

IN THE EUROPEAN COURT OF HUMAN RIGHTS
Application No. 29627/16 – *Sentsov and Kolchenko v. Russia*

**WRITTEN COMMENTS OF THE
OPEN SOCIETY JUSTICE INITIATIVE**

I. INTRODUCTION

1. These written comments consider the legal effects of imposition of Russian citizenship by Russian occupying authorities in Crimea (Ukraine) in respect of the applicants' fair trial rights under Article 6 (1) of the European Convention on Human Rights (ECHR), read alongside international humanitarian law (IHL), in particular the law of occupation.¹ The following analysis is most directly responsive to the Court's third question to the parties (*Was the court which dealt with the applicants' case a tribunal established by law?*). Where appropriate, we indicate information that is also responsive to the fourth question, in respect of overall fair trial rights. These comments draw upon the jurisprudence of this Court, comparative regional and international law and standards and authoritative statements on the importance of the rights at issue, noting that this Court takes into account "evolving norms of national and international law in its interpretation of Convention provisions."²
2. Specifically, these comments address:
 - A. *The relevance of international humanitarian law in answering the Questions to the Parties, in particular Question 3.* The Russian Federation's status as an Occupying Power at the time of the relevant events is inseparable from the question of whether the tribunal that subsequently tried the applicants as Russian nationals was "established by law."
 - B. *The imposition of Russian citizenship in occupied Crimea.* The mass imposition of Russian citizenship in Crimea implicates both international humanitarian and international human rights law and served as the legal foundation for the subsequent transfer and trial of the applicants as Russian nationals.³
 - C. *The transfer of the applicants to the territory of the Russian Federation and their subsequent trial and conviction by domestic courts as Russian nationals.* The question of compliance with governing rules in the exercise of jurisdiction by domestic tribunals is considered in light of the above context and relevant rules of public international law.
3. In sum, the following comments aim to assist the Court in considering the implications of establishment of criminal jurisdiction in the applicants' trials, which rested on serious violations of applicable rules and provisions of public international law. The comments discuss the extent to which Article 6 (1) required that Russian courts take these serious violations of applicable international humanitarian and human rights law into account in exercising jurisdiction under the Russian Criminal Code.

II. SUBMISSIONS

A. The relevance of international humanitarian law

4. Crimea is considered a temporarily occupied territory where the Russian Federation, at the

¹ Written comments provided pursuant to the Court's grant of permission under Rule 44(3) of the Rules of Court, dated 12 March 2019.

² *Demir and Baykara v. Turkey*, 12 November 2008, Application no. 34503/97, para. 68.

³ The terms "citizen" and "national" are used synonymously throughout these comments.

time of writing, is the Occupying Power.⁴ These comments reject the proposition that the occupation of Crimea constitutes a case of state succession, consistent with international consensus that Crimea continues to be part of Ukraine.⁵

5. Given this context, IHL, and more specifically occupation law, applies alongside human rights law, as embodied in international and European law, including the right to nationality and the right to a fair trial, which must be respected by an Occupying Power.⁶
6. Occupation law, a subdivision of IHL, regulates the occupation of a territory. Provisions regulating occupation are contained in The Hague Regulations of 1907, the Fourth Geneva Convention of 1949 and Additional Protocol I of 1977. According to Article 42 of the Hague Regulations of 1907 a “[t]erritory is considered occupied when it is actually placed under the authority of the hostile army.” The UN General Assembly has affirmed its commitment to Ukraine’s sovereignty and territorial integrity over Crimea⁷ and the European Union “has adopted a strict non-recognition policy with regard to the illegal annexation.”⁸
7. The fundamental purpose of contemporary occupation law is to preserve the sovereignty of the occupied state and maintain the *status quo ante*.⁹ In doing so, occupation law recognises the unlawfulness of annexation. As such, the aim of occupation law is “to ensure the protection and welfare of the civilians living in occupied territories.”¹⁰
8. Article 64 of the Fourth Geneva Convention on the protection of civilians (GCIV) reflects many of these purposes and is the cornerstone of occupation law. Article 64 prohibits Occupying Powers from tampering with the occupied territory’s laws unless doing so is “absolutely necessary” for a specified set of reasons. For instance, an Occupying Power may repeal or suspend laws of occupied territories where they “constitute a threat to its security or an obstacle to the application of the...Convention.”¹¹ The Occupying Power may also

⁴ Charter of the United Nations and Statute of the International Court of Justice, Article 2(4), 26 June 1945, 59 Stat. 1031 (1945); Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U N. Doc. A/8028 (1970); UN General Assembly, Territorial integrity of Ukraine, G.A. Res. 68/262 (1 April 2014); UN General Assembly, Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, G.A. Res. 71/205 (1 February 2016). The Russian Federation is party to the 1907 Hague Regulations, the Fourth Geneva Convention of 1949 and the 1977 Additional Protocol I to the Geneva Conventions. In 2016, the Office of the Prosecutor of the International Criminal Court determined that Crimea was under the occupation of the Russian Federation. Office of the Prosecutor, Report on Preliminary Examination Activities 2016, paras. 155-58 (14 November 2016), available at https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf.

⁵ *Ibid.* For a discussion of why the situation in Crimea does not constitute a case of state secession. Simone F. van den Driest, *Crimea’s Separation from Ukraine: An Analysis of the Right to Self-Determination and (Remedial) Secession in International Law*, 62 Neth. Int’l. L. R. 329 (2015) (analysing the illegality of Crimea’s unilateral secession from Ukraine from the perspective of public international law); Christian Marxsen, *The Crimea Crisis – An International Law Perspective*, 74/2 Heidelberg J. Int’l L. 367 (2014), 367-391.

⁶ *Al-Skeini and Others v the United Kingdom*, App. No. 55721/07, Grand Chamber Judgment of 7 July 2011, at paras. 89-94 (surveying relevant international humanitarian law pertaining to belligerent occupation) and at para. 149 (conclusion as regards jurisdiction under Article 1 of the Convention).

⁷ UN General Assembly, Territorial integrity of Ukraine, G.A. Res. 68/262 (1 April 2014).

⁸ European Union, The EU non-recognition policy for Crimea and Sevastopol: Fact Sheet, 12 December 2017, https://eeas.europa.eu/headquarters/headquarters-Homepage/37464/eu-non-recognition-policy-crimea-and-sevastopol-fact-sheet_en.

⁹ International Committee of the Red Cross (ICRC), *Contemporary challenges to IHL – Occupation: overview*, 11 June 2012, <https://www.icrc.org/en/document/occupation>.

¹⁰ *Ibid.*

¹¹ Article 64 provides a narrower set of exceptions compared to the earlier Hague Regulations (Article 43), which covered power “to restore, and ensure, as far as possible, public order and safety, while respecting, unless

impose laws that are “essential to enable the Occupying Power to fulfil its obligations under the...Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.” Any law that an Occupying Power promulgates for the occupied territory must fit within the narrow confines of Article 64.¹² The Russian Federation’s abrogation of Ukraine’s nationality laws did not meet these extremely limited exceptions. Finally, any newly enacted laws that do meet these stringent requirements shall not be retroactive (Article 65) and courts applying such laws must sit in the occupied territory (Article 66).

B. The imposition of Russian citizenship in Crimea

9. The mass imposition of Russian citizenship in Crimea, which served as the theoretical legal foundation for the subsequent transfer and trial of the applicants as Russian nationals, implicates and was in violation of both international humanitarian and human rights law. This section details relevant general background information and considers the applicable international legal rules and standards.

1. Automatic Russian citizenship in Crimea

10. During the initial occupation and subsequent annexation of the Crimean peninsula, the Russian Federation announced all Ukrainian nationals living in Crimea as its subjects—effectively depositing the applicable law to citizenship and illegally imposing the application of Russian citizenship law in an occupied territory. During a period of 18 days, residents of Crimea could, theoretically, submit a “declaration about the willingness to retain the nationality of Ukraine” to one of four offices accepting such declarations. In Crimea, Russian authorities automatically granted nationality to approximately 96 percent of residents, declaring them subjects of the Russian Federation—including Oleg Sentsov (*first applicant*) and Aleksandr Kolchenko (*second applicant*). Claiming that Sentsov and Kolchenko are now Russian,¹³ the Russian Federation has used this as a basis for transferring them to Russian territory and exercising criminal jurisdiction over both applicants, despite their objection that they are in fact Ukrainian.¹⁴
11. On 18 March 2014, the Russian Federation and the “Republic of Crimea” signed a *Treaty on the Accession of the Republic of Crimea to the Russian Federation* in Moscow, annexing the peninsula into the Russian Federation.¹⁵ Three days later, on 21 March 2014, the Rus-

absolutely prevented, the laws in force in the country.”

¹² The language of Article 64 only references changes to “penal laws.” This should not be read literally and, instead, should be interpreted to include civil and other laws. For an explanation, ICRC, Commentary to GCIV, Article 64, available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=9DA4ED335D627BBFC12563CD0042CB83>; Jean S. Pictet, *The Geneva Conventions of 12 August 1949 Commentary - IV Geneva Convention relative to the Protection of Civilian Persons in Time of War* (1958) at 334-35, affirming that the “words ‘penal laws’ mean all legal provisions.” Pictet additionally explains how narrowly exceptions to Article 64 should be interpreted: “The occupation authorities *cannot abrogate or suspend the penal laws for any other reason-and not, in particular, merely to make it accord with their own legal conceptions.*” *Ibid.* at 335-36 (emphasis added).

¹³ Russian News Agency TASS, *Russian Justice Ministry refuses to transfer jailed filmmaker to Ukraine*, 21 October 2016, <http://tass.com/politics/908028>.

¹⁴ In its Statement of Facts, the Court appropriately refers to the applicants as Ukrainian nationals. However, for the purposes of understanding the nature and circumstances of the Russian Federation’s actions, it is essential to consider that they were at all relevant times treated by Russian authorities as Russian nationals.

¹⁵ Office of the High Commissioner for Human Rights (OHCHR), *Situation of human rights in the temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol*, para. 55, UN Doc. A/HRC/36/CRP.3 (25

sian Federation enacted Federal Constitutional Law No. 6-FKZ “*On Admission of the Republic of Crimea to the Russian Federation and Creation in the Framework of the Russian Federation of new entities – Republic of Crimea and the City of Federal Significance of Sevastopol*” (“*Law No. 6-FKZ*”), which codified automatic recognition of all who were deemed to be residing permanently in Crimea as Russian citizens. Article 4(1) states that:

“From the day of admission of the Republic of Crimea to the Russian Federation and creation of new entities in the framework of the Russian Federation, *citizens of Ukraine*...who as of that day permanently reside on the territory of the Republic of Crimea or on the territory of the city of federal significance of Sevastopol, *shall be recognized as the citizens of the Russian Federation*, with the exception of the persons, who within one month from that day shall declare their wish to keep their...other citizenship.”

12. The only way to “exempt” oneself from becoming a Russian citizen was to affirmatively inform the *de facto* authorities, by 18 April 2014, of the intention to opt out of Russian citizenship.¹⁶ The law came into force on 1 April 2014, at which time the Russian Federal Migration Service first provided instructions on the refusal procedure,¹⁷ leaving those who “chose” to opt out of Russian citizenship and “retain” Ukrainian citizenship only 18 days to do so.¹⁸

13. Article 4(4) of *Law No. 6-FKZ* states:

“A person who has been recognized as a citizen of the Russian Federation and who has received an identification document of a citizen of the Russian Federation, shall be deemed a citizen who has no foreign citizenship, if that person submits a statement that he/she does not wish to keep the foreign citizenship...”

14. Under these provisions, Russian citizenship “replaces” Ukrainian citizenship unless residents affirmatively take steps to retain their Ukrainian citizenship and reject Russian citizenship (para.10, above), in which case they would become foreigners in their own country.¹⁹ Dual citizenship was not presented as a legally viable option to Crimean residents, nor is dual citizenship permitted by Ukraine. *Law No. 6-FKZ*, resulted in the practical invalidation of Ukrainian citizenship under occupation.

15. Groups monitoring the situation in Crimea, including the UN Office of the High Commissioner for Human Rights (OHCHR) and the OSCE, cited multiple obstacles in the practical exercise of the “opt out” process, in addition to the limited time period during which the option applied.²⁰ From 4 through 9 April 2014, only two locations in Crimea were available

September 2017) [hereinafter OHCHR, *Human Rights in Crimea*].

¹⁶ The Organization for Security and Cooperation in Europe Office for Democratic Institutions and Human Rights and the High Commissioner on National Minorities, *Report of the Human Rights Assessment Mission on Crimea (6–18 July 2015)*, para. 37 (17 September 2015) available at <https://www.osce.org/odihr/report-of-the-human-rights-assessment-mission-on-crimea?download=true> [hereinafter OSCE, *Mission on Crimea*].

¹⁷ OHCHR, *Report on the human rights situation in Ukraine 15 May 2014*, para. 127 (15 May 2014), available at <http://www.ohchr.org/Documents/Countries/UA/HRMMUReport15May2014.pdf> [hereinafter OHCHR, *Human Rights in Ukraine*]; OSCE, *Mission on Crimea*, note 16, above, at para. 38.

¹⁸ Regional Centre for Human Rights, Ukrainian Helsinki Human Rights Union & CHROT, *Crimea Beyond Rules: Thematic review of the human rights situation under occupation, Vol. 3, Right to nationality (citizenship)* (2017), available at https://helsinki.org.ua/wp-content/uploads/2016/04/Crimea_beyond_rules-3en-fin.pdf.

¹⁹ Open Society Justice Initiative, *Human Rights in the Context of Automatic Naturalization in Crimea* (2018), at paras. 76-91, available at <https://www.opensocietyfoundations.org/sites/default/files/report-osji-crimea-20180601.pdf>.

²⁰ OHCHR, *Human Rights in Crimea*, note 15, above, at para. 59.

to formally opt out of Russian citizenship.²¹ Since these sites were also dually designated for those seeking to acquire Russian passports (without which, they would “face obstacles in every aspect of their lives”),²² long queues of thousands of individuals resulted, surpassing the daily capacity of these offices, resulting in individuals unable to reach the front of the line before the deadline expired.²³ Those applying to reject Russian citizenship were intimidated and harassed.²⁴

16. These constraints “made it impossible to make an informed choice about whether to accept Russian citizenship” and as such “the majority of Crimeans did not even attempt to make a choice and acquired the status of Russian citizens ‘by default’ at the end of the 18-day period.”²⁵

17. In an environment of intense legal uncertainty, political upheaval, and physical insecurity, the circumstances were extremely dissuasive for anyone wishing to opt out of Russian citizenship. The Commissioner for Human Rights of the Republic of Crimea noted that an “ordinary person is lost” in the web of new rules and procedures, not to mention the coercive nature of the choice itself in terms of its legal implications. According to Ukrainian human rights monitoring groups:

“[A]ny option of choice, which had to be made by the Crimeans, led to a deterioration in their situation: they had to choose between a significant restriction of rights (up to a complete loss of legal personality) and the oath of allegiance to the aggressor state.”²⁶

18. Should one successfully opt out of Russian citizenship, obtaining a residence permit in order to stay in Crimea was discretionary, subject to repeated renewal and required multiple documents and proof that would have needed to be obtained prior to annexation. Those who held a residence permit, but without Russian citizenship, did not enjoy equality before the law and were deprived of important rights and freedoms.²⁷

2. International humanitarian law and imposition of Occupying Power’s citizenship

19. The law of occupation heavily favours the continuity of nationality for residents of occupied territory, with mass automatic imposition running counter to several well-established rules.

20. Given occupation law’s purpose of preserving the sovereignty of the occupied state and maintaining the *status quo ante* (para. 7, above), primarily through the idea of continuity of the occupied state’s legal system, a law which alters the citizenship of all inhabitants is incompatible with those terms. As such, this incompatibility would render the law illegitimate and any consequences of its implementation should be nullified.

²¹ OSCE, *Mission on Crimea*, note 16, above, at para. 38; OHCHR, *Human Rights in Ukraine*, note 17, above, at para. 37.

²² OSCE, *Mission on Crimea*, note 16, above, at para. 12.

²³ *Ibid.* at para. 39; Human Rights Watch, *Rights in Retreat: Abuses in Crimea*, 29-30 (2014), available at https://www.hrw.org/sites/default/files/report_pdf/russia1114web.pdf.

²⁴ OSCE, *Mission on Crimea*, note 16, above, at para. 39; Council of Europe, *Commissioner for Human Rights, Report of Nils Muižnieks following his Mission in Kyiv, Moscow and Crimea from 7 To 12 September 2014*, para. 48 (27 October 2014) [hereinafter COE Commissioner for Human Rights, *Mission in Crimea*].

²⁵ Sergei Zayets, *Enforced citizenship in Crimea*, European Human Rights Bulletin p. 5 (Winter 2017), available at <http://ehrac.org.uk/wp-content/uploads/2018/01/EHRAC-Winter-2017-WEB.pdf>.

²⁶ *Crimea Beyond Rules*, note 18, above, at pp.46-47 (2017).

²⁷ Open Society Justice Initiative, *Human Rights in the Context of Automatic Naturalization in Crimea*, note 19, above, at paras. 87-97.

21. IHL also reflects the importance of free will by prohibiting the imposition of loyalty. Article 45 of the Hague Convention (IV) of 1907 forbids states from compelling inhabitants of occupied territory to swear allegiance to a hostile power.²⁸ Imposing citizenship on the inhabitants of an occupied territory, in the manner Russia did in regard to Crimea, equates to, or in effect is, compelling them to swear allegiance.²⁹
22. According to IHL, title to the occupied territory remains with the displaced state, thus residents do not lose their nationality and “allegiance to the displaced sovereign cannot be severed under duress.”³⁰ As inferred from Article 67 and 68 of GCIV, “persons who were nationals of the displaced sovereign...cling to that nationality.”³¹ Russia, in imposing its citizenship on Crimeans, contravened the law.
3. International and regional human rights law: the right to nationality
23. States, including in the context of occupation, must comply with applicable international law, which includes defining and applying nationality laws.³²
24. The right to nationality and the prohibition against arbitrary deprivation of nationality have been increasingly incorporated into international human rights law, beginning with Article 15 of the Universal Declaration of Human Rights, which prohibits arbitrary deprivation of nationality, the right to change nationality, and protects one’s right to a nationality.³³
25. Just as IHL safeguards against the imposition of loyalty, rules governing acquisition and loss of nationality reflect the importance of subjective choice based and individual freedom.³⁴ Naturalisation, as the International Court of Justice (ICJ) has recognised, assumes individual choice or a “volitional predicate.”³⁵ In *Liechtenstein v. Guatemala (Nottebohm)*, the Court anchored the notion that *overextending* nationality—bending the rules to sweep more people within a state’s political membership—was a nuisance to inter-state relations.³⁶ Article 6 of the 1930 Hague Convention, a foundational instrument in modern nationality law, incorporates “the right of a person to renounce one of two nationalities if this nationality was acquired without any voluntary act on his part.”
26. This Court, in *D.H. and others v. Czech Republic* concerning segregation of Roma students

²⁸ “It is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile Power.” Hague Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, Article 45, 18 October 1907, 36 Stat. 2277 (1907).

²⁹ *Crimea Beyond Rules*, note 18, above, at pp. 26-27 (2017).

³⁰ Yoram Dinstein, *The International Law of Belligerent Occupation*, para. 176 (2009).

³¹ *Ibid.* at para. 174 (citing G. von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* 60 (1957)).

³² UN General Assembly, *Basic principles for the protection of civilian populations in armed conflicts*, Article 1, 9 December 1970, A/RES/2675; UN Human Rights Committee (HRC), *UN Human Rights Committee: Concluding Observations: Israel*, 18 August 1998, CCPR/C/79/Add.93 (“The Committee is therefore of the view that...the Covenant must be held applicable to the occupied territories”); *Cyprus v. Turkey*, Grand Chamber Judgment of 10 May 2001 and *Loizidou v. Turkey*, Grand Chamber Judgment of 18 December 1996, finding violations of the ECHR by Turkey in the occupied territory.

³³ Universal Declaration of Human Rights, Article 15 (1948); International Covenant on Civil and Political Rights, Article 24 (1967); International Convention on the Elimination of All Forms of Racial Discrimination, Article 5(d)(iii) (1996); Convention on the Elimination of All Forms of Discrimination Against Women, Article 9 (1980); Convention on the Rights of the Child, Articles 7 and 8 (1989); American Convention on Human Rights, Article 20 (1970); African Charter on the Rights and Welfare of the Child, Article 6 (1982).

³⁴ Citizenship by birth, however, is frequently imposed automatically and most of the world’s population acquires at least one citizenship in this way.

³⁵ Peter J. Spiro, *Citizenship Overreach*, 38 Mich. J. Int’l L. 167, 172 (2017).

³⁶ *Nottebohm, Liechtenstein v. Guatemala*, Judgment, 1953 I.C.J. 111 (18 November).

in Czech schools, stressed that voluntariness requires an unfettered choice, not a false one. In *D.H.*, parents could not make decisions in respect of their children’s schooling “without constraint” where they were presented with two equally harmful alternatives, leaving them with an “impossible dilemma.”³⁷

27. The Inter-American Commission has also stressed the importance of voluntariness in regulation of nationality:

“... this right [to nationality] is properly considered to be one of the most important rights of man, after the right to life itself, because all the prerogatives, guarantees and benefits man derives from his membership in a political and social community – the State – stem from or are supported by this right.[...] It is generally considered that since nationality of origin is an inherent attribute of man, his natural right, and is not a gift or favour bestowed through the generosity or benevolence of the State, *the State may neither impose it on anyone by force, nor withdraw it as punishment or reprisal.*”³⁸

28. International bodies have condemned the use of automatic citizenship in Crimea, including the UN Human Rights Committee, which specifically expressed concern regarding the inability of residents to make informed choices.³⁹ The UN General Assembly “condemn[ed]” such imposition, noting that it “is contrary to international humanitarian...and customary international law.”⁴⁰ OHCHR stated that in addition to violating IHL, “[i]mposing citizenship...raises a number of important concerns under international human rights law.”⁴¹
29. Automatic naturalization in Crimea contradicts the principle set out in international law to protect the individual’s free choice in acquisition, renunciation and change of nationality. As noted by the Council of Europe Commissioner for Human Rights: “The consent of the person concerned should be the paramount consideration in this regard, and this consent should be active and clearly stated.”⁴²

C. The transfer of the applicants to the territory of the Russian Federation and their subsequent trial and conviction by domestic courts as Russian nationals

30. In addition to the unlawful imposition of Russian citizenship, considered above, the subsequent physical transfer of prisoners, including the applicants, from Ukraine to Russian territory as “Russians” facilitated and is therefore implicated in the exercise of jurisdiction by Russian courts in their trials. The question of compliance with governing rules in the exercise of jurisdiction by domestic tribunals is considered in this section in light of the above context and relevant rules of public international law.

1. Ukrainian prisoners transferred to Russian territory

31. Russian authorities transferred both applicants to Russian territory on the erroneous basis that these individuals were Russian citizens and hence failed to engage applicable formal

³⁷ *D.H. and others v. Czech Republic*, Grand Chamber Judgment of 13 November 2007, at paras. 202-203 (parents of Roma children required to choose between denying consent to special schooling and ordinary schools where their children would be ostracized).

³⁸ Inter-American Comm. on Human Rights, Third Report on the Situation of Human Rights in Chile, Ch. IX: Right to Nationality, OEA/Ser.L/V/II.40, doc. 10, 11 February 1977, para. 10, available at <http://www.cidh.org/countryrep/Chile77eng/chap.9.htm>.

³⁹ Human Rights Committee, *Concluding Observations on the Seventh Periodic Report of the Russian Federation*, para. 23(c), U.N. Doc. CCPR/C/RUS/CO/7 (28 April 2015).

⁴⁰ UN General Assembly, Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, G.A. Res. 72/190, p. 2 (19 December 2017).

⁴¹ OHCHR, *Human Rights in Crimea*, note 15, above, at para. 57 and 220.

⁴² COE Commissioner for Human Rights, *Mission in Crimea*, note 24, above, at para. 47 n. 40.

extradition procedures. Both applicants were subsequently tried as Russian citizens.

32. As recited in the Statement of Facts, Sentsov and Kolchenko are detained in correctional colonies in Russia. Due to the claim that both applicants were Russian, Russian officials denied both applicants access to Ukrainian consular officials and have refused to transfer them to Ukraine citing that they are Russian citizens.⁴³ On 21 October 2016, the Russian Justice Ministry's press service stated that "Sentsov had obtained the Russian citizenship in compliance with [*Law No. 6-FKZ*...thus,] Sentsov's transfer to Ukraine is impossible."⁴⁴ A document posted by Ukraine's Deputy Justice Minister for European Integration Sergei Petukhov reached the same conclusion with regards to Kolchenko.⁴⁵
33. According to Ukrainian human rights experts, "[m]ore than 4,700 civilian prisoners, Ukrainian citizens kept in places of detention, were transferred by the Russian authorities from Crimea, and now they are in at least 49 penal colonies located in 23 regions of the Russian Federation."⁴⁶

2. Article 6 of the Convention: whether a tribunal is "established by law"

34. Article 6 (1) of the ECHR holds that, "In the determination...of any criminal charge against him, everyone is entitled to a fair...hearing...by...[a] tribunal established by law." "What is important to ensure compliance with Article 6 (1) are the guarantees, both substantive and procedural, which are in place."⁴⁷ If a tribunal does not have jurisdiction to try a defendant in accordance with the provisions applicable under domestic law, it is not "established by law" within the meaning of Article 6 (1).
35. Under Article 6 (1), a tribunal must always be "established by law." This has been understood by the Court as an expression that "reflects the principle of the rule of law, which is inherent in the system of protection established by the Convention and its Protocols."⁴⁸ The Court considers that a "tribunal" must always be "established by law," as it would otherwise lack the legitimacy required in a democratic society to hear individual cases.⁴⁹ The "established by law" requirement "covers not only the legal basis for the very existence of a 'tribunal,' but also *compliance by the tribunal with the particular rules that govern it*...the term 'a tribunal established by law' in Article 6 (1) envisages the whole organisational set-up of the courts, including...the matters coming within the jurisdiction of a certain category of courts..."⁵⁰ A court which—as was the case with the Russian Court that tried the Applicants—is established through recourse to an illegal law or procedure or one that

⁴³ *Russian Justice Ministry refuses to transfer jailed filmmaker to Ukraine*, note 13, above.

⁴⁴ *Ibid*; Sergiy Petukhov, «Росія відмовила у передачі Олега Сенцова», Facebook post, 21 October 2016, <https://www.facebook.com/photo.php?fbid=1796566357285662&set=a.1434318470177121&type=3&theater>, accessed 27 March 2019.

⁴⁵ *Russian Justice Ministry refuses to transfer jailed filmmaker to Ukraine*, note 13, above.

⁴⁶ Crimean Human Rights Group, Human Rights Information Centre, Regional Centre for Human Rights, and Ukrainian Helsinki Human Rights Union, Joint Submission to the UN Universal Periodic Review: Russian Federation, para. 26 (2017), available at https://www.uprinfo.org/sites/default/files/document/russie_federation_de/session_30_-_mai_2018/js2_upr30_rus_e_main.pdf. Pending cases before this Court on behalf of persons transferred to Russian territory: 63621/16, 72092/16, 70212/16 and 30742/17.

⁴⁷ *Rolf Gustafson v. Sweden*, Judgment of 7 January 1997, at para. 45.

⁴⁸ *Jorgic v. Germany*, Judgment of 7 December 2007, at para. 64; *Richert v. Poland*, Judgment of 25 October 2011, at para. 41.

⁴⁹ *Lavents v. Latvia*, Judgment of 28 November 2002, at para. 81; *Biagioli v. San Marino*, Judgment of 8 July 2014, at para. 71.

⁵⁰ *Sokurenko and Strygun v. Ukraine*, Judgment of 20 July 2006, at paras. 27-28 (emphasis added and internal citations removed).

oversteps the limits of its jurisdiction is not a “tribunal established by law” in the proceedings in question.⁵¹

36. Whether a national court is a “tribunal established by law” is thus a question of European Convention law for this Court to determine in the exercise of its supervisory power. Accordingly, a national court’s interpretation of the relevant tribunal’s governing rules is properly subject to this Court’s review, in particular if there has been a flagrant violation of domestic law.⁵² A finding of a flagrant violation of domestic law can occur when the Court determines reasonable grounds did not exist for the authorities to establish jurisdiction.⁵³ In the determination of whether reasonable grounds exist for the authorities to establish jurisdiction, domestic courts must reasonably interpret their domestic jurisdictional provisions in light of applicable rules and provisions of public international law.⁵⁴
37. Under the Court’s case-law, an issue might arise under Article 6 as a result of an extradition or expulsion decision in circumstances where the individual would risk suffering a flagrant denial of justice in the requesting country. This principle was set out in *Soering v. the United Kingdom*⁵⁵ and was subsequently confirmed by the Court in a number of cases.⁵⁶ The term “flagrant denial of justice” has been considered synonymous with a trial which is manifestly contrary to the provisions of Article 6 or the principles embodied therein. A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial proceedings such as might result in a breach of Article 6 if occurring within the Contracting State itself. What is required is a breach of the principles of a fair trial guaranteed by Article 6 which interferes with the very essence of the right.⁵⁷ The collective conversion of residents within an occupied territory (Ukraine) into “nationals” of the Occupying Power (Russia), in addition to fostering other deficiencies in the legitimate exercise of jurisdiction in such cases, also nullifies recourse to extradition procedures in criminal cases, compounding the extreme irregularity of subsequent trials in the territory of the Occupying Power.

3. Applicable international standards

39. As noted above (paras.19-38), the due process and fair trial guarantees of international human rights law, IHL and the ECHR are complementary.⁵⁸ These bodies of law contain relevant provisions effectively outlawing the conversion of nationals into foreigners and thereby thwarting the protections to which their rightful status entitles them. This is emphatically the case for actions that employ such a conversion *en masse*, given the actions of this character undertaken in furtherance of mass atrocities, which represent a formative predicate to the modern human rights and humanitarian legal canon.

⁵¹ *Ibid.*

⁵² *Coëme and Others v. Belgium*, Judgment of 22 June 2000, at para. 98 *in fine*; *Lavents v. Latvia*, note 49, above, at para. 114.

⁵³ *G. v. Switzerland* (App. No. 16875/90) ECHR, Commission Decision of 10 October 1990; *Kübli v. Switzerland* (App. No. 17495/90) ECHR, Commission Decision of 2 December 1992.

⁵⁴ *Jorgic v. Germany*, note 48, above, at paras. 67-72.

⁵⁵ *Soering v. the United Kingdom*, Judgment of 7 July 1989, at para. 113.

⁵⁶ *Mamatkulov and Askarov v. Turkey*, Grand Chamber Judgment of 4 February 2005, at paras. 90-91; *Al-Saadoun and Mufdhi v. the United Kingdom*, Judgment of 2 March 2010, at para. 149; *Ahorugeze v. Sweden*, Judgment of 27 October 2011, at para. 115; *Othman (Abu Qatada) v. the United Kingdom*, Judgment of 17 January 2012, at para. 258.

⁵⁷ *Ahorugeze v. Sweden*, note 56, above, at para. 115; *Othman (Abu Qatada) v. UK*, note 56, above, at para. 260.

⁵⁸ Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Articles 71-74, 12 August 1949 (GCIV); Protocol Additions to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Article 75, 8 June 1977 (Additional Protocol I).

40. Under international human rights law, converting nationals from an occupied territory into “foreigners” in order to transfer, or expel, contravenes human rights protections safeguarding against the manipulation of nationality law in order to expel nationals from their “own country.”⁵⁹ Those who do not obtain the imposed nationality risk expulsion under the new regime’s immigration laws, and similarly those expelled may be unable to return, left outside their home in a land they may not know. This new “non-national” may now be exempt from enjoying the rights reserved specifically for “nationals” under the new regime’s laws.
41. The right to return to one’s own country is firmly established in international law.⁶⁰ Article 12(4) of the ICCPR states that “No one shall be arbitrarily deprived of the right to enter his own country.” Similarly, Article 3 of Protocol No. 4 to the European Convention on Human Rights, prohibits the expulsion of nationals, stating that “(1) [n]o one shall be expelled...from the territory of the State of which he is a national” and “(2) [n]o one shall be deprived of the right to enter the territory of the State of which he is a national.” In General Comment 27, the Human Rights Committee likewise affirmed that “stripping a person of nationality or [] expelling an individual to a third country, arbitrarily prevent[s] this person from returning to his or her own country.”⁶¹
42. Under IHL, Sentsov and Kolchenko are considered “civilians,” or “protected persons.” Article 4 of the GCIV defines “protected persons” as civilians who find themselves “in the hands of a Party to the conflict or Occupying Power of which they *are not nationals*” (emphasis added). As such, converting the nationality of the inhabitant of the occupied territory to that of the Occupying Power could result in the inhabitant falling outside the IHL protections afforded to “protected persons.” IHL furthermore imposes specific procedural protections that hinge on the continuity of laws within an occupied territory (see para. 8), including the requirement that courts “shall take into consideration the fact that the accused *is not a national* of the Occupying Power” (GCIV, Article 67).
43. IHL also prohibits an Occupying Power from transferring civilians to its own territory. Article 49 of GCIV prohibits, “regardless of motive,” the transfer of individuals “from occupied territory to the territory of the Occupying Power.”⁶² Article 147 of the GCIV lists violations of IHL that constitute grave breaches, which includes the “unlawful deportation or transfer or unlawful confinement of a protected person.”⁶³

Natasha Arnpriester, Aryeh Neier Fellow
 Laura Bingham, Senior Managing Legal Officer
 James A. Goldston, Executive Director
 Open Society Justice Initiative

⁵⁹ For an in-depth examination of the implications for the population of the Crimean peninsula of the mass imposition of Russian citizenship that followed Russia’s seizure of the territory from Ukraine in 2014; Open Society Justice Initiative, *Human Rights in the Context of Automatic Naturalization in Crimea* (2018), available at <https://www.opensocietyfoundations.org/sites/default/files/report-osji-crimea-20180601.pdf>.

⁶⁰ Article 13(2) of the Universal Declaration of Human Rights, “Everyone has the right...to return to his country;” Article 5(d)(ii) of the Convention on the Elimination of All Forms of Racial Discrimination, “right...to return to one’s country;” Article 12(4) of the International Covenant on Civil and Political Rights.

⁶¹ Human Rights Committee, General comment No. 27, para. 21, U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999).

⁶² GCIV, note 58, above, at Article 49.

⁶³ Article 76 of GVIC requires that “[p]rotected persons accused of offences shall be detained in the occupied country, and if convicted they shall serve their sentences therein.” Though Article 66 permits some accused of certain offenses to be handed over to an Occupier’s “properly constituted, non-political military courts” (Article 64 of GCIV), this is only on the condition that the said court sits in the occupied country. Furthermore, the appeals courts should also sit in the occupied country.