

INTERNATIONAL COURT OF JUSTICE

**CASE CONCERNING
APPLICATION OF THE INTERNATIONAL CONVENTION FOR THE SUPPRESSION
OF THE FINANCING OF TERRORISM AND OF THE INTERNATIONAL
CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL
DISCRIMINATION**

(UKRAINE v. RUSSIAN FEDERATION)

**COUNTER-MEMORIAL ON THE CASE CONCERNING APPLICATION OF THE
INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING
OF TERRORISM**

SUBMITTED BY THE RUSSIAN FEDERATION

9 AUGUST 2021

As the Russian Federation repeatedly noted, Ukraine's Application to the International Court of Justice of 16 January 2017 is formally directed jointly against alleged violations of the International Convention for the Suppression of the Financing of Terrorism and the International Convention on the Elimination of All Forms of Racial Discrimination. It actually concerns two entirely separate cases which have in common only the use of the Court's forum in an attempt to stigmatise Russia for alleged aggression against, and violation of sovereignty of, Ukraine. Accordingly, Russia submits two Counter-Memorials dealing separately with each of these cases.

The present Counter-Memorial deals with the case concerning the International Convention for the Suppression of the Financing of Terrorism ("ICSFT").

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CHAPTER I INTRODUCTION

1. On any reading of Ukraine’s Memorial, it is plain that its real complaint concerns an alleged Russian “campaign for hegemony in Ukraine” (the heading given to section A of the Introduction to Ukraine’s Memorial),¹ including alleged “overt aggression”² and “supporting and arming illegal proxy groups” in Eastern Ukraine.³ For the purposes of establishing the Court’s jurisdiction, however, Ukraine has characterised its allegations concerning the armed conflict in Eastern Ukraine as concerning the financing of terrorism – although Ukraine stands alone in its characterisation of the Donetsk People’s Republic (“DPR”) and the Lugansk People’s Republic (“LPR”) as “groups which have notoriously committed terrorist acts”,⁴ and likewise in its characterisations of the tragic shooting down of Flight MH17 and acts of shelling within the armed conflict as acts of “terrorism”.
2. Before turning to the details of Ukraine’s untenable (and indeed still implausible⁵) case on breach of the ICSFT, Russia makes five introductory observations.

I. The Armed Conflict in Eastern Ukraine

3. As the Court recorded in its Order of 19 April 2017 that rejected Ukraine’s application for provisional measures with respect to its ICSFT case, “extensive fighting” has claimed a significant number of lives in large parts of Eastern Ukraine.⁶ Indeed, the armed conflict between Ukraine and the DPR/LPR, and particularly shelling, has resulted in an appalling loss of civilian life on both sides (i.e., Ukraine and the DPR/LPR), and both sides have also reportedly engaged in killings of political figures and mistreatment.
4. This armed conflict provides the critical context in which Ukraine’s claims are made. It is certainly not Russia’s case that the ICSFT does not apply in an armed conflict or that acts of terrorism cannot be committed during an armed conflict. However, it is of great and even systemic importance that

¹ Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Memorial of Ukraine, 12 June 2018 (“Memorial” or “MU”), Part I, Section A, paras. 8-22.

² MU, para. 11.

³ MU, para. 16.

⁴ MU, para. 281. See also *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Written Statement of Observations and Submissions on the Preliminary Objections of the Russian Federation by Ukraine, 14 January 2019 (“Ukraine’s Observations” or “WSU”), paras. 194 and 203.

⁵ See *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Provisional Measures, Order of 19 April 2017, *I.C.J. Reports 2017*, p. 104 (“Order of 19 April 2017”), para. 75.

⁶ Order of 19 April 2017, para. 16.

alleged acts in an armed conflict are not improperly elevated and mischaracterised as terrorism *per se*.

II. The Continuing Importance of the Court's Order of 19 April 2017

5. The Court's assessment, in its Order of 19 April 2017, that there was no plausible allegation of terrorism retains considerable – and unusual – importance for this merits phase, given the way that Ukraine has constructed its case on terrorism funding.

6. According to Ukraine's Memorial: "Since early in the conflict, it was apparent that these illegal armed groups in Ukraine [i.e., the DPR and LPR] had committed, and were willing to continue to commit, terrorist acts. Despite the DPR and LPR's early and open embrace of terrorism, followed by a series of significant acts of terrorism, Russian state officials repeatedly provided these groups with additional funds".⁷ The case is then built up as follows, by reference to the key question of what the alleged funders supposedly knew (or intended) in terms of the end use of funds:

- a. Ukraine contends that: "By the spring and summer of 2014, the whole world was aware of the terrorist nature of the aims and activities of the DPR and LPR", who were "engaged in a pattern of violence against civilians, targeting political opponents with the unmistakable purpose of intimidation";⁸ and that anyone providing or collecting funds for the DPR/LPR "knew that their [...] indifference to human life would continue".⁹
- b. Ukraine also contends that the terrorist nature of the acts of the DPR/LPR was "surely common knowledge" following the shooting down of Flight MH17 in July 2014 and the four subsequent specific episodes of reportedly indiscriminate shelling between January 2015 and 2017 to which it refers.¹⁰
- c. Ukraine states that it is necessary to take into account "all of these circumstances, particularly when viewed against the backdrop of the DPR's established track record of targeting civilians".¹¹

7. Thus, Ukraine's case is premised on what a person who was collecting or providing funds for the DPR/LPR in 2014-2017 knew about the acts committed by those groups and their purposes (allegedly, "the whole world was aware"¹²).

8. Yet, in its Order of 19 April 2017, and with the benefit of the close examination of a large collection of evidence, the Court determined that there was not even a plausible allegation of

⁷ MU, para. 279.

⁸ MU, para. 285.

⁹ MU, para. 287.

¹⁰ MU, para. 290-291.

¹¹ MU, para. 290.

¹² MU, para. 285.

terrorism. That determination gave, and still gives, a highly relevant insight into what “the whole world” would indeed have been aware of, i.e. the likely state of knowledge (as to whether funds were being used for terrorist acts) of anyone with access to even a very considerable pool of information and evidence, such as was before the Court in 2017. In short, regardless of what Ukraine now contends the whole world knew, an alleged funder would not be concluding that (so-called) funds were being used for terrorism.

III. There Is Unsurprisingly Still No Evidence of Funding of Terrorism

9. As to the position in the current merits phase, there is no material new evidence to support Ukraine’s exceptionally serious allegation of terrorism funding with respect to the shooting down of Flight MH17. It remains the case that, even if Ukraine’s evidence (and the position as stated by Ukraine’s Security Service) were to be accepted, it would merely show that whoever supplied the weapon used to shoot down Flight MH17 did so specifically in response to a request for assistance in defending against a series of armed strikes by Ukraine’s military aircraft that were taking place within the context of the armed conflict. Likewise, it would show that the persons alleged to have operated the weapon intended to shoot down a Ukrainian military aircraft, and initially believed that they had done so.¹³

10. As to the further central element to Ukraine’s case, i.e. the alleged financing by Russian state officials and other Russian nationals of shelling during the armed conflict in Eastern Ukraine, it remains the case that it is Ukraine alone that has characterised such acts of shelling as “terrorism”.

- a. By contrast, the OHCHR, OSCE and ICRC have consistently characterised such acts (including the specific episodes relied on by Ukraine in this case) as indiscriminate shelling in breach of IHL, but *never* as a breach of the IHL prohibition on spreading terror. Further, if this were indeed terrorism (it is not), on the basis of the reports of the OHCHR, OSCE and ICRC which Ukraine relies on, Ukraine would be equally, if not more, responsible than the forces of the DPR and LPR.¹⁴ Civilian casualties caused by the reported indiscriminate shelling of populated areas have consistently been *greater* in territory controlled by the DPR and LPR, i.e., *through shelling by Ukrainian forces*.¹⁵
- b. Moreover, as part of the Minsk “Package of Measures” of February 2015, Ukraine itself gave an undertaking to “[e]nsure pardon and amnesty [...] of persons in connection with the events that took place in certain areas of the Donetsk and Luhansk regions of Ukraine”.¹⁶ That commitment postdates and encompasses the specific events at

¹³ See further Chapter VI below.

¹⁴ See further Chapter VII below.

¹⁵ As to the fact that such shelling by Ukraine includes use of MLRS of the same type that it says were used by the DPR/LPR, see Chapter VII below.

¹⁶ *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Preliminary

Volnovakha, Mariupol and Kramatorsk that Ukraine now focuses on. It is hardly conceivable that Ukraine would have agreed to pardon and amnesty if it truly considered these to have been “terrorist” acts.¹⁷

- c. Ukraine has also elected to make its very serious allegations of terrorism financing whilst failing to put before the Court the abundant documentation that must exist that would show the activities and movements of Ukrainian armed forces in the vicinity of the alleged terrorist attacks, and therefore allow for a proper assessment of the relevant military backdrop.

11. The final series of episodes relied on by Ukraine concern bombings and killings/ill-treatment of civilians. The principal function of the allegations here appears to be to form a basis from which to allege that the (wholly separate) shooting down of Flight MH17 and the four specific incidents of shelling constitute terrorism. Notably, before commencing the present proceedings, Ukraine did not request the Russian authorities’ legal assistance in the investigation of these offences, and it did not provide information in its possession to the Russian authorities, despite Russia’s express request to do so.¹⁸

IV. Ukraine Relies on Inferences to Be Drawn from an Alleged Pattern of Conduct

12. Consistent with the absence of solid evidence, Ukraine seeks to prove its allegations of terrorism financing – and in particular the requisite mental elements of the offence – largely by inference from an (untenable) alleged pattern of conduct.¹⁹

13. Before entering into any details on the evidence, Russia recalls that, in the *Bosnia Genocide* case, the Court reaffirmed that it “has long recognised that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive” and applied this standard to allegations under Article III of the Genocide Convention.²⁰ Further, in respect of the claims related to the obligations to prevent and punish genocide, the Court required “a high level of certainty appropriate to the seriousness of the allegation”.²¹ In relation to the question of whether the specific

Objections submitted by the Russian Federation, 12 September 2018 (“Preliminary Objections of the Russian Federation” or “PORF”), para. 100.

¹⁷ See further Chapter VIII below.

¹⁸ See, e.g., Note Verbale No. 3219/dnv of the Ministry of foreign Affairs of the Russian Federation to the Embassy of Ukraine, 4 March 2016 (Annex 1 to PORF), p. 56.

¹⁹ Notably, the allegations of terrorism financing with respect to the DPR/LPR and their alleged conduct in Eastern Ukraine are entirely separate from the allegations concerning financing of “other illegal armed groups” allegedly responsible for bombings in Ukrainian cities: see MU, para. 115. The only link that Ukraine pleads exists between “the DPR, the LPR, the Kharkiv Partisans, and others” is that they are all allegedly “Russia’s proxies” (see, for instance, MU, paras. 25 and 41). It follows from this that the bombings are not relevant to the terrorism financing claims with respect to the killing and intimidation, the shooting down of Flight MH17 and the shelling episodes.

²⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, I.C.J. Reports 2007 (I), p. 90, para. 209.

²¹ *Ibid.*, para. 210.

intent required to establish genocide may be inferred, the Court has held that this must be “the only reasonable inference that can be drawn from the pattern of conduct [...] relied upon”.²² The same approach is called for here with respect to the exceptionally grave allegations against Russia for any breach of the ICSFT.

14. In this respect, Ukraine seeks to build its whole case around two references to “terror” in the 2014 reports of the OHCHR that are taken entirely out of their context (of certain reported individual killings and mistreatment).²³ It contends that these two isolated references evidence the existence of a “substantial risk” that weapons would be used in indiscriminate attacks,²⁴ which Ukraine characterises as terrorist acts. This is the foundation on which Ukraine seeks to build its case with respect to the shoot down of Flight MH17 and the episodes of reported indiscriminate shelling.

15. Yet these two isolated references were made in the different context of alleged individual killings and mistreatment, acts which the OHCHR has also reported Ukraine as having engaged in. The OHCHR did *not* use the same language in subsequent reports (including after the current proceedings were initiated). It has never used the language of “terrorism” with respect to either the tragic shoot down of Flight MH17 or episodes of reported indiscriminate shelling. Russia also recalls that the OHCHR reports were before the Court at the provisional measures stage, and Ukraine evidently – and correctly – thought little of these two references then, but now seeks to place them at the centre of its case.

V. The Express Elements of the Offence of Terrorism Financing

16. By way of a final introductory observation, Russia notes that Ukraine’s attempt to portray the various events that it relies on as concerning terrorism financing is entirely dependent on its systematic – and impermissible – watering down of the express elements of the offence of financing of terrorism established by Article 2(1) of the ICSFT. It is recalled that this provides:

“1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or

(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict,

²² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015*, p. 129, para. 440. See also p. 68, para. 148.

²³ See MU, paras. 21, 25, 53, 196, 213, 285 and 291; in particular para. 285 referring to OHCHR, Report on Human Rights Situation in Ukraine (15 June 2014), para. 207 (Annex 293 to MU).

²⁴ MU, paras. 285-294.

when the purpose of such act, by its nature and context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.”

17. As to its expansive (incorrect) interpretation:

- a. Ukraine interprets the provision/collection of “funds” expansively and well beyond its ordinary meaning in context and in light of the objects and purposes of the ICSFT.
- b. Ukraine seeks to give the broadest possible meaning to the express mental elements of the offence of terrorism financing in the chapeau to Article 2(1) of the ICSFT of “intention” or “knowledge” that the funds should/are to be used to commit a terrorist act. Ukraine’s position is that these are overlapping mental elements and that recklessness, indirect intent or constructive knowledge will suffice.
- c. Similarly, Ukraine takes the broadest possible interpretation of the mental elements of the definition of a terrorist act under Article 2(1)(a) of the ICSFT (read together with Article 1(1)(b) of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation²⁵) and under Article 2(1)(b) of the ICSFT. It seeks to subject both the requirement of a specific intent to kill or harm civilians and the requirement to establish a specific terrorist purpose to an unduly low threshold.

18. While the details of Ukraine’s expansive case on interpretation are considered in the Chapters that follow, Russia notes at the outset that on Ukraine’s expansive interpretation of the offence of terrorism financing, Ukraine’s own provision of funds to the DPR and LPR in return for coal or steel (or for any other reason)²⁶ would entail the provision of funds in circumstances where Ukraine knew (applying its misconceived interpretative approach) that those funds are to be used to commit a terrorist act under Article 2(1) of the ICSFT.

* * *

²⁵ Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 23 September 1971, *United Nations Treaty Series (UNTS)*, Vol. 974, p. 178 (the “Montreal Convention”).

²⁶ See Ernst & Young, Extractive Industries Transparency Initiative, National Report of Ukraine 2014–2015, https://eiti.org/files/documents/uaeiti_2014-2015_report_eng_final_0.pdf, p. 11, emphasis added: “At the beginning of 2016 coal was produced at 150 mines, of them 85 mines of all types of ownership (83 in 2014), or 57% of the total number of Ukrainian mines (55% - 2014), are located in the territories of Donetsk and Luhansk regions that are temporarily not under control of the Ukrainian authorities”. By way of example, in 2014 the Donbas Fuel and Energy Company (DTEK) generated 10% of its revenue (around USD 730 million) from power generation, electricity distribution and coal mining in the territories under the control of the DPR/LPR, where 29% of the company’s assets (around USD 1,934 million) were located, and the company produced a total of 4.6 million tons of coal (16% of total output) from the non-government controlled areas of the Donetsk and Lugansk regions in 2015 and 8 million tons (26% of total output) in 2016: see DTEK, 2014 Results Corporate Presentation DTEK Energy B.V., March 2015, <https://energo.dtek.com/content/files/fy2014/dtek2014-ir-presentation-march2015-pdf.pdf>, p. 27; DTEK, 2015 Results Corporate Presentation DTEK Energy B.V., March 2016, <https://www.dtek.com/content/files/fy2015/ir-presentation-march-2016-2.pdf>, p. 26; DTEK, FY 2016 Results Corporate Presentation DTEK Energy B.V., April 2017, https://www.dtek.com/content/files/dtek_preziryfy2017_02-10-17.pdf, p. 18.

19. This Part of Russia’s Counter-Memorial is structured as follows:

- a. Chapter II explains that, properly interpreted, the provision/collection of “funds” under Article 2(1) of the ICSFT does not include non-financial support for insurgents, including through the supply of weapons;
- b. Chapter III explains the key role that the offence of terrorism financing as defined in Article 2(1) plays with respect to the ICSFT as a whole, including the substantive provisions relied on by Ukraine. Russia interprets the mental elements of “intention” or “knowledge” in the chapeau to Article 2(1) of the ICSFT that must be established for there to be an offence of financing of terrorism;
- c. Chapter IV explains the definition of terrorist acts under Article 2(1)(a) of the ICSFT read together with the two treaty offences in Annex A that Ukraine relies on, namely (i) the offence of the intentional destruction of a civil aircraft in Article 1(1)(b) of the Montreal Convention, and (ii) the offence under Article 2(1) of the International Convention for the Suppression of Terrorist Bombings (“ICSTB”);²⁷
- d. Chapter V explains the correct interpretation of the definition of terrorist acts under Article 2(1)(b) of the ICSFT, namely the requisite specific intent and purpose to commit a terrorist act as defined;
- e. Chapter VI responds to Ukraine’s case that Russian officials or nationals allegedly financed the tragic shooting down of Flight MH17, showing that there is no material evidence of the presence of the requisite mental elements under the chapeau to Article 2(1) of the ICSFT;
- f. Chapter VII responds to Ukraine’s case that Russian officials or nationals allegedly financed acts of shelling at Volnovakha, Mariupol, Kramatorsk and Avdiivka that are alleged to constitute terrorism, and also its case with respect to certain bombings and killings of individuals;
- g. Chapter VIII responds to Chapter 6 of Ukraine’s Memorial, i.e., the specific allegations that Russia breached its obligations under Articles 8, 9, 10, 12 and 18 of the ICSFT;
- h. This Counter-Memorial closes with Russia’s submission.

²⁷ International Convention for the Suppression of Terrorist Bombings, 15 December 1997, *UNTS*, Vol. 2149, p.256.

CHAPTER II FUNDS WITHIN THE MEANING OF THE ICSFT

I. Introduction

20. In its Judgment on Preliminary Objections of 8 November 2019 the Court unequivocally confirmed that

“[t]he financing by a State of acts of terrorism is not addressed by the ICSFT”.²⁸

Accordingly, the Court also found that any matter of State responsibility for a State allegedly financing acts of terrorism

“lies outside the scope of the Convention”.²⁹

21. In its Judgment, the Court further emphasized that “the interpretation of the definition of ‘funds’ could be relevant [...] at the stage of an examination of the merits”.³⁰ This is indeed an important issue that now falls for consideration since Ukraine alleges that the (purported) provision of weapons comes within the scope of the ICSFT.³¹

22. In the following discussion, the Russian Federation will demonstrate that the wording of Article 1 of the ICSFT read in the context of other provisions of the treaty, its object and purpose, its drafting history, as well as other relevant rules of international law all confirm that any alleged delivery of weapons, assuming *arguendo* that such took place, does not amount to the provision of “funds” within the meaning of Article 2(1) of the ICSFT.

23. At the outset, it has however to be noted first that Ukraine itself, in various diplomatic notes preceding the submission of the current case, has carefully distinguished between the alleged *financing* of terrorist attacks on the one hand, and others forms of *support* for such acts on the other.³²

24. Even when bringing its case, Ukraine still seems to have implicitly accepted the distinction between the *financing* of terrorism (covered by the ICSFT) and other means of *support* of terrorism (as being beyond the scope of the ICSFT). It is for this reason that the very heading of the Chapter of Ukraine’s Application dealing with alleged violations of the ICSFT drew a distinction between the alleged “supply of arms” to terrorist groups on the one hand, and the “financing” of such alleged

²⁸ *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 558 (“Judgment of 8 November 2019”), para. 59.

²⁹ *Ibid.*

³⁰ Judgment of 8 November 2019, para. 62.

³¹ MU, p. 80 et seq.

³² See e.g. Note Verbale No. 72/22-620-1069 of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, 7 May 2015 (Annex 24 to PORF), as well as Note Verbale No. 72/22-484-1103 of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, 13 May 2015 (Annex 26 to PORF).

groups on the other.³³ Ukraine thereby distinguished between the financing of terrorist activities and other activities not amounting to such financing. Ukraine thereby acknowledged that any such supply of weapons does not constitute the financing of alleged terrorist acts within the meaning of the ICSFT.

25. Second, this approach also stands in line with the way the Ukrainian government interpreted the ICSFT when in 2002, it submitted the ICSFT for ratification by the Ukrainian parliament. The memorandum proposing the ratification of the ICSFT by Ukraine provided that Ukraine's envisaged accession to the ICSFT was

“driven by the need to counter, through joint efforts, the social phenomenon of terrorist *financing*”.³⁴

26. It then further referred to “*financial* transactions” that are meant to be combated by the ICSFT.³⁵ According to Ukraine itself the ICSFT thus

“qualifies terrorist *financing* as a criminal offence”,³⁶

which the State parties of the Convention have to prevent

“without impeding in any way the freedom of legitimate *capital* movements.”³⁷

27. It must be further noted that the said explanatory memorandum, laying out Ukraine's own understanding of the scope and content of the ICSFT, at no point claimed that the ICSFT as a matter of treaty law regulates or prohibits other forms of material support to terrorist organizations. Notably, the explanatory memorandum makes no mention whatsoever to the transfer of weapons or arms as being covered by the ICSFT, although Ukraine now claims that such are also covered by the ICSFT.

28. Third, this distinction between the provision of arms to terrorists on the one hand, and the financing of terrorists on the other, is also reflected in two separate sets of provisions of Ukraine's own penal code: while Article 258-4 of the Criminal Code of Ukraine *inter alia* deals with the arming of terrorists, Article 258-5 of the Criminal Code of Ukraine as per its title specifically addresses the “Financing of Terrorism”. Financing and arming thus constitute in Ukraine's own understanding two different acts.³⁸

³³ *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Application instituting proceedings, 16 January 2017 (“Ukraine's Application of 16 January 2017” or “Application”), p. 26; heading number 1.

³⁴ Explanatory note on the draft law of Ukraine on ratification of the International Convention for the Suppression of the Financing of Terrorism (Law No. 149-IV, 12 September 2002), 8 July 2002 (Annex 7 to PORF), p. 1 (emphasis added).

³⁵ *Ibid.* (emphasis added).

³⁶ *Ibid.*, p. 2 (emphasis added).

³⁷ *Ibid.* (emphasis added).

³⁸ Criminal Code of Ukraine, 5 April 2001, Articles 258-4 and 258-5 (Annex 51).

II. Wording of Article 1(1) Read in Conjunction with Article 2(1) of the ICSFT

29. The central provision of the ICSFT, Article 2(1), prohibits the provision or collection of *funds* with the intention that they should be used, or in the knowledge that they are to be used, in full or in part, in order to carry out any of the offences listed therein. The term “funds” is defined in Article 1(1) of the ICSFT, which provides that funds are

“assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit”.

30. The notion of “assets”, as used in Article 1(1) of the ICSFT, must in turn be read in the context of the provision as a whole, and in particular in light of the specific categories of assets provided, namely bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit, as well as documents or instruments evidencing title to, or interest in, such assets. Those examples all refer *exclusively* to assets that share three common characteristics: (i) they have an inherent monetary value as such; (ii) they are forms of payments, and (iii) they can be freely and legally purchased, exchanged and sold. In serving as examples for the interpretation of the term “assets” they indicate that the provision is only meant to encompass instruments and titles, be they movable or immovable, that are similar in nature to those explicitly listed in Article 1(1) of the ICSFT. None of these listed assets are, however, items that can be used in and of themselves to undertake terrorist activities. Or to put it otherwise, the definition aims at covering items that are meant to *finance* the commission of terrorist activities, rather than items that are themselves means to be resorted to in order to *commit* these very acts of terrorism.

31. As a matter of fact, “financing” is by its very definition an ancillary activity, i.e., an activity that enables the recipient to then decide how, and for what purpose, to use the funds that have been provided. This stands in contrast to a situation where the very means to commit the alleged terrorist acts are being provided, which does not amount to the “financing” of such acts.

III. Interpretation of the Notion of “Funds” In Light of Other Provisions of the ICSFT

A. TITLE OF THE INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM

32. The Court has previously noted that the purpose of a treaty “is that indicated in its title”.³⁹ In this respect, the title of the ICSFT does indeed demonstrate that it is only the financing of terrorist activities that is governed by the ICSFT.

³⁹ *Certain Norwegian Loans (France v. Norway), Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 24.

33. The title of the ICSFT refers to the suppression of the “*financing* of terrorism” or, in the French version, the “*financement* du terrorisme”. Accordingly, the purpose of the “International Convention for the Suppression of the *Financing* of Terrorism” (“Convention internationale pour la répression du *financement* du terrorisme”)⁴⁰ is *not* generally to cover *any form of support* of terrorism. Rather the ICSFT is meant, as confirmed by this title, specifically to prevent *financial support* of terrorism.

34. Hence, the term “funds”, as used in Article 2 of the ICSFT, must be interpreted in light of the aim of the Convention to prohibit specifically the *financing* of terrorism, rather than broadly prohibiting *all forms of support* for such alleged acts.

35. This result is further confirmed by the Court’s Judgment in the *Oil Platforms* case, where the Court compared the title of the instrument providing for the Court’s jurisdiction in that case with that of other contemporaneous treaties covering a similar subject-matter. In *Oil Platforms* the Court accordingly first noted that

“the actual title of the Treaty of 1955 – contrary to that of most similar treaties concluded by the United States at that time, such as the Treaty of 1956 between the United States and Nicaragua – refers, besides ‘Amity’ and ‘Consular Rights’, not to ‘Commerce’ but, more broadly, to ‘Economic Relations’.”⁴¹

36. Taking this broader formula into account, the Court then concluded that

“it would be a natural interpretation of the word ‘commerce’ in [...] the Treaty of 1955 that it includes commercial activities in general – not merely the immediate act of purchase and sale, but also the ancillary activities integrally related to commerce”.⁴²

37. To similar effect, where the title of a treaty like the ICSFT contains a very specific and limited concept, i.e., “financing” rather than “supporting”, and where at the same time the titles of other contemporaneous and closely related treaties use a broader terminology, one cannot but conclude (to paraphrase the Court in *Oil Platforms*) that it would be a natural interpretation of the word “financing”, as used in the title of the ICSFT, so as *not* to encompass the transfer of non-financial assets.

38. As a matter of fact, where States have wanted also to regulate the transfer of weapons in anti-terrorism conventions, they have addressed the matter *explicitly*. They have done so by choosing a title that broadly covers all types of support for terrorist activities, and by then also including provisions to that effect in the operative part of the respective treaty. Indeed, it is hard to imagine that a matter as sensitive as regulating the provision of weapons to non-state groups would be addressed, as claimed by Ukraine, implicitly and *en passant*, without explicitly referring to it and regulating the

⁴⁰ Emphasis added.

⁴¹ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996, p. 803, 819, para. 47.

⁴² *Ibid.*, para. 49.

details thereof. It is even less plausible that such a sensitive question would fall within the scope of a treaty without the matter having been subject to a very thorough debate throughout the drafting process.

39. Consistent with this reasoning, in 1998 (i.e., only one year prior to adoption of the ICSFT) States within the framework of the League of Arab States adopted an anti-terrorism convention with a notably broader title, namely the “Arab Convention for the *Suppression* of Terrorism”.⁴³ This Convention, as confirmed by its title and unlike the ICSFT, not only regulates the *suppression of the financing* of terrorism, but more generally deals with the *suppression* of terrorism *in toto*. The Arab Convention, unlike the ICSFT, was thus meant to also address other forms of support of terrorism. Accordingly, and in line with its broad title, the “Arab Convention for the *Suppression* of Terrorism” in its Article 3- I(3) specifically addresses

“the movement, importation, exportation, stockpiling and use of weapons, munitions and explosives [...] as well as procedures for monitoring their passage through customs and across borders in order to prevent their transfer from one Contracting State to another or to third-party States other than for lawful purposes”.

40. The same holds true for the Convention of the Organization of African Unity on the *Prevention and Combating* of Terrorism (“OAU Convention”),⁴⁴ which was adopted in July 1999, i.e., only five months prior to the adoption of the ICSFT. Again, in line with its broad title, and unlike the ICSFT it not only regulates in its Article 4(1) the *financing* of terrorist activities, but also *other forms of support* for such acts. Consistent with this broad scope, Article 4(2)(b) of the OAU Convention explicitly encompasses the obligation to

“(b) develop and strengthen methods of monitoring and detecting plans or activities aimed at the illegal cross-border transportation, importation, export, stockpiling and use of arms, ammunition and explosives and other materials and means of committing terrorist acts”.

41. Thus, as could only be expected, where a matter as important and sensitive as the supply of arms is concerned, the parties to the OAU Convention also thought it necessary specifically to include a provision expressly aimed at weapon supply in the scope of the notion of support of terrorist activities. Further, where the parties to the OAU Convention refer to “funds”, they plainly had in mind financial resources, not weaponry. In the 2004 Protocol to this OAU Convention, concluded with the desire “of ensuring the effective implementation of the OAU Convention on the Prevention and Combating

⁴³ The Arab Convention for the Suppression of Terrorism, April 1998, available at: https://www.unodc.org/images/tldb-f/conv_arab_terrorism.en.pdf (emphasis added).

⁴⁴ Convention of the Organization of African Unity on the Prevention and Combating of Terrorism (“OAU Convention”), July 1999, available at: https://au.int/sites/default/files/treaties/37289-treaty-0020_-_oau_convention_on_the_prevention_and_combating_of_terrorism_e.pdf (emphasis added).

of Terrorism”,⁴⁵ and in order to “supplement the Convention”,⁴⁶ its Article 3(1)(c) obliges State parties *inter alia* to compensate victims of terrorist acts and their families with confiscated *funds* used or allocated for the purpose of committing a terrorist act. Yet, since such funds are thus meant financially to compensate victims of terrorist acts, the term cannot be meant to include weapons, but instead must be limited to financial resources.

42. Reference should also be had to the Convention of the Organisation of the Islamic Conference on Combating International Terrorism, adopted on 1 July 1999, i.e., again only five months prior to the ICSFT. This OIC Convention, unlike the ICSFT, and in line with its broad title which refers to “Combating International Terrorism”, concerns the fight against terrorism in general, rather than merely addressing the financing of terrorism. In line with its broad title, the OIC Convention then regulates financing, as well as other forms of support of terrorist acts. Accordingly, Article 3(I) of the OIC Convention on Combating International Terrorism provides that the contracting States are committed

“not to execute, initiate or participate in any form in [...] *financing* [...] *or supporting* terrorist acts whether directly or indirectly.”⁴⁷

43. In the same vein Article 3 (II) lit. (A) no. 3 of the OIC Convention specifically addresses the

“transportation, importing, exporting stockpiling, and using of *weapons, ammunition and explosives*”.⁴⁸

44. Accordingly, the OIC Convention, again in line with its very broad title, not only regulates the financing of terrorist acts, but also deals with forms of non-financial support. Besides, Article 3(I) of the OIC Convention on Combating International Terrorism clearly distinguishes between the arming of terrorist elements on the one hand, and their financing on the other.

45. The drafters of the ICSFT must obviously have been aware of these other closely related conventions which had been adopted just months before the ICSFT, and which had been negotiated in parallel with the ICSFT. It can thus safely be inferred that the drafters of the ICSFT deliberately decided not to select a broader title, and indeed content, for the ICSFT. Had the drafters indeed wanted also to encompass forms of non-financial support of terrorist activities they would have chosen, being aware of those other contemporaneous broad anti-terrorist treaties, a different title such as “International Convention for the Suppression of *the Support* of Terrorism”.

⁴⁵ Protocol to the OAU Convention on the Prevention and Combating of Terrorism, 8 July 2004, available at: [https://au.int/sites/default/files/treaties/37291-treaty-0030 - protocol to the oau convention on the prevention and combating of terrorism_e.pdf](https://au.int/sites/default/files/treaties/37291-treaty-0030_-_protocol_to_the_oau_convention_on_the_prevention_and_combating_of_terrorism_e.pdf), preambular paragraph 16.

⁴⁶ See Article 2 of the Protocol to the OAU Convention on the Prevention and Combating of Terrorism.

⁴⁷ Convention of the Organisation of the Islamic Conference on Combating International Terrorism, 1 July 1999, available at: <https://undocs.org/en/A/54/637> (emphasis added).

⁴⁸ *Ibid.* (emphasis added).

46. Consistent with its narrow title, the ICSFT (unlike other significantly broader treaties) as a matter of treaty law thus obliges States to suppress the *financing* of terrorism. It does not encompass other forms of support, which continue to be governed by customary international law. Any possible violations of such customary law based prohibitions (including the provision of weapons to non-State actors by a State), as confirmed by the Court in its judgment on jurisdiction and admissibility, fall outside the Court’s jurisdiction under the ICSFT’s compromissory clause. This is in line with the Court’s reasoning that:

“[a]s the title of the ICSFT indicates, the Convention specifically concerns the support given to acts of terrorism *by financing them*.”⁴⁹

Respectively in the authoritative French text of the judgment:

« Comme l’indique son intitulé, la CIRFT réprime précisément le fait d’appuyer la commission d’actes de terrorisme en les finançant. »⁵⁰

B. PREAMBLE

47. In the same vein, the preamble of the ICSFT also refers to the aim of the treaty to suppress specifically the *financing* of terrorist activities rather than more generally to suppress any support for terrorist activities. Particularly telling in this respect is preambular paragraph 7, as well as preambular paragraphs 10-13, of the ICSFT.

48. Preambular paragraph 7 recalls the work of the General Assembly on the prevention of the financing of terrorists and terrorist organizations. It recalls in particular General Assembly resolution 51/210 of 17 December 1996. In this resolution the General Assembly had called upon States to take steps to prevent and counteract the financing of such individuals and organizations regardless of

“whether such *financing* is direct or indirect through organizations which also have or claim to have charitable, social or cultural goals or *which are also engaged in unlawful activities such as illicit arms trafficking, drug dealing and racketeering*”.⁵¹

49. Under preambular paragraph 7, it is thus also the aim of the ICSFT to cover the *recipients* of financial support, i.e., terrorists and terrorist organizations that might as a separate matter be engaged *inter alia* in the trafficking in arms. Put another way, the ICSFT is meant to procure the eradication of financial support for terrorist organizations, which organizations might then acquire weapons or ammunition with the financial support previously received. *A contrario* this preambular paragraph thereby confirms that only direct or indirect *financial* support to terrorists and terrorist organizations, but not support by way of providing physical means to commit terrorist acts, is covered by the ICSFT.

⁴⁹ Judgment of 8 November 2019, para. 62 (emphasis added).

⁵⁰ *Ibid.* (emphasis added).

⁵¹ Emphasis added.

50. Besides, preambular paragraph 7 further recalls the need to adopt

“regulatory measures to prevent and counteract *movements of funds* suspected to be intended for terrorist purposes *without impeding in any way the freedom of legitimate capital movements*”.⁵²

51. This reference in preambular paragraph 7 to legitimate *capital movements*, which should not be impeded by measures aimed to prevent certain *movements of funds*, confirms that funds are to be understood as merely encompassing funds that possess a monetary value as such.

52. Preambular paragraphs 12 and 13 of the ICSFT also specifically refer to the *financing* of acts of terrorism and terrorist organizations. Preambular paragraph 12 of the ICSFT thus notes that

“existing multilateral legal instruments do not expressly address such *financing* [of terrorists]”.⁵³

53. Accordingly, the ICSFT was meant to supplement other pre-existing legal instruments so that, henceforth, there would also be a prohibition of specifically the provision of *financial* support for terrorists. The aim of the ICSFT was thus a limited and specific one, namely expressly to address and prohibit the monetary support for terrorists and terrorist organizations.

54. If the ICSFT had indeed been meant to cover generally all forms of direct support for terrorists, it would in particular have been necessary to rephrase preambular paragraphs 10-13 as follows:

[10] Considering that the financing *and other forms of support* of terrorism is a matter of grave concern to the international community as a whole,

[11] Noting that the number and seriousness of acts of international terrorism depend on the financial *or other forms of support* that terrorists may obtain,

[12] Noting also that existing multilateral legal instruments do not expressly address such financial *or other forms of support* [...],

[13] Being convinced of the urgent need to enhance international cooperation among States in devising and adopting effective measures for the prevention of the financing *and of other forms of support* of terrorism, as well as for its suppression through the prosecution and punishment of its perpetrators”.

55. Yet, preambular paragraphs 10-13, as drafted and adopted, all limit the scope of the ICSFT to the provision of *financial* support for terrorist and terrorist organizations.

⁵² Emphasis added.

⁵³ Emphasis added.

56. The preamble of the ICSFT therefore confirms that only various forms of *financial* support to terrorist and terrorist organization is covered by the ICSFT, but not direct support in the form of providing as such the means to commit terrorist acts.

C. ARTICLE 8(4) OF THE ICSFT

57. Other provisions in the ICSFT confirm this interpretation. Notably, Article 8(4) of the ICSFT obliges State parties to

“consider establishing mechanisms whereby the funds derived from the forfeitures [of funds] referred to in this article are utilized to compensate the victims of offences referred to in article 2, paragraph 1, subparagraph (a) or (b), or their families.”

58. Article 8(4) of the ICSFT accordingly presupposes that the funds that have been seized under Article 8(1) of the ICSFT can be subject to forfeiture in order for them to be used as financial reparation for victims of the principal offence, i.e. the terrorist activities themselves. This possibility of forfeiture, as envisaged by Article 8(4), in turn presupposes that the seized funds, which had been intended to finance terrorist activities, can compensate those that have suffered from terrorist activities. It is obvious that non-monetary items such as weapons cannot be used in such a manner, nor could they be sold on the *open* market in order for the proceeds of such sale to compensate possible victims.

59. Article 8(4) of the ICSFT therefore, by necessary implication, confirms that the ICSFT at large, and Article 1 of the ICSFT in particular, only cover forms of *financial* support to terrorist activities, but not the direct support in the form of providing the means to commit terrorist activities.

D. ARTICLE 12(2) OF THE ICSFT

60. In the same vein, Article 12(2) of the ICSFT provides that

“2. States Parties may not refuse a request for mutual legal assistance on the ground of *bank secrecy*.”⁵⁴

61. This provision confirms once again that the focus of the ICSFT is on financial transactions, and financial transactions only, since it deals exclusively with the issue of the secrecy of *financial* transactions, but not with other form of secrets.

62. If the ICSFT were indeed to cover the transfer of weapons, it would in particular have been necessary to also address the issue of military secrets or related matters of national security either in Article 12(2) of the ICSFT or elsewhere. As a matter of fact, if the drafters had indeed wanted to cover the supply of weapons one would expect the treaty to contain a provision addressing, in one way or another, the issue of whether or not requests for mutual legal assistance may be refused on

⁵⁴ Emphasis added.

grounds of military secrets or national security. This is due to the fact that any cross-border transfer of weapons is, to state the obvious, intrinsically linked to issues of national security.

63. *A contrario*, the lack of any such provision regulating a possible denial of requests for mutual legal assistance for reasons of national security therefore confirms that the transfer of weapons was not perceived as being governed by the ICSFT.

E. ARTICLE 13 OF THE ICSFT

64. Article 13 of the ICSFT further provides that none of the offences set forth in Article 2 of the ICSFT shall be regarded, for the purposes of extradition or mutual legal assistance, as a *fiscal* offence and that States Parties may not refuse a request for extradition or for mutual legal assistance on the ground that it concerns a *fiscal* offence.

65. This, once more, implies that the offences that the ICSFT is addressing are offences of a financial character, given that those offences relate to the non-payment of taxes and similar duties. Hence the need formally to exclude the possibility of claiming that such offences constitute fiscal offences for purposes of the ICSFT. In contrast, offences related to the transfer of items to be directly used for terrorist acts by their very nature never constitute fiscal offences, which means Article 13 of the ICSFT would be at least redundant as far as such transfers are concerned – if one were to follow Ukraine’s interpretation of the term “funds” in Article 1 of the ICSFT.

F. ARTICLE 18 OF THE ICSFT

66. Similarly, Article 18(1)(b) of the ICSFT specifically addresses *financial* transactions and the behaviour of *financial institutions*, and indeed of such institutions only. In the same vein, Article 18(2)(a) obliges State parties to supervise *money*-transmission agencies only. *A contrario* it does not oblige State parties to supervise legal entities involved in the alleged transfer of items meant directly to commit terrorist acts. This again confirms that such items are not encompassed by the notion of “funds”.

67. Most telling, however, is Article 18(2)(b) of the ICSFT. It obliges States parties to cooperate in the prevention of offences set forth in Article 2 of the ICSFT by considering feasible measures to detect or monitor the physical cross-border transportation of “*cash and bearer negotiable instruments*”⁵⁵ only.

68. This limited scope of Article 18(2)(b) of the ICSFT is further reinforced by the fact that any such border controls shall not impede “the freedom of *capital* movements”.⁵⁶

⁵⁵ Emphasis added.

⁵⁶ Emphasis added.

69. If indeed, as claimed by Ukraine, the physical cross-border transportation of weapons were to amount to the provision of “funds” within the meaning of Article 1 of the ICSFT read in conjunction with Article 2, it cannot be explained why the treaty does not also address cooperation between States Parties to prevent the cross-border transportation of weapons either in its Article 18, or in a separate provision, akin to the cooperation when it comes to the physical cross-border transportation of cash.

70. Indeed, if the term “funds” in Article 1 of the ICSFT were also to cover assets that do not possess an intrinsic financial value as such, the ICSFT would necessarily provide for the obligation of States Parties to consider

“(b) Feasible measures to detect or monitor the physical cross-border transportation of cash and bearer negotiable instruments *or other assets*, subject to strict safeguards to ensure proper use of information and without impeding in any way the freedom of capital movements *and the freedom of movements of goods.*” (emphasis added).

71. By omitting in Article 18 any either direct or indirect reference to the physical cross-border transportation of *non-monetary* funds, the text of the ICSFT itself confirms that the direct supply of means to commit terrorist activities does not fall within the scope of the said Convention.

72. This result that weapons are not encompassed by the notion of “funds”, based on the wording of Article 1 of the ICSFT, as well as from its context, is further confirmed by the object and purpose of the ICSFT.

IV. Object and Purpose of the ICSFT

73. The object and purpose of the International Convention for the Suppression of the Financing of Terrorism is to suppress one specific form of support of terrorist activities only, namely its financing. It aims to do so because assets such as cash, shares, money orders, cheques, titles, or even immovable property [such as buildings], are themselves “neutral” in character. The inherent and specific risk in providing such assets to non-state actors therefore lies in the fact that those assets can readily be liquidated and transformed into bombs or weaponry, but are *prima facie* not linked to terrorist activities. What is more, such financial assets can freely and legally be exchanged and traded both, domestically and internationally. The provision of such *prima facie* “neutral” assets to terrorists therefore poses the particular danger that terrorist activities are supported by financial means that themselves are not subject to domestic or international supervision and regulation, or other forms of control by States, were it not for the ICSFT.

74. Providing financial support to terrorist organizations also gives terrorist organizations the ability to continue their illegal activities, and also participate in regular, otherwise “neutral” economic activities. It was thus specifically the raising of such *financial* support, not previously addressed in a specific treaty that was addressed by the ICSFT.

75. In contrast, any form of cross-boundary trafficking *in weapons* undertaken by individuals has, throughout the world, always been subject to strict governmental scrutiny and control by States. At the same time there was an urgent need to regulate the *financial* support to be provided to terrorists by individuals, be it by way of money or other means of payments, since such financial support had not previously been subject to governmental scrutiny, and even less subject to an international treaty regime.

76. Hence, the object and purpose of the ICSFT was specifically to dry out the financial support for terrorist organizations, which confirms that the provision of means that themselves can be used to commit terrorist acts is not covered by the treaty. This result is further confirmed by the drafting history of the ICSFT.

V. Drafting History of Article 1(1) of the ICSFT

77. The ICSFT is based on a draft submitted by France in 1999.⁵⁷ That draft contained definitions of both “financing” and “funds”, as follows:

“For the purposes of this Convention:

1. ‘Financing’ means the transfer or reception of funds, assets *or other property*, whether lawful or unlawful, by any means, directly or indirectly, to or from another person or another organization.
2. ‘Funds’ means any type of financial resource, including the cash or currency of any State, bank credits, travellers’ cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit and any other negotiable instrument in any form, including electronic or digital form.”⁵⁸

78. This proposal in French read:

« *Aux fins de la présente Convention:*

1. *Financement s’entend du transfert ou réception de fonds, d’avoirs ou d’autres biens, licites ou illicites, par quelque moyen que ce soit, directement ou indirectement, à une autre personne ou à une autre organisation.*
2. *Fonds s’entend de tout type de ressource financière, et notamment des espèces ou de la monnaie de tout État, des crédits bancaires, des chèques de voyage, chèques bancaires, mandats, actions, titres, obligations, traites, lettres de crédit, de tout autre instrument*

⁵⁷ Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, Third session, Draft international convention for the suppression of the financing of terrorism, Working document submitted by France, UN Doc. A/AC.252/L.7, 11 March 1999 (Annex 5 to PORF), p. 2.

⁵⁸ *Ibid.* (emphasis added).

*négociable sous quelque forme que ce soit, y compris sous forme électronique ou numérique. »*⁵⁹

79. Accordingly, while the notion of funds was to be understood for purposes of the Convention as limited to financial resources, the term “financing” was *originally* extended to include also the transfer of other “property” as distinct from “funds”, as well as “assets”. In the perspective of its sponsor, the notion of “financing” was thus to be understood *only* to cover providing financial means, were it not for the proposed explicit use of the words “*or other property*”.⁶⁰ Put another way, it was only the proposed addition of the words “other property” that would have extended the scope of the future ICSFT to also cover direct support for acts prohibited under the Convention.

80. Both definitions of “financing” and “funds” were then merged in a working paper submitted by France where the notion of “property” was still used in addition to, and distinguished from, the notion of assets.⁶¹ It was thus still the understanding of the sponsor that there exists “other property” («*autres biens*») that does *not* at the same time constitute “assets” («*d’avoirs*»). Hence, such other forms of support for terrorist activities by way of transferring items of “other property” that do not at the same time constitute “assets” would accordingly not come within the scope of the envisaged Convention, were it not for the proposed addition of the term “property”.

81. The issue as to whether the term “property” should be retained in draft Article 1 of the ICSFT led to an intense debate within the Working Group dealing with the matter.⁶² It is particularly relevant to note that there was a consensus that “other property” was understood as specifically covering “arms, explosives and similar goods”.⁶³ Consistent with the intended scope of the Convention and this understanding of the term “other property”, it was decided to drop the reference to this concept of “other property”, and thereby also to weapons, from Article 1 as adopted.

⁵⁹ *Ibid.* (emphasis added).

⁶⁰ Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, Third session, Draft international convention for the suppression of the financing of terrorism, Working document submitted by France “Why an international convention against the financing of terrorism?”, A/AC.252/L.7/Add.1, 11 March 1999 (Annex 275 to MU), p. 2.

⁶¹ United Nations General Assembly, 54th Session, Official Records, Supplement No. 37, Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, UN Doc. A/54/37 (Annex 5 to PORF), p. 12.

⁶² Informal summary of the discussion in the Working Group, prepared by the Rapporteur: first reading of draft articles 1 to 8, 12, paragraphs 3 and 4, and 17 on the basis of document A/AC.252/L.7, *ibid.*, p. 57.

⁶³ *Ibid.*

VI. Interpretation of the Notion of “Funds” In Light of Other Relevant Rules of International Law

A. INTRODUCTION

82. This understanding of the notion of “funds” contained in Article 1 of the ICSFT, as only encompassing financial means, as well as more generally the clear distinction between the “financing” of terrorism and the backing of terrorism by way of in-kind support is further confirmed by reference to other relevant international instruments.

B. ARMS TRADE TREATY

83. The Arms Trade Treaty (“ATT”) was adopted on 2 April 2013,⁶⁴ i.e., fourteen years after the ICSFT, which in Ukraine’s reading of the ICSFT had already regulated the transfer of arms to terrorist groups.⁶⁵ Yet, the development of the ATT, as well as its content, confirm that it has been the shared understanding of the States participating in the negotiation of the ATT that prior treaties, including notably the ICSFT that had already entered into force 11 years earlier, had not yet addressed the transfer of conventional weapons to terrorist groups.

84. Already General Assembly resolution 61/89 of 6 December 2006 “Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms”⁶⁶ had confirmed the lack of

“international standards on the [...] transfer of conventional arms”,⁶⁷

which lacuna the General Assembly considered to constitute

“a contributory factor to [...] terrorism”.⁶⁸

85. Yet, if Ukraine’s interpretation of the ICSFT was correct, this finding by the General Assembly, in 2006, as to the lack of any specific legal regulation of the transfer of arms contributing to acts of terrorism would have been blatantly wrong. It follows that it has been, and indeed necessarily must have been, the General Assembly’s understanding, when adopting its resolution 61/89, that the ICSFT

⁶⁴ Arms Trade Treaty, 2 April 2013, United Nations, *UNTS*, Vol. 3013 (“ATT”).

⁶⁵ MU, pp. 166-167.

⁶⁶ United Nations General Assembly, 61st Session, “Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms”, Resolution 61/89, 6 December 2006.

⁶⁷ *Ibid.*, preambular paragraph 9.

⁶⁸ *Ibid.*

did not already regulate the transfer of arms to terrorist groups. In that regard, it is worth noting that Ukraine itself was one of the sponsors of the said resolution,⁶⁹ and later voted in favour of it.⁷⁰

86. This understanding of the scope of the ICSFT, as not encompassing the transfer of weapons, is then further reflected in the preamble of the ATT itself. Its preamble underlines

“the need [...] to prevent their [i.e. conventional arms] diversion [...] for unauthorized end use and end users, including in the *commission of terrorist acts*”.⁷¹

87. If the notion of “funds” within the meaning of Article 1 of the ICSFT truly covered weapons and arms, and if therefore the ICSFT had already addressed the diversion of weapons for the purpose of committing terrorist acts in its Article 2(1), this would have been recorded in the preamble of the ATT. The preamble of the ATT, however, does not contain any reference to the ICSFT. By contrast, the preamble to the ATT specifically mentions certain *other* pre-existing international instruments that do govern the control of arms transfers such as *inter alia* the 2005 “Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime”;⁷² but it does *not* mention the ICSFT.

88. Instead, and to the contrary, the preamble of the ATT deplores the fact that the obligation to prevent the transfer of weapons to terrorist groups was, at the date of the adoption of the ATT on 2 April 2013, i.e. at a time when 182 States including both Ukraine and the Russian Federation had already become bound by the ICSFT, still missing. Yet again, such statement is inconsistent with Ukraine’s claim that already as from 2002 onwards, i.e. from the time the ICSFT entered into force, such an obligation did already exist *as per* Article 2 of the ICSFT.

89. It is also telling that during the negotiations leading to the adoption of Article 6 para. 2 of the ATT, which obliges States Parties of the ATT not to

“authorize any transfer of conventional arms [...] if the transfer would violate its relevant international obligations under international agreements to which it is a Party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms”,

no mention was made of the ICSFT. This again contradicts Ukraine’s claim that the ICSFT encompasses a treaty-based international obligation to prevent the transfer of arms to terrorist groups. The result that the ICSFT does not comprise such an obligation is further confirmed by the fact that leading authorities on the ATT, when analyzing Article 6, para. 2 of the ATT in detail, do *not* even

⁶⁹ Cf. General Assembly resolution 61/89, Notes: Additional sponsors, at: <https://digitallibrary.un.org/record/584694?ln=en>.

⁷⁰ General Assembly resolution 61/89, Voting record, at: <https://digitallibrary.un.org/record/588253?ln=en>.

⁷¹ ATT, preambular paragraph 4; emphasis added.

⁷² See ATT, preambular paragraphs 7-8.

mention the ICSFT.⁷³ Accordingly, the ICSFT is not seen as entailing a treaty-based prohibition on transfer of weapons.

90. This is further confirmed by Article 7 para. 1 lit. b) (iii) of the ATT which contains an additional obligation for States Parties, prior to authorizing the export of weapons, to assess the potential that the conventional arms or items could be used to

“(iii) commit or facilitate an act constituting an offence under international conventions or protocols relating to terrorism to which the exporting State is a Party”.

91. If, as argued by Ukraine, Article 1 of the ICSFT read in conjunction with Article 2 of the ICSFT already obliged States to prevent the transfer of weapons as such, the obligation laid down in Article 7 of the ATT merely to assess the potential for the terrorist use of any such weapons to be transferred, and only in case of an overriding risk of such use not to authorize such transfer, rather than prevent such transfer *per se*, would be significantly lower than the standard allegedly already previously contained in the ICSFT. This would contradict the overall aim of the ATT to *strengthen* the legal regime for the transfer of conventional weapons, rather than to *weaken* it. What is more, commentators on Article 7 of the ATT have never considered the ICSFT to fall within the ambit of that provision,⁷⁴ once again contradicting Ukraine’s overbroad interpretation of the ICSFT.

C. PROTOCOL AGAINST THE ILLICIT MANUFACTURING OF AND TRAFFICKING IN FIREARMS, THEIR PARTS AND COMPONENTS AND AMMUNITION SUPPLEMENTING THE UNITED NATIONS [PALERMO] CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME

92. The 2001 Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations [Palermo] Convention against Transnational Organized Crime⁷⁵ specifically addresses illegal trafficking *in weapons*. This once again confirms that any such regulation, provided it is meant to be covered by a given treaty, is done *expressis verbis*, not least given the sensitive character of the matter. Besides, the preamble to the 2001 Protocol does not mention the ICSFT, which would have been expected if the drafters of the Protocol had shared Ukraine’s position that the transfer of weapons had previously been addressed by the ICSFT.

⁷³ See, *inter alia*, C. Da Silva/ P. Nevill, Article 6 ATT, *passim*, in: C. Da Silva/ B. Wood (eds.), *Weapons and International Law –The Arms Trade Treaty* (2015), as well as S. Casey-Maslen, Article 6 para. 2 ATT, *passim*, in: S. Casey-Maslen/ A. Clapham/ G. Giacca/ S. Parker (eds.), *The Arms Trade Treaty – A Commentary* (2016).

⁷⁴ See *inter alia* C. Da Silva/ B. Wood, Article 7 ATT, 4.5., p. 127 and accompanying footnotes, in: C. Da Silva/ B. Wood (eds.), *Weapons and International Law –The Arms Trade Treaty* (2015), as well as S. Casey-Maslen, Article 7 para. 2 ATT, p. 272, marginal note 7.83 and in particular fn. 121, in: S. Casey-Maslen/ A. Clapham/ G. Giacca/ S. Parker (eds.), *The Arms Trade Treaty – A Commentary* (2016).

⁷⁵ Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, 31 May 2001, *UNTS*, vol. 2326, p. 211.

D. SECURITY COUNCIL RESOLUTIONS

93. The distinction between the *financing* of terrorist activities on the one hand, and other forms of *support in kind* of terrorism, is further confirmed by the practice of the Security Council. Its resolutions of course constitute other relevant rules of international law applicable in the relations between the parties within the meaning of Article 31 para. 3 lit. c of the Vienna Convention on the Law of Treaties.

94. Security Council resolution 1373 (2001) indicated that “funds” are to be understood as various forms of “*financial assets*” when obliging the member States of the United Nations to freeze the

“*funds and other financial assets* [...] of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts”.⁷⁶

95. The same resolution further confirmed the distinction between the *support* for terrorist activities e.g., by supplying weapons⁷⁷ on the one hand, and its *financing* on the other, when obliging States to deny safe haven to those who

“*finance, plan, support, or commit terrorist acts*”.⁷⁸

96. This distinction was then reiterated by Security Council resolution 1377 (2001), when referring to “*financial and [...] other forms of support*” for terrorist activities.⁷⁹

97. Most recently, and indeed soon after Ukraine had brought its case under the ICSFT,⁸⁰ the Security Council in resolution 2370 (2017) reaffirmed the obligations of States to

“prevent and suppress the *financing* of terrorist acts *and* refrain from providing any form of *support* [...] *including by [...] eliminating the supply of weapons to terrorists*”.⁸¹

98. Put another way, Security Council resolution 2370 (2017) confirms that the supply of weapons to terrorists, while forming part of *support* for terrorist acts, does not amount to the specific offence of terrorism *financing*. Yet, as previously shown, the ICSFT only regulates the financing of terrorists, but does not encompass issues related to other forms of support for such terrorists.

99. Most telling is operative paragraph 3 of Security Council resolution 2482 (2019) in which the Security Council, after having made an explicit reference to the ICSFT, calls for the fight against

⁷⁶ Security Council resolution 1373 (2001), operative paragraph 1, lit. c) (emphasis added).

⁷⁷ See *ibid.*, operative paragraph 2, lit. a), obliging States to “[r]efrain from providing any form of support, [...] including by [...] eliminating the supply of weapons to terrorists”.

⁷⁸ *Ibid.*, operative paragraph 2, lit. c).

⁷⁹ See Security Council resolution 1377 (2001), Annex, paragraph 12.

⁸⁰ Ukraine’s Application of 16 January 2017, p. 26.

⁸¹ Security Council, resolution 2370 (2017), preambular paragraph 17, emphasis added; see also most recently Security Council, resolution 2462 (2019), operative paragraph 1.

“illicit *finance* including *terrorist financing* and money-laundering”.⁸² At the same time operative paragraph 10 of the very same resolution, addressing the trade of all types of military materials and components, does *not* contain any such reference to the ICSFT. This confirms the understanding of the Security Council that the ICSFT does not encompass the transfer of weapons, but is limited to regulating the transfer of financial assets.

100. More specifically concerning the notion of “funds”, the Security Council in its practice subsequent to the adoption of the ICSFT has frequently made reference to the notion of “funds and *other financial assets*”⁸³ including *inter alia* in resolution 2199 (2015),⁸⁴ resolution 2253 (2015),⁸⁵ resolution 2255 (2015),⁸⁶ as well as in resolution 2395 (2017),⁸⁷ thereby confirming, by consistently using the word “other”, that the term “funds” is to be understood as something with an inherently *financial* character as opposed to other kind of assets.

VII. Conclusion

101. As has thus been demonstrated, Article 2(1) of the ICSFT read in conjunction with its Article 1, properly interpreted, does not encompass the provision of direct, in-kind support to alleged terrorist groups, but is limited to suppressing the provision of financial support.

102. A different, yet overbroad, reading of the notion of “funds”, as proposed by Ukraine, would be contrary, as shown, to established principles of treaty interpretation.

103. What is more, and even more importantly, it would, be it only through the backdoor, turn the ICSFT into an all-embracing comprehensive anti-terrorist convention on which the international community has so far unfortunately failed to reach a consensus, as confirmed by the still ongoing negotiations on a comprehensive convention on international terrorism.⁸⁸

⁸² Security Council, resolution 2482 (2019), operative paragraph 3; emphasis added.

⁸³ Emphasis added.

⁸⁴ Security Council resolution 2199 (2015), operative paragraphs 3, 4 and 5.

⁸⁵ Security Council resolution 2253 (2015), operative paragraph 2, lit. a); *ibid.*, operative paragraph 75, lit. a).

⁸⁶ Security Council resolution 2255 (2015), operative paragraph 1, lit. a); *ibid.*, operative paragraph 5; *ibid.*, operative paragraph 18.

⁸⁷ Security Council resolution 2395 (2017), preambular paragraph 22.

⁸⁸ See most recently General Assembly resolution A/RES/75/145, 15 December 2020, para. 25.

CHAPTER III
THE MENTAL ELEMENTS OF THE OFFENCE OF TERRORISM FINANCING UNDER
THE CHAPEAU TO ARTICLE 2(1) OF THE ICSFT

104. All of the substantive provisions that Ukraine relies on – i.e. Articles 8-10, 12 and 18 of the ICSFT – apply only in respect of the offence of terrorism financing in Article 2 of the ICSFT. Indeed, as Ukraine has accepted in its Written Statement of Observations and Submissions on Preliminary Objections (“Observations”), “the entire architecture of the treaty hinges on the Article 2 offence”.⁸⁹ In this respect, as the Court explained in its Judgment on Preliminary Objections:

“The ICSFT imposes obligations on States parties with respect to offences committed by a person when ‘that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds *with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out*’ acts of terrorism as described in Article 2, paragraph 1 (a) and (b).”⁹⁰

105. To similar effect, in its Order of 19 April 2017, in responding to Ukraine’s request for provisional measures which was focused on Article 18 of the ICSFT, the Court recognised the importance of the relationship between that provision and the offence under Article 2 of the ICSFT, reasoning that:

“the obligations under Article 18 and the corresponding rights are premised on the acts identified in Article 2, namely the provision or collection of funds with the intention that they should be used or in the knowledge that they are to be used in order to carry out acts set out in paragraphs 1 (a) and 1 (b) of this Article.”⁹¹

106. It follows that it is essential in the current case to focus on all the elements of Article 2(1) of the ICSFT, including the specific requirements with respect to the mental elements of intention, knowledge and purpose. In this section Russia interprets the mental elements which are required to establish the offence of terrorism financing “intention” or “knowledge” under the chapeau to Article 2(1) of the ICSFT. The additional elements of the offence under Article 2(1)(a) and 2(1)(b) of the ICSFT are addressed in Chapters IV and V respectively.

I. The “Intention” or “Knowledge” Necessary for the Offence of Terrorism Financing under the Chapeau to Article 2(1) of the ICSFT

107. Article 2(1) of the ICSFT – and, indeed, the Convention as a whole – is concerned only with the suppression of financing of terrorism, that is the unlawful and wilful provision or collection of “funds with the intention that they should be used or in the knowledge that they are to be used” to carry out one of the specified terrorist acts, as then defined in Articles 2(1)(a) and (b) of the ICSFT.

⁸⁹ WSU, para. 200.

⁹⁰ Judgment of 8 November 2019, para. 59 (emphasis added).

⁹¹ Order of 19 April 2017, para. 74.

The mental element of the offence of terrorism financing, and its component elements, therefore performs a central role in the structure and application of the Convention.⁹²

108. Contrary to Ukraine's repeated assertion, it has never been Russia's position that the ICSFT does not apply during armed conflict.⁹³ However, the ICSFT was not intended to, and does not, criminalise support for a party to an armed conflict as such. The Convention is concerned specifically and exclusively with *terrorism financing* as defined in the Convention, and the requirement that the financier must intend or know that the funds are to be used to commit a terrorist act is critical to that distinction.

109. While the provision or collection of financing under Article 2(1) of the ICSFT may be by direct or indirect means, Article 2(1) contains the further qualification that this must be "unlawfully and wilfully", i.e. a lawful and/or non-deliberate (e.g. inadvertent, negligent or involuntary) provision/collection of funds would not fall within Article 2(1) of the ICSFT.⁹⁴ The key mental requirements are then further spelled out as the provision/collection of funds with the "intention that [funds] should be used" "or" with the "knowledge that [funds] are to be used" to commit a terrorist act as defined in Article 2(1)(a) or (b) of the ICSFT.

110. Hence, the first mental element is the provision/collection of funds "with the intention that they should be used" to carry out a terrorist act as defined in Article 2(1)(a) or (b) of the ICSFT. The second, alternative, mental element is the provision/collection of funds "in the knowledge that they are to be used" to carry out a terrorist act, as defined in Article 2(1)(a) or (b) of the ICSFT.

A. THE ORDINARY MEANING OF THE TERMS USED, IN THEIR CONTEXT, AND IN LIGHT OF OBJECT AND PURPOSE

111. As follows from the ordinary meaning of the phrase "with the intention that [funds] should be used or in the knowledge that [funds] are to be used", "intention" and "knowledge" are plainly not synonyms and they refer to two different, alternative, mental elements. Put another way, the mental

⁹² See, e.g., the commentary relied on by Ukraine: M. Lehto, *Indirect Responsibility for Terrorist Acts*, Martinus Nijhoff, 2009, p. 287 (Annex 490 to MU): "As article 2 has been formulated, [...] it lays all the stress on the subjective side (intention or knowledge)". See also pp. 261 ("The mental element of terrorist financing has been defined carefully, and consists of several components"), 264 ("The criminal nature of terrorist financing relies heavily, if not exclusively, on the guilty mind of the perpetrator. For the purpose of the personal culpability of the financier, the connection is a mental one, created by the criminal knowledge or intention"). By contrast, UN Security Council Resolution 1373 requires Member States to prohibit terrorism financing, while remaining silent as to the mental element of the offence: see United Nations Security Council, Resolution 1373 (2001), operative para. 1(d).

⁹³ Cf. CR 2019/12, 7 June 2019, p. 15, para. 11 (Koh); p. 37, paras. 34-35 (Cheek).

⁹⁴ See e.g. A. Aust, "Counter-Terrorism - A New Approach - The International Convention for the Suppression of the Financing of Terrorism", *Max Planck Yearbook of United Nations Law*, 5, 2001, p. 295: "'wilfully' was added to emphasise that the financing had to be done deliberately, not accidentally or negligently, though the following elements of intention or knowledge are probably sufficient." See also Implementation Kits for International Counter-Terrorism Conventions, Commonwealth Secretariat, p. 268, available at: https://thecommonwealth.org/sites/default/files/key_reform_pdfs/Implementation%20Kits%20for%20Terrorism%20Conventions_0.pdf.

element of “intention” must be interpreted in the context of the immediately following alternative mental element of “knowledge”.

- a. Every term of a treaty must be interpreted in a way that gives it meaning and effect.⁹⁵ Hence if the words “intention that [funds] should be used” were interpreted as meaning or encompassing “knowledge that [funds] are to be used”, that would render the latter wording redundant, which cannot have been intended. This is because, if the words “intention that [funds] should be used” included standards that are merely based on knowledge, there would have been no need to refer to “knowledge that [funds] are to be used” as a separate concept.
- b. Further, where the ICSFT Parties wished to refer to the concept of “intention” alone, they did so (as in Article 2(1)(b)).

112. It is therefore plain that the Contracting States did not agree to a broad concept of “intention that [funds] are to be used” which subsumes knowledge-based mental elements. Rather, they perceived the concept of “intention” as excluding knowledge-based standards and for this reason expressly provided for an alternative “knowledge” mental element. Such knowledge-based standards would include “indirect” intent (i.e. where a consequence is a virtually certain result of a person’s act and that person knows this).

113. Ukraine nonetheless seeks to reinterpret the mental element of “intention” as if the drafters had instead used the terms “*dolus directus*”, “*dolus indirectus*” and “*dolus eventualis*”.⁹⁶ None of these terms are to be found anywhere in the ICSFT. Moreover, while it interprets “intention” expansively as including knowledge-based standards, Ukraine makes no attempt to explain how such an unduly broad interpretation of “intention” can be reconciled with the meaning it ascribes to “knowledge” in the chapeau of Article 2(1). Indeed, Ukraine puts forward no basis in the ICSFT for its interpretation, instead referring to a (supposedly) “common practice in international law” and placing particular reliance on international criminal law.⁹⁷

114. Russia explains below the content of the two alternative mental elements included in the chapeau of Article 2(1) of the ICSFT, starting with the ordinary meaning of the words.

⁹⁵ As recognised in, e.g., *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994, p. 23, para. 47.

⁹⁶ MU, paras. 206-207 with respect to the meaning of “intent” in Article 2(1)(b) of the ICSFT. See also para. 229 applying this broad interpretation of “intent”.

⁹⁷ Ukraine’s basic case has fluctuated. At the preliminary objections stage, the case put before the Court by Ukraine in its Memorial was that Russian officials and other Russian nationals knowingly financed terrorism in Ukraine: see PORF, para. 42 referring to MU, para. 26. During the hearing, however, Ukraine adopted a broader position, alleging that Russian officials and other Russian nationals intentionally and/or knowingly financed terrorism in Ukraine, including with respect to the tragic shoot down of Flight MH17: see CR 2019/12, 7 June 2019, p. 40, para. 49 (Cheek). Ukraine’s revised position relies on conflating the separate mental elements of intent and knowledge, which it wrongly contends are “overlapping”: WSU, para. 235.

1. Ordinary Meaning of “Intention That They Should Be Used”

115. By reference to their ordinary meaning, the words “intention that they should be used” refer to an actual desire or goal – on the part of the financier that the funds “should be used” to commit a terrorist act. Indeed, guidance that Ukraine relies on identifies the subjective element required under the ICSFT as “specific intent”, which is “characterized by the intention of obtaining a certain result prohibited by the texts, namely the pursued goal.”⁹⁸ This is consistent with, and is supported by, the Court’s analysis in cases concerning the Genocide Convention, in which the Court has held that the purpose element of the offence of genocide establishes a requirement of “specific intent” or “*dolus specialis*”.⁹⁹ This is discussed further in Chapter V below.

116. There is no basis in the ICSFT for Ukraine’s unduly broad interpretation of “intention” as encompassing knowledge-based mental elements and in particular “indirect intent” and recklessness. Indeed, Ukraine does not suggest the contrary. Instead, it relies on sources of international law external to the ICSFT such as the general definition of intention in the Rome Statute of the International Criminal Court which, however, does not encompass an offence related to terrorism.¹⁰⁰

2. Ordinary Meaning of “Knowledge That They Are to Be Used”

117. By reference to its ordinary meaning, the phrase “knowledge that they are to be used” (« *sachant qu’ils seront utilisés* ») refers to actual awareness of a fact or situation,¹⁰¹ i.e. that the funds *are* to be used to carry out a terrorist act.

- a. In its Memorial, however, Ukraine argues that these words are to be interpreted as meaning that “all that must be proved is that the financier” “*had to know* that the ‘funds’ would *probably* be used (or *could* be used)” to commit a terrorist act or that “the financier ‘is aware of the *possibility*, sometimes even the *probability*, that the funds may be used for the commission of terrorist acts,’ and ‘*willingly took the risk* that they would be so used.’”¹⁰²
- b. Ukraine seeks to support this interpretation by reference to its take on the object and purpose of the ICSFT and the views of certain commentators. There is, however, no

⁹⁸ UNODC, Guide for the legislative incorporation and implementation of the universal anti-terrorism instruments (2006), p. 15, para. 31 referring to Article 2(1) as a whole.

⁹⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, para. 187. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, p. 3, para. 132: “*dolus specialis*, that is to say a specific intent”.

¹⁰⁰ See MU, para. 206 with respect to Article 2(1)(b) of the ICSFT.

¹⁰¹ A. Stevenson (ed.), *Oxford Dictionary of English* (3rd ed.), Oxford University Press, 2010 (current online version: 2015), entry for “knowledge”.

¹⁰² MU, para. 281 quoting M. Lehto, *Indirect Responsibility for Terrorist Acts*, Martinus Nijhoff, 2009, p. 293, 298 (Annex 490 to MU) (emphasis added) and R. Lavalley, “The International Convention for the Suppression of the Financing of Terrorism”, *Heidelberg Journal of International Law*, Vol. 60, 2000, p. 504 (Annex 484 to MU).

textual basis for Ukraine’s expansive interpretation of the relevant words as including knowledge or a likelihood or risk that the funds “*might*” be used, or “*could*” be used (« *pourraient être utilisés* »), to carry out a terrorist act. None of these words, which could easily have been used, are to be found in the treaty text. Nor is there anything in the ICSFT, which indicates that the Contracting States agreed that it was sufficient to show that the relevant person *should have known* (i.e. constructive knowledge) that the funds are to be used to carry out a terrorist act.

- c. Ukraine seeks to emphasise that the chapeau of Article 2(1) does not refer to “*actual* knowledge that [funds] are to be used”¹⁰³ and on this basis argues that the concept of knowledge must be broad given that it was open to the drafters to add the word “*actual*”, and they did not do so. The correct position is that Ukraine is seeking to extend the terms used beyond the meaning that follows from the usual rules of interpretation, ignoring the ordinary meaning of these words in their context (including reading this phrase as a whole; and as to context, see further below). If the Treaty Parties had been seeking to broaden the knowledge mental element as Ukraine contends, they would have added express language to this effect.

118. In support of its overbroad interpretation Ukraine also says that Article 2(1) of the ICSFT does not require knowledge that “*particular* funds provided will be used for *particular* terrorist acts” and that such an interpretation could not be in good faith.¹⁰⁴ However, that is of no assistance to Ukraine. Pursuant to the ordinary meaning of the words, Article 2(1) of the ICSFT does require that a person must actually know that the funds are to be used in full or in part to carry out a terrorist act within the meaning of Article 2(1)(a) and (b) of the ICSFT, rather than for some other purpose.¹⁰⁵

3. Further Points on Context

119. In addition to the point on context made at paragraph 111 above as to the significance of establishing in the alternative the two different mental elements of intention and knowledge in Article 2(1), the words “*intention that they should be used*” and “*knowledge that they are to be used*” in the chapeau to Article 2(1) of the ICSFT must be read in the context of Article 2(1) of the ICSFT as a whole.

120. One notable element here is that, unlike with respect to the separate specific purpose element of the definition of a terrorist act in Article 2(1)(b) of the ICSFT, the chapeau does not state that the requisite “*intention*” or “*knowledge*” as to the use of the funds may be inferred from the objective

¹⁰³ CR 2019/12, 7 June 2019, p. 33, para. 11 (Cheek) (emphasis added).

¹⁰⁴ MU, para. 280 (emphasis in the original) and see further para. 281, referring to M. Lehto, *Indirect Responsibility for Terrorist Acts*, Martinus Nijhoff, 2009, p. 293 (Annex 490 to MU). See also WSU, para. 203.

¹⁰⁵ The words “*in full or in part*” in no way change the ordinary meaning of the words “*knowledge that [funds] are to be used*” to carry out a terrorist act: *Cf.* MU, para. 280; WSU, para. 201.

“nature or context”. This supports the point arising from the ordinary meaning of the words that the focus is on what the funder actually intended the funds should be used for, or what the funder knew the funds were to be used for.

121. The deliberate nature of the decision not to give circumstantial evidence greater weight is emphasised by the fact that the wording of the chapeau to Article 2(1) of the ICSFT represents a departure from the approach adopted in other UN conventions which were concluded both before and after the ICSFT.¹⁰⁶ For example:

- a. Article 3(3) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 (the “Vienna Convention 1988”)¹⁰⁷ states: “*Knowledge, intent or purpose* required as an element of an offence set forth in paragraph 1 of this article *may be inferred from objective factual circumstances*” (emphasis added).
- b. Article 5(2) of the United Nations Convention against Transnational Organized Crime 2000 (the “Palermo Convention”)¹⁰⁸ states: “The *knowledge, intent, aim, purpose or agreement* referred to in paragraph 1 of this article *may be inferred from objective factual circumstances*” (emphasis added). Similarly, pursuant to Article 6(2)(f): “*Knowledge, intent or purpose* required as an element of an offence set forth in paragraph 1 of this article *may be inferred from objective factual circumstances*” (emphasis added).
- c. Article 28 of the United Nations Convention against Corruption 2002¹⁰⁹ states: “*Knowledge, intent or purpose* required as an element of an offence established in accordance with this Convention *may be inferred from objective factual circumstances*” (emphasis added).

122. Of course, even if these different formulations were to be applied to Article 2(1) of the ICSFT, this would not assist Ukraine since it would mean only that, as a matter of principle, sufficient objective proof could be used to establish the existence of the requisite intention or knowledge. As demonstrated elsewhere in this pleading, Ukraine has failed to put forward sufficient objective proof.¹¹⁰

¹⁰⁶ Reference to such other conventions is to be made, including under Article 31(3)(c) of the Vienna Convention on the Law of Treaties.

¹⁰⁷ *UNTS*, vol. 1582, p. 95. Russia signed the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 on 19 January 1989 and ratified on 17 December 1990; Ukraine signed on 16 March 1989 and ratified on 28 August 1991.

¹⁰⁸ *UNTS*, vol. 2225, p. 209. Russia signed the UN Convention against Transnational Organized Crime 2000 on 12 December 2000 and ratified on 26 May 2004; Ukraine signed on 12 December 2000 and ratified on 21 May 2004.

¹⁰⁹ *UNTS*, vol. 2349, p. 41. Russia signed the UN Convention against Corruption 2002 on 9 December 2003 and ratified on 9 May 2006; Ukraine signed on 11 December 2003 and ratified on 2 December 2009.

¹¹⁰ See Chapters VI, VII below.

123. Ukraine’s reliance on Article 2(3) of the ICSFT, which states that it is not necessary that funds were actually used to carry out an offence referred to in subparagraph 1(a) or 1(b), is misconceived,¹¹¹ as Ukraine accepts in its Observations,¹¹² that provision is not in any way concerned with the required mental elements.¹¹³

4. Object and Purpose

124. As to object and purpose, although Ukraine has referred in its Memorial to the Preamble of the ICSFT in support of its overbroad reading of the mental elements in the chapeau of Article 2(1) of the ICSFT,¹¹⁴ this is of little assistance to its case. While, as Ukraine notes, the Preamble refers to the United Nations Member States’ “unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed”,¹¹⁵ and the “urgent need” to prevent and deter terrorism financing,¹¹⁶ these references tell the interpreter nothing about either what is considered under the ICSFT as constituting an act of terrorism or the mental elements of the offence of terrorism financing, including knowledge.

125. Ukraine also invokes the object and purpose in support of its contention that all that is required is “knowledge that the financier is providing funds to groups or individuals *known to commit terrorist acts*, because doing so necessarily facilitates the recipient’s ability to engage in further acts of terrorism”,¹¹⁷ and that therefore it “must be assumed that the financing of a group which has *notoriously* committed terrorist acts would meet the requirements of paragraph 1” of Article 2 of the ICSFT.¹¹⁸ Whether that is correct or not, the point made is an irrelevance. Such notoriety will be satisfied in relation to entities and persons who are shown to be associates of notorious terrorist groups which have been characterised by the international community as engaging in terrorist acts such as Al-Qaida, Usama bin Laden or the Taliban, including where the person or entity has been designated by the UN Security Council pursuant to Security Council resolution 1373.¹¹⁹ In cases involving

¹¹¹ MU, para. 280; WSU, para. 202.

¹¹² WSU, para. 202, fn. 347.

¹¹³ See also the commentary relied on by Ukraine, M. Lehto, *Indirect Responsibility for Terrorist Acts*, Martinus Nijhoff, 2009, p. 296 (Annex 490 to MU).

¹¹⁴ See, e.g., MU, paras. 280-281 and see also para. 207 with respect to Article 2(1)(b).

¹¹⁵ MU, p. 134, fn. 481 (emphasis omitted).

¹¹⁶ See, e.g., MU, para. 280.

¹¹⁷ MU, para. 280 (emphasis in the original).

¹¹⁸ MU, para. 281, quoting M. Lehto, *Indirect Responsibility for Terrorist Acts*, Martinus Nijhoff, 2009, p. 289 (Annex 490 to MU) (emphasis added). See also p. 290: “For instance, financing a group that has been notoriously involved in aircraft hijacking or in the taking of hostages and that could be expected to continue such odious activities would satisfy the requirements of article 2.”

¹¹⁹ M. Lehto, *Indirect Responsibility for Terrorist Acts*, Martinus Nijhoff, 2009, p. 289 (Annex 490 to MU): “The existing lists of terrorist organisations, groups and individuals for the purposes of preventive asset-freezing spread such notoriety [...]. Thus, the act of financing is less ambiguous where funds have been transferred to a proscribed organisation or to a person who has been listed as an associate of Al-Qaida, Usama bin Laden or the Taliban or on the basis of UN Security Council resolution 1373. In such cases it may be presumed that the financier has intended to finance terrorist activities”

financing of such notorious entities, it would be no defence for the financier to say that he/she intended the funds to contribute to the non-terrorist activities of the relevant group or that he/she could not know whether the funds are to be used to commit a terrorist act or for some other purpose.

126. There has, however, been no such characterisation (whether by designation or otherwise¹²⁰) of the DPR/LPR, and the alleged perpetrators of terrorist acts in the present case can in no way be suggested to be notorious terrorist groups equivalent to groups such as Al-Qaida.

B. TRAVAUX PRÉPARATOIRES AND OTHER MATERIALS

1. *Travaux Préparatoires*

127. Certain elements of the *travaux préparatoires* with respect to the chapeau of Article 2(1) of the ICSFT, which Ukraine has omitted to bring to the Court's attention, confirm Russia's position that "intention" means actual intention and that "knowledge" means actual knowledge.

128. Ukraine relies on a statement by France in its March 1999 working document containing commentary on a draft convention it had prepared in the same month, explaining that: "This convention is aimed both at 'those who give orders', who are aware of the use of the funds, and contributors, who are aware of the terrorist nature of the aims and objectives of the whole or part of the association which they support with their donations in cash or in kind".¹²¹

129. First, Ukraine omits to mention that this statement concerns the materially different and broader definition of the offence in the draft convention, which provided that:

"Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally proceeds with the financing of a person or organization in the knowledge that such financing will or could be used, in full or in part, in order to prepare or commit" a terrorist act, as defined.¹²²

"Commet une infraction au sens de la présente Convention toute personne qui, illicitement et intentionnellement, procède au financement d'une personne ou d'une

(footnotes omitted). See also FATF, *Guidance on Criminalising Terrorism Financing (Recommendation 5)*, 2016, para. 26, suggesting that a country could consider designation by the Security Council or by that country as "a prima facie indication" (available at <http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-Criminalising-Terrorist-Financing.pdf>).

¹²⁰ Ukraine is incorrect to suggest that Russia's position is that "designation of a group is *legally* necessary to establish knowledge": see WSU, para. 209 (emphasis in the original).

¹²¹ MU, para. 284, referring to Working document submitted by France "Why an international convention against the financing of terrorism?", A/AC.252/L.7/Add.1, 11 March 1999, para. 5 (Annex 275 to MU). See also WSU, para. 206; CR 2019/12, 7 June 2019, p. 32, para. 8 (Cheek). For Russia's position with respect to the meaning of "funds" in the final text, see Chapter II above.

¹²² United Nations General Assembly, Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, Third session, Draft international convention for the suppression of the financing of terrorism: Working document submitted by France, UN Doc. A/AC.252/L.7, 11 March 1999, Article 2.

organisation en sachant que ce financement sera ou pourra être utilisé, en tout ou partie, pour préparer ou pour commettre”.

130. As follows from the ordinary meaning of the words, the mental elements in this French proposal were very different from those in the final text of the chapeau of Article 2(1) of the ICSFT. What was proposed was “*en sachant que ce financement sera ou pourra être utilisé*” to carry out a terrorist act. By contrast, what was agreed in the final text was “*en sachant qu’ils seront utilisés*”.

131. It also noted that this March 1999 draft deviated from an earlier draft in November 1998, which focused on whether funds are intentionally provided to “a person or group of persons who, to his or her [i.e., the funder’s] knowledge: (a) Commits, or proposes to commit” a terrorist act as defined. This original draft did not require “intention that [the funds] are to be used” (“*l’intention des les voir utilisés*”), or “knowledge that [the funds] should be used” (“*en sachant qu’ils seront utilisés*”), to commit a terrorist act.¹²³ Rather, it was sufficient that funds were intentionally provided to a person or group who was known to have committed a terrorist act in the past.

132. Second, in the course of discussion in the Working Group on the basis of the French proposal, the mental element in the chapeau of draft Article 2(1) was specifically considered and it was not adopted. The summary of discussion prepared by the Rapporteur records that:

“The phrase ‘will or could be used’ was the subject of several proposals intended to clarify the scope of the offences being created by draft article 2. Hence, the suggestion was made to replace the phrase ‘will ... be used’ by ‘is ... to be used’; others recommended either deleting ‘or could’ before the phrase ‘be used’ [...] or replacing it by ‘is designed to’ or ‘is likely to’. Alternatively, some spoke in favour of the retention of the phrase ‘or could’ as in the draft text under consideration.”¹²⁴

133. As follows from the final text, the Contracting States did not accept the French proposal that would have lowered the standard to knowledge that the funds “will or could be used”.¹²⁵ Consistent with this, the *travaux* also shows that they rejected similar proposals (referred to by the Rapporteur

¹²³ United Nations General Assembly, 53rd Session, Sixth Committee, Letter dated 3 November 1998 from the Permanent Representative of France to the United Nations addressed to the Secretary-General, UN Doc. A/C.6/53/9, 4 November 1998, Article 2.

¹²⁴ See United Nations General Assembly, 54th Session, Official Records, Supplement No. 37, Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, UN Doc. A/54/37, 5 May 1999, Annex IV, Informal summary of the discussion in the Working Group, prepared by the Rapporteur: first reading of draft articles 1 to 8, 12, paragraphs 3 and 4, and 17 on the basis of document A/AC.252/L.7, para. 18 (Annex 5 to PORF).

¹²⁵ See *ibid.* Cf. the commentary relied on by Ukraine suggesting that the phrase “or could be” may be read back into the final text of Article 2(1) notwithstanding the deliberate omission of precisely that phrase during the negotiations: M. Lehto, *Indirect Responsibility for Terrorist Acts*, Martinus Nijhoff, 2009, p. 303 (Annex 490 to MU); R. Lavalley, “The International Convention for the Suppression of the Financing of Terrorism”, *Heidelberg Journal of International Law*, Vol. 60, 2000, pp. 499-500 and 504 (Annex 484 to MU).

in the above passage) that would have encompassed knowledge that the funds are “likely to be used”,¹²⁶ or “[w]hen there is a reasonable likelihood that the funds will be used for such purpose”.¹²⁷

134. It follows that recklessness (or *dolus eventualis*, as is referred to by Ukraine¹²⁸) was specifically excluded as insufficient to establish “knowledge” for the purpose of Article 2(1) of the ICSFT.¹²⁹

135. On 25 March 1999, France submitted a working paper containing a revised proposed Article 2,¹³⁰ which “took into account the views expressed by delegations during the debate in the Sixth Committee and the ensuing consultations”.¹³¹ The words “or could” had been removed.

136. Third, a later proposal by Mexico that the requisite “intention” or “knowledge” “shall be inferred from well-founded evidence or objective and actual circumstances”, as is sufficient in certain other UN treaties (see para. 121 above), was not accepted.¹³²

2. *Materials Concerning Domestic Implementation*

137. Contracting States are not precluded from defining the mental elements of the offence of terrorism financing more broadly under their own domestic legislation; the core minimum

¹²⁶ United Nations General Assembly, 54th Session, Official Records, Supplement No. 37, Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, UN Doc. A/54/37, 5 May 1999, p. 20, Annex III, p. 33, proposal submitted by Guatemala (A/AC.252/1999/WP.16) (Annex 5 to PORF).

¹²⁷ United Nations General Assembly, 54th Session, Official Records, Supplement No. 37, Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, UN Doc. A/54/37, 5 May 1999, p. 20, Annex III, pp. 34-35, proposal submitted by the UK (A/AC.252/1999/WP.20) (Annex 5 to PORF). This language was omitted from a revised UK proposal without explanation: see *ibid.*, pp. 35-36, revised proposal submitted by the UK (A/AC.252/1999/WP.20/Rev.1).

¹²⁸ There is no need for the Court to seek to determine the vexed theoretical question of the exact relationship between the concepts of recklessness at common law and the concept of *dolus eventualis* in civil law.

¹²⁹ It is also noted that the phrase “are to be used” was substituted for the phrase “will be used”. However, the change appears to have been one of form only and there is no suggestion that it was intended to entail any change in the standard of knowledge required. *Cf.* United Nations General Assembly, 54th Session, Official Records, Supplement No. 37, Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, UN Doc. A/54/37, 5 May 1999, p. 20, Annex II, Working Document submitted by France (“will or could be used”) (Annex 5 to PORF); Report of the Working Group, 26 October 1999 (A/C.6/54/L.2), Annex I, Revised text prepared by the Friends of the Chairman (“are to be used”) (Annex 277 to MU).

¹³⁰ See United Nations General Assembly, 54th Session, Official Records, Supplement No. 37, Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, UN Doc. A/54/37, 5 May 1999, Annex I.B, Working Paper prepared by France on articles 1 and 2 (Annex 5 to PORF), p.12: “Any person commits an offence within the meaning of this Convention if that person unlawfully proceeds with the financing, by any means, directly or indirectly, of any person or organization with the intention that the funds should be used, or in the knowledge that the funds are to be used, in full or part, to prepare for or to commit” a terrorist act as defined.

¹³¹ See United Nations General Assembly, 54th Session, Official Records, Supplement No. 37, Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, UN Doc. A/54/37, 5 May 1999, para. 26 (Annex 5 to PORF).

¹³² See proposal submitted by Mexico (UN Doc. A/C.6/54/CRP.10), reproduced in Report of the Working Group, UN Doc. A/C.6/54/L.2, 26 October 1999, Annex II, Discussion papers, written amendments and proposals submitted to the Working Group, pp. 22-23 (Annex 277 to MU). This proposal is also referred to in Annex III, Informal summary of the discussions in the Working Group, prepared by the Chairman, para. 98 (Annex 277 to MU).

requirement of specific intention or actual knowledge under the chapeau of Article 2(1) of the ICSFT establishes a floor, not a ceiling, for the content of domestic law. But it is the specific definition of the chapeau of Article 2(1) of the ICSFT, as accepted by all Contracting States, that the Court is concerned with in this case.

138. In its Handbook for Legislative Drafting on suppressing terrorism financing, the Legal Department of the IMF interprets the chapeau to Article 2(1) of the ICSFT as containing “knowledge and a *specific* form of intent as two alternative mental elements”,¹³³ and advises States that:

“The Convention leaves it to each state party to define the form of intent or knowledge that would be necessary to constitute the offense, as well as the means to prove either element. The minimum requirement would consist of *actual knowledge* on the part of the perpetrator that the funds will be used for a terrorist act, *together with the will to achieve this result*. This requirement should be implemented in all states parties.”¹³⁴

139. Ukraine’s only response to the above passage, at the Preliminary Objections stage, was that this passage “*has no citations to support the proposition*”.¹³⁵ This is, however, to ignore the obvious point that the passage does no more than reflect the ordinary meaning of the words “intention that [funds] should be used” and “knowledge that [funds] are to be used”, in their context, and in the light of the other relevant UN conventions, as well as the confirmation in the *travaux*.

140. Ukraine also relies on Financial Action Task Force (FATF)’s Recommendation no. 5,¹³⁶ according to which: “Countries should criminalise... the financing of terrorist organisations and individual terrorists even in the absence of a link to a specific terrorist act or acts...” From this, it follows according to FATF, that all that is required is that the financier should intend/know that the funds are to be used by a terrorist organisation or individual terrorist.¹³⁷

141. FATF’s Recommendation no. 5 is, however, of no assistance to Ukraine because:

- a. In paragraph 1 to its 2016 Guidance (to which Ukraine does not refer in its Memorial), FATF emphasises the obvious point that its Recommendation “deliberately goes beyond the obligations contained in the *Terrorist Financing Convention*”.¹³⁸

¹³³ International Monetary Fund, Legal Department, *Suppressing the Financing of Terrorism: A Handbook for Legislative Drafting* (2003), p. 52 (emphasis added), available at <https://www.imf.org/external/pubs/nft/2003/SFTH/pdf/SFTH.pdf>.

¹³⁴ *Ibid.*

¹³⁵ CR 2019/12, 7 June 2019, p. 33, para. 11 (Cheek).

¹³⁶ MU, para. 282, referring to 2012 Recommendations (updated 2018).

¹³⁷ FATF, *Guidance on Criminalising Terrorism Financing (Recommendation 5)*, 2016, p. 8, Recommendation 5 and p. 10, para. 24. See also UN Security Council resolution 2253 (2015), operative para. 17, highlighting that “FATF Recommendation 5 applies to the financing of terrorist organizations or individual terrorists for any purpose, including but not limited to recruitment, training, or travel, even in the absence of a link to a specific terrorist act”.

¹³⁸ FATF, *Guidance on Criminalising Terrorism Financing (Recommendation 5)*, 2016, p. 1, para. 1 and p. 8, para. 18. FATF explains that on its recommended approach there is no need to consider “the purpose for which the financier intended th[e] funds [...] to be used by the terrorist organisation / individual terrorist” or “any knowledge that the terrorist

- b. Similarly, the UNODC confirms that: “The FATF Special Recommendations go beyond the provisions of the 1999 Convention and Security Council resolution 1373 in several respects”.¹³⁹
- c. FATF also explains that its Recommendation that the requisite intention or knowledge “may be inferred from objective factual circumstances” is “based on [the mental elements of the offence of money laundering specified in] Article 6(2) of the United Nations Convention on Transnational Organised Crime”, rather than on Article 2(1) of the ICSFT.¹⁴⁰
- d. FATF also recommends that: “Countries should criminalise terrorist financing on the basis of the *Terrorist Financing Convention*”¹⁴¹ and confirms that the ICSFT “does not require countries to criminalise [terrorism financing] as a strict liability offence (i.e., an offence for which the *mens rea* need not be proven), *reckless* or negligent [terrorism financing], or unwitting acts of [terrorism financing].”¹⁴² Thus FATF’s view on Article 2(1) of the ICSFT is inconsistent with Ukraine’s case on recklessness.

142. Ukraine also relies on UNODC materials on domestic implementation. It says that the advice of the UNODC is that the ICFST requires that “the offence implementing the Convention must also punish provision or collection of funds with the knowledge and willing acceptance of the *possibility* that they may be used for terrorist acts”.¹⁴³ The passage Ukraine relies on appears in the context of a discussion about what the scope of implementing legislation *should* be, as opposed to what is actually required by the ICSFT. In an earlier passage, which Ukraine seeks to pass over, the UNODC explains what the chapeau to Article 2(1) of the ICSFT requires by way of mental element, and how some national laws have extended this:

“The Financing Convention applies only to unlawful and wilful provision or collection of funds ‘with the intention that they should be used or in the knowledge that they are to

financier may have had about how the terrorist organisation / individual terrorist was using or intending to use the funds”: FATF, *Guidance on Criminalising Terrorism Financing (Recommendation 5)*, 2016, p. 9, para. 22.

¹³⁹ UNODC, *Guide for the legislative incorporation and implementation of the universal anti-terrorism instruments* (2006), p. 20, para. 59.

¹⁴⁰ FATF, *Guidance on Criminalising Terrorism Financing (Recommendation 5)*, 2016, p. 21, para. 58.

¹⁴¹ FATF, *Guidance on Criminalising Terrorism Financing (Recommendation 5)*, 2016, p. 2, Recommendation 5.

¹⁴² FATF, *Guidance on Criminalising Terrorism Financing (Recommendation 5)*, 2016, p. 2, para. 8 (emphasis added). See also p. 11, para. 29 stating that recklessness “cannot substitute for criminalising the intentional financing of a terrorist organisation”. FATF also notes that: “Some countries use the concept of recklessness to criminalise financing an individual terrorist in the absence of a link to a specific terrorist act or acts. This requires prosecutors to show that the offender was aware of a substantial risk that the funds would be used for terrorist purposes, and that the risk was unjustifiable”: FATF, *Guidance on Criminalising Terrorism Financing (Recommendation 5)*, 2016, p. 11, para. 28 (emphasis added). See also pp. 13-14 giving the example of the implementing legislation enacted by Australia. FATF endorses this approach: see FATF, *Guidance on Criminalising Terrorism Financing (Recommendation 5)*, 2016, p. 11, para. 29.

¹⁴³ MU, para. 282 (emphasis in the original), referring to UNODC, *Legislative Guide to the Universal Legal Regime Against Terrorism* (2008), p. 31 (Annex 285 to MU). See also WSU, para. 205; CR 2019/12, 7 June 2019, p. 34, para. 15 (Check).

be used, in full or in part, in order to carry out' specified violent acts. *Some national laws have extended criminal liability to a person who 'has reasonable cause to suspect' that his or her participation, support or funds may be used for the purposes of supporting terrorist groups or actions.* The question may arise whether proof of reasonable cause for suspicion is a standard of negligence or at most recklessness and not of intentional or knowing wrongdoing. [...] Which view will prevail depends upon local jurisprudence and statutory language.”¹⁴⁴

143. This is plainly not suggesting that there is a *requirement* under Article 2(1) of the ICSFT to adopt implementing laws that refer to “reasonable cause to suspect” since the UNODC is merely commenting on the practice under “*some national laws*” without suggesting that this is required of *all* national laws.

144. As to Ukraine’s continued reliance on certain domestic court judgments which it claims support an expansive concept of “knowledge”:¹⁴⁵

- a. Each of the cases relied on concerned financing of a group or organisation which was designated as a terrorist group or organisation by competent international bodies or, at least, by multiple States, namely FARC and PFLP,¹⁴⁶ Hamas,¹⁴⁷ PKK,¹⁴⁸ ETA¹⁴⁹ and ISIS.¹⁵⁰ In such circumstances, on the basis of international and/or national designations,

¹⁴⁴ UNODC, Legislative Guide to the Universal Legal Regime Against Terrorism (2008), p. 30 (Annex 285 to MU) (emphasis added).

¹⁴⁵ See MU, para. 283; WSU, para. 204; CR 2019/12, 7 June 2019, pp. 33-34. paras. 13-18 (Cheek).

¹⁴⁶ Supreme Court of Denmark, *Fighters and Lovers Case*, Case No. 399/2008, Press release, 25 March 2009 (Annex 476 to MU). The evidence before the Court as to the terrorist nature of FARC and PFLP included UN materials: see pp. 1-2. See Supreme Court of Denmark, *Fighters and Lovers Case*, T1 and ors v A, Appeal judgment, Case No. 399/2008, ILDC 2250 (DK 2009), accessed at: <https://opil.ouplaw.com/>, 25 March 2009 (Annex 249).

¹⁴⁷ *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 698 (7th Cir. 2008) (Annex 474 to MU). See, e.g., p. 700 noting that Hamas “engages in violence as a declared goal of the organization”. See also pp. 693-694. It should also be noted that that case also concerned tortious liability, rather than criminal law, and the U.S. Court recognised that “knowledge and intent have lesser roles in tort law than in criminal law”: see p. 692.

¹⁴⁸ *French Cour de cassation*, Case No. 13-83.758, Judgment, 21 May 2014 (Annex 477 to MU). As Ukraine notes at paragraph 283 of its Memorial, the *Cour de Cassation* relied on the fact that the PKK had been “classified as terrorist” (“un soutien logistique et financier effectif à une organisation classée comme terroriste”).

¹⁴⁹ *French Cour de cassation*, Case No. Z 04-84.264, Judgment, 12 April 2005 (Annex 472 to MU). For background see ECtHR, *Case of Herri Batasuna and Batasuna v. Spain*, ECtHR Applications nos. 25803/04 and 25817/04, Judgment, 30 June 2009.

¹⁵⁰ *Tribunal correctionnel de Paris*, 28 September 2017 referred to in Nouvelobs, “Deux Ans de Prison Pour la Mère d’un Djihadiste : ‘J’aurais Pu Sauver mon Fils’”, 6/28 September 2017 (Annex 480 to MU). It is noted that Ukraine has annexed a press report only. The commentary relied on by Ukraine in Bertrand Perrin, “L’incrimination du Financement du Terrorisme en Droits Canadien et Suisse”, *Revue Générale de Droit*, Vol. 42 (2012), pp. 236-237 (Annex 492 to MU) also supports Russia’s position:

« Sur le plan subjectif, l’accusé doit avoir su que le bien serait utilisé pour le terrorisme. Les personnes qui soutiennent une organisation, mais qui ne soupçonnent pas que tout ou partie de l’argent qu’ils donnent sera détourné pour le financement d’une violence politique ou religieuse, ne sont pas punissables. Cette restriction protège ceux qui financent le terrorisme à leur insu, mais elle rend aussi plus délicate la tâche des autorités de poursuite. Cependant, lorsqu’un groupe a été inscrit comme entité terroriste, il est plus difficile pour un prévenu d’arguer qu’il ignorait que les montants qu’il lui a alloués seraient utilisés, partiellement ou totalement, en faveur du terrorisme. » (footnote omitted).

and in light of other evidence, consistent with the general approach in *Croatia v. Serbia*,¹⁵¹ the relevant national tribunals drew the inference that the financier knew that the funds were to be used to carry out terrorist acts.¹⁵²

- b. In relation to the decision of the Supreme Court of Denmark in the *Fighters and Lovers Case*, Ukraine fails to mention that the offence of terrorism financing in section 114(b) of the Danish Criminal Code does not expressly state the mental element required, and therefore sheds no light on the requirement in the chapeau of Article 2(1) of the ICSFT.¹⁵³ Rather, it appears that the definition of intent in Danish criminal law is applied.¹⁵⁴ The evidence before the court as to the terrorist nature of FARC and PFLP included UN materials. On the basis of such evidence, the court reasoned that the defendants knew or should have known that FARC and PFLP had committed terrorist acts as defined in Article 114 of the Danish Criminal Code.
- c. Ukraine's reliance on the decision of the US Court of Appeals, Seventh Circuit in *Boim v. Holy Land Foundation for Relief and Development* is premised on its assertion that: "The statute interpreted in *Boim* [...] tracks the language of Article 2(1) of the ICSFT, criminalizing the provision of material support 'knowing or intending that they are to be used' for covered acts of terrorism."¹⁵⁵ However, this case did not concern the US legislation implementing Article 2(1) of the ICSFT (18 U.S.C.A. § 2339C).¹⁵⁶ Rather,

Whereas Ukraine translates the words « *lorsqu'un groupe a été inscrit comme entité terroriste* » as "when a group has been identified as a terrorist entity" (WSU, para. 204), the passage is properly understood as referring to an entity which has been designated on the list of terrorist groups in accordance with the mechanism established by section 83.05 read together with the definition of "terrorist group" in section 83.01(1) as including "a listed entity".

¹⁵¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, p. 67, para. 148.

¹⁵² This is without prejudice to the fact that FARC, PFLP, Hamas, PKK and ETA are not included in the Unified federal list of organisations recognised as terrorist in accordance with the legislation of the Russian Federation.

¹⁵³ An unofficial translation of Section 114 of the Danish Penal Code may be found in FATF/OECD, Mutual Evaluation Third Follow-Up Report: Anti-Money Laundering and Combating the Financing of Terrorism: Kingdom of Denmark, 22 October 2010 at p. 20, fn. 8, available at <http://www.fatf-gafi.org/media/fatf/documents/reports/mer/FoR%20Denmark.pdf>:

"A person who (1) provides financial support directly or indirectly to, (2) procures or collects funds directly or indirectly to, or (3) places money, other assets or financial or similar benefits at the disposal, directly or indirectly, of a person, a group or an association which commits or intends to commit acts that are covered by sections 114 or 114A of this Act, shall be liable to imprisonment for any term not exceeding ten years."

¹⁵⁴ See FATF/IMF, Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism: Kingdom of Denmark, 22 June 2006, p. 55, para. 220, available at <http://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20Denmark%20full.pdf>.

¹⁵⁵ MU, para. 283, footnote 624; WSU, para. 204, footnote 353.

¹⁵⁶ 18 U.S.C.A. § 2339C was enacted in 2001 pursuant to the USA PATRIOT Act. It defines the offence of terrorism financing as "by any means, directly or indirectly, unlawfully and wilfully provides or collects funds with the intention that such funds be used, or with the knowledge that such funds are to be used, in full or in part to carry out" a terrorist act as defined in this section. See further M. Taxay, L. Schneider, K. Didow, "What to Charge in a Terrorist Financing or Facilitation Case" (2014) 62(5) *United States Attorneys' Bulletin* 9 at p. 11 where the authors also note that "Section 2339C has been used infrequently for several reasons. [...] Perhaps most significantly, § 2339C further requires intent that the funds be used to 'carry out' an enumerated predicate offense. Presently, no case law interpreting this language

the U.S. court was concerned with the interpretation of the *mens rea* element of a statute providing a civil cause of action for US persons injured by an act of “international terrorism” (18 U.S.C.A. § 2333(a)) where the alleged act of international terrorism (i.e. the predicate offence) was not an offence under the domestic legislation implementing the ICSFT.¹⁵⁷

3. *Other Materials*

145. Ukraine also contends that the absence of express language in the Treaty does not mean that the drafters meant to depart from what it calls the “widely accepted principle that knowledge is usually proved by the circumstances”.¹⁵⁸ Ukraine relies, *inter alia*, on the case law of the International Military Tribunal and the ICTY, and the ICC Elements of Crimes.¹⁵⁹ Even if the words “knowledge that [funds] are to be used” were to be interpreted in this way, that would only mean that knowledge as to the use of the funds to commit a terrorist act may be established by sufficient objective proof, which is lacking in the present case.

146. It is also noted that the Rome Statute and the ICC Elements of Crimes are of little assistance since they do not encompass the offence of terrorism, a deliberate decision having been made to exclude this from their scope. In any event, reference to the Rome Statute would not support Ukraine’s position. While the mental element of particular offences under the Rome Statute varies, Article 30(3) of the Rome Statute defines “knowledge” as “awareness that a circumstance exists or a consequence will occur in the ordinary course of events” (Article 30 of the Rome Statute is also considered in the context of Article 2(1)(b) ICSFT: see paras. 217-218 below).

can be found. It therefore remains an open question whether courts would find that § 2339C covers funds intended generally to support a terrorist group’s operational infrastructure.”

¹⁵⁷ The predicate offence was “providing material support to terrorists” contrary to 18 U.S.C.A. § 2339A.

¹⁵⁸ CR 2019/12, 7 June 2019, p. 33, para. 13 (Cheek).

¹⁵⁹ *Ibid.*

CHAPTER IV
THE REQUIREMENTS FOR ACTS OF TERRORISM WITHIN THE MEANING OF
ARTICLE 2(1)(A) OF THE ICSFT

147. Article 2(1)(a) of the ICSFT defines a terrorist act for the purposes of Article 2(1) of the ICSFT as: “An act which constitutes an offence within the scope of and as defined in one of the treaties in the annex”.

148. In this Chapter, Russia sets out the correct interpretation of the acts of terrorism under Article 2(1)(a) of the ICSFT with respect to the two treaty offences relied on by Ukraine. Section I addresses Ukraine’s strained and incorrect interpretation of the offence under Article 1(1)(b) of the Montreal Convention. Section II briefly summarises the offence under Article 2(1) of the ICSTB, as to which there is no interpretative dispute.

I. Article 1(1)(b) of the Montreal Convention

149. The offence under Article 1(1)(b) of the Montreal Convention applies where any person “unlawfully and intentionally [...] destroys an aircraft in service”. This offence is concerned with *the intent* to destroy a civil aircraft. It does not encompass the destruction of civil aircraft in error as Ukraine contends.

A. ARTICLE 1(1)(B) OF THE MONTREAL CONVENTION INTERPRETED ACCORDING TO THE ORDINARY
RULES

150. Article 1(1) is the central provision of the Montreal Convention, the full title of which is “Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation”. When Article 1(1) of the Montreal Convention establishes the all-important offence where a person “unlawfully and intentionally [...] destroys an aircraft in service”, it is plain that it is concerned with the intent to destroy a civil aircraft. This follows all the more from Article 4 of the Montreal Convention which states, without qualification, that:

“The Convention shall not apply to an aircraft used in military, customs or police services”.

151. This formulation is identical to that contained in Article 1(4) of the Tokyo Convention 1963,¹⁶⁰ and Article 3(2) of the Hague Convention 1970.¹⁶¹ As in those Conventions, in light of this express

¹⁶⁰ Convention on Offences and Certain Other Acts Committed on Board Aircraft, 14 September 1962, *UNTS*, vol. 704, p. 219, Article 1(4): “This Convention shall not apply to aircraft used in military, customs or police services.” Since it applies to the Convention as a whole, this limitation qualifies the scope of the offence set out in Article 1(2), which concerns “any aircraft”, as well as the definition of an “aircraft in flight” in Article 1(3).

¹⁶¹ Convention on the Suppression of Unlawful Seizure of Aircraft, 16 December 1970, *UNTS*, vol. 860, p. 105, Article 3(2): “This Convention shall not apply to aircraft used in military, customs or police services.” Since it applies to the Convention as a whole, this limitation qualifies the scope of the offence on board “an aircraft” in Article 1, as well as the definition of an “aircraft in flight” under Article 3(1).

exclusion of military, customs and police aircraft, the term “aircraft” is not specifically defined in the Montreal Convention.

152. Proper effect must be given to the limitation in Article 4 of the Montreal Convention, which is expressly stated to apply to “[the] Convention” as a whole. Thus, pursuant to its ordinary meaning, Article 4 of the Montreal Convention limits the scope of the offence of unlawfully and intentionally destroying an “aircraft” in service in Article 1(1)(b) of the Montreal Convention, as well as the meaning of an “aircraft in service” under Article 2(b) of the Montreal Convention. Ukraine is wrong to assert that Russia’s interpretation “finds no support in the text of the Convention”.¹⁶² To the contrary, it is anchored in the text of Article 4 of the Montreal Convention.

153. Ukraine’s position is that, notwithstanding the unqualified terms of Article 4 of the Montreal Convention, the offence in Article 1(1)(b) of the Montreal Convention encompasses the unintentional shoot down of a civil aircraft (i.e. where the intent was in fact to shoot down a military aircraft) because the word “civil” does not appear in Article 1(1)(b) of the Montreal Convention. This interpretation is to be rejected because it fails to give effect to the ordinary meaning of Article 1(1) when read alongside and in the context of Article 4 of the Montreal Convention. Where Article 1 provides that “[a]ny person commits an offence if he unlawfully and intentionally: [...] (b) destroys an aircraft in service”, such intention and destruction refers only to an aircraft that is “not [...] an] aircraft used in military, customs or police services”.

154. Ukraine also casts Russia’s position as depending on reading the word “civilian” into the phrase “aircraft in service”, which phrase it characterises as establishing a “jurisdictional element not subject to the requirement of *mens rea*”.¹⁶³ This is to ignore the obvious point that the term “aircraft” is used in both Article 1(1)(b) and in Article 2(b) without being specifically defined in the Montreal Convention and this term cannot be understood other than by reference to Article 4. Ukraine’s distinction between jurisdictional elements and mental elements is therefore an irrelevance.

155. The word “intentionally” is not to be given a broader meaning, which would encompass indirect intent or recklessness, and this is confirmed by the context. Where the Contracting States to the Montreal Convention agreed to a different mental element to achieve a certain end, they did so expressly. For example, the offence under Article 1(1)(c) will be established where the relevant conduct (i.e., unlawfully and intentionally placing or causing to be placed a device or substance) is “likely to destroy” an aircraft in service. This shows that “intention” was not understood as referring to actual or inferred knowledge of a possibility or a probability that civil aircraft will be destroyed.

156. As to context and the object and purpose of the Montreal Convention, the mental element of the offence in Article 1(1)(b) of the Montreal Convention is to be read together with the Protocol for the

¹⁶² WSU, para. 218.

¹⁶³ WSU, para. 219.

Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (the “Montreal Protocol”) adopted in 1988:¹⁶⁴

- a. Article 2(1) of the Protocol added Article 1 (1bis (b)) to the Montreal Convention, establishing an offence for “unlawfully and intentionally” using any device, substance or weapon to destroy or seriously damage the facilities of “an airport serving international civil aviation”, where such act endangers or is likely to endanger safety at that airport.
- b. Reference to this provision supports Russia’s interpretation because the offence will be made out only where the intention is to target an airport of a particular status, i.e. an airport that is “serving international civil aviation”. It follows from this element of the offence that use of a weapon against the facilities of an airport serving international civil aviation which is committed in error (believing this to be a military airport and being targeted by reason of such status) would not fall within the scope of the offence under Article 1 (1 bis (b)).
- c. If Ukraine were correct that a key objective of the Montreal Convention is to criminalise all acts which *in fact* endanger civil aviation, Article 1 (1 bis) would be framed more broadly to cover all such acts which are in fact against airports serving international civil aviation, irrespective of whether this was the intention of the perpetrator. Further, it would make little sense for the drafters to have limited the offence under Article 1 (1 bis (b)) of the Protocol in this way while casting the related offence in Article 1(1)(b) of the Convention much wider to encompass destruction of civil aircraft in error.

B. OTHER MATERIALS RELIED UPON BY UKRAINE TO INTERPRET ARTICLE 1(1)(B) OF THE MONTREAL CONVENTION

157. Ukraine also relies on Article 2(1)(a) of the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (“IPP Convention”). Russia agrees that this is a useful reference point.¹⁶⁵

- a. Article 2(1)(a) of the IPP Convention proscribes the offence of the “*intentional* commission of: (a) A murder, kidnapping or other attack upon the person or liberty of an internationally protected person”. In substantially similar terms, draft article 2(1)(a) of the said Convention

¹⁶⁴ Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, 24 February 1988, *UNTS*, vol. 1589, p. 474.

¹⁶⁵ Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, 14 December 1973, *UNTS*, vol. 1035, p. 167. Russia signed the IPP Convention on 7 June 1974 and ratified on 15 January 1976; Ukraine signed on 18 June 1974 and ratified on 20 January 1976. Regard is to be had to the IPP Convention including under Article 31(3)(c) of the Vienna Convention on the Law of Treaties.

had proposed an offence of “[t]he *intentional* commission, regardless of motive, of: (a) A violent attack upon the person or liberty of an internationally protected person”.¹⁶⁶

- b. Ukraine contends that there is a material distinction between Article 1(1)(b) of the Montreal Convention and Article 2(1) of the IPP Convention because only the latter “includes the status of the victim in the definition of the offence” (“an internationally protected person”).¹⁶⁷ This is, however, irrelevant since both provisions must be read in their context. In the case of Article 1(1)(b) of the Montreal Convention, the context includes the limitation in its Article 4 which applies to the Convention as a whole, including Article 1(1)(b), and thereby does make the status of the aircraft part of the definition of the offence. Thus, the fact that this limitation is located in Article 4 of the Montreal Convention, rather than in Article 1(1)(b), is immaterial. Contrary to Ukraine’s contention, the definition of the offence is not contained in Article 1(1)(b) alone. Moreover, in light of the general rule in Article 4, which forms part of this definition, there was no need also expressly to include the status of the aircraft in service in Article 1(1)(b).
- c. At the Preliminary Objections stage, Ukraine also argued that “the IPP Convention has been interpreted to require only that the victim in fact has protected status; it does not require the attacker to intend to assault someone with that status”.¹⁶⁸ This is incorrect. As the ILC explained in its Commentary on the 1972 Draft Articles upon which the IPP Convention was based, this provision was modelled on Article 1(1)(b) of the Montreal Convention. Moreover, the ILC stated that: “The word ‘intentional’, which is *similar to the requirement found in article 1 of the Montreal Convention, has been used both to make clear that the offender must be aware of the status as an internationally protected person enjoyed by the victim*”.¹⁶⁹ Further, in a 1974 article, Sir Michael Wood, who participated in the negotiations, recorded that no different position was taken by States during the debate in the Sixth Committee.¹⁷⁰
- d. Ukraine omitted to refer the Court to these authorities and instead relied on the practice of selected States which it portrayed as evidence of how the IPP Convention “has been

¹⁶⁶ International Law Commission, Draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons with commentaries (1972), Yearbook of the International Law Commission, 1972, vol. II, p. 315, draft article 2.

¹⁶⁷ CR 2019/12, 7 June 2019, pp. 35-36, para. 23 (Check).

¹⁶⁸ WSU, para. 219.

¹⁶⁹ International Law Commission, Draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons with commentaries (1972), Yearbook of the International Law Commission, 1972, vol. II, p. 316, para. 8. See also the Implementation Kits for International Counter-Terrorism Conventions, Commonwealth Secretariat, available at: https://thecommonwealth.org/sites/default/files/key_reform_pdfs/Implementation%20Kits%20for%20Terrorism%20Conventions_0.pdf, p. 124, para. 7: “As the opening words make clear, the offences must be committed intentionally. This means not only that negligent acts are excluded, but also that the alleged offender must know before the act is committed that the victim is an IPP” (emphasis in the original).

¹⁷⁰ See M. Wood, “The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents” (Oct. 1974) 23 (4) *International and Comparative Law Quarterly* 791, p. 803.

interpreted”.¹⁷¹ This is to confuse the separate questions of what Contracting States to the Montreal Convention have understood Article 1(1)(b) to require as a matter of treaty obligation and the scope of the criminal offence they have chosen to enact in their domestic legislation (which may of course go further than what is required as a matter of the treaty obligation). Just as in relation to the offence of terrorism financing in Article 2(1) of the ICSFT, States are of course at liberty to enact an extended form of liability to suit their own objectives.

- e. Moreover, Ukraine sought to develop this argument by quoting only the penultimate sentence in the following passage of the UNODC’s Legislative Guide:¹⁷²

“29. [...] It should be noted that, while the 1973 [IPP] Convention requires penalization of attacks upon internationally protected persons, it is silent as to whether that intent must include knowledge of the victim’s protected status. *The Cook Islands legislation criminalizes the offences established by the two conventions and addresses the issue [...] in the following manner: [quote]*

30. *Such an approach is typically used by those countries that provide particular penalties or special jurisdiction, for example, by national authorities in a federal system, for assaults on government officials. Invocation of such special jurisdiction or particular penalties does not depend upon proof that the perpetrator knew that the victim occupied an official position. The necessary element of a criminal intent is supplied by the fact that an assault upon any person is a clearly criminal act, malum in se. Such legislation can be regarded as a demonstration of a Government’s commitment to protecting functionaries of and relationships with other States rather than as a special deterrent to criminal conduct.*”¹⁷³

- f. As follows from the above, the comments of the UNODC on the IPP Convention do not assist Ukraine because these concern the domestic legislation of the Cook Islands, which expressly excludes the requirement of knowledge of the victim’s internationally protected status. The same point applies to Ukraine’s reference to a decision of a U.S. court, which also concerns the specifics of domestic legislation.¹⁷⁴

158. Ukraine also relies on the statement in the Commonwealth Secretariat’s Implementation Kits that “[t]he requirement that the act should be intentional applies only to the acts performed, not to their

¹⁷¹ WSU, para. 219.

¹⁷² See WSU, para. 219, fn. 379.

¹⁷³ UNODC, Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols (2003), pp. 12-13, para. 30 (Annex 284 to MU), emphasis added. See also UNODC, Legislative Guide (2008), p. 16 (Annex 285 to MU): “While the 1973 [IPP] Convention requires criminalization of attacks on protected persons, it is silent as to whether the necessary criminal intent must include knowledge of the victim’s protected status. The Cook Islands legislation specifically provides that knowledge of the person’s protected status is not an element of the offence and need not be proven by the prosecution.”

¹⁷⁴ WSU, para. 219, footnote 379 referring to *United States v. Murrillo*, 826 F.3d 152 (Court of Appeals for the 4th Circuit of the United States, 2016), pp. 158–59 (Annex 62 to WSU). See also CR 2019/12, 7 June 2019, pp. 35-36, para. 23 (Cheek): “States parties to the IPP Convention have treated status of the victim as a jurisdictional requirement, not part of the mens rea” (footnote omitted).

consequences; it is immaterial whether the consequences were those intended.”¹⁷⁵ However, it omits to mention that, with respect to what is recognised to be an “identical” limitation¹⁷⁶ in Article 1(4) of the Tokyo Convention, the same document proposes a model legislative provision stating that:

“In this Act, unless the context otherwise requires – ‘aircraft’ means any aircraft [...] other than - (a) a military aircraft; or (b) an aircraft which, not being military aircraft, is exclusively employed in the service of the Government”.¹⁷⁷

159. In doing so, the Commonwealth Secretariat accepts that the definition of an “aircraft” for the purpose of the Tokyo Convention excludes military aircraft. This reflects the text of Article 1(4) of the Tokyo Convention, which, in identical terms to Article 4 of the Montreal Convention, states: “This Convention shall not apply to aircraft used in military, customs or police services”.

160. The same would presumably follow in respect of the Commonwealth Secretariat’s understanding of the meaning of “aircraft” (and, by extension, “aircraft in flight”) in Article 1(1)(b) of the Montreal Convention.

161. Moreover, this is the approach adopted by certain States in their legislation implementing the Montreal Convention. Since the Montreal Convention, like the ICSFT, sets a floor on the elements of the offences it proscribes, it is sufficient for present purposes to show that not all States have understood Article 1(1)(b) of the Montreal Convention as requiring legislation which reflects Ukraine’s position. Reference may be made, as an illustrative example, to the Malaysian Aviation Offences Act 1984 (as amended).¹⁷⁸ The term “*aircraft*” is defined in section 2(1) as meaning “*any aircraft, whether or not a Malaysian-controlled aircraft, other than – (a) a military aircraft; or (b) an aircraft which, not being a military aircraft, is exclusively employed in the service of the Government*”.¹⁷⁹ The offence in Article 1(1)(b) of the Montreal Convention is implemented in section 9(1), which states:

“(1) Subject to subsection (4), any person who unlawfully and *intentionally* –

(a) *destroys an aircraft in service* or so damages such aircraft as to render it incapable of flight or as to likely endanger its safety in flight; or [...]

¹⁷⁵ See CR 2019/10, 4 June 2019, p. 28, para. 41 (Professor Thouvenin) referring to Implementation Kits for International Counter-Terrorism Conventions, Commonwealth Secretariat, p. 77, para. 9, available at: https://thecommonwealth.org/sites/default/files/key_reform_pdfs/Implementation%20Kits%20for%20Terrorism%20Conventions_0.pdf.

¹⁷⁶ Implementation Kits for International Counter-Terrorism Conventions, Commonwealth Secretariat, p. 75, available at: https://thecommonwealth.org/sites/default/files/key_reform_pdfs/Implementation%20Kits%20for%20Terrorism%20Conventions_0.pdf.

¹⁷⁷ *Ibid.*, p. 37, Article 2(1) of the Model Legislative Provisions.

¹⁷⁸ Malaysian Aviation Offences Act 1984, available at: <https://www.icj.org/wp-content/uploads/1984/09/Malaysia-Aviation-Offences-Act-1984-2012-eng.pdf>.

¹⁷⁹ For completeness, note also that section 10, which concerns “other acts endangering or likely to endanger the safety of aircraft”, and which does not use the phrase “an aircraft in flight” (which is defined in section 2(2)(a) read together with the definition of “aircraft” in section 2(1)) refers specifically to “civil aircraft” and defines this term in section 10(7).

commits an offence under this Act.”¹⁸⁰ (emphasis added)

162. It follows from the general definition of “aircraft” in section 2(1) as excluding military aircraft that the words “aircraft in service” are to be read as referring specifically to civil aircraft and the status of the aircraft is therefore made part of the definition of the offence, including with respect to the intention requirement.

163. It is also instructive to consider whether other episodes involving the destruction of civil aircraft in error have been alleged to constitute (or have been prosecuted as) a breach of Article 1(1)(b) (or the relevant offence as implemented in domestic law).

164. Most recently, and tragically, Ukrainian International Airlines Flight 752 was shot down by Iran on 8 January 2020, which has since stated that it mistook Flight 752 in “human error” for an incoming cruise missile. States have not characterised this explanation as entailing a breach of Article 1(1)(b) of the Montreal Convention. For example, the UK Prime Minister referred to a “terrible mistake”.¹⁸¹ Likewise, once it became clear that Flight 1812 had been shot down over the Black Sea in 2001 by Ukraine by mistake, Russia neither characterised this as a terrorist act nor invoked Article 1(1)(b) of the Montreal Convention.¹⁸²

II. Article 2(1) of the ICSTB

165. Article 2(1) of the ICSTB provides:

“Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility:

(a) *With the intent* to cause death or serious bodily injury; or

(b) *With the intent* to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.”

166. It is common ground between the Parties that Article 2(1) of the ICSTB contains a dual intention requirement: (1) intentional delivery, placing, discharging or detonating an explosive or other lethal

¹⁸⁰ See also section 9(4) which qualifies the general definition of “aircraft” in section 2(1) and states: “Subsections (1) and (2) do not apply to any act committed in relation to an aircraft used in military, customs or police service unless – (a) the act is committed in or over Malaysia; or (b) where the act is committed outside of Malaysia, the person committing the act is a citizen of Malaysia.”

¹⁸¹ *BBC*, “Iran plane downing: ‘Several people detained’ over airliner loss”, 14 January 2020, <https://www.bbc.co.uk/news/world-middle-east-51104687>.

¹⁸² Other examples include the shooting down in error of Cathay Pacific Airways C-54 by China on 23 July 1954, the shooting down over Western Sahara by the Western Sahara Popular Front for the Liberation of Saguia el-Hamra and Rio de Oro of a Dornier Do 228-100 on 24 February 1985 and a Douglas DC-7CF on 8 December 1988, and the shooting down of a helicopter chartered by the UN by the Sudan People’s Liberation Army in South Sudan on 21 December 2012.

device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility, with (2) the intent to cause death/serious bodily harm/extensive destruction.

167. The word “intent” in Article 2(1) of the ICSTB is to be given the same meaning as the word “intended” in Article 2(1)(b) of the ICSFT, which is explained further in Chapter V below.

168. Ukraine also does not dispute that where the Parties to the ICSTB agreed to introduce any element of likelihood, they did so expressly in Article 1(b) of the ICSTB, which uses the formulation “or is likely to result in”.

CHAPTER V
THE REQUIREMENTS FOR ACTS OF TERRORISM WITHIN THE MEANING OF
ARTICLE 2(1)(B) OF THE ICSFT

169. While Article 2(1)(a) of the ICSFT¹⁸³ refers to offences within the scope of, and as defined in, one of the treaties listed in the annex of the Convention, Article 2(1)(b) of the ICSFT lays out the necessary elements that must be fulfilled for an act to constitute terrorism, i.e. such act must be

“intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.”

170. Article 2(1)(b) of the ICSFT thus requires the fulfilment of two distinct *mental* elements, namely that

- there has been the *intention* by the person responsible to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict;

and

- the *purpose* of such act, by its nature or context, has been to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

171. As the Court determined in its Order on Provisional Measures of 19 April 2017, Ukraine had then not been able to adduce sufficient evidence to support even a *plausible* claim that both those mental elements of intention *and* purpose were present at the relevant time with regard to the events that it relied upon.¹⁸⁴

172. In seeking to overcome the problems it faces in light of this initial finding by the Court, Ukraine, in its Memorial, proposes a very broad interpretation of the ICSFT in general, but even more so specifically with regard to the two mental elements contained in Article 2(1)(b) of the ICSFT.¹⁸⁵

173. Such interpretation is, however, not in line with the well-established methods of treaty interpretation. Russia will thus now first establish the correct standard for the element of *intent* to cause death or serious bodily injury (I), before turning to the second required mental element of *purpose* (II).

¹⁸³ See Chapter IV of this Counter-Memorial.

¹⁸⁴ Order of 19 April 2017, para. 75 (emphasis added).

¹⁸⁵ MU, paras. 202-209.

I. Intent to Cause Death or Serious Bodily Injury to Civilians

174. As a preliminary matter, it must first be noted that a relevant act within the meaning of Article 2(1)(b) of the ICSFT can only be committed provided the intention was to harm either “a civilian” or “any other person not taking an active part in the hostilities”.¹⁸⁶ If members of armed forces or groups or other persons taking an active part in the hostilities were targeted, such an act is not encompassed within Article 2(1)(b) of the ICSFT, and hence does not trigger the obligations of the contracting parties under the ICSFT.

175. Regarding the appropriate interpretation of the *intention* to cause death or serious bodily injury, Ukraine asserts in its Memorial that “the most appropriate reading of intent in Article 2(1)(b) [of the ICSFT] encompasses all of these *mens rea*”,¹⁸⁷ i.e. *dolus directus*, *dolus indirectus* and *dolus eventualis*. According to Ukraine, any of these forms of its characterisation of intention would fulfil this first mental element contained in Article (2)(1)(b) of the ICSFT.¹⁸⁸

176. In doing so, Ukraine not only deliberately blurs the line between different categories of *mens rea* and attempts to brand belligerent acts by insurgents within an armed conflict causing collateral civilian damage as acts of terrorism,¹⁸⁹ but also deviates from well-established methods of treaty interpretation.

177. Further, Ukraine’s reliance on the Rome Statute and/or national case law does not support Ukraine’s proposition that forms of intent other than direct intent suffice to trigger the applicability of Article 2(1)(b) of the ICSFT.

178. Finally, Russia will demonstrate that Ukraine’s suggestion that one may simply draw a conclusion from an objective situation as to the mental element of the existence of intent to cause death to civilians in the situation of an armed conflict, such as the one prevailing in Eastern Ukraine, is also misconceived.

A. THE ORDINARY MEANING OF THE WORDS “INTENDED TO CAUSE”

179. The phrase “*intended to*”, as used in Article 2(1)(b) of the ICSFT, is defined by the Oxford Dictionary as something “that [one is] trying to achieve or reach”.¹⁹⁰ The ordinary meaning thus refers

¹⁸⁶ The distinction is e.g. found in Article 43 and 50 of the Additional Protocol I to the Geneva Conventions (referring to Article 4 of the Third Geneva Convention); in the context of a non-international armed conflict especially Article 13 of Additional Protocol II is reflective of the two categories; see also ICTY, *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Appeals Chamber, Judgment of 30 November 2006, paras. 100 *et seq.*

¹⁸⁷ MU, para. 207.

¹⁸⁸ MU, para. 207.

¹⁸⁹ MU, para. 206.

¹⁹⁰ See Oxford Learners Dictionaries “intended”; <https://www.oxfordlearnersdictionaries.com/definition/english/intended>.

to an actual aim, desire or plan. The specific effect and outcome of the act must therefore have been aimed at and desired by the perpetrator.

180. This interpretation is supported by the Spanish version of Article 2(1)(b) of the ICSFT, which uses the expression “*a destinado a causar*”. This wording connotes an intention actually to cause a specific outcome, as confirmed by the official Dictionary of the Spanish language published by the Royal Spanish Academy. It defines the term “*destinar*” as “ordering, pointing out or determining something for some purpose or effect” (“*ordenar, señalar o determinar algo para algún fin o efecto*”).¹⁹¹

181. In the same vein, the Russian version of Article 2(1)(b) of the ICSFT uses “*napravlennogo na*” («*направленного на*»), which is the equivalent of “directed at” and which expresses that a direct form of intent was meant to be incorporated. This is confirmed by the Russian Criminal Code, in which this same term is used to describe an action committed with direct intent and for a specific purpose.¹⁹²

182. This interpretation is further supported by the French text of the ICSFT. Ukraine suggests that the French language version implies a different and broader meaning than direct intent.¹⁹³ However, the term “*destiné à*” refers to “intended for” and “aimed at”, both of which mental states require a specific will of the respective person that the act is directed at producing a certain result.¹⁹⁴

183. Had the drafters indeed wanted to broaden the scope so as also to include forms of intent lesser than direct intent they would have used wording from other closely related treaties such as “*de nature à causer*” (used in Article 35(2) of Additional Protocol I), or “*propres à*” (previously used in Article 23(e) of the 1907 Hague Regulation Concerning the Laws and Customs of War on Land).

184. It is in this regard also worth noting that the French wording “*destiné à*” had, in an earlier version, been translated as “designed to”. Draft Article 2(1)(b) of the ICSFT accordingly then referred in English to acts

“*designed to cause death or serious bodily injury to a civilian or to any other person, other than in armed conflict*”.¹⁹⁵

¹⁹¹ See Diccionario de la lengua española, entry for “destinar”, at: <https://dle.rae.es/destinar#DTzRYFc>.

¹⁹² As to the interpretation of the term «направленный на» (“*napravlennyi na*”), i.e. intended to, used in Article 2(1)(b) of the ICSFT in Russian criminal law see the relevant Schedule (Annex 248).

¹⁹³ MU, para. 206.

¹⁹⁴ The Larousse dictionary defines the verb “destiner” as: «*Fixer la destination de quelque chose, le réserver à cet usage, à cet emploi; affecter*». The dictionary of the Académie Française is somewhat less specific but still clear in defining it as “*préparer, réserver*”. See for instance, for a law where «*destiné à*» has been interpreted as to mean “intended to”: *Code pénal*, Article 432-1: «*Le fait, par une personne dépositaire de l'autorité publique, agissant dans l'exercice de ses fonctions, de prendre des mesures destinées à faire échec à l'exécution de la loi est puni de cinq ans d'emprisonnement et de 75 000 euros d'amende*».

¹⁹⁵ Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, Third session, Draft international convention for the suppression of the financing of terrorism, Working document submitted by France, UN Doc. A/AC.252/L.7., 11 March 1999 (emphasis added).

185. While the initial English version of “*destiné à*”, i.e. the term “designed to”, would have arguably been slightly more open to interpretation, the English term “intended to” was perceived to be more in line with the French term “*destiné à*” and thus replaced the phrase “designed to”. Yet, the term “intended to”, just like “*destiné à*”, inherently entails a reference to the subjective mind-set of the perpetrator, requiring that he or she actually wanted the act to cause a particular consequence.

186. This change in wording is reflective of the explanatory note, which accompanied the French proposal. In that note, France referred to the underlying act of causing death to civilians, as now contained in Article 2(1)(b) of the ICSFT, as an act of “murder”.¹⁹⁶ Murder is however usually referred to as an act that is committed with direct intent, and therefore “intended to” was more appropriate in capturing that understanding.

187. Similarly, the Arabic version, namely *يهدف إلى التسبب في*, also indicates that the perpetrator must have had the intention to cause the death or serious bodily injury to civilians or other persons not taking an active part in hostilities.

188. The Chinese version for “intended to cause”, i.e. *意图致使*, does not seem to include forms other than direct intent either, since otherwise the addition of the term “intended to”, i.e. *意图*, would have been unnecessary.

189. Hence, according to the actual terminology used, only acts committed with direct intent to cause the death or serious bodily injury to civilians are covered by Article 2(1)(b) of the ICSFT.

B. THE CONTEXT CONFIRMS THE EXCLUSION OF FORMS OF *MENS REA* OTHER THAN DIRECT INTENT

190. This conclusion, based on the text of Article 2(1)(b) of the ICSFT, is further supported by a comparison with other instances where the ICSFT refers to the concept of intention.

191. Notably, by contrast to the chapeau of Article 2(1) of the ICSFT, which uses the formulation “intention [...] or [...] knowledge”,¹⁹⁷ subparagraph (b) of Article 2(1) of the ICSFT deliberately does not employ the same formulation. The ICSFT is thus reflective of the general distinction between intention and knowledge and, importantly, Article 2(1)(b) of the ICSFT refers to intention *only*. It thereby implicitly excludes knowledge-based standards, i.e. a mind-set in which a perpetrator only knows about the possibility or even likelihood of causing civilian deaths (“knowledge”), but does not act with the actual will (“intention”/ “intended”) to cause that particular outcome.¹⁹⁸ Article 2(1)(b)

¹⁹⁶ Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, Third session, Explanatory Report France, UN Doc. A/AC.252/L.7/Add.1, 11 March 1999, para. 6; repeated in United Nations General Assembly, 54th Session, Official Records, Supplement No. 37, Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, UN Doc. A/54/37, 5 May 1999, para. 29 (Annex 5 to PORF).

¹⁹⁷ Emphasis added.

¹⁹⁸ See above, paras. 111-112.

of the ICSFT, by referring to intention only, therefore *a contrario* explicitly requires the different and stronger intention-based mind-set.

C. THE OBJECT AND PURPOSE OF THE ICSFT AS WELL AS AN INTERPRETATION IN LINE WITH INTERNATIONAL HUMANITARIAN LAW WARRANTS ENCOMPASSING DIRECT INTENT ONLY

192. Ukraine's interpretation so as to include all possible forms of intent is also incompatible with the object and purpose of the Convention, especially in light of the requirement of an interpretation of the ICSFT in line with other rules of international law, and most importantly rules and norms of international humanitarian law.

193. The object and purpose of the ICSFT is the suppression of the financing of terrorism. Ukraine, in order to interpret the concept of intent in Article 2(1)(b) of the ICSFT, refers to the preamble,¹⁹⁹ according to which the ICSFT Parties recall the "condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed". This sentence, however, sheds no light whatsoever on the meaning of the term "intended to" as a specific mandatory component of the definition of a terrorist act under Article 2(1)(b) of the ICSFT. Notably (and unsurprisingly), the condemnation does not refer to or otherwise shed light on the required mental elements of the offence of terrorism.

194. Of course, if terrorism, no matter in what form, shape, method or practice, occurs, it is to be condemned, and Russia firmly and unambiguously condemns it. Yet, in search of a definition of the elements that constitute terrorism, a broad and unspecific reference to the preamble does not suffice to establish the content of any of the specific elements laid out in detail in Article 2(1)(b) of the ICSFT.

195. In fact, the question of what actually constitutes terrorism is a long-standing and disputed question in international law, and a universal definition of terrorism has yet to emerge.²⁰⁰ While it is of course true that the ultimate object and purpose of the Convention is to protect civilians from terrorist attacks, the ICSFT was plainly not intended to upset and undermine other pre-existing and well-established international standards.

196. In particular, the interplay between international humanitarian law and anti-terrorism conventions warrants careful consideration. In armed conflict situations, the ICSFT is to be applied alongside and with respect for international humanitarian law. It is for this reason that Article 21 of the ICSFT provides explicitly that

¹⁹⁹ MU, para. 207, fn. 481.

²⁰⁰ R. Higgins, "The General International Law of Terrorism", in *Terrorism and International Law* (1997), R. Higgins and M. Flory (eds.), pp. 27-28.

“[n]othing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes of the Charter of the United Nations, *international humanitarian law* and other relevant conventions.”²⁰¹

197. The Russian Federation agrees that Article 21 of the ICSFT is not to be read as an exclusion clause leading to the non-application of the ICSFT in its entirety in situations of armed conflict. However, in line with the position taken by the Court in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the interpretation of the ICSFT, including the interpretation of the mental elements of a terrorist act under Article 2(1)(b) of the ICSFT, must take place in light, and against the background, of simultaneously applicable and closely related relevant standards of international law.²⁰²

198. Most importantly, international humanitarian law, while prohibiting a direct attack against civilians, does not *per se* prohibit expected collateral damage among civilians when aiming at a legitimate military target.²⁰³ International humanitarian law is thus reflective of the fact that during situations of armed conflict military conduct can, and often does almost inevitably, lead to deaths or serious bodily injuries of civilians, regrettable as that is. This is most clearly brought out by both of the 1977 Additional Protocols to the four Geneva Conventions as being reflective of customary law in demanding that

“the civilian population as such, as well as individual civilians, shall not be the object of attack.”²⁰⁴

199. On the other hand, incidental loss of civilians only violates international humanitarian law where it had been expected that such collateral damage would be excessive in relation to the anticipated military advantage.²⁰⁵ An attack that is not directed against civilians is only prohibited where it is indiscriminate, i.e. if the attack

“may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which [is] *excessive in relation to the concrete and direct military advantage anticipated*.”²⁰⁶

²⁰¹ Emphasis added.

²⁰² Cf. *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, para. 25.

²⁰³ See e.g. ICTY, *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2-A, Appeals Chamber, Judgment of 17 December 2004, para. 52.

²⁰⁴ Article 51(2) of Additional Protocol I; the same rule can be inferred from Article 13(2) of Additional Protocol II for non-international armed conflicts, see ICRC Customary Law Study, Rule 14, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule14.

²⁰⁵ Established in Article 48 and Article 51 (2), (4) (5) of Additional Protocol I for an international armed conflict; and Article 13 (2) of Additional Protocol II for non-international armed conflicts.

²⁰⁶ Article 51(5)(b) of Additional Protocol I (emphasis added).

200. The expectation and eventual causation of death of civilians has thus, under international humanitarian law, to be considered in relation to the military advantage.²⁰⁷ It is only if the expected casualties are excessive in relation to the military advantage anticipated that such act is prohibited under international humanitarian law. In turn, even expected civilian casualties are not generally prohibited by international humanitarian law.

201. If Article 2(1)(b) of the ICSFT were to be interpreted so as to also cover indirect intent or recklessness, thereby outlawing expected civilian casualties *per se* regardless of their proportionality, the military advantage to be gained in the situation of an armed conflict would not be taken into account for purposes of the ICSFT. This would create a situation in which an attack could be lawful under international humanitarian law provided the expected civilian casualties are not excessive when compared with the military advantage anticipated. At the same time, the very same act would be considered an act of terrorism in Ukraine's reading of the ICSFT even if the civilian casualties were not excessive, but where at least some civilian casualties were expected.

202. That such result is not in line with international humanitarian law is further reflected in the drafting history of Article 51(2) of the Additional Protocol I to the Geneva Conventions, which prohibits the spread of terror among the civilian population. Notably, it was the Ukrainian delegation participating in the negotiations leading to the adoption of the Additional Protocol I, which stated that

“[draft] Article 46 [now Article 51 of the Additional Protocol I] widens the scope of protection for the civilian population and individual civilians, who under no circumstances shall be the object of attack. *In particular, paragraph 2 [of draft Article 46 = now Article 51 of the Additional Protocol I] explicitly prohibits acts or threats of violence the primary purpose of which is to spread terror among the civilian population; this is in line with the generally recognized rules of international law, which lay down that Parties to the conflict shall not make the civilian population an object of attack.*”²⁰⁸

203. The Ukrainian delegation thus agreed that the prohibition of spreading terror is limited to those attacks that are specifically directed against the civilian population as such. At the same time, Ukraine did not see this prohibition of spreading terror as also encompassing attacks directed against military targets when these are expected to cause excessive collateral damage among a given civilian population.

204. This distinction is also reflected in the grave breaches provisions of the Geneva Conventions and its Additional Protocol I, as being reflective of customary international law. It is particularly noteworthy that Article 85(3) of Additional Protocol I requires not only a wilful commission of the acts, as they are defined in sub-articles (a) to (f) thereof, in order for such acts to constitute a grave breach. Rather, and leaving to one side the general requirement of a wilful violation of international

²⁰⁷ ICRC Customary Law Study, Rule 14, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule14.

²⁰⁸ Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977), Vol. VI, Statement of the Ukrainian Soviet Socialist Republic, pp. 200-201 (emphasis added).

humanitarian law and the causation of death or serious injury, in addition, different standards of *mens rea* apply as far as concerns the direct targeting of civilians on the one hand (Article 85(3)(a) of Additional Protocol I), and excessive attacks on the other (Article 85(3)(b) of Additional Protocol I).

205. In particular, prohibited direct attacks under Article 85(3)(a) of Additional Protocol I are only those where the perpetrator is “making the civilian population or individual civilians the object of attack”.²⁰⁹ Yet, making civilians or a civilian population the object of an attack, an element which is also inherent in the requirement of intending to cause death to civilians in Article 2(1)(b) of the ICSFT, necessarily requires a deliberate decision and the will of the perpetrator to select, determine and orient the attack against such civilians or against a civilian population.

206. The direct intended targeting of civilians on the one hand, and the causation of excessive collateral damage to civilians on the other, must therefore be carefully distinguished,²¹⁰ as confirmed by this distinction made in Article 85(3) of Additional Protocol I.

207. Yet, Article 2(1)(b) of the ICSFT does not deal with a situation of balancing between the expected loss of civilian life and an anticipated military advantage but, as per its wording, solely with the intended causation of death or serious bodily injury to civilians. The provision thus addresses a situation akin to that one covered by Article 85(3)(a) of Additional Protocol I (i.e. direct attacks against civilians), rather than the situation addressed in Article 85(3)(b) of Additional Protocol I (i.e. a particularly severe form of indiscriminate attack). It follows that Article 2(1)(b) of the ICSFT, just like the rule of international humanitarian law to which it is related, requires a considered decision and the determination of the perpetrator deliberately to attack civilians.

208. The fact that international humanitarian law does indeed distinguish between intention-based acts on the one hand, and knowledge-based forms of acting, on the other, is further confirmed by other provisions that have deliberately differentiated between these two concepts.

209. Notably, where less stringent forms of *mens rea* are meant to be included, international humanitarian law explicitly and unequivocally refers to standards other than direct intent. Article 35(3) of Additional Protocol I, as well as Article 55(1) of Additional Protocol I, serve as striking examples. Article 35(3) of Additional Protocol I states explicitly that

²⁰⁹ Text of Article 85(3)(a): “In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health: (a) making the civilian population or individual civilians the object of attack”; ICRC Commentary, para. 1932; <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/5e5142b6ba102b45c12563cd00434741>.

²¹⁰ ICTY, *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2-A, Appeals Chamber, Judgment of 17 December 2004, para. 396.

“[i]t is prohibited to employ methods or means of warfare which are intended, *or may be expected*, to cause widespread, long-term and severe damage to the natural environment.”²¹¹

210. Similarly, Article 55(1) of Additional Protocol I also provides for the obligation to protect the environment, which obligation includes

“a prohibition of the use of methods or means of warfare which are intended or *may be expected to cause* such [widespread, long-term and severe] damage to the natural environment and thereby to prejudice the health or survival of the population.”²¹²

211. Accordingly, with regard to these provisions both direct intent (“intended”), as well as indirect intent (“may be expected”) falls within the scope of the respective provision. *A contrario*, when a provision such as Article 2(1)(b) of the ICSFT, which is closely related to relevant standards developed for purposes of international humanitarian law, specifically requires intent, it means that a mere knowledge-based standard (“or knowledge”), or a standard based on the expectation of a certain outcome to occur (“may be expected”), is not encompassed.

212. Otherwise, the drafters of Article 2(1)(b) of the ICSFT would have had to define the relevant acts as those:

“intended to cause, *or which may be expected to cause*, death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict” (emphasis added).

213. Yet, the drafters of Article 2(1)(b) of the ICSFT decided not to choose such language, while being fully aware of the above-mentioned obvious examples where such formula had previously been used. Accordingly, against the background of the ICSFT’s object and purpose and in light of international humanitarian law, Article 2(1)(b) of the ICSFT must be understood as encompassing, in a situation of an armed conflict, intentional attacks on civilians only. This however is only the case where the perpetrator acts with the direct intent to cause death or serious bodily injury to civilians, i.e. the perpetrator voluntarily and explicitly wanted the consequence to be effectuated.

D. NEITHER INTERNATIONAL CRIMINAL LAW NOR THE DOMESTIC CASE INVOKED BY UKRAINE SUPPORT UKRAINE’S POSITION

214. In furtherance of its suggested overbroad interpretation of Article 2(1)(b) of the ICSFT, Ukraine relies on the Rome Statute to support its claim. Apart from the fact that neither Ukraine nor Russia are State parties of the Rome Statute, it has also to be noted that terrorism has been deliberately excluded from its scope, and thus it can have no direct bearing on this question.²¹³ Besides, the Rome

²¹¹ Emphasis added.

²¹² Emphasis added.

²¹³ Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June – 17 July 1998, Annex I, Resolutions Adopted by the United Nations Diplomatic

Statute deals exclusively with individual criminal responsibility, which constitutes yet another reason why it has no direct relevance for the case at hand which deals with matters of State responsibility.

215. It is thus Russia's position that the Rome Statute does not provide an answer as to the necessary mental element needed under Article 2(1)(b) of the ICSFT in order for a specific belligerent act to constitute an act of terrorism.

216. However, even if one were to assume *arguendo* that it might have some relevance, neither the text of the Rome Statute, nor its interpretation support Ukraine's case.

217. Notably, in the Rome Statute, intent and knowledge are two terms that are kept separate.²¹⁴ Since Article 2(1)(b) of the ICSFT only uses one of those terms, i.e. intention, this term may not be conflated with the other. This is even more true so where, as in Article 2 of the ICSFT, both terms appear in different parts of the same provision, and the treaty thereby confirms their different meanings.

218. It is also important to note that the ICSFT and the Rome Statute were negotiated almost in parallel, and that the ICSFT was adopted by the General Assembly less than two years after the adoption of the Rome Statute. Hence, the drafters of the ICSFT were obviously aware of the intensive debate leading to the adoption of the definition of intent contained in Article 30 of the Rome Statute. Yet, Article 2(1)(b) of the ICSFT makes no reference to knowledge or otherwise suggests that knowledge could be sufficient to establish the requisite intention. Had the drafters of the ICSFT wanted to include forms of intent other than direct intent there would have thus been the need to do so expressly.

219. International criminal tribunals, and especially the ICTY, that have dealt with the crime of spreading terror, have confirmed the requirement of direct intent for terrorism. The specific structure and requirements of the mental elements for the war crime of spreading terror were brought out by the ICTY Appeals Chamber in the *Milošević* case. It defined the specific crime of spreading terror as

“[...] consist[ing] of the *intent* to make the civilian population or individual civilians not taking direct part in hostilities the *object of the acts of violence* or threats thereof, and of the *specific intent to spread terror* among the civilian population”.²¹⁵

220. Thus, as stated by the Tribunal, there must – in line with international humanitarian law²¹⁶ – exist an intent that is directed at making civilians the very object of the respective acts of violence or

Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Doc. A/CONF.183/10, 17 July 1998, Res E.

²¹⁴ See Article 30 (1) of the Rome Statute of the International Criminal Court, 17 July 1998, *UNTS*, vol. 2187.

²¹⁵ ICTY, *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Appeal Chamber, Judgment of 12 November 2009, para. 37 (Annex 467 to MU), referring to ICTY, *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Appeals Chamber, Judgment of 30 November 2006, para. 104 (emphasis added).

²¹⁶ See above, paras. 204.-206..

threats, rendering direct intent necessary. In addition, there must also be evidence of the specific intent to spread terror.²¹⁷

221. Lastly, in its Memorial, Ukraine relies upon the Italian case of *Abdelaziz* to support the inclusion of *dolus eventualis* into the mental element for terrorism.²¹⁸ Apart from the fact that such a single domestic decision cannot be said to provide for an established interpretation of the ICSFT, the case referred to by Ukraine does not even support its proposition.

222. In confirming the possibility that a terrorist attack might also take place in the context of an armed conflict, and by providing the *example* of bombing a market place, it is worth noting that the Italian decision found that

“*certainty* (and not mere possibility or probability) of serious harm inflicted on civilians shows unequivocally that the committing of *an intentional and specific act* marked by an *intent to engage in the action and achieve the particular results that constitute terrorist purposes*.”²¹⁹

223. The judgment thus confirms that only where there is certainty as to the damage to civilians, and where accordingly it can be concluded that the perpetrator had the will to cause such consequence, i.e. acted with direct intent, could the act be regarded as having been committed with the required intent.

E. THE MENTAL ELEMENT OF INTENT CANNOT SIMPLY BE INFERRED FROM THE MERE OCCURRENCE OF A PARTICULAR ACT

224. Finally, in order to establish the necessary mental element of direct intent, Ukraine contends that the Court may simply draw inferences from the occurrence of a particular act.²²⁰ Yet, such an approach was explicitly rejected by the Court in the *Croatian Genocide* case, in which Serbia had claimed that the acts committed by Croatia constituted the act of killing civilians. The Court rejected the assumption that those acts were undertaken with the intent to cause the death of civilians, despite the fact that shelling of towns took place by Croatian forces. The Court expressly stated that

“it is unable to find that there was any indiscriminate shelling of the Krajina towns deliberately *intended* to cause civilian casualties.”²²¹

²¹⁷ See below Section II.

²¹⁸ Supreme Court of Cassation, Italy, Final Appeal Judgement, No. 1072, 17 January 2007 (*Italy v. Abdelaziz and others*) (Annex 473 to MU).

²¹⁹ *Ibid.*, p. 12 (emphasis added).

²²⁰ MU, para. 207.

²²¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, *I.C.J. Reports 2015*, para. 472 (emphasis added).

225. The Court in its reasoning thereby followed the decision of the ICTY in the *Gotovina* case, in which the ICTY’s Appeals Chamber had clarified that no general rule can be established under what circumstances an attack might be deemed indiscriminate.²²² The ICTY had therefore emphasized the importance of “targets of opportunity” when analysing an attack,²²³ and had in particular required a careful determination as to impact sites in that they were not “the result of shelling aimed at targets” that were legitimate²²⁴ in order to eventually, and if at all, draw any inference from certain acts as to the underlying intent.

226. Despite the fact that the ICTY’s Appeals Chamber confirmed that evidence had established that “individual units of the HV [Croatian Army] aimed artillery in the general direction of the Four Towns rather than at specific targets”, it nevertheless still found such evidence to be inconclusive in order to establish an indiscriminate attack.²²⁵ Thus, notably in case of involvement of lawful military targets, a first step of the analysis would be “a concrete assessment of [a] comparative military advantage” before making any finding as to the indiscriminate nature of such an attack.²²⁶

227. This result is also in line with the Court’s approach in the *Bosnian Genocide* case, in which the Court had concluded that

“[...] [t]he acts [constituting the objective elements for genocide], in the words of the ILC, are by their very nature conscious, intentional or volitional acts”.

228. Accordingly, the Court concluded that

“[...] ‘Killing’ must be intentional, as must ‘causing serious bodily or mental harm’.”²²⁷

F. CONCLUSION

229. In sum, direct intent is therefore required as far as the first mental element of Article 2(1)(b) of the ICSFT, i.e. causing death or serious bodily injury of a civilian or other persons not taking an active part in hostilities, is concerned.

230. Beyond establishing this *first* mental element of intent, in addition a *second*, additional and distinct mental element also needs to be present, namely that of a specific purpose.

²²² ICTY, *Prosecutor v. Ante Gotovina & Mladen Markač*, Case No. IT-06-90-A, Appeals Chamber, Judgment of 16 November 2012, para. 61.

²²³ *Ibid.*, para. 63.

²²⁴ *Ibid.*, para. 64.

²²⁵ *Ibid.*, paras. 65-67.

²²⁶ *Ibid.*, para. 82.

²²⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, para. 186.

231. It is therefore to this second mental element that Russia will now turn to and show that this requirement renders the act as one for which *dolus specialis* is necessary, subsequently laying out the appropriate standard for establishing such *dolus specialis*.

II. The Required Purpose of the Act Qualifies Terrorism as a Special Intent Crime

232. Pursuant to Article 2(1)(b) of the ICSFT, the act of causing death to a civilian or other person not taking an active part in the hostilities in the situation of an armed conflict only falls within the scope of this provision provided also that

“the *purpose* of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.”²²⁸

233. Although Ukraine cannot but acknowledge that the drafters of the ICSFT included this additional mental element into Article 2(1)(b) of the ICSFT “so as to exclude ordinary crimes”²²⁹ from the definition of terrorism, Ukraine fails to draw the appropriate conclusions from this insight, namely that terrorism thereby expressly requires a *special intent*. Hence, apart from the general requirement of intent, the perpetrator must have also acted with the primary purpose of spreading terror.

234. Ukraine, recognising the lack of evidence in this case for any such specific intent, suggests that this required purpose may simply be inferred from the nature and context of an act. However, it does so without applying the appropriate standard for any such inference, or sufficiently taking into consideration the context of the armed conflict prevailing in Eastern Ukraine.²³⁰ This lack of contextualisation results in an incorrect interpretation as to the required element of intimidation or compulsion, which Ukraine again fails to interpret in light of applicable standards of international humanitarian law.

235. In the following sub-sections, Russia will demonstrate that Article 2(1)(b) of the ICSFT was designed as a specific intent crime, establishing the appropriate standard for such specific intent or *dolus specialis*, before turning to the requisite specific purpose of intimidation or compulsion of a government.

A. TERRORISM REQUIRES A SPECIFIC INTENT

236. It is well established that certain crimes and prohibited acts require a special intent, meaning they require the proof of an

²²⁸ Emphasis added.

²²⁹ MU, para. 208

²³⁰ MU, paras. 213-216.

“additional subjective requirement that complements the general intent and goes beyond the objective elements of the offence definition”.²³¹

237. With regard to such acts, an additional intent characterizes the offence and distinguishes it from other crimes, in which the *mens rea* merely reflects the objective elements of a crime.²³² This additional mental element is usually referred to as “specific intent” or “*dolus specialis*”.²³³

238. A number of other international crimes have been designed as such “specific intent crimes”, including but not limited to genocide,²³⁴ apartheid,²³⁵ extermination,²³⁶ persecution,²³⁷ torture,²³⁸ killing and wounding treacherously,²³⁹ pillaging,²⁴⁰ forced pregnancy²⁴¹ and enforced disappearance.²⁴²

²³¹ K. Ambos, “What does ‘intent to destroy’ in genocide mean?”, *International Review of the Red Cross*, Volume 91, Number 876, December 2009, p. 935; see also O. Triffterer, “Genocide, its particular intent to destroy in whole or in part the group as such”, *Leiden Journal of International Law (LJIL)*, No. 14, 2001, pp. 399 at pp. 402-403.

²³² K. Ambos, “What does ‘intent to destroy’ in genocide mean?”, *International Review of the Red Cross*, Volume 91, Number 876, December 2009, p. 935.

²³³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, *I.C.J. Reports 2007*, para. 187.

²³⁴ Article 3 of the Genocide Convention; “with intent to destroy” has been interpreted as a *dolus specialis* element in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, *I.C.J. Reports 2007*, para. 187; see also ICTY, *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-A, Appeals Chamber, Judgment of 5 July 2001, para. 45; ICTY, *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Trial Chamber II, Judgment of 1 September 2004, para. 695; with regard to Article 6 of the Rome Statute of the International Criminal Court this element has been described as an “additional subjective element”, “specific intent” or “*dolus specialis*” requirement in the ICC, see *Prosecutor v. Omar Al Bashir* (Decision on Application for an Arrest Warrant), ICC-02/05-01/09-3, Pre-Trial Chamber I, 4 March 2009, paras. 134 and 139.

²³⁵ See for the description of the crime as defined in Article II of the International Convention on the Suppression and Punishment of the Crime of Apartheid below, para. 240.; see also Article 7(1)(j) and (2)(h) of the Rome Statute according to which the crime of apartheid is only committed if the acts are committed “with the intention of maintaining” a racist regime.

²³⁶ According to Article 7(1)(b) and (2)(b) of the Rome Statute, the crime of “extermination” is committed if the acts were “calculated to bring about the destruction of part of a population”.

²³⁷ According to Article 7(1)(h) and (2)(g) of the Rome Statute, the element “by reason of the identity of the group or collectivity” has been identified as *dolus specialis*/specific intent in ICC, *Prosecutor v. Omar Al Bashir* (Decision on Application for an Arrest Warrant), ICC-02/05-01/09-3, Pre-Trial Chamber I, 4 March 2009, para. 141.

²³⁸ In Article 8(2)(c)(i) of the Rome Statute identified as a “specific intent” requirement, in ICC, *Prosecutor v. Jean-Pierre Bemba Gombo* (Confirmation Decision), ICC-01/05-01/08, Pre-Trial Chamber II, 15 June 2009, para. 294.

²³⁹ See Article 8(2)(b)(xi) in conjunction with Article 8(2)(b)(ix) of the Rome Statute.

²⁴⁰ See Article 8(2)(b)(xvi) in conjunction with Article 8(2)(e)(v) of the Rome Statute. This element has been defined as a specific intent element in ICC, *Prosecutor v. Jean-Pierre Bemba Gombo* (Confirmation Decision), ICC-01/05-01/08, Pre-Trial Chamber II, 15 June 2009, para. 320 and in ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (Confirmation Decision), ICC-01/04-01/07, Pre-Trial Chamber I, 30 September 2008, para. 332.

²⁴¹ Article 7(1)(g) in conjunction with Article 7(2)(f) of the Rome Statute, see Werle/Jessberger, *Völkerstrafrecht* (4th ed. 2016), p. 489, para. 489.

²⁴² Article 7(1)(i) in conjunction with Article 7(2)(i) of the Rome Statute.

239. What characterizes these crimes is that, according to their respective wording, the crime's aim or goal extends beyond the actual act. For example, in order for e.g. a killing to constitute an act of genocide, there must not only be an intent to kill but also the intent to "destroy a group as such".²⁴³

240. Similarly, only provided certain acts are committed "for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them" will they qualify as amounting to the crime of apartheid.²⁴⁴

241. In the same vein, Article 1(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requires the infliction of pain or suffering "*for such purposes* as obtaining from him or a third person information or a confession"²⁴⁵ in order for an act to constitute torture.²⁴⁶

242. The same holds true for the ICSFT where the phrase "when the purpose of such act", as contained in Article 2(1)(b) of the ICSFT, brings the required act of terrorism in line with those other special intent crimes.

243. The crime of terror has in fact consistently been referred to as a specific intent crime by different courts and tribunals and notably by the ICTY,²⁴⁷ this specific element having been described as the "distinguishing feature of the crime of terror".²⁴⁸

244. That result is confirmed by the drafting history of Article 2(1)(b) of the ICSFT. The initial 1998 draft convention prepared by France followed a different approach, simply referring to certain acts including causing or threatening to cause the death of or causing serious injury to civilians or extensive destruction of property.²⁴⁹ At this stage, no reference had yet been made as to the purpose of these acts. France then changed its approach in order to include, apart from the acts specifically listed in the conventions to be included in an annex, the offence of what has accurately been described

²⁴³ F. Jessberger in: P. Gaeta (ed.), *The UN Genocide Convention – A Commentary*, 2009, p. 105 *et seq.*

²⁴⁴ Article II of the International Convention on the Suppression and Punishment of the Crime of Apartheid.

²⁴⁵ Emphasis added.

²⁴⁶ See in: M. Nowak, M. Birk, G. Monina (eds.), *The United Nations Convention Against Torture and its Optional Protocol: A Commentary* (2nd Edition, forthcoming), Article 1, para. 107, "the requirement of a specific purpose seems to be the most decisive criterion which distinguishes torture from cruel or inhuman treatment".

²⁴⁷ ICTY, *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Trial Chamber I, Judgment of 5 December 2003, paras. 128 and 136; ICTY, *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Appeals Chamber, Judgment of 30 November 2006, para. 104; ICTY, *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Appeals Chamber, Judgment of 12 November 2009, para. 37 (Annex 467 to MU).

²⁴⁸ ICTY, *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Trial Chamber I, Judgment of 5 December 2003, paras. 72 and 78 (Annex 464 to MU).

²⁴⁹ Draft international convention for the suppression of terrorist financing (as prepared by the French delegation), 4 November 1998, UN Doc. A/C.6/53/9, p. 3.

as “murder with terrorist purpose”²⁵⁰ that would otherwise not have been covered by the mere reference to the conventions to be included in the envisaged annex.

245. The subsequent working document submitted by France then used the formulation “*constitutes a means* of intimidating a government or the civilian population” in order to give expression to the particular terrorist purpose.²⁵¹

246. This formulation was criticised by a number of delegations as providing for a mere objective evaluation as to whether or not a specific act “constitute[s] a means” to intimidate a government or a civilian population.²⁵²

247. In response to intense debates on the definition of terrorism in Article 2(1)(b) of the ICSFT, ranging from changing the wording to deleting the entire paragraph, the next working paper presented by France used the different formulation “designed to” in order to expressly incorporate a mental element for an act to qualify as terrorism.²⁵³

248. Yet, this amended text still did not garner sufficient support. By way of reaction to this continued lack of support for what was still considered by many States involved in the negotiations to be too low a threshold for the mental element, the revised text prepared by the Friends of the Chairman then included in the text of draft Article 2(1)(b) of the ICSFT the additional mental element that the alleged terrorist act had to be committed for a specific purpose (“*visé à*”), namely the purpose to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act, as was later adopted.²⁵⁴

249. In light of its wording, context, object and purpose, as well as the drafting history deliberately including the element of “purpose” into the provision, one cannot therefore but conclude that Article 2(1)(b) of the ICSFT requires that the alleged acts in question require *special intent*, in line with other crimes that provide for such specific mental element and using the same or a similar wording.

²⁵⁰ Diaz-Panigua, Carlos Fernando, *Negotiating Terrorism: The Negotiation Dynamics of Four UN Counter-Terrorism Treaties, 1997-2005* (2011), p. 461 *et seqq.*

²⁵¹ Draft international convention for the suppression of the financing of terrorism, Working document submitted by France, 11 March 1999, UN Doc. A/AC.252/L.7 (emphasis added).

²⁵² See especially the Proposal submitted by Germany (UN Doc. A/AC.252/1999/WP.26, 18 March 1999): “The exact meaning of the words ‘constitutes a means of intimidating a government’ is unclear to the German delegation”, p. 2 (see the same in UN Doc. A/54/37, p. 39 (Annex 5 to PORF)).

²⁵³ Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, UN Doc. A/54/37, 5 May 1999, p. 12 (Annex 5 to PORF); see on this very formulation already above paras. 184.-185. in the context of the first subjective element.

²⁵⁴ Revised text prepared by the Friends of the Chairman, UN Doc. A/C.6/54/L.2, p. 5.

B. A SPECIFIC INTENT CRIME REQUIRES AN ADDITIONAL MENTAL ELEMENT OF *DOLUS SPECIALIS*

250. When establishing such specific intent, international courts and tribunals, including the Court itself, have in particular meticulously distinguished such specific intent from other reasons and motives of the perpetrator.

251. Notably, it was the Court itself that in the *Bosnian Genocide* case stressed the importance of this element when elaborating, with regard to the crime of genocide, that

“[i]t is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. Something more is required. The acts listed in Article II must be done with intent to destroy the group as such in whole or in part.”²⁵⁵

252. Applying this holding of the Court to the purpose-requirement contained in Article 2(1)(b) of the ICSFT means that it is not sufficient that death or serious bodily injury was caused. Something more is required. The alleged acts must also have been committed with the specific intent to intimidate a population or to compel a government to do or to abstain from any act. Thus, the mental element in question is fulfilled, and fulfilled only, provided the perpetrator desired the act for the requisite specific purpose, i.e. either to provide for intimidation or compulsion.

253. Inherent in this understanding of a particular aim or goal that is specifically desired by the perpetrator is the result that lesser forms of *mens rea* than direct intent are not sufficient to fulfil this special intent requirement. Thus, indifference or mere acceptance of a certain result is not sufficient to establish that the perpetrator acted with intent in relation to the purpose of his or her act. It is therefore not enough if the perpetrator merely intended that fear be created that might in turn intimidate the civilian population or the government in question. Rather, such instigation of fear and such intimidating effect must have constituted the *very purpose* for committing the respective act.

254. This point was emphasized by the ICTY’s Trial Chamber in the *Galić* case with respect to Article 51(2) of Additional Protocol I,²⁵⁶ and was confirmed by the ICTY’s Appeals Chamber. The latter referred to the drafting history of Additional Protocol I and, on that basis, accepted that

“[t]he prohibition of ‘acts or threats of violence which have the primary object of spreading terror’ is directed to intentional conduct *specifically directed toward the spreading of terror*”²⁵⁷

²⁵⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, para. 187.

²⁵⁶ ICTY, *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Trial Chamber I, Judgment of 5 December 2003, para. 136: “[the prohibition of spreading terror] is to be understood as excluding *dolus eventualis* or recklessness from the intentional state specific to terror”.

²⁵⁷ ICTY, *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Appeals Chamber, Judgment of 30 November 2006, para. 103 referring to *Travaux préparatoires*, Vol. XV, p. 274, cited at paragraph 101 of the Trial Judgement (emphasis added).

which in turn therefore

“excludes terror which was not intended by a belligerent and terror that is merely an incidental effect of acts of warfare which have another primary object”.²⁵⁸

255. Two important consequences follow from this, namely *first* that the creation of terror that was not intended would not fulfil the mental element of the offence of terrorism and, *second*, that terror must be specifically caused by the respective act and not just constitute a general consequence of the overall situation of armed conflict. In particular, the feeling of terror inherent in acts of warfare as such does not qualify the underlying acts as acts of terror.

256. Due to the special role of the mental element of purpose for the crime of terrorism, according to the ICTY Trial Chamber in *Galić*, the party claiming the commission of acts of terror

“is required to prove not only that the Accused accepted the likelihood that terror would result from the illegal acts – or, in other words, that he was aware of the possibility that terror would result – but that that was the result which he *specifically intended*. The crime of terror is a specific-intent crime.”²⁵⁹

257. This was confirmed by the ICTY’s Appeals Chamber in *Galić*,

“[t]he *mens rea* of the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population is composed of the specific intent to spread terror among the civilian population.”²⁶⁰

258. Given its character as a specific-intent provision, the same must also hold true for the offence defined in Article 2(1)(b) of the ICSFT.

C. THE SPECIFIC INTENT TO CREATE TERROR MUST FORM THE PURPOSE OF THE ACT

259. According to the text of Article 2(1)(b) of the ICSFT, the reference to the purpose of the act indicates that creating an effect of intimidation or compulsion must have been the reason to commit the respective act. This is brought out by the fact that Article 2(1)(b) of the ICSFT refers to “*the purpose*” in the singular, rather than to “*a purpose*” to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

260. This direct link between the intent to commit the act and the purpose of spreading terror has also been emphasized by the ICTY:

“[t]he fact that other purposes may have coexisted simultaneously with the purpose of spreading terror among the civilian population would not disprove this charge, provided

²⁵⁸ *Ibid.* (emphasis added).

²⁵⁹ ICTY, *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Trial Chamber I, Judgment of 5 December 2003, para. 136 (emphasis added).

²⁶⁰ ICTY, *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Appeals Chamber, Judgment of 30 November 2006, para. 104.

that the intent to spread terror among the civilian population was principal among the aims.”²⁶¹

261. This understanding of the importance of the terrorist purpose is supported by both Article 51(2) sentence 2 of the Additional Protocol I and Article 13(2) sentence 2 of the Additional Protocol II which in the context of an armed conflict both explicitly provide that

“[a]cts or threats of violence *the primary* purpose of which is to spread terror among the civilian population are prohibited.”²⁶²

262. Thus, international humanitarian law makes it clear that an act only constitutes terror in the context of an armed conflict, if the *primary* purpose of an act was to spread terror among the civilian population. This is reflective of the fact that even lawful acts of warfare necessarily frighten the civilian population in the context of an armed conflict, and therefore spread fear and anxiety that were however not intended, or at least not primarily intended.²⁶³ There is nothing in Article 2(1)(b) of the ICSFT to suggest any different standard was intended, and it would have been confusing and anomalous to introduce such a different standard.

263. Thus Ukraine, as the claimant, is required to establish that the acts it relies upon were committed with the *specific* purpose of intimidating the population or compelling a government in order to establish an offence as one falling under Article 2(1)(b) of the ICSFT, thus possibly giving rise to the treaty obligations arising for other State parties of the ICSFT.

D. REFERENCE TO THE NATURE AND CONTEXT WAS NOT MEANT TO REPLACE THE MENTAL ELEMENT OF PURPOSE

264. Ukraine, not only in the provisional measures phase, but also in its Memorial, has failed to provide any convincing direct evidence that would establish the required *dolus specialis* regarding the acts it incorrectly denotes as acts of “terrorism”.²⁶⁴ Rather, it simply attempts to rely on the nature and context, suggesting that the Court may infer the existence of the required mental element of *dolus specialis* from the fulfilment of certain objective elements.²⁶⁵

265. Yet, it must be noted that the drafters did not mean to set aside the necessity to prove the required *dolus specialis*. The submission by Ukraine that

²⁶¹ ICTY, *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Appeals Chamber, Judgment of 30 November 2006, para. 104 (emphasis added); confirmed in ICTY, *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Appeal Chamber, Judgment of 12 November 2009, para. 37 (Annex 467 to MU).

²⁶² Emphasis added.

²⁶³ See on this particular aspect Section E below.

²⁶⁴ See Chapter VII.

²⁶⁵ MU, para. 208.

“[t]his language [of nature and context] was included in the final version of the Convention specifically to ensure that ‘proof of the perpetrator’s subjective state of mind’ would not be required”²⁶⁶

does not withstand scrutiny. This statement, taken from the Informal Summary of the discussion in the Working Group, prepared by the Chairman, constitutes a mere summary reflecting the intense debate that had taken place with regard to this particular element. While some delegations had suggested deleting the reference to nature and context, some other delegations had explicitly opposed such deletion.²⁶⁷

266. The formula now contained in Article 2(1)(b) of the ICSFT, referring to the purpose, while taking into consideration the nature and context, therefore constitutes a compromise that was reached between the generally approved necessity to include a specific mental element (“when the purpose of such act”/ “*cet acte vise à*”) on the one hand, and the heavily disputed possibility to infer such mental element from the nature and context on the other.²⁶⁸

267. In fact, the stand-alone function and importance of this mental element has been stressed by this Court already in its Order of 19 April 2017, where the Court noted that Ukraine had failed to submit a plausible case as far as the required purpose to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act is concerned.²⁶⁹

268. The Court also unequivocally stated that while Ukraine had made reference to acts giving rise to the death and injury of a large number of civilians, Ukraine had not been able *in addition* to adduce evidence as to the presence of the “other elements set out in Article 2, paragraph 1, such as [...] the element of purpose specified in Article 2, paragraph 1 (b)”.²⁷⁰

E. IN ANY EVENT, THE NATURE AND CONTEXT OF THE ACT MUST ALLOW A CONCLUSION THAT TERROR WAS ACTUALLY INTENDED

269. Ukraine additionally fails properly to contextualise the situation in its assessment of the nature and context of an ongoing armed conflict. In that regard, it is to be noted that such alleged acts of terrorism are, as far as their objective elements are concerned, composed of acts that constitute other criminal offences. Yet, this is exactly the reason why tribunals concerned with the crime of terrorism have repeatedly reiterated that the special intent element underlying the crime of terrorism needs to be proven, as it is this subjective element that distinguishes an act of terrorism from other crimes that

²⁶⁶ MU, para. 208, fn. 484.

²⁶⁷ Measures to eliminate international terrorism, Report of the Working Group, Annex III, Informal summary of the discussions in the Working Group, prepared by the Chairman, UN Doc. A/C.6/54/L.2, 26 October 1999, para. 87 and 88.

²⁶⁸ Diaz-Panigua, Carlos Fernando, *Negotiating Terrorism: The Negotiation Dynamics of Four UN Counter-Terrorism Treaties, 1997-2005* (2011), pp. 465-466; see on the element of nature and context below, Section E.

²⁶⁹ Order of 19 April 2017, para. 75.

²⁷⁰ *Ibid.*

share the same objective elements and which therefore, be it only at first glance, seem to be identical in nature.

270. This aspect has been stressed by the ICTY Trial Chamber in the *Galić* case when stating that

“[t]he legal elements [for the crime of terror and for the war crime of directing attacks against civilians] are the same except that the crime of terror contains the distinct material element of ‘primary purpose of spreading terror.’ This makes it *more specific* than the crime of attack on civilians.”²⁷¹

271. One must therefore be careful in establishing the specific intent, as was emphasized by this Court in the *Bosnian Genocide* case, in which the Court explicitly stated that

“[t]he specific intent is also to be distinguished from other reasons or motives the perpetrator may have. Great care must be taken in finding in the facts a sufficiently clear manifestation of that intent.”²⁷²

272. The Court further confirmed in the *Croatian Genocide* case that where there is no evidence as to the required *dolus specialis*, this specific intention may only be deduced from a pattern of conduct if this constitutes the only inference that could reasonably be drawn from the acts in question.²⁷³

273. In fact, and in contrast to what Ukraine is now suggesting,²⁷⁴ the Court in *DRC v. Uganda* emphasized that even if there was

“credible evidence sufficient to conclude that the UPDF troops committed acts of killing, torture and other forms of inhumane treatment of the civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, incited ethnic conflict and took no steps to put an end to such conflicts, was involved in the training of child soldiers, and did not take measures to ensure respect for human rights and international humanitarian law in the occupied territories”,²⁷⁵

it still did not agree that these acts constituted acts of terror, as claimed by the DRC.²⁷⁶

274. Thus, in contrast to Ukraine’s suggestion, it is especially in the circumstances of an armed conflict, in which one or even several acts may fulfil the *objective* elements of terrorism, that these

²⁷¹ ICTY, *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Trial Chamber I, Judgment of 5 December 2003, para. 162 (emphasis added).

²⁷² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, para. 189.

²⁷³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, para. 148.

²⁷⁴ MU, para. 209.

²⁷⁵ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, para. 211.

²⁷⁶ *Ibid.*, para. 212.

acts may still not be found to have been accompanied by the specific intent of terrorising the civilian population, requiring in turn evidence and proof of such specific intent.

275. Ukraine fails properly to contextualise the situation in its assessment of the nature and context. In fact, belligerent acts in wartime often possess an intimidating effect on the civilian population. This is due to the fact that, unfortunately, the risk of causing collateral damage to civilians is generally inherent in modern warfare, and is in particular prevalent in urban warfare.

276. It has thus, due to the overall frightening situation of an armed conflict especially for civilians, been stressed that

“[t]he prohibition of spreading terror among a civilian population must [...] always be distinguished from the effects that acts of legitimate warfare can have on a civilian population.”²⁷⁷

because

“a certain degree of fear and intimidation among the civilian population is present in nearly every armed conflict.”²⁷⁸

277. Hence,

“the closer the theatre of war is to the civilian population, the more it will suffer from fear and intimidation. This is particularly the case in an armed conflict conducted in an urban environment, where even legitimate attacks against combatants may result in intense fear and intimidation among the civilian population, *but to constitute terror, an intent to instill fear beyond this level is required.*”²⁷⁹

278. It is also for these reasons that:

“the circumstances of a particular armed conflict must be taken into account in determining whether the crime of terror has been committed, or whether the perpetrators intended to ‘spread terror among a civilian population.’”²⁸⁰

279. In the context of an armed conflict with ongoing military activities, for an act of terror to exist the effects on the population must thus extend beyond the usual detrimental effects of a war scenario for the population, i.e. must cause “extreme fear”.²⁸¹ Even more explicit, “terror” in its ordinary meaning denotes, as it has been put by the ICTY, a

²⁷⁷ ICTY, *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Trial Chamber III, Judgment of 12 December 2007, para. 888 (Annex 466 to MU).

²⁷⁸ *Ibid.*

²⁷⁹ *Ibid.* (emphasis added).

²⁸⁰ *Ibid.* (emphasis added).

²⁸¹ ICTY, *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Trial Chamber I, Judgment of 5 December 2003, para. 593.

“ ‘[...] state of being terrified or greatly frightened; intense fear, fright or dread’ or the ‘action or quality of causing dread; terrific quality or terribleness’.”²⁸²

280. The requirements for such a finding have thus been described by the ICTY as follows, namely that such state of terror

“ ‘[...] has to be of the highest intensity. It has to be long-term. It has to be direct. And it has to be capable of causing long-term-consequences’.”²⁸³

281. In an armed conflict, factors for establishing such purpose might be the “nature, manner, timing and duration”,²⁸⁴ including an assessment as to the overall “theatre of war” setting. This would include the nature and context of any shelling incidents, including in turn factors such as the position of the respective front lines of conflict, the location of military targets (or objects which have been treated by both sides to the conflict as military targets), and the question of whether there have been similar or recent attacks from the opposing side and/or whether such are anticipated.

282. The nature and context of the acts in question must thus be of a kind to allow the only reasonable conclusion that terror has intentionally been inflicted upon a civilian population, taking into consideration the overall context of the ongoing armed conflict in Eastern Ukraine.

F. INTIMIDATION AND COMPELLING OF A GOVERNMENT SIMILARLY REQUIRE CONTEXTUALISATION

283. Lastly, the purpose of the alleged act of terrorism must explicitly be to intimidate a population or compel a government. This element must similarly be interpreted in light of the ongoing circumstances and, similarly to as already described above,²⁸⁵ in light of the laws of armed conflict.

284. In order to establish this particular purpose, Ukraine claims that “these acts occurred as the DPR and LPR demanded greater autonomy from Ukraine’s central authorities”.²⁸⁶ Yet, this is not a purpose over and above the overall context in which the entire armed conflict is taking place, and cannot therefore be pertinent for establishing the offence of terrorism with regard to particular acts fulfilling the purpose to intimidate the civilian population or to compel a government.

285. The purpose of any lawful act in any armed conflict will always, and indeed inevitably, be to compel a government to do or to abstain from doing any act, i.e. to achieve military objectives and ultimately to bring about surrender by the other party to the conflict and translate a military victory into political gains. The purpose of the entire conflict in Eastern Ukraine and with it each and every

²⁸² ICTY, *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Trial Chamber III, Judgment of 12 December 2007, para. 884 (Annex 466 to MU).

²⁸³ *Ibid.*, para. 883.

²⁸⁴ ICTY, *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Appeals Chamber, Judgment of 30 November 2006, para. 104; ICTY, *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Trial Chamber III, Judgment of 12 December 2007, para. 881 (Annex 466 to MU).

²⁸⁵ See Section B above.

²⁸⁶ MU, para. 215.

act committed in that context, according to Ukraine's suggestion, would thus serve the purpose of spreading terror.

286. Thus, following Ukraine's interpretation would lead to the consequence that whenever an armed conflict has started, the requisite specific purpose will always be established because, in Ukraine's view, the purpose would *ipso facto* be to compel a given government to do or to abstain from doing any act.

287. It is therefore required to interpret this element against the background of the overall ongoing armed conflict, and it may not be equated with the whole panoply of military aims and goals that can be legitimately pursued in accordance with international humanitarian law.

288. The broad interpretation of the purpose requirement contained in Article 2(1)(b) of the ICSFT, as suggested by Ukraine, would even provide a disincentive for non-state actors engaged in an armed conflict to abide by their obligations under international humanitarian law since all of their acts aimed to "force" the respective territorial State to accept their political goals, be it autonomy, be it independence, or be it some other political goal, could without exception be qualified as acts committed with a terrorist purpose.²⁸⁷

289. It is therefore required to show that either the specific purpose of the acts under consideration has been to intimidate the population, or that the alleged intended compulsion of the Ukrainian government related to something beyond the overall goal of the armed conflict as such. Ukraine also has to provide evidence that the insurgents' alleged acts were committed for the purpose of something more than trying to achieve military advantages, even if such military advantages, if gained, would then exercise pressure upon the Ukrainian government.

G. SELECTED DOMESTIC CASES DO NOT SUPPORT UKRAINE'S CASE

290. In order to seek support for its broad assumption that "attacks on civilian areas will, by their nature or context, generally be regarded as having the requisite purpose",²⁸⁸ Ukraine relies upon a number of domestic cases that are however not supportive of its claim.

291. The first is the Danish Supreme Court decision in the so called *Fighters and Lovers Case*,²⁸⁹ where the statement on which Ukraine relies, namely that the use of "imprecise mortar shells in civilian areas" would always constitute terrorism, has been taken out of context.²⁹⁰

²⁸⁷ A. Cassese, Should rebels be treated as criminals? Some modest proposals for rendering internal armed conflicts less inhumane, in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford University Press, 2012), at p. 519.

²⁸⁸ MU, para. 209.

²⁸⁹ Supreme Court of Denmark, *Fighters and Lovers Case*, Case 399/2008, Press release, 25 March 2009, pp. 1-2 (Annex 476 to MU); see also above para. 144 (b).

²⁹⁰ See above, para. 144 (b).

292. The Danish Supreme Court, when making this particular statement, was concerned with the armed conflict in Colombia and with certain operations by the FARC.²⁹¹ The Court relied upon a broad range of measures by this group of “having murdered civilians, subjected civilians to gross acts of violence, carried out kidnappings, including kidnappings of politicians and a presidential candidate, and used imprecise mortar shells in civilian areas, in which civilians became victims” that were then *cumulatively* regarded by the Danish Supreme Court as allowing to qualify the FARC as a *terrorist organisation*. Apart from the fact that the decision thus took into account acts committed by the FARC outside the theatre of war, and that it looked at all of those acts in a holistic manner, it also made a finding as to the character of the FARC as a terrorist organization.²⁹² This however, as is self-evident, is a finding different from the question now before this Court, in which acts of organisations, namely the DPR and LPR, that no one except Ukraine is considering terrorist organisations, require an evaluation of their individual nature in the specific context of an armed conflict.

293. The *Fighters and Lovers Case* is thus of no instructive value for the case at hand due to a lack of findings as to the terrorist nature of specific acts.

294. The same holds true for the decision of the Italian Supreme Court (*Abdelaziz*) that Ukraine has also relied upon for its interpretation of the intent element of the crime of terrorism.²⁹³ The Italian Supreme Court held that a peculiar and concrete factual situation might allow for a finding as to the terrorist purpose of a particular act.²⁹⁴ The Italian Supreme Court, did not, however, provide more specific guidance on when this could actually be the case, as it had relied on a hypothetical situation in order to counter the approach taken by the Court of Milan.

295. Finally, in relation to Ukraine’s reference to the Russian Supreme Court,²⁹⁵ it should first be noted that Ukraine’s reference to the guidelines adopted by the Russian Supreme Court is misplaced. Ukraine refers to the Resolution of the Plenum of the Supreme Court of the Russian Federation, No. 1 of 9 February 2012, “On Some Aspects of Judicial Practice Relating to Criminal Cases on Crimes of Terrorist Nature”. The relevant paragraph is a comment on article 205 of the Russian Criminal Code that provides for the intimidation of the population as a mandatory objective element of the crime of terrorism along with other grave consequences such as risk to human life or significant damage to property.

296. Ukraine once again fails properly to distinguish between the objective and mental elements of the crime of terror. While the Russian Supreme Court has indeed provided a list of examples to establish the objective criteria for the crime of terror, it is still required that the mental elements

²⁹¹ Fuerzas Armadas Revolucionarias de Colombia.

²⁹² Supreme Court of Denmark, *Fighters and Lovers Case*, Case 399/2008, Press release, 25 March 2009, pp. 1-2 (Annex 476 to MU).

²⁹³ See above, paras. 221-223.

²⁹⁴ Supreme Court of Cassation, Italy, Final Appeal Judgement, No. 1072, 17 January 2007 (*Italy v. Abdelaziz and others*) at 4.1 (Annex 473 to MU).

²⁹⁵ MU, para. 209 and fn. 485.

necessary for the act to constitute terrorism, including direct intent to intimidate the population, must be established.²⁹⁶ There is thus, contrary to what Ukraine is claiming, no automatic inference to be drawn as to intent from the objective elements of a certain act.²⁹⁷

H. CONCLUSION

297. In light of all of the foregoing, it is established that Article 2(1)(b) of the ICSFT constitutes a special intent offence. It thus requires a careful assessment of the overall armed conflict in order to establish that the alleged acts have indeed been committed, with the specific purpose of intimidation or coercion beyond the coercive element inherent in each and every military operation not prohibited by rules of international humanitarian law applicable in situations of armed conflicts.

²⁹⁶ Commentary on Article 205, in *Article-by-Article Commentary on the Criminal Code of the Russian Federation: in Four Volumes*, Special Part, Section IX, Volume 3, Editor-in-Chief V.M. Lebedev, Urait, 2017 (Annex 95); Commentary on Article 205, in *Article-by-Article Commentary on the Criminal Code of the Russian Federation: in Two Volumes*, Volume 2, 2nd Edition, Edited by A.V. Brilliantov, Prospekt, 2015 (Annex 94).

²⁹⁷ Commentary on Article 205, in *Article-by-Article Commentary on the Criminal Code of the Russian Federation: in Four Volumes*, Special Part, Section IX, Volume 3, Editor-in-Chief V.M. Lebedev, Urait, 2017 (Annex 95).

CHAPTER VI
UKRAINE HAS FAILED TO ESTABLISH THE OFFENCE OF TERRORISM
FINANCING WITH RESPECT TO FLIGHT MH17

298. Ukraine has made the appalling loss of life caused by the shooting down of Flight MH17 on 17 July 2014 the centrepiece of its ICSFT case. It alleges that Russian State officials (and Russian nationals) supplied the weapon used to shoot down Flight MH17 with the intention that it be used to shoot down a civil aircraft or in the knowledge that it was to be used in this way.²⁹⁸

299. The Court is aware of the ongoing Dutch criminal proceedings (Russia is not a party) and the proceedings before the ECtHR (where Russia is a party) within which, various allegations have been made as to the weapon that shot down Flight MH17 being supplied by Russia. Such allegations are vigorously denied by Russia. However, as already noted in the previous phases of the current proceedings, these are not matters that are necessary to determination of Ukraine's claims before the Court since they do not concern whether the specific elements of an act of terrorism financing as defined in Article 2(1) of the ICSFT have been established.

300. Even leaving aside the fact that the provision of "funds" does not include the supply of weapons (see Chapter II above), Ukraine's claim falls at the next hurdle. There is still no material evidence before the Court, credible or otherwise, that whoever provided the weapon used to shoot down Flight MH17 did so with the requisite specific intent or knowledge that such weapon should/was to be used to shoot down a civil aircraft, as would be required under Article 2(1)(a) of the ICSFT read in conjunction with Article 1(1)(b) of the Montreal Convention or under Article 2(1)(b) of the ICSFT.

301. The evidence that Ukraine relies on, if it were accepted, shows that:

- a. Whoever (allegedly) supplied the weapon (allegedly) used to shoot down Flight MH17 was acting in response to a series of armed strikes by Ukraine's military aircraft, and was responding to a request for assistance to be used to defend against such military strikes.
- b. The person who allegedly requested the weapon made that request for the purpose of defending against military air strikes and expressed shock at the shoot down of a civil aircraft.

302. It follows from this that, even if the evidence that Ukraine relies on were to be accepted, it would show that whoever provided the weapon did so with the intention that it should be used, or in the knowledge that it was to be used, to target *Ukraine's military aircraft*, and moreover that Flight MH17 was shot down in a tragic error. Thus, even taking Ukraine's evidence at its highest, the requisite intention or knowledge under the chapeau to Article 2(1) of the ICSFT would be absent.

303. Further, it is untenable for Ukraine to contend that any person providing a BUK to the DPR/LPR knew or should have known that the DPR/LPR would use that weapon to shoot down civil aircraft flying

²⁹⁸ See CR 2019/12, 7 June 2019, p. 40, para. 49 (Check).

at cruising altitude over eastern Ukraine²⁹⁹ when, at the time, Ukraine itself did not even see this as a risk – although it knew of the possible use of high powered weapon systems to shoot down Ukrainian military aircraft at high altitude in the days prior to 17 July 2014 (see below). Indeed, it was, and is, wholly inconceivable that there would be an intentional targeting of a civil aircraft within the armed conflict in Eastern Ukraine.

I. The Alleged Request for and Provision of a BUK for the Purpose of Defending against Ukrainian Air Attacks

304. As at the provisional measures and preliminary objections phases, the evidence put forward by Ukraine principally concerns the alleged delivery of a weapon by the Russian Federation, and Ukraine relies on reports of the Dutch Safety Board (“DSB”) and the Joint Investigation Team (“JIT”). However, the contents of the alleged telephone intercepts to which the JIT refers and the passage of the JIT’s presentation are of central relevance to the current claim and these support Russia’s position.³⁰⁰

305. As to the background to the shooting down of Flight MH17, the DSB Report states:

“[I]t is clear that between April and July, the armed conflict in the eastern part of Ukraine was continuing to extend into the air. Ukrainian armed forces aeroplanes and helicopters conducted assault flights and transported military personnel and equipment to and from the conflict area. The armed groups that were fighting against the Ukrainian government attempted to down these aeroplanes. In May 2014, mainly helicopters were downed, while in June and July also military aeroplanes were downed, including fighter aeroplanes.”³⁰¹

306. The DSB Report details that:

“During the period between the conflict breaking out in the eastern part of Ukraine in April 2014 and the day of the crash of flight MH17 on 17 July, a number of Ukrainian military aircraft were shot at (mostly from the ground). The Ukrainian authorities officially confirmed some of these incidents although specific details, such as the weapons used or the altitude at which the incident occurred, were not always revealed. [...] It cannot be ruled out that, during the period mentioned, other incidents also occurred. Therefore, no verified overview of the total number of incidents can be provided.”³⁰²

307. More specifically, in the days leading up to the shoot down of Flight MH17, two of Ukraine’s military aircraft were shot down: an Antonov An-26 military transport aeroplane on 14 July, flying at

²⁹⁹ MU, para. 287.

³⁰⁰ Russia does not accept the authenticity of any of alleged intercepts produced by Ukraine’s Security Service and any reference to intercepts in this Chapter is without prejudice to this position.

³⁰¹ Dutch Safety Board, Report “Crash of Malaysia Airlines Flight MH17, Hrabove, Ukraine, 17 July 2014”, October 2015 (the “DSB Report”), p. 185 (Annex 38 to MU).

³⁰² DSB Report, p. 181 (Annex 38 to MU).

an altitude of 6,500 metres,³⁰³ and a Sukhoi Su-25 fighter aeroplane on 16 July, flying at an altitude of 8,250 metres.³⁰⁴

308. The DSB Report also found that, while military aircraft at high altitude were being targeted, a risk to civil aviation arose from the potential for “errors and slips”.³⁰⁵

309. On 17 July 2014, the National Security and Defense Council of Ukraine provided the following account of the situation as at 12:00, referring to airstrikes by the Ukrainian Armed Forces and to the aircraft carrying out such operations being targeted:

“After a forced break, yesterday the aircraft of the Armed Forces of Ukraine resumed combat missions in the area of the anti-terrorist operation. Fighter planes of the UAF struck several precision strikes at “Grad” multiple launch rocket systems, checkpoints, strong points, accumulations of manpower and equipment of mercenaries. [...]

During the day, 12 flights of Air Force aircraft and 17 flights of helicopters of the Army Aviation of the Ground Forces were made in order to strike at the positions of militants, deliver humanitarian supplies and search and rescue support.

Yesterday at about 13:00, using a portable anti-aircraft missile system the terrorists damaged a Su-25 aircraft that was performing a combat mission. [...]

Fighting near Marynivka has not stopped since yesterday. Ukrainian servicemen beat off 4 powerful enemy attacks. The militants attacked under the cover of 5 tanks and several armoured personnel carriers. Our military destroyed 3 tanks, 2 APCs [armoured personnel carriers], and 3 terrorist vehicles, which were delivering militants to the battlefield.”³⁰⁶

310. This is consistent with a social media post on the evening of 16 July 2014 claiming to be a “Message from Igor Ivanovich Strelkov” (a pseudonym of I. Girkin, a senior member of the DPR), stating: “Heavy fighting continues near Marinovka. The village was bombed twice from high altitude”.³⁰⁷

³⁰³ Flight MH17 was flying at an altitude of around 10,000 metres when it was destroyed.

³⁰⁴ Ukraine later revised its position with respect to these incidents, informing the DSB that the Antonov An-26 was flying at 6,300 metres and the Sukhoi Su-25 at 6,250 metres: see Dutch Safety Board, Report “Crash of Malaysia Airlines Flight MH17, Hrabove, Ukraine, 17 July 2014”, October 2015, fig. 77 at p. 182 (Annex 38 to MU).

³⁰⁵ DSB Report, p. 207 (Annex 38 to MU).

³⁰⁶ Latest information from the Information and Analysis Center of the National Security and Defence Council of Ukraine, 17 July 2014, <https://www.rnbo.gov.ua/ua/Diialnist/1738.html> (Annex 53).

³⁰⁷ VKontakte page “Reports from the Novorossiia’s militia”, post “16.07.14 19:42 Message from Igor Ivanovich Strelkov”, at https://vk.com/wall-57424472?day=16072014&w=wall-57424472_7094%2Fall, 16 July 2014 (Annex 146). See also a further post on the same social media group page stating that: “Aviation (with the loss of two Su-25) carried out attacks on Saur[-Mogila]. In spite of this, the militia, with difficulty, are tightening the encirclement”, VKontakte page “Reports from the Novorossiia’s militia”, post “16.07.14. A big review of the combat situation in the most important fighting locations over the past day”, 16 July 2014 at https://vk.com/wall-57424472?day=16072014&w=wall-57424472_7148%2Fall, 16 July 2014 (Annex 147).

311. With respect to the provision of the weapon allegedly used to shoot down Flight MH17, the JIT report found that:

“In July 2014, heavy fighting was going on in the area southeast of Donetsk. The pro-Russian fighters were engaged in an offensive to force a passage to the border with the Russian Federation south of the conflict zone. During these fights, the Ukrainian army carried out many air strikes in order to stop this offensive. The pro-Russian fighters suffered greatly: there were many losses, both human and material. Intercepted telephone conversations show that during the days prior to 17 July, the pro-Russian fighters mentioned that they needed better air defence systems to defend themselves against these air strikes. In this respect, a BUK was discussed explicitly.”³⁰⁸

312. The relevant intercept of a call between “Khmuryi” (allegedly Mr Dubinsky) and “Sanych” on 16 July 2014 contains the following key passage, which Ukraine has not drawn to the Court’s attention:

“**Khmuryi:** [...] Screw it, Sanych, I don’t even know if my men will be able to hold there today or not. They start coming down on them with Grads, I’ll be left without my reconnaissance battalion and the spetsnaz company. This sh*t is f**ked up. Oh crap... [...] And there’s nothing we can do about it... Now, Grads are something we can ****ing bear with, but if Sushkas [slang term for Sukhoi fighter aeroplanes] strike in the morning... If I can receive a Buk in the morning and send it over there that’d be good. If not, things will go totally f**ked up. [...]

Sanych: Well, look here, Nikolayevich, if you need..., we’ll send it...over to your area...”³⁰⁹

313. Moreover, Ukraine has chosen not to put before the Court certain other relevant intercepts of conversations which were previously published by its Security Service. These additional intercepts expressly refer to a request for a BUK for the purpose of defending against high altitude air attacks.

314. First, on 16 July at 18:12, around one hour before the alleged conversation between “Khmuryi” and “Sanych”:

“**Dubinskiy:** [...] I’ll send you three tanks, ok?

Pulatov: What’s the point? They’ll just be burnt here. They really are irrelevant here.

Dubinskiy: In principle, you don’t need tanks there yet, right?

³⁰⁸ Joint Investigation Team, Presentation Preliminary Results Criminal Investigation MH17, Openbaar Ministerie, 28 September 2016 (Annex 39 to MU). Transcript available at: <https://www.prosecutionservice.nl/topics/mh17-plane-crash/criminal-investigation-jit-mh17/jit-presentation-first-results-mh17-criminal-investigation-28-9-2016>.

³⁰⁹ Intercepted conversation between “Khmuryi” and “Sanych” (19:09:20), 16 July 2014 (Annex 394 to MU).

Pulatov: No, we don't need tanks. *What we need is long-range artillery and decent air defense. Because the plane worked at high altitude. Meaning, virtually no system was able to reach it.*"³¹⁰

315. Second, around two hours later (at 20:13):

Dubinskiy: [...] if a Buk-M is brought here tonight it will be taken to you directly. Aha?

Pulatov: Got it.

Dubinskiy: That Buk is our only hope. There is nothing else we can do. Right?

Pulatov: Yes."³¹¹

316. Third, a Dutch broadcaster published an intercept of a conversation which took place at 00:17 on 17 July 2014:

“Dubinskiy: “The thing is that they went to the top [started flying high]. Before that, all casualties... my reconnaissance battalion took Marinovka with only three three-hundredths [wounded]. And then Sushkas [Ukrainian military aircraft] started working from five kilometers and I have ten two-hundredths [killed] straight away. I have ... at night Buk-M should come. In principle, all the problems will go ...”³¹²

317. Notably, Ukraine's own Security Service stated shortly after the tragic shooting down of Flight MH17 that the weapon had been supplied in order to take part in a military operation in response to the combat operations of the Ukrainian Armed Forces (including air warfare). In four Notices of Suspicion issued by Ukraine's Security Service on 18 June 2019, which Ukraine has not put into evidence, it is stated:

“On 16 July 2014, the armed units of the DPR [...] attempted to breach the defenses of the Ukrainian government forces in the area of Savur Mohyla (Snizhne District, Donetsk Region); however, due to defense combat action of the Ukrainian Armed Forces (including

³¹⁰ Emphasis added. Intercepted conversation between Dubinskiy and Pulatov, at 18:12 on 16 July 2014, published at: <https://app.nos.nl/op3/mh17-tapes/#/hoofdstuk2?overlay=audiotape-3> (Annex 246). Dutch Prosecutor referred to this conversation on 26 July 2020 (“a decent air-defence system [was] needed’, because an aircraft attacked them that day from high altitude and no available air-defence system could reach it”. See Excerpts from the presentation of the public prosecutors on 26 July 2020, <https://www.prosecutionservice.nl/topics/mh17-plane-crash/prosecution-and-trial/court-session-26-june-2020>). For “original” Russian version with translation see No. 1 in Transcripts of certain publicly available alleged intercepts concerning the shoot down of Flight MH17, 16-17 July 2014 (Annex 251).

³¹¹ Excerpts from the presentation of the public prosecutors on 26 July 2020, <https://www.prosecutionservice.nl/topics/mh17-plane-crash/prosecution-and-trial/court-session-26-june-2020>. Audio available at *YouTube channel of Nieuwsuur*, “A reconstruction of the MH17 disaster: tapes of thousands of overheard conversations”, 11 April 2021, <https://youtu.be/iUQk6i31fBc?t=1592:39-2:51> (Annex 243). For “original” Russian version with translation see No. 3 in Transcripts of certain publicly available alleged intercepts concerning the shoot down of Flight MH17, 16-17 July 2014 (Annex 251).

³¹² Intercepted conversation between Skiff and Dubinskiy, at 00:17 on 17 July 2014, published at: <https://app.nos.nl/op3/mh17-tapes/#/hoofdstuk2?overlay=audiotape-5> (Annex 247). For “original” Russian version with translation see No. 4 in Transcripts of certain publicly available alleged intercepts concerning the shoot down of Flight MH17, 16-17 July 2014 (Annex 251).

air warfare), they suffered significant losses in personnel and military equipment. *For this reason* it was decided to take the further offensive under the cover of military air defense systems.

For these purposes, during the night of 16 to 17 July 2016 the 53rd Anti-Aircraft Missile Brigade's BUK TELAR [...] was illegally transported across the state border between Ukraine and the Russian Federation".³¹³

318. This shows the view of Ukraine's Security Service that the BUK was supplied for the purpose of "air defense" and, it follows, that Flight MH17 was shot down in error, not intentionally targeted as a civil aircraft.

II. Ukraine's Intercept Evidence Concerning the Shooting Down of Flight MH17

319. Ukraine also contends (and the evidence it relies on, if it were to be accepted, shows) that the persons allegedly responsible for shooting down Flight MH17 believed that they had targeted and destroyed a military aircraft.

320. As a preliminary observation, it is noted that all of the intercepts which were provided to the DSB, the JIT and to the Dutch prosecution authorities originate from Ukraine's Security Service.³¹⁴ The further intercepts which were recently published by Dutch broadcasters are also understood to originate from Ukraine's Security Service.³¹⁵

321. Ukraine has relied in this case on the transcript of an intercept said to refer to the downing of Flight MH17. But it has not drawn the Court's attention to the passage of the intercept which shows that the same individual ("Khmuryi", who Ukraine alleges is a Mr Dubinskiy) lacked the specific intent to use the weapon to shoot down a civil aircraft for the requisite specific purpose:

"Khmuryi: [...] What happened yesterday was messed up [swearing]. I am speechless."³¹⁶

322. Nor has Ukraine put into evidence the four Notices of Suspicion issued by its Security Service on 18 June 2019 or the documents referred to therein. These Notices record that:

³¹³ Security Service of Ukraine, Notices of suspicion to L. Kharchenko, I. Girkin, S. Dubinskiy and O. Pulatov, 18 June 2019 (Annex 76), p. 5 (emphasis added), accessible at: https://web.archive.org/web/20190717084427/https://ssu.gov.ua/uploads/Harchenko_eng.pdf, https://web.archive.org/web/20190630185956/https://ssu.gov.ua/uploads/Girkin_eng.pdf, https://web.archive.org/web/20190717084258/https://ssu.gov.ua/uploads/Pulatov_eng.pdf, https://web.archive.org/web/20190717084303/https://ssu.gov.ua/uploads/Dubinskiy_eng.pdf.

³¹⁴ See e.g. Summary of the speaking notes of the Prosecutor, The Hague Court session of 8 June 2020, <https://www.prosecutionservice.nl/topics/mh17-plane-crash/prosecution-and-trial/court-sessions-june-2020/investigation-on-telecommunications>.

³¹⁵ See e.g. *Nieuwsuur*, "Thousands of secret MH17 tapes provide insight into the situation before, during and after the disaster", 11 April 2021, <https://nos.nl/nieuwsuur/artikel/2376243-duizenden-geheime-mh17-tapes-geven-inzicht-in-situatie-voor-tijdens-en-na-ramp> (Annex 143) and *NOS op 3*, "MH17-Tapes", "Responsibility", 15 April 2021, <https://app.nos.nl/op3/mh17-tapes/#/intro?overlay=verantwoording> (Annex 144).

³¹⁶ Intercepted conversation between "Krot" and "Khmuryi" (07:41:06), 18 July 2014 (Annex 399 to MU).

“Thereafter, at 16:48 hours on 17 July 2014, L. V. Kharchenko reported to S.N. Dubinsky that ‘they are at the spot and have already downed one sushka [slang term for Sukhoi fighter aeroplane]’.

At 16:37, 16:41, 16:50 and 17:16 hours (Kyiv time) on 17 July 2014, posts about the downing of the AN-26 aircraft near Torez appeared on I. V. Girkin’s Twitter and Vkontakte pages on behalf of Igor Ivanovich Strelkov and the so called ‘militia’.”³¹⁷

323. In particular, Ukraine has omitted to adduce the documents referred to in the passage quoted above, comprising: (i) an intercept in which the DPR officers state that “they are at the spot and have already downed one sushka [slang term for Sukhoi fighter aeroplane]”, and (ii) a social media post published by a DPR representative on 17 July 2014 referring to the shoot down of an “AN-26 [military] aircraft”.³¹⁸

324. In order to provide the Court with a more complete picture of what emerges from the relevant intercepts and social media posts, these two bodies of material (which Ukraine’s Security Service rely on in the Notices of Suspicion) are examined in turn below.

III. Relevant Intercepts Not Produced by Ukraine

325. Ukraine has elected not to produce many intercepts of conversations which took place on the day of the incident, all of which were allegedly obtained by its Security Service and some of which were previously published by its Security Service. Such intercepts show that the DPR believed that a BUK had been used to shoot down a Ukrainian military aircraft (“a sushka”). Certain of the intercepts which Ukraine has omitted also record an understanding on the part of those speaking that this Ukrainian military aircraft shot down Flight MH17.

326. The first relevant intercept is of a call at 16:48 on 17 July 2014, which was presented to the Dutch court by the Dutch public prosecutors. This states that the DPR were “on the spot” and had “brought down one Sushka”, and also contains a direction to cover and guard “the BUK”:

“Kharchenko: We are on the spot. We’ve already brought down one Sushka.

Dubinskiy: Well done! Attaboys! Well... You’ve brought down one Sushka. Well done! Lonia, tell me....

[...]

Dubinskiy: What do you do there? I’ll put a question tonight. Obviously you will come here. Well, you’ll leave one company there to cover the BUK and you’ll probably go here,

³¹⁷ Security Service of Ukraine, Notices of suspicion to L. Kharchenko, I. Girkin, S. Dubinskiy and O. Pulatov, 18 June 2019 (Annex 76), p. 10.

³¹⁸ *Ibid.*

you know? You will leave one assault [brigade]. What there is for you to do there? You have enough work here. Giurza will come here too.”³¹⁹

327. The second relevant intercept is of a call around one hour later, at 17:42 on 17 July 2014, in which Dubinskiy states: “We also just shot down a Sushka, over Saur-Mogila. We got a Buk-M” and also refers to the shooting down of two “Sushkas” on the previous day.³²⁰

“Botsman: [...] A plane was shot down near us. I have to go there now and pick up the boxes. I’ll hand them over to you, just in case ... and then you can pass them on afterwards, right?

Dubinskiy: Who got shot down?

Botsman: What’s that?

Dubinskiy: I won’t be in the city for another two hours or so. I’m in Marinovka now, as I said. We also just shot down a Sushka, over Saur-Mogila. We got a Buk-M, so [...]

[...]

Botsman: Have you had heavy losses?

Dubinskiy: Very heavy. So ...

Botsman: Jeez.

Dubinskiy: We captured ... Yesterday, the reconnaissance battalion captured Marinovka, and the spetsnaz group took three hills. The infantry was deployed, and together we held our position, and after that, another infantry group came, and we only left this morning, and the infantry was completely crushed by the Grads, and we had to deploy another damn reconnaissance battalion in Marinovka. And now they are f***** firing Grads at us again.

[...]

Dubinskiy: They’re trying to flee Zelenopillya, but their only way out is through me [my position], do you follow? So that sucks. Yesterday two Sushkas were shot down, and another one today. Thank God the Buk arrived this morning. That’ll be a big help. But of course, things will still be difficult. They’re not letting any bloody tanks through, not nothing. They plainly have 5 Grads batteries firing and 3 batteries of SAU [self-propelled artillery]. In short, we are having fun here, f***.”³²¹

³¹⁹ Intercepted conversation between Kharchenko and Dubinskiy, at 16:48 on 17 July 2014, published at: <https://www.prosecutionservice.nl/topics/mh17-plane-crash/prosecution-and-trial/court-session-26-june-2020> (Annex 217). For “original” Russian version with translation see No. 5 in Transcripts of certain publicly available alleged intercepts concerning the shoot down of Flight MH17, 16-17 July 2014 (Annex 251).

³²⁰ Intercepted conversation between Botsman and Dubinskiy, at 17:42 on 17 July 2014, published at: <https://www.prosecutionservice.nl/topics/mh17-plane-crash/prosecution-and-trial/court-sessions-12--13-november-2020/court-session-13-november-2020> (Annex 241).

³²¹ *Ibid.*, for “original” Russian version with translation see No. 6 in Transcripts of certain publicly available alleged intercepts concerning the shoot down of Flight MH17, 16-17 July 2014 (Annex 251).

328. The third relevant intercept, of a call at 18:20 on 17 July 2014, which was published by a Dutch broadcaster on 11 April 2021, records that Dubinsky repeated that: “Our guys shot down a plane over Saur-Mogila, near Marinovka. Our guys shot down a Sushka”; and that he stated that he was “not aware” that a “Boeing” had “crashed”:

Unknown caller: And another question I have. I'm getting calls from the press, like NTV. They say a Boeing crashed in the vicinity of Donetsk. About 80 kms from Donetsk. Is it true?

Dubinskiy: You mean there's a battle ['boi' in Russian] going on?

Unknown caller: BOE-ING. A plane crashed.

Dubinskiy: Ah, yes! Our guys shot down a plane over Saur-Mogila, near Marinovka. Our guys shot down a Sushka.

Unknown caller: [inaudible] Sushka, Sushka... But people say a Boeing crashed.

Dubinskiy: There are talks that some plane crashed somewhere around Khartsyzk, between Khartsyzk and Gorlovka. But I don't know the details of this yet. Our guys shot down “Sushka” near...

Unknown caller: Yes, I know that. But I'm interested in that Boeing.

Dubinskiy: Igor, I'm not aware. I'm saying this frankly, I am not aware.

Unknown caller: Okay.

Dubinskiy: Aha.

Unknown caller: Fine, sorry. Yeah. Over.”³²²

329. The fourth relevant intercept, of a call at 19:01 on 17 July 2014, repeats that a militant has “shot down Sushka that had - just a minute before that - shot down that civilian plane”:

Koreets: Have you called, brother?

Pulatov: Yes, sure. You have been worried and here I am informing you. Look, your “blood brother” has shot down Sushka that had - just a minute before that - shot down that civilian plane. So, he is just a f***** hero of..., a f***** hero of everything. You understand?

Koreets: Good job!

Pulatov: The Chinese didn't even have time to flare up and they f***** got it. I am going to go look for that f***** captive now.

³²² Audio with English subtitles available at *Nieuwsuur*, “A reconstruction of the MH17 disaster: tapes of thousands of overheard conversations”, 11 April 2021, <https://youtu.be/iUOk6i31fBc?t=159>, at 06:52 - 7:37 (Annex 243). For “original” Russian version with translation see No. 7 in Transcripts of certain publicly available alleged intercepts concerning the shoot down of Flight MH17, 16-17 July 2014 (Annex 251).

Koreets: F***** as*****e. They say it crashed somewhere behind the mine.

Pulatov: Yes, yes. Somewhere in that area.

Koreets: I got you, little brother, thank you for the good news.

Pulatov: That's all, that's that. Everything is fine, he did a great f***** job.

Koreets: So long, So long.

Pulatov: And f***, so soon he [inaudible], and he was caught straight away. This is crazy s***.

Koreets: Awesome.

Pulatov: Ok then.

Koreets: Ok then.”³²³

330. The fifth relevant intercept, of a call at 19:52 on 17 July 2014, records that a DPR superior officer (“Dubinskiy”) interrogated, in an agitated tone, a subordinate on the cause of the shooting down of Flight MH17. The speakers confirm their understanding that it was “the ‘sushka’ [Ukrainian military aircraft] that blew the Boeing away”:

“**Dubinskiy:** It was a Sushka that blew the Boeing away, right?

Pulatov: Yes, yes, yes.

Dubinskiy: Okay, I got this. And you saw it happening, you observed it?

Pulatov: They observed it from the ground. I myself was in Marinovka.

Dubinskiy: Aha. And who observed it among ours, whose people?

Pulatov: Our [people] observed it from practically all posts.

Dubinskiy: That is, they saw how the Sushka downed the Boeing and then...

Pulatov: They saw how the Sushka downed the Boeing, they saw it from Snezhnoye. The Sushka went further and then the Buk downed it.

Dubinskiy: Buk, right?

Pulatov: Right.

³²³ An intercept played during the interview of Pulatov, “Full interviews MH17 defendant Oleg Pulatov”, 59:14-1:01:07, at <https://youtu.be/csrPZdVj99w?t=3668> (Annex 242). For “original” Russian version with translation see No. 8 in Transcripts of certain publicly available alleged intercepts concerning the shoot down of Flight MH17, 16-17 July 2014 (Annex 251).

Dubinskiy: Understood, understood, , I got it all.”³²⁴

331. The sixth relevant intercept, of a call immediately after (at 19:54) between Dubinsky and Girkin, repeats the same account that “Sushka ****ing hit [the] Boeing and then ... ours hit the Sushka the second time it was coming around and a lot of people saw this”, stating that this was “good news”:

“Dubinskiy: So, people from Snezhnoye and our people saw ... so the point is that Sushka ****ing hit Boeing and then when Sushka was making the approach ... the second one ... circle-wise ... ours hit the Sushka with the Buk. And ****ing lots of people saw this. Giurza has reported on this.

Girkin: So, this is the way how it happened. I got it. Good.

Dubinskiy: Sushka ****ing hit Boeing and our people ****ing hit Sushka with a Buk.

Girkin: Uh-huh.

Dubinskiy: Good news, Igor?

Girkin: Well, I don’t know. Frankly speaking, I don’t believe in this much, but ...

Dubinskiy: They’ll put the blame on us regardless, you know.

Girkin: I understand this much.”³²⁵

332. This is consistent with the seventh relevant intercept, of a call at 19:59 on 17 July 2014, which was published by a Dutch broadcaster on 15 April 2021:

“Kharchenko: Nikolaevitch, should we let the OSCE onto the crash site?

Dubinskiy: Of course, you should, let them in! Are you sure that you observed it being downed by a Sushka, or was it actually us?

Kharchenko: Ah? Not us, Nikolaevitch, not us.

Dubinskiy: It was the Sushka, right?

Kharchenko: The Sushka. There was one parachute.

Dubinskiy: Aha. And then the Sushka [was downed] by our Buk, right?

³²⁴ Intercepted conversation between Dubinskiy and Pulatov, at 19:52 on 17 July 2014, published at: <https://app.nos.nl/op3/mh17-tapes/#!/hoofdstuk5?overlay=audiotape-12> (Annex 244). For “original” Russian version with translation see No. 9 in Transcripts of certain publicly available alleged intercepts concerning the shoot down of Flight MH17, 16-17 July 2014 (Annex 251).

³²⁵ Intercepted conversation between Dubinskiy and Girkin, at 19:54 on 17 July 2014, published at: <https://www.prosecutionservice.nl/topics/mh17-plane-crash/prosecution-and-trial/court-session-26-june-2020> (Annex 240). For “original” Russian version with translation see No. 10 in Transcripts of certain publicly available alleged intercepts concerning the shoot down of Flight MH17, 16-17 July 2014 (Annex 251).

Kharchenko: Right... Well, there was one blow in the air, and then our blow took place.”³²⁶

333. It follows that the relevant intercepts that Ukraine has elected not to put before the Court (although emanating from Ukraine’s Security Service) are likewise inconsistent with the case that it is now putting on Flight MH17.

IV. Relevant Social Media Posts Not Produced by Ukraine

334. The Notices of Suspicion published by Ukraine’s Security Service also refer to four social media posts, made at 16:37, 16:41, 16:50 and 17:16 on 17 July 2014. Ukraine has not produced any of these documents notwithstanding the reliance of its Security Service upon them. In the absence of any further information from Ukraine, Russia is unable to identify with any certainty the relevant posts. However, two social media posts which match the time stamp given by Ukraine’s Security Service, appear to be relevant.

335. The two relevant social media posts (both messages apparently re-posted on Twitter containing links to a social media website) state: “Message from the militia. // An ‘AN-26’ has just been taken down in the area of Snizhne” (at 16:41 Kiev time; 17:41 Moscow time³²⁷) and “Message from the militia. // In the Torez region an AN-26 has just been shot down” (at 17:16 Kiev time; 18:16 Moscow time³²⁸). A later message published on the same social media page stated that the relevant information had been obtained from an online forum where locals and members of the militia converse.³²⁹

V. Air Restrictions Imposed by Ukraine and by Russia as of 17 July 2014

336. In its Memorial Ukraine alleges that, one day before the shooting down of Flight MH17, Russia deliberately restricted its airspace in an area bordering eastern Ukraine below 53,000 feet (FL530) for civil aircraft. Ukraine points to the fact that Ukraine had restricted its airspace up to 32,000 feet (FL320) only and asserts that this discrepancy demonstrates that Russia had “*guilty knowledge of the dangers of operating a Buk in civilian-trafficked skies*”.³³⁰

³²⁶ Intercepted conversation between Dubinskiy and Kharchenko, at 19:59 on 17 July 2014, published at: <https://app.nos.nl/op3/mh17-tapes/#/hoofdstuk5?overlay=audiotape-14> (Annex 245). For “original” Russian version with translation see No. 11 in Transcripts of certain publicly available alleged intercepts concerning the shoot down of Flight MH17, 16-17 July 2014 (Annex 251).

³²⁷ VKontakte page “Reports from Strelkov Igor Ivanovich”, post of 17 July 2014, 17:41 (Moscow time) containing a message from 17:37 (Moscow time) (Annex 148).

³²⁸ VKontakte page “Reports from Strelkov Igor Ivanovich”, post of 17 July 2014, 18:16 containing a message from 17:50 (Moscow time) (Annex 149).

³²⁹ VKontakte page “Reports from Strelkov Igor Ivanovich”, post of 17 July 2014, 22:00 (Annex 150).

³³⁰ MU, para. 289.

337. This allegation rests on a gross misinterpretation of the relevant Russian Notice to Airmen (“NOTAM”)³³¹ published on 16 July 2014 (V6158/14).³³² This NOTAM did not introduce any restriction or closure of the airspace for civil aviation up to FL530, as is evident from flight data for civil aircraft operating in the area at the time including Flight MH17. Rather, it restricted specified segments of certain air routes up to FL320 and additionally contained directions for aircraft arriving and departing at the Rostov-on-Don aerodrome to use specified entry and exit air routes at FL330 or FL340 and *above*.

338. Contemporaneous flight plan data for 17 July 2014 confirms that the relevant area of Russian airspace was not closed between FL320 and FL530 because it demonstrates that civil aircraft, including Flight MH17, operated at this altitude. As an illustrative example:³³³

- a. The TAMAK waypoint was the planned point of entry into Russian airspace for which Flight MH17 had been cleared along air route A87. The flight plan shows that the MH17 was to fly at FL350 to the TAMAK waypoint and then continue at the same altitude along the A87 air route.³³⁴ After coordination between Ukrainian and Russian civil aviation authorities, Flight MH17 was cleared to cross the border around 45 nautical miles south-east of the TAMAK waypoint and south of the planned airway and to proceed directly to the RND waypoint.³³⁵ Neither the Ukrainian nor the Russian authorities directed Flight MH17 to rise to a higher altitude in order to comply with the Russian NOTAM. The DSB Report confirms that “the automatic flight plan used by Malaysia Airlines accepted the [Russian] NOTAM” and that the reference to FL530 “did not lead to a route change”.³³⁶

³³¹ The issuance and format of NOTAMs is explained in ICAO, Aeronautical Information Services Manual, ICAO Doc 8126/AN/872 (Sixth Edition 2003), chapter 6 (available at: https://www.bazl.admin.ch/dam/bazl/en/dokumente/Fachleute/Regulationen_und_Grundlagen/icao-annex/ICAO%20doc%208126%20Aeronautical%20Information%20Services%20Manual%20%20.pdf.download.pdf/ICAO%20Doc%208126%20Aeronautical%20Information%20Services%20Manual.pdf). See also chapter 5 of ICAO, International Standards and Recommended Practices: Aeronautical Information Services, Annex 15 to the Convention on International Civil Action.

³³² NOTAM V6158/14, 16 July 2014 (Annex 36). NOTAM V6158/14 is part of series V, which is defined in the AIP (Aeronautical Information Publication), Russian Federation, GEN 3.1 “Aeronautical information services of the Russian Federation” (Annex 32), at para. 3.5.1, as NOTAMs which “contain information about temporary restrictions (prohibited, danger and restricted areas, restrictions on ATS routes, navigation warnings)” in certain segments of the airspace of the Russian Federation, including the Rostov FIR (URRV).

³³³ See Schedule of flights that used the TAMAK waypoint to enter the airspace of the Russian Federation on 17 July 2014 (Annex 250).

³³⁴ See the DSB Report, p. 212 (Annex 38 to MU).

³³⁵ See the DSB Report, pp. 26 and 43 (Annex 38 to MU).

³³⁶ The DSB Report, p. 218 (Annex 38 to MU).

- b. Four other civil aircraft operating international flights were to enter Russian airspace at the TAMAK waypoint and proceed along the A87 air route.³³⁷ In each instance, the flight plan specifies that the aircraft would fly to the TAMAK waypoint at FL330, FL350 or FL370.³³⁸
- c. A sixth civil aircraft entered Russian airspace at the TAMAK waypoint, proceeded along the A712 air route, descended and landed at the Rostov-on-Don aerodrome near the border.³³⁹
- d. A seventh and eighth civil aircraft, one of which was operated by a Ukrainian airline, were to enter Russian airspace at the TAMAK waypoint and proceed along a segment of the B947 air route at FL350 and FL390, respectively.³⁴⁰

339. As follows from the above, the Ukrainian and Russian civil aviation authorities and the operators of numerous aircraft (including a Ukrainian airline) correctly interpreted the Russian NOTAM as *not* closing the Russian airspace between FL320 and FL530.

340. As to the details:

- a. As the DSB Report observed (in a passage which Ukraine seeks to gloss over): “*The [Russian] NOTAMs effectively imposed the same altitude restrictions as the Ukrainian NOTAMs (FL320) did*”.³⁴¹ Contrary to Ukraine’s suggestion, the DSB Report did not make a positive finding that the Russian airspace was in fact closed up to FL530, “effectively closing civilian airspace”.³⁴² Indeed, as explained in paragraph 338 above, there was no such closure and multiple aircraft were operating below FL530.
- b. FL530 is the highest altitude at which aeronavigation services are provided to civil aviation and at which civil aircraft are permitted to operate at any time on any of the segments of the air routes specified in the Russian NOTAM, including on the A87 air route which was

³³⁷ These were: (a) Jet Airways Flight JAI119 from London (LHR) to Mumbai (BOM); (b) Singapore Airlines Flight SIA323 from Amsterdam (AMS) to Singapore (SIN); (c) Air Astana Flight KZR904 from Amsterdam (AMS) to Atyrau (GUW); and (d) Singapore Airlines Flight SIA25 from Frankfurt (FRA) to Singapore (SIN).

³³⁸ See Nos. 1 to 4 in Schedule of flights that used the TAMAK waypoint to enter the airspace of the Russian Federation on 17 July 2014 (Annex 250).

³³⁹ Austrian Airlines Flight AUA659 from Vienna (VIE) to Rostov-on-Don (RVI), see No. 5 in Schedule of flights that used the TAMAK waypoint to enter the airspace of the Russian Federation on 17 July 2014 (Annex 250).

³⁴⁰ Dniproavia Airlines Flight UDN703 from Kharkov (HRK) to Yerevan (EVN); Emirates Flight UAE242 from Toronto (YYZ) to Dubai (DBX), see Nos. 6 and 7 in Schedule of flights that used the TAMAK waypoint to enter the airspace of the Russian Federation on 17 July 2014 (Annex 250).

³⁴¹ DSB Report, p. 180 (Annex 38 to MU).

³⁴² *Cf.* MU, para. 289 referring to DSB Report, p. 180 (Annex 38 to MU). Rather, in the passage cited the DSB Report characterised the reference to FL530 in the Russian NOTAM as an “internal contradiction”.

used by Flight MH17.³⁴³ Hence, restricting the air route up to FL530 would have meant closing it entirely.

- c. On 16 July 2014, the Russian civil aviation authorities published two NOTAMs for the Rostov Flight Information Region (“FIR”), an area of Russian airspace that borders the Dnepropetrovsk area of eastern Ukraine (NOTAMs V6158/14 and A2681/14).³⁴⁴ Both of these NOTAMs entered into force on 17 July at 00.00. The process leading to the issuance of NOTAM V6158/14 was initiated by the regional civil aviation authority, the Rostov-based Southern Interregional Territorial Department (the “SITD”) of the Federal Air Transport Agency of Russia (“FATA” or “Rosaviation”).³⁴⁵
- d. Whereas the Ukrainian NOTAMs contained no reasons (see para. 344 below), the Russian NOTAMs stated that the restrictions were introduced: “Due to combat actions on the territory of the Ukraine near the state border with the Russian Federation and the facts of firing from the territory of the Ukraine towards the territory of the Russian Federation, to ensure intl flt [international flight] safety”.
- e. Russian NOTAM V6158/14 closed specified segments of air routes up to FL320 in the area of the Rostov FIR. Most of the relevant segments are continuations of air routes that run through the airspace of eastern Ukraine and cross the border, including the A87 air route which was to be used by Flight MH17.³⁴⁶
- f. The restricted segments started from specified compulsory navigation waypoints, primarily located at the border with the Dnepropetrovsk FIR in Ukraine. One of these waypoints, “TAMAK”, is located on the three air routes (A87, B947 and A712).

341. If Russia’s closure of airspace had indeed been motivated by a perceived threat caused by the use of a BUK, then airspace on the relevant air routes would have been closed for civil aviation up to the altitude that could be affected by this weapon. In practical terms, however, many civil aircraft (including the Boeing 777, i.e. the Flight MH17 aircraft) have a maximum cruising altitude of around 43,000 feet (FL 430).³⁴⁷

³⁴³ See Aeronautical Information Publication, AIP, ENR 3.1.1 “International airways of the Russian Federation” (Annex 33), pp. 3.1.1-3, 3.1.1-7, 3.1.1-9, 3.1.1-16, 3.1.1-63, 3.1.1-141, 3.1.1-234, 3.1.1-286, 3.1.1-330, 3.1.1-345, 3.1.1-486, 3.1.1-406, 3.1.1-447, 3.1.1-486.

³⁴⁴ The International NOTAM Center of the Center of Aeronautical Information is the body responsible for providing aeronautical information to users of the airspace of the Russian Federation through NOTAMs. All issued NOTAMs are published in the Aeronautical Information Publication (“AIP”).

³⁴⁵ Telegram from the Southern Interregional Territorial Department of FATA, 12 July 2014 (Annex 34) and Submission of a NOTAM to the Federal State Unitary Enterprise “State Air Traffic Management Corporation of the Russian Federation” for Issuance, 16 July 2014 (Annex 35).

³⁴⁶ These routes are A87, A102, A225, A712, B493, B947, G118, G534, G904, and R114. Routes A100, B145 and G247 run in the Russian airspace along the border. See the Graphic scheme of the air routes and segments restricted by NOTAM V6158/14 (Annex 260).

³⁴⁷ See page on Boeing 777-200/777-200ER at SKYbrary: <https://www.skybrary.aero/index.php/B772> (“Ceiling FL430”).

342. The process leading to the issuance of the Russian NOTAM also confirms that no restriction up to FL530 was intended.

- a. On 12 July 2014, the SITD sent a telegram to the State Air Traffic Management Corporation of the Russian Federation (“State ATM Corporation”), suggesting that “Due to a tense situation near the border with Ukraine and to the fact that the Ukrainian Armed Forces use various weapons”: (i) flight crews be informed about “a possible risk to flight operations” on specified air route segments,³⁴⁸ and (ii) “to ensure flight safety, not to use the flight level 0 to 200 (up to 6,100 metres)” on specified air route segments^{349, 350}
- b. On 16 July 2014, the State ATM Corporation communicated a submission to the Center of Aeronautical Information (“CAI”), requesting the issuance of a NOTAM with effect from midnight on 17 July: “Due to combat actions on the territory of the Ukraine near the State border with the Russian Federation (Moscow and Rostov FIRs) and the facts of firing from the territory of the Ukraine towards the territory of Russian Federation”. The submission proposed a NOTAM containing the following information: (i) closure of all air route segments in the Rostov FIR “from ground level to FL320 (9,750 M), (ii) directions for arrival/departure at the Rostov aerodrome, including a direction to use FL330 or FL340 and above on specified air route segments,³⁵¹ and (iii) “closure of all air routes in the Moscow FIR “from ground level to FL200 (6,100 M)”³⁵²
- c. The Russian authorities were faced with a need to respond urgently to a highly unusual situation involving combat operations in a neighbouring country. By including the information regarding the restrictions on the air routes and the directions concerning the Rostov-on-Don aerodrome in a single NOTAM, the Russian authorities sought to provide operators with complete information regarding the measures taken in the Rostov FIR.
- d. Since the Russian NOTAM concerned restrictions on flying below FL320 as well as directions for arrival/departure at the Rostov-on-Don aerodrome at above FL330/340,

³⁴⁸ The specified air route segments were B145, B947, G118, G534, R114, A87, A100, A102, A235.

³⁴⁹ The specified air route segments and waypoints were A87 Tamak – Sarna, A100 Mimra – Rostov-na-Donu (RND), A102 Ablog – Nalem, A225 Gukol – Odeta, A712 Tamak – Sambek, B145 Mimra – Gekra, B493 Fasad – RND, B947 Tamak – RND, G118 Ramog – Bagayevskiy (BA), G534 Mimra – Toros, G904 Sambek – Fasad, R114 BA – Derib.

³⁵⁰ Telegram from the Southern Interregional Territorial Department of FATA, 12 July 2014 (Annex 34). The telegram also suggested that the SITD be immediately informed of all breaches and failures in flight operations and navigation services.

³⁵¹ The relevant part of the submission states:

“Dep fm/arr to Rostov-Na-Donu AD [aerodrome] to/fm FIR carried out along ATS RTE G128 (Konstantinovsk Ndb (KA) – Morozovsk Vor/DME (MOR) And R11 Morozovsk Vor/DME (MOR) – Butri on assigned FL.

Dep fm Rostov-Na-Donu AD to Dnepropetrovsk FIR carried out along ATS RTE A102 (Konstantinovsk Ndb (KA) – Nalem on FL340 and above

Arr to Rostov-Na-Donu AD fm Dnepropetrovsk FIR carried out along ATS RTE A712 (Tamak – Sambek Ndb (SB) then Det Konstantinovsk (KA)) on FL330 and above.”

³⁵² Submission of a NOTAM to the Federal State Unitary Enterprise “State Air Traffic Management Corporation of the Russian Federation” for Issuance, 16 July 2014 (Annex 35).

viewed as a whole, the NOTAM was concerned with the use of airspace above FL320 up to the maximum altitude. The issuing authority therefore included reference to FL530, the highest operating altitude for the specified air route segments in the Rostov FIR in fields Q and G (indicating the limits of application) of the Russian NOTAM. An additional benefit of this was the wider dissemination of the information contained in the Russian NOTAM, including the notification of the existence of the armed conflict and ongoing hostilities. This is because civil aircraft operators using the airspace (including Flight MH17³⁵³) who had automatically filtered out NOTAMs concerning altitudes below their planned flight routes would still receive the Russian NOTAM as part of the pre-flight bulletin even if (as with the flights referred to above) there was no need to change the flight plan in order to comply with the NOTAM.³⁵⁴

343. As explained above and noted by the DSB, the approach of the Russian civil aviation authorities was to mirror in the area near the border the airspace restrictions introduced by Ukraine. Thus, if Ukraine had conducted a complete risk assessment and introduced additional restrictions in response to the shooting down of the Antonov An-26 and the Sukhoi Su-25 military aircraft on 14 and 16 July by closing the airspace at least up to, for example, FL330 (the altitude of Flight MH17), there is every indication that the same restrictions would have been adopted by the Russian authorities. Although this is not relevant to Ukraine's claim with respect to Flight MH17, the matter has been put in issue by Ukraine through the regrettable allegations that it is now making with respect to the restrictions introduced in Russia's airspace.

344. In this connection, it is noted that the Ukrainian NOTAMs did not include any reasons about the nature of the threat to civil aviation which Russian aviation authorities might have independently assessed.³⁵⁵ They contained no mention of the existence and the extent of armed hostilities, or of the recent shooting down of Ukrainian military aircraft or of any concern about possible ground-to-air attacks using high powered weapons. The DSB Report finds that: "Due to the fact that so-called 'State aircraft' were excluded [from some of the Ukrainian NOTAMs] and that exercise areas are intended for military aircraft, it can be deduced that airspace restrictions were related to Ukrainian air force activities."³⁵⁶

³⁵³ See DSB Report, p. 180: "Since flight MH17 also flew over the Rostov FIR, the Russian NOTAMs concerned were also part of the briefing package for flight MH17. [...] The cited information in the NOTAM on the conflict is not automatically obvious from the selection, but it becomes apparent if someone studies the NOTAMs package in detail".

³⁵⁴ See e.g. DSB Report, p. 218 noting that: "Whether the reference to the armed conflict [in the Russian NOTAMs] was picked up by Malaysia Airlines is unknown".

³⁵⁵ DSB Report, pp. 207 and 209 (Annex 38 to MU).

³⁵⁶ DSB Report, p. 179 (Annex 38 to MU). See also Ukraine's position as recorded at pp. 194 and 196.

VI. Ukraine's Expert Evidence Is of No Assistance to It

345. Ukraine also contends that whoever allegedly supplied the BUK without its control centre knew that it *could* be used to shoot down a civil aircraft because they knew that the weapon provided “could not be used in a manner distinguishing civilian from military targets”.³⁵⁷ As to this:

- a. Even if it were correct, this would not be sufficient to establish actual knowledge or actual intention that the alleged “funds” are to be used to commit a terrorist act under Article 2(1)(a) of the ICSFT.
- b. Moreover, Ukraine's expert also testifies that even if a BUK had been operated with the control module, there would still have been a risk that a civil aircraft might be shot down in error. Similarly, in its Memorial, Ukraine states that “a TELAR operator acting under intense time pressure would not be able to make sophisticated judgments about the air situation”.³⁵⁸ Thus, Ukraine's position is that the supply of the control centre merely “would have lessened the danger to civil aviation”, not eliminated that danger.³⁵⁹ Russia recalls that there are of course well-known incidents (such as the shooting down of Iran Air Flight 655 by the USS Vincennes in 1988) in which weaponry which is (or should be) capable of distinguishing between civil and military aircraft has nonetheless been used to shoot down civil aircraft in error without such incidents being characterised as terrorist acts.
- c. It is anyway factually incorrect since a person providing such a weapon would also know that the operator could use other methods to distinguish between civilian and military aircraft. Indeed, Ukraine's position in its Memorial is that anyone with access to the internet could have been following the flightpath of Flight MH17.³⁶⁰ Further, Ukraine's expert notes that in “modern practice” the BUK-M1 TELAR is commonly used in autonomous mode in “close coordination with the command centre of the Armed Forces, including cooperation with radio-technical troops of the Air Force with the use of modern communication solutions”.³⁶¹ Dr Skorik also states that “[a]n experienced Buk-M1 TELAR commander and operator can fairly accurately identify the target based on its parameters (dimensions, jet engines, if any). [...] The altitude and speed of different types of aircraft [...] are additional identification factors”. His further observation that these factors are unlikely to be taken into account in highly stressful combat situations identifies the potential for human error, rather than the allegedly inherently indiscriminate nature of the BUK system.³⁶²

³⁵⁷ MU, para. 288.

³⁵⁸ MU, para. 287.

³⁵⁹ MU, para. 288.

³⁶⁰ MU, paras. 71-72.

³⁶¹ Report by Dr Anatolii Skorik (Annex 12 to MU), para. 28.

³⁶² Report by Dr Anatolii Skorik (Annex 12 to MU), para 24.

VII. Ukraine Has Failed to Establish the Existence of a “Terrorist” Act under Article 2(1)(a) of the ICSFT

346. It follows from Ukraine’s failure to establish the elements of terrorism financing under the chapeau of Article 2(1) that the Court also does not need to consider the separate question of whether the shooting down of Flight MH17 was a terrorist act within the meaning of Article 2(1) of the ICSFT. For completeness, however, Ukraine has failed to establish the existence of a terrorist act under Article 2(1)(a).

347. Ukraine’s case rests on a strained interpretation of the offence under Article 1(1)(b) of the Montreal Convention, which should be rejected (see above). Ukraine has also been unable to evidence any general support for the case that the shooting down of Flight MH17 has been recognised as entailing an offence under Article 1(1)(b) of the Montreal Convention.³⁶³ It is Ukraine alone that has characterised the shoot down of Flight MH17 as an act of “terrorism” while, moreover, the Notices of Suspicion referring to the alleged offences under Ukrainian law were issued by its Security Service *after* this dispute was submitted to the Court. Ukraine has been unable to evidence any support for the case that the shooting down of Flight MH17 has been recognised as a “terrorist” act.³⁶⁴

³⁶³ *Cf.* also, e.g., the absence of any reference to a violation of Article 1(1)(b) Montreal Convention in ICAO Resolution 17 July 2014. Note also that, whereas the second preambular paragraph of UN Security Council resolution 2166 (2014) “reaffirm[s] the rules of international law that prohibit acts of violence that pose a threat to the safety of international civil aviation”, operative paragraph 1 “condemns in the strongest terms the downing” without stating that this entailed an offence under Article 1(1)(b) of the Montreal Convention.

³⁶⁴ *Cf.* UN Security Council resolution 2166 (2014), which contains no reference to “terrorism”.

CHAPTER VII THE SHELLING INCIDENTS

I. Reported Indiscriminate Shelling

A. GENERAL OBSERVATIONS

348. The further central element to Ukraine's case concerns the alleged financing by Russian state officials³⁶⁵ and other Russian nationals of shelling during the armed conflict in Eastern Ukraine. It is recalled that, in its Order of 19 April 2017, the Court found that Ukraine had failed to establish even a plausible offence of terrorism financing.

349. Before turning to the details of each of the four individual events of shelling – at Volnovakha, Mariupol, Kramatorsk and Avdiivka – that are said by Ukraine to constitute acts of terrorism, Russia makes six general observations.

350. First, the critical context for the current allegations is the armed conflict, and particularly the shelling within the conflict, that has resulted in an appalling loss of civilian life on both sides (*i.e.*, Ukraine and the DPR/LPR). The causes of the armed conflict are multiple and complex, and it is neither necessary nor appropriate to enter into these in any detail. As background to the armed conflict, the OHCHR has recognised (in a report that Ukraine relies on) that “many of the concerns that led to the Maidan events and the crisis in the east are systemic ones, rooted in a weak rule of law and the absence of effective checks and balances” in Ukraine.³⁶⁶ Russia notes that large parts of the population of Eastern Ukraine strongly opposed what they perceived as a *coup d'État* and an unlawful constitutional upheaval in 2014. This led to independence referenda and to the formation of the DPR and the LPR, which became *de facto* State-like entities and parties to an armed conflict opposing Ukrainian governmental forces. Further, Ukraine imposed a blockade and other restrictions on access to the territory under the control of the DPR and the LPR which, as the OHCHR has recorded, gave rise to a severe need for humanitarian aid.³⁶⁷

³⁶⁵ Ukraine's claims with respect to Russia's alleged state responsibility under the ICSFT were dismissed at the preliminary objections stage. Ukraine has also failed to establish that any specific Russian state official exercised control over the DPR/LPR, had insight into the relevant military planning and operations, or knew of the alleged “importance of terrorism to the agenda of the DPR/LPR”: *Cf.* MU, para. 286. This is nothing more than a reformulation of the state responsibility argument which the Court has found falls outside its jurisdiction. For completeness, and without prejudice to its primary position, Russia denies that it has ever exercised control over the DPR/LPR and that it had insight into their military plans and actions.

³⁶⁶ OHCHR, Report on the Human Rights Situation in Ukraine, 15 July 2014, para. 87 (Annex 296 to MU).

³⁶⁷ See e.g. OHCHR, Report on the Human Rights Situation in Ukraine, 15 June 2014, para. 147 (Annex 764 to MU); OHCHR, Report on the Human Rights Situation in Ukraine, 15 July 2014, para. 129 (Annex 296 to MU); OHCHR, Report on the Human Rights Situation in Ukraine, 16 August 2019, https://www.ohchr.org/Documents/Countries/UA/28thReportUkraine_EN.pdf, para. 3; OHCHR, Report on the Human Rights Situation in Ukraine, 15 June 2014, <https://www.ohchr.org/Documents/Countries/UA/HRMMUReport15June2014.pdf>, paras. 147, 251-252 (including requests to UN agencies).

351. As to the armed conflict that ensued, the OHCHR and OSCE have repeatedly recorded that the indiscriminate shelling of populated areas by all parties to the conflict has occurred in a context in which all parties have placed military objectives in (and engaged in hostilities from) residential areas, in violation of the IHL principle of precaution, and all parties have then targeted such areas.³⁶⁸ This is particularly true of mobile military materiel which may be relocated quickly, such as mortars, tanks and multi-launch rocket systems (MLRS). In this last respect, it is to be emphasised that Ukraine's shelling of populated areas in territory under the control of the DPR/LPR includes using MLRS of the same type said to have been used by the DPR/LPR in the shelling episodes that Ukraine relies on in this case (i.e., BM-21 Grad, BM-27 Uragan and BM-30 Smerch), as well as the use of rockets equipped with incendiary weapons and cluster munitions.³⁶⁹

352. Second, as Russia demonstrated at the provisional measures stage, and as noted in Chapter I above, on the basis of the reports of the OHCHR, the OSCE and the ICRC (which Ukraine relies on), Ukraine is equally, if not more, responsible than the forces of the DPR and the LPR for the loss of civilian life in the armed conflict as a result of reported indiscriminate shelling. This matters because it enables the Court to put Ukraine's current claims into a truer perspective. If the multiple reported incidents of indiscriminate shelling in Eastern Ukraine were in fact acts of terrorism (they are not), as would follow from Ukraine's incorrect and over-expansive reading of Article 2(1) ICSFT, Ukraine itself would be engaged in such terrorism. For example:³⁷⁰

- a. The reports of the OHCHR record that civilian casualties caused by the reported indiscriminate shelling of populated areas have consistently been greater in territory controlled by the DPR and the LPR, i.e. through shelling by Ukrainian governmental forces. This can be seen from the figures stated in the OHCHR report for the period May to August 2015,³⁷¹ and from the OHCHR maps showing civilian casualties caused by

³⁶⁸ See, e.g., OHCHR, "Report on the human rights situation in Ukraine 1 December 2014 to 15 February 2015" (Annex 309 to MU), para. 21; OHCHR, "Report on the human rights situation in Ukraine 16 May to 15 August 2015" (Annex 769 to MU), para. 193 (b); OHCHR, "Report on the human rights situation in Ukraine 16 November 2015 to 15 February 2016" (Annex 314 to MU), para. 25.

³⁶⁹ See Table 3 in Appendix A: Examples of Ukraine's documented use of MLRS and other heavy weapons in populated areas.

³⁷⁰ No specific data is available on this point in the OHCHR report for the period December 2014 to February 2015. It is, however, clear that shelling by Ukraine caused civilian deaths in territory controlled by the armed groups during this period. For example, on 22 January 2015 (two days before the shelling of Mariupol), 8 civilians were killed and 13 were injured when a trolley bus was hit by mortar or artillery rounds in Kuprina Street in Donetsk City. The OSCE assessed that the shells had been "fired from a north-western direction", i.e., from government-controlled territory: see OSCE SMM, "Spot report by the OSCE Special Monitoring Mission to Ukraine (SMM), 22 January 2015: Shelling Incident on Kuprina Street in Donetsk City", 22 January 2015, <https://www.osce.org/ukraine-smm/135786> (Annex 7).

³⁷¹ OHCHR, "Report on the human rights situation in Ukraine 16 May to 15 August 2015", paras. 29 and 32 (Annex 769 to MU): Government-controlled territory, 165 civilian casualties, including 41 killed; DPR/LPR-controlled territory, 244 civilian casualties, including 69 killed.

shelling between November 2015 and February 2016,³⁷² February and May 2016,³⁷³ and May and August 2016.³⁷⁴ For each period, OSCE crater analysis assessed that specific episodes of the shelling of the DPR/LPR-controlled areas had come from the north or west, i.e., the direction from which shelling by Ukrainian armed forces would come.³⁷⁵

- b. In October 2016, the OHCHR “recorded eight times more civilian casualties in armed group-controlled territories than in Government-controlled areas of the conflict zone, indicating that civilians in territories controlled by the armed groups *continue* to be particularly at risk of injury and death.”³⁷⁶ This pattern can also be seen from the OHCHR map showing civilian casualties caused by shelling between August and November 2016, which shows far greater casualties on the DPR/LPR right-hand side of the red contact

³⁷² OHCHR, “Report on the human rights situation in Ukraine 16 November 2015 to 15 February 2016”, map at p. 5 (Annex 314 to MU).

³⁷³ OHCHR, “Report on the human rights situation in Ukraine 16 February to 15 May 2016”, map at p. 5 (Annex 771 to MU).

³⁷⁴ OHCHR, “Report on the human rights situation in Ukraine 16 May to 15 August 2016”, map at p. 4 (Annex 772 to MU).

³⁷⁵ For the period between May and August 2015 see e.g., OSCE, “Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 19:30 (Kyiv time), 27 May 2015”, 28 May 2015”, available at <https://www.osce.org/ukraine-smm/160611>; OSCE, “Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30hrs (Kyiv time), 12 June 2015”, 13 June 2015, available at <https://www.osce.org/ukraine-smm/164141>; OSCE, “Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 19:30 hrs (Kyiv time), 19 July 2015”, 20 July 2015, available at <https://www.osce.org/ukraine-smm/173666>; OSCE, “Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 19:30 hrs (Kyiv time), 30 July 2015”, 31 July 2015, available at <https://www.osce.org/ukraine-smm/175591>; OSCE, “Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 19:30 (Kyiv time), 2 August 2015”, 3 August 2015, available at <https://www.osce.org/ukraine-smm/175736>; OSCE, “Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30 hrs (Kyiv time), 11 August 2015”, 12 August 2015, available at <https://www.osce.org/ukraine-smm/176961>. For the period between November 2015 and February 2016 see e.g. OSCE, “Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30 hrs (Kyiv time), 7 February 2016”, 8 February 2016, available at <https://www.osce.org/ukraine-smm/221171>. See also OSCE, “Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30 hrs (Kyiv time), 8 February 2016”, 9 February 2016, available at <https://www.osce.org/ukraine-smm/221436>. For the period between February and May 2016 see e.g. OSCE, “Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30 hrs (Kyiv time), 23 February 2016”, 24 February 2016, available at <https://www.osce.org/ukraine-smm/224136>; OSCE, “Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30 hrs (Kyiv time), 1 April 2016”, 2 April 2016, available at <https://www.osce.org/ukraine-smm/231261>; OSCE, “Spot Report by the OSCE Special Monitoring Mission to Ukraine (SMM): Shelling in Olenivka”, 28 April 2016, available at <https://www.osce.org/ukraine-smm/236936>. For the period between May and August 2016 see e.g. OSCE, “Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30 hrs (Kyiv time), 25 May 2016”, 26 May 2016, available at <https://www.osce.org/ukraine-smm/243031>; OSCE, “Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30 hrs (Kyiv time), 26 June 2016”, 27 June 2016, available at <https://www.osce.org/ukraine-smm/248801>; OSCE, “Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30 hrs (Kyiv time), 1 August 2016”, 2 August 2016, available at <https://www.osce.org/ukraine-smm/257516>.

³⁷⁶ OHCHR, “Report on the human rights situation in Ukraine 16 August to 15 November 2016”, para. 4 (Annex 773 to MU) (emphasis added). See also para. 23.

line.³⁷⁷ The origin of the shelling as territory under the control of Ukraine is supported by OSCE analysis of specific shelling incidents.³⁷⁸

- c. The same pattern is repeated for the OHCHR maps showing civilian casualties caused by shelling for the period November 2016 to February 2017,³⁷⁹ and for February to May 2017³⁸⁰ (i.e., the period that includes the shelling at Avdiivka and the period immediately after the Court’s Order of 19 April 2017), as well as for later periods.³⁸¹

353. Ukraine has not engaged with this point beyond a bare denial of the facts and a bald assertion that Russia’s position is unsupported by evidence.³⁸² It has presented no contrary documentary evidence and in fact relies on the OHCHR’s reports where it considers that these support its case.

354. On the logic of Ukraine’s case, Ukraine would have also committed terrorist acts and the offence of terrorism financing (through the provision or collection of funds with the intention that they should be used or the knowledge that they are to be used to carry out such shelling), yet that is certainly not its case.

355. Third, around 80% of these civilian casualties occurred prior to the adoption of the Minsk “Package of Measures” in February 2015, which was endorsed by the UN Security Council.³⁸³ As part of the Minsk “Package of Measures” of 12 February 2015, Ukraine gave an undertaking to “ensure pardon and amnesty ... of persons in connection with the events that took place in certain areas of the Donetsk and Luhansk regions of Ukraine”.³⁸⁴ That commitment postdates and encompasses the specific events at Volnovakha (13 January 2015), Mariupol (24 January 2015) and Kramatorsk (10 February 2015) that Ukraine now focuses on, and it is hardly conceivable that

³⁷⁷ OHCHR, “Report on the human rights situation in Ukraine 16 August to 15 November 2016”, map at p. 4 (Annex 773 to MU) (emphasis added).

³⁷⁸ See OSCE SMM, “Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30, 9 October 2016”, 10 October 2016, <https://www.osce.org/ukraine-smm/273756> (Annex 12); OSCE SMM, “Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30, 11 October 2016”, 12 October 2016, <https://www.osce.org/ukraine-smm/274286> (Annex 13); OSCE SMM, “Latest from OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 28 October 2016”, 29 October 2016, <https://www.osce.org/ukraine-smm/278046> (Annex 14).

³⁷⁹ OHCHR, Report on the Human Rights Situation in Ukraine, 16 Nov. 2016 to 15 Feb. 2017, map at p. 4 and para. 28 (recording three times as many civilian casualties in territory controlled by the DPR/LPR), available at https://www.ohchr.org/Documents/Countries/UA/UARReport17th_EN.pdf.

³⁸⁰ OHCHR, Report on the Human Rights Situation in Ukraine, 16 Feb. to 15 May 2017, map at p. 6 (Annex 774 to MU).

³⁸¹ OHCHR, “Report on the human rights situation in Ukraine 16 May to 15 August 2017”, map p. 6 and table at para. 33 (Annex 775 to MU); OHCHR, “Report on the human rights situation in Ukraine 16 August to 15 November 2017”, map at p. 6 and table at para. 27 (Annex 776 to MU); OHCHR, “Report on the human rights situation in Ukraine 16 November 2017 to 15 February 2018”, map at p. 5 and para. 19 (Annex 779 to MU); OHCHR, “Report on the human rights situation in Ukraine 16 February to 15 May 2018”, map at p. 5 and para. 18, available at https://www.ohchr.org/Documents/Countries/UA/ReportUkraineFev-May2018_EN.pdf.

³⁸² See CR 2017/3, 8 March 2017, p. 16, para. 13 (Koh, referring to what “any fair-minded observer of the eastern Ukraine situation knows”); CR 2019/10, 4 June 2019, p. 40, para. 53 (Check).

³⁸³ Security Council Resolution 2202 (2015).

³⁸⁴ PORF, para. 100.

Ukraine would have agreed to pardon and amnesty if it had considered these to have been “terrorist” acts. Ukraine’s only response at the preliminary objections stage was to say that it has not in fact granted amnesty to the perpetrators of the shellings at Volnovakha, Mariupol and Kramatorsk and that it now regards them as terrorist acts.³⁸⁵ But this fails to engage with the point that, unlike the shooting down of Flight MH17, Ukraine did not exclude those acts from the scope of the commitment to grant amnesty when it agreed to the Minsk Package of Measures.

356. Fourth, as noted in Chapter I above, it is Ukraine alone that has characterised such acts of shelling as acts of “terrorism”. By contrast, the OHCHR, OSCE and ICRC have consistently characterised such acts (including the specific episodes relied on by Ukraine) as indiscriminate shelling in breach of IHL, but *never* as a breach of the IHL prohibition on spreading terror.³⁸⁶ Those organisations are looking at the armed conflict through the prism of IHL and, as explained above, that body of law contains separate prohibitions on direct attacks,³⁸⁷ indiscriminate attacks³⁸⁸ and the spread of terror among the civilian population.³⁸⁹ These organisations are making characterisations of acts within the armed conflict in full knowledge of the applicable legal framework, and are describing acts and making recommendations accordingly.³⁹⁰

³⁸⁵ CR 2019/12, 7 June 2019, para. 41 (Cheek).

³⁸⁶ OHCHR, “Report on the human rights situation in Ukraine 16 May to 15 August 2015”, para. 193 (b) (Annex 769 to MU); OHCHR, “Report on the human rights situation in Ukraine 16 August to 15 November 2015”, para. 185 (b) (Annex 312 to MU); OHCHR, “Report on the human rights situation in Ukraine 16 November 2015 to 15 February 2016”, para. 214 (b) (Annex 314 to MU); OHCHR, “Accountability for killings in Ukraine from January 2014 to May 2016”, p. 3 (Annex 49 to MU); OHCHR, “Report on the human rights situation in Ukraine 16 May to 15 August 2016”, para. 209 (b) (Annex 772 to MU); OHCHR, “Report on the human rights situation in Ukraine 16 August to 15 November 2016”, para. 224 (d)-(f) (Annex 773 to MU); ICRC, “Ukraine crisis: ICRC calls on all parties to spare civilians”, 20 January 2015, available at <https://www.icrc.org/en/document/ukraine-crisis-icrc-calls-all-parties-spare-civilians>; ICRC, “Ukraine crisis: Intensifying hostilities endanger civilian lives and infrastructure”, 10 June 2016, available at <https://www.icrc.org/en/document/ukraine-crisis-intensifying-hostilities-endanger-civilian-lives-and-infrastructure>; ICRC, “ICRC warns of deteriorating humanitarian situation amid intensifying hostilities in eastern Ukraine”, 2 February 2017, available at <https://www.icrc.org/en/document/icrc-warns-deteriorating-humanitarian-situation-intensification-hostilities-eastern-ukraine>.

³⁸⁷ Article 51(2) of Additional Protocol I, Article 13(2) of Additional Protocol II; ICRC, Study on Customary International Humanitarian Law: Rule 1. The Principle of Distinction between Civilians and Combatants, IHL database, available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1.

³⁸⁸ Article 51(4)-(5) of Additional Protocol I.

³⁸⁹ Article 51(2) of Additional Protocol I, Article 13(2) of Additional Protocol II; ICRC, Study on Customary International Humanitarian Law: Rule 2. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited, IHL database, available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule2.

³⁹⁰ Cf. OSCE, “Kosovo/Kosova, as seen, as told, An analysis of the human rights findings of the OSCE Kosovo Verification Mission, October 1998 to June 1999”, 1999, executive summary, referring to “intent to apply mass killings as an instrument of terror” (available at <https://www.osce.org/odihr/17772?download=true>). Cf. also 26th International Conference of the Red Cross and Red Crescent, Geneva, 3-7 December 1995, Resolution II, “Protection of the civilian population in period of armed conflict”, 7 December 1995, preamble, expressing deep alarm at “the serious violations of international humanitarian law in internal as well as international armed conflicts by acts or threats of violence the primary purpose of which is to spread terror among the civilian population” (available at <https://www.icrc.org/eng/resources/documents/resolution/26-international-conference-resolution-2-1995.htm>).

357. Fifth, as in relation to Flight MH17, it appears that Ukraine has been very selective in the evidence which it has chosen to put before the Court. Unlike Ukraine, Russia has no access to the primary evidence and was, of course, not in a position to conduct its own investigations of the shelling episodes occurring on Ukraine's territory. Likewise, unlike Ukraine, Russia does not have full information regarding the location of Ukraine's military positions, the deployment and movement of Ukraine's military materiel, or the operations (both aggressive and defensive) conducted by Ukraine's forces – information that must exist and that would show the extent of military activities in the relevant areas.

358. Ukraine's military expert, General Brown, is also reliant upon the information that Ukraine chooses to provide with respect to the shelling episodes. Ukraine, however, does not appear to have shared with its expert relevant evidence, including:

- a. Contextual information regarding military operations (by both the DPR/LPR and Ukraine) in the area of the episodes of the shelling relied on and around the day of those episodes, including the shelling of other positions of the Ukrainian forces by DPR/LPR forces;
- b. Contemporaneous documentation which must exist recording the location of Ukraine's military positions and military equipment (including mobile military materiel) on and around the days of the shelling episodes and the location of all relevant impact sites. For example, Ukraine has not put into evidence (or even acknowledged) documents recording the movement and activities of tanks which it had located in a residential area in Avdiivka at the relevant time.
- c. Additional intercept evidence, all of which it is understood originates from Ukraine's Security Service, which has been published or which is referred to in Ukrainian criminal court documents.³⁹¹

359. The materials available to Russia do not contain such information, i.e. official reports and press reporting, witness accounts from interviews and social media cannot provide the necessary details. With a view to helping fill this evidentiary gap, Russia has requested that the OSCE provide documents relevant to its inspections for each of the shelling episodes, but the OSCE declined.³⁹² Publicly available satellite imagery relevant to the specific shelling episodes Ukraine relies on is also limited. In principle, if it were available, satellite imagery might help to verify Ukraine's account, although it provides only a very high-level and fragmentary snapshot of the situation on the ground.

³⁹¹ As in relation to the shooting down of Flight MH17, Russia does not accept the validity of the alleged intercepts obtained by Ukraine and it is for Ukraine to prove this. Reference to the intercept evidence and what it shows is without prejudice to this position.

³⁹² Letter of Alexander Lukashevich, Permanent Representative of the Russian Federation to the OSCE, to the Secretary General of the OSCE of 13 May 2020 No. 261 and Letter of the Secretary General of the OSCE to Alexander Lukashevich, Permanent Representative of the Russian Federation to the OSCE, of 6 July 2020 (Annex 45).

360. Sixth, Ukraine’s position with respect to the “military justification” for each of the shellings also conflates the existence of a military objective with the proportionality of an attack against that object (an assessment of which would require consideration of the anticipated military advantage in relation to the expected harm to civilians and civilian objects). However, even if an attack were disproportionate or indiscriminate, this would not without more establish that it was a terrorist act.

361. Against the backdrop of these general observations, Russia turns to each of the individual instances of shelling relied on by Ukraine.

B. THE SHELLING CLOSE TO THE CHECKPOINT NEAR VOLNOVAKHA

362. Ukraine has failed to show that the loss of life resulting from shelling impacts close to the checkpoint near Volnovakha (the “Buhas checkpoint”) on 13 January 2015 was caused by an act of terrorism within the meaning of Article 2(1)(b) of the ICSFT.

363. It is Ukraine alone that has characterised this shelling as a “terrorist” act. Notwithstanding Ukraine’s very public position, the OHCHR, the ICRC or the UNSC have not adopted that characterisation.

1. *The Character of the Buhas Checkpoint and Military Advantage*

364. Ukraine repeatedly refers to the Buhas checkpoint as a “civilian checkpoint”³⁹³ which “played no role in the ongoing armed conflict”.³⁹⁴ This is central to Ukraine’s unilateral characterisation of the shelling as a terrorist act under Article 2(1)(b) of the ICSFT, including the alleged existence of the requisite intention and terrorist purpose.³⁹⁵

365. However, Ukraine’s position is contradicted by its own witness evidence, which states that the checkpoint was established as part of the so-called “Anti-Terrorist Operation” and that it was manned by, among others, “State Border Guard servicemen, internal troops of ‘Kyiv-2’ unit”, both “equipped with small arms, in particular Kalashnikov assault rifles, pistols, and hand grenades.”³⁹⁶

366. General Brown refers to a “civilian-vehicle checkpoint”³⁹⁷ and states:

“It is difficult to argue that the checkpoint was taking an active part in hostilities, or that its destruction gave the DPR any military advantage. The function of the Volnovakha checkpoint appears to have been a continuation of its long-standing civilian role of checking vehicles, albeit reinforced by armed personnel in order both to provide a greater degree of protection to the police forces manning the checkpoint and also to extend the

³⁹³ MU, paras. 2, 77, 226, 229, 230 and 291.

³⁹⁴ See WSU, para. 253.

³⁹⁵ See MU, paras. 227, 230-231.

³⁹⁶ Witness Statement of Maksym Anatoliyovych Shevkoplias, 4 June 2018 (Annex 4 to MU), paras. 5, 8 and 10.

³⁹⁷ Expert Report of Lieutenant General Christopher Brown (“Brown Report”) (Annex 11 to MU), para. 20.

role of the checkpoint to include checks for the movement of weapons and separatist personnel. There is no evidence to suggest that the checkpoint played any offensive role; indeed, its size and number of personnel manning it suggest it could not even have conducted any effective defensive role against anything more than attacks by individuals with small arms. While the checkpoint could undoubtedly warn Ukrainian Armed Forces of any impending attack along the road to Volnovakha, any advantage of a conventional military attack on the checkpoint, either by direct assault or by indirect fire, would in my opinion be outweighed by its waste of resources and a loss of surprise if it were a precursor to a larger attack”.³⁹⁸

367. In the above passage, General Brown appears to be conflating the separate questions of whether the Buhas checkpoint was a purely civilian objective and, if not, whether any attack would have been proportionate or served military logic.

368. As to the first question (i.e., the status of the checkpoint), Ukraine does not mention in its Memorial, and does not appear to have asked General Brown to consider,³⁹⁹ the following:

- a. Documents produced by Ukraine,⁴⁰⁰ as well as the OSCE, describe the location as a checkpoint of the Ukrainian Armed Forces.⁴⁰¹
- b. According to open-source information, the Kyiv-2 battalion engaged in combat operations in Eastern Ukraine in 2014 and, after receiving additional heavy weaponry, was redeployed to the area of Volnovakha (including the Buhas checkpoint) in October 2014.⁴⁰² Notably, it appears from a ruling of a Ukrainian court that Kyiv-2 servicemen were involved in combat tasks while stationed in the Volnovakha region.⁴⁰³ The open-source information also indicates that the Kyiv-2 battalion engaged in reconnaissance operations in the area of Volnovakha, Olenivka and Dokuchayevsk.⁴⁰⁴ There are also suggestions that the Kyiv-2 battalion became a part of,⁴⁰⁵ or at least cooperated with, the

³⁹⁸ Brown Report (Annex 11 to MU), para. 27.

³⁹⁹ Cf. WSU, para. 253 stating that General Brown considered “all relevant circumstances”.

⁴⁰⁰ Annex 87 to MU.

⁴⁰¹ OSCE SMM, “Spot report by the OSCE Special Monitoring Mission to Ukraine, 14 January 2015: 12 civilians killed and 17 wounded when a rocket exploded close to a civilian bus near Volnovakha”, 14 January 2015 (Annex 323 to MU); OSCE SMM, “Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 18:00 (Kyiv time), 13 January 2015”, 14 January 2015 (Annex 320 to MU).

⁴⁰² *112.ua*, “Kyiv-2 has been relocated to Donetsk Region and is at a checkpoint in Volnovakha as ordered by Ministry of Internal Affairs, battalion commander says”, 10 October 2014, <https://112.ua/glavnye-novosti/kyiv-2-perebazirovalsya-po-prikazu-mvd-v-doneckuyu-oblast-i-nahoditsya-na-blokpostu-v-volnovahe-kombat-127627.html> (Annex 97).

⁴⁰³ Ukraine, Svyatoshinsky District Court of Kyiv, Case No. 759/13012/18, Decision, 26 December 2018, <https://reyestr.court.gov.ua/Review/79393757> (Annex 75).

⁴⁰⁴ See Expert Report of Major General Valery Alexeevich Samolenkov (“Samolenkov Report”) (Annex 2), Addendum 1, para. 9 referring to Facebook page ‘Kyiv’, post at: <https://www.facebook.com/044.Kyiv/posts/736355026412539>, 17 November 2014 (Annex 153).

⁴⁰⁵ The suggestion is apparently based on witness accounts. See Centre for Civil Liberties, “In search of justice: Investigation of crimes related to violation of the right to life, the right to liberty and security of person, freedom from

72nd brigade⁴⁰⁶ of the Ukrainian Armed Forces. Ukraine has not put before the Court contemporaneous documentation recording the activities of the Kiev-2 battalion at and around the Buhas checkpoint.

- c. As is explained in the Bobkov Report, contemporaneous satellite imagery and CCTV footage of the Buhas checkpoint show a number of military features, including observation posts and trenches for personnel and dug-out positions for military equipment.⁴⁰⁷ Photographs reportedly taken at the checkpoint (and verified by Expert Bobkov) show firing positions for a machine gun and an RPG-7 on the roof of a shelter.⁴⁰⁸
- d. The Bobkov Report also concludes that open-source information shows that mobile military equipment (including an anti-tank gun) was observed at the Buhas checkpoint, although the dates of the relevant photographs are unclear.⁴⁰⁹
- e. Russia's military expert, General Samolenkov explains that the degree of fortification and protection indicates that the road was considered by Ukraine to have military value and that the checkpoint did not perform purely civilian functions.⁴¹⁰
- f. The Buhas checkpoint was located on a section of the H-20⁴¹¹ public road connecting Donetsk and Mariupol. As General Samolenkov explains, it is reasonable to assume that the road would have also been used to redeploy military equipment and men and to bring ammunition and supplies to various Ukrainian military positions, including those closer to Dokuchayevsk.⁴¹² Ukraine has not put into evidence any contemporaneous

torture committed in the anti-terrorist operation zone: shortcomings of the work of investigative bodies and recommendations of human rights activists", 2016, http://ccl.org.ua/wp-content/uploads/2016/06/Spravedlivist_CCL_MF_Weblow-1.pdf (Annex 82).

⁴⁰⁶ See *Glavnoe*, "If there were no war: Arsen Karapetyan, Kherson (photo)", 11 April 2016, <https://glavnoe.ua/news/n267407> (Annex 117).

⁴⁰⁷ Expert Report of Alexander Alekseevich Bobkov ("Bobkov Report") (Annex 1), paras. 35-46.

⁴⁰⁸ See Blog of Andrey Skaternoy, "Volnovakha-Donetsk checkpoint "Buhas". The one", post at: <http://asket.in.ua/?p=977>, 20 January 2015 (Annex 186).

⁴⁰⁹ Bobkov Report (Annex 1), paras. 39-46. See also a video report by Mariupol TV filmed at "the checkpoint in Volnovakha" and published on 1 November 2014, which features interviews with the Kiev-2 Battalion which the journalist says is "based there" and demonstrating a BRDM-2 (amphibious armoured patrol car) and an installed machine gun at the checkpoint: YouTube channel Mariupol TV, "2014-10-30 How do our soldiers live under constant shellings? (MTV story)", available at: <https://www.youtube.com/watch?v=C706hvRXm3c&t=27s>, 1 November 2014 (Annex 222).

⁴¹⁰ Samolenkov Report (Annex 2), paras. 44-52. See also Instruction on the procedure for implementing the norms of international humanitarian law in the Armed Forces of Ukraine approved by the Order of the Ministry of Defence of Ukraine No. 164, 23 March 2017, <https://zakon.rada.gov.ua/laws/show/z0704-17#Text> (Annex 50), Article 11 defining military objectives which may lawfully be attacked as including "objects (buildings, houses, positions, barracks, warehouses, and others) used or prepared to be used for military purposes".

⁴¹¹ While the correct transliteration may be "N-20" (with Latin "N" standing for Cyrillic "H" in the original), the "H-20" reference will be preserved for consistency with Ukraine's Memorial (para. 78).

⁴¹² Samolenkov Report (Annex 2), para. 48.

documentation recording the movements of troops and military materiel on this road, including at or near the checkpoint, on and around 13 January 2015.

- g. As General Samolenkov also explains, the Buhas checkpoint could be used as a defensive position in the event of a ground assault by the DPR, in particular, to repel any advance towards Volnovakha or any attempt to gain control of the road.⁴¹³

369. As follows from the above, and as confirmed by the view of General Samolenkov, notwithstanding the fact that Ukraine has not put before the Court all of the essential information, it is clear that the Buhas checkpoint was not a purely civilian object.

370. Turning specifically to the day of the shelling, Ukraine has not put into evidence the contemporaneous logbooks and other reports in its exclusive possession which would help to analyse the deployment and movement of military materiel at and around the Buhas checkpoint on or around 13 January 2015. Moreover, although Ukraine has provided video footage taken by a camera located at the Buhas checkpoint at the time of the shelling and immediately before, this is limited to around one hour in duration (between around 2 pm and 3 pm).⁴¹⁴ It does not show the situation at the Buhas checkpoint earlier in the day. It appears that this footage and information about persons who crossed through the checkpoint was also not provided to the Ukrainian investigators.⁴¹⁵

371. As regards the separate question of whether there would be a military advantage to shelling the Buhas checkpoint (or the road nearby), as General Samolenkov explains, this question also must be considered in context.⁴¹⁶

372. First, it is necessary to look at the location of Ukraine's military positions in the area between the Buhas checkpoint and the territory which was under the control of the DPR to the northeast and to consider the relationship between such positions and the Buhas checkpoint.⁴¹⁷ General Brown's Report contains no such consideration and Russia assumes that Ukraine provided no such information to him.

⁴¹³ Samolenkov Report (Annex 2), paras. 51-52.

⁴¹⁴ Footage from a Surveillance Camera at the Checkpoint, 10 January 2015 (video) (Annex 695 to MU).

⁴¹⁵ See National Police, Main Donetsk Regional Administration of the National Police Letter No. 1812/04/18-2016 to the Main Military Prosecutor's Office, Prosecutor General's Office of Ukraine, 18 March 2016 (Annex 147 to MU), emphasis added: "It will not be possible to send the Prosecutor General's Office of Ukraine video recordings from the fixed video surveillance camera located on the roof of fixed post No. 5 of the State Traffic Inspectorate Administration of the Main Donetsk Regional Directorate of the Ministry of Internal Affairs of Ukraine *for the period from 8:00 a.m. to 4:00 p.m. on January 13, 2015*, due to the fact that the Kyiv-2 Special-purpose battalion was stationed at th[at] fixed post. All of the video surveillance cameras and recordings made by them belong to and are being held by the leadership of that battalion. The same applies to information concerning persons who crossed, in either direction, the temporary checkpoint controlled by the Kyiv-2 special-purpose battalion" (emphasis added).

⁴¹⁶ Samolenkov Report (Annex 2), para. 9.

⁴¹⁷ Samolenkov Report (Annex 2), para. 56.

373. The Buhas checkpoint was the last Ukrainian checkpoint on the H-20 road between territory controlled by Government and territory under the control of the DPR. The contact line appears to have run north of Novotroitske (around 14-15 km from the Buhas checkpoint).⁴¹⁸

374. The Bobkov Report contains an analysis of contemporaneous satellite imagery showing Ukraine's military positions in this area at around 11 am on 13 January 2015.⁴¹⁹ Based on this wider context, General Samolenkov explains that the Buhas checkpoint most likely held an important place in supporting these other military positions through controlling the road behind them.⁴²⁰ He considers that it is reasonable to conclude that the Buhas checkpoint formed part of the Ukrainian system of combat positions.⁴²¹ While civilian vehicles wishing to travel on this section of the road had to pass the Buhas checkpoint, the function of the checkpoint was not limited to this activity.

375. Second, it is relevant that all parties to the armed conflict have treated checkpoints located on public roads which are manned by armed forces as military targets, and it is regularly recorded in the reports of the OSCE that shelling impact sites are at or near checkpoints controlled by both parties to the conflict.⁴²² That the Ukrainian Armed Forces targeted checkpoints is also supported by open-source material reporting comments made by members of the Kyiv-2 Battalion.⁴²³ As General Samolenkov explains:

“I understand that, during the military conflict in Eastern Ukraine, warfare extended to various checkpoints situated on critical roads. This is normal since vehicular checkpoints were likely part of the system of combat positions, meaning that they were equipped and used for military purposes. Road positions guard critical movement routes that the enemy may use for potential attacks. Unprotected roads would allow the attacker to gain control over the fastest channel for transporting personnel and materiel with minimal effort. On the other hand, if the road is taken under control, this can also disrupt the supply of the enemy's positions. In view of this, checkpoint positions on roads are typically fortified to some extent, although their particular features may vary.”⁴²⁴

376. For example, on 27 April 2016, Ukraine's armed forces shelled an area in the vicinity of a DPR checkpoint located nearby on the same H-20 road in the village of Olenivka (around 25 km from the

⁴¹⁸ Samolenkov Report (Annex 2), para. 11.

⁴¹⁹ Bobkov Report (Annex 1), paras. 53-54.

⁴²⁰ Samolenkov Report (Annex 2), para. 48.

⁴²¹ Samolenkov Report (Annex 2), paras. 56-57.

⁴²² OSCE SMM, “Latest from OSCE Special Monitoring Mission to Ukraine (SMM) based on information received as of 18:00 (Kyiv time), 27 October 2014”, 28 October 2014, <https://www.osce.org/ukraine-smm/126103> (Annex 5); OSCE SMM, “Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 13 July 2017”, 14 July 2017, <https://www.osce.org/special-monitoring-mission-to-ukraine/329496> (Annex 30); OSCE SMM, “Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 7 May 2017”, 8 May 2017, <https://www.osce.org/special-monitoring-mission-to-ukraine/315996> (Annex 28).

⁴²³ See Samolenkov Report (Annex 2), Addendum 1, para. 3 referring to YouTube channel of Radio Liberty Ukraine, “Battle in the vicinity of Volnovakha, Separatists Lost Firing Positions”, available at: https://www.youtube.com/watch?v=rKAO9JGw_TA, 9 November 2014 (Annex 224).

⁴²⁴ Samolenkov Report (Annex 2), para. 44.

Buhas checkpoint), killing four civilians and injuring eight more. The OHCHR report for that period records that: “According to OSCE crater analysis, the mortar rounds were fired from the west-south-westerly direction. This indicates the responsibility of the Ukrainian Armed Forces. The checkpoint is routinely — both during day and night time — surrounded by passenger vehicles waiting to cross the contact line”.⁴²⁵

- a. Even Ukraine’s own expert emphasises the similarities between the checkpoints near Volnovakha and Olenivka.⁴²⁶ Ukraine attempts to distinguish the shelling near the Olenivka checkpoint on the basis that the OSCE found “firing positions” in the vicinity but Ukraine omits to mention that the OSCE referred specifically to “small arms firing positions”⁴²⁷ and that the Buhas checkpoint also featured small arms firing positions not merely in the vicinity but at the checkpoint itself (see above).
- b. Ukraine also emphasises that it appears that artillery guns, not BM-21 Grad, were used in the attack on the Olenivka checkpoint, but this is immaterial to the question of the similarities between the checkpoints and whether they were treated as military objectives.⁴²⁸

377. Third, it is necessary to consider the context of the active hostilities in the wider area at the relevant time.⁴²⁹ Although the full details of the situation on the ground are not known and Ukraine has not put into evidence the necessary information in this regard (see above), some general observations may be made.

- a. Open-source material indicates that the Ukrainian Armed Forces fired from a position at Buhas and that the DPR “returned fire at Buhas” on 7 January 2015.⁴³⁰ Moreover, it appears that the Ukrainian Armed Forces used the Buhas checkpoint as an artillery firing position on 12 January 2015.⁴³¹

⁴²⁵ OHCHR, “Report on the human rights situation in Ukraine 16 February to 15 May 2016”, para. 20 (Annex 771 to MU). See also OSCE SMM, “Spot Report by the OSCE Special Monitoring Mission to Ukraine (SMM): Shelling in Olenivka”, 28 April 2016, <https://www.osce.org/ukraine-smm/236936> (Annex 10).

⁴²⁶ Brown Report (Annex 11 to MU), para. 32.

⁴²⁷ OSCE SMM, “Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), Based on Information Received as of 19:30 hrs, 29 April 2016”, 30 April 2016 (Annex 3 to WSU).

⁴²⁸ Cf. WSU, para. 253.

⁴²⁹ See Samolenkov Report (Annex 2), para. 9.

⁴³⁰ VKontakte page Reports from the Novorossiia’s militia, available at: https://vk.com/wall-57424472?day=07012015&w=wall-57424472_38207, 7 January 2015 (Annex 225), referring to DPR having “returned fire at Buhas”.

⁴³¹ VKontakte page Reports from the Novorossiia’s militia, post at: <https://archive.md/0SASD>, 12 January 2015 (Annex 168), stating that “volleys were fired from the Volnovakha area (from the traffic police post) towards Dokuchaevsk and Starobeshevo”. See also Twitter page Ridna_Vilna 33%, post at: https://twitter.com/ua_ridna_vilna/status/554520877283692544, 12 January 2015 (Annex 169). See also Samolenkov Report (Annex 2), para. 63.

- b. The Bobkov Report identifies evidence of intensive exchanges of fire in the area between Volnovakha and Dokuchayevsk.⁴³² This is consistent with open-source contemporaneous reporting between late November 2014 and mid-January 2015 of shelling (including the use of BM-21 Grad MLRS) by the Ukrainian Armed Forces of Dokuchayevsk from the direction of Novotroitske and Volnovakha and shelling by DPR forces of Ukrainian military positions, including at Buhas (around 3 km from the Buhas checkpoint).⁴³³
- c. According to information contained in Ukrainian court judgments (which Ukraine has not put into evidence), there were active hostilities and movements of military equipment in the vicinity of the Buhas checkpoint in the period around the shelling.⁴³⁴ For example: (a) on 5 December 2014, a howitzer self-propelled artillery battery came under fire near Blyzhne (around 2 km from the Buhas checkpoint),⁴³⁵ (b) on 26 December 2014, military equipment was observed moving in Volnovakha and Buhas (around 1 km from the Buhas checkpoint),⁴³⁶ and (c) on 22 January 2015, Ukrainian military equipment was located in Blyzhne, as well as in Rybynske (around 6 km from the Buhas checkpoint).⁴³⁷
- d. The maps produced contemporaneously by Ukraine's Information Analysis Centre of the National Security and Defence Council for the period between 7 and 14 January 2015 appear to show that the DPR captured substantial territory to the northeast of Volnovakha between 13 and 14 January 2015, suggesting that there was a ground offensive in this area pushing towards the general direction of the Buhas checkpoint and Volnovakha.⁴³⁸

⁴³² See Bobkov Report (Annex 1), para. 54, Figure 24. See also Samolenkov Report (Annex 2), para. 16.

⁴³³ See Samolenkov Report (Annex 2), para. 13 referring to VKontakte page Reports from the Novorossiia's militia, post at: https://vk.com/wall-57424472?day=05122014&w=wall-57424472_32801%2Fall, 5 December 2014 (Annex 158); VKontakte page Reports from the Novorossiia's militia, available at: https://vk.com/wall-57424472?day=07012015&w=wall-57424472_38207, 7 January 2015 (Annex 225); VKontakte page Reports from the Novorossiia's militia, post at: https://vk.com/wall-57424472?day=14012015&w=wall-57424472_38414, 9 January 2015 (Annex 159); VKontakte page Reports from the Novorossiia's militia, post at: https://vk.com/wall-57424472?day=14012015&w=wall-57424472_38757, 11 January 2015 (Annex 164); VKontakte page Reports from the Novorossiia's militia, post at: https://vk.com/wall-57424472?day=14012015&w=wall-57424472_39071, 13 January 2015 (Annex 173); VKontakte page Reports from the Novorossiia's militia, post at: https://vk.com/wall-57424472?day=09012015&w=wall-57424472_38467%2Fall, 9 January 2015 (Annex 161); VKontakte page Reports from the Novorossiia's militia, post at: https://vk.com/wall-57424472?day=14012015&w=wall-57424472_39241, 14 January 2015 (Annex 179).

⁴³⁴ See Samolenkov Report (Annex 2), para. 15.

⁴³⁵ Ukraine, Oktyabrsky District Court of Mariupol, Case No. 263/574/15-k, Ruling, 15 January 2015, <https://reyestr.court.gov.ua/Review/45424002> (Annex 57).

⁴³⁶ Ukraine, Volnovakha District Court of the Donetsk Region, Case No. 221/1370/15-k, Judgment, 20 May 2015, <https://reyestr.court.gov.ua/Review/44277498> (Annex 60).

⁴³⁷ Ukraine, Volnovakha District Court of the Donetsk Region, Case No. 221/1556/15-k, Judgment, 23 September 2015, <https://reyestr.court.gov.ua/Review/51123690> (Annex 62).

⁴³⁸ Information and Analysis Center of the National Security and Defence Council of Ukraine, "The Situation in the Eastern Regions of Ukraine – 14.01.15", 14 January 2015, <http://mediarnbo.org/2015/01/14/the-situation-in-the-eastern-regions-of-ukraine-14-01-15/?lang=en> (Annex 56); Information and Analysis Center of the National Security and Defence Council of Ukraine, "The Situation in the Eastern Regions of Ukraine – 13.01.15", 13 January 2015,

378. As to the intercepts produced by Ukraine:

- a. General Samolenkov explains that, based on his military understanding of the terms used, the intercepts of calls between DPR members refer to active hostilities involving artillery guns, howitzers, tanks, mortars and close combat weapons, but not BM-21 Grad MLRS.⁴³⁹
- b. These intercepts expressly mention two targets: a “checkpoint” between Berezove and Dokuchayevsk (“down from Berezov[e], the first turn-off [...] to Dokuchayevsk”) and a target near Slavne (at the “beginning of Slavne”, around 25 km from the Buhas checkpoint).⁴⁴⁰ As is explained in the Bobkov Report⁴⁴¹ and by General Samolenkov,⁴⁴² neither of these descriptions refer to the Buhas checkpoint. However, the context is significant in showing the existence of hostilities in the general area on the same day and in showing that other checkpoints were targeted by DPR forces.

2. *Contradictions and Other Deficiencies in Ukraine’s Evidence with respect to DPR’s Alleged Responsibility for the Attack*

379. General Brown’s conclusion that the DPR was responsible for the shelling rests on his acceptance of the findings of the Ukrainian investigators, particularly the crater analysis performed.

i. *Inconsistent assessment of the dispersal pattern of impact sites*

380. General Brown notes that one method that can be used to assess the direction and range of fire is to draw an ellipse around the main impact sites and to measure the vertical and horizontal axis. It also follows that where the direction of fire and angle of incidence are known, one can calculate the shape and measurements of the expected dispersal ellipse.⁴⁴³

381. General Brown assumes as correct the crater analysis of the Ukrainian investigators with respect to the direction of fire and the angle of incidence.⁴⁴⁴ Using the data in the firing table for M-21OF projectiles, General Brown describes the fall of shot pattern created by 122 mm rockets at a range of 19.6 km.⁴⁴⁵ He also includes a diagram (Figure 1), which is reproduced below, showing an oval ellipse measuring 784 m along the deduced line of fire and 1304 m perpendicular to the deduced line of fire.

<http://mediarnbo.org/2015/01/13/the-situation-in-the-eastern-regions-of-ukraine-13-01-15/?lang=en> (Annex 55). See also Samolenkov Report (Annex 2), para. 17.

⁴³⁹ Samolenkov Report (Annex 2), para. 27.

⁴⁴⁰ Translation of the transcripts of the Intercepted Conversations of Yuriy Shpakov (16 September 2016) contained in Annex 430 to the Memorial of Ukraine (Annex 257), conversation no. 2, at 11:07:43 on 13 January 2015.

⁴⁴¹ Bobkov Report (Annex 1), paras. 47-50.

⁴⁴² Samolenkov Report (Annex 2), paras. 22-24.

⁴⁴³ *Ibid.*, para. 84 referring to Brown Report (Annex 11 to MU), para. 13.

⁴⁴⁴ *Ibid.*, para. 84 referring to Brown Report (Annex 11 to MU), paras. 25-26.

⁴⁴⁵ Brown Report (Annex 11 to MU), paras. 29. See also para. 26.

The probable error for range is stated as 90 m and the probable error for direction is stated to be 163 m. General Samolenkov agrees that this shows the expected ellipse for this range.⁴⁴⁶

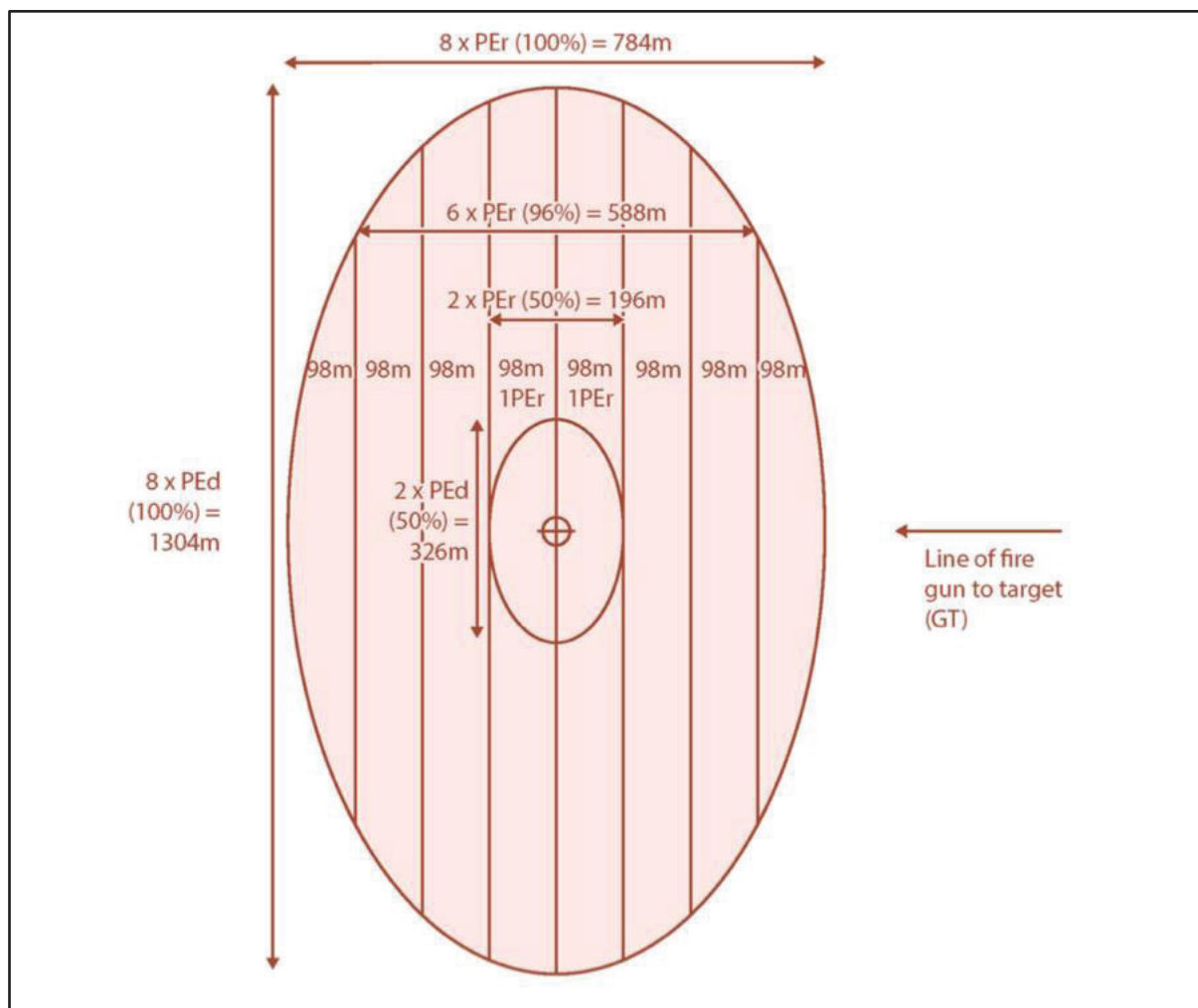


Figure 1. Diagram (to scale) showing fall of shot pattern created by 122mm Rockets at 19.6 km range, using Firing Table data (Figure 1 of Brown Report)

382. However, as to the facts of the current incident, General Brown states that an image taken by an OSCE UAV and the Ukrainian analysis “exhibit a spread of shot approximately 640 metres [*cf. his expected figure of 784 m*] along the deduced line of fire and 580 metres perpendicular to the deduced line of fire [*cf. his expected figure of 1304 m*]”.⁴⁴⁷ Although General Brown states that “[t]his is consistent with the firing pattern of BM-21 using standard high explosive projectiles”,⁴⁴⁸ referring to paragraphs 29-30 of his Report, there is plainly an inconsistency between the two sets of measurements; they cannot both be correct.⁴⁴⁹

⁴⁴⁶ Samolenkov Report (Annex 2), para. 86.

⁴⁴⁷ Brown Report (Annex 11 to MU), para. 23.

⁴⁴⁸ *Ibid.*

⁴⁴⁹ Samolenkov Report (Annex 2), para. 88.

383. General Samolenkov explains that this is an important inconsistency. It follows from the impact map in Annex 89 to the Memorial that the impact area is elongated in the direction of the shelling and narrower perpendicular to that direction.

- a. This broadly conforms with the measurements suggested by General Brown, but not with the ellipse measurements referred to in paragraphs 29 and 30 of his report.
- b. General Samolenkov further explains that this shape of the impact pattern is consistent with a range of fire below 13-14 km (or even 9-10 km with spoiler rings – a device used to reduce the velocity and range of BM-21 rockets). That is confirmed by the data in the Firing Tables.⁴⁵⁰
- c. This creates uncertainty as to the correct placement of the firing position, which may have been on either side of the contact line or in the grey area (i.e., no man’s land). General Samolenkov states on this basis that it would be impossible to reach a clear conclusion as to which party was responsible for the shelling.⁴⁵¹

ii. *Failure to collect fragments from all craters*

384. General Brown also relies on the analysis of fragments collected from the impact sites by the Ukrainian investigators. With respect to his assessment of the likely range of fire, General Brown states that: “There is no evidence that debris from safety ring spoilers was found at the site of the attack”.⁴⁵² This can only refer to the question of whether evidence of safety ring spoilers was found among the fragments of the rockets collected from impact sites. General Samolenkov agrees that this is an important question:

“To accurately determine the shelling conditions, it is important not only to examine the craters in detail, but also to collect projectile fragments. This makes it possible to reliably identify the type of ammunition used (including its specific modification and the type of fuze, the use of spoiler rings).”⁴⁵³

385. However, General Brown does not appear to have considered the fact that the Ukrainian inspection reports refer to the *collection of fragments from three craters only*.⁴⁵⁴ General Samolenkov explains that “even in those cases there is no clarity as to where exactly the fragments were collected and no photographs of the fragments on the site”.⁴⁵⁵ In the absence of more complete evidence of the

⁴⁵⁰ *Ibid.*, para. 88.

⁴⁵¹ *Ibid.*, para. 89.

⁴⁵² Brown Report (Annex 11 to MU), para. 26.

⁴⁵³ Samolenkov Report (Annex 2), para. 80.

⁴⁵⁴ *Ibid.*

⁴⁵⁵ *Ibid.*

fragments, it is not possible to express any firm view on whether safety ring spoilers were used or on the range of fire deduced by Ukraine's investigation.⁴⁵⁶

iii. Insufficient explanation contained in Ukraine's inspection reports

386. There are additional reasons why Ukraine's crater analysis, which General Brown has relied on, is to be approached with caution. As General Samolenkov explains, the inspection reports do not contain sufficient detail to allow the reader to understand precisely how the crater was measured (including, for example, where the wooden stick was placed and whether or how the ground surrounding the crater was levelled), although in any event unsuitable equipment was used.⁴⁵⁷ As a result, the Court can have no confidence that the angles were measured accurately. This is significant because, as General Samolenkov explains, such analysis is very sensitive to mistakes: "Even an error of 5 degrees in determining the angle of descent will cause an error of 1 kilometre in determining the range of firing".⁴⁵⁸ In these circumstances, it becomes particularly important to corroborate the crater analysis by reference to the ellipse of dispersion.

iv. Ukraine's witness statements are of no assistance to the Court

387. The Court is also not assisted by the witness evidence put forward by Ukraine in which civilians with no military training who observed or overheard the shelling purport to have somehow established (some of them under extreme pressure) such technical details as the launch site, the direction of fire, the number of firing launchers, the type of projectiles used, and/or the angle the projectiles struck the ground.⁴⁵⁹ This is not credible.

v. Ukraine's intercept evidence

388. The context provided by Ukraine's intercept evidence shows that a senior DPR officer reacted to the result of the shelling negatively, asking the DPR officer who Ukraine says was in charge of the Grad unit:⁴⁶⁰

⁴⁵⁶ In the absence of post-mortem reports, it is also not possible to verify Ukraine's claims that certain fragments were extracted from the bodies of individuals killed in the shelling.

⁴⁵⁷ See Samolenkov Report (Annex 2), paras. 68-76.

⁴⁵⁸ *Ibid.*, para. 70.

⁴⁵⁹ Signed Declaration of Oleksandr Pavlenko, Witness Interrogation Protocol (23 January 2015) (Annex 209 to MU); Signed Declaration of Artem Kalus, Witness Interrogation Protocol, 17 January 2015 (Annex 204 to MU); Signed Declaration of Anton Fadeev, Witness Interrogation Protocol, 16 December 2015 (Annex 244 to MU).

⁴⁶⁰ Based on the language used in the intercepts, General Samolenkov believes it is unlikely that the artillery used in that battle was MLRS: see Samolenkov Report (Annex 2), para. 27.

“Who is it that f***** Batyushka who shelled Volnovakha from Dokuchayevsk today, that *****?”⁴⁶¹

389. Neither Ukraine, in its Memorial, nor its expert appear to have considered this passage of the intercept. This is the only passage in the intercepts which appears to relate to the Buhas checkpoint and it strongly indicates that the civilian harm was not actually intended. It is also noted that, on 13 January 2015, the DPR issued a statement denying responsibility for the attack.⁴⁶²

390. Ukraine contends that two other statements in the intercepts concerning an attack against a checkpoint refer specifically to (and, indeed, celebrate) the shelling at the Buhas checkpoint.⁴⁶³

- a. First, at 14:29 on 13 January, “Yust” allegedly stated: “[We] blew a Ukropian [Ukrainian] checkpoint to hell”.⁴⁶⁴
- b. Second, at 10:51 on 14 January, “Yust” directed “Opasny” to: “Sound the alarm for three crews, take the main firing position and pound the checkpoint that we worked on yesterday ... [at the] intersection”.⁴⁶⁵

391. Ukraine is incorrect. Both of these statements are understood to refer to the Ukrainian Armed Forces checkpoint at an intersection on the road between Berezove and Dokuchayevsk, which was expressly identified as a target in other intercepts.⁴⁶⁶ As is evident from the satellite imagery, the Buhas checkpoint is not located at an intersection between two roads or at the first turn left from Berezove,⁴⁶⁷ and it was hardly damaged. Since they do not refer to the Buhas checkpoint, the passages Ukraine relies on are of no assistance to it.

392. Further, the other intercepts show that the DPR took steps to protect civilians. Although Ukraine’s position is that these intercepts relate to the shelling of the Buhas checkpoint, it does not appear to have provided them to General Brown and they are not considered in his Report. While these intercepts in fact concern different military operations conducted against Ukraine’s forces

⁴⁶¹ Intercepted conversations of Yuriy Shpakov, 16 September 2016 (Annex 430 to MU), conversation no. 31 at 16:54:08 on 13 January 2015.

⁴⁶² *Donetsk News Agency*, “DPR Ministry of Defence denounces DPR militia involvement in shelling attack on a route taxi van near Volnovakha as disinformation”, 13 January 2015, <https://dan-news.info/defence/v-minoborony-dnr-nazvali-dezinformaciej-prichastnost-opolcheniya-dnr-k-vystrelu-po-marshrutke-pod-volnovaxoj.html> (Annex 99).

⁴⁶³ See MU, para. 88.

⁴⁶⁴ Translation of the transcripts of the Intercepted Conversations of Yuriy Shpakov (16 September 2016) contained in Annex 430 to the Memorial of Ukraine (Annex 257), conversation no. 28, at 15:29:09 on 13 January 2015.

⁴⁶⁵ *Ibid.*, conversation no. 33, at 10:51:01 on 14 January 2015.

⁴⁶⁶ See Bobkov Report (Annex 1), paras. 47-50. See also VKontakte page Reports from the Novorossiia’s militia, post at: https://vk.com/wall-57424472?day=12012015&w=wall-57424472_38862%2Fall, 12 January 2015 (Annex 171), reporting that the DPR forces attacked a checkpoint in the area of Berezove on 11 January 2015.

⁴⁶⁷ This location is suggested in Translation of the Conversations of Yu. Shpakov (Annex 257), conversation no. 2 at 11:07:43 on 13 January 2015.

located between Berezove and Dokuchayevsk and near Slavne on the same day, they still provide relevant context with respect to the DPR's aims and the tactics it employed as part of its offensive.

- a. The DPR operators sought clarification of their assigned targets after realising that the coordinates they had been given were located in a residential area.⁴⁶⁸
- b. The DPR forces who Ukraine alleged were in control of a BM-21 Grad unit (but who General Samolenkov explains, based on the language they used, appear to have been using conventional artillery guns and mortars⁴⁶⁹) used ranging shots,⁴⁷⁰ and spotters,⁴⁷¹ while also adjusting fire away from a populated area.⁴⁷²

3. *Ukraine Has Failed to Establish the Requisite Intent and Terrorist Purpose*

393. In its Memorial, Ukraine relies on a passage in *Milošević* which refers to the intimidation resulting in that case from the sustained targeting of “sites well-known to be frequented by [civilians] during their daily activities, such as ... public transport”.⁴⁷³ Ukraine's reliance on the very different facts of *Milošević* is, however, misplaced. A single attack on an armed checkpoint or the road nearby is manifestly not analogous to the fourteen-month campaign of continuous sniping and shelling directed against the civilian population of Sarajevo.⁴⁷⁴

394. Ukraine argues that the requisite actual intent to kill or seriously harm civilians may be inferred from the fact that the Buhas checkpoint “did not play any role in the ongoing conflict, and there was no military reason to attack it”.⁴⁷⁵ This is factually incorrect (see above).

395. Ukraine also contends that indirect intent to kill civilians is to be inferred on the basis that the BM-21 Grad is an area weapon, which is unsuitable for targeting an objective such as a checkpoint.⁴⁷⁶ However, Article 2(1)(b) requires actual intent (see above).

396. Ukraine contends that the requisite terrorist purpose (*dolus specialis*) to intimidate the civilian population should be inferred from the nature of the so-called “civilian checkpoint” as a site well-

⁴⁶⁸ *Ibid.*

⁴⁶⁹ Samolenkov Report (Annex 2), paras. 27, 30.

⁴⁷⁰ Translation of the Conversations of Yu. Shpakov (Annex 257), conversation no. 15 at 12:24:19 on 13 January 2015.

⁴⁷¹ *Ibid.*, conversation no. 15 at 12:24:19 on 13 January 2015 and conversation no. 19 at 13:55:14 on 13 January 2015, referring to “eyes out front” and “the second [pair of] eyes”.

⁴⁷² *Ibid.*, conversation no. 20 at 14:02:14 on 13.01.2015: “Now wait, it went close to the town, you need to put them further away”.

⁴⁷³ MU, para. 231 referring to ICTY, *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Trial Chamber Judgment, pp. 290–91, para. 881 (12 December 2007) (Annex 466 to MU).

⁴⁷⁴ See ICTY, *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Judgment, 12 Nov. 2009, para. 38. See also paras. 245 and 254.

⁴⁷⁵ MU, para. 227.

⁴⁷⁶ *Ibid.*, para. 229.

known to be frequented by civilians, the timing of the attack and the use of the BM-21 Grad.⁴⁷⁷ As to these factors:

- a. The characterisation of the Buhas checkpoint as a “civilian checkpoint” is incorrect (see above) and, in any event, the road section it protected was of military significance.
- b. The likely presence of civilians at or near the checkpoint is relevant to an assessment of proportionality, but even if there were a disproportionate attack (i.e., launching an attack in the expectation that the incidental harm to civilians would be excessive in relation to the anticipated military advantage), this could not be conflated with attacking for the specific purpose of spreading terror. That specific purpose is either established or it is not (it is not).
- c. The contention that the timing of the attack was designed to cause maximum harm to civilians is contradicted by contemporaneous satellite imagery showing that there was a much greater volume of traffic at around 9 am on 13 January 2015 than is shown in the video footage of the shelling at around 2.30 pm.⁴⁷⁸
- d. While a BM-21 Grad would not have been an efficient choice of weapon for directed attack against a specific military objective of the size of the Buhas checkpoint,⁴⁷⁹ this is relevant only to an assessment of whether the attack was indiscriminate under international humanitarian law. Even if the attack were to be characterised as indiscriminate (*quod non*), this would not suffice to establish the requisite specific intent to terrorise the civilian population.

397. Ukraine also speculates, but has not put forward any documentary evidence, that the DPR/LPR may have intended to target civilian residents of territory controlled by the DPR/LPR who were travelling to Government-controlled territory “to collect pension and social benefit payments”.⁴⁸⁰

398. Finally, Ukraine also speculates that the shelling could have been part of a campaign to obtain political concessions.⁴⁸¹ However, no evidence in support of this allegation has been provided.

C. MARIUPOL

399. Ukraine has also failed to establish that the shelling at Mariupol on 24 January 2015 was a terrorist act within the meaning of Article 2(1)(b) of the ICSFT.

400. As explained in greater detail below, General Samolenkov concludes that:

⁴⁷⁷ *Ibid.*, paras. 230-231.

⁴⁷⁸ See Bobkov Report (Annex 1), para. 35(2). See also Samolenkov Report (Annex 2), para. 60.

⁴⁷⁹ See Samolenkov Report (Annex 2), para. 58.

⁴⁸⁰ MU, para. 232.

⁴⁸¹ *Ibid.*, para. 234.

“Based on the information provided to me, it appears likely that the residential areas of the Vostochniy micro-district of Mariupol were not the target of the attack(s). Rather it is likely that the artillery attacks were conducted in support of the announced and intended offensive operation aimed at capturing Mariupol.

It also appears likely that the civilian damage occurred by mistake, as is strongly suggested by the intercept evidence. I do not agree with General Brown’s conclusion that the attackers intended or anticipated the damage to civilian areas. It is unclear whether more accurate weapons or targeting methods were available to the DPR in this situation. It is plausible that civilian facilities of the Vostochniy micro-district could have been hit because of errors in the information about coordinates of intended military targets and/or errors in the aiming of the launchers and/or incorrect technical preparation of the launchers or even technical defects of the same. This could also be due to ‘human error’: incorrect interpretation of received orders (commands), meteorological data or coordinates.”⁴⁸²

401. Once again, it is Ukraine alone that has characterised the shelling as a “terrorist” act. Notwithstanding Ukraine’s very public position, the OHCHR, the ICRC, the UNSC and the UN Secretary-General⁴⁸³ have not adopted that characterisation.

1. The Context of the Shelling Impacts at the Vostochniy District of Mariupol

402. General Samolenkov explains that when assessing a given combat operation, its potential aims and its consequences, it is essential to consider the context. That obviously includes the parties’ military positions and activities, the territory under their control and hostilities in the surrounding area at the relevant time.⁴⁸⁴

403. The relevance of such contextual information appears to be common ground. Thus, in its oral submission on Preliminary Objections, Ukraine made the point that Mariupol is “not near the contact line”.⁴⁸⁵ This, however, was an inaccurate statement.

404. First, Ukraine omitted to inform the Court (and, it appears, also its expert) that one day prior to the shelling of 24 January 2015, the DPR had announced a major offensive with the aim of recapturing Mariupol, a port city with great strategic value.⁴⁸⁶ According to a statement from a then external adviser to the Ministry of Internal Affairs of Ukraine on 24 February 2015, the industrial

⁴⁸² Samolenkov Report (Annex 2), paras. 188-189.

⁴⁸³ United Nations Secretary-General, “Statement Attributable to the United Nations Secretary-General on Ukraine”, 24 January 2015 (Annex 306 to MU).

⁴⁸⁴ Samolenkov Report (Annex 2), para. 98.

⁴⁸⁵ CR 2019/12, 7 June 2019, pp. 40-41, para. 50 (Ms. Cheek).

⁴⁸⁶ The DPR previously controlled Mariupol until June 2014.

capability located in Mariupol was needed for Ukraine to be able to produce armour for military vehicles, and the DPR forces were expected to persist in attempting to re-capture the city.⁴⁸⁷

- a. On 23 January 2015, the leader of the DPR was reported as announcing: “We will fight until we reach the Donetsk region border”, and this was interpreted as “indicating [that] the rebels plan to seize the region’s western and southern territories which include the Ukrainian-held port city of Mariupol”.⁴⁸⁸
- b. On the same day, the Commander of the Kiev-1 battalion published a statement that: “After Zakharchenko’s statement about his intention to capture Mariupol, the [DPR] began a tank advance in regions adjacent to the city.”⁴⁸⁹
- c. On 24 January 2015 (the day of the shelling), the leader of the DPR stated “today we have started our advance at Mariupol”.⁴⁹⁰

405. General Brown does not appear to have been asked to consider any of these materials. His analysis relies on the fact that “no ground assault was forthcoming”, but in assessing the probable intentions of the DPR it is necessary to consider not only what happened but also the evidence of what was planned.⁴⁹¹ General Samolenkov concludes that the evidence suggests that the DPR did indeed intend to advance into the territory controlled by Ukraine in the direction of Mariupol and that:⁴⁹²

“In this situation, shelling all Ukrainian positions defending the city would be a logical preparatory phase of the offensive [...] The planned “ground assault” on the city may not have happened for a variety of reasons (including tactical considerations and priorities in other areas of active fighting).”⁴⁹³

⁴⁸⁷ See Facebook page of Anton Gerashchenko, post at: https://www.facebook.com/anton.gerashchenko.7/posts/816004235153092?_rdc=2&_rdr, 24 February 2015 (Annex 194). From March 2014 to November 2014 Mr Gerashchenko was an external adviser to the Minister of Internal Affairs of Ukraine Arsen Avakov: see *Liga Dossier*, “Gerashchenko Anton, Deputy Minister of Internal Affairs of Ukraine”, 9 February 2021, <https://file.liga.net/persons/gerashchenko-anton> (Annex 142).

⁴⁸⁸ *Newsweek*, “Civilians Caught in Crossfire as Ukraine Separatists Make Gains”, 23 January 2015, <https://www.newsweek.com/pro-russian-rebels-mount-new-offensive-ukraine-held-territory-301514> (Annex 104). The leader of the DPR was earlier reported as stating that the DPR intended to recapture Mariupol as early as October 2014: see e.g. *Interfax*, “Head of the DPR Promised to Capture Kramatorsk, Slovyansk, and Mariupol”, 23 October 2014, <https://www.interfax.ru/world/403434> (Annex 98).

⁴⁸⁹ Facebook page of Evgeniy Deidei, coordinator of the Kyiv-1 battalion, post at: <https://www.facebook.com/evgeniy.deidei/posts/742959402462277>, 23 January 2015 (Annex 190). This statement was also reported: see *Newsweek*, “Civilians Caught in Crossfire as Ukraine Separatists Make Gains” (Annex 104).

⁴⁹⁰ YouTube channel Russian Dialogue.ru, “Zakharchenko on the beginning of the offence on Mariupol”, available at: <https://www.youtube.com/watch?v=ShOHb-aHJHw>, 24 January 2015 (Annex 229).

⁴⁹¹ Brown Report (Annex 11 to MU), para. 49. Note that General Brown refers in this context to Ministry of Interior of Ukraine, Main Department of the National Guard of Ukraine Letter No. 27/6/2-3553 to the Ministry of Foreign Affairs of Ukraine, 31 May 2018 (Annex 183 to MU), which is silent on this point.

⁴⁹² Samolenkov Report (Annex 2), para. 114-115, 121-122.

⁴⁹³ *Ibid.*, para. 121.

406. Ukraine has also omitted to mention that, after the shelling, the Mariupol authorities reportedly stated that security measures in the city had been strengthened and that all units were “fully battle ready”.⁴⁹⁴ As General Samolenkov points out, this indicates that the authorities at the very least regarded a ground assault as a possibility.⁴⁹⁵

407. Second, Ukraine relies on a map which indicates that the contact line on 24 January 2015 was around 10 km to the north-east and east of Mariupol.⁴⁹⁶ This is, however, contradicted by a map published more recently by the former Head of the Criminal Police of the National Guard of Ukraine, which shows that, at the time of the shelling, and consistent with the announced offensive, the DPR controlled significantly more territory to the east of Mariupol (including the settlement of Lebedynske, which is around 4 km from Mariupol).⁴⁹⁷ It appears that Ukraine has not provided this map to its expert. A statement of Ukraine’s Ministry of Internal Affairs dated 25 January 2015 likewise indicates that Lebedynske was controlled by the DPR at the time of the shelling.⁴⁹⁸

408. Third, Ukraine has also omitted to mention (and does not appear to have informed its expert) that, even before the announcement of the DPR offensive to capture Mariupol, between 19 and 22 January 2015 there was an escalation in DPR military operations in the area around Mariupol. The OHCHR report for the relevant period describes the area around Mariupol as a “major flashpoint”.⁴⁹⁹ Unlike Ukraine, Russia does not have complete information about these events. However, it is clear that Ukraine has provided the Court with an inaccurate picture. For example:

- a. According to open-source information, on 19 January 2015, the positions of the Ukrainian Armed Forces were attacked near Hnutove, Orlivske (around 15 km to the north-north-east of Mariupol), Chermalyk (around 20 km to the north-north-east of

⁴⁹⁴ *Associated Press*, “Police: 10 Killed in Mariupol Shelling in Ukraine”, 24 January 2015, <http://web.archive.org/web/20150124110035/http://abcnews.go.com/International/wireStory/10-reported-killed-rocket-fire-mariupol-ukraine-28447614> (Annex 107).

⁴⁹⁵ Samolenkov Report (Annex 2), para. 120.

⁴⁹⁶ MU, Map 4 at p. 54. Ukraine also relies on a statement of the U.N. Under-Secretary for Political Affairs that the city “lies outside the immediate conflict zone”: see para. 92, referring to U.N. Security Council, Official Record, 7368th mtg., U.N. Doc. S/PV.7368 (26 January 2015), p. 2 (statement of Jeffrey Feltman, U.N. Under-Secretary-General for Political Affairs) (Annex 307 to MU).

⁴⁹⁷ Facebook page of Vyacheslav Abroskin, post at: <https://www.facebook.com/Vyacheslav.Abroskin/posts/2156580624634600>, 15 August 2019 (Annex 215). See also Samolenkov Report (Annex 2), para. 109. For background on Mr Abroskin see: *Liga Dossier*, “Vyacheslav Abroskin, Rector of the Odessa University of Internal Affairs, former First Deputy Head of the National Police of Ukraine”, 19 April 2021, <https://file.liga.net/persons/abroskin-vyacheslav> (Annex 145). Even earlier, on 7 November 2014, Ukraine passed Order of the Cabinet of Ministers of Ukraine “On the approval of the list of localities on the territory of which the state authorities temporarily do not exercise or do not fully exercise their authority”, No. 1085-r, 7 November 2014, <https://zakon.rada.gov.ua/laws/show/1085-2014-%D1%80#Text> (Annex 49).

⁴⁹⁸ Donetsk Region Main Directorate of the Ministry of Internal Affairs of Ukraine, All Necessary Measures Being Taken to Deal with the Consequences of Militants’ Shelling of Mariupol (25 January 2015) (Annex 91 to MU).

⁴⁹⁹ OHCHR, “Report on the human rights situation in Ukraine 1 December 2014 to 15 February 2015”, para. 21 (Annex 309 to MU).

Mariupol), and Pavlopil (around 16 km to the north-north-east of Mariupol), using mortars, artillery, grenade launchers and anti-tank missile systems.⁵⁰⁰

- b. On 20 January 2015, the BBC reported that Ukrainian troops had recorded 11 artillery attacks in the area of Mariupol.⁵⁰¹
- c. On 21 January 2015, a representative of Ukraine's "Anti-Terrorist Operation" was reported as stating that positions of the Ukrainian Armed Forces near Hnutove (around 11 km to the north-north-east of the eastern outskirts of Mariupol), Pavlopil and in Talakivka were attacked.⁵⁰² Open-source material published on the same day states: "The intensity of the fighting for this seaport town and its isolation are increasing every day. The epicentre of the fighting is currently located near the eastern and north-eastern outskirts of Mariupol ... the Ukrainian command is in fact unable to hold Mariupol for long".⁵⁰³
- d. On 21 and 22 January 2015, open-source information indicates that the positions of the Ukrainian Armed Forces in the area around Mariupol were heavily shelled and that it was understood that the attacks on 22 January were carried out in order to prepare for further advances.⁵⁰⁴
- e. On 23 January 2015, an official spokesperson for Ukraine's "Anti-Terrorist Operation" stated that the DPR was intensively shelling the positions of the Ukrainian forces in the outskirts of Mariupol.⁵⁰⁵

409. Taking into account the above information, General Samolenkov concludes that: "it appears likely that the shellings conducted at least since 19 January were aimed at suppressing the UAF positions around the city" (of Mariupol).⁵⁰⁶

⁵⁰⁰ Facebook page Defence of Mariupol, post at: https://www.facebook.com/mariupol.oborona/posts/565411070262497?__tn__=-R, 19 January 2015 (Annex 184).

⁵⁰¹ *BBC News Russia*, "Fighting breaks out again in Eastern Ukraine", 20 January 2015, https://www.bbc.com/russian/international/2015/01/150120_ukraine_donetsk_airport_fighting (Annex 101).

⁵⁰² *Radio Svoboda*, "Hostilities continue in the area of the Donetsk Airport - ATO headquarters", 21 January 2015, <https://web.archive.org/web/20201127053625/https://www.radiosvoboda.org/a/26806294.html> (Annex 102).

⁵⁰³ VKontakte page Reports from the Novorossiya's militia, post at: https://vk.com/wall-57424472?day=21012015&w=wall-57424472_40651%2Fall, 21 January 2015 (Annex 188).

⁵⁰⁴ See the social media posts of Mr Tymchuk, who appears to be a private Ukrainian commentator on military operations: Facebook page of Dmitry Tymchuk, former member of the Ukrainian Parliament, Ukrainian military expert and blogger, post at: <https://www.facebook.com/dmitry.tymchuk/posts/624786844316641>, 21 January 2015 (Annex 187) and Facebook page of Dmitry Tymchuk, former member of the Ukrainian Parliament, Ukrainian military expert and blogger, post at: <https://www.facebook.com/dmitry.tymchuk/posts/625257450936247>, 22 January 2015 (Annex 189).

⁵⁰⁵ *UNIAN*, "ATO Headquarters: the militants are not attacking Mariupol, but they are intensively shelling its outskirts", 23 January 2015, <https://www.unian.net/war/1035588-shtab-ato-boeviki-ne-nastupayut-na-mariupol-no-intensivno-obstrelivayut-ego-okrestnosti.html> (Annex 103).

⁵⁰⁶ Samolenkov Report (Annex 2), para. 115.

410. Finally, Ukraine has also not drawn the attention of the Court or its expert to a judgment of its criminal court finding that the defendant (Mr Kirsanov, a person who Ukraine claims features prominently in the telephone intercepts) provided details concerning the location of military equipment of the Armed Forces of Ukraine in and around Mariupol between 17 and 24 January 2015, including at Talakivka, Primorske and Vynohradne (south-east of the Vostochniy microdistrict of Mariupol).⁵⁰⁷ The judgment also refers to telephone intercepts on 17 January and on 24 January 2015 at 1.31 pm concerning the results of shelling near the checkpoint of the Ukrainian Armed Forces in Vynohradne.⁵⁰⁸ This is consistent with the evidence that the DPR intended to advance upon Mariupol. Further, the map published by the then Head of the Criminal Police of the National Guard of Ukraine appears to indicate that these positions were shelled at 09.15 and 09.20 am on 24 January 2015.⁵⁰⁹

411. It follows that the shelling at Mariupol in fact took place in the context of a significant escalation of hostilities near the contact line, including near Mariupol. It is this, rather than Ukraine's speculation that the attack could be part of a campaign to obtain political concessions,⁵¹⁰ that provides the essential background. As General Samolenkov concludes: "In view of the overall military situation ... I believe that the shelling that impacted Mariupol on 24 January 2015 is most likely to be seen in the context of an overall assault against the UAF positions in the area and the planned advance at the city. [That] is also supported by the events of 24 January".⁵¹¹

2. *Relevant Military Objects Which the DPR May Have Been Targeting*

412. Ukraine's evidence identifies five specific Ukrainian positions in and around Mariupol,⁵¹² and four of them are considered as objectives by General Brown.⁵¹³ Two of the positions mentioned by Ukraine are of particular relevance:

- a. A checkpoint at the junction of the two main routes entering Mariupol from the east, which was manned by up to 100 National Guard officers armed with automatic small arms and armoured personnel carriers (Checkpoint No. 4014).⁵¹⁴ General Brown refers to this object as the "northern checkpoint". The OSCE reports refer to this object as the "Vostochny checkpoint" and repeatedly state that it was located around 300 m from certain shelling impacts.⁵¹⁵ This object is shown as position No. 20 in the Bobkov

⁵⁰⁷ Ukraine, Primorsky District Court of Mariupol, Case No. 265/4773/15-k, Judgment, 18 June 2019, <https://reyestr.court.gov.ua/Review/82431956> (Annex 77).

⁵⁰⁸ *Ibid.*

⁵⁰⁹ Vyacheslav Abroskin Facebook post on 15 August 2019 (Annex 215).

⁵¹⁰ MU, para. 244.

⁵¹¹ Samolenkov Report (Annex 2), para. 123.

⁵¹² Letter No. 27/6/2-3553 of the Ministry of Interior of Ukraine (Annex 183 to MU).

⁵¹³ See Brown Report (Annex 11 to MU), para. 48.

⁵¹⁴ Letter No. 27/6/2-3553 of the Ministry of Interior of Ukraine (Annex 183 to MU).

⁵¹⁵ OSCE SMM, "Spot report by the OSCE Special Monitoring Mission to Ukraine (SMM), 24 January 2015: Shelling Incident on Olimpiiska Street in Mariupol, 24 January 2015" (Annex 328 to MU); OSCE SMM, "Latest from OSCE

Report.⁵¹⁶ Ukraine has not drawn to the Court’s attention the fact that the OSCE observed that soon after shells hit the Vostochniy district, this checkpoint was shelled at around 13.00 or 13.20 (on 24 January 2015).⁵¹⁷ This point is also not mentioned by General Brown, who states that Checkpoint No. 4014 “suffered no damage from the shelling”.⁵¹⁸

- b. A strongpoint of the National Guard (Company Position 4013), which Ukraine states was staffed by up to 100 servicemen who it is assumed were also armed.⁵¹⁹ This military object, which is not considered by General Brown, is shown as position No. 17 in the Bobkov Report.⁵²⁰ It is located on the road around 1.7 km from the nearest residential buildings to the south-west. As explained in the Bobkov Report, there is evidence that this object was shelled in September 2014 and video footage of this episode was uploaded under a title which referred to the “vostochniy checkpoint”.⁵²¹

413. Neither Ukraine nor its expert appear to dispute that Checkpoint No. 4014 and Company Position 4013 could legitimately have been treated as military objects which could be attacked by reason of this status. Instead, as in the context of the Volnovakha episode, their focus is on the question of whether attacking these objects served an apparent military advantage (i.e., the issue of proportionality).⁵²²

414. As to Checkpoint No. 4014, General Brown states that this “was effectively in the front line and the National Guard posted there would have warned the Ukrainian Armed Forces of, and resisted to the best of their ability, any attack by DPR forces”.⁵²³ Further, the Bobkov Report identifies that at

Special Monitoring Mission (SMM) to Ukraine based on information received as of 18:00 (Kyiv time), 25 January 2015”, 26 January 2015, available at <https://www.osce.org/ukraine-smm/136421> (Annex 32 to PORF). Earlier in the conflict the OSCE raised concerns that the “Vostochniy checkpoint” (apparently the object) was located near residential buildings and had observed that Ukrainian Armed Forces had located military vehicles at the Vostochniy checkpoint and had used the area 500m to the north as a firing position, leading to return fire from the DPR/LPR at the Vostochniy checkpoint and another checkpoint located to the north: see OSCE SMM, “Spot report by the OSCE Special Monitoring Mission to Ukraine (SMM), 5 September 2014: The Situation in Mariupol”, 6 September 2014, <https://www.osce.org/ukraine-smm/123254> (Annex 3). See also LB.ua, “Microdistrict ‘Vostochny’ in Mariupol is under shelling again”, 24 January 2015, https://lb.ua/society/2015/01/24/293182_mikrorayon_vostochniy_mariupole.html (Annex 105).

⁵¹⁶ See Bobkov Report (Annex 1), Fig. 27, 28, 31 and Table 6.

⁵¹⁷ OSCE SMM, Spot Report: Shelling Incident on Olimpiiska Street in Mariupol (Annex 328 to MU). See also Facebook page Defence of Mariupol, post at: <https://www.facebook.com/mariupol.oborona/photos/a.492952414175030/567460703390867>, 24 January 2015 (Annex 191). Cf. MU, para. 97, n. 172: “This checkpoint was not damaged in the shelling attack”.

⁵¹⁸ Brown Report (Annex 11 to MU), para. 48(d), n. 61.

⁵¹⁹ Letter No. 27/6/2-3553 of the Ministry of Interior of Ukraine (Annex 183 to MU), referring to this position as Company Position 4013.

⁵²⁰ See Bobkov Report (Annex 1), Fig. 27, 28, 37, 45 and Table 6.

⁵²¹ *Ibid.*, paras. 80-92. See also Samolenkov Report (Annex 2), para. 159. The word “vostochniy” means “eastern” in Russian.

⁵²² MU, para. 238; Brown Report (Annex 11 to MU), paras. 50, 58.

⁵²³ Brown Report (Annex 11 to MU), para. 49.

least on 13 January 2015 an armoured vehicle was present in a dug-out position at Checkpoint No. 4014.⁵²⁴

415. As to Company Position 4013, General Brown does not specifically consider whether there would be a military advantage in attacking this object. However, based on its location and function, it follows that he would likewise regard this position as located on the front line and that it too would have played an important defensive role against any ground assault. Further, the Bobkov Report identifies that at least on 13 January 2015 a tank and two armoured vehicles were present in dug-out positions at Company Position 4013.⁵²⁵ According to a press report, it appears that Company Position 4013 was shelled by BM-21 fire on 12 February 2015 without the residential area being impacted.⁵²⁶

416. General Samolenkov agrees that these positions, as well as some of the other objects identified in the Bobkov Report (see below), likely comprised a system of fortified defensive positions of the city.⁵²⁷

417. General Brown reasons that there would have been military advantage in attacking this object only “if followed up immediately by a ground assault”.⁵²⁸ Yet, Ukraine has not provided General Brown with the evidence which indicates that this is what the DPR had planned (see above).⁵²⁹

418. Moreover, Ukraine’s account of relevant military objectives is materially incomplete. For example, according to the judgment of the Ukrainian criminal court in the Kirsanov case, the Headquarters of Ukraine’s “Anti-Terrorist Operation” sent encrypted telegrams about the locations of the units and other military matters of the Ukrainian Armed Forces and other military formations and the shellings to which they were subjected.⁵³⁰ Yet, Ukraine has put none of these reports before the Court. Further, Ukraine has not put into evidence the contemporaneous documents, such as logbooks, recording the movement and location of military vehicles and materiel at and around Company Position 4013 and Checkpoint No. 4014 on 24 January 2015.

419. Having analysed the publicly available satellite imagery for 13 January 2015,⁵³¹ the Bobkov Report shows that in the wider area of Mariupol, it appears that there was a line of Ukrainian defensive

⁵²⁴ Bobkov Report (Annex 1), Fig. 26 and Table 7 referring to position No. 20.

⁵²⁵ *Ibid.*, Fig. 26 and Tables 7 referring to position no. 17. See also Fig. 27 and Table 8 identifying one tank and one armoured vehicle in imagery of 13 February 2015.

⁵²⁶ *0629.ua*, “Grad shells exploded In Mariupol near the checkpoint on Vostochny. There are battles for Sakhanka (UPDATE + PHOTO + VIDEO)”, 12 February 2015, <https://www.0629.com.ua/news/737920/v-mariupole-na-vostocnom-vozle-blokposta-vzorvalis-snarady-grada-idut-boi-za-sahanku-dopolnaetsafotovideo> (Annex 113). See also Bobkov Report (Annex 1), para. 84, Figure 45.

⁵²⁷ Samolenkov Report (Annex 2), para. 169.

⁵²⁸ Brown Report (Annex 11 to MU), para. 49.

⁵²⁹ The intercept evidence also suggests that ground assaults were carried out in the area: see Samolenkov Report (Annex 2), paras. 115, 119, 121-122, 127.

⁵³⁰ Kirsanov Judgment (Annex 77).

⁵³¹ As Expert Bobkov explains, satellite imagery of Mariupol was available for 13 January and 23 February 2015 only: see Bobkov Report (Annex 1), paras. 55-56 and see Addendum Annex 2.

positions running parallel to the Vostochniy district from Hnutove in the north to Vynohradne in the south.⁵³² This is part of the context in which the DPR offensive on 24 January 2015 is to be seen. General Samolenkov explains that:

“I understand from the Bobkov Report that the city appears to have been protected by a system of military positions. There are three roads that could have been used to attack from the east: highways M-14 and T0519, and a section of road C051236 from the direction of Vynohradne. Each of these roads appears to have been protected by defensive positions, such as company (platoon) strong points and checkpoints.⁵³³ In between the positions, the area was also apparently reinforced. Had the above positions been cleared of the UAF forces, this could have enabled the DPR to approach Mariupol from these directions without impediment.”⁵³⁴

420. The Bobkov Report also shows that Checkpoint No. 4014 was not an isolated checkpoint located “at the junction of the two main routes running into Mariupol”,⁵³⁵ as is suggested by Ukraine and assumed by General Brown.⁵³⁶ Notably, unlike for the other positions which are referred to in Ukraine’s Annex 183, no coordinates are specified for the location of “Checkpoint No. 4014”. In fact, the checkpoint on the road, at which Ukraine says around 100 armed servicemen were based, appears to have formed part of a larger military object in front of the Vostochniy neighbourhood which also comprised protective trenches (Nos. 19 and 21), trenches for personnel and dug-out positions for armoured vehicles (Nos. 22, 23, 25).⁵³⁷

421. That these positions should be understood as part of the same military object is supported by the judgment of the Ukrainian criminal court in the Kirsanov case, which quotes a telegram of the Headquarters of Ukraine’s “Anti-Terrorist Operation” as stating the location of “company strongpoint No. 4014 of the Operational Regiment of the National Guard of Ukraine” by reference to coordinates that correspond to position No. 25 identified by Expert Bobkov, rather than the checkpoint on the road (position No. 20).⁵³⁸ The natural inference is that the 100 or so armed servicemen based at the checkpoint were also deployed to man the connected military positions.

422. The true nature of the objects comprising Checkpoint 4014 / Company Strongpoint 4014 is important. The existence of trenches for personnel and dug-out positions for armoured vehicles

⁵³² Bobkov Report (Annex 1), paras. 58-66. See also Samolenkov Report (Annex 2), para. 102.

⁵³³ See detailed information about them below.

⁵³⁴ Samolenkov Report (Annex 2), para. 154.

⁵³⁵ See Bobkov Report (Annex 1), Fig. 35 and Table 6.

⁵³⁶ See Brown Report (Annex 11 to MU), para. 48(d), referring to the Letter No. 27/6/2-3553 of the Ministry of Interior of Ukraine (Annex 183 to MU), which identifies the northern checkpoint as position No. 4014.

⁵³⁷ See also Samolenkov Report (Annex 2), paras. 154, 167-169. Expert Bobkov also identifies what appear to be anti-tank ditches with a total length of more than 4,800 m located in front of the defensive positions comprising Checkpoint No. 4014.

⁵³⁸ Kirsanov Judgment (Annex 77), p. 11: “Point No.6 (B=47 °07 '09,34", L=37 °42 '08,30"), 23.01.15, company strongpoint No. 4014 of the 18th Operational Regiment of the National Guard of Ukraine, a BM-21 shelling was recorded on 23.01.15, no casualties”. See Bobkov Report (Annex 1), paras. 67, 69.

disproves Ukraine's attempt to suggest that there was nothing but a "National Guard" checkpoint close to the Vostochniy residential area.⁵³⁹ Moreover, some of these positions are in close proximity to the Vostochniy residential area, in places as close as around 250 m, 450 m and 600 m (positions Nos. 22, 23 and 25 in the Bobkov Report, respectively). Based on the location of these objects, if shelling from a north-eastern or eastern direction was directed at these targets, it would follow that overshooting could have impacted the residential area beyond.⁵⁴⁰

⁵³⁹ MU, para. 97.

⁵⁴⁰ See Samolenkov Report (Annex 2), paras. 168.

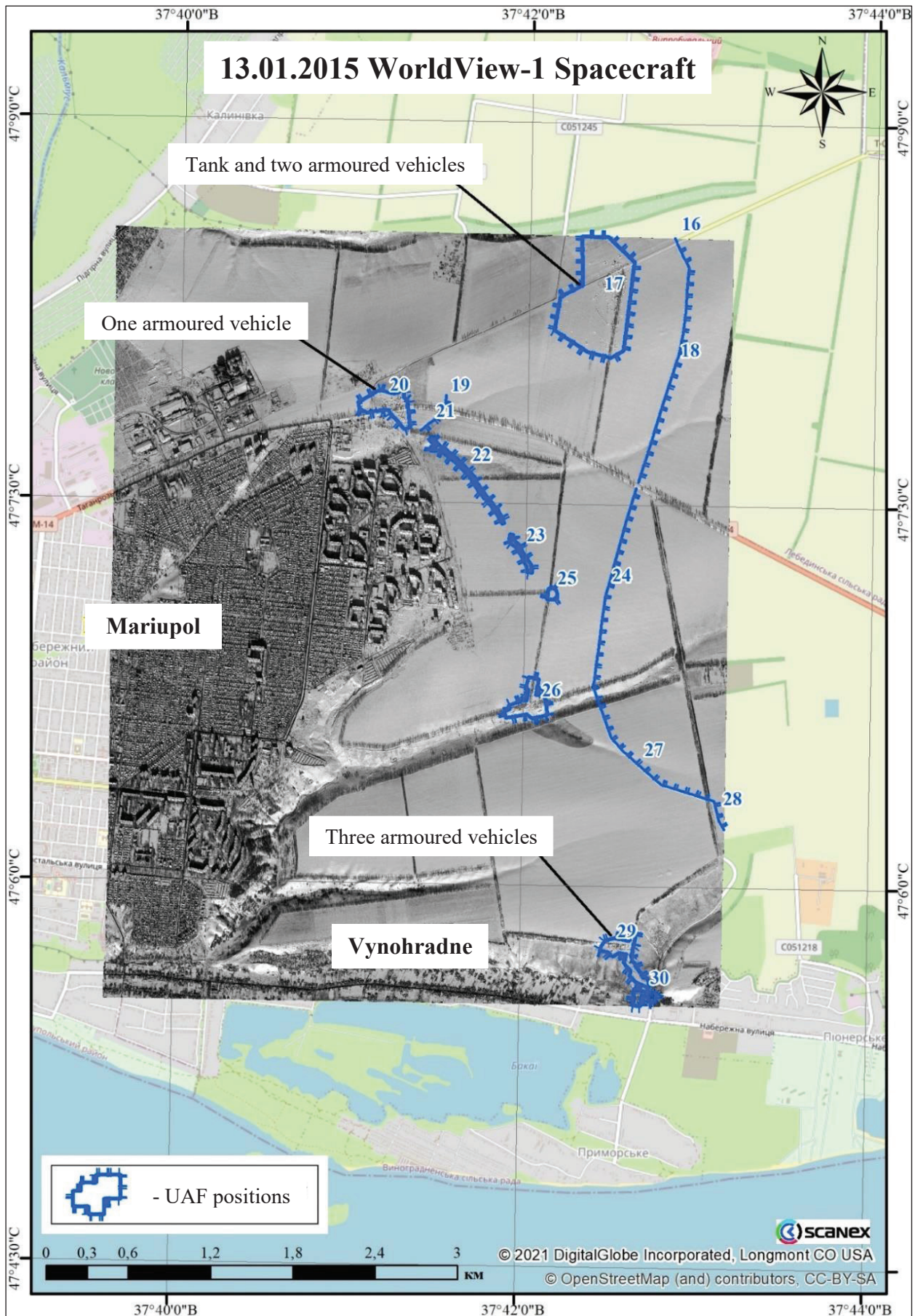


Figure 2. Location of the UAF positions and forces in the area of Mariupol and Vynohradne on 13 January 2015 (Fig. 27 in the Bobkov Report)⁵⁴¹

423. General Samolenkov explains:

“If the shelling occurred from the north-eastern or eastern direction against positions 20-25, and the shells overflowed the target (as suggested in the Kirsanov intercept), it is possible that the residential area behind was hit in that attack. The main well-documented impact area around the Kievskiy market is about 1.2 km from position 25 which is broadly consistent with the statement in the intercept evidence which Ukraine attributes to Mr Kirsanov.

It appears that the line of reinforcements from position 20 to position 25 (as well as position 24, and the other positions visible in front of the city in the satellite images⁵⁴² was important for the city defence, especially if Lebedynske had already been captured by the militia.⁵⁴³ Therefore, artillery shelling of these positions would have been a reasonable step in preparation of the planned ground offensive.”⁵⁴⁴

424. Moreover, Ukraine has also omitted to mention that, according to the same telegram of its “Anti-Terrorist Operation” referred to in the judgment of the criminal court, “company strong point No. 4014 of the Operational Regiment of the National Guard of Ukraine” (corresponding to position No. 25) came under BM-21 shelling on 23 January 2015.⁵⁴⁵ This is significant because it shows that *one day before the shelling at the Vostochniy district*, it was the military object that was targeted and actually attacked, not the residential area.

425. Against the above background, General Samolenkov concludes that, although it is not possible to say whether or what Ukrainian forces and military materiel were present at these positions on 24 January 2015,⁵⁴⁶ given the impact sites in the residential area, the closest potential military targets could have been positions Nos. 20-25 identified in the Bobkov Report.⁵⁴⁷

426. Consistent with the evidence relating to the shelling of military objects near Vynohradne (see above), the Bobkov Report identifies that there were two strong points in this area (Nos. 29 and 30) which featured fighting holes and trenches as well as dug-out positions for armoured vehicles.⁵⁴⁸ The Bobkov Report also identifies that at least on 13 January 2015 three armoured vehicles were present at one of these positions (No. 29).⁵⁴⁹ Again, this is relevant context in indicating that the targets of the shelling on 24 January 2015 were military objects, not the residential area located behind them.

⁵⁴² Bobkov Report (Annex 1), para. 64, Figure 26.

⁵⁴³ See para. 106 above.

⁵⁴⁴ Samolenkov Report (Annex 2), paras. 168-169.

⁵⁴⁵ Kirsanov Judgment (Annex 77), p. 11: “Point No.6 (B=47 °07 '09,34", L=37 °42 '08,30"), 23.01.15, company strongpoint No. 4014 of the 18th Operational Regiment of the National Guard of Ukraine, a BM-21 shelling was recorded on 23.01.15, no casualties”.

⁵⁴⁶ Samolenkov Report (Annex 2), para. 167.

⁵⁴⁷ *Ibid.*, para. 155.

⁵⁴⁸ Bobkov Report (Annex 1), Table 6.

⁵⁴⁹ *Ibid.*, Fig. 26.

3. *Ukraine's Intercept Evidence*

427. It is also clear that Ukraine has been selective in its choice of intercepts to put before the Court. It has not even included the full set of intercepts referred to in the judgment of its criminal court in the case against a person who Ukraine claims provided the DPR with information about the location of Ukrainian military equipment in and around Mariupol and the results of shelling on 23-24 January 2015.⁵⁵⁰ All of the calls referred to in the judgment of the criminal court, including those concerning Mariupol, are stated to concern the targeting of military objects and reports on the shelling of those military objects. Contrary to Ukraine's current position, Ukraine's own criminal court did not approach the 24 January 2015 shelling as a situation involving the intentional targeting of the residential area of Mariupol. The criminal court characterised the intentions of the defendants as being to assist the DPR "in the implementation of their malicious intentions to commit crimes against the military units of the Armed Forces of Ukraine and other military formations of Ukraine involved in the anti-terrorist operation, and to create conditions that promote this criminal activity".⁵⁵¹

428. While Russia is limited to commenting on the intercepts which Ukraine has produced, these do not support Ukraine's position. Rather, these intercepts are consistent only with the absence of the requisite specific intent and purpose. The alleged DPR/LPR fighters responsible for the attack: (a) discuss targeting a checkpoint which is around 1.5 km from the residential area, which is referred to as the "Vostochniy" checkpoint; (b) refer to the purpose of the attack as being to facilitate a ground assault; and (c) express shock and horror at the civilian casualties that resulted from the shells overshooting the targeted checkpoint.⁵⁵²

429. Ukraine⁵⁵³ and General Brown⁵⁵⁴ rely heavily on an intercept of a call on the evening of 23 January 2015 (the day before the shelling) as evidence that the target of the shelling was the Vostochniy residential area:

Ponomarenko S.L. - F***** crush it, I f***** asked you, that one, f***** Vostochniy.

Evdotiy O.M. ("Pepel") - Well...

Ponomarenko S.L. - *There is a f***** long distance to the houses, little brother!*

Evdotiy O.M. ("Pepel") - I will, I'll do Vostochniy tonight as well, don't worry.

Ponomarenko S.L. - So that I can f***** come in there and f***** clean it up. [...]

⁵⁵⁰ Kirsanov Judgment (Annex 77), see especially at pp. 6-7. The defendant referred to as "Person 1" is understood to be Mr Kirsanov.

⁵⁵¹ Kirsanov Judgment (Annex 77), p. 2.

⁵⁵² Cf. MU, para. 237 contending that the intercept evidence supports an inference of the requisite actual intention to harm civilians.

⁵⁵³ MU, para. 93.

⁵⁵⁴ Brown Report (Annex 11 to MU), para. 39(c) and fn. 60.

Ponomarenko S.L. – [...] Come on, I'm waiting for it tonight.

Evdotiy O.M. ("Pepel") – Okay, okay."⁵⁵⁵

430. This transcript is, however, inconsistent with Ukraine's position in three respects.

- c. Based on the fact that the protagonists say that "Vostochniy" is "a f***** long distance to the houses", it appears that "Vostochniy" is not being used to refer to the residential area as a target.
- d. There is apparent agreement that this target will be shelled "tonight" (i.e., on 23 January 2015).
- e. It is also implied that the purpose of the attack is to facilitate a planned ground assault ("so I can ... come in there and ... clean it up").

431. Moreover, Ukraine has not put into evidence (and does not appear to have provided to its own expert) another intercept between the same two individuals before the shelling on 24 January 2015, which Ukraine (directly or indirectly) has published online.⁵⁵⁶

Ponomarenko S.L. – F***, pound the "Vostochniy" well, do it right one f***** time.

Evdotiy O.M. ("Pepel") – F***, bro, there are nine-storey buildings there.

Ponomarenko S.L. – Hey, bro, they [the buildings] are really f***** far. Really f***** far [from the checkpoint]. *Pound the checkpoint itself, on the highway... The nine-storey buildings are some f***** 1.5 kilometres away, I believe...* "

432. Consistent with the intercept on the previous evening, this conversation refers to the target as "Vostochniy" but also more specifically "the highway ... the checkpoint itself", and, in response to a concern about the possible presence of civilian buildings, it is stated that these are some distance away ("*The nine-storey buildings are some f***** 1.5 kilometres away*"). It follows that, as in the earlier intercept, "Vostochniy" does not refer to the residential area, and the apparent intention is to avoid shelling of the residential area.

433. The reference to a checkpoint at a distance of around 1.5 km from the residential area is consistent with the location of Company Position 4013, which Ukraine states was staffed by up to 100 of its servicemen.⁵⁵⁷ This object, which is shown as position No. 17 in the Bobkov Report (see paragraph 412(b) above), is located on the highway around 1.7 km from the nearest residential

⁵⁵⁵ Translation of the transcripts of the Intercepted Conversation between Evdotiy ("Pepel") and Ponomarenko (18:00:22, 23 January 2015) contained in Annex 418 to the Memorial of Ukraine (Annex 252) (emphasis added).

⁵⁵⁶ YouTube channel of the Security Service of Ukraine, "SBU intercepted conversation of terrorists which is proof of their involvement in attacks of Mariupol", available at: https://www.youtube.com/watch?v=H1a_KkguBlg, 24 January 2015 (Annex 228) (emphasis added). Cf. MU, para. 237.

⁵⁵⁷ Letter No. 27/6/2-3553 of the Ministry of Interior of Ukraine (Annex 183 to MU), referring to this position as Platoon Position 4014A.

buildings to the south-west. It is plainly not what the OSCE in its reports on the shelling referred to as the “Vostochniy checkpoint” located around 300 m from certain impact sites,⁵⁵⁸ which General Brown refers to as the “northern checkpoint”. The OSCE also reported, however, that this checkpoint was shelled at around 13.00 or 13.20.⁵⁵⁹

434. At 10.36, the DPR member who Ukraine claims had been ordered to target the Vostochniy residential area was, according to Ukraine’s intercepts, informed that the shelling had overshoot:

Valeriy Kirsanov - Alexander, well... *Too far, too far, too far - overdid it.*

Evdotiy O.M. (“Pepel”) - Tell me, what’s going on there?

Valeriy Kirsanov - What’s going on? Long story short, *everything flew over*, and it went on houses... on houses, on nine-story buildings, on private residences, the Kievskiy market, in short. [...]

Evdotiy O.M. (“Pepel”) – I don’t f***** understand”.⁵⁶⁰

435. A further intercept of a call immediately after, at 10.38, records the DPR member who Ukraine claims gave the order to target the Vostochniy residential area being informed of the result of the shelling by the alleged lookout:

“Valeriy Kirsanov: Look what Aleksander has done.

Ponomarenko S.L.: Yes.

Valeriy Kirsanov: *It’s a totally f***** disaster here.*

Ponomarenko S.L.: What?

Valeriy Kirsanov: The damn market, nine storey high-rise buildings, private houses. All the s*** was f***** up.

Ponomarenko S.L.: Are you serious?

Valeriy Kirsanov: *It f***** overflow. Overflow by approximately a kilometre.*

Ponomarenko S.L.: To Vostochniy?

Valeriy Kirsanov: Yes, yes. The Kievskiy market, school No. 5, nine-storey high-rise buildings, right into the courtyards, f***, the boiler house. They even f***** landed on what-you-may-call-it, on Olimpiyskaya. F***** f***. Basically, *they overflow the entire Vostochniy.*

⁵⁵⁸ OSCE SMM, Spot Report: Shelling Incident on Olimpiiska Street in Mariupol (Annex 328 to MU).

⁵⁵⁹ *Ibid.* See also Defence of Mariupol Facebook post on 24 January 2015 (Annex 191).

⁵⁶⁰ Intercepted conversation between Evdotiy (“Pepel”) and Kirsanov (10:36:40), 24 January 2015 (Annex 413 to MU) (emphasis added).

Ponomarenko S.L.: Oh, f***** s***.

[...]

Ponomarenko S.L.: *Oh, the ukrops will do good PR now.*

[...]

Valeriy Kirsanov: I f***** called him. *He is totally f***** shocked.* [...]

Ponomarenko S.L.: No injured people, right?

Valeriy Kirsanov: There are, why not? Dead bodies are laying f***** everywhere.

[...]

Ponomarenko S.L.: *This is f***** awful f*** [...]*.⁵⁶¹

436. Consistent with the earlier intercept which specifically identifies a checkpoint on the highway as the target, the DPR member who is alleged to have ordered the attack asked specifically about damage to “the checkpoint”:

“Ponomarenko S.L.: *How about the checkpoint?*

Valeriy Kirsanov: *Untouched motherf*****!*

Ponomarenko S.L.: *It sucks!*”⁵⁶²

437. Ukraine ignores the above intercepts which are plain in their meaning, preferring instead to focus in isolation on a vague reference in a single line of a later intercept of a call between the same two individuals which Ukraine characterises as “celebrat[ing] the terror”.⁵⁶³ This is key to Ukraine’s contention that the requisite intention and terrorist purpose should be inferred.⁵⁶⁴ The transcript of the intercept that Ukraine relies on reads (in full):

“Ponomarenko S.L. - So the Ukrop column is heading toward Hnutove [10km north-east of Mariupol⁵⁶⁵].

Valeriy Kirsanov - Yes, to meet them.

[...]

Ponomarenko S.L. - Well, they’re shooting. You can hear it.

[...]

⁵⁶¹ Translation of the transcripts of the Intercepted Conversation between Kirsanov and Ponomarenko (10:38:14, 24 January 2015) contained in Annex 414 to the Memorial of Ukraine (Annex 255) (emphasis added).

⁵⁶² *Ibid.*

⁵⁶³ MU, para. 99. See also Brown Report (Annex 11 to MU), para. 48(c), which refers to the statement regarding overshoot but not to the reference to the checkpoint or to the apparent shock and surprise of the DPR members.

⁵⁶⁴ MU, paras. 99, 241.

⁵⁶⁵ See OSCE SMM, “Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 18:00 (Kyiv time), 17 September 2014”, 18 September 2014, <https://www.osce.org/ukraine-smm/123746> (Annex 4).

Valeriy Kirsanov - Yeah. Talakivka [8-9 km north east of Mariupol⁵⁶⁶] unleashed a bombardment first thing in the morning.

Ponomarenko S.L. - I know.

Valeriy Kirsanov - And then Vostochniy.

Ponomarenko S.L.: - *Let the f***** b***** be more afraid.*⁵⁶⁷

Valeriy Kirsanov - Well, yes.

Ponomarenko S.L. – It just f***** sucks, you know that they’re forcing people to leave now, and they’re going to sit there.

Valeriy Kirsanov – Yeah. That’s right. And the people there, I tell you, they’re leaving in droves. In droves!”⁵⁶⁸

438. Contrary to Ukraine’s contention, this intercept does not come close to supporting the existence of the requisite intent to harm civilians or terrorist purpose:

- a. The intercept is to be read in the context of the earlier intercepts. As in the case of the earlier intercepts, Ukraine asserts that the word “Vostochniy” refers to the residential area.⁵⁶⁹ However, the DPR members used this word in those other intercepts to refer to a checkpoint located some distance from the residential area (see above).
- b. The context of the comment that Ukraine portrays as celebrating spreading terror is also important. The two individuals are discussing Ukrainian forces (“they” and “they’re”) that are being deployed from Mariupol to engage with the attacking DPR troops. The comment about causing fear is most naturally read as relating to the Ukrainian forces. Immediately after this comment, the speakers regret that the Ukrainian forces are “forcing people [i.e., civilians] to leave now” and that “the people” (i.e., civilians) are leaving in droves.⁵⁷⁰

439. There are two further intercepts on 24 January 2015 which mention the shelling at Mariupol, both of which Ukraine has ignored.

⁵⁶⁶ See OSCE SMM, Daily Report as of 17 September 2014 (Annex 4).

⁵⁶⁷ The accurate translation of this statement is: “Let them d*** be more afraid, f***”. The word that literally translates as “b*****” is used but not with reference to addressees but as a gap-filler. See Translation of the transcripts of the Intercepted Conversation between Kirsanov and Ponomarenko (11:04:12, 24 January 2015) contained in Annex 415 to the Memorial of Ukraine (Annex 254).

⁵⁶⁸ Translation of the transcripts of the Intercepted Conversation between Kirsanov and Ponomarenko (11:04:12, 24 January 2015) contained in Annex 415 to the Memorial of Ukraine (Annex 254).

⁵⁶⁹ MU, para. 99.

⁵⁷⁰ The fact that civilians were able to leave Mariupol by choice also does not support the existence of the requisite terrorist purpose: Cf. MU, para. 243.

- a. A call at 11.21 records the commander of a unit being instructed to check “every vehicle” and to “check everything” because the “morons” that are their “friends” have “shelled the city”.⁵⁷¹
- b. At 13.23, a DPR commander is instructed to target a firing position at “[Kichiksu] station behind Kalchik” from where “Grads are f***** shelling Mariupol”.⁵⁷²

440. None of the other intercepts produced by Ukraine refer to “Vostochniy” or to a checkpoint in this area. As General Samolenkov observes, it appears that at least 11 targets are discussed (each by number only) and the shelling operations commenced at around 08.00 and continued for several hours.⁵⁷³

441. Ukraine has also not translated other intercepts of a call in which DPR members are recorded as discussing not only the fact that shelling has overshoot, but also the resultant need to cancel targets and check the targeting of the weapon systems in use. In doing so, it is said that there is a need to keep away from buildings and houses. All of this is completely inconsistent with the alleged terrorist intent. Thus:

- a. A call at 09.55, shortly after the shelling, directs the commander of a unit to “abandon [two] targets” and to check the targets, stating “you overshoot it a lot” and need to “fire closer”.⁵⁷⁴ In a call at 10.18, the same two individuals discuss the target coordinates and the commander of the unit is instructed: “to keep away from buildings” and to be removed “further away from large houses”.⁵⁷⁵
- b. At 13.26, a commander of a unit receives an order to fire.⁵⁷⁶ Around 10 minutes later, he is informed that “one of your vehicles is overshooting a lot” and asked whether vehicles have been checked for accuracy.⁵⁷⁷ The commander is also instructed to “shift further to the right, some one hundred and fifty metres”.

442. In light of the above, General Samolenkov concludes – and this Court can safely determine – that Ukraine’s own intercept evidence indicates that the DPR forces tried to avoid civilian casualties.⁵⁷⁸

⁵⁷¹ Translation of the transcripts of the Intercepted Conversations of Maxim Vlasov (23–24 January 2015) contained in Annex 408 to the Memorial of Ukraine (Annex 253), conversation no. 160, at 11:21:44 on 24 January 2015.

⁵⁷² *Ibid.*, conversation no. 185 at 13:23:44 on 24 January 2015. The transcript refers to “Pichiksu Station” and this is understood to be a reference to Kichiksu Station.

⁵⁷³ Samolenkov Report (Annex 2), para. 129, 132.

⁵⁷⁴ Translation of the Conversations of M. Vlasov (Annex 253), conversation no. 138, at 09:55:58 on 24 January 2015. See also conversation no. 140 at 10:01:30 on 24 January 2015, referring to overshoot.

⁵⁷⁵ *Ibid.*, conversation no. 144 at 10:18:48 on 24 January 2015.

⁵⁷⁶ *Ibid.*, conversation no. 186 at 13:26:23 on 24 January 2015.

⁵⁷⁷ *Ibid.*, conversation no. 188 at 13:35:56 on 24 January 2015.

⁵⁷⁸ See Samolenkov Report (Annex 2), paras. 173-184.

443. General Samolenkov also explains that, contrary to General Brown’s view,⁵⁷⁹ it appears likely that the shelling was intended to target the military positions in front of the city.⁵⁸⁰ The closest positions that General Bobkov was able to identify pertain to Checkpoint No. 4014 (including the connected objects such as No. 25 which is located around 1-2 km from some major impact sites).⁵⁸¹ At the same time, the intercept evidence shows that Company Position 4013, which is further away from the residential area impacted, was targeted. Consistent with the references in the intercepts to the need to check every vehicle, the overshoot could have happened due to incorrect calibration of the BM-21 MLRS, insufficient time for complete fire preparation, a mistake on the part of the operator or an equipment malfunction.⁵⁸²

444. The intercept evidence also indicates that observers were used by the DPR to adjust fire closer to the targets,⁵⁸³ and that the DPR tried to use ranging points.⁵⁸⁴

4. *Ukraine’s Interrogation Evidence*

445. Ukraine has not drawn the Court’s attention (or, it appears, its own expert’s attention⁵⁸⁵) to the following facts concerning the interrogation evidence obtained by its own authorities:

- a. The Ukrainian authorities’ interrogation of the individual alleged to have acted as a “spotter” for the DPR/LPR proceeded on the basis that the target of the attack was “Ukrainian roadblocks”.⁵⁸⁶
- b. That suspect stated that he was asked to provide DPR with “*the locations of the Ukrainian Armed Forces*”, and confirmation that he did so but “always intentionally gave [...] wrong coordinates”.⁵⁸⁷
- c. That suspect also stated that on 21 and 22 January 2015⁵⁸⁸ he “provided coordinates for the sites in Taganrogskaya Street and Marshala Zhukova Street”, which is a reference to the location of Checkpoint No. 4014, and that “those coordinates were wrong”.⁵⁸⁹ The

⁵⁷⁹ Brown Report (Annex 11 to MU), para. 48(c).

⁵⁸⁰ Samolenkov Report, para. 188 (Annex 2).

⁵⁸¹ See Bobkov Report (Annex 1), Fig. 31 and Table 6. Samolenkov Report (Annex 2), paras. 154, 167-169, 171(c).

⁵⁸² Samolenkov Report (Annex 2), paras. 171.

⁵⁸³ Translation of the Conversations of M. Vlasov (Annex 253), conversation no. 153 at 11:05:54 on 24 January 2015.

⁵⁸⁴ *Ibid.*, conversation no. 31 at 17:59:51 on 23 January 2015: “**Max ‘Yugra’**: Well, I always create ranging points, I don’t fire for no reason. All the time with (inaudible word)”.

⁵⁸⁵ Brown Report (Annex 11 to MU), para. 48(d), stating that it is more plausible that the residential district was targeted because the shelling cannot be explained by “gross incompetence alone”.

⁵⁸⁶ Signed Declaration of Valerii Kirsanov, Witness Interrogation Protocol, 25 January 2015 (Annex 213 to MU).

⁵⁸⁷ *Ibid.* (emphasis added).

⁵⁸⁸ Note that the document refers to “2014”, and this is assumed to be a mistake.

⁵⁸⁹ Signed Declaration of Valerii Kirsanov, Witness Interrogation Protocol, 25 January 2015 (Annex 213 to MU).

document does not record why incorrect coordinates were provided or the coordinates which were actually provided.

446. The evidence that the incorrect coordinates were provided for the shelling at around 09.15 is consistent with the fact that Checkpoint No. 4014 was actually hit by shelling at around 13.00.

5. *The Timing of the Shelling*

447. In its Memorial, Ukraine emphasises that the Vostochniy neighbourhood was shelled at around 09.15, 11.00, 13.02 and 13.21. The alleged shelling at 11.00 is of particular significance to Ukraine because it contends that the timing demonstrates the perpetrator's intention to target first responders to the 09.15 shelling.⁵⁹⁰ However, Ukraine has failed to establish that the Vostochniy neighbourhood was shelled at around 11.00.

448. The OSCE reports state that the area was shelled at around 09.15 and that the OSCE, who were at that stage on the scene, heard shelling at around 13.02 and 13.21, at which time Checkpoint No. 4014 close to the Vostochniy residential area was shelled.⁵⁹¹ The report also confirms that the OSCE were present at 10.20, counting impact craters and conducting crater analysis, a process which is likely to have taken more than forty minutes.⁵⁹² Yet, the OSCE reports contain no mention of any shelling of the area at 11.00. It is inconceivable that the OSCE specialists would not have observed or heard such shelling if it had occurred. It is likewise inconceivable that the OSCE would not have included any such shelling in its report. It is far more likely that untrained civilians mistakenly thought that the later shelling of Checkpoint No. 4014 which they heard was shelling at the residential area.

449. In this respect, Ukraine's claim (and the conclusion of its investigators) that the neighbourhood was shelled at around 11.00 rests on the evidence of a single witness and a video taken by a car dashboard camera.⁵⁹³

- a. The witness statement is of no material assistance. The witness does not claim to have observed shelling after 09.00, but rather to have heard a second episode of shelling at an unspecified time after 09.00.⁵⁹⁴ The actual impact of this shelling is also unclear and it

⁵⁹⁰ See MU, para. 242.

⁵⁹¹ OSCE, Spot Report: Shelling Incident on Olimpiiska Street in Mariupol (Annex 328 to MU).

⁵⁹² Cf. MU, para. 95 which does not mention when the "OSCE monitors arrived in the Vostochniy neighbourhood to investigate". Additionally, the map published by the former Head of the Criminal Police of the National Guard of Ukraine refers to shelling of the micro-district at 09.25 only: see Vyacheslav Abroskin Facebook post on 15 August 2019 (Annex 215).

⁵⁹³ See Witness Statement of Igor Evhenovych Yanovskyi (31 May 2018) (Annex 5 to MU), para. 13, referring to signed testimony of Oleksiy Oleksandrovych Demchenko, Record of victim questioning (30 January 2015) (Annex 216 to MU) and Video of the shelling of Mariupol (24 January 2015) (Annex 697 to MU).

⁵⁹⁴ Translation of the Signed Declaration of Oleksiy Oleksandrovich Demchenko, Victim Interrogation Protocol (30 January 2015) contained in Annex 216 to the Memorial of Ukraine (Annex 256). Note that the translation of Annex 216 provided by Ukraine is of the incorrect document.

is possible that the shelling was not of the residential area but of the military objects nearby, such as Company Position 4013 or Platoon Position 4014A.

- b. As to the dashboard camera video, the time recorded may well have been incorrect. Indeed, the dashboard camera video of the shelling at the Buhas checkpoint, which occurred at around 14.30, that Ukraine has put into evidence incorrectly states the time as 20.09.⁵⁹⁵

6. *Use of BM-21 Grad MLRS*

450. Ukraine contends that the requisite intention and terrorist purpose should be inferred from the use of BM-21 Grad weapon systems to attack Checkpoint No. 4014.⁵⁹⁶

451. With respect to an intention to harm civilians, Ukraine's position is limited to indirect intent, which is insufficient under Article 2(1)(b) ICSFT.⁵⁹⁷

452. In any event, Ukraine does not contend that BM-21 would be incapable of damaging Company Position 4013 without hitting the residential areas around 1.7 km away. Similarly with regard to Checkpoint No. 4014, General Brown focuses on the question of whether more precise accurate weapons (i.e., tanks, infantry or artillery guns) could feasibly have been used by the DPR.⁵⁹⁸ However, as General Samolenkov observes, this is to assume that such options were in fact reasonably available to the DPR when this is far from clear.⁵⁹⁹ Additionally, the intercepts do suggest that observed fire was used in some cases (see above).⁶⁰⁰ As explained above, there is also considerable evidence that the Ukrainian Armed Forces themselves used BM-21 (as well as more powerful weapon systems) against civilian areas in territory controlled by the DPR.⁶⁰¹

D. KRAMATORSK

453. The shelling impacts at the residential areas of Kramatorsk on 10 February 2015 were also not an act of terrorism within the meaning of Article 2(1)(b) of the ICSFT.

454. Once again, it is Ukraine alone that has characterised the shelling as a "terrorist" act (i.e. not the OHCHR, the ICRC or the UN Security Council).

⁵⁹⁵ Dashboard Camera Footage of Shelling on 13 January 2015 (video) (Annex 696 to MU).

⁵⁹⁶ MU, paras. 239, 240-242. See also Brown Report (Annex 11 to MU) paras. 50-51.

⁵⁹⁷ See Chapter V.

⁵⁹⁸ Brown Report (Annex 11 to MU), paras. 53-54.

⁵⁹⁹ Samolenkov Report (Annex 2), para. 189.

⁶⁰⁰ See para. 444. above.

⁶⁰¹ See Table 3 in Appendix A: Examples of Ukraine's documented use of MLRS and other heavy weapons in populated areas.

455. It is common ground that the Kramatorsk airfield which is located around two km south-east of the edge of the city was a legitimate military target of great significance. The airfield was not only the site of the headquarters of the Anti-Terrorist Operation of the Ukrainian Armed Forces but also the site of a BUK air defence missile system and a helicopter base, as well as other military units (including radar stations, support units and a field camp).⁶⁰² In total, at least 26 military units were located on the territory of the airfield.⁶⁰³

456. It is also undisputed that these military objects were in fact attacked. Ukraine's evidence states that eight of its servicemen from six different military units were killed,⁶⁰⁴ 33 servicemen were injured, including high ranking military officers,⁶⁰⁵ and military equipment was damaged.⁶⁰⁶ Open-source information also suggests that the helicopter base was damaged.⁶⁰⁷

457. At the time, an aide to Ukraine's President was reported as saying that the shelling "must have been targeting the headquarters of the operation against them", i.e. the headquarters of the so-called Anti-Terrorist Operation at the airfield.⁶⁰⁸ Ukraine now contends, however, that the shelling of the airfield must have been separate to the shelling that landed on the residential areas, such that the residential areas was directly attacked.⁶⁰⁹ General Brown states that: "Based on the dispersion of the bomblets in the residential neighbourhood, it is highly unlikely that these bomblets were targeted at the airfield".⁶¹⁰

458. However, as General Samolenkov explains, Ukraine has not put before the Court the necessary evidence which would allow for him to assess whether the shelling at the airfield is properly to be considered as separate to the shelling on the same day at the residential areas behind the airfield.⁶¹¹

⁶⁰² Brown Report (Annex 11 to MU), para. 66; Signed Declaration of Denys Hoyko, Victim Interrogation Protocol, 20 August 2015 (Annex 239 to MU); Signed Declaration of Oleksandr Bondaruk, Victim Interrogation Protocol, 20 August 2015 (Annex 240 to MU).

⁶⁰³ Brown Report (Annex 11 to MU), para. 66. See also Bobkov Report (Annex 1), paras. 85-90 interpreting the available satellite imagery showing the position as at 8 January 2015.

⁶⁰⁴ Headquarters of the Antiterrorist Operation Letter No. 1696 og, 12 February 2015 (Annex 102 to MU). According to Human Rights Watch quantity of losses among military personnel were slightly higher: 12. See: Human Rights Watch, Ukraine: More Civilians Killed in Cluster Munition Attacks, 19 March 2015 (Annex 449 to MU).

⁶⁰⁵ Headquarters of the Antiterrorist Operation Letter No. 778 og, 16 February 2015 (Annex 107 to MU).

⁶⁰⁶ Signed Declaration of Oleksandr Bondaruk, Victim Interrogation Protocol, 20 August 2015 (Annex 240 to MU).

⁶⁰⁷ YouTube channel Mazut Sdeshnyy, "MLRS SMERCH - Kramatorsk airfield", available at: <https://youtu.be/0DKsJ9hbHas>, 10 February 2019 (Annex 238); *Militaryaviation.in.ua*, "Damaged Mi-24P helicopters as a result of the shelling of Kramatorsk on 10 February 2015", 11 February 2019, <http://militaryaviation.in.ua/uk/2019/02/11/poshkodzheni-gelikopteri-mi-24p-vnaslidok-obstrilu-kramatorska-10-02-2015-r/> (Annex 140). See further Bobkov Report (Annex 1), paras. 91-99.

⁶⁰⁸ *Los Angeles Times*, "Missiles strike eastern Ukrainian town, killing at least 15", 10 February 2015, <https://www.latimes.com/world/europe/la-fg-ukraine-rocket-attack-20150210-story.html> (Annex 110).

⁶⁰⁹ See e.g. MU, paras. 245-246.

⁶¹⁰ Brown Report (Annex 11 to MU), para. 73.

⁶¹¹ Samolenkov Report (Annex 2), para. 208.

Indeed, Ukraine has focused exclusively on the latter and, remarkably, it has provided no details of the former.

459. Ukraine's Memorial does not mention such essential facts concerning the shelling at the airfield as: (a) the number of shelling attacks, (b) the number and location of the tail pieces, other fragments and sub-munition impact sites at or near the airfield, including between the airfield and the residential area beyond,⁶¹² and (c) the weapon which was assessed to have been used, the number of rockets which were assessed to have impacted the airfield.

460. It is inconceivable that the shelling at the airfield would not have been the subject of precisely such detailed investigation by Ukraine.⁶¹³ A press report of the incident states that a spokesperson for Ukraine's so-called Anti-Terrorist Operation referred to the existence of a military intelligence report⁶¹⁴ and Ukraine has put into evidence a witness interrogation protocol showing that it interrogated witnesses of the shelling at the airfield.⁶¹⁵

461. As to the timing, the shelling at the airfield appears to have occurred at the same time as the shelling at the residential areas beyond. Ukraine states that the latter was: "Approximately five minutes later" at around 12.30 pm.⁶¹⁶ Likewise, both a report of the press centre of Ukraine's Anti-Terrorist Operation and Ukraine's witness evidence state that the shelling at the airfield occurred at around 12.30 pm.⁶¹⁷ According to the OSCE reports, the residential areas were also impacted at around 12.30 pm.⁶¹⁸ This does not suggest that the residential areas were damaged in a separate attack.⁶¹⁹ Some thirty minutes before both the airfield and the residential areas beyond were impacted, a UAV was reportedly shot down near the airfield, suggesting that this was the target under reconnaissance.⁶²⁰

⁶¹² This detail is not apparent from Map 5 at page 58 of MU.

⁶¹³ See also Samolenkov Report (Annex 2), para. 208.

⁶¹⁴ *Ukraine Crisis Media Center*, "Andriy Lysenko: OSCE identifies the direction from which Kramatorsk was shelled", 11 February 2015, <https://uacrisis.org/en/17677-andriij-lisenko-35> (Annex 112). See also *Los Angeles Times*, "Missiles Strike eastern Ukrainian town" (Annex 110).

⁶¹⁵ Signed Declaration of Oleksandr Chorniy, Witness Interrogation Protocol, 12 February 2015 (Annex 219 to MU).

⁶¹⁶ MU, para. 102. See also Witness Statement of Kyrilo Ihorevych Dvorskyi (4 June 2018) (Annex 3 to MU): "Based on the results of the investigative activities, my team determined that on 10 February 2015, at 12:30 p.m. and 12:35 p.m., members of the DPR carried out the artillery shellings of the residential neighborhood of the city of Kramatorsk and the military airport located two kilometers from the city."

⁶¹⁷ *Ukraine Crisis Media Center*, "Pro-Russian militants attacked Kramatorsk airport", 10 February 2015, <https://uacrisis.org/en/17542-zajava-pres-centru-ato> (Annex 111); Signed Declaration of Oleksandr Chorniy, Witness Interrogation Protocol (12 February 2015), p. 2 (Annex 219 to MU); Signed Declaration of Vitaly Hrynychuk, Witness Interrogation Protocol (19 August 2015), p. 1 (Annex 237 to MU); Signed Declaration of Denys Goiko, Witness Interrogation Protocol (20 August 2015), p. 1 (Annex 238 to MU); Signed Declaration of Denys Hoyko, Witness Interrogation Protocol (20 August 2015), p. 1 (Annex 239 to MU).

⁶¹⁸ OSCE SMM, "Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 18:00 (Kyiv time), 10 February 2015", 11 February 2015, <https://www.osce.org/ukraine-smm/140056> (Annex 9).

⁶¹⁹ *Cf.* MU, para. 102.

⁶²⁰ See Brown Report (Annex 11 to MU), para. 62 referring to Signed Declaration of Oleksandr Chorniy, Witness Interrogation Protocol (12 February 2015) (Annex 219); Signed Declaration of Denys Goiko, Witness Interrogation

462. Unlike for the shelling episodes near Volnovakha and at Mariupol, Ukraine has also not put forward any evidence of telephone intercepts.

463. General Brown assesses a bearing from the firing position of between 325° and 330°. ⁶²¹ On Ukraine's position that the shelling came from a general south-east direction, General Samolenkov observes, the rockets that fell in the city must have flown further from the launch site, perhaps even broadly in the same direction as the main shelling of the airfield. ⁶²²

464. General Brown does not believe that any errors could explain how the rockets targeted at the airport could hit the residential areas 5 km away. ⁶²³ As General Samolenkov explains, however, General Brown does not appear to have considered the possibility that the rockets may have malfunctioned and overflowed or deviated:

“[J]ust 2-4 rockets opened above the residential areas. One BM-30 can launch 12 rockets without recharging. It seems unlikely that these rockets were fired separately at the city and opened about 1.7 km from each other. It appears more likely that these rockets may have malfunctioned and overflowed the target (they may have also somewhat deviated by direction). As General Brown correctly points out, BM-30 rockets can adjust the pitch and yaw for the active part of the trajectory. Such complex electronics and internal organisation of the rocket make it more vulnerable to malfunctioning. I understand that the rockets were old [i.e., manufactured in 1991 according to Ukraine's investigation]. I do not know whether maintenance was performed [...] to enable them to function correctly. [...] If such munition is stored without due protection and/or maintenance, it is at the greater risk of various malfunctions. In any event, even proper storage conditions for the MLRS rockets of this type do not exclude malfunctions, in particular, malfunctioning or failure of the on-board range adjustment equipment, making it possible that some rockets may have significantly overflowed.”⁶²⁴

465. General Samolenkov also points out that even the records of the sub-munitions' impact sites provided by Ukraine are not consistent with the working assumption that 2-4 rockets impacted the city. ⁶²⁵ While the sub-munitions seem to have impacted a large area, far beyond the impact pattern of one rocket, the total number of impact sites is not sufficient to account for even one rocket. Ukraine has suggested that the total number of impact sites in the airfield and the residential areas both from sub-munitions and from other fragments was 58; ⁶²⁶ however, just one BM-30 cluster rocket carries

Protocol (20 August 2015) (Annex 238). General Samolenkov explains that it is not possible to define the angle of bearing with such precision: see Samolenkov Report (Annex 2), paras. 212-215.

⁶²² *Ibid.*, para. 212.

⁶²³ Brown Report (Annex 11 to MU), paras. 72-73.

⁶²⁴ Samolenkov Report (Annex 2), paras. 224-227.

⁶²⁵ *Ibid.*, para. 211.

⁶²⁶ MU, para. 102.

72 bomblets. This inconsistency in the Ukrainian claims (based on the deficiency in its investigation) further complicates any meaningful analysis at this stage.

E. AVDIIVKA

466. The shelling of Avdiivka between late January and February 2017 was also not an act of terrorism within the meaning of Article 2(1)(b) of the ICSFT.

467. The area around Avdiivka was subject to intense shelling between late January and March 2017 as both sides to the conflict fought for advantage along this sector of the front line. A source Ukraine relies on characterises the situation as involving a “full scale battle”⁶²⁷ for “control over a stretch of major highway connecting rebel-held Donetsk City with Horlivka” and notes that more than twice as many DPR fighters were reportedly killed than members of the Ukrainian Armed Forces.⁶²⁸

468. As General Samolenkov notes, on some days the OSCE reported that its observers had recorded hundreds or even thousands of explosions.⁶²⁹ Yet, Ukraine’s contention that the militants directly attacked residential areas rests on a comparatively far smaller number of impact sites, and it appears to be accepted that the vast majority of the shelling attacks were directed against military targets.⁶³⁰ It is, once again, Ukraine alone that has characterised the shelling that is at issue as a “terrorist” act. Notwithstanding Ukraine’s very public position, the OHCHR, the ICRC or the UNSC have not adopted that characterisation.

469. In a report covering the period between November 2016 and February 2017, the OHCHR stated:

“OHCHR observed the continued use of civilian property by Ukrainian Armed Forces with military positions in many residential areas along the contact line, endangering civilians in these populated areas [including Avdiivka and Mariupol]. ... OHCHR

⁶²⁷ International Partnership for Human Rights, *Attacks on Civilian Infrastructure in Eastern Ukraine* (2017), para. 31 (Annex 454 to MU).

⁶²⁸ *Ibid.*, para. 39.

⁶²⁹ Samolenkov Report (Annex 2), para. 252. See e.g. OSCE SMM, “Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 30 January 2017”, 31 January 2017, <https://www.osce.org/ukraine-smm/296721> (Annex 17); OSCE SMM, “Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 31 January 2017” (Annex 343 to MU).

⁶²⁹ OSCE SMM, “Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 1 February 2017” (Annex 344 to MU); OSCE SMM, “Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 3 February 2017”, 4 February 2017, <https://www.osce.org/ukraine-smm/297646> (Annex 19); OSCE SMM, “Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 16 February 2017”, 17 February 2017, <https://www.osce.org/ukraine-smm/300761> (Annex 21); OSCE SMM, “Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 17 February 2017”, 18 February 2017, <https://www.osce.org/ukraine-smm/300816> (Annex 22); OSCE SMM, “Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 24 February 2017”, 25 February 2017, <https://www.osce.org/ukraine-smm/301841> (Annex 23); OSCE SMM, “Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 2 March 2017”, <https://www.osce.org/ukraine-smm/302791> (Annex 27).

⁶³⁰ Samolenkov Report (Annex 2), para. 253.

collected consistent testimony from residents that Ukrainian Armed Forces had fired from positions inside villages and towns, often attracting return fire. Such conduct put civilians in the line of fire, and runs contrary to the obligation of the Ukrainian Armed Forces to take all feasible measures to spare civilians from harm.”⁶³¹

470. Just as for the other specific shelling episodes upon which it relies, Ukraine does not appear to have informed its expert of the essential military context to the shelling at Avdiivka, including the fact that a key cause of the escalation of hostilities in January 2017 was Ukraine’s so-called “creeping offensives” and the heavy presence of Ukrainian Armed Forces both positioned in and moving through residential areas (see subsection (1) below).

471. In addition to omitting information about its “creeping offensives”, Ukraine has also not put into evidence any of the documentation that General Samolenkov explains may reasonably be assumed to exist which would help to establish the true position on the ground.⁶³² For example, Ukraine has not provided the Court with:

- a. Confirmation from the agencies involved of the positions of the Ukrainian Armed Forces in and around Avdiivka at the relevant time;
- b. Reports and other communications (such as telegrams and letters) prepared by the headquarters of its so-called Anti-Terrorist Operation and units on the ground in the relevant areas on the location of military materiel and shelling;
- c. Logbooks, orders and instructions showing the deployment and movement of military materiel, including tanks, mortar units and artillery, in and around Avdiivka for the relevant period, including in or through residential areas;

472. This is especially significant in light of the fact that open-source information demonstrates that the unverified account of Ukraine’s military positions which it has provided in Annex 28 to its Memorial is inaccurate. Ukraine has omitted to mention that it positioned tanks in a residential area, behind high rise apartment buildings (see subsection (2) below). Further, it appears that many of the impact sites in residential areas are located on roads through residential areas which it appears may have been used to transport military vehicles and materiel to the frontline positions of the Ukrainian Armed Forces (see subsection (3) below).

473. Ukraine has also not put forward any evidence of telephone intercepts. Yet, as is to be expected, Ukrainian criminal court judgments demonstrate that Ukraine was obtaining intercepts and that these were later relied on as evidence against defendants who were found to have provided information to the DPR about the location of Ukrainian military positions in Avdiivka.⁶³³ For example, a ruling dated

⁶³¹ OHCHR, “Report on the human rights situation in Ukraine 16 November 2016 to 15 February 2017”, https://www.ohchr.org/Documents/Countries/UA/UAReport17th_EN.pdf (Annex 25), paras. 19-20.

⁶³² Samolenkov Report (Annex 2), paras. 254, 269.

⁶³³ Ukraine, Dobropilsky City Court, Case No. 227/431/16-k, Judgment, 14 December 2017, <https://reyestr.court.gov.ua/Review/71062044> (Annex 72); Ukraine, Dobropilsky City Court, Case No. 227/431/16-k,

8 April 2017 states that an investigation has found that the defendants used their telephones to inform the DPR about the location of military equipment of the Ukrainian Armed Forces in Avdiivka on 1, 5 and 10 February 2017.⁶³⁴ Ukraine appears to be content to prevent Russia and the Court from considering material that might shed light on the intentions and purposes of the militants, as well as their methods including whether adjusted or observed fire were used.⁶³⁵

474. In light of the above, Russia is currently unable to respond to the details of Ukraine's allegations with respect to each of the specific shelling episodes at Avdiivka. In many cases, it is simply not possible to assess where potential military targets were located, and whether such were likely being targeted (as opposed to residential areas, as Ukraine contends).

1. The Reason for the Escalation of Hostilities in Late January 2017

475. Ukraine asserts that the escalation of hostilities in late January 2017 was part of a campaign by the militants to obtain political concessions.⁶³⁶ This appears wholly inaccurate.

476. In late January 2017, repeating a tactic which it had earlier used successfully in other parts of the contact line,⁶³⁷ Ukraine mounted a series of "creeping offensives" to seize certain sections of the "grey zone" near the contact line in Avdiivka.⁶³⁸ The aim of these military operations was gradually to expand the territory under the control of Ukraine, including areas of strategic value, and to establish new military positions to be used for defensive and aggressive actions.⁶³⁹

Judgment, 24 January 2017, <https://reyestr.court.gov.ua/Review/64246978> (Annex 67); Ukraine, Selydovsky City Court, Case No. 242/3538/18, Judgment, 17 October 2018, <https://reyestr.court.gov.ua/Review/77166094> (Annex 74).

⁶³⁴ Ukraine, Shevchenkivsky District Court of Chernivtsi, Case No. 727/3421/17, Ruling, 8 April 2017 <https://reyestr.court.gov.ua/Review/65851811> (Annex 70).

⁶³⁵ Cf. Brown Report (Annex 11 to MU), para. 84 stating: "There is no suggestion in the reporting that any of the fire on Avdiivka was observed and/or adjusted onto intended targets to ensure its accuracy".

⁶³⁶ MU, para. 260.

⁶³⁷ See e.g. *BBC News Ukraine*, "What happened at the Svitlodarsk Bulge?", 24 December 2016, <https://www.bbc.com/ukrainian/features-russian-38426404> (Annex 119); Eurasia Daily Monitor, "Crawling Advance': A New Tactic of Ukrainian Troops in Donbas", Vladimir Socor, Volume 14, Issue: 16, 9 February 2017, <https://jamestown.org/program/crawling-advance-new-tactic-ukrainian-troops-donbas/> (Annex 137); *Radio Free Europe/Radio Liberty*, "Anxious Ukraine Risks Escalation In 'Creeping Offensive'", 30 January 2017, <https://www.rferl.org/a/ukraine-russia-creeping-offensive-escalation-fighting/28268104.html> (Annex 120); *Novaya Gazeta*, "Fighting draw", 31 January 2017, <https://novayagazeta.ru/articles/2017/01/31/71352-boevaya-nichya> (Annex 122).

⁶³⁸ See Samolenkov Report (Annex 2), paras. 240, 255.

⁶³⁹ Eurasia Daily Monitor, "Crawling Advance': A New Tactic of Ukrainian Troops in Donbas", Vladimir Socor, Volume 14, Issue: 16, 9 February 2017, <https://jamestown.org/program/crawling-advance-new-tactic-ukrainian-troops-donbas/> (Annex 137).

477. The “Industrial Area” adjacent to a motorway, which Ukraine had captured in March 2016,⁶⁴⁰ continued to be a major flashpoint for conflict in January 2017.⁶⁴¹ On 29 January 2017, the Press Centre of the so-called “Anti-Terrorist Operation” stated that the DPR had mounted an intense attack in this area with mortars being followed by a ground assault.⁶⁴² Another report of the same date refers to the DPR using artillery and tanks.⁶⁴³ Describing the situation in Avdiivka on 31 January 2017, the BBC service in Ukraine emphasised that “the main fighting is ... for the ‘Industrial Area, which opens out upon the road leading from Donetsk to Horlivka’”.⁶⁴⁴ Consistent with this, on 5 February 2017, the OSCE reported a large number of artillery impact sites near the “Industrial Area” and that ten of the twelve DPR howitzers located to the east and southeast of Avdiivka were in a firing position pointed at the Industrial Area.⁶⁴⁵

478. Also in late January and February 2017, Ukraine launched two specific “creeping offensives” in Avdiivka, as a result of which its forces seized a strong point known as “Almaz-2” near the Industrial Zone which was previously under the control of the militants and an area of Avdiivka forest near the Donetsk Filtration Station (the “DFS”).

- a. *Almaz-2 strong point*:⁶⁴⁶ According to statements published by the Ukraine military, Ukrainian forces captured the Almaz-2 strong point in a military operation on 29 January 2017.⁶⁴⁷ General Samolenkov explains that this was a position of strategic importance including with respect to control over the adjacent motorway between two large cities in territory controlled by the militants (Donetsk and Horlivka).⁶⁴⁸ The statements published by Ukraine also record that, as a reaction to Ukraine’s operation and in an effort to regain the Almaz-2 strong point, the militants engaged in “intense shelling” of the positions of

⁶⁴⁰ Official website of the Ministry of Defence of Ukraine, “Operation ‘Industrial Area’”, 22 April 2016, <https://www.mil.gov.ua/news/2016/04/22/operacziya-promzona-/> (Annex 65).

⁶⁴¹ Samolenkov Report (Annex 2), paras. 249.

⁶⁴² Facebook page of the Press Centre for the ATO headquarters (archived page), post at: <https://web.archive.org/web/20170504221814/https://www.facebook.com/ato.news/posts/1440712675939534>, 29 January 2017 (Annex 200).

⁶⁴³ Facebook page of Yuriy Butusov, post at: <https://facebook.com/butusov.yuriy/posts/1532030086837282>, 29 January 2017 (Annex 201).

⁶⁴⁴ *BBC News Ukraine*, “Avdiivka: why is there an ongoing fighting for frozen trenches?”, 31 January 2017, <https://www.bbc.com/ukrainian/features-russian-38810871> (Annex 123).

⁶⁴⁵ OSCE SMM, “Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 5 February 2017”, 6 February 2017 (Annex 347 to MU).

⁶⁴⁶ Samolenkov Report (Annex 2), paras. 245-246.

⁶⁴⁷ Facebook page of the General Staff of the Armed Forces of Ukraine, post at: <https://www.facebook.com/GeneralStaff.ua/posts/732453826923877>, 3 February 2017 (Annex 209); Official website of the Ministry of Defence of Ukraine, “‘Now the situation in the ATO is difficult, but controlled’ - Minister of Defence of Ukraine”, 29 January 2017, <https://www.mil.gov.ua/news/2017/01/29/narazi-situacziya-v-ato-skladna-ale-kontrolovana-ministr-oboroni-ukraini/> (Annex 68); Facebook page of the Ministry of Defence of Ukraine, post at: <https://www.facebook.com/watch/?v=120155595981733>, 29 January 2020 (Annex 216).

⁶⁴⁸ Samolenkov Report (Annex 2), para. 246.

the Ukrainian Armed Forces⁶⁴⁹ and that there was “fierce fighting” between the two sides from 29 January until 6 February 2017.⁶⁵⁰

- b. *Positions in Avdiivka forest near the DFS:*⁶⁵¹ In January and February 2017, the Ukrainian Armed Forces also conducted an offensive with the aim of taking artillery control of a motorway near the DFS that was used by the militants to supply their positions.⁶⁵² On 22 January 2017, the Deputy Head of the OSCE SMM stated that the Ukrainian Armed Forces had established new positions at or near the DFS and drew attention to the obvious risk to this critical civilian object.⁶⁵³ On 14 February 2017, it was reported that the offensive had succeeded.⁶⁵⁴

479. Ukraine’s “creeping offensives” were a key reason for the escalation of hostilities in late January 2017.⁶⁵⁵ For example, on 30 January 2017, the First Deputy Head of the OSCE SMM was reported as stating: “The direct result of forward moves is escalation in tension, which often turns to violence”.⁶⁵⁶ On 14 February 2017, a soldier of the Ukrainian Armed Forces from a unit deployed near the Industrial Area was quoted in a press report as saying: “The Ukrainians had provoked the rebel side into an aggressive response by seizing a small stretch of road. We knew exactly what to do, and it worked perfectly”.⁶⁵⁷ Ukrainian military commentators reportedly expressed similar views.⁶⁵⁸

⁶⁴⁹ General Staff of the Armed Forces of Ukraine Facebook post of 3 February 2017 (Annex 209).

⁶⁵⁰ Facebook page of the Ministry of Defence of Ukraine, post at: <https://www.facebook.com/watch/?v=120155595981733>, 29 January 2020 (Annex 216).

⁶⁵¹ Samolenkov Report (Annex 2), paras. 247-248.

⁶⁵² See e.g. *Dsnews*, “Spontaneous counter-attack. The UAF take control over Avdiivka road junction (MAP)”, 30 January 2017, <https://www.dsnews.ua/politics/spontannaya-kontrataka--30012017123000> (Annex 121).

⁶⁵³ YouTube channel of the Ministry of Information of the DPR, “Alexander Hug confirmed the presence of new dugouts of the UAF near the DFS (press-conference 22.01.2017)”, available at: <https://youtu.be/8tRDtK7ueho?t=806>, 22 January 2017 (Annex 233) (13:26 – 14:31): “We have seen there also while at the water filtration station in Donetsk that on the side controlled by the Ukrainian Armed Forces there are new positions being built. That leads to more fighting. And not in an open field where there is nothing to damage. The Krutaya Balka or the water filtration station is in the middle of these positions. We can count 1 and 1 together and we’ll know what the result will be if that is not being stopped.”

⁶⁵⁴ *TSN*, “In complete secrecy, the Ukrainian military took up new positions near a strategic highway in Donbas”, 12 February 2017, <https://tsn.ua/ru/ato/ukrainskie-voennye-v-polnoy-sekretnosti-zanyali-novye-pozicii-voze-strategicheskoy-trassy-na-donbasse-803353.html> (Annex 235).

⁶⁵⁵ See e.g. *Ukrainskaya Pravda*, “It became known how the aggravation began in Avdiivka”, 3 February 2017, <https://www.pravda.com.ua/news/2017/02/3/7134334/> (Annex 134): “According to UP’s source, now the militants are trying to regain the strategic position captured by the ATO forces (the militants called the position “Almaz-2”- Ed.), since the Donetsk-Lugansk and Donetsk-Horlivka roads are fully controlled from it.” See also Samolenkov Report (Annex 2), paras. 241, 242, 252.

⁶⁵⁶ *Radio Free Europe*, “Anxious Ukraine Risks Escalation In ‘Creeping Offensive’” (Annex 120).

⁶⁵⁷ *The Guardian*, “Violence flares in war-weary Ukraine as US dithers and Russia pounces”, 14 February 2017, <https://www.theguardian.com/world/2017/feb/14/Avdiivka-frontline-ukraine-war-russia-backed-separatists> (Annex 138).

⁶⁵⁸ *Glavcom*, “Dmytro Tymchuk: Transfer of regular Russian troops is observed in several directions at once”, 17 February 2017, <https://glavcom.ua/interviews/dmitro-timchuk-perekidannya-regulyarnih-rosiyskih-viysk-sposterigajetsya-odrazu-na-kilkoh-napryamkah-398955.html> (Annex 139): “The rebels have been pounding away the

2. *The Positions of the Ukrainian Armed Forces in Avdiivka*

480. As follows from the above, the Ukrainian Armed Forces established frontline military positions at the Industrial Area, the Almaz-2 strong point and the positions in Avdiivka forest near the DFS. These were not the only military positions of the Ukrainian Armed Forces at the relevant time. Although Ukraine has not confirmed the location of all such positions, it is clear that the account depicted in Annex 28 to Ukraine's Memorial is incomplete and inaccurate.

481. In the map produced as Annex 28 to its Memorial, Ukraine has indicated that the military objects at or around 15 Vorobyov Street consisted of UAF sleeping quarters and a checkpoint only. This is inaccurate. Open-source materials also report that Ukraine established military positions in residential areas of Avdiivka, including at Vorobyov Street on the southern edge of the city.

482. According to a 2019 OHCHR report, the Ukrainian Armed Forces had a long-established military position at the residential buildings on Vorobyov Street, which is located on the southern edge of the city facing the direction of Donetsk airport:

“Since February 2015, residents at 15 Vorobyov Street in Avdiivka, in Government-controlled Donetsk region, were forced to leave their apartments due to safety and security concerns stemming from the presence of Ukrainian Armed Forces and other law-enforcement personnel. Tenants of the apartments reported that since 2014, the Ukrainian military and law-enforcement forces have taken over empty apartments and asked the remaining tenants to vacate their apartments. Those who remained suffered from serious shelling.”⁶⁵⁹

483. The area was not, however, just used as sleeping quarters for the Ukrainian Armed Forces. As follows from a large number of reports and photographs, Ukraine also positioned tanks next to these high-rise residential buildings. Russia made this point at the provisional measures stage, although at that stage it did not know the location shown in the photographs, and Ukraine has still not engaged with it.

484. The OSCE reported that:

- a. Between 29 and 31 January 2017, the Ukrainian Armed Forces moved four tanks to Avdiivka.⁶⁶⁰

same strategy lately – moving the Ukrainian troops as far as possible. Today, the Ukrainian troops can control a large part of DPR with the help of artillery. Clearly, the rebels are not fine with that”. See also *BBC News Ukraine*, “Avdiivka: why is there an ongoing fighting for frozen trenches?” (Annex 123), quoting a Ukrainian military expert and retired colonel of the Ukrainian Armed Forces as stated that the escalation “is some kind of a response to our actions”.

⁶⁵⁹ OHCHR, “Report on the human rights situation in Ukraine 16 May to 15 August 2019”, https://www.ohchr.org/Documents/Countries/UA/ReportUkraine16May-15Aug2019_EN.pdf (Annex 31), p. 10.

⁶⁶⁰ OSCE SMM, “Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 29 January 2017”, 30 January 2017, <https://www.osce.org/ukraine-smm/296416> (Annex 16); OSCE SMM, Daily Report as of 30 January 2017 (Annex 17); OSCE SMM, “Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 31 January 2017”, 1 February 2017 (Annex 343 to MU).

- b. On 1 February 2017, “In violation of the respective withdrawal lines, in government-controlled areas the SMM observed [...] four tanks (T-64) parked behind a building in Avdiivka.”⁶⁶¹
- c. On 3 February, “In violation of the respective withdrawal lines the SMM observed the following in government-controlled areas [...] four tanks (T-64) in Avdiivka.”⁶⁶²

485. The presence of Ukrainian tanks at this location is confirmed by contemporaneous photographs published by journalists.⁶⁶³ On 3 February 2017, Bellingcat (a source upon which Ukraine relies) published an article finding that:

- a. The DPR had published images that it claimed were taken from UAVs on 29 January and 2 February 2017, which showed multiple armoured vehicles at the location.⁶⁶⁴ Another image taken by a UAV on 2 February 2017 showed three tanks behind the residential building and a trench that was also visible in photographs from 2015, which Bellingcat interpreted as evidence that the location “has long been a military position”.⁶⁶⁵
- b. On 2 February 2017, artillery fire hit the apartment buildings next to where the Ukrainian Armed Forces had positioned tanks, as well as nearby buildings.

⁶⁶¹ OSCE SMM, “Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 1 February 2017”, 2 February 2017 (Annex 344 to MU).

⁶⁶² OSCE SMM, Daily Report as of 3 February 2017 (Annex 19).

⁶⁶³ See *Bellingcat*, “Ukrainian Tanks in Avdiivka Residential Area”, 3 February 2017, <https://www.bellingcat.com/news/uk-and-europe/2017/02/03/ukrainian-tanks-avdiivka-residential-area/> (Annex 258). See also Samolenkov Report (Annex 2), Addendum 2, paras. 13-18, where General Samolenkov assesses that these tanks are model T-64BV. See also Bobkov Report (Annex 1), paras. 106-129 analysing the location of the relevant images and footage.

⁶⁶⁴ General Samolenkov identifies these vehicles as (1) two multi-purpose light-armoured towing vehicles (in the central part of the photograph), (2) an armoured personnel carrier (likely a BTR-60PB) and (3) an infantry fighting vehicle (likely a BMP-2): see Samolenkov Report (Annex 2), Addendum 2, para. 14(c).

⁶⁶⁵ *Bellingcat*, “Ukrainian Tanks in Avdiivka Residential Area” (Annex 258). Additional photographs published on 3 February 2017 also show the tanks next to the same residential buildings, as well as images of what General Samolenkov identifies as 122 mm high explosive fragmentation tank shells being loaded from a military truck into a tank: see Samolenkov Report (Annex 2), Addendum 2, paras. 15, 16.



Figure 3. 2 February 2017 drone image from the Bellingcat article



Figure 4. A photograph of two T-64BV tanks from the Bellingcat article

486. Notably, a representative of the Ukrainian Armed Forces denied that tanks were being located in residential areas, calling BBC news video footage in which the tanks were shown “fake”.⁶⁶⁶ This is consistent with Ukraine’s current approach in failing to inform the Court of the matter, and in

⁶⁶⁶ *Bellingcat*, “Ukrainian Tanks in Avdiivka Residential Area” (Annex 258).

failing to give to the Court the details as to the movements of Ukrainian troops and military equipment in Avdiivka.

487. In light of the omission of any mention of tanks at this location in the IPHR Report (on which Ukraine relies extensively), this source is to be approached with caution.⁶⁶⁷ It is plain that the authors of the report were basing their conclusions on materially inaccurate information.

488. General Samolenkov concludes:

“these tanks could fire at the DPR positions from various positions nearby. The tanks were likely to change firing positions to avoid return fire and to use the nearby multi-storey buildings as a shield, including for the purposes of recharging. I believe that these tanks were obvious military targets and that by positioning them in the residential areas Ukraine has put the nearby residential buildings at grave risk. That risk would be exacerbated, if the firing positions were also chosen in the residential areas around, but I do not have information about that.”⁶⁶⁸

489. According to Ukraine’s map, there is a large concentration of shelling impacts around Vorobyov Street.⁶⁶⁹

490. Annex 28 to Ukraine’s Memorial also does not mention that, as reported by the OSCE and other organisations, its Armed Forces had a long-established position on Molodizhna Street where military equipment had been observed.⁶⁷⁰ Instead, Ukraine’s map seeks to emphasise the presence of the humanitarian aid distribution centre nearby. In order properly to assess the nature of these positions, Ukraine would need to put into evidence the relevant documents concerning the presence of personnel and military materiel at the relevant time. A number of the reported impact sites are located around Molodizhna Street.

491. Nor has Ukraine mentioned a long-established military position at an abandoned brick factory near 122 Zavodska Street, which is also not referred to in the IPHR Report.⁶⁷¹ Ukrainian criminal court judgments state that reports of the so-called Anti-Terrorist Operation and telephone intercepts

⁶⁶⁷ Cf. IPHR Report, para. 88 (Annex 454 to MU).

⁶⁶⁸ Samolenkov Report (Annex 2), Addendum 2, para. 18.

⁶⁶⁹ Annex 28 to MU.

⁶⁷⁰ OSCE SMM, “Latest from OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 6 September 2016”, 7 September 2016, <https://www.osce.org/ukraine-smm/263091> (Annex 11); OSCE SMM, “Thematic report, Hardship for conflict-affected civilians in eastern Ukraine”, February 2017, <https://www.osce.org/files/f/documents/4/0/300276.pdf> (Annex 18), p. 17. See also Human Rights Watch, “Studying Under Fire, Attacks on Schools, Military Use of Schools During the Armed Conflict in Eastern Ukraine”, 11 February 2016, https://www.hrw.org/sites/default/files/report_pdf/ukraine0216_web.pdf (Annex 83), pp. 37–38. Ukrainian court judgments from 2018 and 2019 refer to this position as the location of the volunteer battalion “Right Sector”: Ukraine, Selydovsky City Court, Case No. 242/3786/18, Ruling, 6 August 2018, <https://reyestr.court.gov.ua/Review/75716048> (Annex 73); Ukraine, Ordzhonikidzevsky District Court of Mariupol, Case No. 265/6438/19, Ruling, 6 November 2019, <https://reyestr.court.gov.ua/Review/85528051> (Annex 78). See also Samolenkov Report (Annex 2), Addendum 2, paras. 21–26.

⁶⁷¹ Samolenkov Report (Annex 2), Addendum 2, paras. 27–35.

(neither of which type of evidence Ukraine has put forward with respect to the events in Avdiivka in 2017) state that in 2015 and 2016 defendants informed the DPR that this was a location of military equipment of the Ukrainian Armed Forces,⁶⁷² and in May 2016 a defendant informed the DPR that this location was used as a mortar firing position.⁶⁷³ Some of the shelling impacts illustrated on Annex 28 to Ukraine’s Memorial are in the vicinity of this position. Ukraine has not provided any evidence as to whether this was also used as a position by its Armed Forces between late January and March 2017.

492. Additionally, a Ukrainian court ruling refers to findings that defendants provided information to the DPR on 1, 5 and 10 February 2017 regarding the location of military equipment of the Ukrainian Armed Forces in Avdiivka.⁶⁷⁴ One of the locations referred to is 12 Turgeneva Street, which is in the vicinity of a UAF firing position and impact sites marked on Ukraine’s map to the south of the military positions at Vorobyov Street (Annex 28 to Ukraine’s Memorial). The list of Ukraine’s military positions contained in the IPHR Report does not include a firing position to the south of Vorobyov Street,⁶⁷⁵ and it is unclear whether the authors of the IPHR Report were aware of this position since they do not specify which firing position was a certain distance from the impacts at Turgeneva Street.⁶⁷⁶ The Ukrainian court judgment also refers to information being provided regarding “the deployment of a large number of equipment and military personnel in the area of ‘Khimik’”, i.e. a residential area.⁶⁷⁷ The judgment is significant evidence that the DPR were understood by Ukraine to be targeting military objects, not residential areas.

3. *The Presence of Military Equipment Moving Through Residential Areas of Avdiivka between January and March 2017*

493. Notably, unlike for the other shelling episodes, Ukraine has produced no documentation from its authorities confirming the location of its military positions in Avdiivka at the relevant time.

494. As General Samolenkov observes, and as already seen above, open-source material shows that there was a significant military presence in Avdiivka between January and March 2017, including in residential areas.

⁶⁷² Ukraine, Dobropilsky City Court, Case No. 227/431/16-k, Judgment, 24 January 2017, <https://reyestr.court.gov.ua/Review/64246978> (Annex 67); Ukraine, Dobropilsky City Court, Case No. 227/431/16-k, Judgment, 14 December 2017, <https://reyestr.court.gov.ua/Review/71062044> (Annex 72); Ukraine, Selydovsky City Court, Case No. 242/3538/18, Judgment, 17 October 2018, <https://reyestr.court.gov.ua/Review/77166094> (Annex 74).

⁶⁷³ Selydovsky City Court Judgment of 17 October 2018 (Annex 74).

⁶⁷⁴ Ukraine, Shevchenkivsky District Court of Chernivtsi, Case No. 727/3421/17, Ruling, 8 April 2017 <https://reyestr.court.gov.ua/Review/65851811> (Annex 70).

⁶⁷⁵ IPHR Report, pp. 43-44 (Annex 454 to MU).

⁶⁷⁶ IPHR Report, pp. 48-49 (Annex 454 to MU).

⁶⁷⁷ Shevchenkivsky District Court of Chernivtsi Ruling of 8 April 2017 (Annex 70).

495. From 31 January 2017, journalists reporting from the city regularly photographed and otherwise reported tanks and other military vehicles moving through populated areas of Avdiivka, although the exact locations cannot be identified (by Russia).⁶⁷⁸ This provides useful indication of the situation on the ground, but it is reasonable to assume that the scale of such movements was much greater than that reported.⁶⁷⁹ Ukraine (alone) has complete information about the movement of its military forces.

496. General Samolenkov explains that it would have been necessary for the Ukrainian Armed Forces to move military vehicles and equipment through residential areas in order to supply the frontline military positions, including the Industrial Area, the Almaz-2 strong point and the positions near Avdiivka forest and the DFS.⁶⁸⁰ This need would have increased after Ukraine's "creeping offensives" and the resultant escalation of hostilities. Further, he explains that it is likely that the DPR would have sought to identify such movements (through informants, reconnaissance groups and/or UAVs) and to shell these military objects before they reached the frontline positions:

"in a situation of prolonged exchanges of fire between frontline positions, it is often important to prevent supplies and strengthening of the enemy's positions to, among other things, seize the initiative in certain areas. It is also possible to assume with a high degree of probability that – apart from military equipment necessary for direct support of combat operations – military equipment of the second line (reserve) could have moved across the residential areas with the purpose of strengthening and rotation of troops at the frontline. It would, therefore, have been militarily important to prevent supply of troops and munitions to the frontline positions, and it is likely that the DPR would have targeted the reserve troops and supply vehicles en route to the positions."⁶⁸¹

497. In this connection it is noted that Ukrainian court judgments support the use of informants by the DPR in Avdiivka in February 2017,⁶⁸² and the DPR has published images of a residential area in

⁶⁷⁸ See Samolenkov Report (Annex 2), Addendum 2, paras. 1-8 referring to e.g. *BBC News*, "Ukraine: Avdiivka, the front line of Europe's 'forgotten war'", 31 January 2017, available at <http://www.bbc.com/news/world-europe-38818543> (Annex 37 to PORF), at 00.34 showing a tank moving through a residential area; *Krym.Realii*, "From Avdiivka: 'The main thing is that the "Grads" stop "hammering" from Donetsk'", 31 January 2017, <https://ru.krymr.com/a/28270453.html> (Annex 126); Twitter page of Christopher Miller, photographer, post at: <https://twitter.com/ChristopherJM/status/826815510130069504>, 1 February 2017 (Annex 206); Twitter page of Christopher Miller, photographer, post at: <https://twitter.com/ChristopherJM/status/826905101398896640>, 2 February 2017 (Annex 207); Twitter page of Christopher Miller, photographer, post at: <https://twitter.com/ChristopherJM/status/827398463088242690>, 3 February 2017 (Annex 210); Twitter page of Christopher Miller, photographer, post at: <https://twitter.com/ChristopherJM/status/827543299703599104>, 3 February 2017 (Annex 212); *European Pressphoto Agency*, "Crisis in Ukraine", 6 February 2017, <https://webgate.epa.eu/?16634349628007773501&MEDIANUMBER=53307517> (Annex 135); *Al Jazeera*, "Avdiivka, evacuating again as fighting escalates", 8 February 2017, <https://www.aljazeera.com/features/2017/2/8/avdiivka-evacuating-again-as-fighting-escalates> (Annex 136); *Vice*, "Civilians flee East Ukraine town of Avdiivka as fighting with Russian-backed separatists escalates", 23 February 2017, <https://www.vice.com/en/article/595vnd/civilians-flee-east-ukraine-town-of-Avdiivka-as-fighting-with-russian-backed-separatists-escalates> (Annex 237).

⁶⁷⁹ See Samolenkov Report (Annex 2), Addendum 2, para. 8.

⁶⁸⁰ *Ibid.*, paras. 268, 270.

⁶⁸¹ *Ibid.*, para. 272.

⁶⁸² Shevchenkivsky District Court of Chernivtsi Ruling of 8 April 2017 (Annex 70).

Avdiivka which it claimed were taken by a UAV.⁶⁸³ Assuming that they were aware of such movements, as General Samolenkov observes, the DPR “likely faced a choice on many occasions: either to allow an unimpeded supply of the UAF frontline positions or attack military equipment when it was moving towards these positions.”⁶⁸⁴

498. Given their location on the outskirts of the city and the demarcation of the contact line, the frontline positions of the Ukrainian Armed Forces could be accessed only by the road entering Avdiivka from the Government-controlled territory to the north-west.⁶⁸⁵ In order to reach the frontline positions from this direction, the military equipment would have to travel through residential areas. While it is impossible for Russia to know which routes were actually used for this purpose, many of the shelling impacts at the residential areas are located along possible convoy routes.⁶⁸⁶ General Samolenkov concludes that: “The targeting of military equipment moving along these roads may explain collateral damage to the civilian objects located nearby”.⁶⁸⁷ Possible routes are shown in blue on the map below:

⁶⁸³ *Bellingcat*, “Ukrainian Tanks in Avdiivka Residential Area” (Annex 258).

⁶⁸⁴ Samolenkov Report (Annex 2), para. 273.

⁶⁸⁵ *Ibid.*, para. 270.

⁶⁸⁶ *Ibid.*, para. 271.

⁶⁸⁷ *Ibid.*, para. 275.

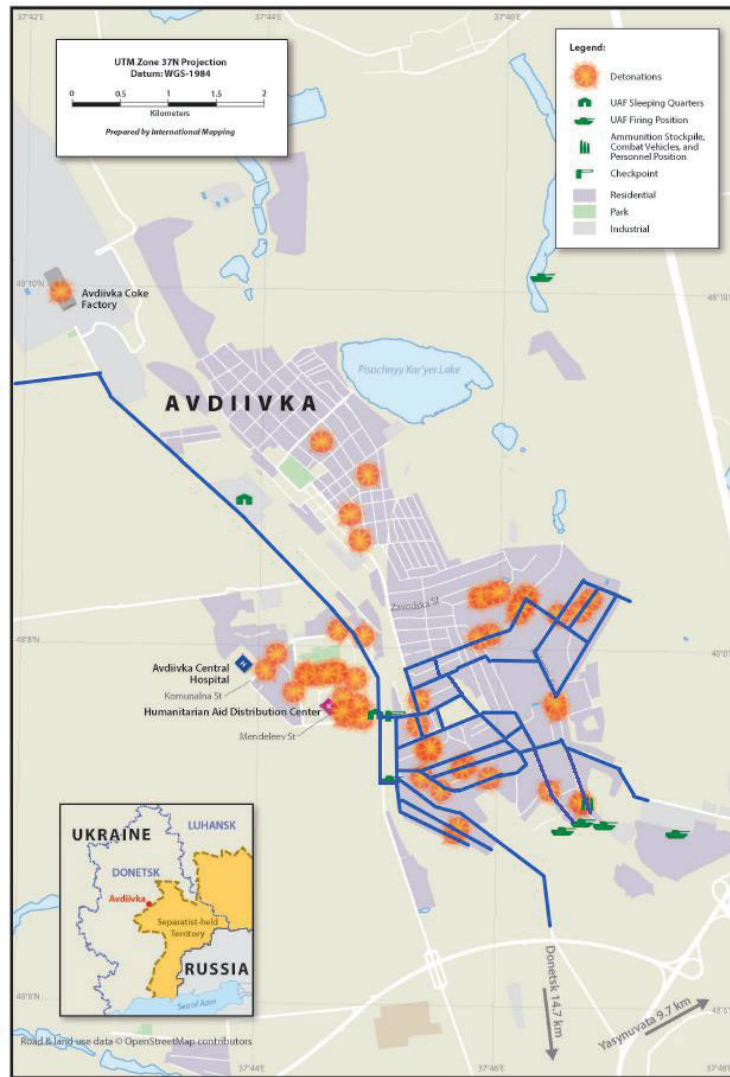


Figure 5. The routes marked on a map presented by Ukraine

4. *Specific Shelling Episodes Relied on by General Brown and Ukraine*

499. In light of Ukraine’s failure to put into evidence much of the relevant information, which is in its exclusive possession, Russia is not currently able to respond to the specific allegations concerning each shelling impact at Avdiivka which is relied on by General Brown and Ukraine (see above).⁶⁸⁸ Ukraine’s approach does not allow for an assessment of the likelihood of whether the damage to civilian buildings may be explained as collateral damage from targeting of military positions or equipment, including mobile materiel which was likely moving through the city constantly.

500. It is, however, possible to make certain observations based on the limited evidence which is before the Court.

⁶⁸⁸ See MU, para. 111; Brown Report (Annex 11 to MU), para. 81.

501. First, it is striking that Ukraine places particular reliance on the IPHR report.⁶⁸⁹ This is all the more surprising given the approach taken in the IPHR report of grouping together various impact sites across Avdiivka for a single day and referring to the use of particular weapons (such as BM-21) without stating to which impact sites this refers.

502. Second, while it is clear that the authors of the IPHR report were unaware of the extent of military objects placed by Ukraine within residential areas of Avdiivka, in a second report on the shelling (which Ukraine has not put into evidence) they do still record the view that: “It should be noted that numerous incidents of shelling of civilian objects were possible amongst other things because of the military objects located near to civilian populations and residential areas.”⁶⁹⁰

503. Third, certain findings in the IPHR Report are contradicted by contemporaneous open-source information. For example, contrary to Ukraine’s contention and General Brown’s assumption, there is no evidence before the Court that a shelling impact at the Coke Plant was the cause of the power outage on 30 January 2017.⁶⁹¹

- a. The reference to such impact in the IPHR Report⁶⁹² is not supported by the reports of either the OSCE⁶⁹³ or the OHCHR⁶⁹⁴ and, moreover, it is directly contradicted by the contemporaneous statement of the Director of the Coke Plant:

“As of 6 p.m., the situation with the restoration of power supply in Avdiivka is as follows: only a part of the power line has been examined, we understand that the breakage occurred somewhere between the Krasnenky [pond] and the Horlivka motorway, but it is not possible to clarify this due to active hostilities.”⁶⁹⁵

- b. Consistent with this, the OSCE report for 31 January 2017 states that workers had been “unable to locate the area where the power line was cut and that repair workers would in

⁶⁸⁹ See MU, para. 111, footnotes 204-212 referring to IPHR Report, pp. 49-50 (Annex 454 to MU), pp. 48-50.

⁶⁹⁰ International Partnership for Human Rights, Civic Solidarity Platform, Truth Hounds, “Scorching Winter 2016-2017. Analysis of the shellings of residential areas in Eastern Ukraine”, 2017, <https://truth-hounds.org/wp-content/uploads/2017/09/last-UA-eng-20.09-web.compressed.pdf> (Annex 88), p. 27. See also Kharkiv Human Rights Publisher, “Armed conflict in the East of Ukraine: the damage caused to the housing of the civilian population”, 2019, https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/report_on_damage_to_housing_of_the_civilian_population_in_the_eastern_ukraine_eng.pdf (Annex 90), pp. 21-22.

⁶⁹¹ See Samolenkov Report (Annex 2), paras. 311-315.

⁶⁹² Cf. MU, para. 111, n. 204, referring to IPHR Report, p. 46 (Annex 454 to MU).

⁶⁹³ OSCE SMM, “Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 31 January 2017” (Annex 343 to MU).

⁶⁹⁴ OHCHR Report (16 November 2016 - 15 February 2017) (Annex 25), para. 25: “In Donetsk region, shelling in January and February 2017 cut off the power supply to four water filtration stations and damaged water pipes”. There is no express mention of the Avdiivka Coke Plant.

⁶⁹⁵ Facebook page of Musa Magomedov, Director General of the Avdiivka Coke Plant, post at: <https://www.facebook.com/photo.php?fbid=1413352195341857&set=a.109001049110318&type=3>, 30 January 2017 (Annex 202).

any case not be able to reach the area due to the security situation”.⁶⁹⁶ The OSCE also reported that, on 1 February 2017, a ceasefire in the area around the DFS had to be brokered to ensure safe access for the repair teams.⁶⁹⁷ General Samolenkov notes that this suggests that the line was cut in the area of hostilities.⁶⁹⁸ It appears that this OSCE report is mistakenly referred to in the IPHR Report as support for the fact that the power outage was caused by shelling at the Coke Plant.

- c. A published map of the power lines confirms that these cross the area of active hostilities.⁶⁹⁹ Further, the power supply was not only for Avdiivka and Government-controlled territory but also for DPR-controlled territory nearby. As a result of the outage, miners in a mine in the DPR-controlled territory were trapped⁷⁰⁰ and residents nearby were without electricity or heating.⁷⁰¹ General Samolenkov observes that it is therefore unlikely that the DPR would deliberately target the power lines.
- d. The Director of the Coke Plant stated that there were two impacts; one caused damage to railway tracks and the other resulted in no damage.⁷⁰² General Samolenkov explains that a photograph showing damage to the railway tracks does not appear to have been caused by BM-21 missiles because these do not have sufficient destructive power.⁷⁰³

504. Fourth, with respect to certain of the specific shelling episodes, there are also specific inconsistencies with the evidence relied on by Ukraine and certain impact sites appear to have been close to military targets.

- a. *Zavodska Street (27 January 2017)*: Ukraine’s contention that civilian residences on Zavodska Street were shelled by BM-21 rockets on 27 January 2017 rests upon inspection reports prepared by its authorities based on materials gathered almost a month

⁶⁹⁶ OSCE SMM, “Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 31 January 2017”, 1 February 2017 (Annex 343 to MU).

⁶⁹⁷ OSCE SMM, “Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 1 February 2017”, 2 February 2017 (Annex 344 to MU): “In order to restore electricity [...] the SMM worked together with Ukrainian and Russian Federation Armed Forces Representatives of the JCCC to facilitate the reestablishment of the ceasefire in the area around the Donetsk water filtration station. [...] [R]epair crews had been given the green light to advance toward affected sections of the power lines.”

⁶⁹⁸ Samolenkov Report (Annex 2), para. 315.

⁶⁹⁹ Shelter Cluster Ukraine, Ukraine-Donbass Region, Shelter repairs in Avdiivka as reported to the Cluster as of December 2016, 18 February 2017, https://reliefweb.int/sites/reliefweb.int/files/resources/reach_ukr_map_eastern_ukraine_shelterrepairsinavdiivka_16feb2017_a0.pdf (Annex 85). See also Samolenkov Report (Annex 2), para. 313.

⁷⁰⁰ *Interfax*, “Due to the shelling, 203 miners were trapped in the Donetsk mine”, 31 January 2017, <https://www.interfax.ru/world/547735> (Annex 124).

⁷⁰¹ *62.ua (Donetsk city website)*, “In Donetsk, the Northern Water Supply Facility was de-energized - part of the Kyivski District was left without electricity and heating”, 31 January 2017, <https://www.62.ua/news/1529458/v-donecke-obestocen-severnyj-vodouzel-cast-kievskogo-rajona-ostalas-bez-sveta-i-otoplenia> (Annex 125).

⁷⁰² YouTube channel of Metinvest, “Press briefing ‘Humanitarian situation in Avdiivka’”, available at: https://youtu.be/ejjz9dsIQ_k?t=1952, 1 February 2017 (Annex 234).

⁷⁰³ Samolenkov Report (Annex 2), paras. 317-318.

later.⁷⁰⁴ There is no corroboration that the shelling occurred on this date and, by contrast, the IPHR Report refers to shelling at this location on 1 February 2017.⁷⁰⁵ The civilian buildings impacted are close to the possible military position at the brick factory on the same street.

- b. *Komunalna Steet (31 January 2017)*: Ukraine’s contention that a civilian residence on Komunalna Street was shelled by a BM-21 rocket on 31 January 2017, again, relies on the IPHR Report.⁷⁰⁶ This report groups together different impacts across Avdiivka (including at Tugeneva Street, Zelena Street and Kosolov Street, all of which the Report notes were close to firing positions of the Ukrainian Armed Forces of which the authors were aware) and it is unclear to which impacts the reference to BM-21 Grad rockets relates. The “Scorching Winter” Report refers to the impact being caused by a single shell⁷⁰⁷ and the materials put forward by Ukraine contain no reference to any other impacts in the same residential area on the same day.⁷⁰⁸ Moreover, the documents relevant to Ukraine’s investigation also do not contain evidence of the use of BM-21 in the relevant area.⁷⁰⁹ Against this background (and noting the unavailability of evidence referred to in the IPHR Report), General Samolenkov explains that is “unlikely”⁷¹⁰ that the damage was caused by a BM-21 missile (i.e., an area weapon) since this would be expected to cause damage to other buildings in the immediate vicinity of this populated area.⁷¹¹ If, however, there were to be an isolated BM-21 impact site, this would mean that it was unlikely that the building was the actual target.⁷¹²
- c. *Zavodska Street (1 February 2017)*: Ukraine’s investigation reports concerning shelling at Zavodska Street on 1 February 2017 merely refer to the fact of damage to buildings.⁷¹³ They contain no assessment of the type of weapon used or crater analysis.

⁷⁰⁴ See Annexes 167-171 to MU.

⁷⁰⁵ IPHR Report, p. 49 (Annex 454 to MU).

⁷⁰⁶ MU, para. 111, n. 205 referring to IPHR Report, p. 48 (Annex 454 to MU).

⁷⁰⁷ International Partnership for Human Rights, Civic Solidarity Platform, Truth Hounds, “Scorching Winter 2016-2017. Analysis of the shellings of residential areas in Eastern Ukraine”, 2017, <https://truth-hounds.org/wp-content/uploads/2017/09/last-UA-eng-20.09-web.compressed.pdf> (Annex 88), p. 9

⁷⁰⁸ As General Samolenkov notes, Extract from Criminal Proceedings No. 12017050140000081, 6 February 2017 (Annex 164 to MU) refers to the inspection on 30 January 2017 (i.e., one day prior) of one other impact site recorded in the same residential area as Komunalna Steet (around 400 m away on Budivelnkyiv Kvartal), although it is unclear on what date the impact occurred and whether the building hit was a civilian object and there is also no reference to the impact being caused by BM-21: see Samolenkov Report (Annex 2), para. 325.

⁷⁰⁹ See Extract from Criminal Proceedings No. 12017050140000081 (Annex 164 to MU). See also Facebook page of Pavlo Zhebrivskyi, Chairman of the Donetsk Regional Civilian-Military Administration, post at: <https://www.facebook.com/zhebrivskyi/posts/680461565469699>, 31 January 2017 (Annex 203).

⁷¹⁰ Samolenkov Report (Annex 2), para. 323.

⁷¹¹ *Ibid.*, paras. 323-325.

⁷¹² *Ibid.*, paras. 324, 328.

⁷¹³ Record of Site Inspection, drafted by N. Protsyk, Senior Investigator (1 February 2017) (Annex 162 to MU); Record of Site Inspection, drafted by Y. Ponomarenko, Senior Investigator (1 February 2017) (Annex 163 to MU); Record of

As such, they provide no support for the contention that the shelling was caused by BM-21 rockets. Similarly, the relevant OSCE report also does not mention the specific weapon used.⁷¹⁴ The IPHR Report (which is relied upon by Ukraine and which is the sole document relied upon by General Brown⁷¹⁵) is of no greater assistance because, in light of the grouping together of various shelling locations across Avdiivka (including Turgenev Street, which is close to a Ukrainian Armed Forces firing position) it is impossible to know whether the reference to BM-21 concerns the shelling at Zavodska Street specifically (near a possible military position) and the other evidence referred to is not before the Court.⁷¹⁶

- d. *Soborna Street (3 February 2017)*: Ukraine relies on two sources as evidence for shelling of a civilian residence at Soborna Street on 3 February 2017, namely an OSCE report and the IPHR Report.⁷¹⁷ Each source refers to a single impact site at this location resulting from shelling on 3 February 2017. However, the reports are materially contradictory. Whereas the OSCE report states that on 4 February 2017 the SMM observed a 120 mm mortar round which had been fired from a south-western direction,⁷¹⁸ the IPHR Report states that a shell hit the eastern side of the building (i.e., the direction of fire was from the east, north-east or south-east).⁷¹⁹ As General Samolenkov notes, the territory to the south-west was under the control of Ukraine (indicating the responsibility of the Ukrainian Armed Forces) and the territory to the east was heavily contested (meaning that either side might be responsible).⁷²⁰ These matters are not considered in General Brown's Report, which assumes that the two reports refer to two different impact sites,⁷²¹ and records General Brown's incorrect understanding that the DPR controlled the territory to the south west.⁷²²
- e. *Gagarin Street and 9-Kvartal Street (16 February 2017)*: As support for its contention that BM-21 shelling caused damage to civilian buildings on Gagarin Street and 9-Kvartal Street on 16 February 2017, Ukraine relies on the IPHR Report.⁷²³ This

Site Inspection, drafted by A. Zaychik (1 February 2017) (Annex 161 to MU). See also Extract from Criminal Proceedings No. 12017050140000085 (Annex 160 to MU).

⁷¹⁴ OSCE SMM, "Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), Based on Information Received as of 19:30, 2 February 2017", p. 2 (Annex 1111 to MU).

⁷¹⁵ See MU, para. 111, n. 206; Brown Report (Annex 11 to MU), para. 98(a).

⁷¹⁶ IPHR Report, p. 49 (Annex 454 to MU).

⁷¹⁷ See MU, para. 111, n. 208.

⁷¹⁸ OSCE SMM, "Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 5 February 2017", 6 February 2017 (Annex 347 to MU).

⁷¹⁹ IPHR Report, p. 49 (Annex 454 to MU). The video evidence referred to is not before the Court.

⁷²⁰ Samolenkov Report (Annex 2), paras. 335-337.

⁷²¹ Brown Report (Annex 11 to MU), para. 81(c)-(d).

⁷²² *Ibid.*, para. 81. See also para. 82.

⁷²³ MU, para. 111, n. 209.

report, however, is contradicted by a second report of the same NGO, which specifically refers to tank fire,⁷²⁴ as well as the relevant OSCE report which assessed the actual impact sites as caused by either artillery (without specific reference to BM-21 or to MLRS generally⁷²⁵) or tank shells.⁷²⁶ Additionally, the statements issued by the Ukrainian authorities concerning the shelling also does not mention BM-21.⁷²⁷ It also appears that these impact sites were reasonably close to the military objects of the Ukrainian Armed Forces located at Molodizhna Street (see above).

- f. *Molodizhna Street, Mendeleev Street and Gagarin Street (2 March 2017)*: These impact sites, which the IPHR Report states were caused by tank shelling⁷²⁸ and which the OSCE reports state were caused by tank or artillery shelling,⁷²⁹ were close to the military objects of the Ukrainian Armed Forces located at Molodizhna Street (see above).

505. Ukraine has therefore failed to establish the requisite actual intention to harm civilians and the requisite terrorist purpose under Article 2(1)(b) ICSFT. As explained above:

- a. Avdiivka remained a major flashpoint of the armed conflict for over a month (having been located on the contact line for much longer). Ukraine's speculation that the escalation of hostilities was part of a campaign by the militants to obtain political concessions is unsupported and ignores the statements of its own authorities that the escalation was a reaction to Ukraine's "creeping offensives" (see above).⁷³⁰
- b. The Ukrainian Armed Forces locating military objects in residential areas and transporting military materiel through residential areas, and seemingly fired from those

⁷²⁴ Scorching Winter IPHR Report (Annex 88), p. 13. See further Samolenkov Report (Annex 2), para. 344.

⁷²⁵ General Samolenkov explains that both tube artillery and MLRS can have a caliber of 122 mm: see Samolenkov Report (Annex 2), para. 347, n. 468.

⁷²⁶ OSCE SMM, "Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 19 February 2017" (Annex 349 to MU).

⁷²⁷ Facebook page of Pavlo Zhebrivskiy, Chairman of the Donetsk Regional Civilian-Military Administration, post at: <https://www.facebook.com/zhebrivskiy/posts/688914104624445>, 16 February 2017 (Annex 213), referring to shells; Facebook page of the Donetsk Regional Prosecutor's Office, post at: <https://www.facebook.com/don.gp.gov.ua/posts/2223122507913887/>, 16 February 2017 (Annex 214), referring to shelling.

⁷²⁸ IPHR Report, p. 49. The evidence referred to in this report is not before the Court. See also Scorching Winter IPHR Report (Annex 88), at p. 14 referring to "tank shelling" but also to "rockets". However, the Russian and English versions of this report are not consistent in describing the munition used. The Russian uses the generic term "shell" not mentioning the rockets. See International Partnership for Human Rights, Civic Solidarity Platform, Truth Hounds, "Scorching Winter 2016-2017. Analysis of the shellings of residential areas in Eastern Ukraine" (Russian language version), 2017, <https://truth-hounds.org/wp-content/uploads/2017/08/%D0%A1%D0%BF%D0%B5%D0%BA%D0%BE%D1%82%D0%BD%D0%B0-%D0%B7%D0%B8%D0%BC%D0%B0-2016-2017.pdf> (Annex 89).

⁷²⁹ OSCE SMM, "Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 5 March 2017" (Annex 351 to MU).

⁷³⁰ Cf. MU, para. 260.

areas⁷³¹ and the DPR targeting those positions (including as returning fire), does not establish the requisite actual intention or terrorist purpose.⁷³²

- c. Whereas General Brown states that “[t]he weapon system used in the attack guaranteed that civilian areas would be hit”,⁷³³ there is no clear evidence that a BM-21 weapon system was used in the shelling at the Khimik area of Avdiivka at the relevant time (see above).⁷³⁴ There is, however, considerable evidence that the Ukrainian Armed Forces used BM-21 (as well as more powerful weapon systems) against civilian areas in territory controlled by the DPR.⁷³⁵
- d. Ukraine’s contention that the militants directly shelled the Avdiivka Coke Plant, “resulting” in a humanitarian emergency is incorrect (see above).⁷³⁶ This is also a key assumed fact for General Brown with respect to the alleged use of BM-21 at locations far from military objects.⁷³⁷
- e. Whereas Ukraine now seeks to portray civilians as having in fact been terrorised, in a video report dated 31 January 2017, a BBC correspondent described the situation very differently:

“[E]ven when the soundtrack of fighting swells, *surreal normality persists* as well as resilience. [...] *You can see people just milling about going about their everyday business here* while gunfire, mortars and artillery just a short distance from here [...] in the industrial area on the edge of this small city. There has been a violent stalemate in Eastern Ukraine for two years. In that time, I have rarely witnessed such a presence from the Ukrainian military.”⁷³⁸

II. Bombings and Killings/Ill-Treatment

A. BOMBINGS

506. Ukraine’s Application focuses on the bombing in Kharkov of 22 February 2015, killing three people and wounding fifteen others.⁷³⁹ Ukraine claims there, without reference to any evidentiary materials, that this bombing “was supported by the Russian Federation”. That is an allegation of

⁷³¹ See OHCHR Report (16 November 2016 - 15 February 2017) (Annex 25), paras. 19-20.

⁷³² Cf. MU, para. 259.

⁷³³ Brown Report (Annex 11 to MU), para. 96.

⁷³⁴ See Samolenkov Report (Annex 2), paras. 318-319, 323-325, 332, 344-345.

⁷³⁵ See Table 3 in Appendix A: Examples of Ukraine’s documented use of MLRS and other heavy weapons in populated areas.

⁷³⁶ MU, para. 258.

⁷³⁷ Brown Report (Annex 11 to MU), para. 89.

⁷³⁸ *BBC News*, “Ukraine: Avdiivka, the front line of Europe’s ‘forgotten war’” (Annex 37 to PORF) (emphasis added).

⁷³⁹ Application, para. 72.

extreme gravity. All that was relied upon at the provisional measures stage was a single press report, containing the comments of someone who claims to be the spokesman of the so-called Kharkov Partisans. Notably, in that press report, the alleged spokesperson says that this bombing was not carried out by the Kharkov Partisans.⁷⁴⁰

507. In its Memorial, Ukraine contends that “numerous Russian officials and private actors have provided funds to groups engaged in terrorism in Ukraine”.⁷⁴¹ The focus of this section of Ukraine’s Memorial is very much on the alleged supply of funds to the DPR/LPR which is said to be relevant to the shoot down of Flight MH17 and the episodes of indiscriminate shelling at Volnovakha, Kramatorsk, Mariupol and Avdiivka. In relation to the bombings in Ukrainian cities, the case Ukraine has put before this Court appears to be that Russian State officials have knowingly financed those acts:

“Various military intelligence operatives supplied explosives and weapons to the perpetrators of bombings in Kharkiv, Kyiv, and Odesa. Russian intelligence officers provided, for example, the anti-personnel mine used against the Kharkiv unity march, and the SPM limpet mine used against the Stena Rock Club. Eduard Dobrodeev, a GRU officer, financed the attempted assassination of Anton Geraschenko.”⁷⁴²

508. Ukraine relies principally on transcripts of interrogations of suspects conducted by the State Security Service. There are multiple reasons why such materials do not amount to evidence establishing terrorism financing, not least because multiple international bodies (including OHCHR and other UN bodies) have expressed deep concern about the pattern of torture and ill-treatment of alleged separatists and collaborators (see further Section B below). Indeed, some of the individuals whose testimony Ukraine now relies on have already sought to withdraw their statements on the basis that they were obtained by torture or ill-treatment.⁷⁴³

B. KILLINGS AND ILL-TREATMENT

509. The evidence before the Court shows that all parties to the armed conflict have committed extra-judicial killings, torture and ill-treatment of civilians. Such acts should be and are characterised as serious violations of obligations under IHL and human rights law. However, there is no credible evidence before the Court that they also amount to “terrorist” acts within the meaning of Article 2(1)(b) of the ICSFT.

⁷⁴⁰ CR 2017/1, 6 March 2017, pp. 46-47, para. 45 (Cheek), citing Simon Shuster, “Meet the Pro-Russian ‘Partisans’ Waging a Bombing Campaign in Ukraine”, *Time*, 10 April 2015, available at <http://time.com/3768762/pro-russian-partisans-ukraine/> (Annex 571 to MU).

⁷⁴¹ MU, Chapter 5(A).

⁷⁴² MU, para. 276.

⁷⁴³ See Chapter VIII below. Notably, Ukraine elected to bring the present case before the Court before it had concluded criminal proceedings against the alleged perpetrators.

510. First, the OHCHR reports on Ukraine have repeatedly documented allegations of extra-judicial killings, torture and ill-treatment by all parties to the conflict, including Ukraine (see further Table 5 in Appendix A). Ukraine’s use of torture has also been condemned by the UN Subcommittee on Prevention of Torture, as well as by a source that Ukraine relies on in its Memorial.

511. By way of example, in a report published in May 2017, after Ukraine filed the present claims with the Court, the Subcommittee on Prevention of Torture concluded that:

“34. The Subcommittee has received numerous and serious allegations of acts that, if proven, would amount to torture and ill-treatment. Persons interviewed by the Subcommittee in various parts of the country have recounted beatings, electrocutions, mock executions, asphyxiations, acts of intimidation and threats of sexual violence against themselves and their family members. In the light of all the work done and experience gained during the visit, the Subcommittee has no difficulty in concluding that these allegations are likely to be true.

35. Many of the above-mentioned acts are alleged to have occurred while the persons concerned were under the control of the State Security Service or during periods of unofficial detention. In such cases, *detainees accused of crimes relevant to the armed conflict in eastern Ukraine [...] are alleged to have been tortured in order to extract information regarding their involvement or that of their associates in “separatist” activities and to identify armed groups’ military positions.* The Subcommittee also understands that, in some cases, acts were committed by private individuals or volunteer battalions with the consent or acquiescence of public officials.

[...]

37. In addition, it appears that *prosecutors and judges are not particularly sensitive or sympathetic to complaints of torture and ill-treatment.*”⁷⁴⁴

512. As with indiscriminate shelling, if Ukraine were correct that the acts of killing and ill-treatment amount to “terrorist” acts under Article 2(1)(b), Ukraine would likewise be centrally implicated in such “terrorist” acts and that is a legal characterisation that Ukraine presumably would not accept.

513. Ukraine has also not put before the Court a 2017 report on “Unlawful detentions and torture committed by the Ukrainian side in the armed conflict in Eastern Ukraine”, prepared by a source which Ukraine relies on.⁷⁴⁵

⁷⁴⁴ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, “Visit to Ukraine undertaken from 19 to 25 May and from 5 to 9 September 2016: observations and recommendations addressed to the State party”, UN Doc. CAT/OP/UKR/3, 18 May 2017, paras. 34-35 and 37 (emphasis added), available at <http://undocs.org/en/CAT/OP/UKR/3>.

⁷⁴⁵ Ukrainian Helsinki Human Rights Union, Kharkiv Human Rights Protection Group, Truth Hounds, “Unlawful detentions and torture committed by the Ukrainian side in the armed conflict in Eastern Ukraine”, 2017, available at <http://truth-hounds.org/wp-content/uploads/2017/11/ZVIT-engl.pdf>.

- a. The report observes that “as of today, the instances of the similar violations, committed by the Ukrainian side have not been analysed by the national human rights NGOs, and are mainly brought to light by international institutions [...] at the level of the Ukrainian government and civil society, the topic of war crimes committed by the Ukrainian side is swept under the carpet.”⁷⁴⁶
- b. Based on the cases of 23 detainees, the report concludes that “Detainees were subjected to torture, particularly during interrogation with the purpose of obtaining information about alleged possession of weapons and support of the separatists. Under the pressure of torture, detainees were forced to accept the responsibility for crimes they did not commit. [...] In some cases, detainees were used as human shields or were forced to work in conditions that threatened their lives.”⁷⁴⁷ The report characterises these acts as violations of international human rights law and IHL.

514. Secondly, such acts have generally been characterised by the OHCHR, OSCE and others as violations of IHL and human rights law, rather than “terrorist” acts (see further Table 1 in Appendix A).

- a. While Ukraine states that “The OHCHR and OSCE also repeatedly concluded that civilians were terrorized by DPR and LPR attacks”, it is able to put forward only two references (both by the OHCHR) to “terror” or “terrorize” across the multiple OHCHR reports spanning more than three years. Where the OHCHR has used those terms it has done so to describe the effect on the population, rather than as part of its legal characterisation of the relevant acts and, in context, the use of those terms certainly do not establish the requisite terrorist intent.
- b. Ukraine also relies on “OSCE interviews with internally-displaced persons from areas under DPR and LPR control reveal[ing] that many fled these regions because of ‘[d]irect experience or the witnessing of acts of violence [...] as well as the perception by people that these acts of violence could affect them also personally’”.⁷⁴⁸ However, that passage concerns not only the psychological effect of killings and ill-treatment but all acts during the armed conflict, including episodes of indiscriminate shelling (which Ukraine treats as separate “terrorist” acts) and acts not entailing serious bodily harm such as detention.
- c. The July 2014 statement of the UN High Commissioner for Human Rights which Ukraine relies on reports a written threat made by a DPR leader to “immerse [civilians] in horror”.⁷⁴⁹ However, unlike the IHL prohibition on spreading terror, the definition of

⁷⁴⁶ *Ibid.*, p. 3.

⁷⁴⁷ *Ibid.*, p. 2.

⁷⁴⁸ MU, para. 213, quoting OSCE, “Thematic Report: Internal Displacement in Ukraine” (12 August 2014), pp. 5-6 (Annex 316 to MU).

⁷⁴⁹ MU, para. 213, quoting OHCHR, “Intensified Fighting Putting at Risk Lives of People in Donetsk and Luhansk – Pillay”, 4 July 2014 (Annex 295 to MU).

a terrorist act under Article 2(1)(b) of the ICSFT does not encompass threats. Further, the High Commission characterised that threat as “a clear violation of international human rights law”, and not as a “terrorist” act.

515. Thirdly, Ukraine has failed to demonstrate that the only inference that could reasonably be drawn from the killing and ill-treatment of particular individuals is that the perpetrators acted with the specific purpose to intimidate “a population” at large.⁷⁵⁰ In particular, Ukraine has not explained how those killings and acts of ill-treatment (and the accompanying psychological effect) rises beyond so-called “ordinary crimes” so as to fall within the definition of “terrorist” acts.

⁷⁵⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, p. 67, para. 148.

CHAPTER VIII
UKRAINE HAS FAILED TO ESTABLISH THAT RUSSIA BREACHED ITS
OBLIGATIONS UNDER ARTICLES 8-10, 12 AND 18 OF THE ICSFT

I. Introduction

516. The present Chapter responds to Chapter 6 of Ukraine’s Memorial and addresses specifically the allegations that Russia did not comply with its obligations under Articles 8, 9, 10, 12 and 18 of the ICSFT. Obligations under each of those provisions will be addressed separately to demonstrate that Ukraine has failed to establish that Russia violated any of its obligations under the ICSFT.

517. As a preliminary point, Ukraine’s primary case under these provisions of the Convention is based on the fundamentally incorrect allegation that the provision of support to the DPR or LPR, or to the persons associated with them constitutes financing of terrorism under Article 2 of the ICSFT. First, and as shown above in Chapter II, the alleged instances of material support (such as weapons or training) for the DPR or LPR on which Ukraine almost exclusively relies do not amount to the provision of “funds” within the meaning of the ICSFT. Second, and as further demonstrated in Chapters VI and VII, Ukraine has failed to establish that any of the incidents it relies on with respect to the alleged actions of the DPR or LPR constitute acts of terrorism even with the benefit of evidence submitted in support of the Memorial. Nor had it established that there was financing of terrorism meeting the mental elements established in Article 2(1) of the ICSFT.

518. It is also important to bear in mind that, as will be demonstrated in more detail below, when sending communications concerning alleged financing of terrorism that – Ukraine now claims – Russia should have investigated or pursuant to which Russia should have frozen funds, Ukraine did not provide to Russia the evidence that it now attempts to rely on. Indeed, as part of the requests for cooperation at issue, Ukraine did not provide any evidence or facts, and not even such as submitted by Ukraine during the provisional measures stage of these proceedings (which in any case the Court found did not make a plausible case of terrorism financing).⁷⁵¹

519. It is, however, against the background of the information provided to the Russian Federation at the relevant time that Russia’s compliance with its obligations under the ICSFT must be assessed. If Ukraine had indeed considered at the relevant time that there were incidents of terrorism financing, it ought to have provided the relevant available information and evidence at its disposal so as to enable the Russian Federation to assess what action (if any) should be taken under the ICSFT, rather than providing such information *ex post facto* and only after having commenced the present proceedings.

⁷⁵¹ Order of 19 April 2017, para. 75.

II. Russia Has Complied with Its Obligations under Article 8 of the ICSFT

520. Ukraine asserts that Russia has violated Article 8 of the ICSFT by failing to freeze funds of certain individuals that Ukraine alleged had provided funding to the DPR or LPR or persons associated with them. However, Article 8 applies solely to funds used or allocated to be used for the commission of an offence under Article 2 of the ICSFT. Ukraine has failed to establish that any of the funds it identifies fall within this category. This section will first address the proper interpretation of Article 8 before then addressing Ukraine's specific allegations.

A. THE PROPER SCOPE OF THE OBLIGATION UNDER ARTICLE 8 OF THE ICSFT

521. Article 8(1) of the ICSFT provides that

“Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the identification, detection and freezing or seizure of any funds *used or allocated for the purpose of committing the offences set forth in article 2* as well as the proceeds derived from such offences, for purposes of possible forfeiture.”⁷⁵²

522. For this provision to apply, the funds in question must therefore be “used or allocated for the purpose of committing the offences set forth in article 2”, i.e. terrorism financing falling within the scope of Article 2 of the ICSFT. According to the ordinary meaning of the words used in Article 8(1) of the ICSFT, it does not suffice for another State Party merely to allege that the funds are allocated for such purpose – under the Convention, the nature of the use or allocation of the funds for terroristic purposes within the meaning of Article 2 of the ICSFT must be proven.

523. This interpretation – that Article 8 of the ICSFT requires State Parties to freeze funds provided it has been verified (not merely alleged) that the funds are used or allocated for financing of terrorism falling within Article 2 of the ICSFT – also follows from the context of the provision and the nature of the obligation imposed by Article 8 of the ICSFT.

- a. Unlike other provisions of the ICSFT, such as Articles 9 (“[...] a person who has committed or *who is alleged to have committed* [...]”)⁷⁵³ or 10 (“*alleged* offender”),⁷⁵⁴ Article 8 of the ICSFT does not use the word “alleged” or a similar expression to qualify the “use” or “allocation” of the funds. Had the State Parties intended for the provision to apply where it is merely “alleged” that the funds are to be used for a terrorist purpose, they would have said so.

⁷⁵² Emphasis added.

⁷⁵³ Emphasis added.

⁷⁵⁴ Emphasis added.

- b. Freezing or seizure of assets constitutes a significant interference with the property rights of a person which are protected under both international and domestic law and such measures thus may not be ordered lightly on the basis of a mere allegation.

524. Ukraine contends that Article 8 of the ICSFT already applies where there is a “reasonable suspicion” or “reasonable basis to believe” that the funds are used or allocated for terrorism financing. Ukraine however offers no support for this interpretation.⁷⁵⁵ The two external documents it relies on do not, on a proper reading, apply to the interpretation of the ICSFT and provide no support to Ukraine’s position.

- a. Ukraine relies on a 2002 letter of Mr Wainwright, Expert Advisor to the Chairman of the UN Counter-Terrorism Committee. However, Mr Wainwright’s point is not that the State Parties of the ICSFT are required as a matter of treaty law to freeze funds once there is a reasonable suspicion that the funds are used for terrorism financing. Rather he suggests that it is “appropriate” for States to consider adopting laws of general application allowing the freezing of funds where there is reasonable suspicion. He offers no argument however to support a proposition that the ICSFT obliges State Parties to freeze funds where only a reasonable suspicion exists.⁷⁵⁶
- b. Ukraine also relies on FATF Special Recommendation III: Freezing and Confiscating Terrorism Assets. However, in its interpretative note to the recommendation FATF states that the recommendation “is intended, with regard to [the requirement to freeze funds] to *complement* the obligations in the context of the United Nations Security Council [...] resolutions [...]”.⁷⁵⁷ The recommendation does not state that it purports to implement obligations of States under relevant Security Council obligations and even less so under the ICSFT when suggesting the “reasonable basis to believe” standard. To the contrary, when discussing the States’ obligations under the ICSFT, the interpretative note to the recommendation refers to the freezing of funds that countries “identify, detect, and *verify*, in accordance with applicable legal principles, as being used by, allocated for, or being made available to terrorists [...]”.⁷⁵⁸ In other words, FATF does not appear to dispute that, under the ICSFT, States are only required to freeze funds once it has been verified that they are to be used or intended to be used for terrorism or terrorism financing.

⁷⁵⁵ MU, para. 320.

⁷⁵⁶ Letter from J.W. Wainwright, Expert Adviser to the Chairman of the Counter-Terrorism Committee, 12 November 2002 (Annex 281 to MU).

⁷⁵⁷ FATF, Special Recommendation III: Freezing and Confiscating Terrorist Assets, Text of the Special Recommendation and Interpretative Note, October 2001, para. 3, emphasis added (Annex 360 to MU).

⁷⁵⁸ FATF, Special Recommendation III: Freezing and Confiscating Terrorist Assets, Text of the Special Recommendation and Interpretative Note, October 2001, para. 8(c), emphasis added (Annex 360 to MU).

B. UKRAINE HAS FAILED TO ESTABLISH THAT RUSSIA BREACHED ITS OBLIGATIONS UNDER ARTICLE 8 OF THE ICSFT

525. Ukraine claims that Russia violated its obligations by failing to freeze certain accounts Ukraine alleges were used to finance terrorism by providing funds to certain entities associated with the DPR and LPR.⁷⁵⁹ This claim must fail. In the relevant communications, Ukraine did not provide any evidence, let alone establish, that these funds were used or allocated to be used for commission of offences under Article 2, let alone did Ukraine establish this.

526. Even if one were to accept, for the sake of argument, Ukraine's standard for the applicability of obligations under Article 8 of the ICSFT (i.e. that it would suffice that there exists a "reasonable suspicion" that funds are used or intended to be used for terrorism financing under Article 2 of the ICSFT), Ukraine has still failed to show that such reasonable suspicion existed with respect to any of the instances of alleged breaches of Article 8 of the ICSFT.

527. In its Memorial, Ukraine invokes five instances where it provided information to Russia concerning alleged use of certain bank accounts and other accounts to finance terrorism.⁷⁶⁰ In each of these instances, Ukraine provided no information whatsoever as to: (i) how the alleged provision of financing to the DPR or LPR or to the persons associated with them constitutes financing of terrorism under Article 2 of the ICSFT, or (ii) how the alleged provision of financing to the specified individuals constitutes the financing of the DRP or LPR.

528. Below, Russia addresses each of the five instances that Ukraine relies on.

529. First, Ukraine claims that certain individuals (Mr Melkov, Ms Pyleska, Ms Kutyumova, Mr Yaralov and Ms Ovsyannikova) paid 150 million rubles to a Ms Saralpova, and that these funds should have been frozen by the Russian authorities.⁷⁶¹

- a. Ukraine relies on the Note Verbale of 12 August 2014 which, however, fails to provide any evidence that the unidentified "terrorist organizations" engage in acts of terrorism falling within Article 2 of the ICSFT.⁷⁶² The only evidence Ukraine relies on to establish that the specific funds were allegedly used to finance terrorism is the claim that such "information [is] available to the Ukrainian side".

⁷⁵⁹ MU, paras. 188-189; Note Verbale No. 72/22-620-2087 of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, 12 August 2014 (Annex 369 to MU); Note Verbale No. 72/22-620-2221 of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, 29 August 2014 (Annex 371 to MU).

⁷⁶⁰ MU, paras. 188-189.

⁷⁶¹ MU, para. 188; Note Verbale No. 72/22-620-2087 of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, 12 August 2014 (Annex 369 to MU).

⁷⁶² Note Verbale No. 72/22-620-2087 of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, 12 August 2014 (Annex 369 to MU).

- b. Moreover, according to the Note Verbale itself, the sum in question was transferred to accounts in two Ukrainian banks⁷⁶³ between 1 March 2013 and 1 February 2014, i.e. before the emergence of the DPR and LPR (in April 2014) or the commission of any of the acts Ukraine now claims to constitute acts of terrorism (in July 2014 – 2017).⁷⁶⁴ Ukraine offers no explanation whatsoever why Russian authorities should have frozen these funds in 2013 or early 2014, at the time of the alleged transfers.
- c. Finally, and again according to the Note Verbale, the funds were withdrawn from the accounts in the Ukrainian banks by Ms Saralpova, i.e. they were located in Ukraine.⁷⁶⁵ Notably, Ukraine did not assert that these funds had been returned to Russia after their transfer to Ukraine by 1 February 2014. Hence, Russia had no opportunity or obligation arising under the ICSFT to freeze them.

530. Second, on 12 August 2014, Ukraine notified Russia that an account with Sberbank of a Mr Sergey Igorevich Khyzhnyak was used by the “Liberation Movement Russian Sector – Ukraine”. Ukraine claims that Russia violated its obligations under Article 8 of the ICSFT by failing to freeze the account.⁷⁶⁶ However, the relevant Note Verbale contains only an unsupported assertion that the account is used “for the financing of terrorist organizations in the territory of Ukraine”,⁷⁶⁷ without providing any explanation what organizations are referred to, why they are “terrorist organizations”, or how the account is used to engage in an offence falling under Article 2 of the ICSFT.

531. Third, on 29 August 2014, Ukraine notified Russia that a Ms Tatiana Mikhailovna Azarova used her accounts with PJSC “Subsidiary Bank of Sberbank of Russia” (Ukraine) and, apparently, an account at OJSC “Sberbank of Russia” (the Russian Federation) “to raise funds used to finance terrorist activities on the territory of Ukraine”.⁷⁶⁸ Ukraine again claims that by failing to freeze these accounts Russia violated its obligations under Article 8 of the ICSFT. However, Ukraine does not explain how Russia was required, or indeed able, to freeze accounts or funds in bank accounts with PJSC “Subsidiary Bank of Sberbank of Russia” (a subsidiary of a Russian bank – Sberbank) which is located and operating in Ukraine. In any event, Ukraine failed to provide any evidence concerning the alleged terrorism financing perpetrated using these accounts.

⁷⁶³ In the Memorial Ukraine claims that the accounts of Ms Saralpova were “Russian banks accounts” (MU, para. 188). Russia understands this to be a reference to accounts denominated in Russian rubles with Ukrainian banks, since both banks identified in the Memorial and the note – Kredyt Dnipro and Terra bank – are Ukrainian banks.

⁷⁶⁴ Note Verbale No. 72/22-620-2087 of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, 12 August 2014 (Annex 369 to MU).

⁷⁶⁵ Note Verbale No. 72/22-620-2087 of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, 12 August 2014 (Annex 369 to MU).

⁷⁶⁶ MU, paras. 188-189.

⁷⁶⁷ Note Verbale No. 72/22-620-2087 of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, 12 August 2014 (Annex 369 to MU).

⁷⁶⁸ Note Verbale No. 72/22-620-2221 of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, 29 August 2014 (Annex 371 to MU).

532. Fourth, on 29 August 2014, Ukraine notified Russia that a Mr Andrey Gennadievich Lazarchuk used his bank account with OJSC Sberbank of Russia for “financing of terrorist activities”.⁷⁶⁹ As with other incidents relied on by Ukraine, no information or evidence was provided to Russia concerning the alleged terrorist activities or the use of the account for terrorism financing.

533. Finally, Ukraine notified Russia of a number of bank accounts with PJSC “Subsidiary Bank of Sberbank of Russia” (Ukraine), OJSC Sberbank of Russia and electronic wallets with JSC NKO Yandex Money that Ukraine alleged were associated with terrorism financing.⁷⁷⁰ Ukraine again fails to explain how Russia was required to freeze accounts with a bank registered and located in Ukraine – PJSC “Subsidiary Bank of Sberbank of Russia”. More fundamentally, as with the other incidents relied on by Ukraine, no information or evidence was provided concerning the alleged terrorist activities or the use of accounts for terrorism financing.

534. Remarkably, in several instances Ukraine thus requested Russia to freeze funds held in bank accounts with banks registered and located in Ukraine.⁷⁷¹ If Ukraine considered that these funds were used for terrorism financing, Ukrainian authorities should have frozen the funds themselves. Yet, apparently, they did not: otherwise Ukraine’s requests would presumably have been redundant. It is of note that Ukraine has not submitted any documents confirming that the funds in these accounts were frozen by the Ukrainian authorities.

535. In summary, Ukraine has failed to establish that the bank accounts and funds it identified were used or allocated to be used for commission of an offence under Article 2 of the ICSFT (or that even a reasonable suspicion existed in this respect). Accordingly, Russia had no obligation under Article 8 of the ICSFT to freeze these funds or accounts.

III. Russia Has Complied with Its Obligations under Article 9 of the ICSFT

536. The Russian Federation has at all times complied with its obligations under Article 9 of the ICSFT. This section explains the scope of obligations under Article 9 of the ICSFT before turning to Ukraine’s specific allegations of breach of this provision.

A. CORRECT INTERPRETATION OF ARTICLE 9 OF THE ICSFT

537. Article 9 (1) of the ICSFT provides that

“Upon receiving information that a person who has committed or who is alleged to have committed an offence set forth in article 2 may be present in its territory, the State Party

⁷⁶⁹ Note Verbale No. 72/22-620-2221 of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, 29 August 2014 (Annex 371 to MU).

⁷⁷⁰ Note Verbale No. 72/22-620-2221 of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, 29 August 2014 (Annex 371 to MU).

⁷⁷¹ See paras. 533, 535 above.

concerned shall take such measures as may be necessary under its domestic law to investigate the facts contained in the information”.

538. According to the ordinary meaning of the words used in Article 9(1) of the ICSFT, it contains an obligation qualified by domestic law to investigate the “facts contained in the information” provided to the State where the information discloses that a person “has committed [...] or is alleged to have committed an offence set forth in article 2” and information that the person “may be present in its territory”.

539. Several conclusions follow from the ordinary meaning of the terms of this provision read in their context.

540. First, as an obvious preliminary matter, the information provided to the State must identify a person who may be present within the requested State’s territory.

- a. Under Article 9 of the ICSFT the State has an obligation to investigate where it receives information that a “person” (“*l’auteur ou l’auteur présumé*” in French) may be present in its territory. The obligation does not apply generally to any allegations of terrorism financing from the territory of the State. Rather a specific person must be identified and this person must be specifically alleged to have committed an offence under Article 2 of the ICSFT and said to be present in the territory of the requested State.
- b. This is consistent with the purpose of the Convention to promote international cooperation in the suppression of terrorism financing⁷⁷² and, in particular, the application of *aut dedere, aut judicare* principle. Indeed, Article 9 of the ICSFT is seen as a precursor to the application of this principle, i.e. before deciding whether to prosecute or extradite an alleged offender the State must undertake a preliminary investigation.⁷⁷³ It follows that this provision applies only where a specific person is identified.

541. Second, the information provided must be sufficiently detailed to serve as a basis for an investigation and must, accordingly, give rise to at least a reasonable suspicion that an offence under Article 2 of the ICSFT has been committed.

542. The necessary threshold therefore is whether the information provided contains facts that the person “is alleged to have committed an offence” of terrorism financing under Article 2(1) of the ICSFT, i.e. the provision/collection of funds with the requisite intention or knowledge that the funds were to be used to commit a terrorist act as defined, including the requisite actual intention and

⁷⁷² ICSFT, Preamble, paragraph 13.

⁷⁷³ United Nations Office on Drugs and Crime, Guide for the Legislative Incorporation and Implementation of the Universal Anti-Terrorism Instruments, 2006, p. 68, para. 351; Suppressing the Financing of Terrorism: A Handbook of Legislative Drafting, IMF Legal Department, 2003, p. 11.

terrorist purpose. Contrary to Ukraine's contention,⁷⁷⁴ it is not enough for the requesting State merely to refer to the ICSFT or to assert that an offence of terrorism financing has been committed.

543. The information provided must give rise to a reasonable suspicion.

- a. Ukraine does not clearly define the standard it proposes to apply to determine whether the State's obligation under Article 9 of the ICSFT is engaged. Ukraine accepts however, that there must be a "reason to believe [that a person] may have committed an offense under Article 2 of the ICSFT",⁷⁷⁵ which appears consistent with the reasonable suspicion standard.
- b. Any broader reading of Article 9 of the ICSFT would mean that States would need to investigate each and every allegation of terrorism financing no matter how unfounded. This would drain important law enforcement resources of States. Furthermore, such unfounded investigations, based on mere assertions by the requesting State, would constitute inappropriate interferences with the human rights of those whose activities would be reviewed by the investigating authorities.
- c. Indeed, as a practical matter and as noted in the OSCE Practical Manual for Law Enforcement Officers on Human Rights in Counter-Terrorism Investigation,
*"On the basis of available information, a decision is taken whether to start an investigation. This decision must be based on reasonable suspicion that a terrorism-related offence, as defined in domestic law, has been committed".*⁷⁷⁶
- d. Moreover, when dealing with the State's obligation to cooperate in conducting inquiries concerning the identities and the whereabouts of persons alleged to be involved in offences under Article 2 of the ICSFT Article 18 ICSFT states that such cooperation is to be provided only where a "reasonable suspicion" exists. Interpreted in the context of Article 18, Article 9 of the ICSFT which imposes on the requested State an obligation to conduct investigations that may be more extensive and intrusive than merely identifying the whereabouts of a person cannot be engaged where the information provided to the requested State does not give rise to a reasonable suspicion that an offence under Article 2 of the ICSFT has indeed been committed.

⁷⁷⁴ MU, para. 324.

⁷⁷⁵ MU, para. 323.

⁷⁷⁶ OSCE, Human Rights in Counter-Terrorism Investigations: A Practical Manual for Law Enforcement Officers, p. 46 (emphasis added).

B. RUSSIA HAS COMPLIED WITH ITS OBLIGATIONS UNDER ARTICLE 9 OF THE ICSFT WITH RESPECT TO THE SPECIFIC INCIDENTS RELIED ON BY UKRAINE

544. In its Memorial Ukraine identifies a number of instances where Russia has allegedly failed to investigate information concerning alleged financing of terrorism.⁷⁷⁷ The specific incidents that Ukraine relied on concern, or appear to concern, the alleged financing of the DPR or of the LPR. For example, with respect to Mr Zhuchkovsky⁷⁷⁸ Ukraine claims that he “conducted acts aimed at provision and collection of funds with the intention that they should be used [...] to carry out terrorist activity of DPR in the territory of Ukraine”.⁷⁷⁹

545. In an attempt to demonstrate that Ukraine provided information that should have led Russia to undertake an investigation under Article 9, Ukraine relies on three Notes Verbales sent between August and November 2014.⁷⁸⁰ These documents are of no assistance to Ukraine, since they do not contain any “facts” alleging the commission of the offence of terrorism financing under Article 2 of the ICSFT. As explained in greater detail below:

- a. they do not contain any facts concerning the collection or provision of funds or evidencing the requisite intent or knowledge to provide funds for the purpose of financing terrorism;
- b. they do not provide any facts concerning the specific recipients of the funds that allegedly engage in terrorism, or the specific acts of terrorism allegedly committed by the recipients which the alleged financier intended or knew would thereby be funded;
- c. they do not contain any facts giving rise to a reasonable suspicion that the DPR or LPR – the allegedly funded entities – engage in acts of terrorism.

546. More specifically,

- a. In the Note Verbale of 12 August 2014, Ukraine dedicates just one paragraph to a mere assertion that the DPR and the LPR “intentionally and consciously carry out in the territory of Ukraine terrorist acts aimed at intimidation of population, killing of civilian population, causing grave bodily injury to civilian population, seizure of hostages and

⁷⁷⁷ MU, para. 190. Ukraine claims that it “asked Russia to investigate more than 50 named individuals” without specifying these individuals (MU, para. 325). Russia will wait for particulars of this allegation, including the identification of individuals Ukraine claims Russia should have investigated, before responding to it in detail.

⁷⁷⁸ MU, para. 190. In the relevant Note Verbale of 12 August 2014 No. 72/22-620-2087, Annex 369 to MU, Ukraine referred to a “Mr Zhukovsky” (“Жуковский”) (a different name) but Russia understands that Ukraine refers to Mr Zhuchkovsky (“Жучковский”).

⁷⁷⁹ Note Verbale No. 72/22-620-2087 of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, 12 August 2014 (Annex 369 to MU).

⁷⁸⁰ MU, para. 190; Note Verbale No. 72/22-620-2087 of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, 12 August 2014 (Annex 369 to MU); Note Verbale No. 72/22-620-2221 of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, 29 August 2014 (Annex 371 to MU); Note Verbale No. 72/22-620-2717 of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, 3 November 2014 (Annex 374 to MU).

administrative buildings”.⁷⁸¹ There is no reference to any specific events that Ukraine claimed to constitute terrorist acts within the meaning of the ICSFT, nor to any facts that would have enabled the Russian authorities to assess whether they give rise to the necessary reasonable suspicion of the financing of terrorism.

- b. In the Note Verbale of 29 August 2014 Ukraine repeated the very same unspecific allegations almost verbatim.⁷⁸²
- c. In its Note Verbale of 2 November 2014, Ukraine once again repeated the same allegations. However, Ukraine added two examples of alleged “terrorist attacks” by the DPR and LPR in Ukraine, namely the shelling of Ukraine’s National Guard checkpoints near Bakhmutka and the use of “magnetic resonance arms” near Debaltsevo.⁷⁸³ Notably, these alleged instances of deployment of various weapons appear – from Ukraine’s own description – to have taken place in the context of the armed conflict. Ukraine did not assert that the persons alleged to be responsible acted with the requisite intention to cause death or serious injury to civilians and/or acted with the requisite terrorist purpose under Article 2 of the ICSFT. Russia also notes that these specific episodes are not even included among those acts which Ukraine now puts before the Court as part of its case that the DPR/LPR have committed terrorist acts.

547. It is further important to recall that these assertions were made by Ukraine in a context where (as was already set out in more detail above):

- a. no international organisation or State had (or have now) characterised the DPR or LPR or their activities as “terrorism”;⁷⁸⁴
- b. Ukraine has been using the reference to “terrorism” to justify an “Anti-Terrorist Operation” to bypass its own domestic rules on the deployment of its armed forces; and
- c. the relevant communications were sent, and the alleged financing took place, even before any of the acts of shelling that Ukraine relies on as acts of terrorism allegedly carried out by the DPR/LPR (in January 2015 – February 2017).

548. Moreover, Ukraine now appears to accept that its characterisation of the DPR and LPR as allegedly constituting “terrorist organisations” does not assist in deciding whether an offence under Article 2(1) of the ICSFT was committed. Rather, Ukraine itself now accepts that the inquiry must

⁷⁸¹ Note Verbale No. 72/22-620-2087 of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, 12 August 2014 (Annex 369 to MU).

⁷⁸² Note Verbale No. 72/22-620-2221 of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, 29 August 2014 (Annex 371 to MU).

⁷⁸³ Note Verbale No. 72/22-620-2717 of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, 3 November 2014 (Annex 374 to MU).

⁷⁸⁴ See paras. 10, 356 above.

be whether the funds relate to terrorist acts.⁷⁸⁵ However, in the above communications, Ukraine had provided no facts or information about any acts of terrorism falling under Article 2(1) of the ICSFT that were allegedly financed by the persons Ukraine claims the Russian authorities should have investigated.

549. In conclusion, the information provided by Ukraine was nowhere near sufficient for the purposes of Articles 2(1) and 9 of the ICSFT. None of the allegations communicated by Ukraine gave rise to a reasonable suspicion that a person located in the territory of the Russian Federation had committed an offence under Article 2(1) of the ICSFT. The Russian Federation was therefore under no duty to investigate. Accordingly, Ukraine has failed to establish that Russia's obligations under Article 9 of the ICSFT were engaged, much less that those obligations have been breached.

IV. Russia Complied with Its Obligations under Article 10 of the ICSFT

550. Ukraine has likewise failed to establish that Russia violated its obligations under Article 10 of the ICSFT. Russia will first address the correct interpretation of Article 10 of the ICSFT, before then turning to Ukraine's specific claims.

A. CORRECT INTERPRETATION OF ARTICLE 10 OF THE ICSFT

551. Article 10(1) of the ICSFT states:

“The State Party in the territory of which the alleged offender is present shall, in cases to which article 7 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.”

552. Article 7 of the ICSFT, in turn, provides that

“Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2”.

This provision then defines the circumstances in which the State Party concerned shall take measures to establish its jurisdiction and these where the State may establish its jurisdiction.

553. First, pursuant to the ordinary meaning of the words, Article 10(1) of the ICSFT applies only where an “alleged offender” (i.e., a person who is alleged to have committed an offence of terrorism financing as defined in Article 2) is present in the State Party's territory. As in the case of Article 9 of the ICSFT, the obligation under Article 10 of the ICSFT is only triggered where, properly

⁷⁸⁵ WSU, paras. 192, 195.

understood, the information provided describes an offence of terrorism financing falling within Article 2 of the ICSFT.

554. Second, Article 10 is a reflection of the *aut dedere, aut judicare* principle.⁷⁸⁶ It follows that there is no absolute obligation; rather the prosecuting authorities may decide that there is no sufficient basis for prosecution.⁷⁸⁷ This would notably be the case where “there was not sufficient evidence to prosecute, at least at the time when the request to prosecute was made”.⁷⁸⁸

555. Finally, in the same way as Article 9 of the ICSFT,⁷⁸⁹ Article 10 of the ICSFT requires a specific person, the “alleged offender”, to be identified before the case is submitted to prosecution.

B. UKRAINE HAS FAILED TO ESTABLISH THAT RUSSIA VIOLATED ITS OBLIGATIONS UNDER ARTICLE 10 OF THE ICSFT

556. As explained in paragraphs 544-549 above, Ukraine has failed to establish that even a reasonable suspicion existed that the persons Ukraine identified had engaged in terrorism financing under Article 9 of the ICSFT. Accordingly, Russia had no obligation under Article 10 to submit the case for prosecution or to conclude that there was a basis for the Russian authorities to proceed with the prosecution.

V. Russia Has Complied with Its Obligations under Article 12 of the ICSFT

557. In its Memorial Ukraine refers to twelve requests for mutual legal assistance (“MLA requests”) that Ukraine claims Russia did not handle in accordance with its obligations arising under the ICSFT.⁷⁹⁰

558. In this section, the Russian Federation will first outline the proper interpretation of Article 12 of the ICSFT before explaining how Ukraine has failed to establish that Russia violated its obligations under this provision.

⁷⁸⁶ United Nations Office on Drugs and Crime, Guide for the Legislative Incorporation and Implementation of the Universal Anti-Terrorism Instruments, 2006, p. 68, para. 351; Suppressing the Financing of Terrorism: A Handbook of Legislative Drafting, IMF Legal Department, 2003, p. 11.

⁷⁸⁷ The Obligation to Extradite or Prosecute (*aut dedere aut judicare*), Final Report of the International Law Commission, 2014, *Yearbook of the International Law Commission*, 2014, vol. II, p. 10.

⁷⁸⁸ Committee against Torture, Suleymane Guengueng et al. v Senegal, Communication No. 181/2001, CAT/C/36/D/181/2001, 19 May 2006, para. 9.8.

⁷⁸⁹ See para. 542 above.

⁷⁹⁰ In the Memorial Ukraine claims that it requested mutual legal assistance “[in] more than twenty requests under mutual legal assistance treaties” (MU, para. 193), however, Ukraine only identifies 12 MLA requests. Russia will await further particulars concerning the other requests Ukraine alleges were not handled in accordance with Russia’s obligations under the ICSFT before responding to that allegation.

A. THE CORRECT INTERPRETATION OF ARTICLE 12 OF THE ICSFT

559. Under Article 12(1) of the ICSFT

“States Parties shall afford one another the greatest measure of assistance in connection with criminal investigations or criminal or extradition proceedings in respect of the offences set forth in article 2, including assistance in obtaining evidence in their possession necessary for the proceedings.”

560. This provision is supplemented by Article 12(5) of the ICSFT which provides

“States Parties shall carry out their obligations under paragraphs 1 and 2 in conformity with any treaties or other arrangements on mutual legal assistance or information exchange that may exist between them. In the absence of such treaties or arrangements, States Parties shall afford one another assistance in accordance with their domestic law.”

561. As follows from the ordinary meaning of the words of Article 12, State Parties are required to afford each other the greatest measure of assistance provided several conditions are satisfied:

- a. First, the request must relate to “criminal investigations or criminal or extradition proceedings”. If the investigation and criminal proceedings have already been concluded, Article 12 of the ICSFT does not apply to mutual legal assistance requests.
- b. Second, the investigation or proceedings must be “in respect of the offences set forth in Article 2”. It follows that it is insufficient for the requesting State simply to assert that a person is involved in terrorism financing. Consistent with the scope of Articles 9 and 10 of the ICSFT, Article 12 is engaged only provided the relevant investigation or proceedings are based on an allegation that, properly understood, amounts to the offence of terrorism financing as defined in Article 2(1) of the ICSFT;
- c. Finally, a State may deny a request to provide mutual legal assistance on one of the grounds provided in the applicable treaty, if such grounds have not been rendered inapplicable by the ICSFT (e.g. denial cannot be based on the concept of bank secrecy or the notion of political offence).

B. UKRAINE HAS FAILED TO ESTABLISH THAT RUSSIA VIOLATED ITS OBLIGATIONS WITH RESPECT TO ANY OF THE MLA REQUESTS RELIED ON

562. In its Memorial, Ukraine concentrates on certain alleged deficiencies in Russia’s provision of mutual legal assistance. However, it fails to address the most important (and logically prior) question that must be answered before even coming to the matters Ukraine deals with, namely whether Ukraine’s MLA requests in fact concerned assistance with respect to investigations into offences covered by Article 2 of the ICSFT.

563. Fundamentally, Ukraine’s claim based on Article 12 of the ICSFT fails because the MLA requests it relies on do not concern financing of terrorism within the meaning of Article 2 of the

ICSFT. In any event, the way the Russian authorities handled the MLA requests was in compliance with the ICSFT (even if the ICSFT had somehow applied to them in the first place).

1. Ukraine's MLA Requests Do Not Relate to Investigations of Terrorism Financing under Article 2 of the ICSFT

564. For Article 12 of the ICSFT to apply, the relevant investigation or proceedings must relate to an offence under Article 2 of the ICSFT.⁷⁹¹ The MLA requests that Ukraine refers to do not however relate to such offences.

565. First, all twelve MLA requests⁷⁹² that Ukraine relies on concern alleged interaction with, or the financing of the DPR or the LPR. Yet, as established above,⁷⁹³ the provision of financing to the DPR or LPR does not constitute an offence falling within Article 2 of the ICSFT. Therefore, Article 12 of the ICSFT does not apply to these requests.

566. Second, none of the twelve MLA requests contains a single reference to the ICSFT or to the investigation of an offence under Article 2 of the ICSFT.

- a. This is particularly notable since all the requests expressly list the treaties that the Ukrainian authorities invoke. For example, in the request dated 30 September 2014 the Central Investigative Directorate of the Security Service of Ukraine “invokes the Convention on Legal Assistance and Legal Relations in Civil, Family, and Criminal Matters of January 23, 1993”.⁷⁹⁴ In the request dated 28 July 2015, the General Prosecutor’s Office of Ukraine submitted a request for mutual legal assistance “on the basis of the 1993 Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters, and the 1959 European Convention on Mutual Legal Assistance in Criminal Matters”.⁷⁹⁵
- b. Having made clear at the time of making the requests the legal instruments relied on, Ukraine cannot credibly change course and invoke the ICSFT. When invoking a State’s obligation under international law the State must identify either in general terms or specifically the source of the obligation. Indeed, the choice may be deliberate where, for example, the State believes that the request does not satisfy the requirements of a specific convention or rule of customary international law but may satisfy the requirements of another one. Here, the Ukrainian authorities, when making the request, chose to rely on

⁷⁹¹ See para. 563 above.

⁷⁹² Annexes 400, 401, 404, 405, 419-423, 427, 431, 433 to MU.

⁷⁹³ See Chapters VI-VII.

⁷⁹⁴ Ukrainian Request for Mutual Legal Assistance Concerning Case No. 220140500000000015 of 30 September 2014 (Annex 401 to MU).

⁷⁹⁵ Ukrainian Request for Mutual Legal Assistance Concerning Case No. 42014000000000457 of 28 July 2015 (Annex 423 to MU).

the 1993 Legal Assistance Convention and the 1959 European Convention rather than the ICSFT. Hence, the MLA requests Ukraine relies on do not fall under the ICSFT.

567. Third, eleven of the twelve MLA requests that Ukraine relies on do not even concern investigations into alleged terrorism *financing* under Ukrainian law (the twelfth request is addressed separately below). For example,

- a. according to Ukraine's MLA request of 11 November 2014, Mr Sergey Mironov was investigated for allegedly providing financing to "an extralegal armed group" (Article 260 of the Criminal Code of Ukraine),⁷⁹⁶ not for the financing of terrorism, which constitutes a separate criminal offence falling under Article 258-5 of the Ukrainian Criminal Code;
- b. Mr Gennady Zyuganov was investigated in relation to allegations of committing the same offence;⁷⁹⁷
- c. according to Ukraine's MLA request dated 3 July 2015, Mr Igor Bezler was investigated for allegedly committing an act of terrorism (Article 258 of the Ukrainian Criminal Code), creating a terrorist organization (Article 258-3 of the Ukrainian Criminal Code) and organizing mass riots (Article 294 of the Ukrainian Criminal Code) but no investigation into allegations of terrorism financing is relied on in the MLA request;⁷⁹⁸
- d. another MLA request arose out of the investigation of Mr Alexander Boroday concerning allegations that he was involved in the creation of a terrorist organization, as well in the assault against the territorial integrity of Ukraine and the attempt to overthrow the government by violent means (crimes enshrined in Articles 109, 110 and 258-3 of the Ukrainian Criminal Code);⁷⁹⁹
- e. several of Ukraine's MLA requests concern Russian military servicemen investigated for the alleged commission of terrorist acts (Article 258 of the Ukrainian Criminal Code), the participation in a terrorist organization (Article 258-3 of the Ukrainian Criminal Code), the planning and conduct of aggressive war (Article 437 of the Ukrainian

⁷⁹⁶ Ukrainian Request for Mutual Legal Assistance Concerning Case No. 1201400000000293 of 11 November 2014 (Annex 404 to MU).

⁷⁹⁷ Ukrainian Request for Mutual Legal Assistance Concerning Case No. 1201400000000291 of 3 December 2014 (Annex 405 to MU).

⁷⁹⁸ Ukrainian Request for Mutual Legal Assistance Concerning Case No. 2201400000000283 of 3 July 2015 (Annex 421 to MU). Similar allegations were investigated with respect to Mr Igor Girkin (Ukrainian Request for Mutual Legal Assistance Concerning Case No. 2201400000000286 of 3 July 2015, Annex 422 to MU).

⁷⁹⁹ Ukrainian Request for Mutual Legal Assistance Concerning Case No. 2201400000000245 of 3 July 2015 (Annex 420 to MU).

Criminal Code) and the violation of laws and customs of war (Article 438 of the Ukrainian Criminal Code).⁸⁰⁰

568. Ukraine relies on only one request, issued on 14 November 2017 – with respect to Mr Gleb Kornilov – where the investigations specifically concerned allegations of terrorism financing under Ukrainian domestic law (Article 258-5 of the Ukrainian Criminal Code).⁸⁰¹ However, Article 12 of the ICSFT does not apply to this request either, since the offence described in the request does not fall under Article 2 of the ICSFT. According to the request, Mr Kornilov is investigated for allegedly “committing acts aimed at delivering supplies to representatives of [terrorist organisations “Donetsk People’s Republic” and “Luhansk People’s Republic]”; the request does not refer to the ICSFT, and it does not identify any alleged terrorist acts falling under Article 2 of the ICSFT that Mr Kornilov is alleged to have financed.

569. In summary, Article 12 of the ICSFT does not apply to the MLA requests that Ukraine has invoked and, for this reason, Ukraine has failed to establish that Russia violated its obligations under the ICSFT.

2. *In Any Event, Russian Authorities Handled Ukraine’s MLA Requests Consistently with Applicable Legal Assistance Treaties*

570. Russia notes that, under Article 12(5) of the ICSFT, requests for mutual legal assistance must be handled in accordance with applicable legal assistance treaties. The requesting State must comply with the requirements these establish. Ukraine does not appear to dispute this general proposition. Yet in the instances that Ukraine invokes, Russian authorities rejected or postponed the performance of Ukraine’s requests based on the failure of the Ukrainian authorities to comply with the applicable treaty requirements. For example,

- a. Russian authorities requested Ukrainian authorities to supply a translation into Russian of documents communicated to support the characterisation of the LPR as a terrorist organisation.⁸⁰² Ukraine claims that this response acknowledged that Ukraine’s request “fulfilled Ukraine’s obligations”,⁸⁰³ yet no such acknowledgment can be found in the document Ukraine relies on. To the contrary, Article 17 of the 1993 Legal Assistance Convention expressly requires foreign language documents to be accompanied with a translation into Russian. Notably, the Ukrainian authorities generally accepted that the

⁸⁰⁰ E.g. Ukrainian Request for Mutual Legal Assistance Concerning Case No. 4201400000000457 of 28 July 2015 (Annex 423 to MU); Ukrainian Request for Mutual Legal Assistance Concerning Case No. 4201400000000457 of 15 September 2015 (Annex 427 to MU); Ukrainian Request for Mutual Legal Assistance Concerning Case No. 2201505000000021 of 23 March 2017 (Annex 431 to MU).

⁸⁰¹ Ukrainian Request for Legal Assistance Concerning Case No. 2201500000000001 of 14 November 2017 (Annex 433 to MU).

⁸⁰² Letter of the Prosecutor General’s Office of the Russian Federation of 14 September 2016 No. 82/1-759-16 (Annex 429 to MU).

⁸⁰³ MU, para. 328.

documents submitted must be in Russian or translated into Russian. Indeed, all the MLA requests that Ukraine relies on are in Russian and refer to attached documents that are in Russian as well (such as extracts from the Ukrainian Criminal Code).⁸⁰⁴

- b. Ukraine claims that the Russian authorities failed to handle the request with respect to a Mr Starkov in accordance with Article 12 of the ICSFT.⁸⁰⁵ However, Ukraine failed to inform the Court that, in 2016, before Ukraine commenced the present proceedings, the Russian authorities had notified Ukraine that they cannot provide mutual legal assistance since there was no ongoing investigation or proceedings with respect to Mr Starkov in Ukraine itself. As a matter of fact Ukraine's request was sent on 13 October 2015, while Mr Starkov had already on been convicted on 25 September 2015.⁸⁰⁶ Yet, neither the 1993 Legal Assistance Convention, nor Article 12 of the ICSFT, provide for mutual legal assistance with respect to cases that have already been brought to their end.

571. Ukraine takes particular issue with the level of explanation provided by the Russian authorities when refusing to provide mutual legal assistance on the basis that such would represent a threat to the sovereignty and security of the Russian Federation.⁸⁰⁷ As explained by Ukraine, under Article 19 of the 1993 Legal Assistance Convention, “[t]he request about granting legal aid may be rejected, if granting such aid may inflict damage to the sovereignty or security, or contradicts the legislation of the requested Contracting Party”.⁸⁰⁸

572. Importantly, Ukraine accepts, as it must, that the Russian authorities were entitled to refuse to provide legal assistance on this basis.⁸⁰⁹ This is the only possible interpretation of the ICSFT, since under Article 12(5) of the ICSFT legal assistance is to be provided in accordance with the terms of the applicable mutual legal assistance treaties. Other provisions of the ICSFT such as Article 12(2), as well as Articles 13 and 14 of the ICSFT preclude States from relying on certain grounds for refusing legal assistance (bank secrecy, political and fiscal offences). States remain entitled to rely on other grounds for refusing to provide legal assistance in accordance with the specific terms of applicable MLA treaties.

573. Ukraine nevertheless alleges that Russia breached its obligations by failing to provide at the very least a “brief further explanation” of the reasons for such refusal that would have allowed

⁸⁰⁴ See e.g. Ukrainian Request for Mutual Legal Assistance Concerning Case No. 4201400000000457 of 28 July 2015 (Annex 423 to MU); Ukrainian Request for Mutual Legal Assistance Concerning Case No. 2201505000000021 of 23 March 2017 (Annex 431 to MU).

⁸⁰⁵ MU, para. 197.

⁸⁰⁶ Letter of the Prosecutor General's Office of the Russian Federation No. 82/1-6425-15, 13 September 2016 (Annex 41).

⁸⁰⁷ MU, paras. 198, 329.

⁸⁰⁸ MU, para. 329, fn. 687.

⁸⁰⁹ MU, paras. 329-330.

Ukraine to modify the request.⁸¹⁰ To support this argument, Ukraine relies on the Judgment of the Court in *Djibouti v. France*. However, that Judgment dealt with the France-Djibouti mutual legal assistance treaty rather than the 1993 Legal Assistance Convention which is pertinently different in this respect.

574. Specifically, pursuant to the rules of treaty interpretation codified in Article 31(3)(b) of the Vienna Convention on the Law of Treaties, the relevant provision of the 1993 Legal Assistance Convention must be interpreted in accordance with the subsequent practice of the Parties. With respect to refusals to provide mutual legal assistance under Article 19 of the 1993 Legal Assistance Convention the practice of both, Russia and Ukraine itself has been consistent in that no reasons for such refusals were provided. As a matter of fact Ukraine's own authorities have been consistent in merely invoking Article 19 of the 1993 Legal Assistance Convention when requested by Russia for legal assistance and gave no reasons or explanation when rejecting Russia's requests. By way of illustrative example,

- a. in response to the Russian authorities' MLA request with respect to Mr A.Yu. Korolev, Ukraine simply stated that mutual legal assistance cannot be provided "on the grounds provided in Article 19 of the 1993 Convention on Legal Aid and Legal Relations in Civil, Family and Criminal Cases and Article 2 of the 1959 European Convention on Mutual Assistance in Criminal Matters", without giving any information about what these grounds were;⁸¹¹
- b. a similar response, which was limited to an invocation of the treaty provisions in the mutual legal assistance treaties, was received in response to a number of other MLA requests.⁸¹²

575. In conclusion, the ICSFT does not apply to the MLA requests that Ukraine claims Russia failed to deal with. In any event, Russia handled these requests in a manner consistent with the ICSFT.

VI. Russia Has Complied with Its Obligations under Article 18 of the ICSFT

576. Ukraine's claim that Russia violated Article 18 of the ICSFT is based on an incorrect and overly broad reading of this provision, as well as on a misinterpretation of the facts. In this section, Russia will first address the correct interpretation of Article 18 before explaining why Ukraine failed to establish that Russia violated any of its obligations under this provision.

⁸¹⁰ MU, para. 329 (quoting *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, *I.C.J. Reports 2008*, p. 229, para. 145).

⁸¹¹ Letter from the Prosecutor General's Office of Ukraine No. 14/1/1-25106-18, 20 November 2018 (Annex 42).

⁸¹² See e.g. Letter from the Prosecutor General's Office of Ukraine No. 14/1/1-24350-19, 16 September 2019 (Annex 43), Letter from the Prosecutor General's Office of Ukraine No. 14/1/1-25562-19, 26 December 2019 (Annex 44).

A. THE PROPER INTERPRETATION OF ARTICLE 18 OF THE ICSFT

577. Article 18 of the ICSFT provides:

“1. States Parties shall cooperate in the prevention of the offences set forth in article 2 by taking all practicable measures, *inter alia*, by adapting their domestic legislation, if necessary, to prevent and counter preparations in their respective territories for the commission of those offences within or outside their territories, including:

(a) Measures to prohibit in their territories illegal activities of persons and organizations that knowingly encourage, instigate, organize or engage in the commission of offences set forth in article 2;

(b) Measures requiring financial institutions and other professions involved in financial transactions to utilize the most efficient measures available for the identification of their usual or occasional customers, as well as customers in whose interest accounts are opened, and to pay special attention to unusual or suspicious transactions and report transactions suspected of stemming from a criminal activity. For this purpose, States Parties shall consider:

(i) Adopting regulations prohibiting the opening of accounts the holders or beneficiaries of which are unidentified or unidentifiable, and measures to ensure that such institutions verify the identity of the real owners of such transactions;

(ii) With respect to the identification of legal entities, requiring financial institutions, when necessary, to take measures to verify the legal existence and the structure of the customer by obtaining, either from a public register or from the customer or both, proof of incorporation, including information concerning the customer’s name, legal form, address, directors and provisions regulating the power to bind the entity;

(iii) Adopting regulations imposing on financial institutions the obligation to report promptly to the competent authorities all complex, unusual large transactions and unusual patterns of transactions, which have no apparent economic or obviously lawful purpose, without fear of assuming criminal or civil liability for breach of any restriction on disclosure of information if they report their suspicions in good faith;

(iv) Requiring financial institutions to maintain, for at least five years, all necessary records on transactions, both domestic or international.”

Followed by provisions encouraging States to consider further measures of cooperation as well as requiring them to cooperate by exchanging certain information.

578. Contrary to Ukraine’s interpretation, Article 18 imposes a carefully drafted obligation to cooperate in the prevention of terrorism financing. It is limited in two important respects. First, Article 18 requires States to prevent terrorism financing by certain specific means, that is, by cooperating in the prevention of these offences by establishing a regulatory framework and by taking certain specific

steps aimed at hindering terrorism financing operations in their territories. Second, Article 18 imposes obligations only with respect to cooperation in the prevention of the offences falling within Article 2 of the ICSFT.

1. Obligation to “Cooperate in the Prevention” under Article 18 of the ICSFT

579. Article 18 of the ICSFT is a carefully drafted provision. It lays down a specific obligation to “cooperate in the prevention” of Article 2 offences by States taking “all practicable measures, *inter alia*, by adapting their domestic legislation, if necessary, to prevent and counter preparations in their respective territories for the commission of those offences within or outside their territories”, including those expressly listed in Article 18 of the ICSFT. It provides for an obligation of States to create a regulatory framework, i.e. adopt a comprehensive set of regulatory measures, aimed at blocking or hindering such operations (Article 18(1)-(2)), as well as obligations to cooperate through information sharing (Article 18(3)-(4)). The obligation arising under Article 18 of the ICSFT to cooperate in order to prevent certain things from happening is thus textually and structurally different from a straightforward obligation to prevent certain things from happening as such.

580. The decision merely to provide in Article 18 of the ICSFT for a specific obligation to “cooperate in the prevention of”, rather than for an obligation to prevent terrorism financing *tout court*, takes into account the nature of the underlying financial transactions that may not be easy to identify, and hence requires State Parties to cooperate in order to implement systems that aim to prevent suspicious transactions. Article 18 also supplements the separate obligations of State Parties under Articles 8-10 of the ICSFT to freeze funds used or allocated to be used for terrorism financing, and investigate and prosecute those allegedly engaged in terrorism financing.

581. Several factors, including the ordinary meaning of the words used in Article 18, as well as the context of this provision and the underlying preparatory work confirm that Article 18 of the ICSFT was not meant to be understood as an obligation to prevent the financing of terrorism as such, but that it merely requires States parties to cooperate by taking steps that aim at the prevention of the financing of terrorism.

582. The ordinary meaning of the words used in Article 18 of the ICSFT is inconsistent with the claim that the provision lays down a general obligation to prevent as such. As the Court has confirmed the content of a duty to prevent “varies from one instrument to another, *according to the wording of the relevant provisions*.”⁸¹³ The deliberate decision not to include in Article 18 of the ICSFT a general obligation to prevent the financing of terrorist acts, but rather only an obligation to cooperate in the prevention of such financing, must thus be taken seriously. Indeed, even within Article 18(1) itself, the formula “shall cooperate in the prevention of” stands in sharp contrast to the precision then supplied with respect to domestic legislation “by adapting their domestic legislation, if necessary, to

⁸¹³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 220, para. 429; emphasis added.

prevent ...”. Had State Parties of the ICSFT indeed intended to impose, as claimed by Ukraine, upon State Parties a general obligation to prevent the financing of terrorist acts, they would plainly have said so expressly rather than using the more limited “cooperate in the prevention of” formula.

583. Article 18 of the ICSFT thus stands in sharp contrast to the express “obligation to prevent” in Article 1 of the Genocide Convention, with which the Court was specifically concerned in its 2007 Judgment in the *Bosnian Genocide* case. There, the Court found that even this more far-reaching obligation to prevent does not constitute an obligation of result, but rather an obligation of conduct only to employ all means reasonably available.⁸¹⁴ Thus “[a] State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide”.⁸¹⁵ Accordingly even a full-fledged obligation to prevent does not entail an obligation to be successful in preventing the outcome in question.⁸¹⁶

584. Hence, the more specific *obligation to cooperate to prevent* enshrined in Article 18 of the ICSFT must *a fortiori* constitute merely an obligation of conduct rather than one of result. It follows that a State Party of the ICSFT, subject only to an obligation to cooperate in the prevention of, is thus even less under an obligation to succeed in preventing the financing of alleged terrorist acts.

585. Put another way, this obligation of State Parties to the ICSFT to cooperate is fulfilled once a State Party has taken all steps to cooperate that can be reasonably expected from it. A State Party of the ICSFT does not incur responsibility under Article 18 of the ICSFT simply because the prevention of financing of alleged terrorist acts is not achieved. Instead, in line with the standard developed by the Court as to the materially different and stricter obligation to prevent,⁸¹⁷ responsibility for a violation of Article 18 of the ICSFT could only be incurred provided the State Party of the ICSFT concerned *manifestly* failed to take the required steps laid down in Article 18 of the ICSFT in order to try to thereby prevent such financing.

586. As to the context, this understanding of Article 18, as only encompassing a duty to cooperate, is confirmed by the fact that it is located at the very end of the substantive provisions of the Convention. Had Article 18 indeed sought, as claimed, to impose a general obligation to prevent the financing of terrorism as such, one would have expected the provision to appear at the beginning of the text of the treaty in the same way as Article I of the Genocide Convention.

587. In addition, the specific examples of the obligation to “cooperate in the prevention” provided for in Article 18 of the ICSFT are consistent with an obligation to adopt a regulatory framework only, rather than with a general obligation to prevent specific incidents. For example, States are required

⁸¹⁴ *Ibid.*, para. 430.

⁸¹⁵ *Ibid.*

⁸¹⁶ *Ibid.*

⁸¹⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 220, para. 430.

(i) to ban opening accounts with unidentified or unidentifiable holders of beneficiaries,⁸¹⁸ (ii) to require financial institutions to obtain corporate information concerning legal entities,⁸¹⁹ (iii) to require financial institutions to report unusual transactions or complex of transactions.⁸²⁰ With respect to organizations and persons that “engage in the commission of offences set forth in article 2”,⁸²¹ States are required not to prevent these persons from operating, but to prohibit their operations.

588. This interpretation of what is now Article 18 of the ICSFT is confirmed by its drafting history. When submitting the text of its draft convention, France explained the content of draft Article 17 (now Article 18 of the ICSFT) as follows:

“Des mesures préventives inspirées des principes généralement admis en matière de lutte antiblanchiment (art. 17).^[822] [now Article 18 of the ICSFT] [...] cette convention prévoit-elle plusieurs dispositions [...] qui ont pour objectif d’encourager les États parties à prendre des mesures internes faisant obligation aux institutions financières de mieux identifier leurs clients habituels ou potentiels.^[823] en particulier en proscrivant la tenue de comptes anonymes, en identifiant formellement les titulaires des comptes, en conservant pendant au moins cinq ans les pièces se rapportant aux transactions effectuées.”⁸²⁴

“Preventive measures based on generally accepted principles followed in combating money-laundering (art. 17).^[825] [now Article 18 of the ICSFT]. [...] this convention includes a number of provisions [...] which are designed to encourage States to adopt domestic measures to require financial institutions to improve the identification of their usual or occasional customers.^[826] notably by prohibiting the opening of anonymous accounts, formally identifying account holders, and preserving for at least five years the necessary documents in connection with the transactions carried out.”⁸²⁷

589. Article 18 is *mutatis mutandis* identical to the draft Article 17 submitted by France. Accordingly, France as the main sponsor of the draft convention understood the obligation to cooperate as being limited to requiring State Parties to oblige financial institutions operating on their territory to strengthen the ability to identify their clients.

⁸¹⁸ Article 18(1)(b)(i) of the ICSFT.

⁸¹⁹ Article 18(1)(b)(ii) of the ICSFT.

⁸²⁰ Article 18(1)(b)(iii) of the ICSFT.

⁸²¹ Article 18(1)(a) of the ICSFT.

⁸²² Emphasis in the original.

⁸²³ Emphasis added.

⁸²⁴ *Projet de convention internationale pour la répression du financement du terrorisme - Document de travail présenté par la France, 11 March 1999, UN.Doc A/AC.252/L.7/Add.1, para. 10.*

⁸²⁵ Emphasis in the original.

⁸²⁶ Emphasis added.

⁸²⁷ *Draft International Convention for the Suppression of the Financing of Terrorism, Working Document submitted by France, 11 March 1999, UN.Doc A/AC.252/L.7/Add.1, para. 10.*

590. International and national bodies that have commented on Article 18 of the ICSFT or its implementation in domestic legislation have similarly perceived the provision as being limited to entailing an obligation to prevent the financing of terrorist activities through the creation of a regulatory framework. For example:

- a. The IMF has considered Article 18 as containing a limited number of mandatory “preventive measures” “borrowed from the FATF 40 recommendations”.⁸²⁸ This assessment is only consistent with Article 18 imposing a limited obligation to take certain specific preventive measures, rather than with an understanding of Article 18 as containing a general obligation to prevent.
- b. UNODC in its Incorporation and Implementation Guide similarly interprets Article 18 of the ICSFT as an obligation to cooperate by implementing certain preventive measures. The Guide notes that:

“[a] number of *measures of cooperation are required under article 18 of the 1999 Financing of Terrorism Convention.*”⁸²⁹

- c. The Commonwealth Implementation Kit similarly notes that:

“Article 18 is entirely new *since it is relevant only to financial offences*. It contains detailed provisions intended to encourage further practical co-operation between the Parties to prevent and counter preparations for terrorist financing, whether inside or outside their territory. The suggested measures are based on ‘The Forty Recommendations’ of the Financial Action Task Force (FATF). *Although expressed as obligations, they are only obligations to ‘co-operate’*. Furthermore, they are qualified by phrases such as ‘shall consider’. Nevertheless, such measures, if adopted and properly implemented, will be a valuable means of limiting the access of terrorists to funds.”⁸³⁰

591. Notably, both the IMF and the Commonwealth Implementation Kit refer to FATF’s forty recommendations as the basis of Article 18 of the ICSFT. This is significant since those recommendations encourage States to implement certain legislative and regulatory measures to generally counter the financing of terrorism, rather than obliging them to prevent specific alleged acts of terrorism financing.⁸³¹

⁸²⁸ Suppressing the Financing of Terrorism: A Handbook of Legislative Drafting, IMF Legal Department, 2003, p. 12.

⁸²⁹ United Nations Office on Drugs and Crime, Guide for the Legislative Incorporation and Implementation of the Universal Anti-Terrorism Instruments, 2006, p. 92, para. 484 (emphasis added).

⁸³⁰ Commonwealth Implementation Kits for the International Counter-Terrorism Conventions, p. 273, para. 35, emphasis added and footnotes omitted. Available at: https://thecommonwealth.org/sites/default/files/key_reform_pdfs/Implementation%20Kits%20for%20Terrorism%20Conventions_0.pdf.

⁸³¹ The Forty Recommendations of the Financial Task Force on Money Laundering, 1990, available at <https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%201990.pdf>.

592. In sum, Article 18 of the ICSFT is a provision specifically designed to establish an obligation to cooperate in the prevention of the financing of terrorism by taking certain legislative and administrative measures rather than containing a general obligation to prevent specific acts of terrorism financing.

2. *A Breach of Article 18 of the ICSFT Can Be Established Only Provided an Act of Terrorism Financing under Article 2 of the ICSFT Has Been Committed*

593. The wording of Article 18 of the ICSFT is clear: the obligation it imposes applies only with respect to “offences set forth in article 2”. State Parties have no obligation to prevent acts that another State Party merely alleges to constitute terrorism financing.

594. The Court’s finding in its Order on Provisional Measures in the case at hand supports this interpretation when stating that:

“the obligations under Article 18 and the corresponding rights are premised on the acts identified in Article 2”.⁸³²

595. Similarly, when addressing the obligation to prevent genocide the Court found in *Bosnian Genocide* that

“a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed”.⁸³³

596. Accordingly, to uphold Ukraine’s claim the Court will, first, need to make a determination that there was an act of financing of terrorism, before considering whether Russia complied with an obligation to prevent such act.

B. UKRAINE HAS FAILED TO DEMONSTRATE THAT RUSSIA HAS VIOLATED ITS OBLIGATIONS UNDER ARTICLE 18 OF THE ICSFT

597. Ukraine claims that Russia violated its obligations under Article 18 of the ICSFT by failing to designate the DPR and LPR as terrorist organisations,⁸³⁴ by failing to stop fundraising for the DPR and LPR in Russia,⁸³⁵ by failing to police its borders to prevent transfer of weapons and resources to the DPR and LPR,⁸³⁶ and because Russian officials engaged in financing the DPR and LPR.⁸³⁷

⁸³² Order of 19 April 2017, para. 74.

⁸³³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 221, para. 431.

⁸³⁴ MU, para. 316.

⁸³⁵ MU, para. 317.

⁸³⁶ MU, paras. 314-315.

⁸³⁷ MU, para. 308.

598. However, these allegations do not demonstrate a breach of Article 18 of the ICSFT. First, as previously shown, Ukraine failed to establish that the provision of funds to the DPR or the LPR constitutes an offence under Article 2⁸³⁸ and accordingly the ICSFT does not apply to such acts. Second, Article 18 of the ICSFT does not apply to any alleged provision of weapons because, as demonstrated in Chapter II, weapons do not constitute funds under the ICSFT.⁸³⁹ Third, Article 18 requires States to adopt a regulatory framework, rather than requiring them to prevent specific incidents of terrorism financing and Ukraine has failed to identify any failure by Russia to adopt such appropriate regulatory framework.

599. Ukraine attempts to use Article 18 primarily as a means of bringing before the Court its claims that the Russian Federation has been supplying weapons to the DPR and LPR. As established above,⁸⁴⁰ these allegations do not fall under the ICSFT and hence the Court lacks jurisdiction to resolve them. For this reason, the Russian Federation does not address these untenable claims in detail.

600. Finally, Ukraine contends that Russia violated Article 18 by failing to prevent the provision of funds to the alleged perpetrators of the bombing incidents in Kharkov.⁸⁴¹ Even if Article 18 were to establish a general obligation to prevent the financing of terrorism, as asserted by Ukraine, and even if, besides, the provision of weapons were to constitute the provision of funds within the meaning of the ICSFT, *quod non*, Ukraine has still failed to establish that Russia violated its obligations under Article 18 of the ICSFT with respect to these incidents.

601. This is due to the fact that any obligation to prevent requires a State to exercise due diligence rather establishing an absolute obligation.⁸⁴² Ukraine has not established that Russia violated this due diligence obligation underlying Article 18 of the ICSFT, even assuming *arguendo* that Article 18 would otherwise be applicable.

602. First, Ukraine claims that Russia failed to prevent the alleged transfer of weapons to the Kharkov Partisans through the Russian-Ukrainian border.⁸⁴³ However, Ukraine has failed to demonstrate how Russia could have prevented the alleged transfer.

- a. Contrary to what may be implied from its Memorial,⁸⁴⁴ Ukraine never informed Russia about the alleged transfer.

⁸³⁸ See Chapters V and VI above.

⁸³⁹ See Chapter II.

⁸⁴⁰ See Chapters II-VII.

⁸⁴¹ MU, para. 313.

⁸⁴² See paras. 585-587 above.

⁸⁴³ MU, para. 313. Russian Federation notes that Ukraine does not appear to identify any transfer of funds and items other than weapons through the border allegedly relating to the Kharkov Partisans that Russia should have prevented.

⁸⁴⁴ MU, para. 314.

- b. To prove such alleged transfer, Ukraine relies primarily on the record of interrogation of Mr Slitenko.⁸⁴⁵ According to this document, weapons were allegedly transferred through a secret stash at the border between Russia and Ukraine in the Kharkov Region of Ukraine, the territory being indisputably under the control of Ukraine at all relevant times. Notably, the document does not suggest that Mr Slitenko saw either Russian or Ukrainian border guards at the time of allegedly collecting the weapons. Ukraine fails to explain how the Russian border guards should have prevented the alleged transfer despite regular border controls having taken place in the area during the relevant time (with such controls not implying that any State has complete ability to monitor and prevent illegal crossing of the border at all places at all times). Russia further notes that the Ukrainian border guards apparently failed to prevent the transfer either.

603. Second, Ukraine also appears to suggest, according to its interpretation of Article 18, that Russia violated the obligation to prevent because Russian officials were purportedly involved in the alleged transfers. However, Ukraine has failed to prove such involvement of any Russian officials.

604. The evidence relied on by Ukraine consists of records of interrogations. These records are generally unreliable given the widely reported use of torture during interrogations and public statements by some of the persons on whose statements Ukraine relies.⁸⁴⁶ In any event, they cannot have any evidentiary weight with respect to the alleged involvement of Russian officials. In this respect the records consist of hearsay, i.e. an interrogated person stating that he was told that somebody met with “officers of the Central Intelligence Directorate”⁸⁴⁷ or mere speculations (“as far as I could tell, he was an employee of the Russian FSB”⁸⁴⁸). As the Court has held, such evidence does not carry much if any weight.⁸⁴⁹

605. The unreliability of Ukraine’s evidence in this respect is confirmed by the investigation into the alleged “GRU officer” Ukraine identifies by full name – a certain Mr Eduard Dobrodeev.⁸⁵⁰ The Russian investigative authorities have determined that only three persons by that name live or have

⁸⁴⁵ Record of Interrogation of Suspect, Mr Sergey Slitenko, 10 August 2015 (Annex 235 to MU). Russia notes that the record of interrogation is not signed by either the interrogated person, his attorney or indeed, the investigator and cannot serve as evidence. In addition, in the document itself the person purportedly interrogated refers to himself as Mr Mikhail Viktorovich Reznikov. As such, the document cannot have any weight in supporting Ukraine’s case.

⁸⁴⁶ See para. 510 above.

⁸⁴⁷ E.g. Record of interrogation of Mr Maksim Mykolaichyk, 15 April 2015 (Annex 227 to MU); Record of Interrogation of Suspect Mr Andrey Tyshchenko, 26 December 2015 (Annex 245 to MU) (Mr Tyshchenko being recorded stating that he was told by Mr Sobchenko that Mr Sobchenko “had FSB handlers”).

⁸⁴⁸ Record of Interrogation of Suspect Mr Andrii Baranenko, 23 October 2014 (Annex 191 to MU).

⁸⁴⁹ *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, 27 June 1986, I.C.J. Reports 1986, p. 42, para. 68.

⁸⁵⁰ MU, para. 276.

lived in Russia one of them having already passed away in 2010,⁸⁵¹ while two others have never had any links with Russian State authorities or the events in question.⁸⁵²

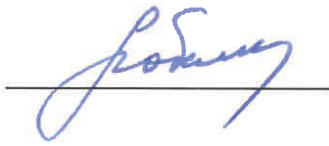
606. In conclusion, Ukraine has failed to establish that the Russian Federation violated any of its obligations under Article 18 of the ICSFT.

⁸⁵¹ Ruling on the provision of the results of operative search activities to the body of inquiry, investigator, or court, Criminal Case No. 201/837072-14, 26 March 2020 (Annex 38).

⁸⁵² Record of Witness Interrogation of Eduard Ivanovich Dobrodeev, 9 October 2020 (Annex 39), Record of Witness Interrogation of Irina Alekseevna Dobrodeeva, 16 February 2021 (Annex 40).

SUBMISSION

607. For the reasons set out in the present Counter-Memorial, and reserving its right to supplement or amend this Submission, the Russian Federation respectfully requests the Court to dismiss all of the claims made by Ukraine.

A handwritten signature in blue ink, appearing to read 'Lobach', written over a horizontal line.

Dmitry A. LOBACH

A handwritten signature in black ink, appearing to read 'Lukiyantsev', written over a horizontal line.

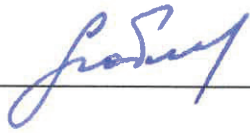
Grigory E. LUKIYANTSEV

Agents of the Russian Federation

Moscow, 9 August 2021

CERTIFICATION

We hereby certify that the annexes are true copies of the documents referred to
and that the translations provided are accurate.



Dmitry A. LOBACH



Grigory E. LUKIYANTSEV

Agents of the Russian Federation

Moscow, 9 August 2021

APPENDIX A

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Table 1: Characterisation of indiscriminate shelling and presence of military objectives

Date	Organisation	Characterisation of indiscriminate shelling by all parties to the armed conflict as “terrorism”?	All parties to the armed conflict locating military objectives in populated areas?
December 2014 to February 2015	OHCHR	No.	Yes: “In January 2015, usage of tanks, heavy artillery and multiple launch rocket systems (MLRS) resumed and spread to populated areas along or near the line of contact.” ¹
January 2014 to May 2016	OHCHR	No: “The vast majority of civilian casualties, recorded on the territories controlled by the Government of Ukraine and on those controlled by armed groups, were caused by the indiscriminate shelling of residential areas, in violation of the international humanitarian law principle of distinction.” ²	-
January 2015	ICRC	No: With specific respect to Volnovakha: “We once again call on all parties to refrain from harming civilians and to comply with international humanitarian law [...] In particular, we remind them that indiscriminate attacks are prohibited.” ³	-
May to August 2015	OHCHR	No: Calls on “ <i>all parties</i> involved in the hostilities in Donetsk and Luhansk regions: [...] Respect international humanitarian law, particularly by complying with the principles of distinction,	Yes: Calls on “all parties involved in the hostilities [...] Respect international humanitarian law, particularly by complying with the principles of distinction, proportionality and precaution and, in any situation,

¹ OHCHR, “Report on the human rights situation in Ukraine 1 December 2014 to 15 February 2015”, para. 21 (Annex 309 to Memorial).

² OHCHR, “Accountability for killings in Ukraine from January 2014 to May 2016”, p. 3 (Annex 49 to Memorial).

³ ICRC, “Ukraine Crisis: ICRC calls on all parties to spare civilians”, 20 January 2015, available at <https://www.icrc.org/en/document/ukraine-crisis-icrc-calls-all-parties-spare-civilians>.

		<p>proportionality and precaution, and in any situation, refraining from indiscriminate shelling of populated areas”⁴.</p>	<p>refraining from indiscriminate shelling of populated areas, and <i>refraining from locating military objectives within or near densely populated areas</i> and damaging objects indispensable to the survival of the civilian population (i.e. water facilities), as well as protect medical personnel, ambulances and facilities.”⁵</p>
<p>August to November 2015</p>	<p>OHCHR</p>	<p>No: “To all parties involved in the hostilities [...] Ensure the protection of civilians in conflict affected areas in fully conformity with international human rights and humanitarian law, including complete avoidance of indiscriminate shelling by populated areas.”⁶</p>	<p>“Recommendations made in OHCHR previous reports [...] that have not yet been acted upon or implemented, remain valid.”⁷</p>
<p>November 2015 to February 2016</p>	<p>OHCHR</p>	<p>No: “To all parties involved in the hostilities [...] Respect international humanitarian law, particularly the principles of distinction, proportionality and precaution; in any situation, refraining from indiscriminate shelling of populated areas, and from locating military objectives within or near densely populated areas”⁸.</p>	<p>Yes: “Ukrainian armed forces and armed groups maintained their positions and further embedded their weapons and forces in populated areas, in violation of their obligations under international humanitarian law.”⁹</p>

⁴ OHCHR, “Report on the human rights situation in Ukraine 16 May to 15 August 2015”, para. 193 (b) (Annex 769 to Memorial) (emphasis added).

⁵ *Ibid.* (emphasis added).

⁶ OHCHR, “Report on the human rights situation in Ukraine 16 August to 15 November 2015”, para. 185 (b) (Annex 312 to Memorial).

⁷ *Ibid.*, para. 185.

⁸ OHCHR, “Report on the human rights situation in Ukraine 16 November 2015 to 15 February 2016”, para. 214(b) (Annex 314 to Memorial).

⁹ *Ibid.*, para. 25.

June 2016	ICRC	<p>No:</p> <p>“When conducting military operations, constant care must be taken to spare the civilian population and civilian property. Under international humanitarian law, all those involved in the conflict must do their utmost to verify that targets are indeed military objectives”.¹⁰</p>	-
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¹⁰ ICRC, “Ukraine crisis: Intensifying hostilities endanger civilian lives and infrastructure”, 10 June 2016, available at <https://www.icrc.org/en/document/ukraine-crisis-intensifying-hostilities-endanger-civilian-lives-and-infrastructure>. See also ICRC, “ICRC warns of deteriorating humanitarian situation amid intensifying hostilities in eastern Ukraine”, 2 February 2017, available at <https://www.icrc.org/en/document/icrc-warns-deteriorating-humanitarian-situation-intensification-hostilities-eastern-ukraine>.

Table 2: Greater civilian casualties caused by shelling attributed to Ukraine

Date	Organisation	Greater civilian casualties caused by indiscriminate shelling in territory controlled by the DPR/LPR?	Attribution to UAF?
December 2014 to February 2015	OHCHR/OSCE	No specific data	<p>Yes:</p> <p>On 22 January 2015 (two days before the shelling of Mariupol), 8 civilians were killed and 13 were injured when a trolley bus was hit by mortar or artillery rounds in Kuprina Street in Donetsk City. The OSCE assessed that the shells had been “fired from a north-western direction”, i.e., from government-controlled territory.¹¹</p>
May to August 2015	OHCHR/OSCE	<p>Yes:</p> <p>Government-controlled territory, 165 civilian casualties, including 41 killed;</p> <p>DPR/LPR-controlled territory, 244 civilian casualties, including 69 killed.¹²</p>	<p>Yes:</p> <p>OSCE crater analysis, which is of obvious use in identifying the source of a given attack, shows how indiscriminate shelling in the DPR/LPR-controlled areas has come from the north or west, i.e., the direction from which shelling by Ukrainian armed forces would come.¹³</p>

¹¹ OSCE, “Spot report by the OSCE Special Monitoring Mission to Ukraine (SMM): Shelling incident on Kuprina Street in Donetsk City”, 22 January 2015, available at <https://www.osce.org/ukraine-smm/135786>.

¹² OHCHR, “Report on the human rights situation in Ukraine 16 May to 15 August 2015”, paras. 29 and 32 (Annex 769 to Memorial).

¹³ See e.g., OSCE, “Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 19:30 (Kyiv time), 27 May 2015”, 28 May 2015”, available at <https://www.osce.org/ukraine-smm/160611>; OSCE, “Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30hrs (Kyiv time), 12 June 2015”, 13 June 2015, available at <https://www.osce.org/ukraine-smm/164141>; OSCE, “Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 19:30 hrs (Kyiv time), 19 July 2015”, 20 July 2015, available at <https://www.osce.org/ukraine-smm/173666>; OSCE, “Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 19:30 hrs (Kyiv time), 30 July 2015”, 31 July 2015, available at <https://www.osce.org/ukraine-smm/175591>; OSCE, “Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 19:30 (Kyiv time), 2 August 2015”, 3 August 2015, available at <https://www.osce.org/ukraine-smm/175736>; OSCE, “Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30 hrs (Kyiv time), 11 August 2015”, 12 August 2015, available at <https://www.osce.org/ukraine-smm/176961>.

November 2015 to February 2016	OHCHR	Yes: see Map 1 below ¹⁴	Yes. ¹⁵
February to May 2016	OHCHR	Yes: see Map 2 below ¹⁶	Yes: ¹⁷ Supported by OSCE crater analysis of specific shelling attacks on populated areas on the DPR/LPR side of the contact line. For example, on 27 April 2016, four civilians were killed by shelling near a DPR checkpoint near Olenivka. The OSCE assessed the shells to have been fired from a west-south-west direction, i.e., from the territory held by Ukrainian armed forces. ¹⁸
May to August 2016	OHCHR	Yes: see Map 3 below ¹⁹	Yes: Origin of the shelling is again supported by OSCE analysis of specific shelling incidents. ²⁰

¹⁴

OHCHR, "Report on the human rights situation in Ukraine 16 November 2015 to 15 February 2016", map at p. 5 (Annex 314 to Memorial). For specific incidents see e.g., OSCE, "Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30 hrs (Kyiv time), 7 February 2016", 8 February 2016, available at <https://www.osce.org/ukraine-smm/221171>. See also OSCE, "Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30 hrs (Kyiv time), 8 February 2016", 9 February 2016, available at <https://www.osce.org/ukraine-smm/221436>.

¹⁶

OHCHR, "Report on the human rights situation in Ukraine 16 February to 15 May 2016", map at p. 5 (Annex 771 to Memorial).

¹⁷

See e.g., OSCE, "Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30 hrs (Kyiv time), 23 February 2016", 24 February 2016, available at <https://www.osce.org/ukraine-smm/224136>; OSCE, "Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30 hrs (Kyiv time), 1 April 2016", 2 April 2016, available at <https://www.osce.org/ukraine-smm/231261>.

¹⁸

OSCE, "Spot Report by the OSCE Special Monitoring Mission to Ukraine (SMM): Shelling in Olenivka", 28 April 2016, available at <https://www.osce.org/ukraine-smm/236936>.

¹⁹

OHCHR, "Report on the human rights situation in Ukraine 16 May to 15 August 2016", map at p. 4 (Annex 772 to Memorial).

²⁰

See OSCE, "Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30 hrs (Kyiv time), 25 May 2016", 26 May 2016, available at <https://www.osce.org/ukraine-smm/243031>; OSCE, "Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30 hrs (Kyiv time), 26 June 2016", 27 June 2016, available at <https://www.osce.org/ukraine-smm/248801>; OSCE, "Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30 hrs (Kyiv time), 1 August 2016", 2 August 2016, available at <https://www.osce.org/ukraine-smm/257516>.

August to November 2016	OHCHR	<p>Yes:</p> <p>“In October, OHCHR recorded eight times more civilian casualties in armed group-controlled territories than in Government-controlled areas of the conflict zone, indicating that civilians in territories controlled by the armed groups <i>continue</i> to be particularly at risk of injury and death.”²¹</p> <p>See also Map 4 below.²²</p>	<p>Yes:</p> <p>Origin of the shelling is again supported by OSCE analysis of specific shelling incidents.²³</p>
November 2016 to May 2017	OHCHR	<p>Yes:</p> <p>see Map 5 and Map 6 below²⁴</p> <p>Note that this period includes the shelling of Avdiivka and the period immediately after the Order of 19 April 2017. Note also that the same pattern has continued to date.²⁵</p>	-

²¹

OHCHR, “Report on the human rights situation in Ukraine 16 August to 15 November 2016”, para. 4 (Annex 773 to Memorial) (emphasis added). See also para. 23. *Ibid.*, map at p. 4.

²²

See OSCE, “Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30 hrs (Kyiv time), 9 October 2016”, 10 October 2016, available at <https://www.osce.org/ukraine-smm/273756>; OSCE, “Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30 hrs (Kyiv time), 11 October 2016”, 12 October 2016, available at <https://www.osce.org/ukraine-smm/274286>; OSCE, “Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30 hrs (Kyiv time), 28 October 2016”, 29 October 2016, available at <https://www.osce.org/ukraine-smm/278046>.

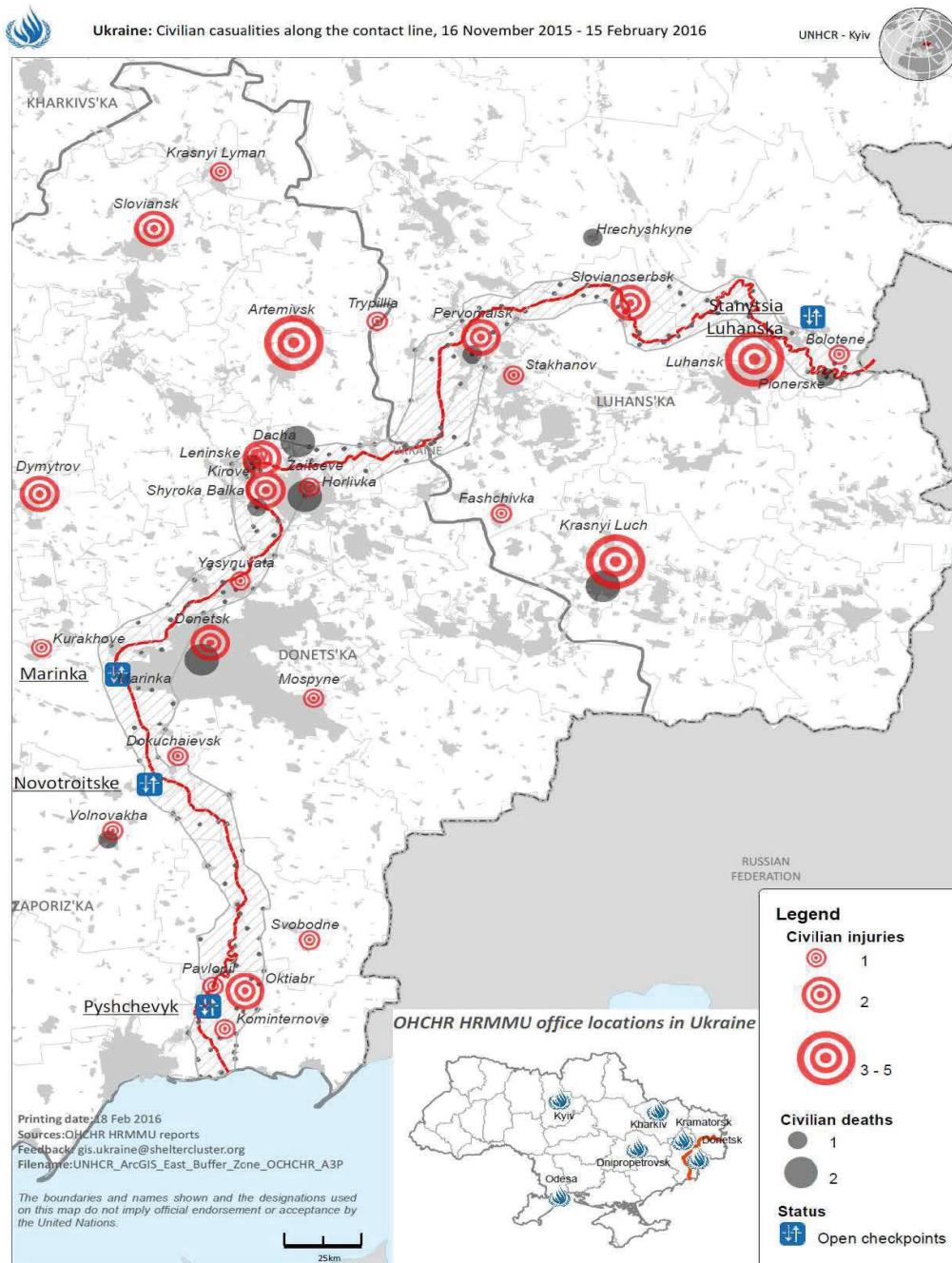
²⁴

OHCHR, “Report on the human rights situation in Ukraine 16 November 2016 to 15 February 2017”, map at p. 4 and para. 28 (recording three times as many civilian casualties in territory controlled by the DPR/LPR), available at https://www.ohchr.org/Documents/Countries/UA/UAReport17th_EN.pdf; OHCHR, “Report on the human rights situation in Ukraine 16 February to 15 May 2017”, map at p. 6 (Annex 774 to Memorial).

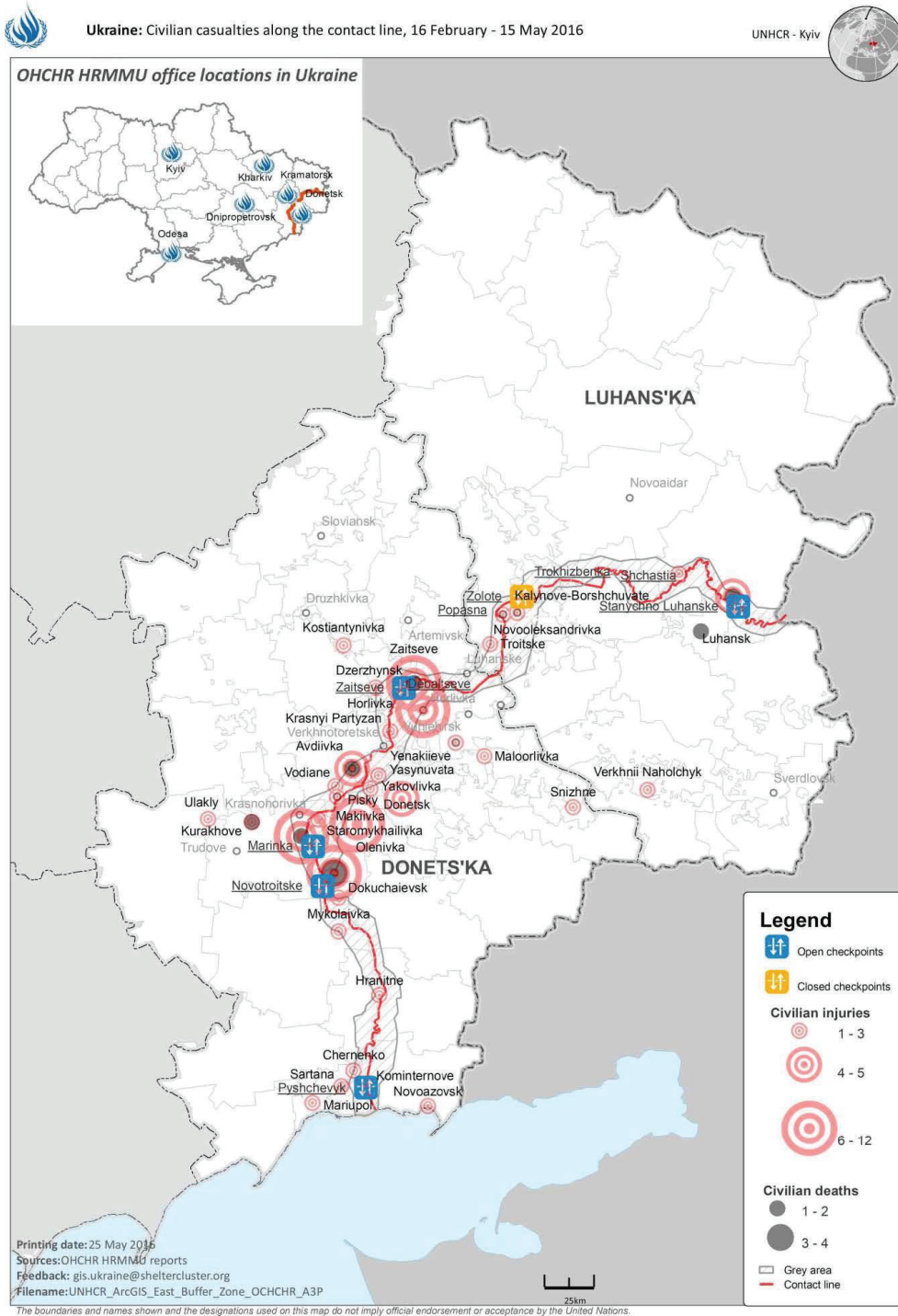
²⁵

OHCHR, “Report on the human rights situation in Ukraine 16 May to 15 August 2017”, map p. 6 and table at para. 33 (Annex 775 to Memorial); OHCHR, “Report on the human rights situation in Ukraine 16 August to 15 November 2017”, map at p. 6 and table at para. 27 (Annex 776 to Memorial); OHCHR, “Report on the human rights situation in Ukraine 16 November 2017 to 15 February 2018”, map at p. 5 and para. 19 (Annex 779 to Memorial); OHCHR, “Report on the human rights situation in Ukraine 16 February to 15 May 2018”, map at p. 5 and para. 18, available at https://www.ohchr.org/Documents/Countries/UA/ReportUkraineFev-May2018_EN.pdf.

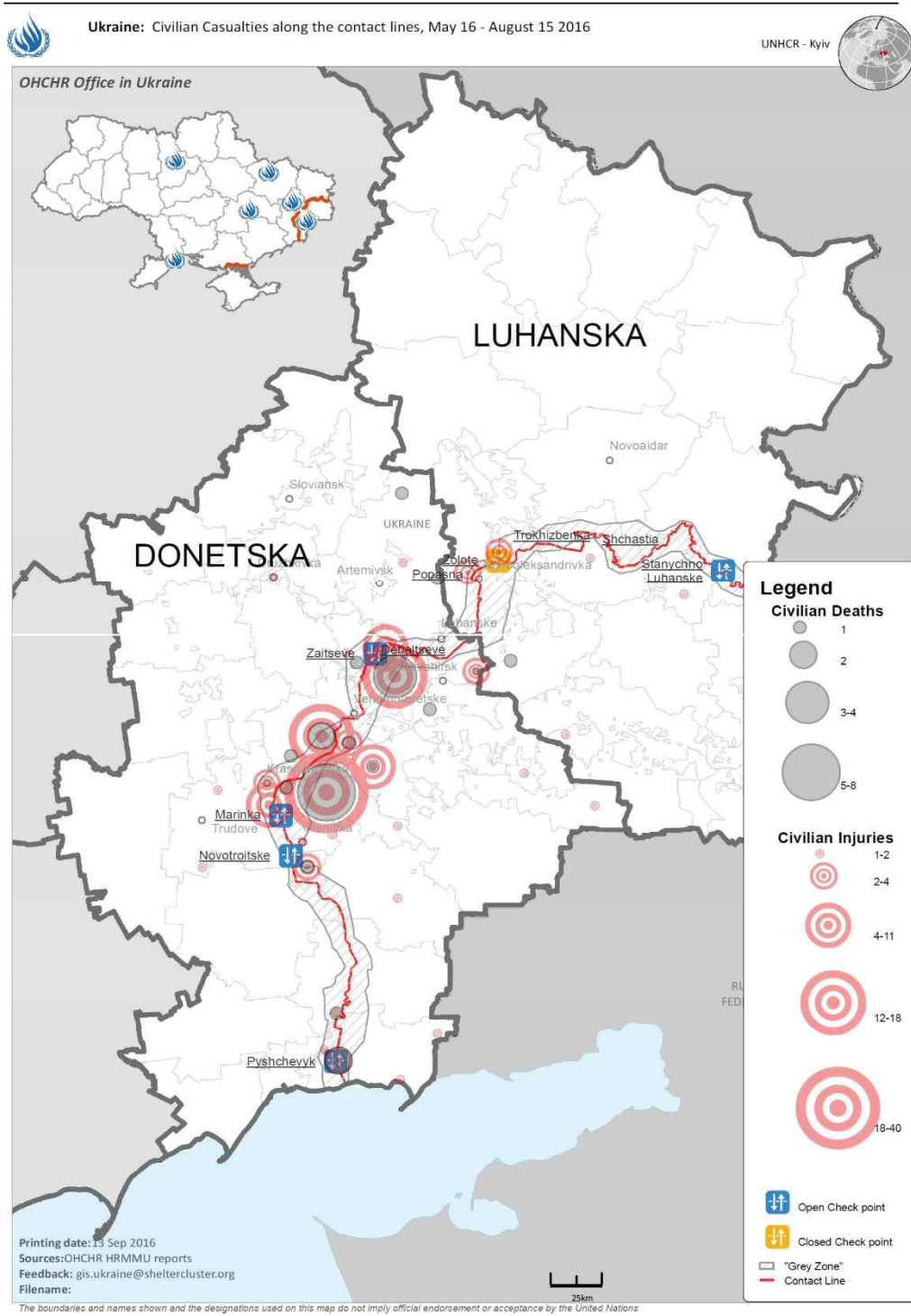
Map 1: OHCHR Map showing civilian casualties caused by shelling along the contact line, 16 November 2015 to 15 February 2016



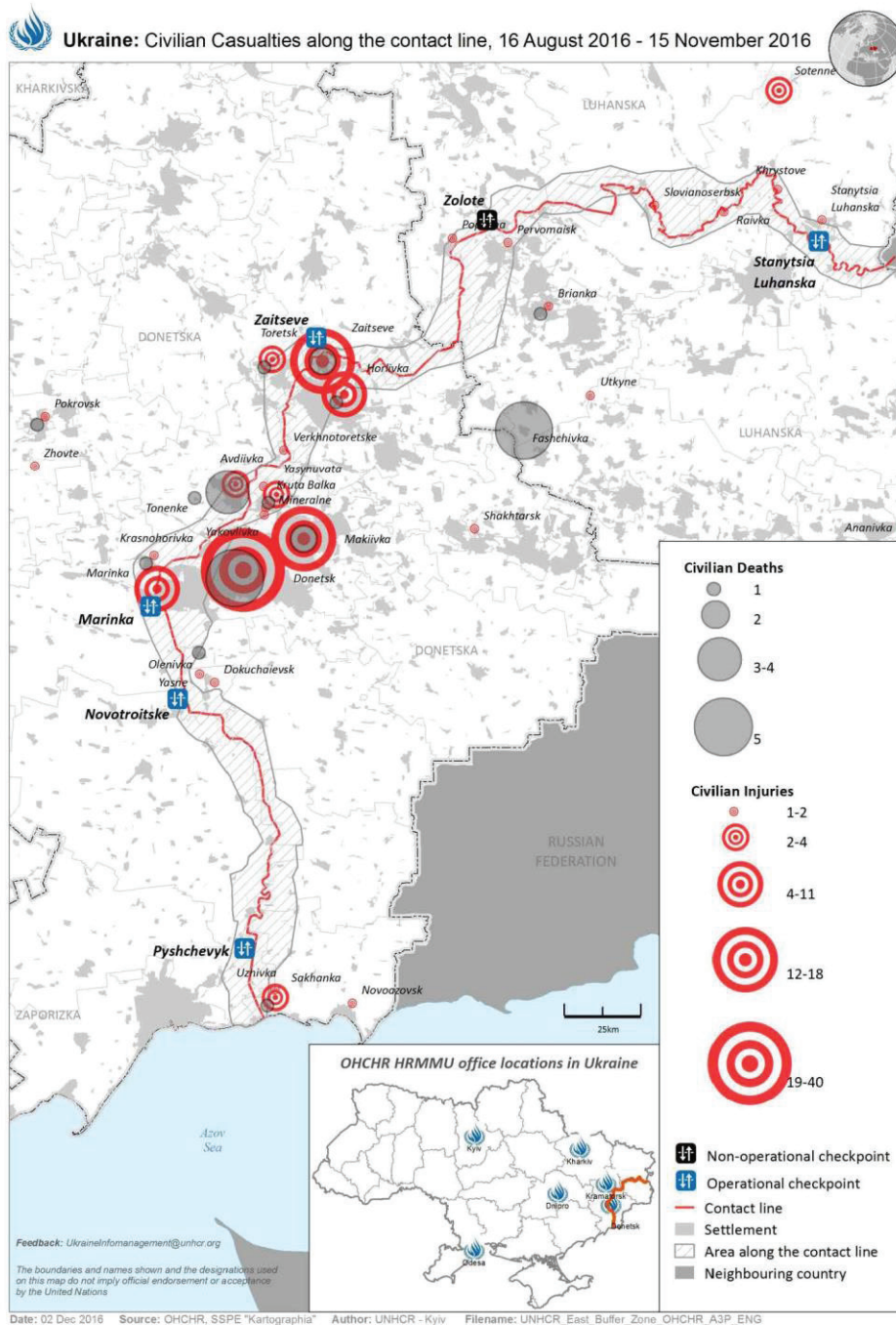
Map 2: OHCHR Map showing civilian casualties caused by shelling along the contact line, 16 February to 15 May 2016



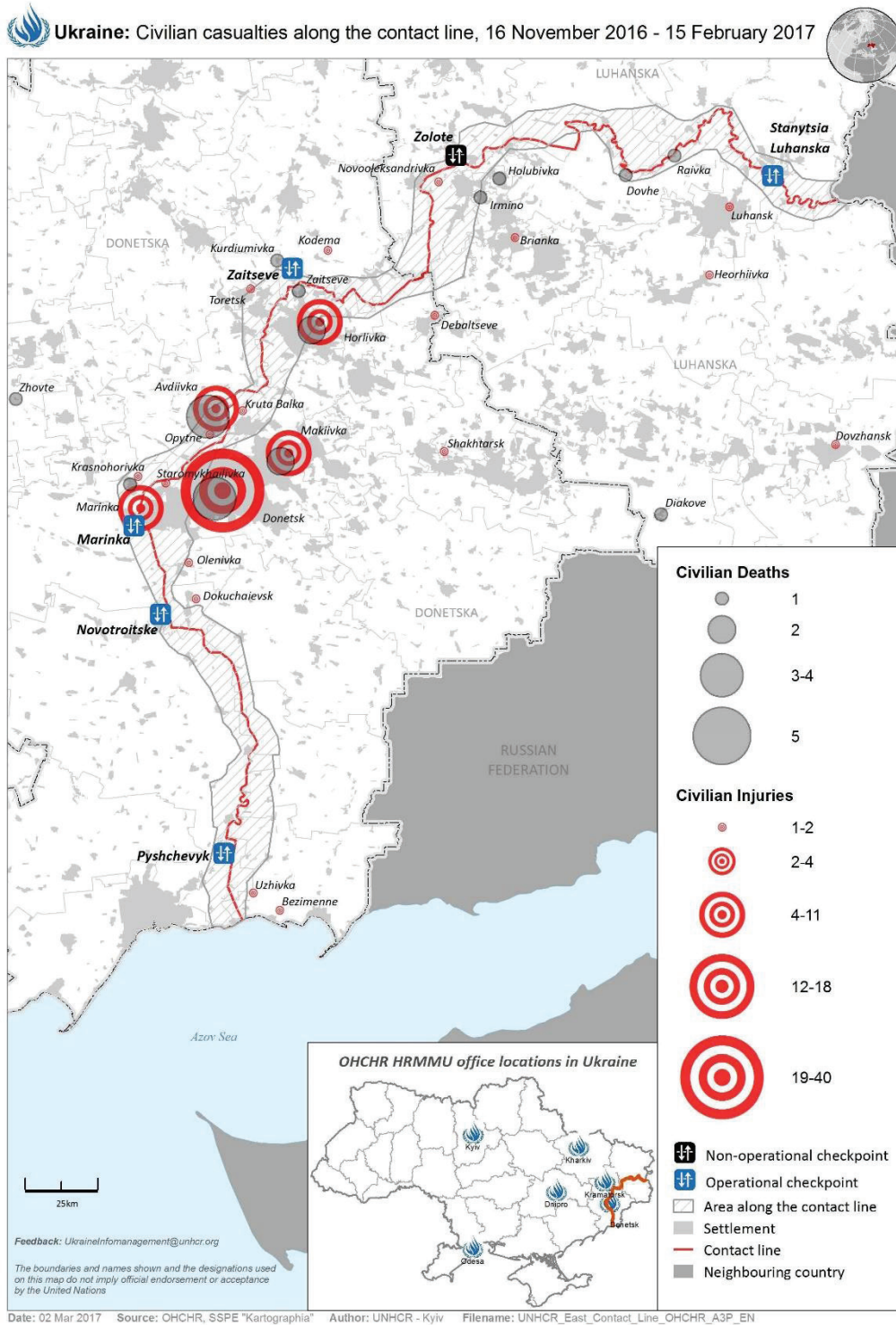
Map 3: OHCHR Map showing civilian casualties caused by shelling along the contact line, 16 May to 15 August 2016



Map 4: OHCHR Map showing civilian casualties caused by shelling along the contact line, 16 August to 15 November 2016



Map 5: OHCHR Map showing civilian casualties caused by shelling along the contact line, 16 November 2016 to 15 February 2017



Map 6: OHCHR Map showing civilian casualties caused by shelling along the contact line, 16 February to 15 May 2017

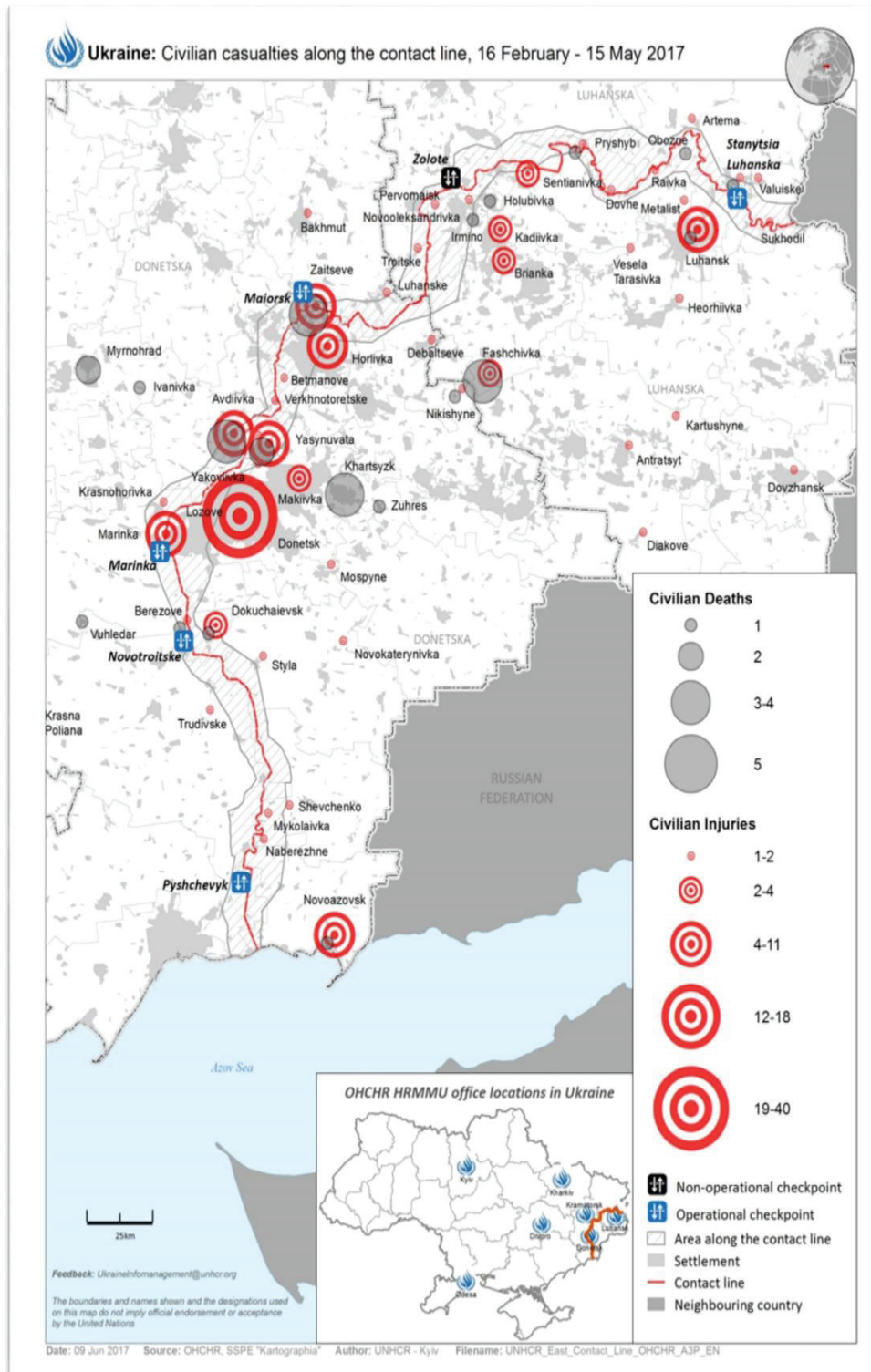


Table 3: Illustrative examples of reported use by Ukraine of MLRS and other heavy weapons in populated areas in territory controlled by the DPR/LPR

(1) BM-21 “Grad” MLRS

Date	Location	Source	Incident
12-21 July 2014	Donetsk	Human Rights Watch, Ukraine: Unguided Rockets Killing Civilians, 24 July 2014, https://www.hrw.org/news/2014/07/24/ukraine-unguided-rockets-killing-civilians	<p>Unguided Grad rockets launched apparently by Ukrainian government forces and pro-government militias have <u>killed at least 16 civilians and wounded many more</u> in insurgent-controlled areas of Donetsk and its suburbs in at least four attacks between July 12 and 21, 2014 [...] The use of indiscriminate rockets in populated areas violates international humanitarian law, or the laws of war, and may amount to war crimes. [...]</p> <p>Both Ukrainian government and insurgent forces have recently used Grad rockets. Although Ukrainian government officials and the press service of the National Guard have denied using Grad rockets in Donetsk, a Human Rights Watch investigation on the ground strongly indicates that Ukrainian government forces were responsible for the attacks that occurred between July 12 and 21.</p> <p>The four attacks took place close to the front line between insurgent and government forces. Impact craters on the ground and on buildings investigated by Human Rights Watch were characteristic of rocket attacks, not shelling. In all four cases, the angle and shape of the craters, and the fact that they were on the side of buildings facing the front line, strongly suggests that the rockets came from the direction of Ukrainian government forces or pro-Kiev armed groups. The attacks’ proximity to the front line also makes it unlikely, and in some cases impossible, that insurgent forces were responsible for the attacks. In two of the attacks, rockets hit on or near insurgent bases and checkpoints at the same time as they hit residential areas, indicating government forces were responsible.</p> <p>In the July 21 attack, <u>three civilians died when Grad rockets hit a residential area near the Donetsk train station.</u> Ongoing fighting made it difficult for Human Rights Watch to determine whether there were additional casualties, but what</p>

			<p>could be identified as Grad rockets by their distinctive sound could be heard throughout the day.</p> <p>On July 19, at least five rockets struck a residential area in the Kuibyshevskiyi district in western Donetsk, <u>injuring at least four civilians</u>.</p> <p>Human Rights Watch documented multiple rocket impacts on July 12 on a residential area in the Petrovskiyi district on the western outskirts of Donetsk that <u>killed at least seven civilians</u>.</p> <p>Also on July 12, multiple rockets struck a residential area in Maryinka, a village just outside of Donetsk, close to the Petrovskiyi district, <u>killing at least six civilians</u>.</p> <p>Human Rights Watch was able to identify the rockets fired as unguided 122-millimeter surface-to-surface Grad artillery rockets launched from multi-barrel rocket launchers with up to 40 launch tubes. Most Grad rockets have a range of 1.5 to 20 kilometers. The rockets vary in length from 1.9 to 3.3 meters and weigh 45 to 75 kilograms. [...]</p>
<p>27 July 2014</p>	<p>Horlivka</p>	<p>Fair Protection, Ukrainian Crimes in Donbass (Collection of Analytical Materials). – Donetsk, 2019, p.335, http://armiyadnr.su/sites/default/files/pictures/%D0%A1%D0%B1%D0%BE%D1%80%D0%BD%D0%B8%D0%BA%2031.10.pdf.</p>	<p><i>[Unofficial translation]:</i></p> <p>On 27 July 2014, the city of Horlivka came under three artillery attacks. The first artillery attack came at 05:30 a.m., local time. The centre of the city and the detached house suburbs in the village of Korolenka were damaged. <u>Residential buildings and a narcolological dispensary's laboratory in the centre of Horlivka were damaged</u>.</p> <p>The second heavy artillery attack that day came at 12:30 p.m., local time.</p> <p>The next artillery attack on Horlivka came at 07:00 p.m., local time. Buildings and structures on Peremohy Avenue, Hertsena Street, Rudakova Street, Lenina Street and others were damaged.</p> <p>In total, on 27 July 2014, the artillery attacks on Horlivka <u>killed 22 civilians, while 43 people sustained wounds of various severity</u>.</p> <p>The majority of civilian casualties occurred as a result of the artillery attack at 12:30 p.m. Projectiles exploded near the Melodia public transport stop (Peremohy Avenue); a pop-up market near an ATB shop (Peremohy Avenue);</p>

			<p>in the Kommunarov Square, near School No. 85. <u>13 civilians died and more than 30 civilians were injured</u> in the attack.</p> <p>There were fragments near all impact sites that clearly indicated that MLRS BM-21 Grad had been used in the attack. [...] As follows from all aforementioned data, the most probable version is that Horlivka was attacked by MLRS BM-21 Grad using M-21OF high-explosive fragmentation projectiles.</p> <p>[...] [T]he entire area from which the 27 July 2014 attacks on the centre of Horlivka most likely came was controlled by Ukrainian armed units. Further, there was at least one MLRS BM-21 Grad in that area that belonged to the 93rd Separate Mechanised Brigade of the Ukrainian Armed Forces [...]</p> <p>As for the units that were located in the relevant sector on 27 July 2014, it was the aforementioned Artemovsk battalion, as well as the 93rd separate mechanized brigade [...] which employed BM-21 Grad MLRS. [...]</p> <p>The overall security situation in Donetsk remained tense. Shelling on the outskirts of Donetsk city was more frequent than the previous day, with more activity in the evening hours. The SMM visited areas affected by shelling, located east and northeast of the city airport. <u>These areas were exclusively civilian localities, with neither military nor police installations nearby.</u> According to the inhabitants, the areas were shelled in the early hours of 28 and 29 July [2014]. The SMM observed damage caused by shrapnel. The SMM saw a house in which the interior walls had large holes, making it uninhabitable. According to neighbours, the occupants were not injured. Inhabitants whose houses and property was damaged presented the SMM with the alleged remnants of exploded Grad missiles, photographed by the SMM. The local inhabitants told the SMM, that four families from the affected areas had already left the city. Some other locals present voiced their intention to leave because of fear and uncertainty, with artillery attacks threatening their safety. Local residents appreciated the interest demonstrated by the SMM.</p>
28-29 July 2014	Donetsk	OSCE SMM, Latest from the OSCE Special Monitoring Mission to Ukraine, based on information received as of 18:00 hrs, 1 August 2014, http://www.osce.org/ukraine-smm/122189	
Somewhere after 14	Ilovaisk	Human Rights Watch and IHRC, Incendiary Weapons: Recent Use and Growing	Evidence of new use of incendiary weapons in Ukraine in 2014 is especially troubling. During field missions in August and October 2014, Human Rights Watch researchers documented use of incendiary weapons in Ilovaisk, a town

August 2014		<p>Opposition, November 2014, p.6, https://www.hrw.org/sites/default/files/related_material/Incendiary%20Weapons_Recent%20Use%20and%20Growing%20Opposition_Nov2014_final.pdf</p>	<p>30 kilometers southeast of Donetsk, and Luhanskoe, a small village south of Donetsk. Residents of Ilovaik told Human Rights Watch that weapons resembling fireworks fell on the northwest part of their town over the course of three nights and burned three homes. They could not pinpoint the date of the attack although one resident said it was after August 14, and possibly during a time when intense battles were taking place between Ukrainian forces and Russia-supported rebels. Human Rights Watch researchers also found in a field about 18 kilometers south-southwest of Ilovaik an abandoned firing position with several misfired 122mm Grad 9M22S rockets equipped with the 9N510 incendiary warhead that contains 180 hexagonal incendiary capsules, which burn for two minutes.</p>
		<p><i>Vice News</i>, A Rain of Fire: Ukrainian Forces Used Little-Known Soviet-Era Incendiary Weapons to Attack Ilovaik, 13 November 2014, https://www.vice.com/en_us/article/a3894a/a-rain-of-fire-ukrainian-forces-used-little-known-soviet-era-incendiary-weapons-to-attack-ilovaik</p>	<p>A subsequent investigation by VICE News, including an independent expert analysis of retrieved rocket remnants by Armament Research Services (ARES), showed that the "fireworks" were in fact thousands of incendiary elements cascading out of a Soviet-era 9M22S rocket in mid-flight. [...] "They started firing Grad rockets shortly after, while we were still putting out the fires. [...] Bombardment was near constant at this point. We managed to save four houses on this street but one burned down. After this fire attack I'd had enough. I took my stuff and moved to the bomb shelter at about 4:30am that morning." That night at least <u>eight houses were completely destroyed and dozens more damaged</u> by the "fire" that fell from the sky.</p>
4 September 2014	Donetsk	<p>OSCE SMM, Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 18:00 (Kyiv time), 5 September 2014, http://www.osce.org/ukraine-smm/123256</p>	<p>In Donetsk, while on patrol on the outskirts of Donetsk, in the "Oktyabrskiy" area, the SMM heard intense shelling targeting the airport and originating from both the east and the west. The SMM witnessed damage to several buildings, which were reported to have occurred on 4 September and include direct hits on the cultural house, five apartment buildings and a residential house with a total of <u>two deaths being reported</u>. Furthermore two "Grad" missiles landed within the Hospital complex causing <u>three light casualties</u> and some material damage. The Hospital continues to function.</p>

23 September 2014	Donetsk	OSCE SMM, Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 18:00 (Kyiv time), 24 September 2014, http://www.osce.org/ukraine-smm/124328	In Donetsk, during the night hours of 23 September, the SMM heard a series of 11 explosions consistent with GRAD shelling , but could not ascertain the origin or the direction. On 24 September, between 18:00 and 18:42 hrs, the SMM heard a series of 53 intermittent explosions, which appeared to be consistent with mortar shelling and concentrated in the northern part of the city, where the airport is located. The SMM could not verify the situation at the airport area due to the security situation.
24 September 2014	Donetsk	OSCE SMM, Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 18:00 (Kyiv time), 25 September 2014, http://www.osce.org/ukraine-smm/124435	At around 18:55hrs on 24 September, the SMM heard what appeared to be approximately 20 outgoing mortar rounds emanating from the north-western suburbs of Donetsk city. The following morning at 8:50hrs, the SMM heard more explosions, again in the northwest of the city. Later that day, from 18:00 to 18:35hrs, the SMM heard approximately 30 explosions in the northern outskirts of the city, assessed to have been mortars and GRAD rockets . Donetsk airport lies on the north-western outskirts of the city.
8 October 2014	Donetsk	Human Rights Watch, Dispatches: The Ukraine Ceasefire That Wasn't, 9 October 2014, https://www.hrw.org/news/2014/10/09/dispatches-ukraine-ceasefire-wasnt	At about 5 p.m. on October 8 [2014] several rockets simultaneously slammed into a residential area in the Kuibyshevskiy district of Donetsk. They <u>also hit a supermarket, a sports complex, at least two residential buildings, and areas in between</u> . We counted eight impact sites, but there were likely more. The attack killed two grocery store employees, women in their mid-forties, and a customer. It injured at least nine other people in the supermarket, two severely. The Donetsk city council reported that the <u>attack killed five and injured 24</u> . Using explosive weapons with wide-area effect in populated areas is problematic because of the high likelihood of injuring and killing civilians. The rockets fired on October 8, so-called Grad rockets , are of particular concern because they can't be precisely targeted, so this attack violates the laws of war. Human Rights Watch has documented and condemned previous use of Grad rockets in eastern Ukraine, including attacks that killed and injured civilians. A Kuibyshevskiy district official gave us a list of dozens of houses damaged in attacks since the ceasefire announcement. A recent United Nations report said

			<p>that more than 300 people had been killed between the start of the ceasefire and October 6.</p> <p>The circumstances of most attacks we documented point to Ukraine government forces' responsibility. Craters and damage to buildings in the October 8 rocket attack indicate that the rockets came from the northwest, where government forces are 15 kilometers away.</p>
<p>15-20 October 2014</p>	<p>Donetsk</p>	<p>OSCE SMM, Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 18:00 (Kyiv time), 22 October 2014, http://www.osce.org/ukraine-smm/125834</p>	<p>The SMM spoke to inhabitants of the Kyivskiy district in Donetsk (3.5km south-east of Donetsk airport). According to them there had been frequent shelling between 15 to 20 October, which had been particularly heavy between 18 to 19 October. The interlocutors told the SMM that many houses had been seriously <u>damaged or completely destroyed</u>, and that the area was <u>without electricity, water and gas</u>, as the <u>utility infrastructure had been damaged</u>. The SMM observed at least ten partly destroyed houses (damaged windows and roofs), and four completely destroyed houses. According to the interlocutors there had not been any casualties. Residents of the area told the SMM that the mortars had come from Pisky (9km east of Donetsk airport). The SMM inspected a crater which could have been caused by a Grad rocket. The SMM assessed that the projectile had impacted from west north-west. The SMM also saw remnants of exploded ordnance, probably fired from a Grad rocket artillery system. Starting at 11:13 the SMM heard 10-20 explosions from intensive shelling incoming from the west and landing about 1 km from the site where the SMM was monitoring.</p>
<p>6-7 December 2014</p>	<p>Donetsk</p>	<p>OSCE SMM, Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 18:00 (Kyiv time), 8 December 2014, http://www.osce.org/ukraine-smm/130956</p>	<p>In Kuybivshivskiy district (5.8 km west of Donetsk city centre), which is controlled by the "Donetsk People's Republic" ("DPR"), the SMM observed material damage caused by what appeared to be explosive impacts. Several residents, to whom the SMM spoke, said the area had been shelled during the night between 6 and 7 December. The SMM observed that shelling had hit most of the business facilities. A private domicile was also hit. In the entire area observed, the SMM saw 20 craters appearing to have been caused by Grad rockets, and two craters of mortars ranging from 82 to 120 mm. Extensive material damage was caused to the buildings at all visited locations</p>

			<p>(Kubyshieva, Yuhoslavska and Olimpyeva Streets). According to residents, there were no casualties.</p>
<p>8 December 2014</p>	<p>Donetsk</p>	<p>OSCE SMM, Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 18:00 (Kyiv time), 9 December 2014, http://www.osce.org/ukraine-smm/131311</p>	<p>[The SMM] patrolled Donetsk city to follow up reports of shelling on 8 December, and observed substantial material damage consistent with the reports. The SMM assessed that a civilian apartment complex located at 209 Kuybishev Street was hit by two Grad rockets and sustained extensive structural damage. At 51-53 Slovatskaya Street another apartment complex sustained heavy damage and most of its windows were shattered. There were craters on both sides of the building, including one in the playground. Further down the street, a rocket's remnants lay in the middle of the road near the Children's Infectious Disease Clinic. The clinic itself suffered extensive damage from a Grad rocket that detonated four meters from its walls, <u>shattering all windows on that side of the building as well as cracking walls inside the building</u>. A nearby shop at 213 Kuybisheva Street was also destroyed. No injuries were reported. In all cases the residents informed the SMM that the shelling occurred on 8 December from 18:00 to 18:30.</p>
<p>17-19 January 2015</p>	<p>Donetsk</p>	<p>OSCE SMM, Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 18:00 (Kyiv time), 19 January 2015, http://www.osce.org/ukraine-smm/135491</p>	<p>The SMM observed substantial damage of civilian infrastructure in "DPR"-controlled Donetsk city and surroundings as a result of recent intensified shelling over the last 48 hours. In the DPR-controlled districts of Kyivski (8 km north-west of Donetsk), Kirovskiy (7 km south-west of Donetsk), Petroveski (9 km south-west of Donetsk) and Voroshilovski (1 km north of Donetsk) the SMM observed damage to civilian buildings caused by recent shelling. [...] Damage to civilian infrastructure due to what appeared to be Smerch multiple rocket launchers (300mm) and Grad (122mm) rocket strikes was observed by the SMM.</p>
<p>8-9 February 2015</p>	<p>Donetsk</p>	<p>OSCE SMM, Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 18:00 (Kyiv time), 10 February 2015,</p>	<p>The SMM visited four sites of shelling in Donetsk city. In Leninskyi district at Kuybisheva Street (2.7km south of Donetsk city centre, "DPR"-controlled), the SMM went to an area that was shelled on 8 February and saw a crater impact it assessed as having been caused by a Grad rocket strike. Crater analysis was not possible as repairs were complete. [...] According to "DPR" "police", on 9 February one Grad rocket hit Petrovskiyi bridge (10.7km south west of Donetsk city centre, "DPR"-controlled) in Petrovskiyi district and penetrated the road,</p>

		http://www.osce.org/ukraine-smm/140056	<p>destroying one lane. Based on its analysis of one impact, the SMM assessed the direction of fire as being from the north-west. In Petrovskiy district on 9 February, two MLRS rockets struck near a gas station (10.6km south-west of Donetsk city centre, “DPR”-controlled), according to “DPR” “police”. The SMM crater analysis suggested that it was caused by Grad rocket fire from the west. The “emergency services department” of the “DPR” told the SMM that on 9 February a residential area at 125 Petrovskaya street (10.6km south-west of Donetsk city centre) was hit by MLRS shelling. The SMM conducted the crater analysis, determining a westerly direction of fire.</p>
<p>12 February 2015</p>	<p>Luhansk</p>	<p>OSCE SMM, Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 18:00 (Kyiv time), 13 February [2015], http://www.osce.org/ukraine-smm/140586</p>	<p>The SMM visited areas of Luhansk city (“LPR”-controlled) to assess the damages of a shelling which it heard the previous evening at 21:15hrs. [...] On Richchya Peremohy Street, the SMM observed a <u>severely damaged bakery</u>, which sustained a direct MLRS Grad rocket hit on its roof, as well the body of another Grad rocket in the ground, which it estimated to have been fired from the north-east. In Vostochnyi Kvartal a five storey residential building sustained a <u>direct hit</u>, which destroyed <u>two apartments on the top floor</u>. Based on fragments and the impact crater on the site, the SMM estimates that the building was hit by a Grad, fired from north east. The JCCC, the “emergency services department” of the “LPR” and the local hospital told the SMM that a woman was wounded as a result. On Dzerzhinskaya Street, the SMM observed that a <u>kindergarten had suffered a direct hit to the roof</u> by what the SMM estimates to have been a Grad rocket. The SMM observed that the impact had destroyed part of the roof, at least one room of the facility and shattered windows. On Klubnaya Street, the SMM observed remnants of a Grad rocket on the tarmac, which the SMM assessed had caused <u>damages to the walls and roofs of nearby houses and shattered windows</u>.</p>
<p>21 February 2015</p>	<p>Donetsk</p>	<p>OSCE SMM, Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 18:00 (Kyiv time), 22 February 2015,</p>	<p>In the “DPR”-controlled Petrovskiy district of Donetsk city (13km west-south-west of Donetsk city-centre), the SMM on 21 February observed <u>12 shelled buildings</u>. Local people told the SMM that the area had been shelled that day, resulting in the <u>death of one woman, whose apartment had sustained a direct artillery hit</u>. The SMM noted approximately 30 impacts in the area, caused by Grad missiles, which the SMM assessed to have been fired from a location to</p>

		http://www.osce.org/ukraine-smm/142351	<p>the west-south-west. <u>One of the buildings sustaining damage was a kindergarten. A walled compound with concertina wire – with a tracked infantry vehicle and a military truck parked and men in military fatigues present inside – was also hit. While at the scene, the SMM heard the sound of 15 explosions coming from a location approximately 20 kilometres to the north.</u></p>
4 June 2015	Telmanove	<p>OSCE SMM, Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 19:30 (Kyiv time), 5 June 2015, http://www.osce.org/ukraine-smm/162611</p>	<p>The SMM visited Telmanove (“DPR”-controlled, 67km south-south-east of Donetsk) in order to monitor and assess the damage and confirm the civilian casualties caused by shelling on 4 June. The SMM analyzed 13 craters in an area of 1 square kilometre. At seven of these impact sites, the SMM determined that the shelling had originated from a westerly direction. At six impact sites, the SMM could identify that the type of the weapon used was a multiple launch rocket system (MLRS), and in two cases the SMM could specify the type of MLRS as a BM-21 GRAD. The SMM visited the local hospital and spoke to the deputy head doctor, who stated that a four-year-old boy was killed in his home by the shelling. The SMM spoke to a “DPR” “policeman” who confirmed this and further stated that <u>three elderly female residents had also been injured due to the shelling.</u></p>
10 August 2015	Telmanove	<p>OSCE SMM, Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 11 August 2015, http://www.osce.org/ukraine-smm/176961</p>	<p>The SMM observed eight fresh craters in a residential area of Telmanove (“DPR”-controlled, 67km south-east of Donetsk) and assessed that all of them were caused by a multiple launched rocket system (MLRS) calibre 122mm (BM-21 Grad type) fired from a westerly direction. In the village, the SMM saw the funeral procession for a 62-year old woman from Telmanove, who was <u>hit by shrapnel during shelling on 10 August.</u></p>
16 August 2015	Krasnyi Partizan	<p>OSCE SMM, Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 19:30 (Kyiv time), 17 August 2015, http://www.osce.org/ukraine-smm/178011</p>	<p>In a roughly one-square-kilometre area in “DPR”-controlled Krasnyi Partizan (22km north-north-east of Donetsk), the SMM observed 15 craters, carrying out analysis on eight of them. It assessed that 122mm Grad multiple launch rocket systems (MLRS) rockets – fired from the west-north-west – had caused the craters. Residents told the SMM that the shelling had occurred at around midnight on 16 August. They said there had been no casualties. <u>The SMM observed shattered windows in and shrapnel-damage to exterior walls of private</u></p>

			<p><u>residences, a school and a kindergarten, and one completely destroyed private dwelling and a garage.</u></p>
<p>16 August 2015</p>	<p>Telmanove</p>	<p>OSCE SMM, Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 19:30 (Kyiv time), 16 August 2015, http://www.osce.org/ukraine-smm/177826</p>	<p>On 16 August the SMM visited “DPR”-controlled Telmanove (50km north-east of Mariupol) to follow up on reports by representatives of the Ukrainian Armed Forces at the JCCC that the <u>village had been shelled in the early morning</u>. The SMM analysed 16 craters and concluded that they were caused by MLRS (122mm BM-21 Grad) fired from a west-south-westerly direction. The SMM observed that <u>some houses were heavily damaged and a transformer providing electricity to the village was destroyed.</u></p>
<p>17 June 2017</p>	<p>Starolaspsa</p>	<p>OSCE SMM, Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 18 June 2017, http://www.osce.org/special-monitoring-mission-to-ukraine/324026</p>	<p>On 17 June, led by “DPR” members, the SMM observed impact sites in “DPR”-controlled Starolaspa (51km south of Donetsk). At 8 Lenina Street, the SMM saw a fresh crater about 8m east of a house and 250m south-west of a “DPR” checkpoint, assessed as caused by a multiple launch rocket system (MLRS) (BM-21 Grad, 122mm) rocket fired from a south-westerly direction. A rocket casing was visible inside the crater. The SMM also saw several metal fragments, including a curved portion of a steel warhead, near the crater. The SMM observed <u>extensive shrapnel damage to the north-west-facing wall of the house and its north-west-facing windows destroyed</u>. Inside the house, the SMM saw shrapnel damage to an interior wall in the bedroom opposite the broken windows. Three residents of the house (one 34-year-old-man, two 26-and 28-year-old women) told the SMM that they had been asleep, together with three children under ten years old, in the bedroom the eastern part of the house at the time of shelling at about 4:00 on 17 June, and that the <u>28-year-old woman had sustained minor shrapnel wounds to her right forearm</u>. The SMM saw minor bruises and scrapes on her arm.</p>
<p>13-14 February 2018</p>	<p>Kadiivka</p>	<p>OSCE SMM, Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 14 February 2018, https://www.osce.org/special-</p>	<p>On the evening and night of 13-14 February, while in Kadiivka (formerly Stakhanov, non-government-controlled, 50km west of Luhansk), the SMM heard around 445 undetermined explosions and 20 bursts of IFV (BMP-2) cannon fire 10-20km west and south-west, as well as 39 explosions (15 assessed as explosions of multiple launch rocket system rounds (BM-21 Grad, 122mm and the remainder undetermined), all 8-20km west and south-west.</p>

		monitoring-mission-to-ukraine/372171	
16 May 2018	Donetsk Filtration Station	OSCE SMM, Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 17 May 2018, https://www.osce.org/special-monitoring-mission-to-ukraine/382042	On the evening of 16 May, the SMM camera at Oktiabr mine (non-government-controlled, 9km north-west of Donetsk) recorded, over a two-minute period, 21 muzzle flashes assessed as a salvo of outgoing multiple launch rocket system (MLRS) (BM-21 Grad, 122mm) rounds as well as their subsequent projectiles in flight from south-east to north-west 5-10km north-west. During the same period of time, the SMM in Avdiivka (government-controlled, 17km north of Donetsk) recorded 26 projectiles in flight from south to north assessed as rounds of MLRS (BM-21) , all 3-3.5km south-east. Immediately thereafter, the SMM camera at the Donetsk Filtration Station (DFS) (15km north of Donetsk) recorded 25 explosions assessed as impacts of rounds of MLRS (BM-21) , followed by two projectiles in flight from south-east and north-west, all 2-4km west-south-west. (The SMM assessed that the three cameras above recorded the same instance.)

(2) BM-27 “Uragan” MLRS

Date	Location	Source	Incident
19-20 August 2014	Makiivka	Human Rights Watch, Ukraine: Widespread Use of Cluster Munitions. Government Responsible for Cluster Attacks on Donetsk, 20 October 2014, https://www.hrw.org/news/2014/10/20/ukraine-widespread-use-cluster-munitions	A local first responder in Makiivka, a rebel-controlled town bordering Donetsk to the east, told Human Rights Watch that they had found remnants of submunitions and rockets in at least three places. He said that cluster munitions had killed two people on August 19 and 20 near a train station in the town and that they had found submunitions remnants there. A second cluster munition attack took place near a rebel checkpoint northeast of the town, suggesting a government attack. Human Rights Watch observed the cargo section of an Uragan cluster munition rocket at the checkpoint. The third cluster munition attack in Makiivka took place in the village of Khanzhenkovo, which was also controlled by rebel forces at the time of the attack. Human Rights Watch visited the village and confirmed that it had been struck by cluster munitions . Local residents showed Human Rights Watch remnants of submunitions collected from the site.

2 October 2014	Donetsk	OSCE SMM, Spot report by OSCE Special Monitoring Mission to Ukraine (SMM), 2 October 2014: ICRC Staff Member Killed in Shelling in Donetsk City, http://www.osce.org/ukraine-smm/125044	<p>From 17:15 to 18:00hrs, on 2 October, at intervals of every fifteen minutes, the SMM heard very loud explosions somewhere in the north of Donetsk city. At around 18:00hrs, the SMM heard a quick succession of five incoming rounds, which it assessed to have been Uragan rockets, again in the north of the city.</p> <p>Fifteen minutes later the head of the local branch of the International Committee of the Red Cross (ICRC) in Donetsk, calling on the phone from Kyiv, told the SMM that the <u>ICRC office in Donetsk city had just been shelled and one staff member had been killed.</u></p>
5 October 2014	Donetsk	Human Rights Watch, Ukraine: Widespread Use of Cluster Munitions. Government Responsible for Cluster Attacks on Donetsk, 20 October 2014, https://www.hrw.org/news/2014/10/20/ukraine-widespread-use-cluster-munitions	<p>In the morning of October 5, at least two Uragan cluster munition rockets struck the fifth subdistrict of the Kyivskiy district in central Donetsk. Submunitions from one rocket struck the intersection between Raduzhnaya street and Zvyagilskogo street.</p> <p>Human Rights Watch documented 11 submunition impact craters on Zvyagilskogo street and fragment patterns on nearby fences consistent with the use of Uragan cluster munition rockets. Human Rights Watch also found remnants of submunitions at the site.</p> <p>The attack injured a 37-year-old man who was working in his backyard. He is still recovering from his injuries in a hospital.</p>
6 October 2014	Donetsk	OSCE SMM, Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 18:00 (Kyiv time), 6 October 2014, http://www.osce.org/ukraine-smm/125235	<p>The SMM heard a total of six rounds – of an unspecified nature – impacting in the north of Donetsk city at two separate times – at midday and in the late afternoon. Residents of a north-eastern suburb of the city also told the SMM that the area had been shelled the previous evening, consistent with what the SMM had heard at the time (see Daily Report of 6 October 2014). The SMM visited the area and noted some shrapnel damage, numerous craters, and what appeared to be an Uragan rocket in the area. A number of residents told the SMM that a <u>man and woman had required hospitalization as a result of the shelling.</u></p>
11 October 2014	Starobeshevo	OSCE SMM, Latest from OSCE Special Monitoring Mission (SMM) to Ukraine	<p>On 11 October the SMM visited the town of Starobeshevo (40km south-east of Donetsk) where it observed one “Uragan” type unexploded missile struck in</p>

			based on information received as of 18:00 (Kyiv time), 12 October 2014, https://www.osce.org/ukraine-smm/125502	the ground between the street and pavement, with the impact area around 8 meters away from an administrative building hosting the village council.
2015 (remnants observed on 2 August 2017)	Debaltseve	OSCE SMM, Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 2 August 2017, http://www.osce.org/special-monitoring-mission-to-ukraine/333961	OSCE SMM, Latest from the OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 18:00 (Kyiv time), 19 January 2015, http://www.osce.org/ukraine-smm/135491	In “DPR”-controlled Debaltseve (58km north-east of Donetsk), the SMM observed remnants of cluster munitions . The SMM observed old damage to a shop (now shut) it assessed as caused by cluster sub-munitions fired from an MLRS (either 9M27K, Uragan, 220mm or 9M55K Smerch, 300mm) . Around the building, the SMM observed the old remnants of cluster sub-munition (tails) and rusted steel pellets, including cluster sub-munition bomblets (9N210 or 9N235) . A number of residents (four women aged 30-60 years old and a man, aged about 40) told the SMM that they think that the cluster sub-munitions date back to 2015.
18-19 January 2015	Donetsk	OSCE SMM, Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 18:00 (Kyiv time), 19 January 2015, http://www.osce.org/ukraine-smm/135491	OSCE SMM, Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 18:00 (Kyiv time), 2 February 2015, http://www.osce.org/ukraine-smm/138896	The SMM observed <u>substantial damage of civilian infrastructure in “DPR”-controlled Donetsk city and surroundings</u> as a result of recent intensified shelling over the last 48 hours. In the DPR-controlled districts of Kyivski (8 km north-west of Donetsk), Kirovskiy (7 km south-west of Donetsk), Petroveski (9 km south-west of Donetsk) and Voroshilovski (1 km north of Donetsk) the SMM observed <u>damage to civilian buildings</u> caused by recent shelling. The SMM also observed a crater with remnants of what appeared to be a (Uragan) multiple launch rocket system that had resulted in damage to a number of buildings. The SMM could not ascertain the direction from which the missile was fired.
1-2 February 2015	Donetsk	OSCE SMM, Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 18:00 (Kyiv time), 2 February 2015, http://www.osce.org/ukraine-smm/138896	OSCE SMM, Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 18:00 (Kyiv time), 2 February 2015, http://www.osce.org/ukraine-smm/138896	The SMM visited Donetsk city’s Petrovskiy and Voroshilovskiy districts (respectively 1.7km north-west and 15km south-west of Donetsk city centre, “DPR”-controlled) to monitor the effects of shelling reported by various sources. The SMM visited six sites in the two districts where it observed damage to infrastructure and residential properties. Local residents reported that Petrovskiy district was shelled on 1 February at approximately 17:00hrs and that a young girl was killed and two men wounded as a result. SMM crater analysis leads it to conclude that one of the impacts in the district was caused by a mortar round originating from the south-west and another impact was the result of an Uragan

			<p>rocket fired from the north-west. In Voroshilovskiy district local residents told the SMM that shelling occurred on 2 February at approximately 07:45hrs and that two adults, one woman and one man were killed. SMM crater analysis shows that one building sustained a direct artillery hit originating from the north-west.</p> <p>According to local residents of “DPR”-controlled Komsomolske (45km south-east of Donetsk) the village had been affected by heavy shelling by MLRS on 2 February in the early morning hours, which had caused civilian casualties and damage to civilian property and infrastructure. The residents said that shelling was incoming from a westerly and south- westerly direction. The SMM examined nine impacts caused by what appeared to be 220mm rockets which appear to have been launched from a Uragan MLRS. The analysis suggested that the shelling came from a south-western direction. Among the remnants from the rockets, the SMM saw delivery casing which it assessed as evidence that anti-personnel cluster munition had been used. According to the interlocutors one <u>37-year-old woman was killed. A girl, 5 years old, and a man were allegedly seriously wounded and brought to a hospital in Donetsk.</u></p>
<p>2 February 2015</p>	<p>Komsomolske</p>	<p>OSCE SMM, Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 18:00 (Kyiv time), 3 February 2015[5], http://www.osce.org/ukraine-smm/139061</p>	<p>On 5 February, the SMM followed up on the shelling which reportedly struck the Kirovskiy district in Donetsk city on 4 February from 11:40 to 11:45hrs. The same shelling salvo reportedly hit the direct surrounding of the Kindergarten No. 381, a neighbouring street near the Kindergarten and Donetsk Hospital No. 27. The SMM inspected the three aforementioned different sites located in the Kirovskiy district on 5 February between 10:00 and 15:00hrs.</p>
<p>4 February 2015</p>	<p>Donetsk</p>	<p>OSCE SMM, Spot report by the OSCE Special Monitoring Mission to Ukraine (SMM): Shelling in the Kirovskiy district of Donetsk city on 4 February 2015, https://www.osce.org/ukraine-smm/139406</p>	<p>[...] Based on an analysis of the crater impact, the fuse diameter and the observed damage, the SMM concluded that the shelling had come from a south-south-westerly direction and was fired by a BM-27 Uragan MLRS. The SMM did not find any remnants on the spot. A kindergarten employee told the SMM that members of the “Donetsk People’s Republic” (“DPR”) “Vostok battalion” had removed the remnants shortly after the shelling had occurred.</p> <p>The SMM inspected a second impact crater located 500m south-east of the first crater at the kindergarten. The second impact crater was located 20m west of the sidewalk in front of Pintera Street 2. Based on the crater analysis, the SMM assessed that the impact was also consistent with a BM-27 Uragan MLRS strike.</p>

		<p>The SMM did not find remnants around the crater. The SMM could not specify the bearing of the shelling as the crater on the sidewalk had been filled in with dirt and stones. The SMM observed a large amount of congealed blood on the sidewalk 20m from the impact site. A male individual – who claimed that he had eye-witnessed the shelling on 4 February – said that the shelling at Pintera Street 2 had killed one man and injured two women. The SMM could not verify this information. The interlocutor added that members of the “DPR” “Vostok battalion” had removed the remnants shortly after the shelling had occurred.</p> <p>At 11:15hrs, the SMM arrived at Donetsk Hospital No. 27. The SMM spotted two impact craters, one located north-east and the second located north-west of the hospital building facility. [...] Based on the analysis of both craters, the SMM assessed that the shelling that had hit the hospital’s immediate surrounding came from a south-south-westerly direction. The SMM found three small metal parts around the north-eastern crater which the SMM assessed belong to the propellant cylinder of a shell fired from a BM-27 MLRS Uragan rocket.</p> <p>A nurse and a director employed at Hospital No. 27, who said that they had been on duty on 4 February at 11:40hrs during the shelling, told the SMM that two rockets hit the surrounding of the hospital. They added that the shelling had immediately killed five men and left 26 other individuals injured. The interlocutors explained that the aforementioned 26 wounded individuals had been transferred to Hospitals Nos. 16 and 24 and Gusok Hospital. The SMM met a nurse and a director employed at Hospital No. 24, who said that they had treated 14 wounded individuals belonging to the group of 26 injured on 4 February. The interlocutors added that one injured individual from the group of 14 wounded had later died at Hospital No. 24. Based on the statement from the personnel employed at Hospitals Nos. 27 and 24, the SMM assesses that the shelling at Hospital No. 27 left 6 individuals killed and 25 injured. At hospital No. 24, the SMM spoke to a wounded woman who explained that she was hit by shrapnel while working as a nurse at Hospital No. 27 during the shelling.</p> <p>The SMM followed-up on the reported 4 February shelling in Kirovskiy District of Donetsk city and assessed three different locations in the area. The SMM saw damage to the wall of Kindergarten number 381 located at Pintera Street 10 and</p>
	<p>OSCE SMM, Latest from OSCE Special Monitoring Mission (SMM) to Ukraine</p>	

	<p>based on information received as of 18:00 (Kyiv time), 5 February 2015, http://www.osce.org/ukraine-smm/139391</p>	<p>at an apartment building nearby. The damage was consistent with shrapnel impacts caused by a Multiple Launch Rocket System (MLRS) strike. A pavement was also damaged by a shell impact. The SMM visited the site of the shelling at Donetsk Hospital number 27 and noted the front of the building was badly damaged. The SMM examined four impact craters at the three sites (including two at the hospital), and assessed that they had all been caused by BM-26 Uragan MLRS, based on the size and nature of the craters, and that they had been fired from a south-south-western direction. The SMM were told by a doctor and nurse at Hospital number 24 (where some of the injured were brought) that <u>five people had died instantly and 26 were injured when two shells hit close to Hospital number 27. One of the wounded died later.</u></p>
	<p>Fair Protection, Ukrainian Crimes in Donbass (Collection of Analytical Materials). – Donetsk, 2019, pp. 196, 212, http://armiyadnr.su/sites/default/files/pictures/%D0%A1%D0%B1%D0%BE%D1%80%D0%BD%D0%B8%D0%BA%2031.10.pdf</p>	<p><i>[Unofficial translation]:</i> page 196 On 4 February 2015, the Ukrainian Armed Forces (UAF) shelled districts of Donetsk: between 11:40 a.m. and 11:45 a.m. – the Tekstilshchik microdistrict (Kirovskiy district), where <u>six people died, 25 people were injured</u>; at around 05:00 p.m. – the Mariupol fork, where <u>two civilians died, between 5 and 19 people were injured</u>. The attacks were covered in the following mass media: the website of Komsomolskaya Pravda in Ukraine, TVC television channel (Russia), RIA Novosti Ukraine, Donetsk News Agency, and others [<i>see references to articles on p. 196 of the report</i>] [...] page 212 [...] Having analysed open source information and documents, examined the OSCE SMM report and versions proposed in the mass media, the Public Committee for Documenting Military Crimes concluded that the Tekstilshchik microdistrict and Mariupol fork of Donetsk were shelled on 4 February 2015 involving BM-27 Uragan MLRS which were part of the 27th Rocket Artillery Regiment (currently – the 27th Separate Rocket Artillery Brigade) of the UAF headed by colonel Valery Ismailov.</p>

12 February 2015	Luhansk	OSCE SMM, Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 18:00 (Kyiv time), 13 February [2015], http://www.osce.org/ukraine-smm/140586	The [Committee's] investigation established that the artillery fire had come from the south-southwestern direction from the area to the north of Volnovakha, in a triangle of residential settlements "Olginka – Novotroitske – Polne". Having analysed open source publications, the Committee established a set of officers from the 27 th Rocket Artillery Regiment of the UAF who could have been involved in the above-mentioned artillery attack.
			The SMM visited areas of Luhansk city ("LPR"-controlled) to assess the damages of a shelling which it heard the previous evening at 21:15hrs. At a house in Volkhova Kvartal (6.7km east of Luhansk city centre) the SMM observed broken windows and balconies caused by what it assessed to be the explosion of an Uragan rocket from a Multiple Launch Rocket System (MLRS) . The JCCC office in Luhansk and the "emergency services department" of the "LPR" confirmed the shelling and said that <u>a woman had died</u> as a result. At another house in the same street, the SMM also observed broken windows and the remains of an Uragan type MLRS rocket stuck in the ground, which it assessed to have been fired from north east.

(3) BM-30 "Smerch" MLRS

Date	Location	Source	Incident
September 2014 (remnants observed on 11 May 2016)	Rozsypne	OSCE SMM, Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30hrs, 11 May 2016, http://www.osce.org/ukraine-smm/239871	In "DPR"-controlled Rozsypne (56km north-east of Donetsk), the SMM observed the unexploded remnants of an MLRS BM-30 Smerch rocket (300mm) in the yard of a house. [...] A resident told the SMM that the village had been shelled with Smerch rockets in September 2014.
2015 (remnants observed on 2 August 2017)	Debaltseve	OSCE SMM, Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 2 August 2017,	In "DPR"-controlled Debaltseve (58km north-east of Donetsk), the SMM observed remnants of cluster munitions . The SMM observed old damage to a shop (now shut) it assessed as caused by cluster sub-munitions fired from an MLRS (either 9M27K, Uragan, 220mm or 9M55K Smerch, 300mm) . Around the building, the SMM observed the old remnants of cluster sub-munition (tails)

		http://www.osce.org/special-monitoring-mission-to-ukraine/333961	<p>and rusted steel pellets, including cluster sub-munition bomblets (9N210 or 9N235). A number of residents (four women aged 30-60 years old and a man, aged about 40) told the SMM that they think that the cluster sub-munitions date back to 2015.</p> <p>The SMM observed <u>substantial damage of civilian infrastructure in ‘DPR’-controlled Donetsk city and surroundings</u> as a result of recent intensified shelling over the last 48 hours. In the DPR-controlled districts of Kyivski (8 km north-west of Donetsk), Kirovskiy (7 km south-west of Donetsk), Petroveski (9 km south-west of Donetsk) and Voroshilovski (1 km north of Donetsk) the SMM observed damage to civilian buildings caused by recent shelling. [...] Damage to civilian infrastructure due to what appeared to be Smerch multiple rocket launchers (300mm) and Grad (122mm) rocket strikes was observed by the SMM.</p>
19 January 2015	Donetsk	<p>OSCE SMM, Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 18:00 (Kyiv time), 19 January 2015, http://www.osce.org/ukraine-smm/135491</p>	<p>On Voziednannia Street [in Donetsk], the SMM observed <u>four artillery impacts</u> which caused structural damage to roofs and windows in three houses on the street. In Brusova Street, the SMM observed structural damage to <u>four residential houses allegedly caused by shelling</u> on 22 January. The residents informed the SMM that a woman had died and a man was wounded in the shelling. In Pavla Popovycha Street, the SMM observed the casing of a BM30 series ‘Smerch’ rocket in a garage.</p>
22 January 2015	Donetsk	<p>OSCE SMM. Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 18:00 (Kyiv time), 25 January 2015, http://www.osce.org/ukraine-smm/136421</p>	<p>At approximately 18:15hrs and 22:45hrs on 27 January, the SMM, based in Luhansk city centre (“Lugansk People’s Republic” –“LPR” -controlled), heard intensive incoming shelling and impact explosions about 5km west of its location. [...]</p> <p>The SMM saw considerable damage caused by the impacts of rocket shelling, such as broken windows, fences, gates and walls. The SMM assessed that some of the damage to the buildings, e.g. a series of parallel rows of strike marks on a gate and wall, were consistent with damage typically caused by shrapnel elements from cluster munition. According to the SMM’s assessment, a hole in</p>
27 January 2015	Luhansk	<p>OSCE SMM, Spot report by the OSCE Special Monitoring Mission to Ukraine (SMM), 3 February 2015: Civilians killed and wounded in strike with cluster munitions in Izvestkova Street in Luhansk city, http://www.osce.org/ukraine-smm/138906</p>	

			<p>a roof of a house was caused by the impact of what appears to be a bomblet, with small calibre.</p> <p>The SMM discovered parts of rockets, including engines, fins and cargo compartments, in the front and backyards of several houses; the cargo compartment in particular is typical of a rocket carrying cluster munitions. Some parts sighted by the SMM at the impact site (1.5 cm white metal fragments, 6 by 3 cm black metal fragments of bomblets cases) are typical for cluster munition.</p> <p>The SMM identified them as parts consistent with 9M55K model “Smerch” rockets (calibre 300mm). The SMM observed a crater (diameter approximately 4m, depth approximately 3m) at the backyard of the house located at Dekabristiv Street 106 which had been caused by the explosion of a “Smerch” rocket, according to the SMM’s assessment.</p> <p>[...]</p> <p>Local residents of the impacted area of Artemivskiyi district told the SMM during its visit on 28 January to the site that <u>one man was killed</u> in his residence at Korolenko Street 33. The JCCC and the “emergency services department” of the “LPR” both confirmed the same casualty figures.</p> <p>On 30 January, the SMM visited the central morgue in Luhansk city and met representatives of the regional pathologist office, who stated that their post-mortem examination confirmed that two individuals had died as a result of the shelling. <u>The first individual died as a result of being struck in the chest and abdomen by metal fragments. The second individual died from stress-related heart-failure as a result of shelling.</u></p> <p>The SMM met, on 30 January, the deputy head of the central regional hospital who confirmed that <u>two persons wounded on 27 January were still staying in hospital for surgery and medical treatment.</u> On 3 February the hospital confirmed to the SMM the information previously received.</p>
1 February 2015	Luhansk	OSCE SMM, Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received	<p>The head of the JCCC Luhansk office and the head of the demining group of the “LPR” “emergency service” informed the SMM of two alleged rocket strikes on the city the previous evening at approximately 21:00hrs and 23:00hrs, which included a total of five rockets. [...] On the second impact site the SMM observed</p>

		<p>as of 18:00 (Kyiv time), 2 February 2015, http://www.osce.org/ukraine-smm/138896</p>	<p>the remains of a rocket, probably unexploded, in the backyard of a residential house located on Serhei Tiulenin Street (7km north-west of Luhansk city centre, “LPR”-controlled). The SMM assessed the rocket as 300mm calibre, fired from a “Smerch” MLRS situated north-north-west from the point of impact.</p>
<p>12 February 2015</p>	<p>Luhansk</p>	<p>OSCE SMM, Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 18:00 (Kyiv time), 12 February 2015, http://www.osce.org/ukraine-smm/140521</p>	<p>On 12 February the SMM visited in Luhansk city a number of areas affected by shelling which occurred at 00:15hrs the same day. On Stara Mogila Street (approximately 6km south-east of the city centre), the SMM spoke to a de-mining team from the “ministry for emergency situations” of the “LPR” who said that they had removed from a children’s playground what they said was the body of a rocket fired by a Smerch MLRS. Based on the angle of the impact, which the SMM measured, the SMM estimated that the firing had originated from a north-westerly direction. On Oboronna Street the SMM observed the body of a rocket in the soil. Based on the diameter of the rocket and its marking, the SMM assessed it to be a Smerch and based on the angle of the impact, the SMM estimates that the firing originated from a north-westerly direction. At the Luhansk municipal bus company parking, located at Olega Koshevogo Street, the SMM observed the empty cluster cargo compartment of what it assessed to be the same type of rocket. The SMM observed damaged houses on Volgodonska Street. <u>The damage to the buildings (broken windows, roofs, fences)</u> was estimated by the SMM, based on the small size of the shrapnel and the high number of impacts on the wall, to have been caused by explosions of bomblets from cluster munitions. In Arkhticheska Street (approximately 1,2km east of the city centre) the SMM observed nine impacts – small craters – in the yard and on the roofs of buildings. Based on the small size of the impacts the SMM estimated that cluster munition was used.</p>
<p>Remnants observed on 23 February 2016</p>	<p>Makedonivka</p>	<p>OSCE SMM, Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30hrs, 23 February 2016,</p>	<p>On 23 February the SMM observed remnants of a multiple rocket launch system (MLRS) projectile (BM-30 Smerch, 300mm) in a cemetery in “LPR”-controlled Makedonivka (37km south of Luhansk). The entry trajectory of the rocket suggested that it had been fired from the north-east. [...] [the UXO] seemed to have been present in the area for some time.</p>

31 May 2016	Rozsypne	http://www.osce.org/ukraine-smm/224136	Whilst in Rozsypne (“DPR”-controlled 60km north-east of Donetsk), the SMM observed a piece of unexploded ordnance (UXO) stuck in the ground in the garden of an abandoned house (from a distance it appeared to be a 300mm Smerch rocket), close to an area populated by families with small children.
		OSCE SMM, Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30, 31 May 2016, http://www.osce.org/ukraine-smm/244231	

(4) Cluster munitions²⁶

Date	Location	Source	Incident
19-20 August 2014*	Makiivka	Human Rights Watch, Ukraine: Widespread Use of Cluster Munitions. Government Responsible for Cluster Attacks on Donetsk, 20 October 2014, https://www.hrw.org/news/2014/10/20/ukraine-widespread-use-cluster-munitions	A local first responder in Makiivka, a rebel-controlled town bordering Donetsk to the east, told Human Rights Watch that they had found remnants of submunitions and rockets in at least three places. He said that cluster munitions had killed two people on August 19 and 20 near a train station in the town and that they had found submunitions remnants there. A second cluster munition attack took place near a rebel checkpoint northeast of the town, suggesting a government attack. Human Rights Watch observed the cargo section of an Uragan cluster munition rocket at the checkpoint. The third cluster munition attack in Makiivka took place in the village of Khanzenkovo, which was also controlled by rebel forces at the time of the attack. Human Rights Watch visited the village and confirmed that it had been struck by cluster munitions . Local residents showed Human Rights Watch remnants of submunitions collected from the site.

²⁶ Some incidents reproduced in this and further tables have been mentioned in the foregoing tables on other types of weapons. Such incidents are marked with asterisk in the “Date” column.

28-29 August 2014	Snizhne	Fair Protection, Ukrainian Crimes in Donbass (Collection of Analytical Materials). – Donetsk, 2019, p. 284, http://armiyadnr.su/sites/default/files/pictures/%D0%A1%D0%B1%D0%BE%D1%80%D0%BD%D0%B8%D0%BA%2031.10.pdf .	<p><i>[Unofficial translation]:</i> During the night of 28 to 29 August 2014, at around 00:30 a.m., the detached house suburbs of Snizhne came under a rocket attack. Explosions damaged civilian facilities at the following addresses: 1) 49 Pryhorodna Street – the fence and gates of the house were damaged by fragments; 2) 38 Vyshneva Street – the windows and façade of the building were damaged; besides, the gates of the nearby garage were also damaged; 3) Paryzhskoi Komuny Street – the road pavement and the railroad tracks nearby were damaged. There is no information concerning any civilian casualties and injuries. Missile parts identified as the carrier section of a missile launched by Tochka-U systems operated by the Ukrainian Armed Forces were found in the yard of the house at 214 Paryzhskoi Komuny Street. The body of the carrier section had the following prefabricated imprinted marking “9M79 0352000 Sh 89391179”. This means that it was a 9M79M missile was used (its range is between 15 and 70 km). Numerous simultaneous explosions taking place within a circle of a radius of 300 m indicate that a 9N123K cluster warhead was used.</p>
4 September 2014	Khartsyzk	Fair Protection, Ukrainian Crimes in Donbass (Collection of Analytical Materials). – Donetsk, 2019, pp. 287-288, http://armiyadnr.su/sites/default/files/pictures/%D0%A1%D0%B1%D0%BE%D1%80%D0%BD%D0%B8%D0%BA%2031.10.pdf	<p><i>[Unofficial translation]:</i> page 287 On 4 September 2014, at around 6:00 p.m., the Chekhov City Park of Culture and Leisure in the city of Khartsyzk came under a rocket attack. page 288 Explosions damaged civilian facilities at the following addresses: 1) The Stalekanatnyk stadium located on Adamsia Street in the territory of the Chekhov Park of Culture and Leisure of the city of Khartsyzk – the facilities, road pavement and grass turf of the stadium were damaged; 2) Territory of the Chekhov Park of Culture and Leisure of the city of Khartsyzk – the fences, road pavement and vegetation were damaged.</p>

			<p>It is known that <u>one civilian died and three civilians were injured</u>:</p> <ol style="list-style-type: none"> 1) Valentin Valentinovich Breev, born in 1977 – died; badly wounded at the Stalekanatnyk stadium, passed away in the hospital; 2) A woman, born in 1975 – wounded at the Stalekanatnyk stadium; 3) A man, born in 1969 – wounded in the territory of the park of culture and leisure near the Stalekanatnyk stadium; 4) A woman, born in 1978 – wounded in the territory of the park of culture and leisure near the Stalekanatnyk stadium 5) A man, born in 1997 – wounded while at the Stalekanatnyk stadium. <p>Missile parts identified as the carrier section of a missile launched by Tochka-U systems operated by the Ukrainian Armed Forces were found at a distance of about 5–10 m from the southwestern section of the Stalekanatnyk stadium’s fence.</p> <p>[...]</p> <p>The marking “9N123K”, numerous simultaneous explosions taking place within a circle of a radius of 300 m, and distinct fragments of cluster munitions discovered at the stadium, indicate that a 9N123K cluster warhead was used.</p> <p>Ukrainian government forces used cluster munitions in populated areas in Donetsk city in early October 2014, Human Rights Watch said today. The use of cluster munitions in populated areas violates the laws of war due to the indiscriminate nature of the weapon and may amount to war crimes.</p> <p>During a week-long investigation in eastern Ukraine, Human Rights Watch documented widespread use of cluster munitions in fighting between government forces and pro-Russian rebels in more than a dozen urban and rural locations. While it was not possible to conclusively determine responsibility for many of the attacks, the evidence points to Ukrainian government forces’ responsibility for several cluster munition attacks on Donetsk. An <u>employee of the International Committee of the Red Cross (ICRC)</u> was killed on October 2 in an attack on Donetsk that included use of cluster munition rockets.</p> <p>[...]</p>
<p>5 October 2014*</p>	<p>Donetsk</p>	<p>Human Rights Watch, Ukraine: Widespread Use of Cluster Munitions. Government Responsible for Cluster Attacks on Donetsk, 20 October 2014, https://www.hrw.org/news/2014/10/20/ukraine-widespread-use-cluster-munitions</p>	

			<p>In the morning of October 5, at least two Uragan cluster munition rockets struck the fifth subdistrict of the Kyivskiy district in central Donetsk. Submunitions from one rocket struck the intersection between Raduzhnaya street and Zvyagil'skogo street.</p> <p>Human Rights Watch documented 11 submunition impact craters on Zvyagil'skogo street and fragment patterns on nearby fences consistent with the use of Uragan cluster munition rockets. Human Rights Watch also found remnants of submunitions at the site.</p> <p>The attack injured a <u>37-year-old man</u> who was working in his backyard. He is still recovering from his injuries in a hospital.</p> <p>[...]</p> <p>A second cluster munition struck the residential area between Parkivska street and Kosiora street, about 500 meters west of the first impact site. Human Rights Watch identified several impact craters and local residents showed Human Rights Watch submunition remnants they had found after the attack. <u>At least one civilian was injured in his leg by a fragment.</u></p>
<p>2015 (remnants observed on 2 August 2017)*</p>	<p>Debaltseve</p>	<p>OSCE SMM, Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 2 August 2017, http://www.osce.org/special-monitoring-mission-to-ukraine/333961</p>	<p>In "DPR"-controlled Debaltseve (58km north-east of Donetsk), the SMM observed remnants of cluster munitions. The SMM observed old damage to a shop (now shut) it assessed as caused by cluster sub-munitions fired from an MLRS (either 9M27K, Uragan, 220mm or 9M55K Smerch, 300mm). Around the building, the SMM observed the old remnants of cluster sub-munition (tails) and rusted steel pellets, including cluster sub-munition bomblets (9N210 or 9N235). A number of residents (four women aged 30-60 years old and a man, aged about 40) told the SMM that they think that the cluster sub-munitions date back to 2015.</p>
<p>27 January 2015*</p>	<p>Luhansk</p>	<p>OSCE SMM, Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 18:00 (Kyiv time), 30 January 2015,</p>	<p>The SMM returned to the site of the 27 January shelling of the Artemivskiy district in "LPR"-controlled Luhansk city (See SMM Daily Report 29 January) where it observed that <u>all windows of Kindergarten No.5, located at 31 Gaiovogo Street had been shattered during the shelling</u>. The SMM also observed and documented remnants of rockets including engines, fins and cargo compartments, as well as remnants of cluster munitions.</p>

	<p>http://www.osce.org/ukraine-smm/138296</p> <p>OSCE SMM., Spot report by the OSCE Special Monitoring Mission to Ukraine (SMM), 3 February 2015: Civilians killed and wounded in strike with cluster munitions in Izvestkova Street in Luhansk city, http://www.osce.org/ukraine-smm/138906</p>	<p>At approximately 18:15hrs and 22:45hrs on 27 January, the SMM, based in Luhansk city centre (“Lugansk People’s Republic” –“LPR”-controlled), heard intensive incoming shelling and impact explosions about 5km west of its location.</p> <p>The SMM saw considerable damage caused by the impacts of rocket shelling, such as broken windows, fences, gates and walls. The SMM assessed that some of the damage to the buildings, e.g. a series of parallel rows of strike marks on a gate and wall, were consistent with damage typically caused by shrapnel elements from cluster munition. According to the SMM’s assessment, a hole in a roof of a house was caused by the impact of what appears to be a bomblet, with small calibre.</p> <p>The SMM discovered parts of rockets, including engines, fins and cargo compartments, in the front and backyards of several houses; the cargo compartment in particular is typical of a rocket carrying cluster munitions. Some parts sighted by the SMM at the impact site (1.5 cm white metal fragments, 6 by 3 cm black metal fragments of bomblets cases) are typical for cluster munition. The SMM identified them as parts consistent with 9M55K model “Smerch” rockets (calibre 300mm). The SMM observed a crater (diameter approximately 4m, depth approximately 3m) at the backyard of the house located at Dekabristiv Street 106 which had been caused by the explosion of a “Smerch” rocket, according to the SMM’s assessment.</p> <p>[...]</p> <p>Local residents of the impacted area of Artemivskiyi district told the SMM during its visit on 28 January to the site that one man was killed in his residence at Korolenko Street 33. The JCCC and the “emergency services department” of the “LPR” both confirmed the same casualty figures.</p> <p>On 30 January, the SMM visited the central morgue in Luhansk city and met representatives of the regional pathologist office, who stated that their post-mortem examination confirmed that two individuals had died as a result of the</p>
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2 February 2015*	Komsomolske	OSCE SMM, Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 18:00 (Kyiv time), 3 February 2015[5], http://www.osce.org/ukraine-smm/139061	<p><u>shelling. The first individual died as a result of being struck in the chest and abdomen by metal fragments. The second individual died from stress-related heart-failure as a result of shelling.</u></p> <p>The SMM met, on 30 January, the deputy head of the central regional hospital who confirmed that <u>two persons wounded on 27 January were still staying in hospital for surgery and medical treatment.</u> On 3 February the hospital confirmed to the SMM the information previously received.</p> <p>According to local residents of “DPR”-controlled Komsomolske (45km south-east of Donetsk) the village had been affected by heavy shelling by MLRS on 2 February in the early morning hours, which had caused civilian casualties and damage to civilian property and infrastructure. The residents said that shelling was incoming from a westerly and south- westerly direction. The SMM examined nine impacts caused by what appeared to be 220mm rockets which appear to have been launched from a Uragan MLRS. The analysis suggested that the shelling came from a south-western direction. Among the remnants from the rockets, the SMM saw delivery casing which it assessed as evidence that anti-personnel cluster munition had been used. According to the interlocutors one 37-year-old woman was killed. <u>A girl, 5 years old, and a man were allegedly seriously wounded and brought to a hospital in Donetsk.</u></p>
12 February 2015*	Luhansk	OSCE SMM, Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 18:00 (Kyiv time), 12 February 2015, http://www.osce.org/ukraine-smm/140521	<p>On 12 February the SMM visited in Luhansk city a number of areas affected by shelling which occurred at 00:15hrs the same day. On Stara Mogila Street (approximately 6km south-east of the city centre), the SMM spoke to a de-mining team from the “ministry for emergency situations” of the “LPR” who said that they had removed from a children’s playground what they said was the body of a rocket fired by a Smerch MLRS. Based on the angle of the impact, which the SMM measured, the SMM estimated that the firing had originated from a north-westerly direction. On Oboronna Street the SMM observed the body of a rocket in the soil. Based on the diameter of the rocket and its marking, the SMM assessed it to be a Smerch and based on the angle of the impact, the SMM estimates that the firing originated from a north-westerly direction. At the Luhansk municipal bus company parking, located at Olega Koshevogo Street, the SMM observed the empty cluster cargo compartment of what it assessed</p>

			<p>to be the same type of rocket. The SMM observed damaged houses on Volgodonska Street. <u>The damage to the buildings (broken windows, roofs, fences) was estimated by the SMM, based on the small size of the shrapnel and the high number of impacts on the wall, to have been caused by explosions of bomblets from cluster munitions.</u> In Arkhicheska Street (approximately 1,2km east of the city centre) the SMM observed nine impacts – small craters – in the yard and on the roofs of buildings. Based on the small size of the impacts the SMM estimated that cluster munition was used.</p>
<p>13-14 February 2015*</p>	<p>Ilovaisk</p>	<p>Fair Protection, Ukrainian Crimes in Donbass (Collection of Analytical Materials). – Donetsk, 2019, pp. 291-292, http://armiyadnr.su/sites/default/files/pictures/%D0%A1%D0%B1%D0%BE%D1%80%D0%BD%D0%B8%D0%BA%2031.10.pdf</p>	<p>[Unofficial translation]: page 291</p> <p>During the night of 13 to 14 February 2015, at around 00:05 a.m., <u>a power supply division of Ilovaisk came under a rocket attack.</u></p> <p><u>Explosions hit civilian facilities at the addresses:</u> coordinates 47°54'44"N 38°11'55"E (the Ilovaisk power supply division of the Donetsk railway) – structures, buildings, transformers, and other high-voltage equipment were damaged. <u>Ilovaisk and several other neighbouring villages were cut off from the power supply.</u></p> <p>It is known that <u>one civilian was injured: a man, born in 1988 – an injury, multiple wounds, he was at a checkpoint near the entrance to the power supply division.</u></p> <p>Missile parts that broke through the roof of the attic of the Railway Hospital of Ilovaisk located at a distance of about 500 m to the east of the power supply division, were identified as the carrier section of a missile launched by Tochka-U systems operated by the Ukrainian Armed Forces.</p> <p>page 292</p> <p>The body of the carrier section had the following markings: 1) An inscription in black that reads: “9M721 01 20 000 I895521 Sh32”; 2) Below is another inscription also in black that reads: “9M79-1 0100000 ISh8939307”.</p>

			The marking “9M79-1” means that a 9M79-1 missile was used (its range is between 20 and 120 km). Numerous simultaneous explosions taking place within a circle of a radius of 300 m indicate that a 9N123K cluster warhead was used.
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(5) Incendiary weapons

Date	Location	Source	Incident
Somewhere after 14 August 2014*	Ilovaisk	Human Rights Watch and IHRC, Incendiary Weapons: Recent Use and Growing Opposition, November 2014, p.6, https://www.hrw.org/news/2014/11/10/incendiary-weapons-recent-use-and-growing-opposition	Evidence of new use of incendiary weapons in Ukraine in 2014 is especially troubling. During field missions in August and October 2014, Human Rights Watch researchers documented use of incendiary weapons in Ilovaisk, a town 30 kilometers southeast of Donetsk, and Luhanskoe, a small village south of Donetsk. Residents of Ilovaisk told Human Rights Watch that weapons resembling fireworks fell on the northwest part of their town over the course of three nights and burned three homes. They could not pinpoint the date of the attack although one resident said it was after August 14, and possibly during a time when intense battles were taking place between Ukrainian forces and Russia-supported rebels. Human Rights Watch researchers also found in a field about 18 kilometers south-southwest of Ilovaisk an abandoned firing position with several misfired 122mm Grad 9M22S rockets equipped with the 9N510 incendiary warhead that contains 180 hexagonal incendiary capsules , which burn for two minutes. A subsequent investigation by VICE News, including an independent expert analysis of retrieved rocket remnants by Armament Research Services (ARES), showed that the "fireworks" were in fact thousands of incendiary elements cascading out of a Soviet-era 9M22S rocket in mid-flight. [...] “They started firing Grad rockets shortly after, while we were still putting out the fires. [...] Bombardment was near constant at this point. We managed to save four houses on this street but one burned down. After this fire attack I’d had enough. I took my stuff and moved to the bomb shelter at about 4:30am that morning.”

		known-soviet-era-incendiary-weapons-to-attack-ilorvatsk	That night at least <u>eight houses were completely destroyed and dozens more damaged</u> by the "fire" that fell from the sky.
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(6) OTR-21 Tochka (SS-21 Scarab) short range ballistic missile

Date	Location	Source	Incident
July 2014	Unclear	CNN, U.S. Officials: Ukraine Military Fired Short Range Ballistic Missiles at Rebels, 29 July 2014, http://edition.cnn.com/TRANS/CRIPTS/1407/29/cnr.03.htm ²⁷	BARBARA STARR, CNN PENTAGON CORRESPONDENT: Officials confirmed to me a short time ago that U.S. intelligence over the last 48 hours has monitored the firing of several short range ballistic missiles from territory controlled by Ukrainian government forces into areas controlled by the pro-Russian separatists . Now this would be a significant escalation. Short range ballistic missiles. These are missiles that go perhaps 50 miles, but have warheads of up to 1000 pounds. We are talking maximum lethality. We are talking about a weapon that can kill dozens of people at a time potentially when it hits. We do not have the exact launch point. We don't have the exact impact point.
24 August 2014	Donetsk	Fair Protection, Ukrainian Crimes in Donbass (Collection of Analytical Materials). – Donetsk, 2019, p.279, http://armiyadnr.su/sites/default/files/pictures/%D0%A1%D0%B1%D0%BE%D1%80%D0	<i>[Unofficial translation]:</i> On 24 August 2014, at around 6:25 p.m., the Tekstilshchik district of Donetsk came under a rocket attack. The explosion damaged civilian facilities at the following addresses: 1) 18 Pintera Street – damaged windows; 2) 22 Pintera Street – damaged windows; 3) 6 Pintera Street – damaged windows.

²⁷ Video record is available here: <https://youtu.be/v9-8KvtffZA>. See also Global Research News, Kiev Fires Ballistic Missiles into Eastern Ukraine, 30 July 2014, <https://www.globalresearch.ca/kiev-fires-ballistic-missiles-into-eastern-ukraine/5393974>: “CNN has reported that the regime in **Kiev launched several short-range ballistic missiles into eastern Ukraine** – each missile containing warheads of up to 1,000 lbs (450 kg). The missiles fired were **OTR-21 Tochka** also known by their NATO reporting name as SS-21 Scarabs and are considered far from “precision” weapons. While smaller than the infamous “Scud” missile, SS-21s are similarly inaccurate and their use in combat against an enemy entrenched in populated areas is almost guaranteed to cause indiscriminate mass casualties.”

		<p>%BD%D0%B8%D0%BA%2031.10.pdf</p>	<p>Two civilians are known to have been injured:</p> <ol style="list-style-type: none"> 1) An elderly man who was walking at the back of house at 18 Pintera Street; 2) A young woman who was in her apartment at 18 Pintera Street (fragment wound caused by glass). <p>Missile parts identified as fragments of the carrier section of a missile launched by Tochka-U systems operated by the Ukrainian Armed Forces were found at a distance of about 150 m to the east of the central area of the house at 18 Pintera Street. [...]</p>
<p>28-29 August 2014*</p>	<p>Snizhne</p>	<p>Fair Protection, Ukrainian Crimes in Donbass (Collection of Analytical Materials). – Donetsk, 2019, p. 284, http://armiyadnr.su/sites/default/files/pictures/%D0%A1%D0%B1%D0%BE%D1%80%D0%BD%D0%B8%D0%BA%2031.10.pdf</p>	<p><i>[Unofficial translation]:</i></p> <p>During the night of 28 to 29 August 2014, at around 00:30 a.m., the detached house suburbs of Snizhne came under a rocket attack.</p> <p>Explosions damaged civilian facilities at the following addresses:</p> <ol style="list-style-type: none"> 1) 49 Pryhorodna Street – the fence and gates of the house were damaged by fragments; 2) 38 Vyshneva Street – the windows and façade of the building were damaged; besides, the gates of the nearby garage were also damaged; 3) Paryzhskoi Komuny Street – the road pavement and the railroad tracks nearby were damaged. <p>There is no information concerning any civilian casualties and injuries.</p> <p>Missile parts identified as the carrier section of a missile launched by Tochka-U systems operated by the Ukrainian Armed Forces were found in the yard of the house at 214 Paryzhskoi Komuny Street.</p> <p>The body of the carrier section had the following prefabricated imprinted marking “9M79 0352000 Sh 89391179”.</p> <p>This means that it was a 9M79M missile was used (its range is between 15 and 70 km).</p> <p>Numerous simultaneous explosions taking place within a circle of a radius of 300 m indicate that a 9N123K cluster warhead was used.</p>
<p>4 September 2014*</p>	<p>Khartsyzk</p>	<p>Fair Protection, Ukrainian Crimes in Donbass (Collection of Analytical Materials). – Donetsk, 2019, pp. 287-288,</p>	<p><i>[Unofficial translation]:</i></p> <p>page 287</p>

		<p>http://armiyadnr.su/sites/default/files/pictures/%D0%A1%D0%B1%D0%BE%D1%80%D0%BD%D0%B8%D0%BA%2031.10.pdf</p>	<p>On 4 September 2014, at around 6:00 p.m., the Chekhov City Park of Culture and Leisure in the city of Khartsyzk came under a rocket attack.</p> <p>page 288</p> <p>Explosions damaged civilian facilities at the following addresses:</p> <ol style="list-style-type: none"> 1) The Stalekanatnyk stadium located on Adamtsia Street in the territory of the Chekhov Park of Culture and Leisure of the city of Khartsyzk – the facilities, road pavement and grass turf of the stadium were damaged; 2) Territory of the Chekhov Park of Culture and Leisure of the city of Khartsyzk – the fences, road pavement and vegetation were damaged. <p>It is known that <u>one civilian died and three civilians were injured</u>:</p> <ol style="list-style-type: none"> 1) Valentin Valentinovich Breev, born in 1977 – died; badly wounded at the Stalekanatnyk stadium, passed away in the hospital; 2) A woman, born in 1975 – wounded at the Stalekanatnyk stadium; 3) A man, born in 1969 – wounded in the territory of the park of culture and leisure near the Stalekanatnyk stadium; 4) A woman, born in 1978 – wounded in the territory of the park of culture and leisure near the Stalekanatnyk stadium 5) A man, born in 1997 – wounded while at the Stalekanatnyk stadium. <p>Missile parts identified as the carrier section of a missile launched by Tochka-U systems operated by the Ukrainian Armed Forces were found at a distance of about 5–10 m from the southwestern section of the Stalekanatnyk stadium’s fence.</p> <p>[...]</p> <p>The marking “9N123K”, numerous simultaneous explosions taking place within a circle of a radius of 300 m, and distinct fragments of cluster munitions discovered at the stadium, indicate that a 9N123K cluster warhead was used.</p> <p>[<i>Unofficial translation</i>]:</p> <p>page 291</p> <p>During the night of 13 to 14 February 2015, at around 00:05 a.m., a <u>power supply division of Ilovaisk</u> came under a rocket attack.</p>
13-14 February 2015	Ilovaisk	Fair Protection, Ukrainian Crimes in Donbass (Collection of Analytical Materials). – Donetsk, 2019, pp. 291-292,	

		http://armiyadnr.su/sites/default/files/pictures/%D0%A1%D0%B1%D0%BE%D1%80%D0%BD%D0%B8%D0%BA%2031.10.pdf	<p>Explosions hit <u>civilian facilities</u> at the addresses: coordinates 47°54'44"N 38°11'55"E (the Ilovaisk power supply division of the Donetsk railway) – structures, buildings, transformers, and other high-voltage equipment were damaged. <u>Ilovaisk and several other neighbouring villages were cut off from the power supply.</u></p> <p>It is known that <u>one civilian was injured</u>: a man, born in 1988 – an injury, multiple wounds, he was at a checkpoint near the entrance to the power supply division. Missile parts that broke through the roof of the attic of the Railway Hospital of Ilovaisk located at a distance of about 500 m to the east of the power supply division, were identified as the carrier section of a missile launched by Tochka-U systems operated by the Ukrainian Armed Forces.</p> <p>page 292</p> <p>The body of the carrier section had the following markings:</p> <ol style="list-style-type: none"> 1) An inscription in black that reads: “9M721 01 20 000 I895521 Sh32”; 2) Below is another inscription also in black that reads: “9M79-1 0100000 ISh8939307”. <p>The marking “9M79-1” means that a 9M79-1 missile was used (its range is between 20 and 120 km).</p> <p>Numerous simultaneous explosions taking place within a circle of a radius of 300 m indicate that a 9N123K cluster warhead was used.</p>
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(7) Aerial bombs and air-to-surface missiles

Date	Location	Source	Incident
2 June 2014	Luhansk	Human Rights Watch, Eastern Ukraine: Questions and Answers about the Laws of War, 11 September 2014, https://www.hrw.org/news/2014/09/11/eastern-ukraine-	- In the early hours of June 2, following an intense nine-hour fight, the insurgents, armed with machine guns and mine launchers, took control of a border-guard outpost on the outskirts of Luhansk. Later that day, a Ukrainian military aircraft shot an unguided air-to-surface missile at the Luhansk administration building, which insurgents occupied. <u>Several people inside were killed.</u>

		<p><u>questions-and-answers-about-laws-war</u> The Kharkiv Human Rights Group, Report on the Violations of Human Rights in the Zone of Armed Conflict in the Lugansk Region. Stanytsia Luhanska area, http://khp.org/files/docs/1530865045.pdf²⁸</p>	<p><i>[Unofficial translation]:</i> page 4 [...] <u>9 people died and 11 people were injured in a Ukrainian aircraft's airstrike</u> on 2 July 2014 in the village of Stanytsia Luhanska. [...] page 41 1. The applicant, Mr. G, a Ukrainian citizen, resided with his family (wife, mother-in-law, and son with his wife) in a private house on Ostrovskoho Street in the village of Stanytsia Luhanska. On 2 July 2014, at around 10 a.m., a Su-25 military aircraft flew over the village of Stanytsia Luhanska in the direction of the village's centre. <u>A local police station and a district court on Moscow-Donbas Street were shelled.</u> After that, on its way back, the aircraft flew over Ostrovskoho Street. On hearing the noise, many residents went outside to see what it was. The aircraft was flying low from the direction of the Stara Kondrashevka station. There were 4 bombs dropped from under one wing. One of the bombs directly hit the house that belonged to the applicant, Mr G. The applicant's wife was in the house at that time. The mother-in-law was on the household's territory. <u>As a result of the explosion, the applicant's wife's leg was torn off, after which she died in hospital 3 days later. The applicant's mother-in-law suffered multiple shrapnel injuries to her chest and other parts of her body and died 20 days later after several operations. The applicant's house was completely destroyed, along with all the property that was in it.</u> [...]</p>
2 July 2014	Stanytsia Luhanska		

²⁸ See also_OHCHR, Report on the human rights situation in Ukraine, 15 July 2014, para. 32: "Human Rights Watch and Memorial, sometimes accompanied by Ukrainian human rights defenders, have visited the town of Krasny Liman, and the villages of Stanista-Luganskaya and Staraya Kondrashovka to investigate the circumstances in which civilians have been killed. In Stanista-Luganskaya and Staraya Kondrashovka, at least 11 people were killed including 2 children on 2 July [...]."

			<p>2. Mr M resided with his wife and adult son in a private house on Ostrovskoho Street. As a result of the airstrike on 2 July 2014, a projectile hit the applicant's house when his wife was inside. <u>She died on the spot. The applicant's house was completely destroyed with all property inside.</u></p>
<p>15 July 2014</p>	<p>Snizhne</p>	<p><i>BBC</i>, Ukraine conflict: Jet bombs rebel-held town of Snizhne, 15 July 2014, https://www.bbc.com/news/world-europe-28309034</p> <p>Fair Protection, Ukrainian Crimes in Donbass (Collection of Analytical Materials). – Donetsk, 2019, pp. 306, 332, http://armiyadnr.su/sites/default/files/pictures/%D0%A1%D0%B1%D0%BE%D1%80%D0%BD%D0%B8%D0%BA%2031.10.pdf</p>	<p>A warplane has attacked a rebel-held town with rockets in eastern Ukraine, shattering homes and killing 11 people.</p> <p>Rockets struck the town of Snizhne in Donetsk region around 07:00 (04:00 GMT), hitting a block of flats and a tax office.</p> <p>The rebels blamed the attack on Ukraine's air force - a claim denied by Ukrainian sources.</p> <p>Security forces have been pushing the rebels back to the city of Donetsk.</p> <p>Fighting has also raged in the neighbouring region of Luhansk, with rockets hitting a southern suburb of Luhansk city on Monday.</p>
			<p><i>[Unofficial translation]:</i> page 306</p> <p>In the early morning of 15 July 2014, at 06:30 a.m. (UTC +3), the centre of Snizhne was attacked by a Su-25 ground-attack aircraft that dropped at least eight aerial bombs identified as OFAB-100-120. <u>Several buildings were destroyed in the attack, including a residential building at 14 Lenina Street, a tax office building, a bread factory, and a power substation. The bombing killed 12 civilians who died of injuries, wounds, and under debris, 10 people were injured, including one child.</u></p> <p>page 332</p> <p>The centre of Snizhne was damaged by 8 exploded projectiles (reportedly OFAB-100-120) lying in a straight line from north-west to south-east. Distinctive impacts on destroyed buildings and impacts on the ground suggest that the projectiles hit the targets moving vertically down. Such direction is mostly typical of mortars and aerial bombs. However, the features of fragments that remained at the scene rule out mortars and suggest that munitions of a larger calibre were used (more than 200-mm).</p>

[...]

According to witnesses, the Snizhne airstrike took place almost at the same time as loud explosions were heard from the direction of Savur-Mohyla (10 km away from Snizhne).

This implies that **two Ukrainian Su-25 ground-attack aircraft carrying a load of 100 kg bombs (OFAB-100-120)** took off from the Chuguev aerodrome (Kharkiv Region), dropped the bombs on Snizhne and Savur-Mohyla, and left the bombing area.

Table 4: Civilian casualties caused by shelling of populated areas of territory controlled by the DPR/ LPR and attributable to Ukraine

In its Preliminary Objections, Russia has explained that the number of civilian casualties (including deaths) caused by shelling of populated areas has been far greater on the DPR/LPR side of the contact line: see Preliminary Objections, para. 99 and **Table 2 of Appendix A**.

According to the SMM OSCE and OHCHR alone, there were numerous attacks on the DPR/ LPR-controlled territories as of the end of December 2017 that led to civilian casualties or damage to key civilian infrastructure.²⁹

The following table presents representative examples of civilian casualties caused by shelling of the DPR-/LPR-controlled territories attributable to Ukraine, as reported by the OSCE and OHCHR.³⁰

Date	Episode	Organisation reporting the attack	Origin of fire: Ukraine-controlled territory
22 January 2015	<p>“At 08:40hrs on 22 January, the “Emergency Services Department” of the “Donetsk People’s Republic” (“DPR”) informed the SMM of an alleged shelling incident – involving multiple fatalities – at 42 Kuprina Street, 4.4km south-south-west of city-centre Donetsk. [...] At 11:30hrs the SMM visited Donetsk Regional Trauma Hospital, where the chief surgeon said that 13 people with injuries sustained in the incident on Kuprina Street had been admitted.”</p>	OSCE ³¹	<p>“At 11:00hrs the SMM conducted a crater analysis on both craters, and determined that the rounds that caused the two craters had been fired from a <i>north-western direction</i>.”</p>

²⁹ For an indicative list of examples of OSCE and OHCHR reports covering respective attacks, including shelling attacks, see List of reports containing the examples of attacks on the DPR-/LPR-controlled territories as of the end of December 2017 (Annex 30).

³⁰ Note that civilian casualties in the territory controlled by the DPR/LPR have also resulted from other forms of indiscriminate and targeted attacks including air strikes and small arms fire. For a recent example of a targeted attack, from the direction of government-controlled territory, on civilians see OHCHR, “Report on the human rights situation in Ukraine 16 February to 15 May 2018”, para. 22 (“Of deep concern, on 17 April, a bus carrying approximately 30 civilian workers from the DFS in armed-groups-controlled territory came under what appears to be deliberate small arms fire originating from the direction of government-controlled territory.”), available at https://www.ohchr.org/Documents/Countries/UA/ReportUkraineFev-May2018_EN.pdf.

³¹ OSCE, “Spot report by the OSCE Special Monitoring Mission to Ukraine (SMM), 22 January 2015: Shelling Incident on Kuprina Street in Donetsk City”, available at <https://www.osce.org/ukraine-smm/135786> (emphasis added).

1-2 February 2015	<p>“The SMM visited Donetsk city’s Petrovskiyi and Voroshilovskiyi districts (respectively 1.7km north-west and 15km south-west of Donetsk city centre, “DPR”-controlled) to monitor the effects of shelling reported by various sources. The SMM visited six sites in the two districts where it observed damage to infrastructure and residential properties. Local residents reported that Petrovskiyi district was shelled on 1 February at approximately 17:00hrs and that a young girl was killed and two men wounded as a result. [...] In Voroshilovskiyi district local residents told the SMM that shelling occurred on 2 February at approximately 07:45hrs and that two adults, one woman and one man were killed.”</p>	OSCE ³²	<p>“SMM crater analysis shows that one building sustained a direct artillery hit <i>originating from the north-west.</i>”</p>
4 February 2015	<p>According to the OSCE SMM Spot Report, the shelling took place in the Kirov quarters of Donetsk on 4 February, between 11:40 a.m. and 11:45 a.m. strikes hit the immediate vicinity of a kindergarten No 381, a neighbouring street and the Donetsk Hospital No 27. As a result, 6 persons were killed, 25 or 26 injured.</p>	OSCE ³³	<p>“Based on the analysis of the impact site, the size of the crater and observed destructions, the SMM concluded that the shelling came <i>from south-south-westerly direction</i> and was carried out with the use of MSLR BM-27 Uragan.”</p>

³² OSCE, “Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 18:00 (Kyiv time), 2 February 2015”, 3 February 2015, available at <http://www.osce.org/ukraine-smm/138896> (emphasis added).

³³ OSCE, “Spot report by the OSCE Special Monitoring Mission to Ukraine (SMM): Shelling in the Kirovskiyi district of Donetsk city on 4 February 2015”, 7 February 2015, available at <https://www.osce.org/ukraine-smm/139406> (emphasis added).

11 February 2015	<p>“In Donetsk, on 11 February from 10:00 to 11:30hrs, the SMM observed the aftermath of a shelling incident in the morning of 11 February at the central bus station and a metal works factory located in Leninskyi district (“Donetsk People’s Republic” (“DPR”)-controlled). At the bus station the SMM saw two burnt-out buses, one of them struck by an artillery shell. The SMM could not determine the precise type of artillery shell or the direction of fire. Staff at the Donetsk Central Hospital later confirmed to the SMM that the shelling at the two sites had caused four civilian casualties and injured three.”</p>	OSCE ³⁴	<p>“Based on its observations and crater analysis, the SMM assessed that the impacts were caused by mortar shells <i>fired from the north-west.</i>”</p>
26 May 2015	<p>“The SMM saw the aftermath of shelling in “DPR”-controlled Horlivka (39km north-north-east of Donetsk). Residents, including one injured by the shelling, told the SMM that shells struck at 18:00hrs on 26 May. The SMM saw nine crater impacts (all within a radius of 200 metres) at three locations in residential areas and conducted crater analysis at one location. At this location, the SMM saw the body of a deceased woman close to two crater impacts. [...] According to the “DPR” “emergency services” and local residents, a 38 year old man and his 11 year old daughter were killed instantly in this strike and his wife and two young children had been hospitalized with injuries. At City Central Hospital No.2 the SMM spoke with the wounded mother. She and her children had suffered shrapnel wounds. Later, the SMM saw three bodies at the mortuary (one a middle</p>	OSCE ³⁵	<p>“The SMM estimated that the craters were caused by incoming artillery <i>from the north-north-west</i>. In both craters the SMM found shrapnel consistent with 122mm artillery.”</p>

³⁴ OSCE, “Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 18:00 (Kyiv time), 11 February 2015”, 12 February 2015, available at <http://www.osce.org/ukraine-smm/140271> (emphasis added).

³⁵ OSCE, “Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 19:30 (Kyiv time), 27 May 2015”, 28 May 2015, available at <http://www.osce.org/ukraine-smm/160611> (emphasis added).

7 July 2015	<p>aged man, one woman and a child). The SMM assessed that all three were victims of the shelling.”</p> <p>“In ‘DPR’-controlled Svobodne (49km north-east of Mariupol), the SMM noted 15 shell impacts, assessed to have been caused by 120mm artillery rounds fired from the west. The SMM observed three destroyed houses, which it assessed to have sustained direct hits. A number of other houses had sustained damage. According to ‘DPR’ armed personnel and residents of the village, an elderly woman and her adult son were killed in the shelling. The SMM observed a destroyed house where residents said the victims had lived. Human remains and blood were at the scene. The shelling occurred between 04:10 and 04:50hrs on 7 July, according to residents in neighbouring ‘DPR’-controlled Telmanove (50km north-east of Mariupol). In ‘DPR’-controlled Starobesheve (81km north-north-east of Mariupol), the head doctor of the hospital later told the SMM that two civilians killed in Svobodne had been taken to the morgue, which is attached to the hospital.”</p>	OSCE ³⁶	<p>“In ‘DPR’-controlled Svobodne (49km north-east of Mariupol), the SMM noted 15 shell impacts, assessed to have been caused by 120mm artillery rounds fired from the west.”</p>
19 July 2015	<p>“On 19 July the SMM observed the aftermath of shelling overnight and conducted crater analyses in ‘DPR’-controlled Donetsk city, visiting a total of 12 impact sites. Around 80 Universytetska Street and 69 Shehorska Street (2.5km north-west of Donetsk city centre), the SMM observed three fresh craters that it concluded had been caused by MBT fragmentation</p>	OSCE ³⁷	<p>“In both cases, the SMM was able to conclude the direction of fire to have been from the area of government-controlled Pisky (11km north-west of Donetsk) and Pervomaiske (17km north-west of Donetsk).”</p>

³⁶ OSCE, “Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 19:30 (Kyiv time), 7 July 2015”, 8 July 2015, available at <https://www.osce.org/ukraine-smm/171186> (emphasis added).

³⁷ OSCE, “Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 19:30 (Kyiv time), 19 July 2015”, 20 July 2015, available at <https://www.osce.org/ukraine-smm/173666> (emphasis added).

	<p>shells (125mm) fired from the north-west. At Hospital No. 23 at 46 Tselinogradska Street (4km west of Donetsk city centre), the SMM observed three fresh craters that it also concluded had been caused by MBT fragmentation shells (125mm) fired from the north-west.”</p>		
<p>29-30 July 2015</p>	<p>“In ‘DPR’-controlled Horlivka (37km north-east of Donetsk), in the area of Pereslavska Street, the SMM was told by residents that shelling had taken place around 22:00hrs on 29 July. [...] A resident told the SMM that as a result of the shelling, one woman had been killed and her son and husband had been injured and hospitalized. [...] In another area of Horlivka (Rutna Street), the SMM observed impacts to the western sides of apartment buildings, and some shrapnel marks on eastern façades. [...] The walls of buildings were damaged and windows were shattered. Three residents told the SMM that shelling had begun at around 04:00hrs on 30 July. According to them, one man had been killed and two elderly women and a 14-year-old child were injured.</p> <p>The head and deputy head of Horlivka trauma hospital no. 2 together told the SMM that six people (two elderly women, two men and two children) had been injured as a result of the shelling and brought to the hospital, among them two children (one aged seven and the other 14 years).”</p>	<p>OSCE³⁸</p>	<p>“The SMM found remnants of shells in the craters, assessed to be from 120mm calibre mortar. The SMM assessed the direction of fire as incoming <i>from the west-north-west</i>.</p> <p>[...]</p> <p>The SMM assessed the direction of fire as incoming <i>from the west-north-west</i>.”</p>

³⁸ OSCE, “Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 19:30 (Kyiv time), 30 July 2015”, 31 July 2015, available at <http://www.osce.org/ukraine-smm/175591> (emphasis added).

27 April 2016	<p>“Four civilians were killed close to a “DPR” checkpoint near Olenivka when shelling occurred in the early hours of 27 April.”³⁹</p>	OSCE / OHCHR	<p>“According to OSCE crater analysis, the mortar rounds were fired from the west-south-westerly direction. <i>This indicates the responsibility of the Ukrainian armed forces.</i>”⁴⁰</p>
11 October 2016	<p>“The SMM followed up on reports of civilian casualties and observed the result of shelling. In a hamlet between “DPR”-controlled Sakhanka and Uzhyvka (formerly Leninske) (both 24km north-east of Mariupol) the SMM observed two impact sites. At the first site the SMM saw the totally destroyed roof of an inhabited house. Based on the damage and shrapnel, the SMM assessed it as caused by a 122mm artillery round possibly fired from a north-westerly direction. At the second site the SMM saw a fresh crater next to a road and assessed it as possibly caused by a 122mm artillery round fired from a north-westerly direction. The “head” of Sakhanka “village council” told the SMM that a woman (in her late seventies) had been killed during shelling which occurred on the previous night, and as a result her husband (in his late seventies) had suffered a heart attack, adding that two women (aged 53 and 47) and a man had been injured and taken to a hospital”.</p> <p>“Conversely, neighbouring villages and towns, such as “DPR”-controlled Makivka which is adjacent to Avdiivka-Yasynuvata-Donetsk airport area saw a considerable</p>	OSCE ⁴¹	<p>“Based on the damage and shrapnel, the SMM assessed it as caused by a 122mm artillery round possibly fired from a north-westerly direction. At the second site the SMM saw a fresh crater next to a road and assessed it as possibly caused by a 122mm artillery round fired from a north-westerly direction.”</p>
20 October 2016	<p>“Conversely, neighbouring villages and towns, such as “DPR”-controlled Makivka which is adjacent to Avdiivka-Yasynuvata-Donetsk airport area saw a considerable</p>	OSCE ⁴²	<p>“The SMM assessed two of the impact sites as caused by 122mm artillery rounds fired from a north-westerly direction.”</p>

³⁹ OSCE, “Spot Report by the OSCE Special Monitoring Mission to Ukraine (SMM): Shelling in Olenivka”, 28 April 2016, available at <https://www.osce.org/ukraine-smm/236936> (emphasis added).

⁴⁰ OHCHR, “Report on the human rights situation in Ukraine, 16 February to 15 May 2016”, para. 20, available at https://www.ohchr.org/Documents/Countries/UA/Ukraine_14th_HRMMU_Report.pdf (emphasis added).

⁴¹ OSCE, “Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30, 11 October 2016”, 12 October 2016, available at <https://www.osce.org/ukraine-smm/274286> (emphasis added).

⁴² OSCE, “Thematic Report: Civilian casualties in eastern Ukraine 2016”, September 2017, p. 21, available at <https://www.osce.org/special-monitoring-mission-to-ukraine/342121?download=true> (emphasis added).

	<p>number of casualties, amounting to 23 cases, almost 90 per cent of which resulted from shelling. An example is the incident which occurred on neighbouring streets of a residential area in Makiivka on 27 October, leading to nine casualties (two killed, seven injured). Many of those interviewed by the SMM described being thrown against the wall or the floor during the impacts and being injured by flying shrapnel and shards of glass from shattering windows. The SMM confirmed the deaths of two men as a result of injuries sustained during the shelling.”</p>		
<p>2 February 2017</p>	<p>“In Kalininskyi district of Donetsk city, the SMM observed a fresh impact next to a roundabout assessed as caused by a single multiple-launch rocket system (MLRS; likely Smerch or Uragan) rocket fired from a direction ranging from west to north. [...]</p> <p>An SMM mini unmanned aerial vehicle (UAV) spotted a five-storey dormitory building, about 30m south of the impact, whose roof had been completely ripped off and all windows shattered. About 170m north-west of the impact, the gates of a car wash had been blown in, while a gas station behind the car wash had sustained slight damages. The UAV spotted a “DPR” compound some 260m south-east of the impact site with two multi-purpose armoured tracked vehicles (MTLB) inside. The head of the dormitory where internally displaced persons reside said that two of them had been injured. At a morgue, staff said</p>	<p>OSCE⁴³</p>	<p>“In Kalininskyi district of Donetsk city, the SMM observed a fresh impact next to a roundabout assessed as caused by a single multiple-launch rocket system (MLRS; likely Smerch or Uragan) rocket fired from a direction ranging from west to north. [...]</p> <p>The SMM assessed the impacts as caused by MLRS (BM-21Grad, 122mm) rockets fired from a westerly direction.”</p>

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OSCE, “Spot Report by the OSCE Special Monitoring Mission to Ukraine: Casualties, damage to civilian infrastructure registered in Donetsk region following fighting”, 3 February 2017, available at <https://www.osce.org/ukraine-smm/297606> (emphasis added).

	<p>that the body of a dead man had been brought in together with partial remains of another person.</p> <p>On Artema Street in Donetsk city the SMM observed two fresh impacts: one in the entry steps of a residential apartment building and another on the road 15-20m north of the building. The SMM assessed the impacts as caused by MLRS (BM-21 Grad, 122mm) rockets fired from a westerly direction. Half of the windows on the south-west-facing side of the building were destroyed.</p> <p>On Sobinova Street the SMM observed a fresh impact in the garden of a house assessed as caused by a single MLRS (BM-21) rocket. [...]</p> <p>On Kievskiy Avenue the SMM observed two impacts, one on the first and another on the fourth floor of two residential buildings, as well as shrapnel damage to nearby buildings. The SMM saw holes in the exterior west-facing walls of several apartments and broken windows. The SMM assessed one impact as caused by an MLRS (BM-21) rocket and the other by an artillery round at least 122mm, both fired from a north-westerly direction. According to local residents the above explosions in Donetsk city had occurred between 22:20 and 23:30 on 2 February.”</p> <p>“At a hospital in Dokuchaievsk the injured woman’s daughter (in her thirties) told the SMM that on the morning of 28 April her mother, while on the way to a store, had heard sounds of shelling. Then, about 100m away from her house at 4 Polzunova Street, she had felt a strong pain in her right shoulder. The SMM</p>		
28 April 2018		OSCE ⁴⁴	“The SMM assessed the craters as caused by <i>fire from a north-westerly direction.</i> ”

⁴⁴

OSCE, “Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 29 April 2018”, 30 April 2018, available at <https://www.osce.org/special-monitoring-mission-to-ukraine/379156> (emphasis added).

		<p>spoke to a doctor (man, in his sixties) who said that a woman (in her sixties) with injuries caused by shrapnel had been admitted to the hospital that morning.</p> <p>[...]</p> <p>On 28 April, at a morgue in Dokuchaievsk the SMM saw two covered bodies. At the morgue medical staff told the SMM that the bodies were victims of shelling.”</p>	
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Table 5: Killing and ill-treatment by all parties to the armed conflict

Date	Organisation	Killing and ill-treatment by all parties to the armed conflict, including Ukraine?
March to April 2014	OHCHR	<p>Yes:⁴⁵</p> <p>“2. [...] Serious human rights violations were committed during the Maidan protests, which resulted in the death of 121 individuals [...] There have been also numerous reports of torture and ill-treatment of protestors [...]”</p> <p>“45. [...] dozens of people who participated in the Maidan demonstrations were [...] subjected to torture and ill-treatment [...]”</p> <p>“52. There has been a culture of effective impunity in Ukraine for the high level of criminal misconduct, including torture [...] often committed by the police in the course of their work [...]”</p> <p>“58. Most acts of severe beatings, torture, and other cruel, inhuman or degrading treatment were attributed to the ‘Berkut’ riot police [...]”</p>
April to May 2014	OHCHR	<p>Yes:⁴⁶</p> <p>“39. [...] The use of torture and ill-treatment in pre-trial detention facilities is often attributed to the fact that police officers are still evaluated on quantitative indicators.”</p> <p>“113. [...] the HRMMU verified allegations [...] that Pavel Gubarev, the self-proclaimed governor of Donetsk, who was detained in Donetsk by police on 6 March and transferred to Kyiv, had been tortured and was in a critical condition [...]”</p>

⁴⁵ OHCHR, “Report on the human rights situation in Ukraine 15 April 2014”, paras. 2, 45, 52, 58 (Annex 44 to Memorial).

⁴⁶ OHCHR, “Report on the human rights situation in Ukraine 15 May 2014”, paras. 39, 113 (Annex 45 to Memorial).

May to June 2014	OHCHR	Yes: ⁴⁷ “4. The escalation in criminal activity resulting in human rights abuses [...] torture, and killings by armed groups are now affecting the broader population of the two eastern regions, which are now marked by an atmosphere of intimidation and consequent fear [...]”
June to July 2014	OHCHR	Yes: ⁴⁸ “59. Reports suggested that members of the Ukraine forces have been responsible for the ill-treatment and torture of detainees [...]”
July to August 2014	OHCHR	Yes: ⁴⁹ “10. The HRMMU also received reports of human rights violations committed by territorial battalions under the Ministry of Defence or special battalions under the Ministry of Internal Affairs. This includes cases of [...] torture [...]” “12. [...] The Security Service of Ukraine and police have detained more than 1,000 people in the Donbas region, as of 16 August, because of ‘irrefutable evidence of their participation in terrorist activities.’ [...] and there are reports of ill-treatment during arrest or while in custody.”
August to September 2014	OHCHR	Yes: ⁵⁰ “23. The Human Rights Monitoring Mission in Ukraine also received reports of allegations of human rights violations committed by volunteer battalions under the Ministry of Defence or special battalions under the Ministry of Internal Affairs [...]”

⁴⁷

OHCHR, “Report on the human rights situation in Ukraine 15 June 2014”, para. 4 (Annex 46 to Memorial).

⁴⁸

OHCHR, “Report on the human rights situation in Ukraine 15 July 2014”, para. 59 (Annex 296 to Memorial).

⁴⁹

OHCHR, “Report on the human rights situation in Ukraine 17 August 2014”, paras. 10, 12, available at <https://www.ohchr.org/Documents/Countries/UA/UkraineReport28August2014.pdf>.

⁵⁰

OHCHR, “Report on the human rights situation in Ukraine 19 September 2014”, para. 23 (Annex 47 to Memorial).

September to November 2014	OHCHR	<p>Yes:⁵¹</p> <p>“10. [...] The HRMMU continued to receive credible reports of persons deprived of their liberty being subjected to torture and ill-treatment while being illegally held or detained by either the armed groups or by Ukrainian law enforcement agencies and some volunteer battalions.”</p>
November to December 2014	OHCHR	<p>Yes:⁵²</p> <p>“9. The efforts of the Government to safeguard the territorial integrity of Ukraine and restore law and order in the conflict zone have been accompanied by arbitrary detentions, torture, and enforced disappearances of people suspected of ‘separatism and terrorism’. Most of such human rights violations appear to have been perpetrated by certain voluntary battalions or by the Security Service of Ukraine (SBU). The procedural rights of people have not always been observed, with reports of ill-treatment and reports of reprisals upon release.”</p> <p>“44. [...] Some other detainees interviewed by the HRMMU reported being beaten and intimidated to confess to participation in the armed groups. On 14 November, a Donetsk resident died on the premises of Izium district police department (Kharkiv region), shortly after being taken out and then returned by masked men and an identified SBU official. Forensic examination found multiple and extensive hematomas on his body and a closed blunt injury of the chest [...]”</p> <p>Yes:⁵³</p>
December 2014 to February 2015	OHCHR	<p>“14. Allegations of violations of international human rights law and international humanitarian law have persisted over the reporting period. Credible reports of arbitrary detentions of civilians, torture and enforced disappearance have been alleged against the armed groups and the Government [...]”</p> <p>“37. [...] a pattern of enforced disappearances, secret detention and ill-treatment by Ukrainian law enforcement agencies in the security operation area and adjacent territories.”</p>

⁵¹ OHCHR, “Report on the human rights situation in Ukraine 15 November 2014”, para. 10 (Annex 48 to Memorial).

⁵² OHCHR, “Report on the human rights situation in Ukraine 15 December 2014”, paras. 9 and 44 (Annex 303 to Memorial).

⁵³ OHCHR, “Report on the human rights situation in Ukraine 1 December 2014 to 15 February 2015”, paras. 14 and 37 (Annex 309 to Memorial).

February to May 2015	OHCHR	<p style="text-align: center;">Yes:⁵⁴</p> <p>“13. [...] The HRMMU continued to receive allegations of ill-treatment and torture of people detained by the Ukrainian armed forces and law enforcement agencies. It is also concerned that investigations into allegations of gross human rights violations by the Ukrainian military and law enforcement personnel have yet to be carried out.”</p> <p>“45. [...] the HRMMU received allegations that during interrogation, some detainees were subjected to ill-treatment and torture (beatings, suffocation with bag on the head, electric shocks and deprivation of sleep, food and water for more than 24 hours). The people arrested were not provided with a defense lawyer and were mocked at when requesting one [...]”</p>
January 2014 to May 2016	OHCHR	<p style="text-align: center;">Yes:⁵⁵</p> <p>“51. HRMMU has also received allegations concerning the death of people in custody of the Government or its constituent armed forces. The majority of these allegations pertain to the initial stages of the conflict, i.e. June 2014 – February 2015. They mostly concern individuals who had been members of the armed groups or were suspected of affiliation with them. Most often, the death of victims was allegedly caused by torture and ill-treatment, or by inadequate or absent medical aid.”</p> <p>“62. At the same time, OHCHR has observed an apparent lack of motivation to investigate some cases and a formalistic approach in the work of investigative bodies, especially when it concerns acts allegedly committed by Ukrainian forces. Cover-up and political bias are not uncommon, especially when alleged perpetrators belong to the ranks of the military and law enforcement. As a result, some perpetrators continue to enjoy impunity. Changes of measures of restraint often provide alleged perpetrators with opportunities to escape from justice. While, forensic experts do not always pay sufficient attention to documenting signs of torture on bodies recovered from the conflict zone, investigators also do not always task forensic experts to answer questions whether a body bears signs of torture. Material evidence related to a summary deprivation of life is often collected poorly and is not properly preserved.”</p>

⁵⁴ OHCHR, “Report on the human rights situation in Ukraine 16 February to 15 May 2015”, paras. 13 and 45 (Annex 310 to Memorial).

⁵⁵ OHCHR, “Accountability for killings in Ukraine from January 2014 to May 2016”, paras. 51, 62 and 68 (Annex 49 to Memorial).

		<p>“68. To the Government of Ukraine: [...] (c) Improve the collection of forensic and preservation of other material evidence related to acts of arbitrary deprivation of life in the conflict zone, including documenting signs of torture or ill-treatment in accordance with international standards [...]”</p> <p style="text-align: center;">Yes:⁵⁶</p>
<p>May to August 2015</p>	<p style="text-align: center;">OHCHR</p>	<p>“6. HRMMU continued to receive and verify allegations of killings, abductions, torture and ill-treatment, sexual violence, forced labour, ransom demands and extortion of money on the territories controlled by the ‘Donetsk people’s republic’ and ‘Luhansk people’s republic’. It also received reports of isolated incidents where armed groups disrupted religious services and intimidated several religious communities [...]”</p> <p>7. [...] HRMMU has received testimonies of plea bargains being made by individuals under torture or duress.</p> <p>8. HRMMU continued to observe a persistent pattern of arbitrary and incommunicado detention by Ukrainian law enforcement officials (mainly by the Security Service of Ukraine) and military and paramilitary units (primarily by former volunteer battalions now formally incorporated into the Ukrainian armed forces, National Guard and police), which is often accompanied by torture and ill-treatment of detainees, and violations of their procedural rights. HRMMU continues to advocate for proper and prompt investigation of every single reported case, and for prosecution of perpetrators.”</p> <p style="text-align: center;">Yes:⁵⁷</p>
<p>August to November 2015</p>	<p style="text-align: center;">OHCHR</p>	<p>“7. Efforts of the Government of Ukraine to safeguard the territorial integrity of Ukraine and restore law and order in the conflict zone continued to be accompanied by allegations of enforced disappearances, arbitrary and <i>incommunicado</i> detention as well as torture and ill-treatment of people suspected of trespassing against territorial integrity or terrorism or believed to be supporters of the ‘Donetsk people’s republic’ and ‘Luhansk people’s republic’. Elements of the Security Service of Ukraine appear to enjoy a high degree of impunity, with rare investigations into allegations involving them.”</p>

⁵⁶ OHCHR, “Report on the human rights situation in Ukraine 16 May to 15 August 2015”, paras. 6-8 (Annex 769 to Memorial).

⁵⁷ OHCHR, “Report on the human rights situation in Ukraine 16 August to 15 November 2015”, para. 7 (Annex 312 to Memorial). See also paras. 43-48 for details.

Yes:⁵⁸

“45. Throughout the country, OHCHR continued to receive allegations of enforced disappearances, arbitrary and incommunicado detention, and torture and ill-treatment of people accused by the Ukrainian authorities of ‘trespassing territorial integrity’, ‘terrorism’ or related offenses, or of individuals suspected of being members of, or affiliated with, the armed groups.”

“50. During the reporting period, OHCHR documented a pattern of cases of SBU detaining and allegedly torturing the female relatives of men suspected of membership or affiliation with the armed groups [...]”

“53. [...] OHCHR is also deeply concerned that despite its repeated interventions, it continues to receive allegations of SBU violating basic procedural guarantees, denying detainees the right to counsel, and subjecting them to torture and ill-treatment.

54. The failure to investigate allegations of torture is of particular concern. OHCHR has observed that the authorities are unwilling to investigate allegations of torture particularly when the victims are persons detained on grounds related to national security or are viewed as being ‘pro-federalist’. [...] While monitoring trials, OHCHR observed that prosecutors and judges rarely record or act upon defendant’s allegations of torture [...]

55. OHCHR is also very concerned about the use of statements extracted through torture as evidence in court proceedings [...]

“70. As mentioned above, OHCHR continued to document consistent and credible allegations of torture, ill-treatment, incommunicado detention and enforced disappearances by SBU elements in Kharkiv, Mariupol, and Zaporizhzhia.

November 2015
to February
2016

OHCHR

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OHCHR, “Report on the human rights situation in Ukraine 16 November 2015 to 15 February 2016”, paras. 45, 50, 53-55, 70-71, 73 and 103 (Annex 314 to Memorial).

		<p>71. OHCHR is concerned about SBU officials’ systematic denial of these allegations, which suggests their resistance to any investigations [...]”</p> <p>“73. OHCHR has followed cases of residents of Government-controlled Donetsk and Luhansk regions who have been charged and tried for their alleged membership in and support of the armed groups, simply for being in contact with people (usually their relatives) living in territories controlled by these groups or working for a civilian water supply company operating in the ‘Luhansk people’s republic.’”</p> <p>“103. [...] Of grave concern is the allegation that the accused suffered reprisals in the form of threats, intimidation and ill-treatment by the SBU after they challenged the admissibility of evidence in court.”</p>
<p>February to May 2016</p> <p style="text-align: center;">OHCHR</p>	<p style="text-align: center;">Yes.⁵⁹</p>	<p>“30. OHCHR received allegations of enforced disappearances, arbitrary and <i>incommunicado</i> detention, torture and ill-treatment committed by Ukrainian law enforcement. [...]”</p> <p>31. The majority of cases documented during the reporting period concerned incidents in the conflict zone. While the cases from 2014 and early 2015 suggest that volunteer battalions (often in conjunction with the Security Service of Ukraine (SBU)) were frequent perpetrators, information from the late 2015 and early 2016 mostly implicate SBU. Many of these cases concern <i>incommunicado</i> detention in informal detention facilities where torture and ill-treatment are persistently used as means to extract confessions or information, or to intimidate or punish the victim. [...]”</p> <p>32. On 20 February 2016, a Mariupol resident was transferred to Donetsk as part of a simultaneous release of detainees. Since March 2015, he had been held <i>incommunicado</i> at the Kharkiv SBU. He was apprehended in Mariupol on 28 January 2015 and kept in an illegal detention facility. There, he was reportedly severely tortured and electrocuted by three men who wanted him to identify supporters of the ‘Donetsk people’s republic’ in Mariupol. On 8 February 2015, he was charged under article 258 (terrorism) of the Criminal Code. The following day, the court placed him in Mariupol SIZO. On 12 March 2015, he was released from custody under house arrest and, while leaving the courthouse, was</p>

⁵⁹ OHCHR, “Report on the human rights situation in Ukraine 16 February to 15 May 2016”, paras. 30-32, 48-49, 59, 212(e)-(f), 213(d) (Annex 771 to Memorial).

apprehended by SBU and transferred to Kharkiv SBU. At the time of his arrival, 72 individuals were held there; 17 when he was released on 20 February 2016.”

“48. In the majority of cases documented by OHCHR, law enforcement employed threats of sexual violence against individuals detained under charges of terrorism, along with other forms of torture and ill-treatment during interrogation. Two of the documented cases took place in or around Avdiivka in April and May 2015. A male detainee who was subjected to torture and forced to confess to his involvement in the armed groups on camera, was subsequently threatened with sexual violence, told that he would be handcuffed and raped by a homosexual man. Two women from the same family, aged 18 and 41, were tortured and repeatedly threatened with sexual violence.

49. Other documented cases appear to be linked to the military presence in densely populated civilian areas, such as towns near the contact line, and general impunity. A man with a mental disability was subject to cruel treatment, rape and other forms of sexual violence by eight to 10 members of the ‘Azov’ and ‘Donbas’ battalions in August-September 2014. The victim’s health subsequently deteriorated and he was hospitalized in a psychiatric hospital.”

“59. A resident of Mariupol was detained by three servicemen of the ‘Azov’ battalion on 28 January 2015 for supporting the ‘Donetsk people’s republic’. He was taken to the basement of Athletic School No. 61 in Mariupol, where he was held until 6 February 2015. He was continuously interrogated and tortured. He complained about being handcuffed to a metal rod and left hanging on it, he was reportedly tortured with electricity, gas mask and subjected to waterboarding and he was also beaten in his genitals. As a result he confessed about sharing information with the armed groups about the locations of the Government checkpoints. Only on 7 February, he was taken to the Mariupol SBU, where he was officially detained.”

“212. [...] (e) The Security Service of Ukraine (SBU) to treat all persons detained in the context of the ‘anti-terrorism operation’ humanely and without adverse distinction in compliance with binding international human rights law and standards; (f) The SBU to cease the practice of extracting confessions or self-incriminating statements under duress [...]”

		<p>“213. [...] (d) To all parties involved in the hostilities [...] Treat all persons deprived of their liberty, civilian or military, humanely and according to international human rights and humanitarian law standards [...]”</p>
<p>May to August 2016</p>	<p>OHCHR</p>	<p>Yes:⁶⁰</p> <p>“5. [...] OHCHR has continued to document cases of torture and ill-treatment by the Government and armed groups [...]”</p> <p>“45. [...] approximately 70 per cent of cases documented by OHCHR contained allegations of torture, ill-treatment, and incommunicado detention prior to transfer into the criminal justice system. The majority of allegations implicate SBU officials, police, and members of the paramilitary DUK ‘Right Sector’ [...]”</p> <p>“47. In an emblematic case, armed men in camouflage bearing no insignia apprehended a man in his house in Government-controlled areas of Donetsk region in October 2015. He was handcuffed, blindfolded and taken to an indoor shooting range in the basement of the SBU building in Mariupol. There, he was beaten, suffocated with a plastic bag, submerged in cold water, and had his ribs broken by a man who jumped on his torso. He was forced to sign a confession, read it in front of a camera, and was subsequently charged under article 258-3 of the Criminal Code of Ukraine. Still in detention, he is afraid of reprisals and unwilling to corroborate the use of the Mariupol SBU basement indoor shooting range for complain about his ill-treatment to the authorities. Four additional verified cases from 2015 incommunicado detention and torture.”</p>
<p>May 2017</p>	<p>United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or</p>	<p>Yes:⁶¹</p> <p>“34. The Subcommittee has received numerous and serious allegations of acts that, if proven, would amount to torture and ill-treatment. Persons interviewed by the Subcommittee in various parts of the country have recounted beatings, electrocutions, mock executions, asphyxiations, acts of intimidation and threats of</p>

⁶⁰ OHCHR, “Report on the human rights situation in Ukraine 16 May to 15 August 2016”, paras. 5, 45 and 47 (Annex 772 to Memorial). See also paras. 43-44, 46 and 48 for details.

⁶¹ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, “Visit to Ukraine undertaken from 19 to 25 May and from 5 to 9 September 2016: observations and recommendations addressed to the State party”, UN Doc. CAT/OP/UKR/3, 18 May 2017, paras. 34-38, available at <http://undocs.org/en/CAT/OP/UKR/3> (emphasis added).

Degrading Treatment or Punishment	<p>sexual violence against themselves and their family members. In the light of all the work done and experience gained during the visit, the Subcommittee has no difficulty in concluding that these allegations are likely to be true.</p> <p>35. Many of the above-mentioned acts are alleged to have occurred while the persons concerned were under the control of the State Security Service or during periods of informal detention. In such cases, <i>detainees accused of crimes relevant to the armed conflict in eastern Ukraine [...] are alleged to have been tortured in order to extract information regarding their involvement or that of their associates in "separatist" activities and to identify armed groups' military positions</i>. The Subcommittee also understands that, in some cases, acts were committed by private individuals or volunteer battalions with the consent or acquiescence of public officials.</p> <p>36. As it did during its 2011 visit (see CAT/OP/UKR/1, paras. 64 and 93-94), the Subcommittee also received allegations about the ill-treatment of detained persons, including juveniles, by the police during their apprehension and interrogation. Reports of juveniles being punched, kicked, burned and shocked with tasers were borne out by consistent interviews, observation of injuries and registers (even if such records were not always complete). Many detainees stated that, following ill-treatment by the police, they were prevented from entering pretrial detention facilities (SIZOs) because they had visible injuries and had therefore been kept in pretrial centres under the authority of the national police (ITTs) for their "faces to heal" before being registered and undergoing a medical examination at a SIZO.</p> <p>37. In addition, it appears that <i>prosecutors and judges are not particularly sensitive or sympathetic to complaints of torture and ill-treatment</i>. A number of factors may contribute to this, including [...] the deference shown to police investigators given prosecutors' reliance on them for other cases and a tolerance for torture committed by 'defenders' (volunteers fighting in eastern Ukraine), stemming from expressions of sympathy for their cause. [...] In addition, the Subcommittee met many officials, including administrators, law enforcement officers and medical professionals, who did not feel it was their responsibility to report suspected cases of torture and ill-treatment.</p> <p>38. When allegations of torture were looked into, some investigative steps, such as medical examinations, witness interviews and the provision of timely access to the scene of the events, were either severely delayed or completely thwarted. Moreover, the Subcommittee observed that accounts of suspicious injuries were treated in a variety of ways. In some cases, a report was forwarded to the prosecutor's office; in others, it was sent to the police. In any event, it was not clear that investigations systematically followed from such</p>
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September 2017	United Nations Human Rights Council	reports, perhaps because some were sent to the police officers accused of committing the act. In addition, a number of reports received no reply and others received only an initial acknowledgment.”
<p>Yes:</p> <p>“21. Dozens of civilians and persons hors de combat had been subjected to summary executions and killings or had died of torture and ill-treatment in custody. About 3,000 conflict-related detainees had been deprived of their liberty in the territories controlled by the armed groups. They had been subjected to torture, ill-treatment and/or inhuman conditions of detention, often aggravated by the lack of access to external observers. In Government-controlled territory, conflict-related detainees had often been kept incommunicado, including in informal places of detention, and subjected to torture and ill-treatment. Hundreds of persons remained missing on both sides of the contact line.”⁶²</p> <p>“39. The Subcommittee recommends [inter alia] that [Ukraine] take urgent measures to prevent and punish all acts of torture and ill-treatment occurring at the hands of, or with the consent or acquiescence of, State officials [...]”⁶³</p>		

⁶² United Nations General Assembly, Human Rights Council, Working Group on the Universal Periodic Review, 28th Session, Compilation on Ukraine, Report of the Office of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/WG.6/28/UKR/2, 4 September 2017, para. 21, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/257/58/PDF/G1725758.pdf?OpenElement>.

⁶³ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, “Visit to Ukraine undertaken from 19 to 25 May and from 5 to 9 September 2016: observations and recommendations addressed to the State party”, UN Doc. CAT/OP/UKR/3, 18 May 2017, para. 39, available at <http://undocs.org/en/CAT/OP/UKR/3>.

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Submitted by the Russian Federation

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