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**Case commentary Series (by Pavlo Pushkar<sup>1</sup>)**

**CASES OF THE EUROPEAN COURT OF HUMAN RIGHTS  
SIGNIFICANT FOR EUROPEAN INTEGRATION OF UKRAINE**

**“MAIDAN JUDGMENTS” CONCERNING UKRAINE,  
of 21 January 2021 (final on 21 April 2021)**

*The present case commentary is focused on cases concerning the so-called Maidan events of 2013-2014. The commentary suggests that the cases at issue underline existence of the long-standing systemic and structural problems within the domestic legal system of Ukraine, which need to be resolved, notably in order to harmonise the legislative and institutional framework of protection of human rights with the requirements of the European human rights law, which incorporates both the European Convention of Human Rights and the EU Charter of Fundamental Rights. The cases touch upon a number of previously deficient legislative provisions and institutional practices. However, most importantly they underline the need to adopt legislation to regulate and ensure protection of freedom of association. Such demand is clearly ensuing from the case-law of the Court and its findings in specific cases as to the lack of coherent legislative framework for this right. The extensive Council of Europe expertise in the area covered by the judgments is surely of reference to the implementation measures – the CPT standards, Venice Commission recommendations, other elements, as well as the findings of the International Advisory Panel are all of relevance. Change is needed urgently as the problems identified in the judgments of the Court clearly fall within the rule of law and justice cooperation aspects of interaction not only with the Council of Europe, but also with the European Union, under the Association Agreement with Ukraine.*

**Keywords:** efficient investigations, ill-treatment, loss of life, arbitrary detention, disproportionate interference with freedom of association, European Court of Human Rights, Maidan judgments, leading cases, repetitive cases, execution of judgments of the European Court, Committee of Ministers, Council of Europe.

On 21 April 2021 the five judgments of the European Court of Human Rights in the cases concerning the so-called “Maidan events” became

final and binding for Ukraine.<sup>2</sup> The Ukrainian authorities have an obligation now, under Article 46 of the Convention, to undertake measures with a view to ensuring *restitutio in integrum* in these cases.

<sup>1</sup> The views expressed in this case commentary are solely of the author. They are personal academic views and do not represent a view of the Council of Europe or the Department for the Execution of Judgments of the European Court of Human Rights, where the author is employed. The present commentary reflects the content of a presentation made during the 2021 Spring School on the Freedom of Expression and Freedom of Association (10 to 18 May 2021), organised in cooperation with the OSCE Project Coordinator in Ukraine and the Council of Europe. It was held on-line.

<sup>2</sup> Judgments in the cases of *Shmorgunov and Others v. Ukraine* (nos. 15367/14 and 13 others), *Lutsenko and Verbytskyy v. Ukraine* (nos. 12482/14 and 39800/14), *Kadura and Smaliy v. Ukraine* (nos. 42753/14 and 43860/14), *Dubovtsev and Others v. Ukraine* (nos. 21429/14 and 9 others) and *Vorontsov and Others v. Ukraine* (nos. 58925/14 and 4 others). All of the judgments above are available from the HUDOC database of the Court.

The authorities also have an obligation to ensure that similar breaches of the Convention no longer repeat themselves – an international law obligation of non-repetition must be complied with in both good faith and according to the principle of *pacta sunt servanda*. Similarly, an obligation of ensuring cessation of the continuing breaches of the Convention, especially from the point of view of unchanged systemic and structural deficiencies in the domestic system of Ukraine previously identified in the judgments of the Court, notably with a view to facilitate and protect peaceful assemblies, is also one of the primary aims of required remedial action. Such a course of action is ensuing from the established liability of the State for multiple breaches of international law in these cases and as declared by the Strasbourg Court. All three instances of the required remedial action – *restitutio in integrum*, cessation and non-repetition are clear demands ensuing from the established State liability. These demands are being based on the general principles of international law and the state practices, in the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (also known as "ARSIWA").

In 2001 the Draft Articles were submitted to the attention of the United Nations General Assembly in a report which contained commentaries to them. They never became a finally approved international legal document, notwithstanding the fact that the International Law Commission had attempted to both codify and develop provisions of the international law on State responsibility. The Draft did not find consensus among the States, being not recognised as an authority or even being objected to by some States, who conceive international law primarily as consisting of the international treaties, to which the States shall give their "blessings". For such states – non-approved provisions of international law are simply not a part of international law. The work on the Draft Articles started from the moment of inception of the United Nations and had been one of the primary aims of work of the International Law Commission. It has lasted for more than 50 years. The Draft Articles were eventually "commended to the attention of the Governments without prejudice to the question of their future adoption or appropriate action".<sup>3</sup> The idea was that these Draft Articles

would serve the basis for an international treaty, under the auspices of the United Nations. Nevertheless, not being adopted in a form of a treaty, they still have served tremendously its proclaimed aims – progressive development of international law in the area of great concern after the WWII,<sup>4</sup> specifically with a view to giving real effect to individual's standing in international law and the demands to restore *status quo ante* for the breaches inflicted on individual's rights. The aim of the Draft Articles could also be seen in limiting arbitrary or illegal acts of states vis-à-vis their counterparts in horizontal relations between them, but in "vertical" relations as to their citizens, with the main aim being quite pragmatic, but also dignified as focusing on achieving international rule of law by giving a sanctioning tool to international law itself.

The Draft Articles, therefore, to this date are the key doctrinal international law text on issues of State liability, on obligations arising from established State liability, on the issues of remedial actions and ensuing reparations – restitution, compensation, satisfaction. As Judge Rosalyn Higgins mentioned in her seminal work on international law: "it is important to understand how [international law] determines the international responsibility of states. ... the law of state responsibility is about obligations incurred when a state does act ... In the law of state responsibility one might be forgiven for thinking that there is almost nothing that is certain."<sup>5</sup> This statement is possibly partly true, from the point of legal theory, however, it has a different meaning in the practice of the Convention as ensuing from how the State liability doctrine has been realized in practice, by both the Strasbourg Court and the Committee of Ministers of the Council of Europe. In particular, it is seen that the principles of State responsibility (I use "liability" and "responsibility" interchangeably) have gained specificity in particular areas of international law, such as the European human rights law.

One should note that the Draft Articles have been cited extensively in various sources, including most recently in the judgment of the Grand Chamber of the European Court of Human Rights in the case of *Ilgar Mammadov v. Azerbaijan* (Article 46).<sup>6</sup> The Court, in particular, in that case, referred to the fact

<sup>3</sup> UN General Assembly Resolution adopted at the Fifty-sixth session held on 28 January 2002. *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr.1). For the text of the Articles and Commentary, see the Report of the International Law Commission on the Work of its Fifty-third Session, *Official Records of the General Assembly, Fifty-sixth Session* (Supplement no. 10 (A/56/10), chap. IV.E.1 and chap. IV.E.2, pp. 46 and 133-145). The text of the Articles is annexed to General Assembly resolution 56/83 of 12 December 2001 and corrected by document A/56/49 (Vol. I) / Corr. 4.

<sup>4</sup> James Crawford, Jacqueline Peel and Simon Olleson, "The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading," *European Journal of International Law* 12, no. 5, (2001): 963–91.

<sup>5</sup> Rosalyn Higgins, *Problems and Process: International Law and How We Use It*. Chapter 9, 146. (24<sup>th</sup> August 1995).

<sup>6</sup> See *Ilgar Mammadov v. Azerbaijan* (infringement proceedings under Article 46(4)), Grand Chamber judgment of 29 May 2019. <http://hudoc.echr.coe.int/eng?i=001-193543>

that the Draft Articles are now widely referred to and are used as a basis for decision-making by various international courts and tribunals. This suggests, once again, that they have partly reached their proclaimed aim. They, according to the Court, “formulate general conditions under international law for the State to be considered responsible for wrongful actions and omissions, and the legal consequences which flow therefrom.”<sup>7</sup> The states found to be in breach of international law are therefore to cease that act, if it is continuing and to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.<sup>8</sup> The responsibility of states establishes also an obligation of reparation for the injury caused by the internationally wrongful act.<sup>9</sup> The Articles also suggest various forms of reparations, i.e. restitution, compensation or satisfaction, which could be provided for separately or in combination with other forms of reparations.<sup>10</sup> In particular, as to *restitutio in integrum* – the requirement is to re-establish the status *quo ante* that existed before the breach occurred. In some instances, full *restitutio in integrum* would not be possible and could be “covered” by satisfaction potentially consisting in acknowledgment of the breach, expression of regret, a formal apology or another appropriate modality.<sup>11</sup>

The approach to reparations and remedial action on the basis of the judgments of the Strasbourg Court is largely reflecting the approach taken in “general international law” on State liability for acts contrary to international law. It is indeed in synchrony with “general international law”, being possibly more nuanced with respect to and aligned with the ideas of “general and individual measures” required on the basis of the inherently declaratory judgments of the Court. While the judgments “reveal” the instances of a breach of the Convention, they largely do not establish a specific remedial action to be taken by the State in the suggested areas above. Such action needs to be developed with the involvement of the State, under the guidance given by the Committee of Ministers of the Council of Europe, acting under Article 46 of the Convention. The most complex issue is though for the judgments pending execution, insofar as it specifically concerns the cases concerning Maidan, is where there are *lacunae* at the domestic level in capacity of the State to enforce rights under the Convention. Therefore, in many instances, it is not only the requirements of Article 46, which are

engaged in the execution process, but also wider obligations of subsidiarity and margin of appreciation, which are now a part of the Preamble of the Convention, as well as the obligations arising from Article 1 of the Convention – obligation to ensure effective enforcement of rights as well as the Article 13 of the Convention – obligation to establish and to give effect to “accessible” and “effective” remedies, compliant with the Convention. In this sense, the domestic system of human rights protection, with Convention being an integral and indissociable part of it, cannot be replaced by the European human rights supervision mechanism. The subsidiary dialogue between these hierarchically equal systems as to implementation of the Convention must be put in place through direct pre-emptive application of the Council of Europe legal framework, which includes the Convention, case-law of the Court and the Committee of Ministers’ guidance on execution matters or alternatively through the follow up action required on the basis of judgments of the Court. In this sense the Maidan judgments are not unique – they are a reminder of the “not done” work on the implementation of the Convention: domestic non-compliance gaps, previously unenforced judgments of the Court indicating general measures and, once again, lack of sufficient domestic capacity to implement the Convention, notwithstanding the guidance and expert assistance from the Council of Europe.

However, let’s turn to the judgments of the Court themselves and their substance. In these judgments the Court found multiple violations of mainly Articles 2, 3, 5 and 11 of the Convention as a result of how the authorities had conducted themselves during the Maidan protests and the absence to date of an independent and effective mechanism within Ukraine for the investigation of crimes committed by law-enforcement officers and non-State agents. These judgments pointed to a deliberate strategy on the part of the authorities to hinder and put an end to a protest, the conduct of which was initially peaceful, with rapid recourse to excessive force which resulted in, if not contributed to, an escalation of violence.<sup>12</sup> Are these findings new on the part of the Court as regards Ukraine?

The adopted judgments, as established by the Court, firstly pointed to a deliberate strategy on the part of the authorities, or parts thereof, to hinder and put an end to a protest, the conduct of which had initially been peaceful, with rapid recourse to excessive force which had resulted in, if not

<sup>7</sup> See par. 83 of the *Ilgar Mammadov* judgment (cited above).

<sup>8</sup> Article 30 of the Draft Articles.

<sup>9</sup> Article 31 of the Draft Articles.

<sup>10</sup> Articles 34–38 of the Draft Articles.

<sup>11</sup> Article 37 of the Draft Articles.

<sup>12</sup> For more details, see legal summaries and press releases concerning the cases, which provide a succinct description of the Court’s findings, <http://hudoc.echr.coe.int/eng/?i=003-6912931-9284963>

contributed to, an escalation of violence. Some of the abuse had been committed by non-State agents (so-called *titushky*), who had acted with the acquiescence if not the approval of the authorities. More specifically, in *Shmorgunov and Others*<sup>13</sup>, the Court found multiple violations of Articles 3, 5 § 1 and 11 of the Convention as a result of the manner in which the law-enforcement authorities had engaged in the public order operations undertaken to deal with the Maidan protests in 2013 and 2014, the excessive force and, in certain cases, deliberate ill-treatment used in relation to some protesters, amounting, in relation to two applicants, to torture, and, in one case, failure to provide adequate medical assistance during detention. Additionally, in *Lutsenko and Verbytskyi*<sup>14</sup>, the Court found violations of Articles 2, 3, 5 § 1 and 11 of the Convention on account, in particular, of the abductions, ill-treatment and persecution of the first applicant and the torture and death of the second applicant's brother as a result of their implication in the Maidan protests. In both cases, the Court found that to date no independent and effective official investigation had been conducted into crimes committed by law-enforcement officers and non-State agents, who had been allowed to act with the acquiescence, if not the approval of the latter.

The judgment in the cases of *Lutsenko and Verbytskyi*<sup>15</sup> very much remind of the findings of the Court in the case of *Gongadze v. Ukraine* as well as still outstanding measures related to implementation of this judgment.<sup>16</sup> Both Lutsenko and Verbytskyi were abducted and ill-treated by private individuals and, most importantly, there was no dispute that those suspected of being responsible had been under the control of the authorities or had acted on the authorities' instructions. Having been subjected to torture, Mr Y. Verbytskyi had been left in a remote location by the suspects who had been hired by law-enforcement officials, in weather conditions which had been particularly harsh, where he had been unlikely to survive for long if left unattended. The responsibility for his death therefore rested with the respondent State.

The Court also adopted specific findings and conclusions as to the police recourse to violence. It noted that there was no evidence or information indicating that the police's recourse to physical

force against the applicants in relation to dispersals had been made strictly necessary by their conduct, nor that the force had been used in compliance with domestic law. The Court noted that the applicants had been subjected to beatings, including with rubber and/or plastic batons, in public and with accompanying verbal abuse, this having amounted to ill-treatment. In addition, two applicants had been subjected to torture.

As to the investigations into notably ill-treatment, there had been significant shortcomings in the investigations into the events of the respective dates and evidence had not been collected in a timely fashion. On the whole, the investigations and the related court proceedings had not resulted in the establishment of circumstances pertaining to the applicants' alleged ill-treatment. Nor had they led to the identification of those responsible. Some court proceedings had been ongoing at first instance since 2015, with the trials having been protracted, without necessary measures taken to ensure the appearance of victims, witnesses and defendants. As a result of delays and omissions, some suspects and possible offenders appeared to have fled Ukraine. Moreover, the Court established instances where the Ministry of the Interior refused to cooperate with the investigations. Those serious shortcomings were sufficient to find that no effective investigation had been conducted into the applicants' complaints of ill-treatment by the police.

As the complaints under Article 11 of the Convention, the Court noted that the applicants enjoyed the protection of Article 11 and established that the interference of all concerned applicants had been disproportionate to any legitimate aims which they might have pursued and thus had not been necessary in a democratic society. In particular, as regards *Lutsenko and Verbytskyi*, there were cogent and substantial elements demonstrating that the abuses suffered had been aimed at punishing or intimidating on account of involvement in the protests. The Court made specific remarks and made references to previously adopted judgments on the same subject-matter – *Vyrentsov, Shmushkovych, Chumak*<sup>17</sup> and *Karpyuk and Lyakhovych*<sup>18</sup>. In particular, in the case of *Shmorgunov and Others*, it stated that it had already analyzed the regulatory acts in force at the time of the events giving rise to those two cases, in 2009 and 2010 respectively, it found that Ukraine had lacked clear and foreseeable

<sup>13</sup> *Shmorgunov and Others*, judgment of 21 January 2021, <http://hudoc.echr.coe.int/eng?i=001-207418>

<sup>14</sup> *Lutsenko and Verbytskyi*, judgment of 21 January 2021, <http://hudoc.echr.coe.int/eng?i=001-207417>

<sup>15</sup> Cited above.

<sup>16</sup> See, *Gongadze v. Ukraine*, implementation measures supervised by the Committee of Ministers of the Council of Europe, <http://hudoc.exec.coe.int/eng?i=004-31344>

<sup>17</sup> See *Vyrentsov* group of cases still pending execution, <http://hudoc.exec.coe.int/eng?i=004-31279>

<sup>18</sup> See *Karpyuk and Lyakhovych* cases, where there are still outstanding measures not undertaken by the authorities, <http://hudoc.exec.coe.int/eng?i=004-31600>

legislation laying down the rules for holding peaceful demonstrations. In particular, at the material time no law had yet been enacted by the Ukrainian Parliament regulating the procedure for holding peaceful demonstrations, although Articles 39 and 92 of the Constitution clearly required that such a procedure be established by law, that is, by an Act of the Ukrainian Parliament.<sup>19</sup>

In a number of judgments previously adopted by the Court, concerning provisions of the Convention underlined above, the Strasbourg Court concluded notably that mechanism for investigating allegations of death at the hands of the law enforcement and ill treatment allegations does not comply with the “procedural requirements” of Articles 2 and 3 of the Convention (the cases of *Efimenko*<sup>20</sup> – procedural violations of Article 2 of the Convention on account of the lack of effective investigations into the deaths of the applicants’ relatives caused by illegal acts of private individuals; *Kaverzin*<sup>21</sup> – the physical ill-treatment by the police and lack of effective investigations into such complaints (procedural violations of Article 3) and *Davydov and Others*<sup>22</sup> most notably) as to the conduct of investigations. Similar findings concerned also liability of the State for “substantive” breaches of obligations to protect right to life and not to infringe on it (Article 2) and not to inflict ill-treatment, respect the principle of human dignity and integrity, with a view to absolute prohibition of torture, inhuman or degrading treatment or punishment (Article 3). In a continuous row of judgments concerning Article 5 – right to liberty and security of a person – the Strasbourg Court established that the prosecutorial and judicial practice on detention in Ukraine is contrary to the principles of lawfulness under this provision of the Convention. It also continuously criticised that the State does not ensure the principle of presumption in favour of liberty, suggesting that it must only be an exceptional measure, strictly based on the exclusive list of exceptions specified in this provision (cases of *Ignatov and Chanyev v. Ukraine*<sup>23</sup>). Additionally, one cannot avoid speaking about the previously adopted judgments of the Court in the cases of *Vyerentsov and Shmushkovych*<sup>24</sup>, suggesting

that there are no Convention-compliant legal regulations as to the peaceful assemblies in Ukraine and that Ukraine must adopt necessary legislation to ensure right to peaceful assemblies. Similar opinions on a number of points and related issues were issued by the Venice Commission<sup>25</sup> and various expert bodies of the Council of Europe, including the reports of the International Advisory Panel<sup>26</sup> and the CPT<sup>27</sup>, both referred to in the Maidan judgments.

So, how many judgments of the Court on similar issues, from the point of view of general measures, would one need to adopt in order to enforce, for instance, the absolute prohibition of torture under Article 3? How many layers of international obligations are necessary to push the State for compliance with its primary obligations of protection of its citizens against arbitrary and unlawful violence? And possibly the main question that one could ask – would the events of a similar kind occur if the authorities have really taken necessary measures previously to enforce these international undertakings by Ukraine? The answers to these questions are not obvious and they possibly stem from the fact that some of the reform efforts have taken increasingly long period of time and important institutional changes do not occur immediately and magically.<sup>28</sup> Nevertheless, the “Maidan judgments” will serve an important role for consolidating the efforts of the Ukrainian authorities in reaching the level of compliance required by the European Convention and its case-law, execution requirements. These matters are on the radars not only of the Council of Europe, but also the larger European community, as the right to peaceful assembly is undoubtedly a cornerstone of democracy. Convention-compliant police action and law enforcement follow up to investigate any illegality and judicial protection of that right are the main foundations for ensuring that this right is effectively exercised in practice.

<sup>19</sup> See *Shmorgunov and Others*, par. 508, <http://hudoc.echr.coe.int/eng?i=001-207418>

<sup>20</sup> See *Lyubov Efimenko* (a part of the *Khaylo* group of cases concerning a breach of Article 2 of the Convention in lack of effective investigation), <http://hudoc.exec.coe.int/eng?i=004-33459>

<sup>21</sup> See *Kaverzin*, <http://hudoc.exec.coe.int/eng?i=004-31569>

<sup>22</sup> See *Davydov and Others* (similarly to *Karabet and Others* still outstanding from the point of view execution measures), <http://hudoc.exec.coe.int/eng?i=004-31328>

<sup>23</sup> See *Ignatov* group of cases (also outstanding from the point of view of execution measures), <http://hudoc.exec.coe.int/eng?i=004-46503>

<sup>24</sup> Cited above.

<sup>25</sup> In its assessment of June 2017 of the general measures taken by the Ukrainian authorities the Committee of Ministers of the Council of Europe referred to the two draft laws pending before Parliament had been positively assessed by the Venice Commission, the Directorate of Human Rights of the Directorate General of Human Rights and the Rule of Law (DGI) of the Council of Europe and the OSCE/ODIHR, and called upon the authorities to accelerate the legislative process. However, to date these recommendations were not adopted: <http://hudoc.exec.coe.int/eng?i=004-31279>

<sup>26</sup> See pars. 236–249 in the *Shmorgunov and Others* judgment as regards the Report of the International Advisory Panel.

<sup>27</sup> See pars. 250–256 in the *Shmorgunov and Others* judgments as regards the CPT report related to the Maidan events.

<sup>28</sup> Some of the issues above were described by me before in a publication from 2001: Pavlo Pushkar, “The Reform of the System of Criminal Justice in Ukraine: the Influence of the European Convention on Human Rights,” *European Journal of Crime, Criminal Law and Criminal Justice* 2 (2003): 195–215.

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Пушкар П. В.

## СПРАВИ ЄВРОПЕЙСЬКОГО СУДУ З ПРАВ ЛЮДИНИ, ЗНАЧУЩІ ДЛЯ ЄВРОПЕЙСЬКОЇ ІНТЕГРАЦІЇ УКРАЇНИ

### «РІШЕННЯ У СПРАВАХ МАЙДАНУ» СТОСОВНО УКРАЇНИ, 21 січня 2021 року (остаточне 21 квітня 2021 року)

Рішення Страсбурзького Суду у справах «щодо Майдану» є суттєвими для європейських інтеграційних перспектив України. По-перше, з точки зору того, як національна правова система реагує на попередні рішення Європейського суду з прав людини та вимоги їх виконання в аспекті заходів загального характеру. По-друге, з точки зору базисного законодавства, що стосується права на мирні зібрання, що так і не врегульоване в законі. По-третє, це очевидна проблема ефективності розслідувань, якості та тривалості заходів щодо розслідування таких справ і надмірної тривалості судових проваджень. Цілком очевидно, що в майбутньому на виконання як цих, так і попередніх рішень Європейського суду з прав людини, потрібно взяти до уваги системно-структурні недоліки правової системи України та системи кримінальної юстиції, що передували визнанню порушень, визначених у рішеннях Європейського Суду. У цьому контексті важливою є реалізація м'яких стандартів Ради Європи і норм-рекомендацій Європейського комітету із запобігання катуванням (СКЗК) та Венеційської комісії, що безпосередньо стосувалися питань, які розглядалися в аналізованих у цьому коментарі рішеннях Європейського суду з прав людини.

**Ключові слова:** ефективне розслідування, жорстоке поводження, порушення права на життя, свавільне затримання, рішення щодо Майдану, непропорційне втручання у право на мирні зібрання, Європейський суд з прав людини, провідні справи, повторювані рішення, виконання рішень Європейського Суду, Комітет Міністрів, Рада Європи.

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