

The Adjudication by International Courts of Violations Committed during the Armed Conflict in Ukraine

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Lecture Outline

- The context of the armed conflict and the Minsk agreements;
- International peace and peaceful settlement of disputes;
- The function of international adjudication (generally and then concerning the Ukrainian situation):
 - European Court of Human Rights (ECtHR); and
 - International Court of Justice (ICJ).
- Provisional (interim) measures and legal proceedings concerning responsibility for violations of:
 - public international law;
 - international human rights law; and
 - international humanitarian law.
- Concluding remarks and recommended materials.




Background to the (Recent) Conflict

- Following the Orange Revolution of 2004, Ukraine has been subjected to increasing degrees of Russian intervention.
- Since 2014 the Russian Federation has escalated its interference in Ukraine:
 - by occupying Crimea in February-March 2014; and
 - by providing support to separatist armed groups in Eastern Ukraine.
- The Minsk agreements of September 2014 and February 2015 have brought a relative ceasefire to eastern Ukraine, even though the truce stops short of peace.
- Military activities in Crimea and Eastern Ukraine have resulted in the violation of fundamental human rights of many Ukrainian citizens and other violations of international law.



Main Points Minsk 2

- In effect from 15 February 2015, 12 points, including:
 1. Immediate and full bilateral ceasefire;
 2. Withdrawal of all heavy weapons by both sides;
 3. Effective monitoring and verification regime for the ceasefire and withdrawal of heavy weapons (OSCE Special Monitoring Mission to Ukraine ([SMM](#)));
 - 4. From day one of the withdrawal begin a dialogue on the holding of local elections;**
 5. Pardon and amnesty by banning any prosecution of figures involved in the Donetsk and Luhansk conflict;
 -  **6. Release of all hostages and other illegally detained people;**

Main Points Minsk 2

7. Unimpeded delivery of humanitarian aid to the needy, internationally supervised;
8. Restoration of full social and economic links with affected areas;
- 9. Full Ukrainian government control will be restored over the state border, throughout the conflict zone;**
10. Withdrawal of all foreign armed groups, weapons and mercenaries from Ukrainian territory;
- 11. Constitutional reform in Ukraine, with adoption of a new constitution by the end of 2015.**



Key Documents on International Peace

- 1945 UN Charter;
- 1949 UN General Assembly (GA) Resolution 290 (IV) Essentials of Peace;
- 1970 UN Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States;
- 1974 Charter on Economic Rights and Duties of States;
- 1992 An Agenda for Peace (A/47/277 – S24111);
- 2005 World Summit Outcome Document: Responsibility to Protect.



Peaceful Settlement of Disputes

- Article 2(3) of the UN Charter:
 - All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
- Article 33(1) of the UN Charter:
 - The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by **negotiation**, enquiry, **mediation**, conciliation, **arbitration**, **judicial settlement**, resort to regional agencies or arrangements, or **other peaceful means of their own choice**.



Functions of International Courts (1)

- **Bogdandy and Venzke** ([LJIL, 2013](#)):
 1. settling disputes;
 2. stabilizing normative expectations;
 3. making law; and
 4. controlling and legitimating public authority.
- **Alvarez** ([OUP, 2014](#)):
 1. dispute-settlement function;
 2. the fact-finding function;
 3. the law-making function; and
 4. the governance function.



Functions of International Courts (2)

- ICs **provide legal services** to those entities that have access to it, including States, international organizations and individuals (**judicial function/ institutional role**).
- **Preventive/corrective effect** on the behavior of States or non-State actors, ICs exercise either directly through their judicial activity, or indirectly through the mere possibility of being subjected to judicial proceedings.
- **Strengthening the rule of law**, both at the international and at the domestic level.



International Adjudication of Dispute(s)

- Proceedings before the European Court of Human Rights:
 - Four out of the five inter-State applications lodged by Ukraine against Russia are pending before the [European Court of Human Rights](#).
- Proceedings before the International Court of Justice:
 - On 16 January 2017 Ukraine brought a case against Russia before the [International Court of Justice](#).
 - Hearings on the provisional measures currently taking place in The Hague, 6-9 March 2017.
- Preliminary investigations before the International Criminal Court (see ICC Report 2016, pp. 33-42).



Importance of International Adjudication

- Establishing the facts;
- Establishing State responsibility and ordering (appropriate) remedies.
- **European Court of Human Rights:**
 - Rule 39 of the Rules of Court (interim measures of protection);
 - Articles 41 and 46 ECHR (just satisfaction and binding force).
- Similarity with other [inter-State cases](#) decided by the ECtHR?
 - *Georgia v. Russian Federation* (I; II; and III (struck off the list));
 - *Cyprus v. Turkey* (I-IV)?
- **International Court of Justice:**
 - Article 41 ICJ Statute (provisional measures);
 - Articles 59-60 ICJ Statute (binding and final judgment).
 - Similarity with other cases decided by the ICJ?
 - *Georgia v. Russian Federation*;
- *Application of the Genocide Convention cases?*



ECtHR Inter-State Cases (1)

- ***Ukraine v. Russia (no. 20958/14)***, assumption of control over the Crimean peninsula from March 2014 and subsequent developments in Eastern Ukraine up to the beginning of September 2014.
- ***Ukraine v. Russia (II) (no. 43800/14)***, concerns the alleged abduction of three groups of children in Eastern Ukraine and their temporary transfer to Russia on three occasions between June and August 2014.
- ***Ukraine v. Russia (III) (no. 49537/14)***, was struck out of the Court's list of cases given that an individual application (***no. 49522/14 Dzhemilov v. Ukraine and Russia***) concerning the same subject matter was pending before the Court.
- ***Ukraine v. Russia (IV) (application no. 42410/15)***, concerns the events in Crimea and Eastern Ukraine mainly as from September 2014.



ECtHR Inter-State Cases (2)

- **Ukraine v. Russia (no 20958/14):** All the complaints related to the events in Crimea up to September 2014;
- ***Ukraine v. Russia (IV) case no. 42410/15:*** all the complaints related to the events in Crimea from September 2014;
- ***Ukraine v. Russia (V) (no. 8019/16)*** the complaints concerning the events in Eastern Ukraine up to September 2014.
- ***Ukraine v. Russia (VI), case no. 70856/16:*** the complaints concerning the events in Eastern Ukraine from September 2014.



ECtHR Individual Cases

- **Almost 4000 individual applications** apparently related to the events in Crimea or the hostilities in Eastern Ukraine are pending before the Court.
- Individual cases submitted against Russia, against Ukraine, or against both States.



Derogation under Article 15 ECHR

- The Government of Ukraine has exercised the right of derogation (under Article 15 of the Convention – derogation in time of emergency) from its obligations under Articles 5, 6, 8 and 13 of the Convention in respect of those areas in the Donetsk and Luhansk regions where Ukrainian authorities have been conducting an anti-terrorist operation in view of the actions of armed groups there.



Case before the ICJ

- *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*
- Provisional measures of protection
- Main case



Provisional Measures: ICSFT (1)

- a) The Russian Federation shall **refrain from any action which might aggravate or extend the dispute** under the Terrorism Financing Convention before the Court or make this dispute more difficult to resolve.
- (b) The Russian Federation shall exercise **appropriate control over its border** to prevent further acts of terrorism financing, including the supply of weapons from the territory of the Russian Federation to the territory of Ukraine.



Provisional Measures: ICSFT (2)

- (c) The Russian Federation shall **halt and prevent all transfers from the territory of the Russian Federation of money, weapons, vehicles, equipment, training, or personnel** to groups that have engaged in acts of terrorism against civilians in Ukraine, or that the Russian Federation knows may in the future engage in acts of terrorism against civilians in Ukraine, including but not limited to the “**Donetsk People’s Republic,**” the “**Luhansk People’s Republic,**” the “**Kharkiv Partisans,**” and **associated groups and individuals.**



Provisional Measures: ICSFT (3)

- (d) The Russian Federation shall take all measures at its disposal to ensure that any groups operating in Ukraine that have previously received transfers from the territory of the Russian Federation of money, weapons, vehicles, equipment, training, or personnel will **refrain from carrying out acts of terrorism against civilians in Ukraine.**



Provisional Measures: CERD (1)

- (a) The Russian Federation shall refrain from any action which might aggravate or extend the dispute under CERD before the Court or make it more difficult to resolve.
- (b) The Russian Federation shall refrain from any act of racial discrimination against persons, groups of persons, or institutions in the territory under its effective control, including the Crimean peninsula.
- (c) The Russian Federation shall cease and desist from acts of political and cultural suppression against the Crimean Tatar people, including suspending the decree banning the Mejlis of the Crimean Tatar People and refraining from enforcement of this decree and any similar measures, while this case is pending.



Provisional Measures: CERD (2)

- (d) The Russian Federation shall take all necessary steps to halt the disappearance of Crimean Tatar individuals and to promptly investigate those disappearances that have already occurred.
- (e) The Russian Federation shall cease and desist from acts of political and cultural suppression against the ethnic Ukrainian people in Crimea, including suspending restrictions on Ukrainian-language education and respecting ethnic Ukrainian language and educational rights, while this case is pending.



Main Case: ICSFT (1)

- through its State organs, State agents, and other persons and entities exercising governmental authority, and through other agents acting on its instructions or under its direction and control:
- (a) Supplying funds, including in-kind contributions of weapons and training, to illegal armed groups that engage in acts of terrorism in Ukraine, including the DPR, the LPR, the Kharkiv Partisans, and associated groups and individuals, in violation of Article 18;
- (b) Failing to take appropriate measures to detect, freeze, and seize funds used to assist illegal armed groups that engage in acts of terrorism in Ukraine, including the DPR, the LPR, the Kharkiv Partisans, and associated groups and individuals, in violation of Articles 8 and 18;



Main Case: ICSFT (2)

- (c) Failing to investigate, prosecute, or extradite perpetrators of the financing of terrorism found within its territory, in violation of Articles 9, 10, 11, and 18;
- (d) Failing to provide Ukraine with the greatest measure of assistance in connection with criminal investigations of the financing of terrorism, in violation of Articles 12 and 18; and
- (e) Failing to take all practicable measures to prevent and counter acts of financing of terrorism committed by Russian public and private actors, in violation of Article 18.



Main Case: ICSFT (3)

- by virtue of its sponsorship of terrorism and failure to prevent the financing of terrorism under the Convention, for the acts of terrorism committed by its proxies in Ukraine:
- (a) The shoot-down of Malaysian Airlines Flight MH17;
- (b) The shelling of civilians, including in Volnovakha, Mariupol, and Kramatorsk; and
- (c) The bombing of civilians, including in Kharkiv.



Main Case: CERD (1)

- through its State organs, State agents, and other persons and entities exercising governmental authority, including the de facto authorities administering the illegal Russian occupation of Crimea, and through other agents acting on its instructions or under its direction and control:
- (a) Systematically discriminating against and mistreating the Crimean Tatar and ethnic Ukrainian communities in Crimea, in furtherance of a state policy of cultural erasure of disfavored groups perceived to be opponents of the occupation regime;
- (b) Holding an illegal referendum in an atmosphere of violence and intimidation against non-Russian ethnic groups, without any effort to seek a consensual and inclusive solution protecting those groups, and as an initial step toward depriving these communities of the protection of Ukrainian law and subjecting them to a regime of Russian dominance;



Main Case: CERD (2)

- (c) Suppressing the political and cultural expression of Crimean Tatar identity, including through the persecution of Crimean Tatar leaders and the ban on the Mejlis of the Crimean Tatar People;
- (d) Preventing Crimean Tatars from gathering to celebrate and commemorate important cultural events;
- (e) Perpetrating and tolerating a campaign of disappearances and murders of Crimean Tatars;
- (f) Harassing the Crimean Tatar community with an arbitrary regime of searches and detention;
- (g) Silencing Crimean Tatar media;



Main Case: CERD (3)

- (h) Suppressing Crimean Tatar language education and the community's educational institutions;
- (i) Suppressing Ukrainian language education relied on by ethnic Ukrainians;
- (j) Preventing ethnic Ukrainians from gathering to celebrate and commemorate important cultural events; and
- (k) Silencing ethnic Ukrainian media



Concluding Remarks (1)

- The annexation of Crimea and armed conflict in Eastern Ukraine has resulted in serious violations of international law;
- International adjudication important:
 - Inter-State cases before the ECtHR;
 - About 4000 individual cases before the ECtHR;
 - Contentious case before the ICJ;
 - Preliminary investigations before the International Criminal Court.



Concluding Remarks (2)

- Obligations on the part of international community not to recognize an unlawful situation or assist in its maintenance;
- Political processes aimed at resolving the situation also important and can take place simultaneously.



Recommended Materials (1)

- Serhy Yekelchyk, *The Conflict in Ukraine: What Everyone Needs to Know?* (Oxford University Press, 2015);
- Anders Åslund, *Ukraine: What Went Wrong and How to Fix It* (Peterson Institute for International Economics, Washington, D.C., 2015);
- Richard Sakwa, *Frontline Ukraine: Crisis in the Borderlands* (I.B. Tauris, 2014);



Recommended Materials (2)

- Lauri Mälksoo, *Russian Approaches to International Law* (Oxford University Press, 2015);
- [UN Audiovisual Library of International Law](#);
- Eurasian Geopolitics, [Ukraine maps](#)

