

# Ukraine v. Russia: The Question of Jurisdiction and the Legal Implications of Russia's Actions in Ukraine

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## I. INTRODUCTION

In March 2014, the ongoing crisis in Ukraine began with the Russian invasion of Crimea.<sup>1</sup> Over the past six years, the conflict has

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1. See Nick Thompson, *Ukraine: Everything You Need to Know About How We Got Here*, CNN (Feb. 3, 2017) <https://www.cnn.com/2015/02/10/europe/ukraine-war-how-we-got-here/index.html>; *Global Conflict Tracker*, COUNCIL ON FOREIGN RELATIONS [hereinafter Global Conflict Tracker], <https://www.cfr.org/interactive/global-conflict-tracker/conflict/conflict-ukraine> (last updated Mar. 17, 2020); CORY WELT, CONG. RESEARCH SERV. R45008, UKRAINE: BACKGROUND, CONFLICT WITH RUSSIA, AND U.S. POLICY 9 (2019).

caused the growth of separatist movements, inter-state fighting, widespread discrimination, and thousands of deaths.<sup>2</sup> Over the years, the Russian Government has repeatedly tried to deny its involvement, but eventually admitted that it had a role, justifying the action taken by claiming that it is helping those who identify as ethnically Russian.<sup>3</sup> Ukraine is now attempting to hold Russia accountable for its actions.<sup>4</sup> Unfortunately, because there is not a viable international forum with general jurisdiction to hear the major dispute as a whole, this has led to the disaggregation of the dispute into several smaller claims in multiple international courts.<sup>5</sup> There are currently over 5,000 individual applications regarding events that have occurred in the Donbas region of Ukraine and Crimea.<sup>6</sup> This Comment explores Ukraine's claims against Russia in the International Court of Justice and the European Court of Human Rights and the implications that this has on the jurisdiction of these courts, the resolution of the claims, and the ability to hold the Russian Government accountable for the broader issues.

## II. OVERVIEW OF THE UKRAINIAN CRISIS

The Ukrainian Crisis began as a dispute over a trade agreement, but later grew into a much larger and bloodier conflict.<sup>7</sup> In 2013, Ukraine was set to sign a deal that would open European Union (EU) markets for Ukrainian goods, but Russia, one of Ukraine's predominant trading partners, opposed the deal.<sup>8</sup> The deal was viewed by many in Ukraine as a pathway to EU membership and a commitment to a European future.<sup>9</sup>

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2. *Global Conflict Tracker*, *supra* note 1.

3. Shaun Walker, *New Evidence Emerges of Russian Role in Ukraine Conflict*, THE GUARDIAN (Aug. 18, 2019) <https://www.theguardian.com/world/2019/aug/18/new-video-evidence-of-russian-tanks-in-ukraine-european-court-human-rights>; *Global Conflict Tracker*, *supra* note 1.

4. See Application of the International Convention for the Suppression of Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.), Preliminary Objections, Judgment, 2019 I.C.J. No. 166, ¶ 1 (Nov. 8); Ukraine v. Russia, (Re Crimea) App. No. 20958/14 (2019) [https://www.echr.coe.int/Pages/home.aspx?p=hearings&w=2095814\\_11092019&language=en&c=&py=2019](https://www.echr.coe.int/Pages/home.aspx?p=hearings&w=2095814_11092019&language=en&c=&py=2019).

5. Lawrence Hill-Cawthorne, *International Litigation and the Disaggregation of Disputes: Ukraine/Russia as a Case Study*, 68 INT'L & COMP. L.Q. 779 (2019).

6. Press Release, Grand Chamber Hearing on Inter-State Case Ukraine v. Russia (re Crimea), U.N. Press Release [there should be a "U.N press releave symbol" for this; see BB 21.7.5 for what this should look like] (Sept. 11, 2019) [hereinafter Press Release].

7. Thompson, *supra* note 1.

8. Nataliya Vasilyeva, *AP Explains: Russia-Ukraine Dispute Raises New Tensions*, AP NEWS (Nov. 26, 2018), <https://apnews.com/8b8f11d5d41a4a5cb1790bf9a26d6e39>.

9. *Id.*

The former Ukrainian President, Viktor Yanukovich, had committed to sign the deal but suddenly backed out, which resulted in mass protests and violent crackdowns against protestors perpetrated by the government.<sup>10</sup> Following the protests, Yanukovich fled the capital, abandoning his country in a time of strife and turmoil.<sup>11</sup> A week later, on March 1, 2014, Russian troops, wearing unmarked uniforms, invaded and took control of Ukraine's Crimean region.<sup>12</sup> Two weeks later, following a local referendum that much of the world has viewed as illegitimate, the region was formally annexed.<sup>13</sup> Later, pro-Russian separatists in the Donbas region, specifically Donetsk and Luhansk, held unrecognized referendums to declare their independence from Ukraine.<sup>14</sup> While already a grave international concern, the crisis escalated when, in July 2014, Russian-built missiles shot down Malaysian Airlines Flight 17 in separatist territory in Ukraine, killing all on board.<sup>15</sup>

Following the occupation of Crimea, Russia instigated the rise of separatist movements in the Donbas region of Ukraine.<sup>16</sup> As these movements progressed, two separatist entities, the Donetsk People's Republic (DPR) and the Luhansk People's Republic (LPR), took over cities and towns within the region and expanded their control.<sup>17</sup> Through multiple battles, the Ukrainian government forces have attempted to restore control, but while they have had success in some areas, they have suffered crushing defeats in others.<sup>18</sup> Russia has claimed that by establishing these entities in the region they were seeking to protect the pro-Russian populations, but many international observers believe that the Russian government "sought to complicate Ukraine's domestic development and foreign policy and increase Russian leverage in potential negotiations over Ukraine's future trajectory."<sup>19</sup>

Throughout the conflict, Russia continuously denied any military involvement in Ukraine, despite a mounting pile of evidence that proved

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10. *Id.*

11. Thompson, *supra* note 1.

12. *Id.*

13. *Id.*; WELT, *supra* note 1, at 14.

14. Global Conflict Tracker, *supra* note 1.

15. *Id.*; Thompson, *supra* note 1.

16. WELT, *supra* note 1 at 15.

17. *Id.* at 16.

18. *Id.*

19. *Id.*

otherwise.<sup>20</sup> Eventually, the Russian President, Vladimir Putin, admitted that Russia had played a part in the invasion and separatist movements and claimed, as justification for the Russian Government's actions, that they are protecting "the Russian-speaking population of Ukraine from Ukrainian nationalists."<sup>21</sup> Russians have traditionally viewed Ukraine, one of many post-Soviet states, as "a historical province of Russia," and many Russians consider Ukrainians to be "close ethnic brethren."<sup>22</sup> Vladimir Putin has said that "Russians and Ukrainians are one people . . . one nation."<sup>23</sup> Many Ukrainians speak Russian and there is an estimated fifteen to twenty percent of the population that ethnically identifies as Russian.<sup>24</sup> Within the regions where the ethnic Russians live, there is still sympathy for the Kremlin, while many other Ukrainians are Western-oriented.<sup>25</sup> The words of Putin's former advisor Vladislav Surkov put into perspective the view that the Russian Government has towards its neighbor. Surkov has stated "forceful coercion to establish brotherly relations is the only method that has historically proven effective in relation to Ukraine."<sup>26</sup>

At a more political level, it could be surmised that another reason Vladimir Putin overtook Crimea was in attempt to show dominance and fight to gain back his political power and popularity, which were slowly diminishing.<sup>27</sup> The annexation of Crimea certainly gave Putin a substantial boost in popularity, with the Russian President's approval rating of sixty percent prior to the annexation rising to nearly ninety percent following the invasion.<sup>28</sup> Russian political analyst Kirill Rogov

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20. Walker, *supra* note 3.

21. See Olena Zerkal, *Russo-Ukrainian War: Putin Must Be Held Accountable*, ATLANTIC COUNCIL (Mar. 26, 2020) <https://www.atlanticcouncil.org/blogs/ukrainealert/russo-ukrainian-war-putin-must-be-held-accountable/>; Pavlo Klimkin, *Five Years Have Passed, and Russia Is Still Occupying Territory in Ukraine*, WASHINGTON POST (Feb. 19, 2019), <https://www.washingtonpost.com/opinions/2019/02/19/five-years-have-passed-russia-is-still-occupying-territory-ukraine/>.

22. WELT, *supra* note 1, at 13.

23. Associated Press, *Putin: Russians, Ukrainians are 'One People'*, AP NEWS (July 20, 2019) <https://apnews.com/3fe3ff2299994fae97825381765b831c>.

24. WELT, *supra* note 1, at 13.

25. Andrew Langley, *Standoff in Ukraine*, BLOOMBERG (Dec. 13, 2019) <https://www.bloomberg.com/quicktake/unrest-in-ukraine>.

26. Alexei Chesnakov, *Sukov: Mne Interesno Deistvovat' Protiv Real'nosti*, ACTUAL'NYE COMMENTARII (Feb. 26, 2020) <http://actualcomment.ru/surkov-mne-interesno-deystvovat-protiv-realnosti-2002260855.html>.

27. Nina Khrushecheva, *Russia's Crimea Invasion was Good for Putin. But Five Years Later the Nationalist Glow is Gone*, NBC NEWS (Mar. 18, 2019) <https://www.nbcnews.com/think/opinion/russia-s-crimea-invasion-was-good-putin-five-years-later-ncna984431>.

28. *Id.*

observed that there were spikes in loyalty and a conservative and patriotic shift that occurred in the Russian people following the annexation.<sup>29</sup> Additionally, Putin's actions were likely an attempt to prevent Ukraine from breaking ties with Russia even further and moving towards closer association and integration with the West.<sup>30</sup>

Whatever the motivation, since the annexation of Crimea, Russia has continued to increase its military presence as well as suppress local opposition to its actions.<sup>31</sup> Satellite images have revealed that there are still a number of troops in the region and surface-to-air missile systems among other advanced weaponry.<sup>32</sup> Russia also continues to deny direct involvement in the conflict, but many international observers surmise that the government has unofficially deployed more troops to fight and has supplied weapons to local combatants.<sup>33</sup> The U.S. Special Representative for Ukraine Negotiations, Kurt Volker, stated that "Russia has 100 percent command and control of what is happening in the occupied areas there—military forces, political entities, and direct economic activity."<sup>34</sup> More recently, Ukraine continues to deal with serious challenges.<sup>35</sup> The country has transitioned to a new government and has implemented reforms to "promote Ukraine's Western integration, rebuild ties with residents of Russian-controlled areas of eastern Ukraine, and revitalize talks with Russia on conflict resolution."<sup>36</sup> Due to the ongoing conflict, there is a growing number of internally displaced persons, with the official count of the Ukrainian government reaching 1.4 million as of July 2019.<sup>37</sup> A number of the people who have been displaced by the conflict are Crimean Tatars, a Muslim ethnic minority who have lived in Crimea for hundreds of years.<sup>38</sup> The Tatars

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29. Julia Ioffe, *What Putin Really Wants*, ATLANTIC (Jan. 2018) <https://www.theatlantic.com/magazine/archive/2018/01/putins-game/546548/>.

30. Vasilyeva, *supra* note 8.

31. WELT, *supra* note 1, at 14.

32. See PATRICK TUCKER, U.S. INTELLIGENCE OFFICIALS AND SATELLITE PHOTOS DETAIL RUSSIAN MILITARY BUILDUP ON CRIMEA (2019); UNIAN INFORMATION AGENCY, UKRAINE INTEL ASSESSES SIZE OF RUSSIA'S MILITARY FORCE AMASSED IN OCCUPIED CRIMEA (2019).

33. WELT, *supra* note 1, at 16.

34. Kurt Volker, Special Representative for Ukraine Negotiations, U.S. Dep't of State, Press Briefing (Nov. 8, 2018).

35. WELT, *supra* note 1, at 1.

36. *Id.*

37. *Id.* at 17.

38. Alice Popovici, *Why Russia Wants Crimea*, HISTORY (Aug. 30, 2018) <https://www.history.com/news/crimea-russia-ukraine-annexation>.

openly oppose Russia's occupation of the region and have been subjected to harassment, physical attacks, and threats by Russian authorities and their proxies since 2014.<sup>39</sup>

It is no secret that many states' governments, including that of the United States, have condemned Russia's invasion of Ukraine and actions in Crimea.<sup>40</sup> The United States government has supported sanctions against Russia for its actions in Ukraine and has committed to increased security and economic aid.<sup>41</sup> Both states and international organizations have denounced Russia's annexation of Ukraine as "a violation of international law and Russia's own commitments under the 1975 Final Act of the Conference on Security and Cooperation in Europe."<sup>42</sup> Among other documents and international obligations, it is considered to be a violation of the 1994 Budapest Memorandum.<sup>43</sup> In this memorandum, Russia reaffirmed its commitment "to respect the independence and sovereignty and the existing borders of Ukraine" and the "obligation to refrain from the threat or use of force" against Ukraine.<sup>44</sup> Additionally, the United Nations has passed multiple resolutions condemning Russia's occupation of Crimea, reaffirming the refusal to recognize its annexation and affirming Ukraine's territorial integrity.<sup>45</sup> As a whole, there is a general consensus among states and those who practice international law that the actions of the Russian Government "constitute illegal use of force and should be qualified as an aggression."<sup>46</sup>

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39. *Crimea: Persecution of Crimean Tatars Intensifies*, HUM. RTS. WATCH (Nov. 14, 2017) <https://www.hrw.org/news/2017/11/14/crimea-persecution-crimean-tatars-intensifies#> [hereinafter HUM. RTS. WATCH].

40. See WELT, *supra* note 1, at 1; *Putin's Stance on Ukraine Supported by Minority of Nations*, BLOOMBERG (Mar. 14, 2014) <https://www.bloomberg.com/graphics/infographics/countries-react-to-russian-intervention-in-crimea.html>; *NATO, EU Condemn Russia's 2014 Seizure of Crimea*, AP NEWS (Mar. 18, 2019) <https://apnews.com/a827c28f416243e984c9b329bc638cc0>.

41. WELT, *supra* note 1, at 1.

42. *Id.* at 15.

43. *Id.*; *Ukraine Crisis: Does Russia Have a Case?*, BBC (Mar. 5, 2014) <https://www.bbc.com/news/world-europe-26415508/>.

44. S.C. Res. A/49/765, S/1994/1399, ¶ 1-2 (Dec. 19, 1994) <https://digitallibrary.un.org/record/169471?ln=en>.

45. See G.A. Res. 68/262, ¶ 1 (Mar. 27, 2014); G.A. Res. 71/205, 1 (Dec. 19, 2016); G.A. Res. 72/190, 2 (Dec. 19, 2017); G.A. Res. 73/L.47, ¶ 1 (Dec. 5, 2018).

46. DAINIUS ZALIMAS, *RUSSIAN JUSTIFICATION OF THE ANNEXATION OF CRIMEA AND NAZI PROPAGANDA: GREAT SIMILARITIES AND MINOR DIFFERENCES*, (2015).

## III. THE QUESTION OF JURISDICTION

While much of the world, and of course Ukraine, condemn Russia's actions, one of the predominant issues with taking legal action against the country is the question of jurisdiction.<sup>47</sup> Since Russia's annexation of Crimea and the fighting in the Donbas region began, Ukraine has actively tried to pursue claims against Russia in various international courts including the International Criminal Court, the Permanent Court of Arbitration, and the Law of the Sea Tribunal.<sup>48</sup> Much of the battle for Ukraine in attempting to hold the Russian Government accountable for its actions has been the difficulty of finding a valid legal forum in which to bring its claims.<sup>49</sup> It is well understood that instead of an integrated international court system, the current structure is decentralized, made up of multiple courts and tribunals that have different jurisdictions.<sup>50</sup> Unfortunately, this type of system often leads to disaggregation of broad disputes into specific legal claims before a number of different courts or tribunals.<sup>51</sup> This problem is evident in the ongoing dispute between Ukraine and Russia.<sup>52</sup> Specifically, the broad disputes here are the annexation of Crimea and Russia's support of the separatist movements in the Donbas Region of Ukraine.<sup>53</sup> These disputes are being litigated in various different courts, including the International Court of Justice (ICJ)

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47. See WELT, *supra* note 1, at 1; *Putin's Stance on Ukraine Supported by Minority of Nations*, BLOOMBERG (Mar. 14, 2014) <https://www.bloomberg.com/graphics/infographics/countries-react-to-russian-intervention-in-crimea.html>; *NATO, EU Condemn Russia's 2014 Seizure of Crimea*, AP NEWS (Mar. 18, 2019) <https://apnews.com/a827c28f416243e984c9b329bc638cc0>; Hill-Cawthorne, *supra* note 5, at 793.

48. Paul Roderick Gregory, *International Criminal Court: Russia's Invasion of Ukraine Is a 'Crime,' Not a Civil War*, FORBES (Nov. 20, 2016) <https://www.forbes.com/sites/paulroderickgregory/2016/11/20/international-criminal-court-russias-invasion-of-ukraine-is-a-crime-not-a-civil-war/#36a8b0167ddb>; Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation), Case No. 26, Order of May 25, 2019, ¶1, [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_26/C26\\_Order\\_25.05.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_26/C26_Order_25.05.pdf).

49. Mike Corder, *UN Court Says it Has Jurisdiction in Ukraine-Russia Case*, AP NEWS (Nov. 8, 2019) <https://apnews.com/6fde70814c30438aa2d013436c5b58ec>.

50. Hill-Cawthorne, *supra* note 5, at 779.

51. *Id.*

52. See *id.* at 780; Application of the International Convention for the Suppression of Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.), Preliminary Objections, Judgment, 2019 I.C.J. No. 166, ¶18 (Nov. 8); Ukraine v. Russia, (re Crimea) App. No. 20958/14 (2019) [https://www.echr.coe.int/Pages/home.aspx?p=hearings&w=2095814\\_11092019&language=en&c=&py=2019](https://www.echr.coe.int/Pages/home.aspx?p=hearings&w=2095814_11092019&language=en&c=&py=2019).

53. Hill-Cawthorne, *supra* note 5, at 780.

and the European Court of Human Rights (ECtHR), among others.<sup>54</sup> Many of the individual claims that are being brought in separate courts implicate one or both of the broader disputes.<sup>55</sup> This begs the question of what affect these relationships between the claims have on the jurisdiction of the international courts and their ability to hear the claims.<sup>56</sup>

Oftentimes courts will take one of three broad approaches to handling this issue.<sup>57</sup> The court will either take the severability, restrictive, or expansive approach.<sup>58</sup> Under the severability approach, the court isolates the claim it has jurisdiction over from the broad dispute, whereas under the restrictive approach, the court refuses to hear the claim because the specific claim is undividable from the broad dispute.<sup>59</sup> In the expansive approach, the court decides on matters that it would not otherwise have jurisdiction over when it is necessary to do so in order to address the claims that it actually does have jurisdiction over.<sup>60</sup> The approach the court takes is critical in regard to whether there will be any resolution of the claim.<sup>61</sup>

The ICJ has traditionally taken the severability approach.<sup>62</sup> In regard to the present case, the court, in its order on provisional measures, noted that it had narrow jurisdiction but emphasized that the case that was presented before it was limited in scope.<sup>63</sup> The court made it clear that the jurisdiction is granted by the Conventions, but is also limited to only the claims under those Conventions.<sup>64</sup> In the past though, the ICJ has looked beyond the specific claims that it has jurisdiction over if it is necessary for the interpretation and understanding of the claims.<sup>65</sup> It is evident from the case law that there are also certain circumstances when the ICJ will utilize the restrictive approach and reject jurisdiction over

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54. See *id.* at 781; Ukr. v. Russ., 2019 I.C.J. at ¶ 32; Ukraine v. Russia (re Crimea) No. 20958/14.

55. See Ukr. v. Russ., 2019 I.C.J. at ¶ 32; Ukraine v. Russia (re Crimea) No. 20958/14.

56. Hill-Cawthorne, *supra* note 5, at 782.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 808-09.

62. *Id.* at 794.

63. 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 (Ukr. v. Russ.) Order, Provisional Measures 2017 (Apr. 19).

64. See *id.*; Hill-Cawthorne, *supra* note 5, at 795.

65. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Judgment, 2008 I.C.J. 412, ¶ 90 (Feb. 3).



the claims.<sup>66</sup> The court will take this approach when the “very essence of the dispute” is something that the court does not have jurisdiction over or when addressing the claims would require the court to make a determination on a matter that the court does not have jurisdiction over.<sup>67</sup>

As discernible from the case law, the ECtHR typically takes the expansive approach, as claims brought before the court oftentimes implicate broader disputes.<sup>68</sup> The case law demonstrates that the court has not shied away from making determinations on matters that are incidental to the specific claim that is in front of the court.<sup>69</sup> As evident from the cases in Cyprus and Transnistria, the court is willing to look at issues of territorial sovereignty if necessary to rule on the specific claims that it has jurisdiction over.<sup>70</sup> Furthermore, the court has ruled on issues of foreign state intervention and separatist control for the same reason.<sup>71</sup>

The initial jurisdiction of the International Court of Justice is based on the consent of the parties and is confined to the extent accepted by them.<sup>72</sup> The issue when it comes to cases against Russia is that the State does not recognize the compulsory jurisdiction of the ICJ.<sup>73</sup> Consequently, the only way in which a State can bring an action against Russia in the ICJ is to rely on a treaty, such as CERD or the ICSFT, which has been ratified by both of the parties and allows for judicial settlement in the ICJ.<sup>74</sup> The European Court of Human Rights has jurisdiction to decide applications that have been submitted by either individuals or states that concern violations of the European Convention

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66. See *Sovereignty Over Pedra Branca/Pulan Batu Puteh, Middle Rocks and South Ledge (Malay v. Sing.)* 2008 I.C.J. 12 ¶ 297-99 (May 23); *Application of the Interim Accord of 13 September 1995 (Maced v. Greece) Judgment, Merits*, 2011 I.C.J. 644 ¶ 37 (Dec. 5).

67. Hill-Cawthorne, *supra* note 5, at 800.

68. See *Cyprus v. Turkey*, App. No. 25781/94, ¶ 15 [http://hudoc.exec.coe.int/eng?i=004-37128\(2001\)](http://hudoc.exec.coe.int/eng?i=004-37128(2001);); *Soyma v. Republic of Moldova, Russia, & Ukraine*, App. No. 1203/05, ¶ 22 (Nov. 13, 2017), [https://hudoc.echr.coe.int/eng#{"itemid":\["001-173797"\]}](https://hudoc.echr.coe.int/eng#{).

69. See *Cyprus v. Turkey*, App. No. 25781/94, at ¶ 293-95; *Soyma v. Republic of Moldova, Russia, & Ukraine*, App. No. 1203/05 at ¶ 22.

70. See *Cyprus v. Turkey*, App. No. 25781/94, at 93; *Soyma v. Republic of Moldova, Russia, & Ukraine*, App. No. 1203/05 at ¶ 20; Hill-Cawthorne, *supra* note 5, at 805.

71. See *Cyprus v. Turkey*, App. No. 25781/94, at ¶ 14; *Soyma v. Republic of Moldova, Russia, & Ukraine*, App. No. 1203/05, at ¶ 22; Hill-Cawthorne, *supra* note 5, at 805.

72. *Immunities and Criminal Proceedings (Eq. Guinea v. Fr.)*, Preliminary Objections, Judgment, 2017 I.C.J. 307, ¶ 54; *Basis of Jurisdiction*, INT'L CT. OF JUST. <https://www.icj-cij.org/en/basis-of-jurisdiction> (last visited Apr. 3, 2020).

73. *Basis of Jurisdiction*, INT'L CT. OF JUST. <https://www.icj-cij.org/en/basis-of-jurisdiction> (last visited Apr. 3, 2020).

74. *Treaties*, INT'L CT. OF JUST. <https://www.icj-cij.org/en/treaties> (last visited Apr. 3, 2020).

on Human Rights (ECHR).<sup>75</sup> The complaint must concern violations that have allegedly been committed by a State that is party to the Convention, and the violations must significantly and directly have affected the applicant.<sup>76</sup> Ukraine and Russia are both parties to the Convention, giving the court jurisdiction over the present case.<sup>77</sup> Acknowledging that the courts have jurisdiction over the parties, the significant issue at hand in both of these cases is that the courts must also have jurisdiction over the subject matter of the claims.<sup>78</sup> The first step for each of the courts was to determine whether, under the respective Conventions, they could in fact hear Ukraine's claims against Russia.<sup>79</sup>

#### IV. UKRAINE V. RUSSIAN FEDERATION

In January of 2017, the Ukrainian Government instituted proceedings against the Russian Federation, claiming that Russia violated the ICSFT in regard to events in eastern Ukraine and the CERD in regard to the situation in Crimea.<sup>80</sup> Specifically, Ukraine is requesting the International Court of Justice declare that Russia has violated the stated provisions of the ICSFT and the CERD, that it has “international responsibility for those violations,” and it is required to end the violations and make reparation.<sup>81</sup> In reality, the major issues in dispute are Russia's unlawful use of force in annexing Crimea and the separatist movements in the Donbas region of eastern Ukraine, and although the two conventions being invoked are relevant to those issues, they “do not directly address the core of the dispute.”<sup>82</sup> While the financing of

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75. *International Justice Resource Center*, EUR. CT. OF HUM. RTS., <https://ijrcenter.org/european-court-of-human-rights/> (last visited Apr. 3, 2020).

76. *Id.*

77. *Chart of Signatures and Ratifications of Treaty 005*, COUNCIL OF EUR. [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p\\_auth=IxIA4l6G](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=IxIA4l6G) (last visited Apr. 3, 2020).

78. *See Treaties*, INT'L CT. OF JUST., <https://www.icj-cij.org/en/treaties> (last visited Apr. 3, 2020); *International Justice Resource Center*, EUR. CT. OF HUM. RTS., <https://ijrcenter.org/european-court-of-human-rights/> (last visited Apr. 3, 2020).

79. *See Application of the International Convention for the Suppression of Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.)*, Preliminary Objections, Judgment, 2019 I.C.J. No. 166, ¶ 64 (Nov. 8); *Ukraine v. Russia, (re Crimea)* No. 20958/14 (2019) [https://www.echr.coe.int/Pages/home.aspx?p=hearings&w=2095814\\_11092019&language=en&c=&py=2019](https://www.echr.coe.int/Pages/home.aspx?p=hearings&w=2095814_11092019&language=en&c=&py=2019).

80. *Ukr. v. Russ.*, 2019 I.C.J. at ¶ 23.

81. *Id.*

82. Iryna Marchuk, *Ukraine Takes Russia to the International: Will it Work?*, EJIL: TALK! (Jan. 26, 2017) <https://www.ejiltalk.org/ukraine-takes-russia-to-the-international-court-of-justice-will-it-work/> [hereinafter Marchuk II].

terrorism and racial discrimination are certainly major problems and should be addressed, they are not what are really at the heart of this matter.<sup>83</sup> This reality has potential implications on the ICJ's jurisdiction over these claims.<sup>84</sup>

In response to each of the claims against it, Russia argued that these matters were unconnected to the two conventions.<sup>85</sup> Furthermore, Russia contested the allegations under both conventions and asserted that the evidence provided does not substantiate the claims.<sup>86</sup> Russia argued that these allegations concern violations of “different rules of international law,” yet the court asserted that just because this is a complex situation in which the parties have opposite views does not mean that the court should decline to resolve the dispute as long as the conditions for jurisdiction are met.<sup>87</sup> Russia claimed that the court did not have subject-matter jurisdiction over this matter under either convention and that the procedural preconditions required by the respective provisions of the convention were not met by Ukraine.<sup>88</sup> Despite these arguments, in a victory in Ukraine's fight to hold Russia accountable, the ICJ held that it had jurisdiction to hear the claims under both of the Conventions.<sup>89</sup>

A. *Violation of Obligations Under the International Convention for the Suppression of the Financing of Terrorism*

Ukraine claimed that Russia “failed to take all practicable measures to prevent and counter preparations in its territory for the commission of terrorism financing offences” and “supplied funds to groups that engage in acts of terrorism” in regard to the events that occurred in eastern Ukraine.<sup>90</sup> The court found that the question to be considered was whether, under the ICSFT, Russia was obligated to take measures to prevent and suppress the alleged financing of terrorism in the events that occurred in eastern Ukraine and if they were, whether they breached that obligation.<sup>91</sup> Under Article 24, paragraph 1, of the ICSFT the court has jurisdiction over “[a]ny dispute between two or more States Parties

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83. *See id.*

84. *See Hill-Cawthorne, supra* note 5, at 796.

85. *Ukr. v. Russ.*, 2019 I.C.J. at ¶ 27.

86. *Id.*

87. *Id.* at ¶ 27-28.

88. *Id.* at ¶ 36.

89. *Id.*

90. *Id.* at ¶ 26.

91. *Id.* at ¶ 32.

concerning the interpretation or application of this convention” which cannot be settled by negotiation.<sup>92</sup> Both States are parties to the ICSFT without reservations; therefore, it was necessary for the court to determine whether it had jurisdiction over the subject matter of the dispute.<sup>93</sup>

To determine whether it had jurisdiction, the court looked at whether the acts complained about fell “within the provisions” of the Convention.<sup>94</sup> First, the court looked at the interpretation of the provisions and the scope of the Convention in accordance with the rules in Articles 31-33 of the Vienna Convention on the Law of Treaties (Vienna Convention).<sup>95</sup> The ICSFT was created in an attempt to adopt “effective measures for the prevention of the financing of terrorism, as well as for its suppression through the prosecution and punishment of its perpetrators.”<sup>96</sup> Ukraine’s claims against Russia under the ICSFT concern Articles 2, 8, 9, 10, 12, and 18.<sup>97</sup> Article 2 describes the acts that qualify as an offense within the meaning of the Convention, imposing obligations when a person essentially provides or collects funds with the intent or knowledge that they will be used to carry out the described acts of terrorism.<sup>98</sup> Therefore, it was necessary for the court to determine whether Russia actually had the obligation to cooperate with the terms of the Convention.<sup>99</sup>

Critically, the ICSFT refers to offences that are committed by individual persons, not States.<sup>100</sup> In describing the perpetrators, the ICSFT refers to “any person,” a term that, in accordance with ordinary usage, covers all individuals.<sup>101</sup> Thus, it applies not only to private persons, but also those who are acting as agents of the State, and States

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92. International Convention for the Suppression of the Financing of Terrorism art. 24, *opened for signature* Jan. 10, 2000, 2178 U.N.T.S. 197 (entered into force Apr. 10, 2002) [hereinafter ICSFT].

93. Ukr. v. Russ., 2019 I.C.J. at ¶ 35.

94. Certain Iranian Assets (Iran v. U.S.), Preliminary Objections, Judgment 2019 I.C.J. 809, ¶ 36 (Feb 13).

95. Ukr. v. Russ., 2019 I.C.J. at ¶ 57.

96. ICSFT, *supra* note 92.

97. Ukr. v. Russ., 2019 I.C.J. at ¶ 57.

98. ICSFT, *supra* note 92.

99. Iryna Marchuk, *Green Light from the ICJ to Go Ahead with Ukraine’s Dispute Against the Russian Federation Involving Allegations of Racial Discrimination and Terrorism Financing*, EJIL: TALK! (Nov. 22, 2019) <https://www.ejiltalk.org/green-light-from-the-icj-to-go-ahead-with-ukraines-dispute-against-the-russian-federation-involving-allegations-of-racial-discrimination-and-terrorism-financing/> [hereinafter Marchuk].

100. *See id.*

101. ICSFT, *supra* note 92, at art. 2; Ukr. v. Russ., 2019 I.C.J. at ¶ 61.

that are parties to the Convention have “an obligation to take appropriate measures and to co-operate in the prevention and suppression of offenses of financing acts of terrorism committed by whichever person.”<sup>102</sup> Failure to abide by this obligation results in responsibility under the ICSFT.<sup>103</sup> Therefore, if Russia were found to have breached its obligation, it would be held responsible by the court. Based on this, the court concluded that it did have jurisdiction under the Convention.<sup>104</sup>

The court then examined whether the procedural preconditions in Article 24 were met, specifically whether this dispute could have been settled through negotiation within a reasonable time and, if it could not have been, whether the parties were able to agree on the organization of an arbitration within six months from the date of the request for arbitration.<sup>105</sup> Under Article 24, parties must first genuinely pursue negotiations before going to the court for relief.<sup>106</sup> Ukraine and Russia extensively discussed the issue at hand through various diplomatic notes and four in-person meetings over the course of two years, but little progress was made.<sup>107</sup> The court concluded that the dispute between the parties could not have been settled within a reasonable time through negotiation and thus that precondition was met.<sup>108</sup> Then, the court examined whether the parties were able to agree on “the organization of an arbitration” and concluded that this precondition was also fulfilled.<sup>109</sup> It based this conclusion on the fact that, two years after the beginning of the negotiations between Ukraine and Russia, the former sent a diplomatic note stating that, pursuant to Article 24, it was requesting that the latter “submit the dispute to arbitration.”<sup>110</sup> After this note, negotiations about arbitration continued but no agreement was met during the requisite period of six months.<sup>111</sup> The court determined that, because the procedural preconditions were met, the court could hear the claims.<sup>112</sup>

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102. See Marchuk, *supra* note 99; Ukr. v. Russ., 2019 I.C.J. at ¶ 61.

103. Ukr. v. Russ., 2019 I.C.J. at ¶ 61.

104. *Id.* at ¶ 64.

105. *Id.* at ¶ 65, 69; ICSFT, *supra* note 92.

106. ICSFT, *supra* note 92.

107. See Ukr. v. Russ., 2019 I.C.J. at ¶ 70.

108. *Id.*

109. *Id.* at ¶ 70-77.

110. *Id.* at ¶ 76.

111. *Id.*

112. *Id.*

*B. Violation of Obligations Under the International Convention on the Elimination of All Forms of Racial Discrimination*

Ukraine alleged that Russia violated its obligations under the CERD by engaging “in a campaign directed at depriving the Crimean Tatars and ethnic Ukrainians in Crimea of their political, civil, economic, social, and cultural rights and pursued a policy and practice of racial discrimination against those communities.”<sup>113</sup> The court found that the question to be considered was whether, under the CERD, Russia breached its obligations “through discriminatory measures allegedly taken against the Crimean Tatar and Ukrainian communities in Crimea.”<sup>114</sup> Ukraine claimed that Russia breached its obligations under Articles 2, 4, 5, 6, and 7 of the Convention.<sup>115</sup> Here, Russia again argued that the court does not have subject matter jurisdiction under CERD and that the procedural preconditions have not been met.<sup>116</sup> Both States are currently parties to the CERD without reservation.<sup>117</sup> Article 22 of CERD says the court has jurisdiction over the dispute under the Convention if it is “not settled by negotiation or by the procedures expressly provided for” in the Convention.<sup>118</sup>

Russia argued that the real dispute is not the concern of racial discrimination, but rather is over the status of Crimea.<sup>119</sup> According to Russia, the claims made by Ukraine were based “on the assumption that the application of Russian laws in Crimea amounts to a breach of certain rules of international humanitarian law” and thus, according to Ukraine, a breach of CERD.<sup>120</sup> In response, Ukraine argued that the violations of CERD were not the result of breaches of international law, but rather are “from the discriminatory application by the Russian Federation of its domestic legislation as a means of repressing the Crimean Tatar and Ukrainian communities in Crimea.”<sup>121</sup> The court found that, despite these disagreements, it did not need to determine whether the measures complained of actually constitute “racial discrimination” as it is defined

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113. *Ukr. v. Russ.*, 2019 I.C.J. at ¶ 26.

114. *Id.* at ¶ 32.

115. *Id.*

116. *Id.* at ¶ 78.

117. *Id.* at ¶ 35.

118. International Convention on the Elimination of All Forms of Racial Discrimination art. 22, *opened for signature* Dec. 21, 1965, 660 U.N.T.S 195 (entered into force Jan. 4, 1969) [hereinafter CERD].

119. *Ukr. v. Russ.*, 2019 I.C.J. at ¶ 79.

120. *Id.* at ¶ 86.

121. *Id.* at ¶ 93.

in Article 1 of CERD or establish whether certain acts were actually covered by the Convention, as both determinations are “a matter for the merits.”<sup>122</sup>

Thus, the court found that the only question it needed to address was whether the measures that Ukraine asserted fell within the purview of the Convention.<sup>123</sup> First, it is established that Crimean Tatars and ethnic Ukrainians in Crimea are ethnic groups that are protected under CERD.<sup>124</sup> Specific obligations for treatment based on “race, colour, descent, or national or ethnic origin” are set out in Articles 2, 4, 5, 6, and 7 of CERD.<sup>125</sup> Article 2 specifies that there is a general obligation “to pursue by all appropriate means . . . a policy of eliminating racial discrimination” and an obligation “to engage in no act or practice of racial discrimination against persons, groups of persons or institutions.”<sup>126</sup> There is also an obligation to “prohibit and eliminate racial discrimination” as well as “guarantee the right of everyone to equality before the law,” which includes political, civil, economic, social, and cultural rights, which is found in Article 5 of the Convention.<sup>127</sup> Taking the aforementioned obligations into account, the court found that the measures that Ukraine has complained about could certainly have adverse effects on the enjoyment of protected rights under the Convention.<sup>128</sup> Accordingly, the court determined that these measures fall under the CERD, and it therefore has jurisdiction over the matter as long as the procedural preconditions were met.<sup>129</sup>

The court next turned to Article 22 of the CERD to determine whether the procedural preconditions had been met by Ukraine prior to bringing the claims to this court.<sup>130</sup> The parties disputed the interpretation of Article 22, disagreeing on whether the preconditions are alternative or cumulative.<sup>131</sup> To make this determination, the court applied the rules of

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122. *Id.* at ¶ 94.

123. *Id.* at ¶ 95.

124. *Id.*

125. CERD, *supra* note 118.

126. *See id.* at art. 2; Application of the International Convention for the Suppression of Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.), Preliminary Objections, Judgment, 2019 I.C.J. No. 166, ¶ 95 (Nov. 8).

127. CERD, *supra* note 118, at art. 5.

128. Ukr. v. Russ., 2019 I.C.J. at ¶ 96.

129. *Id.*

130. *Id.* at ¶ 98.

131. *See id.* at ¶ 99-105.

customary international law from Articles 31-33 of the Vienna Convention.<sup>132</sup> Looking at the ordinary meaning of the word “or,” the context of Article 22 of CERD, and the purpose of the Convention, the court determined that “negotiation” and “procedures expressly provided for in [the] Convention” are alternatives to reaching the same objective, which is to settle the dispute by agreement.<sup>133</sup>

Finding that the two conditions laid out in Article 22 are alternatives and noting that the dispute was not referred to the CERD Committee, the court examined whether Russia and Ukraine had attempted to settle their dispute by negotiation.<sup>134</sup> In the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, the ICJ had determined that “negotiation” entails “a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute,” and is more than simply expressing accusations and rebuttals, but “does not require the reaching of an actual agreement.”<sup>135</sup> The court noted in the present case that Ukraine sent its first diplomatic note to Russia in 2014, and the two countries continued to send notes through 2015 in addition to holding three rounds of negotiation in 2015 and 2016.<sup>136</sup> The court found that, despite the lack of success, Ukraine had made “a genuine attempt at negotiation” and thus concluded that the procedural preconditions under Article 22 of CERD were met and the court has jurisdiction to hear the claims.<sup>137</sup>

### C. *Implications of Court’s Determination*

The ruling that the ICJ has jurisdiction to entertain Ukraine’s claims under the ICSFT and CERD has been “hailed as a victory by Ukraine.”<sup>138</sup> While the claims under each of the conventions are narrowly limited, they touch upon the broader issues related to both the annexation of Crimea and the separatist movements in Donetsk and Luhansk.<sup>139</sup> These broader issues include concepts that are beyond the

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132. *Id.* at ¶ 106.

133. *Id.* at ¶ 110; CERD, *supra* note 118.

134. *Ukr. v. Russ.*, 2019 I.C.J. at ¶ 113.

135. *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russ.) Preliminary Objections*, Judgment, 2011 I.C.J. 70, ¶ 157 (Apr. 1).

136. *Ukr. v. Russ.*, 2019 I.C.J. at ¶ 118.

137. *Id.* at ¶ 120-21.

138. Marchuk, *supra* note 99.

139. *Id.*



scope of the jurisdiction of the ICJ.<sup>140</sup> The approach that the court took in evaluating the claims was critical to whether or not it would find that it had jurisdiction over the subject matter of the claims despite the implication of the broader disputes. In this case, the court took the severability approach, rejecting the restrictive approach that it has taken before, because it determined that the claims could be addressed without making a determination on a different matter over which it did not have jurisdiction, and the essence of the dispute is something that the court may exercise jurisdiction over.<sup>141</sup>

Similar to the case at hand, in *Georgia v. Russia*, Georgia brought an action against Russia in the ICJ under CERD following the Russo-Georgia war that occurred in 2008 in Abkhazia and South Ossetia.<sup>142</sup> Russia viewed this as a peacekeeping operation, but Georgia characterized it as an armed conflict.<sup>143</sup> Just as in this case, the violations of CERD were not the main dispute, but unlike in this case, the ICJ dismissed that case for lack of jurisdiction.<sup>144</sup> The distinction between that case and the present one is that in *Georgia v. Russia*, Georgia had failed, in the eyes of the court, to negotiate and had not invoked any of the other preconditions to settle the dispute before going to the court.<sup>145</sup> Furthermore, although the ICJ used the severability approach as it had in prior court cases, it did not find that it could separate the individual claims from the broader dispute, whereas in *Ukraine v. Russian Federation*, the court viewed the two claims under the ICSFT and CERD as severable from the broader disputes between the two States.<sup>146</sup>

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140. Marchuk, *supra* note 99.

141. See Application of the International Convention for the Suppression of Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.), Preliminary Objections, Judgment, 2019 I.C.J. No. 166, ¶ 95 (Nov. 8); Sovereignty Over Pedra Branca/Pulan Batu Puteh, Middle Rocks and South Ledge (Malay v. Sing.) 2008 I.C.J. 12 ¶ 297-99 (May 23); Application of the Interim Accord of 13 September 1995 (Maced v. Greece) Judgment, Merits, 2011 I.C.J. 644 ¶ 37 (Dec. 5).

142. Marchuk II, *supra* note 82.

143. Hill-Cawthorne, *supra* note 5, at 796.

144. Marchuk, *supra* note 99.

145. Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russ.) Preliminary Objections, Judgment, 2011 I.C.J. 70, ¶ 181 (Apr. 1).

146. See Hill-Cawthorne *supra* note 5, at 782; Application of the International Convention for the Suppression of Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.), Preliminary Objections, Judgment, 2019 I.C.J. No. 166, ¶ 23 (Nov. 8); Georgia v. Russ 2011 I.C.J. at ¶ 184.

The issues that arise following the court's recognition of jurisdiction over these claims is whether the court will actually be able to separate these specific claims from the broader issues when deciding the merits and whether the court will produce a judgment that satisfies Ukraine in holding the Russian Government accountable for the actions that it has taken.<sup>147</sup> In terms of the ability to separate the claims, none of the claims under CERD clearly implicate the occupation of Crimea, but in parts of the memorial submitted to the court by Ukraine it does refer to Russia's annexation of Crimea in the context of the claims.<sup>148</sup> Furthermore, it could be difficult for the court to look at the discrimination that has taken place in Crimea without looking at how the situation came about and addressing the context of the breaches.<sup>149</sup> In regard to the claims under the ICSFT, it is possible that the court could face difficulty along the same lines, finding it challenging to address the obligations that were allegedly breached without examining Russia's support of the separatist movements, the questionable referendums, and the events that led up to the current crisis.<sup>150</sup>

In terms of producing a satisfactory result, if the court takes the severability approach, the broader disputes between Ukraine and Russia will not be resolved by the ICJ.<sup>151</sup> Furthermore, one of the main issues with Ukraine's choice of pursuing a case against Russia under the ICSFT is the question of whether the Donetsk People's Republic and the Luhansk People's Republic are actually categorized as "terrorists."<sup>152</sup> One of the problems is that there is no universally accepted definition of terrorism, which would make it difficult for the court to fully determine this issue.<sup>153</sup> Another problem is that the fighting in Eastern Ukraine has been described by the international community, under the principles of international humanitarian law, as "hybrid warfare," making it questionable whether the court would accept defining the separatists as terrorists.<sup>154</sup> Further issues are surely to arise when the court examines the merits, but those problems are ripe for examination in another article.

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147. Hill-Cawthorne, *supra* note 5, at 784.

148. *Id.*

149. Marchuk II, *supra* note 82.

150. *See generally* Ukr. v. Russ., 2019 I.C.J.

151. *See id.*

152. Marchuk II, *supra* note 82.

153. *See Defining Terrorism*, UNITED NATIONS, <https://www.unodc.org/e4j/en/terrorism/module-4/key-issues/defining-terrorism.html> (last visited Apr. 2, 2020).

154. Marchuk, *supra* note 82.

## V. UKRAINE V. RUSSIA (RE CRIMEA)

One of the most worrisome consequences of Russia's annexation of Crimea has been the wave of human rights violations.<sup>155</sup> Specifically, the occupation is persecuting the Crimean Tatar population that is native to the peninsula.<sup>156</sup> Russian ties to Crimea are strong and go back to when Russia took parts of southern Ukraine and Crimea from the Ottoman Empire in the eighteenth century.<sup>157</sup> The region has gone through its fair share of turmoil, including the deportation of the entire Tatar population of around 300,000 people initiated by Joseph Stalin in the 1940s.<sup>158</sup> About ten years later, another Soviet leader, Nikita Krushchev, gave Ukraine to Crimea as a gift.<sup>159</sup> After the fall of the Soviet Union and Ukraine's subsequent independence in 1991, it was determined that Crimea would remain a part of Ukraine.<sup>160</sup>

Currently, Ukraine alleges that there is widespread persecution of the Crimean Tatars, Ukrainian servicemen, and civilians who oppose the Russian occupation throughout the peninsula, with many of them subjected to torture, humiliation, harassment, and illegal fines and detentions.<sup>161</sup> On March 13, 2014, Ukraine filed an application with the ECtHR alleging that Russia violated the ECHR through various actions by the Russian Government in the Crimean peninsula.<sup>162</sup> The case was subsequently divided into two cases, one concerning the events in eastern Ukraine and the other regarding Crimea.<sup>163</sup> In May of 2018, jurisdiction was given to the Grand Chamber, due to the serious questions before the court that affect the interpretation of the ECHR.<sup>164</sup>

*A. Violation of the European Convention on Human Rights*

In September of 2019, the ECtHR held a Grand Chamber hearing concerning Ukraine's claims that Russia violated the European

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155. Klimkin, *supra* note 21.

156. *Id.*

157. *Ukraine Crisis: Does Russia Have a Case?* BBC (Mar. 5, 2014) <https://www.bbc.com/news/world-europe-26415508>.

158. *Id.*

159. *Id.*

160. *Id.*

161. HUM. RTS. WATCH, *supra* note 39.

162. Press Release, *supra* note 6.

163. *Id.*

164. *Id.*

Convention on Human Rights in Crimea.<sup>165</sup> In its allegations, Ukraine relied on Articles 2-11 of the ECHR, as well as Articles 1 and 2 of the Protocol No. 1 to the Convention, and Article 2 of Protocol No. 4.<sup>166</sup> These articles address right to life, prohibition of inhuman treatment and torture, right to liberty and security, right to a fair trial, right to respect for private life, freedom of religion, freedom of expression, freedom of assembly and association, protection of property, right to education, and freedom of movement.<sup>167</sup> Ukraine argued that the violations that occurred are a result of “a general administrative practice” by Russia.<sup>168</sup> Particularly, the State alleged that there was a practice attributable to Russia of killing “Ukrainian military servicemen, officers of law-enforcement bodies and civilians.”<sup>169</sup> Additionally, Ukraine alleged that there were cases of torture and “arbitrary deprivation of liberty” of servicemen and civilians, as well as issues with the court system in which judgments from the Ukrainian courts were “reclassified under Russian legislation” and then convicted persons were transferred to Russia.<sup>170</sup> They further alleged that Ukrainian nationals were forced to become Russian citizens, journalists and religious ministers were attacked and harassed, the non-Russian media was suppressed, property was expropriated, and Crimean Tatars were severely discriminated against.<sup>171</sup> In the first hearing before the court, the parties expressed their allegations and arguments for and against the ability of the court to hear the broad disputes before it.<sup>172</sup>

### *B. Implications of the Court's Determination*

The claims before the ECtHR are likely to implicate the broader disputes between Russia and Ukraine.<sup>173</sup> It would be difficult to address the alleged violations without discussing Russia's intervention in Crimea, as well as its support of the pro-Russian separatists in Luhansk and Donetsk.<sup>174</sup> It seems likely that the court will continue to utilize the

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165. *Id.*

166. *Id.*

167. Ukraine v. Russia, (Re. Crimea) No. 20958/14 (2019) [https://www.echr.coe.int/Pages/home.aspx?p=hearings&w=2095814\\_11092019&language=en&c=&py=2019](https://www.echr.coe.int/Pages/home.aspx?p=hearings&w=2095814_11092019&language=en&c=&py=2019).

168. Press Release, *supra* note 6.

169. *Id.*

170. *Id.*

171. *Id.*

172. Ukraine v. Russia, (Re. Crimea) No. 20958/14.

173. Hill-Cawthorne, *supra* note 5, at 787.

174. *Id.*

expansive approach, but only the ongoing resolution of the case will determine whether the court will go beyond the scope of the claims under ECHR.<sup>175</sup> Interestingly, at the Grand Chamber Hearing, the court explicitly asked the parties whether the court should, in order to establish the question of which State had jurisdiction over Crimea, determine the issue of sovereignty over Crimea and whether there were UN Charter violations.<sup>176</sup> Unsurprisingly, Russia argued that the court should not determine this issue because of lack of jurisdiction over the subject matter, while Ukraine argued that the court should rule on this matter.<sup>177</sup> Should the court continue the practice of taking the expansive approach, it would find it acceptable to hear the broader disputes, but it must be kept in mind that the ECtHR is not a general international court, but rather a human rights court.<sup>178</sup>

In addition to the problems the court may have with separating the claims before it from the broader dispute, the court will likely have issues determining which State has responsibility for human rights in Crimea when it gets to the merits of the case.<sup>179</sup> This determination depends on the status of Crimea, whether it has been formally annexed or is currently only occupied by Russia, as well as which State exercises jurisdiction over the peninsula and the individuals within the peninsula.<sup>180</sup> Crucially, these determinations will require the court to delve into issues related to the broader dispute, such as whether Ukraine or Russia is the rightful sovereign of Crimea and whether the action taken by Russia was lawful.<sup>181</sup> The issues of jurisdiction and state responsibility are critical to the outcome of the case, but once again these, and further issues that will likely arise when the court decides on the merits of the case, are ripe for exploration in another article. Ultimately, the ability of the court to go beyond the narrow claims under the ECHR and the resolution of the issues of jurisdiction and state responsibility will determine whether

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175. Ukraine v. Russia, (Re Crimea) No. 20958/14 (2019) [https://www.echr.coe.int/Pages/home.aspx?p=hearings&w=2095814\\_11092019&language=en&c=&py=2019](https://www.echr.coe.int/Pages/home.aspx?p=hearings&w=2095814_11092019&language=en&c=&py=2019).

176. *Id.*

177. *Id.*

178. Marko Milanovic, *Does the European Court of Human Rights Have to Decide on the Sovereignty Over Crimea? Part I: Jurisdiction in Article 1 ECHR*, EJIL: TALK! (Sept. 23, 2019) <https://www.ejiltalk.org/does-the-european-court-of-human-rights-have-to-decide-on-sovereignty-over-crimea-part-i-jurisdiction-in-article-1-echr/>.

179. Stuart Wallace & Conall Mallory, *Applying the European Convention on Human Rights to the Conflict in Ukraine*, 6 Russ. L. J. 8, 11 (2018).

180. *Id.* at 17.

181. *Id.* at 18; Milanovic, *supra* note 178.

Ukraine will be satisfied with the resolution and whether the Russian Government will be held accountable.

## VI. CONCLUSION

As the Ukrainian Crisis enters its sixth year, there is seemingly no end or satisfactory resolution in sight.<sup>182</sup> The cases that are currently pending in the various international courts have only now gotten past the preliminary hearings on jurisdiction and preliminary objections.<sup>183</sup> It is likely that it will take years for the cases to be heard and fully adjudicated by the courts.<sup>184</sup> Furthermore, when the cases finally are heard on the merits, it is likely that there will be significant challenges drawing the lines between what the court has jurisdiction over and what it does not.<sup>185</sup> No matter which jurisdictional approach the respective court takes, there will likely be significant problems with substantive law and the boundaries of the court. In the end, it is uncertain whether Ukraine will be completely satisfied with the resolutions and, more importantly, whether the Russian Government will ever be held fully accountable for the actions that it has taken in Crimea and eastern Ukraine.

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182. Global Conflict Tracker, *supra* note 1.

183. *See* Application of the International Convention for the Suppression of Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.), Preliminary Objections, Judgment, 2019 I.C.J. No. 166, ¶ 134 (Nov. 8); Ukraine v. Russia, (Re. Crimea) No. 20958/14 (2019) [https://www.echr.coe.int/Pages/home.aspx?p=hearings&w=2095814\\_11092019&language=en&c=&py=2019](https://www.echr.coe.int/Pages/home.aspx?p=hearings&w=2095814_11092019&language=en&c=&py=2019).

184. *See* Hill-Cawthorne, *supra* note 5, at 794.

185. *Id.* at 807.