Ukraine and the Netherlands v. Russia (nos 8019/16, 43800/14, 28525/20, 11055/22)

***Amicus Curiae* Brief**
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1. By letter dated 17 March 2023, the President of the Grand Chamber invited the Human Rights Law Centre to make further written submissions as a third-party intervener in this case. This submission will not deal with questions of fact or the merits, which are for the parties. The brief will be confined to the outstanding jurisdiction issues that were not dealt with in the Court's admissibility decision of 30 November 2022, as well as the interpretation of Article 2 of the ECHR in light of applicable rules of international humanitarian law (IHL). This brief considers the relationship between the ECHR and IHL more fully than our brief at the admissibility stage, particularly in light of the Court's joinder of application no. 11055/22 that concerns numerous acts of hostilities committed in the international armed conflict between Russia and Ukraine since February 2022.

II. REMAINING JURISDICTION AND ATTRIBUTION ISSUES

Spatial jurisdiction during armed conflict

2. In its admissibility decision of 30 November 2022 the Court found that, according to the available evidence, as a result of both i) the Russian Federation's military presence in Eastern Ukraine and ii) the decisive degree of influence and control it exerted over the Donetsk People's Republic (DPR) and Lugansk People's Republic (LPR) as a result of its military, political and economic support, the Russian Federation exercised effective overall control over the area of Eastern Ukraine from 11 May 2014 onwards.[1] This control was considered to suffice for an exercise of jurisdiction pursuant to Article 1 ECHR, and specifically the 'spatial' form of jurisdiction. Furthermore, this spatial jurisdiction is considered to cover both the territory on the ground, as well as the airspace above it.[2]

3. The Court has previously suggested that a 'context of chaos' arising from 'armed confrontation and fighting between enemy forces seeking to establish control over an area' will serve to preclude any finding of spatial control (as well as state agent authority and control under the personal conception of Article 1 jurisdiction, on which see below).[3] In the present case, the Court has held that no context of chaos existed that prevented spatial jurisdiction from being established in relation to the downing of the MH17 airliner over the territory of Ukraine controlled by the respondent. The Court established this on two bases: 1) whilst there was a general situation of violence, there was no armed confrontation on the ground in the area where the missile that brought down the airliner had been launched nor the impact

[1] *Ukraine and the Netherlands v. Russian Federation*, nos 8019/16, 43800/14, 28525/20 (Dec.) 30 November 2022, para 695.
[2] *Ibid.* para 702.
[3] *Georgia v. Russia (No. 2)* [GC], no. 38263/08, 21 January 2021, para 126.

site; and 2) there was sufficient information to 'pierce "the fog of war" in relation to particular incidents'.[4]

4. We respectfully submit that, as a general matter, the 'context of chaos' exception to establishing Article 1 jurisdiction lacks internal coherence with other principles the Court has expounded. When it comes to spatial jurisdiction, however, it can fairly be said that there will be some situations in which control over a discrete area is contested to such a degree that it is impossible to determine whether any State exercises control over that particular area. This will especially be the case for areas on the front line of intense hostilities between two States engaged in an international armed conflict. Consider, for example, the battle raging around the city of Bakhmut in Eastern Ukraine since the summer of 2022. It is reasonable to say that in a situation of intense hostilities and street-to-street fighting in this specific area, neither Ukraine nor Russia exercises effective overall control over that area while such hostilities last. But such control easily exists in the immediately adjacent areas behind the front lines, especially when such lines remain relatively stable over time.

5. In short, the Court can apply the spatial conception of Article 1 jurisdiction to many events that are before it in the context of the joined applications. This is the case both for events in 2014 and for those taking place after the full-scale invasion of Ukraine in February 2022. In both of these periods Ukraine and Russia controlled discrete areas of territory. This control fluctuated over time due to the ebb and flow of military operations, as was for example the case with the withdrawal of Russian forces from the vicinity of Kyiv in April 2022 or with the recovery of substantial territory by Ukraine in the Kharkiv counter-offensive in September 2022. Again, while it is reasonable to exclude the application of the spatial conception of jurisdiction to immediate areas in which intense fighting on the ground is taking place, and for such time as it is taking place, many areas proximate to the fighting will nonetheless clearly be within the control of one of the parties. There is no bar to applying the Convention fully in such areas. Put differently, a 'context of chaos' cannot justify failing to apply the Convention to a town or village under the control of one of the parties to the conflict in which civilians or prisoners of war are unlawfully killed or mistreated. That said, it will be for the parties to provide evidence on how control over specific areas may have changed over time or was affected by intense fighting.

Personal jurisdiction during armed conflict

6. In the absence of spatial control, allegations of violations of the right to life by kinetic means, such as artillery shelling, missile strikes or aerial bombardment, must be considered under the personal model of jurisdiction. This can include situations when such kinetic uses of force emanate from Russian-controlled territory while causing death, injury and damage in Ukrainian-controlled territory, or situations that are wholly confined to a contested area, such as the town of Bakhmut. In either case the alleged victim would be outside the area over which the respondent State has been found to exercise spatial jurisdiction.

[4] *Ukraine and the Netherlands*, n 1, paras 704-705.

7. Under the personal model, jurisdiction is authority or control exercised by a state agent over the victim of a human rights violation.[5] In order to assess whether such personal jurisdiction existed the Court is required to establish whether the various killings and destruction of property caused by uses of armed force are an exercise of authority and control by the Russian Federation over the victims and their property.

8. The Court's approach to kinetic uses of force absent territorial control has tended to be rather conservative. In *Banković*, the Court did not expressly apply the personal conception of jurisdiction, but found that the use of lethal force against the applicants from the air did not create a jurisdictional link.[6] By contrast, in *Al-Skeini*, the Court confirmed that the use of lethal force could, in certain unspecified circumstances, constitute such a link,[7] and that Convention rights can be divided and tailored depending on the context, so that only the rights relevant to the victims' situation – here the right to life – would apply.[8] In its judgment in *Georgia v. Russia (No. 2)* a majority of the Grand Chamber reaffirmed a restrictive approach in that regard, suggesting that only 'isolated and specific acts involving an element of proximity' serve to create the relevant link.[9] And in *Carter v. Russia*, a Chamber of the Court held that extraterritorial assassinations are covered by the Convention precisely because they involve such an 'element of proximity'.[10] This is a finding that the Grand Chamber's admissibility decision in the present case has endorsed.[11]

9. In that same admissibility decision, the Grand Chamber decided to join the outstanding personal jurisdiction issue to the merits stage of the present proceedings, holding that

> [t]he question whether there was State agent authority and control in respect of acts of shelling in the present case, such as to give rise to the respondent State's jurisdiction in respect of them, requires a careful examination of whether these incidents fell within the exception identified in *Georgia v. Russia (II)* by reference to the specific facts of the incidents alleged.[12]

10. Should the restrictive approach taken in *Georgia v. Russia (No. 2)* be applied faithfully applied by the Court, the vast majority of individual acts of hostilities committed in Ukraine would be excluded from the purview of the Convention. With respect, in our view, this is not a normatively justifiable result. At the merits stage of these proceedings, the Court should take the opportunity to overrule the arbitrary approach adopted in *Georgia v. Russia (No. 2)*, rather than somehow try to fit the individual acts of hostilities at issue in this case within any supposed 'exceptions'.

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[5] *Ibid.* paras 565-572.
[6] *Banković and Others v. Belgium and Others* [GC] (dec.), no. 52207/99, 12 December 2001.
[7] *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, 7 July 2011, para. 136.
[8] *Ibid.* para. 137.
[9] *Georgia v. Russia (No. 2)*, n 3, para. 132.
[10] See *Carter v. Russia*, no. 20914/07, 21 September 2021, para. 130.
[11] *Ukraine and the Netherlands*, n 1, para. 570.
[12] *Ibid.* para. 700.

The restrictive approach taken in that case is unprincipled and unworkable and should be discarded, in the same way that the Court has already acknowledged the error in *Bankovic* that Convention rights cannot be divided and tailored to take into account the particular circumstances of the act in question.[13] This is the right thing to do for at least three reasons.

11. First, the whole notion of a 'context of chaos' precluding the existence of personal jurisdiction is simply unfounded. As the Court said in *Issa*, 'Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.'[14] To be sure, the chaos or fog of war can obscure our vision of whether there is 'control' for the purposes of Article 1 ECHR, i.e. it can hamper the Court's ability to reliably establish what actually happened. But, as has been seen in the present case, there is a wealth of information – from official intergovernmental and governmental sources, as well as open-source journalism – which can provide factual clarity. If there is sufficient evidence to present a *prima facie* case of killings and destruction of property caused by artillery shelling, missile strikes or air strikes, then there is no 'chaos' to obfuscate the Court's view. In fact, at the admissibility stage of the present case the Court has shown its willingness to take into account such material, requesting clarifications from the respondent State, and drawing inferences whenever appropriate. This is exactly what the Court should do on the merits, and no 'context of chaos' can or should prevent it from doing so.

12. Second, there is no good reason of principle to distinguish between 'isolated' or 'proximate' incidents of lethal force – which according to the Court undoubtedly constitute personal jurisdiction for the purposes of Article 1 of the ECHR – and more 'distant' takings of life, such as through shelling or aerial bombardment in the context of an armed conflict. If the former involves the exertion of authority and control over the victim, then the same must be said of the latter.[15]

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[13] *Ibid.* para. 571: 'Convention rights can be divided and tailored (see *Al-Skeini and Others*, cited above, § 137; and *Carter*, cited above § 126); the rejection of that proposition in *Banković and Others* (cited above, § 75) is, therefore, no longer an accurate statement of the Court's approach under Article 1 of the Convention.'

[14] *Issa and others v. Turkey*, no. 31821/96, 16 November 2004, para. 71, citing the approach taken by the Human Rights Committee and the Inter-American Commission on Human Rights.

[15] As Mr Justice Leggatt of the High Court of England and Wales (now a Justice of the UK Supreme Court) held in *Al-Saadoon*: 'I find it impossible to say that shooting someone dead does not involve the exercise of physical power and control over that person. Using force to kill is indeed the ultimate exercise of physical control over another human being. Nor as it seems to me can a principled system of human rights law draw a distinction between killing an individual after arresting him and simply shooting him without arresting him first, such that in the first case there is an obligation to respect the person's right to life yet in the second case there is not': *Al-Saadoon & Ors v Secretary of State for Defence* [2015] EWHC 715 (Admin), para. 95. See also *Al-Saadoon & Ors v Secretary of State for Defence* [2016] EWCA Civ 811 (Court of Appeal agreeing with the force of Mr Justice Leggatt's argument, but finding that it is for the Strasbourg Court to authoritatively clarify the reach of the Convention in cases of kinetic use of force).

The same can be said of the use of force to destroy property.[16] Just like it makes no sense to argue that the Convention applies to a killing only if a person is first arrested, no principled system of human rights law can draw a distinction between killing an individual 'proximately' by poisoning or stabbing them and killing them more 'distantly' through a missile strike or an artillery shell. If the former is an exercise of authority or control over the victim by a State agent, as the Court held in *Carter* and affirmed at the admissibility stage of the present case, then so must be the latter. And if killing one person is an exercise of personal jurisdiction by the State over that individual, then the same must be true if the victims number in the hundreds or the thousands.

13. Third, in *Georgia v. Russia (No. 2)* the Court justified its restrictive approach partly by saying that if 'the Court is to be entrusted with the task of assessing acts of war and active hostilities in the context of an international armed conflict outside the territory of a respondent State, it must be for the Contracting Parties to provide the necessary legal basis for such a task.'[17] We respectfully submit that there is *nothing* in the text of Convention that in any way indicates that it does not apply to active hostilities in an armed conflict outside the territory of a contracting State. On the contrary, Article 15(2) ECHR expressly provides for the possibility of a derogation from Article 2 'in respect of deaths resulting from lawful acts of war.' The Court's restrictive approach in *Georgia v. Russia (No. 2)* renders this express language of the Convention entirely nugatory. Nor does it make sense to focus on the *extraterritorial* nature of any hostilities. Should we really accept an approach under which Ukraine would be bound to respect the Convention in wartime because hostilities take place on its own territory, whereas Russia would not be so bound (while it was still a party to the treaty) because the hostilities are taking place in a territory which it had invaded? That a State party defending its own territory has vastly greater obligation than a State party attacking it? Surely this cannot be the right position.

14. We would add in this regard that it is for Contracting States to provide the Court with the resources that it needs to adequately address the indisputably difficult task of assessing the legality of deprivations of life in armed conflict. The Court has, *and has always had*, the legal basis to do so. All it needs to do is apply Article 2 ECHR as interpreted in light of the relevant rules of IHL. That said, the Court should take note of the evolution of State views on the extraterritorial application of the Convention, which does point to a less restrictive approach. For example, one of the applicant States in these proceedings, the Netherlands, previously strenuously argued for a restrictive approach to extraterritoriality.[18] But when it came to the downing of the MH17 airliner the applicant State adopted a much broader view on extraterritoriality. Similarly, the Court granted leave to 26 member States to intervene in the present joined proceedings.[19] While we have not had sight of their

[16] Whilst of course there may be pragmatic difficulties, as indicated in *Georgia v Russia (No. 2),* it is suggested that these should not be used to dilute legal principle.
[17] *Georgia v. Russia (No. 2)*, n 3, para. 142.
[18] *Jaloud v the Netherlands* [GC], No. 47708/08, 20 November 2014, paras 112-119.
[19] Press release dated 17 March 2023.

submissions, all of these States are ostensibly intervening in support of Ukraine, and in doing so they all must logically acknowledge that the Convention applies to Russia's uses of force on Ukraine's territory during the international armed conflict. Their exact theories on how the Convention applies may of course vary. But again the Court can take note of the fact that the opposition to the Convention's extraterritorial application that has historically been expressed by some States parties that with some frequency engage in overseas military operations, such as the United Kingdom, appears to be waning.

15. We therefore respectfully submit that the Court should adopt a very simple approach to personal jurisdiction in the context of Article 2 ECHR: whenever a State party, acting through one of its agents, deprives an individual of life, that State party has exercised authority and control and thus jurisdiction over that individual. This is equally the case within armed conflict or outside it, regardless of whether the killing was 'proximate' or distant, 'isolated' or part of a pattern. The same approach can also be applied *mutatis mutandis* to other Convention rights.

16. This approach would accord with that taken by other international human rights bodies. For example, in its General Comment No. 36 the Human Rights Committee has confirmed that the International Covenant on Civil and Political Rights applies to

> all persons who are within [the state's] territory and all persons subject to its jurisdiction, that is, all persons over *whose enjoyment of the right to life it exercises power or effective control*. This includes persons located outside any territory effectively controlled by the State whose right to life is nonetheless affected by its military or other activities *in a direct and reasonably foreseeable manner*.[20]

17. Where Article 1 jurisdiction is found, it would be for the Court to then decide on the merits whether any deprivation of life would give rise to responsibility under the Convention. In doing so, it would be for the Court to determine whether the context of an (international) armed conflict impacts the scope of protection of individual Convention rights, including the right to life.

Attribution of conduct

18. It bears repeating that establishing spatial or personal jurisdiction for the purposes of Article 1 of the ECHR confirms that the Russian Federation's Convention obligations are at play in Eastern Ukraine. Whether the Russian Federation is *responsible* for the violations alleged requires the Court to also find that the relevant acts or omissions are *actually attributable (imputable)* to the Russian Federation. In its admissibility decision, the Court held that all acts and omissions conducted by the separatist forces are attributable to the Russian

[20] UN Human Rights Committee, General Comment No. 36: Article 6: right to life, UN Doc. CCPR/C/GC/36, 3 September 2019, para. 63 (emphasis added). See also African Commission on Human and Peoples' Rights, General Comment 3: The Rights to Life (Article 4), 18 November 2015, para 14.

Federation by virtue of its control over these entities, but it has left the door open for the Russian Federation to argue that certain alleged violations are not attributable to it.[21]

19. Should the Russian Federation make such an argument, the assessment of the attribution of the relevant acts or omissions should be conducted according to the relevant tests in general international law that have been developed by the International Law Commission (ILC), specifically in its Articles on State Responsibility (ASR), and in the jurisprudence of the International Court of Justice (ICJ). The European Court has repeatedly held that 'despite its specific character as a human rights instrument, the Convention is an international treaty to be interpreted in accordance with the relevant norms and principles of public international law.'[22] While the Court's record of applying the ASR has not been the most consistent, especially with regard to situations of relationships between States and non-state actors administering territory,[23] the Court has regularly referred to the Articles and has relied on the attribution rules contained therein.[24] In short, the rules articulated by the ILC are a necessary starting point and any divergence from them requires principled and substantial justification.

20. The relevant rules of attribution are as follows. First, the conduct of persons who are considered *organs* of the State is attributable to the state (Article 4 ASR).[25] That rule has two variants, depending on whether 'organ' status exists *de jure* or only *de facto.* A *de jure* organ is a person who enjoys such status under the State's domestic law. A *de facto* organ is not regarded as such by the State's own law,[26] but is a person or entity *completely dependent* on the state, which *in fact* acts as if it was one of its organs.[27] The conduct of an organ will be attributable to the State even if it was committed *ultra vires*, against the instructions of higher-ranking officials or was contrary to the State's domestic law (Article 7 ASR). Second, the conduct of a person who is neither a *de jure* nor a *de facto* organ can still be attributed to the State if the State instructed, directed or effectively controlled that person into committing the specific conduct in question (Article 8 ASR).[28]

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[21] *Ukraine and the Netherlands*, n 1, para. 697.

[22] See, e.g., *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, 21 June 2016, para. 134; *Slovenia v. Croatia* [GC] (Dec.), no. 54155/16, 18 November 2020, para. 41.

[23] See M. Milanovic, 'Special Rules of Attribution of Conduct in International Law', (2020) 96 *International Law Studies* 295, at 342-7, 362-6.

[24] E.g., *Makuchyan and Minasyan v. Azerbaijan and Hungary*, no. 17247/13, 26 May 2020, paras 34-37, 112-114; *Carter*, n 10, paras 72 and 166.

[25] Under Art. 4(2) ASR: 'An organ includes any person or entity which has that status in accordance with the internal law of the State'.

[26] As the ILC explains, 'a State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law. This result is achieved by the use of the word "includes" in paragraph 2.' ASR commentary to Art. 2, para. 11.

[27] See *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)* [1986] ICJ Rep 14, para. 109; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* [2007] ICJ Rep 43, para. 392.

[28] See *Nicaragua*, *ibid*, para. 115. *Bosnian Genocide*, *ibid*, paras 399-401, as well as Art. 8 ASR and commentary, para. 5.

21. Given the Court's holding that 'the acts and omissions of the separatists are attributable to the Russian Federation in the same way as the acts and omissions of any subordinate administration engage the responsibility of the territorial State',[29] it would be appropriate for the Court to clarify that it has made this decision on the basis that the separatists were *de facto* organs of the state pursuant to Article 4 ASR. After the annexation of the separatist entities by the Russian Federation organ status would exist even *de jure*, because separatist authorities would be regarded as state organs under Russian law, regardless of the manifest illegality of the annexation as a matter of international law. Assessment of any alternate argument by the respondent State should again take into account that States are responsible for the conduct of their organs, whether *de jure* or *de facto*, even if this conduct was done *ultra vires*.

III THE RIGHT TO LIFE AND INTERNATIONAL HUMANITARIAN LAW

Preliminary issues, Article 15 and the jus ad bellum

22. When assessing whether there have been violations of the right to life – either through the downing of the MH17 airliner or with regard to some of the other uses of kinetic force at issue in this case – the Court will need to assess whether the use of lethal force was justified under Article 2 ECHR. In doing so, as the Court itself has accepted, it would need to take into account relevant rules of international law, including IHL, when interpreting Article 2.[30]

23. The Court's justification analysis under Article 2 ECHR normally requires an assessment of whether force was 'absolutely necessary' for one of the purposes set out in Article 2(2). That approach cannot, however, work as such in the context of deprivations of life in international armed conflict. None of the purposes in Article 2(2) can accommodate status-based targeting rules of IHL in international armed conflict, under which it is lawful to target a combatant at any time so long as he is not *hors de combat*, and under which it is also lawful to target a civilian who is directly participating in hostilities for such time as he is doing so.[31] IHL moreover permits the taking of life of civilians who are not directly participating in hostilities so long as such taking of life is incidental to pursuing a lawful military objective and is compliant with the IHL principle of proportionality. The IHL principle of proportionality, which is solely about incidental harm to civilians and civilian objects, is different from a human rights approach to proportionality. Furthermore, the targeting rules of IHL do not employ the 'absolute necessity' standard for the taking of human life. (For more detail, see below paras 30-34.)

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[29] *Ukraine and the Netherlands*, n 1, para 697.

[30] See *Varnava v. Turkey* nos 16064/90 etc [GC] 18 September 2009, para 185.

[31] This is in particular the case with the purpose set out in Art. 2(2)(a), that is 'in defence of any person from unlawful violence.' This purpose is a poor fit for IHL because lethal force in armed conflict is used offensively, not just defensively, and because violence in IHL is generally not unlawful. The purpose set out in Art. 2(2)(c) ('action lawfully taken for the purpose of quelling a riot or insurrection') could reasonably accommodate the use of lethal force in *non*-international armed conflict, but that does not concern us here.

24. In short, interpreting Article 2 in light of applicable IHL requires a significant departure from the text of this provision. Any such interpretation must also take into account the text of the derogation clause in Article 15(2) ECHR, which prohibits derogations from the right to life 'except in respect of deaths resulting from lawful acts of war.' This possibility of wartime derogation from Article 2 was put in place by the drafters of the Convention precisely because the rules of IHL governing the conduct of hostilities cannot easily be accommodated by the categorical framing of the text of Article 2. This is in contrast to the much more flexible text of Article 6 of the International Covenant on Civil and Political Rights (ICCPR), which simply prohibits *arbitrary* deprivations of life, thus providing an interpretive window through which IHL could enter (as the benchmark of arbitrariness), while not allowing for any derogations whatsoever from the right to life.[32]

25. Therefore, in the context of an international armed conflict Articles 2 and 15(2) of the Convention must be interpreted together. This raises three preliminary issues. First, whether the 'lawful acts of war' derogation from the right to life can operate automatically, or whether, as is generally the case with derogations, it requires a formal statement by the derogating State. Second, whether derogations can operate extraterritorially. Third, whether the reference to *lawful* acts of war encompasses not just IHL, the *jus in bello*, but also the UN Charter-based law on the use of force, the *jus ad bellum*.

26. The first point is of the greatest relevance in this case. It can certainly reasonably be argued that the text of Article 15 is clear and does not allow for automatic derogation.[33] But it is also undeniable that no State has ever derogated from Article 2 by relying on the lawful acts of war exception. This includes both Russia while it was a State party, which did not derogate at all with regard to the situation in Ukraine, and even more importantly Ukraine itself, which extensively derogated from numerous provisions of the Convention but not from Article 2. In line with this state practice, it can therefore also be reasonably argued that the Court should read into Article 2 a 'lawful acts of war' exception or justification, in the same way as it has in *Hassan* already read into the (equally categorical) language of Article 5 a further exception for IHL-authorised deprivation of liberty.[34] On this approach, which we suggest that the Court endorses on purely pragmatic grounds, the application of Article 2 during armed conflict would be essentially the same as that of Article 6 ICCPR, despite their different wording. In that sense, as explained by

[32] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep 226, para 25: 'The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.' See also Mr Justice Leggatt in *Al-Saadoon*, n 15, para 111: 'It seems to me that…where the armed forces of a state kill someone in the course of an armed conflict the killing will be lawful provided it is consistent with IHL even if it results from use of force which is not absolutely necessary to achieve any of the purposes set out in subparagraphs (a) to (c) of article 2.'
[33] See Partly Dissenting Opinion of Judge Spano in *Hassan v. the United Kingdom* [GC], no. 29750/09, 16 September 2014, para. 8.
[34] *Hassan, ibid*. para. 105.

the Human Rights Committee, a '[u]se of lethal force consistent with international humanitarian law and other applicable international law norms is, in general, not arbitrary' and thus not a violation of the right to life.[35] If the Court were to adopt this approach, both Russia and Ukraine could in principle argue that deprivations of life committed by their armed forces during hostilities do not violate Article 2 ECHR so long as they were compliant with all relevant rules of IHL.

27. The second point raises the question whether derogations can be made with regard to emergencies that arise extraterritorially. No State has ever derogated on such grounds, but as with derogations from Article 2 this does not entail that such derogations cannot be done. Were the Court to adopt the automaticity approach that we advocate above this point would be moot, and we would just direct the Court to scholarship discussing this issue.[36]

28. The third point is more relevant. On one view, a *lawful* act of war is not only one that is compliant with IHL, but also one that is compliant with the *jus ad bellum*. Put differently, a State waging a war of aggression is committing only *unlawful* acts of war, even if its forces are fighting in accordance with the rules of IHL. Every deprivation of life by an aggressor is on this position arbitrary and a violation of the right to life, even the deaths of the defending State's combatants killed in combat. This view can be reasonably held. It has been argued for by academics,[37] and has also been endorsed by the Human Rights Committee, which held that 'States parties engaged in acts of aggression as defined in international law, resulting in deprivation of life, violate ipso facto article 6 of the Covenant.'[38] While again we do not dispute that this approach is normatively coherent and can reasonably be argued for, we would nonetheless argue against it on pragmatic grounds. Adopting this approach would require the Court and other human rights bodies to make determinations on whether a State has committed aggression, which may be straightforward in some cases but not in others, and may open the door to political controversy. The Court can instead embrace the same approach to the application of the right to life in armed conflict as the one taken by IHL, which applies both to aggressors and defenders equally. The reference to 'lawful acts of war' in Article 15(2) should therefore be understood as lawful under IHL only.

General approach to be followed

29. There are two basic types of situations in which individuals are deprived of their life during armed conflict. First, individuals may be killed while in the power of the enemy, e.g. civilians in captivity or prisoners of war. Such killings may be both numerous and difficult to document, but they are legally straightforward and we

[35] General Comment 36, n 20, para. 64.
[36] See M. Milanovic, 'Extraterritorial Derogations from Human Rights Treaties in Armed Conflict' in N. Bhuta (ed.), *The Frontiers of Human Rights* (OUP, 2016) 55-88.
[37] See e.g. W. A. Schabas, '*Lex Specialis*? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus ad Bellum' (2007) 40 *Israel Law Review* 592; E. Lieblich, 'The Humanization of Jus ad Bellum: Prospects and Perils' (2021) 32 *European Journal of International Law* 579.
[38] General Comment 36, n 20, para. 70.

will not address them here. Second, individuals may be killed in the course of hostilities. In such situations, we submit that Article 2 ECHR is violated whenever the individual is deprived of life during armed conflict and the attack[39] that resulted in the deprivation of life was unlawful under IHL rules governing the conduct of hostilities. That is, a violation of the relevant rules of IHL would entail a violation of the right to life as protected by the Convention.

30. There are four basic sets of IHL rules governing the conduct of hostilities that the Court would need to take into account in making such assessments: (1) the principle of distinction; (2) the principle of proportionality; (3) rules governing precautions in attack; (4) rules governing means and methods of warfare. These rules are firmly grounded in customary IHL and in treaties to which both Ukraine and Russia are parties, most importantly the 1977 Additional Protocol I to the 1949 Geneva Conventions.[40]

31. The principle of distinction mandates that attacks may be directed only against military objectives, and must not be directed against civilians or civilian objects.[41] Military objectives include two classes of persons: combatants[42] (unless they are *hors de combat*[43]) and civilians directly participating in hostilities for such time as they participate in hostilities.[44] As for objects rather than persons, military objectives are limited to 'those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.'[45]

32. Under the IHL principle of proportionality, '[l]aunching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.'[46] The IHL principle of proportionality is concerned *solely* with incidental harm to civilians ('collateral damage'); it is not at all concerned with any harm to combatants. Under this principle there are situations in which civilians may be justifiably killed, so long as they are not made the object of attack and so long as the specified types of

[39] Attacks are defined in IHL as 'acts of violence against the adversary, whether in offence or in defence' in any territory. See Art. 49 of Additional Protocol I.
[40] To avoid unnecessary duplication, we will here cite only to the rules articulated in the ICRC Study of Customary International Humanitarian Law ('ICRC Study', available with commentaries at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul), which the Court has relied on in several previous cases. There is no dispute about the customary nature of the specific rules governing the conduct of hostilities that we will cite, and most of them are based on the formulations of Additional Protocol I.
[41] Rules 1 and 7, ICRC Study.
[42] 'All members of the armed forces of a party to the conflict are combatants, except medical and religious personnel.' Rule 3, ICRC Study.
[43] Rule 47, ICRC Study.
[44] Rule 6, ICRC Study.
[45] Rule 8, ICRC Study.
[46] Rule 14, ICRC Study.

harm to civilians are not excessive in relation to the anticipated military advantage. IHL proportionality is different from human rights proportionality in the right to life context, which is about limiting uses of lethal force to measures of last resort, in a manner commensurate to the threat the targeted individual poses to the lives of others. Again, IHL proportionality is solely about incidental harm to civilians. Attacks that only harm combatants or cause damage only to military objectives cannot be disproportionate in the IHL sense of the term.

33. Under IHL rules governing precautions in attack, '[i]n the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. All feasible precautions must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.'[47] In addition to this overarching obligation, parties to the conflict have to take a number of specific precautionary measures. First, each party 'must do everything feasible to verify that targets are military objectives.'[48] Second, each party 'must take all feasible precautions in the choice of means and methods of warfare with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.'[49] Third, each party 'must do everything feasible to assess whether the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.'[50] Fourth, each party 'must do everything feasible to cancel or suspend an attack if it becomes apparent that the target is not a military objective or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.'[51] Fifth, each party 'must give effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit.'[52] Sixth and finally, '[w]hen a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected must be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.'[53] As a general matter, all of these precautions are subject to *feasibility*, an assessment which incorporates considerations of military advantage, including the need of a party to safeguard the lives of its own military personnel.

34. IHL also contains numerous rules governing means and methods of warfare. As to means, i.e. weapons, they are subject to two overarching rules: parties must not use weapons which are of a nature to cause superfluous injury or unnecessary

[47] Rule 15, ICRC Study.
[48] Rule 16, ICRC Study.
[49] Rule 17, ICRC Study.
[50] Rule 18, ICRC Study.
[51] Rule 19, ICRC Study.
[52] Rule 20, ICRC Study.
[53] Rule 21, ICRC Study.

suffering,[54] and they must not use weapons which are by nature indiscriminate.[55] Specific rules outlaw particular means of warfare such as the use of poison,[56] riot-control agents and expanding bullets (which may be used in domestic law-enforcement contexts),[57] or blinding laser weapons.[58] Similarly, specific rules outlaw particular methods of warfare, such as denial of quarter,[59] starvation of civilians[60] or perfidy.[61] It is possible that some of these rules may be relevant with regard to particular incidents at issue in this case, but this is fact-specific inquiry that is properly for the parties.

35. Since *McCann*, the Court's jurisprudence on uses of lethal force has distinguished between the immediate decisions of those on the ground who used lethal force and the overall planning of an operation in which the use of force took place.[62] This approach is equally relevant in armed conflict situations, and there is no need for the Court to depart from it. Precautions in IHL would generally be most relevant at the planning stage, but are also relevant while an operation is ongoing (for example, if the armed forces attacking a particular target realise that it has been misidentified as a military objective). In the context of a large-scale conflict such as the one in Ukraine there will also be frequent spontaneous exchanges of fire between adversary forces. In such situations there might be no planning stage as such that the Court would scrutinise.

36. In sum, when Article 2 ECHR is interpreted in light of the relevant rules of IHL, we can identify the following situations during an armed conflict that would constitute violations of Article 2, when loss of life results from:

(1) Attacks directed against combatants who are *hors de combat*, e.g. those who are incapacitated on the battlefield or who have surrendered;
(2) Attacks directed against combatants or civilians directly participating in hostilities (both otherwise lawful military objectives) by using unlawful means (e.g. expanding bullets) or methods of warfare (e.g. perfidy);
(3) Attacks directed against civilians;
(4) Indiscriminate attacks[63] that result in any civilian deaths;

[54] Rule 70, ICRC Study.
[55] Rule 71, ICRC Study.
[56] Rule 72, ICRC Study.
[57] Rules 75 and 77, ICRC Study.
[58] Rule 86, ICRC Study.
[59] Rule 46, ICRC Study.
[60] Rule 53, ICRC Study.
[61] Rule 65, ICRC Study.
[62] See *McCann and Others v. the United Kingdom*, 27 September 1995, Series A no. 324, para. 150.
[63] 'Indiscriminate attacks are those: (a) which are not directed at a specific military objective; (b) which employ a method or means of combat which cannot be directed at a specific military objective; or (c) which employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.' Rule 12, ICRC Study.

(5) Attacks directed against civilian objects that result in any civilian deaths;[64]
(6) Attacks directed against military objectives that cause disproportionate loss of civilian life;
(7) Attacks compliant with the principles of distinction and proportionality that nonetheless result in the loss of civilian life, if the party concerned used unlawful means or methods of warfare;
(8) Attacks compliant with the principles of distinction and proportionality that nonetheless result in the loss of civilian life, so long as that loss of life could have been avoided through feasible precautions that the attacking party failed to take.

37. Deprivations of life that would generally not constitute violations of Article 2 ECHR during armed conflict, subject to the caveats above, include:

(1) Killings of combatants;
(2) Killings of civilians directly participating in hostilities, if they were attacked whilst they participated in hostilities;
(3) Incidental killings of civilians compliant with the principle of proportionality, if the party concerned used only lawful means and methods of warfare and if all feasible precautions were taken.

38. A scenario that occurs frequently in armed conflict and unfortunately also frequently leads to loss of civilian life is one of mistake of fact. In such a scenario the attacking party misidentifies a target (an error as to distinction, i.e. a civilian object is wrongly perceived as a military objective); or makes a mistake in assessing incidental harm to civilians (an error as to proportionality, i.e. the loss of civilian life anticipated is substantially different from the one that actually occurs), or makes a mistake as to the anticipated effects of particular weapons used. The present case almost certainly involves numerous such scenarios; the downing of the MH17 airliner is likely one of them. We will address these scenarios, which involve an interplay between the Court's approach to mistake of fact under Article 2 and the IHL rules governing precaution, in more detail below (see Section III).

Possible normative conflicts between Article 2 and the targeting rules of IHL

39. In its admissibility decision in the present case, the Grand Chamber quite rightly raised the possibility that there may be some situations in which the rules of IHL and Article 2 ECHR do not operate in the same direction, i.e. in which the relevant norms conflict:

> In the present case, the Court would observe that there is no apparent conflict between the provisions of the Convention and the relevant provisions of international humanitarian law in respect of the complaints made, with the possible exception of the complaints under the substantive limb of Article 2. In so far as the incidental killing of civilians may not be incompatible with international humanitarian law subject to the principle of proportionality, this

[64] The IHL proportionality rule does not apply to incidental killings of civilians if the attack is not directed against a military objective. In other words, collateral damage can never be justified if a party directed its attack against a civilian object.

> may not be entirely consistent with the guarantees afforded by Article 2 of the Convention. It will therefore be for the Court, at the merits stage of the present case, to determine how Article 2 ought to be interpreted as regards allegations of the unintentional killing of civilians in the context of an armed conflict, having regard to the content of international humanitarian law.[65]

40. The Court is right that it is, in principle, possible for Article 2 to impose conditions for a justified deprivation of life in armed conflict that go over and above those of IHL. Put differently, there might be 'lawful acts of war' that are *nonetheless* still violations of Article 2 despite being compliant with IHL. There are in our view two such possibilities.

41. The first one was not raised by the Court in the paragraph above, and that is the killing of combatants who do not pose an immediate threat to anyone's life and who could be neutralised through non-lethal means, e.g. they could feasibly be captured rather than killed. Consider, for example, the situation of a squad of sleeping soldiers who are surrounded by their adversaries, and who then proceed to kill them by throwing grenades into the barracks when they could feasibly have captured them instead. While IHL does *not* require a capture-before-kill approach, the human rights notion of proportionality in the right to conflict generally does, because in human rights law the use of lethal force should correspond to the threat the individual poses to the lives of others and force can only be used as a last resort. The Supreme Court of Israel adopted precisely such an approach in its *Targeted Killings* judgment,[66] in which it held that Palestinian terrorists (whom it regarded as civilians directly participating in hostilities) could be killed only if capture was infeasible, and in doing so relied precisely on the European Court's *McCann* judgment.[67] However, while that approach makes sense in situations of sporadic uses of lethal force in the context of an occupation, it cannot, in our submission, be transplanted wholescale to the kind of intense, large-scale hostilities involving trench warfare and mass artillery fires that we have seen in the conflict in Ukraine. In other words, it would be completely infeasible to expect of either Ukrainian or Russian armed forces to exhaust all non-lethal means across the board when pursuing military objectives in their armed struggle. That said, there might be liminal cases (some of which may indeed be at issue in the present proceedings) of such uses of force again combatants or civilians directly participating in hostilities *in occupied territory* where a capture-before-kill approach might be appropriate.

42. The second possible instance of normative conflict is the one identified by the Court: whether incidental loss of civilian life, i.e. 'collateral damage', that is expressly permitted by IHL, can be compatible with Article 2 ECHR. Here we would make two observations. First, it would be completely unrealistic to impose a requirement on parties to an armed conflict to avoid *any* collateral loss of civilian life, i.e. to treat any incidental death as ipso facto a violation of the right to life. If

[65] *Ukraine and the Netherlands*, n 1, para. 720.
[66] *The Public Committee against Torture in Israel et al v The Government of Israel et al*, Supreme Court of Israel sitting as the High Court of Justice, Judgment, 11 December 2005, HCJ 769/02.
[67] *Ibid.* para. 40.

this was the rule, no war could ever be fought lawfully, even if the parties were fully committed to compliance and possessed substantial technological means to ensure such compliance. Second, the Court has already expressly accepted that incidental loss of life would *not* ipso facto constitute a violation of Article 2. In *Finogenov* the Court considered the conduct of a hostage-rescue operation that resulted in the deaths of hundreds of hostages, but did *not* find a violation on the basis of the incidental deaths alone or on the basis of the decision of the security services to use an anaesthetic gas in the rescue operation. Rather, the Court only found a violation on account of poorly planned medical relief efforts after the rescue operation had taken place.[68]

43. In sum, in our submission Article 2 *can* accommodate incidental loss of life, i.e. regard it as lawful, and no conflict with IHL rules would arise. If the Court could do so in *Finogenov*, which concerned a hostage-rescue operation in peacetime conditions, it can also adopt a similar approach to the conduct of hostilities in armed conflict, especially when co-applicable rules of IHL expressly provide for such situations. It would be difficult in that regard to conceive of a more restrictive, human rights-specific balancing approach to collateral damage that would differ from the IHL proportionality test (weighing whether the 'incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof … would be excessive in relation to the concrete and direct military advantage anticipated'). These are precisely the competing considerations that need to be weighed against each other, even if they are incommensurable and the balancing may produce both easy cases and hard cases. The key point here is not the framing of the balancing test as such, but the degree of *deference* that the Court would pay to the armed forces of the respondent State when they made their own assessment before pursuing the attack. The Court may here adopt a flexible approach that would vary on the circumstances of particular incidents at issue in this case.[69]

Approach to evidence

44. As is apparent from our overview of the targeting rules of IHL, most of these rules require an inquiry into what the combatant using force (or their commander) *intended, knew or anticipated.* In other words, from the mere fact that civilians were killed or civilian objects were damaged or destroyed during hostilities one cannot conclude that IHL rules were violated. It is necessary to determine why these persons or objects were targeted, and what (if any) precautions were taken. This raises difficult, but not insurmountable, issues of proof. And in performing this task the Court will be able to rely not just on material submitted by the parties, but also on the work of independent fact-finding institutions such as the UN Commission of Inquiry on Ukraine.

[68] *Finogenov v. Russia*, nos 18299/03 and 27311/03, 20 December 2011, paras 227-266.

[69] Cf. *Finogenov, ibid.* para. 211 ('the Court may occasionally depart from that rigorous standard of "absolute necessity". As the cases of *Osman*, *Makaratzis*, and *Maiorano and Others* (all cited above) show, its application may be simply impossible where certain aspects of the situation lie far beyond the Court's expertise and where the authorities had to act under tremendous time pressure and where their control of the situation was minimal.')

45. It appears to us that the Court has before it a straightforward path based on the distribution of burden of proof. It is for the applicant States to provide a robust prima facie case that specific incidents give rise to violations of IHL and Article 2 ECHR. The Court can then request that the respondent State party provide evidence that the principles of IHL have been adhered to (or at least there were attempts to adhere to them). This can be done through provision of information on targeting decisions and instructions, strategic and tactical decisions regarding the use of particular weapons, any decisions regarding precautions, and any documentary evidence that would show that the respondent State investigated alleged violations of IHL and obtained further evidence about specific incidents. In the absence of any such information from the respondent State, and so long as the information in its possession is not contradicted by the reports of reputable international fact-finding bodies or other information in the public domain, the Court can draw adverse inferences from the respondent State's refusal to cooperate adequately. This is precisely what the Court did in *Carter* and in its admissibility decision in the present case.[70] And the drawing of such inferences is particularly appropriate in light of the respondent State's continuing obligation to cooperate with the Court regarding cases invoking its responsibility while it was still a party to the Convention, and in light of the fact that the nature of the relevant information (e.g. what the commanders of its armed forces intended when launching any given attack) is of its nature such that it is 'wholly or in large part within the exclusive knowledge of the respondent State.'[71]

III. USE OF LETHAL FORCE WHERE THERE IS A MISTAKE OF FACT

46. As explained above, mistake of fact scenarios, in which civilians or civilian objects are not harmed intentionally but due to a material error in the targeting process, are very common in armed conflict. It is inevitable that at least some of the incidents at issue in this case may have been the result of such errors. Probably the best such example, which we discussed in our brief at the admissibility stage of the proceedings, is the downing of the MH17. The most probable explanation for the destruction of that airliner is that the individuals involved in the targeting process thought they were firing at a Ukrainian military plane, rather than at a civilian airliner. In other words, the BUK operators likely committed a mistake of fact by misidentifying the target.[72] Whilst the respondent State has to date rejected any involvement in the downing of the MH17, it is worthwhile exploring the principles that might be applied should the State change its position and argue that the airliner was mistakenly considered to be a military aircraft and thus a legitimate military objective in the context of the wider armed conflict. The same principles would govern any other similar incidents at issue in these proceedings. It is important to note in that regard that a mistake of fact scenario that goes to distinction, i.e is about

[70] *Ukraine and the Netherlands,* n 1, paras 454-459.
[71] *Ibid.* para. 455.
[72] Civilian airliners certainly have been mistaken for military aircraft in the past: see M. Milanovic, 'Mistakes of Fact When Using Lethal Force in International Law: Part I,' *EJIL: Talk!*, 14 January 2020, at https://www.ejiltalk.org/mistakes-of-fact-when-using-lethal-force-in-international-law-part-i/.

misidentifying the nature of the target, has *nothing* to do with the IHL proportionality rule. The civilians who were killed aboard the MH17 airliner were *not* collateral damage; their deaths were not incidental to striking a military objective, but likely resulted from misidentifying a civilian object as a military objective.

47. The Court was confronted with a mistake of fact scenario in its very first Article 2 case: *McCann v. the United Kingdom*. British SAS special forces had killed several IRA terrorists in Gibraltar, having been told by their superiors that the terrorists posed an imminent threat to the lives of others as they could remotely detonate a car bomb. There was in fact no such bomb, nor were the terrorists otherwise armed. As is well known, the Court accepted that:

> the use of force by agents of the State in pursuit of one of the aims delineated in paragraph 2 of Article 2 (art. 2-2) of the Convention may be justified under this provision (art. 2-2) where it is based on *an honest belief* which is perceived, *for good reasons*, to be valid at the time but which *subsequently turns out to be mistaken*. To hold otherwise would be to impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others.[73]

48. The Court has since confirmed that whether good reasons exist should be determined 'subjectively' and forms part of the analysis of whether an honest belief was held;[74] i.e., did the officer(s) have reason to believe that lethal force was absolutely necessary in light of the circumstances they were facing and the information they had been given? In the heat of the moment, the mistaken belief of an officer that lethal force was absolutely necessary can satisfy the requirements of Article 2(2).

49. However, this is not the end of the analysis. In *McCann* the Court found that the operation had not been planned nor conducted in such a way as to minimise the likelihood of loss of life. The soldiers acted pursuant to orders that were based on *erroneous assumptions* (some of which were made by inexpert personnel) rather than actual knowledge. The combination of the 'failure to make provision for a margin of error' with the training of the officers to shoot to kill meant that there had been a violation of Article 2.[75] *McCann* therefore stands for the proposition that killings based on an honest mistake of fact on the part of the state agent can still give rise to a violation of Article 2, because of errors made further back in the causal chain of the operation that resulted in the use of force. Furthermore, in *Ergi* the Court confirmed that states have an obligation to 'take all feasible precautions in the choice of means and methods of a security operation…with a view to avoiding, and in any event, to minimising, incidental loss of civilian life.'[76]

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[73] McCann, n 62, para. 200 (emphasis added).
[74] *Armani da Silva v the United Kingdom* [GC], no. 5878/08, 30 March 2016, paras 245-246.
[75] *McCann,* n 62, para 211.
[76] *Ergi v Turkey,* no. 23818/94, 28 July 1998, para 79. See also General Comment 36, n 20, para 64.

50. This requirement does not change in the context of an armed conflict. Reading Article 2 in light of relevant principles of IHL would suggest that included in this duty is an obligation on States to take all feasible precautions to avoid basing operational decisions on unverified – and possibly incorrect – information as to the identity or nature of any targets. The rules of treaty and customary IHL are not explicit as to how a mistake of fact regarding distinction should be treated. On one view any direction of attacks against civilians and civilian objects would *ipso facto* violate the principle of distinction.[77] The majority view in IHL scholarship, however, is that the concept of *directing* attacks implies some level of *intent*, and that an honest *and* reasonable mistake of fact could negate that element of intent.[78] In other words, if the armed forces of a party to a conflict *do* take all feasible precautions in attack and all feasible measures to verify that a target is a military objective, but it later transpires that the target was in fact a civilian object, there would be no violation of IHL.[79] And there should be no violation of Article 2 either, even if civilians died as a result of such a mistake.

51. Therefore, should the Court be faced with a defence of mistake of fact, it should seek to establish whether the persons in charge of the targeting process took all objectively feasible measures to verify the identity of the target and any other relevant measures that could minimise the risk of loss of life. In assessing the planning and control of the operation, having particular regard to the context, the Court would have to address a number of factual issues regarding what Russia and/or the separatists did (if anything) to avoid this type of mistake. For example, was it necessary to deploy an anti-aircraft platform of this particular type in an area with dense civilian traffic? Could the respondent have liaised with the Ukrainian authorities to ask for closure of the airspace? Could appropriate warnings have been given to airlines operating through Ukrainian airspace? What specific measures

[77] See L. Hill-Cawthorne, 'Appealing the High Court's Judgment in the Public Law Challenge against UK Arms Export Licenses to Saudi Arabia,' *EJIL: Talk!*, 29 November 2018, at: https://www.ejiltalk.org/appealing-the-high-courts-judgment-in-the-public-law-challenge-against-uk-arms-export-licenses-to-saudi-arabia/.

[78] This is unambiguously the position of some state military manuals. See, e.g., US DoD Law of War Manual, at 7.3.3.1: 'The respect and protection due to the wounded, sick, and shipwrecked do not prohibit incidental damage or casualties due to their proximity to military objectives *or to a justifiable mistake*.' (emphasis added); New Zealand Manual of Armed Forces Law, vol. 4, at 4.5.2: 'The obligation is dependent upon the information available to the commander at the time an attack is decided upon or launched. The commander's decision will not be unlawful if it transpires that a place *honestly believed* to be a legitimate military target later turns out to be a civilian object. However, the political and public-relations effects of a mistaken attack may be extremely damaging. Commanders have a legal duty *to take practicable steps* to gather information and intelligence about the targets they are about to attack and the likely incidental consequences of the means and methods of combat they intend to employ. Wilful blindness to facts that argue against an attack does not provide an excuse for the resulting death and destruction.' (emphasis added). See also Milanovic, n 73.

[79] See M. Schmitt, 'Basic Principles in the Conduct of Hostilities' in B. Saul and D. Akande (eds), *The Oxford Guide to International Humanitarian Law* (OUP, 2020): 'Feasibility is essentially a reasonableness standard that requires attackers to take those measures to avoid collateral damage that a reasonable attacker would in the same or similar circumstances, in light of the information that is "reasonably available at the relevant time and place"' (167-8).

were taken to verify the aircraft was a legitimate military target? Could the BUK platform have been connected to data from civilian air traffic control? Were there any other technical measures that could have contributed to more reliable target verification? These are questions of fact for the Court and for the parties and we express no view on any of them, except to note that in principle reasonable action to mitigate the risk of error should have been taken. [80]

52. In sum, a State will be responsible for violating Article 2 ECHR due to loss of civilian life that resulted from honest mistakes of its agents only if these agents failed to take feasible measures of precaution. It is possible for mistakes to happen even when all feasible precautions were taken, but it would be for the respondent State to convince the Court that this is what actually happened. In a situation in which the respondent State continues to deny its involvement in the loss of civilian life altogether, as with the MH17 airliner, or one in which the respondent State refuses to provide the Court with an adequate explanation of how any mistake happened and what precautions were taken, the Court cannot simply give the respondent the benefit of the doubt. In other words, it is for the State that used lethal force to raise any mistake defence or issue and to provide any supporting information. Its failure to do so would mean that an adverse inference could appropriately be drawn that, at a minimum, the respondent's armed forces failed to take all feasible precautions through which the mistake could have been avoided.

III. CONCLUSION

53. The *amici curiae* therefore respectfully submit that the Court should:

(1) Apply the spatial conception of Article 1 jurisdiction to those incidents in the applications before it that occurred in areas under the control of the respondent State, noting that only where intense fighting on the ground is taking place should such an exception to such jurisdiction be found, whilst areas proximate to such fighting should not be so excluded;

(2) Overrule, rather than find exceptions to, the arbitrary restriction of Article 1 personal jurisdiction relied upon in *Georgia v. Russia (No. 2)* for alleged violations of the Convention resulting from kinetic uses of force;

(3) Hold that an exercise of personal jurisdiction in the sense of Article 1 will be found whenever a State party, through one of its agents, deprives an individual of life;

(4) Expressly refer to the attribution rules contained in the ILC ASR;

(5) Read and apply Article 2 ECHR in light of applicable rules and principles of IHL and together with Article 15(2) ECHR, so that deaths resulting from lawful acts of war will not, in general, constitute a violation of the right to life;

(6) Take into account the mistake of fact question in its analysis under Article 2 ECHR, if the circumstances so warrant.

[80] See also Special Rapporteur on Extrajudicial, Summary or Arbitrary Killings, 'Statement: Commercial Airlines and Conflict Zones: Recommendations to strengthen air safety and prevent unlawful deaths' (January 2021), at: https://www.ohchr.org/Documents/Issues/Executions/StatementCommercialAirlinesConflictZones_Jan2021.pdf