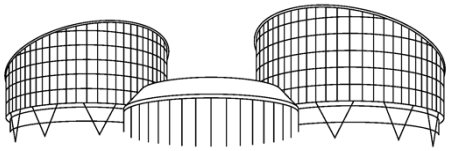

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF UKRAINE AND THE NETHERLANDS v. RUSSIA

(Applications nos. 8019/16, 43800/14 and 28525/20)

DECISION

STRASBOURG

25 January 2023

Table of Contents

LIST OF ABBREVIATIONS

ARSIWA	ILC Articles on Responsibility of States for Internationally Wrongful Acts
ATO	Anti-Terrorist Operation
"DPR"	"Donetsk People's Republic"
DSB	Dutch Safety Board
FSB	Federal Security Service of the Russian Federation
GRU	Russian military intelligence
HRMMU	OHCHR Human Rights Monitoring Mission in Ukraine
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICRF	Investigative Committee of the Russian Federation
ILC	International Law Commission
JIT	Joint Investigation Team
"LPR"	"Lugansk People's Republic"
OHCHR	Office of the UN High Commissioner for Human Rights
OSCE	Organization for Security and Cooperation in Europe
OM	Public Prosecution Service of the Netherlands
SBU	Security Service of Ukraine
SMM	OSCE Special Monitoring Mission

The European Court of Human Rights (Grand Chamber), sitting as a Grand Chamber composed of:

Síofra O'Leary,
Georges Ravarani,
Marko Bošnjak,
Pere Pastor Vilanova,
Ganna Yudkivska,
Krzysztof Wojtyczek,
Faris Vehabović,
Iulia Antoanella Motoc,
Jon Fridrik Kjølbro,
Yonko Grozev,
Stéphanie Mourou-Vikström,
Tim Eicke,
Lətif Hüseynov,
Jovan Ilievski,
Jolien Schukking,
Erik Wennerström,
Anja Seibert-Fohr, *judges*,

and Søren Prebensen, *Deputy Grand Chamber Registrar,*

Having deliberated in private on 26 and 27 January 2022 and 30 November 2022,

Decides as follows:

PROCEDURE

1. The case originated in three applications (nos. 20958/14, 43800/14 and 42410/15) against the Russian Federation lodged with the Court under Article 33 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by the Government of Ukraine ("the applicant Ukrainian Government") on 13 March 2014, 13 June 2014 and 26 August 2015 respectively; and an application (no. 28525/20) against the Russian Federation lodged with the Court under Article 33 of the Convention by the Government of the Kingdom of the Netherlands ("the applicant Dutch Government") on 10 July 2020.

2. Application no. 20958/14, which concerned events in Crimea, was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). On 13 March 2014, the President of the Third Section decided to apply Rule 39 of the Rules of Court calling upon both the High Contracting Parties concerned to refrain from taking any measures, in particular military actions, which might entail breaches of the Convention rights of the civilian population, including putting their life and health at risk, and to comply with their engagements under the Convention, notably in respect of Articles 2 and 3 of the Convention. On 16 December 2020, that measure was lifted in

relation to Crimea in the admissibility decision in *Ukraine v. Russia (*re *Crimea)* ([GC] (dec.), nos. 20958/14 and 38334/18, 16 December 2020).

3. On 14 May 2014, in a detailed letter updating the Court on whether the parties were complying with its Rule 39 indication, the applicant Ukrainian Government first advanced allegations concerning events in eastern Ukraine. A supplement to the application formalising allegations of violations of the Convention in eastern Ukraine was lodged on 12 June 2014. On 8 September 2014, further detailed correspondence concerning compliance with the Rule 39 indication, covering events in Crimea and eastern Ukraine from May to September 2014, was received. A final supplement to the application covering developments in Crimea and eastern Ukraine was submitted on 20 November 2014.

4. Application no. 43800/14 concerned the alleged abduction by armed separatists in eastern Ukraine of three groups of children and accompanying adults, and their transfer to Russia. It was also allocated to the Third Section. A request for Rule 39 measures was made on 13 June 2014 in respect of the first group of children. On the same day, the President of the Third Section decided to indicate to the Government of Russia ("the respondent Government"), under Rule 39 of the Rules of Court, that they should ensure respect for the Convention rights of the persons concerned and their immediate return to Ukraine. On 26 June 2014, following the return of the children to Ukraine, that interim measure was lifted.

5. Application no. 42410/15 concerned events in Crimea and eastern Ukraine. It was also allocated to the Third Section.

6. Application no. 28525/20 brought by the applicant Dutch Government concerned the downing of flight MH17 causing the deaths of all 298 people on board. It was allocated to the First Section.

7. The applicant Ukrainian Government were initially represented by their former Agent, Mr I. Lishchyna, succeeded by Ms O. Davydchuk and Ms M. Sokorenko, Agent of the Ukrainian Government at the European Court of Human Rights.

8. The applicant Dutch Government were represented by their Agent, Ms B. Koopman, of the Ministry of Foreign Affairs.

9. The respondent Government were initially represented by their former Representatives, Mr G. Matyushkin and Mr M. Galperin, succeeded by Mr M. Vinogradov, Representative of the Russian Federation at the European Court of Human Rights.

10. On 20 November 2014 and 29 September 2015, the respondent Government were given notice of applications nos. 20958/14, 43800/14 and 42410/15, lodged by the applicant Ukrainian Government, and were invited to submit observations on the admissibility of the complaints. All three applications were subsequently transferred to the First Section of the Court and observations were filed by both the applicant Ukrainian Government and the respondent Government.

11. Meanwhile, on 9 February and 29 November 2016, the Chamber divided application nos. 20958/14 and 42410/14 into four separate cases. Complaints concerning events in Crimea remained registered under the above case numbers, while the complaints concerning events in eastern Ukraine were given new application nos. 8019/16 and 70856/16 respectively (see *Ukraine v. Russia (*re *Crimea)*, cited above, § 9). The complaints concerning events in Crimea are being examined separately and a decision on admissibility was adopted in those proceedings on 16 December 2020 (see *Ukraine v. Russia (*re *Crimea)*, cited above).

12. On 20 February 2018, a Chamber of the First Section composed of Linos-Alexandre Sicilianos, President, Kristina Pardalos, Ganna Yudkivska, Robert Spano, Aleš Pejchal, Dmitry Dedov and Jovan Ilievski, judges, assisted by Abel Campos, Section Registrar, decided to give notice to the parties of its intention to relinquish jurisdiction to deal with application nos. 8019/16 and 70856/16 in favour of the Grand Chamber. On 7 May 2018, the Chamber decided to relinquish jurisdiction in favour of the Grand Chamber, having regard to the fact that neither party had objected to such relinquishment (Article 30 of the Convention and Rule 72 §§ 1 and 4).

13. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24. Dmitry Dedov, the judge elected in respect of the Russian Federation, withdrew from sitting in the case as from 1 January 2019 (Rule 28). In accordance with Rule 29, the President decided to appoint Bakhtiyar Tuzmukhamedov to sit as an *ad hoc* judge as from that date. The latter was subsequently replaced by Mikhail Lobov as national judge (see paragraph 32 below). Robert Spano's term as President of the Court came to an end. Síofra O'Leary succeeded him in that capacity and took over the presidency of the Grand Chamber in the present case (Rule 9 § 2). When his term of office expired, Robert Spano was replaced in the composition of the Grand Chamber by Erik Wennerström, substitute judge, by virtue of Rule 24 § 3. Ganna Yudkivska continued to sit following the expiry of her terms of office, in accordance with Article 23 § 3 of the Convention and Rule 24 § 4. After the withdrawal of the national judge (see paragraph 39 below), Anja Seibert-Fohr, substitute member, became a full member in accordance with Rule 24 § 3.

14. On 11 June 2018, the Grand Chamber decided to join application nos. 8019/16 and 70856/16 and renamed the case *Ukraine v. Russia (*re *Eastern Ukraine)*, no. 8019/16.

15. On 5 October 2018, the Grand Chamber decided to hold a hearing on both the admissibility and merits of that case (Article 29 § 2). On 20 December 2018, the parties were informed and were invited to submit their memorials on the admissibility and merits of the case.

16. In their respective letters of 20 March 2019 and 4 April 2019, the Governments of Russia and Ukraine expressed their opposition to the Grand

Chamber's decision to hold a hearing on the admissibility and merits of the case and requested that the hearing be devoted to admissibility issues only.

17. On 10 May 2019, the Grand Chamber decided to examine and decide on admissibility separately, as requested by the parties. The parties were informed of the decision on 15 May 2019 and were given a new time-limit to submit memorials addressing admissibility only. They were also invited to provide submissions on what should be the format of any fact-finding in respect of the admissibility of the application and to suggest a preliminary list of witnesses they considered were essential to cover all aspects of their admissibility arguments so that the Court could take a decision on whether, and if so how, a fact-finding exercise at the admissibility stage would be conducted.

18. In their letter of 30 August 2019, the Ukrainian Government expressed the view that there was no need for the Court to take any oral testimony during the pre-admissibility phase of the case and that the hearing of witnesses should be envisaged if the case was declared admissible. On 2 September 2019, the Russian Government submitted that consideration of an evidence hearing should await the outcome of an admissibility hearing conducted in the normal way.

19. The parties' initial memorials were received on 8 November 2019.

20. Having regard to the parties' agreement that there should be no fact-finding hearing at this stage of the proceedings, and with a view to facilitating the Court's task at the admissibility stage, on 12 June 2020 the parties were informed of the President's invitation to provide further memorials ("supplementary memorials"), focusing on specific aspects of the factual case identified in an annex to the letter.

21. Following the lodging of application no. 28525/20 by the applicant Dutch Government (see paragraphs 1 and 6 above), requests for third-party intervention were made by the Government of Canada, the Human Rights Law Centre of the University of Nottingham ("HRLC"), the applicants in the cases of *Ayley and Others v. Russia* (no. 25714/16), *Angline and Others v. Russia* (no. 56328/18), *Bakker and Others v. Russia* (no. 22719/19) and *Warta and Others v. Russia* (no. 3568/20) (who are relatives of the victims of flight MH17), and the MH17 Air Disaster Foundation ("*Stichting Vliegramp MH17*") in the Netherlands.

22. On 27 November 2020, the Grand Chamber decided to join the three applications (no. 8019/16, no. 43800/14 and no. 28525/20) in accordance with Rules 42 § 1 and 71 § 1 of the Rules of Court and in the interests of the efficient administration of justice.

23. The supplementary memorials of the applicant Ukrainian Government and the respondent Government (see paragraph 20 above) were received on 7 December 2020.

24. Also on 7 December 2020, the respondent Government asked the Court to take immediate measures under Rule 39 and Rule 44A of the Rules

of Court in respect of their complaint concerning the alleged involvement of Ukraine in the Myrotvorets website (see paragraph 485 below). On 2 February 2021, after considering the parties' submissions on the matter, the President refused the request on the ground that it was insufficiently substantiated to warrant any measure being indicated.

25. The requests for third-party intervention made in application no. 28525/20 (see paragraph 21 above) were treated as requests to intervene in the joined case pending before the Grand Chamber in so far as the complaints in that application were concerned. On 18 December 2020, the Government of Canada and the HRLC were granted permission to lodge *amicus curiae* submissions. The applicants in the individual cases and the MH17 Air Disaster Foundation ("MH17 applicants") were recognised as interested third parties and invited to provide joint submissions confined to the factual and legal aspects of the case relevant to the specific interest of the next of kin of the victims of flight MH17. The third parties provided the Court with their written submissions in January and February 2021.

26. Meanwhile, on 21 December 2020, after consulting the parties as to the further written procedure in the case, the Court invited them to submit memorials ("first-stage memorials") in respect of the complaints relevant to them. The parties were subsequently invited to include in their memorials any observations which they wished to make in reply to the third-party submissions (see paragraph 25 above). First-stage memorials were submitted on 12 March 2021. The parties were then invited to submit further, final memorials ("second-stage memorials") and did so on 21 May 2021.

27. On 10 June 2021, the parties were notified that a hearing date of 24 November 2021 had been fixed for the hearing on admissibility. On 28 June 2021 they were informed about the composition of the Grand Chamber constituted to consider the case.

28. On 22 July 2021, the Russian Federation lodged an application under Article 33 of the Convention against Ukraine (*Russia v. Ukraine*, no. 36958/21) and requested that it be joined to nos. 8019/16 and 28525/20. The application was allocated to the First Section.

29. On 19 October 2021, the Grand Chamber decided to reject the Russian Government's request for joinder on the basis that accepting it would not be in the interests of the efficient administration of justice.

30. On 8 November 2021, Mr Tuzmukhamedov, the *ad hoc* judge appointed pursuant to Rule 29 (see paragraph 13 above) informed the Court that he withdrew from sitting in the case, effective immediately.

31. On 12 November 2021, the President decided to adjourn the hearing and fixed a new date of 26 January 2022 for the hearing on admissibility.

32. On 10 January 2022, the judge elected in respect of the Russian Federation, Mikhail Lobov, was sworn in and the composition of the Grand Chamber was duly updated. The parties were informed about the revised composition of the Grand Chamber.

33. A hearing took place in public in the Human Rights Building, Strasbourg, on 26 January 2022.

There appeared before the Court:

(a) *for the respondent Government*

Mr M. VINOGRADOV, *Agent*,
Mr D. GRUNIS,
Mr A. DEVYATKO,
Ms A. KHAMENKOVA,
Ms Y. AFANASYEVA, *Advisers*;

(b) *for the applicant Ukrainian Government*

Mr D. MALIUSKA, Minister of Justice, *Agent*,
Mr B. EMMERSON, QC,
Mr P. HOOD,
Ms A. O'REILLY, *Counsel*,
Ms V. KOLOMIIETS,
Ms M. SOKORENKO ,
Ms O. KOLOMIIETS,
Mr I. LISHCHYNA, *Advisers*;

(c) *for the applicant Dutch Government*

Ms B. KOOPMAN, *Agent*,
Mr R. LEFEBER,
Ms L. VAN HEEST,
Ms A. AAGTEN,
Ms R. DE RUITER, *Advisers*,
Mr P. PLOEG, Chair of the MH17 Air Disaster Foundation.

34. The Court heard addresses and replies to judges' questions by Mr Vinogradov, Mr Maliuska, Mr Emmerson, Ms Koopman, Mr Ploeg and Mr Lefeber.

35. On 16 March 2022, the Committee of Ministers of the Council of Europe, in the context of a procedure launched under Article 8 of the Statute of the Council of Europe, adopted Resolution CM/Res(2022)2, by which the Russian Federation ceased to be a member of the Council of Europe as from 16 March 2022.

36. On 22 March 2022, the Court, sitting in plenary session in accordance with Rule 20 § 1, adopted the "Resolution of the European Court of Human Rights on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights". It stated that the Russian Federation would cease to be a High Contracting Party to the Convention on 16 September 2022.

37. On 5 September 2022, the Plenary Court took formal notice of the fact that the office of judge with respect to the Russian Federation would cease to exist after 16 September 2022. This, as a consequence, also entailed that there was no longer a valid list of *ad hoc* judges who would be eligible to take part in the consideration of the cases where the Russian Federation was the Respondent State.

38. By letter of 8 November 2022, the respondent Government were informed that it was envisaged, in respect of applications against that State that the Court was competent to deal with, to appoint one of the sitting judges of the Court to act as an *ad hoc* judge for the Russian Federation (applying by analogy Rule 29 § 2 of the Rules of Court). The respondent Government were invited to comment on that arrangement by 22 November 2022 but did not submit any comments.

39. On 23 November 2022, Mikhail Lobov, the former judge elected in respect of the Russian Federation (see paragraph 32 above), decided to withdraw from sitting in the present case (Rule 28 § 2 (c) and (e) of the Rules of Court).

40. The President accordingly decided to appoint an *ad hoc* judge among the members of the composition, applying by analogy Rule 29 § 2 of the Rules of Court.

THE FACTS

I. OVERVIEW

41. The present proceedings concern events in the Donetsk and Luhansk regions, in the Donbass area of eastern Ukraine, which began in the spring of 2014. The majority of the facts relevant to these proceedings are contested by the parties and their detailed accounts are set out below (see paragraphs 168-369). The evidence they have relied on is set out in detail in an Annex to this Decision; references in this Decision in the form "A XXX" refer to paragraph XXX of the Annex.

42. This section provides an introductory, brief overview of the relevant context. The facts described in this section are either uncontested or are not seriously contested, or are indisputably established on the evidence. For these reasons, there are no cross-references in this section to the evidence or submissions which may be relevant to the facts described here. As explained, a fuller account of the facts as submitted by each of the parties is set out in a subsequent section (see paragraphs 168-369).

A. The chronology of the conflict

43. In November 2013, the government of Ukraine announced that they would suspend the preparations for signing an Association Agreement with

the European Union (EU) and would renew the dialogue on trade and economic matters with the Russian Federation. This led to mass protests against the government across the country. These deteriorated into violent clashes between security forces and protesters. The protest movement became known as "Euromaidan" (after Independence Square ("Maidan Nezalezhnosti") in Kyiv. See *Shmorgunov and Others v. Ukraine*, nos. 15367/14 and 13 others, §§ 9-17, 21 January 2021).

44. Violence escalated sharply on the evening of 18 February 2014. Hundreds of protestors, and some law enforcement officials, were killed or injured over the following days. On 21 February 2014, the then President of Ukraine, Viktor Yanukovych, and opposition leaders signed a compromise agreement which envisaged early elections by the end of the year.

45. On 22 February 2014, President Yanukovych left Kyiv and went to the Russian Federation. Later that day, the Ukrainian Parliament voted to remove him from office on account of his failure to perform his constitutional duties. It elected a new speaker, who became acting President of Ukraine pending new elections on 25 May 2014. A new interim government was put in place. It was not recognised by the government of the respondent State.

46. Subsequently, unidentified armed men in green military uniforms without insignia began taking over strategic infrastructure in Crimea. On 27 February 2014, armed groups took over the building of the Supreme Council of the Autonomous Republic of Crimea. Later that day, at gunpoint, members of the Supreme Council dismissed the government of Crimea and appointed Sergey Aksyonov as "Prime Minister" (see paragraph 98 below). It was also decided to hold a "referendum" on the future status of Crimea (see *Ukraine v. Russia (*re *Crimea)* [GC] (dec.), nos. 20958/14 and 38334/18, §§ 32-66 and 149-168, 16 December 2020).

47. In early March 2014, pro-Russian protests began across eastern regions of Ukraine, including in the Donetsk and Luhansk regions where a large Russian minority resided. The protestors objected to what they claimed to have been an unconstitutional change of power in Ukraine.

48. The "referendum" in Crimea took place on 16 March 2014 and according to the published results there was overwhelming support for Crimea joining the Russian Federation. On 18 March 2014, Crimea therefore purported to join the Russian Federation.

49. From early April 2014, there was a rapid escalation of violence in eastern Ukraine. Some of the protestors formed armed groups which started to take control by force of public buildings as well as police and security facilities in cities and towns across the Donetsk and Luhansk regions. They set up barricades and checkpoints to maintain control of the areas seized. They demanded regionalisation and/or separatism.

50. On 6 April 2014, separatists in Luhansk seized the building of the Security Service of Ukraine ("SBU") regional office and declared it to be the headquarters of the "South-East Army".

51. That night, separatists occupied the Regional State Administration building in Donetsk and on 7 April 2014 they declared the independence of the "Donetsk People's Republic" ("DPR").

52. On 12 April 2014, a group of armed men led by Russian national Igor Girkin (see paragraph 108 below) seized public buildings in Slovyansk, in the Donetsk region. Public administration buildings in a number of surrounding towns were also seized in the following days.

53. On 14 April 2014, the government of Ukraine launched an "Anti-Terrorist Operation" ("ATO") to re-establish control over territory controlled by the separatist armed groups, deploying units of the Ukrainian Armed Forces supported by volunteer battalions. Meanwhile, an increasing number of troops of the armed forces of the Russian Federation were deployed in the border area near Ukraine.

54. On 17 April 2014, following negotiations between the representatives of Ukraine, the EU, the United States and the Russian Federation, the Joint Geneva Statement on Ukraine was published. The parties notably agreed that all sides should refrain from any violence, intimidation or provocative actions; that all illegal armed groups should be disarmed; that all illegally seized buildings should be returned to legitimate owners; and that all illegally occupied streets, squares and other public places in Ukrainian cities and towns should be vacated.

55. By 20 April 2014, the entire town of Slovyansk was under the control of armed groups.

56. On 27 April 2014, the "Lugansk People's Republic" ("LPR") was declared in Luhansk. On 29 April 2014, the Luhansk Regional State Administration building was stormed and occupied by separatists.

57. In the following days and weeks further buildings in towns and cities in the Donetsk and Luhansk regions were taken over by separatists. Meanwhile, on 30 April 2014, the acting President of Ukraine announced that the government was no longer in control of certain parts of those regions.

58. In early May, the first detachments of Cossack fighters arrived in Antratsyt, Luhansk region, headed by Nikolay Kozitsyn (see paragraph 114 below). Various groups of Cossacks went on to occupy parts of the west (under the command of two other Cossack commanders, Aleksey Mozgovoy and Pavel Dryomov – see, respectively, paragraphs 117 and 106 below) and the entire southern part (under the command of Mr Kozitsyn) of the Luhansk region.

59. On 11 May 2014, so-called "independence referendums" took place in the parts of the Donetsk and Luhansk regions under separatist control. The "DPR" and the "LPR" announced that a majority had voted in favour of independence. They declared themselves to be sovereign states and formed new "governments".

60. On or around 16 May 2014, the "Supreme Council" of the "DPR" approved Alexander Borodai, a Russian national (see paragraph 105 below),

to head the new government and Mr Girkin as the head of the "Security Council" and "Minister of Defence" of the "DPR". In the "LPR", Valery Bolotov became "President" and Igor Plotnitsky became "Minister of Defence" (see paragraphs 104 and 122 below). Vassily Nikitin became "Prime Minister" (see paragraph 118 below).

61. On 24 May 2014, "DPR" and "LPR" leaders signed a joint declaration on the establishment of the "Union of People's Republics", alternatively referred to as the "Confederate Alliance of People's Republics of Novorossiya".

62. On 25 May 2014, Presidential elections took place in Ukraine. In the parts of Donbass under separatist control, voting did not take place.

63. Over the ensuing weeks there was a significant deterioration in the security situation in Donbass. There were reports of an escalation of abductions, arbitrary detentions, summary executions, torture, ill-treatment and looting by the armed groups.

64. On 6 June 2014, the "Normandy Format", which included Germany, France, Ukraine and the Russian Federation, was established at a 6 June 2014 commemoration of the seventieth anniversary of the allied landings in Normandy. The diplomatic efforts of this group led to the establishment of the Trilateral Contact Group for the peaceful settlement of the situation in eastern Ukraine, composed of senior representatives from Ukraine, the Russian Federation and the Organization for Security and Co-operation in Europe (OSCE). The Trilateral Contact Group held its first session on 8 June 2014.

65. In the course of June and July 2014, with the exception of a ten-day period from 20 June 2014 when the President of Ukraine announced a unilateral ten-day ceasefire, the Ukrainian armed forces regained control over a number of towns and strategic positions in Donbass.

66. On 5 July 2014, the separatists retreated to Donetsk from Slovyansk and surrounding towns.

67. In early July, Mr Bolotov dismissed the "LPR" government. Marat Bashirov (see paragraph 101 below) was appointed acting "Prime Minister".

68. From around mid-July, intense shelling began in Donbass, striking targets in Ukrainian- and separatist-held territory. There was heavy fighting in the south-eastern part of the Donetsk region as the separatists sought to hold the territory they had occupied and to gain control over a passage of land which would link the "DPR" to the Russian border in the south. The Ukrainian forces used heavy artillery and air support to attack separatist positions.

69. On 17 July 2014, Malaysian Airlines flight MH17 from Amsterdam to Kuala Lumpur was downed near Snizhne, in the Donetsk region. All 298 civilians aboard were killed. 196 of the victims were nationals of the Netherlands. According to the passenger manifest, the remaining victims were nationals of Malaysia, Australia, Indonesia, the United Kingdom,

Belgium, Germany, the Philippines, Canada or New Zealand. Some of the deceased had dual nationality (see the list of nationalities referred to by the applicant Dutch Government at paragraph 316 below). The Netherlands, working closely with Ukraine and other affected States, coordinated the recovery and repatriation efforts.

70. A new round of peace talks started on 31 July 2014 in Minsk, Belarus, in the context of the Trilateral Contact Group (see paragraph 64 above), with the informal participation of representatives of the "DPR" and the "LPR".

71. On 7 August 2014, authorities from the Netherlands, Australia, Belgium and Ukraine established a joint investigation team ("JIT") to carry out a criminal investigation into the crash of flight MH17, with the participation of Malaysia and the EU's Agency for Criminal Justice Cooperation ("Eurojust").

72. In early August, Mr Borodai and Mr Girkin stepped down from their posts in the "DPR government". Alexander Zakharchenko (see paragraph 131 below) took over as "Prime Minister" of the "DPR". In the "LPR", Mr Bolotov resigned in favour of Mr Plotnitsky, who subsequently also took over from Mr Bashirov as "Prime Minister" before appointing Gennady Tsyplakov (see paragraph 130 below) to that post.

73. Meanwhile, also in early August 2014, Ukrainian forces launched an operation to regain control over the town of Ilovaisk, south-east of Donetsk. By mid-August, they had taken control of the surrounding villages and from 18 to 28 August 2014, Ukrainian volunteer battalions fought the separatists positioned in the town itself and took partial control of it. However, by 27 August 2014, Ukrainian forces were surrounded by separatist armed groups and on 29 August 2014 they were forced to retreat from the town. During the retreat, many of them were killed, injured or taken captive.

74. On 5 September 2014, senior representatives of Ukraine, the Russian Federation, the OSCE, the "DPR" and the "LPR" signed the Protocol on the results of consultations of the Trilateral Contact Group ("Minsk Protocol"), which set out a 12-point peace plan including an immediate ceasefire. Despite the ceasefire, fighting continued. A Memorandum was signed on 19 September 2014 outlining the parameters for the implementation of commitments of the Minsk Protocol. A line of separation was created.

75. Meanwhile, on 9 September 2014, the Dutch Safety Board (DSB"), tasked with the technical investigation in accordance with Article 26 of the Convention on International Civil Aviation (Chicago Convention) into the cause of the crash of flight MH17, published its preliminary report. The report disclosed that no technical or operational issues had been found in respect of the aircraft or the crew and that the damage appeared to indicate that the aircraft had been penetrated by a large number of high-energy objects from outside.

76. In September 2014, the merger of the armed groups of the "DPR" and the "LPR" under the umbrella of the United Armed Forces of Novorossiya

was announced. The two militias were to become the "DPR 1st Army Corps" and "LPR 2nd Army Corps".

77. On 26 September 2014, the Joint Center for Control and Coordination of issues related to the ceasefire regime and the stabilization of the situation ("JCCC") was established with the participation of representatives of the armed forces of Ukraine and the Russian Federation.

78. In January 2015, increased hostilities began around Donetsk airport. In February 2015, intense fighting began around Debaltseve.

79. As a result of peace talks held on 11 and 12 February 2015 in Minsk, the "Package of Measures for the Implementation of the Minsk Agreements" ("Minsk II") was adopted. Minsk II provided for a ceasefire to enter into force from 15 February 2015, the withdrawal of heavy weaponry from the contact line, the establishment of a security zone and the withdrawal of foreign armed formations, mercenaries and weapons from the territory of Ukraine.

80. On 18 May 2015, the separatists announced the indefinite freezing of the Novorossiya project (see paragraph 61 above).

81. On 13 October 2015, the DSB (see paragraph 75 above) published its final report in the context of the technical investigation into the cause of the crash of flight MH17. It concluded that flight MH17 had been downed by a Buk missile fired from separatist-held territory. It said that further forensic research was required to determine the exact launch location.

82. On 28 September 2016, the JIT (see paragraph 71 above) presented its first partial findings from its criminal investigation into the downing of flight MH17. It said that flight MH17 had been downed by a Buk missile from the 9M38-series, that the missile had been launched by a Buk-TELAR from a field south of Snizhne and west of Pervomaiskyi under the control of separatists, and that the Buk-TELAR had been transported from the Russian Federation into Ukraine and had returned to Russia after the launch.

83. In January and February 2017, there was an increase in the intensity of hostilities around Avdiivka and Makiivka.

84. In late December 2017, the Russian representatives left the JCCC (see paragraph 77 above).

85. On 24 May 2018, the JIT announced that the Buk-TELAR that had downed flight MH17 belonged to the 53rd Anti-Aircraft Missile Brigade ("AAMB") of the armed forces of the Russian Federation.

86. In a joint diplomatic note of 25 May 2018 to the Ministry of Foreign Affairs of the Russian Federation from their embassies, the Netherlands and Australia invoked the State responsibility of the Russian Federation for the downing of flight MH17. They invited the Russian Federation to enter into negotiations in relation to the legal consequences flowing from that responsibility. A number of meetings subsequently took place; the parties involved agreed to the confidentiality of the meetings.

87. On 19 June 2019, the JIT announced that the Public Prosecution Service of the Netherlands ("OM") was bringing charges against four men

(three Russian nationals and one Ukrainian), for causing the crash of flight MH17, resulting in the death of all persons on board, and for the murder of the 298 persons on board that flight. The defendants were Mr Girkin (see paragraph 52 above and 108 below), Sergey Dubinskiy (see paragraph 107 below), Oleg Pulatov (see paragraph 124 below) and Leonid Kharchenko.

88. The trial started on 9 March 2020 before the first instance court in The Hague. Only Mr Pulatov instructed legal representation and entered an appearance in the proceedings. The other defendants were tried *in absentia*.

89. On 21 February 2022, the State Duma of the Russian Federation passed a bill to officially recognise the "DPR" and "LPR" as independent states. The bill was approved by the Russian President.

90. On 24 February 2022, four weeks after the hearing in the present case, the Russian President announced the start of what he termed a "special military operation" in Ukraine and the deployment of Russian troops there. In that context, fighting intensified in eastern Ukraine and Ukrainian troops were forced to retreat from a number of areas in Donbass. Russian troops were also deployed in other areas of Ukraine, advancing deep into Ukrainian territory. Ukrainian forces subsequently launched a successful counter-offensive, recovering some of the areas previously lost. Heavy fighting continues.

91. On 10 June 2022, the judges at the criminal trial before the first instance court in The Hague (see paragraph 88 above) retired to consider their verdict.

92. On 30 September 2022, after "referendums" in the occupied areas of the Donetsk, Luhansk, Zaporizhzhia and Kherson regions, the Russian President declared that these regions of Ukraine would be formally incorporated into the Russian Federation and signed "treaties" to that effect. Part of the regions concerned was not in the hands of the Russian Federation at the time of the declaration and Ukrainian control over further parts has since been restored (see paragraph 90 above).

93. On 17 November 2022, the first instance court in The Hague delivered its verdict in the criminal proceedings in respect of the downing of flight MH17. It determined that flight MH17 was downed by a Buk missile fired from an agricultural field near Pervomaiskyi, resulting in the deaths of all 283 passengers and 15 crew members. It further found that the Russian Federation had overall control over the "DPR" from mid-May 2014 until at least the crash of flight MH17 and that thus the conflict was an international armed conflict. It found Mr Girkin, Mr Dubinskiy and Mr Kharchenko guilty of both charges and sentenced them to life imprisonment. Mr Pulatov was acquitted. It is not known, as at the date of the adoption of the present decision, whether the judgment has been appealed.

B. The incidents forming the basis of the complaints regarding the alleged abduction and transfer to Russia of three groups of children and accompanying adults (no. 43800/14)

94. On 12 June 2014, a bus with twenty-five children (sixteen orphans or children without parental care from a care home in Snizhne and nine children in foster care) and three accompanying adults travelling to a respite centre in eastern Ukraine was stopped at a checkpoint in the "DPR". The sixteen orphans and two accompanying adults then crossed the border into the Russian Federation, with a "DPR" escort, at the Dolzhanskyy border checkpoint. Following the grant of interim measures by the Court (see paragraph 4 above), they returned to Ukraine the following day.

95. On 26 July 2014, sixty-one children from an orphanage in Luhansk Region (forty-three of whom were under the age of five), four further minors and twenty-two adult employees of the orphanage crossed into the Russian Federation at the Izvaryne-Donetsk border checkpoint at the Ukraine-Russia border. They were accompanied to the border by "LPR" representatives. They returned to Ukraine the following day.

96. On 8 August 2014, eight children from a care home for babies in Luhansk were transported across the Ukraine-Russia border at the Izvaryne-Donetsk checkpoint. The children were aged between eight months and two years, and six of them had cerebral palsy. They returned to Ukraine on 13 August 2014.

C. Relevant individuals

97. Separatists who have played an important role in the events in eastern Ukraine and other persons of interest in respect of those events are listed below together with brief information about their backgrounds. Subsequent sections provide fuller information about the separatist armed groups and the political structures in the separatist entities. Many of the separatists had "call-signs" which they used during the conflict; these are indicated in inverted commas where known.

98. Sergey Valeryevich Aksyonov is currently serving as "Head of the Republic of Crimea". He was "appointed" "Prime Minister" of Crimea at gunpoint on 27 February 2014 (see paragraph 46 above and *Ukraine v. Russia (*re *Crimea)*, cited above, §§ 42-47). On 14 April 2014, after Crimea had been "joined" to the Russian Federation, he was appointed interim "Head of the Republic of Crimea" by the Russian President. He was "elected" to the position in 2014 and again in 2019.

99. Alexander Yevgenevych Ananchenko is a Donbass native and "DPR" politician.

100. Vladimir Yuryevich Antyufeyev (also written in the Roman alphabet as Antiufeev) is a Russian national with a background in national security.

Between 1992 and 2012, he was the head of the "Ministry of State Security" of Transdniestria, under the name Vadim (or Vladimir) Shevtsov. He worked on cooperation with South Ossetia and Abkhazia during the 2008 war. He served as "first Deputy Prime Minster" of the "DPR" in summer 2014 before returning to Moscow.

101. Marat Faatovich Bashirov is a Russian national and political analyst based in Moscow. In summer 2014, he was the "Prime Minister" of the "LPR".

102. Alexander Aleksandrovich Bednov ("Batman") was a Donbass native and commander of a separatist armed group in the "LPR". He was killed in Luhansk on 1 January 2015. There are conflicting accounts of how he died.

103. Russian national Igor Nikolaevich Bezler ("Bes") was a separatist commander in the "DPR" in 2014. He formerly served in the Soviet Army in Afghanistan and fought against the separatist forces in Chechnya. He is allegedly a former agent of Russian military intelligence ("GRU") with the rank of lieutenant colonel. He left the "DPR" in autumn 2014; information on his current whereabouts is not known.

104. Donbass native Valery Dmitrievich Bolotov formerly served in the Soviet Army. He was a separatist commander in the "LPR" in 2014. He died in Moscow in 2017.

105. Alexander Yurevich Borodai is a Moscow-based Russian national. He was the first "Prime Minister" of the "DPR". Before going to Donetsk, he had worked as an adviser to Mr Aksyonov in Crimea (see paragraph 98 above). He had also worked as a consultant to Konstantin Malofeyev (see paragraph 116 below). He was a long-standing acquaintance of Mr Girkin and had previously fought on the side of Russia in Transdniestria. In 2021, he was elected as a member of the Russian State Duma for the ruling United Russia party.

106. Donbass native Pavel Dryomov (also written in the Roman alphabet as Dremov) ("Batya") was a Cossack commander. He was killed by a car bomb in eastern Ukraine in December 2015.

107. Sergey Nikolayevich Dubinskiy ("Khmuryi"), also known as Colonel Petrovsky, is a Russian national and former Major General of the GRU. He fought in Afghanistan, South Ossetia and Chechnya and was acquainted with Mr Girkin prior to the events in eastern Ukraine. He served under Mr Girkin at the beginning of the conflict and became head of the military intelligence service of the "DPR" after the "independence referendum".

108. Russian national Igor Ivanovich Girkin (or Strelkov) ("Strelok") was the first "Minister of Defence" of the "DPR". He held the rank of Colonel in the Russian Federal Security Service ("FSB"), although he claimed to have retired prior to his involvement in the conflict. He fought for Russia in

Transdniestria and in Chechnya. He is a former employee of Mr Malofeyev (see paragraph 116 below).

109. Sergey Yurievich Glazyev is a Russian economist and politician. He was an adviser to the President of the Russian Federation at the time of the events in Crimea and continued in this role until 2019.

110. Pavlo Yurievich Gubarev is a Donbass native. In 2014, he founded the "People's Militia of Donbass". According to reports, he is currently fighting with the Russian armed forces in Ukraine.

111. Alexander Sergeyevich Khodakovsky ("Skif") is a Donbass native and former commander of the "Alpha" special unit of the SBU. He has been a separatist commander in the "DPR" since 2014.

112. Vladimir Petrovich Kononov is a Donbass native and "DPR" politician.

113. Ukrainian national Oleg Kovalchuk was a "DPR" politician and former chief of police of Luhansk. No information has been provided as to his current whereabouts.

114. Russian national Nikolay Ivanovich Kozitsyn is the ataman of the "International Union of Public Associations 'All-Great Don Army'" (non-registered Cossacks), based in the Rostov region of Russia. The "All-Great Don Army" created the "Cossack National Guard" to participate in the fighting in eastern Ukraine. Mr Kozitsyn previously participated in the conflicts in Transdniestria and Abkhazia.

115. Sergey Kozlov is a Donbass native. He was the Prime Minister of the "LPR" from 2015 to September 2022.

116. Konstantin Valeryevich Malofeyev (also written in the Roman alphabet as Malofeev) is a Russian "oligarch" who openly supported the incorporation of parts of Ukraine into Russia.

117. Aleksey Borisovich Mozgovoy was a Donbass native and a separatist commander in the "LPR". He had Cossack roots but was not directly linked to the Don Cossacks headed by Mr Kozitsyn (see paragraph 114 above). Mr Mozgovoy was killed in an attack on his convoy in the "LPR" in 2015.

118. Vasily Aleksandrovich Nikitin was born in Uzbekistan. At the time of the outbreak of the conflict in spring 2014, he was living in Luhansk. He was the first "Prime Minister" of the "LPR".

119. Leonid Ivanovich Pasechnik is a Donbass native. He formerly worked for the SBU. He became an "LPR" politician and has been the head of the "LPR" since 2018.

120. Arsen Sergeyevich Pavlov ("Motorola") was a Russian national and a former member of the Russian military. He was killed by a bomb at his apartment building in Donetsk in October 2016. On 18 May 2018 he was posthumously awarded the Order for Courage by the President of the Russian Federation for courage and dedication shown in the course of fulfilling the tasks of ensuring the protection of the rights and freedoms of compatriots

(Decree of the President of the Russian Federation dated 18.05.2022 No. 290 "On Awarding State Awards of the Russian Federation").

121. Mikhail Pimenov ("Verin") is a Russian national and was a "DPR" separatist commander. He is currently the deputy director of staff of the Union of Donbass Volunteers, based in Moscow.

122. Igor Venediktovich Plotnitsky was born in Ukraine and resided in the Luhansk region prior to the events of spring 2014. He was a former officer of the Soviet Army. He was an "LPR" politician and head of the "LPR" between 2014 and 2017.

123. Vyacheslav Vladimirovich Ponomaryov is a Donbass native. He served in the Soviet Army. He was involved in the early stages of the conflict in Slovyansk, where he declared himself "People's Mayor".

124. Oleg Pulatov ("Giurza") is a Russian national and a former GRU officer. He was deputy head of the "DPR" intelligence service in 2014.

125. Andrey Yevgenyevich Purgin is a Donbass native. He was a "DPR" politician and "Prime Minister" in 2014-2015.

126. Denis Vladimirovich Pushilin is a Donbass native. He has been a "DPR" politician since 2014 and head of the "DPR" since 2018.

127. Dmitry Aleksandrovich Semenov is a Russian national who was an "LPR" politician in the summer of 2014.

128. Vladislav Yuryevich Surkov is a Russian national and was an aide to the President of the Russian Federation at the time of the outbreak of the conflict.

129. Mikhail Sergeyevich Tolstykh ("Givi") was a Donbass native and separatist commander in the "DPR". He had previously fought alongside Russian troops during the 2008 conflict in Georgia. He was killed in an explosion at his office in February 2017.

130. Gennadiy Tsyplakov was a Donbass native and "LPR" politician. He was arrested and detained by the "LPR" authorities in September 2016 and subsequently found hanged in his cell.

131. Alexander Vladimirovich Zakharchenko was a Donbass native. He was a separatist commander and "DPR" politician. He was head of the "DPR" from 2014 until 2018, when he was killed by a bomb planted in a café in Donetsk.

D. Separatist armed groups in the initial stages of the conflict

132. The precise boundaries of the areas of operation as well as the allegiances and chains of command of the different separatist armed groups active at the outset of hostilities in eastern Ukraine have not been clearly established. It would appear that the groups themselves evolved during the early months of the conflict. The parties' submissions and the various reports published about the conflict enable the following general picture to be established in respect of the separatist armed groups that took part in the

initial period of the conflict. The armed groups that remained were ultimately all subsequently assimilated into the formal armed structures of the "DPR" and the "LPR" (see paragraph 76 above).

1. Donetsk region

133. The "Donbass People's Militia" emerged in March 2014, founded by Mr Gubarev (see paragraph 110 above). The group appears to have been the principal militia of the "DPR". It was active from the earliest stages of the conflict around Donetsk, Horlivka and Yenakiyeve.

134. As the conflict continued and escalated, three further armed groups emerged in Donetsk:

(i) The "Oplot Battalion", led by Mr Zakharchenko (see paragraph 131 above), was active in and around Donetsk from about April 2014.

(ii) The "Russian Orthodox Army", headed by Mr Pimenov (see paragraph 121 above), was based in the SBU building in Donetsk.

(iii) The "Vostok Battalion", led by Mr Khodakovsky (see paragraph 111 above), emerged in May 2014 and its members included Chechens and Ossetians.

135. In Slovyansk, a group of armed separatists led by Mr Girkin (see paragraphs 52 and 108 above) appeared on 12 April 2014 and took over the command of the militias there. The group, sometimes described as "the Crimea group", "Strelkov's Group" or "the 1st Sloviansk Brigade", came directly from Crimea (see *Ukraine v. Russia (re Crimea)*, cited above, § 33), and was joined by local separatists in Slovyansk. It included Mr Bezler, Mr Pavlov and Mr Dubinskiy (see paragraphs 103, 120 and 107 above).

136. From Slovyansk, Mr Bezler went on to command a group of separatists in nearby Horlivka. The group was known as "Bezler's Group" or "Berkut". Other high-profile armed groups appear to have operated under the leadership of the "DPR", at different times answering directly to different "commanders". They included the "Sparta Battalion", led by Mr Pavlov (see paragraph 120 above), and the "Somalia battalion" led by Mr Tolstykh (see paragraph 129 above).

2. Luhansk region

137. In the Luhansk region, the area was, from the outset, largely divided between two main groups: the "South-East Army" and the Cossacks.

(i) The "South-East Army" (or "Army of the South-East"), headed by Mr Bolotov (see paragraphs 60 and 104 above), emerged in March 2014 and was active throughout the Luhansk region. It was the militia of the "LPR".

(ii) The Cossack faction (known as the "All-Great Don Army" or "Cossack National Guard"), headed by Mr Kozitsyn (see paragraph 114 above), controlled south-western areas of the Luhansk region, in and around Antratsyt and Perevalsk. A breakaway Cossack group led by Mr Dryomov

(see paragraph 106 above) subsequently emerged, principally based around Stakhanov.

138. Mr Mozgovoy (see paragraph 117 above) created the "People's Militia of Lugansk Region" in Luhansk in April 2014. The group left Luhansk following a conflict with the "South-East Army". It was active in and around Alchevsk. At some point, it became the "Prizrak Battalion".

139. Other armed groups operated under the overall leadership of the "South-East Army" and the "LPR". They included the "People's Liberation Battalion Zarya", which was created in May 2014 under the command of Mr Plotnitsky (see paragraphs 60 and 122 above), and the Rapid Response Group "Batman", formed by Mr Bednov (see paragraph 102 above) in April 2014.

E. Political structures in the "DPR" and "LPR"

140. An outline of the initial political structures in the "DPR" and the "LPR" together with the principal office-holders up until the date of the hearing on admissibility is set out below. There is, in particular, a great deal of information available about the "DPR" and its composition in the summer of 2014 in light of the independent investigations conducted following the downing of flight MH17.

1. "DPR"

(a) Before the May 2014 "referendum"

141. In early March 2014, Mr Gubarev (see paragraph 110 above) declared himself "People's Governor" of the Donetsk region. He subsequently stormed the Regional State Administration building with other separatists, although the Ukrainian authorities soon recovered control. He was arrested shortly afterwards.

142. Mr Pushilin (see paragraph 126 above) took over the leadership of the separatist movement in the Donetsk region after Mr Gubarev's arrest, calling himself the deputy to the "People's Governor". He was part of the group of separatists who took over the Donetsk Regional State Administration building on 7 April 2014 and declared the "DPR" (see paragraph 51 above). Mr Pushilin became a "Co-Chairman" of the "interim government" and worked on preparing the 11 May 2014 "referendum" on independence.

143. On 14 April 2014, Mr Ponomaryov (see paragraph 123 above) declared himself "People's Mayor" of Slovyansk.

(b) The May 2014 "government"

144. On 15 May 2014, Mr Pushilin became Chairman of the Supreme Council of the "DPR", at that time the highest position in the "DPR" under its "constitution". He held that position until he resigned on 18 July 2014.

145. On 16 May 2014, the Supreme Council elected the new "government" of the "DPR". The following posts were announced:

(i) Mr Borodai (see paragraph 105 above): "Prime Minister".

(ii) Mr Girkin (see paragraph 108 above): "Minister of Defence". As "Minister of Defence", he became commander-in-chief of the "DPR" and took command of all separatist forces operating there.

(iii) Mr Purgin (see paragraph 125 above): "First Deputy Prime Minister".

(iv) Mr Kovalchuk (see paragraph 113 above): "Minister of Internal Affairs".

(v) Mr Khodakovsky (see paragraphs 111 and 134 above): "Minister for State Security".

(vi) Mr Zakharchenko (see paragraphs 131 and 134 above): military commandant of Donetsk.

(vii) Mr Dubinskiy (see paragraphs 107 and 135 above): head of the military intelligence service of the "DPR".

(viii) Mr Pulatov (see paragraph 124 above): deputy head of the "DPR" intelligence service under Mr Dubinskiy.

146. A "Council for Security and Defense" of the "DPR" was established. Its membership included Mr Girkin, Mr Khodakovsky and Mr Kovalchuk.

(c) Subsequent changes to the "government"

147. In July 2014, Mr Antyufeyev (see paragraph 100 above) was named "First Deputy Prime Minister" in charge of law enforcement agencies. He was given responsibility for the "Ministry of Internal Affairs" and the "Ministry of State Security".

148. Mr Borodai resigned as "Prime Minister" on 7 August 2014. Mr Girkin stepped down from his role as "Minister of Defence" on 12 August 2014. Both men returned to Moscow, although Mr Borodai continued as "Deputy Prime Minister" of the "DPR" until October 2014.

149. On 7 August 2014, Mr Zakharchenko was named "Prime Minister". Mr Kononov (see paragraph 112 above) subsequently replaced Mr Girkin as "Minister of Defence" of the "DPR".

(d) After the first "elections" in November 2014

150. In November 2014, "elections" for the "People's Council", the successor to the Supreme Council, and "Head of State" were held in the "DPR".

151. Following the "elections", Mr Zakharchenko (see paragraph 131 above) assumed the post of "Head of State".

152. One hundred deputies were "elected" to the People's Council for a term of four years. During its session on 14 November 2014, it elected Mr Purgin (see paragraph 125 above) as "Prime Minister". Mr Pushilin (see paragraph 126 above) became "Deputy Prime Minister". From November 2014 to September 2018, Mr Pushilin also acted as the Permanent Plenipotentiary Representative of the "DPR" at the Trilateral Contact Group talks in Minsk, Belarus.

153. On 11 September 2015, following Mr Purgin's removal as Prime Minister, Mr Pushilin became "Prime Minister".

154. On 7 September 2018, following Mr Zakharchenko's death (see paragraph 131 above), the People's Council appointed Mr Pushilin acting "Head of State" pending "elections" scheduled for November 2018. He in turn appointed Mr Ananchenko (see paragraph 99 above) "Prime Minister" of the "DPR".

155. In November 2018, Mr Pushilin became "Head of State".

2. "LPR"

(a) Before the May 2014 "referendum"

156. On 21 April 2014, Mr Nikitin (see paragraph 118 above) became chairman of the "Praesidium" of the "People's Assembly of the Lugansk Region".

157. On 27 April 2014, Mr Bolotov (see paragraph 104 above) became "People's Governor" of the Luhansk region.

(b) The May 2014 "government"

158. After the "referendum" of 11 May 2014, the following "LPR" government posts were announced:

(i) Mr Bolotov: "President".

(ii) Mr Nikitin: "Prime Minister".

(iii) Mr Plotnitsky (see paragraph 122 above): "Minister of Defence".

(c) Subsequent changes to the "government"

159. On around 3 July 2014, Mr Bolotov appointed the "LPR Council of Ministers", including Mr Bashirov (see paragraph 101 above) as its acting "Chairman" and thus "Prime Minister", to replace Mr Nikitin. Mr Semenov (see paragraph 127 above) and Mr Nikitin were appointed "First Deputy Chairmen" of the "LPR Council of Ministers".

160. On around 14 August 2014, Mr Bolotov resigned as "President" and Mr Plotnitsky became "President" of the "LPR".

161. Mr Bashirov resigned as "Prime Minister" on around 20 August 2014 and Mr Plotnitsky took on his functions until he appointed Mr Tsyplakov (see paragraph 130 above) to the post on around 26 August 2014.

162. Mr Pasechnik (see paragraph 119 above) served as "Minister of State Security" of the "LPR" from around 9 October 2014.

(d) After the first "elections" in November 2014

163. In November 2014, "elections" were held in the "LPR" for the post of "President" and for the "People's Council".

164. Following the "elections", Mr Plotnitsky continued as "President" of the "LPR". The occupants of other principal "government" posts also remained in place.

165. On 26 December 2015, Mr Tsyplakov was dismissed as "Prime Minister" and Mr Kozlov (see paragraph 115 above) was appointed.

166. Mr Plotnitsky resigned as "President" in November 2017. Mr Pasechnik (see paragraph 119 above) became the acting head of the "LPR". He became "President" following "elections" in November 2018.

II. FACTS ACCORDING TO THE PARTIES

167. The relevant events as advanced by the parties in their memorials (see paragraphs 19, 23 and 26 above) and at the hearing (see paragraph 33 above) are set out below. The submissions were made before the start of the armed attack on Ukraine by the Russian Federation on 24 February 2022 (see paragraph 90 above).

A. According to Ukraine

1. In respect of the general situation in eastern Ukraine (no. 8019/16)

(a) Political background

168. Since the dissolution of the USSR, the Russian Federation has pursued a political strategy of seeking to maintain economic and political influence over the former Soviet republics. One aspect of this policy has been to disrupt efforts at closer integration between former Soviet States and western political allies, such as the EU and NATO. In addition to the use or threat of force and the exertion of economic influence, one way of pursuing this strategy has been through the promotion of the Eurasian Customs Union ("EACU").

169. The election of Mr Yanukovych as President of Ukraine in 2010 was perceived in Moscow as an opportunity to achieve greater control over Ukraine's affairs. Under Moscow's influence, Mr Yanukovych distanced Ukraine from plans for NATO integration. However, his administration was unable to ignore a strong tide of popular opinion in favour of closer economic integration with the EU and reluctantly entered negotiations for an EU-Ukraine Association Agreement.

170. In November 2013, shortly before the agreement was due to be signed, Mr Yanukovych yielded to pressure from the Kremlin to abandon the process and announced instead an intention to begin talks for accession to the EACU. However, the government's decision sparked an uprising which quickly spread. Popular protests began in Kyiv, with people taking to the streets in ever-increasing numbers in an effort to influence government policy. These street protests came to be known as "Euromaidan".

171. On the night of 21 February 2014, President Yanukovych, accompanied by a Russian military escort, left Kyiv. He first went to Kharkiv and then to Moscow, where he sought political asylum. The next day, the Ukrainian Parliament voted by a majority to remove him from office. On 4 March 2014, the Permanent Representative of the Russian Federation to the United Nations produced a letter, dated 1 March 2014, from Mr Yanukovych which called for Russian military intervention in Ukraine in order to "restore law and order".

(b) The start of the unrest

172. At the outbreak of hostilities in 2014, the population of the Donetsk and Luhansk regions was ethnically mixed. Ethnic Russians were present in significantly higher numbers than in other regions of Ukraine. Most people in the regions spoke Ukrainian and Russian, although Russian was the native language for the majority. As part of its policy of influencing Ukraine, the Russian Federation had for many years fostered pro-Russian political groupings that pursued a broadly separatist agenda in these regions. Their aim was to weaken ties between Kyiv and the border regions and thereby facilitate influence over Ukrainian territory adjacent to the border. The Russian President, Vladimir Putin, set about a policy that was designed to change international borders between Ukraine and the Russian Federation.

173. Russian media portrayed the Euromaidan protests as an existential threat to the ethnic Russian minorities living in Ukraine. In a deliberate attempt to stir up historical enmities, the Russian media sought to portray the Euromaidan movement as pro-Nazi and suggested that there was a real risk of genocide against ethnic Russian people. A counter movement calling itself the "Antimaidan" was formed and attracted support from Russian-speaking Ukrainians. It was also supported by Russian citizens who travelled to Ukraine to foment the unrest.

174. On 26 January 2014, a political conference was held in Donetsk to launch the so-called "Russian Spring" movement. It was sponsored by the National Liberation Movement, a pro-Russian political grouping led by Yevhen Fedorov, a member of the Russian Duma. It resulted in the establishment of the "Donbass People's Militia", an illegal paramilitary formation.

175. Organised protests became more frequent during February 2014 and it became increasingly clear that Russia was instigating, organising and

financing the protests in cities in eastern Ukraine with significant Russian-speaking populations. The "maximal" objective was the complete destabilisation of ten southern and eastern Ukrainian regions, through "hybrid warfare" by the FSB. The fallback "minimal" objective was the intensive targeting of at least five priority regions. The most pressing strategic priority of the Russian Federation was to establish effective control over the eastern part of the Donetsk region and part of the Zaporizhzhia region in order to secure a land corridor between mainland Russia and the Crimean peninsula. Local pro-Russian activists were reinforced by trained militants from Russia. The Russian authorities organised regular transports of people from Russia to eastern Ukraine.

176. The first orchestrated mass action took place on 1 March 2014 when civil unrest began simultaneously in the cities of Kharkiv, Donetsk, Dnipropetrovsk and Odessa, as well as across a number of other regions in eastern Ukraine. These were systematically organised by "pro-Russian elements". It was in this context that the first attempts were made to take control of local government and administrative buildings in the Donetsk and Luhansk regions. Armed and organised "pro-Russian elements" "occupied" these buildings and replaced local symbols with Russian flags.

177. From 2 to 15 March 2014, a series of public "actions" were synchronised by pro-Russian elements. The most intense series of "actions" was focused on the Donetsk region, which witnessed the arrival of numerous "tourists" from Russia.

178. On 14 March 2014, a group of armed fighters, including Mr Pavlov, a Russian national with military experience in the Russian armed forces who was close to Mr Girkin, attacked the premises of pro-Ukrainian organisations in Kharkiv. Given Mr Pavlov's background, connections and very early involvement, he was another instrument of Moscow's strategy for exercising effective control over the separatist militias. His operating expenses were known to have been facilitated by ultra-nationalist Russian politician Vladimir Zhirinovsky. Funding was provided by Kremlin backers, including Mr Malofeyev and Mr Glazyev.

179. On 16 March 2014, the day of the Crimea "referendum", pro-Russian elements staged a series of coordinated and simultaneous "mass actions" in the Donetsk and Luhansk regions, ostensibly in "solidarity" with the events taking place in Crimea. Marches and demonstrations were also held in other cities in eastern and southern Ukraine. By this time, the infiltration of armed Russian militants was becoming clearly visible throughout the regions targeted by the Russian Federation.

(c) The build-up of Russian troops along the border

180. Meanwhile, the Russian Federation was deploying a substantial military force on Ukraine's border. By 9 March 2014, there were more than 26,000 combat-ready Russian military personnel stationed close to Ukraine's

eastern border. On 13 March 2014, the Russian Ministry of Defence announced that these units would begin training manoeuvres close to the border.

181. Within a month, a further 14,000 Russian troops had been deployed to the border region in a show of force intended to embolden Russia's proxies in eastern Ukraine and further instigate unrest. On 10 April 2014, the Secretary General of NATO issued a statement in which he underlined that, according to satellite images, 40,000 combat-ready Russian troops were massed along Ukraine's borders. According to him, Russia was stirring up ethnic tensions in eastern Ukraine and provoking unrest.

(d) From civil unrest to paramilitary action

182. Following the outbreak of hostilities, a pattern of abduction, torture and summary execution of pro-Ukrainian civilians became well-entrenched, accompanied by indiscriminate military attacks on civilian targets, protected objects and members of the Ukrainian military who were prisoners of war or otherwise *hors de combat*, in flagrant violation of the applicable rules of international humanitarian law. These incidents were documented by monitors of the Office of the UN High Commissioner for Human Rights (OHCHR) and the OSCE and were part of a continuing pattern. They are constituent elements of the administrative practices alleged.

183. In March and April 2014, the illegal armed groups started to occupy public and administrative buildings in the Donetsk and Luhansk regions. On 7 April 2014, local armed groups, supported by Russian special forces and Cossack paramilitaries, took control of the Donetsk Regional State Administration building, declared independence from Ukraine and announced the establishment of the "DPR". Their leader, Mr Gubarev, was installed as "People's Governor" and they announced that an independence referendum would be held in Donetsk on 11 May 2014. The ideological foundation for these protests emanated from Moscow and was based on the historical notion of "Novorossiya" (or New Russia). "Novorossiya" relates to a region of the Russian Empire corresponding to modern Ukrainian territory north of the Black Sea. In the past, it was formed as a new imperial province of the Russian Empire (Novorossiya Governorate) expanded by the annexation of new territories from the Ottoman Empire in the 18th century. This neo-imperialist concept of Russian territorial expansion was actively encouraged by President Putin.

184. However, as it became clear that these "sponsored" protests had failed to trigger a general uprising against the government in Ukraine, the Russian Federation began supplying military personnel and equipment in ever-increasing volumes. Mr Girkin and Mr Borodai were sent to eastern Ukraine to take effective control of the movement on behalf of the Kremlin administration. Soon after they arrived, Russia began a steady supply of weapons to loosely affiliated groups of pro-Russian paramilitaries whose

leadership had close and enduring ties to the Russian security authorities and special services. Training in the border camps was carried out by the Russian army while the FSB was tasked with recruitment and the operation of the training camps. The recruitment of fighters from Russia was typically organised through a number of publicly available websites that were clearly permitted to operate openly with the consent and acquiescence of the authorities in Moscow. "Volunteers" were also registered at military enlistment offices in various Russian cities where they would receive instructions to travel to one of the border camps, mostly in the area of Rostov-on-Don. Many were former police or military officers. These "volunteers" were paid for their services from Russian State funds.

185. Armed engagement began on 12 April 2014 when Russian special forces, acting under the guise of local separatists, took control of Slovyansk, Kramatorsk and Druzhkivka. A group of masked armed men under the command of Mr Girkin took control of public buildings in Slovyansk and appointed Ukrainian national Mr Ponomaryov, a former member of the Russian army, as "People's Mayor". He immediately issued a call for support to his former military colleagues in the Russian armed forces.

186. Over the following two weeks, municipal buildings in eastern Ukraine were seized by armed gangs amid sporadic armed skirmishes. After a number of failed attempts, the administrative offices of Luhansk were seized on 27 April 2014 and the "LPR" was established, under "People's Governor" Mr Bolotov.

187. Between 2 and 5 May 2014, intense fighting occurred in the areas around Slovyansk and Kramatorsk. Pro-Russian forces shot down three Ukrainian military helicopters using anti-aircraft weapons supplied by the Russian Federation. Intense fighting spread to Mariupol between 3 and 10 May 2014, resulting in significant casualties and serious damage to public property. By this time, the conflict was escalating on a daily basis.

188. On 7 May 2014, Chechnya's President, Ramzan Kadyrov, pledged to send "tens of thousands of Chechen volunteers to southern and eastern Ukraine". Recruitment centres were set up across Chechnya. Chechen paramilitaries were observed in Slovyansk from early May 2014. Such an arrangement for mutual military assistance between the Russian authorities in Grozny and Moscow would have required the approval of both President Kadyrov and President Putin.

189. Operating together with other Cossack formations, the Cossack National Guard is estimated to have deployed more than 4,000 fighters with access to heavy armour and artillery from the Russian Federation. The group, based in Antratsyt, has been identified by the US State Department as an organisation established by Russian special forces.

190. On 11 May 2014, the "DPR" and the "LPR" held "independence referendums" that were largely boycotted by Ukrainians and condemned as unlawful and undemocratic by the international community. Nonetheless, the

Ministry of Foreign Affairs of the Russian Federation published an official statement on its website, on 12 May 2014, in which it expressed Russia's "respect" for the results. A number of irregularities and acts of intimidation were reported, particularly against independent journalists. Ukrainian journalists were not allowed to photograph or film the voting process. According to the separatists there was a high turnout among ethnic Russians resulting in a 90% vote in favour of independence from Ukraine.

191. According to the OHCHR, the violence and repression of the armed groups intensified following the "referendums". In the immediate aftermath of the "referendums", the report of the OSCE's Special Monitoring Mission ("SMM") for 15 May 2014 described the situation on the ground in Donetsk and Luhansk as volatile, with armed groups exercising control of large swathes of territory.

192. On 15 May 2014, Mr Borodai assumed the title of "Prime Minister" of the "DPR" and appointed Mr Girkin as "Defence Minister". Mr Bolotov was named "President" of the "LPR". On the same day, the "Donetsk People's Militia" sent an ultimatum to Kyiv, ordering the withdrawal of all Ukrainian troops from the Donetsk region.

193. Throughout May 2014, the "DPR" and "LPR" forces mounted sustained military operations against government border checkpoints in an effort to gain control of sections of the international border between Russian and Ukraine. The purpose of these operations was to facilitate the free flow of weapons, ammunition and military personnel from the Russian Federation to areas under separatist control.

194. From the outset, Mr Borodai and Mr Girkin publicly called for armed Russian intervention in eastern Ukraine. Almost immediately, their appeals resulted in a steady stream of Russian fighters and weaponry, including rocket-propelled grenades and tanks, that flowed into Ukraine across its eastern border. According to Mr Borodai, around 50,000 Russian nationals fought in the pro-Russian armed groups in eastern Ukraine during the first two years of the conflict. Mr Girkin claimed in the media that one third of the fighters in his unit were Russian combat veterans. The actual figure of Russian-backed forces operating inside Ukraine was probably much higher.

195. On 20 May 2014, the SMM noted the presence of armed members of the Berkut, the special forces loyal to former President Yanukovych, carrying Russian military issue automatic weapons in Luhansk.

196. On 22 May 2014, Mr Bolotov declared "martial law" in the "LPR".

197. On 25 May 2014, Ukraine held nationwide Presidential elections. They were boycotted by armed groups in eastern Ukraine. According to the OHCHR, they were disrupted by acts of intimidation, voter suppression, the abduction of election officials and political corruption. Independent journalists were harassed by separatist militias and prevented from recording the preparations for and the conduct of the Presidential elections prior to and during election day. There were numerous official reports of electoral

officials and employees being threatened, detained and even tortured by armed groups in the "DPR" and the "LPR".

198. On 26 May 2014, fierce fighting broke out for control of Donetsk airport. The majority of those killed or injured were Russian nationals.

199. On 29 May 2014, the "Vostok Battalion", headed by Russian army veteran Mr Khodakovsky, arrived in Donetsk and pledged allegiance to Mr Girkin. International analysts consider it to be a private army with direct links to Russian intelligence. Its members include former members of GRU special forces who fought with Russian troops in the Chechen and Georgia wars.

200. From the end of May 2014, forces from a private military contractor, the Wagner Group, began to arrive. The Wagner Group is controlled by Evgeniy Prigozhin, a close associate of President Putin. Other professional mercenaries operating in Donetsk and Luhansk included ENOT Corp, a private military company registered in Moscow, and MAR, a company registered in St Petersburg.

201. By the end of May, the OSCE was reporting intense fighting on a daily basis. On 30 May 2014, it reported that the "Vostok Battalion" had taken over control of the central administration building in Donetsk, ousting local "DPR" armed separatists.

202. By that point, significant parts of the almost 1,000 kilometre border between the Donetsk and Luhansk regions and the Russian Federation were under separatist control. On 1 June 2014, the border garrison of Luhansk was overrun. Further checkpoints along the Luhansk section of the border fell to the separatists over the next few days. A similar pattern occurred at various points along the Donetsk section of the border.

203. Hostilities intensified during the early part of June 2014, typically involving the exchange of fire between government forces and separatists armed with small arms, grenade launchers, mortars and MANPADS (portable air defence systems). There were multiple separatist attacks on government border points to keep open the supply routes for weapons from the Russian Federation.

204. On 10 June 2014, Mr Antyufeyev, a Russian national with a strong background in national security, was appointed "Deputy Prime Minister" of the "DPR". With his appointment, Moscow had taken decisive and direct control of both the political and military leadership of the separatist militias. The close working relationship between the separatists and the Kremlin was acknowledged by Mr Borodai in a press conference on 16 June 2014.

205. On 12 June 2014, the Russian military authorities began the transfer of heavy armoured vehicles, artillery, tanks and Grad rockets systems across the border into Ukraine. A column of Russian tanks was delivered to Snizhne in the Donetsk region and a column of multiple-launch Grad BM-21 rocket launchers was transferred through Luhansk.

206. On 14 June 2014, armed separatists shot down a Ukrainian military transport plane as it approached Luhansk airport, killing forty soldiers and nine crew. This attack was a direct and immediate result of the transfer across the border of Russian Grad BM-21 rocket launchers two days earlier. At a press conference the next day, Mr Bolotov claimed that the "South Eastern Army" had shot down the plane. At the same time, he appealed for further "volunteers" with military experience of handling mortars, heavy machine guns and armoured personnel carriers ("APCs") to join the "South Eastern Army".

207. Meanwhile, between 12 and 20 June 2014, Ukrainian forces took steps to recapture parts of the border area in an effort to control the flood of weapons entering Ukraine from the Russian Federation. Intense fighting centred on the areas around Slovyansk and Semyonovka. However, the Ukrainian military operation was interrupted on 20 June 2014 by a ten-day unilateral ceasefire announced by the Ukrainian president. That same day, the SMM recorded another military convoy of tanks and armoured vehicles entering Luhansk from the direction of the Russian border.

208. On 21 June 2014, emboldened by the continuing influx of Russian weapons and personnel, the "DPR" told the SMM that it rejected the terms of a proposed mutual ceasefire and insisted instead on the complete withdrawal of Ukrainian forces and recognition of the independence of the "DPR". A similar position was taken by the "LPR".

209. According to the OHCHR and the SMM, during the unilateral ceasefire period, pro-Russian forces carried out 108 armed attacks on Ukrainian positions killing 27 members of the Ukrainian armed forces and injuring a further 69. At least nine civilians were killed by separatists during this time and a significant number of Ukrainian military personnel were taken prisoner.

210. Ukraine relaunched military engagements at the end of June 2014 with the objective of recapturing a fifteen kilometre stretch of the border. By this time, however, they were facing an increasingly well-equipped military force of Russian "volunteers" and mercenaries with a huge arsenal of highly destructive Russian military hardware.

211. On 5 July 2014, Ukrainian forces regained control of Slovyansk, Kramatorsk, Dryzkivka and Kostyantynivka. This marked the start of a reversal of fortunes for the Ukrainian forces.

212. On 10 and 11 July 2014, fighting intensified in and around Donetsk airport with access roads blocked by the "DPR" forces.

213. On 11 July 2014, as a result of Ukraine's operation to re-take control of sections of the international border, Russian conventional forces engaged directly for the first time, shelling Ukrainian positions near the border town of Zenelopillya with Grad BM-21 rocket launchers from inside the territory of the Russian Federation. The local paramilitaries used the Russian artillery barrage as cover in their attempt to re-take the border position. The Russian

cross-border artillery attacks continued with air support from Russian military aircraft.

214. In its report of 15 July 2014, the OHCHR concluded that the rule of law had "collapsed" in the areas under the control of the "DPR" and "LPR". The local police were under the *de facto* control of the armed groups and did not investigate crimes that were perpetrated by the militias. Public buildings associated with law enforcement agencies were "occupied and often used to detain and torture civic activists, journalists and political opponents". Law enforcement by official government agencies had become "a dead letter in territories controlled by the armed groups".

215. Mr Zakharchenko was personally responsible for a large number of abductions and kidnappings. Mr Tolstykh was seen in footage broadcast in January 2015 abusing captured service personnel by cutting military insignia off their uniforms and forcing them to eat them. Mr Pavlov has also admitted the torture and summary execution of Ukrainian prisoners of war.

216. Between 17 and 20 July 2014, intense fighting was continuing in Luhansk. The SMM recorded that Ukrainian forces had re-taken Rubezhnoe in the northern Luhansk region on 20 July 2014 and overrun nearby Severodonetsk on 21 July. The SMM also recorded evidence that these irregular forces had been detaining people in the SBU building in Severodonetsk. A number of the detainees had been summarily executed and their bodies were discovered inside the building. Two survivors informed the SMM that they had been held captive in the building for ten days without food, during which time they had been beaten.

217. The witness statement of Lieutenant Colonel Kolenynyk, of the Ukrainian armed forces explains his role in border operations over the summer of 2014. He refers to shelling by Russian forces from the territory of the Russian Federation of his unit's position near Marynivka from early July. He states that between 15 and 16 July 2014, his unit's border position was subjected to an uninterrupted artillery barrage for nineteen hours while local paramilitaries used the Russian artillery barrage as cover in their attempt to re-take the border position.

218. On 17 July 2014, the "DPR" forces shot down flight MH17, a civilian aircraft flying in civilian airspace over eastern Ukraine, using a 9M38 series missile with a 9N314M warhead launched from a Buk-TELAR that had been delivered by members of a Russian military brigade to "DPR"-controlled territory in Ukraine. The flight came down in Hrabove. All 298 civilians on board were killed. The launch site was later identified by missile trajectory analysis and satellite imagery analysis as a field near Snizhne, in an area under the control of "DPR" forces. Using open-source research technology, investigators were able to trace the route taken by the Buk-TELAR from Russia to the launch site. The evidence shows that between 23 and 25 June 2014, a convoy of the "53rd RAF Brigade" transported several military systems, including six Buk-TELARs, through western Russia from

Kursk to the Millerovo military airbase in the Rostov region. The Buk-TELAR was transported across the border to Ukraine in the morning of 17 July 2014 and travelled from Luhansk to Donetsk then onwards to Snizhne where it was offloaded and driven to the launch site. Shortly thereafter, it deployed the missile which shot down flight MH17. After the attack, the Buk was returned to the Russian Federation. An image of the return journey shows the Buk missing one missile.

219. On 21 July 2014, the UN Security Council adopted Resolution 2166 (2014) condemning the downing of MH17 "in the strongest possible terms" and expressing its "grave concern" that the "DPR" forces were obstructing access to the crash site and impeding international investigators.

220. Over the following weeks, Russia intensified the supply of heavy weaponry and personnel across the border. Its conventional forces also mounted a series of covert special operations, crossing into Ukraine with their official military insignia concealed in an effort to blend in with the paramilitaries. The aim was to bolster the armed groups in their efforts to control and reverse the continuing advance of the Ukrainian military. Russian conventional forces also conducted frequent cross-border artillery attacks on Ukrainian troops from firing positions on the Russian side of the border.

221. On 7 August 2014, in anticipation of the Minsk dialogue, Mr Borodai stepped down as "Prime Minister" of the "DPR" in order to make way for Mr Zakharchenko, the commander of the locally based "Oplot" battalion. The reason for this purely nominal change of leadership was that Mr Zakharchenko was Ukrainian and so was thought to present the international community with a more acceptable face of the separatist leadership than Mr Borodai. This transfer of power was an attempt to create the impression that the separatist political leadership in eastern Ukraine was home-grown, so as to disguise Moscow's overarching control of the situation during the planned Minsk talks. However, Mr Borodai retained effective influence over the movement on behalf of his "master in [the] Kremlin" by taking the role of "Deputy Prime Minister". The Kremlin administration also issued instructions for Mr Girkin to step down from his role as "Defence Minister". These developments, instigated by the Russian government directly, provide further confirmation of Russian State control over the leadership of the paramilitary groups and their "executive authorities".

222. On 12 August 2014, a fierce battle for control of Ilovaisk began and lasted for more than a week. Ukrainian forces made substantial gains. On 20 August they announced that they had re-taken the town. Perceiving that the "DPR" forces were being overrun, the Russian armed forces took the decision to mount a full-scale land invasion into eastern Ukraine. A large contingent of regular Russian soldiers crossed the border in early August 2014 and engaged in direct combat operations against Ukrainian armed forces.

223. On 14 August 2014, a further convoy of 23 Russian APCs was observed crossing the border, supported by fuel trucks and other logistics vehicles with official Russian military plates. On 24 August 2014, a contingent of more than 3,500 Russian forces crossed the border into the Starobeshevsky district of Donetsk and advanced towards Ilovaisk. The invasion force included 400 paratroopers from the Guards Parachute Regiment, 98th Airborne Division. The force was equipped with 60 tanks, 320 armoured vehicles, 60 pieces of artillery equipment and 45 mortars. Identification marks on the Russian military vehicles used in the operation were either obscured or painted over.

224. On 14 August 2014, Mr Bolotov resigned from his position and Mr Plotnitsky became the "President" of the "LPR".

225. On 24 August 2014, Ukrainian forces captured a number of Russian soldiers including ten members of the 331st Guards Airborne Regiment, one member of the 8th Guards Mountain Motor Rifle Brigade and two members of the 6th Tank Brigade.

226. Over the following days, intense fighting continued in the area. The Ukrainian forces in Ilovaisk began planning for a ceasefire and a managed withdrawal. Negotiations for the Ukrainian retreat began on 27 August 2014 between Ukrainian military commanders and the Command of the General Staff of the Russian armed forces. The proposal was for a humanitarian corridor for the withdrawal to take place. Russian forces took up positions along the planned route. On 28 August 2014, agreement was reached with the Russian General Staff for the withdrawal to begin at dawn the following day.

227. On 29 August 2014 at around 5 a.m., Ukrainian forces began the withdrawal operation. However, despite the fact that they were *hors de combat* and in retreat, the Russian forces opened fire on them, killing 366 men and seriously injuring a further 429 men. Approximately 300 men were taken prisoner, many by regular army units but they were then handed into the custody of "DPR" paramilitary formations who subjected them to torture and inhuman and degrading treatment.

228. Russian troops invaded deep into Ukrainian territory, taking up positions in a series of towns several kilometres from the border. There they conducted direct military engagements with Ukrainian forces. Meanwhile, Russian forces inside Ukraine began an offensive against the Ukrainian forces in the Luhansk region with the objective of reversing their territorial gains. The Russian military objective was to break the encirclement of Luhansk by Ukrainian forces. Ukrainian forces eventually withdrew after coming under direct military attack from Russian tanks and artillery on Ukrainian territory. Substantial forces of the Russian army engaged in this operation and intense fighting around Luhansk continued until 5 September 2014.

229. Many of the various irregular formations with numerous Russian nationals among their ranks, were subsumed into the 1st Army Corps (the armed groups of the "DPR") or the 2nd Army Corps (the armed groups of the

"LPR"). All of the pro-Russian military formations operating in the Donetsk and Luhansk regions had a significant military, economic and/or political connection to the Russian Federation. In addition, enlisted members of the Russian armed forces entered Ukraine covertly posing as volunteers, mercenaries or tourists.

230. On 28 August 2014, as the Minsk talks were approaching, NATO released a statement accompanied by satellite images that confirmed the invasion by Russian troops and the movement of large quantities of advanced weaponry (including air defence systems, artillery, tanks and armoured personnel carriers) from Russia into eastern Ukraine.

231. Given the scale and gravity of the war crimes and human rights violations committed during the August events in the area around Ilovaisk, the OHCHR set up a specific investigation and later published a detailed report. It recorded evidence of a number of war crimes by Russian forces and their paramilitary proxies after the Ukrainian forces had confirmed their withdrawal. These included armed attacks on wounded personnel who were *hors de combat*, treacherous killing of retreating formations in violation of agreed withdrawal arrangements, and the torture and murder of prisoners of war.

232. On 1 September 2014, the Trilateral Contact Group, comprised of senior representatives of Ukraine, the Russian Federation and the OSCE, met in Minsk with representatives of the "DPR" and "LPR". The discussions focused on the establishment of an inclusive process for political dialogue, a sustainable ceasefire, restoration of border control, humanitarian assistance and reconstruction in the areas affected by the conflict, and the release of prisoners of war.

233. On 5 September 2014, the Minsk Protocol was signed by representatives of the Trilateral Contact Group and, without any official recognition of their status, by the then leaders of the "DPR" and "LPR". It made provision for an immediate ceasefire, an exchange of prisoners and the establishment of effective border control, all to be monitored by the OSCE. At 6 p.m. that day, the ceasefire came into effect. At that point, Russian forces were deployed in various locations across the Donetsk and Luhansk regions and along the international border. The forces of the "DPR" and the "LPR" controlled significant parts of the territory in Donbass (six districts in the Donetsk region and five districts in the Luhansk region).

234. On 10 September 2014, the President of Ukraine announced that approximately 70% of Russian troops had withdrawn from Ukrainian territory. However, the armed groups almost immediately began a campaign of military engagements in violation of the ceasefire. As a result, on 19 September 2014 the parties signed a Memorandum "outlining the parameters for the implementation of the commitments of the Minsk Protocol of 5 September 2014". This agreement established a ceasefire boundary line between opposing armed forces and required the withdrawal of all military

personnel and equipment to a distance of fifteen kilometres on either side of the boundary line. It also required the complete withdrawal of all foreign armed formations from the territory of Ukraine and prohibited any form of offensive military action by any of the parties to the conflict. Compliance with these commitments on the ground was to be monitored by the OSCE SMM.

235. In a statement issued on 20 September 2014, NATO's Supreme Allied Commander, General Breedlove, described the result of the Minsk agreement as a "ceasefire in name only". He noted that by continuing to enable the "free flow of weapons and fighters across the border", the Russian Federation had made it "nearly impossible for outsiders to determine how many of its troops are operating inside Ukraine".

236. On 2 November 2014, "elections" were held in the "DPR" and "LPR" in violation of Ukrainian law and the Minsk Protocol. Mr Zakharchenko and Mr Plotnitsky won the "elections". The next day, the Russian Ministry of Foreign Affairs pledged to "respect the will of the people".

237. OSCE monitors reported on 8 November 2014 that they had observed large-scale movements of unmarked heavy equipment in separatist-held territory, including APCs, lorries, petrol tankers and tanks, which were being manned and escorted by soldiers in dark green uniforms without insignias. On 12 November 2014, General Breedlove announced that NATO could confirm that Russian troops and heavy equipment had crossed into Ukraine during the preceding two days.

238. It its report published on 15 November 2014, the OHCHR documented "almost daily" breaches of the 5 September ceasefire agreement by the separatist militias at various "flashpoints". These included Donetsk airport and the surrounding north-west suburbs of the city; the areas under government control intersecting the main road and rail links between Donetsk and Luhansk; and the area around Smile, Luhansk region. The OHCHR recorded more than 2,000 instances of shelling and armed attacks by separatist militias on Ukrainian government positions between 5 September and 15 November, although the frequency and intensity of these attacks reportedly decreased.

239. The OHCHR's report of 15 December 2014 highlighted the breakdown of law and order in the conflict zone which had resulted in the killings, abductions, torture, ill-treatment, sexual violence, forced labour, ransom demands and extortion of money by the armed groups reported during the whole conflict period. It also noted that persecution and intimidation of people suspected of supporting Ukrainian forces or merely holding pro-Ukrainian sympathies (or perceived as such) remained widespread and included deprivation of liberty and property, humiliation in public places and mock executions.

240. In January 2015, the Minsk ceasefire broke down completely. During the second half of January 2015, "DPR" forces with Russian military support mounted a sustained attack on Donetsk airport in order to retake it. The "DPR" forces included the "Sparta" and "Somali" battalions. They were supported by troops of regular Russian armed forces with heavy weaponry. This marked the start of a major new Russian offensive in eastern Ukraine.

241. On 15 January 2015, the European Parliament adopted Resolution 2965/2014 in which it recorded that since the signing of the Minsk Protocol the ceasefire had been "violated by the separatist and Russian forces on a daily basis", and that the main points of the Memorandum signed on 19 September 2014 had "not been implemented by the Russian-backed separatists". The European Parliament also relied on "credible sources" to conclude that "Russia continues to support the separatist militias through a steady flow of military equipment, mercenaries and regular Russian units, including main battle tanks, sophisticated anti-aircraft systems and artillery".

242. On 21 January 2015, the OHCHR recorded that a group of fighters from the "Sparta Battalion" had captured twelve members of the Ukrainian military following an intense armed engagement at Donetsk airport. According to reports received by the OHCHR, the prisoners were subjected to torture and one of them was summarily executed.

243. On 24 January 2015, "Russia's proxies" used BM-21 Grad multiple rocket launchers supplied by the Russian Federation against Mariupol, attacking a densely populated residential area. According to eye-witness testimony and expert analysis, the perpetrators discharged at least 154 rocket volleys, killing 30 civilians, including a child, and seriously injuring a further 118. The attack damaged more than 50 residential buildings, four schools and numerous shops and businesses. The attack came from an area under "DPR" control and there was no plausible military target in the vicinity of the attack. The UN Secretary General condemned the launching of rockets indiscriminately into civilian areas and demanded an investigation to bring the perpetrators to justice.

244. From mid-January to 18 February 2015, Russian ground troops and their paramilitary support formations mounted a major offensive to retake control of the strategically significant city of Debaltseve, which had been under government control since July 2014. Russian forces carried out heavy shelling of a densely populated urban area causing significant civilian casualties.

245. On 10 February 2015, "Russia's proxies" used a BM-30 Smerch rocket system to bombard a residential neighbourhood in Kramatorsk with cluster munitions. Kramatorsk is around fifty kilometres north-east of the contact line. There were no significant military targets in the vicinity. The bombardment fell indiscriminately on a civilian residential neighbourhood, hitting apartment buildings, schools and hospitals. Seven civilians were killed

and 26 people were seriously injured. Analysis showed that the attack was launched from Horlivka, a city under the control of the "DPR".

246. The Minsk II agreement came into effect at midnight on the night of 14-15 February 2015. Armed hostilities ceased in most areas of the combat zone but pro-Russian forces renewed their assault on Debaltseve, claiming that it was outside the terms of the ceasefire agreement. Between 16 and 18 February 2015, Russian armed forces supported by the insurgents mounted an intense military bombardment to dislodge Ukrainian positions in Debaltseve. Numerous war crimes were committed by the Russian forces during this phase of the operation, including the summary execution of Ukrainian soldiers who were *hors de combat*.

247. On 17 March 2015, the Ukrainian Parliament adopted Resolution 254-VIII designating certain areas of the Donetsk and Luhansk regions as temporarily occupied territories subject to time-limited special arrangements for local self-government pending the withdrawal of armed forces of the "DPR", the "LPR" and the Russian Federation. This resolution came into force on 24 March 2015.

248. In its 10th report on the situation in Ukraine, the OHCHR noted that the ceasefire was generally observed between mid-February and mid-April 2015. There were some minor skirmishes and exchanges of fire with small arms but heavy weaponry was reported to have been withdrawn from the contact line by both sides. Nonetheless, the OHCHR continued to receive "reports of sophisticated heavy weaponry and fighters being supplied from the Russian Federation".

249. On 31 March 2015, Dmitry Sapozhnikov, a former commander with an irregular paramilitary formation in Donetsk, gave an interview in which he confirmed that his group had received direct military assistance from the armed forces of the Russian Federation during the Battle of Debaltseve. The Russian military he encountered told him that they had been instructed to say they were on a training operation but had entered Ukraine covertly for the purpose of active military service.

250. A Russian major was detained near Donetsk in May 2015 while driving an ammunition truck. There was no comment on his arrest from the Russian government and no attempt by the Russian military to explain or justify his presence in Ukraine. He was later acknowledged by the Russian government and exchanged for captured Ukrainian soldiers.

251. In August 2015, a mass grave containing seventeen bodies was discovered in Brianka, which the OHCHR recorded.

252. A new ceasefire was announced on 1 September 2015 but almost immediately violated by the armed groups. In its report covering the period from November 2015 to February 2016, the OHCHR noted that the absence of government control over the international border running through regions occupied by Russia's proxies in the "DPR" and the "LPR" continued to

facilitate "an inflow of ammunition, weaponry and fighters from the Russian Federation to the territories controlled by the armed groups".

253. On 2 August 2016, the SMM encountered a contingent of Russian military forces without identifying insignia guarding a "DPR" weapons holding area.

254. On 12 October 2016, the Parliamentary Assembly of the Council of Europe ("PACE") adopted Resolution 2133 (2016) reflecting a clear conclusion that Russia bears legal responsibility for a widespread campaign of human rights violations in Donbass and that the only potential legal remedy lies with the Court.

255. On 17 February 2017, the Deputy Head of the SMM in Ukraine stated that he and other monitors had met separatist soldiers who identified themselves as soldiers of units of the Russian army.

256. On 18 February 2017, President Putin signed a decree authorising the Russian authorities to formally recognise and accept personal identification documents, and vehicle registration documents issued by the "DPR" and the "LPR".

257. Ukrainian civilians were subject to continued military attacks, particularly during the relentless and indiscriminate shelling of Avdiivka in January and February 2017.

258. On 19 April 2017, the International Court of Justice (ICJ) issued an Order on provisional measures in proceedings brought by Ukraine against the Russian Federation. Among other things, the court ordered the State parties to work towards the full implementation of the "Package of Measures" agreed on 12 February 2015 in Minsk in order to achieve a peaceful settlement of the conflict in eastern Ukraine.

259. There were further attempts to secure a durable ceasefire in late June 2017, late August 2017 and late December 2017, all of which collapsed soon after they were announced when armed groups resumed active hostilities.

260. In August 2018, a drone belonging to the SMM filmed a large military convoy crossing the border in both directions through an unguarded dirt track near Manych village during the night.

261. Further "elections" took place in November 2018. The armed conflict has continued since then, with ongoing and unpredictable outbreaks of armed hostilities by Russia's proxy forces in a number of areas along the contact line. Overall, there was a decreasing number of conflict-related civilian casualties during 2018.

2. In respect of the alleged abduction and transfer to Russia of three groups of children and accompanying adults (no. 43800/14)

(a) First group of children

262. On 12 June 2014, a bus with twenty-five children (sixteen orphans or children without parental care from a care home in Snizhne and nine

children in foster care with the S. family) and three accompanying adults (including Ms S.) was travelling from Snizhne to a children's sanatorium in the city of Kryvyy (Dnipropetrovsk region).

263. At around 9.30 a.m. at a checkpoint near Krasnyi Luch, Luhansk region, the bus was stopped by armed "DPR" separatists. One of the armed men entered the bus and forbade the group from moving on. On being informed that the group were travelling to a sanatorium, and after a telephone conversation with the leaders of the "DPR", the man informed the group that he would take them to the Russian Federation to rest. He refused to accede to the adults' request to return the group to Snizhne. The group was ordered to turn off their mobile telephones and the children's documents were taken. The "DPR" representatives forced the bus driver, at gunpoint, to travel to the Dolzhanskyy checkpoint at the Ukrainian-Russian border in the Luhansk region.

264. At 3.40 p.m., as the party were crossing the border without the necessary exit papers, Ms S. started to shout that the children were being kidnapped. She and nine of the children were removed from the bus.

265. At 4.30 p.m., communication with the remaining sixteen children and two accompanying adults was lost. The group was transported to the Russian city of Donetsk.

266. On the same day, the First Deputy of the Head of the Donetsk Regional State Administration contacted the Children's Rights Commissioner for the President of the Russian Federation. The latter stated that she knew nothing about the incident.

267. The Ukrainian Ministry of Foreign Affairs contacted its Russian counterparts seeking the return of the children and the prosecution of the official who had permitted their illegal transportation across the border.

268. The Ukrainian Parliament Commissioner for Human Rights applied to the General Prosecutor of the Russian Federation and the Ministry for Civil Defence, Emergencies and Elimination of Consequences of Natural Disasters requesting them to take immediate measures to prevent the illegal forcible transportation of citizens of Ukraine to Russia.

269. On 13 June 2014, the Ukrainian Acting Minister of Foreign Affairs contacted the Russian Minister for Foreign Affairs to discuss the return of the children. A request to provide immediate information concerning the abduction of the group was repeatedly sent to the General Prosecutor of the Russian Federation.

270. On 13 June 2014, the Ukrainian General Consul in the Rostov Region of Russia, Mr Moskalenko, visited the Donetsk Investigative Department of the Investigative Committee of the Russian Federation ("ICRF") in the Rostov Region and lodged a verbal complaint. The officer on duty prepared a "record of oral submission of information of a crime committed", signed by Mr Moskalenko. In his complaint Mr Moskalenko described the events and the whereabouts of children at the time and claimed

that the incident had been an abduction. He requested that the investigating authorities "take immediate action to return to Ukraine all the children and the persons who were accompanying them".

271. The Ukrainian Embassy in the Russian Federation submitted a request to the Border Service of the FSB for assistance in resolving formal issues regarding the exit of the children and adults from Russian territory. An agreement was reached on 13 June 2014, after the Court had notified the parties of its Rule 39 indication, that the children would be handed into the care of the Consul General of Ukraine in Rostov-on-Don (Russia).

272. The same day, the group were transferred to the Consul General of Ukraine. They were taken to the airport by Ukrainian diplomats and, at 10.20 p.m., departed for Ukraine on a chartered aircraft provided by the Donetsk Regional State Administration. They arrived at Dnipropetrovsk at 11.10 p.m.

273. By letter dated 15 July 2014, the Rostov Region Prosecutor's Office informed the Ukrainian Parliament Commissioner for Human Rights that the investigation had not established that any unlawful, forcible transportation of Ukrainian children to Russia had taken place. This decision was not challenged.

274. The General Prosecutor's Office of Ukraine launched a pre-trial investigation in criminal proceedings into the abduction of twenty-five children and three adults and the illegal transportation of sixteen children and two adults across the border.

(b) Second group of children

275. On 26 July 2014, sixty-one children from an orphanage in the Luhansk region (forty-three of whom were under the age of five), four further minors and twenty-two adult employees of the orphanage were abducted and forcibly taken to the Izvaryne-Donetsk checkpoint at the Ukraine-Russia border by separatists from the "LPR".

276. On the same day, the Ukrainian Ministry of Foreign Affairs contacted its Russian counterparts requiring them to comply with international legal obligations in the sphere of protection of children's rights and to take all necessary measures to prevent the illegal transfer of the Ukrainians across the border to the Russian Federation.

277. On 27 July 2014, the Consul General of Ukraine in Rostov-on-Don and the Commissioner for Children's Rights in the Rostov Region reached an agreement to return the Ukrainian citizens.

278. The same day, at around 10.30 a.m. Moscow time, the abducted children and adults were returned to Ukrainian territory via the Chertkovo-Milove checkpoint.

279. The Svativskyy District Police Department of the Luhansk region initiated a pre-trial investigation into the illegal deprivation of liberty or abduction of the group.

(c) Third group of children

280. On 8 August 2014, armed separatists abducted eight children from a care home for babies in Luhansk. The children were aged between eight months and two years, and six of them had cerebral palsy.

281. The children were transported across the Ukraine-Russia border at the Izvaryne-Donetsk checkpoint without medical support or the necessary paperwork.

282. On the same day, the Ukrainian Ministry of Foreign Affairs contacted its Russian counterparts requiring them to comply with international legal obligations in the sphere of protection of children's rights and to take all necessary measures to prevent criminal action by representatives of terrorist groups.

283. The Ukrainian Ministry of Foreign Affairs also notified the Ukrainian Parliament Commissioner for Human Rights of the abduction and transfer of the children across the Russian border. She immediately contacted the Commissioner for Human Rights of the Russian Federation and requested her to take all possible measures to secure the unconditional safe return of the children to Ukraine and to provide them with necessary assistance.

284. As a result of cooperation between the Ukrainian Ministry of Foreign Affairs, the Ukrainian Embassy in the Russian Federation, the Consul General of Ukraine in Rostov-on-Don and the Ukrainian Parliament Commissioner for Human Rights on the one hand, and of the Commissioner for Human Rights of the Russian Federation, the Commissioner for Children's Rights in the Rostov Region and the Department of Protection of Health in Rostov Region on the other, the children were transferred to the City Clinical Hospital in Donetsk (Russia) to provide them with the necessary medical care in view of their health problems.

285. On 13 August 2014, the Ukrainian Parliament Commissioner for Human Rights and the chief doctor of the orphanage in Luhansk arrived to accompany the children back to Ukraine.

286. At around 11 a.m. Ukrainian time, the children were transferred to representatives of Ukraine. At around 2 p.m. they crossed the Russia-Ukraine border through the checkpoint near the village of Milove. The children were taken to the Kharkiv Regional Specialised Orphanage no. 1 to be examined by medical personnel.

287. No criminal complaint was lodged with the Russian authorities.

B. According to the Netherlands

1. The conflict in the east of Ukraine

288. Since October 2013, the political situation in Ukraine has been unstable. Domestic political unrest increased after the announcement by the Ukrainian government, on 21 November 2013, that they would suspend

preparations for signing the Association Agreement with the EU and renew dialogue with the Russian Federation on trade and economic matters. On 17 December 2013, after talks between the Presidents of Ukraine and Russia and amid protests in Kyiv against deepening ties with the Russian Federation, an economic deal between the two States was announced. This led to mass protests against the government, starting in Kyiv but quickly spreading to other parts of the country.

289. As of 18 February 2014, when demonstrators were shot at on and near Independence Square in Kyiv, the political unrest escalated. In the weeks that followed, several public buildings were occupied, including the Ministry of Justice and City Hall. On 21 February 2014, the President of Ukraine signed a compromise deal with opposition leaders scheduling elections for the end of the year and announcing a return to the 2004 Constitution. However, the Ukrainian Parliament decided to reinstate the 2004 Constitution that same day. The President of Ukraine left Kyiv for Kharkiv on 22 February 2014, from where he travelled onwards to Crimea then to the Russian Federation. The Russian President later disclosed that the Russian Federation had assisted his travel. On 22 February 2014, one hour after the President of Ukraine stated in a televised address that he would not resign, the Ukrainian Parliament decided to remove him as he was deemed unable to perform his duties. Early elections were scheduled for 25 May 2014. A new government was formed on 26 February 2014 to act in the meantime.

290. The Russian Federation refused to recognise the new government of Ukraine and continued to recognise the former President of Ukraine as the legitimate head of State. The Russian authorities considered the request by the former President of Ukraine "to use the armed forces of the Russian Federation to re-establish the rule of law, peace, order, stability and to protect the people of Ukraine", while the Ukrainian government asserted that this request "lacked any legal validity". In early March 2014, the Parliament of the Russian Federation granted permission for the use of military force in Ukraine "to protect ethnic Russians".

291. By the end of February 2014, unidentified armed men without military insignia or other identifying marks on their uniforms began to take over strategic infrastructure in Crimea, seizing the Parliament building on 27 February 2014. Because of the colour of their uniform, these men were referred to in media reports as "little green men". The President of the Russian Federation has conceded the deployment of Russian troops in Crimea to "stand behind Crimea's self-defence forces". Members of the armed forces of the Russian Federation who fought in Ukraine later described how they received orders to remove insignia from their uniforms before travelling to Ukraine. On 27 February 2014, the Parliament of the Autonomous Republic of Crimea dismissed the local government and appointed Mr Aksyonov as its new "Prime Minister".

292. On 11 and 16 March 2014, the Supreme Council of the Autonomous Republic of Crimea and the Council of the Special Status City of Sevastopol "voted" in favour of secession from Ukraine. On 16 March 2014, the reported result of a referendum on the future status of Crimea was that 96% of the voters were in favour of acceding to the Russian Federation (the reported turnout being over 81%).

293. On 18 March 2014, a "treaty" was signed between the "Republic of Crimea" and the Russian Federation formalising the annexation of the Crimean Peninsula by the Russian Federation. On 14 April 2014, Mr Aksyonov was appointed Acting Head of the Republic of Crimea by the President of the Russian Federation. In March 2015, the President of the Russian Federation admitted that he had "ordered work on returning Crimea" to the Russian Federation on 22 February 2014, in a meeting called after President Yanukovych had been overthrown.

294. On 19 March 2014, the Constitutional Court of Ukraine ruled the referendum of March 2014 unconstitutional. On 27 March 2014, the United Nations General Assembly adopted Resolution 68/262, affirming the "sovereignty, political independence, unity and territorial integrity of Ukraine within its internationally recognized borders" and underscoring the invalidity of the referendum held on 16 March 2014.

295. In March 2014, armed groups became active in several locations in the south and east of Ukraine. These armed groups were oriented towards the Russian Federation and their objective was to secede from Ukraine and to proclaim independent republics. In parts of the Luhansk and Donetsk regions, these groups succeeded in seizing public buildings.

296. The separatists consisted of local fighters and volunteers from the Russian Federation and supported by the Russian Federation, including through the deployment of (former) members of that State's armed forces. For example, as of early April 2014, the "little green men", earlier reported to have been seen in Crimea, were reported in the east of Ukraine. It appears that they were members of the armed forces of the Russian Federation.

297. Early April 2014, the separatists seized control of more public buildings in the east of Ukraine, such as the regional police headquarters in Horlivka, and also seized control of several towns near the Russian border. In the course of April 2014, the separatists established control of an area that included the cities of Slovyansk (being the most western gain), Luhansk, Donetsk and the village of Hrabove.

298. On 7 April 2014, the "DPR" was proclaimed by separatists. On 11 May 2014, among widespread international condemnation, an "independence referendum" was held in the separatist-controlled parts of Donetsk province. Ukraine's acting President called the result of the referendum a "farce" and stated that the referendum "will have no legal consequences except the criminal responsibility for its organisers". The spokesperson of the United States' Department of State declared that the

referendum was "illegal under Ukrainian law and ... an attempt to create further division and disorder". The President of France stated that the referendum "had no legitimacy and no legality" and that it was "null and void". The United Kingdom's Foreign Secretary stated that the referendum was "illegal by anybody's standards". The EU declared the referendum illegal and refused to recognise the outcome. It was reported that in Donetsk 89% had voted in favour of independence. Following the referendum, the "DPR" appealed to the Russian Federation to be absorbed by it. Mr Pushilin said:

> "Based on the will of the people and on the restoration of an historic justice, we ask the Russian Federation to consider the absorption of the Donetsk People's Republic into the Russian Federation ... The people of Donetsk have always been part of the Russian world. For us, the history of Russia is our history."

299. After the referendum, and without referring to the call for absorption, the Russian Federation said that it respected the will of the people in Donetsk and Luhansk.

300. In the aftermath of the referendum, the separatists continued to seize public buildings. Meanwhile, attempts by the Ukrainian armed forces to retake control of certain areas or cities failed while the separatists continued to advance and gain more ground. Around the same time, in an interview in mid-April that took place in Moscow, the President of the Russian Federation referred to south-east Ukraine as "Novorossiya", a historic term used during the time of the Russian Empire that refers to the regions north of the Black Sea (now part of Ukraine) that were conquered by the Russian Empire in the 18th century.

2. Events preceding the downing of flight MH17

(a) Expansion of the conflict to airspace

301. In the period between April and July 2014, the conflict between the separatists and the Ukrainian forces intensified and expanded into the air. In April 2014, Ukraine launched an anti-terrorism operation aimed at isolating the separatists. At that time, the separatists controlled an area in the east of Ukraine that included the cities of Donetsk, Slovyansk and Luhansk.

302. On 22 April 2014, a Ukrainian military aircraft was downed over Slovyansk. On 25 April 2014, a Ukrainian military helicopter was shot down at Kramatorsk. As of May 2014, the Ukrainian armed forces intensified their air operations leading to an increased number of incidents involving aircraft. On 2 May 2014, three Ukrainian military helicopters were shot down near Slovyansk. Other incidents with Ukrainian military helicopters occurred on 5 May, 29 May and 4 June 2014. On 6 June 2014, a Ukrainian military aircraft was downed using MANPADS at an altitude below 4,500 meters near Slovyansk.

303. During an intercepted telephone conversation on 8 June 2014, Mr Girkin said his men were outnumbered by the enemy and that "Russian support" was required to prevent the separatists losing their ground. Mr Girkin specifically requested the delivery of military material, including anti-aircraft defence.

304. On 14 June 2014, a Ukrainian Air Force military transport aircraft was downed during landing at Luhansk airport by MANPADS followed by machine gun fire, causing 49 fatalities.

305. On 23 June 2014, a convoy of the 53rd AAMB, consisting of almost fifty different vehicles including six Buk-TELARs, left its base near Kursk in the Russian Federation and travelled in a southerly direction. It was last seen south of Millerovo, twenty-five kilometres from the border with Ukraine, travelling west towards the border.

306. On 24 June 2014, a Ukrainian military helicopter was shot down near Slovyansk using MANPADS. On 1 and 2 July 2014, attempts were made to down two Ukrainian Sukhoi fighter jets, allegedly with MANPADS. On 14 July 2014, three days prior to the downing of flight MH17, a Ukrainian military transport plane was downed near Davido-Nikolskoye near the border with the Russian Federation at an altitude between 6,200 and 6,500 metres. On 16 July 2014, a Ukrainian Sukhoi fighter jet was shot at in the Donetsk region near the border with the Russian Federation while flying at an altitude between 6,250 and 8,250 meters.

307. During the days prior to the downing of flight MH17, heavy fighting continued to take place in the east of Ukraine and more specifically in the areas south-east of Donetsk, south of Snizhne and around Savur-Mohyla. Several places, including Marinovka, came under separatist control resulting in almost full control by the separatists over a passage from separatist held-territory to the Russian Federation.

(b) The request for and delivery of the Buk-TELAR with crew

308. The separatists tried to acquire air defence systems in an attempt to protect the area they controlled against the air strikes by the Ukrainian armed forces. In the spring of 2014, they had already seized MANPADS from the Ukrainian armed forces. On 29 June 2014, they took over a military base of the Ukrainian armed forces in Donetsk where Buk surface-to-air missile systems were stationed. However, the Buk systems left at this military base were not operational and therefore could not be deployed. On 15 July 2014, in the afternoon, a call was made by an unidentified person to a separatist to discuss the air strikes by the Ukrainian armed forces. During the conversation, the hope was expressed that the Russian Federation would assist separatists with surface-to-air defence systems.

309. On the morning of 17 July 2014, in an intercepted telephone conversation between two separatists, it was confirmed that a "Buk" had arrived. On the same day, Mr Dubinskiy spoke with a separatist and asked

whether the "Buk" had come with a crew. During that intercepted telephone conversation, it was confirmed that the "Buk" had arrived in Donetsk with a crew and that it would be sent to another location immediately.

310. In an interview with a German-based investigative journalism network, Mr Khodakovsky stated that he knew "for sure that the popular militia did not shoot down the Boeing" because they did not have "specialists" who could "operate such high-precision weapons systems".

(c) The transport to and arrival at the launch location and launch of a missile

311. A Buk-TELAR carrying four missiles was brought into Ukraine from the Russian Federation and transported in Ukraine on a red low-loader carried by a white Volvo truck as part of a convoy accompanied by separatists. Associated Press published an article describing how two of its journalists witnessed a Buk-TELAR with four missiles travelling through Snizhne on 17 July 2014 around lunch time. They reported that the vehicles had stopped in front of them to check that they were not making videos of the convoy. According to the journalists, "[a] man in sand-coloured camouflage without identifying insignia" approached them.

312. During its transportation on the red low-loader, the Buk-TELAR was escorted by multiple vehicles, including a black minibus, a green UAZ-49 jeep, a Toyota RAV4 and a white lorry. The same vehicles are identified in different videos and photographs at different locations along its route. The Buk-TELAR was transported from Sukhodilsk, near the Russian border, towards Yenakiieve, Ukraine. It drove from Yenakiieve towards Donetsk, where it first appeared at 9.40 a.m. From Donetsk, it travelled further towards Makiivka, Zuhres, Shakhtarsk then Torez before arriving in Snizhne at around midday on 17 July 2014. In Snizhne, the Buk-TELAR was offloaded and driven under its own power in a southerly direction towards Pervomaiskyi. Intercepted telephone conversations between separatists confirm this.

313. Based on an analysis of telecommunications data, intercepted telephone conversations, witness statements, image and video analysis and satellite images, it appears that the Buk-TELAR launched a missile at around 4.20 p.m. from a field south of Snizhne and west of Pervomaiskyi. At that time, the area was under the control of the separatists.

314. On 18 July 2014, the US President stated that "[e]vidence indicates that the plane was shot down by a surface-to-air missile that was launched from an area that is controlled by Russian-backed separatists inside of Ukraine". This evidence consisted of satellite data.

315. A witness testified that they heard and saw a missile being launched and also saw the field from which it was launched catch fire. This witness pointed out the location from which the missile was launched on a satellite image. The same location, namely an agricultural field south of Snizhne and west of Pervomaiskyi, emerged from other sources. A second witness

testified that Russian military personnel were with the Buk-TELAR at the launch site. According to this witness, separatists clarified that these individuals were from the FSB.

(d) Return to the Russian Federation

316. Immediately after the launch of the missile, the Buk-TELAR was removed from the launch site leaving behind a scorched piece of land. It was driven under its own power towards Snizhne. The same witness who heard and saw a missile being launched saw the Buk-TELAR being driven to the road after the launch. In Snizhne, in the late evening of 17 July 2014, the Buk-TELAR was reloaded onto the white Volvo truck with the low-loader and driven to Krasnyi Luch, then to Debaltseve and from there to Luhansk.

317. At 9.32 p.m, while the Buk-TELAR was being transported back to the Russian Federation, a person named Ryazan, who has now been identified as Eduard Gilazov, called Mr Kharchenko, the commander of a combat unit in the Donetsk region addressed by Mr Gilazov as "commander", to inform him that "a fighter" had got lost from a "Buk-launcher" and that he had lost his crew. Mr Kharchenko ordered Mr Gilazov to bring the lost crew member to him in Snizhne.

318. In the early morning of 18 July 2014, the Volvo truck and low-loader carrying the Buk-TELAR arrived in Luhansk carrying three missiles instead of four. From Luhansk the transport continued towards the Russian Federation and crossed the border.

3. Flight MH17

(a) Situation in the airspace above the east of Ukraine

319. On 17 July 2014, several restrictions relating to the airspace of both Ukraine and the Russian Federation were in force. The airspace above the conflict zone in the east of Ukraine was open for civil air traffic from FL320 (which corresponds to 9,753 metres) and higher. It was used by civil aircraft on 17 July 2014, including Air India Flight 113 (in a north-western direction), Eva Air Flight 88 (in a south-western direction) and Singapore Airlines Flight 351 (in a south-western direction).

(b) The downing of flight MH17

320. The flight plan for flight MH17 included passage over Ukraine and the Russian Federation and there were no airspace restrictions that affected this part of the planned route. The entire approved flight route of flight MH17 included the Netherlands, Germany, Poland, Ukraine, the Russian Federation, Kazakhstan, Turkmenistan, Uzbekistan, Afghanistan, Pakistan, India, Myanmar, Thailand and Malaysia.

321. At 10.31 a.m. coordinated universal time ("UTC"), the aircraft took off from Amsterdam Airport Schiphol bound for Kuala Lumpur International

Airport. There were 283 passengers, eleven crew members and four pilots on board (298 people in total). Nationals of seventeen different States were on board flight MH17, some of whom possessed dual nationalities. The passengers of flight MH17 were nationals and/or residents of the Netherlands, Malaysia, Australia, Indonesia, the United Kingdom, Germany, Belgium, the Philippines, Canada, Vietnam, New Zealand, Romania, Israel, Ireland, Italy, South Africa and the United States of America.

322. At 1.19:31 p.m. UTC (4.19:31 p.m. local time), flight MH17 was cruising at a height of 10,058 metres and a speed of 913 kilometres per hour and was approximately twenty-six kilometres from the Buk-TELAR. At 1.19:56 p.m. UTC, the cockpit crew made its last transmission. At 1.20:00 p.m. UTC, Dnipro Radar gave instructions to the cockpit crew but no response was received. At 1.20:03 p.m. UTC, flight MH17 crashed near Hrabove. Parts of the aircraft and human remains were observed falling from the sky. Wreckage parts of the aircraft were found within an area of about fifty square kilometres and spread over six sites, including near the villages of Rozsypne and Petropavlivka.

(c) Initial responses to the downing of flight MH17

323. In the initial (social) media responses to the downing of an aircraft in the east of Ukraine, it was stated that a Ukrainian military transport aircraft, an Antonov-26, had been downed. For example, a post on Mr Girkin's account on VKontakte, a Russian social media site, made at around 4.41 p.m. local time (21 minutes after contact was lost with flight MH17), read, "[i]n the vicinity of Torez, we just downed a plane, an AN-26". This message was later updated with the comment that there was information of a second downed plane, which was suggested to be a Sukhoi fighter jet used by the Ukrainian air force. Shortly after the downing, the "DPR" press and a television broadcast of the Russian outlet LifeNews both reported that a Ukrainian military transport aircraft had been downed from within separatist-controlled territory. At 6.01 p.m. local time, Russian news agency Tass reported that, according to witnesses, "militia of the self-proclaimed Donetsk People's Republic have brought down a military transport Antonov-26 (An-26) plane of the Ukrainian Air Force on the outskirts of the town of Torez".

324. Journalists present in the area during the downing confirmed in testimonies that separatists informed them that an aircraft had been downed. One journalist was informed by the press office of the separatists that it was a military aircraft of Ukraine. A witness also testified that, initially, those present at the launch location had been pleased because they had been told that a military transport plane had been downed. Intercepted telephone conversations also confirm that it was initially believed that a Ukrainian military aircraft had been shot down.

325. As soon as it became clear that a civilian aircraft had been brought down, public announcements on the downing of a military aircraft in separatist-controlled territory were either amended or deleted. Pro-Russian media outlets started to report that flight MH17 had been downed by a Ukrainian missile or a Ukrainian fighter jet. In the following days, both the "DPR" and the Russian Federation accused the Ukrainian armed forces of downing flight MH17. On 21 July 2014, the Russian Ministry of Defence held its first press conference on the downing of flight MH17, stating that it had radar data in its possession showing a Ukrainian fighter jet in the vicinity of flight MH17. This theory was later refuted on the basis of the radar data provided by the Russian Federation, among other evidence.

4. Confirming the use of the Buk-TELAR against flight MH17

(a) Cause of the crash

326. The crash of flight MH17 resulted in the loss of life of all 298 people on board. In the days after the crash and under escort of the SMM, air accident investigators from Ukraine and Malaysia and international participants of the repatriation mission were able to access the crash area to start the recovery and repatriation of the victims as well as the technical investigation into the cause of the crash. Ukraine requested the Netherlands to carry out the investigation in accordance with Article 26 of the Chicago Convention. The wreckage parts were photographed extensively during visits to the crash area, showing their locations mostly undisturbed. The majority of the wreckage was clustered at six sites, mostly at three sites south-west of Hrabove. The distribution of the wreckage parts over a large area indicated an in-flight break-up of the aircraft, which is typically the result of the detonation of a warhead with a heavy explosive charge outside the aircraft. The detonation of a heavy explosive charge is, furthermore, typically the result of the use of a heavy surface-to-air missile system.

327. The security situation of the crash site did not allow for the technical investigation to commence before 4 November 2014. On and after 4 November 2014, the security situation allowed the investigators to continue their visits to the locations of the wreckage parts. The investigators were given three opportunities to visit the crash site, namely between 4 and 22 November 2014, between 20 and 28 March 2015 and between 19 April and 2 May 2015. During a six-day period starting on 16 November 2014, wreckage parts were collected and transported to the Netherlands for further investigation. After 20 March 2015, more wreckage parts were collected from a site north-west of the village of Petropavlivka. The recovered wreckage parts were examined to determine the cause of the in-flight break-up of the aircraft. It was concluded that the cause of the crash of flight MH17 originated from the ground. MANPADS could not have caused the crash as these cannot reach the altitude of flight MH17 at the time of the disintegration of the

aircraft. Only larger surface-to-air missiles, usually carrying a warhead in the form of a fragmentation device, are able to engage aircrafts of the size and speed and at the altitude of flight MH17. These fragmentation warheads contain hundreds to several thousands of pre-formed fragments that are layered around an explosive core. These fragments may take various shapes, such as the shape of bow-ties, and are designed to penetrate the target aircraft structure upon detonation of the warhead.

328. The forensic evidence confirmed that flight MH17 was downed by a Buk surface-to-air missile. It was established that a missile detonated above the left-hand side of the cockpit of flight MH17 at around 4.20:03 p.m. local time causing flight MH17 to break-up in flight and subsequently crash. The missile that caused the downing of flight MH17 was identified as a Buk system's missile from the 9M38-series which is capable of being launched by a Buk-TELAR operating independently.

(b) The Buk surface-to-air missile system

329. A Buk surface-to-air missile system is a mobile air defence system that was introduced by the former Soviet Union in the late 1970s. It is an anti-aircraft weapon system that is designed to identify targets in the air and launch a missile to eliminate them. The Buk system is equipped with one central radar vehicle and multiple launch vehicles with their own (limited) radar capability. One advantage of this improved surface-to-air missile system is that upon destruction or failure of the Buk command post ("Buk-CP") or target acquisition radar (Buk-TAR"), the Buk-TELAR is able to continue to operate independently, albeit to a limited extent. Missiles launched by a Buk system can reach targets at an altitude of up to 24 kilometres.

330. The Buk system was operated by air defence brigades of the Russian armed forces, such as the 53rd AAMB. An important step in the process of the launch of a missile is the identification of its target. The Buk-TELAR is equipped with its own radar and is thereby capable of operating on its own. The methods of the Buk system, including the Buk-TELAR when operating independently, to identify targets include the so-called "identification friend or foe" ("IFF") method. This method is limited to giving an indication whether the target is a "friend" (one of its own military aircraft), or "foe" (not one of its own military aircraft, including foreign military aircraft and civil aircraft). Further indications as to the target's nature can be gleaned from characteristics of the appearance of the aircraft on the radar screen. These characteristics may vary according to whether the acquired target is a fighter aircraft, a helicopter, a military transport aircraft or a civil aircraft. The identification methods employed by the Buk system, including the Buk-TELAR operating independently, are not able to identify civilian aircraft as such. For information on civilian flights, the Buk-CP depends on external information from the brigade radar or the national radar and defence network.

The IFF method employed by the Buk system, including the Buk-TELAR operating independently, identifies civilian aircraft as "foe" by default.

331. The Buk-TELAR is, under normal circumstances, operated by four people: a commander, a first operator, a second operator, and a driver-mechanic. The commander is primarily responsible for communication with the battalion or brigade command post as well as with subordinates in the Buk-TELAR and/or transporter erector launcher and loader vehicle ("Buk-TELL"). The commander is also responsible for target acquisition and identification and for supervision of the first and second operator. The commander is the only person on board who is trained and authorised to launch a missile. He holds the "commander's key" which is required to launch a missile. If there is no higher command present, the commander takes the decision to launch a missile. The training of a commander is specialised and typically takes several years: in Ukraine the commander would receive five years of training. The presence of a commander is therefore indispensable to ensure the launch of a missile from a Buk-TELAR.

5. Aftermath

(a) Immediate international responses and repatriation and identification of the victims

332. The downing of flight MH17 immediately led to international responses of both States and international organisations, including the UN Security Council and the International Civil Aviation Organization ("ICAO").

333. After the crash of flight MH17, priority was given to the repatriation of the human remains of the victims from the crash site to storage facilities where they could be preserved for further repatriation and identification. On 28 July 2014, the Netherlands and Ukraine signed an agreement on the establishment of the International Mission for Protection of Investigation tasked with facilitating the recovery of remains and conducting the investigation called for in UN Security Council Resolution 2166 (2014). However, the recovery efforts were severely hampered by the ongoing armed conflict in the area.

(b) Technical investigation

334. A technical investigation in accordance with Article 26 of the Chicago Convention was also initiated. Ukraine, as the "State of Occurrence" responsible for instituting an inquiry into the circumstances of the crash of flight MH17, requested the Netherlands to take over the investigation. To this end, Ukraine and the Netherlands signed a Memorandum of Understanding on 24 July 2014 in which Ukraine delegated the investigation to the Netherlands.

335. The investigation, undertaken with reference to the international standards and recommended practices in Article 13 of the Chicago Convention, was carried out by the DSB, which is tasked to investigate certain occurrences and, if necessary, make recommendations to prevent future occurrences. Ukraine, Malaysia, the United States of America, the United Kingdom, Australia and the Russian Federation participated in the investigation and appointed accredited representatives.

336. As explained, for the first four months after the crash, the crash area was unsafe and therefore inaccessible for investigation. Due to the limited access to the crash area, and to enable further investigation into the wreckage parts of the aircraft, an assessment was made as to which wreckage parts were to be transported to the Netherlands for further investigation. In total, three recovery missions of wreckage parts were organised. States who had a special interest because they had lost citizens in the crash were invited to view the recovered wreckage parts.

337. As part of the investigation, information was required and requested from other States. For example, the Russian Federation was requested to provide information regarding radar and communication data and information on weapon systems. With respect to the requested radar data, the Russian Federation informed the DSB that it was unable to provide this radar data as it had not been saved. The Russian Federation provided a video recording of the radar screen, which showed combined primary (non-processed) and secondary (processed) radar data.

338. On 9 September 2014, the DSB published its preliminary report on the circumstances of the crash of flight MH17. Its main findings were that: the crash had not been caused by a technical failure of the aircraft, its engines, or systems; damage was mainly observed on the forward section of the aircraft, and specifically on the left-hand side of the cockpit; the damage pattern indicated penetration by a large number of high-energy objects originating from outside the aircraft; and the aircraft had broken up in-flight.

339. On 13 October 2015, the DSB published its report on the technical circumstances of the crash of flight MH17. Among its main findings were the following: a) at 1.20:03 p.m. UTC, a 9N314M warhead carried by a 9M38-series Buk missile detonated outside and above the left-hand side of the cockpit of flight MH17 resulting in the penetration of the aircraft by a large number of high-energy objects; b) the structural damage caused by the detonation of the warhead led to the in-flight breakup of the aircraft, resulting in the loss of life of all 298 people on board; c) other scenarios, including an air-to-air missile, were excluded on the basis of the available evidence; d) the missile was launched from within an area of 320 square kilometres in the east of Ukraine which covers Snizhne and Pervomaiskyi.

340. The DSB also conducted a separate investigation into the availability of passenger information for the purpose of informing the next of kin of the

Dutch victims. Subsequently, the DSB conducted an investigation into the follow-up of its recommendations regarding flying over conflict zones.

(c) Criminal investigation and prosecution

(i) The Joint Investigation Team

341. On 7 August 2014, authorities from the Netherlands, Australia, Belgium and Ukraine signed an agreement to set up a JIT to investigate the downing of flight MH17 and to establish the facts, identify those responsible and collect evidence which could be used in court. In November 2014, Malaysia formally joined the JIT as a member.

342. As part of the criminal investigation, a forensic investigation aimed at gathering and analysing physical evidence was carried out. The remains of the victims, their personal belongings and wreckage parts of the aircraft were subjected to forensic investigation. This led to the recovery of metal fragments and to the discovery of explosive residue on wreckage parts of the aircraft.

343. Between 2014 and the first half of 2016, investigators dismantled three Buk missiles from the 9M38-series: one 9M38-type and two 9M38M1-type. All missiles had a 9N314M warhead. The dismantling of the Buk missiles allowed investigators to compare the parts of the Buk missiles to parts that were recovered from the crash area. Arena tests were conducted in which both Buk missiles and a warhead of a Buk missile were detonated. This allowed the investigators to analyse the effects of the launch of a missile, the speed and direction of the fragmentation parts of the warhead and the form and weight of these fragmentation parts after detonation and impact. These findings were compared to the findings of the metal fragments recovered from the remains of the victims, their personal belongings and wreckage parts of the aircraft.

344. On 28 September 2016, the JIT presented its first partial findings. Its main findings were that flight MH17 had been shot down on 17 July 2014 by a Buk missile from the 9M38-series; the missile had been launched by a Buk-TELAR from a field south of Snizhne and west of Pervomaiskyi, which was at the time under the control of separatists; and the Buk-TELAR had been transported from the territory of the Russian Federation into Ukraine and, after the launch, back to the Russian Federation. The JIT refuted the claim of the Russian Ministry of Defence that the launch location was near Zaroshchenskoye. It moreover established that, in any event, at the time of the downing Zaroshchenskoye was also under the control of separatists.

345. On 24 May 2018, the JIT presented further findings, namely that the Buk-TELAR which launched the missile belonged to the 53rd AAMB of the armed forces of the Russian Federation. The Buk-TELAR had been part of a convoy that travelled from its base in the Russian Federation towards the Ukrainian border between 23 and 25 June 2014.

346. On 19 June 2019, the JIT announced the names of four suspects who would be prosecuted by the OM for organising the transportation of a Buk-TELAR to the east of Ukraine around 17 July 2014 and arranging that it be brought to a location from where a Buk missile was launched which caused the downing of flight MH17. The four individuals were also suspected of being involved in the return of the Buk-TELAR to the Russian Federation. The OM subsequently indicted the following three Russian nationals and one Ukrainian national: i) Igor Girkin, former colonel of the FSB and at the time of the downing the Minister of Defence and commander of the army of the "DPR"; ii) Sergey Dubinskiy, former military officer of the GRU and one of Mr Girkin's deputies in 2014 and head of the intelligence service of the "DPR"; iii) Oleg Pulatov, former military officer of the Russian Spetznaz-GRU, the special units of the Russian military intelligence service, and in 2014 deputy head of the intelligence service of the "DPR" and one of the deputies of Mr Dubinskiy, and; iv) Leonid Kharchenko, commander of a combat unit in the Donetsk region in July 2014. They were charged with causing the crash of flight MH17, resulting in the death of all persons on board, punishable pursuant to Article 168 of the Dutch Criminal Code; and the murder of the 298 persons on board flight MH17, punishable pursuant to Article 289 of the Dutch Criminal Code.

347. At its press conference, the JIT also presented further findings and evidence including evidence as to the presence of members of the 53rd AAMB in the west of the Russian Federation near the border with Ukraine in July 2014; a chat conversation from social media in which one of the members of that convoy revealed that members of the 53rd AAMB were part of the convoy that travelled between 23 and 25 June 2014 from the base near Kursk towards Millerovo and suggested that some of them travelled onwards towards Ukraine; and evidence indicating requests made by separatists to the Russian Federation for military support in the months prior to 17 July 2014.

348. On 14 November 2019, the JIT released a witness appeal indicating that it was looking for information on the people within the military and administrative hierarchy involved in the downing of flight MH17. For the purpose of the call for witnesses, the JIT released several intercepted telephone conversations revealing further contact between "DPR" separatists and officials of the Russian Federation including the Minister of Defence of the Russian Federation, Sergei Shoigu.

(ii) The prosecution of individuals

349. In 2015, Australia, Belgium, the Netherlands, Malaysia and Ukraine proposed to establish an international tribunal for the purpose of prosecuting those responsible for crimes connected with the downing of flight MH17 under Chapter VII of the UN Charter. A draft resolution on the adoption of the Statute of the International Criminal Tribunal for Malaysia Airlines Flight

MH17 was presented by Malaysia to the UN Security Council on 29 July 2015. Its adoption was vetoed by the Russian Federation.

350. On 5 July 2017, it was announced that the JIT countries had decided that any individual suspected to be responsible for the downing of flight MH17 would be prosecuted in the Netherlands under Dutch law.

351. In September 2017, it was decided that any prosecution relating to the downing of flight MH17 would be heard by the first instance court in The Hague.

352. On 19 June 2019, the OM took the decision to prosecute the suspects.

353. By letter dated 10 October 2019, the Russian Federation requested the Netherlands to consider transferring the criminal proceedings to the Prosecutor General's Office of the Russian Federation. By letter of 10 December 2019, the Netherlands replied that such a transfer would not be in the interests of the proper administration of justice.

354. The criminal trial started on 9 March 2020. On 25 November 2020, the pre-trial stage was concluded and the trial was referred to the examining magistrate for the implementation of additional investigations.

C. According to Russia

355. The Russian Federation was not involved in the conflict in eastern Ukraine.

356. In the aftermath of the Maidan protests, Ukraine consistently failed properly to investigate the shootings. The following facts are, however, clear:

i) as the violence in Maidan got worse, European politicians attempted to mediate a constitutional settlement between President Yanukovych and leaders of the opposition;

ii) just as they reached agreement on 20 February 2014, the shootings intensified in Maidan for no apparent reason;

iii) the victims were policemen as well as protesters and both groups were shot with the same weapons and the same ammunition by the same provocateurs;

iv) the shootings came from buildings in the hands of the opposition; and

v) the resulting deaths incensed the crowds and, in the ensuing violence, the constitutional government of President Yanukovych was driven out.

357. The new authorities in Ukraine were not a constitutional government. They were installed as the result of a coup, which was not a lawful change of government. None of the constitutional bases for a President to cease to hold office applied in the present case. No impeachment procedure was initiated and President Viktor Yanukovych was not accused of any crime and/or treason, which would have been the only legitimate starting point for impeachment.

358. The new government was therefore unconstitutional and widely regarded as such in eastern Ukraine and in Crimea. It was also totally

unrepresentative. The key appointees all came from the west of Ukraine. Most major posts were taken by far-right extremists from Svoboda (formerly the fascist Social National Party of Ukraine) despite the fact that Svoboda had no broad national support.

359. The new authorities were not trying to restore the rule of law and democratic values. On the contrary, immediately after the displacement of constitutional government in Ukraine, attacks began against all who opposed the new order. Ukraine launched completely unlawful violence against its own people. The result was serious suffering which prompted waves of refugees to make their way to Russia. In response, the Russian Federation was perfectly entitled to provide humanitarian assistance to try and alleviate that suffering.

360. The Nazi heritage of the thugs responsible for this violence was obvious from the chosen symbols of the entities later formalised to accommodate them, such as the Azov battalion, whose commander Andrey Biletsky notably said that, "[t]he historic mission of our nation in this critical moment is to lead White Races of the world in a final crusade for their survival. A crusade against the Semite-led *Untermenschen*".

361. In relation to eastern Ukraine, the new authorities quickly launched an "Anti-Terrorist Operation" against entire civilian communities whose only crime was to refuse to recognise the displacement of the constitutional government of Ukraine.

362. Russian troops did not invade Ukraine. As for alleged Russian military support for separatists in eastern Ukraine, there is not even a prima facie case in terms of evidence. Since August 2014, the Russian Federation has sent humanitarian aid, consisting of medicines, food, clothing, construction materials, literature for studying, presents and other materials, to suffering people in Ukraine. The convoys were delivered to the territory of Donetsk and Luhansk through the Matveyev Kurgan and Izvarino checkpoints "under control of the Ukrainian border and customs services and with the presence of representatives of the OSCE mission".

363. Ten soldiers of the 331st Guards Airborne Regiment of the Russian armed forces were captured in Ukraine. However, these soldiers crossed into Ukraine by mistake.

364. Ukraine's allegations of cross-border firing, of incursions into Ukraine by Russian forces who allegedly fired rockets or artillery and of control over shelling carried out by separatists are not true.

365. The people the applicant Ukrainian Government have identified as agents of the Russian Federation were not, in fact, agents. There is no basis whatsoever for regarding separatist government figures or separatist commanders as Russian agents. In particular, Mr Girkin was not a State agent of the Russian Federation.

366. Without doubt some Russians went to fight in Ukraine, along with concerned and motivated people from a range of countries. It was inevitable

that Ukraine's outrageous violence against Russian speakers in eastern Ukraine would invoke sympathy from the Russian people, who were prompted to help in various ways.

367. The three groups of children and accompanying adults who entered the Russian Federation were fleeing a dire situation created by Ukraine's armed forces. They were not abducted but freely chose to enter the Russian Federation.

368. In their memorials, the respondent Government disputed the findings of the DSB and the JIT as to the circumstances in which flight MH17 had been downed. In oral submissions at the hearing on admissibility, the Representative of the Russian Federation said:

> "It is still argued – and no investigation has evidently and finally established – who exercised control over the territory upon which the aeroplane of Malaysia Airlines was shot down. The only certain fact is that this was the airspace of Ukraine, where the air traffic was managed by the Ukrainian air traffic authorities.
>
> We follow attentively the course of the trial in [the] District Court of The Hague and we know that, according to the clarifications of the court-appointed expert, Mr Mikhail Malyshevskiy, the alleged missile launch took place on the territory under the control of the Ukrainian Armed Forces and the warhead which in [the] view of the Joint Investigation Team downed the aeroplane belonged once again to the Armed Forces of Ukraine."

369. He further emphasised:

> "We know that Russia bears no responsibility in this respect. This is what we know.
>
> We also know that it was the airspace of ... Ukraine, which was managed by the Ukrainian authorities.
>
> .... It was established by the expert of the District Court of The Hague that [the] launch was done from the territory under control of the Ukrainian armed forces.
>
> And we also know, and it is a matter of fact, that the missile as presented by the Joint Investigation Team is the Ukrainian one."

COMPLAINTS

370. Following the relinquishment of application no. 8019/16 to the Grand Chamber (see paragraph 12 above), the respondent Government and the applicant Ukrainian Government were instructed, by letter of 15 May 2019, that all arguments should be particularised in their initial memorials, and that the memorials should constitute an exhaustive outline of their positions, having regard to all documents and submissions lodged to date, as regards both facts and law, for the purposes of admissibility.

371. On 21 December 2020, after the joinder of the three applications and when inviting the parties to submit their first-stage memorials (see paragraph 26 above), the three governments were informed that their memorials, when read together with the pleadings already provided to the

Grand Chamber, should constitute an exhaustive outline of their positions on admissibility in respect of the complaints made in these cases.

372. The Court considers the complaints set out below to be the definitive and exhaustive outline of the complaints now pursued by the applicant Governments. Accordingly, only the admissibility of these complaints will be examined (see *Ukraine v. Russia (re Crimea)*, [GC] (dec.), nos. 20958/14 and 38334/18, §§ 246-48, 16 December 2020).

I. APPLICATION NO. 8019/16

373. In their memorials before the Grand Chamber in respect of the general situation in eastern Ukraine, the applicant Ukrainian Government pleaded an administrative practice contrary to Articles 2, 3, 4, 5, 9, 10, 11 and 14 of the Convention and Articles 1, 2, and 3 of Protocol No. 1 in the "relevant parts of Donbass", committed by the respondent State from March 2014. The purpose of the application was said to be to vindicate the human rights of the victims, to bring the administrative practices to an end and to prevent their recurrence. The complaints were summarised as follows:

"Article 2	There are numerous reports of unlawful military attacks by Russian forces and their armed proxies against civilians and civilian objects which caused many fatalities. These include the shooting down of Malaysian Airlines flight MH17 on 17 July 2014, and numerous instances where civilians were shot dead on the ground. There are also multiple instances of civilians and Ukrainian soldiers who were prisoners of war or *hors de combat* being summarily executed, or otherwise tortured or beaten to death.
Article 3	Reports of the torture of civilians and Ukrainian soldiers who were prisoners of war or otherwise *hors de combat* have been frequently documented and verified throughout the conflict. These include many instances of sexual violence and rape. There have also been consistent reports that prisoners (particularly civilians) were held by the armed groups in conditions amounting to inhuman and degrading treatment.
Article 4	There are numerous reports and the statements of the victims that the 'DPR' and 'LPR' Russian proxies use forced labour of the Ukrainian prisoners of war and civilians for the digging of the tranches [sic] and other fortifications.
Article 5	Abductions, kidnapping for ransom, unlawful arrests and lengthy detentions became a key part of the armed groups' methods of conflict. OHCHR and the SMM (OSCE) have recorded countless cases of such detentions. At one point, one of the leaders of the armed

	groups admitted that his unit alone was detaining more than 600 people. The number and length of time of these unlawful detentions is almost unimaginable, and OHCHR has identified patterns and motivations which make it quite clear that there was a pattern or system in operation, almost from the outset.
Article 9	Chapter 3 [of the initial memorial] contains reports of a number of instances of deliberate attacks on, and intimidation of, various religious congregations not conforming to the Russian Orthodox tradition.
Article 10	Throughout the conflict, the armed groups have targeted independent journalists, both from the international and the Ukrainian media. Journalists have been prevented from reporting on 'elections', shot dead, arrested and detained. The armed groups also blocked Ukrainian broadcasters in the areas under their control.
Article 11	Membership of political organisations supporting Ukrainian territorial integrity was violently suppressed by the armed groups. Those involved in such organisations were targeted for assassination or arrest, and these groups were prevented from meeting or operating in territory under the control of the armed groups.
Article 1 of Protocol 1	The destruction of private property by Russian forces and their proxies in the local armed groups, including civilian homes and vehicles has been commonplace throughout the conflict. There have also been numerous reported instances of theft and looting of private and commercial property throughout the areas under their control. Large swathes of private property have been unlawfully appropriated without compensation.
Article 2 of Protocol 1	Numerous schools and educational facilities have been destroyed by the armed groups. Education in the Ukrainian language has been prohibited, and teachers have been harassed, arrested and in some instances killed.
Article 3 of Protocol 1	The right to free and fair elections in the territory under the control of Russia's paramilitary proxies has been comprehensively disrupted. Local citizens were prevented from voting in the Ukrainian Presidential elections, through acts of intimidation and violence.
Article 14	Virtually all of the violations alleged in this application were committed because of the ethnicity or perceived political affiliation of the victim. The armed groups systematically attacked civilians of Ukrainian ethnicity, or citizens who supported Ukrainian territorial integrity.

> That was the motivation behind nearly all of the violations alleged. Nationality and political opinion are relevant characteristics for the purpose of the article 14 analysis, and the relevant comparators are those of Russian ethnicity or pro-Russian political sympathies. It follows that nearly all of the violations of substantive Convention rights alleged in this case, also constitute violations of article 14 because the victims were singled out for attack by reason of a protected characteristic."

II. APPLICATION NO. 43800/14

374. In their first-stage memorial concerning the abduction and transfer to Russia of three groups of children and accompanying adults, the applicant Ukrainian Government set out the alleged violations in the following way:

> "Ukraine's primary case is that these facts demonstrate clearly (a) an unlawful restriction on freedom of movement in violation of Article 2 of Protocol 4; and (b) an unlawful deprivation of liberty, within the meaning of Article 5 of the Convention.
>
> As a supplementary position, Ukraine submits that the facts arguably give rise to violations Articles 3 and 8 of the Convention, although these latter alleged violations are obviously fact-specific and will depend upon an examination of the evidence relating to the treatment of individual children, and the effect of these events upon them, during the merits phase of this case."

375. They further clarified that they brought the case as *parens patriae* on behalf of the victims; or, in the alternative, that the events amounted to an administrative practice.

III. APPLICATION NO. 28525/20

376. The applicant Dutch Government complained that the shooting down of flight MH17 and the failure to investigate it amounted to violations of Articles 2, 3 and 13 of the Convention. As regards the substantive aspect of Article 2, they argued:

> "The Russian Federation violated Article 2 § 1 of the Convention by not safeguarding the lives of those within its jurisdiction. The Russian Federation did not ensure through a system of rules and through sufficient control that the risk to the lives of civilians from the Buk-TELAR was reduced to a minimum. In addition, in view of the real and immediate threat that the Buk-TELAR presented to the lives of persons on board a civilian aircraft, it was incumbent on the Russian Federation to take preventive operational measures to protect the individuals on board of Flight MH17. There is no indication that the Russian Federation took such measures ...
>
> Furthermore, the downing of Flight MH17 cannot considered to be justified under Article 2 § 2 of the Convention. The deprivation of life of those on board Flight MH17 did not fall within one of the situations in which the use of force, which may result in the conclusion that the deprivation of life, is permitted."

377. In respect of the procedural aspect of Article 2, they argued:

> "[T]he Russian Federation has violated the procedural limb of Article 2 of the Convention by failing to conduct an effective official investigation itself and by failing to cooperate by not responding adequately to the requests for legal assistance of the Government."

378. They contended in particular that the failure to conduct an effective official investigation:

> "... also undermines the right to the truth of [the family of] the victims and the public in general."

379. As regards Article 3, they argued:

> "[T]he conduct of the Russian Federation in the period between the downing in 2014 until this day has aggravated the suffering and uncertainty for the next of kin of the victims to such an extent that the conduct of the Russian Federation which caused this suffering amounts to inhuman or degrading treatment in a violation of Article 3 of the Convention."

380. They clarified:

> "Their suffering is further compounded by the difficulties to visit the crash area, which is controlled by forces under the effective control of the Russian Federation. In many cases, it has not proven possible to recover and identify all human remains. Two of the victims have not even been identified at all. This deprives the next of kin of these victims of the possibility to bury or cremate the remains."

381. Finally, they complained that:

> "Article 13 of the Convention has been violated by the Russian Federation by not providing an effective remedy."

382. The applicant Dutch Government explained that the submission of an inter-State application allowed them "to act on behalf of all the victims and their next of kin". They also argued that while their allegations did not amount to an administrative practice as such, their application did more than simply take the place of individuals to denounce a violation suffered by them. Their position was that their application contained aspects of both types of inter-State applications (see paragraph 751 below).

THE LAW

I. PRELIMINARY OBSERVATIONS

383. Under the terms of Article 32 of the Convention, the Court's jurisdiction "[extends] to all matters concerning the interpretation and application of the Convention and the protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47". "In the event of dispute as to whether the Court has jurisdiction", the decision is a matter for the Court (see *Scoppola v. Italy* (no. 2) [GC], no. 10249/03, § 53, 17 September 2009). Its principal role, as defined by Article 19, is "to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention

and the Protocols thereto". The Court is moreover the master of its own procedure and its own rules (see Article 25 (d); *Ireland v. the United Kingdom*, 18 January 1978, § 210 *in fine*, Series A no. 25; and, more recently, *Merabishvili v. Georgia* [GC], no. 72508/13, § 315, 28 November 2017).

384. Article 33 of the Convention empowers any High Contracting Party to "refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party".

385. The Court has repeatedly emphasised that the purpose of the High Contracting Parties in concluding the Convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but to realise the aims and ideals of the Council of Europe, as expressed in its Statute, and "to establish a common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideals, freedom and the rule of law" (see the Commission's decision on the admissibility of application no. 788/60, *Austria v. Italy*, 11 January 1961, Yearbook, vol. 4, p. 116 at p. 138). It follows that when a High Contracting Party or Parties refer an alleged breach of the Convention to the Court under Article 33 of the Convention, they are not to be regarded as exercising a right of action for the purpose of enforcing their own rights, but rather as bringing before the Court "an alleged violation of the public order of Europe" (ibid., p. 140. See also *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, nos. 9940/82, 9942/82, 9944/82, 9941/82 and 9943/82, Commission decision of 6 December 1983, Decisions and Reports 35, p. 143 at p. 169).

386. The Court's case-law under Article 33 has identified two basic categories of inter-State application. The first category concerns cases raising general issues brought with a view to protecting the public order of Europe. The second category covers cases where the applicant State complains of violations by another Contracting Party of the basic human rights of one or more clearly identified or identifiable persons (see *Slovenia v. Croatia* (dec.) [GC], no. 54155/16, § 67, 18 November 2020). This second category, too, contributes to the protection of the public order of Europe by enabling the High Contracting Parties to ensure the collective enforcement of the rights guaranteed by the Convention regardless of the nationality of the identified victims and the extent to which, if at all, the applicant State's interests are particularly affected by the alleged breach (see *Austria v. Italy*, cited above, p. 140). The Court has further explained that these latter claims are substantially similar not only to those made in an individual application under Article 34 of the Convention but also to claims filed in the context of diplomatic protection under international law (see *Cyprus v. Turkey* (just satisfaction) [GC], no. 25781/94, §§ 45, ECHR 2014; and *Slovenia v. Croatia*, cited above, § 67).

387. Given the events which have unfolded since the hearing and first deliberations on 26 January 2022 in the present case, the Court considers it

necessary, first, to place the present applications in their overall context and, second, to explain certain questions which may arise in relation to its jurisdiction.

388. First, as regards context, the Court recalls that the events which unfolded in Ukraine in 2014 have already given rise to the decision in *Ukraine v. Russia (re Crimea)* [GC] (dec.), nos. 20958/14 and 38334/18, 16 December 2020, to which reference will be made in this decision where relevant. At present, in relation to events in Ukraine from 2014 onwards, the Court is seized of three further inter-State cases with Russia as the respondent State (see *Ukraine v Russia* (VIII), no. 55855/18; *Ukraine v. Russia* (IX), no. 10691/21 and *Ukraine v. Russia* (X), no. 11055/22). Around 8,500 individual applications, pursuant to Article 34 of the Convention, are pending against Ukraine, Russia or both in relation to the conflict in Ukraine.

389. Second, as regards the Court's jurisdiction, it is to be noted that the factual circumstances underlying the applicant Governments' Convention complaints occurred before 16 September 2022, the date on which the Russian Federation ceased to be a High Contracting Party to the Convention following the cessation of its membership of the Council of Europe (see paragraph 35 above). In line with the resolution of 22 March 2022 of the Court's plenary (see paragraph 36 above), the Court, sitting here in its highest judicial formation, is satisfied that it remains competent to examine the applicant Governments' complaints under Article 19 read in conjunction with Article 58 §§ 2 and 3 of the Convention.

II. SCOPE OF THE CASE

A. Temporal scope of the allegation of administrative practices

390. As noted above, the application of the applicant Ukrainian Government in respect of the general situation in eastern Ukraine consists of an allegation of continuing administrative practices which began with the outbreak of hostilities in 2014 (see paragraph 373).

391. The applicant Ukrainian Government contended in their written submissions that the alleged administrative practices in respect of which there was Russian jurisdiction began in March 2014. At the oral hearing, their counsel argued that the Russian Federation established effective control over "occupied Donbass" in April 2014 and exercised Article 1 jurisdiction in respect of the areas in Donbass since at the very latest the end of April 2014.

392. Having regard to the submissions made, the Court will examine whether the evidence before it supports the allegation of Russian jurisdiction over any "relevant parts of Donbass" at any point after 1 April 2014 and whether there is evidence at that time or later supporting the allegation of the administrative practices in breach of the Convention.

393. Since the allegation is that the administrative practices are ongoing, in accordance with its usual practice the Court will consider the evidence available to it up to 26 January 2022, the date of the admissibility hearing, in order to determine the admissibility issues arising, including the question of jurisdiction. Evidence of events post-dating the admissibility hearing will be relevant to the Court's determinations at any subsequent merits stage as to whether any Russian jurisdiction established continued after 26 January and up until 16 September 2022, the date on which the Russian Federation ceased to be a High Contracting Party to the Convention (see paragraph 36 above); and as to the period during which the administrative practice in question, if found established, took place.

394. The Rule 39 measure put in place by the President of the Third Section on 13 March 2014 in respect of eastern Ukraine (see paragraph 2 above) ended upon the Russian Federation's ceasing to be a High Contracting Party to the Convention on 16 September 2022.

B. Scope of responsibility

395. This decision is concerned only with the extent of the jurisdiction and responsibility of the Russian Federation for the violations alleged in this case. As a result, only the question of whether the Russian Federation had jurisdiction in respect of these violations falls to be discussed; the question of the jurisdiction of any other State in respect of the events in eastern Ukraine is not within the scope of the case.

III. APPROACH TO THE EVIDENCE

396. The factual disputes in the present case are extensive. Over one thousand different pieces of evidence have been produced in annexes or cited in footnotes to support the respective positions of the three parties and many thousands of pages of supporting documentation have been submitted. As set out above (see paragraphs 17-18), in 2019 the applicant Ukrainian Government and the respondent Government were invited to express their views on the issue of fact-finding at the admissibility stage. Both parties indicated that they were opposed to the holding of a fact-finding hearing at this stage in the proceedings; such a hearing was, they said, only appropriate at the merits stage. The Grand Chamber must therefore examine the admissibility of the case (see paragraph 17 above) solely on the basis of the written evidence before it, either provided by the parties or in the public domain, applying its usual evidential rules. Where an allegation is declared inadmissible because it has not been made out on the basis of the written evidence, that decision is final.

A. The evidence in the case

1. Evidence relied on by the Governments

397. The parties have relied on various types of evidence to support their allegations.

398. The applicant Ukrainian Government relied in particular on published reports and other material from international organisations and bodies, most notably the OHCHR, the OSCE and the Parliamentary Assembly of the Council of Europe ("PACE"). They also referred to information from Ukrainian State agencies and Government ministries, witness statements, evidence collected in the context of domestic criminal investigations, reports by NGOs and research collectives, newspaper articles, videos and information from other States. As regards the downing of flight MH17 they relied on the report by the DSB, the work of the JIT and reports by Bellingcat, a non-governmental research collective.

399. The applicant Dutch Government relied, *inter alia*, on the DSB report, Dutch police reports analysing evidence prepared in the context of the trial concerning the downing of flight MH17, material of the OM and the JIT, material from inter-governmental organisations, NGO reports and Bellingcat investigations, correspondence between the authorities in the Netherlands and Russia, diplomatic and intelligence material, transcripts of intercepted communications and media reporting.

400. The respondent Government referred*, inter alia*, to a number of reports analysing the authenticity of digital material presented in the case, material related to the downing of flight MH17, witness statements, diplomatic correspondence, official documentation, reports by inter-governmental organisations including the OHCHR and the OSCE, material from NGOs and research collectives, international law materials, newspaper articles and social media material and videos.

2. Request for further factual submissions and supporting evidence

401. The Court routinely, of its own motion, asks the parties to provide material which can corroborate or refute the allegations made before it (see *Merabishvili*, cited above, § 312). As outlined above (see paragraph 20), on 12 June 2020, the applicant Ukrainian Government and the respondent Government were informed that certain factual aspects of the case before the Grand Chamber, as raised by their memorials, had been identified in relation to which it was anticipated that further submissions might be of assistance to the Grand Chamber in reaching its decision on the admissibility of the complaints before it. The specific factual aspects identified were set out in an annex and were grouped under the following broad headings by reference to the submissions concerning:

1. the deployment of Russian troops and weapons in areas of Russia bordering Ukraine, and in particular bordering the Donetsk and Luhansk regions;
2. the participation of Russian nationals and residents in the early protests and in the separatist armed groups and entities;
3. the engagement of Russian military in activities in, or affecting, eastern Ukraine;
4. the nature and origins of weapons and military equipment in eastern Ukraine;
5. the award of Russian military medals;
6. the support by the Russian Federation for the "DPR" and the "LPR";
7. the "DPR" and "LPR" military; and
8. the Ukrainian Government support for or involvement in the Myrotvorets website.

402. The annex also invited the parties to include relevant submissions as to their views on evidence collected by international bodies (in particular the OHCHR and the OSCE) which might be pertinent to the factual aspects of the case identified. The parties were asked to provide all relevant evidence to which they had access in relation to the issues addressed in their further observations, and in particular any evidence which was, or might be said to be, wholly or in large part within the exclusive knowledge of the authorities of the State in question (see *Ukraine v. Russia (*re *Crimea)*, cited above, § 256. See also *Bouyid v. Belgium* [GC], no. 23380/09, § 83, ECHR 2015).

403. In their subsequent supplementary memorial, the applicant Ukrainian Government said that questions directed at allegations of involvement of Russian nationals, troops and weapons in the conflict, as well as the structure of the "DPR" and the "LPR" and alleged Russian support for these bodies, were primarily for Russia to address. They contended that the evidence relevant to those questions was "wholly or mainly within the exclusive knowledge or control of the Russian Federation". However, they nonetheless consulted relevant State agencies in Ukraine seeking additional information on these matters and provided to the Court a further eight letters from various State bodies with updated information on the matters concerned. The applicant Ukrainian Government clarified that, "[i]nevitably, Ukraine's understanding of the factual position is based on observation and military intelligence ... However, the burden of providing evidence to the Court fully explaining Russia's military command and deployments in eastern Ukraine remains at all times on the Russian Federation".

404. The respondent Government, in their supplementary memorial, provided "such answers as are possible", noting that details of military deployments were classified; information concerning the number and types of deployed weapons and material was classified; plans and other information regarding military training were classified; and information on losses of

military personnel was a State secret. By way of explanation for the failure to respond to some of the other requests for submissions, the respondent Government relied on the impracticability of collecting the information sought (for example, information on authorisations given to Russian servicemen for travel abroad) or the irrelevance of the information sought (for example, details of those in positions of leadership in the "DPR" or the "LPR" who held Russian nationality).

3. Material in the public domain

405. Aside from the parties' submissions and the evidential material provided by them, the Court has had regard to material in the public domain (*Ukraine v. Russia (*re *Crimea)*, cited above, § 250). In the present case this material includes, notably, reports by the OHCHR and the OSCE which were not expressly cited by the parties as well as information published by the International Committee of the Red Cross (ICRC) concerning its role in the "humanitarian convoys" supplied by the Russian Federation to areas in eastern Ukraine under separatist control. It also includes material published by the JIT, the OM and the trial court in The Hague in the context of the criminal investigation and proceedings into the downing of flight MH17 even where the parties did not refer to it directly.

B. The parties' submissions

1. The respondent Government

406. As to the standard of proof at the admissibility stage, the respondent Government argued that Ukraine was required to put forward "cogent evidence supporting each of the essential elements of its case", namely jurisdiction, alleged violations and attribution of the alleged violations to the Russian Federation. They contended that what was required was "substantial evidence", particularly on matters going to jurisdiction (citing *Georgia v. Russia (I)* (dec.), no. 13255/07, § 41, 30 June 2009). The evidence presented had to be enough to show that the three elements identified above had been "made out, to a prima facie degree, taking account of the respondent State's contradiction and the entire record". The applicant Governments bore the burden of proof in this respect. The respondent Government also claimed that the kind of evidence required to support a prima facie case had to be related to the kind of evidence ultimately required at the merits stage of the case. Thus, the evidence had to be capable of excluding reasonable doubt given that, in accordance with the Court's case-law, the case ultimately required proof beyond reasonable doubt.

407. The respondent Government maintained that the Court had to require primary evidence at the admissibility stage and scrutinise it carefully. Where an applicant relied on secondary material, the Court had to look carefully at

the material, its sources and the connections of these sources. When "fakery" had been demonstrated, any fair exercise of discretion by the Court would not allow a case to be sustained by secondary evidence without primary evidence. "Credulous acceptance" of secondary evidence had the practical effect of reversing the burden of proof, which was inconsistent with justice. The unfairness against the respondent State that all of this entailed was exacerbated by the Court's failure to allow adequate hearings with adequate opportunity to present evidence. It was not for Russia to disprove the Ukrainian allegations: such an approach was unsustainable as a matter of law, disregarded the impossibility of proving a negative and ignored the fact that many military matters in Russia were classified.

408. The applicant Ukrainian Government had failed to present proper evidence in respect of essential elements of their case and prove them to the necessary prima facie standard. They had failed to provide any evidence at all for vast tracts of their allegations, including those concerning jurisdiction. It was "hugely significant" that Ukraine had not put forward technical evidence from its military as to where the alleged shelling had originated. Many allegations were supported by evidence that was demonstrably false. Other allegations were merely supported by assertions from Ukraine's State agencies. Even where a witness was identified, the statement given was often mere assertion and did not cover the full scope of the allegation made.

409. Moreover, the applicant Governments had relied on dubious digital material and reports from "so-called" citizen journalists, such as Bellingcat and InformNapalm, who "purport to validate digital pictures and videos and to 'geo-locate' them in Ukraine". This kind of material was susceptible to manufacture or manipulation: techniques were now so sophisticated that false material was virtually undetectable. The problem was exacerbated where material was circulated on social media because this process stripped the material of data necessary for proper forensic examination. This was why other courts and specialist lawyers insisted on proof of provenance before relying on digital material. However, the applicant Ukrainian Government had supplied no authentication or metadata for much of the digital material upon which they relied; the same applied to the secondary sources they cited. The respondent Government provided examples of digital data they claimed had, or could have, been manipulated or manufactured. The applicant Ukrainian Government had failed to engage on the substance of these "detailed points". Bellingcat's work was quite obviously the foundation of the work of the JIT.

410. The "*faux* experts" responsible for preparing the secondary evidence relied upon by the applicant Governments were, in reality, not experts at all and had no claim to expertise in technical knowledge of weaponry, geolocation or determining the direction of shellfire. Many had clear links to security establishments of Ukraine or other States with a hostile information agenda against the respondent State and could not therefore be said to be

objective. The respondent Government criticised the Atlantic Council as being a "propaganda vehicle associated with NATO", referring to funding from NATO and the United States and United Kingdom Governments, and pointed to links between Bellingcat investigators and the Atlantic Council. This dubious digital material and "*faux* expert" commentary reflected a system of disinformation used by the Five Eyes States (US, Canada, UK, Australia and New Zealand). Russia had never agreed that fact-finding be delegated to such "*faux* expert" groups.

411. The respondent Government commented, specifically, on reports by Bellingcat and InformNapalm and alleged a general lack of expertise and qualifications. They highlighted some examples of what they considered to be flawed analysis by researchers in these reports or outright manipulation of data. For example, as regards the Bellingcat report "Geolocating Stanislav Tarasov", the respondent Government argued that the photograph of the soldier sitting on a tank had been manipulated to remove identifying numbers from the tank, which were present in the same photograph used by the Atlantic Council, noting that "Bellingcat likes to claim that Russian forces remove numbers from their vehicles before sending them to Ukraine". This "mistake", they said, had prompted closer examination of the photograph by their expert, Mr Rosen, which had revealed other "indications of potential fakery" including a slight halo around Mr Tarasov, "which may indicate montage". They added that, "it may be that the entire column is cloned from a single vehicle".

412. The respondent Government also criticised the authors of a report by the Royal United Services Institute ("RUSI"), which discussed leaked emails claimed to be from Mr Surkov's email accounts, alleging their anti-Russian backgrounds and connections. They disputed the authenticity of the emails analysed and dismissed the report as "fiction", stating that, "Mr Surkov did not use email".

413. The intercept evidence relied on by the applicant Governments, which had been provided exclusively by the Ukrainian security service ("SBU"), had also been falsified. For example, the recorded conversation of an intercepted conversation involving Mr Bezler which had initially been published by the SBU on its website had been a truncated section deliberately omitting Mr Bezler's reference to the fact that a Sukhoi military plane had been shot down. This omission had become apparent following the release of the full version of the conversation. An expert report by Mr Rosen pointed to varying noise levels and discontinuities in specific recordings. As to the criticism that Mr Rosen's report had been based on a compendium of the intercepts released on YouTube by the SBU, neither applicant Government had provided the original digital files for analysis. In any event, although the compendium lacked the metadata of the original files, it had copied their content, so Mr Rosen's comments remained valid.

414. The respondent Government expressed their opposition to any reliance by the Court on the conclusions of the OHCHR. There had been no agreement by States to delegate decision-making to the OHCHR and such a course of action would be inappropriate not least because the OHCHR applied a lower standard of proof ("reasonable grounds to believe"). In any event, the applicant Ukrainian Government had quoted mere allegations recorded by the OHCHR and not factual findings it had made. The respondent Government referred, further, to concerns about "distorted" descriptions of events by the OHCHR. Particular care was warranted in the present case when reliance was placed on any purported assessment of facts by bodies that were potentially influenced by political interests. Referring to the Court's approach to evidence in its decision in *Ukraine v. Russia (*re *Crimea)* (cited above), the respondent Government concluded that the Court's "lack of sensitivity to compromising connections and funding is unfortunate". The Court should have been cautious about relying on the OHCHR in its decision given the partners it listed in its report, which included the applicant Ukrainian Government and other likely "sponsored sock-puppet NGOs".

415. The respondent Government refuted all the evidence presented as to alleged Russian involvement in the downing of flight MH17. The findings of the DSB and the JIT were based on "sham investigations that began with an agenda of blaming Russia". Digital media relied upon in the investigations was fake. The DSB and the JIT had failed to collect, investigate and analyse primary physical evidence properly. They had instead relied on physical evidence with wholly unclear provenance and physical evidence which had been interfered with at the crash site and in the DSB's custody. The respondent Government highlighted a number of aspects in the DSB report which they contended were unsatisfactory. They drew particular attention to the differences between the DSB draft report and its subsequent final report, which they said showed additional pieces of the aircraft while giving no explanation of why they had not featured in the draft report. They also drew attention to what they alleged were clear attempts to manipulate the evidence so as to show penetrative damage from the outside, to suit the allegation that the aircraft had been downed by a Buk missile. Such alleged manipulation included creating a false impression of "dishing" (the inward distortion of plates by a pressure wave from an explosion outside), interfering with the wreckage to render the physical evidence more consistent with its conclusions and fabricating evidence of bow-tie shrapnel (shrapnel which, if present, made it possible that the missile had come from Russia). They also disputed the sound analysis of the cockpit recorder, which had been cited in support of the conclusion that the aircraft had been penetrated externally and not from the inside. The DSB and the JIT had ignored Russia's evidence about the serial numbers that appeared on one of the parts of the missile. The applicant Dutch Government had failed to deal with many substantive points made to show that key digital evidence was fake. They had not produced a single

digital file with their application to enable a proper analysis of their authenticity despite the fact that digital files already in the public domain had been shown to be fake. The respondent Government did not accept that the Netherlands' Forensic Institute ("NFI") had checked the digital material provided by the applicant Governments. There was no detailed evidence from the NFI that even began to address the detailed substantive points made by Russia and if the source material itself had been manipulated, then there was no possibility of the NFI authenticating it. Moreover, the Netherlands had a history of information operations against Russia.

416. In respect of the alleged abduction and transfer to Russia of three groups of children and accompanying adults, the application contained assertions without citing evidence in support and some of the annexes were not provided in English. The applicant Ukrainian Government had failed to summarise investigations allegedly carried out into the incidents or to provide the underlying material. They had presented no prima facie evidence of any abductions.

417. The respondent Government invited the Court to draw "all appropriate adverse inferences" against the applicant Governments from their failure to produce essential evidence in support of their claims.

2. The applicant Ukrainian Government

418. The applicant Ukrainian Government argued in their initial memorial that at the admissibility stage of an inter-State case the Court's assessment of Article 1 jurisdiction was limited to "the question whether its competence to examine the applicant Government's complaints is excluded on the grounds that they concern matters which cannot fall within the jurisdiction of the respondent Government" (citing *Georgia v. Russia* (II) (dec.), no. 38263/08, § 64, 13 December 2011). The operative question was whether the alleged violations were "capable" of falling within Russian jurisdiction. Although expressly invited to comment on the Court's decision in *Ukraine v. Russia (*re *Crimea)* (cited above) in their second-stage memorial, the applicant Ukrainian Government did not address the impact of that decision on their previously stated position as to the standard of proof in this respect. At the hearing on admissibility, counsel argued that on the basis of the evidence he had touched upon in his oral submissions and the evidence set out by the applicant Ukrainian Government in their memorials, it was "abundantly clear that [the alleged] violations [were] capable of falling within the jurisdiction of the Russian Federation".

419. As to the substantive allegations of Convention violations, they referred in their initial and supplementary memorials to the "relatively low evidential threshold applicable at the admissibility stage of an inter-State case". This explained why the respondent Government had resorted to the "extreme submission that Ukraine's case is a complete fabrication, advanced with the connivance of various other States and international entities". It was

not for the Court to assess the weight of the evidence at the admissibility stage. In order to demonstrate a prima facie case, an applicant State needed only to demonstrate that its allegations were not wholly unsubstantiated or lacking the requirements of a genuine allegation in the sense of Article 33 of the Convention (citing *Georgia v. Russia (I)* (dec.), cited above, §§ 43-44). Once that low evidential threshold had been surmounted, the burden of proof shifted to the respondent State. Where the evidence was wholly or largely within the exclusive knowledge of the respondent State, a failure to answer the allegations to the Court's satisfaction would result in the drawing of an adverse inference of fact. The applicant Ukrainian Government did not clarify or adjust their pleadings in this respect following the delivery of the Court's decision in *Ukraine v. Russia (*re *Crimea*) (cited above). At the hearing on admissibility, counsel reiterated their position that there was no evidential threshold to be overcome but argued that, in any event, the evidence here was overwhelming.

420. The applicant Ukrainian Government agreed with the need to establish the authenticity of underlying material to which open-source researchers, such as Bellingcat, referred when conducting data analysis and geolocation, to ensure that it had not been manipulated. However, they contended that the respondent Government had adduced no expert evidence to challenge the reliability of geolocation analysis as a method of proof. It was clear from the reports on the subject to which the respondent Government had referred that evidence of this nature was "a new frontier which can produce reliable and highly probative conclusions in complex cases". The applicant Ukrainian Government were of the view that the merits phase of the present proceedings would offer ample opportunity for all parties to produce expert evidence on the probative value of the open-source reporting by Bellingcat and others. However, in light of the evidential threshold for the admissibility phase of inter-State proceedings, the Court was not now required to reach a final view on each item of evidence relied upon.

421. As to specific challenges to particular pieces of evidence, the applicant Ukrainian Government argued that each example given by the respondent Government was "demonstrably misconceived" and explained why they took that view. There was nothing in any of the respondent Government's points about the reliability of individual items of evidence identified by them as suspect.

422. In respect of challenges to evidence relevant to the downing of flight MH17 the applicant Ukrainian Government referred, *inter alia*, to the forensic examination and independent verification carried out by the Dutch authorities. This included reports prepared in respect of the relevant video and intercept evidence. This material supported the contention that the evidence presented was authentic. As to the criticisms of the DSB report, the allegation concerning the bow-tie shrapnel was "nonsensical". This shrapnel suggested that the missile used was one to which both Ukraine and the

Russian Federation had access. Had the DSB wished to fabricate evidence implicating Russia it would have been easy to plant evidence pointing to a weapon in the exclusive possession of the Russian forces. On the basis of these "far-fetched submissions" the respondent Government had suggested a "carefully organised international conspiracy" involving Ukrainian intelligence services acting in concert with the DSB, the JIT, Google Earth and others "all financed by what Russia describes darkly as 'familiar adverse sources'". The sheer number of people and organisation that would have to have been involved in and given approval for such a conspiracy showed how implausible the respondent Government's argument was.

423. There was likewise no substance to the respondent Government's criticism, on grounds of alleged bias and lack of expertise, of the various sources of evidence presented by the applicant Ukrainian Government. The submissions of the respondent Government took the form of a "series of suggested associations between individuals and western democratic government or institutions". The implicit suggestion was that anyone with such associations, however indirect, must be biased against Russia to such an extent that the evidence they provided should be regarded as inherently unreliable, irrespective of its apparent probative value. In any case, the evidence identified in the respondent Government's initial memorial was not, for the most part, expert opinion at all and had not been presented as such. It was technical evidence, supported by underlying metadata and other analysis available for examination during the merits stage of the proceedings. The specific, articulable objections to the reliability of any particular item of evidence had been addressed by the applicant Ukrainian Government in their supplementary memorial. Beyond these instances, there was no basis for a generalised attack on the integrity of Ukraine's evidence. The NGO reports relied upon were generally characterised by source evidence which bore the indicia of reliability. Photographic and video evidence, geolocation analysis, satellite imagery and contemporary military and political assessments were all sources that had the capacity to shed important light on the pattern of violations alleged.

424. As regards the respondent Government's "sweeping generalisations" about disinformation, they "cast no light on the specific allegations in the present case". There was no expert or other evidence explaining how it was suggested that any of the Five Eyes States were said to be involved in the international conspiracy alleged.

425. The evidence concerning Russian involvement in the conflict in eastern Ukraine was wholly or mainly within the exclusive knowledge or control of the Russian Federation. This being the case, the respondent Government bore the burden of providing evidence to the Court fully explaining Russia's military command and deployments in eastern Ukraine. It was not open to the respondent Government to make an unparticularised and general attack on the evidence adduced by Ukraine and then to fail, or

refuse, to provide the Court with relevant evidence that was under its exclusive control. To the extent that the respondent Government disputed the allegations made by Ukraine, they bore the burden of answering the Court's questions in its letter of 12 June 2020 and adducing relevant evidence of the true position.

3. The applicant Dutch Government

426. The applicant Dutch Government argued that at the admissibility stage in an inter-State case there was no room for a preliminary examination of the merits. In determining the existence of prima facie evidence, it had to be ascertained whether the allegations of the applicant Governments were "wholly unsubstantiated" or were "lacking the requirements of a genuine allegation in the sense of Article 33 of the Convention". This prima facie threshold had been met in respect of their application. The applicant Dutch Government made no separate submissions on the evidential threshold to be applied to the matter of jurisdiction at the admissibility stage.

427. Notwithstanding the evidence in the application in respect of the downing of flight MH17, certain information regarding the relevant issues was primarily within the exclusive knowledge of the respondent State. That State had the "monopoly of first-hand evidence" and had failed or refused to share such information. The respondent Government had been granted ample opportunities to share specific information that was within the exclusive knowledge or possession of the Russian Federation, such as the whereabouts of the relevant Buk-TELAR of the 53rd AAMB on 17 July 2014, but had failed to submit the relevant information.

428. It was ultimately within the Court's discretion to decide whether governmental sources or NGO reports were useful. The Court's practice provided sufficient safeguards to ensure the objective assessment of the credibility and reliability of this material. Fact-finding might be difficult and might take a longer time under certain circumstances, but "difficult" did not mean "impossible". This was demonstrated by the various investigations carried out into the situation in eastern Ukraine and the downing of flight MH17. The findings of these investigations were corroborated by numerous reports and statements of other States, investigative journalists and international governmental and non-governmental organisations.

429. The applicant Dutch Government set out in some detail the investigative and reporting processes of the DSB and of the OM, in the context of the JIT. The two investigations had been carried out independently from one another. This meant that some of the work carried out in the context of the technical investigation (by the DSB), such as the forensic investigation of the wreckage, had been carried out separately as part of the criminal investigation (by the OM and the JIT). Moreover, to ensure that the evidence collected as part of the JIT would be admissible in the national courts of all the States involved, the JIT investigation had complied with all national legal

standards of the different States, thus the highest applicable legal standards, including evidentiary standards, had been adopted.

430. Each conclusion reached as part of the criminal investigation had been reached after an "independent process of collecting, verifying, validating and assessing single pieces of evidence". Neither the OM nor the JIT had evaluated the methodology of others (such as Bellingcat) so as to verify their findings. Instead, the findings of other parties had always been carefully verified through their own investigative processes. In all cases the investigation team itself had determined the correct geolocation based on its own material. Throughout the years, the JIT investigation and results had found broad international support. Accusations of fabrication or manipulation of materials were "unfounded and unconstructive to the establishment of truth, justice and accountability".

431. The applicant Dutch Government referred to the "unfounded criticism" by the Russian Federation of the various investigations carried out into the downing of flight MH17 and its reference to a conspiracy. The Russian Federation was "isolated in voicing this conspiracy" and unable to provide convincing evidence of it. Meanwhile, it had tried to hamper investigations and denied the overwhelming evidence with respect to its activities in eastern Ukraine and its role in the downing of flight MH17. The respondent Government continued to present an incomplete picture to the Court and failed to take into account all relevant findings. Instead, their arguments were conveniently selective in presenting some of the findings while ignoring a significant portion of related findings that did not correspond to their position. Furthermore, the respondent Government had repeatedly quoted out of context and in this way were misleading the Court.

432. Moreover, in seeking to discredit the investigations, the respondent Government had relied on invalid conclusions, thereby invalidating their whole argument. The applicant Dutch Government set out various examples of this by reference to the respondent Government's submissions, relying *inter alia* on statements and material presented by the OM in open court in the criminal proceedings in The Hague to show the invalidity of the Russian arguments. The DSB report and the OM investigation were based on first-hand evidence. This evidence included witness statements, original visual and audio recordings, debris recovered from the wreckage and material recovered from the victims' bodies. The Russian Federation's approval of these investigations was not required in order to establish their legitimacy. The applicant Dutch Government also disputed the accuracy of assertions made by the respondent Government as regards the DSB's conclusions on various matters, including dishing and the missile used. A number of the respondent Government's arguments went into the merits and should be addressed at that stage. This included the detailed assessment and evaluation of the evidence submitted as regards the route of the Buk-TELAR from the Russian Federation to the launch site in eastern Ukraine. The applicant Dutch

Government expressed their willingness to assist the Court at that stage with additional information debunking the claims of the Russian Federation regarding alleged manipulated material.

433. The Russian Federation had engaged in a policy of denial and attempts to undermine the investigations carried out by others, rather than adopting a more proactive role. The conduct of the Russian Federation raised the question whether it was furnishing all the necessary facilities to make possible a proper and effective examination of applications by the Court. This was particularly important given its exclusive access to information with respect to its role in the downing of flight MH17. Russia's conduct and narrative "cannot be regarded as a serious attempt to cooperate with the Court on the basis of Article 38 of the Convention". The applicant Dutch Government asked the Court to draw such inferences as it deemed appropriate.

C. The Court's approach

1. General principles

434. In its decision in *Ukraine v. Russia (*re *Crimea)* (cited above, §§ 249-66 and 378-91), the Court referred to the established case-law of the Commission and the Court, going back to the Commission's second admissibility decision in "the Greek case" (*Denmark, Norway*, *Sweden and the Netherlands v. Greece*, nos. 3321/67, 3322/67, 3323/67 and 3344/67, Commission decision of 31 May 1968, unreported) and the Court's judgment in *Ireland v. the United Kingdom* (cited above, § 161), and set out in detail its approach to the evidence. Some additional observations made by the Grand Chamber in its prior judgment in *Merabishvili* (cited above, §§ 312-13) are of further relevance to the present case. The general principles that may be drawn from those cases, and which are relevant to the assessment of the evidence in the present case-file, can be summarised and explained as follows.

(a) The burden of proof and drawing of inferences

435. As a general principle of law, the initial burden of proof in relation to an allegation is borne by the party which makes the allegation in question (*affirmanti incumbit probatio*) (see *Ukraine v. Russia (*re *Crimea)*, cited above, § 255).

436. The Court has, however, recognised that a strict application of this principle is not always appropriate. Where the respondent State alone has access to information capable of corroborating or refuting the applicant's allegations but fails to provide a satisfactory and convincing explanation in respect of events that lie wholly, or in large part, within the exclusive knowledge of the State's authorities, the Court can draw inferences that may

be unfavourable for that Government. Before it can do so, however, there must be concordant elements supporting the applicant's allegations (see *Ukraine v. Russia (*re *Crimea)*, cited above, § 256).

437. Article 38 of the Convention requires the Contracting States to furnish all necessary facilities to the Court, whether it is conducting a fact-finding investigation or performing its general duties as regards the examination of applications. The conduct of the parties when evidence is being obtained may therefore also be taken into account and inferences may be drawn from such conduct (see *Ukraine v. Russia (*re *Crimea)*, cited above, §§ 256 and 380; *Georgia v. Russia (II)* [GC], no. 38263/08, § 341, 21 January 2021; and *Tahsin Acar v. Turkey* [GC], no. 26307/95, §§ 252-54, ECHR 2004-III). The Court has, in the past, drawn inferences from a failure by the respondent State to provide documents requested (see, for example, *Timurtaş v. Turkey*, no. 23531/94, §§ 66-72, ECHR 2000-VI; *Akkum and Others v. Turkey*, no. 21894/93, §§ 185-190 and 225, ECHR 2005 II (extracts); *Çelikbilek v. Turkey*, no. 27693/95, §§ 56-63, 31 May 2005; and *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, §§ 152-67, ECHR 2012). In *El-Masri* the Court shifted the burden of proof to the respondent Government once it was satisfied that there was prima facie evidence in favour of the applicant's version of events. As a result of the Government's failure to provide relevant explanations or supporting documents, the Court drew inferences from the available material and the authorities' conduct and found the applicant's allegations sufficiently convincing and established beyond reasonable doubt (see §§ 165-67 of the judgment).

438. The Court further refers in this respect to Rule 44A of the Rules of Court, which provides that the parties have a duty to cooperate fully in the conduct of the proceedings and to take such action within their power as the Court considers necessary for the proper administration of justice. Moreover, pursuant to Rule 44C § 1, where a party fails to adduce evidence or provide information requested by the Court or to divulge relevant information of its own motion or otherwise fails to participate effectively in the proceedings, the Court may draw such inferences as it deems appropriate. Rule 44C § 2 plainly states that the failure or refusal by a respondent Contracting Party to participate effectively in the proceedings shall not, in itself, be a reason to discontinue the examination of the application. It is clear from the well-established case-law of the Court and from Rules 44A and 44C that if a respondent Government fail to comply with a request by the Court for material which could corroborate or refute the allegations made before it and do not duly account for their failure or refusal, the Court can draw inferences and combine such inferences with contextual factors (see *Merabishvili*, cited above, § 312).

439. The level of persuasion necessary for reaching a particular conclusion and the distribution of the burden of proof, are intrinsically linked

to the specificity of the facts, the nature of the allegations made and the Convention right at stake (see *Ukraine v. Russia (*re *Crimea)*, cited above, § 257).

(b) Assessment of the evidence

440. There are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment: the Court has complete freedom in assessing not only the admissibility and relevance but also the probative value of each item of evidence before it. The Court adopts those conclusions of fact which are, in its view, supported by the free evaluation of all material before it irrespective of its origin, including such inferences as may flow from the facts and the parties' submissions and conduct (see *Ukraine v. Russia (*re *Crimea)*, cited above, §§ 379-80).

441. Proof may follow from the "coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact" (see *Ukraine v. Russia (*re *Crimea)*, cited above, § 257).

442. The Court takes into account reports and statements by international observers, NGOs and the media as well as decisions of other international and national courts to shed light on the facts or to corroborate findings made by the Court (see *Ukraine v. Russia (*re *Crimea)*, cited above, § 257). Its assessment of the evidence, and in particular the weight to be given to it, varies in view of the different nature of the material, the source of the material and the degree of rigour applied to its collection and verification.

443. It has thus often attached importance to material from reliable and objective sources, such as the UN, reputable NGOs and governmental sources. However, in assessing its probative value a degree of caution is needed since widespread reports of a fact may prove, on closer examination, to derive from a single source. In relation to such material, consideration should be given to the source of the material and in particular its independence, reliability and objectivity. The Court also considers the presence and reporting capacities of the author in the country in question: it will not always be possible for investigations to be carried out in the immediate vicinity of a conflict and in such cases information provided by sources with first-hand knowledge of the situation may have to be relied upon. Consideration is given to the authority and reputation of the author, the seriousness of the investigations forming the basis for the report, and the consistency of the conclusions and their corroboration by other sources (see *Ukraine v. Russia (*re *Crimea)*, cited above, §§ 386-88).

444. Media reports, on the other hand, are to be treated with caution. They are not themselves evidence for judicial purposes, but public knowledge of a fact may be established by means of these sources of information and the Court may attach a certain amount of weight to such public knowledge (see *Ukraine v. Russia (*re *Crimea)*, cited above, § 383).

445. The direct evidence of witnesses is also taken into account by the Court (see the *Georgia v. Russia (II)* judgment, cited above, and *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 26, ECHR 2004-VII). Even where the domestic authorities have not been given the opportunity to test the evidence and the Court itself has not had the opportunity to probe the details of the statement in the course of the proceedings before it, this does not necessarily diminish its probative value (see *El-Masri*, cited above §§ 161-62). It is for the Court to determine whether it considers a statement to be credible and reliable, and what weight to attach to it.

446. The Court may also rely on witness statements from Government officials. Statements by Government ministers or other high officials should, however, be treated with caution since they would tend to be in favour of the Government that they represent. That said, statements from high-ranking officials, even former ministers and officials, who have played a central role in the dispute in question are of particular evidentiary value when they acknowledge facts or conduct that place the authorities in an unfavourable light. They may then be construed as a form of admission (see *Ukraine v. Russia (*re *Crimea)*, cited above, §§ 334 and 381). Similar considerations apply to official documents and intelligence material provided by State ministries and agencies.

447. There is no need for direct evidence from alleged victims in order for a complaint about an administrative practice to be regarded as admissible (see *Ukraine v. Russia (*re *Crimea)*, cited above, § 384).

448. A delay in collecting evidence, or its collection specifically for the purposes of proceedings before this Court, does not render such evidence *per se* inadmissible (see *Ukraine v. Russia (*re *Crimea)*, cited above, § 381).

(c) The standard of proof at the admissibility stage

(i) Standard of proof in relation to the alleged violations

449. The manifestly ill-founded test set out in Article 35 § 3 does not apply to inter-State cases. However, this does not exclude the application of a general rule providing for the possibility of declaring an inter-State application inadmissible if it is clear, from the outset, that it is wholly unsubstantiated, or otherwise lacking the requirements of a genuine allegation in the sense of Article 33 of the Convention (see, most recently, *Slovenia v. Croatia*, cited above, § 40-41).

450. An administrative practice requires that two elements be demonstrated, namely the repetition of acts constituting the alleged violation and official tolerance of those acts (see *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, nos. 9940/82, 9942/82, 9944/82, 9941/82 and 9943/82, cited above, at p. 163; and *Cyprus v. Turkey* [GC], no. 25781/94, § 99, ECHR 2001-IV). The Grand Chamber has recently clarified that the applicable standard of proof for the purposes of admissibility in respect of

allegations of administrative practices is that of "sufficiently substantiated prima facie evidence" (see *Ukraine v. Russia (*re *Crimea*), cited above, §§ 261-63).

451. The Court is satisfied that as far as allegations of individual violations are concerned, the standard of proof applicable at the admissibility stage of proceedings is also that of "sufficiently substantiated prima facie evidence". A uniform standard in respect of both types of allegations promotes internal consistency and harmony in the interpretation and application of the evidentiary admissibility threshold in inter-State cases. This is particularly desirable in cases, such as the present, where allegations are presented as both administrative practices and as individual violations. While the standard imposes a degree of rigour in viewing the evidence provided, in the case of a "genuine allegation" it is hard to envisage that an applicant State would be unable to gather and provide to the Court the necessary evidence to meet this threshold.

(ii) Standard of proof in relation to jurisdiction

452. The Court may determine the issue of the respondent State's "jurisdiction" under Article 1 of the Convention at the admissibility stage of the proceedings (see paragraph 507 below). Where it does so, the "beyond reasonable doubt" standard of proof applies (see *Ukraine v. Russia (*re *Crimea*), cited above, § 265).

453. As regards the content of that standard, it has never been the Court's purpose to borrow the approach of the national legal systems that use that standard. The Court's role is not to rule on criminal guilt or civil liability but on Contracting States' responsibility under the Convention (see *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 147, ECHR 2005-VII).

2. Approaching the evidence in this case

(a) Burden and standard of proof and the drawing of inferences

454. In line with the above principles, the applicant Ukrainian and Dutch Governments bear the initial burden of proof in respect of their allegations as to Russian jurisdiction and the violations alleged. Should the Court consider that the matter of Article 1 jurisdiction should be resolved at this stage of the proceedings, the applicable standard is "beyond reasonable doubt". The allegations of violations, on the other hand, require only sufficiently substantiated prima facie evidence in order to progress to an examination on the merits.

455. As noted above (see paragraphs 401-402), in view of the complexity of the factual background to the present case, the applicant Ukrainian Government and the respondent Government were asked, in the context of their supplementary memorials, to address a number of specific matters

which had been extensively canvassed in the initial memorials and to provide supporting evidence, in particular any evidence which was, or might be said to be, wholly or in large part within their exclusive knowledge. As set out above, the respondent Government declined to provide submissions or evidentiary material in respect of a number of the aspects identified, citing national security concerns and lack of relevance of the material to the questions under judicial consideration (see paragraph 404 above). The Court observes that the information and supporting material sought was wholly or in large part within the exclusive knowledge of the respondent State.

456. The Court considers that through various sets of memorials, there has been a distinct lack of frankness and transparency in the written submissions provided by the respondent Government. For example, the evidence clearly demonstrates the importance of information concerning Igor Girkin, who was a key player in the events in Crimea and in eastern Ukraine and is one of the defendants in the Dutch criminal proceedings concerning the downing of flight MH17 (see paragraph 93 above). The allegation is that he was an agent of the FSB. The respondent Government in their submissions appeared to be deliberately vague when discussing Mr Girkin (see paragraph 511 below). They did not confirm whether the allegation was true and referred merely to press reports that Mr Girkin had retired by April 2014. There can be no doubt that they are in a position to clarify whether Mr Girkin was employed by the FSB and, if so, whether and when he retired. Furthermore, given the Court's finding of Russian extraterritorial jurisdiction over Crimea from 27 February 2014, the respondent Government were also in a position to explain Mr Girkin's involvement in the events there and the nature of the instructions given to him (see *Ukraine v. Russia (*re *Crimea)*, cited above, in particular §§ 33, 47, 329 and 352).

457. Moreover, the Court takes the view that the respondent Government's responses to the specific request for further information and material in the supplementary memorials were superficial and evasive. For example, when asked about the parties and individuals involved in the negotiations concerning the retreat of the Ukrainian army at Ilovaisk in late August 2014, they responded simply that they "cannot comment" on the existence of any negotiations. They did not clarify whether such inability was alleged to arise from a lack of knowledge, or from an unwillingness to disclose the requested information. The Court does not find it credible that the respondent Government would be ignorant of the detail of the events at Ilovaisk, not least because they occurred shortly before the Minsk negotiations in early September 2014 in which Russia played a central role (see paragraph 74 above). While national security concerns may be relevant in respect of some of the information sought, where they have been invoked by the respondent Government they have been deployed with a broad brush to justify a refusal to provide information and material which was necessary to assist the Court. There has been no attempt to engage with the Court with

a view to finding a suitable manner of providing the information sought while protecting any justified national security concerns (see *Georgia v. Russia (II)*, cited above, § 345).

458. The Court underlines the special relationship that the respondent State enjoyed with the separatist entities at the relevant time, as evidenced by its involvement in the ceasefire discussions, by the participation of members of its military in the Joint Center for Control and Coordination, by the humanitarian aid it has allegedly supplied, by the recognition of identity and other official documents issued by the "DPR" and "LPR", by the links between Russia and a number of prominent separatists and by the comments made by separatist leaders (see paragraphs 74, 77, 89 and 97-131 above and A 36-38, 110-15, 2079, 2549, 2551, 2554-57, 2560-64, 2568-69, 2571-72, 2574, 2577-83, 2586-87, 2589, 2593-95, 2598-99 and 2610). By virtue of this special relationship alone, the respondent Government could have obtained material which would have been of substantial assistance to the Court in resolving the matters it is asked to address. However, no material from the separatist entities has been provided.

459. The Court finds that the approach taken by the respondent Government does not represent a constructive engagement with the Court's requests for information or, more generally, with the proceedings for the examination of the case. It considers that the respondent Government have fallen short of their obligation to furnish all necessary facilities to the Court in its task of establishing the facts of the case, as required under Article 38 of the Convention and Rule 44A of the Rules of Court. It will therefore draw all the inferences that it deems relevant (see paragraphs 435-439 above).

(b) How the principal evidence in the case-file should be viewed

460. The Court considers it helpful to set out at this stage its general views as to how it ought to approach the main categories of evidence in the case-file.

(i) Reports of the OSCE and the OHCHR

461. The respondent Government have criticised the reports of the OHCHR in general, referring to "compromising connections and funding" (see paragraph 414 above). However, they have not identified any particular comments in specific reports which they consider to be untrue or misleading, far less presented any evidence to support such a contention and elucidate what they claim to be the true position. Nor have they indicated whether there are parts of these reports which they consider to be accurate, although they have in some instances cited extracts of reports to counter the allegations of the applicant Ukrainian Government. Their criticisms are broad and of a very general nature. They do not appear to challenge the reliability of the OSCE reports.

462. The Court underlines that the reports of the OHCHR and the OSCE are based, *inter alia*, on the direct observations of fact-finding missions *in situ* in Ukraine, including in the Donetsk and Luhansk regions (A 131-34). They also rely on site visits, interviews with local authorities and eye-witness accounts. According to the methodologies set out, the information they contain has, where possible, been subject to verification and validation. Where information has not been authenticated, this is clarified in the reports themselves. There can therefore be no doubt that the objective factual reporting contained in the reports by the OHCHR and the OSCE, based on identified and credible sources of information, carries significant weight. Moreover, widespread reports of allegations of violations of the Convention are in themselves elements which can be taken into account when determining whether there is sufficiently substantiated prima facie evidence of them. It is not, however, necessary for the Court to reach a final conclusion on the argument of the respondent Government regarding the standard of proof applied by the OHCHR to reach particular conclusions, since the Court will reach its own conclusions, applying its own standard of proof, by reference to the objective facts reported rather than adopting the conclusions reached by the OHCHR.

(ii) Material from the OM and the JIT

463. The respondent Government have advanced some general criticisms as to the OM and JIT evidence (see paragraphs 409, 413 and 415 above). The Court does not accept the validity of these criticisms.

464. First, there is no evidence that the JIT has relied upon outside bodies, including Bellingcat, in its analysis of the material and the preparation of the criminal case-file. Rather, it is absolutely clear from the submissions that the JIT has conducted its own analysis in respect of all the evidence in the criminal case-file, including issues discussed in Bellingcat reports and the matters covered by the DSB report. There is no basis whatsoever for suggesting that the OM and JIT material has not been independently gathered and authenticated. The fact that their conclusions are consistent with those of the DSB and Bellingcat merely demonstrates that there is corroboration of the conclusions reached and serves to further enhance the credibility and reliability of the findings.

465. Second, the respondent Government have not provided to the Court any persuasive evidence for their generalised allegations that the intercept material in the case-file, consisting of transcripts of a number of intercepted conversations, has been manipulated. They have submitted one report containing an analysis of the authenticity of videos relating to telephone calls intercepted shortly after the downing of flight MH17 (A 2041-43). They further alleged that the SBU had initially published manipulated intercept material, deliberately omitting a reference to a Sukhoi fighter jet (often referred to as a "sushka") and that this manipulation had only come to light

once the full recording had been made available (see paragraph 413 above). The Court observes that the intercept material in the case-file has been provided by the applicant Dutch Government and comes from the OM, and not the SBU. The criticism concerning the alleged partial publication of material by the SBU is therefore not pertinent to the material provided by the applicant Dutch Government, which the respondent Government do not suggest reflects anything other than the full version of the relevant comments in the telephone call in question. The Court observes in this respect that the version of the transcript in the case-file refers to the "sushka" (A 1585).

466. Moreover, while it appears to be correct that the SBU was the initial source for the intercept evidence, it is clear that the OM has itself authenticated and verified the disclosed material and has investigated criticisms of the intercept evidence of which it became aware. It thereafter prepared a technical report in the context of the criminal proceedings which formed the basis for oral submissions to the first instance court (see A 1498-513 and 1695-98). The OM explained that while the first selection of telecoms data had been carried out by the SBU by listening to all intercepted telephone calls which might have been of relevance to the downing of flight MH17, as the JIT investigation gathered momentum the investigation of telecom data had increasingly been a concerted effort by investigators from different countries. The OM went into detail about the steps taken to validate the telecoms data. For example, in cases involving participants with foreign telephone numbers, the JIT obtained the relevant data from the foreign providers and found that it matched the material provided by the SBU in terms of dates, times and telephone numbers. The OM referred to articles and documentaries disseminated online which had prompted investigators to assess the extent to which claims made in them that intercepted calls had been manipulated could be investigated. It clarified that generalised allegations that all intercept data had been falsified could not be meaningfully investigated.

467. The material published by the OM and the JIT, including the intercept material, has been collected, analysed and subjected to a rigorous validation procedure with a view to domestic criminal proceedings. As explained by the applicant Dutch Government, it has been prepared according to highest applicable legal standards, including evidentiary standards, to enable it to be admissible in the criminal courts of all States participating in the JIT. The Court therefore accepts that this evidence is both reliable and authentic. It is for any Government seeking to challenge a particular piece of evidence to show that it cannot be relied upon. This requires particularised argument as to its alleged flaws and the submission of convincing evidence supporting the criticisms made. No such particularised and substantiated challenge has been made in the present case.

(iii) The DSB report

468. The respondent Government challenged the findings of the DSB report and alleged irregularities in the way that the wreckage had been gathered and forensically assessed (see paragraph 415 above). The Court observes that a number of the allegations related to the respondent Government's argument that the DSB had manipulated the evidence to support its conclusion that the aircraft had been penetrated from the outside. It is significant that the respondent Government have not, in the present proceedings, provided a definitive account of the circumstances that, in their view, led to the crash of flight MH17. The evidence in the case-file shows that they have, in the past, favoured the hypothesis of an air-to-air missile strike (A 1788 and 2029-30). The Court notes that this hypothesis also involves the external penetration of the aircraft. It is apparent from subsequent press conferences of the Russian Ministry of Defence (A 2031-37) and the submissions of the Representative of the respondent Government during the hearing on admissibility (see paragraphs 368-369 above) that they now accept that flight MH17 was downed by a surface-to-air missile. What is, however, contested is the assertion that the missile was supplied by or even came from the Russian Federation and that the launch site was in separatist-held territory. In view of this, and in the absence of an explanation from the respondent Government as to the continued significance of their arguments as regards the evidence of external penetration of the aircraft, the Court considers their challenges to the DSB report in this respect not to advance the case they have put before the Court.

469. The respondent Government's remaining allegations concerned the missile responsible and the location of its detonation in relation to the aircraft, from which the trajectory and possible launch area had been determined. The Court underlines that the DSB is an independent administrative body in the Netherlands and conducted its investigations into the downing of flight MH17 in implementation of the Netherlands' obligation under Article 26 of the Chicago Convention (see paragraphs 334-335 above and A 45-46 and 1621-1626), applying the binding standards and non-binding recommended practices for aircraft accidents and incident investigations set out in Annex 13 of that Convention. In addition to the investigators working for the DSB, six States, including the Russian Federation, participated in the investigation and appointed accredited representatives. The report was welcomed by the ICAO and no concerns whatsoever were raised by that organisation as to the conduct of the technical investigation or the content of the final report (A 1639-40). It is not for the Court to second-guess the conclusions reached in the DSB report, based on the technical data and expert knowledge available to that body. The respondent Government have not presented anything approaching adequate evidence to establish that the conclusions in question reached by the DSB were arbitrary or manifestly unreasonable and are, as appears to be alleged, the product of an international conspiracy resulting in a manipulated

report. While they have contested certain aspects of the DSB's conclusions, they have not presented a detailed account of what they contend to be the true version of events that approaches the level of precision provided by the DSB. The conclusions in the DSB report are, moreover, entirely consistent with the findings of the JIT investigation, which conducted its own forensic testing of the wreckage and carried out a thorough investigation into the origin of the missile and the launch site which went far beyond the technical investigation undertaken by the DSB.

470. For these reasons, the Court finds that the DSB report is authoritative in so far as the facts concerning the technical cause for the crash of flight MH17 are in dispute.

(iv) Reports by NGOs and research collectives

471. There are numerous reports by NGOs and research collectives covering the events in the Donetsk and Luhansk regions since 2014. These are generally the subject of criticism by the respondent Government (see paragraphs 410-412 above).

472. NGO and research collective reports are undoubtedly elements which can be taken into account by the Court. Where it is satisfied as to the experience and reputation of report authors and the credibility of the sources of the information in the reports, the Court may choose to accord them substantial weight. Having regard to their backgrounds and to the methodologies presented in the reports summarised in the Annex (A 2108-548), the Court is of the view that the authors of those reports, which include the Atlantic Council, Bellingcat, and InformNapalm, are credible and serious. There are, therefore, no grounds upon which to reject the evidence of these reports as a category of evidence.

473. As regards the respondent Government's particular criticisms of specific Bellingcat or InformNapalm reports, the Court will have regard to them if and when it seeks to place weight on the reports in question. It does not accept that these criticisms show any general tendency to manipulate evidence or any general flaws in the analysis or approach taken by the authors of the reports. As regards the Tarasov report for example (see paragraph 411 above and A 2044-47), the Court observes, first, that it concerned the geolocation of the soldier and was not presented as evidence that the Russian forces removed identifying numbers from equipment (A 2399). Second, Mr Higgins' statement (A 2063-67) provides a convincing explanation of why there were two photographs, one with numbers and one without. The respondent Government did not engage with the explanation he gave. As for the remainder of the photograph, the respondent Government referred only to indications of "potential" fakery. This falls quite significantly short of establishing that the photograph has been fabricated. Moreover, the respondent Government did not comment on whether Mr Tarasov was, as alleged, a Russian soldier present in Pavlovka, Russia, in the summer of 2014.

They alone had access to primary evidence, in the form of military records, capable of confirming or refuting the report's conclusion to this effect.

474. The Court furthermore observes that the videos and images analysed in reports which concern the downing of flight MH17 have often been verified and validated by the JIT investigation. Only particularised arguments and convincing evidence could lead the Court to examine itself whether such evidence is, in fact, reliable and authentic (see paragraph 467 above). It is also noteworthy that the Bellingcat and InformNapalm reports are largely consistent with the later conclusions of the JIT which, as noted above, reached its conclusions on the basis of its own methodologies and analysis. As noted above (see paragraph 464), the consistency of the JIT's conclusions with the findings of the research collectives would tend to lend support to the credibility of these findings and the methodologies followed.

475. As regards the RUSI report to which the respondent Government have referred (see paragraph 412 above), the Court notes that the report set out in detail the reasons for which its authors concluded that the leaked emails linked to Mr Surkov were genuine (A 2336-38). It explained, for instance, that the volume of emails leaked was significant and that forging this amount of data was "practically unfeasible". It also pointed out that the database of emails "overwhelmingly" comprised daily brief and media-monitoring summaries with only a "modest" amount of revelatory information. It moreover referred to confirmation from some of those whose email correspondence had been leaked that the emails attributed to them were genuine and to the conclusion of the Atlantic Council's Digital Forensic Research Lab that the headers of emails analysed appeared to be authentic and would be difficult to forge in such quantities. The respondent Government's general allegations as to the authenticity of the emails do not engage with these specific reasons for concluding that they were authentic. The Court considers that the steps taken to validate the emails were serious and credible. The respondent Government's objection comes down, essentially, to the single, unsubstantiated assertion that Mr Surkov did not use email. In these circumstances, the Court is persuaded that the details of emails to which the report refers may be relied upon.

476. The Court will take into account any additional, specific criticisms of particular findings as appropriate. Again, what is of particular interest and relevance in all of these reports is their objective factual reporting, rather than their general conclusions, since the Court will reach its own conclusions based on the facts before it.

(v) Government reports and intelligence

477. The applicant Ukrainian Government have submitted a great deal of material produced by their Government officials and agencies containing detailed and lengthy information in support of their allegations. The Court is persuaded that this official material constitutes a valid means by which the

factual picture may be clarified in a case of this nature and is therefore an element which the Court will take into account. As outlined above (see paragraph 446), it must be approached with some caution given that it would likely be in favour of the applicant Ukrainian Government's case. The Court will therefore have regard to the extent to which the material is consistent with the other evidential elements in the case. The Court has already explained that it is prepared to draw appropriate inferences from the respondent Government's failure to provide relevant information and evidence capable of refuting or corroborating extensive and specific factual allegations made by the applicant Governments (see paragraph 459 above).

(vi) Witness statements

478. Witness statements have been provided from individuals in relevant areas of eastern Ukraine and from Russian and Ukrainian soldiers involved in the hostilities there. The Court also has indirect witness testimony via the material provided in respect of the trial in The Hague of four individuals suspected of playing a role in the downing of flight MH17.

479. Where statements have been provided by witnesses whose evidence appears on its face to be truthful and credible, even if entirely untested, they may play an important role in evaluating, at this admissibility stage, whether a prima facie case of alleged violations has been established. That said, statements from untested witnesses should be treated with a greater degree of caution in so far as they are relied on in the context of the establishment of Article 1 jurisdiction beyond reasonable doubt, although they may constitute one of the elements to which the Court may have regard when determining whether it is justified to shift the burden of proof or draw inferences (see paragraph 436 above). Greater reliance may in this context be placed on the evidence of witnesses who have been examined by the examining magistrate in the context of the criminal proceedings before the first instance court in The Hague.

(vii) Interviews and press conferences

480. The President of the Russian Federation, other representatives of the respondent Government and a number of prominent separatists operating in eastern Ukraine have given interviews or made statements relevant to the issues contested in this case. Such interviews constitute elements which the Court will take into account, with due regard to any arguments as to their truthfulness and any inconsistencies between the statements made in interview and other evidence in the case-file. As noted above, statements by the President and Government of the respondent State which support the position adopted by the latter in the present proceedings should be treated with some caution; however, where their statements acknowledge facts or conduct that place the authorities in an unfavourable light, the Court may

construe them as a form of admission (see paragraph 446 above). In view of the special relationship that the respondent State has enjoyed with the separatist entities since the outset (see paragraph 458 above), and the consequent evident interest of the latter in supporting the position of the Russian Federation, the Court will apply similar considerations to statements made by prominent separatists.

(viii) Media reports

481. A number of media articles have been submitted as evidence in the present case. Such articles cannot by themselves be seen as proof in respect of the parties' positions but may be taken into account as relevant elements which are consistent with or contradict the other evidence in the case. Articles which fall into the category of investigative journalism and are thus based on first-hand research which is documented to a sufficient extent may merit particular attention. Again, the Court will reach its own conclusions by reference to the first-hand research reported in the articles rather than accepting at face value the conclusions reached therein.

IV. ALLEGED LACK OF A "GENUINE APPLICATION"

A. The parties' submissions

1. The respondent Government

482. The respondent Government contended that the applications were not "genuine applications" under Article 33 of the Convention. They claimed that they amounted to a bad faith abuse of process.

483. They argued that a genuine inter-State application under Article 33 had to be brought in good faith for a proper human rights purpose. This derived from the duty to cooperate with the Court in Article 38 of the Convention and Rule 44A of the Rules of Court, and from the fundamental principles of international law, of which the good faith principle was one. The application concerning the general situation in eastern Ukraine was not a genuine application brought in good faith. It amounted to political propaganda based on false evidence of Russian involvement and ought therefore to be rejected as an abuse of the right to apply (citing *Jian v. Romania* (dec.), no. 46640/99, 30 March 2004). Similarly, the applicant Dutch Government had relied on false evidence and sham investigations in their application about the downing of flight MH17.

484. The applicant Ukrainian Government had shown contempt for the obligations they invoked because their own evidence showed that they had been involved in the indiscriminate shelling of citizens. Under international law, a State which was guilty of illegal conduct could be deprived of standing in respect of complaints of corresponding illegalities by other States. The

respondent Government pointed in support to the case of *McCann and Others v. the United Kingdom* (27 September 1995, § 219, Series A no. 324), where, they claimed, this Court refused relief to alleged victims engaged in an aggressive enterprise contrary to the human rights of others.

485. Moreover, the applicant Ukrainian Government had interfered with the proper administration of justice because, notwithstanding their denials, they were involved with the Myrotvorets website. The website, which appeared to be hosted in San Francisco, was supported by the applicant Ukrainian Government and had direct links to the SBU. The respondent Government provided evidence to show support for the website from Anton Gerashchenko, at the time an adviser to Ukraine's Interior Minister, who subsequently became Deputy Minister of Internal Affairs. They claimed that the website was notorious for listing journalists and others who expressed views or provided evidence inconsistent with the orthodoxy demanded by the Ukrainian authorities. The consequences of listing could be serious: a former parliamentarian and a journalist had been murdered shortly after their listing in 2015. The site had listed the Representative and counsel of the respondent Government, as well as one of their expert witnesses, Mr Rosen, shortly after the hearing in *Ukraine v. Russia (*re *Crimea)* in September 2019. The applicant Ukrainian Government clearly had the power to close down the website if they wished but had not done so. The listing of Mr Rosen had undermined the willingness of some experts to assist and participate in proceedings, which had fundamentally damaged fairness, natural justice and equality of arms.

486. The respondent Government further claimed that Russian law firm, Ivanyan & Partners, which instructed Russia's counsel and experts in the present proceedings, had been subjected to hacking attacks and that Bellingcat, which supported both applicant Governments, was in possession of the hacked material. This further supported their allegations of abuse of process.

487. As regards the application concerning the alleged abduction and transfer to Russia of groups of children and accompanying adults, the allegations were false and baseless propaganda. It was clear from the evidence that the children had been fleeing a dire situation created by Ukraine's armed forces. The failure of Ukraine to adduce proper evidence over six years carried the implication that it had none. The application was therefore a bad faith abuse of the process of the Court and was also not a genuine allegation as required by Article 33 of the Convention.

2. The applicant Ukrainian Government

488. The applicant Ukrainian Government accepted that an application could be declared inadmissible if it was lacking the requirements of a genuine allegation in the sense of Article 33 of the Convention. However, the necessary evidentiary threshold had plainly been surmounted in the present

case. They refuted allegations of fabricated evidence advanced by the respondent Government.

489. It had also long been settled that the issue of alleged political motivation was not relevant to admissibility in the context of inter-State proceedings. The application concerning the general situation in eastern Ukraine had been brought to vindicate the human rights of certain sections of its population.

490. Finally, the applicant Ukrainian Government refuted any suggestion of their involvement in the Myrotvorets website. The respondent Government had not asserted tangible prejudice to Mr Rosen and the allegation that unnamed experts had been deterred from assisting the respondent Government in these proceedings was unsupported by any evidence. In any event, appropriate arrangements could be made to safeguard the identity of any witness who had a well-founded fear of reprisal.

3. The applicant Dutch Government

491. The applicant Dutch Government insisted that the evidence presented was authentic and reliable. All evidence collected in the context of the criminal investigation had been carefully verified.

B. The Court's assessment

492. In relation to individual applications, Article 35 § 3 (a) allows the Court to declare inadmissible an application lodged under Article 34 on the ground that it constitutes an abuse of the right of individual application. There is no such provision in respect of inter-State applications lodged under Article 33 of the Convention. No general, and in the absence of an express provision, necessarily implied, good faith requirement for the admissibility of inter-State applications has been identified under the Convention or under general public international law beyond the existing criterion already set out in the Court's case-law that such application must not be "lacking the requirements of a genuine allegation" (see *Ukraine v. Russia (*re *Crimea)*, cited above, § 269). The Court does not consider there to be any basis for now introducing such a requirement.

493. It therefore falls to be examined whether the applications fall foul of the criterion that an application must not be "lacking the requirements of a genuine allegation", by reference to the objections made by the respondent Government. These objections may be summarised as follows: (1) that the applications lodged by the applicant Ukrainian Government amounted to political propaganda; (2) that false evidence had knowingly been presented to the Court, in particular in respect of the allegations concerning flight MH17; (3) that Ukraine had shown contempt for the Convention obligations it invoked; (4) that the applicant Ukrainian Government were involved in the

activities of the Myrotvorets website; and (5) that lawyers acting for the respondent Government had been subjected to hacking attacks.

1. Alleged political propaganda

494. In its decision in *Ukraine v. Russia (*re *Crimea)* (cited above, § 271), the Court explained that in considering whether an application is lacking the requirements of a genuine allegation, it would take account of the nature of the issues raised before it by the applicant Government. It continued:

> " ... Having regard to the scope of the case as defined above, the Court considers that those issues are indeed legal ones, since the Court is asked to rule on whether in Crimea the respondent State complied with any obligation it may have had under Article 1 to secure the rights and freedoms defined in the Convention (and the Protocols thereto) to everyone within its jurisdiction, provided that such jurisdiction is established. That preliminary issue of whether, at any relevant time, the respondent State exercised jurisdiction over Crimea within the meaning of Article 1 is closely linked to the object of the case as defined above and is likewise of a legal nature.
>
> 272. The Court is mindful that these questions inevitably have political aspects. However, that fact alone does not suffice to deprive them of their character as legal questions. Indeed, the Court has never refused to decide a case brought before it merely because it had political implications. Any such implications in the present case cannot deprive the Court of the competence expressly conferred on it under Article 19 of the Convention. Judicial adjudication on those issues is entirely consonant with its competence under that Article to ensure the observance of the engagements undertaken by the respondent State in the Convention and the Protocols thereto.
>
> 273. Furthermore, the political nature of any motives which might have inspired the applicant Government to submit the application and the political implications that the Court's ruling might have are of no relevance in the establishment of its jurisdiction to adjudicate the legal issues submitted before it ..."

495. The Court considers that, as in that case, the issue before it in the present case, seen in the context of the scope of the case and the nature of the issues raised, is a legal one. The Court is asked to rule on whether the respondent State has complied with whatever obligations it may have had under Article 1 of the Convention in respect of various events in the relevant parts of Donbass. While this question may have political aspects, this does not deprive the issues concerned of their legal character.

2. Alleged submission of false evidence

496. The Court does not consider that there is any evidence before it to support the argument that either of the applicant Governments have knowingly presented false evidence in the present proceedings. It has already explained (see paragraph 467 above) that it considers the evidence gathered and published in the context of the criminal investigation by the JIT and the OM to be authentic and reliable. It has further indicated that there is no evidence that the conclusions of the DSB were manipulated as part of an

international conspiracy, as alleged by the respondent State (see paragraph 469 above).

3. Alleged contempt for the Convention obligations invoked

497. The Court emphasises that the substance of the present applications requires it to confine its investigation essentially to acts and incidents during the relevant period (see paragraphs 392-393 above) for which Russia, as a High Contracting Party, might be held responsible. Alleged violations of the Convention by Ukraine are not before the Court in these proceedings and therefore cannot be taken into account here (see paragraph 395 above and *Cyprus v. Turkey*, nos. 6780/74 and 6950/75, Commission report of 10 July 1976, Vol. I, unreported, at p. 32, § 85). The Court observes that the respondent Government lodged, in July 2021, an application against Ukraine under Article 33 of the Convention in respect of events in eastern Ukraine (see paragraph 28 above), in which the matter of Ukraine's respect for its obligations under the Convention may well have to be determined.

4. Alleged involvement in the Myrotvorets website

498. The Court considers that as far as Ukraine's involvement in or control over the Myrotvorets website (A 2619) is concerned, the case of the respondent Government amounts to no more than vague and unsubstantiated allegations. On their own admission, the site is hosted in the United States and there is nothing approaching compelling evidence of possible Ukrainian State involvement or control. The respondent Government have at most shown that a senior figure in the Ukrainian Government personally supported the website prior to his appointment as Deputy Minister of Internal Affairs. This falls far short of making out an allegation of control over or support for the website and its activities by the applicant Ukrainian Government.

499. Moreover, and in any case, the respondent Government have provided no evidence to the Court to show that listing on the Myrotvorets website actually entails a risk to life or limb, beyond the threats made on the website. They have consistently and exclusively referred to two killings which occurred in spring 2015, allegedly shortly after the victims had been listed on the Myrotvorets website. No details of the alleged 2015 killings have been provided and no evidence or explanation of the causal link between listing and the killings has been advanced. No further assaults or killings have been alleged, notwithstanding the fact that thousands of people have been listed on the website since 2015. Although the respondent Government have had ample opportunity to provide more details of the risks said to be faced by those listed since first making their allegation in September 2019, they have failed to do so. In short, the allegation comes down to two vague and unexplained instances which occurred eight years ago where persons listed

were killed by, at least as far as the Court is aware, unknown perpetrators for unknown reasons.

500. Finally, there is no evidence that any witnesses in these proceedings have in fact been intimidated as a consequence of the listing of Russia's counsel, Representative or expert. The respondent Government have referred to witnesses refusing to assist or to be named but have provided no evidence at all to substantiate this claim, whether by way of witness statements from potential expert witnesses, anonymous or otherwise, expressing their fears or a statement from Mr Rosen, the expert witness of the respondent Government who was listed on the website, or one of the other named witnesses upon whom they relied.

5. Alleged hacking attacks

501. The Court notes that Ivanyan & Partners have never been on record as acting for the respondent Government in the present proceedings. In any event, there is no suggestion or evidence that the applicant Governments are in any way responsible for these alleged cyber-attacks.

6. Conclusion

502. In conclusion, none of the respondent Government's submissions are capable of substantiating their objection that the applications are lacking the requirements of a genuine allegation under Article 33 of the Convention. The respondent Government's objection under this head is accordingly dismissed.

V. JURISDICTION

A. General

503. The English term "jurisdiction", in the context of the Convention, refers to two separate, but related, matters.

504. The first is the Court's own jurisdiction pursuant in particular to Articles 19 and 32 of the Convention (or "*compétence*" in French) to receive an application and to determine it. This requires, for example, examination of its *ratione personae* jurisdiction (for example whether, in the context of an individual application, an applicant may be considered a "victim" for the purpose of Article 34) and its *ratione materiae* jurisdiction (for example whether the right relied upon is protected by the Convention and the Protocols thereto and the matters complained of fall within their scope). The Court has consistently underlined that it must satisfy itself that it has jurisdiction in any case brought before it and is therefore obliged to examine the question of its jurisdiction at every stage of the proceedings (see *Blečić v. Croatia* [GC], no. 59532/00, § 67, ECHR 2006-III).

505. The second concerns the jurisdiction of the High Contracting Parties, since their Article 1 obligation requires them to secure Convention rights and freedoms to "everyone within their jurisdiction".

506. In order for an alleged violation to fall within the Court's Article 19 jurisdiction to "ensure the observance of the engagements undertaken by the High Contracting Parties", it must first be shown to fall under the Article 1 jurisdiction of a High Contracting Party. It is for this reason that the Court has described Article 1 jurisdiction as a threshold criterion (see *Ilaşcu and Others*, cited above, § 311; *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 130, ECHR 2011; and, most recently, *Georgia v. Russia (II)*, cited above, § 129). In its recent decision in *Ukraine v. Russia (*re *Crimea*) (cited above, § 264), it explained that the question whether the case fell within the jurisdiction of the respondent State was a preliminary issue to be determined before any assessment of the merits of the substantive allegations could take place.

507. Establishing the existence of Article 1 jurisdiction is not necessarily determined by the merits of the case, and it is not therefore necessarily to be left to be determined at the merits stage of the proceedings. There is nothing to prevent the Court from establishing already at this preliminary (admissibility) stage whether the matters complained of by the applicant Governments fall within the jurisdiction of the respondent Government (see *Ukraine v. Russia (*re *Crimea*), cited above, §§ 264-65 and 303 *et seq.*).

B. Article 1 jurisdiction

1. The parties' submissions

(a) The respondent Government

508. The respondent Government opposed what it considered the Court's expansion of the concept of jurisdiction to cover territory outside the geographical borders of a Contracting State on the basis of "effective control". They argued that this development was not in line with the Vienna Convention on the Law of Treaties or the intentions of the drafters of the European Convention on Human Rights. "Jurisdiction" ordinarily meant sovereign jurisdiction, since a State's obligations could only be met using sovereign powers. The Convention had been developed to deal with the domestic affairs of States, in tandem with the separate development of the Geneva Conventions dealing with conflict. Without making reference to Articles 15 and 56 of the Convention, the respondent Government asserted that the Convention contained a provision for derogation in the context of conflict and allowed States to decide whether it should apply in foreign dependent territories that they controlled. This latter provision was totally inconsistent with the Court's imposition of the Convention in relation to territory outside their national territory.

509. The concept of "living instrument" should not be applied to extend the Convention's reach into areas governed by international humanitarian law. The general position of States had been averse to such a development: they had resisted attempts to extend the Convention to such areas and had not lodged derogations under Article 15 in respect of areas outside their territories that might be under their control. Moreover, manuals for forces operating abroad were based on international humanitarian law. The Court's expansion of jurisdiction beyond a State's borders was illegitimate.

510. In any case, even on a most generous reading of the Court's case-law, the suggestion that the Russian Federation had effective control over relevant parts of eastern Ukraine was unsustainable. There was no plausible prima facie evidence of any Russian invasion during the relevant period, which if proved might have been sufficient to show effective control under the Court's case-law. Although ten soldiers of the Russian 331st Guards Airborne Regiment had been captured in Ukraine, they had crossed the border by mistake. As regards alleged control via cross-border shelling by Russian Federation troops, such shelling was denied. In any case, *Banković and Others v. Belgium and Others* ((dec.) [GC], no. 52207/99, ECHR 2001-XII) had clearly established that the firing of weapons did not establish control where they landed for the purposes of making that area subject to the jurisdiction of the firing State.

511. The applicant Ukrainian Government had further failed to show any alleged control via agents in the "DPR" and "LPR". The senior figures in the administration had not been shown to be Russian State agents. The perpetrators of specific acts (variously "Russian armed groups", "armed groups", "Russian militants", "pro-Russian militants", "representatives of LPR" etc.) had also not been demonstrated to be State agents of the Russian Federation. The "high point" of Ukraine's case was to point to the role of Mr Girkin, a Russian national, but "whilst he is referred to in press reports as having belonged, once, to Russia's security services, he is described consistently as retired". He was not a State agent of the Russian Federation. It was inevitable that Ukraine's outrageous violence against Russian speakers in eastern Ukraine had prompted sympathy from the Russian people. There was "no doubt" that some had been prompted to help in various ways and "[w]ithout doubt some Russians have gone to fight in Ukraine, along with concerned and motivated people from a range of countries". This did not, however, entail State control of eastern Ukraine by the Russian Federation.

512. In so far as the applicant Ukrainian Government sought to rely on *Ilaşcu and Others* (cited above) to support an argument of control via support for the "DPR" and "LPR", this argument was also flawed. First, this jurisdictional ground lay at the very extreme of the Court's "expansionist approach". Second, a broad interpretation of *Ilaşcu and Others* would depart from common sense and practical reality. Support given to a separatist administration did not, as a matter of fact, necessarily carry actual control.

Third, a wide application of *Ilaşcu and Others* would have no moral authority since it could extend to an outside State providing humanitarian support, which was the respondent Government's position as to their engagement in eastern Ukraine. It would be absurd and antithetical to everything that the Convention stood for to impose liability on an outside State for provision of necessary humanitarian support. This was especially so here when the humanitarian aid went to ordinary people and not to any administration.

513. In any case, the *Ilaşcu and Others* principle was inapplicable on the present facts. As *Ilaşcu and Others* explained, establishing jurisdiction on the basis of support to a subordinate administration depended on the latter thus being assisted to survive and to resist the efforts of a *de jure* government and the international community to restore the rule of law and democratic values. This did not apply to eastern Ukraine since the new authorities installed in Ukraine in 2014 were neither *de jure* nor constitutional, they were not democratic and they were not trying to restore the rule of law or democratic values. There had been no lawful change of government and the new government was therefore unconstitutional, and widely regarded as such in eastern Ukraine.

514. Even where it applied, the *Ilaşcu and Others* principle merely created a fiction of effective control; it could not create a fiction of attribution and State responsibility. Public international law, in the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts 2001 ("ARSIWA") and ICJ case-law, set out clear conditions for State responsibility to arise. These conditions had not been met here. In particular, the starting principle was one of non-attribution, with exceptions to that principle being outlined in the ARSIWA. The applicant Ukrainian Government had failed to show that any of the exceptions were satisfied on the facts of the case. There was therefore no scope for the Court to find attribution based on support. Russia could not be held accountable for acts of third parties or the subordinate administrations in eastern Ukraine.

515. Moreover, the actual evidence showed that the separatists had no central control themselves. The OHCHR report of 15 June 2014 noted that some of the armed groups operating in the regions had "reportedly slipped out of the control and influence of the self-proclaimed republics and their leaders", for example "in the area surrounding the town of Horlivka (reportedly under the control of an armed group led by Igor Bezler)".

516. In their first-stage memorial, submitted after the delivery of the Court's judgment in *Georgia v. Russia (II)* (cited above), the respondent Government argued that the findings in that judgment as regards jurisdiction during the active phase of hostilities applied to the present applications in respect of complaints about military attacks. The judgment excluded the "complaints concerning MH17 and all allegations of Ukraine concerning shelling".

517. They argued that this was a civil war with defined sides and front lines that were moving all the time. The fluidity of the situation was such that no maps were authoritative. This fluidity was illustrated by the maps prepared in the context of Ukraine's own ATO and a video of them over time and by BBC maps showing very considerable changes over a span of months. The areas affected included the alleged firing position of the Buk missile which had allegedly downed flight MH17 and the crash site close by. Even if, which was denied, the separatists were to be regarded as Russian agents or the alleged Buk had had a Russian crew, control over the whole area had been contested and fluid. The situation on the ground in the area where the Buk missile had allegedly been fired had been "very obviously contested" and the airspace above it had also clearly been a "contested war zone". For this reason, it was impossible to suggest that Russia had had effective control over the area where MH17 was destroyed. The events in the active conflict – including the downing of flight MH17 – were "shrouded in the fog of war". Generally in these circumstances fact-finding was virtually impossible. The confusion about what side controlled what territory was reflected in Ukraine's own application: it had "repeatedly" alleged abuses in areas that it claimed to have controlled, at the material times, in its ATO maps.

518. The respondent Government explicitly addressed the HRLC's submissions in this respect (see paragraphs 539-546 below). They considered that using the personal, and not the spatial, conception of jurisdiction to say that the shooting down of flight MH17 was an exercise of physical power over the individuals onboard for the purpose of Article 1 jurisdiction was inconsistent with the Convention and ignored the result and reasoning in *Georgia v. Russia (II)* (cited above). The firing of weapons indicated an absence of control over those injured by the weapons and the space they occupied. Weapons were fired to gain control of space or to kill the enemy, not because control existed. To take any other view would be to bring all conflict within the purview of the Court if a civilian (or perhaps even a soldier) were hit. Applying the Convention to conflict would stretch it, irreconcilably, into the legal space governed by the very different rules of international humanitarian law, which were outside the substantive jurisdiction of the Court. It would compromise legal clarity in both spheres and introduce compulsory jurisdiction in relation to international humanitarian law where States had not agreed that any tribunal had compulsory jurisdiction. It would also take this Court into huge uncertainty on the facts. In any case, the applicant Ukrainian Government had completely failed to put forward any basis for considering all members of the "DPR" and the "LPR" to be State agents for the purposes of control.

519. As already explained (see paragraphs 408-415 above), the respondent Government also contested the authenticity and reliability of the evidence relied upon by the applicant States to show jurisdiction.

(b) The applicant Ukrainian Government

520. The applicant Ukrainian Government argued that jurisdiction existed on the basis of both the principle of effective control of territory (directly and through subordinate local forces) and the principle of State agent authority and control over the victims of the violations committed against people deprived of their liberty. The evidence demonstrated beyond any doubt that the Russian Federation had effectively instigated the conflict and had, throughout, supported the pro-Russian armed groups by supplying (and facilitating the supply of) funds, weapons, ammunition, "volunteers" and mercenaries and by providing direct military and political support for the separatist forces and their "administrative" entities. The vast majority of Convention violations alleged in the present applications had occurred in territory controlled at the relevant time by the "DPR" and "LPR", and their associated paramilitary formations, with the direct intervention and participation of Russian armed forces on the ground in eastern Ukraine during phases of the conflict.

521. In their initial memorial, the applicant Ukrainian Government argued that the evidence clearly demonstrated that Russia's subordinate local administration and its paramilitary forces had been in effective control of the relevant parts of Donbass from early March 2014. It was true that the precise boundaries of the territory being occupied had seen some fluctuations from time to time as the ATO had succeeded in regaining control of certain areas for certain periods. However, the overall picture was clear: with Russian backing, the separatist entities had been in effective control of the relevant territory in the Donetsk and Luhansk regions since April 2014. In his oral submissions, counsel for the applicant Ukrainian Government clarified that their position was that the Russian Federation had established effective control over "occupied Donbass" in April 2014 and had exercised Article 1 jurisdiction over this area since at the very latest the end of April 2014. Their position was that this remained the case as at the date of the oral hearing. While there had been moments of intense fighting, such as the battle of Ilovaisk, these had occurred within territory that had previously been under Russian separatist occupation. The situation was therefore entirely different from that pertaining in respect of the active phase of hostilities in *Georgia v. Russia (II)*, where it had been impossible for the Court to determine which side had been in "effective control" during the period of active fighting. It was, however, closely analogous to the situation that persisted during the occupation phase examined in that case, in respect of which the Court had found Russia and its subordinate local forces to have established effective territorial control over the area concerned.

522. The evidence also demonstrated "beyond a shadow of a doubt" that during the relevant period the separatist entities were operating under the decisive influence, operative direction and military support of the Russian Federation. The evidence clearly established that the "DPR", the "LPR" and

the various paramilitary and "administrative" entities operating in eastern Ukraine were proxies of the Russian Federation. They depended entirely on Russia for funding, which had initially been provided by individuals close to the President and was later provided directly from State funds. They depended upon Russia for military and political support, through the infiltration of Russian special forces operatives who had instigated the armed rebellion in the first place; through the steady cross-border supply of heavy weapons emanating from the Russian armed forces; through the recruitment, training and transfer of "volunteers" and mercenaries; through the selection, appointment, operational direction and dismissal of the political and military leadership of the armed groups and "administrative entities" of Donetsk and Luhansk; through the conduct of cross-border artillery attacks on Ukrainian forces to support the armed groups; through direct land invasion of the sovereign territory of Ukraine by the conventional forces of the Russian army in support of the armed groups; and through the central coordination of the pro-Russian forces throughout the entire conflict. Many of the key Russian military and political leaders involved in the coup in Crimea and the subsequent occupation had moved immediately on to become part of the "institutions" of the "DPR" and the "LPR". Mr Girkin had been directly involved in the seizure of the Crimean Parliament building on 27 February 2014, had negotiated with the headquarters of the Ukrainian navy and had coordinated the actions of the so-called Crimea "self-defence units"; and Mr Borodai had worked as an advisor to Mr Aksyonov after the latter had become "Prime Minister" of Crimea on 27 February 2014.

523. According to the Court's case-law, where a Contracting Party had taken effective control of a portion of another State's sovereign territory, it would be liable for the actions of its own agents and also for the actions of the agents of any subordinate local administration or paramilitary force which it had established or which depended for its existence and survival on the former State's support. It was unnecessary to show that the occupying State actually exercised detailed control over the policies and actions of the authorities of the subordinate administration. Liability arose by virtue of the relationship of dependency between the subordinate local administration and the Contracting State.

524. The applicant Ukrainian Government referred to a 2015 report by the Atlantic Council which had reviewed satellite imagery and publicly available photographic evidence assessed with geolocation analysis by open-source researchers and had concluded that the war in eastern Ukraine was "a Kremlin-manufactured conflict". The report had tracked the movement of soldiers and vehicles and cross-border shelling from Russia to Ukraine.

525. They also referred to a comprehensive list of reports prepared by Bellingcat, which had used photographs and videos posted to social media and modern geolocation analysis to pinpoint a number of cross-border supply

routes used by the Russian armed forces to smuggle fighters, heavy weapons and ammunition into Ukraine.

526. The respondent Government's attempts to change the Court's approach to extraterritorial jurisdiction based on the public international law principles of State responsibility had already been roundly rejected by the Grand Chamber in *Catan and Others v. the Republic of Moldova and Russia* [GC] (nos. 43370/04 and 2 others, ECHR 2012 (extracts)).

527. As regards alleged jurisdiction on the basis of State agent authority and control, the applicant Ukrainian Government referred to the Court's judgment in *Al-Skeini and Others* (cited above, §§ 134-36). A consistent and widespread practice of abductions, torture and murder of civilians, and torture and extrajudicial execution of Ukrainian service personnel who were prisoners of war or *hors de combat*, had been clearly established on the evidence. There were numerous records by the OHCHR and the OSCE attesting to this pattern of violations. These crimes had been perpetrated by Russian regular and proxy forces, acting separately or in conjunction with one another. All the perpetrators had been either agents or proxies of the Russian State for the purposes of the Convention.

528. In cases involving human rights violations of people taken captive, the victims had been under the complete physical control of the perpetrators at the time the violations had occurred. For this category of violations, it was immaterial whether the events had occurred in territory that was at the time under the effective control of the Russian Federation and its proxies, in contested territory or (exceptionally) in territory that was under Ukrainian Government control. In cases involving the principle of "State agent authority", Article 1 jurisdiction was premised upon the physical control exercised by State agents over the victim's person, rather than upon the overall control of the territory in which the violation occurred. Given the levels of essential military, economic and political support provided by the Russian Federation, agents of the various pro-Russian paramilitary formations were to be treated as Russian State agents for the purposes of Article 1 of the Convention.

529. At the admissibility stage, both of the bases of jurisdiction invoked required the Court to conduct a preliminary evaluation of the extent of Russian State involvement in, and responsibility for, the establishment and activities of the pro-Russian armed groups operating in eastern Ukraine. Such evaluation was sufficient to show that the acts complained of were capable of falling within Russian jurisdiction. Any more detailed examination of the basis for jurisdiction was to be reserved for the merits phase of the case (citing the *Georgia v Russia (II)* decision, cited above, §§ 66-68; see also paragraph 418 above).

530. Finally, the applicant Ukrainian Government confirmed that they adopted the submissions of the applicant Dutch Government in respect of

jurisdiction and the steps taken to verify the evidence gathered in the context of the investigations into the downing of flight MH17.

(c) The applicant Dutch Government

531. The applicant Dutch Government considered that at the time of the downing of flight MH17, those on board had been within the jurisdiction of the Russian Federation. The Russian Federation had exercised effective control over the "DPR", where the downing had taken place and had exercised jurisdiction through the use of force by its State agents.

532. As to the former, a group of separatists had secured an area that included Donetsk, Slovyansk and Hrabove by April 2014 and on 7 April the "DPR" had been proclaimed. Through the use of force, supported by the Russian Federation, the separatists had maintained their control, while establishing an administrative structure and providing the local population with economic support to ensure long-term control over the area. The separatists had been under the effective authority, or at the very least under the decisive influence, of the Russian Federation. There was compelling evidence that the Russian Federation had provided political, military and economic support to the separatists and later to the "DPR", including through the deployment of members of the Russian armed forces, artillery support, influence over military strategy of the separatists and the training and equipping of separatists. This support had been crucial for the establishment and survival of the "DPR". The evidence showed that the missile which downed flight MH17 had been launched from a Buk-TELAR in a field in "DPR" territory; and that the Buk-TELAR in question belonged to the 53rd AAMB of the Russian armed forces and had been transported by the Russian Federation from its territory to the separatist-controlled field in eastern Ukraine and then returned to the Russian Federation after the downing of the aircraft.

533. As to jurisdiction based on the use of force by State agents, the applicant Dutch Government referred to the provision of the Buk-TELAR together with a Russian crew, all from the 53rd AAMB based in Kursk, Russia. The vehicle, which had travelled as part of a large convoy, had been traced from its base on 23 June 2014 to the field in eastern Ukraine from which the missile had been launched on 17 July 2014. Given the knowledge and expertise required to launch a Buk missile (see paragraph 331 above), it was highly unlikely, if not impossible, that the separatists had managed to train someone to the required standard before the missile had been launched. The only logical conclusion was that the Buk-TELAR had been manned by members of the Russian armed forces and that the missile had been launched by or with the assistance of those individuals. Intercepted telephone calls referred to a Buk-TELAR arriving in Donetsk with a crew on the morning of 17 July.

534. This use of force by Russian State agents brought those onboard flight MH17 within the jurisdiction of the Russian Federation based on the Court's case-law in *Pad and Others v. Turkey* ((dec.), no. 60167/00, § 54, 28 June 2007), *Andreou v. Turkey* ((dec.), no. 45653/99, 3 June 2008) and *Solomou and Others v. Turkey* (no. 36832/97, § 51, 24 June 2008).

535. The applicant Dutch Government addressed the Court's judgment in *Georgia v. Russia (II)*, cited above, and in particular the distinction made there between military operations carried out during an "active phase of hostilities" on the one hand and the period following that phase on the other. In the present case there had been no "active phase of hostilities" in the sense of an "armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos" (referring to § 126 of the judgment). In the Court's established case-law, the Convention had been applied to the use of force both territorially and extraterritorially in the event of armed clashes or the use of military force (citing, among other cases, *Hassan v. the United Kingdom* [GC], no. 29750/09, §§ 76-77, ECHR 2014; *Al-Skeini and Others*, cited above, § 23; *Cyprus v. Turkey* judgment, cited above, § 133; and *Varnava and Others v. Turkey* [GC], nos. 16064/90 and 8 others, §§ 185-86, ECHR 2009). They concluded from this that the existence and prevalence of armed clashes and the use of military force did not by definition give rise to a "context of chaos" such as to prevent a State exercising Article 1 jurisdiction.

536. Moreover, the situation in eastern Ukraine on 17 July 2014 could not be compared to the situation in South Ossetia, Abkhazia and the "buffer zone" in Georgia between 8 and 12 August 2008. The *Georgia v. Russia (II)* judgment indicated that there had been a brief period of intense fighting in which the Russian Federation through military forces had captured areas in Georgia, with some armed clashes continuing after the ceasefire of 12 August. In eastern Ukraine, by contrast, there had been no such period of concentrated, intense fighting at the time of the downing of flight MH17. Control over the specific area concerned had already been established by the separatists before 17 July 2014. If, in eastern Ukraine, there was indeed a period that could be characterised as an "active phase of hostilities", such phase would have been in the period preceding the unilateral ceasefire declared by Ukraine on 20 June 2014. That some armed clashes had continued to take place after the ceasefire did not call into question that conclusion.

537. Any other appraisal of the applicability of the Convention would seriously compromise its purpose and effectiveness. If Article 1 jurisdiction were to exist each time hostilities in an area died down and disappear every time they flared up again, this would lead to situations in which there would be jurisdiction one day and not the next, only to be present again the following day. It would create an unacceptable situation whereby Convention protection could be switched on and off. The matter of jurisdiction could not be approached in this way.

538. As regards the alleged violation of the respondent State's procedural obligation under Article 2 of the Convention, the applicant Dutch Government invoked "special features", within the meaning of *Güzelyurtlu and Others v. Cyprus and Turkey* ([GC] no. 36925/07, § 190, 29 January 2019), which they said gave rise to a jurisdictional link for the purposes of that obligation. The Buk-TELAR which had launched the missile belonged to the Russian Federation, those responsible for transporting and launching the missile had been Russian State agents who had fled back to Russia after the launch, the evidence relating to the downing of flight MH17 was located in the Russian Federation, and the Russian Federation had a duty to cooperate following requests for legal assistance by the applicant Dutch Government. The Court's judgment in *Georgia v. Russia (II)* did not call into question jurisdiction arising on this basis in the context of the procedural obligation to investigate under Article 2.

2. Third-party submissions

539. The HRLC began by setting out its view of the relationship between attribution and jurisdiction in the extraterritorial context. As regards attribution, the question was whether particular conduct concerned conduct of a "State". Every case litigated before the Court raised an attribution issue, but in most cases the conclusion was manifestly obvious because the impugned conduct was that of a State's own *de jure* organs. Jurisdiction on the other hand was a condition imposed by Article 1 which had to be satisfied if a State was to be held responsible for acts or omissions attributable to it. It could arise in one of two forms: spatial or personal. In cases of personal jurisdiction, the conduct constitutive of authority or control over the victim was often the same as the violation-establishing conduct.

540. In this context, rules of attribution of conduct stemmed from general international law, as authoritatively interpreted by the International Law Commission ("ILC") and the ICJ. The Court had regularly referred to the ARSIWA and had relied on the attribution rules they contained. The ARSIWA were therefore a necessary starting point and any divergence from them required principled and substantial justification.

541. The HRLC explained the relevant rules of attribution as follows. First, the conduct of persons who were considered *de jure* or *de facto* organs of the State was attributable to the State under Article 4 ARSIWA. A *de jure* organ was a person who enjoyed such status under the State's domestic law. A *de facto* organ was not regarded as such by the State's own law but was a person or entity "completely dependent" on the State, which in fact acted as if it was one of its organs. Second, under Article 8 ARSIWA the conduct of a person who was neither a *de jure* nor a *de facto* organ could still be attributed to the State if the State had instructed, directed or effectively controlled that person into committing the specific conduct in question.

542. In respect of the downing of flight MH17, if the crew of the Buk-TELAR had been members of the armed forces of the Russian Federation, and if any other relevant individuals had been officials of, for example, the respondent State's security agencies, the conduct would be that of the respondent's *de jure* organs. If the crew of the Buk-TELAR and other relevant individuals had been personnel of separatist armed groups, one possible theory of attribution would be that of *de facto* organ status, which would require showing that the armed groups in eastern Ukraine had been completely dependent on and controlled by the respondent State. A different theory would be based on instructions, directions or effective control by the respondent State over the downing of flight MH17. This would require showing that Russian officials had issued instructions that the aircraft be shot down or that they had exercised control over the act itself.

543. In the event that the downing of flight MH17 could be attributed to Russia, the question would then arise whether the victims on board the flight had been within Russia's jurisdiction under either the spatial or the personal approach applied by the Court.

544. If applying the spatial test, it would need to be established that the respondent State had been in effective control of the area of eastern Ukraine over which the aeroplane was shot down. Its control could be exercised either directly or through a subordinate local administration; this was a distinct issue from attribution with the latter depending on the State's control over a non-State actor as opposed to territory. It was unclear whether the Court regarded all conduct of the subordinate administration to be attributable to the State, or whether it held the respondent State responsible for failing to prevent violations by the non-State actor. The latter view was to be preferred to preserve consistency with the ARSIWA and ICJ case-law. Applying this model to the downing of flight MH17 created a potential for arbitrariness since the applicability of the Convention depended on exactly where the aircraft was shot down: had the aircraft been shot down a few kilometres away under otherwise identical circumstances, a different conclusion might be reached.

545. 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. Attribution was a logical precondition of finding jurisdiction on this basis: the act which established jurisdiction was the same act that established a potential violation and it needed to be attributable to the respondent State. While the Court in *Banković and Others* (cited above) had confirmed that the use of lethal force against the applicants from the air did not create a jurisdictional link, it had subsequently accepted in *Al-Skeini and Others* (cited above) that the use of lethal force could, in certain unspecified circumstances, constitute such a link. It had further clarified that in such circumstances Convention rights could be divided and tailored so that only those relevant to the victims' situation (in this case, the

right to life) would apply. In *Georgia v. Russia (II)* (cited above) while a majority of the Grand Chamber had reaffirmed a restrictive approach, it had left the door open to such situations being covered when considering extraterritorial assassinations.

546. In the view of the HRLC, the Court should avoid arbitrary line drawing by applying a personal rather than a spatial model of jurisdiction in the present case. Taking such an approach would enable the Court to conclude that the shooting down of the aircraft was an exercise of physical power over the individuals onboard. It would bring the Court's case-law into line with other human rights bodies, including the Human Rights Committee.

3. The Court's assessment

(a) Introductory remarks

547. The Convention organs have developed a framework for the interpretation and application of Article 1 of the Convention. The relevant principles have evolved with a view to the effective protection of human rights in a largely regional context. Their origins pre-date the ARSIWA (A 85-88), which were only adopted in 2001 and took into account the prior case-law of the Convention organs when formulating the relevant rules under international law.

548. The Court's case-law demonstrates that the assessment of whether a respondent State had Article 1 jurisdiction in respect of complaints about events outside that State's formal territorial borders may involve consideration of *ratione loci* or *ratione personae* jurisdiction, or both. Where the principal argument is that the respondent State exercised effective control over an area, the question that arises is, essentially, whether that area can be considered to fall within the *ratione loci* jurisdiction of the respondent State, with all the attendant rights and responsibilities that entails, notwithstanding the fact that it falls outside its territorial boundaries. Where the argument is rather that the victims fell under State agent authority and control in territory which the State did not control, the principal question will be whether the respondent State exercised *ratione personae* jurisdiction.

549. Even in cases where it is established that the alleged violations occurred in an area under the respondent State's effective control (and thus within its *ratione loci* jurisdiction), the latter will only be responsible for breaches of the Convention if it also has *ratione personae* jurisdiction. This means that the impugned acts or omissions must have been committed by State authorities or be otherwise attributable to the respondent State.

550. The Court has consistently explained that issues of attribution and the responsibility of the respondent State under the Convention for the acts complained of fall to be examined at the merits phase of the proceedings (see, recently, *Ukraine v. Russia (*re *Crimea)*, cited above, § 266, and the references cited there). It is, however, important to clarify that this concerns the

evidential question whether the act or omission complained of was in fact attributable to a State agent as alleged. It does not preclude an assessment, at the admissibility stage, of whether particular individuals or entities could be considered State agents such that any actions shown at the later merits stage to have been taken by them would be capable of giving rise to the responsibility of the State (see, for example, the approach taken in the Commission's decision of 26 May 1975 in *Cyprus v. Turkey,* nos. 6780/74 and 6950/75, D.R. 2, p. 125 at p. 137, and its subsequent report, cited above, p. 32 at § 84).

551. Thus while the test for establishing the existence of jurisdiction under Article 1 of the Convention is not the same as the test for establishing a State's responsibility for an internationally wrongful act under international law, now codified in ARSIWA (see *Catan and Others*, cited above, § 115), there may be some areas of overlap in so far as the Court is invited to examine whether any acts of the perpetrators are to be attributed to the State in the context of its jurisdiction assessment. In determining whether an individual or entity may be considered a State agent, the rules set out in the ARSIWA as applied by international courts and tribunals are clearly relevant and the Court's case-law shows that they are taken into account (see, for example, *Makuchyan and Minasyan v. Azerbaijan and Hungary*, no. 17247/13, §§ 112-18, 26 May 2020; and *Carter v. Russia*, no. 20914/07, §§ 162-69, 21 September 2021).

(b) The general principles regarding jurisdiction

552. As noted above, the present case concerns only the alleged responsibility of the Russian Federation in respect of alleged Convention violations in the relevant parts of Donbass. Only the potential extra-territorial jurisdiction of the Russian Federation over these areas at the relevant time is before the Court in this case: the Article 1 jurisdiction of Ukraine over these areas, which fall within its own sovereign territory, is not under examination. However, the Court considers it helpful to set out the general principles in respect of both situations, since they form part of a holistic view of the Court's approach to jurisdiction in such cases.

(i) Territoriality

553. Under Article 1, the High Contracting Parties undertake to "secure to everyone within their jurisdiction" the rights and freedoms set out in the Convention. It follows that all of those within the territory of a Convention State enjoy the Convention rights and freedoms and that the responsibility for fulfilling the Article 1 obligation falls, in principle, on the territorial State. This gives rise to two presumptions: that a State exercises jurisdiction normally throughout its territory; and that a State does not exercise its jurisdiction outside its territory (see *Ilaşcu and Others*, cited above, §§ 312

and 314). However, either or both of these presumptions may be rebutted in exceptional cases.

(ii) Exception to territoriality: within a State's own territory

554. In *Ilaşcu and Others* (cited above, § 312), a case brought against the Russian Federation and Moldova, the Court explained that a State may be prevented from exercising its authority in part of its territory. This could be as a result of military occupation by the armed forces of another State which effectively controls the territory concerned, acts of war or rebellion, or the acts of a foreign State supporting the installation of a separatist state within the territory of the State concerned (see also *Shavlokhova and Others v. Georgia* (dec.), no. 45431/08 and 4 others, § 29, 5 October 2021; and *Bekoyeva and Others v. Georgia* (dec.), no. 48347/08 and 3 others, § 34, 5 October 2021). This does not mean that the territorial State's jurisdiction is excluded entirely: in view of its positive obligations, the territorial State remains under a residual duty to take all the appropriate measures which it is still able to take, including to re-establish control over the territory in question and to ensure respect for the applicant's individual rights (see *Ilaşcu and Others*, cited above, §§ 313, 333, 335 and 339; and *Sargsyan v. Azerbaijan* [GC], no. 40167/06, §§ 130-31, ECHR 2015).

(iii) Exception to territoriality: outside a State's sovereign borders

555. As regards extraterritorial jurisdiction, it is well-established case-law that acts of the States Parties performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 of the Convention.

(α) The relevance of international armed conflict

556. Extraterritorial jurisdiction is not excluded in situations of international armed conflict: the Court's case-law is replete with examples of States being held responsible for acts which occurred in the context of an international armed conflict taking place outside their own sovereign borders (see, for example, the judgments in *Cyprus v. Turkey*, *Al-Skeini and Others*, *Hassan* and *Georgia v. Russia (II)*, all cited above).

557. However, when approaching the question of Article 1 jurisdiction in its recent judgment in *Georgia v. Russia (II)* (cited above, § 83), the Court drew a distinction between the "military operations carried out during the active phase of hostilities" in that case, and the other events which it was required to consider in the context of the international armed conflict under examination. It explained that:

> "125. In the present case the Court is required to examine whether the conditions applied by the Court in its case-law to determine the exercise of extraterritorial

jurisdiction by a State may be regarded as fulfilled in respect of military operations carried out during an international armed conflict.

126. In that connection it can be considered from the outset that in the event of military operations – including, for example, armed attacks, bombing or shelling – carried out during an international armed conflict, one cannot generally speak of 'effective control' over an area. The very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos means that there is no control over an area. This is also true in the present case, given that the majority of the fighting took place in areas which were previously under Georgian control ...

127. It must therefore be determined in the present case whether there was 'State agent authority and control' over individuals (the direct victims of the alleged violations) in accordance with the Court's case-law, and what the precise scope of those terms is.

...

130. In most of the cases that it has examined since its decision in *Banković and Others* (cited above), the Court has found that the decisive factor in establishing 'State agent authority and control' over individuals outside the State's borders was the exercise of physical power and control over the persons in question ...

131. Admittedly, in other cases concerning fire aimed by the armed forces/police of the States concerned, the Court has applied the concept of 'State agent authority and control' over individuals to scenarios going beyond physical power and control exercised in the context of arrest or detention ...

132. However, those cases concerned isolated and specific acts involving an element of proximity.

133. By contrast, the active phase of hostilities which the Court is required to examine in the present case in the context of an international armed conflict is very different, as it concerns bombing and artillery shelling by Russian armed forces seeking to put the Georgian army hors de combat and to establish control over areas forming part of Georgia.

134. The Court observes that in *Banković and Others* (cited above) it found that the wording of Article 1 of the Convention did not accommodate the theory that 'anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby "brought within" the "jurisdiction' of that State for the purpose of Article 1 of the Convention' (*ibid.*, § 75). It added that interpreting the concept of jurisdiction in that way was tantamount 'to equat[ing] the determination of whether an individual falls within the jurisdiction of a Contracting State with the question of whether that person can be considered to be a victim of a violation of rights guaranteed by the Convention. These are separate and distinct admissibility conditions, each of which has to be satisfied in the aforementioned order, before an individual can invoke the Convention provisions against a Contracting State' (*ibid.*, § 75 *in fine*).

...

136. The Court sees no reason to decide otherwise in the present case. The obligation which Article 1 imposes on the Contracting States to secure to everyone within their jurisdiction the rights and freedoms guaranteed by the Convention is, as indicated above, closely linked to the notion of 'control', whether it be 'State agent authority and control' over individuals or 'effective control' by a State over a territory.

> 137. In this connection, the Court attaches decisive weight to the fact that the very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos not only means that there is no 'effective control' over an area as indicated above (see paragraph 126), but also excludes any form of 'State agent authority and control' over individuals.
>
> 138. The Court therefore considers that the conditions it has applied in its case-law to determine whether there was an exercise of extraterritorial jurisdiction by a State have not been met in respect of the military operations that it is required to examine in the instant case during the active phase of hostilities in the context of an international armed conflict."

558. In *Georgia v. Russia (II)*, there was a clear, single, continuous five-day phase of intense fighting during which Russian troops advanced on Georgian territory seeking to establish control ("the five-day war"); after that, a ceasefire agreement was reached and largely observed. The Grand Chamber was therefore able to refer to "the five-day war" as a distinct "active phase of hostilities" and to separate out complaints which it identified as concerning "military operations carried out during the active phase of hostilities". It summarised the alleged attacks falling under this heading as covering "bombing, shelling and artillery fire" (see, for example, § 51 of the judgment). Since it found jurisdiction to exist in respect of the detention and treatment of civilians and prisoners of war even during the "five-day war" (see §§ 238-39 and 268-69 of the judgment), there can be no doubt that a State may have extraterritorial jurisdiction in respect of complaints concerning events which occurred while active hostilities were taking place. The *Georgia v. Russia (II)* judgment cannot, therefore, be seen as authority for excluding entirely from a State's Article 1 jurisdiction a specific temporal phase of an international armed conflict.

(β) The criteria for establishing jurisdiction

559. Where an allegation of extraterritorial jurisdiction is made, the Court will assess whether there are exceptional circumstances justifying a finding by it that the State concerned was exercising jurisdiction extraterritorially by reference to the specific facts of the case (see *M.N. and Others v. Belgium* (dec.) [GC], no. 3599/18, §§ 101-02, 5 May 2020). The two main criteria are effective control by the State over an area (spatial concept of jurisdiction, or jurisdiction *ratione loci*) and State agent authority and control over individuals (personal concept of jurisdiction, or jurisdiction *ratione personae*) (see *Georgia v. Russia (II)*, cited above, § 115). A further criterion which may be relevant in cases concerning the procedural obligation under Article 2 is the notion of a jurisdictional link between the respondent State and the victim's relatives in the circumstances of the case. These criteria will be considered in turn below.

– *Effective control over an area*

560. The first situation in which extraterritorial jurisdiction may, exceptionally, arise is where a Contracting State exercises effective control of an area outside its national territory, usually as a consequence of lawful or unlawful military action. This is a question of fact and in resolving it the Court will primarily have reference to the strength of the State's military presence in the area. However, other indicators may also be relevant, such as the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region (see *Al-Skeini and Others*, cited above, §§ 138-39; and *Georgia v. Russia (II)*, cited above, §116).

561. Where there is effective control over an area, whether exercised directly by the Contracting State's own armed forces or via the local subordinate administration, there is *ratione loci* jurisdiction (see paragraph 559 above). For Article 1 purposes, therefore, the area in question is treated as being indistinguishable from areas within the controlling State's sovereign borders. The controlling State accordingly has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and will be liable for any violations of those rights in exactly the same way as it would be in a purely territorial context (see *Cyprus v. Turkey*, cited above, §§ 76-77; and *Al-Skeini and Others*, cited above, § 138).

562. The Court has never said that there can only be effective control over an area outside a State's sovereign borders if the area in question falls within the territory of one of the High Contracting Parties (see, in particular, *Issa and Others v. Turkey*, no. 31821/96, §§ 74-75, 16 November 2004). However, this would appear to be the rationale behind its conclusion that the controlling State should in principle be held accountable for all breaches of negative and positive obligations under the Convention within the controlled territory (see paragraph 561 above). After all, as the Court has explained, to hold otherwise would be to deprive the population of that territory of the rights and freedoms previously enjoyed and to which they are entitled, and would result in a vacuum of protection within the legal space of the Convention (see *Cyprus v. Turkey*, cited above, § 78; and *Al-Skeini and Others*, cited above, § 142). It has moreover emphasised that the Convention is a constitutional instrument of European public order: it does not govern the actions of States which are not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States (see *Al-Skeini and Others*, cited above, § 141).

563. The Court has accordingly concluded that extraterritorial *ratione loci* jurisdiction existed in a number of such cases concerning territory inside the Convention legal space (see, for example, *Cyprus v. Turkey*, *Ilaşcu and Others*, *Catan and Others*, *Georgia v. Russia (II)* and *Ukraine v. Russia (*re *Crimea)*, all cited above; and *Chiragov and Others v. Armenia* [GC],

no. 13216/05, ECHR 2015). To date, the Court has never found there to be extraterritorial jurisdiction on account of *ratione loci* jurisdiction over an area outside the sovereign territory of the Council of Europe member States.

564. As explained above (see paragraph 549), even where allegations concern an area within the respondent State's *ratione loci* jurisdiction, that State will ultimately only be held responsible for breaches of the Convention if the impugned acts or omissions are attributable to it. In purely territorial cases, it is uncontroversial that the territorial State is responsible for the policies and actions of local administrations. Their acts and omissions are automatically attributable to the territorial State. It follows that in cases where a State's *ratione loci* jurisdiction is established outside its sovereign borders, the acts and omissions of the local administrations in the areas concerned will similarly be automatically attributable to the State which has Article 1 jurisdiction (see paragraph 561 above).

– *State agent authority and control*

565. The second situation in which extraterritorial jurisdiction may exceptionally arise is where there is State agent authority or control over the victim (see *Georgia v. Russia (II)*, cited above, §§117-24).

566. A State Party's jurisdiction may arise from the actions or omissions of its diplomatic or consular officials when, in their official capacity, they exercise abroad their authority in respect of that State's nationals or their property, or where they exercise physical power and control over certain persons (see *Al-Skeini and Others*, cited above, § 134; and *M.N. and Others v. Belgium*, cited above, §§ 106 and 117-19).

567. The Court has also explained that a State may exercise extraterritorial jurisdiction where, with the consent or at the invitation of the government of the State concerned, it exercises via its agents or others under their command and direct supervision public powers normally to be exercised by that government (see *Al-Skeini and Others*, cited above, §§ 135 and 144-47; and *Jaloud v. the Netherlands* [GC], no. 47708/08, §§ 139, 149 and 152, ECHR 2014).

568. Finally, the Court's case-law establishes 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 within that State's Article 1 jurisdiction (see *Al-Skeini and Others*, cited above, § 136; *Georgia v. Russia (II)*, cited above, § 117; and *Carter*, cited above, §§ 126-130, 150 and 158-61). The exact content of this exception has been the subject of much analysis and discussion in the Court's case-law (see, most recently, *Georgia v. Russia (II)*, cited above, §§ 117-24 and 130-136; and *Carter*, cited above, §§ 126-30). It would appear that it encompasses two distinct, albeit potentially overlapping, scenarios.

569. First, it covers the exercise by State agents of physical power and control over the victim or the property in question (see *Al-Skeini and Others*,

cited above, § 136). This clearly includes cases in which the individual is in custody (*Öcalan v. Turkey* [GC], no. 46221/99, § 91, ECHR 2005-IV). It may also include cases in which freedom of movement or action is subject to a lesser form of restraint (see, for example, *Medvedyev and Others v. France*, [GC], no. 3394/03, § 67, ECHR 2010).

570. Second, it covers isolated and specific acts of violence involving an element of proximity (see *Georgia v. Russia (II)*, cited above, §§ 130-32; and *Carter*, cited above, §§ 129-30). Thus, jurisdiction has been found in respect of the beating or shooting by State agents of individuals outside that State's territory (see, for example, *Isaak v. Turkey* (dec.), no. 44587/98, 28 September 2006; and *Andreou*, cited above) and the extrajudicial targeted killing of an individual by State agents in the territory of another Contracting State, outside the context of military operations (see *Carter*, cited above, §§ 129-30). The Court has explained that accountability in these situations stems from the fact that 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. In *Carter*, it added that targeted violations of the human rights of an individual by one Contracting State in the territory of another Contracting State undermined the effectiveness of the Convention both as a guardian of human rights and as a guarantor of peace, stability and the rule of law in Europe (cited above, § 128).

571. In all cases of State agent authority and control, any jurisdiction established is a personal one over the victim. The extent of the State's obligations under Article 1 of the Convention is to secure to that individual the Convention rights and freedoms that are relevant to his or her situation. In this sense, therefore, the 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.

572. Unlike jurisdiction based on effective control over an area, the Court has on numerous occasions found personal jurisdiction under Article 1 of the Convention to exist outside the Convention legal space (see, among other examples, *Öcalan*, *Medvedyev and Others*, *Al-Skeini and Others* and *Jaloud*, all cited above).

– *"Jurisdictional link" as regards the procedural obligation under Article 2*

573. The Court has recently clarified how the issue of jurisdiction is to be approached where a death occurs outside the territory of the Contracting State in respect of which the procedural obligations under Article 2 of the Convention are said to arise (see *Güzelyurtlu and Others*, cited above, §§ 188-90, 29 January 2019; *Georgia v. Russia (II)*, cited above, § 330; and *Hanan v. Germany* [GC], no. 4871/16, §§ 132-133, 16 February 2021). In

this context, the Court has emphasised that the procedural obligation to carry out an effective investigation under Article 2 has evolved into a separate and autonomous obligation that can be considered to be a detachable obligation arising out of Article 2 and capable of binding the State even when the death occurred outside its jurisdiction (see *Güzelyurtlu and Others*, cited above, § 189). In such cases, the question is whether there is a jurisdictional link for the purposes of Article 1 of the Convention.

574. If the investigative or judicial authorities of a Contracting State institute, by virtue of their domestic law, their own criminal investigation or proceedings concerning a death which has occurred outside the jurisdiction of that State, this may in itself be sufficient to establish a jurisdictional link between that State and the victim's relatives who later bring proceedings before the Court (see, *Güzelyurtlu and Others*, cited above, § 188, as refined in *Hanan*, cited above, § 135).

575. Where no such investigation or proceedings have been instituted in a Contracting State, special features may trigger the existence of a jurisdictional link in relation to the procedural obligation to investigate under Article 2. It is not possible to set out an exhaustive list of such features since they will necessarily depend on the particular circumstances of each case and may vary considerably from one case to another (*Güzelyurtlu and Others*, cited above, § 190). The Court has found special features sufficient to give rise to a jurisdictional link in a number of cases (see, for example, *Güzelyurtlu and Others*, cited above, §§ 191-96; *Georgia v. Russia (II)*, cited above, §§ 331-32; and *Hanan*, cited above, §§ 137-42).

(c) Application of the general principles to the facts of the case

576. According to the approach in *Georgia v. Russia (II)*, the first question to be addressed in cases concerning armed conflict is whether the complaints concern "military operations carried out during an active phase of hostilities", in the sense of "armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos". In that case, the question was answered in the affirmative and, as a result, there was no extraterritorial jurisdiction of either kind in respect of the relevant substantive complaints (see §§ 126 and 137 of that judgment), although there was a duty to investigate deaths which had occurred (see §§ 329-30 of the judgment).

577. Since the vast majority of allegations advanced in the present case (see paragraphs 373-382 above) cannot be said to fall into this category, the Court will first examine whether extraterritorial jurisdiction arose at any point in the present case before considering whether certain complaints or aspects of them might be said to be excluded from any jurisdiction established, on the basis that they occurred outside any area of effective control or concerned "military operations carried out during an active phase of hostilities". It will accordingly first determine whether the respondent Government enjoyed at

any point effective control over the relevant parts of the Donetsk and Luhansk regions (see paragraph 560 above).

(i) Whether there was effective control over an area

578. In order to determine whether the respondent State had extraterritorial jurisdiction over the areas in eastern Ukraine under separatist control, regard must first be had to the military presence of the Russian Federation's armed forces in eastern Ukraine. If such presence alone does not suffice to demonstrate effective control over the area, then it will be necessary to have regard to whether Russian Federation military, political and economic support to the "DPR" and the "LPR" provided it with influence and control over the area (see paragraph 560 above).

(α) Military presence

– *The parties' memorials*

579. The respondent Government denied that Russian troops had been present in eastern Ukraine. They acknowledged only one incident where ten members of the 331st Guards Airborne Regiment had been captured in Ukraine, but claimed that they had crossed the border by mistake. In response to the Court's invitation (see paragraph 401 above) to provide information as to "any presence at any point of regular Russian soldiers or officers or active employees of the Russian military or Russian intelligence/security services in eastern Ukraine working in any capacity", the respondent Government said they considered it "quite likely" that since 2014 some soldiers of the Russian Federation had gone to eastern Ukraine in their personal capacity. However, Ukraine had identified no legal obligation on the Russian Federation to prevent such persons from visiting Ukraine while on leave or after their period of service. Over three million people had been conscripted to the armed forces of the Russian Federation between 2010 and 2019 and it was "not possible for the Russian Federation to monitor the travels and interests of every military officer and soldier". Invited to provide information on the regulations applicable to the taking of leave by Russian servicemen for the purpose of travel abroad and details of such leave requests, the respondent Government referred broadly to Russian servicemen travelling abroad "on the basis of authorisations of the relevant officials of the Ministry of Defence" in accordance with the Russian legislation and applicable treaties. It was not practicable to collect the information requested by the Court and it was "not clear why private travels are of relevance to the case".

580. The respondent Government further declined to provide information and supporting documents as to soldiers' deployment on the basis that details of military deployments were classified. They went on to explain that information on losses of military personnel was a State secret and insisted upon the reasonableness of classifying such information. They added that

Russian armed forces had not been deployed in Ukraine during the relevant period so the data would not, in any event, assist the Court. They denied that there had been any repatriation of dead bodies "relevant to" the alleged deployment in Ukraine of Russian armed forces. They did not respond to the Court's invitation to provide details of soldiers wounded since the outbreak of hostilities in eastern Ukraine, including where they had been wounded.

581. In response to the Court's invitation to provide information as to the number of Russian nationals fighting in eastern Ukraine or individuals crossing the border to fight, the respondent Government provided no substantive information. They provided instead annual figures of the number of people crossing border check points and entry points between Russia and Ukraine.

582. In response to the Court's invitation (see paragraph 401 above) to provide information on why further OSCE observer missions had not been deployed at border crossing points in addition to the two missions mandated in July 2014 at the Donetsk (Russia) and Gukovo border crossings, the respondent Government said that they would seek to obtain details upon Ukraine identifying any communication with any agency of the Russian Federation on this issue.

583. The respondent Government refused to clarify, in response to the Court's invitation, which of the "DPR" and "LPR" leaders had previously served in the Russian army or intelligence/security services or had been involved on behalf of the Russian Federation in Transdniestria, South Ossetia, Abkhazia or Crimea. Instead, they provided the figure of the number of yearly conscripts in the Russian army since 2010. They did not accept that Mr Girkin had been acting on their account or under their instructions and claimed that he had resigned from the Russian military before entering eastern Ukraine.

584. Invited to clarify the parties and individuals involved in the negotiations at Ilovaisk and the capacity in which they had been involved (see paragraph 401 above), the respondent Government replied that they "cannot comment on the existence of any negotiations". Any participation in humanitarian and diplomatic moves would not imply any State participation in, or control over, the hostilities.

585. Invited to make submissions concerning the award of Russian military medals, including the number of each kind of military medal awarded since April 2014, the recipients of and reasons for these awards and the manner in which Russian military medals were numbered (see paragraph 401 above), the respondent Government highlighted Bellingcat's "unwarranted assumption that medals are awarded with sequential numbers". They explained that medals might be forwarded to military authorities from storage warehouses, with no requirement that they be distributed from storage or awarded in ascending order of their numbers. They further explained that medals were not only awarded for achievements in active combat. For example, they explained that the medal "For excellence in combat" had been

awarded to many of those involved in the security of the St Petersburg International Economic Forum. In 2014, various medals had been awarded to those involved in ensuring security at the Sochi Winter Olympic Games. The respondent Government were unable to provide details of the recipients of medals or the dates or reasons for the awards since, they said, the regulations of the Russian armed forces did not provide for registration of decorated servicemen by reason for the award. They added, "In any event, providing details of recipients of medals and the reasons for the award could expose details of military and other operations, as well as exposing military personnel (e.g. those that fought in Syria) to risk of personal harm as reprisals for their involvement in military action". Specifically invited to comment on whether any leaders or members of separatist armed groups had been awarded military medals or other honours, the respondent Government replied that, "[i]n absence of any concrete allegations from Ukraine as to military medals or other honours allegedly awarded to leaders or members of separatist groups, it is not feasible for the Russian Federation to address this question". The question was in any event immaterial because medals and honours could not serve as an indication of relevant acts being inspired or directed by the Russian State.

586. The applicant Ukrainian Government provided extensive and specific lists of the Russian units they claimed were in eastern Ukraine, notably in an "Expert opinion on Forensic Commission Military Examination", dated 6 October 2017, and in a letter from the Main Directorate of the Intelligence of the Ministry of Defence of Ukraine, dated 19 March 2018. The 2017 report included details of specific dates (and in some cases times) when, and places where, identified Russian military units had entered Ukrainian territory. For example, it stated that on 24 August 2014 at 7 a.m., 400 soldiers of the 331st Guards Parachute Regiment of the 98th Division of the Airborne Forces of the Russian Armed Forces invaded Ukraine in the area of Pobeda and Berestove in the Starobeshevsky district of the Donetsk region. The 2018 letter described the structure and relationship of the combined official armed forces of the Russian Federation and the separatist forces. According to the letter, the overall command of Russia's hybrid forces in eastern Ukraine was under the direct control of the General Staff of the Russian armed forces. The letter identified by name and rank those within the Russian military who had taken on leadership roles or spent time in the "DPR" and "LPR" armed forces. The applicant Ukrainian Government provided a supplementary letter from the Ukrainian Ministry of Defence, Directorate of Intelligence, dated 30 April 2018, which listed the names, rank and deployment of Russian service personnel captured or identified as operating inside the territory of Ukraine, together with each person's date and place of birth. They supplied witness statements of soldiers involved in the retreat at Ilovaisk in which the soldiers claimed that they had been taken captive by soldiers who did not hide the fact that they were from

the Russian military and that negotiations had taken place between senior members of the Ukrainian and Russian armed forces. They provided information on deaths of Russian soldiers in eastern Ukraine and the alleged repatriation of their bodies to the Russian Federation.

587. The applicant Dutch Government argued that there was considerable evidence showing the presence of members of the armed forces of the Russian Federation in the east of Ukraine and fighting on the side of the "DPR". First, the presence of members of the Russian armed forces was confirmed in press interviews with them and the parents of the military personnel. Reports by both Russian and non-Russian journalists included eyewitness accounts and photographs as well as interviews with bereaved parents who had lost their sons fighting in eastern Ukraine. Second, the Atlantic Council had identified two members of the armed forces of the Russian Federation who had been sent to Ukraine to fight alongside the separatist forces. One of the two identified members had confirmed that he had been amongst "thousands [of] others", who had been first stationed at military training camps near the Ukrainian border and from there sent to the east of Ukraine. Third, NATO had released images that showed Russian combat forces engaged in military operations in eastern Ukraine. According to NATO's estimates, by March 2015 approximately twelve thousand members of the Russian armed forces (including military advisers, weapons operators and combat troops) had been present in eastern Ukraine. The applicant Dutch Government claimed that the typical *modus operandi* was that commanders ordered members of the armed forces of the Russian Federation to conceal the identifying features of their military vehicles, to remove insignia from uniforms and to travel across the border to join separatist forces in the east of Ukraine. Finally, the applicant Dutch Government underlined that on 17 December 2015, at his annual press conference with journalists, the President of the Russian Federation had confirmed that Russian armed forces had been present in Ukraine, stating as regards eastern Ukraine that "[w]e never said there were not people there who carried out certain tasks, including in the military area ...".

– *The findings of the Court*

588. The respondent Government denied in their written memorials and oral submissions to the Court that there were any members of the Russian military in Donbass during the period under consideration. It is noteworthy, however, that the President of the Russian Federation himself said in 2015 that, "[w]e've never said there are no people there [in Donbass] who deal with certain matters, including in the military area ..." (see A 2608). This statement, in and of itself, provides sufficient grounds for the inference that there were members of the Russian military operating inside eastern Ukraine at the relevant time. At the very least, it calls for further explanation, and it is striking that the respondent Government have consistently failed to provide any explanation whatsoever despite being expressly invited to address the

issue of the presence of members of the Russian military in eastern Ukraine in the context of their supplementary memorials (see paragraph 401 above).

589. The Court further notes the similarities in time, space and method between the events in Crimea in late February and early March 2014 – which the Court has found were within the jurisdiction of the respondent State (see *Ukraine v. Russia (*re *Crimea)*, cited above, §§ 335-37) – and events in eastern Ukraine during the early stages of the unrest. In both cases, protests began by what were apparently local volunteers who subsequently took up arms and took over Government buildings. These "local" separatists subsequently organised "referendums" on the status of the regions concerned which apparently showed a large majority in favour of separation from Ukraine.

590. It is significant that the evidence establishes that one of the central figures in the Crimea events, Mr Girkin (see paragraphs 108, 135 and 145 above), travelled to eastern Ukraine in early April with a group of men and shortly afterwards took control of Government buildings in Slovyansk. Indeed, this is not contested by the respondent Government. They have, however, denied that he was operating on their instructions and claimed that he had resigned from the Russian military before entering eastern Ukraine (see paragraphs 456 and 583 above). These assertions could easily have been corroborated by the submission of evidence of Mr Girkin's previous employment and his resignation. However, no such documents have been provided. It follows from the Court's decision in *Ukraine v. Russia (*re *Crimea)*, cited above, and Mr Girkin's clearly established role in those events that as recently as February 2014, Mr Girkin had entered Ukraine on the instructions of the Russian Federation in order to lead a successful separatist operation in Crimea. In a press interview in November 2014, Mr Girkin underlined his role as an adviser to Mr Aksyonov (see paragraph 98 above) in Crimea and stated that the latter had "asked me to deal with the northern territories" (A 2569). In his capacity as adviser to Mr Aksyonov, he had begun working with delegates from, *inter alia*, the Luhansk and Donetsk regions before gathering a team of armed men to travel to Slovyansk. He explained that in Crimea he had been heavily involved behind the scenes but had been discreet as to his identity and said that he had "planned to behave in the same way" in Slovyansk and find a "charismatic leader and help as an advisor" (A 2570).

591. In the absence of any evidence to the contrary, the Court finds it established that Mr Girkin travelled to eastern Ukraine as an extension of his activities in Crimea, to act there under the general authority of the Russian Federation and to carry out that State's interests. The material before the Court includes extensive intercept evidence which demonstrates significant contact between Mr Girkin and Russian contacts, including Mr Aksyonov, the "Head of the Republic of Crimea" appointed by the Russian President himself (see paragraph 98 above and A 1525, 1528 and 1530). That evidence

appears, moreover, to corroborate the alleged subordinate role of Mr Girkin vis-à-vis his Russian contacts, since it shows Mr Girkin reporting to them, receiving their instructions and requesting their assistance (see also A 1555 and A 1606-09).

592. Similarly, the elements in the case-file show that Mr Borodai, "prime minister" of the "DPR" from May 2014 (see paragraphs 105 and 145 above), had also been in Crimea working as a political advisor to Mr Aksyonov immediately before going to Donbass. Again, the intercept evidence provides support for the allegation that he was acting under instructions: in an intercepted telephone call of 3 July 2014, he can be heard stating that he is "carrying out orders and protecting the interests" of one State and one State only: "the Russian Federation" (A 1550. See also A 1540, 1542, 1544-45, 1554, 1556-57, 1559 and 1605).

593. It is also relevant that the case-file reveals – and it was not denied by the respondent Government – that both men had prior military experience and had fought together on behalf of the respondent State in Transdniestria. Mr Girkin made no secret of the fact that he held the rank of colonel in the FSB. They were not the only two prominent separatist leaders to have come from a Russian military or intelligence background: the elements in the case-file support the allegation that this group also included Mr Dubinskiy, Mr Bezler, Mr Pavlov and Mr Antyufeyev (see paragraphs 107, 103, 120 and 100 respectively, above). Witness statements taken in the proceedings of *Ilaşcu and Others*, cited above, record primary evidence that Mr Antyufeyev, under the name Vadim Shevtsov, was a "Government" minister in the Russian-controlled "Moldavian Republic of Transdniestria" ("MRT") (see also *Catan and Others*, cited above, where it was stated: "The 'Chief of the MRT Internal Security Service' was Vladimir Antiufeev, a former Russian general"). At a "DPR" press conference on 10 July 2014, Mr Antyufeyev confirmed that he had previously worked in Transdniestria, said that he had arrived from Russia that very day and stated that his military rank was Lieutenant-General (A 2555-56). The intercept material includes a telephone conversation between Mr Surkov, at the time an adviser to the Russian President, and Mr Borodai on 3 July 2014 in which the former said that "[s]ome certain Antiufeyev will be setting off for your place" (A 1554). This comment carries the clear implication that Mr Antyufeyev arrived in Donbass as an instrument of the respondent Government. The respondent Government have declined to clarify the military backgrounds and engagements of these individuals. The information as to the exact dates of service of these individuals, their military backgrounds and ranks and the nature of their contacts with officials and agencies of the Russian Federation at the relevant time lies wholly within the exclusive knowledge of the respondent State.

594. It is accordingly appropriate for the Court to infer from the evidence in the case-file, and in the absence of explanation from the respondent

Government, that among the separatist leadership there were members of the Russian military acting under Russian instruction.

595. The case-file also includes evidence of the presence of Russian nationals, including Russian soldiers, in the armed groups as well as of the deployment of regular troops of the Russian armed forces.

596. The reports of the OSCE Border Mission record high numbers of people in military-style dress crossing the border from the Russian Federation to Ukraine (A 473, 475, 480, 482-83, 485, 491, 497-99, 503-04, 506, 511, 514, 518-19, 552, 566, 586). There is also evidence from the OSCE monitors of ambulances, a number of which had Russian registration plates, regularly crossing the border from eastern Ukraine to Russia (A 473, 477, 480, 482, 494, 497, 501, 515-16, 526-27, 529, 535, 537, 540-41, 544, 550, 554-56, 563, 570, 572, 575-76, 579-80, 582, 584, 589, 594-95, 598, 601-02, 606, 609, 613, 615-20, 623, 625-26, 632, 634-35 and 637-39). On one occasion, the OSCE monitors observed a minivan which it described as "similar to an ambulance car" with the words "Search and Rescue Services of the MES RF" written on it and three people in dark blue Ministry of Emergency Situations uniforms inside (A 501). The vehicle entered the Donetsk crossing point from Ukraine and left to the Russian Federation. These elements appear inconsistent with the claim that the participation of Russian nationals was not formally coordinated or arranged by the Russian Federation. In any event, they call for a fuller and more adequate response from the respondent Government as to the participation of Russian nationals in eastern Ukraine and the extent to which it was done with official tolerance, active encouragement and organisational, medical and logistical support.

597. The Court further notes the terms of the interpretative statements attached to the OSCE decisions to deploy observers at two checkpoints on the Ukraine-Russia border and to extend the mission's mandate (A 135). These statements referred regularly to Russia's refusal to extend the geographic scope of that deployment. The evidence therefore confirms that requests were made in the context of the OSCE for a broader deployment of observers at the border and that such requests were refused by Russia. In these circumstances, Russia's response to the Court's invitation to provide further information on this subject clarifying the precise nature of the requests and any reasons for refusal (see paragraph 582 above) was clearly inadequate. Given the allegations since the earliest stages of the conflict that armed men were crossing the border with ease, the relevance of effective border monitoring along the full length of the border between Russia and the separatist entities is evident. The inference to be drawn from the respondent Government's failure to explain the refusal to authorise an extension is that they were unwilling to have extensive independent monitoring put in place. In the absence of any explanation for such unwillingness, the Grand Chamber infers that effective bordering monitoring was against the interests of the

Russian Federation because it would have made it more difficult for Russian soldiers to cross into eastern Ukraine undetected.

598. The SMM reports do not often refer explicitly to the presence of Russian soldiers in eastern Ukraine. Given the alleged covert nature of the deployment this is not surprising. The SMM regularly cited incidents, which they categorised as restrictions on their "freedom of movement" (A 1110, 1113-15, 1120 and 1124), where they were denied access by the separatists to particular areas thus severely restricting their ability to observe and report freely. However, the SMM nonetheless recorded having spoken with two women wearing "military uniforms, with caps with Russian Federation Armed Forces insignia" in "DPR"-controlled territory (A 659). The OSCE monitors also spoke to soldiers without identifying insignia guarding a weapons facility in "DPR"-controlled eastern Ukraine and were informed by them that they were from the 16th airborne brigade in Orenburg, Russian Federation (A 657). The SMM further recorded having spoken to injured men who were receiving medical treatment in Kyiv after having been captured in eastern Ukraine who claimed to be members of the Russian armed forces on reconnaissance missions in Ukraine (A 658). On one occasion in February 2015, the OSCE Border Mission observed a military ambulance arriving at the Russian side of the Donetsk border crossing point containing "four Russian military uniformed personnel" (A 497). They assisted with the transfer of a black plastic bag which the OSCE mission estimated to be the size and weight of a human body from a vehicle parked on the Ukrainian side of the border into the military ambulance.

599. The respondent Government have provided no explanation for any of these incidents in which the OSCE monitors spoke to or directly observed members of the Russian military, clearly identified as such, present in eastern Ukraine. As noted above, the observations reported by the OSCE carry significant weight (see paragraph 462). The Court reiterates that the respondent Government's position is that there were no Russian regular troops in eastern Ukraine. Had their position been that there were only a very limited number of regular troops there, such position may have been reconcilable with the few examples observed by the OSCE monitors outlined above. However in view of their categorical denial, even a single report from the OSCE of the presence of regular Russian troops in eastern Ukraine calls into question the veracity of the respondent Government's position. For this reason, the Court finds these examples to provide persuasive evidence that regular Russian troops were, contrary to what the respondent Government contended, present in eastern Ukraine.

600. The material before the Court also points to the participation of Cossacks and Chechens, fighting on the side of the separatists in eastern Ukraine. There is witness statement evidence of Chechen fighters in eastern Ukraine (A 1317, 1334-35, 1344,1492, 2178, 2192 and 2196). Investigative journalists spoke to men in Donetsk who claimed to be part of a Chechen unit

that had travelled to Donetsk in mid-May 2014 to fight alongside the separatists. One of the men told the journalists that they had been ordered to Donbass by their President, Ramzan Kadyrov (A 2660. See also A 2662). These elements, which support the allegation of the organised involvement of fighters from the Chechen Republic under orders from the regional authorities there, call for an explanation from the Russian Federation as to the extent to which the participation of Chechens was sanctioned by the Russian President; no such explanation has been provided.

601. In the Luhansk region, a large swathe of territory was under the direct control of Mr Kozitsyn, ataman of the Don Cossacks (A 481, 1093 and 1239. See also A 1237-39). From October 2014, the OSCE Border Mission observed an increasing number of Cossacks crossing the border into Ukraine, some of whom carried badges and identification cards with the words "Cossack National Guard" on their sleeves (A 485. See also A 489, 566, 611, 661, 841 and 898). Mr Kozitsyn said in a November 2014 press interview that he was, "answerable only to President Putin and our Lord" (A 2564). In January 2015, Mr Kozitsyn referred to President Putin as "our emperor" (A 2572). No submissions have been provided by the respondent Government regarding the position of Mr Kozitsyn's Don Cossacks vis-à-vis the Russian State and, in particular, the extent of any authority of the latter over the former. What is, however, plain from the evidence is that there was organised and open, large-scale recruitment in Russia of separatist fighters from within the Don Cossack community, whose ataman openly declared his allegiance to the Russian President.

602. In press conferences by and interviews with separatist "commanders", they referred, directly or indirectly, to the presence of Russian nationals in eastern Ukraine with the support of the Russian Government. Mr Borodai, then "DPR Prime Minister", referred to Mr Surkov, at the time adviser to the President of the Russian Federation (see paragraph 128 above), as "our man in the Kremlin" when explaining that the Russian leadership was ready to contribute to the "DPR" at a very high level (A 2549). The respondent Government have not explained what he meant by this and it can be inferred from the intercept calls that Mr Surkov was the direct contact and political supervisor ("kurator") of the separatists on behalf of the Russian administration, and that it was through him that many requests for material assistance were made and acted upon. Mr Borodai further announced, following a visit to Moscow in early July 2014, that he was "very much counting on the assistance of the Russian Federation in the nearest possible future" and that there were "more and more" people from Moscow in the "DPR" (A 2551 and 2554). The context in which this announcement was made must be borne in mind: in the course of June and July 2014, the Ukrainian armed forces were successfully launching offensives to recover territory that had been taken by the separatists. It was only after this that the applicant Ukrainian Government alleged the first artillery attacks

on their troops, from mid-July 2014, and the first large-scale offensive by Russian regular troops at Ilovaisk in August 2014. Mr Zakharchenko, by then head of the "DPR", said in a video released on 16 August 2014 that 1,200 "foreign fighters" had recently crossed the border into Ukraine from the Russian Federation (A 2560). On 27 August 2014, he confirmed on Russian television that 3-4,000 Russian citizens were by then fighting in the ranks of separatist forces, which according to him included former service personnel or current personnel on leave (A 2561-62). These comments, which confirm that the separatist leadership had requested from the Russian Federation more substantial military assistance and that following this request large numbers of military-trained Russian citizens had arrived in eastern Ukraine, are entirely consistent with the allegations of the applicant Ukrainian Government that certainly by August 2014 there was a large-scale deployment of regular Russian troops who participated in the fighting around Ilovaisk.

603. Witness statements by Ukrainian soldiers refer to the presence of regular Russian troops in the fighting around Ilovaisk and claim that the Ukrainian army's retreat was negotiated directly with the Russian military (A 1405-08, 1411-13, 1419, 1423-26, 1435-36, 1443-47, 1450-51, 1453-55 and 1458-60). The OHCHR's report on Ilovaisk refers to interviews with Ukrainian soldiers captured during the Ilovaisk events who maintained that they were attacked and captured by Russian Federation soldiers, highlighting among other things their distinctive accent, their uniforms, their weapons and the fact that the soldiers introduced themselves as belonging to certain units of the Armed Forces of the Russian Federation (A 650). The report also refers to claims by Ukrainian soldiers during interviews with the OHCHR's Human Rights Monitoring Mission in Ukraine ("HRMMU") that they had been taken to Russia following their capture (A 650). Other reports by NGOs which similarly refer to Russian involvement in Ilovaisk are also based on witness interviews with separatists or statements made by Russian soldiers in press interviews (A 2154, 2158 and 2210-11). An article published by Bellingcat analysed open-source material to conclude that Russia's 6th Tank Brigade was involved in the battle of Ilovaisk (see A 2434-35). When invited to clarify their role in the events at Ilovaisk, the respondent Government responded that they were unable to comment (see paragraph 584 above).

604. This position is surprising, given the involvement of Russia in the Minsk process which took place shortly after the Ukrainian retreat at Ilovaisk and resulted in a ceasefire being announced from 5 September 2014. As already explained (see paragraph 458 above), the special relationship enjoyed by the Russian Federation with the separatist entities puts the respondent Government in a position where they should be able to seek any necessary clarifications from the "DPR" and the "LPR" which would assist the Court, including in respect of the events at Ilovaisk. In any event, the Court does not accept the implicit suggestion that the Russian Federation participated in the

Minsk discussions without having had access, either from its own sources or through its relationship with the separatist entities, to a great deal of information as to military matters in the "DPR" and the "LPR" in the spring and summer of 2014. That the Russian Federation was in ignorance of the detail of the events at Ilovaisk is simply not credible. In these circumstances, there are sufficient elements to establish that there is a case for the respondent Government to answer in respect of the involvement of regular Russian troops at Ilovaisk. It can be inferred from the evidence, in view of the respondent Government's failure to provide any explanations, that units of the Russian regular troops were deployed at Ilovaisk and commanded by a hierarchy in the Russian Federation.

605. The evidence of the situation on the ground supports the conclusion that increasing military participation from the Russian Federation occurred over the summer of 2014. It reveals that control initially acquired by the separatists over vast swathes of land in Donbass in April and early May 2014 was gradually being lost over the course of that summer in the face of an increasingly professional and organised Ukrainian military response in the context of the ATO. By July and into August 2014, the separatists were in real danger of being defeated. This is evident from maps prepared in the context of Ukraine's ATO and a video of them over time as well as from BBC maps of the conflict zone (see paragraph 517 above). While there may be some dispute as to whether particular towns or villages were under separatist control on the dates alleged, the respondent Government have not suggested that they contest the overall picture of land acquisition and loss of territory consistently presented by the available maps of the conflict. The precarious position of the separatists in July 2014 is also evident from the intercepted calls in which the prospect of defeat as well as the need for Russian assistance to prevent it are discussed (A 1527-30, 1535-36, 1554-55, 1557, 1562, 1569 and 1587). Nevertheless, in late August 2014, the separatists were suddenly able to push back against the Ukrainian military forces and reacquire the land they had previously lost. This was done in a short space of time and against the deployment of a large number of Ukrainian soldiers. The Court does not consider it credible that local separatists in eastern Ukraine, even with the support of some professional Russian soldiers on leave, could have succeeded in pushing back the Ukrainian offensive to the point of forcing a surrender at Ilovaisk and recovering, in such a short space of time, significant areas of land that had previously been lost. The evidence as to the land controlled by the separatists at different times over the summer of 2014 is therefore an element consistent with the other evidence in the case-file which shows large-scale Russian troop deployment in eastern Ukraine.

606. The applicant Ukrainian Government have provided highly detailed, chronological and specific information about the active participation of Russian servicemen in eastern Ukraine (see paragraph 586 above). Their account has remained coherent and consistent throughout the proceedings

before the Court and has included information regarding specific alleged land incursions, the names of individual soldiers and military units of the respondent State involved and the dates of the alleged incursions. Moreover, the account of the Ukrainian Government, based on intelligence, is supported by witness statements of Russian soldiers captured in eastern Ukraine (A 1476-91). There is also extensive evidence from NGOs which investigated, based on open source material and witness interviews, allegations that Russian soldiers were present in eastern Ukraine throughout the period of the conflict (A 2157-58, 2206-09, 2207-18, 2227-33, 2239, 2242-44, 2246, 2248-49, 2251, 2259-61, 2265, 2269-73, 2276, 2281, 2283, 2293, 2296-99, 2301, 2303, 2305, 2316-20, 2322-23, 2331, 2333, 2390-91, 2397, 2434-35, 2453-54, 2476, 2485, 2518, 2540-45 and 2547-48). The reports went beyond vague and unsubstantiated allegations as to the presence of Russian soldiers and identified particular military units of the Russian armed forces and, in a number of cases, particular soldiers. The reports also set out clearly the material relied upon and the conclusions drawn from it.

607. The respondent Government have provided no information as to the whereabouts at the relevant time of the soldiers and military units identified by Ukraine or in the NGO reports. They were quite clearly in a position to investigate at least a selection of the individuals identified and present detailed information to the Court on whether they did indeed fight with the separatists in eastern Ukraine or where they were in fact deployed at the time. The only direct submission on this issue was the assertion that soldiers arrested had crossed the border by mistake (see paragraph 579 above). This single assertion is inadequate to address the detailed allegations made. The respondent Government have not submitted any evidence to refute the applicant Ukrainian Government's account, such as deployment records in relation to the identified military formations, even though such evidence was within their exclusive control and they were specifically invited to provide it. The Court accepts that information about military matters might reasonably be considered sensitive and that its classification for national security purposes is not, in principle, unreasonable. Rule 33 § 2 of the Rules of Court caters for this consideration since it allows public access to a document or to any part of it to be restricted. It would, moreover, have been possible for the respondent Government to remove sensitive passages in documents or submit a summary of the relevant passages omitting sensitive information. Indeed, in *Georgia v. Russia (II)*, cited above, §§ 345-46, the Grand Chamber concluded that the respondent Government had fallen short of their obligation to furnish all necessary facilities to the Court in its task of establishing the facts of the case, as required under Article 38 of the Convention, because they had refused to submit combat reports on the grounds that the documents in question constituted a "State secret", despite the practical arrangements proposed by the Court to submit non-confidential extracts. The Grand Chamber further observed that the respondent Government had not submitted

any practical proposals of their own to the Court that would have allowed them to satisfy their obligation to cooperate while preserving the secret nature of certain items of information.

608. The Court further finds unconvincing the explanation of the respondent Government that any Russian soldiers present in eastern Ukraine were on leave. The respondent Government were invited to provide further information on the regulation of soldiers' leave requests and authorisation to travel abroad. They referred in reply to Russian servicemen travelling abroad "on the basis of authorisations of the relevant officials of the Ministry of Defence" in accordance with the Russian legislation and applicable treaties (see paragraph 579 above). However, they did not identify the applicable legislation and treaties, explain in greater detail what the authorisation procedure involved or, in so far as the authorisation was individualised, who had been granted such authorisation and for what purpose. It is entirely reasonable to assume that records of leave requests would be held in the personnel files of members of the Russian armed forces. Had the respondent Government wished to be of assistance to the Court, they could have reviewed the personnel files of soldiers in active service in the summer of 2014 (at the very least by reference to the units identified in the evidence) and provided copies or samples of leave requests made and granted. Moreover, it seems implausible that entire military units would have taken leave and travelled to Donbass simultaneously to fight there side by side, such as to be detected and identified as military units of the Russian armed forces by the relevant Ukrainian authorities, NGOs and even, on occasion, the SMM (see paragraph 598 above).

609. Further details of the leave authorisation procedure is provided in the report "Putin.War" (A 2210) where it is claimed that in order to obtain leave a Russian serviceman "must indicate in a report addressed to his commander the exact place where he will spend his vacation" and that "if the vacation is spent abroad, then the serviceman 'must obtain permission from the Defense Minister, his commander and the consent of the Federal Security Bureau'". The report cites an "Order by the Defense Ministry of July 31, 2006, #250 DCP". The respondent Government have neither supplied this Order nor commented on whether it exists and whether its contents were accurately reflected in the report cited. It can be inferred from the material before the Court, in view of the failure of the respondent Government to provide further details of the applicable domestic rules, that at the relevant time Russian soldiers could only travel abroad after having received authorisation from their hierarchy to travel to a specified place. It follows from this that even soldiers on leave who were present in eastern Ukraine had been authorised to take leave there during armed hostilities, in circumstances where the allegation that Russian soldiers on leave were fighting with the separatists armed groups in large numbers was common knowledge (A 651, 2158, 2210, 2561-62, 2567-68, 2666-68, 2746 and 2753). The decision to authorise large

numbers of Russian soldiers to take leave in order to join an armed separatist movement in a neighbouring country would appear to call for some further explanation.

610. This vast body of material provides strong evidential support for the allegation that Russian soldiers were present in the armed groups and that regular Russian troops were deployed in their military units, notably to participate in certain battles. As explained above, the concordant elements revealed in the evidence and the specific, detailed allegations of the applicant Ukrainian Government in this respect call for an explanation from the respondent Government as to the full extent of involvement by its soldiers in eastern Ukraine (see paragraphs 436, 459 and 586 above). However, the respondent Government have provided no convincing arguments that could call into question the credibility of the applicant Ukrainian Government's version of events and the evidence submitted in support of it (see *Ukraine v. Russia (*re *Crimea)*, cited above, § 328). The only reasonable inference to be drawn in these circumstances is that the allegations of the applicant Ukrainian Government in this respect are substantially accurate.

611. In conclusion, the Grand Chamber finds it established beyond any reasonable doubt that there were Russian military personnel in an active capacity in Donbass. The conclusions outlined above in respect of Mr Girkin (see paragraph 591) establish that this was the case from April 2014. Russian soldiers fought in the armed groups and senior members of the Russian military were present in command positions in the separatist armed groups and entities from the outset. From at the latest August 2014 in the context of the battle of Ilovaisk, there was a large-scale deployment of Russian troops (see paragraph 602 above). Given the covert nature of the involvement of members of the Russian military in eastern Ukraine, on the basis of the material before the Court it is not possible to ascertain their exact number especially before the large-scale deployment at Ilovaisk. The Court does not, therefore, consider it established beyond reasonable doubt that the Russian Federation exercised effective control over the territory of the "DPR" and the "LPR" from April 2014 solely by virtue of the military presence of its own *de jure* soldiers.

612. It is accordingly necessary to turn to the further criteria relevant to establishing effective control over an area.

(β) Military support to the separatists

– *Influence on military strategy*

▪ The parties' memorials

613. The respondent Government denied any involvement by the Russian Federation in the events in eastern Ukraine and any contact between Russian State agencies and representatives of the "DPR and LPR armed groups as part of any alleged control over, or instigation of, military action by the militant

groups". They maintained in particular that there was no credible evidence of FSB involvements in those events.

614. The applicant Ukrainian Government argued that the armed rebellion had been instigated by Russian special force operatives and that the separatists had been coordinated centrally throughout the entire conflict. They referred to the use of conventional Russian troops at critical moments in the conflict to reverse Ukrainian territorial gains in eastern Ukraine, such as the offensives launched in August 2014 at Ilovaisk and around Luhansk to break the encirclement of the city by Ukrainian forces.

615. The applicant Ukrainian Government further pointed to the EU's decision to add Russian ministers and military members to its sanctions list. In February 2016, for example, it had added a senior Russian military commander for being involved in "shaping and implementing the military campaign of the Russian forces in Ukraine". Although at the beginning of the conflict enlisted members had originally acted as tactical advisers, they had subsequently assisted commanders of the armed group to professionalise their military operations. The applicant Ukrainian Government relied on witness statements in support of their claims.

616. The applicant Dutch Government alleged that the Russian Federation had exercised influence on the military strategy of the separatists in their conflict with the Ukrainian armed forces. Intercepted telephone conversations revealed that the Russian Federation had given direct orders to the separatists who, in turn, had reported on the conflict to the Russian Federation. Mr Borodai had reported on the situation on the battleground, sometimes upon the specific request of Mr Surkov, at the time adviser to the President of the Russian Federation. The intercepted telephone conversations clearly established that the Russian Federation had exercised decisive influence over the military strategy of the separatists. The evidence of telephone calls between separatist commanders in early July 2014 revealed that the separatists had been dependent on a decision from "Moscow" as to whether they were allowed to surrender Slovyansk.

617. The applicant Dutch Government claimed that both the FSB and the GRU were involved in the day-to-day management of the "DPR". Again, they relied on intercept evidence to support this allegation.

- The findings of the Court

618. The Court has already concluded that several prominent separatists in command positions were senior members of the Russian military acting under Russian instructions (see paragraphs 594 and 611 above). This included Mr Girkin, the "Defence Minister" of the "DPR" who had formal overall command of the armed forces of the "DPR" and the "LPR" (see paragraphs 108 and 145 above). Devising military strategy would appear to be a key responsibility associated with such a role, and the evidence in the case-file does not suggest that the contrary was true in respect of Mr Girkin.

His prominent role at press conferences and the comments he has made clearly illustrate the central role played by Mr Girkin in planning military strategy and coordinating the separatist armed forces, including between the "DPR" and the "LPR" (A 2027, 2550-56, 2566-71 and 2577-98. See also A 1528, 1607 and 1609). In a newspaper interview from November 2014 he referred to the fact that he was "in charge" in eastern Ukraine (A 2570).

619. The intercept evidence reveals that the political hierarchy within the respondent Government exercised significant influence over the separatists' military strategy. It provides multiple examples of references by separatists, including Mr Girkin and Mr Borodai, to instructions and orders from "Moscow", the "FSB" or the "GRU" (A 1538-39, 1544-45, 1549-50, 1556, 1570, 1583 and 1600-01). In one conversation from 4 July 2014, the eve of the separatists' surrender from Slovyansk, Mr Dubinskiy referred to "waiting for the Moscow's decision on whether Slaviansk is to be taken out" (A 1555). The intercept material also shows that the separatist entities regularly reported to Russia on the outcome of military actions (A 1524-25, 1540 and 1554). It further indicates that in the event of conflicting instructions or differing views between the Russian Federation and the separatists as to military strategy, the orders of "Moscow" were to be obeyed (A 1555-56).

620. It is also significant that the material before the Court shows that even those in the senior leadership of the "DPR" received orders from a higher authority. It is telling that Mr Borodai, then "prime minister" of the "DPR" asked in one conversation with a Russian telephone number to talk to "the boss" urgently about an important decision that he had to make (A 1605). Mr Girkin, in another conversation, made it clear that he was subject to orders from a "Vladimir Ivanovich", whose identity has not been confirmed but who is alleged by Bellingcat, on the basis of an open-source investigation, to be FSB Colonel General Andrey Ivanovich Burlaka (A 1610-11 and 2534-36). Mr Girkin also stated in a press interview that he had had a "categorical order not to surrender Slovyansk" (A 2566).

621. The material confirms that orders and instructions were received from Moscow on a range of issues, including whether to surrender Slovyansk. This latter decision was clearly of key importance to the separatists' military strategy. The respondent Government have provided no explanations for these elements. The Court infers from the material before it that the influence of the political hierarchy of the respondent Government on the military strategy of the separatists was significant.

– *Supply of weapons and other equipment*

▪ The parties' memorials

622. The respondent Government stated that no weapons or military equipment had been supplied by the Russian Federation across the border to eastern Ukraine during the relevant period. Their border service had not detected any attempt to export weapons, military equipment or ammunition

from the Russian Federation to Ukraine. This was despite the fact that border security had been reinforced since 2014, with additional manpower and technical equipment having been provided. As to the weapons in the hands of the separatists, these appeared to have been "predominantly Soviet-era weapons" which had been "presumably obtained from armouries abandoned by retreating Ukrainian forces and seized directly from the Ukrainian military on the battlefield". The respondent Government also suggested that the "DPR" and the "LPR" might have acquired weapons on the national and international arms markets. The alleged supply of a Russian Buk was false and based on faked evidence.

623. In reply to the Court's invitation (see paragraph 401 above) to explain the number and dates of humanitarian convoys sent to eastern Ukraine by the Russian Federation and details of their contents, the respondent Government emphasised that Ukraine had not put forward any evidence to sustain allegations that the Russian Federation had used deliveries of humanitarian aid to conceal the delivery of men and material and the return of dead and injured soldiers. They explained that in August 2014, the Russian Federation, Ukraine and the ICRC had established a procedure for inspecting humanitarian convoys from Russia to eastern Ukraine. The convoys were delivered to the Donetsk and Luhansk regions through the checkpoints "Matveyev Kurgan" and "Izvarino", under the control of the Ukrainian border and customs services and with the presence of representatives of the SMM.

624. There had been very extensive inspections covering the vast majority of humanitarian convoys and any small number not covered by such inspections had resulted from Ukraine's failure to cooperate. Thus from 2014 to 2020, 96 humanitarian convoys had undergone joint border and customs control. These convoys had contained medication, food, clothing, construction materials, textbooks and other similar items. The respondent Government provided copies of miscellaneous correspondence to the ICRC and the UNHCR, diplomatic notes to Ukraine and annexes listing material supplied but said that it had not been possible to find all correspondence on this subject in the "short time available" to them for submission of their supplementary memorial. They said that Ukraine had declined to take part in the joint registration and inspection of humanitarian convoys in seven instances (three instances in 2014 and four instances in 2015), for reasons outside the control of the Russian Federation. Every effort had been made to allow Ukraine to inspect the incoming humanitarian cargos and Ukrainian protests were purely political. The ICRC had praised Russian efforts but had "abstained from direct participation in the delivery of the Russian humanitarian cargos".

625. In an Informational Report concerning Russian weapons and equipment, the applicant Ukrainian Government provided an extensive list of military equipment detected in eastern Ukraine that they claimed was of

Russian origin. An official letter from the Ukrainian Security Service to the Deputy Minister of Justice, dated 15 November 2018, listed all the items of military equipment seized or recorded as operating inside Ukraine which were exclusively available to the Russian armed forces including various identifiable types of battle tanks, armoured combat vehicles, artillery systems and armour-defeating weaponry. The letter also contained a detailed assessment of the importation of illegal weapons from the Russian Federation via various routes. It noted that the principal means of weapons-smuggling continued to be the misuse of "humanitarian convoys" organised by the Russian Federation. The letter and its enclosures recorded the alleged dates and times of clandestine border crossings of this equipment and accompanying personnel. Overall, the arms supplied by the Russian Federation to the military contingents in eastern Ukraine produced "a force roughly equivalent in size and capability to the official armed forces of Romania or Sweden".

626. The applicant Dutch Government referred to the continuous flow of military material, including heavy weaponry, tanks and other arms and equipment, from Russia to Ukraine. This was reported by a variety of sources, including States, international organisations, (investigative) journalists, NGOs and other observers and was supported by photographic and video evidence. One separatist had described Russian support as consisting of "substantial amounts of weapons, regular military support and some training" and separatists had referred to the Russian military support as being "intermittently generous".

627. The applicant Dutch Government further claimed that the evidence showed that in the weeks and days prior to the downing of flight MH17, the separatists had been in need of heavier material and had requested such support from the Russian Federation. Mr Girkin, as "Minister of Defence" of the "DPR", had requested military support from the Russian Federation on numerous occasions, sometimes even indicating that Russian support was imperative. In one intercepted telephone call, a separatist had expressed the hope that the Russian Federation would provide them with a surface-to-air missile system. The Russian Federation had lived up to this hope and had provided the Buk-TELAR that was used to down flight MH17. The Buk-TELAR that had been filmed and photographed on 17 and 18 July 2014 in eastern Ukraine had been found to have the same unique combination of distinctive characteristics as a specific Buk-TELAR that had been part of a convoy of the 53rd AAMB that had travelled between 23-25 June 2014 from its base near Kursk in the Russian Federation towards a military base of the Russian Federation at Millerovo in the Russian Federation, close to the Ukrainian border.

▪ The findings of the Court

628. The Court observes that the respondent Government do not contest the accuracy of the list provided by the applicant Ukrainian Government of material found in the possession of the separatists. Nor do they argue with the proposition that the separatists had access to large numbers of arms and heavy weaponry including sophisticated military-grade material. The Court is moreover satisfied that the evidence establishes this to be the case. There is evidence from the intercepted telephone conversations that high-ranking separatists in the "DPR" had access to "special telephones" that were not for sale and which could only be obtained from the Russian security service, the FSB (A 1551). The SMM continued to refer throughout the years of its operation to military material in the hands of separatists in Donbass and identified, in particular, the presence of "sophisticated" and "military-grade" jamming material (A 162 and 1094). That military equipment, weapons and ammunition have been available to the separatists throughout the many years of the conflict is also evident from numerous media and NGO reports (A 2131-52, 2155, 2219-21, 2245, 2265, 2270-75, 2300-02, 2434-35, 2454, 2465, 2540, 2545, 2655, 2685-86, 2703, 2725-28, 2742-45, 2747-48, 2781, 2785, 2815 and 2822) and the very fact that the conflict has been sustained throughout these years. The only question is whether it has been shown that the equipment was provided by the Russian Federation.

629. The respondent Government's explanation that such weapons were taken from armouries or on the battlefield, even if taken at face value, could apply only to the period of time when the separatists were on the offensive and acquiring territory. This appears to have been the case until around May 2014, but from that point onwards further land acquisitions were limited and as a result any possibilities for the separatists to acquire further arms and heavy weaponry from the Ukrainian forces would have been severely curtailed. Such sources certainly cannot explain the apparently uninterrupted flow of large numbers of increasingly sophisticated weapons and ammunition into eastern Ukraine over the ensuing months and years.

630. There are many elements in the case-file which point to the transfer of weapons from the Russian Federation to eastern Ukraine. It is clear from the numbers involved and the nature of the equipment that the transfer of weapons took place in an organised and coordinated way and that some of the equipment could not have been obtained without State assistance. None of the parties has suggested that there is evidence of the involvement of any State other than the Russian Federation. The observations of the SMM include references to "military-grade" material (A 1094. See also A 140, 154, 162, 490 and 712). The OSCE Border Mission observers did not observe any weapons on the individuals crossing the border. They were told by those crossing that they were "not allowed" to take weapons across. However, they observed individuals with holsters and no weapons (A 477). This is suggestive of an organised and coordinated approach to equipping those

entering eastern Ukraine to participate in active fighting. The Court notes that on at least one occasion in August 2018, the SMM's long-range unmanned aerial vehicle ("UAV") spotted convoys of trucks entering and exiting Ukraine from Russia in the middle of the night via a dirt track where there were no border crossing facilities (A 443 and 662). On other occasions, the SMM UAV spotted military vehicles, including on one occasion a convoy of vehicles, on dirt tracks very close to the Russian border, travelling away from the border into Ukraine (A 448 and 450-51). There are numerous reports by the SMM of large convoys of military vehicles travelling westwards in eastern Ukraine (A 356-58, 363, 366, 369, 372-3, 375, 377-78, 380, 381-83 and 461). The only reasonable inference is that this material had crossed into eastern Ukraine over the Russian border in the east and was travelling to the line of contact in the west of the separatist entities. The OSCE monitors also observed, during the night, military convoys on dirt roads near the international border which appeared to be crossing into the Russian Federation (A 444-447). The respondent Government were invited to include relevant submissions on the evidence gathered by the OSCE. They provided no explanation whatsoever.

631. That no large transfers of equipment across the border itself were detected by the OSCE Border Mission can be explained by the fact that the mission was present at only two border crossings. As noted above (see paragraph 597), despite requests to expand the geographical scope of the border monitoring, the Russian Federation refused to authorise any further missions. Moreover, NGO reports indicate that border crossings were effected at informal crossing points, where no surveillance or monitoring by State authorities was in place (A 2227-33, 2252, 2319, 2325-26, 2329-30 and 2476). It is not necessary for the Grand Chamber to be satisfied as to the reliability and credibility of each of these reports in order to accept that it would be easy for the Russian Federation to arrange for weapons to cross its border into Ukraine undetected by formal border controls. There is evidence from the OSCE that this is indeed what occurred (see paragraph 630 above).

632. It is, moreover, evident from the intercepted calls that the message conveyed to the Russian Federation by the separatist leadership in the summer of 2014 was that without large-scale support the separatists would be defeated, if not entirely then certainly to the extent that separatist strongholds would be substantially reduced. A clear example of this can be seen in the call by Mr Girkin to the assistant of Mr Aksyonov on 8 June 2014 (A 1527-30). It was argued by the applicant Governments that the provision of the Buk-TELAR used to down flight MH17 was an example of a request for particular material being answered, and owing to the extensive criminal investigation there is a particularly full account of how it came to be in eastern Ukraine. The evidence collected by the JIT in this respect includes intercept evidence, photographic and video material and eye-witness statements (A 1527-30, 1561-62, 1569, 1573-82, 1589-99, 1644-793 and 1859-950). The

first instance court in The Hague concluded that in the night of 16 to 17 July 2014, a Buk-TELAR had been transported from the Russian Federation in response to the separatists' requests for air defence weapons and that it had been swiftly returned to the Russian Federation after the downing of flight MH17 (A 1964-76). The evidence therefore demonstrates beyond reasonable doubt that the Buk-TELAR used to shoot down flight MH17 was provided by the Russian Federation in direct response to the separatists' call for anti-aircraft weaponry.

633. The material assistance provided by the Russian Federation was also referred to by separatist leaders at various press conferences in the summer of 2014. As already noted, Mr Borodai referred to Mr Surkov as "our man in the Kremlin" (A 2549 and paragraph 602 above) from which it can be inferred that he channelled the separatists' requests for material assistance. Mr Borodai further announced, following a visit to Moscow in July 2014, that he was "very much counting on the assistance of the Russian Federation in the nearest possible future" (A 2551 and paragraph 602 above). In a speech to the "DPR People's Council" on 15 August 2014, Mr Zakharchenko, then the new head of the "DPR", said that 30 tanks and 120 armoured vehicles had recently crossed the border into Ukraine from the Russian Federation (A 2560). The respondent Government have provided no response to this very specific assertion which was widely reported (A 2743-45).

634. The applicant Governments have alleged that the "humanitarian convoys" provided by the Russian Federation were a cover to enable weapons and ammunition to be smuggled into eastern Ukraine. The Court will be slow to attribute ulterior motives to the ostensible provision of humanitarian aid since in a conflict situation the provision of such aid is clearly desirable. However, for humanitarian convoys to be accepted at face value, the State providing the aid must comply with all reasonable conditions as to its provision and inspection, including the participation and assistance of relevant international organisations such as the ICRC. Such conditions cannot be seen as unnecessary formalities but rather constitute important safeguards against the very abuse now being alleged by the applicant Ukrainian Government. In the present case, it is clear that both the applicant Ukrainian Government and the ICRC expected that the latter would be involved in the distribution of the aid provided by the respondent Government. The ICRC expressed its readiness to facilitate the delivery of aid "with the involvement, endorsement, and support of all sides concerned" (A 2069). To that end, in August 2014 it shared with the Ukrainian and Russian authorities a document specifying the manner in which such an operation could take place (A 2069). However, it emerges from the material before the Court that no arrangements enabling the ICRC to play a role in the delivery of aid were ultimately reached. The respondent Government merely stated that the ICRC "abstained from direct participation in the delivery of the Russian humanitarian cargos" (see paragraph 624 above) but provided no explanation for the alleged

decision of the ICRC to abstain from direct participation. The available evidence appears to show that the ICRC's exclusion from the process was the result of a failure by one or both of the States concerned to provide the necessary guarantees (A 2070-76). Since the respondent Government are asserting the purely humanitarian nature of the convoys in the absence of independent inspection, the Court considers that the burden is on them to explain why the ICRC did not ultimately participate in the delivery and distribution of the aid. The respondent Government claimed that they did not have enough time to submit the relevant evidence before the December 2020 deadline for their supplementary memorials. However, they provided no explanation for their failure to provide this material with the further memorials submitted in March and in May 2021 (see paragraph 26 above) or, indeed, at the hearing itself in January 2022.

635. The Court is not persuaded that appropriate opportunities were provided to the applicant Ukrainian Government to inspect the entirety of the convoys and that there was full transparency in this respect, as alleged by the respondent Government. The Russian Federation have provided no documents demonstrating that Ukrainian officials were involved in "extensive inspections" of any of the convoys (A 2080). There are repeated references by the OSCE Border Mission to the fact that border inspections were carried out by Russian Federation border guards only (A 166-68, 171, 174, 180, 182-84 and 193). Moreover, where the OSCE Border Mission records that Ukrainian officials were present at the border while the convoy was inspected, at the very most the observations refer to "visual" checks being carried out by them from outside the vehicles (A 179, 181, 185, 190, 194-97, 205-09, 212, 220-21, 225-28, 230-37, 239 and 241-67). These "visual" checks were often referred to as "light" or "superficial" (A 198, 201, 203-04, 213-14, 216 and 218-19). The Border Mission observations also often record the time spent by the convoys at the border crossing point. It is not evident that the relatively short periods of time spent by the convoys at the crossing point would have permitted anything more than a superficial examination of the trucks in the convoy (A 168, describing a convoy of 83 vehicles which spent a total of 90 minutes at the border crossing point, and A 170, describing a six-truck convoy which spent fifteen minutes at the border crossing point).

636. The Court further notes that the SMM and Border Mission were not involved in the inspection of the convoy at the border or the offloading of the trucks at their final destination, despite the respondent Government's assertion that the aid was delivered with the presence of representatives of the SMM. Although it appears that the SMM was able, on some occasions, to observe parts of the unloading process, its participation appears to have been limited (A 169, 173 and 176-77). None of the parties claimed that the OSCE missions were involved in the independent verification of the convoys. Moreover, the SMM recorded occasions when it was refused access to, or told to move away from, the convoys, an instruction which the observers

considered to constitute a restriction on the freedom of movement of their mission (A 223, 238 and 240).

637. In view of all the elements in the case-file concerning the convoys, the Court is not persuaded that it can be said with any certainty that they were purely humanitarian in nature and were not used as a means to transport weapons and other military equipment to Donbass.

638. Against the weighty evidence of the ongoing, organised provision of weapons and other military equipment from and by the Russian Federation is the suggestion by the respondent Government that the separatists could have acquired their weapons and equipment on the arms market. There is no evidence to support this suggestion. There are no detailed submissions in the respondent Government's memorials as to how this arms market operates, who are the key players and how and from whom, specifically, the "DPR" and the "LPR" might have sourced the weapons and equipment identified in eastern Ukraine. Nor is there any assessment of the kind of budget which would be required for the purchase on the arms market of the weapons identified in Donbass or analysis of how the necessary funds to make such purchases might have been acquired. There are no submissions on how such purchased weapons entered Ukraine or, in particular in this respect, any acknowledgment that such weapons and equipment crossed the border from Russia. The Court underlines again the acknowledged relationship between the separatist entities and the Russian Federation (see paragraph 458 above). The Court does not consider it credible, in view of this relationship, that the respondent Government would not be in a position to provide more accurate and detailed information as to the source of the weapons and equipment to which the separatists have had access throughout the conflict.

639. In view of the above, the Court considers it established beyond any reasonable doubt that from the earliest days of the separatist administrations and over the ensuing months and years, the Russian Federation provided weapons and other military equipment to the separatists in eastern Ukraine on a significant scale.

– *Training*

▪ The parties' memorials

640. The respondent Government stated that plans regarding military training were classified, as were details of buildings used for military training. They confirmed that the GPS coordinates of alleged training camps near the Ukrainian border were within Russian territory. The military trainings carried out near the Ukrainian border were fully appropriate and had in no way interfered with events in Ukraine. The Russian Federation was entitled to hold training and to establish training camps in border areas. The respondent Government firmly denied that Russian military facilities were used to train anyone but Russian servicemen.

641. The applicant Ukrainian Government alleged that training camps were established in the Russian Federation close to the border with Ukraine. The express purpose of these camps was to provide military training to those entering eastern Ukraine to fight alongside the separatists.

642. The applicant Dutch Government claimed that at the end of March 2014 and the beginning of April 2014, the Russian Federation started to establish training camps near the border between Ukraine and the Russian Federation. It was notable that the Russian Federation had established these training camps near the border in the same period that the separatists became active in the south and east of Ukraine and had started to make territorial gains. In August 2014, Mr Zakharchenko, then "Prime Minister" of the "DPR", declared that by then, over a four-month period, 1,200 individuals had already gone through training in the Russian Federation. The applicant Dutch Government invited the Court to conclude that the camps were used, *inter alia*, for military training of separatists.

- The findings of the Court

643. The respondent Government have not disputed the allegation that there were training camps in the locations alleged by the applicant Governments. That training was carried out near the Ukrainian border is supported by observations of the OSCE Border Mission: on 26 September 2014 it heard more than 160 reports of mortar fire and automatic cannons being fired over the course of three hours which it determined originated from firing practice on Russian Federation territory (A 726). The Atlantic Council, in its 2015 report, analysed satellite data and determined that Russian training camps stationed along the Ukrainian border were "the staging ground for Russian military equipment transported into Ukraine, soon to join the separatist arsenal, and for Russian soldiers mobilised across Russia to cross into Ukraine" (A 2246). Mr Zakharchenko referred to the training in the Russian Federation of some 1,200 fighters who, in August 2014, had just arrived in eastern Ukraine (A 2560).

644. The carrying out of military training near the border with Ukraine in the context where a separatist conflict had broken out in eastern Ukraine calls for an explanation if it is not to be inferred that there was, as alleged, Russian involvement in the training of those fighting in eastern Ukraine. The respondent Government's explanations in this respect are incomplete and unpersuasive. They declined to provide any concrete information as to the purpose of the training and the identities of those being trained or their subsequent deployment. It may therefore be inferred that training was provided to Russian soldiers prior to their deployment in eastern Ukraine. However, the evidence produced by the applicant Governments is insufficient for the Grand Chamber to reach any conclusions as to whether training was also offered to other separatists, aside from regular Russian troops, fighting in eastern Ukraine. Taken as a whole, the material provides further

corroborating evidence of Russian military presence, via the deployment of regular Russian soldiers, in eastern Ukraine (see paragraphs 595-611 above).

– *Artillery cover*

▪ The parties' memorials

645. The respondent Government denied any cross-border artillery attacks by the Russian military in eastern Ukraine and claimed that the allegations were based on false and unreliable evidence. The evidence relied upon by the applicant Ukrainian Government amounted to letters written by the State Border Guard Service of Ukraine which did not themselves refer to any primary evidence. Had these shelling attacks taken place, there would have been no shortage of witnesses as well as photographic evidence of the damage caused, medical records of those wounded and killed and citations and medals for bravery. The statement of the sole witness relied upon by the applicant Ukrainian Government was inconsistent and itself appeared to suggest that shelling had come from within Ukrainian territory.

646. It was "hugely significant" that the applicant Ukrainian Government had failed to put forward technical evidence from its military of where the alleged shelling had originated. Artillery direction finding and ranging was a well-established military practice which could be performed using a variety of methods. The applicant Ukrainian Government had, however, relied instead on reports by Bellingcat and Truth Hounds. These bodies had no expertise on shelling, were not objective and relied on sources for satellite imagery which also lacked objectivity. In particular, the "crater analysis method" was "hopeless" and Bellingcat's assertion that its technique was based on US military analysis was inaccurate. There was, moreover, a lack of overlap between the cross-border artillery attacks identified in the reports and the allegations advanced by the applicant Ukrainian Government in their written submissions.

647. The applicant Ukrainian Government claimed that on 11 July 2014, as a result of Ukraine's operation to regain control over parts of the international border, Russian conventional forces engaged directly for the first time, shelling Ukrainian positions near the border town of Zelenopillya with Grad BM-21 rocket launchers from inside the territory of the Russian Federation. They provided detailed information from the State Border Guard Service Administration of Ukraine setting out all the occasions on which they claim to have observed shelling by Russian military originating either in the Russian Federation or from just inside the Ukrainian border between 11 July and 3 September 2014. They also referred to a witness statement from a Ukrainian Lieutenant Colonel deployed in the vicinity.

648. The applicant Dutch Government pointed to evidence that the armed forces of the Russian Federation directly supported "DPR" forces from their own territory through cross-border artillery attacks on positions of Ukrainian armed forces. Such attacks started in July 2014, before the downing of flight

MH17, and continued thereafter. The applicant Dutch Government relied *inter alia* on the conclusion of Bellingcat's investigation, based on satellite images, videos from social media, local media reports, and the shifting maps of the ongoing conflict, that not later than in the beginning of July 2014, the Russian Federation had carried out artillery attacks on Ukrainian territory and against Ukrainian armed forces. Furthermore, cross-border artillery attacks from Russian territory on Ukrainian armed forces had been confirmed by the United States and other observers. Russian cross-border artillery attacks were carried out upon requests from the separatists. The applicant Dutch Government relied on intercept evidence in support of their submission.

- The findings of the Court

649. Despite the highly detailed allegations made in the applicant Ukrainian Government submissions and evidence (see paragraph 647 above and A 1146, 1149, 1155, 1157, 1159, 1162-64, 1214-15, 1244 and 1247), they have provided comparatively little in the way of primary evidence to support their allegations of cross-border shelling. As the respondent Government have pointed out, the applicant Ukrainian Government should have been able to submit numerous witness statements from those they claim witnessed these events, including border guards. It would also be reasonable to expect some form of expert analysis of impact sites, with conclusions as to trajectories and origins of the artillery attacks. The applicant Ukrainian Government have presented a handful of witness statements from members of the Ukrainian armed forces stating that they were subject to artillery fire from the Russian Federation and providing, to varying extents, information as to dates and places of alleged shelling (A 1408, 1419, 1430-32, 1452, 1457 and 1461). They have also relied upon a record of interrogation of a Russian soldier captured in eastern Ukraine, who described artillery shelling from the Russian Federation on 18 August 2014 which he had witnessed from Ukrainian territory (A 1483).

650. As to expert analysis of impact sites, the applicant Ukrainian Government appear to rely in the present proceedings solely on the work of Bellingcat and the analysis conducted in its reports. As noted above (see paragraph 472), the Court does not consider that there are grounds upon which to reject the reports prepared by Bellingcat as a matter of principle. However, the respondent Government have formulated specific criticisms of the analysis and conclusions reached by Bellingcat as to cross-border artillery attacks. The Court observes that, in a report relied upon by the applicant Ukrainian Government, Bellingcat alleged that its crater analysis method had been cited with approval in an expert report relied upon by the prosecution in the trial in the Russian Federation of Ukrainian national Nadiya Savchenko (A 2464). It may be regarded as significant that the respondent Government did not engage with this claim. The Court considers that it is not in a position, at this stage in the proceedings, to resolve differences of views concerning

the appropriate methodology for analysing artillery craters. It would, however, note that the conclusions reached by Bellingcat find support from the report published by the Atlantic Council (A 2240-51). That report identified Gukovo, Russian Federation, as a launch site of cross-border artillery attacks, also using satellite imagery and crater analysis. However, significantly, the report went on to explain that a Russian journalist had subsequently made inquiries with locals in Gukovo who had confirmed that artillery attacks had been launched from a field there. The journalist had visited the field and had found artillery rocket end caps there (A 2251).

651. The applicant Dutch Government rely on intercept evidence to support the allegations of cross-border shelling. For example, in one intercepted conversation on 23 July 2014 it was immediately clarified by the separatist speaker that the question "[i]s the artillery active there now or not" referred to "the Russian artillery" (A 1607). In another conversation which took place that same day, a request is made for "them" to provide artillery cover at a particular place near Dibrivka because "they" had previously "missed" (A 1609). The respondent Government did not provide any explanation for these comments. It can be inferred from the content of these calls that operational requests for immediate artillery cover were regularly made to the Russian Federation in the full expectation that such cover would be swiftly provided (see also A 1587).

652. The conclusion that cross-border shelling took place is also supported by the report of the ICC Office of the Prosecutor ("OTP") on Preliminary Examination Activities 2016 (A 65-66). The OTP assessed, based on reports of shelling and the detention of Russian military personnel by Ukraine and vice versa, that direct military engagement between the respective armed forces of the Russian Federation and Ukraine indicated the existence of an international armed conflict in eastern Ukraine from 14 July 2014 at the latest.

653. The OSCE border mission also recorded hearing artillery fire in the vicinity of the Russian border checkpoints of Donetsk and Gukovo in the Rostov Region. On 10 August, during the day and the evening, the border mission heard and felt several heavy detonations which it identified as departing artillery fire at a distance of approximately ten kilometres west south-west of the Donetsk border crossing point. On 12 August, it heard continuous heavy artillery fire at an approximate distance of ten kilometres in the west north-west direction and similar heavy artillery fire at an approximate distance of ten kilometres north of the border crossing point. It said that in both instances the noise resembled multiple-launch rocket systems (A 298). Towards the end of August the border mission heard blasts and artillery detonations at various times of the day and night, and from different distances and directions around the Donetsk Border Crossing Point. Some of the detonations were close by in a westerly/north-westerly direction (A 477). These areas would appear to fall inside separatist-controlled Ukrainian

territory near the Russian border, which lends support to the allegation that some artillery attacks were launched from inside Ukrainian territory at the border.

654. The Court is persuaded by the evidence that the separatists relied on the Russian military to provide artillery cover and that it was provided.

– *Build-up of troops at the border*

▪ The parties' memorials

655. The respondent Government did not dispute their military presence on the territory of the Russian Federation at the border with Ukraine. They said that deployments had been carried out as part of military exercises (training). The presence of troops was not "an identification of any involvement of the Russian Federation" in the conflict.

656. In response to the Court's invitation to provide information concerning the number of any Russian troops and details of weapons and military equipment deployed in border regions in Russia since October 2013, the respondent Government replied that such information was classified. Classification of information about military matters such as military bases, deployments of personnel and weapons systems and military training was essential for national security. The allegation of the applicant Ukrainian Government that there were about 50,000 servicemen of the armed forces of the Russian Federation deployed in the areas bordering the "DPR" and the "LPR" was false. If there had been such a huge build-up, the applicant Ukrainian Government would have been able to provide photographic evidence of the troops from observation flights of Russian territory. Between 17 March and 7 July 2014 the Russian Federation had accepted sixteen such observation flights, the vast majority of which had been along the border. They had further permitted an extraordinary observation flight on 20-23 March 2014. Ukraine had repeatedly failed to make the data from the flight available, despite being obliged by treaty to do so.

657. The applicant Ukrainian Government argued that there had been a vast build-up of Russian troops along the border in the weeks after the protests had begun in eastern Ukraine in March 2014. By 9 March 2014, there were 26,000 combat-ready Russian military personnel stationed close to Ukraine's eastern border. Within a month a further 14,000 Russian troops had been deployed to the border region. The applicant Ukrainian Government referred to statements from the then NATO Secretary General to support their allegations.

658. The applicant Dutch Government referred to evidence from NATO that there was a build-up of Russian troops in the border region in spring 2014.

▪ The findings of the Court

659. The presence of Russian troops at the border cannot, in itself, show any control over eastern Ukraine. However, it is relevant to the assessment of what military support was available to the separatist administrations. The amassing of troops at the border could clearly be seen as a show of force in support of the separatist entities and in view of the other evidence of Russian support identified above carried the implication that, if the need arose, the forces were available and ready to be deployed in the conflict. Indeed, it is suggested that some of these troops were duly deployed in eastern Ukraine, notably during the Battle of Ilovaisk.

660. There are many references to the deployment of Russian troops at the border area within Russian territory. These include statements from NATO and conclusions in NGO reports (A 2205, 2209, 2226, 2244-48, 2256, 2266, 2276, 2281, 2299, 2305, 2308, 2399 and 2893-98). Ultimately, the respondent Government did not deny that troops were thus deployed, but declined to provide any details of their numbers or the equipment they carried.

661. The Court observes that the respondent Government have in the past consented to provide certain information concerning military deployments, including personnel and equipment. In the course of the proceedings in *Georgia v. Russia (II)*, for example, the respondent Government provided exact numbers of military personnel, tanks, armoured fighting vehicles, artillery systems and air defence systems deployed in the conflict in South Ossetia and Abkhazia in August 2008. Such information extended to identifying at least one particular unit deployed there by name and confirming the establishment of a military base with details of the number of personnel stationed there and its military equipment (see §§ 150 and 165 of the judgment). The Court accepts that information about military matters might reasonably be considered sensitive and that its classification for national security purposes is not, in principle, unreasonable. However, the allegations in the present case date back to spring 2014, almost nine years ago. The Court also observes that the Ukrainian authorities were permitted by the Russian Federation to undertake an extraordinary observation flight on 20-23 March 2014 (see paragraph 656 above). In these circumstances, it is difficult to accept that confirming the numbers deployed to border regions within the Russian Federation itself between March and September 2014 could be considered – in general terms and without more explanation – to jeopardise national security. The Court further observes that the respondent Government did not avail themselves of possibilities open to them to ensure that national security interests were protected in the provision of information in these proceedings. Rule 33 § 2 of the Rules of Court provides that public access to a document or to any part of it may be restricted. It would, moreover, have been possible for the respondent Government to remove sensitive passages in documents, to submit a summary of the relevant passages omitting sensitive information or to submit practical proposals of their own to the Court that

would have allowed them to satisfy their obligation to cooperate while preserving the secret nature of certain items of information (see *Georgia v. Russia (II)*, cited above, § 345; and paragraph 607 above).

662. The Court accordingly infers from the respondent Government's refusal to provide the information requested that the number of troops deployed in the border regions of the Russian Federation and the dates of their deployments corresponded broadly to the allegations made by the applicant Governments. It is also reasonable to infer, against the backdrop of all the information available in the case-file including the evidence as to the presence of Russian military in eastern Ukraine itself, that these troops were deployed to that region in order to be available for further deployment to eastern Ukraine. This constitutes a further example of the military support offered to the separatists by the Russian Federation.

(γ) Political support to the separatists

– *The parties' memorials*

663. Invited to describe their reaction to the early acts of separatists, the "independence referendums" and subsequent "elections" in eastern Ukraine (see paragraph 401 above), the respondent Government referred to the Joint Geneva Statement on Ukraine of 17 April 2014. They further explained that the Russian President had publicly called for the "referendums" to be postponed but that they had nonetheless gone ahead against his recommendation. While respecting the expression of will of the population of Donetsk and Luhansk, the Russian Federation recognised that eastern Ukraine, and specifically the areas around Donetsk and Luhansk were, without doubt, part of Ukraine. Political support was easy to confuse with the sensible encouragement of both sides to reach a political resolution of their differences. Even if the political support alleged were established, it would not be evidence of "effective control".

664. The respondent Government further denied that there had been "any contact between Russian State agencies and representatives of the DPR and LPR armed groups as part of any alleged control over, or instigation of, military action by the militant groups". Some allegations were inherently implausible, such as purported emails from Mr Surkov described in a report by RUSI. The Russian Federation had played no role in political appointments to the "DPR" and the "LPR". Invited to provide submissions on any involvement of Mr Surkov or other Russian nationals in mobilising and directing participation in the early protests, providing funds to separatists in eastern Ukraine or otherwise supporting separatist actions in eastern Ukraine (see paragraph 401 above), the respondent Government replied that the Russian Federation was "unable to account for every Russian national that had any involvement in, or have supported, the DPR and LPR actions in eastern Ukraine".

665. The respondent Government described allegations concerning contact between Russian officials and the separatists as "hopeless". Generally the alleged contact relied on false intercept evidence. In any case, contact was not command or effective control. It was absurd to suggest that in the circumstance of an armed conflict raging on its border, Russia could not have any contact with the "two sides" without assuming responsibility for all that they (allegedly) did.

666. The applicant Ukrainian Government pointed to alleged leaked emails of Mr Surkov described in the RUSI report. These demonstrated the involvement of Mr Surkov in the administration of the "DPR" and the "LPR". They further relied on the findings of other reports, including a 2019 report of the International Crisis Group which claimed that "the chief backer of annexation appears to have been Kremlin adviser Sergey Glazyev, an outspoken champion of Novorossiya".

667. The applicant Dutch Government detailed the political support that they claimed was given by the Russian Federation to the "DPR". They referred in particular to the Russian Federation's legitimisation of the "independence referendums" in May 2014 by its reaction to them in which it expressed its respect for the "will of the people", while other States referred to the illegality of the "referendums" and declared them null and void. They also referred to the Russian Federation's involvement in the organisation, direction and funding of the "DPR", including its decisive role in the appointment of some of those in leadership roles. On 13 May 2014, two days after the referendum on independence, Mr Surkov had received a list with names of individuals recommended for political posts in the "DPR" from an employee of the international investment firm Marshall, owned by Russian oligarch Mr Malofeyev. This list included the names of those ultimately appointed to "government" posts in the "DPR". Intercepted telephone conversations demonstrated that the Russian Federation was not only advising on these political appointments but that it had enjoyed a decisive role and had been able to block certain proposed appointments. For example, the Russian Federation did not approve of the inclusion of "Purgin" in the Security Council of the "DPR" which had resulted, to the regret of the separatists, in his exclusion. The list approved by the Russian Federation had included, for example, the appointment of Mr Girkin as "Head of the Security Council" and "Minister of Defence" of the "DPR", posts which he had subsequently held.

668. The applicant Dutch Government referred, moreover, to the close links with the Russian Federation of individuals holding key leadership roles in the "DPR" and evidence that they had received instructions from people connected with the respondent Government. Mr Borodai had frequently travelled to Moscow for consultations; he had stated, during a press conference on 10 July 2014, that he had been in Moscow for "political consultations". On another occasion, during an interview on 27 February

2015, Mr Borodai had indicated that in early July 2014 his position had required him to travel to Moscow every three to four weeks. There was extensive intercept evidence demonstrating contacts between individuals in the "DPR", such as Mr Girkin and Mr Borodai, and the Russian Federation. An intercepted call from 3 July 2014 showed Mr Borodai and Mr Surkov discussing the "Constitutional Act of Novorossiya". Mr Surkov had had direct and regular contact with the separatist leaders; Mr Borodai had referred to him as "our man in the Kremlin". Mr Surkov had been involved in the arrangement of elections and the building of power structures responsive to the wishes of the Russian Federation.

669. The applicant Dutch Government further claimed that requests for support from the Russian Federation were made to and through Mr Aksyonov, the Russian appointed leader of Crimea. On at least one occasion, as revealed by the intercept evidence, the Minister of Defence of the Russian Federation had issued a mandate to "a bunch of men" to take charge in the east of Ukraine. Mr Borodai had stated that he was carrying out orders and protecting the interests of the Russian Federation only. His successor as "Prime Minister" of the "DPR", Mr Zakharchenko, had stated during one of his interviews that the Russian Federation provided the separatists with political support.

– *The findings of the Court*

670. As noted above, the political leaders in eastern Ukraine following the constitution of "governments" of the "DPR" and the "LPR" after the May 2014 "referendums" included members of the Russian military acting under Russian instruction. These included Mr Borodai, Mr Girkin and Mr Antyufeyev (see paragraphs 590-594).

671. The evidence points to the decisive role played by the Russian Federation in appointing individuals to leadership posts in the "DPR". Leaked emails show that on 13 May 2014 Mr Surkov was sent a list of recommendations for posts in the "DPR government", which included the names of those subsequently appointed (A 2342 and paragraph 475 above). The respondent Government challenge the authenticity of the emails and deny having played any role in political appointments. However, they do not address the specific allegations concerning Mr Surkov's role in deciding political appointments in the "DPR". There is also intercept evidence of a conversation on 15 May 2014 in which the names of those to be appointed was conveyed to Mr Pushilin by Mr Borodai's assistant shortly prior to their announcement. Mr Borodai's assistant stated explicitly, "Moscow approved the closed list" (A 1526). As noted above, the Court is satisfied that the general allegations challenging the authenticity of the intercept material are unfounded (see paragraphs 465-467).

672. The respondent Government did not comment on the extent or nature of the contact between Mr Surkov and the armed groups in eastern Ukraine

despite being expressly invited to do so (see paragraph 664 above). The Court refers to intercept evidence demonstrating that extensive contact took place and the content of such contact (A 1553-4, 1557, 1583 and 1617-18). Among other things, Mr Surkov and Mr Borodai discussed a "screw-up" on Mr Surkov's side with the "Constitutional Act of Novorossiya" (A 1554). The leaked emails further confirm Mr Surkov's involvement in the Novorossiya project (A 2346). The Court further notes that Mr Borodai described Mr Surkov as "our man in the Kremlin" after a trip to Moscow (A 2549). The respondent Government have not provided any explanation for why the Russian President's political adviser would be thus described by the leader of the separatist entity. As already explained (see paragraph 602), the only reasonable inference to draw is that Mr Surkov acted as a liaison between the separatists and the Russian leadership to ensure that the former were given the necessary support.

673. The leaked emails show the extent to which the entire political mechanism of the separatist entities was overseen by Mr Surkov. An email received by him in December 2015 enclosed a list of candidates who might replace unsatisfactory "LPR" leaders, and included candidates CVs (see A 2342). An email received on 13 June 2014 enclosed a printout of all the positions in the "DPR" parliament, including the maintenance staff (see A 2343). An email from Mr Pushilin (see paragraphs 126 and 153 above) on 12 January 2016 enclosed maps of the "Ukrainian Federation" which divided Ukraine into three parts, including Novorossiya and Malorossiya (see A 2344). An email received in March 2015 included specific proposals for changes to Ukraine's constitution; these proposals were published by the separatist entities two days later with minor changes (see A 2348).

674. The Court further refers to statements issued by the Russian Foreign Ministry after the 11 May 2014 "referendums" and the November 2014 "elections" (A 2604 and 2606). These statements did not acknowledge the illegality of the votes and instead appeared to validate them, referring notably to the Russian Federation's respect for "the will of the people". As the applicant Dutch Government pointed out, this position was out of step with the position of the rest of the international community (see paragraphs 298 and 667 above). In February 2017 and April 2019, the President of the Russian Federation passed decrees recognising official documents issued by the "DPR" and the "LPR", including passports and car registrations, and providing for simplified access to Russian nationality for the holders of "DPR" or "LPR" identity documents (A 37-38 and see *Chiragov and Others*, cited above, § 182). The respondent Government also clearly provided political support to the separatists at international level and in July 2015 they vetoed the establishment of an independent international criminal tribunal by the United Nations Security Council to prosecute those responsible for downing flight MH17 (A 49).

675. There is thus clear evidence of political support being provided by the respondent Government to the separatist entities in eastern Ukraine.

(δ) Economic support to the separatists

– *The parties' memorials*

676. The respondent Government claimed that Ukraine's allegations in relation to pensions paid by the "DPR" and the "LPR" were inconsistent, since they claimed both that Russia had provided funding to pay for pensions and that Russia had helped separatists sell coal on the international markets to raise cash for pensions. They considered it unclear where Ukraine's alleged data had come from. They pointed to a statement from the "DPR" Minister of Finance of August 2015 which referred to the source of revenue being mostly "tax and non-tax revenues from the core business of individuals and legal entities". In any case, even if Ukraine could demonstrate the truth of its contentions concerning financing from the Russian Federation, this would still not establish effective control by Russia as "[w]elfare contributions would merely indicate a willingness to provide humanitarian aid to the people in that area".

677. The "Inter-Departmental Commission for the Provision of Humanitarian Assistance to the Affected Territories of the Southeast Areas of the Donetsk and Lugansk Regions of Ukraine" had been established on 15 December 2014 in view of the critical humanitarian situation in those areas. It was entrusted with functions of identification of humanitarian needs in the affected territories and adaptation of Russia's humanitarian assistance to those needs to ensure that the humanitarian assistance was properly utilised to maintain and sustain the population. It coordinated executive and local authorities as well as civic organisations for the purposes of providing humanitarian assistance. It included representatives of different agencies since the humanitarian effort implied accumulation of various resources depending on the needs of the population and it was further necessary that the aid was delivered safely to the affected territories. The respondent Government underlined that the Russian Federation had undertaken substantial efforts to provide humanitarian assistance to the people of south-east Ukraine. In the period of 2014-2020, it had arranged for and delivered more than ninety humanitarian convoys to the affected territories.

678. Invited to comment on the provision and financing of basic services (such as water, gas and electricity) in the "DPR" and the "LPR" (see paragraph 401 above), the respondent Government reiterated their position regarding humanitarian assistance. They said that, "[t]o the extent that Ukraine alleges direct reliance on the Russian resources, Ukraine shall be put to the proof of these allegations".

679. The applicant Ukrainian Government referred to a letter of the Ukrainian Security Service to the Deputy Minister of Justice, dated

15 November 2018, which they said documented the arrangements for the financing of the pro-Russian armed groups operating in eastern Ukraine. Based on a detailed analysis of banking transfers, the letter demonstrated the role of Moscow-backed financing. It explained that the Russian financial institution, the Centre for International Settlements Bank LLC, in accordance with the power entrusted to it by the Russian authorities, performed the function of a supplier and regulator of cash coming from the Russian Federation to banking institutions operating in eastern Ukraine.

680. The letter referred to financial analysis showing that a key source of finance for the "governments" of the "DPR" and "LPR" came "through external financial assistance from the Russian Federation". From these funds, the "governments" funded the local paramilitary forces. Recent budgetary figures indicated that vast sums of Russian roubles had been allocated for local paramilitary groups.

681. The applicant Dutch Government alleged that there was evidence to show that in May 2014 the Russian Federation was preparing to finance to "DPR". Leaked e-mails contained calculations of future costs until 2017, including military costs and costs for law enforcement structures and pensions. The calculations also included the establishment of the "DPR Ministry of Information", a press centre and a newspaper. The fact that the estimated costs for various expenses in 2017 were being calculated as early as 2014 indicated that the Russian Federation was preparing for long-term involvement in and control over the "DPR".

682. The applicant Dutch Government further referred to an intercepted telephone conversation that took place on 11 July 2014 between Mr Borodai and Mr Surkov which they said demonstrated further socio-economic support of the Russian Federation. The support being offered included supplies for the winter, payment of social services and medicines. Mr Surkov stressed in particular the importance of covering these social services to ensure the continuous support of the population. The report on Russian involvement, prepared by the Dutch police in the context of the criminal investigation into the downing of flight MH17, also found that the influence of the Russian Federation extended to financial matters.

683. This information demonstrated that the Russian Federation was closely involved in the daily management of the "DPR", aimed at keeping the population satisfied and preventing dissent. The "DPR" depended on the Russian Federation both for the influx of money as well as for its experience in how to allocate the money.

– *The findings of the Court*

684. Following the outbreak of hostilities in the relevant parts of Donbass, the applicant Ukrainian Government stopped making pension and social welfare payments in territories outside Ukrainian control. The cessation of such payments is evidenced in the reports of the HRMMU, the SMM and the

OSCE Border Mission, which record that payment of pensions and other social welfare payments as well as the wages of those employed in the State sector stopped in eastern Ukraine in the summer of 2014 (A 665-67, 669, 671-72, 677-78 and 680-81 and 989). The SMM refers to statements by various representatives of the "DPR" and "LPR" indicating that payments slowly recommenced in some places in late autumn 2014 via the separatist administrations (A 673, 675 and 679. See also A 678). The respondent Government contended that the budgets of the separatist administrations were funded by tax revenues. It is to be expected that had such revenues been collected, there would be legal instruments passed by the separatist entities to authorise tax collection and material to show the incoming funds. These could have been provided to the Court but no such evidence was submitted. It seems, moreover, unlikely that in the midst of a conflict the newly-established separatist administrations – largely headed by military commanders (see paragraphs 133-139, 144-149 and 158-162 above) – would have achieved a level of organisation and efficiency in the non-military sphere such that adequate tax revenue would already be flowing by autumn 2014 so as to enable the payment of at least some social welfare benefits and wages as well as the purchase of the weapons and other equipment needed to sustain the ongoing conflict. It is significant that the "LPR President" commented to the SMM that the anticipated resumption of payments of salaries from 1 October 2014 might "possibly" be met from "Russian sources" (A 667). He later commented that funding for pensions and welfare payments came from "private donations from local donors and investors" and that tax collection needed to be reformed and implemented (A 673).

685. The intercept evidence clearly shows the close liaison between the "DPR", via Mr Borodai, and the Russian Federation, via Mr Surkov, in terms of the economic survival of the separatist entity. In a conversation with Mr Borodai of 11 July 2014, Mr Surkov referred to the fact that certain social needs were to be addressed and requested Mr Borodai to provide him with an overview of what was necessary for them to prepare for winter and to pay the social services provided for in national legislation. Mr Surkov further requested Mr Borodai to provide him with a professional overview of the need for money, medicines and other social services. Mr Borodai informed Mr Surkov that the "DPR" was running out of money (A 1557). It is clear from that conversation that Russia was both expected and itself intended to provide the necessary funds and other essential supplies, such as gas, on a long-term basis. Mr Borodai did not refer during the conversation with Mr Surkov to any other potential source of revenue.

686. The leaked emails of Mr Surkov support the contention that he was involved in arranging funds for the separatist entities and in overseeing their expenditure. On 26 May 2014, Mr Surkov received an e-mail with an outline of the 2013 budget for the Donetsk and Luhansk regions and in which future costs until 2017 were calculated (A 2347). On 14 June 2014, Mr Surkov

received from Mr Pushilin a list of compensation paid to the families of soldiers who had been killed or wounded (A 2343). On 16 June 2014, Mr Surkov received a list of expenses and equipment for the establishment of a "DPR Ministry of Information" (A 2347). A meeting agenda circulated by email indicates that on 21 October 2015, Mr Surkov held a meeting involving Russia's deputy ministers of economic development, trade, construction and energy where economic matters related to the separatist entities were discussed (A 2347).

687. The financial support provided by the Russian Federation was also referred to by Mr Khodakovsky, a senior separatist leader (see paragraph 111 above), in a press interview in October 2014. Mr Khodakovsky confirmed that Russia was funding pensions and State wages in Donbass adding, "[w]ithout outside help, it is impossible to sustain the territory even if you have the most effective tax-raising system" (A 2563).

688. The "humanitarian convoys" organised by the Inter-Departmental Commission (containing, *inter alia*, electric power stations, foodstuffs, fuel, construction materials, medical equipment, paper, educational literature, heaters and agricultural materials – A 2079) are also relevant to the consideration of the extent to which Russian support enabled the economic survival of the separatist entities. According to the respondent Government, almost 100 convoys were sent to eastern Ukraine in the period between 2014 and 2020 (see paragraph 677 above and A 2079). The provision of humanitarian aid alone is of course not capable of establishing Article 1 jurisdiction over the territory controlled by a subordinate administration where the aid is provided. But where the aid is extensive, as in the present case, it would be artificial to ignore the critical role that it may have played in the economic survival of the subordinate administration. The extent of the aid demonstrates the degree to which the Russian Federation has invested in the economic future of the separatist entities in eastern Ukraine.

689. All of this shows that the Russian Federation has played an active role in the financing of the separatist entities. Indeed, there is no evidence before the Court of any other form of financing and no real explanation by the respondent Government of potential alternative sources of funds and services. The elements in the material before the Court paint a consistent picture of significant economic support from the Russian Federation. Again, by virtue of the acknowledged relationship between the "DPR" and the "LPR" on the one hand and the Russian Federation on the other (see paragraph 458 above), the respondent Government ought to be in a position to provide the Court with more precise information in this respect and with documentary evidence supporting its claim that the source of funding was "tax and non-tax revenues from the core business of individuals and legal entities". The failure to provide any such information or documentation is telling and justifies the drawing of inferences in this respect.

(ε) Conclusion

690. The evidence shows that in early April 2014, disparate separatist armed groups, under different leaderships, began to take control of buildings and then towns in eastern Ukraine. That month, the "DPR" and the "LPR" were declared in Donetsk and Luhansk by groups of separatists. Further, separate armed groups had taken control of buildings and then of the towns elsewhere in eastern Ukraine, in Slovyansk and Horlivka, for example. Gradually, armed groups extended their control to the villages surrounding the towns and cities they held, and the areas under separatist control began to join up (see paragraphs 47-58 above). The evidence suggests that throughout this period, the armed groups were operating with varying degrees of independence from one another and the links between them are not necessarily evident. The evidence also tends to suggest that the degree of support received from Russia may have varied not inconsiderably between the various armed groups. The intercept evidence shows that in some cases instructions were given by the GRU whereas in others they were given by the FSB (A 1600-01).

691. On 11 May 2014, "referendums" were held in the "DPR" and the "LPR", across the area under the control of separatist armed groups (see paragraph 59 above). Following these "referendums", "governments" in respect of each of the two bodies were appointed, including a "Minister of Defence" of the "DPR" under whose authority all the separatist armed groups were said to be operating (see paragraphs 60 and 145 above). The various posts in the "governments" were allocated, with a number of the key roles being given to leaders of the most important armed groups operating in the area, including Mr Girkin, Mr Khodakovsky, Mr Bolotov, Mr Dubinskiy, Mr Plotnitsky and Mr Zakharchenko (see paragraphs 145 and 158 above).

692. Some two weeks after the "referendums", the leaders of the "DPR" and the "LPR" signed a declaration of Novorossiya confederation under the so-called "Union of People's Republics" which aimed to unify these two entities under a confederation (see paragraph 61 and A 674, 1554, 2332-34, and 2346); that goal was apparently abandoned in 2015.

693. The available evidence supports the conclusion that by the time of the 11 May 2014 "referendums", the separatist operation as a whole was being managed and coordinated by the Russian Federation. The Court finds that the appointment of various different leaders of the major armed groups to "government" positions following the "referendums" was subject to Russia's approval and marked a critical step in the transition of the array of irregular armed groups into a single "separatist administration". Thereafter, the command structure was more clearly established, with a hierarchy announced and the overall leadership of the armed forces being vested in Mr Girkin, "Minister of Defence" of the "DPR" (see paragraph 145 above). At this point the armed groups essentially came together and formally became the armed factions of the "DPR" and the "LPR". The armed groups were

subsequently formally integrated into the "DPR" and "LPR" militaries (see paragraph 76 above). Moreover, it is clear that the two entities were operating in tandem, with the "referendum" in each taking place on the same day and the swift announcement thereafter that they were to be united in a confederation. To the extent that a degree of disorganisation continued after this date, this would appear to be the natural consequence of the manner in which the conflict was begun and escalated. What is evident is that with the holding of the "referendums" and the forming of the "governments" there was a decision to exert authority over the entirety of the area under separatist control and to bring separatist groups which had, until that point, been allowed for tactical reasons to operate somewhat independently back under a centralised command.

694. As a consequence, it is unnecessary to identify what areas were in the hands of what groups from 11 May 2014: the Court finds that all areas in the hands of separatists from that date were areas under "DPR" and "LPR" control.

695. The vast body of evidence above demonstrates beyond reasonable doubt that, as a result of Russia's military presence in eastern Ukraine and the decisive degree of influence and control it enjoyed over the areas under separatist control in eastern Ukraine as a result of its military, political and economic support to the separatist entities, these areas were, from 11 May 2014 and subsequently, under the effective control of the Russian Federation (see paragraph 560 above). The threshold for establishing Russian jurisdiction in respect of allegations concerning events which took place within these areas after 11 May 2014 has therefore passed. Moreover, in response to the invitation in June 2020 to clarify the nature of the current relationship between Russia and the separatist entities (see paragraph 401 above), the respondent Government replied that "[t]here has been no change to the relationship outlined above". In the absence of any evidence demonstrating that the dependence of the entities on Russia has decreased since 2014, the Court finds that the jurisdiction of the respondent State continued as at the date of the hearing on 26 January 2022. As noted above (see paragraph 393), it may be necessary for the Grand Chamber to assess, at the merits stage, whether the jurisdiction of the respondent Government continued beyond that date.

696. The complaints of the applicant Ukrainian Government concerning events that took place in the territory under separatist control from 11 May 2014 accordingly fall within the respondent State's jurisdiction *ratione loci* within the meaning of Article 1 of the Convention. The respondent Government's objection in this respect is dismissed.

697. As explained above (see paragraph 564), the finding that the Russian Federation had effective control over the relevant parts of Donbass controlled by the subordinate separatist administrations or separatist armed groups means 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. It will be for the respondent Government to demonstrate at the subsequent merits phase of these proceedings, should they wish to do so, that the separatists did not, in fact, control particular pockets of land or commit the particular acts which form the basis of the allegations by the applicant States; or that the specific acts of particular separatists cannot be attributed to them.

(ii) Whether some particular complaints may be excluded from the respondent State's spatial jurisdiction

698. A finding of spatial jurisdiction brings within the jurisdiction of the respondent State all complaints which concern events occurring wholly within the relevant area. Such a finding does not, however, bring within the respondent State's jurisdiction events which took place outside that area. Moreover, even if the events occurred wholly within the relevant area, the impact, if any, of the exclusion from jurisdiction of "military operations carried out during the active phase of hostilities", in the sense of "armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos", identified in *Georgia v. Russia (II)*, must also be considered (see paragraphs 557-558 above).

699. The majority of the complaints advanced concern events unconnected with military operations occurring within the area under the effective control of the separatists at the relevant time. However, the applicant Ukrainian Government also referred to "unlawful military attacks" against civilians and civilian objects and the destruction of private property and schools as part of the alleged administrative practices in violation of Article 2 and Articles 1 and 2 of Protocol No. 1. They provided detailed submissions on the specific attacks alleged to have occurred (see paragraph 647 above). It would appear from the submissions and the evidence that the only military attacks launched against civilians were artillery attacks and that most – if not all – of the destruction of private property and schools was the result of artillery attacks. In the case of such attacks, while the firing of the weapon may have taken place in territory under the control of the Russian Federation, the damage was caused to individuals and properties in Ukrainian-controlled territory, outside the areas controlled by the separatists. As the victims were therefore outside the areas under the spatial jurisdiction of the respondent State, the attacks cannot fall within the jurisdiction of the Russian Federation on this basis (see paragraph 698 above).

700. It will accordingly be necessary to examine whether the Russian Federation had personal jurisdiction in respect of these complaints (see paragraphs 565-571 above). The 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 (see paragraphs 557-558 above). In the circumstances of the present case, this matter is so closely connected to the merits of the case that it cannot be decided at the present stage of the procedure. The Court accordingly decides to join to the merits of the case the objection raised by the respondent Government as to whether the applicant Ukrainian Government's complaints of administrative practices of shelling in violation of Article 2 of the Convention and Article 1 of Protocol No. 1 to the Convention, together with associated Article 14 complaints, fall within the Article 1 jurisdiction of the respondent State, in so far as these complaints are declared admissible (see paragraphs 831-832, 868-869 and 875 below).

701. The applicant Dutch Government's complaints in relation to Articles 2, 3 and 13 concern the downing of flight MH17 by a Buk missile. As outlined above (see paragraph 698), the Court must first assess where this incident took place in order to determine whether it occurred within the area which it has found to fall within the spatial jurisdiction of the respondent State. The respondent Government claimed that it had been "established by the expert of the District Court of The Hague", Mr Malyshevskiy, that the launch had taken place in territory under control of the Ukrainian armed forces and that it was "a matter of fact" that the missile was Ukrainian (see paragraphs 368-369 above). The Court observes that Mr Malyshevskiy was, according to his witness statement submitted to this Court by the respondent Government in 2019, "Chief of Staff for the lead engineer" at Almaz-Antey, the missile manufacturer (A 2001-15). The respondent Government did not explain how Mr Malyshevskiy was subsequently said to have been "appointed" as an expert by the first instance court in The Hague, nor clarify what precisely he said in those proceedings and on what basis (see also A 1966-67). The DSB and JIT investigations clearly concluded that the aircraft had been downed by a Buk missile supplied by the Russian Federation and fired from separatist-controlled territory while the aircraft was flying over separatist-controlled territory (A 1635-38 and 1859-89). The Court has already found that the evidence gathered by these bodies is authentic and reliable (see paragraphs 467 and 470 above); their various conclusions on this matter have been endorsed by the first instance court in The Hague (A 1965-74). The purported evidence to the contrary presented by the Russian Federation is unpersuasive.

702. It is therefore clear from the ample evidence before the Court that, unlike in the case of the artillery attacks discussed above, both the firing of the Buk-missile and the consequent downing of flight MH17 occurred in territory which was in the hands of separatists. The Court has found that the area in the hands of separatists was, on the date of the incident, under the effective control of the respondent State (see paragraphs 694-695 above). The respondent Government argued that the incident occurred in the airspace controlled by the Ukrainian Government. The Court notes that it is not

disputed that Ukrainian air traffic control was responsible for managing the passage of commercial aircraft over the territory captured by the separatists in eastern Ukraine. However, the Court's conclusion that the territory in question was under the control of the Russian Federation entails the responsibility of that State, under Article 1, to secure Convention rights in exactly the same way as it would in a purely territorial context (see paragraph 561 above). Its spatial jurisdiction therefore covered the territory on the ground as well as the airspace above it.

703. The only question that remains is whether jurisdiction in respect of this incident is excluded on the basis that it concerned "military operations in the active phase of hostilities", in the sense of "armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos", as the respondent Government have alleged (see paragraph 692 above). The Court finds that it cannot be so excluded. While the evidence in the present case shows that the downing of flight MH17 took place in the context of active fighting between the two opposing forces, it would be wholly inaccurate to invoke any "context of chaos" preventing jurisdiction on the basis of effective control over an area from being established.

704. First, the chaos that may exist on the ground as large numbers of advancing forces seek to take control of territory under cover of a barrage of artillery fire does not inevitably exist in the context of the use of surface-to-air missiles. Such missiles are used to attack specific targets in the air. They may be used in circumstances where there is no armed confrontation on the ground below between enemy military forces seeking to establish control over an area (compare *Georgia v. Russia (II)*, cited above, § 126). There is no evidence in the present case of any such fighting in the areas directly relevant to the missile launch site or the impact site.

705. Second, the Court acknowledges that in many instances the available information may be insufficient to enable the circumstances to be elucidated with the precision required in order to determine whether jurisdiction existed. However, the exceptional work of the JIT demonstrates that it is not impossible to pierce "the fog of war" in relation to particular incidents. Its painstaking investigation has provided a great deal of clarity as to the circumstances in which flight MH17 was downed. Most importantly, as noted above, it has shown beyond any doubt that the missile, which had been supplied and transported by the Russian Federation, was launched from and the aircraft was struck over territory under separatist control. As already explained (see paragraph 701), these areas were, the Court has found, within the jurisdiction of the respondent State at the relevant time.

706. The Court is accordingly satisfied that the applicant Dutch Government's complaints fall within the spatial jurisdiction of the respondent State.

C. Jurisdiction *ratione materiae*

1. Complaints concerning the armed conflict

(a) The parties' submissions

(i) The respondent Government

707. The respondent Government contended that, on the very argument of the applicant Governments, the events in question concerned an international armed conflict raising questions of targeting, discrimination and proportionality in so far as there was a risk to civilians. This would put complaints concerning the armed conflict squarely within the scope of international humanitarian law and thus outside the jurisdiction of the Court. Even if the conflict in eastern Ukraine were regarded as a non-international armed conflict, it was still governed by international humanitarian law to the exclusion of the Convention.

708. In previous cases where the Court had suggested that the Convention might apply in tandem with international humanitarian law, the situation had been one of relatively settled control over the areas concerned (for example, in *Hassan*, and *Jaloud*, both cited above). The Court had not sought to apply Convention law to active conflict because doing so would confound the clarity of international humanitarian law, because there was a need for clear rules in the field, and because interfering with international humanitarian law at potential cost to both service personnel and civilians would carry a very grave responsibility.

709. The legal regimes of international humanitarian law and Convention law had developed separately because the two regimes were incompatible. There were several examples of where the provisions of international humanitarian law and those of the Convention were directly incompatible with one another. These included the right to life under Article 2, the right to liberty under Article 5 and the positive obligation inherent in various articles of the Convention to put in place a legal framework to ensure respect for Convention rights. The ICJ's attempt to reconcile international humanitarian law and human rights law in its Advisory Opinion on *The Legality of the Threat or Use of Nuclear Weapons* (8 July 1996) was based on the specific language of the right to life in Article 4 of the International Covenant on Civil and Political Rights and would not work in the context of Article 2 of the Convention. The general guidance there and in its Advisory Opinion on *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (9 July 2004) provided no clarity as to how specific normative conflicts in specific cases ought to be resolved. Reconciliation of human rights law and international humanitarian law would have to be attempted on a case-by-case basis, with unpredictable results. This would seriously undermine legal certainty.

710. The Court's jurisdiction was limited by Article 32 of the Convention to matters concerning the application and interpretation of the Convention itself. States had not agreed that the Court should adjudicate on matters of international humanitarian law. Indeed, none of the core instruments of international humanitarian law, including the Geneva Conventions, gave any jurisdiction to any court in respect of violations of international humanitarian law. Armed conflict raised the highest national interests of States, which States were not prepared to submit to judicial resolution except occasionally and on an *ad hoc* basis. Moreover, the "fog of war" was real, and what happened in battle was "beyond the practical ability of any court to fathom" having regard to the sheer breadth and sweep of evidence, to the fact that soldiers engaged in military operations were not collecting evidence and to the classified nature of much of the relevant evidence. Quite simply, the Convention was not designed for conflict.

711. The respondent Government concluded that all the complaints concerning the alleged armed conflict, in particular shelling, the downing of flight MH17, events during combat and alleged poor treatment of prisoners of war, were outside the jurisdiction *ratione materiae* of the Court.

(ii) The applicant Ukrainian Government

712. The applicant Ukrainian Government responded that it was now well-established that the provisions of international human rights law, including those of the Convention, continued to apply during situations of armed conflict. The contrary suggestion had been roundly rejected by the ICJ in its 19 December 2005 judgment in the *Case concerning armed activities on the territory of the Congo (Democratic Republic of Congo v. Uganda)*. Indeed, no international body had ever concluded that international human rights law was overridden by international humanitarian law. On the contrary, all the international human rights bodies that had dealt with these matters had always applied human rights treaties to the armed forces of a State engaged in an armed conflict. In its admissibility decision in *Georgia v. Russia (II)* (cited above), the Court had expressly rejected a similar argument advanced by the respondent Government.

713. The respondent Government's suggestion that questions of public international law, including international humanitarian law, were somehow outside the Court's competence or mandate was unfounded. In previous cases, where it had been necessary and appropriate to do so, the Court had examined and resolved disputed questions of public international law that had a bearing on the exercise of its functions (citing *Medvedyev and Others*, cited above, § 150). The Court had routinely adopted the approach that the Convention should, so far as possible, be interpreted and applied in harmony with other rules of international law, including international humanitarian law, of which it formed part (*Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI).

714. International humanitarian law was a source of guidance in determining whether a relevant Convention right applied and had been violated. The question whether a deprivation of life was to be regarded as "arbitrary" for the purposes of Article 2 would usually be determined by the application of the relevant rules of international humanitarian law. This had been recognised on several occasions by the Court (for example, in *Varnava and Others*, cited above, § 185; *Ergi v. Turkey*, 28 July 1998, §§ 79 and 82, *Reports of Judgments and Decisions* 1998-IV; *Isayeva and Others v. Russia*, nos. 57947/00 and 2 others, §§ 180 and 210, 24 February 2005; and *Al-Skeini and Others*, cited above).

(iii) The applicant Dutch Government

715. For the applicant Dutch Government, any argument that the applicability of international humanitarian law in and of itself excluded or displaced the applicability of the Convention or affected the jurisdiction exercised by the respondent State had to be rejected. The Court had consistently rejected the suggestion that where international humanitarian law applied the Convention did not apply. In *Hassan* (cited above), the Court had held that "even in situations of international armed conflict, the safeguards under the Convention continue to apply". This had been confirmed in *Georgia v. Russia (II)* (cited above). More recently, in *Saribekyan and Balyan v. Azerbaijan* (no. 35746/11, 30 January 2020), the Court had similarly found that "international humanitarian law and international human rights law are not mutually exclusive collections of law". This was the correct approach, taking into account also the position under international law.

716. The Court had previously found the Convention to be applicable to the extraterritorial use of force in the armed conflict between Cyprus and Turkey, even during the "conduct of military operations ... accompanied by arrest and killings on a large scale" (for example, in *Cyprus v. Turkey*, cited above, § 133; and *Varnava and Others*, cited above, § 186). The Court had similarly applied the Convention to high-intensity fighting, including the use of missiles and grenades, on States' own territories (for example, *Isayeva and Others v. Russia*, cited above, §§ 178, 181 and 183; and *Ahmet Özkan and Others v. Turkey*, no. 21689/93, §§ 298 and 305, 6 April 2004).

717. The Court had developed a methodology for deciding cases involving the simultaneous applicability of international humanitarian law and the Convention. In the case of *Hassan* (cited above), confirmed by the Court in *Georgia v. Russia (II)*, the Court said it had "made it clear on many occasions that the Convention must be interpreted in harmony with other rules of international law of which it forms part ... This applies no less to international humanitarian law". In *Varnava and Others* (cited above), the Court had moreover held that the right to life "must be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and

universally accepted role in mitigating the savagery and inhumanity of armed conflict". The Court had developed this methodology further in *Georgia v. Russia (II)*, where it had considered that it had to "examine the interrelation between the two legal regimes with regard to each aspect of the case and each Convention Article alleged to have been breached". In doing so, the Court said it had to ascertain each time whether there was a conflict between the provisions of the Convention and the rules of international humanitarian law. This approach had also been confirmed in *Hanan* (cited above), where the Court had also assessed whether the Convention came into conflict with international humanitarian law and had proceeded to interpret Convention standards in light of the applicable rules of that body of law.

(b) The Court's assessment

718. The Court's case-law as to the application of the Convention in armed conflict is both clear and consistent (see, *inter alia*, *Cyprus v. Turkey*, *Al-Skeini and Others*, *Georgia v. Russia (II)* and *Hassan*, all cited above). In *Hassan* (cited above, § 104), the Court confirmed that even in situations of international armed conflict, the safeguards under the Convention continue to apply. There can therefore be no doubt that the simultaneous application of provisions of international humanitarian law in a context of armed conflict cannot remove allegations of Convention violations from the Court's *ratione materiae* jurisdiction.

719. Rather, as the Court has made clear on many occasions, the Convention must be interpreted in harmony with the other rules of international law of which it forms part. In *Varnava and others* (cited above, § 185), for example, it held that Articles 2 and 5 of the Convention should be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally-accepted role in mitigating the savagery and inhumanity of armed conflict. In *Georgia v. Russia (II)* (cited above, §§ 93-94), the Court therefore examined in respect of each of the Articles invoked by the applicant State whether there was a conflict between the relevant international humanitarian law provisions and the Convention provisions. Since no conflict arose in respect of any of the complaints, the Court determined them by reference to Convention principles only (see §§ 194-222; 234-256; 266-281; 290-301; 310-14; and 323-327).

720. 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 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.

721. The Court accordingly has *ratione materiae* jurisdiction to examine the applicant States' allegations concerning the downing of flight MH17, shelling and other events which occurred during combat, and the treatment of prisoners of war. The objection of the respondent Government in this respect is dismissed.

2. Complaint under Article 3 of Protocol No. 1

722. The applicant Ukrainian Government's summary in their initial memorial reads:

> "The right to free and fair elections in the territory under the control of Russia's paramilitary proxies has been comprehensively disrupted. Local citizens were prevented from voting in the Ukrainian Presidential elections, through acts of intimidation and violence."

(a) The parties' submissions

723. When the case was pending before the Chamber, the applicant Ukrainian Government invoked Article 3 of Protocol No. 1 referring to parliamentary elections, "elections" in the "DPR" and the "LPR" and (in conjunction with Articles 10 and 11), complaints about the "independence referendums" and the May 2014 Presidential election. However, in their memorials before the Grand Chamber, they did not comment on the extent of the complaint beyond the brief statement set out above (see paragraph 722) and no further arguments concerning this complaint were presented in oral submissions.

724. At the oral hearing, the respondent Government argued that this complaint was inadmissible *ratione materiae* with the provisions of the Convention, citing *Paksas v. Lithuania* ([GC], no. 34932/04, ECHR 2011 (extracts)).

(b) The Court's assessment

725. As explained above (see paragraphs 370-372) the parties were informed that their pleadings before the Grand Chamber should contain an exhaustive outline of their positions. The above summary of the applicant Ukrainian Government's complaint under Article 3 of Protocol No. 1 must therefore be taken as the definitive and exhaustive outline of the complaint pursued. In so far as the formulation of the complaint may be said to be in general terms, the Court considers that it cannot be read as including a complaint about elections to the parliament of Ukraine since no factual allegations in this respect have been presented to the Grand Chamber in any of the memorials provided by the applicant Ukrainian Government. The

complaint itself identifies expressly only presidential elections and it must be concluded that it is about such elections that the applicant Ukrainian Government have complained.

726. Article 3 of Protocol No. 1 guarantees the "choice of the legislature". The word "legislature" has to be interpreted in the light of the constitutional structure of the State in question (see *Matthews v. the United Kingdom* [GC], no. 24833/94, § 40, ECHR 1999-I; and *Boškoski v. "the former Yugoslav Republic of Macedonia"* (dec.), no. 11676/04, ECHR 2004-VI). The question whether the Presidential elections in Ukraine fall within the scope of Article 3 of Protocol No. 1 goes to the very heart of the Court's jurisdiction *ratione materiae* to examine the complaint (see paragraph 504 above).

727. The obligations imposed on the Contracting States by Article 3 of Protocol No. 1 do not, in principle, apply to the election of a Head of State (see *Baškauskaitė v. Lithuania*, no. 41090/98, Commission decision of 21 October 1998, unreported; *Boškoski*, cited above; *Krivobokov v. Ukraine* (dec.), no. 38707/04, 19 February 2013; and *Anchugov and Gladkov v. Russia*, nos. 11157/04 and 15162/05, § 55, 4 July 2013). However, the Court has accepted that should it be established that the office of the Head of State in question has been given the power to initiate and adopt legislation or enjoys wide powers to control the passage of legislation or the power to censure the principal legislation-setting authorities, then it could arguably be considered to be a "legislature" within the meaning of Article 3 of Protocol No. 1 (see *Boškoski* and *Krivobokov*, both cited above).

728. The Court's decision in *Krivobokov* concerned the applicability of Article 3 of Protocol No. 1 to the office of President in Ukraine. After reviewing the provisions of the Constitution of Ukraine in force at the time concerning the role and powers of the President, the Court concluded that the Article was not applicable because the election of the President of Ukraine could not be interpreted as a "choice of the legislature". The applicant Ukrainian Government did not comment on the Court's case-law in this respect either in general or in respect of its specific finding in *Krivobokov*. They did not point to any constitutional changes which might have brought subsequent presidential elections within the scope of Article 3 of Protocol No. 1.

729. The Court accordingly declares this complaint inadmissible on the ground that it falls outside the *ratione materiae* jurisdiction of the Court.

VI. COMPLIANCE WITH ARTICLE 35 § 1 OF THE CONVENTION

A. The parties' submissions

1. The respondent Government

730. The respondent Government pointed out that the applicant Ukrainian Government had not lodged a statement on compliance with the admissibility

criteria, as required by Rule 46 of the Rules of Court, in respect of any of its applications.

731. The applicant Ukrainian Government had in any case failed to exhaust effective remedies which were available. They had pursued no remedies in Ukraine, which would apply to the events in issue since they had taken place in Ukraine (of which eastern Ukraine was indisputably part). Moreover, they had ignored the possibility of proceedings in Russia in so far as they alleged that certain violations were attributable to Russian agents. Even if there were an administrative practice in respect of the acts alleged, the applicant Ukrainian Government would have had to show that it was of such a nature as to make domestic remedies futile or ineffective. They had not done so.

732. According to the respondent Government, the Russian legal system provided effective legal remedies in respect of all the allegations made by the applicant Ukrainian Government. There were various relevant crimes under Russian law and if there was a prima facie case on attribution via Russian nationals in the service of the State, that would open the possibility for proceedings in Russia even where the alleged crimes had taken place on the territory of Ukraine. Any unjustified refusal by the investigator to institute criminal proceedings could have been appealed to the Russian courts under Article 125 of the Code on Criminal Procedure. The Court had held on numerous occasions that in the Russian legal system the power of a court to reverse a decision not to institute criminal proceedings was a substantial safeguard against the arbitrary exercise of powers by the investigating authorities and that an appeal to a court against a prosecutor's decision not to investigate complaints therefore constituted an effective domestic remedy which had to be exhausted (citing, in particular, the Committee judgment in *Taziyeva and Others v. Russia*, no. 32394/11, § 62, 9 April 2019).

733. In respect of the first alleged kidnapping of a group of children on 12 June 2012, the Ukrainian Consul General had made a complaint to the investigative authorities before he had known the full facts. An investigation had been carried out and all necessary steps had been taken to establish the circumstances surrounding the events. The investigation had established that neither the children nor their teachers had been abducted but that they had gone to Russia voluntarily. The investigation had been thorough and unimpeachable: the sixteen children and their two teachers had been questioned and examined by doctors; the director of the school where the children had been taken in Russia had been interviewed; and the documents drawn up by the Russian border authorities had been examined. The statements of the two teachers and five of the children record that they had not objected to going to Russia and that they had not been abducted. The applicant Ukrainian Government acknowledged that they had been informed of the finding of the Rostov Regional Prosecutor's Office that there had been no forcible transportation of the children to Russian Federation territory.

They had not sought to appeal that finding. When the file had been closed in 2015, a copy had been provided to the Consul General informing him of this appeal rights. However, he had not sought to challenge the decision.

734. No criminal complaints had been received as regards the alleged abductions of the second and third groups of children in July and August 2014. No criminal proceedings had therefore been initiated by the Russian authorities. No claims had been received regarding any alleged acts or omissions on the part of the Russian investigative authorities.

735. Furthermore, the six-month time-limit had not been respected in the applicant Ukrainian Government's August 2015 application as it included allegations related to numerous events alleged to have occurred more than six months before the date of lodging. Moreover, it had not been possible to assess whether a number of the complaints had been lodged in time since the alleged date on which the impugned events had occurred had not been provided.

736. As regards the application by the Netherlands, domestic remedies had not been exhausted by the applicant Dutch Government. If there was evidence that the downing of the aircraft had been carried out by Russian nationals, it would be possible for proceedings to be brought in Russia under the Criminal Code. The victims' relatives would be able to lodge a complaint with the investigative authorities or the courts of the Russian Federation. In the case of alleged war crimes, the authorities' jurisdiction could extend beyond Russian nationals. The victims' relatives could have either made complaints directly to the Russian investigative authorities or the authorities of the Netherlands could have forwarded such complaints via mutual legal assistance channels. No such complaints had ever been received.

737. The position of the respondent Government as to Russia's lack of responsibility for the downing of flight MH17 had no bearing on the effectiveness, adequacy or accessibility of remedies in Russia, given the distinction between the respondent Government and the Russian courts and the relevant safeguards in the Russian legal system. As already explained, any refusal to bring proceedings against Russian nationals could be appealed to the Russian courts and the Court had previously confirmed that this possibility could be regarded as an effective domestic remedy which must, in principle, be exhausted (see paragraph 732 above). The applicant Dutch Government had presented nothing to challenge the integrity of Russia's courts and legal system.

738. The Netherlands could, moreover, have formally requested that a criminal investigation be initiated in the Russian Federation. Until the JIT had announced the names of the Russian nationals suspected of participating in the downing of flight MH17, there had been no grounds for the Russian authorities to launch any investigation. At that point, however, the respondent Government had requested the transfer of the criminal proceedings to the Russian Federation but the request had been refused. The respondent

Government were still open to the possibility of transferring these proceedings. Had the request been acceded to, this would not have prevented the Netherlands from continuing its own investigation.

739. The investigative possibilities outlined above remained open to the relevant authorities of the Netherlands and the victims' relatives. It was therefore incumbent upon them even today to pursue these possibilities.

740. There were no "special circumstances" which exempted the applicant Dutch Government from their obligation to exhaust (see paragraphs 756-759 below). As regards the first "special circumstance" relied upon, namely the denial by the Russian Federation of any involvement, as already outlined the Russian legal system contained safeguards which allowed for appeals to the courts in the event that public prosecutors refused to act. Second, it was alleged that it had proved impossible for next of kin to institute domestic proceedings in the Russian Federation, but no explanation or supporting documents in relation to any such attempts had been provided. A single complaint from a single victim's relative would have been enough to apply for an investigation to be opened. As to the third "special circumstance", which was the lack of any connection between the victims and the Russian Federation, this was not a recognised basis for waiving the requirement to exhaust domestic remedies.

741. The allegations of the applicant Dutch Government also did not comply with the six-month time-limit in Article 35 § 1. The application had been lodged almost six years after the downing of flight MH17, almost five years after the DSB's final report, nearly four years after the JIT public presentation setting out the conclusion that the flight had been downed by a Buk missile that had come from Russia, more than one year after four individuals had been charged with a criminal offence in the Netherlands and four months after the first public hearing in the criminal proceedings in the Netherlands had taken place. The submission that the alleged violations were "continuing until this day" conflated the various alleged violations. The "primary alleged breach" was that unlawful use of force had been used to bring down flight MH17. That breach was not in any sense continuing but related only to matters up to and/or on 17 July 2014. Indeed, the applicant Dutch Government themselves only contended that the procedural elements of Article 2 and the alleged violations of Articles 3 and 13 were continuing. In the view of the respondent Government, the substantive allegation under Article 2 had accordingly been made out of time and was inadmissible.

742. As for the remaining allegations concerning the downing of flight MH17 which were alleged to be continuing, the applicant Dutch Government had acknowledged that the Court imposed a duty of diligence and initiative and that a continuing situation did not postpone the commencement of the six-month deadline indefinitely. The Court's case-law confirmed that even in cases where there was some uncertainty or confusion, applications could be rejected as out of time where there had been "excessive or unexplained delay"

on the part of applicants once they had, or should have, become aware that no investigation had been instigated or that the investigation had lapsed into inaction or become ineffective (notably, in *Varnava and Others*, cited above, § 165). If the applicant Dutch Government was acting in good faith then presumably it had "satisfied itself as to the material facts" before the JIT public presentation in 2016 and certainly before charging four individuals in June 2019.

2. The applicant Ukrainian Government

743. The applicant Ukrainian Government submitted that in light of the administrative practices established on the evidence, the absence of any effective system of legal investigation, accountability or redress, and the obvious pattern of official tolerance, there was no obligation to demonstrate the exhaustion of domestic remedies. They referred to the OHCHR reporting set out in their initial memorial, which consistently emphasised the complete absence of any functioning system of independent and impartial courts and the total subordination of all "administrative institutions" to the whims of the very armed groups that were responsible for perpetrating the violations in the first place. In light of the existence of the clearest possible evidence of an administrative practice of Convention violations and official indifference, Article 35 § 1 did not apply so as to require Ukraine to establish that the numerous victims in this case had sought to make use of the "domestic courts" or "administrative organs" of the unlawful *de facto* "governing entities".

744. Alternatively, there were no domestic legal remedies available in the territories controlled by Russia's "paramilitary proxies" that were sufficiently practical and effective to require attempts at exhaustion by the victims. Such "courts", "judges" and "prosecutors" as had been appointed were, in practice, ineffective, biased, inaccessible, powerless and in every respect unavailable to the victims of the alleged violations. Resolution 2133 (2016) of the Parliamentary Assembly of the Council of Europe "Legal remedies for human rights violations on the Ukrainian territories outside the control of the Ukrainian authorities" had concluded that victims of human rights violations had no effective internal legal remedies at their disposal.

745. As regards the alleged administrative practice in respect of the abduction and transfer to Russia of groups of children, the Ukrainian Minister of Foreign Affairs had spoken with his Russian counterpart in the morning of 13 June 2014 and had lodged a formal request, acting as the children's legal guardians, to the Russian police and the ICRF later that day to open a criminal investigation into their abduction and removal from the territory of Ukraine. However, it had been only after the Court had made a Rule 39 indication on 13 June 2014 that the Russian Federation had made arrangements to hand the children to the care of the Ukrainian Consul General in Rostov-on-Don (Russia). Meanwhile, in response to the international scrutiny and in the hours between the Court's Rule 39 indication and the return of the children

to Ukraine at 10.20 p.m. that same night, the Russian authorities had hastily interviewed the children and their carers. Two days after the children had been returned to Ukraine, the Rostov Regional Prosecutor's Office had informed the Ukrainian Parliament's Commissioner for Human Rights that the Russian investigation had failed to establish that any unlawful forcible transportation of Ukrainian children to Russia had taken place.

746. The applicant Ukrainian Government invited the Court to place no reliance whatsoever on the Russian Government's "self-serving 'investigation'". It had been "conducted under conditions of extreme duress for the children and their carers, who would no doubt be aware that if they complained to the Russian authorities about their treatment, this would likely prolong their ordeal". The applicant Ukrainian Government further disputed the veracity of the documents supplied by Russia, arguing that, "[g]iven Russia's history of seeking to deceive the Court in inter-State litigation, the onus is firmly on the Russian Federation to prove the authenticity of its defence, during the merits phase of these proceedings".

747. The applicant Ukrainian Government further invited the Grand Chamber to accept, based on numerous prior judgments against Russia concerning violations of Article 2 and 3 investigative obligations, that in any case where a Russian official was alleged to be at fault, it was the practice of the ICRF to conduct "investigations" that were not Convention-compliant. If Russian officials were potentially at fault, it was the "settled practice of the ICRF to obstruct efforts to achieve accountability".

748. It was no part of the Court's function at the admissibility stage of an inter-State case under Article 33 to make a preliminary assessment of the evidence, particularly when it was disputed. Russia's reliance on the findings of "its own self-serving 'investigation'" could not conceivably provide any basis for declaring the application inadmissible. Indeed, the contents of the Russian file were irrelevant at the admissibility stage.

749. The applicant Ukrainian Government accordingly invited the Court to conclude that in view of the "peremptory 'investigation'" conducted by the Russian authorities on 13 June 2014 and the perfunctory dismissal of the criminal complaint two days after their return to Ukraine, there would be no practical and effective remedy available in the Russian legal system for a group of orphans, some of whom were mentally or physically disabled and many of whom were under five years old. The onus was on the respondent Government to establish the existence of legal remedies that were practically available to the children and likely to be effective in these circumstances. In reality, given the Russian Federation's continuing "false denials" of responsibility for the separatist forces and the "whitewash" investigation, the prospects of any remedy in the Russian legal system had to be regarded as, "at best, theoretical and illusory".

750. The applicant Ukrainian Government did not comment on the respondent Government's objection that some of the allegations in their August 2015 application had been lodged outside the six-month time-limit.

3. The applicant Dutch Government

751. The applicant Dutch Government accepted that the rule of exhaustion of domestic remedies applied to inter-State applications in the same way as it did to individual complaints when the applicant State did no more than "denounce a violation or violations suffered by 'individuals' whose place, as it were, is taken by the State". While their allegations did not amount to an administrative practice as such, their application did more than simply take the place of individuals to denounce a violation suffered by them. Unlike a number of previous inter-State applications in which the applicant Governments had offered protection to "a few individuals", in the present case the applicant Dutch Government were standing up for a large and diverse group of individuals who had suffered and continued to suffer from breaches of their Convention rights as a result of the role of the Russian Federation in the downing of flight MH17. As such, their application contained aspects of both types of inter-State applications. The official policy of denial by the Russian Federation amounted to "official tolerance" and while the application might not concern a pattern of repetition of acts, it could not be said to relate to an isolated individual violation. Because of this the exhaustion requirement was inapplicable to their application.

752. There were, in any event, no domestic remedies in the Russian Federation likely to be effective, adequate and accessible, either in theory or in practice, offering reasonable prospects of success for remedying the breaches of the Convention related to the downing of flight MH17.

753. First, the respondent Government had consistently denied both their own direct involvement and their indirect involvement through the military, economic and political support given to the separatists in the conflict in eastern Ukraine since the beginning of 2014. They had maintained their official policy of denial despite the findings of the JIT, the UN, NATO and the OSCE and the reports by civil society and independent media.

754. Second, the respondent Government had not cooperated with international efforts in an efficient and comprehensive way to establish the cause of the crash or the identities of those responsible. They had vetoed the establishment of an independent international criminal tribunal by the UN Security Council. They had consistently sought to discredit the investigations conducted by the JIT and had failed to cooperate constructively and comprehensively with requests for mutual legal assistance. They had also failed to pursue an effective criminal investigation into the downing of flight MH17 within their own criminal justice system.

755. This demonstrated that any attempt to pursue remedies in the courts of the Russian Federation would have been bound to fail. Even if there were

remedies available in theory, such remedies would neither be effective nor adequate on account of the respondent Government's consistent denial of any involvement in the downing of flight MH17 (for example, as in the reasoning of the Court's admissibility decision in *Ilaşcu and Others v. Moldova and the Russian Federation* (dec.), [GC] no. 48787/99, 4 July 2001, and *Sandu and Others v. the Republic of Moldova and Russia*, nos. 21034/05 and 7 others, § 45, 17 July 2018). There was no distinction between the respondent Government and the Russian courts and there were not relevant safeguards in the Russian legal system. The remedies referred to by the respondent Government did not enable the Russian Federation to be held accountable, but only individuals with Russian nationality. Although the evidence indicated that the missile had been launched by or with the assistance of members of the Russian armed forces, these individuals were yet to be identified. This precise information lay primarily within the exclusive knowledge of the respondent Government, and not knowing against whom to pursue legal action seriously hampered the possibility of making use of any domestic remedies. Even if their identities had been known, it was inconceivable that Russian prosecutors would have started an investigation against those perpetrators since doing so would be at odds with their official policy of denial.

756. In the further alternative, the applicant Dutch Government argued that even if there were effective, adequate and accessible domestic remedies, there were three factors in the present case which, separately and in combination, constituted "special circumstances" capable of absolving them from the obligation to exhaust domestic remedies.

757. They pointed, first, to the conduct of the respondent Government. The Russian Federation had not only remained totally passive in the face of serious allegations of infliction of harm and death by their own State agents but had consistently denied any involvement and refused to cooperate with investigations aimed at establishing the truth and upholding accountability for the downing of flight MH17.

758. Second, the applicant Dutch Government highlighted the personal circumstances of the next of kin of the victims. It had proved impossible for the next of kin to institute domestic proceedings in the Russian Federation. The denial by the respondent Government of their role had rendered any attempt for the next of kin to exhaust remedies in the Russian Federation futile. Moreover, the large number of next of kin of a wide range of nationalities and spread out all over the world had rendered any joint litigation in the Russian Federation virtually impossible. A letter sent to the President of the Russian Federation by relatives of the victims in January 2016, asking for his support in the investigation, had remained unanswered.

759. Third, the applicant Dutch Government referred to the lack of a relevant connection between the victims and the Russian Federation. In support of this argument they invoked Article 15 (c) of the International Law

Commission's Articles on Diplomatic Protection ("ILC ADP"). They also referred to the ILC's commentary to Article 15 which expressly cited the example of an aircraft shot down while flying over another State's territory as an instance where it would be unreasonable and unfair to require an injured person to exhaust local remedies because of the absence of a "voluntary link or territorial connection" between the victim and the State over which the aircraft had been downed. In the present case there had been no consent or voluntary act that had created a relevant connection between those on board flight MH17 and the Russian Federation.

760. Citing the *Georgia v. Russia (I)* decision (cited above, § 47), the applicant Dutch Government submitted that in the absence of remedies the six-month time-limit was to be calculated from the date of the act or decision which was said not to comply with the Convention, but did not apply to a situation that was continuing. In the latter case, the six-month period started to run from the end of the continuing situation. They accepted that continuing situations did not postpone the application of the rule indefinitely and that the Court imposed a duty of diligence and initiative on applicants wishing to complain about a continuing failure of a Contracting State to comply with its obligations.

761. Alleged violations by the respondent Government of the procedural elements of Article 2 of the Convention and of Articles 3 and 13 continued to this day. This had not been contested by the respondent Government. This meant that the six-month period had not yet commenced in respect of these complaints. If the Court were to consider that the six-month period commenced at a particular moment in time in respect of these complaints, there were special circumstances which were in large part attributable to the conduct of the respondent Government and which had prevented the applicant Dutch Government from referring this breach of the Convention to the Court at an earlier stage. Confronted with ongoing violations by the Russian Federation, the applicant Dutch Government had consistently shown due diligence and initiative in introducing, presenting and explaining their case without undue delay. They, together with international partners, had sought full cooperation from the Russian Federation. At no point had there been any excessive or unexplained delay on their part. They had approached the Russian Federation regularly and frequently and in a number of different ways, including through requests for mutual legal assistance and through diplomatic channels. They had committed very considerable resources to repatriating and identifying the remains of victims, investigating and establishing the cause of death, investigating individual criminal responsibility and establishing the State responsibility of the respondent Government for the crash. However, even after the respondent Government had been presented with evidence of their involvement they had not provided a comprehensive account of their role in it.

762. As regards their substantive complaint under Article 2, the applicant Dutch Government contended that there had been no failure to comply with the six-month rule. From the outset, they had committed themselves to establishing truth, justice and accountability in respect of the downing of flight MH17. Invoking the responsibility of a State under international law and submitting an inter-State application to an international court required careful consideration. They had had to satisfy themselves, on the basis of evidence that they had gathered, verified and validated, that there were reasonable grounds for doing so. Moreover, the magnitude of the downing of MH17 and the geopolitical context in which it had taken place had made this case highly complex. As a result, the process had taken considerable time and was not to be rushed.

763. The DSB investigation had revealed that flight MH17 had been shot down with a missile launched from a Buk-TELAR located on territory under the effective control of separatists. Subsequent investigations by the JIT had reached the same conclusions and had further shown that the Buk-TELAR had been brought from Russia and taken back there after the launch. The JIT had announced on 24 May 2018 that the Buk-TELAR belonged to the 53rd AAMB of the Russian Federation and the role of the respondent Government had thus become apparent. The following day, the applicant Dutch Government and the Government of Australia had invoked the responsibility of the Russian Federation under international law for their role in the downing of flight MH17. They had asked the respondent Government to enter into negotiations to clarify the circumstances of the incident and reach a settlement. A number of trilateral meetings had subsequently taken place between the Netherlands, the Russian Federation and Australia until the respondent Government had announced on 15 October 2020 their decision to stop participating in the meetings.

764. The decision to introduce the inter-State application on 10 July 2020 had been prompted by the pending Grand Chamber case brought by the applicant Ukrainian Government, in which the downing of flight MH17 had been raised, and the individual applications lodged by the next of kin. These cases were progressing and the applicant Dutch Government had wished to provide the Court with all relevant information then at their disposal together with their views on that information. They considered this of paramount importance to the proper administration of justice.

765. The applicant Dutch Government had made continuous efforts to uncover the facts surrounding the downing of flight MH17 and establish responsibility for those facts. They had been diligent throughout the process and, in light of the circumstances and complex nature of the dispute, the application had to be regarded as having been submitted in time. It could not be said that the applicant Dutch Government or the next of kin had been unreasonable in awaiting the outcome of developments which could have resolved crucial factual or legal issues regarding the present case. Nor could

it be said that the Russian Federation had been kept in uncertainty for a long period of time (citing *Mocanu and Others v. Romania* [GC], nos. 10865/09 and 2 others, § 258, ECHR 2014 (extracts)).

766. In the light of the foregoing the applicant Dutch Government maintained that they had complied with the six-month rule regarding both the substantive and procedural elements of their complaints.

B. The Court's assessment

767. At the time of lodging of the applications, Article 35 § 1 provided:

> "The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."

768. Article 35 § 1 has since been amended to reduce the six-month period to four months.

1. General principles under Article 35 § 1

(a) Exhaustion of domestic remedies

769. The rationale behind the exhaustion rule is that States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system. The rule is based on the assumption, reflected in Article 13 of the Convention, that there is an effective remedy available in the domestic system in respect of alleged breaches of the Convention. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. (see the Preamble to the Convention; *Akdivar and Others v. Turkey*, 16 September 1996, § 65, *Reports* 1996-IV; and *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 69, 25 March 2014).

770. The obligation to exhaust domestic remedies requires victims or their heirs to make normal use of remedies which are available and sufficient in respect of their Convention grievances. The existence of the remedies in question must be sufficiently certain not only in theory but in practice. To be effective, a remedy must be capable of directly redressing the impugned state of affairs and must offer reasonable prospects of success. The existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust that avenue of redress. However, the Court has frequently underlined the need to apply the exhaustion rule with some degree of flexibility and without excessive formalism (see *Akdivar and Others*, cited above, §§ 66-69; *Vučković and Others*, cited above, §§ 71 and 74; and *Mocanu and Others*, cited above, §§ 222-24).

771. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time. Once this burden has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was inadequate and ineffective in the particular circumstances of the case; or that there were other special circumstances absolving him or her from the requirement to exhaust it (see *Akdivar and Others*, cited above, § 68; *Vučković and Others*, cited above, § 77; and *Mocanu and Others*, cited above, § 225).

772. The Court explained in *Demopoulos and Others v. Turkey* ((dec.) [GC], nos. 46113/99 and 7 others, § 98, ECHR 2010) that factual or legal borders are not an obstacle in themselves to the exhaustion of domestic remedies. As a general rule, therefore, applicants living outside the jurisdiction of a Contracting State are not exempted from exhausting domestic remedies within that State, practical inconveniences or understandable personal reluctance notwithstanding. Applicants have not infrequently been required to exhaust domestic remedies even where they have not chosen voluntarily to place themselves under the jurisdiction of the respondent State (see *Demopoulos and Others*, cited above, § 101-03; *Pad and Others*, cited above; and *Al-Saadoon and Mufdhi v. United Kingdom* (dec.), no. 61498/08, 30 June 2009).

773. Nevertheless, the Court has in some cases made allowances for the very real difficulties which may be faced by individuals trying to exhaust domestic remedies in circumstances of international conflict. It has therefore found there to be special circumstances absolving applicants of exhausting remedies in respect of complaints by displaced persons in the context of the conflict in Nagorno Karabakh in view of the respondent State's denial of involvement or jurisdiction as well as the political and general context and the considerable practical difficulties in bringing and pursuing legal proceedings in the other country (see *Chiragov and Others*, cited above, § 119; and *Sargsyan*, cited above, §§ 117-19).

774. The rule in Article 35 § 1 that the Court may only deal with a matter after "all domestic remedies have been exhausted, according to the generally recognised rules of international law" applies to inter-State applications in the same way as it does to individuals when the applicant State does no more than denounce a violation or violations allegedly suffered by individuals whose place is taken by the State (see *Ukraine v. Russia (*re *Crimea)*, cited above, § 363)). While the rule applies in inter-State cases, however, it does not apply to the applicant State as such: those who must have exhausted remedies afforded by the national legal system are the victims or their heirs (see, for example, the discussion of exhaustion of domestic remedies in the Commission's decision on the admissibility of application no. 788/60, *Austria v. Italy*, cited above, pp. 166-78). Moreover, it is clear that the remedies which ought to have been exhausted are those provided by the

national legal system of the State alleged to be responsible (see, for example, *Akdivar and others*, cited above, § 65, and *Vučković and Others*, cited above, § 70; and Article 14 of the ILC ADP at A 89). In other words, there is no obligation for victims and their heirs to have sought to pursue remedies in other States or to seek redress for their grievances indirectly through procedures available under international law.

775. The exhaustion rule does not apply to applications brought under Article 33 of the Convention where the applicant State complains of legislative measures or an administrative practice, with the aim of preventing its continuation or recurrence, but does not ask the Court to give a decision on each of the cases put forward as proof or illustrations of that practice (see *Ireland v. the United Kingdom*, cited above, § 159; and *Denmark v. Turkey* (dec.), no. 34382/97, 8 June 1999). In this case both component elements of the alleged administrative practice (the "repetition of acts" and "official tolerance") must be sufficiently substantiated by prima facie evidence (see the *Crimea* decision, cited above, §§ 363 and 366). The rationale behind this exception is that where there is both repetition of acts and official tolerance, any remedies would clearly be ineffective at putting an end to the impugned administrative practice (see *Georgia v. Russia (I)* [GC], no. 13255/07, §§ 124-25, ECHR 2014 (extracts)).

(b) The six-month time-limit

776. The requirement contained in Article 35 § 1 concerning the exhaustion of domestic remedies is closely interrelated with the requirement of compliance with the six-month period. After all, the two requirements are not only combined in the same Article but are also expressed in a single sentence whose grammatical construction implies such correlation (see *Ulemek v. Croatia*, no. 21613/16, § 78, 31 October 2019; and *Gregačević v. Croatia*, no. 58331/09, § 35, 10 July 2012, with further references).

777. The object of what was, at the relevant time, the six-month time-limit under Article 35 § 1 is to promote legal certainty by ensuring that cases raising issues under the Convention are dealt with in a reasonable time, that past decisions are not continually open to challenge, and that the authorities and other persons concerned are not kept in a state of uncertainty for a long period of time (*Sabri Güneş v. Turkey* [GC], no. 27396/06, §§ 39-40, 29 June 2012). The rule also ensures that, in so far as possible, matters are examined while they are still fresh, before the passage of time makes it difficult to ascertain the pertinent facts and renders a fair examination of the question at issue almost impossible (*Jeronovičs v. Latvia* [GC], no. 44898/10, § 74, 5 July 2016). It thus serves the interests not only of the respondent Government but of legal certainty as a value in itself. It marks out the temporal limits of supervision carried out by the organs of the Convention and signals to both individuals and State authorities the period beyond which

such supervision is no longer possible (see, recently, *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 138, 20 March 2018, and the authorities to which it refers).

778. As a rule, the six-month period runs from the date of the final decision in the process of exhaustion of domestic remedies. Where it is clear from the outset that no effective remedy is available to the applicant, the period runs from the date of the acts or measures complained of, or from the date of knowledge of that act or its effect on or prejudice to the applicant (see *Varnava and Others*, cited above, § 157; and *Sabri Güneş*, cited above, § 54). However, Article 35 § 1 cannot be interpreted in a manner which would require an applicant to seize the Court of his complaint before his position in connection with the matter has been finally settled at the domestic level. Accordingly, where an applicant avails himself of an apparently existing remedy and only subsequently becomes aware of circumstances which render the remedy ineffective, it may be appropriate to take the start of the six-month period as the date when the applicant first became or ought to have become aware of those circumstances (*Varnava and Others*, cited above, § 157; and *Mocanu and Others*, cited above, § 260).

779. In some continuing situations, the Article 35 § 1 time-limit starts afresh each day and it is only once the situation ceases that the final period of six months will run to its end (see *Sabri Güneş*, cited above, § 54; and *Mocanu and Others*, cited above, § 261). In this respect, a distinction is to be drawn between cases where an applicant is subject to an ongoing violation (as in *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A no. 45, which concerned a legislative provision which intruded, continuously, on the applicant's private life) and cases where the continuing situation flows from a factual situation arising at a particular point in time (as in *Varnava and Others*, cited above, concerning disappearances). Only ongoing violations will automatically result in the time-limit being started afresh each day for an indefinite period of time (see the Chamber's explanation in *Varnava and Others v. Turkey*, nos. 16064/90 and 8 others, § 117, 10 January 2008, subsequently endorsed by the Grand Chamber at § 161 of its judgment).

780. In continuing situations flowing from a factual situation arising at a particular point in time, the Court has formulated an obligation of diligence which arises where time is of the essence in resolving the issues raised (see *Varnava and Others*, cited above, § 160; and *Mocanu and Others*, cited above, § 262). In such cases, there is a burden on the applicant to ensure that his or her claims are raised before the Court with the necessary expedition to ensure that they may be properly, and fairly, resolved. This is particularly true with respect to complaints relating to any obligation under the Convention to investigate certain events. As the passage of time leads to the deterioration of evidence, time has an effect not only on the fulfilment of the State's obligation to investigate but also on the meaningfulness and effectiveness of the Court's own examination of the case. An applicant has to become active

once it is clear that no effective investigation will be provided, in other words once it becomes apparent that the respondent State will not fulfil its obligation under the Convention. It follows that the obligation of diligence and expedition incumbent on applicants contains two distinct but closely linked aspects. First, the applicants must contact the domestic authorities promptly and diligently concerning progress in the investigation, since any delay risks compromising the effectiveness of the investigation. Second, they must lodge their application promptly with the Court as soon as they become aware or should have become aware that the investigation is not effective (*Varnava and Others*, §§ 158 and 160-61; and *Mocanu and Others*, cited above, §§ 262-64).

781. In assessing diligence and expedition, the Court has regard to the complexity and the serious nature of the allegations as well as to any obstruction by the respondent State and its authorities in the provision of relevant information concerning the allegations. These factors may lead to the conclusion that it was reasonable for the applicant to wait for developments that could have resolved crucial factual or legal issues pertaining to his or her complaints (see *El-Masri*, cited above, § 142). Moreover, as long as there is some meaningful contact between relatives and the respondent State's authorities concerning complaints and requests for information, or some indication or realistic possibility of progress in investigative measures, considerations of undue delay by the applicants will not generally arise (see *Varnava and Others*, cited above, § 165; and *Mocanu and Others*, cited above, § 269). The Court has also recognised that in an exceptional situation of international conflict where no normal investigative procedures are available, applicants may reasonably await the outcome of the initiatives taken by their government and the United Nations where these procedures could have resulted in further investigative steps or provided the basis for further measures (see *Varnava and Others*, cited above, § 170).

2. Application of the general principles to the facts of the case

782. The Court underlines the novel nature of the inter-State case now before it. The vast majority of the Court's case-law on the six-month rule and the exhaustion requirement, summarised above, concerns domestic incidents with remedies in the State where the incident occurred and where the State whose authorities might ultimately be held responsible for failings under the Convention was not in doubt. While Article 35 § 1 creates an interplay between the six-month rule and the exhaustion of "domestic" remedies (see paragraph 776 above), it does not clarify whether and how this interplay is to be transposed to potential remedies outside the respondent State or to avenues which States themselves may wish to pursue at the international level prior to lodging an inter-State case with this Court. These are matters which the Court must consider when determining the compliance of the applicant States with Article 35 § 1 in the present case.

(a) Alleged administrative practices

783. The applicant Ukrainian Government contended that the alleged breaches of the Convention invoked in their applications about the general situation in eastern Ukraine and the alleged abduction and transfer to Russia of three groups of children and accompanying adults amounted to administrative practices.

784. As explained above, where there is an allegation of an administrative practice, the exhaustion requirement is inapplicable to that allegation (see paragraph 775 above). In so far as the applicant Ukrainian Government complain of administrative practices, the rule of exhaustion of domestic remedies is therefore not applicable and the respondent Government's objection in this respect is accordingly dismissed. The question whether the applicant State has succeeded in demonstrating the existence of the alleged administrative practice to the standard required at the admissibility stage is a separate question which must be answered in the affirmative before a case may proceed to consideration on the merits. This question is examined below (see paragraphs 828-890 regarding the general situation in eastern Ukraine and 895-898 regarding the alleged abduction and transfer to Russia of three groups of children and accompanying adults).

785. The six-month time-limit, however, applies to allegations of administrative practices and the Court must therefore determine whether it has been complied with.

786. Having regard to the nature and the scope of the complaints made in respect of the general situation in eastern Ukraine, the Court is satisfied that they concern a continuing situation of alleged ongoing violations. As a result, the six-month time-limit will only begin to run in respect of the allegations once the alleged violations have ceased (see paragraph 779 above). The Court will therefore consider in its examination of the evidence for each of the various administrative practices alleged (see paragraphs 828-890 below) whether that evidence shows that the acts in question, if shown to have occurred, came to an end more than six months before the complaint was originally made to the Court in substance. Complaints about administrative practices which ended six months before the date on which the complaint was introduced must be declared inadmissible (see *Cyprus v. Turkey*, cited above § 104).

787. As regards the alleged abduction of the three groups of children and accompanying adults, the first complaint was made on 13 June 2014, a day after the first alleged abduction. The application form was submitted on 22 August 2014 and invoked the alleged abductions of 26 July and 8 August 2014. It is not disputed, and the Court finds, that this complaint has been lodged in time.

(b) Complaints alleged to be akin to an administrative practice

788. The applicant Dutch Government contended that their application did more than simply take the place of individuals to denounce a violation suffered by them. They conceded that the allegations did not amount to an administrative practice as such but argued that their application nonetheless contained aspects of both types of inter-State applications. Their position was that the official policy of denial by the Russian Federation amounted to "official tolerance" and that while the application might not concern a pattern of repetition of acts, it could not be said to relate to an isolated individual violation. Because of this, they argued, the exhaustion requirement did not apply (see paragraph 751 above).

789. The Court must therefore first assess whether the complaints made can be said to be akin to complaints of an administrative practice such that the requirement to exhaust domestic remedies simply does not apply to them. The Court finds that no such parallel can be drawn. It observes, first, that the application clearly denounces violations of the rights of identified individuals on board flight MH17 and their relatives. Although the application, by seeking to ensure the collective enforcement of the rights guaranteed by the Convention, contributes to the protection of the public order of Europe, it cannot be said that it complains of "general issues" (see paragraph 386 above). Moreover, as explained above (see paragraph 775), the rationale behind the exception to the exhaustion requirement in cases invoking an administrative practice is that where there is both repetition of acts and official tolerance, any remedies would clearly be ineffective at putting an end to the impugned practice. It is the recurrence of the acts, itself enabled by the inaction of the authorities in response to previous acts of a similar nature, that leads to the conclusion that remedies would not be effective to prevent these acts from happening. Such considerations do not apply to the single act of downing flight MH17.

790. The allegations linked to the downing of flight MH17 must therefore be viewed as allegations of individual violations which are substantially similar to claims filed in the context of diplomatic protection under international law.

(c) Individual violations

(i) Complaints concerning the alleged abduction of children

791. In respect of the alleged abduction of three groups of children and accompanying adults in eastern Ukraine, the applicant Ukrainian Government alleged, as an alternative to their complaint of an administrative practice, that these incidents amounted to individual violations.

792. As noted above, it is not disputed that the allegations were introduced in time. The only issue is whether the requirement to exhaust domestic remedies has been satisfied in respect of these complaints.

793. The basic facts underlying this complaint are not contested by the parties. It is agreed that the three groups of children and the adults accompanying them were taken to Russia by or with the involvement of separatists and subsequently returned to Ukraine. The parties further agree that on 13 June 2014, the Ukrainian authorities made a complaint to the ICRF about the alleged abduction of the first group of children but did not appeal against unfavourable decisions of that body; and that no complaints were made in respect of the second and third groups of children. The question is whether the possibility of making a complaint to the ICRF and the further appeal to a court available amounted to an effective remedy which ought to have been pursued for the purposes of the present allegations.

794. The Court has previously found in the context of the Russian legal system that a judicial appeal against a decision not to institute criminal proceedings may offer a substantial safeguard against the arbitrary exercise of power by the investigating authority, given the courts' power to annul such decisions and indicate the defects to be addressed (see *Trubnikov v. Russia* (dec.), no. 49790/99, 14 October 2003; *Belevitskiy v. Russia*, no. 72967/01, §§ 54-67, 1 March 2007; and *Chumakov v. Russia*, no. 41794/04, § 91, 24 April 2012). It has therefore required applicants to appeal against the inaction or unfavourable decisions of the ICRF before bringing an application to this Court. It has moreover rejected complaints under Article 13 on the basis of the effectiveness of the possibility of an appeal to a court, even in the context of Articles 2 and 3 (see *Trubnikov*, cited above).

795. The applicant Ukrainian Government contended that statements from the children and their carers taken by the ICRF (A 2081-87) had been obtained under duress. They relied in support on statements given to the Ukrainian authorities by some of those concerned after their return to Ukraine (A 2097-106). The Court is not in a position to judge whether the allegation of the applicant Ukrainian Government in this respect is true. It observes that such an allegation, together with the evidence relied upon in support, could have been advanced in the context of a judicial appeal against the finding of the ICRF that there had been no forcible transfer of those concerned. Had such an argument been made, it would have been incumbent on the relevant Russian authorities to address it.

796. The Court reiterates that in respect of these complaints there was no dispute as to the underlying facts, which notably included the crossing of the international border between Ukraine and Russia by the children and their carers. This was not, therefore, a situation in which the allegation of a violation was met by a blanket denial by the Russian authorities. The Court considers that the Russian authorities ought to have been afforded the opportunity by the applicant Ukrainian Government to investigate their allegations and the evidence collected by them in order to determine whether the individuals had crossed the border freely or had been forcibly transferred. The mere doubts which the applicant Ukrainian Government may have

harboured as to the prospects of success of a challenge to the ICRF's decision were not sufficient to absolve them, acting as the children's legal guardians, from pursuing this possibility (see *Akdivar*, cited above, § 71; and *Epözdemir v. Turkey* (dec.), no. 57039/00, 31 January 2002).

797. In these circumstances, the Court is not satisfied that the applicant Ukrainian Government have discharged the burden incumbent on them of showing that the possibility of pursuing criminal complaints in Russia regarding the alleged abduction did not offer reasonable prospects of success. Accordingly, in so far as the applicant Ukrainian Government's allegations of individual violations are concerned, these complaints are inadmissible under Article 35 §§ 1 and 4.

798. As noted above (see paragraph 784), the exhaustion rule is not applicable to allegations of administrative practices. The admissibility of the applicant Ukrainian Government's complaint that the alleged abduction and transfer to Russia of three groups of children amounted to an administrative practice in breach of the Convention is examined below (see paragraphs 895-898 below).

(ii) Complaints concerning the downing of flight MH17

799. In respect of the downing of flight MH17, the respondent Government have contested the compatibility of the application with both the exhaustion rule and the six-month rule. The Court will accordingly examine these two matters in turn.

(α) Objection as to exhaustion

800. As with the previous allegation relating to the alleged abduction of children, the respondent Government argued that a complaint should have been made to the investigating authorities of the Russian Federation and, in the event of an unfavourable decision from those authorities, an appeal should have been lodged with the court.

801. In the circumstances of the previous complaint, the Court upheld the respondent Government's objection that the remedy invoked was effective and ought to have been exhausted. In doing so, it referred to the broad agreement as to the underlying facts and underlined that it did not concern a situation in which the allegation of a violation was met by a blanket denial by the Russian authorities (see paragraph 796 above).

802. It is, however, noteworthy that, unlike in relation to the previous allegation, the complaint about the downing of flight MH17 has been met by the respondent Government with a blanket denial of any involvement whatsoever in the events leading to the incident. This denial represents their consistent position since the immediate aftermath of the incident.

803. Moreover, the complaints concern events which occurred outside the sovereign territory of the Russian Federation by perpetrators who were at the

time unknown whose acts are said to be attributable to Russia. The respondent Government have not explained how the ICRF's jurisdiction in cases of the commission of crimes abroad by Russian nationals can be established where the identities of the perpetrators are unknown. They have provided no evidence that the ICRF has exercised its jurisdiction to open an investigation in such cases, either immediately or after remittal by a court following a successful Article 125 appeal. It would appear from evidence in the public domain that the approach of the ICRF in such cases is particularly restrictive and that the courts do not conduct any meaningful review of the exercise of the ICRF's discretion (A 9-12).

804. It is true that under Article 12 of the Russian criminal code, jurisdiction is expressed to be universal in the case of war crimes such that it would not be necessary to show that the perpetrators held Russian nationality in order for the ICRF to open a criminal investigation (A 1). Assuming that the complaint could have been made that the downing of flight MH17 amounted to a war crime, it is again relevant to consider what evidence is available as to the manner in which the ICRF exercises its jurisdiction where the alleged war crime in question took place abroad and the perpetrators were unknown. The respondent Government have provided no relevant information on this matter. Material in the public domain published on the internet site of the Russian Ministry of Defence shows that a number of such investigations have recently been opened into events in Ukraine since 24 February 2022 (A 32). It is however noteworthy that all investigations are into alleged war crimes committed by Ukrainian nationals. According to the information published, no investigation has been opened into war crimes allegedly committed by Russian nationals, despite extensive media coverage that such crimes have been committed which would appear to merit further examination.

805. Moreover, the Court has concerns as to whether the remedy relied upon by the respondent Government can be considered effective in cases with a political dimension in which State agents are allegedly implicated in the commission of a crime condemned by the UN Security Council (A 47) and one which, even today, remains under intense international scrutiny. In this regard, again the respondent Government have provided no relevant information. However, it is noteworthy that the Court found a violation of the procedural aspect of Article 2 in the case of *Carter*, cited above, §§ 138-48, concerning the high-profile poisoning of a Russian dissident abroad by State agents, on account of the ineffectiveness of the criminal investigation in Russia (see also the statement of facts and questions to the parties in the pending case of *Navalnyy v. Russia*, no. 36418/20, communicated on 12 January 2021).

806. Finally, the Court observes that the Russian authorities were clearly aware of the allegation that Russian nationals had been involved in the downing of flight MH17 from, at the very latest, June 2019 (see paragraph 87

above). The respondent Government have, moreover, not suggested that the submission of the victims' relatives that they had tried to obtain information from the respondent Government on multiple occasions and had contacted the President of the Russian Federation as early as January 2016 (see paragraph 934 below) was inaccurate. Their insistence in the present proceedings on the need for a request from the victims' relatives or the authorities of the Netherlands to the investigative authorities of the Russian Federation (see paragraphs 736 and 738 above) displays a formalistic approach which is hard to reconcile with the broad circumstances in which a criminal investigation can be initiated set out in Article 140 of the Russian Code of Criminal Procedure, which enables an investigation to be opened based on a communication about a crime "received from other sources" (A 2). The failure to initiate a criminal investigation in these circumstances further corroborates the doubts expressed above as to the effectiveness of the remedy proposed in cases with a political dimension in which State agents are implicated in the commission of a crime.

807. In conclusion, the respondent Government have not discharged the burden incumbent on them of showing that there was an effective remedy available to the victims' relatives which offered reasonable prospects of success in respect of their complaints.

(β) Objection as to six months

808. The applicant Dutch Government's position was that the alleged procedural violation of Article 2 and the alleged violations of Articles 3 and 13 were continuing and that, as a result, the six-month time-limit had not yet begun to run in respect of them. They further argued that in the circumstances of the case, the complaint in respect of the alleged substantive violation of Article 2 had also been submitted in time.

809. The allegation of a violation of the substantive aspect of Article 2 of the Convention concerns the downing of flight MH17 on 17 July 2014. The Court has found that in the particular circumstances of this case there were no effective domestic remedies available. The normal starting point would therefore be that the six-month period began to run on the date of the incident itself. However, the application of such an approach in respect of the present application would be incompatible with the interests of justice and with the objectives of the six-month time-limit itself for a number of reasons.

810. First, the general approach outlined above (see paragraphs 776-781) was developed in the context of cases where the identity of the State allegedly responsible for a violation of the Convention was apparent from the date of the impugned act itself. This is either because the cases were purely domestic such that only the national State could be held responsible; or because there was no doubt that the alleged perpetrators were the agents of a particular State. By contrast, while some intelligence information suggesting the involvement of the respondent State in the downing of flight MH17 was

quickly available, there remained a real lack of clarity as to the precise circumstances surrounding the incident, including the identities of the perpetrators, the weapon used and the extent of any State's control over the area where the flight had been downed. Moreover, it must be recalled that the allegations as to the Russian Federation's role in the downing of flight MH17 were and still are met by the respondent Government with a categorical denial of any involvement whatsoever in the actions of the separatists or the provision of a Buk-TELAR. In view of these circumstances, the applicant Dutch Government cannot be faulted for awaiting the receipt of sufficiently credible and specific evidence before lodging their application, rather than referring the complaints to the Court on the basis of speculation and intelligence material. Article 35 § 1 cannot be interpreted in a manner which would require an applicant State to seize the Court of its complaint before having reasonably satisfied itself that there had been an alleged breach of the provisions of the Convention by another High Contracting Party and before that State had been identified with sufficient certainty to bring such a case.

811. Second, while no investigation was undertaken in the respondent State in respect of the present complaints, it would be artificial to ignore the investigative steps taken in the Netherlands and in the context of the JIT which enabled the circumstances of the downing of flight MH17 to be clarified (A 1641-901). One of the purposes of requiring applicants complaining of criminal acts to await the outcome of effective domestic investigations is precisely to enable the facts of the matter to be elucidated. This facilitates the Court's own subsequent examination of the case. The highly unusual combination of events in the present application means that the criminal investigation, carried out in the Netherlands, cannot be seen as a "domestic" remedy in respect of complaints lodged against the Russian Federation. However, there is no credible suggestion that the criminal investigation carried out by the Dutch authorities with the assistance of the JIT was not an investigation capable of complying with the requirements of Article 2. It would be unjust and contrary to the purpose of Article 35 § 1 if the effect of reasonably awaiting relevant findings of an independent, prompt and effective criminal investigation, in order to assist the Court in its assessment of the complaints, was to render those complaints out of time.

812. Third, the present dispute being between States, it must be acknowledged that as well as potential domestic remedies there were potential remedies under international law which might have afforded redress for the applicant Dutch Government's complaints, including invoking State responsibility. These remedies are not mentioned in Article 35 § 1 and as a result the running of the time-limit in that Article is not linked to their exercise. However, the Court has already accepted that in some circumstances it may be appropriate to have regard to such remedies when assessing whether the obligation of diligence has been met (see paragraph 781 above). This is particularly relevant where the argument is not that particular State agents

ought to be identified and punished but rather that the State itself, at the highest level of government, bears responsibility for the Convention breach alleged.

813. Turning to the facts of the present application, the Court notes that the DSB report published in October 2015 showed that flight MH17 had been downed by a missile and indicated the location of the aircraft and the general area from which the missile had been launched (A 1635-38). However, it was the extensive work of the JIT that established more clearly the circumstances in which the missile was alleged to have been fired, including pinpointing the exact launch site, and provided evidence as to the involvement of the respondent State (A 1644-793 and 1859-901). On 28 September 2016, the JIT presented its first findings identifying the specific missile responsible, the vehicle which had launched it and the location of the launch in an area then under the control of the separatists; and disclosing evidence that the Buk-TELAR had been transported from the territory of the Russian Federation into Ukraine and returned to the Russian Federation after the launch (A 1859-72). On 24 May 2018, the JIT presented its conclusion that the Buk-TELAR belonged to the 53rd AAMB, a unit of the armed forces of the Russian Federation, and had been part of a convoy that had travelled from its base in the Russian Federation towards the Ukrainian border between 23 and 25 June 2014 (A 1873-80). On 19 June 2019, the JIT announced the names of the four suspects to be prosecuted for their role in causing the crash of flight MH17 (A 1881-89). In November 2019, the JIT indicated that it was looking for information on the persons within the military and administrative hierarchy involved in the downing of flight MH17 (A 1890-900). In March 2020, the trial of the four individuals began before the first instance court in The Hague and the verdict was handed down on 17 November 2022 (A 1964-76). As at the date of the adoption of the present decision, it is not known whether any appeals have been lodged (see paragraphs 88 and 93 above).

814. Meanwhile, on 25 May 2018, the Netherlands and Australia invoked the international responsibility of the Russian Federation for breaches of international law which they alleged constituted internationally wrongful acts (see paragraph 86 above and A 2038-39). That responsibility, they claimed, gave rise to legal consequences for the Russian Federation to, among other things accept fully its responsibility for those internationally wrongful acts and provide full reparation for the injury caused by them. They requested that the Russian Federation enter into negotiations with them in relation to these breaches of international law and the legal consequences that flowed from them. A first round of State responsibility talks between Australia, the Netherlands and Russia took place in early March 2019. Further trilateral meetings subsequently took place until the respondent State announced in October 2020 its decision to stop participating in them (see paragraph 763 above). The Court considers that it was legitimate for the applicant Dutch

Government to explore this opportunity afforded by international law which could potentially have resulted in further or renewed engagement by the Russian Federation and, ultimately, a settlement agreement.

815. The Court reiterates that the aim of the time-limit in Article 35 § 1 is to promote legal certainty and to ensure that matters are examined while they are still fresh, before the passage of time makes it difficult to ascertain the pertinent facts and renders a fair examination of the question at issue almost impossible (see paragraph 777 above). On the specific facts of this case, none of these considerations is undermined by the lodging of the application on 10 July 2020, some six years after the aircraft was downed. The incident was immediately discussed in the Security Council of the United Nations, of which Russia is a permanent member, and it remains under its active consideration (A 47-50). The JIT investigation and the evidence gathered by it have been publicised – indeed, the Russian Federation has responded publicly to the investigation's findings on more than one occasion (A 2031-37). Throughout the investigation, numerous mutual legal assistance requests have been made to the Russian authorities by investigators and the examining magistrate in the MH17 trial, including a request of 15 October 2014 for satellite images, primary radar images and any further information related to the circumstances of the crash and possible suspects; a request of 1 March 2017 for non-processed radar data from particular radar stations; a request of 7 March 2018 for written answers to questions concerning Messrs Dubinskiy, Tkachev, Geranin and Bezler and for copies of statements/interview transcripts of Messrs Girkin, Agapov and Baturin; requests of 6 April and 6 June 2018 with a number of questions about visual material concerning a Buk-TELAR; requests in September 2019 for the provisional arrest of Mr Tsemakh; and a request of the examining magistrate to interview the commander of the 53rd AAMB (A 1797-829, 1838-59 and 1960). The criminal trial in The Hague was conducted under close media scrutiny and with every effort to make the proceedings accessible to relatives and the public. It cannot therefore be said that the matter of the downing of flight MH17 is not fresh or that there has been a delay in the referral of the complaints to this Court such that it would be difficult to ascertain the pertinent facts, rendering a fair examination of the allegations almost impossible. On the contrary, it is precisely because of these steps undertaken by the JIT and the Dutch authorities that the pertinent facts have been elucidated. The investigative steps were begun promptly and have continued regularly and diligently since then in a transparent and open manner in which the engagement of the authorities of the respondent State has been frequently and consistently sought.

816. The Court accordingly concludes that in the exceptional circumstances of the present application the complaint under the substantive limb of Article 2 has been lodged in time. The associated complaints under

the procedural limb of Article 2, under Article 3 and under Article 13 must also be regarded as having been lodged in time.

(γ) Conclusion

817. The respondent Government's formal objections under Article 35 § 1 in respect of the applicant Dutch Government's complaints regarding the downing of flight MH17 are accordingly dismissed.

VII. PRIMA FACIE EVIDENCE OF ALLEGED VIOLATIONS

A. The alleged administrative practice in the application concerning the general situation in eastern Ukraine (no. 8019/16)

1. The parties' submissions

(a) The respondent Government

818. The respondent Government contended that the applicant Ukrainian Government had failed to deploy evidence in respect of large parts of its case and had, in any event, failed to produce evidence capable of sustaining a prima facie case of administrative practices.

819. As regards allegations of summary executions by Russian soldiers at the Battle of Ilovaisk, the OHCHR reports relied upon largely referred to allegations only and were therefore not proof that, even to its lower standard of proof, the OHCHR accepted that such executions had occurred. The OHCHR had moreover acknowledged that available evidence suggested that the killings had not been of massive or systematic scale.

820. In so far as the applicant Ukrainian Government's Article 2 complaint concerned cross-border artillery attacks by the Russian military, they relied largely on assertion rather than evidence. In the few instances where a witness had been relied upon, the witness evidence barely qualified as such given the absence of a stated basis for knowledge. Moreover, the applicant Ukrainian Government's submissions often went beyond what was alleged in the witness statement concerned. In so far as video material was relied upon in this respect, the respondent Government repeated their objections to what they considered to be manipulated or fabricated digital evidence (see paragraph 409 above). In their initial memorial, the respondent Government moreover emphasised that the letters of the State Border Guard Service of Ukraine relied upon in respect of a number of the alleged artillery attacks were all *ex post facto* documents, dating from at least one year after the attacks were alleged to have occurred. There was no suggestion that they had been written by witnesses to the events in question and they contained no reference to primary evidence. Similarly, diplomatic notes produced by the Ukrainian Ministry of Foreign Affairs, produced in support of the allegations of a number of attacks, had been written by unknown authors by reference to

unknown sources and amounted to nothing more than mere assertion. Had such attacks occurred, there would have been no shortage of witnesses, photographic evidence of damage caused, battlefield communiqués, citations and medals awarded for bravery, medical records of treatment of the wounded and mortuary records of those killed. The respondent Government challenged the reports relied upon in this respect by the applicant Ukrainian Government prepared by Bellingcat and others, for the reasons explained above (see paragraphs 410-412).

(b) The applicant Ukrainian Government

821. The applicant Ukrainian Government argued that there was clear evidence of the existence of a widespread practice of repeated violations of the same or similar character, occurring over a period of years and linked by time, place and the motivation and affiliations of the perpetrators. The proof of this practice was overwhelming and comfortably exceeded the prima facie threshold set out in the Court's case-law. There was also clear evidence of the complete "collapse" of the rule of law in the affected territories, and an overwhelming practice of official tolerance towards the crimes and violations committed by the Russian forces and their paramilitary proxies.

822. There was compelling evidence compiled by the OHCHR and the OSCE attesting to a widespread pattern of human rights violations by Russia's armed forces and their proxies. The pattern included the targeting of civilians for direct military attacks, a wide and systematic campaign over a period of years involving the abduction and unlawful detention of civilians, public officials and international observers, the infliction of torture and other forms of grave physical ill-treatment of civilian detainees, the summary execution of civilians, the looting and destruction of private property, the torture and summary execution of prisoners of war and Ukrainian soldiers who were *hors de combat*, the suppression of and attacks on independent media in violation of press freedom, the deliberate disruption of Ukraine's presidential elections and intimidation of the civilian population to prevent them from exercising their right to vote, the consistent and unlawful obstruction of citizens' freedom of movement, particularly across contact lines separating the armed groups from Government-held positions, and the perpetration of attacks on religious congregations not part of the Russian Orthodox church.

823. The instances of these violations were too numerous to list but the OHCHR's regular reporting established that over a period of several years the rule of law and the protection of human rights had completely "collapsed" in the territories under separatist control and a disturbing pattern of human rights violations of every kind had been allowed to flourish. The OHCHR had emphasised the complete absence of any effective system of accountability in territory held by the separatist armed groups, which had been able to commit the gravest of crimes with complete impunity. According to the

OHCHR's 16th report on the human rights situation in Ukraine, two and half years after the conflict began, the "courts" and "prosecutors" of Russia's subordinate administrations in Donetsk and Luhansk had remained completely incapable of providing a minimum level of due process necessary to qualify as an effective domestic remedy. In its 20th report of November 2017, the OHCHR had reported on the complete absence of any semblance of due process or any effective legal remedy for human rights violations in the territory occupied by Russia's proxy forces. The Council of Europe's Parliamentary Assembly had also endorsed the view that there were no effective remedies available for the victims of the violations. In the face of the widespread reports of serious and systematic human rights violations, it might be expected that Russia would be in a position to demonstrate clearly the steps taken to investigate and hold accountable the numerous public officials and paramilitaries implicated in these violations. Instead, the respondent Government had said nothing.

2. The Court's assessment

(a) The applicable tests

824. As set out above (see paragraph 450), in order to show the existence of an administrative practice the applicant Ukrainian Government must present sufficiently substantiated prima facie evidence of the repetition of the acts in question and official tolerance.

(i) Repetition of acts

825. As to what is required by way of repetition, the Court has previously endorsed the Commission's view that there has to be "an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected not to amount to merely isolated incidents or exceptions but to a pattern or system" (see the *Georgia v. Russia (I)* judgment, cited above, § 123). There is no place for excessive formalism in interpreting this phrase and it is unnecessary, in determining whether the test is met, to insist upon the repetition of specific acts of an identical nature. What matters in the present case is whether there has been a repetition of acts in flagrant disrespect, and thus in breach, of a particular Convention right.

(ii) Official tolerance

826. By official tolerance, what is meant is that illegal acts are tolerated in that the superiors of those immediately responsible, though cognisant of such acts, take no action to punish them or to prevent their repetition; that a higher authority, in the face of numerous allegations, manifests indifference by refusing any adequate investigation of their truth or falsity; or that in judicial proceedings a fair hearing of such complaints is denied. It is inconceivable that the higher authorities of a State should be, or at least

should be entitled to be, unaware of the existence of such a practice. Any action taken by the higher authority must be on a scale which is sufficient to put an end to the repetition of acts or to interrupt the pattern or system. Furthermore, higher authorities of the Contracting States are under a duty to impose their will on subordinates and cannot shelter behind their inability to ensure that it is respected (see the *Georgia v. Russia (I)* judgment, cited above, § 124).

827. The applicant Ukrainian Government allege the widespread disrespect of a range of Convention rights by separatists whose acts engage the respondent State's responsibility. They have argued that there was, in the relevant parts of Donbass, a situation of lawlessness such that the acts of the armed groups could be carried out with impunity. The Court considers that it would be artificial, in such a context, to consider the matter of official tolerance separately in respect of each of the Articles of the Convention alleged to have been violated (cf. *Ukraine v. Russia (re Crimea)*, cited above, §§ 402, 417, 449 and 457). It will therefore examine the situation as a whole to determine whether there was "official tolerance" for the alleged acts in breach of various Convention rights (see paragraphs 882-888 below).

(b) Repetition of acts within the scope of the Convention

(i) Article 2

828. The applicant Ukrainian Government's summary in the memorial reads:

> "There are numerous reports of unlawful military attacks by Russian forces and their armed proxies against civilians and civilian objects which caused many fatalities. These include the shooting down of Malaysian Airlines flight MH17 on 17 July 2014, and numerous instances where civilians were shot dead on the ground. There are also multiple instances of civilians and Ukrainian soldiers who were prisoners of war or *hors de combat* being summarily executed, or otherwise tortured or beaten to death."

829. In their letter to the Court of 14 May 2014 (see paragraph 3 above), the applicant Ukrainian Government referred to "large-scale violations of human rights" under Article 2 of the Convention. They gave examples of civilians allegedly killed or seriously injured by separatists in shootings or after being abducted by separatists. In their supplement to the application of 12 June 2014, the applicant Ukrainian Government expressly invoked Article 2 and complained, *inter alia*, of indiscriminate shootings, of the deaths of civilians abducted by the separatists and of the killing of civilians by the separatists. In a subsequent letter of 8 September 2014, the applicant Ukrainian Government referred to the shelling of Ukrainian villages by the Russian Federation and complained that the use of indiscriminate weapons created a real threat to the lives of civilians. They also invoked instances where the dead bodies of civilians had been recovered. In their supplement to the application of 20 November 2014, they referred to the killing of those in captivity and the deaths of those on board flight MH17, which they contended

had been shot down by separatists. They also highlighted the discovery of documents indicating that court martials had been held and had sentenced people to death, which sentences had been carried out.

830. Article 2 of the Convention reads:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

831. There is extensive evidence in the case-file in respect of each of the elements of the above complaint. Reports of the OHCHR and the OSCE SMM confirm that widespread shelling, resulting in civilian casualties, occurred. They further provide support for the allegations that civilians were shot dead, that summary executions occurred and that individuals were tortured or beaten to death (A 268-455 and 698-813). Witness statements of Ukrainian soldiers involved in the fighting at Ilovaisk corroborate the specific allegations regarding prisoners of war and soldiers *hors de combat* (A 1405-64. See also 717-22). NGO reports report widely on the allegations (A 2110-19, 2161-205 and 2311-19. See also A 77). The DSB report and the material from the JIT and the OM provide a strong evidential basis for the contention that flight MH17 was shot down by a Buk missile, supplied by the Russian Federation, in the hands of separatists and launched from separatist-held territory (A 1633-38, 1644-793 and 1859-951). The first instance court in The Hague has, moreover, found this to be proved beyond reasonable doubt (A 1964-76).

832. There is therefore no doubt that the threshold applicable at this stage of the proceedings has been met and that there is sufficiently substantiated prima facie evidence of the repetition of acts in respect of the applicant Ukrainian Government's complaint that there was an administrative practice in breach of the substantive obligations under Article 2 of the Convention (see paragraphs 449-47 and 824 above). Moreover, the Court concludes, having regard to the evidence presented, that the present complaint was raised within the six-month time-limit (see paragraph 786 above).

(ii) Article 3

833. The applicant Ukrainian Government's summary in the memorial reads:

> "Reports of the torture of civilians and Ukrainian soldiers who were prisoners of war or otherwise *hors de combat* have been frequently documented and verified throughout the conflict. These include many instances of sexual violence and rape. There have also been consistent reports that prisoners (particularly civilians) were held by the armed groups in conditions amounting to inhuman and degrading treatment."

834. In their letter to the Court of 14 May 2014, the applicant Ukrainian Government referred to "large-scale violations of human rights" under Article 3 of the Convention. They gave examples of civilians allegedly being detained in inhuman or degrading conditions and being ill-treated or tortured. In their supplement to the application of 12 June 2014, the applicant Ukrainian Government expressly invoked Article 3 and complained, *inter alia*, of torture and ill-treatment in detention and inhuman conditions of detention. In a subsequent letter of 8 September 2014, they repeated these claims. In their supplement to the application of 20 November 2014 the applicant Ukrainian Government referred to torture and abuse of hostages detained in poor conditions by the separatists.

835. Article 3 of the Convention provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

836. The OHCHR reports (A 698-879) contain extensive evidence as to the torture and ill-treatment of detainees, both civilian and military. They also support the allegations of the applicant Ukrainian Government as to the conditions of detention. Other relevant evidence includes NGO reports and witness statements (A 1313-464, 2108-19, 2161-200 and 2234-39).

837. Applying the evidential threshold applicable at this stage of the proceedings, the Court therefore finds that there is sufficiently substantiated prima facie evidence of the repetition of acts in respect of the applicant Ukrainian Government's complaint that there was an administrative practice in breach of the substantive obligations under Article 3 of the Convention. Moreover, having regard to the evidence presented, the present complaint was raised within the six-month time-limit (see paragraph 786 above).

(iii) Article 4

838. The applicant Ukrainian Government's summary in the memorial reads:

> "There are numerous reports and the statements of the victims that the 'DPR' and 'LPR' Russian proxies use forced labour of the Ukrainian prisoners of war and civilians for the digging of the tranches and other fortifications."

839. The applicant Ukrainian Government did not refer in their 2014 application or any of the subsequent letters or supplements to that application to alleged violations of Article 4 of the Convention. Their 2015 application form (see paragraphs 1 and 5 above) similarly did not refer to any alleged Article 4 breaches by the respondent State. Article 4 was first invoked in the

applicant Ukrainian Government's Chamber observations of 16 October 2017 (see paragraph 10 above) in the context of a complaint that detainees were being put to work by the separatists, including to dig trenches.

840. Article 4 of the Convention reads:

> "1. No one shall be held in slavery or servitude.
>
> 2. No one shall be required to perform forced or compulsory labour.
>
> 3. For the purpose of this article the term 'forced or compulsory labour' shall not include:
>
> (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of [the] Convention or during conditional release from such detention;
>
> (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
>
> (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
>
> (d) any work or service which forms part of normal civic obligations."

841. The Court observes that the SMM heard from an armed member of the "DPR" in November 2014 that it was holding "66 members from the Ukrainian Donbas battalion hostage and has mainly tasked them with the reconstruction of buildings" (A 883). In its 6th report of November 2014, the OHCHR said that "[i]n territories under the control of both 'republics', cases of serious human rights abuses by the armed groups continued to be reported, including ... forced labour... These violations are of a systematic nature ..." (A 884). These generalised allegations continued, with allegations recorded by the OHCHR in its 10th report of June 2015 and its 11th report of September 2015 (A 885-86). Subsequent to that, there is a reference in the OHCHR's 19th report of September 2017 to meetings in July and August 2017 with pre-conflict prisoners detained in the "DPR". It is noted that that "[s]ome prisoners stated they were subjected to forced labour", but no details are provided (A 887). The OHCHR's 20th report of December 2017 states that in one "DPR" detention facility, "[t]o keep detainees in a state of exhaustion, the guards forced them to constantly perform physical work". HRMMU interviews are cited as the source for this assertion, but no further details are given (A 888). There are also a number of witness statements before the Court, concerning the period between 2017 and 2019, in which individuals state that they were detained by separatists and forced to work (A 1328, 1348, 1354-60, 1370-73, 1384, 1389, 1404, 1449 and 1462).

842. The Court is satisfied that this material constitutes sufficiently substantiated prima facie evidence of the repetition of acts in respect of the applicant Ukrainian Government's complaint that there was an administrative practice in breach of Article 4 § 2 of the Convention. Moreover, having regard

to the evidence presented, the present complaint was raised within the six-month time-limit (see paragraph 786 above).

(iv) Article 5

843. The applicant Ukrainian Government's summary in the memorial reads:

> "Abductions, kidnapping for ransom, unlawful arrests and lengthy detentions became a key part of the armed groups' methods of conflict. OHCHR and the SMM (OSCE) have recorded countless cases of such detentions. At one point, one of the leaders of the armed groups admitted that his unit alone was detaining more than 600 people. The number and length of time of these unlawful detentions is almost unimaginable, and OHCHR has identified patterns and motivations which make it quite clear that there was a pattern or system in operation, almost from the outset."

844. The applicant Ukrainian Government first alleged a breach of Article 5 by the separatists in eastern Ukraine in their supplement to the application of 12 June 2014, contending that people had been kidnapped and unlawfully detained by the separatists.

845. Article 5 of the Convention reads, in relevant part:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law ..."

846. Unlawful abduction and detention has been a theme of the OHCHR reports since the very outset of the conflict in eastern Ukraine. In a thematic report covering the period from 2014 to 2021, the OHCHR estimated that armed groups and other actors of self-proclaimed "republics" had detained from 4,300 to 4,700 individuals in the context of the armed conflict in eastern Ukraine (A 878). The SMM reports also refer regularly to abductions and detention by the separatists (A 814-79). Further evidence of this alleged practice can be found in numerous NGO reports and witness statements (A 1313-464, 2108-19, 2161-200 and 2234-39).

847. In conclusion, the case-file contains sufficiently substantiated prima facie evidence of the repetition of acts in respect of the applicant Ukrainian Government's complaint that there was an administrative practice in breach of Article 5 of the Convention. Moreover, the present complaint was raised within the six-month time-limit (see paragraph 786 above).

(v) Article 9

848. The applicant Ukrainian Government's summary in the memorial reads:

> "Chapter 3 [of the memorial] contains reports of a number of instances of deliberate attacks on, and intimidation of, various religious congregations not conforming to the Russian Orthodox tradition."

849. The applicant Ukrainian Government first complained under Article 9 of the Convention in their supplement to the application of 12 June 2014. The complaint concerned alleged threats to priests and parishioners, detention of priests and obstacles to the activities of the Ukrainian Orthodox Church (Kyiv Patriarchate). In their supplement to the application of 20 November 2014, they gave further examples of alleged religious persecution, including of the Ukrainian Greek Catholic Church, although they did not refer to Article 9 in their "Statement of the alleged violations of the Convention and its Protocols, and relevant arguments" included in that supplement. In their 2015 application form they referred to persecution of all religious groups except the Russian Orthodox Church.

850. Article 9 provides:

> "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

851. The applicant Ukrainian Government rely in this respect on the report "Religious Persecution in Eastern Ukraine and Crimea 2014" (A 2161-200). That report contains numerous witness statements from various individuals in different areas of the Donetsk and Luhansk regions recounting incidents of alleged persecution by separatists on account of the victims' non-adherence to the Orthodox Church of the Moscow Patriarchate.

852. The OHCHR reports also recorded attacks against members of non-Orthodox religious groups and of the Ukrainian Orthodox Church (Kyiv Patriarchate). Its report of November 2014 referred to the apparent targeting of all faith traditions except for the Orthodox Church of the Moscow Patriarchate (A 898). The reports refer to incidents where clergy members were harassed and church property was seized. On at least one reported occasion, this treatment was expressly stated by the perpetrators to be on religious grounds (A 896-98, 900-02, 904-05, 909 and 911). Jehovah's Witnesses appear to have been particularly targeted (A 901, 905, 907 and 913). There is also evidence that a 2017 decree introduced new and arguably onerous requirements for religious organisations to register as legal entities, and that subsequent laws further restricted the freedom of religious organisations to operate (A 906-08 and 910). In the course of 2021, the OHCHR continued to report that several religious communities in the separatist-controlled territory faced limitations on their freedom of religion or belief including discrimination, bans and criminal sanctions for religious activities that were equated with extremist activity (A 911-13).

853. The Court finds that on the basis of the evidence available the complaint of an administrative practice in violation of Article 9 of the Convention cannot be rejected on the basis of the repetition of acts having been insufficiently substantiated as alleged by the respondent Government. It was, moreover, raised within the six-month time-limit (see paragraph 786 above).

(vi) Article 10

854. The applicant Ukrainian Government's summary in the memorial reads:

> "Throughout the conflict, the armed groups have targeted independent journalists, both from the international and the Ukrainian media. Journalists have been prevented from reporting on 'elections', shot dead, arrested and detained. The armed groups also blocked Ukrainian broadcasters in the areas under their control."

855. The applicant Ukrainian Government first raised complaints under Article 10 in their supplement to the application of 12 June 2014. They complained of ill-treatment and unlawful detention of journalists and damage to their equipment, restricted access to public sessions for journalists and the blocking of Ukrainian television channels.

856. Article 10 provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

857. The OHCHR reports refer extensively to the targeting of journalists, including their arbitrary detention, ill-treatment and murder on account of their journalistic activities (A 834, 838 and 914-57). They also refer to the blocking of Ukrainian broadcasters in separatist-controlled territory (A 922, 926 and 931). Reports by the SMM and NGOs also record incidents where journalists or Ukrainian broadcasters were targeted by the separatists (A 820, 917-18, 2108-19 and 2310-15). There are witness statements from journalists describing how they or the newspapers for which they worked were targeted by the separatists (A 1317-19, 1374 and 1394-95).

858. The Court is satisfied that there is sufficiently substantiated prima facie evidence of the repetition of acts in respect of the applicant Ukrainian Government's complaint that there was an administrative practice in breach

of Article 10 of the Convention and that the present complaint was raised within the six-month time-limit (see paragraph 786 above).

(vii) Article 11

859. The applicant Ukrainian Government's summary in the memorial reads:

> "Membership of political organisations supporting Ukrainian territorial integrity was violently suppressed by the armed groups. Those involved in such organisations were targeted for assassination or arrest, and these groups were prevented from meeting or operating in territory under the control of the armed groups."

860. Allegations under Article 11 of the Convention concerning intimidation of protest participants, restriction of associations' activities and changes to the law restricting Article 11 rights were first made by the applicant Ukrainian Government in their August 2015 application form.

861. Article 11 reads:

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

862. As can be seen from the formulation of the complaint, it is limited to restrictions on and targeting of political organisations supporting Ukrainian territorial integrity and their members. The complaint does not extend to restrictions on other associations, including human rights and humanitarian organisations, or to the general right to political protest and assembly in separatist-controlled territory.

863. The OHCHR noted in its 3rd report of June 2014 that on 7 May "several political parties were allegedly banned in Luhansk region by a decision of the 'people's council'" (A 1048). In its 17th report of March 2017, the OHCHR referred to the violation of the rights of existing associations to pursue their activities (A 966). The examples of restrictions given in that report concerned associations providing humanitarian aid, and not political associations.

864. As explained above (see paragraph 454), the burden is on the applicant Ukrainian Government to provide evidence supporting its substantive allegations. While the Court may gather evidence of its own motion, it is not an investigative body and it is not its role actively to locate evidence supporting specific assertions made in the proceedings before it. It is therefore for the applicant Ukrainian Government to provide the prima facie evidence necessary to support its allegation of an administrative practice

in violation of Article 11 on account of restrictions on and targeting of political parties and their membership. They have not suggested that there was any particular difficulty for them to provide relevant material to demonstrate the evidential basis of their allegations. On the basis of the evidence presented to it, the Court is not persuaded that there is sufficiently substantiated prima facie evidence of the repetition of acts constituting such an administrative practice after February 2015 (six months before the lodging of the 2015 application in which this complaint was first made).

(viii) Article 1 of Protocol No. 1

865. The applicant Ukrainian Government's summary in the memorial reads:

> "The destruction of private property by Russian forces and their proxies in the local armed groups, including civilian homes and vehicles has been commonplace throughout the conflict. There have also been numerous reported instances of theft and looting of private and commercial property throughout the areas under their control. Large swathes of private property have been unlawfully appropriated without compensation."

866. In the 20 November 2014 supplement to their application, the applicant Ukrainian Government complained under Article 1 of Protocol No. 1 about the violation of the property rights of private individuals and the introduction of martial law imposing an obligation to accommodate "DPR" troops. In their 2015 application form they complained about the illegal seizure of property, the imposition of illegal taxes, the destruction of property, the confiscation of private property and the nationalisation of property.

867. Article 1 of Protocol No. 1 provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

868. As already explained (see paragraph 831 above), there is extensive evidence in the OHCHR and SMM reports of widespread shelling, which resulted in the destruction of property. The OHCHR reports also contain accounts of theft and looting and the appropriation of private property (A 977-1027). Such accounts are also provided in NGO reports and by witnesses (A 1339-47, 1363, 1376, 1427-29 and 2161-99 and 2318).

869. The Court therefore concludes that there is sufficiently substantiated prima facie evidence, the threshold applicable at this stage of the proceedings, of the repetition of acts in respect of the applicant Ukrainian Government's complaint that there was an administrative practice in breach of Article 1 of

Protocol No. 1 to the Convention. It further finds that the complaint was raised within the six-month time-limit (see paragraph 786 above).

(ix) Article 2 of Protocol No. 1

870. The applicant Ukrainian Government's summary in the memorial reads:

> "Numerous schools and educational facilities have been destroyed by the armed groups. Education in the Ukrainian language has been prohibited, and teachers have been harassed, arrested and in some instances killed."

871. In their August 2015 application form, the applicant Ukrainian Government first complained under Article 2 of Protocol No. 1 of limitations on schooling because of destruction of property, insecurity and intimidation of teachers. They also complained of the exclusion of Ukrainian language and history from the curriculum.

872. Article 2 of Protocol No. 1 reads:

> "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

873. In *Georgia v. Russia (II)* (cited above, §§ 302-14), where similar allegations had been made, the Grand Chamber referred in this respect to *Catan and others (*cited above, § 137) where the Court said:

> "By binding themselves, in the first sentence of Article 2 of Protocol No. 1, not to 'deny the right to education', the Contracting States guarantee to anyone within their jurisdiction a right of access to educational institutions existing at a given time (*see Case 'relating to certain aspects of the laws on the use of languages in education in Belgium'* (merits), 23 July 1968, pp. 30-32, §§ 3-4, Series A no. 6) ... Moreover, although the text of Article 2 of Protocol No. 1 does not specify the language in which education must be conducted, the right to education would be meaningless if it did not imply in favour of its beneficiaries, the right to be educated in the national language or in one of the national languages, as the case may be (ibid., pp. 30-31, § 3).

874. It went on to consider, in *Georgia v. Russia (II)*, that it did not have sufficient evidence in its possession to conclude beyond reasonable doubt that there had been incidents contrary to Article 2 of Protocol No. 1 and concluded that there had therefore been no violation of that Article.

875. While there is evidence in the present case-file as to the destruction of schools and other educational facilities and the harassment and detention of teachers (A 1028-47), that evidence does not suggest that such incidents were part of a campaign intended expressly to limit the right to education. The educational nature of destroyed buildings and the teaching occupations of those harassed and killed appear to have been incidental to the alleged violence inflicted. In these circumstances, the Court is not persuaded that the complaints fall within the scope of Article 2 of Protocol No. 1. They do, however, fall within the scope of complaints under Articles 2, 3 and 5 and

Article 1 of Protocol No. 1 and may be invoked as further evidence of those complaints.

876. The Court observes that the applicant Ukrainian Government provided scarce details in their memorials of the alleged prohibition on education in the Ukrainian language. According to an SMM report of 5 November 2014, in one school in Luhansk it was announced that the language of instruction would be Russian only (A 1038. See also 1034). It appears from a report of the OHCHR that in March and June 2020 respectively, the "DPR" and the "LPR" introduced legislation stipulating that Russian was the official language in educational institutions in territory under their control (A 1047).

877. It is true that the evidence in the case-file does not expressly identify any prohibition on teaching in the Ukrainian language in the relevant parts of Donbass. However, it does reveal a significant change to the status of the Ukrainian language in that area and the precedence given to the Russian language. In these circumstances, the Court is prepared to accept that there is sufficiently substantiated prima facie evidence of a prohibition on education in the Ukrainian language demonstrating the necessary element of repetition to support the allegation of an administrative practice. It further finds that the complaint was raised within the six-month time-limit (see paragraph 786 above).

(x) Article 14

878. The applicant Ukrainian Government's summary in the memorial reads:

> "Virtually all of the violations alleged in this application were committed because of the ethnicity or perceived political affiliation of the victim. The armed groups systematically attacked civilians of Ukrainian ethnicity, or citizens who supported Ukrainian territorial integrity. That was the motivation behind nearly all of the violations alleged. Nationality and political opinion are relevant characteristics for the purpose of the article 14 analysis, and the relevant comparators are those of Russian ethnicity or pro-Russian political sympathies. It follows that nearly all of the violations of substantive Convention rights alleged in this case, also constitute violations of article 14 because the victims were singled out for attack by reason of a protected characteristic."

879. The applicant Ukrainian Government first expressly invoked Article 14, taken in conjunction with the other Articles of the Convention relied on, in their application form of 2015. It is, however, clear from their complaints and accompanying narrative since 14 May 2014 that they alleged violations of the human rights of those opposed to the separatists.

880. Article 14 provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

881. Witness statements, reports of the OHCHR and the SMM and NGO reports support the allegation that the separatists targeted those who supported Ukraine's territorial integrity (A 750, 777, 831, 848, 943, 948-50, 954, 1317-19, 1320-24, 1327, 1333-36, 1339-48, 1351-52, 1363, 1366, 1368-69, 1385, 1396, 1403, 2108-09, 2110-19, 2161-90 and 2251. See also A 72). The Court is satisfied that there is sufficiently substantiated prima facie evidence of the repetition of acts in respect of the applicant Ukrainian Government's complaint that there was an administrative practice in breach of Article 14 of the Convention, taken in conjunction with Articles 2, 3, 4 § 2, 5, 9 and 10 and Articles 1 and 2 of Protocol No. 1, and that the complaint was raised within the six-month time-limit in Article 35 § 1 of the Convention (see paragraph 786 above).

(c) "Official tolerance"

882. As explained above, the Court will examine the situation as a whole in the relevant parts of Donbass to determine whether there was "official tolerance" for the alleged acts in breach of various Convention rights in respect of which it has found the requisite repetition to be present (see paragraph 827 above).

883. The Court observes that from its earliest reports, the OHCHR referred to widespread, grave human rights abuses committed by the armed groups. In its 2nd report of May 2014, the OHCHR noted the acquiescence of law enforcement bodies in the illegal seizure and occupation of public and administrative buildings in the Donetsk and Luhansk regions and said that this raised questions regarding its implications for the administration of justice and the rule of law, including the prompt and effective investigation into reported criminal acts. This in turn raised "serious concerns regarding residents' access to legal remedies, due process and overall guarantees for human rights protection" (A 691). In its 3rd report of June 2014, it said, "[v]iolence and lawlessness have spread in the regions of Donetsk and Luhansk". It noted that despite the "virtual" independence declared by the armed groups, they had not undertaken any governing responsibilities. The OHCHR referred to "the atmosphere of fear and intimidation" and the "continued erosion of the rule of law" in these areas. The report explained that although criminality was increasing, there was nobody to apply to in case of an alleged crime, and no effective means to intervene for police (A 692). In its 16th report, covering the period between August and November 2016, it said that the "courts", "judges" and "prosecutors" of the armed groups did "not comply with the right 'to a fair and public hearing by a competent, independent and impartial tribunal established by law'" (A 697).

884. The OSCE, in its thematic report entitled "Access to Justice and the Conflict in Ukraine" published in December 2015, referred to "the absence of legitimate and effective judicial services in non-government-controlled areas", highlighting that access to justice for people living in the "DPR" and

the "LPR" remained "severely limited". Describing the "parallel 'Justice systems'" established in these territories, the OSCE said they faced "significant challenges including: reliance on an uncertain, ad hoc and non-transparent legal framework which is subject to constant change; shortages of professional staff; and, in certain instances, 'courts' which have no operational capacity". The report noted that the systems in place in the "DPR" and the "LPR" raised "considerable access to justice concerns particularly with respect to due process and fair trial rights". It pointed to ambiguity as to the applicable law, especially in the "LPR" (A 696).

885. The Parliamentary Assembly of the Council of Europe also expressed concern at the "prevailing climate of impunity and general lawlessness due to the absence of legitimate, functioning State institutions, and in particular access to justice". In a resolution of October 2016, it underlined that victims of human rights violations had no internal legal remedies at their disposal, pointing out that the courts of the "DPR" and the "LPR" lacked legitimacy, independence and professionalism (A 104).

886. The Court further observes that the sheer scale of the impugned acts reported is itself an indication of a tolerant environment which enabled such acts to be carried out again and again. As the Court has previously indicated (see paragraph 826 above), where there is an administrative practice, the higher authorities of a State cannot claim to be unaware of the existence of such a practice. In any event, there can be no doubt that the higher authorities were aware of the acts in question: they were reported in detail by IGOs, NGOs and the media from the very earliest days of the conflict and without interruption (A 691-1085, 2108-548 and 2626-892).

887. The respondent Government have presented no evidence that their authorities have taken any steps to investigate or sanction the widespread unlawful behaviour which was being reported since spring 2014. It is true that there is some evidence of steps being taken by some armed groups themselves to sanction what they saw as unacceptable behaviour from members of their groups. This includes the execution by Mr Girkin's armed group, in purported application of martial law, of individuals considered to be responsible for looting (A 702, 2112 and 2596). Such sparse and selectively-applied sanctions – some of which are themselves clearly in breach of human rights law – cannot be accepted as evidence that breaches of human rights law were not officially tolerated.

888. The Court accordingly concludes that there is sufficiently substantiated prima facie evidence of "official tolerance" in respect of the repetition of acts identified above in the relevant parts of Donbass.

(d) Conclusion

889. The Court declares admissible the following complaints of the applicant Ukrainian Government (see paragraph 373 above):

- the complaint of an administrative practice in breach of Article 2 consisting of unlawful military attacks against civilians and civilian objects, including the shooting down of Malaysian Airlines flight MH17 on 17 July 2014, the shooting of civilians and the summary execution and torture or beating to death of civilians and Ukrainian soldiers who were prisoners of war or otherwise *hors de combat*;

- the complaint of an administrative practice in breach of Article 3 consisting of the torture of civilians and Ukrainian soldiers who were prisoners of war or otherwise *hors de combat*, including instances of sexual violence and rape, and inhuman and degrading conditions of detention;

- the complaint of an administrative practice in breach of Article 4 § 2 consisting of forced labour;

- the complaint of an administrative practice in breach of Article 5 consisting of abductions, unlawful arrests and lengthy unlawful detentions;

- the complaint of an administrative practice in breach of Article 9 consisting of deliberate attacks on, and intimidation of, various religious congregations not conforming to the Russian Orthodox tradition;

- the complaint of an administrative practice in breach of Article 10 consisting of the targeting of independent journalists and the blocking of Ukrainian broadcasters;

- the complaint of an administrative practice in breach of Article 1 of Protocol No. 1 consisting of the destruction of private property including civilian homes and vehicles, the theft and looting of private and commercial property, and the unlawful appropriation of private property without compensation;

- the complaint of an administrative practice in breach of Article 2 of Protocol No. 1 consisting of the prohibition of education in the Ukrainian language; and

- the complaint of an administrative practice in breach of Article 14, taken in conjunction with the above Articles, consisting of the targeting of civilians of Ukrainian ethnicity or citizens who supported Ukrainian territorial integrity.

890. The remaining complaints of administrative practices in application no. 8019/16 are declared inadmissible.

B. The alleged administrative practice in respect of the abduction and transfer to Russia of three groups of children (no. 43800/14)

891. The applicant Ukrainian Government argued:

> "Ukraine's primary case is that these facts demonstrate clearly (a) an unlawful restriction on freedom of movement in violation of Article 2 of Protocol 4; and (b) an unlawful deprivation of liberty, within the meaning of Article 5 of the Convention.
>
> As a supplementary position, Ukraine submits that the facts arguably give rise to violations Articles 3 and 8 of the Convention, although these latter alleged violations

are obviously fact-specific and will depend upon an examination of the evidence relating to the treatment of individual children, and the effect of these events upon them, during the merits phase of this case."

892. The relevant Articles of the Convention read:

Article 3

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 5

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law ..."

Article 8

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 2 of Protocol No. 4

"1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society."

1. The parties' submissions

(a) The respondent Government

893. The respondent Government argued that the applicant Ukrainian Government had failed to present a prima facie case. They claimed that there was not sufficient evidence to support allegations of kidnappings and contended that the evidence confirmed that the victims had been voluntarily trying to escape the conflict.

(b) The applicant Ukrainian Government

894. The applicant Ukrainian Government maintained that the three groups of children had been abducted and referred to the evidence that they had provided in this respect.

2. The Court's assessment

895. The Court must determine whether there is sufficiently substantiated prima facie evidence in the case-file that the allegations concerned satisfied the requirements of an administrative practice, namely whether there was the requisite repetition of acts and official tolerance (see paragraph 824-826 above).

896. The Court notes that the applicant Ukrainian Government invoked three incidents, each involving the alleged abduction of a group of children and accompanying adults, which occurred over a period of around two and a half months in the summer of 2014. A total of 85 children without parental care were allegedly abducted and transferred to Russia in the course of these incidents. The Court notes the very young age of many of the children concerned: the material before the Court indicates that the vast majority of the children in the second group were under the age of five years old and that all of the children in the third group were two years old or younger. Moreover, the third group of children included six infants with cerebral palsy (see paragraphs 95-96 above). The Court is satisfied that in the circumstances of the present case, notably the short period of time within which these three events occurred and the number and characteristics of the children involved, these incidents may be deemed sufficiently numerous to amount to a pattern or system (compare and contrast *Ukraine v. Russia (*re *Crimea)*, cited above, § 399). In consequence, the required standard of proof has been met in respect of the alleged repetition of the acts for the purposes of establishing an administrative practice. Moreover, for the reasons outlined above (see paragraph 883-888), there is also sufficiently substantiated prima facie evidence of official tolerance in respect of these complaints.

897. It is not disputed that the three groups of children and accompanying adults concerned crossed the border and entered the Russian Federation. However, the material before the Court demonstrates a fundamental disagreement between the parties as to whether the crossings were voluntary or involuntarily. In view of the material supplied by the applicant Ukrainian Government, the Court is satisfied that they have discharged the burden of proof incumbent on them at this stage of the proceedings of showing sufficiently substantiated prima facie evidence of the complaints under Article 5 and Article 2 of Protocol No. 4 that the transfer to and crossing of the border were involuntary and occurred with the intervention of armed separatists. It is moreover satisfied that this threshold has been overcome in respect of the complaints under Articles 3 and 8 having regard to the young

age of the individuals concerned and the special health needs of at least one of the groups of children. It will be for the Court at the merits stage to decide whether the material provided by the applicant Ukrainian Government is sufficient to overcome the threshold of beyond reasonable doubt in respect of each of the complaints advanced when confronted with the evidence supplied by the respondent State.

898. The applicant Ukrainian Government's complaint of an administrative practice in violation of Articles 3, 5 and 8 of the Convention and Article 2 of Protocol No. 4 to the Convention in respect of the alleged abduction of three groups of children is accordingly declared admissible.

C. The alleged violations related to the downing of flight MH17 (no. 28525/20)

1. The alleged violation of the substantive limb of Article 2

899. The applicant Dutch Government argued the following:

> "The Russian Federation violated Article 2 § 1 of the Convention by not safeguarding the lives of those within its jurisdiction. The Russian Federation did not ensure through a system of rules and through sufficient control that the risk to the lives of civilians from the Buk-TELAR was reduced to a minimum. In addition, in view of the real and immediate threat that the Buk-TELAR presented to the lives of persons on board a civilian aircraft, it was incumbent on the Russian Federation to take preventive operational measures to protect the individuals on board of Flight MH17. There is no indication that the Russian Federation took such measures. On the contrary, the fact that Flight MH17 was shot down demonstrates that no such measures were taken.
>
> Furthermore, the downing of Flight MH17 cannot considered to be justified under Article 2 § 2 of the Convention. The deprivation of life of those on board Flight MH17 did not fall within one of the situations in which the use of force, which may result in the conclusion that the deprivation of life, is permitted."

900. Article 2 of the Convention reads:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

(a) The parties' memorials

(i) The respondent Government

901. As explained above, the respondent Government denied any involvement by the Russian Federation in the downing of flight MH17. They contested the allegation that the missile had been supplied by Russia and launched from separatist-held territory (see paragraph 368-369 above). They did not provide specific submissions as to whether, if the findings of the DSB and the JIT were accepted, there had been a violation of the substantive limb of Article 2 or as to the extent of any positive obligations that may have arisen in these circumstances.

(ii) The applicant Dutch Government

902. The applicant Dutch Government invoked the respondent State's positive obligations under Article 2 to provide a sufficient regulatory framework and to take preventative operational measures. The Russian Federation had failed to ensure through a system of rules and through sufficient control that the risk to the lives of civilians from the Buk-TELAR had been reduced to a minimum. The deployment of a powerful weapon in an area over which civilian aircraft continued to fly had presented a real and immediate risk to the lives of those on board flight MH17 and other civilian aircraft which the Russian Federation knew, or ought to have known, to be flying over eastern Ukraine on 17 July 2014. The Buk system was not capable of distinguishing between enemy military aircraft and civilian aircraft. Other preventative measures ought therefore have been taken by the Russian Federation including closing its own airspace near the border with Ukraine which would have precluded any civilian flights in the area where flight MH17 was downed; ensuring the involvement of air traffic controllers in the operation of the Buk-TELAR who would have informed the crew of the Buk-TELAR whether there were at any given moment civilian aircraft in its vicinity; notifying the Ukrainian authorities about the presence of a Buk-TELAR on its territory thereby enabling them to take preventative measures; and issuing a Notice to Airmen (NOTAM) so that all airlines planning to fly over the conflict zone would have been warned of threats to the safety of civil aircrafts in the part of the airspace not already closed by Ukraine. The Russian Federation had taken none of these measures and there were no indications that it had taken any other precautions with a view to minimising incidental loss of civilian life.

903. The applicant Dutch Government also contended that the downing of the aircraft constituted an unlawful deprivation of life. The force used to down flight MH17 could not be justified by reference to Article 2 § 2 of the Convention. In this respect, it was irrelevant whether the downing of flight MH17 was intentional or not. Even if the use of force was deemed to have pursued one of the Article 2 § 2 purposes, it was not absolutely necessary.

(b) The Court's assessment

904. Although the respondent Government challenged a great deal of the evidence presented by the JIT and the DSB, they do not now dispute the conclusion that flight MH17 was shot down by a missile (see paragraphs 368-369 above). Extensive evidence that the aircraft was downed by a Buk missile provided by the Russian Federation and fired from separatist-controlled territory has been collected by the JIT (A 1496-620, 1644-793 and 1857-88). Moreover, the SMM reports, in particular, refer to their observers at the crash site being accompanied by armed guards of the "DPR" when visiting the crash sites, and the evidence shows that the black boxes and bodies were recovered by the "DPR" (A 1061-85 and 1604-05). As already indicated (see paragraph 701 above), the Russian Government's position on these matters is unpersuasive and is not supported by any plausible evidence.

905. The Court refers to its finding that the Russian Federation had jurisdiction over the areas in Donbass under the control of separatists from 11 May 2014 (see paragraph 694 above). It moreover refers to the intercept evidence and the other material gathered by the JIT which support the allegation that the respondent State provided the Buk-TELAR used to shoot down flight MH17 (A 1496-620, 1644-793 and 1857-88). In view of this material, the Court finds that there is sufficiently substantiated prima facie evidence to support the allegation of a violation of the substantive limb of Article 2 by the respondent State. This complaint is accordingly declared admissible.

2. The alleged violation of the procedural limb of Article 2

906. The applicant Dutch Government contended that:

> "[t]he Russian Federation has violated the procedural limb of Article 2 of the Convention by failing to conduct an effective official investigation itself and by failing to cooperate by not responding adequately to the requests for legal assistance of the Government."

907. They moreover contended that the failure to conduct an effective official investigation:

> "... also undermines the right to the truth of [the family of] the victims and the public in general."

(a) The parties' memorials

(i) The respondent Government

908. The respondent Government reiterated their position that responsibility to investigate lay with Ukraine because the aircraft had been destroyed in Ukraine, and that responsibility had been voluntarily undertaken by the Netherlands. They claimed that they had tried to investigate the

downing of flight MH17 and referred to their "assisting in what were presented as bona fide investigations by the DSB and the JIT". They had done their utmost to assist the DSB and JIT investigations, but it was now clear that the DSB and JIT investigations had not been "proper investigations". None of the legal assistance requests from the Netherlands had been left without a response: at the time of the hearing, of 29 requests made, 28 had been executed and 1 was pending.

909. In response to a question at the hearing on admissibility as to any investigations and inquiries carried out in Russia, the Representative of the Russian Federation explained that pursuant to mutual legal assistance requests received from the Netherlands, the Russian authorities had "done a good number of inquiries and investigative measures" on Russian territory and within Russian bodies. The materials gathered had been transferred to the Ministry of Justice of the Netherlands. They explained that some pieces of evidence, including a report by the missile manufacturer Almaz-Antey, had been classified by the Dutch authorities and had therefore not been transmitted to JIT but had been revealed only in 2021 before the first instance court of The Hague. The Russian authorities had taken no investigative steps in Donbass as this was Ukrainian sovereign territory.

910. The respondent Government argued that in so far as they had any obligations under the procedural limb of Article 2 of the Convention, they had complied with them, emphasising that the procedural limb of Article 2 set up an obligation of means, not of result.

(ii) The applicant Dutch Government

911. The applicant Dutch Government argued that, on account of their failure to conduct an effective investigation in respect of the downing of flight MH17 and to cooperate with the international investigation, the respondent Government had violated the procedural aspect of Article 2 of the Convention.

912. The respondent Government had maintained an official policy of denial with respect to their role in the downing of flight MH17 and had not conducted any meaningful investigations, contrary to their obligations under Article 2 of the Convention. Their obligation to carry out an effective investigation stemmed from the fact that the Buk-TELAR which was used to launch the missile that downed flight MH17 belonged to the armed forces of the Russian Federation; that the persons involved in the transport of the Buk-TELAR and the launch of the missile were Russian State agents who had fled to the Russian Federation after the launch; and that it was clear that the evidence relating to the downing of flight MH17 – in particular the Buk-TELAR – was located in the Russian Federation.

913. Although in 2014, 2016 and 2018 the Ministry of Defence of the Russian Federation had given several press conferences concerning the results of some investigative actions relating to certain aspects of the downing

of flight MH17, those actions could in no way be regarded as an effective investigation within the meaning of Article 2 of the Convention. The inquiries had not been carried out promptly and with reasonable expedition and it appeared that they had been conducted mainly in reaction to the information which had been made public by the JIT. The conclusions presented by the respondent Government in their press conferences had not been based on thorough, objective and impartial analysis of all relevant elements. Indeed, the information presented at several press conferences was internally contradictory. Moreover, it was questionable whether the purported investigations had been carried out by experts who could be considered independent, as required by Article 2. Furthermore, the next of kin of the victims had not had access to the investigative efforts allegedly made by the respondent Government and there had been no attempt by the Russian Federation to involve the families in their purported investigations or to provide them with any information about developments in those investigations. The families who had sent a letter to the President of the Russian Federation and requested his support had never received a response in writing (see paragraph 934 below). The purported investigations by the respondent Government were neither adequate nor capable of leading to a determination of whether the force used was or was not justified in the circumstances or establishing the identities of the perpetrators and punishing them.

914. The applicant Dutch Government further complained that by not responding adequately to their requests for legal assistance, the respondent Government had also failed to cooperate with them in their efforts to investigate the shooting down of the aircraft. Although the respondent Government had provided some information pursuant to the requests of the OM, several requests for mutual legal assistance pertaining to crucial information and evidence had remained unanswered or been answered only in part.

(b) Third-party submissions

915. The MH17 applicants alleged that the respondent Government had failed to carry out an investigation into the shooting down of the aeroplane, in breach of their procedural obligations inherent in Article 2 of the Convention. Any investigation the respondent Government had purportedly carried out was clearly inadequate, flawed and not based on a thorough, objective and impartial analysis of all relevant elements; as such it was not capable of, or not even aimed at, leading to the establishment of the facts and the identification and punishment of those responsible. Moreover, family members of the victims had not had access to any investigations conducted by the respondent Government. Furthermore, the respondent Government had not only failed to cooperate with the investigations conducted by the Netherlands together with a number of other States or with the DSB in their

efforts to identify the cause of the crash, but had in fact made attempts to influence and hinder those investigations through the actions of the GRU.

(c) The Court's assessment

916. In view of the evidence to which the Court has already referred above (see paragraphs 904-905), the applicant Dutch Government have demonstrated to the requisite standard that an obligation on the respondent State to investigate under the procedural aspect of Article 2 arose.

917. The respondent Government did not claim to have carried out an investigation into the downing of flight MH17. They relied on the assistance that they claim to have provided to the JIT investigation within the framework of mutual legal assistance requests from the authorities of the Netherlands and the asserted failure of the victims' relatives or the Dutch authorities to request the initiation of a criminal investigation or to transfer the prosecution of three Russian nationals to the Russian Federation. However, the correspondence submitted by the applicant Dutch Government and the respondent Government appears to support the allegation that the Russian authorities' assistance was very limited (A 1797-829). There are, moreover, elements in the evidence which support the allegation that the Russian authorities deliberately sought to mislead investigators and to disseminate inaccurate information about the circumstances of the downing of flight MH17 (A 1800, 1840-42, 1862, 1867, 2377-82, 2402-05, 2411, 2415-22, 2442-45, 2478-84, 2486 and 2505-10). Finally, the respondent Government have not explained why, at the latest following the disclosure by the JIT in June 2019 of the identities of three Russian nationals to be prosecuted in The Hague, they did not launch an investigation of their own initiative. Their insistence on the need for a formal request from the victims' relatives or the Dutch authorities is unexplained, particularly given the terms of Article 140 of the Russian Code of Criminal Procedure which allow for an investigation to be opened even in the absence of a direct request from victims (A 2). The respondent Government moreover clearly stated that the transfer to Russia of the criminal proceedings in The Hague would not have prevented the authorities of the Netherlands from continuing with their investigation; it is therefore not apparent why the Dutch refusal to agree to such a transfer prevented the Russian authorities from initiating a criminal investigation themselves in parallel with those proceedings.

918. There can be no doubt that there is sufficiently substantiated prima facie evidence in respect of the applicant Dutch Government's complaint of a breach of the procedural limb of Article 2 of the Convention. The complaint is therefore declared admissible.

3. The alleged violation of Article 3

919. The applicant Dutch Government alleged the following:

> "[t]he conduct of the Russian Federation in the period between the downing in 2014 until this day has aggravated the suffering and uncertainty for the next of kin of the victims to such an extent that the conduct of the Russian Federation which caused this suffering amounts to inhuman or degrading treatment in a violation of Article 3 of the Convention."

920. They further clarified:

> "Their suffering is further compounded by the difficulties to visit the crash area, which is controlled by forces under the effective control of the Russian Federation. In many cases, it has not proven possible to recover and identify all human remains. Two of the victims have not even been identified at all. This deprives the next of kin of these victims of the possibility to bury or cremate the remains."

921. Article 3 of the Convention provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

(a) The parties' memorials

(i) The respondent Government

922. The respondent Government acknowledged that the greatest sympathy was due to the relatives of victims aboard flight MH17. They accepted that the trauma of family members who lost their loved ones in an air disaster and the anxiety caused by lack of knowledge of what had happened must be very great. However, suggesting that such trauma had been increased by Russia's denial of the allegations made by Ukraine and the Netherlands went too far. Controversy in legal proceedings could not possibly entail a breach of Article 3 of the Convention. On the contrary, truth was important for the relatives and the best way of exploring truth was via legal proceedings which were effective, open and accessible, with public evidence and argument and a full opportunity for each party to present its case and to challenge any opposing case. This was a cardinal principle of the Convention which accounted for the very foundation of the Court. At the hearing on admissibility, the Representative of the Russian Federation said:

> "We understand that the victims, they clearly want the truth. And we are willing to assist them. And on behalf of the Russian Federation, I would like to declare that we will make available every piece of document transferred to the Dutch authorities on their MLA [mutual legal assistance] requests. And we are well prepared to go further: we will make them publicly available. And everybody can see what is true and what is not."

923. To the extent that it had been argued that the family members' suffering had been caused by a failure on the part of the respondent Government adequately to investigate the downing of flight MH17, the respondent Government had tried to assist in what were presented as *bona fide* investigations by the DSB and JIT. Unfortunately, it was now clear that the DSB and JIT investigations were not proper investigations. Thus, if a

"right to truth" indeed existed in international law and bound all States, Ukraine and the Netherlands were the culprits in relation to flight MH17.

924. The respondent Government were fully entitled to challenge the evidence relied upon by the applicant States and the sham nature of their purported investigations. To the extent that uncertainty persisted, it was because Ukraine and the Netherlands had not discharged their obligations to investigate properly in the first place, and because, even now, they would not provide original digital evidence.

(ii) The applicant Dutch Government

925. The applicant Dutch Government alleged that the suffering of the next of kin of the victims of the downing of flight MH17 consisted of multiple elements. They submitted that the conduct on the part of the respondent Government after the downing until this day, in particular the failure to acknowledge their responsibilities and to themselves conduct an effective investigation into the downing, and the lack of effective and comprehensive cooperation with other governments, was a key element in the suffering of the families and other persons close to the victims, as this had resulted in years of uncertainty and anguish and had hampered their ability to find closure and acceptance. Other elements that had added to their suffering were the difficulties in visiting the crash area which was controlled by forces under the effective control of the respondent Government and the obstacles in recovering and identifying all human remains resulting in two families being deprived of the possibility to bury or cremate the remains. They alleged that the family members' suffering amounted to inhuman or degrading treatment in violation of Article 3 of the Convention that the violation was continuing.

926. In support of their allegation regarding the respondent Government's conduct, the applicant Dutch Government referred to the case-law developed by the Court in cases concerning enforced disappearances (see, *inter alia*, *Orhan v. Turkey*, no. 25656/94, § 358, 18 June 2002), in which the Court had held that "the essence of such a violation does not so much lie in the fact of the disappearance of the family member but rather concerns the authorities' reactions and attitudes when the situation is brought to their attention. It is especially in respect of the latter that a relative may claim to be a direct victim of the authorities' conduct".

927. Whether a family member of a "disappeared person" was a victim of treatment contrary to Article 3 of the Convention would depend on the existence of special factors which gave the suffering of the relative a dimension and character distinct from the emotional distress which might be regarded as inevitably caused to the next of kin of a victim of serious violations of human rights. Relevant factors included the proximity of the family tie, the particular circumstances of the relationship, the extent to which the family member had witnessed the events in question, the involvement of

family members in the attempts to obtain information about the disappeared person and the way in which the authorities had responded to those enquiries.

928. The deliberate conduct of the respondent Government presented parallels with the situation of relatives of disappeared persons. All the special factors highlighted by the Court in its case-law in disappearance cases were also applicable in the present case. For example, the next of kin were closely related to the victims of flight MH17 and had lost their partners, children, parents, brothers, sisters, uncles, aunts, grandparents or other close family members. Second, although the family members had learned about the crash from the media, they had nevertheless been exposed to a period of uncertainty and confusion as to whether their next of kin had actually been on board the flight. Meanwhile, they had been confronted with graphic images of the results of the crash and the handling of the human remains along with reports of looting. In the months and years following the downing, they had on several occasions been confronted with reports – both accurate and false – of new human remains and personal belongings being found.

929. The family members had also been very active in trying to obtain adequate information from the respondent Government as to the cause of the crash and the identities of those responsible for the downing. The response had been inadequate and not always truthful. The Russian Federation had denied its role in the downing of flight MH17 and its continuous denial and misrepresentation of facts had caused additional suffering to the next of kin which continued until this day. At the hearing on admissibility, the Agent underlined the position of the applicant Dutch Government that Russia had not "effectively" cooperated with the criminal investigations, explaining:

> "It is not argued that Russia has done nothing at all. However, several requests for mutual legal assistance have remained unanswered. The responses to other requests have been incomplete or only responses to parts of the request. For reasons set out in its application, my Government submits that Russia has not adequately responded to the requests for mutual assistance."

(b) Third-party submissions

(i) The Government of Canada

930. The Government of Canada argued that the Inter-American Court of Human Rights had repeatedly held that a State's conduct following initial serious human rights violations such as enforced disappearances, extrajudicial executions or torture could itself be so egregious as to constitute inhuman or degrading treatment of the victims' loved ones. In support they referred, *inter alia*, to the judgments in *Villagrán-Morales et al v. Guatemala* ((the "Street Children" Case), (Merits), Judgment of November 19, 1999, Series C, No. 63); *Bámaca-Velásquez v. Guatemala* ((Merits) Judgment of November 25, 2000, Series C, No. 70); and *"Mapiripán Massacre" v. Colombia* ((Merits, Reparations and Costs), Judgment of September 15, 2015), which variously concerned kidnapping, detention, ill-treatment and

killings. In these judgments the Inter-American Court had found that in addition to the suffering and anguish caused to the next of kin of those victims stemming directly from the violation of the primary victims' rights, various subsequent actions and omissions of the respondent States had also created a sense of insecurity, frustration, impotence and a source of additional suffering and anguish and had thus amounted to cruel, inhuman and degrading treatment in respect of those victims' loved ones. The actions and omissions in question had included, in particular, the failure properly to establish the identities of the victims and to provide the families with information on the investigation; the failure fully to investigate the crimes and punish those responsible; a "continued obstruction" by the respondent State of the efforts made by the next of kin; and "the official refusal to provide relevant information" to the next of kin.

931. The Government of Canada also referred to the judgment in the case of *La Cantuta v. Perú* ((Merits, Reparations and Costs), Judgment of November 29, 2006) in which the Inter-American Court of Human Rights had found that continued deprivation of the truth regarding the fate of a disappeared person constituted cruel, inhuman and degrading treatment for the next of kin. They submitted that the "right to truth" was best understood as the right of families to know the fate of victims of serious human rights violations, such as enforced disappearances, torture or extrajudicial killings. The "right to truth" was grounded in the obligation of customary international law to provide an effective remedy for human rights violations. It was treated in the Inter-American context as indivisible from human rights obligations relating to effective remedies for human rights violations, access to courts and judicial protection, fair trial, recognition as a person before the courts and access to information. The Inter-American Court of Human Rights and the Inter-American Commission on Human Rights had further recognised the "right to truth" as directly connected to the right to judicial guarantees and the right to judicial protection. Under the general principles of international human rights law, illustrated in the case-law of the Inter-American Court, all States had an obligation under international law to respect the right of family members to know the fate of the victims of serious human rights violations. The Government of Canada invited the Court to consider whether a serious and ongoing violation of the "right to truth" about the death of an initial victim could also support a finding of a breach of the Article 3 rights of the victims' next of kin.

(ii) The MH17 applicants

932. The MH17 applicants referred to the Court's case-law on victim status of relatives of victims of enforced disappearances or killings. They also referred to the UN Human Rights Committee General Comment No. 36, where the Committee had referred to the possibility that an arbitrary deprivation of life, failure to provide relatives with information on the

circumstances of the death or failure to inform them of the location of the body might cause relatives mental suffering which could amount to a violation of their own rights under the equivalent of Article 3 of the Convention in the International Covenant on Civil and Political Rights. The suffering of the relatives had a dimension and character distinct from the emotional distress inevitably stemming from the death of their next of kin and capable of bringing it within the scope of Article 3 of the Convention. That additional dimension stemmed, in particular, from the respondent Government's refusal to take responsibility for the downing of the plane; their failure adequately to investigate the circumstances of the downing; and their intentional disinformation campaign.

933. The MH17 applicants had shared close family ties with victims of flight MH17. Each had lost one or more family members. There were minors who had lost their parents; parents who had lost their children; grandparents who had lost their grandchildren; siblings who were very close to the victims; and other close relatives. Although the relatives had not been present at the scene of the crash, they had nevertheless been unable to avoid bearing witness to the fate of their loved ones through news reports and the media. They had not been able to escape the news and the images completely because the downing of MH17 was an international disaster which had been publicised very widely. Furthermore, they had found it difficult to separate truth-based news reports from those based on disinformation spread by Russia.

934. Ever since the downing of the plane the relatives had been intimately involved in the efforts to uncover the truth. They continued to suffer due to the active obstruction by the respondent Government. They had tried to obtain information from the respondent Government on multiple occasions. In a letter to the President of the Russian Federation of 22 January 2016, some of the relatives had asked him to divulge certain crucial information and also to support the investigation carried out by the JIT. The Russian Federation had either not responded at all or had responded inadequately and untruthfully to their requests. This rendered the ongoing investigations more extensive and lengthier and therefore prolonged the families' suffering. The way in which the respondent Government were spreading disinformation, hindering the investigations and responding to various investigations and evidence as "sham" and "fake" was very painful for the relatives.

935. The MH17 applicants highlighted a number of additional specific aspects which were particularly traumatising and painful for the families. After the downing of the aircraft, they had gone through a period of great uncertainty and confusion as to whether their loved ones had been on board the aircraft and had died. It had taken three to five days before they had received official confirmation that their relatives had perished. This delay was due to the respondent Government, who had been exercising effective control over the crash site but who had not provided information swiftly, clearly, emphatically or in a respectful manner. Moreover, the respondent

Government, which had sufficient power and influence to cease the armed conflict, had not responded positively to the international community's requests to ensure that the fighting cease at least for the duration of the recovery efforts so that adequate measures could be taken to secure the crash site in order to recover the bodies in a timely and appropriate manner. As a result, locals, the OSCE team and the Dutch authorities had had limited access to the crash site and it had taken eight months to recover the bodies. During that time the bodies had remained out in the open and the relatives had had to witness the gruesome images of the bodies of their loved ones being treated with little respect, as the crash site had been made available to journalists long before the forensic teams and experts had carried out their work.

936. The families had also had to wait for long periods for the return of the bodies of their loved ones. Some had received only small body parts or fragments of body parts, sometimes after they had been exhumed after their first burial. In some cases, family members had had to help identify what remained of the bodies. In other cases, they had been unable to view them due to extensive decomposition. In one case, many months after the burial of their son one family had been informed about the finding of further body parts and had realised that they had not buried his complete body. The trauma of loss was re-lived for the second, but not the last, time as a few months later they had been informed of a further discovery of parts of their son's body. Bodies of two of the victims had never been found. Even years after the downing of the plane journalists still reported finding more human remains. One journalist had reported seeing, some two and a half years after the incident, a bin bag filled with "stuff and human remains". Some family members had been told that bodies had been buried by the locals because of their decomposition.

937. The families had also been left wondering whether their loved ones had been aware of their fate in the moments after the impact of the missile. One family member recounted recurring nightmares about loved ones falling out of the sky and visualised the terror the victims must have felt when the plane broke apart. The families had been left with unanswered questions, such as whether the bodies of their loved ones had also broken apart, whether they had died instantly, whether they had witnessed cabin decompression and rapid descent and whether they had still been alive when they hit the ground. These unanswered questions severely hindered the family members' healing process and had made it difficult for them to say farewell to their loved ones.

938. The foregoing elements had compounded the family members' suffering beyond that of an ordinary bereaved person and had aroused in them feelings of powerlessness and injustice. On account of their suffering, the relatives had experienced serious psychological problems and some relatives had sought – and continued to seek – help from medical professionals. In this connection, the MH17 applicants referred to reports prepared by academics

from the psychology departments of the Universities of Utrecht and Groningen in the Netherlands who had examined the consequences of the MH17 disaster on the mental health of Dutch relatives of the victims. According to the reports, the mental health consequences for those relatives were very serious even 42 months after the event. A large group had had mild or severe problems with grief (persistent complex bereavement disorder), post-traumatic stress disorder and/or depression. Many had found it hard to realise that the disaster had happened and to accept that their loved ones would never come back.

(c) The Court's assessment

939. The Court has consistently explained that in order for an allegation of "inhuman or degrading" treatment to fall within the scope of Article 3 of the Convention, it must attain a minimum level of severity. The assessment of that level is relative and depends on all the circumstances of the case, principally the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim. The Court may also take into consideration the purpose for which the ill-treatment was inflicted, together with the intention or motivation behind it; the context in which the ill-treatment was inflicted, such as an atmosphere of heightened tension and emotions; and whether the victim was in a vulnerable situation. Subjecting a person to ill-treatment that attains such a minimum level of severity usually involves actual bodily injury or intense physical or mental suffering. However, even in the absence of those characteristics, where treatment humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition set forth in Article 3 (see *Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, §§ 116-18, 25 June 2019).

940. In *Janowiec and Others v. Russia* ([GC], nos. 55508/07 and 29520/09, § 177-81, ECHR 2013), the Court explained its approach to alleged violations of Article 3 on account of confirmed deaths and disappearances of applicants' relatives. It said, notably, that in order for a separate violation of Article 3 of the Convention to be found in such cases, there had to be special factors in place giving relatives' suffering a dimension and character distinct from the emotional distress inevitably stemming from the aforementioned violation itself. The relevant factors identified included the proximity of the family tie, the particular circumstances of the relationship, the extent to which the family member had witnessed the events in question and the involvement of the applicants in the attempts to obtain information about the fate of their relatives.

941. The Court is satisfied that in view of the facts of the case and the evidence submitted, notably the reports prepared by the Universities of

Utrecht and Groningen in the Netherlands (A 2902-18), there is sufficiently substantiated prima facie evidence of the suffering of the next of kin on account of the downing of flight MH17 and its aftermath. It observes that no submissions have been received following the hearing on admissibility as to whether the Russian Government made available to the relatives all information provided in respect of mutual legal assistance requests (see paragraph 922 above). In any event, the applicant Dutch Government alleges that the response of the Russian Federation to the mutual legal assistance requests was incomplete (see paragraphs 914 and 929 above). The question whether the alleged suffering of the relatives attained the minimum level of severity to fall within the scope of Article 3 is closely linked to the substance of the complaint and raises complex issues of fact and law that cannot be resolved at this stage of the proceedings. It is accordingly joined to the merits.

942. The complaint is declared admissible.

4. The alleged violation of Article 13

943. The applicant Dutch Government argued:

> "Article 13 of the Convention has been violated by the Russian Federation by not providing an effective remedy."

944. Article 13 reads:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

(a) The parties' memorials

(i) The respondent Government

945. The respondent Government submitted that Russian law provided effective remedies in respect of the alleged violations of the Convention. As explained above, they objected to the admissibility of the complaints concerning the downing of flight MH17 on account of an alleged failure to exhaust effective domestic remedies (see paragraphs 736-739 above). In that context, they argued that the victims' relatives or the authorities of the Netherlands could have requested the initiation of a criminal investigation by the Russian authorities. Any refusal could have been appealed to the courts pursuant to Article 125 of the Russian Code of Criminal Procedure. They further pointed to the possibility for the Dutch authorities to transfer the criminal prosecution of the three Russian nationals to the Russian Federation. In the absence of such steps, the Russian Federation had carried out investigations in Russia pursuant to the mutual legal assistance requests from the Dutch authorities.

(ii) The applicant Dutch Government

946. The applicant Dutch Government argued that the respondent Government's continuing failure to provide an effective remedy in respect of their complaints under Articles 2 and 3 of the Convention amounted to a breach of Article 13 of the Convention. The absence of an effective criminal investigation made it impossible for the respondent Government to provide for an effective criminal-law remedy capable of holding the perpetrators accountable.

947. A civil procedure remained the only option for the next of kin of the victims. However, and with reference to the Court's case-law, the applicant Dutch Government argued that in cases concerning complaints under Articles 2 and 3 of the Convention a civil procedure on its own could not be considered an effective remedy for the purposes of Article 13 of the Convention. Thus, in the absence of an effective criminal investigation, the next of kin could not be expected to start a civil procedure in the Russian Federation.

(b) The Court's assessment

948. The Court has found that the allegations of the applicant Dutch Government under Articles 2 and 3 of the Convention are supported by sufficiently substantiated prima facie evidence. It considers that they are accordingly arguable for the purposes of the complaint under Article 13 of the Convention.

949. The Court has moreover rejected the respondent Government's arguments as to the existence of an effective remedy in the Russian Federation in respect of the downing of flight MH17 (see paragraphs 800-807 above). It is accordingly satisfied that there is sufficiently substantiated prima facie evidence that the respondent Government have failed to provide an effective remedy in respect of the complaints under the substantive and procedural aspects of Article 2 and under Article 3 and declares this complaint admissible.

FOR THESE REASONS, THE COURT,

1. *Dismisses*, unanimously, the respondent Government's objection that the applications lack the requirements of a genuine allegation under Article 33 of the Convention;

2. *Holds*, unanimously, that the complaints by the applicant Ukrainian Government concerning events which took place in the territory under separatist control from 11 May 2014 fall within the jurisdiction *ratione loci* of the respondent State within the meaning of Article 1 of the

Convention and dismisses the respondent Government's objection in this respect;

3. *Joins to the merits*, by a majority, the objection raised by the respondent Government as to whether the applicant Ukrainian Government's complaints of administrative practices of shelling in violation of Article 2 of the Convention and Article 1 of Protocol No. 1 to the Convention, together with associated Article 14 complaints, fall within the Article 1 jurisdiction of the respondent State;

4. *Holds*, by a majority, that the complaints by the applicant Dutch Government concerning the downing of flight MH17 fall within the jurisdiction *ratione loci* of the respondent State within the meaning of Article 1 of the Convention and dismisses the respondent Government's objection in this respect;

5. *Holds*, unanimously, that the complaints concerning armed conflict fall within the *ratione materiae* jurisdiction of the Court and *dismisses* the objection of the respondent Government in this respect;

6. *Declares*, unanimously, inadmissible the complaint of the applicant Ukrainian Government under Article 3 of Protocol No. 1 to the Convention as outside the *ratione materiae* jurisdiction of the Court;

7. *Declares*, unanimously, that the rule of exhaustion of domestic remedies is not applicable to the allegations of the existence of administrative practices and accordingly *dismisses* the respondent Government's objection of non-exhaustion of domestic remedies in respect of the complaints concerned;

8. *Dismisses*, unanimously, the respondent Government's objection on grounds of failure to comply with the six-month time-limit and *declares*, unanimously, admissible, without prejudging the merits:
   (a) the complaint of an administrative practice in breach of Article 2 of the Convention consisting of unlawful military attacks against civilians and civilian objects, including the shooting down of flight MH17 on 17 July 2014; the shooting of civilians and the summary execution and torture or beating to death of civilians and Ukrainian soldiers who were prisoners of war or otherwise *hors de combat*;
   (b) the complaint of an administrative practice in breach of Article 3 of the Convention consisting of the torture of civilians and Ukrainian soldiers who were prisoners of war or otherwise *hors de combat*, including instances of sexual violence and rape, and inhuman and degrading conditions of detention;

(c) the complaint of an administrative practice in breach of Article 4 § 2 of the Convention consisting of forced labour;
(d) the complaint of an administrative practice in breach of Article 5 of the Convention consisting of abductions, unlawful arrests and lengthy unlawful detentions;
(e) the complaint of an administrative practice in breach of Article 9 of the Convention consisting of deliberate attacks on, and intimidation of, various religious congregations not conforming to the Russian Orthodox tradition;
(f) the complaint of an administrative practice in breach of Article 10 of the Convention consisting of the targeting of independent journalists and the blocking of Ukrainian broadcasters;
(g) the complaint of an administrative practice in breach of Article 1 of Protocol No. 1 to the Convention consisting of the destruction of private property, including civilian homes and vehicles; the theft and looting of private and commercial property; and the unlawful appropriation of private property without compensation;
(h) the complaint of an administrative practice in breach of Article 2 of Protocol No. 1 to the Convention consisting of the prohibition of education in the Ukrainian language;
(i) the complaint of an administrative practice in breach of Article 14, taken in conjunction with the admissible complaints under Articles 2, 3, 4 § 2, 5, 9 and 10 of the Convention and Articles 1 and 2 of Protocol No. 1 to the Convention, consisting of the targeting of civilians of Ukrainian ethnicity or citizens who supported Ukrainian territorial integrity;

9. *Declares*, by a majority, admissible, without prejudging the merits, the complaint of an administrative practice in violation of Articles 3, 5 and 8 of the Convention and Article 2 of Protocol No. 4 to the Convention in respect of the alleged abduction and transfer to Russia of three groups of children and accompanying adults;

10. *Declares*, by a majority, inadmissible the individual complaints concerning the alleged abduction and transfer to Russia of three groups of children and accompanying adults for failure to exhaust domestic remedies;

11. *Dismisses*, unanimously, the respondent Government's objections under Article 35 § 1 on grounds of non-exhaustion of domestic remedies in respect of the complaints concerning the downing of flight MH17;

12. *Dismisses*, by a majority, the respondent Government's objections under Article 35 § 1 on grounds of failure to comply with the six-month

time-limit in respect of the complaints concerning the downing of flight MH17;

13. *Joins to the merits*, by a majority, the question whether the suffering of the relatives of the victims of the downing of flight MH17 met the minimum threshold of severity to fall within the scope of Article 3 of the Convention;

14. *Declares*, by a majority, admissible, without prejudging the merits, the individual complaints under the procedural and substantive limbs of Article 2, Article 3 and Article 13 of the Convention in respect of the downing of flight MH17; and

15. *Declares*, unanimously, the remaining complaints inadmissible.

Done in English and in French and delivered at a public hearing in the Human Rights Building, Strasbourg, on 25 January 2023.

Søren Prebensen	Síofra O'Leary
Deputy to the Registrar	President

ANNEX