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

***Amicus Curiae* Brief**
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on behalf of the Human Rights Law Centre of the University of Nottingham

1. By letter dated 21 December 2020, the President of the Grand Chamber granted leave to the Human Rights Law Centre to make written submissions as a third-party intervenor in this case. As requested by the Court, this submission will not deal with questions of fact or the merits, which are for the parties. The brief will be confined solely to some of the legal issues raised by the downing of the MH17 airliner over Ukraine on 17 July 2014.
2. The first part of this brief will address issues of attribution and state jurisdiction in the sense of Article 1 ECHR, providing guidance on the applicable tests for considering whether the respondent state can be held responsible for the downing of MH17. The second part of the brief will examine how mistake of fact in the use of lethal force should be considered in light of the obligations under Article 2 ECHR. The third part of the brief will examine possible prevention and complicity doctrines relating to the right to life under the Convention in the context of weapons transfers to third parties.

I. Attribution and Article 1 jurisdiction

3. In the present case, the two key preliminary *legal* questions are (i) whether the act of shooting down of MH17 is attributable to the respondent state under the attribution rules of customary international law codified in the International Law Commission's Articles on State Responsibility (ILC ASR),[1] and (ii) whether the victims who perished onboard the plane were within the respondent state's jurisdiction. The two questions are interlinked, but not identical.
4. The resolution of these two legal questions depends on two sets of *factual* questions: (i) how, exactly, did the shooting down of MH17 take place and who, in fact, did it, and (ii) what was the nature of the relationship between the Russian Federation and the separatist armed groups operating in Eastern Ukraine. We express no view here on any of the relevant questions of fact, which are deeply contested between the parties. However, this brief explores the legal questions that arise on the assumption that MH17 was shot down in circumstances that essentially correspond to those established by the international Joint Investigative Team (JIT), i.e. that the plane was shot down by a surface-to-air missile launched from a BUK TELAR anti-aircraft platform belonging to a unit of the Russian armed forces, which had briefly crossed the Russian border into Ukraine, and returned to Russia after the plane was shot down.[2] This is simply because the respondent likely has no *legal* case to answer if the airliner was not shot down in these or substantially similar circumstances.

A. Relationship between attribution and jurisdiction

5. An internationally wrongful act exists if there is conduct, consisting of either action or of omission, that is attributable to the state and breaches the state's international legal obligations.[3] Attribution (imputation) is a legal operation whereby the conduct of a human being, or a group thereof, is in law regarded as the conduct of the state, an abstract legal entity. In that sense, every case litigated before the Court raises an attribution issue (even if in the vast majority of cases the issue is implicit or manifestly obvious, because the conduct in question is that of the state's own *de jure* organs[4]).
6. Under Article 1 ECHR, states parties must secure to 'everyone within their jurisdiction' the rights protected by the Convention. As the Court's established case law demonstrates, there are two basic forms of Article 1 jurisdiction: i) the spatial, which conceives jurisdiction as effective overall control

[1] Report of the International Law Commission on the work of its Fifty-third session, *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10* (A/56/10), chp.IV.E.2).
[2] See at: https://www.prosecutionservice.nl/topics/mh17-plane-crash/news/2018/05/24/update-in-criminal-investigation-mh17-disaster.
[3] See Art. 2 ILC ASR and Commentary.
[4] See generally J. Crawford and A. Keene, 'The Structure of State Responsibility under the European Convention on Human Rights,' in A. van Aaken and I. Motoc (eds.), *The ECHR and General International Law* (OUP, 2018) 178.

by a state of the territory of another state,[5] and ii) the personal, which conceives jurisdiction as authority or control exercised by a state agent over the victim of a human rights violation.[6]

7. As the Grand Chamber explained in *Al-Skeini*, '"[j]urisdiction" under Article 1 is *a threshold criterion*. The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions *imputable to it* [i.e. attributable to it] which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention.'[7] This is the right approach, most recently reaffirmed by the Court in *Ukraine v. Russia (re Crimea)*.[8] In short, for there to be a violation of the Convention the conduct in question, consisting of action or of omission, must be *both* attributable to the state *and* the victim must be within the state's jurisdiction.[9]
8. The jurisdiction and attribution criteria perform different functions. The former is about whether the Convention applies; the latter about whether a particular act or omission should be regarded as that of the respondent state. It is thus in principle possible for conduct to occur within a state's jurisdiction but not be attributable to it (e.g. a purely private killing on the state's territory) and vice versa. But there can also be a direct link between attribution and jurisdiction where an attribution issue is logically prior to the jurisdiction one – the *conduct establishing the state's jurisdiction* must be attributable to the state, i.e. be committed by state agents. For example, in case of the spatial conception of jurisdiction, the conduct through which the state established control over an area must be that of its organs or other agents (e.g. Turkish soldiers in Northern Cyprus[10]). In the context of the personal conception of jurisdiction, the conduct constitutive of authority or control over the victim must be committed by a state agent, and is often the same as the violation-establishing conduct (e.g. an act of detention[11]).

B. Possible bases for attributing the downing of MH17 to the respondent state

9. The rules of attribution of conduct stem from general international law, as authoritatively interpreted by the ILC and the 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.'[12] While the Court's record of applying the ILC Articles on State Responsibility has not been the most consistent, especially with regard to situations of relationships between states and non-state actors administering territory,[13] the Court has regularly referred to the Articles and has relied on the attribution rules contained therein.[14] In short, the rules articulated by the ILC are a necessary starting point and any divergence from them requires principled and substantial justification.
10. 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 ILC ASR).[15] 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

[5] *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, 7 July 2011, paras 138-140.
[6] Ibid., paras 133-137.
[7] Ibid., para. 130 (emphasis added).
[8] *Ukraine v. Russia (re Crimea)* [GC] (dec.), nos 20958/14 & 38334/18, 16 December 2020, para. 264.
[9] See also *Al-Skeini*, para. 135: 'where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State, the Contracting State may be responsible for breaches of the Convention thereby incurred, *as long as the acts in question are attributable to it* rather than to the territorial State.' (emphasis added)
[10] See *Loizidou v. Turkey*, no. 15318/89 (preliminary objections), 23 February 1995; *Cyprus v. Turkey* [GC], no. 25781/94, 10 May 2001.
[11] See *Hassan v. United Kingdom* [GC], no. 29750/09, 16 September 2014. It is of course also possible for the jurisdiction-establishing conduct (e.g. detention) to precede the violation, as with the applicant Baha Mousa in *Al-Skeini*, who was first detained and was then subjected to ill-treatment which resulted in his death.
[12] 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.
[13] See more M. Milanovic, 'Special Rules of Attribution of Conduct in International Law,' (2020) 96 *International Law Studies* 295, at 342-7, 362-6.
[14] For a recent example, see *Makuchyan and Minasyan v. Azerbaijan and Hungary*, no. 17247/13, 26 May 2020.
[15] 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.'

state's own law,[16] but is a person or entity *completely dependent* on the state, which *in fact* acts as if it was one of its organs.[17] 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).[18] 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).[19]

11. The application of these rules will depend on the Court's ultimate factual findings regarding the identity of the individuals who decided on and launched the missile that (allegedly) hit MH17. Two factual hypotheses are suggested in order to explore the issue of attribution. First, that the crew of the BUK missile launcher consisted of personnel of the armed forces of the Russian Federation. Second, that while the launcher may have been Russian, the crew were not service members of the Russian Federation, but were personnel belonging to separatist armed groups in Eastern Ukraine.[20] The same goes for any other individuals who may have been involved in the decision-making process that led to the shooting down of MH17, especially those who gave any relevant orders to the BUK crew.
12. If the crew of the BUK were members of the armed forces of the Russian Federation, and if any other relevant individuals were officials of, for example, the respondent state's security agencies, the attribution inquiry is straightforward. The conduct would be that of the respondent's *de jure* organs. It would be immaterial whether these individuals acted *ultra vires*, against the instructions of their superiors. It would also be immaterial whether these persons were somehow put at the disposal of or collaborated with the Donetsk/Luhansk separatist armed groups.[21]
13. Alternatively, if the crew of the BUK and other relevant individuals were personnel of separatist armed groups, and not Russian servicemembers or officials, the attribution inquiry would be more complex. One possible theory of attribution would be that of *de facto* organ status, which would cover *ultra vires* acts. This would require showing that the armed groups in Eastern Ukraine were completely dependent on and controlled by the respondent state. This is a demanding test, whereby the *general relationship* between the state and the non-state actor is considered, rather than the specific conduct at issue. A different theory would be precisely that of instructions, directions or effective control by the respondent state over the specific conduct, i.e. the downing of MH17.[22] This would require showing that Russian officials issued instructions that the plane be shot down, or that they exercised control over the act itself.

C. Article 1 jurisdiction and the extraterritorial application of the Convention

14. If the incident can be attributed to Russia, given that MH17 was shot down outside Russian territory, the Court will need to establish whether the victims onboard the plane were within the respondent state's jurisdiction in the sense of Article 1 ECHR. As explained above, it could do so using two different approaches: the spatial and the personal.
15. Under the spatial test, the Court would need to establish that the respondent state was in effective overall control of *the area* of Eastern Ukraine over which MH17 was shot down, with this control

[16] 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.

[17] 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.

[18] So long as the persons in question acted in their official capacity – see Art. 7 ASR commentary, para. 7.

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

[20] The provision of the weapons system alone, without the crew, may be sufficient basis for the respondent's responsibility for some type of complicity in an arbitrary deprivation of life, which we will discuss in Part III. It is also possible that the personnel in question were a mix of Russian officials and members of the armed groups; in that case the key question of fact would be what decisions exactly were made by Russian officials.

[21] See Art. 6 ASR and commentary (this rule applies solely to inter-state relationships).

[22] For a helpful general overview of the operation of the various control tests, see S. Talmon, 'The Responsibility of Outside Powers for Acts of Secessionist Entities', (2009) 58 *ICLQ* 493.

either being exercised directly or through a subordinate local administration.[23] This is a distinct issue to attribution, with the latter depending on the state's control over a non-state actor (as opposed to territory). The Court's jurisprudence in cases where a state exercises control over the territory of another through a proxy non-state actor often uses the formula that this local administration 'survives by virtue' of the intervening state's support.[24] It is unclear whether in such cases the Court regards all of the conduct of the proxy administration/actor to be attributable to the intervening state, or whether by contrast it holds the intervening state responsible for failing to secure human rights, i.e. failing to prevent violations by the non-state actor. The latter view should be preferred in order to preserve consistency with the ILC's attribution framework and the jurisprudence of the ICJ.[25] In that regard, it is important to note that in *Catan* the Court arguably disclaimed any intention of fashioning Convention-specific attribution rules.[26] And in the recent Crimea admissibility decision the Court, while finding that Russia was in control over Crimea for the purpose of Article 1 jurisdiction, expressly reserved for the merits the question of whether the violations at issue in the case were attributable to Russia.[27]

16. We express no view on whether Russia in fact exercised control over the relevant parts of Eastern Ukraine. We would, however, make one further observation: applying this model of jurisdiction to the downing of MH17 creates the potential for arbitrariness, since the applicability of the Convention would depend on *where exactly* the aircraft was when it was shot down. Had it been shot down by the same BUK missile system, in the exact same circumstances but only a few kilometres away, over an area *not* controlled by the respondent state/the separatists, the Convention would not apply.
17. Under the personal test, the Court would need to establish whether the firing of the missile was an exercise of authority or control by the respondent state over the victims onboard the plane. As explained above, attribution is a logical precondition to finding jurisdiction on this basis. On the facts of this case, the act which establishes jurisdiction is the same act that establishes the potential violation, and it needs to be attributable to the respondent, i.e. authority or control must be exercised by a state agent. The issue is whether the killing of the persons onboard MH17, allegedly by the agents of the respondent, was an exercise of authority or control over the victims by the respondent state. 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.[28] In *Al-Skeini*, by contrast, the Court confirmed that the use of lethal force could, in certain unspecified circumstances, constitute such a link,[29] 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.[30] The Court since *Banković* had not expressly ruled on the jurisdictional issue regarding purely kinetic uses of force absent territorial control, e.g. via drone strikes, until its judgment in *Georgia v. Russia No. 2*, where a majority of the Grand Chamber reaffirmed a restrictive approach

[23] See, e.g., *Ilaşcu et al. v Moldova and Russia* [GC], no. 48787/99, 8 July 2004, para. 392 (also referring to the respondent state's 'decisive influence' over the separatist entity); *Chiragov and Others v Armenia* [GC], no. 13216/05, 16 June 2015, para. 186 (same); *Ukraine v. Russia (re Crimea)*, paras 308-337.
[24] Starting from *Cyprus v. Turkey,* para. 77. For an extensive analysis, see Milanovic, *supra* note 13, at 349-355.
[25] See Milanovic, *supra* note 13, at 362-4.
[26] See *Catan and Others v. Moldova and Russia* [GC], nos. 43370/04, 8252/05 and 18454/06, 19 October 2012, para. 115 (the Court holding that 'the test for establishing the existence of "jurisdiction" under Article 1 of the Convention has never been equated with the test for establishing a State's responsibility for an internationally wrongful act under international law.' The Court made the same remark in *Jaloud v. the Netherlands* [GC], no. 47708/08, 20 November 2014, para. 154.
[27] See *Ukraine v. Russia (re Crimea)*, para. 266: 'The Court's decision on this preliminary issue at this stage of the proceedings is without prejudice to the issues of attribution and responsibility of the respondent State under the Convention for the acts complained of, which fall to be examined at the merits phase of the proceedings.'
[28] *Banković and Others v. Belgium and Others* [GC] (dec.), no. 52207/99, 12 December 2001.
[29] *Al-Skeini*, para. 136: 'the Court's case-law demonstrates that, in certain circumstances, the use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction …What is decisive in such cases is the exercise of physical power and control over the person in question.'
[30] *Al-Skeini*, para. 137.

in that regard.[31] But the Court has also recently left the door open that such situations could be covered by the Convention, when considering extraterritorial assassinations.[32]

18. In our submission, the Court should avoid any arbitrary line-drawing. Using the personal rather than the spatial conception of jurisdiction would achieve that goal. The applicability of the Convention to the destruction of a civilian airliner should not depend on the location of the plane. It should not matter whether the plane was shot down over government or separatist-held territory in Ukraine, over the territory of the respondent or that of a third state, or over the high seas.[33] Rather, the Court can simply say that the shooting down of the airliner was an exercise of physical power over the individuals onboard for the purpose of the personal test of Article 1 jurisdiction. As Mr Justice Leggatt of the High Court of England and Wales (now a Justice of the UK Supreme Court) held in *Al-Sadoon*:

> 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.[34]

19. Adopting this reasoning would also bring the Court's jurisprudence into alignment with other 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*.'[35]

II. Mistake of fact when using lethal force under Article 2 ECHR

20. On the assumption that the downing of MH17 was attributable to Russia (on whatever basis), and on the assumption that the victims onboard the plane were within Russia's Article 1 jurisdiction (again, on whatever basis), Russia would have a case to answer as to whether the destruction of the plane resulted in a violation of the right to life under Article 2 ECHR. We express no views on any of the factual issues or on what the right outcome should be on the merits. That said, two versions of the facts seem possible, which allow for an exploration of the relevant principles.
21. On the first, simpler one, the crew of the BUK and/or those who gave them instructions knew that MH17 was a civilian airliner and wanted it destroyed. In such circumstances, the legal analysis would be straightforward: the Court would need to establish whether the destruction of the civilian airliner was 'absolutely necessary' for one of the purposes set out in Article 2(2) ECHR.[36]

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[31] *Georgia v. Russia No. 2* [GC], no. 38263/08, 21 January 2021.

[32] See *Makuchyan and Minasyan*, paras 52, 120.

[33] In particular, the Court should resist the temptation of ruling that jurisdiction exists simply by virtue of the territory of Ukraine already being part of European legal space or *espace juridique*, i.e. a territory already covered by the Convention. This is a suspect doctrine that first arose in *Banković* but was effective put to rest by the Court in *Al-Skeini*, para. 142. It would be entirely devoid of principle to have a jurisdictional outcome by which European states would be prohibited from shooting down airlines within Europe (however defined) but would be allowed to do so outside Europe.

[34] *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).

[35] 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.

[36] We express no view on whether the deliberate use of lethal force against a civilian airliner could ever be justified on any of the bases articulated in Article 2(2) ECHR.

22. A second hypothesis is that the crew of BUK and their superiors did intend to destroy the aircraft on their radar, but they believed that this was a military aircraft of some kind that could be considered a legitimate target in the context of the wider armed conflict in Ukraine. In other words, the BUK operators committed a mistake of fact in misidentifying the target.[37] Civilian airliners certainly have been mistaken for military aircraft in the past: for example, the 1988 downing of Iran Air Flight 655 by the USS *Vincennes* and the 2020 downing of Ukraine International Airlines Flight 752 by Iranian air defences over Tehran.[38] To clarify, this mistake of fact hypothesis relates to an error in the identity or nature of the object or person towards which lethal force was directed, e.g. by misapprehending the person or object as a threat to life. This is *not* the same as a situation where the state causes loss of life incidentally to civilians while pursuing some other, correctly identified target[39] (e.g. *Finogenov*[40]).
23. 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.'[41]
24. 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;[42] 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).
25. 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 minimize 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.[43] *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.
26. 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.'[44] It is a short logical step to infer 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.

[37] A preliminary question, on which we express no view, is whether the mistake of fact defence (such as it is) can be considered by the Court *proprio motu* in circumstances where the respondent state simply rejects that the destruction of the airliner took place in the manner suggested. See *Esmukhambetov and Others v Russia*, no. 23445/03, 29 March 2011; *Benzer and others v Turkey*, no. 23502/06, 12 November 2013.

[38] For an extended analysis, 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/.

[39] In terms of IHL, this would be an error in terms of the principle of distinction between military and civilian objects, not an error relating to the (IHL-specific) principle of proportionality that governs incidental damage to civilians and their property (collateral damage).

[40] See *Finogenov v. Russia,* nos 18299/03 and 27311/03, 20 December 2011 paras. 227-236 (incidental loss of life among hostages during a rescue operation was not a violation of Art. 2).

[41] *McCann and Others v. the United Kingdom*, 27 September 1995, Series A no. 324 para. 200 (emphasis added)

[42] *Armani da Silva v the United Kingdom,* 30 March 2016, App 5878/08, paras 245-246.

[43] *McCann* para 211.

[44] *Ergi* para 79. See also HRC GC 36, para 64.

27. On the assumption that, in the circumstances of armed conflict, it would have been lawful to target the aircraft if it was a military plane,[45] a finding that the shooting down of MH17 was attributable to Russia would not, therefore, automatically entail a violation of Article 2. It would further have to be shown that persons in charge failed to take all objectively feasible measures to verify the identity of the target and minimize 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, what measures 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.
28. Minimising the risk of an erroneous identification is only one element of the consideration of the planning and control of the operation. Having full regard for the overarching circumstances in which the downing of MH17 took place, further questions of fact should be asked to confirm that all feasible measures were taken to minimise loss of life. 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? And so forth.[46] As before, these are all questions of fact for the Court and the parties upon which we do not express a view.[47]
29. This approach to assessing the legality of uses of lethal force based on mistakes of fact is supported by the relevant rules of IHL, which reinforce those of the Convention. That said, we use IHL to confirm the logical consistency of the approach outlined above, rather than expressing a firm view on whether IHL is directly applicable in the present context.[48]
30. The IHL principle of distinction categorically prohibits directing attacks against civilians or civilian objects (as opposed to affecting them incidentally).[49] The rules of treaty and customary IHL are not

[45] This would be in line with the approach the Court took in *Hassan* by using IHL to 'read in' exceptions into a categorical ECHR rule. An alternative approach would require a derogation from Art. 2 pursuant to Art. 15(2) ECHR, which allows for derogations 'in respect of deaths resulting from lawful acts of war.' We express no view on this issue here.

[46] See, e.g., 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

[47] The Court expected the respondent state to provide similar information in *Isayeva*, para. 175.

[48] In *Hassan* (para 102) the Court held that it is appropriate to take IHL into account when interpreting and applying the Convention in situations of armed conflict. However, there is a preliminary matter of whether the Court should have recourse to IHL when the respondent state does not invoke it, because it denies that it is involved in an armed conflict. See also *Georgia v. Russia No. 2,* paras 92-5, We also do not comment on whether the armed conflict of Ukraine can be classified as an international armed conflict or a non-international armed conflict, except to note that this is an issue that can be avoided since the relevant substantive rules of IHL apply equally to both types of armed conflicts.

[49] The relevant rules of customary IHL apply to both international armed conflicts and non-international armed conflicts and are authoritatively set out in the ICRC Customary IHL Study (available with commentaries at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul.):

> Rule 7. The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects.
>
> Rule 15. In 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.
>
> Rule 16. Each party to the conflict must do everything feasible to verify that targets are military objectives.

See also UN General Assembly resolution 2675 (1970), para. 3, noting that. in all armed conflicts (international or non-international), '[i]n the conduct of military operations, every effort should be made to spare civilian populations from the ravages of war, and all necessary precautions should be taken to avoid injury, loss or damage to civilian populations.'

explicit, however, 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.[50] The majority view, 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.[51] 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.[52] This is essentially the same position we outline above regarding Article 2.

III. Prevention and complicity

31. If the Court does not find the downing of MH17 to be attributable to the respondent state on any of the bases articulated in Part I above, the respondent state may still possibly incur responsibility for failing to protect the right to life by failing to prevent the destruction of the airliner or for being complicit in the action.

A. Prevention

32. The positive obligation of states parties to protect individuals from real and immediate risks to their lives is long-established in the Court's jurisprudence[53] and that of other human rights bodies.[54] One jurisdictional basis under Article 1 ECHR for such an obligation to arise could be (if proven) the respondent's effective control over parts of Eastern Ukraine, i.e. the spatial test of jurisdiction.[55] Another possible basis, which has so far not been utilised by the Court, but has been used by other human rights bodies, would be to anchor the duty to prevent in the state's capacity to influence the primary wrongdoer, i.e. this would be a functional approach to jurisdiction.[56] In such a conception the state's control over the victims' ability to exercise their right to life would form the basis for the positive obligation of protection.[57] A good comparison point, albeit one not directly bounded by a jurisdictional threshold criterion, would be the approach to positive obligations taken by the ICJ in the *Bosnian Genocide* case. There the ICJ found the Federal Republic of Yugoslavia responsible for

[50] 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/.

[51] 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, *supra* note 38.

[52] See Schmitt, 'International Humanitarian Law and the Conduct of Hostilities' in Saul and Akande (eds), *The Oxford Guide to International Humanitarian Law* (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).

[53] See, e.g., *Osman v the United Kingdom* [GC], no. 23452/94, 28 October 1998, para 115.

[54] See, e.g., *Velasquez-Rodriguez v. Honduras*, IACtHR (ser. C) No. 4, 29 July 1988; HRC GC 36, paras 21-22.

[55] See *supra* paras 13-15.

[56] See HRC GC 36, para 63; Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions: Investigation into the unlawful death of Mr. Jamal Khashoggi, UN Doc. A/HRC/41/CRP.1, Part IV (arguing that states in possession of information about an imminent risk to the life of an individual abroad at the hands of third parties have the positive duty to warn that individual). See also Inter-American Advisory Opinion on the Environment and Human Rights (OC-23/17) (2017) where a causal link between the human rights violation and the state's action or omission were considered sufficient to ground a finding of jurisdiction (para 101).

[57] See the views of the Human Rights Committee quoted in para. 19 *supra*.

failing to prevent the Srebrenica genocide, even though the genocide was not attributable to it (for lack of control over the Bosnian Serbs) and even though it was not complicit in it (because it did not know it was about to occur), but because it did know or should have known of a risk of it occurring and did not exercise the many levers of influence it had over the Bosnian Serbs to stop it.[58]

33. If jurisdiction is established, on whatever basis, for the positive obligation to take measures to prevent the loss of life to be triggered, the Court would need to be satisfied that a) there was a real and immediate risk to life of those using the airspace above Ukraine and that b) the respondent state knew *or ought to have known* of this risk.[59] The Court has previously accepted that general risks to the population – and not just those to specific individuals – will trigger this obligation.[60] It is for the Court to determine what was known or ought to have been known by the Russian authorities immediately prior to the attack on the basis of its assessment of how the downing of MH17 took place. That is, it is a question of fact whether the Russian authorities knew that a BUK TELAR anti-aircraft platform was present in the relevant part of Ukraine, or at least *ought to have known* that it was there and that there was a risk to any civilian aircraft passing over the territory.
34. If the knowledge threshold was met, the respondent state would have been under an obligation of due diligence to take reasonably practical measures that are within the scope of its power to mitigate the risk of loss of life. Whilst there is a margin of appreciation as to what measures the state should take, the measures taken should be 'reasonable' insofar as they are appropriate to the situation and can serve to mitigate the risk – as it was known or ought to have been known – as far as possible.[61] Factors that will impact what is possible include the extent to which the state could have influenced or controlled the situation,[62] which, in the present case, will have been impacted by the extra-territorial and political context. And yet, it should be reiterated that these contextual factors do not serve to excuse the state from taking any action at all.[63] For example, arguably the obligation might be discharged at a minimum by Russian authorities issuing a warning to the Ukrainian authorities and civilian aircraft operators, allowing them to take action as necessary.[64] This would require little resource and would be eminently practicable in the circumstances.[65] It is a question of fact for the Court to examine whether the measures taken – if any – were sufficient.

B. *Complicity*

35. Alternatively, the respondent state's responsibility could be conceptualized as complicity in the downing of the MH17 by separatist forces (again, if such facts are proven), on account of the provision of the BUK weapons system. The Human Rights Committee has thus stated in its General Comment 36 that 'States…have obligations under international law not to aid or assist activities undertaken by other States and non-State actors that violate the right to life.'[66] A complicity frame potentially provides a middle ground between a state committing the wrongful act itself and failing to prevent it – a complicit state is less culpable than the direct perpetrator whose conduct it facilitated, but more

[58] *Bosnian Genocide*, paras 413-5, 422-4, 432-8.
[59] *Osman*, para. 116.
[60] See, e.g., *Tagayeva v. Russia*, nos 260562/07, 14755/08, 49339/08 etc, 13 April 2017, para. 482.
[61] *Osman,* para. 116.
[62] *Finogenov,* para. 209.
[63] Thus, for example, in *Jaloud* in the context of the procedural obligation to investigate the Court noted that 'prepared to make reasonable allowances for the relatively difficult conditions under which the Netherlands military and investigators had to work. In particular, it must be recognised that they were engaged in a foreign country which had yet to be rebuilt in the aftermath of hostilities, whose language and culture were alien to them, and whose population … clearly included armed hostile elements,' but nonetheless found that the Netherlands had failed to discharge the positive obligation (paras 226-7).
[64] This would be an application of the requirement to 'warn' potential victims of dangers that has been developed by the Court in the context of environmental disaster cases (see *Őneryildiz v Turkey* [GC], no. 48939/99, 30 November 2004).
[65] An extra-territorial 'duty to warn' has been advocated by the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions in relation to both risks to individuals (see Khashoggi report, *supra* note 56) as well as risks to civilian aircraft in conflict zones (Commercial Airlines and Conflict Zones statement, *supra* note 46).
[66] GC 36, para 63, referring to *Bosnian Genocide,* para, 420 and Art. 16 ASR, on state aid or assistance in the commission of an internationally wrongful act by another state (rather than a non-state actor).

culpable than one that simply failed to act – with potential legal consequences not only in terms of fair labelling but also for any possible award of damages and other remedies.

36. Using complicity as a foundation for finding responsibility in the present case would require a degree of innovation in the Court's jurisprudence. It is likely to have implications for many other situations, e.g. interstate arms trade. If the Court wished to pursue a complicity route, and the facts so warranted, it would have to clarify (1) the jurisdictional basis governing this rule and (2) its fault element.
37. The Court's case law on complicity-type scenarios is still embryonic. One line of cases, culminating in *El-Masri*[67] and four subsequent extraordinary rendition judgments,[68] revolves around the notion of state 'acquiescence or connivance' in the wrongful conduct of third parties.[69] Another instructive line of cases is on *non-refoulement*, in *Soering* and its progeny,[70] where the Court has found states liable for exposing individuals to a real risk of harm at the hands of third parties.[71]
38. The Court is yet to deal with a complicity scenario whereby state A provides weapons (or other assistance) to non-state actor state B operating *outside its territory*, knowing to some level of likelihood or certainty that the weapons could be used to unlawfully kill person P. In other words, the Court would need to clarify whether P could in this scenario ever be within A's jurisdiction *solely on the basis of the aid* that A had provided to B.[72] As for fault or culpability, the Court would, in particular, need to define what A would need to know about how B would use the aid it provided against P – ranging from objectivized, constructive knowledge (a 'should have known' standard) to subjective appreciation of a mere possibility or risk that the B would kill P using the aid provided, to a real or substantial risk, likelihood, high likelihood, up to practical certainty.[73] The Court would also need to elaborate on what mitigation measures an assisting state can reasonably be expected to take in order to avoid being responsible for complicity.

IV. Conclusion

39. The *amici curiae* therefore respectfully submit that the Court should:
    (1) Distinguish between questions of jurisdiction and attribution, while appreciating that jurisdiction issues can depend on the identity of the state agents through which jurisdiction is exercised;
    (2) Apply either the spatial or (preferably) the personal conception of jurisdiction, if the facts so warrant, in a way that does not lead to arbitrary distinctions;
    (3) Expressly refer to and apply the attribution rules contained in the ILC ASR;
    (4) Take into account the mistake of fact question in its analysis under Article 2 of the Convention;
    (5) If the downing of the MH17 cannot be directly attributed to the respondent, employ a prevention or complicity approach to establish whether a violation of the Convention has occurred.

[67] *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, 13 December 2012.
[68] *Al Nashiri v. Poland*, no. 28761/11, 24 July 2014; *Husayn (Abu Zubaydah) v. Poland*, no. 7511/13, 24 July 2014; *Al Nashiri v. Romania*, no. 33234/12, 31 May 2018; *Abu Zubaydah v. Lithuania*, no. 46454/11, 31 May 2018.
[69] For a detailed analysis, see M. Milanovic, 'State Acquiescence or Connivance in the Wrongful Conduct of Third Parties in the Jurisprudence of the European Court of Human Rights,' at https://ssrn.com/abstract=3454007.
[70] *Soering v the United Kingdom*, no. 14038/88, 7 July 1989.
[71] That said, *non-refoulement* cases are not those of complicity proper. The responsibility is inchoate and consists of the exposure to risk of harm alone, even if the harm fails to materialize. For an extensive discussion of the relevance of the *Soering* line cases to accomplice liability under the ECHR, see M. Jackson, 'Freeing *Soering*: The ECHR, State Complicity in Torture and Jurisdiction', (2016) 27 *EJIL* 817.
[72] One option would the functional approach as endorsed by the HRC in GC 36; another would focus on the negative duty to respect human rights as applying without territorial restriction.
[73] For a helpful analysis of analogous questions under Art. 16 ASR, see H. Moynihan, 'Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism' (Chatham House Research Paper, 2016) available at: chathamhouse.org/sites/default/files/publications/research/2016-11-11-aiding-assisting-challenges-armed-conflict-moynihan.pdf