President calling for an end to the politicization of the PCHR.³²⁸ Also, the OHCHR asked the Rada to establish a new PCHR selection process that complies with the Paris Principles and GANHRI's reaccreditation recommendations on the selection process.³²⁹ The President stepped in and stated that he would make proposals to the Rada to amend the PCHR Law.³³⁰ The PCHR expected that the

has declined proposals to change the ombudsman”] ZAKON I BUSINESS (The Law and Business) (February 27, 2014); *see also* Olha Karetnikova-Kotiahina, “Lutkovska: Z toho, shcho ia bachu, volonter vziali na sebe 90% vsiei roboty v zoni ATO” [“Lutkovska: From what I am observing, volunteers have taken upon themselves 90% of the entire work load in the Anti-Terrorist Operation’s zone”], UNIAN INFORMATION AGENCY, (June 15, 2015) <http://www.unian.ua/politics/1089650-valeriya-lutkovska-z-togo-scho-ya-bachu-volonteri-vzyali-na-sebe-90-vsieji-roboti-v-zoni-ato.html> [<https://perma.cc/3R6P-Z77Q>].

321. *See, e.g.*, IOI, *id.*; *Infringement of Human Rights and Freedoms in Ukraine*, *supra* note 192.

322. *See, e.g.*, IOI, *id.*; “The Committee has declined proposals to change the ombudsman,” *supra* note 320.

323. *See* “The Committee has declined proposals to change the ombudsman,” *id.*

324. Letter from COE Commissioner for Human Rights to Chairperson of the Parliament of Ukraine (May 26, 2015), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806db857> [<https://perma.cc/MT9G-CQUJ>]. The Commissioner also cited the 2012 Belgrade Principles on the Relationship between NHRIs and Parliament (February 22–23, 2012, ¶¶ 4, 10, 12, 16–19) that underscore the importance of the legislative branch in protecting the independence of NHRIs.

325. PCHR, “Political games take over human rights ombudsman election”, *Press Release* (August 11, 2017) [“Political games”]; PCHR, “Bohdan Kryklyvenko: We have the chance to bring the election process of the Ombudsman in full compliance with international standards”, *Press Release* (August 3, 2017) [“Bohdan Kryklyvenko”].

326. *See* PCHR, “Political games”, *supra* note 325.

327. *See, e.g.*, PCHR, *supra* note 325.; PCHR, “Bohdan Kryklyvenko”, *supra* note 325.

328. *See* PCHR, “Political games”, *supra* note 325. They also argued that the candidates lacked the required human rights expertise.

329. *See, e.g.*, OHCHR, *Report on the human rights situation in Ukraine 16 May to 15 August 2017*, ¶ 169; Paris Principles, *supra* note 15; October 2014 ICC SCA Report, *supra* note 147, at 147; *supra* text accompanying note 157.

330. *See* PCHR, “Bohdan Kryklyvenko,” *supra* note 325.

changes would enhance the institution's independence and alter the selection process to comply with relevant GANHRI recommendations.³³¹ Today, the Commissioner remains in office until her replacement is elected.³³²

The executive also needs to be reasonably receptive to the recommendations of NHRIs, a factor interconnected with the NHRI's independence and impartiality, the NHRI leader's character, and the democratic environment.³³³ Ukraine's government did not respond to the very small number of recommendations made by the first Commissioner, influenced no doubt by her political behavior.³³⁴ In the post-Euromaidan period, the PCHR still has difficulties with getting government leaders to collaborate.³³⁵

C. *Democratic Environment, Internal Conflict and Weak Human Rights Culture in Ukraine*

It is more difficult for the PCHR to fulfill its mandates effectively because it operates in a partially free democracy faced with an ongoing economic crisis and an internal conflict.³³⁶ The deficiencies in the democratic environment add to the workload and complexity of the PCHR. The democratic deficiencies also feed the resistance of public actors to the institution's work. In addition, the inability of the Ukrainian courts to protect human rights adds to the workload of the PCHR and the public expectations that are placed on it. The COE Commissioner for Human Rights has recognized that “[t]he human rights challenges Ukraine is facing are vast both in scope and substance and require systemic changes, including constitutional, legislative and institutional reforms as well as changes in everyday practice.”³³⁷ Nonetheless, GANHRI has commended the PCHR for its work in monitoring and inquiring into the human rights abuses committed in Ukraine during the Euromaidan.³³⁸

There are also cultural behaviors that negatively impact the PCHR's ability to fulfill its mandates. In addition to the lingering effects of the weak post-Soviet human rights culture,³³⁹ the internal conflict has added new attitudinal problems. The PCHR has recognized that it faces challenges in “the growth of aggression in the society and law-related nihilism.”³⁴⁰ In the context of internal conflict, the UN Special Rapporteur has

331. See PCHR, “Bohdan Kryklyvenko,” *supra* note 325; see also text accompanying *supra* note 157.

332. PCHR Law, *supra* note 129, art. 9.

333. See Reif, *The Ombudsman*, *supra* note 126, at 408–409.

334. Serdiuk & Petrov, *supra* note 310, at 189.

335. PCHR 2016-2017 Strategic Plan, *supra* note 132, at 11.

336. Arch Puddington and Tyler Roylance, “The Dual Threat of Populists and Autocrats” (2017) 28 J OF DEMOCRACY 105 at 106-109 (2016). Freedom House statistics categorize Ukraine as “partly free” with rankings of 3 for political rights and 3 for civil liberties, with 1 given to those countries enjoying the most free conditions and 7 representing the least free.

337. COE Commissioner June 29, 2015 Report, *supra* note 64, ¶ 7.

338. ICC March 2014 Report and Recommendations, *supra* note 319, at 20.

339. See *supra* text accompanying note 35.

340. PCHR 2016-2017 Strategic Plan, *supra* note 132, at 11.

found that “[h]uman rights are being treated as an instrument with which to assail the opponent, not as a shared system of values and accountability.”³⁴¹ Changing the human rights culture in Ukraine will be a generational challenge and the PCHR needs to contribute to the changing of this culture through educating, training, and raising public awareness of human rights. Indeed, Carver argues that human rights ombuds institutions in Central and East Europe, including the PCHR, must not let their complaints-handling obligations prevent them from paying sufficient attention to their human rights promotion responsibilities.³⁴²

D. Popular Legitimacy of the PCHR: Mixed Messages

The popular legitimacy of a NHRI such as the PCHR is influenced by all of the above-noted factors: the extent of its powers contained in its legal framework, its ability to fulfill all of its mandates based on the level of resources it enjoys, the character of the NHRI’s leadership, the receptivity or resistance of the executive and legislative branches to the recommendations of the NHRI, and the overall democratic environment, which includes whether the NHRI has to operate in a conflict-affected territory, and the quality of the country’s human rights culture. Public perception of NHRI independence and effectiveness should increase its popular legitimacy in society. However, longstanding suspicions of the public sector in Ukraine make it difficult for the NHRI to build popular legitimacy. In particular, the PCHR has tried to change its public image, which was tarnished by the political behavior of the first Commissioner, through its work and collaborative relationships over the past five years.

Human rights NGOs do acknowledge that the PCHR, at least under Lutkovska’s leadership, has become an effective institution that is making a positive difference in Ukraine.³⁴³ This is connected to Lutkovska’s character and the operating practices she instituted. The Kharkiv Human Rights Group and Ukrainian Helsinki Human Rights Group take the view that under her leadership the PCHR has made a strong contribution to improvements in human rights protection.³⁴⁴ The Equal Rights Trust and the Nash Mir Centre state that the PCHR is a “strong and independent human rights and equality body. . .with broad powers and a good record on high-

341. UN Special Rapporteur on extrajudicial, summary or arbitrary executions, *supra* note 10, ¶ 91.

342. Carver, *supra* note 127 at 208-209 (complaints should be used to determine larger systemic issues).

343. See, e.g., “What did MPs dislike about Ombudswoman Lutkovska?”, Hromadskeradio <https://hromadskeradio.org/programs/prava-lyudyny/chym-deputatam-ne-vgodyla-ombudsmen-valeriya-lutkovska> [<https://perma.cc/PRG5-DJGS>] (June 8, 2015); Bohdan Krasavtsev, Radio Svoboda [Radio Liberty], “Ukrainci zdebilshe ne znaiut’ pro svoi prava - Lutkovska” [Lutkovska: Ukrainians by and large are unaware of their rights], <http://www.radiosvoboda.org/a/24972087.html> [<https://perma.cc/8GPD-XNYX>] (April 24, 2013); *supra* text accompanying notes 322–323 on civil society support for Commissioner in 2014-2015 period.

344. “What did MPs dislike about Ombudswoman Lutkovska?”, *id.*

lighting discrimination as part of its work.”³⁴⁵ The Nash Mir Center further concluded that the PCHR “very actively worked in 2016 for the protection of LGBTI Ukrainians’ rights.”³⁴⁶ However, DRI has criticized the NHRI for paying insufficient attention to institutionalized children.³⁴⁷

Moreover, the general public appears to have mixed feelings about the PCHR and Commissioner Lutkovska. In 2013, the accessibility, openness and overall effectiveness of the PCHR received good poll numbers, while in 2016 a trust rating of politicians including Lutkovska found that public attitudes were generally negative.³⁴⁸ NGOs noted that Lutkovska’s reluctance to raise her public profile, including in the Rada, affected negatively the public perception of the Commissioner.³⁴⁹

VII. CONCLUSION

The PCHR enjoys GANHRI A-status accreditation, denoting full compliance with the Paris Principles. This is reflective of the relatively strong legal framework supporting Ukraine’s independent NHRI. However, the legislation has some deficiencies, such as the need for a more extensive human rights promotion mandate, a more transparent and participatory Commissioner selection process, and the elimination of the influence of the bureaucracy over the PCHR staff. Further, the Paris Principles requirement of adequate funding has not been met by the state, especially given the PCHR’s additional mandates in the areas of torture prevention, gender equality, and data protection, and its self-assumed children’s rights focus. Nonetheless, the international human rights community and a number of Ukrainian human rights NGOs consider the post-Euromaidan PCHR as an effective NHRI that has played an important role in furthering human rights protection and promotion in Ukraine.

Aside from the Paris Principles, a number of extra-legal factors influence the level of effectiveness of a NHRI, including that of the PCHR. These factors are the character of the NHRI leadership, the country’s democratic environment, the receptivity or resistance of the government to the NHRI’s work, including any attempts to interfere with the NHRI’s independence, and whether the NHRI has popular legitimacy. The second Commissioner, appointed in 2012, had an independent character accompanied by strong

345. *In the Crosscurrents*, *supra* note 58, at xvi.

346. *A New Beginning*, *supra* note 187, at 12.

347. *See supra* text accompanying notes 240–241.

348. Oleksii Pysarev, “An Interview with Valeriia Lutkovska”, *Zakon i Biznes*” (The Law and Business) http://zib.com.ua/ua/print/16292-upovnovazheniy_vr_z_prav_lyudini_valeriya_lutkovska_mene_nih.html [<https://perma.cc/93LS-679S>] (June 1–7, 2013); *Dzerkalo Tyzhnia* [Weekly Mirror] http://dt.ua/POLITICS/gontareva-yacenyuk-i-avakov-ocholili-antireyting-politikiv-2016-roku-228844_.html [<https://perma.cc/U4LL-4T5J>] (December 28, 2016) (conducted by Democratic Initiatives Fund & Razumkov Centre, with Lutkovska at 32% indicating that 32% more respondents distrusted her than trusted her, a ranking that was better than those for the President and Prime Minister).

349. “What did MPs dislike about Ombudswoman Lutkovska?”, *supra* note 343.

leadership skills. This resulted in more effective operating practices and the development of strong collaborative relationships with important stakeholders, such as human rights NGOs and international organizations. However, even here some additional improvements are needed including increasing the number of own-motion investigations to protect vulnerable populations and address systemic problems, the establishment of an internal unit devoted entirely to children's rights headed by a Representative, and an increased reference to international human rights law in PCHR work. Since Lutkovska's appointment has ended, there is some concern whether her successor will have the same independent character given the attempts of some legislators to interfere with the independence of the appointment process. The continuation of strong and independent PCHR leadership is essential to prevent a decline in the PCHR's current level of effectiveness that has been built over the past five years.

Other extra-legal factors continue to hinder the PCHR from improving its effectiveness. There is continuing resistance to an independent PCHR and its work from some elements in the executive and legislative branches. The government's failure to provide the institution with sufficient resources functions as a restriction on the PCHR's ability to fulfill all of its mandates. Most recently, legislators have tried to politicize the appointment process for the new Commissioner. Ukraine's shallow democratic environment, ongoing internal conflict and weak human rights culture are additional barriers that make it more difficult for the PCHR to contribute to improved human rights outcomes. These are generational challenges that require the PCHR to increase its focus on human rights promotion work. The interaction of all of these factors influences the attitudes of the public towards the PCHR. While human rights NGOs generally take the position that the PCHR has been effective and has made a positive contribution to human rights over the past five years, the mixed attitudes of the general public to the PCHR have a negative impact on its popular legitimacy.

Although compliance with the Paris Principles is essential for a NHRI, it is insufficient to guarantee full effectiveness given the influence of the above noted extra-legal factors on the ability of a NHRI such as the PCHR to completely fulfill its mandates. Ukraine's post-Soviet history does not provide much optimism that the deficiencies that hold back the PCHR from achieving full effectiveness will be easily removed. Hopefully, the current period in Ukraine is not one of the "heroic moments" referred to by Peter Rosenblum, which follow social ruptures and during which there are strong international and domestic pressures placed on the NHRI to protect and promote human rights, but which can be followed by a diminishment in the NHRI's effectiveness as the moment fades away.³⁵⁰

350. Rosenblum, *supra* note 306, at 299–300.

ACRONYMS

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
COE	Council of Europe
CPUCR	Commissioner of the President of Ukraine for Children's Rights
CRC	Convention on the Rights of the Child
CtRC	Committee on the Rights of the Child
CtRPD	Committee on the Rights of Persons with Disabilities
DRI	Disability Rights International
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ENNHRI	European Network of National Human Rights Institutions
ENOC	European Network of Ombudspersons for Children
EU	European Union
GANHRI	Global Alliance of National Human Rights Institutions
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDPs	internally displaced persons
LGBTI	lesbian, gay, bisexual, transgender and intersex
NGOs	non-governmental organizations
NHRAP	National Human Rights Action Plan
NHRI	national human rights institution
NHRS	National Human Rights Strategy
NPM	National Preventive Mechanism
OHCHR	UN Office of the High Commissioner for Human Rights
OPCAT	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
OSCE	Organization for Security and Co-operation in Europe
PCHR	Parliament Commissioner for Human Rights
SPT	Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
UN	United Nations
UNDP	United Nations Development Programme
UPR	Universal Periodic Review