PISM POLSKI INSTYTUT SPRAW MIĘDZYNARODOWYCH
THE POLISH INSTITUTE OF INTERNATIONAL AFFAIRS

BULLETIN

No. 27 (622), 4 March 2014 © PISM

Editors: Marcin Zaborowski (Editor-in-Chief) ● Katarzyna Staniewska (Managing Editor)
Jarosław Ćwiek-Karpowicz ● Artur Gradziuk ● Piotr Kościński
Roderick Parkes ● Marcin Terlikowski

Yanukovych at the ICC? A Fork in the Road

Maria Radziejowska

Three months of unprecedented anti-government protests in Ukraine culminated in bloodshed. The former president, Victor Yanukovych, disappeared only hours after he conceded to an agreement settling the crisis. The new authorities are now seeking to hold Ukraine's former leadership to account, and the International Criminal Court (ICC) has been brought up as one of the options for doing this. Ukraine is in its first days of transition, and the questions as to the best way forward for dealing with the "abuses" of the past regime arise. The authorities should use this opportunity to instigate a broad public debate on the matter.

Ukraine on the Brink of Change. Following three months of unprecedented anti-government protests in which over 80 people lost their lives and hundreds were injured, president Yanukovych agreed to settle the crisis. Only hours late, he left Kyiv. The Ukrainian parliament elected Oleksandr V. Turchynov as interim president. The question of holding to account those responsible for the crimes allegedly committed in relation to the protests is at the top of the agenda for the new transition authorities. On 24 February, unofficial information was released by the acting minister of internal affairs, Arsen Avakov, that Yanukovych was wanted by the Ukrainian authorities.

ICC on the Radar. The day after this information was released, the Ukrainian parliament adopted a draft declaration accepting the ICC's jurisdiction over crimes allegedly committed during protests in Ukraine between 30 November 2013 and 22 February 2014. However, the actual declaration has not yet been submitted to the Court's registrar. Apart from ratifying the Rome Statute (RS), the treaty that established the ICC, submission of such a declaration might be the most expeditious way for Ukraine to give the ICC jurisdiction over the alleged crimes in question. Nonetheless, it would still be up to the ICC prosecutor to open investigations and to issue arrest warrants against specific individuals. Furthermore, the ICC judges would need to determine whether the crimes allegedly committed in relation to the protests fall under the court's jurisdiction. The court can adjudicate only in cases of crimes against humanity, war crimes, genocide and aggression. In this case, it could be asserted that the alleged crimes could possibly be categorised as crimes against humanity. According to the Rome Statute, such crimes must be part of a wide-spread and systematic attack against a civilian population, carried out as part of or in furtherance of a state policy (article 7(1) and (2) RS). Finally, in order to take up the case, the ICC would need to determine that Ukraine is unable or unwilling to prosecute those allegedly responsible for the crimes in question. Then, the court would also assess whether the case is of sufficient gravity for it to deal with (article 17 RS).

If Ukraine eventually submits its declaration to the ICC, it might be difficult to meet these requirements. For the ICC, the case would be the first ever concerning a European state. It would involve adjudicating upon crimes alleged to have been committed in contexts that the ICC has not previously encountered. At the same time, it would engage the court in a primarily internal political conflict, albeit one in which Russia, the EU and the United States are all involved.

Reasons behind the ICC Call. Theoretically a trial at the ICC is one of the possible avenues through which justice for the alleged crimes may be sought. However, it is only a complementary one. Given the abruptness of the vote on the draft declaration, the day after unofficial information that a warrant for the arrest of Yanukovych and other officials was issued, it appears that the new authorities fear that they lack the legitimacy to prosecute the former regime. The official arrest warrants were not issued until a day after the declaration was adopted. The vote on the draft referral of the case to the ICC reflects an urge to seek justice for the crimes allegedly committed against the protesters. Simultaneously, however, it aims to shift the responsibility for possible investigation and trials away from

the new authorities and onto an international institution. Thus it would be more challenging for potential critics, both domestic and international, to question the impartiality of the decisions taken by an international institution such as the ICC, than it would be to question those of the new Ukrainian authorities. Yet this move might also be seen as an attempt to gain greater recognition for its decision to conduct national investigations and trials.

Domestic Alternatives. ICC proceedings would probably not suffice to fully deal with the alleged crimes concerned. However, prosecuting Yanukovych and his regime domestically under the new authorities might have a negative impact on the efforts to reconcile politically and socially divided Ukraine. Investigations and trials in connection with the alleged crimes related to the demonstrations must be carried out transparently and impartially. The question is whether the Ukrainian judicial system today has both the legitimacy and capacity to investigate and prosecute those accused of the crimes in question in accordance with international human rights standards. The current judicial and law enforcement system, linked by most with the former establishment and corruption, does not enjoy broad recognition among Ukrainians. According to polls conducted in January 2014 by the Kyiv Institute of Sociology, only 12% of respondents trust judicial institutions, whereas 80% do not. With regard to the police, these numbers stand at 12.3% and 77% respectively. This demonstrates a plausible risk that domestic trials might only deepen divisions within society and counter any efforts to reconcile those standing at various points on the Ukrainian political spectrum.

Reform of the justice system began in 2010 but has never been fully completed. Some of the laws adopted, such as the law on the judicial system and the status of judges, need further amendments to secure fuller independence of the justice system from the executive and other political powers. Others, such as the law on the public prosecutor's office, were adopted but are yet to be fully implemented. In the current context, further efforts to secure the Ombudsman's autonomy are vital.

Without questioning the need to document and prosecute crimes that were allegedly committed in Ukraine during recent months, there seems to be overwhelming support for lustration, which many consider a key condition for a successful democratisation. A public debate on establishing a lustration mechanism most suitable for the Ukrainian context is necessary. The key questions to consider would be, among others, the temporal, material and personal scope of the future lustration mechanism. That is, for whom, and for what behaviour or relationships, would participation in the lustration process be obligatory, and what consequences would result from a negative (for the participant) outcome. Then there is the question of the modes of the lustration procedure and the institutions responsible for conducting the process. Any model must ensure judicial remedies for those subjected to lustration. Due consideration must also be given to the regulation of the organisation of and access to document archives pertaining to lustration proceedings. Various, context-specific models have been applied in the former communist countries, not all of which were successful. Lustration may offer a suitable foundation upon which the state can be rebuilt, based on new, democratic grounds, provided that the risks of abusing lustration for political gain are reduced to the fullest possible extent. The process may play an important role in narrowing social splits, and in furthering the process of transformation in Ukraine.

Conclusions and Recommendations. Ukraine remains socially and politically divided, and the new authorities do not enjoy nationwide support. Thus any mechanisms aimed at reckoning with alleged crimes and abuses by the former authorities should be subject to a broad public debate. In order to gain the fullest legitimisation possible, any national prosecutions or lustration proceedings should take place following parliamentary elections and the appointment of the new government.

The same pertains to submitting a declaration to the ICC, and thus accepting the court's jurisdiction over the crimes allegedly committed in relation to the protests. However, a decision to ratify the Rome Statute would be advisable and most welcome by the international community. In the event that prosecutions take place, it would be advisable that they are subject to international monitoring. If need be, assistance of international judges might be considered, as for instance happened at the War Crimes Chamber in the Court of Bosnia and Herzegovina. This could be one of the means to strengthen the legitimacy of the courts adjudicating on the cases pertaining to the crimes allegedly committed in relation to anti-government protests.

Whichever avenue Ukraine takes, completion of the reform of the judicial and law enforcement systems is vital. To this end, continuous support from, among others, the Council of Europe and the Venice Commission, has been and remains crucial. Poland, together with other countries that have implemented lustration processes (for example the Czech Republic and Slovakia), should share the lessons learned on successes and failures of various lustration models. Experts in the area could advise Ukraine on how to establish the most suitable tools and mechanisms for lustration in the social and political context. This could be done, for instance, through the EU's "twinning" format, or through a series of study visits, workshops with legal experts and sustained supervision of the process.