



**FIDH, Center for Civil Liberties, Kharkiv Human Rights Protection Group, Advocacy
Advisory Panel**

Joint situation note

Fight against impunity in Ukraine

November 2015

FIDH, in partnership with its Ukrainian partner organisations, Center for Civil Liberties, Kharkiv Human Rights Protection Group and Advocacy Advisory Panel, present a joint situation note¹ which sums up main challenges to the fight against impunity identified by our organisations as well as key recommendations regarding the way to address them.

Main findings

A climate of impunity still reigns in Ukraine regarding grave violations of international humanitarian law and human rights law committed during the Maidan events, in Odesa in May 2014, in Crimea since November 2013 and most massively in Eastern Ukraine. Some isolated cases have been investigated and brought to trial, and there are very rare precedents of victims having received compensation for physical and moral damage caused to them. However Ukrainian national authorities have no systematic approach to the investigation and prosecution of perpetrators of these grave violations. Nor is there any comprehensive approach to reparations for victims of this conflict.

Ukrainian civil society and victims' lawyers denounce the **lack of political will** to investigate and prosecute crimes committed in Ukraine. It is demonstrated in many different aspects, including unreasonable delays in taking investigative actions following complaints, difficulties of lawyers of victims to access the case files, lack of access to certain crime sites even if under control of Ukrainian authorities (such as for instance the base of battalion 'Azov' attached to the Ministry of Interior), reluctance to investigate crimes committed by the Ukrainian side and complete absence of investigation of sexual and gender-based crimes. The fact that persons allegedly responsible for violations committed during the Maidan events still hold high-ranking positions in public office is

¹ International mission conducted by FIDH from 20 to 24 October 2015, included a two-day FIDH seminar for lawyers representing victims of the Maidan events and the ongoing conflict, as well as meetings with civil society and national authorities to discuss the pursuit of justice and to call for greater fight against impunity in the country.

of particular concern. Persons suspected of being directly responsible for crimes have systematically fled the country. Some of them managed to flee while being subject of an official investigation or after they have been arrested. Finally, corruption continues to undermine the conduct of genuine investigations in Ukraine.

Second, our organisations note the problematic fragmentation of on-going investigations and the lack of coordination between the various investigative bodies. A specialised unit for “crimes against peace, security of humanity and international rule of law” has recently been created within Ukrainian military prosecution, however its mandate is limited to crimes against national security, thus in practice committed by Russian military officers in the s.c. DPR/LPR controlled territories. Also, investigators within the Ministry of Interior are in charge of investigating crimes allegedly committed by officers of this very same Ministry. It appears furthermore that investigative bodies – attached to the General Prosecutor office, the Ministry of Defence, the Ministry of Interior, or the Services of Security – are poorly coordinating their work. This approach, consisting of dividing the investigations by nature of crimes and status of perpetrators among various bodies attached to different national authorities, appears to be inefficient and harmful to a proper investigation of violations suffered by civilians in this conflict, as it does not allow identification of the pattern and the scale of crimes committed. Indeed, national proceedings thus far mostly focus on specific minor offences while important evidence related to the most serious crimes committed within the context of the conflict is lost, preventing perpetrators of these crimes to be brought to justice.

Additionally, and partly as a consequence of the fragmented approach in the investigation of crimes committed in Ukraine, on-going domestic proceedings wrongly qualify the violations of international humanitarian and human rights law as other crimes under national law. The Ukrainian authorities have indeed adopted the position to prosecute individual cases and to qualify crimes committed by the separatist forces in the East as "terrorist acts", following the official qualification of the Ukrainian military operation as an "anti-terrorist operation". There are however reasons to believe that crimes committed in Eastern Ukraine not only constitute grave violations of human rights law and serious violations of international humanitarian law, but could also qualify as crimes against humanity and/or war crimes, as defined under the Rome Statute². Our organisations stress the importance of qualifying violations in Ukraine as crimes under international law since such qualification reflects the nature and the scale of on-going crimes committed since the beginning of the conflict.

Notwithstanding practical challenges related to the lack of access to territories in the East of Ukraine and in Crimea and the capacity limitations of Ukrainian investigative teams, the need to improve the efficiency of national investigations and to adopt a comprehensive approach consistent with international law cannot be overemphasized.

International Advisory Panel conclusions

Our organisations' conclusions echo the findings of utmost importance delivered by the International Advisory Panel³ constituted by the Secretary General of the Council of Europe in April

2 As developed in FIDH/CCL joint report published in October 2015 : « Eastern Ukraine: Civilians caught in the crossfire », available at : https://www.fidh.org/IMG/pdf/eastern_ukraine-ld.pdf

3 See <http://www.coe.int/en/web/portal/international-advisory-panel>

2014. The Panel was initially mandated to examine whether the investigation into Maidan violence met the requirements of the European Convention on Human Rights and the case-law of the European Court. In September 2014, its mandate was extended to assess the investigations of violence in Odesa on 2 May 2014.

In its report published on 31 March 2015⁴, the International Advisory Panel found that investigations into the violent incidents which took place during the Maidan demonstrations from 30 November 2013 to 21 February 2014 have failed to satisfy the requirements of the European Convention of Human Rights (ECHR). Similar conclusions on the non-conformity with the ECHR were made with respect to the investigations into the events in Odesa.

The Panel found that during the three months of the Maidan demonstrations, “there was no genuine attempt to pursue investigations” which hence did not begin promptly and posed substantial challenges for the subsequent phase of investigations. These challenges, however, cannot be considered as an excuse for failings such as the lack of practical independence and inefficiency. Inefficiency was the result of inadequate resources, inefficient work allocation and a lack of continuity in the leadership of the Prosecutor General Office. Moreover, the Panel underlined that the lack of cooperation on the part of the Ministry of Interior and the State Security Service had a negative impact, as illustrated by the example of the investigation on the Berkut officers' involvement in crimes.

The Panel also advised against the granting of amnesties or pardons to law enforcement officers in relation to unlawful killings or ill-treatment, and concluded that a coordinated communication policy has not been put in place to ensure adequate public scrutiny of investigations. As a result, substantial progress had not been made in the Maidan investigations.

In Odesa, the Ukrainian authorities initiated three investigations with respect to the clashes and the fire in the Trade Union Building that resulted in 48 deaths and several hundreds injured. The first covers the conduct of the police on 2 May 2014 and the release of detainees on 4 May 2014 after protesters attacked a local police station. The second investigation focuses on the mass disorder and the fire in the Trade Union Building on 2 May 2014. The third investigates the conduct of the State Emergency Service (SES) staff during the fire. In its [report](#)⁵ published on 4 November 2015, the International Advisory Panel found that the last two investigations lacked institutional and practical independence. Given the evidence indicative of police complicity in the mass disorder on 2 May 2014 and the hierarchical relationship between the SES and the Ministry of the Interior (MoI), the investigations as a whole should have been carried by an institution independent from the MoI.

The Panel further considered that the investigations were ineffective due to inefficient work division and inadequate allocated resources. The quality of the investigation was deficient: the authorities failed to show sufficient thoroughness and diligence as illustrated by the investigation of the late arrival of fire-fighters to the Trade Union Building. Until December 2014, no efforts were made to investigate the incident.

⁴ Report of the International Advisory Panel on its review of the Maidan Investigations. 31 March 2015 <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168048851b>

⁵ [Report](#) of the [International Advisory Panel](#) on its review of the investigations into the tragic events in Odesa of May 2014, 4 November 2015, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168048851b>

Aside from the flaws during the investigation phase, serious concerns were raised with respect to the prosecution and trial of suspects. For example, decisions to terminate proceedings on the grounds of lack of evidence, repeated recusals of judges, collective indictment without individual charges had had an adverse impact on the proceedings.

As for the public scrutiny of the investigations, the Panel acknowledged the promptness of information provided by the authorities to the public. However, lack of consistency, evenness and regularity of the information provided to the victims and next-of-kin was highlighted among the shortcomings.

As a result of these investigative deficiencies, the Panel concluded that substantial progress had not been made in the investigations into the violent events in Maidan and Odesa and that the authorities failed to take all reasonable steps to ensure that the investigations comply with Article 2 (Right to life) and Article 3 (Prohibition of torture and inhuman and degrading treatment) of the Convention.

Extension of the International Criminal Court (ICC) jurisdiction and the ratification of the ICC Statute

Our organisations hope the recent extension of the ICC's jurisdiction over the entire period of conflict in Ukraine will lead to the opening of an investigation by the Court into the situation, and we welcome Ukrainian authorities and civil society's commitment to cooperate with the ICC Office of the Prosecutor.

However we regret that the Constitutional amendment bill necessary to facilitate the ratification of the ICC Statute also includes amendments on other non-related and highly controversial issues. This puts the adoption of the entire bill at risk and therefore endangers the possibility of ratifying the Rome Statute in due course, despite an apparent consensus on the matter in Ukraine. The Office of the Presidency and the Parliament should separate the issue of amendments to the Constitution allowing for the ratification of the Rome Statute from other issues under debate in order to ensure a smooth and efficient procedure towards becoming a State party to the ICC.

Finally, our organisations observe the distrust of Ukrainians towards their judiciary and the request by Ukrainian lawyers for an international support mechanism of some sort for the investigation and prosecution of the most serious crimes in Ukraine. This type of international support to remedy the inefficiency of national proceedings might take various forms, *inter alia* the inclusion of international investigators within national teams, the creation of a national independent body supported by international staff, the intervention of an international commission of inquiry, or the establishment of a hybrid tribunal. Our organisations call for a comprehensive debate on the appropriateness and efficiency of each of the possible mechanism. The debate should take a form of consultations with national authorities, victims and affected communities, lawyers, civil society and other stakeholders.

Recommendations

Our organisations reiterate the recommendations to the international community, and notably the EU, Russia and the ICC, provided in the joint FIDH and CCL [report](#)⁶ *Eastern Ukraine, Civilians Caught in the Crossfire*. Emphasizing the responsibility of Ukraine to ensure that the investigations comply with the international law, the following recommendations are addressed to the national authorities as a result of the advocacy mission:

- Reiterate their political commitment to investigate and prosecute violations of international humanitarian and human rights law in Ukraine;
- Provide adequate resources to national investigative bodies and ensure coordination among them;
- Improve police enforcement, especially with regards to preventing fleeing of suspects outside of the country,
- Adopt a comprehensive investigative approach consistent with qualification of crimes under international law, and include the investigation of sexual and gender-based crimes;
- Adopt the Constitutional amendment bill allowing for the ratification of the Rome Statute and ratify it without delay;
- Open the debate on the eventual international judiciary support mechanism to fill the gap in the absence of genuine national investigations and prosecutions.

⁶ FIDH-CCL. «Eastern Ukraine: Civilians caught in the crossfire», October 2015, available at : https://www.fidh.org/IMG/pdf/eastern_ukraine-ld.pdf