

LEGAL
UN | CERTAINTY
| OF OCCUPATION:
| CRIMEA
| AND DONBAS

| 09.06.2021-
| 11.06.2021



Global
Rights
Compliance



Donbas &
Crimea:
Legal
Un/Certainty

From 9 to 11 June 2021, Global Rights Compliance ('GRC') held a three-day, six-panel conference titled, "Legal (Un)Certainty of Occupation: Crimea and Donbas". The conference was a key part of GRC's project "International Law and Defining Russia's Involvement in Crimea and Donbas" funded by the Swedish Ministry of Foreign Affairs. It was designed to contribute to the project's mission of developing an authoritative international legal opinion on Russia's legal status in Crimea and Donbas.

It brought together leading scholars and practitioners of international human rights and humanitarian laws to obtain considered, expert legal commentary of relevance to Crimea and Donbas. The expert views are world leading and provided impartial expertise on the most salient issues of international law, including the status of Crimea and Donbas, the law of occupation, the division of responsibilities between an occupying power and an ousted sovereign, and avenues for effective redress and accountability for Ukraine and its citizenry in relation to violations of humanitarian and human rights law.

The following extracts have been drawn from conference contributions. Any conclusions are without prejudice to the findings that will be reached in GRC's forthcoming legal opinion on the status Russia's involvement in Ukraine. For the full context and more of the conversation, we invite you to watch the recordings of panels in English¹ or Ukrainian².

¹ Watch the conference in English: <https://www.youtube.com/playlist?list=PLLoGS-dYwxfKJJfAWLcltDJIsNji7dXY>

² Watch the conference in Ukrainian: https://www.facebook.com/DonbasCrimeaLegalCertainty/videos/?ref=page_internal

DAY ONE

INTRODUCTION

Swedish Ambassador to Ukraine, Mr. Tobias Thyberg, welcomed participants to the conference, expressing Sweden's belief that the project represents an investment in the future.

In a changing world, how can we ensure that international law forms the basis for international relations?



Amb. Thyberg described:

It's important that international law develops in a way which keeps pace with developments on the ground, with the way relations between states develop as well, and we believe that Ukraine is a case in point. What happened in Ukraine in 2014, both in Crimea and in the east of Ukraine, raised a number of questions about the nature of the inter-state conflict that need to be clarified.

In his introduction to the conference, GRC co-founder and managing partner, Wayne Jordash QC, provided GRC's motivation for the project, arguing that truth need not be a casualty of war.

How can international law promote the truth and help protect sovereignty and territorial integrity?



Mr. Jordash described:

The key to fortifying resistance to Russia's involvement in Ukraine is at least in part to be found in international law. Ukraine must respond to warfare with lawfare. At a minimum, Ukraine must seek to demonstrate the legal truth of Russia's involvement in Ukraine, including any violations of international law. Of course, such an approach may seem like an underwhelming response to war that is now at its 7th year and has already claimed over 13,000 Ukrainian lives. Unfortunately, such criticisms are obviously partly true. Nonetheless, when neither force nor reason have produced answers, lawfare can at least provide a bedrock of legal principle and a record for posterity, which is the bare minimum, we believe, required for accountability and redress.

PANEL ONE

moderated by Prof. Yael Ronen,
explored the 'Legal status of Crimea and Donbas'

Speaking on the law of belligerent occupation and the situation in Crimea, Prof. Michael Bothe recalled that it is a basic peremptory norm of customary law that "no territorial acquisition resulting from the threat or use of force shall be recognized as legal".

Was the Russian Federation's involvement in Crimea consensual?



Prof. Bothe described:

Starting 27 February 2014, the Russian military presence was increased without Ukrainian consent. The Ukrainian authorities were displaced by the Russian military, new local authorities were established, a referendum declaring the secession of Crimea was held and on 18 March a Treaty on unification was signed. These developments took place without the consent and against the will of the pre-existing local Ukrainian authorities and of the Ukrainian government. They must, therefore, be characterised as a use of force.

Speaking on occupation by proxy and the situation in Donbas, Prof. Robert Heinsch recalled that one cannot assume the existence of a classical situation of belligerent occupation despite heavy involvement by one state on the territory of another.

Does the Russian Federation occupy Donbas?



Prof. Heinsch described:

This could possibly be acknowledged if we come to the conclusion that pro-Russian rebel groups exercise effective control over the territory in Donbas and at the same time Russia would have overall control over these organised armed groups. [...] Certain publicly available facts and assumptions are pointing towards this.

Speaking on lawful secession and self-determination, Max du Plessis SC cited the Canadian Supreme Court in the Quebec Secession case which noted that "international law contains neither a right of unilateral secession nor the explicit denial of such a right".

Did the Crimean people chose to join the Russian Federation through a legitimate exercise of self-determination?



Mr. du Plessis described:

As the debates in this conference attest, the right to self-determination and the principle of territorial integrity, while still both significant principles are increasingly subject to contestation and qualification. It's the task of States and institutions and of ourselves in conferences like these, to balance these rights wisely to ensure fairness and stability in the international legal order and to do so with very clear recognition that there are forces afoot that are attempting to use their power in ways which ultimately are there to destabilise the international institutions and international rules that are applicable and which make for civilized and peaceful existence together. There can be few examples where that is happening more forcibly than in the context of Crimea and Russia in the background.

Speaking on the intersection of terrorism and IHL, Dr. Sandra Krähenmann recalled the inherent limitations of the international legal system when it comes to the judicial resolution of disputes and the need to establish specific bases for jurisdiction within appropriate forms.

Are IHL and terrorist suppression regimes mutually exclusive?



Dr. Krähenmann described:

I don't think that any regime is completely mutually exclusive and there's no separate regime. They all interact with each other. My main point is that there's an overlap between these two legal regimes and then that overlap needs to be harmonized in a way so that we do not end up undermining one regime over the other and I think that's particularly the case for international humanitarian law, with its primary purpose of protecting civilians, because we have seen during the last decade how the conflation between the two regimes leads to an increased suffering of the civilian population.

PANEL TWO

moderated by Dr. Mykola Gnatovsky,
explored 'Belligerents' obligations under IHL and IHRL in practice'

Speaking on the interaction between IHL and IHRL in armed conflict, Prof. Jann Kleffner recalled that the law of armed conflicts is presumed to also apply extraterritorially in cases of international armed conflicts and political occupation; whereas IHRL is confined to the territory of a State that is subject to human rights obligations.

Does the Russian Federation have human rights obligations towards the populations of Crimea and Donbas?



Prof. Kleffner described:

There seems to be consensus that the Russian Federation is to be considered the occupying power in Crimea. Since occupation implies effective control and effective control amounts to an exercise of jurisdiction in the sense of human rights law, the Russian Federation is subject to the law of belligerent occupation as much as to human rights law. [...] If one could establish that the Russian Federation exercises effective control or overall control over the rebel forces [in Donbas], who in turn exercise effective control over that part of Ukrainian territory, the Russian Federation would be subject to the same IHRL obligations as in Crimea, as a belligerent occupying power (by proxy).

Speaking specifically on environmental obligations in armed conflict, Amb. Marja Lehto recalled that, as a general rule of thumb, it can be said that the longer an occupation lasts, the more onerous the obligations of the occupying power will be, as affirmed by the ICRC's Commentary on Article 2 of Geneva Convention I.

Do the ILC draft principles on protection of the environment in armed conflict apply to the situations in both Crimea and Donbas?



Amb. Lehto described:

The Commission's Draft principles have been prepared without expressly differentiating between international and non-international armed conflicts. In addition to the situation in Crimea as one of occupation and illegal annexation, they may therefore have some relevance also to the situation in Donbas irrespective of whether it is classified as an occupation by proxy, an international armed conflict, internationalised non-international armed conflict or a combination of an international and non-international armed conflict.

Speaking specifically on water obligations in armed conflict, Ms. Catriona Murdoch recalled that it is absolutely essential when confronting the alarming rates of global food and water insecurity, that we must reflect on the causal links to that with conflict.

Does the IHL prohibition of starvation in armed conflict extend to deprivation of water?



Ms. Murdoch described:

It's important to flag that there is a common misperception that prohibition of starvation in international law refers only to a lack of food, whereas objects indispensable to survival have been defined non-exhaustively and of course include water. Water installations, supplies and irrigation works are specifically mentioned under the category of objects indispensable to survival in the Geneva Conventions and the protection extends not just to water but to the supply itself. [...] In both non-international armed conflict and international armed conflict, it is prohibited to attack, destroy and render useless objects indispensable to survival of the population.

Speaking specifically on health obligations in the occupation context, Mr. Eitan Diamond recalled that an occupying power is obliged to step into the shoes of the ousted sovereign and to perform the basic governmental functions that the sovereign can no longer perform, including functions relating to health services and securing the right to health.

Can an occupying power treat its own population different from the occupied population when ensuring public health?



Mr. Diamond described:

Another important feature that is introduced by human rights law is that health services are to be provided in a non-discriminatory manner and that should inform [...] the interpretation of the IHL provisions as well, so non-discrimination between the protected persons within the occupied territory but [...] also non-discrimination between the occupying power's own population and the population of the occupied territory.

DAY TWO

PANEL THREE

moderated by Prof. Dino Kritsiotis,
explored 'Belligerents' obligations to specific populations affected by conflict'

Speaking on Human Shields and the Location of Agency, Prof. Neve Gordon recalled that the concept of a human shield does not fit neatly within the two axiomatic figures of international law – civilian and combatant.

Have the majority of persons described as human shields acted voluntarily or involuntarily?



Prof. Gordon described:

About 99% or 98% of human shields that are mentioned in the [recent major news] articles are neither voluntary human shields nor involuntary human shields, but they are what we call proximate shields. Proximate shields are shields that are trapped in urban zones because most of the fighting today in the world takes place in urban settings; so you have a city with several hundred thousand, sometimes millions of people in it, and there's fighting taking place in it. And by definition, once the fighting takes place in the city, there is proximity between the protected civilian actors and the combatants that are fighting; and this proximity, we claim, is being used to basically cast the whole civilian population as human shields so what we have is the disappearance of the battlefield.

Speaking on Crimean Tatars and Prisoners, Ms. Yuliia Gorbunova recalled that an occupying power has an obligation to restore and ensure public order and safety as far as possible while respecting, unless absolutely prevented from doing so, the laws in place in the occupied territory.

How is it alleged that Russian Federation laws have been used to oppress Crimean Tatars?



Ms. Gorbunova described in part:

The authorities started dozens of criminal proceedings against Crimean Tartar activists on trumped up charges of extremism and terrorism. [...] They framed all activists, or members of the Crimean Tartar community that they wanted to effectively silence, as affiliated with Hizb ut-Tahrir, which is a pan-Islamic movement that seeks to peacefully establish a caliphate [...] and that movement is and has been legal in Ukraine and most European coun-

tries but is prohibited in Russia. Again, that's a violation of laws of occupation because Russia [...], as an occupying power, cannot impose legislation that contradicts laws that were in place before the occupation.

Speaking on internally displaced persons in Ukraine, Dr. Elina Shyshkina recalled that the rights of persons displaced as result of hostilities is a much-neglected topic.

How does international law protect the human rights of internally displaced persons?



Dr. Shyshkina described:

At the international level, the rights of IDPs are regulated by the acts of international organisations and institutions of international organisations. In this regard, the UN Guiding principles on IDPs can be mentioned, and the Handbook on Housing and Property Restitution for Refugees and Displaced Persons (or the so-called Pinheiro principles), as well as resolutions and recommendations of the Council of Europe institutions (in particular, the committee of Ministers and Parliamentary Assembly). The mentioned documents are of a “soft law” nature and are of recommendatory character. Those are frequently perceived as the calls to action or roadmap for states, which ought to be implemented in the internal legislation to protect the rights of persons affected by the armed conflict.

Speaking on SGBV and gendered aspects of conflict in Ukraine, Ms. Amal Nassar recalled that conflict-related sexual violence goes beyond rape against women to include incidents or patterns of sexual slavery, forced prostitution, forced pregnancy, enforced sterilization any other form of sexual violence of comparable gravity that occurs in a conflict or post conflict setting with a direct or indirect link to conflict, and it can target men, women, girls, boys and gender non-conforming persons.

What approach should be taken to analysing conflict-related crimes, including conflict-related sexual violence?



Ms. Nassar described:

Often, and not only in Ukraine, conflict related sexual violence is almost always gendered and deeply rooted in gender-based discrimination and gender stereotypes. In addition to sexual violence being gendered, the impact of it, too, is gendered. But ... there are other elements to consider, not only gender, when analysing crimes and assessing the harm and therefore an intersectional approach should be applied to the analysis of conflict-related crimes, including sexual violence, that considers any grounds

that have played a role in the targeting of persons and may have impacted the harm that they had experienced [...], whether that is their political affiliation – actual or perceived – but also their demographic background which includes their language, their ethnicity, their religion, and their personal backgrounds as well, their education, their social status, their professions and so on. [...] And why is gendered and intersectional analysis of [...] all conflict-related crimes, including sexual violence so important? Because they help us in understanding the harm suffered by survivors and in understanding how they can access the right to a remedy and what modalities we have to consider in enabling survivors to access remedy and reparations.

PANEL FOUR

moderated by Prof. Ian Scobbie,
explored the 'Roles and obligations of third parties in the Ukrainian context'

Speaking on third state responsibility, Mr. Charles Shamas recalled that peer enforcement of state responsibilities including the obligation to respect and ensure respect for the Geneva Conventions, codified under Common Article 1, and the principle of non-recognition, codified under Article 41 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts, are critical to the protective effectiveness of IHL and IHRL.

Can it be expected that States abide by their 'duty to respect and ensure respect' for the Geneva Conventions vis-à-vis the situations in Crimea and Donbas?



Mr. Shamas described:

In situations like those of Crimea and Donbas and the Israeli-occupied territories that involve a State's gross and systematic violations of IHL, IHRL as well as the prohibition on the use of force to acquire territory, it is more than reasonable to expect third states that command effective means to ensure respect, including effective sanctioning power, to utilize them lawfully by way of performing their Common Art 1 duty.

Speaking on corporate responsibility, Dr. Valentina Azarova recalled that "in many contemporary occupations, the repurposing of land and natural resources for the use of occupiers, civilians and foreign business is closely linked with demographic engineering and is critically entrenched and legitimised through transnational business links with the occupier's economy".

How do transnational business links impact on corporate responsibility?



Dr. Azarova described:

Any business that becomes involved in transactions related to such illicit economies benefits from the fruits of, and contributes to the maintenance of, an unlawful situation by doing two things – predicating their activity on particular unlawful exercises of authority of the occupier in a number of ways including paying into taxes and so forth; and using unlawfully obtained factors of production through titles and rights conveyed to such businesses or their partners in joint venture to control and use property and, of course, make gains from such property, creating sustaining economic interfaces for the primary offending conduct, the primary violations of peremptory norms.

Speaking on the role of humanitarian organisations in relief operations, Ms. Emanuela Gillard, recalled that the needs of affected populations being met in an impartial and non-discriminatory manner is of paramount importance.

What are the basic rules governing humanitarian relief operations?



Ms. Gillard described:

The key elements of humanitarian relief operations are pretty straightforward. Primary responsibility for meeting the needs of civilians lies with the party (state or organized group) that has control over them. If this party is unable or unwilling to meet the needs, offers to conduct humanitarian relief operations can be made. The consent of the affected territorial state is required but may not be arbitrarily withheld. [...] Once this consent has been obtained, all parties are under an obligation to allow and facilitate the rapidly unimpeded passage of relief operations, but may impose technical arrangements for this passage.

Speaking on the role of civil society, Dr. Raffaele Marchetti emphasised the importance of broad interpretation of the 'civil society actors' which should not be limited to NGOs in western societies accredited in the national registers of civil society organisations, but include a wider range of players, local to international actors, independent to quasi-governmental players.

Has civil society proved capable of supporting State functions when the situation so demanded?



Dr. Marchetti described:

[C]ivil organisations or post-Maidan organisations ended up performing functions like security and defence which the state had proven unable to fulfil fully at the time. Civil society became de facto a security actor involved first in the provision of hard security with the establishment of self-defence units during the Maidan demonstration and then of voluntary battalions following the beginning of hostilities. Second, civil society was active in the procurement of military equipment for the troops and the provision of the logistical services like medical and clerical work, even at the front line. Third, in the monitoring and oversight of defence-related issues in Donbas, and not to a small extent. At some point, several thousand organisations and civic formations were recorded officially by the Ministry of Interior and almost a hundred thousand people were involved somehow in armed conflict related activities.

DAY THREE

PANEL FIVE

moderated by Prof. Alex Whiting,

explored 'International and Regional Avenues towards Accountability for Violations of International Humanitarian Law and International Human Rights Law'

Speaking on the International Criminal Court ('ICC') and its examination of the situation in Ukraine, Dr. Rod Rastan recalled that the ICC's Office of the Prosecutor found reasonable grounds to believe that crimes against humanity and/or war crimes have been committed in Crimea and Donbas.

Will the ICC open a full investigation into the Situation in Ukraine?



Dr. Rastan described:

We have not yet lodged the application [...] the criteria are met but the Court simply has no capacity with the current budgetary constraints to roll these investigations out. We have more cases in trial and pre-trial than we have ever had. We have multiple investigations including new ones we recently opened in Bangladesh/ Myanmar, in Afghanistan and now, more recently, Palestine, and so we basically made an appeal for State Parties to give the Court the means to be able to proceed. But for us the next stage is to lodge that application and then the last thing that the Prosecutor mentioned is that, of course, there is an incoming Prosecutor about to take Office. And so she said as part of that transition she intends to discuss with the incoming Prosecutor and he will ultimately [...] have to decide on issues of prioritisation, how to prioritise rolling out these investigations, potentially closing down some of the existing cases or wrapping them up to be able to address these situations or to be successful in appealing for greater budgetary means to take these things forward.

Speaking on the International Court of Justice ('ICJ'), Dr. Iryna Marchuk recalled that the term 'lawfare' covers the use or misuse of international law as a substitute for military means and noted that, although it initially had a negative connotation, it is increasingly used in a positive sense where parties, while relying on international law, initiate proceedings in international courts to defend their sovereign interests.

Is the ICJ capable of establishing the truth about the conflict in Ukraine?



Dr. Marchuk described:

International courts, as we know, are limited by their jurisdictions. It is of course very unfortunate for Ukraine that the ICJ will not be able to deal with the real issues at stake: [...] self-determination, remedial secession, use of force, aggression, because we know that the Court will deal squarely with the allegations under the CERD and Terrorism Financing Convention. So what Ukraine can get out of it is partial truth.

Speaking on the European Court of Human Rights ('ECtHR'), Mr. Kirill Koroteev recalled the Court's slow progress since 2014 and reluctance to deliver justice on individual cases until inter-state complaints are resolved.

According to the ECtHR, what is the basis for Russia's exercise of jurisdiction over Crimea?



Mr. Koroteev described:

The ruling of the Grand Chamber in Ukraine against Russia, all matters of jurisdiction, [...] was a very clear ruling that Russia exercises its jurisdiction in Crimea on the basis of effective control rather than territorial sovereignty and from the 20th of February [2014] rather than the formal dates of what Russia sees as incorporation of Crimea into the Russian Federation, so from the days of first military operations.

Speaking on UN human rights mechanisms, Ms. Olga Skrypnyk recalled that various mechanisms, including UN treaty bodies and special rapporteurs, are successfully being used by human rights defenders in an attempt to protect the rights and freedoms of civilians in Crimea.

How has the UN General Assembly encouraged the international community to protect human rights in Crimea?



Ms. Skrypnyk describes:

[In the UNGA Resolution 75/192 of 2020] we can see in the recommendations, in the last part of the Resolution, that UN member states were called upon to support international platforms that aim to resolve the problems of human rights protection in Crimea and this undoubtedly is connected with the initiative of Ukraine that announced the creation of the Crimean Platform and we can see that this is reflected, to a certain extent, in the resolution.

PANEL SIX

moderated by Dr. Marieke Wierda,

explored 'Domestic Pathways towards Accountability for Violations of International Humanitarian Law and International Human Rights Law'

Speaking on universal jurisdiction, Ms. Yaroslavna Sychenkova recalled that war crimes, crimes against humanity and other crimes that concern the international community as a whole, in principle, can be prosecuted by any state, although many domestic systems impose certain limitations to the framework of universal jurisdiction.

Have foreign states prosecuted perpetrators of international crimes committed in Ukraine under universal jurisdiction?



Ms. Sychenkova described:

I am not aware of any ongoing cases [regarding Ukraine], however, it does not mean that there are no cases because the prosecutor does not have to disclose in some cases, especially when, let's say, a political message needs to be sent. They disclose arrest warrants but in a majority of cases we are not aware, let's say, of the ongoing investigations. [G]iven the developments before the ICC, the prosecutorial authorities might be at the moment hesitant to undertake very concrete steps and to open cases unless a suspect would be present in the country.

Speaking on domestic (Ukrainian) justice for conflict-related crimes, Mr. Igor Ponochovny recalled that Ukrainian prosecutors have faced, and continue to face, difficulties in handling complex conflict-related investigations, including as a result of inadequate legislation and insufficient quantities of specialized training.

How does Ukraine prosecute conflict-related crimes reportedly committed in Crimea?



Mr. Ponochovny describes:

We decided to cooperate with the International Criminal Court because we understand that the top leadership of the Russian Federation, as in top officials, ministers, high-ranking officials, are in fact unattainable for Ukrainian justice. That is, we can carry out convictions in absentia, but we will not achieve the goal of criminal prosecution, meaning, we will not actually be able to ensure that a high-ranking Russian official involved in war crimes or crimes against humanity in the Crimea is punished accordingly. That is why, together with GRC, we have developed a certain vertical of offenders, and with the offenders up to a certain rank we deal at the national level, and regarding the top leadership

of the Russian Federation, we send information messages to the International Criminal Court.

Speaking on transitional justice, Mr. Ilya Nuzov highlighted the importance of addressing not only the violations committed in the context of the ongoing conflict, but also the Soviet era human rights violations.

Do the measures designed by Ukraine adequately reflect the concept and purpose of transitional justice?



Mr. Nuzov describes, speaking on the draft bill published by Ukraine's Ministry of Reintegration of the Temporarily Occupied Territories:

[The draft bill] contains a comprehensive framework for addressing the consequences of the armed conflict in the eastern Ukraine, reintegration of the currently occupied territories and development of sustainable peace. [...] I would like to point out the narrowness of this definition [of transitional justice ...] Russian aggression is the casus belli of the current conflict but we do note that many Ukrainians do fight on the side of pro-Russian separatists and by framing the transitional justice policy exclusively around the problem of Russian aggression might presuppose that which it could aim to uncover, document and prove, namely all the root causes of the conflict, including the deeply rooted ideological divisions that might go back to the early independence period and even before.

GRC's co-founder and managing partner, Wayne Jordash QC provided the closing remarks for the conference, recalling that the determination of law and legal principles can only be developed in an effective, robust and sustainable way by interrogating the legal status of Crimea and Donbas with delineation of the IHL and IHRL obligations of Russia, Ukraine and

How does Ukraine move forward from here?



Mr. Jordash described:

Ukraine must meet warfare with lawfare. It must seek to create a historical record based on legal principles and decisions not only through the international justice system which, as we have heard and which is obvious, has its limitations, but with the help of international lawyers more generally. [...] This task depends not just on international lawyers but on a range of domestic and international lawyers, practitioners and civil society activists coming together to identify relevant law and practice as essential steps towards building Ukraine's ability to not only understand Russia's responsibilities for violations of international law but also to understand its own interlinked obligations and use all of these principles to advance its own lawfare.

