

BETWEEN UNWILLINGNESS AND INCAPACITY: WILL HOPES FOR JUSTICE IN UKRAINE FADE AWAY?

Summary

Two years ago, Ukrainians took to the streets to demand government accountability, justice and democracy. Since that time, the country has got a new government and president, elected a new parliament, implemented some political reforms and signed an Association Agreement with the EU. However, hopes for accountability and justice remain largely unfulfilled. About a hundred Ukrainians gave their lives during the Maidan protests, while thousands have been killed, injured, tortured and taken as hostages during the ongoing armed conflict in Eastern Ukraine. The authorities have made only limited efforts to investigate these crimes and to bring the perpetrators to justice.

Ukraine has granted the International Criminal Court (ICC) jurisdiction over all alleged international crimes committed on its territory since November 2013. However, an international investigation cannot replace national criminal proceedings. Even if the ICC prosecutes crimes committed during Maidan and the armed conflict in Eastern Ukraine, it is likely that it will only investigate major violations and only bring main perpetrators on the top of the chain of command to justice. At the same time, hundreds of police officers who used excessive force against protesters, prosecutors and judges who clearly took unlawful decisions, and employees of law enforcement authorities who are complicit in abuses are still performing their duties. To restore the rule of law, prevent further violations and ensure proper law enforcement, transparent, fair and comprehensive national investigations should be conducted into all allegations of abuses.

The current state of investigations into Maidan crimes is worrying. Almost no perpetrators from special police forces have been brought to court; there is a trend to investigate minor episodes and disregard possible links between crimes and the systematic character of actions; no effort has been made to hold judges responsible for unlawful decisions taken against protesters; there has been no vetting of police officers, investigators and prosecutors involved in these events, which decreases the efficiency of investigations. After a year of uncoordinated efforts of different institutions such as the Kyiv City Prosecutor's Office, the Ministry of Interior and the Security Services, all the cases related to the Maidan protests were transferred to the Unified Special Investigation Department under the General Prosecutor's Office. This increased the quality of the investigations. However, the department is understaffed and lacks adequate resources.

Similar trends are observed with respect to the investigation into crimes related to the armed conflict in the Eastern Ukraine and Russia's annexation of Crimea. Currently responsibility for investigating such crimes is divided between different authorities based in different regions of the country, and no effort to consolidate these investigations and study systemic patterns has been made. There is a trend of primarily investigating minor offences, while serious crimes are ignored. The process of investigation is non-transparent, especially with respect to the cases dealt with by the Security Services.

Both the investigations into Maidan crimes and the investigations into crimes perpetrated during the conflict in Eastern Ukraine are undermined by the lack of political will to identify and punish perpetrators¹

1. Which crimes were committed?

1.1. The Maidan protests

The protests dubbed Euromaidan began on and around Maidan Square in Kyiv on 21 November 2013 after then President Yanukovich announced that he would not sign the Association Agreement that had been negotiated with the EU. Protests surged after a demonstrations were violently broken up by riot police early on 30 November 2013. From Kyiv the protests quickly spread to the cities all over Ukraine. While the rallies were largely peaceful for the first three months, protesters clashed with riot police on 18 February 2014. During 3 days, on 18-21 February, almost 100 protesters were killed. On 22 February, Yanukovich fled the capital. The new interim government of Ukraine that was formed publicly announced that a thorough investigation of crimes committed by police and state officials against protesters would be investigated.

The main events relating to Euromaidan that should be investigated are:

- 1) Unlawful actions of the police and the use of the excessive force against peaceful protesters on 30 November 2013;
- 2) Beating and unlawful detention of protesters on 1 December 2013;
- 3) Violations of the right to freedom of assembly through the prohibition of a peaceful rally on 10 December 2013;

¹ FIDH, Center for Civil Liberties, Kharkiv Human Rights Protection Group, Advocacy Advisory Panel Joint situation note "Fight against impunity in Ukraine" November 2015, https://www.fidh.org/IMG/pdf/fight_against_impunity_in_ukraine_joint_situation_note_november_2015.pdf

- 4) Actions of police forces during the clashes with protesters of 18-21 February 2014, which resulted in that some 100 protesters were killed and around 700 were injured;
- 5) Concerted unlawful actions of paramilitary unions, so called “titushka”;
- 6) Court decisions infringing the right to freedom of assembly and other rights of protesters, such as decisions to prohibit peaceful rallies, as well as to fine, detain and confiscate the driving license of peaceful protest participants; and
- 7) Arbitrary detentions and abductions of protesters.²

1.2. The armed conflict in Eastern Ukraine and the annexation of Crimea

Almost immediately after the Maidan events and the escape of then President Yanukovich, unrest broke out in Crimea and the Eastern provinces of the country. In February 2014, all public buildings in Crimea were seized by so-called Crimean self-defense paramilitary formations, with military support by the Russian Federation. Soon the Ukrainian army and representatives of the Ukrainian government were forced to leave the peninsula. In April 2014, after the violent takeover of public buildings in the Lugansk and Donetsk regions, the government announced that it was launching a so-called anti-terrorist operation in these regions. Ukrainian army and volunteer paramilitary battalions were deployed to Eastern Ukraine. After this, fighting between these forces and separatist forces began. The active phase of fighting lasted until 5 September 2014, when a ceasefire was negotiated. However, fighting did not stop completely. Occasional attacks and local escalations of fighting have regularly taken place in the months since then. Since the beginning of the conflict, numerous violations of international humanitarian law have been committed by both sides of the conflict. The crimes related to the armed conflict can be broken down into the following categories:

- 1) Purposeful shelling of residential areas, hospitals, schools (examples include the shelling of Mariupol by separatists on 24 January 2015³, shelling of Kramatorsk by separatists on 10 February 2015⁴, shelling of a hospital in Krasniy Liman⁵ by the Ukrainian army on June 3, 2014). Common features of these episodes is the use of inherently indiscriminate means of warfare such as unguided rockets and cluster munitions, and/or the reliance on inherently indiscriminate methods such as area bombardments and the targeting of areas with high concentrations of civilians.

² CCL, Year of impunity (Рік безкарності) Access <http://ccl.org.ua/wp-content/uploads/2013/10/Rik-bezkarnosti-gromadskij-analiz-rozsliduvannya-sprav-YEvromajdanu.pdf>

³ IPHR, Investigation of the shelling of Mariupol, http://iphronline.org/wp-content/uploads/2015/09/mariupol_mission_report_febr_2015.pdf

⁴ IPHR, Rockets hit residential area in Kramatorsk, Ukraine http://iphronline.org/wp-content/uploads/2015/05/rockets_hit_residential_area_in_kramatorsk_ukraine.pdf

⁵ Memorial, Report on the visit to krasniy Liman (RUS) <http://memohrc.org/news/otchet-o-monitoringovom-vizite-v-g-krasnyy-liman-doneckoy-oblasti-ukraina-osushchestvlenno>

2) Killings, torture, abductions and forced disappearances of civilians belonging to particular groups⁶. Separatists have systemically targeted civilians belonging to the following groups: right-wing members (“pravoseki”), those accused of being part of the Euromaidan movement, and more generally civilians perceived as being pro Ukrainian or anti-separatist; religious leaders and vocal followers of faiths other than that of the Russian Orthodox Church of the Moscow Patriarchate. Hundreds of civilians and captured combatants have been held without charge or judicial supervision in makeshift prisons across the separatist-controlled territory. Similarly, hundreds of actual or perceived separatist have been held without charge by Ukrainian authorities and pro-Kyiv volunteer battalions. Detainees are being held for ransom, as bargaining chips, de facto prisoners of war or “on suspicion of espionage.” Many detainees have been subjected to inhuman and degrading treatment and torture⁷. Abductions and forced disappearances is also a widespread practice used by the current Crimean authorities against those who are perceived as opponents. Particular groups targeted are Crimean Tatars, ethnic Ukrainians, people who publicly express pro-Ukrainian positions, as well as representatives of all churches except that of the Orthodox Church of the Moscow Patriarchy. Numerous cases of searches in mosques, setting mosques on fire, attacks on representatives of the Orthodox Church of the Kiev patriarchy, abduction of activists have been reported.⁸

3) Summary executions. In the separatist-held areas arrests, confinement and interrogations take place in the absence of judicial supervision or set procedure. Those accused of petty crimes, substance abuse and curfew violations tend to receive a summary punishment of several days’ or weeks’ detention⁹.

4) Destruction and/or appropriation of public or personal property is perpetrated across the conflict-affected area of Eastern Ukraine by separatist and pro-Ukrainian forces.

5) Case, which relates specifically to Crimea, is extensive appropriation of property, carried out unlawfully. This relates to nationalization, or destruction of the state owned Ukrainian property.

6 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

7 IPHR, Fighting impunity in Eastern Ukraine <http://iphronline.org/wp-content/uploads/2015/10/Fighting-impunity-in-Eastern-Ukraine-October-2015.pdf>

8 MRG, Ukraine, Deteriorating frights for Crimean Tatars in State of World Minorities 2014 <http://minorityrights.org/wp-content/uploads/2015/07/MRG-state-of-the-worlds-minorities-2015-FULL-TEXT.pdf>

9 Ibid

2. Status of national investigations

2.1. Maidan cases

Almost two years have passed since the Maidan events. Public officials regularly make statements saying that it is a priority for the state to investigate crimes committed during these protests and punish the perpetrators. However, analyses of the process of investigation raise serious concerns.

According to data available to lawyers of victims, only around 10 criminal cases are now being investigated. Among them are cases related to the clashes and beating of students on 30 November 2013; the clashes on 1 December 2013; the attack on so-called Avtomaidan protesters in Kyiv; the forced disappearance of journalist Igor Lutsenko; the killing of people participating in protests Yuriy Verbitskiy and Viacheslav Veremiy; and clashes and killings in January-February 2014¹⁰.

Lawyers and human rights organizations point to the following problems of the investigations:

- No investigation has been opened into many relevant episodes and no effort has been made to investigate common patterns between separate cases. There is an impression that the investigators are trying to diminish crimes, qualifying violations as minor offences and presenting standardized accusations. Not a single case has been opened against any representative of the Ministry of Interior's top level command and only few cases have been initiated on key issues such as the use of torture and ill-treatment against protesters and the creation of criminal organizations or paramilitary formations. For instance the investigation of crimes committed by so-called "titushki" (a paramilitary gang harassing protesters) has focused on isolated individuals, while no effort has been made to look into how the actions of the "titushki" were coordinated or their alleged links to militia or government representatives at that time. The same pattern can be seen in the investigation of unlawful decisions of prosecutors and judges during the protests. Each case is examined separately; possible pressure on judges to rule against protesters is not examined.
- Insufficient efforts have been made to establish responsibility of representatives of special militia units for committed crimes. In some cases, officers suspected of crimes have been able to flee the country. Other officers suspected of crimes have not been suspended from duty but continue working and communicating with colleagues, which complicates the investigation. There has also been no

¹⁰ BBC Ukraine, Crimes against Maidan, who blocks the investigation? (Злочини проти Майдану: хто гальмує розслідування)

http://www.bbc.com/ukrainian/politics/2015/11/151030_anniversary_maidan_revolution_sd

consistent effort to ensure the safety of “Berkut” special security officers who could witness about crimes committed during the Maidan protests. There is no real witness protection program, and officers are not really encouraged to testify as refusal to witness is tolerated by the current leadership of the Ministry of Interior.

- No vetting process in the law enforcement bodies has been conducted. In some cases, people allegedly involved in unlawful actions during the Maidan protests are still working in the law enforcement bodies and some even are in charge of the investigation of cases related to Maidan.
- Many investigations have been delayed. For instance, the Kyiv City Prosecutor’s Office refused to consider protesters injured at Maidan on 10 December 2013 as victims for a year. Only in January 2015, when the investigation was taken over by the General Prosecutor’s Office they were granted such a status. The same happened in the case of unlawful detention of protesters during January–February 2014.
- There is a trend whereby prosecutors are bringing to court cases that have not been properly investigated and where not all evidence has been collected and properly examined. This leads to situations where judges rule that there is not enough evidence and close the case and/or relatives of victims have to submit evidence themselves for the judge to consider. This decreases the likelihood of establishing the truth.
- Another problem is the lack of independence of prosecutors and investigators. Investigations are often politicized. For instance, the Prosecutor General’s Office was pressured to deliver results by the first anniversary of the Maidan events. As a result, the office quickly compiled a submission to the ICC to show some progress in establishing justice, but the submission was very weak because a lot of evidence was left out.

To facilitate the investigations into the Maidan crimes, a Unified Department on Special Investigation was created in the General Prosecutor’s Office. Lawyers and human rights defenders recognize that creation of this department has indeed facilitated the investigation: more thorough work has been done and more evidence studied since it was set up. This department has also shown more readiness to investigate links between different crimes and different perpetrators. However, the department is extremely understaffed. Currently 18 investigators of the department are working on some 2000

cases¹¹. One person is in charge of coordination all activities of the department. Another problem of the department is the lack of equipment and specialized IT skills of employees to analyze properly available video and audio evidence.

It is evident that the lack of progress in the investigation is mainly caused by the lack of political will to establish the truth and find the real perpetrators, and by the absence of access to a big part of eastern Ukraine and Crimea, but which can not be seen as an excuse for non-action. Moreover, mid-level officials often block the investigation, but the political leadership of the country does not make the extra effort needed to break this system of collusion.

2.2. Investigations related to the armed conflict in Eastern Ukraine and the annexation of Crimea

Currently the division of powers between institutions conducting investigations of crimes related to the conflict in Eastern Ukraine is the following:

1) The **Security Service of Ukraine** (SSU) deals with the investigation of cases qualified as terrorism and separatism. The process of investigation is extremely closed; there is no information on the progress of these investigations except occasional public statements of officials. In March 2015 Head of the Chief Investigative Unit Vasiliy Vovk stated that currently the SSU is working on 4000 cases related to crimes committed in Eastern Ukraine¹². Due to the lack of more detailed information, it is not possible to assess the efficiency of the process of investigation. No case related to crimes in Eastern Ukraine is known to have been brought to court yet. In March 2014, the SSU started investigating cases related to the seizure of public buildings in Crimea, the seizure of border control points, actions related to the armed coup organized by the head of the Parliament of Crimea V.Konstantinov and Member of Parliament S.Aksenov¹³. The case against S.Aksenov and V.Konstantinov was brought to court, but the warrant issued by Shevchenkivskiy District Court of Kyiv was not enforced¹⁴. Since then, there has been no information on the investigations related to the annexation of Crimea led by the SSU.

11 Oleksandra Matviychuk, How Maidan cases are investigated <http://nv.ua/ukr/opinion/matviychuk/jak-naspravdi-rozslidujutsja-spravi-evromajdana-80711.html>

12 Strana.in.ua SSU investigates 4000 cases of separatism and terrorism Access <http://strana.in.ua/news/accidents/6388-sbu-vedet-rassledovanie-4-tysyach-del-za-separatizm-i-terrorizm.html>

13 Channel 5, SSU investigates 16 cases related to separatism, <http://www.5.ua/suspilstvo/sbu-rozsliduiet-16-kryminalnykh-provadhzen-za-separatyzm-44252.html>

14 Mirror of the week, Arrest warrant for Aksenov and Konstantinov were issued by the court <http://zn.ua/POLITICS/sud-vynes-reshenie-o-zaderzhanii-krymskih-separatistov-aksenova-i-konstantinova-140467.html>

2) The **Military Prosecutor's Office** investigates crimes committed by members of the Ukrainian army. These include all types of crimes, ranging from defecting from the army to organized looting and torture and ill-treatment. Court hearings in many of these cases are about to start. It is too early to evaluate the activity of the Military Prosecutor's Office. However, there is a worrying trend of multiplying the number of cases by addressing less serious crimes such as the absence without leave from a military unit or evasion of service meanwhile grave violations are not investigated. According to the report of the UN Human Rights Monitoring Mission Ukraine, by May 2015 a total of 7,560 criminal investigations into crimes committed by Ukrainian soldiers had been initiated since the beginning of 2014, including 1,964 cases under Article 407 of the Criminal Code (absence without leave from a military unit or place of service), 948 under Article 408 (desertion), and 107 under Article 409 (evasion from military service). The HRMMU was unaware of any criminal investigations conducted by the Office of the Military Prosecutor related to human rights violations against civilians and violations of international humanitarian law in the east¹⁵. In regards to the annexation of Crimea, the Military Prosecutor's Office is investigating several cases of defection of soldiers and a case related to Security Service officers who were serving in Simferopol. There is no information on the progress of these investigations.¹⁶

3) The **Ministry of Interior** opened a number of criminal proceedings into the killings of members of the Ukrainian armed forces and civilians in the area where the government's security operation is being carried out under Article 115 of the Criminal Code (intentional homicide).¹⁷ However, there has been little progress on these investigations due to the lack of access to the crime scenes and to victims. The situation is similar with respect to cases of abduction and forced disappearances in Crimea. Complaints were filed by the lawyers of victims, but the progress on the investigation has been limited.¹⁸ Apart from this, local militia offices are investigating cases based on complains filed by internally displaced persons upon their arrival to territories controlled by the Ukrainian government. The majority of such cases are closed before they are brought to court. The main problem of these investigations is the lack of coordination between different militia units. If the case is filed far from the area of the armed conflict (for example in Kyiv or Dnipropetrovsk), local officers lack the capacity to conduct a proper investigation and gather evidence. If the investigation is launched in regions closer to the places where the crimes were committed, other factors interfere. Cases against separatists and their

15 OHCHR Report on the human rights situation in Ukraine 16 February to 15 May 2015, Access: <http://www.ohchr.org/Documents/Countries/UA/10thOHCHRreportUkraine.pdf>

16 IPHR interview with Yevgenia Zakrevska, lawyer, November 23, 2015

17 ibid

18 IPHR interview with Yevgenia Zakrevska, lawyer, November 23, 2015

supporters are usually complicated and sometimes politically sensitive because suspects may still occupy public position. Ongoing discussion of blanket amnesty for all parties involved in the conflict in the Eastern Ukraine make investigators hesitant to take on investigation of the cases which might be closed if the amnesty is passed. Moreover, there is no political will or any kind of clear order from higher-ranking authorities to prioritize the investigation of such cases. Different regional militias often launch cases against the same perpetrators. Without coordination of the activities of different offices, this results in multiple, separate investigations in the course of which systemic violations are not studied.¹⁹

Thus, the main problems are currently the following:

- The lack of transparency of investigations;
- The lack of coordination of the activities of local bodies of the Ministry of Interior;
- The tendency by the Military Prosecutor's Office to focus on investigating cases involving less serious crimes, creating the risk that gross violations may not be addressed

These problems can be tackled by creating a unified investigation unit under the General Prosecutor's Office, which should include representatives of the Ministry of Interior, the Security Service and the General Prosecutor's Office. Such a body will be able to unify separate cases within the framework of one investigation, focusing on patterns and systemic violations. It will be also easier for civil society to monitor the progress of activities of such a body. Considering the experience of the Unified Department on Special Investigation under the General Prosecutor's Office set up to investigate cases related to the Maidan protests, it is very important to make sure that a new unit is properly staffed and has all necessary equipment and capacity to operate. Creating a structure of this kind would help the national authorities demonstrate real political will to establish the truth and conduct proper investigations.

3. Recommendations

International criminal justice instruments are not sufficient to fight impunity in Ukraine. Proper national investigations into all allegations of violations related to the Maidan events and the violence in Eastern Ukraine and Crimea should be undertaken and all perpetrators should be brought to justice. Thus, the international community should encourage the Ukrainian government to:

¹⁹ IPHR, Interview with Volodymyr Yavorskiy, Ukrainian Helsinki Human Rights Union, November 20, 2015

1. Recognize that cooperation with the ICC should be supplemented by proper national investigations. The government should acknowledge that current national investigations do not meet the required standards. Perpetrators of all levels of command should face prosecution. It is very important to conduct vetting of police officers, prosecutors and judges identifying those responsible of crimes and bringing them to justice. Taking these steps is the only way to restore justice and build a democratic society.
2. Create a unified agency for the investigation of crimes committed during the armed conflict in Eastern Ukraine. Such an agency should include representatives from the General Prosecutor's Office, the Security Service of Ukraine and the Ministry of Interior. The agency should consolidate the investigation of cases related to the armed conflict and study systemic patterns of crimes.
3. Enhance the capacity of the Unified Department on Special Investigation set up under the General Prosecutor's Office to facilitate investigation of crimes related to Maidan.
4. Ensure transparency of investigations and take into account findings of non-governmental organizations conducting alternative investigations into violations perpetrated both during the Maidan protests and the conflict in the Donbass region and Crimea