IS DONBAS OCCUPIED?

CONTENTS

INTRODUCTION .......................................................................................................................... 2
(1) HOW THE ASSESSMENT OF RUSSIA'S ALLEGED OCCUPATION OF DONBAS SHOULD BE APPROACHED. 2
   A. LEGAL PROVISION: ARTICLE 42 OF THE HAGUE REGULATIONS ........................................ 4
   B. FACTUAL BASIS............................................................................................................. 4
   C. THE COMMENCEMENT OF AN OCCUPATION .................................................................. 4
      (i) PHYSICAL PRESENCE OF THE ARMED FORCES OF A STATE IN A FOREIGN TERRITORY ........ 6
      (ii) THE EXERCISE OF AUTHORITY IN LIEU OF THE LOCAL GOVERNMENT ...................... 6
      (iii) SUBSTANTIAL OR COMPLETE INCAPABILITY OF THE EFFECTIVE LOCAL GOVERNMENT .... 7
   D. CLASSIC FOREIGN OCCUPATION .................................................................................. 7
   E. OCCUPATION BY PROXY .............................................................................................. 8
      (i) NOTION OF OVERALL CONTROL .................................................................................. 9
   F. END OF THE OCCUPATION ........................................................................................... 11
(2) IF RUSSIA OCCUPIES DONBAS, WHAT HUMAN RIGHTS AND HUMANITARIAN LAW OBLIGATIONS DOES IT HAVE? ........................................................................................................... 12
(3) THE PRINCIPAL LEGAL OPTIONS THAT EXIST FOR UKRAINE TO ENFORCE ITS RIGHTS AGAINST RUSSIA AS AN OCCUPYING STATE ................................................................................................. 16
INTRODUCTION

The question of whether the Russian Federation is in occupation of Donbas is a complicated issue that rests upon detailed factual assessments concerning a number of legal issues that I will outline in this presentation. Unfortunately, international humanitarian law (IHL) instruments do not provide definitive standards for determining when an occupation begins, or when it is terminated.\(^1\)

However, it is critical that Ukraine attempts this assessment. Although a finding that Russia is in occupation will not remove Ukraine’s IHL or human rights obligations towards the civilian population, it will help to define what they are and will also clarify the obligations that Russia owes to civilians in Donbas and enable Ukraine to take legal action to enforce those rights and seek remedies for any violations.

In the next 20 minutes, I will therefore discuss:

1. the assessment of Russia’s alleged occupation of Donbas and how it should be approached;
2. in the event that Donbas is occupied, what human rights and humanitarian law obligations likely remain upon Russia; and
3. the principal legal options that exist for Ukraine to enforce its rights against Russia as an occupying state.

(1) HOW THE ASSESSMENT OF RUSSIA’S ALLEGED OCCUPATION OF DONBAS SHOULD BE APPROACHED

The main legal issue arising in relation to the concept and the beginning of military occupation is: how much control must a State exercise over territory before it can be considered an Occupying Power?\(^2\)

\(\Rightarrow\) SEE OVERVIEW: PICTOGRAPH 1

---


\(^2\) Sassòli, How does law Protect in War? 2015, 1391.
APPLICATION OF THE LAW OF OCCUPATION TO THE SITUATION IN UKRAINE

The occupation is
An occupation is an inherently temporary placement of a state territory or a part of a state territory under the authority of the hostile army that exercises a high degree of control or administration over such territory.

Legal provision – Article 42 of the Hague Regulations:
“Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”

Factual basis
The de facto submission of a territory to the authority of the hostile army.

The Commencement of an Occupation

Physical presence of the armed forces of a state in a foreign territory given that the effective local government did not give its consent for such presence at the time of invasion.

Exercise of authority over the entire territory or its parts by the foreign forces in lieu of the local government.

Substantial or complete incapability of effective local government to exercise its powers by virtue of the foreign forces’ unconsented-to presence.

OCCUPATION

Classic: if the effective control of the foreign armed forces over a state’s territory is demonstrated (Crimea).

By proxy: if a foreign state exercises overall control over the surrogate army that exercises effective control over the territory (Donbas).

Effective control is established on a case-by-case basis, including with regard to scale, scope and nature of: (i) Military presence e.g. troops present; checkpoints; communication; (ii) Military dependency e.g. supplies of weapons and logistics; (iii) economic, financial and political support.

Overall control is established on a case-by-case basis, including with regard to the precise military relationship between the state and the group (e.g. financial, logistical, organisational support and planning, coordination and participation in and around military actions).

End of the Occupation
Transfer of authority to a local government re-establishing the full and free exercise of sovereignty even if the government agrees to the continued presence of foreign troops on its territory.
**A. Legal Provision: Article 42 of the Hague Regulations**

The law that defines an occupation comes from various sources. First, it is contained in **Article 42 of the 1907 Hague Regulations** that reads as follows: “Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.” As you will appreciate, that is somewhat vague. Nevertheless, despite its vagueness, Article 42 of the Hague Regulation continues to be the cornerstone against which any determination as to whether a situation amounts to an occupation has to be made. In the absence of any definition in the subsequent Geneva Conventions, international courts such as ICJ and the ICTY have relied upon the Hague Regulations.³

**B. Factual Basis**

Following the provisions of Article 42 and from the jurisprudence that seeks to interpret it, an occupation is an inherently temporary placement of a state territory or a part of a state territory under the authority of the hostile army that exercises a high degree of control or administration over such territory.⁴ The sole factual basis for determining the existence of occupation is the de facto submission of a territory to the authority of the hostile army.⁵

**C. The Commencement of an Occupation**


Hence, the occupation begins and the law of occupation starts to apply when the territory is placed under the effective control of the hostile army regardless of whether the occupation was approved by the UN Security Council, whether it is called “invasion”, “liberation”, “administration” or actually “occupation”, whether there is an armed resistance or whether it is referred to as a situation of “effective control”. The moment the hostile army is in effective control, it is able to carry out all of the duties imposed by the law of occupation and therefore it is deemed to be in occupation.

Effective control should not be confused with full control. Effective control is not full control, it is something less. However, this cannot be decided in the abstract. What is effective will depend upon the terrain; the density of the population; the size of the army, the nature of the replaced administration, and many other considerations.

The best test we have for demonstrating the existence of an occupation under IHL comes from the International Committee of the Red Cross. According to them, three cumulative conditions must be met in order to demonstrate the existence of an occupation:

(i) Physical presence of the armed forces of a state in a foreign territory without consent;
(ii) Exercise of authority over the entire territory or its parts by the foreign forces in lieu of the local government
(iii) Substantial or complete incapability of the effective local government to exercise its powers by virtue of the foreign forces’ unconsented-to presence

Having considered the notion of the effective control, it is necessary to examine these three criteria to ascertain how they may be interpreted. Taking each of these boxes in turn.

7 Ibid.
8 Ferraro, p.139, stating that Daniel Thürrer and Malcolm MacLaren assert that occupation exists ‘when a party to a conflict is exercising some level of authority over enemy territory’. See: “Ius post bellum” in Iraq: a challenge to the applicability and relevance of international humanitarian law?, in Klaus Dicke et al. (eds), Weltinnenrecht: Liber Amicorum Jost Delbrück, Duncker & Humblot, Berlin, 2005, p. 757.
10 ICRC Commentary to First Geneva Convention, para.304
(i) **Physical Presence of the Armed Forces of a State in a Foreign Territory**

This consideration involves one central question: is the foreign military physically present and thus able exert authority over occupied territory?\(^{11}\) Put another way, effective control over foreign territory requires the Occupying Power to be able to impose its authority in that territory within a reasonable time, as a result of having already established its authority as a result of a military invasion.

Therefore, in general, the obligations and rights conferred upon the Occupying Power by IHL require its physical presence in the occupied territory.\(^{12}\) Without physical presence, it will not be able to respect the many rights it is required to protect and fulfil, for example, those concerning maintaining public order and civil life etc.\(^{13}\)

Nevertheless, the prerequisite of foreign troops on the ground does not mean that effective control requires their presence on the totality of the territory.\(^{14}\) On the contrary, the size of the foreign forces cannot be predetermined and could vary according to the circumstances (for example, effective control could be established by positioning foreign forces in strategic places within the occupied territory rendering the Occupying Power capable of sending troops within reasonable time in order to make its authority felt).\(^{15}\) It is the ability to be able to exert authority combined with the assertion of it that is at the heart of the overall assessment.

(ii) **The Exercise of Authority in Lieu of the Local Government**

The occupation requires the exercise of governmental functions.\(^{16}\) This assists in distinguishing an invasion from an occupation: as noted by the US Military Tribunal in Nuremberg in the *Hostages* case, “invasion implies a military operation while an occupation indicates the exercise of governmental authority to the exclusion of an established government”.\(^{17}\)

---

\(^{11}\) Ferraro 2012, 144.

\(^{12}\) Ferraro 2012, 144.

\(^{13}\) Sassoli 2015, 1395.

\(^{14}\) Ferraro 2012, 145.

\(^{15}\) Spoerri 2014, 189.

\(^{16}\) Ferraro 2012, 148.

However, a majority of experts consider that a possibility of exercising control over the territory or part of it can be sufficient. Indeed, there is broad agreement that once enemy foreign forces have established a presence in a territory, what counts for the purposes of determining the applicability of occupation law, is the ability of the foreign forces to exert authority in the foreign territory and not the actual and concrete exercise of such authority.

(iii) **Substantial or Complete Incapability of the Effective Local Government**

The substantial threshold means that there is no requirement that an entire territory be occupied. If the occupied power is still functioning in parts of the occupied territory but these areas “are effectively cut off from the rest of the occupied territory”, then the territory remains occupied. Similarly, the fact that the ousted state or troops acting on behalf of the state are able to conduct guerrilla operations entailing brief or temporary control over certain parts of the territory does not alter the legal status of occupation.

**D. Classic Foreign Occupation**

As discussed, the standard notion of occupation involves a foreign, hostile army exercising effective control over a state’s territory or its part. IHL does not go as far as recognising the possibility that in non-international armed conflicts, non-state actors (NSA) that control part of the territory might become a de facto occupying power.

The ECHR applies the “effective control” test to address the issue whether a state in question, as a result of its military action, exercises its jurisdiction over a foreign territory – “[b]earing in mind the object and purpose of the Convention, the responsibility of a Contracting Party [under the

---

18 Sassoli 2015, 1397.
19 Spoerri 2014, 190, citing ICJ, Armed Activities Case, para 173.
Convention] may also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory.\textsuperscript{22}

Effective control is established on a case-by-case basis. The ECtHR has examined the issue of effective control on a case-by-case basis with regard to the scale, scope and nature of: (i) Military presence e.g. troops present; checkpoints; communication; (ii) Military dependency e.g. supplies of weapons and logistics; and (iii) economic, financial and political support.

As an example: in the \textit{Loizidou v. Turkey}, Judgement, paras.16, 17 and 56): the fact that Turkey had 30,000 military personnel in Northern Cyprus involved in patrols and checkpoints along the main lines of communication was decisive.

In the case of \textit{Ilaşcu and others v. Moldova and Russia}, the fact that Russia had military personnel and weaponry stocks located in the area, combined with clear commercial relations between their state-controlled military institutions and those in the occupied state was important. These factors showed that the allegedly separate entity – the MRT – remained under the effective authority, or at the very least under the decisive influence, of the Russian Federation. As noted, “in any event… it (the MRT) survives by virtue of the military, economic, financial and political support given to it by the Russian Federation.”\textsuperscript{23}

\textbf{E. OCCUPATION BY PROXY}

However, contemporary IHL also acknowledges that certain situations that arise in armed conflicts nowadays may trigger the law of occupation even if they do not fit into the ‘traditional’ definition of occupation. In modern conflicts, it is common to have a situation where a territory is controlled by surrogate armed forces acting on behalf of and controlled by a foreign state. Obviously, this may be highly relevant to the situation in Donbas.

In these situations, a state of occupation may exist. An important consideration is determining whether those who exercise control are acting on behalf of – or are controlled by – a foreign...


power.\textsuperscript{24} As noted in \textit{Loizidou v. Turkey} by the ECtHR, it does not matter if effective control is maintained directly by the armed forces or is exercised “through a subordinate local administration”\textsuperscript{25} This is always a question of fact – whether \textit{de jure} or \textit{de facto} agents contribute to the required effective control or exercise it alone.

In this regard, there are many possibilities; cases that encompass complete and effective control of persons and / or facilities by the armed forces of another state; occupation by multinational forces in breach of international agreements to employ these forces; and occupation by proxy.\textsuperscript{26} Such an approach clearly encompasses indirect occupation by proxy if a foreign state exercises \textit{overall control} over a separatist army that, in its turn, exercises effective control over the territory.

When examining the question of whether Donbas is occupied by the Russian Federation, the ICC Prosecutor has adopted a similar approach: she is examining whether the “Russian Federation has exercised \textit{overall control} over armed groups in eastern Ukraine”.

\textbf{(i) Notion of Overall Control}

The notion of \textit{Overall Control} has arisen in the context of ICL in examining whether conflicts are international or non-international and has become the favoured test in international law when addressing occupation by proxy. Overall control may amount to less control than effective control and arguably lowers the threshold for state responsibility that arguably rests on the effective control test as expounded during the \textit{Nicaragua} ICJ Judgement. This judgement found that the USA had exercised overall control over contras groups by ‘recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding, and directing military and paramilitary actions in and against Nicaragua’ but found that this was insufficient and that only \textit{effective control} would suffice.\textsuperscript{27}

In contrast, the overall control test originates from the ICTY Tadić case where the Appeals Chamber used it as a means of assessing whether a state (Serbia) had sufficient control over its

\textsuperscript{24} Sassòli 2015, 1399.  
\textsuperscript{25} \textit{Loizidou v. Turkey}, Judgement of 18 December 1996, Application No. 15318/89, para 52.  
\textsuperscript{27} \textit{Nicaragua v. USA}, paras.15, 292.
army when it operated in another state (Bosnia) to establish that Serbia was part of the conflict and the conflict was therefore an international armed conflict.28 In other words, the question was whether the foreign power was occupying or operating through the act of local de facto organ or agents”.29

As mentioned, overall control is established on a case-by-case basis, including with regard to the precise military relationship between the state and the group (e.g. financial, logistical, organisational support and planning, coordination and participation in and around military actions).30 Therefore, in order to determine the question of whether a state such as Russia has overall control over relevant armed groups, the question might be summarised as: whether the state ‘normally has a say in, as well as an impact on, the planning or organization of the group’s activities.”31

This test was confirmed in the Blažkij case at the ICTY, where it was stated that:

In relation to areas within Bosnia, Croatia played the role of occupying Power through the overall control it exercised over the HVO [a local militia, the “Croatian Defence Council”], the support it lent it and the close ties it maintained with it… [ ]…the overall control exercised by Croatia over the HVO means that at the time of its destruction, the property of the Bosnian Muslims was under the control of Croatia and was in occupied territory.32

Apart from the ICTY, this test has been adopted in ECHR cases and by the UN Working Group on Arbitrary Detention for the same purpose of establishing the required link between a state and activities of an armed group that controls certain territory.

In Cyprus v. Turkey, the ECHR held that “[h]aving effective overall control over northern Cyprus, [Turkey’s] responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support.”33

---

30 Ibid.
32 Prosecutor v. Blažkij, Trial Judgement, Case No. IT 95-14-T, 3 March 2000, para. 149 (”Blaški Trial Judgement”) [emphasis added].
33 Cyprus v. Turkey, Judgement (10 May 2001), para.77 [online] available at: http://hudoc.echr.coe.int/eng#"fulltext":"Cyprus
Relying on the *Tadić* Judgement, the UN Working Group on Arbitrary Detention, relied upon the overall control test to address the issue whether the South Lebanese Army acted on behalf of Israel. It assessed what assistance the Israeli state provided, including:

- Financial assistance (particularly, through the payment of salaries);
- Logistical assistance (including, but not limited to building roads ‘to enable military forces to move without entering [villages] due to the danger that is inherent in driving within the villages’);
- Other assistance and support (such as conducting professional trainings);
- Cooperation (in the release of detainees, gathering intelligence, transferring the information received during interrogations);
- Coordination (of routine and military activities, as well as small military presence).  

The Working Group concluded that the requirements of the overall control test were met and Israel exercised overall control over the South Lebanese Army – ‘it has been sufficiently demonstrated that the SLA is acting on behalf of the IDF.’

A similar approach was taken at the ICJ in the *Armed Activities Case*, wherein the ICJ examined whether Uganda exerted overall control over Congolese insurgent groups.

**F. END OF THE OCCUPATION**

Whether classic or occupation by proxy, it the occupation ends with a transfer of authority to a local government re-establishing the full and free exercise of sovereignty even if the government agrees to the continued presence of foreign troops on its territory.
(2) **If Russia occupies Donbas, what human rights and humanitarian law obligations does it have?**

As is plain from the facts, Russia has assumed the role of an occupier in Crimea and possibly also in the regions of Donetsk and Luhansk. In these circumstances, the Russian Federation bears a range of extensive obligations that derive from both IHL and international human rights law (IHRL).

A finding that Russia had become an occupier could change the GoU’s international humanitarian and human rights obligations to the citizens of the occupied territory, but it does not remove them. Generally, on occupied territories, the occupying state is obliged to preserve life that existed before the occupation with some specifics that appear by virtue of an armed conflict. Three overriding principles should be considered:

- Occupation is a temporary situation, not equivalent to annexation;
- The Occupying Power has a duty of good governance; and
- The Occupying Power may take measures to ensure the safety and sustenance of its army and the administration of an occupied territory.

First, as established by Article 43 of the Hague Regulations, the occupying power must, as far as possible, restore and ensure security and public life in the occupied territory. Secondly, the occupying power must respect the laws in force in the occupied territory. As such, the occupying power must not repeal, amend or adopt new legislation in the occupied territory. However, the occupying power does have the right, or duty, to amend or adopt legislation in the occupying territory if such measures are necessary for its security, and to ensure that human rights are enforced and the territory properly administered.

Finally, in line with the principle of continuity, no fundamental changes should be made to the administrative structures in occupied territory. In particular, Article 54 of the Fourth Geneva

---

Convention provides that the Occupying Power may not alter the status of public officials or judges in the occupied territories.

Thus, the occupying power has to:

- Respect property rights: there can be no destruction or seizure of private or public property;\(^{39}\)
- Preserve the civilian population on the territory: there can be no individual or mass forcible transfers or deportations of protected persons from the occupied territory or transferring of its own population to the territory it occupies;\(^{40}\)
- Respect social and labour rights of the population, refraining from compelling protected persons to work,\(^{41}\) paying every worker a fair wage,\(^{42}\) ensuring access to food, medical supplies, medical assistance,\(^{43}\) etc.
- Comply with human rights obligations set forth in the treaties it has signed (e.g., in the case of Russia, the ECHR and the ICCPR): e.g. the right to life,\(^{44}\) freedom from torture,\(^{45}\) servitude, slavery, forced labour,\(^{46}\) right to liberty and security of person,\(^{47}\) freedom of movement,\(^{48}\) equality before courts,\(^{49}\) right to family life,\(^{50}\) freedom of thought, conscience and religion\(^{51}\) etc.).

As noted, a positive finding that Russia is an occupier allocates certain responsibilities to Russia; however it does not remove Ukraine’s responsibilities. In fact, Ukraine is bound by IHL obligations by virtue of existence of an armed conflict and must comply with human rights obligations by

---

\(^{39}\) Article 53, 55, and 56 of the 1907 Hague Regulations.
\(^{40}\) Article 49 of Fourth Geneva Convention.
\(^{41}\) Article 51 of Fourth Geneva Convention.
\(^{42}\) Article 54 of Fourth Geneva Convention.
\(^{43}\) Article 55-56 of Fourth Geneva Convention, Article 14(1) of First Additional Protocol.
\(^{44}\) Article 2(1) of the ECHR, Article 6(1) of the ICCPR.
\(^{45}\) Article 3 of the ECHR, Article 7 of the ICCPR.
\(^{46}\) Article 4 of the ECHR, Article 8 of the ICCPR.
\(^{47}\) Article 5 of the ECHR, Article 9(1) of the ICCPR.
\(^{48}\) Article 2 of Protocol 4 to the ECHR, Article 12(1) of the ICCPR.
\(^{49}\) Article 6 of the ECHR, Article 14(1) of the ICCPR.
\(^{50}\) Article 8(1) of the ECHR, Article 17(1) of the ICCPR.
\(^{51}\) Article 9(1) of the ECHR, Article 18(1) of the ICCPR.
taking ‘measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention.’

Concerning IHL, Ukraine has to comply with norms that regulate the means and methods of warfare, such as the principle of distinction, the verification of military targets, control over the execution of attack, and the humane treatment of protected persons. Ukraine must also comply with norms that ensure humanitarian relief, such as an obligation to allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, and to ensure the freedom of movement of authorized humanitarian relief personnel essential to the exercise of their functions.

Furthermore, Ukraine has to comply with its human rights obligations under the ECHR and the ICCPR. Even if Ukraine lacks control over Donbas, as a general rule established by the ECHR and by the Human Rights Committee, it retains these human rights obligations towards its population living on such territory outside of states’ control, including: the right to life, freedom from torture, freedom from servitude, slavery, forced labour, the right to liberty and security of person, the freedom of movement, equality before courts, freedom of thought, conscience and religion, freedom of assembly, and non-discrimination, etc.

Acknowledging that some obligations may not be fulfilled due to the lack of control, Ukraine should take all possible measures to ensure human rights. The appropriateness and sufficiency of

---

53 Articles 48, 51(2) and 52(2) of First Additional Protocol.
54 Article 57(2)(a) of First Additional Protocol.
55 Article 57(2)(b) of First Additional Protocol.
56 Article 4 of the Hague Regulations, common Article 3 to Geneva Conventions, Article 75(1) of First Additional Protocol.
57 Article 70(3) of First Additional Protocol.
58 Article 7(1) of First Additional Protocol.
59 Article 2(1) of the ECHR, Article 6(1) of the ICCPR.
60 Article 3 of the ECHR, Article 7 of the ICCPR.
61 Article 4 of the ECHR, Article 8 of the ICCPR.
62 Article 5 of the ECHR, Article 9(1) of the ICCPR.
63 Article 2 of Protocol 4 to the ECHR, Article 12(1) of the ICCPR.
64 Article 6 of the ECHR, Article 14(1) of the ICCPR.
65 Article 9(1) of the ECHR, Article 18(1) of the ICCPR.
66 Article 11(1) of the ECHR, Article 21 of the ICCPR.
67 Article 14 of the ECHR, Article 26 of the ICCPR.
such measures is decided on a case-by-case basis.\(^{68}\) This generally requires Ukraine ‘to refrain from supporting the separatist regime and to act by taking all the political, judicial and other measures at its disposal’.\(^{69}\) This means that Ukraine has a positive obligation to re-establish control over its uncontrolled territory that requires ‘to refrain supporting the separatist regime and to act by taking all the political, judicial and other measures at its disposal’.\(^{70}\) These may include taking part in diplomatic negotiations with the Russian Federation; filing appeals to intergovernmental organisations and foreign countries, quashing unlawful decisions by the Russian Federation; and investigating complaints of violations by the Russian Federation and their agents, the separatists.

---

\(^{68}\) Ilaşcu and others v. Moldova and Russia, paras.333-334

\(^{69}\) Mozer v. The Republic of Moldova and Russia, para.151.

\(^{70}\) Mozer v. The Republic of Moldova and Russia, para.151.
(3) **The principal legal options that exist for Ukraine to enforce its rights against Russia as an occupying state**

Discussing in depth the principal judicial and quasi-judicial options that Ukraine may take to enforce its rights against Russia (as an occupying state) are outside the confines of this presentation. However, as may be seen by our second Overhead, these include the ICJ, the ECrHR, the International Humanitarian Fact-Finding Commission, the Human Rights Committee and the Committee on the Elimination of Racial Discrimination.

Each of these has its own jurisdictional threshold and each has its own advantages and disadvantages. The path chosen will depend upon the precise complaint, the legal remedies sought and the overall political objectives sought. As is plain, whilst practitioners and legal scholars acknowledge the capacity of the ICJ to settle inter-state disputes, to ensure legal order within the international system and to develop international law, given that Russia has not accepted the jurisdiction of the Court, the claims available to be brought to the ICJ, remain limited.

→ **SEE OVERVIEW: PICTOGRAPH 2**
# International Judicial Institutions to Address Ukraine’s Complaints Concerning Occupation

## International Court of Justice:
**Remedies:** The Court delivers a final, without appeal, judgement that is binding upon the parties concerned. In its judgement the ICJ addresses the issue whether a state party to the proceedings had committed a breach of international law. If addressed positively, the Court also demonstrates how such breach was committed and orders to cease a violation and to refrain from all such acts as may constitute breaches of the legal obligations. The ICJ may order a violating state to pay reparations for injuries.

## European Court of Human Rights:
**Remedies:** In a judgment, the ECHR will state whether there has been a violation by the Respondent State, and if so which Articles of the Convention or the Protocols have been violated. Where an applicant has made a claim for just satisfaction the ECHR will also state whether the applicant shall receive such an award (typically by way of a monetary compensation) from the Respondent State. In exceptional cases, the ECHR can mandate that a State take specific action, such as the release of an applicant from detention or the enforcement of an applicant’s right to access to a child over which they have custody.

## International Criminal Court:
**Remedies:** The written decision on individual criminal liability (based upon violation of Occupation/IHL) delivered in open court contains a full and reasoned statement of the Trial Chamber’s findings on the law and the evidence. The ICC determines the scope and extent of any damage, loss and injury to, or in respect of, victims and states the principles on which it is acting. It may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

---

## Key International Quasi-Judicial Institutions to Address Ukraine’s Complaints

### Human Rights Committee:
**Outcome:** The Committee will propose its solutions to resolve the situation but will not launch the process until States – Parties make the efforts to resolve the matter in a ‘friendly’ way. States Parties are not bound by the recommendations of the Committee in the inter-state disputes. They shall explicitly state whether they accept the proposed solution.

### Committee on the Elimination of Racial Discrimination:
**Outcome:** Report on the matter which includes findings and recommendations on the possible amicable solution of the dispute. Recommendations and offers shall be accepted by the States. The Report is also communicated to other State Parties.

### Humanitarian Fact-Finding Commission:
**International Humanitarian Fact-Finding Commission (IHFFC or “Commission”), which is a permanent body established under article 90 of Additional Protocol I to the Geneva Conventions of 1949**

**Outcome:** Once the Commission is finished gathering facts, it will submit a confidential report to the States concerned its factual findings. The Commission is not competent to make judgments but may make recommendations and/or offer its offices to the States concerned so that they may resolve the matter amongst themselves.
Ukraine has already submitted inter-state complaints to the ECtHR in cases related to the conflict in Donbas, namely Ukraine v. Russia (I) concerning the events in Crimea and in Donbas between March and September 2014 and Ukraine v. Russia (IV) concerning the developments occurring since September 2014.

The finding of a violation “imposes on the respondent state a legal obligation not just to pay those concerned the sum awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects.”

In this regard, the ICC remains a useful court. Unsurprisingly, the ICC Prosecutor has already indicated that she has considers the Russian Federation to be in occupation of Crimea and she is examining whether they have exercised overall control over armed groups in eastern Ukraine” to ascertain whether they are in occupation. These findings bring into play the application of articles of the Rome Statute relevant to armed conflict of an international character for the relevant period and provide the opportunity to hold relevant members of the Russian Federation responsible for a range of war crimes in Article 8 of the Rome Statute.

As may be seen from our Pictograph, there are a number of available quasi-judicial mechanisms, including the International Humanitarian Fact-Finding Commission (IHFFC or “Commission”), which is a permanent body established under article 90 of Additional Protocol I to the Geneva Conventions of 1949 (“Additional Protocol I”). Although the Commission was constituted in 1991 and has been recognized by numerous States and may enquire into any facts alleged to be a grave breaches defined in the Conventions and this Protocol or other serious violation of the

---

74 ECHR, Scozzari and Giunta v. Italy [GC], nos. 39221/98 and 41963/98 [2000] ECHR 2000-VIII, para.249
Conventions or of this Protocol, the Human Rights Committee that rules upon violations of the ICCPR, and the Committee on the Elimination of Racial Discrimination that will consider a state’s failure to fulfil its obligations under Convention on the Elimination of All Forms of Racial Discrimination (ICERD) if matter is brought to its attention.

In conclusion, Ukraine has several legal options. As noted at the beginning of this presentation, the sole factual basis for the determination of the existence of occupation is the de facto submission of a territory to the authority of the hostile army. Therefore, in relation to the East, in order to ensure optimal use of any remedy, the starting point must be for Ukraine to conduct an objective factual based assessment of whether Russia is in fact in overall control of the separatists and if so, what violations have occurred and how might they be remedied using the available legal mechanisms.

---

78 Protocol I, art 90(2)(c).
79 ICERD, art 12(1).